



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

Summary of the 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

*with support of the
Association of Commercial Television in Europe (ACT)*

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May 2021

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.