Overview of the impact of the proposed EU Digital Services Act Package on broadcasting in Europe

A legal issue paper concerning the main elements of the Commission proposals for a Digital Services Act (DSA) and a Digital Markets Act (DMA) from a media law perspective

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Overview

This issue paper – research on which was made possible through the kind support of the Association of Commercial Television in Europe (ACT) – will highlight elements of the recently proposed EU Regulations for a Digital Services Act (DSA) and a Digital Markets Act (DMA) that are especially relevant for the broadcasting sector. In light of the relevance of media and more specifically broadcasters for the basic values of the EU such as democracy and diversity as well as fundamental rights such as freedom of expression and information, the impact of DSA and DMA on this sector should be mirrored in the proposed rules. A free and pluralistic media landscape is needed both offline and online to contribute to the functioning of the democratic decision-making process. The ongoing legislative procedure for the DSA and DMA will allow for further improvement of the proposed future regulatory framework for online content dissemination.

The Main Issues of the Digital Services Act (DSA) Proposal

1. The DSA addresses intermediary services, which are categorised in mere conduit, caching and hosting providers as already was the case in the E-Commerce Directive (ECD). Maintaining these categories of providers has the advantage of being able to draw on relevant CJEU case law, especially concerning the distinction between active and passive providers of which only the latter are able to profit from liability exemptions. Although the DSA contains further clarification on the categorization, problems with the scope of application of the ECD remain unaddressed in substance in the new legislative act.

2. From the perspective of fundamental rights protection, which includes in this context not only freedom of expression but also the right to conduct a business and the right to property as well as the overarching value of human dignity, it is crucial to closely examine whether this graduated system offers sufficient protection and does not lead to noteworthy enforcement gaps, as some "niche" offers of small providers may be especially problematic when it comes to illegal and/or harmful information such as piracy or racist or violent content. This is especially important as otherwise the regulatory asymmetry between smaller broadcasting service providers compared with pure online service providers is further enhanced as the former do not benefit from a general exemption from stricter regulatory requirements e.g. stemming from the Audiovisual Media Services Directive (AVMSD). As the underlying rationale of the proposal is to ensure that what is illegal offline should be illegal online, broad exceptions in the scope of application could contradict this aim.

3. With regard to the harmonisation of the horizontal DSA with sectoral law, the DSA clarifies that it is supposed to be "without prejudice" to relevant rules for the media sector, such as copyright and AVMSD. Yet, it remains unclear as to how an overlap of the rules shall be avoided as well as the implications that the DSA may have on areas in copyright and AVMSD that are not detailed or are being contested. Depending on how this would be interpreted, in effect the DSA might after all undermine the object of those Directives. In this regard, it is of particular importance to ensure a *lex specialis* priority for the more specific definitions of the acts that – contrary to the horizontally

applicable DSA – contain rules for specific providers or specific situations. Similarly, the relevance and possibility of Member States legislation aimed at other objectives than the DSA must be clearly stated. With regard to broadcasters, it may be otherwise unclear to what extent sector-specific legislation on both EU and Member State level, to which providers have adapted their offers will continue to be of primary relevance.

4. Concerning the liability exemption rules, the DSA Proposal transfers those from the ECD into the new legal framework leaving the current system of largely reactive conditions for the safe harbour protections in place. However, some clarifications are added. Notably, Art. 6 of the DSA Proposal responds to the expressed reluctance of providers to combat illegal content due to the fear of losing their exemption from liability, as such action would make them "active" and possibly presumed to have "actual knowledge" of the illegal content. There have always been debates as to whether certain providers of intermediaries are actually covered by the liability exemptions and should not be regarded as active due to their involvement in the dissemination of content. This question has become even more relevant considering the way these providers have evolved since the passing of the ECD.

5. With the new provision intermediary service providers shall explicitly be shielded from losing their privileges only for carrying out voluntary own-initiative investigations or other activities aimed at detecting, identifying and removing, or disabling of access to, illegal or harmful content, or take the necessary measures to comply with the requirements of Union law, including those set out in the DSA Proposal. This provision is often referred to as "Good Samaritan" clause because parallels are drawn to U.S. internet legislation ("Section 230"), but that provision is very different to the DSA approach. In addition, it has been questioned whether a provision such as Art. 6 DSA proposal is needed at all, as providers that have actually contributed to combatting illegal content have not shown that they were exposed to negative consequences of this active behaviour.

6. Separate from this, but directly related to the liability exemptions, are the new obligations that the DSA imposes on providers. Their fulfilment is neither to be seen as a voluntary measure nor do they directly affect the liability privilege, as they apply independently of the question of whether a provider is responsible for a specific content item. Of particular importance for broadcasters, is the creation and harmonisation of a notice and action mechanism in Art. 14 DSA Proposal, which not only stipulates the creation of complaints system, but also contains concrete rules on how such notices must be formulated and dealt with. The form and treatment of notices has an impact on the liability question through the establishment of actual knowledge. From the perspective of media law it is rather problematic that Art. 14 does not sufficiently address the actual realities of content dissemination and the connected threats to fundamental rights and values. From a risk-oriented point of view, the restriction of the notice and action mechanisms to hosting services and the lack of emergency rules that would justify a stay-down obligation are some of the elements that question the benefits of such a newly introduced system.

7. Closely related to the notice and action mechanism, and also significant for the broadcasting sector, is the provision on trusted flaggers. Trusted flagger systems already exists. The DSA would formalise these in a legally binding way which is to be

welcomed where this allows for fast track outcomes. However, it would also be important that existing designations as trusted flaggers can be maintained for individual and/or collective rightholder representatives. Ideally, the system will create external possibilities of influence on platform governance and a better and faster reaction to perceived illegal content. Practically, the centralisation of designation and the cumulative requirements introduced may not yield the best approach to support such a fast track and effective notice system. This is to be further assessed in line with the notification burdens placed on the trusted flaggers according to the proposal and which may not resolve the issues faced in the fight against illegal content. The criteria for qualification of the flaggers could be problematic if applied too widely, or too narrowly if it precludes individual rightholders, such as broadcasters, from efficiently contributing to the removal of illegal content by addressing such requests to platforms. In this regard it is important to ensure that existing systems of involving flaggers, whether they are labelled as trusted or not, and which may be based on already established initiatives by commercial entities as well as the EU e.g. in the area of hate speech and disinformation or industry agreements in the area of copyright, are not contradicted by the new rules of the DSA.

The Main Issues of the Digital Markets Act (DMA) Proposal

8. The core platform services listed by the DMA proposal have important intermediary functions for the offer of broadcast media. In this regard it is key to limit the scope by precise indications already in the legislative act, because the consequences attached to the applicability of the DMA proposal amount to significant new requirements and therefore legal clarity is required as to which providers are addressed. Nonetheless, such obligations have been considered in the light of proportionality according to the position on the market for the companies concerned that offer such services. Overly broad interpretations of the categories such as the category of online intermediary services could bear the risk that the scope of application is expanded in an unintended way to services which deliberately were not included into the DMA. Rather, all important actors that are to be addressed should be explicitly included now and in case it is regarded as no more covering the market reality in the future, the list can be updated through the amendment mechanism. At the same time, it may be advisable to include in the language of the Recitals why certain types of services are excluded from the scope of the DMA because they are regulated specifically and do not match the conditions for a gatekeeper-type of service, such as is the case for certain media type services where these are not part of a (bundled) gatekeeper platform, e.g. linear and non-linear audiovisual media services in contrast to video sharing platform services.

9. Regarding the designation procedure, the criteria listed by the DMA clearly acknowledge the risks posed by the gatekeepers and give a workable tool for the Commission to deal with a certain flexibility when scrutinizing borderline cases or market threats that occur below the thresholds. At the same time, the list of criteria and description of the Commission's powers in this provision is of a kind that limits the Commission's discretion in expanding the gatekeeper definition. Although the actual designation of gatekeepers will be the result of a procedure in which the Commission has to assess the situation on a case-by-case basis, the criteria laid down in the DMA proposal will give legal certainty as to the outcome of this procedure.

10. This legal certainty as well as the actual implementation of the obligations the DMA imposes on gatekeepers, is a pressing demand of the current online market situation, not last because it is apparent that competition law approaches alone have not been sufficient to respond to the problems resulting from the market reality. In this regard, the proposal poses several temporal issues of concern. This includes procedural steps in the designation of the gatekeepers possibly leading to lengthy procedures as well as the time period until possible specific obligations are imposed in light of a need for further specification to be potentially made by the Commission for some of the obligations. To some extent, the additional delay in the application of measures even after designation of a gatekeeper position may diminish the effect of the proposal to address market shifts that are currently happening in the online sector where it impacts the competitive position of other providers of audiovisual content. It should be considered to what extent interim measures that can apply immediately even if there is a challenge of the measure could remedy this problem.

11. Given that the quantitative criteria should be straight-forward in many cases, the duration and procedure until possible measures can actually be enforced, should be reconsidered. This also concerns whether there is actually a need for lengthy transition periods after a designation has taken place, as most (of the anyway few) gatekeepers should be able to initiate a compliance-assuring process internally already before being officially designated. The market risk is the basis for the initial decision to designate and an early addressing of the risk in order not to further reinforce the position of an assumed gatekeeper may necessitate that at least temporary measures are applied.

12. This temporal factor also carries over into the specific obligations imposed by the DMA. The DMA contains "obligations for gatekeepers" (Art. 5) and "obligations for gatekeepers susceptible of being further specified" (Art. 6), whereby this distinction is not to be understood in a way that compliance with the obligations of Art. 6 would be less binding, have only delayed effect or are less important for gatekeepers. Rather, in those cases the Commission can impose specific measures to be applied by the gatekeepers if it assesses that the measures taken or planned by the gatekeeper are insufficient. This has to take place as a result of a regulatory dialogue which in practice may lead to a further delay in enforcement. It should therefore be carefully considered whether the separation into obligations under Art. 5 and 6 should be upheld or whether a specification power could not exist towards both sets of obligations irrespective of the immediate application of the obligations in both provisions.

13. Attention should be paid to whether the obligations of the DMA are sufficiently concrete or whether the application of the rules could not be accelerated. The idea of developing best practices and guidelines for implementation by the platforms does not necessitate a delay of applying the rules. Compliance with these can be challenged where measures are regarded as insufficient and can subsequently lead to the development of such best practices.

14. Furthermore, the distinction in the formulation as duties to act (allow, provide) or duties to refrain should not be understood to suggest that the obligations to refrain are only limited to abstaining from a certain action, as for some of the concerned obligations active measures may still be needed to reach the level of compliance requested. A clearer formulation of the provisions as to what can be expected from the gatekeepers

to ensure compliance, would lead to more legal certainty for all affected parties – gatekeepers, business users, end users and enforcement authorities – in some of the proposed provisions.

15. The proposed prohibitions of data accumulation in Art. 5 lit. a) and 6 (1) lit a) aim to prevent the power over data from being further intensified by gatekeepers merging data from different services without giving other companies access to this data. This objective may not be disregarded by a too narrow wording or interpretation of the rules. The same applies to the obligations in the area of advertising systems laid down in Art. 5 lit. g) and Art. 6(1) lit. g). These provisions aim to ensure transparency to address the prevailing information imbalance in the advertising market where advertisers and content creators/publishers need data about the advertising and functioning of algorithms in order to succeed in the market. Limitations to these obligations should therefore be carefully assessed in order not to be applied in a way that contradicts this purpose. Obligations concerning portability of and access to data provided for in Art. 6(1) lit. h) and i) DMA Proposal also complement this idea in other areas than the advertising market.

16. Overall, the DMA obligations are aimed at significantly increasing transparency for business users that are relying and dependent on the way gatekeepers offer their core platform services. This shall enable broadcasters to compete on more realistic terms than currently by redressing the imbalance with regard to relevant information in commercial interaction, because it is important that when it comes to the dissemination of content, applicable rules must be considered in light of EU values and fundamental rights including the relevance for media pluralism. In order to ensure the continued existence of diverse content accessible online, the dissemination of it has to be non-discriminatory but also reflecting the diversity requirement. Therefore, content creators have to be able to conduct their businesses in this competition with services offered by platforms on fair terms and must have the possibility to refinance their offers.

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Foreword

„Shaping Europe's Digital Future" – this is at the top of the agenda of the von der Leyen-Commission. One of the essential building blocks is the **new Digital Services Act package** presented in **December 2020** with **two proposed Regulations for a Digital Services Act (DSA) and a Digital Markets Act (DMA)**. These shall ensure that the EU Digital Single Market has a modern legal framework ensuring the **safety of users online**, establishes governance with the **protection of fundamental rights** at its forefront, and **creates a fair and open online platform environment**.

The need for these new rules is put in clear words by the Commission: "The current regulatory framework for digital services dates back twenty years. It helped the growth of European digital services but it does not give answers to many of today's pressing questions on the role and responsibility of online platforms, especially the largest ones." That **regulatory framework** consists **at EU level** of a **complex web of sectoral rules for certain types of actors, services or content**, that at least also have relevance in the online environment, as well as the horizontal framework for all information society services, regardless of their offer or business models in the **e-Commerce Directive** (ECD). The ECD has been the cornerstone of the internal market in the online context in an unamended way for two decades although the **internet landscape changed entirely since**. This is exactly where DSA and DMA now step in.

The **DSA proposal** continues with a **horizontal approach** for all digital services and lays down in 74 provisions, detailed in 106 recitals, rules regarding liability exemptions as well as due diligence obligations tailored to certain specific categories of information society services. It includes an extensive section about implementation and enforcement, including structures for supervision. While essentially retaining the liability exemption regime from the ECD with some additions, the DSA introduces a tiered system of obligations for all intermediaries, or more specifically hosting services, online platforms and very large online platforms (VLOPs). These include labelling obligations for illegal goods, services and content, the establishment of complaints systems for users as well as formalised notice and action mechanisms, and transparency requirements. These obligations as well as the upholding of the liability exemptions show the importance of the DSA for the media sector including for commercial broadcasting. First, the intermediaries addressed are primarily intermediaries of content and thus part of the online distribution chain of media content in text, image, sound or other and mixed formats. Intermediaries (from search engines to providers of user interfaces and social networks) play a crucial role as gatekeepers or at least key intersection between content providers and recipients (end users, consumers) and are therefore equally important for both.

The **stakes of the media sector** are multi-faceted: media companies have an interest in overseeing the dissemination or possible removal of their content both in positive terms (when it comes to content infringing their copyright, for example) and in negative terms (when it comes to avoiding removal of content protected by freedom of expression and information); transparency obligations for intermediaries can lead to a better data basis for media companies concerning both the removal of and visibility and findability of their content; supervisory structures concern the creation of contact persons for law enforcement and cooperation structures. And, more generally, the interest is to achieve a

market environment in which other participants involved in similar activities as the media are at least covered by a comparable set of rules.

Unlike the DSA, the Commission's **Proposal for a DMA** with 39 provisions and 79 recitals aims to **create "contestable and fair markets" in the digital sector**, thus primarily addressing competition aspects in relation to so-called 'core platform services' provided or offered by 'gatekeepers' which are designated as such by the Commission. Therefore, these two rulesets are very different in their structure and need to be assessed separately. The DMA Proposal contains a list of practices that are assumed to limit contestability of the market and that are to be regarded as unfair which is why gatekeepers have to refrain from behaving in specific ways or are obliged to take action to ensure (more) fairness. This concerns above all the opening of interfaces of their offers in a non-discriminatory way and ensuring transparency, especially in the area of advertising. Unlike in the DSA, where the design of supervision remains at least essentially at the level of the Member States, although even for that Proposal the Commission suggests a strong role with possibilities of intervention for itself (especially with regard to VLOPs), the Commission is the central supervisory body within the DMA. This can be explained with its proximity to competition law.

As the **gatekeepers** can be, inter alia, online intermediation services, search engines, social networks and Video-Sharing-Platforms (VSPs), these are also **highly relevant for media content in the relationship between media provider and user**. Especially **online advertising** is an area that concerns an essential element for refinancing of content production and is therefore directly relevant for media pluralism, and has been very opaque in the past, which is why its regulation by the DMA is of high relevance for broadcasters.

In light of the relevance of media for the basic values of the EU such as democracy and diversity as well as fundamental rights such as freedom of expression and information, the impact of the DSA and DMA for the media should be mirrored in the proposed Regulations. As a free and pluralistic media landscape is needed both offline and online to contribute to the functioning of the democratic decision-making process it is important to take into consideration the specificities of the media sector and possible special needs even if the DSA proposal is a horizontal and not sector-specific legislative instrument. In that respect the **legislative procedure with the input from European Parliament and Council still offers room for improvement**. This issue paper will highlight those areas that are of especially significant for the broadcasting sector.

A. The DSA Package and Broadcasting in the EU

Broadcasting is a significant factor in terms of both a cultural and economic perspective. At the end of 2019, 11 418 TV channels were available in Europe, 4 757 of them local. For the (then) EU28 they contributed to an annual audiovisual market volume in Europe of about EUR 130 bn.[1] These figures illustrate the importance of broadcasting for the EU's economy as well as an employer. Importantly, broadcasters are the main financing source for film productions besides public support.[2]

Moreover, broadcasting makes a **significant contribution to the democratic system**. To underpin this with a fundamental rights aspect regularly highlighted by the European Court of Human Rights: The media act in their function as a '**public watchdog**'[3] and contribute to the public debate as mediator of information and forum for public discourse in a pluralistic media landscape. According to the Court there is no democracy without **pluralism**[4], which is particularly true for audiovisual media[5] in their capacity as a particularly pervasive means of mass communication. This may explain why broadcasters enjoy a status of trusted provider in the public eye. A recent Eurobarometer survey conducted in 2018 showed that broadcasting (television) remains the medium most used by European citizens, and, maybe even more importantly, the main source (radio and television) that EU citizens use for information on political matters, which underlines its cultural and societal importance.[6] This is obviously determined not least by the trust that Union citizens have in television and radio in contrast to "the internet" and, for the most part, social networks.[7]

The relevance of the broadcasting sector for the EU as well as the regulatory framework applicable to audiovisual media services providers underline the need to consider vectors of cultural diversity, media trust and pluralism carefully in the final shaping of DSA and DMA. The main reason and **aim** for proposing a new framework with the DSA and DMA should be the benchmark: **enhancing the responsibility of platforms in the dissemination of online content** as well as the business environment online more generally.

Although the DSA and DMA **proposals follow a horizontal approach, from a broadcaster perspective these proposals should be understood and integrated as complementing rather than superseding a wider net of rules**. It is therefore essential that the border lines in this respect are taken into account in the current legislative discussions in order to address lingering issues in the context of the ECD and other instruments pertaining to online services. This applies both to the substantive scope and to enforcement, which needs to be coordinated between the different instruments.

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1 European Audiovisual Observatory, Yearbook 2020/2021 - Key Trends, Strasbourg 2021, p. 26, 36; numbers referring to the European market concern EU28 plus further Council of Europe Members and Observer States.

2 Ibid, p. 8.

3 ECtHR, no. 21980/93, Bladet Tromsø / Norwegen.

4 ECtHR, no. 13936/02, Manole u.a. / Moldova, para. 95.

5 ECtHR, no. 17207/90, Informationsverein Lentia ./. Austria, para. 38.

6 Standard Eurobarometer 90, 2018, https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/survey/getsurveydetail/instruments/standard/surveyky/2215.

7 Ibid.

There has been a build up in the **regulatory framework for broadcasting** in the EU since more than 30 years that is important in this context. The EU regulated first (cross-border) television and, since 2007, audiovisual media services in the **Audiovisual Media Services Directive (AVMSD)**.[8] The focus continues to be on simplifying the cross-border distribution of these services while protecting various interests, such as of consumers (e.g. rules on advertising labelling and sponsoring), the protection of minors (e.g. rules on content that is harmful to minors) and the public (e.g. rules against incitement to violence or hatred or terrorist content).

Monitoring compliance with these rules is the responsibility of regulatory bodies established at national level, which cooperate at supranational level in the **European Regulators Group for Audiovisual Media Services (ERGA)**. These **national regulatory authorities** shall "ensure respect for the objectives of media pluralism, cultural diversity, consumer protection, the proper functioning of the internal market and the promotion of fair competition"[9] and therefore are to be established "legally distinct from the government and functionally independent of their respective governments and of any other public or private body" (Art. 30 AVMSD).

In the recent revision, the AVMSD was adapted in light of the considerable changes in the distribution chain and the role of intermediaries. The way media are consumed and the advertising market have shifted to a large extent to online formats, in which broadcasters rely on the intermediary function of such online services while at the same time competing with many of them when it comes to the offer of audiovisual content. In addition, within the limited scope of application of the AVMSD the **overarching regulatory goal** was to maintain that **what is illegal in the traditional audiovisual content dissemination forms is illegal online, too**.

If new rules are now added that affect both content (DSA) and the competitive relationship (DMA) of broadcasters and intermediaries, a **close observation of the interaction with the AVMSD and other sector-specific rules is especially important**.

This is namely true for **VSPs**, which are **addressed in all three sets of rules**. But also the more traditional broadcasting media need clear consistency between the rules and the new distribution of roles in the online environment should not contradict the intentions and successes of the AVMSD. However, this is not a simple task, precisely because DSA and DMA are not specifically (sectorally) geared towards the regulation of opinion-forming content or even content as such.

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8 The Television without Frontiers Directive (TwF Directive) was created in 1989 with the aim of establishing rules for the cross-border transmission of television broadcasts that would ensure the transition from national markets to a common market for the production and distribution of programs and that would guarantee fair conditions of competition, without prejudice to television's function of safeguarding the general interest. This objective was pursued with the approach of minimum harmonization based on the underlying country of origin principle. Today, three decades and three substantive reforms (1997, 2007, 2018) later, the AVMSD contains far more rules than originally in the TwF Directive and it applies to more types of providers (linear, non-linear and video-sharing platform services). However, the approach of minimum harmonisation with discretion for the Member States and deviating powers on the basis of the country of origin principle, has remained unchanged. See extensively on the background to the applicable regulatory framework for audiovisual media services cf. *Cole/Ukrow/Etteldorf*, On the Allocation of Competences between the European Union and its Member States in the Media Sector, Chapter D. II.; *Cole/Etteldorf/Ullrich*, Cross-Border Dissemination of Online Content, p. 53 et seq.

9 Recital 53 of Directive (EU) 2018/1808.

The fundamental rights and EU values of "freedom of expression and information, as well as the freedom and pluralism of the media", which are so important for the media sector, are only mentioned in passing in Recital 105 of the DSA Proposal. For the DMA, pluralism is only a footnote in the accompanying Explanatory Memorandum.[10] This is understandable insofar as DSA and the DMA primarily pursue internal market policy objectives within a horizontal framework, which is why they are both based on the single market harmonisation rule of Art. 114 TFEU. They aim to contribute "to the proper functioning of the internal market for intermediary services" by setting out "uniform rules for a safe, predictable and trusted online environment" (DSA) and to ensure "contestable and fair markets in the digital sector" (DMA).

In this regard the objective must be, as the DSA itself refers to in Art. 1(2) lit. b) of the proposal on its subject matter, an "online environment, where fundamental rights enshrined in the Charter are effectively protected". **Media pluralism and freedom of speech** are exactly such rights. Hence, part of designing this online environment must be to ensure that the building blocks for pluralism are already in place or at least not hindered to be implemented by Member States and that all relevant fundamental rights – including besides freedom of expression for example also the **right to conduct one's business and the right to property** of companies active in the field – are adequately protected.

Especially with regard to maintaining media pluralism it should be recalled that this is neither the main aim of the proposed Regulations nor within the competence of the EU at all in light of the **allocation of competences between EU and Member States**.[11] But the fundamental creation of market conditions that allow for pluralism in the sense of external pluralism has always been part of economic and competition law as an indirect goal. Pluralism from the perspective of media law means that there is a multitude of providers or a multitude of diverse offerings from which citizens can draw information for their democratic formation of opinion as well as other purposes. Pluralism from the perspective of economic and competition law means the creation of fair, non-discriminatory and open market conditions.[12]

As mentioned, there is a whole web (or network) of sectoral provisions, which goes beyond the AVMSD. Since a significant part of broadcasting also revolves around the creation or licensing of content, copyright law is particularly important. It is the instrument with which rights can be defended also online. This is about combating online piracy, when content is used without licensing, for example in user-generated content or by content aggregators (e.g. news platforms) exceeding the limitations set under copyright law. The latter aspect was addressed in particular by the recent **EU DSM Copyright Directive**[13]. Article 17 DSMD, which makes 'online content-sharing service providers' (OCSSP) more responsible for copyright-infringing material within user-generated content, is currently being

10 Fn. 2 mentions for the important role of online platforms in digital markets with its societal and economic implications as an example that "the importance of ensuring a level playing field that supports essential values such as cultural diversity and media pluralism was for instance stressed by the Council in its conclusions on the strengthening of European content in the digital economy and on safeguarding a free and pluralistic media system".

11 See extensively on this *Cole/Ukrow/Etteldorf*, On the Allocation of Competences between the European Union and its Member States in the Media Sector, 2021.

12 *Ukrow*, How to define media pluralism?, in: Cappello (ed.), Media pluralism and competition issues, 2020, p. 3, 5 et seq.

13 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, OJ L 130, 17.5.2019, p. 92–125.

transposed into Member State law. The overlap of all this with the DSA in particular is obvious: not only the extension of the scope of the DSA in general to "content" for which intellectual property rights regularly exist, but also the individual obligations (notice and action mechanism; integration of trusted flaggers) and the liability privilege regime are of crucial importance for the enforcement of right holders, too.

In addition, there are a number of other instruments that do not have a media law dimension per se, but impact the media sector, because they either concern important economic aspects in the distribution chain or deal with content dissemination. Examples include the **Platform-to-Business (P2B) Regulation**[14], and **the Regulation on preventing the dissemination of terrorist content online (TCO Regulation)**[15]. Finally, also the level of **non-legislative measures, in particular initiatives of self-regulation**, are to be considered.[16]

This **issue paper** will **highlight** which **elements of the DSA and DMA** need to be carefully **considered from the perspective of broadcasters** and in respect of the above mentioned applicable regulatory framework.

14 The P2B Regulation is aimed at creating information and transparency obligations for online intermediation services and search engines that are relevant for the visibility of content as well as complaint handling systems vis-à-vis business users, 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, OJ L 186, 11.7.2019, p. 57–79.

15 The TCO Regulation is aimed at improving effectiveness of the current measures for the detection, identification and removal of terrorist content on online platforms addressing hosting providers with additional obligations. The original Proposal for a Regulation on preventing the dissemination of terrorist content online - A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, COM/2018/640 final, was referred to as the TERREG proposal. In the meanwhile it has been adopted and is now known as the TCO Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online, OJ L 172, 17.5.2021, p. 79–109.

16 For more details *Cole/Etteldorf/Ullrich*, Cross-Border Dissemination of Online Content, p. 152 et seq.

B. The Digital Services Act and Broadcasting– the Main Issues

I. Scope of Application

1. The Original "Information Society Services" Definition and E-Commerce Directive Approach

For many years the only reference point to define the personal scope of application in the regulation of the online environment by the EU was the **category of information society services (ISS)**. The definition for such services is laid down in the Technical Standards and Regulations Directive of 1998[17] and takes a very broad and general approach thereby encompassing a vast majority of services offered online: such services (i.e. typically for remuneration) are provided at a distance, by electronic means and at the individual request of the service recipients. However, the ECD's liability exemption regime was introduced for three types of service providers which in 2000 were seen as the relevant actors online: mere conduit, caching and hosting services. For each of these, a number of conditions were set in order for them to qualify for the liability exemptions and thereby a kind of definition was laid down.

Besides a number of cases in which the **CJEU had to interpret some of the criteria of the ISS definition or give guidelines to the application of the liability exemptions** – mainly in situations concerning intellectual property violations – the EU legislator in recent years added sector-specific definitions for new types of online platforms which can be seen as sub-categories of the more general ISS category.[18] Examples for this are the definitions of VSPs in the AVMSD revision of 2018 or the OCSSP in the DSM Directive of 2019.[19]

As the original definition of ISS was included in a Directive this meant that Member States regulatory frameworks transposing it led to **varying interpretations especially through case law of national courts**. These divergences concern especially the qualification of a provider for the applicability of the liability exemptions of the ECD which depend on whether the activity of a provider fulfils the conditions mentioned. This in turn means whether the provider falls under the definition of that type of service, mostly these questions concerned the category of hosting provider. More precisely, the controversies

17 Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 204, 21.7.1998, p. 37–48, repealed and replaced by 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, OJ L 241, 17.9.2015, p. 1–15.

18 *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online-Content, p. 177 et seq.

19 Besides binding legislative acts, the European Commission has introduced in Communications a further delineation of the online sector, cf. e.g. online advertising platforms, marketplaces, search engines, social media and creative content outlets, application distribution platforms, communications services, payment systems, and platforms for the collaborative economy mention in the Communication Online Platforms and the Digital Single Market Opportunities and Challenges for Europe, COM/2016/0288 final.

deal with the question whether **new types of platforms and business models in which providers for economic or compliance reasons apply technologies and content management mechanisms making them more active than the original criteria** (as described in the relevant Recital 42 of the ECD) of a "mere technical, automatic and passive nature" indicated, can still be regarded as neutral and thereby fully profit of the liability exemption. The currently pending case before the CJEU concerning a VSP on which copyright violations were conducted by users and possible consequences for the provider of that platform perfectly illustrates this difficulty: a broad interpretation (as seems to be suggested by AG Saugmandsgaard Øe in his Opinion[20]) of passiveness would not allow to qualify organisational measures taken by platforms concerning the presentation of the information, indexing, ranking and recommending it, making it searchable, conducting certain checks of the content, or the fact that these measures impact the (advertising based) revenue for the platform as making the platform an active provider. However, the recent addition of a liability provision for OCSSP in the DSM Directive was based exactly on the perception that this type of **involvement has changed the nature of the providers from being merely passive to active involvement in the dissemination of the content**. Also, the above-mentioned, more recently introduced new definitions and categories are again included in Directives – with the notable exception of online intermediation services and online search engines in the recent P2B-Regulation which concerns the relationship between platforms and business users –, so the problem of diverging interpretations could persist. As a result, in the discussion about how to respond to this challenge, there were different possible solutions suggested, one of them being that the future horizontal framework would allow for the introduction of further sector-specific definitions reflecting new business models or types of providers and attaching specific obligations to these categories, while not relying any longer on the distinction between active and passive.[21] Other suggestions opted for a clarification that the activeness of platforms, while in principle allowing for a continuation of the distinction from passive, commences with any form of relevant intervention by the service providers. In the DSA proposal the Commission chose a simple continuation of the approach of the ECD as far as the three main categories are concerned.

2. The Continuation of the Existing Approach

The DSA proposal integrates the current approach by relying on the "old" ISS definition as well as **fully taking over the ECD categories of mere conduit, caching and hosting provider**. However, in contrast to the ECD these are not only introduced as categories for which liability exemptions apply, but instead they are **now included as self-standing definitions** in Art. 2 (f) as three possible types of a 'intermediary service'. The DSA proposal thereby introduces as a novelty (albeit in parts based on the old categories) a **layered approach** of ISS, some of which are intermediary services (either mere conduit,

20 Opinion of Advocate General *Saugmandsgaard Øe*, Joined Cases, C-682/18 and C-683/18, YouTube, para. 141–168, in which he suggests that management possibilities of the platform have to concern the changing of the content itself and not merely how it is displayed and arranged. But he also acknowledges that this is what will change with the application of the DSM Copyright Directive.

21 See for references to such proposals *Cole/Etteldorf/Ullrich*, Updating the Rules for Online Content Dissemination, 2021, p. 162 et seq.; such sectoral specifications could have given indications about relevant degrees of "editorial involvement" or influence that intermediaries have in the intermediation between content producer and recipient.

caching or hosting), some of the hosting providers are then identified as **online platforms** and a specific group of those are categorised as **very large online platforms (VLOPs)**.

With this approach, although continuing with an emphasis on the pre-existing categories of intermediaries, the DSA proposal acknowledges that the involvement of intermediaries in content dissemination necessitates specific rules. In order to apply such specific rules the category of online platforms is introduced in Art. 2 (h), where they are defined as providers of a hosting service which stores and disseminates information (on request of its users) to the public as long as this is not a "minor and purely ancillary feature". Recital 13 underlines that the added activity of such a platform is the dissemination activity (beyond the mere storing of the information) and clarifies that e.g. social networks are therefore included, but that on the other hand a comments function (= users adding own content to pre-existing information) alone, e.g. on an online newspaper website, is not a main function of such a service that would justify including that service in the definition.

Although the DSA proposal rightly includes a more differentiated approach to the variety of online service providers and the role they play today, one issue that remains concerns the interrelation with other legislative acts applicable to the online sector and the definitions contained therein. It is necessary to **safeguard the more specific (as lex specialis) definitions of the acts that – contrary to the horizontally applicable DSA – contain rules for specific providers or specific situations** (again, as examples, one can think of the situation of a platform qualifying as a VSP under the AVMSD, an OSCCP under the DSM Directive and an online-platform under the future DSA). Similarly, the **relevance and possibility of Member States legislation aimed at other objectives than the DSA such as safeguarding media pluralism should be more clearly stated**.

What remains problematic from a substantive point of view concerning the (attempted) clarifications by the DSA proposal and which is relevant for the question of liability exemption (see on that below B.II), is the issue of **"neutrality" of providers**. Although this is a question of legal consequences (liability exemption) of a certain behavior of providers, in actual fact it also has to do with the more overarching question of how these types of providers are to be characterised. In that regard, the wording of Recital 18 refers to guidance offered by the CJEU in some of its case law, but it does not specifically refer to the judgments and thereby also limits itself to only some of the aspects discussed in those cases. Furthermore, it is doubtful whether this attempted clarification alone is future proof as it only marginally gives indications what constitutes editorial control, but no further explanation of what could be a relevant active role besides editorial responsibility. That matter is of relevance mainly when it comes to judging whether the liability exemptions are not too far-reaching, but is mentioned already here as it also questions the approach to define categories of providers in the scope of the proposed Regulation.

The last issue with the scope of application that needs to be briefly pointed out, concerns the approach to **exemptions from the applicable rules for certain providers**. In light of new obligations that the DSA proposal aims to introduce, a graduated approach considering the impact of a specific provider (typically established by its size) is reflective of the principle of proportionality. Therefore, in line with other recent legislative acts concerning platforms active in the online sphere, the DSA proposal also contains exemptions for micro and small undertakings according to the SME Recommendation of

the Commission.[22] Examples are the transparency reporting obligations or the complaint handling as laid down in Articles 17 et seq. Although on first view it is indeed to be expected that the harm potentially caused to end-users e.g. in case of dissemination of illegal content is higher if the platform used has wider reach and therefore exempting very small providers from burdensome obligations seems consequential. However, e.g. the exemption from the trusted flaggers-cooperation obligation of Article 19 (see below B.III) might lead to noteworthy enforcement gaps as some "niche" offers of small providers may be especially problematic when it comes to illegal content and illegal or otherwise harmful information such as racist or violent content. Another problematic example of exclusion are the transparency requirements concerning online advertising (Art. 24) because also on small online platforms it is relevant for users to be able to understand the ad exposure. In addition, although SME-type-exceptions are being included in legislative acts of the EU increasingly, there is no consistency across the regulatory network applicable to the online environment: while measures that come along with burdens for providers concerned are partly excluded or subjected to specific proportionality requirements, such general exemptions do not exist for start-up businesses competing with these providers.[23]

3. Assessing the Definition of Scope of Application

Overall, the scoping of applicability of the DSA proposal is to be welcomed as it responds in principle to the reality shift that has occurred since the ECD was conceived. Also, the wide applicability and extension of basic rules to the majority of intermediaries follows the right approach. A **careful consideration should be undertaken to check whether the current proposal is sufficiently suitable for ensuring a smooth interconnection with existing, sector-specific elements of the regulatory framework** and whether it appropriately leaves room for the differing Member State approaches. Also, the horizontal **approach focuses for some rules on online marketplaces and the trading of goods, while the underlying problems may exist in a comparable degree also in the context of content dissemination**.

By including the definition of online platforms as such and not only in connection with the liability regime, it is possible to consider them for obligations newly introduced with the DSA proposal. In following a value-based regulatory approach that considers **appropriate reactions to risk situations identified**, there cannot be room for exempting any type of provider from the basic rules or from contributing to reaching the objectives of the DSA. This is especially important for another reason, too: the regulatory asymmetry between smaller broadcasting service providers compared with pure online service providers would otherwise be further enhanced, as the broadcasters do not benefit from a general exemption from stricter regulatory requirements e.g. stemming from the Audiovisual Media Services Directive (AVMSD).

Concerning the **territorial scope of application**, the proposal rightly takes a broad approach relying not on the establishment of the intermediary services, but the place of

22 Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ L 124, 20.5.2003, p. 36-41.

23 Compare e.g. the provisions in the DSM Copyright Directive (Recital 67 and Art. 17 (5) and (6)) and the AVMSD (Art. 28b (3)) for VSPs with the providers of "regular" linear and non-linear audiovisual media services.

establishment of the "recipients", covering in principle any EU-based business or end user to whom the service is provided.

II. The Continuing Reliance on the Pre-existing Liability Privilege Regime

1. The Problems in Interpreting the E-Commerce Directive

With regard to the liability rules, the **DSA Proposal transfers the liability exemption regime from the ECD** (Art. 12-14 ECD) almost unchanged into the new legal framework. It does so by deleting the provisions in the otherwise retained ECD and inserting them in **nearly exactly the same wording**[24] with one additional clarifying paragraph included in the hosting provision that excludes, for the goal of consumer protection, the exemption from liability in case the consumer entering into a distance contract could reasonably assume he or she is trading with the platform. Transferring the liability exemption – remembering that it is not the ECD or the future DSA that creates the liability but only harmonise the cases in which Member State-law induced liability may not be extend to the services mentioned – from the ECD also means that the **current system of largely reactive conditions in order for the providers to profit from the "safe harbour"** (liability exemption) **protections remains unchanged**. Newly added are clarifications on the liability conditions with regard to voluntary proactive obligations (Art. 6) and reactive obligations relating to authority orders to act against illegal content (Art. 8) and to disclose information (Art. 9). The prohibition of imposing general monitoring obligations on providers is also upheld (Art. 7). As already described above concerning the scope (B.I.), this approach of fully retaining the principles of the ECD poses some potential risks by continuing to rely on the active/passive distinction of providers, which is at the heart of the liability rules, without fully integrating developments in CJEU case law or attempting to further clarify open issues around the criteria relevant for this distinction.

Several problems in the application of the liability regime have surfaced over the years since the ECD came into being, concerning three key points in particular. First and foremost, the initial idea for setting up a liability exemption granting extensive privileges to intermediaries was based on the **idea that passive services offer their services in a state of full neutrality and should not be held accountable beyond duties of care** for the information travelling through their service**, cannot be upheld in the same way in the current state of online content dissemination**. Second, the precise determination of the **notion of "actual knowledge" of illegal content**, which triggers the need for reaction by providers if they do not want to become liable**, is not always clear** even in case of notification and content recognition systems in place. Third, there is a **tension between the liability privilege for hosting platforms in Art. 14 and the no general monitoring rule** in Art. 15 ECD. While this allows for specific preventive injunctions to be directed at service providers against infringements, it prohibits measures characterised as general monitoring obligations.[25] For the area of intellectual property

[24] Art. 5 (1) lit. a and b use the term "illegal content" instead of "illegal information" as under Art. 14 (1) lit. a and b ECD to align it with the scope addressed by the DSA.

[25] Cf. on this *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content, p. 221 et seq.

rights violations this meant that rightholders still had to rely on individual notifications of breaches while platforms often were reluctant to react in a more active way. In a number of relevant CJEU judgments the court attempted at developing criteria to determine when intermediary service providers act in a "mere technical, automatic and passive" role, in which situations actual knowledge can be assumed in the digital sector with a vast amount of content being hosted and disseminated, as well as finding a standard of what behaviour can be reasonably expected from and imposed on providers with regard to dealing with illegal content without contradicting the no general monitoring rule.[26] At several points, the DSA Proposal indicates that this case law of the CJEU is the basis for the understanding of the provisions and therefore the interpretation of the DSA shall continue to rely on it.[27] In other words, the **DSA aims to adapt the ECD rules to bring them in line with the respective jurisprudence**, but does not do so by changing the wording but by **simply restating that the provisions are to be read in light of the CJEU case law**. However, it has been questioned already in the past whether certain providers of intermediaries are actually covered by the liability exemptions and should not be regarded as active due to their involvement in dissemination. This question has become even more relevant considering the way these providers have evolved since the passing of the ECD.In order to address the question of the impact the new liability privilege regime, which is widely the old one, on the broadcasting sector and the dissemination of content online in general, it is not necessary to discuss all elements of the system, instead a focus will be put on the attempted clarifications and added rules of the DSA proposal.

2. Liability Exemption Rules in the DSA Proposal

a. Applicability to Intermediary Service Providers

While previously in the ECD the three types of services were only described in connection with the rules as to when they can profit from a liability exemption, the DSA proposal now introduces the **three categories of intermediary services as separate definitions** as well as applying the pre-existing liability privilege regime. The question is therefore, whether this change affects the application of the liability exemptions to other types of providers.

Although Recital 17 is formulated broadly, the reference to Chapter II which is only applicable to intermediary services makes it clear that the rules connected to liability in Art. 3-5 DSA Proposal as well as the further clarifications only apply to mere conduit, caching and hosting service providers. For the latter category, in case the providers do not only store information but also disseminate it to the public, they are subjected to further rules as so-called online platforms. For all other aspects, the seemingly broader formulation of Recital 17 – which was not contained in this way in the ECD and is not a necessary explanation that derives from relevant CJEU case law – according to which "any type of liability" is limited concerning "any type of illegal content", may not be misunderstood as expanding the liability exemptions. As will be shown below, the conditions for being within the scope of the liability exemptions are not changed, so that the new wording (albeit only in the Recital) has to be understood as only clarifying that there is no difference made as

[26] For an analysis cf. *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content, p. 176 et seq.

[27] E.g. Recitals 6, 16, 19 DSA Proposal.

to the original source of liability rules (which then exceptionally may not be applied) in EU or Member States law and irrespective of the precise subject matter or nature of those laws.

b. The Notion of "Neutrality" of the Providers

Another important question connected to the transfer of the liability exemption rules from the ECD to the DSA Proposal concerns the distinction between active and passive providers. This notion derived from Recital 42 of the ECD which characterised the providers profiting from the liability exemptions as "passive". In order to clarify this notion further, Recitals 18, 20 and 25 of the DSA proposal attempt at qualifying this approach although the substantive provisions remain unchanged in this regard and some of the Recitals follow old wording, too. Recital 18 is the equivalent explanation to the old ECD-Recital 42, but the formulation has changed – although marginally – in a two-fold manner.

First, the Recital now explains from the outset that **there are cases in which the exemptions do not apply, which means that there is a condition to fulfil and that providers of hosting (and the other concerned) services do not automatically qualify for the exemptions**. This is not a substantive change in the understanding but it is a nuance that could be applied in the interpretation. As such, it is not a set rule that all providers are covered and only exceptionally some would disqualify if their activity turns out (in the wording of old Recital 42) to be not "of a mere technical, automatic and passive nature".

Second, in lieu of referring to the behaviour of the provider as passive, the **DSA proposal in Recital 18 addresses the concerned providers as offering the services "neutrally".** However, as the substantive provisions concerning the liability exemption remain unaltered and as the other elements of description of the provider activity in the Recital also pick up the old Recital-language (namely "merely technical and automatic processing" and 'active' meaning "knowledge of, or control over, that information")[28], it is **doubtful whether any change in addressing the providers can follow from this change and the use of the 'new' term "neutrally"**. More importantly, the addition to Recital 18 seemingly states the obvious: that liability exemptions cannot apply if the intermediary provides information developed under its editorial responsibility. In that case there is no passiveness (except if one were trying to construe a limitation only to the act of dissemination) or neutrality, but the intermediary is addressed not in that function but as content/information producer.

The fact that this added explanation is deemed necessary underlines that there is a **scale from being editorially responsible to a mere neutral (or passive) service provider and that intermediaries are placed somewhere on this scale**. In doing so, the proposal is acknowledging that many intermediaries have become much more active in the treatment of third party content but regularly act as vertically integrated entities with their own content offers. The distinction is blurred and not always applicable in a clear-cut manner. In that respect the addition of the reference to the clear case of editorial responsibility does not help with regard to assessing these nuances. Although the clarification in Recital 18 DSA Proposal that there is no exemption from liability in the case of content-related responsibility is correct, it is not able to bring about any clarification to

28 On this, see once again above at B.I.1. and the pending CJEU case mentioned at fn. 20.

the question when such liability exists and at what point in the spectrum the activity makes the provider lose its neutrality.

The notion of **editorial responsibility** is one of the foundational criteria for the applicability of strict rules concerning audiovisual media services providers under AVMSD. The latter introduced in its revised 2018 version some content (and other) obligations for VSPs acknowledging that rules should apply irrespective of the lack of editorial responsibility. The AVMSD, however, with its definition of editorial responsibility is not intended to answer questions of liability[29] but rather how the responsibility leads to protection (and not only obligations) of the media service providers. It is clear that the diverging aims of the AVMSD and the proposed DSA may also mean that the criteria for what amounts to editorial control have to be answered differently. For example, whether human intervention is conditional for having editorial responsibility or whether algorithmic control (by itself or in combination with changing terms and conditions) could be equivalent to editorial control, has to be evaluated differently under AVMSD than under the proposed DSA.

More generally speaking, the DSA Proposal does little to serve – at least in the part on liability exemptions – the **originally targeted aim of involving platforms in a more responsible position when it comes to dealing with illegal content dissemination**. It may therefore **miss the possibility of creating a more level playing field between services that are offered under editorial responsibility** and in turn have to respect strict(er) rules **and other services that remain very lightly regulated** as they are seen as only the provider in the middle enabling exchange between content producer and user.

If the legislative approach stays as in the proposal at the position of not changing the liability exemption idea already in its principle, then the reference made to the exemptions should rather be narrowed down than leave the intermediary privilege untouched or even expanding it unintentionally. For that purpose it is likely not enough to integrate in Recital 20 the old ECD-Recital 44 aimed against possible circumventions of liability by collaborating with the recipients of the service (and then claiming not to have control over the information provided), although this now expressly also includes hosting service providers. The level of "deliberate collaboration" will have to be assessed by deciding how much activity is needed beyond knowledge and tolerance of the activity by the provider. An example where this is highly relevant concerns the provision of services that offer a particularly favourable infrastructure for the provision of illegal content, e.g. by allowing full anonymity, closed user groups, redirection via proxy servers, etc.

c. Voluntary Investigations and Measures against Illegal Content

Art. 6 DSA Proposal addresses **"voluntary own-initiative investigations"**, in current discussions **often referred to as a "Good Samaritan" clause** because parallels are drawn to the principle of the same name that is the centrepiece of U.S. internet legislation introduced in 1996 as Section 230 by the Communications Decency Act. However, this reference suggesting a similar approach may not be mistaken to assume the provision in

[29] According to Art. 1 (1) lit. c) editorial responsibility is defined as the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided.

U.S. law[30] – introduced well before the ECD – is actually copied or even closely tailored. The neutrality of a provider is not automatically questioned if it takes measures to act against illegal content in "good faith and in a diligent manner" as Recital 25 puts it. However, activity of this kind necessitates a reaction to discovery of illegal content in the same way as if this knowledge is created by a notification, otherwise the liability shield falls.

With the introduction of Art. 6 in the DSA Proposal, the Commission responded to the assumed and expressed reluctance of providers to combat illegal content proactively and on their own behalf due to the fear of losing the ability to invoke a liability privilege because it would make them "active" and possibly presumed to have "actual knowledge" of the content on its platform. However, Art. 6 and Recital 25 do not answer the extent to which such voluntary measures may (not) be included in the assessment of the neutrality and thus responsibility of an intermediary service. The only specific example for activities not amounting to a loss of the liability exemption per se is the measures for the implementation of the terms and conditions of the providers. In addition to the legal uncertainty that continues to exist in assessing whether the liability exceptions apply at all, another level of uncertainty may be created as it may not be evident in a tangible case whether Art. 6 applies. On the other hand, more legal clarity is already created by the fact that the DSA proposes a fixed catalogue of obligations, separately regulated from the question of lack of liability.

The Commission conceived the relation between the liability exemption Chapter II of the Proposal with the additional due diligence obligations introduced in Chapter III (see below at B.III) as separate and therefore a **lack of compliance with the obligations does not automatically lead to a loss of the liability shield**.[31] The **exact interconnection between these two parts as well as with Member State laws** that may in their liability rules include that e.g. non-responsiveness to an order to act against illegal content is taken as a basis for establishing liability, **should be further elaborated** in the discussions of the proposal.

The catalogue of due diligence obligations addresses a number of measures that might otherwise have fallen under a Good Samaritan clause, so that the additional introduction of Art. 6 for obligations "devised" by the services themselves can be questioned. In particular for VLOPs, which have to fulfil even more obligations and already involve themselves in similar ways as provided for in some of the obligations, it can be asked whether Art. 6 offers added value.[32] In its current design, it is not clear whether Art. 6 can

30 That provision very broadly states at Sec. 230 (c) that online intermediaries should not be regarded aspublishers if they disseminate information by another content provider and that no liability shall incur for any activity aimed at removal or moderation of third-party material that the intermediary considers to be obscene or offensive in other ways, with the only limitation that this activity has to be done in good faith. Already the setting of the ECD, and consequently the DSA Proposal is different and the formulation of Art. 6 in the new proposal only suggests a clarification that eligibility for liability exemption is not lost, if platforms actively seek and remove illegal content or become active in order to comply with the requirements stemming from the DSA.

31 In its impact assessment, the Commission (SWD(2020) 348 final, PART 2/2, p. 165) explains that the option of a differing liability system allowing intermediaries to be in scope of the conditional liability exemption only if they acted with the necessary due diligence, was discarded due to the fact that this would imply that compliance would be ultimately voluntary: the intermediary service would only be "incentivised", but not "required" to comply with the rules.

32 In its Impact Assessment (ibid, p. 158) the Commission also highlighted that the ECD lacked to create incentives "in particular for small players which might want to take measures for keeping their users safe, but, in order to escape legal risks, avoid doing so".

create, besides the possibility of providers to shield themselves from liability, a positive effect from a societal perspective, namely in terms of encouraging responsible behaviour of platforms that contributes to a safer environment online. The provision should certainly not be construed as extending the liability shield as laid down in Art. 3-5 DSA Proposal.[33]

III. New Obligations for Intermediaries

Unlike the ECD, which contains only a limited set of rules and few obligations besides the core element of the liability privilege, the DSA proposal is much more extensive, contains a number of separate Chapters with further obligations for providers that all need to be considered in context. This is especially true for the system of liability exemptions presented above and the interrelation with the **due diligence obligations imposed by the DSA**.

1. A Separate Layer of Obligations

The Commission opted for maintaining the liability privilege but adding another layer of obligations that are in principle independent of the liability issue. Other options were possible either by imposing additional duties of care or diligence obligations as part of the conditional regime for liability exemption or replacing the existing conditional liability regime entirely with positive obligations, in which case failure to comply would result in being liable.

As a consequence, the fulfilment of certain general obligations as part of the business practice which are detached from specific individual cases of illegal content, is to be separated from the issue of liability of platforms. Also, the obligations as laid down in the DSA proposal do not contradict the rule that general monitoring obligations may not be imposed on platforms. The **duties are therefore an additional layer of obligations that must be fulfilled independently of the possibility of invoking the liability privilege in individual content cases**. Nonetheless, there is a **close connection between these two instruments of the DSA** which requires a careful consideration of their interaction. This can be illustrated for the notice and action mechanism proposed in Art. 14 DSA.

2. Notice and Action Mechanisms

According to Art. 14 DSA Proposal, all hosting **providers need to put notice and action procedures in place that allow for an easy, electronic notification of presumed illegal content**. The Proposal explicitly applies this requirement to all hosting platforms in order to capture, in principle, file sharing (peer-to-peer) and web hosting providers, ad servers or paste bins (Recital 40). No exceptions are provided for micro and small enterprises in this section of Chapter III.

[33] See on this also *Cole/Etteldorf/Ullrich*, Updating the Rules for Content Dissemination, p. 176 et seq.

Notices need to comply with a common format and contain certain information in order to make them useful for the service provider: the reasons why the notifier considers the content item illegal; the exact URL(s) of the notified content; contact details of the submitter; and a good faith statement on the accuracy of the information provided. Providers are obliged to send the submitter a receipt of the notice and a message once the decision has been taken. This information message must include a mention if the decision relied on automated means. The decision needs to be taken in a timely manner.

The notification is of particular relevance for the interrelation to the liability regime as the notice, if it meets the above-mentioned criteria, qualifies as creating actual knowledge with the provider. Recital 22 clarifies that **actual knowledge** – being a condition for liability for hosting services – **is obtained if the notices are sufficiently precise and adequately substantiated to allow a diligent economic operator to reasonably identify, assess and where appropriate act against the allegedly illegal content**. By providing the basic criteria and basis for a valid notice, the proposal in some ways largely reflecting how complaints mechanisms are currently designed in certain popular platforms. In so doing, this approach may result in the replication of existing systems that are regularly used also by broadcasters to notify illegal content and therefore may lead to additional burden for theses actors.

This **approach partially reflects**[34] **the case law of the CJEU** and the approaches already established by the Commission in its Recommendation on measures to effectively tackle illegal content online[35]. It makes clear that having complaint systems in place on a platform and in a specific case receiving notifications of alleged infringements, does not fall under the "Good Samaritan" clause (see B.II.c) which **leaves the shield against liability intact for investigatory actions taken by the intermediary in case of notified infringements**. In positioning the intermediaries in this way, the approach provides more assurances for content intermediaries but leaves much of the onus **and burden for the fight against illegal content online on complainants**. **Legal certainty** as to the obligation to follow-up notifications as well as the **facilitation of the process of notification from the perspective of complainants should be aimed for**. This is important, because notices about assumed illegal content create a clear responsibility for intermediaries and then can also be the basis for regulatory measures.

However, Art. 14 is limited as the obligation to introduce **notice and action mechanisms is restricted to hosting services**. It is true that these providers are regularly involved more closely with the content distributed via their services than, for example, mere conduits. The latter typically have no means of influencing the individual content. This would only be different for content that is technically separated or separable on the platform. Otherwise they can only "control" the access to the hosting service altogether.

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34 The DSA seems to require more detail that what has been developed in the case law of the CJEU in this context. For example, in its decision in Case C-324/09 (*L'Oréal v eBay*), the CJEU held already in 2011 that a notification establishing actual knowledge must be "sufficiently precise and adequately substantiated". The DSA limits this requirement by making the inclusion of a URL in the notification necessary, which will not be possible for all services affected by the notice and action mechanism, such as app-based platforms. In this respect, it would be questionable and in need of clarification whether a notification without a URL can also, following the case law of the CJEU, constitute actual knowledge outside of Art. 14 DSA proposal, as long as it is otherwise sufficiently precise and substantiated.

35 Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, C/2018/1177, OJ L 63, 6.3.2018, p. 50–61.

Nonetheless, **Internet access providers (IAPs) play an important role** in the context of notice and action mechanisms and have been included in national laws and codes of conduct in such frameworks, for example when it comes to reacting to copyright violations.[36] In cases of rogue websites that are piracy platforms where copyright infringements are the basis of activity or for platforms that at least create favourable conditions for such violations, **access providers are often the last resort that rights holders can turn to if the hosting provider cannot be reached or is not cooperative in the request for deleting or blocking access to hosted content**.[37] The risks are not limited to property rights, as in copyright, but can affect public interests, for example when it comes to content that violates human dignity or constitutes terrorist content.[38]

The **general exclusion of IAPs** without providing a comparable system adapted to them or at least making their involvement in the hosting providers' systems clear by the law, **does not seem to do justice to the potential dangers online**. This applies all the more because without inclusion in the scope of application, there is also a lack of connection with the liability privilege by not being able to create actual knowledge through notice for these types of providers. In the liability exemption section the possibilities of recourse against access providers is not regulated in a sufficiently clear manner either. Adapted systems would be conceivable, for example, by reverting to mechanisms introduced by the DSA proposal with regard to complaints, such as the trusted flaggers, or by excluding certain providers, such as WiFi providers, from the scope of application.

3. The Question of Stay Down Mechanisms

The notice and action mechanism relies on a notification necessary for every single case and action based on this notification for this item – even though a notification can include multiple content items. This procedure does not consider that content may reappear and the high burden of continuously re-notifying for the same or similar content. The DSA Proposal fails to satisfactorily respond to what could be referred to as the "whack a mole" issue concerning this need for constant re-notification.

The **reappearance of previously notified (illegal) content has been a serious problem** in that it questions the effectiveness of responses to illegal situations. The question of stay down requirements was partly obscured due to the unclear interaction with the general monitoring prohibition and – until now – unharmonised requirements in the area of notice and action mechanisms.[39] Addressing this issue in the DSA or at least laying down a foundation on which sectoral law could build upon, now that the DSA Proposal harmonises requirements in the area of notice and action mechanisms, would be

36 Cf. on this *Cole/Etteldorf/Ullrich*, Updating the Rules for Online Content Dissemination, p. 197 et seq.

37 Access providers are routinely addressed by rightsholders and other damaged parties when it comes to requesting the blocking of access to illegal content, for example via dynamic injunctions or graduated response systems. This necessity of relying on IAPs can also be true if a service itself does not have a substantial connection to the internal market and would therefore not be subject to the DSA, but the content hosted is redistributed via other platforms that have such a connection and is therefore in the realm of European citizens and businesses.

38 This does not necessarily mean that the same standards must or should be applied to all categories of intermediary services in the case of Art. 14 DSA Proposal. In particular, the autonomous installation of a corresponding complaints system for all mere conduit providers would probably not be feasible in view of the potentially large number of possible complaints.

39 *Cole/Etteldorf/Ullrich*, Updating the Rules of Content Dissemination Online, p. 184.

an opportunity. It could include the alignment with the no general monitoring rule and consider proportionality requests. Possibly, such **stay down mechanisms could be limited to types of risks that** do not reach the threshold of exceptional circumstances (Art. 37) but **go beyond what applies to any type or specific item of illegal content** (Art. 14). In this way, the different intensity of infringement on fundamental rights, which is more impactful for certain content, e.g. if it violates human dignity or qualifies as terrorist content, due to its nature or due to the type of infringement (repeated re-uploads), could be taken into account. This enhanced obligation measure for platforms should be considered, as in actual fact and practice technical means already exist and are implemented that are able to recognise and classify content to a certain degree.

4. The Role of 'Trusted Flaggers'

While the notice and action mechanism of Art. 14 applies to all hosting services, the **trusted flagger cooperation**[40] **concerns** only **online platforms which do not only store but also disseminate information by third parties**. The main element of interest here is the designation and recognition of the trusted flaggers and the added value that the **qualification as formally recognized trusted flagger** will bring. This status is **awarded to entities that fulfil certain criteria and applied for it** with the Digital Services Coordinator of the Member State of establishment of the applying entity. A trusted flagger has to meet the following **cumulative conditions**:

> (a) it has particular expertise and competence for the purposes of detecting, identifying and notifying illegal content;
>
> (b) it represents collective interests and is independent from any online platform;
>
> (c) it carries out its activities for the purposes of submitting notices in a timely, diligent and objective manner.

The reliance on trusted flaggers was inter alia introduced as a measure in the Commission Recommendation on illegal content online, but that system is discontinued. Under the Recommendation a 'trusted flagger' referred to an individual or entity which is considered by a hosting service provider to have particular expertise and responsibilities for the purposes of tackling illegal content online.[41] There was therefore not a formal designation process, but the relevance of those flaggers emanated from the relationship between platforms and flaggers without the involvement of regulatory institutions. The more formalised procedure of the DSA proposal is to be welcomed as it responds to some extent to the potential dangers posed by the assessment of the legality or illegality of opinion-forming content by platforms (together with such partners) "behind closed doors" without the involvement of independent regulatory bodies or courts. However, it does **call into**

40 According to Art. 19 DSA Proposal online platforms have to deal with notifications as under Art. 14 DSA Proposal in an expedited way if they are issued by so-called trusted flaggers that have been identified as being knowledgeable and reliable in connection with identification of illegal content. More specifically, the platforms concerned are obliged to take the necessary technical and organisational measures so that they process notices by such flaggers with priority and without delay . A register of recognised trusted flaggers will be published by the Commission so that any provider knows who to trust. Furthermore, the provision introduces mechanisms to avoid potential abuse of the status of trusted flagger by putting procedures in place to deal with the repeated filing of unsubstantiated or incorrect notices.

41 Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, C/2018/1177, OJ L 63, 6.3.2018, p. 50–61.

question functioning cooperation procedures that developed without a specific regulatory obligation existing until now.

Besides the qualification of the entity the question of its form is relevant. Recital 46 clarifies that with the reference to "**entities**" in Art. 19 **no individuals** can be awarded trusted flagger status, but **entities can be either public in nature or non-governmental organisations and semi-public bodies**. It mentions for the specific area of terrorist content law enforcement agencies, namely Europol as possible trusted flagger. In doing so, it is evident that the reference to "collective interests" that the entity has to represent according to Art. 19(2) lit. b) DSA Proposal does not limit this to some form of collective consumer interests, but that public interest goals enforced by public bodies are included. Surprisingly, national regulatory authorities in charge of supervising audiovisual media services are not mentioned as obvious examples of such public bodies that in addition have a long-standing experience of dealing with the careful balancing of freedom of expression with the safeguarding of public interests and fundamental rights that may be negatively impacted by content. It is further explained that for the specific area of intellectual property rights, industry and right-holders associations could be regarded as trusted flaggers, thereby again clarifying that "collective interests" is not to be interpreted narrowly, but that the representation of collective rights is included.

However, for intellectual property rights individual right-holders often hold large catalogues of rights and are strongly affected by violations which is why some have successfully developed cooperation mechanisms with platforms. The **focus of the DSA proposal on organisations representing interests of a multitude of members allows for the continuation of such individual cooperation, but will not allow for a formal designation as trusted flagger** according to the DSA-system. Thus, by referring to procedures where industry organisations can be seen as trusted flaggers when it comes to intellectual property rights violations, the intention of the new procedure in the DSA is expressed: although the awarding of the status is more formalised, existing and functioning cooperation mechanisms – as especially demonstrated by right holder organisations and large individual IP right holders having "fast access"-channels to the platforms – are not supposed to be put in question. Therefore, existing systems of involving trusted flaggers, whether labelled as such or not, for example based on initiatives in the area of hate speech and disinformation or industry agreements in the area of copyright, can be maintained according to Recital 46. The DSA provision shall not prevent online platforms from giving similar treatment to notices submitted by entities or even individuals. However, as Art. 19 requires a **prioritised treatment of notices submitted by trusted flaggers** in the sense of the DSA, this **can potentially lead to a decrease in relevance for notifications of "unofficial" trusted flaggers**. In addition, it is possible that platforms will abandon previously voluntary agreements with the argument that the trusted flagger system is now officialised in the DSA and resources have to be dedicated to these procedures as well as in order to avoid misunderstandings as to what is obligatory and voluntary response by the platforms. It should be considered whether a non-cumulative listing of the conditions to be designated as trusted flagger could resolve this issue.

5. Transparency and Data Access Obligations

Besides the notice and action mechanism relying partly on trusted flaggers, further obligations for intermediaries included in the DSA Proposal include labelling obligations for

illegal goods, services and content, as well as **transparency requirements** which are relevant to the broadcasting sector, such as **in connection with online advertising** as foreseen in Art. 24 DSA Proposal for all online platforms and Art. 30 with additional obligations for VLOPs. Transparency is also the way to reach better understanding and monitoring of compliance of platforms with the newly proposed rules. For VLOPs, Art. 31 therefore establishes a very general **data access obligation allowing the Digital Services Coordinator and the Commission to request any data which they may need for their supervisory tasks**. This obligation comes in addition to the audits by organisations independent of the VLOPs that will have to be conducted once a year at least (Art. 28). The reliance on such audits should not dilute the need for a regulatory oversight by public bodies leading to those audits only being a supplementary first step.[42]

For this reason it is important that the data access **extends to any type of relevant information including about algorithmic systems where these are used by VLOPs**. Accordingly, Recital 64 refers to "data on the accuracy, functioning and testing of algorithmic systems for content moderation" and also mentions recommender and advertising systems as relevant aspects of VLOPs that can be the topic of data access requests. However, as algorithmic systems are used widely by platforms in content dissemination – and this includes content that is illegal or otherwise harmful – and not only for moderation or ranking purposes, but generally for the organisation of the content dissemination, the substantive provision itself should include an explicit reference to this type of data and it should not be limited to specific areas such as content moderation. Whenever VLOPs are required to give access to such data, they enable a form of oversight by public authorities into the specific way that the platform shapes content distribution, its monetisation and the effects this may have on the exposure of individuals to different types of content. With a clearly formulated and broad disclosure obligation VLOPs will have an incentive to define internally the use of algorithmic systems very precisely and take measures against negative impacts of such systems, if they have to otherwise expect consequences after scrutiny by such a public authority.

The DSA proposal suggests regular and easy access to such data for these authorities by foreseeing in Art. 31 (3) that the access shall happen via online databases or APIs. All the more it is **important that the VLOPs cannot reject access requests due to alleged technical difficulties or** – as Art. 31 (6) would allow – **alleged breaches of trade secrets**, as public authorities should not be limited in their supervisory task and can deal with confidential information as it happens for example in competition investigations.[43] That the data access provision allows for more data being available also to selected researchers (Art. 31 (2)) is to be welcomed, but should not be mistaken as substituting investigation possibilities by public authorities.

42 See also *Cole/Etteldorf, Ullrich*, Updating the Rules for Online Content Dissemination, p. 201-202 and 223 et seq.

43 On this criticism also *Strowel/Somaini*, Towards a robust framework for algorithmic transparency to tackle the dissemination of illegal and harmful content on online platforms, CRIDES Working Paper Series no. 2/2021, p. 33 and 48-49.

C. The Digital Markets Act and Broadcasting– the Main Issues

I. Scope of Application

The DMA proposal has a different starting point and aims to achieve a different goal than the DSA. The DMA is supposed to ensure "contestable and fair markets" (in the digital sector) and therefore targets providers that are designated as so-called gatekeepers. The **DMA proposal** does not sketch out a completely new understanding of such a category of providers. It **relies** instead **on existing categories of service providers and definitions contained in other legislative acts of the EU** and **additionally introduces mainly quantitative and some qualitative criteria to define thresholds** which justify a dedicated scrutiny concerning such providers with incontestable influence in the market. The DMA-oversight takes place alongside (and, as ex-ante instrument, before) possible competition law instruments such as measures against the abuse of dominant market power, which could still also be initiated.[44]

By addressing only gatekeepers, it is clear from the outset that the **DMA proposal rightly takes a limited approach focussing on only very few providers** which have the **potential to significantly impact the market** in fulfilling the **quantitative thresholds**, which are set at a high level. Beyond this quantitative aspect it is the reliance on **(qualitative) criteria that characterise the especially powerful position of these types of intermediary gatekeepers** in comparison to dominant market participants in other markets, namely because of the types of services offered which put them in a strong position between business and end-users and the permanence of this position due to network effects. By keeping the personal scope limited, the DMA proposal can justifiably introduce potentially far-reaching obligations and prohibitions that apply to these gatekeeper-type of providers.

1. The List of Core Platform Services

The first element of "**core platform services**" that characterises these gatekeepers is defined by a conclusive list of enumerated services (Art. 2 (2)). The eight types of services cover a **wide range of online services** and are the result of an evaluation process aimed at identifying services **offered in such a way by providers in a gatekeeping position that makes it so difficult for other businesses** (including the business users of these services) **to compete on a comparable basis**. Not only the choice of services included in the scope but also the exceptions were deliberately chosen: according to Art. 1 (3) markets that are covered by the EECC and strictly regulated in that legislative act, are excluded from the DMA proposal. But one specific market already covered by the EECC is

44 This is illustrated not only for situations of abuse of dominant market power, but also by the fact that "planned" mergers and takeovers have to be announced to the Commission according to Art. 12 DMA Proposal well before they fall under the notification obligation under the Merger Regulation (EU) 139/2004. Generally on questions of possible conflicts between competition law and the proposed Regulation cf. *Monti*, The Digital Markets Act – Institutional Design and Suggestions for Improvement, TILEC Discussion Paper DP 2021-004, https://ssrn.com/abstract=3797730, p. 14 et seq.

nonetheless excluded from the exception, namely **interpersonal communication services**. The market structure for those is comparable to the other core platform services covered by the DMA proposal, because economies of scale and network effects work so strongly here that for these – in combination with availability of user data – there is the potential to result in 'failing markets'. This is especially true because typically providers of these services can extend (and already have extended) their dominance beyond one activity, some "exercise control over whole platform ecosystems in the digital economy" as Recital 3 underlines. **Limiting the scope of application by precise indications already in the legislative act is important** as the consequences attached to the applicability of the DMA proposal amount to significant requirements for the companies concerned and therefore legal clarity is required as to which providers are addressed.

Most of the services covered by the list are not defined in the DMA proposal itself, but the list refers to the corresponding definitions in the other relevant legislative acts of the EU thereby enabling a dynamic adjustment in the sectoral laws with effect also for the planned DMA.[45] This also means that there are two layers of regulation that apply to such services: for the service as such the more specific legislative acts, in the case that such services are offered by a gatekeeper then the additional layer of the DMA proposal with a much stricter set of obligations. This can be illustrated with the **example of VSPs** that are addressed by the new provisions in the AVMSD of 2018 even though with only a limited number of substantive rules compared to audiovisual media service providers, while a gatekeeper-VSP-provider is subjected to (additional) obligations and prohibitions by the DMA that are different in nature compared to the ones that apply under the AVMSD.

Two examples of pre-existing recent definitions for such core platform services that are relevant for online (including audiovisual) content dissemination as well as for broadcasters when addressing their viewers or listeners online, and that are referred to, can be found in Art. 2 P2B Regulation: "**online intermediation services**" are ISS offered on contractual basis to business users with the aim of enabling the offering of goods or services to consumers. These types of services shall facilitate the initiating of direct transactions between the business users and the consumers. "**Online search engines**" as the second example are digital services which allow end users to input queries searching for websites and returning results in any format, including for example via voice assistants. The term "online intermediation services" which is used by the DMA proposal for the first type of core platform services is not as broad as the similar term "intermediary services" in the DSA proposal, but on first view it seems to have the potential to serve as a kind of catch-all provision for those types of online services that are not specifically addressed in the other points. Such services are already regarded as being offered in potentially problematic market circumstances which is illustrated by the fact that they were already addressed by the transparency obligations of the P2B Regulation.

That relatively broad definition allows some flexibility in encompassing all other types of providers with an intermediary role in the online context that have not been addressed in the more specific following definitions such as search engines. Given the specific conditions to qualify as online intermediation service, it is however **questionable whether this category can really serve to include other services that have an intermediary function, such as voice assistants and web browsers, and have a key position in**

[45] For lack of existing definitions elsewhere 'online social networking service' and 'operating system' are defined in the DMA proposal itself and 'advertising service' is not defined specifically.

the digital environment. The P2B Regulation requires that a contractual relationship exists between such services and business customers in order to be included in the obligations. In addition, overly broad interpretations of the category could bear the risk that the scope of application is expanded in an unintended way to services which deliberately were not included into the DMA based on the preparatory evaluation of the market. An example of this would be video-on-demand services, which unlike VSPs were not included by the Commission in the list of core platform services as the market structure here does not fulfil the specific risks that the DMA intends to address, such as network and lock-in effects, as well as currently being an open market with a sufficiently plural provider landscape. The DMA proposal does, however, foresee the possibility to reconsider the list of core platform services in case future developments indicate that there is a change in a given sector that replicates the same risks that were seen for the services currently included. In such a case Art. 17 DMA proposal establishes a procedure for the identification of new services, which then rightly defers this to the legislative procedure for amending the Regulation.

It is noteworthy that also the other **listed specific services in the DMA proposal have important intermediary functions for the offer of broadcast media** in total or specific elements of content, such as is the case for online social networking and video-sharing platform services. Operating systems include device-operating software and thereby interfaces of consumers concerning their hardware or software applications, such as e.g. connected TV devices or app stores and pre-installed software on devices. Also, **advertising services** are obviously particularly important for the financing of broadcasting, at least when it comes to ad-based revenue models. This is an especially **problematic market in the online context,** as **intermediaries**, based on their business models, **regularly do not allow the integration of third-party advertising services** and therefore require the business users to rely on the intermediaries' proprietary advertising services. In the DMA proposal these services only constitute core platform services if they are "provided by a provider of any of the [other] core platform services" – as the DMA Proposal formulates it –, so the issue here is the possibility of bundling services offered and tying them to accepting advertising mechanism driven by the providers of those services. As the Explanatory Memorandum puts it clearly, and the substantive provision of the DMA proposal should be equally clear on this, it concerns advertising services that are "related" to one of the other core platform services; it needs to be ensured that the aim of including the services cannot be circumvented by outsourcing the ad service.

2. The Qualification of Gatekeepers Offering the Services

The personal scope of the DMA proposal is delineated firstly on above described limitation to certain core platform services and secondly by the condition that it is a gatekeeper that is offering these services. The **gatekeeper is defined** by Art. 3 (1) **based on three cumulative criteria** of having significant impact on the single market, constituting an important "gateway" between business and end users and being in (or advancing to) an "entrenched and durable position". Each of those elements has a quantitative counterpart in Art. 3 (2) enabling an application based on objective and objectively identifiable factors. The **procedure of designating a provider as gatekeeper is conducted by the Commission with involvement of the service providers concerned** and is based on the fulfilment of the criteria laid down in Art. 3 (1) and (2) by the provider in question.

The designation can be the result of two procedures: it is either based on reaching the quantitative criteria based on information by the provider which triggers a presumption for being a gatekeeper subject to counter-demonstration concerning the qualitative criteria, or it results from a market investigation. The latter is undertaken by the Commission with a case-by-case assessment and can result in designation even if the provider analysed does not meet any of the quantitative thresholds. The **Commission has a certain leeway for the future application of the calculation criteria for these thresholds** according to Art. 3 (5) DMA proposal by being authorized to adopt delegated acts, but when it comes to the designation irrespective of reaching the quantitative thresholds, these are already established in detail in Art. 3 (6) and include criteria oriented at the quantitative thresholds such as size and number of business users, as well as elements such as entry barriers derived from network effects and data driven advantages, scale and scope effects or lock-in risks concerning business or end users. These criteria clearly acknowledge the risks posed by the gatekeepers and give a workable tool for the Commission to deal with a certain flexibility when scrutinizing borderline cases or market threats that occur below the thresholds. **At the same time**, the list of criteria and description of Commission powers in this provision is of a kind that **limits the Commission's discretion in expanding the gatekeeper definition**. This is further underlined by the above-mentioned fact that the Commission has no direct concretising power concerning the list of core platform services while the application to specific providers in concrete cases necessitates flexibility for the Commission in the important role of identifying the actually risk-emanating market participants, especially when it comes to a prospective view.

3. Assessing the Definition of Scope of Application

Overall, the DMA proposal defines the scope of application in a manner that is to be welcomed by identifying the actors which are in an exceptional position when intermediating between businesses and end-users and targets these narrowly. Because the specificities that lead to the exceptional position of these providers cannot be sufficiently responded to with instruments in EU competition law, the newly proposed approach promises are more efficient ex-ante response to identified existing imbalances between participants on markets in the digital sector. First attempts in this direction, as witnessed with the entry into force of the P2B-Regulation, are further strengthened with this new proposal. Although the **actual designation of gatekeepers will be the result of a procedure** in which the Commission has to assess the situation on a case-by-case basis, the **criteria laid down in the DMA proposal for the quantitative thresholds will give sufficient legal certainty** as to the outcome of this procedure. At the same time, it may be advisable to include in the language of the Recitals why certain types of services are excluded from the scope of the DMA because they are regulated specifically and do not match the conditions for a gatekeeper-type of service, such as is the case for certain media type services where these are not part of a (bundled) gatekeeper platform, e.g. linear and non-linear audiovisual media services in contrast to video sharing platform services.

Concerning the **territorial scope of application**, the proposal – in line with the DSA proposal – does not rely on an establishment of the provider of services but the perspective of recipients. Therefore, it includes services that are offered to business or end users established or located in the EU irrespective of location of the provider. The relevance of the gatekeepers for the EU market is rightly assumed due to the volume of market share that these have to first reach before being subjected to a designation as gatekeeper.

II. Procedural Steps in Implementing the DMA

Concerning the procedural steps in implementing the DMA once this has entered into force, there are several **temporal issues of concern**. The actual criteria for identification of gatekeepers falling into the scope of the DMA proposal are clearly set as described above. The **application in practice might**, however, still **lead to significant delays before the prohibitions and obligations** imposed on such gatekeepers can **show an effect**.

This is a result of the procedural steps in the designation of the gatekeepers as well as the time period until possible specific obligations are imposed. As with any other legislative proposal, it also remains to be seen when a final version will be reached in negotiations between European Parliament and Council so that applicability of the proposed Regulation will not begin for a certain period of time anyway. Although the proposal aims at an applicability after six months of entry into force and even allows the designation procedure to start immediately with entry into force.[46] However, the fact that the DMA proposal is a response to markets with significant imbalances (or even with the risk of failure in terms of maintaining competitiveness), makes any delay in applicability problematic, as further manifestations of these risks may occur and possibly become difficult to reverse. Given this situation, swift procedures in bringing the DMA to practical application once it has been passed, should be ensured.

The designation procedure builds on procedural steps that in effect could slow down the application of the substantive provisions to such gatekeepers. Unlike in the DSA proposal, in the DMA proposal the obligations and prohibitions can only apply to providers that have been identified as gatekeepers. As the proposal itself gives clear guidance who is to be qualified as gatekeeper, it puts an **obligation on concerned companies to identify themselves as such gatekeepers** providing core platform services. Accordingly, they are obliged to notify the Commission within three months that they meet the thresholds of the Regulation – as from the moment they do so – and therefore have to be designated as gatekeepers. The subsequent designation decision by the Commission shall be taken with undue delay but at the latest within 60 days after receiving the relevant information from the concerned provider.[47] However, there is a **possibility for providers to challenge the (possible) designation** in advance and irrespective of the fact that the thresholds of Article 3(2) have actually been met. In order to benefit from this situation in which the Commission then has to launch a market investigation to find out whether or not a designation should take place based on fulfilment of the qualitative criteria, the provider has to present sufficiently substantiated arguments. As the Commission has to use investigative measures, consequently the time delays are increased and there is only an indicative goal of concluding that investigation within five months (Art. 15(3) in conjunction with Art. 3(4) and (6)). A further delay takes place because **even after final designation as a gatekeeper these have six months to comply with the rules** laid down in Articles 5 and 6, once the Commission has in its decision listed which services of a given gatekeeper

46 This possibility under Art. 39(2) DMA proposal is underlined by Recital 16 that suggests the Commission „should be able to directly designate" the gatekeepers for which applicability of the DMA is evident and also mentions the need of a „fast designation process".

47 Art. 3 DMA Proposal does not refer at any point to the nature of the "designation", but the form is detailed by Art. 4 (1) which allows for changes to "a *decision* adopted pursuant to Article 3".

are relevant and to which undertaking the gatekeeper belongs.[48] Given that the quantitative criteria should be straight-forward in many cases, **such a duration until possible measures can actually be enforced should be reconsidered**.

Further delays are possible due to the **construction of the obligations** that can be imposed. While **some are mandatory and self-executing** (Art. 5 DMA Proposal), as is further explained below, **others** under Art. 6 DMA Proposal **can depend on a further specification by the Commission**. This means that initially the gatekeepers are charged with implementing effective measures to comply with Art. 5 and 6 of the DMA Proposal, but that the Commission can decide further details on how the obligations under Art. 6 have to be reached. This decision may take another six months until it is taken once an insufficiency of measures to achieve compliance has been identified. The situation is complicated by the fact that in this process the gatekeeper concerned is involved. Art. 7(4) indicates the expectation that the Commission does not decide on possible measures by itself, but engages in what Recitals 29 and 33 refer to as "regulatory dialogue" in which the gatekeeper first presents its (planned) measures before the Commission finally decides. Although self-regulatory approaches in the digital sector are common and also in competition law there are instruments which build on a previous "dialogue" between Commission and concerned undertaking (e.g. commitment decisions under Art. 9 Regulation (EU) 1/2003), the **wording of the DMA proposal lacks clarity when it comes to the role of the gatekeepers in this "dialogue" as well as the question of its need** after Art. 6-specifications are already the result of a case-by-case assessment of the Commission that the measures implemented or foreseen by the given provider are insufficient.

As the Commission is acting with decisions under the DMA, these are subject to contestation by concerned gatekeepers. However, as the DMA setup assumes for the regular cases a "self-identification" of gatekeepers as falling under that category, with their notification to the Commission they should already be able to initiate a compliance-assuring process internally. In light of the above-mentioned delays until the actual designation takes place, there is **no need for lengthy transition periods after a designation has taken place before obligations become applicable**. It **should also be considered** whether the mandatory obligations that are precisely laid down can be made **applicable without suspensive effect in case of a review request**. The market risk is the basis for the initial decision and an early addressing of the risk in order not to further reinforce the position of an assumed gatekeeper may necessitate that at least temporary measures are applied in the phase until final clarification whether e.g. a designation decision is upheld.

III. Obligations and Prohibitions for Gatekeepers

In terms of substantive provisions, the key norms are Art. 5-7 of the DMA proposal. They contain a number of very specific obligations that gatekeepers have to comply with as well as some indications on how concretely appropriate measures to achieve this compliance with the obligations can be defined between the providers of the services and the Commission. The obligations concern partly the behaviour towards business users of the

[48] Art. 4(3) adds that the Commission shall provide publicly a regularly updated list of all gatekeepers and all connected services which are within the scope of the DMA.

gatekeeper services and partly the rights that end users including customers of the business users of the gatekeeper services are being given.

1. The Structure of Art. 5 and Art. 6 DMA Proposal and their Application

In discussions about the forthcoming DMA Proposal reference was – and after publication of the proposal still is – often made to a black, grey and a white list which would be used to categorise gatekeeper behaviour. This can be traced back to a list of "unfair practices" in a preparatory document of the Commission that was leaked and comprised a blacklist and a grey list, but also referred to a whitelist. As the final proposal does not use this terminology and structure, it is preferable to refrain from using these terms and address the provisions of Art. 5 and 6 DMA Proposal as what they are: obligations for gatekeepers which list certain "do's and don'ts" in terms of their business practices when offering the services concerned by the DMA. However, the distinction between the obligations laid down in each of those two proposed Articles needs to be taken into account and should be clarified before taking a closer look at some of the obligations.

Article 5 contains "obligations for gatekeepers" while Art. 6 refers to "obligations for gatekeepers susceptible of being further specified", as mentioned above. Irrespective of the concrete nature of the obligations contained therein, Art. 7(1) underlines **that measures implemented by the gatekeeper to ensure compliance shall be effective in achieving the objective of the relevant obligation** in both provisions. Art. 5 and 6 are also treated in the same way with regard to a possible suspension of the obligations which gatekeepers can ask for (Art. 8), the updating of the rules through delegated acts (Art. 10), the prohibition of circumvention (Art. 11) as well as for the Commission's enforcement powers, as can be seen for the market investigation procedure (Art. 15 and 16) and the monitoring (in particular Art. 22 to 25) and sanctioning measures (Art. 26 and 27). This clearly shows that the **distinction in different provisions does not have the intention to suggest that compliance with the obligations of Art. 6 would be less binding for gatekeepers or less important**. As explained by the Commission in its Explanatory Memorandum there are "self-executing obligations (Article 5) and obligations that are susceptible to specification (Article 6)", while this may not be misunderstood as meaning that the obligations of the latter are conditional on a further specification procedure, but rather that for these obligations the Commission has the possibility to lay down in a specific decision directed at a gatekeeper the way in which an obligation of Art. 6 needs to be achieved. Differently formulated: where the Commission assesses the measures taken or planned to be implemented by the gatekeeper as being insufficient to ensure compliance with an obligation of Art. 6 it can impose on the gatekeeper specific measures to be applied. Besides the fact that the Commission is empowered to adopt implementing acts for certain of the obligations of Art. 6 according to Art. 36 DMA Proposal, this specific additional layer of "review" by the Commission is the difference to Art. 5-categories of obligations. As mentioned above, Recitals 29 and 33, but also Recital 58 suggest that the procedure of involving the gatekeepers in defining such measures through a "regulatory dialogue" will "facilitate compliance by gatekeepers and expedite the correct implementation of the Regulation".

Even though the heading of Art. 6 may be misunderstood as necessitating the "further specification" before they can apply, the above explanation shows that this is clearly not

the case. The fact that the Commission has the possibility to define specifically which measures are (more) appropriate than the ones suggested or already implemented by the gatekeeper concerning these obligations, seems motivated by the idea that for some obligations the measures to be taken might depend on the actual gatekeeper (and specific service offered by it) and be different in comparison to others or that the obligation's consequences are not as self-explanatory or obvious as for the ones under Art. 5. The obligation itself, does not only stem directly from Art. 6, but in addition the ability of the Commission to further specify measures does not hinder it to impose sanctions because of a violation irrespective of whether a specification has been or will be made (Art. 7(3)).

It should be noted that the DMA proposal includes possibilities for concretising the obligations provisions through delegated acts (Art. 37, concerning Art. 5 and 6) and the adoption of implementing provisions (Art. 36, concerning Art. 6).[49] The power to adopt **delegated acts** concerning the obligations of Art. 5 and 6 aims at keeping the list of obligations up-to-date in responding to practices that are not yet covered but have an equally negative impact on the market as the ones already determined. All of the obligations address "unfair market practices" or the further manifestation of market imbalances, both of which may present themselves in different ways in the future than today. Therefore, it is important to stress that this **relatively flexible instrument for the Commission can be applied only with caution**, and has to be based on the outcome of a market investigation, as Art. 37(3) and (6) do not only give the legislative bodies of the EU the right to veto a delegated act that is proposed by the Commission, but also to revoke the possibility overall if they do not agree with the way it is being used by the Commission. The implementing provisions power, where the Commission is not dependent on the acceptance by the legislative bodies, concerns only those obligations of Art. 6 that relate to the provision of data. Art. 36(1) lit. b points out that the details of the technical measures for these measures should be addressed by giving implementation directions.

As a result of the above, although the obligations of **Art. 5 and 6 are equally binding for gatekeepers**, the **specification power for the Art. 6-obligations allows the Commission to intervene in a more concrete manner** and beyond being only able to state a violation and combine it with a sanction. At the same time, this **additional layer of intervention may in practice lead to a delayed enforcement**. It should be carefully considered whether the separation into obligations under Art. 5 and 6 should be upheld or whether a specification power could not exist towards both sets of obligations. This would have to be combined with underlining that the obligations apply irrespective and not only after a specification took place. A reconsideration should also extend to each of the obligations in order to decide whether they are correctly placed if the distinction would be upheld. For certain, in light of the importance of all the obligations, the current clarification by Art. 7(1) about equal validity and applicability of all obligations even before a specification, should be upheld explicitly. In both provisions the **obligations are either formulated as duties to act (allow, provide) or duties to refrain**. This should not be understood to suggest that the obligations to refrain are only limited to abstaining from a certain action, as for some of the concerned obligations active measures may be needed to reach the level of compliance requested. For each of the obligations which partly consist

[49] Generally on these instruments in EU law eg. *Hofmann*, Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality, in: European Law Journal, 4/2009, p. 482–505.

of several elements, the provisions themselves in combination with the associated recitals sufficiently express the objective so that especially business users are aware of what behaviour they can expect from the gatekeeper. For example, Recitals 48 and 49 of the DMA proposal illustrate more detailed what the prohibition of self-preferencing according to Art. 6(1) lit. d) means and the reasons why it is applied as gatekeepers are regularly vertically integrated and are in a dual-role position as intermediary for services of others while also providing directly services or products in competition with these other parties. Such detail of description should be applied for all obligations, irrespective of the fact that the Commission for Art. 6-obligations can give further details in a specification for which it has to give a relevant justification.

2. Overview of Relevant Obligations from a Broadcasting Media Perspective

The obligations laid down in the DMA proposal cover several issues which constitute unfair practices or have led to the entrenched position in which gatekeepers are and the difficulty for competitors or providers that are dependent on the services of the gatekeeper to act on similar footing. Most of them have relevant aspects also for broadcasters that are partly users of the services of these gatekeeper platforms in offering their content online and are partly in competition with them when it comes to comparability as content provider or content disseminator. Some of the relevant proposed obligations will be highlighted briefly in the following.

a. Prohibition of Data Accumulation

As mentioned already in the context of the scope of the DMA, **data access and availability play a significant role in giving gatekeepers the position they have**. They are equally important for business users active online. According to Art. 5 lit. a) DMA Proposal gatekeepers are essentially **prohibited from bundling personal data** by combining data created on the core platform service with such from any other source, typically other services offered by the same gatekeeper. This includes that signing in end users to other services of the gatekeeper in order to combine personal data is prohibited except if the user consented to it on an informed basis. For that matter, the provision refers to Regulation (EU) 2016/679, the General Data Protection Regulation (GDPR).

This provision addresses the two interrelated aspects of availability and processing of data by companies: there are potential data protection issues but, moreover, due to the relevance of the data, the behaviour in connection with it can raise competition law questions. Although the question of lawfulness of a specific form of processing, in this case the question of possible combination of data from different sources, is first of all a question of data protection law, the possibility – and current business practice of companies that would qualify as gatekeepers in the future – of using data to optimize own services to the detriment of competitors needs to be addressed from a different angle.

The DMA is not concerned in detail with what is permissible under data protection rules, but adds to limitations for processing under those rules an additional important restriction which is aimed at restoring a fairer competition situation in the markets concerned. Accompanying Recital 36 is very clear about the aim to limit the possibility of accumulation of data because that raises (and has already done so) the barriers to market entry.

Especially the **parallel signing in to several services and using the "entrance door" of a user account to one core platform service in order to facilitate the use of other services**, thereby giving such companies access to a wide range of data of their users, **has put other service providers in a disadvantaged position**. However, the limitations introduced shall not be imposed against the user, so **user autonomy is upheld** by allowing them to consent to such practices. The latter possibility which according to the provision necessitates that "the end user has been presented with the specific choice" and has provided GDPR-compliant consent, actually addresses the requirement to offer less personalised alternatives of use of the platform services by the end users and giving them a possibility for use that does not require opting in to data accumulation, as the Recital puts it in very clear language.

An illustrative example for the need of limiting data accumulation possibilities in the interest of upholding competition is the case of the merging of data from Facebook and WhatsApp after the takeover. This practice has in recent years been addressed by cartel authorities, but the interaction of data protection rules with prohibitions under competition law is not yet clarified. While the Irish data protection authority (which is the lead supervisory authority under the GDPR system) from the perspective of a violation of GDPR rules by the combination of user personal data finally submitted in January 2021 its draft decision to the European Data Protection Board to follow the cooperation procedure in cases with cross-border relevance, the German Federal Cartel Office had already prohibited the combining of data on the grounds of abuse of a dominant market position in 2019.[50] The relevant Italian authority dealt similarly with the question of data use by Facebook and fined it for the transfer of personal data to third parties when users access websites and apps via their Facebook account.[51]

Art. 5 lit. a) DMA proposal – in combination with other **data-related obligations** in the proposal – reacts to this urgent **need for clarification of abusive practices in data accumulation as it has been identified by several competition authorities of the Member States** and with the prohibition inserted into a Regulation would now create EU-wide consistency. The issue of data accumulation has been intensely discussed where it has been picked up by competition authorities, because of the implications by and effects for data protection law.[52] The level of protection provided by GDPR which as a flipside includes the level of obligations and limitations already applicable to data controllers and processors has to remain untouched. Even though the DMA proposal only includes a limited number of references to existing legislative acts in its scope, namely the EECC, competition law rules and the proposed DSA, it regulates a different area than the GDPR and that no overlap, but only a complementary addition is intended, finds its expression in Recital 11

50 BKartA, decision of 6 February 2019, B6-22/16, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=8, cf. Etteldorf, IRIS 2019-4:1/10, http://merlin.obs.coe.int/article/8531. The decision was upheld in principle and with extensive reasoning by the Federal Court of Justice, decision of 23.06.2020, KVR 69/19, https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&nr=109506&pos=10&anz=651. The lower court, which in consequence had to revisit its decision that had questioned the Cartel Office's competence for the prohibition decision, decided to stay the proceedings and refer questions to the CJEU for preliminary reference, case lodged as C-252/21.

51 Decision of 10 December 2018, no 46/2018, https://www.agcm.it/dotcmsdoc/bollettini/2018/46-18.pdf.

52 For an overview *Etteldorf*, Data 'Protection' from a Different Perspective: German Competition Authority Targets Facebook's Data Usage, European Data Protection Law Review 5(2019)2, pp. 238 – 245, DOI: https://doi.org/10.21552/edpl/2019/2/14.

which could also be repeated in the substantive part of the proposed Regulation. As explained above, the formulation of Art. 5 lit. a) as an obligation to refrain does not imply that a purely passive behaviour of concerned gatekeepers is sufficient. Active measures may well be required in this context which prevent the merging of data, even beyond measures already implemented in reaction to data protection law, for example technical and organisational protection measures.

The prohibition reaches across different services of the gatekeepers as well as data they have access to from other sources, therefore an active (re-) organisation for example concerning source data that is fed into algorithmic systems or concerning gatekeeper-run interfaces that provide logins and interaction features leading to the passing on of data will be needed. Although the formulation of Art. 5 lit. a) clearly states that the limitation applies to data from any other of a gatekeeper's services (or beyond), the formulation "gatekeeper as a whole" of Recital 43 that accompanies Art. 6(1) lit. a) with additional data use limitations could also be included in Recital 36 to remove any doubts about the intention of the provision. In order to avoid possible circumventions, it could be further explicitly stated that gatekeepers, while refraining from **accumulating data** without themselves asking for consent from end users, **may not make their offer of services to business users conditional on them obtaining the corresponding consent from end users to merge the data collected by the gatekeepers**, then in the role of processors. This is particularly relevant for platform services for which the business users are eventually the ones "in touch" with the end user as e.g. for software offered on app stores. Such behaviour would have to be regarded contrary to the full effectiveness requirement of Art. 7(1) as well as – if conducted by other business units of a gatekeeper – the anti-circumvention provision of Art. 11 DMA proposal.

Art. 6(1) lit. a) DMA Proposal similarly addresses the **potential abuse of "data power"** of gatekeepers, but in this case in relation to its business users that create data (themselves or by their end users) through their activities and should not be disadvantaged by not having access to their "own" data which is available to the platform service provider. This far-reaching obligation across all business units of a gatekeeper extends to any data, including non-personal, that is not available publicly, and aims at stopping gatekeepers to profit from data just because of the intermediary position they are in although the value of the process originates from an offer of another party, the business user of the service. This is why the provision applies a wide notion by referring to the term "use" covering a wide range of possible actions and not to data protection language. Gatekeeper behaviour that concerns any form of **unfairly exploiting its dual role of intermediary for business users** between them and end users **and** at the same **direct provider of similar services**, shall be avoided. However, the prohibition is limited to situations in which the gatekeeper is in "competition" with the concerned business user. Although this term and its interpretation can be inferred from competition law, it should not be construed narrowly in the sense of market definitions. Especially in the area of offering content to end users there is a similarity (and in that sense "competition") between very different appearances of the content and dissemination channel, because the attention and consumption abilities of end users are limited when it comes to receiving content.

b. Obligations concerning Advertising Systems

Another major pillar addressed by the obligations of the DMA is the area of advertising and the **access to information about the functioning of online advertising value chains**.

Although there are different business models in broadcasting media, besides advertising revenue-based "free-to-air"-services also subscription-based refinancing models and therefore some of the obligations applicable to gatekeepers are of higher relevance depending on the model, the advertising information is crucial. For advertising revenue-based models this is obvious and by its very nature the refinancing through efficient advertising also plays an important role for safeguarding media pluralism. But even for subscription-based content offerings it is important to be able to understand how the advertising functions in the online context in concrete cases, as the availability of (audiovisual) content via numerous channels can lead to a diversion of user attention to alternative sources depending on what is advertised to them.

Art. 5 lit. g) and Art. 6(1) lit. g) are very closely linked and aim to **ensure transparency and a balancing of the prevailing information imbalance in the advertising market**. Advertisers and content creators/publishers need data about the advertising and functioning of algorithms in order to succeed in the market. Programmatic advertising systems regularly applied today and relevant especially in the framework of gatekeeper platforms, provide increasingly rich sources of such data for reporting, analytics and optimisation. However, they are often not accessible at all or difficult to access for others than the gatekeepers even for the ones that placed the advertising due to their unstandardised format, therefore amplifying the power of "infrastructure".[53] The two provisions of the DMA proposal address these challenges for market participants by tackling the opacity of the ad tech industry. As Recital 42 mentions, due to limitations in making available data because of new data protection rules, the problem of lack of transparency for publishers and advertisers has already increased and with the blocking of third-party cookies by adapted business practices or forthcoming changes in legislation this opacity will be further maintained.

Gatekeepers should therefore provide advertisers and publishers on their request with relevant information. Art. 5 lit. g) concerns information on price elements and the background of calculation in the advertising chain. This is potentially a lot of information as the advertising value chain has become highly complex. Therefore, the provision promises to make a significant difference to the current situation, even if Recital 42 points out that the information only has to be provided "to the extent possible". Art. 6(1) lit g) adds to this availability of information about how the advertising performs, so business users of core platform services can decide about worthiness and thereby possible changes they would like to make. In this case, it is not only general information data to be provided, but in actual fact access to the performance measuring tools of the gatekeeper has to be given and even free of charge. The intention is to allow advertisers and publishers (and Recital 53 clarifies that also advertising agencies acting on behalf of a company placing advertising are concerned) to be able to not have to rely on the gatekeeper information but to carry out their own independent verification of the relevant online advertising services. The fact that the elements of overlapping information provision towards advertisers and publishers were not included in one provision can be explained by the fact that there might be some reluctance to opening broad access to tools by the gatekeeper and therefore likely some further specification might be needed. The area of **programmatic advertising is already highly complex** and the **implementation of the obligation (also in technical terms) must be done in respect of trade secrets**

53 *Knapp,* Media pluralism from an economic perspective: Algorithmic media – new considerations for media plurality, in: Cappello (ed.), Media pluralism and competition issues, 2020, p. 9, 16.

as well as possibly applicable **data protection law**. Such limitations should, however, be carefully assessed in order **not to be applied in a way that contradicts the purpose of the obligations to attempt at equalizing the information imbalance** and its abuse by the gatekeepers.

c. Obligations concerning Portability of and Access to Data

It is also worth taking a brief look at the provisions of Art. 6(1) lit. h) and i) DMA Proposal. These are aimed at rectifying an imbalance on the market that is again created by access to different types of data which is available to gatekeepers but originates in the context of activities of third parties that do not have comparable insights due to a lack of transparency. They concern (also) technical measures that need to be introduced in order to meet the obligations and are subject to possible implementing provisions according to Art. 36(1) lit b).

Art. 6(1) lit. h) introduces a **data portability obligation** that requires gatekeepers to **allow business and end users to "take their data"** with them **when switching to other service providers** offering comparable services for which the (already created) data continues to be of relevance. Building on the notion of data portability under Art. 20 GDPR, the approach here goes well beyond, both in relation to the conditions on how end user can port their data as well as in the extension of the right to non-personal data and a different rights holder, namely the business users. The provision aims to counteract lock-in effects, which have long been seen as a potential threat posed by platforms. Business users can benefit from the proposed new rule in a twofold manner: not only can they switch services more easily, but it can be more attractive for end users to consider alternative offers provided by them in competition to services offered by the platforms of the gatekeepers as the existing barriers for such mobility are lowered. The provision is potentially far-reaching in technical terms which is why it is included as an obligation susceptible to further specification and a possible standardisation of the requirements in an implementing act.

Where platforms have been processing personal data in their services they have already been covered by the obligation to enabling data portability under the GDPR by providing the user data "in a structured, common and machine-readable format". Therefore, there should be pre-existing experience with the application of such an obligation. However, this will have to be expanded, as Art. 6(1) lit. h) specifies that **portability shall be facilitated by having "continuous and real-time access"** to the data for both business and end users. Recital 54 underlines that the wording of the provision does not limit this qualification of the portability requirement only to end users, but that both "should be granted effective and immediate access" to their data and enabled to port "in real time effectively". Such a solution puts clear obligations on gatekeepers to not limit the exercise of the right to dealing with an individual request with an according time lag, but that portability should be the norm enabled in the same way as opening or closing an account for example. This "multi-homing" possibility, as the Recital puts it, shall not only enable mobility of users, but also put pressure on the gatekeepers to not only gain users initially and keep them by simply making a change unattractive, but to continue to offer innovations in order to attract them to stay.

A similar obligation, also in technical terms as it relates again to "effective, high-quality, continuous and real-time access", follows from Art. 6(1) lit. i). This provision is directed at

business users that benefit from full access to all data, including that created by end users when using their services, at any time – irrespective of a decision to port – and free of charge. The aim is again that economic benefit should be enabled for the party that initially invested into an offer that was chosen by end users and not (exclusively) the intermediary between business and end user. Therefore, Recital 55 states that the **power of "data knowledge" on the side of the gatekeeper** should even be limited when it comes to data originating from different services of the concerned gatekeeper but created by interaction between the same business and end users. This clearly **enhances the competitive position of business users of platforms vis-à-vis them and improves return on investment possibilities**.

The obligation, however, finds its limits in data protection rules. Whenever personal data of end users is concerned, the DMA rightly refers to the necessary existence of consent by the end user to allow for the passing on of the data to the business user. It is then also limited more narrowly to the data generated in direct connection to the specific service's use. If no anonymisation takes place typically personal data will be concerned by platform use, since identifiability is already sufficient to assume personal data according to the GDPR and this can already be established by linking the data with IP addresses, user contracts or personal accounts with personal identification data. Therefore, the provision is relevant mainly where direct interaction of business user with the end user is possible in order to ensure the granting of consent, as the gatekeeper is not obliged to obtain such consent on behalf of the business user or to provide the possibility to opt-in or to ensure a possibility of contact between the end user and the business user for this purpose, although the gatekeeper may not exclude the possibilities given by Art. 6(1) lit. h) through contractual or other restrictions in the relation to the business or end user.

d. Conclusion on the Selected Obligations

Overall, the obligations of the DMA proposal highlighted above, are aimed at significantly **increasing transparency for business users** that are relying and are dependent on the way gatekeepers offer their core platform services. They are aimed at enabling business users to **compete on more realistic terms** than currently by **redressing the imbalance with regard to relevant information in commercial interaction**. It should not be forgotten, however, that when it comes to the dissemination of content, applicable rules must be considered in light of EU values and fundamental rights including the relevance for media pluralism. In order to ensure the continued existence of diverse content accessible online, the dissemination of it has to be non-discriminatory but also reflecting the diversity. Therefore, content creators have to be able to conduct their businesses in this competition with services offered by platforms on fair terms. Access to data is one of the most important points for that and is consequently addressed in the DMA in several places. However, attention should be paid whether the obligations are all sufficiently concrete or whether the application of the rules could not be accelerated by not relying so widely on possible specification measures by the Commission as the outcome of a "regulatory dialogue" with the concerned platforms. The idea of developing best practices and guidelines for implementation by the platforms does not necessitate a delay of having generally applicable rules. The compliance with these can be challenged where measures are regarded as insufficient and can then lead to the development of such best practices.

Several of the **obligations have the potential to contribute**, as demonstrated above, **to a better refinancing situation for content providers**, **namely broadcast media**.

This is not only true for **providers of advertising revenue-based services** that would profit from better understandability of the ad value chain. It is **just as relevant for subscription-based services** which can monetize the information that comes from data originally created by their service offer as well as allowing for more autonomy in the visibility and branding of the provider services overall on platforms by gaining more control.