FIDE 2025
Katowice

EU Digital Economy:
general framework (DSA/DMA) and specialised regimes

XXXI FIDE Congress | **Katowice 2025**
Congress Publications Vol. 2

Edited by Krzysztof Pacuła

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EU Digital Economy: general framework (DSA/DMA) and specialised regimes

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Wydawnictwo Uniwersytetu Śląskiego • Katowice 2025

The proceedings of the XXXI FIDE Congress in Katowice in 2025 are published in three volumes.
This book (Vol. 2) contains the reports of the General Rapporteur (Martin Husovec), the Institutional Rapporteurs (Paul-John Loewenthal, Cristina Sjödin, Folkert Wilman) and the National Rapporteurs on Topic 2: EU Digital Economy: general framework (DSA/DMA) and specialised regimes

Editor: Krzysztof Pacuła

General Rapporteur: Martin Husovec

Institutional Rapporteurs: Paul-John Loewenthal, Cristina Sjödin, Folkert Wilman

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XXXI FIDE Congress | Katowice 2025

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FOREWORD

1. XXXI FIDE Congress in Katowice

Founded in 1961, the International Federation for European Law (Fédération Internationale pour le Droit Européen – FIDE) brings together national associations from the Member States of the European Union and beyond. Its mission is to advance knowledge of EU law and to foster unity within the legal community, all in service of the enduring project of European integration. One of the most significant manifestations of FIDE's workings is the organisation of biennial congresses, which convene participants from across Europe and afar, including representatives of the judiciary, public authorities, academia, and legal practice.

The previous, XXX FIDE Congress, flawlessly organised by the Bulgarian Association for European Law, took place from 31st May to 3rd June 2023 in Sofia. This event set an extraordinary standard for excellence and stood as a testament to the remarkable cordiality of our colleagues from the Bulgarian Association – a cordiality that the Polish Association of European Law has had the privilege to experience also throughout the past two years.

As per decision of the FIDE Steering Committee, the privilege of organising the XXXI FIDE Congress was entrusted to the Polish Association of European Law. Consequently, on Saturday of the 3rd June 2023, at the close of the XXX FIDE Congress, Alexander Arabadjiev, President of the Bulgarian Association, passed on the FIDE Presidency to Maciej Szpunar, President of the Polish Association of European Law. With this symbolic act, we embarked on our own journey to organise the next Congress.

Thus, in 2025, Poland has the honour of hosting the FIDE Congress for the very first time, at an occasion which coincides with its presidency of the Council of the European Union.

The Polish Association of European Law was fortunate to be joined by two dedicated co-organisers – the city of Katowice and the University of Silesia. The unwavering support and firm belief in FIDE's mission shared by Marcin Krupa, Mayor of Katowice, and Professor Ryszard Koziołek, Rector of the University, have been instrumental in bringing the 2025 Congress to fruition.

Historically, the overwhelming majority of FIDE Congresses have taken place in the capital cities of the countries from which the host associations originated. In 2025, however, the honour of hosting the Congress fell to Katowice – a city that proudly stands as the vibrant heart of the region of Upper Silesia and serves as the capital of that region. Yet, there is far more to justify this choice than the city's appeal, its logistical convenience, or the support generously offered by the co-organisers.

In the aftermath of the First World War, following the restoration of Polish independence in 1918, the fate of Upper Silesia remained uncertain due to the claims of both Poland and Germany to the region. Ultimately, a unique solution was proposed, in which the vision of Jean Monnet, who would come to be regarded as the chief architect of European integration, played a key role. The disputed territory was to be divided between Poland and Germany, which would then conclude a bilateral agreement governing the cross-border functioning of this hybrid creation. These efforts culminated in the signing of the German-Polish Convention on Upper Silesia in Geneva on 15th May 1922.

Under the Convention, an arbitral tribunal was established as one of the bodies overseeing the implementation of the Convention. The Tribunal was entrusted with the authority to interpret, in a binding manner, the provisions of the Convention at the request of national courts and other public bodies. Some scholars have noted that the preliminary reference procedure before the Court of Justice of the European Union bears a striking resemblance to the mechanism employed by the Upper Silesian Arbitral Tribunal.[1] Remarkably, one of the core mechanisms of the European Union's legal system, the preliminary ruling procedure, traces its conceptual lineage to a legal innovation implemented over a century ago in Upper Silesia.

2. The themes of the XXXI FIDE Congress in Katowice

Each FIDE Congress is defined by thoughtfully chosen themes, reflecting the pressing legal questions of their time. For those seeking to understand the evolving landscape of the European Union and the challenges it has confronted

[1] See, to that effect, M. Erpelding, 'Local International Adjudication: The Groundbreaking "Experiment" of the Arbitral Tribunal for Upper Silesia', in: M. Erpelding, B. Hess, H. Ruiz Fabri (eds.), *Peace Through Law: The Versailles Peace Treaty and Dispute Settlement After World War I*, Baden-Baden 2019, p. 318; F. Irurzun Montoro, '¿La cuestión de interpretación ante el Tribunal Arbitral de la Alta Silesia (1922-1937) como antecedente de la cuestión prejudicial europeo?', *Revista Espanola de Derecho Europeo* 2017, No. 63, pp. 31–34.

at key historical moments, the FIDE Congresses constitute unparalleled points of reference and a true chronicle of legal dialogue on EU law.[2]

It was in the spirit of this tradition that we set out to identify the themes of the 2025 Congress.

In a process set in motion in 2022, the Polish Association established an advisory committee. This body included *Miguel Poiares Maduro*, former Advocate General at the Court of Justice of the European Union, Dean of the Global School of Law at the Universidade Católica Portuguesa and Adjunct Professor at the School of Transnational Governance of the European University Institute in Florence; *Daniel Sarmiento*, Professor of EU and Administrative Law at the University Complutense of Madrid; and *Stanislas Adam*, Legal Clerk in the Chambers of the President of the CJEU. They were joined by the Polish Judges at the General Court, *Nina Półtorak* and *Krystyna Kowalik-Bańczyk*. Members of the Board of the Polish Association of European Law – *Maciej Szpunar*, *Dagmara Kornobis-Romanowska*, *Sylwia Majkowska-Szulc*, and myself – who also formed part of this committee, wish to express our sincere gratitude to these esteemed colleagues, whose insights have significantly shaped the intellectual agenda of the 2025 Congress.

We also benefited from the invaluable input of the FIDE Steering Committee, national associations, the academic community, and legal practitioners, whose collective and individual insights enriched the conceptualisation of the Congress main themes.

The topics ultimately selected for the XXXI FIDE Congress were the following:

Topic 1: EU Emergency Law

Topic 2: EU Digital Economy: general framework (DSA/DMA) and specialised regimes

Topic 3: Energy solidarity and energy security – from green transition to the EU's crisis management

In retrospect, each of the selected themes emerged organically from the specific context and challenges that defined the years 2022 and 2023.

[2] See, for early manifestations of the links between the FIDE Congresses and evolution of EU law, M. Rasmussen, 'Revolutionizing European law: A history of the Van Gend en Loos judgment', *International Journal of Constitutional Law* 2014, Vol. 12(1), pp. 149–150.

By way of illustration, and with full awareness of the necessarily general and subjective nature of this recollection: the choice of "emergency law" as one of the Congress themes was almost instinctively shaped by the recent and still resonant experience of the COVID-19 pandemic. The year 2022 likewise marked a watershed moment in the European Union's approach to digital governance, exemplified by the adoption of the Digital Services Act and the Digital Markets Act (DSA/DMA). This emerging legal landscape prompted a necessary reflection on the interaction between these landmark instruments and the broader corpus of EU and national law. The inclusion of energy solidarity and security, in turn, was at least in part influenced by the brutal war near the European Union's eastern border and the profound geopolitical instability it triggered – bringing issues of energy resilience, autonomy, and solidarity to the forefront of the Union's legal and political discourse.

Remarkably, over the course of just two years, the relevance of these central themes intensified for reasons that have evolved with the shifting tides of our times.

The concept of "emergency" now seems to encompass a broader array of challenges: from trade conflicts and hybrid threats to the strategic manipulation of digital platforms that threaten democratic institutions. In a similar vein, the Digital Services Act and Digital Markets Act now stand as both bulwarks and battlegrounds for freedom of expression and democratic resilience. Meanwhile, energy solidarity and security are confronted with the reality that traditional alliances may be shifting, and the explosive growth of artificial intelligence and data centres has created new demands and new geopolitical fault lines in that regard.

Hence, the choice of topics for the XXXI FIDE Congress was vindicated, albeit for reasons that partially differed from those that were initially anticipated.

Understandably, these transformations demand renewed reflection on the existing legal frameworks. Through the steadfast commitment and deep insight of the authors whose works constitute this publication, it is our privilege to present to the reader a detailed exploration of the three Congress themes, addressing both the initial concerns and the new challenges that have surfaced over the past two years.

The experiences outlined above impart a valuable lesson and serve as a cautionary tale: rarely can we anticipate all the challenges that the future might bring. It is only through collective effort that we can devise the solutions required to confront such challenges. I remain deeply convinced that this publication provides an excellent confirmation of this thought.

3. Acknowledgements

The present publication is the result of the tireless work and dedication of many individuals. On behalf of the Board of the Polish Association of European Law, I wish to express our profound appreciation to all who have contributed to shaping the agenda and preparing the reports for the XXXI FIDE Congress.

I am particularly grateful to the General Rapporteur for Topic II, *Martin Husovec*, Associate Professor of Law at The London School of Economics and Political Science (LSE). I also wish to thank the Institutional Rapporteurs – *Paul-John Loewenthal*, *Cristina Sjödin* and *Folkert Wilman* from the European Commission's Legal Service. I am also thankful to *Ewa Gromnicka*, who acted as the coordinator for Topic II and with whom I had the privilege of assembling the present volume.

Special thanks are also due to the national rapporteurs, whose thoughtful and rigorous contributions form the backbone of this volume and reflect the rich diversity of legal traditions across the European Union.

The organisation of the XXXI FIDE Congress would not have been possible without the generous support of our sponsors and institutional partners.

The steadfast support of the Court of Justice of the European Union and the European Commission proved indispensable to the success of this endeavour.

Krzysztof Pacuła
Secretary General and Member of the Board of the Polish Association of European Law

XXXI FIDE Congress | Katowice 2025

TOPIC II – EU Digital Economy: general framework (DSA/DMA) and specialised regimes

QUESTIONNAIRE

General Rapporteur: Martin Husovec

In 2022, the European Union adopted two important legislative acts that aim to strengthen the EU Digital Single Market: the Digital Services Act, and the Digital Markets Act. Both regulations target the exercise of private power amassed by important digital gatekeepers. The goal of this report is to explore the institutional arrangements that the Member States have introduced to support the new EU legal regime and several other important issues that will likely influence the effectiveness of the two regulations in the coming years.

Section 1: National institutional set-up

1. Which pre-existing or new authorities have been designed for the DSA enforcement in your Member State? If several, how are the tasks and responsibilities divided between them? How do such authorities interact with national sector-specific regulators (e.g., media, data protection, and consumer authorities)?

2. Which specific rules, resources or other measures have been adopted regarding the supervisory, investigative and enforcement powers of the competent authorities under the DSA? (e.g., allocation of powers and resources, the existence of special technical units, presence of procedural safeguards, supervisory fees, etc.) How many staff are dedicated to DSA enforcement?

3. What are the initial experiences with national competent authorities acting under the DSA (if any)? Did the authorities undertake any scoping exercises to map which companies are being regulated by the DSA in the Member State? Did they announce any enforcement priorities?

4. What tasks are allocated to competition authorities for the DMA enforcement? Do the authorities have the competence and investigative powers to conduct investigations into possible non-compliance with the

obligations laid down in the DMA (under Article 38(7) DMA) and if so, how is this set up?

5. Which specific rules, resources or other measures have been adopted regarding the supervisory, investigative and enforcement powers of the competent authorities under the DMA? (e.g., allocation of powers and resources, procedural safeguards, supervisory fees, etc.) How many staff are dedicated to the DMA enforcement?

6. What are the initial experiences with national competent authorities acting under the DMA (if any)? Did the authorities announce any enforcement priorities?

Section 2: Use of national legislative leeway under the DMA/DSA

1. How are MSs dealing with the pre-emption effects of the DSA? What happened to the (partially) overlapping pre-existing national laws? (e.g., hate speech notification laws; implementations of the E-Commerce Directive, including provisions on search engines, etc.)

2. Did the Member States try to map the national rules on the illegality of content that is relevant for the DSA enforcement? Were there any notable DSA-related changes in such content rules recently?

3. Apart from the institutional implementation of the DSA, what other related legislative acts were/are considered or adopted on the national level? (e.g., laws on influencers or other content creators, content rules, etc.)

4. How are MSs dealing with the pre-emption effects of the DMA? (e.g., other rules ensuring fairness and contestability in digital markets)

5. Apart from the institutional implementation of the DMA, what other related legislative acts were/are considered or adopted on the national level?

Section 3: Vertical and horizontal public enforcement-related cooperation under the DSA/DMA

1. What procedural or other rules related to the DSA and DMA are relied upon to create effective cooperation, both between national competent authorities of various Member States among themselves and with the European Commission? Do you see any potential challenges in this regard?

2. Which measures apply specifically to the role of national courts and their interaction with the European Commission (COM) in the context of the DSA and DMA (e.g., possible submission by COM of written or oral observations, avoidance of national court decisions running counter to COM decisions, transmission of national judgments, etc.)?

3. Are there areas of the DMA (e.g., particular obligations or categories of core platform services) for which you consider that the role of the national competition authorities is or is likely to be particularly useful in bringing to the attention of the Commission information about possible non-compliance with the DMA under Article 27 DMA?

Section 4: Private enforcement of the DMA/DSA

1. In your Member State, can you observe any actions brought by private parties before national courts to enforce the provisions of the DSA or DMA? If so, please describe the relevant experience.

2. What are the actual or expected causes of action under national law to privately enforce the DSA? What are their limits and opportunities? How likely is the use of private redress, including collective redress or contract law, in your Member State to enforce the DSA? What type of actors do you expect to be most likely to engage in private enforcement?

3. What are the actual or expected causes of action under national law to privately enforce the DMA? What are their limits and opportunities? How likely is the use of private redress in your Member State? What type of actors do you expect to be most likely to engage in private enforcement?

4. Have any specific national rules been adopted (or planned for adoption) for private enforcement of either DMA/DSA (e.g., taking inspiration from the national rules transposing the antitrust Damages Directive)? Is there any plan to allocate cases concerning the DMA/DSA to a specific court or chamber and if so, which one?

5. Does the national procedural law allow civil society organisations to intervene in pending private disputes in support of the public interest? If so, how difficult or costly is it, and how does it work?

Section 5: General questions

1. Did your Member State specifically implement Articles 9 and 10 of the DSA in the national law? And if yes, in what way, and why? Does the national law specifying injunctions according to Articles 4(3), 5(2) and 6(4) meet the requirements of oversight by authorities or courts? Are there any specific rules, or cases in this regard in your jurisdiction?

2. Are you aware of the services of legal representatives according to Article 13 DSA being provided in your Member State? If so, please describe the situation.

3. Did the national law adopt any specific approach vis-à-vis complaints according to Article 53 of the DSA? (e.g., limiting them only to systemic violations)

4. Were the DSA or DMA subject to political controversy during the implementation on the national level, and if so, why?

5. Which measures have been taken, or are foreseen, to support the creation of out-of-court dispute resolution bodies, trusted flaggers, DSA/DMA-focused consumer organisations, and data access requests by researchers? Did the national legislature or regulators adopt any specific approaches in this regard?

6. Are there any other specific provisions or issues relating to the DMA/DSA that received particular attention from the side of practitioners (service providers, lawyers, regulators) or academics in your MS, because they are seen as controversial, complex or unclear? If so, please specify. Please limit yourself to issues that may be of relevance from a European perspective.

GENERAL REPORT

TOPIC II – EU Digital Economy: general framework (DSA/DMA) and specialised regimes

*Martin Husovec**

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* Associate Professor at the London School of Economics and Political Science. Disclosure: Dr Martin Husovec acts as a counsel for three non-profit organisations appearing as interveners on the side of the European Commission in the following pending DSA/DMA cases: *Zalando v Commission* (T-348/a23), *Apple v Commission* (T-1080/23), *Technius v Commission* (T-134/24). He also provided educational training on the EU Digital Services Act to staff of all regulators in the European Union, including the European Commission, technology companies, non-profit organisations, auditors, consultancies, and law firms.

Section 1: Introduction

This report has been prepared with tremendous help from many individuals. First, I would like to thank all the national rapporteurs who have contributed with their national reports as well as institutional rapporteurs who also helped me to draft the original questionnaire. Readers can read the extensive national and institutional reports in full at the end of this document. The report covers the period until 20.3.2025.

Second, I would like to acknowledge the help of two national rapporteurs who helped me draft the general report. Inge Graef and Alexander de Streel have generously contributed their ideas and drafting to the DMA section of this report. I also wish to thank many other experts who have spoken to me in the last two years. Many of my observations are based on numerous discussions with various stakeholders and experts. Mistakes and omissions, as always, are solely mine.

Finally, I would like to thank Marianne Bellavance who masterfully prepared the comparison section of this report and without whose help I would have grown much more grey hair. I hope the readers will find this report helpful when thinking about the future of the Digital Services Act and Digital Markets Act.

A regulatory moment

One popular narrative around digital services is that they flourished thanks to the absence of state regulation. The narrative is hardly accurate. The great majority of today's popular digital services, such as social media, marketplaces, video-sharing services, or app stores, were largely *enabled* by the early legislation in many countries. In the absence of this legislation, there was a real prospect that the vibrant internet as we know it today would not emerge due to excessive liability rules that would inevitably suppress people's ability to communicate with others without editors. The legislation saved companies years of litigating generalist rules and shaped how related areas of law thought about the issue.

In the United States, Section 230 of the Communication Decency Act (CDA) and Section 512 of the Digital Millennium Copyright Act (DMCA) made the provision of user-generated content services possible because they rejected potential strict (editorial) liability of new intermediaries for their users' content.[1]

Similarly, in the EU, of which the UK was part at the time, Section 4 of the E-Commerce Directive,[2] inspired by the DMCA, rejected potential strict liability

[1] Communications Decency Act of 1996, 47 USC § 230 (1996); Digital Millennium Copyright Act of 1998, 17 USC § 512 (1998).

[2] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1.

for non-editorial user-generated content and thus provided a protective legislative shield across the EU Member States. The European legislation was unprecedented in its reach, cutting through the entire legal system, to protect intermediaries from potential strict liability.

Without such affordances, the digital services that we know today could not have emerged in the same way.[3] Their legal liability across the European legal system would have been much more complicated and thus costly. Any potential harsh negligence or strict liability standards would have pushed companies to a more editorial-style relationship with user-generated content and thus turned the ecosystem into a fancy television.

This is why not only legislatures but also the highest courts were rightly highly critical of it.[4] Decentralised non-editorial expressions of citizens unlocked unprecedented value for societies around the world, and increased participation of masses in the public spaces.

It is remarkable that when the early legislation was adopted, most Europeans and Americans did not have access to the internet.[5] With the majority of the population offline, it was harder to imagine the problems that non-editorial content would cause, especially if coupled with sophisticated algorithmic recommender systems, and attention-focused business models. Twenty years later, the problems associated with non-editorial content have crystallised well enough, although the evidence on the structural causes is sometimes still thin. Thus, reacting to challenges in nuanced ways remains a work in progress. However, the legislatures in Europe could no longer ignore the various societal crises that play out very significantly online.

Confronting these societal problems was not made easier by the fact that most of the solutions require the cooperation of new providers of digital services, and most of the biggest digital services are provided by US companies that have often grown into economic powerhouses. Many EU states, and their authorities, before the adoption of EU-wide rules of second generation (DSA/DMA), struggled to enforce their own laws in their own states. Laws like the Digital Services Act are thus partly born out of the frustration with this situation where foreign companies do not have sufficient commercial or political incentives to cooperate. The Digital Markets Act, in contrast, came out of the frustration of European businesses with their new business partners who had

[3] Jeff Kosseff, *The Twenty-Six Words That Created the Internet* (Cornell UP 2019); Martin Husovec, 'Rising Above Liability: The Digital Services Act as a Blueprint for the Second Generation of Global Internet Rules' (2023) 38 Berkeley Tech LJ 3.

[4] See *Reno v. ACLU*, 521 U.S. 844 (1997); *Delfi AS v. Estonia*, App. No. 64669/09 (Jun. 16, 2015), *Magyar Jeti ZRT v. Hungary* App. No. 11257/16 (Dec. 4, 2018), *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* App. No. 22947/13 (Feb. 2, 2016); *Sanchez v. France* App. No. 45581/15, (Sept. 2, 2021); Case C-401/19, *Poland v. Council & Eur. Parliament* [2021] ECLI:EU:C:2021:613.

[5] Martin Husovec, *Principles of the Digital Services Act* (OUP 2024), 57 ff.

unmatched market power over their digital ecosystems and could coerce them into one-sided technical, organisational and commercial arrangements.

The domination of one country as an exporter in any sector cannot stop legislatures in the receiving markets from regulating imported products and services. Otherwise, legislatures in these countries would abdicate the mandate from their constituencies. Introducing rules on safety and fairness is not any different. If German cars are very popular in Canada, they must be adjusted to local requirements for safety, interoperability, and commercial practices. Even though some equate such regulation immediately with protectionism, as I will show, this is hardly convincing in the case of the DSA/DMA. Foreign tech companies are tremendous beneficiaries of the harmonised EU legislation, and various mechanisms introduced by these two laws.

If the tech companies do not want to offer the obligatory features in other jurisdictions, they are free to do so. Again, this is nothing special. If for instance, the EU imposes seat belts for its market, cars sold in other markets do not have to be designed the same way. The early DSA/DMA compliance shows that tech companies are largely localising European compliance.

Goals of the DSA/DMA

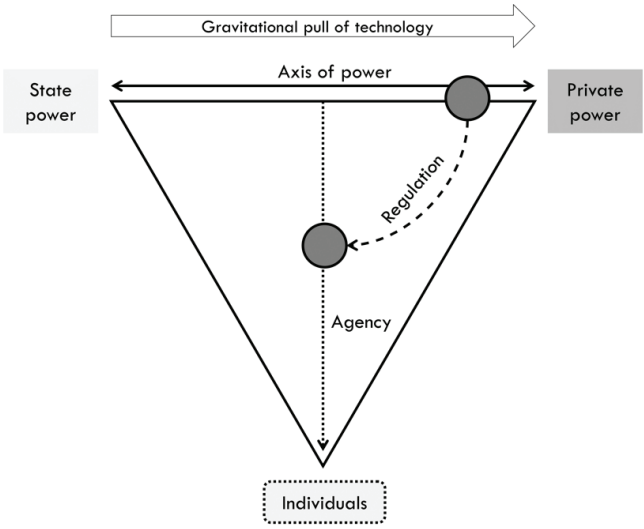
The Digital Services Act (DSA) and the Digital Markets Act (DMA) were adopted in late 2022 with the goal of regulating digital services.

The DSA aims to safeguard "safe, predictable and trusted online environment," while the DMA 'contestable and fair markets in digital sector'. Despite the different focus, their combination is more than logical. Both laws redistribute power from the tech companies to their customers, that is, users, albeit in different ways and for different purposes.

The DSA intervenes to redistribute the power that tech companies exert over users' speech and online experience to increase people's agency, sense of safety, and freedom. The DMA intervenes to redistribute the tech companies' power over their products to create more space for innovation by business users. While the DMA tries to diffuse the market power of big tech companies ("gatekeepers"), the DSA creates minimum regulatory requirements that must be met by all market entrants. Even though bigness is considered for the purposes of the DSA too, it mostly serves to avoid over-regulating micro, small and medium-sized enterprises.[6] The most onerous rules apply to digital services with 45 million monthly active users in the EU ("VLOPs" or "VLOSEs").

[6] Once the threshold of 45 million EU users is reached, the size of the company is irrelevant (see Article 19(2)).

Figure 1. The Empowerment Rationale



Source: Husovec, 2024[7]

The DSA/DMA end the period of little to no specific regulation of digital services. Obviously, these services have been subject to the GDPR but data protection only regulates one aspect, and is more horizontal law. In this case, the envisaged redistribution of power takes the form of sector-specific legislation, more specifically an EU regulation. Fairness in the DMA is about giving business users enough space to develop their businesses via the established digital ecosystems. Fairness in the DSA is about how users – consumers and businesses – experience the design and content moderation processes of digital services.

The Member States, through the European Union, are putting their thumbs on the scales of online safety and innovation to achieve all this together. Inevitably, the Member States collectively and individually assume new powers of their own to supervise digital services. This dynamic is not very surprising given that the prior experience of 20 years made a perfect case for a need of harmonised rules. Especially in small and mid-sized Member States it was often felt that tech companies had very weak political and economic incentives to pay attention to their local problems. Thus, along with individuals and business users that are potentially emerging stronger from the adoption of the DSA and DMA, so are the Member States themselves.

The common denominator of the DSA/DMA is **user empowerment**. Both regulations send an identical message to companies. European citizens do not wish to uncritically and without reservation accept any digital technology as

[7] Martin Husovec, Principles of the Digital Services Act (OUP 2024), Chapter 1.

designed by a few companies that are motivated mostly by quick profits or their own ideologies. Through their representatives, European users oblige tech companies to introduce adjustments to their services and ways of doing business that better reflect also other interests that they, the customers, hold dear.

European businesses and consumers are gaining new ways to control their online experience on digital services. If the DSA/DMA succeed, businesses and consumers gain the ability to do business online and understand the providers' decision-making, more easily switch between competing services, run apps otherwise restricted by app stores, customise their recommender systems on social media, contest termination of their accounts on online platforms, or personalise their interactions on social media to better reflect their safety preferences.

The Member States, in contrast, gain the ability to better enforce their regular laws about what is prohibited to say or do online from their territory. The DSA is thus **an extra regulatory layer** that grants the state authorities, individuals and civil society new paths to enforcement of what parliaments establish to be illegal. States thus remain in charge of authoritatively regulating content, and the behaviour of users, but the platforms now have a clearer list of expectations through which such content laws are enforced. For instance, the platforms must have processes for illegal content notification, encourage professional notifiers ("trusted flaggers") to send them as many notifications as they find, adjust the design of their services to factor in also the safety of users, or objective vulnerabilities.

These adjustments are meant to increase the **trust of users** in the decision-making of online platforms. Paradoxically, even the second Trump administration, a great critic of the DSA, is asking the tech companies a similar set of questions in the United States. The recent investigations of the US Federal Trade Commission to unearth "censorship" by tech companies sent a set of questions that closely resemble the due process requirements of the DSA, such as demanding an explanation of their practices, their consistency appeals mechanisms, etc.[8] It seems that if the questions are sent by the right agency, these demands are not that censorial after all.

Regulation: costs and benefits

While new regulations are resented by some as potential "over-regulation," both the DSA and DMA have underappreciated effects of lowering the barriers to entry to the EU markets. The reduction of barriers to entry is especially important for the DSA which harmonises a broad range of rules. While the scope of harmonisation by the DMA is not as broad, its substantive rules help the entry of business users that use gatekeepers' services.

[8] The Federal Trade Commission, ‚Request for Public Comment Regarding Technology Platform Censorship' (2025), https://www.ftc.gov/system/files/ftc_gov/pdf/P251203CensorshipRFI.pdf

Prior to the DSA, all Member States were at liberty to regulate digital services as they saw fit, with some limits imposed by the liability regime, the country-of-origin principle and EU primary law. This means that companies had to face 27 national laws, possibly also additional regional laws, and, potentially deal with over a hundred responsible authorities. Moreover, companies without an establishment in the EU did not even benefit from the country-of-origin principle.[9]

Since the DSA, all companies around the world that wish to enter the European market have a firm and fully harmonised rulebook that mostly does not tolerate national deviation.

Thus, while the fact of being regulated is clearly an extra cost for companies, the opportunity of being regulated so *uniformly* is a tremendous benefit, especially for small and medium-sized companies anywhere in the world. Even though the DMA does not have as broad pre-emptive effects as the DSA, it still replaces deviating national rules across the EU, concentrates enforcement, thus avoiding fragmentation, and opens the opportunities for innovation by business users from anywhere in the world, not just by those from the EU.

According to some, the DMA/DSA are plots to extract revenues from US tech companies. As explained by FCC Chair, Brendan Carr: "If there is an urge in Europe to engage in protectionist regulations, to give disparate treatment to U.S. technology companies, the Trump administration has been clear that we are going to speak up and defend the interests of U.S. businesses."[10] Put differently, some think that "the DSA and DMA were never really principled actions, but rather an effort to create a new industry of compliance and to generate revenue based on fines."[11] If that were the case, the instruments have been poorly designed because extracting high fines is not that simple for the Commission (see below).

The benefits of the DSA/DMA are open to anyone operating in the EU markets, including foreign companies. They also pre-empt a much more complicated web of national rules. The American criticism incoherently lambasts the law as "targeting US companies" and "helping Chinese companies."[12] This refrain is something that some US representatives repeatedly tend to use in other markets that seek to regulate their companies (e.g., South Korea).[13]

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[9] E-Commerce Directive (n 3), art. 3.

[10] Reuters, 'US FCC chair says EU Digital Services Act is threat to free speech' (3 March 2025), https://www.reuters.com/technology/eu-content-law-incompatible-with-us-free-speech-tradition-says-fccs-carr-2025-03-03/

[11] Dean Jackson and Berin Skóza, 'The Far Right's War on Content Moderation Comes to Europe' (11 February 2025), https://www.techpolicy.press/the-far-rights-war-on-content-moderation-comes-to-europe/ (quoting Kate Klonick who reports what some people in the industry think).

[12] Reuters, 'US demands EU antitrust chief clarify rules reining in Big Tech' (23 February 2025) https://www.reuters.com/technology/us-demands-eu-antitrust-chief-clarify-rules-reining-big-tech-2025-02-23/

[13] See for instance Lilla Nóra Kiss, 'Why South Korea Should Resist New Digital Platform laws' (*Information Technology & Innovation* Foundation December 2024), https://itif.org/publica-

Already for the reasons stated above the claims that the two laws are protectionist in spirit are hardly convincing. The fact alone that regulatees are often US companies only reflects the market success of these services and mostly applies to several product categories. Under the DSA, very large online platforms (VLOPs) are predominantly US companies in the segment of social media and app stores, but exclusively EU companies in the segment of adult sites. Marketplaces, in contrast, are represented equally by US, Chinese and European companies. Moreover, the DSA outside of the VLOP/VLOSE category predominantly regulates local European companies. Their numbers are in the thousands.[14]

Under the DSA, access to data is open to all researchers around the world if they study effects in the EU. Under the DMA, any company take advantage of interoperability provisions to offer their services in Europe. There are no rules that specifically favour European companies either as providers or as users. Even the requirement of "legal representative" under the DSA in fact helps the foreign companies without establishment because they can pick one EU regulator instead of facing 27 of them for a few thousand euros a year (see Article 56(7)). As demonstrated by the stakeholder engagement to date, the DSA and DMA managed to engage a global ecosystem of players, including many foreign companies and researchers.

Because the DMA only applies to bigger players, it has arguably little direct negative effect on new market entrants. Such effects could theoretically take place were the DMA to strip gatekeepers of substantial abilities of appropriation of their investment, which is hardly the case. The DMA rather marginally *calibrates* the ability of companies to appropriate their investments. It puts some limits on how they can exploit their ecosystems in the pursuit of profit by giving some affordances to users and banning some practices.

The DSA, in contrast, applies to all businesses; however, it staggers the set of obligations and doses them based on the size. Micro and small companies are subject to more limited rules. Only mid-sized companies are regulated as platforms. Yet, as will be argued below, there are still some obligations for micro and small companies that might be not properly calibrated for the size and role of these companies. Finally, only companies with more than 45 million monthly active users in the EU are subject to the most onerous obligations as very large online platforms (VLOPs) or very large online search engines (VLOSEs).

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tions/2024/12/09/south-korea-should-resist-new-digital-platform-laws/

[14] Carl J. N. Frielinghaus et al., 'Zur Ausschreibung: „Studie zur Umsetzung des Digital Services Act in Deutschland - Bestandsaufnahme der relevanten Akteure"' (2024). https://www.bundesnetzagentur.de/DE/Fachthemen/Digitalisierung/DSA/studie_dsa_akteure.pdf?__blob=publicationFile&v=3

Institutional setup

The lessons from the enforcement of the EU data protection regime undoubtedly shaped the institutional set-up of the DMA and DSA. In the DMA, the European Commission has always exclusive competence. In the DSA, the European Commission has become the most powerful enforcer of the law against VLOPs and VLOSEs. The Commission is exclusively competent to supervise key parts of the DSA. While it can share its competence with the national authorities ("Digital Services Coordinators") in whose territory the platforms are established or legally represented,[15] the Commission has a priority and can always "relieve" DSCs of their competence.[16]

Thus, the Commission is the key regulator for the VLOPs/VLOSEs. However, for the remainder of the digital ecosystem, DSCs remain exclusively competent. This creates a unique situation where most micro, small and mid-sized companies, as well as some types of services, such as infrastructure services, are exclusively supervised on the national level. DSCs thus have a critical role in presenting the SME viewpoint when interpreting the DSA, because the Commission's work exclusively focuses on very large services.

From a broader perspective, the Commission has several roles. It supervises the implementation of the law by the Member States, it supervises some regulatees, and finally, it cooperates with the national authorities. Since both the DSA and DMA can and will be privately enforced, the Commission moreover is in a relationship with national courts that sometimes can hear cases running in parallel to their investigations. Finally, the Commission also is the ultimate guarantor of the consistency of the EU rules, and thus also supervises that the Member States' legislatures do not adopt legislation that would be pre-empted by the DSA and the DMA. In that sense, the Commission is sometimes helping companies, and sometimes enforcing against them; it is mostly cooperating with the Member States but sometimes also enforcing against them.

To complicate matters further, the Commission is also a political body that negotiates trade agreements around the world. This complicates matters because the Commissioner responsible for the DSA/DMA is also a member of the College of Commissioners that approves collective political decisions of the Commission. As politicians, these Commissioners could see the DSA/DMA compliance as a negotiation tool with external trading partners, or in the EU or national politics. Moreover, employees managed by such Commissioners might become worried about the political repercussions that their enforcement decisions could lead to.

[15] See Digital Services Act, art. 13.

[16] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), O.J. (L 277) 1 EU, art. 66(2).

The closeness of the DSA/DMA enforcement to politics is highly problematic for the credibility of the system. Thierry Breton's tenure as a responsible Commissioner has shown that over-motivated politicians who try to instrumentalise the law can do a lot of damage. The current attempts of the second Trump administration, which is openly and uncritically championing the US tech companies' maximalist interests, show that if you politicise the enforcement, there will be equally political backlash. I argue below that the system therefore must institutionally change to gain more distance from politics.

At the time of writing, the US government is actively and aggressively pushing against the DSA/DMA. The US Vice-President, JD Vance, even suggested that the US should not support European countries through NATO if the EU does not respect US freedom of speech.[17]

In my view, we must learn from the data protection law, where the Commission consistently negotiated weaker data transfer safeguards with the United States, than the ones that were expected by the Court of Justice of the European Union.[18] If we are serious about the empowerment of users in Europe, we must further insulate the DSA/DMA enforcement from the external and internal political pressures and create a dedicated and independent EU agency for this purpose.

Scope of regulations

The DMA and DSA target digital services. The DMA is a law for big companies, while the DSA is a law for small and big companies, with different rules for each of them. In the DSA, the big companies correspond to the so-called very large online platforms (VLOPs), and very large search engines (VLOSEs). In the DMA, they are so-called gatekeepers.

The DMA has a much more circumscribed scope. The law exhaustively lists several "core platform services" whose providers can be designated as gatekeepers. The DSA in contrast, relies on five broad categories to define its scope, namely "mere conduit," "caching," "hosting," "online platform," and "search engines."

[17] The Independent, 'JD Vance says US could drop support for NATO if Europe tries to regulate Elon Musk's platforms' (17 September 2024), https://www.independent.co.uk/news/world/americas/us-politics/jd-vance-elon-musk-x-twitter-donald-trump-b2614525.html

[18] Case C-362/14 *Maximillian Schrems v Data Protection Commissioner* [2015] ECLI:EU:C:2015:650; Case C-311/18 *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems* [2020] ECLI:EU:C:2020:559; Orla Lynskey, 'Digital Empire or Digital Fiefdoms? Institutional Tensions and the EU Right to Data Protection' Cambridge Yearbook of European Legal Studies (forthcoming).

Figure 2. Big Players under the DSA and the DMA

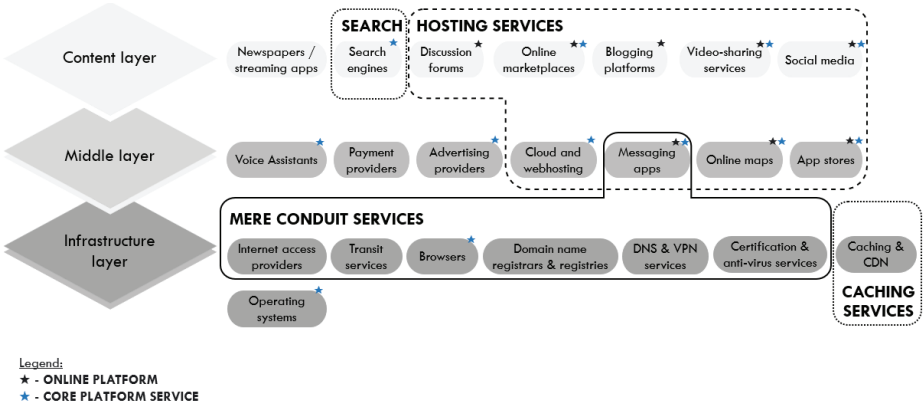
DSA		DMA	
Company	**VLOP/VLOSE**	**Gatekeeper**	**CPS**
Amazon	Amazon Store	Amazon	Amazon Marketplace
Alibaba	AliExpress		Amazon Advertising
Apple	Apple App Store	Apple	App Store
Alphabet	Google App Store		iOS
	Google Maps		Safari
	Google Shopping		iPodOS
	Google Play	Alphabet	Google Play
	Youtube		Google Maps
	Google Search		Google Shopping
Aylo Freesites	Pornhub		Google Search
Booking.com	Booking.com		YouTube
Bytedance	TikTok		Android Mobile
Infinite Styles	Shein		Google Advertising
Meta Mircosoft	Facebook		Google Chrome
	Instagram	Booking	Booking
Microsoft	LinkedIn	Bytedance	TikTok
	Bing	Meta Booking Bytedance Meta	Facebook Marketplace
NKL Associates	XNXX		Facebook
Pinterest	Pinterest		Instagram
Snap	Snapchat		WhatsApp
Technius	Stripchat		Messenger
Twitter	X/Twitter		Meta Ads
Webgroup Czech Republic	XVideos	Microsoft	LinkedIn
Wikimedia	Wikipedia		Windows OS
Whaleco Technology	Temu		
Zalando	Zalando		

Source: Own research

While for both laws it is a challenge to delimit the exact scope of services, under the DSA, the task can be incredibly complex. Especially the term "online platform" might require further elaboration, or at least clarification by means of examples in future legislation. In the DSA, the key problem is to separate what is regulated from what is not, especially if services have editorial and non-editorial content along with each other (e.g., podcasts and music, or maps and user reviews). In the DMA, the key challenge is the delineation of what is a Core Platforms Services (CPS), and what if one digital service includes several CPS services, some of which are big enough, and others that are not (e.g., social media, and its advertising, messaging parts).

In terms of coverage, both DMA and DSA cover large parts of the digital ecosystem, ranging from the *application layer* (social media, video-sharing services, marketplaces), *distribution layer* (search, cloud computing, advertising services, messaging services) to the *infrastructure layer* (browsers).[19] While the DSA never covers as big the services in the infrastructure layer because they cannot qualify as online platforms or search engines, the DMA covers big services across all three layers.

Figure 3. Regulatory Coverage of the Digital Ecosystem



Source: Own research

Even sidestepping the question of size thresholds, the DSA regulates many application layer services, such as dating, review, gaming, adult content, etc. This is especially true because what the DSA understands as a regulated service can constitute only a feature or subpart of an overall product (e.g., the comments section in newspapers, or hosting of event profiles for a live streaming app). Moreover, many infrastructure services regulated by the DSA have little relevance for DMA (e.g., WiFi operators, or VPN services). The DMA puts comparatively much more emphasis on infrastructure. For instance, virtual assistants and operating systems are not under the scope of the DSA. Advertising services can be regulated by the DSA but only some of them (e.g., storage and distribution of third-party advertisements).

Both the DSA and DMA did not specifically address the question of generative artificial intelligence services. However, both regulate AI as it is incorporated into regulated services, such as social media, or search engines. If they are embedded into regulated services, their regulation is always possible, especially under the DSA for VLOPs and VLOSEs. Even self-standing generative AI services, such as ChatGPT, might be regulated by the DSA and DMA as

[19] The coverage of browsers under the DSA can be contested, see Article 3(g)(i) ["a 'mere conduit' service, consisting of […] the provision of access to a communication network;"].

online search engines if they are connected to the web search.[20] Under both regulations, only very large providers of such services would be regulated, as the DSA only regulates very large search engines (VLOSEs), and the DMA only gatekeeper-sized search engines.

Regulatory nature of the DSA/DMA

The DMA and the DSA formulate their legal expectations through a set of due diligence obligations or prohibitions. Some rules are prescriptive and narrow, others are prescriptive but open-ended, and finally, some grant a lot of discretion to companies and regulators. However, in all cases, the rules are meant to be self-executing enough so that companies can incorporate them upfront into their digital services and compliance processes.

Big companies under the DSA/DMA are subject to designation by the European Commission. The DSA thresholds are purely quantitative. Once the company reaches 45 million monthly active users in the EU for the regulated portion of the service, it ought to be designated by the Commission. Under the DMA, the threshold is a mixture of quantitative and qualitative thresholds, where the former creation presumptions that can be rebutted by companies.[21] This process is subject to judicial review by the General Court, and then the European Court of Justice. The first months of the law clearly show that companies are actively using judicial review under the DSA/DMA to clarify legal concepts.

Under the DMA, the key issues related to the delineation of the scope of CPS services (*Apple v Commission,* T-1080/23*, Meta v Commission*, T-1078/23), but also the process of rebutting the presumption (*TikTok v Commission*, C-627/24 P). Finally, one case concerns the non-designation decision of the Edge browser by a competitor (*Opera Norway*, T-357/24). Under the DSA, the key issues related to the scope of regulated services (*Zalando v Commission*, T-348/23), and user counting (*Zalando v Commission*, T-348/23; *Amazon v Commission,* T-367/23; *Technius v Commission,* T-134/24; *Webgroup* v Commission, T-139/24; *Aylo v Commission*, T-138/24). There is no dispute against

[20] This because the definition of online search engines Article 3(j): "an intermediary service that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found." Since almost identical definition is applicable under the DMA (see Article 2(6) DMA, and Article 2(5) Regulation (EU) 2019/1150 (Platform to Business Regulation)); for additional discussion, see Botero Arcila, Beatriz, Is it a Platform? Is it a Search Engine? It's Chat GPT! The European Liability Regime for Large Language Models (August 12, 2023). Journal of Free Speech Law, Vol. 3, Issue 2, 2023, Available at SSRN: https://ssrn.com/abstract=4539452. Based on public disclosures, ChatGPT is inching toward the VLOSE status, see https://help.openai.com/en/articles/8959649-eu-digital-services-act-dsa

[21] See more detail in the institutional FIDE report: Paul-John Loewenthal, Cristina Sjödin and Folkert Wilman, Europe's Digital Revolution: The DSA, the DMA, and Complementary Regimes (2025).

non-designation under the DSA, even though there are some services whose non-designation status might be disputed (e.g., Spotify, Telegram, advertising platforms). However, under the DSA, it is harder to seek redress against non-designation because the Commission does not make such decisions formally.[22]

The institutional report says that the designation process seems to "work rather well."[23] I do not disagree, but I also see several important points for improvement. The DSA might benefit from a notification mechanism that exists under the DMA. The Commission should make decisions about non-designation too, so it is easier for third parties to contest such decisions as is the case under the DMA. Moreover, both laws might benefit from an administrative process that would allow third parties to initiate a process of designation, especially for companies that are unwilling to see themselves regulated. The Commission should also aim to clarify how it understands the scope of CPS services and DSA-regulated services. Under the DSA, DSCs might consider providing voluntary registries which would allow companies to gain more clarity about which rules apply to them and for which of their services.

Enforcement and supervision

Compliance with the DSA/DMA can be only achieved by combining persuasion (dialogue and guidance) and coercion (fines or orders). The first year of the DSA/DMA has been overall marked by more coercion, especially under the DSA. This might be explained by the need to mark a shift from non-regulation and gain respect for the regulatory framework.

However, overemphasis of coercion is not sustainable in the long run. Neither is it the most appropriate main strategy of compliance given that the Commission encounters the same companies over the years in repeated interactions. That is not to say that coercion should not be used, however, it must be used strategically in the areas where companies are unwilling to move their positions without it. Coercion via fines and orders is a costly process for business but also for the regulator. Every investigation ties a lot of resources into the process of collecting evidence, deciding, explaining the decision, and eventually defending it before the CJEU. If coercion is coupled with enforcement of open-ended provisions, or those that give a lot of discretion to companies, prevailing is even more costly for the regulator. Enforcement of open-ended provisions often requires evidence, and investigation of industry practices to establish due diligence benchmarks. Under the DSA, the Commission currently has 9 pending investigations,[24] all with a rather broad scope. Concluding all of them

[22] According to the case law, if such an applicant could seek direct annulment of an act according to Article 263, it can also pursue an action against a failure to issue an act. See Husovec, *Principles of the Digital Services Act* (n 6) 181.

[23] See Loewenthal, Sjödin and Wilman (n 21) 38.

[24] See ibidem, footnote 209.

means spending a lot of resources that cannot be used for dialogue and guidance that can have a more immediate impact on users.

At the time of writing, the Commission has only produced one piece of guidance on elections,[25] although two others, on trusted flaggers and protection of minors, are on the way. Some of the commonly occurring problems, such as data access for researchers (Article 40(12)) and notification of illegal content (Article 16), which the Commission is investigating were not subject to previous guidance or dialogue by the Commission. This means that investigations were started before the companies could have been potentially more easily persuaded to change their positions without locking resources into an expensive multi-year legal fight. This is sometimes unfortunate because once an investigation begins, companies are also internally limited in their ability to change their positions, so the investigation can slow down rather than speed up compliance. This problem is less visible under the DMA where only 6 more narrow investigations are being undertaken.[26]

However, regulatory theory and practice in some other areas suggest that enforcement actions are only part of the clout of the regulator,[27] and although they are helpful in achieving compliance, they must be used strategically. No one naively expects that companies will give up fights on some of the issues that are core to their business if the law provides some latitude for this, however, on many issues compliance can be achieved much more cheaply by persuasion.

This will free resources for the strategic use of coercion.

To be sure, it remains very important the Commission acts swiftly and decisively whenever it sees clear and simple violations that are not remedied voluntarily. This is how it builds its reputation and will undoubtedly incentivise companies to better comply with the DSA. Such swift and decisive actions can achieve long-term cooperation from companies. However, due to resource constraints, it will never be possible to achieve perfect compliance only through coercion.

Thus, one of the challenges for the European Commission in the coming years will be to develop a culture of dialogue and persuasion, next to its enforcement actions. This is a novel role for the Commission, especially given that many of its rules, processes and experts come to the DSA/DMA enforcement from competition law that works as an ex-post regime. And it might be also

[25] European Commission, 'Commission publishes guidelines under the DSA for the mitigation of systemic risks online for elections' (26 March 2024), https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1707

[26] See Loewenthal, Sjödin and Wilman (n 21) 70.

[27] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP 1992) 21; John T Scholz, 'Cooperative Regulatory Enforcement and the Politics of Administrative Effectiveness' (1991) 85 American Political Science Review 115; see Husovec, *Principles of the Digital Services Act* (n 6) 456 ff.

counter-intuitive given that the Commission has gained unprecedented powers to enforce regulations centrally and exclusively.

Unlike the DSA, the DMA has an explicit procedure for regulatory dialogue. The so-called specification procedure (Article 8(2) DMA) has a regulatory rather than a sanctioning function. As noted by the institutional report,

> [...] the key feature of the DMA's specification process, which also sets it apart from the non-compliance proceedings, is its regulatory as opposed to sanctioning function. The purpose of specification is indeed to determine in a more granular manner what a particular gatekeeper should do to comply with a specific obligation, taking into account the specific circumstances of the gatekeeper and of its CPS. The guiding principles in this respect are the effectiveness in achieving the objectives of the DMA and of the particular obligation, and proportionality.[28]

The Commission currently has two pending specification procedures against Apple's iOS and iPadOS pursuant to Article 6(7). As noted by the institutional report, the benefits of such a procedure are that it can establish regulatory expectations in detail and faster. Moreover, the lack of sanctions for non-compliance with the specification decision might reduce some worries of regulatees that the decision itself can serve as a basis for follow-on litigation. The DSA lacks a similar process that would be often similarly helpful, especially for provisions like Articles 14(4), 28 and 35.

For the above reasons, it is important that the Commission embraces more dialogue and guidance in the coming years. It might take some inspiration from the work of Ofcom, although one could argue that the UK's regime has the opposite problem – too much guidance. The DSA intentionally imposed the cost of uncertainty on companies. However, that is not a reason to avoid reducing it if it delivers quick benefits to users. While dialogue is unlikely to push compliance on most commercially sensitive issues where companies are likely to fight, it can achieve a lot and save resources for the inevitable legal fights.

Critiques of the DSA/DMA

Even the biggest critics of the EU tech regulation seem to like the features that benefit them, such as regulation of their competitors, or limits on arbitrary moderation of accounts.[29] The two main criticisms of the DSA/DMA are that they kill innovation, and the DSA amounts to censorship.

The innovation objection against the DMA argues that the regulation will discourage new entrants by reducing incentives or making market entry overly

[28] See Loewenthal, Sjödin and Wilman (n 21) 66.

[29] Joe Rogan 'Joe Rogan Experience #2255 - Mark Zuckerberg' (*Youtube* 10 January 2025), https://www.youtube.com/watch?v=7k1ehaE0bdU (Zuckerberg criticising DMA but positively speaking of regulation of Apple); BBC, 'Meta to pay $25m to settle Trump lawsuit over ban' (30 January 2025), https://www.bbc.com/news/articles/c79d74nppvpo

expensive. Europe, in this argument, is shooting itself in the foot, and becoming less competitive. This narrative is very simplistic.[30] The innovation environment of any country has many other components that determine the success of businesses. Some forms of regulation encourage the entry of new businesses. Regulation can thus enable new businesses and innovations as much as it can prevent them.[31] The story behind the first generation of internet rules is a case in point.

More fundamentally, the criticism often assumes that innovation has some inherent "pure" trajectory which is only manifested under the conditions of unrestrained market forces. This obviously ignores that even in less regulation-prone countries, the governments always tilt the trajectory of innovation through many of their policies, ranging from intellectual property, and tax treatments to immigration policies. As eloquently put by Mazzucato, "[i]f the rest of the world wants to emulate the US model, they should do as the United States actually did, not as they say they did."[32] In other words, the US system itself has benefited tremendously from government interventions in the innovation ecosystem. Finally, it seems obvious, but worth highlighting anyway – not all innovation is a net benefit for society or has desirable re-distributive effects.[33]

Thus, the debate between regulation and innovation is hardly useful in the abstract, as one needs to know what specific rules are being discussed to be able to assess their impact on innovation and others.

The period from the E-Commerce Directive until the DSA/DMA, that is 2000–2020, was relatively quiet on the front of industry-specific rules for digital services. The EU even adopted a specific IP right for databases to incentivise investments into advanced data processing systems.[34] Yet, as noted also by the institutional report, the EU businesses mostly lagged behind the most successful digital services. This clearly shows that the reasons for this are not really caused by the presence or absence of industry-specific regulation. If anything, as I stated earlier, the EU rules enabled the EU-wide digital ecosystem by rejecting stricter forms of liability across the region. Thus, the sources of problems of European competitiveness and innovation ecosystems are much larger.[35]

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[30] See Anu Bradford, 'The False Choice Between Digital Regulation and Innovation' (2024) 118 Nw U L Rev 2; Pierre Larouche and Alexandre de Streel, 'The European Digital Markets Act: A Revolution Grounded on Traditions' (2021) 12(7) Journal of European Competition Law & Practice 542.

[31] See examples provided by Larouche and de Streel (n 30) 544 (e.g., postal, telecommunication, finance).

[32] Mariana Mazzucato, *The Entrepreneurial State* (Anthem Press 2013), 1.

[33] See generally, Daron Acemoglu and Simon Johnson, *Power and Progress: Our Thousand-Year Struggle Over Technology and Prosperity* (PublicAffairs 2023).

[34] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20.

[35] See Mario Draghi, 'The Draghi Report' (*European Commission* 9 September 2024), https://commission.europa.eu/topics/eu-competitiveness/draghi-report_en#paragraph_47059

The DSA and the DMA have the potential to significantly reshape the power relationships between EU users and tech companies. However, their contribution to the actual contestability of the underlying digital markets 'owned' by gatekeepers is probably going to be more modest exactly because it mostly recalibrates their appropriability in favour of complementary incremental innovation.[36] To achieve a see change, the European innovation ecosystem requires a boost via a broader set of innovation policies to which the DSA/DMA are likely only a complement.

The second criticism levelled by the second Trump administration concerns allegedly censorial features of the DSA. The public comments by JD Vance or Elon Musk show a great deal of misunderstanding of what the law does, or what the powers of the Commission are. JD Vance presented the view that the EU Commission can annul elections or block websites for DSA violations, and Elon Musk that he was offered secret deals[37] — neither of which is true. The Chair of the Federal Communications Commission called the DSA's approach "something that is incompatible with both our free speech tradition in America and the commitments that these technology companies have made to a diversity of opinions," and Zuckerberg labelled it "institutionalised censorship."[38]

The DSA has two main components: content moderation rules, and risk management rules. Both types of rules are complemented by transparency. The content moderation rules force companies to better explain their decisions, and handle appeals so that individuals know why their content is blocked, demonetised, or accounts suspended. Risk management rules ask companies to redesign their services in favour of transparency, and sometimes more user empowerment (e.g., to be able to opt out from default recommender systems). For both types of rules, compliance can be localised.
Presumably, when the US administration talks about the censorial effects of the DSA, they refer to the removal of hate speech and the general risk management system that requires US social media to assess the risks on their services, audit them, and then improve, including with respect to their impact on electoral processes. I will address these concerns below in the DSA section in more detail. At this point, I want to make three observations.

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[36] See for a fuller discussion, Larouche and de Streel (n 30) 548 ff; Pablo Ibáñez Colomo P, *The New EU Competition Law* (Bloomsbury 2023) 133 ff.

[37] See Euro News, 'Elon Musk claims EU offered an ‚illegal secret deal' as X charged with DSA breaches' (12 July 2024), https://www.euronews.com/next/2024/07/12/elon-musk-claims-eu-offered-an-illegal-secret-deal-as-x-charged-with-dsa-breaches; In February, Vice President JD Vance denounced content moderation at an AI summit in Paris, calling it "authoritarian censorship."; Foreign Policy, 'The Speech That Stunned Europe' (18 February 2025), https://foreignpolicy.com/2025/02/18/vance-speech-munich-full-text-read-transcript-europe/; x

[38] Reuters (n 10). Politico, 'Zuckerberg's censorship claims were 'misleading' — EU tech chief' (January 2025), https://www.politico.eu/article/mark-zuckerberg-meta-misleading-censorship-henna-virkkunen/

- Firstly, European legislatures have for a long time maintained different decisions about what speech must be prohibited. Such democratically adopted rules are not censorship only because they do not align with the case law of the US Supreme Court. Europe has its own tradition of freedom of expression. European Convention on Human Rights expects the European countries to outlaw expressions that cannot be outlawed in the United States, such as many forms of hate speech. In contrast, on matters of national security, the US case law can be seen as too willing to sacrifice freedom of expression from the EU perspective.[39]
- Secondly, as I explained, the DSA does not allow the European Commission to create new content rules, and thus it cannot 'censor' anything lawful. If it expects companies to remove unlawful content, it is because some legislature in the EU made a democratic decision that such content should be illegal in some circumstances.
- Thirdly, nothing in the DSA expects companies to comply with such rules on illegality outside of the European Union. Companies are thus permitted to localise the compliance. Arguably, the *de facto* Brussels effect of the DSA is going to be weak.[40]

Consumer awareness

To assess the success of the DSA/DMA, it is not only important to evaluate the experiences of regulatees and experts.

The perceptions of consumers and citizens are as important. To ensure that consumers understand what is at stake, it is important that legislators, policymakers and consumer organisations proactively inform consumers about the intended impact of legislation. This may require campaigns to make consumers aware of their rights[41] and to explain that inconvenient short-term effects pursue a higher and more long-term goal. There is a risk that companies will use various tactics to misrepresent the effects of the laws, or sometimes blame everything on the regulation.

However, the campaigns need to be candid about the trade-offs involved. Risk assessment for each new feature that can have a critical impact on consumers

[39] *TikTok, Inc. v. Garland*, 604 U.S. (2025). While the decision has similar logic to the EU Schrems cases (see n (18)), it goes much further because the US law was clearly equally adopted to counter the concerns about Chinese propaganda. ECtHR currently hears a comparable case against Ukraine (*Artur Volodymyrovych BOYAROV against Ukraine* App no 79083/17 (ECtHr, 16 September 2024); European Information Institute, 'Third-Party Intervention by European Information Society Institute (EISi) in re Artur Volodymyrovych BOYAROV against Ukraine Application no. 79083/17 (5 November 2024), available at https://husovec.eu/wp-content/uploads/2025/01/Boyarov-v.-Ukraine-Final-Public.pdf).

[40] Martin Husovec and Jennifer Urban, 'Will the DSA Have the Brussels Effect?' (*Verfassungsblog*, 21 February 2024).

[41] For instance, to consent to the combination of their personal data under Article 5(2) DMA and to port their data free of charge under Article 6(9) DMA.

(Article 34) might mean that European consumers will not be the first market for the roll-out. Some features might not be available in Europe because companies decide not to offer them for regulatory concerns. Other times, the convenience might be traded against fairness.

For example, as a result of the DMA, Google Maps is no longer prominently displayed at the top of Google's general search results when you search for a location. As a result, users will no longer immediately find a link in Google's general search results to open the relevant map for the location they are searching for, but will have to go to the Google Maps website to find the relevant map. The average user will probably find this inconvenient, as it takes a little more time and effort to access the map than the experience we are used to. However, these changes are aimed at making markets more contestable and fairer by giving other businesses a chance to attract consumers.

Trade-offs like these must be explained to consumers to increase their understanding of why these laws exist. Otherwise, companies might misrepresent the law to claim that any discomfort, overreach or deterioration of their online user experience is "the fault of the EU." Other industries, such as the food industry, face a lot of inconvenience too, but people already understand that access to the cheapest low-quality products is not always in their interest.

Private enforcement

Scholars seem to broadly agree that the DSA and DMA are capable of being enforced privately before national courts in parallel to public enforcement.[42] This includes strong possibilities of collective redress under EU consumer law (Article 42 DMA; Article 90 DSA), and possibly national extensions under unfair competition laws, or tort law. National experts seem to have a positive view of the prospects of such litigation. However, in the DMA context, there are concerns about potential retaliation by the gatekeepers against business users.

Under both acts, the Commission benefits from a protective mechanism for its adopted decisions (Article 39(5) DMA, Article 82(3) DSA). The provision

[42] Husovec, *Principles of the Digital Services Act* (n 6); Folkert Wilman, Saulius Lukas Kalėda, and Paul-John Loewenthal, *The EU Digital Services Act* (OUP 2024) § 54; Benjamin Raue and Franz Hofmann, *Digital Services Act: Article-by-Article Commentary* (Bloomsbury Publishing 2024) § 54; See Lena Hornkohl and Alba Ribera Martínez, 'Collective Actions and the Digital Markets Act: A Bird Without Wings' (2023) The Antitrust Bulletin; Josef Drexl, Beatriz Conde Gallego, Begoña González Otero, Liza Herrmann, Jörg Hoffmann, Germán Oscar Johannsen, Lukas Kestler & Giulio Matarazzi, Position Statement of the Max Planck Institute for Innovation and Competition of 2 May 2023 on the Implementation of the Digital Markets Act (DMA), 72 GRUR International 875 (2023); Rupprecht Podszun, 'Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act,' 13 JECLAP (2022), 254; Björn Christian Becker, 'Privatrechtliche Durchsetzung des Digital Markets Act' ZEuP 403 (2023); Assimakis Komninos, 'Private Enforcement of the DMA Rules before the National Courts' (*SSRN* 5 April 2024), https://ssrn.com/abstract=4791499

is inspired by Article 16(1) Regulation 1/2003 that applies in EU competition law.[43] The mechanism does not stop national courts from being able to seek different views from the Court of Justice of the European Union.

Another type of private enforcement is when technology companies start using the EU law as a protective shield against pre-empted national rules. This is especially likely under the DSA which has a broad scope combined with the effects of full harmonization. As a result, the regulation can help companies to set aside national rules that conflict with common EU rules, and seek invalidation of any decisions that are adopted on their basis. In the context of the DSA, we see the first such cases, and are likely to see more. This type of private enforcement actually does the Commission's job as the guardian of the EU treaties by protecting the internal market from becoming unjustifiably fragmented.

Conclusions and recommendations

The empowerment of Europeans stands at the centre of DSA/DMA compliance. In these regulations, European governments demand concessions from other powerful non-state actors for their own people.

As noted by Draghi, Europeans need economic heft to be able to enforce their values.[44] Adopting new laws is not enough. In that sense, the DSA/DMA are only powerful in combination with the size of vibrant consumer markets that are too attractive an opportunity to avoid for companies.

In the increasingly aggressive global environment, preserving and expanding the user empowerment protected by the DSA/DMA is becoming ever more vital. As shown by the second Trump administration, foreign companies can conspire with their governments to push back against European plans to empower their citizens. To preserve it, Europeans must have a good position to push back. But Europeans must also be able to defend as sensible everything that these laws do.

As explained above, my general recommendations for the DSA/DMA are as follows:

- The supervision and enforcement of the DSA and the DMA should be insulated from external and internal politics and allocated to an independent agency;
- The designation process under both the DSA and DMA should allow for third parties to initiate the designation process and should be followed by a formal decision even if it is negative, to facilitate judicial review;
- The Commission should prioritise persuasion (dialogue and guidance) and combine it with the strategic use of coercion (fines and orders) to speed up compliance for users and save resources for inevitable legal fights;

[43] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 001.

[44] Draghi (n 34) 5.

- The Commission should issue guidance on how it understands the key concepts, such as core platform services, and online platforms;
- Stakeholders and regulators should increase consumer awareness about the new types of user empowerment and their rationale.

Section 2: Digital Services Act

Goals and Background

The Digital Services Act has three components.

First, the DSA is a tool for users to better understand how and why companies make decisions about their online activities. Second, the DSA is a regulatory system that forces companies to change the design and processes to better protect their users. Finally, it is a tool for society at large, including victims, NGOs, and law enforcement, to enforce the existing rules about what is illegal to do or say also in the online environment.

The DSA itself is a regulation,[45] accompanied by an implementing regulation[46] and delegated acts that can be adopted by the European Commission. To this date, the Commission has adopted delegated acts on supervisory fees,[47] audits,[48] transparency reports.[49] Delegated acts on counting of users and access to data by vetted researchers will be adopted soon.[50]

[45] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), O.J. (L 277) 1 EU.

[46] Commission Implementing Regulation (EU) 2023/1201 of 21 June 2023 on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to Regulation (EU) 2022/2065 of the European Parliament and of the Council ('Digital Services Act') [2023] OJ L159/21.

[47] Commission Delegated Regulation (EU) 2023/1127 of 10 May 2023 supplementing Regulation (EU) 2021/784 of the European Parliament and of the Council by laying down rules on the procedures for issuing, reviewing, and lifting orders to providers of hosting services regarding terrorist content online [2023] OJ L149/23.

[48] Commission Delegated Regulation (EU) 2024/436 of 20 October 2023 supplementing Regulation (EU) 2022/2065 of the European Parliament and of the Council, by laying down rules on the performance of audits for very large online platforms and very large online search engines [2023].

[49] Commission Implementing Regulation (EU) 2024/2835 of 4 November 2024 laying down templates concerning the transparency reporting obligations of providers of intermediary services and of providers of online platforms under Regulation (EU) 2022/2065 of the European Parliament and of the Council [2024].

[50] European Commission, 'Questions and Answers on identification and counting of active recipients of the service under the Digital Services Act' (31 January 2023), https://digital-strategy.ec.europa.eu/en/library/dsa-guidance-requirement-publish-user-numbers; [Draft] Commission delegated regulation (EU) .../... of XXX supplementing Regulation (EU) 2022/2065 of the European Parliament and of the Council by laying down the technical conditions and procedures under which providers of very large online platforms and of very large online search engines are to share data pursuant to Article 40 of Regulation (EU) 2022/2065 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13817-Delegated-Regulation-on-data-access-provided-for-in-the-Digital-Services-Act

The DSA sets out its scope around the terms of safety, trust and predictability. This means that the law is claiming a lot of ground as its own. This fact is confirmed by numerous provisions that are drafted broadly. The definition of illegal content extends to anything that is unlawful to say or do in at least one of the Member States.[51] The risk management system also extends to all risks posed by illegal content, and any fundamental right.[52] Content moderation provisions procedurally cover decisions made by platforms based on illegality and contractual breaches ("ToS violations").[53] Thus, the DSA is a horizontal law that deals with almost everything that platforms do for and against their users.

As I have argued elsewhere,[54] we should measure the success of the law by how well it empowers the EU citizens. If Europeans improve their understanding of how decisions are made about them, feel more protected against unlawful activities of others, and are more able to seek correction of mistakes, the DSA will be successful.

But safety cannot be simplified as top-down state-imposed minimisation of all possible risks. Individuals need risks to become more resilient through learning. This is why I tend to emphasize that trust is equally important in the future enforcement of the law. Most of the time, safety promotes trust. But sometimes, it is at odds with it. In those cases, it needs to be balanced with the agency of individuals and their ability to make their own choices.[55]

Unlike many other laws, the DSA creates legal mechanisms that presuppose an existing ecosystem of other non-state players. The goal is to avoid concentrating all the power with either platforms, or the state. These non-state players include professional notifiers of illegal content who help victims or defend the public interest, users' groups that represent content creators, out-of-court dispute settlement bodies who provide external appeals services, researchers who study the risks and mitigation strategies, etc. As I argued after the adoption of the DSA in November 2022,

> My main concern about the DSA resides also in its strength – it relies on societal structures that the law can only foresee and incentivize but cannot build; only people can. These structures, such as local organisations analysing threats, consumer groups helping content creators, and communities of researchers, are the only ones to give life to the DSA's tools. They need to be built bottom-up and sometimes locally in each Member State. If their creation fails, the regulatory promises might turn out to be a glorious aspiration.[56]

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[51] Digital Services Act, art. 3(h).

[52] Ibidem, art. 34.

[53] Ibidem, art. 17, 20, and 21.

[54] Husovec, Rising Above Liability: *The Digital Services Act as a Blueprint For the Second Generation of Global Internet Rules* (n 4); Martin Husovec, 'Will the DSA work' in Joris van Hoboken et al. (eds), *Putting the Digital Services Act Into Practice: Enforcement, Access to Justice, and Global Implications* (Verfassungsbooks 2023).

[55] Husovec, *Principles of the Digital Services Act* (n 6) 465.

[56] Husovec, 'Will the DSA work' (n 54) 21.

The DSA only offers incentives for these social structures. In the first official evaluation of the law, the Commission should empirically interrogate if these incentives are always strong enough, and, possibly, if they are not too strong in some cases.

From this perspective, the first phase of the DSA rollout must focus on institutions. In February 2025, we still do not have a fully functioning institutional set-up. While the Commission machine is up and running, five Member States still have not fully institutionally prepared their national regulators, or even designated them.[57] This means they cannot shape the European system, and supervise companies that are in their orbit, that is, established in their jurisdiction. For instance, before Belgium adopted its law, Telegram, which has a Belgian legal representative, could not have been supervised by anyone, as the Commission's powers only start with the designation as a VLOP.

In terms of non-state actors, the data access for researchers is still not fully in place because the Commission has not yet formally adopted the Delegated Act for vetted researchers. This should happen soon. The certification of trusted flaggers and out-of-court dispute settlement bodies is in full swing, but some shortcomings are becoming clear. The Commission's website currently lists 20 certified trusted flaggers,[58] especially with a focus on the protection of minors, consumers and intellectual property rights, but many countries remain without a trusted flagger. It seems like the promises made by the DSA to trusted flaggers in Article 22 are not always sufficient to attract enough players to seek certification for their activities in exchange for a decision fast-lane and technological privileges. There is a general sense that the trusted flaggers often lack the resources to do their work.

The out-of-court dispute settlement bodies are slowly coming to existence too and have already received thousands of cases.[59] There are six such bodies to this date,[60] and several other applicants in the pipeline. The certified ODS bodies were granted certification in Austria, Germany, Hungary, Malta, Italy and Ireland. They cover English, German, Italian, Dutch, Spanish, Maltese, Hungarian, French, and Portuguese.[61] Most of the ODS bodies focus on major social media companies. Thus, many speakers of smaller languages yet lack

[57] Poland, Czech Republic, Spain, Portugal, and Cyprus. See https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1081

[58] European Commission, 'Trusted flaggers under the Digital Services Act (DSA),' https://digital-strategy.ec.europa.eu/en/policies/trusted-flaggers-under-dsa

[59] Daniel Holznagel, 'Art. 21 DSA Has Come to Life' (*Verfassungsblog* 5 November 2024), https://verfassungsblog.de/art-21-dsa-fundamental-rights-certification/; Appeals Centre Europe, *Transparency Reports*, https://www.appealscentre.eu/transparency-reports/; Appeals Centre Europe, 'Users Make Voices Heard as Appeals Centre's First Decisions Overturn Platforms' (10 March 2025).

[60] European Commission, 'Out-of-court dispute settlement bodies under the Digital Services Act (DSA),' https://digital-strategy.ec.europa.eu/en/policies/dsa-out-court-dispute-settlement

[61] One ODS body covers all languages, but offers services only in English, German, French, Italian and Dutch.

the option of an external appeal in practice. Moreover, even among these languages, some subject matters might not have respective ODS bodies.

While the NGOs are starting to engage in private enforcement of the DSA,[62] it does not seem that mainstream collective interest groups, such as trade unions or trade associations, have already internalised the possibility of helping their constituencies with content disputes as professional user groups.[63] There is thus a long way to go on the awareness among those who are empowered by the law. In other words, the ecosystem of players that the DSA envisages is still not fully in force.

The DSA's scope

The DSA relies on terms developed under the first generation of rules, where the terms determine only whether a particular provider benefits from liability exemptions. The DSA divorced these terms from their origin and introduced them into Chapter 1 as concepts that open the scope of the DSA in general. As a result, the potential application of Chapter 2 (liability exemptions) and Chapter 3 (due diligence obligations) are independent of each other. While this is clear from the legislative history, in *Zalando v Commission*,[64] an online marketplace attempts to infuse the meaning of the pre-existing case law on liability exemptions into the terms themselves, and thus undercut the applicability of Chapter 3. The General Court is expected to clarify this issue soon.

Due diligence obligations and liability exemptions play different roles, even though they are both given to the services that are defined through the same terms. The analogy one can use to explain this is that of banks and money laundering. Banks can become co-conspirators and be liable for individual attempts to launder money. However, in most cases, they are not co-conspiring in such ways. Thus, to motivate them further, the law imposes due diligence obligations in the form of anti-money laundering rules that are meant to minimise such occurrences or make it more difficult. Violating such due diligence obligations triggers fines and supervision but does not make one a criminal or money launderer.

The DSA is very similar. Chapter 2 draws the line between co-conspirators who potentially act in concert with their users and those who do not, while Chapter 3 imposes general expectations of due diligence on the industry. Even as a co-conspirator, that is, someone losing liability exemptions, one can violate due diligence duties, but it is not going to be the worst thing that can happen to such a person, as other laws, for example, criminal law, have free reign at that point too (c.f., the French case of Mr Durov, the CEO of Telegram).[65]

[62] LG Berlin, judgement of February 6, 2025 – 41 O 140/25 eV.

[63] Digital Services Act, art. 86.

[64] Case T-348/23 [2023].

[65] BBC, 'Telegram founder allowed to leave France following arrest' (17 March 2025), https://www.bbc.co.uk/news/articles/cg703lz02l0o

The terms used by the DSA – mere conduit, caching, hosting, online platforms, search engines – are all sufficiently broad to be future-proof. They describe technical functioning and not products, or business models.[66] The basic technical reality is unlikely to change. That is, digital services will continue to store other people's information at their request and distribute it to the public.

That being said, it is not always possible to separate the storage of non-editorial content of users from editorial content. While the DSA does not have explicit provisions to this effect, as indicated by the definition of "online platforms,"[67] if users cannot separate the two types of content in their user experience, the service remains regulated. For this reason, the DSA inevitably, at least for purposes of some provisions, such as protection of minors, or risk management, also regulates digital services that mix the two together (e.g., Google Maps). This serves as an incentive for companies to decouple the two types of content if possible or comply with the obligations for user-generated content *and* other inseparable features.

Aside from the hybrid services, the scope issues have also arisen also in other contexts. The qualification of live-streaming remains difficult, albeit somewhat mitigated by the fact that live-streaming is rarely only a stand-alone service and is usually integrated into broader regulated services, such as social media. The interpretation of the economic character of services that is important to open the scope of the DSA will at some point have to be clarified by the CJEU. At the moment, the General Court has an opportunity to do so in *Apple v Commission*.[68]

Finally, there are potentially some unforeseen effects in using the terms from the liability exemptions in the new context. This has become a problem for some services that have several providers within the same digital service, for example, social media as an overarching hosting service, that has owners of groups that can be said to host material of their users. Such layered structure is typical for the internet as most blogs have their own hosting providers, and they might have their own hosting providers.

For liability exemptions, this did not cause any problems, as it only multiplied the number of beneficiaries of the liability exemptions. However, within the due diligence system for individual digital services, this causes difficulties, especially if applied to the smallest communities on those services. If the DSA is understood as a regulatory tax on central decision-making of providers of digital services, then the smallest community components of the ecosystem within such services should not be regulated as providers in their own right. This is intentionally why community-based content moderation is outside of the scope of the DSA's procedural duties.

[66] Digital Services Act, Recital 29.
[67] Ibidem, art.3(i); Husovec, *Principles of the Digital Services Act* (n 6) 167 ff.
[68] Case T-1080/23 [2023].

Thus, for instance, an owner of a group on a social media site should not be considered hosting for due diligence purposes, while it should be for liability exemption purposes. Currently, there is no explicit consideration of this problem in the DSA itself. If a term is applicable per Chapter 1, it triggers both Chapters 2 and 3 equally. In the future, the legislature might want to consider clarification on the scope of hosting services in particular, as their obligations are not qualified by size. It might be counterproductive to expect that small communities comply with Articles 17 and 18, even though they should benefit from the liability exemptions. One possibility would be to offer an explicit carve-out from hosting and online platform tiers of obligations for such entities.

Due diligence obligations

The DSA due diligence obligations cover three main areas: (a) content moderation process, (b) risk management on services, and (c) transparency.

Content moderation obligations (Articles 14, 16, 17, 18, 20, 21) are meant to improve the decision-making process by subjecting decisions to prior disclosure of rules, explanation of individual decisions, and provision of contestation mechanisms in form of internal and external appeals. Taken together, these provisions aim to reduce opacity and arbitrariness of the decision-making and increase predictability and fairness of the outcomes.

Risk management provisions relate online platforms, and they either take form of prescriptive design obligations (Articles 25, 26, 27, 28) or general risk management system for VLOPs/VLOSEs (Articles 34-35). In essence, all online platforms operated by mid-sized companies must protect minors and consumers, however, only VLOPs/VLOSEs must conduct ongoing risk assessments and audits also for other types of risks.

Transparency obligations underpin both content moderation and risk management rules. The DSA forces mid-sized regulated companies to publish bi-annual content moderation reports (Article 15), submit their statements of reasons to a centralised database (Article 24), and give access to researchers and publish risk assessments, audits and implementation reports if they are VLOPs/VLOSEs (Articles 40, 42).

It is too early to say how these due diligence obligations will influence the quality of the user experience on digital services. While some questions might turn on the exact interpretation of the rules, there are several provisions that require dialogue and coordination to establish useful compliance practices. One such example relates to enforcement of illegal content.

Content moderation

The DSA sometimes limits the scope of mechanisms to illegal content due to considerations of freedom of expression (e.g., Article 16, 22, 23, etc.). This is

often motivated by the fact that assessing illegality must be treated differently from pure contractual breaches of rules that are not mandatory for platforms. The problem is that companies prefer to decide everything against their own terms and conditions because this allows them to save resources compared to assessing conduct and behaviour against a multitude of national laws. Plus, platforms often act globally against ToS violations, and tend to localise compliance with illegality-based notifications, as not all countries must consider the same content illegal.

In other words, there are many efficiencies and other good reasons behind such an approach of companies. It is therefore no surprise that companies encourage their users to report content primarily as ToS violations, and not as illegal content. And it is possible that users find it more user friendly too.

The problem is, however, that if mechanisms for illegal content in the DSA are only applicable if the content is *notified* or *assessed* against a specific national law, as opposed to when it actually *is* against a specific law, the companies effectively would not be implementing some of the DSA provisions (e.g., suspension of accounts of repeated offenders), or publicly reporting numbers that are not very helpful (e.g., how much illegal content they took down).

Thus, what is needed is more cooperation. For instance, the companies and regulators could initiate a close upfront mapping of the terms and conditions violations against the illegality rules in the EU Member States. Such mapping would allow companies to continue deciding against their own terms and conditions, but would internalise that some of such decisions are in parallel also about illegal content (e.g., a breach of harassment policy is also the case of illegal behaviour in some cases). If the regulators were to insist that objective illegality is always what triggers the application of the various illegality-only provisions, the only way to comply with such interpretation would be to over-implement the DSA to apply to all scenarios. In contrast, if companies can read the rules based on the channel which the notifications arrive at their doors, many DSA provisions will never be activated.

Thus, it seems that the best way out of a difficult situation is to try to find middle-ground solutions, such as pre-mapping of terms and conditions against rules on illegality, and then allow companies to decide against their contractual rules, however, internalise consequences for the process and transparency as if these cases concerned illegality.

Out-of-court dispute settlement bodies

Another key area in terms of coordination is the out-of-court dispute settlement system. Article 21 of the DSA created conditions for certification of non-state bodies interested in the role. At the time of writing, five bodies were certified.

Three bodies are at no cost to complainants, and two charge symbolic fees (5–10 euros). That means that all the cost is borne by the online platforms (usually several hundred euros).

This is a result of the provisions that indicate that "for recipients of the service, the dispute settlement shall be available free of charge or at a nominal fee" (Article 21(5)). This seems to have been interpreted by many not only as fees that are below the overall cost but as zero or symbolic fees. Such fee structure is obviously preferrable for the ODS bodies (and users) that can attract more complainants with no fee or symbolic fee than with fees that approach 50% of the overall dispute costs.

As a result, the ODS system has become costlier for online platforms. That per se is not as problematic because as we can see so far, even though Article 21 applies to all online platforms, not just VLOPs, the ODS bodies effectively conduct it only for a subset or all VLOPs. In other words, the potentially high cost of compliance for mid-sized platforms is being mitigated by the scope of certification of the ODS bodies that are not interested in the market around smaller online platforms or demand of users.

However, the problem is that VLOPs that are subject to this system already and are already requested to pay several hundred euros per dispute, regardless of whether their decisions are confirmed or rejected by the ODS bodies. In other words, they pay even if their decisions were found to be correct.

The only way that regulators can address this problematic incentive structure is to expect ODS bodies to differentiate the fees based on the outcome, or the procedural stage. This is a direct outcome of the complainants taking no risks when filing disputes under this fee structure. Many certified ODS bodies are already doing this. They are charging platforms lower fees in cases of self-correction by platforms, vexation complaints, or rejections on the admissibility stage. But in the absence of real fees for complainants, these are the only levers that can be used and demanded by the regulators and they still might turn out to be insufficient.

To be sure, it is too early to evaluate the ODS system. The system is clearly in operation, and Europeans are filing disputes, and sometimes complaining to the DSCs when the ODS decisions are not implemented. There are many questions of cooperation between ODS bodies and platforms that would require standardisation.

It is recommended that the European Commission invests resources in facilitating such a standardisation process. Standardisation can lower the overall costs of the system but also encourage entry by new ODS bodies. And as noted earlier, there are significant gaps in coverage when it comes to some languages at the moment.

Based on my conversations with stakeholders, including a workshop at LSE,[69] I am of the view that the following issues will sooner or later require some form of harmonisation:

1. Dedicated contact points on each side for technical, financial and legal issues;
2. Case matching methods (e.g., unique identifiers);
3. List of key information related to content moderation decisions, including:
   a. communication of cases where legal obligations prevent sharing of case data, such as for child sexual abuse material (CSAM),
   b. communication of cases where data is very sensitive;
4. Data retention periods for content moderation;
5. Procedural rules for the entire process:
   a. including admissibility and vexatious complaints policies,
   b. policies about "the EU nexus" for admissibility,
   c. rules about "default judgments";
6. Educational interventions to increase the visibility of the ODS bodies;
7. Transparency on the issuance of decisions and their follow-up implementation.

Designation of VLOPs/VLOSEs

The Commission has designated 23 VLOPs and 2 VLOSEs.[70] Based on recent disclosures, two additional services, namely WhatsApp and Waze, will be designated soon.[71]

The designation process under the DSA starts with companies publishing their disclosures of monthly active users (Article 3(p)) on their own websites. Unfortunately, Article 24(3) does not include any notification process for those companies that exceed the threshold or are close to the threshold of 45 million monthly active recipients of the service in the EU. Moreover, because the European Commission does not have the competence to formally investigate companies before they are designated, this results in a somewhat suboptimal situation where the Commission must rely on the national DSCs across the EU to do its job.

In the original Commission's proposal, the Commission was under an obligation to publish a delegated act on methodology for how to count

[69] I held a workshop at LSE in November 2024. The event brought together many leading ODS bodies and big and small online platforms to discuss the need for harmonisation of certain issues, such as those noted above.

[70] European Commission, 'Supervision of the designated very large online platforms and search engines under DSA' https://digital-strategy.ec.europa.eu/en/policies/list-designated-vlops-and-vloses#ecl-inpage-metaplatforms

[71] Reuters, 'WhatsApp faces EU tech rules after reaching very large platform status' (19 February 2025), https://www.reuters.com/technology/whatsapp-faces-eu-tech-rules-after-reaching-very-large-platform-status-2025-02-19/

users.[72] However, the co-legislators, the European Parliament and Council, insisted on the optionality of such a provision. To clarify the concept, therefore, the final text includes Recital 77 which provides additional guidance that should be used to interpret Article 3(p). To this date, the Commission has not adopted the delegated act on counting users, although one is being prepared.

In *Zalando v Commission*, Zalando argues that the absence of a more specific methodology violates legal certainty and leads to unequal treatment between companies.[73] To the best of my knowledge, in all designations to date, the Commission has relied upon companies' data and only rejected various criteria that companies have used to reduce the overall numbers. Only in the context of the fee calculation, the Commission has used its own methodology. Thus, companies have a lot of discretion to overcome lack of certainty, and the Commission has a reduced ability to object to different methodologies as long as they are plausible.

That being said, the problem of **unequal treatment** can arise. It arises less in the context of designated services. For them, even if they report numbers that are not comparable, this is without consequence because the only relevant fact is that they exceed the threshold. However, if competitors adopt methodologies that underestimate numbers, this could lead to a situation where one competitor is subject to a regime while the other is not (e.g., WhatsApp vs Telegram). An additional complication is that for such scenarios, the Commission does not have the competence to investigate, and has to rely on the DSCs who are competent. As a result, the responsibility to assure equal treatment lies with the competent DSC. However, DSC might have insufficient information about other competitor VLOPs in that area.

The anticipated delegated act could address this problem. But the EU legislature should oblige the Commission to issue negative designation decisions, and have stronger investigatory powers for the purposes of Article 24(2) even before the companies are designated. The powers envisaged in Article 24(3) are limited given Articles 56(2) and (3). The proposal would thus require changes in the competencies of the Commission. The direct benefit of such change would be that the Commission's decision to not designate could be reviewed before the General Court, similarly as is the case under the DMA.

[72] See Article 25(2) of European Commission, *Proposal for a regulation of the European parliament and of the council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, (2020), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52020PC0825

[73] See my disclosure on page 1. I represent EISi as an intervener before the General Court.

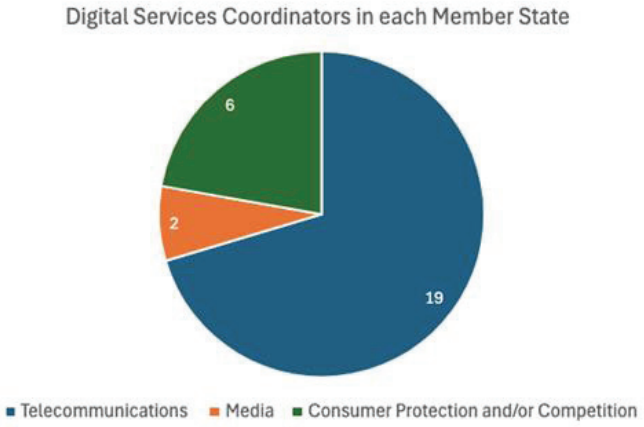
Figure 4. Details of VLOPs and VLOSEs

Type of service	Digital Service	COO	Company
Social media	Youtube	Ireland	Alphabet
	Facebook	Ireland	Meta
	Instagram	Ireland	Meta
	Tiktok	Ireland	Bytedance
	LinkedIn	Ireland	Microsoft
	Snapchat	Netherlands	Snap
	Pinterest	Ireland	Pinterest
	X/Twitter	Ireland	Twitter
App stores	Google App Store	Ireland	Alphabet
	Apple Store	Ireland	Apple
Marketplaces	Amazon Marketplace	Luxembourg	Amazon
	AliExpress	Netherlands	Alibaba
	Booking.com	Netherlands	Booking.com
	Temu	Ireland	Whaleco Technology
	Shein	Ireland	Infinite Styles
	Zalando	Germany	Zalando
Adult sites	Pornhub	Cyprus	Aylo Freesites
	Stripchat	Cyprus	Technius
	XVideos	Czechia	Webgroup Czech Republic
	XNXX	Czechia	NKL Associates
Price comparison	Google Shopping	Ireland	Alphabet
Maps	Google Maps	Ireland	Alphabet
Encyclopaedia	Wikipedia	Netherlands	Wikimedia
Search	Google	Ireland	Alphabet
	Bing	Ireland	Microsoft

Public enforcement

The public enforcement architecture around the DSA is unusual. Informed by the failures of the GDPR enforcement, the Commission was given partly exclusive and partly strong shared competence to supervise VLOPs and VLOSEs. All other companies are supervised exclusively by national regulators – Digital Services Coordinators (DSCs). Since there were no pre-existing national regulators in the area, the Member States had to either invent or pick an existing one. A great majority of the Member States designated telecommunications regulators, with a minority opting for media and consumer/markets regulators (see Figure 5). This variety is arguably a good thing as it brings more diversity of views which is much needed in an area as broad as regulation of digital services.

Figure 5. Types of Digital Services Coordinators



The overview in the comparison section details how Member States allocated resources to the DSA supervision and enforcement. As expected, the approaches differ significantly. On the one hand, Ireland has allocated significant resources, and on the other, some countries have only designated an authority but did not increase resources. A few countries have adopted special fees for online platforms; most others do not levy any fees on established platforms.

The DSA allows the Member States to allocate specific areas or provisions to other authorities. The overview below shows that several countries have done this, especially on provisions that relate to recommender systems, protection of minors, and consumer protection. The authorities competent for these provisions are often consumer or data protection authorities.

Figure 6. Non-DSC with DSA Competences

	Art 14	Art 18	Art 25	Art 26	Art 27	Art 28	Art 30	Art 31	Art 32	Art 37
Croatia										
Finland										
France										
Germany										
Greece										
Lithuania										
Slovenia										
Spain										
Sweden										

Legend: Blue: Data Protection; Orange: Consumer Protection; Green: Other.

Between 2023 and 2024, the only public enforcement has been taking place on the EU level. National regulators have not started their own investigations yet – although Irish DSC has requested a number of questions from regulatees on specific compliance issues.[74] To date, the Commission has launched a number of investigations against 6 services – AliExpress, Facebook, Instagram, TikTok, X, and Temu (see Figure 7). TikTok averted interim measures for a procedural violation of failing to submit ad hoc off-cycle risk assessment for a new feature of its service by accepting commitments.[75] Only the case against X/Twitter has progressed to preliminary findings.[76] Commitments were rejected by Elon Musk as "secret deal," which means that the case is likely to soon conclude with a non-compliance decision on a narrow set of issues.

- X/Twitter (December 2023),
- AliExpress (March 2024),
- Meta (April, May 2024),
- TikTok (April and December 2024),
- Temu (October 2024).

Thus, most of the investigations that were initiated by the Commission have not progressed to the stage of preliminary findings. The reason might be that as shown below, the scope of these investigations is often very broad, and includes even questions that would require a lot of fact-finding and additional evidence (e.g., Articles 28 and 35).

Figure 7. Pending DSA investigations

	Type of obligations	X = Twitter	TikTok	AliExpress	FB/Instagram	Temu
Standard obligations	Content moderation rules				14(1)	
	Content moderation process	16(5), (6)		16(1), (4), (5)	16(1), (5), (6)	
	Statement of reasons and appeals			20(1), (6)	17(1); 20(1), (3)	
	Dark patterns	25(1)			25(1)	
	Transparency				24(5)	
	Advertising			26(1)		
	Protection of minors		28(1)		28(1)	
	B2C marketplace obligations			30(1), (2), (7)		
	Recommender systems			27(1), (2)		27
Special obligations	Risk assessment	34(1), (2)	34(1), (2)	34(1), (2)	34(1), (2)	34
	Risk mitigation	35(1)	35(1)	35(1)	35(1)	35
	Recommender systems			38		38
	Advertising	39	39(1)	39		
	Transparency					
	Compliance function					
	Data access	40(12)	40(12)	40(12)	40(12)	40

[74] Coimisiún na Meán, 'Coimisiún na Meán opens review of online platforms' compliance with EU Digital Services Act' (12 September 2024). https://www.cnam.ie/coimisiun-na-mean-opens-review-of-online-platforms-compliance-with-eu-digital-services-act/

[75] European Commission, 'TikTok commits to permanently withdraw TikTok Lite Rewards programme from the EU to comply with the Digital Services Act' (5 August 2024). https://ec.europa.eu/commission/presscorner/detail/en/ip_24_4161

[76] European Commission, 'Commission sends preliminary findings to X for breach of the Digital Services Act' (12 July 2024). https://digital-strategy.ec.europa.eu/en/news/commission-sends-preliminary-findings-x-breach-digital-services-act

In the meantime, the Commission has been busy defending its designation decisions before the General Court. There are currently six pending designation disputes (Amazon, Zalando, Xvideos, Stripchat, Pornhub, Xnxx),[77] none of which have been decided yet. The General Court, and Court of Justice of the European Union, however, already issued some procedural decisions. Their common starting point is that:

> [...] it must be emphasised that Regulation 2022/2065 is a central element of the policy developed by the EU legislature in the digital sector. In the context of that policy, that regulation pursues objectives of great importance, since it seeks, as is apparent from recital 155 thereof, to contribute to the proper functioning of the internal market and to ensure a safe, predictable and trusted online environment in which the fundamental rights enshrined in the Charter are duly protected.[78]
>
> In addition, the unprecedented speed – only 16 months – with which political agreement was reached on Regulation 2022/2065 demonstrates the urgency which the EU legislature has attached to the pursuit of that objective. That is particularly the case with regard to the enhanced due diligence obligations [..] which the EU legislature specifically decided to apply before the general entry into application of that regulation in the light of the systemic societal risks associated with those types of services [..].[79]

In *Amazon v Commission*,[80] Amazon sought an interim order seeking suspension of Articles 38 and 39 before the General Court decides on the merits of its invalidity pleas raised against the designation decisions. The President of the General Court initially granted it with respect to Article 39, however, on appeal, the European Court of Justice quashed the decision.[81] ECJ found that Amazon satisfied all the requirements for interim measures except for the balancing of interests. According to the Court, the effects of publishing ad archives are not existential for Amazon's business, and the downside can be somewhat restored, and/or ex-post compensated by money. Moreover, the public interest represented by the DSA is strong. Hence, Amazon has to comply with Article 39 while it awaits the ruling. The attempts of XVideos, YouPorn and Xnxx to seek the same interim measures equally failed.[82]

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[77] Case T-367/23 *Amazon EU v Commission* [2023] ECLI:EU:T:2023:589, Case T-348/23 *Zalando v Commission* [2023]; Case T-138/24 *Aylo Freesites v Commission* [2024]; Case T-139/24 *WebGroup Czech Republic v Commission* [2024]; Case T-134/24 *Technius v Commission* [2024] (commonly referred to as *Stripchat*); Case T-486/24 *NKL Associates v Commission* [2024].

[78] Case C-639/23 P(R) *Amazon EU v Commission* [2023], para 155.

[79] This has been repeated by the General Court, see e.g., Case T-486/24 R *NKL Associates v Commission* [2024], para 111.

[80] Case T-367/23 *Amazon EU v Commission* [2023] ECLI:EU:T:2023:589.

[81] Case C-639/23 P(R) *Amazon EU v Commission* [2023].

[82] Case T-138/24 *Aylo Freesites v Commission* [2024]; Case T-139/24 R *WebGroup Czech Republic v Commission* [2024]; Case T-486/24 *NKL Associates v Commission* [2024]; Case Aylo Freesites LTD v European Commission Case C-511/24 P(R).

Moreover, in three out of six pending cases, the General Court had to decide about the ability of third parties to intervene to support either the European Commission or the plaintiffs. In *Amazon*, BEUC was allowed to intervene on the side of the Commission. In *Zalando*, the European Information Society Institute (EISi), after an appeal to the ECJ, has been allowed to intervene on the side of the Commission, while the German association of e-commerce, BEVH, was allowed to intervene on the side of Zalando. Finally, in *Stripchat* case, Article 19, a freedom of expression NGO, was allowed to intervene on the side of the Commission. In Stripchat and Zalando, the General Court has accepted that Article 86 of the DSA gives companies direct legal interest in these cases, which has made interventions easier than it is usually the case.[83] Thus, the Court has embraced the role of civil society in these cases.

Finally, the Commission has five pending cases concerning supervisory fees.[84]

Risk management and audits of VLOPs/VLOSEs

In November 2024, VLOPs/VLOSEs published the first batch of their systemic risk assessments and mitigations (SRAMs), audit reports, and audit implementation reports.[85] Although the public reports have been redacted, they unveil a great amount of detail about the risk management practices of technology companies. Even though the documents were primarily prepared for regulators, as opposed to the public, they will undoubtedly serve researchers, civil society, and other regulators who otherwise do not have access to such information. Civil society has been particularly critical of their lack of DSA-specific involvement in these audits.[86]

Risk assessment exercises entail considerable costs for all designated companies because they must prepare their SRAMs, prepare for audits, pay for audits, and spend time cooperating with auditors who try to validate SRAMs, which often means involving staff across the organisation for prolonged periods, and finally respond to findings of audit reports in a short period of time. Some industry players consider the pace of such annual audits too fast. Indeed, there is usually little time after the end of one cycle, to incorporate the learnings into the new cycle, which creates an odd situation for the following year. While the

[83] Krzysztof Pacula, 'Inquiry into the validity of the Digital Services Act and the role of the representative associations under that regulation' (2024) 25 ERA Forum 259.

[84] Case T-55/24 *Meta Platforms Ireland v Commission* [2024]; Case T-58/24 *Tiktok Technology v Commission* [2024]. Case T-66/25 *Meta Platforms and Meta Platforms Ireland v Commission* [2025]; Case T-88/25 *Tiktok Technology v Commission* [2025]; Case T-89/25 *Meta Platforms Ireland v Commission* [2025]; Case T-92/25 *Google Ireland v Commission* [2025].

[85] See an overview here: https://docs.google.com/spreadsheets/d/12hJWpCFmHJMQQlz1qkd6OgGsMW82YcsWgJHXD7BHVps/edit?gid=0#gid=0 (maintained by Alexander Hohlfeld).

[86] Center for Democracy & Technology, 'Civil Society Responds to DSA Risk Assessment Reports: An Initial Feedback Brief' (17 March 2025), https://cdt.org/insights/dsa-civil-society-coordination-group-publishes-an-initial-analysis-of-the-major-online-platforms-risks-analysis-reports/

overall costs of these exercises have not been officially disclosed by companies, they likely reach millions of euros per year per service.

The audits and audit implementation reports force companies to self-correct many non-compliance issues without the need for regulators to weigh in. Moreover, auditing often more closely looks at the types of non-compliance that would be hard to detect or monitor for regulators (e.g., governance, or whether a particular control was in place for the entire year, etc.). Published audits showed a great effort in decomposing the DSA obligations into the smallest auditable components.

The audits show that auditors tend to accept internal self-imposed benchmarks of companies or invoke procedural shortcuts when it comes to the questions of substantive interpretations of more complex provisions (e.g., Articles 14(4), 28, etc.). This is only a short-term problem. In the long run because as the authoritative interpretation of the DSA develops, the opacity of some of these provisions will be hopefully reduced. All this again suggests that the Commission can improve the specificity of such audits by adopting their own benchmarks as recommendations.

The auditing process itself has been criticised for being set up too late[87] and lacking more nuance in the evaluation system. Under the DSA, auditors must assign one of the following three marks: "positive," "positive with comments" or "negative" (Article 37(4)(g)). For instance, EY decomposed the DSA into 301 auditable obligations.[88] Based on the DSA's exact wording, if only one of them is not complied with, the audit outcome will be negative. That seems not only harsh but also misleading. The Commission might want to encourage complementary language by auditors, such as "overall positive," or "predominantly positive," or in percentages.

Furthermore, the Commission should explore whether the enhanced obligations for VLOPs/VLOSEs need to remain the same regardless of regulatees track record over the years. Currently, there are very different actors in the top tier, such as Meta and Alphabet on one hand, and Wikipedia, an NGO, or smaller companies on the other. Some of them are subject to many investigations or complaints, while others are subject to none. The key costs related to compliance with the enhanced obligations is annual auditing. To motivate companies, the DSA might borrow the mechanism of suspension from the DMA (see Article 9). The possible options could be to suspend the application of selected provisions in the VLOP/VLOSE tier or prolong the risk assessment cycle. VLOPs/VLOSEs anyway remain subject to an obligation to produce ad

[87] While the first designations took place in April 2023, the Delegated Act was adopted in October 2023, see European Commission, 'Delegated Regulation on independent audits under the Digital Services Act' (20 October 2023), https://digital-strategy.ec.europa.eu/en/library/delegated-regulation-independent-audits-under-digital-services-act

[88] Google Ireland Limited, *DSA Audit Implementation Report* (2024), https://storage.googleapis.com/transparencyreport/report-downloads/dsa-audit-google-implementation_2023-8-28_2024-5-31_en_v1.pdf

hoc off-cycle risk assessment whenever they introduce features that can have a critical impact on their risk profile (Article 34(1)).

Moreover, the VLOP designation under the DSA is becoming increasingly used in other acts of EU law, which does not always reflect their internal diversity.[89] It is often assumed that VLOP stands for Big Tech, which is hardly true. This is another aspect that should be carefully watched and analysed. Eventually, the EU legislature might consider if the status conferred in the broader EU legislation should not be subject to a qualitative threshold, along with the current quantitative threshold, that would test the impact of services on society at large. While the mechanism could be modelled after the DMA, the key problem would be properly defining the qualitative threshold that is subject to the rebuttal by companies.

Finally, the role of the compliance officer seems underutilised so far. The DSA has undoubtedly influenced the internal structure of companies. However, the strong position of compliance officers in the internal governance structure should be better mapped and understood. Governance can act as an important facilitator of further compliance by persuasion.

The censorship critique

The DSA is a pioneering piece of legislation that tries to marry the risk-based approach with the regulation of digital services that often implicate the political liberties of individuals, such as freedom of expression. While the DSA tries to *advance* the rights of speakers by giving them procedural rights against private power that distributes their content, it also creates tools to *suppress* the distribution of illegal content or the proliferation of illegal behaviour. Thus, it both advances but also limits the freedom of expression.

The DSA does not create new content rules for users, that is, rules about what can be said by users online. The DSA does not even include an obligation to remove illegal content; but, by virtue of its liability exemptions, it offers an important incentive to remove manifestly illegal content.[90] The power to decide about content policy remains in the hands of parliaments, especially national parliaments, *and* in the hands of platforms that enjoy contractual freedom. In this sense, the DSA is an extra layer of tools for victims, civil society and the state to enforce regular norms on illegality. It is also confirmation of the contractual freedom of providers to set their own policies as they see fit if they respect local rules about illegality.[91]

[89] Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act) [2024] art. 18, Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising [2024], art. 13 and 15.

[90] Digital Services Act, art. 6.

[91] Ibidem, art. 14(4); see Raue and Hoffman (n 40), art. 14.

The DSA thus only enforces what is already the law in the Member States.

The criticism of the DSA on the freedom of expression grounds comes from three main directions. First is the narrative that simply regulating social media is equivalent to censorship. Second is that enforcing hate speech rules is a form of censorship. Third is a more pointed critique that trying to suppress, or disincentivise disinformation might endanger legitimate speech, including by invoking the notion of "harmful but lawful content."

Regulating social media undoubtedly has a freedom of expression dimension. The highest courts of EU/US legal systems have been grappling with the constitutional limits of the legislative power.[92] However, while both systems draw the line between what is possible differently, owing to different legal traditions, neither system simply considers any regulation of social media censorship.

While extreme forms of imposition of liability on digital services can indeed inflict high levels of collateral censorship, as companies would remove content out of caution, the DSA preserves the liability exemptions that prevent this. If anything, the DSA protects against overreach by imposing liability on providers who are not aware of specific unlawful content.

The alleged intentional censorship of conservative voices by Big Tech has clear antidotes in solutions like those offered by the DSA – actionable transparency and procedural safeguards in favour of users. But in the general narrative of the second Trump administration, those safeguards for users are also being dismissed as censorship. In other words, it seems like the EU legislature must be damned if it tries to hold to account, but also if it fails to do so.

The criticism about the enforcement of hate speech rules has little to do with the DSA itself. Hate speech rules have a long tradition in Europe.[93] They were created by democratically adopted laws. The US, EU, and other regions differ on what types of speech are considered illegal under the rubric. But tech companies routinely resolve these differences by enforcing their own contractual rules, and then localising compliance with illegal content. Thus, unless the specific national law seeks extraterritorial effect, which is in itself controversial, the EU hate speech rules do not limit the speech of Americans in the US. If they do, it is usually the choice of companies who extend bans on such content to other countries.

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[92] *Reno v. ACLU*, 521 U.S. 844 (1997); *Delfi AS v. Estonia* App. No. 64669/09 (Jun. 16, 2015); *Magyar Jeti ZRT v. Hungary* App. No. 11257/16 (Dec. 4, 2018), *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* App. No. 22947/13 (Feb. 2, 2016); *Sanchez v. France* App. No. 45581/15, (Sept. 2, 2021).

[93] Jacob Mchangama and Natalie Alkiviadou, 'Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?' (2021) 21(4) Human Rights Law Review; Mario Oetheimer, 'Protecting Freedom of Expression: The Challenge of Hate Speech in the European Court of Human Rights Case Law Symposium: Comparative Law of Hate Speech' (2009) 17 Cardozo J Int'l & Comp L 427.

European hate speech laws[94] have been subject to an ongoing debate that is entirely legitimate. However, only because Europeans have different views than the US does not mean any side is wrong. In any case, the debate has little to do with the DSA itself because it does not create new content rules.

A related controversy pertains to trusted flaggers. In some member states, the concern has been that these organisations can remove content directly. Providers are not obliged to take down material notified by trusted flaggers. The certification of trusted flaggers only relates to illegal content. Thus, providers can reject their notifications if they are incorrect. In fact, the DSA only forces companies to receive more notifications from such entities but does not go as far as to say that companies must trust them and remove content automatically. If the removal is automatic then this is something that companies decided to do voluntarily, which they could have done even before the DSA, and with much less oversight. If anything, the DSA creates a framework for oversight of such actors and discourages incorrect notifications (Article 23).

Finally, as noted above, the third argument relates to the potential abuse of law in efforts against disinformation or harmful content. Disinformation as a legal concept does not exist in the DSA. However, it is often used as an umbrella term to deal with various phenomena, ranging from benign and lawful to very serious and unlawful. Harmful content only has a specific legal meaning with respect to minors (see below).

Even though the DSA does not create new content rules, and remains content-neutral, it has two provisions that could challenge this characterisation: Article 14(4) and Article 35. The former obliges providers to consider the fundamental rights of others when designing their content policies for users. If such content policies are disproportionate, they could be viewed by courts and regulators as illegal, and thus not a valid part of their mutual contract.

However, Article 14(4) must respect contractual freedom of companies. Thus, it is more likely that it can be invoked for content-neutral assessment of terms, such as lack of some procedural safeguards, or excessiveness of penalties, etc. Asking for content-specific restrictions based on Article 14(4), such as banning some lawful disinformation, should have the same problems as similar efforts under Article 35 (or possibly Article 28).

Article 35 obliges VLOPs and VLOSEs to mitigate risks arising from the use, functioning and design of their service. Some are of the view that the provision could serve as a basis for the regulator to regulate specific content, such

[94] Recommendation CM/Rec(2022)16[1] of the Committee of Ministers to member States on combating hate speech (Adopted by the Committee of Ministers on 20 May 2022 at the 132nd Session of the Committee of Ministers).

as disinformation.[95] The censorship argument usually invokes Article 35(1)(b) and the fact that the DSA covers also risks posed by otherwise lawful behaviour or expression into its scope.

As I have argued in another article and book,[96] I consider such reading not only a dangerous overreach of administrative authorities, but also against the legislative intent, and broader human rights constraints of the DSA. While it is true that the DSA's scope includes risks posed by otherwise lawful behaviour, there is also no provision in the DSA empowering the administrative authorities to impose new binding content rules for users through their supervision of online platforms.

Responsible Commissioner Henna Virkkunen recently affirmed the content-neutrality in a letter to United States House Judiciary Chair Jim Jordan. According to Politico, she wrote that the Digital Services Act (DSA) is "content-agnostic" and that Brussels and national regulators "have no power to moderate content or to impose any specific approach to moderation."[97]

The reference to terms and conditions (Article 35(1)(b)) can be seen as a reference to content-neutral adjustments, such as reformulation for the purposes of clarity, or compliance with precision and fairness requirements (Article 14(1) or (4)). In the legislative process, Commissioners have repeatedly confirmed that the law is "content-neutral."[98] Article 35 can hardly serve as a sufficient legal basis to impose restrictions on specific expressions of users because such restrictions would not be prescribed by the law. Thus, if interpreted correctly, in my view, neither Article 14(4) nor Article 35 should challenge the characterisation that the DSA does not create new content rules and remains content-neutral. But the truth remains that a stronger statement to this effect in the law itself would have been beneficial.

Finally, some point to the use of the term "harmful content" by media and regulators. The DSA does not recognise any special category of "harmful content." The term only has legal relevance in the context of audiovisual media law where it defines what content minors should not be able to see.[99] For the

[95] The study has been prepared by Reset but commissioned by Directorate-General for Communications Networks and Content and Technology (European Commission), see 'Digital Services Act: Application of the risk management framework to Russian disinformation campaigns' (2023), https://op.europa.eu/en/publication-detail/-/publication/c1d645d0-42f5-11ee-a8b8-01aa75ed71a1/language-en

[96] Husovec, *Principles of the Digital Services Act* (n 6); Martin Husovec, 'The Digital Services Act's red line: what the Commission can and cannot do about disinformation' (2024) 16(1) Journal of Media Law 47.

[97] Politico, 'EU social media law isn't censorship, tech chief tells US critic' (10 March 2025), https://www.politico.eu/article/social-media-law-does-not-regulate-speech-eu-tech-chief-tells-us-lawmaker-henna-virkkunen/?ref=everythinginmoderation.co

[98] Husovec, *Principles of the Digital Services Act* (n 6), 334 ff.

[99] Article 6a of the Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions

purposes of the DSA, such regulated content is not easy to classify. It often involves content that is perfectly lawful but should not be shown to minors on some platforms. According to Article 3(h) DSA:

> "illegal content" means any information that, in itself or in relation to an activity, including the sale of products or the provision of services, is not in compliance with Union law or the law of any Member State which is in compliance with Union law, irrespective of the precise subject matter or nature of that law.

Regulated content harmful to minors might be seen as information that is not in compliance with audio-visual media laws if they are shown to minors. It depends on how these categories are operationalised in the national law. Alternatively, it can be seen as a self-standing obligation of some providers. In any case, there is no comparable category for adults in the same audio-visual media laws. Plus, the category does not apply to all online platforms.

To use the concept along with illegal/unlawful content is therefore incorrect. Either the content is regulated on the basis of law, or it is not. There is nothing in between. This is why it was problematic when the former Commissioner, Thierry Breton, often used the term along with the term illegal content. In his letter to X/Twitter, he stated (emphasis mine):[100]

> This notably means ensuring, on one hand, that freedom of expression and of information, including media freedom and pluralism, are effectively protected and, on the other hand, that all proportionate and effective mitigation measures are put in place regarding the amplification of *harmful content* in connection with relevant events, including live streaming, which, if unaddressed, might increase the risk profile of X and generate detrimental effects on civic discourse and public security. This is important against the background of recent examples of public unrest brought about by the amplification of content that promotes hatred, disorder, incitement to violence, or certain instances of disinformation.

European civil society rightly criticised this choice of words and a broader approach.[101] Even the College of Commissioners distanced itself eventually from Breton's PR stunts.[102]

The best way that the Commission could handle the censorship criticism would be to issue specific public guidance that provides the interpretation of Articles 14(4) and 35 that firmly rejects the existence of any competence to create

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laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities OJ L 303/69.

[100] Thierry Breton, (*X* 12 August 2024), https://x.com/ThierryBreton/status/1823033048109367549

[101] The Future of Free Speech et al., 'Open Letter to Thierry Breton on The DSA's Threats to Free Speech' (21 August 2024), https://futurefreespeech.org/open-letter-to-thierry-breton-on-the-dsas-threats-to-free-speech/

[102] Financial Times, 'Brussels slaps down Thierry Breton over 'harmful content' letter to Elon Musk' (13 August 2024), https://www.ft.com/content/09cf4713-7199-4e47-a373-ed5de61c2afa

new content rules by means of content-specific measures. Such guidance would draw a red line around the Commission's exercise of the powers. It could be accompanied by a commitment to always explain how enforcement actions on the basis of Articles 14(4) and 35 comply with this red line. Going forward, such explicit safeguards should be explicitly enshrined in the DSA itself.

Admittedly, the DSA should have been more explicit in legislating this safeguard. However, the oversight can still be remedied by the Courts that would eventually review any enforcement decisions that the Commission makes.

Private enforcement

The DSA has three provisions foreseeing some kind of private enforcement. Similarly as DMA, it submits the entire regulation to the collective enforcement regime of the Representative Actions Directive that grants collective redress to qualified consumer organisations (Article 90). Moreover, Article 54, introduced in the legislative process, foresees the possibility of damages for violations of the DSA. Finally, Article 86 gives user groups a right to represent users concerning their rights derived from the DSA.

The first months of application show that private enforcement will make an important contribution to DSA compliance. At the time of writing, I am aware of the following cases:

- A Dutch case concerning X/Twitter and shadow banning,[103]
- German pre-trial enforcement by a German association, Wettbewerbszentrale, concerning Temu and Etsy and their compliance with consumer obligations of online marketplaces (know your customer),[104]
- Italian cases by TikTok and Meta seeking review of AGCOM decisions in consumer law that allegedly violate the exclusive competencies of the European Commission,[105]
- A German case concerning X/Twitter and its compliance with data access provisions for researchers under Article 40(12) DSA,[106]

[103] Paddy Leerssen, 'The DSA's first shadow banning case' (*DSA Observatory* 6 August 2024), https://dsa-observatory.eu/2024/08/06/the-dsas-first-shadow-banning-case/

[104] Wettbewerbszentrale, 'DSA proceedings: TEMU undertakes to refrain from' (12 September 2024), https://www.wettbewerbszentrale.de/dsa-verfahren-temu-verpflichtet-sich-zur-unterlassung/; Wettbewerbszentrale, 'Competition authority sues Etsy' (8 April 2024), https://www.wettbewerbszentrale.de/wettbewerbszentrale-klagt-gegen-etsy/

[105] AGCOM, [press release] 'Tutela dei minori, agcom fa rimuovere diversi video sulla piattaforma TikTok' available at https://www.agcom.it/sites/default/files/migration/article/Comunicato%20stampa%2016-02-2024.pdf; Delibera 204/23/CONS, available at https://www.agcom.it/provvedimenti/delibera-204-23-cons.

[106] Daniel Holznagel, 'Berlin court rules on Art. 40(12) DSA – with broader lessons for private enforcement of the DSA, (*ottoschmidt* 12 February 2025), https://www.otto-schmidt.de/blog/it-recht-blog/berlin-court-rules-on-art-40-12-dsa-with-broader-lessons-for-private-enforcement-of-the-dsa-ITBLOG0007850.html

- An Irish case initiated by X/Twitter against the Irish Online Safety Code, an implementation of the Audiovisual Media Services Directive, as potentially pre-empted by the DSA.[107]

Of the above, the last two X/Twitter cases raise fundamental legal questions. The Irish and Italian case raises the questions of pre-emption by the DSA, and content-neutrality, while the German case direct enforceability of Article 40(12) and interaction of national courts with the Commission under Article 82(3) DSA (c.f. Article 39(5) DMA).

Since the Commission's preliminary findings against X relate also to Article 40(12), this would suggest that finding against X/Twitter should not create any obstacle to the issuance of an injunction. However, the opposite outcome could lead to questions of potential conflict with the Commission's view under the second sentence, and if the Commission adopts the non-compliance decision, also with the first sentence. In such a case, the German court could seek preliminary reference to the Court of Justice of the European Union.

Finally, as shown by the national reports, Member States have different confidence concerning the future of private enforcement of the DSA. However, several seem to be of the view that the most likely private enforcement will come from consumer organisations according to Article 90.

In this context, it is interesting to note that the majority of the Member States repealed their implementations of Articles 12-15 of the E-Commerce Directive (Austria, Denmark, Germany, Lithuania, Netherlands, Romania, Slovakia, Slovenia, Sweden). This often included also extended liability exemptions to other services, such as search engines.

Conclusions and recommendations

The DSA has the potential to reduce the opacity of central decision-making of platforms and increase the safety of users on digital services. Some of the envisaged effects are clearly materialising, while others might take a few more years to fully manifest themselves.
The DSA has a review clause in Article 91 which pays special attention to the impact on SMEs, competitiveness, and scope of regulated services. While the DSA is asymmetric, as noted above, the Commission should consider a number of areas where the DSA might be overly bureaucratic or less favourable for SMEs. I recommend several changes, most of which would improve the situation of SMEs. I explain some of them in more detail below.

- The Commission should have stronger investigatory powers for the purposes of Article 24(2) even before the companies are designated.

[107] Breakingnews.ie, ' 'X' asks High Court to quash Coimisiún na Meán decisions' (16 December 2024), https://www.breakingnews.ie/ireland/x-asks-high-court-to-quash-coimisiun-na-mean-decisions-1708506.html

The powers envisaged in Article 24(3) are very limited given Articles 56(2) and (3).

- The DSCs might consider maintaining voluntary registries of online platforms.
- The Commission should explore the designation of advertising services under the DSA.

Many advertising services constitute online platforms because they store and publicly disseminate other ads of advertisers. Since the definition of monthly active users extends to any user "exposed" to information posted by users, this includes also not only advertisers but also viewers of ads.[108]

- The Commission should empirically interrogate if incentives granted to trusted flaggers, out-of-court dispute settlement bodies, and user groups are always strong enough, and, possibly, if they are not too strong in some cases.
- The Commission, DSCs and companies should initiate a close mapping of the terms and conditions violations against the illegality rules in the EU Member States.

As explained above, such mapping would allow companies to continue deciding against their own terms and conditions, and to keep one main channel for notifications, but would improve the application of provisions of the DSA that are specifically targeting illegal content.

- The European Commission should invest resources in facilitating de facto standardisation of many practical questions of cooperation between out-of-court dispute settlement bodies and online platforms.

Such standardisation can lower the overall costs of the system but also encourage entry by new ODS bodies. As explained earlier, there are a number of issues that require coordination.

- The Commission should study the impact of the out-of-court dispute settlement system (Article 21) on companies (and users), especially whether, given the dominant financing structure, it should extend to all online platforms regardless of their importance.

While ODS bodies are themselves opting to cover mostly the most popular services, which somewhat mitigates the impact on mid-sized online platforms, the problem might still arise in the future. One simple solution would be to adjust the financing system for non-VLOP/VLOSE providers, where the complainants would have to always initially pay the full overall fee, which would be reimbursed upon success.[109] Special attention should be also paid to linguistic coverage across the EU.

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[108] For a discussion, see Pieter Wolters and Frederik Zuiderveen Borgesius, 'The EU Digital Services Act: what does it mean for online advertising and adtech?' (2025), https://arxiv.org/abs/2503.05764

[109] This was the original design proposed by Lenka Fiala and Martin Husovec, 'Using experimental evidence to improve delegated enforcement' (2022), 71 International Review of Law and Economics.

- The language for audit results seems misleading. The Commission should encourage complementary language by auditors, such as "overall positive," or "predominantly positive," or in percentage.
- The Commission should closely map the position of compliance officers in the internal governance structures of companies.
- The EU legislatures should clarify that nothing in the DSA can serve as a legal basis to impose obligations on providers to prohibit or otherwise limit specific expressions of their users that are lawful under the law. In the meantime, the Commission should adopt a guidance that draws a red line around the Commission's exercise of its powers. The guidance could be accompanied by a commitment to always explain how enforcement actions on the basis of Articles 14(4), 28 and 35 comply with this red line.
- The DSA should clarify that on composite services, such as social media, only central decision-making by the overall provider is subject to any due diligence obligations. Thus, owners of pages or groups on major social media services should not fall under the hosting due diligence obligations, but can still benefit from the liability exemptions.
- The Commission should analyse whether the benefits of the statement of reasons database (Article 24(5)) are justified by its costs for non-VLOPs/VLOSEs.[110]
- The Commission should explore whether the enhanced obligations for VLOPs/VLOSEs need to remain the same regardless of the track record of regulatees over the years.

To motivate companies, the DSA might borrow the mechanism of suspension from the DMA (see Article 9). The possible options could be to suspend the application of selected provisions in the VLOP/VLOSE tier, such as audits or prolong the risk assessment cycle. VLOPs/VLOSEs anyway remain subject to an obligation to produce ad hoc off-cycle risk assessment whenever they introduce features that can have a critical impact on their risk profile (Article 34(1)).

- The Commission should consider internal differentiation of VLOPs, for instance by user count, because the designation under the DSA is becoming increasingly used in other acts of EU law as a shorthand for Big Tech, which does not always reflect their internal diversity.[111]
- The future update of the DSA should harmonise the questions of issuance of cross-border orders, their follow-up enforcement, EU-wide effects, and safeguards.

[110] On VLOPs/VLOSE, researchers have already used the data to gain many, and their findings point to many useful insights. See Daria Dergacheva et al., 'One Day in Content Moderation: Analyzing 24 h of Social Media Platforms' Content Decisions through the DSA Transparency Database' (2023) Center for Media, Communication, and Information Research (ZeMKI).

[111] Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act) [2024] art. 18, Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising [2024], art. 13 and 15.

Orders issued by authorities are not properly regulated by the DSA. There was a lack of political will to do so. This is now felt by the DSCs and other national authorities who continue to struggle with the enforcement of their domestic orders. Articles 9-10 that create a feedback mechanism are not sufficient. The problem is compounded by a lack of clear rules about cross-border enforcement of administrative orders, or better rules on cross-border enforcement of judgments. This gap was known at the time of the legislative process, but Member States were not willing to go beyond the status quo.

An ideal future update of the DSA would supplement Articles 9-10 with a universal list of safeguards, and rules on cross-border competence and enforcement. Such effort could also try to codify the case law on what constitutes specific monitoring allowed by Article 8 because there continues to be a lot of divergence in how some courts understand the concept. The EU legislature should pay special attention to orders that are based on local competence but might have EU-wide validity (e.g., blocking of violent hate speech).

- The future update of the DSA should better incentivise content creators whose content is widely praised for its high quality.

The DSA does not regulate content creators. Thus, Member States are free to develop rules about influencers and similar superusers, as long as they do not regulate platforms. While such subject matter arguably falls outside of the scope of the law, the DSA could consider mechanisms that incentivise better organisation of content creators who produce high-quality content. At the moment, the DSA grants the same procedural rights to everyone, regardless of their track record or history. As I have argued elsewhere,[112] such a starting point is understandable, but should not stop us from giving better treatment to those who have a strong track record of high-quality content. European Media Freedom Act's attempt to do so for media service providers, unfortunately, does not sufficiently link new privileges with the track record and looks more at the status of legacy media, although it is preconditioned on some form of independence.[113] This could be also achieved through Codes of Conduct.

- Stakeholders and regulators must continue working on increasing the awareness among those who are empowered by the law.

Section 3: Digital Markets Act

The Digital Markets Act is a collection of prescriptive rules inspired by controversies of competition law enforcement against tech companies over the last two decades. The DMA only targets powerful actors that act as a bottleneck for business users.

[112] Martin Husovec, 'Trusted Content Creators' (2022), LSE Law - Policy Briefing Paper No. 52.
[113] European Media Freedom Act (n 109), art. 17.

Once the "gatekeepers" are designated by the European Commission, they become subject to numerous per se obligations. The common declared goal of these obligations is to increase fairness and contestability of the underlying markets.

Two leading competition scholars, Pierre Larouche and Alexander de Streel eloquently summarize the DMA's contribution as follows:

> While the DMA will be a revolution in Big Tech regulation, it is mostly built on traditional policy choices which have been made before in other EU economic regulatory frameworks. Indeed, the DMA is a regulatory tool that will complement competition law, although it is positioned somewhat uncomfortably between the two, in epistemological terms. It aims at opening paths for sustaining and disruptive innovation. It foresees mostly behavioural interventions leaving structural interventions for very exceptional circumstances. It relies on detailed rules that are easier to enforce than flexible standards. Only one choice is truly path-breaking, and that is to favour centralised enforcement through the Commission over decentralised enforcement by national independent authorities.[114]

In their article, the two authors present the view that a stronger case for the DMA is in supporting users' innovation who often innovate by introducing complementary products for the gatekeepers' ecosystem (e.g., apps, or features).[115] I fully agree that this type of innovation arguably constitutes the primary focus of the law. As noted in the introduction, the DMA rather *recalibrates* the ability of companies to appropriate their investments.[116] It puts some limits on how they can exploit their ecosystems in the pursuit of profit by giving some affordances to users and banning some practices. This improves the "sustainability of innovation" by users of such ecosystems.[117] The key mechanism for this is potentially increased appropriability of investments of business users. Such innovation is mostly of incremental type which, however, equally contributes to consumer welfare and innovation trajectories.[118]

In contrast, the theory behind the DMA incentives for disruptive innovation is that it might make the position of core platform services more contestable by weakening their entrenchment. Pierre Larouche and Alexander de Streel argue that some DMA obligations, such as advertising transparency, data portability, or bans on Most Favoured Nation (MFN) clauses or anti-steering provisions, could increase the vulnerability of providers to disruption.[119] Thus, the DMA "opens a path to disruption."[120] Ibáñez Colomo sees it most clearly in the DMA's attempts to force companies to open up their core segments by

[114] Larouche and de Streel (n 30) 560.
[115] Ibidem, 549 and 551.
[116] Ibáñez Colomo (n 30) 145.
[117] Larouche and de Streel (n 30), 549; Ibáñez Colomo (n 30) 144.
[118] Larouche and de Streel (n 30), 549.
[119] Ibidem, 550.
[120] Ibidem, 551.

opening up closed parts of the value chain to third-parties via interoperability, such as that of competing messaging services.[121] While such interventions are certainly important and more interventionist than others, arguably, compared with the DMA's contribution to complementary innovation, its likely contribution to contestability is going to be more modest.

Looking at the DMA's architecture, we observe several types of obligations whose rationale is somewhere on the spectrum between the stated goals of fairness and contestability.

Some obligations try to outlaw more aggressive business-to-business practices, such as insider imitation of products by gatekeepers (Article 6(2)), self-preferencing (Article 6(5)), and practices that prevent business users from developing their businesses on their own terms (many in Article 5). Others intervene to increase the contestability of the CPS services in the core market segment, such as interoperability obligations for messaging apps (Article 7). The main common denominator of rules, however, is arguably the attempt to achieve fairness and contestability through better empowerment of business users and end users.

To do this, the DMA grants users new agency to change defaults on software applications (Article 6(3)), install and switch new apps or entire app stores (Articles 6(4), 6(6)), interoperate with gatekeepers' hardware and software (Article 6(7)), including competing messaging services (Article 7), and port users' data (Articles 6(9) and 6(10)), and object to combination of personal data by gatekeepers (Article 5(2)). The empowerment mechanism is thus meant to shake things up by giving better choices to users. However, it also means that if users' choice is something that will not materialise in practice, many of the expected benefits will not either.

The DMA's scope and designation of gatekeepers

To date, the European Commission has designated 7 gatekeepers for 24 core platform services (CPSs).[122] As Commission officials themselves have acknowledged,[123] there have been some challenges in defining the boundaries of the core platform services – making this process arguably more complex than expected.

[121] Ibáñez Colomo (n 30) 136.

[122] See European Commision, 'Gatekeepers' https://digital-markets-act.ec.europa.eu/gatekeepers_en.

[123] Alberto Bacchiega & Thomas Tombal, 'Agency Insights: The first steps of the DMA adventure,' (2024) 12(2) Journal of Antitrust Enforcement, 191–192.

Figure 8. Gatekeepers under the DMA

	Gatekeepers						
	Alphabet	**Amazon**	**Apple**	**Booking**	**Bytedance**	**Meta**	**Microsoft**
Core Platform Services	Googe Play	Marketplace	AppStore	Online intermediation services	TikTok	Facebook Marketplace	LinkedIn
	Google Maps	Amazon Advertising	iOS			Facebook	Windows PC OS
	Google Shopping		Safari			Instagram	
	Google Search		IPadOS			WhatsApp	
	Youtube					Messenger	
	Android Mobile					Meta Ads	
	Alphabet's online advertising						
	Google Chrome						

For instance, questions arose about the type of CPS offered by a particular gatekeeper (whether TikTok is a video-sharing service or an online social network) and whether a specific functionality offered by a gatekeeper qualifies as a separate service or an integral part of the CPS.[124] So far, the DMA designation process appears to be working reasonably well and is effective in identifying the market players and services relevant to protecting the contestability and fairness of markets in the digital sector – in line with the objective of the DMA in Article 1(1).

No gatekeepers have yet been designated for virtual assistants and cloud computing services as CPSs. More controversial, however, is the rise of another type of service that is not included in the DMA's list of CPSs, namely generative artificial intelligence (AI) systems. It is fair to say that the inclusion of AI systems in the list of CPSs would have been premature at the time of the adoption of the DMA. Although this means that AI systems currently cannot be regulated as a stand-alone CPS under the DMA, other CPSs already do or may at some point rely on large language models (such as search engines or social networks) and will then be covered, at least to some extent, by the DMA's substantive obligations. This allows the fitness of the DMA to be monitored in light of new developments and, if necessary, to rely on Article 19 DMA to add generative AI systems as a standalone CPS at a later stage.

The outcome of the designations shows that the DMA differs in approach from EU competition law. One illustration of this is that more than one gatekeeper has been designated for several CPSs (including for online social networks, operating systems, and online advertising services), while there can normally only be one dominant undertaking in a given relevant market under EU competition

[124] For an in-depth analysis of the delineation of core platform services, see Friso Bostoen & Giorgio Monti, 'The Rhyme and Reason of Gatekeeper Designation under the Digital Markets Act,' (2024) TILEC Discussion Paper No. 2024-16, 3-11, available at http://dx.doi.org/10.2139/ssrn.4904116

law. The General Court also clearly sets the DMA apart from EU competition law in its judgment dismissing Bytedance's appeal against the Commission's decision to designate Bytedance as a gatekeeper with TikTok as CPS.

In sketching the context of the DMA, the General Court recalled the EU legislature's belief that "existing EU law did not address, or did not address effectively, the challenges to the effective functioning of the internal market posed by the conduct of gatekeepers that are not necessarily dominant in competition law terms" and that "the DMA pursued an objective that is complementary to, but different from, that of protecting undistorted competition on any given market, as defined in competition law terms."[125]

While Bytedance relied on case law in the domain of EU competition law and state aid to claim that it should be allowed to deliver new arguments or evidence for the first time before the Court, the General Court argued that this case law "concerns legal frameworks and fields of law which are different from those covered by the DMA" and therefore does not apply.[126]

Moreover, the General Court refused to interpret the concept of "entrenched and durable position" for gatekeeper designation in line with the notion of dominance under Article 102 TFEU on the ground that "the EU legislature knowingly chose to use a new concept, different from that of 'dominant position.'"[127] For the DMA to achieve its objective, its interpretation and enforcement should not mimic approaches from EU competition law – even though some of the investigative powers under the DMA are modelled on those of Regulation 1/2003.

These explicit statements by the General Court are therefore welcome and will contribute to the effectiveness of the DMA as a complement to, rather than a substitute for, EU competition law. TikTok appealed the judgment of the General Court.[128]

Many designation disputes are motivated by more than mere judicial review of the designation decisions itself. In *Apple v Commission*,[129] for instance, Apple is also seeking an incidental review of the constitutionality of Article 6(7) on the basis of the Charter of Fundamental Rights. This shows why the involvement of civil society (Free Software Foundation Europe (FSFE)), and stakeholder representatives (Coalition for App Fairness)[130] is key because these cases are about much more than narrow designation questions.

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[125] Case T-1077/23 *Bytedance v European Commission* [2023] ECLI:EU:T:2024:478, para 19.

[126] Ibidem, para 234-237.

[127] Ibidem, para 298.

[128] Case C-627/24 P *Bytedance / Commission* [2024].

[129] Case T-1080/23 *Apple v Commission* [2023].

[130] Order of the President of the Eight Chamber, August 1, T-1080/23, accepted Coalition for App Fairness and Free Software Foundation Europe as interveners on the side of the European Commission. See my disclosure on page 1. I represent FSFE as an intervener in the General Court.

Substantive obligations

The DMA imposes a range of obligations and prohibitions on gatekeepers in Articles 5, 6 and 7. Compliance with all obligations and prohibitions is required, but it is not feasible to monitor all of them at the same time. It is therefore necessary to set good priorities as to how enforcement resources are to be allocated. Two and a half weeks after the compliance deadline, the European Commission opened five non-compliance investigations against Alphabet, Apple and Meta in March 2024.[131]

Arguably most important for the DMA to achieve its objectives of contestability and fairness is to protect the openness of digital ecosystems. In this light, the non-compliance investigations can be said to focus on the right priorities by looking into:

(1) Apple's and Alphabet's compliance with the anti-steering prohibition in their app stores,[132]
(2) concerns about Alphabet favouring its own vertical search services over competing services,[133]
(3) Apple's presentation of web browser choice screens,[134] and
(4) Meta's pay or consent model to comply with the DMA's requirement to obtain consent from users in order to combine or cross-use personal data.[135]

At the same time, there are other obligations and prohibitions that have not yet been the subject of investigations but are important too.[136]

The European Commission holds the exclusive power to enforce the DMA. Thus, combining available resources and involvement of NCAs is recommended to ensure as effective and as complete compliance as possible. Moreover, private enforcement can be a key additional channel that will allow the business community to push compliance on the issues where the Commission might have little, or opposite interests. Most national rapporteurs consider collective action the most promising avenue for private enforcement in the Member States.

Gaps in the DMA's architecture

The DMA includes a number of obligations that require companies to share data, interoperate, or facilitate interoperability. However, the law omits to

[131] European Commission, 'Commission opens non-compliance investigations against Alphabet, Apple and Meta under the Digital Markets Act,' (2024) available at https://digital-markets-act.ec.europa.eu/commission-opens-non-compliance-investigations-against-alphabet-apple-and-meta-under-digital-markets-2024-03-25_en

[132] Digital Markets Act, art. 5(4).

[133] Ibidem, art. 6(5).

[134] Ibidem, art. 6(3).

[135] Ibidem, art. 5(2).

[136] This includes for instance the transparency requirements in online advertising services, namely Digital Markets Act, art. 5(9) and (10).

engage a broader set of stakeholders around such exercises. Unlike under the DSA's Article 40, in the absence of further specification by the regulator, the companies are fully left in charge of deciding the scope of these obligations. Going forward, the DMA would benefit from the creation of a broader ecosystem that would support companies' compliance efforts, particularly around questions such as portability, interoperability and data sharing. Professional organisations in a particular area, or consumer organisations, could become useful partners for companies when trying to reconcile the conflicts between the empowerment of users, and the security or the integrity of their systems, including the protection of necessary trade secrets. Inevitably, many of these conversations will be extremely technical, which is why standardisation (Article 48), and other voluntary consensual stakeholder exchanges should be encouraged by the Commission.

The obvious candidates for these efforts are the issues of interoperability of messaging systems (Article 7), apps and app stores (Articles 6(4) and (7)), and facilitation of third-party content moderation services on social media via middleware services (Articles 6(7) and 6(10)).

Public and Private Enforcement

The EU legislator distinguished the obligations of Articles 6 and 7 DMA as "susceptible of being further specified" from those of Article 5 DMA that are not susceptible of further specification in a dialogue with the respective gatekeeper.[137] Experience to date shows that the obligations contained in both Article 5 and Article 6 of the DMA may require further interpretation, as non-compliance investigations cover both provisions and address the extent to which current actions of gatekeepers are sufficient to meet the requirements.

Figure 10. Pending DMA investigations

Types of obligation	Alphabet	Meta	Apple	Amazon
Personal Data		5(2)*		
Promotion of offers by business users	5(4)		5(4)*	
Users un-installing applications and changing default settings			6(3)	6(5)
Users installing third-party applications			6(4)	
Ranking	6(5)			6(5)

* *Note.* After the report was finalised, the Commission issued non-compliance decisions in these two cases.

The Commission is also defending four of its designation decisions before the Court of Justice of the European Union: *Bytedance v. Commission* C-627/24 P,[138]

[137] See also Digital Markets Act, Recital 65.

[138] General Court case: T-1077/23; Interim measures: T 1077/23 R.

Meta v. Commission T-1078/23, s*Opera Norway v. Commission* T-357/24, and *Apple v. Commission*, T-1080/23. TikTok's and Meta's cases concern the appropriateness of designation. Apple's case, as noted above, in addition challenges the validity of Article 6(7) of the DMA.[139]

Figure 11. Pending DMA disputes before the CJEU

Reasons for action	T-1077/23 Bytedance v. Commission	T-1078/23 Meta v. Commission	T-357/24 Opera Norway v. Commission	T-1080/23 Apple v. Commission
Contestation of designation	3(1), (5)	3(9)		3
Contestation of failure to designate			3(1), (4), (5)	
Validity of obligation imposed by DMA				6(7)

While efforts have been made to categorize the range of obligations and prohibitions according to different "theories of harm,"[140] it is difficult to identify one uniform underlying set of principles or beliefs. The objectives of contestability and fairness can, to some extent, guide the interpretation of unclear aspects of the DMA obligations, but in many cases, the two objectives do not prescribe one particular outcome.[141]

Private enforcement can be especially useful to ensure compliance with obligations that contain open or unclear terms and are not yet taken up by the Commission in ongoing non-compliance investigations. The DMA foresees cooperation mechanisms with national courts to ensure its coherent application. This includes the possibility of the Commission submitting observations to national courts and the requirement of national courts to refrain from delivering a judgment running counter to a Commission decision or conflicting with a decision contemplated by the Commission in proceedings it has initiated under the DMA.[142]

With these cooperation mechanisms in place, private enforcement is a valuable complement to public enforcement by the Commission. A challenge for claimants in private cases will be to prove and quantify their damages as well as to demonstrate that the damages were caused by an infringement of the DMA. Stand-alone cases can be particularly challenging, as claimants must also prove that the DMA has been breached – whereas information to establish such a violation may not be readily available and only be in the hands of

[139] See *Case T-1080/23 Apple v Commission* [2023].

[140] For instance, see the four categories identified by CERRE: (1) preventing anti-competitive leverage from one service into another, (2) facilitating switching and multi-homing for both business and end-users, (3) opening platforms and data, and (4) increasing transparency. Alexandre de Streel et al., 'Effective and Proportionate Implementation of the DMA,' (2023), 32, available at https://cerre.eu/wp-content/uploads/2023/01/DMA_Book-1.pdf

[141] As defined in Digital Markets Act, Recitals 32 and 33.

[142] Respectively, Digital Markets Act, art. 39(3), (4) and (5).

the gatekeeper or the relevant authorities. Another aspect that may discourage claimants from bringing private actions is the so-called "fear factor." Those who are harmed by a gatekeeper's behaviour are also often dependent on it to reach customers or generate revenue and may be concerned that the gatekeeper will react by implementing even more restrictive measures.

NCAs could play a role in addressing this fear of retaliation by acting as a first point of contact for businesses and consumers in their jurisdiction by receiving and investigating complaints and advising businesses and consumers on the next steps. This could include starting private litigation or bringing the case to the attention of the Commission. Even though NCAs do not hold any formal enforcement powers, they are an important actor in the DMA's institutional ecosystem.

Smaller or less experienced businesses and consumers are more likely to approach the respective authority in their jurisdiction than to immediately escalate a case to the Commission. The DMA also foresees in cooperation mechanisms between the Commission and NCAs to ensure "coherent, effective and complementary enforcement of available legal instruments."[143]

Noteworthy is that the DMA preempts the application of rules with a similar scope and underlying objectives at the national level.[144] This is important not only for the gatekeeper, who is now subject to a single EU regime, but especially for smaller business users who would otherwise have to navigate different legal frameworks across EU Member States. In this regard, it is also important for the Commission to closely monitor the developments regarding the introduction of a market investigation tool in several Member States (including Germany, Norway, Italy, Denmark).[145]

A market investigation tool allows a competition authority to intervene in a market to address a structural market problem without having to identify a violation of the competition rules. The tool is also referred to as the "New Competition Tool," as it was called when its introduction was considered as part of the Digital Services Act package in 2020.[146] The Draghi report has reopened the debate on the introduction of a New Competition Tool at the EU level.[147] Although the New Competition Tool does not directly interact with the DMA, some of the core platform services regulated under the DMA may also face structural market problems.

[143] Ibidem, art. 37 and 38.

[144] Ibidem, art. 1(5) and (6).

[145] Other EU Member States are also considering to introduce a market investigation tool. For a discussion of the Dutch context, see Jasper van den Boom et al., 'Towards Market Investigation Tools in Competition Law: The Case of the Netherlands,' (2023) 14(8) Journal of European Competition Law & Practice, 553–564.

[146] See the 2020 Impact Assessment for a possible New Competition Tool, available at https://competition-policy.ec.europa.eu/public-consultations/2020-new-comp-tool_en

[147] Draghi (n 35), Part B 303-304.

If different Member States have their own versions of a New Competition Tool, this could lead to diverging competences and market outcomes – if certain digital markets are regulated more strictly in one Member State than in others. While a degree of experimentation and divergence can sometimes be useful to learn and evaluate what approaches work, the coexistence of different regulatory frameworks and competencies risks fragmenting the internal market – which is arguably particularly problematic when dealing with powerful and global companies.

Conclusions and recommendations

The DMA is limiting the scope of business and design practices that can generate better profits for gatekeepers. It is thus understandable that it is resented by regulatees. However, claiming that the DMA is protectionist, or was adopted to extract extra revenue from the US companies, seems not very convincing if benefits are offered to all companies who conduct business via these services in the European Union.

In addition to the general recommendations mentioned above, I recommend the following:

- The Commission should facilitate the creation of informal institutions that would facilitate exchange on technical issues between companies and business users.

Very technical questions such as portability, interoperability and data sharing often require complex discussions that are not best suited to primarily regulatory fora. Professional organisations in a particular area of expertise could become useful partners for companies when trying to reconcile the conflicts between the empowerment of users, and the security or the integrity of their systems, including the protection of necessary trade secrets.

Inevitably, many of these conversations will be extremely technical, which is why standardisation (Article 48), and other voluntary consensual stakeholder exchanges should be encouraged by the Commission.

- The Commission should formally embrace the role of NCAs in filtering credible complaints where companies are justifiably afraid of retaliation.

NCAs could play a role in addressing this fear of retaliation by acting as a first point of contact for businesses and consumers in their jurisdiction by receiving and investigating complaints and advising businesses and consumers on the next steps.

- The EU legislature should further explore the need for a market investigation tool that allows a competition authority to intervene in a market to address a structural market problem without having to identify a violation of the competition rules.

From the internal market perspective, it is problematic if different Member States have their own versions of a New Competition Tool. Such a situation can lead to diverging outcomes if certain digital markets are regulated more strictly in one Member State than in others.

Comparative Report: Table of Contents

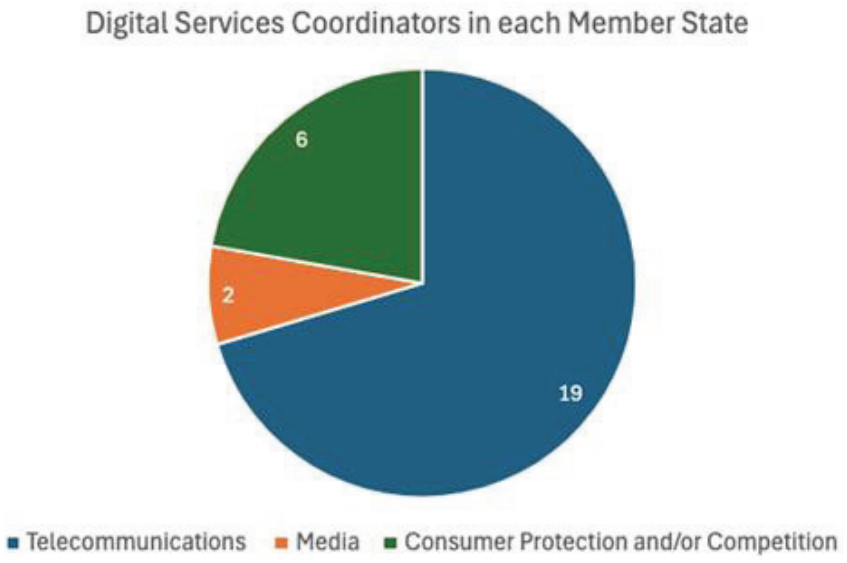
Section 1: National Institution Set-up

Question 1. Allocation of DSA competences

Which pre-existing or new authorities have been designed for the DSA enforcement in your Member State? If several, how are the tasks and responsibilities divided between them? How do such authorities interact with national sector-specific regulators (e.g., media, data protection, and consumer authorities)?

According to the reports, most of the Member States designated a telecommunications authority as their Digital Services Coordinator ("DSC"). The majority of the Member States also designated sector-specific authorities to ensure the protection of personal data, consumers, minors, or intellectual property, with only five Member States choosing to designate only a DSC.

While a few Member States have not yet decided on the division of responsibilities among the designated authorities, most national implementing acts provide for cooperation and guidance measures between the DSC and sector-specific authorities.



Sector-Specific Authorities' Competencies Following DSA Articles

	14	18	25	26	27	28	30	31	32	37	
Croatia					x	x					
Finland		x	x	x					x	x	
France			x	x		x	x	x	x		
Germany	x	x		x		x					
Lithuania	x		x	x	x		x	x	x		
Slovenia				x		x					
Spain				x		x					
Sweden	x	x	x	x	x	x	x	x	x	x	

	Digital Services Coordinator	Sector-specific authorities
Austria	Austrian Communications Authority ("KommAustria")	N/A
Belgium	Belgian institute for Postal Services and Telecommunications ("BIPT")	– Authorities designated for the 3 language -based Communities (Flemish, French, German): – Conseil Supérieur de l'Audiovisuel ("CSA") – Vlaamse regulator voor de media ("VRM") – Medienrat
Bulgaria[a)]	Commission for Regulation of Communications	Council for Electronic Media Commission for Data Protection
Croatia[b)]	Croatian Regulatory Authority for Network Industries (HAKOM) 5 other authorities (Art. 9 and 10 DSA)	Croatian Personal Data Protection Agency (Art. 27 and 28 DSA) 5 other authorities (Art. 27 and 28 DSA)
Czechia[c)]	Czech Telecommunication Office ("CTO")	Ministry of Industry and Trade and the Personal Data Protection Office ("PDPO") for personal data protection matters and coordination with other Member States
Denmark	Danish Competition and Consumer Authority	N/A

[a)] The bill amending the Bulgarian Electronic Communications Act has not been adopted as law yet.

[b)] The Act on the implementation of EU Regulation 2022/2065 has not been adopted yet.

[c)] The implementation of the DSA is not finished yet, as the Digital Economy Act has not been enacted.

Finland	Finnish Transport and Communications Agency Traficom ("Traficom")	Consumer Ombudsman (Art. 25, 26(1) a-c, 26(2), 37, and 32(7) DSA) Data Protection Ombudsman (Art. 26(1) a-d, 26(3), 27, and 28 DSA) Police (Art. 18 DSA) Market Court Legal Register Centre ("LRC")
France	Regulatory Authority for Audiovisual and Digital Communication ("Arcom")	Direction générale de la concurrence, de la consommation et de la répression des fraudes (DGCCRF") (Art. 25 and 30 to 32 DSA) Commission Nationale de l'Informatique et des Libertés ("CNIL") (Art. 26(1) d, 26(3), and 28(2) DSA)
Germany	Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railways (BNetzA)	Federal Agency for the Protection of Children and Young Persons in the Media (Art. 14(3) and 28(1) DSA) Federal Commissioner for Data Protection and Freedom of Information (Art. 26(3) and 28(2)-(3) DSA) Federal Criminal Police Office (Art. 18 DSA) State authorities are responsible for content and diversity-related requirements
Greece	National Committee of telecommunications and post	Personal Data Authority for personal data protection matters (Art. 26(1)(d) and (3) and 28(1) DSA) National radio and television council for supervision of service providers (Art. 26(1)(a) to (c) and (2), and 28 DSA)
Hungary	National Media and Infocommunications Authority ("NMHH")	Hungarian competition authority ("GVH")
Italy	Authority for Communications Guarantees ("AGCOM")	Italian Competition Authority-Autorità Garante della Concorrenza e del Mercato ("ICA" or "AGCM") Data Protection Authority (Garante per la protezione dei dati personali)
Latvia	Consumer Rights Protection Centre (CRPC)	N/A

Lithuania	Communications Regulatory Authority ("CRA")	State Consumer Protection Authority (Art. 25, 26, 30, 31, and 32 DSA) State Data Protection Inspectorate (Art. 26(1) d, 28(2), and 27 DSA) Office of the Inspector of Journalistic Ethics (Art. 14.3 and 28(1) DSA)
Netherlands[d)]	Authority for Consumers and Markets ("ACM")	Dutch Data Protection Authority (Autoriteit Persoonsgegevens) (Chapter 3 DSA) Digital Regulation Cooperation Platform (Samenwerkingsplatform Digitale Toezichthouders) for coordination matters with other national authorities
Norway[e)]	Not designated yet	N/A
Poland[f)]	** Not officially designated yet Prezes UKE Urzędu Komunikacji Elektronicznej (Regulator for Electronic Communications)	** Not officially designated yet Prezes Urzędu Ochrony Konkurencji i Konsumentów UOKIK (the Polish Competition Authority)
Portugal	National Authority for Communications ("ANACOM")	Entidade Reguladora para a Comunicação Social - ERC (Regulatory Entity for Social Communication) for matters related to social communication and other media content IGAC (General Inspectorate for Cultural Activities) for copyright matters
Romania	National Authority for Management and Regulation in Communications ("ANCOM")	N/A
Slovakia	Council for Media Services (Rada pre mediálne služby)	N/A
Slovenia	Agency for Communication Networks and Services of the Republic of Slovenia ("AKOS")	Information Commissioner (Art. 26(1), 26(3), and 28 DSA)
Spain[g)]	National Commission for Markets and Competition (CNMC)	Still being discussed: – Data Protection Authority (Art. 26(3) and 28(3)

[d)] The DSA Implementation Act is currently pending before the House of Representatives.

[e)] The DSA is not yet applicable in Norway.

[f)] The act implementing the DSA has not been adopted yet.

[g)] The implementing legislation, Law on Information Society Services and Electronic Commerce/Ley de Servicios de la Sociedad de la Información y Comercio Electrónico (LSSICE), was modified by the recent Royal Decree Law 9/2024. However, Royal Decree Law 9/2024 in turn has been repealed by a Congress Resolution of 22 January 2025. Nevertheless, it is expected that the legal changes introduced by Royal Decree Law 9/2024 will finally see the light of day very soon.

Sweden	The Swedish Post and Telecom Authority	The Swedish Consumer Authority (Art. 25, 26(1), 26(3), 27, 28(2) + 9-42 + 44, 45, 48 + 64, 66, 67, 69, and 72 DSA) The Swedish Agency for the Media (Art. 14, 25, 26(1), 26(2), 26(3), 28 + 11-42 + 44, 45, 48 + 64, 66, 67, 69, and 72 DSA)

Question 2. Special rules for DSA

Which specific rules, resources or other measures that have been adopted regarding the supervisory, investigative and enforcement powers of the competent authorities under the DSA? (e.g., allocation of powers and resources, the existence of special technical units, presence of procedural safeguards, supervisory fees, etc.) How many staff are dedicated to DSA enforcement?

Regarding staff resources, DSCs range between having two to seventy employees dedicated to the DSA, a few being the result of a new department or unit which was set up for the DSA. Nine Member States plan on hiring additional staff for their DSCs in the future.

Concerning financial resources, only Greece, Italy, and Romania answered positively in regard to the imposition of supervisory fees. The Romanian DSC will only start to impose such fees in 2027.

	Powers of Designated Authorities	Financial Resources	Staff Resources	Procedural Safeguards
Austria	KommAustria (DSC) can: – Decide on specific matters after having conducted an administrative procedure (Art. 54 and 51(3) DSA) – Impose fines and periodic penalty payments	KommAustria's federal budget is EUR 2,501,000 in 2024. No sector-specific funding provided for.	KommAustria has 6–7 full-time employees. Budget allows for hiring additional staff if necessary.	KommAustria must submit an application to the Federal Administrative Court to order temporary restriction of access to a provider (51(3) and 82(1) DSA).
Belgium	BIPT (DSC) is competent for: – Consumer protection – Price and income policy – Competition law – Trades and practices law	N/A	BIPT will have 22 full-time employees for the DSA. CSA does not currently have a team.	N/A

	– Commercial and company law – Residual competences (criminal and police matters) Communities authorities are competent for: – Providers of intermediary services that enable audio-visual media services – Protection of young people		VRM does not have additional full-time employees. Medienrat has 1 full-time employee for the DSA.	
Bulgaria	The bill makes reference to powers allocated under the DSA.	N/A	N/A	N/A
Croatia	HACOM (DSC) can: – Coordinate bodies (Art. 49(2) DSA) – Exercise powers based on Art. 51 and 53 DSA – Compile annual reports (Art. 55 DSA) – Cooperate with other Member States (Art. 58 DSA)	Government has the obligation to provide sufficient funds (unknown amount).	Currently, HACOM has several part-time employees. Full-time employees will be hired soon (number unknown).	N/A
	– Participate in the European Committee for Digital Services (Art. 62 and 63 DSA) – Exercise powers for out-of-court settlement disputes (Art. 21 DSA) – Exercise powers based on Art. 22 DSA			
Czechia	N/A	N/A	The proposal foresees that the CTO (DSC) will need up to 12 additional employees and the PDPO up to 2.	N/A

Denmark	N/A	The estimated budget is EUR 684,000 (to be evaluated in 2025). It will be evaluated whether supervisory fees are possible.	N/A	N/A
Finland	Traficom (DSC) can: – Conduct inspections and investigations – Order sanctions – Request access to an intermediary service to be blocked by a court – Assist the Commission (Art. 69 DSA) – Coordinate with other bodies – Supervise intermediary services (even if there are no VLOPs in Finland) Consumer Ombudsman's powers are broadened with the DSA in regard to: – Penalty payments – Art. 25 and 26 DSA	Traficom will require an additional budget of EUR 650,000. Consumer Ombudsman will require EUR 228,000.	N/A	N/A
France	Arcom (DSC) can: – Investigate – Collect necessary information (Art. 58 and 65 DSA) – Inspect service providers' offices – Require the service providers to cease any violation – Take corrective measures – Adopt provisional injunctions – Impose fines	DGCCRF's financial needs will be adapted as seen fit for the implementation of the DSA. CNIL does not require additional resources at this point.	Arcom is currently composed of about 15 employees, of which 2/3 have knowledge about the DSA.	N/A

	DGCCRF's powers are broadened with the DSA in regard to: – Requesting a new type of civil injunction – Investigative powers (Art. 49(4) and 50(2) DSA) – Accessing online platforms service providers' data (Art. 40 DSA) CNIL's powers are broadened with the DSA in regard to: – Seizing any document under the judge's supervision – Recording interviewees"responses – Adopting corrective measures			
Germany	The BNetzA (DSC) can: – Conduct investigations by itself and ex officio (Art. 51 DSA) – Order the necessary measures to a provider who does not comply – Impose a monetary penalty (art. 52(1) and (4) DSA)	The estimated material costs are EUR 1.7 million	70 additional staff positions for the DSC are planned.	N/A
Greece	National Telecommunications and Posts Commission (DSC) can: – Impose fines and sanctions – Manage user complaints – Collect information from providers – Coordinate with other bodies – Cooperate with other Member States – Participate in the European – Digital Services Council with right to vote			

	– Recognize entities as "trusted flaggers" – Certify out-of-court dispute resolution bodies – Publish an annual report National Radio and Television Council can: – Supervise intermediate service providers (Art. 26(1) a, b, and c, 26(2), 28(1) DSA) – Participate in the European Digital Services Council without right to vote Personal Data Protection Authority can: – Supervise intermediate service providers (Art. 26(1) d, 26(3), and 28 DSA) – Participate in the European Digital Services Council without right to vote	The DSC's expenses are covered by fines, periodic monetary penalties, and supervisory fees (if applicable). The DSC may impose supervisory fees to service providers with establishment or legal representative in Greece.	The DSC has 217 employees. The National Radio and Television Council has 18 specialists and 17 permanent administrative employees. The Personal Data Protection Authority has 14 specialists and 50 administrative employees.	Fines and periodic monetary penalties shall be imposed only with a specially reasoned decision by the DSC or other authority and the service provider should have the chance to present its views.
Hungary	The NMHH's (DSC) can: – Impose fines for procedural infringements, including imposing fines on directors of a company – Adopt interim measures Impose fines on the subject of an investigation who fails to provide data or if the data is not satisfactory	N/A	The task has been allocated to the DG Online Platforms internally.	The implementing act provides for safeguards relating to the protection of secret information.

Italy	AGCOM's (DSC) competencies are broadened with the DSA in regard to: – Imposing sanctions	The budget for 2024 is EUR 4,005,457. The resources are financed from a supervisory fee of 0.135 per thousand of the turnover from the last approved balance sheet of intermediary service providers.	The AGCOM will have 23 additional employees.	N/A
Latvia	The DSC's investigative powers are: – Carrying out on-site inspections without authorization of the court – Requesting traffic data from an electronic communications undertaking The DSC's enforcement powers are: – Imposing penalties if a person interferes or resists the inspections	N/A	Six additional positions have been allocated to the DSC.	The control of the legality and administrative acts issued by the DSC will be ensured under Art. 7(5) of the State Administration Structure Law. It is also provided that the DSC shall be financed to the extent necessary to ensure the independence of its function and the effective application of the DSA.
Lithuania	The CRA's (DSC) competencies are broadened with the DSA in regard to: – Appointment of legal representatives of intermediaries – Certification of entities which may investigate disputes out-of-court – Assignment of trusted flaggers – Investigations of violations	The CRA's budget is EUR 120,000 for 2024–2026. There is no supervisory fee currently imposed.	The CRA's internal department dedicated to the DSA has 4 employees.	N/A

Netherlands	The ACM's (DSC) competencies are broadened with the DSA in regard to: – Certification of trusted flaggers – Certification of alternative dispute resolution entities and vetted researchers	N/A	The ACM will have 49 full-time additional employees. Currently, about 70 full-time employees are dedicated to the implementation of new digital legislation.	N/A
Norway	N/A	N/A	N/A	N/A
Poland	The draft proposal of December 2024 for implementing act for the DSA addresses the powers in the area of: – Certification of out-of-court dispute resolution bodies, vetted researchers, and trusted flaggers – Supervision of intermediary service providers (infringement proceedings, controls, imposing decisions/ restrictions) – Issuing orders (by DSC) addressing illegal content and unjustified restrictions imposed on service recipients Imposition of fines – User complaints	Draft proposal estimates cost limits for UKE as111 208 738 PLN in years 2025-2034 And for UOKiK 31 896 949,20 PLN for the same period	Draft proposal includes information about prospective new 30 employees for UKE and 11 for UOKiK	The decision to impose a fine should be subject to appeal to the Sąd Ochrony Konkurencji i Konsumentów.
Portugal	N/A	N/A	ANACOM (DSC) has 8 full-time employees dedicated to the DSA.	N/A
Romania	N/A	ANCOM (DSC) will apply supervisory fees from 2027.	ANCOM has a new department dedicated to the DSA, with currently 7 full-time employees and a goal of 21 employees in 2 years.	N/A

Slovakia	The DSC can: – Conduct an anonymised control purchase of the service or real-time recordings to document deficiencies in the service – Carry out on-site inspections and enter the premises without notice – Acquire, process, and evaluate information and documents provided by service providers – Impose appropriate interim measures or remedy measures	The DSC's budget is EUR 2,965,858 for 2024.	The DSC will have an increase of 49 employees in 2024–2026.	Procedural safeguards are guaranteed: – Right to refuse to disclose information if doing so create a risk of criminal prosecution – Right to refuse the audio-visual, video or sound recording – During the inspections, right of inviolability of home must be respected. – Inspected subject may be present at all individual acts of the inspection – A written confirmation on securing of copies of information provided must be provided. – Preliminary statement to a written record on the inspection procedure may be provided – A written record from the inspection must be provided – The procedure for issuing an interim measure and the decision on the objection is regulated by the Administrative Procedure Code
Slovenia	AKOS' (DSC) competencies are broadened with the DSA in regard to – Full inspection and prosecution powers – Certification of trusted flaggers	N/A	AKOS has a new internal unit, Digital Services Division, for the DSA.	N/A

	– Certification of out-of-court dispute resolution providers		This unit has currently 3 employees, with 2 additional employees foreseen by the end of 2024.	
Spain	CNMC's (DSC) investigative powers are: – Entering the premises of online service providers – Examining books – Make copies or extracts – Requiring access to be provided – Sealing premises – Asking for explanations – Asking questions New infringements are introduced: – Very serious infringements – Serious infringements – Minor infringements – Penalties of Art. 52 DSA are introduced. The CNMC has a new enforcement power: – Declaring commitments made by service providers binding or in the event of non-compliance, to continue with the sanctioning procedure		The DSC was planning on filling 7 vacancies.	The exercise of the investigative powers will require judicial authorisation where the right to inviolability of the home on premises other than those of the business is at issue.
Sweden	On top of the powers granted by the DSA, the Complementary Act provides supplementary provisions.	Estimated that approximately SEK 24 million per year would be needed.	N/A	Procedural safeguards are already in Swedish law (Instrument of Government, Administrative Procedure Act, Administrative Court Procedure Act).

Question 3. Initial experiences under the DSA

What are the initial experiences with national competent authorities acting under the DSA (if any)? Did the authorities undertake any scoping exercises to map which companies are being regulated by the DSA in the Member State? Did they announce any enforcement priorities?

Some DSCs have started providing guidance to companies to help them comply with the DSA, whether directly (e.g., by discussing with them) or indirectly (e.g., by publishing information on their website). Rapporteurs for Denmark and Portugal have said that these Member States have experience in receiving and screening complaints.

Eight Member States have conducted studies to map the companies regulated by the DSA in their territory.

	Initial experiences	Companies regulated by the DSA	Enforcement Priorities
Austria	N/A	A study is currently being conducted but has not been completed.	Initially, the priority was to handle the contact points (Art. 11 DSA).
Belgium	N/A	BIPT commissioned a study in 2024 and found that around 500 intermediary services fall under their jurisdiction.	Since BIPT is not fully staffed, it is prioritizing a risk-based approach, by contact services that present the highest risk to users.
Bulgaria	N/A	N/A	N/A
Croatia	N/A	N/A	N/A
Czechia	HAKOM (DSC) has exchanged contacts and participated in the working group to draft the implementing act.	Companies have to self-identify and notify the DSC. A scoping exercise was completed.	N/A
Denmark	The DSC has taken initiatives to implement the DSA: – Informed the identified companies about the DSA – Conducted the initial examination of all complaints received (which mainly concern platforms established in other Member States or in third countries)	A study to identify the companies was conducted, but it is not publicly available. The necessity for a scoping exercise will be assessed in 2025.	

	– Identified cases where the DSA is relevant and in serious cases, informed the victims of their options to complain. So far, the DSC's experience has been much more about screening the complaints and forwarding them to the Commission or Digital Services Coordinators and competent authorities in the relevant Member States.		
Finland	N/A	N/A	N/A
France	Arcom (DSC): It has started guiding companies to help them comply with the DSA. It is in contact with professional federations and legal networks which might help companies.	Arcom: It is up to the companies to self-identify. DGCCRF: It has identified about 20 marketplaces subject to the DSA. One of the difficulties is due to the fact that some entities are hybrids (physical stores and e-commerce platforms).	Arcom: Priorities are set by the European Digital Services Council. In June 2024, the priority was to protect the digital ecosystem in light of the elections. Currently, the priority is the protection of minors and of the youth online. DGCCRF: By the end of 2024, it will launch a national investigation with about 20 large entities to control their compliance with the DSA. CNIL: Priorities are not defined yet, but the protection of minors and online advertising have been highlighted.

Germany	N/A	A study and database have been created.	N/A
Greece	The DSC has taken initiatives to implement the DSA: – Creation of the Registry of Intermediary Service Providers including Host Services – Publication of the procedure for the certification of trusted flaggers	N/A	N/A
Hungary	Two studies on dark patterns have been commissioned to delimit enforcement powers under DSA and UCPD.	The DSC mapped and contacted domestic online platform providers to help them comply.	N/A
Italy	AGCOM (DSC) has taken initiatives to implement the DSA: – Initiated preliminary analysis to identify the procedure for filing a complaint (Art. 53 DSA) – Issued a notice concerning the modalities for communicating contact points (Art. 11 DSA) – Issued a notice concerning modalities for designating legal representatives (Art. 13 DSA) – Issued a notice concerning the modalities for communicating the number of active recipients (Art. 24(2) DSA) – Adopted a decision concerning the procedure to certify out-of-court dispute resolution bodies (Art. 21 DSA) – Adopted a decision concerning the procedure to certify trusted flaggers (Art. 22 DSA)	N/A	N/A

Latvia	N/A	Data is unclear, but it is estimated that there are at least 300 different intermediary service providers in 2024.	N/A
Lithuania	CRA (DSC) has set up an internal task force and has started publishing information to help users and entities understand the DSA on its website.	N/A	For 2024: – Preparatory activities (preparing implementing acts, procedures, and principles) – Adapting information systems
Netherlands	N/A	N/A	N/A
Norway	N/A	N/A	N/A
Poland	N/A	Reports have been done by national authorities, but not directly in the context of the DSA.	N/A
Portugal	ANACOM (DSC) has already received 12 complaints, which ranged from account blockages to the lack of communication channels with the platforms. It set up a team of 8 people to address the coordination task. However, it foresees that a team of 12 to 20 people will be needed. 4 requests to become trusted flaggers have been received.	ANACOM will launch a brief study to identify intermediary service providers in Portugal. So far, 100 providers have already been identified.	N/A
Romania	ANCOM (DSC) has undertaken extensive discussions with other national authorities for the enforcement of the DSA.	N/A	N/A
Slovakia	N/A	N/A	N/A

Slovenia	N/A	N/A	For 2025–2030: – Ensuring a transparent and secure online environment – Monitoring the situation in Slovenian and EU markets and identifying key challenges to respond promptly – Effective and rapid participation in supervisory procedures – Developing predictable and effective regulatory practices – Cooperating with other Member States
Spain	N/A	N/A	N/A
Sweden	N/A	N/A	N/A

Question 4. Allocation of DMA competences

What tasks are allocated to competition authorities for the DMA enforcement? Do the authorities have the competence and investigative powers to conduct investigations into possible non-compliance with the obligations laid down in the DMA (under Article 38(7) DMA) and if so, how is this set up?

Most of the Member States have reported tasks relating to assisting and supporting the European Commission ("Commission") for their competition authorities.

Only four Member States have answered that their competition authorities do not have investigative powers. France has noted that its competition authority's investigative powers were not amended with the DMA. As a result, it could only discover non-compliance with the DMA while investigating under different regulations. The Swedish competition authority can only investigate upon the Commission's request but cannot initiate investigations.

	Tasks of Competition Authorities	Investigative Powers
Austria[a)]	N/A	The Federal Competition Authority ("FCA") has investigative powers.
Belgium	The Belgian Competition Authority ("BCA")'s competencies: – Receive complaints from third parties – Inform the Commission in case of suspected non-compliance – Request the Commission to open a market investigation (Art. 41 DMA) – Receive information from the Commission on concentration of gatekeepers (Art. 14 DMA) – Refer concentrations to the Commission Communities Authorities are competent for audio-visual media services.	The BCA has the same investigative powers for the DMA as under national competition law.
Bulgaria[b)]	N/A	N/A
Croatia	The Croatian Competition Agency's ("CCA") competencies: – Coordinating and supporting the Commission – Notifying the Commission about its intention to open a proceeding against the gatekeeper – Informing the Commission about the implementation measures (sending a draft of the measures at the latest 30 days prior to their adoption) – Informing the Commission of the imposition of interim measures as soon as possible	The CCA does not conduct investigations only based on the DMA. It informs the Commission about the potential case against the gatekeeper by the implementation of competition rules. It can perform certain investigatory steps for the Commission.
Czechia	The Office for Protection of Competition's ("OPC") competencies: – Provide assistance and cooperation to the Commission – Seek assistance from the companies when necessary	No investigative powers specified in the law. Presumably, the OPC would need specific legislative authorization on DMA grounds.

[a)] Specific national regulations relating to the DMA are still outstanding.

[b)] There is no current national legislation allocating powers to national authorities for DMA matters.

Denmark	The competencies of the Danish Competition and Consumer Authority include: – Request the Commission to open a market investigation. – Have the right to access information, including algorithms and tests, as well as explanations regarding these elements, as deemed necessary to fulfill the Authority's responsibilities. – May conduct interviews with legal or natural persons, provided they are deemed to have relevant information.	The Danish Competition and Consumer Authority has investigative powers. It decides whether an investigation needs to continue or be suspended. It must inform the Commission before taking any investigative measure. It may inform the Commission of the findings after an investigation is completed, which the Danish Competition Council must approve before the conclusions of the investigation are sent to the Commission.
Finland	The Finnish Competition and Consumer Authority's competencies ("FCCA"): Have the right to access to information regarding gatekeeper companies and from third parties, and may forward this information to the Commission (Art. 21(5), 27, and 53(4) DMA) Assist the Commission in conducting inspections and market surveys (Art. 23 and 16(5) DMA) Request the Commision to open a market investigation. No new competencies were given to other national authorities than the FCCA.	No investigative powers based on Art. 38(7) DMA were given to national authorities because of the lack of gatekeepers in Finland.
France	N/A	Competition authorities have the same investigative powers under the DMA as they did prior to investigating mergers and anti-competitive practices. This means that authorities could discover a violation of the DMA while investigating under different regulations. The investigative powers: – Hearing of a natural or legal person on the premises of a company, with possible assistance from the competent national authority (Art. 22(2) DMA)

		Inspections requested by the Commission (Art. 23(3) DMA) – Requiring the company or association of companies to provide access to its organisation, operation, computer system, algorithms, data processing and commercial practices (Art. 23(4) DMA) – Active assistance to the Commission (Art. 23(7) and (10) DMA) – Investigation at the request of the Commission (38(6) DMA) – Investigation on its own initiative (38(7)
Germany	N/A	National competition authorities have investigative powers. The Federal Cartel Office can decide to open or not an investigation. It is obliged to inform the Commission of the findings of an investigation. It can publish reports on the findings. If they are published, the company concerned may have to be granted the right to be heard. In parallel to an investigation, administrative proceedings can be conducted. The investigative powers: – Gathering of necessary evidence – Seizing evidence – Requesting of information – Requesting of documents – Inspect and examine business documents during business hours – Search business premises, homes, land and property of companies These powers are limited to matters with a potential impact on Germany.

Greece	The Competition Commission is tasked with (Art. 38 and 39 DMA): – Cooperation with the Commission – Informing the Commission before any investigation or obligation is imposed – Supporting the Commission when required – Forwarding copies of any written judgment of national courts regarding the DMA to the Commission	The Competition Commission has investigative powers.
Hungary	The Enforcement Unit will assist in dawn raids. The Legal Assistance Unit will deal with court procedures. For all other matters, the General Vice-President will appoint an investigator. For enquiries from the Commission, the Cabinet of the President is competent. The Antitrust Unit is responsible for procedures under Art. 80/S Tpvt. For the meetings at the High-Level Group, the President appoints the representative after consulting and approval by the President of the Competition Council and the Unit Supporting Decision-making.	The GVH has investigative powers. Investigations should be concluded by an order of the investigator transmitting the report to the Commission.
Italy	The ICA is tasked with: – Coordination and cooperation The Data Protection Authority is tasked with: – Data protection – Confidentiality	The ICA has the same investigative powers under the DMA as it has under the national competition law. It can use the information collected from an investigation for more general purposes (e.g., to enforce agreements restricting competition, abuse of dominant position, abuse of economic dependence, and merger control). It must inform the Commission before initiating an investigation.

		It must have a resolution that is communicated to the gatekeepers and to those who have filed complaints or petitions related to the investigation. The investigative powers: – Request information – Hold hearings – Conduct inspections Participating parties in an investigation may submit pleadings and have the right to access documents, the disclosure of which must not hinder the Commission's investigation or the adoption of implementing acts.
Latvia	The competition authority is tasked with: – Providing support to the Commission – Providing necessary assistance to the Commission in the preparation and execution of Art. 23 DMA	The competition authority has investigative powers: – Request information – Take statements – Carry out announced or unannounced visits to business premises – Conduct dawn raids warranted by the court
Lithuania	N/A	The authorities do not have investigative powers.
Netherlands[c)]	N/A	The ACM has investigative powers based on the DMA and based on previous existing powers. However, the ACM cannot investigate private homes for DMA matters, while it can under national competition law.
Norway[d)]	N/A	N/A
Poland[e)]	Prezes UOKik is tasked with: – Being a member of the High Level Group (Art. 40 DMA) – Assist the Commission to conduct interviews and take statements (Art. 22(2) DMA) – Assist the Commission when conducting inspections (Art. 23(7) to (9) DMA)	Prezes UOKik has investigative powers. Investigative powers: – Decide to conduct an investigation or not – Collect evidence in the course of the investigation

[c)] The DMA Implementation Act is currently pending before the House of Representatives.
[d)] The DMA is not yet applicable in Norway.
[e)] The act implementing the DSA has not been adopted yet.

	– Receive information regarding DMA violation (Art. 27 DMA) – Cooperate with the Commission (Art. 38(1) to (6) DMA)	– Authorize an employee of Urząd Ochrony Konkurencji i Konsumentów ("UOKIK") to take statements during an investigation led by the Commission (Art. 22 DMA) and to assist the Commission (Art. 22 DMA) – In cases where gatekeepers object to an investigation, employees of UOKIK can enter office premises, request access to documents, request explanations, secure evidence or seek assistance from the police or other organizations
Portugal[f)]	N/A	N/A
Romania	N/A	The Romanian Competition Council ("RCC") has investigative powers. The RCC has to inform the Commission before starting any investigation. The RCC has to submit the findings to the Commission.
Slovakia	N/A	The Antimonopoly Office of the Slovak Republic has investigative powers. Investigative powers: – Investigate to determine if there is a basis for a request for a market investigation (Art. 41 DMA) – Require from any person any information or documents necessary – Make copies and extracts, or require official translations of these documents – Require oral explanations – Investigate on all premises and means of transport which are related to the activity of the company – Seal documents or media on which information is recorded – Seal premises, equipment, or means of transport – To secure access to information stored on an electronic form

[f)] No specific measure to regulate the domestic application of the DMA has been adopted yet.

Slovenia	The Slovenian Competition Protection Agency ("AVK") is tasked with: – Cooperation and coordination with the Commission	Slovenia amended its Prevention of the Restriction of Competition Act (ZPOmK-2) to regulate the procedure and competence for enforcing the DMA and granting the powers to the AVK. The AVK has investigative powers under national competition law.
Spain	The Comisión Nacional de los Mercados y la Competencia (CNMC) is tasked with: – Receiving complaints (Art. 27 DMA) – Deciding on the appropriate measures to take to enquire about a complaint – Informing the Commission before taking investigative measures (Art. 38(7) DMA)	The CNMC has investigative powers. Investigative powers: – Conducting interviews and inspections – Recording and elaborating a transcript of the interviews – Requiring the presence of particular members of the staff when conducting a raid and asking them for particular documents – Powers contained in art. 23(2) DMA – Requesting the corresponding judicial authorisation – Investigating information confidentially without notifying the proceedings to the undertakings – All natural or legal persons and bodies of public administration must collaborate with the CNMC – The information collected during DMA-related investigations may also be used for other competition-related cases
Sweden	N/A	The Swedish Competition Authority does not have investigative powers to initiate and conduct its own investigations under Art. 38(7) DMA. It can conduct investigations at the Commission's request and can support it.

Question 5. Special rules for DMA

Which specific rules, resources or other measures have been adopted regarding the supervisory, investigative and enforcement powers of the competent authorities under the DMA? (e.g., allocation of powers and resources, procedural safeguards, supervisory fees, etc.) How many staff are dedicated to the DMA enforcement?

Regarding staff resources, competition authorities have or will have between one to sixteen employees dedicated to the DMA. Many have noted that no additional resources would be allocated to their competition authorities.

Of three Member States who provided an answer to the financial resources aspect, two said that no additional resources would be allocated.

	Financial Resources	Staff Resources	Procedural Safeguards
Austria	N/A	N/A	N/A
Belgium	N/A	The BCA has 6 full-time employees for the DMA.	N/A
Bulgaria	N/A	N/A	N/A
Croatia	N/A	The CCA has a separate digital unit, which will have 1 employee whose sole responsibility is DMA enforcement.	N/A
Czechia	N/A	N/A	N/A
Denmark	The yearly budget is EUR 536,303.	The Competition and Consumer Authority will have 1 full-time employee dedicated to the DMA.	N/A
Finland	N/A	N/A	N/A
France	No additional resource allocated. A tax could be implemented, but it has yet to be evaluated first.	No additional resource allocated.	N/A
Germany	N/A	Two Decision Divisions within the Federal Cartel Office are dedicated to the digital sector.	N/A
Greece	N/A	N/A	N/A
Hungary	N/A	No specific unit dedicated to the DMA.	N/A
Italy	No additional resource allocated.	No additional resource allocated. The ICA underwent reorganization and has now a Digital Platforms and Communications Directorate.	N/A

Latvia	EUR 154,631.00 for 2024. EUR 151,521.00 for 2025. EUR151,621.00 for subsequent years.	Two new staff positions will be added.	N/A
Lithuania	N/A	N/A	N/A
Netherlands	N/A	The ACM will receive 7 additional full-time employees. Cross-use of resources with other authorities is possible.	Officials must carry an identification card. Officials can only exercise their powers insofar as it is necessary for the performance of their duties. Private homes can only be entered with a prior judicial authorization and the official must write a report on the entry.
Norway	N/A	N/A	N/A
Poland	N/A	N/A	N/A
Portugal	N/A	N/A	N/A
Romania	N/A	The Competition Council has two new departments dedicated to the DMA, with 4 employees. No additional resources allocated.	Procedural guarantees are offered by the Commission as the sole enforcer of the DMA,
Slovakia	N/A	N/A	N/A
Slovenia	N/A	N/A	N/A
Spain	N/A	N/A	N/A
Sweden	N/A	A unit of 16 agents is tasked with responsibility for the DMA.	N/A

Question 6. Initial experiences under the DMA

What are the initial experiences with national competent authorities acting under the DMA (if any)? Did the authorities announce any enforcement priorities?

A few Member States reported that their competition authorities have consulted with the Commission and/or other groups such as the Advisory Committee and the High Level Group. Belgium stated that its competition authority held

consultations with gatekeepers. Spain has reported two cases related to the DMA involving Booking.com and Apple.

Of five Member States who provided an answer concerning enforcement priorities, three have mentioned international cooperation as a priority.

	Initial experiences	Enforcement Priorities
Austria	The Federal Competition Authority is primarily contributing its experience from competition enforcement to the High-Level Group and the Advisory Committee.	N/A
Belgium	The BCA held consultations with gatekeepers and small business users, but no case has been opened. A short guide was published for business users.	N/A
Bulgaria	N/A	N/A
Croatia	No relevant experience so far, and a low level of activities is expected given Croatia's small market. The CCA has conducted market research for food delivery services and online accommodation reservation services.	For 2024, the CCA did not address the DMA directly, but has set as a priority the investigation of exclusionary conduct by dominant companies.
Czechia	N/A	N/A
Denmark	The Authority expects the tasks to be largely coordinated with the Commission.	N/A
Finland	N/A	N/A
France	N/A	The priority is to establish the boundary between the DMA and abuses of a dominant position, prohibited by Art. 102 of the TFEU to decide whether prohibited practices under Art. 102 TFEU fall under the DMA.
Germany	N/A	N/A
Greece	N/A	N/A
Hungary	N/A	N/A
Italy	The ICA has been cooperating closely with the Commission: Digital Market Advisory Committee (Art. 50 DMA) High Level Group (Art. 40 DMA) European Competition Network Informal exchanges	N/A

Latvia	The competition authority participated in the High-Level Group and the Advisory Committee.	For 2024: Monitoring of rapidly evolving and innovative markets Active cooperation with Member States, the OECD, and the Commission
Lithuania	N/A	N/A
Netherlands	N/A	N/A
Norway	N/A	N/A
Poland	N/A	N/A
Portugal		For 2024: Monitoring of trends and developments in the digital area to map out appropriate solutions Strengthening of international cooperation
Romania	N/A	N/A
Slovakia	N/A	N/A
Slovenia	The AVK has cooperated with: The Commission The Advisory Committee The European Competition Network.	N/A
Spain	The CNMC was involved in 2 cases: Booking.com, but which only became a designated gatekeeper after the proceedings Apple regarding the potential unfair terms it had imposed on app developers using the App store	Priorities include: Digital markets Cooperation with the Commission and the European Competition Network
Sweden	Informational efforts to enhance awareness surrounding the DMA: Updating the website Dissemination of information to the public through various channels The competition authority has received inquiries and complaints from business organisations. The competition authority received a tip concerning a gatekeeper, which was reviewed and forwarded to the Commission.	N/A

Section 2: Use of National Legislative Leeway Under the DMA/DSA

Question 1. Pre-emption by the DSA

How are the MSs dealing with the pre-emption effects of the DSA? What happened to the (partially) overlapping pre-existing national laws? (e.g., hate speech notification laws, implementations of the E-Commerce Directive, including provisions on search engines, etc.)

Of the twenty-three Member States, fifteen have answered that provisions in the national laws implementing the E-Commerce Directive have been repealed or will be. Among others, laws concerning consumer protection and cyber-security as well as civil and criminal codes have been partially repealed for overlapping with the DSA. Greece reported that since the national laws and the DSA apply cumulatively, no amendments have been made. Poland noted that the current lack of provisions on search engines creates a legal gap.

	Amendments made to national laws
Austria	Austria refrained from repealing regulations applicable to intermediary services in conformity with Union law, e.g., Hate Online Combating Act. Some sections of the E-Commerce Act were repealed: – s. 13-17 now Art. 4-6 DSA – s. 18 now Art. 8 DSA regarding the monitoring obligation of service providers and (new) S. 13 E-Commerce Act regarding the right to information – s. 19(1) now Art. 4(3), 5(2), 6(4) DSA The Austrian Communications Platforms Act was repealed entirely.
Belgium	Sections of the Economic Law Code were repealed: – Liability of intermediaries – Non-general monitoring obligation of intermediaries – Injunctions and duties to inform competent authorities and law enforcement authorities of illegal activities
Bulgaria	The approach of the draft bill is to make references to powers under the DSA but without abrogating the local legislation.
Croatia	Electronic Media Act: – No overlap, because it does not regulate the behaviour of service providers directly E-Commerce Act: – Overlaps with Art. 4,5, and 6 DMA, but the draft implementing act would repeal them Currently, there is an intention to implement new sectoral regulation that would overlap with the DSA.

Czechia	No modifications have been made yet, but the implement act proposal has been put forward to update existing regulations. The proposal focuses more on procedural obligations, e.g., penalties, since the DSA imposes substantive obligations. The proposal would amend: – Act on Some Information Society Services – Act on On-Demand Audiovisual Media Services – Cybersecurity Act – Act on Consumer Protection – Civil Code There does not seem to be an intention to adopt specific rules at the national level.
Denmark	Section 14-16 of the E-Commerce law were repealed.
Finland	Sections of the Act on Provision of Electronic Communications Services were repealed: Chapter 22: conditional exemption from intermediary liability
France	The Law on confidence of digital economy is amended: – Many definitions refer to Art. 2 DSA – Intervention of judicial authority is adapted – Sections relating to the DSC are created – Sections relating to the anticipation of the DSA are removed Consumer Code is amended: – Definition of "platform" refers to Art. 2 DSA. – DGCCRF is designated as an authority along with Arcom and CNIL The Law on freedom of communication is amended relating to the Arcom's powers. The Law on combating the manipulation of information is amended. The Law on Data Processing, Data Files and Individual Liberties is amended to designate the CNIL as an authority.
Germany	The Network Enforcement Act was almost completely repealed. The Telemedia Act was completely repealed. The Interstate Media Treaty was amended: – Sections on the responsibilities of the state media authorities
Greece	The DSA and the existing legislation cumulatively apply.
Hungary	The implementing act complements the DSA and amended other laws, such as copyright, media law, and electronic commerce rules.
Italy	N/A

Latvia	Amendments to Cabinet of Ministers 08.02.2022 Regulation No. 99 are required. The Ministry of Economics is currently assessing if it is necessary to adopt a new regulation to replace Regulation No. 99.
Lithuania	The Law on Information of Society Services was amended: – Sections on the liability of intermediaries were removed – Sections implementing the E-Commerce Directive were removed – Section on the liability of mere conduit, caching, and hosting service providers was added (Art. 4-6 DSA) Legislation on notice and take down mechanism was repealed.
Netherlands	Dutch Civil Code will be amended: – Section on the liability exemption for providers of mere conduit, caching, and hosting services will be removed Dutch Code of Criminal Procedure will be amended: – Sections on the confidentiality of orders and claims addressed to providers and the postponement of notification to a recipient of a service will be amended
Norway	N/A
Poland	A proposed amendment of the Act on Providing the Services Electronically is the removal of the liability exemptions for providers. There are no specific provisions for search engines, which creates a legal gap. The legal doctrine proposes that the liability exemption for search engines should be clearly addressed in the future amendments. There is a potential conflict between the powers of Prezes KRRiT to order disabling access to certain content and impose penalties to video-sharing platforms, and the powers of the DSC.
Portugal	Proposed amendments are not made public. The current overlaps relate to: – Liability of intermediary service providers. – Supervising, monitoring, removing, and preventing access to protected content (Art. 9 DSA) – Joint liability between online marketplace providers and sellers – Portuguese Charter on Human Rights in the Digital Age (no direct overlap)
Romania	Some sections of the law implementing E-Commerce Directive were repealed.
Slovakia	Sections that overlapped with the DSA were repealed: – Act No 22/2004 Col. Art 6 - Exclusion of liability of the service provider (Arts. 4-6, 8 DSA) was repealed. The Act on electronic commerce was repealed relating to the liability exemption of service providers.
Slovenia	The Electronic Commerce Market Act was repealed relating to the liability of intermediary service providers, data transmission, caching, and hosting services (Art. 4-8 DSA).
Spain	The implementing act has not been adopted.

Sweden	S. 4 of the BBS Act was amended because it overlapped with Art. 8 DSA regarding the imposition of a duty of oversight on providers. Sections of the E-Commerce Act that implemented Art. 12-15 of the E-Commerce Directive were amended because of the DSA.

Question 2. National rules on illegality

Did the Member States try to map the national rules on the illegality of content that is relevant for the DSA enforcement? Were there any notable DSA-related changes in such content rules recently?

Among the seven Member States who have conducted a mapping exercise, three have reported that their implementing acts contain some rules mentioning also the types of illegal content. Croatia's definition of illegal content contained in its implementing act is assumed to be exhaustive. Only France and Latvia have reported that their national regulations have been amended by the DSA concerning illegality of content.

	Mapping	**Changes in content rules**
Austria	The implementing act contains a list of regulations that is relevant for assessing illegal content. Illegal content is a violation of: – Civil law – Copyright law – Administrative law – Consumer protection or product safety law – Criminal law KommAustria has the "typologies of illegal content" on its website.	N/A
Belgium	N/A	N/A
Bulgaria	N/A	N/A
Croatia	The implementing act contains a definition of illegal content: – Criminal act or misdemeanour – Breach of personal data processing legislation – Breach of intellectual property rights – Breach of regulations within the State's – Inspector's powers (e.g., consumer protection and tourism)	No changes.

	– Violation of health, medicine, medical products, and biomedicine aspects It is implied that this list is exhaustive.	
Czechia	No mapping.	N/A
Denmark	A law regulating illegal content on social media was proposed, but it was withdrawn because of the imminent adoption of the DSA.	N/A
Finland	Legislation that deals with illegal content: – Act on Interference in the Dissemination of Terrorist Content Online – Act on Combating the Dissemination of Child Pornography – Copyright Act	N/A
France	There was mapping in the implementing act.	The implementing act modifies the following regulations on the illegality of content: – Law on confidence of digital economy – Consumer Code – Law on the freedom of communication – Electoral Code – Law on combating the manipulation of information – Data Processing, Data Files and Individual Liberties – Law on the status of newspaper and periodical grouping and distribution companies – Law aimed at preserving the ethics of sport, strengthening the regulation and transparency of professional sport and improving the competitiveness of clubs – Intellectual Property Code
Germany	No mapping.	No changes.
Greece	N/A	No changes.
Hungary	Rules identified in the Act CVIII of 2001: – An amendment to the liability rules for electronic commerce service providers – Intermediary service providers are obliged to remove infringing content if they become aware of its infringing nature – Provisions on complaints concerning infringements	N/A

Italy	No mapping.	No changes.
Latvia	N/A	National regulations have been amended to be compliant with the DSA, e.g., the Law on Information Society Services.
Lithuania	The only mapping is with the Law on Electronic Communications, which contains a list of competent authorities able to issue take down orders.	N/A
Netherlands	No mapping.	N/A
Norway	N/A	N/A
Poland	No mapping by the relevant authorities yet. Illegal content should be considered as violating: – Criminal law – Civil law – Intellectual property law – Consumer protection law – Competition law – Media law Rules identified: – Notification of illegal content – Role of NASK, a contact point for illegal content – Website blocking as a measure to address illegal content	No changes.
Portugal	No mapping. The Regulatory Entity for Social Communication stated that it should be made clear which authority will be responsible for illegal content.	No changes.
Romania	No mapping. The principle "what is illegal offline is illegal online" applies, so it has not been deemed necessary to define illegal content under the DSA.	N/A
Slovakia	No mapping.	No changes.
Slovenia	No mapping.	No changes.
Spain	No mapping.	No changes.
Sweden	There was mapping.	No further changes than those mentioned in Question 1.

Question 3. Implementation of the DSA

Apart from the institutional implementation of the DSA, what other related legislative acts were/are considered or adopted on the national level? (e.g., laws on influencers or other content creators, content rules, etc.)

Seven Member States have reported that DSA-related laws have been modified, will be adopted, or are currently under discussion to be adopted. France, Italy, Poland, and Romania have mentioned in this context a law for the protection of minors. France has reported that its law on influencers was modified because of the DSA and Romania is currently issuing recommendations to influencers. Besides that, laws on online violence, freedom of press and deep fakes are being discussed for adoption.

	Other relevant laws
Austria	Already in place before the DSA: – The E-Commerce Act to strengthen the legal position of the victim and law enforcement of online hate
Belgium	No other laws are being considered except those already in place.
Bulgaria	The bill envisions that respective authorities should issue instructions (form of subordinate legislative instruments) for coordination of exercise of their powers.
Croatia	No other laws are being considered except those already in place.
Czechia	No other laws are being considered except those already in place.
Denmark	Already in place before the DSA: – The marketing law to protect children – Government has an expert committee to examine and recommend actions to big search engines, platforms, and social media
Finland	N/A
France	Modified by the DSA: – The Act on the regulation of commercial influence – The Act introducing a digital majority – Titles I and II of the Security and Regulation of Digital Space Act on the protection of minors against pornography and child pornography
Germany	Will be adopted: – A law against digital violence
Greece	Already in place before the DSA: – Legislation about e-commerce and consumer protection – Legislation about hate speech – Legislation about data protection – Legislation about equal treatment in service provision

Hungary	Amendment of Act LXXVI of 1999 on Copyright Amendment of Act CLXXXV of 2010 on Media Services and Mass Media Amendment of Act XXIII of 2023 on cybersecurity certification and cybersecurity supervision Amendment of Act CXCIV of 2011 on the Economic Stability of Hungary Amendment of Act CVIII of 2001 on Certain Issues of Electronic Commerce Services and Information Society Services
Italy	Modified by the DSA: – Law implementing the Directive on Audio-Visual Services to limit communication of audio-visual content by a provider from another Member State – Decreto Caivano for the protection of minors Already in place before the DSA: – Decreto Caivano for the protection of copyright Adopted after the DSA: – (Not legislative) Guidelines on influencers as some obligations imposed on influencers are parallels to the DSA
Latvia	No other laws are being considered except those already in place.
Lithuania	Already in place before the DSA: – Guidelines on Marking information in Social media
Netherlands	No other laws are being considered except those already in place. Already in place before the DSA: – Social Media & Influencer Marketing Advertising Code – Child and Youth Advertising Code – Code of Conduct on Transparency of Online Political Advertisements
Norway	Discussions are currently being held about the need to adopt complementary legislation, e.g., protection of press freedom on digital platforms.
Poland	New: government proposal for law protecting minors from harmful content online; planned for 2025.[a)] Already in place before the DSA: – Law combatting the unfair competition and the unfair market practices – The proposal on the freedom of speech in the social media (2021) might be in conflict with the DSA (dropped)
Portugal	No other laws are being considered except those already in place. Already in place before the DSA: – Law on monitoring, controlling, removing, and preventing access in the digital environment to content protected by copyright and related rights – Influencer Marketing – Information on Rules and Good Practices in Commercial Communication in the Digital Media (Guidelines)
Romania	– Proposals for protection of minors – Proposals for measures against deep-fake content – Recommendations issued to influencers on disclosing commercial intent

[a)] https://www.gov.pl/web/premier/projekt-ustawy-o-ochronie-maloletnich-przed-dostepem-do-tresci-szkodliwych-w-internecie

Slovakia	Already in place before the DSA: – Consumer protection laws – Media Services Act
Slovenia	No other laws are being considered except those already in place. – Draft of the Mass Media Act for the regulation of online safety and influencers
Spain	No other laws are being considered except those already in place. Already in place before the DSA: – Law on Information Society Services and Electronic Commerce – General Law on Audiovisual Communication – General Law on Advertising – Law on Unfair Competition
Sweden	No other laws are being considered except those already in place.

Question 4. Pre-emption by the DMA

How are the MSs dealing with the pre-emption effects of the DMA? (e.g., other rules ensuring fairness and contestability in digital markets)

Most Member States have reported that there was no overlap between the DMA and the national legislation. Only Latvia, Slovenia and Slovakia mentioned provisions of their competition laws were amended. Italy and Spain stated that there might be overlap between the DMA and their national laws on the abuse of economic dependence.

	Dealing with pre-emption effects
Austria	No overlap with national legislation. It coexists with competition law.
Belgium	Two sections of the Economic Law Code might interact with the DMA (but no overlap): – Section on competition law that prohibits the abuse of economic dependency which applies to gatekeepers designated by the DMA – Section on market practices to ensure B2B fairness
Bulgaria[a)]	N/A
Croatia	No overlap with national legislation, because there are no laws to ensure fairness and contestability in digital markets. The only effect is that the DMA prohibits the CCA from conducting investigations under Art. 101 and 102 TFEU, which is in the implementing law.
Czechia	No overlap with national legislation. It coexists with competition law.
Denmark	No overlap with national legislation. It coexists with competition law and electronic commerce law.

[a)] No national legislation implementing the DMA yet.

Finland	N/A
France	Supposedly, no overlap with national B2B law. There could theoretically be overlap with competition law.
Germany	No overlap with national legislation. It coexists with competition law.
Greece	No overlap with national legislation.
Hungary	The rules are applied directly.
Italy	There might be overlap between the DMA and the national law on the abuse of economic dependence.
Latvia	The Competition Law of the Republic of Latvia has been amended: – Investigative powers – Assistance to the Commission – Damages Current amendments are under discussion relating to expanding the competition authority's powers to monitor the abuse of economic dependence.
Lithuania	No overlap with national legislation.
Netherlands	No overlap with national legislation.
Norway	It is unlikely that there will be overlap with competition law.
Poland	No overlap with national legislation. It coexists with competition law.
Portugal	N/A
Romania	No overlap with national legislation. It coexists with competition law.
Slovakia	Sections of national laws that conflicted with the DMA were repealed.
Slovenia	The national competition law was amended to be aligned with the DMA.
Spain	A potential overlap is Art. 3 of the national Competition Act, which prohibits abuse of economic dependence.
Sweden	No pre-emption effects identified yet.

Question 5. Implementation of the DMA

Apart from the institutional implementation of the DMA, what other related legislative acts were/are considered or adopted on the national level?

Only a few Member States are considering adopting new legislation. Austria has reported that many whistleblower-related acts were modified by the DMA. In Finland, the Netherlands, and Norway, there is discussion for the adoption of complementary legislation concerning namely, investigative powers.

	Other relevant laws
Austria	Already in place before the DMA: – Federal Whistleblower Protection Act – State laws regulating whistleblowing protection Modified by the DMA: – Upper Austrian Whistleblower Protection Act – Carinthian Provencal Code of Law – Carinthian Whistleblower Protection Act – MiCA Regulation Enforcement Act – Lower Austrian Information Act – Lower Austrian Whistleblower Protection Act
Belgium	No other laws are being considered except those already in place.
Bulgaria	N/A
Croatia	No other laws are being considered except those already in place.
Czechia	No other laws are being considered except those already in place.
Denmark	No other laws are being considered except those already in place.
Finland	There is a need for complementary provisions concerning: – Information exchange between national authorities and the Commission (Art. 21, 27, 38, and 53 DMA) – Requests and assistance in market investigations (Art. 16(5) and 41 DMA) – Investigative and enforcement powers (e.g., Art. 23(8) DMA)
France	No other laws are being considered except those already in place.
Germany	No other laws are being considered except those already in place.
Greece	Already in place before the DMA: – Legislation about competition – Legislation about e-commerce – Legislation about unfair commercial practices – Legislation about the provision of services
Hungary	No other laws are being considered except those already in place.
Italy	N/A
Latvia	Already in place before the DMA: – Civil Procedure Law
Lithuania	No other laws are being considered except those already in place.
Netherlands	No other laws are being considered except those already in place. However, there is discussion about the introduction of 2 new competencies for the competent authority: – Investigation tool – Call-in power
Norway	There is discussion about the need for additional legislation outside of the DMA.

Poland	No other laws are being considered except those already in place.
Portugal	N/A
Romania	N/A
Slovakia	N/A
Slovenia	No other laws are being considered except those already in place.
Spain	An amendment was introduced to Art. 18 of the Competition Act.
Sweden	No other laws are being considered except those already in place.

Section 3: Vertical and Horizontal Public Enforcement-Related Cooperation Under the DSA/DMA

Question 1. Procedural rules for the DSA/DMA

What procedural or other rules related to the DSA and DMA are relied upon to create effective cooperation, both between national competent authorities of various Member States among themselves and with the European Commission? Do you see any potential challenges in this regard?

In regard to the DSA, half of the Member States reported that their implementing acts set out rules for cooperation between authorities, while others did not implement specific rules beyond what the DSA requires. Among the challenges highlighted, Austria and Portugal have pointed out the difficulty in maintaining the independence of the DSC vis-à-vis the Commission. Moreover, Austria and Lithuania mentioned the challenge of responsibilities overlapping between national authorities as well as with the Commission.

In regard to the DMA, only Belgium and Hungary implemented specific rules concerning cooperation between national authorities. Among the challenges highlighted, Austria, Finland, and Germany stated that the interactions between national competition law and EU law might give rise to difficulties. Belgium and Portugal mentioned that the delineation of responsibilities between national authorities might pose a challenge.

	DSA	DMA
Austria	No specific rules in the implementing act but national law sets out: – Obligation to cooperate with Member States – Authorization to use results of foreign proceedings – Right to be heard – Right to access files and confidentiality restrictions Challenges: – Maintaining independence of the DSC vis-à-vis the Commission – Clear handling of responsibilities between the national authorities and the Commission – Ensuring equivalent and effective legal protection – Use of soft law acts	Challenges: – Challenge in enforcing the DMA due to the interfaces with competition law
Belgium	Cooperation Agreement sets out: – National information sharing system – Obligation for regulators to meet every 3 months – Questions of competences among regulators should be settled by consensus and by inter-ministerial committee if consensus is not possible – Regulators should check before issuing a sanction that an identical one has not already been issued by another regulator – Participation of the DSC and other regulators in the European Board for Digital Services The DSC is currently entering into bilateral agreements with federal regulators that are not competent under the DSA, e.g., Data Protection Authority.	Challenges: – 3 Communities authorities are expected to cooperate with the Commission (on top of the Belgian Competition Authority), but the imprecise nature of their powers, the lack of harmonization between their powers, and the lack of clear framework for cooperation with the Belgian Competition Authority Economic Law Code sets out: – Regulators can inform the Prosecutor General when they believe a market investigation is ecessary – The Prosecutor General should seek the opinion of other regulators – The Belgian Competition Authority Chairman may invite sectoral regulators to the Digital Markets Advisory Committee No specific rules beyond the DMA requirements regarding cooperation with the Commission.
Bulgaria	No national legislation that implements procedures.	No national legislation that implements procedures.

Croatia	Implementing act sets out: – Duty of cooperation between national authorities – DSC is required to ask for the opinion of the relevant authority when creating ordinances for out-of-court dispute resolution bodies and trusted flaggers. No specific rules beyond the DSA requirements regarding cooperation with other Member States and the Commission.	No specific rules beyond the DMA requirements.
Czechia	No specific rules beyond the DSA requirements.	No specific rules beyond the DMA requirements.
Denmark	Implementing act sets out: – The law applies irrespective of whether the inspection is carried out for the purpose of a national case or to assist Member States or the Commission	No specific rules beyond the DMA requirements.
Finland	Implementing act sets out: – Exchange of information and documents between authorities – Authorities can get information from criminal investigations – DSC can get information when necessary for suspected criminal offences (Art. 18 DSA) Challenge: – Delay for Member States to designate their DSC	No specific rules beyond the DMA requirements. Challenges: – Complexity of interplay between EU and national levels
France	Implementing act sets out: – National coordination network for digital services regulation including all the competent administrative authorities and State services Tripartite agreement between the competent authorities under the DSA (Arcom, DGCCRF, and CNIL) regulates their cooperation.	CNIL is part of the European Data Protection Board, which includes the Commission and other Member States.
Germany	Implementing act sets out: – In case of conflict with another Member State, the issue must be brought to the attention of the Commission without delay	The European Competition Network is the coordination mechanism with the Commission. No specific rules beyond the DMA requirements for cooperation between national authorities.

		Challenges: – It will be challenging to ensure a consistent enforcement practice of antitrust rules between national authorities in areas not covered by a DMA decision adopted by the Commission – Although there is an obligation to notify the Commission before imposing obligations on a gatekeeper, the national authority is not obliged to consult with or await an opinion from the Commission, so it remains to be seen to what extent the Commission can influence national authorities that may deviate from its assessment.
Greece	No rules regulate cooperation with other authorities, other Member States, and the Commission.	No rules regulate cooperation with other authorities, other Member States, and the Commission.
Hungary	The implementing act sets out that: – The President of the DSC shall cooperate with DSCs from other Member States, the Commission, and the European Digital Services Board – The President is entitled to request information from other DSCs and the Commission – The President shall provide the information at the request of other DSCs or the Commission. – The DSC shall cooperate with the competition authority – The President can, in a reasoned request, require the transfer of data submitted to another Member State's DSC if the data is necessary for the performance of the President's tasks.	A new chapter has been added to the Hungarian Competition Act regarding cooperation between the competition authority and the Commission: – When the Commission requests the GVH to open an investigation, the rules of the competition procedure apply with derogations specific for DMA investigations – If requested by the Commission or a competent authority under the DMA or by the DMA itself, the GVH shall make the information available – The GVH shall transmit a report to the Commission when investigating compliance with the DMA The Competition Act provides limitation to access to files: – The right of access to the file may not be disclosed where the absence of such documents or information would prevent the exercise of the client's statutory rights

Italy	The DSC signed a collaboration agreement with the Commission to define the procedural framework to exchange information, data, methodologies, systems, and tools to help identify systemic risks with VLOPs and VLOSEs. The DSC has also attended meetings with the European Board for Digital Services for coordination with other Member States.	N/A
Latvia	Implementing act sets out: – Competent authorities shall provide the DSC at its request an opinion within a month	State Administration Structure Law provides that: – Upon request, institutions are required to provide the necessary information or assistance, regardless of their hierarchical status The Competition Law provides that: – The competition authority shall provide all necessary support to the Commission in preparing and executing the activities of Art. 23 DMA – The national police force must assist the Commission where a market participant fails to comply with the procedural obligations of Art. 23(2) DMA – The competition authority is obligation to undertake procedural actions at the request of the Commission in cases involving potential violations of the DMA
Lithuania	Implementing act sets out: – Centralisation of information on take down orders – Distribution of complaints between competent authorities Challenges: – These rules assume that only one authority is competent and do not foresee potential overlap or cooperation between national authorities	N/A

Netherlands	No specific rules beyond the DSA requirements. The DSC had requested a rule according to which the orders to act against illegal content or to provide information sent by the national authorities should be shared with all authorities to avoid individual arrangements, but the request was denied.	No specific rules beyond the DMA requirements for cooperation with the Commission.
Norway	N/A	To be decided.
Poland	To be decided.	There are discussions to amend the Act on Protection of Competition and Consumers to ensure close cooperation between Prezes UOKiK and the Commission.
Portugal	ANACOM (the DSC)'s Statutes sets out: – ANACOM shall establish forms of cooperation at the national or European Union level when necessary or convenient – ANACOM shall ensure its representation at national and international bodies and forums Challenges: – The independence requirements can raise issues since they surpass the limited universe of current independent administrative bodies	Procedural rules set out by the DMA: – Formal consultation mechanisms between national authorities and the Commission – Coordinated investigation – Join enforcement of actions Challenges: – The separation of powers among the competent authorities might not be clear – Limited resources of national authorities – Complexity of transactional investigations involving multiple Member States
Romania	Implementing act sets out: – The DSC and national authorities can share data and consult each other – The DSC can request the support of any national authority – The DSC can request that national authorities participate in working groups	No specific rules beyond the DMA requirements for cooperation with the Commission. No challenges are foreseen.
Slovakia	Media Services Act sets out: – DSC prepares COM annual reports – DSC cooperates with the COM – DSC cooperates with other Member States and the Commission No major challenges expected.	Challenges are currently being observed.

Slovenia	No rules for cooperation with other Member States and the Commission. No major challenges so far, but they are to be expected.	No specific rules beyond the DMA requirements for cooperation with the Commission. As cooperation with the Commission and other national authorities is well established under Art. 101 and 102 TFEU, no additional challenges are foreseen.
Spain	N/A	No specific rules beyond the DMA requirements for other national authorities and Member States. For the Commission, a joint investigation unit has been created.
Sweden	The Complementary Act sets out: – The DSC is tasked with leading a coordination mechanism with relevant competent authorities – Competent authorities must provide the DSC with information and support	N/A

Question 2. Interaction with national courts

Which measures apply specifically to the role of national courts and their interaction with the European Commission (COM) in the context of the DSA and DMA (e.g., possible submission by COM of written or oral observations, avoidance of national court decisions running counter to COM decisions, transmission of national judgments)?

Most of the Member States have not implemented specific measures, so interactions with the Commission would rely on Article 82 of the DSA and Article 39 of the DMA. The Netherlands amended their General Civil Procedural Code to allow civil courts to judge on the application of the DMA in private disputes and to allow the Commission to provide written and oral observations to Dutch courts. Hungary's Competition Act provides that a copy of the final judgment decided by a national court should be transmitted to the Commission. Latvia also amended its Civil Procedure Law for DMA matters.

	DSA	DMA
Austria	No specific measures, so cooperation would rely on Art. 82 DSA. There are general procedural rules not related to the DSA but that can be applied.	No specific measures, so cooperation would rely on Art. 39 DMA.
Belgium	No specific measures, so cooperation would rely on Art. 82 DSA.	No specific measures, so cooperation would rely on Art. 39 DMA.
Bulgaria	No specific measures, so cooperation would rely on Art. 82 DSA.	No specific measures, so cooperation would rely on Art. 39 DMA.
Croatia	No specific measures, so cooperation would rely on Art. 82 DSA.	No specific measures, so cooperation would rely on Art. 39 DMA. There are rules about cooperation between courts contained in the Competition Act.
Czechia	No specific measures, so cooperation would rely on Art. 82 DSA.	No specific measures, so cooperation would rely on Art. 39 DMA.
Denmark	No specific measures, so cooperation would rely on Art. 82 DSA.	No specific measures, so cooperation would rely on Art. 39 DMA.
Finland	The Act on the Publicity of Court Proceedings in General Courts sets out: – A trial document is public unless it needs to be kept secret for a listed reason or because of a court order The Act on the Publicity of Administrative Court Proceedings sets out: – Provisions of the Act on the Openness of Government Activities and other legislation apply to the publicity and confidentiality of court documents, unless otherwise stipulated in the Act	No specific measures, so cooperation would rely on Art. 39 DMA.
France	No specific measures, so cooperation would rely on Art. 82 DSA.	No specific measures, so cooperation would rely on Art. 39 DMA.
Germany	No specific measures, so cooperation would rely on Art. 82 DSA.	No specific measures, so cooperation would rely on Art. 39 DMA.
Greece	No specific measures, so cooperation would rely on Art. 82 DSA.	No specific measures, so cooperation would rely on Art. 39 DMA.
Hungary	N/A	The court issuing the decision sends a copy of the final judgment to the National Office, who forwards a copy of the final judgment without delay to the Minister responsible for Justice for transmission to the Commission.

Italy	No specific measures, so cooperation would rely on Art. 82 DSA.	No specific measures, so cooperation would rely on Art. 39 DMA.
Latvia	– Decisions of the DSC may be appealed before the Administrative District Court – Decisions cannot be challenged before the DSC, only in appeal – The Commission has the right to submit written or oral observations to the national courts – The DSC carry out its tasks unless the Commission has initiated proceedings	– Cases concerning breaches of DMA are to be heard by the Economic Court of the Republic of Latvia in accordance with civil procedure – Upon initiating a case, the court must send a copy of the claim and the decision to initiate the case to the competition authority in 7 days – After the judgment, the Economic Court must send a copy of it to the competition authority and the Commission in 7 days. – (proposed) the Economic Court must suspend proceedings if there is an ongoing investigation by the competition authority or Commission. – The Economic Court's decisions must not be contradictory to the Commission's decisions.
Lithuania	No specific measures, so cooperation would rely on Art. 82 DSA.	No specific measures, so cooperation would rely on Art. 39 DMA.
Netherlands	No specific measures, so cooperation would rely on Art. 82 DSA.	General Civil Procedural Code was amended: – Civil courts can judge on the application of the DMA in private disputes – Commission is allowed to provide written and oral observations to Dutch courts (Art. 39 DMA)
Norway	The DSA does not yet apply in Norway, but the submission of written observations as provided for in Article 82(2) could also be based on provisions of the Norwegian Dispute Act.	The DMA does not yet apply in Norway, but the submission of written observations as provided for in Article 39(3) could also be based on provisions of the Norwegian Dispute Act.
Poland	No specific measures, so cooperation would rely on Art. 82 DSA.	No specific measures, so cooperation would rely on Art. 39 DMA.
Portugal	No specific measures, so cooperation would rely on Art. 82 DSA.	No specific measures, so cooperation would rely on Art. 39 DMA.
Romania	No specific measures, so cooperation would rely on Art. 82 DSA.	No specific measures, so cooperation would rely on Art. 39 DMA.

Slovakia	Administrative Procedure Code sets out: – Commission is allowed to be heard before the court and submits its observations – Court has to allow access the Commission access to court files and documents – Court is bound by a decision from the Commission	
Slovenia	No specific measures, so cooperation would rely on Art. 82 DSA.	Rules that apply to competition law and which apply to the DMA by extension: – Where the Commission issues a decision based on Art. 101 or 102 TFEU, the court must send a copy of the written opinion to the competition law agency and parties – The competition law agency may submit written opinions to the court – Where the competition law agency gives a written opinion based on Art. 101 or 102 TFEU, it must send a copy to the Commission – The court itself may request the opinion of the Commission – in such a case, it must inform the parties thereof and, upon receipt of the opinion, send a copy of the opinion to the competition law agency and the parties to the proceedings.
Spain	N/A	No specific measures, so cooperation would rely on Art. 39 DMA.
Sweden	No specific measures, so cooperation would rely on Art. 82 DSA.	N/A

Question 3. National authorities and the DMA

Are there areas of the DMA (e.g., particular obligations or categories of core platform services) for which you consider that the role of national competition authorities is or is likely to be particularly useful in bringing to the attention of the Commission information about possible non-compliance with the DMA under Article 27 DMA?

Croatia answered that their competition authority might be able to provide valuable insight in the tourism sector for core platform services, while Spain stated that their competition authority will be useful in four different types of core platform services (online advertising services, online social networking services, online intermediation services, and number-independent interpersonal communication services).

Austria, Germany, the Netherlands, and Portugal have reported that their competition authorities could be useful in filtering and investigating potential breaches of the DMA.

	Areas
Austria	The competition authority could be useful in 2 ways: – Subordinate role to the Commission where there is a potential breach of the DMA – Filtering role by sorting cases that are solely to do with antitrust law and not the DMA.
Belgium	N/A
Bulgaria	It can be assumed that the competition authority can signal to the Commission valuable information and important cases on misleading information dispersed via platform services.
Croatia	It is unlikely that the competition authority will be particularly useful in bringing to the Commission's attention information about possible non-compliance. However, it might provide valuable insight in the tourism sector for core platform services.
Czechia	N/A
Denmark	Cooperation could be particularly useful for: – Assessment of technical details – Requirements related to data access
Finland	N/A
France	The competition authority issued 2 opinions on: – Competitive operation of cloud computing – Competitive operation of the generative artificial intelligence sector
Germany	The competition authority can be useful in 2 ways: – Act as a filter and messenger, by forwarding information to the Commission – As a first point of contact for information from commercial users, competitors or end users.
Greece	N/A
Hungary	N/A
Italy	N/A
Latvia	The competition authority is well-positioned to monitor compliance with local undertakings. The competition authority is likely to be the first point of contact for companies at risk of violations of the DMA.
Lithuania	It is unlikely that the competition authority will be particularly useful in bringing to the Commission's attention information about possible non-compliance.
Netherlands	The competition authority will be useful: – By filtering and investigating complaints on behalf of the Commission – With its knowledge of the competition sector in the Dutch context – With its experience in enforcing competition law in digital markets

Norway	N/A
Poland	No areas are identified.
Portugal	The competition authority can be useful for areas where experience and investigative capacity are essential to identify and report breaches as well as perform and monitoring roles.
Romania	No areas are identified.
Slovakia	No areas are identified.
Slovenia	No areas are identified.
Spain	The competition authority will be useful in 4 different types of core platform services: – Online advertising services – Online social networking services – Online intermediation services – Number-independent interpersonal communication services Regarding enforcement, the competition authority is also knowledgeable in competitive dynamics of online intermediation services, with experience in sanctioning Amazon and Apple.
Sweden	As there are large tech firms in Sweden, they may provide tips. Game developers who conduct transactions through platforms could become relevant.

Section 4: Private Enforcement of the DSA/DMA

Question 1. National experience

In your Member State, can you observe any actions brought by private parties before national courts to enforce the provisions of the DSA or DMA? If so, please describe the relevant experience.

Only a few Member States reported actions before national courts to enforce the DSA. Germany had a case dealing with Articles 54, 16, and 20 of the DSA. There is also an ongoing case against Etsy for various breaches of transparency obligations. The Netherlands reported a case involving Articles 12 and 17 in the context of shadow banning, and a case involving Articles 16 and 23 of the DSA in the context of intellectual property infringement.

No specific actions were reported concerning the DMA.

	DSA	DMA
Austria	Several cases relating to: – Provision of information data for the purpose of clarifying a concrete suspicion of a defamation offense – Claims for injunctive relief against the dissemination of content infringing personal rights with effect for Austria, Germany, and Switzerland and how the DSA affects the assessment of the applicable law – International jurisdiction regarding claims for information against a service provider in the context of the Brussels I Regulation – Exclusions of liability standardized in Art. 4 DSA in relation to the national law	No actions.
Belgium	No actions.	No actions.
Bulgaria	N/A	N/A
Croatia	No actions.	No actions.
Czechia	No actions.	No actions.
Denmark	No actions.	No actions.
Finland	N/A	N/A
France	No actions.	No actions.
Germany	Only a small number of published court decisions: – One case that dealt with Art. 54, 16, and 20 DSA[a)] – Some cases addressed the question of future regulations under the DSA and their retroactive effect (but did not answer the question)[b)] There is also an ongoing case against Etsy for various breaches of transparency obligations.[c)] The action against TEMU has been withdrawn.[d)]	It can be assumed that there are pending actions, especially with the recent waves of actions against large platform companies in Germany.
Greece	No actions.	No actions.
Hungary	No actions.	No actions.

[a)] LG Berlin, judgment of November 21, 2023 – 27 O 97/22.
[b)] E.g. OLG Dresden, judgement of December 5, 2023 – 14 U 503/23.
[c)] https://www.wettbewerbszentrale.de/wettbewerbszentrale-klagt-gegen-etsy/
[d)] https://www.wettbewerbszentrale.de/dsa-verfahren-temu-verpflichtet-sich-zur-unterlassung/

Italy	N/A	No actions. However, the gap in the adoption of specific private enforcement rules for the DMA makes it harder to detect pending cases.
Latvia	No actions.	No actions.
Lithuania	No actions.	No actions.
Netherlands	2 cases relating to: – An X user claimed to have been shadow banned and Art. 12 and 17 DSA were breached by the provider in doing so.[e)] – Erasmus University sought a technical remedy whereby a note-sharing website would take action to prevent infringement of the University's intellectual property, but the Court explained that Art. 16 and 23 DSA were not breached, as there is no obligation to filter content beforehand.[f)]	N/A
Norway	No actions because the law is not yet implemented.	No actions because the law is not yet implemented.
Poland	No actions. There is proposal for the adoption of provisions relating to civil law claims of service recipients affected by an infringement of the DSA.	No actions.
Portugal	No actions.	No actions.
Romania	No actions.	No actions.
Slovakia	N/A	N/A
Slovenia	N/A	N/A
Spain	No actions.	No actions.
Sweden	No actions.	No actions.

[e)] Amsterdam District Court, July 5, 2024, ECLI:NL:RBAMS:2024:3980, https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBAMS:2024:3980

[f)] Amsterdam District Court, July 24, 2024, ECLI:NL:RBAMS:2024:4425, https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBAMS:2024:4425&showbutton=true&keyword=Studeersnel&idx=1

Question 2. Causes of action and likely litigation of the DSA

What are the actual or expected causes of action under national law to privately enforce the DSA? What are their limits and opportunities? How likely is the use of private redress, including collective redress or contract law, in your Member State to enforce the DSA? What type of actors do you expect to be most likely to engage in private enforcement?

Many Member States identified the difficulty of proving the existence of a breach or proving the extent of damages as a potential limitation. Another limitation mentioned by Member States is the fact that parties might be deterred from filing a lawsuit because such difficulty to demonstrate the damages and because of the costs and hassle. Most answers to the question on opportunities focused on collective procedure.

Among the Member States who answered positively to the likelihood of private redress, most specified that collective redress would be most likely.

In regard to the types of actors to be most likely to engage in private enforcement, most Member States mentioned intermediary services providers, while Slovakia and Slovenia answered consumer organisations.

	Causes	**Limits and pportunities**	**Likeliness of private redress**	**Types of actors**
Austria	Basis: – Art. 14, 16, 17, 20, and 21 DSA Causes – Disclosure of user data Injunctive relief and removal due to violation of personal rights, specifically for online hate speech – Damages and losses	Limits: – Proving the existence of a breach might be difficult because general rules of evidence apply – Parties might be deterred from filing a lawsuit, especially in the case of scattered damage, because of the low claims and high risk Opportunities: – Class actions could be a better form of redress	N/A	Intermediary service providers Service users
Belgium	N/A	N/A	N/A	N/A

Bulgaria	N/A	N/A	Private enforcement is unexplored under national law.	N/A
Croatia	Basis: – Art. 9, 10, 21, 22, 51(1)-(3), 53 DSA	N/A	N/A	Intermediary service providers Service users
Czechia	Basis: – Competition or consumer protection Causes: – Non-consensual use of personal data	Limits: – Costs and hassle of individual private lawsuits Opportunities: – The recent adoption of the Act on Collective Civil Court Procedure might encourage more private enforcement – Out-of-court dispute resolution as an alternative	Not likely before the adoption of the implementing act. Even after the adoption, public enforcement is more likely.	N/A
Denmark	Causes: – Contesting competent authority's decisions or failure to act – Violation of the DSA	N/A	Complaints to the competent authority are more likely than lawsuits.	Business organisations
Finland	No specific rules for private enforcement, so general rules apply.			
France	Basis: – Intellectual property – Competition	N/A	N/A	Intermediary service providers Service users
Germany	Causes: – Art. 25 DSA – Art. 54 DSA – Violations of personality rights	N/A	Private redress is likely regarding violations of personal rights.	Individual users Business users Competitors
Greece	Basis: – Civil tort based on unfair competition	N/A	N/A	Service providers only on the basis of civil tort

Hungary	Basis: – Liability in tort for incompliance with the DSA Causes: – Interference with fundamental rights – Limiting access to resources for market players – Content interfering with the plaintiff's rights	Opportunities: – National tort law is flexible, and a great variety of cases are possible – Another remedy available is prohibiting the service provider from the behaviour that threatens by causing damage, which can be combined with an injunction order	N/A	N/A
Italy	Causes: – To oblige the service provider to comply with the DSA – To recover damage caused by failure to comply with the DSA	Opportunities: – New Art. 840 of Civil Procedure Code provides that non-profit organizations or organizations whose objective is the protection of individual rights or members of a class action can file a lawsuit against a public services provider, which might facilitate actions as opposed to individual actions	N/A	N/A
Latvia	– Contractual breaches – Non-compliance with consumer protection regulations	Limitations: – Establishing causation or demonstrating a direct link between the non-compliance and the harm suffered can complex – Obtaining such evidence can be challenging due to the technical compleity of digital services and the often cross-border.	Collective actions are likely	Businesses Consumers

		Nature of the digital service providers Opportunities: – A decision on interim relief may be taken by the DSC based on a prima facie finding of an infringement where it has reason to believe that the recipients of the service provided by online intermediary are likely to suffer significant harm and urgent action there is required		
Lithuania	Basis: – Intellectual property	N/A	Not likely, as private collective redress are not developed in Lithuania.	N/A
Netherlands	Causes: – Claims for damages based on tort law or unjust enrichment – Preliminary injunctions – Claims for condemnatory relief – Claims for declaratory relief – Nullity of contracts	Limits: – For damage-based claims, it will be hard to prove and quantify damages, demonstrate a causal link between the infringement and the damages	Likely Mass or bundled actions are more likely than individual actions because of the cost of litigation	Business users End users
Norway	N/A	Limits: – Class actions might be hard to finance because it relies on an opt-out model where class members cannot be held liable for legal costs or remuneration of the class representative	N/A	N/A

Poland	Causes: – Compensation for damages – Compensation for violation of personal rights – Contractual liability and compensation for breach of contract	N/A	Some possibilities offered by the law on collective redress amended in 2024 to facilitate consumers bringing collective actions.	Based on a recent case pre-DSA: – NGOs – Associations – Service providers
Portugal	Causes: – Extracontractual liability – Injunctions – Collective actions	N/A	Currently, collective redress is not common.	N/A
Romania	N/A	N/A	N/A	N/A
Slovakia	Anticipated: – Claims for damages	N/A	Unlikely	Consumer organisations
Slovenia	Basis: – Tort law – Contract law – Consumer protection law – Data protection law Causes: – Claims for damages due to infringement of the DSA – Breach of contractual obligation	Limits: – Proving the existence of damages	Collective actions are more likely than individual actions.	Consumer organisations

Spain	Basis: – Non-contractual liability – Consumer law – Unfair competition	Opportunities: – For collective complaints, there are two paths available simultaneously: representation regarding the responsibility of intermediary service providers (Art. 86 DSA) and representation regarding consumer rights (Directive 2020/1828)	N/A	N/A
Sweden	N/A	N/A	Private redress is likely to be limited.	N/A

Question 3. Causes of action and likely litigation of the DMA

What are the actual or expected causes of action under national law to privately enforce the DMA? What are their limits and opportunities? How likely is the use of private redress in your Member State? What type of actors do you expect to be most likely to engage in private enforcement?

Similar to the DSA, most Member States answered that a limitation is the quantification and proof of damages. Austria and Germany also identified the risk of national courts and the Commission arriving at divergent interpretations.

Out of the twenty-three Member States, nine answered that the use of private redress was unlikely. Member States who answered private redress was likely mentioned different circumstances. Namely, Austria mentioned that follow-on actions are more likely, while Germany mentioned that actions led by consumer associations are probably going to become more relevant.

Among the types of actors that were named, competitors, end users, and consumer organisations were identified.

	Causes	Limits and Opportunities	Likeliness of private redress	Types of actors
Austria	Basis: – Tort law – Unfair competition Causes – Claims for damages – Injunctive relief	Limits: – Determining and quantifying damages – For stand-alone actions (as opposed to follow-on actions): risk of different interpretations of the DMA provisions by the Commission and national courts	Follow-on actions are more likely	Competitors of gatekeepers
Belgium	N/A	N/A	N/A	N/A
Bulgaria	N/A	N/A	Private enforcement is unexplored under national law.	N/A
Croatia	N/A	N/A	N/A	N/A
Czechia	Basis: – DMA – Competition laws, e.g., TFEU or national law	N/A	Unlikely, given that private enforcement will probably be at the EU level and not the national level	N/A
Denmark	Causes: – Contesting competent authority's decisions or failure to act – Violation of the DMA	N/A	Complaints to the competent authority are more likely than lawsuits.	Business organisations
Finland	No specific rules have been adopted for private enforcement, so general rules apply.			
France	N/A	Limits: – Evaluation of damages	Likely because: – There is already private enforcement under Art. 102 TFEU – 20 years of experience in competition law enforcement means lawyers, counsels, judges, etc. are	Businesses

			better equipped to deal DMA enforcement – Applying prohibitions per se will be easier than prohibitions based on unfair competition – CJEU might see private enforcement as an essential pillar for DMA enforcement.	
Germany	Injunctions are expected to become more relevant. Preliminary rulings from German civil courts and CJEU are likely to have a special role in the context of legal uncertainty. As opposed to antitrust law, follow-on actions are not likely for the DMA, because violations are practiced openly and are addressed by the Commission quickly.	Limits: – Art. 5-7 DMA are not interpreted uniformly by courts – Lack of guidance from the Commission's decision-making practice or procedures might lead to national judges arriving at different interpretations – Proving causal damage in civil proceedings	Likely, because the evidence requirements are lower than traditional abuse control. Collective redress is not likely to become relevant. Redress action led by consumer associations is more likely to become relevant (Art. 42 DMA).	Competing service providers End users
Greece	Basis: – Competition law – Tort law	N/A	N/A	Competitors Users

Hungary	Causes: – Damages action	Limitations: *See next column.*	Unlikely because proving the causal link and the amount of loss resulted from the violation of the DMA may create obstacles for bringing claims before courts.	N/A
Italy	N/A	N/A	Unlikely for the time being, because private enforcement of the DMA has not yet been regulated	N/A
Latvia	N/A	N/A	Unlikely	End users and business users of core platform services
Lithuania	N/A	N/A	Unlikely because private enforcement is rarely used in competition cases	N/A
Netherlands	Causes: – Claims for damages based on tort law or unjust enrichment – Preliminary injunctions – Claims for condemnatory relief – Claims for declaratory relief – Nullity of contracts	Limits: – For damage-based claims, it will be hard to prove and quantify damages, demonstrate a causal link between the infringement and the damages – Information is often kept by gatekeepers and not accessible – The cost of quantifying damages might deter parties	Likely Mass or bundled actions are more likely than individual actions because of the cost of litigation	N/A
Norway	*See Question 2.*			

Poland	N/A	N/A	Unlikely Although the law on collective redress was amended in 2024 to facilitate consumers bringing collective actions.	Larger e-commerce platforms that are gatekeepers' business users
Portugal	N/A	N/A	Collective redress is unlikely	N/A
Romania	N/A	N/A	N/A	N/A
Slovakia	Claim for damages	N/A	Unlikely	Consumer organisations
Slovenia	Basis: – Unfair competition – Contract law Claim for damages	Limits: – Private actions might be limited by the need to align with or wait for the Commission's findings – Proving damages may require complex resources Opportunities: – Introduction of collective actions and growing role of the EU in regulating digital markets could encourage more private actions	Unlikely, because there are no gatekeepers established in Slovenia.	Businesses that rely on digital platforms Consumer associations
Spain	Causes: – Violation of one of the DMA provisions – (Once it is transposed in the national law) collective action through the Representative Actions Directive (Art. 42 DMA) Basis: – Non-contractual liability	Opportunities: – A private party can take action against other private parties (e.g., gatekeepers) for breach of other laws to demonstrate unfair competition	Not likely, because of the leeway the DMA allows for forum shopping	Consumers Business users
Sweden	N/A	N/A	N/A	Competitors

Question 4. Specific rules for the DSA/DMA

Have any specific national rules been adopted (or planned for adoption) for private enforcement of either DMA/DSA (e.g., taking inspiration from the national rules transposing the antitrust Damages Directive)? Is there any plan to allocate cases concerning the DMA/DSA to a specific court or chamber and if so, which one?

Concerning the DSA, only France reported that some measures have been amended for the DSA and Poland mentioned proposals for the adoption of measures. Concerning the DMA, only Germany reported that specific rules have been extended to the application of the EU Regulation.

While most Member States do not have a specific court or chamber, Lithuania, Norway, and Slovenia have designated a court. Germany designated a court for DMA matters and mentioned the possibility of DSA disputes falling within a court's area of specialization. Latvia also proposed to designate a court for DMA matters.

	Specific Rules	**Specific court or chamber**
Austria	DSA: no specific rules. DMA: no specific rules, but regulations based on the German model have been proposed and regulation at EU level based on the Damages Directive has been considered.	DSA: no specific court, except for information orders which go to the Court of First Instance.
Belgium	N/A	N/A
Bulgaria	DSA: According to the bill, the DSC is designated to certify out-of-court resolution bodies. DMA: N/A.	The Sofia City Administrative Court is designated as competent to order measures for removal of content.
Croatia	DSA: No specific rules. DMA: N/A	N/A
Czechia	No specific rules.	Unlikely that there will be specific courts or chambers designated. With the Collective Civil Procedure Act, the Municipal Court in Prague has sole jurisdiction for collective claims, which could include the DSA and DMA.
Denmark	No specific rules.	No specific courts.
Finland	No specific rules.	No specific courts.

France	DSA: the following provisions have been amended: – Concerning the role of courts relating to online communication to the public – Concerning measures to stop or prevent damage caused by the content of an online public communication service DMA: no specific rules, but a law on collective action has been proposed which would include DMA breaches.	N/A
Germany	DSA: No specific rules. DMA: provisions concerning private enforcement of antitrust law based on the Antitrust Damages Directive have been partially extended to the DMA – Parties are entitled to claims for removal and injunctive relief – Parties are entitled to claim compensation – Decisions from the Commission are binding in regard to violations and appointment of gatekeepers – Possible to order the publication of binding decisions from authorities – Parties can claim for the disclosure of evidence and provision of information against the gatekeeper – Federal Cartel Office is allowed to intervene as an "amicus curiae"	DSA: No specific court, but there might be a regional court and a higher regional court designated if DSA-related disputes fall under a specialized area. DMA: antitrust chambers of regional courts have jurisdiction for DMA disputes.
Greece	No specific rules.	No specific court. However, the Court of First Instance in Athens and Thessaloniki has exclusive competence for data protection and e-communication.
Hungary	No specific rules.	No specific court.
Italy	DSA: N/A DMA: no specific rules. However, the Associazione Italiana Giuristi Europei has requested the implementation of specific rules.	DSA: N/A DMA: no specific court.

Latvia	No specific rules.	DSA: N/A DMA: (proposed) Economic Court of the Republic of Latvia
Lithuania	No specific rules.	The administrative courts will be competent.
Netherlands	No specific rules.	N/A
Norway	No specific rules, proposed or adopted. The Damages Directive has not yet been incorporated into the EEA Agreement, so it could not serve as a model. Nonetheless, private enforcement of competition law does take place, which could be the same for the DSA and DMA.	Some specialised courts and specialised out-of-court dispute resolution bodies exist in specific fields, e.g., relating to consumer disputes.
Poland	DSA: following rules have been proposed: – Interrelations between civil and administrative proceedings – Competent authorities may present opinions to the courts, if it is of public interest – Courts should inform the competent authorities about the claim and about the binding rulings DMA: No specific rules, proposed or adopted. However, there are discussions to broaden the application of the national law implementing the Damages Directive to the DMA.	DSA: (proposal) regional courts for matters of Art. 54 DSA. DMA: no specific court.
Portugal	No specific rules.	No specific court.
Romania	DSA: no specific rules. DMA: N/A	DSA: no specific court. DMA: N/A
Slovakia	No specific rules. However, the law on collective actions applies.	No specific court.
Slovenia	DSA: No specific rules, proposed or adopted. DMA: No specific rules, proposed or adopted. However, the law on collective actions applies.	DSA: The Nova Gorica District Court has exclusive jurisdiction for requests for the removal of illegal content from the Internet (Art. 9 DSA). Initially, the Ljubljana District Court held exclusive jurisdiction, but due to

		this court's overload of other cases, the exclusive jurisdiction was soon transferred to the District Court in Nova Gorica. Actions against the supervisory authorities' decisions against internet intermediaries in a supervisory procedure may be brought before the Administrative Court of the Republic of Slovenia. DMA: No special court, proposed or adopted. Actions against the competition agency can be brought before the Administrative Court.
Spain	DSA: N/A DMA: No specific rules, proposed or adopted.	DSA: N/A DMA: No specific court.
Sweden	No specific rules, proposed or adopted.	No specific court.

Question 5. Civil society and interventions

Does the national procedural law allow civil society organisations to intervene in pending private disputes in support of the public interest? If so, how difficult or costly is it, and how does it work?

Only in Lithuania, Slovenia, and Spain, civil society organisations are not allowed to intervene. In most Member States, the criteria for allowing the participation of civil society organisations are a legitimate legal interest and that the case falls within the scope of the organisation. Two Member States indicated that organisations should cover their legal costs, while three indicated the opposite. Norway, Portugal, and Sweden reported that the organisations would pay only where the case is not successful.

	Allowed	Criteria	Difficulty or cost	How it works
Austria	Yes.	Legal interest that goes beyond a mere economic and public interest.	Costs are covered by litigation funding or state subsidies. A fee can be agreed upon, that may not exceed EUR 250.00 and 20% of the amount of the claim.	N/A
Belgium	Yes.	Interest corresponds to the organisation's corporate purpose and aims at protection human rights or fundamental freedoms.	N/A	N/A
Bulgaria	No.	N/A	N/A	N/A
Croatia	Yes.	Legitimate interest and relevance.	Organisations may have to bear the procedural costs.	1. Organisation files a request to the court 2. Court evaluates the organisation's standing and interest 3. Possibility to appeal the court decision
Czechia	Yes.	Legal interest that is beyond a moral or general interest.	N/A	1. Organisation notifies the court of their intention to intervene. 2. The party must consent to the intervention. In the cases of collective actions, consumer associations are meant to initiate the dispute on their own.
Denmark	Yes.	Legal interest.	The costs might be covered by the organisation or by the parties, depending on the outcome of the case.	Organisation submits a written or oral application to the court. The court decides how the intervener may participate in the case and if it allowed to submit evidence.

Finland	Yes, but it is the exception.	The matter concerns their rights and plausible reasons are presented.	N/A	N/A
France	Yes, to intervene or initiate.	N/A	N/A	N/A
Germany	Yes.	Legal interest, which is not simply economic, idealistic or an actual interest, or the interest of others.	No costs incurred by the court, but there might be attorney fees.	The organisation can perform all procedural acts if they do not contradict the declarations and actions of the main party. The intervention is declared by a written statement submitted to court.
Greece	Yes, but only in consumer protection and data protection cases.	N/A	N/A	N/A
Hungary	Yes.	They do not have the right to claim for damages; they can only submit claims for public interests.	N/A	N/A
Italy	Yes.	N/A	N/A	N/A
Latvia	N/A	N/A	N/A	N/A
Lithuania	No.	N/A	N/A	N/A
Netherlands	Yes, pursuant to the Representative Actions Directive.	N/A	N/A	N/A

Norway	Yes. They are also allowed to submit observations without intervening.	If the case falls under the purpose and normal scope of the organisation.	If the action is successful, the legal costs might be covered by the opposing party. If the action is unsuccessful, the organisation might be liable to cover the legal costs of the opposing party. In the case of submitting only observations, the organisation must support its own costs and is not liable for costs from the opposing party.	1. Intervention is declared to the court and must be motivated. 2. Parties may contest the intervention.
Poland	Yes, to intervene or initiate.	The case must be within the organisation's statutory goals. It can only be in relation to: – Consumer protection – Environment – Industrial property – Equality and non-discrimination	Organisations are exempt from court proceedings costs.	N/A
Portugal	Yes, through voluntary joint litigation.	The case is to protect constitutional interests. The case is within the organisation's purpose.	If the case is successful, the organisation does not pay the costs. If the case is not successful, the organisation will pay between 1/10 and 1/2 of the costs.	1. The organisation submits an application to the court. 2. The organisation can accept the case as it stands when it joins.

Romania	Yes.	Legal interest.	The organisation will need to cover the cost of the stamp for the request.	1. The organisation submits a request to the court. 2. If the request supports the public interest, it will be qualified as an accessory request which can be filed at any times throughout the trial before the closing of debates.
Slovakia	Yes.	In support of public interest.	N/A	The court might bring in the organisation without motion if the main party agrees. For consumer associations, it needs to be on the List of Entitled Persons to be allowed to initiate a collective action.
Slovenia	No.	N/A	N/A	N/A
Spain	No.	N/A	N/A	N/A
Sweden	Yes	N/A	The losing party bears the costs.	N/A

Section 5: General Questions

Question 1. Orders under the DSA

Did your Member State specifically implement Articles 9 and 10 of the DSA in the national law? And if yes, in what way, and why? Does the national law specifying injunctions according to Articles 4(3), 5(2) and 6(4) meet the requirements of oversight by authorities or courts? Are there any specific rules, or cases in this regard in your jurisdiction?

Regarding the implementation of Articles 9 and 10 of the DSA, five Member States specifically implemented them in their national law, and Slovakia and Slovenia only did for Article 9. Six Member States implemented the articles

only by referring to the DSA in their national laws, and six Member States did not implement the articles.

Many Member States reported that Articles 4(3), 5(2) and 6(4) were not implemented in their national law. The ones that did implement the articles reported that the national law met the requirements of oversight.

	Implementation of Art. 9 and 10 DSA	**Does the law meet the requirements of oversight?**	**Specific rules or cases**
Austria	The national E-Commerce Act already contained provisions which regulate orders of Art. 9 and 10 DSA.	Yes, as these injunctions were already implemented in the national law with the E-Commerce Directive.	Because cases of hate online are often cross-borders, the national law has specific rules for these cases.
Belgium	N/A	N/A	N/A
Bulgaria	N/A	N/A	N/A
Croatia	They are transposed in the implementing act: – Competent authorities to issue orders are designated – Authorities have to issue the orders ex officio – Content of the orders is not directly regulated but rather refers to the DSA – The delivery time is recorded as the time when the order has been sent	Injunctions issued by courts: Yes, they would be subject to ordinary judicial oversight. Injunctions issued by competent authorities: Yes, they would be subject to administrative judicial oversight.	There have been multiple cases on the constitutionality of the General Administrative Procedures Act and the conclusions have been that the law meets the criterion of effective judicial oversight and right to a fair trial.
Czechia	They are transposed in the draft implementing act: – There are requirements for the content of orders in general and for criminal proceedings	Art. 4(3), 5(2), and 6(4) DSA are not implemented in the draft implementing act.	N/A
Denmark	They are transposed in the implementing act, which refer to the requirements of Art. 9(2) and 10(2) DSA.	Art. 4(3), 5(2), 6(4) DSA are not implemented in the implementing act.	N/A

Finland	They are transposed in the implementing act, which refer to Art. 9 and 10 DSA. Provisions of the PECSA, the law implementing the E-Commerce Directive, which was after modified by the DSA, also contains provisions regarding to information orders.	N/A	N/A
France	They are transposed in the implementing act: – Search, investigation, injunction and penalty powers of the Arcom are defined – Arcom can collect undertakings from platforms which would become mandatory and require that action plans are submitted – Arcom can request the court to order a temporary restriction order to access a provider – Arcom can issue monetary sanctions if injunctions are not followed	Arcom's decisions regarding injunctions can be contested before the State Council.	*See first column.*
Germany	They have not been implemented.	Art. 4(3), 5(2), 6(4) DSA are not implemented in the implementing act.	N/A
Greece	They are transposed in the implementing act, which refer to Art. 9(2) and 10(2) DSA.	They meet the oversight requirements.	N/A
Hungary	N/A	N/A	N/A
Italy	They have not been implemented.	N/A	N/A

Latvia	The Cabinet of Ministers shall be authorized to issue legal acts to regulate on: – Information to be specified in the decision referred to in Art. 9 DSA – Procedure for attaching an annex to the decision referred to in Art. 9 DSA where the decision relates to the restriction of multiple online resources – Time limit for the execution and operation of the decision referred to in Art. 9 DSA – Conditions and procedure for the inclusion of the information contained in the decision referred to in Art. 9 DSA or in an annex in a machine-readable list maintained by the authority – Procedure for communicating the decision referred to in Art. 9 or the request for information referred to in Art. 10 DSA and information on the execution thereof to the DSC	N/A	N/A
Lithuania	They are implemented in the national law only by reference.	N/A	The authorities must obtain approval from the administrative court before issuing orders.
Netherlands	They have not been implemented because of their direct effect.	N/A	When orders originate from criminal law, Art. 9 (3)-(5) and 10(3)-(5) can be put aside.
Norway	N/A	N/A	N/A

Poland	They are transposed in the draft implementing act, but it is still under discussion.	N/A	N/A
Portugal	They have not been implemented.	Art. 4(3), 5(2), 6(4) DSA are not implemented in the implementing act.	N/A
Romania	They are transposed in the implementing act.	Decisions taken pursuant to Art. 4(3), 5(2), 6(4) DSA are overseen by at least one court.	N/A
Slovakia	Art. 9 was transposed in the implementing act to complement the existing law on: – Identification and localisation information – Information on legal basis – Information on territorial scope – Information on public administration bodies – Delivery through electronic contact points – Establishment of a special time period to submit objections against decisions on the prevention of the dissemination of illegal content	Art. 4(3), 5(2), 6(4) DSA are not implemented in the implementing act.	N/A
Slovenia	Art. 9 is transposed in the implementing act.	N/A	The implementing act adopts a graduated approach to the choice of possible measures for removing illegal content which can be imposed on hosting providers, mere conduit providers, registries, and domain registrars.

Spain	The implementing act refers to Art. 9 and 10 DSA, but fails to incorporate in a right way the spirit of the articles and the referral is included in the wrong place in the national legislation	Art. 4(3), 5(2), 6(4) DSA are not implemented in the implementing act.	The DSC now has the power to transmit a copy of the orders to act against illegal content or the delivery of information received by it to other DSCs.
Sweden	The implementing act refers to Art. 9 DSA	N/A	The implement act provides that: – Decisions made by supervisory authorities may be appealed when they are made under the DSA, legal acts adopted pursuant to the DSA, the implementing act, or regulations in connection – Appeals to the Administrative Court of Appeal require leave to appeal

Question 2. Legal representatives under the DSA

Are you aware of the services of legal representatives according to Article 13 DSA being provided in your Member State? If so, please describe the situation.

Only Austria, Belgium, Germany, and the Netherlands have reported that legal representatives were appointed by service providers in their countries.

	Appointment of Legal Representatives
Austria	Only one service provider has appointed legal representatives.
Belgium	These intermediary service providers had appointed legal representatives: – Telegram – Samsung Electronics
Bulgaria	No legal representatives appointed.
Croatia	No legal representatives appointed.
Czechia	No legal representatives appointed.
Denmark	No legal representatives appointed.
Finland	N/A
France	No legal representatives appointed.

Germany	There are already providers that have legal representatives available for communication and coordination with supervisory authorities.
Greece	N/A
Hungary	No legal representatives appointed.
Italy	No legal representatives appointed.
Latvia	No legal representatives appointed.
Lithuania	No legal representatives appointed.
Netherlands	Several have appointed legal representatives. Their contact details must be shared with the DSC. They will be consulted by the competent authorities or the Commission concerning compliance with the DSA.
Norway	N/A
Poland	No legal representatives appointed.
Portugal	No legal representatives appointed.
Romania	No legal representatives appointed.
Slovakia	N/A
Slovenia	No legal representatives appointed.
Spain	No legal representatives appointed.
Sweden	No legal representatives appointed.

Question 3. National DSA complaints

Did the national law adopt any specific approach vis-a-vis complaints according to Article 53 of the DSA? (e.g., limiting them only to systemic violations)

Only Denmark, France, and Poland have reported that their national laws adopt a specific approach.

	Specific Approach
Austria	No specific approach.
Belgium	No specific approach.
Bulgaria	No specific approach.
Croatia	No specific approach. The approach is rather perfunctory.
Czechia	No specific approach.
Denmark	The authority can reject complaints without further assessment. There is no possibility to appeal the decisions of authorities before a higher public authority, only before national courts. The Minister for industry, business and financial affairs can adopt rules on submission of complaints.

Finland	No specific approach.
France	The tripartite agreement between the Arcom, CNIL and DGCCRF regulates cooperation between the authorities for handling complaints.
Germany	The DSC is the central and sole body receiving complaints. No further specific approach.
Greece	No specific approach.
Hungary	No specific approach.
Italy	N/A
Latvia	The DSC will deal with complaints according to the procedure laid down in the Law on Submissions,
Lithuania	No specific approach.
Netherlands	No specific approach.
Norway	N/A
Poland	Although the complaints are not limited to systemic infringements, the general approach focuses on systemic infringements.
Portugal	No specific approach.
Romania	No specific approach.
Slovakia	No specific approach.
Slovenia	No specific approach.
Spain	N/A
Sweden	No specific approach.

Question 4. Political controversy of the DSA/DMA

Were the DSA or DMA subject to political controversy during the implementation on the national level, and if so, why?

Criticism for the DSA and DMA varies among the different Member States.

Concerning the DSA, four Member States identified controversy surrounding the lack of clarity regarding the competent authorities' powers. Two Member States mentioned the orders to act against illegal content as a point of contention.

Concerning the DMA, two Member States reported that the lack of enforcement powers for their competent authorities drew criticism.

	Political Controversies
Austria	No controversies for the DSA, but there was criticism for: – Data protection provisions – Information mechanism for removal orders (Art. 9 DSA) – Lack of clarity on the provisions on which individuals can rely to assert their claims No controversies for the DMA, but there was criticism for: – Individual deadlines for the designation procedure should be shortened in order to speed up the process – Greater account should be taken of the customer need for customizability of contracts and facilitation of a change of provider – Interoperable cloud infrastructure components should be more widely used and consideration should be given to avoid lock-in effects and promoting offers – Taxation of the digital sector and online platform work should not have been excluded
Belgium	N/A for the DSA. No controversies for the DMA.
Bulgaria	No controversies yet.
Croatia	No controversies for the DMA. For the DSA, there were 2 issues: – The lack of clear division of jurisdiction among the different authorities – The lack of clarity concerning the extent of the powers of HACOM (DSC) to issue take down notices for illegal content during elections
Czechia	No controversies for the DMA and the DSA.
Denmark	For the DSA, there was criticism concerning: – Provision which states that when handling complaints, the authority should rely on the purpose of the DSA to prioritise or not complaints – which showed a lack of clarity according to some – Derogation of the Law on Access to Documents – which was not necessary according to some – The designation of a single competent authority – which could lead to some issues where the subject matter is also within the scope of the competence of other authorities For the DMA, there was criticism concerning: – Provision that grants the competent authority the right to request all necessary information and require explanations – lack of clarity and wide discretion was criticized by some – Derogation from the Law on Access to Documents – which was not necessary according to some – Provision granting the right to the competent authority to impose daily or weekly fines for supplying information that is incorrect, incomplete or not within the deadline – it was not necessary because the – Commission is the sole enforcer and the fine level appears to be high

Finland	No controversies for the DMA and the DSA.
France	The DSA was criticized for not regulating platforms strictly enough and for allowing extra-judiciary censoring practices. The DMA was criticized for undermining legal certainty and stifling innovation.
Germany	No controversies for the DSA. For the DMA, there was criticism concerning: – Lack of enforcement powers of the Federal Cartel Office – Decentralized law enforcement involving national competition authorities is called for – The continued application of a provision of the Act Against Restraints of Competition which clashed or overlapped with the Art. 1(5) and (6) DMA – Designated gatekeepers are generally unable to provide objective reasons or legitimate interests or efficiencies to justify prima facie unlawful conduct with regard to DMA violations
Greece	No controversies for the DMA and the DSA.
Hungary	No controversies for the DMA and the DSA.
Italy	No controversies for the DMA and the DSA.
Latvia	No controversies for the DMA and DSA. There were some concerns which were addressed during the revisions of the draft law.
Lithuania	No controversies for the DMA and the DSA.
Netherlands	The DSA was criticized for: – Lack of clarity for who determines the illegality of content The DMA was criticized for: – Not leaving a bigger role for national competition authorities
Norway	No controversies for the DMA and the DSA for the time being, apart for the "two pillar challenges" and the potential transfer of authority to ESA and/or the Commission.
Poland	No controversies for the DMA. Under the DSA, the section on legal grounds and national procedures for issuing orders addressing illegal content was subject to controversies raised by NGOs (e.g., Panoptykon) and politicians. Controversies concern excessive powers of Prezes UKE and lack of sufficient judicial control.
Portugal	For the DSA, there is the issue of the lack of clarity concerning the allocation of powers between competent national authorities. No controversies for the DMA.
Romania	For the DSA, the designation of the DSC was presented in some media as the creation of an internet police.
Slovakia	No controversies for the DMA and the DSA.

Slovenia	No controversies for the DMA and the DSA, apart from discussion concerning the designation of an authority to decide on the illegality of content.
Spain	No controversies for the DMA.
Sweden	There was only one referral body that expressed concern for the potential risks of granting the competition authority new powers for the DMA because of the untested nature of the legal framework.

Question 5. Measures to supporting the DSA/DMA ecosystem

Which measures have been taken, or are foreseen, to support the creation of out-of-court dispute resolution bodies, trusted flaggers, DSA/DMA-focused consumer organisations, and data access requests by researchers? Did the national legislature or regulators adopt any specific approaches in this regard?

Concerning the out-of-court resolution bodies and trusted flaggers, many Member States have adopted measures regarding who can qualify, financing, the approval process, and appeal mechanisms.

No Member States have reported any measures adopted for consumer organisations.

For data access requests by researchers, France reported to have set up access for researchers. Germany has published an information page and an application will be made available.

	Out-of-court Dispute Resolution Bodies and Trusted Flaggers	**Consumer Organisations**	**Data Access Requests**
Austria	Concerning trusted flaggers, the implementing act provides that: – An application form must be used – KommAustria is responsible for revoking the approval of trusted flaggers – Appeals against revocation decisions have no suspensive effect	No measures.	N/A
Belgium	The selection procedure has not been adopted yet. The implementing act provides that the DSC should indicate which competent authority is responsible for accrediting the applicant.	N/A	Same as out-of-court dispute resolution bodies and trusted flaggers.
Bulgaria	According to the bill, the DSC is designated to certify out-of-court resolution bodies.	N/A	N/A

Croatia	Draft implementing act provides that: – HACOM shall adopt ordinances governing the creation and certification of out-of-court dispute resolution bodies and trusted flaggers within 3 months of the adoption of the implementing act – HACOM shall consult with the competent authority	No measures.	No measures.
Czechia	No measures.	No measures.	No measures.
Denmark	DSA: There are several conditions to be met to become an out-of-court dispute resolution body. DMA: No measures.	N/A	N/A
Finland	Concerning out-of-court dispute resolution bodies, there are no measures. Concerning trusted flaggers, Traficom must notify the approved bodies at the EU level.	N/A	N/A
France	DSA: Concerning trusted flaggers, procedures are currently being drafted. DMA: No measures.	N/A	Arcom has organised its internal interface mission to allow access for researchers.
Germany	DSA: An online form and guide were set up to apply for certification for out-of-court dispute resolution and trusted flaggers. DMA: No measures.	No measures.	An information page has been set up and an application form will be made available.
Greece	No measures.	No measures.	No measures.
Hungary	DSA: Concerning trusted flaggers, the implementing act provides that: – The President of the DSC keeps a register. – The President decides to suspend or revoke the status. – The register is public and available on the DSC's website. Concerning out-of-court dispute resolution bodies, the implementing act provides that:	N/A	The President of the DSC keeps a register. The register is public and available on the DSC's website.

	– They are responsible for attempting to reach an amicable settlement. If unsuccessful, they can make a recommendation. – The body cannot be an administrative authority, and it cannot have judicial or administrative powers. Its procedure is not official procedure. It shall establish its own rules of procedure. – It shall report annually on cases in which the online platform operator has failed to comply with the decision or recommendation. – The rules concerning the initiation of the procedure, the examination of the application, and the proceedings are also provided in the implementing act.		
Italy	Concerning out-of-court dispute resolution bodies, an applicant may already be certified as an ADR body in another sector.	No measures.	No measures.
Latvia	Latvia has decided not to establish out-of-court resolution bodies at this point. There are no trusted flaggers.	No consumer organizations.	No established mechanisms for data access requests.
Lithuania	The CRA has adopted the Description of the supervision procedure for the provision of mediation services provided for in Regulation (EU) 2022/2065, which provides procedures and conditions for applying as an out-of-court dispute resolution body or trusted flagger.	No measures.	No measures yet, but they will be published in the future.
Netherlands	The Ministry of Internal Affairs announced that it is studying the possibility of creating or endorsing with journalists, universities, and other members, a trusted flagger and out-of-court dispute resolution entity. Individuals cannot qualify as trusted flaggers, but associations representing right holders and individual companies can. The Minister is not answering the request to provide more detailed procedures to certify trusted flaggers, out-of-court dispute resolution bodies, and vetted researchers.	N/A	N/A

Norway	No measures.	N/A	N/A
Poland	N/A	N/A	N/A
Portugal	No measures.	No measures.	No measures.
Romania	Measures have been adopted.	N/A	Measures will be adopted in 2025.
Slovakia	No measures.	No measures.	No measures.
Slovenia	The implementing act provides for co-financing of trusted flaggers' activities if deemed necessary (by AKOS). No new measures concerning out-of-court dispute resolution bodies.	N/A	N/A
Spain	Out-of-court dispute resolution bodies: – The DSC can certify bodies and elaborate a biannual report (Art. 21 DSA) – The DSC can grant, suspend and withdraw the condition of a trusted flagger (e.g., Art. 22 DSA)	No measures.	No measures.
Sweden	The establishment of out-of-court resolution bodies is still under discussion.	N/A	N/A

Question 6. Special attention to selected issues

Are there any other specific provisions or issues relating to the DMA/DSA that received particular attention from the side of practitioners (service providers, lawyers, regulators) or academics in your MS, because they are seen as controversial, complex or unclear? If so, please specify. Please limit yourself to issues that may be of relevance from a European perspective.

Various concerns were reported by Member States.

Concerning the DSA, Austria, Denmark, Germany, and Slovenia highlighted issues with delegated acts such as out-of-court resolutions bodies, trusted flaggers, or researchers. Denmark, Poland, and Slovenia noted concerns with the GDPR or other personal data laws.

Concerning the DMA, the ex-ante nature of the regulation raised concerns according to Denmark, the Netherlands, and Slovakia. Moreover, the overlap with Article 102 TFEU was also noted by Czechia and Portugal as a source of concern. Germany, Netherlands, and Portugal mentioned issues with Articles 5 to 7 of the DMA.

	DSA	DMA
Austria	– Incorporation and horizontalization of the effects of Union fundamental rights in the relationship between the service provider and its users is unclear. – Transfer of far-reaching powers to certain actors, e.g., out-of-court dispute resolution bodies is questionable concerning the protection of fundamental rights. – The role of the Commission in the enforcement of the DSA was examined, especially in relation to other legal acts, e.g., DMA – The importance of clear tertiary legal requirements for independent review (Art. 37 DSA) was emphasized in the context that the DSA takes a self-regulatory approach. – The legal basis for claims for damages (Art. 54 DSA) is not harmonized and leads to a fragmentation of the internal market and the level of protection in actions for damages.	No issues yet.
Belgium	N/A	N/A
Bulgaria	Since the authorities to be designated to deal with the DSA/DMA have no experience, there is potential for many claims for state liability due to omission to act/take measures and lack of implementation on national level.	
Croatia	No issues yet.	No issues yet.
Czechia	– The Deputy Prime Minister for Digitalisation views the blocking measures to online services as a significant threat to the development of free digital markets. – Stakeholders seek clarity on how information sharing with law enforcement authorities will be managed.	– The Commission's process for selecting gatekeepers. – Prospects for a parallel private enforcement of the DMA and Article 102 TFEU.
Denmark	– Difficulty in locating mere conduit and caching services. – The DSA's use of delegated acts, e.g., for access for researchers to data, has led to a delay which is difficult to communicate to the persons affected. – Lack of a specific time limit for removal of illegal content has been criticized. – The interaction between the DSA and other acts, e.g., GDPR, is very complex	– The DMA being an ex-ante regulatory tool is an issue.

Finland	– The approach is not radical enough to reach the potential of the DSA and DMA – More active dissemination is required	
France	– There was a controversy surrounding the adoption of a Law on influencers and the provisions not in accordance with EU law were later removed. – The DGCCRF noticed that the economic actors on which diligence obligations are imposed are concerned with the lack of clarity of those obligations.	– The concept of cumulative legislation is unclear. – The legal nature of the ex-post aspect of the DMA is debated. – The possibility of implementing structural solutions is debated.
Germany	– There was criticism for the system of trusted flaggers and how it will play out in practice	– The ne bis in idem principle concerning the imposition of fines. – Concerning the duties of conduct, matters with cross-border implications. – The burden of presentation and proof in civil proceedings. – The manner with which German civil courts should deal with the categorical nature of Art. 5 to 7 DMA – To what extent proceedings in which courts have to ignore potentially valid objections to anti-competitive effects or justifications will lead to inequitable results.
Greece	No issues yet.	No issues yet.
Hungary	N/A	N/A
Italy	No issues yet.	No issues yet.
Latvia	No issues yet.	No issues yet.
Lithuania	– Google's proposal to limit the application of the DSA to the providers established in Lithuania was rejected and then accepted. – Internet media association has proposed to clarify that service providers only become aware of the infringing information is they receive credible data, which was accepted.	N/A
Netherlands	– Role of VLOPs and VLOSEs in the procedures is unclear.	– Risk of over-inclusiveness of the Regulation given its ex-ante nature. – Designation of gatekeepers – Art. 5 to 7 DMA have been discussed in terms of scope and enforceability.
Norway	No issues yet.	No issues yet.

Poland	– Role played by the supervisory authority for personal data – Proposal for regulation of orders in the amended Act on Providing Services by Electronic Means should be discussed – Legislative proposal for amendments of the civil procedure to enable claims against unknown defendants to facilitate lawsuits of online defamation.	
Portugal	– Art. 6(1)(a) DSA because the judgment of illegality implied in it was noted to foster conflicts – The possibility of the notice and action mechanisms being used to notify the platforms of breaches to their Terms and Conditions was discussed – The degree of diligence of an online platform when issuing an opinion on the illegality of the content under Art. 16(2) and Art. 14(4) DSA was discussed.	– Prohibitions of Art. 5 DMA are too inflexible as they do not demand corresponding proof of the harmful effects of a behaviour – The DMA imposes a one-size-fits-all approach to gatekeepers with considerably diverse business models – Ne bis in idem principle raises some concerns as the obligations of Art. 6 and 7 DMA seem to arise from court disputes in the context of Art. 102 TFEU – The DMA was criticized for having broad remedies while EU competition law imposes specific reparations rules – The possibility that access controllers not based in the EU will prefer to provide their services to less regulated territories – The possibility that only Big Tech companies will be able to afford compliance with the DMA
Romania	No issues yet.	N/A
Slovakia	Nothing specific.	– the relevance of legal basis of the DMA and its relationship with competition law, – claims for damages, private enforcement under DMA – applicability of competition-like efficiencies of EU-style rule of reason in the context of the ex ante regulation by the DMA.
Slovenia	The Ministry of Digital Transformation identified the following provisions as unclear: – Art. 22 (trusted flaggers) – Art. 40(4) (data access and scrutiny) – Art. 53 DSA (right to lodge a complaint) The Information Commissioner notes that Art. 26 and 28 overlap with the GDPR.	No issues yet.

Spain	N/A	– Implementation of the regulation at the national level might be problematic due to the lack of a clear reference to any rule relating to how private enforcement should work in practice – Risks might arise from the interactions between the Commission as the sole enforcer and the national application of competition law – Problems might arise from the potential overlap with the merger control regime
Sweden	N/A	– Private enforcement – Interplay between the DMA and the antitrust legal framework

EUROPE'S DIGITAL REVOLUTION: THE DSA, THE DMA, AND COMPLEMENTARY REGIMES

TOPIC II – INSTITUTIONAL REPORT

P.J. Loewenthal
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At the end of 2022, two pieces of landmark legislation regulating the provision of certain digital services in the European Union ("EU") – the Digital Services Act ("DSA")[1] and the Digital Markets Act ("DMA")[2] – were adopted. Two years following their entry into application, the present Report aims to analyse this new regulatory framework and take stock of the first experiences gathered in its application, as well as to map the broader regulatory context in which to place that framework. To that aim, this report consists of three parts. Part I examines the DSA and the DMA as a whole and places them alongside the various complementary EU legal regimes that regulate the provision of digital service in the EU. Part II focuses specifically on the DSA, while Part III focuses specifically on the DMA.

PART I: GENERAL OVERVIEW AND COMPLEMENTARY REGIMES

A. Introduction

While the DSA and the DMA pursue different objectives, vary in their scope of application, and are likely to have a different impact on European society, they share common origins and features. The rules that those acts lay down were in fact meant to form part of a single legislative instrument regulating the provision of digital services in the EU, but the aforementioned divergences rendered such an approach impractical. The consequence is two separate acts whose main common feature is that they redefine the regulatory landscape for providers of digital services in the EU, tilting the balance of the relationship in favour of users.

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[1] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (OJ L 277, 27.10.2022, p. 1).

[2] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (OJ L 265, 12.10.2022, p. 1).

The first part of this report explores the convergences and divergences between the DSA and the DMA, while placing those acts within the broader regulatory framework governing the provision of digital services in the EU. It begins by exploring the economic and regulatory climate within which those acts were adopted. It then examines the common legislative origins of those acts, turning to the divergences in objectives and obligations, which explains the differing scopes of application of each act and their expected impact on society. It also compares the new supervision and enforcement frameworks created by those acts, and explains how those acts will apply alongside other acts regulating the provision of digital services in the EU, many of which were only enacted after the DSA and the DMA came into force.

B. Europe's digital deficit

Europeans are often accused of over-regulation. "While Americans innovate, Europeans regulate" is an oft-repeated refrain. Europe's seeming failure to reap the benefits of the technology revolution following the launch of the Internet is cited as a case in point. Of the top-ten tech companies in the world as measured by total revenues, eight are American, two are Chinese, and none are European. Of the top-fifty tech companies worldwide, only four are European.[3] It is this lack of tech companies which best explains the divergent economic fortunes of the United States ("U.S.") and the EU since the start of the new millennium.[4] Europeans' regulatory zeal – so the argument goes – must therefore explain the lack of innovation in digital services, which cannot thrive in an environment hostile to business.

Yet, when it comes to digital services, the EU barely regulated their provision until very recently. In fact, prior to 2019, only one EU law directly regulated the provision of such services: the e-Commerce Directive of 2000.[5] What is more, that directive took a hands-off approach to such regulation. Giving effect to the freedom to provide services, the e-Commerce Directive is based on the "country-of-origin" (or "home State control") principle, according to which providers of information society services established in the EU need only comply with the rules on such services in the Member State in which they are established (the Member State of establishment) in order to provide their services in all other

[3] M. Draghi, *The future of European competitiveness*, September 2024, p. 5.

[4] Ibidem, p. 20: "The key driver of the rising productivity gap between the EU and the US has been digital technology ("tech") – and Europe currently looks set to fall further behind. […] In fact, if we exclude the tech sector, EU productivity growth over the past twenty years would be broadly at par with the US […]. Europe is lagging in the breakthrough digital technologies that will drive growth in the future."

[5] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce") (OJ L 178, 17.7.2000, p. 1).

Member States.[6] The flipside of that principle is that other Member States are prohibited from imposing general obligations on those providers that restrict their freedom to provide their services in those Member States (the Member States of destination).[7] In addition, the e-Commerce Directive introduced exemptions from liability for intermediary service providers which, subject to certain conditions and exceptions, shielded them from being held liable for the content uploaded to their service by users, however harmful that content may be.[8] Finally, that directive introduced a prohibition on general monitoring obligations, which means that the Member States were prohibited from obliging, in a general manner, providers of intermediary services to assess whether content uploaded to their services complied with the law prior to that uploading.[9]

If anything, the e-Commerce Directive was actually the biggest obstacle to national digital market regulation in the EU during the past quarter century.[10] Member States that wished to address the societal and competitive harms associated with the provision of digital services were severely limited in adopting measures regulating such services in relation to providers not established in their territory, however noble the objectives pursued or problematic the harms that those measures sought to address. The e-Commerce Directive only permitted those Member States to adopt *ad hoc* measures, subject to stringent substantive and procedural requirements with which most measures with even the most noble objectives had difficulty complying.[11]

Similarly, it was only from the late 2010s onwards that the practices of digital service providers were seriously scrutinised under the EU antitrust rules. Apart from the seminal Microsoft decision of 2004,[12] the Commission's application of the antitrust rules to prominent digital service providers only began in earnest a few years before the Commission's DMA proposal, with three decisions fining Google for various anticompetitive practices in the late 2010s,[13]

[6] Art 3(1) e-Commerce Directive.

[7] Art 3(2) e-Commerce Directive.

[8] Arts 12 to 14 e-Commerce Directive.

[9] Art 15 e-Commerce Directive.

[10] A case in point is Case C-376/22, *Google Ireland and Others*, EU:C:2023:835, in which the Court held that an Austrian law requiring providers of online platforms operating in Austria to have a notice and action mechanism in place was incompatible with the country-of-origin principle. A case currently pending before the Court is Case C-188/24, *WebGroup*, which deals with the question whether French legislation penalising the distribution of pornography to minors constitutes an impermissible restriction in relation to the Czech-based pornography platform XVideos.

[11] Art 3(4) e-Commerce Directive.

[12] Commission Decision C(2004) 900 final of 24 May 2004 relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement against Microsoft Corporation.

[13] Commission Decision C(2017) 4444 final of 27 June 2017 relating to proceedings under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.39740 – Google Search (Shopping)); Commission Decision C(2018) 4761 final of 18 July 2018 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.40099 – Google Android); and Commission Decision C(2019) 2173 final of 20 March 2019 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.40411 – Google Search (AdSense)).

a commitment decision in relation to Amazon[14] adopted in 2022 and decisions fining Apple[15] and Meta[16] for anticompetitive conduct in 2024.

In short, Europeans' alleged regulatory zeal cannot explain the lack of EU companies among the top tech companies worldwide. That there is a lack of EU companies among the top providers of digital services worldwide does not detract from the fact that Europeans rely heavily on such services. This is true both for European citizens and businesses. The top-ten tech companies worldwide are often the top-ten providers of digital services in the EU. Google Search, Amazon Store, Apple's App Store, Facebook, Instagram, TikTok and X (formerly Twitter) command an important share of their respective markets in the EU and have become a ubiquitous part of Europeans' lives. The providers of those services have generated considerable revenues in Europe, in some cases more than in their home countries. European residents rely on those services for much of their information, goods, and services, and European businesses rely on those services to reach European consumers.

For over a decade, those digital services have had a profound impact on European society, some, but not all of it, good. It is in response to several high-profile cases demonstrating the societal and competitive harms that accompany the provision of digital services in the EU that Europeans have finally demanded their representatives to hold providers of those services accountable for their (in)actions and the resulting harms. That is where the DSA and the DMA come in. However, while the DSA and the DMA mark a distinct change in the regulatory environment applicable to the provision of digital services in the EU, many of the concepts and tools that they deploy are already well known to regulators and the industry.

The DSA is the successor to and was inspired by several soft-law instruments adopted in the late-2010s that sought to address certain societal harms to which the provision of specific digital services give rise. The European Commission's initial forays into the area that would later be governed by the DSA began by emphasising self-regulation and voluntary codes of conduct,[17] but quickly turned to contemplating legislative solutions to address those societal harms.[18]

[14] Commission Decision C(2022) 9442 final of 20 December 2022 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.40462 - Amazon Marketplace and AT.40703 – Amazon Buy Box).

[15] Commission Decision C(2024)1307 final of 4 March 2024 (Case AT.40437 – Apple – App Store Practices (music streaming)).

[16] See Commission Press Release, "Commission fines Meta €797.72 million over abusive practices benefitting Facebook Marketplace," 13 November 2024.

[17] Commission Communication "A Digital Single Market Strategy for Europe (COM/2015/0192 final)" and Communication "Online platforms in the Digital Single Market – Opportunities and Challenges for Europe" (COM/2016/0288 final).

[18] See Commission Communication "Tackling Illegal Content Online – Towards and Enhanced Responsibility of Online Platforms" (COM/2017/0555 final) and Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online (OJ L 63, 6.3.2018, p. 50).

As for the DMA, the excessive duration of antitrust investigations and the high burden of proof to establish infringements of the competition rules drove the search for a "new competition tool" that was meant to bring certainty through *ex ante* regulation. Given the rapid pace of innovation by which digital markets are characterised, the choice was made to devise that tool to bring contestability and fairness to those markets. The resulting prohibitions and obligations imposed by the DMA on gatekeepers operating in EU digital markets essentially correspond to those practices which had been found to be anticompetitive time and again and for which there were no conceivable efficiency defences.

All this means that the DSA and the DMA should not be seen as a radical break with the past. The doctrine and case-law that has developed in relation to the notions and practices which the DSA and DMA have made their own remain relevant for the future, but new ground will be broken, particularly in relation to notions and practices that are new or broadly defined.

C. Common origins

At their heart, the DSA and the DMA serve a common purpose: to regulate the provision of digital services in the EU. This also explains why both acts share the same legal basis: Article 114 of the Treaty on the Functioning of the European Union ("TFEU"). Unlike EU legislation regulating the provision of digital services before it, the DSA is not merely about removing barriers to the cross-border provision of digital services, nor is the DMA simply *ex ante* competition law enforcement in digital markets.

Article 114 TFEU allows the European Parliament and the Council to adopt legislative acts which have as their objective the establishment and functioning of the internal market. Unlike Articles 53 and 62 TFEU, which allow the EU legislature to adopt directives for the purpose of removing impediments to the taking-up and pursuit of the cross-border provision of services, and Articles 101 and 102 TFEU, which allow the Commission to sanction anti-competitive conduct, Article 114 TFEU allows the EU legislature to regulate the conditions under which the exercise of cross-border economic activities, of which the provision of digital services clearly qualifies, takes place in the EU. In other words, the DSA and the DMA should be compared to any other regulation of economic activity in the EU, for example, similar to telecoms, banking, and transport regulation.

However, whereas telecom and transport regulation are primarily about liberalising previously State-operated markets, the DSA and the DMA, like banking regulation, should be seen as a response to the societal and competitive harms that have been identified and studied over the past two decades as emanating from the provision of digital services. Several high-profile cases

concerning certain digital services have brought those harms to the fore: the Cambridge Analytica scandal, the whistleblower Frances Haugen's revelations about Facebook's deliberate failure to protect teenagers using its service, Epic Game's challenge to Apple's profiteering by charging exorbitant fees for hosting its apps on the App Store, and Amazon's practices of collecting and leveraging customer data from its business users. These are but a handful of pertinent examples of where legislative action was considered necessary to protect Europeans citizens and businesses using digital services.

The DSA and the DMA should also be seen as a response to increasing legislative action at national level. Notwithstanding the restrictions placed by the e-Commerce Directive and the competition law provisions of the TFEU on national legislative action, numerous Member States began regulating digital services at national level, sometimes in disregard of those restrictions. This further explains the EU legislature's recourse to Article 114 TFEU as the legal basis for the DSA and the DMA. Both acts lay down fully harmonised rules for the provision of the digital services that they cover in the EU and thus seek to prevent the emergence of 27 different regulatory regimes and excessive administrative burdens for digital service providers wishing to operate in the EU.[19]

At their inception, the DSA and the DMA were conceived in the Commission's 2020 Work Programme[20] as a single legal instrument to regulate the provision of digital services. This idea of a single legislative act regulating both the content moderation practices of online intermediaries and the business practices of digital service providers was further reflected in the Commission's Communication "Shaping Europe's Digital Future."[21] The European Parliament followed suit with its legislative own-initiative report proposing a single "Digital Services Act."[22] However, it quickly became clear that the divergent

[19] See Rec. 9 DSA and Art. 1(5) DMA.

[20] See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2020: A Union that Strives for More, COM/2020/37 final, section 2.2 ("*Digital Services Act [that] will reinforce the single market for digital services and help provide smaller businesses with the legal clarity and level playing field they need*").

[21] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Shaping Europe's Digital Future, COM/2020/67 final (That communication describes the content of a future "Digital Services Act Package" as including "ex ante rules to ensure that markets characterised by large platforms with significant network effects acting as gate-keepers, remain fair and contestable for innovators, businesses, and new market entrants" (Section 2.B) and "[n]ew and revised rules to deepen the Internal Market for Digital Services, by increasing and harmonising the responsibilities of online platforms and information service providers and reinforce the oversight over platforms' content policies in the EU" (Section 2.C).

[22] See European Parliament resolution of 20 October 2020 with recommendations to the Commission on the Digital Services Act: Improving the functioning of the Single Market (2020/2018(INL)), P9_TA(2020)0272. In that report, the European Parliament "welcome[d] the Commission's commitment to submit a proposal for a Digital Services Act package ('DSA'), which should consist of a proposal

objectives and obligations, the divergent scopes of application, and the divergent supervisory and enforcement regimes would require two separate legislative acts due to their divergent objectives and obligations, their divergent scopes of application and their divergent supervisory and enforcement frameworks.

D. Divergent objectives and obligations

The objective of the DSA is "to contribute to the proper functioning of the internal market for intermediary services by setting out harmonised rules for a safe, predictable and trusted online environment that facilitates innovation and in which fundamental rights enshrined in the Charter, including the principle of consumer protection, are effectively protected."[23] The novelty of the DSA, as compared to the e-Commerce Directive, is that it places certain responsibilities on providers of intermediary services. Such providers are in a unique position in relation to the content displayed on their online interfaces, since they are neither the author of that content, nor are they responsible for uploading it to those interfaces. As the Court describes it, "the role played by [such an] operator is neutral, that is to say, […] its conduct is merely technical, automatic and passive, which means that it has no knowledge of or control over the content […]."[24]

Whereas the e-Commerce Directive sought to enhance the cross-border provision of services in the EU by restricting the ability of Member States to adopt national regulatory barriers and conditionally exempting the liability of intermediary service providers where they have no knowledge or control over the content displayed on their online interfaces, the DSA seeks, in particular, to prevent the spread of illegal and harmful content online by placing "due diligence" obligations on such providers in relation to the services that they provide. It does so by prescribing certain mechanisms that intermediary service providers should put in place and certain actions that they should take to minimise the risk of disseminating illegal and harmful content through their services.

By contrast, the objective of the DMA is "to contribute to the proper functioning of the internal market by laying down harmonised rules ensuring for all businesses, contestable and fair markets in the digital sector across the Union where gatekeepers are present, to the benefit of business users and end users."[25] In essence, that legal instrument seeks to create a level playing field on the market for digital services by imposing ex ante prohibitions and obligations on "gatekeepers" with the ultimate aim of promoting innovation and enhancing consumer choice. Some of those prohibitions and obligations find their genesis

amending the E-Commerce Directive and a proposal for ex ante rules on systemic operators with a gatekeeper role" (para 1).

[23] Art. 1 DSA.

[24] Joined Cases C-682/18 and C-683/18, *YouTube and Cyando*, EU:C:2021:503, para 106.

[25] Art. 1 DMA.

in the Commission's competition law case practice, but others are entirely new. By defining the core platform services to which those prohibitions and obligations apply in advance, all the complexity of defining relevant markets in competition law cases was eliminated from the regulatory equation: once an undertaking is designated as a gatekeeper, certain practices in relation to certain core platform services are per se prohibited. In short, the DMA seeks to prevent the largest providers of certain digital services from leveraging their gatekeeper status over those services by obstructing business users using those services to reach their customers directly.

These diverging objectives explain, to a large extent, the divergent content of the obligations imposed by each of those acts, the providers to which they are addressed, and the persons that they are meant to benefit.

The DSA's aim to prevent the dissemination of illegal and harmful content online is meant primarily for the benefit of recipients of intermediary services, but also for those persons affected by those services, even if they have not used them. Consequently, the due diligence obligations that the DSA imposes on providers of such services are primarily aimed at their content moderation practices.[26] The DSA does not define what content is illegal, nor does it oblige providers to remove illegal content from their services; rather, it obliges providers to put in place certain procedural mechanisms to ensure that recipients can notify illegal content to them and that recipients are in turn notified of the action providers have taken in relation to that content. The DSA also seeks to enhance the transparency of intermediary services to the benefit of their recipients and persons affected by those services by requiring providers to set up points of contact, include certain information in their terms and conditions, publish reports and perform audits.[27] Finally, the DSA contains a handful of due diligence obligations constituting absolute prohibitions of certain practices, such as dark patterns and profiling minors.[28]

The DMA's aim to ensure fair and contestable markets for digital services is meant first and foremost for the benefit of business users, which is meant to enhance consumer choice, thus ultimately benefitting end users. To achieve that aim, the DMA contains two lists of obligations for gatekeepers,[29] although some of those "obligations" are in fact framed as prohibitions. The purpose of those separate lists is in fact to make clear that only the second list may be subject to the specification procedure described in Part III of this Report.[30] In addition, the DMA requires gatekeepers to report on the measures that they

[26] See, e.g., Arts. 14, 16, 17, 23, 28, 34 and 35 DSA.
[27] See, e.g., Arts. 11, 12, 14, 24, 26, 27, 30 to 32, 37 to 40 and 42 DSA.
[28] See, e.g., Arts. 25, 26 and 28 DSA.
[29] Arts. 5 and 6 DMA.
[30] Art. 8 DMA.

have adopted to ensure compliance with the prohibitions and obligations, to inform the Commission of planned concentrations even if they fall outside the notification requirements in the Merger Regulation, and to submit themselves to an audit of any techniques for profiling of consumers that it applies.[31]

An overview of these obligations leaves the impression that while the DSA focuses primarily on procedure (establishing redress mechanisms, transparency, and reporting), the DMA focuses primarily on substance (prohibitions of specific anti-competitive conduct). These diverging obligations and, most important, the diverging persons that they are meant to protect (society as a whole vs. business and end users) help explain why a single legislative act covering both the DSA and the DMA would have been impractical and unwieldy. The same is true for the DSA's and DMA's diverging scopes of application.

E. Divergent yet intersecting scopes of application

While the DSA and the DMA pursue different objectives, they will often apply to the same digital service providers and to the same digital services. Nevertheless, the DSA and DMA have different scopes of application.

E.1. Material scope of application

The DSA only applies to the provision of one specific type of digital service, namely the provision of "intermediary services." By contrast, the DMA applies to ten categories of "core platform services" ("CPSs"), five of which are covered by the DSA's material scope of application, whereas the others are of a different nature to the intermediary services covered by the DSA. What is more, the DSA and the DMA contain different definitions of intermediary/intermediation services.

Article 3(i) DSA defines "intermediary services" by incorporating the descriptions of the three types of intermediary services that benefitted from an exemption from liability under the e-Commerce Directive.[32] From that definition it follows that the notion of "intermediary services" used in the DSA is limited to "mere conduit," "caching" and "hosting" services. Article 3(i) DSA introduces the new notion of "online platform," which is a type of hosting service. Certain provisions of the DSA also apply to online search engines, a term which is defined in Article 3(j) DSA, but whose relationship with the three intermediary

[31] Arts. 11, 14, and 15 DMA.

[32] Arts. 12-14 e-Commerce Directive, which the DSA has repealed and replaced (Arts. 4 to 6 DSA).

services covered by the DSA is unclear. While Article 3(j) defines online search engines as a type of intermediary service, it does not specify which type. Nor is that apparent from the definitions in Article 3(i) DSA. That classification is important, given the graduated approach to the due diligence obligations imposed on intermediary service providers, with hosting service providers being subjected to more exacting obligations than caching service providers.

By contrast, Article 2(5) DMA defines "online intermediation services" by reference to the definition in Article 2(2) of the Platform-to-Business ("P2B") Regulation.[33] That latter definition requires three cumulative elements to be fulfilled: (i) the service must be an "information society service"; (ii) the service must allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded; and (iii) the service must be provided to business users on the basis of contractual relationships. Only the first of those three elements is a necessary condition for a service to constitute an "intermediary service" within the meaning of Article 3(i) DSA. Rather, the notion of "online intermediation service" in the DMA comes closest to the notion of "online platforms allowing consumers to conclude distance contracts with traders" used in the DSA, which are subject to special due diligence obligations under that act.[34]

The DMA's reference to the P2B Regulation for the definition of online intermediation services makes sense insofar as DMA's objective aligns to a certain extent with that of the P2B Regulation, which is, *inter alia*, "to ensure that business users of online intermediation services […] are granted appropriate transparency, fairness and effective redress possibilities."[35] This also explains the divergence with the DSA's definition, given that the aim of that act is primarily to protect all users from the societal harms to which an intermediary service may give rise, not business users specifically.

The DMA also applies to online search engines, online social networking services, and video sharing platforms. The latter two services will generally qualify as hosting services and online platforms, and thus intermediary services, within the meaning of the DSA. The former is defined by reference to the definition of online search engines in the P2B Regulation, which is largely identical to the definition for online search engines in Article 3(j) DSA, except that the P2B Regulation defines such services as "digital services," whereas the DSA defines them as "intermediary services."

[33] 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).

[34] Arts. 29 to 32 DSA.

[35] Art. 1 P2B Regulation.

Aside from intermediation services and online search engines, the DMA's material scope of application also includes number-independent interpersonal communications (i.e., messaging) services, operating systems, web browsers, virtual assistants, and cloud computing services. None of these services are covered by the DSA's material scope of application. That having been said, the DMA may be considered to apply to "intermediary services" in the broadest sense of that notion, in that a CPS shall only be listed in a designation decision if it constitutes an important gateway for business users to reach end users.[36]

Online advertising services occupy a special position both under the DSA and the DMA. Under the DSA, certain provisions specifically apply to providers of online platforms and of very large services "that present advertisements on their online interfaces."[37] Thus, without taking a position on whether online advertising services constitute a form of intermediary service,[38] the DSA ensures that those services are brought within its material scope of application to a certain degree. Under the DMA, only online advertising services provided by an undertaking that provides another CPS can fall within the DMA's material scope of application.[39] The reason for this restriction was to avoid that providers of purely advertising services would be covered by the DMA, when its objective is to regulate the provision of CPSs (i.e. digital services) in the EU.

These divergent yet intersecting material scopes of application mean that many of the same services that have been designated as "very large" under the DSA have also been listed in the designation decisions of gatekeepers as an important gateway for business users to reach end users under the DMA. That is the case *inter alia* for Google Search, Amazon Store, Apple's App Store, Facebook, Instagram, and TikTok. Conversely, certain services which, at first sight, would qualify for designation under both instruments have not been so designated due to the objectives pursued by the legislation in question.

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[36] Art. 3(1)(b) DMA.

[37] Arts. 26, 28(2) and 39 DSA.

[38] This is a complicated question, which the CJEU has not yet resolved, given that it touches upon whether the provision of advertising services is truly "neutral" with respect to the advertising content being intermediated. In Joined Cases C-236/08 to C-238/08, *Google France*, EU:C:2010:159, paras. 114 to 120, the CJEU pointed to factors that could be relevant in determining whether the exemption from liability for hosting service providers could apply to Google in relation to its advertising service "AdWords,, but it ultimately reserved the resolution of that question for the national referring court.

[39] Art. 2, point (2)(j) DMA lists as a CPS "online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by an undertaking that provides any of the CPSs listed in points (a) to (i)."

An example of the latter is X, formerly Twitter, which was designated as a very large online platform in the first batch of designation decisions adopted by the Commission in April 2023,[40] but which the Commission agreed not to designate as a gatekeeper in October 2024, even though it met the quantitative thresholds for such designation. X's user base easily exceeds the 45 million user threshold for designation as a very large online platform under the DSA. That online platform's broad reach means that the societal risks to which it gives rise in relation to the dissemination of illegal and harmful content can be considered systemic in nature and therefore it deserves to be subject to heightened due diligence obligations. However, the provider of X was able to show that that online social networking service did not constitute an important means for business users to reach end users and that it was therefore not necessary to apply the *ex ante* prohibitions and obligations laid down in the DMA to it,[41] which are meant to ensure fair and contestable markets. The same is true of Microsoft's Bing, which was designated as a very large online search engine under the DSA,[42] but which the Commission decided not to list as an important gateway for business users to reach end users in Microsoft's designation decision,[43] notwithstanding the fact that the presumptions for designation under the DMA were met in relation to that service.

Finally, certain intermediary services exceed the threshold for designation under the DSA, but do not qualify as CPSs under the DMA. An example of this is online platforms hosting pornographic content, four of which have been designated as very large online platforms under the DSA. It is clear why the EU legislature would want to regulate such services under the DSA, but not under the DMA, given the societal harms to which such platforms may give rise, as compared to the lack of a gatekeeper role exercised by such platforms in relation to business users.

[40] Commission Decision C(2023)2721 final of 25 April 2023 designating Twitter as a very large online platform in accordance with Article 33(4) of Regulation (EU) 2022/2065 of the European Parliament and of the Council.

[41] Commission Implementing Decision of 16 October 2024 closing the market investigation opened by Decision C(2024)3117 into X under Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector.

[42] Commission Decision C(2023)2728 final of 25 April 2023 designating Bing as a very large online search engine in accordance with Article 33(4) of Regulation (EU) 2022/2065 of the European Parliament and of the Council.

[43] Commission Implementing Decision C(2024)806 final of 12 February 2024 closing the market investigation opened by Decision C(2023)6078 into Bing, Edge and Microsoft Advertising under Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector.

E.2. Personal scopes of application

Although the DSA applies to only one type of digital service, that is, intermediary services, it will apply to a far greater number of providers of such services than the DMA in absolute terms. That is because it imposes a basic set of due diligence obligations on all providers of intermediary services, regardless of their size.[44] Even those DSA obligations that do not apply to micro- and small enterprises will still apply to a larger number of providers than the DMA,[45] given the latter's high standard for designation as a "gatekeeper," which is a necessary pre-condition for that act to apply to a given provider. The same is true of the most demanding obligations in the DSA for very large online platforms and very large online search engines, since the designation of such services depends solely on their total number of users, whereas the DMA looks at the provider's EU turnover, average market capitalisation, or fair market value and the number of business users using its CPS. In short, while the DMA is likely to apply to a limited number of providers enjoying "gatekeeper" status on the market, the DSA will apply to thousands of small, lesser-known intermediary service providers, as well as to the very large, well-known services often also covered by the DMA.

The addressee of the due diligence obligations laid down in the DSA is the "provider" of intermediary services. The addressee of the obligations and prohibitions laid down in the DMA is the gatekeeper, which that act defines as the "undertaking providing core platform services."[46] While the Commission's proposals for the DSA and the DMA both referred to those addressees as "providers," a conscious decision was taken during the legislative negotiations of the DMA to further specify that notion with the notion of "undertaking" as used in Articles 101 and 102 TFEU. That decision was taken to confirm that the addressees of the prohibitions laid down in EU antitrust law would be the same as the addressees targeted by the obligations and prohibitions in the DMA. In contrast, the scope of the notion of provider used in the DSA was not the focus of legislative negotiations.

This begs the question whether the notion of "provider" used in the DSA has a different scope to the notion of "undertaking providing" used in the

[44] Chapter III, Section 1, DSA includes five provisions that apply to all intermediary services providers, while Chapter III, Section 2, DSA includes three provisions that apply to all hosting service providers, including micro- and small enterprises. Section 5, Chapter III, DSA also applies to small- and micro enterprises, provided their service reaches the threshold for designation as a very large online platform or as a very large online search engine laid down in Article 33(1) DSA.

[45] That is the case for the obligations laid down in Section 3, Chapter III, DSA, which apply to online platforms, and the due diligence obligations laid down in Section 4, Chapter III, DSA, which apply to online marketplaces, but which exclude from their scope micro- and small enterprises.

[46] Art. 2(1) DMA.

DMA. The DSA does not define the notion of "provider." Where that notion is defined in other acts of EU digital law, its definition varies, referring either to a "natural or legal person"[47] or to an "undertaking"[48] providing a service.

There is no compelling reason why the notion of "provider" used in the DSA should differ in meaning from the notion of "undertaking providing" used in the DMA. Whether a particular intermediary service is provided in line with the obligations laid down in the DSA will require decisions to be taken on the presentation and operation of the online interface through which that service is provided.[49] Where an online interface is operated by a subsidiary forming part of a larger corporate group, that technology will often be developed and managed by the parent company of the group and transferred to that subsidiary for the purposes of operating the online interface in the EU. Even if the group uses different online interfaces for the provision of an intermediary service in different Member States, those interfaces will often be based on the same underlying technology, which will normally be developed and managed at the level of the parent company of the group.

Consequently, where an online interface is operated in the EU by a subsidiary forming part of a larger corporate group, ensuring compliance with the obligations laid down by the DSA will generally require strategic decisions to be taken at the level of the parent company of that group in relation to the technology underlying that interface. It is thus the parent company of the group that is able to take the necessary strategic decisions to ensure that the online interfaces operated by its subsidiaries in the EU comply with the obligations laid down in the DSA. A functional approach to the notion of "provider" used in the DSA therefore seems warranted to ensure full compliance with that instrument.

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[47] See e.g. Art. 2(b) e-Commerce Directive which refers to a natural or legal person as the provider and Article 2(2)(a) of Regulation (EU) 2022/612 which refers to an undertaking as the provider. Depending on the scope and objectives of the legal act, that term may also refer to other "bodies,, including Member States or their authorities (Article 4, point 11) of Directive (EU) 2015/2366). Many acts do not define the "provider" (e.g., Directive (EU) 2018/1972 (the European Electronic Communications Code), which instead defines the notion of operator by reference to the notion of "undertaking." See, also, Art 2(3) P2B Regulation, which defines providers of online intermediation services and of online search engines as a natural or legal person. This is curious, since the DMA refers to the definitions of the P2B Regulation to define the notions of online intermediation services and online search engines.

[48] See, e.g., Art. 2(2), point (a), of Regulation (EU) 2022/612 of the European Parliament and of the Council of 6 April 2022 on roaming on public mobile communications networks within the Union (OJ L 115, 13.4.2022, p. 1).

[49] As explained in Rec. 70 DSA, the presentation and operation of an online interface lies at the heart of an intermediary service provider's business.

E.3. Territorial scopes of application

Digital services are unique in that they can be provided to users located in the EU from any other place on earth. The provider of digital services need not have an establishment in the EU to provide those services to users located or established in the EU. The DSA and DMA account for this fact in that they apply to digital services provided to users located or established in the EU, irrespective of where the provider has its place of establishment.[50] This is important given that only a handful of providers of very large services and none of the gatekeepers designated by the Commission are headquartered in the EU. Moreover, while many of those providers have a subsidiary operating the service or an establishment in the EU, not all of them do.

The question that arises in this context is which internet domains must be taken into account when assessing compliance with the DSA and the DMA. The fact that users located in the EU may access the internet domain of a digital service for users in third countries (e.g., the .co.uk or the .com domain) does not necessarily mean that the provider of that domain must also comply with its DSA or DMA obligations in relation to that domain.

The DSA resolves this issue by defining the notion "offering services in the Union" as requiring the provider to have a "substantial connection to the Union."[51] The DSA defines the latter notion as a connection resulting either from an establishment in the EU or from specific factual criteria, such as "a significant number of recipients of the service in one or more Member States in relation to its or their population' or 'the targeting of activities towards one or more Member States."[52] An example of the former could be a significant number of recipients located in Ireland that make use of the service's .co.uk website. An example of the latter could be a third country provider that targets EU residents by offering services in multiple EU languages, offering payment for goods or services in Euros, or offering shipping to the EU.[53] The mere fact that a website is accessible to EU residents does not constitute on its own a substantial connection to the EU.[54]

For its part, the DMA does not regulate this issue beyond providing that that act applies to CPSs provided by gatekeepers to users in the EU irrespective of where those gatekeepers are established and irrespective of the law otherwise applicable to the provision of the service. Further regulation is probably not needed, as the

[50] Art. 2(1) DSA and Art. 1(2) DMA. These definitions were already included in Art. 3(4) and (5) TCO Regulation.
[51] Art. 3(d) DSA.
[52] Art. 3(e) DSA.
[53] Rec. 8 DSA.
[54] Ibidem.

DMA only applies to gatekeepers, which are generally large multinationals with an establishment in the EU. By contrast, the DSA applies to all intermediary services provided to users located in the EU, irrespective of their size or number of users.[55] Notwithstanding this difference, it still begs the question to which internet domains the provisions of the DMA apply. To achieve the objectives of that instrument, its prohibitions and obligations should apply to those domains that business users use to reach end users located in the EU. That could mean that a co.uk or a .com domain could be caught by the provisions of the DMA.

Of course, none of these solutions resolve the tricky issue of supervising and enforcing the DSA and the DMA in relation to entities located wholly outside the EU. That issue has already arisen in the context of antitrust enforcement, where the lack of extra-territoriality means that fines cannot be enforced against undertakings established entirely outside the EU. The DSA attempts to resolve that issue by requiring providers of intermediary services established outside the EU to appoint a legal representative inside the EU.[56] The DSA further provides that those representatives may be held liable for non-compliance of DSA obligations by the provider.[57] This is without prejudice to the liability and legal actions that may be initiated against the provider itself.

Taken literally, this would mean that fines could be collected from the legal representative. In this regard, the DSA requires the provider to mandate its legal representative for the purpose of being addressed on all issues necessary for compliance with and enforcement of decisions and to provide its legal representative with necessary powers and sufficient resources to comply with such decisions.[58] It is to be seen how difficult this will make appointing a legal representative in the EU. In the end, if such a representative has insufficient resources to comply with a decision adopted under the DSA, the Commission or Digital Service Coordinator, that is, the national authority competent for supervising and enforcing the DSA at Member State level, will have to attempt enforcement against an entity established outside the EU with all the pitfalls that that entails.

F. Diverging yet intersecting supervision and enforcement frameworks

Whereas the DMA is exclusively supervised and enforced by the Commission, the DSA foresees complementary supervisory and enforcement tasks for the Commission and the Digital Service Coordinators depending on the size of the service and the obligations at stake. As explained in the subsequent chapters, this

[55] Certain DSA due diligence obligations do not apply to micro- and small enterprises. See n. 45 above.

[56] Art. 13(1) DSA.

[57] Art. 13(3) DSA.

[58] Art. 13(2) DSA.

centralised supervision and enforcement of those instruments by the Commission makes those pieces of digital services legislation unique as compared to other pieces of digital services legislation. For example, the AVMSD,[59] the P2B Regulation, and the TCO Regulation[60] all place supervision and enforcement solely in the hands of national competent authorities, as does the GDPR,[61] whose concepts are of particular relevance in relation to numerous obligations and prohibitions laid down in the DSA and the DMA which make a direct reference to those concepts. Being regulations, which "have general application" and are "binding in [their] entirety and directly applicable in all Member States,"[62] the DSA and the DMA may also be privately enforced in the courts of the Member States.

When it comes to the supervision and enforcement of the DSA and the DMA by the Commission, the first thing that strikes a reader comparing those two acts in relation to that matter is the similarity of their provisions. The second thing that strikes a reader is the similarity of those provisions to the provisions on supervision and enforcement of Article 101 and 102 TFEU by the Commission as enshrined in Regulation 1/2003.[63] That similarity is unsurprising, as it was considered better to have recourse to a tried and tested system of supervision and enforcement by the Commission, rather than to reinvent the wheel. Nevertheless, certain differences exist between similar provisions in the DSA and the DMA, as well as between similar provisions in the DSA and the DMA, on one hand, and Regulation 1/2003, on the other.

Already at the outset, the DSA empowers the Commission to deploy its investigatory powers only "[f]or the purposes of investigating compliance of providers of very large online platforms and of very large online search engines with the obligations laid down in this Regulation."[64] Its investigatory powers are then further curtailed by specifying that they may only be deployed "[i]n order to carry out the tasks assigned to it under [Section 4 of Chapter IV]."[65] By contrast, the DMA and Regulation 1/2003 allow the Commission to deploy such powers "[i]n order to carry out its duties under this Regulation."[66]

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[59] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ L 95, 15.4.2010, p. 1).

[60] 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).

[61] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119, 4.5.2016, p. 1).

[62] Art. 288 TFEU.

[63] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

[64] Art. 65(1) DMA.

[65] Arts. 67(1), 68(1) and 69(1) DSA.

[66] Arts. 21(1), 22(1), and 23(1) DMA; Arts. 18(1), 19(1), 20(1) Regulation 1/2003.

This may seem like a trivial difference, but it has concrete consequences for the Commission's decision-making practice. For example, prior to the designation of a service as a very large online platform or very large online search engine, the Commission is only empowered to request additional information from the provider on the calculation it performed to determine the average monthly active recipients of its service in the EU, including explanations and substantiations of the data used,[67] and not, for example, on the corporate structure of the provider, since it has no general competence to request information from providers whose services have not been designated as very large. The reason for this difference probably lies in the fact that the DMA was always intended to be monitored and enforced solely by the Commission, while the DSA's supervision and enforcement mechanism was altered during the legislative negotiations as a result of which the Commission was given primary responsibility for designation, supervision and enforcement of very large online platforms and very large online search engines.

Even where the DSA does allow the Commission to deploy its investigatory powers, it appears to place a higher standard of motivation on their deployment than under the DMA or Regulation 1/2003. For example, the DSA provision empowering the Commission to request information explicitly refers to "information relating to the suspected infringement" as justifying recourse to that investigatory power. This explains why the Commission is not entitled to request information on the corporate structure of the provider in the proceedings leading up to the adoption of its supervisory fee decisions,[68] since at that stage there is no suspicion of an infringement justifying recourse to a request for information. By contrast, the DMA provision empowering the Commission to request information simply refers to "all necessary information,"[69] as does the similar provision in Regulation 1/2003.[70] The same difference emerges as regards the power to take interviews and statements, but curiously not for the power to conduct inspections, which is similarly worded across all three instruments.

Otherwise, certain of the Commission's enforcement powers are phrased differently in the DSA and the DMA without it being clear whether that difference has an impact on the exercise of those powers. For example, the DSA does not list the imposition of interim measures as a decision requiring the adoption of preliminary findings.[71] By contrast, the DMA does require such a prior administrative step,[72] as does Regulation 1/2003.[73] Conversely, neither

[67] Art. 24(3) DSA.

[68] The Supervisory Fee Delegated Regulation only refers to information requested pursuant to Article 24(3) DSA, thus information on the calculation used to estimate a service's average monthly active recipients.

[69] Art. 21(1) DMA.

[70] Art. 18(1) Regulation 1/2003.

[71] Art. 79(1) DSA which does not refer to Art. 70 DSA.

[72] Art. 34(1) DMA which refers to Art. 24 DMA.

[73] Art. 27(1) Regulation 1/2003 which refers to Art. 8 of that regulation.

the DMA nor Regulation 1/2003 requires the adoption of preliminary findings prior to imposing periodic penalty payments, but only where the definitive amount is set following compliance with the obligation that the periodic penalty payment was intended to enforce.[74] The DSA does not make any similar distinction,[75] although that appears to be the result of an oversight, since it is unclear how the Commission could adopt effective periodic penalty payments to ensure rapid compliance with obligations under the DSA if it is required to first solicit the views of the provider on those penalties.

As regards differences with Regulation 1/2003, the DSA and the DMA contain a novel supervisory mechanism which empowers the Commission to take "the necessary actions to monitor the effective implementation and compliance with this Regulation."[76] The provisions in question list certain examples of what such a mechanism might entail, including requiring the provider to retain all documents deemed to be necessary to assess the implementation of and compliance with the obligations of that act and appointing independent external experts and auditors, as well as experts and auditors from competent national authorities with the agreement of the authority concerned, to assist the Commission in supervising the effective implementation and compliance with the relevant provisions of those acts and to provide specific expertise or knowledge to the Commission. While the DSA lists requiring the provider to grant access to, and explanations relating to, its databases and algorithms as an example one such monitoring mechanism, the DMA includes as part of the Commission's competence to request information.[77] That difference may be explained by the fact that the Commission may not request information under the DSA until it suspects an infringement. In any event, these are just examples, making the broad wording of the monitoring mechanisms in the DSA and DMA potentially limitless. It is clear that the Commission should not be able to circumvent the procedural safeguards in other provisions of the DSA and the DMA,[78] but beyond that restriction, the limits of the Commission's broad supervisory power are unclear and will have to be tested over time.

Another important difference between the DSA and the DMA, on the one hand, and Regulation 1/2003, on the other, is the access to documents procedure. Not only do the former not foresee the role for a hearing officer; they also limit the documents to which providers of digital services may obtain access during non-compliance procedures. While non-confidential versions of all documents cited in

[74] Art. 34(1) DMA only refers to Art. 31(2) DMA.
[75] Art. 79(1) DSA refers to Art. 74 DSA as a whole.
[76] Art. 72 DSA and Art. 26 DMA.
[77] Art. 21(1) DMA.
[78] E.g., the Commission should be able to rely on its general supervisory power to send requests for information where the conditions of Art. 67 DSA or Art. 21 DMA are not met, nor should it be able to request access to data where the conditions of Art. 40 DSA are not met.

the preliminary findings are directly shared with the provider, other information from the Commission's case file, such as documents not cited in the preliminary findings and confidential documents, are only shared with specified external legal and economic counsel and technical experts, which are not in an employment relationship with the providers, under a "confidentiality rings" procedure. This is meant to ensure maximum access, while protecting third-party rights and fulfilling the Commission's obligation to protect confidential information.

G. Complementary regimes

The Digital Services Package was not adopted in a regulatory vacuum. Both prior to and since the adoption of the DSA and the DMA, the EU legislature adopted several acts of more limited application regulating the provision of digital services in the EU. The Draghi report refers to "around 100 tech-focused laws" regulating the provision of digital services in the EU, but that is an exaggeration.[79]

In reality, the AVMSD, the Copyright in the Digital Single Market Directive ("Copyright in the DSM Directive"),[80] the P2B Regulation, and the TCO Regulation are examples of EU legislative acts that addressed in a more targeted manner several of the societal and competitive harms that the DSA and the DMA were designed to address comprehensively. Since the adoption of the DSA and the DMA, the EU legislature has enacted a handful of legislative acts that also regulate certain specific aspects of the provision of digital services in the EU, in some cases going beyond the provisions of the DSA and the DMA: the Political Advertising ("Pol Ads") Regulation,[81] the European Media Freedom Act (EMFA)[82] and the General Product Safety Regulation (GPSR)[83] all include

[79] See Draghi Report, p. 30. In support of the claim that "the EU's regulatory stance towards tech companies hampers innovation," the report cites the Breugel Foundation's 2024 EU Digital Policy Overview, but most of the laws listed there do not directly regulate the provision of digital services in the EU. They are either meant to promote technology in the EU (i.e., the Digital Europe Programme Regulation, the Recovery and Resilience Facility Regulation, the EuroHPC Regulation, the Chips Act, etc.) or they apply to a particular digital service as an incidental consequence of that service falling within the scope of application of the legislation in question (i.e., the Product Liability Directive, the Unfair Contract Terms Directive, the Toys Regulation, the Law Enforcement Directive, Administrative Cooperation in the Field of taxation, the Common VAT system, etc.).

[80] 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).

[81] Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising (OJ L, 2024/900, 20.3.2024).

[82] Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act) (OJ L, 2024/1083, 17.4.2024).

[83] Regulation (EU) 2023/988 of the European Parliament and of the Council of 10 May 2023 on general product safety, amending Regulation (EU) No 1025/2012 of the European Parliament and of

dedicated provisions on the provision of certain type of digital services. The question arises how all these legislative acts are to be applied concurrently.

As regards the DSA in particular, it provides that it "is without prejudice to the rules laid down by other Union legal acts regulating other aspects of the provision of intermediary services in the internal market or specifying and complementing this Regulation" and subsequently lists as examples all the aforementioned acts adopted prior to its adoption. The DMA contains no similar provision.

A distinction is thus made in the DSA between "rules regulating other aspects of the provision of intermediary services" and rules "specifying and complementing" the DSA. What is meant by the first category of rules is relatively straightforward: it concerns rules governing intermediary services on matters falling outside the scope of the DSA. Although, remarkably, not expressly mentioned, the DMA is an example of such rules. Other examples include EU competition law, labour law, and data protection law, to name a few. The more complex question is when rules may be considered as "specifying and complementing" the DSA and what is the consequence of either qualification for the relationship between the DSA and those rules.

For example, under the AVMSD, which was amended in 2018 to include provisions regulating video-sharing platforms, Member States must ensure that providers of such platforms adopt appropriate measures to protect minors from harmful content.[84] That rule would appear to constitute a specification of the rules in the DSA that online platforms that are accessible to minors must put in place appropriate and proportionate measures to ensure a high level of privacy, safety, and security of minors.[85] But what of the rule in the AVMSD requiring Member States to ensure that video sharing platform providers adopt appropriate measures to protect all users from content containing incitement to violence or hatred and from content the dissemination of which constitutes an activity which is a criminal offence under EU law? Do the mechanisms that the DSA require intermediary service providers to adopt constitute such measures? An interesting follow-up question is to what extent a Member State may continue to impose on video-sharing platform providers measures that are more detailed or stricter measures. While the AVMSD expressly allows for this possibility,[86] doing so could undermine the exhaustive harmonisation to which the DSA strives and would therefore be impermissible. A case-by-case

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the Council and Directive (EU) 2020/1828 of the European Parliament and the Council, and repealing Directive 2001/95/EC of the European Parliament and of the Council and Council Directive 87/357/EEC (OJ L 135, 23.5.2023, p. 1).

[84] Art. 28b(1) AVMSD.

[85] Art. 28(1) DSA.

[86] Art. 28b(6) AVMSD.

assessment would therefore be necessary and may need to be conducted by the Commission under the mechanism provided for in Directive 2015/1535.

Another interesting question is how to treat EU legislation where it is only more specific in relation to certain aspects covered by the DSA. For example, the Copyright in the DSM Directive, which regulates "online content-sharing services," contains a provision further specifying how the liability exemption for hosting service providers, previously laid down in the e-Commerce Directive and now laid down in the DSA, should apply to such services.[87] Another question is whether the mechanisms laid down in the Copyright in the DSM Directive to ensure transparency, sufficiently substantiated notices, and the rules on misuse constitute "specifications" in relation to the DSA. The answer to that question will depend on the exact circumstances of each case and require a balancing of the different sets of applicable provisions. The same is true for the TCO Regulation, which contains more detailed requirements than the DSA on transparency, removal orders and due diligence measures, including notice and action, for online platform providers exposed to terrorist content.

As regards EU legislation regulating the provision of digital services adopted after the adoption of the DSA, it contains a mix of specifying and complementary provisions. For example, the GPSR contains a provision on online marketplaces that both specifies obligations already contained in Chapter III, Section 4, of the DSA and complements those obligations with cooperation and transparency obligations in line with its product safety rationale.[88] Similarly, the Pol Ads Regulation, which applies to all forms of political advertising including online advertisements, supplements the transparency and due diligence obligations applicable to intermediary service providers that publish advertisements on their online interfaces.[89] The same is true for the EMFA,

[87] Art. 17(3) and (4) Copyright in the DSM Directive: the provider must obtain an authorisation from the rightsholder, failing which it must demonstrates that it has made best efforts to obtain such an authorisation, that it has made best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information, and, in any event, that it has acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholder, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads.

[88] E.g., Art. 22 GPSR

[89] The obligation that will have the most prominent visible impact for users of intermediary services is the one to label political advertisements as such (Art. 11 Pol Ads Regulation). In addition, the Pol Ads Regulation supplements the type of information that the DSA obliges providers of very large online platforms and very large online search engines to include in their advertisement repository (Arts. 13(2) and 12(1) Pol Ads Regulation and Art. 39 DSA). Finally, the Political Advertisement Regulation initially took a stricter approach to regulating the use of targeting and ad-delivery techniques that involve the processing of personal data in the context of online political advertising, but such practices were subsequently banned under the DSA at the instigation of the European Parliament (Art. 26(3) DSA), leaving limited scope for the application of the provision on such techniques to circumstances in which no service is provided (Arts. 18-20 Pol Ads Regulation).

which imposes additional obligations on providers of very large online platforms designated under the DSA.[90]

Of all the complementary regimes mentioned, the P2B Regulation is unique in its relationship to the DSA and the DMA, since it displays features akin to both instruments. It already addresses issues of transparency in relation to the terms and conditions of providers of online intermediation services and online search engines in favour of business users,[91] which are further elaborated upon for all providers of intermediary services in relation to all users under the DSA.[92] It also addresses the modalities of restriction, suspension, and termination of service by providers of online intermediation services and online search engines in relation to business users,[93] which are further elaborated upon for all hosting service providers in relation to all users under the DSA.[94] Finally, it requires providers of online intermediation services and online search engines to set out in their terms and conditions the main parameters determining ranking and the reasons for the relative importance of those main parameters as opposed to other parameters,[95] while providers of online intermediation services are to set out in their terms and conditions any restrictions on the ability of business users to offer the same goods and services to consumers under different conditions through other means than through those services.[96] The DSA imposes a similar transparency obligation as regards all recommender systems on all providers of online platforms,[97] while the DMA prohibits gatekeepers from imposing such restrictions.[98] Finally, the DMA draws on the P2B Regulation for several of its definitions, which means that the material scope of the former will depend on a determination of the latter.[99] The biggest deficiency in relation to the P2B Regulation to date has been a general lack of awareness of its existence and a rather weak and open-ended enforcement mechanism which it places entirely in the hands of Member State authorities.[100]

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[90] In particular, such providers must provide a functionality to their users to declare that they are media service providers and that they comply with certain transparency requirements (Art. 18(1)-(3) EMFA). EMFA further requires such providers to provide a statement of reasons to media service providers before suspending its service to them or restricting the visibility of their content due to a breach with their terms and conditions and to give those providers the opportunity to respond within 24 hours before any such action is undertaken (Art. 18(4) EMFA).

[91] Art. 3 P2B Regulation.

[92] Art. 14 DSA.

[93] Art. 4 P2B Regulation.

[94] Art. 17 DSA.

[95] Art. 5 P2B Regulation.

[96] Art. 10 P2B Regulation.

[97] Art. 27 DSA (with the exception of micro- and small enterprises).

[98] Art. 5(3), (4) and (5) DMA.

[99] But not the personal scope, since the P2B Regulation applies to "providers" which it defines as "natural and legal persons," not "undertakings."

[100] Art. 15 P2B Regulation.

Providers of digital services covered by the DSA and the DMA may also have to consider the application of the Artificial Intelligence (AI) Act[101] where they incorporate AI into their services. A pertinent example of a digital service increasingly reliant on AI is online search engines, while recommender and other algorithmic systems used by other digital service providers are increasingly based on AI. The provisions of the AI Act are most likely to apply concurrently with those of the DSA on content moderation, dark patterns and recommender systems. However, for that to be the case, the AI system in question must in some way be involved in the provision of intermediary services, since only the latter fall within the material scope of application of the DSA. Where the AI system itself is the service offered by the provider, only the provisions of the AI Act will apply to that system. Moreover, while the rules of the AI Act are likely to apply to the system as such (i.e., its development and use), the DSA will regulate how the dissemination of the illegal or harmful content is amplified through the recommender system in the user interface or how the dark patterns deceive users of that interface. As regards the DMA, AI systems are not themselves listed as a CPS, so they will only be covered by the prohibitions and obligations of the DMA where they form part of such a service.

All these complementary regimes regulating the provision of digital services in the EU raises the question whether the lack of regulation in the two decades prior to 2019 mentioned in Section B above has given way to the overregulation of such services in the past five years. The DSA and DMA are horizontal legal instruments precisely meant to prevent excessive regulation of digital services by limiting the number of addressees on whom the most demanding obligations are placed. However, digital services are currently in vogue, thus any opportunity to revise existing legislation or devise new legislation for the digital age gives rise to the temptation to include provisions specifically addressed to providers of such services regardless of the area being regulated.[102] Excessive complementary legislation on digital services could undermine the Digital Services Package's objective of facilitating innovation in those services. While very large digital service providers typically have the financial and technical resources to comply with their obligations under these numerous regimes, not all complementary regimes referred to above apply a graduated approach to regulation, nor do they always exclude micro- and small digital service providers from their remit.

[101] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (OJ L, 2024/1689, 12.7.2024).

[102] See, e.g., Regulation (EU) 2023/1542 of the European Parliament and of the Council concerning batteries and waste batteries and Regulation (EU) 2025/40 of the European Parliament and of the Council of 19 December 2024 on packaging and packaging waste, which include provisions on online marketplaces mirroring provisions in Arts. 30 and 31 DSA.

At the end of the day, the DSA and the DMA, if thoroughly implemented and enforced, will have a profound impact on the provision of digital services in the EU. What the DSA and the DMA ultimately have in common is their aim to regulate services which have come to form an important part of the lives of EU citizens and businesses. Abandoning a *laissez-faire* and *ex post* approach to regulation, the rules by which digital services may be provided in the EU are now set out clearly in advance in those two acts, increasing legal certainty and predictability of outcomes by preventing a plethora of national rules seeking to address the same societal and competitive harms. Only time will tell whether the DSA and the DMA will achieve the lofty goals that the EU legislature has set out for those instruments.

PART II: DIGITAL SERVICES ACT (DSA)

A. Introduction

In the first case on the DSA to reach the Court of Justice, its Vice-President described this novel piece of legislation as "a central element of the policy developed by the EU legislature in the digital sector," which "pursues objectives of great importance."[103] This view of the DSA's importance is broadly shared in the legal literature.[104] Recent events relating to topics covered by the DSA have shown its relevance in practice. Think, for instance, of the arrest of the CEO of messaging service Telegram,[105] the debates surrounding the functioning of microblogging service X (formerly Twitter),[106] or the impact that social media platform TikTok was deemed to have had on the presidential elections in Romania.[107] One could say that the DSA's importance corresponds to the importance of the internet in general and the digital services covered in particular for all kinds of political, commercial, cultural, and entertainment purposes and thus, in essence, for virtually all aspects of modern-day life. Indeed, the DSA is to a large extent driven by the view that especially certain large digital

[103] Order Vice-President Court of Justice, Case C-639/23 P(R), *Commission v. Amazon*, EU:C:2024:277, para. 155.

[104] E.g., A. Savin, 'The EU Digital Services Act: Towards a more responsible internet,' *Copenhagen Business School CBS LAW Research Paper* No. 21-04, 2021, p. 14 (referring to the DSA proposal as being "among the most important documents in digital regulation"); M. Eifert, A. Metzger, H. Schweitzer and G. Wagner, 'Taming the giants: the DMS/DSA package,' *Common Market Law Review* 58 2021, pp. 987-1028, at p. 994 (calling the DSA (and DMA) "a turning point in European platform regulation"); D. Keller, 'The EU's new Digital Services Act and the rest of the world', in: J. van Hoboken et all (eds.), *Putting the DSA into practice*, Verfassungsbooks 2022, pp. 227–241, at p. 229 (speaking of "a major milestone in the history of platform regulation").

[105] E.g., 'Telegram CEO Pavel Durov arrested at French airport,' *BBC News*, 25 August 2024.

[106] E.g., 'Musk's X banned in Brazil after disinformation row,' *BBC News*, 31 August 2024; 'Elon Musk launches profane attack on X advertisers,' *BBC News*, 30 November 2023.

[107] E.g., 'Romanian court annuls result of presidential election first round,' *BBC News*, 6 December 2004.

services have become "de facto public spaces,"[108] which as such require proper regulation.

The fact that its importance is beyond doubt does not mean, however, that the DSA is necessarily easily understood or straightforward to apply. In the relatively limited time that it has been applicable, not only the promise of, but also certain potential challenges relating to the approach it embodies have become apparent. Against this background, and building on the general discussion in Part I of this report, the present Part II seeks to highlight a number of key issues and to take stock of the main experiences gathered with the DSA thus far.[109] To that aim, first a number of general comments are made.[110] These center on what are arguably the DSA's central concepts, namely, diligence, balance, and evolution. Subsequently, attention turns to the initial experiences gained with the exercise of the Commission's tasks under the DSA as implementor, designator, and supervisor. Finally, certain specific topics are discussed relating to the DSA's application in practice.[111]

B. General comments

B.1. Diligence

As set out in Part I, the DSA applies to intermediary services.[112] In essence, these are services involving the transmission and storage of information provided by third parties (in other words, user-generated content). The DSA regulates these services in a layered manner. Broadly speaking, the more actively involved the service provider is – in particular in terms of not only storing but also disseminating third-party information to the public, thus making it an "online platform"[113] – and the larger the scale at which the service is operated – in particular if it exceeds the threshold of 45 million average monthly active users[114] in the EU that the DSA sets for qualifying it as "very large"[115] – the more far-going the obligations are that the DSA imposes in respect of the service in question.

[108] Commission, Impact assessment DSA (part 1/2), SWD(2020) 348, 15 December 2020, p. 9.

[109] For a more general overview of the DSA, see F. Wilman, 'The Digital Services Act (DSA): an overview,' 2022, available via https://ssrn.com/abstract=4304586

[110] See also F. Wilman, 'Conclusion,' in: F. Wilman, S. Kalėda and P.J. Loewenthal, *The EU Digital Services Act: a commentary*, OUP 2024, pp. 522–531 (containing more extensive general comments on the DSA).

[111] These topics reflect as much as possible those highlighted in the FIDE questionnaire prepared for the national rapporteurs, whilst bearing in mind however the specificities of the institutional perspective taken in this Report.

[112] Art. 3(g) DSA.

[113] Art. 3(i) DSA.

[114] The DSA speaks of "recipients of the service" rather than "users." As the latter is the shorter and more commonly used term, that term is used in this contribution.

[115] Art. 33 DSA.

On the substance, the central concept of the DSA's obligations is that of due diligence. The DSA translates this concept essentially into two distinct types of obligations. For the first type, the due diligence involves efforts aimed at tackling illegal content, subject to certain safeguards. Thus, the primary "danger" to be addressed in these cases is external to the service provider and consists of users providing illegal content. The activities to be undertaken are repressive in nature and should be as effective as reasonably possible.[116] At the same time, it is acknowledged that there is a related, secondary "danger," namely, that of the repressive activities overshooting. Such overshooting could take various forms, such as wrongly removing information that is not actually illegal content, excessively monitoring users' behavior or processing their personal data, or using technical means that are not accurate and up to date.

Under the DSA this kind of content-focused, "repressive diligence" is at play, for instance, where service providers: process notices of illegal content submitted by third parties through the mandatory notice and action mechanisms, including where those notices originate from parties that are deemed to have particular expertise, such as NGOs dedicated to combating matters like child sexual abuse material or hate speech (so-called "trusted flaggers");[117] act voluntarily to tackle illegal content under the DSA's "Good Samaritan" clause;[118] or take the required measures to combat misuse of its service consisting of users frequently providing manifestly illegal content.[119] The DSA's prohibition of imposing general monitoring obligations on intermediary service providers[120] and the latter's obligation to provide transparency *ex post* on the measures taken[121] act in this connection as a sort of horizontal safeguard. The second kind of due diligence requirements is different. True, the "danger" at issue still manifests itself in connection to third-party information, as is by definition the case under the DSA. Yet the primary concern is not so much *what* the service providers intermediate, but rather *how* they do so. In other words, the focus is not on repressing illegal content and the associated risk of overshooting, but rather on the service providers' own activities in providing the service. Here the concept of due diligence is elaborated into self-standing obligations or prohibitions imposed on intermediary service providers. The main aim is to protect users against negligent, manipulative, arbitrary, or excessive practices on the part of those service providers.

Examples of such service-focused, "protective diligence" requirements of the DSA include: the obligation for service providers to give clarity upfront about

[116] Cf. Case C-314/12, *UPC Telekabel Wien*, EU:C:2014:192, para. 62.
[117] Arts. 16 and 22 DSA.
[118] Art. 7 DSA.
[119] Art. 23 DSA.
[120] Art. 8 DSA.
[121] Arts. 15 and 24 DSA.

the applicable terms and conditions and to respect limits in the way that these are enforced;[122] the ban on manipulative behavior in connection to the design and organization of service providers' online interfaces (that is, their websites or apps), known as "dark patterns";[123] the transparency required and the limits set in connection to advertising;[124] the transparency and user agency requirements in respect of recommender systems;[125] and the required protection of minors.[126] Under the DSA's layered approach, very large service providers[127] are subject to additional obligations, most notably to conduct an annual risk assessment and mitigation exercise.[128] Whilst somewhat harder to categorize, these are also best seen as due diligence requirements of this second type.[129]

The former, "repressive diligence"-type of requirements are in essence manifestations of the duty of care already recognised by the e-Commerce Directive, which dates from 2000 and which, as explained in Part I, can be seen as the DSA's predecessor. Especially in the case of hosting services, the conditions attached to the liability exemptions contained in that Directive, which have since been transferred to the DSA,[130] were designed to encourage service providers to act diligently in respect of illegal content that they may encounter.[131] What is more, under the Directive Member States had the possibility to add "duties of care […] in order to detect and prevent certain types of illegal activities."[132] The DSA now essentially articulates such duties of care in a harmonized manner at EU level, including the safeguards deemed necessary.

Although under the DSA users are not necessarily consumers, the requirements of the second, "protective diligence"-type are more consumer protection-like in appearance. They tend to focus on service providers' core activities, like using recommender systems to bring information to users' attention, advertising, and data-related practices. The DSA's provisions in question can accordingly

[122] Art. 14 DSA.

[123] Art. 25 DSA.

[124] Arts. 26 and 39 DSA.

[125] Arts. 27 and 38 DSA

[126] Art. 28 DSA.

[127] That is, very large online platforms and very large online search engines, which have been designed as such in accordance with Art. 33 DSA.

[128] Chapter III, Section 5, DSA.

[129] E.g., whilst the risk assessment and mitigation obligations of Arts. 34 and 35 DSA also relate to systemic risks consisting of the dissemination of illegal content, that is only one of four categories of such systemic risks. Moreover, the overall focus of the risk assessment and mitigation is on the contribution of the service in question (in terms of its design, functioning and use) to those systemic risks.

[130] Arts. 4, 5 and 6 DSA (formerly Art. 12-14 e-Commerce Directive). See also Art. 89 DSA (deleting those articles from the e-Commerce Directive). See further, e.g., Opinion AG Szpunar Case C-492/23, *Russmedia*, EU:C:2025:68, paras. 42-96 (discussing the liability exemption for hosting).

[131] Cf. Case C-324/09, *L'Oréal v. eBay*, EU:C:2011:474, paras. 120-124; C-682/18 and C-683/18, *YouTube and Cyando*, para. 115 (both using as a standard that of a diligent operator). See also Art. 17(4) Copyright in the DSM Directive, which expressly requires professional diligence.

[132] Rec. 48 e-Commerce Directive.

resemble or even overlap with, and sometimes also rely on concepts from, EU consumer protection law and the General Data Protection Regulation (GDPR).[133] Nonetheless, the DSA should not be seen as a consumer or data protection instrument properly speaking. The context and underlying aim of the obligations are different. As noted earlier, the regulated services essentially involve the intermediation of third-party speech. The focus is therefore on addressing speech-related harms, particularly those negatively affecting the exercise of the freedom of expression and information as well as other fundamental rights, connected to the service provision, such as the unjustified removal of legal content, the creation of unwanted filter bubbles, practices harmful to minors, and election manipulation.

B. 2. Balance

Ultimately, the DSA naturally aims to address both types of challenges mentioned above, that is, those resulting from third-party information as such, as well as those resulting from the service providers' own activities when intermediating the information. According to its Article 1(1), the DSA seeks to ensure that the online environment is not only *safe*, but also *predictable* and *trusted*.

Article 1(1) DSA also refers to the aim of effectively protecting the fundamental rights. It is noticeable that the reference is to the fundamental rights enshrined in the Charter of Fundamental Rights of the EU ("the Charter") in general. That indicates that the DSA does not aim to "implement" one or several specific fundamental rights. That sets it apart from, for instance, the GDPR or the EU copyright acquis. It will be interesting to see what this means for the manner in which the DSA is interpreted, bearing in mind that the Court of Justice of the EU (CJEU) tends to consider the aims pursued by a given act of EU law a particularly important interpretative element. Indeed, such teleological interpretation has been key to the expansive way in which the GDPR and the copyright acquis have often been interpreted.[134] Arguably, Article 1(1) DSA should be read as stating that, first and foremost, the DSA aims to achieve a *balance* between the various fundamental rights typically at stake in disputes arising under it. Thus, it could be said that rather than "implementing" one or

[133] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1). See, e.g., Art. 25(2) DSA (seeking to avoid overlaps with EU consumer protection law and the GDPR in connection to the regulation of "dark patters") and Art. 26(3) DSA (relying on the GDPR concepts of "profiling" and "special categories" of personal data in connection to the DSA's regulation of advertising).

[134] E.g., C-487/21, *F.F. v Österreichische Datenschutzbehörde*, EU:C:2023:369, para. 40 (concerning the GDPR); Case C-607/11, *TVCatchup*, EU:C:2013:147, para. 20 (concerning copyright).

the other specific fundamental right, the DSA seeks to give effect to CJEU's case law insisting that in such cases of conflicting fundamental rights a "fair balance," in accordance with the principle of proportionality, must be struck.[135]

The aforementioned distinction between the due diligence provisions of the DSA with a "repressive" and a "protective" character can be of relevance in this regard. Where provisions of the former type are at stake, a three-way balance is typically called for.[136] First of all, the freedom of expression and information tends to be at issue.[137] This fundamental right is relevant both for the users who provided the information that might be repressed for being illegal content and for the users who might wish to access that information. The importance of the internet and digital services for free expression and obtaining information, as often emphasized by the CJEU,[138] makes that this is a particularly important fundamental right in the present context. However, it is certainly not the only – or even necessarily the predominant – one. Account should also be taken of the fundamental rights of the persons aggrieved by illegal content, such as the right to protection of intellectual property of a party whose copyright has been infringed, or the right to a private and family life of persons whose honour or privacy has been violated.[139] Their right to an effective judicial remedy can also play a role.[140] Finally, the service providers themselves have fundamental rights too, notably their freedom to conduct a business.[141]

Where DSA provisions of the latter, "protective" type are at stake, things may play out somewhat differently. The relationship may not always be triangular in nature, yet the required balancing can still be complex. Think, for instance, of the question how the service providers' freedom of contract, as part of the freedom to conduct a business, can be squared with users' freedom of expression when it comes to the content, application, and enforcement of contractual restrictions imposed by the former. That question is particularly relevant con-

[135] E.g., Case C-275/06, *Promusicae*, ECLI:EU:C:2008:54, para. 68.

[136] E.g., C-682/18 and C-683/18, *YouTube and Cyando*, para. 113; Case C-70/10, *Scarlet Extended v. SABAM*, EU:C:2011:771, paras. 44-53.

[137] Art. 11 Charter.

[138] Case C-401/19, *Poland v. EP and Council*, EU:C:2022:297, para. 46 (stating that the internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information, that online content-sharing platforms play an important role in enhancing the public's access to news and facilitating the dissemination of information in general and that user-generated expressive activity on the internet provides an unprecedented platform for the exercise of freedom of expression). The same goes for the European Court of Human Rights (ECtHR); see, e.g., ECtHR *Sanchez v. France*, Appl. no. 45581/15, paras. 158-162 (noting also certain risks connected to the internet).

[139] Arts. 17 and 7 Charter, respectively.

[140] Art. 47 Charter.

[141] Art. 16 Charter. In addition, service providers' own freedom of expression could conceivably come into play. The latter element has to date not featured in the relevant CJEU case law, but it has in that of the ECtHR. See, e.g., ECtHR *Delfi v. Estonia*, Appl. no. 64569/09.

sidering that some of the services covered are of great importance for reaching a public and that, in practice, most content moderation takes place based on the terms and conditions rather than the law as such. That being so, the DSA contains a provision expressly requiring service providers to have due regard to users' fundamental rights in this connection.[142] Other relevant questions include how decisions to demote or not recommend certain third-party information (rather than simply removing it) are to be assessed from the angle of freedom of expression and information;[143] how the fundamental rights of advertisers are to be factored in under the DSA's advertising-related provisions;[144] and how the rights of the child play out when seeking to protect minors.[145] The fact that Article 1(1) DSA makes express reference to the principle of consumer protection could be of particular interest when interpreting and applying DSA provisions of this "protective" type.[146]

As a final point it is worth noting that Article 1(1) DSA refers also to facilitating innovation. This point connects to debates about possible overregulation, already touched upon above.[147] One the one hand, through its layered design and differentiation based on the nature and the size of the services,[148] the DSA clearly seeks to avoid imposing excessive regulatory burdens. On the other hand, it is true that its scope is broad and that the burdens imposed can still be considerable (and increased significantly during the legislative process[149]).

The central issue in striking the balance in this respect is perhaps that the aim of facilitating innovation does not necessarily translate into a need to interpret the DSA's provisions restrictively. What is good for a given service provider is not necessarily good for innovation; innovation should be viewed from the perspective of the users and society at large. The DSA's aim of facilitating innovation should arguably especially play a role when interpreting the many open norms that it contains, in accordance with the principle of proportional-

[142] Art. 14(4) DSA. See further, e.g., J.P. Quintais, N. Appelman and R. Ó Fathaigh, 'Using Terms and Conditions to apply Fundamental Rights to Content Moderation,' *German Law Journal* 24 2023, pp. 881–911.

[143] As no information is being removed, it remains accessible. However, given the typically enormous amounts of information stored and disseminated to the public, the question could arise whether such accessibility is not merely theoretical.

[144] In particular, Arts. 26 and 39 DSA. See, e.g., C-639/23 P(R), *Commission v. Amazon*, para. 131.

[145] Art. 24 Charter.

[146] Art. 38 Charter.

[147] See Part I, Section G, above. See further, e.g., A. Bradford, 'The false choice between digital regulation and innovation,' *Northwestern University Law Review* 2024 119, pp. 377–453.

[148] Such size-based differentiation occurs in two ways. First, as described above, specific obligations apply to designated very large services (Chapter III, Section 5). Second, the DSA contains several exemptions for small and micro enterprises (Arts. 15(2), 19 and 29).

[149] By means of a rough illustration: the number of articles in the DSA increased from 74 to 93 during the legislative process, whilst the total word count (articles only) went from about 19,000 to about 35,000 words.

ity. Thus, account should be taken, *inter alia*, of the means and capacities of the service providers concerned, so that start-ups and smaller players do not necessarily carry the same burdens as larger ones. Accordingly, for instance, what is "expeditious" action upon receiving a notice, what are "diligent" steps to combat misuse, or what are "appropriate and proportionate measures" to protect minors may not always be the same for all service providers subject to the provisions in question.[150]

B.3. Evolution

In addition to diligence and balance, the DSA's third key word is evolution. That is apparent, first of all, when we consider the origin of its provisions. The DSA may be a big deal, but it did not come about in a big bang, in the sense that its content comes out of the blue. Some provisions codify and uniformize industry practices developed over the past decades. These had often previously been enshrined in voluntary codes of conduct[151] and in EU soft law.[152] On certain points, pre-existing CJEU case law was also incorporated.[153] Most importantly, as already touched upon in Part I, the DSA borrows quite extensively from other acts of EU law.[154]

The reliance on the concepts and content of other acts of EU law has two implications. First, even if there is obviously no automatic parallelism considering the specific content, context, and aims of the DSA, the manner in which the relevant provisions of other acts of EU law are interpreted may have consequences for the interpretation of the DSA (and *vice versa*). Second,

[150] See, respectively, Arts. 6(1), 23(3) and 28(1) DSA.

[151] See, e.g., the 2016 Memorandum of understanding on the sale of counterfeit goods on the internet, available via https://single-market-economy.ec.europa.eu/industry/strategy/intellectual-property/enforcement-intellectual-property-rights/memorandum-understanding-sale-counterfeit-goods-internet_en (containing provisions on matters like notice and takedown procedures and repeat infringers).

[152] See, in particular, Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online (OJ L 63, 6.3.2018, p. 50), points 5-17 and 25-27 (containing provisions on notice and action procedures, redress, transparency, and trusted flaggers).

[153] See, in particular, C-682/18 and C-683/18, *YouTube and Cyando*, paras. 109 and 115 (on matters relating to the processing of notices and "Good Samaritan" actions).

[154] That goes for the DSA's concepts of intermediary services, the conditional liability exemptions, and the prohibition of imposing general monitoring obligations (Arts. 3(g), 4-6 and 8), all taken from the e-Commerce Directive (Arts. 12-15); the DSA's provisions on giving reasons, redress, and recommender systems (Arts. 17, 20, 21, 27 and 38), inspired by the P2B Regulation (Arts. 4, 11 and 12); and the DSA's rules on service providers' contractual restrictions and the notification of suspicions of criminal offences (Arts. 14(4) and 18), based on the TCO Regulation (Arts. 5(1) and 14(5)). Furthermore, as noted, the DSA occasionally relies on concepts from other EU legislation, notably the GDPR (Arts. 25(2), 26(3), 28(2), 38, 40(8) and (13) DSA). And the DSA's provisions dealing with enforcement (Chapter IV, Section 4) echo not only those of Regulation 1/2003 (Chapters III-VII), and therefore indirectly those of the DMA (Chapter V), but on some points also those of the GDPR (Arts. 61 and 62).

other institutional actors than those designated under the DSA, such as the European Data Protection Board, may have an indirect say on how the DSA is to be understood and applied. These potentially relevant actors are added to the already remarkably long lists of parties involved in the application of the DSA. That list includes – besides the services providers themselves – public bodies such as the Commission, national supervisory authorities (especially, Digital Services Coordinators[155]), the European Board for Digital Services,[156] and EU and national courts, as well as private sector operators or NGOs like trusted flagger organizations, out-of-court dispute settlement bodies, auditors, and vetted researchers.[157] In many ways, this involvement of such a broad range of parties may be one of the DSA's strengths, as it ensures a variety of perspectives, broad legitimacy, and possible synergies. Yet, it also carries risks of inconsistencies and divergent views.

There is also a second way in which the DSA embodies an approach centered on evolution. Its provisions may be relevant on their own, but the DSA is particularly noteworthy for the manner in which it weaves together several provisions into a regulatory system covering entire cycles. Take, for instance, the provisions related to the content moderation conducted by service providers. In this respect, the DSA seeks to cover the full cycle. As noted, service providers are required to provide clarity upfront in their terms and conditions about the restrictions that they apply.[158] In addition, there are requirements regarding the subsequent stages in which those restrictions are applied and enforced, including as regards the provision of reasons and the possibility of internal and external redress.[159] At the end of the cycle, service providers must provide transparency *ex post* about their content moderation practices.[160] In this manner, users can ideally take informed decisions as to their use of the service. Moreover, a virtuous feedback loop might emerge. For instance, service providers may conclude as a consequence of the redress decisions that certain provisions of their terms and conditions, or the manner in which they are enforced, need revision.

A similar logic underpins the DSA's rules on risk management, which are applicable only to very large service providers. They must annually assess the systemic risks associated with the provision of their services and, based on the outcome thereof, take mitigating measures.[161] Moreover, there is a system of both internal

[155] Art. 49 DSA.
[156] Arts. 61-63 DSA.
[157] See, respectively, Arts. 22, 21, 37 and 40(4) DSA.
[158] Art. 14(1) DSA.
[159] Arts. 14(4), 16(5), 17, 20 and 21 DSA.
[160] Arts. 14(1), 15 and 24 DSA.
[161] Arts. 34 and 35 DSA.

(compliance officers[162]) and external (independent auditors, vetted researchers[163]) overview and verification of these service providers' actions. Again, there is mandatory transparency reporting *ex post*.[164] In this manner, the risk assessments can build on each other, whereby account can be taken of the effects of earlier risk mitigation measures. There are also mechanisms to share best practices between the different service providers concerned.[165] Moreover, the findings of the auditors and vetted researchers can be expected to feed into this process.

Finally, at the more fundamental level, another evolution is worth noting, too. The *laissez-faire* approach of the e-Commerce Directive, referred to earlier,[166] had been pioneered in the U.S.[167] As a consequence of this approach, the question whether and, if so, to which extent due diligence was to be exercised vis-à-vis users was logically primarily answered by the service providers themselves, mostly in view of commercial considerations.[168] In many ways, having regard to the increased importance of the digital services concerned mentioned earlier, the DSA embodies an attempt to ensure that that question is instead principally answered by public bodies, in function of public policy considerations. At the same time, the service providers retain a margin of maneuver as a consequence of the DSA's focus on procedure,[169] its sometimes broadly worded norms,[170] and the space it leaves for co-regulatory solutions.[171] It will be interesting to see whether this evolution towards imposing a degree of public control over the provision of digital services that are essential to many aspects of modern-day life will extend further, both in terms of the degree of descriptiveness potentially being increased in the future and in the sense that the EU's approach might spill-over to third countries either through a de jure or a de facto "Brussels effect."[172]

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[162] Art. 41 DSA.

[163] Arts. 37 and 40(4) DSA.

[164] Art. 42 DSA.

[165] Art. 35(2) and (3) DSA.

[166] See Part I, Section B, above.

[167] In particular, US Code Section 230 (Communications Decency Act) and Section 512 (Digital Millennium Copyright Act). See further, e.g., J.P. Quintais (ed.), 'From the DMCA to the DSA: a Transatlantic dialogue on online platform regulation and copyright,' Verfassungsbooks 2024; F. Wilman, *The responsibility of online intermediaries for illegal user content in the EU and the US*, Edward Elgar 2020, pp. 97–167.

[168] The considerations tend to involve seeking to satisfy users' expectations, but they can also relate to considerations such as not estranging advertisers, avoiding negative publicity, and responding to pressure from civil society and governments.

[169] E.g., whilst the DSA sets certain procedural rules regarding the service providers' content moderation policies (Art. 14), it remains in principle for the service providers to determine the content thereof and the means of enforcement.

[170] Such norms, firstly, allow for keeping pace with changing circumstances and, secondly, leave the service providers some scope to determine the specific measures needed to achieve the result sought, in accordance with their freedom to conduct a business. Cf., e.g., C-401/19, *Poland v. EP and Council*, para. 74.

[171] See Arts. 44-48 DSA (regarding non-binding standards and codes of conduct).

[172] A. Bradford, *The Brussels Effect: How the European Union Rules the World*, OUP 2020.

C. The Commission's roles under the DSA

C.1. The Commission as implementor

Under the DSA the Commission has essentially three roles: implementor, designator, and supervisor. Its role as an implementor – which entails, in essence, doing everything that needs to be done at EU level to ensure the proper implementation of the DSA – is a classic one, in the sense that it plays this kind of role under many other pieces of EU legislation. Under the DSA the role is nonetheless rather extensive. It includes diverse activities such as acting as a repository of information,[173] chairing and supporting the European Board for Digital Services,[174] helping to solve disagreements between public authorities involved in enforcement,[175] and contributing to the co-regulatory solutions mentioned above.[176]

Yet, this role principally entails the Commission giving effect to the DSA's numerous empowerments to adopt guidelines and delegated and implementing acts.[177] Especially the delegated acts and guidelines can play an important role in giving further substance to the DSA provisions in question. The relevant empowerments can mainly be found in provisions that either were added during the legislative process and are in themselves not particularly clear,[178] or concern "the highest standard of due diligence obligations"[179] that the DSA imposes on very large service providers.[180]

The Commission is currently still in the process of giving effect to all the empowerments.[181] Its priorities included ensuring its own supervisory capacities under the DSA. To that aim, it adopted not only an implementing act concerning its enforcement powers,[182] but also a delegated act on the supervisory fees to be paid by the very large service providers subject to Commission

[173] E.g., Arts. 21(8), 22(4) and (5) and 24(5) DSA.

[174] Art. 61 DSA.

[175] Art. 59 DSA.

[176] Arts. 44-48 DSA.

[177] See Arts. 33(2) and (3), 40(13), 43(4) and 37(7) (empowerments for delegated acts); Arts. 15(3), 24(6), 43(3), 83 and 85(3) (empowerments for implementing acts); Arts. 22(8), 25(3), 28(4), 35(3) and 39(3) (empowerments for guidelines). Note that the Commission can, in principle, also issue guidelines without an express empowerment.

[178] In particular, Arts. 25 and 28 DSA (on "dark patterns" and the protection of minors, respectively).

[179] Rec. 76 DSA.

[180] Arts. 33, 35, 37, 39, 40 and 43 DSA (all of which are part of Chapter III, Section 5, i.e., the rules applicable specifically to very large online platforms and very large online search engines).

[181] Some of the empowerments prescribe consultation of the European Board for Digital Services, referred to in Art. 61 DSA, which logically first had to be established and be operational.

[182] Commission Implementing Regulation (EU) 2023/1201 of 21 June 2023 on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to Regulation (EU) 2022/2065 of the European Parliament and of the Council (OJ L 159, 22.6.2023, p. 51).

supervision.[183] The funds thus obtained help pay for the exercise of the Commission's supervisory tasks under the DSA.[184] Some service providers have challenged the subsequent implementing decisions requiring them to pay the fee, calling into question the manner in which it was calculated.[185] Those cases were still pending at the time of writing.

The Commission has also adopted an implementing act on transparency reporting and a delegated act on auditing.[186] Additional measures, especially the delegated acts on access to data and on calculating the number of average monthly active users,[187] were still to be adopted at the time of writing. In April 2024, ahead of the European Parliament elections, guidelines were issued on the mitigation of risks for electoral processes in the context of the DSA's risk management obligations.[188] To date, no further formal Commission guidelines have been adopted, although guidelines on the protection of minors are expected for the first half of 2025.[189] The revised Code of Practice on Disinformation, agreed in June 2022 and soon to become a code of conduct under the DSA, is also worth mentioning here.[190]

C.2. The Commission as designator

As noted, the DSA imposes the most demanding due diligence obligations only on providers of very large services – specifically, on very large online platforms and very large online search engines. Those obligations – unlike the DSA's other obligations – become applicable only upon designation of the service

[183] Commission Delegated Regulation (EU) 2023/1127 of 2 March 2023 supplementing Regulation (EU) 2022/2065 of the European Parliament and of the Council with the detailed methodologies and procedures regarding the supervisory fees charged by the Commission on providers of very large online platforms and very large online search engines (OJ L 149, 9.6.2023, p. 16). On supervisory fees, see Art. 43 DSA.

[184] See Rec. 101 DSA.

[185] See Cases T-55/24, *Meta v. Commission*; T-58/24, *TikTok v. Commission* (both pending).

[186] See, respectively, Commission Implementing Regulation (EU) 2024/2835 of 4 November 2024 laying down templates concerning the transparency reporting obligations of providers of intermediary services and of providers of online platforms under Regulation (EU) 2022/2065 of the European Parliament and of the Council (OJ L, 2024/2835, 5.11.2024); Commission Delegated Regulation (EU) 2024/436 of 20 October 2023 supplementing Regulation (EU) 2022/2065 of the European Parliament and of the Council, by laying down rules on the performance of audits for very large online platforms and very large online search engines (OJ L, 2024/436, 2.2.2024).

[187] At the end of 2024, the Commission launched a public consultation on the former delegated act. See https://digital-strategy.ec.europa.eu/en/news/commission-launches-public-consultation-rules-researchers-access-online-platform-data-under-digital

[188] Commission, Guidelines for providers of very large online platforms and very large online search engines on the mitigation of systemic risks for electoral processes pursuant to Article 35(3) of Regulation (EU) 2022/2065, C/2024/3014, 26.4.2024.

[189] See https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14352-Protection-of-minors-guidelines_en

[190] Commission, Press release IP/25/505, 13 February 2025. See https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation

in question. Unlike under the DMA, under the DSA designation depends on a single criterion, without there being any rebuttable presumptions,[191] namely, exceeding the threshold of 45 million average monthly active users in the EU.[192] Although the DSA's definitions[193] and recitals[194] and the Q&A document that the Commission published in 2023 all help increase clarity,[195] determining the number of average monthly active users is not necessarily as straightforward as it may sound. Challenges arising in this connection include precisely how such numbers should be calculated and whose data should be used for these purposes, as well as how to deal with "hybrid" services that are used not only by third parties, but also by the service provider itself, to sell certain goods or services to users.[196]

To date, the Commission has designated 25 services as either very large online platforms or as very large online search engines.[197] Those services include, among others, Zalando, Wikipedia, Google Search, Bing, Amazon, LinkedIn, YouTube, Facebook, Instagram, TikTok, and X.

Several service providers challenged the Commission implementing decisions by which their respective services were designated.[198] In all cases, the main actions are currently still pending. However, some service providers also brought proceedings for interim measures. The leading case is the one brought by Amazon seeking the suspension of the designation decision relating to its marketplace service in so far as it concerns the DSA's obligations regarding recommender systems and advertising transparency.[199] Amazon was initially partly successful: the President of the General Court ordered the suspension of the advertising transparency obligation, which entails service providers compiling and making publicly available a repository containing information on the advertisement presented on their services.[200] The order was essentially based on the view that the information, presumed to be sensitive, that is disclosed in this manner could subsequently not be "undisclosed" should Amazon succeed in the main action. However, on appeal the Vice-President of the Court of

[191] Unlike under the DMA. See Part III, Section B.3, below.

[192] Art. 33(1) DSA.

[193] See in particular Art. 3(m), (p) and (q) DSA.

[194] Rec. 77 DSA.

[195] See https://digital-strategy.ec.europa.eu/en/library/dsa-guidance-requirement-publish-user-numbers

[196] See further, e.g., M. Husovec, *Principles of the Digital Services Act*, OUP 2024, pp. 168–171; F. Wilman, 'Article 33: Very large online platforms and very large online search engines,' in: Wilman, Kalėda and Loewenthal, n. 110 above, pp. 250–252.

[197] See https://digital-strategy.ec.europa.eu/en/policies/list-designated-vlops-and-vloses

[198] In addition to the cases mentioned below, see Cases T-348/23, *Zalando v. Commission*; T-134/24, *Technius v. Commission*; T-138/24, *Aylo Freesites v. Commission*; T-139/24, *WebGroup v. Commission*; T-486/24, *NKL Associates v. Commission* (all pending).

[199] Arts. 38 and 39 DSA.

[200] Order President General Court Case T-367/23 R, *Amazon v. Commission*, EU:T:2023:589.

Justice ruled differently and lifted the suspension. In particular, the latter gave more weight to the public interest associated with ensuring advertising transparency and also took account of the unequal playing field that would result from suspending the obligation only in respect of Amazon.[201] The designation-based approach on which the DSA partially relies is also followed by the DMA, yet it is quite rare in EU law generally. It has considerable advantages. Most notably, it enables targeted interventions (covering precisely the services that are deemed in need of regulation), allows for a degree of dynamism (services designated can also be "un-designated"), and provides clarity and legal certainty (it is clear to all which services are covered). The initial experiences gathered seem to indicate that this approach works rather well. Nonetheless, it involves transaction costs of various types. To make it possible to determine which services might need to be designated, all relevant service providers must publish their number of average monthly active users.[202] There are naturally also costs involved in the designation process itself. Moreover, the approach inherently creates challengeable acts, namely the designation decisions.[203] As has been seen, the service providers concerned are not shy to challenge those decisions in court. Unsurprisingly, given what is at stake, they sometimes use this opportunity not to call into question the designation as such, but rather – as, for instance, in the Amazon case mentioned – the application to them of certain specific due diligence obligations.[204]

C.3. The Commission as supervisor: first impressions

The DSA attributes important supervisory tasks to the Commission.[205] The latter is exclusively competent for supervising providers of very large services' compliance with the DSA obligations that apply only to them.[206] In respect of their compliance with all other DSA obligations, the Commission shares competence with the relevant authorities designated by the Member States, in particular their Digital Services Coordinators. However, those national

[201] C-639/23 P(R), *Commission v. Amazon*. See also Cases C-511/24 P(R) (appeal T-138/24 R) and C-620/24 P(R) (appeal T-139/24 R).

[202] Art. 24(2) DSA.

[203] The Commission had proposed attributing the task of taking designation decisions to the competent national authorities, meaning that litigation would have taken place at national level, but the EU legislator decided to attribute it to the Commission instead. See Commission, Proposal for a Regulation of the European Parliament and of the Council on a single market for digital services (Digital Services Act) and amending Directive 2000/31/EC, 15 December 2020, COM(2020) 825, p. 59 (Art. 25).

[204] Indeed, it may be no coincidence that Amazon's action for interim measures, and those of several other service providers, focused specially on the DSA obligations regarding recommender systems and advertising, considering the importance of those two topics for many of the services covered.

[205] Art. 56 DSA.

[206] That is, the obligations laid down in Chapter III, Section 5, DSA.

authorities are competent only where the Commission has not initiated proceedings for the same infringement.[207] All other – that is, not "very large" – services covered by the DSA are solely subject to supervision by the national authorities of the Member State of their main place of establishment (or, where relevant, that of their legal representative[208]).

It is currently too early to draw conclusions on the exercise of the Commission's supervisory tasks. Nonetheless, as a first impression, it seems fair to say that the Commission has energetically taken up these tasks. Having sent numerous requests for information to the providers of many of the (at present) 25 very large services under its supervision on a broad range of topics, to date it has opened in total nine formal proceedings to investigate possible violations in respect of six of those services.[209] One of them, concerning X, has resulted in preliminary findings.[210] Moreover, one of the investigations has already been concluded. That investigation concerned a new functionality – the TikTok Lite programme – that Bytedance intended to launch in certain Member States. The Commission took the view that a prior risk assessment and mitigation exercise should have been conducted, in particular in the light of concerns about the potentially addictive effects of the new functionality, including for minors.[211] In the light of the Commission's concerns, Bytedance committed to permanently withdrawing that functionality from the EU. The Commission made the commitments binding, thus bringing the proceedings to an end.[212]

In fact, many of the aforementioned investigations involve alleged violations of the DSA's risk assessment and mitigation obligations.[213] This illustrates both the centrality and the broad scope of those obligations. It also illustrates that whilst, as was discussed above, gradual evolution is an important feature of the risk management system, in the Commission's view this does not rule out holding service providers accountable for failures in individual cases. Possible violation of the DSA's data access obligations is another recurring topic in

[207] Cf. Rec. 125 DSA (stating that the Commission should normally deal with systematic infringements and Member States with individual infringements).

[208] See Art. 13 DSA (regarding service providers without an establishment in the EU).

[209] The six services subject to investigations are X, TikTok, AliExpress, Facebook, Instagram, and Temu, some of them being subject to several investigations. In addition to the press releases cited in the other footnotes, see Commission, Press release IP/23/6709, 18 December 2023; Press release IP/24/926, 19 February 2024; Press release IP/24/1485, 14 March 2024; Press release IP/24/2664, 16 May 2024; Press release IP/24/3761, 12 July 2024; Press release IP/24/5622, 31 October 2024.

[210] Commission, Press release IP/24/3761, 12 July 2024.

[211] Commission, Press release IP/24/2227, 22 April 2024. Pursuant to Art. 34(1) DSA, risk assessments are to be conducted not only annually, but also "prior to deploying functionalities that are likely to have a critical impact on the risks identified."

[212] Commission, Press release IP/24/4161, 5 August 2024.

[213] Arts. 34 and 35 DSA, at stake in seven of the nine investigations (sometimes combined with other alleged violations).

the investigations.[214] This arguably illustrates service providers' hesitance to give insights into what happens "under the hood" when it comes to some of their core activities, such as the workings of their recommender systems and their data-related practices. Although somewhat less frequently at stake, other possible breaches under investigation relate to notice and action mechanisms, the protection of minors, and advertising transparency.[215] It thus appears that many of the obligations at stake involve the "protective diligence" requirements of the type mentioned earlier.

Perhaps the most eye-catching ongoing investigation concerns the one into TikTok's suspected failure to properly assess and mitigate systemic risks linked to election integrity in the context of the Romanian presidential elections on 24 November 2024.[216] Manipulation and foreign interference, especially on TikTok, was an important reason for the annulment by Romania's constitutional court of the result of the first round of voting and its order to restart the process rather than to proceed with the second round.[217] In this connection the Commission issued a retention order, requiring the preservation of data related to systemic risks this service could pose on electoral processes and civic discourse in the EU (and therefore not only in Romania).[218] The European Parliament, too, got involved in the discussions.[219] This investigation came on top of earlier investigatory proceedings in respect of Facebook and Instagram, both provided by Meta, for activities relating to civic discourse and electoral processes, specifically in connection to the European Parliament elections of June 2024.[220] Whilst also involving other concerns, the latter investigation turns in particular on Meta's decision to phase out a tool called CrowdTangle, which enabled real-time election monitoring for researchers, journalists, and civil society organizations.

C.4. The Commission as supervisor: underlying issues

Views on the DSA's system of public enforcement are likely to differ considerably depending on one's point of view. Persons familiar with EU competition law might find it hardly noteworthy, since in this respect the DSA resembles – and has indeed been inspired by – Regulation 1/2003. However, those viewing the system from the angle of EU internal market law may well find it remarkable, given that in the latter domain the DSA's approach is a novelty. Considering

[214] Art. 40 DSA, at stake in six investigations.
[215] Arts. 16, 25 and 39 DSA, respectively, at stake in three of four investigations.
[216] Commission, Press release IP/24/6487, 17 December 2024.
[217] See n. 107 above.
[218] Commission, Press release IP/24/6243, 5 December 2024.
[219] "We are getting fed up': EU lawmakers snap at TikTok over Romanian election,' *Politico*, 3 December 2024.
[220] Commission, Press release IP/24/2373, 30 April 2024.

that under the DMA (strictly speaking also an internal market measure) the Commission is the principal supervisor and that also the more recently adopted Artificial Intelligence (AI) Act attributes certain supervisory tasks to the Commission,[221] we might be witnessing the emergence of a new model for the enforcement of "Big Tech"-related internal market legislation in which the Commission plays a central role.

It is noteworthy that, in its proposal for the DSA, the Commission had proposed a more limited supervisory role for itself.[222] In contrast to what occurred in connection to the DMA,[223] especially the Member States gathered in the Council argued for increasing the Commission's role in this respect under the DSA.[224] The main reason appears to have been dissatisfaction with the functioning of the country-of-origin principle, which is enshrined in e-Commerce Directive[225] and essentially also in the GDPR,[226] where it has not always functioned fully satisfactorily.[227] Moreover, there is a certain logic to subjecting the largest digital service providers, which tend to operate in a pan-European way, to oversight by a centralized, pan-European body such as the Commission.

That does not mean, however, that the choice to attribute important supervisory tasks to the Commission is without challenges. Some of these are mainly practical. There were, for instance, concerns about the Commission having the necessary expertise and resources. The DSA seeks to address these by measures like the imposition of the aforementioned supervisory fees as well as an emphasis on cooperation and mutual assistance.[228] Within the Commission, DSA supervision and enforcement is principally done by the Platforms Directorate set up within its Directorate-General for Communications Networks, Content and Technology (DG CNECT), assisted by the Legal Service. The Commission reported that, by the end of 2023, it had spent around 27 million euros on this task and the responsible team consisted of 69 persons.[229]

[221] Art. 75 AI Act.

[222] See Commission, Proposal for a Regulation of the European Parliament and of the Council on a single market for digital services (Digital Services Act) and amending Directive 2000/31/EC, 15 December 2020, COM(2020) 825, pp. 68–69 (Art. 40) and pp. 75–77 (Arts. 50-51).

[223] See Part III, Section E, below.

[224] See Council, General approach on the DSA, 18 November 2021, 13203/21 (Art. 44a).

[225] Art. 3 e-Commerce Directive.

[226] Art. 56 GDPR.

[227] See, e.g., Commission, 'Data protection as a pillar of citizens' empowerment and the EU's approach to the digital transition: two years of application of the General Data Protection Regulation,' COM(2020) 264, 24 June 2020, p. 5 (stating that further progress is needed to make the handling of cross-border cases more efficient and harmonized across the EU). See further Husovec, n. 196 above, pp. 420–421.

[228] See, in particular, Arts. 56(5) and 57 DSA.

[229] See Commission, Report on the overall annual costs incurred for the fulfilment of the Commission's tasks pursuant to Regulation (EU) 2022/2065 in the period from 16 November 2022 until 31 December 2023 and the total amount of the annual supervisory fees charged pursuant to Article 6(4) of Commission Delegated Regulation (EU) 2023/1127 in 2023, COM(2024) 523, 6 November 2024.

A Centre for Algorithmic Transparency and a DSA whistleblower tool have also been established.[230] Any practical challenges experienced in the process of taking on its supervisory tasks appear not to have substantially hindered the Commission in the exercise of those tasks.

Given that national supervisory authorities still play an important role and that digital services can easily be provided across borders, effective cooperation between the different supervisory authorities is likely to be essential to make a success of DSA enforcement. The DSA contains several measures to this effect, such as the provisions on cross-border cooperation and joint investigations.[231] In addition, the European Board for Digital Services offers a forum for cooperation and information exchange. Time will tell whether these measures are sufficient or whether additional ones might be called for, as occurred in the field of competition law and in connection to GDPR enforcement.[232] The Commission, for its part, is already working together with national supervisory authorities – notably with the Irish one, Ireland being the Member State where many of the service providers concerned are established – when conducting some of the abovementioned investigations.[233]

More principled issues have arisen too. These relate particularly to the risk of DSA enforcement being seen as "politicized."[234] There is no doubt that the DSA – and therefore also DSA *enforcement* – can raise issues that are highly political in nature. The annulment of the Romanian elections because of manipulation and foreign interference via TikTok, mentioned earlier, is but one powerful illustration thereof. Moreover, as noted, the DSA relies on open norms in several key provisions, including those on risk assessment and mitigation, thus leaving a degree of discretion. That being so, there is a risk of perceptions arising that "political" considerations might have played a role in the decision-making.

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[230] See, respectively, https://algorithmic-transparency.ec.europa.eu/index_en and https://digital-strategy.ec.europa.eu/en/policies/dsa-whistleblower-tool

[231] Arts. 58 and 60 DSA.

[232] See Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (OJ L 11, 14.1.2019, p. 3); Commission, Proposal for a Regulation of the European Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/679, COM(2023) 348, 4 July 2023.

[233] According to the relevant press releases, that goes for the aforementioned investigations relating to TikTok and Temu, initiated on 31 October 2024 and 17 December 2024, respectively.

[234] See, e.g., I. Buri, 'A regulator caught between conflicting policy objectives: reflections on the European Commission's role as DSA enforcer, in: Van Hoboken et all (eds.), n. 104 above, pp. 75–89, at p. 85 (noting that content moderation is highly contested and politicised and arguing that questions connected to the perceived legitimacy of the Commission in overseeing the regulation of these matters might have been underestimated); Access Now, ARTICLE 19 and Electronic Frontier Foundation, 'Civil society statement: Commissioner Breton needs to stop politicising the Digital Services Act,' 19 August 2024, available via https://www.accessnow.org/press-release/commissioner-breton-stop-politicising-digital-services-act

The Commission's independence is anchored in the Treaties.[235] Yet perceptions can matter, too. It may well be in the Commission's own interest to dispel any perception of politization as much as possible. It could do so, for instance, by being predictable and transparent – concretely, by being clear upfront about its enforcement priorities and by publishing annual activity reports *ex post*.[236] Fleshing out what, in its view, service providers are expected to do exactly under broadly worded provisions such as those on risk assessment and mitigation should help too. Other conceivable measures could include setting up a panel of independent experts to advise on sensitive cases and to appoint a hearing officer to help ensure impartiality and objectivity in the DSA enforcement proceedings.[237] It is not excluded that, in the longer run and depending on the experiences gathered, the question of whether a separate body ought to be charged with EU-level DSA enforcement might re-emerge – that option having been rejected whilst the DSA was being prepared, mainly due to the costs and time constraints.[238]

Additional challenges might result from the changing political winds blowing across the Atlantic, which might entail push-back against attempts to enforce the DSA in respect of U.S.-based service providers.[239] In that regard, some may see it as disadvantageous that the DSA attributes to the Commission enforcement tasks in respect of very large service providers, many of which are headquartered in the U.S. For this might involve a risk of the performance of those tasks being intertwined – or being *seen* as intertwined – with some of the Commission's other responsibilities, such as those under the EU's trade or security policies. However, apart from the fact that the Commission has not only a clear responsibility but also a clear interest in adequately performing its tasks under the DSA, it is probably better placed to withstand any such external pressure than the competent authority of an individual Member State would be. The DSA reflects the idea that, by acting collectively, Europeans are better able to stand up to "Big Tech." That logic holds irrespective of whether the latter exercise pressure directly, for instance through threats to end their service provision,[240] or indirectly, through the government of their home country.

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[235] See, in particular, Art. 17 TEU. Cf., e.g., W. Wils, 'The independence of competition authorities: the example of the EU and its Member States,' *World Competition* 42 2019, p. 149 (expanding on the Commission's independence in a competition law context).

[236] Cf. Art. 55 DSA (obliging national supervisory authorities to draw up annual activity reports).

[237] Cf. Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (OJ J L 275, 20.10.2011, p. 29).

[238] Commission, Impact assessment DSA (part 1/2), SWD(2020) 348, 15 December 2020, pp. 71 and 73. See also Husovec, n. 196 above, p. 425.

[239] E.g., 'JD Vance says US could drop support for NATO if Europe tries to regulate Elon Musk's platforms,' *Independent*, 17 September 2024; 'Zuckerberg urges Trump to stop the EU from fining US tech companies,' *Politico*, 11 January 2025.

[240] E.g., 'Google threatens to withdraw search engine from Australia,' *BBC News*, 22 January 2021; 'Facebook and Instagram to restrict news access in Canada,' *BBC News*, 23 June 2023.

D. Specific issues

D.1. Private enforcement

Article 54 DSA deals with the possibility of users to seek – and, where the relevant conditions are met, naturally also *obtain* – compensation for any damage or loss suffered due to service providers' infringements of their obligations under the DSA.

This article is helpful, first, in that it clarifies what already results from primary EU law, namely, that such a right to compensation exists.[241] Second, it articulates the three conditions that apply for this right to arise, that is, the existence of an infringement, damage, and a causal link between the two.[242] Third, it makes clear that "any damage or loss" is compensable, covering therefore both material and immaterial damage.[243] Whilst less clearly articulated, it can safely be assumed that users have a right to full compensation of the damage or loss actually suffered – no less, but no more, either.[244]

Article 54 DSA underlines the need to exercise the users' right to compensation in accordance with EU and national law. That means, on the one hand, that the fundamental right to effective judicial protection, enshrined in Article 47 Charter, and the EU law principles of effectiveness and equivalence must be respected. On the other hand, provided EU law is complied with, pursuant to the principle of national procedural autonomy, national law plays an important role in operationalizing this right, for instance concerning the quantification of the loss or damage suffered.[245] As seen in other domains, such quantification can be challenging in practice.[246] Especially considering that under the DSA users will often be consumers and that the harm can be limited at individual level, it is relevant to note that the Representative Actions Directive also covers infringements of the DSA.[247] In addition, the DSA contains its own rules on the possible representation of users by specific bodies.[248]

[241] Cf., e.g., Case C-295/04, *Manfredi*, EU:C:2006:461 (regarding competition law).

[242] Cf., e.g., Case C-300/21, *Österreichische Post*, EU:C:2023:370, para. 32 (regarding the GDPR); Case C-295/04, *Manfredi*, para. 61 (regarding competition law).

[243] Cf., e.g., Case C-99/15, *Liffers*, EU:C:2016:173, para. 26 (regarding intellectual property law).

[244] Cf., e.g., C-300/21, *Österreichische Post*, para. 58; C-99/15, *Liffers*, para. 25. See, however, also C-295/04, *Manfredi*, para. 99 (indicating that the principle of equivalence could necessitate the possibility to award punitive damages).

[245] E.g., C-300/21, *Österreichische Post*, para. 54; C-295/04, *Manfredi*, para. 98.

[246] Cf., e.g., Commission, Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights, COM(2017) 708, 29 November 2017, p. 3 ("Practice shows that assessing damages for infringement of [intellectual property rights] can be complicated"). See also Commission, Communication on quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU (OJ C 167, 13.6.2013, p. 19).

[247] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (OJ L 409, 4.12.2020, p. 1). See Art. 90 DSA.

[248] Art. 86 DSA.

The DSA expressly provides for the possibility of the Commission making written or oral submissions before national courts, but only in connection to proceedings to temporarily restrict the access to the online interfaces of service providers engaged in certain persistent and serious infringements.[249] In this respect the DSA is thus more restrictive than Regulation 1/2003, which provides for that possibility in a more general manner.[250] Perhaps this difference can be explained by the fact that, as mentioned, the Commission was only attributed full-blown enforcement powers during the legislative process. In any event, it probably means that the Commission's involvement in national proceedings is dependent on the competent national courts having requested its assistance, in accordance with the CJEU's case law.[251]

The Commission's role in DSA enforcement means that there is scope for "follow-on" actions of the type known in competition law, that is, damages claims brought at national level after the Commission established an infringement at EU level. This can have implications for matters such as the application of limitation periods provided for in national law.[252] Echoing Regulation 1/2003, the DSA expressly provides for the binding effect of Commission decisions.[253] There is no equivalent of the rule of the Competition Damages Directive on the effects of decisions taken by national supervisory authorities.[254]

Finally, the DSA seems to illustrate a broader issue with private enforcement of EU law, namely, that it is often somewhat of an afterthought. Article 54 DSA was only added during the legislative process. There is also little consistency in the EU legislature's approach.[255] For instance, it is hard to explain why the DMA contains no similar provision, whilst the corresponding provision in the GDPR is drafted differently.[256] Moreover, Article 54 DSA does not cover all private enforcement-related issues that can emerge. There might even be a risk of it – wrongly – being read *a contrario*. For example, the article should not be understood as implying that damages claims are necessarily the *only* type of private enforcement actions possible. In all likelihood, other types of actions, such as those for injunctions, are in principle possible too.[257] Furthermore,

[249] Art. 82(2), read in conjunction with Art. 51(3), DSA.

[250] Art. 15 Regulation 1/2003.

[251] Order Case C-2/88 Imm., *Zwartveld*, EU:C:1990:315.

[252] E.g., Case C-605/21, *Heureka Group*, EU:C:2024:324.

[253] Art. 82(3) DSA. See Art. 16(1) Regulation 1/2003.

[254] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349, 5.12.2014, p. 1), Art. 9.

[255] See, more generally, F. Wilman, *Private enforcement of EU law before national courts: the EU legislative framework*, Edward Elgar 2015, pp. 437–442 and 560–564.

[256] Art. 82(1) GDPR.

[257] Cf., e.g., Case C-253/00, *Muñoz*, EU:2002:497. See also Husovec, n. 196 above, p. 428; S. Kalėda, 'Article 54: Compensation,' in Wilman, Kalėda and Loewenthal, n. 110 above, p. 371; A. Komninos, 'Private enforcement of the DMA rules before national courts,' 2024, available via

it seems not excluded that other parties than users can also bring claims against service providers for violation of the relevant DSA obligations. Think, for instance, of trusted flaggers organizations or (vetted) researchers.[258]

D.2. Out-of-court dispute settlement

In addition to the public and private enforcement discussed above, the DSA also provides for what could be called "privatized" enforcement. Its Article 21 constitutes the basis for the establishment of out-of-court dispute settlement (ODS) bodies. Users can turn to one of these bodies when they disagree with content moderation decisions taken by the service providers covered, such as the removal of information, suspension of the users' accounts, or restrictions of their ability to monetize information. Users will at most be charged a nominal fee, which they can recover if the body decides in their favour. In practice, service providers are likely to bear most, if not all, of the costs.[259]

Under the DSA, ODS bodies need prior certification by the competent national authorities. This is meant to ensure that they are independent and have the necessary expertise and that the proceedings are fair and efficient. At the time of writing, six bodies had been certified, in France, Ireland, Germany, Hungary, Malta, and Italy.[260] The certified bodies have different areas of expertise, and most are capable of settling disputes in several languages. Still, so far, they offer proceedings in only nine of the EU's 24 official languages. This underlines the point that civil society uptake is crucial to fully realize the DSA's potential across the EU.[261] Article 21 DSA provides for the option – but not the obligation – for Member States to step in and either set up ODS bodies themselves or to support the activities of existing bodies.

In essence, Article 21 DSA seeks to offer users a quick, simple, and cheap means of redress. That is particularly important in the present context, given the characteristics of the typical disputes covered. Often the users concerned are consumers (thus having limited resources and expertise) and the disputes may well involve only relatively modest harm (expressed in monetary terms) and be time-sensitive (in that they become moot if it takes too long to resolve them). As importantly, especially for very large service providers, the disputes tend to arise on a massive

https://ssrn.com/abstract=4791499 (all taking a similar view, the latter in connection to the DMA). See also Part III, Section F, below.

[258] Cf., e.g., 'German civil activists win victory in election case against Musk's X,' *Reuters*, 7 February 2025.

[259] See, e.g., D. Holznagel, 'Art. 21 DSA Has Come to Life,' *Verfassungsblog*, 5 November 2024.

[260] See https://digital-strategy.ec.europa.eu/en/policies/dsa-out-court-dispute-settlement

[261] M. Husovec, 'Will the DSA work?,' Van Hoboken et all (eds.), n. 104 above, pp. 20–33, at pp. 21–22.

scale. They can take millions of content moderation decisions leading to hundreds of thousands of appeals per year.[262] Whilst the internal redress mechanisms prescribed by the DSA may help deal with the bulk of them,[263] affected users may still feel the need for independent review. For the reasons given, "classic" judicial redress is often hardly a realistic option. ODS is meant to plug the resulting hole. Since judicial redress remains possible for affected parties, their right to an effective remedy under Article 47 Charter is not called into question.

Crucially, the ODS bodies' decisions taken under Article 21 DSA are not binding. However, the parties must engage in good faith and service providers may be under pressure to respect the outcomes.[264] Time will tell whether service providers will accept and implement the decisions to a degree sufficient to make this form of redress attractive for users. Conversely, especially if users pay no fees at all, there might be a risk of abuse. The DSA's provision on combatting misuse does not cover misuse of the ODS mechanism.[265] Instead, Article 21 DSA foresees the possibility of the ODS bodies requiring users to pay the service providers' costs where they "manifestly acted in bad faith." Whether that possibility will serve as a sufficiently effective deterrent in practice remains to be seen. It will also be interesting to see what weight, if any, national courts will give to decisions by ODS bodies when seized after a user has received an unfavourable decision or a service provider refuses to implement a favourable onFrom an institutional perspective, perhaps the most important question is that of consistency. Especially since Article 21 DSA leaves certified ODS bodies some latitude (for instance, no standard of review is specified), it is not inconceivable that different bodies develop somewhat different practices and that their decisions are not always perfectly aligned. If that were to occur on a significant scale, it would not only put affected service providers in a difficult position; it could also undermine the credibility and therefore the effectiveness of the ODS mechanism and create uncertainty about the interpretation of the relevant provisions of the DSA. It seems evident that the preliminary reference procedure is not available for ODS bodies, if only because of their lack of compulsory jurisdiction.[266] The DSA does not provide any formal mechanism to help ensure consistency in this respect.[267] Under Article 21 DSA, only in

[262] See, e.g., YouTube's transparency report for the period 1 March – 30 June 2024, available via https://transparencyreport.google.com/report-downloads?lu=report-27 (citing around 230.000 notice-based and around 30 million own initiative content moderation decisions, as well as around 400.000 complaints received).

[263] Art. 20 DSA. Note that the disputes brought under Art. 21 DSA may be preceded by such internal review, but that this is not a mandatory requirement.

[264] Cf., e.g., Art. 35(1)(g) DSA (mentioning implementing said decisions as a possible risk mitigation measure for very large service providers).

[265] Art. 23 DSA.

[266] E.g., Case C-54/96, *Dorsch Consult*, EU:C:1997:413, paras. 27-29.

[267] Interestingly, as a private initiative initiated by one of the certified ODR bodies (namely, User Rights), an "Article 21 Academic Advisory Board" has been set up, which might help reduce the risk of inconsistencies. See https://www.user-rights.org/de/advisory-board#:~:text=The%20

extreme cases, involving non-compliance with the applicable conditions, can national supervisory authorities step in by revoking the certification.

D.3. Preemption

The last topic to be addressed in this Part II is not about enforcement but rather involves the preemptive effect of the DSA in respect of national legislation. In this connection its Recital 9 states that the DSA constitutes full harmonization and that, accordingly, Member States should not adopt or maintain additional national requirements relating to matters falling within the scope of the DSA.[268] This recital recalls in essence what already follows from settled CJEU case law, namely, that Member States are precluded in principle from adopting or maintaining national provisions in parallel to Regulations.[269] Naturally, that rule only extends to the matters covered by the Regulation in question. And it does not exclude Member States taking certain implementing measures. They may even expressly be required to do so, as occurs under the DSA when it comes to the designation and powers of national supervisory authorities and the penalties that those authorities may impose.[270]

Whilst the rule recalled in Recital 9 DSA itself is clear, its application can raise complex questions. Detailed, case-by-case assessments of both the Regulation and the relevant national rules at issue can be required to assess whether the former preempts the latter.[271] The DSA may prove particularly challenging in this regard given that its objective and scope are wide and that some of its provisions are worded in general terms. Perhaps as importantly, the field of digital service provision tends to be dynamic and give rise to politically sensitive issues. Although the broad wording of some of the DSA's provisions serves in part precisely to take account of such dynamism,[272] it is therefore nonetheless not hard to conceive of issues arising that are seen as in need of regulation and in respect of which it is not beyond debate whether they are covered by the DSA or not.

One could think, for instance, of current debates about whether minors should be prevented from having access to social media services. Such "social media bans" tend to be framed in terms of requirements addressed to the relevant

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Article%2021%20Academic%20Advisory%20Board%20discusses%20the%20most%20challenging,academics%20and%20civil%20society%20organisations

[268] See further S. Kalėda, 'Article 1: Subject matter,' in: Wilman, Kalėda and Loewenthal, n. 110 above, pp. 17–19.

[269] E.g., Joined Cases C-539/10 P and C-550/10 P, *Stichting Al-Aqsa v. Council*, EU:C:2012:711, paras. 85-87.

[270] Arts. 49-52 DSA.

[271] E.g., Case C-438/23, *Protéines France*, EU:C:2024:826, paras. 50-96.

[272] See n. 170 above.

service providers.[273] They raise complex legal and practical questions already in themselves, for instance regarding the effectiveness of age-verification technology and the compatibility of such bans with the rights of the child. But on top of that, debates could arise about the relationship with existing EU law, including (although not only) the DSA.[274] Similar questions can arise in respect of national laws meant to bar minors' access to services hosting pornographic content.[275] The DSA not only evidently covers these kinds of services and seems to pursue similar aims; it also contains rules that specifically require relevant service providers to "put in place appropriate and proportionate measures to ensure a high level of privacy, safety, and security of minors,"[276] whilst the rights of the child and the protection of minors are also part of the risk assessment and mitigation exercise.[277] At the same time, the DSA includes nothing resembling express bans of this type.

Therefore, differences of opinion could arise in connection to the DSA's preemptive effect on possible national legislation regarding these sorts of matters. Such questions are, of course, analytically distinct from the ones on the relationship between the DSA and other acts of EU law, discussed earlier.[278] However, in practice they may overlap. That could occur, for instance, where a Member States claims the national law at issue constitutes a measure to protect minors from harmful content on video-sharing platforms in implementation of the AVMSD.

Subject to political decision-making and the availability of a sufficient legal basis (normally, Article 114 TFEU on the internal market), it might in certain cases be deemed preferable to regulate the matter at EU, rather than at national, level. If so, this would likely happen in the form of a complementary, self-standing legal act. For there is probably little appetite to amend the DSA, since it has been adopted only quite recently and proposing an amendment could lead to discussions on all kinds of other topics being re-opened. Even more recently adopted legal acts such as the European Media Freedom Act and the Political Advertising Regulation are examples of such complementary legal acts. As noted in Part I, they contain certain "top-ups" to DSA provisions.[279] Yet this approach is not without downsides. At best it adds complexity and at worst it turns the DSA into something of a Christmas tree.

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[273] E.g., 'Australia approves social media ban on under-16s,' *BBC News*, 29 November 2024.

[274] Apart from the DSA, questions about consistency with, e.g., the GDPR (especially when it comes to age-verification tools) and the e-Commerce Directive (especially the home state control principle of its Art. 3) could arise too.

[275] See, e.g., Case C-188/24, *WebGroup* (pending, focusing on the e-Commerce Directive).

[276] Art. 28(1) DSA.

[277] Art. 34(1)(b) and (d) DSA.

[278] See Part I, Section G, above.

[279] E.g., Art. 18(4) and (5) European Media Freedom Act; Arts. 13(2) and (3) and 22(3) Political Advertising Regulation. See further Part I, Section G, above.

Alternatively, the potential differences of opinion referred to above might eventually have to be settled through infringement proceedings under Article 258 TFEU. To date, the Commission's activities in this regard have focused solely on the Member States's positive obligations under the DSA, specifically those to designate and empower national supervisory authorities.[280] However, for the reasons given, those activities might, where necessary, in time also extend to Member States' negative obligations pursuant to the principle of preemption. In that sense, this topic too might be about enforcement after all.

PART III: DIGITAL MARKETS ACT (DMA)

A. Introduction

If one had to condense the DMA into just two words, those would undoubtedly be "fairness" and "contestability." This is not just because those words appear in the title of the DMA or in its Article 1 as the two objectives that the DMA is meant to achieve. They also permeate a large part of the 109 recitals and 54 articles of which the DMA is composed and explain many of the concrete policy choices made by the EU legislature in the design of the DMA.

"Contestability" is defined in the DMA as "the ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services."[281] Fairness can be derived, a contrario, from the DMA's definition of "unfairness," which relates to "an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage."[282]

Weak contestability and unfairness correspond to two of the three "problem clusters" that the Commission's Impact Assessment Report found digital markets to be particularly vulnerable to, the third one being the "fragmented regulation and oversight" arising from the risk of different national legislations within the EU.[283] The risk of fragmentation is of course what justified the adoption of the DMA as a set of harmonised rules established at EU level on the basis of Article 114 TFEU.[284]

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[280] In December 2024 the Commission sent reasoned opinions to four Member States (Belgium, Spain, the Netherlands, and Poland). See https://ec.europa.eu/commission/presscorner/detail/en/inf_24_6006

[281] Rec. 32 DMA.

[282] Rec. 33 DMA.

[283] Impact Assessment Report accompanying the Commission's proposal for the DMA, SWD(2020) 363 final, Part 1/2, paras. 26-29.

[284] As explained below (Section E), the need to avoid fragmentation also explains the central role that the Commission has been given in the implementation of the DMA.

The need to remedy weak contestability and unfairness in the EU digital sector was reflected in the DMA at several levels. First, it guided the identification of the categories of core platform services ("CPSs") falling within the material scope of application of the DMA. Indeed, the ten categories of CPSs listed in Article 2, point (2), DMA refer to those digital services that are most broadly used by business users and end users and where concerns about weak contestability and unfair practices by gatekeepers were considered to be more apparent and pressing.[285] Second, the objectives of contestability and fairness also informed the three qualitative criteria that define the notion of "gatekeeper" under Article 3(1) DMA (and, as a result, the quantitative thresholds that are based on those criteria). It is only when a CPS constitutes an important gateway and is operated by an undertaking with a significant impact in the internal market and an entrenched and durable position, that concerns of weak contestability and unfairness are deemed likely to arise, thereby justifying the imposition of obligations.[286] Third, and most importantly, contestability and fairness substantially inspired the design of the obligations imposed on gatekeepers under Articles 5, 6 and 7 DMA. Many of those obligations are based on concrete experience from competition law enforcement showing that certain unilateral practices by large undertakings are likely to undermine contestability and fairness in digital markets.[287]

Against this background, this Part III seeks to provide an overview of the architecture of the DMA, taking into account the experience gathered in its first 21 months of application. First, the mechanism of gatekeeper designation is examined – a crucial, and all the more contentious, requirement for the application of the DMA's obligations. Second, focus is placed on those obligations and their distinctive features, including their links to the objectives of contestability and fairness. Third, attention turns to the two complementary pillars on which the implementation of the DMA relies on, namely compliance and public enforcement. Finally, other important topics such as the DMA's institutional set-up, private enforcement, the interplay of the DMA with other laws and future proofness of the DMA are examined.

[285] This is due to features such as extreme scale economies, very strong network effects, an ability to connect many business users with many end users, lock-in effects, a lack of multi-homing or vertical integration, which characterise some of those digital services. Rec. 13-14 DMA. See also Part I, Section E.1, above.

[286] Rec. 15-21 DMA.

[287] Rec. 31 DMA. Examples include the Commission's decisions in cases AT.39740 *Google Search (Shopping)*, AT.40462/AT.40703 *Amazon Marketplace* and *BuyBox*, and AT.40437 *Apple – App Store Practices (Music Streaming)*.

B. Gatekeeper designation

B.1. Overview

The DMA's personal scope of application is determined by the notion of "gatekeeper." That notion is based on a combination of three criteria that an undertaking must fulfil to be deemed such a gatekeeper. First, it must have a significant impact on the internal market. Second, it must provide a digital service which (i) falls into one of the ten categories of CPSs listed in the DMA[288] and (ii) is an important gateway for business users to reach end users. Third, it must enjoy an entrenched and durable position, in its operations, either currently or foreseeably, in the near future. It is only in the presence of those cumulative criteria that the legislator considered that sufficiently serious concerns of contestability or unfair practices arise to justify the imposition of behavioural obligations on digital service providers.[289]

Importantly, however, undertakings meeting those criteria are not automatically deemed gatekeepers. A Commission designation decision is required to this effect. Absent that, undertakings are not bound by any of the obligations laid down in the DMA. Consequently, enforcement of the DMA against them, whether by the Commission or by national courts, also cannot take place.

The crucial role of gatekeeper designation for the functioning of the DMA explains why designation is not framed as a discretionary power of the Commission, but as an obligation that arises whenever there is evidence that the relevant criteria are fulfilled.[290] The importance of gatekeeper designation and the ensuing need to ensure a fast and streamlined process[291] also explain the particular features of the designation mechanism. First, the DMA provides for a set of gatekeeper presumptions based on quantitative thresholds (essentially, the undertaking's annual EU turnover or market capitalisation, and the number of active end and business users of the CPS in the EU), which can only be rebutted in exceptional circumstances.[292] Second, undertakings meeting those thresholds are required to notify the Commission thereof within 2 months,[293] on pain of fines.[294] And third, the Commission is to designate those undertakings within 45 working days from a complete notification,

[288] Art. 2, point (2), DMA.

[289] Rec. 15 DMA.

[290] Art. 3(1) DMA, providing that "an undertaking *shall* be designated as a gatekeeper if […]" [emphasis added.

[291] Rec. 16 DMA. See also Case T-1077/23, *Bytedance v. Commission*, EU:T:2024:478, para. 233 (appeal pending in C-627/24 P).

[292] Art. 3(2) and 3(5) DMA.

[293] Art. 3(3) DMA.

[294] Art. 30(3)(a) and (b) DMA.

unless it accepts (if appropriate, following a market investigation) that the undertakings have successfully rebutted the presumptions.[295]

While presumptions can lead to false positives (which is why the DMA contains a rebuttal mechanism), they can also lead to false negatives. To address that risk, the DMA provides for an alternative "qualitative" designation process based on a market investigation. This process is meant to enable the designation of those undertakings that do not satisfy (all) the quantitative thresholds but nevertheless fulfil the three substantive gatekeeper criteria set out above. The DMA includes a list of elements that the Commission may take into account in its assessment.[296]

Importantly, the gatekeeper designation, and thus the obligations laid down in the DMA, only apply in relation to those CPSs provided by the gatekeeper that are considered (whether based on the presumptions or on the qualitative criteria) to be important gateways for business users to reach end users and that are listed as such in the Commission's designation decision.[297] In practice, this means that undertakings can be (and indeed have been) designated as gatekeepers in relation to some of their CPSs but not others.[298] To date, seven undertakings have been designated as gatekeepers, for a total of 24 CPSs.[299]

Given that it is at the same time a requirement for designation and the target of the DMA obligations, the notion of important gateway for business users to reach end users within the meaning of Article 3(1) DMA deserves particular attention. Two points bear emphasis.

First, the CPS must be an "important" gateway, not the *most important*, let alone the *only* gateway.[300] It follows from this that there can be several gate-

[295] Art. 3(4) and (5) DMA.

[296] Art. 3(8) DMA and Rec. 24.

[297] Art. 3(9) and Rec. 15 and 29 DMA.

[298] However, it is noteworthy that certain obligations of the DMA pull within their orbit other CPSs or services of the gatekeeper.

[299] Those are: (1) Alphabet's Google Search, YouTube, Google Maps, Google Play, Google Shopping, online ad services, Google Android and Google Chrome (see Commission decision C(2023) 6101 final of 5 September 2023); (2) Amazon's Marketplace and Amazon Advertising (see Commission decision C(2023) 6104 final of 5 September 2023); (3) Apple's App Store, Safari, iOS and iPadOS (see Commission decision C(2023) 6100 final of 5 September 2023, as amended by Commission decision C(2024) 2500 final of 29 April 2024); (4) Booking Holdings' Booking.com (see Commission decision C(2024) 3176 final of 13 May 2024); (5) ByteDance's TikTok (see Commission decision C(2023) 6102 final of 5 September 2023); (6) Meta's Facebook, Instagram, Marketplace, Whatsapp, Messenger and Meta Ads (see Commission decision C(2023) 6105 final of 5 September 2023); and (7) Microsoft's LinkedIn and Windows PC OS (see Commission decision C(2023) 6106 final of 5 September 2023). All designations are based on the application of the presumptions, but the one of Apple's iPadOS, which was of a qualitative mature.

[300] See also T-1077/23, *Bytedance v. Commission*, para. 210.

keepers within the same CPS category, as the DMA explicitly recognises.[301] And indeed, the Commission has already designated several CPSs as important gateways within each CPS category.[302] This is not to say that a CPS's scale relative to other CPSs within the same CPS category is irrelevant as such to the notion of important gateway. Indeed, one of the elements that undertakings can rely on to try to rebut the presumption arising from the user thresholds is "the importance of the undertaking's core platform service considering the overall scale of activities of the respective core platform service."[303] However, it is not just because an undertaking's CPS is smaller than the CPS of a gatekeeper or that its position is contestable by gatekeepers that it cannot be a gatekeeper itself. This became clear in *Bytedance*, where the General Court rejected Bytedance's argument that the Commission should have concluded that TikTok's smaller scale compared with other online platforms meant that it could not be an important gateway.[304] This is one important element that distinguishes the notion of gatekeeper under the DMA from that of dominant position under Article 102 TFEU.

Second, the DMA's recitals mention a number of distinctive features of CPSs and gatekeepers, such as extreme scale economies, very strong network effects, lock-in effects, a lack of multi-homing, vertical integration and data driven-advantages.[305] However, those are mere examples rather than boxes to be ticked for a CPS to be considered an important gateway. This was once again confirmed by the General Court in *Bytedance*, when it rejected Bytedance's claim that the Commission should have accepted its rebuttal argument that TikTok is not an important gateway on the ground that a significant proportion of TikTok users multi-home.[306] After all, the fact that the features referred to in the DMA's recitals are not cumulative requirements for the notion of important gateway is rather intuitive, given that the DMA applies to a range of different categories of CPSs and that the presence of those features can vary greatly across CPS categories.[307]

In general, designation – even quantitative – is not always a straightforward exercise in practice. As shown by the designation decisions adopted so far, the

[301] Rec. 32 DMA.

[302] For instance, Facebook, Instagram, LinkedIn and TikTok, which belong to the category of online social networking services, have all been designated as CPSs constituting important gateways.

[303] Rec. 23 DMA.

[304] The General Court noted, *inter alia*, that TikTok's relative scale reached approximately half of the size of Facebook and of Instagram. This, so the Court held, distinguished TikTok's case from that of Microsoft's Bing and Edge, which were shown to be 10 or even 25 times smaller than other CPSs within their respective CPS categories. See T-1077/23, *Bytedance v. Commission*, para. 240.

[305] Rec. 2, 3 and 13 DMA.

[306] T-1077/23, *Bytedance v. Commission*, paras. 175 and 182-214.

[307] E.g., end user multi-homing tends to be more common within some CPS categories (such as online social networking services and video-sharing platform services) than others (such as online search engines and web browsers). See also T-1077/23, *Bytedance v. Commission*, paras. 183-184.

Commission assesses thoroughly the information provided by the undertakings in their notification form (the "Form GD")[308] and, in several instances, the scope of its designation does not correspond to the narrative put forward by the undertakings in their notifications. Unsurprisingly given the high stakes of designation, three out of the seven designation decisions issued so far have led to actions for annulment by the respective gatekeepers,[309] and in one case even to an application for interim measures.[310] Litigation is also pending in relation to a decision *not* to designate a gatekeeper in relation to a given CPS.[311]

So far, the most contentious issues in relation to designation have involved CPS delineation and attempts at rebutting the gatekeepers presumptions.[312] Those issues are examined in the next sections.

B.2. Core platform services delineation

Firms active in the digital sector often do not just provide a single neatly delineated CPS, but several interrelated or integrated services or features, or even several versions of the same service. This means that the delineation of CPSs (i.e., the determination of their exact scope) and in particular whether or not they should be deemed to constitute a single or distinct CPSs, might not be clear-cut. The DMA does not contain detailed guidance on CPS delineation, besides some provisions in the Annex[313] and a prohibition on gatekeepers artificially segmenting their CPS as a way to circumvent designation.[314]

Yet, the stakes of CPS delineation can be high. First, delineation can determine whether or not a CPS meets the user thresholds for quantitative designation. In

[308] The template for the Form GD is attached as Annex I to Commission Implementing Regulation (EU) 2023/814 of 14 April 2023 on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to Regulation (EU) 2022/1925 of the European Parliament and of the Council (OJ L 102, 17.4.2023, p. 6) (the "DMA Implementing Regulation").

[309] T-1077/23, *Bytedance v. Commission*; T-1078/23, *Meta v. Commission* (pending); and T-1080/23, *Apple v. Commission* (pending).

[310] Case T-1077/23 R, *Bytedance v. Commission*, EU:T:2024:94. The application for interim measures has been rejected.

[311] T-357/24, *Opera Norway v. Commission* (pending), which concerns the Commission decision not to designate Microsoft as a gatekeeper in relation to its web browser CPS Edge.

[312] Other issues include, e.g., the identification and calculation of end and business users for the purpose of determining whether the thresholds in Art. 3(2)(b) and (c) DMA are met, in light of the rules set out in the Annex to the DMA, or the qualification of a CPS as belonging to a particular category among those listed in Art. 2, point (2), DMA (which can be relevant, since some DMA obligations, such as Art. 6(12) DMA on fair access, only apply to certain categories of CPSs and not to others).

[313] DMA Annex, Sect. D.2.b.-c., essentially states that CPSs provided by the same undertaking shall be considered distinct for the purposes of calculating user numbers if: (i) the CPSs belong to different CPS categories pursuant to Art. 2, point (2), DMA; or (ii) the CPSs are used for different purposes by either their end users or their business users, or both. This applies even if the CPSs are offered in an integrated way or if their end or business users are the same.

[314] Art. 13(1) and Rec. 70 DMA.

some cases, splitting CPSs may mean that some of them, if considered on their own, do not reach the quantitative thresholds for designation, whereas defining one single CPS may lead to the opposite result. Second, CPS delineation can determine whether a gatekeeper needs to comply with those DMA obligations that govern the relationship between *distinct* services of the same undertaking. Examples include Article 5(2) DMA, which prohibits *inter alia* the cross-use or combination of personal data from different CPSs or services of the gatekeeper absent end user consent, or Article 6(5) DMA, which prohibits favouring of the gatekeeper's own services in ranking. Considering two services as one single CPS means that those prohibitions will not apply between them.

Those issues have already arisen in concrete cases and even given rise to litigation.

For instance, when determining the CPSs in relation to which Apple had to be designated as gatekeeper, the Commission was faced with the question whether Apple's App Store constitutes a single CPS or ought to be split into distinct CPSs depending on the devices on which it is offered (e.g. iPhones, iPads, Mac computers). The Commission concluded, contrary to Apple's view, that the App Store constitutes a single online intermediation CPS, irrespective of the device. That finding was *inter alia* based on the observation that the App Store is used for the same purpose across all devices on which it is available, namely to intermediate the distribution of apps between business and end-users.[315] As a result, the Commission designated Apple as a gatekeeper in relation the App Store as a whole and not only in relation to the App Store on iOS (which, had the App Store been split by device, would have been the only CPS to meet the user thresholds in Article 3(2)(b) DMA).[316] This finding has been challenged by Apple as part of its action for annulment of the Commission designation decision.[317]

A second example relates to the delineation of Meta's online social networking CPS Facebook. Meta claimed Facebook to be part of a single ad-supported online social networking CPS, comprising all features of Facebook (i.e., Messenger, Marketplace, Facebook Dating and Facebook Gaming Play) and Instagram, as well as Meta's online advertising services Meta Ads (or, alternatively, to be part of a single online social networking CPS, distinct from Meta Ads).[318] Contrary to Meta's view, the Commission concluded that Instagram was a distinct CPS from Facebook, *inter alia* since Meta offers those two services separately to end and business users.[319] Meta Ads was also considered to be distinct, *inter*

[315] Commission decision C(2023) 6100 final of 5 September 2023, Section 5.1.1.2.
[316] Ibidem, Art. 2.
[317] T-1080/23 *Apple v. Commission* (pending).
[318] Commission decision C(2023) 6105 final of 5 September 2023, Section 5.1.1.1.
[319] Ibidem, Section 5.1.1.2.2.

alia since it belongs to a different CPS category from that of Facebook.[320] Likewise, the Commission found that Messenger and Marketplace should not be regarded as mere functionalities of Facebook, but as standalone CPSs, *inter alia* because they belong to different CPS categories from Facebook (respectively, number-independent interpersonal communication services and online intermediation services) and they were either developed as, or evolved into, separate services from the Facebook social network CPS.[321] Accordingly, the Commission's designation decision lists Facebook, Instagram, Meta Ads, Messenger and Marketplace as distinct CPSs.[322] This means that Article 5(2) DMA, and particularly the prohibition on user data combination, applies between those CPSs and between them and other services of Meta, with potentially substantial implications for Meta's business model, which relies on the accumulation and combination of user data to support its online advertising services.[323] Meta has challenged the Commission's designation decision on some of those points.[324]

B.3. Rebutting the gatekeeper presumptions

As mentioned, to avoid designation, undertakings meeting the quantitative thresholds may submit, as part of their notification, arguments seeking to rebut the presumptions of gatekeeper status triggered by those quantitative thresholds.[325] The burden is thus on the undertaking concerned to adduce evidence rebutting the presumptions.

So far, most undertakings that notified the Commission that they met the quantitative thresholds also attempted to rebut the gatekeeper presumptions in relation to at least one of their CPSs. While the Commission accepted some rebuttals (in some cases, following a market investigation),[326] it rejected

[320] Ibidem, Section 5.3.1.2.

[321] Ibidem, Sections 5.5.1.2 and 5.6.1.2. In addition, the Commission found that Facebook Dating and Facebook Gaming Play constitute distinct services from the Facebook online social networking CPS, since Meta offers them as a clearly identifiable and distinct services from that of Facebook and, in any event, those services fulfil specific and distinct purposes. Ibidem, Sections 5.1.1.2.3 and 5.1.1.2.4.

[322] Ibidem, Art. 2.

[323] The fact that Messenger is qualified as a number-independent interpersonal communication service ("NIICS") also entails that it is subject to the specific interoperability obligations laid down in Art. 7 DMA.

[324] T-1078/23, *Meta v. Commission* (pending).

[325] Art. 3(5) DMA. In this respect, the DMA differs from the DSA, which does not provide for this possibility.

[326] Rebuttals have been accepted in relation to: (1) Alphabet's Gmail (see Commission decision C(2023) 6101 final of 5 September 2023); (2) Microsoft's Outlook.com, Bing, Edge and Microsoft Advertising (see Commission decisions C(2023) 6106 final of 5 September 2023 and C(2024) 806 final of 12 February 2024); (3) Samsung's Internet Browser (see Commission decision C(2023) 6103 final of 5 September 2023); (4) Apple's iMessage (see Commission decision C(2024) 785 final of 12 February 2024); (5) ByteDance's TikTok Ads (see Commission decision C(2024) 3153 final of 13 May 2024); and (6) the Musk Group's X and X Ads (see Commission decisions C(2024) 3156 final of 13

others,[327] which eventually led to litigation. The General Court's first judgment concerning the DMA, in *Bytedance*, focuses precisely on the framework applicable to rebuttals. It confirms that the possibility to rebut the gatekeeper presumptions is subject to strict requirements, in terms of substantive standard, standard of proof and procedural rules.[328]

As regards the substantive standard, undertakings must demonstrate that, exceptionally, although they meet the quantitative thresholds, due to the circumstances in which their CPS operates, they do not satisfy (at least one of) the qualitative requirements for gatekeeper designation laid down in Article 3(1) DMA. For the Commission to take them into account, the arguments should "directly relate to the quantitative criteria" laid down in Article 3(2) DMA.[329] This does not mean that arguments can be disregarded as irrelevant on the mere ground that they are not expressed in figures, but they must be specifically and concretely aimed at rebutting one of the three gatekeeper presumptions.[330] Moreover, given that, as explained above, the typical features of CPSs listed in the recitals of the DMA are not conditions *sine qua non* for a CPS to be regarded as an important gateway, the mere fact that a CPS does not display one of those features will not automatically be sufficient to rebut the presumption. Specific account should always be taken of the circumstances in which the relevant CPS operates.[331]

The standard of proof is also high, as the notifying undertaking's arguments must be "sufficiently substantiated" and they must "manifestly call into question the presumptions."[332] In other words, the arguments must be supported by evidence and capable of showing, with a high degree of plausibility, that the presumptions are called into question. Mere proof of the existence of doubts or *prima facie* evidence is not sufficient.[333]

In terms of procedural requirements, the evidence must be presented as part of the undertaking's notification and must clearly identify which of the three cumulative requirements set out in Article 3(1) DMA it relates to.[334]

May 2024 and of 16 October 2024).

[327] Rebuttals have been rejected in relation to Meta's Messenger and Marketplace and Bytedance's TikTok.

[328] T-1077/23, *Bytedance v. Commission*, para. 233.

[329] Rec. 23 DMA.

[330] T-1077/23, *Bytedance v. Commission*, paras. 47-48 and 326. All the more so, arguments that are not even related to the notion of gatekeeper cannot be accepted, such as justifications on economic grounds seeking to enter into market definition or to demonstrate efficiencies deriving from a specific type of behaviour. See Rec. 23 DMA and T-1077/23, *Bytedance v. Commission*, para. 46.

[331] T-1077/23, *Bytedance v. Commission*, paras. 176-185. See also Section B.1 above.

[332] Art. 3(5) DMA.

[333] T-1077/23, *Bytedance v. Commission*, para. 71.

[334] Art. 3(5) DMA and Art. 2(3) DMA Implementing Regulation.

The undertaking will not be able to submit, for the first time before the General Court, rebuttal arguments which it had not submitted during the administrative procedure, unless it seeks to challenge a matter of law or of fact on which it was not able to comment during that procedure.[335]

If the rebuttal arguments meet the applicable criteria in terms of substance, standard of proof and procedure, the Commission is required to at least open a market investigation in order to test the undertaking's rebuttal arguments with relevant market players.[336] The Commission could, as an alternative, also directly accept the rebuttal arguments without launching a market investigation.[337] So far, it has done so when it found that the undertaking's arguments were not only sufficient to manifestly call into question the quantitative presumptions, but also clearly and comprehensively demonstrated that one or more of the requirements of Article 3(1) DMA was not fulfilled.[338]

C. Substantive obligations

C.1. Overview

The core provisions of the DMA are definitely its Articles 5, 6 and 7, which are intended to concretely achieve the DMA's contestability and fairness objectives. Those provisions contain closed lists of behavioural obligations applicable to gatekeepers, totalling 22 obligations and covering areas such as end-user and business-user data, mobile ecosystems, interoperability, fair access, transparency and commercial relationships with gatekeepers.[339] They are formulated either as positive obligations ("the gatekeeper shall…") or as prohibitions ("the gatekeeper shall not…").[340] While some obligations only apply to specifically identified categories of CPSs, others are meant to apply to any category.[341]

Although they refer to a multitude of diverse behaviours and CPSs, the obligations laid down in Articles 5, 6 and 7 DMA share some key common features. First, they are all directly applicable and *ex ante* rules. Second, most (if not all)

[335] T-1077/23, *Bytedance v. Commission*, para. 234.

[336] Art. 17(3) DMA. This is what the Commission did in relation to Microsoft's Edge, Bing and Advertising, Apple's iMessage and the Musk Group's X. In light of the outcome of the market investigation, the Commission then accepted the rebuttals.

[337] As the use of "may" in Art. 3(5), subpara. 3, DMA shows.

[338] That was the outcome in relation to e.g., Alphabet's Gmail, Microsoft's Outlook.com and Bytedance's TikTok Ads.

[339] In addition, the DMA also imposes some obligations on gatekeepers of a more procedural nature. See e.g., Art. 14 (information on concentrations) and Art. 15 (submission of an audit) DMA.

[340] See also Part I, Section D, above.

[341] See, as examples of the first type, Art. 6(3) DMA (uninstallation and change of default settings) and Art. 6(12) DMA (fair access); as examples of the second type, Art. 5(2) DMA (consent for personal data use) and Art. 6(2) DMA (no use of business user data).

of them can be linked to both, and not only one, of the DMA's fundamental goals, namely contestability and fairness.

C.2. Directly applicable and *ex ante* nature

Direct applicability. The DMA's behavioural obligations are grouped into different articles to distinguish those that are "susceptible of being further specified" by an *ad hoc* Commission decision concerning a particular gatekeeper (i.e., the obligations in Articles 6 and 7)[342] from those that are not susceptible of further specification, other than in the event of circumvention[343] (i.e., the obligations in Article 5).[344] On this basis, a common misconception is that the Articles 6 and 7 obligations would not be directly applicable. However, "susceptible" of further specification does not mean *requiring* further specification: it is apparent from the DMA that the Commission has discretion as to whether to provide further specification.[345] And the absence of a Commission specification decision does not exempt gatekeepers from the duty to comply with the obligations in Articles 6 and 7.[346] Accordingly, it also does not prevent the Commission from pursuing non-compliance proceedings and from imposing fines or periodic penalty payments.[347] At the time of writing, there are indeed three open proceedings for possible non-compliance with (not previously specified) Article 6 obligations.[348]

Ex ante nature. The obligations in Articles 5, 6 and 7 DMA are intended to address those practices that the EU legislature identified as undermining contestability or fairness in the digital sector, or both, and as having a particularly negative direct impact on business users and end users.[349] However, while the design of the obligations was inspired by the DMA's objectives, their applicability is not subject to those practices actually affecting, or risking to affect, contestability or fairness in individual cases. Rather, the obligations in Articles 5, 6 and 7 are formulated as *ex ante* rules, which apply irrespective of actual of potential effects of the gatekeeper's conduct on contestability or fairness – in other words, as *per se* rules. Moreover, although some obligations leave room

[342] See Art. 8(2) DMA.

[343] Art. 8(2) and Rec. 65 DMA.

[344] Moreover, while Arts. 5 and 6 DMA cover various obligations concerning different CPSs, Art. 7 DMA is focused on the obligation to ensure interoperability between NIICSs. Since the text relating to that obligation (which was not in the original Commission proposal but was added at a later stage) spans over several paragraphs, those paragraphs were placed in a separate article.

[345] Art. 8(2) ("may"), Art. 8(3) ("shall have discretion") and Rec. 65 DMA.

[346] Art. 8(1) DMA.

[347] Art. 8(4) and Rec. 65 DMA.

[348] Cases DMA.100193 *Alphabet – Google Search* (Art. 6(5) DMA); DMA.100185 *Apple – iOS* (Art. 6(3) DMA); and DMA.100206 *Apple new business terms* (*inter alia* Art. 6(4) DMA).

[349] Rec. 31 DMA. The objective(s) pursued by a particular obligation is typically identified in the accompanying recitals, although some are more explicit than others.

for gatekeepers to claim justifications, those are limited to integrity, security or privacy considerations and do not allow gatekeepers to claim countervailing efficiencies.[350] The *ex ante* nature of the DMA obligations is a key factor that distinguishes them from the prohibition on abuse of dominance under Article 102 TFEU. Indeed, a finding of abuse requires the capability of a given practice to produce anti-competitive effects and allows the dominant undertaking to escape such a finding by demonstrating objective justifications, including pro-competitive effects.[351]

That said, the DMA's contestability and fairness objectives can still play a concrete role in the practical implementation of the DMA, from at least two perspectives.

First, they can come into play in assessing whether the measures implemented by the gatekeeper effectively comply with the DMA obligations. Article 8(1) DMA requires those measures to "be effective in achieving the objectives of this Regulation and of the relevant obligation." Moreover, Article 13(4) DMA prohibits gatekeepers from engaging in "any behaviour that undermines effective compliance with the obligations of Articles 5, 6 and 7." In some cases, the requirement for effectiveness is even emphasised in the wording of the obligation itself.[352] The contestability and fairness objectives could thus play a concrete role in assessing gatekeepers' compliance with a given obligation where, although the measures implemented by the gatekeeper are on their face in line with a given obligation, there are doubts as to whether they effectively achieve the objectives of the obligation. This could be, for instance, because the scope of the measures is too limited, or because their benefits are jeopardised by other measures implemented by the gatekeeper.

Second, contestability and fairness are also intended to guide the Commission when it decides to specify the measures that a gatekeeper should implement to comply with the obligations in Articles 6 and 7 DMA (or even Article 5 in case of possible circumvention). Article 8(7) DMA requires the Commission, in specifying the measures, to "ensure that the measures are effective in achieving the objectives of this Regulation and the relevant obligation."

Finally, the contestability and fairness objectives should also help identifying *other* practices in the digital sector that are not caught by Articles 5, 6 and 7 DMA but are nevertheless detrimental to those objectives. This can trigger a process governed by Article 19 DMA, possibly culminating in the addition of new obligations or in the update of existing obligations.

[350] Arts. 6(4), 6(7) and 7 DMA. The measures should be duly justified by the gatekeeper and strictly necessary and proportionate to the relevant objectives.

[351] See, e.g., Case C-377/20, *Servizio Elettrico Nazionale and Others*, EU:C:2022:379, para. 103.

[352] E.g. Art. 6(4), 6(7), 6(9) DMA.

C.3. Link to contestability and fairness

A closer look at the contestability and fairness objectives shows that they are conceived rather broadly under the DMA, which is reflected in the multitude, diversity and far-reaching scope of the obligations laid down in Articles 5, 6 and 7 DMA.

This is especially visible in relation to contestability. Under the DMA, pursuing contestability is not only about halting practices that can increase barriers to entry and expansion and thus undermine contestability, but also about mandating active behaviours by gatekeepers with a view to *lowering* existing barriers and thus positively promoting contestability.[353] The former aspect is typically rendered through negative obligations, the latter through positive obligations (e.g., the obligations mandating access).[354] Moreover, the objective of contestability relates not only to the gatekeeper's CPS listed in the designation decision that triggers the application of the particular obligation, but also to *other* digital services of the gatekeeper, such as those provided together with, or in support of, that CPS.[355] This is also in line with the DMA's clarification that contestability may justify creating or increasing *intra*-platform competition as a way to compensate for ineffective *inter*-platform competition.[356] In addition, practices are also deemed to limit contestability under the DMA where they prevent other operators from having the same access to a key input as the gatekeeper and are therefore capable of impeding innovation and limiting choice for business users and end users.[357]

Similarly, fairness encompasses *inter alia* the setting by gatekeepers of unbalanced conditions for the use of their CPSs or of related or supporting services that does not allow others to capture fully the benefits of their own contributions.[358] But it also relates to the exclusion or discrimination against business users, in particular if they compete with the gatekeeper's services.[359] Moreover, although the emphasis is on unfairness towards business users, the DMA also contains several explicit references to the need to protect *end* users from unfair practices by gatekeepers that may affect them directly.[360]

The multi-faceted and broad nature of the contestability and fairness objectives explains why the DMA obligations very often display a direct link to both objectives or to several facets of those objectives.

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[353] See Rec. 32 DMA.

[354] E.g., Art. 6(11) and (12) DMA.

[355] See, e.g., Rec. 31 (last sentence) and Art. 12(5)(a)(i) DMA. Relevant examples include the obligations against self-preferencing, discussed below.

[356] Rec. 32, last sentence, DMA.

[357] Art. 12(5)(a)(ii) DMA.

[358] Rec. 33 DMA.

[359] Rec. 33 DMA.

[360] See, e.g., Rec. 4, 7 and 13 DMA.

In some cases, the two objectives are presented equally. For instance, some obligations are aimed at promoting both contestability of the gatekeeper's CPS (i.e., inter-platform contestability) and fairness to the benefit of business users. This is the case of the prohibition in Article 5(3) on price-parity clauses, which prevent business users from offering their products through their own online sales channels or third-party intermediation services at different terms than those offered through the gatekeeper's intermediation service. Such clauses are clearly at the same time unfair towards business users and detrimental to inter-platform contestability.[361] The same applies to Article 6(4), which mandates gatekeepers, *inter alia*, to allow the effective installation and use of third-party apps or app stores on hardware or operating systems of the gatekeeper. This provision is aimed both at promoting inter-platform contestability and at protecting business users (and end users) from unfair practices.[362]

In other cases, more emphasis is placed on one objective, but the other objective is also important. An example in point are the obligations banning self-preferencing, which typically concern situations where gatekeepers are vertically integrated or have a dual role. Those include Articles 6(2) (prohibiting the use of business users' data to compete with them), 6(3) (mandating the possibility of software un-installation and change in default settings), 6(5) (prohibiting the favouring of the gatekeeper's own services in ranking) and 6(7) (mandating interoperability with third-party hardware and software on equal conditions as those available to the gatekeeper). Those obligations are clearly designed to ensure fairness to the benefit of business users. However, they also aim to ensure contestability of digital services of the gatekeeper *other* than the CPS that is directly concerned by the obligation, which are typically those that the gatekeeper's behaviour seeks to favour.[363]

Conversely, the obligations involving end user data are principally aimed at remedying a lack of contestability of CPSs. Article 5(2) does so by subjecting personal data processing, combination, and cross-use by gatekeepers to end users giving their consent, after having being presented with the specific choice of a less personalised but equivalent alternative. This provision aims to counter data accumulation by gatekeepers, which can increase barriers to entry, and ultimately to improve the contestability of CPSs relying on user data, such as online advertising services.[364] Similarly, Article 6(9) ensures that end users can effectively port their data, with a view to easing restrictions to switching and multi-homing and, as a result, improving the contestability of CPSs.[365] However, in pursuing contestability objectives, both provisions also ensure that end users are treated fairly by granting them control over their own data.

[361] Rec. 39 DMA.
[362] Rec. 50 DMA.
[363] Rec. 46, 49, 51-52 and 55-57, read in conjunction with Rec. 32-33 DMA.
[364] Rec. 36-37 DMA.
[365] Rec. 59 DMA.

Finally, on a more general level, contestability and fairness are intertwined in a virtuous mutually reinforcing circle.[366] Strengthening contestability can indirectly limit the gatekeeper's ability or incentive to engage in unfair practices. *Vice versa*, freeing business users from unfair practices by gatekeepers can indirectly enable them to better challenge the gatekeeper's position. As a result, ultimately, all the DMA obligations could also be viewed as (indirectly) beneficial to both objectives.

D. Compliance and public enforcement

D.1. Overview

The DMA establishes a detailed framework to ensure the fulfilment of its substantive obligations.

One of the distinctive features of the DMA is that, unlike Articles 101-102 TFEU, it places *ex ante* compliance by gatekeepers rather than *ex post* enforcement by the Commission at the centre of this architecture. This is made possible precisely by the directly applicable and *per se* nature of the DMA's substantive obligations, as explained above. Compliance with those obligations is to be monitored by the Commission,[367] with interested third parties playing an important role in this respect. Moreover, as previously mentioned, some of those obligations can be specified in an *ad hoc* Commission decision. In that case, the measures set out in that decision add to the substantive obligations that the gatekeeper is required to comply with, and the Commission is expected to monitor compliance with those measures as well.[368]

It is only if pro-active compliance by gatekeepers fails or appears to fail that enforcement of the obligations by the Commission enters the scene. That is achieved through proceedings for non-compliance, which can lead to the imposition of fines and periodic penalty payments (including, as a last resort, remedies for systematic non-compliance).[369] The threat faced by gatekeepers of such proceedings and of the possible monetary sanctions and remedies can also act as an incentive to ensure compliance.

Accordingly, the effective implementation of the DMA can be seen as hinging on two complementary pillars: compliance (including the monitoring thereof) on the one hand, and enforcement, on the other. As explained below, those

[366] See Rec. 34 DMA.
[367] Art. 26(1) DMA.
[368] Arts. 8(2) and 26(1) DMA, respectively.
[369] Of course, private enforcement is also possible. See Section F below.

two pillars each rely on a number of specific tools and procedural phases to ensure that gatekeepers fulfil the obligations in Articles 5, 6 and 7 as effectively and as fast as possible.

D.2. Compliance pillar

Gatekeepers are automatically required to implement measures to comply with the obligations in Articles 5, 6 and 7 DMA within six months after the relevant CPS has been listed in the Commission's designation decision.[370] The grant of suspensions, exemptions or (in the case of Article 7) postponements of this duty to comply are reserved for exceptional circumstances and are subject to proof by the gatekeeper that the relevant requirements are satisfied.[371] Likewise, the possibility for the Commission to declare some obligations as not applicable is limited to the case of designation of so-called emerging gatekeepers, namely undertakings that do not yet enjoy an entrenched and durable position but will foreseeably do so in the near future.[372]

As previously mentioned, compliance should be effective in light of the objectives of the DMA and of the specific obligation.[373] The DMA's preference is for the gatekeepers to ensure compliance by design, that is, to integrate the implementing measures as much as possible into the technological design they use.[374]

Besides ensuring compliance, gatekeepers are also required, first, to actively demonstrate such compliance to the Commission and third parties[375] and, second, to monitor their own continued compliance. The latter is to be achieved by introducing a "compliance function" composed of one or more compliance officers within the gatekeeper, which is independent from the operational functions of the gatekeeper.[376] The main tool for gatekeepers to demonstrate compliance with the DMA's substantial obligations is the report that they are required

[370] Art. 3(10) DMA. For the six undertakings designated in September 2023, the deadline for compliance was therefore March 2024. For the seventh (Booking), it was November 2024.

[371] See, respectively, Arts. 9, 10 and 7(6) DMA, allowing the Commission, respectively, to suspend a particular obligation if compliance would endanger the economic viability of the gatekeeper's operations, to exempt the gatekeeper from a particular obligation on grounds of public health or public security and to extend the time limits for ensuring interoperability of NIICSs in certain cases. So far, the Commission has not granted any suspension or exemption. It has however extended Meta's time limit to ensure interoperability in relation to Facebook Messenger by six months pursuant to Art. 7(6) DMA. See Commission decision of 25 March 2024 in case DMA.100097.

[372] That declaration must be made in the relevant designation decision. See Art. 17(4) and Rec. 74 DMA.

[373] Art. 8(1) DMA. The onus is on the gatekeeper to ensure that the measures it implements comply with applicable law.

[374] Rec. 65 DMA.

[375] Art. 8(1) DMA.

[376] Art. 28 DMA.

to submit to the Commission within 6 months after designation and to update thereafter at least annually, describing "in a detailed and transparent manner" the measures they have implemented to ensure compliance.[377] Gatekeepers are also required to publish a non-confidential version of their compliance report, which is also made available on the Commission's DMA website.[378]

In turn, the gatekeepers' periodic compliance reports are a critical tool for the Commission and third parties to review the gatekeeper's effective compliance with the DMA's obligations. This is apparent from the very detailed and comprehensive nature of the information required in the template published by the Commission for this purpose.[379]

The content of the compliance reports (or the possible gaps identified therein) and potential information submitted by third parties or national authorities about gatekeepers' behaviours[380] can also trigger additional follow-up measures on the part of the Commission.

Some of those follow-up measures are specifically foreseen by the DMA. They include, first, possible monitoring actions, such as measures ordering the gatekeeper to retain documents relevant to assess compliance.[381] This is a novel power that is not available under Regulation 1/2003 and is inspired by the preservation obligations that exist *inter alia* in the context of US antitrust investigations. The Commission has already made use of this power in relation to most of the gatekeepers by ordering them to retain documents relevant to the DMA obligations, so as to preserve available evidence for potential subsequent enforcement actions.[382] To assist it in monitoring compliance, the Commission may also decide to appoint independent external experts and auditors or officials from national competent authorities.[383]

Second, the Commission may, already at this monitoring stage, exercise its investigative powers, a possibility explicitly foreseen by Article 20(1) DMA.[384] Those investigative powers are largely modelled on those already provided for by Regulation 1/2003, consisting of the power to issue requests for information,

[377] Art. 11 DMA.

[378] See https://digital-markets-act-cases.ec.europa.eu/reports/compliance-reports

[379] See https://digital-markets-act.ec.europa.eu/document/download/904debdf-2eb3-469a-8bbc-e62e5e356fb1_en?filename=Article%2011%20DMA%20-%20Compliance%20Report%20Template%20Form.pdf

[380] Art. 27(1) DMA. On information submitted by third parties, see also Section D.3 below.

[381] See also Part I, Section F, above.

[382] See https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1689

[383] Art. 26(2) DMA.

[384] The Commission made use of its investigative powers as early as on 25 March 2024. See https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1689

carry out interviews and conduct inspections.[385] The main novel element in this respect is the power to require access to undertaking's data and algorithms and information about testing, as well as related explanations.[386]

In addition to the tools explicitly granted by the DMA, in practice, the Commission also makes use of additional tools to monitor and promote compliance. One of those is the organization of public workshops with interested stakeholders to elicit their views on the gatekeepers' proposed compliance solutions and to enable them to ask questions.[387] Another is the hosting of meetings with gatekeepers and interested third parties and, in general, the engagement in informal "regulatory dialogues" with gatekeepers to monitor compliance and, when necessary, encourage gatekeepers to improve their compliance solutions. Whether spontaneously or following the regulatory dialogues with the Commission, gatekeepers have already rolled out multiple changes to comply with those obligations.[388]

Another element worth mentioning in the context of the compliance pillar is the possible specification of the obligations laid down in Articles 6-7 DMA.[389] True, the opening of specification proceedings can be triggered by possible flaws or gaps identified in a gatekeeper's compliance report or even by indications that the gatekeeper is circumventing the DMA obligations,[390] which could in some cases also justify, as an alternative, the opening of non-compliance proceedings. However, even in those cases, the purpose of specification decisions is to clarify[391] what the gatekeeper should do to implement a particular obligation. It is not to take issue with, and sanction, the way the gatekeeper has implemented it.[392] The only "punitive" feature of specification proceedings which is evocative of non-compliance proceedings is the possibility for the Commission to directly back its specification decision by the threat of periodic penalty payments in case of non-compliance with it.[393] However, even then,

[385] See Arts. 21, 22 and 23 DMA, respectively.

[386] Art. 21(1) DMA, in the context of requests for information. See also Art. 23(2)(d), (3) and (4) DMA in the context of inspections.

[387] See https://digital-markets-act.ec.europa.eu/events/workshops_en, which also includes links to the recordings of the workshops held in 2024.

[388] See, e.g., https://developer.apple.com/support/dma-and-apps-in-the-eu#dev-qaa:~:text=To%20comply%20with%20the%20Digital%20Markets%20Act%2C (Apple), https://www.google.com/chrome/choicescreen/ (Alphabet), https://blogs.microsoft.com/eupolicy/2024/03/07/microsoft-dma-compliance-windows-linkedin/ (Microsoft).

[389] See Art. 8(2) DMA.

[390] Art. 13(7) DMA.

[391] Through a formal Commission decision addressed to the gatekeeper, rather than mere informal dialogues.

[392] Moreover, the purpose of specification is also not to modify the content of the obligations as such, but only to clarify the measures that the gatekeeper should take to effectively comply with those obligations.

[393] Art. 31(1)(a) DMA.

the actual imposition of those payments requires further procedural steps and a separate decision.[394]

Thus, the key feature of the DMA's specification process, which also sets it apart from the non-compliance proceedings, is its regulatory as opposed to sanctioning function. The purpose of specification is to determine in a more granular manner what a particular gatekeeper should do to comply with a specific obligation, taking into account the specific circumstances of the gatekeeper and of its CPS. The guiding principles in this respect are the effectiveness in achieving the objectives of the DMA and of the particular obligation, and proportionality.[395]

The specification process can take place either following a reasoned request of the gatekeeper (based on a specific template)[396] or on the Commission's initiative. In any event, the Commission has discretion in deciding whether to engage in the process, provided it complies with the principles of equal treatment, proportionality and good administration.[397]

The regulatory function of the specification proceedings is reflected at several levels. First, once launched, the proceedings are subject to compulsory and particularly short time limits.[398] Second, the process is meant to rely on technical input and guidance from interested third parties (e.g., the beneficiaries of the measures) to help craft more effective measures. This is why the DMA requires the Commission, when it communicates its preliminary findings to the gatekeeper, to publish a non-confidential summary of the case and of the envisaged specification measures to enable those third parties to provide comments.[399] Third, specification decisions are not set in stone. Proceedings may be reopened, including in the event that the specification measures turn out not to be effective.[400]

The two ongoing specification processes to ensure interoperability with Apple's iOS and iPadOS pursuant to Article 6(7) DMA serve as a good illustration of the level of technicality and granularity that specification measures can

[394] Art. 31(2) DMA.

[395] Art. 8(7) DMA.

[396] See https://digital-markets-act.ec.europa.eu/document/download/b034f7c4-c877-420c-87fa-0e69f8aea522_en?filename=Article%208%283%29%20DMA%20Template%20%28request%20for%20specification%20dialogue%29_1.pdf

[397] Art. 8(3) DMA. See also Section C.2 above.

[398] The specification decision must be adopted within six months from the opening of proceedings and must be preceded by the communication to the gatekeeper of the Commission's preliminary findings. See Art. 8(2) and (5) DMA.

[399] Art. 8(6) DMA.

[400] Art. 8(9) DMA.

reach.[401] They also provide a foretaste of the potentially significant benefits of the DMA's specification instrument in terms of delivering fast and effective solutions for business and end users of CPSs. Of course, those benefits assume that the gatekeeper complies with the measures set out in the specification decision.

As the above overview demonstrates, compliance is a key pillar of the DMA architecture and the DMA offers a range of tools to promote it. Gatekeepers' compliance with the DMA obligations can occur spontaneously, can be facilitated by regulatory dialogues or can follow formal specification decisions. In all cases, it generally translates into a fast implementation of the DMA obligations, often in cooperation with the gatekeeper itself and the beneficiaries of those obligations (thus increasing the chances that the solution will work in practice).

If compliance is maintained over time, this makes it possible to avoid both the enforcement phase and the litigation before the EU Courts that typically follows. Admittedly, gatekeepers are still free to challenge specification decisions in Court if they are dissatisfied with the specification measures or if they wish to raise a plea of illegality of the relevant obligation under Article 277 TFEU. Still, the lack of financial sanctions and of a finding of non-compliance in the specification decision (which would otherwise facilitate follow-on damages actions before national courts) should in principle help mitigate the gatekeepers' incentive to engage in potentially prolonged litigation against the specification decision as such.

D.3. Public enforcement pillar

Where there are indications that a gatekeeper may not comply with one or more of the obligations in Articles 5, 6 or 7 DMA, the Commission may decide to resort to non-compliance proceedings.

The structure of non-compliance proceedings and the rules applicable to them[402] are inspired to a large extent by the infringement proceedings in

[401] The two specification processes aim to specify the measures that Apple should implement, respectively, (i) to ensure interoperability in relation to several iOS connectivity features, predominantly used for and by connected devices (e.g., notifications, automatic Wi-Fi connection, AirPlay, AirDrop, or automatic Bluetooth audio switching) and (ii) in relation to the request-based process developers need to go through to obtain interoperability with a specific iOS or iPadOS feature (e.g., increased upfront transparency of internal iOS and iPadOS features, timely communication and updates, fair and transparent handling of rejections and a more predictable timeline). See https://digital-markets-act.ec.europa.eu/dma100203-consultation-proposed-measures-interoperability-between-apples-ios-operating-system-and_en and https://digital-markets-act.ec.europa.eu/dma100204-consultation-proposed-measures-requesting-interoperability-apples-ios-and-ipados-operating_en

[402] Those rules are set out in the DMA itself and in the DMA Implementing Regulation.

antitrust cases governed by Regulation 1/2003.[403] Non-compliance proceedings formally start with a Commission opening decision.[404] This is followed by the communication of preliminary findings (similar to the statement of objections in antitrust cases), after which the gatekeeper is entitled to submit observations and to have access to the Commission's file.[405] On this basis, the Commission may then adopt a decision finding that the gatekeeper does not comply with one or more of the obligations in Articles 5 to 7 and ordering it to cease and desist with the non-compliance.[406] In the same decision, the Commission may also impose fines on the gatekeeper of up to 10% of its worldwide turnover, as well as periodic penalty payments in order to compel it to comply with its decision.[407] Alternatively, the Commission may close the proceedings by decision, without finding non-compliance.[408] The DMA also provides for the possibility to impose interim measures in the context of non-compliance proceedings.[409] Throughout the proceedings, the Commission is entitled to exercise investigative powers that are also largely modelled on those of Regulation 1/2003.[410]

This symmetry between the DMA and the antitrust procedural rules is important for at least two reasons. First, it enables the Commission, when enforcing the DMA, to draw on the extensive experience gathered in applying the antitrust procedural rules over the past decades. Second, the significant body of case law developed around the procedural provisions of Regulation 1/2003 may in principle apply to the implementation of the DMA's procedural rules (subject to any adaptations that may be necessary in light of the differences between the two instruments).[411]

Despite the overall strong similarities, the DMA's rules governing non-compliance proceedings depart from Regulation 1/2003 in some notable respects.

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[403] This is the result of an intentional choice. See Part I, Section F, above. See also Impact Assessment Report accompanying the Commission's proposal for the DMA, SWD(2020) 363 final, Part 1/2, para. 159 (finding that "Regulation 1/2003 offers a well- known and legally sound model that can be replicated").

[404] Art. 20(1) DMA.

[405] Arts. 29(3) and 34 DMA. The DMA does not however provide for a right for the gatekeeper to develop its arguments at an oral hearing.

[406] Art. 29(1)(a) and (5) DMA.

[407] Arts. 30(1)(a) and 31(1)(h) DMA.

[408] Art. 29(7) DMA.

[409] Art. 24 DMA.

[410] Arts. 21, 22 and 23 DMA. See also Section D.2 above.

[411] This was indirectly confirmed by the General Court's recent order in Case T-284/24, *Nuctech v Commission*, EU:T:2024:564, para. 35, concerning the Foreign Subsidies Regulation, another recent Regulation whose procedural provisions are also largely inspired by those of Regulation 1/2003 (Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, OJ 2022 L 330, p. 1).

First, whereas antitrust proceedings are not subject to any deadlines, the DMA requires the Commission to "endeavour" to adopt its non-compliance decision within 12 months from the opening of proceedings.[412] This deadline reflects the legislator's attempt to avoid replicating in the DMA context the oft-criticised long duration of antitrust proceedings and to ensure that the non-compliant conduct is quickly brought to a halt. Even though it is only expressed in best-endeavours terms,[413] the 12-months deadline may have a concrete impact on the length and the outcome of non-compliance proceedings. In particular, it may help push gatekeepers to offer compliant solutions at an early stage, in the hope to persuade the Commission to close the proceedings without a finding of non-compliance and without a fine. As a matter of fact, several gatekeepers have implemented changes precisely following the opening of non-compliance proceedings or the issuance of preliminary findings.[414]

Second, the DMA, unlike Regulation 1/2003, does not provide for the possibility for third parties to submit formal complaints regarding alleged infringements of the substantive obligations. Although third parties (e.g., business and end users of CPSs) may "inform" the Commission about gatekeepers' practices falling under the DMA,[415] the DMA does not grant them a right to participate in the proceedings and does not require the Commission to formally reject their submission if it does not intend to act on it.[416] In any event, third parties can still play an important role by submitting valuable information to the Commission (including anonymously through the Commission's whistleblower tool)[417] or by providing input in response to a Commission consultation.[418]

Third, the DMA deviates from the traditional access to file procedure, which is based on the disclosure to the investigated undertaking of non-confidential versions of the documents that are part of the Commission's file. As already mentioned,[419] the DMA mainly relies on a novel mechanism that is centred on the use of "confidentiality rings." Where this mechanism applies, docu-

[412] Art. 29(2) DMA.

[413] Unlike the deadline for the adoption of specification decisions pursuant to Art. 8(2) DMA, which cannot be derogated. See Section D.2 above.

[414] E.g., this has been the case of Apple in relation to the non-compliance proceedings concerning Art. 6(3) DMA (https://developer.apple.com/support/browser-choice-screen/) and of Meta in relation to the non-compliance proceedings concerning Art. 5(2) DMA (https://about.fb.com/news/2024/11/facebook-and-instagram-to-offer-subscription-for-no-ads-in-europe/).

[415] Art. 27(1) DMA.

[416] Unlike under Arts. 6-8 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.4.2004, p. 18).

[417] See https://digital-markets-act.ec.europa.eu/whistleblower-tool_en

[418] Art. 29(4) DMA. Third parties also play a role in the procedures relating to systematic non-compliance and commitments, as explained further below.

[419] See Part I, Section F, above.

ments are to be disclosed, in principle in their full version, to the gatekeeper's external counsel (usually in a data room) rather than to the gatekeeper itself.[420]

Fourth, the DMA allows for the possibility of imposing higher fines, of up to 20% of the gatekeeper's worldwide turnover, in case of recidivism.[421] The DMA also specifically mentions "recurrence" among the factors that the Commission is required to take into account in fixing the amount of a fine, in addition to gravity and duration.[422] Subject to respecting those criteria, and absent guidelines on the setting of fines (such as those applicable to infringements of the competition rules), the Commission enjoys considerable leeway in deciding the methodology it wishes to follow to determine the amount of fines for non-compliance with the DMA.

Last but not least, while the DMA provides for the possibility of commitments and remedies, those are not part of the "standard" non-compliance proceedings, but can come into play at a potential subsequent stage, which is that of "systematic non-compliance." Where the conditions for a finding of systematic non-compliance with the DMA obligations are met,[423] the DMA enables the Commission to impose on the gatekeeper any behavioural or structural remedies that are necessary and proportionate to ensure effective compliance with the DMA. Those remedies may even include, depending on the circumstances, a temporary ban on concentrations involving the relevant CPSs or services.[424] As in the case of specification proceedings, the Commission is required to consult third parties on the remedies that is considers imposing.[425] The gatekeeper may escape the imposition of remedies by offering commitments to ensure compliance with the relevant obligation(s), which the Commission may decide to make binding, following a public consultation.[426]

To date, the Commission has opened six non-compliance proceedings against three gatekeepers. One in relation to Meta concerning its so-called "Consent or Pay" advertising model, to the extent that it forces users to consent to the combination of their personal data and fails to provide them with a less personalised but equivalent version of Meta's social networks, contrary to Article 5(2) DMA. Two in relation to Alphabet, concerning respectively (i) its app store rules, to the extent that they restrict the app developers' ability to freely communicate and promote offers and directly conclude contracts with end users, contrary to Article 5(4) DMA; and (ii) its potential self-preferencing of

[420] Art. 34(4) DMA. See also Art. 8 DMA Implementing Regulation.
[421] Art. 30(2) DMA.
[422] Art. 30(4) DMA.
[423] Art. 18(1) and (3) and Rec. 75 DMA.
[424] Art. 18(1) and (2) and Rec. 75 DMA.
[425] Art. 18(5) DMA.
[426] Arts. 25, 18(6) and Rec. 76 DMA.

Google's vertical search services over similar rival services in the display of Google search results, contrary to Article 6(5) DMA. And three in relation to Apple, concerning respectively (i) its app store rules, to the extent that they restrict the app developers' ability to freely communicate and promote offers and directly conclude contracts with end users, contrary to Article 5(4) DMA; (ii) the design, *inter alia*, of its web browser choice screen, to the extent that it prevents end users from effectively exercising their choice of services within the Apple ecosystem, contrary to Article 6(3) DMA; and (iii) its contractual requirements for developers, to the extent that they restrict the provision of alternative app stores or the possibility to offer an app via an alternative distribution channel, contrary *inter alia* to Article 6(4) DMA.

E. Institutional set-up

The core competencies under the DMA – designation of gatekeepers, specification and public enforcement of the obligations – are reserved for the Commission only, as the sole enforcer of the DMA.[427] Underlying this centralised approach is the need to avoid the risk of regulatory fragmentation, given the pan-European reach of the addressees of the DMA's obligations.[428]

Despite calls by the Member States' national competition authorities ("NCAs") during the legislative process to provide for a joint application of the DMA by the Commission and NCAs,[429] NCAs do not have full-fledged enforcement powers under the DMA. They are however tasked with cooperating with and supporting the Commission in its enforcement, notably by assisting it in its market investigations, transferring to the Commission information they may receive from third parties on possible non-compliance and replying to Commission requests for information.[430] Where empowered to do so under national law, NCAs may also investigate on their own initiative possible cases of non-compliance by gatekeepers with the DMA substantive obligations on their territories, unless and until the Commission decides to open proceedings.[431]

This Commission-centric system of implementation of the DMA contrasts with the decentralised system of enforcement of Articles 101 and 102 TFEU, which relies on parallel enforcement by the Commission and NCAs. Since

[427] Art. 38(7) and Rec. 91 DMA.

[428] Commission proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector, Explanatory memorandum, Section 3.

[429] See e.g., Joint paper of the heads of the NCAs of the EU, 'How national competition agencies can strengthen the DMA,' 22 June 2021, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/DMA_ECN_Paper.pdf?__blob=publicationFile&v=2

[430] Arts. 16(5), 38(6), 27(3) and 21(5) DMA.

[431] Art. 38(7) DMA.

the DMA is without prejudice to the EU and national competition rules (as Article 1(6) DMA makes clear), NCAs will in principle still be able to intervene under those rules against unilateral conduct by gatekeepers that could also fall within the scope of the DMA. Indeed, the DMA does not provide for any mechanism similar to that of Article 11(6) of Regulation 1/2003, which would enable the Commission to relieve the NCAs of their competence to apply the competition rules in cases covered by the DMA. Still, the DMA prevents NCAs (and national authorities in general) from intervening when their decisions would run counter to decisions adopted by the Commission under the DMA.[432] It also includes detailed provisions governing the coordination between the Commission and NCAs in relation to their enforcement of the DMA and of the competition rules, respectively.[433]

In addition, the DMA also entrusts two distinct entities with the task of assisting the Commission in its enforcement. First, the High-Level Group for the DMA, which is composed of representatives of European bodies and networks and is intended to provide advice to the Commission in the areas of competence of its members, including on possible interactions between the DMA and the sector-specific rules.[434] Second, the Digital Markets Advisory Committee, which is composed of representatives of Member States and is to be consulted by the Commission before adopting implementing acts under the DMA.[435]

Finally, public enforcement of the DMA by the Commission is meant to be complemented by private enforcement by the national courts of the Member States.[436] For this purpose, the DMA contains specific provisions regulating cooperation between the Commission and national courts aimed to ensure the uniform enforcement of the DMA.[437]

F. Private enforcement

The DMA does not contain a specific provision enabling users to enforce its obligations against gatekeepers before national courts.[438] Nevertheless, the possibility of private enforcement is implicit in the DMA's provisions governing cooperation between the Commission and national courts.[439] It is also

[432] Art. 1(7) DMA.
[433] Art. 38(1) to (5) DMA.
[434] Art. 40 DMA and Commission Decision C(2023) 1833 final of 23 March 2023.
[435] Art. 50 and Rec. 99-101 DMA.
[436] See Section F below.
[437] Art. 39 and Rec. 92 DMA.
[438] Unlike the DSA, whose Art. 54 specifically refers to damages actions. See Part II, Section D.1, above.
[439] Art. 39 and Rec. 92 DMA. See also Section E above.

borne out by the DMA's reference to the Representative Actions Directive as being applicable to the representative actions brought against infringements by gatekeepers of the DMA that harm or may harm the collective interests of consumers.[440] In any event, the possibility of private enforcement of the DMA follows in principle from its directly applicable nature as a Regulation. As a result, business and end users should, where the relevant conditions are met, be able to rely on the DMA's substantive obligations before national courts against undertakings that have been designated as gatekeepers.[441]

In terms of types of private enforcement actions available, those should include, in particular, damages claims[442] and private injunctions. Moreover, both follow-on actions (based on a prior Commission decision finding non-compliance) and standalone actions (where no prior Commission non-compliance decision has been adopted) can be envisaged. In any event, national courts may not adopt decisions running counter to decisions that the Commission has adopted under the DMA (whether concerning non-compliance or for instance, specification) or that the Commission is contemplating in proceedings it has initiated under the DMA.[443]

While private enforcement of the DMA by national courts is still at its early stages, it has the potential to significantly enhance the effectiveness of the DMA's substantive obligations. Over time, it could thus become an important complement to the Commission's public enforcement. Moreover, the very risk of having to pay large amounts to compensate damages from DMA infringements may in itself contribute to increasing deterrence and ultimately fostering compliance by gatekeepers.

G. Interplay with other laws

While the DMA lays down a comprehensive framework of substantive and procedural rules aimed at ensuring contestable and fair digital markets, it does not operate in a vacuum.

On the one hand, the DMA relies to a significant extent on external legal instruments. Examples include DMA's definitions of the CPS categories (many of which refer to the P2B Regulation or to certain Directives),[444] the notion

[440] Art. 42 and Rec. 104 DMA.

[441] Absent prior designation, undertakings are not bound by the obligations and private enforcement is therefore excluded. See Section B.1 above.

[442] While the Competition Damages Directive does not apply to actions under the DMA, nothing would prevent Member States from extending their national measures transposing the Directive to damages claims based on the DMA.

[443] Art. 39(5) DMA.

[444] Art. 2, points (5), (6), (8), (9) and (13), DMA.

of turnover for the purposes of the gatekeeper presumption (which refers to the Merger Regulation)[445] and the notion of user consent under Article 5(2) (which refers to the GDPR). Also, as mentioned above, the procedural rules governing the DMA's enforcement are largely modelled on Regulation 1/2003 (and are now in common with those of the DSA and the Foreign Subsidies Regulation), meaning that the body of related case law could be considered to apply *mutatis mutandis*. In addition, the Commission is to draw on the enforcement of Articles 101 and 102 TFEU when assessing possible extensions of the scope of the DMA to new practices or new CPSs[446] (just as past antitrust decisions have inspired many of the existing DMA obligations). On the other hand, the DMA may also contribute to the implementation of other laws. One example is the obligation on gatekeepers to submit to the Commission an audit of their user profiling techniques, which is then transmitted by the Commission to the European Data Protection Board to inform the enforcement of EU data protection rules.[447] Likewise, gatekeepers are required to inform the Commission of intended concentrations, which enables NCAs to use that information for national merger control purposes or to refer a transaction to the Commission under the Merger Regulation.[448] The DMA obligations themselves (or, more precisely, their role in constraining gatekeepers' conduct), can even have a direct impact on the Commission's review of concentrations involving gatekeepers under the Merger Regulation. A concrete example is the Commission's investigation into Amazon's proposed acquisition of iRobot, which took into account the impact of the prohibition on self-preferencing in Article 6(5) DMA in assessing Amazon's incentives to foreclose rivals post-merger.[449] Finally, some of the novel procedural provisions of the DMA (for instance, as regards access to file based on mandatory confidentiality rings) are likely to inform the future revision of the antitrust procedural rules.[450]

The above are all examples of direct touchpoints between the DMA and other laws, where the two may influence one another in their implementation.

In addition, questions may (and in all likelihood, will) also arise as to the possible parallel application of the DMA and complementary regimes.[451] Those include not least the EU and national competition rules, which, as explained above, may catch conduct that is also prohibited under the DMA.[452] In this

[445] Art. 3(2)(a) DMA (see Art. 2, point (30), DMA).

[446] Art. 19(1), last sentence, DMA.

[447] Art. 15 and Rec. 72 DMA.

[448] Art. 14 and Rec. 71 DMA.

[449] M.10920 *Amazon/iRobot*. See European Commission's Competition Merger Brief, Issue 2/2024, p. 8.

[450] Commission Staff Working Document, SWD(2024) 216 final, Evaluation of Regulations 1/2003 and 773/2004, pp. 145–146.

[451] See also Part I, Section G, above.

[452] See Section E above.

connection, one question that is likely to generate significant discussions in light of Article 1(5) and (6) DMA is the exact scope left by the DMA for the application of national obligations to gatekeepers.[453] A fine line might need to be drawn depending on the nature and purpose of the national rules at issue (e.g., whether or not they qualify as "competition rules" under Article 1(6) DMA) and the nature of the obligations imposed in the concrete case (e.g., whether they genuinely amount to "further," as opposed to stricter, obligations under Article 1(6)(b) DMA). In addition, complementary regimes also include other legal instruments which gatekeepers have to comply with, such as the GDPR, rules on consumer protection, product safety[454] and other EU legislation regulating the provision of digital services in the EU.[455] To the extent that some of those legal instruments may be enforced by national authorities, the DMA requires them and the Commission to cooperate with each other and coordinate their enforcement actions.[456]

H. Future proofness

As explained, the DMA establishes a closed catalogue of clearly predefined *ex ante* obligations. Those obligations have a circumscribed material and personal scope of application, namely undertakings which provide one or more services out of a closed list of CPS categories and which satisfy a set of clear quantitative criteria, or, alternatively certain qualitative criteria.

Such a closed set of rules (where the only element of openness comes from the qualitative designation tool) is clearly beneficial to legal certainty, predictability and fast implementation. However, it can come at the expense of flexibility and adaptability to future market developments, which are particularly likely in the digital sector given its fast-moving pace.

To remedy this, the DMA provides for a number of mechanisms meant to ensure its future proofness.

First, the DMA enables the Commission to conduct a market investigation to examine whether new CPS categories should be added to the list in Article 2,

[453] Art. 1(5) DMA prohibits Member States from imposing "further obligations" on gatekeepers "for the purpose of ensuring contestable and fair markets," but, at the same time, does not preclude them from imposing obligations on undertakings for matters falling outside the scope of the DMA, provided that they do not result from the status of gatekeeper. In stating that the DMA is without prejudice to national competition rules, Art. 1(6) DMA also includes in that notion "national competition rules prohibiting other forms of unilateral conduct insofar as they […] amount to the imposition of further obligations on gatekeepers."

[454] Art. 8(1) DMA.

[455] See Part I, Section G, above.

[456] Art. 37(1) DMA.

point (2), DMA. The findings of the market investigation shall be published in a report, which, where appropriate, can be accompanied by a legislative proposal to amend the DMA accordingly.[457]

Second, the Commission is required to examine at least every year whether new undertakings providing CPSs satisfy the qualitative requirements for gatekeeper status. It is also expected to review at least every three years whether designated gatekeepers continue to satisfy the requirements for designation and whether the list set out in the designation decisions of CPSs that constitute an important gateway is up-to-date. Where appropriate, those reviews should lead to amendments of the designation decisions[458] (which, in the case of qualitative designations, require a prior market investigation).

Third, the DMA also provides for the possibility to supplement or update the behavioural obligations in Articles 5-7 DMA to take into account further practices that limit contestability or fairness, including in light of the experience gathered through antitrust enforcement. Where there is a need to add entirely *new* obligations, the procedure to be followed is the same as that applicable to the addition of new CPS categories (i.e., a market investigation followed by a legislative proposal).[459] On the contrary, where all is required is to update *existing* obligations (e.g., by extending their scope to further CPS categories or by specifying them *erga omnes*), the Commission may directly proceed by means of a delegated act (following, once again, a market investigation).[460]

As follows from the above, the key tool to ensure future proofness of the DMA is that of market investigations, which are aimed to guarantee that any changes to the DMA's scope or obligations benefit from a solid evidentiary basis.[461] The opening of market investigations can also be formally requested by Member States, which triggers a four-months period within which the Commission is required to assess whether such opening is justified.[462]

Finally, the DMA requires the Commission to publish an annual report on the implementation of the DMA and the progress made toward achieving

[457] Art. 19(1) and (3)(a) DMA. The legislative proposal may also propose to remove existing CPS categories.

[458] Art. 4(2) DMA. Amendments are also possible on an *ad hoc* basis (see Art. 4(1) DMA).

[459] Art. 19(1) and (3)(a) DMA. The legislative proposal may also propose to remove existing obligations.

[460] Arts. 12 and 19(3)(b) DMA.

[461] See also Rec. 77 DMA.

[462] Art. 41(1) and (3)-(5) DMA. In addition, Member States may also request the Commission to open a market investigation into possible systematic non-compliance by a gatekeeper with the DMA's substantive obligations (see Art. 41(2) DMA).

its contestability and fairness objectives.[463] The Commission is also required to carry out an evaluation of the DMA every three years to assess whether the contestability and fairness objectives have been achieved and the impact of the DMA on business users and end users. The evaluations should also establish whether there is a need to amend the applicable rules, including as regards the lists of CPSs and substantive obligations.[464] The first evaluation report is due by 3 May 2026. This will allow for a first comprehensive stock-taking of the effectiveness of the DMA in achieving contestable and fair markets in the digital sector across the EU, to the benefit of business users and end users.

[463] Art. 35 DMA. Published reports are available at https://digital-markets-act.ec.europa.eu/about-dma/dma-annual-reports_en

[464] Art. 53 DMA.

NATIONAL REPORTS

Austria

Cornelia Lanser / Emil Nigmatullin***

Kapitel 1: Institutioneller Rahmen auf nationaler Ebene

Question 1

1. Organisation

Die Vollziehung des DSA ist auf nationaler Ebene wie folgt organisiert:

Als **zuständige nationale Behörde** iSd Art 49 Abs 1 DSA zur Überwachung und Durchsetzung des DSA nach Maßgabe der horizontalen und vertikalen Zuständigkeitsregelung des Art 56 DSA wurde die **Kommunikationsbehörde Austria** benannt („*KommAustria*"). Ihr obliegt auch die Wahrnehmung der Aufgaben des **Koordinators für digitale Dienste** iSd Art 49 Abs 2 DSA („*KDD*").[1] Die KommAustria war bereits zuvor mit anderen, insbesondere die Bereiche der elektronischen Audiomedien und der elektronischen audiovisuellen Medien betreffenden behördlichen Aufgaben betraut gewesen.[2] Eine aufgaben- oder sektorspezifische Zuständigkeit einer anderen Behörde iSd Art 49 Abs 2 zweiter Satz DSA ist nicht vorgesehen. Zu ihrer „**Unterstützung**" ist die – ebenso bereits zuvor bestehende und vom Vorsitzenden der KommAustria beaufsichtigten[3] – **RTR-GmbH, Fachbereich Medien,** unter der Verantwortung des Geschäftsführers dieses Fachbereichs berufen. Diese hat daneben unter der Verantwortung ihres Geschäftsführers für den Fachbereich Medien die Aufgaben der außergerichtlichen Streitbeilegungsstelle eigenständig wahrzunehmen.[4]

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* Rechtsanwältin bei Haslinger / Nagele Rechtsanwälte GmbH. Sie ist für die Beantwortung der Fragen zum DMA primärverantwortlich.

** Rechtsanwaltsanwärter bei Haslinger / Nagele Rechtsanwälte GmbH. Er ist für die Beantwortung der Fragen zum DSA primärverantwortlich.

[1] § 2 Abs 1 KDD-G; § 1 Abs 4 sowie § 2 Abs 1 Z 15 KOG.

[2] Ihr waren nach dem KoPl-G und sind nach dem 9b. Abschnitt des AMD-G „regulatorische Vollzugsaufgaben zum Schutz vor verbotenen Inhalten und die Beurteilung der Angemessenheit von Beschwerdemechanismen sowie der von Plattformbetreibern ergriffenen Maßnahmen aufgetragen". Siehe ErläutRV 2309 BlgNR XXVII. GP 6.

[3] § 18 Abs 3 Z 1 KOG.

[4] § 2 Abs 3 und Abs 4 KDD-G; § 17 Abs 6a Z 4 KOG.

Die KommAustria ist in folgenden **organisationsrechtlichen Rahmen** eingebettet:

Der organisationsrechtliche Rahmen der KommAustria im Zusammenhang mit der Vollziehung des DSA ergibt sich aus den teils allgemeinen, teils besonderen Regelungen des KommAustria-Gesetzes („*KOG*"). Bei der KommAustria handelt es sich demnach um eine **Kollegialbehörde**, deren sieben **Mitglieder** (nicht aber deren sonstige Mitarbeiter) in Ausübung ihres Amtes im Allgemeinen **von Gesetzes wegen** „***unabhängig** und **an keine Weisungen gebunden** sind*".[5] Die KommAustria erledigt ihre Aufgaben als KDD nach dem DSA und dem KDD-G „*jedenfalls*" durch **Einzelmitglied**.[6] Nach § 4 Z 2 der für den Zeitraum von 24.07.2024 bis inklusive 31.12.2024 geltenden Fassung der Geschäftsverteilung 2024/IV der KommAustria[7] obliegen die Aufgaben des KDD ihrem Mitglied Frau Dr.in Susanne Lackner. Ihre **Mitglieder** werden vom **Bundespräsidenten** auf – im Einvernehmen mit dem Hauptausschuss des Nationalrates hergestelltem[8] – **Vorschlag der Bundesregierung bestellt**. Dem Vorschlag der Bundesregierung hat eine Ausschreibung zur allgemeinen Bewerbung voranzugehen. Die Ausschreibung ist vom Bundeskanzler zu veranlassen und auf der elektronischen Verlautbarungs- und Informationsplattform des Bundes kundzumachen. Die Bestellung des Mitgliedes erfolgt **für die Dauer von sechs Jahren**[9], eine Weiterbestellung ist zulässig. Zum Mitglied kann nur bestellt werden, wer bestimmte **Eignungskriterien** erfüllt.[10] Daneben bestehen das **Verbot der Ausübung bestimmter inkompatibler Tätigkeiten**.[11] Für die Dauer der Funktionsperiode besteht ein **privatrechtliches Dienstverhältnis** des bestellten Mitglieds zum Bund.[12] Während als Dienstgeber beim Vorsitzenden der KommAustria der Bundeskanzler fungiert, übt diese Funktion im Hinblick auf die sonstigen Mitglieder der Vorsitzende aus.[13]

Die KommAustria wird durch **§ 15 Abs 1 KOG** dem **ministeriellen Aufsichtsgefüge** unterworfen. Aufgrund bundesverfassungsrechtlicher Anforderungen[14] wurde dem Bundeskanzler zum einen die gesetzliche Befugnis eingeräumt, sich über „*alle*" Gegenstände der Geschäftsführung der Komm-

[5] § 6 Abs 1 KOG; Hervorhebungen nicht im Original.

[6] § 13 Abs 4 Z 1 lit n KOG.

[7] https://www.rtr.at/medien/aktuelles/veroeffentlichungen/Veroeffentlichungen/Sonstiges/Geschaeftseinteilung/Geschaeftsverteilung_2024-IV_KommAustria.de.html (abgerufen am 09.10.2024).

[8] § 3 Abs 3 KOG.

[9] § 3 Abs 2 KOG.

[10] § 3 Abs 1 KOG; § 4 KOG.

[11] § 4 Abs 2 KOG.

[12] § 14 Abs 1 KOG.

[13] § 14 Abs 3 KOG.

[14] Nach Art 20 Abs 2 zweiter UAbs B-VG ist unter anderem in dem Fall, in dem das Unionsrecht eine Weisungsfreistellung eines Organs erfordert, das Recht des obersten Organs der Verwaltung vorzusehen, „*sich über alle Gegenstände der Geschäftsführung der weisungsfreien Organe zu unterrichten*".

Austria zu unterrichten. Zum anderen ist er befugt, alle einschlägigen Auskünfte betreffend die Gegenstände der Geschäftsführung zu verlangen.[15] Weiters haben die zuständigen Ausschüsse des National- und des Bundesrates nach Art 52 Abs 1a B-VG das Recht, „*die Anwesenheit des Leiters eines gemäß Art. 20 Abs. 2 weisungsfreien Organs in den Sitzungen der Ausschüsse zu verlangen und diesen zu allen Gegenständen der Geschäftsführung zu befragen*".

Es stellt sich die **Frage, ob** diese **Regelungen betreffend die KommAustria** in jeder Hinsicht den in dem **Art 50 Abs 2 DSA** niedergelegten Unabhängigkeitsanforderungen entsprechen. Dabei ist unter anderem von Interesse, ob die Regelung des § 15 Abs 1 KOG mit dem Unionsrecht **vereinbar** ist. Bei dem in Art 50 Abs 2 DSA niedergelegten Unabhängigkeitskonzept, das eine völlige Unabhängigkeit des KDD bei der Wahrnehmung seiner (sprich sämtlicher) Aufgaben und Befugnisse nach dem DSA fordert und dies mit einem Weisungs- und Beeinflussungsverbot flankiert, handelt es sich um kein Konzept absoluter, sondern relativer Unabhängigkeit. Der zweite Satz des Art 50 Abs 3 legt nämlich fest, dass die Regelung des Abs 2 „*nicht die angemessenen Rechenschaftspflichten in Bezug auf die allgemeinen Tätigkeiten der Koordinatoren für digitale Dienste, wie Finanzausgaben oder Berichterstattung an die nationalen Parlamente*", berührt, „*sofern diese Pflichten die Verwirklichung der Ziele dieser Verordnung nicht untergraben*". Art 50 Abs 3 DSA knüpft an die Art („Rechenschaftspflicht") und an den Gegenstand des Eingriffes („allgemeine" Tätigkeiten) an und setzt „Angemessenheit" und „Zielkonformität" voraus. Bei dieser Regelung hatte der Unionsgesetzgeber – wie ErwGr 112 nahelegt – zwar insbesondere organisatorische Anforderungen der Verfassungen der Mitgliedstaaten, die der Tätigkeit des KDD demokratische Legitimation vermitteln, vor Augen. Allerdings fehlt im Wortlaut des Art 50 Abs 3 DSA – anders als noch im DSA-Kommissionsvorschlag[16] – ein nationaler Verfassungsvorbehalt, wie er in Art 8 Abs 1 zweiter Satz RL 2018/1972[17] und Art 30 Abs 2 zweiter UAbs zweiter Satz RL 2010/13/EU[18] vorgesehen ist, oder eine sonstige Bezugnahme auf nationales Verfassungsrecht. Dass § 15 Abs 1 KOG – wie dargelegt – im Einklang mit bundesverfassungsrechtlichen Anforderungen steht, rechtfertigt somit nicht automatisch die durch § 15 Abs 1 KOG bewirkte Beschränkung der Unabhängigkeit der KommAustria als KDD.

Im vorliegenden Kontext ist vor allem die Wortfolge „*allgemeinen Tätigkeiten*" in den Blick zu nehmen. Aus dem Sinn des Begriffes „allgemein" und in sys-

[15] § 15 Abs 1 KOG.

[16] COM(2020) 825 final: „Absatz 2 steht einer Aufsicht der betreffenden Behörden im Einklang mit dem nationalen Verfassungsrecht nicht entgegen.".

[17] EKEK-RL 2018/1972, ABI L 321/2018, 36 idF der Berichtigung ABI L 334/2019, 164.

[18] AVMD-RL 2010/13, ABl L 95/2010, 1 idF RL (EU) 2018/1808, ABI L 303/2018, 69.

tematischer Hinsicht[19] folgt, dass zwischen allgemeinen und besonderen Tätigkeiten des KDD zu unterscheiden ist. Vor diesem Hintergrund differenziert das Schrifttum[20] zu Recht zwischen (unzulässigen) Rechenschaftspflichten, die sich auf den Einzelfall beziehen, und Rechenschaftspflichten, welche die allgemeinen Tätigkeiten des KDD betreffen und zulässig sind, wenn sie angemessen sind und dem Verordnungszweck nicht zuwiderlaufen. Die Normierung einer Rechenschaftspflicht im Hinblick auf „besondere" Tätigkeiten des KDD, die über die im Tätigkeitsbericht nach Art 55 DSA zu veröffentlichenden Informationen hinausgeht, wäre daher mit Art 50 Abs 2 DSA unvereinbar.

Ob die in § 15 Abs 1 KOG vorgesehene unbedingte Unterrichtungs- und Auskunftsverlangungsbefugnis des Bundeskanzlers betreffend „*alle Gegenstände der Geschäftsführung*" mit diesen Anforderungen im Einklang steht, wird zwar in den Materialien zum DSA-BegG[21] mit Verweis auf ErwGr 112 ohne nähere Begründung, insbesondere ohne Darlegung des Vorliegens sämtlicher Tatbestandselemente des Art 50 Abs 3 zweiter Satz DSA, bejaht. Dem steht nach Auffassung der Berichterstatter jedoch – auch vor dem Hintergrund der zu anderen Regulierungsbereichen ergangenen Rechtsprechung und Lehre, die in diesem Rahmen nicht erörtert werden können – schon die **fehlende Beschränkung der Unterrichtungs- und Auskunftsverlangungsbefugnis des Bundeskanzlers auf die allgemeinen Tätigkeiten des KDD** entgegen. Insoweit erweist sich § 15 Abs 1 KOG als unionsrechtlich bedenklich. Wenn sich etwa ein Auskunftsverlangen auf einzelne Entscheidungen der KommAustria bezieht, die zu den „besonderen" Tätigkeiten des KDD zählen und daher von Art 50 Abs 3 zweiter DSA nicht erfasst sind, wäre die Auskunft nach der hier vertretenen Auffassung unter Berufung auf den unmittelbar anwendbaren Art 50 Abs 2 DSA zu verweigern.

2. Horizontale Kooperation

Das **KDD-G** enthält in unionsrechtlich nicht zu beanstandender Weise[22] Regelungen zur Gewährleistung der horizontalen Kooperation zwischen der KommAustria und anderen nationalen Behörden, Organen oder Einrichtungen. Der mit „*Datenschutz und Behördenkooperation*" überschriebene § 3 KDD-G sieht in seinen Abs 3, 4 und 5 Regelungen vor, die (die Modalitäten der) **aktive**(n) **Kooperationspflichten auf horizontaler nationaler Ebene** normieren. Diese Regelungen haben insbesondere im Blick, einen (interfö-

[19] Vgl. Art 53 DSA, der den Tätigkeitsbericht des KDD regelt und dabei „*ihre Tätigkeiten*" (Abs 3) und „*die Tätigkeiten*" (Abs 3) anspricht und unter anderem die Behandlung von „*Beschwerden gemäß Artikel 53*" (Abs 1) als Tätigkeit nennt.

[20] *Cornils/Auler/Kirsch*, Vollzug des Digital Services Act in Deutschland – Implementierung einer verbraucherorientierten Aufsichtsbehördenstruktur (2022) 43.

[21] ErläutRV 2309 BlgNR XXVII. GP 7.

[22] Vgl. Art 49 Abs 2 zweiter UAbs DSA.

deralen) **Informationsverbund** zwischen dem KDD und anderen Behörden, Organisationen und Einrichtungen, deren Tätigkeiten auch auf die betroffenen Marktakteure ausgerichtet sind, einzurichten, ohne die Kooperierenden in die von der KommAustria geführten Verfahren formell einzubinden und ihnen Entscheidungskompetenzen einzuräumen. Dadurch soll vor allem die **Verfahrenseffizienz** (insbesondere durch kürzere Verfahrensdauern infolge zügigerer materieller Wahrheitserforschung) gesteigert werden. In dem Umfang, in dem das horizontale Hilfeleistungsverhältnis in diesen Regelungen nicht konkretisiert wird, gelangt Art 22 B-VG zur Anwendung, der zur gegenseitigen Hilfeleistung bestimmter Organe verpflichtet. Somit finden sich die Grundlagen zur Behördenzusammenarbeit auf nationaler Ebene im Zusammenhang mit dem DSA in § 3 KDD-G und Art 22 B-VG.[23]

Den **Kooperationsregelungen** des § 3 KDD-G ist gemein, dass sie der Entscheidungsfindung der KommAustria vorgelagert und/oder begleitend sind. Sie **unterscheiden** nach (i) der **Art der Kooperation** und (ii) dem **Verpflichtetenkreis**. Während die Abs 3 und 5 den informationellen Austausch betreffen und damit eine Informationsgewinnungsfunktion aufweisen, sieht der Abs 4 die Mitwirkung der Organe des öffentlichen Sicherheitsdienstes an Nachprüfungsverfahren der KommAustria oder der Kommission auf Ersuchen der KommAustria zum Zwecke der Gewährleistung ihrer reibungslosen Durchführung vor. Im Hinblick auf den Verpflichtetenkreis ist zwischen Regelungen, mit denen (einseitige) informations- und sonstige tätigkeitsbezogene Pflichten bestimmter Behörden und Organe normiert werden, deren Erfüllung der Besorgung der Aufgaben der KommAustria dient[24], sowie Regelungen, welche die KommAustria zur aktiven Kooperation im Sinne eines Meinungsaustausches mit anderen Behörden, außergerichtlichen Streitbeilegungsstellen sowie vertrauenswürdigen Hinweisgebern verpflichten[25], zu unterscheiden. Zur ersten Regelungskategorie zählt insbesondere § 3 Abs 3 KDD-G, wonach die „*mit der Überwachung und Durchsetzung von Verhaltenspflichten von Anbietern von Vermittlungsdiensten betraute*[n] *Behörden* […] *im Rahmen ihres gesetzmäßigen Wirkungsbereichs verpflichtet*" sind, der KommAustria bei der Erfüllung ihrer Aufgaben „*Hilfe zu leisten*". Diese als „Daueraufgabe" konzipierte Hilfeleistungspflicht durch Behörden unterschiedlicher Regulierungsfelder besteht konkret darin, dass die jeweilige Behörde der KommAustria – ohne dass dem ein förmliches Ersuchen vorauszugehen hat – die „*hierzu unbedingt erforderlichen Informationen*", inklusive personenbezogener Daten nach Art 10 und Art 9 Abs 1 DSGVO, übermittelt.

[23] Daneben können weitere Regelungen zur Anwendung kommen. Beispielsweise ist in § 3 Abs 4 KDD-G – abgesehen von seinen letzten beiden Sätzen – nicht geregelt, welche Hilfehandlungen das Organ des öffentlichen Sicherheitsdienstes setzt, um die erbetene Hilfeleistung erbringen zu können. Dies richtet sich nach den Bestimmungen im SPG.

[24] § 3 Abs 3, Abs 4 KDD-G.

[25] § 3 Abs 5 KDD-G.

Nach Auskunft der **KommAustria** erfolgt im Rahmen dieser Regelungen ein **guter** und **enger Austausch mit anderen Behörden**, insbesondere der Datenschutzbehörde. So etwa finden regelmäßige Treffen statt.

Frage 2

Es wurden mehrere Maßnahmen auf nationaler Ebene getroffen, welche die zweckmäßige Besorgung der Aufgaben der KommAustria als KDD gewährleisten sollen. Dazu gehören insbesondere Maßnahmen betreffend (i) die Modalitäten ihrer im DSA vorgesehenen Kompetenzen und (ii) ihre finanzielle sowie personelle Ausstattung. Diese gestalten sich wie folgt:

Zunächst ist darauf hinzuweisen, dass der Gesetzgeber im KDD-G nähere Regelungen betreffend die Erfüllung der von der KommAustria in **Vollziehung** des DSA zu besorgenden Aufgaben erlassen hat. Ihr wurde die Befugnis eingeräumt, über bestimmte, abschließend aufgezählte Angelegenheiten nach Durchführung eines förmlichen Verwaltungsverfahrens mit Bescheid zu entscheiden. Hierzu zählen insbesondere die Zulassung einer außergerichtlichen Streitbeilegungsstelle und ihr Widerruf, die Zuerkennung des Status als vertrauenswürdiger Hinweisgeber und ihr Widerruf, eine Entscheidung über Beschwerden gemäß Art 53 DSA und das Ergreifen von Maßnahmen in Bezug auf Anbieter von Vermittlungsdiensten gemäß Art 51 Abs 3 lit a leg cit.[26] Daneben enthält das KDD-G materielle und prozedurale Regelungen betreffend Geldstrafen und Zwangsgeldern, für deren Verhängung die KommAustria zuständig ist.[27]

Zudem regelt der Gesetzgeber, dass die KommAustria bei Vorliegen der Voraussetzungen des Art 51 Abs 3 lit b DSA einen Antrag auf **Anordnung der vorübergehenden Einschränkung des Zugangs der Nutzer zu dem betroffenen Dienst** oder zu der betroffenen Online-Schnittstelle des **Anbieters von Vermittlungsdiensten** beim Bundesverwaltungsgericht, das als „*zuständige Justizbehörde*" iSd Art 51 Abs 3 DSA eingerichtet wurde, zu stellen hat.[28] Über den Antrag hat das Gericht binnen zwei Monaten zu entscheiden[29]; dessen Entscheidung unterliegt der Kontrolle des Verfassungs- und Verwaltungsgerichtshofes. Diese Regelung dürfte sich auch auf die in Art 82 Abs 1 DSA geregelte Konstellation beziehen, in der die Kommission in ihrem Zuständigkeitsbereich den KDD bei Vorliegen der Voraussetzungen hierfür zu einem Vorgehen nach Art 51 Abs 3 lit b DSA auffordert.

[26] § 2 Abs 3 KDD-G.
[27] §§ 5 f KDD-G.
[28] § 4 Abs 1 KDD-G.
[29] § 4 Abs 1, Abs 2 KDD-G.

Für die **finanzielle Ausstattung** der KommAustria trägt der Gesetzgeber auf folgende Weise Vorsorge:

Zur **Finanzierung** des in Erfüllung der DSA-bezogenen Aufgaben der KommAustria und der RTR-GmbH, Fachbereich Medien, entstehenden Aufwandes dienen gesetzlich näher bestimmte **Mittel aus dem Bundeshaushalt**. **Branchenbezogene Finanzierungsbeiträge**, wie sie für den Fachbereich Telekommunikation und Post sowie auch für Teile des Fachbereichs Medien festgelegt sind[30], sind hingegen **nicht vorgesehen**.[31] Insoweit besteht **kein gemischtes Finanzierungsmodell**.

Konkret hat der Bund zur Finanzierung des in Erfüllung der DSA-bezogenen Aufgaben entstehenden Aufwandes der KommAustria und der RTR-GmbH im Jahr 2024 einen Betrag von EUR 2.501.000,- zur Verfügung zu stellen.[32] Ab dem Jahr 2025 ist ein (valorisierter) jährlicher Betrag zu gewähren.[33] Seine Höhe setzt sich aus den Kosten für bestimmte Maßnahmen, die in dem im Zuge des Gesetzgebungsverfahrens erstellten Vorblatt zur Wirkungsfolgenabschätzung zum KDD-G[34] substantiiert wurden, zusammen. Der Betrag ist der RTR-GmbH in zwei gleich hohen Teilbeträgen bis zu einem bestimmten Stichtag zu überweisen.

Die **personelle Situation** gestaltet sich wie folgt:

Neben ihrer Funktion als Erbringerin von Unterstützungsleistungen und Erfüllerin ihrer gesetzlich vorgesehenen Aufgaben ist die RTR-GmbH die Geschäftsstelle der KommAustria. Nach Auskunft der KommAustria besteht ihr Team „digitale Dienste" im Zeitpunkt der Berichterstattung aus sechs bis sieben Mitarbeiter:innen (Vollzeitäquivalente), dem Juristen, Kanzleikräfte und – dies ist vor dem Hintergrund der technischen Anforderungen des DSA relevant – Datenanalysten angehören. Es sind – wie aus der Wirkungsfolgenabschätzung zum KDD-G hervorgeht – bereits budgetäre Vorkehrungen getroffen, um hinkünftig erforderlichenfalls weiteres Personal einzustellen. Insgesamt gehen diese Vorkehrungen von dem Erfordernis von 16,5 Vollzeitäquivalenten aus.[35]

[30] Vgl. §§ 34, 34a und § 35 Abs 1 KOG.

[31] § 6 Abs 6 KDD-G, nach dem die nach dem KDD-G verhängten Geldstrafen dem Bund zufließen und der RTR-GmbH jährlich die Hälfte der Summe der verhängten Geldstrafen als finanzieller Beitrag zur Erfüllung der im KDD-G vorgesehenen Aufgaben zu überweisen ist. Dies stellt keinen solchen „Finanzierungsbeitrag" i.e.S. dar.

[32] § 35 Abs 1d KOG.

[33] In der Wirkungsfolgenabschätzung zum KDD-G sind Beträge in Höhe von EUR 2.842.000, EUR 2.855.000, EUR 2.865.000 und EUR 2.877.000 für die Jahre 2025 bis 2028 ausgewiesen.

[34] WFA 2309 BlgNR XXVII. GP 1 f, 8 ff.

[35] WFA 2309 BlgNR XXVII. GP 3, 10.

Der österreichische Gesetzgeber hat dem Bedürfnis der KommAustria nach ausreichenden technischen, finanziellen und personellen Ressourcen durch eine gesetzliche **Evaluierungspflicht** Rechnung getragen. Konkret hat die KommAustria bestehende Maßnahmen beginnend mit 2024 zweijährig zu evaluieren und darüber zu berichten.[36]

Frage 3

Nach den Angaben der KommAustria hat sie Kriterien für die Beurteilung der Eigenschaft eines Unternehmens als Anbieter eines Vermittlungsdienstes erarbeitet und unter Anwendung dieser Kriterien **erste Erhebungen** durchgeführt. Ziel dieser Erhebungen war es, sich einen Überblick über jene betroffenen **Anbieter** zu verschaffen, die eine gewisse Größe erreichen. Zu diesem Zweck wurde auch eine Studie einer bestimmten österreichischen Forschungseinrichtung in Auftrag gegeben. Die Erhebungsmaßnahmen sind allerdings noch nicht abgeschlossen, weshalb die Erstellung einer finalen Auflistung sämtlicher betroffenen Unternehmen noch aussteht. Auf der Homepage der KommAustria findet sich im elektronischen Beschwerdeformular, welches den Nutzern im Hinblick auf die Einleitung von Streitbeilegungsmaßnahmen bei der RTR-GmbH und eines amtswegigen Prüfverfahrens bei der KommAustria zur Verfügung gestellt wird, eine Auflistung der Dienste, die als „Beschwerdegegner" adressiert werden können. Dabei werden 24 Dienste näher bezeichnet.[37]

Die **Vollziehungsschwerpunkte** lagen zunächst in der Abwicklung der nach Art 11 DSA zu benennenden Kontaktstellen. Zudem wurden Beschwerden, die in den ersten Monaten nach Inkrafttreten des DSA eingebracht wurden, bearbeitet. Im Berichtszeitraum wurde insbesondere ein Bescheid erlassen, dessen Veröffentlichung bevorsteht.

Fragen 4–6

Zum Zwecke der Gewährleistung einer einheitlichen Rechtsdurchsetzung ist die Kommission die einzige Durchsetzungsstelle für die Vorschriften des DMA. Als zentralisierte Regulierungsbehörde wird sie komplexe und technische Sachverhalte – wenn auch mithilfe der mitgliedstaatlichen Behörden – eigenständig zu lösen haben.[38]

[36] § 7 KDD-G.

[37] https://beschwerde.rtr.at/startseite.de.html (abgerufen am 09.10.2024).

[38] *Achleitner*, Digital Markets Act beschlossen: Verhaltenspflichten und Rolle nationaler Wettbewerbsbehörden, NZKart 2022, 359 (364).

Die Kommission ist zwar die zur Durchsetzung des DMA zuständige Behörde. Der DMA schließt es jedoch nicht aus, dass die nationalen Wettbewerbsbehörden Ermittlungen über mögliche Verstöße einleiten und ihre Ergebnisse an die Kommission weiterleiten können.[39] Dafür ist es auf nationaler Ebene erforderlich, der **Bundeswettbewerbsbehörde** („BWB") Untersuchungsbefugnisse im Hinblick auf mögliche DMA-Verstöße einzuräumen, was aktuell nicht der Fall ist. Dadurch wird die Möglichkeit eröffnet, Ermittlungen aufgrund eines Anfangsverdachtes parallel auf mehrere Rechtsgrundlagen (Kartellrecht sowie DMA) zu stützen. Ebenso wären **gesetzliche Grundlagen** zur Unterstützung von Ermittlungshandlungen der Kommission gemäß Art 22 f DMA analog zu den vergleichbaren Vorschriften der VO 1/2003 zu schaffen. Da derartige Regelungen **fehlen**, hat die BWB Regelungsvorschläge an das zuständige Ministerium übermittelt. Vom diesem wurde zwar ein Problembewusstsein signalisiert, jedoch ist der genaue Zeitpunkt einer Umsetzung nicht vorhersehbar.

Dr. Natalie Harsdorf, LL.M. ist Generaldirektorin der BWB und wurde für die Dauer von 2 Jahren an der Seite der Generaldirektoren der dänischen, deutschen, griechischen, polnischen und spanischen Wettbewerbsbehörden zur Vertreterin des Europäischen Wettbewerbsnetzes (ECN) in der hochrangigen Gruppe für den DMA (High Level Group) nominiert. Zur Unterstützung der High Level Group wurden unter anderem Sub-Groups zum spezifischen Austausch in den Bereichen (i) Daten gemäß Art 5 Abs 2 DMA und (ii) Interoperabilität nummernunabhängiger interpersoneller Kommunikationsdienste gemäß Art 7 DMA aufgesetzt, in denen die BWB vertreten ist.[40] Zudem ist die BWB auch im Beratenden Ausschuss des DMA vertreten. Dementsprechend erfolgt der Austausch zum DMA sowohl in den Arbeitsgruppen des DMA als auch im ECN.[41]

Vor diesem Hintergrund lässt sich festhalten, dass spezifische nationale Regelungen mit DMA-Bezug noch ausstehen. Eine „Vollzugspraxis" der BWB besteht daher nicht. Die BWB bringt sich gegenwärtig vor allem mit ihren Erfahrungen aus dem Wettbewerbsvollzug in der High Level Group und den entsprechenden Sub-Gruppen sowie dem Beratenden Ausschuss ein.

[39] Art 38 Abs 7 DMA.

[40] Siehe Entscheidung der Europäischen Kommission vom 23.03.2023 „*on setting up the High-Level Group for the Digital Markets Act*", COM(2023) 1833 final.

[41] BWB, EU Digital Markets Act - BWB arbeitet eng mit Europäischer Kommission zusammen (23.03.2023), https://www.bwb.gv.at/news/detail/eu-digital-markets-act-bwb-arbeitet-eng-mit-europaeischer-kommission-zu-zusammen (abgerufen am 09.10.2024).

Kapitel 2: Nutzung der im DSA und DMA eröffneten nationalen Spielräume

Frage 1

In den Materialien zum DSA-BegG[42], das Durchführungsmaßnahmen zum DSA enthält, wird unter Hinweis auf seinen ErwGr 9 des DSA hervorgehoben, dass der DSA die Möglichkeit unberührt lasse, „*andere nationale Rechtsvorschriften, die für Anbieter von Vermittlungsdiensten gelten, unionsrechtskonform anzuwenden*". Vor diesem Hintergrund sah der österreichische Gesetzgeber davon ab, derartige Regelungen, insbesondere jene im Hass-im-Netz-Bekämpfungs-Gesetz[43] erlassenen Regelungen, aufzuheben.

Allerdings wurden im Zuge der Durchführung des DSA jene Vorschriften aufgehoben, die den im Anwendungsbereich des DSA vollharmonisierenden Regelungen entsprachen:

Zunächst wurden die in Umsetzung der E-Commerce-RL erlassenen §§ 13-17 ECG[44], die mit Art 4-6 DSA vergleichbar sind, aufgehoben.[45] § 18 ECG[46], der den „*Umfang der Pflichten der Diensteanbieter*" regelte, wurde ebenso im Rahmen des DSA-BegG aufgehoben, weil der Umfang der Pflichten zum Teil im DSA (insbesondere in Art 8 DSA betreffend die Überwachungspflicht von Diensteanbietern) und zum Teil in den neuen §§ 13 f ECG, welche die Auskunftsansprüche gegenüber Vermittlungsdiensteanbietern und das Verfahren bei Auskunftsanordnungen bei Fällen von „Hass im Netz" zum Gegenstand haben, geregelt ist. Auch § 19 Abs 1 ECG wurde aufgehoben, da sein Inhalt nunmehr in Art 4 Abs 3, Art 5 Abs 2 und Art 6 Abs 4 DSA geregelt ist.[47]

Im Zuge des DSA-BegG wurde weiters das KoPl-G[48] zur Gänze aufgehoben. Dieses Gesetz wies zwar mehrere Überschneidungen zu den Regelungen des DSA auf.[49] Insbesondere verpflichtete es Kommunikationsplattformen dazu, ein Melde- und Überprüfungsverfahren für den Umgang mit bestimmten strafrechtswidrigen Inhalten zu schaffen sowie Transparenzmaßnahmen zu ergreifen. Allerdings geht der Anwendungsbereich des DSA über jenen des KoPl-G hinaus, weil sich dessen Anwendungsbereich nicht auf die Dienste der Informationsgesellschaft beschränkt, bei denen der Hauptzweck oder eine wesentliche Funktion darin besteht, im Wege der Massenverbreitung den Aus-

[42] ErläutRV 2309 BlgNR XXVII. GP 3.
[43] BGBl I 2020/148.
[44] IdF vor BGBl I 2023/182.
[45] ErläutRV 2309 BlgNR XXVII. GP 28.
[46] IdF vor BGBI I 2023/182.
[47] ErläutRV 2309 BlgNR XXVII. GP 28.
[48] BGBl I 2020/151 idF (zuletzt) BGBl I 2023/135.
[49] ErläutRV 2309 BlgNR XXVII. GP 3.

tausch von Mitteilungen oder Darbietungen mit gedanklichem Inhalt in Wort, Schrift, Ton oder Bild zwischen Nutzern und einem größeren Personenkreis anderer zu ermöglichen.[50]

Frage 2

Der österreichische **Gesetzgeber** hat zwar im Zuge des DSA-BegG den Kreis der „rechtswidrigen Inhalte" nicht gesondert geregelt. Allerdings findet sich in den **Materialien**[51] zu § 3 KDD-G eine **beispielhafte Aufzählung** jener Regelungen, die für die Beurteilung der Rechtswidrigkeit eines Inhalts maßgeblich sind. Zu den rechtswidrigen Inhalten gehören demnach zum einen Inhalte, die gegen allgemeines Zivil-[52], Urheber-[53], Verwaltungs-[54] und Verbraucherschutz- oder Produktsicherheitsrecht[55] verstoßen. Zum anderen werden darin Inhalte genannt, die sich deshalb als rechtswidrig erweisen, weil sie in einem Zusammenhang mit strafbaren Handlungen stehen.[56]
Daneben hat die KommAustria „**Typologien rechtswidriger Inhalte**" erstellt, die sie auf ihrer Homepage[57] veröffentlicht hat.

Frage 3

Neben institutionellen und verfahrensrechtlichen Regelungen wurden im Rahmen des DSA-BegG **materiell-rechtliche Begleitregelungen zum DSA** in den §§ 13 ff ECG erlassen. Diese Regelungen dienen der **Stärkung der Rechtsstellung des Opfers** und der effizienteren **Rechtsdurchsetzung** in Fällen von „**Hass im Netz**".[58] Sie gestalten sich wie folgt:

§ 13 ECG verpflichtet Onlinedienste, Gerichte, Behörden sowie Private dazu, Auskunft über die Namen und die Adressen der Nutzer ihres Dienstes zu er-

[50] ErläutRV 2309 BlgNR XXVII. GP 3.
[51] ErläutRV 2309 BlgNR XXVII. GP 10 f.
[52] Verweis auf § 1330 Abs 1 und 2 ABGB.
[53] Verweis auf § 78 Abs 1 UrhG.
[54] Es wird beispielhaft auf den Verstoß gegen das im GSpG geregelte Verbot der Bewerbung von Online-Glücksspiel hingewiesen.
[55] Es wird dabei auf Verstöße gegen die Regelungen betreffend vorvertragliche Informationspflichten nach KSchG, FAGG, PrAG, ECG sowie betreffend irreführende und aggressive Geschäfts- und Werbepraktiken, z.B. jene nach dem AMG, hingewiesen.
[56] Als strafbare Handlungen werden insbesondere die Nötigung (§ 105 StGB), die Gefährliche Drohung (§ 107 StGB), die Beharrliche Verfolgung (§ 107a StGB) sowie die Verhetzung (§ 283 StGB) genannt.
[57] https://www.rtr.at/medien/was_wir_tun/DigitaleDienste/DownloadOrdnerDigitaleDienste/Informationen_fuer_Antragstellende_Streitbeilegungsstellen.pdf (abgerufen am 09.10.2024).
[58] Vgl. § 31 Abs 3 ECG.

teilen, und räumt damit einen materiellen Auskunftserteilungsanspruch ein.[59] Die Erlassung einer Auskunftsanordnung, die diesen Auskunftserteilungsanspruch flankiert, kann nach Maßgabe des **§ 14 ECG** rechtlich durchgesetzt werden.[60] **§ 15 ECG** sieht eine nationale Rechtsgrundlage für die Auslösung des in Art 9 DSA vorgesehenen Informationsmechanismus für Vermittlungsdiensteanbieter vor, die an anderer Stelle dieses Berichts im Detail erörtert wird.[61] Schließlich wurde in **§ 16 ECG** eine – bisher im österreichischen Recht fehlende – ausdrückliche Rechtsgrundlage für immateriellen Schadenersatz bei „erheblichen" Ehrenbeleidigungen in einem elektronischen Kommunikationsnetz geschaffen.[62]

Frage 4

Da der **DMA** nicht auf der **Kompetenzgrundlage** des Art 103 AEUV (Wettbewerbsrecht) basiert, sondern auf Basis des Art 114 AEUV (Binnenmarkt) erlassen wurde, koexistiert er neben nationalem Wettbewerbsrecht.[63] Vor diesem Hintergrund dienen seine harmonisierenden Regelungen der Hintanhaltung einer Fragmentierung nationaler Regelungen. Teilweise finden sich im DMA „mindestharmonisierende" Regelungen, die den Mitgliedstaaten einen gewissen Spielraum lassen.[64]

Außerhalb des Wettbewerbsrechts setzt der DMA zwei **Grenzen**:

Erstens ist es den Mitgliedstaaten nicht gestattet, den Status des Torwächters zu nutzen, um den Torwächtern weitere Verpflichtungen aufzuerlegen. Die zweite Grenze ergibt sich aus dem Umstand, dass die Mitgliedstaaten nur Angelegenheiten, die nicht in den Anwendungsbereich des DMA fallen, regeln können. Dabei handelt es sich zwar *prima vista* um eine großzügige Bestätigung der Zuständigkeiten der Mitgliedstaaten. Allerdings bleibt den Mitgliedstaaten mit Blick auf den weiten Anwendungsbereich des DMA im Ergebnis ein kleiner Regelungsbereich.[65]

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[59] Siehe Abschnitt 5, Frage 1.

[60] Siehe Abschnitt 4, Frage 4.

[61] Siehe Abschnitt 5, Frage 1.

[62] Siehe zur Zulässigkeit solcher Regelungen vor dem Hintergrund des DSA *Schroeder/Reider*, Der rechtliche Kampf gegen Hass im Netz - Nationale Spielräume unter dem DSA, ÖJZ 2024, 465 (469).

[63] Siehe etwa *Nowag/Patiño*, Enough of fairness: pre-emption and the DMA, LundLawCompWP 2023, 6 ff.

[64] *Achleitner*, Begrenzung der Marktmacht in der Digitalökonomie als Innovationsbremse? Der Digital Markets Act: Rechtsgrundlage, Verhältnis zum Wettbewerbsrecht und Fragen der Primärrechtskonformität, in Heger/Gourdet (Hrsg.), Fairen Wettbewerb in der Europäischen Union sichern (2022) 77 (88).

[65] *Achleitner*, aaO 90 f.

Frage 5

In diesem Zusammenhang sind das HinweisgeberInnenschutzgesetz des Bundes (§ 5; BGBl I 2023/6), sowie mehrere Landesgesetze, die den Hinweisgeberschutz regeln, zu nennen. Dies ist im Zuge der Umsetzung der Richtlinie (EU) 2019/1937, die durch den DMA geändert wurde, geschehen. Im Zuge des DMA wurde zunächst das OÖ Hinweis-Schutzgesetz (§ 22; LGBl 2022/98) geändert, indem ein Verweis auf den DMA gesetzt wurde. Die Kärntner Landesrechtsordnung wurde angepasst und das Kärntner Hinweisgeberschutzgesetz geändert (LGBl 2024/51). Weiters wurden das MiCA-Verordnung-Vollzugsgesetz, das NÖ Auskunftsgesetz, das Kärntner Hinweisgeberschutzgesetz (§ 21) und das NÖ Hinweisgeberschutzgesetz (§ 21) geändert.

Abgesehen davon wurden keine Regelungen erlassen, mit denen die Untersuchungsbefugnisse der BWB im Hinblick auf DMA-Verstöße iSd Art 38 Abs 7 DMA normiert werden. Ebenso fehlen Regelungen betreffend die Mitwirkung der BWB an Ermittlungshandlungen gemäß Art 22 f DMA.

Kapitel 3: Vertikale und horizontale Zusammenarbeit auf überstaatlicher Ebene bei der Durchsetzung des DSA und DMA

Frage 1

DSA

Der **DSA** sieht mehrere Regelungen vor, welche die **horizontalen** und **vertikalen Kooperationsverhältnisse** des europäischen digitalwirtschaftsrechtlichen Verwaltungsverbunds ausgestalten.[66] Auf **nationaler Ebene** wurden – anders als in anderen Regulierungsbereichen[67] – **keine spezifischen Regelungen** erlassen, welche diese unionsrechtlichen Regelungen konkretisieren oder aus ihrem Anlass normiert wurden. Allerdings bestehen **allgemeine Regelungen**, wie § 39 AVG, der die Offizialmaxime im Verwaltungsverfahren regelt und daher zur Kooperation mit ausländischen Behörden im Zuge eines konkreten Verwaltungsverfahrens ermächtigt und in einem gewissen Umfang verpflichtet. Weiters ist es grundsätzlich zulässig, Ergebnisse anderer Verfahren, wie Ermittlungen ausländischer Behörden, zu verwerten. Zudem regelt das AVG weitere verfahrensrechtliche Aspekte, die in nationalen Verfahren, die im Zusammenhang mit solchen Kooperationsverhältnissen relevant sind, beacht-

[66] Siehe zur Einteilung dieser Regelungen exemplarisch *Krönke*, Die Europäische Kommission als Aufsichtsbehörde für digitale Dienste, EuR 2023, 136 ff sowie *Deutscher Bundestag*, Zu den Zuständigkeiten für die Durchsetzung des Digital Markets Act, des Digital Services Act und des geplanten Artificial Intelligence Act (2024) 11 ff, https://www.bundestag.de/resource/blob/1014048/f3b51c5e6ebea5017776ab621c7cf26b/EU-6-016-24-pdf.pdf (abgerufen am 09.10.2024).

[67] Vgl. z.B. § 88 Abs 7 ElWOG 2010 und § 42 Abs 9 GWG 2011.

lich sind, wie das Parteiengehör und die Akteneinsicht (z.B. im Hinblick auf Informationen, zu denen die nationale Behörde aufgrund einer zwischenbehördlichen Kooperation gelangt) sowie deren Grenzen, insbesondere Geheimnisschutzschranken.[68]

Wenngleich die unionsrechtlichen Koordinations- und Kooperationsregelungen insbesondere unter den Gesichtspunkten der Vollzugskohärenz, der Steigerung der Netzwerkexternalität und der Verfahrenseffizienz, der Transparenz sowie der Vermeidung der Mehrfachsanktionierung zu begrüßen sind, erscheinen aus Sicht der Berichterstatter mehrere Aspekte erwähnenswert, welche die **Funktionalität** des **horizontalen und vertikalen Verwaltungsverbunds beeinträchtigen** könnten. Die **Hauptaspekte** betreffen die

- Unabhängigkeit jedes KDD,
- Handhabung von Zuständigkeiten und die Zurechnung von Verantwortung,
- Gewährleistung äquivalenten und effektiven Rechtsschutzes sowie
- Einbettung subnormativer Akte, die in (bestimmten Phasen eines) kooperativen Verfahren(s) gesetzt werden, in demokratische Legitimationszusammenhänge und rechtsstaatliche Kontrollmechanismen.

Zunächst ist darauf hinzuweisen, dass die völlige **Unabhängigkeit** jedes KDD iSd Art 50 Abs 2 DSA im Rahmen der Kooperationsverhältnisse in jeder Lage zu wahren ist. In diesem Zusammenhang ist zu berücksichtigen, dass Stellungnahmen der Kommission, die im Zuge der vorgesehenen Koordinierungs- und Kooperationsverfahren erstattet werden, vielfach keine Befolgungspflicht, wohl aber einen Befolgungsdruck der KDD begründen können. Dieses Spannungsverhältnis dürfte zwar insbesondere durch die im DSA an mehreren Stellen hervorgehobene Rolle des Europäischen Gremiums für digitale Dienste, dem unter anderem Bindegliedfunktion zukommt[69], gemildert werden. Jedoch ist unabhängig davon zu gewährleisten, dass Handlungen unterlassen werden, die geeignet sind, den KDD (mittelbar oder unmittelbar) zu beeinflussen.

Weiters ist ein Augenmerk auf die **klare Handhabung der im DSA geregelten Zuständigkeiten** der nationalen Behörden und der Kommission zu richten. Der informationelle Austausch auf horizontaler und vertikaler Ebene kann zu Problemen bei der **Zurechnung von Verantwortung** („wer ist wann auf welche Weise für was und aus welchem Grund zuständig?“) führen.[70] Dies ist deshalb

[68] *Potacs*, Parteiengehör, Geheimnisschutz, Beweisverwertungsverbote und Rechtsschutz im Verfahren zur Zusammenarbeit von Regulierungsbehörden in Europa am Beispiel der Energie- und Telekommunikationsmärkte, in Holoubek/Lang (Hrsg.), Verfahren der Zusammenarbeit von Verwaltungsbehörden in Europa (2012) 167 (177 ff) mwN.

[69] Siehe im Detail *Achleitner*, Das Wechselspiel zwischen Public und Private Enforcement im digitalen Binnenmarkt, in Bauermeister/Schwamberger (Hrsg.), Private Enforcement im digitalen Binnenmarkt (im Erscheinen).

[70] Siehe exemplarisch *Holoubek*, Kooperative Entscheidungen im europäischen Verwaltungsverbund – von der Tatbestandswirkung zum kooperativen Verwaltungsakt?, in Holoubek/Lang (Hrsg.), Verfahren der Zusammenarbeit von Verwaltungsbehörden in Europa (2012) 351 (358) mwN.

relevant, weil der DSA ein „*komplexes Mischmodell aus indirektem und direktem Vollzug vorgibt und vielfältige Vernetzungsmechanismen vorsieht*".[71] Die klare Zuständigkeits- und Verantwortungsallokation gewährleisten eine hohe Systemfunktionalität.

Dieser zweite Aspekt hängt auch mit dem Aspekt der **Gewährleistung äquivalenten und effektiven Rechtsschutzes** zusammen. Fragen des Rechtsschutzes stellen sich insbesondere bei der Durchführung von Maßnahmen, die in die Rechte der relevanten Wirtschaftsakteure eingreifen können. Hierbei ist unter anderem daran zu denken, dass schutzwürdige Informationen eines Wirtschaftsakteurs im Zuge von Kooperationshandlungen ausgetauscht werden und allenfalls Eingang in – grundsätzlich der Akteneinsicht unterliegenden – Verfahrensakten finden. Nach Art 19 Abs 1 AEUV sind die Mitgliedstaaten zur Schaffung entsprechender Rechtsschutzeinrichtungen und -verfahren „*in den vom Unionsrecht erfassten Bereichen*" zuständig, weshalb Lücken im Rechtsschutzsystem von den Mitgliedstaaten nach Maßgabe der primärrechtlichen Verfahrensgarantien zu schließen sind.[72] Als „Vorbedingungen" für einen hinreichenden Rechtsschutz dienen Anhörungsrechte, die den betroffenen Akteuren im jeweiligen Verfahren erforderlichenfalls zu gewähren sind, Begründungspflichten sowie sonstige rationalitätssichernde verfahrensrechtliche Elemente, wie Parteiengehör, Geheimnisschutz und Beweisverwertungsverbote, die in der (den) jeweils anzuwendenden Verfahrensordnung(en) vorgesehen sind.[73] Im vorliegenden Kontext stellt sich vor allem die Frage, ob die Kooperation Ausdruck „verwaltungsinterner" Abstimmungsprozesse ist, deren Ergebnisse *einer* (bestimmten) Behörde mit der Konsequenz zugerechnet werden, dass diese die Verfahrensrechte berechtigter Personen zu wahren hat und die betroffenen Personen gegen ihre Entscheidungen vorgehen können.[74]

Unter Rechtsschutzgesichtspunkten ist weiters der Einsatz generell-abstrakter und individuell-konkreter **Soft Law-Akte**, wie Leitlinien, Verhaltenskodizes und Stellungnahmen zu beleuchten. Je nach konkreter unionsrechtlicher Einpassung entfalten derartige Akte über ihre interne Bindungswirkung hinausgehend rechtliche oder zumindest faktische externe Bindungswirkung.[75]

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[71] *Mast*, Plattformrecht als Europarecht, in Buchheim/Kraetzi/Mendelsohn/Steinrötter (Hrsg.), Plattformen (2024) 207 (215).

[72] Siehe exemplarisch *Merli*, Rechtsschutz in grenzüberschreitenden verwaltungsrechtlichen Kooperationsverfahren in Europa, in Holoubek/Lang (Hrsg.), Verfahren der Zusammenarbeit von Verwaltungsbehörden in Europa (2012) 377.

[73] Vgl. zu ihrer Bedeutung *Potacs*, aaO 167 ff sowie *Tobisch*, Kooperative Verfahren der Telekommunikationsregulierung (2017) 123.

[74] Siehe dazu etwa *Fuchs*, Allgemeine Grundsätze eines europäischen Verfahrens der Verwaltungskooperation, in Holoubek/Lang (Hrsg.), Verfahren der Zusammenarbeit von Verwaltungsbehörden in Europa (2012) 361 ff, sowie *Merli*, aaO 377 ff.

[75] Siehe mit spezifischem Blick auf die im DSA vorgesehenen Verhaltenskodizes *Panahi/de Bittencourt Siqueira*, Soft law, hardcore? Die rechtliche Durchsetzung von Verhaltenskodizes nach dem

In diesem Zusammenhang ist beispielsweise auf Regelungen, wie Art 58 Abs 4 DSA, hinzuweisen, die zur „weitestgehenden" Rechnungstragung oder Berücksichtigung eines bestimmten, unter Umständen für sich genommen rechtsunverbindlichen und sohin nicht bekämpfbaren Aktes durch den jeweiligen Entscheidungsträger gebieten. Derartige Gebote dürften zumindest teilweise eine materielle Wirkung entfalten, die den Spielraum des jeweiligen Entscheidungsträgers verringern.[76] Vor dem Hintergrund der im Schrifttum[77] diskutierten Frage, ob derartige, die jeweilige Entscheidung inhaltlich vorprägenden „Zwischenakte" durch diejenigen Personen, für welche die darin geäußerten Rechtsansichten nachteilig sind, selbstständig bekämpfbar sind, sollte Klarheit über die Wirkung und Anfechtbarkeit solcher Akte und der darauf aufbauenden (verfahrensbeendenden) Akte herrschen, sprich darüber, ob getrennter oder phasenweiser Rechtsschutz zu gewähren ist.[78] **„Akte subnormativer Verhaltenssteuerung"**[79], die vor allem in Anbetracht der technischen Komplexität und Dynamik der Digitalwirtschaft zweifellos der effektiven Kooperation im digitalwirtschaftsrechtlichen europäischen Verwaltungsverbund dienen können[80], sind in **demokratische Legitimationszusammenhänge** und in **rechtsstaatliche Kontrollmechanismen** einzubetten.[81]

DMA

Das **Governance-System** des DMA ist anders ausgestaltet als jenes des DSA. Der DMA regelt vordergründig die Pflichtenauferlegung für potentielle Torwächter. Die Kommission ist hierbei primäre und weitgehend alleinige Durchsetzungsinstanz. Die nationale Behörde hat in diesem Zusammenhang eine bloß beratende und unterstützende Funktion.[82]

Da die Durchsetzung des DMA weitestgehend bei der Kommission zentralisiert ist, verbleibt für seine **Durchsetzung durch nationale Behörden** nur ein **schmaler Anwendungsbereich**. Zwar werden nationale Behörden nach Art 37 DMA, der die Zusammenarbeit mit nationalen Behörden regelt, explizit in das Verfahren miteinbezogen. Jedoch regelt diese Bestimmung in erster Linie die

Digital Services Act, VerfBlog 2024/6/03, https://verfassungsblog.de/soft-law-dsa-ko-regulierung/ (abgerufen am 09.10.2024).

[76] Siehe zu Art 58 Abs 4 DSA *Schroeder/Reider*, ÖJZ 2024, 469 mwH.

[77] Siehe in einem finanzmarktrechtlichen Kontext *Storr*, Agenturen und Rechtsschutz, in Braumüller/Ennöckl/Gruber/N. Raschauer (Hrsg.), Die neue europäische Finanzmarktaufsicht (2011) 89 ff.

[78] Siehe instruktiv *Merli*, aaO 381.

[79] Siehe zum Begriff allgemein *B. Raschauer*, Subnormative Verhaltenssteuerungen, in Akyürek/Baumgartner/Jahnel/Lienbacher/Stolzlechner (Hrsg.), Staat und Recht in europäischer Perspektive. Festschrift Schäffer (2006) 685.

[80] Siehe zu dieser Effizienzfunktion z.B. *Mast*, aaO 219 f.

[81] Vgl. in einem anderen unionsrechtlichen Zusammenhang *B. Raschauer*, „Leitlinien" europäischer Agenturen, ÖZW 2013, 34 ff.

[82] Siehe z.B. Art 37 und Art 39 DMA; vgl. dazu auch *Mainusch*, Alle Macht der EU-Kommission: Ist die zentralisierte Durchsetzung des Digital Markets Acts alternativlos? ZEuS 2024, 149 ff.

Zusammenarbeit der Behörden mit der Kommission im Anwendungsbereich des Durchsetzungsverfahrens der Kommission. Art 37 Abs 2 DMA sieht vor, dass die Kommission die nationalen Behörden konsultieren „*kann*". Daraus lässt sich ableiten, dass die nationalen Behörden innerhalb des Verfahrens untergeordnet sind. Wie Stellungnahmen im Gesetzgebungsverfahren nahelegen, ging die Einbeziehung nationaler Behörden vor allem von den Mitgliedstaaten aus, die eine noch weitergehende Einbeziehung forderten.

Während Art 37 DMA die Zusammenarbeit mit nationalen Behörden regelt, baut Art 38 DMA darauf auf und regelt insbesondere die Einbeziehung des sog. Europäischen Wettbewerbsnetzes (ECN), dessen Beteiligung gewissermaßen als Ausgleich dafür angesehen werden kann, dass die von den Mitgliedstaaten geforderte verstärkte Beteiligung nicht umgesetzt wurde. Die zentrale Rolle der Kommission wird durch die Zusammenarbeit jedoch nicht berührt (vgl. Art 38 Abs 2, 3 und 7 DMA).[83]

Potenzielle Herausforderungen bei der Durchsetzung des DMA können sich insbesondere durch die Schnittstellen zum Wettbewerbsrecht ergeben. Die Verfahren in den kommenden Jahren werden zeigen, in welchem Ausmaß und in welcher Weise eine Zusammenarbeit bei wettbewerbsrechtlich relevanten Sachverhalten geboten bzw. erforderlich sein wird.

Frage 2

In **Art 82 DSA** sind unterschiedliche Regelungen normiert, welche das **Verhältnis** der **Kommission** und der **nationalen Gerichte** im Hinblick auf jene Angelegenheiten, die in den Zuständigkeitsbereich der Kommission fallen, zum Gegenstand haben. Diese Regelungen haben zum einen die **Ermächtigung** der **Kommission** zur **Mitwirkung an** bestimmten **nationalen Gerichtsverfahren** zum Gegenstand („Kooperation durch Stellungnahme").[84] Zum anderen sehen sie zwei **Kollisionsregelungen** vor, welche das Verhältnis zwischen nationalen Gerichten und der Kommission betreffen und die **Vermeidung widersprüchlicher Entscheidungen** in „parallelen" Verfahren (der öffentlichen und privaten Rechtsdurchsetzung) bezwecken.[85]

Der **DSA regelt nicht sämtliche Aspekte des Verhältnisses der Kommission und der nationalen Gerichte**, weshalb insoweit – wenn das Unionsrecht sonst keine Festlegungen enthält – **Raum für nationale Regelungen** bleibt. Dies be-

[83] Vgl. *Mainusch*, Alle Macht der EU-Kommission: Ist die zentralisierte Durchsetzung des Digital Markets Acts alternativlos?, ZEuS 2024, 149 ff.

[84] Art 81 Abs 1 und Abs 2 DSA.

[85] Art 81 Abs 3 DSA.

trifft unter anderem drei Aspekte. Zum einen fehlen Festlegungen zu den prozessualen Wirkungen der in Art 82 Abs 3 DSA normierten Bindungswirkung im nationalen Verfahren und zur Auflösung eines Konfliktes bestandskräftiger Entscheidungen eines nationalen Gerichtes mit einem Beschluss der Kommission. Zum zweiten ist der informationelle Austausch zwischen nationalem Gericht und Kommission im DSA nicht näher geregelt. Dies betrifft zunächst die – etwa in Art 39 Abs 1 DMA geregelte – Frage, auf welche Weise sich nationale Gerichte über Verfahren bei der Kommission informieren können. Zudem fehlen Regelungen dazu, ob und unter welchen Voraussetzungen nationale Gerichtsentscheidungen der Kommission zu übermitteln sind. Zum dritten sind die Voraussetzungen, bei deren Vorliegen ein nationales Gericht zum Zwecke der Vermeidung eines antizipierten Konflikts mit einem künftigen Kommissionsbeschluss ein Verfahren aussetzt, unionsrechtlich nicht geregelt.

Die unionsrechtlichen Vorschriften des DSA werden durch folgende **nationale Regelungen** flankiert:

Zunächst ist darauf hinzuweisen, dass im Zuge des DSA-BegG abgesehen von § 4 KDD-G, der das Verfahren zur Anordnung der vorübergehenden Einschränkung des Zugangs der Nutzer zu dem betroffenen Dienst regelt und damit im Zusammenhang mit Art 82 Abs 1 DSA steht,[86] **keine *spezifischen* Regelungen** erlassen wurden, die auf das Verhältnis zwischen Kommission und nationalem Gericht Bezug nehmen. Insbesondere fehlt eine Regelung, die das nationale Gericht unter näher bezeichneten Voraussetzungen zur Übermittlung eines Entwurfes bestimmter Entscheidungen an die Kommission vor endgültiger Entscheidung verpflichtet.[87] Ebenso ist keine Regelung ersichtlich, die das nationale Gericht dazu verpflichtet, eine Abschrift bestimmter Entscheidungen an die Kommission zu übermitteln.[88] Schließlich bestehen etwa keine spezifischen Regelungen, wonach nationale Gerichtsentscheidungen, die einem Kommissionsbeschluss zuwiderlaufen, unter bestimmten Voraussetzungen *ex lege* außer Kraft treten[89] oder unwirksam werden oder ein Verfahren zur Abänderung oder Behebung solcher Entscheidungen zu führen ist.

Allerdings gibt es mehrere ***allgemeine* verfahrensrechtliche Regelungen**, die zwar in keinem spezifischen Zusammenhang zum DSA stehen, die aber in DSA-bezogenen Verfahren zur Anwendung gelangen können und eine gewisse **kollisionsvermeidende** und damit **rechtsdurchsetzungsfördernde Wirkung** haben.

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[86] Siehe Abschnitt 1, Frage 2.

[87] Vgl. zu einer solchen Regelung im Gaswirtschaftsrecht § 42 Abs 11 GWG 2011.

[88] Art 39 Abs 2 DMA; vgl. zu einer derartigen Regelung auch im Telekommunikationsrecht § 90 Abs 5 TKG.

[89] Vgl. § 21b FMABG, der in Umsetzung von Unionsrecht die „*Einschränkung der Rechtskraft von Bescheiden*" der Finanzmarktaufsichtsbehörde regelt.

Dies betrifft zunächst Regelungen, welche die **„Integration" von Stellungnahmen**, welche die Kommission nach Art 82 Abs 2 DSA im nationalen Verfahren erstattet, **im nationalen Verfahren** zum Gegenstand haben. Im zivilgerichtlichen Verfahren nach der Zivilprozessordnung („*ZPO*") ist zu berücksichtigen, dass grundsätzlich die Parteien für die Beibringung des Prozessstoffes verantwortlich sind, dem Gericht aber eine gewisse Prozessleitungsbefugnis zukommt. Diese Befugnis erstreckt sich auch dahin, Stellungnahmen, die in den Verfahrensakt Eingang finden, als Beweise nach den allgemeinen **Beweisregeln** aufzunehmen und zu verwerten. Erstattet die Kommission nach Art 82 Abs 2 DSA von Amts wegen eine Stellungnahme, hat das Gericht diese Stellungnahme mit den Parteien im Rahmen seiner Prozessleitungsbefugnis zu erörtern und ggf. auf eine Ergänzung des Parteivorbringens hinzuwirken. Eine solche Stellungnahme kann insbesondere als Urkunden- oder Sachverständigenbeweis verwertet werden.[90] Im verwaltungsgerichtlichen Verfahren stellt sich die Lage anders dar, weil das Verwaltungsgericht unter bestimmten Voraussetzungen in der Sache selbst zu ermitteln und ggf. Beweise von Amts wegen zu erheben, aufzunehmen und zu verwerten hat. Stellungnahmen sind nach den allgemeinen Regelungen dem Parteiengehör zuzuführen, zumal Entscheidungen, die auf Beweismittel gestützt werden, die den Parteien unbekannt sind, prinzipiell rechtswidrig sind.[91] Abgesehen von einer allfälligen unionsrechtlichen „materiellen" Berücksichtigungspflicht solcher Stellungnahmen bestehen nach den nationalen Verfahrensordnungen gewisse **Begründungspflichten**.[92]

Im Hinblick auf **Art 82 Abs 3 DSA** sind folgende Regelungen in den Blick zu nehmen:

Das nationale Gericht hat nach Art 82 Abs 3 erster Satz DSA in jedem Einzelfall zu prüfen, ob die unionsrechtliche Bindungswirkung eines Kommissionsbeschlusses der Erlassung einer bestimmten Gerichtsentscheidung entgegensteht. Die **prozessualen Rechtsfolgen dieser Bindungswirkung** ergeben sich aus nationalem Verfahrensrecht. Bspw. bedeutet die Bindungswirkung aus zivilprozessualer Sicht, dass in einem solchen Verfahren weder der Nachweis einer unrichtigen Tatsachenfeststellung noch einer falschen rechtlichen Beurteilung geführt werden darf; eine neuerliche Verhandlung, Beweisaufnahme und neuerliche Prüfung im Umfang der Bindungswirkung ist ausgeschlossen.[93]

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[90] Siehe zum Beihilfeverfahren z.B. *Roth*, Die Europäische Kommission als Amicus curiae im Beilhilfeverfahren vor nationalen Gerichten, Jahrbuch Beihilfenrecht (2018) 425 ff.

[91] Siehe in einem regulierungsbehördlichen Kontext *Potacs*, aaO 173, 177 ff.

[92] Siehe zu nationalen Beihilfenverfahren *Roth*, aaO 425 ff mwH.

[93] Siehe allgemein zu der prozessualen Dimension der Bindungswirkung *Trenker*, Bindung des Zivilgerichts an verwaltungsbehördliche/-gerichtliche Entscheidungen, JBL 2016, 488 (499) mwN.

Weiters ist von Interesse, wie nationale Gerichte vorzugehen haben, wenn ein Kommissionsverfahren anhängig ist. Die Frage, ob und inwieweit ein **nationales gerichtliches Verfahren ausgesetzt** werden kann, richtet sich – weil Art 82 Abs 3 dritter Satz DSA die Ermächtigung des nationalen Gerichts zur Prüfung der Aussetzung, nicht aber die Aussetzungsgründe i.e.S. regelt – nach nationalem Recht. Die Unterbrechung zivilgerichtlicher Verfahren ist in § 190 ZPO und § 25 Abs 2 Z 1 AußStrG geregelt. Nach der erstgenannten Regelung bildet die gänzliche oder teilweise Abhängigkeit des Verfahrens von der Entscheidung über eine präjudizielle **Vorfrage** aus einem anderen gerichtlichen oder „verwaltungsbehördlichen" Verfahren einen Unterbrechungsgrund. Ausgehend davon, dass § 190 Abs 1 ZPO auch Verfahren vor der Europäischen Kommission erfasst, ist zu prüfen, ob das anhängige Kommissionsverfahren eine präjudizielle Vorfrage betrifft.[94] Ist dies zu bejahen, steht es nach der nationalen Rechtslage im pflichtgebundenen Ermessen des Gerichts, das Verfahren zu unterbrechen oder die Vorfrage eigenständig zu beurteilen, wobei bei dieser Ermessensentscheidung prozessökonomische Zweckmäßigkeitserwägungen im Vordergrund stehen.[95] Das nationale Gericht darf nicht gegen Art 82 Abs 3 zweiter Satz DSA verstoßen. Im Wesentlichen dieselbe nationale Rechtslage besteht im Hinblick auf die Zulässigkeit der verwaltungsbehördlichen und -gerichtlichen Vorfragenbeurteilung.[96]

Vor dem Hintergrund, dass die Mitgliedstaaten alle erforderlichen Maßnahmen zur Umsetzung des Unionsrechts zu treffen haben[97], stellt sich schließlich die Frage, wie vorzugehen ist, wenn die **Kommission *nachträglich* einen Beschluss erlässt, der von der eigenständigen Vorfragenbeurteilung des nationalen Gerichts oder der nationalen Behörde abweicht**. Dabei geht es zum einen um die Frage, ob das nationale Recht Rechtsbehelfe zur Verfügung stellt, die auf die Vermeidung dieses Konflikts abzielen. Zum anderen geht es insbesondere um die damit eng verbundene Frage, ob und inwieweit eine nachträgliche Kommissionsentscheidung die Rechtskraft einer solchen nationalen Entscheidung beschränkt bzw. durchbricht. Im Hinblick auf die erste Frage geht es darum, ob das nationale Verfahren trotz rechtskräftigen Abschlusses wiederaufgenommen werden kann bzw. muss. Die österreichische Rechtsprechung zum Zivilprozessrecht hält in nationalen Konstellationen eine Wiederaufnahme des Verfahrens für unzulässig,[98] zumal diese Konstellation im Zivilprozessrecht – anders als im Verwaltungsprozessrecht – nicht

[94] Vgl. RS0111310, wonach die Entscheidung der Europäischen Kommission über das beantragte Negativattest nach Art 2 der VO 17/62 bzw. für die Entscheidung des Kartellgerichtes über die Genehmigung des Kartells keine Vorfrage iSd § 190 ZPO bildet.

[95] Siehe z.B. *Trenker*, aaO 489.

[96] (§ 17 VwGVG iVm) § 38 AVG, wobei die Anwendung davon abhängt, ob die Wortfolge „*anderen Verwaltungsbehörden oder von den Gerichten*" die Kommission erfasst.

[97] Art 4 Abs 3 zweiter Satz EUV.

[98] Siehe exemplarisch *Trenker*, aaO 505 ff mwN.

geregelt wird. Im Verwaltungsverfahren richtet sich die Abänderbarkeit eines Bescheides und die Wiederaufnahme des Verfahrens mangels materiengesetzlicher Regelung nach den Bestimmungen der §§ 68 f AVG. Auf die in der Rechtsprechung teilweise bejahte Möglichkeit der Durchbrechung der Rechtskraft nationaler Entscheidungen kraft Unionsrecht, die über die in den Verfahrensordnungen vorgesehenen Möglichkeiten hinausgeht, sei an dieser Stelle hingewiesen.[99]

Nach der Kollisionsregel des Art 39 Abs 1 DMA können nationale Gerichte die Kommission um Informationen oder Stellungnahmen im Zusammenhang mit der Anwendung des DMA bitten. Damit sollen Divergenzen in der Rechtsdurchsetzung vermieden und Kohärenz gewährleistet werden. Derzeit ist noch unklar, inwiefern die nationalen Gerichte und die Kommission von diesen Kooperationsmöglichkeiten Gebrauch machen werden bzw. ob die nationalen Gerichte vielmehr auf das Instrument des Vorabentscheidungsverfahrens nach Art 267 AEUV zurückgreifen werden, das letztlich endgültige Rechtssicherheit bringt.[100]

Die nationalen Wettbewerbsbehörden sind überdies verpflichtet, die Kommission über geplante kartellrechtliche Untersuchungen iSv Art 1 Abs 6 DMA zu informieren. Beabsichtigt eine nationale Behörde, Torwächtern Verpflichtungen aufzuerlegen, die sich auf kartellrechtliche Bestimmungen stützen, ist dies der Kommission innerhalb von 30 Tagen vor dem Erlass einer Sanktion zu melden. Nicht übernommen wurde der Abänderungsantrag des Parlaments, der vorsah, dass die Europäische Kommission im Falle eines Widerspruchs der geplanten nationalen Maßnahme zum DMA die nationale Behörde anweisen darf, die kartellrechtliche Maßnahme nicht durchzusetzen. Ein Koordinierungsmechanismus und das hierdurch geschaffene „Kooperationsforum", wie es der DMA vorsieht, ist eine notwendige und begrüßenswerte Ergänzung des Kommissionsvorschlags, wodurch die Expertise nationaler Behörden eingebunden wird.

Frage 3

Die nationalen Wettbewerbsbehörden dürften – wie **Art 27 DMA** nahelegt – vor allem bei der Gewinnung von Informationen, welche die Grundlage für die Einleitung eines Verfahrens der Kommission bilden und/oder in solchen Verfahren verwertet werden können, eine gewisse Rolle spielen. Dabei sind **zwei Szenarien** denkbar:

[99] Siehe dazu aus verwaltungsrechtlicher Sicht etwa *Hengstschläger/Leeb*, AVG § 68 Rz 138 ff mwH (Stand 01.03.2018, rdb.at).

[100] Vgl. *Achleitner*, Das Durchsetzungsregime im Digital Markets Act: Private Enforcement unerwünscht?, ZöR 2023, 287 (294).

Ein erstes Szenario könnte darin liegen, dass Dritte der BWB einen möglichen Verstoß gegen den DMA melden und diese befindet, dass es sich tatsächlich um einen Verstoß gegen den DMA handeln könnte. In diesem Zusammenhang ist nicht entscheidend, welche Art von Verstoß des DMA in Rede steht. Die BWB könnte die jeweiligen **Informationen** an die Kommission **weiterleiten**. In diesem Fall dürfte sie eine untergeordnete Rolle haben, da die „geeigneten" Maßnahmen, die sie nach Art 27 Abs 2 DMA ergreifen kann, begrenzt sind.

Daneben ist denkbar, dass die nationale Wettbewerbsbehörde auf Grundlage der von Dritten bereitgestellten Informationen befindet, dass es sich zwar um keinen Verstoß gegen die Vorschriften des DMA, aber um einen kartellrechtlich relevanten Verstoß handelt. Aufgrund der möglichen Überschneidungen zwischen DMA und Kartellrecht könnte die BWB bestimmte Meldungen, die keinen (hinreichenden) DMA-Bezug enthalten, zum Zwecke der Entlastung der Kommission „aussortieren". Insoweit käme der BWB eine „**Filterungsfunktion**" zu.

Kapitel 4: Private Rechtsdurchsetzung des DSA und DMA

Frage 1

DSA

Den Berichterstattern sind mehrere (überwiegend unveröffentlichte) Entscheidungen mit DSA-Bezug bekannt. Diese Entscheidungen betrafen insbesondere

1. die Erteilung von Auskunftsdaten zum Zwecke der Aufklärung eines konkreten Verdachts des Vergehens der üblen Nachrede gemäß § 111 StGB durch eine Online-Plattform gegenüber dem Betroffenen;
2. einen Fall, in dem Ansprüche auf Unterlassung der Verbreitung von Persönlichkeitsrechte verletzenden Inhalten nach §§ 16, 1330 ABGB mit Wirkung für Österreich, Deutschland und der Schweiz geltend gemacht wurden und sich die Frage gestellt hat, wie sich der DSA auf die Beurteilung des anwendbaren Rechts auswirkt[101];
3. die internationale Zuständigkeit im Hinblick auf Auskunftsansprüche gegen einen Diensteanbieter nach § 13 Abs 3 ECG idF des DSA-BegG vor dem Hintergrund des Art 7 Abs 2 EuGVVO, der die Ansprüche aus unerlaubter Handlung betrifft;
4. die in Art 4 ff DSA normierten Haftungsausschlüsse im Verhältnis zum Haftungsausschluss nach § 17 ECG, der den Ausschluss der Verantwortlichkeit bei Links regelte.

[101] OGH 25.06.2024, 4 Ob 191/23a.

DMA

Den Berichterstattern sind im Berichtszeitraum keine Fälle bekannt, in denen in Österreich aufgrund oder aus Anlass einer Zuwiderhandlung gegen den DMA Gerichtsverfahren eingeleitet wurden.

Frage 2

Die **bisherige österreichische Praxis** der privaten Rechtsdurchsetzung von Nutzern gegen Plattformen betraf zunächst Klagen im Zusammenhang mit den **Allgemeinen Geschäftsbedingungen** der Plattformen.[102] Vor dem Hintergrund, dass die österreichische Rechtsordnung mehrere Grundlagen für die Haftung von Plattformen kennt[103], stützten sich Klagen der Nutzer gegen Plattformen weiters auf **Ansprüche auf Unterlassung** und **Beseitigung einer drohenden oder aktuellen Verletzung ihres Persönlichkeitsrechts** durch einen Inhalt eines anderen Nutzers. Daneben wurden Ansprüche auf Ersatz von (immateriellen) Schäden gegen Plattformen wegen solcher Verletzungen geltend gemacht. Mit dem – kurz vor dem DSA-BegG erlassenen – „Hass-im-Netz-Bekämpfungs-Gesetz" wurden materiell- und verfahrensrechtliche Sonderregelungen für den „Hass im Netz"-Bereich erlassen, die zu den bisherigen Anspruchsgrundlagen und Verfahrenstypen hinzutreten oder diese ersetzen und teilweise bereits in Verfahren zur Anwendung gelangten. Weiters sind den Berichterstattern **Konkurrenzklagen auf Grundlage des UWG** bekannt.

Bei der Frage, ob sich diese Praxis durch den DSA und die nationalen Begleitregelungen ändern wird, ist Folgendes zu berücksichtigen:

Zunächst ist darauf hinzuweisen, dass der **DSA** einer privaten Rechtsdurchsetzung nicht entgegensteht.[104] Nach herrschender Auffassung[105] sind **mehrere Vorschriften** seines Kapitels III **individualschützend** und **privatrechtsgestaltend**. Dies trifft insbesondere auf die Regelungen betreffend die allgemeinen Geschäftsbedingungen (Art 14), das Melde- und Abhilfeverfahren (Art 16), die Begründung einer Beschränkung (Art 17), das interne Beschwerdemanagementsystem (Art 20) und die außergerichtliche Streitbeilegung (Art 21)

[102] Siehe bereits OGH 16.04.2009, 2 Ob 137/08y.

[103] Siehe ausführlich zu den rechtlichen Grundlagen der (unmittelbaren und mittelbaren) Haftung von Plattformen für ihre Nutzer *Holzweber*, Zur Haftung von Plattformen für ihre Nutzer, wbl 2020, 477.

[104] Im österreichischen und deutschen Schrifttum (siehe exemplarisch *Schroeder/Reider*, aaO 469 f; *Achleitner*, aaO Wechselspiel; *Zurth*, Private Rechtsdurchsetzung im Digital Services Act, in Buchheim/Kraetzi/Mendelsohn/Steinrötter [Hrsg.], Plattformen [2024] 125 [134]) wird in diesem Zusammenhang insbesondere auf die Bestimmungen des Art 9, 10, 14, 54 und 82 Abs 3 DSA hingewiesen.

[105] Siehe exemplarisch für Österreich *Schroeder/Reider*, aaO 469 f und für Deutschland *Zurth*, aaO 134 ff; aA z.B. *Buchheim/Schrenk*, Der Vollzug des Digital Services Act, NVwZ 2024, 1 (7).

zur Gänze oder in Teilen zu.[106] Diese Regelungen sind (zumindest in großen Teilen) **hinreichend bestimmt** und **unbedingt formuliert**. Sie sind daher der privaten Rechtsdurchsetzung zugänglich. Ob sie eine eigenständige unionsrechtliche Anspruchsgrundlage darstellen oder es eines Rückgriffs auf **Anspruchsgrundlagen des nationalen Rechts** bedarf, hängt von der jeweiligen Bestimmung ab.[107]

Zwar dürfte der Großteil der Rechtsdurchsetzung im Plattformbereich nach Einschätzung der Berichterstatter im Wege von **Konkurrenzklagen** erfolgen. Allerdings dürfte der DSA auch im Bereich der **Rechtsdurchsetzung der Nutzer gegen Diensteanbieter** zumindest in bestimmten Teilbereichen einen Aufschwung bringen. Den Schwerpunkt solcher Klagsführungen dürfte zunächst – wie die ersten Verfahren zeigen[108] – in der Geltendmachung von **Ansprüchen** auf **Erteilung** einer **Auskunft über Nutzerdaten** sowie von **Unterlassungs- und Beseitigungsansprüchen** wegen Verletzung von Persönlichkeitsrechten, insbesondere im Bereich von „Hass im Netz", liegen, bei deren Durchsetzung der DSA und die nationalen Begleitregelungen gewisse Erleichterungen vorsehen.[109] Zudem dürften auch die in Art 14 DSA normierten Mindeststandards für **Allgemeine Geschäftsbedingungen** bedeutsam sein.

Einen weiteren Schwerpunkt dürften Klagen bilden, die **Ansprüche auf Ersatz von Schäden und Verlusten** zum Gegenstand haben. Bei der Durchsetzung von Schadenersatzansprüchen nach nationalem Recht bestehen mehrere **Herausforderungen** vor allem im Hinblick auf **„Stand-Alone"-Klagen**.[110] Dabei sind **zwei Aspekte** herauszugreifen. Zum einen ist zu berücksichtigen, dass mangels eines sektoralen Sonderbeweisrechts die allgemeinen Beweis(last) regeln zur Anwendung gelangen. Insbesondere könnte die **Beweisbarkeit** des Vorliegens eines Verstoßes gegen den DSA zu Herausforderungen führen. Zum anderen werden zahlreiche Nutzer im Falle von **Streuschäden** von einer Klagsführung absehen, weil deren Geltendmachung aufgrund der geringen Höhe des Anspruchs und des Prozess(kosten)risikos nicht zweckmäßig erscheinen wird („rationale Apathie").[111] In diesen Fällen dürften vor allem **Verbandsklagen** der Durchsetzung des DSA zum Durchbruch verhelfen, wobei aus öster-

[106] Siehe im Detail z.B. *Zurth*, aaO 137 ff.

[107] *Schroeder/Reider*, aaO 469; vgl. den – im DSA-Kommissionsvorschlag nicht enthaltenen – Art 54 und ErwGr 121 DSA.

[108] Siehe Abschnitt 4, Frage 1.

[109] Siehe Abschnitt 5, Frage 1.

[110] Da bei „Follow-On"-Klagen die Bindungswirkung von Kommissionsbeschlüssen in rechtlicher und tatsächlicher Hinsicht zu beachten ist (Art 82 Abs 3 erster Satz DSA), dürfte in diesen Fällen die Beweisbarkeit von Verstößen gegen den DSA keine größeren Herausforderungen darstellen.

[111] Siehe dazu im Kontext des DSA *Cornils*, Vollzug des Digital Services Act in Deutschland – Implementierung einer verbraucherorientierten Aufsichtsbehördenstruktur. Gutachten im Auftrag des Verbraucherzentrale Bundesverbands e.V. (2022) 84.

reichischer Sicht darauf hinzuweisen ist, dass nur wenig Verbandsklagenpraxis im Plattformbereich besteht.

Frage 3

Vor dem Hintergrund, dass nach dem Schrifttum[112] die **private Rechtsdurchsetzung** (im Hinblick auf einzelne Vorschriften) des DMA in einem bestimmten Umfang **zulässig** ist, stellt sich die Frage, auf welcher Grundlage jene Vorschriften, wie (Teile der) Art 5–7, die einen individualschützenden Charakter aufweisen sowie hinreichend bestimmt sind und daher einer solchen Rechtsdurchsetzung durch bestimmte Personen zugänglich sind, durchgesetzt werden können. Abgesehen von allfälligen unionsrechtlichen Anspruchsgrundlagen[113] könnte als **Anspruchsgrundlage** mangels besonderer Regelungen[114] zunächst das **allgemeine Deliktsrecht** dienen, welches Bestimmungen Schadenersatz- und Unterlassungsansprüche vermittelt, wenn es sich bei der verletzten (Verbots-)Norm um ein Schutzgesetz iSd § 1311 ABGB handelt und der Kläger von ihrem Verstoß unmittelbar betroffen ist.[115]

Weiters kommt eine private Rechtsdurchsetzung über das **Lauterkeitsrecht** in Betracht. Das UWG enthält zivilrechtliche Anspruchsgrundlagen bei lauterkeitsrechtlichen Verstößen, die auf Unterlassung, Beseitigung, Schadenersatz und Urteilsveröffentlichung gerichtet sind. Betroffene Mitbewerber können Verstöße eines Torwächters gegen den DMA über die Ansprüche nach § 1 UWG geltend machen (eine Form der „Konkurrenzklagen"). Konkret könnte die Fallgruppe des Rechtsbruches nach § 1 Abs 1 Z 1 UWG zur Anwendung gelangen, wenn ein Verstoß gegen eine generelle Norm, wie die Vorschriften des DMA, vorliegt. Die Verletzung einer solchen Norm ist allerdings nur dann als (anspruchsbegründende) unlautere Geschäftspraktik oder als sonstige unlautere Handlung zu qualifizieren, wenn die Norm nicht auch mit guten Gründen (vertretbar) in der Weise ausgelegt werden kann, dass sie dem beanstandeten Verhalten nicht entgegensteht. In seiner *Stadtrundfahrt*-Entscheidung[116] hielt der OGH fest, dass es auch außerhalb des UWG Bestimmungen mit „*spezifisch lauterkeitsrechtlichem Charakter*" geben könnte, bei deren Verletzung sich der Beklagte nicht auf eine vertretbare Rechtsansicht berufen kann. Im Hinblick auf die/einzelne Vorschriften des DMA könnte vor dem Hintergrund seines

[112] Siehe instruktiv *Achleitner*, aaO 287 ff sowie *Weigl*, Margarethe, the 80, and Who? – Private Rechtsdurchsetzung des Digital Markets Act (DMA), in Buchheim/Kraetzi/Mendelsohn/Steinrötter (Hrsg.), Plattformen (2024) 97 (109 ff).

[113] *Weigl*, aaO 111 f, der dies im Hinblick auf die in Art 5 ff DMA enthaltenen Gebote bejaht.

[114] Anders als in Deutschland, wo mit der 11. GWB-Novelle besondere Anspruchsgrundlagen geschaffen wurden, fehlen derartige Regelungen in der österreichischen Rechtsordnung.

[115] *Achleitner*, aaO 291.

[116] OGH 11.03.2008, 4 Ob 225/07b.

Telos und der zahlreichen Hinweise auf ein „faires und diskriminierungsfreies" Verhalten der Torwächter vertreten werden, dass es sich dabei um Normen mit „spezifisch lauterkeitsrechtlichem Gehalt" handelt.[117]

Daneben sind die Bestimmungen des **Preisauszeichnungsgesetzes,** §§ 4 ff **KartG** sowie das **Faire-Wettbewerbsbedingungen-Gesetz** (FWBG) für Klagen im Zusammenhang mit dem DMA bedeutsam.[118]

Vor dem Hintergrund dieser Rechtsgrundlagen ist davon auszugehen, dass die Mehrheit der Klagen im Zusammenhang mit dem DMA „**Konkurrenzklagen**" darstellen werden, in denen sich Mitbewerber gegen einen Torwächter wenden. **„Follow-On"-Klagen** werden aller Voraussicht nach **häufiger** erhoben werden, da sie direkt an eine Entscheidung der Kommission in tatsächlicher und rechtlicher Hinsicht anknüpfen (müssen[119]), sodass sich zum einen insbesondere im Schadenersatzbereich Probleme bei der **Beweisbarkeit** – unabhängig davon, ob man Art 8 Abs 1 erster Satz DMA als Beweislastumkehrnorm deutet, was auch für Stand-Alone-Klagen erwogen wird[120] – nicht stellen. Dies ändert aber nichts an den Herausforderungen, die im Zusammenhang mit der Feststellung und Bezifferbarkeit von Schäden stehen.[121] Zum anderen besteht bei Follow-On-Klagen die (bei „Stand-Alone"-Klagen unter Umstände bestehende) **Gefahr der unterschiedlichen Auslegung der Bestimmungen des DMA** durch die Kommission und nationalen Gerichte nicht. Allerdings ist im Hinblick auf Art 6 f DMA unter anderem zu berücksichtigen, dass die Kommission die darin normierten Verhaltenspflichten in einem Akt des tertiären Rechts spezifizieren kann.[122] Zudem normiert Art 39 Abs 5 DMA mehrere Kollisionsregelungen, die auch auf die Vermeidung von Konflikten von Entscheidungen nationaler Gerichte mit bevorstehenden Entscheidungen der Kommission abzielen, was im Falle von Stand-Alone-Klagen relevant ist.[123] Die Chancen, welche die private Rechtsdurchsetzung unabhängig vom Klagstyp bietet, werden – wie das Schrifttum[124] betont – im Übrigen dadurch relativiert, dass Klagen oder Rechtsmittel gegen Entscheidungen nationaler Gerichte, etwa infolge eines allenfalls abgeschlossenen Vergleichs, infolge des Dispositionsgrundsatzes zurückgenommen bzw. – gezogen werden, was der Herausbildung einer Rechtsprechung abträglich wäre.

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[117] Siehe zum Ganzen *Achleitner*, aaO 291 f.

[118] https://www.rtr.at/TKP/aktuelles/veranstaltungen/veranstaltungen/2023/Gesetz_ueber_Digitale_Maerkte_Salzburg_2023_.pdf (abgerufen am 09.10.2024).

[119] Art 39 Abs 5 DMA.

[120] *Weigl*, aaO 121.

[121] *Weigl*, aaO 122.

[122] Art 8 Abs 2 zweiter Satz DMA.

[123] Siehe Abschnitt 3, Frage 2.

[124] *Weigl*, aaO 120.

Frage 4

DSA

Neben den **§§ 13 ff ECG**, die unterschiedliche Regelungen betreffend Hass im Netz zum Gegenstand haben[125], sind den Berichterstattern keine spezifischen Regelungen bekannt, welche die private Rechtsdurchsetzung im Zusammenhang mit dem DSA betreffen.

Die Zuständigkeit für Klagen zur privaten Durchsetzung des DSA richtet sich nach der nationalen Rechtsordnung. Die Jurisdiktionsnorm, die die Zuständigkeit der Gerichte regelt, enthält keine besondere Zuständigkeitszuweisung im Hinblick auf Klagen im Zusammenhang mit dem DSA. Allerdings wurde im Zuge des DSA-BegG in § 14 ECG eine Zuständigkeit des zur Ausübung der Gerichtsbarkeit in **Handelssachen** berufenen Gerichtshofs erster Instanz für Klagen, die einen **Anspruch auf Erteilung der Informationen** nach § 13 Abs 3 ECG (**Auskunftsanordnung**), normiert. Örtlich zuständig ist jener Gerichtshof, in dessen Sprengel das schädigende Ereignis eingetreten ist oder einzutreten droht. Den Berichterstattern ist nicht bekannt, dass diese Sonderzuständigkeit auf weitere Bereiche ausgeweitet werden soll.

DMA

Den Berichterstattern sind **keine spezifischen Vorschriften** bekannt, welche die private Rechtsdurchsetzung des DMA in Österreich regeln. Im Schrifttum[126] wurde dieser Umstand kritisiert und nach Lösungsansätzen gesucht. Einerseits wird die Erlassung von Regelungen dem Vorbild Deutschlands (11. GWB-Novelle), mit denen die private Rechtsdurchsetzung in nationale wettbewerbsrechtliche Vorschriften eingebettet wurde, vorgeschlagen. Andererseits wurde eine Regelung auf Ebene der EU in Anlehnung an die Schadenersatz-RL angedacht.[127]

Frage 5

Auf nationaler Ebene besteht zunächst die Möglichkeit der Beteiligung zivilgesellschaftlicher Organisationen im Wege der **Nebenintervention** (§§ 17-19 ZPO). Der Beitritt eines Nebenintervenienten kann in jeder Lage des Verfahrens bis zu dessen rechtskräftiger Beendigung erfolgen. Er kann grundsätzlich jegliche Prozesshandlungen vornehmen, selbst wenn die Hauptpartei untätig

[125] Siehe Abschnitt 2, Frage 3.

[126] Siehe etwa *Achleitner*, aaO 359.

[127] Siehe *Achleitner,* aaO 295; *Schweitzer*, The Art to make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair: A Discussion of the Digital Markets Act Proposal, ZEuP 2021, 503 (541).

bleibt. Wesentliche Voraussetzung ist ein rechtliches Interesse des Nebenintervenienten am Obsiegen der Hauptpartei. Das rechtliche Interesse muss dabei über ein bloß wirtschaftliches und öffentliches Interesse hinausgehen. Dies ist in erster Linie dann der Fall, wenn ein zwischen dem Nebenintervenienten und einer der beiden Hauptparteien bestehendes Rechtsverhältnis, wie Rechtsverhältnisse betreffend Regress- und Schadenersatzansprüche,[128] von dem Rechtsverhältnis zwischen den beiden Hauptparteien abhängig ist.[129] Vor diesem Hintergrund ist im Hinblick auf den Beitritt einer zivilgesellschaftlichen Organisation als Nebenintervenientin im Rahmen der privaten Durchsetzung des **DSA** und **DMA** durch einen Nutzer gegen einen Diensteanbieter zu fragen, ob diese Organisationen ein rechtliches Interesse am Obsiegen der Hauptpartei haben. Dies ist in bestimmten Konstellationen denkbar.

Sofern bei Verbraucherinteressen öffentliche Interessen im Vordergrund stehen, erweist sich die Erhebung einer **Verbandsklage** als zweckmäßig, weil dabei jede zivilgesellschaftliche Organisation, die in Österreich als Qualifizierte Einrichtung zugelassen ist, befugt ist, Klagen in Verbraucherangelegenheiten zu erheben. Damit ist es einem Verbraucher grundsätzlich möglich, sich in einem laufenden Verbandsverfahren von Anfang an oder nachträglich anzuschließen, wenn es sich um einen im Wesentlichen gleichen Sachverhalt handelt.[130]

Mit der Umsetzung der Verbandsklagerichtlinie (EU) 2020/1828 („VK-RL") ist es nunmehr möglich, jeden Verstoß eines Unternehmens, der die kollektiven Interessen von Verbrauchern beeinträchtigt, mittels Klage vor einem Zivilgericht geltend zu machen. In Österreich wird die VK-RL in der **Verbandsklagen-Richtlinie-Umsetzungs-Novelle**[131] („VRUN") umgesetzt, deren sachlicher Anwendungsbereich über jenen der VK-RL hinausgeht. Daneben ist zum einen auf **Art 86 Abs 1 DSA** hinzuweisen, wonach Nutzer von Vermittlungsdiensten unbeschadet der VK-RL nach nationalem Recht das Recht haben, eine Einrichtung, Organisation oder Vereinigung mit der Wahrnehmung der ihnen mit dem DSA eingeräumten Rechte zu beauftragen.[132] Zum anderen stellt **Art 42 DMA** klar, dass die (drohende) Beeinträchtigung kollektiver Verbraucherinteressen durch Verstoß gegen den DMA mit Verbandsklage nach der VK-RL geltend gemacht werden kann.[133]

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[128] Siehe z.B. *Schneider*, in Fasching/Konecny (Hrsg.), Zivilprozessgesetze 1. Teilband § 17 ZPO Rz 1.

[129] Siehe etwa *Domej*, in Kodek/Oberhammer (Hrsg.), ZPO-ON § 17 ZPO Rz 20 (Stand 09.10.2023, rdb.at).

[130] Siehe exemplarisch *Rastegar*, Der Beitritt zur Abhilfeklage, VbR 2024 91 ff.

[131] BGBl I 2024/85.

[132] Siehe zu möglichen individualschützenden Vorschriften des DSA Abschnitt 4, Frage 2.

[133] *Kapusta*, Pflichten von Gatekeepern im Digital Markets Act, GPR 2023, 82.

Folgende **Verbandsklagetypen** bestehen nach der österreichischen Rechtslage:

1. Verbandsklage auf Unterlassung (§§ 619-622 ZPO): Damit können Rechtsverstöße von Torwächtern, welche kollektive Verbraucherinteressen beeinträchtigen, geltend gemacht werden. Damit wurden der sachliche Anwendungsbereich erweitert und Rechtsbereiche eröffnet, in welchen zuvor Unterlassungsklagen durch den VKI oder Sozialpartner nur eingeschränkt oder gar nicht möglich waren.[134]
2. Verbandsklage auf Abhilfe (§§ 623-635 ZPO): Qualifizierte Einrichtungen können im Wege einer „Prozessstandschaft" Verfahren für Verbraucher führen, während Verbraucher lediglich den Nutzen daraus ziehen.[135]
3. Sammelklage österreichischer Prägung.

Die prozessualen Bestimmungen zu den ersten beiden Verbandsklagetypen sind in der ZPO geregelt. Diese treten neben die bestehenden Klagemöglichkeiten, sodass es weiterhin möglich ist, Unterlassungsklagen auf §§ 28 ff KSchG und/oder § 15 UWG zu stützen und Ansprüche im Wege einer „Sammelklage österreichischer Prägung" geltend zu machen.

Mit dem Qualifizierte-Einrichtungen-Gesetz (QEG, BGBI 2024/85) wurden Vorschriften für „Qualifizierte Einrichtungen" erlassen. Diese sind zum einen berechtigt, die Unterlassung (Beendigung und Verbot) des rechtswidrigen Verhaltens eines Unternehmens zu verlangen, wenn dieses die kollektiven Verbraucherinteressen beeinträchtigt oder zu beeinträchtigen droht.[136] Dieser **Unterlassungsanspruch** wird durch die Möglichkeit der Erlassung einstweiliger Verfügungen flankiert.[137] Zum anderen können solche Einrichtungen unter bestimmten Voraussetzungen Abhilfe für einzelne Verbraucher verlangen.[138] Neben den gesetzlich anerkannten Qualifizierten Einrichtungen, zu denen unter anderem die Sozialpartner und der VKI zählen[139], entscheidet der Bundeskartellanwalt über Anträge auf Anerkennung weiterer juristischer Personen als Qualifizierte Einrichtungen für grenzüberschreitende und innerstaatliche Verbandsklagen.[140]

Die **Finanzierung** solcher Klagen und Einrichtungen erfolgt durch sogenannte Prozessfinanzierung und/oder staatliche Förderungen.[141] Der einzelne Verbraucher trägt dabei grundsätzlich kein Kostenrisiko.[142] Es kann eine Betrags-

[134] *Leupold/Eder*, Die Verbandsklage auf Unterlassung, VbR 2024 84 ff.
[135] *Thaler/Zimmermann*, Die neue österreichische Verbandsklage, CFOaktuell 2024, 131.
[136] § 5 Abs 1 QEG.
[137] § 622 ZPO.
[138] § 5 Abs 2 QEG.
[139] § 3 QEG.
[140] § 1 Abs 2 und § 2 Abs 2 QEG.
[141] § 6 Abs 1 QEG.
[142] Nach § 632 ZPO trägt der Verbraucher im Hinblick auf Verbandsklagen auf Abhilfe nur ein Kostenrisiko, wenn er durch Vorsatz überhöhte Verfahrenskosten verursacht; vgl. ErwGr 36 VK-RL.

gebühr vereinbart werden, die maximal EUR 250,00 und nicht höher als 20 % der geltend gemachten Anspruchssumme betragen darf.[143]

Kapitel 5: Allgemeine Fragen

Frage 1

Nach den Art 4 Abs 3, 5 Abs 2 und 6 Abs 4 DSA bleibt die Möglichkeit unberührt, „*dass eine Justiz- oder Verwaltungsbehörde nach dem Rechtssystem eines Mitgliedstaats vom Diensteanbieter verlangt, eine Zuwiderhandlung abzustellen oder zu verhindern*". Eine derartige Bestimmung enthielt bereits der in Umsetzung der Art 12 Abs 3, 13 Abs 2 und 14 Abs 3 E-Commerce-RL erlassene § 19 Abs 1 ECG, mit deren Gehalt und Grenzen sich der OGH mehrmals auseinandersetzte.[144] Nach dieser Bestimmung blieben gesetzliche Vorschriften, „*nach denen ein Gericht oder eine Behörde dem Diensteanbieter die Unterlassung, Beseitigung oder Verhinderung einer Rechtsverletzung auftragen kann*", unberührt. Dementsprechend bleibt es Gerichten unbenommen, gegen einen Provider einen Unterlassungsbefehl mit einstweiliger Verfügung oder mit Urteil wegen eines rechtswidrigen Inhalts oder sinngleicher Inhalte zu erlassen, sofern die materiell-rechtlichen Voraussetzungen hierfür vorlagen. Diese Entscheidungen unterliegen der nachprüfenden Kontrolle der Rechtsmittelgerichte. Als Grundlage kommen allgemeine zivilrechtliche Regelungen, wie die §§ 16, 43 und 1330 ABGB, oder besondere Regelungen, wie § 81 UrhG, in Betracht, wobei die materiell-rechtlichen Voraussetzungen variieren.[145]

Vor dem Hintergrund, dass die Art 9 f DSA lediglich bestimmte Aspekte der Anordnungen zum Vorgehen gegen rechtswidrige Inhalte („Entfernungsanordnungen") und Auskunftsanordnungen normieren und daher nationaler Begleitregelungen bedürfen, regeln Teile der §§ 13-15 ECG sowie weitere Vorschriften die **Auskunfts- und Entfernungsanordnungen**.

Die nationale Rechtslage gestaltet sich im Hinblick auf **Entfernungsanordnungen** zusammengefasst wie folgt:

Zunächst ist zu berücksichtigen, dass der Unionsgesetzgeber in Art 9 DSA die Voraussetzungen der Erlassung einer „Entfernungsanordnung" nicht eigenständig regelt, sondern auf Unionsrecht und nationales Recht verweist. Unter welchen Voraussetzungen eine Entfernungsanordnung erlassen werden kann, richtet sich somit unter anderem nach nationalem Recht. Aus österreichischer

[143] § 9 Abs 4 QEG.

[144] Vgl. mwH *Zemann* in Dokalik/Zemann (Hrsg.), Urheberrecht8 § 19 ECG (Stand 01.10.2022, rdb.at).

[145] ErläutRV 2309 BlgNR XXVII. GP 40.

Perspektive sind insbesondere **Unterlassungsaufträge nach § 549 ZPO** (Unterlassung wegen erheblicher, eine natürliche Person in ihrer Menschenwürde beeinträchtigender Verletzung von Persönlichkeitsrechten), **einstweilige Verfügungen nach § 382d Z 7 EO** sowie **Unterlassungsurteile nach § 1330 ABGB** als Entfernungsanordnungen zu qualifizieren.[146]

§ 15 ECG regelt die **Voraussetzungen für die Auslösung des Informationsmechanismus**, der in Art 9 DSA vorgesehen ist, im Hinblick auf Fälle von „Hass im Netz" für den Bereich der Gerichtsbarkeit. Ausgehend davon, dass der Entfernung von „Hasspostings" vielfach ein langwieriger Vorgang der grenzüberschreitenden Zustellung der Anordnung unter Anwendung der EU-ZustellVO vorangeht, war es Ziel des Gesetzgebers, mit § 15 ECG die effektive Rechtsdurchsetzung in diesen Fällen zu erleichtern.[147] Zu diesem Zweck ist – abweichend vom im österreichischen Zivilprozessrecht vorherrschenden Grundsatz der amtswegigen Zustellung – vorgesehen, dass das jeweilige Gericht die Entfernungsanordnung auf Antrag des Betroffenen unverzüglich vorerst nur auf elektronischem Weg an die Kontaktstelle des Vermittlungsdiensteanbieters übermittelt, wobei dies sowohl in Fällen, in denen sich die Anordnung gegen den Anbieter richtet, und Fällen, in denen ihr Adressat „Urheber" des Inhalts ist, möglich ist. Auf diese Weise kann der Vermittlungsdiensteanbieter der Anordnung in den erstgenannten Fällen ohne förmliche Zustellung Folge leisten oder das Gericht darüber informieren, dass er die Anordnung nicht entfernt.[148] Das Gericht führt die Zustellung der Anordnung in diesen Fällen nur durch, wenn der Antragsteller die Zustellung innerhalb einer bestimmten Frist beantragt. Dadurch wird Opfern von „Hass im Netz" die Möglichkeit gegeben, aus dem Gerichtsverfahren „auszusteigen" und – durch Verzicht auf das Erlangen eines rechtskräftigen Titels – das weitere Prozesskostenrisiko zu vermeiden, etwa, weil das Hassposting, das einen persönlichkeitsverletzenden Inhalt hat, infolge der elektronischen Übermittlung bereits beseitigt wurde.

Im Hinblick auf **Auskunftsanordnungen** gestaltet sich die nationale Rechtslage zusammengefasst wie folgt:

Auch die Voraussetzungen der Erlassung einer Auskunftsanordnung richten sich unter anderem nach nationalem Recht.[149] Zu den Auskunftsanordnungen sind zunächst strafprozessuale und telekommunikationsrechtliche Anordnungen, die auf die Erteilung einer Auskunft abzielen, zu zählen.[150] Für den Bereich von Hass im Netz sieht § 13 Abs 3 ECG einen Anspruch bestimmter

[146] ErläutRV 2309 BlgNR XXVII. GP 26.

[147] ErläutRV 2309 BlgNR XXVII. GP 3. Verweigert der Vermittlungsdiensteanbieter die Durchführung der Anordnung, steht ihm vor Abschluss des Zustellvorganges ein Rechtsmittel zu. Er kann auch auf die formelle Zustellung warten und erst danach gegen die Anordnung vorgehen.

[148] Art 9 Abs 1 DSA.

[149] Vgl. Art 10 Abs 1 DSA.

[150] § 76a und § 134 Z 3, § 135 Abs 3 StPO; § 181 Abs 8 und 9 TKG 2021.

Personen gegen den Vermittlungsdiensteanbieter auf Erteilung einer Auskunft über den Namen und die Adresse ihrer Nutzer unter zwei kumulativen Voraussetzungen vor: Zum einen muss ein überwiegendes rechtliches Interesse an der Feststellung der Identität eines Nutzers und eines bestimmten rechtswidrigen Sachverhalts bestehen. Zum anderen muss die anspruchsstellende Person glaubhaft machen, dass die Kenntnis dieser Informationen eine wesentliche Voraussetzung für die Rechtsverfolgung bildet. Ein solcher Anspruch auf Erteilung einer Auskunftsanordnung ist vor dem zur Ausübung der Gerichtsbarkeit in Handelssachen berufenen Gerichtshof erster Instanz geltend zu machen, in dessen Sprengel das schädigende Ereignis eingetreten ist oder einzutreten droht.[151] Eine Vorschrift, wie § 15 ECG, welche im Hinblick auf Auskunftsanordnungen die Auslösung des im Art 10 DSA vorgesehenen Informationsmechanismus besonders regelt, ist nicht ersichtlich.

Frage 2

Im Berichtszeitraum ist den Berichterstattern lediglich **ein Fall** bekannt, in dem ein nach dem Schweizer Recht gegründeter Anbieter von einem (oder mehreren) Vermittlungsdienst(en), der Dienstleistungen in der EU anbietet, eine entsprechende Person der KommAustria benannt hat. Nach Auskunft der KommAustria ist dies unter anderem darauf zurückzuführen, dass zahlreiche größere Plattformen eine Niederlassung in Irland haben und daher keiner Benennungspflicht nach Art 13 Abs 1 DSA unterliegen.

Frage 3

Das **Recht** der Nutzer und Vertretungsorganisationen **zur Erhebung einer Beschwerde** nach Art 53 DSA wurde im Rahmen des DSA-BegG **in materieller Hinsicht nicht besonders geregelt**. Insbesondere fehlt eine Rechtsgrundlage dafür, die den Kreis der Zuwiderhandlungen, die zur Erhebung einer solchen Beschwerde legitimieren, nach Dauer, Schwere, Zeitpunkt[152], Zeitraum oder sonstigen Kriterien beschränkt. Daneben fehlen spezifische[153] nationale Rechtsvorschriften, welche die Erhebung einer solchen Beschwerde von materiellen Vorbedingungen, wie die vorherige Durchführung einer Streitbeilegung gemäß Art 21 DSA, abhängig machen. Somit berechtigt jede (mögliche) Zuwiderhandlung bei Erfüllung der in Art 53 DSA normierten Voraussetzungen zur

[151] § 14 ECG.

[152] Siehe etwa § 24 Abs 4 DSG, wonach der Anspruch auf Behandlung einer Beschwerde bei Nichteinbringung der Beschwerde innerhalb bestimmter Fristen erlischt.

[153] Hiervon sind „Erfolgsvoraussetzungen", wie das Vorliegen einer Zuwiderhandlung, zu unterscheiden. Siehe *Grafl*, Das Koordinator-für digitale-Dienste-Gesetz – nationale Begleitmaßnahmen zum Digital Services Act, ZIIR 2024, 130 (132).

Erhebung einer Beschwerde an die KommAustria,[154] die über die Beschwerde mit Bescheid zu entscheiden hat,[155] wenn und soweit die Angelegenheit in ihren Zuständigkeitsbereich fällt.[156] Sache des Beschwerdeverfahrens ist die Beurteilung des Vorliegens der behaupteten Zuwiderhandlung gegen den DSA.

Ungeachtet dessen, dass Art 53 DSA nicht sämtliche Modalitäten des Beschwerdeverfahrens regelt und es daher dem Mitgliedstaat entsprechend dem Grundsatz der Verfahrensautonomie nicht verwehrt ist, solche Modalitäten insbesondere unter Wahrung der Grundsätze der Äquivalenz und Effektivität zu regeln[157], hat das österreichische Recht – anders als in anderen Regulierungsbereichen – **keinen spezifischen Ansatz in verfahrensrechtlicher Hinsicht** entwickelt. Auf das Beschwerdeverfahren vor der KommAustria gelangt mangels sonderverfahrensrechtlicher Vorschriften[158] das AVG, insbesondere seine §§ 13, 17 f, 53 und 73[159], zur Anwendung.[160] Sofern Regelungen dazu fehlen, wie vorzugehen ist, wenn die Zuwiderhandlung nach einer Beschwerde nachträglich beseitigt wurde, richtet sich dies nach allgemeinen Vorschriften. Über die Beschwerde ist mit Bescheid abzusprechen, in dem ihr entweder Folge gegeben und die Zuwiderhandlung festgestellt wird oder sie zurück- oder abgewiesen wird. Über Beschwerden[161] gegen solche Bescheide entscheidet das Bundesverwaltungsgericht[162] durch Senat.[163] Verletzt die KommAustria ihre Entscheidungspflicht, kann der Beschwerdeführer das Bundesverwaltungsgericht mit Säumnisbeschwerde anrufen.[164] Beschwerden gegen Bescheide haben – anders als Beschwerden gegen einstweilige Maßnahmen zur Vermeidung der Gefahr eines schwerwiegenden Schadens – grundsätzlich keine aufschiebende Wirkung.[165]

Nach Auskunft der KommAustria wurden bereits **einige Beschwerden erhoben**. Dabei wurden mehrere Beschwerden an den KDD eines anderen Mitgliedstaats **zuständigkeitshalber weitergeleitet**. Dieser **Prozess** gestaltet sich

[154] Es wurde eine Beschwerdestelle eingerichtet, über die die Beschwerde erhoben werden kann, https://beschwerde.rtr.at/startseite.de.html (abgerufen am 09.10.2024).

[155] § 2 Abs 3 Z 11 KDD-G.

[156] Vgl. ErläutRV 2309 BlgNR XXVII. GP 2.

[157] Siehe z.B. EuGH 12.01.2023, Rs C-132/21, *Budapesti Elektromos Művek*, ECLI:EU:C:2023:2, Rn 43 ff, im Hinblick auf das in Art 77 DSGVO geregelte Beschwerderecht.

[158] In anderen Regulierungsbereichen bestehen solche Vorschriften, vgl. etwa § 24 Abs 6 DSG.

[159] Die genannten Vorschriften regeln die Anforderungen an Anbringen, die Akteneinsicht, die Beiziehung von Sachverständigen und die Entscheidungspflicht.

[160] ErläutRV 2309 BlgNR XXVII. GP 2.

[161] Art 130 Abs 1 Z 1 B-VG.

[162] Dies folgt daraus, dass der Bescheid eine Angelegenheit betrifft, die unmittelbar von Bundesbehörden besorgt wird (Art 131 Abs 2 B-VG).

[163] § 2 VwGVG iVm § 36 KOG.

[164] Art 130 Abs 1 Z 3 B-VG.

[165] Bescheide nach § 2 Abs 3 Z 11 KDD-G sind – anders als Bescheide nach § 2 Abs 3 Z 9 *leg cit* – in der Aufzählung des § 39 KOG nicht genannt.

dahin, dass zunächst eine Vorprüfung durchgeführt wird, in der insbesondere das Vorliegen eines hinreichenden Beschwerdegrunds überprüft wird. Ist die Beschwerde mangelhaft, wird ein Verbesserungsverfahren durchgeführt. Nach Abschluss der Vorprüfung wird die Beschwerde samt Beilagen an den zuständigen KDD weitergeleitet. In manchen Fällen hat der zuständige KDD Rückfragen, welche die KommAustria dem Beschwerdeführer übermittelt.

Frage 4

DSA

Der DSA fand auf politischer Ebene **Zuspruch**.[166] Zum Entwurf des **DSA-BegG** bezogen verschiedene Institutionen zum Teil kritisch Stellung. Dies betraf nicht nur die datenschutzbezogenen Regelungen des KDD-G[167], sondern auch § 15 ECG, der den Informationsmechanismus für Entfernungsanordnungen nach Art 9 DSA näher regelt.[168] Daneben wurde insbesondere die fehlende Übersichtlichkeit jener Vorschriften kritisiert, auf die sich Einzelne zur Geltendmachung ihrer Ansprüche stützen können.[169]

DMA

Auch der DMA wurde auf politischer Ebene grundsätzlich **befürwortet**. Wesentliche Diskussionen erfolgten im Jahr 2021, wo **Nachschärfungen** gefordert wurden.[170] Demnach sollten einzelne Fristen des Designationsverfahrens zum Zwecke der Verfahrensbeschleunigung verkürzt werden. Mit Blick auf die Verpflichtung der Torwächter und die damit zusammenhängenden Verträge für Cloud-Dienste sollte dem Kundenbedürfnis nach Individualisierbarkeit von Verträgen und Erleichterung eines Anbieterwechsels mehr Rechnung getragen werden. Weiters sollten interoperable Cloud-Infrastruktur-Komponenten stärkere Verbreitung finden und Überlegungen zur Vermeidung von Lock-

[166] Siehe beispielhaft *ÖVP Parlamentsklub*, Himmelbauer/Weidinger: Auswahlmöglichkeit bei Online-Diensten wird verbessert (07.03.2024), https://www.ots.at/presseaussendung/OTS_20240307_OTS0184/himmelbauerweidinger-auswahlmoeglichkeit-bei-online-diensten-wird-verbessert und *Grüner Klub im Parlament*, Zorba/Grüne: Europäischer Digital Services Act (DSA) ist ein Meilenstein gegen Manipulation und Hass im Netz (08.07.2022), https://www.ots.at/presseaussendung/OTS_20220708_OTS0097/zorbagruene-europaeischer-digital-services-act-dsa-ist-ein-meilenstein-gegen-manipulation-und-hass-im-netz (beide abgerufen am 09.10.2024).

[167] Stellungnahme des Datenschutzrates, GZ 2023-0.815.615.

[168] OGH 10.11.2023, 509 Präs 72/23v.

[169] *Lohmann/Lohninger*, Für epicenter.works (10.11.2023), https://epicenter.works/fileadmin/user_upload/epicenter.works_Stellungnahme_DSA-BegG.pdf (abgerufen am 09.10.2024).

[170] *Arbeiterkammer*, Digital Markets Act – Prozess der Einstufung als „Gatekeeper" Plattform muss beschleunigt werden, Positionspapier Jänner 2021, https://wien.arbeiterkammer.at/interessenvertretung/arbeitdigital/EinEuropafuerdasdigitaleZeitalter/Digital_Markets_Act_Deutsch.pdf und *Wirtschaftskammer Österreich*, Stellungnahme vom 24.02.2021, https://www.wko.at/oe/news/gesetze-digital-service-marktes-act-stellungnahme-bmj.pdf (beide abgerufen am 09.10.2024).

in-Effekten und der Förderung von Angeboten angestellt werden. Weiters wurde kritisiert, dass Aspekte der Besteuerung des digitalen Sektors sowie der Online-Plattform-Arbeit ausgeklammert wurden.

Frage 5

Österreich hat von der in Art 21 Abs 6 DSA vorgesehenen Möglichkeit der Einrichtung einer **außergerichtlichen Streitbeilegungsstelle** Gebrauch gemacht und die RTR-GmbH, Fachbereich Medien, die bereits als Schlichtungsstelle im Rahmen des AMD-G und KoPl-G fungiert(e),[171] mit den Aufgaben einer außergerichtlichen Streitbeilegungsstelle betraut.[172] Es besteht die Möglichkeit, dass die KommAustria auf Antrag (über das bereitgestellte Antragsformular[173]) weitere außergerichtliche Streitbeilegungsstellen bescheidmäßig zulässt bzw. zertifiziert[174]. Im Berichtszeitraum hat die KommAustria zwar keinen Bescheid, mit dem über einen solchen Antrag abgesprochen wird, veröffentlicht. Allerdings ist nach Auskunft der KommAustria aktuell ein Zulassungsverfahren anhängig. Dies ist insoweit relevant, als nach Auskunft der KommAustria zahlreiche Zulassungsanbieter das Vorliegen eines Bedarfs an solchen Stellen zum Ausdruck gebracht haben. Die KommAustria hat weiters die Zuständigkeit betreffend den Widerruf der Zulassung solcher Stellen.[175] Dadurch, dass einer Beschwerde gegen einen Bescheid, mit dem die Zulassung widerrufen wird, grundsätzlich keine aufschiebende Wirkung zukommt,[176] unterstreicht der österreichische Gesetzgeber die Bedeutung solcher Streitbeilegungsstellen im Bereich des DSA.

Die KommAustria ist weiters zur bescheidmäßigen Absprache über Anträge auf Zuerkennung des Status als **vertrauenswürdiger Hinweisgeber** gemäß Art 22 Abs 2 DSA zuständig.[177] Sie stellt dazu ein Antragsformular[178] sowie ein Informationsdokument[179] zur Verfügung. Bis Ende des Berichtszeitraums erkannte die KommAustria den Status eines vertrauenswürdigen Hinweis-

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[171] Vgl. § 66 Abs 2 AMD-G.

[172] § 2 Abs 4 KDD-G.

[173] https://www.rtr.at/medien/was_wir_tun/DigitaleDienste/DownloadOrdnerDigitaleDienste/Antragsformular_fuer_aussergerichtliche_Streitbeilegung.docx (abgerufen am 09.10.2024).

[174] § 2 Abs 3 Z 1 KDD-G. Die KommAustria hat ein Informationsdokument veröffentlicht, siehe Informationen_fuer_Antragstellende_Streitbeilegungsstellen.pdf (rtr.at) (abgerufen am 09.10.2024).

[175] § 2 Abs 3 Z 2 KDD-G.

[176] § 39 Abs 1 Z 4 KOG. Die Materialien (ErläutRV 2309 BlgNR XXVII. GP 24) begründen die Erforderlichkeit dieser Abweichung von § 13 Abs 1 VwGVG im Wesentlichen mit dem „*dringenden öffentlichen Interesse eines effizienten Schutzes der Allgemeinheit vor schädlichen Inhalten*".

[177] § 2 Abs 3 Z 3 KDD-G.

[178] https://www.rtr.at/medien/was_wir_tun/DigitaleDienste/DownloadOrdnerDigitaleDienste/Antragsformular_fuer_Trusted_Flagger.pdf (abgerufen am 09.10.2024).

[179] https://www.rtr.at/medien/was_wir_tun/DigitaleDienste/DownloadOrdnerDigitaleDienste/Informationen_fuer_Antragstellende_Tusted_Flaggers.pdf (abgerufen am 09.10.2024).

gebers drei österreichischen Einrichtungen bescheidmäßig zu, konkret (i) dem Schutzverband gegen unlauteren Wettbewerb[180], (ii) der Rat auf Draht gemeinnützige GmbH[181] sowie (iii) dem Österreichischen Institut für angewandte Telekommunikation.[182] Nach Auskunft der KommAustria sind weitere Zulassungsverfahren anhängig. Neben der Zulassung hat die KommAustria die Zuständigkeit zum bescheidmäßigen Widerruf der Zuerkennung solcher Hinweisgeber.[183] Auch Beschwerden gegen einen solchen „Widerrufsbescheid" haben keine aufschiebende Wirkung.[184]

Die KommAustria ist weiter zur Entscheidung über Verlangen auf **Datenzugang zugelassener Forscher** zuständig.[185] Nach ihrer Auskunft wurde bis dato kein solches Verlangen gestellt, weil es bestimmte technische Hindernisse gebe sowie ein Tertiärrechtsakt fehle.

Den Berichterstattern sind keine auf den DSA spezialisierten **Verbraucherschutzverbände** mit Sitz in Österreich bekannt. Nach Auskunft der KommAustria hat kein solcher Verband bisher um die Zulassung etwa als vertrauenswürdiger Hinweisgeber angesucht. Der Gesetzgeber hat – abgesehen von den Maßnahmen betreffend Verbandsklagen[186] – keine spezifischen Regelungen getroffen.

Die KommAustria hat im Übrigen **mehrere Informationsveranstaltungen** durchgeführt, die sich unter anderem an die genannten Einrichtungen und Personen richteten.[187]

Frage 6

Im Zusammenhang mit dem DSA und DMA wurden mehrere Aspekte diskutiert, die aus einer europäischen Perspektive von Bedeutung sein können. Die folgenden Aspekte verdienen nach Auffassung der Berichterstatter besondere Beachtung:

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[180] Bescheid vom 23.05.2024, KOA 16.400/24-011, https://www.rtr.at/medien/aktuelles/entscheidungen/Entscheidungen/KOA_16.400-24-011__anonymisiert.pdf (abgerufen am 09.10.2024).

[181] Bescheid vom 07.06.2024, KOA 16.400/24-013, https://www.rtr.at/files/staging/m_ent/96CF8A82E6A878A4C1258B430031DED1_KOA_16.400-24-013_anonymisiert.pdf (abgerufen am 09.10.2024).

[182] Bescheid vom 26.07.2024, KOA 16.400/24-017, https://www.rtr.at/files/staging/m_ent/4542BE6C1D85AB4EC1258B89003F245A_KOA_16.400-24-017_anonymisiert.pdf (abgerufen am 09.10.2024).

[183] § 2 Abs 3 Z 4 KDD-G.

[184] § 39 Abs 1 Z 4 KOG.

[185] § 2 Abs 3 Z 5 KDD-G.

[186] Siehe Abschnitt 4, Frage 5.

[187] Beispielhaft sei auf die „Informationsveranstaltung für Trusted Flagger und außergerichtliche Streitbeilegung" hingewiesen, https://www.rtr.at/medien/aktuelles/veranstaltungen/Veranstaltungen/2024/DSA-veranstaltung_2802.html (abgerufen am 09.10.2024).

DSA

Zunächst wurden mehrere **Grundrechtsfragen** aufgeworfen. Zum einen betrifft dies die **Inkorporierung und Horizontalisierung der Wirkungen der Unionsgrundrechte im Verhältnis des Diensteanbieters und ihrer Nutzer**. Vor dem Hintergrund, dass die Diensteanbieter durch Regelungen, wie Art 14 Abs 4 DSA, zur „Berücksichtigung" der (darin beispielhaft aufgezählten) Unionsgrundrechte verpflichtet werden, wurde insbesondere die unklare Reichweite des Grundrechtsniveaus und das unklare Verhältnis gegenläufiger Grundrechtspositionen hervorgehoben.[188] Zum anderen wurde unter dem Gesichtspunkt des Grundrechtsschutzes der betroffenen Nutzer die **Übertragung weitreichender Befugnisse auf bestimmte Akteure**, wie außergerichtliche Streitbeilegungsstellen, hinterfragt. Dabei wurde betont, dass diese Akteure – ungeachtet ihrer sekundärrechtlich vorgesehenen Zulassungsbedingungen, die insbesondere auf ihre Unparteilichkeit und Unabhängigkeit abzielen, sowie der Ermächtigung zum Widerruf ihrer Zulassung[189] – mitunter eigene Interessen verfolgen können und ihre Grundrechtsbindung aus näher bezeichneten Gründen ausscheide. Vor diesem Hintergrund wurden weitreichendere Kontroll- und Transparenzmechanismen im Hinblick auf diese Akteure gefordert.[190] Die KommAustria hob die besondere Bedeutung der Prüfung ihrer organisatorischen und finanziellen Unabhängigkeit im Zulassungsverfahren und deren Überprüfung im Zuge der Berichtslegung hervor.

Weiters wurde die **Rolle der Kommission bei der Durchsetzung des DSA** beleuchtet. Dabei wurden Rechtsschutzerwägungen angestellt und – vor dem Hintergrund, dass die Durchsetzung des DSA durch die Kommission maßgeblich von ihren personellen Ressourcen und ihrer sonstigen Ausstattung abhängt – hinterfragt, wie ihre Erkenntnisgewinne aus der Vollziehung anderer Rechtsakte, wie dem DMA, in Verfahren nach dem DSA verwertet werden können. Zudem wurde die Einrichtung einer eigenen „*European Plattform Authority*" diskutiert.[191]

Daneben bildeten das **Risikomanagement** und die **Moderation schädlicher Inhalte** Gegenstand des rechtswissenschaftlichen Diskurses. Vor dem Hintergrund, dass der DSA insoweit den Ansatz einer „Selbstregulierung" wähle, wurde die Bedeutung klarer tertiärrechtlicher Vorgaben für die unabhängige Überprüfung nach Art 37 DSA und der Überwachung betont.[192]

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[188] *Mast*, aaO 225.

[189] Vgl. zu den Zulassungs(widerrufs)bedingungen außergerichtlicher Streitbeilegungsstellen Art 21 Abs 3 lit a und Abs 7 DSA.

[190] *Achleitner*, Governance im Digital Services Act: Zur erstarkenden Rolle der Europäischen Kommission und privater Akteure in der Plattformregulierung, in Hoffberger-Pippan/Ladeck/Ivankovics (Hrsg.), Jahrbuch Digitalisierungsrecht 2023, 107 ff.

[191] *Achleitner*, aaO Wechselspiel.

[192] *Achleitner*, Der Digital Services Act als risikobasierte Regulierung, MR-Int 2022, 114 ff.

Schließlich wurde problematisiert, dass die rechtliche Grundlage für **Schadenersatzansprüche** im DSA, insbesondere in dessen Art 54, die als „*unvollkommene Haftungsnorm*" charakterisiert wurde[193], nicht harmonisiert ist und daher die private Rechtsdurchsetzung maßgeblich von den mitgliedstaatlichen Rechtsvorschriften abhängt. Hierdurch komme es zu einer „*Fragmentierung*"[194] des Binnenmarktes und des Schutzniveaus bei Schadenersatzklagen.

DMA

Aufgrund der Umstände, dass die Kommission – abgesehen von der in Art 38 Abs 7 DMA geregelten Möglichkeit der nationalen Wettbewerbsbehörden zur Vornahme amtswegiger Untersuchungen – ausschließlich zur Vollziehung des DMA befugt ist und auf nationaler Ebene keine Regelungen erlassen wurden, die der BWB konkrete Untersuchungsbefugnisse im Hinblick auf Zuwiderhandlungen gegen den DMA einräumen, liegen den Berichterstattern zu möglichen praktischen Herausforderungen keine Erfahrungswerte vor.

In der Rechtswissenschaft wurde die Bedeutung des Grundsatzes *ne bis in idem* betont. Die Anwendung des *ne bis in idem*-Grundsatzes wird insbesondere davon abhängen, inwieweit der im DMA verankerte Kooperationsmechanismus den Kriterien der Verhältnismäßigkeit und eines ordnungsgemäßen Verfahrens Genüge tut.[195]

[193] *Raue*, in Hofmann/Raue (Hrsg.), Digital Services Act (2023) Art 54 Rn 6 ff.

[194] *Kraul*, Der Digital Services Act bekommt Zähne: Das neue Digitale-Dienste-Gesetz, KuR 2024, 379 ff.

[195] *Achleitner*, aaO 365.

Belgium

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Section 1: National institutional set-up

Question 1–6 relating to the enforcement of the DSA

In Belgium, there are three partially overlapping levels of government: the federal level in charge of telecommunications and competition policies, the three language-based Communities (Flemish, French and German) in charge of media policy and three territorially-Regions (Flanders, Brussels and Wallonia). Therefore, the regulators at the federal level and at the three Communities are the enforcers of the DSA, depending on the topics and services covered.

- The *Belgian Institute for Postal Services and Telecommunications (BIPT)* was designated at federal level by the Federal Act of 21 April 2024[1] amending the Books XII and XV of the Belgian Economic Law Code and the Act of 17 January 2003 on the BIPT; BIPT is the pre-existing federal regulatory body responsible for regulating the electronic communications market, the postal market for the whole Belgium, as well as spectrum and audiovisual media services and video-sharing platforms services for the Brussels Region. Moreover, BIPT was designed as the Digital Service Coordinator (DSC) by the Cooperation Agreement of 13 February 2024 on the DSA implementation concluded between the Federal state and the three Communities[2];

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[1] Loi du 21 avril 2024 mettant en œuvre le règlement 2022/2065 du Parlement européen et du Conseil du 19 octobre 2022 relatif à un marché unique des services numériques et modifiant la directive 2000/31/CE, portant modifications du livre XII et du livre XV du Code de droit économique et portant modifications de la loi du 17 janvier 2003 relative au statut du régulateur des secteurs des postes et des télécommunications belges.

[2] Accord de coopération du 13 février 2024 entre l'Etat fédéral, la Communauté flamande, la Communauté française, la Communauté germanophone relatif à l'exécution coordonnée partielle du règlement 2022/2065 du Parlement européen et du Conseil du 19 octobre 2022 relatif à un marché unique des services numériques: https://www.lachambre.be/kvvcr/showpage.cfm?section=/none&leftmenu=no&language=fr&cfm=/site/wwwcfm/flwb/flwbn.cfm?lang=F&legislat=56&dossierID=0288

- The *Conseil Supérieur de l'Audiovisuel (CSA)* designated by the French Community Decree of 5 February 2024[3] amending the Decree of 4 February 2021 on Audio-Visual Media Services;

- the *Vlaamse regulator voor de media (VRM)* was designated[4] by the Flemish Community Decree of 26 January 2024[5] amending the Decree of 27 March 2009 on radio and TV broadcasting;

- the *Medienrat* was designated by the German-speaking Community Decree of 14 December 2023[6] amending the Decree of 01 March 2021.

As explained on the BIPT's website, each regulator oversees potential breaches of the DSA that occur on its territory and in matters for which it is competent, according to the Belgian division of competences as interpreted in the judgements of the Belgian Constitutional Court in 2004 and 2020.[7] In the legislative process leading up to the adoption of the Cooperation Agreement, the Opinion 75.731 of the Belgian Council of State concluded on the outcome of this case law in the context of the areas covered in the DSA: [8]

- "the federal authority is competent […] in particular for consumer protection, price and income policy, competition law and trade practices law, commercial law and company law, as well as its residual competences, notably in criminal and police matters with particular regard to the fight against terrorism (as well as) audio-visual media services, with regard to persons and institutions established in the bilingual Brussels-Capital Region which, because of their activities, cannot be considered as belonging exclusively to the Flemish Community or the French Community"[9];

- As far as the Communities are concerned, the Council of State referred to its previous opinion 73.934/3 and confirmed their jurisdiction "insofar as the

[3] Décret de la Communauté française du 15 février 2024 modifiant le décret du 4 février 2021 relatif aux services de médias audiovisuels et aux services de partage de vidéos et mettant partiellement en œuvre le règlement sur les services numériques: https://www.ejustice.just.fgov.be/eli/decret/2024/02/15/2024001713/justel

[4] https://www.ejustice.just.fgov.be/eli/decreet/2024/01/26/2024001001/staatsblad

[5] Décret de la Communauté flamande du 26 janvier 2024 modifiant le décret du 27 mars 2009 relatif à la radiodiffusion et à la télévision, portant exécution partielle du règlement sur les services numériques: https://www.ejustice.just.fgov.be/eli/decret/2024/01/26/2024001001/justel

[6] Décret-programme de la Communauté germanophone du 14 décembre 2023: https://www.ejustice.just.fgov.be/eli/decret/2023/12/14/2024202002/justel

[7] Judgement of 14 July 2004 (132/2004), available at https://www.csa.be/wp-content/uploads/documents-csa/ARBITRAGE_20040714_arret132_2004_role2767.pdf and Judgement of 26 November 2020 (155/2020), available at https://www.const-court.be/public/f/2020/2020-155f.pdf

[8] https://www.lachambre.be/kvvcr/showpage.cfm?section=/none&leftmenu=no&language=fr&cfm=/site/wwwcfm/flwb/flwbn.cfm?lang=F&legislat=56&dossierID=0288

[9] Point 4 of the Opinion.

DSA is intended to apply to providers of 'intermediary services' which enable audio-visual media services to be broadcasted via these services […] The Council of State also notes the competence of the Communities in relation to the protection of young people […]".[10]

In terms of the resources allocated for the DSA enforcement:

- The BIPT will have a total of 22 Full Time Equivalents (FTE) to work on the DSA, with a combination of lawyers (including human rights specialists), social scientists and one data analyst;
- The CSA does not yet have a dedicated team and budget but is examining the work to be conducted pursuant to the Cooperation Agreement and the current teams are contributing to various working groups within the European Board of Digital Services (EBDS) according to their areas of competence;
- The VRM had at the time of writing not communicated on the additional FTE;
- The Medienrat has one FTE working on DSA questions.

In 2024, the BIPT commissioned a study to determine which intermediaries have their main establishment in Belgium. The study – which is not publicly available – concluded that around 500 intermediary services fall under Belgian jurisdiction. Since the BIPT is not yet fully staffed, it will prioritise its enforcement on a risked-based approach, by contacting initially the services that present the highest risk to users in case of non-compliance of the rules of the DSA.

Question 1–6 relating to the enforcement of the DMA

In order to enforce the DMA, the federal Act of 29 March 2024 modifies the Book IV of the Belgian Economic Law Code (ELC) on competition policy.[11] The Act designates the Belgian Competition Authority (BCA) as the competent authority in charge of application of competition rules listed in Article 1(6) DMA and enables the application of the institutional rules relating to the BCA to enforcement of the DMA. [12] The Prosecutor General of the BCA received the following three new powers to enforce the DMA:

[10] Point 5 of the Opinion.

[11] Loi du 29 mars 2024 exécutant le règlement 2022/1925 du Parlement européen et du Conseil du 14 septembre 2022 relatif aux marchés contestables et équitables dans le secteur numérique, available at: https://www.ejustice.just.fgov.be/eli/loi/2024/03/29/2024003904/justel. See K. Marchand, Y. Van Gerven, S. De Cock, « De wet van 29 maart 2024 tot uitvoering van de Digital Markets Act en tot wijziging van diverse bepalingen aangaande organisatie en bevoegdheden van de BMA: een overzicht », *Competitio*, 2024, p. 154.

[12] Article IV.16 ELC.

- Receive complaints from third parties (e.g., business users or end-users of core platform services) on gatekeepers' practices and inform the Commission in case of suspected non-compliance[13];

- Open, on his own initiative, investigations on gatekeeper's non-compliance with the same investigative powers as for investigations than under competition law.[14] The preparatory works of the Act clarify that investigation power has a purely ancillary role, consisting in gathering information and evidence for the Commission which is the sole enforcer of the DMA[15];

- Request the Commission to open a market investigation in the four cases foreseen by Article 41 DMA.[16]

Moreover, the BCA is the competent national authority within the meaning of Article 14 DMA: it is the recipient of information from the European Commission on intended concentration of gatekeepers, it is authorised to refer concentrations to the Commission under Article 22 of the Merger Regulation, and is authorised to use the information provided by the Commission for the purpose of applying Belgian merger rules.[17] The BCA has prioritized the digitization of the economy and application of the DMA.[18] Accordingly, a team of six persons is dedicated to competition in digital sector, including application of the DMA. At this stage, the experience of the BCA under the DMA consists mainly of consultations with gatekeepers and a small number of business users, but no case has been opened. Additionally, the authority published a short guide on the DMA for business users.[19] Moreover, the BCA has concluded a Memorandum of Understanding with DG Competition allowing staff secondment and currently one staff member is seconded to the Commission.

[13] Article IV. 99 ELC executing article 27 DMA.

[14] Articles IV. 26(3), 3°/1 and IV. 96 ELC, executing Article 38(7) DMA. These investigative powers are listed in arts. VI.40 to VI.40/5 ELC.

[15] Projet de loi exécutant le règlement 2022/1925 du Parlement européen et du Conseil du 14 septembre 2022 relatif aux marchés contestables et équitables dans le secteur numérique et modifiant diverses dispositions relatives à l'organisation et aux pouvoirs de l'Autorité belge de la concurrence, exposé des motifs, *Doc*., Ch., 2023-2024, n° 3813/001, p.20. Also see Belgian Competition authority, press release n°18/2024, 17 May 2024, p 1. The preparatory works also clarify that the opening of such an inquiry is a possibility for the authority and not an obligation.

[16] Article IV. 100 ELC.

[17] Projet de loi exécutant le règlement 2022/1925 du Parlement européen et du Conseil du 14 septembre 2022 relatif aux marchés contestables et équitables dans le secteur numérique et modifiant diverses dispositions relatives à l'organisation et aux pouvoirs de l'Autorité belge de la concurrence, exposé des motifs, *Doc*., Ch., 2023-2024, n° 3813/001, pp.11-12.

Preparatory works of the act available here: https://www.lachambre.be/FLWB/PDF/55/3813/55K3813001.pdf

[18] Belgian Competition Authority, Note de priorités 7 June 2024, pp 3-4 and p. 7: https://www.abc-bma.be/sites/default/files/content/download/files/2024_politique_priorit%C3%A9s_ABC.pdf

[19] https://www.belgiancompetition.be/en/about-us/publications/digital-markets-act-short-guide-tech-challengers

Next to federal Act of 29 March 2024, three legislative acts of languages-based Communities executing the DSA mentioned above also contain provisions related to the execution of the DMA, in particular because the Core Platform Services under the DMA cover the video sharing platforms which are supervised by the media regulators.[20] Thus, those Decrees provide that the four media regulators – CSA, VRM, Medienrat and BIPT – are in charge of the execution of the DMA within the limits of their material and territorial competences, that is, the scope of Audio-visual Media Services. However, the precise tasks allocated to each regulator are different:

- The preparatory work of the French Community Decree merely states that the CSA should cooperate with other authorities "among others for the purpose of market investigations";[21]

- The Flemish Community Decree mentions without further details that the VRM contributes to the application, implementation and monitoring of DMA[22];

- The German Community Decree specifies that the Medienrat (i) collaborates with the Commission and Member States in accordance with article 37 of the DMA[23] and (ii) is in charge with monitoring DMA compliance by AVMS providers;[24] more surprisingly the Decree also enables the Medienrat to impose penalties (including fines) when AVMS providers fail to comply with DMA obligations;[25] this has been now considered as violating the DMA which is solely enforced by the DMA and the Decree should be amended soon to remove those sanctioning powers.

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[20] In this sense see the preparatory works of the French and Flemish decrees. Projet de décret de la Communauté française 2024 modifiant le décret du 4 février 2021 relatif aux services de médias audiovisuels et aux services de partage de vidéos et mettant partiellement en œuvre le règlement sur les services numériques, exposé des motifs, *Doc*., Parl. Comm. fr., 2023-2024, n°644/1, p.6: https://archive.pfwb.be/1000000020d70e2 ; Ontwerp van decreet tot wijziging van het decreet van 27 maart 2009 betreffende radio-omroep en televisie tot gedeeltelijke uitvoering van de digitaledienstenverordening, exposé des motifs, *Parl. St*., Vl. Parl, 2023-2024, n°1907/1, p.9: https://www.vlaamsparlement.be/nl/parlementaire-documenten/parlementaire-initiatieven/1784477

[21] Projet de décret de la Communauté française 2024 modifiant le décret du 4 février 2021 relatif aux services de médias audiovisuels et aux services de partage de vidéos et mettant partiellement en œuvre le règlement sur les services numériques, exposé des motifs, *Doc*., Parl. Comm. fr., 2023-2024, n°644/1, p. 11.

[22] Article 217/1 of the Décret de la Communauté flamande du 27 mars 2009 relatif à la radiodiffusion et à la télévision: https://www.ejustice.just.fgov.be/eli/decret/2009/03/27/2009035356/justel

[23] Article 103 para 1, 3° of the Décret de la Communauté germanophone du 1er mars 2021 relatif aux services de médias et aux représentations cinématographiques: https://www.ejustice.just.fgov.be/eli/decret/2021/03/01/2021201177/justel

[24] Article 112(3) of the Décret de la Communauté germanophone du 1er mars 2021 relatif aux services de médias et aux représentations cinématographiques.

[25] Article 138 of the Décret de la Communauté germanophone du 1er mars 2021 relatif aux services de médias et aux représentations cinématographiques.

Section 2: Use of national legislative leeway

a) Questions 1–5 – Under the DSA

The amendment of the Economic Law Code, introduced by the Act of 21 April 2024, repeals the rules on the liability of intermediaries, the non-general monitoring obligation of intermediaries, the injunctions and the duties to inform competent authorities and law enforcement authorities of illegal activities that derived from the implementation of the E-commerce Directive because of duplication with the DSA.[26] These rules are replaced by a new article which refers to back to the DSA including on the requirement that the injunctions by the administrative and judicial authorities need to fulfil at the least the conditions listed in Article 9(2) DSA and in Article 10(2) DSA.

According to the Cooperation Agreement of 13 February 2024 on the DSA implementation,[27] whenever the DSC receives a copy of an injunction, it is logged without delay in the national Domus information sharing system. Intermediaries that fail to collaborate with injunctions may face fines according to the amended Article XV.118 ELC. No specific rules have been added to sanction administrative authorities or judicial authorities in case they fail to transmit their orders to the DSC. These authorities are supposed to know that this obligation to transmit their orders derives from the DSA. In practice, the BIPT is informing the authorities of this new duty in an effort to ensure that they comply with this DSA requirement.

Apart from these modifications, no other related legislative act was modified or contemplated for adoption in Belgium during the "transposition phase" of the DSA.

b) Question 1–5 – Under the DMA

Under Belgian law, no pre-existing rules were specifically adopted to ensure fairness and contestability on digital markets. However, two types of some pre-existing rules could contribute to those objectives:

- The first rules, included in Book IV of the ELC on competition law, prohibit the abuse of economic dependency, that is, when a dominant undertaking abusively exploits a situation of economic dependence and where competition is likely to be affected on the Belgian market;[28] this prohibition covers

[26] This was done by repealing Articles XII.17, XII.18, XII.19 and XII.20 ELC.

[27] Article 13 of the Cooperation Agreement on DSA implementation.

[28] Article IV.2/1 ELC. N. Daubies, T. Léonard, J.-F. Puyraimond, « La loi du 4 avril 2019 relative à l'abus de dépendance économique : une quête d'équilibre dans les relations entre entreprises »,

sale refusal or imposition of purchase or sale prices or other unfair trading conditions. The application of this prohibition by the BCA against gatekeepers designated under the DMA will trigger a duty to inform the Commission;

- The second set of rules, included in Book VI of the ELC on market practices, ensure B2B fairness by prohibiting "any act contrary to fair market practices by which an undertaking harms or may harm the professional interests of one or more other undertakings"[29]; in particular, the ELC prohibits in B2B relationships unfair contract terms,[30] misleading market practices,[31] and aggressive market practices.[32]

Apart from institutional implementation of the DMA, no other legislative instruments were adopted in Belgium. It should be noted that a study evaluating the regulatory framework applicable to the Belgian online platform market has been carried for the Ministry of Economic Affairs.[33] It analyses, among others, the opportunity to impose requirements on platform services not-provided by gatekeepers designated under the DMA. The study concludes that an effective application of the existing legislative framework should be preferred as a first step.

Section 3: Vertical and horizontal public enforcement-related cooperation

Questions 1–3 – Under the DSA

The Cooperation Agreement of February 2024 on DSA implementation sets out a detailed cooperation regime between the DSC (BIPT) and the other Belgian media regulators as well as the participation to the EBDS. In a nutshell, the Cooperation Agreement introduces the exhaustive list of competences that are listed in the DSA as belonging to the DSC[34] and all other competences/missions belong to the competent authorities.

Vers des relations entre entreprises plus équilibrées et une meilleure protection du consommateur dans la vente de biens et la fourniture de services numériques ?, Y. Ninane (dir.), Bruxelles, Larcier, 2021, pp. 22–24.

[29] Article VI.104 ELC. M. Buydens, *Droits des brevets d'invention*, 2e édition, Bruxelles, Larcier, 2020, p. 71.

[30] Articles VI.91/1 – VI.91/10 ELC.

[31] Articles VI.105-108 ELC.

[32] Article VI.109/1 ELC.

[33] E. Salvador, O. Brolis, C. Huveneers, A. de Streel, F. Jacques, *Marché belge des plateformes en ligne : Evaluation de la concurrence et du cadre réglementaire*, 2024: https://economie.fgov.be/en/publication/belgian-market-online

[34] Article 4 of the Cooperation Agreement on DSA implementation.

The Cooperation Agreement on DSA implementation also sets out:

- A national information sharing system, called Domus, to enable each regulator to receive in real time information on the cases that are being processed by the other Belgian regulators[35];
- The obligation for the regulators to meet at least every three months[36];
- The principle according to which questions of division of competence should be settled by consensus between the regulators in the first instance and if disagreement persists, within an inter-ministerial committee composed of the representatives of the relevant Ministers;
- Before issuing a sanction, the regulator needs to check that another regulator has not already applied a final sanction for an identical breach in relation to the same service provider[37];
- The participation of the DSC and the other regulators in the European Board for Digital Services[38];
- Each regulator uploads its activity report – which contains all the elements specified in Article 55 DSA– in the information sharing system within 20 days after having been requested to do so by the DSC; and then the BIPT compiles a single report with the individual reports of the competent authorities and places it in the information sharing system.[39]

On top of this Cooperation Agreement on DSA implementation, the BIPT is also in the process of entering into bilateral agreements with other federal regulators – such as the Data Protection Authority – but which are not a competent authorities within the meaning of the DSA.
There is no particular debate or measure concerning the role of national courts in the enforcement of the DSA.

Questions 1–5 – Under the DMA

The Economic Law Code, as amended by the Act of 29 March 2024, contains specific provisions on the cooperation of the BCA (i) with the European Commission, (ii) with other Member States regulators and (iii) with other Belgian regulators.

[35] Articles 5 and 6 of the Cooperation Agreement on DSA implementation.
[36] Article 7 of the Cooperation Agreement on DSA implementation.
[37] Article 8 of the Cooperation Agreement on DSA implementation.
[38] Article 9 of the Cooperation Agreement on DSA implementation.
[39] Article 12 of the Cooperation Agreement on DSA implementation.

Cooperation with the European Commission takes place when the BCA enforces competition and DMA rules. When the BCA enforces competition law against a gatekeeper designated under the DMA, the BCA must inform the Commission when it opens an investigation and when it intends to impose a sanction.[40] Moreover, the BCA can support the Commission in enforcing the DMA by supplying all information in its possession, providing assistance when investigations must be conducted in Belgium and helping the Commission to monitor DMA compliance. [41]

Further, as explained above, the three Decrees of the Communities also provide for cooperation of the CSA, the VRM and the Medienrat with the Commission when video sharing platforms are concerned. However, this cooperation will be challenging because of the imprecise nature of the powers conferred on the Communities media regulators, the lack of harmonization between the powers conferred on those regulators and the absence of a clear framework for cooperation with the BCA.

To enable cooperation with Member State regulators, the BCA is designated as the member of the Digital Markets Advisory Committee established by Article 50 DMA. Within this Committee, the BCA is represented by its Chairman (or by a staff member designated by it).[42] Moreover, the BCA should cooperate with other competition authorities within the European Competition Network (ECN) and is empowered to communicate to the Commission and national competition authorities any factual or legal element, including confidential information.[43] Up to now, this cooperation is rather limited as national competition authorities do not have yet much experience in participating to the DMA enforcement.

At national level, the ELC provides for the cooperation between the BCA and other Belgian regulators. The Belgian regulators which are part of DMA High-level Group and other Belgian authorities in charge with control of an economic sector can inform the Prosecutor General when they believe that a market investigation is necessary.[44] Similarly, before requesting the Commission to open any market investigation, the Prosecutor General should seek the opinion of the other concerned Belgian regulators.[45] Moreover when appropriate,

[40] Article IV. 78/1(2) ELC executing Article 38(2) and (3) DMA.

[41] Article IV. 97 ELC executing Articles 16(5), 21(5), 22(2), 23(3), 26(2) and 38(6) DMA.

[42] Article IV. 101 ELC. According to the preparatory works of the law, this designation is justified by (i) the already existing familiarity with the Advisory Committee in competition cases, (ii) the DMA's close link with competition law, (iii) the possibility of parallel investigations under the DMA and competition law, and (iv) the leading role accorded to competition authorities under the DMA.

[43] Article IV.98 ELC, executing art. 38(1) DMA.

[44] Article IV. 100(2) ELC.

[45] Article IV. 100(2) ELC.

the BCA Chairman may invite sectoral regulators (e.g. in electronic communication, AVMS or data protection) at the Digital Markets Advisory Committee. When the Advisory Committee intervenes in the adoption process of an implementing act according to Article 46 DMA, the BCA Chairman invites a representative of the Economics Ministry.[46]

No other specific rules were adopted regarding the role of Belgian Courts and their interaction with European Commission in the context of the DMA.

Section 4: Private enforcement

Questions 1–5

National procedural law allows civil society organisations to intervene in pending private disputes in support of the public interest. Moreover, Article 17(2) of the Belgian Judicial Code recognises the validity, in general terms, of a collective interest action. The legal entity concerned may bring an action to defend an interest that corresponds to its corporate purpose, provided that the proceedings are aimed at protecting human rights or fundamental freedoms recognised in the Constitution and in international instruments binding on Belgium. This procedure is not particularly difficult to access, nor is it particularly costly compared to procedures open to individuals.

To the best of our knowledge, no actions brought by private parties are pending before the Belgian courts in order to enforce provisions of the DSA or the DMA.

Section 5: General questions

Questions 1–6 regarding the DSA

As of November 2024, two intermediary service providers had appointed legal representatives in the Belgium (Brussels region): Telegram[47] (Dubai, UAE) and Samsung Electronics (no further information available).
On complaints handling pursuant to Article 53 DSA, the Cooperation Agreement on the DSA implementation specifies that the DSC and the other competent regulators can receive complaints.[48] The regulator that receives a complaint needs to log the complaint in the Domus information sharing

[46] Article IV. 101 ECL.

[47] https://www.euronews.com/next/2024/05/07/belgium-to-monitor-telegram-to-comply-with-new-eu-content-moderation-law

[48] Article 11 of the Cooperation Agreement on DSA implementation.

system. The procedure then follows that of Article 53 DSA, with a duty for the DSC to refer the complaint to a DSC of another Member State or to another (national) competent authority. If there is a disagreement on the competent authority, this needs to be logged in the information sharing system. The DSC and the other competent authorities need to meet within 5 working days to reach a consensus on the competent authority within 20 working days (from the date on which the disagreement was logged in Domus). If no agreement is found, the inter-ministerial committee can be seized of the case.

As of November 2024, trusted flaggers and out-of-court dispute resolution bodies had not yet been accredited in Belgium. The procedure for their selection had not yet been initiated either. The BIPT intends to adopt guidelines on the procedure to become a trusted flagger. The Cooperation Agreement on the DSA implementation specifies that the DSC which receives requests from potential trusted flaggers and out-of-court dispute resolution bodies needs to log the information in Domus. The DSC also needs to indicate which competent authority seems responsible to accredit the applicant. The same procedure described above on complaints handling applies in case of disagreement.[49]
Similarly, no researcher in Belgium had been granted the status of vetted researcher under Article 40 DSA yet, but the Cooperation Agreement on the DSA implementation specifies the same procedure as for trusted flaggers and out-of-court dispute resolution bodies.

Generally speaking the process of translating the DSA into the Belgian law has been complex given the division of powers in the country. The DSA is a horizontal legal instrument covering a wide range of intermediaries and all types of illegal content. The decision on who should be the DSC emerged quite rapidly since it was either a matter of creating a new (inter) federal authority or of extending the competences of the existing federal regulator (BIPT) and this second option was seen as the most effective. However, deciding on the cooperation between the DSC and the other media regulators was a more complex task. The resulting Cooperation Agreement has attempted to anticipate how to settle future questions of competence. It also foresees that three years after its entry into force, the different Belgian regulators need to jointly evaluate its operation and then report back to an inter-ministerial committee.[50] Also, each of the four regulators can request the revision of the Cooperation Agreement, but agreement cannot be terminated unless another agreement covering the same areas is entered into.[51]

[49] Article 10 of the Cooperation Agreement on DSA implementation.
[50] Article 18 of the Cooperation Agreement on DSA implementation.
[51] Article 19 of the Cooperation Agreement on DSA implementation.

Questions 1–6 regarding the DSA

The DMA was not subject to particular political controversies during its implementation at the Belgian level. This only issue was the granting of sanctioning power to the Medienrat – the media regulator of the German Community for breaches of the DMA by video sharing platforms providers which was contrary to the DMA, this will be corrected soon with an amendment to the German Community Decree to remove those powers.

Bulgaria

*Deyan Dragiev**

Section 1: National institutional set-up

Question 1

The Bulgarian government has drafted a bill for amendment of the Bulgarian Electronic Communications Act whereby the designated local authority to serve as coordinator is the Commission for Regulation of Communications and some additional powers are allocated to the Council for Electronic Media and the Commission for Data Protection. The bill has not yet been adopted as law and, therefore, these amendments have not entered in force.

Question 2

The draft bill amending the Electronic Communications Act l has not yet been adopted as law and, therefore, these amendments have not entered in force. The draft bill does not specify local powers but makes reference to the powers allocated under Regulation 2022/2065. The three bodies designated as having powers on local level are the Commission for Regulation of Communications, the Council for Electronic Media, and the Commission for Data Protection.

Question 3

Since the DSA has not been yet received mirroring legislation on local level, currently there is no known local practice or experience as of now.

Question 4

Currently, there is no specific legislation on local level allocating powers of Bulgarian authorities, incl. regarding the Bulgarian Commission for Pro-

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tection of Competition, which is the Bulgarian authority on competition enforcement.

Question 5

Currently there is no specific legislation on local level allocating powers of Bulgarian authorities, incl. regarding the Bulgarian Commission for Protection of Competition, which is the Bulgarian authority on competition enforcement.

Question 6

Since there is no specific legislation on local level allocating powers of Bulgarian authorities, incl. regarding the Bulgarian Commission for Protection of Competition, which is the Bulgarian authority on competition enforcement, there is no known experience or case law on competition enforcement of DMA breaches.

Section 2: Use of national legislative leeway under the DMA/DSA

Question 1

The draft bill on amendment of the Electronic Communications Act has not been adopted yet, and so the law has not been changed to be in line with DSA. The approach of the draft bill is to make reference to powers under the DSA but without abrogating the local legislation.

Question 2

The draft bill on amendment of the Electronic Communications Act has not been adopted yet, and so the law has not been changed to be in line with DSA. The approach of the draft bill is to make reference to powers under the DSA but without abrogating the local legislation.

Question 3

The draft bill on amendment of the Electronic Communications Act envisions that the respective authorities should issue instructions (form of subordinate legislative instruments) for coordination of exercise of their powers; however, the amendment has not entered into force.

Question 4

Currently there is no legislation on local level implementing DMA

Question 5

Currently there is no legislation on local level implementing DMA

Section 3: Vertical and horizontal public enforcement-related cooperation under DSA/DMA

Question 1

Currently there is no national legislation that implements DMA and DSA procedures.

Question 2

National procedural law has not been amended to implement procedural standing or position of COM on DSA/DMA matters. Under the current law, COM has no role or bearing to local procedures.

Question 3

Since there is currently no local legislation on implementing DMA, the Bulgarian authorities, including the Commission for Protection of Competition, have not declared or hinted at their policy. However, it may be assumed that the local competition authority can signal to COM valuable information and important cases on misleading information dispersed via platform services, incl. information harmful to competitors. The local competition authority does regularly deal with cases on misleading/damaging advertising, incl. such disseminated via platforms, and thus can provide case law guidance to COM.

Section 4: Private enforcement of DMA/DSA

Question 1

There is no public information about such claims yet.

Question 2

As currently there is no local legislation, there are no actual causes of actions known. Generally, private enforcement of public regulations is still a very unexplored area of Bulgarian case law. There have been some successful claims for private enforcement in other areas, for example, energy, so there is such theoretical possibility. Usually, these would be causes of action based on alleged tort. It is potentially possible also to lay claims for state liability for non-intervention in matters pertaining to the powers of the local authorities. Unfortunately, the case law on collective actions is still scant and NGOs coordinating such claims virtually do not exist.

Question 3

As currently there is no local legislation, there are no actual causes of actions known. Generally, private enforcement of public regulations is still a very unexplored area of Bulgarian case law. There have been some successful claims for private enforcement in other areas, for example, energy, so there is such theoretical possibility. Usually, these would be causes of action based on alleged tort. It is potentially possible also to lay claims for state liability for non-intervention in matters pertaining to the powers of the local authorities. Unfortunately, the case law on collective actions is still scant and NGOs coordinating such claims virtually do not exist.

Question 4

Under the draft bill for amendment of the Electronic Communications Act regarding implementation of DSA, the Commission for Regulation of Communications is designated to certify authorities for out-of-court settlement. Moreover, the Sofia City Administrative Court is designated as competent to order measures for removal of content. However, this draft bill has not been adopted as law yet.

There is no proposed legislation for DMA implementation yet.

Question 5

Generally, under current law, this is not possible.

Section 5: General questions

Question 1

No, national legislation on implementation of DSA has not yet been adopted.

Question 2

No.

Question 3

No, as there is currently no national law on the matter.

Question 4

There is no adoption on national level yet.

Question 5

The Commission for Regulation on Communications is designated to certify out-of-court dispute resolution bodies under the draft bill implementing the DSA. This has not yet become law.

Question 6

The area of DSA/DMA is severely unexplored in Bulgaria and virtually not implemented. Since the respective authorities to be designated to deal with DSA/DMA have no experience with this area, there is potential for many claims for state liability due to omission to act/take measures, and due to lack of implementation on national level.

Croatia

*Dubravka Akšamovic, Luka Petrović**

Introduction

This report indicates that Croatia has taken steps to implement the Digital Services Act and Digital Markets Act in accordance with EU law. However, it also indicates that the Croatian legal framework has not implemented a robust support system which could additionally increase the effectiveness of the two regulations in the coming years. Croatian law has not yet encountered cases involving digital gatekeepers nor has it enacted legislation which aims to regulate the digital markets. Consequently, the implementation of the Digital Markets Act does not significantly alter the Croatian competition law system, nor are the new institutional arrangements regarding the DMA likely to strengthen the enforcement of the DMA in Croatia to a significant extent. Similarly, when it comes to regulating digital services, Croatia has not yet developed an overarching legal framework aimed at regulating digital services. Therefore, the upcoming implementation of the DSA is likely to significantly strengthen the regulation of digital services in Croatia.

The report was written on the basis of desk research of the Croatian legal framework and case law, and information obtained from the Croatian Competition Agency and the Croatian Regulatory Authority for Network Industries.[1] The research of national case law was performed through the publicly available search engine of the Constitutional Court and the private databases IUS INFO. However, it should be noted that the abovementioned databases are limited in scope and only contain a selection of national case law. Our research results are therefore limited to publicly available jurisprudence of Croatian courts.

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[1] The authors are grateful to the Croatian Competition Agency and Croatian Regulatory Authority for Network Industries for helping in conducting this research.

Section 1: National institutional set-up

Question 1

In Croatia, according to the draft Act on the implementation of EU Regulation 2022/2065 the enforcement of the Digital Services Act (DSA)[2] envisages several (pre-existing) authorities with distinct roles and responsibilities:

The Digital Services Coordinator (DSC) is the Croatian Regulatory Authority for Network Industries (HAKOM).[3] This body is responsible for coordinating the work of other national authorities involved in DSA enforcement, serving as the contact point for cooperation with other EU member states' Coordinators, and performing various tasks such as cross-border cooperation and participating in joint investigations.[4]

Other national authorities responsible for issuing orders to act against illegal content under Article 9 and orders to provide information under Article 10 of Regulation (EU) 2022/2065 are:

- State Attorney's Office of the Republic of Croatia (DORH) and the Ministry of the Interior for illegal content that constitutes a criminal offense and misdemeanour;
- Croatian Personal Data Protection Agency for illegal content that constitutes a violation of regulations governing the protection of personal data;
- Ministry of Finance, Customs Administration for illegal content that constitutes a violation of intellectual property rights;
- State Inspectorate for illegal content that constitutes a violation of regulations within the scope of the State Inspectorate's inspections in accordance with powers specified by special regulations;
- Ministry of Health for illegal content that constitutes a violation in the areas of health, medicines and medical products, and biomedicine, in accordance with powers specified by special law.

Croatian Personal Data Protection Agency is responsible for enforcing Articles 27 and 28 of the DSA, which pertain to the processing of personal data. Other aforementioned authorities/bodies are responsible for the implementation of Articles 25, 26, and 30 to 32 of Regulation (EU) 2022/2065, within their

[2] Draft Act on the implementation of EU Regulation 2022/2065 on the enforcement of Digital Service Act (Prijedlog zakona o provedbi Uredbe (EU) 202212065 Europskog parlamenta i Vijeća od 19. listopada 2022 o jedinstvenom tržištu digitalnih usluga i izmjeni Direktive 2000l3llEz) (Further in the text: "draft DSA Implementing Act").

[3] The Digital Service Coordinator is Croatian Regulatory Authority for Network Industries (Hrvatska regulatorna agencija za mrežne djelatnosti; Further in the text: "HACOM").

[4] Draft DSA Implementing Act, art 4.

respective domains and within the scope defined by their specific mandates. These authorities are required to report their activities and findings to the DSC, who compiles annual reports and ensures effective communication and cooperation at both the national and EU levels.

Question 2

On 30 August 2024 the Croatian Government have send to legislative procedure draft Act on the implementation of EU Regulation 2022/2065 on the enforcement of Digital Service Act.

According to the recital of the draft Act, which is currently in phase of public consultation,[5] Croatian Government took over the obligation to provide sufficient funds for the efficient implementation and enforcement of the DSA. In line with obligation prescribed by the Article 49(2) of the DSA, Croatian Government has determined that Digital Service Coordinator is HACOM.

Duties and powers of HACOM are defined in Article 4. of the draft Act as follows:

1. Coordinates the work of all bodies involved in the implementation of the provisions of Regulation (EU) 2022/2065 from Articles 6, 7 and 8 of this Act and represents a contact point for cooperation with to coordinators of digital services in other Member States on the basis of Article 49. paragraph 2 of Regulation (EU) 2022/2065;
2. Exercises powers based on Articles 51 and 53 of Regulation (EU) 2022/2065;
3. Compiles the annual report referred to in Article 55 of Regulation (EU) 2022/2065;
4. Cooperates cross-border with other Coordinators for digital services in other Member States based on Article 58 of Regulation (EU) 2022/2065;
5. Participates in joint investigations with other Coordinators for digital services in other Member States based on Article 60 of Regulation (EU) 2022/2065;
6. Participates in the work of the European Committee for Digital Services as a member with the right to vote based on Articles 62 and 63 of Regulation (EU) 2022/2065;
7. Exercise powers related to the out-of-court settlement of disputes from Article 21 of Regulation (EU) 2022/2065;
8. Exercises authority in connection with the assignment of the status of reliable applicants from Article 22. Regulation (EU) 2022/2065.

[5] Public consultation is avaialble at: https://esavjetovanja.gov.hr/ECon/MainScreen?entityId=26124

Within HAKOM, currently several employees are daily part time dedicated to activities under the DSA. Full time engagement of a number of employees will be soon and the number will be depending on future needs and workload. HAKOM currently has no information regarding the staffing of other competent bodies. Additionally, supervisory fees are not envisaged at the moment.

Question 3

According to available information, HAKOM exchanged contacts and participated in the working group for drafting the national law on DSA implementation. The process of mapping the companies that will fall under the scope of the DSA started by obtaining the list from Croatian Bureau of Statistics of companies registered in certain categories. Moreover, according to the draft DSA Implementing Act Intermediary service providers established in Croatia are required to self-identify within a deadline and notify the DSC.

Question 4

The Regulation on the implementation of the Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) entered into force on 11 November 2023[6]. According to the article 3(1) of the Regulation the Croatian Competition Agency[7] is designated coordinating body for the implementation of DMA on national level. The main task of the national competition authority in the DMA enforcement is coordinating role and support to the EC in applying DMA while the EC remains main enforcer. This is in line with Article 38, paragraph 7 of the DMA and the obligation of EU member states to ensure the implementation of DMA with cooperation of competent national authority by the application of national competition rules against gatekeepers.

CCA does not conduct investigations based solely on the DMA, but it informs the EC about the potential case against the gatekeeper by the implementation of competition rules. It can perform certain investigatory steps for the EC. According

[6] The Regulation on the implementation of the Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (*Uredba o provedbi Uredbe(EU) 2022/1925 Europskog parlamenta i vijeća od 14. Rujna 2022. o pravednim tržištima s mogućnošću neograničenog tržišnog natjecanja u digitalnom sektoru I izmjeni direktiva (EU) 201971937 I (EU) 202/1828 (Akt o digitalnom tržištu*)) (Further in the text: "DMA Implementing Regulation").

[7] Croatian Competition Agency (*Agencija za zaštitu tržišnog natjecanja*) (Further in the text: "CCA").

to the abovementioned Regulation, the national competition authority (CCA) has the following tasks:

- it notifies the EC in writing about the intention to open the proceeding against the gatekeeper with the application of competition law, it should do so before or immidately after the opening of such proceeding;
- it informs the EC about the implementation measures including submitting all information regarding facts or legal issues and confidential information via European Competition Network (ECN);
- in the case where it intends to adopt certain measures or commitments towards the gatekeeper based on the competition rules, the national competition authority (CCA) should send to the EC draft of those measures/commitments at the latest 30 days prior of their adoption;
- in the case of intention to impose interim measures to a gatekeeper based on the competition rules, the CCA should send to the EC draft of those interim measures as soon as possible at the latest immediately after their adoption.[8]

In case that the CCA has already conducted certain actions, relating to a conduct of the gatekeeper against which the EC has already opened the proceeding based on the DMA (Regulation EU 2022/1925), the competent national authority will suspend its proceeding and inform the EC about the results of the implemented actions.[9] The information, which are subject to exchange between CCA and EC, can be exchanged and used only for the purpose of implementation of the Regulation and competition law.[10] However, when the EC starts the proceeding based on the DMA (EU Regulation 2022/1925), the CCA cannot conduct any investigatory actions under competition rules.[11]

Question 5

In order to ensure the implementation framework for the proper functioning of the internal market of the European Union related to digital markets, Croatian Government has enacted separate legislation, notably, the Regulation on the implementation of the Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828.

The CCA has a separate digital unit in the competition sector which includes IT issues but also topics like cyber security, data analysis, IA and partly DMA.

[8] DMA Implementing Regulation, art 3(2).
[9] DMA Implementing Regulation, art 3(3).
[10] DMA Implementing Regulation, art 3(4).
[11] See more: Poščić, Ana, The Digital markets Act. Ensuring more Contestability and Openness in the European Digital market, InterEULawEast: Journal for the international and european law, economics and market integrations, Vol. 11 No. 1, 2024.

According to available information, CCA planes to employ one person whose sole responsibility will be the DMA enforcement. Besides, the members of the staff team of the CCA are participating in the DMA Advisory Committee on the level of vice-president of the Competition Council and in the relevant ECN working groups including topics such as digital markets, data science and AI on the level of the expert team of the CCA.

Question 6

So far, there is no relevant experience to share, but considering that Croatia is a small market and that the majority of actual or potential DMA cases will be dealt with by the EC as the competent enforcement body for the DMA, one should not expect too many activities based on the DMA.

However, in relation to addressed question, it seems important to mention that CCA has conducted market research of digital platforms for providing food delivery services in 2022,[12] as well as sector research of the market for the provision of online accommodation reservation services in the Republic of Croatia in 2019.[13] Further, it should be also mentioned that CCA publishes relevant information on its web site on the EC decisions in relations to application of DMA. It published Commission's decision where EC designates Booking as a gatekeeper and opened a market investigation into X.[14]

With regard to enforcement priorities, CCA has announced enforcement priorities for 2024.[15] In its enforcement priorities CCA do not specifically mention cases related to DSA or DMA, however it is emphasized that CCA will focus its investigations to cartels and prohibited vertical agreements as well as that it will follow Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty. Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty implicitly refer to abusive exclusionary conduct by dominant undertakings which are capture by DSA and DMA.[16]

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[12] Croatian Competition Agency, press release "AZTN proveo istraživanje tržišta digitalnih platformi za pružanje usluga dostave hrane," <https://www.aztn.hr/aztn-proveo-istrazivanje-trzista-digitalnih-platformi-za-pruzanje-usluga-dostave-hrane/>

[13] Croatian Competition Agency, press release "AZTN proveo sektorsko istraživanje tržišta pružanja usluga online rezervacija smještaja u Republici Hrvatskoj." Press release available at: https://www.aztn.hr/aztn-proveo-sektorsko-istrazivanje-trzista-pruzanja-usluga-online-rezervacija-smjestaja-u-republici-hrvatskoj/

[14] Croatian Competition Agency, press release "Europska komisija utvrdila Bookingu status nadzornika pristupa i pokrenula istragu za društvenu mrežu X," https://www.aztn.hr/europska-komisija-utvrdila-bookingu-status-nadzornika-pristupa-i-pokrenula-istragu-za-drustvenu-mrezu-x/

[15] Croatian Competition Agency, "Prioriteti AZTN-a za 2024 Godinu." https://www.aztn.hr/ea/wp-content/uploads//2024/04/Prioriteti-AZTN-2024.pdf

[16] Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Text with EEA relevance).OJ C 45, 24.2.2009, pp. 7–20.

Section 2: Use of national legislative leeway under the DMA/DSA

Question 1

At the onset, it is important to note that Croatian legislation so far has not implemented significant legislation which regulates the behaviour of intermediary information service providers. This may perhaps be seen most clearly in reference to hate speech regulation and the responsibility of electronic media for content published on their platforms, governed by the Electronic Media Act.[17] Rather than governing social media platforms or intermediary service providers, this Act relates purely to TV and radio programming, as well as electronic publications, which all share editorial oversight of their content. Currently there is also an intention to implement new sectoral regulation which would overlap with the DSA.

The most relevant piece of overlapping Croatian legislation is the E-Commerce Act[18] which still currently retains provisions identical to those contained in Articles 4, 5 and 6 of the DMA. The draft DSA Implementing Act deals with the DSA pre-emption effects by effectively repealing the parts of the E-Commerce Act which are contained in the DSA.[19]

Question 2

In the process of implementing the DSA the Croatian Government attempted to map out all the rules on illegality of content relevant for the DSA enforcement. This is evidenced in Article 6 of the draft DSA Implementing Act, which sets out the governing bodies which can issue orders against illegal content. Notably, the government has separated the content into five categories: (1) content which constitutes a criminal act or a misdemeanour, (2) content in breach of personal data processing legislation, (3) content in breach of intellectual property rights, (4) content in breach of regulations within the scope of the State's Inspectorate's powers (such as consumer protection and tourism), and, (5) content which constitutes a violation in areas of health, medicine and medical products, and biomedicine.[20]

Notably though, the initial proposal for the DSA Implementing Act contained a provision which explicitly stated that the list of authorities responsible for issuing orders to act against illegal content in Article 6 was a non-exhaustive list. However, in the draft DSA Implementing Act proposed to the Croatian

[17] Electronic Media Act *(Zakon o elektroničkim medijima*), Official Gazette No. 111/21, 114/22.

[18] E-Commerce Act (*Zakon o elektroničkoj trgovini*), Official Gazette No. 173/03, 67/08, 130/11, 36/09, 30/14, 32/19.

[19] Draft DSA Implementing Act, art 25(1).

[20] Draft DSA Implementing Act, art 6.

Parliament, this provision was removed, implying that the Government considered that this list included all the relevant national bodies and all relevant national rules on the illegality of content relevant for the DSA.

Regarding other DSA-related changes, we were unable to find changes in such content rules recently.

Question 3

Currently we do not have information on any other DSA related legislative acts which are considered or adopted on the national level. At the time of writing this report, there are no public consultations nor draft legislation which would be related to the implementation of the DSA. However, it is important to recognise that the DSA has still not been fully implemented into Croatian legislation.

Primarily, rules which govern content such as hate speech and other criminal offences or misdemeanours are applied regardless of the DSA. Even with the most recent changes to the Electronic Media Act in 2022, content rules have not been specifically catered to social media or content creators. Rather, as noted by the present (and former) Minister for Culture and Media, content generated by users of platforms should not be regulated by such rules.[21]

The most relevant legislative act on the national level related to the implementation of the DSA is the E-Commerce Act which, amongst other provisions, regulates the responsibility of intermediary service providers. As a consequence of the draft DSA Implementing Act, these provisions have been removed, as the DSA pre-empts any national legislation.[22]

Question 4

The pre-emption effects of the DMA are unlikely to influence Croatian legislation or the CCA's action in a significant manner. Notably, Croatia has not introduced any rules ensuring fairness and contestability in digital markets, nor has it introduced any specific sectoral regulation for digital markets which would overlap with the DMA. The DMA's pre-emption effects would therefore be limited to the influence of Article 38 (7) DMA which would prohibit the CCA from conducting investigations under Article 101 and 102 TFEU and their Croatian counterparts. This has also explicitly been transposed in Article 3(5)

[21] Croatian Government, press release "Obuljen Koržinek: Sadržaj na društvenim mrežama ne reguliraju medijski zakoni," https://vlada.gov.hr/vijesti/obuljen-korzinek-sadrzaj-na-drustvenim-mrezama-ne-reguliraju-medijski-zakoni/31556. Accessed 15 October.

[22] Art 15(1) draft DSA Implementing Act.

the DMA Implementing Regulation which states that "In the event that the European Commission conducts an investigation [...] [under the DMA] the competent body is not entitled to carry out action under competition rules."

Question 5

There have been no DMA related legislative acts adopted in Croatia and currently we do not have information on any other DMA related legislative acts which are considered by the Croatian Government. Given that Croatia is a small market and there have been no competition law cases concerning gatekeepers, this is unlikely to change.

Section 3: Vertical and horizontal public enforcement-related cooperation under DSA/DMA

Question 1

Croatia has not implemented any specific rules – other than those contained in the DMA – in order to create effective cooperation. Rather, Article 3 of the DMA Implementing Regulation makes it explicit that the CCA has all of the duties of cooperation with the EC and other national competition authorities which are contained in Article 38 of the DMA.

Regarding the implementation of the DSA, the draft DSA Implementing Act creates a more robust mechanism for cooperation between Croatian competent authorities in the enforcement of the DSA. It introduces a duty of cooperation of all competent authorities and requires HACOM to ask for the opinion of a competent national authority when creating ordinances which regulate the creation of out-of-court dispute resolution bodies and trusted flaggers. However, similarly to the DMA, there is a distinct lack of any specific procedural obligations which are aimed at achieving effective cooperation with other national competent authorities or with the EC. Rather, this is limited to HACOM's duty to provide the EC with yearly reports and to designating HACOM as the contact point with other national competent authorities under the DSA. [23]

Question 2

Croatia has not implemented any measures which specifically govern the interaction between the national courts and the EC in the context of the DSA and DMA.

[23] Draft DSA Implementing Act, art 9(3) and 4(1).

Regarding the DMA, the DMA Implementing Regulation does not contain any rules on cooperation. Rather, the only relevant provision governing cooperation of national courts, in the context of competition law, with other authorities are contained in the Article 66(a) of the Competition Act.[24] However, these rules explicitly refer to the cooperation between national courts and the EC in the context of Regulation (EC) No 1/2003. This provision allows the EC to submit non-binding observations to national courts as well as allows national courts to request observations from the EC. Furthermore, Article 66(a) of the Competition Act explicitly prohibits national court decisions which would be contrary to a decision of the EC in the same case and gives the national courts the possibility to halt proceedings while the Commission conducts an investigation under Article 101 and 102 TFEU. While these rules could theoretically be used in the context of the DMA, it would require an explicit revision of the Croatian Competition Act to widen their scope.

Similarly, the DSA Implementing Act (nor any other related legislation) does not contain any specific provisions governing the interaction between national courts and the EC in the context of the DSA.

Question 3

Given the fact that Croatia is a small market and that the CCA has relatively little experience tackling digital markets, it is not likely that it will, on a general level, be particularly useful in bringing to the attention of the EC information about possible non-compliance under the DMA. Nonetheless, the CCA might provide valuable insight in relation to gatekeepers operating core platform services operating in the tourism sector – particularly related to core platform services regarding accommodation booking and travel, that is, those operated by Booking.com which was designated as a gatekeeper in May 2024.[25] The reasons for this are twofold. Primarily, the tourism industry forms a significant part of the Croatian economy and any gatekeepers operating in the sector may have a significant influence on the operation of those markets in Croatia. Furthermore, the CCA has explicitly confirmed that one of its priorities in 2024 is to monitor markets related to hotel accommodation and the hospitality industry.[26] This priority builds on the CCA's previously conducted market research regarding online accommodation booking services in 2020.

[24] Competition Act (*Zakon o zaštiti tržišnog natjecanja*), Official Gazette No. 79/09, 80/13, 41/21, 155/23.

[25] European Commission, press release "Commission designates Booking as a gatekeeper and opens a market investigation into X" (2024), https://digital-strategy.ec.europa.eu/en/news/commission-designates-booking-gatekeeper-and-opens-market-investigation-x#:~:text=13%20May%202024-,Commission%20designates%20Booking%20as%20a%20gatekeeper%20and%20opens%20a%20market,X%20Ads%20and%20TikTok%20Ads. Accessed 12 October 2024.

[26] Croatian Competition Agency, "AZTN objavljuje dopunjenu listu prioriteta u radu za 2024. Godinu" (2024). Accessed 15 October 2024.

Section 4: Private enforcement of DMA/DSA

Question 1

Currently we do not have information about any action brought by private party before national court involving DSA or DMA.

Question 2

Currently there is very little experience concerning these issues, so it is not possible to anticipate whether there will be interest for proceedings through collective redress mechanisms. Under national law, both providers of intermediary services and recipients of services may lodge objections against orders from competent authorities to act against illegal content issued pursuant to Article 9 of the DSA and orders to provide information issued pursuant to Article 10 of the DSA. It should be noted that an objection lodged pursuant to this provision does not suspend the execution of the order. Decisions by the DSC under Articles 21, 22, and 51(1)-(3) of the DSA can be challenged through administrative litigation.

Such litigation are initiated at the High Administrative Court. Additionally, decisions by the DSC regarding complaints filed under Article 53 of the DSA can be challenged through administrative litigation before the locally competent administrative court.

Parties can initiate civil proceedings to seek compensation for any potential damages incurred. This represents an opportunity for private enforcement, as parties affected by the decisions or actions taken under the DSA can pursue remedies through the courts.

Question 3

With regard to the DSA there are no specific national provisions relating to private enforcement in addition to provisions on compensation of EU Regulation 2022/2065. It remains to see how national courts will handle private enforcement cases if any and whether courts will require prior DSA decisions of competent national authorities.

Question 4

With regard to the DSA there are no specific national provisions relating to private enforcement in addition to provisions on compensation of EU

Regulation 2022/2065. It remains to be seen how national courts will handle private enforcement cases, if any, and whether courts will require prior DSA decisions of competent national authorities.

Question 5

Croatian national civil procedural law allows interested parties including civil society organizations to intervene in pending private disputes provided they can demonstrate a legitimate interest and relevance to the case. The process involves filing a request with the court, which then evaluates the organization's standing and interest case by case. The intervenient can appeal a possible negative decision of the lower court to the higher court. In some cases, intervenient may have to bear procedural costs caused by their intervention.

Section 5: General questions

Question 1

Articles 9 and 10 of the DSA have been explicitly transposed to Article 6 of the draft DSA Implementing Act. In doing so, the Croatian Government has chosen to designate specific authorities competent to issue orders to act against illegal content and orders to provide information, depending on the type of illegal content or service.[27] These authorities are required to issue the aforementioned orders *ex officio*. The draft DSA Implementing Act does not repeat the required content of those orders, but rather points to Article 9 and 10 DSA. Interestingly, Article 6(6) does explicitly establish that the order will be considered delivered to the intermediary service provider at the time recorded on the server for sending such messages. Essentially, this provision is a copy of a similar provision in Article 75 of the General Administrative Procedure Act which regulates electronic communications in an administrative procedure.[28] In all likelihood, this serves to increase legal certainty around the procedure by creating explicit rules on the delivery of orders, as national provision regulating content (and provision of information) are scattered throughout different legal acts and are subject to different types of proceedings, ranging from criminal to administrative.

Regarding the national law specifying injunctions according to Article s 4(39, 5(29 and 6(4) DSA, it is important to differentiate between injunctions adopted *ex officio* by competent bodies (such as HACOM), and those given by national courts on the basis of private action.

[27] See answer to Section 1, question 1 for a detailed explanation of the competent national authorities.

[28] General Administrative Procedure Act (*Zakon o općem upravnom postupku*), Official Gazette No. 47/09.

With regards to injunctions issued by national courts on the basis of a private action (e.g., in cases of intellectual property violations), injunctions under Articles 4(3), 5(2) and 6(4) DSA would be based in Article 22(a) of the E-Commerce Act which allows individuals to initiate civil proceedings at the competent national court to request removal of the illegal content – if the intermediary service provider refuses to remove the illegal content in the first place. These proceedings would be regulated by the Civil Procedures Act and would be subject to ordinary judicial oversight, same as any civil procedure under Croatian law.[29]

In cases of injunctions issued by competent bodies, such as HACOM or the Ministry of Health, the injunctions are issued under and administrative procedure governed by the Administrative Procedures Act which meets the requirements of judicial oversight in Croatian law. Namely, Articles 19 and 29 of the Croatian Constitution establish that "everyone shall be entitled to have his/her rights and obligations […] decided upon fairly and within a reasonable time by an independent and impartial court established by law"[30] and guarantees "judicial review of individual acts made by administrative authorities [...]" In this context, the Administrative Procedure Act allows for an appeal to a second instance administrative body, or – if there is no second instance administrative body or the appeal concerns a second instance decision – allows parties to initiate an administrative dispute in front of administrative courts in Croatia.[31] The Croatian Constitutional Court has heard several cases on the constitutionality of the General Administrative Procedures Act and has, in each instance, concluded that it fulfils the criterion of effective judicial oversight and right to a fair trial.[32]

Question 2

Currently we are not aware of the services of legal representatives being provided in Croatia according to Article 13 DSA.

Question 3

The draft DSA Implementing Act did not adopt any specific approach vis-à-vis complaints according to Article 53 of the DSA, such as limiting them to systemic

[29] Civil Procedures Act (*Zakon o parničnom postupku*), Official Gazette No 25/13, 89/14, 70/19. 80/22, 114/22, 155/23.

[30] Art 29 Croatian Constitution (*Ustav Republike Hrvatske*), Official Gazette No. 56/90, 135/97, 113/00, 28/01, 76/10, 5/14.

[31] General Administrative Procedure Act, art 12.

[32] See Judgements U-I-1517/2023 23 May 2023, U-I-1898/2014 4 April 2017, and U-I-515/2014 7 March 2017.

violations or establishing clear procedures for submitting a complaint to HACOM. Rather, the complaints procedure is very cursorily regulated. Article 4(2) of the draft DSA Implementing Act establishes HACOM as the relevant body for administering the complaints and Article 14 establishes the right to initiate an administrative dispute against HACOM's decision on the basis of Article 53 DSA. The dispute is adjudicated by administrative courts and is governed by the Administrative Disputes Act.[33]

Question 4

The DMA and the DSA were not subject to political controversy during their implementation in Croatia. Specifically, the implementation of the DMA has not received public nor political attention during its implementation as it was seen as a purely technical matter. Consequently, the DMA was implemented through the DMA Implementing Regulation, which was passed by the government instead of the Croatian parliament. This type of instrument was chosen as the DMA Implementing Regulation did not relate to misdemeanour (or criminal) law, nor did it introduce any new administrative procedures.[34]

Similarly, the implementation of the DSA was not the subject of significant political controversy. However, there were two instances in which the DSA's implementation was the subject of political discourse. First, while Croatia did designate HACOM as the DSC in February 2024, other parts of the DSA (such as a clear division of jurisdiction among different authorities) are still not fully implemented. Consequently, on 25 July, the EC sent a letter of formal notice to Croatia due to a lack of effective enforcement of the DSA.[35] As already outlined above, the draft DSA Implementing Act is still in the legislative process and is expected to remedy the issues recognized by the EC.

The second situation in which the DSA was subject to political controversy related to the use of bots and fake news on social media during elections in Croatia.[36] Specifically, the powers and efficiency of removing illegal content.

[33] Administrative Disputes Act (*Zakon o upravnim sporovima*), Official Gazette No. 36/2024.

[34] Draft Regulation on the implementation of the Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Prijedlog uredbe o provedbi Uredbe (EU) 2022/1925 Europskog parlamenta i Vijeća od 14. rujna 2022. o pravednim tržištima s mogućnošću neograničenog tržišnog natjecanja u digitalnom sektoru i izmjeni direktiva (EU) 2019/1937 i (EU) 2020/1828 (Akt o digitalnim tržištima)).

[35] European Commission, press release "The Commission calls on 6 member states to comply with the EU Digital Services Act," https://digital-strategy.ec.europa.eu/en/news/commission-calls-6-member-states-comply-eu-digital-services-act. Accessed 15 August.

[36] GONG, "Akt o digitalnim uslugama: U Hrvatskoj se još uvijek ne zna tko je odgovoran za novu regulative," https://gong.hr/2024/08/23/akt-o-digitalnim-uslugama-u-hrvatskoj-se-jos-uvijek-ne-zna-tko-je-odgovoran-za-novu-regulativu/. Accessed 1 September.

This issue was brought up by an election observation NGO GONG, as it was unclear to what extent HACOM, as the DSC, had jurisdiction to issue take down notices. However, as mentioned in answer to Section 1, Question 1, the Croatian draft DSA Implementing Act does not grant HACOM new powers to regulate online content. Rather, this power is retained by various institutions which performed those function prior to the DSA. This showcases that the effectiveness in achieving the goals of the DSA is still closely connected with national legislation and the overall framework for regulating online content.

Question 5

Currently there are no measures which have been taken, or are foreseen, to support the creation of out-of-court dispute resolution bodies, trusted flaggers, DSA/DMA-focused consumer organisations, and data access requests by researchers.

In relation to the DMA, the creation and support of DMA-focused consumer organisations is not a priority in Croatia,[37] as the Croatia is a relatively small market. Rather, the CCA is focusing on areas which have proven to have a much more significant impact in Croatia, such as cartels in public procurement or the sector.[38]

Regarding the DSA, it is important to once again note that the draft DSA Implementing Act has not been adopted at the time of writing this report, which is why there has been very little in the way of additional measures being adopted in relation to the DSA. However, the draft DSA Implementing Act does contain several relevant provisions on additional measures in relation to the DSA. Namely, Articles 5 and 24 oblige HACOM to adopt ordinances governing the creation and certification of out-of-court dispute resolution bodies and trusted flaggers within three months of the adoption of the DSA Implementing Act. In this process, HACOM has a duty to consult with the competent sector specific authorities depending on the type of illegal content. Interestingly though, the draft DSA Implementing Act contains no provisions on data access requests by vetted researchers, signifying that the legislator intended to directly apply the DSA without any need for specific procedures under Croatian law. Most likely, this also indicates that the legislator does not expect a significant number of data access requests to reach HACOM.

[37] Croatian Competition Agency, "AZTN objavljuje dopunjenu listu prioriteta u radu za 2024. Godinu" (2024). Accessed 15 October 2024.

[38] Ibidem.

Question 6

Currently, we were unable to find any specific provisions or issues relating to the DSA and DMA which have received particular attention in Croatia. At a general level, the DMA and DSA seem to be welcomed by practitioners and academics in Croatia.

Czech Republic

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Section 1: National institutional set-up

Question 1

Implementation of the DSA has not yet been finished in the Czech Republic. At the end of August 2024, the Government approved a proposal for a new Digital Economy Act (hereinafter referred to as "DEA Proposal"), which seeks to introduce a complex regulation of digital economy, including implementation of the DSA, while amending certain pre-existing laws.[1] The Government has asked the Parliament, specifically its lower chamber, the Chamber of Deputies, to adopt the proposed legislation in an expedited procedure; the Chamber of Deputies does not have to heed this request. The new legislation cannot be expected to be adopted earlier than by the end of this year.

Should the Digital Economy Act be enacted in its currently proposed form, enforcement of its provisions would fall under the purview of the Czech Telecommunication Office (hereinafter referred to as "CTO").[2] In matters related to personal data protection the Personal Data Protection Office (hereinafter referred to as "PDPO") would assume responsibility.[3] Additionally, the Ministry of Industry and Trade, along with the PDPO, would serve as the central

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[1] All relevant information regarding the legislative procedure concerning the DEA Proposal, including the draft bill and the related explanatory memorandum, can be found on the website: https://www.psp.cz/sqw/text/tiskt.sqw?O=9&CT=776&CT1=0 (6 September 2024).

[2] DEA Proposal, Sections 23 and 27 (1).

[3] DEA Proposal, Sections 23 (1) and 27 (2).

contact points for cooperation with other EU member states and the European Commission.[4] The CTO would also assume a broader role by overseeing the certification of entities involved in out-of-court dispute resolution, as well as granting trusted whistleblower/flagger and cleared researcher statuses. These designated entities, upon receiving the relevant certifications, would assist the CTO in identifying, assessing, and addressing risks that arise under both the DSA and the DEA Proposal.

Specific rules were adopted for the cooperation among competent authorities. It is explicitly stated that CTO and PDPO may share information, including confidential one, necessary for the exercise of their duties;[5] the same applies to other public authorities.[6] Additional rules on the cooperation between CTO and PDPO are in place with respect to vetted researchers (Art. 40 (8) (d) DSA).[7] CTO is also entitled to seek opinions from the PDPO in matters of personal data protection.[8] Competent public authorities are obliged to submit to the CTO information necessary for drafting the annual activity reports (Art. 55 DSA); special rules apply to criminal authorities.[9]

Finally, the DEA Proposal prescribes rules for cooperation and mutual assistance among the CTO and other Digital Services Coordinators or the Commission,[10] and for representation at the European Board for Digital Services.[11]

Question 2

As the DEA Proposal has not yet been enacted, no specific measures have been adopted yet. The DEA Proposal nonetheless foresees that the CTO would need up to 12 additional employees, while the PDPO up to 2.[12]

Question 3

As of this moment, there has far been no experience with the application of DSA in the Czech Republic.

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[4] DEA Proposal, Section 8.
[5] DEA Proposal, Section 29 (1).
[6] DEA Proposal, Section 29 (2).
[7] DEA Proposal, Sections 29 (3) and (4).
[8] DEA Proposal, Section 29 (5).
[9] DEA Proposal, Section 30.
[10] DEA Proposal, Section 31.
[11] DEA Proposal, Section 32.
[12] DEA Proposal p. 68.

The Ministry of Industry and Trade runs a web site dedicated to the DSA.[13] Unfortunately, it has been last updated in August 2023, announcing that the Digital Services Coordinator will be the CTO.

Question 4

The Act on the Protection of Competition (hereinafter referred to as "APC")[14] was amended in 2023 in order to implement the DMA.[15] This amendment was not a self-standing legislative proposal, containing all the standard features as an explanatory memorandum, regulatory impact assessment, etc. Instead, three new provisions were added to the act implementing the ECN+ Directive, without any further clarification.

The Czech Competition Authority, the Office for the Protection of Competition (hereinafter referred to as "OPC") was given additional powers in order to implement the DMA. Only a relatively brief provisions were included into the APC which formally recognized the OPC as the competent authority under the DMA and obligated it to provide assistance and cooperation vis-à-vis the Commission in this respect.[16] The OPC was also provided a power to seek assistance from the undertakings when it would be necessary in connection with the DMA's enforcement.[17]

The OPC's procedure concerning these powers is not further specified. Presumably, without a specific legislative authorization, the OPC will not be able to employ the extensive investigatory powers it was given in antitrust proceedings.

No specific provisions implementing the Article 38 (7) DMA were adopted. The OPC would have to conduct its investigations directly on the basis of this Article. Thus, if the OPC would enforce Articles 101 and 102 TFEU or its Czech equivalents, it would be able to also investigate possible non-compliance with Articles 5, 6 and 7 DMA according to the rules applicable to antitrust enforcement.[18]

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[13] Available at: https://www.mpo.gov.cz/cz/podnikani/digitalni-ekonomika/digitalni-sluzby/narizeni-o-digitalnich-sluzbach/ (6 September 2024).

[14] Act No. 143/2001 Coll., on the Protection of Competition, as amended.

[15] Act No. 226/2023 Coll., amending the Act No. 143/2001 Coll., on the Protection of Competition, and the Act No. 276/1993 Coll., on the Competences of the Office for the Protection of Competition.

[16] See Section 1(2) and 20a(4)(f) of the APC.

[17] See Section 20a(3)(i) of the APC.

[18] These rules are contained in Sections 21e – 21ga APC.

Question 5

In addition to the legislative changes discussed above, no further measures have been adopted in order to implement the DMA. The OPC has not published any information concerning its DMA-related activities. The OPC did not establish any new department dedicated to the DMA.

Question 6

As of this moment, there are no publicly available information concerning the OPC' position vis-à-vis the DMA. In a press release accompanying the adoption of an amendment of the APC implementing the ECN+ Directive, to which the implementation of DMA was added in the Parliament, particular, the DMA was not mentioned at all.[19] When the DMA entered into force, the OPC announced that the DMA's enforcement is dedicated exclusively to the Commission.[20] In the Annual Reports for 2022 and 2023,[21] the DMA is not mentioned at all. The Annual Report for 2023 only mentions without any further details that in the next year, the OPC would "focus on digital markets."

Taking into account the hitherto track-record of the OPC in digital markets, we do not expect any significant activity under the DMA.

Section 2: Use of national legislative leeway under the DMA/DSA

Question 1

Despite the Digital Services Act (DSA) officially entering into force in February 2024, Czech legislators have yet to adapt the national laws to enforce its provisions effectively. The Ministry of Industry and Trade has put forward the DEA Proposal, which seeks to introduce updated regulations while amending certain pre-existing laws.[22] The DEA Proposal has been submitted by the Government to the Czech Parliament at the end of August 2024, which means

[19] Available at: https://uohs.gov.cz/cs/informacni-centrum/tiskove-zpravy/hospodarska-soutez/3624-novela-soutezniho-zakona-byla-dnes-zverejnena-ve-sbirce-zakonu-ucinnosti-nabude-pred-koncem-cervence.html (6 September 2024).

[20] Avaliable at: https://uohs.gov.cz/cs/informacni-centrum/tiskove-zpravy/hospodarska-soutez/3567-dnesnim-dnem-nabyl-plne-ucinnosti-akt-o-digitalnich-trzich.html (6 September 2024).

[21] Annual Reports of the OPC are available at: https://uohs.gov.cz/en/information-centre/annual-reports.html (6 September 2024).

[22] All relevant information regarding the legislative procedure concerning the draft Digital Economy Act, including the draft bill and the related explanatory memorandum, can be found on the website: https://www.odok.cz/portal/veklep/material/ALBSCWAFVK4T/ (25 August 2024).

that the formal stages of the legislative process have recently just begun. Given the procedural timelines involved, it is anticipated that the new legislation will not likely be adopted earlier than at the end of 2024 and several provisions are proposed to enter into force in summer 2025. As regards the pre-existing laws that are meant to be amended by the DEA Proposal, those only partially cover the complexities of the digital economy and fall short of providing comprehensive regulation. As a result, the current legislative framework seems to be inadequate to fully address the challenges posed by the digital economy. This is explicitly acknowledged in the explanatory memorandum to the DEA Proposal.

The core focus of DEA Proposal lies in its procedural approach to enforcement, as the substantive regulations themselves are already established by the DSA, which has direct effect within the EU member states, including the Czech Republic. The draft legislation outlines the procedures for enforcement, specifying which activities constitute misdemeanours and defining the potential penalties for non-compliance. It is important to note that some offenses under the proposed law could be classified as criminal, which would have to lead to corresponding amendments to the Czech Criminal Procedure Code in relation to digital economy violations.

In addition to the new measures introduced by the DEA Proposal, pre-existing Czech legislation already encompasses certain laws relevant to the digital economy, many of which are based on EU directives. These include, in particular, the Act on Some Information Society Services,[23] the Act on On-Demand Audiovisual Media Services[24] and the Cybersecurity Act.[25] The DEA Proposal will replace and/or amend these laws in alignment with the DSA in order to ensure consistency across the legal framework. As the consumer protection is one of the primary objectives of the DSA, additional amendments will also be made to the Act on Consumer Protection[26] and the Czech Civil Code[27] to enable the enforcement of consumer protection provisions under the DSA.

Overall, once adopted, the DEA Proposal would represent a significant step toward modernizing the Czech Republic's approach to the regulation of the digital economy. However, its eventual impact will depend on the specifics of its final version and the efficiency with which the legislative process unfolds. Currently, there does not seem to be an intention to use the potential legislative leeway in order to adopt some specific rules at the national level. In fact,

[23] Act No. 480/2004 Coll., on Some Information Society Services, as amended.
[24] Act No. 132/2010 Coll., on On-Demand Audiovisual Media Services, as amended.
[25] Act No. 181/2014 Coll., on Cybersecurity, as amended.
[26] Act No. 634/1992 Coll., on Protection of Consumers, as amended.
[27] Act No. 89/2012 Coll., Civil Code, as amended.

the explanatory memorandum to the DEA Proposal explicitly mentions that it does not adopt any rules that would be in addition to what is required under the applicable EU rules.

Question 2

Based on the currently available information, there has not been a comprehensive mapping of the rules concerning the illegality of content that are relevant to the enforcement of the DSA. To date, the only significant review of pre-existing laws pertaining to the digital economy has been carried out by the Ministry of Industry and Trade, primarily as part of the preparatory work for the draft of the DEA Proposal, as outlined in response to question 1, section 2 above. However, it is important to note that the respective review did not focus specifically on the issue of content illegality. Instead, the scope of the scrutiny was broader, encompassing a wider range of topics related to the digital economy within the Czech Republic.

That broader review aimed to assess the state of existing legislation in areas such as digital commerce, and other components of the digital ecosystem. However, the targeted issue of illegal content—whether related to hate speech, disinformation, intellectual property infringements, or other forms of illicit online activity—was not the primary focus of the respective analysis. As a result, there remains a gap in understanding the full extent to which current laws address the illegality of content and how these laws align with the enforcement demands of the DSA. The Ministry of Industry and Trade just provides some (soft-law) guidance on the construction of the DSA via its website.[28]

Question 3

Aside from the DEA Proposal, as described in response to question 1, section 2 above, there are currently no other legislative proposals aimed at amending the existing legal framework within the digital economy sector. The DEA Proposal remains the primary and most significant legislative effort in this domain, addressing a broad range of issues associated with the regulation of digital services, consumer protection, and enforcement procedures.

[28] See in this respectfor example, a brochure concerning content moderation under the DSA which is available at: https://www.mpo.gov.cz/assets/cz/podnikani/2023/2/DSA_info_FAQ_2024.pdf (25 August 2024).

While the proposal represents an important step towards modernizing the legal landscape for the digital economy in the Czech Republic, no additional legislation has been introduced or is under active consideration at this time. This indicates that, for the moment, legislative efforts remain concentrated on the DEA Proposal, with no parallel or complementary bills being developed to address other aspects of the rapidly evolving digital sector.

Question 4

Given the direct effect of the DMA, Czech legislators opted not to implement it through a separate, specific legislation. Instead, only a relatively brief provisions were included into the APC[29] which formally recognized the OPC as the competent authority under the DMA and obligated it to provide assistance and cooperation vis-à-vis the European Commission in this respect[30] and also provided it with a power to seek assistance from the undertakings when it would be necessary in connection with the DMA's enforcement.[31] However, since the primary responsibility for enforcing the DMA rests with the European Commission, the role of the OPC is likely to remain only cooperative. That might involve actions such as identifying potential gatekeepers to the Commission and supplying relevant information to support the Commission's enforcement efforts, rather than leading direct enforcement activities within the Czech Republic.

It is not expected that there would be any specific conflicts between the DMA enforcement and the pre-existing rules. There could be some parallel investigations based on the competition law but, since the Czech competition law is largely harmonized with the EU competition law, the relationship between the DMA and the competition law would correspond in principle to the one between the EU competition law and the DMA.

Question 5

Based on the currently available information, no additional legislative acts are currently being considered. The focus remains solely on the existing framework, with no further legislative measures or amendments under active discussion at this time.

[29] Act No. 143/2001 Coll., on the Protection of Competition, as amended.
[30] See Section 1(2) and 20a(4)(f) of the Competition Act.
[31] See Section 20a(3)(i) of the Competition Act.

Section 3: Vertical and horizontal public enforcement-related cooperation under DSA/DMA

Question 1

Regarding the DSA, DEA Proposal implements the rules on cooperation among the digital services coordinators and with the Commission in Section 31. This provision is merely a technical implementation of relevant provisions of the DSA. It is sufficient to allow for the cooperation foreseen by the DSA, but it does not go beyond this minimal standard.

Regarding the DMA, no specific procedural rules were adopted to implement it. In particular, there are no rules allowing the OPC to cooperate with other competition authorities in matters related to the DMA enforcement. The OPC may cooperate with other NCAs only as far as Articles 101 and/or 102 TFEU are applied. Vis-à-vis the Commission, the OPC is only empowered to "provide assistance" to it.[32] Any further cooperation would have to be based directly on Article 38 DMA.

Question 2

Concerning the DMA, no rules on cooperation between Czech courts and the Commission were adopted. Any mutual assistance will have to take place directly on the basis of Article 39 DMA.

Similarly with respect to the DSA, no specific rules on cooperation with the Commission have been proposed in the DEA Proposal. Any cooperation will have to take place directly on the basis of the DSA, in particular its Article 82.

Question 3

So far, the OPC has not been very active in digital markets.[33] Its activities may be triggered by complaints of Czech companies not regulated by the DMA, but still with significant impact on Czech digital markets, for example, search engines or price-comparison sites.

[32] Section 20a (4) (f) APC.

[33] At the end of August 2024, the OPC suggested it might be investigating one of the most important Czech internet companies, Seznam.cz. No further details were provided. Press release: https://uohs.gov.cz/cs/informacni-centrum/tiskove-zpravy/verejne-zakazky/3962-uvadime-na-pravou-miru-seznam-zpravy-sef-antimonopolniho-uradu-spolupracuje-s-obzalovanym-expertem-na-losovacky.html (6 September 2024).

Section 4: Private enforcement of DMA/DSA

Question 1

As of this moment, according to publicly available information, no private actions have been initiated under the provisions of the DSA or the DMA within the Czech Republic.

Question 2

One potential cause of action could be based on non-consensual use of personal data and, in this connection, be based on the violations of the legislation concerning protection of personal data and privacy or potentially a breach of other provisions under the DSA (or comparable provisions). As mentioned in Section 2 above, there is some pre-existing Czech legislation which, however, did not address the respective issues in the digital economy comprehensively. Accordingly, the DEA Proposal is currently in the legislative pipeline. It is unlikely that there would be any significant private enforcement before its adoption. Hypothetically, it would be possible to structure some breaches of the DSA as violations of the Consumer Protection Act and/or unfair competition (Section 2976 et seq. of the Civil Code) and initiate a lawsuit on that basis. Generally, however, private enforcement (even of competition law where it would be much easier and is supported by specific legislation[34]) is very limited in this regard and it is unlikely that it would change any time soon. In other words, public enforcement via the appropriate public authorities would likely preponderate. There could be, however, some prospects for a more enhanced private enforcement driven by the following legislative developments.

The Czech Republic recently adopted the Act on Collective Civil Court Procedure.[35] That Act could encourage more private enforcement of the DSA through class actions that are allowed under the said Act and which could assist in alleviating the financial and administrative burdens faced otherwise by individuals in case they proceed in seeking the redress individually and who would, thereby, be discouraged from pursuing legal action due to the costs and hassle involved. As the said legislation is very new, there is no experience with this legal mechanism, as of yet. As a result, it remains uncertain how frequently class actions will be utilized, particularly in the context of DSA enforcement. It is worth mentioning that the said Act allows for collective actions only in

[34] Namely, Act No. 262/2017 Coll., on Damages in the Area of Competition, which has implemented the EU Damages Directive.

[35] Act No. 179/2024 Coll., on Collective Civil Court Procedure, which is effective as of 1 July 2024.

the context of the business-to-consumer relationships (B2C). Namely, it allows a collective action initiated by the appropriate (and registered) consumer protection association. For the purposes of the Act, however, the term consumer includes not only natural persons in their dealings with entrepreneurs but also small entrepreneurs (with less than 10 employees and with an annual turnover or sum of balance sheet lower than CZK 50 million).[36] Given that the said Act is based on the opt-in principle and would require an initiative of consumer associations who are not yet accustomed to it, there are no huge expectations as regards the collective enforcement going forward in Czech Republic generally or in connection with the DSA, in particular.

However, the (not yet adopted) DEA Proposal would introduce an alternative route for resolving disputes through out-of-court mechanisms, with a list of certified entities authorized to handle such disputes. These out-of-court dispute resolution processes could provide a faster and less burdensome option for addressing conflicts under the DSA, as there are some positive experiences with similar mechanisms under current consumer protection laws. Accordingly, once the DEA Proposal is adopted and the said certified entities are established, it is hoped that more individuals and organizations will be encouraged to resolve disputes in this manner, potentially leading to a more efficient and accessible means of enforcing the DSA in the Czech Republic.

Question 3

As mentioned in Sections 1 and 2 above, the DMA was reflected in the Czech Republic only via a few technical changes in the APC which provided the OPC with appropriate general obligations and powers. The potential cause of action could be then based either on the direct effect of the respective provisions of the DMA or, maybe even in parallel, on the competition laws, namely on Article 102 TFEU and/or Section 11 of the OPC. In this regard, there does not seem to be anything specific in the Czech laws and, hence, the general analyses or thoughts concerning the possibilities of the DMA's private enforcement discussed at the EU level would apply *mutatis mutandis* also in the Czech Republic.[37]

Given the fact that the DMA enforcement is likely to be driven primarily at the EU level and against big players it seems unlikely that there would be any DMA private enforcement spree in the Czech Republic. As mentioned above, the Czech Republic recently adopted new legislation allowing for collective

[36] Section 1(1)h) and 1(2) of the Collective Civil Court Procedure Act.

[37] In this respect see, Kindl, J. Prospects for concurrent private enforcement of the DMA and Article 102 TFEU. Journal of Antitrust Enforcement, 2024, 12, pp. 241–246.

actions in B2C settings (or in claims of small enterprises against bigger ones) and this could help somewhat but given especially the opt-in regime of the said legislation expectations of the involved stakeholders are not high. Should that be relevant, however, some consumer associations could become involved. Additionally, it would be possible that some companies would seek an individual redress against the Big Tech companies. There are, for example, claims of Heureka (a comparison shopping website) against Google on the basis of the Google Shopping decision of the European Commission or Seznam.cz (inter alia, an independent general search website) against Google on the basis of the European Commission's Google Android decision, that is, those claims are based on the breach of Czech and EU competition laws and it is imaginable that going forward if there was DMA incompliance by Big Tech similar Czech companies could proceed directly via Czech courts as they have been doing via the competition law route.

Question 4

According to the information currently available, there are no additional legislative measures under consideration regarding the private enforcement of the DMA and/or DSA in the Czech Republic. It is highly unlikely that specific courts or chambers will be designated for handling cases related to these regulations on the substantive grounds, as the establishment of specialized courts or chambers is relatively uncommon within the Czech judicial system.[38] The Czech legal framework typically relies on existing courts to handle a broad range of cases, including those related to new regulations like the DMA and DSA, rather than creating specialized judicial bodies for such purposes. This applies also to competition law cases where all regional courts have jurisdiction. However, it is worth noting that under the new Collective Civil Procedure Act, there is a sole jurisdiction of the Municipal Court in Prague for all collective claims lodged on the basis of that Act.[39] Accordingly, that could apply also to the DMA and/or DSA case should they be initiated via collective action route.

Question 5

Generally, not. Under Czech procedural law, interventions in pending civil procedures are permitted, but there are specific requirements for eligibility. To qualify as an intervener, a party must demonstrate its own legal interest in

[38] There are, however, some exceptions. For example, the Municipal Court in Prague is the sole court of first instance in intellectual property enforcement cases.

[39] Section 6 of the Collective Civil Procedure Act.

the outcome of the dispute; a mere moral or general interest is insufficient.[40] Typically, interventions are seen from entities such as insurance companies that have a direct financial stake in the case's outcome, as their obligations to compensate for damages hinge on the result of the proceedings.

When a party wishes to intervene in an ongoing case, they must either proactively notify the court of their intention or wait for the court to request their participation. In the latter scenario, the potential intervener must consent to their involvement, as they cannot be compelled to participate against their will. The same principle applies to the party on whose side the intervener seeks to join.

As mentioned above, the new Collective Civil Court Procedure Act anticipates that consumer associations would be the claimants under that law. In other words, in those circumstances the associations would have to initiate the dispute on their own and not intervene in the dispute initiated by someone else.

Section 5: General questions

Question 1

According to the Explanatory Memorandum to the DEA Proposal,[41] the Articles 9 and 10 DMA do not themselves provide a legal basis for imposing obligations on providers of intermediary services. Accordingly, an authorization to issue orders, foreseen by those provisions, needs to stem from specific provisions of national or EU laws. The DEA Proposal, therefore, prescribes requirements on the content of these orders in general[42] and specifically in criminal proceedings.[43]

Articles 4 (3), 5 (2) and 6 (4) of the DSA are not proposed to be specifically implemented by the DEA Proposal.

Question 2

As of today, there is no available information regarding the provision of specific services by legal representatives as outlined in Article 13 of the DSA within

[40] See, for example, Přidal O. in Svoboda, K., Smolík, P., Levý, J., Doležílek, J. a kol. Občanský soudní řád. Komentář. 3. vydání (2. aktualizace). [Civil Procedure Code. A Commentary. 3rd edn] Prague: C. H. Beck, 2023, commentary to Section 93.

[41] DEA Proposal, p. 93.

[42] DEA Proposal, Section 12.

[43] DEA Proposal, Section 68.

the Czech Republic. Consequently, there is no indication that such specialized legal services are currently being offered or recognized in the country.

Question 3

Complaints according to Article 53 DSA are to be handled in a standard way,[44] in accordance with the Administrative Procedure Code.[45] These provisions do not limit the right to file a complaint in any way. The competent authority should, in principle, decide within 30 days whether it will open proceedings on the basis of the complaint, or not.

Question 4

Concerning the DMA, there was absolutely no discussion about its "implementation" and, hence, also no political controversy. As mentioned in Section 1, the provisions implementing the DMA were not even introduced by the Government, they were only added and adopted during the legislative procedure in the Chamber of Deputies in connection with another legislative act (the implementation of the ECN+ Directive).
Concerning the DSA, the implementing DEA Proposal has so far proceeded by a standard legislative procedure, without causing any specific controversies. The Government presents it as a purely technical piece of legislation. It even proposed that the legislation should be adopted by the Chamber of Deputies in an expedited procedure, that is, without any substantive discussion.

Question 5

As previously described, the DEA Proposal proposes that the CTO will be responsible for certifying out-of-court dispute resolution bodies and granting the status of trusted flaggers. However, beyond this, there is currently no proposal for establishing consumer organizations specifically focused on the DSA or the DMA, nor is there any provision for a registry of data access requests by researchers. As noted earlier, the proposed legislation may take up to a year to come into effect.

Despite this delay, the Ministry of Industry and Trade and the CTO undertake some unofficial efforts to lay the groundwork for these entities. Their activities are primarily focused on political coordination and preparatory work to en-

[44] DEA Proposal, Section 65 (2).
[45] Act No. 500/2004 Coll., Administrative Procedure Code, as amended, Section 42.

sure a smooth transition once the legislation is implemented. These efforts aim to facilitate the prompt establishment and operation of relevant organizations in anticipation of the legislation's eventual entry into force.[46]

Question 6

In his comments to the DEA Proposal, the Deputy Prime Minister for Digitalisation has voiced long-standing concerns regarding the potential or obligation to block access to online services. Despite ongoing discussions about blocking access in other areas of the Czech legislation, such as the regulation of lotteries and pharmaceuticals, the Deputy Prime Minister views such measures as a significant threat to the development of free digital markets. Nevertheless, given that the DSA has direct effect, the Czech legislator is required to implement the relevant procedural rules, even amidst substantial disagreements.[47]

In addition to these concerns, objections to the DEA Proposal have generally focused on technical aspects, with particular emphasis on the procedures and scope for sharing relevant information with law enforcement authorities, including the police. This issue has garnered considerable attention as stakeholders seek clarity on how information sharing will be managed.

Regarding the DMA, the focus has been somewhat limited due to its largely technical implementation. The primary concerns have centred on the European Commission's process for selecting gatekeepers and the enforcement of DMA provisions. Specific attention has been given to practices by major tech companies, such as Meta's pay or consent practices and Google's self-preferencing on Google Shopping, which are currently seen as key areas of scrutiny under the DMA.[48] Some practitioners dealt with the relationship between the DMA and the competition law in general and, in this connection, discussed the prospects for a parallel private enforcement of the DMA and of Article 102 TFEU.[49]

[46] See, for example, https://www.mpo.gov.cz/cz/podnikani/digitalni-ekonomika/digitalni-sluzby/na-digitalni-ekonomiku-dohledne-cesky-telekomunikacni-urad---276277/ (25 August 2024).

[47] Cf. https://www.odok.cz/portal/veklep/material/pripominky/ALBSCWAFVK4T/ (14 September 2024).

[48] See, for example, https://www.patria.cz/zpravodajstvi/5828764/narizeni-o-digitalnich-trzich-dma-plati-prvni-mesic-komise-uz-vysetruje-apple-google-i-metu.html (25 August 2024).

[49] See Kindl, J. Prospects for concurrent private enforcement of the DMA and Article 102 TFEU. Journal of Antitrust Enforcement, 2024, 12, pp. 241–246.

Denmark

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Section 1: National institutional set-up

Question 1

The Danish Competition and Consumer Authority has been designated as the competent authority (Article 49(1) of the DSA) and as Digital Services Coordinator (Article 49(2) of the DSA).[1] One of the reasons for designating the Competition and Consumer Authority is that it is already the competent Authority for the Directive on electronic commerce[2] and the DSA and thus possesses relevant competencies.[3]

The Law on Enforcement of the DSA provides legal basis for the Minister for Industry, Business and Financial Affairs to designate other public authorities as competent authorities, also in the remit of other ministries, upon agreement hereon with the relevant Minister.[4] However, by royal resolution of 29 August 2024, this responsibility was transferred to the Ministry of Digitization that was appointed as the resort Ministry for the DSA.[5] So far, the Danish Competition and Consumer Authority remains the competent authority. It is

* The National Rapporteurs have been in dialogue with employees at the Danish Competition and Consumer Authority to answer the questions in this questionnaire. Thus, they would like to thank Head of Division, Susanne Aaman, and Special Advisor, Erik Dahlberg.

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[1] Section 3(1) of Lov om håndhævelse af Europa-Parlamentets og Rådets forordning om et indre marked for digitale tjenester, LOV nr. 1765 af 28/12/2023 (henceforth: Law on Enforcement of the DSA), available at: https://www.retsinformation.dk/eli/lta/2023/1765, accessed September 2024.

[2] Article 19 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ 2000 L 178/1, as amended.

[3] General comments in section 3.2.3.1 of Forslag til Lov om håndhævelse af Europa-Parlamentets og Rådets forordning om et indre marked for digitale tjenester, fremsat af erhvervsministeren 25. oktober 2023 (Proposal for law on enforcement of the DSA by the Minister for Industry, Business and Financial Affairs on 25 October 2023 (henceforth: Proposal for law on enforcement of the DSA), available at: https://www.retsinformation.dk/eli/ft/202312L00060, accessed September 2024.

[4] Section 3(2) of the Law on Enforcement of the DSA.

[5] https://www.stm.dk/media/13387/kgl-resolution-af-29-august-2024.pdf, accessed September 2024.

stated in the preparatory acts that it may be necessary to designate other public authorities to carry out specific tasks or cover certain areas related to the supervision and enforcement under the DSA.[6] Further, it is explained that it is necessary to gain experience with the character and scope of violations of the DSA before it can be determined whether designation of additional competent authorities is needed.

Generally, the Law on Enforcement of the DSA perceives the term "Digital Services Coordinator" as covered by the term "competent authority" and is thus primarily directed at the competent authorities.[7]

Question 2

The Danish legislator has estimated that the annual cost of the tasks concerning the DSA will be DKK 5.1 million (approx. EUR 684,000).[8] The financing of the tasks will be evaluated in 2025. In this context, it will be assessed whether a formal registration of the undertakings subject to the competent authority's supervision would be possible/useful and whether it would be possible to adopt a legal basis to charge fees from these undertakings to contribute to the financing of the tasks of the competent authority. However, current experience of the competent authority shows that complaints so far mainly concern international platforms or platforms established in other Member States.

The Competition and Consumer Authority has been designated as the competent authority, with the Director General of the Authority as the head responsible for the enforcement. Internally in the Authority, the tasks of the competent authority have been assigned to a dedicated unit with a Head of Division. Information on the number of Full Time Employees in the DSA-unit is not available but corresponds to the mentioned budget.

The Danish legislator has assessed that handling of complaints could take place via the existing IT-systems after they have been adapted for this purpose.

Question 3

Prior to the adoption of the Law on enforcement of the DSA a preliminary study was done to identify undertakings covered by the DSA and thereby estimate the scope of the tasks of the competent authority, but this study is not publicly

[6] Specific comments to Section 3 of Proposal for law on enforcement of the DSA.

[7] Based on Article 49(4) of the DSA. In this regard, see specific comments to Section 3 in the Proposal for law on enforcement of the DSA.

[8] Section 4 in the general comments of the Proposal for law on enforcement of the DSA.

available. The feasibility and usefulness of a scoping exercise will be assessed in the 2025 evaluation mentioned in the reply to Question 2, Section 1.

The initial experience of the competent authority is that so far, they have:

- Informed the identified undertakings about the DSA;
- Conducted initial examination of all complaints received and as mentioned, the complaints mainly concern platforms established in other Member States or in third countries;
- Proactively identified cases where the DSA is relevant and in serious cases inform victims of their options to complaint.

Thus, the initial experience is that violation of the DSA is not a major issue on Danish-based platforms. Until now, the role of the competent authority is more of a screening function for the complaints which are then forwarded to and handled by either the Commission or Digital Services Coordinators and competent authorities in the relevant Member State.

Question 4

The Danish Competition and Consumer Authority has been designated as the competent authority according to Article 38 of the DMA.[9] One of the reasons for designating the Danish Competition and Consumer Authority is that it is familiar with the obligations under the DMA and has experience from similar types of investigations in accordance with the competition rules.[10] In Denmark, the Danish Competition and Consumer Authority and the Danish Competition Council constitute an independent competition authority.[11] The Danish Competition Council is responsible for the Danish Competition and Consumer Authority's administration of the Danish Competition Act including ministerial decrees issued pursuant thereto and the Law on Supplementary Provisions to the DMA.[12] The Danish Competition and Consumer Authority

[9] Section 2(2) of Lov om supplerende bestemmelser til Europa-Parlamentets og Rådets forordning om digitale markeder, LOV nr. 1533 af 12/12/2023 (henceforth: Law on supplementary provisions to the DMA), available at: https://www.retsinformation.dk/eli/lta/2023/1533, accessed September 2024.

[10] General comments in section 3.2.3 of Forslag til Lov om supplerende bestemmelser til Europa-Parlamentets og Rådets forordning om digitale markeder, fremsat af erhvervsministeren d. 04. oktober 2023 (henceforth: Proposal for the Law on Supplementary Provisions to the DMA), available at: https://www.retsinformation.dk/eli/ft/202312L00037, accessed September 2024.

[11] The division of tasks between the Danish Competition Council and the Danish Competition and Consumer Authority is stated in Bekendtgørelse om forretningsorden for Konkurrencerådet, BEK nr. 399 af 11/03/2021 available at: https://www.retsinformation.dk/eli/lta/2021/399, accessed September 2024.

[12] Section 15(3) of Bekendtgørelse af konkurrenceloven, lbk nr. 360 af 04/03/2021 (consolidated version of the Danish Competition Act), available at: https://www.retsinformation.dk/eli/

acts as the secretariat of the Competition Council and is responsible for the day-to-day administration. Thus, both the Danish Competition Council and the Danish Competition and Consumer Authority jointly assist the European Commission with the DMA enforcement.

The competent authority can request the European Commission to open a market investigation.[13] According to section 2(4) of the Law on Supplementary Provisions to the DMA, the competent authority must first obtain approval from the Danish Competition Council before they can make a request for a market investigation to the European Commission.

In addition, the competent authority has the power to initiate its own investigation into possible non-compliance with Articles 5, 6, and 7 of the DMA in Denmark.[14] According to section 3(2) of the Law on Supplementary Provisions to the DMA, the competent authority has the right to investigate by its own initiative or following a complaint. The competent authority decides whether an investigation must continue including whether to suspend an investigation, either permanently or temporarily.[15] Before initiating the first formal investigative measure, the competent authority must inform the European Commission in writing.[16] After a completed investigation of possible non-compliance in Denmark, the competent authority may notify the European Commission of its findings. The Danish Competition Council must approve the findings of such an investigation before the competent authority can forward the conclusions of the investigation to the European Commission.[17] Hence, the competent authority cannot communicate the findings of the investigation before approval by the Danish Competition Council.

Section 4(1) of the Law on Supplementary Provisions to the DMA grants the competent authority the right to request all necessary information, access to algorithms and information about tests, and require explanations regarding these, as deemed necessary for the authority to carry out its tasks under the Law on Supplementary Provisions to the DMA

Moreover, under section 5(1) of the Law Supplementary Provisions to the DMA, the competent authority is empowered to conduct interviews with any legal or natural person who consents, provided the person is believed to pos-

lta/2021/360, accessed September 2024. Furthermore, this is stated in section 2(1) of the Law on Supplementary Provisions to the DMA.

[13] Pursuant to Article 41 of the DMA and section 2(3) of Law on supplementary provisions to the DMA.

[14] Section 3(1) of the Law on Supplementary Provisions to the DMA.

[15] Section 3(3) of the Law on Supplementary Provisions to the DMA.

[16] Pursuant to Article 38(7) of the DMA.

[17] Section 3(4) of the law on Supplementary Provisions to the DMA.

sess relevant information necessary for investigating potential non-compliance with Articles 5, 6, and 7 of the DMA in Denmark.

Question 5

The Danish legislator has estimated the yearly cost of the tasks concerning the DMA will be below DKK 4 million (approximately EUR 536.303).[18] Furthermore, the Danish Competition and Consumer Authority states that the administration of the DMA can take place within the existing IT systems.[19] The Danish Competition and Consumer Authority estimates that there will be approximately one Full-Time Equivalent employee dedicated to DMA enforcement assistance depending on the tasks.

Question 6

The Danish Competition and Consumer Authority has not announced any enforcement priorities. However, it is expected by the Authority that the tasks largely will be coordinated with the European Commission.

Section 2: Use of national legislative leeway under the DMA/DSA

Question 1

Section 18 of the Law on Enforcement of the DSA implements Article 89 of the DSA on deletion of Article 12-15 of the E-Commerce Directive by deleting section 14–16 of the Danish E-commerce Law.[20]

See also the reply to Question 2 below.

Question 2

On 27 February 2020, a political party outside the government proposed to regulate removal of illegal content on social media.[21] The proposal was not

[18] General comments in section 11 of Proposal for the Law on Supplementary Provisions to the DMA.

[19] General comments in section 5 of Proposal for the Law on Supplementary Provisions to the DMA.

[20] Lov om tjenester i informationssamfundet, herunder visse aspekter af elektronisk handel, lov nr. 227 af 22/04/2002, available at: https://www.retsinformation.dk/eli/lta/2002/227, accessed September 2024.

[21] The proposal is available here: https://www.retsinformation.dk/eli/ft/20191BB00116, accessed September 2024.

adopted, because the government was examining the possibility for proposing such legislation in more detail.

On 15 March 2022, the government proposed new legislation on regulation of social media.[22] The purpose of the proposal was to increase the protection against illegal content and to increase transparency regarding content moderation on communication platforms and group message services. The proposal was intended to supplement the TCO-Regulation,[23] the P2B-Regulation,[24] as well as national law implementing certain provisions of EU Directives on online content-sharing service providers[25] and on video-sharing platform services.[26] The proposal was described as being similar to the German NetzDG.[27] The proposed law was to be adapted to the DSA when the DSA entered into force in February 2024. After dialogue with the Commission, the proposal was withdrawn partly because the adoption of the DSA was imminent.[28]

Question 3

In 2021, the Danish marketing law was amended to further protect children against marketing.[29] The existing prohibition on directing marketing for drugs

[22] The proposal is available at: https://www.ft.dk/ripdf/samling/20211/lovforslag/l146/20211_l146_som_fremsat.pdf, accessed September 2024.

[23] 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 2021 L172/79.

[24] 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 2019 L 186/57.

[25] Directive 2019/790/EU 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 2019 L 130/92, as implemented by Lov om ændring af lov om ophavsret, lov nr. nr 1121 af 04/06/2021, available at: https://www.retsinformation.dk/eli/lta/2021/1121; see also the consolidated law, Bekendtgørelse af lov om ophavsret, lbk nr. 1093 af 20/08/2023, available at: https://www.retsinformation.dk/eli/lta/2023/1093. Both accessed September2024.

[26] Directive 2018/1808/EU of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, OJ 2018 L 303/69, implemented by Lov om ændring af lov om radio- og fjernsynsvirksomhed og lov om film, lov nr. 805 af 09/06/2020, available at: https://www.retsinformation.dk/eli/lta/2020/805; see also the consolidated law, Bekendtgørelse af lov om radio- og fjernsynsvirksomhed m.v., lbk nr. 1350 af 04/09/2020, available at: https://www.retsinformation.dk/eli/lta/2020/1350. Both accessed September 2024.

[27] With the amendments adopted on 3 June 2021: https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//*%5b@attr_id=%27bgbl121s1436.pdf%27%5d#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl121s1436.pdf%27%5D__1715425646922, accessed September 2024.

[28] The withdrawal is available at: https://www.ft.dk/samling/20211/lovforslag/L146/bilag/22/2583080.pdf, accessed September 2024.

[29] Lov om ændring af lov om markedsføring, lov nr. 2192 af 30/11/2021, available at: https://www.retsinformation.dk/eli/lta/2021/2192; see also the consolidated law, Bekendtgørelse af

and alcohol to children was widened in scope to cover all "products not suitable for their age." Furthermore, the rules adopted prohibit the use of social media profiles belonging to – or perceived as belonging to – children under 15 years, in marketing targeted at children under 18 years.

The marketing law is currently used to regulate influencers. It is enforced by the Danish Consumer Ombudsman. There is continuous political debate on whether stricter regulation of influencers is necessary.

The government has appointed an expert committee to examine and recommend actions towards big search engines, platforms and social media.[30] In the spring of 2024, the government initiated a dialogue with market actors (Facebook, Google, Snapchat, and TikTok) on how verification of age of subscribers may be ensured.[31] Further, on 24 June 2024, the government presented an alliance with the organisations Dansk Ungdoms Fællesråd,[32] Red Barnet,[33] and Børns Vilkår[34] which will take initiatives to ensure a better balance between the digital and physical lives of children.[35] The two latter initiatives are policy oriented rather than legislative (at this stage).

Question 4

The DMA has not required legislative changes in Denmark. Thus, the DMA supplements Articles 101 and 102 TFEU and the corresponding Danish competition rules. Furthermore, the DMA supplements the Electronic Commerce Directive, which has been implemented in Danish law by the Danish Electronic Commerce law.[36] Additionally, the Danish Competition and Consumer Authority has established a department called "Center for Tech," which for several years focused on the tech area and digital markets.[37]

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lov om markedsføring, lbk nr. 866 af 15/06/2022, available at: https://www.retsinformation.dk/eli/lta/2022/866. Both accessed September 2024.

[30] The reports of the committee are available here: https://www.em.dk/aktuelt/temaer/tech-giganter (also in English), accessed September 2024.

[31] https://www.em.dk/aktuelt/nyheder/2024/mar/tech-giganter-indkaldes-til-moede-de-skal-tage-stoerre-ansvar-for-boern-og-unge, accessed September 2024.

[32] https://en.duf.dk/, accessed September 2024.

[33] https://redbarnet.dk/, accessed September 2024.

[34] https://bornsvilkar.dk/, accessed September 2024.

[35] https://www.regeringen.dk/aktuelt/publikationer-og-aftaletekster/alliancen-for-en-tryg-hverdag-for-boern-og-unge/, accessed September 2024.

[36] Lov om tjenester i informationssamfundet, herunder visse aspekter af elektronisk handel, lov nr. 227 af 22/04/2002, available at: https://www.retsinformation.dk/eli/lta/2002/227, accessed September 2024.

[37] For more about the Center for Tech: https://www.kfst.dk/konkurrenceforhold/kontakt-et-konkurrencecenter/center-for-tech-tech/, accessed September 2024.

Question 5

On 28 February 2024, the Danish legislator proposed amendments of the Danish Competition Act.[38] The Amending Act to the Danish Competition Act entered into force on 1 July 2024.[39] One of the amendments is the introduction of a market investigation tool that enables the Danish Competition and Consumer Authority to investigate structures or practices in business sectors where there is evidence of conditions weakening effective competition.[40] The market investigation tool empowers the Danish Competition and Consumer Authority to open market investigations following approval by the Danish Competition Council.[41] If the Danish Competition and Consumer Authority through its market investigation finds that there are conditions that clearly weaken effective competition, the Danish Competition and Consumer Authority will after a consultation process be entitled to impose behavioural remedies on the relevant undertakings or enter into binding commitment agreements.[42] However, the tool does not grant the Authority the powers to impose structural remedies.

The market investigation tool should be considered as a supplement to the enforcement and intervention options available to the Danish Competition and Consumer Authority under applicable law.[43] The legislator does not provide specific examples of situations where the Danish Competition and Consumer Authority, based on the market investigation tool, will be able to intervene against behaviour or structures that weaken effective competition. However, the legislator has stated that the purpose of the introduction of the market investigation tool is to ensure more effective competition by strengthening the competition authorities' ability to investigate and intervene where the current competition rules are not sufficiently effective.[44] In this connection, it is emphasised by the legislator that new technologies and new business models may significantly change the competitive conditions in certain markets, and it is therefore essential that the competition authority can take this into account and adapt to the developments.[45] Thus, it must be expected that the market investigation tool can also be applied to ensure effective competition in digital

[38] The proposal is available here: https://www.retsinformation.dk/eli/ft/202312L00121, accessed September 2024.

[39] Section 2(1) of Forslag til Lov om ændring af konkurrenceloven, fremsat af erhvervsministeren d. 11. juni 2024, henceforth: Amending Act to the Danish Competition Act, available at: https://www.retsinformation.dk/eli/lta/2024/638, accessed September 2024.

[40] Section 15f(1) of the amending act to the Danish Competition Act.

[41] Section 15f(3) of the amending act to the Danish Competition Act.

[42] Section 15f(5) and section 15f(6) of the amending act to the Danish Competition Act. The Danish Competition and Consumer Authority cannot impose structural orders as part of a market investigation tool.

[43] General comments in section 2.2.2 of Proposal for the Law on Supplementary Provisions to the DMA.

[44] Ibidem.

[45] Ibidem.

markets. The Danish Competition and Consumer Authority is expected to exercise its powers under the DMA alongside general competition law. The market investigation tool is not restricted to specific sectors or business practices and thus there may be an overlap between the market investigation tool and the DMA. In this regard, the Danish Competition and Consumer Authority and the European Commission are expected to cooperate closely and coordinate enforcement actions against gatekeepers to ensure that the available legal instruments are used effectively and coherently.[46]

Section 3: Vertical and horizontal public enforcement-related cooperation under DSA/DMA

Question 1

The DSA

The Law on Enforcement of the DSA contains procedural rules that supplement the DSA. Section 2(3) of the Law on Enforcement of the DSA provides that the law also applies where Danish authorities assist other Member States or the European Commission, according to Article 57(2), Article 60(4) and Article 66(3) of the DSA. For example, Section 7 of the Law on Enforcement of the DSA regulates the inspection of premises that competent authorities may carry out according to Article 51(1)(b) of the DSA, and this provision applies irrespectively of whether the inspection is carried out for the purpose of a national case or to assist other Member States or the European Commission.

The DMA

The objective of the Law on Supplementary Provisions to the DMA is to give the Danish Competition and Consumer Authority powers to support the European Commission in ensuring sufficient and effective enforcement of the DMA.[47] Thus, the Law on Supplementary Provisions to the DMA regulates the cooperation between the competent authority and the European Commission. There are no provisions that regulate cooperation between the Danish competent authority and the competent authorities of other Member States.

However, the Director General of the Danish Competition and Consumer Authority, Jakob Hald, has been appointed as a member of the high-level working group for the DMA.[48] Jakob Hald participates as one of six representatives of

[46] Pursuant to Article 37(1) of the DMA.

[47] Section 1 of the Law on Supplementary Provisions to the DMA.

[48] Commission Decision of 23 March 2023 on setting up the High-Level Group for the Digital Markets Act C(2023)1833 is available here: https://competition-policy.ec.europa.eu/document/download/a46c9a1d-54c1-4025-aa45-f454f52790fc_en?filename=High_Level_Group_on_the_DMA_0.pdf, accessed September 2024

the network of European competition authorities in the EU (ECN) and was appointed for two years.[49] Among other things, the high-level group provides the EU Commission with advice and recommendations on matters relating to the enforcement of the DMA.

Question 2

The DSA
No specific rules have been adopted in this regard, thus, only the DSA applies.

The DMA
No specific rules have been adopted in this regard, thus, only the DMA applies.

Question 3

The Danish Competition and Consumer Authority expects that few Danish companies will be able to compete directly with the tech giants designated under the DMA. This emphasises the growing importance of business users in Denmark in raising competitive concerns with the Authority. The Danish Competition and Consumer Authority also expects that collaboration with the European Commission will be particularly valuable in relation to tasks involving the assessment of technical details and data access requirements.

Section 4: Private enforcement of DMA/DSA

Question 1

The DSA
To the knowledge of the authors, at the time of writing, no actions have yet been brought by private parties to enforce the DSA.

The DMA
To the knowledge of the authors, no actions have yet been brought by private parties to enforce the DMA at the time of writing.

[49] https://www.kfst.dk/pressemeddelelser/kfst/2023/20230502-konkurrence-og-forbrugerstyrelsen-skal-raadgive-om-eu-regulering-af-tech-giganter/ and https://digital-strategy.ec.europa.eu/en/news/digital-markets-act-commission-creates-high-level-group-provide-advice-and-expertise-implementation, both accessed September 2024.

Question 2

The access to submit complaints to the competent authority seems to be the most likely venue for enforcement of the DSA by private parties against other private parties.

The competent authority is not a mandatory first instance, so private actors may bring a case directly before the national courts. Such cases could concern decisions of the competent authority or failure of the competent authority to act. They may also concern direct enforcement of the DSA against private parties.

As the Danish business organisations have taken an interest in the legislative process at both the EU level and national level, it is not unlikely that business organisations would engage in private enforcement in matters affecting their members.

Question 3

According to 3(3) of the Law on Supplementary Provisions to the DMA, the competent authority has the right to carry out an investigation by its own initiative or following a complaint.[50] The access to submit complaints to the competent authority seems to be the most likely venue for enforcement of the DMA by private parties against other private parties. However, the private actors may bring a case directly before the national courts, and thus, obligations under the DMA can be enforced under private law according to Article 39 of the DMA.

As the Danish business organisations have taken an interest in the legislative process at both the EU level and national level, it is not unlikely that business organisations would engage in private enforcement in matters affecting their members.

Question 4

The DSA
No to both questions.

[50] The DMA itself does not contain an explicit reference to private enforcement, and there is not a provision on the compensation for damages caused by an infringement of the DMA, unlike Article 54 of the DSA.

The DMA
No to both questions.

Question 5

A civil society organisation may intervene in a pending private dispute if it has a legal interest in the outcome of the case.[51] Application to intervene must be submitted in writing to the relevant court or the court may allow an oral submission of the application at a hearing.[52] The court decides on how the intervener may participate in the case, for example, whether it is allowed to submit evidence.[53]

The court may require the intervener to pay (part of) the cost of the case, or alternatively may order other parties to pay (part of) the cost of the intervener, depending on the outcome of the case.

Section 5: General questions

Question 1

Article 9 and 10 of the DSA are implemented in Section 16 of the Law on Enforcement of the DSA. This section merely points out that the injunctions must comply with the criteria in Article 9(2) and 10(2) respectively of the DSA. The purpose is to make the competent authorities aware of the requirements in the DSA.[54]

The injunctions in Articles 4(3), 5(2) and 6(4) are not specifically regulated in the Law on Enforcement of the DSA.

Question 2

At the time of writing, no legal representatives have been registered in Denmark.

[51] Section 420(2) of Bekendtgørelse af lov om rettens pleje, lbk nr. 250 af 04/03/2024 (consolidated version of the law on administration of justice), available at: https://www.retsinformation.dk/eli/lta/2024/250, accessed September 2024.

[52] Section 252(3) of the law on administration of justice

[53] Section 252(4) of the law on administration of justice.

[54] Specific comments to Section 16 in Proposal for law on enforcement of the DSA.

Question 3

Section 5 of the Law on Enforcement of the DSA implements Article 53 of the DSA. Section 5(2) provides that the competent authority may reject complaints without making any further assessment. It is stated that the competent authority in particular must take into account the purpose provided in Article 1 of the DSA when prioritising which complaints to investigate further. This rule was debated in the legislative process, cf. below in the reply to Question 4, Section 5Under general principles in Danish administrative law, decisions of public authorities may be appealed to a higher public authority. Section 5(3) of the Law on Enforcement of the DSA provides that there is no such access to appeal the decisions of the competent authorities. Thus, decisions of the competent authorities can only be contested before national courts. The rule is intended to ensure the independence of the competent authorities.[55]

In section 5(4), a legal basis is provided for the Minister for industry, business and financial affairs to adopt rules on submission of complaints, such as formal requirements and digital submission.

Question 4

The DSA

Several topics were debated during the implementation of the DSA; the main points may be summarised as follows:[56]

- Section 5(2) of the Law on Enforcement of the DSA contains a right of the competent authority to prioritise cases, including complaints, according to the objectives of the DSA. In the prioritising, the competent authority must consider i.a. the seriousness of the breach and whether an individual or the general public is affected.[57] Arguments against this rule included the lack of clarity on rejection of complaints and thus the wide discretion granted to the competent authority in this regard. The provision was adopted.
- Section 12 of the Law on Enforcement of the DSA contains derogation from the Law on access to documents.[58] The two main reasons for the derogation are stated to be (a) the competent authority's wide access to information, cf. Article 51(1) of the DSA, which will include information of internal character

[55] Section 3.3.3.1 of the general comments in Proposal for law on enforcement of the DSA.

[56] See in particular the replies to the public consultation on the Proposal for law on enforcement of the DSA, available at: https://www.ft.dk/samling/20231/lovforslag/L60/bilag/1/2769974.pdf as well as the political debate on 17 November 2023: https://www.ft.dk/samling/20231/lovforslag/L60/BEH1-20/forhandling.htm, both accessed September 2024.

[57] Specific comments to section 5(2) of the Proposal for law on enforcement of the DSA.

[58] Bekendtgørelse af lov om offentlighed i forvaltningen, LBK nr 145 af 24/02/2020, available at: https://www.retsinformation.dk/eli/lta/2020/145, accessed September 2024.

that – whereas not necessarily confidential – was never intended to be shared with the public;[59] and (b) that the obligations to publish decisions and annual reports ensures sufficient transparency. Arguments against this derogation included that the derogation was not necessary because even under the Law on access to documents, it is possible to redact confidential information. The derogation was adopted.
- Designation of a single competent authority. Arguments against appointment of just one competence authority concerned the competence issues that could arise in specific situations where the subject matter of a case is also within the scope of the competence of other authorities.

The DMA

Several topics were debated during the implementation of the DMA; the main points may be summarised as follows:[60]

- Section 4(1) of the Law on Supplementary Provisions to the DMA grants the competent authority the right to request all necessary information, access to algorithms and information about tests, and require explanations regarding these, as deemed necessary for the performance of the tasks assigned to the competent authority under the Law on Supplementary Provisions to the DMA.[61] Arguments against this rule included the lack of clarity regarding the duty to provide information and the wide discretion granted to the competent authority in this regard including confidentiality about the information collected. The provision was adopted.
- Section 6(1) of the Law on Supplementary Provisions to the DMA contains derogation from the Law on Access to Documents with a few exceptions.[62] The two main reasons for the derogation are stated to be: (1) The competent authority may receive business-sensitive information and similar matters, making it essential to ensure confidentiality and non-disclosure. Undertakings must be able to act in confidence knowing that information provided to the competent authority can be kept confidential; (2) The competent authority's ability to effectively carry out investigations.[63] Arguments against this derogation included that the derogation was not necessary because even under the Law on Access to Documents, it is possible to redact confidential information. The derogation was adopted.

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[59] Specific comments to section 12 of the Proposal for law on enforcement of the DSA.

[60] See in particular the replies to the public consultation on the Proposal for law on enforcement of the DMA, available at: https://www.ft.dk/samling/20231/lovforslag/L37/bilag/1/2759445.pdf, accessed September 2024.

[61] Reply to public consultation regarding the Proposal for law on enforcement of the DMA: https://www.ft.dk/samling/20231/lovforslag/L37/bilag/1/2759445.pdf, accessed September 2024.

[62] Bekendtgørelse af lov om offentlighed i forvaltningen, LBK nr. 145 af 24/02/2020, available at: https://www.retsinformation.dk/eli/lta/2020/145, accessed September 2024.

[63] As stated by the Danish legislator in the general comments on section 6 of Proposal for the Law on Supplementary Provisions to the DMA.

Section 8 of the Law on Supplementary Provisions to the DMA contains a right of the competent authority to impose daily or weekly compulsory fines to undertakings, associations of undertakings, and any other legal person that supplies incorrect, incomplete information or fails to supply the information requested within the time limit set by the competent authority. The fines can amount to up to 5% of the average daily turnover worldwide in the preceding financial year per day. Arguments against this included that this right was not necessary because the European Commission is the sole enforcer of the DMA and thus the competent authority is expected to support the European Commission. Furthermore, there is no time limit on how long compulsory fines can be given and the fine level appears to be very high. The provision was adopted

Question 5

The DSA
In Denmark, the Danish Competition and Consumer Authority is responsible for certifying out-of-court dispute resolution bodies. To become an out-of-court dispute resolution body in Denmark, several conditions must be met.[64]

The DMA
To the knowledge of the authors, there is no an out-of-court dispute resolution body for the DMA and nor DMA-focused consumer organisation at the time of writing.

Question 6

The DSA
The competent authority points to the difficulty in locating undertakings that provide mere conduit and caching services. Further, the competent authority points out that the DSA's use of delegated acts, for example, for access for researchers to data from very large online platforms or of very large online search engines under Article 40 of the DSA, has led to a delay which is difficult to communicate to the persons affected.

Several issues have been raised by practitioners and academics. For example, the trade-off between freedom of speech and protection of victims. In this context, the lack of a specific time limit for (temporary) removal of illegal

[64] Read more about the creation of out-of-court dispute resolution bodies in Denmark here: https://www.kfst.dk/forbrugerforhold/digitale-formidlingstjenester-dsa/paalidelig-indberetter-forsker-eller-tvistbilaegger/udenretsligt-tvistbilaeggelsesorgan/, accessed September 2024.

content has been criticised. Further, it has been raised that the interaction between the DSA (regulating mainly procedural aspects) and other regulation on the substance (such as e.g., the GDPR[65]) is very complex and that use of delegated acts entails that the rules develop consecutively which can make it difficult for undertakings and individuals to maintain an overview of rights and obligations.

At political level there is a focus on the need for technical solutions to protect children from certain content, such as age-verification tools, but there is also an acknowledgement that European solutions are necessary.

DMA

An issue that has been raised is that the DMA applies as an ex-ante regulatory tool. Thus, there may be some infant uncertainty associated with the enforcement of the DMA in Denmark, hereunder procedural aspects. This includes the scope for national investigations into possible non-compliance according to Articles 5, 6, and 7 of the DMA.

[65] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1.

Finland

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Introduction

In Finland, the national implementation of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act, DSA) was mainly accomplished via the Act on Supervision of Online Intermediary Services and Certain Other Acts (later SOISA).[1] In addition, the following acts were amended: Act on Certain Competencies of Consumer Protection Authorities,[2] Act on Provision of Electronic Communications Services (later PECSA)[3] and Act on Judicial Procedure in the Market Court,[4] while the enforcement of the DSA also required complementary rules on supervision.[5] Moreover, national provisions were enacted that complement Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act, DMA). These provisions amend the Act on the Finnish Competition and Consumer Authority (later FCCA Act[6]) and are included in new Chapter 1 b.

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[1] Laki verkon välityspalvelujen valvonnasta 18/2024; unofficial translation. Please, note that unofficial translations by the national rapporteurs are used throughout the report where official translations or unofficial translations by officials are not available at the time of writing. Finnish legislation is legally binding only in Finnish and Swedish. Where applicable, the terminology of EU law is used.

[2] Kuluttajansuojaviranomaisten eräistä toimivaltuuksista annettu laki 566/2020; unofficial translation.

[3] Sähköisen viestinnän palveluista annettu laki 917/2014, sakon täytäntöönpanosta annettu laki 672/2002; unofficial translation.

[4] Oikeudenkäynnistä markkinaoikeudessa annettu laki 100/2013; unofficial translation.

[5] Government proposal for Act on the Supervision of Online Intermediary Services and Certain Other Acts – HE 70/2023 vp Hallituksen esitys eduskunnalle laiksi verkon välityspalvelujen valvonnasta ja eräiksi muiksi laeiksi.

[6] Laki kilpailu- ja kuluttajavirastosta 661/2012; unofficial translation.

The purpose was to clarify the competence of the national authorities in terms of information exchange as well as assisting the Commission in inspections and market investigations.[7] The DSA related amendments entered into force 17 Feb 2024, while those related to the DMA followed on 15 May 2024.

Section 1: National institutional set-up

Questions 1, 2, and 3

The DSA regulatory framework is linked to the activities of various national authorities, while new competencies and functions were also established in implementing the new regulation. Competent authorities include the Finnish Transport and Communications Agency Traficom, with its new sanctions board, and the Consumer Ombudsman, as well as the Data Protection Ombudsman. Sections 1–3 SOISA include provisions on the roles and competencies of relevant authorities. Traficom is the coordinating authority (Digital Services Coordinator) and principal supervisory authority in the DSA framework (Sec 1 and Sec 3(3) SOISA), while having the relevant duties derived from the regulation.[8] The Act on the Transport and Communications Agency (Traficom Act)[9] includes institutional provisions and tasks of Traficom, while its competences derive from national provisions, EU-law and international law obligations. The Consumer Ombudsman has competence with regard to articles 25, 26(1) a-c, 26(2), 37, and 32(7) DSA (Sec 2 SOISA), while the competences of the Data Protection Ombudsman are linked to Articles 26(1) a-d, 26(3), 27, and 28 DSA (Sec 3(1) SOISA). The division of responsibilities and competencies means that contact to Traficom may concern, for example, the lack or passivity of notification procedures from the online platform's side, whereas contacts related to platforms belonging under the umbrella of the Commission and other national coordinators would be forwarded to them.[10] The Consumer Ombudsman handles contacts related to consumer relations, including in cases of so called "dark patterns"[11] or regarding deficiencies related to the identifiability

[7] Government proposal on amending the Act on the Finnish Competition and Consumer Authority – HE 11/2024 vp Hallituksen esitys eduskunnalle laiksi Kilpailu- ja kuluttajavirastosta annetun lain muuttamisesta.

[8] See *EU digital and data statutes in a nutshell*, Traficom, 5 June 2024: https://www.traficom.fi/en/communications/data-economy-and-digital-services/eu-digital-and-data-statutes-nutshell. Accessed 12 Sept. 2024.

[9] Laki liikenne- ja viestintävirastosta 935/2018, unofficial translation.

[10] See *The rights of an online platform user*, Traficom, 9 Sept. 2024: https://www.traficom.fi/en/communications/data-economy-and-digital-services/rights-online-platform-user. Accessed 12 Sept. 2024.

[11] See e.g., Luguri, Jamie, and Lior Jacob Strahilevitz. "Shining a Light on Dark Patterns." *Journal of Legal Analysis*, vol. 13, issue 1, 2021, pp. 43–109. https://doi.org/10.1093/jla/laaa006 "Dark patterns are user interfaces whose designers knowingly confuse users, make it difficult for users to express their actual preferences, or manipulate users into taking certain actions."

of advertisements and trader information.[12] Contacts to the Data Protection Ombudsman could involve other types of deficiencies, such as those related to the identifiability of ideological and societal advertising, targeted advertising based on sensitive personal data or profiling of minors, or transparency issues of advertising and recommender systems.[13]

Traficom functions as the main supervisory authority, while the other two have more specific competencies in their operational fields. This division of powers was deemed as the most efficient option taking into account some overlapping areas.[14] With the DSA related legislative amendments, the relevant authorities also gained DSA related powers to access and exchange information, conduct activities (incl. inspections, investigations), and order sanctions, while including updated provisions on decision-making powers (Sections 7 and 7a Traficom Act) and the establishment of the Traficom sanctions board.[15] The competences pursuant to SOISA also include the right to request access to an intermediary service to be blocked by a court in cases of violations.[16] At the moment, Finland lacks the establishment of gatekeepers, but the Commission may request relevant information from national authorities as well as carry out inspections in Finland in which case Traficom would assist the Commission (Art. 69 DSA). Traficom also coordinates questions related to the application of the DSA and acts as a national contact point in relation to intermediary service providers and service recipients, consumers, trusted flaggers, researchers, as well as other authorities.[17] Traficom supervises intermediary services established in Finland, including mere transmission and caching, while there are no "very large online platforms" (VLOPs) in Finland.[18] Nonetheless,

[12] See Government proposal HE 70/2023 vp, p. 46 where the following articles of DSA are noted in the context of the Consumer Ombudsman's competence: Article 25; Article 26(1a), (1b) and (1c); Article 26 (2); Article 30(7); and Article 32. See also *The rights of an online platform user*, Traficom, 9 Sept. 2024: https://www.traficom.fi/en/communications/data-economy-and-digital-services/rights-online-platform-user. Accessed 12 Sept 2024. For Consumer Ombudsman, see Seppo Villa et al., *Yritysoikeus*. Alma Talent, 2020 (online version updated 2 May 2024), Chapter VII.

[13] See *The rights of an online platform user*, Traficom, 9 Sept9. 2024: https://www.traficom.fi/en/communications/data-economy-and-digital-services/rights-online-platform-use; also *The Digital Services Act and powers of the Data Protection Ombudsman in the monitoring of online platforms*, Office of the Data Protection Ombudsman, https://tietosuoja.fi/en/digital-services-act. Accessed 12 Sept. 2024. For the national Data Ombudsman and its competences in general, see Päivi Korpisaari, Olli Pitkänen and Eija Warma-Lehtinen, *Tietosuoja*. Alma Talent, 2022 (2nd ed.), Chapter VI.

[14] See Government proposal HE 70/2023 vp, pp. 30, 52. See also ibidem. p. 30 where it is noted that the directly applicable provisions of the DSA entrust the nationally designated Digital Services Coordinator with the task of coordinating national supervision among several authorities.

[15] See Government proposal HE 70/2023 vp, p. 36. According to Sec 7 a of Traficom Act, the sanctions board issues fines exceeding 100.000 euros. The set up of a new collegial decision-making body was considered necessary in light of constitutional considerations, while not extending this to all of Traficom's activities (Government proposal HE 70/2023 vp, pp. 34–35).

[16] See Government proposal HE 70/2023 vp, p. 36.

[17] See Government proposal HE 70/2023 vp, pp. 31, 41.

[18] See Government proposal HE 70/2023 vp, p. 43, 46: it is estimated that there are around 70 sufficiently large online platforms established in Finland to fall within the scope of the DSA.

a complaint could be lodged by a Finnish service recipient to Traficom as coordinating authority (with the obligation to forward the complaint when necessary). With the DSA regulatory framework, the scope of supervision was expanded compared to the companies Traficom previously supervised.[19]

According to the preparatory works of the DSA related legislative amendments the priorities and actual implementation of the supervision are dependent both on the resources and the activity of various service recipients.[20] The reform was estimated to require additional EUR 650,000 in resources for Traficom (that is, 6.5 man-years), more precisely allocated in the following areas: the national coordination and cooperation with other authorities (1.5 man-years), complaint handling and supervision of the procedures of intermediary services, including the preparation penalty payments (2 man-years), advice to all stakeholders (1 man-year), as well as cooperation with the Commission and other Member States (1 man-year), and finally, the use of the information sharing system (ISS) (1 man-year). Moreover, it is noted that the establishment and activities of the sanctions board as well as updates to the procedure also require human resources, including permanently.[21]

The Consumer Ombudsman has a wide array of powers in the field of consumer protection both in terms of general competence and those deriving from special legislation.[22] The relevant definitions in this area also render intermediary service providers and their services within the scope of the DSA subject to supervision by the consumer ombudsman. The consumer ombudsman's competences pursuant to the Consumer Protection Act[23] (later CPA) relate to illegal content, such as unfair commercial practices in marketing, misleading information in customer service, and agreements that are unfair to consumers. Chapter 2 CPA contains, among other things, provisions on unfair conduct. Within the scope of the general competence, the consumer ombudsman also supervises the directly applicable EU consumer protection regulatory framework. The consumer ombudsman is equipped to prohibit unlawful

[19] See Government proposal HE 70/2023 vp, pp. 39, 43. According to the preparatory works, it is not possible to accurately estimate the number of providers of caching/transmission services in Finland since there is no general notification obligation. However, around 300 companies have submitted a telecommunications notification and there are about 3.000 domain brokers with.fi domains (ibidem p. 39).

[20] See Government proposal HE 70/2023 vp, p. 43. According to email exchange (Project Manager Jarmo Riikonen, 28 Oct. 2024), Traficom has received 6,5 fte resources for DSA enforcement, funded by the state budget.

[21] See Government proposal HE 70/2023 vp, pp. 44–45.

[22] For more, see Seppo Villa et al., *Yritysoikeus*. Alma Talent, 2020 (online version updated 2 May 2024), Chapter VII.

[23] Kuluttajansuojalaki 38/1978; unofficial translation by officials (2 Jan. 2024; amendments up to 740/2022 included). Available at https://www.finlex.fi/fi/laki/kaannokset/1978/en19780038_20220740.pdf

practices and impose penalty payments.[24] The prohibition is imposed by the Market Court (Ch. 2 CPA), while in some cases by the Consumer Ombudsman (Sec. 10 FCCA Act). Provisions on the imposition of penalty payments, imposed by the Market Court on the proposal of the Consumer Ombudsman, are laid down in the Act on Certain Powers of Consumer Protection Authorities[25] (later CPCPAA; Secs 13-16a). Moreover, the Consumer Ombudsman has the right of access to information from private and public parties (Secs 6-7), while in the former case, an obligation to provide information can also be imposed with a fine. The Consumer Ombudsman also has the right to carry out inspections (Sec 8). The CPCPAA was updated regarding the provisions on penalty payments related to the DSA (Secs 15 and 18).

Competences of relevant authorities targeting service providers' online interface and domain name may in practice also concern online platforms or other intermediary services. This may include orders to remove content or interface, block or restrict access, as well as to warn consumers. Furthermore, competent authorities may order the operator of the domain name registry (Traficom) or a domain name broker to deactivate domain names or designate them to the competent authority. These competences have been in force from 2020, while there is no experience of their application to date.[26] For their part, the obligations in Articles 25 and 26 DSA concerning online platforms (interface design and organisation as well as advertising) are new and complementary to the previously existing provisions of the CPA, broadening the scope of Consumer Ombudsman's authority: it is responsible for monitoring these situations in cases of consumer relations, while other cases would fall under the scope of FCCA and Data Protection Ombudsman respectively.[27] Moreover, according to the preparatory works, there is a need for international supervisory activities since Finnish consumers use platforms established in other EU countries and third countries.[28] All in all, the Consumer Ombudsman is equipped with new tasks both legally and technically, which was estimated in the preparatory works of the DSA reform to require a permanent resource of EUR 228.000 (3 man-yers). Resources are particularly required for supervisory activities and cooperation between authorities (2 man-years) as well as the development and maintenance of technical monitoring (1 man-year).[29]

[24] See Government proposal HE 70/2023 vp, pp. 28–29.

[25] Laki kuluttajansuojaviranomaisten eräistä toimivaltuuksista 566/2020; unofficial translation by officials (8 Feb. 2024). Available at https://www.finlex.fi/fi/laki/kaannokset/2020/en20200566.pdf

[26] See Government proposal HE 70/2023 vp, pp. 28–29.

[27] See Government proposal HE 70/2023 vp, p. 46.

[28] Government proposal HE 70/2023 vp, p. 46.

[29] See Government proposal HE 70/2023 vp, p. 48.

In Finland, the General Data Protection Regulation (EU) 2016/679 (GDPR) is accompanied by the Data Protection Act,[30] and the Data Protection Ombudsman has a general competence to monitor processing of personal data also in the context of intermediary services. The Data Ombudsman is the competent authority with regard to DSA provisions (Arts 26-28) overlapping with or detailing the GDPR, while not overstepping the above-mentioned competences of the Consumer Ombudsman.[31] The Data Ombudsman has extensive competencies to supervise processing of personal data, including the sanctions board which may impose administrative fines. Thus, the Data Ombudsman's Office was deemed to require an initial additional resource of EUR 85.000 per (1 man-year), while temporary resources were not deemed necessary for the process. Other resource needs would be discussed as part of annual budgetary considerations.[32]

In addition to the three main authorities, the police, the Market Court, and the Legal Register Centre (LRC) have a role within the DSA framework.[33] The resource needs for the police was deemed to stem from notification obligation of hosting service providers related to criminal offenses (Art. 18 DSA), equaling a minimum of EUR 425.000 (5 man-years).[34] The Market Court was deemed non-significantly affected by the number of cases deriving from the Consumer Ombudsman.[35] The LRC is responsible for the enforcement of fines and sanctions,[36] and therefore the workload and need for additional resources will be determined in the course of time.[37] The Market Court Proceedings Act[38] as well as the Act on the Enforcement of Fine[39] were also amended to include references to DSA related provisions.

Moreover, the obligation of national authorities to provide information and guidance related to the DSA/DMA has of course been triggered at the national level. Regarding the DSA, Traficom reports a rather low awareness of the regulation among end-users. The priority at the initial stage is to communicate information to stakeholders, while complaints primarily target few large social media platforms, reflecting the nature of internet use. Overall, national au-

[30] Tietosuojalaki 1050/2018; unofficial translation by officials (24 June 2024; amendments up to 29/2024 included). Available at https://www.finlex.fi/fi/laki/kaannokset/2018/en20181050_20240029.pdf

[31] Government proposal HE 70/2023 vp, pp. 29, 49.

[32] Government proposal HE 70/2023 vp, p. 50.

[33] See Government proposal HE 70/2023 vp, pp. 50–51.

[34] Government proposal HE 70/2023 vp, p. 50.

[35] Government proposal HE 70/2023 vp, p. 51.

[36] See *Fines and sanctions – enforcement,* Oikeusrekisterikeskus, 4 June 2024, https://www.oikeusrekisterikeskus.fi/en/index/services/moreinformationaboutenforcementoffinesandothersanctions.html. Accessed 12 Sept. 2024.

[37] See Government proposal HE 70/2023 vp, p. 51.

[38] Laki oikeudenkäynnistä markkinaoikeudessa 100/2013; unofficial translation by officials (7.1.2016). Available at https://finlex.fi/fi/laki/kaannokset/2013/en20130100.pdf

[39] Laki sakon täytäntöönpanosta 672/2002; unofficial translation.

thorities act partly based on the national market situation and priorities based on their wider activities, in which the DSA/DMA are only one part. Thereby, the DSA/DMA form a relatively limited area in relation to wider supervisory tasks of national authorities. Moreover, the economic situation and national public sector efficiency goals affect resource allocation. For example, in practice, the Consumer Ombudsman largely operates with 1 man-year dedicated to DSA related tasks, but these are dispersed to several staff members with differing areas of expertise.[40]

Questions 4 and 5

The Finnish Competition and Consumer Authority (FCCA) functions as the centralized national contact point in Finland in the connection of the DMA and it may request the Commission to open a market investigation.[41] The FCCA Act came to include a new Chapter 1 b which includes the tasks related to the DMA. These tasks include the following: The FCCA has the right of access to information regarding gatekeeper companies and it may forward this information to the Commission pursuant to Articles 21(5)[42] and 53(4) DMA as well as information acquired from third parties pursuant to Article 27 DMA (Sec 7 d FCCA Act). The FCCA also assists the Commission in conducting inspections and market surveys pursuant to Articles 23 and 16(5) DMA (Sec 7 e and 7 f FCCA Act). The amendments complement the regulation and safeguard clearly defined and sufficiently formulated competences.[43] National authorities were not deemed to be in need of any powers pursuant to Article 38(7) DMA mainly due to lack of gatekeepers' headquarters in Finland. However, the situation could be different in the future, as noted in the preparatory works of the reform.[44] The enforcement was noted to be primarily a task of the Commission, with assistance from the national level. The tasks related to information exchange and assistance were not deemed to have significant effects, while it would be possible to assess the workload of the FCCA only later in the process. However, in the preparatory works, this was considered to remain relatively small.[45]

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[40] Information about initial experiences of authorities: email exchange with Traficom (Project Manager Jarmo Riikonen, 28 Oct. 2024) and interview with Riikka Rosendahl, Team Manager, FCCA (online, 26 Sept.2024).

[41] Government proposal HE 11/2024 vp.

[42] See also Government proposal HE 11/2024 vp, pp. 34–35 where it is noted that relevant information could be held by the FCCA, the Data Protection Ombudsman, Traficom, or the Financial Supervisory Authority.

[43] See also *Government to name FCCA the national contact point for EU Digital Markets Act matter*s, Ministry of Economic Affairs and Employment, 29.2.2024, https://tem.fi/en/-/government-to-name-fcca-the-national-contact-point-for-eu-digital-markets-act-matters. Accessed 25 Sept. 2024.

[44] Government proposal HE 11/2024 vp.

[45] Government proposal HE 11/2024 vp, pp. 34–35.

Regarding other national authorities, no new competences were drafted for the Data Protection Ombudsman, Traficom, or the Financial Supervisory Authority in this connection. Obligations related to potential additional work derive directly from applicable legislation and depend on the activities of the Commission. In general, no drastic changes were deemed to derive from the DMA. National courts may face additional workload following cooperation pursuant to Article 39 DMA.[46]

Also, even without legislative amendments concerning national coordination, Section 10 Administrative Procedure Act[47] (later APA) obliges national authorities to cooperate.[48] Moreover, the obligation of national authorities to provide information and guidance (Section 8 APA) related to the DSA/DMA has of course been triggered at the national level.

Question 6

National authorities act partly based on the national market situation and priorities based on their wider activities, in which the DSA/DMA are only one part. Thereby, DSA/DMA form a relatively limited area in relation to wider supervisional tasks of national authorities.

Section 2: Use of national legislative leeway under the DMA/DSA

Questions 1, 2, and 3

Alongside the legislative amendments referred to above, some amendments were considered necessary. According to the preparatory works of the reform, Chapter 22 PECSA needed to be repealed as it included a conditional exemption from intermediary liability pursuant to the e-Commerce Directive, including national provisions for copyright-related notice and take-down procedure.[49] This regulatory framework is currently under the scope of the DSA regulatory framework.

Chapter 26 a PECSA includes provisions on video sharing platforms pursuant to the Audiovisual Media Services Directive (EU) 2018/1808. Traficom supervises these platforms alongside some other tasks according to the Act (Secs 303–304 PECSA). In some matters Traficom and the Consumer Ombudsman also have the competence to propose the imposition of penalty payment to the

[46] Government proposal HE 11/2024 vp, pp. 35–36.

[47] Hallintolaki 434/2003; unofficial translation by officials (7.1.2019; amendments up to 893/2015 included). Available at https://www.finlex.fi/fi/laki/kaannokset/2003/en20030434_20150893.pdf

[48] Government proposal HE 11/2024 vp, p. 35.

[49] Government proposal HE 70/2023 vp, pp. 25–26, 36.

Market Court (Chapter 42 PECSA). The Act on the Exercise of Freedom of Expression in Mass Media[50] includes provisions on cease orders regarding the distribution of network messages (Sec. 18).[51]

The Act on Interference in the Dissemination of Terrorist Content Online[52] includes provisions on terrorist content, where the competent authority is the police, while special competences are vested on Traficom. The Act on Combating the Dissemination of Child Pornography[53] targets matters related to child pornographic content, which was not in need of amendments due to the DSA. The Finnish Copyright Act[54] also includes provisions on access to information, cease orders, as well as online content-sharing platforms.[55]

As noted in the preparatory works, provisions on the legality of goods and services are laid down in product safety and market surveillance legislation as well as in product- and service-specific laws. The Consumer Ombudsman engages in collective supervision on a wide scale under the scope of consumer protection, while supervisory tasks are also dispersed among sectors, including authorities such as Traficom, the Finnish Safety and Chemicals Agency, the Finnish Food Authority, the Finnish Medicines Agency, Finnish Customs, and the Financial Supervisory Authority.[56]

Questions 4 and 5

Alongside the legislative amendments referred to above, some amendments were considered necessary. In the preparatory works for the DMA related reform, it is noted that no national legislation exists for core platform services as enshrined in the regulation. Some needs for complementary national provisions were identified, in particular regarding information exchange between national authorities and the Commission (Articles 21, 27, 38 and 53 DMA), requests and assistance in market investigations (Arts 16(5) and 41) as well as some investigative and enforcement powers (e.g., Article 23(8) DMA).[57]

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[50] Sananvapauden käyttämisestä joukkoviestinnässä annettu laki 460/2003; unofficial translation by officials (12 Nov. 2003). Available at https://www.finlex.fi/fi/laki/kaannokset/2003/en20030460.pdf

[51] Government proposal HE 70/2023 vp, pp. 26–27.

[52] Laki verkossa tapahtuvaan terroristisen sisällön levittämiseen puuttumisesta (99/2023); unofficial translation.

[53] Laki lapsipornografian levittämisen estotoimista 1068/2006; unofficial translation.

[54] Tekijänoikeuslaki 404/1961; unofficial translation by officials (amendments up to 1216/2023 included). Available at https://www.finlex.fi/fi/laki/kaannokset/1961/en19610404_20231216.pdf

[55] Government proposal HE 70/2023 vp, pp. 26–27.

[56] Government proposal HE 70/2023, pp. 28.

[57] Government proposal HE 11/2024 vp, pp. 16–17.

According to the preparatory works, Article 14 DMA is complementary to the regulation of concentration control in the national Competition Act.[58] Complementary national legislation was deemed necessary to safeguard information exchange between national authorities and the Commission. National provisions related to exchange of information were not deemed to be restricted by the DMA or complementary national legislation. An exception to the FCCA coordination would be national courts, which are independently responsible for the provision of information to the Commission.[59] The exchange of information under secrecy obligations was also discussed in the preparatory works. Reference to exchange despite such obligations was deemed to be necessary in relevant national provisions due to clarity, even if the Act on the Openness of Government Activities (Publicity Act)[60] would not have strictly required this.[61]

Section 3: Vertical and horizontal public enforcement-related cooperation under DSA/DMA

Question 1

To ensure an efficient enforcement of the DSA, the Commission is creating a network.[62] In Finland, the officially appointed Digital Service Coordinator (DSC) and main supervisory authority under the DSA is Traficom, as explained above, while other authorities include the Consumer Ombudsman and the Data Protection Ombudsman. The provisions include Section 5 SOISA which concerns exchange of information between the competent authorities: when imperative, they can give information and documents to each other in carrying out their DSA related tasks, despite provisions on confidentiality. Competent authority is also entitled to gain information from criminal investigations in cases imperative for sanctions (*ne bis in idem*). Traficom should also get information imperative for tasks related to suspected infringement of Article 18 DSA (Notification of suspicions of criminal offences).
Generally, a challenge could be that while the Commission has stressed the importance of Member States designating their DSCs and adapting their national laws in time, several countries have not met the deadline.[63] Traficom,

[58] Kilpailulaki 948/2011; unofficial translation by officials (14 Sept. 2023; amendments up to 1297/2022 included). Available at https://www.finlex.fi/fi/laki/kaannokset/2011/en20110948_20221297.pdf

[59] Government proposal HE 11/2024 vp, pp. 18, 21, 25, 58.

[60] Laki viranomaisten toiminnan julkisuudesta 621/1999; unofficial translation by (11 Jan. 2016; amendments to 907/2015 included). Available at https://www.finlex.fi/fi/laki/kaannokset/1999/en19990621_20150907.pdf

[61] Government proposal HE 11/2024 vp, p. 26.

[62] *The cooperation framework under the Digital Services Act*, European Commission, 11 June 2024, https://digital-strategy.ec.europa.eu/en/policies/dsa-cooperation. Accessed 27 Sept. 2024.

[63] Ibidem. Moreover, at the time writing there is no administrative agreement with Traficom to reinforce the response to the spread of illegal content.

however, is invested with the task to cooperate with other national DSCs of the and the Commission, as well as participation in the work of the European Digital Services Board to be established separately. Traficom's tasks would also include reporting to the Commission and other DSCs. In addition, the tasks would include close cooperation with other national authorities, such as the Data Protection Ombudsman and the Consumer Ombudsman. The above-mentioned tasks are new for Traficom and require strong legal and technical-economic expertise alongside cross-border procedures.[64]

Regarding the DMA, Article 38 on cooperation between the Commission and national competent authorities refers to the European Competition Network (ECN) as means to inform and coordinate. In Finland, the main objective of the national preparation related to the DMA was to clarify the powers of the FCCA, as explained above.[65]

From a practical perspective, the frameworks tend to be complex due to the interplay of EU and national level, while there may be several authorities involved in a particular case within their specific scope of competence, including, both from the perspective of DSA as well as consumer protection and data protection. National authorities might need to wait for the EU level guidelines and decisions.[66]

Question 2

According to the preparatory works for the DMA reform, an exception to the FCCA coordination is the role of national courts who are independently responsible for provision of information to the Commission. The exchange of information pursuant to Article 39 DMA takes place directly between the court and the Commission, and, thus, this was not part of the regulatory amendments concerning the national coordinator.[67] It was deemed unnecessary to pass any special legislation to transpose Article 39 in Finland and the article was estimated to be clear enough on its own.[68]

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[64] See Government proposal HE 70/2023 vp, p. 43

[65] In terms of stakeholder statements during the legislative process, the FCCA noted that the restriction on the use of data received from third parties proposed in national legislation should be removed. The FCCA considered that the proposed provision restricted its powers in a way that could impede the effective enforcement of the competition rules. This was clarified. See statement concerning Government proposal HE 11/2024vp EDK-2024-AK-10275.pdf (eduskunta.fi) and KKV/1041/03.02/2023. Statements concerning Government proposal for the DMA reform note the importance of case C-252/21 *Meta Platforms* so that the principles and obligations regarding cooperation are executed properly in Finland. See statements concerning Government proposal HE 11/2024 vp: EDK-2024-AK-10374.pdf (eduskunta.fi) EDK-2024-AK-10302.pdf (eduskunta.fi).

[66] This was also an issue discussed in the interview with Riikka Rosendahl, Team Manager, FCCA (online, 26 Sept. 2024).

[67] Government proposal HE 11/2024 vp, pp. 25, 58.

[68] Government proposal HE 11/2024 vp, p. 23.

The Finnish Act on the Publicity of Court Proceedings in General Courts[69] provides for the publicity of court documents. A trial document is public, unless it is to be kept secret according to reasons listed in Section 9 of that Act or unless a court orders it to be kept secret pursuant to Section 10 on the request of a party or also for a special reason.

Regarding administrative courts, the Act on the Publicity of Administrative Court Proceedings[70] provides as follows: According to § 8 of the law in question, provisions of the Act on the Openness of Government Activities and of other legislation applies to the publicity and confidentiality of court documents, unless otherwise stipulated in the Act. However, the administrative court may, notwithstanding the confidentiality regulations, provide information about the trial document to the extent necessary to secure a fair trial or an important public or private interest related to the matter.

Question 3

As a general matter, the public and relevant stakeholders would need to be informed and awareness raised about the regulatory framework so as to support information provision in practice.[71]

Section 4: Private enforcement of DMA/DSA

Question 1

No knowledge.

Question 2

There are no specific rules on private enforcement of the DSA as it stands. That means, the general rules on contractual and non-contractual liability apply, in addition to the specific liability provisions under the DSA.[72]

[69] Laki oikeudenkäynnin julkisuudesta yleisissä tuomioistuimissa 370/2007; unofficial translation by officials (11 Jan. 2016; amendments to 742/2015 included). Available at https://www.finlex.fi/fi/laki/kaannokset/2007/en20070370_20150742.pdf

[70] Laki oikeudenkäynnin julkisuudesta hallintotuomioistuimissa 381/2007; unofficial translation by the officials (20 Sept. 2009). Available at https://www.finlex.fi/fi/laki/kaannokset/2007/en20070381.pdf

[71] This was also an issue discussed in the interview with Riikka Rosendahl, Team Manager, FCCA (online, 26 Sept. 2024).

[72] In this context, it is important to bear in mind that damages awarded for non-material harm are not very high in Finland.

Question 3

DMA is a regulation containing precise obligations and prohibitions for the gatekeepers in scope, which can be enforced directly in national courts. This will facilitate direct actions for damages by those harmed by the conduct of non-complying gatekeepers. No specific rules on the private enforcement of the DMA have been enacted so far. That means, the general rules on contractual and non-contractual liability apply. Just as in relation to the DSA, it is also important to consider that the damages awarded for non-material harm are not very high.

Question 4

No specific rules have been adopted for either DMA or DSA. No plans exist to allocate cases to a specific court at the moment.

Question 5

The Finnish Code of Judicial Procedure[73] allows intervention, but not in this manner. Chapter 18 Section 8 states that if a non-party claims that the matter concerns their rights and presents plausible reasons in support of the claim, they may participate in the proceedings as an intervener to support either one of the parties.

The matter concerns rights of an intervener if a judgment in the case could adversely affect their legal position. The alleged interest must always be legal in the sense that it could be the subject of independent legal proceedings. For example, humanitarian causes do not provide a cause for intervention. As intervention is the exception, it must be interpreted narrowly. Thus, as the matter needs to concern the rights of the intervener, civil society organisations are not allowed to intervene due to a wider cause per se as there needs to be a concrete connection to the case at hand.[74]

[73] Oikeudenkäymiskaari 4/1734; unofficial translation by officials (7 Sept. 2022; amendments up to 812/2019 included), available at https://www.finlex.fi/fi/laki/kaannokset/1734/en17340004_20190812.pdf

[74] See Vuorenpää, Mikko et. al. *Prosessioikeus*. Alma Talent, 2021, Chapter III > 3. Available at https://verkkokirjahylly-almatalent-fi.libproxy.helsinki.fi/teos/BAFBHXETEB#kohta:PROSESSIOIKEUS/piste:b29

Section 5: General questions

Question 1

According to the preparatory works of the DSA reform, the framework established in Articles 9 and 10 do not provide for a legal basis for issuing the orders in question, nor do they directly create competences for national authorities and courts in this regard. The authority issuing the order is obliged to submit the order and relevant information to the national coordinator, that is, Traficom in the case of Finland. The obligation concerns all national authorities and courts with competence to issue the orders. Traficom then informs other national coordinators in the electronic system established for the purpose.[75]

Section 28 SOISA includes provisions on orders to act against illegal content or orders to provide information: these shall be drafted pursuant to Article 9(2) and 10(2) respectively, while it is informatively stated that the procedure is regulated in Articles 9 and 10 DSA. These provisions are binding to national authorities and courts with competence to issue the orders in question. The competences derive from national and EU law. In the case of Article 9, such competences derive, for example, from Section 185 PECSA and Section 12 CPCPAA, while in the context of Article 10, relevant competences include Section 6 CPCPAA. The provisions also mean that the order must be submitted to Traficom as the national coordinator.[76]

As noted in the preparatory works of the DSA reform, the provisions of PECSA (§§ 182–184) implementing the liability regime in the context of the e-Commerce Directive were repealed due to DSA regulatory framework. However, this was not considered a change in terms of legal state. One of the aims is to safeguard uniform interpretation of the liability exemptions in EU Member States.[77] Section 185 PECSA on orders to disable access to information was amended so as to refer to "hosting service" providers pursuant to Article 3(g)(iii) DSA.[78] According to the provisions, a court may, upon request by application by the public prosecutor or the head investigator or those whose right

[75] Government proposal HE 70/2023 vp, pp. 10–11.

[76] Government proposal HE 70/2023 vp, p. 86. Stakeholder statements concerning the Government proposal noted that penalties ought to be provided for failure to comply with the obligations of the DSA. See the following statements: EDK-2023-AK-40450.pdf (eduskunta.fi) EDK-2023-AK-40470.pdf (eduskunta.fi) EDK-2023-AK-40451.pdf (eduskunta.fi) EDK-2023-AK-38967.pdf (eduskunta.fi) EDK-2023-AK-38744.pdf (eduskunta.fi) Lausunto eduskunnan liikenne- ja viestintävaliokunnalle hallituksen esityksestä eduskunnalle laiksi verkon välityspalvelujen valvonnasta ja eräiksi muiksi laeiksi (HE 70/2023 vp) (eduskunta.fi) EDK-2023-AK-39271.pdf (eduskunta.fi) EDK-2023-AK-39268.pdf (eduskunta.fi). See also Government proposal HE 70/2023 vp, pp. 107–108.

[77] Government proposal HE 70/2023 vp, pp. 88–89.

[78] Government proposal HE 70/2023 vp, pp. 89–90.

the matter concerns, order the hosting service provider to disable access to the information stored it if it clearly amounts to a situation where transmitting or keeping the content available to the public is punishable or as a basis for civil liability.

Question 2

In Finland, information about the legal representatives pursuant to Article 13 DSA is communicated to Traficom, while many companies are already obliged to appoint a representative pursuant to other regulatory regimes.[79] In the case of an intermediary service provider that offers service in Finland (e.g., in Finnish) but fails to designate a legal representative in accordance with Article 13 of the DSA, Traficom may impose a penalty payment on an intermediary service provider that intentionally or negligently violates or neglects the obligation (Sec. 14(3) SOISA).[80]

Question 3

According to the preparatory works of the DSA reform, Article 53 does not automatically mean a party status (despite the use of the term "complaint") but it is rather a question of notification to the competent authority whereby they assess the situation. This may of course result in an administrative decision. The national coordinator Traficom would also assess notifications from Finland so as to forward them to other Member States if necessary, and vice versa, if it receives notifications from other Member States, it forwards them to competent authorities in Finland. This means that individual users in Finland may contact Traficom also in cases of service providers in other Member States. The procedure follows the Administrative Procedure Act whereby the individual user's position is also regulated.[81]

As a general matter, awareness of the public and relevant stakeholders would need to be raised about the regulatory framework to support information provision in practice.

There is an electronic contact service on Traficom's webpage.[82]

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[79] Government proposal HE 70/2023 vp, pp. 72–73. See also *Questions and answers about the Digital Services Act*, Traficom (13 Sept. 2024).

[80] Government proposal HE 70/2023, pp. 72–73.

[81] Government proposal HE 70/2023 vp, pp. 19–20, 41.

[82] See *Contact us regarding the Digital Services Act*, Traficom.

Question 4

No particular political controversy existed.

For example, stakeholder statements concerning the Government proposal for the DSA reform reveal no major controversies. However, as general issues, the need to guarantee adequate resources and clear institutional settings is noted as well as the need to guarantee coherent interpretation of fundamental and human rights.[83]

Question 5

Currently, there are no out-of-court dispute resolution bodies in Finland pursuant to the DSA. Users in Finland have, however, the opportunity to benefit from those of other Member States. Traficom is obliged to upon request certify such bodies in Finland. The establishment of dispute resolution bodies by the state would require national legislation. There are no plans to this effect at the moment. However, consumer protection bodies and court proceedings are available to users.[84]

Traficom has the task of handling requests by researchers concerning the status of "vetted researcher" as well as providing relevant documents to national coordinators in other Member States.[85] Moreover, Traficom may, upon application, grant the status of "trusted flagger" to any entity meeting the requirements, and it notifies these to the EU level. Deficiences must be notified by the online platform to Traficom.[86] The following trusted flaggers are approved (25.8.2024): Copyright Information and Anti-Piracy Centre (CIAPC) for unauthorized use of material protected by copyright; Save the Children Finland for protection of minors; and Somis Enterprises Oy for Illegal or harmful speech, non-consensual behaviour, online bullying/intimidation, protection of minors, scams and/or fraud.[87]

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[83] See e.g., the following statements concerning Government proposal HE 70/2023 vp: Liikenne- ja viestintäministeriön vastine (eduskunta.fi) Microsoft Word - PeV DSA täytäntöönpano SLH (eduskunta.fi) EDK-2023-AK-37688.pdf (eduskunta.fi) EDK-2023-AK-37691.pdf (eduskunta.fi) EDK-2023-AK-39273.pdf (eduskunta.fi)Eduskunnan liikenne- ja viestintävaliokunta (eduskunta.fi) PowerPoint-esitys (eduskunta.fi) EDK-2023-AK-38741.pdf (eduskunta.fi) EDK-2023-AK-38739.pdf (eduskunta.fi) Title (eduskunta.fi) EDK-2023-AK-37688.pdf (eduskunta.fi) EDK-2023-AK-38237.pdf (eduskunta.fi) Liikenne- ja viestintäministeriö Mahti-asiakirjamalli (eduskunta.fi) EDK-2023-AK-37961.pdf (eduskunta.fi) Microsoft Word - PeV DSA täytäntöönpano SLH (eduskunta.fi) Microsoft Word - PeV DSA täytäntöönpano SLH (eduskunta.fi) Export HTML To Doc (eduskunta.fi) Microsoft Word - Eduskunnan liikenneviestintävaliokunnalle (eduskunta.fi).

[84] Government proposal HE 70/2023 vp, p. 13; see also *Questions and answers about the Digital Services Act*, Traficom (13 Sept. 2024).

[85] Government proposal HE 70/2023 vp, pp. 42–43.

[86] Government proposal HE 70/2023 vp, p. 13. See also *The rights of an online platform user*, Traficom. Accessed 27 Sept. 2024.

[87] See also *The rights of an online platform user*, Traficom. Accessed 27.9.2024.

Question 6

In terms of academic discussion, for example, Hiltunen's analysis suggests that the approach adopted in the regulatory framework is not radical enough to reach the "equalizing potential" of the two instruments.[88] Moreover, the practical side requires more active dissemination of information to the public and other relevant stakeholders in order for the awareness of the regulatory framework to increase and, thus, become part of industry practices.[89]

[88] Hiltunen, Miikka. "Social Media Platforms within Internal Market Construction: Patterns of Reproduction in EU Platform Law", *German law journal*, vol. 23, no. 9, 2022, pp. 1226–1245, https://doi.org/10.1017/glj.2022.80

[89] This was also an issue discussed in the interview with Riikka Rosendahl, Team Manager, FCCA (online, 26 Sept. 2024).

France

*Marion Ho-Dac**
*Juliette Sénéchal***

Section I: National institutional set-up

Question 1[1]

Généralités. La loi n° 2024-449 du 21 mai 2024 visant à sécuriser et à réguler l'espace numérique (ci-après « loi SREN »)[2] désigne l'Arcom (*Autorité de régulation de la communication audiovisuelle et numérique*) comme coordinateur français des services numériques et principale autorité compétente nationale pour l'essentiel du cadre juridique du DSA, à l'exception de certaines dispositions pour lesquelles la DGCCRF (*Direction générale de la concurrence, de la consommation et de la répression des fraudes*) et la CNIL (*Commission Nationale de l'Informatique et des Libertés*) sont compétentes.[3] Ces trois autorités étaient déjà en fonctionnement au moment de leur désignation. Aucune nouvelle autorité n'a été créée pour mettre en œuvre le DSA en France.

S'agissant de l'Arcom, elle est, de manière générale, l'autorité française de régulation « garante de la liberté de communication et veille au financement de la création audiovisuelle et à la protection des droits. »[4]
Dans le contexte spécifique du DSA, elle est d'abord chargée par la loi de veiller au respect par les fournisseurs de services intermédiaires, des obligations prévues aux paragraphes 1 et 5 de l'article 9 et aux paragraphes 1 et 5 de l'article 10 en matière de responsabilité des fournisseurs de services intermédiaires,

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[1] Cette question a été rédigée par Marion Ho-Dac, avec en appui les contributions écrite de la CNIL et orales de l'Arcom et de la DGCCRF.

[2] Sur ce texte, voir J. Groffe-Charier, Approche transversale de la loi SREN. Renforcer (ou bâtir) le cadre légal de l'environnement numérique, *Dalloz IP/IT* 2024 p.387 ; N. Martial-Braz, La loi SREN : un texte de plus au millefeuille numérique, *sofrenchy* !, *Communication Commerce électronique*, n° 7, juillet-août 2024, alerte 206.

[3] Voir (nouvel) article 7 de la loi 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique (dite LCEN), issu de l'article 51 de la loi SREN. Version consolidée de la LCEN : https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000801164/

[4] Voir la présentation de l'Arcom sur son site Internet : https://www.arcom.fr/nous-connaitre/decouvrir-linstitution. Voir également la présentation par l'Arcom du DSA à destination des opérateurs concernés : https://www.arcom.fr/espace-professionnel/reglement-sur-les-services-numeriques-ou-dsa-obligations-et-services-concernes

ainsi qu'aux articles 11 à 15 du DSA en matière d'obligations de diligence.[5] En outre, l'autorité est chargée de veiller au respect par les fournisseurs de service d'hébergement, des obligations de diligence prévues aux articles 16 et 17 du DSA.[6]

Ensuite, l'autorité est chargée de veiller au respect par les opérateurs de services de plateforme en ligne[7] des obligations prévues aux articles 20 à 24 du DSA,[8] et à l'article 25 en matière de conception des interfaces en ligne, à l'exception des pratiques d'interfaces trompeuses (*dark patterns*) telles que sanctionnées par le Code de la consommation.[9] Elle assure également le respect par les plateformes en ligne des règles en matière de publicité de l'article 26, § 1, a) à c) et § 2,[10] en matière de transparence du système de recommandation fondée sur le paramétrage selon l'article 27 et, pour les plateformes qui sont accessibles aux mineurs, en matière de protection de la vie privée, de la sûreté et de la sécurité des mineurs à travers la mise en place de mesures appropriées en application de l'article 28, § 1 du DSA.[11] En outre, l'autorité est investie de la mission d'analyser les rapports de transparence des fournisseurs de plateformes en ligne relevant de sa compétence[12] et qui sont publiés en application des articles 15 et 24 du DSA. La loi SREN prévoit que cette analyse fasse l'objet d'un rapport annuel remis au Parlement français.[13]

Enfin, l'Arcom a une série de fonctions directement liées à son statut de coordinateur des services numériques. À ce titre et de manière générale, l'Autorité entend développer une culture commune fondée sur le DSA auprès de l'ensemble des autorités publiques françaises visant à renforcer la responsabilité des fournisseurs de services intermédiaires, en particulier les plateformes en ligne, pour assurer la protection des droits fondamentaux des destinataires de services. D'une part, l'autorité veille à assurer une coopération étroite entre elle et les deux autres autorités compétentes – la DGCCRF et la CNIL – dans le champ du DSA, ainsi qu'une assistance mutuelle dans la mise en œuvre du règlement.[14] D'autre part, en tant que coordinateur français des services

[5] (Nouvel) article 8-1 LCEN, issu de l'article 51 loi SREN.

[6] *Ibid*.

[7] À l'exception des microentreprises ou des petites entreprises au sens de l'article 19 du DSA.

[8] Ces articles sont relatifs à l'établissement d'un système interne de traitement des réclamations, à l'accès des destinataires de services à un règlement extrajudiciaire des litiges, aux signaleurs de confiance, aux mesures de lutte et de protection contre les utilisations abusives et à des exigences complémentaires concernant les rapports de transparence.

[9] Cette question relève des compétences de la DGCCRF et concerne les « pratiques mentionnées au 1° de l'article L. 133-1 du Code de la consommation, » voir *infra*.

[10] À l'exception du droit au paramétrage de l'article 26, § 1, b) et de l'interdiction de publicité ciblée fondée sur des données sensibles à l'article 26, § 3 qui relèvent des compétences de la CNIL, voir *infra*.

[11] À l'exception de l'interdiction de la publicité fondée sur le profilage à l'égard des mineurs selon l'article 28, § 2, qui relève du contrôle de la CNIL, voir *infra*.

[12] Au titre de l'article 56 du DSA.

[13] (Nouvel) article 8-2, LCEN, issu de l'article 51 loi SREN.

[14] (Nouvel) article 7-2, LCEN, issu de l'article 51 loi SREN.

numériques, l'autorité siège au Comité européen des services numériques au sens de l'article 61 du DSA. Lorsque les questions examinées par le comité relèvent de la compétence d'une autre autorité que l'Arcom, l'autorité compétente concernée (à savoir la DGCCRF ou la CNIL) participe au Comité aux côtés du coordinateur.[15] En outre, l'Arcom exerce une mission de veille et d'analyse des risques systémiques au sens de l'article 34 du DSA, aux fins d'exercer les compétences prévues aux articles 63, 64 et 65 du DSA.[16]

S'agissant de la DGCCRF, elle constitue, de manière générale, une direction du Ministère français de l'Économie, des Finances et de la Souveraineté industrielle et numérique. Elle a pour mission transverse de « garant[ir] l'ordre public économique en veillant au respect des règles pour conforter la confiance des entreprises et des consommateurs et assurer le bon fonctionnement des marchés et de l'économie. »[17] Dans ce contexte, elle assure la protection des consommateurs à la fois sous l'angle de la sécurité des produits non alimentaires, de ses intérêts économiques et de la régulation concurrentielle des marchés. Dans le cadre particulier du DSA, la DGCCRF est en charge, d'une part, de l'article 25 du DSA pour son application aux places de marché.[18] Cela renvoie à la sanction des pratiques d'interfaces trompeuses (*dark patterns*) telles que sanctionnées par le Code de la consommation.[19] À ce sujet, la DGCCRF travaille en collaboration avec les autres autorités compétentes en matière d'interfaces trompeuses. Un groupe d'étude commun avec l'Arcom et la CNIL travaille actuellement sur l'identification (juridique et technique) des *dark patterns* à l'aune du DSA et d'autres bases juridiques pertinentes.
D'autre part, la DGCCRF est responsable de la mise en œuvre des articles 30 à 32 du DSA relatifs aux exigences imposées aux fournisseurs de place de marché en matière de traçabilité des professionnels présents sur la plateforme, de conformité dès la conception des interfaces des places de marché et, enfin,

[15] (Nouvel) article 7-3, LCEN, issu de l'article 51 loi SREN.

[16] (Nouvel) article 7-3, LCEN, issu de l'article 51 loi SREN.

[17] Voir la présentation de la DGCCRF sur son site Internet : https://www.economie.gouv.fr/dgccrf/comprendre-la-dgccrf/les-missions-de-la-dgccrf

[18] Les places de marché visent, selon la terminologie du DSA, les fournisseurs de plateformes en ligne permettant aux consommateurs de conclure des contrats à distance avec des professionnels (voir spécialement section 4 du chapitre II) et sont définis à l'article préliminaire, 14°, du code français de la consommation comme étant « un service utilisant un logiciel, y compris un site Internet, une partie de site Internet ou une application, exploité par un professionnel ou pour son compte, qui permet aux consommateurs de conclure des contrats à distance avec d'autres professionnels ou consommateurs. »

[19] Voir les pratiques mentionnées au 1° de l'article L. 133-1 du Code de la consommation qui dispose : « Est puni d'un emprisonnement de deux ans et d'une amende de 300 000 euros, dont le montant peut être porté, de manière proportionnée aux avantages tirés du délit, à 6 % du chiffre d'affaires mondial hors taxes réalisé au cours de l'exercice précédent pour une personne morale, le fait pour un fournisseur de places de marché : 1° De méconnaître ses obligations relatives à la conception, à l'organisation ou à l'exploitation d'une interface en ligne, en violation de l'article 25 du règlement (UE) 2022/2065 (…) sur les services numériques (…). »

en matière de droit à l'information des consommateurs en cas de produits illégaux accessibles sur la place de marché.

S'agissant de la CNIL, autorité administrative indépendante, elle est le régulateur français de la protection des données personnelles. Elle a pour mission, d'une part, « d'accompagner les professionnels dans leur mise en conformité » et, d'autre part, « d'aider les particuliers à maîtriser leurs données personnelles et exercer leurs droits. »[20]
Dans le contexte particulier du DSA, la CNIL est l'autorité compétente pour assurer le respect de certaines obligations issues du DSA, applicables aux plateformes en ligne, en lien avec les données personnelles :[21] obligations renforcées de transparence en matière de publicité ciblée, interdiction du profilage sur la base des données sensibles et du profilage des mineurs, selon les articles 26, § 1, d) et 26, § 3 et 28, § 2 du DSA.[22]
En outre, un outil est en développement, en dialogue avec la CNIL et la DGCCRF, au sein du PEReN – Pôle d'Expertise de la Régulation Numérique[23] – visant à détecter les *dark patterns*.

Question 2[24]

Généralités. Les évolutions règlementaires relatives aux pouvoirs de régulation, d'enquête et de sanctions des autorités en charge de mettre en œuvre le DSA sont issues de la loi n° 2024-449 du 21 mai 2024 visant à sécuriser et à réguler l'espace numérique (ci-après « loi SREN ») précitée.

S'agissant de l'Arcom, elle comprend une direction d'une quinzaine de personnes qui se consacrent à la surveillance des plateformes en ligne dans le cadre du DSA mais également d'autres textes à l'instar de la lutte contre la pédopornographie en ligne sur le fondement du droit français. Mais en pratique environ deux-tiers du personnel de l'Arcom connaît le DSA. Il en va de même au sein du Collègue de l'Arcom au sein duquel des groupes de travail traitent du DSA afin de monter en compétence pour la bonne maîtrise du cadre juridique.

[20] Voir les missions de la CNIL décrites sur son site Internet : https://www.cnil.fr/en/cnil/cnils-missions

[21] La CNIL a publié un communiqué sur ses nouvelles compétences : https://www.cnil.fr/fr/sren-loi-securiser-reguler-lespace-numerique-nouvelles-missions-cnil

[22] Cela résulte de la modification de la loi n° 78-17 « Informatique et Libertés » du 6 janvier 1978 (dite « LIL ») par la loi SREN précitée, voir nouveaux articles 124-4 et 124-5 de la LIL.

[23] Le PEReN a pour mission de fournir un appui aux services de l'État ayant des compétences de régulation des plateformes numériques (à l'instar de la DGCCRF, de la CNIL et de l'Arcom) et s'investit dans des projets de recherche en science des données, à caractère exploratoire ou scientifique (https://www.peren.gouv.fr/en/).

[24] Cette question a été rédigée par Marion Ho-Dac, avec en appui les contributions écrite de la CNIL et orales de l'Arcom et de la DGCCRF.

Pour ce qui est de la dynamique générale de mise en œuvre du DSA, l'Arcom opère une surveillance de principe de l'ensemble des plateformes qui ont une activité sur le marché français, y compris les très grands opérateurs, tout en concentrant *in fine* ses pouvoirs d'exécution sur les seuls opérateurs qui relèvent de sa compétence selon le règlement. Plus précisément, l'article 51, 5° de la loi SREN met en place les nouvelles compétences de régulation de l'Arcom dans le contexte du DSA. L'Arcom peut exercer les pouvoirs d'enquête prévus par le DSA auprès des fournisseurs qui opèrent en France. Elle peut recueillir les informations nécessaires pour formuler des demandes d'examen sur le fondement des articles 58 (coopération transfrontière) et 65 (exécution des obligations des très grands opérateurs) du DSA. Pour constater les manquements aux obligations, les agents habilités de l'Arcom peuvent procéder à des inspections dans les locaux des fournisseurs de services. En cas d'exercice du droit de s'opposer à la visite par l'opérateur concerné, une autorisation judiciaire sera nécessaire pour poursuivre la visite. L'Autorité peut également enjoindre aux fournisseurs de mettre fin à des manquements, de prendre des mesures correctives ou adopter des injonctions provisoires en cas de risque de dommages graves. Elle peut également accepter des engagements des fournisseurs pour mettre fin aux manquements constatés. En cas de non-conformité persistante, l'Arcom peut saisir l'autorité judiciaire pour ordonner une restriction temporaire de l'accès au service. Des voies de recours sont par ailleurs prévues pour permettre aux fournisseurs concernés de contester l'ensemble de ces mesures. Sur le terrain des sanctions, en cas de non-respect des mises en demeure ou des injonctions, l'Arcom peut imposer des sanctions financières pouvant atteindre 6 % du chiffre d'affaires mondial du fournisseur ; les astreintes journalières peuvent s'élever à 5 % du chiffre d'affaires quotidien moyen. En outre, les sanctions prononcées peuvent être rendues publiques.

S'agissant de la DGCCRF, elle se voit attribuer de nouveaux pouvoirs aux fins de sanctionner les infractions aux dispositions du DSA dont elle a la charge, à savoir les exigences en matière d'interfaces trompeuses.[25] Est d'abord créée une nouvelle injonction civile qui assure aux opérateurs de plateformes les garanties procédurales attachées à l'indépendance de la justice ; la DGCCRF ne possède pas de pouvoir de police administrative propre sur la base du DSA. Elle peut ainsi, « après en avoir avisé le procureur de la République,[26] demander à la juridiction civile d'enjoindre à l'auteur des pratiques de se mettre en conformité. Le juge peut assortir son injonction d'une astreinte journalière ne pouvant excéder un montant de 5 % du chiffre d'affaires mondial hors taxes journalier moyen réalisé par le fournisseur de services concerné au cours du

[25] Voir *supra* question 1 et (nouvel) article L 133-1 du Code de la consommation.

[26] Il s'agit du représentant du ministère public devant les juridictions de l'ordre judiciaire.

dernier exercice clos. »[27] Ensuite, une nouvelle section du Code de la consommation a été créée par la loi SREN[28] s'agissant du pouvoir d'enquête attribué à la DGCCRF à l'égard des plateformes en ligne. Au titre du nouvel article 512-66, les agents de la DGCCRF agissent dans les conditions des articles 49, § 4 et 50, § 2 du DSA pour mettre en œuvre les contrôles administratifs en vue de rechercher et constater des infractions aux dispositions du DSA dont ils ont la charge. Les agents disposent également d'un pouvoir d'accès aux données des fournisseurs de plateformes en ligne au titre et dans les conditions à l'article 40 du DSA.[29] Enfin, ils peuvent coopérer avec les agents de l'Arcom au titre des enquêtes et, dans ce cadre, « se communiquer les informations et les documents détenus ou recueillis dans l'exercice de leurs missions respectives, sans que les dispositions (…) relatives au secret professionnel [et au secret de la procédure pénale au stade de l'enquête et de l'instruction][30] ne leur soient opposables. »[31]

Quant aux moyens dont dispose la DGCCRF, ils sont stables mais adaptés au besoin de la mise en œuvre du DSA. Elle dispose d'un bureau central spécialisé en droit de la consommation au siège de la Direction générale (Paris) et la présence d'agents en déconcentration dans les régions françaises (enquêteurs). La DGCCRF possède également une cellule informatique avec des informaticiens qualifiés pour permettre la bonne conduite des enquêtes dans l'écosystème numérique.

S'agissant de la CNIL, elle se voit attribuer de nouveaux moyens de contrôle : le pouvoir de saisir tout document sous le contrôle du juge, ainsi que la possibilité d'enregistrer les réponses des personnes auditionnées.[32] Elle pourra également adopter des mesures correctrices dont des amendes, ces pouvoirs étant identiques à ceux figurant déjà dans le droit positif.[33] Dans l'ensemble, il s'agit de nouvelles compétences déjà fortement liées à celles exercées actuellement et qui visent un périmètre restreint. Dès lors, il n'est pas envisagé à ce stade de dédier des moyens et ressources supplémentaires à la CNIL à ce titre.

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[27] Article L. 133-2 du Code de la consommation issu de l'article 52 de la loi SREN. En outre, la plateforme ne donne pas suite à l'injonction : « le juge procède, après une procédure contradictoire, à la liquidation de l'astreinte. »

[28] Article 52 de la loi SREN.

[29] Article 512-67 du Code de la consommation.

[30] Article 11 du Code de procédure pénale.

[31] Article 512-68 du Code de la consommation.

[32] Voir article 51 du DSA et article 19 de la LIL (tel que modifié par l'article 46 de la loi SREN).

[33] En ce sens, selon le nouvel article 124-5 *in fine* de la LIL, la CNIL dispose « à l'égard de ces fournisseurs de plateformes en ligne et de toute autre personne agissant pour les besoins de son activité et susceptible de disposer d'informations relatives à un éventuel manquement, des pouvoirs prévus aux articles 19 [pouvoirs d'enquête], 20, 22 et 22-1 [mesures correctives et sanctions] de la présente loi. »

Question 3[34]

L'Arcom a ouvert un dialogue avec les opérateurs afin de les accompagner dans leur mise en conformité *ex ante*. Il s'agit d'une phase essentielle d'adaptation au nouveau cadre réglementaire qui n'est pas toujours très précis. Partant, l'accompagnement par les autorités nationales est essentiel.[35] L'Arcom devrait ainsi pouvoir faire part aux autorités de l'Union des difficultés ou incertitudes concernant la mise en conformité des opérateurs en France, afin que des solutions soient trouvées à l'échelle européenne, notamment par le biais des actes délégués que la Commission est en charge de rédiger au soutien de plusieurs dispositions du DSA.[36] Il est essentiel que la mise en conformité soit harmonisée sur l'ensemble du marché unique de l'Union.
Concernant l'identification des opérateurs soumis au DSA, la tâche incombe à ces derniers de « s'auto-identifier, » tout en bénéficiant d'un accompagnement de l'Arcom. En ce sens, l'Autorité est en contact avec les fédérations professionnelles et les réseaux juridiques, notamment d'avocats d'affaire, qui jouent un rôle de relais. En outre, l'Arcom est vigilante à l'égard de toutes les plateformes, y compris étrangères et les « très grands » opérateurs qui ont des activités dirigées vers le public français.
Quant aux priorités d'actions dans la mise en œuvre du DSA, elles sont définies par le Comité européen des services numériques. La protection de l'écosystème numérique dans le contexte des élections européennes de juin 2024 a été la première dynamique politique de mise en œuvre règlementaire du DSA. À présent, la protection des mineurs et, plus largement, de la jeunesse en ligne est une autre voie prioritaire à l'échelle de l'Union, suivie de près par l'Arcom.

S'agissant de la DGCCRF, au sein de son bureau dédié au droit de la consommation, elle a réalisé une cartographie des fournisseurs de places de marché françaises soumis aux dispositions du règlement DSA. Aucun opérateur de très grande taille n'a pour l'instant été identifié comme ayant son siège social sur le territoire français.

Quant aux priorités d'action, la Direction générale a prévu de lancer plusieurs enquêtes au cours de l'année 2024/2025 dans le secteur du numérique notamment aux fins de contrôle de la bonne mise en œuvre des dispositions de droit de la protection des intérêts économiques des consommateurs et des dispositions du Règlement DSA relatives aux places de marché en ligne.

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[34] Cette question a été rédigée par Marion Ho-Dac, avec en appui les contributions écrite de la CNIL et orales de l'Arcom et de la DGCCRF.

[35] Par exemple en matière de *dark patterns* ou s'agissant des rapports de transparence.

[36] Article 87 du DSA.

S'agissant de la CNIL, elle se met en ordre de marche sur ses nouvelles compétences mais n'a pas produit de plan d'action à cet égard. Néanmoins, elle a, dans son programme de contrôle, des thématiques en lien avec ses nouvelles compétences, à savoir la publicité en ligne et les données personnelles des mineurs.

Question 4[37]

L'action publique contre les *gatekeepers* fondée sur le DMA appartient exclusivement à la Commission européenne. Dès lors, les Autorités nationales de concurrence (ANC) du réseau européen des autorités de concurrence (REC en français, ECN en anglais) ne peuvent appliquer le DMA. Le DMA désigne toutefois notamment des « autorités nationales compétentes des États membres chargées de faire appliquer les règles visées à l'article 1er, paragraphe 6 »[38] car elles ont un rôle à jouer en matière d'enquêtes.

Qui sont ces autorités en France ? En France, l'article L 450-11 du code de commerce issu de la loi n° 2024-449 du 21 mai 2024 visant à sécuriser et à réguler l'espace numérique (dite « loi SREN ») précise que « L'Autorité de la concurrence, le ministre chargé de l'économie et les fonctionnaires qu'il a désignés ou habilités conformément à l'article L. 450-1 sont les autorités nationales chargées de faire appliquer les règles mentionnées au paragraphe 6 de l'article 1er du règlement (UE) 2022/1925 (…) sur les marchés numériques. » Ces mêmes autorités – qui incluent ainsi aux côtés des agents de l'Autorité de la concurrence, ceux de la DGCCRF, spécialement son bureau de la concurrence – sont chargées de la mise en œuvre de l'article 27 du DMA concernant les « renseignements en provenance de tiers. »[39]

Quels pouvoirs ont ces autorités en France ? L'article L 450-12 du code de commerce ajoute que les autorités nationales chargées de l'application de l'article 1er, § 6 du DMA disposent des mêmes pouvoirs que ceux qu'elles ont pour enquêter en matière de concentrations,[40] et de pratiques anticoncurrentielles.[41] Cela est opportun car il n'est pas exclu que ce soit à propos d'une enquête diligentée sur le fondement des Règlements 139/2004 ou 1/2003 que ces autorités découvrent une violation du DMA, sur laquelle elles décideraient d'enquêter davantage.

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[37] Cette question a été rédigée par Martine Behar-Touchais.

[38] Article 38, § 7, DMA.

[39] Article L. 462-9-2 du code (français) de commerce.

[40] Règlement (CE) n° 139/2004 du Conseil du 20 janvier 2004 relatif au contrôle des concentrations entre entreprises.

[41] Règlement (CE) n° 1/2003 du Conseil du 16 décembre 2002 relatif à la mise en œuvre des règles de concurrence prévues aux articles 81 et 82 du traité, devenus 101 et 102 TFUE.

Les autorités nationales françaises ainsi désignées disposent des pouvoirs suivants pour la mise en œuvre des articles suivants du DMA :

- Article 22, § 2 : audition d'une personne physique ou morale dans les locaux d'une entreprise, avec l'assistance éventuelle de l'autorité nationale compétente de l'État membre ;
- Article 23, § 3 : inspections pour laquelle la Commission demande le concours de l'autorité nationale compétente de l'État membre chargée de faire appliquer les règles visées à l'article 1er, paragraphe 6, sur le territoire duquel l'inspection doit être menée ;
- Article 23, § 4 : exiger de l'entreprise ou de l'association d'entreprises qu'elle donne accès à son organisation, son fonctionnement, son système informatique, ses algorithmes, son traitement des données et ses pratiques commerciales ;
- Article 23, § 7 et 10 : concours actif aux agents et aux autres personnes les accompagnant mandatés par la Commission, éventuellement avec autorisation judiciaire si cela est exigé ;
- Article 38, § 6 : pouvoir d'enquête menée à la demande de la Commission ;
- Article 38, § 7 : pouvoir d'enquête menée de sa propre initiative.

Question 5[42]

S'agissant de l'Autorité française de la concurrence, l'exécution du DMA s'opère à moyens humains et financiers constants. Il sera précisé, par ailleurs, que l'Autorité française de la concurrence a été dotée de nouvelles compétences en matière de contrôle des concentrations ces dernières années, pour lesquelles elle n'a pas non plus bénéficié de ressources supplémentaires. Aussi, au titre de la mise en œuvre du DMA, l'Autorité française de la concurrence exercera principalement une mission d'assistance de la Commission européenne, lorsque cette dernière la sollicitera.[43]
Une taxe pour financer la mise en œuvre du DMA pourrait être une idée à étudier, mais cela devrait en toute hypothèse revenir à la Commission.[44]

Au sein de la DGCCRF, le bureau en charge de la concurrence n'a pas, à notre connaissance, modifié son organisation dans le contexte de la mise en œuvre du DMA.

[42] Cette question a été rédigée par Juliette Sénéchal.

[43] Benoît Cœuré, président de l'Autorité de la Concurrence. Entretien en date du 10 octobre 2024 auprès de la Revue Contexte (https://www.contexte.com/article/tech/benoit-cure-nous-navons-pas-encore-atteint-le-rythme-de-croisiere-du-dma-_204567.html).

[44] *Ibid*.

Question 6[45]

Les nouvelles missions de l'Autorité française de la concurrence et du Ministère de l'Économie (spécialement au sein de la DGCCRF), au titre du DMA, sont très récentes puisque qu'elles datent de la loi SREN précitée du 21 mai 2024.
En outre, la première année de la mise en œuvre du DMA a été consacrée par la Commission européenne à désigner les contrôleurs d'accès et à gérer les contentieux liés à ces désignations. La Commission européenne se prépare dorénavant à entrer dans la phase suivante, à savoir celle de la mise en œuvre du règlement, de la détection puis des sanctions des pratiques illégales.[46] Dans ce contexte, la principale préoccupation de l'Autorité française de la concurrence au titre du DMA consiste à établir la frontière entre le DMA et les abus de position dominante, interdits par l'article 102 du TFUE, et à analyser, dans le cadre des nouveaux dossiers, si les pratiques qui relevaient par le passé de l'article 102 du TFUE, en relèvent toujours ou si, au contraire, elles relèvent désormais du DMA.[47]

Section II: Use of national legislative leeway under the DMA/DSA

Question 1[48]

La loi n° 2024-449 du 21 mai 2024 visant à sécuriser et à réguler l'espace numérique (ci-après « loi SREN ») précitée est une loi qui a pour objet, d'une part, d'adapter le droit national français au droit de l'Union européenne, en particulier au DSA, mais également au DMA, au DGA, par anticipation au Data Act, voire à l'AI Act, et, d'autre part, de créer des dispositions principalement pénales en matière de protection des mineurs contre la pornographie et la pédopornographie.
L'adaptation du droit français au DSA a été opérée par la loi SREN de plusieurs manières.
Tout d'abord, la loi SREN a procédé à la modification des dispositions du Titre I de la loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique (ci-après « LCEN ») précitée, consacré à « la liberté de communication en ligne » car la directive e-commerce avait principalement été transposée en droit français au sein de la précédente version des Titres I et II de la LCEN. Il est néanmoins important de préciser que la LCEN, dans sa précédente version, comprenait également plusieurs autres Titres ne se rattachant ni à la

[45] Cette question a été rédigée par Juliette Sénéchal.
[46] Benoît Cœuré, Entretien, *op. cit.*
[47] *Ibid.*
[48] Cette question a été rédigée par Juliette Sénéchal.

directive e-commerce ni aux questions que traitent aujourd'hui le DSA (par exemple Titres relatifs à la cryptologie ou aux systèmes satellitaires).
En raison de l'abrogation simplement partielle de la directive e-commerce par le DSA, le Chapitre I du Titre VIII de la loi SREN relatif aux « mesures d'adaptation de la loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique » préserve le Titre II de la LCEN consacré au commerce électronique. Il vient procéder, au sein du Titre I dédié à la liberté de communication en ligne, à plusieurs modifications qui consistent principalement à renvoyer aux définitions présentes à l'article 2 du DSA, dans la section I du Chapitre II du Titre I de la LCEN consacrée aux Définitions et obligations relatives aux fournisseurs de services intermédiaires.[49] En outre, il adapte la section III du Chapitre II du Titre I consacrée aux Dispositions relatives à l'intervention de l'autorité judiciaire.[50] Il crée une section IV du chapitre II du Titre I consacrée au Coordinateur pour les services numériques, désigné comme étant l'Arcom, et à la coopération entre les autorités compétentes.[51] Finalement, il supprime toutes les dispositions en application de la LCEN qui avaient, lors de la publication de la proposition du DSA, anticipé son entrée en vigueur.
Ensuite, à côté de la LCEN, d'autres codes ou lois français font également l'objet de modification par la loi SREN. En particulier, le Chapitre II du Titre VIII de la loi SREN vient modifier le code de la consommation français pour abroger la définition nationale de la plateforme présente à l'article L.111-7 du Code de la consommation. Il est à présent renvoyé à la définition de la plateforme présente à l'article 2 du DSA. De plus, la Direction générale de la consommation, de la concurrence et de la répression des fraudes (DGCCRF) est désignée comme l'une des autorités en charge de la régulation des services numériques, aux côtés de l'Arcom et de la CNIL (voir *supra* section I du rapport).
En outre, le Chapitre IV du Titre VIII de la loi SREN vient abroger plusieurs dispositions de la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication,[52], qui précisaient les pouvoirs de l'Arcom en matière de contrôle des obligations des plateformes, et ce pour se mettre en conformité avec les dispositions du DSA.
Également, le Chapitre V du Titre VIII de la loi SREN vient abroger plusieurs dispositions de la loi relative à la lutte contre la manipulation de l'information[53] non conformes au DSA.
Finalement, le Chapitre VII du Titre VIII de la loi SREN vient adapter la loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés (loi « LIL ») précitée en désignant la Commission nationale informatique et

[49] (Nouvels) Articles 5 à 6, LCEN.
[50] (Nouvels) Articles 6-3 à 6-5, LCEN.
[51] (Nouvels) Articles 7 à 9-2, LCEN.
[52] Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication.
[53] Loi n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information.

libertés (CNIL) comme l'une des autorités en charge de la régulation des services numériques aux côtés de l'Arcom et de la DGCCRF (voir *supra* section I du rapport).

Question 2[54]

Le Titre VIII de la loi SREN intitulé « Adaptations du droit national » procède à la cartographie des règles nationales relative à l'illégalité des contenus pertinentes pour la mise en œuvre du DSA de la manière suivante :

Chapitre I : Mesures d'adaptation de la loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique (Articles 48 à 51) ;

Chapitre II : Modification du code de la consommation (Article 52) ; (…)

Chapitre IV : Mesures d'adaptation de la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Article 54) ;

Chapitre V : Mesures d'adaptation de la loi relative à la lutte contre la manipulation de l'information (Article 55) ;

Chapitre VI : Mesures d'adaptation du code électoral (Article 56) ;

Chapitre VII : Mesures d'adaptation de la loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés (Articles 57 à 60) ;

Chapitre VIII : Mesures d'adaptation de la loi n° 47-585 du 2 avril 1947 relative au statut des entreprises de groupage et de distribution des journaux et publications périodiques (Article 61) ;

Chapitre IX : Mesures d'adaptation de la loi n° 2017-261 du 1er mars 2017 visant à préserver l'éthique du sport, à renforcer la régulation et la transparence du sport professionnel et à améliorer la compétitivité des clubs, du code de la propriété intellectuelle, de la loi n° 2021-1382 du 25 octobre 2021 relative à la régulation et à la protection de l'accès aux œuvres culturelles à l'ère numérique et du code pénal (Article 62).

En outre, au titre de l'échéancier des décrets d'application de la loi SREN,[55] plusieurs des 46 décrets d'application envisagés pour cette loi concernent la mise en application du DSA.

Question 3[56]

Trois lois françaises, en lien avec l'objet du DSA, seront ici successivement évoquées :

[54] Cette question a été rédigée par Juliette Sénéchal.

[55] Disponible à cette adresse : https://www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000047533100/?detailType=CONTENU&detailId=2

[56] Cette question a été rédigée par Juliette Sénéchal.

– la loi visant à encadrer l'influence commerciale,
– la loi visant à instaurer une majorité numérique,
– les Titres I et II de la loi SREN sur la protection des mineurs contre la pornographie et la pédopornographie.

En premier lieu, la loi n° 2023-451 du 9 juin 2023 visant à encadrer l'influence commerciale et à lutter contre les dérives des influenceurs sur les réseaux sociaux posait un certain nombre de questions d'articulation avec le DSA. Ce point avait été anticipé par le législateur français dans l'article 18 de la loi précitée, ainsi rédigé : « L'entrée en vigueur des articles 10 à 12 et 15 de la présente loi ne peut être antérieure à la date de réception par le Gouvernement de la réponse de la Commission européenne permettant de considérer le dispositif législatif lui ayant été notifié comme conforme au droit de l'Union européenne. »
La Commission européenne ayant souligné ces difficultés d'articulation dans un courrier au Gouvernement français en août 2023, l'article 3 de la loi n° 2024-364 du 22 avril 2024 portant diverses dispositions d'adaptation au droit de l'Union européenne en matière d'économie, de finances, de transition écologique, de droit pénal, de droit social et en matière agricole a abrogé les articles 10 à 12, 15 et 18 de la loi visant à encadrer l'influence commerciale et a habilité le Gouvernement français à modifier cette loi par ordonnance pour la mettre en conformité avec la directive e-commerce et le DSA. Ce projet d'ordonnance a été notifié à la Commission européenne le 3 juillet 2024.[57] La période de *statu quo* a expiré le 4 octobre 2024. (voir également *infra* question 6 de la section V du rapport).

En deuxième lieu, la loi n° 2023-566 du 7 juillet 2023 visant à instaurer une majorité numérique et à lutter contre la haine en ligne, instaurant en particulier une majorité numérique à 15 ans, posait également un certain nombre de questions d'articulation avec le DSA. Ce point avait été anticipé par le législateur français dans l'article 7 de la loi précitée, ainsi rédigé : « La présente loi entre en vigueur à une date fixée par décret qui ne peut être postérieure de plus de trois mois à la date de réception par le Gouvernement de la réponse de la Commission européenne permettant de considérer le dispositif législatif lui ayant été notifié comme conforme au droit de l'Union européenne. »
La Commission européenne ayant souligné des difficultés d'articulation dans un courrier au Gouvernement français en août 2023, le décret prévu par cette loi afin de fixer la date d'entrée en vigueur de celle-ci, dès lors qu'il était conditionné à une réponse favorable de la Commission européenne,[58] n'a pas été adopté et n'a pas vocation à l'être dans le futur. Partant, la loi n'est toujours pas en vigueur.

[57] https://technical-regulation-information-system.ec.europa.eu/en/notification/26042
[58] Article 7 de la loi 2023-566 précitée.

En troisième et dernier lieu, le Titre premier de la loi SREN intitulé « Protection des mineurs en ligne » se compose de deux sections : une section I, consacrée au « Renforcement des pouvoirs de l'Autorité de régulation de la communication audiovisuelle et numérique en matière de protection en ligne des mineurs » et une section II, consacrée à la « pénalisation du défaut d'exécution en vingt-quatre heures d'une demande de l'autorité administrative de retrait de contenu pédopornographique. » Ce Titre premier est ensuite complété d'un Titre II consacré à la protection des citoyens dans l'environnement numérique. Aux termes de ces dispositions, l'Arcom est en particulier chargée de veiller à ce que les contenus pornographiques mis à la disposition du public par un éditeur de service de communication au public en ligne, sous sa responsabilité éditoriale, ou fournis par un service de plateforme de partage de vidéos, ne soient pas accessibles aux mineurs. L'Arcom a, en particulier, été chargée d'établir un référentiel de la vérification de l'âge en ligne qui définit des « exigences techniques minimales » sur la façon dont les plateformes pornographiques s'assurent de la majorité de leurs visiteurs. En outre, la loi SREN oblige les acteurs concernés à s'y conformer dans un délai de trois mois à compter de sa publication. Le Conseil constitutionnel français, dans sa décision n° 2024-866 DC du 17 mai 2024,[59] a considéré ces deux Titres conformes au « bloc de constitutionnalité. » La loi SREN a, par ailleurs, fait l'objet de deux notifications à la Commission européenne.[60] La Commission européenne, après deux avis circonstanciés sur les versions législatives précédant le vote final de la loi SREN, a accusé réception du texte promulgué le 31 mai 2024. Le référentiel a également fait l'objet d'une notification.[61] La période de *statu quo* liée à cette dernière notification s'est achevée le 16 juillet 2024.

Il faut également mentionner que, dans la version définitive de la loi SREN, le dispositif évoqué, inséré dans les nouveaux articles 10 à 10-2 de la loi LCEN, précise, afin de tenir compte de la clause « marché intérieur » de l'article 3 de la directive e-commerce et des principes de primauté et d'application directe du DSA, que : « Les articles 10 et 10-1 s'appliquent aux éditeurs de service de communication au public en ligne et aux fournisseurs de services de plateforme de partage de vidéos établis en France ou hors de l'Union européenne. » Le dispositif français ne remet ainsi pas en cause le principe du pays d'origine dans le marché intérieur.

En outre, afin de prendre en compte les conséquences de l'arrêt de la CJUE « *Google Ireland* », du 9 novembre 2023,[62] l'article 10-2 de la LCEN (précitée)

[59] https://www.conseil-constitutionnel.fr/decision/2024/2024866DC.htm

[60] https://technical-regulation-information-system.ec.europa.eu/fr/notification/25091

[61] https://technical-regulation-information-system.ec.europa.eu/fr/notification/25785

[62] Aff. C-376/22. Sur cette décision, voir notamment (dans la doctrine française) T. Douville, « De l'amputation discutable de la compétence des États membres de l'Union européenne pour encadrer le secteur numérique, » *Recueil Dalloz* 2024, p. 19 ; M. Ho-Dac, « Comment construire la confiance (mutuelle) numérique à l'heure des plateformes communicationnelles en ligne ? Pour une relecture du "principe de la modération d'origine" à l'aune d'une modération européenne – Commentaire de l'arrêt de la CJUE, *Google Ireland Limited*, aff. C-376/22. 2024, » *Revue des affaires*

prévoit la possibilité de la prise de mesures individuelles, sous la forme d'arrêtés, à l'égard des opérateurs du numérique ayant leur siège dans un État membre de l'Union européenne autre que la France, selon les conditions suivantes :

> Lorsque les conditions mentionnées au a) du paragraphe 4 de l'article 3 de la directive 2000/31/ CE (…) sont remplies et au terme de la procédure prévue au b) du paragraphe 4 ou, le cas échéant, au paragraphe 5 du même article 3, les articles 10 et 10-1 de la présente loi [évoqués plus haut] s'appliquent également aux éditeurs de service de communication au public en ligne et aux fournisseurs de services de plateforme de partage de vidéos établis dans un autre État membre de l'Union européenne, trois mois après la publication de l'arrêté conjoint du ministre chargé de la culture et de la communication et du ministre chargé du numérique les désignant. [L'Arcom] peut proposer aux ministres la désignation de ces personnes et fournit à l'appui tous les éléments de nature à justifier sa proposition. L'arrêté est pris après avis de [l'Arcom], sauf lorsqu'il fait suite à une proposition de l'Autorité portant sur chacun des fournisseurs désignés par cet arrêté.

Il sera finalement souligné que des éditeurs tchèques de sites de diffusion de contenus pornographiques ont déposé un recours devant le Conseil d'État français afin de contester le décret d'application de la version antérieure du dispositif dorénavant consacré par les articles 10 à 10-2 nouveaux de la LCEN. Il s'agit du décret n° 2021-1306 du 7 octobre 2021 relatif aux modalités de mise œuvre des mesures visant à protéger les mineurs contre l'accès à des sites diffusant un contenu pornographique, leur imposant le contrôle de l'âge de leurs utilisateurs. Avant de trancher cette contestation, par décision en date du 6 mars 2024, dans les affaires 461193 et 461195,[63] le Conseil d'État a posé plusieurs questions préjudicielles à la CJUE[64] relatives aux contours à donner au « domaine coordonné » par la directive commerce électronique – en ce qu'il délimite le champ d'action du principe d'origine – ainsi que sur l'existence « [d'] un principe général du droit de l'Union européenne qui autoriserait les États membres à prendre, notamment en cas d'urgence, les mesures – y compris lorsqu'elles sont générales et abstraites à l'égard d'une catégorie de prestataires de service – qu'impose la protection des mineurs contre les atteintes à leur dignité et à leur intégrité, en dérogeant lorsque cela est nécessaire, à l'égard de prestataires régis par la directive 2000/31/CE, au principe de régulation de ceux-ci par leur État d'origine posé par cette directive ? » L'affaire est actuellement pendante devant la CJUE.[65]

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européennes, 1/2024, <hal-04613879>; J. Sénéchal, « Premiers impacts concrets de l'arrêt Google Ireland sur la loi "Influenceurs" et le projet de loi "SREN", » *Dalloz actualité* 21 décembre 2023, https://www.dalloz-actualite.fr/flash/premiers-impacts-concrets-de-l-arret-google-ireland-sur-loi-influenceurs-et-projet-de-loi-sren

[63] Disponible à cette adresse : https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2024-03-06/461193

[64] Aff. pendante C-188/24.

[65] *Ibid*.

Question 4[66]

Le recul est insuffisant pour répondre à cette question de manière complète.
A priori, il peut y avoir cumul théorique du DMA et des textes sur les pratiques anticoncurrentielles, puisque le considérant 11 du DMA, indique que « [l]e présent règlement poursuit un objectif complémentaire, mais différent de la protection d'une concurrence non faussée. » Toutefois, par économie de moyens, si la Commission européenne traite un cas d'irrespect du DMA, il est fort peu probable que l'Autorité de la concurrence française se saisisse du même cas sur le fondement du droit des pratiques anticoncurrentielles.
Cependant le DMA ne dit rien de la coordination avec le droit des pratiques commerciales déloyales *B-to-B* que l'on appelle en France « le droit des pratiques restrictives de concurrence » du Titre IV du Livre IV du code de commerce. Notamment, il ne dit pas que ces deux corpus ont des objectifs différents, et l'on peut penser, au contraire, que leur objectif est le même. La comparaison de l'article 12, § 5, b) du DMA qui punit « un déséquilibre entre les droits et les obligations des entreprises utilisatrices » qui permet au contrôleur d'accès d'obtenir « un avantage des entreprises utilisatrices qui est disproportionné par rapport au service fourni par ce contrôleur d'accès à ces entreprises utilisatrices » avec l'article L 442-1 I 2 du code de commerce français qui punit le fait « de soumettre ou de tenter de soumettre l'autre partie à des obligations créant un déséquilibre significatif dans les droits et obligations des parties » est éloquente. De notre point de vue, il ne devrait pas pouvoir y avoir cumul entre ces deux textes, qui poursuivent le même objectif. Mais ce sera aux juges d'en décider.

Question 5[67]

La loi n° 2024-449 du 21 mai 2024 (dite « loi SREN ») précitée a été adoptée. Elle vise à réguler et à sécuriser l'espace numérique. Comme indiqué ci-dessus, elle donne aux Autorités nationales (françaises) désignées les pouvoirs qui leur permettront d'aider la Commission européenne dans la mise en œuvre du DMA.
Cette même loi a fait quelques adaptations terminologiques.[68] Elle a également rendu applicables en Nouvelle-Calédonie, en Polynésie française, dans les îles Wallis et Futuna, à Saint-Barthélemy et à Saint-Pierre-et-Miquelon, les dispositions du DMA, avec les adaptations nécessaires et dans les matières relevant de la compétence de l'État.[69]

[66] Cette question a été rédigée par Martine Behar-Touchais.
[67] Cette question a été rédigée par Martine Behar-Touchais.
[68] Voir article 54 de la loi SREN.
[69] Article 63 de la loi SREN.

Section III: Vertical and horizontal public enforcement-related cooperation under DSA/DMA

Question 1[70]

Réseau national de coordination de la régulation des services numériques. La loi n° 2024-449 du 21 mai 2024 (dite « loi SREN ») instaure un réseau national de coordination de la régulation des services numériques. Composé de l'ensemble des autorités administratives compétentes (Arcom, CNIL, Arcep, Autorité de la concurrence…) et des principaux services de l'État (DGCCRF, Pharos…), ce Réseau sera chargé de partager des informations et de collaborer dans le champ des régulations du numérique dans l'ordre juridique français.[71] De manière plus générale, on relèvera que la question de la coordination des autorités est au cœur de réflexions plus profondes du Gouvernement français. Un rapport du Conseil Général de l'Économie (CGE) avait ainsi été préparé en amont de la création de ce réseau des régulateurs du numérique. Il avait formulé plusieurs recommandations à caractère opérationnel destinées à améliorer le fonctionnement de la régulation, en agissant sur trois leviers : les dispositifs institutionnels de coordination, les consultations et la mobilisation et la mutualisation de l'expertise.[72]

Convention tripartite pour la mise en œuvre du DSA. La coopération entre l'Arcom, en tant que coordinateur des services numérique, la DGCCRF et la CNIL, en tant qu'autres autorités nationales compétentes au titre du DSA, est formellement organisée par une convention tripartite signée entre les trois acteurs le 27 juin 2024.[73] Cette convention organise également la coopération au niveau européen de ces autorités compétentes. Elle sera affinée au regard de la pratique décisionnelle des autorités compétentes, avec une attention particulière aux difficultés d'articulation entre les différentes réglementations et aux éventuels chevauchements sur les matières présentant des recoupements importants.

Article 40 du DMA. La CNIL participe en tant que représentante du Comité européen de la protection des données (CEPD) au Groupe de haut niveau institué par l'article 40 du DMA.[74] Seule instance formelle de coopération entre autorités pour la mise en œuvre du paquet numérique européen, ce groupe rassemble la Commission européenne et des représentants des autorités char-

[70] Cette question a été rédigée par Marion Ho-Dac, avec en appui les contributions écrite de la CNIL et orales de l'Arcom et de la DGCCRF.

[71] (Nouvel) article 7-4, LCEN, issu de l'article 51 loi SREN.

[72] Rapport préparé par Laurent de Mercey et Christophe Ravier, CGE, disponible à l'adresse suivante : https://www.economie.gouv.fr/files/files/directions_services/cge/regulation-numerique.pdf?v=1687358145

[73] Le texte de cette convention est disponible en ligne : https://www.arcom.fr/sites/default/files/2024-06/Arcom%20-%20Convention%20coopération_ARCOM_CNIL_DGCCRF.pdf

[74] https://competition-policy.ec.europa.eu/system/files/2023-03/High_Level_Group_on_the_DMA_0.pdf

gées de la concurrence, des communications électroniques, de la protection des consommateurs et des médias. Il est actif en matière d'articulation entre les différents instruments législatifs concernés. Le Groupe de haut niveau comprend un sous-groupe d'experts chargé des dispositions du DMA liées aux données, un autre chargé de l'interopérabilité et un troisième chargé des développements sur le marché de l'intelligence artificielle.
En raison des objectifs du DMA, qui visent la contestabilité des marchés numériques, les autorités nationales principalement concernées sont les autorités de concurrence, qui coopèrent avec la Commission, chargée de la mise en œuvre du DMA, *via* le réseau européen de concurrence.[75]

Question 2

Aucune mesure n'a été adoptée sur ce point à notre connaissance.

Question 3[76]

S'agissant des orientations d'exécution du DMA en France, l'Autorité de la concurrence a rendu deux avis qui peuvent être mentionnés :

- un avis 23-A-08 du 29 juin 2023 portant sur le fonctionnement concurrentiel de l'informatique en nuage (« *cloud* »).[77] Elle y mentionne notamment les importants risques concurrentiels sur ce marché ;[78]
- un avis 24-A-05 du 28 juin 2024 sur le fonctionnement concurrentiel du secteur de l'intelligence artificielle générative.[79] Elle y mentionne notamment la nécessité d'assurer une meilleure transparence sur les prises de participations des géants du numérique. À cette occasion, elle formule une proposition dans le cadre de la mise en œuvre de l'article 14 du DMA.[80]

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[75] Article 38 du DMA.

[76] Cette question a été rédigée par Marion Ho-Dac et Juliette Sénéchal.

[77] L'avis est disponible à cette adresse : https://www.autoritedelaconcurrence.fr/fr/avis/portant-sur-le-fonctionnement-concurrentiel-de-linformatique-en-nuage-cloud

[78] Benoît Cœuré, président de l'Autorité de la Concurrence, Entretien en date du 10 octobre 2024 auprès de la Revue Contexte (https://www.contexte.com/article/tech/benoit-cure-nous-navons-pas-encore-atteint-le-rythme-de-croisiere-du-dma-_204567.html).

[79] L'avis est disponible à cette adresse : https://www.autoritedelaconcurrence.fr/fr/avis/relatif-au-fonctionnement-concurrentiel-du-secteur-de-lintelligence-artificielle-generative; voir également Benoît Coeuré, Président de l'Autorité française de la concurrence, « L'IA est la première technologie à être d'emblée dominée par des grands acteurs », Entretien du 21 septembre 2024, journal *Le Monde*. https://www.lemonde.fr/economie/article/2024/09/21/l-ia-est-la-premiere-technologie-a-etre-d-emblee-dominee-par-des-grands-acteurs_6326499_3234.html

[80] Selon l'Autorité de la concurrence, « Proposition n° 10 : à l'occasion de l'obligation d'information des concentrations prévue à l'article 14 du DMA, la Commission pourrait également demander, dans le modèle relatif à l'article 14 du règlement sur les marchés numériques, des informations sur les participations minoritaires détenues dans le même secteur d'activité que la cible. »

Section IV: Private enforcement of DMA/DSA

Question 1[81]

Non.

Question 2

Cette question est traitée avec la question 3, *infra*.

Question 3[82]

En l'absence de texte européen et en vertu du principe d'autonomie procédurale, les recours seront soumis aux dispositions du droit commun de la responsabilité civile pour la réparation des préjudices et à celles de droit commun des contrats pour la nullité des contrats qui violent le DMA ou le DSA.

S'agissant du DMA, si l'on se fie au contentieux de la réparation des pratiques anticoncurrentielles traité par les juridictions françaises avant l'entrée en vigueur de la directive 2014/104 « Dommages, »[83] ce droit commun permet la réparation d'une variété de préjudices sans que les exigences relatives à la causalité ou au préjudice ne pose d'obstacle majeur. La difficulté principale tient surtout à l'évaluation du préjudice qui ralentit considérablement le règlement des litiges devant les juridictions. Ce ralentissement favorise essentiellement les grandes entreprises qui peuvent supporter des procès longs et coûteux et ne sont, en conséquence, pas incitées à transiger avec les demandeurs aux ressources plus limitées.
Il nous semble assez probable que, dans le contexte du DMA, le contentieux se développera plutôt rapidement pour plusieurs raisons.
D'abord, si l'on se fie au contentieux déjà engagé sur le fondement de l'article 102 du TFUE, on constate qu'il résulte souvent de plaintes déposées par des victimes des abus des entreprises dominantes. On songe bien sûr à l'affaire *Google Shopping* au niveau européen mais aussi aux affaires françaises. Un exemple : dans la première affaire ayant abouti à une condamnation de *Google* par l'Autorité française de concurrence à propos de l'application discrimina-

[81] Cette question a été rédigée par Thibault Douville (pour les aspects DSA) et Rafael Amaro (pour les aspects DMA).

[82] Cette question a été rédigée par Thibault Douville (pour les aspects DSA) et Rafael Amaro (pour les aspects DMA).

[83] Directive 2014/104/UE du Parlement européen et du Conseil du 26 novembre 2014 relative à certaines règles régissant les actions en dommages et intérêts en droit national pour les infractions aux dispositions du droit de la concurrence des États membres et de l'Union européenne, JO L 349 du 5.12.2014, p. 1–19.

toire de ses conditions d'utilisation, c'est une entreprise qui avait recours au service *AdWords* qui était à l'origine de la procédure – l'entreprise *Gibmedia*.[84] Il est à prévoir que des entreprises comme celles-ci soient promptes à invoquer le DMA.

Ensuite, vingt ans de discussions relatives au *private enforcement* du droit de la concurrence ont fini par éduquer le marché du droit. Les avocats, les conseils internes, les universitaires, les experts économiques et les juges sont aujourd'hui beaucoup plus compétents qu'il y a vingt ans pour traiter de contentieux à forte valeur économique. Il est donc assez probable qu'une offre de services juridiques performants serait proposée aux victimes des pratiques illicites des *gatekeepers* pour engager des actions privées.

À notre avis également, l'application de prohibitions *per se* sera plus aisée pour les juridictions nationales que l'application de prohibitions basées sur les effets anticoncurrentiels. Certes, il restera des difficultés d'ordre économique, à l'instar de celles relatives à l'évaluation des préjudices, mais ces difficultés ne diffèrent qu'assez peu de celles que l'on observe déjà en droit de la concurrence.

Enfin (et tout a déjà été dit pour le droit de la concurrence), il est probable qu'à terme la Cour de justice de l'UE, fidèle à sa doctrine *Courage*, verra le contentieux privé comme un indispensable pilier de l'effectivité du DMA. L'affirmation serait d'autant plus convaincante qu'à la différence du droit de la concurrence, le DMA sera appliqué uniquement par la Commission européenne sans le support des autorités des États membres. On imagine alors qu'assez vite la tâche sera insurmontable pour elle si elle doit gérer l'intégralité du contentieux généré par l'application du DMA.

S'agissant du DSA, et dans le prolongement de ce qui a été dit à propos du DMA, des actions en responsabilité civile pourraient être engagées contre les services intermédiaires et les plateformes tant par les titulaires de droits (notamment de propriété intellectuelle) qui seraient violés en raison d'un manquement aux dispositions du DSA, que par d'autres services intermédiaires ou plateformes sur le terrain de la concurrence déloyale. Il existe de nombreuses décisions internes concernant l'exclusion de la responsabilité des intermédiaires techniques en application du régime d'exemption de responsabilité qui était initialement prévu par la directive 2000/31 commerce électronique.[85]

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[84] Aut. conc., décembre 19-MC-01 du 31 janvier 2019 relative à une demande de mesures conservatoires de la société Amadeus ; décembre 19-D-26 du 19 décembre 2019 relative à des pratiques mises en œuvre dans le secteur de la publicité en ligne liée aux recherches ; *RTD com.* 2020, chr., p. 806 et s., obs. E. Claudel ; *Concurrences*, n° 2-2020, article n° 94661, p. 87, note M. Cartapanis. Voir encore Trib. com. Paris, 8e ch., 10 février 2021, *Oxone Technologies e.a. c/ Google Ireland Ltd*, R. G. n° 2020035242 ; *Concurrences*, n° 2-2021, article n° 100387, note M. Idri ; *Concurrences*, n° 2-2021, article n° 99316, note A. Ronzano.

[85] Cour de cassation, Civ. 1re, 17 février 2011, n° 09-67.896 ; Civ. 1re, 23 novembre 2022, n° 21-10.220.

De la même manière, le juge français ordonne aux intermédiaires techniques de prendre des mesures de cessation de l'illicite.[86] Pour autant, l'adoption du DSA ouvre de nouveaux espaces contentieux, notamment s'agissant de la mise en place par les plateformes de leurs systèmes de gestion des risques ou des droits créés en faveur des personnes concernées. Consécutivement, le juge pourrait être saisi du non-respect de ces dispositions.

Question 4[87]

Concernant le DMA, aucune règle propre à la mise en œuvre du règlement n'a été adoptée. On peut tout au plus mentionner une proposition de loi[88] destinée à transposer la directive 2020/1828 sur les actions collectives.[89] Cette loi aurait étendu le domaine de l'actuelle « action de groupe » – l'un des recours collectifs du droit français – aux violations du DMA. En raison de la dissolution de l'Assemblée nationale du 9 juin 2024 par le Président de la République, l'adoption de cette loi, pourtant votée en première lecture à l'Assemblée nationale et au Sénat, semble devoir être significativement retardée.

Concernant le DSA, les dispositions concernant l'office du juge à propos des services de communication au public en ligne ont été révisées pour tenir compte de ce règlement par la loi n° 2024-449 du 21 mai 2024 visant à sécuriser et à réguler l'espace numérique (loi « SREN ») précitée. L'article 50 de la loi SREN modifie les articles 6-3 et 6-4 de la loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique (LCEN), à propos des mesures propres à faire cesser un dommage ou à prévenir un dommage occasionné par le contenu d'un service de communication au public en ligne.

Question 5[90]

En droit français, comme dans la plupart des autres systèmes juridiques de l'Union, les associations peuvent ester en justice pour défendre des intérêts collectifs, ce qui signifie qu'elles peuvent engager des actions ou intervenir dans des affaires pendantes devant les juridictions. Rien n'interdirait donc à une association dont l'objet est de défendre une profession dont les intérêts pour-

[86] Cour de cassation, Com., 27 mars 2024, n° 22-21.586, *Leboncoin*.

[87] Cette question a été rédigée par Thibault Douville (pour les aspects DSA) et Rafael Amaro (pour les aspects DMA).

[88] Proposition de loi n° 639 du 15 décembre 2022, déposée par les députés Laurence Vichnievsky et Philippe Gosselin.

[89] Directive 2020/1828 du 25 novembre 2020 relative aux actions représentatives visant à protéger les intérêts collectifs des consommateurs et abrogeant la directive 2009/22/CE.

[90] Cette question a été rédigée par Rafael Amaro.

raient être menacés par des violations du DMA ou du DSA d'agir en justice ou d'intervenir dans des instances engagées par des victimes. Il est difficile d'anticiper la propension de ces associations à le faire, mais on peut remarquer que de telles actions sont très rares en droit de la concurrence ou concernant la responsabilité des intermédiaires techniques ou des plateformes communicationnelles. On mentionnera néanmoins l'exception de l'intervention des associations ayant pour objet la défense des droits de propriété intellectuelle qui sont actives d'un point de vue contentieux.

Section V: General questions

Question 1[91]

L'opérationnalisation des articles 9 et 10 du DSA en droit national français a été organisée par la loi n° 2024-449 du 21 mai 2024 visant à sécuriser et à réguler l'espace numérique (dite « loi SREN »)[92] précitée qui a pour cela modifié la loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique (dite « LCEN ») précitée. La LCEN est en effet la pierre angulaire du droit français en matière d'obligations des plateformes de lutter contre les contenus illicites, y compris en ce qu'elle a transposé la directive 2000/31 relative au commerce électronique. L'article 8-1 de la LCEN (révisée) charge l'Autorité de régulation de la communication audiovisuelle et numérique (Arcom) de veiller, notamment, au respect « par les personnes dont l'activité consiste à fournir un service intermédiaire, des obligations prévues aux paragraphes 1 et 5 de l'article 9, aux paragraphes 1 et 5 de l'article 10 (…) règlement (UE) 2022/2065 » (voir *supra*, section I du rapport).
Cela permet, dans la suite du texte, de préciser les pouvoirs d'enquête et de perquisition de l'autorité et de ses agents.[93] Sont ensuite précisés les pouvoirs d'injonction et d'astreinte.[94] Il est ensuite prévu que l'Autorité puisse recueillir des engagements des plateformes, qui prendront valeur obligatoire, et même enjoindre à ce que des plans d'action lui soient soumis.[95] Plus remarquable encore, l'Arcom peut saisir l'autorité judiciaire afin que cette dernière ordonne une mesure de restriction temporaire de l'accès au service du fournisseur concerné.[96] L'article 9-2, quant à lui, aborde l'hypothèse d'injonctions de l'Arcom qui, si elles restent sans effet, font l'objet d'une sanction pécuniaire. Cette approche est conforme aux possibilités ouvertes par les articles 51 et 52 du DSA (voir *supra*, section I du rapport).

[91] Cette question a été rédigée par Emmanuel Netter.
[92] Article 51 de la loi SREN.
[93] Article 9-1 de la loi pour la confiance dans l'économie numérique (LCEN).
[94] Article 9-1, V-A de la LCEN.
[95] Article 9-1, VI-A de la LCEN.
[96] Article 9-1, VI-B de la LCEN.

Par ailleurs, la France avait intégré de façon spécifique les articles 9 et 10 du DSA dans une loi relative aux influenceurs,[97] mais cela n'est plus d'actualité et nous revenons sur ce point ci-dessous, à la question 6 de cette section.
S'agissant du contrôle des injonctions, les décisions de l'Arcom peuvent faire l'objet d'un recours devant le Conseil d'État.[98]

Question 2

À notre connaissance, les autorités françaises de régulation n'ont pas, pour l'heure, connaissance d'acteurs proposant de tels services en France.

Question 3[99]

L'Arcom peut être saisie au titre de l'article 53 du DSA. Le point de vigilance a trait, pour l'Autorité, au fait qu'il est essentiel que les plaintes entrent dans le champ d'application du DSA et ne porte pas, de manière erronée, sur la régulation des contenus illicites qui n'est pas l'objet des compétences règlementaires de l'Autorité en application du DSA. En outre, dans le cadre de la convention tripartite signée entre les trois autorités en charge du DSA – Arcom, CNIL et DGCCRF – le 27 juin 2024[100] précitée, l'article 3.4 organise la coopération entre ces autorités en matière de plaintes. L'Arcom transmet toute plainte reçue ou éléments de celle-ci qui rentre dans le domaine de compétence des deux autres autorités. Ces dernières transmettent également toute plainte qu'elles reçoivent à l'Arcom pour information. Elles peuvent ainsi travailler ensemble et s'échanger des informations pour le traitement des plaintes.
Pour le reste, la loi SREN ne prévoit pas d'adaptation spécifique concernant le traitement des plaintes pour la CNIL et la DGCCRF.

Question 4[101]

S'agissant d'une part du DSA, les principales controverses politiques en France ont plutôt eu lieu avant l'adoption du DSA. Une loi n° 2020-766 du 24 juin 2020 visant à lutter contre les contenus haineux sur Internet (dite « loi Avia »)

[97] Loi n° 2023-451 du 9 juin 2023 visant à encadrer l'influence commerciale et à lutter contre les dérives des influenceurs sur les réseaux sociaux (modifiée par la loi SREN, voir *infra* question 6).

[98] Article 9-1 *in fine* de la LCEN.

[99] Cette question a été rédigée par Marion Ho-Dac, avec en appui les contributions écrite de la CNIL et orales de l'Arcom et de la DGCCRF.

[100] Le texte de cette convention est disponible en ligne : https://www.arcom.fr/sites/default/files/2024-06/Arcom%20-%20Convention%20coopération_ARCOM_CNIL_DGCCRF.pdf

[101] Cette question a été rédigée par Emmanuel Netter (pour les aspects DSA) et par Martine Behar-Touchais (pour les aspects DMA).

avait en effet opté pour une approche de la régulation des plateformes qui était, de l'avis général, dangereuse pour la liberté d'expression. Inspiré par la loi allemande *NetzDG*, le législateur français avait notamment prévu une obligation de retirer de nombreuses formes de contenus illicites dans les 24 heures après signalement, sous peine d'une amende de 250 000 euros par manquement. Ce texte a été très largement censuré par le Conseil constitutionnel lors d'un contrôle de constitutionnalité *ex ante* de la loi.[102] Le DSA a ainsi été considéré comme un progrès dans la mesure où il n'exerce pas de pressions extrêmes sur les plateformes afin qu'elles retirent des contenus, au risque d'une censure excessive, mais attend des professionnels des procédures de modération diligentes et adéquates.

La phase qui a suivi l'adoption du DSA n'a cependant pas été exempte de polémiques. L'association « la Quadrature du Net », qui dit « défendre les libertés fondamentales dans l'environnement numérique, »[103] explique par exemple que ce texte :

> poursuit bien la dynamique existante de confier les clés de la liberté d'expression aux plateformes privées, quitte à les encadrer mollement. Le DSA légitime les logiques de censure extra-judiciaire, renforçant ainsi l'hégémonie des grandes plateformes qui ont développé des outils de reconnaissance et de censure automatisés de contenus. Des contenus terroristes aux vidéos protégées par le droit d'auteur en passant par les opinions radicales, c'est tout un arsenal juridique européen qui existe aujourd'hui pour fonder la censure sur Internet. En pratique, elle permet surtout de donner aux États qui façonnent ces législations des outils de contrôle de l'expression en ligne. On le voit en ce moment avec les vidéos d'émeutes, ces règles sont mobilisées pour contenir et maîtriser les contestations politiques ou problématiques. Le contrôle des moyens d'expression finit toujours aux mains de projets sécuritaires et antidémocratiques.[104]

S'agissant d'autre part du DMA, il n'a pas fait l'objet de controverses politiques lors de sa mise en œuvre au niveau national. Les débats politiques ont davantage porté sur d'autres textes des régulations européennes du numérique et sur des questions concrètes, telles que la protection contre la haine en ligne, contre les *fake news* et la désinformation, ou la protection des enfants contre la pornographie en ligne.

Quant aux pouvoirs des Autorités chargés d'appliquer le DMA, ils n'ont pas suscité de controverses politiques. Il y a un certain consensus en France sur le

[102] Décision n° 2020-801 DC du 18 juin 2020, disponible sur le site du Conseil constitutionnel (y compris une analyse de la décision) : https://www.conseil-constitutionnel.fr/decision/2020/2020801DC.htm

[103] https://www.laquadrature.net/nous

[104] Article laquadrature.net du 28 juillet 2023, « Révoltes et réseaux sociaux : Le retour du coupable idéal. » https://www.laquadrature.net/2023/07/28/revoltes-et-reseaux-sociaux-le-retour-du-coupable-ideal/

fait que le droit applicable aux GAFAM ou MAAMA doit être effectif, ce qui implique que l'on donne d'importants pouvoirs aux Autorités de régulation pour les contrôler. D'ailleurs, la saisine du Conseil Constitutionnel par des membres du Parlement aux fins d'un contrôle de constitutionnalité *ex ante* de la loi SREN[105] qui révèle, au-delà des questions juridiques, les controverses politiques, n'a pas porté sur les dispositions de la loi permettant la mise en œuvre du DMA, mais sur d'autres questions, telles que :

- les mesures destinées à garantir que les contenus pornographiques mis en ligne ne soient pas accessibles aux mineurs ;
- les mesures de blocage que peut adopter l'Arcom, lorsqu'un service de communication au public en ligne ou un service de plateforme de partage de vidéos permet à des mineurs d'avoir accès à des contenus pornographiques ;
- l'injonction administrative adressée à un éditeur d'un service de communication au public en ligne ou à un fournisseur de services d'hébergement de retirer un contenu à caractère pédopornographique ;
- l'injonction que l'autorité administrative peut, à titre expérimental, adresser à un éditeur d'un service de communication au public en ligne ou à un fournisseur de services d'hébergement pour exiger le retrait d'images de tortures ou d'actes de barbarie ;
- l'aggravation des peines encourues en cas de chantage à caractère sexuel exercé par le biais d'un service de communication au public en ligne ;
- le délit d'outrage en ligne (dont le texte sera censuré par la décision n° 2024-866 DCC du Conseil Constitutionnel), etc.

En revanche, lors de l'adoption du DMA certains *think-tanks* du numérique avaient insisté sur la possible atteinte à la sécurité juridique et à la capacité d'innover des entreprises, qui pourrait résulter du DMA.[106] D'autres avaient douté de l'efficacité même du règlement.[107] Il semble que ces critiques soient actuellement en sommeil.

Question 5[108]

Sur le volet DSA. En premier lieu, sur l'accès des chercheurs aux données des plateformes au sens de l'article 40 du DSA, l'Arcom a d'ores et déjà tenu plusieurs journées de sensibilisation et d'échange entre chercheurs et opérateurs

[105] Conseil constitutionnel, Décision n° 2024-866 DC du 17 mai 2024 (disponible à cette adresse, y compris une analyse de la décision : https://www.conseil-constitutionnel.fr/decision/2024/2024866DC.htm).

[106] Par exemple, le *think-tank* « Renaissance numérique » : https://www.renaissancenumerique.org/publications/digital-markets-act-revolution-ou-contradiction-juridique/

[107] Voir Olivier Giannoni, membre du « cercle Montesquieu » : https://www.latribune.fr/opinions/tribunes/le-nouveau-reglement-europeen-sur-les-marches-numeriques-dma-protege-t-il-vraiment-des-gafam-946792.html

[108] Cette question a été rédigée par Juliette Sénéchal (pour les aspects DSA) et par Martine Behar-Touchais (pour les aspects DMA). Elle intègre par ailleurs la contribution orale de l'Arcom.

de plateforme en ligne. L'Arcom a également organisé en interne sa mission d'interface entre les chercheurs français et les autorités de régulation des autres États membres dans lesquels des opérateurs de plateforme auraient leur siège social. L'objectif est que ces chercheurs puissent solliciter auprès de ces autorités l'accès aux données prévu dans le cadre de l'article 40 du DSA. En second lieu, les procédures de désignation des signaleurs de confiance sont en cours d'élaboration par l'Arcom.

Sur le volet DMA. Aucune mesure de ce type n'est prévue, à notre connaissance, dans l'ordre juridique français, pour la mise en œuvre du DMA.

Question 6[109]

Sur le volet DSA. Le législateur français s'est distingué par une controverse qui l'a opposé aux services de la Commission européenne s'agissant de l'interprétation des marges de manœuvre que le DSA offre aux États membres, notamment lorsqu'elle a adopté la loi n° 2023-451 du 9 juin 2023 visant à encadrer l'influence commerciale et à lutter contre les dérives des influenceurs sur les réseaux sociaux (dite « loi sur les influenceurs »). Ce texte répétait notamment les dispositions du DSA relatives aux dispositifs de signalement, en ajoutant simplement que les contenus illicites s'entendaient, y compris des contenus violant la loi sur les influenceurs.[110] Puis il reprenait de la même façon le dispositif des signaleurs de confiance[111] et les injonctions d'agir et d'informer.[112] Par ailleurs, le texte prévoyait une obligation nouvelle, à la charge des plateformes, d'adopter des protocoles d'engagements en matière d'influence commerciale.[113] La loi se terminait par la formule : « L'entrée en vigueur des articles 10 à 12 et 15 de la présente loi ne peut être antérieure à la date de réception par le Gouvernement de la réponse de la Commission européenne permettant de considérer le dispositif législatif lui ayant été notifié comme conforme au droit de l'Union européenne, » ce qui montre que le législateur français était conscient du risque qu'il prenait.
Le commissaire Thierry Breton fit part, à cette époque, de ses vives protestations, dans une lettre du 14 août 2023 révélée par la presse. Les dispositions citées ci-dessus furent retirées à l'occasion d'une loi ultérieure, précisément par l'article 3 de la loi n° 2024-364 du 22 avril 2024 portant diverses dispositions d'adaptation au droit de l'Union européenne en matière d'économie,

[109] Cette question a été rédigée par Emmanuel Netter (pour les aspects DSA), par Martine Behar-Touchais (pour les aspects DMA). Elle intègre, par ailleurs, la contribution écrite de la CNIL et la contribution orale de la DGCCRF.

[110] Article 10 de la loi sur les influenceurs (dans sa version d'origine).

[111] Article 11 de la loi sur les influenceurs (dans sa version d'origine).

[112] Article 12 de la loi sur les influenceurs (dans sa version d'origine).

[113] Article 15 de la loi sur les influenceurs (dans sa version d'origine).

de finances, de transition écologique, de droit pénal, de droit social et en matière agricole (voir également *supra*, section II, question 3 du rapport).

S'agissant de la réaction de l'Arcom aux éventuelles obscurités du texte, il est sans doute trop tôt pour se prononcer. Dans le cadre d'un entretien, nous avons notamment interrogé l'Autorité sur les silences de l'article 20, relatif au système interne de traitement des réclamations. L'Autorité a répondu qu'il appartenait d'abord aux plateformes d'interpréter le texte et de mettre en place des procédures, et qu'ensuite seulement l'Arcom se prononcerait sur leur conformité. Une telle approche, si elle est conforme à l'esprit du droit de la régulation, va différer l'émergence d'une doctrine de l'Arcom sur le DSA.

Du point de vue de la DGCCRF, il a été constaté que les termes très généraux utilisés pour décrire les obligations de diligence imposées par le DSA aux acteurs économiques suscitent des inquiétudes chez certains de ces acteurs quant à la manière de comprendre et de mettre en œuvre de manière effective ces dispositions.

Du point de la CNIL, cette autorité contribue aux travaux du CEPD concernant l'articulation entre le DSA et le RGPD, qui prendront la forme de lignes directrices. La CNIL n'a pas à ce stade identifié de difficultés majeures dans la mise en œuvre de ces dispositions. Elle reste néanmoins attentive aux éventuelles difficultés qui pourraient être rencontrées par les parties prenantes.

Sur le volet DMA. La notion de *gatekeeper* qui détermine l'application du DMA a bien entendu été suivie avec attention.
La question du cumul du DMA avec les autres textes a été débattue. Notamment, l'expression « *sans préjudice de* »[114] signifie-t-elle que le cumul est permis, ou que c'est au juge de décider plus tard si le cumul est ou non permis avec tel texte ?
La question de la nature juridique des règles du DMA a également été beaucoup débattue, quoi qu'il n'en découle pas de grandes conséquences pratiques. Tout le monde est d'accord pour dire que dans son versant *ex ante*, le DMA est de la régulation sectorielle. Mais dans son versant *ex post*, la doctrine est divisée. En général ceux qui ne font que du droit des pratiques anticoncurrentielles et du droit des concentrations rangent le DMA dans le droit des pratiques anticoncurrentielles, car la plupart des interdictions sont inspirées de solutions jurisprudentielles adoptées lors de litiges portant sur des pratiques anticoncurrentielles. Mais selon nous, cette analyse se concilie très mal avec le considérant 11 du DMA qui indique que « [l]e présent règlement poursuit un objectif complémentaire, mais différent de la protection d'une concurrence

[114] Voir par exemple le considérant 12 du DMA.

non faussée. » Toujours de notre point de vue, dans ce versant *ex post*, le DMA est un droit des pratiques commerciales déloyales des *gatekeepers*.
Enfin, la question de la mise en place de remèdes structurels suscite aussi la controverse. Pourraient-ils effectivement être déployés ?

Du côté de la CNIL, des lignes directrices concernant l'articulation entre le RGPD et le DMA sont en cours d'élaboration au CEPD, afin notamment de fournir de la sécurité juridique aux écosystèmes. La CNIL participe également aux travaux du CEPD sur les rapports d'audit soumis par les contrôleurs d'accès à la Commission européenne s'agissant de leurs techniques de profilage au titre de l'article 15 DMA.
Plus généralement, la CNIL a été à l'origine, au sein du CEPD, d'une *task force* sur l'articulation entre protection des données, concurrence et protection du consommateur, dite *task force C&C*. Cette *task force* a pour but d'améliorer la coopération des autorités nationales de protection des données et de concurrence, de contribuer en tant que de besoin au réseau européen de protection des consommateurs et de veiller à la bonne articulation entre protection des données et DMA.
Ainsi la CNIL, comme le CEPD, entendent prendre toute leur part dans la gouvernance du paquet numérique européen et sa mise en œuvre.

Germany

*Bruno Immanuel Striebel**

Section 1: National institutional set-up

Question 1

Zuständigkeiten
Die Verordnung 2022/2065 EU ("DSA") wird in Deutschland, soweit erforderlich, im Digitale-Dienste-Gesetz (DDG)[1] umgesetzt. Die Mitgliedstaaten müssen die für die Beaufsichtigung der Anbieter von Vermittlungsdiensten und die Durchsetzung der Verordnung zuständige Behörde oder die zuständigen Behörden benennen.[2] Die Umsetzung in das nationale Recht erfolgte zum 06.05.2024 und damit erst einige Zeit nach dem Stichtag für die Geltung des DSA am 17. Februar 2024. Aufgrund der bundesstaatlichen Struktur in Deutschland ist die Zuständigkeit auf verschiedene Bundes- und Landesbehörden verteilt.

Die zuständigen Behörden sind im deutschen Recht in § 12 DDG benannt. Nach Abs. 1 ist grundsätzlich die Bundesnetzagentur (BNetzA)[3] die im Sinne von Art. 49 Abs. 1 DSA zuständige nationale Behörde. Die BNetzA existierte bereits vor der Umsetzung des DSA. Sie ist eine Bundesoberbehörde im Geschäftsbereich des Bundesministeriums für Wirtschaft und Klimaschutz (BMWK) mit Sitz in Bonn und übernimmt bereits seit langer Zeit vielfältige Regulierungsaufgaben in den Bereichen Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen.

Bei der BNetzA wird zudem auch die Koordinierungsstelle nach Art. 49 Abs. 2 DSA eingerichtet.[4] Damit ist die BNetzA nicht nur die zuständige Behörde zur Überwachung und Durchsetzung des DSA, sondern gleichzeitig auch Koordinator für digitale Dienste.[5] Die BNetzA ist damit insbesondere verantwortlich

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[1] Gesetz vom 06.05.2024 (BGBl. 2024 I Nr. 149).

[2] Art. 49 Abs. 1 DSA.

[3] Bundesagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (Bundesnetzagentur).

[4] § 14 Abs. 1 DDG.

[5] BT-Drs. 20/10031, S. 73, abrufbar unter https://dserver.bundestag.de/btd/20/100/2010031.pdf, abgerufen am 03.09.2024.

für die Verhängung von Zwangsgeldern und Geldbußen bei Nichteinhaltung des DSA (Art. 52 DSA) und die zentrale Kontaktstelle für die Europäische Kommission (Art. 49 Abs. 2 UAbs. 2 DSA).[6]

Bei der Koordinierungsstelle wird zudem – in überschießender Umsetzung des DSA – ein Beirat eingerichtet.[7] Dieser soll insbesondere die Koordinierungsstelle und die zur Durchsetzung weiteren zuständigen Behörden beraten. Daneben soll er allgemeine Empfehlungen zur wirkungsvollen und einheitlichen Durchführung des DSA vorschlagen und wissenschaftliche Fragestellungen an diese Stellen herantragen.[8] Der Beirat hat 16 Mitglieder, von denen acht Vertreter der Zivilgesellschaft, vier Vertreter der Wissenschaft und vier Vertreter von Wirtschaftsverbänden sind.[9]

Von der grundsätzlichen Zuständigkeit der BNetzA sind einige Bereiche ausdrücklich ausgenommen:

– Gemäß § 12 Abs. 2 DDG ist die Bundeszentrale für Kinder- und Jugendmedienschutz (BzKJ) die zuständige Behörde für die Durchsetzung von Artikel 14 Abs. 3 DSA und für die Durchsetzung von Maßnahmen nach Artikel 28 Abs. 1 DSA. Bei dieser wird eine Stelle zur Durchsetzung von Kinderrechten in digitalen Diensten mit Sitz in Bonn eingerichtet.[10] Die Zuweisung der Aufgabe an die BzKJ wird mit deren langjähriger Erfahrung im Bereich Kinder- und Jugendschutz begründet. Ziel ist es, einen einheitlichen Regulierungsansatz für den Online-Schutz Minderjähriger zu gewährleisten.[11]

Neben der BzKJ sind die Landesmedienanstalten für diejenigen Maßnahmen nach Art. 28 Abs. 1 DSA zuständig, die ihnen bereits zuvor nach dem Jugendmedienschutzstaatsvertrag zugeordnet waren.[12]

– Gemäß § 12 Abs. 3 DDG ist die Bundesbeauftragte für den Datenschutz und die Informationsfreiheit (BfDI) die zuständige Behörde für die Durchsetzung von Artikel 26 Abs. 3 und Artikel 28 Abs. 2 und 3 DSA. Hintergrund ist, dass sich die in diesen Regelungen enthaltenen Werbeverbote auf in der Datenschutzgrundverordnung (DSGVO) definierte Begriffe stützen, für die die BfDI die erforderliche Erfahrung und Expertise besitzt.[13]

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[6] *Kraul*, Die Durchsetzung des Digital Service Act nach dem neuen deutschen Digitale-Dienste-Gesetz: Behörden- und Aufsichtsstrukturen, GRUR-Prax 2024, 529 (530).

[7] § 21 DDG.

[8] *Kraul*, Die Durchsetzung des Digital Service Act nach dem neuen deutschen Digitale-Dienste-Gesetz: Behörden- und Aufsichtsstrukturen, GRUR-Prax 2024, 529 (530).

[9] § 21 II DDG.

[10] § 12 Abs. 2 S. 3 DDG.

[11] BT-Drs. 20/10031, S. 72.

[12] *Kraul*, a.a.O., 529.

[13] BT-Drs. 20/10031, S. 72.

Darüber hinaus bestimmt § 13 Abs. 1 DDG, dass das Bundeskriminalamt (BKA) als Zentralstelle Informationen nach Art. 18 I DSA entgegen nimmt. Dies betrifft die Weiterleitung eines Verdachts auf eine Straftat durch einen Hostinganbieter, die eine Gefahr für das Leben oder die Sicherheit einer Person darstellt. Diese Informationen sind vom BKA an die zuständigen Landes- bzw. Bundesbehörden weiterzuleiten.[14]

Zuletzt ist noch auf § 1 Abs. 2 DDG hinzuweisen. Danach ergeben sich die inhalts- und vielfaltsbezogenen Anforderungen an digitale Dienste und die hierfür zuständigen Aufsichtsbehörden aus den medienrechtlichen Bestimmungen der Länder. Für das Land Baden-Württemberg ist dies beispielsweise nach dem Landesmediengesetz (LMedienG) die Landesanstalt für Kommunikation (LFK).[15]

Zusammenarbeit

Die Zusammenarbeit zwischen den nach § 12 DDG zuständigen Behörden richtet sich nach § 18 DDG. Diese sollen zur Erfüllung ihrer Aufgaben allgemein kooperativ und vertrauensvoll zusammenarbeiten (Abs. 1). Insbesondere haben sich die verschiedenen Behörden untereinander Beobachtungen und Feststellungen mitzuteilen, die für die Erfüllung der Aufgaben von Bedeutung sein können.[16] Als besonderes Instrument ist vorgesehen, dass die Behörden die Einzelheiten der Zusammenarbeit in einer Verwaltungsvereinbarung regeln können (Abs. 2). Dies betrifft insbesondere die Koordinierung des Daten- und Informationsaustauschs sowie Beschwerden, die von anderen Behörden an die Koordinierungsstelle bei der BNetzA als zentraler Beschwerdestelle weitergeleitet werden. Dadurch soll trotz der auf verschiedene Behörden verteilten Zuständigkeit eine effektive Durchsetzung des DSA gewährleistet werden. Eine Pflicht zum Abschluss solcher Verwaltungsvereinbarung besteht nicht, was insbesondere für die Zusammenarbeit mit den Landesbehörden gilt.[17]

Die Zusammenarbeit der Koordinierungsstelle und der nach § 12 DDG zuständigen Behörden mit anderen Behörden ist in § 19 DDG geregelt. Sofern Aufgaben der Koordinierungsstelle für digitale Dienste die Prüfung der Einhaltung der DSGVO betreffen, entscheidet die Koordinierungsstelle für digitale Dienste im Benehmen mit der zuständigen Datenschutzaufsichtsbehörde.[18] Hierdurch wird die Zuständigkeit der Datenschutzbehörden, über solche Fragen unabhängig zu entscheiden, gewahrt.[19]

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[14] *Kraul*, a.a.O., 529.

[15] § 30 Abs. 1 LMG-BW.

[16] Personenbezogene Daten dürfen nur unter den einschränkenden Voraussetzungen von § 18 Abs. 3 DDG übermittelt werden.

[17] BT-Drs. 20/10031, S. 76f.

[18] § 19 Abs. 1 DDG.

[19] BT-Drs. 20/10031, S. 77.

Daneben ist vorgesehen, dass die Koordinierungsstelle und die nach § 12 Abs. 2 S. 1 und Abs. 3 DDG zuständigen Behörden mit dem Bundeskartellamt (BKartA) und der BNetzA zusammenarbeiten und untereinander Informationen einschließlich Betriebs- und Geschäftsgeheimnissen austauschen können.[20] Ebenfalls vorgesehen ist eine Zusammenarbeit mit dem BKA, was vor allem den Austausch von Internetinhalten sowie der zugehörigen Bestands- und Nutzungsdaten des Nutzerkontos erfasst. Hiermit wird die Verpflichtung nach Art. 18 DSA zur Meldeverpflichtung der Hostingdiensteanbieter durchgeführt.[21]

Auch mit allen weiteren, nicht ausdrücklich genannten Behörden, die für die Beaufsichtigung der Diensteanbieter zuständig sind, ist eine Zusammenarbeit vorgesehen.[22] Dies betrifft insbesondere Justiz- und Verwaltungsbehörden, die Entfernungsanordnungen für rechtswidrige Inhalte oder Auskunftsanordnungen gegenüber Vermittlungsdiensten erlassen.[23]

Question 2

Die Regelungen zu den Befugnissen der Koordinierungsstelle und der weiteren nach § 12 DDG zuständigen Behörden und dem Verfahren sind in den §§ 24ff. DDG enthalten. Hiermit wird Art. 51 DSA umgesetzt.

Die Koordinierungsstelle darf selbst **Ermittlungen** führen, auch von Amts wegen.[24] Die Befugnisse im Ermittlungsverfahren umfassen dabei insbesondere:

- Das Erheben von Beweisen, wobei insbesondere Zeugen vernommen, ein Augenschein eingenommen oder Sachverständige gehört werden dürfen.[25]
- Die in Art. 51 Abs. 1 lit. a) und c) DSA genannten Personen sind verpflichtet, auf Verlangen Auskunft über die erforderlichen Informationen zu erteilen.[26] Die in Art. 51 Abs. 1 lit. b) DSA genannten Personen sind verpflichtet, das Betreten der dort genannten Räumlichkeiten und die Prüfung der geschäftlichen Unterlagen zu dulden. Eine Durchsuchung ist grundsätzlich nur nach richterlicher Anordnung zulässig.[27]
- Beweismittel, die für die Ermittlung von Bedeutung sind, dürfen beschlagnahmt werden.[28]

[20] § 19 Abs. 2 DDG.
[21] BT-Drs. 20/10031, S. 78.
[22] § 19 Abs. 4 DDG.
[23] BT-Drs. 20/10031, S. 79.
[24] BT-Drs. 20/10031, S. 82.
[25] § 24 DDG.
[26] § 25 DDG.
[27] § 25 Abs. 3 DDG.
[28] § 26 DDG.

Für die **Durchsetzung** der Verpflichtungen nach dem DSA und den §§ 24ff. DDG gilt § 27 DDG. Wird ein Verstoß gegen die Bestimmungen des DSA festgestellt, so wird der Anbieter von Vermittlungsleistungen zunächst zur Stellungnahme und Abhilfe aufgefordert. Sodann können die Koordinierungsstelle oder die zuständigen Behörden die "erforderlichen Maßnahmen anordnen", um die Einhaltung der Verpflichtungen nach dem DSA sicherzustellen. Welche Maßnahmen dies sind, ergibt sich weder aus dem DDG unmittelbar noch aus der Gesetzesbegründung. Insoweit legt die gewählte Formulierung einen Ermessensspielraum nahe.

Im Rahmen der Vollstreckung der Anordnungen zur Durchsetzung der Verpflichtungen nach dem DSA kann ein Zwangsgeld als Zwangsmittel festgesetzt werden.[29] Die Höhe des Zwangsgeldes richtet sich nach Art. 52 Abs. 1 und 4 DSA.[30]

Personell sind nach dem Gesetzesentwurf 70 neue Personalstellen für die zu schaffende Koordinierungsstelle vorgesehen, zur Durchsetzung der Bestimmungen des DSA. Als jährliche Sachkosten sind 1,7 Mio EUR veranschlagt.[31]

Question 3

Die nationale Koordinierungsstelle[32] hat bislang keine Prioritäten zur Durchsetzung des DSA bekannt gegeben. Bereits vor Umsetzung des DSA im DDG hat die BNetzA eine Studie zur Bestandsaufnahme der relevanten Akteure in Deutschland in Auftrag gegeben.[33] Neben der inhaltlichen Erschließung des DSA wurde im Rahmen dieser Studie eine Datenbank erstellt, die relevante Anbieter digitaler Dienste für die deutsche Koordinierungsstelle des DSA auflistet. Diese soll die Koordinierungsstelle bei ihrer Arbeit unterstützen und einen Überblick über relevante Anbieter geben.[34]

[29] § 27 Abs. 4 DDG.

[30] BT-Drs. 20/10031, S. 83.

[31] BT-Drs. 20/10031, S. 59.

[32] Website der Koordinierungsstelle abrufbar unter https://www.dsc.bund.de/DSC/DE/1DSC/start.html, zuletzt abgerufen 06.09.2024.

[33] Umsetzung des Digital Services Act in Deutschland – Bestandsaufnahme der relevanten Akteure, Berlin 11.01.2024, abrufbar unter https://www.bundesnetzagentur.de/DE/Fachthemen/Digitalisierung/DSA/studie_dsa_akteure.html, abgerufen am 05.10.2024.

[34] S. 4 a.a.O.

Section 2: Use of national legislative leeway under the DMA/DSA

Question 1

Insbesondere mit dem **Netzwerkdurchsetzungsgesetz (NetzDG)35** galten in Deutschland bereits vor Inkrafttreten des DSA Bestimmungen zur Plattformregulierung, die dem DSA mitunter als Impulsgeber gedient haben.[36] Dieses führte im Wesentlichen zwei Pflichten für soziale Netzwerke mit mehr als zwei Millionen Nutzern ein.[37] Es legte den Anbietern erstens eine Berichtspflicht auf. In den halbjährlich anzufertigenden Berichten musste der Umgang mit Beschwerden über rechtswidrige Inhalte auf den Plattformen dokumentiert werden.[38] Zweitens verpflichtete es die Anbieter dazu, ein wirksames und transparentes Verfahren für den Umgang mit Beschwerden über rechtswidrige Inhalte vorzuhalten. Das Verfahren musste für Nutzer zur Übermittlung von Beschwerden leicht erkennbar, unmittelbar erreichbar und ständig verfügbar sein.[39]

An der Unionsrechtsmäßigkeit der Bestimmungen im NetzDG bestanden erhebliche Zweifel, insbesondere an der Vereinbarkeit mit der E-Commerce-RL.[40] Aufgrund der sachlichen Überlagerung der Vorschriften des NetzDG durch den DSA wurden die Vorschriften mit der Umsetzung des DSA im DDG fast vollständig aufgehoben.[41] Gem. § 5 NetzDG i.V.m. § 2 Abs. 2 DDG ist für Anbieter sozialer Netzwerke ohne Sitz in einem anderen Mitgliedstaat weiterhin ein Zustellungsbevollmächtigter zu benennen. Das NetzDG wurde durch das Bundesamt für Justiz (BfJ) durchgesetzt.[42]

Das **Telemediengesetz (TMG)** wurde mit Inkrafttreten des DDG gänzlich aufgehoben und durch dieses ersetzt. Mit dem TMG war die E-Commerce-Richtlinie[43] umgesetzt worden.[44] So findet sich etwa das Herkunftslandprinzip aus Art. 3 E-Commerce-RL, das ursprünglich in § 3 TMG geregelt war, nunmehr

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[35] Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken vom 1. September 2017, BGBl. I S. 3352.

[36] *Gerdemann/Spindler*, Das Gesetz über digitale Dienste (Digital Services Act) (Teil 2), GRUR 2023, 115 (125).

[37] *Liesching*, Fünf Jahre Netzwerkdurchsetzungsgesetz, MMR 2023, 56.

[38] § 2 NetzDG a.F.

[39] § 3 Abs. 1 NetzDG a.F.

[40] So ging etwa das VG Köln in einem Verfahren des einstweiligen Rechtsschutzes davon aus, dass die in § 3a NetzDG normierte Meldepflicht nicht mit dem in Art. 3 Abs. 2 E-Commerce-RL normierten Herkunftslandprinzip vereinbar ist, VG Köln Beschl. v. 01.03.2022 – 6 L 1354/21.

[41] BT-Drs. 20/10031, S. 97.

[42] § 4 Abs. 4 NetzDG.

[43] Richtlinie 2000/31/EG des Europäischen Parlaments und des Rates vom 8. Juni 2000 über bestimmte rechtliche Aspekte der Dienste der Informationsgesellschaft, insbesondere des elektronischen Geschäftsverkehrs, im Binnenmarkt.

[44] MüKoBGB/*Martiny*, 8. Aufl. 2021, TMG, §§ 1-3, Rn. 1.

in § 3 DDG.[45] Daneben kam es auch zu vorwiegend redaktionellen Änderungen des Telekommunikation-Telemedien-Datenschutzgesetzes (TTDSG).[46]

Letztlich kommt es zum 1. Oktober 2024 zu einer (vorwiegend redaktionellen) Änderung des **Medienstaatsvertrages (MStV)**. Dies betrifft insbesondere die nunmehr nach dem DDG bestehenden Zuständigkeiten der Landesmedienanstalten für die Umsetzung des DSA.[47] In diesem Staatsvertrag zwischen den 16 Bundesländern sind grundlegende Regelungen für die Veranstaltung und das Angebot, die Verbreitung und die Zugänglichmachung von Rundfunk und Telemedien in Deutschland geregelt.[48]

Question 2

Insbesondere die Koordinierungsstelle, die BNetzA und das Bundesministerium der Justiz und für Verbraucherschutz haben bislang keine entsprechenden Anstrengungen unternommen. Hinzuweisen ist darauf, dass im NetzDG der Begriff des "rechtswidrigen Inhalts" im Sinne des Gesetzes noch ausdrücklich definiert wurde.[49] Eine entsprechende Begriffsbestimmung, was im Sinne des nationalen Rechts unter einem "rechtswidrigen Inhalt" zu verstehen ist, findet sich im DDG dagegen nicht.

Question 3

Neben der Umsetzung des DSA im DDG plant die Bundesregierung derzeit ein **Gesetz gegen digitale Gewalt**.[50] Dieses soll es Betroffenen von Rechtsverletzungen im digitalen Raum erleichtern, ihre Rechte durchzusetzen und weiteren Rechtsverletzungen vorzubeugen. Vorgesehen ist insbesondere ein Auskunftsverfahren gegenüber Dienstanbietern. Unter gewissen Voraussetzungen soll ein Anspruch auf Accountsperre eingeräumt werden. Betroffene sollen verlangen können, dass ein Gericht gegenüber dem Diensteanbieter die Sperrung des fraglichen Accounts anordnet. Das aktuelle Eckpunktepapier

[45] *Kraul*, a.a.O., 529.

[46] Vormals Telekommunikation-Telemedien-Datenschutzgesetzes (TTDG).

[47] LT-BW Drs. 17/6163, 30.01.2024, abrufbar unter https://www.landtag-bw.de/files/live/sites/LTBW/files/dokumente/WP17/Drucksachen/6000/17_6163_D.pdf, abgerufen am 10.09.2024.

[48] Vgl. Präambel des MStV in seiner seit dem 01.01.2024 geltenden Fassung, abrufbar unter https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Medienstaatsvertrag_MStV.pdf, abgerufen am 10.09.2024.

[49] Nach § 1 Abs. 3 sind Inhalte im Sinne des NetzDG rechtswidrig, die den Tatbestand der §§ 86, 86a, 89a, 91, 100a, 111, 126, 129 bis 129b, 130, 131, 140, 166, 184b in Verbindung mit 184d, 185 bis 187, 201a, 241 oder 269 des Strafgesetzbuchs erfüllen und nicht gerechtfertigt sind.

[50] Eckpunkte des Bundesministeriums der Justiz zum Gesetz gegen digitale Gewalt, abrufbar unter https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/Eckpunkte/Digitale_Gewalt_Eckpunkte.pdf?__blob=publicationFile&v=2, abgerufen am 07.10.2024.

stammt zwar noch von April 2023 und datiert damit vor Inkrafttreten des DSA und Verabschiedung des DDG. Es ist aber vorgesehen, dass die im Gesetz gegen digitale Gewalt vorgesehenen Regelungen neben dem DSA anwendbar sind. Der DSA enthalte laut einem Erläuterungspapier des Bundesjustizministeriums (BMJ) kaum Aussagen über die privaten Rechte von Nutzern und regle deren Durchsetzung nicht.[51]

Eine einheitliche Gesetzgebung betreffend die Tätigkeit von "Influencern" besteht in Deutschland nicht. Die relevanten Regelungen verteilen sich vielmehr auf verschiedene Gesetze, unter anderem das Gesetz gegen den unlauteren Wettbewerb (UWG) und auch das DDG (vormals TMG). Eine Aktualisierung des Rechtsrahmens ist derzeit nicht geplant.

Section 3: Vertical and horizontal public enforcement-related cooperation under DSA/DMA

Question 1

Die Zusammenarbeit zwischen den nach nationalem Recht zur Durchsetzung des DSA zuständigen Behörden richtet sich nach § 18 DDG (siehe hierzu oben Section 1,1.). Für den Fall, dass mit einer Behörde eines anderen Mitgliedstaates Meinungsverschiedenheiten darüber bestehen, welcher Mitgliedstaat Sitzland des Diensteanbieters ist oder als solcher gilt, ist im DDG bestimmt, dass die nationale Behörde diese Meinungsverschiedenheiten der Kommission unverzüglich zur Kenntnis bringt. Soweit darüber hinaus Art. 49 Abs. 2 UAbs. 2 DSA bestimmt, dass die Koordinatoren für digitale Dienste untereinander sowie mit anderen nationalen zuständigen Behörden, dem Gremium und der Kommission zusammenarbeiten, wurde hierzu im Rahmen der Umsetzung im DDG keine weitere spezifische Regelung getroffen.

Question 2

Im DSA ist in Art. 82 Abs. 3 geregelt, dass wenn ein nationales Gericht in einer Angelegenheit entscheidet, die bereits Gegenstand eines Beschlusses der Kommission war, erlässt das nationale Gericht keine Entscheidung, die diesem Beschluss zuwiderläuft. Dies dient der einheitlichen Anwendung und Durchsetzung des DSA.[52] Im DDG findet sich keine Bestimmung, die Art. 82

[51] Vgl. der letzte Punkt des Erläuterungspapiers zu den Eckpunkten des Bundesministeriums der Justiz zum Gesetz gegen digitale Gewalt vom 25.03.2023, abrufbar unter https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/Dokumente/Digitale_Gewalt_Erlaeuterungen_Eckpunkte.pdf?__blob=publicationFile&v=3, abgerufen am 07.10.2024.

[52] Erwägungsgrund 147 DSA.

DSA explizit umsetzt bzw. konkretisiert. Die Bindung nationaler Gerichte an Entscheidungen der Kommission wurde mit Blick auf die richterliche Unabhängigkeit teils kritisch gesehen.[53]

Section 4: Private enforcement of DMA/DSA

Question 1

Gegenwärtig gibt es nur eine überschaubare Anzahl an veröffentlichten Gerichtsurteilen, in denen der DSA überhaupt eine Rolle gespielt hat bzw. von den Urteilsgründen in Bezug genommen worden ist.[54] Da der Großteil der Bestimmungen des DSA erst im Februar 2024 in Kraft getreten ist, ist dies nicht verwunderlich. Beispielsweise befasste sich das LG Berlin – wenn auch sehr knapp – mit einem auf Art. 54 iVm. Art. 16, 20 DSA gestützten Löschungsanspruch. Diesen prüfte es neben anderen Anspruchsgrundlagen, gerichtet auf Löschung einer Gruppe in einem sozialen Netzwerk.[55] Im Übrigen wurde in einigen Urteilen auf die künftig nach dem DSA geltenden Regelungen Bezug genommen und teilweise auch in den Raum gestellt, ob diesen eine Vorwirkung zukommt, ohne dass die Frage letztlich beantwortet wurde.[56]

Question 2

Angesichts der bisher nur spärlich vorhandenen zivilgerichtlichen Judikatur mit Bezug zum DSA kann derzeit noch kein klares Bild der privaten Rechtsdurchsetzung gezeichnet werden. Allerdings besteht mit Blick auf das NetzDG, das mit dem DSA vergleichbare Verpflichtungen zur Content-Moderation enthielt, bereits eine gewisse Erfahrung mit der Rechtsdurchsetzung Privater. Das NetzDG verfolgte – wie auch der DSA – einen dualen Regelungsansatz von privater und aufsichtsrechtlicher Rechtsdurchsetzung.[57] Ziel des NetzDG war es, die Rechtsdurchsetzung in sozialen Netzwerken zu verbessern, um objektiv strafbare Inhalte unverzüglich zu entfernen.[58] Die aufsichtsrechtlichen Maßnahmen, insbesondere die Verhängung von Bußgeldern durch das zuständige BfJ, spielten für die Durchsetzung des NetzDG kaum eine Rolle[59]

[53] Müller-Terpitz/Köhler/*Apel*, 1. Aufl. 2024, DSA, Art. 82 Rn. 7.

[54] Stand 15.09.2024 findet man im Rechtsprechungsportal Juris 11 Gerichtsentscheidungen, in denen das Stichwort „Digital Services Act" enthalten ist. Da nicht jedes Urteil dort veröffentlicht wird, dürfte die Gesamtzahl aber höher liegen.

[55] LG Berlin, Urteil vom 21. November 2023 – 27 O 97/22.

[56] So z.B. OLG Dresden, Urteil vom 5. Dezember 2023 – 14 U 503/23.

[57] *Buchheim/Schrenk*: Der Vollzug des Digital Services Act, NVwZ 2024, 1 (2).

[58] BT-Drs. 18/12356; Eifert/Metzger/Schweitzer/Wagner CMLR 58 (2021), 987 (1019).

[59] Das BfJ verhängte seit Inkrafttreten des NetzDG 2017 gerade einmal acht Bußgelder, fünf davon wegen der Nichtbenennung eines inländischen Zustellungsbevollmächtigten, *Zurth*, Private Rechtsdurchsetzung im Digital Services Act, GRUR 2023, 1331 (1333).

Demgegenüber kam es zu einer erheblichen Anzahl privater Klagen, die maßgeblich zur Kontrolle der Inhaltemoderation beitrugen.[60] Ob diese Zunahme an privatrechtlichen Klagen auf die Einführung des NetzDG zurückzuführen ist oder ob diese Resultat freiwilliger Anstrengungen von Netzwerkbetreibern bei der Durchsetzung ihrer Communitystandards ist, die zu vermehrtem "Overblocking" geführt haben, lässt sich nicht sicher sagen.[61] Die den privaten Klagen zugrundeliegenden Sachverhalte betrafen im Wesentlichen zwei Situationen.

Einerseits gingen Nutzer gegen die Löschung eines Beitrages oder die Sperrung eines Kontos in einem sozialen Netzwerk vor. Sie beantragten, die Plattformbetreiber zu verpflichten, gelöschte Beiträge und gesperrte Konten wieder freizuschalten und eine erneute Löschung und Sperrung künftig zu unterlassen. Die sogenannten "put-back-Ansprüche" wurden auf eine Schadensersatzpflicht des Plattformbetreibers wegen einer Vertragspflichtverletzung gestützt.[62] Der Plattformbetreiber darf aufgrund des Nutzungsvertrages die Beiträge eines Nutzers nicht grundlos löschen.[63] Verstößt er gegen diese Vertragspflicht, so ist er im Wege des Schadensersatzes dazu verpflichtet, den Beitrag wiederherzustellen.[64] Soweit eine Wiederholungsgefahr gegeben ist, ergibt sich zudem ein Anspruch auf Unterlassung einer erneuten Kontosperrung und Löschung des Beitrags bei dessen Wiedereinstellung.[65] Von großer Bedeutung war in diesen Verfahren die Rechtmäßigkeit der in Allgemeinen Geschäftsbedingungen inkorporierten Regelungen zur Löschung von Beiträgen, Kontensperrungen und der Moderation von Inhalten, die gegen Gemeinschaftsstandards verstoßen.[66]

Andererseits ging es um Fälle, in denen sich Nutzer gegen eine unterlassene Löschung eines Beitrages mit aus ihrer Sicht rechtswidrigem Inhalt vorgingen.[67] Materielle Grundlage für dieses Vorgehen war die zivilrechtliche Störerhaftung des Plattformbetreibers.[68] Zwar ist nicht dieser, sondern der Nutzer, von dem der Beitrag stammt, unmittelbarer Störer. Der Plattformbetreiber haftet aber gleichwohl als mittelbarer Störer, soweit er Kenntnis von einer Rechtsverletzung erlangt und die Störung nicht rechtzeitig beseitigt.[69] Die Feststellung einer

[60] *Zurth*, a.a.O., 1331; *Holznagel,* Put-back-Ansprüche gegen soziale Netzwerke: Quo Vadis?, CR 2019, 518 (518 f.), der von einer „Klageflut" spricht.

[61] *Holznagel*, a.a.O. 519.

[62] *Zurth*, a.a.O. 1333.

[63] BGH, Urt. v. 29.07.2021 – III ZR 179/20 („Hassrede"), Rn. 27.

[64] BGH, a.a.O., Rn. 27.

[65] BGH, a.a.O., Rn. 100f.

[66] BGH, a.a.O., Rn. 30ff; sog. „lawful but awful", *Janal*, Friendly Fire? Das Urheberrechts-Dienstanbieter-Gesetz und sein Verhältnis zum künftigen Digital Services Act, GRUR 2022, 211 (217).

[67] BGH, Urt. v. 29.07.2021 – III ZR 179/20 („Hassrede"); OLG München, Urteil vom 14. Dezember 2021 – 18 U 6997/20.

[68] *Zurth*, Private Rechtsdurchsetzung im Digital Services Act, GRUR 2023, 1331 (1333).

[69] BGH, Urteil vom 27.02.2018 – VI ZR 489/16, Rn. 31, 32.

solchen Rechtsverletzung durch den Plattformbetreiber verlangt dann eine Abwägung der widerstreitenden grundrechtlichen Positionen, namentlich der Meinungsfreiheit und des Persönlichkeitsrechts.[70] Nicht bewahrheitet hat sich insoweit die Vermutung, private Akteure würden für einzelne Posts in sozialen Netzwerken das ökonomische Risiko eines Gerichtsverfahrens scheuen.[71]

Anders gestaltet sich die Lage voraussichtlich mit Blick auf die Regelung in Art. 25 DSA, wonach Online-Schnittstellen so zu konzipieren, organisieren oder betreiben sind, dass Nutzer nicht getäuscht, manipuliert oder sonst in ihrer freien Entscheidungsfindung maßgeblich beeinträchtigt oder behindert werden. Hier geht es nicht um mit den oben beschriebenen Persönlichkeitsrechtsverletzungen vergleichbare Sachverhalte. Insoweit besteht die Vermutung, dass in diesem Zusammenhang mangels vergleichbarer Anreize für die individuelle Rechtsdurchsetzung und aufgrund des begrenzten Anwendungsbereichs für kollektive Rechtsdurchsetzung die ordnungsrechtliche Durchsetzung weitaus bedeutsamer sein wird, als die privatrechtliche.[72] Daneben kommt auch eine private Rechtsdurchsetzung weiterer Pflichten nach dem DSA über den Schadensersatzanspruch nach Art. 54 DSA in Betracht. Als weitere Akteure bei der Rechtsdurchsetzung kommen nicht nur private, sondern auch geschäftliche Nutzer sozialer Netzwerke in Betracht[73] und gegebenenfalls auch andere Mitbewerber.[74] Diesen Fragen wurde in der bisherigen Diskussion um die private Durchsetzung des DSA bislang deutlich weniger Beachtung geschenkt, als dem Vorgehen Privater gegen Persönlichkeitsverletzungen.

Es ist daher insgesamt zu erwarten, dass der privaten Rechtsdurchsetzung auch für den DSA eine bedeutende Rolle zu kommen wird, jedenfalls, soweit es um Persönlichkeitsrechtsverletzungen geht. Insoweit wird dem "private enforcement" eine größere Rolle zukommen als der behördlicher Maßnahmen.[75] Solche privaten Klagen werden erwartungsgemäß vor allem von Nutzern ausgehen, die sich gegen "Overblocking" wehren oder gegen die unterlassene Sperrung eines Beitrages vorgehen. Hierfür sprechen zum einen die beschriebenen Erfahrungen seit Einführung des NetzDG. Zum anderen ist zu berücksichtigen, dass mit dem mandatorischen internen Beschwerdemanagementsystem und der Möglichkeit zur außergerichtlichen Streitbeilegung weitere Elemente privater Rechtsdurchsetzung hinzukommen.[76] Zwar bestehen für ein gerichtliches Vorgehen Privater vor allem finanzielle Hürden, da

[70] BGH, Urteil vom 27.02.2018 – VI ZR 489/16, Rn. 32.
[71] *Zurth*, a.a.O. 1331.
[72] *Kaesling*, Regulierung von Dark Patterns im Digital Services Act, NJW 2024, 1609 (1613).
[73] *Wegmann/Kehl,* Die Auswirkungen von Digital Services Act und Digitale-Dienste-Gesetz auf digital aktive Unternehmen jenseits von TikTok, Facebook & Co, BB 2024 387 (393).
[74] *Kraul*, a.a.O. 531.
[75] *Zurth*, a.a.O. 1333.
[76] *Eifert/Metzger/Schweitzer/Wagner,* a.a.O. 1018f.

ein Zivilprozess mit nicht unerheblichen Kosten[77] einhergeht. Gleichzeitig ist wegen der Bedeutung solcher Maßnahmen für den Einzelnen angesichts der im Raum stehenden Persönlichkeitsrechtsverletzungen zu erwarten, dass diese ihre Rechte (weiter) auch gerichtlich durchsetzen werden.[78] Soweit es dagegen an einer vergleichbaren Situation fehlt, ist es bislang nicht absehbar, ob auch insoweit der privaten Rechtsdurchsetzung eine größere Bedeutung zukommen wird als der behördlichen.

Question 4

Spezifische Regelungen zur privaten Durchsetzung des DSA wurden im Rahmen der Umsetzung des DSA in das nationale Recht bislang nicht getroffen. Ebenso kam es bisher zu keiner gesetzlichen Änderung wonach bestimmte Gerichte oder Kammern für Streitigkeiten im Zusammenhang mit dem DSA bzw. für vom DSA erfasste Sachverhalte besonders zuständig sind. Die Zuständigkeit einer besonderen Kammer richtet sich nach dem Gerichtsverfassungsgesetz (GVG) und insbesondere dem jeweiligen Geschäftsverteilungsplan eines jeden Gerichts. Dieser wird vom Präsidium für jedes Geschäftsjahr festgelegt.[79] Für die Landgerichte ist dabei im GVG geregelt, dass für bestimmte Sachgebiete spezialisierte Kammern eingerichtet werden müssen.[80] Mit Blick auf den DSA einschlägig könnte insbesondere § 72a Abs. 1 Nr. 5 GVG sein. Dieser betrifft unter anderem Streitigkeiten über Ansprüche aus Veröffentlichungen durch Druckerzeugnisse, Bild und Tonträger jeder Art, insbesondere in Presse, Rundfunk, Film und Fernsehen.[81] Eine spiegelbildliche Regelung besteht auch für die Einrichtung entsprechender spezialisierter Senate bei den Oberlandesgerichten.[82] Der offene Wortlaut ("insbesondere") erfasst nach der Gesetzesbegründung dabei auch Verletzungen des allgemeinen Persönlichkeitsrechts als Folge von Veröffentlichungen auf sozialen Netzwerken.[83] Allerdings betrifft dies voraussichtlich nur Fälle, in denen sich zwei Nutzer unmittelbar über den ehrverletzenden Charakter einer Äußerung in sozialen Netzwerken streiten.[84]

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[77] Der BGH nahm an, dass für eine 30-tägige Sperrung eines Kontos ein Streitwert von 2.500 € anzunehmen sei, für einen Antrag auf Löschung 500 € und für einen Antrag auf künftige Unterlassung von Löschung und Kontosperrung 1.500 €, BGH Beschl. v. 27.05.2021 – III ZR 351/20, juris Rn. 13. Ausgehend von einem Streitwert von 4.500 € ergibt sich bei einem zivilgerichtlichen Verfahren erster Instanz ein Kostenrisiko von 2.517,90 €. Kommt ein Verfahren zweiter Instanz hinzu, erhöht sich das Kostenrisiko um weitere 2.917,38 €.

[78] *Zurth*, a.a.O. 1331.

[79] § 21e Abs. 1 S. 1 GVG.

[80] § 72a Abs. 1 GVG

[81] § 72a Abs. 1 Nr. 5 GVG.

[82] § 119a Abs. 1 Nr. 5 GVG.

[83] OLG Nürnberg, Beschl. v. 11.03.2021 – 1 AR 631/21; Musielak/Voit/*Wittschier*, 21. Aufl. 2024, ZPO § 348 Rn 7.

[84] Der oben zitierten Entscheidung des OLG Nürnberg liegt ein Fall zugrunde, in dem Unterlassung einer Aussage auf einer öffentlich zugänglichen Facebook-Seite begehrt wurde.

Ob daneben auch Ansprüche erfasst sind, die sich unmittelbar gegen den Betreiber eines sozialen Netzwerks richten, ist noch nicht abschließend geklärt. Einerseits steht auch hier jedenfalls mittelbar eine Persönlichkeitsrechtsverletzung im Raum. Andererseits geht es – mit Blick auf "put-back-Ansprüche" – unmittelbar um die Frage einer Pflichtverletzung aus dem Nutzungsvertrag und es wird eine weitere Erfüllung dieses Vertrages begehrt.[85] Zudem sind in solchen Konstellationen generell nicht die Aussagen des Betreibers des sozialen Netzwerks, sondern die eines anderen Nutzers anspruchsbegründend.[86] Es spricht daher viel dafür, dass solche Streitgegenstände nicht schon von Gesetzes wegen einer bestimmten Kammer beim Landgericht und einem bestimmten Senat beim Oberlandesgericht zugewiesen sind.

Unabhängig davon, ob solche Streitigkeiten beim Landgericht in den Zuständigkeitsbereich einer obligatorisch einzurichtenden Spezialkammer fallen, können die Landgerichte solche Streitigkeiten aber selbst einer bestimmten Kammer im Geschäftsverteilungsplan zuweisen. Ob eine solche Zuweisung besteht, unterscheidet sich naturgemäß von Landgericht zu Landgericht. So wird etwa im Geschäftsverteilungsplan des Landgerichts Stuttgart für das Jahr 2024 bestimmt, dass die 11. Zivilkammer für alle Rechtsstreitigkeiten "wegen der Deaktivierung des Nutzerkontos und/oder der Sperrung des Zugangs und/oder der Entfernung von Inhalten durch die Betreiber sozialer Netzwerke" zuständig ist.[87]

Question 5

Eine entsprechende Regelung, wonach sich Dritte im öffentlichen Interesse an Zivilprozessen beteiligen können, kennt die Zivilprozessordnung (ZPO) nicht. Die Beteiligung Dritter richtet sich nach den §§ 64ff. ZPO. Zwar kann ein Dritter, der ein rechtliches Interesse am Obsiegen einer Partei hat, dieser zu ihrer Unterstützung beitreten.[88] Da das Interesse ein "rechtliches" sein muss, genügt ein bloß tatsächliches, ideellles oder wirtschaftliches Interesse nicht.[89] Hinzuweisen ist aber auf das Verbraucherrechtedurchsetzungsgesetz (VDuG)[90] vom 08.10.2023, das die Verbandsklagerichtlinie[91] in das nationale Recht umsetzt.

[85] OLG Hamm, Urt. v. 26. Oktober 2022 – I-14 U 8/22.

[86] OLG Hamm, a.a.O.

[87] Geschäftsverteilungsplan des Landgerichts Stuttgart für das Jahr 2024, Stand 01.09.2024, S. 16, abrufbar unter https://landgericht-stuttgart.justiz-bw.de/pb/site/jum2/get/documents/jum1/JuM/import/landgericht%20stuttgart/pdf/gv/Richterlicher%20Geschäftsverteilungsplan%2001.09.2024.pdf, abgerufen am 01.10.2024.

[88] § 66 Abs. 1 ZPO.

[89] BGH, Beschl v. 18.11.2015 – VII ZB 57/12; Musielak/Voit/*Weth*, 21. Aufl. 2024, ZPO § 66 Rn. 5.

[90] BGBl. 2023 I Nr. 272.

[91] Richtlinie (EU) 2020/1828 des Europäischen Parlaments und des Rates vom 25. November 2020 über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher und zur Aufhebung der Richtlinie 2009/22/EG (ABl. L 409 vom 04.12.2020, S. 1).

Zwar ist es auch danach nicht möglich, dass sich eine Organisation im Sinne der Fragestellung an einem laufenden Individualprozess eines Verbrauchers beteiligt. Nach § 11 VDuG sind aber Konstellationen denkbar, in denen ein Verbraucher eine Individualklage erhebt und sich nachträglich in derselben Sache an einer Verbandsabhilfeklage beteiligt, indem er sich dort anmeldet. In diesem Fall würde der Verband im Kollektivinteresse der Verbraucher vorgehen. Im bereits rechtshängigen Individualprozess müsste das Verfahren dann bis zur rechtskräftigen Entscheidung über die Verbandsklage ausgesetzt werden.[92] Beim DSA handelt es sich gemäß Art. 90 um eine Rechtsstreitigkeit im Sinne des Anhangs I der Verbandsklagerichtlinie.

Letztlich ist in diesem Zusammenhang zu berücksichtigen, dass es sich beim DSA um ein Verbraucherschutzgesetz im Sinne von § 2 Abs. 2 Nr. 57 UKlaG handelt. Damit droht bei einer Zuwiderhandlung eine Inanspruchnahme durch eine nach dem UKlaG anspruchsberechtigte Stelle.[93]

Section 5: General questions

Question 1

Die Artikel 9 und 10 DSA wurden im deutschen Recht nicht spezifisch umgesetzt. Hinzuweisen ist auf § 12 Abs. 4 DDG, wonach abseits der ausdrücklichen Zuständigkeitszuweisung nach § 12 Abs. 1 bis 3 DDG die für die Beaufsichtigung von Diensteanbietern bestehenden gesetzlichen Zuständigkeiten unberührt bleiben. Dies betrifft insbesondere die Befugnisse der Justiz- und Verwaltungsbehörden für den Erlass von Entfernungsanordnungen hinsichtlich rechtswidriger Inhalte.[94] Mit Blick auf die in Art. 4 Abs. 3, 5 Abs. 2 und 6 Abs. 4 DSA bezeichneten Maßnahmen nationaler Verwaltungs- oder Justizbehörden erfolgte keine spezifische Neuregelung im Rahmen der nationalen Umsetzung. Gegen solche Anordnungen kann gerichtlicher und gegebenenfalls auch behördlicher Rechtsschutz erlangt werden. Für Anordnungen von Justizbehörden ist dabei der ordentliche Rechtsweg gegeben,[95] für Anordnungen von Behörden – der Verwaltungsrechtsweg.[96]

[92] § 11 Abs. 1 VDuG.

[93] Anspruchsberechtigt sind z.B. qualifizierte Verbraucherverbände gemäß § 2 Abs. 1 S. 1 Nr. 1 UKlaG.

[94] BT-Drs. 20/10031, S. 72.

[95] § 23 Einführungsgesetz zum Gerichtsverfassungsgesetz (EGGVG).

[96] § 40 Verwaltungsgerichtsordnung (VwGO).

Question 2

Es gibt bereits Anbieter, die sich als gesetzlicher Vertreter im Sinne von Art. 13 DSA zur Verfügung stellen. Diese bieten in der EU tätigen, aber nicht ansässigen Unternehmen an, die Kommunikation und Koordination mit den Aufsichtsbehörden zu übernehmen, um die Einhaltung der Vorschriften des DSA zu gewährleisten.[97]

Question 3

Die Bestimmung des Art. 53 DSA zum Beschwerderecht und Beschwerdeverfahren ist im deutschen Recht in § 20 DDG umgesetzt. Dieser bestimmt im Wesentlichen, dass die Koordinierungsstelle für digitale Dienste die zentrale Beschwerdestelle für Nutzer ist, unabhängig davon, ob im Einzelfall gemäß § 12 Abs. 2 und 3 DDG eine andere Behörde für die Beschwerde zuständig ist ("One-Stop-Shop-Prinzip").[98] Hierdurch soll die praktische Ausübung des Beschwerderechts trotz der gegebenenfalls unterschiedlichen Behörden erleichtert bzw. durch diese Struktur nicht erschwert werden.[99] Eine weitere inhaltliche Ausgestaltung erfährt der Beschwerdemechanismus dagegen nicht. Insoweit verweist die Gesetzesbegründung darauf, dass Art. 53 DSA bereits das Recht der Beschwerdeführer vorsieht, Beschwerden an die nationale Beschwerdestelle zu richten.

Question 4

Weder der Digital Services Act noch seine Umsetzung im Digitale-Dienste-Gesetz haben zu erwähnenswerten politischen Kontroversen geführt. Kritisiert wurde mit Blick auf die Umsetzung in das nationale Recht vor allem, dass diese nicht rechtzeitig innerhalb der vorgegebenen Fristen erfolgte.

Question 5

Für die **außergerichtliche Streitbeilegung** hat die nationale Koordinierungsstelle ein Online-Formular eingerichtet, mit dem eine Zertifizierung beantragt werden kann. Für die Registrierung als außergerichtliche Streitbeilegungsstelle wurde ein Leitfaden herausgegeben sowie ein "Q&A" mit Antworten auf die

[97] Vgl. etwa https://www.dp-dock.com/dsa-gesetzlicher-vertreter#:~:text=Als%20gesetzlicher%20Vertreter%20gemäß%20Artikel,Digital%20Services%20Act%20zu%20gewährleisten, abgerufen am 07.10.2024.

[98] Kraul, a.a.O., 530.

[99] BT-Drs. 20/10031, S. 80.

wichtigsten Fragen auf der Website veröffentlicht.[100] Bislang wurde eine Stelle zur außergerichtlichen Streitbeilegung offiziell zertifiziert.[101]

Auch für die Zulassung als "**Trusted Flagger"** hat die nationale Koordinierungsstelle ein entsprechendes Online-Formular eingerichtet, mit dem eine solche beantragt werden kann.[102] Insoweit hat die Koordinierungsstelle ebenfalls einen Leitfaden für die Registrierung herausgegeben, der Hinweise zu den erforderlichen Angaben macht. In Deutschland wurde am 01.10.2024 die Meldestelle REspect! der Stiftung zur Förderung der Jugend in Baden-Württemberg als erster "Trusted Flagger" von der BNetzA gemäß dem DSA zugelassen.[103]

Für den **Datenzugang für die Forschung** findet sich ebenfalls auf der Website der nationalen Koordinierungsstelle eine Informationsseite. Zukünftig kann hierüber auch ein Antrag gestellt werden, um als "zugelassener Forscher" einen Zugang zu den betreffenden Daten zu erhalten.[104]

[100] Abrufbar unter: https://www.dsc.bund.de/DSC/DE/5Streitb/start.html, abgerufen am 23.09.2024.

[101] Hierbei handelt es sich um die User Rights GmbH mit Sitz in Berlin, die am 12.08.2024 zugelassen wurde, https://www.bundesnetzagentur.de/1019662.

[102] Abrufbar unter: https://www.dsc.bund.de/DSC/DE/4TrustedF/start.html, abgerufen am 23.09.2024.

[103] Vgl. Pressemitteilung der BNetzA vom 01.10.2024, abrufbar unter https://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/DE/2024/20240927_DSC_TrustedFlagger.html, abgerufen am 07.10.2024.

[104] Abrufbar unter: https://www.dsc.bund.de/DSC/DE/6Forschung/start.html, abgerufen am 23.09.2024.

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Section 1: National institutional set-up

Question 1–4

Mit der 11. GWB-Novelle (sog. „Wettbewerbsdurchsetzungsgesetz") wurden dem Bundeskartellamt entsprechende Befugnisse eingeräumt, um Expertise und Kapazitäten für eine effektive Durchsetzung des DMA nutzbar zu machen.[1] Aufgrund der zuletzt effektiven Durchsetzung der Vorschriften der allgemeinen Missbrauchskontrolle gegen große Online-Plattformen[2] und der begonnenen Durchsetzung des neu eingeführten § 19a GWB für „Unternehmen mit überragender marktübergreifender Bedeutung für den Wettbewerb",[3] beansprucht das Bundeskartellamt für sich eine Vorreiterrolle bei der Sicherstellung von Wettbewerb auf digitalen Märkten.[4] Diesen Fokus will das Bundeskartellamt auch zukünftig beibehalten und „einen Beitrag zur effektiven Durchsetzung des DMA leisten".[5]

Neben der Europäischen („Kommission") als „alleiniger Durchsetzungsbehörde"[6] dürfen nationale Wettbewerbsbehörden aus eigener Initiative mögliche DMA-Verstöße auf ihrem Hoheitsgebiet untersuchen (Art. 38 Abs. 7 DMA), d.h. hierzu Vorermittlungen anstellen.[7] Hierfür schafft § 32g GWB, der sich eng am Wortlaut des Art. 38 Abs. 7 DMA orientiert, für das Bundeskartellamt in Deutschland die Rechtsgrundlage.[8] Diese Ermächtigungsgrundlage ermöglicht es dem Bundeskartellamt, durch eigene (vorbereitende) Untersuchungen

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[1] Bundeskartellamt, Jahresbericht 2022/23, S. 4; vgl. Gesetzesbegründung? Gesetzesentwurf der Bundesregierung, Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze, S. 20.

[2] S. etwa Bundeskartellamt, Beschl. 04.12.2017, B6-132/14-2, „*CTS Eventim*"; Beschl. v. 06.02.2019, B6-22/16, „*Facebook*"; Beschl. v. 17.09.2019, B2-88/18, „*Amazon*"; Beschl. v. 05.10.2023, B7-70/21, „*Google*".

[3] S. dazu unten Rn. 14 f.

[4] Bundeskartellamt, Jahresbericht 2022/23, S. 4.

[5] Bundeskartellamt, Jahresbericht 2022/23, S. 4.

[6] Art. 38 Abs. 7 DMA; ErwG 91 DMA.

[7] HK-DMA/*Gappa/Käseberg*, 1. Aufl. 2023, DMA Art. 38, Rn. 25.

[8] Immenga/Mestmäcker/*Wirtz*, Wettbewerbsrecht, 7. Aufl. 2024, GWB § 32g, Rn. 2.

seinen Beitrag zur effektiven Rechtsdurchsetzung von Art. 5 bis 7 DMA gegenüber designierten sog. „Gatekeepern“[9] zu leisten.[10]

Die Aufnahme entsprechender Ermittlungen liegt im Ermessen des Bundeskartellamts. Führt das Bundeskartellamt entsprechende Ermittlungen hinsichtlich eines potenziellen DMA-Verstoßes durch, ist es verpflichtet, die Kommission über die Ergebnisse dieser Ermittlungen zu unterrichten (§ 32g Abs. 3 S. 1 GWB). Darüber hinaus kann das Bundeskartellamt die Berichte über die Ermittlungsergebnisse als vorläufige Ergebnisse veröffentlichen (§ 32g Abs. 3 S. 2 GWB).[11] Werden diese Berichte veröffentlicht, so muss dem betroffenen Unternehmen unter Umständen rechtliches Gehör gewährt werden.[12] Eine Ermittlung nach § 32g GWB kann parallel zu einem Verwaltungsverfahren nach § 19a GWB durchgeführt werden.[13] Die Einleitung eines Verfahrens durch das Bundeskartellamt ist als vorbereitende Verfahrenshandlung durch die Verfahrensbeteiligten nicht selbstständig anfechtbar.[14]

Die Kompetenzen für diese Ermittlungen entsprechen den Kompetenzen des Bundeskartellamts in Kartellverfahren, da § 32g Abs. 2 GWB auf die Vorschriften der §§ 57 bis 59b, 61 GWB verweist. Die Befugnisse umfassen die Erhebung von erforderlichen Beweisen (§ 57 GWB), die Sicherung von Beweismaterialien im Wege der Beschlagnahme (§ 58 GWB), das Verlangen von Auskünften (§ 59 GWB), die Einbestellung von Vertretern der zur Auskunft Verpflichteten zu einer Befragung (§ 59 GWB) und das Herausverlangen von Unterlagen (§ 59 GWB). Das Bundeskartellamt ist außerdem befugt, die geschäftlichen Unterlagen der designierten Gatekeeper während der Geschäftszeiten einzusehen und zu prüfen (§ 59a GWB). Darüber hinaus ist es dem Bundeskartellamt möglich, Geschäftsräume, Wohnungen, Grundstücke und Sachen der designierten Gatekeeper zu durchsuchen, wenn zu vermuten ist, dass sich dort Unterlagen befinden, die es nach §§ 59, 59a GWB einsehen, prüfen und herausverlangen darf (§ 59b GWB). Die entsprechenden Ermittlungsbefugnisse sind auf Sachverhalte mit potenzieller Auswirkung auf Deutschland beschränkt (§ 185 GWB). Nicht umfasst von den Ermittlungskompetenzen des Bundeskartellamts sind Abhilfemaßnahmen, die einem potenziellen Verstoß entgegenwirken.[15]

Für den Fall, dass die Ermittlungen die Verletzung von Interoperabilitätspflichten (Art. 7 DMA) betreffen, muss das Bundeskartellamt der Bundesnetzagen-

[9] Gem. Art. 1 Abs. 2 DMA adressiert der DMA Gatekeeper. Dies sind gem. Art. 2 Nr. 1 DMA Unternehmen, die bestimmte zentrale Plattformdienste (sog. „*Core Platform Services*“) bereitstellen und von der Kommission durch Beschluss als Gatekeeper benannt wurden (Art. 3 DMA).

[10] Immenga/Mestmäcker/*Wirtz*, Wettbewerbsrecht, 7. Aufl. 2024, GWB § 32g, Rn. 2.

[11] Reg.Begr. zur 11. GWB-Novelle, BT-Drs. 20/6824, S. 38.

[12] Reg.Begr. zur 11. GWB-Novelle, BT-Drs. 20/6824, S. 37.

[13] Reg.Begr. zur 11. GWB-Novelle, BT-Drs. 20/6824, S. 37.

[14] HK-DMA/*Gappa/Käseberg*, 1. Aufl. 2023, DMA Art. 38, Rn. 30.

[15] HK-DMA/*Gappa/Käseberg*, 1. Aufl. 2023, DMA Art. 38, Rn. 28.

tur die Möglichkeit zur Stellungnahme geben (§ 32g Abs. 2 S. 3 GWB). Dies soll sicherstellen, dass die Bundesnetzagentur aufgrund ihrer Expertise im Telekommunikationsbereich eingebunden wird.[16] Mittels Interoperabilitätspflichten kann etwa einem Missbrauch von Marktmacht im Messengerbereich entgegengewirkt werden, in dem in Deutschland bereits eine besonders hohe Marktkonzentration festgestellt wurde.[17]

Question 5

Innerhalb des Bundeskartellamts treffen dreizehn Beschlussabteilungen Entscheidungen über Kartelle, Zusammenschlüsse und missbräuchliche Verhaltensweisen in Verwaltungssachen und in Bußgeldsachen.[18] Neun dieser Beschlussabteilungen sind jeweils für bestimmte Wirtschaftsbereiche zuständig. Die Beschlussabteilungen „B6" und „B7" sind unter anderem für Internetwirtschaft und Informationstechnik zuständig. Es ist davon auszugehen, dass Ermittlungen in Bezug auf potenzielle DMA-Verstöße abhängig vom betroffenen Wirtschaftsbereich von einer dieser Beschlussabteilungen ausgehen werden. Entscheidungen der Beschlussabteilungen werden nach dem Kollegialitätsprinzip in einer Mehrheitsentscheidung von der Vorsitzenden bzw. dem Vorsitzenden und zwei Beisitzern getroffen. Eine darüber hinausgehende Ressourcenverteilung im Bundeskartellamt oder interne Regelungen speziell in Bezug auf den DMA sind nicht öffentlich bekannt.

Question 6

Angesichts der zahlreichen teilweise sehr prominenten Verfahren des Bundeskartellamts gegen große Digitalplattformen beansprucht das Bundeskartellamt eine Vorreiterrolle bei der Sicherstellung von Wettbewerb auf digitalen Märkten für sich.[19] Diesen Fokus will das Bundeskartellamt auch zukünftig beibehalten und „einen Beitrag zur effektiven Durchsetzung des DMA leisten".[20]

Dem Bundeskartellamt wird insbesondere dort eine sehr relevante (Ermittlungs-)Rolle zukommen, wo Dienste von designierten Plattformunternehmen

[16] Reg.Begr. zur 11. GWB-Novelle, BT-Drs. 20/6824, S. 37.

[17] Immenga/Mestmäcker/*Wirtz*, Wettbewerbsrecht, 7. Aufl. 2024, GWB § 32g, Rn. 4; vgl. Bundesnetzagentur (09.12.2021), Interoperabilität zwischen Messengerdiensten, S. 4 ff.

[18] S. zur Organisation die Webseite des Bundeskartellamts und das dort abrufbare Organigramm (Stand: 01.10.2024) des Bundeskartellamts, verfügbar unter https://www.bundeskartellamt.de/DE/Bundeskartellamt/AufgabenUndOrganisation/aufgabenundorganisation.html#frage1.

[19] S. Bundeskartellamt, Jahresbericht 2022/23, S. 4. Vgl. etwa Bundeskartellamt, Beschl. 04.12.2017, B6-132/14-2, „*CTS Eventim*"; Beschl. v. 06.02.2019, B6-22/16, „*Facebook*"; Beschl. v. 17.09.2019, B2-88/18, „*Amazon*"; Beschl. v. 05.10.2023, B7-70/21, „*Google*".

[20] Bundeskartellamt, Jahresbericht 2022/23, S. 4.

potenzielle Anknüpfungspunkte für Verstöße bieten, die (noch) keine zentralen Plattformdienste sind (vgl. das Verfahren betreffend dienstübergreifende Datenverarbeitung durch Google gestützt auf § 19a GWB (B7-70/21), in dem zum DMA komplementäre Dienste aufgegriffen wurden). Es ist davon auszugehen, dass Ermittlungen des Bundeskartellamts in Bezug auf den DMA regelmäßig mit Ermittlungstätigkeiten zu § 19a GWB zusammenfallen.

Leitet das Bundeskartellamt auf der Grundlage nationalen Wettbewerbsrechts, wie § 19a GWB, Ermittlungen gegen designierte Gatekeeper ein, hat es die Kommission über die ergriffenen Maßnahmen zu unterrichten (Art. 37 Abs. 2 DMA).

Durchsetzungsprioritäten hinsichtlich des DMA hat das Bundeskartellamt bislang nicht angekündigt. Auch sind zum jetzigen Zeitpunkt (noch) keine Ermittlungstätigkeiten des Bundeskartellamts im Rahmen der Durchsetzung des DMA bekannt.

Es bleibt abzuwarten, wie engagiert nationale Behörden die (Vor-)Ermittlungsarbeit leisten, wenn die Kommission das Verfahren jederzeit an sich ziehen oder beenden kann und ausschließlich über den Verfahrensausgang entscheidet sowie letztlich die Anerkennung erhält.[21] Positiv beeinflusst werden könnte das Engagement beispielsweise, indem die Kommission Anreize für ein Tätigwerden nationaler Wettbewerbsbehörden schafft.[22]

Section 2: Use of national legislative leeway under the DMA/DSA

Question 1–4

Das Bundeskartellamt geht davon aus, dass sich die Anwendung des DMA komplementär zum deutschen und europäischen Wettbewerbsrecht verhält.[23] Das bedeutet, dass die nationalen Regelungen zur Missbrauchsaufsicht über Digitalkonzerne (insb. der § 19a GWB) anwendbar bleiben, jedenfalls soweit sie auf Unternehmen angewandt werden, die von der Kommission bislang nicht als Gatekeeper benannt sind oder soweit bereits benannten Gatekeepern damit weitere Verpflichtungen auferlegt werden. Die Vorschrift des § 19a GWB kann auch auf bislang noch unbekannte Verhaltensweisen angewendet werden.

[21] S. auch HK-DMA/*Gappa/Käseberg*, 1. Aufl. 2023, DMA Art. 38, Rn. 30.

[22] S. auch HK-DMA/*Gappa/Käseberg*, 1. Aufl. 2023, DMA Art. 38, Rn. 30; vgl. dazu *Monti*, Procedures and Institutions in the DMA, 2022, S. 26.

[23] Bundeskartellamt, Jahresbericht 2023/24, S. 40. Zur Diskussion im deutschen Schrifttum s.u., Rn. 51.

Das Bundeskartellamt betont die enge Zusammenarbeit mit der Kommission hinsichtlich des DMA.[24] So wurde etwa das Verfahren gegen Alphabet/Google hinsichtlich der dienstübergreifenden Datenverarbeitung auf der Grundlage der neuen Digitalvorschrift § 19a GWB (B7-70/21) in enger Zusammenarbeit mit der Kommission geführt.[25] Das Verfahren des Bundeskartellamts wurde im Oktober 2023 aufgrund von Verpflichtungszusagen von *Alphabet/Google* beendet, die Verbesserungen hinsichtlich der dienstübergreifenden Datenverarbeitung (wie eine freiwillige und informierte Wahlmöglichkeit der Nutzer in Bezug auf die dienstübergreifende Datenverarbeitung bzw. die Präzisierung von Datenverarbeitungskonditionen) beinhalteten.[26] Einige Dienste von *Alphabet/Google* (*Google Shopping*, *Google Play*, *Google Maps*, *Google Search*, *YouTube*, *Google Android*, *Google Chrome* und *Google Onlinewerbedienste*) wurden zwischenzeitlich von den Vorschriften des DMA erfasst, die hinsichtlich dieser Dienste bereits Verpflichtungen in Bezug auf die Einwilligung der Nutzer vorsehen. Ergänzend dazu betrifft das Ergebnis des Verfahrens des Bundeskartellamts die dienstübergreifende Datenverarbeitung unter Beteiligung von mehr als 25 weiteren Diensten, darunter *Gmail*, *Google News*, *Assistant*, *Contacts* und *Google TV*.[27]

Question 5

Auf nationaler Ebene wurde § 19a GWB im Zuge der 10. GWB-Novelle (sog. „GWB-Digitalisierungsgesetz")[28] verabschiedet, um eine effektivere Grundlage für die Kontrolle großer Digitalkonzerne, die zunehmend als Intermediäre an Bedeutung gewinnen, zu schaffen und hierfür nicht ausschließlich auf die regelmäßig ressourcenintensiven und zeitaufwendigen Verfahren der nachträglichen (ex post) Missbrauchskontrolle angewiesen zu sein.[29] Die Vorschrift des § 19a GWB ermöglicht dem Bundeskartellamt ein schnelleres und potenziell effektiveres Einschreiten durch präventive Verhaltensverbote, um den Wettbewerb durch Einhegung wirtschaftlicher Macht zu stärken.[30] Mit der Vorschrift des § 19a GWB wurde ein zweistufiges Behördenverfahren eingeführt: Zunächst stellt das Bundeskartellamt durch Verfügung die

[24] Bundeskartellamt, Jahresbericht 2023/24, S. 38.

[25] Bundeskartellamt, Jahresbericht 2023/24, S. 38 f.; Bundeskartellamt, Jahresbericht 2022/23, S. 38.

[26] Bundeskartellamt, Beschl. v. 05.10.2023, B7-70/21, „*Google*".

[27] Bundeskartellamt, Jahresbericht 2023/24, S. 38.

[28] Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer wettbewerbsrechtlicher Bestimmungen („GWB-Digitalisierungsgesetz").

[29] Reg.Begr. zur 10. GWB-Novelle, BT-Drs. 19/23492, S. 55 f., 69, 73; vgl. auch *Bechtold/Bosch*, 10. Aufl. 2021, GWB § 19a, Rn. 1; s. zum Hintergrund ausführlich Bien/*Käseberg*/Klumpe/Körber/Ost, Die 10. GWB-Novelle, 1. Aufl. 2021, Kapitel 1, C.I.1., Rn. 173 ff.

[30] Immenga/Mestmäcker/*Schweitzer*, 7. Aufl. 2024, GWB § 19a, Rn. 21; vgl. auch *Bechtold/Bosch*, 10. Aufl. 2021, GWB § 19a Rn. 1; MüKoEuWettbR/*Wolf*, 4. Aufl. 2022, GWB § 19a, Rn. 1, 4.

Normadressatenschaft gem. § 19a GWB konstitutiv fest; sodann kann das Bundeskartellamt dem adressierten Unternehmen die in § 19a Abs. 2 S. 1 GWB beschriebenen Verhaltensweisen untersagen.[31] Die Untersagung kann mit der Feststellung der Normadressatenstellung zusammenfallen.[32] Die Vorschrift des § 19a GWB tritt als besondere Missbrauchsaufsicht gem. § 19a Abs. 3 GWB neben die allgemeine kartellrechtliche Missbrauchsaufsicht i.S.d. §§ 19, 20 GWB.[33] Für Beschwerden gegen Entscheidungen nach § 19a GWB ist gem. § 73 Abs. 5 GWB der Bundesgerichtshof erstinstanzlich zuständig.[34]

Die Vorschrift des § 19a GWB adressiert „Unternehmen mit überragender marktübergreifender Bedeutung für den Wettbewerb" und stellt eine weitreichende Neuerung dar, die als „Blaupause für eine Regulierung der Plattformökonomie"[35] bezeichnet wurde.[36] Diese Eingriffsmöglichkeit unterhalb der Marktbeherrschung zielt ähnlich wie der DMA auf den Adressatenkreis von Gatekeepern digitaler Ökosysteme.[37] Die adressierten Unternehmen haben teilweise auch eine beherrschende Stellung auf einzelnen Plattform- oder Netzwerkmärkten und verfügen darüber hinaus über Ressourcen durch konglomerate Strukturen und eine strategische Positionierung in Schlüsselrollen für den Wettbewerb, durch die sie für verschiedene Märkte von zentraler Bedeutung sein können, insbesondere durch Ausweitung der eigenen Geschäftstätigkeit in neue Märkte und Sektoren.[38] Das Bundeskartellamt hat bereits eine überragende marktübergreifende Bedeutung für den Wettbewerb i.S.d. § 19a Abs. 1 GWB für die Digitalunternehmen *Alphabet*[39], *Meta*[40], *Amazon*[41],

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[31] Immenga/Mestmäcker/*Schweitzer*, 7. Aufl. 2024, GWB § 19a, Rn. 21; *Bechtold/Bosch*, 10. Aufl. 2021, GWB § 19a, Rn. 2.

[32] Immenga/Mestmäcker/*Schweitzer*, 7. Aufl. 2024, GWB § 19a, Rn. 21.

[33] Vgl. *Bechtold/Bosch*, 10. Aufl. 2021, GWB § 19a, Rn. 18.

[34] Der Rechtsweg wurde verkürzt aufgrund der Länge vergangener kartellrechtlicher Verfahren gegen Digitalkonzerne und der zu erwartenden komplexen Verfahren im Rahmen der Anwendung des § 19a GWB (s. Beschlussempfehlung und Bericht des Ausschusses für Wirtschaft und Energie (9. Ausschuss) u.a. zu dem Gesetzesentwurf der Bundesregierung, BT-Drs. 19/23492 (10. GWB-Novelle), BT-Drs. 19/25868, S. 9).

[35] S. Beschlussempfehlung und Bericht des Ausschusses für Wirtschaft und Energie (9. Ausschuss) u.a. zu dem Gesetzesentwurf der Bundesregierung, BT-Drs. 19/23492 (10. GWB-Novelle), BT-Drs. 19/25868, S. 8, 9, die sich an dieser Stelle auf die gesamte 10. GWB-Novelle bezieht.

[36] Immenga/Mestmäcker/*Schweitzer*, 7. Aufl. 2024, GWB § 19a, Rn. 15; vgl. auch *Bechtold/Bosch*, 10. Aufl. 2021, GWB § 19a, Rn. 1 f.

[37] Vgl. Reg.Begr. zur 10. GWB-Novelle, BT-Drs. 19/23492, S. 73, 74.

[38] Reg.Begr. zur 10. GWB-Novelle, BT-Drs. 19/23492, S. 73, 74.

[39] S. Feststellungsverfügung vom 30.12.2021 (rechtskräftig), B7-61/21, abrufbar unter https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2021/B7-61-21.html.

[40] S. Feststellungsverfügung vom 02.05.2022 (rechtskräftig), B6-27/21, abrufbar unter https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2022/B6-27-21.html.

[41] S. Feststellungsverfügung vom 05.07.2022 (rechtskräftig), B2-55/21, abrufbar unter https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2022/B2-55-21.html.

Apple42 und *Microsoft43* festgestellt.[44] Das gegen *Alphabet/Google* auf dieser Grundlage geführte Verfahren „*Google News Showcase*" (V-43/20) wurde aufgrund von durch *Google* vorgenommenen Maßnahmen im Jahr 2022 eingestellt und das Verfahren „*Google Datenverarbeitung*" (B7-70/21) wurde im Jahr 2023 abgeschlossen, in dem die Verpflichtungszusagen für verbindlich erklärt wurden.[45] Derzeit laufen Verfahren des Bundeskartellamts auf der Grundlage von § 19a Abs. 2 GWB gegen *Alphabet/Google* („*Google Maps Platform und Google Automotive Services*"), *Amazon* („*Preiskontrolle*" und „*Brandgating*"), *Apple* (App-Tracking-Transparency-Framework (ATTF)) und *Meta/Facebook* („*VR-Brillen/Facebook*").[46]

In § 19a Abs. 2 GWB sind spezifische Verhaltensweisen abschließend normiert, die durch Verfügung verboten werden müssen (kein gesetzliches Verbot).[47] Die benannten Verhaltensweisen können unmittelbar und ohne den Nachweis einer wettbewerbsbeschränkenden Wirkung untersagt werden. Die Untersagungstatbestände in § 19a Abs. 2 S. 1 GWB wurden ausgehend von klassischen Missbrauchsfallgruppen, wie wettbewerbsschädlicher Kopplung oder missbräuchlichen Exklusivitätsbindungen, entwickelt und verfolgen das Ziel, unternehmerische Strategien, denen nach bisheriger Fallpraxis ein besonderes Gefährdungspotenzial innewohnt, verallgemeinert abzubilden.[48] Die behördlichen Eingriffsmöglichkeiten in § 19a Abs. 2 GWB beziehen sich auf die folgenden Verhaltensweisen: Selbstbevorzugung (Nr. 1), Behinderung auf Absatz- und Beschaffungsmärkten (Nr. 2), Aufrollen von Märkten (Nr. 3), Behinderung durch Datenverarbeitung (Nr. 4), Behinderung der Interoperabilität oder Portabilität (Nr. 5), Zurückhalten von Informationen (Nr. 6) und Fordern von unangemessenen Vorteilen (Nr. 7). Eine in diesem Zusammenhang gem. § 19a Abs. 2 S. 2 GWB mögliche sachliche Rechtfertigung muss von den Unternehmen dargelegt und bewiesen werden.

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[42] S. Feststellungsverfügung vom 03.04.2023, B9-67/21, abrufbar unter https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2023/B9-67-21.html.

[43] S. Pressemitteilung vom 30.09.2024, verfügbar unter https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2024/30_09_2024_Microsoft.html?nn=52004.

[44] S. zum Stand der Verfahren gem. § 19a GWB die Übersicht des Bundeskartellamts „Verfahren gegen Digitalkonzerne" (Stand: September 2024), abrufbar unter https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Downloads/Liste_Verfahren_Digitalkonzerne.html.

[45] S. Fallbericht vom 21.12.2022, V-43/20, abrufbar unter https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Missbrauchsaufsicht/2023/V-43-20.html; S. Beschluss vom 02.10.2023, B7-70/21, abrufbar unter: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2023/B7-70-21.html?nn=3591568.

[46] S. die Übersicht des Bundeskartellamts „Verfahren gegen Digitalkonzerne" (Stand: September 2024), abrufbar unter https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Downloads/Liste_Verfahren_Digitalkonzerne.html.

[47] S. Reg.Begr. zur 10. GWB-Novelle, BT-Drs. 19/23492, S. 75 („Zur Gewährleistung einer hinreichenden Rechtssicherheit ist § 19a derart ausgestaltet, […]").

[48] S. Reg.Begr. zur 10. GWB-Novelle, BT-Drs. 19/23492, S. 75; vgl. Immenga/Mestmäcker/*Schweitzer*, 7. Aufl. 2024, GWB § 19a, Rn. 22.

Während sich der DMA in Terminologie und Regelungstechnik vom Wettbewerbsrecht löst, ist § 19a GWB – trotz Inspiration durch das Regulierungsrecht in verfahrenstechnischer Hinsicht – im Wettbewerbsrecht verankert.[49] Der Anwendungsbereich von § 19a GWB ist nicht auf Sektoren oder bestimmte Digitalunternehmen beschränkt und verfolgt die herkömmlichen Ziele des Wettbewerbsrechts (Wettbewerbsfreiheit, offene Märkte und einen unverfälschten Wettbewerbsprozess).[50] Der DMA verfolgt vergleichbare Wettbewerbsziele,[51] setzt sich davon aber auch ab.[52] Der auf Art. 114 AEUV gestützte DMA soll der „Bestreitbarkeit" digitaler Märkte und der „Fairness" auf diesen Märkten dienen und ist folglich kein klassisches Wettbewerbsinstrument, sondern rückt etwa mit der Designierung großer Online-Plattformen als Gatekeeper und konkreten Verhaltensvorgaben ohne unmittelbaren Wettbewerbsbezug jedenfalls deutlich näher in den Bereich der Regulierung.[53]

Trotz im Grunde vergleichbarer Zielsetzung weisen § 19a GWB und der DMA im Einzelnen Unterschiede auf. Zunächst ist der persönliche Anwendungsbereich des § 19a GWB nicht mit dem des DMA identisch.[54] Adressaten des § 19a GWB sind anhand qualitativer Kriterien zu bestimmen, ohne dass wie von den Regelungen des DMA quantitative Schwellenwerte für eine Vermutung vorausgesetzt werden. Während der DMA Vermutungsregelungen basierend auf Umsatz, Nutzerzahlen und der Marktkapitalisierung vorsieht und dabei einzelne zentrale Plattformdienste in den Fokus nimmt, steht bei § 19a GWB eine stärker dienste- bzw. marktübergreifende Perspektive im Vordergrund.[55] Mit beiden Regelungen kann beispielsweise die Verhaltensweise der Selbstbevorzugung konzerneigener Dienste aufgegriffen werden. Allerdings sieht der DMA einen spezifischen, für designierte Gatekeeper unmittelbar und direkt geltenden Katalog von Ge- und Verboten vor, während § 19a GWB mit seiner weiteren und abstrakteren Formulierung ein „Zuschneiden" auf den konkreten

[49] Immenga/Mestmäcker/*Schweitzer*, 7. Aufl. 2024, GWB § 19a, Rn. 27; MüKoEuWettbR/*Wolf*, 4. Aufl. 2022, GWB § 19a, Rn. 4.

[50] Immenga/Mestmäcker/*Schweitzer*, 7. Aufl. 2024, GWB § 19a, Rn. 27; MüKoEuWettbR/*Wolf*, 4. Aufl. 2022, GWB § 19a, Rn. 97.

[51] Siehe dazu *Schweitzer*, ZEuP 2021, 503, 509 ff. Immenga/Mestmäcker/*Schweitzer*, 7. Aufl. 2024, GWB § 19a, Rn. 27.

[52] Siehe ErwGr 11 des DMA: „Diese Verordnung verfolgt ein Ziel, das das im Wettbewerbsrecht definierte Ziel, den unverfälschten Wettbewerb auf bestimmten Märkten zu schützen, ergänzt, aber sich davon unterscheidet"; näher: *Zimmer/Göhsl*, ZWeR 2021, 29, 35 f.; *Podszun/Bongartz/Langenstein*, EuCML, 2021, 60 (61 f.); Immenga/Mestmäcker/*Schweitzer*, 7. Aufl. 2024, GWB § 19a, Rn. 27.

[53] S. Bien/*Käseberg*/Klumpe/Körber/Ost, Die 10. GWB-Novelle, 1. Aufl. 2021, Kapitel 1, C.I.4., Rn. 215.

[54] Sowohl bei § 19a GWB als auch beim DMA wird allgemein davon ausgegangen, dass auf absehbare Zeit Google, Amazon, Facebook und Apple die vordringlichen Normadressaten sein werden. Siehe *Polley/Konrad*, WuW 2021, 198, 201; in Bezug auf § 19a: *Mäger/Budde*, DB 2020, 378, 382; *Nagel/Hillmer*, DB 2021, 327, 330. Microsoft tritt in jüngerer Zeit als weiterer wichtiger Normadressat hinzu.

[55] Bundeskartellamt, Jahresbericht 2021/22, S. 38; vgl. Reg.Begr. zur 10. GWB-Novelle, BT-Drs. 19/23492, S. 73.

Sachverhalt ermöglicht und grundsätzlich auch andere oder neuartige Verhaltensweisen erfassen kann. Im Unterschied zu den Verpflichtungen in Art. 5–7 DMA ist im Rahmen von § 19a GWB eine Einzelfallprüfung mit sachlicher Rechtfertigung möglich.[56] Mit der Regelung des § 19a Abs. 2 GWB wurde wie auch mit dem Regime des DMA von der im allgemeinen kartellrechtlichen Missbrauchsverbot verankerten wettbewerblichen Auswirkungsanalyse abgewichen.[57] Für den Erlass einer Untersagungsverfügung nach § 19a Abs. 2 GWB muss das wettbewerbsschädigende Potenzial aber jedenfalls plausibilisiert werden, während der DMA keine Wirkungsanalyse vorsieht.[58] Da beide Regelungen letztlich den gleichen überschaubaren Adressatenkreis betreffen, werden sich künftig komplexe Kollisionsfragen stellen.

Section 3: Vertical and horizontal public enforcement-related cooperation under DSA/DMA

Question 1

Das Netzwerk der europäischen Wettbewerbsbehörden (European Competition Network, „ECN") ist das auch in Bezug auf den DMA zuständige Koordinierungskriterium für die Zusammenarbeit von Kommission und nationalen Behörden der Mitgliedstaaten. Dieses Netzwerk wurde durch die VO 1/2003[59] geschaffen, um eine gewisse Kohärenz bei der Anwendung des europäischen Wettbewerbsrechts zu gewährleisten. Art. 38 Abs. 1 DMA ordnet die Zuständigkeit des Netzwerks explizit an, da es sich beim DMA nicht um Wettbewerbsrecht handelt und verweist hierfür auf „die für die Durchsetzung der in Art. 1 Abs. 6 genannten Vorschriften zuständigen Behörden der Mitgliedstaaten".[60]

Die Behörden unterrichten sich über ihre jeweiligen Durchsetzungsmaßnahmen und sind zum Informationsaustausch untereinander berechtigt, Art. 38 Abs. 1 S. 1 und 2 DMA. Die Unterrichtungspflicht gilt im Verhältnis von

[56] Reg.Begr. zur 10. GWB-Novelle, BT-Drs. 19/23492, S. 75; Beschlussempfehlung und Bericht des Ausschusses für Wirtschaft und Energie (9. Ausschuss) u.a. zu dem Gesetzesentwurf der Bundesregierung, BT-Drs. 19/23492 (10. GWB-Novelle), BT-Drs. 19/25868, S. 113; vgl. auch Immenga/Mestmäcker/*Schweitzer*, 7. Aufl. 2024, GWB § 19a, Rn. 30, 31.

[57] Immenga/Mestmäcker/*Schweitzer*, 7. Aufl. 2024, GWB § 19a, Rn. 32.

[58] Immenga/Mestmäcker/*Schweitzer*, 7. Aufl. 2024, GWB § 19a, Rn. 32.

[59] Verordnung (EG) Nr. 1/2003 des Rates vom 16. Dezember 2002 zur Durchführung der in den Artikeln 81 und 82 des Vertrags niedergelegten Wettbewerbsregeln.

[60] S. auch HK-DMA/*Gappa/Käseberg*, 1. Aufl. 2023, DMA, Art. 38, Rn. 5. In einer am 23.06.2021 veröffentlichten gemeinsamen Position der Europäischen Wettbewerbsbehörden sprachen sich die Behördenleiter für die Etablierung eines Mechanismus' zur engen Koordinierung und Kooperation zwischen den Behörden im Zusammenhang mit dem DMA aus, der auf das ECN-Modell aufsetzen könnte. Das gemeinsame Papier ist abrufbar unter https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/23_06_2021_DMA.html?nn=55030.

Kommission und nationalen Behörden für beide Seiten und auch für nationale Behörden untereinander. Des Weiteren regelt Art. 38 Abs. 2 DMA vergleichbar mit Art. 11 Abs. 3 VO 1/2003 die Pflicht nationaler Behörden, die Kommission über Untersuchungsmaßnahmen gegenüber Gatekeepern zu informieren. Diese Mitteilungspflicht gilt auch für nationales Wettbewerbsrecht i.S.d. Art. 1 Abs. 6 DMA, d.h. Art. 101 AEUV und Art. 102 AEUV, nationale Parallelvorschriften hierzu, darunter § 19a GWB – was in Anbetracht potenzieller Überschneidungen sinnvoll ist –, sowie Vorschriften der nationalen Fusionskontrolle, für deren Durchsetzung nationale Wettbewerbsbehörden weiterhin zuständig bleiben.[61] Art. 1 Abs. 7 DMA regelt für die parallele Durchsetzung des Kartellrechts durch nationale Wettbewerbsbehörden, dass diese Entscheidungen einem Beschluss der Kommission in Bezug auf den DMA nicht zuwiderlaufen dürfen. Die in Art. 38 DMA vorgesehene Zusammenarbeit und Koordinierung dient dazu, Widersprüche zwischen Entscheidungen nationaler Wettbewerbsbehörden gegen Gatekeeper einerseits und DMA-Beschlüssen der Kommission andererseits frühzeitig zu erkennen und diese zu vermeiden.[62]

Es wird in der Praxis vor allem eine Herausforderung darstellen, in Bereichen, die ein zu einem angrenzenden Sachverhalt bereits erlassener DMA-Beschluss der Kommission nicht abdeckt oder in neuen Bereichen, in denen noch kein DMA-Beschluss der Kommission ergangen ist, eine kohärente Durchsetzungspraxis kartellrechtlicher Vorschriften gegen Gatekeeper, vor allem auch der nationalen Wettbewerbsbehörden untereinander zu gewährleisten. Während die zuständigen mitgliedstaatlichen Behörden verpflichtet sind, die Kommission über ihre jeweiligen Durchsetzungsmaßnahmen hinsichtlich kartellrechtlicher Vorschriften zu unterrichten, besteht Ermessen hinsichtlich der Informationsübermittlung an die zuständigen nationalen Behörden anderer Mitgliedstaaten (Art. 38 Abs. 1 bis 3 DMA).[63] In erster Linie dient die Mitteilungspflicht nationaler Behörden gem. Art. 38 Abs. 2 bis 4 DMA der Koordinierung und Abstimmung mit der Kommission.[64]

Des Weiteren sieht Art. 28 Abs. 3 DMA zwar eine Mitteilungspflicht bzw. Wartefrist für den Fall vor, dass die zuständige nationale Behörde einem Gatekeeper Verpflichtungen aufzuerlegen beabsichtigt, aber die nationale Behörde ist in diesem Zusammenhang nicht verpflichtet, sich mit der Kommission abzustimmen, eine Stellungnahme der Kommission abzuwarten oder Anregungen umzuset-

[61] MüKoEuWettbR/*Schubert*, 4. Aufl. 2023, DMA Art. 38, Rn. 16; *Franck/Peitz*, JECLAP 2021, 513, 526; *Polley/Konrad*, WuW 2021, 198, 199; *Gielen/Uphues*, EuZW 2021, 627, 632; *Zimmer/Göhsl*, ZWeR 2021, 29, 59; *Horn/Schmalenberger*, K&R 2022, 465, 467; wohl auch *Achleitner*, NZKart 2022, 359, 364.

[62] MüKoEuWettbR/*Schubert*, 4. Aufl. 2023, DMA Art. 38, Rn. 17.

[63] Innerhalb des ECN werden (nur) Fälle, in denen (auch) europäisches Recht Anwendung findet, bekannt gemacht. § 50d GWB regelt die Befugnis des Bundeskartellamts zum Informationsaustausch im Netzwerk der europäischen Wettbewerbsbehörden.

[64] HK-DMA/*Gappa/Käseberg*, 1. Aufl. 2023, DMA Art. 38, Rn. 10.

zen.[65] Auch diesbezüglich bleibt abzuwarten, inwiefern die Kommission Einfluss auf möglicherweise von ihrer Einschätzung abweichende zuständige nationale Behörden i.S.e. einheitlichen, effektiven Durchsetzung des DMA nehmen kann.

Question 2

Um eine kohärente Auslegung des DMA zu gewährleisten, sollen nationale Gerichte mit der Kommission entsprechend der Bestimmung des Art. 39 DMA zusammenarbeiten, der sich wesentlich an den kartellrechtlichen Regelungen zur Zusammenarbeit nach Art. 15 Abs. 1 bis 3 VO 1/2003 orientiert. Gem. Art. 39 Abs. 1 DMA können nationale Gerichte die Kommission um eine Stellungnahme oder Informationen im Zusammenhang mit der Anwendung des DMA bitten. Vergleichbar mit der Anwendung der Parallelvorschrift des Art. 15 Abs. 1 VO 1/2003 dürfte die Kommission unter Berücksichtigung des Grundsatzes der loyalen Zusammenarbeit verpflichtet sein, dieser Bitte nachzukommen.[66] Das Ersuchen kann auch in Verfahren relevant werden, in denen das Gericht die Anwendung des DMA jedenfalls ernsthaft erwägt, die Vorschriften aber letztlich nicht anwendet.[67] Bezweifelt wird, ob allein der Umstand, dass ein Verfahrensbeteiligter sich auf eine Vorschrift des DMA beruft, die Pflichten nach Art. 39 DMA auslöst.[68] Die von der Kommission übermittelte Stellungnahme kann allgemeine Informationen, wie Berichte, Studien, Marktanalysen und Statistiken, oder fallspezifische Informationen beinhalten, bindet die nationalen Gerichte jedoch nicht.[69] Fallspezifische Informationen umfassen nicht nur perpetuierte Informationen, sondern auch das Wissen von Kommissionsbeamten, das bislang noch nicht aufgezeichnet wurde.[70] Bei diesen Stellungnahmen wird eine strukturelle Ähnlichkeit zum Vorabentscheidungsersuchen nach Art. 267 AEUV gesehen, da dort ebenfalls ein nicht überprüfter Sachverhalt bewertet wird.[71] In Bezug auf vertrauliche Informationen (Art. 339 AEUV) wird keine Pflicht zur Übermittlung bestehen, jedenfalls für den Fall, dass das Gericht die Wahrung der Vertraulichkeit der Informationen nicht gewährleisten kann.[72]Das nationale Gericht ist gem.

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[65] HK-DMA/*Gappa/Käseberg*, 1. Aufl. 2023, DMA Art. 38, Rn. 17; zur Parallelvorschrift in Art. 11 Abs. 4 VO 1/2003 vgl. MüKoEUWettbR/*Bardong/Stempel*, 4. Aufl. 2023, VO Nr. 1/2003 Art. 11, Rn. 54.

[66] Zu Art. 15 Abs. 1 VO (EG) Nr. 1/2003 sieht sich die Kommission „verpflichtet, den Gerichten Hilfestellung zu gewähren", von denen der Verordnungstext die häufigsten Arten der Unterstützung lediglich „nennt": KOMM (2004/C 101/04) Rn. 17.

[67] Vgl. zur Parallelvorschrift MüKoWettbR/*Nothdurft*, 4. Aufl. 2023, VO 1/2003 Art. 15, Rn. 8.

[68] HK-DMA/*Lahme/Ruster*, 1. Aufl. 2023, DMA Art. 39, Rn. 17.

[69] HK-DMA/*Lahme/Ruster*, 1. Aufl. 2023, DMA Art. 39, Rn. 19.

[70] HK-DMA/*Lahme/Ruster*, 1. Aufl. 2023, DMA Art. 39, Rn. 19.

[71] HK-DMA/Lahme/Ruster, 1. Aufl. 2023, DMA Art. 39, Rn. 19.

[72] HK-DMA/*Lahme/Ruster*, 1. Aufl. 2023, DMA Art. 39, Rn. 19 mit Verweis auf EuG 18.09.1996 – T-353/94, ECLI:EU:T:1996:119, Rn. 90 – Postbank; s. zur Anwendung der Parallelvorschrift des Art. 15 Abs. 1 VO (EG) Nr. 1/2003 z.B. KOMM (2004/C 101/04) Rn. 25.

Art. 39 Abs. 2 DMA verpflichtet, sein Urteil an die Kommission zu übermitteln. Diese Pflicht dient dem Zweck der Gewährleistung einer kohärenten Anwendung des DMA und ist daher weit, auch in Bezug auf andere Entscheidungen, zu verstehen.[73]

Die Kommission kann gem. Art. 39 Abs. 3 DMA als sog. „amicus curiae" auftreten und eine schriftliche oder – mit Erlaubnis des Gerichts – auch mündliche Stellungnahme abgeben, sofern die kohärente Anwendung des DMA dies erfordert.[74] Unter Berücksichtigung des Normzwecks –einer wirksamen Durchsetzung des DMA – ist der Begriff der Kohärenz tendenziell weit auszulegen und bildet damit keine allzu hohe Hürde für die Beteiligung der Kommission im nationalen Gerichtsverfahren.[75] Im Sinne einer effektiven Durchsetzung des DMA und einer effizienten Verfahrensführung ist eine frühe Beteiligung der Kommission, bereits in erster Instanz, wünschenswert.[76]

Darüber hinaus hat die Kommission gem. Art. 39 Abs. 4 DMA ein Informationsrecht, das die Übermittlung von Schriftstücken zum Zweck der Anfertigung ihrer Stellungnahmen umfasst, falls diese zur Beurteilung des Falls notwendig sind.[77] Notwendig dürfte die Übermittlung sein, wenn die Kenntnis des Inhalts für die Kommission objektiv erforderlich ist, um die in der Stellungnahme aufgeworfenen Fragen zielführend zu prüfen.[78] Der Umfang der sich unter diesen Umständen ergebenden Übermittlungspflicht der Gerichte kann sich auf Teile der Akte, wie Schriftsätze, oder die gesamte Verfahrensakte beziehen.[79] Zum Teil wird ein Beweisverwertungsverbot für das behördliche Verfahren hinsichtlich der zum Zwecke der Stellungnahmen an die Kommission übermittelten Schriftstücke aus den Gerichtsverfahren angenommen.[80] Es bleibt abzuwarten, inwieweit ein etwaiges Verwertungsverbot unter Berücksichtigung des Art. 26 DMA und weitgehender Informationsmöglichkeiten seitens der Kommission praktische Relevanz entfalten wird.[81]

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[73] HK-DMA/*Lahme/Ruster*, 1. Aufl. 2023, DMA Art. 39, Rn. 20. Vgl. zur Parallelvorschrift MüKoWettbR/*Nothdurft*, 4. Aufl. 2023, VO 1/2003 Art. 15, Rn. 1, 32.

[74] HK-DMA/*Lahme/Ruster*, 1. Aufl. 2023, DMA Art. 39, Rn. 22; vgl. Abs. 5 S. 2, ErwG 90, 93.

[75] Ibd.

[76] So auch HK-DMA/*Lahme/Ruster*, 1. Aufl. 2023, DMA Art. 39, Rn. 22. Zur Parallelvorschrift führt die Kommission in ihrer Bekanntmachung aus, dass die Norm dafür sorge, dass die Kommission rechtzeitig Kenntnis von Fällen erlange, bei denen die Vorlage einer Stellungnahme zweckmäßig sein könnte, falls eine der Parteien gegen das Urteil Rechtsmittel einlegen würde: KOM (2004/C 101/04) Rn. 37.

[77] *Galle/Dressel*, EuZW 2024, 107, 114; vgl. ähnlich auch *von Schreitter/Sura*, DB 2022, 2715, 2720.

[78] Vgl. HK-DMA/*Lahme/Ruster*, 1. Aufl. 2023, DMA Art. 39, Rn. 23. Vgl. zur Parallelvorschrift von der Groeben/Schwarze/Hatje/*Becker*, EU-Recht, 7. Aufl. 2015, VO 1/2003 Art. 15, Rn. 90.

[79] HK-DMA/*Lahme/Ruster*, 1. Aufl. 2023, DMA Art. 39, Rn. 23.

[80] S. MüKoWettbR/*Nothdurft*, 4. Aufl. 2023, VO 1/2003 Art. 15, Rn. 41; vgl. BeckOKKartellR/*Riesenkampff/Steinbarth*, 13. Ed. 2024, Kartellverfahrens-VO Art. 15, Rn. 12.

[81] HK-DMA/*Lahme/Ruster*, 1. Aufl. 2023, DMA Art. 39, Rn. 24.

Außerdem dürfen gem. Art. 39 Abs. 5 DMA, der Art. 16 Abs. 1 S. 1 VO 1/2003 entspricht, Zivilgerichte keine Entscheidungen erlassen, die einem erlassenen Kommissionsbeschluss oder einer beabsichtigten Entscheidung der Kommission in einem Verfahren i.S.d. Art. 20 DMA zuwiderlaufen. Durch diese Vorschrift wird eine Bindungswirkung von Entscheidungen der Kommission bewirkt, sodass auch bei DMA-Verstößen „follow-on"-Klagen, vergleichbar mit dem klassischen Kartellrecht, möglich sind. Die Bindungswirkung betrifft wie im klassischen Kartellrecht tatsächliche und rechtliche Gesichtspunkte.[82] Von der Bindungswirkung umfasst sind neben Nichteinhaltungsbeschlüssen nach Art. 29 DMA auch Beschlüsse, die feststellen, dass kein DMA-Verstoß vorliegt.[83] Über die Regelung des § 33b GWB hinaus, der eine Bindungswirkung nur für bereits ergangene (rechtskräftige) Entscheidungen vorsieht, dürfen nach Art. 39 Abs. 5 DMA ebenfalls keine Entscheidungen ergehen, die einer Entscheidung der Kommission widersprechen, diese sie in einem nach Art. 20 DMA eingeleiteten Verfahren zu erlassen beabsichtigt. Es ist davon auszugehen, dass deutsche Gerichte Verfahren, die einen potenziell konfligierenden Streitgegenstand betreffen, in der Regel gem. § 148 Abs. 1 ZPO aussetzen werden (vgl. Art. 39 Abs. 5 S. 2 DMA), da nationale Gerichte den Ausgang des eingeleiteten Kommissionsverfahrens in der Regel nicht antizipieren können.[84] Das Gericht kann das Verfahren auch unter Anordnung einstweiliger Maßnahmen aussetzen.[85] In einstweiligen Rechtsschutzverfahren ist allerdings davon auszugehen, dass die primärrechtlich anerkannten Grundsätze effektiven Rechtsschutzes nach Art. 47 GRCh und Art. 4 Abs. 3 EUV die Vorschrift des Art. 39 Abs. 5 S. 2 bis 4 DMA überlagern.[86] Davon unabhängig können die Zivilgerichte nach Art. 267 AEUV eine Vorabentscheidung des Gerichtshofs ersuchen. Umgekehrt sieht Art. 39 Abs. 5 DMA keine Bindung der Kommission an zeitlich frühere Entscheidungen nationaler Gerichte vor.[87]

Question 3

Im Rahmen von Art. 27 DMA kann auch das Bundeskartellamt einen Beitrag zur effektiven Durchsetzung des DMA durch eine „Grobfilter- und Botenfunktion" leisten, in dem es relevante Informationen Dritter über Praktiken

[82] HK-DMA/*Lahme/Ruster*, 1. Aufl. 2023, DMA Art. 39, Rn. 25.

[83] *Becker*, ZEuP 2023, 403, 411 f.; *Galle/Dressel*, EuZW 2024, 107, 114.

[84] S. HK-DMA/*Lahme/Ruster*, 1. Aufl. 2023, DMA Art. 39, Rn. 26; *Galle/Dressel*, EuZW 2024, 107, 114. Eine Aussetzung muss nicht zwingend erfolgen, da Art. 39 Abs. 5 DMA es dem Gericht nur für diesen Fall verbietet, in der Sache zu entscheiden.

[85] S. HK-DMA/*Lahme/Ruster*, 1. Aufl. 2023, DMA Art. 39, Rn. 26.

[86] S. HK-DMA/*Lahme/Ruster*, 1. Aufl. 2023, DMA Art. 39, Rn. 26 mit Verweis auf die Grundsätze zu effektivem Rechtsschutz in der EuGH-Rechtsprechung: s. EuGH, Urt. v. 09.11.1995, C-465/93, „*Atlanta*", ECLI:EU:C:1995:369, Rn. 27 ff.; EuGH, Urt. v. 21.02.1991, C-143/88 und C-92/89, „*Zuckerfabrik Süderdithmarschen*", ECLI:EU:C:1991:65, Rn. 16 ff.

[87] Vgl. HK-DMA/*Lahme/Ruster*, 1. Aufl. 2023, DMA Art. 39, Rn. 25.

oder Verhaltensweisen von Gatekeepern, die einen möglichen Verstoß gegen den DMA begründen, an die Kommission weiterleitet.[88] Für den Fall, dass aus Sicht des Bundeskartellamts keine Anhaltspunkte für eine Nichteinhaltung des DMA gegeben sind, besteht keine Informationspflicht gegenüber der Kommission.[89]

Das Bundeskartellamt kann insbesondere in Bezug auf Verhalten, das deutsche Dienste auf einem in erster Linie deutschen Markt betrifft, als erste Anlaufstelle für Hinweise von gewerblichen Nutzern, Wettbewerbern oder Endnutzern besondere Relevanz zukommen.[90] Grundsätzlich ist davon auszugehen, dass insbesondere Endnutzer und kleinere Unternehmen den ersten Kontakt zur nationalen Wettbewerbsbehörde suchen.[91] Denkbar sind beispielsweise Fälle, in denen Endnutzer hinsichtlich eines Zugangsbegehrens zu bestimmten Inhalten durch Nutzung der Software eines Drittanbieters (Art. 5 Abs. 5 DMA) oder einer Kopplung von zentralen Plattformdiensten mit anderen Diensten (Art. 5 Abs. 7 DMA) an das Bundeskartellamt herantreten.

Section 4: Private enforcement of DMA/DSA

Question 1

Es ist davon auszugehen, dass derzeit insbesondere Verfahren im einstweiligen Rechtsschutz gegen designierte Gatekeeper gestützt auf DMA-Verstöße vor deutschen Zivilgerichten anhängig sind. Außerdem stützt die zuletzt positive Erfahrung, insbesondere im Wege des Eilrechtsschutzes gegen potenzielle Rechtsverletzungen großer Plattformunternehmen wie etwa Amazon[92] und Google[93] in Deutschland vorzugehen, die Erwartung, dass die private Rechtsdurchsetzung durch betroffene Marktteilnehmer in der Digitalwirtschaft auch

[88] HK-DMA/*Lahme/Ruster*, 1. Aufl. 2023, DMA Art. 27, Rn. 4, vgl. MüKoEuWettbR/*Schubert*, 4. Aufl. 2023, DMA Art. 27, Rn. 1, 3.

[89] HK-DMA/*Lahme/Ruster*, 1. Aufl. 2023, DMA Art. 27, Rn. 4; MüKoEuWettbR/*Schubert*, 4. Aufl. 2023, DMA Art. 27, Rn. 5.

[90] In diesen Sachverhalten besteht eine naturgemäße Nähe zur nationalen Wettbewerbsbehörde. Außerdem ist es für Betroffene mitunter schwierig zu beurteilen, ob bestimmte Verhaltensweisen auch über die Landesgrenzen hinaus in anderen Mitgliedstaaten Relevanz haben und daher überhaupt von Interesse für eine Verfolgung durch die Kommission sind.

[91] MüKoEuWettbR/*Schubert*, 4. Aufl. 2023, DMA Art. 27, Rn. 3.

[92] LG München I, Beschl. v. 14.01.2021, 37 O 32/21, „*Amazon Kontensperrung I*“, NZKart 2021, 198, später aufgehoben durch LG München I, Urt. v. 12.05.2021, 37 O 32/21, „*Amazon Kontensperrung II*“, BeckRS 2021, 10613; vgl. LG Stuttgart, Urt. v. 22.04.2021, 11 O 10/21, „*Kontosperre*“, MMR 2021, 1000; vgl. LG Hannover, Beschl. v. 22.07.2021, 25 O 221/21, „*Sperrung des Verkäuferkontos*“, GRUR-RS 2021, 24622.

[93] LG München I, Urt. v. 10.02.2021, 37 O 15721/20, „*BMG/Google*“, NZKart 2021, 193. Die Kooperation zwischen Google und dem vom Bundesministerium betriebenen Gesundheitsportal, die zu einer bevorzugten Platzierung des Portals führte, verstößt nach Auffassung des Gerichts gegen Art. 101 AEUV/§ 1 GWB.

hinsichtlich des DMA zukünftig eine ergänzende Rolle neben dem behördlichen Vollzug spielen wird.[94] Dies ist verstärkt zu erwarten, sobald sich die behördliche Anwendungspraxis des DMA weiter etabliert hat.

Question 2

Im Allgemeinen bietet eine rege private Rechtsdurchsetzung die Möglichkeit, die Kommission zu entlasten.[95] Die im deutschen Recht vorgesehene private Rechtsdurchsetzung soll der effektiven Implementierung des DMA dienen und damit dem europarechtlichen Effektivitätsgrundsatz Rechnung tragen.[96] Die im Zivilverfahren stattfindende dezentrale auf den Kläger zugeschnittene Betrachtung bietet Raum für eine trennschärfere Analyse bei etwaigen unterschiedlichen Marktverhältnissen in den Mitgliedstaaten.[97] Allerdings enthält der Verpflichtungskatalog der Art. 5 bis 7 DMA viele unbestimmte und wertungsoffene Rechtsbegriffe, die Argumentationsspielräume eröffnen (Art. 6 DMA wird grundsätzlich erst im Dialog mit der Kommission konkretisiert) und in der Praxis nicht zwingend einheitlich ausgelegt werden.[98] Das Fehlen einer Orientierung durch eine Entscheidungspraxis bzw. Verfahren der Kommission oder entsprechende Leitlinien birgt die Gefahr, dass Richter in zivilrechtlichen Verfahren zu unterschiedlichen Bewertungen kommen und dadurch Rechtsunsicherheit verstärkt wird.[99] Dies stünde ebenso wie durch unterschiedliche Verhaltensanforderungen nationaler Gerichte geprägte Geschäftsmodelle großer Online-Plattformen in verschiedenen Mitgliedstaaten (Stichwort: „nationale Flickenteppiche") letztlich dem Harmonisierungszweck des DMA entgegen.

Bei Verstößen gegen Art. 5, 6 und 7 DMA stehen Betroffenen Beseitigungs- und Unterlassungsansprüche gem. § 33 Abs. 1 GWB sowie Schadensersatzansprüche gem. § 33a GWB zu. Verbände und Einrichtungen nach

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[94] Ähnlich Immenga/Mestmäcker/*Franck*, Wettbewerbsrecht, 7. Aufl. 2024, vor §§ 33-34a GWB, Rn. 39, der jedenfalls trotz der Schwächen der individuellen privatrechtlichen Durchsetzung von Rechten gegen große Digitalunternehmen nicht ausschließt, dass diese einen bedeutsamen Beitrag für eine wirksame Durchsetzung der DMA-Verpflichtungen leisten kann.

[95] Vgl. *Galle/Dressel*, EuZW 2024, 107.

[96] Gesetzesbegründung? Gesetzesentwurf der Bunderegierung, Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze, S. 21

[97] S. *Galle/Dressel*, EuZW 2024, 107 mit Verweis auf die unterschiedliche Relevanz eines Online-Marktplatzes im Abschlussbericht über die Sektoruntersuchung zum elektronischen Handel v. 10.05.2017 der Kommission (COM(2017)229, 12) und das Urteil „*Coty Germany*" des EuGH, Urt. v. 06.12.2017, C-230/16, ECLI:EU:C:2017:941, EuZW 2018, 122.

[98] *Bueren/Zober*, NZKart 2023, 643; vgl. auch *Podszun/Bongartz/Kirk*, NJW 2022, 3249; *Seeliger/Rump*, RIW 2023, 321, 324.

[99] Vgl. MüKoWettbR/*Schubert*, DMA Art. 39, Rn. 1. Unter anderem die langwierigen Verhandlungsrunden der designierten Gatekeeper mit der Kommission hinsichtlich der Compliance zeigen, wie intensiv um die Auslegung der Verbotstatbestände gerungen wird.

§ 33 Abs. 4 GWB können Beseitigungs- und Unterlassungsansprüche ebenfalls geltend machen. Da im Vergleich zu der klassischen Missbrauchskontrolle die Nachweisanforderungen geringer sind – beispielsweise ergibt sich die Adressateneigenschaft des Beklagten bereits aus der bindend festgestellten Benennung als Gatekeeper, was eine ggf. aufwendige Marktdefinition und den Nachweis einer marktbeherrschenden Stellung entbehrlich macht – ist davon auszugehen, dass potenziell Betroffene Ansprüche gegen designierte Gatekeeper gestützt auf DMA-Verstöße zunehmend gerichtlich geltend machen werden.

Es ist zu erwarten, dass Unterlassungsklagen bei der privaten Durchsetzung des DMA eine größere Relevanz haben werden.[100] Insbesondere ist damit zu rechnen, dass Unterlassungsansprüche im einstweiligen Rechtsschutzverfahren geltend gemacht werden.[101] Mittels einer einstweiligen Verfügung können etwa Ansprüche auf eine Handlung, Duldung und Unterlassung gesichert werden.[102] Beispielsweise können Verstöße gegen Art. 5 Abs. 2 bis 9 DMA anderen Plattformbetreibern und unter Umständen auch gewerblichen Nutzern Anlass geben, Klagen auf Unterlassung einzureichen.[103] In Bezug auf die Verpflichtungen gem. Art 5 DMA liegt die private Durchsetzung der positiven Leistungspflichten i.S.d. Art. 5 Abs. 9 und 10 DMA nahe.[104] Geht man davon aus, dass Art. 6 DMA hinreichend bestimmt für eine privatrechtliche Durchsetzung ist,[105] so ist auch hier vor allem mit Klagen auf Unterlassung oder Zugang zu rechnen.

Um eine einstweilige Verfügung i.S.d. § 935 ZPO im Eilrechtsschutz erfolgreich zu beantragen, muss der Kläger einen Verfügungsanspruch und einen Verfügungsgrund glaubhaft machen, §§ 936, 920 Abs. 2 ZPO.[106] Für die Glaubhaftmachung i.S.d. § 294 ZPO genügt im Vergleich zur allgemeinen zivilprozessualen Beweis- und Darlegungslast ein geringerer Überzeugungswert des Beweises, da sie eine freie Form der Beweisaufnahme und ein minderes Maß

[100] So auch *Galle/Dressel*, EuZW 2024, 107, 108; HK-DMA/*Lahme/Ruster*, 1. Aufl. 2023, DMA Art. 39, Rn. 12; vgl. auch Monopolkommission, Sondergutachten 82: Empfehlungen für einen effektiven und effizienten Digital Markets Act v. 05.10.2021. Monopolkommission, Hauptgutachten Wettbewerb, 2022, Rn. 493.

[101] Vgl. hierzu LG München I, Urt. v. 10.02.2021, 37 O 15721/20, „*BMG/Google*", NZKart 2021, 193; LG München I, Beschl. v. 14.01.2021, 37 O 32/21, „*Amazon Kontensperrung I*", NZKart 2021, 198; später aufgehoben durch Urteil des LG München I, Urt. v. 12.05.2021 – 37 O 32/21, „*Amazon Kontensperrung II*", BeckRS 2021, 10613.

[102] MüKoZPO/*Drescher*, 6. Aufl. 2020, ZPO § 935, Rn. 7; Musielak/Voit/*Huber/Braun*, 21. Aufl. 2024, ZPO § 935, Rn. 12.

[103] MüKoEuWettbR/*Bueren/Weck*, 4. Aufl. 2023, DMA Art. 5, Rn. 275.

[104] MüKoEuWettbR/*Bueren/Weck*, 4. Aufl. 2023, DMA Art. 5, Rn. 275.

[105] Dies ist in der Literatur umstritten. S. dazu *Karbaum/Schulz*, NZKart 2022, 107, 109; *Körber*, NZKart 2021, 436, 442 f.; *Haus/Weusthof*, WuW 2021, 318, 324; *Podszun* JECLAP 2021, 254, 255; MüKoEuWettbR/*Bueren/Weck*, 4. Aufl. 2023, DMA Art. 6, Rn. 306.

[106] MüKoZPO/*Drescher*, 6. Aufl. 2020, ZPO § 935, Rn. 6 ff., 13 f.; Musielak/Voit/*Huber/Braun*, 21. Aufl. 2024, ZPO § 935, Rn. 4.

an richterlicher Überzeugung genügen lässt.[107] Um eine effektive Durchsetzung des DMA zu gewährleisten, werden weitergehende Beweiserleichterungen für die Geltendmachung von DMA-Verstößen diskutiert.[108] Grundsätzlich gilt im deutschen Zivilprozessrecht der Beibringungsgrundsatz, d.h. der Kläger hat die für ihn günstigen Tatsachen darzulegen und ggf. zu beweisen.[109] Eine Ausnahme kann in Fällen gelten, in denen private Dritte einen Verstoß nur schwer nachweisen können. Unter bestimmten Voraussetzungen gelten dann Beweiserleichterungen in Gestalt der sekundären Darlegungslast, des Indizien- und Anscheinsbeweises und der Beweislastumkehr.[110] Beispielsweise wird im Zivilprozess auf eine sekundäre Darlegungslast zurückgegriffen, wenn die darlegungs- und beweisbelastete Partei außerhalb des von ihr darzulegenden Geschehensablaufs steht und keine Kenntnis von den maßgeblichen Tatsachen haben kann, während sie der anderen Partei naturgemäß bekannt sind.[111] Denkbar sind solche Beweisschwierigkeiten für Kläger in Bezug auf DMA-Verstöße insbesondere, wenn diese Verstöße interne Datenverarbeitungsprozesse der Gatekeeper zum Gegenstand haben (etwa Art. 5 Abs. 2 lit. a bis c oder Art. 6 Abs. 2 DMA).[112] Ebenso dürfte es für Kläger im Rahmen der Selbstbevorzugung nach Art. 6 Abs. 5 DMA schwierig sein, darzulegen, dass der Indexierung bzw. dem Ranking insbesondere keine transparenten, fairen und diskriminierungsfreien Bedingungen zugrunde liegen.[113] In diesen Fällen kommt eine sekundäre Darlegungslast des Gatekeepers in Betracht.[114] Insoweit Angaben des Gatekeepers zumutbar sind, genügt nicht das Bestreiten der vom Kläger vorgetragenen Tatsache, vielmehr muss im Einzelnen dargelegt werden, dass die Behauptung des Klägers unrichtig ist. Kommt der Gatekeeper der ihm obliegenden Darlegungslast nicht nach, wird die vom Kläger behauptete Tatsache als zugestanden gem. § 138 Abs. 2 und 3 ZPO behandelt. Darüber hinaus könnten private Betroffene bei intransparenten Sachverhalten gem. §§ 33g, 89b, 89c GWB Auskunft über beispielsweise die Verarbeitung der eigenen Daten oder über die internen Bedingungen des Rankings von Ergebnissen beantragen.[115]

In Anbetracht der Rechtsunsicherheit bei der Auslegung der Verstöße nach Art. 5 und 6 DMA dürften insbesondere in den ersten Jahren Vorabentschei-

[107] Vgl. z.B. BGH, Beschl. v. 11.11.2003, IX ZB 37/03, NJW 2003, 3558; MüKoZPO/*Drescher*, 6. Aufl. 2020, ZPO § 935, Rn. 6 ff., 13 f.; Saenger/*Kemper*, 10. Aufl. 2023, ZPO § 935, Rn. 14 f.

[108] S.u.

[109] MüKoZPO/*Rauscher*, 6. Aufl. 2020, ZPO Einleitung, Rn. 357 ff., 361 ff.

[110] MüKoZPO/*Fritsche*, 6. Aufl. 2020, ZPO § 138, Rn. 24 f.

[111] Vgl. BGH, Urt. v. 12. 05. 2010, I ZR 121/08 (OLG Frankfurt a. M.), „*Sommer unseres Lebens*", BGHZ 185, 330 (333), NJW 2010, 2061; BGH, Urt. v. 11.06.1990, II ZR 159/89 (Hamburg), NJW 1990, 3151, ZZP 104 (1991), 203.

[112] S. *Becker*, ZEuP 2023, 403, 428 f.

[113] S. *Becker*, ZEuP 2023, 403, 428 f.

[114] S. *Becker*, ZEuP 2023, 403, 428 f.

[115] S. *Becker*, ZEuP 2023, 403, 429.

dungsersuchen deutscher Zivilgerichte gegenüber dem Gerichtshof nach Art. 267 AEUV eine besondere Rolle in der Praxis zukommen.[116] Dies gilt selbst für Verfahren, in denen die Kommission Informationen oder Stellungnahmen übermittelt hat.[117] Insofern dürften Verzögerungen in Zivilverfahren zu erwarten sein.[118]

Die Umsetzung der privaten Rechtsdurchsetzung des DMA nach §§ 33 ff. GWB suggeriert einen Gleichlauf zur privaten Kartellrechtsdurchsetzung, wo „follow on"-Kartellschadensersatzklagen dominieren. Ein solches Übergewicht von Schadensersatzfolgeklagen ist allerdings bei der privaten Durchsetzung des DMA nicht zu erwarten, denn Verstöße gegen den DMA werden regelmäßig offen praktiziert und durch die Kommission meist rasch adressiert, sodass sie in der Regel nicht jahrelang im Verborgenen bleiben und dadurch potenziell hohe Schäden implizieren.[119] Die im März 2024 eröffneten ersten Nichteinhaltungsverfahren der Kommission gegen Alphabet, Apple und Meta könnten nach ihrem Abschluss (voraussichtlich im März 2025), abhängig von ihren Ergebnissen, erste Bindungswirkungen hinsichtlich des jeweiligen Verstoßes entfalten.[120]

Der Nachweis eines kausalen Schadens im Zivilprozess gem. § 287 ZPO wird auch für von DMA-Verstößen Betroffene (etwa Art. 5 DMA) regelmäßig eine große Hürde darstellen.[121] Es dürfte im Wesentlichen darum gehen, dass Gatekeeper konkurrierenden Unternehmen eine Markttätigkeit erschweren bzw. ihnen Marktchancen nehmen (§ 252 BGB).[122] Schadensersatzklagen sind auch insbesondere bei Verstößen gegen Art. 6 Abs. 2, 3, 4 und 6 bis 12 DMA denkbar, wobei auch hier der Nachweis eines kausalen Schadens mitunter schwierig sein könnte, vor allem wenn z.B. aufgrund einer Zugangsverweigerung hauptsächlich Innovation verhindert wird.[123]

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[116] So auch *Becker*, ZEuP 2023, 403, 433; vgl. auch MüKoWettbR/*Schubert*, 4. Aufl. 2023, DMA Art. 39, Rn. 1. Eine Vorlage zur Vorabentscheidung nach Art 267 AEUV ist auch im Eilverfahren möglich, s. etwa EuGH, Urt. v. 24. 05. 1977, 107/76, NJW 1977, 1585 zur Zulässigkeit dieser Vorabentscheidungsersuchen.

[117] S. ErwG 92 des DMA.

[118] So auch *Becker*, ZEuP 2023, 403, 433.

[119] A.A. *Galle/Dressel*, EuZW 2024, 107, 108, die bei DMA-Verstößen follow-on-Klagen eine „große Relevanz" beimessen. Vgl. ähnlich Schmidt/Hübener/*Schäfke/Schuler*, Der neue DMA § 13, Rn. 56.

[120] S. Europäische Kommission, Pressemitteilung vom 25.03.2024, „Commission opens non-compliance investigations against Alphabet, Apple and Meta under the Digital Markets Act", abrufbar unter https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1689.

[121] Monopolkommission, XIV. Hauptgutachten, Rn. 490 (Schaden durch erkennbar höhere Preise und durch Verhinderung von Innovation); s. Becker, ZEuP 2023, 403, 429.

[122] MüKoEuWettbR/*Bueren/Weck*, 4. Aufl. 2023, DMA Art. 5, Rn. 275.

[123] MüKoEuWettbR/*Bueren/Weck*, 4. Aufl. 2023, DMA Art. 6, Rn. 307, S. auch Monopolkommission, XXIII. Hauptgutachten, Wettbewerb 2022, 1. Aufl. 2022, Tz. 490.

Die private Rechtsdurchsetzung des DMA wird in Deutschland wohl in erster Linie durch Individualkläger, konkurrierende Online-Diensteanbieter bzw. Plattformen und Endnutzer, betrieben. Es kann bezweifelt werden, dass auch die kollektive Durchsetzung des DMA vor deutschen Zivilgerichten relevant wird, denn auch im Rahmen der privaten Durchsetzung des Kartellrechts führen die möglichen Instrumente des kollektiven Rechtsschutzes ein Schattendasein.[124] Den meisten Erfolg dahingehend verspricht noch das Instrument der sog. Abhilfeklage, die in der Richtlinie (EU) 2020/1828 (sog. „Verbandsklage-Richtlinie") geregelt ist und gem. Art. 42 DMA auf den DMA Anwendung findet.[125] Mithilfe einer Abhilfeklage können qualifizierte Verbraucherverbände an deutschen Oberlandesgerichten eine Leistung an die betroffenen Verbraucher oder die Zahlung eines kollektiven Gesamtbetrags (darunter Schadensersatz) einklagen, wenn mindestens 50 Verbraucher betroffen sind (vgl. §§ 3, 4 VDuG). Das Verfahren läuft auf die gerichtliche Anordnung des Umsetzungsverfahrens hinaus, in dem ein Sachwalter, zu dessen Händen das verurteilte Unternehmen einen durch das Gericht geschätzten Betrag zahlt, prüft, ob die im Verbandsklageregister angemeldeten Personen nach den im Urteil dargelegten Maßstäben leistungsberechtigt sind.[126] Letztlich wird aber auch die Abhilfeklage in der Praxis wahrscheinlich keine große Rolle spielen, da sie für Prozessfinanzierer aufgrund der begrenzten Beteiligungsmöglichkeit (bis zu 10%) wirtschaftlich nicht attraktiv ist und für Verbraucherverbände allein aufgrund von Aufwand und Kosten dieser komplexen Verfahren gegen große Digitalunternehmen nicht realistisch durchführbar sein dürfte.[127] Andere Instrumente wie die Musterfeststellungsklage, die ein reines Feststellungsurteil als Grundlage für eine Schadensersatzklage des einzelnen Verbrauchers vorsieht, oder die Verbandsklage nach § 33 Abs. 4 GWB, die nur Beseitigung und Unterlassen umfasst, sind noch weniger aussichtsreich.[128] Darüber hinaus ist auch fraglich, ob sich ein gebündeltes Einklagen von Schadensersatzansprüchen im Wege eines Abtretungsmodells von Prozessfinanzierern im Sinne der Cartel Damage Claims („CDC") oder ähnlicher Anbieter in Bezug auf DMA-Verstöße durchsetzen wird, da in Kartellschadensersatzverfahren bereits Verstöße gegen das RDG festgestellt wurden, was zur Unwirksamkeit der Abtretungen führte.[129]

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[124] *Galle/Dressel*, EuZW 2024, 107, 114.

[125] Die Regelungen zur Abhilfeklage wurden durch das Verbandsklagenrichtlinienumsetzungsgesetz (VRUG) und insbesondere das Verbraucherrechtedurchsetzungsgesetz (VDuG) in das deutsche Recht umgesetzt.

[126] S. *Janal*, GRUR 2023, 985, 991; *Röthemeyer*, VuR 2023, 332, 335.

[127] S. *Galle/Dressel*, EuZW 2024, 107, 114; vgl. auch *Röthemeyer*, VuR 2023, 332, 333.

[128] HK-DMA/*Lahme/Ruster* 1. Auflage 2023, DMA Art. 39, Rn. 42.

[129] S. zum Beispiel LG Hannover, Urt. v. 04.05.2020, 18 O 50/16, „*Zuckerkartell (Kaufland)*", NZKart 2020, 398, Rn. 171 ff.; LG Hannover, Urt. v. 01.02.2021, 18 O 34/17, „*Zuckerkartell (CDC)*", juris, Rn. 349 ff.; LG Stuttgart, Urt. v. 20.01.2022, 30 O 176/19, „*Rundholzvermarktung*", juris, Rn. 75 ff.; s. auch die Vorlagefrage des LG Dortmund (LG Dortmund, Beschl. v. 13.03.2023, 8 O 7/20 (Kart), NZKart 2023, 229).

Question 4

Der DMA selbst sieht in Art. 39 DMA keine detaillierte Ausgestaltung der privaten Rechtsdurchsetzung vor. Den Mitgliedstaaten obliegt es, eine effektive privatrechtliche Durchsetzung des DMA sicherzustellen. Mit der 11. GWB-Novelle sind Vorschriften zur (erleichterten) privaten Kartellrechtsdurchsetzung in Deutschland basierend auf der Kartellschadensersatzrichtlinie teilweise auf Verstöße gegen den DMA erstreckt worden. Bei Verstößen gegen Art. 5, 6 und 7 DMA stehen Betroffenen Beseitigungs- und Unterlassungsansprüche gem. § 33 Abs. 1 GWB zu. Hiervon ebenfalls umfasst – jedenfalls in analoger Anwendung – sind Verstöße gegen die Umgehungsverbote nach Art. 13 Abs. 4 bis 6 DMA.[130] Dies ergibt sich daraus, dass auch durch den Verstoß gegen die Umgehungsverbote für Betroffene (implizit) individuelle Rechte entstehen,[131] die die Mitgliedstaaten nach dem Loyalitätsgebot gem. Art. 4 Abs. 3 EUV gewährleisten und unterstützend durchsetzen müssen.[132] Verbände und Einrichtungen nach § 33 Abs. 4 GWB können diese Ansprüche ebenfalls geltend machen. Geschädigten steht bei Verstößen gegen Art. 5 bis 7 DMA bzw. Art. 13 Abs. 4 bis 6 DMA ein Anspruch auf Schadensersatz zu, § 33a GWB. Entscheidungen der Kommission haben insofern Bindungswirkung, § 33b GWB (Art. 39 Abs. 5 DMA), wodurch die praktische Wirksamkeit des DMA erhöht wird.[133] Dies gilt nicht nur für Entscheidungen, die einen Verstoß gegen Art. 5 bis 7 DMA bzw. Art. 13 Abs. 4 bis 6 DMA feststellen, sondern auch für Entscheidungen über die Benennung der Gatekeeper. Des Weiteren ermöglicht es die Regelung des § 89b Abs. 5 GWB, im einstweiligen Rechtsschutz die Herausgabe der bindenden Behördenentscheidung, die einen Verstoß gegen Art. 5, 6 oder 7 DMA feststellt, ohne die Darlegung und Glaubhaftmachung der Voraussetzungen nach §§ 935, 940 ZPO gegen den Adressaten der Entscheidung anzuordnen.

Wird ein Verfahren nach Art. 18 DMA durch Verpflichtungszusagen i.S.d. Art. 25 DMA beendet, fehlt es für eine Bindungswirkung an einem festgestellten Verstoß. Hieraus lässt sich nach der Rechtsprechung des Gerichtshofs in der Rechtssache „*Gasorba*" unter Berücksichtigung des Grundsatzes der loyalen Zusammenarbeit nach Art. 4 Abs. 3 EUV lediglich eine Indizwirkung bzw. ein Anscheinsbeweis für das Vorliegen eines Verstoßes ableiten.[134]

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[130] S. dazu Immenga/Mestmäcker/*Franck*, Wettbewerbsrecht, 7. Aufl. 2024, § 33 GWB, Rn. 10a; vor §§ 33-34a GWB, Rn. 36 f., 52 f.

[131] Vgl. zu Art. 101 AEUV: EuGH, Urt. v. 20.09.2001, C-453/99, „*Courage/Crehan*", ECLI:EU:C:2001:465, Rn. 24 ff.

[132] Immenga/Mestmäcker/*Franck*, Wettbewerbsrecht, 7. Aufl. 2024, § 33 GWB, Rn. 10a, vor §§ 33-34a GWB, Rn. 36 f., 52 f.

[133] Reg.Begr. zur 11. GWB-Novelle, BT-Drs. 20/6824, S. 38.

[134] EuGH, Urt. v. 23.11.2017, C-547/16, „*Gasorba*", ECLI:EU:C:2017:891, Rn. 29.

Potenziell Geschädigte, die von einem DMA-Verstoß betroffen sind, profitieren jedoch weder von der widerleglichen Schadensvermutung gem. § 33a Abs. 2 GWB noch von der Vermutung zur Schadensabwälzung nach § 33c Abs. 2 GWB auf indirekte Abnehmer,[135] beides gilt weiterhin nur für Kartelle. Insoweit obliegen dem Anspruchsteller die allgemeinen Nachweispflichten.

Allerdings gilt die kartellrechtliche Verjährungsnorm gem. § 33h GWB auch für DMA-Verstöße, wonach die kenntnisabhängige Verjährungsfrist von Ansprüchen aus §§ 33 Abs. 1, 33a Abs. 1 abweichend von §§ 195, 199 BGB fünf Jahre beträgt und kenntnisunabhängige Ansprüche frühestens zehn Jahre nach Beendigung des Verstoßes gegen den DMA verjähren. Gem. § 33h Abs. 6 S. 1 Nr. 3 GWB wird die Verjährung gehemmt, wenn die Kommission oder eine Behörde, die die in Art. 1 Abs. 6 DMA genannten Vorschriften anwendet, Maßnahmen im Hinblick auf eine Untersuchung oder auf ihr Verfahren wegen eines Verstoßes gegen Art. 5 bis 7 DMA trifft. Insgesamt wird ein erfolgreicher Verjährungseinwand in Bezug auf Verstöße gegen den DMA auf Ausnahmekonstellationen beschränkt bleiben.

Um einen Schadensersatzanspruch nach § 33a GWB hinreichend darzulegen, kann der potenziell von einem Verstoß gegen Art. 5 bis 7 DMA Betroffene Ansprüche auf Herausgabe von Beweismitteln und auf Erteilung von Auskünften nach § 33g GWB gegen den designierten Gatekeeper geltend machen, wofür nach aktueller Rechtsprechung des Bundesgerichtshofs keine besonders hohen Voraussetzungen erfüllt sein müssen.[136] Eine entsprechende Klage auf Auskunft oder Herausgabe von Beweismitteln nach § 33g GWB hemmt ebenfalls die Verjährung, § 33h Abs. 6 S. 1 Nr. 4 GWB. Auch die verfahrensrechtlichen Vorschriften der §§ 89b, 89c und 89e GWB sind auf Verstöße gegen den DMA anwendbar.

Wie im Kartellrecht wird eine gerichtliche Zuständigkeitskonzentration herbeigeführt, sodass die Kartellspruchkörper auch für DMA-Streitigkeiten zuständig sind (§§ 87, 89 GWB). Demnach sind ausschließlich, d.h. streitwertunabhängig, die Landgerichte zuständig, wobei die Verfahren speziellen (Kartell-)Kammern zugewiesen werden können. Diese Zuständigkeitskonzentration ist sinnvoll, da die Kammern häufig bereits über gesteigerte Expertise im Bereich des Kartellrechts (in der Digitalwirtschaft) verfügen. Sie können zudem die mit den Schadensersatzansprüchen regelmäßig verbundenen komplexen sachlichen, ökonomischen und rechtlichen Fragen besser bewältigen als die meist nur mit einem Berufsrichter besetzten Kammern für

[135] Wenngleich eine Übertragung auf den DMA im Vorfeld teilweise gefordert wurde, s. zur Forderung der Schadensvermutung Monopolkommission, Hauptgutachten Wettbewerb, 2022, Rn. 493, vgl. kritisch *Richter/Gömann*, NZKart 2023, 208, 212.

[136] Vgl. BGH, Urt. v. 04.04.2023, KZR 20/21, „*Vertriebskooperation im SPNV*“, NZKart 2023, 362, Rn. 46.

Handelssachen.[137] Allerdings verfügen deutsche Zivilgerichte auch nicht über unbegrenzte Ressourcen und stehen angesichts einer mitunter komplexen Rechtsmaterie inklusive technischer Besonderheiten (s. beispielsweise die in Art. 6 Abs. 3 DMA vorgesehene Möglichkeit der Beschränkung der Deinstallation, die für das Funktionieren des Betriebssystems unabdingbar ist oder aus technischen Gründen nicht von Dritten eigenständig angeboten werden kann) vor großen Herausforderungen. Im Übrigen müssen die Gerichte gem. § 90 Abs. 1 GWB das Bundeskartellamt über DMA-Verfahren unterrichten. Dem Bundeskartellamt wird darüber hinaus ermöglicht, sich in Gerichtsverfahren mit Bezug zum DMA als sog. „amicus curiae" in die Verfahren einzubringen, § 90 Abs. 2 GWB. Auch wenn das Bundeskartellamt den DMA nicht behördlich durchsetzt, kann es an der Durchsetzung durch die Kommission beteiligt sein. Zudem dürften sich einige Auslegungsfragen des DMA mit denen des Kartellrechts überschneiden und das Bundeskartellamt über entsprechende Expertise hinsichtlich bestimmter Marktbesonderheiten und Marktwirkungen in der Digitalwirtschaft verfügen.[138]

Question 5

Neben der Möglichkeit der sog. Abhilfeklage, die es qualifizierten Verbraucherverbänden erlaubt, an deutschen Oberlandesgerichten eine Leistung an die betroffenen Verbraucher oder die Zahlung eines kollektiven Gesamtbetrags (darunter Schadensersatz) einzuklagen (s.o.), können sich zivilgesellschaftliche Organisationen im öffentlichen Interesse nicht ohne Weiteres an anhängigen Zivilverfahren Dritter beteiligen bzw. in diese eingreifen.

Grundsätzlich können Dritte als Nebenintervenienten in Streitigkeiten vor deutschen Zivilgerichten auftreten.[139] Der Beitritt eines Nebenintervenienten, auch Streithelfer genannt, ist zulässig, wenn ein Rechtsstreit zwischen anderen Parteien anhängig ist und der Dritte am Obsiegen einer Partei ein rechtliches Interesse hat (sog. Interventionsgrund).[140] Der Begriff des rechtlichen Interesses gem. § 66 Abs. 1 ZPO ist nach der ständigen Rechtsprechung des Bundesgerichtshofs weit auszulegen.[141] Allerdings reicht ein rein wirtschaftliches, ideelles oder tatsächliches Interesse für die Zulässigkeit einer Nebenintervention nicht

[137] Reg.Begr. zur 11. GWB-Novelle, BT-Drs. 20/6824, S. 46.

[138] Reg.Begr. zur 11. GWB-Novelle, BT-Drs. 20/6824, S. 45.

[139] Zöller/*Althammer*, 35. Aufl. 2024, ZPO § 66, Rn. 2; MüKoZPO/*Schultes*, 5. Aufl., ZPO § 66, Rn. 2; OLG Düsseldorf, Urt. v. 09.07.2020, 20 U 162/20, GRUR-RS 2020, 39384, Rn. 4.

[140] Zöller/*Althammer*, 35. Aufl. 2024, § 66, Rn. 1; Musielak/Voit/*Weth*, 21. Aufl. 2024, ZPO § 66, Rn. 5.

[141] S. stRspr BGH, Beschl. v. 18.11.2015, VII ZB 57/12, NJW 2016, 1018, Rn. 13; Beschl. v. 18.11.2015, VII ZB 2/15, VersR 2016, 481, Rn. 11; Beschl. v. 17.01.2006, X ZR 236/01 (BPatG), „*Carvedilol II*", BGHZ 166, 18, Rn. 7; BGH, Beschl. v. 10.02. 2011, I ZB 63/09 (KG), „*Parallelverwendung*", NJW-RR 2011, 907, Rn. 10.

aus. Das Interesse muss ein eigenes Interesse des Nebenintervenienten sein und darf nicht das Interesse anderer oder der Allgemeinheit sein.[142] Allgemeininteressen genügen in der Regel nur in Fällen, in denen der Gesetzgeber die Befugnis zur Verfolgung von Allgemeininteressen als eigene eingeräumt hat.[143] Vielmehr ist erforderlich, dass der Nebenintervenient zu der unterstützten Partei oder zu dem Gegenstand des Rechtsstreits in einem privatrechtlichen oder öffentlich-rechtlichen Verhältnis steht, auf das die Entscheidung des Rechtsstreits durch ihren Inhalt oder ihre Vollstreckung unmittelbar oder auch nur mittelbar rechtlich einwirkt (typischerweise in Fällen der Rechtskrafterstreckung, akzessorischen Schuld oder Haftung und in Regressfällen).[144]

Liegen die Voraussetzungen der Nebenintervention vor, kann der Nebenintervenient ab dem Zeitpunkt des Verfahrensbeitritts Angriffs- und Verteidigungsmittel geltend machen und alle Prozesshandlungen wirksam vornehmen, insoweit sie nicht den Erklärungen und Handlungen der unterstützten Hauptpartei widersprechen, § 67 ZPO. Der Beitritt wird durch Einreichung eines Schriftsatzes bei dem Prozessgericht erklärt, § 70 ZPO. Nebenintervention erfolgt in der Regel infolge der Streitverkündung und meist nicht auf Initiative Dritter.[145]

Für eine Nebenintervention müssen die allgemeinen Prozesshandlungsvoraussetzungen vorliegen (Parteifähigkeit, Prozessfähigkeit oder gesetzliche Vertretung, Postulationsfähigkeit etc.).[146] Bis auf Zustellungskosten entstehen Kosten bei Gericht durch die Nebenintervention als solche nicht.[147] Anwaltskosten richten sich für den Nebenintervenienten nach dem RVG, VV 3100 ff. RVG. Der Gegenstandswert bestimmt sich nach dem eigenen Interesse des Streitgehilfen am Obsiegen der unterstützten Partei.[148]

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[142] BeckOK ZPO/*Dressler/von Selle*, 53. Ed. 01.07.2024, ZPO § 66, Rn. 7.

[143] Musielak/Voit/*Weth*, 21. Aufl. 2024, ZPO § 66, Rn. 6.

[144] Daneben wird das rechtliche Interesse für folgende Fallgruppen bejaht: Gestaltungswirkung, d.h. ein Dritter wird von der Gestaltungswirkung eines Urteils in seinen Rechten betroffen; Vollstreckbarkeit und Tatbestandswirkung, d.h. aus dem Urteil im anhängigen Rechtsstreit kommt eine Vollstreckbarkeit in das Ver-mögen des Dritten in Betracht oder die Entscheidung hat nur im Kostenausspruch rechtliche Auswirkung auf den Dritten; Vorgreiflichkeit, d.h. Fälle in denen keine Rechtskraftwirkungen eintreten, aber eine tatsächliche Vorentscheidung für Anspruch oder Verpflichtung des Dritten getroffen wird; und Prozessstandschaft: vgl. Musielak/Voit/*Weth*, 21. Aufl. 2024, ZPO § 66, Rn. 7 ff. m. w. Nachw.; MüKoZPO/*Schultes*, 6. Aufl. 2020, ZPO § 66, Rn. 10 ff.

[145] Musielak/Voit/*Weth*, 21. Aufl. 2024, ZPO § 66, Rn. 1; MüKoZPO/*Schultes*, 6. Aufl. 2020, ZPO § 66, Rn. 2.

[146] MüKoZPO/*Schultes*, 6. Aufl. 2020, ZPO § 66, Rn. 23.

[147] MüKoZPO/*Schultes*, 6. Aufl. 2020, ZPO § 66, Rn. 26.

[148] Vgl. OLG Frankfurt a. M., Beschl. v. 07.10.2016, 13 W 47/16, BeckRS 2016, 111316, Rn. 4 (1/6 des Hauptsachewertes); OLG Frankfurt a. M., Beschl. v. 13.02.2009, 10 W 4/09, OLGR Frankfurt 2009, 763, Rn. 4; vgl. ferner BGH, Beschl. v. 30.10.1959, V ZR 204/57, BGHZ 31, 144, NJW 1960, 42, 43; A.A. (Streitwert der Hauptsache entscheidend): KG, Beschl. v. 26.07.2004, 2 W 18/04, MDR 2004, 1445; OLG Karlsruhe, Beschl. v. 07.10.2002, 9 W 38/02, OLGR 2002, 458.

Section 5: General questions

Question 1–4

Aus deutscher Sicht wurde im Hinblick auf die Einführung des DMA insbesondere die fehlende Durchsetzungsbefugnis des Bundeskartellamts kritisiert.[149] Die deutsche Position in der Ratsarbeitsgruppe[150] und die Leiter der ECN-Behörden forderten eine Teilhabe am Vollzug des DMA aufgrund ihrer eigenen Expertise und Erfahrung im Digitalbereich.[151] Die Kompetenz zur Anwendung des DMA solle zwar bei der Kommission liegen (konkret: bei der Generaldirektion Wettbewerb), jedoch „ergänzt um Möglichkeiten einer komplementären Durchsetzung durch nationale Wettbewerbsbehörden" und gestützt durch einen Mechanismus zur engen Koordinierung und Kooperation zwischen diesen Institutionen.[152] Bei ausschließlich zentraler Durchsetzung durch die Kommission drohten Ineffizienzen mangels Nutzung bestehender Ressourcen und Rechtsdurchsetzungslücken.[153] Darüber hinaus gelänge eine Vermeidung der Friktion zwischen der Anwendung des DMA und der Anwendung des Wettbewerbsrechts nur durch eine parallele Zuständigkeit. [154] Neben einer Orientierung an der Rollenverteilung nach der VO 1/2003[155] wurde unter anderem von deutscher Seite ein Verweisungssystem für eine Rechtsdurchsetzung unter komplementärer Beteiligung der nationalen Wettbewerbsbehörden vorgeschlagen.[156]

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[149] S. insgesamt zur Diskussion im deutschen Schrifttum zu verschiedenen DMA-Entwürfen das Hintergrundpapier zur Sitzung des Arbeitskreises Kartellrecht (Professorentagung) am 07.10.2021, „Digital Markets Act: Perspektiven des (inter)nationalen Wettbewerbsrechts", abrufbar unter https://www.bundeskartellamt.de/SiteGlobals/Forms/Suche/Servicesuche_Formular.html?nn=55030&resourceId=52078&input_=75946&pageLocale=de&templateQueryString=Hintergrundpapier.

[150] S. *Steinberg/L'Hoest/Käseberg*, Digitale Plattformen als Herausforderung für die Wettbewerbspolitik in der EU, WuW 2021, S. 414, 416 f., Fn. 14, wonach „die Bundesregierung im Rat einen vollständigen Entwurf für eine volle Einbindung der nationalen Wettbewerbsbehörden in die Durchsetzung des DMA" vorgelegt habe.

[151] Heads of the national competition authorities of the European Union, Joint paper: How national competition agencies can strengthen the DMA, 22.06.2021 (https://www.bundeskartellamt.de/SharedDocs/ Publikation/EN/Others/DMA_ECN_Paper.pdf), Rn. 5 ff., 18.

[152] Heads of the national competition authorities of the European Union, Joint paper: How national competition agencies can strengthen the DMA, 22.06.2021 (https://www.bundeskartellamt.de/SharedDocs/ Publikation/EN/Others/DMA_ECN_Paper.pdf), Rn. 19.

[153] Heads of the national competition authorities of the European Union, Joint paper: How national competition agencies can strengthen the DMA, 22.06.2021 (https://www.bundeskartellamt.de/SharedDocs/ Publikation/EN/Others/DMA_ECN_Paper.pdf), Rn. 21.

[154] Heads of the national competition authorities of the European Union, Joint paper: How national competition agencies can strengthen the DMA, 22.06.2021 (https://www.bundeskartellamt.de/SharedDocs/ Publikation/EN/Others/DMA_ECN_Paper.pdf), Rn. 25.

[155] S. Heads of the national competition authorities of the European Union, Joint paper: How national com-petition agencies can strengthen the DMA, 22.06.2021 (https://www.bundeskartellamt.de/SharedDocs/ Publikation/EN/Others/DMA_ECN_Paper.pdf), Rn. 28, 30.

[156] Deutschland/Frankreich/Niederlande, Zweites gemeinsames Positionspapier der Friends of an effective DMA, 08.09.2021 (https://www.bmwi.de/Redaktion/DE/Downloads/XYZ/zweites-gemeinsames-positi-onspapier-der-friends-of-an-effective-digital-markets-act.pdf?__blob=publicationFile&v=4).

Auch in der Literatur wurde eine dezentrale Rechtsdurchsetzung unter Einbeziehung nationaler (Wettbewerbs-)Behörden gefordert.[157] In diesem Zusammenhang wurde auf die Ressourcenknappheit und damit einhergehende Verzögerungen hingewiesen.[158] Mittels der Modellierung des Kooperationsmechanismus nach dem Vorbild des ECN könnten darüber hinaus divergierende Entscheidungen nationaler Behörden vermieden werden.[159] Letztlich wurde im DMA auf eine Implementierung durch die national zuständigen Behörden unter Berücksichtigung des Harmonisierungszwecks verzichtet. Es wäre denkbar, dass nach den ersten Verhandlungsrunden der Kommission mit den designierten Gatekeepern zur Compliance ihrer Verhaltensweisen zukünftig erste Orientierungshilfen vorhanden sind, die es erlauben, die Umsetzungsbefugnis auch den nationalen Behörden zu erteilen. Hierdurch könnte die Effektivität der Durchsetzung des DMA gesteigert werden.

Insbesondere wurde auch in der Literatur in Anbetracht der Regelung in Art. 1 Abs. 5 und 6 DMA die Weitergeltung von § 19a GWB diskutiert.[160] Mit Blick auf die in der 10. GWB-Novelle eingeführte besondere Missbrauchsaufsicht für „Unternehmen mit überragender marktübergreifender Bedeutung für den Wettbewerb" (s.o.) wurde aus deutscher Sicht um eine Koexistenz vergleichbarer Regelungen gerungen.[161] Bei § 19a GWB, der nicht auf Sektoren oder bestimmte Digitalunternehmen beschränkt ist, handelt es sich in materieller Hinsicht um eine Erweiterung des allgemeinen Wettbewerbsrechts zur Bekämpfung wirtschaftlicher Macht i.S.d. Art. 3 Abs. 2 S. 2 VO 1/2003, ähnlich wie § 20 GWB (s.o.).[162]

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[157] *Basedow*, Das Rad neu erfunden, ZEuP 2021, 217, 223 f.; *Gerpott*, Wer reguliert zukünftig Betreiber großer Online-Plattformen?, WuW 2021, 481, 485, der jedoch verschiedene Abstufungen diskutiert; *Haus/Weusthof*, The Digital Markets Act, WuW 2021, 318, 323; *Podszun/Bongartz/Langenstein*, The Digital Markets Act, EuCML 2021, 60, 67; *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, 29, 51 f.

[158] *Haus/Weusthof*, The Digital Markets Act, WuW 2021, 318, 323.

[159] *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, 503, 540.

[160] Weitergeltung sei offen: z.B. *Körber*, Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 1, NZKart 2021, 379, 381; *Podszun/Bongartz/Langenstein*, The Digital Markets Act, EuCML 2021, 60, 66 f.: „not entirely clear whether [§ 19a GWB] counts as a piece of competition law that remains"; von einer Weitergeltung ausgehend: z.B. *Bongartz*, § 19a GWB, S. 7 f. (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3923287); *Franck/Peitz*, Digital Platforms and the New 19a Tool in the German Competition Act, JECLAP 2021, 513, 526; *Haus/Weusthof*, The Digital Markets Act, WuW 2021, 318, 324.

[161] S. *Steinberg/L'Hoest/Käseberg*, WuW 2021, 414, 416; vgl. auch den Änderungsvorschlag des Schwab-Reports, der in Art. 1 Abs. 6 DMA-E die Einschränkung „soweit sie auf andere Unternehmen als Gatekeeper anwendbar sind oder Gatekeepern damit zusätzliche Verpflichtungen auferlegt werden" streichen wollte (EP 2020/0374(COD), Amendment No. 31).

[162] MüKoEuWettbR/*Wolf*, 4. Aufl. 2022, GWB § 19a, Rn. 97; *Haus/Weusthof* WuW 2021, 318, 324 f.; aA *Polley/Konrad* WuW 2021, 198, 199.

In der Literatur wurde darüber hinaus kritisiert, dass designierte Gatekeeper hinsichtlich der DMA-Verstöße grundsätzlich weder sachliche Gründe bzw. berechtigte Interessen oder Effizienzen für die Rechtfertigung einer prima facie rechtswidrigen Verhaltensweise vorbringen können.[163] Während Art. 6 DMA für einzelne Verhaltenspflichten teilweise tatbestandsimmanente und das Verbot begrenzende Ausnahmen vorsieht, wurde insbesondere in Bezug auf die Verbotsregelung des Art. 5 DMA angemerkt, dass von dieser Regelung auch unschädliche Verhaltensweisen erfasst werden können.[164] Es könne nur schwer zwischen Verhalten von Gatekeepern auf alleine kontrollierten Märkten und (im ökonomischen Sinne) oligopolistischen Märkten, in denen mehr Wettbewerb herrscht, differenziert werden.[165] Einige Autoren regten vor diesem Hintergrund an, dass eine Rechtfertigungsmöglichkeit (im Einzelnen in unterschiedlicher Ausgestaltung) eingeführt werden sollte.[166]

Letztlich wurde im DMA auf allgemeine sachliche Rechtfertigungsmöglichkeiten sowie eine Effizienzeinrede in Anbetracht des übergeordneten Ziels des DMA verzichtet, um eine direktere Verhaltenssteuerung und eine gesteigerte Rechtsdurchsetzungsgeschwindigkeit zu erreichen.[167]

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[163] Vgl. zur Notwendigkeit einer Effizienzeinrede auch Monopolkommission, Sondergutachten 82: Empfehlungen für einen effektiven und effizienten Digital Markets Act v. 05.10.2021, S. 47 ff.

[164] *Haucap/Schweitzer*, Die Begrenzung überragender Marktmacht digitaler Plattformen im deutschen und europäischen Wettbewerbsrecht, Perspektiven der Wirtschaftspolitik 2021, S. 17 ff., 23; *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, 503, 535; *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, 29, 53.

[165] *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, 503, 535.

[166] S. Monopolkommission, Sondergutachten 82: Empfehlungen für einen effektiven und effizienten Digital Markets Act v. 05.10.2021, S. 59; de Streel et al., Making the Digital Markets Act more resilient and effective, 2021, S. 34, 92; *Lamadrid/Fernández*, Why the Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, JECLP Advance Article, 05.08.2021, S. 11; *Cabral et al.*, The EU Digital Markets Act, 2021, S. 13; *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, S. 503 ff. (536); ähnlich auch *Haus/Weusthof*, The Digital Markets Act, WuW 2021, S. 318, 323; *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, S. 503, 537 f. *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, 29, 54 f.; *Körber*, Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 2, NZKart 2021, 436, 441.

[167] S. Hintergrundpapier zur Sitzung des Arbeitskreises Kartellrecht (Professorentagung) am 07.10.2021, „Digital Markets Act: Perspektiven des (inter)nationalen Wettbewerbsrechts", S. 26, abrufbar unter https://www.bundeskartellamt.de/SiteGlobals/Forms/Suche/Servicesuche_Formular.html?nn=55030&resourceId=52078&input_=75946&pageLocale=de&templateQueryString=Hintergrundpapier.

Question 5

In dieser Hinsicht hat der deutsche Gesetzgeber keine Regelungen mit spezifischem Bezug auf den DMA eingeführt. Im Schrifttum wird diskutiert, ob Schiedsvereinbarungen, die sich auf DMA-Streitigkeiten beziehen, wirksam sind.[168]

Im Übrigen bietet beispielsweise die Verbraucherzentrale Bundesverband („vzbv") unter anderem Beratung zu digitalen Diensten und Märkten an. Als Dachorganisation der deutschen Verbraucherzentralen setzt sich der vzbv für die Rechte und Interessen der Verbraucher ein, vertritt Verbraucherinteressen in regulatorischen Diskussionen und kann daher ebenfalls zur Durchsetzung des DMA beitragen.

Question 6

In Deutschland wurde insbesondere das Verbot der Doppelbestrafung (ne bis in idem) in Bezug auf die Verhängung von Bußgeldern diskutiert, soweit Wettbewerbsrecht neben dem DMA auf denselben Sachverhalt anwendbar ist.[169] Teilweise wird vertreten, dass nach den Grundsätzen der Rechtsprechung des Gerichtshofs[170] das Verbot keine Anwendung auf parallele Entscheidungen auf der Grundlage des DMA und des Wettbewerbsrechts finde, da beide Regelungsbereiche unterschiedliche Schutzinteressen verfolgten (jedenfalls nach Ansicht der Kommission).[171] Des Weiteren dürfte für die Möglichkeit paralleler Entscheidungen auch auf eine enge Kooperation der zuständigen Behörden abzustellen sein.[172] Jedenfalls müsste sich eine weitere Bußgeldentscheidung, die denselben Sachverhalt betrifft, bei der Bemessung des zeitlich später verhängten Bußgeldes mindernd auswirken.[173]

Die folgenden Anmerkungen und skizzierten Diskussionen beziehen sich auf Fragen im Zusammenhang mit der Durchsetzung des DMA vor deutschen Zivilgerichten.

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[168] S. hierzu *Podszun*, HK-DMA, 1. Aufl. 2023, DMA Art. 5, Rn. 133 ff; vgl. HK-DMA/*Lahme/Ruster*, 1. Aufl. 2023, DMA Art. 39, Rn. 11.

[169] *Haus/Weusthof*, The Digital Markets Act, WuW 2021, 318, 324 und *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, 29, 48; *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, 503, 518.

[170] S. etwa EuGH, Urt. v. 07.01.2004, C-204/00 P, „*Aalborg Portland*", ECLI:EU:C:2004:6), Rn. 338 (Identität des Sachverhalts, der Zuwiderhandlung und des geschützten Rechtsguts).

[171] *Haus/Weusthof*, The Digital Markets Act, WuW 2021, 318, 324 und *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, 29, 48 halten jeweils eine ausdrückliche Klarstellung für erforderlich.

[172] Vgl. EuGH, Urt. v. 22.03.2022, C-117/20, „*Bpost*", ECLI:EU:C:2022:202, Rn. 40 ff., 55, 56.

[173] *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, 503, 518.

Im Zusammenhang mit den Verhaltenspflichten des DMA wird es regelmäßig um Sachverhalte mit grenzüberschreitendem Bezug gehen, weil der Gatekeeper seinen Sitz im Ausland hat oder die Klage Verhalten im Ausland betrifft. In prozessualer Hinsicht stellen sich unter anderem Fragen der internationalen Zuständigkeit und der Passivlegitimation.[174] Für Gatekeeper mit Sitz in der EU bestimmt sich die Zuständigkeit nach der EuGVVO.[175] Haben sie ihren Sitz außerhalb der EU, richtet sich die Zuständigkeit nach Art. 6 Abs. 1 EuGVVO i.V.m. §§ 12 ff. ZPO. Die Zuständigkeit deutscher Gerichte kann sich neben der Beklagteneigenschaft am Sitz des beklagten Gatekeepers (Art. 4 Abs. 1 i.V.m. Art. 63 EuGVVO und § 17 ZPO), aus Delikt (Art. 7 Nr. 2 EUGVVO und § 32 ZPO) oder über die Streitgenossenschaft ergeben, etwa wenn die deutsche Konzerngesellschaft eines Gatekeepers zusammen mit der ausländischen Obergesellschaft verklagt wird (Art. 8 Nr. 1 EuGVVO und § 36 Abs. 1 Nr. 3 ZPO). Es wird sich zeigen, inwieweit dies Potenzial für sog. „*forum shopping*" birgt.[176] Darüber hinaus könnte die Passivlegitimation in Fällen problematisch werden, in denen nur eine nationale Konzerntochtergesellschaft, nicht aber die verklagte Rechtseinheit unmittelbar in dem Benennungsbeschluss der Kommission adressiert wird.[177] Bislang hat die Kommission in den Benennungsbeschlüssen die Obergesellschaft adressiert und in der Begriffsdefinition die Tochtergesellschaften miteinbezogen.[178] Sofern der deutsche Gerichtsstand auch für einen grenzüberschreitenden Sachverhalt gegeben ist, wird auch die Frage zu diskutieren sein, ob die Kognitionsbefugnis der Gerichte territorial auf Deutschland begrenzt ist.[179] Für „follow on"-Klagen im Kartellschadensersatz hat der Gerichtshof entschieden, dass am Sitz des Geschädigten der Erfolgsort liegt, sodass auch Schäden hinsichtlich ausländischer Warenbezüge Gegenstand der Klage sein können.[180] Inwieweit diese Auslegung auch auf sog. „*stand alone*"-Kartellschadensersatzklagen oder auch nur kartellrechtsnahe Klagen, gestützt auf einen DMA-Verstoß, übertragbar ist, ist noch offen.[181]

Ferner stellen sich Fragen hinsichtlich der Darlegungs- und Beweislast im Zivilprozess, etwa in Bezug auf die Dringlichkeit im Eilverfahren. Beispielsweise werden im Zusammenhang mit Verstößen gegen das UWG die Anforderungen an die Schlüssigkeit und Glaubhaftmachung des Verfügungsgrunds einer

[174] S. hierzu *Galle/Dressel*, EuZW 2024, 112.

[175] Siehe Art. 4 i.V.m. Art. 63 I VO (EU) Nr. 1215/2012 des Europäischen Parlaments und Rates v. 12.12.2012 über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen, ABl. 2012 L 351, 1.

[176] Vgl. *Galle/Dressel*, EuZW 2024, 112; *Wurmnest*, NZKart 2017, 2, 6 f.

[177] S. hierzu *Galle/Dressel*, EuZW 2024, 112.

[178] S. etwa die Kommissionsentscheidung gegen Alphabet v. 05.09.2023, C(2023) 6101 final.

[179] S. hierzu *Galle/Dressel*, EuZW 2024, 112.

[180] EuGH, Urt. v. 21.05.2015, C-352/13, „*CDC Hydrogen Peroxide*", ECLI:EU:C:2015:335 , Rn. 51 ff.

[181] S. hierzu *Galle/Dressel*, 112. Zur eingeschränkten Kognitionsbefugnis bei deliktischer Zuständigkeit nach Art. 7 Nr. 2 EuGVVO: Musielak/Voit/*Stadler/Krüger* ZPO, 20. Aufl. 2023, EuGVVO Art. 7, Rn. 19 u. 20 d.

einstweiligen Verfügung i.S.d. § 935 ZPO gem. § 12 UWG abgesenkt, wonach die Dringlichkeit nicht einmal schlüssig dargelegt werden muss.[182] Teilweise wird angeregt, dass aufgrund des Machtgefälles zwischen designiertem Gatekeeper und dem Anspruchsteller die Maßstäbe für die Beweisführung herabgesetzt werden.[183] Letztlich muss bei der Herabsetzung der Anforderungen im Eilverfahren auch berücksichtigt werden, dass aufgrund einer prima facie-Bewertung im einstweiligen Rechtsschutz der Gatekeeper gezwungen sein kann, sein Geschäftsmodell tiefgreifend zu ändern und damit einem schwerwiegenden Grundrechtseingriff ausgesetzt ist.

Des Weiteren wird diskutiert, wie deutsche Zivilgerichte mit dem kategorischen Charakter der Verbotsregelungen der Art. 5 bis 7 DMA umgehen und inwieweit Verfahren, in denen Gerichte potenziell valide Einwände zu wettbewerbsschädlichen Effekten bzw. Rechtfertigungsmöglichkeiten außen vor lassen müssen, zu unbilligen Ergebnissen führen werden.[184] Dies gilt insbesondere vor dem Hintergrund, dass die Auslegung der Verbotstatbestände etwa in Art. 6 DMA mit gewissen Unsicherheiten und Interpretationsspielräumen verbunden ist. Grundsätzlich obliegt es nach allgemeinen zivilprozessualen Regeln dem Kläger, ggf. eine Konkretisierung darzulegen und zu beweisen. Denn im deutschen Zivilprozess muss grundsätzlich jede Partei die ihr günstigen Umstände darlegen und beweisen (s.o.). Klagt nun ein potenziell Geschädigter auf Schadensersatz gem. § 33a Abs. 1 GWB auf der Grundlage eines Verstoßes gegen Art. 5 bis 7 DMA, so muss der Anspruchsteller diesen Verstoß nachweisen. Der Gatekeeper hat die Darlegungs- und Beweispflicht für ggf. tatbestandsimmanente Ausnahmen. Dass in diesem Rahmen die Beweislastumkehr aus Art. 8 DMA auch zugunsten privater Anspruchsteller wirkt, wird vereinzelt angenommen.[185] Der Wortlaut lässt eine Anwendung im Zivilprozess grundsätzlich zu. Aus der Regelungssystematik der Nachweisobliegenheit gem. Art 8 Abs. 1 DMA wird jedoch richtigerweise abgeleitet, dass diese jedenfalls nicht für den Zivilprozess gilt.[186] Diese Auslegung entspricht auch dem regulatorischen Geist des DMA.[187] Letztlich bezieht sich Art. 8 DMA ausschließlich auf die Pflichten des Gatekeepers im regulatorischen Dialog mit der Kommission. Eine solche Beweislastumkehr wäre im deutschen Zivilverfahren sehr ungewöhnlich und würde zu einer erheblichen Belastung des beklagten Unternehmens führen.[188] Mit Blick auf das Effektivitätsgebot müssen Gerichte allerdings Erleichterungen hinsichtlich der Darlegung eines Verstoßes, insbesondere sekundäre Darlegungslasten, zulasten der Beklag-

[182] MüKoZPO/*Drescher*, 6. Aufl. 2020, ZPO § 935. Rn. 26.
[183] S. *Galle/Dressel*, EuZW 2024, 107, 112.
[184] S. *Galle/Dressel*, EuZW 2024, 107, 112.
[185] Mit diesem Vorschlag *Richter/Gömann*, NZKart 2023, 208, 211 f.
[186] Immenga/Mestmäcker/*Franck*, 7. Aufl. 2024, GWB § 33, Rn. 10b.
[187] S. *Galle/Dressel*, EuZW 2024, 107, 113.
[188] S. *Galle/Dressel*, EuZW 2024, 107, 113.

ten im Einzelfall erwägen, wenn Sachverhalte mit großem Wissensgefälle (wie hinsichtlich der Kombination von Daten, vgl. Art. 5 Abs. 2 DMA) anderenfalls die Geltendmachung privatrechtlichen Rechtschutzes unmöglich machen bzw. übermäßig erschweren.[189] Andererseits wird angenommen, dass die originäre Substantiierungslast der Kläger nicht abgesenkt werden sollte, da dem Kläger in der Mehrzahl der Tatbestände (etwa Art. 5 Abs. 3 bis 10 DMA) eine substantiierte Darlegung des Verstoßes zumutbar sei.[190] Auch Auskunfts- und Herausgabeansprüche nach § 33g GWB sowie §§ 89b, 89c GWB können in diesem Zusammenhang an Relevanz gewinnen.[191]

Letztlich wird beispielsweise hinsichtlich der Nachweisanforderungen in Bezug auf den Schaden von indirekten Abnehmern teilweise vorgeschlagen, dass die kartellrechtliche Vermutung der Schadensweiterwälzung zugunsten mittelbarer Abnehmer nach § 33c Abs. 2 und 3 GWB analog auch für Verstöße gegen den DMA gelten soll.[192]

[189] Immenga/Mestmäcker/*Franck*, 7. Aufl. 2024, GWB § 33, Rn. 10b; HK-DMA/*Lahme/Ruster*, 1. Aufl. 2023, DMA Art. 39, Rn. 31; vgl. auch *Galle/Dressel*, EuZW 2024, 107, 113; *Becker*, ZEuP 2023, 403, 426 f.

[190] Immenga/Mestmäcker/*Franck*, 7. Aufl. 2024, GWB § 33, Rn. 10b.

[191] *Galle/Dressel*, EuZW 2024, 107, 113.

[192] hierzu *Becker*, ZEuP 2023, 403, 431.

Greece

*Ioannis Iglezakis**
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Section 1: National institutional set-up

Question 1

Before the enactment of the Greek Law No. 5099/2024 "taking measures to implement Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on the single market for digital services and amending Directive 2000/31/ EC ("Digital Services Act") and other provisions" (Greek Official Gazeta A' 48/05.04.2024) (henceforth the "Greek Law") there was no central authority in Greece regarding digital services, rather several authorities with different tasks and responsibilities, as described below. One of them (the National Committee of Telecommunications and Post) has been appointed as the national (Greek) Digital Services Coordinator for DSA, while other two (The Personal Data Authority and the National Radio and Television Council) have been appointed as competent authorities for DSA.[1]

The tasks and responsibilities each of the already existing Greek authorities are briefly presented as following[2]:

(a) National Committee of Telecommunications and Posts, an independent public authority (https://www.eett.gr/eett/), which has been appointed as the National Digital Services Coordinator, according to Article 49 Regulation 2022/2065, as further discussed below. The National Committee of Telecommunications and Posts regulates, supervises and controls the electronic communications and postal market, and the use of radio frequency spectrum, having inter alia the powers of Competition Authority.

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[1] See an overview of DSA provisions in Greek legal order Iglezakis I., *IT Law*, (Sakkoulas Publications, 5th edition, 2024), p. 262, par. 2; Iglezakis I., *The Law of Digital Economy,* 2nd ed. 2024, pp. 116 et seq; Zekos G., *Artificial Intelligence & Competition*, (Sakkoulas Publications, 2024), pp. 38–53.

[2] See also Splinder G., "Conflict of laws, the Digital Services Act, the Digital Markets Act and the country-of-origin-principle" (2023)2, Lex&Forum, pp. 369–394.

(b) Personal Data Protection Authority (https://www.dpa.gr/), and independent public authority, which supervises the application of the General Data Protection Regulation (GDPR), national laws about data protection (Laws No. 4624/2019 and 3471/2006) as well as other regulations concerning the protection of the individual from the processing of personal data. The Authority supervises and enforces the application of legal framework about personal data, it provides opinions on any regulation that is to be included in a law or regulatory act concerning data processing, it issues instructions and recommendations on any matter related to data processing, it provides upon request information to data subjects regarding the exercise of their rights, it conducts investigations or audits related to the application of personal data protection legislation, as well as imposes penalties in case of data protection legislation violation.

(c) National Radio and Television Council (https://www.esr.gr/), an independent public authority, which supervises the operation of radio and television service providers, and internet as well, aiming for their compliance with the constitutional imperatives of objectivity, equal quality level of the programs, protection of the value of the human being and minors. The council is responsible for granting, renewal and revocation of licenses and approvals related to the provision of radio and television services. It also has several control powers, concerning the operation of radio and television service providers in accordance with the Constitution and the laws governing broadcasting, it can issue binding instructions, recommendations and hints to the broadcasting content providers as well as impose administrative sanctions.

Apart from these authorities, there are also other national public authorities, which could assist the Digital Service Coordinator and the Competent Authorities at the implementation of DSA, such as the Electronic Crime Prosecution Directorate of the Hellenic Police and the Consumer Advocate.

Question 2

As already mentioned above, the Greek Law No. 5099/2024 defines in article 4(1) as National Digital Services Coordinator, according to Article 49 of Regulation 2022/2065, the **National Committee of Telecommunications and Posts** (see also above), which is responsible for the supervision of providers whose country of establishment is Greece.Further, competent authorities for the supervision of intermediary service providers and the enforcement of DSA are defined in article 5 of the Greek Law: (a) the **National Radio and Television Council** (also see above) and (b) the **Personal Data Protection Authority** (also see above). The task, responsibilities and powers of them are provided by

the Greek Law in conjunction with the already existing legislation concerning them. More specifically:

(a) Responsibilities of National Services Coordinator. The National Telecommunications and Posts Commission acting as National Digital Services Coordinator exercises all the powers and responsibilities conferred on the Digital Services Coordinator by DSA and the Greek law. More specifically it has the following powers and duties:

- supervise the compliance of intermediate digital service providers established in Greece with DSA;
- impose sanctions/fines for violations of DSA;
- manage user complaints (individuals and businesses) for violations of DSA;
- collect information from providers regarding compliance with DSA;
- coordinate at national level and cooperation with other authorities for the implementation of the Act;
- cooperate with Coordinators of other member states and the European Commission;
- participate in the European Digital Services Council;
- recognize the status of entities to act as "trusted flaggers of illegal content";
- certify of out-of-court dispute resolution bodies;
- publish, by the end of June each year, an annual activity report for the previous calendar year;
- participate in the European Digital Services Council with right to vote.

(b) Responsibilities of competent authorities: The National Radio and Television Council is responsible for the supervision of intermediate service providers and the enforcement of paragraphs (a), (b) and (c) of paragraph 1 and paragraph 2 of article 26 and paragraph 1 of Article 28 of DSA, while the Personal Data Protection Authority is responsible for the supervision of intermediate service providers and the enforcement of paragraph (d) of paragraph 1 and paragraph 3 of article 26 and article 28 of DSA. The two competent authorities can also participate in the European Digital Services Council, without the right to vote, if the matter concerns their responsibilities for the implementation and enforcement of DSA and the Greek law.

(c) Cooperation between National Digital Services Coordinator and competent authorities and confidentiality (article 8 of Greek Law): The Digital Services Coordinator and the competent authorities shall closely cooperate, provide mutual assistance and exchange in a direct and efficient manner all the information at their disposal for the implementation of DSA and the Greek law, within the deadlines set by DSA or the Greek law, otherwise within the

deadline set by the party requesting cooperation, in order to meet the deadlines set by DSA. They may exchange and use personal data and information falling under business and professional confidentiality, to the extent necessary for the performance of their duties. In relation to the information exchanged, the receiving authority ensures the same level of confidentiality as the transmitting authority.

(d) Establishment of an Advisory Committee on Digital Services (article 14 of Greek Law): An unpaid Advisory Committee on Digital Services is established in the Ministry of Digital Governance (see above), which is an advisory body on digital services issues, without affecting the independence of the Digital Services Coordinator and the competent authorities in the exercise of their powers based on DSA and the Greek Law. Its statutory role is the issuance of opinions towards the Ministry of Digital Governance for legislative or regulatory arrangements for the implementation of DSA, as well as for the regulation of any issue related to the field of digital services.

(e) Sanctions (article 16 of Greek Law): In case of violation of the provisions of DSA as well as Greek Law, the Digital Services Coordinator or the competent authorities can impose fines and periodic monetary penalties on intermediate service providers, in accordance with the (c) and (d) of paragraph 2 of article 51 of DSA.

Fines and periodic penalty payments must be effective, proportionate and dissuasive. The competent authorities shall take into account various factors, including the nature, gravity and duration of the infringement, the fraud or negligence of the intermediary service provider, any systematic or repeated non-compliance of the intermediary service provider with its obligations under DSA, the size of the intermediary service provider, its financial capacity, the activity of the intermediate service provider in several Member States, any cooperation of the intermediary service provider with the competent authority to remedy the violation and limit its possible adverse consequences.

In any case, the amount may not exceed 6% of the annual global turnover of the intermediary service provider concerned in the previous financial year. Especially in the case of providing inaccurate, incomplete or misleading information, failing to respond or correcting inaccurate, incomplete or misleading information and not submitting to an inspection, the fine may not exceed 1% of the annual income or worldwide turnover of the concerned intermediary service provider or the relevant person during the previous financial year. In the event of a periodic monetary penalty, it shall not exceed 5% of the average daily global turnover or income of the intermediary service provider concerned during the previous financial year.

(f) Procedural safeguards (article 16 of Greek Law): Fines and periodic monetary penalties shall be imposed only with a specially reasoned decision issued by the Digital Services Coordinator or the competent authority, after having previously provided the intermediary service provider with the chance to present its views on the identified violations, orally or in writing as applicable of the provisions defining the sanctioning procedure for each competent authority.

(g) Right to legal act (article 17 of Greek Law): Against the decisions of the Digital Services Coordinator or the competent authorities imposing sanctions, the service provider is entitled the right to legal act before the Athens Administrative Court of Appeal or the State of Council.

(h) Supervisory Fee (article 20 of Greek Law): The Digital Services Coordinator may impose an annual supervisory fee of a remunerative nature, to intermediate service providers that have their main establishment in Greece, or their legal representative resides or is established in Greece, if they do not have an establishment in the European Union but offer services in the European Union. The supervisory fee shall be objective, transparent and proportionate.

(i) Expenses (article 19 of Greek Law): The expenses of the Digital Services Coordinator for the implementation of DSA and the Greek Law are covered by the revenues it collects from the fines, periodic monetary penalties, and the fees, including the afore-mentioned supervisory fee.

(j) Staff: The **National Digital Services Coordinator** employs 217 people. The human capital consists both of university, technological and secondary education employees and lawyers with a salaried mandate. All of them have extensive professional experience and a high academic background. In particular, 85% are graduates of higher education and also, approximately 39% hold a master's degree and 24% a doctorate. Further, article 4(2) of Greek Law provides that there will be new hires to cover the increased staffing needs of the Digital Services Coordinator, resulting from the exercise of the powers assigned to it by the Greek Law and the Regulation 2022/2065, based on the special provisions of the Law No. 873/2021 (Greek Official Gazeta A' 248) "on the mobility of employees in newly established services."

The **National Radio and Television Council** employs 18 specialists (Private Law of Indefinite Term) and 17 permanent administrative employees. The **Personal Data Protection Authority** employs 14 specialists and 50 administrative employees. All of them have extensive professional experience and a high academic background.

Question 3

Although the National Digital Service Coordinator has been recently appointed (April 2024), it has already taken several actions to enhance the enforcement of DSA in Greece. Among these actions are the following:

(a) The creation of the Registry of Intermediary Service Providers including Hosting Services, after public consultation. The creation of the Registry was set as priority in article 15 of Greek Law (according to which the National Telecommunications and Posts Commission shall within 6months from the entry into force of the Greek Law, create, put into operation, and maintain a Register of Intermediary Service Providers in electronic form).
(b) The publication of the procedure for the recognition of the status of "trusted flagger of illegal content" to stakeholders based in Greece, within the framework of the Digital Services Act.

Question 4

There is no statutory provision regarding the application and enforcement of DMA in Greece until now.[3] According to article 83 of Law 5019/2023 (Greek Official Gazette A' 27/14.2.2023), the Competition Commission, an independent authority competent for art. 101 and 102 TFEU enforcement in Greece, has been appointed as the national competent authority for the implementation of Regulation (EU) 2022/1925 (DMA) and in particular paragraph 7 of article 38 thereof, without prejudice to the special arrangements concerning the competences of the National Telecommunications and Posts Committee (the National Digital Service Coordinator for DSA).

To fulfill its competence, national Competition Commission may exercise the powers provided for in articles 38 and 39 of DMA, that is, cooperate with the European Commission, conduct investigations and impose obligations on gatekeepers, inform European Commission prior any investigation be conducted, or obligations be imposed, support European Commission when asked, forward copies of any written judgment of national courts regarding DMA to European Commission.

Question 5

There is no specific provision thereon in Greece until now, neither has the national Competition Authority announced the resources available for DMA enforcement.

[3] See about DMA in Greek: Zekos (2024), pp. 38–52.

Question 6

There have been no experiences until now.

Section 2: Use of national legislative leeway under the DMA/DSA

Question 1

There is no specific legal provision thereon in the Greek Law. Therefore, the Greek Law (No. 5099/2024) about DSA and the already existing legislation (as mentioned at the next question 3) cumulatively apply.

Question 2

There have been no legislative changes after the implementation of the Greek Law about DSA (No. 5099/2024) until now.

Question 3

There are several legislative acts, the most important of which are the following[4]:

(a) **Legislation about e-commerce** (P.D. 131/2003) **and consumer protection** (Law No. 2251/1994 covering, inter alia, consumer protection against unfair terms, unfair commercial practices, including influencers' advertisements, and products' safety);
(c) **Legislation about "hate speech"** (Laws No. 3719/2008, 4139/2013, 4285/2014)[5];
(d) **Legislation about data protection** (GDPR, Law 4624/2019);
(e) **Legislation about equal treatment** in service provision (Law No. 3769/2009).

Question 4

There has been no specific national legal provision thereon in Greece until now, therefore, the relevant provisions of DMA are going to apply, that is, articles 38 and 39 about European Commission and national Competition Commission

[4] See critically about the multitude of conflict-of-law under DSA: Splinder G. (2023), p. 376.

[5] See also Pavlopoulos P., "New social media control rules a phenomenon of civil society regulatory intervention in the context of globalization" in *Legal Studies* of Pavlopoulos P., (Sakkoulas Publications, 2023), pp. 98–114; Mantzoufas P., "The influence of internet companies on free speech and political debate – Areas of conflict and potential risks" (2021) 4 EDD, pp. 522–532.

cooperation,[6] without prejudice to articles 101 and 102 TFEU and the Greek Antitrust Law 3959/2011.

Question 5

There are several legislative acts, the most important of which are the following:

(a) **Legislation about competition** (antitrust law) (Articles 101 and 102 TFEU and Law No. 3959/2011);
(b) **Legislation about e-commerce** (P.D. 131/2003);
(c) **Legislation about unfair commercial practices** (Law No. 2251/1994);
(d) **Legislation about the provision of services** (including 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).

Section 3: Vertical and horizontal public enforcement-related cooperation under DSA/DMA

Question 1

In Greece, Article 83 of Law 5019/2023 defines the Hellenic Competition Commission as the national authority which is competent for the implementation of Regulation 2022/1925 (DMA), particularly as regards Article 38 (7) of the DMA. There is no other more specific national provision providing for the implementation of the DMA. Furthermore, Law No. 5099/2024 which provides for implementation measures regarding the DSA does not include any measures for a cooperation between the competent authorities and the EU Commission. Such a failure is critical to establishing effective implementation of the DSA and DMA which both address VLOPs.

Question 2

There are no provisions for the interaction of national courts with the Commission in the context of the DSA and DMA under Law No. 5099/2024. No Law has been enacted yet regarding the implementation of DMA in Greece, as has been already mentioned.

[6] See also Recital 10, 11 and 78 about the complementary application of Art. 101 and 102 TFEU, Recital 71 for merger control, in the light of Recital 90, 91 and 100.

Question 3

In my view, the role of the national competition authorities is crucial as regards violations of Articles 5 and 6 of the DMA in bringing into the attention of the Commission these violations in specific cases.

Section 4: Private enforcement of DMA/DSA

Question 1

Until now, no actions have been brought to courts in Greece to enforce the provisions of the DSA or the DMA.

Question 2

In order to privately enforce DSA, one could invoke the provisions of the Greek civil code introducing provisions for tort, that is, articles 914 et seq. This would be possible for traders only against other traders who violate the provisions of DSA enjoying thereby a competitive advantage over other competitors.

Question 3

One might complain before the Competition Commission for violations of competition law, that is, Law 3959/2011, as amended. One can also file a lawsuit for compensation in case of violation of competition law, in accordance with Law 4529/2018 which implements the provisions of Directive 2014/104/EU. Before the enactment of this law, tort law was the legal basis for compensation claims, as well as Law 3959/2011 (Article 1 and 2) and articles 101 and 102 TFEU. The actors which are most likely to engage in private enforcement are traders which are competitors or users of online intermediary services.

Question 4

No rules have been adopted for private enforcement of either DMA or DSA in Greece. There is currently no plan to allocate cases to a specific court or chamber. However, it should be mentioned that according to Article 359 of Law 4700/2020 exclusive competence is established for the Court of First Instance in Athens and Thessaloniki for legal actions in the field of data protection and e-communication.

Question 5

The Greek procedural law allows NGOs to intervene in pending private disputes in support of the public interest only in consumer law cases under Article 19 paragraph 15 of Law 2251/1994 and in cases related to violations of the GDPR under Article 41 of Law 4624/2019.

Section 5: General questions

Question 1

Greece implemented Articles 9 and 10 of the DSA in Law 5099/2024. Article 12 provides for orders to take action against illegal content. Accordingly, judicial or public authorities shall ensure that the orders to take action they issue against one or more elements of illegal content to intermediary service providers meet the conditions of paragraph 2 of article 9 of the Act. Furthermore, Article 13 provides for information orders and, in particular, it states that judicial or public authorities shall ensure that the orders for the provision of specific information, which they issue in relation to one or more specific individual recipients of the service, meet the conditions of paragraph 2 of article 10 of the Act. If the order of the public authority does not comply with one or more of these conditions, the order is considered non-existent for the purposes of the Act.

The national law specifying injunctions according to Articles 4(3), 5(2) and 6(4), that is, Article 11 (3), 12 (2) and 13 (3) of P.D. 131/2003 meet the requirements of oversight by authorities or courts.
There are no specific rules, or cases in this regard in Greece.

Question 2

Law 5099/2024 provides the legal definition of a legal representative in Article 3, but not any specific provisions regarding their role.

Question 3

The Greek law does not regulate in details the complaints procedure. It only provides in Article 11 (5) that complaints against intermediary services providers are dealt with by the digital coordinator on the basis of their importance and the effect of the alleged violation. Complaints which are not substantiated, or which are abusive or anonymous or do not regard a violation of the DSA are not taken into account and will be filed.

Question 4

We are not aware of any such political controversy.

Question 5

No measures have been taken to support the creation of out-of-court dispute resolution bodies, trusted flaggers, DSA/DMA-focused consumer organisations, and data access requests by researchers.

Question 6

It is still too early to notice the reactions from practitioners. During the discussion of the bill for DSA implementation (Greek Law 5099/2024) in the Greek Parliament, there were mentioned, inter alia: the delayed implementation of DSA in the Greek legal order, language failures and incomplete provisions of the bill, as well as the need for more resources allocation to the competent authorities.

Hungary

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Section 1: National institutional set-up

Question 1

In Hungary the Digital Services Coordinator is the National Media and Infocommunications Authority (NMHH). Act CIV of 2023 on Certain Rules for Internet Intermediary Services (IIS Act), Act CLXXXV of 2010 on Media Services and Mass Communications (Media Act) and Act CVIII of 2001 on certain aspects of electronic commerce services and information society services provide that the NMHH is the sole authority to enforce the DMA and DSA.[1]

According to Article 6 (4) of the Act CIV of 2023 on Certain Rules for Internet Intermediary Services, in order to perform his or her functions under the Regulation and this Act, the President shall apply the provisions of the Act C of 2003 on electronic communications on the cooperation as follows:

(a) the Hungarian competition authority (GVH) in matters concerning competition in the digital services market in order to ensure consistent enforcement of the protection of competition and to promote uniform application of the law;

(b) the consumer protection authority and the GVH in matters concerning users in the digital services market in accordance with the rules of competence specified in the laws, and

(c) the National Authority for Data Protection and Freedom of Information in matters concerning the protection of personal data in the digital services market.

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**** Pázmány Péter Catholic University.

[1] See Media Act 110. § (1) i) and (2).

The GVH and the NMHH concluded – continued – a cooperation agreement,[2] which was also extended to cooperation on DSA matters. Paragraphs 34 – 44 detail that they will inform each other about all cases concerning the possible parallel applications of the DSA and the national implementing provision of the Unfair Commercial Practices Directive. If the GVH receives a complaint or notification which might concern the application of the DSA it will immediately notify the NMHH and start a reconciliation process. The GVH will also inform the NMHH immediately if it adopts a decision according to Articles 9 and 10 of the DSA. The NMHH also undertakes to inform the GVH and cooperate on matters relevant to the powers of the GVH, especially regarding consumer or business partner deceptions. The NMHH also undertakes to involve the GVH while exercising its power as a digital coordinator or when it is warranted regarding the meetings of the European Board for Digital Services. At the time of writing the report no trusted flaggers under the Digital Services Act is listed on the European Commission website.

Question 2

Act CIV of 2023 on Certain Rules for Internet Intermediary Services details the specific rules on the powers of the NMHH. The enforcement if no specific rules are provided for is the Act C of 2003 on electronic communications.

The IIS Act provides for safeguards relating to protection of secret information, e.g., business secrets.[3] It also provides for power to impose fines for procedural infringements. The fines can amount to up to 1% of global turnover of the persons.[4] Fining powers include the imposition of fines on the directors of a company.[5] The act also provides for powers to adopt interim measures.[6]

The detailed rules on the procedure related to Article 56. paragraphs (6) and (7) are in articles 10 – 15, while on remedies in Article 16 of the IIS Act. If the subject of an investigation fails to fulfil the obligations to provide data or the provision of data is not satisfactory, it can be fined up to 6% of global turnover, with a maximum of 50 million HUF in the case of third parties according to Article 12 paragraph (2).[7]

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[2] The agreement is accessible in Hungarian here: https://www.gvh.hu/pfile/file?path=/gvh/egyuttmukodesi_megallapodasok/egyuttmukodesi_megallapodas_gvh_nmhh_20240710&inline=true

[3] Art. 7.

[4] Art. 8. (1) – (3).

[5] Art. 8. (4).

[6] Art. 9.

[7] Art. 12. (9).

The rules on out-of-court dispute settlement are in Articles 13., 17 – 20 of the IIS Act. The registered out-of-court dispute settlement body "Online Platform Vitarendező Tanács"(OPVT)[8] came into existence during the summer of 2024 under the NMHH Decree No. 4/2024 (III.21.)[9] The rules of procedure of the OPVT are published on the website of the out-of-court dispute settlement body.[10] As to the date of writing the report no decision has been adopted yet.[11] The rules on trusted flaggers are in Article 14., while on vetted researchers in Article 15. Noone is yet listed on the website of the NMHH.[12]

The NMHH allocated the task mainly to the DG Online Platforms internally.

Question 3

Currently no data is available publicly which would allow a detailed answer to these questions and there is no relevant experience yet. Two studies have been commissioned on dark patterns by the NMHH to delimit enforcement powers under DSA and UCPD.

According to the annual work plan of the NMHH for 2024,[13] it has mapped and contacted domestic online platform providers to help them properly comply with the new service obligations under the DSA.

Question 4

According to Article 33 paragraph (2d) the GVH is the competent authority under the DMA. The President of the GVH is appointing the representatives in the High Level Group of Digital Regulators.[14]

The GVH is carrying out its enforcement actions according to the general rules of the Tpvt., with some special rules included in Articles 80/Q-T. According to Article 80/S paragraph (2) the competition authority may open competition proceedings to determine whether it considers that the designated gatekeeper company complies with the obligations under Articles 5 to 7 of Regulation (EU) 2022/1925 of the European Parliament and of the Council. Competi-

[8] https://opvt.hu/opvt

[9] https://opvt.hu/upload/NMHH_Decree_No_4_2024_III_21.pdf

[10] https://nmhh.hu/upload/rules_of_procedure_of_the_online_platform_dispute_resolution_board.pdf

[11] For up-to-date information see: https://opvt.hu/opvt/dontesek

[12] For up-to-date information see the available databases here: https://nmhh.hu/cikk/205233/A_szerv_nyilvantartasai

[13] A_Nemzeti_Media_es_Hirkozlesi_Hatosag_2024_evi_munkaterve.pdf

[14] Art. 36. (1) e) of the Hungarian Competition Act (Tpvt).

tion proceedings under this paragraph shall be concluded by an order of the investigator transmitting the report to the European Commission. The rules applicable are the general procedural rules in the act.

The GVH Order 1/2023 (I. 31.) amending certain instructions in connection with the reorganisation of the organisation and the amendment of certain laws governing the operation of the Competition Authority in Article 51 deals with the internal resource allocation regarding DMA enforcement, amending GVH Order 7/2021 (V. 31.) on the internal administrative procedure to be applied in the proceedings of the competition authority. Section 57A rules that the Enforcement Unit will assist in dawn raids, the Legal Assistance Unit will deal with court procedures and for all other matters the General Vice-President will appoint an investigator. For enquiries from the European Commission the Cabinet of the President is competent, while the Antitrust Unit is responsible for procedures under Article 80/S. paragraph (2) of the Tpvt. Regarding meetings and the official position of the GVH at the meetings of the High Level Group of Digital Regulators the President appoints the representative after consulting and approval by the President of the Competition Council and the Unit Supporting Decision-making.

Question 5

There is no special unit dedicated to DMA enforcement at the GVH. It is part of the general activities of the authority. The enforcement rules are the same as in competition law related matters.

Question 6

There is no information publicly available at the time of submitting the report on any case or on the enforcement priorities of the GVH.

Section 2: Use of national legislative leeway under the DMA/DSA

Question 1

Hungary's approach to the DSA Regulation is not to transpose the concepts and procedures used in the DSA into Hungarian law, but to create the additional legal provisions that are indispensable for the DSA to take effect. The relevant rules were adopted in the Act CIV of 2023 on certain rules for Internet intermediary services. This act also contains the provisions amending other laws (copyright, media law, electronic commerce rules).

According to the official reasoning of the proposal: The purpose of the bill is to serve the application and enforcement in Hungary of the relevant EU legal source, Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on the single market for digital services and amending Directive 2000/31/EC (the Digital Services Regulation, hereinafter the Regulation). To this end, the Regulation contains additional provisions necessary for its application and implementation in accordance with the Hungarian legal system, as well as detailed rules to be adopted by the Member States under the Regulation. The law lays down the guarantee provisions – typically procedural provisions – that are indispensable for the implementation of the Regulation, taking into account its direct scope and direct applicability, thus ensuring that the uniform EU provisions on the cross-border activities of service providers and intermediary service providers subject to the Regulation are implemented and enforced in Hungary in accordance with the legal provisions of the Regulation.

Question 2

Act CVIII of 2001 introduced a comprehensive amendment to the liability rules for electronic commerce service providers. This corresponds to the way the DSA amended the liability of e-com service providers in the E-com directive.

§ 3 of the above mentioned Act states, in line with the Regulation, that intermediary service providers are obliged to remove infringing content if they become aware of its infringing nature.

The Act contains provisions on complaints concerning infringements in conjunction with Article 53 of the Regulation (Articles 10-11). If the complaint is against a decision of an intermediary service provider on a user notification concerning infringing content (including content that is incompatible with the provider's terms and conditions), the complainant must exhaust the procedural and remedies available under the provider's internal complaints handling system before initiating the administrative procedure. If the complainant has not exhausted the remedies available under the provider's internal complaint handling system before lodging the complaint, the President shall inform the complainant of the procedural condition by letter.

Question 3

- Amendment of Act LXXVI of 1999 on Copyright,
- Amendment of Act CLXXXV of 2010 on Media Services and Mass Media,

- Amendment of Act XXIII of 2023 on cybersecurity certification and cybersecurity supervision,
- Amendment of Act CXCIV of 2011 on the Economic Stability of Hungary,
- Amendment of Act CVIII of 2001 on Certain Issues of Electronic Commerce Services and Information Society Services.

The detailed rules that do not require regulation at the statutory level were developed by NMHH decree on the basis of the authorisation of the Act CIV of 2023.

Question 4

These rules are directly applied.

Question 5

The President of the Authority for the Supervision of Regulated Activities and the President of the National Media and Infocommunications Authority (NMHH) are responsible for setting the level of the supervision fee.

The internal rules for the functioning of the Online Platform Dispute Resolution Council have been drawn up by the NMHH. Once the Board is established, it adopts its rules of procedure and applies to the President of the NMHH for certification. Once this certificate has been issued and the council has been registered, it may commence its activities.

Section 3: Vertical and horizontal public enforcement-related cooperation under DSA/DMA

Question 1

With regard to the implementation of the DMA the Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (hereinafter: the Hungarian Competition Act) has been amended. In order to enhance the procedural aspect of the cooperation between the Hungarian Competition Authority (hereinafter: the GVH) and the European Commission a new Chapter XI/D. has been added to the Hungarian Competition Act.

According to the new rules of the Competition Act the procedures laid down in the Competition Act are governing the application of the DMA with the derogation set out in Chapter XI/D. [Art 80/Q (1)]. If the European Commission

requests the GVH to open an investigation under the DMA, the rules of the competition procedure shall apply, except that (a) the procedure shall end with an order of the case handler to hand over the evidence obtained, (b) an official of the European Commission and the person accompanying the official may attend the on-the-spot (down raid) investigation or the hearing held by the GVH under the supervision of the case handler who is carrying out the investigative measure, (c) the request for prior judicial authorisation for an on-the-spot investigation (down raid) is submitted to the court by the European Commission directly or through the GVH, and (d) if the European Commission's investigative measure requires the assistance of the police, the GVH shall, at the request of the European Commission, act to ensure that the police are involved [Art 80/R a)-d)].

With regard to the information sharing the Competition Act declares that if requested by the European Commission or a competent authority under the DMA or if the information is required under the DMA itself, the GVH shall make available to the European Commission and to the competent authorities within the meaning of the DMA any information, including restricted information, which is subject to the obligation to provide information under the DMA, concerning procedural, legal or factual matters relating to its activities [Art. 80/S. (1)].

The GVH may open an investigation to determine whether it considers that the designated gatekeeper company complies with the obligations under Articles 5 to 7 of the DMA. The investigation under this paragraph shall be concluded by an order of the case handler transmitting the report to the European Commission. The report should include (a) an indication of the subject of the investigation, (b) the facts established and the evidence supporting them [Art. 80/S. (2)].

We may note here, that the Completion Act provides limitation with regard to the access to files in connection with certain procedures of vertical and horizontal cooperation. The right of access to the file may not, even if the conditions laid down in the Competition Act are fulfilled, be disclosed to the person entitled to inspect the file the internal documents of the GVH, the European Commission, the competition authorities of the Member States and the competent authorities within the meaning of the DMA, including the documents referred to in Articles 11, 12, 14 and 22 of Council Regulation (EC) No 1/2003. documents, correspondence between or between the GVH and the European Commission or other competition authorities of the Member States or competent authorities within the meaning of the DMA, [...] except for documents or information contained therein which have been used as evidence in establishing the facts of the case, where the absence of such documents or information would prevent the exercise of the client's statutory rights [55/A. (1)(e)].

We may also note that the president of the GVH appoint the persons representing the GVH in the Advisory Committee on Digital Markets under the DMA and, if invited by the European Competition Network, the High Level Expert Committee on Digital Markets [Art 36 (1) e)].

With regard to the implementation of the DSA the Act CIV of 2023 on certain rules for Internet intermediary services has been adopted by Parliament on 12 December 2023. According to the Act to achieve the objectives of the DSA and the Act CIV of 2023, the President of the NMHH (acting on the capacity provided by the digital service coordinator) shall cooperate with the digital service coordinators of the Member States, the European Commission and the European Digital Services Board [Art 6(1)]. In order to exercise his/her powers, the President is entitled to request information from the relevant national digital service coordinators and the European Commission [Art 6(2)]. The President shall, at the request of the national digital service coordinators exercising their powers of investigation or of the European Commission, provide the information available to them in relation to their investigations under the DSA [Art 6(3)].

Furthermore, in order to carry out his/her duties under the DSA and the Act of 2023, the President of the NMHH shall cooperate in accordance with the rules of Act C of 2003 on electronic communication: (a) with the GVH on competition issues in the digital services market, to ensure consistent enforcement of competition protection and to promote uniform application of the law; (b) with the consumer protection authority and the GVH in matters concerning users in the digital services market, in accordance with the rules of competence laid down by law, and (c) the National Authority for Data Protection and Freedom of Information in matters concerning the protection of personal data in the digital services market [Art (4) a)-c)].

The President may also, in a reasoned request, require the transfer of data submitted to another Member State's digital service coordinator if the data concerned are necessary for the performance of the President's tasks under the DSA and are held by another Member State's digital service coordinator. The President shall ensure that the data transferred are at least as protected as those of the transferring digital service coordinator [Art 12 (3)].

Question 2

The Hungarian Competition Act provides that by application of the DMA, the court issuing the decision sends a copy of the final judgment of the court to the National Office for the Judicary after having notified the parties. The National Office for the Judicary shall forward a copy of the final judgment

without delay to the Minister responsible for Justice for transmission to the European Commission [Art 80/T].

Question 3

We can add no specific observations or recommendations to this regard.

Section 4: Private enforcement of DMA/DSA

Question 1

Up to the moment, according to the available sources of information, there are no actions brought by private parties before national courts to enforce DSA or DMA.

Question 2

Expected causes of action are claims for damages (pecuniary as well as non-pecuniary) brought to courts on the basis liability in tort for incompliance with the provisions of DSA and causing loss by that. Such claims would be governed by national law (Art 43a DSA). Hungarian tort law is rather flexible and capable to channel such claims. A great variety of cases are possible. One direction of such litigation could presumably be based on interference with fundamental rights (e.g., via discriminatory treatment) or for limiting access to resources for market players. Another possible direction of such claims could be based on content interfering with the plaintiff's rights. From this point of view, there is a difference between Hungarian tort law and the European legislation. While European legislation focuses on illegality of content, private law has an autonomous concept of unlawfulness. From this follows that even if content was not illegal according to the DSA, it may be held unlawful in private law if it interfered with protected interests of the victim. On the other hand, if content is illegal but did not cause damage, liability is not an available remedy. Causing actual damage is not required if illegality of content constitutes wrongful interference with inherent rights (fundamental rights) of the person, because in such cases *solatium doloris (*functionally equivalent in Hungarian private aw to non-pecuniary damages) shall be awarded to the victim.

Unlawfulness is difficult to assess, in particular, in context of interference with fundamental rights, because the collision of fundamental rights of the parties (e.g., freedom of speech vs human dignity), establishing unlawfulness requires

setting up priorities among such competing rights. In context of liability, this is left to national courts.

In context of liability, contributory negligence of the victim also shall be taken into account while allocating the risks of illegality. In Hungarian tort law, the victim has a duty to mitigate the loss and shall be bear the risk of failing to comply this obligation (§ 6:525 of the Hungarian Civil Code).

A further available remedy, also in context of tort law is, that the victim may have a claim to have the service provider, as a potential wrongdoer, prohibited from the behaviour that threatens by causing damage (§ 6:523 of the Hungarian Civil Code). Combining such a claim with an injunction ordered by the court may be an effective remedy, although there is no extended court practice established so far to this rule.

Question 3

Primarily, damages action may be a proper tool of private law enforcement of DMA. We believe that private law redress is less likely to use, because the problem of proving causal link and the amount of loss resulted from violating the provisions of DMA may create obstacles for bringing such claims successfully to the courts. These are the general problems of private law litigation in antitrust and consumer law cases. While private law enforcement of competition law via claims for damages had been addressed by the European legislator in the Antitrust Damages Directive, in cases falling outside the scope of antitrust law, but falling under the scope of DMA, there are no such solutions to apply.

Question 4

Although it would seem to be logical, there are no specific national rules adopted (or plans to adopt) for private law enforcement of DSA and/or DMA. We are not aware of any plan to allocate cases concerning the DMA/DSA to a specific court or chamber, neither to adopt other kind of specific procedural rules going beyond the European legislation.

Question 5

Private interest groups or associations may have the right to submit claims for public interests, for example, for establishing that certain general contract terms used by the service provider are invalid, but they do not have the right

to claim for damages. They do not have the opportunity initiate cases or to join pending cases for damages. Civil procedural law allows the opportunity of a kind a class action but the impediments as to financing such groups and the uncertain legal environment of managing such groups do not create incentives for such litigation. Actually, there are no experiences with this in Hungary. The public prosecutor has the opportunity to intervene and join pending cases but can do it in order to protect public interests. That is why it cannot stand for private law enforcement. Thus, such solutions are not available or are so costly and uncertain that they do not work.

Section 5: General questions

Questions 1 and 2

At the moment, we are not aware of such services.

Question 3

No specific approach can be derived from the national law regarding the complaints according Art 53 of the DSA. As already mentioned above, the Act CIV of 2023 on certain rules for Internet intermediary services has been adopted in order to implement the DSA into the Hungarian law. According to the statutory explanation, the Parliament adopted the act in order to ensure the security of the online space, to regulate the liability of intermediary service providers, to enhance the protection of consumers' rights in the online space, to promote e-commerce, to ensure effective cooperation between EU bodies and regulatory authorities, and to comply with European Community legislation.

The Act CIV of 2023 on certain rules for Internet intermediary services provides the general rules on the activities and procedures of the Digital Service Coordinator [Art 5-9.], and stipulates also the rules for specific procedures for the Digital Service Coordinator [Art. 10 to 15].

Anyone can submit a complaint to the President regarding violations of the DSA and the Act of 2023 by an intermediary service provider [Art 10 (3)]. The President investigates the complaint in accordance with the DSA and the Act CIV 2023, and if he/she has jurisdiction and authority in relation to the intermediary service provider concerned, makes an official decision by applying its relevant procedural rules of the Act C 2003. In the case of legal violations discovered in the framework of general official supervision, the President may apply the legal consequences specified in Art 16 of Act CIV 2023 [Art 10 (6)].

In official matters, under the Act CIV 2023 (that covers the complaints under Art 53 of the DSA), the President shall act in accordance with the procedural rules of Act C of 2003 on Electronic Communications, with the amendments and derogations provided for in the DSA and the Act CIV 2023 [Art 5 (1)].

The communication between the President and the intermediary service provider established in Hungary shall be carried out exclusively by electronic means as defined in the Act CIII of 2023 on the digital state and certain rules for the provision of digital services. The intermediary service provider may submit the data required under the rule on digital services by electronic means using the electronic form provided by the NMHH [Art 5 (2)]. Unless otherwise provided, the time limit for the President's proceedings shall be 90 days [Art 5 (3)].

Among the specific procedures of the Digital Service Coordinator, in connection with the complaint according the Art 53 of the DSA, the Act CIV of 2023 stipulates that where the President does not have jurisdiction and competence in relation to the intermediary service provider concerned, but the complaint is likely to reveal a breach of the rules of the Regulation, the President shall, pursuant to Article 53 of the Regulation, forward the complaint, together with an indication of the legal provision infringed, the facts and data found in his investigation, the grounds for the breach and his opinion on the matter, to the digital service coordinator having jurisdiction in the place where the intermediary service provider is established or to the Commission [Art 10 (7)].

Question 4

In general, the implementation of the DSA and the DMA did not cause any political controversy at the national level in Hungary.

Question 5

The Act CIV of 2023 contains the special provisions on trusted flaggers (§ 14), researchers (§15) and the dispute settlement body (§§17-20).

The President of the NMHH shall keep a public official register of trusted flaggers. On the basis of an application by an organisation established in Hungary which meets the conditions, the President shall, by decision, designate the organisation submitting the application as a trusted flagger and register it. The President shall decide by an official decision to suspend or revoke the

effect of the trusted reporter status and, in case of revocation, to remove it from the register. The register referred contains the name, registered office and electronic mail address of the trusted flagger, the speciality or specialities of the trusted reporter, as designated by decision of the President; and in the case of suspension of the status of a trusted reporter, the details of the suspension. The information in the register shall be public and shall be available on the Authority's website.

The President of the NMHH shall keep an official register of controlled researchers. If a researcher established in Hungary demonstrates in his application that he fulfils the conditions set out in the DSA and that the purpose of the research contributes to the detection, identification and understanding of systemic risks within the European Union and to the assessment of the adequacy, effectiveness and impact of risk mitigation measures, the President shall register him as a controlled researcher. The register shall include: the name of the researcher, the postal and electronic mail address and telephone number of the researcher, the name and location of the research site to which the researcher belongs and the purpose of the research. The register shall be publicly available on the Authority's website and shall be deemed to be a public official record for this purpose.

The dispute resolution body shall be competent for the out-of-court settlement of disputes between the provider of the online platform and the recipient of the service and on the subject matter specified in the register. The Dispute Resolution Body shall be responsible for attempting to reach an amicable settlement between the parties to the dispute and, if this is not successful, for making a recommendation in the case to ensure that the rights of the service users are enforced in a simple, rapid, efficient and cost-effective manner. In the context of its activities, the Dispute Settlement Body shall not be an administrative authority, nor shall it have judicial or administrative powers or powers of public authority, nor shall it be empowered to carry out administrative or judicial acts. The procedure of the Dispute Settlement Body shall not be an official procedure and it shall not exercise official authority. A dispute settlement initiative or complaint submitted to a dispute settlement body is not a matter of public authority. The Dispute Settlement Body shall establish its own rules of procedure. The rules of procedure shall contain the rules governing the organisation and conduct of business of the Dispute Settlement Body and the rules on conflicts of interest of its members. The Dispute Settlement Body shall report in its annual report on cases in which the online platform operator concerned has failed to comply with the decision or recommendation. The dispute resolution bodies shall cooperate in order to improve jurisprudence and to adopt best practices in alternative dispute resolution procedures.

The procedure of the Dispute Settlement Body shall be initiated upon the dispute resolution initiative or complaint (hereinafter referred to as "request") of the recipient of the service (hereinafter referred to as "the applicant"). The initiation of the procedure shall be subject to the condition that the applicant tries to settle the dispute directly with the relevant mediation service provider or that the applicant makes use of the internal complaint handling system of the online platform provider. If the applicant has not fulfilled the conditions before submitting the application to the dispute resolution body, the dispute resolution body shall inform the applicant of the procedural condition. The Dispute Settlement Body shall examine the application and, if the application is manifestly unfounded or if the interest or matter raised in the application is not within its competence, shall notify the applicant within fifteen days. In the notification, the dispute settlement body shall inform the claimant, as appropriate, of his rights and obligations under the Regulation and the terms and conditions of the contract, as well as of the procedures and remedies available to him. The dispute settlement body shall, for the purposes of the investigation of the application and the settlement of the case, process the natural person identification data necessary to identify the applicant and other participants in the procedure, as well as other personal data essential for the effective conduct of the procedure, until the report is sent to the digital service coordinator.

In the course of the procedure, the Dispute Settlement Body shall attempt to reach an agreement between the parties. If the agreement complies with the rules on digital service, the panel shall approve it, otherwise, or in the absence of an agreement, it shall continue the proceedings. In the absence of a settlement, the dispute resolution body shall decide on the merits of the dispute:

- issue a binding decision if the request is justified and the online platform provider recognises in a statement at the start of the proceedings or at the latest by the time the decision is issued that it is bound by the decision of the panel;
- make a recommendation where the request is justified but the online platform provider has not accepted the decision of the dispute settlement body as binding on itself;
- take a decision rejecting the request if the request is unfounded.

The decision or recommendation of the Dispute Settlement Body shall not affect the right of the applicant to pursue his claim at any stage of the proceedings in court.

The Online Platform Dispute Resolution Council (hereinafter referred to as the "Council") shall be competent to settle out-of-court disputes. The Council shall be a professionally independent body, operated by the Authority. The Council

shall consist of a Chairperson and a number of members to be determined by order of the Chairperson. The Chairperson of the Council shall be appointed by the President, and its members shall be appointed by the President and by the organisations carrying out activities related to digital services, as specified in the President's Decree. The President and members of the Council shall be persons with a law degree and at least 3 years of professional experience. The President's decree may specify additional conditions for the eligibility of a member of the Board. The President shall appoint the Chairperson of the Council and its members from among the candidates for a term of 5 years. The members of the Board shall perform their duties under a contract of appointment and may receive remuneration for their services at the rate laid down by the President's decree. A member of the Board may not be instructed to take decisions in connection with a dispute.

Question 6

We can add no specific observations or recommendations to this regard.

Italy

*Pietro Manzini**
*Gabriella Muscolo***, ****

Section 1: National institutional set-up

Question 1

The main provisions regarding the implementation of the DSA were adopted by Law Decree No. 123 of 15 September 2023, subsequently converted and amended by Law no. 159 of 13 November 2023 (Law Decree).

Article 15 designates the Italian Communications Regulatory Authority (AGCOM) as the Digital Services Coordinator (Article 49 DSA). The same Article mandates that the Italian Competition Authority-Autorità Garante della Concorrenza e del Mercato (hereinafter "ICA" or "AGCM") and the Data Protection Authority (Garante per la protezione dei dati personali), along with any other competent authorities, shall cooperate with AGCOM to support its role as Digital Services Coordinator. To this end, the authorities may conclude memoranda of understanding. However, the Decree does not specify how the task and responsibilities are divided among those authorities.

It is not entirely clear whether the Italian government intended to assign a new competence to ICA and the Data Protection Authority regarding the DSA enforcement, or whether it intended to state that these authorities should apply the DSA in their preexisting area of competence, similar to other national regulations.

As for the interaction among others national sector-specific regulators, it has to be underlined that AGCOM is also competent on communication services, which include electronic communications, audio-visual, press, postal services and digital platform, while ICA is competent regarding competition law and consumer protection.

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** Lawyer-Of Cousel, Commissioner, Italian Competition Authority (2014/2021). Judge, Court of Rome, IP and Competition division (1985/2014).

*** Pietro Manzini reported on questions related to DSA. Gabriella Muscolo reported on questions related to the DMA.The rapporteurs thank Maria Buquicchio, Lawyer and Ph.D. in Public Law, and Anna Vicinanza, Ph.D. candidate, for their accurate work of research as the basis for this report.

Cases on potential overlapping competences between DSA and Consumer legislation

A recent position taken by AGCOM on 30.4.2024 (Delibera 110/24/CONS) has already demonstrated potential overlapping of competences among national authorities.

AGCOM's position originated from a request for an opinion submitted by ICA in a case regarding unfair commercial practices performed by Meta (specifically, Meta Platforms Inc. and Meta Platforms Ireland Limited). In this context, Meta was accused of various practices, including failing to provide exhaustive explanation for the interruption of its services on Facebook and Instagram, which limited the recipients' right to defence.

Since the contested unfair commercial practice was disseminated through telecommunications services, the Italian Consumer Code (Article 27.6) required ICA to obtain an opinion from AGCOM. However, AGCOM refused to provide such opinion, arguing that the practices charged to Meta did not constitute a violation of consumer law but rather a breach of the DSA, whose enforcement fell within its competence. In particular, Articles 17 and 23 of the DSA were deemed relevant, as they require platforms to provide a statement of reasons to recipients when imposing restrictions.

Despite receiving this negative opinion, ICA decided to proceed, considering that the DSA does not affect consumer law, as stated in the Article 2 DSA. Therefore, consumer law should remain applicable even in the areas covered by the DSA. This procedure resulted in ICA imposing a fine of 3,500,000 € on Meta. However, it remains unclear whether AGCOM could impose another sanction for the same behaviour in light of the DSA, potentially leading to a collision with the ne bis in idem principle.

Another Italian case presented similar issues. ICA opened a case against TikTok (specifically, TikTok Technology Limited, TikTok Information Technologies UK Limited e TikTok Italy S.r.l.) for unfair commercial practices. The case concerned the spread of harmful content among minors due to recommender systems, affecting consumers' self-determination and creating addiction. In this case, TikTok submitted an allegation arguing that ICA lacked competence since the supervision of VLOPs is assigned by the DSA to different institutions (namely, the European Commission). This allegation was dismissed by ICA, following the same reasoning as above on the basis of Article 2 DSA.

Furthermore, in this case ICA also argued (§54) that, following Article 27.1bis of the Italian Consumer Code, the competence of other authorities can only exist when the contested behaviour does not also constitute an unfair commercial practice (recalling a jurisprudence by the Court of Justice).

Moreover, AGCOM was required to provide an opinion, which it refused on the basis of its exclusive competence in audiovisual services, as well as in the capacity of digital services coordinator (Delibera 325/23/CONS, 20.12.2023). In fact, a procedure for the same behaviour had been initiated by AGCOM but was dismissed when TikTok accepted to remove the harmful videos.
In any case, ICA ultimately imposed a joint fine of 10,000,000 € to TikTok Technology Limited, TikTok Italy S.r.l. e TikTok Information Technologies UK Limited for unfair commercial practices.

In another case, AGCOM explicitly mentioned the division of competences with ICA. In this context, AGCOM had been required to issue an opinion on the request of ICA on an unfair commercial practice operated through a website and social media ("Hot Chip Challenge" case). AGCOM issued a positive opinion but stated (Delibera n. 33/24/CONS) that it would reserve the right to assess whether the same behaviours are also related to a lack of protection for minors by audiovisual services providers or a violation of guidelines on influencers. However, it is not entirely clear if it intended to state that the same behaviours could be addressed, or those operated by different subjects (e.g., audiovisual service providers like TikTok).

Question 2

The aforementioned Article 15 of the Decree requires the Communications Regulatory Authority to define, by its own regulation, the conditions, procedures and operational modalities for exercising the powers and functions vested in it as Digital Services Coordinator, pursuant to Regulation (EU) 2022/2065. The Authority must carry out the related tasks in an impartial, transparent and timely manner.

Paragraph 5 of Article 15 establishes an increase in AGCOM staff by 23 units, specifically distributed as follows: 1 manager, 20 officers, and 2 operational personnel. The regulation also provides for the temporary use of existing administrative staff until the completion of the open competition procedures.

Furthermore, an allocation of 4,005,457 euros is provided for 2024, with the following allocations for subsequent years:

2025	4,125,590 €
2026	3,903,136 €
2027	4,081,636 €
2028	4,267,375 €
2029	4,527,751 €
2030	4,737,357 €
2031	4,971,989 €
2032	5,434,808 €
2033 and onwards	5,694,052 €

These resources will be financed from a contribution (i.e., supervisory fee) of 0.135 per thousand of the turnover resulting from the last approved balance sheet of intermediary services providers established in Italy. The Authority may revise the fee in subsequent years up to a maximum of 0.5 per thousand of turnover.

In accordance with Article 15 of the Decree, the Authority, in cooperation with the National Statistics Institute (ISTAT) and the Revenue Agency (Agenzia delle Entrate), should identify the list of entities liable to pay the contribution. The instructions for paying the contribution were issued on 10 July 2024 (Delibera 270/24/CONS). The payment was due within 30 days of the Delibera's publication, meaning by 4 October 2024, and had to be made by completing the online form available at impresainungiorno.gov.it. Entities with a taxable income of €500,000 or less, companies in a state of crisis with suspended activity, in liquidation, or subject to insolvency proceedings, as well as companies that began their activity in 2023, are exempt from paying the contribution.

Furthermore, the law establishing AGCOM (Law no. 249 of 31 July 1997) was amended to include the possibility of imposing sanction on supervised entities for violation of certain DSA provisions.

Question 3

No mapping exercise has been conducted by the competent authorities. However, AGCOM has already taken some initiatives in order to implement the DSA at national level.

On 14 February 2024, through Delibera 41/24/CONS, AGCOM initiated a preliminary analysis aimed at defining the procedure for filing complaints under Article 53 of the DSA. The conclusion of this analysis was delayed by Delibera 89/24/CONS due to the need for coordination with DSCs in other Member States, as indicated in the AGCOM's Annual Report for 2024.

On 8 march 2024 AGCOM issued three notices regarding: (i) the modalities for communicating contact points by intermediary services providers in line with Article 11 DSA; (ii) the modalities for communicating the designation of legal representatives by intermediary services providers in line with Article 13 DSA; (iii) the modalities for communicating the number of active recipients in line with Article 24(2) DSA.

On the 24th of July 2024, following a public consultation started on 14th of February 2024, AGCOM has adopted 2 Decisions: (i) the first on the procedures for certifying out-of-court dispute resolution bodies under Article 21 DSA, and (ii) the second on the procedure to certify "trusted flaggers" under Article 22 DSA. Both Decisions entered into force on the 15th of September 2024.

While the initiatives of 14 February and 8 March are merely preparatory or containing simple practical arrangements, Decisions adopted on the 24th of July deserve further analysis.

A. Procedural rules for the certification of out-of-court dispute resolution bodies ("ADR" bodies) between service recipients and online platform providers under Article 21 DSA (Delibera 282/24/CONS)

The regulation outlines: (i) eligibility criteria (Article 3), (ii) application submission and certification process (Articles 3, 4 and 5), (iii) voluntary withdrawal from certification by the ADR (Article 6), (iv) revocation of the status of ADR (Article 7), (v) certified ADR bodies mandatory reports (Article 8).

i) Eligibility criteria.

The eligibility criteria are defined by the DSA, and the AGCOM's decision strictly follows the requirements provided for by it.

These requirements are further specified in Annex 1 of the Decision. Since the DSA does not specify the legal nature of eligible ADR bodies, Annex 1 stipulates that any entity – regardless of its legal status, whether public or private – established on a permanent basis and engaged in dispute resolution through an ADR procedure is eligible. If the applicant is certified as an ADR bodies in another sector, such as consumer law, this must also be communicated.

ii) Application Submission and Certification Process.

The application should be submitted using the form published on AGCOM's website and transmitted by certified electronic email or, potentially, online.

The certification procedure involves two AGCOM bodies: the Directorate of Digital Services, responsible for investigative tasks, and the AGCOM Council, which holds decision-making power.

If the application is not submitted in accordance with the required procedures, the Directorate may dismiss it. In any other case, after reviewing the application the Directorate will forward a reasoned proposal, either recommending rejection or approval, to the Council. The entire procedure must be completed within 60 days (with some exceptions). Afterwards, the Council will issue a decision to either award or deny the certification. The Directorate will notify the applicant of the outcome and will publish it on AGCOM's website.

The certification is valid for five years and can be renewed upon the certified ADR body's request. Renewal is contingent upon the continued fulfilment of all requirements and compliance with relevant obligations.

AGCOM must publish on its website the updated list of the certified ADR entities, indicating for each the date of certification, the areas of competence and the languages available. AGCOM also publish a link on its website to the list of certified ADR bodies published by the Commission, pursuant to Article 21(8) of the DSA.

iii) Voluntary withdrawal from certification by the ADR.

If a certified ADR body wishes to withdraw from the list and relinquish its certification, it must notify AGCOM via certified email, expressly stating that it has no pending procedures initiated pursuant to Article 21 of the DSA.

iv) Revocation of the status of ADR .

The Directorate, either on its own initiative or based on information provided by any interested party, may determine that a certified ADR body no longer meets the required criteria.

The Council will decide whether to revoke the certification or dismiss the proceedings.

v) Certified ADR bodies' mandatory reports.

The Decision also details the obligation of certified ADR bodies concerning transparency reports in accordance with Article 21(4) of the DSA.

B. Procedural rules for the recognition of the status of "trusted flaggers" under Article 22 DSA Delibera 283/24/CONS)

The Decision for certifying trusted flaggers essentially follows the same structure as the out-of-court dispute resolution bodies Decision illustrated above. It outlines (i) the eligibility criteria (Article 3), (ii) application submission and certification process (Articles 3, 4 and 5), (iii) Voluntary withdrawal from certification by the trusted flagger (Article 6), (iv) revocation of the status of trusted flaggers (Article 7), (v) trusted flaggers mandatory reports (Article 8).

i) Eligibility criteria

The eligibility criteria are defined by the DSA, and the AGCOM's decision strictly follows the requirements provided for by it. To qualify, an applicant must be an organization established in Italy complying with the following conditions:

1) must be an organization with specific expertise in identifying and reporting illegal content on online platforms;
2) must be independent of any platform service provider;
3) must have the capability to operate in a diligent, accurate, and objective manner.

The application must detail the areas of competence for which the certification is sought and provide evidence demonstrating specific capabilities in these areas.

The above-mentioned requirements are further specified in Annex 1 of the Decision.

Annex 1 firstly stipulates that only organizations – not natural persons – are eligible for certification. Eligible organizations can be public or private, including for example (a) professional or industrial associations, professional orders, and trade unions; (b) fact checking bodies; and (c) NGOs, such as consumer associations or organisations for the protection of human rights, the environment, or animals.

The decision also includes an Annex 2 identifying by way of example and not exhaustively, 14 areas of competence for exercising the functions of a trusted flagger.

ii) Application Submission and Certification Process

The procedures for obtaining certification are the same as those described above for ADR.

In this case, the certification is valid for three years

iii) Voluntary withdrawal from certification by the trusted flagger

If a trusted flagger wishes to withdraw from the list and relinquish its certification, it must notify AGCOM via certified electronic email. The withdrawal may also concern only specific areas of recognized competence.

iv) Revocation of the status of trusted flaggers

The procedure for revoking trusted flagger certification is the same as that for ADR certified bodies. The only difference is that, in this case, if the procedure is initiated based on information received from an online platform provider, the Directorate will also suspend the trusted flagger status until the conclusion of the procedure.

v) Trusted flaggers' mandatory reports

The Decision also details the obligation of trusted flaggers concerning transparency reports.

Question 4

In implementation of Article 38(7) of the DMA, the Italian legislator has enhanced synergies between EU and national legislation for the digital sector, by adopting internal rules specifically aimed at implementing some provisions of the DMA into the Italian legal order.

The key provision is Article 18 of Law No. 214/2023 (Annual Law on Competition and Market 2022), entitled "Measures for the implementation of Regulation (EU) 2022/1925 of the European Parliament and the Council of 14 September 2022."

Paragraph 1 of Article 18 establishes the ICA as the entity responsible for enforcing the DMA in Italy.

Paragraph 2 of Article 18 confirms that the ICA serves as the primary contact point for the Commission and the network of authorities in fulfilling the obligations set out in the DMA, including various forms of coordination and cooperation (e.g., for purposes of performing inspections).

Paragraphs 3 and 4 of Article 18 clarify that the ICA, in performing its functions under the DMA, enjoys the same investigation powers and can impose the same sanctions provided for by Law No. 287/90, (hereinafter, "Italian Antitrust Law").

There are, however, limitations on the use of information collected during DMA investigations, aligning with the EU regulatory framework.

Paragraph 6 enables the ICA to use the information it collects through investigations carried out in application of the DMA for more general purposes as well, as long as this is compatible with the relevant EU legislation. In particular, the ICA is allowed to use this kind of information in the enforcement of the provisions concerning agreements restricting competition, abuse of dominant position, abuse of economic dependence and merger control.

Finally, Article 18 also underlines the role of the Italian Data Protection Authority, to which general supervisory and control powers are conferred, particularly concerning personal data protection and confidentiality. This safeguard clause aims to prevent conflicts, overlapping of competences, and excessive administrative burdens on private entities under the supervision of the relevant authorities.

In general terms, the provision adopted by the Italian legislator to implement the DMA in the Italian legal order is clear and exhaustive from the perspective of public enforcement.

Furthermore, pursuant to Article 18, following a public consultation and by resolution dated July 23, 2024, the ICA adopted the "Regulation on Forms of Collaboration and Cooperation."

The ICA is thus expressly authorized to conduct investigations into non-compliance with the DMA in close cooperation with the European Commission. The Regulation stipulates that all ICA activities related to the DMA, including investigations under Article 38(7) of the DMA, must be carried out in coordination with the Commission to ensure overall consistency.

In this context, as specified in Article 5 of the Regulation, the ICA must inform the Commission before initiating an investigation. The investigation begins with a specific resolution that is communicated to the gatekeepers and to those who have filed complaints or petitions relevant to the investigation. The ICA has the same powers for DMA investigations as it does for antitrust enforcement, including the ability to request information, hold hearings, and conduct inspections. During the investigation, participating parties (i.e., gatekeepers and other interested parties) may submit pleadings and have the right to access documents.

The rules for document access follow those applicable to antitrust proceedings; however, it should be noted that, given the specifics of the DMA,

"documents whose disclosure might hinder the Commission's investigatory powers or the adoption of implementing acts are excluded from access" (Article 12).

Once the evidence-gathering phase is complete, the ICA will decide on the investigation's outcome and forward the case to the European Commission for any actions within its purview.

The gatekeepers' right of defence will therefore significantly impact the Commission's potential proceedings.

Finally, the ICA has entered into an administrative agreement with the European Commission to enhance collaboration on DMA-related issues of mutual interest.

Question 5

According to para. 7 of Article 18 of the abovementioned Law, the ICA must perform its tasks with the resources available to it under existing legislation, which means that, in principle, no additional resources will be granted as a result of the new provisions concerning the implementation of the DMA.

However, the ICA undertook an internal reorganization effective January 1, 2023. As part of this reorganization, a new Digital Platforms and Communications Directorate was established within the Competition Department 1.

This new Directorate not only absorbed the responsibilities of the former Communications Directorate but also focused specifically on digital platforms in light of the DMA. The Directorate is responsible for both traditional antitrust enforcement and the implementation of the DMA, within the limits prescribed by the DMA.

Question 6

Since the DMA came into force, ICA has been cooperating closely with the Commission in various forms, including:

- Participation in the DMAC (i.e., the Digital Market Advisory Committee under Art. 50 DMA) and the High Level Group under Art. 40 DMA;
- Cooperation in the ECN network;
- Informal exchanges on common topics of interest that may represent points of intersection between the DMA and antitrust enforcement.

Section 2: Use of national legislative leeway under the DMA/DSA

Question 1

The problem with possible pre-emption effect of DSA has not been explicitly addressed. Overlapping pre-existing national law has not been modified.

Question 2

Italy did not map the national rules on illegality of on-line content. No change of this content has been made recently. However, some provisions of criminal law may be relevant for illegal online content:

(a) Defamation (Article 595 c.p. meaning "a communication with several persons offending the reputation of others"), which may be aggravated if motivated by ethnic, national, racial, religious discrimination or hatred;
(b) Propaganda and incitement to crime on the grounds of racial and religious discrimination (Article 604 bis c.p.), introduced in 2018;
(c) Illicit dissemination of sexually explicit images or videos (Article 612ter c.p.), concerning the publication of sexual content without the consent of the person involved, introduced in 2019.

Question 3

Four pieces of national legislation may be considered related to DSA, given that they regulate the content transmission online and its possible restrictions.

1. Article 41, Para. 7, TUSMA (Testo unico Servizi media audiovisivi, implementing the Directive on Audio-visual Services[1]).

This provision establishes that the free movement of programs, or user-generated video or audio-visual communications whose provider is established in another Member State, and which are directed to the Italian public, may be limited, by an order issued by AGCOM, to: (a) protect minors from content that may harm their physical, psychological or moral development; (b) combat incitement to racial, sexual, religious or ethnical hatred and violations of human dignity; (c) protect consumers, including investors.[2]

[1] Directive (EU) 2018/1808 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

[2] To be noted that the violation of Article 42 TUSMA may result in the imposition of a fine in line with its Article 67.9. This provision is explicitly "without prejudice to the provisions of Article 74 of Regulation (EU) 2022/2065 for violations of the provisions recited by the same European Regulation."

As established by paragraph 9 of Article 41 TUSMA, AGCOM defined a procedure Delibera AGCOM n. 298/23/CONS (issued on 22 November 2023) for the restricting the free movement of programs which was notified to the European Commission. Due to potential overlap with Article 9 of the DSA, AGCOM's Delibera was modified in order to avoid inconsistency.

2. Decreto Caivano (quoted): rules to protect minors online and age verification systems

The above-mentioned Decreto Caivano introduced some provisions regarding the protection of minors online.

In particular:

(i) Article 13 imposes an obligation to producers of electronic devices (as defined in the same Article) and to internet service providers (as defined by the Directive on electronic commerce 2000/31/EC) to allow the installation of parental control applications (free of charges) and to inform users on the possibility and benefits of installing such systems.

(ii) Article 14 prohibits access to pornographic content by minors. To this end, website operators and video sharing platform providers that distribute pornographic images and videos in Italy are required to verify the age of majority of users. To this end, AGCOM issued a report to identify different age verification mechanisms and launched a public consultation. As a result, AGCOM approved on the 24.9.2024, the draft regulation regarding the modalities for ascertaining the age of majority of users, which is explicitly considered in line with Article 28 of the DSA. The draft regulation has been notified to the European Commission for final consideration.

3. Rules on Copyright Protection

The Decreto Caivano, Article 15ter, also contains relevant provisions regarding the role and powers of the AGCOM in the fight against the illegal dissemination of content protected by copyright through electronic communication networks. In this context, the Authority has the power to require to internet service providers to disable access to illicit content, even as a provisional measure (Law No. 93 of 14 July 2023, Article 2).

4. Guidelines on influencers

Another act, however non legislative, that may be linked to DSA are the Guidelines on influencers adopted by AGCOM *Delibera AGCOM n. 7/24/CONS,* (adopted 10th January 2024) regarding the application of the regulation on audio-visual media services (D.Lgs. no. 208, 8 November 2021 implementing the Directive (UE) 2018/1808, "Testo Unico dei Servizi Media Audiovisivi").

To be precise, DSA is applicable to the intermediary services providers and not to the "influencers" who are simple recipients. However, some obligations imposed by the Delibera to "influencers" echo those provided for in DSA.

The key points of the Delibera are: the (1) definition of "influencer" based on the number of followers, their activity and the engagement rate; (2) identification of the provisions of TUSMA applicable to influencers; (3) necessity of adopting codes of conduct; (4) institution of a technical board to define any further measures.

Question 4

The Italian legislator has implemented a number of specific measures governing the conduct of players in digital markets: some pre-date the adoption of the DMA, while others were adopted subsequently.

Law No. 118/2022 (Annual Market and Competition Law 2021) has introduced an amendment to the provision on the abuse of economic dependence (Article 9 of Law No. 192/1998),[3] providing for a rebuttable presumption of economic dependence for digital platforms with a decisive role in reaching customers or suppliers.

The purpose of the amendment was to facilitate NCAs' application of the prohibition in specific sectors where large digital platforms enjoy significant market power.

More in details, plaintiffs still meet the burden of proving that the defendant platform plays a "decisive role in reaching end users or suppliers."

As for the presumption of economic dependence, that reverses the burden of proof, it is a rebuttable one, and, hence, it can always be overcome by offering evidence to the contrary. In this case, the defendant must prove the actual market position of that undertaking and the concrete absence of bargaining subservience to it.

In this context, it remains to be clarified what the provision means by the words "decisive role," leading some authors to argue that the presumption may apply automatically to the so-called GAFAMs (Google, Amazon, Facebook, Apple, Microsoft).

On the one hand, the recent Italian reform is part of a broader trend to bolster the use of national rules on the abuse of economic dependence, which are generally easier to enforce than the rules prohibiting abuses of dominant position.

[3] The text of Article 9 of Law No. 192/1998 was supplemented with three new sentences.

On the other hand, the presumptive technique in particular is often used, by both the Italian and the European legislators, to rebalance the information asymmetry typically suffered by injured parties as a result of an antitrust violation.

The reform at issue provides that the Presidency of the Council of Ministers, in agreement with the Ministry of Justice and after having consulted the ICA, "may adopt special guidelines aimed at facilitating the application of the provisions set forth in paragraph 1, in accordance with the principles of European law, also for the purpose of preventing litigation and promoting good market practices in the field of competition and the free exercise of economic activity."

However, the entry into force of the new rules is not conditional on the publication of such guidelines, the adoption of which is a simple faculty (and not a duty) of the Presidency of the Council of Ministers. Until now, no guidelines of this kind have been adopted.

A closer look at the overall structure of the DMA and the feature of the Italian reform reveals that some differences between the two sets of rules may serve to limit the areas of potential overlap, at least in part.[4]

At the same time, some overlap may be possible. In particular, in the event that such abuse (relevant pursuant to the Italian provisions) was carried out by a gatekeeper. In such a case in principle the Italian rules on the abuse of economic dependence, can be enforced, notwithstanding the entry into force (and full applicability) of the DMA, provided that they do not "affect the obligations imposed on gatekeepers under [the DMA] and their uniform and effective application in the internal market."[5]

Furthermore, the Decree-Law No 104 of 10 August 2023, converted with amendments by Law No. 136 of 9 October 2023 (so called "Asset Decree"), attributed to the ICA new powers to adopt, at the outcome of market enquiries under Article 12 of the Antitrust Law " any structural or behavioral measure proportionate […] in order to eliminate distortions of competition," in compliance with the principles of the European Union's legal system and after consulting the market,[6] as a part of a series of provisions on the protection of competition and consumers in the aviation sector.

[4] See, in particular, V. Bachelet, *Il rafforzamento del contrasto agli abusi di posizione "non dominante" delle piattaforme digitali*, cit., p. 76 ff.; M. Libertini, *La presunzione di dipendenza economica nei mercati digitali*, cit., p. 13 ff.

[5] Recital 10.

[6] See Article 1(5) of Decree-Law No 104 of 10 August 2023, converted with amendments by Law No. 136 of 9 October 2023.

In a note on November 2023, the ICA had requested an opinion from the Council of State ("CoS") as to the scope of application of these powers, asking, in particular, whether they should be considered limited to a particular sector or product area or could be applied without restrictions.[7]

With its opinion[8] published on 29 January 2024, the CoS ruled on the scope of application of the new powers of the Authority, granted by the Asset Decree, affirming that they relates to every sector of the market that needs very incisive corrective measures – both behavioural and structural – even outside the traditional investigation procedures.

Subsequently, on 13 May 2024, the Authority adopted a Communication on the procedural rules for the exercise of the powers introduced by the Decree, in the context of fact-finding investigations (hereinafter the Communication).[9]

In defining the structure of the relevant procedure, the Communication distinguished between a first phase, which substantially follows the typical fact-finding investigation always carried out by the ICA, and a second phase, of a remedial nature, aimed at identifying necessary and proportionate measures to eliminate any distortions of competition identified in the first phase.

The adoption of remedial measures will be "primarily oriented" to cases where consumer detriment is "significant and persistent."[10]

The most recent doctrine defines the new rules as "new competition tool" and divides on their very nature.

Most of scholars identify it not as a *lex specialis* but as a subsidiary system rule that complements Articles 101 and 102 TFEU and Articles 2 and 3 of Italian Antitrust Law, introducing a paradigm shift: the rule allows binding intervention on undertakings even in the absence of the legal prerequisites of Articles 101 and 102 TFEU.

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[7] By note prot. 97737 of 23 November 2023, the Italian Competition Authority requested an opinion on the scope of application of Article 1, paragraphs 5 and 6, of Decree-Law No. 104 of 10 August 2023 (containing "Urgent provisions for the protection of users, in the field of economic and financial activities and strategic investments"), as converted by Law 9 October 2023, No. 136.

[8] Cons. of State, Sec. First, Plenary Meeting, deal no. 01388/2023. https://portali.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza?nodeRef=&schema=consul&nrg=202301388&nomeFile=202400061_27.html&subDir=Provvedimenti

[9] Communication on the application of article 1, paragraph 5, of decree-law no. 104 of 10 august 2023, converted with amendments by law no. 136 of 9 october 2023 provision no. 31190.

[10] In fact, paragraph 15 of the Communication states that "Where the Authority considers that the commitments are appropriate to eliminate the distortions or obstacles to competition indicated in the DRC, it shall make them binding in the measure closing the fact-finding investigation, after having obtained the opinion of the sectoral regulatory authority competent for the markets or sectors concerned by the fact-finding investigation, indicating to the latter a deadline for replying. If it deems it appropriate, the Authority may acquire the observations of other public entities."

A second doctrinal strand has pointed out that it would not be a classic repressive instrument since it would not be aimed at repressing unlawful conduct, but lawful behaviour, and does not provide for sanctioning powers: the possible remedial consequence is limited to a warning for the future, representing a sort of penalty without the market offence.

The similarities with the *ex ante* regulatory approach of sectoral regulators lead the nature of this instrument back to that of non-sector-specific regulation.

Section 3: Vertical and horizontal public enforcement-related cooperation under DSA/DMA

Question 1

As it is well known, the EU Commission has adopted on 20.10.23 a Recommendation on coordinating responses to incidents in particular arising from the dissemination of illegal content, ahead of the full entry into application of the DSA. Following this Recommendation AGCOM, signed a collaboration agreement with the Commission whose aim is to define a procedural framework to exchange information, data, methodologies, technical system and tool to help the European Commission to identify systemic risks in which VLOPs and VLOSEs may incur.

As for the relation with other national Digital services coordinator, AGCOM started to attend the meetings of the European Board for Digital services organized by the European Commission.

Question 2

For more in general, on the gap in Italy in adoption of rules on private enforcement of the DMA and the absence of cases, see Section 4.

However, the principle of coordination between the Commission and National Courts is enshrined in the system. It was already envisaged by the directly applicable provisions contained in Articles 15 and 16 of Regulation (EC) No 1/2003 (hereinafter also referred as "Regulation 1/2003"), titled "Cooperation with national courts" and "Uniform application of Community competition law" respectively.[11]

[11] REGULATION (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty. Article 15 "Cooperation with national courts."

More in particular, Article 15 para. 1 and para. 3 of Regulation 1/2003 expressly provided the possibility for National Competition Authorities (hereinafter, "NCAs") or the European Commission to act on the Court's request or *ex officio* as *amicus curiae* in private antitrust litigation.

This mechanism, rarely applied in the past, has been revitalized by the ICA.[12]

Within Article 39 of the DMA, directly applicable rules on Cooperation with National Courts, in particular, para. 1[13] expressly provides that national courts may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the DMA and paragraph 3 that the Commission, acting on its own initiative, may submit written observations to national courts, as well as, with the permission of the court in question, it may also make oral observations.

Furthermore, paragraph 4 adds that for the purpose of the preparation of their observations only, the Commission may request the relevant national court to transmit or ensure the transmission of any documents necessary for the assessment of the case.

Therefore, the *amicus curiae* mechanism, in its articulations, has been extended by the European legislator also to the DMA private litigation, and, although it has not been frequently applied, the Italian Courts are already familiar with it, as demonstrated by the quoted case.

In addition, a very special *amicus curiae* intervention is set forth by Article 17 of the Directive 2014/104/EU of the European Parliament and of the Council ("Directive"), implemented by Article 14, para. 3 of the Legislative Decree no. 3/2017 (hereinafter also referred as the "Legislative Decree"), and is that contained in the chapter dedicated to the "Quantification of harm."

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[12] Notably, on 6th of April 2017, the District Court of Rome, on the basis of Law no. 21/1992, granted interim measures aimed at blocking UberBlack services in Italy. Thus, the Italian Competition Authority decided to intervene in the UberBlack appeal considering its previous advisory activity on the issues at stake. The decision was reversed on the 26th of May, taking also into account in the Court's reasoning the position held by the Italian Antitrust Authority on these issues. It is interesting to consider that in this case the Italian judges highlighted that: "The act by which the Authority submits written observations to the Court fulfils the need for cooperation between the Authority and the Court; it complies with the protection of a public interest and doesn't support any Party of the proceedings." The Court deemed that both the submission of written observations and the debate in the hearing doesn't require the obligation of technical representation. For a complete view about the case: DESANA, RIGANTI, *Über Alles or not? the Italian Perspective on the "Uber Case*," 2020. https://link.springer.com/chapter/10.1007/978-981-15-7035-3

[13] Article 39, par. 1 provides: "1. In proceedings for the application of this Regulation, national courts may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of this Regulation."

It provides that a Competition Authority may, upon request of National Court and subject to the discretion of the Competition Authority, assist the national court in the calculation of the harm, in the event that such assistance is appropriate.[14]

This provision is consistent with the Guidance Document and its Practical guide on the quantification of harm – that is, a non-binding recommendation directed to courts which provides guidance criteria within the different econometric models to be applied in the quantification of harm.
It has already been applied in some cases.[15]

Although this declination of the *amicus curiae* intervention has not been specifically provided by Article 39, the analogies between damages actions following antitrust and DMA enforcement, with particular reference to the asymmetric position of the parties, makes it appropriate the application of this cooperation mechanism in the DMA private litigation. Furthermore the mechanisms of cooperation envisaged by the Directive are especially relevant for the access to the evidence phase.

First, Article 6 para. 7 of the Directive – implemented in Italy by Article 4, para. 5, of the Legislative Decree – allows the claimant to present a reasoned request that a national court access the evidence referred to in points (a) or (b) of paragraph 6.

In such assessment, National Courts may request assistance only from the competent Competition Authority.[16]

[14] Article 17 "Quantification of harm" provides: "1. Member States shall ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. Member States shall ensure that the national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available. 2. It shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption. 3. Member States shall ensure that, in proceedings relating to an action for damages, a national competition authority may, upon request of a national court, assist that national court with respect to the determination of the quantum of damages where that national competition authority considers such assistance to be appropriate."

[15] AGCM A428C, 26310, 21 December 2016.

[16] Article 6 "Disclosure of evidence included in the file of a competition authority" disposes: "1. Member States shall ensure that, for the purpose of actions for damages, where national courts order the disclosure of evidence included in the file of a competition authority, this article applies in addition to article 5. 2. This article is without prejudice to the rules and practices on public access to documents under Regulation (EC) No 1049/2001. 3. This article is without prejudice to the rules and practices under Union or national law on the protection of internal documents of competition authorities and of correspondence between competition authorities. 4. When assessing, in accordance with article 5(3), the proportionality of an order to disclose information, national courts shall, in addition, consider the following: (a) whether the request has been formulated specifically with regard to the nature, subject matter or contents of documents submitted to a competition authority

Secondly, Article 6, para. 11 of the Directive – implemented by Article 4, para. 7, of the Legislative Decree – establishes the right of competition authorities to submit observations to the national court before which a disclosure order is sought.

This mechanism represents a declination of the faculty to present observations as *amicus curiae* already provided by Art. 15 of Regulation 1/2003 to which reference is made at recital 30 of the Directive.[17]

Article 39 of the DMA does not provide for mechanisms of cooperation related to the collection of evidence: however, the already underlined analogies between the two private litigations makes it appropriate to extend the application of the two mentioned norms to actions for compensation of damages caused by the DMA infringement.

Article 16 is an important mechanism of coordination already envisaged by Regulation 1/2003. Indeed, this article provides for the binding effect of the decision adopted by the European Commission towards national courts and NCAs.[18]

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or held in the file thereof, rather than by a non-specific application concerning documents submitted to a competition authority; (b) whether the party requesting disclosure is doing so in relation to an action for damages before a national court; and (c) in relation to paragraphs 5 and 10, or upon request of a competition authority pursuant to paragraph 11, the need to safeguard the effectiveness of the public enforcement of competition law. 5. National courts may order the disclosure of the following categories of evidence only after a competition authority, by adopting a decision or otherwise, has closed its proceedings: (a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority; (b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and (c) settlement submissions that have been withdrawn. 6. Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence: (a) leniency statements; and (b) settlement submissions. 7. A claimant may present a reasoned request that a national court access the evidence referred to in point (a) or (b) of paragraph 6 for the sole purpose of ensuring that their contents correspond to the definitions in points (16) and (18) of article 2. In that assessment, national courts may request assistance only from the competent competition authority. The authors of the evidence in question may also have the possibility to be heard. In no case shall the national court permit other parties or third parties access to that evidence. 8. If only parts of the evidence requested are covered by paragraph 6, the remaining parts thereof shall, depending on the category under which they fall, be released in accordance with the relevant paragraphs of this article. 9. The disclosure of evidence in the file of a competition authority that does not fall into any of the categories listed in this article may be ordered in actions for damages at any time, without prejudice to this article. 10. Member States shall ensure that national courts request the disclosure from a competition authority of evidence included in its file only where no party or third party is reasonably able to provide that evidence. 11. To the extent that a competition authority is willing to state its views on the proportionality of disclosure requests, it may, acting on its own initiative, submit observations to the national court before which a disclosure order is sought."

[17] See note above.

[18] This principle whereby national courts should avoid rulings that conflict with Commission decisions finds its origins in the Delimitis (Case C-234/89) ruling, in which the Court of Justice underlined that the Commission "is responsible for defining and implementing the orientation

As for article 16, this primacy accorded by case-law to administrative proceedings over national court proceedings had no precedent in our legal system and raised some criticisms of its incompatibility with the Italian Constitution.

In response to these criticisms, it has been argued that article 16 does not impose a positive binding effect but a "negative duty of abstention" on national courts, which retain the possibility to have recourse to a preliminary ruling on validity under article 267 TFEU and the Courts are, therefore, "positively" bound only by decisions of the EU courts.

However, what is important to underline is that Italian Courts seem to have ignored this debate by accepting article 16 of Regulation 1/2003 as a superior rule in antitrust enforcement without raising constitutional issues.[19]

Article 9 of the Directive, implemented by article 7 of the Legislative Decree, provides that (i) a final infringement decision of a national competition authority should have a "binding effect" in follow-on proceedings before the courts in the same Member State where the infringement has been ascertained and that (ii) before courts of other Member States, it should constitute at least *prima facie* evidence of such infringement.[20]

Unlike article 16 of Regulation 1/2003, which refers to the Commission decision,[21] even if this decision has not been already subject to judicial review, article 9 of the Directive refers to an infringement decision irrefutably established by a final decision of an NCA or by a review court; it applies only when

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of Community competition policy" and that, in a system of parallel competences, in order not to breach the general principle of legal certainty, national courts must avoid issuing decisions that would conflict with a decision contemplated by the Commission. See for full decision: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61989CJ0234&from=IT

[19] In such respect see European Court of Justice – Case C–508/11 – Eni S.p.A. v Commission, Judgment of 8 May 2013.

[20] Article 9 of the Directive "Effect of national decisions" provides: "1. Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under article 101 or 102 TFEU or under national competition law. 2. Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties. 3. This article is without prejudice to the rights and obligations of national courts under article 267 TFEU."

[21] The Tribunal of Milan the Court, in the recent case no. 9759/2018, affirmed that decision which have this binding effect are also those decisions which conclude the proceeding through a settlement agreement with the parties (possibility provided for by Regulation no. 622/2008). According to the Tribunal such decisions have indeed a decisory nature and can be appealed by the parties involved.

the administrative decision becomes *res judicata,* even if the "*res judicata* effect" stems from the fact that the decision has not been appealed.[22]

That said, the scope of article 9 of the Directive and therefore also of article 7 of the Legislative Decree has been largely debated.[23]

However it also important to recall that article 7 of the Legislative Decree has a special and derogatory nature within the Italian legal system, but is not an exceptional norm, because, despite the differences that I have underlined, it finds its relevant precedent in article 16 of Regulation 1/2003.

This clearly carries important consequences in terms of interpretation of the norm and might open the doors to its applicability also in private enforcement following the DMA violation.

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[22] Before the Directive, in Italy, as a result of a series of damage claims originating from a decision adopted by the Italian Competition Authority (ICA), it is now settled caselaw that findings in ICA decisions have the status of "privileged evidence" of the facts assessed therein, which means that the findings of the ICA are presumed to be true. The presumption is in principle rebuttable, but is one that deserves very high consideration by the court. The scope of the presumption was first limited by the Italian Supreme Court to infringement findings and later the scope was progressively extended to all assessments and findings contained in a ICA decision.

[23] The literature is very wide, see, for example: MUSCOLO*, Il nuovo assetto istituzionale del private antitrust enforcement in Italia e nell'Unione europea*, in BENNACCHIO, CARPAGNANO, *L'applicazione delle regole di Concorrenza in Italia e nell'Unione europea,* Naples, 2018; BRUZZONE, SAIJA, *Private e public enforcement dopo il recepimento della direttiva. Più di un aggiustamento al margine? (Private and Public Enforcement in the Aftermath of the Transposition of the Damages Directive)*, *Mercato concorrenza regole*, 1/2017; COMOGLIO, *Note a una prima lettura del d.lgs. n. 3 del 2017. Novità processuali e parziali inadeguatezze in tema di danno antitrust*, *Riv. trim. dir. e proc. civ.*, 3/2017; CHIEPPA, *Il recepimento in Italia della Dir. 2014/104/UE e la prospettiva dell'AGCM*, *Dir. Ind*., 4/2016; RORDORF, *Il ruolo del giudice e quello dell'Autorità nazionale della concorrenza e del mercato nel risarcimento del danno antitrust*, *Società*, 7/2014; SIRAGUSA, *L'effetto delle decisioni delle ANC nei giudizi per il risarcimento del danno: la proposta della Commissione e il suo impatto nell'ordinamento italiano*, *Concorrenza e Mercato*, 1/2014; FRIGNANI, *La difesa disarmata nelle cause follow-on per danno antitrust*, *Mercato Concorrenza e Regole*, 3/2013; GIUSSANI, *Direttiva e principi del processo civile italiano*, *AIDA*, 1/2015; CAIAZZO, *L'azione risarcitoria l'onere della prova gli strumenti processuali* ai sensi del diritto italiano, in PACE, *Dizionario sistematico del Diritto della Concorrenza*, Naples, 2013; PARDOLESI, *Il Libro Bianco sul danno antitrust: l'anno che verrà*, *Mercato Concorrenza e Regole*, 2/2008. In foreign literature, see: MARCOS, RODGER, *Promotion And Harmonization Of Antitrust Damages Claims By Directive Eu/2014/104?*, in RODGER, FERRO, MARCOS, *The EU Antitrust Damages Directive: Transposition in the Member States*, Oxford, 2018; WILS, *Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future Wouter*, *World Competition: Law and Economics Review*, 3/2016; WRIGHT, *The Ambit of Judicial Competence After the EU Antitrust Damages Directive, Legal Issues of Economic Integration*, 2016; JONES, *Private Enforcement of EU Competition Law: A Comparison with, and Lessons from, the US*, in BERGSTROM, IACOVIDES, *Harmonising EU Competition Litigation: The New Directive and Beyond*, London, 2016; NAZZINI, *The effect of decisions by Competition Authorities in the European Union*, *Italian Antitrust Review*, 2/2015; PEYER, *The Antitrust Damages Directive – much ado about nothing? in Litigation and Arbitration, EU Competition Law*, Chentelham, 2015; FRESE, *Harmonisation of Antitrust Damages Procedures in the EU and the Binding Effect of Administrative Decision*, *Review of European Administrative Law*, 7/2015; RIFFAULT, *The binding effect of National Competition Authorities decisions – Observations on Article 9 of the Commission proposal of directive on antitrust damages*, *Concorrenza e Mercato*, 3/2014.

The extension of binding effects of the Commission's decision in the DMA application is expected to be one of the main open issues in follow-on actions in private litigation.

Question 3

The answer to this question is intertwined with the last part of the answer to Question 1 of Section 3. The cases on digital markets recently decided or pending before the ICA (see below) that may interfere with the DMA application, also show up the areas in which the NCA in its enforcement action more frequently detects an issue of no compliance with the DMA that shall be transferred to the EC in the framework of cooperation mechanisms.

The already mentioned challenges related to such interference may affect also the phase of the exchange of information and the issue shall be handled in the cooperation fora quoted above.

The above-mentioned cases show some possible areas of interference between antitrust enforcement and the DMA regulation.

The Amazon Case – A528

In December 2021, the ICA fined Amazon over EUR 1 billion for abusing its dominant position in e-commerce to unfairly promote its own logistics services, specifically Fulfillment by Amazon (FBA). The ICA found that Amazon's practices, which tied access to essential platform features to the use of FBA, harmed third-party sellers and distorted competition in both e-commerce and logistics markets.

The case is relevant to the Digital Markets Act (DMA), particularly Article 6(5) which addresses "self-preferencing." This provision prohibits gatekeepers from favouring their own services over those of third parties. The DMA also requires gatekeepers to apply fair and transparent conditions to avoid harming competitors.

However, the case is a pure self-preferencing one; the question remains whether these rules will adequately cover hybrid practices that mix exclusionary and exploitative elements. The ongoing interpretation and implementation of these regulations will determine how effectively they address such practices.[24]

[24] By resolution n. 17965 dated 15 November 2023, the Regional Administrative Court (TAR), before which the fine has been challenged, has suspended the judgment pending the European Court of Justice's ruling on the question of the time limit applicable to the commencement of the investigation phase for proceedings within the jurisdiction of the ICA.

The Google Consumer Case – A552

On 14 July 2022, the ACI launched an investigation into Google for allegedly abusing its dominant position by restricting data portability to other operators. The issue is related to Article 20 of Regulation (EU) 2016/679 (GDPR), which guarantees users the right to transfer their data between online services, thereby promoting competition and improving user control.

In response to the ICA's investigation, Google proposed three commitments that were deemed sufficient by the ICA to address the competition concerns, as they simplify data export procedures and improve interoperability.

The case highlights the importance of the DMA, which in Article 5.2 contains provisions against self-reference and ensures fair data processing practices, in line with the issues raised by ICA in this case and the commitments proposed by Google to improve data export processes.

The Booking Case – A558

Another particularly relevant case in the context of the DMA is the Booking case, initiated by the ICA on potential anti-competitive practices by Booking.com, a major player in the online travel agency market.

The ICA's investigation focused on the price parity clauses applied by Booking.com. These clauses required hotels to maintain the same prices and conditions on their websites as Booking.com. The ICA expressed concern that these practices limited hotels' pricing flexibility, potentially leading to inflated prices and fewer choices for consumers, contrary to the principles of fair competition that the DMA seeks to promote.

In response to the ICA's investigation, Booking.com committed to addressing the problems identified. To date, Booking's commitments are still subject to acceptance by the ICA.

Nevertheless, the Booking A558 case underscores the principles outlined in the DMA, which aims to create a level playing field in digital markets and contributes to a broader regulatory framework aimed at empowering consumers and promoting fair competition.

Section 4: Private enforcement of DMA/DSA

Question 1

Until now no cases of private litigation on the DMA have been brought by private parties before Italian Courts, neither follow on nor stand alone actions.

However the gap in adoption of specific rules on the private enforcement of the DMA-in particular on the point of the competence of specialised Court to deal with damages actions for the DMA infringement (see point 4) results in more difficulties also in detecting pending cases.

Question 2

It is possible to envisage that the main causes of action under DSA will be two: (1) actions directed to oblige the intermediary service provider to comply with the DSA obligations; (2) actions directed to recover the damage caused by failure to comply with the DSA obligation. These two actions may be brought jointly before the national judge.

Most probably there will be follow up actions, that is to say actions brought by private parties following an assessment by the public supervisory authority regarding a DSA violation. In particular, while an individual action can be always foreseen (for instance in case of defamation), it may be possible that the more relevant actions will be lodged by association or organization whose aim is to protect class rights. To this regard, Article 840 bis of the Italian civil procedure code, recently introduced, provides that a non-profit organisation or association whose statutory objectives include the protection of homogeneous individual rights, or any member of a class may bring an action against the author of the infringing conduct for the establishment of the liability and for an order to pay damages and restitution. These class action can be instituted only provided that the author of the infringement is an undertaking or an entity managing public services.

Question 3

Italy is currently witnessing an enhanced development of private antitrust litigation, although antitrust enforcement is still centered on public enforcement.[25] In particular, the contribution of stand-alone cases to the overall volume of private antitrust damages litigation has been relatively small.

[25] See ASHURST, *Study on the conditions of clamais for damages in case of infrigiment of EC antitrust rules*: https://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf

Indeed in the continental jurisdictions the systems of competition law enforcement still seem geared towards achieving deterrence more through the initiative of public enforcers, rather than compensating private plaintiffs.

However the goal of the Directive and of the Legislative Decree is to increase the level of the overall effectiveness of antitrust enforcement, by making antitrust damages actions more effective in the EU and in Italy.[26]

What has been envisaged is a two-pillar system, where public and private enforcement work as complementary tools. At the same time, the Directive is intended to prevent possible abuses of litigation and avoid undermining the effectiveness of public enforcement.[27]

As private enforcement related to the DMA is not yet regulated in Italy on the one hand (see Question 4) and actions for compensation of damages caused by the DMA infringement have not yet been brought before Italian Courts on the other hand (see Question 1), at this stage it seems at least incertain to foresee future developments in the DMA private litigation and to envisage a trend analogue to the already developed antitrust private litigation.

Question 4

It must be noted that the Italian legislator has remained completely silent on private enforcement of the DMA.

First of all, no provision has been adopted on the preliminary issue of competence when private parties bring actions against the gatekeepers designated under the DMA to seek injunctions, interim measures, and/or compensation for damages.

In particular, the legislator did not include a provision like the one in the Legislative Decree which concentrates the competence for the private enforcement of competition law (Articles 101 and 102 TFEU, as well as Articles 2 and 3 of national antitrust law) on only three Courts (and Courts of Appeal) for Enterprises in Milan, Rome and Naples.

The silence of the Italian legislator in this respect has drawn criticism, particularly because it could create inconsistencies between the private enforcement

[26] DIRECTIVE 2014/104/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 November 2014 *on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=IT*

[27] EUROPEAN COMMISSION, *White Paper on Damages actions for breach of the EC antitrust rules*, COM (2008) 165 of 2 April 2008. For an excellent summary and analysis of the various specific proposals contained in this White Paper, see BULST, *Of Arms and Armour – The European Commission's White Paper on Damages Actions for Breach of EC Antitrust Law,* Bucerius Law Journal 81, 2008.

of the DMA, on one side, and of competition law on the other, despite the analogies between the two sets of rules.

It is worth noting that the Associazione Italiana Giuristi Europei (AIGE) has taken an initiative on the matter, addressing all competent public institutions with a request to represent the opportunity to adopt measures aimed at including among the disputes falling within the exclusive jurisdiction of the specialized sections of Milan, Rome and Naples, also those relating to the infringement of the DMA. AIGE has argued that, like those in competition matters, cases relating to the DMA present a high degree of technicality and economic relevance.

Therefore, even if it cannot be excluded that several disputes may fall within the jurisdiction of the specialised enterprise sections already on the basis of the current provisions contained in Article 3 of Legislative Decree, it appears necessary, also for reasons of legal certainty and systematic consistency, to entrust their decision to judges who have already matured a specific professionalism in the related matter of competition.

In addition, the concentration of expertise and the advantage of the opportunity of the specialized judges to dialogue with European colleagues in the network of the Association of European Competition Law Judges (AECLJ) would minimise the risk of clashes in case law and the consequent fragmentation of markets, and would speed up the time taken to decide disputes.

The resulting impact would be positive in terms of the smooth functioning of the economy's justice system and consequently increase the competitiveness of the companies involved.

More uncertain is the section that will be competent for actions based on DSA.

Question 5

It is possible for civil society organisations to intervene in an ongoing procedure through the mechanism of the voluntary intervention ("Intervento volontario di terzo" in accordance with Article 105 of the Code of Civil Procedure), as repeatedly affirmed by the jurisprudence.

Section 5: General questions

Question 1

No specific national rules have been adopted to ensure that the injunctions judicial authorities may issue against intermediary services providers comply

with Articles 9 and 10 of the DSA. However, AGCOM appears to comply with the requirements of these Articles when issuing injunctions (see the injunctions against Google Ireland Limited in Delibera n. 50/24/CONS).

Question 2

I am not aware of any services of legal representatives being provided in Italy according to Article 13 DSA.

Question 3

As explained above, the regulation on the submission of complaints under Article 53 is still under internal review. No details regarding its scope of application are available insofar.

Question 4

The adoption of the DMA and DSA implementing regulation was not subject to any substantial political controversy. However, as for the DSA, from a formal point of view the utilization of an emergency instrument such as the Decreto Legge, have been criticised.

Question 5

AGCOM's procedural rules for the certification of out-of-court dispute resolution bodies *under Article 21 DSA* (Delibera 282/24/CONS) mention the possibility that an applicant body may already be certified as an ADR body in another sector, such as consumer law. The list of such entities is maintained by the Italian Ministry of Enterprises, which also establishes the procedure for the creation of Joint Conciliation Committees. Consequently, it is possible that these types of entities may also be accredited for the implementation of the Digital Services Act. There is no knowledge to date of any initiatives supporting the creation of trusted flaggers, DMA/DSA-focused consumer organizations, or data access requests by researchers.

Question 6

Not per our knowledge.

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Section 1: National institutional set-up

Question 1

According to Article 49 of the Digital Services Act (hereinafter – DSA), Member States are mandated to appoint one or more competent authorities with the responsibility for overseeing intermediary service providers and ensuring the enforcement of the DSA. Among these authorities, each Member State is required to designate one as the Digital Services Coordinator, who shall bear primary responsibility for all aspects of supervision and enforcement of the DSA within that Member State. This Article further stipulates that the Digital Services Coordinator shall oversee all matters related to the monitoring and enforcement of the DSA, except in instances where specific responsibilities have been delegated to other competent authorities by the Member State. Because of the latter in the Republic of Latvia the Law on Information Society Services[1] has been amended to align with the requirements of the DSA. These amendments were necessary to comply with the DSA's provisions, including, but not limited to, the designation of competent authorities and the establishment of a Digital Services Coordinator. As a result, the Consumer Rights Protection Centre (hereinafter – CRPC) has been officially designated as the competent authority and the coordinator for digital services, ensuring that the Republic of Latvia meets the DSA's regulatory framework.

Article 19[2] of the Law on Information Society Services sets out the tasks of CRPC in the application of the DSA. That is, to ensure full legal certainty, it is provided that the CRPC shall perform all the tasks assigned to the Digital Service Coordinator by the DSA, including monitoring the compliance of intermediary service providers with the obligations laid down in Articles 1, 2, 3, and 4 of Chapter III of the DSA.

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* The views expressed in this report are those of the authors and do not necessarily reflect the views of the Competition Council of the Republic of Latvia.

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[1] Available in English: https://likumi.lv/ta/en/en/id/96619-law-on-information-society-services

To ensure the consistent procedural application of the DSA, particularly because various authorities may engage in distinct proceedings (including administrative, criminal, and others), and to uphold the principle of *ne bis in idem* (prohibition of double jeopardy), recognizing that infringements of the DSA may be complex and interrelated, the Republic of Latvia has designated a single competent authority which also serve as the Digital Services Coordinator.

The Law on Information Society Services does not regulate in detail the cooperation between the Digital Service Coordinator and other authorities whose functions include supervision or other activities on matters (or who have expertise) concerning the DSA, leaving the format or scope of cooperation to the authorities themselves. This is to not create an overly prescriptive regulation, but rather to allow authorities to agree among themselves on a flexible and effective model for cooperation, depending on the situation.

Question 2

Article 50 of the DSA requires Member States to provide Digital Service Coordinators with the necessary resources to carry out their tasks, as well as ensure their independence and budgetary autonomy.

Moreover, Article 50 of the DSA establishes the complete independence of the Digital Service Coordinator. Article 50(3) of the DSA provides that the requirement of the complete independence of the Digital Service Coordinator is without prejudice to proportionate accountability requirements regarding the general activities of the Digital Services Coordinators, such as financial expenditure or reporting to national parliaments, provided that those requirements do not undermine the achievement of the objectives of the DSA.

The control of the legality of the real action and administrative acts issued by the CRPC (or otherwise known as the designated Digital Service Coordinator in the Republic of Latvia) will be ensured under Article 7(5) of the State Administration Structure Law.[2] By analogy with the provision in Article 4(4) of the Competition Law of the Republic of Latvia[3] (hereinafter – CL), it is provided that the competent authority for the DSA shall be financed to the extent necessary to ensure the independence of its function and the effective application of the DSA.

[2] Available in English: https://likumi.lv/ta/en/en/id/63545-state-administration-structure-law
[3] Available in English: https://likumi.lv/ta/en/en/id/54890-competition-law/

Article 51 of the DSA outlines the investigatory and enforcement powers granted to the Digital Services Coordinator. Under Article 51(5) of the DSA, it is stipulated that any measures implemented by Digital Services Coordinators in the execution of their powers must be effective, dissuasive, and proportionate. These measures should consider the nature, gravity, recurrence, and duration of the infringement or suspected infringement, as well as the economic, technical, and operational capacity of the intermediary service provider, where applicable.

Under Article 51(6) of the DSA, Member States are required to establish specific rules and procedures for exercising these powers and to ensure that such exercises are subject to adequate safeguards provided under national law. These safeguards must comply with the charter and the general principles of European Union law. Specifically, any measures taken must respect the right to private life and the rights of defense, including the right to be heard and access to the case file, as well as the right to an effective judicial remedy for all affected parties.

Article 51(1)(b) of the DSA provides, regarding on-site inspections, that the competent authorities have the right to carry out such inspections *per se* or after receiving the authorization of the court. Member States are therefore free to determine whether on-the-spot inspections are to be carried out with or without the authorization of the court.

In this respect, Article 19^{3}(1) of the Law on Information Society Services provides that the Digital Service Coordinator is entitled to carry out on-site inspections without authorization of the court, given that this right is not of a criminal nature. For example, consumer protection administrative proceedings on-site inspections are already carried out without authorization from the court, based on the voluntary cooperation of the undertaking. If a person interferes or resists the inspections carried out by the Digital Service Coordinator, the penalties set out in Article 19^{6}(2) of the Law on Information Society Services may be imposed accordingly. It is important to note that other investigatory rights are comprehensively detailed within the DSA and are directly applicable, without the need for additional implementation into the national legal framework.

It is noted that breaches of the DSA mainly take place online, are detected and can be monitored, and recorded (preserved as evidence) remotely using information technology tools. Thus, it is expected that on-site inspections could also be a relatively rare means of verification or merely an aid to evidence gathering. Therefore, it follows that there is no need to introduce a tool as severe as compulsory inspections requiring authorization of the court to

investigate breaches under the DSA, thus also avoiding imposing an additional burden on the courts and the national police force.

Article 19[3](2) of the Law on Information Society Services provides that the Digital Service Coordinator is entitled to request traffic data from an electronic communications undertaking. The request for such data is useful for the competent authority under the DSA to ascertain, for example, internet traffic from one Internet Protocol address to another and whether communication has taken place between devices.

Under Article 51(1)(a) of the DSA, the Digital Services Coordinator has the authority to request information from providers, as well as from any individuals or entities acting for purposes related to their trade, business, craft, or profession, who may reasonably possess information related to a suspected infringement of the DSA. As defined in Article 1(15) of the Electronic Communications Act, an electronic communications service is typically provided for remuneration and transmitted over an electronic communications network, including but not limited to internet access services.

Furthermore, electronic communications providers must supply recipients with Internet Protocol addresses necessary for devices to exchange data over the Internet. Consequently, these providers are responsible for the infrastructure enabling intermediary service providers to deliver their services. Therefore, electronic communications providers are clearly operating within the scope of the trade, business, craft, or profession of intermediary service providers, and the Digital Services Coordinator should be entitled to request the data they hold. Thus, in light of the latter, Article 19(2)[3] of the Law on Information Society Services provides that the Digital Service Coordinator is entitled to request traffic data from an electronic communications undertaking.

Although the right to request traffic data is not explicitly mentioned in the DSA, it derives from Section 51(1)(a) of the DSA. Accordingly, the inscription of this right in a national law cannot be replaced by a specific reference to a provision in the DSA. Traffic data shall be requested and transferred by the procedures laid down in the Electronic Communications law as well as in the Cabinet of Ministers' Regulation 04.10.2022. No. 616 on the Procedure for Transfer of Traffic Data Requested from an Electronic Communications Provider.[4] Given that there are other categories of data stored by electronic communications undertakings, it is necessary to specify in the regulatory act which specific categories of data the Digital Service Coordinator is entitled to receive. Accordingly, the inclusion of specific provisions in the Law on

[4] Available in Latvian: https://likumi.lv/ta/id/336146-elektronisko-sakaru-komersantam-pieprasito-noslodzes-datunodosanas-kartiba

Information Society Services ensures consistency with European Union law and provides clarity on the obligations of electronic communications service providers.

To ensure the effective performance of the duties of the Digital Services Coordinator and the competent authority under the DSA, six additional positions have been allocated to the CRPC within the current staffing structure of the Ministry of Economics of the Republic of Latvia.

Question 3

As per the information public today there is no data on the number of intermediary service providers in the Republic of Latvia, given that there is no special requirement for the latter to register on a specific database that would help to identify the number of the intermediary service providers. Moreover, it has been indicated in the annotation of the amended Law on Information Society Services that the number of intermediary service providers is constantly changing. According to the database of the CRPC, there are 123 electronic communications undertakings providing internet access services in the Republic of Latvia in the year of 2024. Thus, according to CRPC estimates, there are at least 300 different intermediary service providers in the Republic of Latvia in the year of 2024, but the number tends to increase.

Moreover, it has been indicated in the annotation of the amended Law on Information Society Services that there is no precise information on the size of these intermediary service providers and the types of services they provide. The DSA provides for a more lenient compliance regime and fewer obligations for micro and small entrepreneurs. According to the Central Statistical Bureau of the Republic of Latvia, in 2021 there were 1270 companies engaged in data processing, maintenance (and related activities), and operation of internet portals, 98% of them being micro or small enterprises.

Question 4

The Competition Council of the Republic of Latvia (hereinafter – CCL) is the sole authority in the Republic of Latvia with the power to investigate potential abuses of the Digital Markets Act (hereinafter – DMA) and support the European Commission in DMA enforcement. The Republic of Latvia has exercised the discretion granted by Article 38(7) of the DMA, enabling the CCL to independently investigate potential violations of Articles 5, 6, and 7 of the DMA.

Several amendments have been made in the CL. For example, Article 7(1) of the CL has been amended adding to the latter pt. 11, which stipulates that the CCL can exercise the rights established in DMA. To ensure that DMA can be applied in civil proceedings, the title of Chapter VI, as well as further articles of the CL have been amended. Article 20 of the CL states that DMA violations as well as claims for damages can be examined by the Economic Court of the Republic of Latvia. In this context, the latter court in its judgment is granted the right to impose obligations, such as prohibit actions that violate DMA. Further, Article 201 of the CL stipulates that the court that initiates a DMA violation case must send a true copy of the claim and the decision to initiate the case to the CCL within 7 days, and after preparing the full judgment, it must be sent to the CCL and the European Commission.

Article 21 of the CL has been amended to delineate the procedure for the compensation of damages. Specifically, it provides that any person who incurs damages because of a violation of the DMA is entitled to receive compensation, including lost profits and interest, to restore the person the same position as they would have been in if the DMA violation had not occurred. The CL specifies that (same as in cases of CL violations) if the number of damages resulting from a DMA violation cannot be determined, the court having the jurisdiction over the matter will determine the damages itself based on the evidence in the case.

The subsequent articles of the CL, specifically Articles 21^1 to 21^5 clarify issues related to compensation for damages concerning overcharges, compensation for claimants at different stages of the supply chain, settlement of dispute, limitation periods, and the gathering of evidence. Essentially, the amendments have been editorial, supplementing the law with references to the DMA, thereby establishing the procedure for compensation of damages almost exactly as in cases of CL violations.

Consequently, the title of Chapter VIII of the CL has also been changed regarding the application of DMA. Article 28 states that the CCL has the powers set out in Article 38(7) of the DMA to investigate and examine potential non-compliance with Articles 5, 6, and 7 of the Regulation. Article 28 of the CL outlines that the CCL also provides support to the European Commission per procedures established in the CL for investigating and examining potential violations. Finally, Article 33 of the CL stipulates that the CCL provides the necessary assistance to the European Commission in the preparation and execution of Article 23 of the DMA and addresses the involvement of the national police force if a market participant does not comply with procedural actions.

Investigative powers of the CCL are outlined in Article 9(5) pt. 4 of the CL, and they include the ability to request information, take statements, carry out announced or unannounced visits to business premises, and conduct dawn raids warranted by the court. As it is explained in the annotation to the draft amendments regarding the implementation of necessary provisions in the context of the DMA in the CL, the powers of the European Commission in Article 23 of the DMA are identical to the powers set out in the Council Regulation 16.12.2002. (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (hereinafter – Regulation 1/2003). Article 20 of Regulation 1/2003, among other things, defines the powers of the European Commission when investigating violations of Article 101 and Article 102 of the Treaty on the Functioning of the European Union (hereinafter – TFEU). Accordingly, Article 32 and Article 33 of the CL stipulate how the CCL obtains permission to carry out procedural actions like dawn raids if they are conducted within the framework of the European Commission's investigation, and what the powers of the CCL in such cases are. According to Article 33 of the CL, the fact that the European Commission conducts procedural actions under Articles 20 and 21 of Regulation 1/2003 does not limit the rights of the CCL to use its powers stipulated in Article 9 of the CL.

Procedural rights of the CCL according to Article 9 of the CL do not extend the scope of the DMA but rather correlate with Article 23(9) and Article 23(10) of the DMA. Both articles stipulate the obligation of the European Commission to obtain authorization from the Member State's court to carry out procedural actions if required by national law. It is in accordance with the DMA itself that, despite its direct applicability, the procedure according to the national law of each Member State must be respected considering their autonomy. The rights of the CCL stipulated in Article 9 of the CL, which are not explicitly cited in Article 23(2) of the DMA, ensure the execution of the powers outlined in the latter article.

Furthermore, Article 23(8) of the DMA also stipulates that, if necessary, the European Commission may request the assistance of law enforcement authorities in cases of non-cooperation (which means that in its spirit Article 23(8) of the DMA recognizes that procedural powers of Member States' competition authorities can be broader than those of the European Commission). Thus, in essence, Article 23(7) of the DMA sets out the minimum scope of powers for the national competition authority, but the powers granted to the national competition authority can be broader, which is the case for the CCL.

Overall, the incorporation of amendments regarding DMA has resulted in only a few modifications to the national competition regulation, as, for instance, the procedures for handling damage claims and the procedural powers for

enforcing the DMA remain consistent with those established for competition infringements.

Question 5

As previously stated, the Article 7(1), pt. 11 of the CL provides that the CCL is authorized to exercise the rights established in the DMA. The amendments to the CL further empower the CCL and the Economic Court of the Republic of Latvia with the requisite authority to address violations and adjudicate damage claims, as well as to assist the European Commission in its enforcement actions, if required (refer to Section 1, Question 4 for further details).

To comply with the requirements of the DMA, the budget allocated to the CCL under its budget sub-program is set at EUR 154,631.00 for the year 2024. The budget for 2025 is projected to be EUR 151,521.00, and for 2026 and subsequent years, EUR 151,621.00. Initially, the plan was to finance the fulfillment of new obligations through a 30% salary increase for two existing CCL employees. However, it was subsequently determined that the budget allocation would instead be used to fund two new staff positions, in anticipation of the increased capacity required to investigate gatekeepers as necessary and to provide support to the European Commission as required.

To ensure the legal framework for implementing new functions, the CCL has thoroughly revised job descriptions and internal regulations, thereby aligning them with the adjusted responsibilities, thus enhancing operational efficiency.

As outlined in the draft law annotation of the CL, previously requested funding (30% salary increase) envisaged only limited powers for the CCL, allowing the CCL to provide minimal support to the European Commission without the capacity to investigate DMA violations independently. The current amendments to the CL are intended to enhance the CCL's ability to independently conduct investigations into gatekeeper practices.

It is expected that the new functions will expand the responsibilities of the CCL and necessitate additional resources to effectively carry out these duties. During the inter-ministerial consultation process, the Ministry of Finance of the Republic of Latvia expressed objections regarding the need for additional funding. Specifically, the Ministry of Finance of the Republic of Latvia opposed advancing legislative proposals without secured financial resources, asserting that the proposed amendments should only proceed if the CCL can fulfill its obligations within the existing state budget and coordinate any additional staffing requirements with the State Chancellery of the Republic of

Latvia. Nevertheless, by the conclusion of the inter-ministerial process, the requisite funding was secured.

Question 6

As of the date of this report's submission, the CCL has not yet engaged in any activities under the DMA, as neither assistance from the European Commission has been requested nor has there been any indication necessitating the initiation of a formal investigation into a potential infringement of the DMA. However, the enforcement mechanisms and procedures are fully established, having been adopted by the Parliament of the Republic of Latvia on February 15, 2024, taking effect on March 14, 2024.

As of the preparation of this report, two staff members – an expert from the Analytical Department and the Chief Lawyer of the Legal Department of the CCL – have been designated to represent the CCL in the DMA High-Level Group and to participate in the Advisory Committee. These individuals possess specialized knowledge in digital markets, having closely followed the DMA adoption process and participated in various educational activities related to digital markets, including workshops and training sessions. Their prior enforcement experience and expertise are intended to ensure that the CCL is adequately prepared to handle future investigations or help the European Commission in the enforcement of the DMA if required.

Furthermore, since the year 2024, the CCL has established the position of Chief Expert of Digital Markets within the Analytical Department. The appointed expert, who possesses advanced knowledge of digital markets, provides general support to the institution on matters related to digital market research and participates in relevant investigations as needed. It is anticipated that this expert will also assist the CCL in matters of the DMA when required.

Furthermore, the monitoring of rapidly developing and innovative markets is one of the CCL's enforcement priorities for 2024. The strategy foresees to dedicate resources to study issues related to the DMA. This includes active cooperation with European Union Member States, the Organisation for Economic Co-operation and Development (hereinafter – OECD), and the European Commission. Within the cooperation with the OECD, the goal is to evaluate possibilities for further improvements in the existing regulations in the context of digital markets and the DMA if it is found necessary.

Section 2: Use of national legislative leeway under the DMA/DSA

Question 1

Member States are managing the pre-emption effects of the DSA by meticulously aligning their national legislation with the DSA's provisions to prevent conflicts and redundancies. The DSA creates a detailed legal framework at the European Union level that is directly applicable in all Member States, thereby constraining the ability of national laws to independently regulate the same areas.

In the Republic of Latvia, the legislator has concluded that amendments to Cabinet of Ministers 08.02.2022. Regulation No. 99 adopted "Procedures by which the Consumer Rights Protection Centre and the Health Inspectorate Restrict Access to an Online Interface in the Electronic Communications Network, Right to Use a Domain Name, and Access to an Online Interface or Content in an Information Society Service"[5] (hereinafter Regulation No. 99) shall be required. The Ministry of Economics of the Republic of Latvia is deemed to assess whether it shall be necessary to issue a new regulation replacing Regulation No. 99. The decision shall depend on the extent of the amendments required. Such a delegation to amend the already existing regulation or to issue a new regulation is necessary given that there are currently no uniform rules and procedures in the Republic of Latvia on how institutions restrict online resources.

Currently, the right to restrict online content is vested in the hands of CRPC (in the field of collective consumer protection and conformity assessment), the Health Inspectorate of the Republic of Latvia (in cases concerning collective consumer protection in the field of medicines), the Lotteries and Gambling Supervisory Inspection of the Republic of Latvia (in relation to unlicensed gambling websites) and the National Electronic Mass Media Council (in relation to unlicensed audiovisual retransmission websites), as set out in specialized laws.

In addition, the scope of the powers of the authorities to restrict online resources is expanding while at the same time, there are no uniform regulations on how the latter shall be exercised. In addition, there are no procedures for forwarding information on restriction decisions to the Digital Services Coordinator. Given that Regulation No. 99 describes in detail how this right is

[5] Available in English: https://likumi.lv/ta/en/en/id/329907-procedures-by-which-the-consumer-rights-protection-centre-and-the-health-inspectorate-restrict-access-to-an-online-interface-in-the-electronic-communications-network-right-to-use-a-domain-name-and-access-to-an-online-interface-or-content-in-an-information-society-service/

exercised by the CRPC the amendments will aim to extend its scope to all authorities with the right to restrict online content.

Question 2

The Republic of Latvia has undertaken a review of its existing content regulation framework to ensure it aligns with the standards set forth by the DSA. This process involves harmonizing national legislation concerning illegal content, such as hate speech, misinformation, and other prohibited materials, with the DSA's requirements. Such alignment aims to prevent regulatory conflicts and facilitate the effective enforcement of the DSA nationally.

In this context, Latvia has enacted legislative amendments to ensure that national regulations are compliant with the DSA. Notably, revisions have been made to the Law on Information Society Services to meet the DSA's stipulations, including the appointment of the CRPC as the designated authority for digital services.

Question 3

As of the date of this report, no specific legislative acts beyond the institutional implementation of the Digital Services Act (DSA) and the already mentioned amendments in the Law on Information Society Services have been identified as adopted on the national level in the Republic of Latvia.

Question 4

The Republic of Latvia is addressing the pre-emption effects of the DMA by carefully harmonizing its national legal framework with the DMA's provisions and adjusting it to ensure alignment with the EU-wide standards established by the regulation.

Necessary amendments to the CL concerning the DMA, such as those related to investigative powers, assistance to the European Commission, and damages, have primarily been editorial to extend the applicability of the CL as needed for the DMA's implementation. It is noteworthy that in the Republic of Latvia, there are no specific rules in the CL governing issues related to competition in digital markets, thus at this point, it is not foreseeable that the CL, in its current version, will come into conflict with DMA.

Notably, the CCL is currently working on amendments initiated in response to the development trends of digital markets. These amendments are based on the relatively new action plan of the government led by the Prime Minister of the Republic of Latvia. The plan includes a measure aiming to expand the powers of the CCL to monitor the abuse of economic dependence. The latter initiative stems from the findings of the CCL's market study of online platforms, in which the CCL concluded that Latvia's current regulatory framework is insufficient to address competition law violations in online platform operations. Also, practical experience of the CCL indicated that certain issues cannot be addressed solely through the prohibition of abuse of dominant position under the CL. In this regard, the proposed regulation would not only apply to companies operating in digital markets but would also allow the CCL to address competition restrictions in other sectors. The said amendments are planned to be developed based on the experiences of other countries with similar or comparable regulations. It should be noted that this work is in its very early stages.

Additionally, the Republic of Latvia has joined a collaborative project with the OECD, Lithuania, and Poland under the European Commission's Technical Support Instrument. This project aims to explore ways to enhance competition regulation in the Republic of Latvia, considering the development of digital markets and DMA. With the support of participating countries, the OECD will conduct the project, examining whether any digital platforms on the national scale do not meet the parameters of a gatekeeper under the DMA but can act as national gatekeepers. The project will provide recommendations on improving existing regulations regarding digital platforms and DMA, if necessary. The project was launched September 12, 2024.

Furthermore, the CCL regularly engages in educational activities, including webinars, and publishes up-to-date information on its website. A publication regarding the DMA has been released, explaining to the public its main aspects, applicability, and the roles of the CCL and the European Commission in implementing the regulation. Additionally, an educational webinar is planned in October 2024 to introduce businesses to DMA, and the related amendments to the CL, and to discuss digital markets in general.

Question 5

In addition to the amendments to the CL establishing the necessary framework for executing functions related to the DMA, amendments to the Civil Procedure Law (hereinafter – CPL) are also being prepared and are currently in the process of adoption. These amendments to the CPL are being advanced

as part of a broader legislative package that includes provisions unrelated to the DMA.

The purpose of the amendments to the CPL is to ensure the effective compensation for damages arising from violations of the DMA. These amendments were prepared by the Ministry of Economics of the Republic of Latvia in coordination with the previously discussed amendments to the CL to facilitate the implementation of the DMA. The amendments to the CPL were also reviewed and agreed upon within the CPL working group of the Ministry of Justice of the Republic of Latvia.

The proposed amendments to the CPL seek to establish the jurisdiction of the Economic Court of the Republic of Latvia over cases involving claims of violations of the DMA. These amendments also define the circumstances under which proceedings may be suspended, as well as the terms governing such suspensions, and expand the scope of damage claims related to the DMA.

The CPL amendments propose modifying Article 24(1^1) pt. 10 of the CPL, stipulating that the Economic Court of the Republic of Latvia has jurisdiction as a court of first instance to decide claims related to violations of DMA. This amendment is necessary considering the comprehensive nature of Article 24 of the CPL, which determines the competencies of the national court. Further, amendments to CPL Article 214 propose adding a new provision, which mandates courts to suspend proceedings if there is an ongoing investigation by the CCL or the European Commission regarding a breach of DMA. This aims to avoid situations where a national court issues a conflicting decision. Additionally, pt. 11 is planned to be added to Article 216 CPL, which specifies the duration of the suspension of proceedings.

Amendments in Chapter 30^6 (Article 250^{65} to Article 250^{70}) of the CPL extend the current regulations that govern the procedure for handling claims for damages resulting from violations of CL to also cover violations of DMA. Therefore, the purpose of these amendments is not only to promote legal certainty but also to strengthen prevention and ensure the full effectiveness of DMA by providing effective tools for the private sector to participate in penalizing breaches of DMA.

Latter amendments will not only ensure compensation for direct losses but also indirect harm. Amendments to Chapter 30^6 of the CPL will allow the court having jurisdiction to examine the claims for halting and prohibiting actions that violate DMA, taking action to prevent violations of the DMA, providing appropriate compensation for breaches of DMA, as well as claims covering several of the aforementioned issues.

The amendments to Article 250[65] of the CPL are designed to establish a clear procedure for handling cases related to violations of the DMA. The proposed changes to Article 250[66] of the CPL acknowledge that claims under the DMA are characterized by information asymmetry, similar to claims for damages arising from violations of CL, as the evidence required to calculate damages may predominantly reside with the infringer or third parties. Specifically, Article 250[66] of the CPL, in the context of the DMA, grants claimants the right to request that national courts, under certain conditions, compel the defendant or third parties, such as the CCL, to produce evidence relevant to the case. Additionally, amendments to Article 250[67](2) are proposed to impose limitations on requesting evidence from CCL materials about damage claims concerning DMA violations. Similarly, Article 250[68](2) of the CPL is to be amended to prevent evidence from being traded in the context of the DMA.

In the context of Article 250[69] of the CPL, proposed amendments stipulate that the decisions of national courts must not contradict European Commission decisions regarding a breach of DMA, thereby strengthening the uniform interpretation of DMA and enhancing legal certainty. The latter provision also simplifies the proof of claims for damages. Additionally, Article 250[69] of the CPL stresses that European Commission decisions in DMA cases, once final, do not need to be reassessed during the trial of a claim for damages. Finally, Article 250[70] of the CPL is planned to be extended to DMA cases, regulating liability for refusal to submit, destroy, or use unauthorized evidence in cases of damages for infringements of DMA.

As of the preparation of this report, the amendments to the CPL have been approved through inter-ministerial consultations and by the Cabinet of Ministers in July 2024, with no substantial objections raised. It is expected that during the autumn session of the Parliament of the Republic of Latvia, the legislative package containing the CPL amendments related to the DMA will advance through the adoption process. This process will include review and deliberation by parliamentary committees before a final vote.

Section 3: Vertical and horizontal public enforcement-related cooperation under DSA/DMA

Question 1

Article 19[2] of the Law on Information Society Services provides that the authorities whose functions include supervision of the DSA shall, at the request of the Digital Service Coordinator, provide the latter with an opinion if requested to do so. The latter is necessary given that certain obligations under Section 3

of the DSA concern areas such as data protection, political participation, protection of children and other groups in society and the protection of the public, combating disinformation and electoral processes, public security, public health, and other areas.

At the same time, Article 19^2 of the Law on Information Society Services provides that the authorities whose functions include supervision or other activities (with expertise) concerning the DSA shall, at the request of the Digital Service Coordinator, provide it with an opinion. While Article 54 of the State Administration Structure Law ensures that state administration bodies shall cooperate to perform their functions and tasks, Article 19^2(2) of the Law on Information Society Services provides such a provision by setting specific deadlines and procedures for submitting opinion. The latter is necessary because public institutions do not always respond to each other within a reasonable timeframe, while the timely receipt of an opinion from other institutions may be essential for the investigation of a breach of the DSA or for responding to other national Digital Service Coordinators or the European Commission within the timeframes set by the DSA.

Moreover, Article 19^2(2) of the Law on Information Society Services requires an authority in question to issue an opinion within the timeframe of one month to ensure effective and timely monitoring. This timeframe has been chosen in light of the timeframes set out in Articles 57, 58, and 59 of the DSA for the Digital Service Coordinator to respond to other Digital Service Coordinators of Member States or the European Commission. Depending on the nature of the request, these time limits are two or three months.

At the same time, Article 19^2(2) of Law on Information Society Services provides that public institutions may mutually agree on a longer timeframe for providing an opinion, considering that in certain cases opinions may be complex and that the institution providing the opinion may require additional investigation, verification, or other activities to provide it in a high-quality. In such a case, the Digital Service Coordinator may provide the information to the Digital Service Coordinators of other Member States or the European Commission that it holds at the time of the reply and inform them that additional information is being collected from other authorities.

As per DMA – throughout the adoption process of the latter, it was emphasized that coordinated action and resource sharing between the European Commission and national competition authorities will be crucial, to ensure that DMA procedures and competition cases can proceed without conflicts and with optimized resource allocation.

Representatives of the CCL are actively engaged in relevant DMA working groups within the European Competition Network (hereinafter – ECN), as well as participating in DMA Advisory committee and the high-level group. As per Article 40 of the DMA concerning participation in the high-level group, the Ministry of Economics of the Republic of Latvia convened a meeting on February 1, 2023, involving the CCL, the Public Utilities Commission, the Data State Inspectorate of the Republic of Latvia, CRPC, and the National Electronic Mass Media Council. The meeting aimed to familiarize these bodies with the DMA requirements and to discuss the necessity of establishing cooperative measures to oversee DMA implementation. The outcome of the meeting was that existing legislation in the Republic of Latvia already mandates inter-institutional cooperation as outlined in Article 54 of the State Administration Structure Law.

Moreover, Article 53 of the Administrative Procedure Law stipulates that, upon request by the relevant institution, other institutions are required to provide the necessary information or assistance, regardless of their hierarchical status. Consequently, it was also concluded in the aforementioned meeting that no further amendments to national legislation are necessary to establish a distinct cooperation mechanism for the supervision of the DMA.

As previously noted, the cooperation between the European Commission and the CCL is delineated in the CL. Amendments to Article 33 of the CL mandate that the CCL provide all necessary support to the European Commission in preparing and executing the activities specified in Article 23 of the DMA. Additionally, Article 33 of the CL stipulates that, if required, the national police force must assist the European Commission in instances where a market participant fails to comply with the procedural obligations outlined in Article 23(2) of the DMA. Furthermore, the CCL is obligated to undertake procedural actions at the request of the European Commission, following judicial authorization, in cases involving potential violations of the DMA.

To date, no potential challenges have been identified concerning the establishment of cooperation with the European Commission or other Member States regarding the DMA and the DSA. Concerning cooperation related to the DMA, the current workload associated with participation in working groups, advisory committees, and high-level groups is not considered burdensome for the CCL.

Moreover, the experts at the CCL possess the necessary expertise to engage in these activities. As of the date of this report, the European Commission has not yet solicited assistance or support from the CCL, which makes it difficult to anticipate potential challenges. Future difficulties might arise if

there is a significant increase in workload or if changes in the regulatory environment require additional resources or expertise. Nonetheless, the current framework and coordination within the ECN appear sufficient to facilitate cooperation both among national competent authorities and with the European Commission.

Question 2

The application of the DSA will be carried out through an administrative procedure. As per Article 19^{8}(1) of the Law on Information Society Services the decision of the Digital Services Coordinator may be appealed before the Administrative District Court following the procedure established in the Administrative Procedure Law.

Accordingly, the new Article 19^{8} of the Law on Information Society Services provides for an appeal procedure against the decision of the Digital Service Coordinator, modelled after Article 26^{18} of the Consumer Rights Protection Law.[6] The latter therefore provides a procedure for an appeal against decisions similar to the one in the field of collective consumer protection, including the prohibition of unfair commercial practices.

Decisions taken by the Digital Service Coordinator can only be appealed in Administrative Court and may not be challenged before the authority. The specific procedure is established for the following reasons. Firstly, Article 25(101) of the Consumer Rights Protection Law already provides that decisions of the CRPC may only be appealed in the procedure laid down in the Administrative Procedure Law (regardless of the field). Secondly, it is not useful to challenge CRPC decisions within the institution itself, as CRPC decisions are taken by its Director. Thirdly, historical practice has shown that appealing CRPC decisions to a higher authority has been ineffective, as it created additional burdens for the institutions and brought cases to court regardless of the institution of appeal. Lastly – such a procedure will ensure a higher degree of independence of the Digital Services Coordinator.

As per the interaction with the European Commission in the context of the DSA, it was concluded that there are no specific amendments necessary to current regulation nor there are any plans to amend it in the future. However, the European Commission has the right to submit written or oral observations to the courts of the Republic of Latvia in proceedings that involve the application of the DSA. This allows the European Commission to provide its interpretation of the DSA, ensuring that the court's decision aligns with

[6] Available in English: https://likumi.lv/ta/en/en/id/23309-consumer-rights-protection-law

European Union law and promotes uniform application of the DSA across Member States.

In addition to the latter and as per Article $19^2(1)$ of the Law on Information Society Services the CRPC shall carry out all the tasks of the Digital Services Coordinator under the DSA unless the European Commission has initiated proceedings for the same infringement against the provider of a very large online platform or very large online search engine within the meaning of Article 33 of the DSA.

Considering DMA, to ensure compliance with Article 39 of DMA regarding the submission of court judgments to the European Commission, Articles 20 and 201 of the CL stipulate that cases concerning breaches of DMA are to be heard by the Economic Court of the Republic of Latvia in accordance with civil procedure. Claims can be filed for violations of Articles 5, 6, and 7 of the DMA and the corresponding damages.

It is expected that claims against gatekeepers to the court will be brought by end-users and commercial users of core platform services. The CL specifies that, upon initiating a case in court for a breach of the DMA, the court must send a copy of the claim and the decision to initiate the case to the CCL within the timeframe of seven days. After the full judgment, the Economic Court of the Republic of Latvia must send a copy of it to the CCL and the European Commission within seven days. This procedure is designed after the procedure of how the European Commission is informed of breaches of European Union competition law.

The purpose of sending the decision to initiate the case to the CCL is to indirectly facilitate the European Commission's involvement in court proceedings regarding DMA violations. This ensures that the CCL is informed about DMA-related cases in national court before a relevant judgment is made. Consequently, where the CCL deems it necessary, the CCL can inform the European Commission about the potential need to get involved in a particular case by providing an opinion to the Economic Court of the Republic of Latvia under Articles 39(3) and 39(4) of the DMA.

The latter creates practical opportunities for the European Commission to engage in the process by providing its opinion at the first instance. This addition also promotes the more effective (and theoretically more frequent) use of the European Commission's rights under Articles 39(3) and 39(4) of the DMA. At the same time, the DMA does not provide for the CCL to give an opinion to the Economic Court of the Republic of Latvia in such cases, given that the European Commission is the sole enforcer of the

DMA, while national competition authorities, such as the CCL, have only a supporting role.

Further, proposed amendments to Article 214 of the CPL mandate the Economic Court of the Republic of Latvia to suspend proceedings if there is an ongoing investigation by the CCL or the European Commission regarding a breach of DMA. This aims to prevent situations where the court's decisions could conflict with ongoing investigations or decisions by the European Commission. The Economic Court of the Republic of Latvia will have to suspend proceedings regardless of whether the claimant has filed a claim to: (1) cease and prohibit actions that violate the DMA, (2) take actions that prevent violations of the DMA, (3) provide appropriate compensation for violations of the DMA, or (4) encompass multiple of the aforementioned claims.

The proposed amendments to the CPL recommend adding pt. 11 to Article 216 of the CPL, establishing the conditions for suspending proceedings. Specifically, the proceedings shall be suspended until the European Commission has issued a decision or until the European Commission or the CCL has otherwise concluded the investigation. This is necessary because, when suspending the assessment of a case, it is crucial to specify when the Economic Court of the Republic of Latvia should resume it. In light of the requirements outlined in Article 39(5) of the DMA, it would not be practical to resume the proceedings before the European Commission has rendered a decision or the investigation has otherwise concluded.

Amendments to Article 250^{69} of the CPL stipulate that the Economic Court of the Republic of Latvia's decisions must not be contradictory to European Commission decisions. This measure is intended to strengthen the uniform interpretation of DMA and enhance legal certainty and simplify the process of proving claims for damages. Additionally, Article 250^{69} of the CPL emphasizes that European Commission decisions, once final, do not need to be reassessed in claims for damages following DMA violation, considering that decisions regarding DMA violations will be made solely by the European Commission. The provision is also in alignment with the objectives of Directive 2014/104/EU (see recital 34) and Regulation 1/2003. This approach will ensure that businesses and consumers are not required to repeatedly establish the existence of a DMA violation in the Economic Court of the Republic of Latvia, but rather need only prove the damages and the causal link between the violation and the resulting harm. Such procedure is consistent with the process for claims for damages in cases of CL violations.

Question 3

The CCL is particularly well-positioned to monitor compliance with the DMA in specific areas, especially when local undertakings are involved. Given its close connection to local markets, the CCL is likely to be the first point of contact for companies facing practices that might violate the DMA.

As of the writing of this report, no complaints have been received in the latter regard. It is important to note that the CCL operates within a limited budget and capacity and therefore retains full discretion in determining the appropriate measures to take. The CCL is under no obligation to act on the information received. Consequently, compliance with the DMA will likely be monitored primarily in response to complaints, and only if the CCL's capacity allows for thorough monitoring of such non-compliance. Given these limitations, the CCL is unlikely to proactively monitor gatekeeper practices or conduct market surveillance to detect DMA violations at the national level. The CCL's role will likely be more reactive, focusing on specific cases brought to its attention and reporting relevant issues to the European Commission.

Section 4: Private enforcement of DMA/DSA

Question 1

As previously mentioned in the report, cases regarding DSA infringements shall be adjudicated in the national Administrative Court. As of the date of this report, there have been no actions brought by private or legal parties before the national Administrative Court to enforce the provisions of the DSA. Therefore, there is no relevant jurisprudence to discuss in this context.

As per the DMA – Article 20 of the CL stipulates that cases regarding violations of DMA are to be examined by the Economic Court of the Republic of Latvia in civil procedure. Claims can be brought for violations of Articles 5, 6, and 7 of the DMA, as well as for any resulting damages. It is anticipated that claims will be brought against gatekeepers by end-users and business users of core platform services. Accordingly, to establish a DMA violation, an individual may submit a complaint to the European Commission or the CCL and is also entitled to file a claim in the Economic Court of the Republic of Latvia, seeking both the establishment of the violation and compensation for damages. However, as of the time of this report, no actions have been initiated by private parties before the Economic Court of the Republic of Latvia concerning the DMA. Therefore, there is no relevant jurisprudence to discuss in this context.

Question 2

In the Republic of Latvia, private enforcement of the DSA is expected to primarily involve claims based on contractual breaches and non-compliance with consumer protection regulations. Businesses and consumers adversely affected by non-compliance with the DSA are likely to seek redress, potentially through collective actions to address widespread violations.

Nevertheless, private enforcement is subject to several challenges. Establishing causation or demonstrating a direct link between the non-compliance and the harm suffered, can be legally complex and may require extensive evidence. Additionally, obtaining such evidence can be challenging due to the technical complexity of digital services and the often cross-border nature of the digital services providers.

In addition to the latter, the Law on Information Society Services provides that a decision on interim relief may be taken by the Digital Service Coordinator based on a *prima facie* finding of an infringement where it has reason to believe that the recipients of the service provided by online intermediary are likely to suffer significant harm and urgent action therefore is required. An interim decision shall take effect from the moment of its notification and shall remain in force until a final decision has been taken. The decision on interim relief is a special legal institute, which is different from the interim regulation or interim decision provided for in the Administrative Procedure Law of the Republic of Latvia. It should be noted that in the Republic of Latvia interim relief as a special legal institute has already existed for more than 10 years in the field of protection of the collective interests of consumers, including the field of prohibition of unfair commercial practices.

Decisions on interim relief within the meaning of the Consumer Rights Protection Law are taken to prevent immediate harm to consumers, not to prevent harm that will occur at some point in the near or distant future. Thus, interim relief prevents the situation of consumers from deteriorating (e.g., increasing consumer detriment) if infringements continue. The interim relief is similar to an interim decision under the Administrative Procedure Law (which is not an administrative act and thus cannot be appealed), but at the same time, it ensures that a person can appeal against a decision taken by the CRPC, thus ensuring a higher level of protection of the person's rights.

Question 3

In the amendments to the CL related to DMA, it was anticipated that the workload of the Economic Court of the Republic of Latvia might increase, as this court is designated to handle claims including but not limited to DMA violations. However, at the time when these estimations were made, it was not possible to accurately predict the extent of the increase in workload of the Economic Court of the Republic of Latvia.

It is likely that individuals and legal entities will rarely initiate claims against the possible breach of DMA. Particularly actions might be brought in the abovementioned court in cases where no decision by the European Commission regarding DMA violation has been made. Regarding claims for damages, the caseload of the Economic Court of the Republic of Latvia in this category could directly correlate with the number of decisions issued by the European Commission. It is important to note that all gatekeepers subject to obligations under the DMA are large companies. Consequently, any potential violation – or a final decision by the European Commission – could result in many potential claimants in the Republic of Latvia, potentially reaching several thousand (though this figure might be significantly lower in some cases, particularly in relation to Article 42 of the DMA). It is anticipated that private redress will be brought against gatekeepers by end-users and business users of core platform services.

At the same time, it should be emphasized that to date in the Republic of Latvia, claimants have not been particularly active in seeking damages for CL infringements, which may indirectly suggest a similarly low level of activity in the future concerning claims for damages under the DMA. While theoretically the first claims for DMA violations could be filed as early as March 2024, it is likely that the increased workload of the Economic Court of the Republic of Latvia may not materialize until late 2024 or early 2025. At the time of writing this report, no actions have been brought by private parties before the Economic Court of the Republic of Latvia regarding DMA. Consequently, there is no relevant experience to describe in this context.

Question 4

As of the date of this report, there is no knowledge of specific national rules having been adopted or being planned for adoption concerning the private enforcement of the DSA. This includes the adoption of any rules inspired by the national framework transposing the antitrust Damages Directive.

The Republic of Latvia has incorporated the Damages Directive into its national law through amendments to the CPL. Specifically, these amendments introduced Chapter 30^{6} into the CPL, amended Article 21 of the CL, and added Articles 21^{1} to 21^{5} to the CL. In light of most recent amendments to the CL, the application of rules derived from the Damages Directive was extended to claims for damages arising under the DMA violations (where applicable). Therefore, it can be concluded that there are no specific rules exclusively for DMA-related damage claims. Instead, claims for damages under the DMA will follow the same procedural framework as those for CL violations.

Amendments to Articles 21 to 21^{5} of the CL (see answer to Section 1 question 4), related to damages in cases of DMA violations, have been developed based on the procedure for claiming damages in cases of CL violations. As rights to request damages do not directly arise from the provision under the DMA, they have been designed as analogs to the rules in the Damages Directive. DMA does not prevent Member States from introducing such regulations, and thus, Member States have the discretion to incorporate such provisions into their national legislation.

In the Republic of Latvia, these amendments have been developed similarly to the approach of Germany, where equivalent provisions from the Damages Directive have been integrated into national legislation and applied to damage claims arising from DMA violations. Together with the upcoming amendments to the CPL, amendments to the CL ensure that businesses of the Republic of Latvia and consumers will no longer need to re-establish the existence of a DMA violation (see also Section 3, Question 2). It is anticipated that this would also mitigate indirect harm caused to the digital market structure and its overall functioning, given the significant influence of gatekeepers across the European Union and the popularity of their services.

Although the amendments to CPL related to claims for damages in DMA violation cases are still in the process of being adopted (see more in Section 2, Question 5), the process for claiming damages concerning DMA, as mentioned earlier, will be comparable to that under the CL. The draft amendments to CPL propose establishing the jurisdiction of the Economic Court of the Republic of Latvia in cases involving claims of DMA violations, defining instances when proceedings are suspended and the terms of such suspensions, and expanding the scope regarding damage claims related to DMA. Unlike damage claims related to the CL violations, Article 250^{67} of the CPL will not apply to claims for damages resulting from breaches of the DMA (the article outlines restrictions on requiring evidence in cases regarding reimbursement of losses for violations of the CL). Specifically, the first section of Article 250^{67} will not be relevant, as DMA does not provide for a leniency program, and any settlement

decisions will be made by the European Commission as the sole enforcer. As the third, fourth, and fifth sections of this article essentially refer to the first section, they will also not be applicable in the DMA damage claims cases. That said, this is the only difference between damage claims regarding the DMA and CL violations.

Question 5

As of the writing of this report, there is no available information indicating that the national procedural law of the Republic of Latvia allows civil society organisations to intervene in pending private disputes in support of the public interest. Consequently, details regarding the difficulty, cost, or process of such interventions are not available.

Section 5: General questions

Question 1

Concerning Articles 9 and 10 of the DSA, the Law on Information Society Services provides that the Cabinet of Ministers shall be authorized to issue legal acts to regulate the latter.

To ensure the implementation of the authorization, a potential solution is set to amend Regulation No. 99 which already establishes the procedure for actions restricting illegal online content in the field of consumer rights and medicine. The scope of this Cabinet of Ministers Regulation will be extended to all authorities with certain powers to take action against online content or to request information from individuals about alleged infringement. As per Article 19^2(3) of the Law on Information Society Services, it was concluded that the Cabinet of Ministers in the future shall issue regulation determining:

1. The information to be specified in the decision referred to in Article 9 of the DSA. The elements of an administrative act are currently laid down in Article 67 of the Administrative Procedure Law, and an administrative act addressed to intermediary service providers will also contain the elements laid down in Article 9 of the DSA. However, in addition to these requirements, after issuing the abovementioned regulation the administrative act will have to also contain additional special technical parameters for the objects of restriction (domain name, Internet Protocol address, Uniform Resource Locator, etc.) or special technical parameters for redirection, depending on the type of decision and the addressee.

2. The procedure for attaching an annex to the decision referred to in Article 9 of the DSA where the decision relates to the restriction of multiple online resources. This is necessary for the sake of transparency and readability of the administrative act, given that the administrative act may contain, for example, the restriction of several websites and, consequently, the list of specific parameters may be long.
3. The time limit for the execution and operation of the decision referred to in Article 9 of the DSA. The time limits for implementation are usually 5 working days, while the duration of such decisions varies from one sector to another. In the field of consumer protection, it is usually up to 2 years.
4. The conditions and procedure for the inclusion of the information contained in the decision referred to in Article 9 of the DSA or in an annex thereto in a machine-readable list maintained by the authority. A type of decision re-transmission specifically designed for the software of the addressee of the decision, which ensures that legal obligations are met in an automated way. This is necessary to ensure a fast and efficient execution of legal obligations, as well as to save the addressees' work, and resources, reduce the administrative burden, and allow to reduce the possibility of human error in the execution of legal obligations.
5. The procedure for communicating the decision referred to in Article 9 of the DSA or the request for information referred to in Article 10 of the DSA and information on the execution thereof, as well as other documents, to the digital services coordinator. This is necessary to ensure the efficient transfer of information to the Digital Service Coordinator from other institutions and persons. In addition, the possibility of communicating this information in an automated way (e.g., via a dedicated website maintained by the Digital Service Coordinator) should be foreseen to reduce the burden on authorities and persons, taking into account that the notification process may involve a large number of documents and a wide range of persons.

Nevertheless, CRPC is entitled to make a decision or make a request for information under Articles 9 and 10 of the DSA. Accordingly, the internal circulation of documents between CRPC (acting as Digital Services Coordinator) and its different departments may be regulated by an internal regulatory act.

Question 2

According to Article 13 of the DSA, service providers based outside the European Union but offering services within the European Union are required to appoint a legal representative in a European Union Member State where their services are available. This representative is responsible for receiving, complying with, and enforcing decisions made under the DSA. Importantly, these legal representatives can be held accountable for any non-compliance with the DSA, in addition to any potential liability that may be pursued against the service provider.

As of the writing of this report, there is no available information indicating that services of legal representatives pursuant to Article 13 of the DSA are being provided in the Republic of Latvia. No official sources or public documentation have confirmed the existence of such services in the country.

Question 3

Concerning complaints from service recipients and bodies, organizations, and associations referred to in Article 53 of the DSA, CRPC will deal with complaints within its competence by the procedure laid down in the Law on Submissions.[7] The Law on Submissions stipulates the procedures by which a private person shall submit a document and an institution or a private person who implements state administration tasks shall examine a document, which includes a request, complaint, proposal, or inquiry within the competence of the institution, and shall reply thereto, as well as prescribes the procedures by which the institution shall receive visitors.[8]

Question 4

There is no known public controversy regarding the implementation of the DSA. However, once the law was in the drafting phase, public sector authorities had the right to express their concerns and objections with regard to the amended law. Once the amendments in the Law on Information Society Services were announced and the annotation became public some national institutions submitted their opinion of the latter. The purpose of the annotation is to inform decision-makers and stakeholders about the impact and consequences of the draft law on different areas of activity.[9]

The institutions in question were the Data State Inspectorate of the Republic of Latvia,[10] Ministry of Finance of the Republic of Latvia,[11] Corruption Prevention and Combating Bureau,[12] Information and Communications Technology

[7] Available in English: https://likumi.lv/ta/en/en/id/164501-law-on-submissions

[8] Article 2(1) of Law on Submissions.

[9] Section 3 of the Cabinet of Ministers 07.09.2021. Regulation No. 617 "Procedure for assessing the initial impact of draft legislation." Available in Latvian: https://likumi.lv/ta/id/325945-tiesibu-akta-projekta-sakotnejas-ietekmes-izvertesanas-kartiba

[10] Data State Inspectorate Republic of Latvia 21.11.2023. opinion available in Latvian: https://tapportals.mk.gov.lv/reviews/resolutions/2f7b8f17-407a-4efc-9710-d51b8250741b and 26.01.2024. opinion available in Latvian: https://tapportals.mk.gov.lv/reviews/resolutions/2c3bcd62-65d6-438f-955b-0694c2ee2854

[11] Ministry of Finance 29.11.2023. opinion available in Latvian: https://tapportals.mk.gov.lv/reviews/resolutions/d44b00c1-39ab-4056-b0ee-6caf35a483cb

[12] Corruption Prevention and Combating Bureau 28.11.2023. opinion available in Latvian: https://tapportals.mk.gov.lv/reviews/resolutions/87335a63-5059-4621-84f2-e31d5b16b7ec

Association,[13] Ministry of Welfare of the Republic of Latvia[14] and Ministry of Justice of the Republic of Latvia.[15] The majority of the opinions of the latter institutions were due to needed clarifications in the annotation in the draft law of Law on Information Society Services. However, the most prominent opinion was provided by the Data State Inspectorate of the Republic of Latvia.

Initially Article 19^3(2) of the draft law of Law on Information Society Services foresaw that the CRPC, when investigating the compliance of intermediary service providers with the requirements of the DSA, has the right, in accordance with the procedure laid down in the Law on Electronic Communications and with the authorization of a judge, to request and receive from an electronic communications service provider all the necessary stored data in its possession. The Data State Inspectorate of the Republic of Latvia in its opinion concluded the purpose of processing retained data specified in Article 19^3(2) of the abovementioned draft law was not compatible with processing data set out in the first paragraph of Article 99 of the Law on Electronic Communications in force. Therefore, the Data State Inspectorate of the Republic of Latvia concluded the provision on transfer of retained data to CRPC should be deleted from the draft law of Law on Information Society Services. It was further concluded that in the opinion of the Data State Inspectorate of the Republic of Latvia, it is unambiguously clear from the previous case law of the Court of Justice of the European Union that severe interference, including the retention and transfer of traffic data to public authorities, is permissible only for particularly important purposes. Thus, in the view of the Data State Inspectorate of the Republic of Latvia, the CRPC should not have been granted the right to access all the stored data. These concerns were addressed through revisions of the draft law.

During the implementation of the DMA-related amendments at the national level, there were no significant political controversies. While some objections were raised during the inter-ministerial discussions, these were not substantial. For instance, the Ministry of Finance of the Republic of Latvia initially opposed the draft law due to uncertainties about budgetary priorities for 2024–2026 and the allocation of additional funding to the CCL to fulfill its new responsibilities under DMA. The Ministry of Justice of the Republic of Latvia also proposed several clarifications and requested an explanation about why the amendments to the CL are not aligned with amendments to the CPL and requested an impact assessment on the workload of the Economic Court

[13] Information and Communications Technology Association 27.11.2023. opinion available in Latvian: https://tapportals.mk.gov.lv/reviews/resolutions/38248342-cc19-4b03-85a1-725ecedd0375

[14] Ministry of Welfare 27.11.2023. opinion available in Latvian: https://tapportals.mk.gov.lv/reviews/resolutions/fae082a3-c8c6-4268-b227-6f47854782f7

[15] Ministry of Justice 27.11.2023. opinion available in Latvian: https://tapportals.mk.gov.lv/reviews/resolutions/5f892b04-cd20-4e7c-a5e6-08ee16424c8e

of the Republic of Latvia. These concerns were addressed through revisions to the draft law and the abovementioned amendments to the CL were forwarded to the parliament of the Republic of Latvia for adoption. In the Parliament of the Republic of Latvia, the amendments were briefly debated, with the proposed changes largely focusing on editorial adjustments and technical matters.

Supposedly, the legislative proposal encountered minimal resistance due to its focus on implementing legal provisions necessary for the smooth application of European Union law. In the Republic of Latvia, the absence of large platforms comparable to gatekeepers likely reduced opposition, and companies of the Republic of Latvia, some of which are commercial users of core platform services provided by gatekeepers, have a vested interest in ensuring that gatekeepers comply with the DMA. Consequently, there was no resistance from Latvian undertakings to these amendments, as they did not negatively impact their business operations. Additionally, the well-crafted legislative proposal and its accompanying explanatory note, which comprehensively clarified the necessity of the amendments, likely contributed to the lack of controversy both in the parliament's committee and its plenary sessions.

Question 5

Article 21(6) of the DSA provides that Member States may establish out-of-court dispute resolution bodies or support the functioning of some or all of the out-of-court dispute resolution bodies they have certified. The Republic of Latvia, exercising the discretion given to Member States, has chosen not to establish such an out-of-court dispute settlement body at this stage, given that it would require additional financial and human resources as well as specialized expertise, but at this time, it is difficult to assess the potential workload and added value for the protection of users of establishing such a body. It should be borne in mind that the regulation contained in the DSA is a new area and the impact of the obligations it imposes, as well as the resulting needs, will require the assessment in the future. At the same time, institutions and non-governmental organizations specializing in certain issues under the DSA are not prevented from setting up and certifying out-of-court dispute resolution bodies later.

In the Republic of Latvia at present, there are no out-of-court dispute resolution bodies, trusted flaggers, DMA-focused consumer organizations, or established mechanisms for data access requests by researchers specifically related to the DMA. Additionally, the national legislature has not adopted any specific measures or approaches concerning these aspects.

Question 6

The annotation of the draft law of Law on Information Society Services did not include any opinions from private parties. Moreover, the annotation states that no opinions regarding the implementation of the amendments in the Law on Information Society Services were received.

To date, there have been no specific provisions or issues related to the DMA in the Republic of Latvia that have garnered notable attention from practitioners or academics due to being perceived as controversial, complex, or unclear. Also, no concerns or debates have emerged in this context that would be of relevance from a European perspective.

Lithuania

*Stasys Drazdauskas**

Section 1: National institutional set-up

Question 1

In Lithuania, the Communications Regulatory Authority (**CRA**) is the main authority entrusted with supervising the DSA enforcement and appointed as digital service coordinator.

State Consumer Protection Authority, State Data Protection Inspectorate, Office of the Inspector of Journalistic Ethics are responsible for the enforcement of DSA requirements, which remain within the area of competence of these authorities.

The Law of the Republic of Lithuania on Information Society Services[1] specifies that State Data Protection Inspectorate has investigation and enforcement powers in relation to the requirements of detecting the advertisement recipients (DSA Art. 26.1.d), restriction of profiling based advertisements using sensitive data (DSA Art. 26.3), addressing minors (DSA Art. 28.2), and recommender system transparency (DSA Art. 27).

State Consumer Protection Authority has investigation and enforcement powers in relation to the requirements of online interface design and organisation, where the service recipients are natural persons (DSA Art. 25), advertising on online platforms (except for profiling based advertising, which is the competence of the State Data Protection Inspectorate) (DSA Art. 26), traceability of traders (DSA Art. 30), compliance by design (DSA Art. 31), right to information (DSA Art. 32).

Office of the Inspector of Journalistic Ethics has investigation and enforcement powers in relation to the requirements of explaining conditions and restrictions for use of the service by minors (DSA Art. 14.3), and implementation of the measures to ensure a high level of privacy, safety and security of minors at online platforms (DSA Art. 28.1).

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[1] The Law of the Republic of Lithuania on Information Society Services, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.277491/asr

All institutions are required to notify the digital service coordinator (CRA) about the launched investigations within 5 working days.

CRA may accept all complaints from recipients of the service, including those which fall within the competence of other authorities. If complaints are lodged directly with the other authorities within their competence, these authorities are required to inform the CRA about the complaint received and the decision made within 5 working days after the decision. If complaints relate to the competence of other institutions, they have to be transferred to them as well.

Question 2

The main rules regarding distribution of competence, investigations and enforcement are established in the Law of the Republic of Lithuania on Information Society Services.

The CRA has also adopted a description of the supervision procedure for the provision of mediation services provided for in Regulation (EU) 2022/2065,[2] which lays out the rules on appointment of legal representatives of intermediaries, certification of entities which may investigate disputes out of court, trusted flagger assignment, investigations of violations. The Description contains forms of application and documentation.

The CRA has an internal department dedicated to DSA supervision – the Digital Services Regulation Group, which has four staff members dedicated specifically to the DSA implementation.[3]

There is no supervision fee currently imposed for the entities within the scope of the DSA.

The annual budget allocated for the supervision functions of the CRA in relation to the digital services is EUR 120,000 for the years 2024–2026.[4]

[2] Description of the supervision procedure for the provision of mediation services provided for in Regulation (EU) 2022/2065, https://www.e-tar.lt/portal/lt/legalAct/31fd8c603a8b11efbdaea558de59136c

[3] Structure and contact of the CRA, https://www.rrt.lt/struktura-ir-kontaktai/struktura-ir-kontaktai/

[4] Annual activities plan of the CRA, https://www.rrt.lt/wp-content/uploads/2024/01/2024-2026-m.-RRT-strateginis-veiklos-planas.pdf

Question 3

There is little information available yet on the CRA activities in the field of DSA supervision.

Currently, the CRA has set up an internal task force for the function and started compiling the information for the users and entities to help understand the content of the obligations under the DSA. The information is published and gradually expanded at the website of the CRA[5] and is also available in the Guidelines on Application of the DSA.[6]

The strategy and plan for 2024 of the CRA[7] provides that the CRA will focus on preparatory activities, that is, planning the implementation (preparing the implementing acts, procedures, principles), adapting the information systems for the new functions.

No information on scoping exercises or enforcement priorities is available yet.

Question 4

The Law of the Republic of Lithuania on Competition[8] authorises the Competition Council of the Republic of Lithuania as supervisory authority the matters listed in DMA Article 1.6.

The local law does not assign the investigative powers in relation to the DMA Articles 5, 6 and 7.

Question 5

The Competition Council declared that it will act only as supporting authority for the Commission enforcement and investigation measures.[9]

[5] https://www.rrt.lt/skaitmeniniu-paslaugu-aktas/

[6] Guidelines on the Application of the DSA, https://www.rrt.lt/wp-content/uploads/2024/07/SPA-taikymo-gaires-2024.pdf

[7] Strategy of the CRA for 2024–2026, https://www.rrt.lt/wp-content/uploads/2024/02/RRT-strategija-2024-2026.pdf

[8] The Law of the Republic of Lithuania on Competition, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.77016/asr

[9] https://kt.gov.lt/lt/naujienos/isigalioja-skaitmeniniu-rinku-akto-reikalavimai

Question 6

There were no announcements on enforcement priorities of the Competition Council.

Section 2: Use of national legislative leeway under the DMA/DSA

Question 1

In Lithuania, the implementation of the E-Commerce Directive – the Law on Information Society Services was amended for compatibility with the DSA. The provisions for liability of intermediaries, implementing the E-Commerce Directive were removed and a generic rule was introduced stating that the liability of mere conduit, caching, and hosting service providers shall be determined in accordance with Articles 4–6 of the DSA.

The secondary legislation for notice and take down mechanisms were revoked – the Government approved Rules on procedure for the withdrawal of access to information acquired, created, modified or used in an unlawful manner, and Rules on the control of sensitive information for public use on computer networks and on the adoption of restricted procedures for the dissemination of public information.

The list of authorities competent to issue orders to hosting service providers and electronic communication services providers to take down the illegal information and the procedure for take down was introduced to the Law on Electronic Communications Article 98.

The list of prohibited public information remains to be defined in the Law on Communication of Information to the Public, the Law on Advertising. The Law on Copyright and Related Rights defines the protections for the content, the public distribution or use of which can be restricted. There were no changes made in relation to DSA implementation.

There were no prior provisions specific to search engines.

Question 2

The only attempt at mapping is in the Article 98 of the Law on Electronic Communications, where the list of competent authorities to issue take down orders is provided, which indicates the areas in which illegality of information can be defined.

Question 3

There were no new rules considered at national level on influencers, content creators or content rules.

The marketing requirements for influencers were adopted before the DSA – the Guidelines on Marking Information in Social Media adopted by the State Consumer Rights Protection Authority.[10]

Question 4

No changes were made to pre existing laws, except for the changes in the Law on Competition, by which the Competition Council was appointed as the supervisory authority in Lithuania for the matters listed in DMA Article 1.6.

Question 5

No such acts considered or adopted.

Section 3: Vertical and horizontal public enforcement-related cooperation under DSA/DMA

Question 1

The rule to ensure cooperation between national authorities are limited to the centralisation of the information on the adopted take down orders at the Communications Regulatory Authority as the Digital Services Coordinator (Art. 21 of the Law on Information Society Services), as well as the rules on distributing the complaints between the competent authorities (Art. 34 of the Law on Information Society Services).

The adopted rules can be viewed as exclusive, that is, they assume and always one authority should be competent to investigate the complaint. This may not always be the case, as there may be cases where infringement relates to several supervised areas, that is, misinformation and breach of advertising requirements. The rules do not foresee a possibility to investigate the same complaint by several institutions and do not provide for cooperation rules, for example, exchange of information of the investigation.

[10] Guidelines on Marking of Advertising in Social Media, https://vvtat.lrv.lt/media/viesa/saugykla/2024/5/gCy7dVRZRxU.pdf

Question 2

The Law on Information Society Services (Art. 19.3) grants the courts a right to provide information on the disputes being solved in relation to information society services to the European Commission and the Communication Regulatory Authority.

There are no specific provisions allowing COM to provide written observations to courts, or requiring the courts to submit their decisions to COM.

Question 3

Lithuanian Competition Council is only authorised to oversee the competition matters listed in DMA Article 1.6. It is therefore unlikely that the Competition Council would take an active role in alerting the Commission about possible non-compliance with the DMA. Any information received under Article 27 DMA by local authority would likely just be forwarded to the Commission.

Section 4: Private enforcement of DMA/DSA

Question 1

No information on such actions can be found yet.

Question 2

Before the DSA taking effect, intellectual property related take down requests were prevalent in the area of private enforcement, so it is to be expected that this trend will continue.

Private collective redress seeking practices are not developed in Lithuania. Although there is a possibility of class actions defined in the civil procedure laws, there were very few cases, where such actions were attempted.

Question 3

In our view it is unlikely that the private redress under the DMA would be used in Lithuania.

There are almost none attempts to use private redress generally in competition cases. Usually private parties try to initiate (or threaten) supervisory enforcement measures as a strategy in private disputes.

Question 4

The administrative courts will be competent to decide cases under the decisions of the supervisory institutions adopted in DMA/DSA cases.
No specific national rules planned for private enforcement.

Question 5

There is no such possibility for civil society organisations. Class action suits are possible but rarely used.

Section 5: General questions

Question 1

DSA Article 9 and 10 are implemented in local law by reference, that is, there is no specific implementation.

The Law of the Republic of Lithuania on Information Society Services provides that authorities, which are indicated as having competence to issue orders to act against illegal content, must follow the requirements for issuing such orders, as established in the DSA Article 9 and 10 (Art. 21 of the Law on Information Society Services). Further, the law provides that orders may be issued to intermediary service providers who are established in Lithuania, or who provide services in Lithuania, regardless of their place of establishment.

The Law of the Republic of Lithuania on Electronic Communications Article 98.2 requires all authorities which my issue orders to hosting service providers to obtain approval from the administrative court. However, the competence of the court to issue injunctions in civil proceedings are not restricted by the implementation of the DSA.

We are not aware of legal representatives being appointed in Lithuania under DSA Article 13. Most intermediary service providers have legal presence at least in one Member State.

Question 3

Article 34 of the Law on Information Society Services adopts the same approach as DSA Article 53 in relation to complaints.

Article 34 also sets out some specific requirements in relation to content of complaints, for example, requires that complainants indicate the institution, to which the complaint is addresses, identifying information of the complainant, as well as date and signature, details of the service provider against whom the complaint is lodged, description of the infringing actions, account names and URLs if they are available, request to the authority.

Procedural requirements regarding evaluation and acceptance of the complaints, reassignment of complaints to competent authorities, grounds for refusal to accept the complaint or terminate the proceedings are also listed.

Question 4

There was no political controversy during the implementation on the national level.

Google and Internet Media Association provided proposals to the draft implementation, some of which were accepted.

Question 5

The CRA has adopted implementing regulations (Description of the supervision procedure for the provision of mediation services provided for in Regulation (EU) 2022/2065[11]), which provide procedure and detail regarding application for the certification of dispute resolution bodies, application for trusted flaggers status. The CRA also publishes information on possibility of certification or obtaining trusted flaggers status at its website.[12]

According to the public announcement of the CRA will publish information about research data after the Commission adopts the relevant delegated acts.[13]

[11] https://www.e-tar.lt/portal/lt/legalAct/31fd8c603a8b11efbdaea558de59136c

[12] https://www.rrt.lt/skaitmeniniu-paslaugu-aktas/patikimi-pranesejai/; https://www.rrt.lt/skaitmeniniu-paslaugu-aktas/neteisminis-gincu-sprendimas/

[13] https://www.rrt.lt/skaitmeniniu-paslaugu-aktas/duomenys-moksliniams-tyrimams/

Question 6

Google proposed to limit application of the implementation of the DSA to those providers who are established in Lithuania, and not to adopt national rules on access to data before the Commission adopts the delegated acts. The former proposal was rejected, the later was accepted.

Internet Media Association proposed to clarify that service providers become aware of the infringing information if they receive *credible* data about the infringement, and to allow service providers to request clarifying data, which was accepted in the adopted implementation.

Netherlands

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with contributions from Philine van der Aalst, Belle Beems, Pepijn van Ginneken, Louise Klinkhamer, Anke Prompers, Octave Schyns, Vincent Scuric, Merle Temme, Harrie Temmink, Lumine van Uden, Ilse van Wendel de Joode[1]

Introduction

The digital economy is one of the priorities of the Netherlands Authority for Consumers and Markets (ACM), besides the energy transition and sustainability.[2] The ACM is the intended competent authority to monitor compliance with the Digital Services Act (DSA)[3] and the Digital Markets Act (DMA)[4] in the Netherlands. The Platform-to-Business Regulation,[5] the Data Governance Act[6] and the Data Act[7] are also planned to be part of its portfolio, so that the ACM becomes a key actor in the digital economy in the Netherlands.

As the ACM had not yet been fully and formally designated as the competent authority at the time of writing, there was no experience of enforcing the DSA and the DMA to report on. In our answers to the questionnaire, we

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[1] These contributors participated in their personal capacity in a working group as members of the Netherlands Association for European Law (NVER).

[2] Agenda ACM 2024,
https://www.acm.nl/nl/over-ons/missie-en-strategie/onze-agenda/acm-agenda-2024

[3] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277/1.

[4] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L 265/1.

[5] 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 (Platform-to-Business Regulation) [2019] OJ 2019 L 186/57.

[6] Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act) [2022] OJ L 152/1.

[7] Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act) [2023] OJ L 2023/2854.

therefore rely on the text and Explanatory Memoranda of the two respective Implementation Acts and other publicly available information. Please note that developments after 25 August 2024 have not been taken into account. After answering the questionnaire in section 2, we conclude with a couple of general reflections in section 3.

Section 1: National institutional set-up

Question 1

The DSA Implementation Act[8] contains provisions on the powers for the supervision and enforcement of the DSA in the Netherlands. It is currently pending before the House of Representatives. Adoption is not expected before September 2024, after which it will be sent on to the Senate for debate. The Act will designate the Netherlands Authority for Consumers and Markets (ACM) as Digital Services Coordinator (DSC) for the application of the DSA and as supervisor of most of the provisions of the DSA (chapter 2 of the DSA Implementation Act). In addition, the Dutch Data Protection Authority (*Autoriteit Persoonsgegevens* – AP) will be designated as the competent authority for the supervision of provisions that relate to the processing of personal data (chapter 3 of the DSA Implementation Act).

DSA enforcement is closely connected with tasks of other national authorities. Coordination takes place in the Digital Regulation Cooperation Platform (*Samenwerkingsplatform Digitale Toezichthouders* – SDT), a network of Dutch regulators that was set up in 2021 by the ACM, the Dutch Authority for the Financial Markets (AFM), the AP and the Dutch Media Authority (*Commissariaat voor de Media* – CvdM).[9] As part of the Digital Regulation Cooperation Platform, the opening of a Chamber regarding the enforcement of the DSA was announced in March 2023. In this DSA Chamber, the ACM will regularly consult with other national authorities and seek mutual coordination to carry out its supervision tasks under the DSA.[10]

In particular, cooperation with other Dutch regulators with special knowledge about illegal content and the national prosecutor's office is necessary in situ-

[8] Parliamentary documents II, 2023–2024, 36 531, no. 2 (Implementation of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC) (DSA Implementation Act).

[9] See https://www.acm.nl/en/about-acm/cooperation/national-cooperation/digital-regulation-cooperation-platform-sdt.

[10] Press release ACM, "SDT members to expand their collaboration regarding digital regulation," 24 March 2023, https://www.acm.nl/en/publications/sdt-members-expand-their-collaboration-regarding-digital-regulation

ations where the illegality of content forms part of the assessment of whether intermediary services are fulfilling their due diligence obligations under the DSA against the online distribution of illegal content. The DSA Implementation Act addresses this need by including an explicit legal basis for the composition of protocols on mutual cooperation. In addition, the AP will provide advice to the ACM in situations where researchers file a data access request under Article 40(4) of the DSA and the requesting researcher's ability to protect personal data needs to be assessed in line with Article 40(8)(d) of the DSA.[11]

Question 2

The ACM's existing units have to be expanded and modified to incorporate the specific DSA tasks, such as the certification of trusted flaggers, alternative dispute resolution entities and vetted researchers. These new tasks are somewhat similar to tasks the ACM already performs in its role as sectoral regulator. For instance, the ACM assesses applications for licenses to supply energy in the Netherlands.[12]

The Minister of Economic Affairs has indicated that an additional 49 FTE will be made available to the ACM for the enforcement of the DSA.[13] The ACM is also intended to be responsible for the enforcement of the DMA, the Data Governance Act and the Data Act. For this reason, there is some flexibility in the allocation of investigatory efforts. FTEs intended for the enforcement of other digital legislation will also be available for the DSA to some extent (and vice versa). At the time of writing, the total amount of resources devoted to the enforcement of all new digital legislation is somewhere around 70+ FTE.[14]

Question 3

There are no initial experiences as of yet. At the time of writing, the ACM has not yet been fully and formally designated as the competent authority under the DSA because the DSA Implementation Act had not yet been passed by Dutch Parliament. No enforcement priorities have been made public yet.

[11] Articles 2.9, 4.2 and 4.4 of the DSA Implementation Act.

[12] See: https://www.acm.nl/en/about-acm/energy-licenses#:~:text=A%20license%20for%20the%20supply,you%20will%20pay%202%2C398%20euros

[13] Feasibility and enforcement test ACM, see: https://www.acm.nl/system/files/documents/Uitvoerbaarheids-%20en%20handhaafbaarheidstoets%20ACM%20-%20DSA.pdf

[14] In addition, further legislation which is connected to the DSA or other digital acts such as the General Products Safety Regulation (GPSR) could increase the total amount of FTE in the coming years.

In January 2024, the ACM published draft guidelines explaining how the ACM interprets the DSA in order to assist companies in their compliance efforts.[15] Beyond this, the ACM is preparing its supervision by training employees and mapping out some core themes to focus on within its supervision in order to better anticipate the moment that the ACM is fully and formally designated as the competent authority under the DSA.

Question 4

The DMA Implementation Act[16] contains provisions on the powers for the supervision and enforcement of the DMA in the Netherlands. It is currently pending before the House of Representatives. Adoption is not expected before September 2024, after which it will be sent on to the Senate for debate. The DMA Implementation Act appoints the ACM as the competent authority within the meaning of Article 38(7) of the DMA. The Explanatory Memorandum to the Act stresses that this competence does not include enforcement of the DMA, because the European Commission is the sole enforcer in this regard. The task of the ACM is thus limited to supervision and monitoring of compliance.[17] In order to exercise this task, the ACM can start an investigation into non-compliance with the DMA on its own initiative (*ex officio*), provide support and exchange information with the Commission.[18]

The ACM has several competences at its disposal to monitor DMA compliance.[19] The DMA Implementation Act aligns the competences for DMA supervision with existing competition law competences under Title 5.2 of the Dutch General Administrative Law Act (GALA) to a significant extent. However, the DMA Implementation Act deviates from the approach adopted in competition law with regard to the inspection of private homes. According to Article 50 of the Dutch Competition Act,[20] the ACM has the competence to inspect private homes as part of a competition law investigation. Despite criticism of the ACM, the Dutch legislator did not consider it desirable to extend this competence

[15] ACM, "Consultation version of DSA Guidelines: Due diligence obligations for digital services," 18 January 2024, https://www.acm.nl/system/files/documents/acm-publishes-for-consultation-the-draft-guidelines-regarding-the-dsa-for-providers-of-online-services.pdf

[16] Parliamentary documents II, 2023–2024, 36 495, no. 2 (Implementation of Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828) (DMA Implementation Act).

[17] Explanatory Memorandum to the DMA Implementation Act, para. 4.2.4.

[18] Explanatory Memorandum to the DMA Implementation Act, para. 1.

[19] Explanatory Memorandum to the DMA Implementation Act, para. 4.2.4.

[20] Act of 24 June 1997, concerning new rules on economic competition (Dutch Competition Act), 1997, 242.

to the monitoring of the DMA. This means that the ACM can *enter* private homes, but does not have the competence to *inspect* in the context of a DMA investigation.[21]

Question 5

For the monitoring and supervision of the DMA, the DMA Implementation Act largely builds upon the existing competences of the ACM and the existing procedural safeguards. The main investigative measures that the ACM can take include the power to acquire information and business records and to investigate cases.[22] Regarding procedural safeguards, reference can again be made to the GALA. For example, officials performing their supervision duties have to carry an identification card (Article 5:12 of the GALA) and can only exercise their powers insofar as this can reasonably be assumed to be necessary for the performance of their duties (Article 5:13 of the GALA). For entering private homes, additional procedural safeguards apply. Private homes can only be entered with a prior judicial authorization and the officer who entered the premises shall write a report on the entry (Articles 12e and 12f of the Establishment Act ACM). In the Explanatory Memorandum, the Dutch legislator highlights that the competence to enter private homes should be used in a restrictive fashion.[23]

The ACM expects to start one to three *ex officio* DMA investigations on an annual basis.[24] The Explanatory Memorandum determines that the ACM will structurally receive 7 FTE for monitoring and supervising DMA compliance.[25] In addition, cross-use of resources intended for the enforcement of other digital legislation is possible, as mentioned under Question 2 above.

Question 6

There are no initial experiences as of yet. At the time of writing, the ACM has not yet been formally designated as the competent authority under the DMA because the DMA Implementation Act had not yet been passed by the Dutch Parliament. No enforcement priorities have been made public yet.

[21] Explanatory Memorandum to the DMA Implementation Act, para. 6.1.
[22] Titel 5.2 GALA.
[23] Explanatory Memorandum to the DMA Implementation Act, para. 4.2.4.
[24] Explanatory Memorandum to the DMA Implementation Act, para. 5.2.
[25] Explanatory Memorandum to the DMA Implementation Act, para. 6.2.

Section 2: Use of national legislative leeway under the DMA/DSA

Question 1

Several provisions in other laws and regulations will be repealed or amended as a result of the DSA Implementation Act. The most relevant ones relate to the Dutch Civil Code and the Dutch Code of Criminal Procedure.

Article 5.4 of the DSA Implementation Act provides for the deletion of Article 6:196c of the Dutch Civil Code. This provision incorporates the liability exemption for providers of mere conduit, caching and hosting services and the associated conditions from the E-Commerce Directive. The result is that the providers of these services are not liable on the basis of tort in accordance with Article 6:162 of the Dutch Civil Code if they meet the conditions set. Under the DSA, the liability exemption for providers of mere conduit, caching and hosting services with associated conditions has a direct effect on the Dutch legal order. It is therefore not necessary to enforce Article 6:196c of the Dutch Civil Code.

The Dutch Code of Criminal Procedure contains rules regarding the confidentiality of orders and claims addressed to providers of intermediary services and the postponement of notification to a recipient of a service for as long as the interests of the investigation so require. Several amendments are proposed to ensure that: (i) all claims for the provision of data made to communication services are subject to the obligation of confidentiality as long as the research interest requires this confidentiality, and (ii) in the event of an order to make data inaccessible on the basis of Article 125p of the Dutch Code of Criminal Procedure, a confidentiality obligation is provided for the communications service to make this data inaccessible. Furthermore, the order to take action against illegal content of Article 9 of the DSA is laid down in Article 125p of the Dutch Code of Criminal Procedure. In addition, the order to provide information of Article 10 of the DSA is laid down in Articles 126n/u/zh and Articles 126ng/ug/zl of the Dutch Code of Criminal Procedure. There are also several other related laws and regulations that remain unaffected by the DSA Implementation Act.

An example related to the DSA's scope is the Media Act,[26] which contains provisions for public media services, commercial media services, video platform services, protection of minors, major events, use of broadcasting networks, and supervision and enforcement. A relevant provision is Article 4.1 (1) of the Media Act, focusing on the protection of minors. The audiovisual media offer may only contain offerings that may harm the physical, mental or

[26] Media Act, https://wetten.overheid.nl/BWBR0025028/2024-01-01

moral development of persons under sixteen years of age if the provider is affiliated with the Media Authority. Another relevant provision is Article 4.1a (2) of the Media Act, which contains rules for protecting youth online. The most harmful content such as gratuitous violence and pornography shall be made inaccessible to persons under sixteen years of age by the institution responsible for the content of the offer.

Question 2

As far as we know, the Netherlands did not try to map the national rules on the illegality of content relevant for the DSA enforcement. No (parliamentary) documents refer to such a mapping exercise. No notable DSA-related changes in legislation were made concerning content rules, other than those proposed in the DSA Implementation Act (see question 1). One reason may be that in practice, given its broad scope, it would be difficult to map all the national rules that would be covered by the notion "illegal content."

Question 3

To our knowledge, no Dutch national laws are being considered beyond those implementing EU legislation. The Netherlands did have several relevant codes in place already preceding the DSA.

The Social Media & Influencer Marketing Advertising Code[27] contains specific rules for advertising by influencers on, for example, online platforms. For example, Article 3 of this code states that advertising through social media should be clearly recognisable as such. If a distributor of advertising, such as an influencer, has a relevant relationship with the advertiser, this should be explicitly stated in the advertisement. This can be done, for example, by including the text '#ad' or '#spon' in the post or video.

The Child and Youth Advertising Code[28] contains specific rules for advertising aimed at children. For instance, Article 12 (1) of this code focuses on the protection of minors in the context of advertising and data collection and emphasises the need to inform children and their parents about the use of personal data.

[27] Social Media & Influencer Marketing Advertising Code, https://www.reclamecode.nl/nrc/advertising-code-for-social-media-influencer-marketing-rsm-2019/?lang=en

[28] Child and Youth Advertising Code, https://www.reclamecode.nl/nrc/code-for-advertising-directed-at-children-and-young-people/?lang=en

The Code of Conduct on Transparency of Online Political Advertisements[29] helps to protect several core values around online political ads and elections, including transparency, privacy, security, honesty, integrity and a level playing field. Following this code of conduct, online platforms should promote transparency in political advertisements with mechanisms, data access, advertiser registration, funding reports, EU advertisement restrictions, content management and post-election reviews.

Question 4

The Netherlands does not have its own national rules in place ensuring fairness and contestability in digital markets. For instance, the Netherlands does not have a regime on abuse of economic dependence or relative market power. Rules regarding unfair practices and contract terms are part of the Dutch Civil Code and mostly stem from EU legislation (such as Directive 93/13, Directive 2005/29 and Directive 2019/633), which are therefore not pre-empted by the DMA.

Question 5

The ACM is advocating for the introduction of two new competences. One is a market investigation tool or new competition tool. Such a tool would allow the ACM to intervene in markets to address structural market problems without having to establish a violation of the competition rules. This is considered relevant due to the gradual increase in concentration across the economy, giving rise to practices that harm competition without violating the law. Examples referred to include the lock-in of customers in the banking and cloud sector.[30]

The other possible new competence under discussion is a "call-in power" under Dutch merger review. With this power, the ACM would be able to call-in small acquisitions that do not meet the turnover thresholds but still could have significant impact on the market and to assess them under the regular merger procedure. This is relevant in the context of so-called "roll-up strategies," whereby smaller competitors are acquired one at a time to consolidate them into a large company as has recently happened in the Netherlands when

[29] Dutch Code of Conduct on Transparency of Online Political Advertisements, https://www.rijksoverheid.nl/documenten/richtlijnen/2021/02/09/nederlandse-gedragscode-transparantie-online-politieke-advertenties

[30] Blog of ACM Chief Economist Paul de Bijl, "A new phase in competition oversight," 25 May 2023, https://www.acm.nl/en/publications/blog-new-phase-competition-oversight; and Blog of ACM Chairman Martijn Snoep, "More tools to combat market power, please," 29 August 2023, https://www.acm.nl/en/publications/blog-martijn-snoep-more-tools-combat-market-power-please

private-equity firms acquired local veterinary practices and GP practices, and in the context of so-called "killer acquisitions," whereby start-ups with a new technology or service are acquired by an established market player to prevent that they become a competitive threat.[31]

The introduction of both competences would require a legislative intervention. At the moment of writing, no legislative acts have been proposed yet to add these competences to the ACM's toolbox.

Section 3: Vertical and horizontal public enforcement-related cooperation under DSA/DMA

Question 1

The ACM had requested a specific legal basis for arrangements with the national judicial and administrative authorities on sending orders based on Article 9 (act against illegal content) and Article 10 of the DSA (provide information), which should then be shared with all DSCs (see Article 9(4) and Article 10(4) of the DSA). This would avoid individual arrangements with each judicial or administrative authority. However, the Dutch legislator did not see added value in such a legal basis because the ACM could enter into a cooperation agreement with more parties. It has accepted that the Council for the Judiciary should be the only interlocutor for the ACM.[32]

The DMA Implementation Act addresses the issue of cooperation between the ACM and the European Commission. According to Article 3 of the DMA Implementation Act, ACM officials can support the Commission in inspections, if needed with the assistance of the police. The DMA Implementation Act does not explicitly address the issue of exchange of information between the ACM and the Commission. According to the Explanatory Memorandum, this issue is regulated in the DMA and therefore does not require additional national provisions.[33]

Question 2

The District Court of Rotterdam, in first instance, and the Trade and Industry Appeals Tribunal, on appeal, (*College van Beroep voor het bedrijfsleven* – CBb) are designated as solely competent to adjudicate in cases arising from the

[31] Blog of ACM Chairman Martijn Snoep, "Small mergers, big problems," 6 November 2023, https://www.acm.nl/en/publications/blog-martijn-snoep-small-mergers-big-problems

[32] Explanatory Memorandum to the DSA Implementation Act, para. 9.1.2.

[33] Explanatory Memorandum to the DMA Implementation Act, para. 4.3.4.

DMA and the DSA in the context of enforcement by the ACM. This is in line with the already existing exclusive competence for the public enforcement of competition, regulatory and consumer law.[34]

In the context of private enforcement of the DMA, the Dutch legislator added or redacted a few general provisions. Articles 29(9), 44a(1) and 67 of the General Civil Procedural Code (Rv) are adjusted and a new Article 44b of the Rv is introduced to let civil courts judge upon the application of the DMA in private disputes. To implement Article 39 of the DMA, Article 44(b) of the Dutch Civil Code had to be changed in order to allow the European Commission to provide written and oral observations to Dutch courts on the application of the DMA.[35] With this approach, the Dutch legislator follows an almost similar construction as was applied when Regulation 1/2003 came into force in the Netherlands. As this works well for the enforcement of ordinary competition law, the legislator has chosen to use the same construction to implement Article 39 of the DMA.

In the context of the DSA, the CBb is the court of first and only instance in regards to administrative procedures regarding the certification of trusted flaggers, alternative dispute resolution entities and the vetting of researchers.[36] In addition, the Dutch legislator decided that there is no need to implement Article 82(3) of the DSA. This requirement for national judges not to overrule a decision of the European Commission already applies in the Netherlands.

Question 3

The Explanatory Memorandum to the DMA Implementation Act gives the ACM the mandate to proactively monitor the implementation of the DMA in the Netherlands. The Dutch government believes that the threshold for business users to complain about gatekeepers' behaviour to the ACM is much lower than for lodging a complaint with the Commission.[37] Business users have the right to provide information regarding such complaints to the national competent authorities of Member States under Article 27 of the DMA. This will allow the ACM to screen and investigate such complaints on behalf of the Commission. Additionally, the Dutch government believes that the ACM may have specific knowledge about possible competition issues related to the

[34] Article 5.2 of the DSA Implementation Act, amending Articles 7 and 11 of Annex II of the GALA.

[35] Article 5 of the DMA Implementation Act.

[36] Article 5.2 of the DSA Implementation Act, amending Articles 7 and 11 of Annex II of the GALA.

[37] Explanatory Memorandum to the DMA Implementation Act, para. 3.6.2.

Dutch context, which can be used to identify and effectively investigate the complaints.[38]

While the DMA allows the ACM to start an investigation into non-compliance, it only provides the Commission with enforcement powers. Nonetheless, the ACM brings significant experience enforcing competition law in digital markets. Most notable is the ongoing enforcement procedure against Apple concerning the App Store.[39] The ACM's actions target Apple's anti-steering provisions and the exclusive tying with its own payment service, corresponding to Article 5 (4-5 and 7) of the DMA. The Guidance on the Platform-to-Business Regulation published by the ACM,[40] and the monitoring thereof, may also give the ACM more insight into gatekeepers' compliance with Article 6(12) of the DMA by requiring app stores, search engines and online social networking services to apply terms that are fair, reasonable and non-discriminatory (FRAND). Furthermore, any information gathered in the procedure of establishing non-compliance with the DMA can also be used in other areas of enforcement of the ACM according to the Explanatory Memorandum to the DMA Implementation Act.[41] This can be relevant in situations where the scope of DMA provisions overlaps with potential abuses of dominance by undertakings designated as gatekeeper, against which the ACM remains competent to act under Dutch competition law.

Section 4: Private enforcement of DMA/DSA

Question 1

In the context of the DSA, two cases had been published at the time of writing. Both have been adjudicated by the district court of Amsterdam. The first case[42] is brought by a premium user of X (formerly known as Twitter) claiming non-performance by X. The premium user claims to have been "shadowbanned"

[38] Explanatory Memorandum to the DMA Implementation Act, para. 3.6.2. See also the discussion in: Van den Boom, Jasper, Bostoen, Friso, and Monti, Giorgio. "The Netherlands: DMA Enforcement Paradise?" May 2024, p. 6, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4869454

[39] Van den Boom, Jasper, Bostoen, Friso, and Monti, Giorgio. "The Netherlands: DMA Enforcement Paradise?" May 2024, p. 11. On 13 July 2023, ACM declared the objections filed by Apple against ACM's penalty payment order unfounded. See Press release ACM, "ACM rejects Apple's objections against order subject to periodic penalty payments," 2 October 2023, https://www.acm.nl/en/publications/acm-rejects-apples-objections-against-order-subject-periodic-penalty-payments. Appeal proceedings before the District Court of Rotterdam are ongoing.

[40] ACM Guidelines for Promoting a transparent and fair online platform economy for businesses, 12 April 2023, https://www.acm.nl/system/files/documents/acm-guidelines-for-promoting-a-transparent-and-fair-online-platform-economy-for-businesses.pdf

[41] Explanatory Memorandum to the DMA Implementation Act, para. 3.7.4.

[42] District Court of Amsterdam, ECLI:NL:RBAMS:2024:3980, 5 July 2024, https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2024:3980

because X deliberately reduced visibility of their content. Articles 12 and 17 of the DSA are cited to have been infringed. X did not provide a point of contact for rapid communication to the premium user (Article 12 of the DSA). Secondly, X did not give a correct statement of reasons following imposed restrictions on the premium account (Article 17 of the DSA). The court finds X in breach of both Articles. The court states that having a "Help Center" does not in itself mean X is compliant with the DSA obligation to have a point of rapid communication. In addition, the communication the premium user received did not include the necessary information as is set out in Article 17 of the DSA. For instance, in the communication it is unclear that a decision was made to (temporarily) restrict the premium user's account and what led to the restriction.

The second case[43] revolves around an intellectual property claim brought by the Erasmus University against Studeersnel. This is a website where students can upload and exchange study material. The university sought a technical remedy whereby Studeersnel would take action to prevent the infringement of their intellectual property on the platform. The court finds that Studeersnel complies with Articles 16 and 23 of the DSA because it has instituted a notice-and-takedown procedure and a repeat-infringer-policy. The court states that although those procedures are time consuming for the university to use, that does not mean Studeeersnel does not comply with the DSA. In addition, the court explains that the DSA does not compel platforms to filter information beforehand. The DSA explicitly states that there is no general obligation to monitor exchanged or stored information, nor to actively investigate possible illegal activities if the platform does not have knowledge of specific infringements of intellectual property.[44]

Question 2

The DSA includes specific rules for users on remedies and seeking compensation.[45] The use of private redress is likely and could consist of various legal grounds under Dutch law, including:

– claims for damages, for example based on general tort law (Article 6:162 of the Dutch Civil Code) or unjust enrichment (Article 6:212 of the Dutch Civil Code). This can be in the form of a follow-on claim, where the unlawfulness is already established in public enforcement, or a stand-alone claim, where the claimant has to substantiate the breach of the DSA and the unlawfulness;

[43] District Court of Amsterdam, ECLI:NL:RBAMS:2024:4425, 24 July 2024, https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2024:4425

[44] Presumably, here the court refers to recital 30 of the DSA.

[45] See Article 54 of the DSA.

- preliminary injunctions: business users and end users could enforce their rights by seeking interim measures in case of urgency due to the risk of serious and irreparable damage (Article 254(1) of the Dutch Code of Civil Procedure);
- claims for condemnatory relief: business users and end users could enforce their rights by seeking a court order or requesting a permanent injunction to stop certain conduct (Article 3:296 of the Dutch Civil Code). A claim for condemnatory relief does not result in any damages;
- claims for declaratory relief (Article 3:302 of the Dutch Civil Code). In Dutch court cases, claims for damages are often preceded by a claim for a declaratory judgment establishing that the defendant acted unlawfully and is liable. Follow-up proceedings are then used to establish the actual existence and the amount of damage. In addition, a claim for a declaratory relief can also be used as a starting point for a settlement;
- nullity of contracts: Article 3:40(2) of the Dutch Civil Code stipulates that a judicial act that violates a statutory provision of mandatory law is null and void. In case a contract contains a provision that violates the DSA, the business users or end users may argue that this contract is (partially) null.

In terms of damages claims, it will be challenging to prove and quantify damages and demonstrate a causal link between the DSA-infringing conduct and the damage suffered as required by Dutch law (and in case of stand-alone claims – also the unlawful conduct itself). Damages claims can be brought by individual claimants or as mass or bundled claims by special purpose vehicles or claim vehicles (foundations or associations) on the basis of: (i) powers of attorney or mandates, (ii) assignments, and (iii) a class action based on the Act on Damages Claims in a Collective Action (WAMCA). Mass or bundled claims are more likely than individual claims as the cost of litigation is high and the amount of damages suffered by individual business or end users will be low. Although this model provides the possibility to bundle claims of a large group of claimants, the claims remain individual. As a consequence thereof, claim vehicles still have the obligation to furnish facts and substantiate the claims for each individual underlying claimant. To date, the WAMCA has not been used often in competition damages action as it only applies to collective actions: (i) brought on or after its entry into force on 1 January 2020, and (ii) relating to events that took place after 15 November 2016. However, the first few competition damages under the WAMCA have now been brought, relating to: (i) stand-alone damages actions against Apple and Alphabet/Google for abuse of a dominant position, and (ii) follow-on damages actions against Samsung and LG for infringing the cartel prohibition in the Dutch television market.[46]

[46] For the public register of WAMCA-cases (in Dutch), see https://www.rechtspraak.nl/Registers/centraal-register-voor-collectieve-vorderingen

Question 3

The DMA does not include specific rules on compensation, but it does contain indications that it allows for private redress.[47] In any event, it is clear from case law of the Court of Justice that Regulations, such as the DMA, have direct effect in the Member States and can in principle serve as a basis for damages claims as they confer rights on individuals which the national courts have a duty to protect.[48] However, for the substantive obligations and prohibitions of the DMA to create rights for individuals and to be relied upon by individuals before national courts, they will need to be sufficiently unconditional and precise. There is little doubt that, after the Commission has designated a gatekeeper, the obligations applicable to this gatekeeper as included in Articles 5, 6 and potentially Article 7 of the DMA have direct effect and may be invoked horizontally in national courts. Indeed, the Explanatory Memorandum to DMA Implementation Act stresses that business users and end users, as referred to in the DMA, can lodge a claim before the national courts in case of DMA-infringing conduct of a gatekeeper.[49] The use of private redress is likely and could consist of the same legal grounds as discussed under the previous question for the DSA.

In the context of the DMA too, a challenge for the claimants is to prove and quantify their damages and demonstrate a causal link between the DMA-infringing conduct and the damage suffered (and in case of stand-alone claims – also the unlawful conduct itself). That may be problematic since detailed information pertaining to this conduct is often in the possession of the gatekeeper itself and/or the authorities and, therefore, not easily accessible by claimants. Furthermore, the presumable complexity of quantifying damages (for example in case of unlawful combination of personal data across services) could necessitate costly economic analysis and may raise the barrier to lodge a claim. The DMA Implementation Act does not include a rebuttable presumption that DMA-infringing conduct causes damages – comparable to Article 17(2) of Directive 2014/104/EU (the Damages Directive), implemented into Article 6:193l Dutch Civil Code that applies in case of (horizontal) infringements of the EU or Dutch cartel prohibition. Damages are more likely to be brought as mass or bundled claims than by individual claimants, as discussed under the previous question for the DSA.

[47] See for example recital 104, Articles 39 and 42 of the DMA.

[48] See for example the judgment of the Court of 17 September 2002, *Antonio Muñoz y Cia SA and Superior Fruiticola SA v Frumar Ltd and Redbridge Produce Marketing Ltd*., ECLI:EU:C:2002:497, para. 27.

[49] Parliamentary documents II, 2023–2024, 36 495, no. 3, p. 17.

Question 4

No additional national rules for private enforcement have been foreseen. Actions for damages will follow the ordinary rules for private damages claims based on Article 6:162 of the Dutch Civil Code.

Question 5

Following Article 42 of the DMA, the Representative Actions Directive (RAD) applies to representative actions brought against infringements by gatekeepers of provisions of the DMA that harm or may harm *the collective interests of consumers*. In addition, Article 86 of the DSA allows recipients of intermediary services to mandate a body, organisation or association to exercise their rights on their behalf. The law implementing the RAD into Dutch law will apply to collective actions that are brought on or after 25 June 2023, as a result of which this law will have an immediate effect in relation to DSA and DMA infringement claims that fall within the scope of the RAD.[50] Article 18 of the RAD (disclosure of evidence) may help end users to obtain information about DSA and DMA-infringing conduct.

Section 5: General questions

Question 1

The direct applicability and the direct effect of the DSA apply equally to the requirements of Articles 9 and 10 of the DSA.[51] Therefore, the Dutch legislator did not consider any further national implementation measures necessary. Article 4.5 of the DSA Implementation Act does specify that paragraphs 3, 4 and 5 of Articles 9 and 10 of the DSA can be put aside when orders to act against illegal content or orders to provide information are made based on the Dutch Code of Criminal Procedure as far as the interest of the investigation requires it. This means that orders stemming from criminal law do not always have to be transmitted to other Digital Services Coordinators under the Dutch implementation of the DSA in order to protect criminal investigations and confidentiality where necessary.

It could be said that the main hurdle for the implementation of Articles 9 and 10 of the DSA is the required cooperation between the ACM as DSC on the one hand, and the national judicial and administrative authorities on the other

[50] Article IX of the Implementation Act Representative Actions Directive, Staatsblad 2022, 459.
[51] Explanatory Memorandum to the DSA Implementation Act, para. 3.4.2.3.

hand. A further possible legal hurdle could be that some public bodies that are required to inform the ACM under the DSA are in some cases exempted from this requirement by other European legislation. How this exemption works in practice is still unclear.

An example can be found in Article 3 of Regulation 2021/784, which regulates the content of administrative orders to remove online terrorist content. Article 9(2) of the DSA also regulates the content of administrative orders to act against illegal content. The rules set out in the DSA are without prejudice to the requirements given by Regulation 2021/784 (see specifically Article 2(4)(c) of the DSA). However, it remains unclear in what sense an obligation (if any) remains for the competent authority to inform the ACM of orders given to remove terrorist content under the DSA. In any case, this is a matter for EU legislation (or adjudication) and not national law.

Question 2

Several non-EU entities have started providing services as legal representatives under Article 13 of the DSA in the Netherlands. Providers of online intermediary services making use of such legal representatives have to share the contact details of their legal representative with the ACM. These legal representatives will be consulted by the competent Dutch authorities or the Commission, in connection with compliance with the DSA. They may also be held liable in case of non-compliance with the DSA.[52]

Question 3

The DSA Implementation Act does not contain a specific approach vis-à-vis complaints handling according to Article 53 of the DSA.[53] While the preamble states that Article 53 of the DSA has direct effect and therefore does not require implementation in national law,[54] the provision does contain elements that are open to interpretation for which the European Commission has not yet provided guidance. Different interpretations may lead to different national procedures across the EU, which will become visible in the types of complaints that will be transmitted between DSCs.

To fulfil the requirements of Article 53 of the DSA and to set up an efficient and easy-to-access system in which problems are addressed that are (most)

[52] ACM, "Consultation version of DSA Guidelines: Due diligence obligations for digital services," 18 January 2024.

[53] DSA Implementation Act.

[54] Explanatory Memorandum to the DSA Implementation Act, para. 5.3.8.2.

damaging to society, the ACM set up a new complaint handling system for DSA-complaints. Users can lodge a DSA-complaint online through a series of questions as part of a digital form. The ACM does not work with reporting thresholds, but accepts and processes all complaints, no matter the reporting party, on all alleged infringements. This increases the accessibility of the Dutch complaints system. In addition, this will lead to a relatively large number of complaints creating opportunities for maximum data gathering for monitoring purposes.

All DSA-complaints processed by the complaint handling system are reviewed by employees working in a special division of the ACM. The complaints are labelled by: (1) recipient (user of an intermediary service), (2) (alleged) infringement, (3) location of the provider (to determine whether the complaint should be forwarded following a check to confirm if information provided to the DSC by the complainant is complete), and (4) official request for enforcement (that require a special treatment according to Dutch law). The Dutch legislator clarified in the DSA Implementation Act that not every complaint needs to lead to a formal investigation.

Received complaints that fall within the competence of another DSC will be forwarded through the European system Agora. While assessing the complaint, the system applies filters to support this process. For example, the type of possible infringement will be forwarded together with the complaint to the appropriate DSC. Complaints can also be bundled and linked to each other. This could be helpful in the event of a spike in complaints connected to a specific event (e.g., a complaint submitted by a celebrity, together with numerous "supporting complaints" received).

Question 4

The Netherlands was one of the most active Member States throughout the process of developing and implementing the DMA, together with Germany and France. In 2021, these three governments jointly published a non-paper entitled "Strengthening the Digital Markets Act and its Enforcement" as the "Friends of an Effective DMA."[55] In addition, the ACM saw a bigger role for national (competition) authorities than was eventually assigned to those national authorities. The call for greater involvement of the Member States was echoed and strongly advocated by the European Competition Network (ECN) in a 2021 paper entitled "How national competition agencies can strengthen

[55] Friends of an effective Digital Markets Act, non-paper "Strengthening the Digital Markets Act and its Enforcement," 27 May 2021, https://www.bmwk.de/Redaktion/DE/Downloads/M-O/non-paper-friends-of-an-effective-digital-markets-act.pdf?__blob=publicationFile&v=4

the DMA." In that paper, the ECN advocated for a larger role for the national competition authorities. Without their involvement, the ECN argued that there are "multiple risks, including unreasonable inefficiencies due to underutilization of existing resources, thus causing an enforcement bottleneck, significant delays, in particular in establishing elsewhere the expertise that competition authorities have acquired over many years of dealing with digital platforms' behaviors and the way digital markets work, and potentially conflicting decisions undermining the effectiveness of both the DMA and competition law."[56] In that same paper, the ECN also signaled the very positive spill-over effects investigations may have to other jurisdictions and the valuable function NCA's have as radar-screen for cases.

In the context of the DSA, an issue raised by the Council of State, who advises the Dutch government and parliament on legislation, is who determines the illegality of content. The Council of State recommended to clarify the concept of "illegal content" in the Explanatory Memorandum to the DSA Implementation Act in order to have a clear delineation of powers between the various actors. It also argued that in certain cases it will be unavoidable for the ACM to assess whether certain information present on the services of online intermediaries should be considered illegal content within the meaning of the DSA. Given the potentially far-reaching considerations that will sometimes have to be made by the ACM, the Council of State pointed at the importance of the ACM being held accountable for the exercise of its powers.[57]

Question 5

The Dutch Ministry of Internal Affairs has announced that it is studying the possibility to create or endorse, in tandem with journalists, universities and other members of the civic society, a trusted flagger and alternative dispute resolution entity in order to counter online disinformation.[58]

Like in other countries, the scope and application of Article 22 of the DSA on trusted flaggers notices has been broadly discussed in the Netherlands. In the context of the preparations for the DSA Implementation Act, businesses

[56] ECN, Joint paper of the heads of the national competition authorities of the European Union "How national competition agencies can strengthen the DMA," 22 June 2021, pp. 6–7, https://www.acm.nl/sites/default/files/documents/verklaring-voorstel-digital-markets-act.pdf. See also press release ACM, "New European competition rules for Big Tech companies can be even more effective," 23 June 2021, https://www.acm.nl/en/publications/new-european-competition-rules-big-tech-companies-can-be-even-more-effective

[57] Parliamentary documents II, 2023–2024, 36 531, no. 4, https://www.raadvanstate.nl/adviezen/@140199/w18-23-00330-iv/

[58] Parliamentary documents II, 2023–2024, 30821, no. 230, pp. 7, https://zoek.officielebekendmakingen.nl/kst-1148350

raised the question whether also individual companies owning intellectual property rights could be awarded the status of "trusted flagger."The Minister responded that the status cannot be awarded to "individuals" but, in addition to associations representing right holders, individual companies can qualify as "entities" (cf. recital 61) if they meet the substantive requirements of Article 22(2) of the DSA. On the procedure to award entities the status of "trusted flagger," the Minister appears to leave it to the ACM to decide whether it will make use of the public consultation procedure of the GALA, in which case any affected person, including the online platforms, can provide their views. In any case, once the status has been awarded, online platforms could challenge that administrative decision based on the GALA and, in case of a significant number of "wrong" notices.[59]

The Minister does not follow the request of a number of stakeholders for more detailed procedures on the award of trusted flaggers, on the status of "recognized researchers" or on certified out-of-court dispute resolution bodies, based on the direct effect doctrine.[60] This is legally questionable, first because what is meant is probably the direct applicability of the Regulation – and not direct effect – and second because a Regulation does not necessarily impede additional national procedures (e.g., on time limits). However, it can be welcomed that the government does not intend to complicate procedures further. Unclarities about the application of DSA provisions can be discussed in the European Board for Digital Services and the Commission can decide to provide further guidance such as delegated acts (cf. for instance Article 14(13) of the DSA).

Question 6

In the context of the DSA, additional guidance is welcomed from the European Commission on the qualification of "trusted flagger" and the vetting of researchers, which are seen as complex matters. Specifically, the role of VLOPs and VLOSEs in the procedures (if any) is unclear. According to Dutch administrative law, public bodies are required to allow affected parties which could have objections against an administrative decision to express these concerns before it is taken (Article 4:8 of the GALA).

In the context of the DMA and its ex ante character, the risk of over-inclusiveness of the Regulation has been discussed by practitioners. Determining which undertakings qualify as gatekeepers is argued to be a relatively

[59] See Article 22(6) of the DSA and Explanatory Memorandum to the DSA Implementation Act, para. 9.6.4.

[60] Explanatory Memorandum to the DSA Implementation Act, para. 9.6.5.

mechanical exercise, based on turnover (or market capitalization) and user numbers. Once an undertaking meets these quantitative thresholds, it is up to that undertaking to prove that it does not qualify as a gatekeeper while it cannot invoke innovation and efficiency defences to avoid the application of the DMA's obligations and prohibitions.[61] Apart from the designation of gatekeepers, the substantive provisions of Article 5-7 of the DMA have also been discussed in relation to their scope and enforceability – for instance with regard to the interpretation of "specific choice" under Article 5(2) of the DMA for the user's consent to combine personal data, the scope of the prohibition of self-preferencing in Article 6(5), the scope of the data access provisions in Article 6(9-10), and the position of large language models when they form part of designated core platform services.[62]

Conclusion

Although the ACM had not yet been fully and formally designated to monitor compliance with the DSA and DMA and has no enforcement experience at the time of writing, there are several indications that the Netherlands has the potential to significantly contribute to the achievement of the objectives underlying the DSA and the DMA. The ACM is an active enforcer who took up impactful competition cases in the digital economy in the past years and conducted several market studies from which it gained substantial experience in the area. The fact that the ACM will also be responsible for the enforcement of the Platform-to-Business Regulation, the Data Governance Act and the Data Act allows for the achievement of synergies in oversight – although the availability of sufficient resources is key to fulfil these extra tasks. In terms of private enforcement, the Netherlands offers a favourable environment for collective damages actions because of the WAMCA that facilitates the bundling of damages claims. This can make the Netherlands an attractive jurisdiction for litigating private cases under the DSA and the DMA.

Another important element of the Dutch enforcement system is the Digital Regulation Cooperation Platform in which several Dutch regulators come together to coordinate their supervision tasks. The DSA and DMA are important pieces of legislation, but they do not operate in a vacuum and interact with other legal domains. For instance, duties requiring platforms to open up their ecosystems on the basis of the DSA or DMA may conflict with data

[61] De Vries, Yvo, Klijsen, Midas, and Pannekoek, Marik. "De Commissie aan de poort: de voorgenomen regulering van techreuzen onder de Digital Markets Act." *Nederlands tijdschrift voor Europees recht* 2021, no. 1, pp. 37–48, https://www.bjutijdschriften.nl/tijdschrift/tijdschrifteuropeesrecht/2021/1-2/NtER_1382-4120_2021_027_102_006

[62] Note following the report – Digital Markets Implementation Act, 24 May 2024, https://open.overheid.nl/documenten/55f7e272-a79c-4ce0-a940-59d32a1553ab/file

protection rules or intellectual property rights. Part of the ability of the two Acts to achieve their objectives will therefore depend on how well potential frictions with other areas of law are managed. It is up to the regulators in charge of the different legal domains to resolve such frictions. To ensure that regulators can effectively exchange insights and overcome tensions between the areas of law they oversee, cooperation protocols are required. The combination of the establishment of cooperation protocols and the existence of a cooperation platform between relevant regulators at the national level in the Netherlands may therefore be a best practice for other Member States too. With an increasingly fragmented EU regulatory framework, ensuring consistency in the interpretation of the law and an efficient division of resources (not only between different regulators within a Member State, but also between different Member States and between the EU and Member State level) is becoming a priority for effective compliance and enforcement in the digital economy.

Norway

*Hanne Zimmer**

Introductory comment

The DSA and the DMA are, at the time of writing, not yet applicable in Norway.

The reason for this is that Norway is not a member of the European Union but participates in the internal market through the Agreement on the European Economic Area (the EEA Agreement),[1] signed in 1992 between the EFTA countries, the (then) EU Member States and the European Communities. Internal market legislation must be incorporated into the EEA Agreement and subsequently implemented into the internal legal order of the EEA EFTA states. Regulations are no exception in this regard: A decision in the EEA Joint Committee, and national implementation (i.e., incorporation of the regulation "as such"[2]), are still required. As a rule, the subsequent supranational enforcement is entrusted to institutions specifically set up for the EFTA pillar (the EFTA Surveillance Authority (ESA) and the EFTA Court).

Consequently, in the EEA EFTA states, new EU legislation does not automatically apply from the date of entry into force set out in the legislative act but is contingent on a decision by the EEA Joint Committee and the notification by the EEA EFTA states of fulfilment of necessary constitutional requirements (i.e., adoption of the requisite national legislation). In most cases, major new legislation of EU origin enters into force significantly later in Norway than in the EU Member States. It should also be noted that, in recent years, the dynamic development of EU legislation, with more legislation spanning different areas and increased reliance on agencies for the implementation and enforcement, has made adaptation of EU legislation to the EEA Agreement more challenging. Inter alia, difficulties relating to the enforcement of EU legislation in the EFTA pillar (as will be explained below) is a frequent cause of delay.

The DSA and the DMA have yet to be incorporated into the EEA Agreement, and hardly any official information is available regarding many of the questions

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[1] For the full text of the main agreement, its annexes and protocols, see: https://www.efta.int/about-efta/legal-documents/eea-legal-texts

[2] Article 7(a) EEA: "an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties."

posed in the questionnaire. Both regulations are considered EEA relevant by the EU. The Norwegian government also considers the DSA and the DMA to be EEA relevant, but assessments are ongoing as regards the need for adaptations in connection with their incorporation into the EEA Agreement.[3]

The EFTA secretariat has set up a Digital Platform Task Force to prepare for the incorporation of the DMA and the DSA into the EEA Agreement. The Norwegian government has set up a DSA/DMA working group of representatives from affected ministries and government agencies have been set up. The working group considers various aspects of national implementation of the acts in Norway, including questions relating to their incorporation into the EEA Agreement and the need for adaptations for the EFTA pillar.[4] The output of these groups' work is, for the time being, not publicly available. The government has repeatedly stated that the two regulations enjoy "high priority" and that they aim to implement them "quickly," [5] but not timetable has been announced.

Against this background, most of the questions in the questionnaire cannot be answered directly with respect to Norway. The reply below will therefore, for each of the main sections of the questionnaire, outline issues that we anticipate will have to be addressed and point to mechanisms employed in other areas that might be of relevance to the implementation of the DSA and the DMA.

Section 1: National institutional set-up

Questions 1–6

Given that the DSA and the DMA have not yet been incorporated into the EEA Agreement, nor been implemented into Norwegian law, no authorities have currently been designated. The overarching responsibility for the DMA and the DSA lies with the Ministry of Digitalisation and Public Governance.

A national working group under the auspices of the Ministry of Digitalisation and Public Governance has been set up.[6] In addition to the lead ministry, the

[3] Cf. the government's EEA briefing notes ("EØS-notat") on the DSA, updated as of 22 December 2022 (https://www.regjeringen.no/no/sub/eos-notatbasen/notatene/2021/feb/forordning-om-digitale-tjenester-digital-services-act-dsa/id2860429/) and the DMA, updated as of 22 December 2022.(https://www.regjeringen.no/no/sub/eos-notatbasen/notatene/2021/juni/forordning-om-digitale-markeder-digital-markets-act-dma/id2860419/), respectively.

[4] Ibidem.

[5] Meeting in the Norwegian parliament's Sub-committee on European Affairs, Tuesday 23 April 2024, at 8:30 a.m. (verbatim minutes) https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Referater/Europautvalget/2023-2024/refe-202324-04-23/?m=1

[6] The working group is described in the government's EEA briefing notes ("EØS-notat") on the DSA, updated as of 22 December 2022 (https://www.regjeringen.no/no/sub/eos-notatbasen/notatene/2021/feb/forordning-om-digitale-tjenester-digital-services-act-dsa/id2860429/) and the

working group consists of ministries and authorities vested with pre-existing powers and competencies that may be affected by or overlap with the new regulations:

- The Ministry of Trade, Industry and Fisheries,
- The Ministry of Culture and Equality,
- The Ministry of Justice and Preparedness,
- The Ministry of Children and Families,
- The Ministry of Foreign Affairs,
- The Norwegian Communications Authority (Nkom) (electronic communications regulator, including ex ante market regulation of electronic communications),
- The Norwegian Competition Authority (enforcement of national and EEA competition law in Norway),
- The Norwegian Media Authority (media regulator, in charge of i.a. broadcasting regulation, age limits, etc.),
- The Consumer Authority (enforcement of consumer protection regulations),
- The Norwegian Data Protection Authority (enforcement of data protection legislation, most notably the GDPR).

Some of these authorities have publicly expressed interest in the DSA and/or the DMA. Inter alia, Nkom has publicly stated that it has a "natural role to play" in the enforcement of the DMA, inter alia through its participation in BEREC and due to the fact that it already enforces similar ex ante regulation in the electronic communications sector.[7] It has also stated that it considers itself a candidate for the role as the Norwegian DSA coordinator and as one out of several competent authorities.[8] The Data Protection Authority, in March 2022, expressed strong support[9] for the government's position paper submitted to the Commission in the public hearing, which advised that targeted advertising aimed at minors should be prohibited. The Media Authority also provides extensive information on the two acts and expresses interest in the role of DSC for Norway.[10]

While no designation decisions have been made to date, it might be worth noting that the Minister of Digitalisation and Public Governance, Ms. Karianne

DMA, updated as of 22 December 2022 (https://www.regjeringen.no/no/sub/eos-notatbasen/notatene/2021/juni/forordning-om-digitale-markeder-digital-markets-act-dma/id2860419/), respectively.

[7] Information on Nkom's website 4 September 2023 (https://nkom.no/internett/internettbaserte-plattformer/digital-markets-act-dma)

[8] Information on Nkom's website of 4 September 2023 (https://nkom.no/internett/internettbaserte-plattformer/digital-services-act-dsa)

[9] Information on the Data Protection Authority's website dated 9 March 2022 (https://www.datatilsynet.no/aktuelt/aktuelle-nyheter-2022/norge-med-egen-posisjon-om-digital-services-act/)

[10] Information on the Media Authority's website 16 February 2024 (https://www.medietilsynet.no/nyheter/aktuelt/forordningen-for-digitale-tjenester-dsa-handheves-i-eu-fra-lordag/)

Tung, in her address to the Storting's (the Norwegian parliament) subcommittee on European Affairs on 21 April this year,[11] indicated that the Data Protection Authority would perhaps not be the most likely candidate as a DSA enforcer (while the word used was "enforcement authority," the likely meaning was DSA coordinator or lead enforcement authority). Nor has any decision been taken on resource allocation to national enforcement. In the EEA briefing notes for the DSA and the DMA,[12] the government assumes that increased administrative resources will be required but neither headcount nor costs are quantified.

Importantly, the question of the national institutional set-up is not likely to be resolved until an agreement is reached between the EEA EFTA States and the EU on the enforcement of the two acts at the European level. This relates to the specific enforcement architecture set up under the EEA Agreement, where enforcement powers at the European level are generally vested in the EFTA Surveillance Authority (ESA), an authority foreseen in Article 108 EEA and set up pursuant to a specific agreement between the EEA EFTA States (the Surveillance and Court Agreement). Thus, it is the responsibility of ESA, not of the European Commission, to check that legal acts which have been made part of the EEA legal order are correctly implemented into national law and correctly applied in the EEA EFTA states. The general division of powers between ESA and the European Commission as regards surveillance and enforcement of the EEA Agreement is set out in Article 109 EEA.[13]

In certain areas, particularly as regards legislation empowering the Commission to adopt decisions that are legally binding on private entities, this pillar-based system of enforcement may be more challenging, as a single case may relate to several jurisdictions, including both EU and EEA EFTA countries.

[11] See, inter alia, verbatim minutes of the meeting in the Norwegian parliament's Sub-committee on European Affairs, Tuesday 23 April 2024, at 8:30 a.m. https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Referater/Europautvalget/2023-2024/refe-202324-04-23/?m=1

[12] Cf. the government's EEA briefing notes ("EØS-notat") on the DSA, updated as of 22 December 2022 (https://www.regjeringen.no/no/sub/eos-notatbasen/notatene/2021/feb/forordning-om-digitale-tjenester-digital-services-act-dsa/id2860429/) and the DMA, updated as of 22 December 2022(https://www.regjeringen.no/no/sub/eos-notatbasen/notatene/2021/juni/forordning-om-digitale-markeder-digital-markets-act-dma/id2860419/), respectively.

[13] A variety of mechanisms ensure that ESA's enforcement practice is consistent with the practice of the European Commission. This includes most notably the general homogeneity principle, ensuring that the jurisprudence of the European Court of Justice is the most important source of law for the interpretation of the EEA Agreement and secondary legislation. There is, formally, a distinction between rulings of the Court of Justice given prior the date of signature of the EEA Agreement (2 May1992), and later jurisprudence. As regards the former, Article 7 EEA and article 3(1) SCA require that EEA law be interpreted "in conformity" with such rulings. By contrast, Article 3(2) EEA merely requires that the EFTA Court and ESA give "due account" to later rulings. In practice, however, rulings by the Court of Justice, regardless of the date they were given, are regarded as the most important authority for the interpretation of the EEA Agreement. In addition, Article 109(2) EEA and specialized mechanisms laid down in protocols to the agreement provide that ESA and the European Commission shall cooperate to ensure uniform surveillance and enforcement practices.

Such problems have been present in the enforcement of competition law since the inception of the EEA Agreement, and Articles 56–58 EEA set out the division of competence between ESA and the Commission. These rules ensure that only one of the authorities is competent in a single case, and, at the same time, that the competence conferred on ESA does not impinge on the Commission's enforcement powers in the EU. The consequence of this system is that the Commission also has significant powers over undertakings in the EFTA States, for example, when trade is appreciably affected not only between an EFTA State and an EU country, but also between different EU countries. In the field of merger control, any merger that meets the thresholds in the EU will be notifiable to the EU Commission, regardless of its impact in the EEA-EFTA states. ESA therefore in practice never has jurisdiction in a merger case.[14]

In other areas, two-pillar problems may be solved differently: for example, in the energy sector, ESA adopts a decision which is binding on the Norwegian regulatory authority, based on a draft from ACER.[15] This solution formally respects the two-pillar architecture of the EEA Agreement. However, such arrangements, which formally ensure that the EEA Agreement is enforced by ESA in the EFTA States, may be difficult to design for regulation of business activities that, irrespective of their location, affect consumers or businesses across the EEA, such as in the case of competition law.

There are also models where the transfer of authority to EU institutions goes even further than in the field of competition. Where a single, EEA-wide decision is essential, for example where a single authorisation must be valid throughout the EEA, it has been accepted that competences to adopt such decisions are bestowed on EU agencies, including with respect to the EFTA States. This is the case inter alia in the transport sector, where the European Railway Authority (ERA) issues certain safety certificates and authorisations for the whole of the EEA.[16] Such arrangements are, however, often politically controversial and raise particular constitutional questions in Norway.[17]

[14] Pursuant to Article 57(2) EEA, ESA shall control concentrations where the threshold values are met in the territory of the EFTA States and not in the EU. Due to the relatively high threshold values, in combination with the two thirds rule, this has never happened. The agreement does, however, ensure involvement of ESA in cases having a significant impact in the territories of one or more EFTA States as well as in the EU, through special cooperation mechanisms set out in protocols 22 and 24.

[15] Decision of The EEA Joint Committee No 93/2017 of 5 May 2017 amending Annex IV (Energy) to the EEA Agreement, Article 1 no. 1 https://www.efta.int/sites/default/files/documents/legal-texts/eea/other-legal-documents/adopted-joint-committee-decisions/2017%20-%20English/093-2017.pdf

[16] Decision of the EEA Joint Committee No 248/2021 of 24 September 2021amending Annex XIII Transport) to the EEA Agreement [2024/471] (https://www.efta.int/sites/default/files/documents/legal-texts/eea/other-legal-documents/adopted-joint-committee-decisions/2021%20-%20English/248-2021.pdf). The decision does not make adaptations conferring ERA's powers in this regard on ESA with respect to the EFTA States.

[17] Due to the controversial nature of arrangements involving the transfer of decision-making powers to EU institutions, the Storting decided, on 17 December 2020, to request the opinion of the Norwegian Supreme Court on the constitutionality of the Storting's consent to the incorporation

The DSA and the DMA entrust the designation of VLOPs and VLOSEs (under the DSA), and gatekeepers (under the DMA), as well as other enforcement activities with respect to such firms, to the Commission. Given the highly internationalised character of the regulated firms and their activities, which are likely to affect businesses and consumers in the EU and the EFTA States alike, it might be practically difficult to ensure that ESA is competent in cases pertaining to the EEA EFTA states. In this respect, the DSA and particularly the DMA bear similarity to competition law.

As the time of writing, the Norwegian government has confirmed that the "two pillar question" is a major reason for the delay in taking a decision on incorporation of the two regulations into the EEA Agreement.[18] This is known to be one of the main topics under consideration in the national working group. It is not publicly known which solutions are being discussed between the EFTA countries and the EU, but the choice of solution ultimately depends on political will on both sides.

Section 2: Use of national legislative leeway under the DMA/DSA

Questions 1–2

Since, as described above, the formal decision to incorporate the DSA and the DMA into the EEA Agreement has not been taken, it is presently also unclear which legislative amendments will be made at the national level or which authorities will be responsible.

Question 3

To date, there has not been much national debate on the need to for amendments to existing legislation to comply with the DSA. The government's EEA briefing note (a short memo drawn up by the responsible government ministry for new EU legal acts under consideration for incorporation into the EEA Agreement) for the DSA states that adjustments to the Norwegian E-commerce Act, which implements the E-commerce Directive, will be required, and that a new law, providing inter alia for national enforcement mechanisms, will probably have to be adopted. However, no further details are discussed.[19]

of the Fourth Railway Package into the EEA Agreement. See the Supreme Court's opinion to the Storting in accordance with Article 83 of the Constitution, 26 March 2021 (https://lovdata.no/dokument/HRSIV/avgjorelse/hr-2021-655-p?q=HR-2021-655-P). For an English summary, see: https://lovdata.no/dokument/HRENG/avgjorelse/hr-2021-655-p-eng?q=HR-2021-655-P

[18] See, inter alia, verbatim minutes of the meeting in the Norwegian parliament's Sub-committee on European Affairs, Tuesday 23 April 2024, at 8:30 a.m. (cited above).

[19] The government's EEA briefing note on the DSA (cited above).

Under the Norwegian Constitution,[20] since legislative changes are required, the Storting (the Norwegian parliament) will have to formally consent to the incorporation of the new regulations into the EEA Agreement and adopt necessary legislative changes. The government may carry out a public consultation before submitting the propositions (Bill and Resolution) to the Storting to obtain consent and enact the necessary legislative changes. The need for legislative changes, including the identification of conflicting existing laws, will generally be mapped in that process. To date, neither the government nor specialised agencies have provided any official views on the need to amend existing legislation to make it compliant with the DSA (apart from the verbatim incorporation of the regulation, the adoption of a law on national enforcement and the abovementioned amendments to the E-commerce Act).

However, there has been some debate on the need to adopt complementary national legislation:

The report of the Norwegian Commission for Freedom of Expression[21] recommended, in 2022, that Norwegian authorities "map the possibilities for adaptations when implementing the DSA into Norwegian law." While recognising that the DSA entails exhaustive harmonisation within its field of application, and, being a regulation, it must be implemented "as such" into Norwegian law, the report nevertheless highlights the need to ensure sufficient control with platform operators' Norwegian language activities, to address identified concerns about transparency at the national level and an adequate number of Norwegian language moderators. The result of any such mapping exercises is not publicly known.

There has also been some debate on the need for further protections of press freedom on digital platforms, that is, to protect editorial content from unjustified removal or restrictions by platforms. The director of the Norwegian Media Authority has argued that, since the DSA does not prohibit platforms' removal of editorial content, a robust protection of press freedom at the national level would be important, inter alia with a view to invoking the platforms' obligation to enforce their terms and conditions with due regard to the freedom and pluralism of the media.[22] In 2023 and 2024, the Ministry of Culture and

[20] LOV-1814-05-17 Kongeriket Norges Grunnlov, § 26 https://lovdata.no/dokument/NL/lov/1814-05-17. Unofficial English Translation https://lovdata.no/dokument/NLE/lov/1814-05-17

[21] Official Norwegian Reports NOU 2022: 9, En åpen og opplyst offentlig samtale – Ytringsfrihetskommisjonens rapport https://www.regjeringen.no/no/dokumenter/nou-2022-9/id2924020/, Chapter 8.9. For an English summary, see: https://www.regjeringen.no/contentassets/753af2a75c21435795cd21bc86faeb2d/en-gb/pdfs/nou202220220009000engpdfs.pdf

[22] See, *inter alia*, an op-ed published at Medier24.no on 5 May 2022, titled "The DSA can contribute to securing press freedom on global platforms" (our translation) (https://www.m24.no/debatt-digital-services-act-dsa/dsa-kan-bidra-til-a-sikre-pressefriheten-pa-de-globale-plattformene/483853#:~:text=Rettsakten%20for%20digitale%20tjenester%20%28DSA%29%20

Equality has held meetings with media organisations to improve dialogue on issues related to media freedom and the freedom of expression, but according to the Ministry, the objective is to explore the possibilities for "self-regulation" by media organisations.[23]

The protection of minors has been a prominent issue in national debates concerning the DSA. In its position paper on the draft DSA, dated 28 February 2022,[24] the Norwegian government proposed a prohibition of "targeting techniques that process, reveal and infer personal data of minors for the purpose of displaying advertisements." This is now largely reflected in Article 28 of the DSA.

In December 2022, the Norwegian Storting adopted a petition resolution[25] requesting the government to "assess the scope for Norway to regulate digital services in addition to the regulation in the DSA and the DMA, with a view to considering a Norwegian prohibition of advertising based on mass collection of personal data, tracking and profiling of individuals on digital platforms" (our translation). It also adopted a petition resolution requesting the government to assess the extent of and the challenges related to storage of biometric data from Norwegian consumers on social media platforms.[26] To date, these resolutions have not been followed up, but the government has confirmed that they are still being assessed.[27]

There has also been much debate over limitations to screen time and access to social media for children and young people in the last year. The Prime Minister, Mr. Jonas Gahr Støre, announced in July 2024 that the government plans to

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har%20som%20m%C3%A5l,frata%20plattformenes%20mulighet%20til%20%C3%A5%20slette%20redaksjonel). In fact, the EEA EFTA states had, in joint comments to the Commission's public consultation on the DSA in 2021, argued that intermediary service providers must be "required to refrain from content moderation, suspension, disabling of access to or otherwise interfere with editorial content and services made available by editorial media with reference to their terms and conditions" (https://www.efta.int/sites/default/files/documents/eea/eea-efta-comments/2021/EEA_EFTA_Comment_on_the_Digital_Services_Act.pdf#:~:text=GENERAL%20REMARKS%20ON%20THE%20PROPOSAL.%20l%20Services%20(Digital).

[23] Information article on technology platforms and democracy, updated on 8 May 2024 https://www.regjeringen.no/no/tema/kultur-idrett-og-frivillighet/film-og-medier/innsiktsartikler/teknologiplattformene-og-demokratiet/id2977897/

[24] Norwegian Position Paper on the Commission Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and – amending Directive 2000/31/EC – (COM(2020) 825) (https://www.regjeringen.no/contentassets/9daf14940a6d401098b0992bef1802cf/norwegian-position-paper-on-the-dsa-target-advertising-28.02.2022-endelig.pdf).

[25] "Anmodningsvedtak", that is, a resolution requesting the government to act.

[26] Resolutions 196 and 197 of 2022 (https://www.stortinget.no/no/Saker-og-publikasjoner/Vedtak/Vedtak/Sak/?p=88758) (Private Member's Motion on better data protection in social media Dok. 8:167 S (2021-2022), Innst. 100 S (2022-2023) (https://www.stortinget.no/no/Saker-og-publikasjoner/Saker/Sak/?p=88758)).

[27] Meld. St. 4 (2023–2024) (the government's report to the Storting on petition resolutions from the Storting session 2022–2023), p. 196 (https://www.regjeringen.no/contentassets/ff19172fd01041cbbeffb03bbcad7258/no/pdfs/stm202320240004000dddpdfs.pdf).

adopt an absolute age limit which must be verified by electronic ID, and to introduce "stricter regulations" of content aimed at minors, by the end of the year. No formal proposals have been published to date, and specialist authorities, such as the Consumer Authority, the Data Protection Authority and the Children's Ombudsman expressed scepticism, citing inter alia concern for children's freedom of expression and right to participation.[28] The government's new Digitalisation Strategy, published on 26 September 2024, states that the government will "consider" age limits for social media.[29] Most likely, not only the scope for national regulation alongside the DSA, but also the relationship between the contemplated regulation and fundamental rights as well as the freedom to provide services, will have to be carefully considered before any such regulation is adopted.

It has also been proposed to work towards amendments to the DSA itself to enact EU level restrictions on minors' use of social media. A report from 2023 by the Nordic Think Tank for Tech and Democracy, a body operating under the auspices of the Nordic Council of Ministers, recommended effective age control verification and parental control as default settings for social media platforms, and that "Nordic countries should work to make such verification part of the common EU agenda and future amendments to the Digital Services Act."[30]

Questions 4–6

There has been little discussion to date about the relationship between the DMA and existing national legislation.

The most important tool to ensure contestable markets in the digital sphere is general competition legislation. Competition in the digital sphere is a high priority area for the Norwegian Competition Authority (NCA), and the authority has participated in working groups on the DMA within the framework of ECN.[31] Notable cases concerning online platforms in recent years include the NCA's prohibition of the acquisition by Schibsted ASA of Nettbil AS, a much smaller provider of online auctions for second-hand cars, which was overturned by the Norwegian Supreme Court in February 2023.[32]

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[28] "Støre vil ha aldersgrense for sosial medier" – article on nrk.no 2 July 2024 (https://www.nrk.no/norge/store-vil-ha-aldersgrense-for-sosiale-medier-1.16944311).

[29] Fremtidens digitale Norge – Chapter 4.5.3 (https://www.regjeringen.no/no/dokumenter/fremtidens-digitale-norge/id3054645/?ch=5#id0088).

[30] A Nordic approach to democratic debate in the age of Big Tech - Recommendations from the Nordic Think Tank for Tech and Democracy, p. 18 (https://norden.diva-portal.org/smash/get/diva2:1751279/FULLTEXT01.pdf).

[31] See the Annual Report of the Norwegian Competition Authority, 2023 https://konkurransetilsynet.no/wp-content/uploads/2024/04/Konkurransetilsynets-arsrapport-2023.pdf

[32] HR-2023-299-A – summary and judgment available in English: https://www.domstol.no/en/supremecourt/rulings/2023/supreme-court-civil-cases/HR-2023-299-A/

There is also some existing specific regulation of online platforms in Norwegian competition law: under its general power to adopt "pro-competitive measures", the responsible ministry adopted, in 2009, a regulation on access to online advertising of homes for sale.[33] The regulation requires undertakings that offer online advertisements of homes for sale to ensure access to their services on non-discriminatory terms. The NCA has also, in several markets, required designated companies to report mergers and acquisitions below the general merger notification thresholds (to allow for a subsequent call-in, if competition concerns are identified). The NCA has used this power in several markets, including to require Schibsted ASA, which owns the digital marketplace finn.no, to report certain acquisitions of online marketplaces below the general merger thresholds.[34]

The abovementioned regulations cover companies and activities that are unlikely to reach the threshold to be designated as gatekeepers. It is not known whether amendments to these regulations as a result of the DMA could be envisaged (for example, to align national regulations with obligations under the DMA). More generally, however, there have been calls to develop national regulations of platforms outside the scope of the DMA. In October 2022, when the DMA had just been adopted, the Norwegian Technology Council, a government-appointed body providing advice to government and lawmakers in the field of technology, recommended to explore the need for additional national regulations outside the scope of the DMA.[35] Furthermore, as mentioned above, the Storting's petition resolution of December 2022 requested the government to assess the scope for additional national regulation to complement not only the DSA, but also the DMA. As the DMA has not yet been incorporated into the EEA Agreement, it is unsurprising that no specific proposals to this effect have been put forward to date.

Section 3: Vertical and horizontal public enforcement-related cooperation under DSA/DMA

Question 1

The two-pillar structure described in Section 1 above also means that the specific cooperation mechanisms set out to ensure uniform enforcement practices, such as the European Board for Digital Services (Section 3 DSA) or the reliance

[33] FOR-2009-09-09-1169 Forskrift om tilgang til boligannonsering på Internett (https://lovdata.no/dokument/SF/forskrift/2009-09-09-1169).

[34] See the NCA's overview of markets and market players subject to such specific reporting obligations https://konkurransetilsynet.no/fusjoner-og-oppkjop-%c2%a716/opplysningsplikt-for-saerskilde-marknader/

[35] "Ny digital konkurranselov i EU og Norge" – report from the Norwegian Technology Council, October 2022 (https://media.wpd.digital/teknologiradet/uploads/2022/10/DMA-SF-ferdig.pdf).

on the European Competition Network (ECN, under Article 38 DMA) must also be specifically adapted to the architecture of the EEA Agreement. To date, no formal proposals have been put forward to this effect. Ultimately, this will depend on how the two pillar questions discussed above are resolved.

It is worth noting that different models for cooperation exist in different fields of EEA law:

In the field of competition, regulation 1/2003 is mirrored in Protocol 4 of the Surveillance and Court Agreement and ESA therefore cooperates with the EFTA NCAs in the same way as the Commission cooperates with EU NCAs. In addition, a separate EFTA network of competition authorities has been established, ensuring cooperation in enforcement proceedings between EFTA NCAs and between such NCAs and ESA. However, the Commission opposed decentralised application of competition law in the EFTA pillar.[36] Thus, decentralised application by national competition authorities and courts, and cooperation mechanisms such as the EFTA network of competition authorities, are only laid down in the Surveillance and Court Agreement (i.e., they are only agreed between the EFTA States), not in the EEA Agreement itself. The consequence of this is that there is no EEA-wide network, and competition authorities of the EFTA-states have the right to participate in the ECN "for the purposes of discussion of general policy issues only."[37]

This approach can be contrasted with the arrangements applicable under, for example, the GDPR, where there is no EFTA specific structure mirroring the European Data Protection Board (EDPB) or the consistency mechanism. Instead, the EDPB's powers extend to the EFTA States, and the supervisory authorities of the EFTA States participate directly in the activities of the EDPB, albeit without having the right to vote or to stand for election as chair or deputy chair of the board.[38]

Question 2

At this stage, it is difficult to foresee which role national courts will play. General principles of EEA law will apply, such as the principle that EEA EFTA States must ensure that EEA rules prevail in case of conflicts between implemented

[36] Ot. Prop. nr. 6 (2003 – 2004), chapter 14.1.2. https://www.regjeringen.no/no/dokumenter/otprp-nr-6-2003-2004-/id127943/?ch=14#kap14-1-2

[37] Article 1A of Protocol 23 to the EEA Agreement (https://www.efta.int/sites/default/files/documents/legal-texts/eea/the-eea-agreement/Protocols%20to%20the%20Agreement/protocol23.pdf).

[38] Decision of the EEA Joint Committee No 154/2018 of 6 July 2018, Article 1(a) (https://www.efta.int/sites/default/files/media/documents/legal-texts/eea/other-legal-documents/adopted-joint-committee-decisions/2018%20-%20English/154-2018.pdf).

EEA legislation and other statutory provisions;[39] the principles of effectiveness and equivalence; and the possibility of the courts of the EFTA states to refer questions for an advisory opinion to the EFTA Court under Article 34 of the Surveillance and Court Agreement.

As regards, specifically, the mechanisms of cooperation between national courts and the Commission foreseen, respectively, in Article 82 DSA and Article 39 DMA, such mechanisms are known from EEA competition law: The incorporation of Regulation (EC) No. 1/2003 into the Surveillance and Court Agreement, as discussed above, allows ESA to submit written (and, with the consent of the national court, oral) observations to national courts. In Norwegian law, these mechanisms are reflected in the EEA Competition Act,[40] as well as in a Regulation incorporating Protocol 4 to the Surveillance and Court Agreement into Norwegian law. ESA has made use of the possibility to submit observations to Norwegian courts in three cases.[41] ESA has also submitted written observations in one national state aid case, relying, in the absence of specific provisions in national state aid legislation, on general provisions on third party submissions in the Norwegian Dispute Act.[42]

Question 3:

Nothing to comment at this stage.

[39] Protocol 35 to the EEA Agreement and as provided for by Section 2 of the EEA Act of 27 November 1992 No. 109 (https://www.efta.int/sites/default/files/documents/legal-texts/eea/the-eea-agreement/Protocols%20to%20the%20Agreement/protocol35.pdf). In Norwegian law, this is enshrined in Section 2 of the EEA Act (LOV-1992-11-27-109 – Lov om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområde (EØS) m.v. (EØS-loven) https://lovdata.no/dokument/NL/lov/1992-11-27-109#:~:text=Bestemmelsene%20i%20hoveddelen%20i%20avtale%20om%20Det%20europeiske).

[40] LOV-2004-03-05-11 Lov om gjennomføring og kontroll av EØS-avtalens konkurranseregler mv. (EØS-konkurranseloven) https://lovdata.no/dokument/NL/lov/2004-03-05-11

[41] Information on ESA's website https://www.eftasurv.int/competition/national-cooperation, with links to three amicus curiae submissions to Norwegian courts (Telenor ASA og Telenor Norge AS (Telenor) (Case No 2019/34), NCC AB and NCC Roads AS v Staten v/Konkurransetilsynet (Case No 14-076039ASD-BORG/03) and Bastø Fosen AS v Color Line (Case No 13-178315ASD-BORG/02)).

[42] HR-2023-1807-A, Oslo municipality v. Grønnegata 21, judgment of 29 September 2023, where ESA submitted an amicus curiae brief on 23. March 2023 (https://www.eftasurv.int/cms/sites/default/files/documents/gopro/1353804%20Norwegian%20Supreme%20Court%20-%20Boligbygg%20case%20-%20ESA%20Written%20Observations%20-%20EN%20language%20version.pdf). The legal basis was Section 15-8 of the Act relating to mediation and procedure in civil disputes (the Dispute Act), which allows organisations and associations, within the scope of the organisation, and public bodies within their areas of responsibility, to submit written observations in a case without being a party thereto. Reliance on national procedural law was necessary because Regulation (EU) 2015/1589, which provides for an amicus curiae mechanism in state aid cases, has not yet been incorporated into the EEA Agreement. (For an unofficial English translation of the Dispute Act, see https://lovdata.no/dokument/NLE/lov/2005-06-17-90. For the authentic, Norwegian version, see Lov om mekling og rettergang i sivile tvister (tvisteloven), https://lovdata.no/dokument/NL/lov/2005-06-17-90).

Section 4: Private enforcement of DMA/DSA

Question 1

Private enforcement actions would not be possible before the two regulations have been implemented into national law, or at least incorporated into the EEA Agreement.

Questions 2 and 3

Given that the current state of the work to incorporate the DSA and the DMA into the EEA Agreement, and the subsequent implementation into Norwegian law, there is no experience and not much debate about the possibility for private enforcement.

Likely complainants are difficult to foresee, but it is noted that civil society organisations and consumer watchdogs may have a role to play. For example, the Norwegian Consumer Council,[43] a consumer organisation financed by the Ministry of Children and Families, regularly intervenes in consumer disputes in support of the public interest, specifically consumer interests.[44] It is conceivable that the Consumer Council, and other civil society organisations, could play a role in the private enforcement of the DSA and DMA as well. Please see question 5 for a more detailed description of the procedural rules relating to interventions. In addition to interventions, the Consumer Council organises a scheme for legal assistance, under which qualified lawyers employed by the council, or external counsels acting on a pro bono basis, provide legal assistance to consumers in matters of principle. Under the scheme, the consumer's legal costs may be wholly or partly covered by the Consumer Council.[45]

It is also conceivable that collective redress may be a useful way to pursue claims where each individual claim is too small to justify the time, and costs, involved in pursuing the claim individually. The Norwegian Dispute Act allows for collective redress both under an opt-out model (i.e., class actions where persons who have claims within the scope of the class action are

[43] https://www.forbrukerradet.no/in-english/

[44] See for example the Annual Report of the Norwegian Consumer Council for 2023, which describes (p. 36 – 37) several such cases (https://storage02.forbrukerradet.no/media/2024/03/fr20aarsrapport20202320web2096dpi.pdf).

[45] "Advokatordninga til Forbrukarrådet" – information on the Consumer Council's web page (https://www.forbrukerradet.no/side/advokatordning/) and their guidelines for legal assistance dated 9 March 2015 (https://storage02.forbrukerradet.no/media/2018/12/retningslinjer-advokatordningen.pdf).

members if they have not actively withdrawn, see Section 35-7 of the Disputes Act) and under an opt-in model (members of the group must register to be part of the class action, see Section 35-6 of the Dispute Act). A prerequisite to allow a class action under the opt-out model, is that the claims individually involve amounts or interests that are so small that it must be assumed that a considerable majority of them would not be brought as individual action (see Section 35-7(1)(b)).

Enforcement of consumer claims through class actions has had some success in Norway. A well-known case of collective enforcement of consumer claims under the opt-out model involved 180 000 unitholders in a securities fund, with the Norwegian Consumer Council as the class representative, who sued the asset manager for breach of contract. The Supreme Court found that the fund had not been managed in accordance with the contract and that the unitholders were therefore entitled to a reduction of the management fee.[46]

While this indicates that collective redress could be a possible means of enforcing consumer claims based on the DSA or the DMA in Norway, costs might turn out to be an obstacle: Under the opt-out model, class members cannot be held liable for legal costs or remuneration of the class representative. Thus, unless a consumer organisation or a public body is willing to act a class representative and has the means to finance the action, opt-out class actions may be difficult to finance. An example of this is an attempt, in 2021, to bring a class action on behalf of cartel customers relying on external financing. In case of success, the fees to the external financier would be deducted from the damages awarded. The admissibility of the action was litigated separately. In 2023, the Supreme Court took the view that the Norwegian provisions on opt-out class actions did not allow such deductions, and therefore dismissed the case.[47]

Question 4

No specific national rules pertaining to private enforcement of the two regulations have, to date, been adopted or proposed.

As regards to the Damages Directive as a possible model, this directive has not yet been incorporated into the EEA Agreement due to difficulties relating to its

[46] HR-2020-475-A DNB Asset Management v. The Norwegian Consumer Council – decision dated 27 February 2020.

[47] HR-2023-1034-A Alarmkundeforeningen v. Verisure AS and Sector Alarm AS – decision dated 5 June 2023.

application in the EFTA pillar.[48] A solution to these difficulties would probably have to be found before the directive could be implemented in Norway, and, in turn, serve as a model in adjacent areas such as the DSA and the DMA. However, even if the directive has not been implemented, some private enforcement of competition law does take place in Norway.[49] This could also be the case for the DSA and the DMA, irrespective of whether national legislation is aligned with the Damages Directive.

As regards the allocation of cases, there are generally few examples of specialised courts in Norway. However, out-of-court dispute resolution bodies do exist in several areas of law, particularly in consumer law. Please see Section 5, Question 5, for further details.

Question 5

Norwegian procedural law allows intervention by civil society organisations "charged with promoting specific interests in cases that fall within the purpose and normal scope of the organisation" (Dispute Act, Section 15-7). It is not uncommon that civil society organisations, such as consumer organisations or environmental organisations, intervene in cases that raise points of principle falling within their "purpose and normal scope."

Intervention is declared before the court or in written pleadings and must be motivated. The parties may contest the intervention, in which case it is for the court to decide if intervention shall be allowed. They may take procedural action for the benefit of the party who is to benefit from the support, insofar as the action is limited to safeguarding the interests of the organisation.

If the action is successful, the intervener may be entitled to coverage of legal costs from the opposing party. By contrast, where the action is unsuccessful, an intervener may be liable for legal costs incurred by the opposing party.[50] The intervener and the party whom the intervention supports may be held

[48] In a recent judgment (E-11/23 Låssenteret AS v Assa Abloy Opening Solutions Norway AS, judgment of 9 August 2024 https://eftacourt.int/download/11-23-judgment/?wpdmdl=9720), the EFTA Court has confirmed that there is no obligation to interpret national law in light of the directive as long as it has not been implemented into the EEA Agreement.

[49] The largest and most well-known national case to date is the action instigated by Norway Post against four truck manufacturers, based on cartel activities for which they had been fined by the European Commission, currently pending before the Borgarting Court of Appeal. It may also be noted that the EFTA Court has provided guidance on damages under EEA competition law in a few cases, inter alia E-10/17Nye Kystlink AS v Color Group AS and Color Line AS (https://eftacourt.int/cases/e-10-17/).

[50] Section 20-6 of the Dispute Act.

jointly and severally liable for the full amount or parts of the amount of legal costs awarded to the opposing party.

In addition to intervention, civil society organisations may, in matters within the purpose and normal scope of the organisation, support a party to a dispute by submitting written observations pursuant to Section 15-8, to highlight matters of public interest (amicus curiae submissions). The observations shall be made in a written pleading submitted to the court. The court may reject the pleading if, by virtue of its form, scope or content, it "ill-suited" to highlight the public interest at stake. If the pleading is not rejected, it shall form part of the basis for the decision and be distributed to the parties. The organisation must bear its own costs and cannot be held liable for costs incurred by the opposing party.

Section 5: General questions

Questions 1–3

Since the two regulations have not yet been implemented and no specific proposals for implementing national legislation have been put forward, there is no information on these issues at present.

Question 4

The DSA and the DMA have generally been received favourably by major political parties in Norway. When the Minister of Digitalisation and Public Governance, Ms. Karianne Tung (Labour Party), gave her address to the Norwegian parliament's Subcommittee on European Affairs on 21 April this year, she took the view that the DSA and the DMA (as well as the EU AI Act) would "contribute positively to the development of digital society in Norway too." In the debate following her address, most participants seemed to take a positive view of the substance of the regulations, although some expressed concerns about the "two pillar challenges" and the potential transfer of authority to ESA and/or the European Commission. Ms. Tung confirmed that a solution needs to be found to these issues and that the Legislation Department of the Ministry of Justice had been requested to assess the question of transfer of authority (to ESA and/or EU institutions).[51] Such questions are generally politically controversial in Norway, and more debate is to be expected when the choice of solution is publicly known.

[51] Meeting in the Norwegian parliament's Sub-committee on European Affairs, Tuesday 23 April 2024, at 8:30 a.m. (verbatim minutes) https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Referater/Europautvalget/2023-2024/refe-202324-04-23/?m=1

As indicated in Section 2 above, there has also been some concern that additional national regulation might be necessary or at least desirable.

In a written question to the Minister of Digitalisation and Public Governance of 2 May 2024, a Conservative Member of the Storting, Mr. Tage Pettersen, expressed impatience for the DSA to be implemented, considering the need for a prohibition of advertisements based on profiling using personal data of minors. In her reply, the Minister shared the concern for better regulation of social media platforms but pointed to the difficulties involved in adapting the enforcement of the regulation to the EFTA pillar and gave no specific timeline for the DSA's incorporation into the EEA Agreement or implementation into national law.[52]

Question 5

As no proposal has been put forward with respect to national implementation measures, it is not known how these provisions will be implemented.

For the sake of completeness, it should be mentioned that a significant number of out-of-court dispute resolution bodies already exist in the field of consumer protection law. Firstly, the Norwegian Consumer Authority may act as a mediator in consumer disputes. If no resolution is found, the dispute may be brought before a consumer complaints board. The decision of the board is binding but may be appealed to the district court.[53] In addition, the Act relating to authorisation of alternative dispute resolution entities in consumer matters,[54] which implements Directive 2013/11/EU and Regulation (EU) No. 524/2013 into Norwegian law, provides a legal basis for the creation of alternative dispute resolution bodies in specific areas, set up by law or under an agreement between industry and consumer organisations.

As regards trusted flaggers, the Commission for Freedom of Expression noted in its report that the system of trusted flaggers under the DSA bears some resemblance to the cooperation between faktisk.no, a fact checking organisation,

[52] Written question dated 2 May 2024 and reply by the Minister of Digitalisation and Public Governance of 10 May 2024 https://www.stortinget.no/no/Saker-og-publikasjoner/Sporsmal/Skriftlige-sporsmal-og-svar/Skriftlig-sporsmal/?qid=98749

[53] LOV-2020-06-23-98 Lov om behandling av forbrukerklager i Forbrukertilsynet og Forbrukerklageutvalget (forbrukerklageloven) (The Act relating to the processing of consumer complaints by the Consumer Authority and the Consumer Complaints Board), https://lovdata.no/dokument/NL/lov/2020-06-23-98

[54] LOV-2016-06-17-29 Lov om godkjenning av klageorganer for forbrukersaker (godkjenningsloven) https://lovdata.no/dokument/NL/lov/2016-06-17-29). Unofficial English translation: https://lovdata.no/dokument/NLE/lov/2016-06-17-29

and Meta.[55] Faktisk.no is a partner in "Meta Third-Party Fact-Checking Program." Under the programme, faktisk.no is informed of content suspected (by Meta or users) to be disinformation. If faktisk.no chooses to carry out a fact-check, a link to the check will appear below the checked content in users' newsfeed.[56] A notable difference, however, is that faktisk.no is a civil society organisation not certified by any public body.

Some organisations have expressed an interest in becoming a trusted flagger. One example is the Nordic Centre for Tech and Democracy.[57]

Question 6

We expect more debate on potentially problematic issues and provisions once a timetable for implementation is set and the two-pillar questions discussed above have been resolved.

[55] NOU 2022:9 The Norwegian Commission for Freedom of Expression Report, Chapter 8.4.2.2 https://www.regjeringen.no/no/dokumenter/nou-2022-9/id2924020/?ch=9#kap8-4-2-2

[56] Information on faktisk.no's web site https://www.faktisk.no/facebook.

[57] See the report "A Nordic approach to democratic debate in the age of Big Tech Recommendations from the Nordic Think Tank for Tech and Democracy" (https://norden.diva-portal.org/smash/get/diva2:1751279/FULLTEXT01.pdf), p. 16.

Poland

*Katarzyna Klafkowska-Waśniowska**
*Miłosz Malaga***

Section 1: National institutional set-up

Question 1

Designated authorities.

Digital services coordinator has not yet been officially designated in Poland. The proposals for the acts introducing the necessary amendments to implement and ensure the application of the DSA and the DMA are still (as of 31 October 2024)[1] at the stage of legislative drafts prepared in the Council of Ministers.[2] Two pre-existing authorities have been proposed as competent for the DSA enforcement: Prezes UKE Urzędu Komunikacji Elektronicznej (Regulator for Electronic Communications)[3] as the Digital Services Coordinator, and Prezes Urzędu Ochrony Konkurencji i Konsumentów UOKIK (the Polish Competition Authority).

According to the law on electronic communication [PKE[4]], Prezes UKE is the regulatory authority for telecommunication and postal services, and is the central government administration body [Art. 413 PKE]. Prezes UKE is appointed by Sejm, based on the request of the Prime Minister (*President of the Council of Ministers*) for the term of 5 years. The requirements for the candidates

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[1] The report reflects the legal framework as of 31 October 2024. It also includes references to evolution of the legal framework after this date. However, these references are incidental and explicitly noted in the report.

[2] Rządowe Centrum Legislacji proposal for the amendments of the Act of 18 July 2002 on Providing the Services by Electronic Means, UC21, last version of 26 September 2024, https://legislacja.rcl.gov.pl/projekt/12383101/katalog/13045617#13045617, last accessed 31 October 2024.

[3] Urząd Komunikacji Elektronicznej w nowej roli. Stanie na straży big techów, https://www.gazetaprawna.pl/firma-i-prawo/artykuly/9403846,urzad-komunikacji-elektronicznej-w-nowej-roli-stanie-na-strazy-big-te.html. After the European Commission decided to refer Poland to the CJEU due to lack of effective implementation of the Digital Services Act on 7 May 2025, Polish Government appointed Prezes UKE as the Digital Services Coordinator on 13 May 2025 https://www.gov.pl/web/premier/uchwala-w-sprawie-wyznaczenia-koordynatora-do-spraw-uslug-cyfrowych

[4] Act on Electronic Communication, Ustawa Prawo komunikacji elektronicznej Dz.U.2024.1221 z dnia 2024.08.09, awaiting entry into force on 9 November 2024.

are specified in law and include experience in the telecommunication or postal sector, managerial skills and impeccable reputation [Art. 415 PKE]. Prezes UKE is the relevant authority for telecommunication together with the minister for informatization [*Minister do spraw informatyzacji*, Art. 412 PKE]. Prezes UKE can be repealed before the end of the term only in instances when the person no longer fulfils the conditions required for the office according to Art. 415 PKE. According to the governmental proposal for the implementation of the DSA, the requirements and conditions set in electronic communication law guarantee that Prezes UKE is an independent authority, as required by EU law.[5]

According to the Act on the Protection of Competition and Consumers of 2007,[6] Prezes UOKiK is the central government administration body subject to supervision of the Prime Minister [Art. 29]. Prezes UOKiK is the relevant authority for the protection of competition and is responsible for counteracting the practices restricting competition and infringing the collective interests of the consumers. Prezes UOKiK is appointed for a 5 year term by the Prime Minister in the course of an open contest. The same person can be appointed twice. The conditions for the office are set out in Art. 29 of the Act on the Protection of Competition and Consumers and include education and knowledge in the areas of competence of Prezes UOKiK, and at least 3 years' experience at the management level.[7] Following implementation of the ECN+ Directive[8] in 2023, the Prezes UOKiK obtained additional independence guarantees and may be dismissed by the Prime Minister only in exceptional circumstances, expressly provided in the law. Beforehand, the Prezes UOKiK could have been dismissed at any time.

In the course of the public consultation of the proposal for implementing act, it was submitted that two other authorities/organs should have been considered as competent authorities under the DSA: the supervisory authority for personal data, Prezes Urzędu Ochrony Danych Osobowych [PUODO] and media authority Krajowa Rada Radiofonii i Telewizji [KRRiT].[9] This proposal for amendments was not sustained. It was responded that appointing more competent authorities would result in an overly complicated supervision framework and potential disputes over the scope of powers. It was also indicated that PUODO is acting based on the GDPR and implementing law,[10] also

[5] Justification for the proposal of the law implementing the Digital Services Act of 19.07.2024, p. 60.

[6] Ustawa o ochronie konkurencji i konsumentów Dz.U.2024.594 t.j. z dnia 2024.04.18.

[7] The persons who cooperated with the security services in the period 1944–1990 are excluded from the potential candidates.

[8] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, pp. 3–33.

[9] Zestawienie uwag i opinii w procesie konsultacji, maj 2024, p.13 and 14.

[10] Act on the protection of personal data, Ustawa o ochronie danych osobowych z 10.05. 2018r, Dz.U. 2018 poz. 1000; t.j.Dz. U. z 2019 r. poz. 1781.

in relations with other organs on matters of ensuring data protection. On the other hand as the DSC, Prezes UKE would be required to cooperate with other organs including PUODO.[11]

The scope of powers and division of responsibilities.

The proposal for implementing act designates Prezes UOKiK as the authority competent for the matters covered by section 4 of Chapter III DSA on additional provisions applicable to providers of online platforms allowing consumers to conclude distance contracts with traders and in other matters related to consumer protection. Prezes UKE would be the competent authority for all other matters falling in the scope of the DSA. The disputes over the scope of powers shall be decided by the Prime Minister.[12]

The unclear scope of the matters related to the infringement of consumer protection was indicated in the course of the public consultation. It was admitted and announced that the scope of powers of Prezes UOKiK is going to be specified in the implementing act, with the reference to matters:
(a) Regulated by section 4 of the Chapter III of the DSA,
(b) Other infringements of the DSA falling in the scope of the Art. 1 (2) of Act on the Protection of Competition and Consumers.

The latter provision indicates two areas directly related to consumers' interests: prohibition of unfair contract terms (Part IIIA of u.o.k.i.k.) and practices infringing the collective consumer interests (Chapter IV of u.o.k.i.k.). This amendment was however not introduced in the new proposal of 26 September 2024. An example of the matters that are regulated in section 1 of the Chapter III DSA, and may potentially fall in the scope of powers of UOKiK are the conditions for the terms of service set in Art. 14.

According to the draft proposal Prezes UKE as the DSC would be obliged to cooperate with Prezes UOKiK.[13] The proposal also ensures that Prezes UOKiK takes part in the works of the European Board for Digital Services, in cases the Board addresses the matters related to consumer protection. The proposal for implementing act states that Prezes UOKiK would submit information on its activities on matters related to consumer protection, as required by Art.55 DSA, to Prezes UKE as the DSC. The obligation to publish an annual report is imposed on the DSCs. This information should therefore be used to complete the annual report of the DSC. According to the proposal for imple-

[11] Explanatory Memorandum for the draft proposal of the law implementing the Digital Services Act of 19.07.2024, p. 60.

[12] Proposed Art. 15a (1) 1) and (2) of the amended Act on Providing the Services by Electronic Means.

[13] Draft Chapter 3a of the amended Act on Providing the Services by Electronic Means.

menting act, the competent authorities, respectively Prezes UKE and Prezes UOKiK shall have the power to initiate the proceeding on the infringement on the DSA.

Prezes UKE would be, according to the DSA and the proposal for implementing law, the competent authority to certify the out-of-court dispute resolution bodies based on the application submitted by the interested party.[14] It would also be a competent authority to grant the status of a trusted flagger and the vetted researcher.[15] These powers are granted to DSCs in the DSA, and implementing law regulates procedural matters, like the content of application, the legal form of a certification decision or confirmation of a status of a vetted researcher, appeal possibilities, as well as ex post control of the entities awarded the certification or status of a vetted researcher.

Interaction with competition, media and data authorities.

According to the draft proposal, the competition authority, Prezes UOKiK, would be designated as the competent authority for matters falling within the scope of the DSA and concerning consumer protection. Prezes UOKiK would be empowered, just as Prezes UKE, to initiate infringement proceedings. The provisions on the scope of powers in the course of infringement proceedings do not differentiate between the role of Prezes UOKiK and Prezes UKE, and address generally "the competent authority" or "competent/relevant organ."[16] Both competent authorities may impose penalties and commitments on ISPs. As already indicated, Prezes UOKiK submits to Prezes UKE an annual information reporting on its activities.

Role of data and media authorities.

The role of two bodies considered, as potential competent authorities: PUODO, and KRRiT was discussed during the consultation of the draft proposal. It was indicated that although data supervisory authority would not be designated under the DSA, it could still, based on the law on the protection of personal data[17] submit requests to other authorities, concerning the protection of personal data. The advisory role of PUODO is also foreseen in the proposed implementation of the DSA. In general, amended law on electronic provision of services would indicate when Prezes UKE is either required or entitled to obtain an opinion of PUODO. An opinion from PUODO would be compulsory in the procedure of awarding the status of a trusted flagger. The opinion of

[14] Draft Chapter 4a of the amended Act on Providing the Services by Electronic Means.

[15] Draft Chapters 4b and 4c of the amended Act on Providing the Services by Electronic Means.

[16] Draft chapter 4d on liability of intermediary service providers of the amended Act on Providing the Services by Electronic Means.

[17] Art. 52 of the Act on the Protection of Personal Data.

PUODO should include the assessment of technical and organizational means to protect the personal data by a potential trusted flagger.[18] The same obligation to consult PUODO on the technical and organizational means of protection of personal data would be required in the process of awarding the status of a vetted researcher.[19] In the course of certification of an out-of-court dispute resolution body, prior to issuing a certification, Prezes UKE should consult with public administration bodies, to assess the knowledge of the applicant in the area of illegal content or terms of service of a at least one type of online platforms.[20] The implementing act does not specify which administrative bodies should be consulted, yet the opinions of Prezes UOKiK, PUODO or KRRiT may be relevant. Consulting PUODO and KRRiT was expressly indicated as an option during the governmental consultation of the proposal.

According to the proposal for implementing law, Prezes UKE should consult other public administration bodies to assess the knowledge of an applicant for a "trusted flagger" and to assess whether the expected research results should contribute to the identification and understanding of a systemic risk,[21] in the course of awarding the status of a vetted researcher.

The role of media authority KRRiT in the supervision of video-sharing platforms.

In this context it should be clarified, that the National Council of Radio Broadcasting and Television, KRRiT is a constitutional authority in charge of safeguarding the freedom of expression, the right to information and the public interest in radio broadcasting and television.[22] According to the law on radio and television broadcasting, KRRiT should guard freedom of expression, the interest of service recipients and users, and open and pluralistic character of the media.[23]

Act on Radio and Television Broadcasting implements the Audiovisual Media Services Directive,[24] and therefore KRRiT should be considered as the national regulatory authority in the light of Art. 30 of this Directive.[25]

[18] Draft Chapter 4b of the amended Act on Providing the Services by Electronic Means.

[19] Draft Chapter 4c of the amended Act on Providing the Services by Electronic Means.

[20] Draft Chapter 4a of the amended Act on Providing the Services by Electronic Means.

[21] Art. 34 of the DSA.

[22] Art. 213 of the Constitution of the Republic of Poland of April 2 1997.

[23] Art. 5 Ustawa o Radiofonii i Telewizji of 29.12.1992, - Dz.U.2022.1722 t.j. z dnia 2022.08.17

[24] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (Codified version) *OJ L 95, 15.4.2010, pp. 1–24, with amendments introduced by the Directive 2018/1808/UE*.

[25] The establishment of another regulatory body in Poland, Rada Mediów Narodowych (national media council) is unconstitutional and there are ongoing problem with its functioning, see:

Given the scope of application of the AVMS Directive, KRRiT is responsible for controlling the media service providers and the video-sharing platforms as to their compliance with obligations with respect to illegal content and content harmful for minors. KRRiT should report on how audiovisual media service providers comply with these obligations, and how video-sharing platforms comply with the obligation to protect minors, to the European Commission.[26]

During the process of public consultation of the proposal for implementation of the DSA, KRRiT raised concerns about the potential overlaps between the Act on Radio and Television Broadcasting, and the implementing act. The concerns addressed the overlapping powers of Prezes KRRiT. Prezes KRRiT may request that video-sharing platform service providers ceases those activities that do not comply with the act on radio and television broadcasting, the resolution of KRRiT or terms and conditions of the service.[27] Prezes KRRiT may also order the termination of such activities. This issue was addressed with an explanation that Art. 10 of Act on Radio and Television Broadcasting concerns other matters than orders within the meaning of Art. 9 and 10 of the DSA, following the CJEU ruling in UPC Telekabel Wien.[28] Orders regulated by the draft proposal address intermediaries not for their actions, but in relation to the wrongdoing, for example violation of copyright provisions of others. Furthermore, the proposal lists the infringements of the DSA that are sanctioned with the fines.[29]

Division of responsibilities: media authority and DSC.

To clarify the scope and delineation of powers of Prezes UKE and Prezes UOKiK, on the one hand and other authorities on the other, in the draft proposal the reference is made to the list of 16 infringements for any intermediary, 3 infringements listed for hosting service provider and 20 infringements for online platform providers. The list provisionally indicates the scope of supervision of the competent authorities under the DSA. In theory, KRRiT is responsible for ensuring compliance with content regulation provided by the AVMSD implementation, and Prezes UKE and Prezes UOKiK would be responsible for compliance with obligations under the DSA. This leaves certain issues unaddressed, given that AVMSD is a *lex specialis*

Klafkowska, Katarzyna *Wpływ nowelizacji Dyrektywy o Audiowizualnych Usługach Medialnych na regulacje w krajach członkowskich*, https://www.batory.org.pl/wp-content/uploads/2021/07/Ekspertyza-wp%C5%82yw.nowelizacji.dyrektywy.audiowizualnej.pdf, last accessed 31.10.2024.

[26] Art. 6 (3) pkt Act on Radio and Television Broadcasting.

[27] Art. 10 (3) Act on Radio and Television Broadcasting.

[28] C-314/12 - UPC Telekabel Wien ECLI:EU:C:2014:192.

[29] Tabela uwag zgłoszonych w ramach opiniowania do projektu ustawy o zmianie ustawy o świadczeniu usług drogą elektroniczną oraz niektórych innych ustaw (UC21) pp. 56–57.

to the DSA, and the obligations to apply certain measures to protect viewers from illegal or harmful content are addressed in both acts. The approach based on the distinction of powers and avoiding overlaps may be explained with the example of protection of minors. An obligation to establish effective technological means of protection of minors from harmful content, such as pornography or excessive scenes of violence is subject to control by KRRiT and is also sanctioned with financial penalties.[30] Obligation to introduce effective and proportionate measures referred to in Art. 28 DSA to ensure high levels of privacy, security and protection of minors, would on the other hand be subject to supervision and financial penalties based on the act implementing the DSA.[31]

On the other hand, according to Act on Radio and Television Broadcasting video-sharing platform service providers are obliged to establish transparent and user friendly notice mechanisms to report the content that contravenes Art. 47 o u.r.t., that clarifies which content is illegal under media law and is forbidden on online platforms.[32] Contravening this obligation is sanctioned with financial penalties under Act on Radio and Television Broadcasting,[33] while the obligation to establish notice mechanisms and to comply with the detailed requirements of Art, 16 DSA refers to all type of illegal content,[34] and would be subject to supervision of Prezes UKE and to fines.[35] Potential overlaps exist also in the area of requirements for the terms of service, included in the Act on Radio and Television Broadcasting for video-sharing platforms,[36] and in Art 14 DSA for all intermediary services. Non-compliance with obligations set in Art. 14 (1) DSA is subject to fines according to the proposal for implementing law. Furthermore, Act on Radio and Television Broadcasting introduced an obligation for video-sharing platform providers to act when illegal content appears, accompanied with certain procedural safeguards. The video-sharing platform service provider should request that user removes illegal content or content non-compliant with the conditions set in the Act,[37] and if the user does not comply, the provider should disable access to such content. The VSP provider is required to justify the decision and to present it immediately to the affected user.[38] The user may complain to the KRRiT, and Prezes KRRiT

[30] Art. 47p (1) and Art. 53e) Act on Radio and Television Broadcasting.

[31] Draft Chapter 4f of Act on Providing the Services by Electronic Means on fines.

[32] Such as incitement to violence or hatred, content facilitating terrorist offence, pornographic content with the participation of minors, content inciting the insultement of a social group or individual for its national, ethnic, racial origin, religious or secular belief.

[33] Art 47s (1) and Art. 53e (1) Act on Radio and Television Broadcasting.

[34] Based on the definition from Art. 3h DSA.

[35] Draft chapters 4d and 4F of the amended Act on Providing the Services by Electronic Means.

[36] Art. 47r Act on Radio and Television Broadcasting.

[37] In Art. 47p on technical means of protection for content harmful for minors or Art. 16 on requirement for commercial communications.

[38] Art. 47t (1) and (4) Act on Radio and Television Broadcasting.

may issue a decision disabling access to content, enabling access to content or enabling the possibility to upload content by user if it was formerly suspended by the VSP provider according to Art. 47 (2) and (3). There is no information on the examples of application of these provision. Their scope and relation to the DSA itself and the implementing acts DSA was not explained in the proposal.

Question 2

General remarks.

To present the specific rules regarding the powers of the DSC the general context should first be outlined. The scope of the activities and the details of financing of Prezes UKE as the administrative body designated as the DSC should be regulated in the law on electronic communications. Act on electronic communications contains a separate chapter dedicated to proceedings before the Prezes UKE (chapter 3 Part VIII), but there is no indication that these provisions applicable in matters concerning compliance with and infringement of the DSA, on the contrary, proceedings in case of DSA infringement are planned to be regulated separately. The law on electronic communication contains a general referral to the application of the code of administrative proceedings.[39]

Parallel, the general rules concerning Prezes UOKiK are included in the law on protection of competition and consumers [u.o.k.i.k.] that regulates proceedings in matters falling in the scope of that act. Part VI is dedicated to proceedings before the Prezes UOKiK. Art. 47 (1) lists the following: explanatory proceedings, antitrust proceedings, proceedings concerning unfair contract terms, proceedings concerning practices infringing the general interest of consumers. There is a general referral to the application of the code of administrative procedure in the matters not regulated by the law on the protection of competition and consumers, and to the code of the civil procedure in matters concerning evidence, and not regulated by the act itself.[40]

This legal framework for the role of regulator in the area of electronic communication and for the tasks of the competition and consumer protection authority is complemented with the amendments proposed to be introduced in the law on the provision of services electronically. For now the Act on Providing Services by Electronic Means, as the implementation of the e-commerce directive, contains no references to neither the role of regulatory authorities nor to any procedural issues. After the implementation of the DSA, it should regulate procedural aspects in the areas of:

[39] Art. 440 (1) PKE.

[40] Art 83 and 84 Act on Protection of Competition and Consumers.

(1) Orders including the role and different responsibilities of Prezes UKE depending on the grounds for the order;
(2) Certification (out-of-court dispute resolution bodies) and awarding the status of vetted researchers and trusted flaggers;
(3) Supervision of intermediary service providers (infringement proceedings, preliminary investigations) and imposition of fines;
(4) Complaints lodged by recipients of the service (and mandated bodies).

The Act on Providing the Services by Electronic Means contains no general referral the code of administrative proceedings. The reference to the application of the code of administrative proceedings, is proposed only in the chapter dedicated to financial penalties. Nevertheless, the code of administrative procedure governs the activities of public administration bodies.
Appeals from the decision of the competent authority in matters concerning the infringement of the DSA should fall in the jurisdiction of the Sąd Ochrony Konkurencji i Konsumentów – Sąd Okręgowy in Warsaw (regional court). Claims arising from the infringement of the DSA should fall in the jurisdiction of the regional courts. A separate part/chapter concerning the court proceedings in matters concerning the provision of services electronically is proposed to be added to the code of civil proceedings.[41]

To conclude, the proposed amendments in the Act on Providing the Services by Electronic Means should introduce the specific set of rules and measures dedicated to the supervision of intermediary service providers and to fostering a safer digital environment, for example with trusted flaggers, and to enhancing the protection of service recipients, with out-of-court dispute resolution bodies or complaints to the DSC. Two administrative authorities whose activities are governed by separate laws (including in matters related to its nomination and independence) should then act in the areas of new tasks related the DSA enforcement based on the law on services provided electronically. There is no specific information yet, on how the potential new departments in the structure of the two authorities would be created,[42] however the proposal for implementing act specifies the budget for the competent authorities.[43]

[41] Art 17 of the code of civil proceedings is amended, and new Art. 17 p.4[6] is added, as well as new Dział IVH on the proceedings in matters concerning the provision of services electronically.

[42] In the remarks concerning the proposal of March 2024, UOKiK submitted the request to create 11 new positions, and UKE -30 new job positions to carry the task under the amended u.ś.u.d.e. *Tabela uwag zgłoszonych w ramach opiniowania do projektu ustawy o zmianie ustawy o świadczeniu usług drogą elektroniczną oraz niektórych innych ustaw* (UC21) p.111.

[43] Maximum amount of spending limits for Prezes UOKiK is proposed at the level of: 98 495 232,40 pln; and for Prezes UOKiK 28 188 454,54 pln. The amounts were substantially increased after the wave of criticism concerning the first proposal of March 2024.Art 9 of the proposal for act implementing the DSA.

Supervision and enforcement of the intermediary service providers obligations under the DSA.

The supervision and enforcement of the obligations of intermediary service providers is proposed to be entrusted to two competent authorities. Their roles would be divided based on the category of the infringement (ratione materiae) with Prezes UOKiK as the authority responsible, in principle for infringements affecting consumers. There are no procedural differences, nor differences in the scope of the powers depending on which authority has initiated the infringement proceedings. Only DSC is competent in matters of complaints from service recipients.

Proposed new chapter 4d of the draft proposal is entitled "Liability of intermediary service providers" and starts with the provisions specifying the submission of complaints to the DSC. The complaint can be brought only to the DSC (in accordance with Art. 53 DSA).

The draft proposal stipulates that proceedings concerning the infringement shall be initiated *ex officio*. The competent authority should notify the parties about the commencement of the proceedings. In the course of the infringement proceedings, the competent authority should be entitled to conduct inspections of premises of the entity concerned. Without initiating any proceedings the competent authority shall conduct inspections, based on the request of the European Commission. This proposed provision specifies the scope and form of the assistance, that should be granted to the officials or persons authorized by the European Commission in conducting inspections of very large online platforms or very large online search engines, in Poland and when the VLOP or VLOSE objects the controls of the European Commission.[44]

According to the proposal, inspections shall thus be carried in the course of other proceedings, either conducted by the competent authorities in Poland, or at the request of the Commission. Intermediaries shall be obliged provide all information requested by the competent authority.

The draft proposal stipulates that competent authority shall be entitled to issue the following decisions:

(1) Decision declaring infringement of the obligations set out in the DSA and ordering to cease the infringement, the decision may indicate the measures to remedy the effects of the infringement;
(2) Decision declaring infringement of the obligations set out in the DSA and stating that the intermediary service provider ceased to infringe the obligations set out in the DSA.

[44] Art. 68 (9) DSA.

(3) Decision imposing commitments on the intermediary service provider, if the service provider infringed the DSA and commits to stop the infringement and remedy its effects; or when it already ceased the infringement and commits to remedy its effects; the decision may state the deadline for compliance with the commitments;
(4) Decision requesting the management body of those providers, without undue delay, to examine the situation, adopt and submit an action plan according to Art. 51 (3) a) of the DSA. In cases referred to in Art. 51 (3) b) the competent authority may request from the court (*Sąd Ochrony Konkurencji i Konsumentów*) that it orders temporary restriction of access to the service in question or the interface of the service providers, by its users.

According to the proposal, in cases where the competent authority finds the infringement, or in cases where the service provider does not comply with the decision ordering to cease the infringement a fine may be imposed. The provision draft chapter 4f lists the infringements that may be subject to fines, which indirectly indicates the scope of the supervisory competence of the authorities in practice. The decision should be subject to the appeal to Sąd Ochrony Konkurencji i Konsumentów.

The decisions ordering to cease the infringement, and to impose commitments shall be issued based on the sufficient probability that the infringement occurred. In the case when it shall be stated with sufficient probability that the intermediary service provider infringed the DSA and its further activities shall result in serious effects that are difficult to remedy, the competent authority may oblige the service provider to restrict the scope of services provided or change the infringing practices.

Question 3

As the competent authorities in Poland were not designated yet, the priorities have not been announced and no initial experience can be discussed.
The market monitoring activities are conducted by both potential competent authorities UKE and UOKiK however not directly in the context of the DSA. The reports available provide for initial information about the market for digital services in Poland. In the case of UKE, the annual report for 2023 provides data on the number of telecommunication service providers, including the Internet access providers. The report indicates the upward trend in the offer of retail services; the prevalence of access via fixed-line internet (65.5%) over mobile internet access (23.6%).[45] Internet access via fixed line internet was provided by 2 225 telecommunication service providers, while mobile internet

[45] Urząd Komunikacji Elektronicznej. Raport o stanie rynku telekomunikacyjnego w 2023r., p. 18 and 27.

was offered by 102 operators.[46] This informs about only a fraction of intermediary services in the scope of the DSA. Hosting service providers or online platforms are not included in the report.

KRRiT as the authority responsible for video-sharing platforms established in Poland,[47] publishes an official list of VSP providers subject to the supervision. The list includes 14 video-sharing platform service providers, some of which are broadly recognized, such as https://www.cda.pl/[48] or https://wykop.pl/[49] and some are more niche services https://www.kawusia.pl.

In terms of consumer protection, the Prezes UOKiK remains active with respect to digital markets, which allows to assume that the authority will use its competences resulting from the DMA.
UOKiK publishes a yearly report on its activities, which are in part dedicated to consumer protection. The report for 2023 indicates activities and interest in the area of online sales, including products and sales opinions and recommendation, price presentation, dropshipping or online influencer marketing.[50] Online sales platforms were subject to the analysis in 2019.[51] In September 2024 UOKiK undertook, together with competition authorities in Lithuania and Latvia, digital market monitoring and ecosystem of online marketplaces from the perspective of competition rules.[52]

The leader of online marketplaces in Poland is Allegro with more than 19 mln "real users" in 2023.[53] It is also faced with the Prezes UOKiK's oversight, including recent decision and fine regarding abuse of dominant position through i.a. self-preferencing.

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[46] Ibidem.

[47] According to Art. 1a(2) of Act on Radio And Television Broadcasting.

[48] According to information published by CDA it has 300 000 active users, and it is considered among most profitable Polish online entertainment business in 2023,other sources indicate 0.5 mln of subscribers. https://www.wirtualnemedia.pl/artykul/oferta-cda-premium-subskrypcja-ile-zarabia; CDA is also listed as 9th most popular VOD service in Poland, as it offers VOD service CDA premium and a video-sharing site for users, Załęska, Aleksandra in: IAB Raport strategiczny. Internet 2023/2024 Włodzimierz Schmidt, Piotr Kowalczyk et al. https://www.iab.org.pl/wp-content/uploads/2024/05/Raport-Strategiczny-INTERNET-IAB-Polska-2023_2024.pdf. p.27 last accessed 31.10.2024.

[49] 10th most popular social media platform according to Gemius, with more than 2 mln "real users" (real users mean visitors who generated at least one page view). Most popular social media platform is Facebook with more than24 mln "real users" in Poland, https://www.iab.org.pl/wp-content/uploads/2024/05/Raport-Strategiczny-INTERNET-IAB-Polska-2023_2024.pdf. P. 25 last accessed 31.10.2024.

[50] Sprawozdanie z działalności UOKiK za rok 2023, https://www.iab.org.pl/wp-content/uploads/2024/05/Raport-Strategiczny-INTERNET-IAB-Polska-2023_2024.pdf, pp. 46–48 last accessed 31.10.2024.

[51] Opinie konsumentów na temat platform internetowych i zakupów na platformach handlowych. Raport Kantar dla UOKiK, https://uokik.gov.pl/download.php?id=19376

[52] The project is financed by the EU and conducted in cooperation with OECD https://uokik.gov.pl/wydarzenie-inaugurujace-badanie-rynku-i-konkurencji-sektor-cyfrowy-polska-lotwa-i-litwa

[53] Załęska, Aleksandra in: IAB Raport strategiczny. Internet 2023/2024, p.26.

Regarding enforcement against popular online platforms, recently Prezes UOKiK opened the preliminary investigation against Meta with respect to the presentation of news from press publishers, subject to the amendments introduced in September 2024 as a result of implementation of the C-DSM Directive.[54]
Prezes UOKiK enforced consumer protection legislation in digital markets with respect to i.a. Booking.com,[55] Amazon[56] and Zalando.[57] Other proceedings are also ongoing with respect to TEMU (online marketplace).[58] Those matters are not however based on the provisions of the DSA.

Question 4

General remarks.

Introduction of the DMA should be complemented at the national level with the amendments proposed in the act on protection of competition and consumers.[59] The general objective of the amendments proposed in the context of the application of DMA is to ensure the effective cooperation with the European Commission in identifying the infringements on digital markets, designating the competent authorities in Poland with powers to conduct explanatory proceedings and support the Commission in the activities conducted in Poland.[60]

Designation of competent authorities.

The Polish Competition Authority, Prezes UOKiK, is the competent authority in the meaning of Articles 1 (6) and 38 DMA. Prezes UOKiK is also the member of the High Level Group as provided in Article 40 DMA. It is expected that Prezes UOKiK will closely cooperate with the European Commission, and other national authorities within the European Competition Network to ensure contestability and fairness in the digital markets.

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[54] 22.10.2024 https://uokik.gov.pl/en/meta-preliminary-investigation, last accessed 31.10.2024.

[55] https://uokik.gov.pl/en/omnibus-and-information-obligations-in-e-commerce-subsequent-actions-and-charges-by-president-of-uokik

[56] https://uokik.gov.pl/en/pln-31-million-fine-for-amazon

[57] Proceedings were initiated in 2023, to enforce the rules established by Omnibus Directive https://uokik.gov.pl/en/zalando-is-going-to-alter-their-practices-and-hand-out-vouchers last accessed 31.10.2024

[58] 16.10.2024 https://uokik.gov.pl/en/who-is-the-seller-on-the-temu-platform, last accessed 31.10.2024.

[59] Rządowe Centrum Legislacji proposal for the amending law to ensure the application of the Union law to improve the functioning of the internal market UC27, last version of 27th September 2024 Proposal includes the application of Regulations 2019/1150, Regulation 2022/1925 and Regulation 2022/2560. https://legislacja.rcl.gov.pl/projekt/12384253/katalog/13053584#13053584

[60] Uzasadnienie projektu ustawy o zmianie niektórych ustaw, w celu zapewnienia stosowania przepisów unijnych poprawiających funkcjonowanie rynku wewnętrznego, p. 2.

Draft legislation introducing competences of Prezes UOKiK foreseen in the DMA is in the phase of government's procedure (not yet in the parliament) and expected to enter into force in 4Q2024.[61]

Obligation to support the identification of violations and monitoring compliance be gatekeepers.

The draft legislation predominantly seeks to confer the Prezes UOKiK competences allowing to:

- assist the Commission to conduct interviews and take statements (Article 22 (2) DMA),
- assist the Commission when conducting inspections (Article 23 (7)-(9) DMA),
- receive information regarding DMA non-compliance (Article 27 DMA),
- cooperate with the Commission and exchange information (Article 38 (1)-(6) DMA,
- conduct investigations regarding compliance with Articles 5-7 DMA in the Polish territory.

To complement the obligations stemming from the DMA and the activities of Prezes UOKiK supporting the European Commission, the provision concerning the use of information obtained during the proceedings conducted by Prezes UOKiK is proposed to be amended to allow the exchange of information with the European Commission and other national competent authorities based on the DMA.[62]

The scope of powers of Prezes UOKiK includes conducting the explanatory proceedings, as auxiliary to antitrust proceedings, or proceedings concerning the infringements of collective consumer interest. It is up to the decision of Prezes UOKiK whether to open the preliminary investigation proceedings or not, therefore it is conducted *ex officio*.[63] The details of the procedure and reference to the application of the code on administrative proceedings are included in the implementing law. After the amendments, Art. 48 u.o.k.i.k. should include the possibility to open the explanatory proceedings in cases when the circumstances indicate that Art. 5-7 of the DMA might be infringed. Proposed Art 48 (2) 6) of the amended u.o.k.i.k would specifically indicate

[61] It is further included in the provisions on the scope of activities of Prezes UOKiK in proposal for Art. 31 7c of the Act on Protection of Competition and Consumers.

[62] Proposed Art. 7 (2) 4a of Act on Protection of Competition and Consumers.

[63] Kohutek, Konrad [in:] Małgorzata Sieradzka, Konrad Kohutek, *Ustawa o ochronie konkurencji i konsumentów. Komentarz, wyd. III*, Warszawa 2024, Art. 48. https://sip-1lex-1pl-1cke16rpy0888.han.amu.edu.pl/#/commentary/587264177/780135/kohutek-konrad-sieradzka-malgorzata-ustawa-o-ochronie-konkurencji-i-konsumentow-komentarz-wyd-iii?cm=URELATIONS (accessed 2024-09-26 09:39).

that explanatory proceedings may have for an objective identification of an infringement of Art. 5-7 DMA.

Controls and inspections of an undertaking may be conducted to collect evidence in the course of proceedings, including the explanatory proceedings, of Prezes UOKiK. The provisions on control and inspections are amended to include the proceedings investigating the infringements of the DMA.[64] Prezes UOKiK may authorize an employee of Urząd Ochrony Konkurencji I Konsumentów, to take statements in the course of proceedings conducted by the Commission based on Art. 22 of the DMA, and to assist the Commission during the control based on Art. 23 of the DMA.[65] In cases when the gatekeepers object the control conducted by the Commission, the authorized employees of UOKiK assist the Commission, using the powers specified in u.o.k.i.k. among other to enter the premises, request access to documents, request explanations, secure the evidence or seek assistance from the Police or other organs.[66] Provisions of u.o.k.i.k. are complemented also with the amendments allowing for inspections in the premises of the undertaking, also in the course of explanatory proceedings initiated in the context of Art. 5-7 DMA.[67]

Question 5

We are not aware of any financial resources dedicated precisely for DMA purposes within the UOKiK's organisation (except for allocation of staff to enforcement of competition law in digital markets and to performing DMA competences).

The UOKiK's Competition Protection Department consists of ca. 50 persons. The Department includes the Unit for New Technologies, which currently consists of 6 persons and is in charge of enforcement of competition law in digital markets as well as of performing the UOKiK's competences under the DMA. It is expected that the number of the Unit's staff shall increase by ca. 2 additional persons. When conducting certain activities, such as inspections, the Unit may rely on other staff of the Department.

Regarding enforcement measures, there are the same regular safeguards as with respect to enforcement of general competition law (e.g., concerning inspections, trade secrets etc.).

[64] Art. 105a is applicable also in cases of control conducted based on Art. 23 of the DMA.

[65] Amended Art. 105ha.

[66] Amended Art. 105ha (2) prescribes application of 105b, Art. 105ca, Art. 105da, Art. 105f-105h, Art. 105n, Art. 105nc i Art. 105o on the scope of powers of authorized controllers.

[67] Art. 105 (1a) u.o.k.i.k.

Question 6

The PCA has been cooperating closely with the Commission within the High Level Group (Art. 40 DMA) and with other authorities within the European Competition Network. It participated in agencies' workshops and seminars regarding specific DMA matters.

Regarding enforcement and assistance to the Commission, it is expected that these tasks will be coordinated by the Commission, if needed.

Section 2: Use of national legislative leeway under the DMA/DSA.

Question 1

The law implementing Art. 12-14 of the E-Commerce Directive is still in force, yet it should not be applied as it conflicts with the directly applicable provisions of the regulation, the DSA. The proposal for amendments in Act on Providing the Services Electronically includes the removal of chapter 3 on the liability exemptions for provides or services by electronic means.[68]

Search engines.

There are no specific provisions on search engines in the law on providing services by electronic means. This issue was addressed in the legal doctrine, as creating a legal gap, with no provisions ensuring legal certainty for search engines providers in Poland,[69] with opinion that the exemption of liability for search engines should be clearly addressed with the amendment of the DSA.[70]

Legal framework for illegal content in Poland.

The definition of "illegal content" in the DSA includes content that is not in compliance with the EU law, but also with the national law. The latter has to comply with EU law. Illegal content in Poland should be considered in the framework of criminal law, such as "hate speech"[71] or crimes in the area of terrorism,[72]

[68] Proposal of 19.07.2024, UC21.

[69] Hańderek, Andrzej, *Naruszenie praw autorskich i praw pokrewnych w związku z funkcjonowaniem wyszukiwarek internetowych,* Warszawa 2024, pp. 288–296, with the review of Polish legal literature;

[70] Hańderek, Andrzej *Naruszenie praw autorskich i praw pokrewnych*, p. 329.

[71] Art. 119 [violence, unlawful threats based on national, ethnic, racial, religious or secular identity] Art. 212 on slander, Art. 256 [propagation of fascism and terrorism] Art 257 defamation of a group or an individual because of the national, ethnic, racial, religious or secular identity] of the criminal code, Dz.U. 1997 nr 88 poz. 553.

[72] Art. 115 § 20.

civil law, in the case of violation of personal rights,[73] IP law infringement, law protecting consumers and the law against unfair competition, as well as media law regulation. These areas of law are subject to different degrees of harmonization. Harmonized areas addressing illegal content include audiovisual media services and video-sharing platforms under the AVMSD, protection of consumers and protection against unfair commercial practices in the UCPD and Omnibus Directive, and to some extent harmonization of criminal law. In the last round of consultation, the proposal to define illegal content and expressly address content such as disinformation or praising the humiliation of offence to other was is still submitted for discussion but not yet included in the proposal.[74]

Hate speech/illegal content notification.

In Poland notification of illegal content including "hate speech" is addressed predominantly in the framework of criminal law that remains intact by the DSA. The official governmental websites encourage the citizens to notify illegal content. The list of content that should be reported includes: child pornography, slandering based on the national, ethnic, racial identity, religion or belief, and terrorist content. The citizens are also encouraged to react against harmful content, such as violence, aggressive behaviour, incitement to self-mutilation, suicide and other auto-destructive behaviour.[75] These notices should be filed via https://dyzurnet.pl/ to the team of experts of NASK, a research institute under the supervision of the Ministry of Digital Affairs.[76] Dyżurnet.pl is a contact point to report illegal content, particularly sexual child abuse (CSAM).[77] Based on the notice the expert team of NASK may inform the police or other authorities or, in the case of harmful content contact the administrator of a website.

The role of NASK-PIB.

NASK-PIB is designated as one of CSIRT, under the law implementing the NIS1 Directive.[78] Dyżurnet.pl activities are based on the INHOPE Code of Practice.[79]

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[73] Art. 24 -25 of the Civil Code.

[74] Stanowisko Ministerstwa Sprawiedliwości of 11th October 2024.

[75] Serwis Rzeczypospolitej Polskiej. https://www.gov.pl/web/numer-alarmowy-112/nielegalne-tresci-w-internecie2, last accessed 31.10.2024.

[76] Naukowa i Akademicka Sieć Komputerowa. https://en.nask.pl/eng/about-us/who-we-are/3261,About-NASK.html, last accessed 31.10.2024.

[77] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, *OJ L 26, 28.1.2012,* pp. 1–21 amended by Directive 2014/52/EU.

[78] Ustawa o krajowym systemie cyberbezpieczeństwa implementing the Directive 2016/1148. Dz.U.2024.1077 t.j. z dnia 2024.07.19.

[79] https://inhope.org/media/site/1fffcc1905-1614610382/inhope_codeofpractice.pdf?utm_source=Members&utm_medium=link&utm_campaign=INHOPE%20COP, last accessed.

NASK also maintains the national – pl. – domain registry and is responsible for domain gov.pl. Illegal content considered as "hate speech" may be reported directly to prosecutors' office or to the police. The level of social awareness in this area is advanced with the activities of NGOs and NASK-PIB.[80] Notices may also be submitted directly to intermediaries or website administrators. Penalization and reporting of illegal content to the public authority and dyżurnet.pl remains in the area left to the national law under the DSA. It may be expected that NASK-PIB could in the future be certified as a trusted flagger under the DSA.

Tackling illegal content in the existing legal framework.

One of the areas that should be analysed in the context of the pre-emptive effect of the DSA is the Act on Radio and Television Broadcasting and the chapter addressing the obligations of video-sharing platforms, in so far as the provisions might lead to the application of *ex ante* measures preventing the dissemination of content.[81] The potential conflict between the scope of powers of Prezes KRRiT to order disabling access to certain content and impose financial penalties on the video-sharing platform service providers, and the scope of powers of the DSC and other competent authority remains unaddressed.

Recent example of notices on *patostreaming* exemplify that Prezes KRRiT is one of the competent authorities, notified on the streamed audiovisual programs containing violence, promoting alcohol and humiliating behaviour, along with the NASK-PIB and prosecutor's office, by Rzecznik Praw Obywatelskich.[82] Considering *patostreaming* as illegal content, and analysing respective powers of different entities is one of the areas that should be mapped.

Website blocking.

Combating illegal content in Poland in the existing legal framework includes measures leading to website blocking. The first example is the law on gambling services in Poland addressing illegal online activities.[83] Internet access provider is obliged to block access to websites that use the domain names included in the register administered by the Ministry of Finance. The register lists the domain names used to offer illegal gambling services,[84] whose providers do not

[80] E.g., Mowa nienawiści info; https://www.mowanienawisci.info/post/zglos-hejta-do-prokuratury-2/, last accessed 31.10.2024.

[81] Art. 47o ust. 2 Act on Radio and Television Broadcasting.

[82] Notification letters issued in 2024 https://bip.brpo.gov.pl/pl/content/rpo-patotresci-alkohol-internet-krrit-nask-odpowiedz; last one in June 2024 https://bip.brpo.gov.pl/pl/content/rpo-internet-patostreaming-nask-krrit-prokuratura ; last accessed 31.10.2024.

[83] Ustawa o grach hazardowych.

[84] https://hazard.mf.gov.pl/, last accessed 31.10.204.

comply with the requirements set in the law on gambling. Numerous concerns have been expressed in the legal doctrine,[85] and by NGO's such as Fundacja Panoptykon,[86] as to the effectiveness and proportionality of the regulation provided for in the law on gambling.[87] Nevertheless, the administrative courts have found that blocking illegal gambling services online is acceptable and proportionate to effectively protect public interest, in line with the case law of the CJEU.[88]

Rzecznik Praw Obywatelskich, based on the numerous complaints of citizens affected by website blocking, addressed the Prime Minister with the need to amend the legal framework provided for the website blocking in the law on gambling, and in the law on Internal Security Agency.[89] RPO raised particular concerns in the area of procedural guarantees for providers of websites blocked, and in the area of information provided to them with respect to blocking. RPO repeated its concerns particularly related to blocking of websites by Agencja Bezpieczeństwa Wewnętrznego (Internal Security Agency).[90] According to the law, the court imposes "access blockade" based on the written request of the chief of ABW, with the written consent of *Prokurator Generalny* (General Prosecutor) in cases of terrorist content or spying activities.[91] Polish telecommunications law obliged telecom operators to block telecommunication connections and transmission of information if it threatens defense, state security or public order, or to facilitate blocking by authorized entities.[92] In September 2024, the Supreme Administrative Court, has dismissed the cassation complaint submitted by ABW in the administrative proceedings concerning blocking of a website, based on the provisions discussed, without sufficient

[85] Izdebski, Krzysztof, Blokowanie treści internetowych. Zagrożenie dla wolności słowa i dyskryminacja użytkowników, pp. 292–304; Grzelak, Agnieszka, Czy rejestr domen prowadzących nielegalną działalność hazardową może naruszać prawa człowieka? pp. 320–324 in: Sołtys,Agnieszka, Taborowski Maciej*Krajowe Regulacje Hazardu w świetle prawa Unii Europejskiej,* Warszawa 2018.

[86] Niklas, Jędrzej Blokowanie w ustawie hazardowej. Nie idźmy tą drogą; Opinion of Fundancja on the draft proposal for amendment in the law on gambling services. Panoptykon, https://panoptykon.org/wiadomosc/blokowanie-w-ustawie-hazardowej-nie-idzmy-ta-droga, last accessed 31.10.2024.

[87] Art.15f of the Act on Gambling Services.

[88] Radowicki Stanisław, Krzysztof Budnik [in:] *Ustawa o grach hazardowych. Komentarz*, ed. M. Wierzbowski, Warszawa 2019, Art. 15(f). citing judgements: Wyrok WSA w Warszawie z 19.06.2018 r., V SA/Wa 1731/17, LEX nr 2569548; wyrok WSA w Warszawie z 13.06.2018 r., V SA/Wa 1888/17, LEX nr 2543420; V SA/Wa 717/19 - Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie LEX nr 3111526; V SA/Wa 253/20 – Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie LEX nr 3116697; V SA/Wa 392/21 – Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie LEX nr 3284527.

[89] Ustawa o Agencji Bezpieczeństwa Publicznego https://bip.brpo.gov.pl/sites/default/files/2023-03/Do_PRM_strony_blokowanie_ponowne_1.03.2023.pdf

[90] https://bip.brpo.gov.pl/sites/default/files/2022-08/Do_PRM_strony_blokowanie_6.08.2022.pdf; last accessed 31.10.2024.

[91] Art. 32c of the law on Internal Security Agency.

[92] Art. 180 Prawo Telekomunikacyjne of 16.07.2004, t.j. Dz. U. z 2024 r.poz. 34, 731, 834,1222 valid until November 2024 (Entry into force of Ustawa prawo komunikacji elektronicznej).

explanations or providing reasons.[93] The NSA indicates that ABW needs to ensure that the scope of blocking is accurate and necessary.

Website blocking in the new law on electronic communications.

Telecommunications law has been amended by the Act on Electronic Communication, introducing as of 9 November 2024 new regulation of website blocking, with more control and procedural guarantees for content providers. New law provides Prezes UKE with powers to issue a decision, based on the reasoned request of the authorized entity, blocking connections or electronic communications transmitted via publicly accessible telecommunication service, in cases of threats to defense, national security, public safety and public order. The telecom operator has 6 hours to comply with the decision that can be communicated orally, but needs to be followed by the decision in writing.[94] There is no obligation to inform the content provider, which is subject to criticism, as a failure to provide for effective remedies. Act on Electronic Communication does not, as is in the case of regulation 2021/784 oblige hosting service providers to inform the content provider about disabling access to content.[95] Prezes UKE may, *ex officio* or based on the request of the entities listed in Art. 40 (4) issue a decision to limit the scope or the area of provision of publicly accessible telecommunication services. The scope of entities entitled to filing such request has been broadened, and includes defense, policy, anti-corruption, cybersecurity and border control authorities.[96]

Parallel, the Act on combatting the abuses in electronic communications[97] was enacted to implement Art. 97 (2) of the electronic communication code,[98] and strengthen the protection against abuses in electronic communications. Art. 20

[93] Judgment of Naczelny Sąd Administracyjny, of 26.09.2024.

[94] Art. 53 of the Act on Electronic Communication.

[95] Stanowisko Fundacji Panoptykon w sprawie projektu ustawy Prawo Komunikacji Elektronicznej, Warszawa 2.01.2023, (R.Bielińska, W.Klicki), https://panoptykon.org/sites/default/files/panoptykon_prawo_komunikacji_elektronicznej_opinia_prawna_2.01.2023.pdf, pp. 4–5.

[96] Full list includes: Ministra Obrony Narodowej, ministra właściwego do spraw wewnętrznych, Komendanta Głównego Policji, Komendanta Centralnego Biura Śledczego Policji, Komendanta Centralnego Biura Zwalczania Cyberprzestępczości, komendanta wojewódzkiego Policji,

Komendanta Głównego Straży Granicznej, komendanta oddziału Straży Granicznej, Komendanta Głównego Żandarmerii Wojskowej, Szefa Agencji Bezpieczeństwa Wewnętrznego, Szefa Służby Kontrwywiadu Wojskowego, Komendanta Służby Ochrony Państwa, Komendanta Głównego Państwowej Straży Pożarnej lub komendanta wojewódzkiego Państwowej Straży Pożarnej.

[97] Act on Combatting Abuses in Electronic CommunicationUstawa z 28.07.2023r. o zwalczaniu nadużyć w komunikacji elektronicznej, Dz.U. 2023 poz. 1703.

[98] Directive (EU) 2018/1972, ar 97 (2) Member States shall ensure that national regulatory or other competent authorities are able to require providers of public electronic communications networks or publicly available electronic communications services to block, on a case-by-case basis, access to numbers or services where this is justified by reasons of fraud or misuse and to require that in such cases providers of electronic communications services withhold relevant interconnection or other service revenues.

of the Act on combating abuses in electronic communications, provides for the possibility to conclude an agreement between the Prezes UKE, minister of informatization, NASK-PIB and telecom operators concerning the list of warnings on internet domains and blocking of websites using such domain names. This provision extends the application of an Agreement previously applied in the time of Covid_19 pandemic, and other extraordinary circumstances. Following the opinion that the Agreement is working in practice, it now has legal basis in the law combating the abuses in electronic communications.[99] The list of warnings is administered by CSIRT- NASK, and anyone may file a notice that is checked by NASK experts. The list contains warning about the internet domains whose primary purpose is to mislead internet users, leading to extortion of their data or disposition of possessions to their detriment. CSRIT NASKs may act based on the notices or out of its own initiative. A telecom operator that is party to that agreement may block access to the websites using the internet domain from the warning list. Anyone entitled to the domain name may object against its inclusion into the warning list to Prezes UKE.[100] The Agreement concluded with 4 major telecom operators in Poland is publicly available online.[101] According to the Agreement the telecom operators commit to act with due diligence and to disable access to websites using the domain names from the list, and to redirect to the information on the warning lists and potential threats to internet users. Telecom operators undertake only voluntary activities and free of charge.

Furthermore, the proposal to amend the law on Internal Security Agency was accepted in September by the Council of Ministers. The act should implement the necessary provisions of Terrorist Content Regulation, and provide for the mechanism of imposing and verifying orders to remove or block access to terrorist content.[102]

In the light of the proposal to designate Prezes UKE as the DSC in Poland, it should be noted that the authority already plays a significant role in the blocking of illegal content.

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[99] Proposal for ustawa o zwalczaniu nadużyć w komunikacji elektronicznej, p. 23 druk sejmowy 3069.

[100] Art. 21 Ustawa z 28.07.2023r. o zwalczaniu nadużyć w komunikacji elektronicznej.

[101] The currently published agreement of 2020 stil refers to the state of epidemic, https://www.uke.gov.pl/akt/uke-przystapil-do-porozumienia-chroniacego-abonentow,300.html, last accessed 31.10.2024.

[102] https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy-o-dzialaniach-antyterrorystycznych-oraz-ustawy-o-agencji-bezpieczenstwa-wewnetrznego-oraz-agencji-wywiadu3, last accessed 31.10.2024.

Question 2

There is no information on other activities in the area of mapping illegal content by NASK-PIB. So far there is no information about any mapping activities in the area of illegal content undertaken by the proposed DSC, as UKE has not undertaken any tasks yet.

Recent discussions in Poland concerned the amendments of criminal code in the area of crimes motivated by hate.[103] This proposal forms part of the broad discussion on measures to fight hate speech.[104]

Question 3

The promotional activites of incluencers were addressed based on the law combating the unfair competition and the unfair market practices act, the latter implementing the Directive 2005/29/EC. Based on these acts, applicable in all sectors, not only digital environment, the influencer marketing was addressed by UOKiK, in the context of practices infringing the collective interest of consumers. The problem concerns situations when advertising was not correctly identified and financial contribution revealed. UOKiK published the set of recommendations for influencers.[105] To our knowledge, no further legislative initiatives have been proposed.

With respect to potential broadening of the scope of powers of Prezes UOKiK, under the draft proposal for DSA implementation, it has to be noted that the DSA addresses the obligations of intermediary service providers, and not the influencers themselves.

The proposal of 2021 on the freedom of speech in the social media, that might be in conflict with the DSA provisions, was published, but was not forwarded to Sejm for further proceedings.[106] Poland has also introduced amendments in antiterrorism law.

[103] Draft proposal UD29 Rządowe centrum legislacji, proposal of 24th May 2024, after the works in Sejm the legislative process was not yet concluded, https://www.sejm.gov.pl/sejm10.nsf/PrzebiegProc.xsp?nr=876

[104] The discussion has taken long, it is sufficient to mention the 2019 recommendation of Rzecznik Praw Obywatelskich to Prime Minister, suggesting the amendments and activities required in the area of fighting the hate speech. https://bip.brpo.gov.pl/pl/content/jak-walczyc-z-mowa-nienawisci-20-rekomendacji-rpo-dla-premiera, last accessed 31.10.2024.

[105] Rekomendacje Prezesa UOKiK dotyczące oznaczania treści reklamowych przez influencerów w mediach społecznościowych, Warszawa 2022, https://uokik.gov.pl/influencer-marketing

[106] Last version of the proposal of May 2022 (preceding DSA) number UD293 https://legislacja.rcl.gov.pl/projekt/12351757

Question 4

Apart from rules entrusting the Prezes UOKiK with DMA-related competences (which are discussed above), there are no other legislative initiatives regarding dealing with the potential pre-emption effects of the DMA. The only other national rules that can be regarded as seeking to ensure fairness and contestability in digital markets belong to the framework of national competition law. At the same time, intersection between national competition rules and the DMA is well addressed in the DMA itself.

Question 5

In Poland the focus remains with adjusting the institutional framework to the DMA's requirements. Currently, we are not aware of any other legislative initiatives being considered on the national level.

Section 3: Vertical and horizontal public enforcement-related cooperation under DSA/DMA

Question 1

The rules on cooperation between national competent authorities and the European Commission, or DSCs from other Member States, were not established yet. If the proposal to designate Prezes UKE as the DSC under the DSA, and Prezes UOKiK as the authority competent for monitoring the compliance with the DSA in the area of consumer protection, and as the relevant authority under Art. 1 (6) of the DMA is followed, it should be noted firstly that Prezes UOKiK already takes part in the works of the High Level Group for digital markets. Prezes UKE, on the other hand takes part in the works of Body of European Regulators for Electronic Communications (BEREC) in the framework established by Electronic Communications Code.[107] Both authorities are already active in the field of transnational cooperation, and it includes matters falling in the scope of the DMA, but not the DSA. Another existing field for cooperation is the European Competition Network.

The proposal for act implementing the DMA stresses the importance of cooperation between Prezes UOKiK and the European Commission, as crucial for uniform and effective application of the rules on digital markets. It is expected

[107] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) (Text with EEA relevance); *OJ L 321*, 17.12.2018, pp. 36–214, https://www.berec.europa.eu/en/mission-strategy

that this cooperation will be close, therefore necessary amendments to the Act on Protection of Competition and Consumers are proposed.

The proposal for the implementation of the DSA indicates the division of competence between the national DSC, to monitor compliance with the DSA of the intermediary service providers with the main place of establishment on its territory (in Poland) and the Commission maintaining exclusive competence to enforce chapter III section 5 of the DSA. The proposal to implement the DSA includes provisions envisaging cooperation between the authorities under the DSA.

To support the Commission, that is also the competent authority to enforce other obligations from the DSA in the case of VLOPs and VLOSEs, the competent authority in Poland shall be entitled to conduct inspections unrelated to any other proceeding at the request of the European Commission based on Art 69 (8) DSA, and it may empower the employee of the European Commission to participate. Provisions on inspections including on obtaining the support from Police or other authorities shall be applicable also in cases where an ISP objects the control of the European Commission. In the course of inspections conducted in the course of infringement proceedings of the competent authorities in Poland, they shall be entitled to empower the employee of a DSC from another Member State, to take part in controls in the case of joint investigations of the DSCs. Prezes UKE shall also be obliged to transmit the information on the complaint it received under Art. 53 of the DSA, to the DSC that has jurisdiction based on the criterion of establishment.[108]

Question 2

The proposal for act implementing the DSA includes **the chapter on civil liability and court proceedings.**[109] The objective of this chapter is to indicate the jurisdiction of regional courts, to clarify that the claims shall be based on the provisions of the Civil Code, and to indicate the relations between administrative proceeding conducted by a competent authority, and civil proceedings before the court.

In the case of receiving the claim the court should inform the "competent authority." This term refers primarily to national competent authorities, and the

[108] For now, there are no specific provisions addressing proactive approach of the DSC to inform the Commission about the problems of compliance with the DSA by VLOPs and VLOSEs actions affecting users in Poland, to foster efficiency in enforcing the DSA. Perhaps the works of European Board for Digital Services have the potential to create the necessary platform for cooperation filling this gap.

[109] Draft chapter 4e of amended Act on Providing Services by Electronic Means, UC21.

European Commission is mentioned expressly nowhere in the proposed chapter. Other provisions shall establish the exchange of information between authorities and civil court on the proceedings conducted in the area of the same infringement. The court shall suspend its proceedings in the case when the competent authority initiates administrative proceedings concerning the infringement of the DSA, and shall discontinue proceedings to the extent that the decision of the authority, or the judgment of the administrative court already satisfies the claim. In the case of claim for damages, the final decision or judgement of the administrative court on the committed infringement, shall be binding for the civil court hearing the claim. The proposed provisions entitle the competent authority or the trusted flagger to raise the claims and initiate civil proceedings on behalf of the service recipient, and refer to Art. 55-60 of the Civil Procedure Code on the prosecutors' powers to submit claims. Competent authorities may, if they consider it is in the public interest, present opinions to the court hearing the claim based on the infringement of the DSA. It is proposed to add a new chapter in the code of civil proceedings, addressing the proceedings in matters related to services provided electronically, with the jurisdiction of Regional Court in Warsaw: Sąd Ochrony Konkurencji i Konsumentów.

Regarding cooperation between national courts and the Commission in application of the DMA, no specific rules have been adopted at the national level. We are also not aware of any draft legislation that would be currently proceeded with this regard. Thus, any mutual assistance would be taking place on the basis of directly applicable Article 39 DMA.

Question 3

Enforcement of competition law in digital markets seems to fit the Prezes UOKiK's priorities. However, with respect to the DMA obligations, we do not identify any Poland-specific features of digital markets or gatekeepers' misconduct that would inspire Prezes UOKiK to submit unique information regarding DMA non-compliance, pursuant to Article 27 DMA. Given presence of relatively strong national market players in the Polish e-commerce market (who are business users to gatekeepers' core platform services), we might expect that they launch complaints regarding DMA non-compliance, either with the Prezes UOKiK, or directly with the Commission.
We also note that certain proceedings currently conducted by the Prezes UOKiK[110] might inform discussions with the Commission regarding the perhaps too narrow definition of core platform services and gatekeepers.

[110] See, e.g., the preliminary investigation regarding the video games market: https://uokik.gov.pl/en/video-game-market-preliminary-investigation

Section 4: Private enforcement of DMA/DSA

Question 1

Private enforcement of the DSA.

As indicated in the Section 3 separate draft chapter on civil law claims of service recipients affected by an intermediaries' infringement of the DSA provisions is proposed. The proposed chapter makes a direct reference to the claim for compensation of damages caused by the infringement, subject to general liability rules. There is no information yet about the private enforcement actions based on the DSA provisions, and we are awaiting the finalization of the legislative process on the DSA implementation.

We are not aware of any DMA private enforcement actions brought before Polish national courts until today. Given the rather low involvement of individuals in private enforcement of competition law and the tendency to rely follow-on actions (rather than standalone ones), we assume that this situation may last at least until adoption of first DMA non-compliance decisions by the Commission.

Question 2

Private enforcement in the narrow sense of seeking compensation in the national courts is addressed in Art. 54 DSA. So far, there have been no information on the actual application of this provisions or pending cases. The proposal for implementing act addresses the liability of IPSs based on the general rules of Civil Code.[111] Potential claims include compensation for damages [Art. 415 k.c.], compensation for violation of personal rights [Art.448 k.c], or contractual liability and compensation for the breach of contract [Art.471 k.c.].
An important pre-DSA case against Facebook/Meta was decided by the court of first instance in March 2024. The claims against Facebook were raised in 2019 by the NGO, *Społeczna Inicjatywa Narkopolityki* (Civil Society Drug Policy Initiative SIN) after the platform removed the fan pages and groups of SIN, and its account on Instagram. SIN has been actively informing about the detrimental effects of psychoactive substances and helping those who used them. Challenging the restrictions SIN claimed violation of its personal rights, notably its freedom of expression, reputation and recognition. SIN lost the possibility to communicate with the public, particularly with the young people, and the restrictions imposed implied that its activities are harmful. The court of first instance ordered Meta to reinstate the content and to pay the costs.

[111] The proposed provisions are discussed in the section 3.

The case was decided by the court of first instance in favour of the claimant, and now the appeal on matters of jurisdiction is pending. SIN was actively supported by Fundacja Panoptykon, an NGO dedicated to protect citizens from abuses linked to the use of technologies. Panoptykon extensively informs about the case, as it is considered to be the strategic lawsuit for users' rights.[112] Recent analysis take into account that with the advent of the DSA the framework for protection of users' rights have changed, but it is anticipated that DSCs shall engage in control of systemic solutions applied by platforms, and not in individual cases. [113]

From the legal perspective, the most important findings can be summarized as follows:

(1) The court found that removal of fan pages, groups and accounts infringes the personal rights of SIN as a legal entity. The fact that SIN contractually agreed to the Terms of Service and Community Standards does not preclude that the restriction was unlawful. The court of first instance found that given that no explanation or statement of reason was provided to the claimant, it cannot actually be proven that the incompatibility the Community Standards was verified, there was no possibility to appeal from platforms' decision and therefore the value of the Community Standards may be merely declarative and platform decision is considered arbitrary.
(2) Meta as the legal entity is bound not to violate the freedom of expression and other personal rights of its users. The court underlined the particularly powerful and leading position that Meta holds in the digital environment for communications. It is important, that SIN had no real alternative to communicate with its users.
(3) The jurisdiction of the Polish court was established based on Art. 7 (2) of the Regulation 1215/2012:[114] "(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur."

To establish the jurisdiction the national court applied the same reasoning as in the CJEU case C-509/09[115] to the case of the removal of content. That removal allegedly constituted the violation of personal rights. The court rejected the argument that the contractual clause provides for the jurisdiction of

[112] https://en.panoptykon.org/sinvsfacebook, last accessed 31.10.2024. The legal advice in the lawsuit was supported financially by the Digital Freedom Fund, and with the *amicus curiae* brief from Gesellschaft für Freiheitsrechte on the case law of the German courts including the Federal Tribunal.

[113] Głowacka, Dorota *Dlaczego sąd nakazał przywrócenie konta SIN na Facebooku i Instagramie? Uzasadnienie wyroku*. 02.08.2024, https://panoptykon.org/sin-vs-facebook-pierwsza-sprawa-wyrok

[114] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[115] C-509/09 eDate Advertising ECLI:EU:C:2011:685.

Irish courts. The contractual clause does not extend to matters of violation of personal rights.

The SIN v FB is indicative of which groups of users (NGO's, association, entities building their communication with users, or their brand nearly entirely through social media) might be interesting in raising claims. This lawsuit aimed at restitution of content and public apologies of Facebook. Cases that would follow are going to be decided in the different legal framework, where, for example, online platforms are obliged to provide for internal complaint mechanisms, and statement of reasons, that needs to be taken into account.

Question 3

In Poland there is no dedicated legislation regarding private enforcement of the DMA. Also, the scope of application of national law implementing the Damages Directive[116] has not been extended to the DMA infringements (as it is done in Germany).

Firstly, in parallel to proposals regarding DMA implementation, the same draft legislation seeks to improve Polish legislation in line with the P2B Regulation,[117] as required by the Commission in a separate action. Therefore, the other piece of national legislation, Ustawa o zwalczaniu nieuczciwej konkurencji (UZNK),[118] will extend its scope of application to online intermediation services. The UZNK constitutes an example of "private competition law" allowing undertakings to bring private law claims against acts of unfair competition performed by their business counterparties.

In Poland, we witness that the UZNK may be relied on by businesses seeking compensation for infringement of competition law in digital markets, when laws implementing the Damages Directive do not apply due to their temporal scope. A recent case includes a follow-on claim to the Google Shopping case, launched by Ceneo (price comparison platform in Poland) against Google.[119] Therefore, we can assume that presently at least certain infringements of Articles 5–7 DMA may be privately enforced by the use of the UZNK provisions, especially following the amendments inspired by the P2B Regulation.

[116] Ustawa z dnia 21 kwietnia 2017 r. o roszczeniach o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji (Dz.U. z 2017 r. poz. 1132).

[117] 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.

[118] Ustawa z dnia 16 kwietnia 1993 r. o zwalczaniu nieuczciwej konkurencji (Dz.U. z 2022 r. poz. 1233).

[119] See the press article describing these proceedings: https://www.gazetaprawna.pl/firma-i-prawo/artykuly/9488026,polskie-ceneo-wygrywa-z-google-chodzilo-o-faworyzowanie-wlasnej-porow.html

Secondly, with respect to private enforcement by end users, the 2024 amendment to the law on collective redress[120] seeks to facilitate consumers collective actions for damages. Rules included in the amended law may encourage consumers to bring collective actions against gatekeepers infringing consumers rights introduced in Article 5-7 DMA. While the amendments mainly focus on facilitating actions brought by consumers, general solutions regarding collective redress remain available for business users as well. The same rules would potentially facilitate the DSA enforcement in the area of infringement of consumers' rights.

We assume that larger e-commerce platforms that are seated in Poland and remain gatekeepers' business users are most likely to engage in DMA private enforcement.

However, given the low engagement in private enforcement of competition law in Poland, rather insufficient legal framework on both EU and national level, as well as dynamics of DMA public enforcement (which may in turn inform private enforcement actions), we do not expect any major developments in the field of DMA private enforcement in Poland in the nearest future.

Question 4

Until today, no specific rules have been adopted for private enforcement of the DMA. We are also not aware of any official (i.e., embodied in proposals for legislation) plans for doing so, albeit in public debate there are calls for at least extending the scope of application of national law implementing the Damages Directive in order to embrace infringements of Articles 5-7 DMA. In consequence, we are not aware of any plans to allocate DMA private enforcement cases with any specific court or chamber.

The draft provisions on civil law liability and court proceedings proposed in Chapter 4e of the act implementing the DSA were already discussed in the sections above. The general rules proposed include the jurisdiction of regional courts in matters falling in the scope of Art. 54 DSA, or the interrelations between the civil proceedings and the administrative proceedings of the competent authorities. Competent authorities may present opinions on the infringements of the DSA to the courts, if it is desirable from the perspective of public interest. The courts should, according to the draft, inform the competent authorities about the claim and about the binding rulings.

[120] Ustawa z dnia 17 grudnia 2009 r. o dochodzeniu roszczeń w postępowaniu grupowym (Dz.U. z 2024 r. poz. 1485).

Question 5

Article 8 of the Polish Civil Procedure Code provides that civil society organisations, may initiate or join the proceedings with the aim of protection of civic rights, as long as such actions are inscribed in their statutory goals and that they do not engage in economic activities in this field. More specific rules are included in Articles 61-63 CPC. Provisions of the CPC limit the cases in which civil society organizations may intervene. The list includes protection of consumers, environment, industrial property, equality and non-discrimination. Based on these provisions, civil society organisations may initiate or join proceedings in consumer matters in the name of a consumer and upon their consent. We assume that infringements of consumer rights introduced in the DSA and DMA are included in the notion of "consumer matters" introduced in the CPC. In principle, organisations are exempted from court proceedings costs. In other terms, initiation or participation in the proceedings is comparably burdensome as for the regular parties to the proceedings.

Section 5: General questions

Question 1

Orders to act against illegal content.

The matter of orders and potential implementation of Art. 9 and 10 has grown in importance during the legislative process. The first proposal of March 2024 did not include provisions referring to orders. The chapter addressing orders was proposed in July 2024, and amended in September 2024 with another round of public consultation, addressing, to a large extent, the shape of these provisions.

The proposal stressed that there are no legal basis in the Polish law to request an order or injunction from the courts or administrative body against the dissemination of illegal content, with the only exception of powers of the Chief of ABW.[121] It was indicated that introducing such orders would specify in Polish law the conditions set in the CJEU judgement UPC Telekabel Wien.

Injunction in the area of copyright and related rights. In the area of copyright infringement the discussion centred about inadequate implementation of Art. 8 (3) InfoSoc Directive and Art. 11 of Enforcement Directive.[122] The case

[121] The powers to issue website blocking orders were discussed in section 2.2.; Proposal of 19 July 2024, p. 53.

[122] Directive2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights *OJ L 157*, 30.4.2004, pp. 45–86.

law indicates the possibility of application of Art. 439 of the Civil Code on preventive measures in the proceedings against ISPs.

In 2016 the Regional Court in Warsaw (Sąd Okręgowy w Warszawie) found that the interim measures based on the code of civil procedure on securing non-pecuniary claims cannot be imposed against the internet access provider, in the case of claims based on Art. 79 (1) of Act on Copyright and Related Rights and Art. 422 of the Civil Code on accessory liability, raised against an online file sharing platform.[123] The court stressed that the courts may order such measures only between the parties to the proceedings, and in the case of the third party – an internet access provider – the requirement of sufficient judicial control would not be fulfilled.[124]

Art. 439 of the Civil Code is the potential legal basis for the injunction against the online platform provider (a hosting service provider) in the case of the copyright infringement. This provisions is the legal basis for measures necessary to reverse the threat of danger and, if necessary, to provide adequate security, in the case of persons whose conduct threatens the damage directly, imposed by courts as part of the infringement proceedings against the platform service provider.[125] The conditions for application of Art. 439 were discussed in the legal doctrine, also in the case of access service providers (mere conduit),[126] based on the existing case law, with the conclusion that the unlawfulness of the act of the ISP is a necessary premise to impose the measures to block access to content.[127] The behavior of an ISP is unlawful if the provider has knowledge of the content infringing copyright on the website. The Supreme Court indicated in 2022, that this interpretation is in line with the requirements of EU law, particularly with Art. 8 (3) and Art. 11 and 13 of the enforcement Directive and Art. 18 (1) of the E-commerce Directive. The emphasis on the effective protection of the rightsholders and availability of preventive measures, form the argument sustaining the applicability of Art. 439 in the case of preventive content blocking in the case when the possibility that the damage should occur is high. The threat should be direct and specified. The court recalled also Art. 11 of the Charter and the case law of the CJEU on the need for an adequate balance in application of measures to protect holders of copyright and related rights.[128]

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[123] Order of the Court of 17.11.2016, XX GC 1004/12.

[124] As required by the CJEU in UPC Telekabel Wien.

[125] II CSKP 3/22, Judgement of Sąd Najwyższy (Supreme Court) of 27.05.2022, https://www.sn.pl/sites/orzecznictwo/orzeczenia3/ii%20cskp%203-22.pdf; English text of the Civil Code: https://www.global-regulation.com/translation/poland/10092092/act-of-23-april-1964-civil-code.html

[126] Art. 12 of the E-Commerce Directive and Art. 12 of u.ś.u.d.e.

[127] Żok Krzysztof, Blokowanie dostępu do stron internetowych w ramach ogólnego roszczenia prewencyjnego, *ZNUJ PPWI* 2019, nr 1, pp. 128–145.

[128] C-70/10, Scarlet Extended, C - 360/10 SABAM, C - 160/15). GS Media,.

Infringement of trademarks.

Law on industrial property provides for general preventive measures: "The holder of a patent, a supplementary protection right, a right of protection or a right in registration, or a person entitled under this Law, may demand stopping the acts threatening infringement of the right."[129]
Furthermore, after the amendments of the Act in 2018, in the case of trademarks the claims available in the case of infringements shall also be enforceable against the person, whose services were used in the course of the infringement, however this provision is not applicable to the intermediaries falling in the scope of Art. 12-15 of the Act on Providing the Services by Electronic Means [Art. 296 (3)].[130]

Proposal for amendments and introduction of legal basis for orders against intermediaries.

The proposal for amendments necessary to implement the DSA in Poland includes the relatively complex chapter on orders, aiming at providing for the legal basis as well as regulating procedural aspects of orders. The proposal addressed the orders on removing content violating personal rights, infringing intellectual property rights, infringing consumer protection laws, or content the dissemination of which is an act prohibited by criminal law.[131] These orders should be issued in the administrative proceedings by the DSC (potentially Prezes UKE) or, in the case of infringements of consumer law, by Prezes UOKiK as competent authority. The judicial proceedings are foreseen for orders on providing personal data of a service recipient. At the substantiated request of the prosecutor or the Police, the Regional Court in Warsaw shall issue orders in case it is probable that the service recipient committed an offense (or financial offense or financial misconduct) in connection with the use of an intermediary service.[132]

[129] Act on Industrial Property, Ustawa prawo własności przemysłowej,t.j. Dz.U. z 2023 r. poz. 1170 . English text: https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/pl/pl076en.pdf, text without most recent amendments.

[130] It may be interesting to note, that Regional Court in Warsaw applied this provision in conjunction with Art.422 of the Civil Code on accessory liability in the case of trade in infringing goods in the offline marketplace and potential liability of the owner of the premises of the marketplace. The Court relied also on the existing CJEU case law, and the national rules on liability and indicated that wilful misconduct (*dolus directus*) is the necessary condition of liability based on Art. 296 (3) p.w.p. and 422 k.c. It was relevant that the defendant had no specific knowledge of the infringement, and securing the claim, according to the court, would result in disproportionate and costly obligations amounting to general monitoring of the sellers at the marketplace. Judgment of Regional Court in Warsaw (Intellectual property division), of 23.05.2023 XXII 709/22, Lex nr 3613705.

[131] The proposed chapter 2 a of the amended Act on Providing Services by Electronic Means.

[132] Proposed Art. 11b).

This draft proposal includes the possibility to request an order by the service recipient against restrictions imposed by a hosting service provider, indicated in Art. 17 (1) of the DSA. Such orders are proposed to be issued by Prezes UKE in the course of administrative proceedings, based on the assessment whether the content restricted by the service provider was actually illegal. The decision addressing content and restrictions on content should be rendered in 7 days, and in more complicated matters in 21 days. Decisions should be subject to appeal to an administrative court.

The proposal aims at providing a fast and effective options for those whose rights were infringed. The request for orders is not linked to any other proceedings, for example, claims in the case of violation of personal rights, or claims in the case of intellectual property infringements. The only condition (not applicable to the Police, or other public authority as the applicant) is that firstly, in the case of hosting, the notice is filed via internal complaint mechanisms system, subject to Art. 16 DSA. The objective of the draft proposal is to strengthen the protection against dissemination of illegal content, or event to prioritize the applicant, therefore not all the principles governing the administrative proceedings should be in place. The question whether the content actually violates personal rights or IP rights or consumer protection, or whether the content is otherwise illegal shall be decided based on the evidence submitted by both parties (the applicant and the ISP) and may be complemented by statements of witnesses, oral hearings, expert opinion or inspections. It should be noted however that the decision should be rendered in 7-21 days, depending on the type of infringement. This proposal raised a number of critical remarks submitted by Prezes UOKiK, primarily with respect to orders addressing content violating consumer law. Critical remarks included the risks for the principle or proportionality, the risk of conflicting decisions,[133] shortcomings as to the time of the procedure, encroachment upon the independence of Prezes UOKiK and weakening of the consumer protection system, causing unnecessary interference with the acts of the Union law.[134] The most recent version does not include orders in cases of infringing consumer law.[135] Furthermore it should be noted that the proposal aims at introducing a relatively short administrative procedure in fact leading to adjudicating on the legality of content in the area of both public and private law. In the case of assessing the restrictions imposed by a hosting service provider it would include assessment of the proportionality of restrictions on the freedom of expression of the platform users.

[133] It is submitted that the proposal may lead to conflict with the powers already granted to Prezes UOKiK and judicial proceedings under the Regulation 2017/2394, Regulation 2019/1020 and Regulation 2023/988.

[134] Tabela uwag, październik, p. 16.

[135] Draft proposal of December 2024.

Question 2

We are not aware of any established legal representatives in Poland, in the context of Art.13 DSA.

Question 3

Complaints based on Art. 53 DSA. The proposal for implementing act contains one provision dedicated to complaints under Art. 53.[136] The provision specifies the formal requirements of the complaints submitted to Prezes UK.

The proposed provisions specify the form of complaint (written and fixed in the electronic form), the content of the complaint, and the response of the DSC. Prezes UKE shall be obliged to answer to the complaint in writing and according to the provisions of the code of administrative proceedings governing the terms of resolving the administrative matters.[137] The answer to the complaint needs to contain statement of reasons. Prezes UKE should also inform the complainant if it transmits the complaint to the DSC in another member state.

Draft proposal stipulates that Prezes UKE should inform the complainant in writing about the outcome of the complaint, with the statement of reasons, and it timeframe governed by the code of administrative proceedings for dealing with administrative affairs (Art. 35-37 code of administrative proceedings). In this proposal the complaints are not limited only to systemic infringements, however the general approach to the supervision of Prezes UKE is focused on systemic infringements, as indicated by the proposed list of infringements subject to administrative penalties. Logically, if the complaint indicates an infringement of the DSA Prezes UKE may initiate infringement proceedings, and if the complaint is not substantiated, it may refuse to initiate the proceedings. Theoretically the claim could address violation of Art. 14(4) or 16 (6) of the DSA, but there is no specific reference to an infringement of the standards of behavior in individual cases.

Question 4

Implementation of the DSA and DMA as such is not subject to any particular political controversy. It is however important to stress that political controversies surrounding the lack of functional independence on the part of

[136] Draft Art. 25t of the amended Act on Radio and Television Broadcasting.
[137] Art. 35-37 code of administrative proceedings.

KRRiT may impact the shape of the proposed legislative measure.[138] Despite its constitutional role to guard the freedom of expression and pluralism of information, and the fact that KRRiT is already responsible for supervision of video-sharing platforms, it has not been included directly in the framework of DSA implementation. The issue of planned orders of Prezes UKE to block content online raised a lot of controversies in the most recent discussion.

Question 5

Given the early stage of works on the proposals for necessary amendments in law, nothing can yet be said about the support for the initiatives of out-of-court dispute resolution bodies, or trusted flaggers or supporting consumer organizations. Concerns were raised whether there is going to be enough incentives to create out-of-court dispute settlement bodies. The proposal for amending laws is so far limited to procedural matters and regulating obligations of out-of-court dispute settlement bodies.

Question 6

The discussion on the implementation of the DSA and the DMA centred around the question of a competent authority and on the role that should be played by the supervisory authority for personal data. As indicated in paragraph (1) above, the proposal for regulation of orders in the amended Act on Providing Services by Electronic Means should be subject to further discussion.

Important discussion is focused on the legislative proposal for amendments of the civil procedure to enable claims against unknown defendants, in the case of infringement of personal rights, so called "ślepy pozew." The amendments would facilitate lawsuits in the area of online defamation.

[138] Rule of law report. Country chapter Poland, p.26 https://commission.europa.eu/document/download/9c081f05-688d-4960-b3bc-ea4fc3b2bafb_en?filename=48_1_58078_coun_chap_poland_en.pdf, last accessed 31.10.2024.

Portugal

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DISCLAIMER

We note that after the publication of this questionnaire, Draft Bill No. 32/XVI/1, dated October 24, 2024, was published. This bill introduces various amendments concerning the competent supervisory authorities, defining their powers and responsibilities, as well as setting out the obligations of intermediary service providers, the inspection procedures, and the applicable sanctioning regime. It also amends and adds to Decree-Law No. 7/2004, of January 7, Law No. 62/2013, of August 26, and revokes Decree-Law No. 20-B/2024, of February 16.

Considering that this legislative document still requires discussion in the Portuguese Parliament, with potential for modifications and additions, the present text does not yet reflect these pending amendments.

Brief Summary of Draft Bill No. 32/XVI/1's Aspects

Under the Draft Bill No. 32/XVI/1 ("Draf Bill"), Autoridade Nacional de Comunicações (National Authority for Communications or "ANACOM"), Entidade Reguladora para a Comunicação Social (Regulatory Entity for Social Communication or "ERC") and Comissão Nacional de Proteção de Dados (National Data Protection Commission or "CNPD") are the competent authorities under the Digital Services Act ("DSA"). Inspeção Geral das Actividades Culturais ("General Inspectorate for Cultural Activities" or "IGAC") is no longer a designated authority.

ANACOM is the Digital Services Coordinator, responsible for the supervision and enforcement of the DSA, with the exception of:

i. The supervision and enforcement of Articles 14 (3), 26 (1) and (2) and Article 28 (1) of the DSA. These powers are attributed to ERC;

ii. The supervision and execution of Article 26 (3) and Article 28 (2) of the DSA. These powers are attributed to the CNPD.

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Additionally, several investigatory powers – including the authority to require information from service providers and to conduct inspections of their premises, as well as enforcement powers, such as the ability to order the termination of DSA violations or impose fines, are granted to these authorities.

Measures for cooperation between competent authorities are introduced, such as the creation and adoption of a common platform aimed at enabling the centralization of communications and decisions issued by the various competent administrative and judicial Portuguese bodies.

With respect to cooperation measures with the European Commission, the Draft Bill designates the Digital Services Coordinator as the single point of contact with the European Commission, the European Digital Services Committee and the digital services coordinators of other Member States, and also grants the Digital Service Coordinator the power to promote the integration or interoperability of the aforementioned communication platform with the information systems used by the European Commission for the implementation of the DSA.

Regarding national courts, Draft Bill establishes their competence to assess the illegality of online content and appoints the Competition Court to judge appeals against the decisions made by the Digital Services Coordinator.
The Draft Bill also foresees the implementation of Article 9 and 10 of the DSA, establishing rules and procedures for supervision, inspection and sanctions regimes. Furthermore, Draft Bill provides for a complaint mechanism under Art. 53 of the DSA.

Finally, it also foresees changes to Decree-Law no.7/2004, which transposes the E-Commerce Directive; Law no. 62/2013, that regulates the Portuguese judicial system and revokes Decree-Law no. 20-B/2024, which designated the competent authorities under the DSA.

Section 1: National institutional set-up

Question 1

In Portugal, the designation of authorities for the Digital Services Act[1] ("DSA") enforcement is governed by Decree-Law No. 20-B/2024, which appointed ANACOM (National Authority for Communications) as the Coordinator of Digital Services ("CDS"), in accordance with Article 49(3) of the DSA. Additionally, sector-specific regulators such as the *Entidade Reguladora para a Comunicação Social* – ERC (Regulatory Entity for Social Communication)

[1] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC.

for matters related to social communication and other media content and IGAC (General Inspectorate for Cultural Activities) for copyright matters were also designated as competent authorities.

Order No. 1747/2024, of February 15, issued by the Presidency of the Council of Ministers set up a working group with the aim of mapping out the legal amendments necessary to ensure the due application of the DSA in the internal legal order. This working group is also responsible for identifying other competent authorities for the purposes of the DSA[2] and clearly define their respective tasks, ensuring close and effective cooperation with the CDS.

The working group is temporary, and it shall send a final report to the members of the Government responsible for the areas of government in charge of the media, culture, digitalization, and infrastructure, with the results of the work carried out in this context.

According to ANACOM's public declarations this report was already sent to the competent Government members. However, until this date, the same was not made available to the public.

The fact is that it is not clear how the competent entities will exercise their powers and if the same will be exclusive or shared, as there may be matters in which the competences of the appointed entities overlap.

Question 2

The working group created by Order no. 1747/2024, of February 15, had, amongst other tasks, to identify other competent authorities for the purposes of the DSA and clearly define their scope of activity, ensuring close and effective cooperation with the CDS.

[2] At the Task Force's first meeting, in March, representatives of multiple public entities, namely, the AdC (Competition Authority), AMT (Transport Authority), ANAC (National Civil Aviation Authority), INFARMED (National Authority of Medicines and Health Products); CNCS (National Cybersecurity Center); CMVM (Securities Market Comission); CNPDPCJ (National Commission for the Promotion of Rights and Protection of Children and Youth); CNPD (National Data Protection Commission); DGC (Generale- Directorate of Consumer, DNPJ (National Directorate of the Judiciary Police); DNPSP (National Directorate of Public Security Police); DGPJ (Directorate- General for Policy of Justice), DNPSP (National Directorate of Public Security Police); ERSAR (Regulatory Entity for Water and Waste Services); ERSE (Regulatory Entity for Energy Services); ERS (Regulatory Entity for Health); IGEC (General Inspectorate for Education and Science); IRAE (Regional Inspectorate for Economic Activities); IMPIC (Institute of Public Markets, Real Estate and Construction); INPI (National Institute of Industrial Property); PGR (Attorney General's Office); SRIJ (Tourism of Portugal Regulation and Inspection Service) were in attendance, ANACOM. "ANACOM acolhe reunião do Grupo de Trabalho para a execução do Regulamento dos Serviços Digitais," *ANACOM,* 2024, https://www.anacom.pt/render.jsp?contentId=1774967. Accessed 15 Ap. 2024.

This report was set to be sent to the Government members responsible for social communication, culture, digitalization and infrastructures on May 30, 2024. As previously referred, according to the information made available by ANACOM, this entity has already made available the report to the referred government members. In such report, according to ANACOM's public declarations, this latter proposed legal amendments to the current legal framework and to applicable sanctions.

At this moment, and again according to ANACOM's public declarations, eight people are full time dedicated to the coordination task of ANACOM as CDS.

ANACOM stated in a press conference held on June, 25 2024,[3] that it is planned the availability to the public of forms and, where justified, guidelines for submitting complaints, applications for trusted flagger status, applications to an out-of-court dispute resolution body, applications for qualified investigator status and communications on the appointment of legal representatives in Portugal.

Additionally, on ANACOM's list of planned initiatives are, among others, the drafting of the specifications, in collaboration with other relevant authorities, the launch of the acquisition process for the platform to support the implementation of the DSA and the launch of an information campaign regarding reports of illegal content and disinformation.

Question 3

At this stage, there is not yet a clear definition of the scope of activities to be carried out by the Authorities which will have a prominent role in the enforcement and supervision of the DSA.

The fact is that there is no public information on specific actions concerning the enforcement of the DSA. Notwithstanding, ANACOM as CDS has publicly informed that it has already received complaints and that it has set up a team of eight people that will specifically address the coordination task attributed to ANACOM. According to ANACOM, this team will need to have between twelve and twenty people with technical background for ANACOM to fully comply with its task as CDS.

ANACOM has also publicly informed that it will launch a brief study to identify intermediary service providers in Portugal. According to ANACOM, one hundred have already been identified which include, for instance, Portal da

[3] Campos, Anabela. "Anacom já tem equipa para supervisionar serviços digitais, mas precisa de reforços, e já recebeu queixas," *Expresso,* 2024, https://expresso.pt/economia/2024-06-25-anacom-ja-tem-equipa-para-supervisionar-servicos-digitais-mas-precisa-de-reforcos-e-ja-recebeu-queixas-6d196814. Accessed 25 Jun. 2024.

Queixa or Idealista. Up until June 27, 2024, ANACOM had received twelve complaints related with the DSA, which ranged from account blockages to the lack of communication channels with the platforms themselves, among others. Companies like Netflix, Instagram, LinkedIn, Facebook, Amazon and Google, as well as Portuguese companies such as, for instance, "Portal da Queixa," "Worten" or "Idealista" may be affected.[4]

There are four requests for status as a trusted flagger, which include MEDIALABS (from ISCTE University). ANACOM referred that entities such as *Associação de Apoio à Vitima* (Victims Support Association) or *Comissão de Proteção de Menores* (Comission on the Protection of Minors) could undertake such role.

Up to the present date no enforcement priorities have been publicly announced.

Question 4

The Portuguese Competition Authority (the "PCA") is the competent authority to assist the European Commission ("Commission") and to which third-party's complaints should be addressed. It is not yet entirely clear whether this includes competence for investigations of suspected breaches of the Digital Markets Act[5] ("DMA") in Portugal.

Question 5

The PCA has accompanied and assisted the Commission in the application of the DMA within the framework of the mechanisms provided for in the DMA, notably: through the Digital Markets Advisory Committee (Article 50 of the DMA); the High Level Group, in which the European Competition Network is represented (Article 40 of the DMA) and also in the context of the operation and cooperation of the European Competition Network (Article 38 of the DMA).

Additionally, the PCA co-organized a European Competition Network Conference on the DMA on June 24, 2024, in Amsterdam, where it highlighted the opportunities created by the DMA to companies that are competitors or clients of the gatekeepers.

[4] Brito, Ana. "Presidente da ANACOM: "O ideal é que as pessoas reclamem" contra as plataformas digitais," *Público,*2024, https://www.publico.pt/2024/06/25/economia/noticia/presidente-anacom-ideal-pessoas-reclamem-plataformas-digitais-2095244. Accessed 25 Jun. 2024.

[5] Regulation (UE) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC.

Question 6

Investigations under Article 38 of the DMA are not public information.

In the year 2022 the PCA announced as its priority to guarantee fairer, more open, and more loyal digital markets, in accordance with the DMA's objectives.[6]

In the year 2023 the monitoring of all digital competition policy initiatives and possible investigations related to digital markets, in close cooperation with other European authorities on these matters. It also stated as its priority action in the digital environment in order to protect the competitive dynamics of the markets and the resulting benefits for households and businesses.[7]

In the year 2024 announced priorities cover the monitoring of trends and developments in the digital area with a view to map out appropriate solutions to the challenges that the digital transition of the economy entails. Likewise, it also announced the strengthening of international cooperation in this area, particularly regarding the implementation the DMA.[8]

Section 2: Use of national legislative leeway under the DMA/DSA

Question 1

Up to the present date the existing national laws that can overlap with the DSA are still in force and have not yet been amended. Notwithstanding, the working group set up by Order no. 1747/2024, of February 15, 2024, had as task to propose amendments to the current legal framework. According to ANACOM's public declarations such amendments were included in the Report sent to the competent Government members which was not made public.

At present, there are some laws and regulations that can potentially overlap with the DSA. The most important overlap concerns the Decree-Law no. 7/2004, of January 7, 2004, which transposed Directive (EU) 2000/31 of the European Parliament and Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market

[6] Autoridade da Concorrência, "Prioridades de política de concorrência para 2022," *Concorrência,* 2022, https://www.concorrencia.pt/sites/default/files/documentos/Prioridades%20de%20pol%C3%ADtica%20de%20concorr%C3%AAncia%202022.pdf. Accessed on 2 Jun. 2024.

[7] Autoridade da Concorrência "Prioridades de política de concorrência para 2023," *Concorrência,* 2023, https://www.concorrencia.pt/sites/default/files/Prioridades%20de%20pol%C3%ADtica%20de%20concorr%C3%AAncia%20para%202023_0.pdf. Accessed on 2 Jun. 2024.

[8] Autoridade da Concorrência "Prioridades de política de concorrência para 2024," *Concorrência,* 2024 https://www.concorrencia.pt/sites/default/files/Prioridades%20de%20pol%C3%ADtica%20de%20concorr%C3%AAncia%20para%202023_0.pdf. Accessed on 2 Jun 2024.

("Directive on electronic commerce"), specifically on the matter of liability of intermediary service providers.

The Decree- Law on the E-Commerce Regime ("E-Commerce Regime"), in line with the Directive, foresees three types of information society services (Chapter III): (i) "Mere Conduit" – an information society service that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network; (ii) "Caching" – an information society service that consists on an intermediate and temporary storage in a communication network of information provided by a recipient of the service, and (iii) "Hosting" – an information society service that consists on the storage of information provided by a recipient of the service.

The main principle arising from the E-Commerce Regime, in line with what is foreseen in the Directive, is that in the cases where the intermediary service provider does not have an active role (selecting or modifying the information, having actual knowledge of the illegal activity or information) it will not be held liable, provided that where it obtains such knowledge or awareness, it acts expeditiously to remove or to disable access to the illegal information.

The same general principle of exemption of liability arises from the DSA. Furthermore, as occurred in the E-Commerce Directive (and Portuguese E-Commerce Regime), there is an absence of an obligation to monitor the information that intermediary service providers transmit or store online. The DSA goes a step further and clearly foresees that voluntary own initiative investigations undertaken by intermediary service providers will not deem them ineligible from the exemptions of liability.

The DSA, however, adds new conditions to the exemption of liability on Hosting services (article 6. number 3 of the DSA), foreseeing such exemption does not apply to online platforms that allow consumers to conclude distance contracts with traders, where such online platforms present elements that can lead the consumer to believe that the product or service is provided by the platform.

The fact is that both regimes on liability are now in force, at least until a formal revocation of the provisions of the E-Commerce Regime related with intermediary service providers liability. Notwithstanding, we consider that the regime of the DSA, an EU Regulation, shall prevail over the previous national provisions foreseen in the E-Commerce Regime.

There are also other national laws that can potentially overlap with the DSA, as occurs with Law 82/2021, of November 30, concerning the supervising, monitoring,

removing, and preventing of access to protected content in the digital environment. This Law foresees the proceedings for control and removal of content protected by copyright and related rights. The competent entity to supervise this law is IGAC, the entity that was designated as competent authority for the DSA on copyright matters under Decree-Law No. 20-B/2024. The Law foresees several obligations for intermediary service providers such as a timeframe of 48 hours as from notification to comply with IGAC's instructions in what concerns the removal or blockage of content protected by copyright.

Article 9 of the DSA foresees that Members States will assure that when a decision from a court of law or an administrative authority (such as IGAC) concerning illegal content provided to intermediary service providers is taken, the same shall include several elements, such as: legal grounds; clear motives on why the content is considered illegal; clear information that allows the intermediary service provider to localize the illegal content; information on the repair mechanisms available to the intermediary service provider or service recipient that has supplied the content; among others. In this light, amendments to Law 82/2021, of November 30 were most likely foreseen by the working group created by Order no. 1747/2024, of February 15.

An additional legislation worth mentioning in this context is Decree Law no. 84/2021, of October 18, which transposes Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects of contracts for the supply of digital content and services. Article 44 of the referred Decree-Law, foresees a special provision concerning joint liability between online marketplace providers and sellers towards the consumer in the case of lack of conformity of the digital good, content or service in the situations where the online marketplace provider is considered a contractual partner of the seller, which occurs if certain conditions are met (for instance if the contract is executed by the consumer exclusively in the platform, the payment is made exclusively in the platform, the terms of sale are mainly determined by the online market place provider, etc). Portugal, unlike the majority of other EU member states, established this joint liability between online marketplace providers and sellers.

Finally, Portugal has also enacted Law no. 27/2021, of May 17, which approves the Portuguese Charter on Human Rights in the Digital Age. This legislation is national in scope and does not result from the transposition of an EU Directive. The referred Law intends to promote a digital environment which defends human rights, notably reinforcing the right to free speech online and an obligation of the State to protect people against misinformation. The present law does not directly overlap with the DSA as it stands for general values related with the access to a safe and compliant digital environment.

Question 2

Up to the present date no notable DSA-related changes in national rules on the illegality of content were implemented.

On February 7, 2024 the *Entidade Reguladora para a Comunicação Social* "ERC" (Regulatory Entity for Social Communication), which is the competent authority for matters related to social communication and other media content, issued a legal opinion (*Deliberação* ERC/2024/63),[9] at the request of the Ministry of Culture on the draft proposal of the Decree-Law No. 20-B/2024, of 16th February 2024 (which would designate the competent authorities and the CDS in Portugal), stating, among other things, that given the importance of the DSA and the impact it will have on the European area, it would have been important that the definition of the competent authorities and the CDS had been preceded by a wide-ranging public debate, which would also have made it possible to identify the matters of the DSA that required legislative adaptations to the internal legal order, which, in the ERC's view, would not be limited to the mere designation of the competent entities.

In its legal Opinion (*Deliberação*), ERC questions, in particular, which entity will be responsible for combating illegal content that constitutes, for example, disinformation, hate speech or racist manifestations, given the designation of the competent authorities and considering that such content is usually propagated by recipients of the service (in the terminology of the DSA), who do not correspond to what is commonly understood as the "media" (a matter that would be within the competence of this entity). It also states that limiting ERC's action to "social communication matters" will raise doubts on the role intended for this regulator.

In this regard, ERC also points out that, as a result of the most recent amendment to Law no. 27/2007 regarding Television and On-Demand Audiovisual Services, this entity already has competences relating to video-sharing platforms under the Portuguese jurisdiction, which must take appropriate measures to protect the general public from programmes, user-generated videos and audiovisual commercial communications that contain incitement to violence or hatred against certain groups of people or members of such groups. These competences will have to be analysed in articulation with the implementation of the DSA in the Portuguese legal order.

[9] Entidade Reguladora Para a Comunicação Social "ERC/2024/63: pedido de parecer do Ministério da Cultura sobre projeto de Decreto-Lei que designa as autoridades competentes e os coordenador dos serviços digitais em Portugal," *ERC,* 2024 https://www.erc.pt/document.php?id=NDc0ZmJlNmUtM2Q0OS00NmM0LThiOWYtYWEyMTExMjQ0Y2M2. Accessed on 8 Jun. 2024.

ERC states in its opinion that it is understood that its main value and greatest contribution to the proper implementation of the DSA in the internal legal order is related to analysing potentially illegal content – which does not relate to copyright or advertising, which is the responsibility of the IGAC and DGV – and the weighting that must be made with freedom of expression. In this light, ERC proposed to add to Decree-Law No. 20-B/2024, of 16th February 2024 that its competence would not only be related to social communication but also to other media content, which wording was accepted and included in the final version of the referred Decree-Law. The fact is that it may raise doubts the interpretation that will be made of "other media content" which will be under the competence of ERC.

Again, the articulation between the several competent entities is a crucial point under the DSA enforcement which was under the scope of competences of the working group set up by Decision no. 1747/2024.

Question 3

No legislative acts were yet adopted further to the publication of the DSA. There are, however, legislative acts that were previously adopted at a national level related to digital content. In this light, Law no. 82/2021, of November 30, established procedures for monitoring, controlling, removing and preventing access in the digital environment to content protected by copyright and related rights.

It also established the administrative procedure to be adopted in the event of unlawful availability of content protected by copyright and related rights, including the obligations, within the scope of this procedure for intermediary service providers.

Additionally, *Direção Geral do Consumidor* (Consumer General Office), together with those involved in digital communication, has developed a guide for influencers and advertisers (Influencer Marketing – Information on Rules and Good Practices in Commercial Communication in the Digital Media[10]) which aims to raise awareness of compliance with the law on advertising and consumer protection, as well as promoting good practices in commercial communication in the digital environment. According to the referred guide, commercial communications undertaken by influencers must be duly marked as such (using several #) so that consumers are fully informed of its nature and are not misled when accessing such contents online.

[10] Direção-Geral Consumidor, "Marketing de Influência – Informação sobre as Regras e Boas Práticas na Comunicação Comercial no Meio Digital: Guia para influenciadores e anunciantes," *Sgeconomia.Gov,* 2024, https://www.sgeconomia.gov.pt/destaques/dgc-apresentacao-de-guia-marketing-de-influencia-29-de-marco-lisboa-span-classnovo-novospan.asp. Accessed on 17 Sep. 2024.

Recently, in the first semester of 2024, ARP (Advertising Self-Regulation Association), a private non-profit organisation that is the national body responsible for implementing the advertising self-regulation system in Portugal, has launched a Good Practice Guide on Influencer Marketing and Native Advertising[11] that aims to guide all those who produce or communicate content that refers to their own or third parties' brands, products or services on digital platforms, content that could potentially be qualified as Digital Marketing Communication. This guide is intended to serve as a guideline for all those involved in digital marketing, ensuring, as occurs with the Guide issued by the Consumer General Office, that content of a commercial nature is clearly identified.

Question 4

Unlike other EU Member States, such has Germany – one of the first countries to adapt its national legislation to accommodate the DMA – Portugal has not yet adopted a specific measure to regulate the domestic application of the DMA.

Question 5

Unlike other EU Member States, Portugal has not yet adopted a specific measure to regulate the domestic application of the DMA.

Section 3: Vertical and horizontal public enforcement-related cooperation under DSA/DMA

Question 1

ANACOM's Statute[12] provides in its Article 14(2) that ANACOM shall establish forms of cooperation or association with other public or private entities, national or foreign, notably with other regulatory entities or groups of regulators, at European Union or international level, when this proves to be necessary or convenient for the pursuit of its respective powers and provided that this does not imply delegation or sharing of regulatory powers.

Article 26(1)(n) of the referred Statute also provides that ANACOM shall ensure its representation and, at the request of the Government, of the State, in

[11] Auto Regulação Publicitária, "Guia 3 I's: Influenciar os Influenciadores que são Influenciados – Boas Práticas sobre Marketing de Influência e Publicidade Nativa," *Auto Regulação Publicitária,* 2024, https://auto-regulacaopublicitaria.pt/wp-content/uploads/2024/03/Guia-Marketing-de-Influencia_v_final.pdf. Accessed 10 Sept. 2024.

[12] Decree – Law no. 39/2015 of 16 of March (Decreto-Lei n.º 39/2015 de 16 de março).

conjunction with the Ministry of Foreign Affairs, participate in national and international bodies and forums related to its activity.

As ANACOM pointed out in its replies to the PCA's 2021 market consultation: digital ecosystems, big data and algorithms,[13] the independence requirements to be applied to the designation of the authorities provided for in the DSA can raise issues, since they surpass the limited universe of the current independent administrative bodies.

Also, on the topic of the DMA, ANACOM pointed out that there can also be some confusion about the spheres of action of the different competent entities in the context of digital markets, and it is certain that the effectiveness of regulation and supervision of these markets will always depend on a transparent and efficient distribution of attributions and competencies.

Please note that until this date there has not been any amendment of the current legislation to specifically address cooperation mechanisms between National Competent Authorities ("NCAs") and the Commission in what concerns the DSA (for the effects of Article 57 to 60 of the DSA) and the DMA (articles below referred).

Regarding the DMA, to ensure effective cooperation between the competent national authorities of the various Member States and the Commission in the application of the DMA, procedural rules and other coordination mechanisms have been established:

- Formal Consultation Mechanisms: The DMA establishes formal consultation mechanisms between NCAs and the Commission (See Article 37(2) of the DMA: "If necessary, the Commission may consult the national authorities on any matter relating to the application of the Regulation"). These consultations help harmonize the application of the rules and prevent divergent interpretations that could lead to regulatory fragmentation;
- Exchange of Information: NCAs are encouraged to share information and investigation data with the Commission and with each other. See Article 21(5) of the DMA: "At the request of the Commission, the competent authorities of the Member States shall provide it with all the information at their disposal which is necessary for it to carry out the tasks assigned to it by the Regulation." This exchange of information is crucial for coordinating actions against digital platforms operating in multiple Member States;

[13] ANACOM, "Resposta da ANACOM à consulta da AdC ao mercado: ecossistemas digitais, *big data* e algoritmos," *ANACOM,* 2021, https://www.anacom.pt/streaming/20211216_Resposta_ANACOM_Consulta_AdC.pdf?contentId=1712758&field=ATTACHED_FILE. Accessed on 25 May 2024.

- Coordinated investigation: the DMA allows and encourages coordinated investigations between NCAs and the Commission. See Consideration 90: "[...] The Commission and national authorities should cooperate and coordinate their actions necessary to enforce the available legal instruments applied to gatekeepers [...] and respect the principle of legal cooperation.";
- Joint enforcement: NCAs can collaborate on joint enforcement actions, sharing resources and expertise to ensure effective application of the DMA.

As potential challenges we consider the existence of:

- Limited resources: NCA's may face difficulties due to limited resources, which may affect their ability to enforce the DMA rules effectively;
- Complexity of Transactional Investigations: investigations involving multiple member states are inherently complex and can be difficult to coordinate.

Question 2

Regarding the DMA, the following measures aim to harmonize the application of the DMA among Member States:

- Written and oral observations (Article 39(3) of the DMA): The Commission has the possibility to submit written observations in national proceedings involving the application of the DMA and, with the consent of the courts, also oral observations. This allows the Commission to assist the interpretation of the DMA rules by national courts;
- Prior consultation (Article 39(1) of the DMA): national courts may request information/opinions from the Commission on issues related to the application of the DMA to ensure that their decisions are in line with the uniform application of the latter;
- Prohibition of decisions contrary to the Commission (Article 1(7) and Article 39(4) of the DMA): National courts may not give decisions contrary to a decision adopted by the Commission under the Regulation. This prevents national courts from adopting decisions that contradict Commission decisions, ensuring that the policies and interpretations established by COM are respected;
- Communication of Decisions (Article 39(2) of the DMA): national courts are obliged to transmit relevant judgments involving the application of the DMA to Commission. The communication of judgments allows the Commission to monitor how the DMA is being applied;
- Supervision and Harmonization: The Commission plays a supervisory role to ensure that Member States and their courts apply the DMA in a uniform and effective manner.

Concerning the DSA article 82 (3) clearly foresees that if a national court rules on a matter which is already the subject matter of a decision adopted by the Commission under the DSA, that national court shall not take any decision which runs counter to that Commission decision. National courts shall also avoid taking decisions which could conflict with a decision contemplated by the Commission in proceedings it has initiated under the DSA. To that effect, a national court may assess whether it is necessary to stay its proceedings.

Portuguese law has not adopted specific provisions concerning the procedural aspects of the abovementioned provisions from the DMA and DSA, Furthermore, it is also unclear the specific communication channels that will be used between national courts and the European Commission for that effect. Notwithstanding, both the DSA and the DMA maintain the possibility for national courts to make a reference for a preliminary ruling from the Court of Justice of the European Union under Article 267 of the Treaty of the Functioning of the European Union. At present national civil procedural law does not foresee a specific procedure to call on the Commission to interpret rules.

Question 3

The DMA establishes a series of obligations for gatekeepers, aimed at promoting a fair and competitive digital market. In several specific areas of the DMA, national competition authorities play a crucial role in monitoring and reporting possible non-compliance to the Commission. A few examples where the intervention of National Competition Authorities ("NCAs") can be particularly useful:

- Gatekeepers are prohibited from treating services and products offered by themselves more favorably than similar services or products offered by a third party – prohibition of self-preferencing (Article 6(5) of the DMA). NCAs have an important monitoring and investigative role here, as well as reporting non-compliance to COM;
- Gatekeepers must allow end users and third parties authorized by an end user to access data generated by their activity on the platform, as well as enabling data portability. In this context, NCAs have a fundamental role to play in verifying that they are effectively complying with the data access and portability obligations, assessing whether the conditions offered are fair and non-discriminatory;
- Gatekeepers are prohibited from combining personal data from different sources without the explicit consent of users. Here, the NCAs have an important supervisory role, monitoring how gatekeepers are collecting, storing and using personal data.

To summarize, we would say that NCAs play a vital role in enforcing the DMA, especially in areas where experience and investigative capacity are essential to identify and report breaches.

Considering that Portugal has not yet adopted specific measures, it is very difficult to anticipate how the Portuguese Competition Authority will deal with its new prerogatives.

Section 4: Private enforcement of DMA/DSA

Question 1

Under national law, there is no specific legislation to ensure the private enforcement of the DSA or DMA.

To this date there is no public record of any significant legal action brought by private individuals in Portugal specifically to enforce the provisions of the DMA.

Regarding the DSA, there is also no public record to date of any legal action brought by private individuals in Portugal to enforce the provisions of the DSA.

There is public knowledge of claims having been submitted.

Question 2

As referred to in the previous question under national law, there is no specific legislation to ensure the private enforcement of the DSA. Therefore, the private protection of the DSA in Portugal is currently subject to the general rules of law and therefore professional users and end users may use extracontractual liability proceedings (Article 483 of the Portuguese Civil Code) and injunctions, which allow to prevent material and severe offenses of the rights arising from the DSA (article 362 of the Portuguese Civil Procedural Code).

In the case of consumers, the same can bring collective actions under Decree-Law no 114-A/2023 of December 5 which rules collective actions for the protection of consumer interests, provided consumer interests are harmed. Collective actions have seen major developments due to the emergence of new players in the Portuguese market (including new consumer associations, the specialization of law firms and the involvement of international financiers), but also the emergence of an increasingly regulated market, particularly in

matters related to competition law, the environment (including ESG) and, in general, consumer protection.

This enables consumers to have their rights protected by consumer protection associations, such as the Portuguese "*Ius Omnibus*" and the European "*Citizen's Voice – Consumer Advocacy Association*," which have been responsible for bringing actions against telecommunications operators Vodafone and NOS, the tech companies Playstation and TikTok, among others.

Question 3

The Private Enforcement Law – Law no. 23/2018, of 5 June– concerning competition law infringements has become very popular in Portugal, mainly by consumers associations. However, such law does not apply to DMA or DSA infringements. In this light if end users or professionals intend to bring actions for DSA or DMA infringements the same will be ruled by general law provisions and brought before civil courts.

It is difficult to anticipate how likely will be the use of private enforcement of the DSA and DMA in Portugal. Notwithstanding, we assume infringements to the DSA to be more likely to occur at national level than to the DMA, and consequently to give rise to actions brought before national courts.

Additionally, as stated in the last answer, collective redress may be used if consumer interests are harmed (Decree-Law n.º 114-A/2023 of December rules collective actions for the protection of consumer interests and transposed Directive (EU) 2020/1828)), and we expect this practice to increase in Portugal regarding the matters of the DSA and DMA.

Question 4

Following the transposition into Portuguese Law of Directive 2014/104/EU (the "Private Enforcement Directive"), compensation for infringements of competition law provisions (Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and the Competition Law) are ruled by Law 23/2018 of 5 June (the "Private Enforcement Law").

We are unaware of any attempt to extend the scope of this national law and any of its specific rules to cover, in addition to actions for damages for infringements of competition law, actions for damages for breach of obligations under the DMA by gatekeepers.

As such, the private protection of the DMA and the DSA in Portugal is currently subject to the general rules of law and therefore professional users and end users may use extracontractual liability proceedings (Article 483 of the Portuguese Civil Code) and injunction proceedings, which allow to prevent material and severe offenses of the rights arising from the DMA (article 362 of the Portuguese Civil Procedural Code). Actions can therefore be brought before civil courts.

In certain cases, in which competitors' rights are infringed, and provided the requirements for disloyal competition are met, procedures claiming disloyal competition can also be brought before the competent courts.

In what concerns national mechanisms of collective redress or popular actions the same are only available for end users.

Article 42 of the DMA makes express reference to Directive (EU) 2020/1828 and therefore collective actions may be brought against gatekeepers that infringe DMA obligations and by doing so harm the collective interests of consumers. Directive (EU) 2020/1828 was transposed in Portugal by Decree-Law n.º 114-A/2023 of December 5 which rules collective actions for the protection of consumer interests. According to this Decree-Law collective actions can be brought by consumers, associations protecting consumer interests, foundations and municipalities. The DMA only foresees collective redress in what concerns infringements that may prejudice collective consumer interests and therefore professional users are left out of the scope of collective actions.

The Portuguese law on popular actions, Law 83/95 of August 31, foresees the same may be submitted by any citizen exercising its civil and political rights and also by associations that protect collective interests but not by companies or professionals. In this light, professionals may not submit collective actions against gatekeepers.

Furthermore, there are no special courts for the private enforcement of the DMA or the DSA and we do not anticipate at this stage a specific allocation of competence concerning these regulations.

Question 5

The national procedural law only allows the intervention of civil society organizations in pending private disputes if two different sets of criteria are met.

The first criterion is if the action that gave rise to the dispute is, in essence, brought to protect diffuse interests, that is, if it is aimed at defending certain constitutionally protected interests, such as the protection of public health, the environment, quality of life, cultural heritage and the public domain, as well as the protection of the consumption of goods and services.

The second criterion is whether these Associations and Foundations are defenders of the interests in question, ithat is, whether their statutes provide for the defense of said interests.

There is only one way to intervene in the process – through voluntary joint litigation. In this case, there is a simple accumulation of actions, with each litigant retaining a position of independence in relation to the other litigants. This intervention is (i) carried out by adhering to the pleadings of the party with whom they associated and that can occur at any time, until the case has been definitively judged and (ii) lodged in a simple application, with the intervener making the plaintiff's or defendant's pleadings their own. The intervener is (i) subject to accept the case as it stands, and is considered to be in default with regard to previous acts and terms, but enjoys the status of principal party from the moment of their intervention and (ii) not be admissible when the opposing party justifiable alleges that the state of the proceedings no longer allows it to assert any personal defense it may have against the intervener.

It does not require the payment of costs, and the plaintiff shall be exempt from paying costs if the claim is partially upheld. However, in the event of a total dismissal, the intervening plaintiff shall be ordered to pay an amount to be set by the judge between one tenth and half of the costs that would normally be due, taking into account their economic situation and the formal or substantive reason for the dismissal.

Section 5: General Questions

Question 1

As of this date, there is no record of implementation of Articles 9 and 10 of the DSA.

The fact is that Law no. 82/2021, 30 of November 2021, is still in force, and establishes rules and procedures for monitoring, controlling, removing and preventing access to content protected by copyright and related rights in the digital environment, and created at that time new obligations for intermediary networking service providers. This law entered into force prior to the DSA and was not a typical transposition of EU legislation.

IGAC was the entity appointed to monitor and control the access to protected content (by copyright and related rights), and of its respective general inspector of cultural activities to determine the removal or prevention of access to such content, if it is unlawfully made available.

According to this Law, intermediary service providers are obliged to remove or block access to protected content within 48 hours of their notification or, where this period would substantially reduce the usefulness of the removal or prevention of access, within the shortest possible time.

According to this Law, providers must immediately inform IGAC when they become aware of manifestly unlawful activities carried out through the services they provide, and they must comply with requests for identification of the recipients of services with whom they have hosting agreements.

In this light, although the injunctions referred to in Articles 4(3),5(2) and 6(4) are not specified by national law, according to Law no. 82/2021, 30 of November 2021, intermediate service providers will have to comply with IGAC's instructions in case of protected content.

Furthermore, the E-Commerce Regime also foresees some mechanisms for provisory settlement of complaints where the nature of the illegal content is not manifest and therefore, according to such regime, intermediate service providers were not obliged to its removal or blockage. In such cases, interested parties could submit a claim to supervisory authorities which should provide a provisory solution within 48 hours.

Question 2

We are not aware of legal representative services being provided for intermediary service providers.

Question 3

The national law did not adopt any approach regarding the complaints set forth in Article 53 of the DSA.

Question 4

Considering that there are no Gatekeepers or major digital market players operating out of Portugal, there has been no political discourse surrounding

either act. As such, no material political controversy has been generated. Notwithstanding, practitioners have been publicly discussing the lack of information on the allocation of powers between competent national authorities for the effects of the DSA.

Question 5

No measures or foreseeable measures have been taken to accommodate the creation of out-of-court dispute resolution bodies, trusted flaggers, DSA/DMA-focused consumer organizations and data access request by researchers. No national legislation or regulation has been, as of now, adopted to specifically address this matter.

Question 6

Regarding the DMA, some practitioners have considered the prohibitions featured in its Article 5 to be too inflexible, since they do not demand corresponding proof of the harmful effects of a behavior. Even though this lack of burden of proof can increase legal certainty, it may also prohibit conducts from which no harmful effects arise.[14] The DMA was also noted by some practitioners to impose a "one-size-fits-all"[15] approach to gatekeepers with considerably diverse business models, henceforth submitting all gatekeepers to all obligations provided for in the DMA. This is viewed by some practitioners as a prevalence of the goals of celerity and efficiency over the guarantees of due process and the gatekeepers' right of defense.[16] "The 'participation' of the target companies is quite restricted, and the escape valves are limited to minimums that may violate the 'prohibition of insufficiency.'"[17]

Concerns over *ne bis in idem* principle were also raised by some practitioners because the obligations foreseen in Articles 6 and 7 were seen as having arisen from previous court-cases in the context of the application of Article 102 TFUE and competition investigations, raising the issue of a possible dou-

[14] Santos, Miguel Máximo dos. "O Regulamento dos Mercados Digitais ("Digital Markets Act") entra hoje em vigor, considerações gerais,"*Servulo,* 2022, https://www.servulo.com/pt/investigacao-e-conhecimento/O-Regulamento-dos-Mercados-Digitais-ldquoDigital-Markets-Actrdquo-entra-hoje-em-vigor-consideraces/8097/. Accessed on 4 May 2024.

[15] Ibidem.

[16] Neves, Inês "O Regulamento dos Mercados Digitais: Em Busca de um *Level Playing Field*," Distribuição Hoje, ID 104083348 , p. 85, 01-02-2023, https://www.mlgts.pt/xms/files/site_2018/Imprensa/2023/DistribuicaoHoje_AO_IFN_O_regulamento_dos_mercados_digitais_em_busca_de_um_level_Playing_Field_9MAR2023.pdf. Accessed on 27 May 2024.

[17] Neves, Inês "Do Pacote Serviços Digitais ao Regulamento Mercados Digitais," Observatório Almedina, 2023, https://observatorio.almedina.net/index.php/2023/05/26/do-pacote-servicos-digitais-ao-regulamento-mercados-digitais/. Accessed on 1 Jun 2024.

ble prohibition.[18] The DMA was also criticized for predicting broad remedies while EU competition law imposes specific reparations rules for each case. Consequently, the general provisions could be limited compared to some "remedies" of competition law.[19]

The strict rules of the DMA have also raised to some practitioners two sets of questions regarding (i) whether access controllers not based in the EU will comply with the stricter DMA regulation or, if on the contrary, access controllers will seek to provide their services on less regulated territories[20] and (ii) how only Big Tech companies with financial capacity to do so will be able to comply with them, impacting small and medium companies disproportionally, similarly to GPDR implementation experience.[21]

Regarding the DSA, current Article 6 (1) (a) was criticized by some practitioners, albeit in its Proposed version (Article 5 (1)(a) of Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) amending Directive 2000/31/EC), which turned out identical, because the judgment of illegality implied in it was noted to foster conflicts, since users that have their content removed or disabled will on several occasions be in disagreement over the reasons presented by the platform to find such content illegal.[22]

The possibility of the notice and action mechanisms of Article 16 (1) of the DSA being used to notify the platforms of breaches to their Terms and Conditions was also discussed by some practitioners,[23] as was the degree of diligence of an online platform when issuing an opinion on the illegality of the content under Article 16 (2) and Article 14 (4) of the DSA – that is, should legal opinions consider not only the applicable rules but also the relevant case law concerning.[24]

[18] Ibidem.

[19] Ibidem.

[20] Santos, Miguel Máximo dos. "O Regulamento dos Mercados Digitais: críticas e potencial impacto negativo sobre as Pequenas e Médias Empresas (PMEs)," *Servulo,* 2023, https://www.servulo.com/pt/investigacao-e-conhecimento/O-Regulamento-dos-Mercados-Digitais-criticas-e-potencial-impacto-negativo-sobre-as-Pequenas-e/8157/. Accessed on 5 May 2024.

[21] Ibidem.

[22] Farinho, Soares Domingos, "Fundamental Rights and the Conflict Resolution in the Digital Services Act Proposal," E-PUBLICA, vol. 9, 75, 2022, p. 91. https://e-publica.pt/article/36849-fundamental-rights-and-conflict-resolution-in-the-digital-services-act-proposal-a-first-approach

[23] Ibidem, p. 93.

[24] Ibidem, p. 93.

Romania

*Raluca Dinu**
*Titus Corlățean***
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Section 1: National institutional set-up

Question 1

In Romania, ANCOM – The National Authority for Management and Regulation in Communications (the pre-existing Telecom regulator) – was designated as DSC.[1]

Currently, there are no other competent authorities designated under the DSA. ANCOM has already held several meetings with a series of relevant authorities to discuss the application of the DSA and establish the fastest and most efficient means of communication between the authorities. A new department was also established within ANCOM to deal exclusively with digital services related matters.

Question 2

Law no. 50/2024 establishes the legal and procedural sanctioning framework, detailing the sanctions applicable for non-compliance with the DSA, DSC's competence to apply such sanctions through its specialised staff and the procedural safeguards. Also, the legal norm specifies the possibility for ANCOM to apply supervisory fees starting from 2027.A new department containing 2 units was set up within ANCOM, dedicated to DSA enforcement; currently,

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[1] Law no. 50/2024 on establishing measures for the application of the Regulation of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC, as well as on amending and completing Law no. 365/2002 on electronic commerce, which was published in the Romanian Official Journal no. 232 of 19 March 2024.

there are 7 full time employees within this department, with a goal of 21 employees in 2 years. Some other departments within ANCOM may offer support for DSA related issues: the user complaints department, the legal department and the control department (in case of inspections).

Question 3

ANCOM is the only national competent authority acting under the DSA. ANCOM has undertaken extensive discussions with other national authorities, relevant for the supervision and enforcement of the DSA at national level, to inform them on the DSA provisions.

Question 4

According to article 25, paragraph (1), letter (w) of the national competition law (Law no. 21/1996[2]), the Romanian Competition Council (RCC) is able to conduct investigations in Romania regarding the potential infringement of articles 5–7 of the DMA. Following such investigative procedures, the RCC will then report the findings to the European Commission. That is where the RCC's investigative role ends, and a supportive role follows, where the RCC may assist the Commission in its role as sole competent authority regarding the application of the DMA.These investigations can only be started in an ex-officio manner, according to article 33, paragraph (1), letter (c) of Law no. 21/1996. According to the same provision, the RCC must inform the European Commission prior to starting any investigative procedure.

Question 5

The national competition law (Law no. 21/1996) was amended to add the competence to investigate in Romania an infringement under art. 5–7 of the DMA. In this regard, the Competition Council has the same powers as the ones provided for investigations into possible anticompetitive practices.

The main difference arises from the fact that the authority only gathers information about the possible infringement of art. 5–7 of DMA in Romania and presents its findings in a report that is to be sent only to the European Commission, which will ultimately decide on the outcome of the investigation. In the end, all procedural guarantees will be offered by the European Commission in its capacity of sole enforcer of the DMA rules.

[2] Romanian Official Journal no. 153 of 29 February 2016, republished, amended and completed.

For the enforcement of the DMA, 2 compartments were created internally, comprising a total of 4 employees, with no additional resources provided so far.

Question 6

Not applicable so far.

Section 2: Use of national legislative leeway under the DMA/DSA

Question 1

The relevant provisions of the national law implementing art. 12 to 15 of the E-Commerce Directive were repealed by the Law n. 50/2024.

The legal provisions in force in other areas of activity have not been affected and the relevant authorities holding certain substantive competences can identify and address illegal content in the areas of activity they manage.

Question 2

What is illegal offline is also illegal online. This principle underpins the DSA and, as a result, no steps have so far been taken to define what is illegal content according with DSA.

Question 3

There were some proposals for protection of minors in the online environment and some measures against deep-fake online content.

With regard to influencers, the Consumer Protection authority – ANPC – issued recommendations for Romanian influencers on disclosing the commercial intent for all photos/videos posted on their social media accounts, including situations when they promote their own brand. This first intervention of ANPC in this field aims to raise awareness of all actors affected by the marketing methods practised by the Romanian influencers.

Question 4

On one hand, the Competition Council is also the enforcer of the Regulation no. 2019/1150 on promoting fairness and transparency for business users of online intermediation services, but, in our opinion, this legislation is complementary to the competition law (Law no. 21/1996) and is also without prejudice to applying the DMA rules.

On the other hand, according to Article (1) of the DMA, Member States shall be prevented from imposing "further obligations on gatekeepers by way of laws, regulations or administrative measures for the purpose of ensuring contestable and fair markets." However, competition law and the DMA are complementary and require coordination between the Commission and national competition authorities in their field of competence. As such, according to the DMA's provisions (point (10) of the Preamble), "At the same time, since this Regulation (DMA) aims to complement the enforcement of competition law, it should apply without prejudice to Articles 101 and 102 TFEU, to the corresponding national competition rules and to other national competition rules regarding unilateral conduct that are based on an individualised assessment of market positions and behaviour, including its actual or potential effects and the precise scope of the prohibited behaviour, and which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question, and to national rules concerning merger control."

In addition, Article (38) of DMA provides for the framework of cooperation and coordination in the enforcement of the DMA by the Commission and the enforcement of the Competition Law by the NCA's.

Question 5

Not applicable.

Section 3: Vertical and horizontal public enforcement-related cooperation under DSA/DMA

Question 1

As we expressed above, there are no other competent authorities under DSA.

However, for DSA related purposes, and in the context of illegal content that might be in online environment, article 12 of Law no. 50/2024 sets up the

possibility for institutional cooperation between the DSC and other national authorities. Also, the public authorities or institutions can provide each other the data and/or the information they have access according with their duties and they can consult each other, ensuring the confidentiality of business secrets, the confidentiality of investigations and compliance with the provisions of Regulation (EU) 2016/679.

At the same time, according to article 13 of Law no. 50/2024, the DSC can request the support of any public authority or institution that has the relevant specialized knowledge, it can also request the support of a legal entity under private law that has relevant specialized knowledge.

Furthermore, according to article 24 of the same law, ANCOM may request public authorities or institutions holding attributions in fields or sectors of activity relevant for the application of the Regulation to participate in working groups set up for the unitary and efficient application of its provisions, the provisions of Article 12 being also applicable, where appropriate.

In article 34, paragraph (9) of Law no. 21/1996, it is specified that the exchange of information, including the exchange of confidential information, for the purpose of using them as evidence during investigations performed under article 25, paragraph (1), letter w) is set out in article 38 of the DMA. This cooperation will take place through the European Competition Network (ECN).

In terms of potential challenges, it is unlikely that there will be significant challenges in the application of this framework. The RCC has, historically, applied the framework for the exchange of information through the ECN. In the context of the DMA, there should be no significant additional challenges.

Furthermore, Article 40 of the DMA creates the high-level group, encompassing representatives for multiple European bodies and networks, including the ECN. This group can provide advice and expertise to the European Commission in areas falling within the competences of its members.

Question 2

ANCOM do not hold information about the measures which apply specifically to the role of national courts, other than that provided for in the Regulation.

According to Article 23, point 9 of the DMA, if national rules require authorization from a judicial authority to conduct inspections, then the European Commission or the RCC shall apply for authorization from the national court.

Furthermore, according to Article 39 of the DMA, national courts may ask the Commission to transmit any information in its possession or its opinion on questions concerning the application of the DMA. The Commission may also submit its opinion on its own initiative.

However, national courts cannot give a decision which runs counter to a decision adopted by the Commission under the DMA, or give decisions which come into conflict with decisions contemplated by the Commission in proceedings under the DMA. As such, the national court
may assess whether it is necessary to stay its proceedings.

Question 3

At present, RCC do not see any particular areas of the DMA where it is considered that the national authority to be more likely to produce information in order to inform the Commission about possible non-compliance with the DMA. If the preliminary assessment of information received according to article (27) of the DMA generates suspicion of non-compliance with DMA provisions, the Romanian Competition Council has the power to provide the Commission and the other competent authorities with any information regarding a matter of fact or of law, including confidential information.

Section 4: Private enforcement of DMA/DSA

Question 1

So far, none was brought to ANCOM's knowledge.

Question 2

We cannot provide an answer at this moment.

Question 3

The DMA does not contain any explicit references to private enforcement or any provisions regarding the compensation for damages caused by an infringement of the DMA. Private actions under the DMA are possible, but Law no. 21/1996 does not contain provisions regarding private enforcement in regards to the DMA.

Question 4

No specific national rules have been adopted or planned for private enforcement of DSA. So far, no information regarding the setting up of a specific court or chamber for DSA cases has been brought to ANCOM's knowledge.

Question 5

According to Romanian Civil Procedure Code, any party that can justify a legal interest can intervene in a pending process, regardless of the matter in question. To do so, interested party has to file a request for intervention. If the request seeks to support the public interest, it would be qualified as an accessory request which can be filed at any point in time throughout the course of the trial before the closing of the debates. For such a request a stamp tax of RON 20 (~€4) has to be paid.

Section 5: General questions

Question 1

Article 7 of Law no. 50/2024 provides for the competence of the authorities that supervise specific sectors of the economy to issue the orders mentioned in articles 9 and 10 of the DSA, in case such competence was not specifically included in the relevant national sectorial legislation. As for the national law specifying injunctions according to articles 4(3), 5(2) and 6(4), ANCOM has to mention that there are different pieces of legislation empowering the authorities to request for injunctions depending on the nature of illegal content. For this reason, the specific rules for overseeing such decisions are different for each particular case. But, as a general rule, each decision taken in this regard can be overseen by at least one court of law.

Question 2

No, we are not aware of the services of legal representatives according to Article 13 DSA being provided in Romania.

Question 3

Law no. 50/2024 provides for ANCOM to issue a decision on the procedural aspects of submitting complaints to ANCOM according to article 53 of the DSA. ANCOM's Decision 335/2024[3] does not add to the DSA provisions.

Question 4

The designation of the DSC under DSA was presented in some media as the creation of an internet police.

Question 5

In 2024, ANCOM has issued decisions no. 336[4] and no. 337[5] on the procedural aspects of granting the status of trusted flagger and on certifying the out-of-court dispute settlement bodies. Another decision on data access requests by researchers is planned to be adopted by ANCOM in 2025.

Question 6

As regards the DSA, so far none was brought to ANCOM's knowledge.

[3] https://www.ancom.ro/uploads/forms_files/Decizie_335_2024_procedura_plangeri1720526272.pdf

[4] https://www.ancom.ro/uploads/forms_files/Dec_336_notificatori_de_incredere_DSa1720704618.pdf

[5] https://www.ancom.ro/uploads/forms_files/Decizia_aNCOM_337_20241721657423.pdf

Slovakia

*Hana Kováčiková**

Section 1: National institutional set-up

Question 1

According to Article 49 of the DSA, Slovakia designated one National Digital Services Coordinator (NDSC) – the Council for Media Services [Rada pre mediálne služby]. NDSC is the preexisting Slovak administrative authority, which was created shortly before adopting the DSA by the Act of the National Council of the Slovak Republic of 22 June 2022 No. 264/2022 Coll. on media services and on amendment and supplementation of certain laws (Media Services Act). Designation as the NDSC and respective specific competences, necessary for the implementation of the DSA, were assigned to the NDSC by the Act of the National Council of the Slovak Republic of 27 June 2024 No. 203/2024 Coll. amending Act No. 264/2022 Coll. on media services and amending and supplementing certain acts (Media Services Act), as amended, and amending and supplementing certain laws.

By its nature, the NDSC is a state administrative body with nationwide competence to implement the DSA.[1] Moreover, NDSC acts also as a regulator in the field of broadcasting, retransmission, provision of on-demand audiovisual media services, provision of content sharing platforms, provision of intermediary services, provision of online intermediary services, and provision of an internet search engine. The diversity and scope of the NDSC's tasks objectively go beyond the expertise of a single public authority, so cooperation with other public authorities in this area is crucial. Therefore, ministries, other central government bodies and other public administration bodies shall cooperate with the NDSC on these issues, providing it with the interaction necessary for the performance of NDSC's tasks as digital services coordinator pursuant to a DSA.[2]

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[1] Article 109(6) of the Media Services Act.

[2] Article § 108(6) of the Media Services Act.

Question 2

The allocation of powers was ensured through Act No. 203/2024 Coll. The NDSC, while executing the supervising and enforcing powers, is entitled to do an anonymised control purchase of the service, or, if the control purchase is not expedient, it is entitled to make real-time visual, audio, and audiovisual recordings to document the identified deficiencies in the service provided, carry out an on-site inspection and without prior notice, enter the premises of the inspected persons related to the provision of its services.[3] Besides, NDSC is entitled to acquire, process, and evaluate information and documents related to the fulfilment of the obligations of the intermediary service provider under the DSA. Those can be required from intermediary service provider or any other business person acting in the course of his/her business, who may reasonably be presumed to have information about suspected breach, or from a person who carries out and independent audit or from their employees or representatives.[4] NDSC also can provide the on-site inspection in the premises, which the intermediary services provider or above-mentioned persons uses for his/her business activity to examine, make or size a copy of information on a suspected breach of obligation emanating from the DSA.[5] Where service recipients are at risk of serious harm, the NDSC is entitled, on a finding of a clear breach of an obligation under the DSA, to impose an appropriate interim measure.[6] Finally, NDSC is entitled to impose fines, or, if the intermediary service provider offers a commitment to ensure compliance with the DSA, NDSC may decide to suspend the compliance proceedings. NDCS may also impose on the intermediary service provider the remedy measure necessary to put an end to a breach of the obligation under the DSA.

Regarding the allocation of resources, the Office of the Council for Media Services in its Draft of Budget for 2024 counted, in relation with establishing the Council for Media Services as NDSC, with the increase of the number of employees on 49 persons in 3 years (2024–2026) with the average wage of 2,200 EUR/month.[7] For 2024, the NDSC was provided a budget of amount 2,741,138 EUR. This initial budget was later during the year increased from 223,720 EUR to 2,964,858 EUR. This budget measure, which overran the accepted NDCS's expenditure limit, was justified by the increase in personnel (that is, 10 people with 2 people from 1 September 2024, 3 additional persons from 1 October 2024, and 3 additional persons from 1 November 2024 and 2 additional persons from 1 December 2024) related to the establishment of

[3] Article 133 of the Media Services Act.
[4] Article 133b of the Media Services Act.
[5] Article 133c of the Media Services Act.
[6] Article 133d of the Media Services Act.
[7] Available at: https://rpms.sk/sites/default/files/2023-10/2023-10-11_bod3.pdf. Accessed on 15 October 2024.

the Council for Media Services as NDSC responsible implementation of the DSA.[8]

As regards the organisation of the NDSC, it is composed of the Council and the Office. The office is then internally divided into 5 departments (Communication, Regulation, Programme, Economy, and Analytics). The Analysis Department is then responsible for ensuring the fulfilment of tasks of the Council for Media Services as NDCS in the EU context. However, as the Organisational Order of the Media Services Council was adopted on 31 August 2022 and not novelised yet, there are not any special mentions regarding the organisation of the NDSC when fulfilling the tasks relating to DSA. Information on the exact number of staff dedicated to DSA enforcement is not available.

Procedural safeguards of the investigated intermediary services provider are guaranteed. Moreover, the procedure for issuing an interim measure and the decision on the objection is regulated by the Administrative Procedure Code.

Question 3

As the NDSC has started to fulfil its tasks only from 24 July 2024, no relevant information on its experiences when acting under DSA is available. Accordingly, no enforcement priorities have been announced yet.

Question 4

Under Article 16(1) of the Act of the National Council of the Slovak Republic of 11 May 2021 No 187/2021 Coll. on the protection of competition and on amendments and additions of certain acts (APC), the Antimonopoly Office of the Slovak republic (NCA) carries out an investigation for the purpose of ascertaining a possible breach of an obligation on the part of the entrepreneur pursuant to the Articles 5, 6 and 7 of the DMA; carries out an investigation to determine whether there is a basis for a request for a market investigation under the Article 41 of the DMA, as well as advances and discharges its responsibilities in matters relating to digital markets. To fulfil its tasks assigned in the DMA, the NCA is entitled to require from any person any information and documents necessary for the activities of the NCA in any form, make copies and extracts thereof, or require their officially certified translations into the Slovak language. Furthermore, the NCA has the right to require oral explanations as well.

[8] The Office of the Council for Media Services. "*Informatívny material Kancelárie Rady na zasadnutie Rady pre mediálne služby dňa 25. 9. 2024*," 9 September 2024, https://rpms.sk/sites/default/files/2024-09/2024-09-25_bod5.pdf

To fulfil its tasks under the DMA, NCA has the right to carry out inspections on all premises and means of transport which are related to the activity or conduct of the entrepreneur. During the inspection, the NCA has right to seal the documents or media on which the information is recorded, seal the premises and their equipment, as well as the means of transport, for the necessary time and to the extent necessary to carry out the inspection; remove the documents or media on which the information is recorded for the necessary time in order to make copies or to gain access to the information if the NCA cannot, in the course of the inspection, in particular for technical reasons, gain access to the information or make copies of the documents or media; to gain access to the premises and means of transport of the undertaking, to open closed premises and their equipment, or otherwise to gain access to the documents or media on which the information is recorded; to secure access to any information which has been stored in any electronic form on the data carriers of the entrepreneur or which has been produced in any electronic form by the entrepreneur or to which the entrepreneur has access in connection with his activities, including information which is stored in any electronic form on the data carriers of other entities and which the entrepreneur has access to and uses for his activities.

Question 5

A new law was adopted in the form of the Act of the National Council of the Slovak Republic of 18 April 2024 Coll. amending the Act No. 187/2021 Coll. on the protection of competition and on amendments and additions to certain acts as amended by the Act No. 309/2023 Coll. and amending the Act No. 368/2021 Coll. on the Recovery and Resilience Mechanism and amending certain acts as amended. This act empowered the NCA with the necessary powers to investigate the cases of possible breaches of the Articles 5, 6, and 7 of the DMA or to determine whether there is a basis for a request for a market investigation under the Article 41 of the DMA, as explained in Section 5 above. As regards the procedural safeguards, they copy those that are applied in competition cases. Information on how many staff is dedicated to DMA enforcement is not available.

Question 6

As the NCA has started to fulfil its tasks only from 15 May 2024, no relevant information on its experiences when acting under DMA is available. Accordingly, no enforcement priorities have been announced yet.

Section 2: Use of national legislative leeway under the DMA/DSA

Question 1

By adopting Act No.203/2024 Coll., the Slovak legislator removed or amended those provisions on preexisting national laws, which contravene to the DSA. For example, in Act of the National Council of the Slovak Republic of 3 December 2003 No. 22/2004 Coll. on electronic commerce and on amendment and supplementation of Act No. 128/2002 Coll. on state control of the internal market in matters of consumer protection and on amendment and supplementation of certain acts, as amended by Act No. 284/2002 Coll., the provision of Article 6, which excluded the responsibility of service provider for information transmitted in the electronic communication network, was removed.

Question 2

There is not publicly available any information on specific mapping the national rules on the illegality of content relevant for the DSA enforcement by the state authorities before adopting the Act No. 203/2024 Coll. This law was adopted after the European Commission sent the letter of formal notice and opened the infringement procedure INFR(2024)2042[9] in April 2024.[10] As the applicable law is still new, there were no notable DSA-related changes in content rules recently.

Question 3

As the NDSC has started to fulfil its tasks only from 24 July 2024, no relevant information on its experiences when acting under DSA is available. Consequently, no enforcement priorities have yet been announced.

As regards influencers, there is no specific regulation of their activity. However, their activity can be covered by the general laws on advertising[11] or consumer protection.[12] Media Services Act also regulates the activities of content creators as well as content rules.

[9] European Commission. "*April infringement package: key decisions*," 24 April 2024, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/inf_24_1941/INF_24_1941_EN.pdf

[10] This infringement procedure was closed by the Commission´s decision of 3 October 2024.

[11] Act of the National Council of the Slovak Republic of 5 April 2001 No.147/2001 Coll. on advertising and on amendments and additions to certain acts.

[12] Act of the National Council of the Slovak Republic of 1 July 2024 No. 108/2024 Coll. on consumer protection and on amendments to certain acts.

Question 4

By adopting Act No. 93/2024 Coll., the Slovak legislator removed or amended those provisions on preexisting national laws, which contravene to the DMA. The NCA is also the regulator for competition. Therefore, any challenges with the preempting effects of the DMA have not been detected yet.

Question 5

The information is not available.

Section 3: Vertical and horizontal public enforcement-related cooperation under DSA/DMA

Question 1

Under Section 110(3) of the Media Services Act, the NDSC shall prepare COM annual reports on its activities. In addition, it shall cooperate with the COM in all fields regulated by the Media Services Act. It shall also participate in the exchange of information and cooperate with the authorities of other states operating in this field. To ensure the cooperation envisaged in Article 57 of the DSA, the Statute of the Council for Media Services (Article 3(5) empowers the Council (NDSC organ) to actively cooperate with the Commission as well as with partner supervisory authorities in other Member States and their associations and organisations. As similar cooperation between national regulators of the Member States already works well in competition law, any insurmountable challenges are expected in this regard.

Regarding the DMA, any of the potential challenges as regards the effective cooperation between the NCA and the COM can be seen at the moment.

Question 2

The national court decides on consent to inspection under Section 430 of the Administrative Procedure Code.[13] Besides, under Section 44 of the same Code, the COM has right to be heard before the court and submits its observations if the specific provision (such as DSA or DMA) provides so. Moreover, the court is obliged to allow the COM access to the court file, with the right to take extracts and copies or, if requested by the COM, serve it a copy of any

[13] Act of the National Council of the Slovak Republic of 21 May 2015 No. 162/2015 Coll on Administrative Procedure Code.

documents relating to the case which are necessary for the preparation of their observations. One might argue that these provisions should be interpreted in relation with the application of the antitrust rules, but as the explicit limitations of the scope of these procedures are missing, it can definitely be used also to other types of specific administrative regulation.

Contrary to this, the Slovak Civil Procedure Code[14] contains, as regards the rights of the COM, a special procedure in Section 94, which is applicable only when Articles 101 and 102 of the TFEU are being applied. These include the rights of COM accordingly to those which are guaranteed in the Administrative Procedure Code. However, there is no similar rule relating to the application of DSA or DMA. On the other side, the court is bound by the decision of the COM or other competent authority that misdemeanour or other administrative offence punishable under a special provision, such as DSA or DMA, has been committed and who committed it (Section 193).

Question 3

Such areas have not yet been detected.

Section 4: Private enforcement of DMA/DSA

Question 1

Information in this regard is not available.

Question 2

The recent causes of action under national law to privately enforce the DSA are not known at the moment. The claim for damages is expected to be one of the causes of action. However, this type of cases is rather rare than usual. The collective interests of consumer organizations are expected to be the most likely actor to engage in private enforcement.

Question 3

The recent causes of action under national law to privately enforce the DMA are not known at the moment. The claim for damages is expected to be one

[14] Act of the National Council of the Slovak Republic of 21 May 2015 No. 160/2015 Coll on Civil Procedure Code.

of the causes of action. However, this type of cases is rather rare than usual. The collective interests of consumer organisations are expected to be the most likely actor to engage in private enforcement.

Question 4

No specific law on private enforcement of DMA/DSA has yet been adopted. However, as regards the collective protection of consumer rights, the general Act of the National Council of the Slovak Republic of 21 June 2023 No. 261/2023 Coll. on actions for the protection of collective interests of consumers and on amendments to certain acts should be applicable. According to Section 9 of this act, there are special courts competent to hear cases of protection of collective interests of consumers. Accordingly, there is a special court competent to decide on disputes arising from the competition.[15] These facts justify the probability that the legislator will have the same approach regarding the DSA/DMA.

Question 5

Slovak procedural law allows civil society organisations to intervene in pending private disputes in support of the public interest. As stated in Section 95 of the Civil Procedure Code, in order to protect the rights of a party, the court may, even without a motion, bring in a legal person whose subject of activity is the protection of rights pursuant to a special regulation if the party whose rights it is to protect agrees to do so. Under Act No. 261/2023 Coll. a legal person representing the interests of consumers, which is enlisted in the List of Entitled Persons [Zoznam oprávnených osôb] provided by the Ministry of Economy of the Slovak Republic, is entitled to launch the action on protection of collective interests of consumers, as well as an action for a corrective measure or initiate the procedure on abstract control in consumer matters. If consumers are not part of the collective action, a legal person representing the interests of consumers can enter the pending private dispute as the intervener under Section 82 of the Civil Procedure Code upon its own initiative or on the basis of announcement and request of the procedural party. The access of the intervener to the procedure is subject to the approval of the court.

[15] Under the Article 27 of the Civil Procedure Code the Municipal Court Bratislava III is competent to hear competition disputes; its territorial jurisdiction covers the entire territory of the Slovak Republic.

Section 5: General questions

Question 1

Slovakia specifically implemented Article 9 of the DSA in the national law. As explained in the Explanatory Memorandum to Act No. 203/2024 Coll.[16] it was necessary to complement the existing law on identification and localisation information, information on legal basis, territorial scope, information on public administration bodies that are addressees of the information on the way of the execution of the order, to provide the information on remedies and to adjust the language of the decisions, as orders to take action against illegal content or decision to prevent the dissemination of illegal content can be sent also to foreign intermediary service providers. Moreover, delivery through the electronic contact points is a different concept as recognised in Slovak republic, so it needed to be adjusted. Finally, to increase the legal certainty of the intermediary service provider, a special time period was established for the submission of objections against the decisions on the prevention of the dissemination of illegal content. The national law does not specify injunctions according to Articles 4(3), 5(2), and 6(4) and there is no relevant case law available in this regard.

Question 2

Information is not available.

Question 3

The national law did not adopt any specific approach to complaints according to Article 53 of the DSA.

Question 4

Neither the DSA nor the DMA were subjects to political controversy during implementation at the national level.

Question 5

The national legislator has not adopted or communicated any specific approaches in this regard yet.

[16] Available at: https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=547911

Question 6

In recent years, the digital markets have been discussed between Slovak academics (e.g., Ondrej Blažo, Hana Kováčiková, Mária T. Patakyová). However, a special attention to the DMA was given just by Ondrej Blažo.[17]

In Slovakia, the DSA has not been discussed scientifically yet, as most articles have just the character of blog and educative, not discussing character.

[17] Blažo, Ondrej. *Private enforcement of the digital markets act: filing holes and creating new ones in harmonized enforcement.* In: Legal issues of digitalisation, robotisation and cyber security in the light of EU law, 2024; Blažo, Ondrej. *Efficiencies under the digital markets act – is there space for the rule of reason?* In: Acta Universitatis Carolinae, 2023; Blažo, Ondrej. *The digital markets acts – between market regulation, competition rules, and unfair trade practices rules.* Strani pravni život, 2022.

Slovenia*

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Section 1: National institutional set-up

Question 1

The national authorities responsible for enforcing the DSA in Slovenia were designated in the Act on the Implementation of the Regulation (EU) on a Single Market for Digital Services (ZIUETDS),[1] adopted in March 2024, which assigned new tasks and responsibilities to two pre-existing authorities.

The Digital Services Coordinator's tasks are carried out by the Agency for Communication Networks and Services of the Republic of Slovenia (AKOS),[2] an independent body that regulates and supervises the electronic communications market, postal services, and railway traffic in Slovenia and performs certain tasks related to radio and television. An additional competent authority designated under Article 49 of the DSA is the Information Commissioner of the Republic of Slovenia,[3] an autonomous and independent body that supervises the protection of personal data and access to public information. AKOS is tasked with supervising the enforcement of the DSA except for the provisions of Article 26(1) and (3) and Article 28 of the DSA, which are supervised by the Information Commissioner (Article 7 of the ZIUETDS).

Article 6 of the ZIUETDS provides that, in performing its duties under this Act, the AKOS shall, where necessary, cooperate with other Slovenian public

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[1] Official Gazette of the Republic of Slovenia, No. 30/24.

[2] Official website at: https://www.akos-rs.si/en/

[3] Official website at: https://www.ip-rs.si/en/

bodies. At the AKOS's request, other public bodies must provide the AKOS with the information needed to perform its tasks. The explanatory memorandum to the ZIUETDS bill[4] states that AKOS may seek the cooperation of other public authorities to address, on a case-by-case basis, the substantive issues raised in implementing the DSA concerning various intermediary platforms. For example, AKOS may cooperate with the Market Inspectorate of the Republic of Slovenia to supervise online intermediary marketplaces and with the Information Commissioner to supervise the processing of personal data. In line with the second subparagraph of Article 49(2) of the DSA, Article 6 of the ZIUETDS introduces a cooperation mechanism between the Digital Service Coordinator and other national authorities where appropriate for performing their respective tasks. The provision obliges other public authorities in Slovenia to provide AKOS with the information it needs to carry out its tasks.

In preparation for taking over the tasks of Digital Service Coordinator, AKOS started establishing contacts with various state bodies relevant to the area covered by the DSA: the Information Commissioner, the Ministry of Public Administration, the Ministry of Digital Transformation, the Government Communications Office, the Market Inspectorate and the Ombudsman. The method of cooperation depends on a case-by-case basis, but now, it mainly consists of exchanging information on competences and current developments. In the future, collaboration with other authorities is also planned. AKOS has stressed that Intensive cooperation is also taking place within the Agency, particularly with its sectors responsible for media regulation, operator regulation and supervision.

The Information Commissioner works primarily with AKOS on the implementation of the DSA. They meet regularly to exchange views and coordinate positions on issues related to the implementation of the DSA's provisions in Slovenia. Due to the relatively short period of the DSA's application, the Information Commissioner does not yet have any concrete experience of cooperating with other authorities concerning the implementation of the DSA.

Question 2

At the general legislative level, the ZIUETDS designated the two competent authorities for implementing and supervising the DSA and defined their powers as well as the related offences and sanctions for violations of the DSA. The law gives AKOS full inspection and prosecution powers to monitor the provisions of the DSA, except its Articles 26 and 28, which fall under the competence of the

[4] EVA: 2023-3150-0030, 11 January 2024.

Information Commissioner. Under Article 7(2) of the ZIUETDS, supervision of the implementation of the DSA is carried out according to the provisions of the Inspection Act,[5] whereby the person who lodges a complaint under Article 53 of the DSA has the status of a party in the inspection proceedings.

Two pre-existing bylaws, the Decision establishing AKOS[6] and the Statutes of AKOS,[7] had to be modified to align them with the provisions of the ZIUETDS, particularly the agency's new powers (see Article 24 of the ZIUETDS). Under Article 14(5) (granting of the status of a trusted flagger) and Article 16(4) and (5) (certification of out-of-court dispute resolution providers) of the ZIUETDS, AKOS may adopt general legal acts to regulate in more detail the manner of implementation of these provisions. However, as of September 2024, AKOS has not yet started preparing such acts. Following the adoption of the ZIUETDS, AKOS has established a new internal organisational unit, the Digital Services Division, which will perform the regulatory tasks under the DSA, which include:

- certification of out-of-court dispute resolution bodies,
- deciding on the status of a trusted flagger,
- making initial assessments of the compliance of applications for vetted researcher status,
- preparation of an assessment of the need to increase the level of security and trust in the Internet,
- launch a call for proposals to co-finance trusted flaggers' work if necessary and if budget resources are available.

The Digital Services Division of AKOS has three employees as of 1 September 2024. According to the current Rules on the internal organisation and organisation of the Agency's posts, a total of five posts are foreseen in this sector. Full staffing is foreseen by the end of 2024. It is currently foreseen that three employees will also have inspection powers.

Question 3

AKOS has not conducted specific analyses to determine which entities in Slovenia are bound by the DSA. Nevertheless, the Agency follows the state of the market and tries to detect as wide a range of regulated entities as possible. In 2025, AKOS will continue its activities to establish and strengthen existing cooperation with all authorities, organisations, and other entities concerned

[5] Official Gazette of the Republic of Slovenia, No. 43/07 – official consolidated text and 40/14.
[6] Official Gazette of the Republic of Slovenia, Nos. 41/13, 66/17, 43/24.
[7] Official Gazette of the Republic of Slovenia, No. 44/24.

by the DSA, as well as raise awareness of the rights and obligations under the DSA among users and providers of intermediary services. AKOS' indicative tasks for 2025 are set out in the draft annual work plan and financial plan published on 31 July 2024 on the Agency's website.[8] According to the draft work plan, the main strategic objectives of AKOS for digital services in the period 2025–2030 are:

- ensuring a transparent and secure online environment as a primary and overarching objective, including managing the procedures for granting trusted flagger status and co-financing their operations;
- onitoring the situation in the Slovenian and EU markets, identifying key challenges in the field of digital services and responding to them promptly;
- effective and rapid participation in supervisory procedures with a cross-border element and active care for Slovenian users when using intermediary services;
- developing predictable and effective regulatory practice and co-shaping European regulatory practice;
- cooperation in an international environment;
- effective cooperation with national authorities and other relevant stakeholders and raising awareness of Slovenian users and providers of their rights and obligations.

Due to the relatively short period of application of the DSA, the Information Commissioner has not yet had specific experience with specific control procedures or identified any particular challenges in this respect. The Information Commissioner has not carried out a specific analysis of entities established in the Republic of Slovenia to which the provisions of the DSA apply. It states that the Digital Services Coordinator, AKOS, would be consulted in case of questions in this respect.

Question 4

Following the adoption of the DMA, Slovenia amended its Prevention of the Restriction of Competition Act (ZPOmK-2)[9] to regulate the procedure and competence for enforcing the DMA and granting the powers to the Slovenian Competition Protection Agency (AVK).[10] Article 12(6) of the ZPOmK-2 provides that AVK shall cooperate and coordinate with the European Commission in the procedures laid down in the DMA and following Article 38 of the DMA. In doing so, AVK may, in accordance with Article 38(7) of the DMA, investigate infringements referred to in Articles 5, 6 and 7 of the DMA

[8] *Predlog Programa dela in finančnega načrta za leto 2025 ter predlogi tarif za leto 2025.* AKOS, 31 July 2024, https://www.akos-rs.si/javna-posvetovanja-in-razpisi/novica/predlog-programa-dela-in-financnega-nacrta-za-leto-2025-ter-predlogi-tarif-za-leto-2025. Accessed 30 September 2024.

[9] Official Gazette of the Republic of Slovenia, Nos. 130/22 and 12/24.

[10] Official website at: https://www.varstvo-konkurence.si/en

in the territory of the Republic of Slovenia. The legislative provisions on international assistance in proceedings with an international element also apply to the cooperation and coordination of the AVK with the European Commission in the proceedings provided for in the DMA (Article 102(7) of the ZPOmK-2).

Question 5

The amendment to ZPOmK-2 provided a legal basis for AVK's cooperation with the European Commission in proceedings conducted by the European Commission and for AVK's independent investigation of irregularities under the DMA. Apart from the legal basis regulating jurisdiction, supervisory, investigative and enforcement powers (the general provisions of ZPOmK-2 on restrictive practices are applied), no additional provisions (e.g., concerning resources or fees) have been adopted. These powers are included in the procedural part of the ZPOmK-2 chapter on mutual assistance. AVK has not received any additional resources for these tasks, neither in terms of additional funding nor in terms of securing additional staff.

Question 6

AVK cooperates with the Commission in enforcing the DMA within the framework of the Advisory Committee and in regular working meetings within the European Competition Network. As of July 2024, AVK has not yet received a request from the Commission to carry out tasks under the regulation. The Agency is monitoring the situation in this area but has not received any reports or similar communications related to this matter.

Section 2: Use of national legislative leeway under the DMA/DSA

Question 1

Only some of the rules previously transposing the E-Commerce Directive into Slovenian law were repealed due to DSA. Namely, the ZIUETDS repealed Articles 8 to 11 of the Electronic Commerce Market Act (ZEPT),[11] which comprised general rules on the liability of intermediary service providers (Article 8 of the ZEPT), liability for data transmission services (Article 9 of the ZEPT), liability of a service provider for caching the information (Article 10 of the

[11] Official Gazette of the Republic of Slovenia, Nos. 96/09, 19/15, 189/21 – ZDU-1M, 18/23 – ZDU-1O in 30/24 – ZIUETDS.

ZEPT) and liability of a service provider for hosting services (Article 11 of the ZEPT). The explanatory memorandum to the ZIUETDS bill notes that the validity of these provisions has been terminated due to the DSA's repealing of Articles 12 to 15 of the E-Commerce Directive, which have been replaced by Articles 4 to 8 of the DSA. Neither the ZEPT nor any other pre-existing Slovenian law included any provisions on search engines.

The provisions of Article 14 of the ZEPT, which regulate the possibility of restricting the provision of information society services from other Member States in accordance with Article 3(4) of the E-Commerce Directive, remain unchanged. A court or competent administrative authority may restrict the provision of information society services by a service provider established in another Member State if the measure relates to the provision of services in the coordinated field and if:

- the measure is necessary for the maintenance of public order, particularly for the prosecution of criminal offences, the protection of minors, the prevention of hatred on the grounds of race, sex, religion or nationality, the protection of human dignity or public health, public security or the protection of consumers, including investors,
- the provision of information society services affects one of the objectives referred to in the previous indent and
- the restriction is proportionate to the objective pursued.

Hate speech is primarily regulated by the Constitution of the Republic of Slovenia[12] and criminal law. Article 63 of the Constitution declares unconstitutional any incitement to national, racial, religious or other inequality and any incitement to national, racial, religious or other hatred and intolerance. This is the basis for Article 297 of the Criminal Code (KZ-1),[13] which provides for criminal liability of anyone who provokes or incites national, racial or religious hatred, discord or intolerance or spreads ideas of the superiority of one race over another (Article 297(1)(2) of KZ-1). If the offence is committed by publication in the media or on a website, the responsible editor is also liable to the penalty, unless the offence concerns the transmission of a live broadcast which they could not prevent or publication on a website which allows users to publish the content in real-time or without prior supervision (Article 297(3) of the KZ-1). These provisions have not been affected by the DSA or the ZIUETDS.

[12] Official Gazette of the Republic of Slovenia, Nos. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13, 47/13, 75/16 – UZ70a, 92/21 – UZ62a.

[13] Official Gazette of the Republic of Slovenia, Nos. 50/12, 6/16, 54/15, 38/16, 27/17, 23/20, 91/20, 175/20 – ZIUOPDVE, 195/20, 95/21, 186/21, 206/21 – ZDUPŠOP, 105/22 – ZZNŠPP, 16/23.

The Mass Media Act (ZMed)[14] prohibits mass media from disseminating programme content that encourages national, racial, religious, sexual, or any other unequal treatment, violence and war or incites national, racial, religious, sexual, or any other form of hatred and intolerance (Article 8). This prohibition also applies to online media. A publisher/broadcaster that allows public commenting in a mass medium (this also concerns readers' online comments on the media websites) is required to establish the rules of public commenting and place them at an appropriate place in the medium content. A comment failing to comply with the published rules must be withdrawn as soon as possible following the complaint or, at the latest, on the subsequent working day following the complaint (Article 9(3) of the ZMed). The law does not define what kind of comments should be considered inadmissible under the commenting rules but leaves this to the media publisher's discretion.

Both provisions are retained in the draft of the new Mass Media Act (ZMed-1, dated 14 May 2024).[15] Its Article 36(2) additionally gives the Inspectorate for Culture and Media the power to issue a temporary measure requiring a media publisher to remove or stop disseminating programme content that is suspected of infringing the prohibition on incitement to inequality, violence and war, and incitement to hatred and intolerance. The media publisher must implement the inspector's measures within 24 hours. Article 38(3) of the draft ZMed-1 adds the requirement that the rules for commenting must compulsorily prohibit incitement to inequality, violence, and war and incitement to hatred and intolerance. They must also provide the possibility of lodging a complaint for violation of the above rules and a complaints procedure. The explanatory memorandum notes that self-regulation of hate speech or offensive speech online removes the risk of censorship of comments as the media outlet sets its own rules for commenting and only has to remove a controversial comment after it has been reported. The memorandum also refers to the decision of the European Court of Human Rights (ECtHR) in the case of Delfi AS v. Estonia, pointing out that the ECtHR thus took the view that the State is permitted to impose stricter liability on the media for allowing the publication of comments of an extreme nature, constituting manifest hate speech and incitement to violence.

No specific online hate speech notification laws are in place in Slovenia.

[14] Official Gazette of the Republic of Slovenia, No 110/06 – Official consolidated text, 36/08 – ZPOmK-1, 77/10 – ZSFCJA, 90/10 – OdlUS, 87/11 – ZAvMS, 47/12, 47/15 – ZZSDT, 22/16, 39/16, 45/19 – OdlUS, 67/19 – OdlUS and 82/21.

[15] *Predlog predpisa: Zakon o medijih*. Republika Slovenija, 14 May 2024, https://e-uprava.gov.si/si/drzava-in-druzba/e-demokracija/predlogi-predpisov/predlog-predpisa.html?id=16268. Accessed 30 September 2024.

Question 2

No systematic mapping of the national rules on the illegality of content was undertaken, and there have been no DSA-related changes to the regulations defining illegal content.

Question 3

The Ministry of Digital Transformation has not proposed any other related legislative acts from its competence apart from the ZIUETDS, which specifies the competent authorities for the implementation and supervision of the DSA, their powers, offences and sanctions for the implementation of the DSA, as well as the tasks of the Digital Services Coordinator and the ministry responsible for the information society, for creating a supportive environment for a safe and trustworthy internet and the procedure for the removal of illegal content.

As already noted, the draft new Mass Media Act (ZMed-1, dated 14 May 2024), which also applies to online media, contains extended provisions prohibiting the encouragement of inequality, violence and war as well as incitement to hatred and intolerance (draft Article 36 of the ZMed-1). Programming content that could seriously harm the physical, mental or moral development of children (for example, in particular, pornography and gratuitous violence) may only be offered through the media in a way that children would not normally be able to access (for example, through an appropriate technical means or technical protection) (draft Article 37(2) of the ZMed-1).

The regulation of influencer content is also anticipated in the latest draft of the ZMed-1. The draft law defines influencers as creators of online content who publish on social networks and video-sharing platforms with the intention of influencing society, public opinion, or the personal opinions of individuals and the public. Their posts may also have an economic interest with the aim of monetising the content (Article 3, point 11 of the draft ZMed-1). The provisions of the draft ZMed-1 on disclosure of conflicts of interest, prohibition of incitement to inequality, violence and war and incitement to hatred and intolerance, protection of children, rules on commenting, and advertising, sponsorship and product placement apply to all forms of communication intended for the general public. This includes influencer services, whether or not they are considered media under this law, unless they are intended exclusively for private communication between individuals (Article 2(4) of the draft ZMed-1).

Question 4

The ZPOmK-2 is the central Slovenian law regulating restrictive practices, concentrations of undertakings, unfair competition, restrictions of competition and measures to prevent restrictive practices and concentrations that significantly impede effective competition. Until the adoption of amendments in 2024 to align it with the DMA, the ZPOmK-2 did not contain specific provisions ensuring fairness and contestability in digital markets. The provisions of ZPOmK-2 were essentially designed to regulate and ensure fairness and contestability in the "physical market."

Question 5

In early 2024, amendments to the ZPOmK-2 were adopted, through which the Republic of Slovenia fulfilled its obligations under Article 38(7) of the DMA. According to this Article, the national competent authority enforcing the competition rules may, on its own initiative, investigate cases of possible non-compliance with Articles 5, 6 and 7 of the DMA on its territory. The AVK has been empowered to investigate non-compliance with Articles 5, 6 and 7 of the DMA in the territory of the Republic of Slovenia.

Article 12(6) of the ZPOmK-2, which defines the tasks and competences of the AVK, provides that "in accordance with Article 38 of Regulation 2022/1925/EU, the Agency shall cooperate and coordinate with the European Commission with regard to the procedures laid down in Regulation 2022/1925/EU. In doing so, the Agency may, in accordance with Article 38(7) of Regulation 2022/1925/EU, investigate non-compliances referred to in Articles 5, 6 and 7 of Regulation 2022/1925/EU on the territory of the Republic of Slovenia."

Furthermore, the following provision has been inserted in Article 37(2) of the ZPOmK-2, which relates to the disclosure of data: "AVK shall also disclose data to the European Commission and to the competition authorities of the EU Member States in accordance with the procedure laid down in Regulation 1/2003/EC, Regulation 2019/1150/EU and Regulation 2022/1925/EU."

Provisions in relation to the DMA have also been added to Article 102(7) of the ZPOmK-2, which defines mutual assistance in proceedings with an international element, namely that this Article applies *mutatis mutandis* with regard to the Agency's cooperation and coordination with the European Commission in relation to the proceedings referred to in the DMA.

Section 3: Vertical and horizontal public enforcement-related cooperation under DSA/DMA

Question 1

Concerning the DSA, no specific procedural rules have been created on the cooperation of the Digital Services Coordinator with other Member States' national competent authorities and the European Commission. Upon our inquiry, AKOS replied that it has so far not encountered any major challenges in establishing cooperation with the European Commission, the Digital Service Coordinators from other Member States, and national authorities. However, it should be stressed that the whole system of cooperation in implementing the DSA is still in the establishment phase and it can be assumed that challenges will certainly emerge over time. Due to the relatively short period of DSA's application, the Information Commissioner also has no specific experience with specific control and cooperation procedures, nor have they identified any particular challenges.

Concerning the DMA, Article 12(6) of the ZPOmK-2 contains a general provision directing the AVK to cooperate and coordinate with the European Commission about the procedures under the DMA while investigating non-compliance with Articles 5, 6, and 7 of the DMA on the territory of Slovenia. AVK notes that cooperation with the European Commission and other national authorities implementing the DMA, which includes all authorities within the ECN network, is already well established in the context of proceedings under Articles 101 and 102 TFEU, as regulated by Regulation 1/2003. In this respect, the DMA does not differ significantly from Regulation 1/2003. As of July 2024, the Slovenian competition authority, the AVK, has not received any requests in relation to the DMA, nor has it made any such requests (as it has not received any complaints or other reports on possible violations of the DMA). However, based on existing experience and rules in other similar procedures, AVK believes that cooperation will not pose any additional challenges.

Question 2

Article 133 of the ZPOmK-2 regulates the cooperation between the courts, the European Commission and the AVK in competition-law cases in general (not limited to DMA-related cases). Where pursuant to Article 15(3) of Regulation (EC) No 1/2003, the European Commission issues a written opinion to ensure the consistent application of Article 101 or 102 TFEU, the court must send a copy of the written opinion to the AVK and the parties to the proceedings.

The AVK may also submit a written opinion to the court on questions concerning the application of those provisions of the TFEU or the domestic rules on the prohibition of restrictive agreements and the prohibition of abuse of a dominant position. The European Commission and AVK may submit an opinion to the court at any time up to the delivery of the decision. If AVK gives a written opinion on questions relating to the application of Article 101 or Article 102 of the TFEU, it must also send a copy of its written opinion to the European Commission. According to Article 15(1) of Regulation (EC) No 1/2003, the court itself may request the opinion of the European Commission. In such a case, it must inform the parties thereof and, upon receipt of the opinion of the European Commission, send a copy of the opinion to the AVK and the parties to the proceedings.

The ZIUETDS contains no comparable provisions dealing with the cooperation of Slovenian courts with the European Commission in DSA-related cases.

The Courts Act[16] regulates how a court should act when a decision depends on the resolution of a preliminary question regarding the validity or the interpretation of EU law (Article 113.a of the Courts Act). The law specifies the manner in which the preliminary issue is referred to the CJEU, and the national proceedings are stayed until the preliminary ruling is received. The court must supply a copy of the preliminary question and the ruling of the CJEU to the Supreme Court without delay. The Courts Act contains no provisions on the cooperation of national courts with the European Commission.

Question 3

AVK notes that under Article 27 of the DMA, it may process and transmit information from third parties relating to any core service under the DMA. However, AVK currently has no experience in this regard as it has not received any complaints or other information in this connection, nor has it conducted any simulations in this field. If the Agency receives any such information in the future, it will act in accordance with the DMA and the procedural rules of the ZPOmK-2.

[16] Official Gazette of the Republic of Slovenia, No. 94/07 – Official consolidated text, 45/08, 96/09, 86/10 – ZJNepS, 33/11, 75/12, 63/13, 17/15, 23/17, 22/18, 16/19 – ZNP-1, 104/20, 203/20 – ZIUPOPDVE, 18/23 -–ZDU-1O and 42/24 – OdlUS.

Section 4: Private enforcement of DMA/DSA

Question 1

AKOS, AVK and the Information Commissioner have replied that they have no information on legal proceedings initiated to enforce the provisions of the DSA or the DMA.

Question 2

The ZIUETDS contains no specific provisions on the private enforcement of DSA's provisions except for Article 17, which concerns the enforcement of removal claims by the recipients of intermediary services. In principle, any law provision granting specific rights to individuals is actionable under Slovenian law, even when contained in an EU regulation. However, it might be disputable which concrete provisions of the DSA can be construed as granting rights to recipients of intermediary services. Private enforcement of the DSA in Slovenia could rely on several legal mechanisms, most notably tort law, contract law, and consumer protection law.

The most likely cause of action seems to be a claim for the compensation of damages suffered due to an infringement of the intermediary service provider's obligations under the DSA, which is already referred to in Article 54 of the DSA. The DSA provides a regulatory framework obligating digital platforms to act in certain ways (e.g., removing illegal content, ensuring transparency, and providing complaint mechanisms). If a platform fails to comply with these obligations and causes harm (e.g., reputational damage, economic harm, or violation of rights), individuals or businesses in Slovenia may file compensation claims under the Slovenian Obligations Code (OZ).[17] The relevant national provision upon which such a claim can be based is Article 131 of the OZ, under which whoever causes damage to another is liable to make good the damage unless they prove that the damage was caused without their fault. Relying on this provision requires proving causation and damages, with the DSA serving as a legal standard to assess the platform's actions. The damage must be illegal, that is, caused by violating a legal provision (in this case, the DSA). The defendant's fault in the form of negligence is presumed but can be rebutted. The main challenge in such proceedings might be proving the existence of actual damages, as many violations under the DSA do not result in immediate, tangible harm that is easily quantifiable (e.g., a platform's failure to remove illegal content quickly). Proving damages in such cases could pose challenges in court.

[17] Official Gazette of the Republic of Slovenia, No 97/07 – Officially consolidated text, 64/16 – OdlUS and 20/18 – OROZ631.

Recipients of intermediary services (individuals or businesses) could also base their claim on the service provider's breach of contractual obligations corresponding to concrete obligations under the DSA. However, this would legally constitute enforcing a contract rather than directly the DSA. In this case, the provisions of the Obligations Code could be used to claim breach of contract, especially if the DSA provides explicit protections that the platform violated. In cases where harmful or defamatory content is not removed in compliance with the DSA, affected individuals may seek private remedies through existing defamation law or, where relevant, data protection law under the GDPR.

Generally speaking, no strong culture of private enforcement of legislation exists in Slovenia, and people expect that any public-law requirements will be enforced primarily through various state inspections. In the case of the DSA, the competent authorities are primarily AKOS and the Information Commissioner.

Considering Article 90 of the DSA, the mechanism of collective actions could also be used to aggregate claims from multiple individuals against an intermediary service provider whose infringements of the DSA's provisions have harmed a group of consumers. The Slovenian Collective Actions Act (ZKolT)[18] expressly provides the legal basis for collective actions in any case where consumer rights have been violated by an enterprise (Article 2(1)(1) of the ZKolT). This mechanism increases the likelihood of private redress for individual recipients of services who might not individually pursue claims. Since many DSA obligations are designed to protect end users, consumer organisations will likely be among the first to seek private redress.

Question 3

Since no gatekeepers in the sense of the DMA are established in Slovenia, it seems unlikely that actions under Slovenian law would be brought against them, although the jurisdiction of Slovenian courts could be based on the fact of the damage due to DMA's violations arising (also) in the territory of Slovenia. In principle, businesses harmed by anti-competitive behaviour (e.g., exclusionary practices by gatekeepers) may file claims seeking compensation. Article 116 of the ZPOmK-2 expressly provides that a person who has suffered damage caused by an infringement of competition law is entitled to compensation for the damage under the general rules of the Obligations Code unless otherwise provided. The DMA's provisions regarding unfair practices by gatekeepers could serve as a basis for proving anti-competitive harm. Where the practices of a gatekeeper impact contractual relationships, private parties may also use

[18] Official Gazette of the Republic of Slovenia, Nos. 55/17 and 133/23.

contract law to challenge unfair terms or practices imposed by the gatekeeper, with the DMA serving as a standard of fair competition.

Since the European Commission plays a primary role in investigating and enforcing the DMA, private actions might be limited by the need to align with or wait for the Commission's findings in specific cases. Proving harm caused by gatekeeper practices, especially in digital markets, may be complex and require significant resources, including technical evidence.

Slovenia traditionally relied more on public enforcement of competition law than private actions. However, the introduction of collective actions and the growing role of the EU in regulating digital markets could encourage more private claims, especially if precedents are set in other EU countries. Article 2(1)(2) of the ZKolT provides the legal basis for collective actions for infringements of the provisions on the prohibition of restrictive practices laid down in Articles 101 and 102 of the TFEU.

The actors most likely to engage in private enforcement of the DMA in Slovenia include businesses that rely on digital platforms but are negatively affected by gatekeeper practices, such as unfair access terms, discriminatory practices, or exclusionary behaviour. Consumer associations may bring collective actions on behalf of users affected by unfair practices, particularly in relation to data portability or unfair terms of service.

Question 4

No specific rules for private enforcement of the DSA have been adopted, and the Ministry of Digital Transformation has stated that there are no current plans to develop such rules.

Under Article 17 of the ZIUETDS, the Ljubljana District Court initially held exclusive jurisdiction over requests to remove illegal content from the Internet per Article 9 of the DSA. Due to the overload of cases at this court, it was soon decided to transfer the jurisdiction to another court. Accordingly, the Act on the Implementation of the Regulation (EU) on addressing the dissemination of terrorist content online (ZIUORTSV),[19] adopted in October 2024, provided exclusive jurisdiction of the District Court in Nova Gorica over the removal of illegal content both under the DSA and the Regulation (EU) 2021/784 on addressing the dissemination of terrorist content online (Article 17 of the ZIUORTSV). This solution concentrates the specialised knowledge of "digital" disputes in one court. Actions against the supervisory authorities' decisions

[19] Official Gazette of the Republic of Slovenia, No 95/24.

against internet intermediaries in a supervisory procedure may be brought before the Administrative Court of the Republic of Slovenia.

Concerning the DMA, the Ministry of the Economy, Tourism and Sport has stated that they do not currently plan for the adoption of any special national rules for the private enforcement of the DMA. However, the DMA provides a new legal basis for claims under the Collective Actions Act (ZKolT), an amendment to which was adopted in December 2023 to take into account the DSA's and DMA's changes to the Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers.

The power to implement Article 38(7) of the DMA has been delegated to the AVK. Judicial protection against decisions of the AVK is provided for in administrative litigation before the Administrative Court. At present, there are no plans to establish a special chamber to deal with matters relating to the DMA.

Question 5

There is no procedural option in Slovenian law for civil society organisations to intervene in pending private disputes in support of the public interest.

Section 5: General questions

Question 1

Article 17 of the ZIUETDS specifically implements the judicial procedure for the removal of illegal content in accordance with Article 9 of the DSA and also takes into account the possible injunctions according to Articles 4(3), 5(2) and 6(4) of the DSA. A similar provision was previously contained in the ZEPT (the law that transposed the E-Commerce Directive in the Slovenian law). A legislative provision is necessary to designate the competent body for issuing removal orders. As such exceptional measures affect fundamental rights, it is appropriate for the court to decide on the restrictions at the request of the recipient of the services. If the procedural possibilities for removing illegal content under the DSA have been exhausted and no other law provides otherwise, the removal of illegal content is decided by the District Court of Ljubljana based on a motion by the recipient of the service.

The Act provides a graduated approach to the choice of possible measures for removing illegal content from the Internet, which may be imposed on host-

ing providers, mere conduit providers, registries and domain registrars. This means that the court may, by judgment, impose the measure most appropriate to achieve a given objective, following the order set out in Article 17(2), which lists the measures from the mildest to the most severe. The Court will have to follow the order of priority and assess whether the imposition of a measure on an online service provider closer to the content of the websites is already capable of achieving the objective. The hosting provider may thus be ordered to remove, disable or restrict access to the web interface. A mere conduit service provider may be ordered to restrict access to the web interface or the explicit display of an infringement warning on the web interface. A further action option is to order registries or domain name registrars, in appropriate cases where the content on the website is under the national domain ".si," to suspend the deletion of DNS records and to allow the registration of a fully specified domain name with the competent authority. As a final resort, the court may order the registries or domain registrars to delete a specified domain name.

The court decides in a non-litigious civil procedure. Depending on the circumstances of the case, the court will either convene a hearing or issue an order without a hearing. The court must decide within 30 days of receipt of the application. The decision must be swift to avoid irreparable damage that may be caused to the user of the intermediary services. An appeal against an order ordering the removal of illegal content from the internet does not suspend the execution of the order. A higher court decides on the appeal.

The ZIUETDS specifies no procedure for issuing orders to provide information. However, Article 20 of the ZIUETDS does provide a penalty for an intermediary service provider failing to inform the authority issuing the order to provide information or any other authority specified in the order of its receipt and of the effect given to the order, specifying if and when the effect was given to the order (Article 10(1) of the DSA). A penalty is also prescribed for an intermediary service provider failing to inform the recipient of the service concerned of the order received and the effect given to it (Article 10(5) of the DSA).

Question 2

AKOS has not received a notification from any intermediary service provider offering services in the Union without having its establishment in the Union of the designation of a legal representative referred to in Article 13 of the DSA in the Republic of Slovenia. Neither AKOS nor the Information Commissioner know of any cases of such legal representatives providing their services in Slovenia.

Question 3

The only provision relating to Article 53 of the DSA is Article 7(4) of the ZIUETDS, which provides that an applicant who lodges a complaint pursuant to Article 53 of the DSA has the status of a party in the inspection proceedings. This provision is needed as, under the standard rules of the inspection proceedings under the Inspection Act, such an applicant could not participate in the inspection proceedings as a party.

Slovenian law does not limit the alleged violations of the DSA for which a complaint against providers of intermediary services may be lodged with the Digital Services Coordinator according to Article 53 of the DSA.

Question 4

Implementing the DSA and the DMA did not cause any notable political controversies in Slovenia. Initially, there was disagreement between the Ministry of Digital Transformation and the Ministry of Justice on determining the competent authority for decisions on removing illegal content from the Internet. Article 9 of the DSA regulates decisions on actions against illegal content and allows Member States to designate either a judicial or an administrative authority for this purpose. Given that the previously applicable ZEPT (Articles 8 to 10) had already designated the court as the competent authority, and based on the conclusions of the public consultation on the implementation of the Digital Services Act organised by the Ministry on 21 February 2023,[20] the Ministry of Digital Transformation initially proposed the Administrative Court of the Republic of Slovenia as the competent authority in the draft ZIUETDS, which was subject to public consultation.[21] The Ministry of Justice initially opposed the idea of a judicial authority for decisions on the removal of illegal content from the internet. However, the Government of the Republic of Slovenia adopted the draft ZIUETDS on 11 January 2024, which provides for the District Court of Ljubljana to be the competent authority for decisions on removing illegal content from the Internet. The National Assembly of the Republic of Slovenia subsequently confirmed this solution. However, the issue was never politicised.

[20] *Posvet o uveljavitvi Akta o digitalnih storitvah*. Republika Slovenija, Ministrstvo za digitalno preobrazbo, 21 February 2023, https://www.gov.si/novice/2023-02-21-posvet-o-uveljavitvi-akta-o-digitalnih-storitvah/. Accessed 30 September 2024.

[21] *Javna obravnava osnutka Zakona o izvajanju uredbe (EU) o enotnem trgu digitalnih storitev.* Republika Slovenija, Ministrstvo za digitalno preobrazbo, 11 August 2023, https://www.gov.si/novice/2023-08-11-javna-obravnava-osnutka-zakona-o-izvajanju-uredbe-eu-o-enotnem-trgu-digitalnih-storitev/. Accessed 30 September 2024.

Question 5

AKOS, which is designated as the Digital Services Coordinator, has general information on the institutions defined by the DSA published on its website. It also provides explanatory notes on these institutions for all interested parties who contact it directly with questions. In the future, AKOS intends to pay even more attention to raising awareness of the rights and obligations under the DSA among all relevant stakeholders. Article 19(2) of the ZIUETDS provides for co-financing the activities of trusted flaggers if AKOS deems this to be necessary in order to increase the level of security and trust on the Internet. AKOS must plan for such measures in its work programme and financial plan. The ZIUETDS does not provide for any other measures of this kind.

With regard to out-of-court dispute resolution concerning the DMA, the Ministry of Economy, Tourism and Sport points out that the Act on Out-of-Court Settlement of Consumer Disputes (ZIsRPS),[22] which implements Directive 2013/11/EU on the Alternative Dispute Resolution of Consumer Disputes, lays down the principles and general rules of out-of-court dispute resolution procedures for the resolution of consumer disputes, as well as the rules and conditions of operation of the providers of these procedures. The ZIsRPS has not been amended since the DMA was adopted, so no additional measures have been taken in this substantive framework.

As regards the envisaged further measures to support the creation of bodies for out-of-court settlement of consumer disputes, a proposal for changes to the Directive 2013/11/EU is currently pending before the Council of the EU and the European Parliament. Its recital 6 states that Member States should have the right to apply ADR procedures to disputes related to other non-contractual rights stemming from Union law, including rights stemming from Articles 101 and 102 TFEU or rights of users provided in the DMA.

Question 6

In preparing the ZUIETDS, the Ministry of Digital Transformation identified the following provisions of the DSA as complex and unclear:

- Article 22 of the DSA (Trusted flaggers) – The provision was unclear as to whether the status of a trusted flagger could be granted to a sole trader, as a natural person cannot be an applicant.
- Article 40(4) of the DSA (Data access and scrutiny) – Whether the Digital Services Coordinator can *ex officio* appoint an organisation

[22] Official Gazette of the Republic of Slovenia, No 81/15.

that meets the criteria for the status of a vetted researcher. Given that the Digital Services Coordinator can mandate access to data *ex officio*, the Ministry of Digital Transformation interpreted this provision as allowing the status of a vetted researcher to be granted *ex officio*.

– Article 53 DSA (Right to lodge a complaint) – This provision deals with complaints, but it is intended to refer to a request to initiate inspection proceedings in which the applicant has the status of a party (i.e., has the right to be heard).

The Information Commissioner notes that advertising on online platforms (Article 26 of the DSA) and the protection of minors online (Article 28 of the DSA), which fall within the Commissioner's competence, are regulated by legislation on protecting personal data. These provisions of the DSA also rely on some of GDPR's definitions, for example, concerning profiling. This raises the question of the interpretation of the above-mentioned provisions in light of the well-established notions of the GDPR to ensure, or rather to maintain, a high level of protection of the fundamental rights and freedoms of the individual.

The Ministry of Economy, Tourism and Sport noted that the purpose of the DMA is to establish uniform rules for the regulation of digital markets at the EU level by setting standards for the creation of competitive, non-discriminatory, responsible and fair digital markets. This is why the Republic of Slovenia supported the adoption of the Act throughout the negotiations. The aim is to ensure a level playing field and more opportunities for all businesses in the EU's digital markets, resulting in more choices for consumers, better prices and more opportunities to switch service providers. Nevertheless, given that the enforcement of the DMA is the exclusive competence of the European Commission, the Ministry does not expect the Slovenian competition authority (AVK) to have much work to do in investigating non-compliance with Articles 5, 6 and 7 of the DMA on the territory of the Republic of Slovenia. Particularly, since it seems unlikely that a company based in the territory of the Republic of Slovenia will be appointed as a gatekeeper in the near future.

Spain

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Section 1: National institutional set-up

Question 1

The Ministry for Digital Transformation and the Civil Service has appointed the National Commission for Markets and Competition (CNMC) as the national Digital Services Coordinator. The Government thus complies with the DSA, which requires Member States to designate a coordinating competent authority that meets the requirements of independence from external influences and sufficient autonomy in managing its budget. This designation has been publicly announced through a press release from the mentioned Ministry for Digital Transformation on 24 January 2024,[1] which has been communicated to the EU Commission (DG CONNECT), although it has not yet been published through the Official National Gazette (*Boletín Oficial del Estado*), as this designation entails a legal empowerment that in turn requires a legal modification of the CNMC' statute.[2]

This legal empowerment has very recently been adopted through DSA's implementing legislation, that is, the Law on Information Society Services and Electronic Commerce/Ley de Servicios de la Sociedad de la Información y Comercio Electrónico (LSSICE)[3] as modified by the recent Royal Decree Law 9/2024.[4] However, Royal Decree Law 9/2024 in turn has been repealed by

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[1] Comisión Nacional de los Mercados y la Competencia, "El Ministerio para la Transformación Digital y de la Función Pública designa a la CNMC como Coordinador de Servicios Digitales de España," Press Release, https://www.cnmc.es/prensa/coordinador-servicios-digitales-20240124. Accessed 28 November 2024.

[2] Ley 3/2013, de 4 de junio, de creación de la Comisión Nacional de los Mercados y la Competencia, *Boletín Oficial del Estado*, núm. 134, de 5 de junio de 2013, p. 42191.

[3] Ley 34/2002, de 11 de julio, de servicios de la sociedad de la información y de comercio electrónico, *Boletín Oficial del Estado*, núm. 166, de 12 de julio de 2002, p. 25388.

[4] Real Decreto-ley 9/2024, de 23 de diciembre, por el que se adoptan medidas urgentes en materia económica, tributaria, de transporte, y de Seguridad Social, y se prorrogan determinadas medidas para hacer frente a situaciones de vulnerabilidad social, *Boletín Oficial del Estado*, núm. 309, de 24 de diciembre de 2024, p. 179226.

a Congress Resolution of 22 January 2025. Nevertheless, it is expected that the legal changes introduced by Royal Decree Law 9/2024 will finally see the light of day very soon.

According to its statute, the responsibilities of the CNMC are very large and they directly relate to the activities included in the DSA's scope. In the first place, the CNMC has the main responsibility in the field of competition, or antitrust, regulation. Therefore, the CNMC supervises market activity to detect and prevent anti-competitive practices that may harm competition and affect consumers. Secondly, several sectors specifically affected by the DSA are also included within the purview of the CNMC, such as the telecommunications or audiovisual sectors.[5] Within the telecommunications sector, the CNMC ensures the proper functioning of electronic communications markets through the establishment and supervision of operators' compliance with their obligations and the resolution of disputes between market players. Regarding the audiovisual sector, the CNMC oversees the proper functioning of the audiovisual media market, promoting diverse and reliable content, and promoting accessibility of audiovisual content, and is also responsible for ensuring that the rights of minors are respected. In this way, Spain seems to be following the German approach, where the *Bundesnetzagentur* has been chosen as the national Digital Services Coordinator.

Royal Decree Law 9/2024 has expanded the CNMC's powers by incorporating Article 9bis to Law 3/2013, which is the CNMC's statute. The amendment to the law vested the power to supervise and monitor the DSA upon the CNMC, without prejudice to any other public authority intervening in cooperation with it. A wide range of powers were included in Royal Decree Law 9/2024, notably those touching upon several DSA provisions, specifically, Articles 9 and 10 (transmission of the orders to other coordinators), 21 (approval of out-of-court dispute resolution bodies), 22 (approval of trusted flaggers), 40 (approval of vetted researchers), 53 (process the claims) and 55 (draw up annual reports). Four different directorates within the CNMC supervise and monitor each of these areas (Competition, Telecommunications and Audiovisual Sector, Energy and Transport and Postal Sector). The repealed amendment introduced by Royal Decree Law 9/2024 added a new directorate to the CNMC's organisational structure via the Digital Services Directorate, which would oversee the investigation of conducts and the processing of applications relating to Articles 9, 10, 21, 22, 40, 53 and 55 DSA.

It was not entirely evident whether other authorities, with responsibilities in the field according to national legislation already in place, would also be invested

[5] According to Ley 11/2022, de 28 de junio, General de Telecomunicaciones, *Boletín Oficial del Estado*, núm. 155, de 29 de junio de 2022, p. 91253 and Ley 13/2022, de 7 de julio, General de Comunicación Audiovisual, *Boletín Oficial del Estado*, núm. 163, de 08/07/2022. p. 96114.

with the responsibilities or powers that would flow from the DSA's application in Spain. This is the case for the Spanish Data Protection Authority (AEPD). Indeed, some authors have previously maintained that the AEPD should be included within the national authorities with responsibilities for the DSA's implementation in Spain.[6] In the press release mentioned above, it was stated that "the Spanish Data Protection Authority will be the competent authority for supervising compliance with data protection rules, with full cooperation between the two bodies," that is, the CNMC and the AEPD. At the present time, both bodies do not interact with each other in any relevant way. The DSA's implementation could serve as a catalyst for a brand-new institutional relationship between these two major national regulatory authorities, as envisaged by the most recent documents produced by the CNMC.[7] However, the implementing legislation, that is, the LSSICE, as modified by the recent Royal Decree Law 9/2024, only contemplates the two different groups of powers to be exercised by the CNMC, or the AEPD, respectively. In the first place, in the field of supervision and control, new Art. 35.2 LSSICE sets out the legal powers of the CNMC regarding its general supervising power, while Art. 35.3 LSSICE provides for the competence of the AEPD regarding Arts. 26.3 and 28.2 DSA. In other words, there is a clear-cut division of competences between the CNMC and the AEPD when personal data are involved.

Question 2

The DSA implementing legislation in Spain, if it finally comes into existence, has provided a supervisory and control power for the CNMC, the competition authority which, as stated above, was previously designated as Digital Services Coordinator. Art. 35.2 LSSICE, as amended by Royal Decree Law 9/2024, sets out a large supervisory power for the CNMC, in accordance with Art. 51 DSA. Therefore, in the exercise of these supervising powers, public authorities may enter the premises of online service providers, including very large platforms and very large engines; examine books; make copies or extracts; require access to be provided; seal premises; ask for explanations; and ask questions. The exercise of these powers of inspection under the DSA will require judicial authorisation where the right to inviolability of the home on premises other than those of the business is at issue (Art. 35.2, paragraphs a) to g)).

[6] Medina Guerrero, M., "Las autoridades nacionales responsables de la ejecución del Reglamento de Servicios Digitales. La necesaria presencia de la Agencia Española de Protección de Datos en el entramado institucional," *Derecho Digital e Innovación. Digital Law and Innovation Review*, Nº. 19 (enero-marzo), 2024, p. 169.

[7] Comisión Nacional de los Mercados y la Competencia, "Plan de Actuaciones 2024," https://www.cnmc.es/sites/default/files/editor_contenidos/CNMC/PortalTransparencia/2024_Plan%20de%20Actuaciones%202024.pdf. Accessed 28 November 2024.

Regarding resources, the repealed Royal Decree Law 4/2024 provided for a new Digital Services Directorate to be incorporated into the CNMC's organisational structure. Following the approval of the Royal Decree Law by the Government, despite that it, finally, did not count with the approval of Congress, the CNMC published that it would trigger in the coming months a selection process to cover seven vacancies for its Digital Services Directorate.[8] The job positions include five vacancies for lawyers, one for an economist and the last one for an ICT specialist. If and when another legal amendment finally grants the CNMC's creation of its Digital Services Directorate, the staff that will be devoted to DSA enforcement is expected to remain the same. It may well be the case that more staff within the CNMC may be repurposed from other Directorates to join the Digital Services Directorate. It is to be seen to what extent the implementation of the DSA will also bring about a significant increase in the staff at the AEPD.

Regarding enforcement powers, Art. 38 LSSICE already set out a system that included penalties in the case of very serious infringements, serious infringements and minor infringements. The implementing legislation has incorporated new penalties according to the DSA. Therefore, new very serious infringements are: breach of the duty of cooperation of providers; significant and repeated breach of Art. 26.3 DSA in relation to profiles; significant and repeated breach of Art. 28.2 DSA in relation to profiles in the case of a minor; failure to comply with the provisions of a resolution or agreement concerning the exercise of the powers to adopt interim measures, injunctions or corrective measures and to accept commitments, in accordance with the DSA. Second, new serous infringements are: significant and repeated breaches of Arts. 9 and 10 DSA; significant and repeated breaches of due diligence of Arts. 11-32 DSA; breaches of 26.3 DSA in relation to profiles; breaches of Art. 28. 2 DSA in relation to profiles in the case of a minor; failure to respond, provide incorrect, incomplete or misleading information, rectify incorrect, incomplete or misleading information or submit to an inspection, by intermediary services or other persons of Art. 51.1 DSA; significant and repeated breach of Art. 86.1 DSA; and significant or repeated breach by online platforms of other rulings or agreements issued under the DSA. Third, new minor infringements are: non-compliance with Arts. 9 and 10 DSA; non-compliance with due diligence of Arts. 11-32 DSA; non-compliance with Art. 86.1 DSA; non-compliance with resolutions or agreements issued pursuant to the DSA, other than the previous mentioned cases.

Art. 39 LSSICE already provided for very serious penalties (150,001 to 600,000 euros), serious penalties (30,001 to 150,000 euros) and minor penalties

[8] Spanish Competition Authority. Resolución por la que se convoca proceso selectivo para la provisión de plazas de personal laboral. 17 Dec. 2024, https://www.cnmc.es/empleo/oferta-empleo-nuevo-ingreso-dsc-2024. Accessed 11 Feb. 2025.

(up to 30,000 euros). The implementing legislation has added to this provision the penalties provided for in Art. 52 DSA. That is, for very serious infringements, up to 6% of the annual worldwide turnover of the intermediary service provider concerned in the preceding business year. For committing serious infringements, up to 4% of that turnover. For minor infringements, up to 2% of that turnover.

These penalties may be imposed by the CNMC or the AEPD, according to their respective scopes of activity (Art. 43 LSSICE, as modified by the implementing legislation).

Finally, the implementing legislation has incorporated into Art. 39 *ter* LSSICE the CNMC's power to declare commitments made by service providers binding or, in the event of non-compliance, to continue with the sanctioning procedure.

Question 3

As stated above, Spain has recently adopted the national legislation that is needed to implement the DSA (Royal Decree Law 9/2024), although it has been repealed by Congress. Even if it is expected that this implementing legislation will be definitively adopted very soon, in Spain there are no experiences involving the CNMC or the AEPD regarding DSA's enforcement.

Question 4

The Spanish competition law regime vests a national competition authority (NCA), the Comisión Nacional de los Mercados y la Competencia (CNMC),[9] with powers to enforce the provisions under the Competition Act 15/2007 of 3 July (the Competition Act). Alongside the NCA, however, there are other regional national authorities across the Member State, such as the Catalan, Basque or Galician competition authorities, with powers to apply Articles 1 and 2 of the Competition Act (that is, the equivalents to Articles 101 and 102 TFEU at the national level). In principle, as provided through Act 1/2002, the regional national authorities' powers in applying Articles 1 and 2 of the Competition Act are limited to their corresponding regional territory.[10] Conduct surpassing those regional borders (matching the distribution of the Autonomous Communities) will always be attributed to the NCA.

[9] Spanish Parliament. Ley de Defensa de la Competencia. No. 15/2007, 3 Jul. 2007, https://www.boe.es/eli/es/l/2007/07/03/15/con. Accessed 9 Jun. 2024.

[10] Spanish Parliament. Ley de Coordinación de las Competencias del Estado y las Comunidades Autónomas en materia de Defensa de la Competencia. No. 1/2002, 21 Feb. 2022, https://www.boe.es/eli/es/l/2002/02/21/1/con. Accessed 9 Jun. 2024.

Due to this reason, the monitoring of conduct happening at the national level (and not limited to the regional territory of one Community) in the terms presented by Article 38(7) DMA only corresponds to the CNMC.[11] The amendment to Article 18 of the Competition Act, introduced via Article 219 of Decree-Law 5/2023 only allocates to the CNMC – and, in particular, to the Competition Directorate within it – the capacity to perform investigations on the potential violation of Articles 5, 6 and 7 of the DMA on the national territory.[12] Thus, the CNMC does have the competence and investigative powers to conduct investigations in the sense of Article 38(7) DMA.

Few amendments have been introduced as a consequence of the DMA's adoption, but they are nuanced in terms of their substance. Article 219 of Decree-Law 5/2023 allocates up to two sets of tasks to the NCA for enforcing the DMA's provisions by introducing Article 18(3) to the Competition Act. First, the Competition Directorate may receive complaints in the sense of Article 27 DMA. Given that the provision is written alongside the recognition of the NCA's powers under Article 38(7) DMA, one can presume that the CNMC may conduct its investigatory powers upon receiving a complaint from a third party, a business user, a competitor or an end user on any given practice or behaviour of the designated gatekeepers. Under the terms of Article 27 DMA, the NCA has full discretion regarding the appropriate measures that it should take to enquire further about a complaint and is under no obligation to follow up on the information received.

Second, the Competition Directorate may also exercise the powers to conduct interviews and inspections according to the terms in Articles 39bis and 40 of the Competition Act. The power to conduct interviews touches upon any person who may have at their disposal information which may be necessary to apply one of the Competition Act's provisions. In a similar vein to the Commission's capacity to record those interviews under Article 22(1) DMA *in fine*, the CNMC may also record and elaborate a transcript thereof. Whilst the interviews under Article 22 DMA are mainly aimed at the collection of information, the documents deriving from those interviews hold

[11] European Union. Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act). *OJ*, L 265, 12 Oct. 2022, pp. 1–66.

[12] Spanish Government. Real Decreto-ley por el que se adoptan y prorrogan determinadas medidas de respuesta a las consecuencias económicas y sociales de la Guerra de Ucrania, de apoyo a la reconstrucción de la isla de La Palma y a otras situaciones de vulnerabilidad; de transposición de Directivas de la Unión Europea en materia de modificaciones estructurales de sociedades mercantiles y conciliación de la vida familiar y la vida profesional de los progenitores y los cuidadores; y de ejecución y cumplimiento del Derecho de la Unión Europea. No. 5/2023, 28 Jun. 2023, https://www.boe.es/eli/es/rdl/2023/06/28/5/con. Accessed 9 Jun. 2024. The Chair to the NCA confirmed this same interpretation in Fernández, Cani, "Keynote." *The Digital Markets Act in Practice*, IEB, 2024.

the value of public documents and may be held as evidence within the NCA's proceedings.

In turn, the power to conduct inspections as set out under Article 40 of the Competition Act also allows the NCA officials to require the presence of particular members of the staff when conducting a dawn raid as well as in asking them for particular documents they may have at their disposal in any given format, on top of the rest of powers established under Article 23(2) DMA. By attributing the CNMC with the capacity to conduct dawn raids to monitor the DMA's enforcement, the national legislator also provides for the possibility that the Director-General to the Competition Directorate may request the corresponding judicial authorisation when needed. Under the Spanish legal regime, a judicial authorisation is only needed if the undertaking opposes such an inspection or when the dawn raid may involve the restriction of fundamental rights (for instance, in those cases where the Spanish NCA inspects the private homes of managers and other members of staff of the undertaking, when there is credible evidence that the necessary documents for investigation are stored there).

The NCA's exercise of those powers, however, does come with limitations. Article 18(3) of the Competition Act mimics the terms of Article 38(7) DMA by compelling the Competition Directorate to inform the European Commission in writing about its potential monitoring of the DMA's provisions at the national level before taking a first formal investigative measure. The provision points that the Competition Directorate (and not the Council) takes responsibility for determining whether the CNMC should conduct those investigations into cases of non-compliance with Articles 5, 6 and 7. In a similar vein, the amendment also replicates the content of the second paragraph of Article 38(7) DMA by establishing the preclusive effect of the European Commission's exercise of its investigative powers over the NCA's investigatory powers.

However, the amendment establishes the investigation will be conducted according to the applicable rules of the "reserved information" procedure enshrined in Article 49(2) of the Competition Act. This procedure enables the NCA to determine whether sufficient *indicia* point to the existence of prohibited conduct without the need to initiate the sanctioning proceedings. Thus, the provision enables the Competition Directorate to investigate information confidentially, without having to notify the initiation of the proceedings to the undertakings. The enforcement actions it can trigger as a result include those related to the power to conduct inspections in the sense of Article 40 of the Competition Act. The fundamental difference between this phase and the "normal" initiation of the proceedings is that the time the NCA spends in determining whether those *indicia* concur in the case at hand does not count

for the limitation period of twenty-four months in which the CNMC must produce a finding of an infringement of anti-competitive rules. The inclusion of this provision within the amendment does seem to point towards the fact that the Spanish competition authority will perform the investigation within this "reserved information" period, and, after that, it will refer those findings back to the European Commission. That is to say, it will pass on its findings on whether the non-compliance procedure should be opened by the European Commission without the necessity of notifying the undertaking of the existence of those enforcement actions.

Similarly to the reference to Articles 39bis and 40 of the Competition Act, the amendment also highlights the fact that all natural or legal persons and the organs and bodies of any public administration are subject to the general duty of collaboration with the NCA. These public bodies are, thus, compelled to provide all kinds of data and information that they may have and may be necessary. The collaboration of these public bodies and persons will not, however, imply that they automatically acquire the status of interested parties within the proceedings.

Finally, the amendment also makes provision for the rules applying to the exchange of information between those units in charge of the DMA and those in charge of the enforcement of the prohibitions under Articles 101 and 102 TFEU and their national equivalents. The nature of the investigatory tasks the NCA may perform under Article 38(7) DMA is built upon the premise that there might be cases where it cannot be determined from the outset whether a gatekeeper's behaviour is capable of infringing the DMA, the competition rules or both, as set out under Recital 91. Therefore, the amendment to Article 18 of the Competition Act recognises that the information it has collected under the legal basis of Article 38(7) DMA may also be used for the application of the Competition Act. In turn, the information that it has collected in the application of the Competition Act may also be used to trigger the monitoring powers under Articles 5, 6 and 7 DMA.

Under the Spanish regime, decree laws must be later validated by Congress insofar as they are adopted based on their urgency and necessity by the executive power. In July 2023, Congress validated Decree-Law 5/2023 via its Resolution of 26 of July.[13]

[13] Spanish Parliament. Resolución por la que se ordena la publicación del Acuerdo de convalidación del Real Decreto-ley, de 28 de junio, por el que se adoptan y prorrogan determinadas medidas de respuesta a las consecuencias económicas y sociales de la Guerra de Ucrania, de apoyo a la reconstrucción de la isla de La Palma y a otras situaciones de vulnerabilidad; de transposición de Directivas de la Unión Europea en materia de modificaciones estructurales de sociedades mercantiles y conciliación de la vida familiar y la vida profesional de los progenitores y los cuidadores; y de ejecución y cumplimiento del Derecho de la Unión Europea. No. 5/2023, 26 Jun. 2023, https://www.boe.es/eli/es/res/2023/07/26/(1). Accessed 9 Jun. 2024.

Question 5

Following the amendment to the Competition Act, the Spanish NCA signed the Memorandum of Understanding (MoU) in June 2024 with the European Commission to create a joint investigation unit for the supervision of digital platforms. According to the press release issued by the CNMC, the MoU is aimed at securing the cooperation between the NCA and the European Commission so that NCA officials may participate in projects, initiatives and investigation units of the European Commission in those cases touching upon the Spanish market.[14] In this regard, the joint investigative team's purpose is to involve selected officials of the CNMC in the EC's investigation projects, and other Commission's workstreams concerning the application of the DMA's obligations which are of mutual interest with the CNMC. The fulfilment of such a purpose started in June 2024 and will run until December 2026 via the incorporation of the CNMC officials into the joint investigate team falling under the "Commission visitor program." That is, those officials remain employed by the CNMC and under their full responsibility, despite that they will perform their tasks under the supervision of the team leader of the investigation and their hierarchical superiors at the EC.[15]

In parallel, the Spanish NCA participates in the High-Level Group in its representative capacity of the European Competition Network alongside other NCAs.[16] Furthermore, it has also signed a cooperation agreement with the Dutch national competition authority for the organisation of the ECN's conference on the DMA in June 2024.[17] The conference was aimed at providing sufficient information to the DMA's business users so that they can grasp the whole array of opportunities the regulation provides them with.[18]

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[14] *Comisión Nacional de los Mercados y la Competencia*. La CNMC y la Comisión Europea firman un acuerdo para la creación de un equipo de investigación conjunto para supervisar las grandes plataformas digitales, 2024, https://www.cnmc.es/prensa/mou-ce-20240606. Accessed 9 Jun. 2024. As a response to a request of information, the EC recognised other MoUs had been signed with several Member States, namely with the Authority for Consumers & Markets, the Autorità Garante della Concorrenza e del Mercato and the Autorité de la Concurrence du Grand-Duché de Luxembourg.

[15] *Comisión Nacional de los Mercados y la Competencia*. Memorandum of Understanding on the Creation of a Joint Investigative Team of the Commission and the National Competition Authority Officials in Investigations under the Digital Markets Act (Joint Investigative Team), 2024, https://cnmc.es/sites/default/files/5367245.pdf. Accessed 29 Aug. 2024.

[16] *Comisión Nacional de los Mercados y la Competencia*. La CNMC, en el Grupo de Alto Nivel para la Ley de Mercados Digitales de la UE que supervisará el desarrollo de la inteligencia artificial, 2024, https://www.cnmc.es/prensa/grupo-alto-nivel-ia-20240528. Accessed 9 Jun. 2024.

[17] *Comisión Nacional de los Mercados y la Competencia*. 240182: Convenio de Cooperación entre la ACM de Holanda y la CNMC para la organización de una conferencia en los Países Bajos sobre la Ley de mercados digitales – DMA por su nombre en inglés, 2024, https://www.cnmc.es/expedientes/240182. Accessed 9 Jun. 2024.

[18] The conference follows the preoccupation of NCAs, see *GCR*. ACM head warns of "worrying" low DMA engagement from businesses, 2023, https://globalcompetitionreview.com/article/acm-head-warns-of-worrying-low-dma-engagement-businesses. Accessed 9 Jun. 2024.

Question 6

The CNMC recognised that digital markets are an absolute priority for the NCA's enforcement. For instance, this type of priority will crystallise when the NCA receives information from third parties under Article 27 DMA or in those instances where it can monitor the enforcement of Articles 5, 6 and 7 under Article 38(7) DMA. In this same regard, the NCA has held informal conversations with the European Commission and within the ECN in paving the way for establishing the coordination mechanisms under Article 38 DMA.[19]

On the side of its enforcement experience, the CNMC initiated a sanctioning proceeding in October 2022 against gatekeeper Booking.com for possible anti-competitive practices affecting hotels and online travel agencies.[20] According to the initial press release, the potential infringements touch upon Article 102 TFEU and Articles 2 and 3 of the Competition Act. That is the national equivalent of abuse in the Spanish competition law regime as well as the idiosyncratic form of abuse of economic dependence. Given that Booking.com was not a designated gatekeeper once the sanctioning proceedings were opened by the NCA, the proceedings did not, preliminarily, touch upon any of the obligations imposed on it under the DMA, notably under Article 5(3) DMA. Thus, the NCA was not compelled to notify the European Commission in the sense of Article 38(2) DMA. Booking.com was designated a gatekeeper in the interim of the CNMC's ongoing investigation and before the CNMC reached a final determination on the gatekeeper's conduct.[21]

On the 30 of July 2024, the CNMC finally issued its public decision fining Booking.com EUR 413.24 million for abusing its dominant position from at least 1 January 2019 by imposing several unfair trading conditions on hotels located in Spain.[22] The Spanish competition authority's does, however, not

[19] These enforcement priorities have been explicitly recognised in *Comisión Nacional de los Mercados y la Competencia*. Plan Estratégico, 2021, https://www.cnmc.es/sites/default/files/editor_contenidos/CNMC/20210421_Plan%20Estrat%C3%A9gico_def.pdf. Accessed 10 Jun. 2024; and *Comisión Nacional de los Mercados y la Competencia*. Plan de Actuaciones 2023, 2023, https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2023/Plan_Act_2023%20_web_oficina.pdf. Accessed 10 Jun. 2024.

[20] *Comisión Nacional de los Mercados y la Competencia*. The CNMC opens formal antitrust proceedings against Booking.com for possible anticompetitive practices affecting hotels and online travel agencies, 2022, https://www.cnmc.es/sites/default/files/4482208_0.pdf. Accessed 9 Jun. 2024.

[21] At the moment of writing, the European Commission has not issued the public designation decision but see *European Commission*. Commission designated Booking as a gatekeeper and opens a market investigation into X, 2024, https://ec.europa.eu/commission/presscorner/detail/en/IP_24_2561. Accessed 9 Jun. 2024.

[22] *Comisión Nacional de los Mercados y la Competencia*. The CNMC fines Booking.com €413.24 million for abusing its dominant position during the last 5 years, 2024, https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2024/20240730_NP_%20Sancionador_Booking.com_eng.pdf. Accessed 29 Aug. 2024.

engage directly with the merits of parity clauses as set out under Article 5(3) DMA. The CNMC does not declare them anti-competitive under Article 102 TFEU nor Article 2 of the Competition Act due to their scope or their anti-competitive nature. Instead, the Spanish competition authority finds that Booking abused its dominant position within the OTA market by simultaneously imposing the parity clauses alongside the Booking Sponsored Benefits (BSB) clause. The BSB clause enables the platform to unilaterally tweak the hotel prices, with no further effect on the hotel. The same fee type is charged as a result to the hotel, but Booking assumes the difference in price itself. According to the Spanish competition authority, the simultaneous imposition of both clauses generates such an imbalance in the bargaining power against the hotels that it merits to be classified as an exploitative abuse.[23]

A few days before the CNMC issued its decision regarding Booking's anti-competitive conduct, the Spanish competition authority triggered a sanctioning proceeding anew about a potential anti-competitive behaviour falling within the remit of the DMA. On the 24 of July, the competition authority announced that it was investigating Apple's practices regarding the potentially unfair commercial terms it may have imposed upon app developers using the App Store.[24] Before the opening of the sanctioning proceeding, Apple was designated a gatekeeper under the DMA for three of its services, including its online intermediation service App Store.[25] Aside from that, a month prior to the CNMC's enforcement action, the European Commission opened a non-compliance procedure against Apple's technical implementation of Articles 5(4), 5(7) and 6(4) DMA. The locus of the procedure is focused on Apple's distribution channels, both through its own App Store and via alternative distribution venues.[26] Therefore, one would have expected that the Spanish competition authority would have, at least, notified the European Commission about the opening of its sanctioning proceedings under the terms of Article 38(2)

[23] Comisión Nacional de los Mercados y la Competencia. Resolución Booking. No S/0005/21, 29 Jul. 2024, https://www.cnmc.es/sites/default/files/5464623.pdf. Accessed 29 Aug. 2024.

[24] *Comisión Nacional de los Mercados y la Competencia*. The CNMC is investigating the Apple group for possible anti-competitive practices related to the distribution of applications on its devices, 2024, https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2024/20240724_NP_Apple_App_Store_eng.pdf. Accessed 29 Aug. 2024.

[25] European Commission. Commission Decision designating Apple as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector. No DMA 100013 Apple – Online Intermediation Service – app stores, DMA.100025 Apple – operating systems and DMA.100027 Apple – web browsers, 5 Sept. 2023, https://ec.europa.eu/competition/digital_markets_act/cases/202344/DMA_100013_215.pdf. Accessed 29 Aug. 2024.

[26] European Commission. Commission decision opening a proceeding pursuant to Article 20(1) of Regulation (EU) 2022/1925 of the European Parliament and of the Council on the contestable and fair markets in the digital sector. No DMA.100206 – Apple – new business terms, 24 Jun. 2024, https://ec.europa.eu/competition/digital_markets_act/cases/202431/DMA_100206_50.pdf. Accessed 29 Aug. 2024.

DMA. No official confirmation has been provided by either the Spanish competition authority or the European Commission.

Section 2: Use of national legislative leeway under the DMA/DSA

Question 1

The applicable legal regime is provided by the Information Society Services and E-Commerce Law (LSSICE). Specifically, illicit content is foreseen in Arts. 16(1) and 17(1) of the LSSICE. Art. 16(1) is addressed to data hosting or storage service providers, and Art. 17(1) is devoted to service providers providing links to content or search tools. These provisions have been derogated by DSA implementing legislation (Royal Decree Law 9/2024). As stated above, this implementing legislation has been annulled by Congress, but is expected to be in force very soon.

Through these two provisions the LSSICE established a much broader exclusion of liability in relation to civil liability than the E-Commerce Directive, insofar as it requires the existence of actual knowledge ("*conocimiento efectivo*") on the part of the information society service provider.[27] However, the Supreme Court case-law has adopted a very large concept of actual knowledge. Intermediary service providers are thus obliged by this case-law to monitor all content they store, which implies a high risk of private censorship since, in case of doubt about the unlawfulness of content, intermediaries may prefer to remove or block access to it in order to avoid incurring liability.[28]

After the adoption of DSA implementing legislation, and according to Art. 13.2 LSSICE, as modified by Royal Decree Law 9/2024, responsibility of digital service providers is now the object of a complete "referral" to the DSA.

Question 2

In the absence of DSA implementing legislation until very recently in Spain, there has been no effort to try to map the national rules on the illegality of content relevant for its enforcement. Likewise, there have also been no recent changes to the content rules in the country.

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[27] Peguera Poch, M., *La exclusión de responsabilidad de los intermediarios en Internet*, Comares, Granada, 2007, p. 286.

[28] Herrerías Castro, L., "El conocimiento efectivo en la jurisprudencia del Tribunal Supremo: ¿Hacia una obligación general de supervisión?," in Hernández Sainz, E., Mate Satué, L. C. and Alonso Pérez, M. T. (eds.), *La responsabilidad civil por servicios de intermediación prestados por plataformas digitales*, Colex, A Coruña, 2023, p. 258.

Question 3

Pending the definitive adoption of DSA implementing legislation, there are no expectations about other related legislative acts being considered for adoption on the national level. Influencers and other content creators are regulated in Spain through an array of different laws. Together with the LSSICE, we would also have to mention the General Law on Advertising (GLA),[29] the Law on Unfair Competition (LUC),[30] and the General Law on Audiovisual Communication (GLAC, quoted above). Of particular significance is the concept of "user of special relevance," as foreseen in Art. 94 GLCA and developed through Royal-Decree 444/2024.[31] Even if there is no exact correlation between an influencer and a user of special relevance (a broader concept, according to the GLCA's preamble), the legal regime provided for the latter will have to be applied also to the former, and so both concepts will eventually converge.[32]

Firstly, the prohibition provided by Art. 26.1 LUC seems to be applicable to those activities developed by influencers identified as covert advertising. Nevertheless, this possibility has been criticised as barely coercive as against influencers,[33] which in turn has led towards the establishment of Codes of Conduct, such as the one set up in 2021.[34] Secondly, the requirement on advertising set out in Art. 9 GLA is not useful as this legislation does not provide any mechanism for legal action against influencers. However, Art. 122.3 GLCA, together with Art. 20 LSSICE clearly prohibit cover advertising so, according to them, administrative bodies with responsibilities in this area may initiate proceedings that would eventually end up with the imposition of important financial penalties.[35] Specifically, Art. 158 GLCA allows the CNMC to impose fines from 30,000–750,000 Euros, while Art. 39 LSSICA allows the Ministry of Digital Transformation to impose fines of up to 30,000 Euros.

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[29] Ley 34/1988, de 11 de noviembre, General de Publicidad, *Boletín Oficial del Estado*, núm. 274, de 15 de noviembre de 1988, p. 32464.

[30] Ley 3/1991, de 10 de enero, de Competencia Desleal, *Boletín Oficial del Estado*, núm. 10, de 11 de enero de 1991, p. 959.

[31] Real Decreto 444/2024, de 30 de abril, por el que se regulan los requisitos a efectos de ser considerado usuario de especial relevancia de los servicios de intercambio de vídeos a través de plataforma, en desarrollo del artículo 94 de la Ley 13/2022, de 7 de julio, General de Comunicación Audiovisual, *Boletín Oficial del Estado*, núm. 106, de 1 de mayo de 2024, p. 49802.

[32] García Escobar, G. and Montero Pascual, J. J., "La publicidad digital," in Montero Pascual, J. J. (coord.), *La regulación de los servicios digitales*, Tirant lo Blanch, Valencia, 2024, p. 428.

[33] Platero Alcón, A., *Repercusiones jurídico-civiles de la actividad de los influencers digitales*, Dykinson, Madrid, 2023, 148.

[34] *Código de Conducta sobre el uso de influencers en la publicidad*, adopted by Asociación Española de Anunciantes (AEA), Asociación para la Autorregulación de la Comunicación Comercial (Autocontrol), and Ministerio de Asuntos Económicos y Transformación Digital y el Ministerio de Consumo, https://www.autocontrol.es/codigos-de-conducta/. Accessed 28 November 2024.

[35] García Escobar and Montero Pascual, note 30, pp. 431–432.

Question 4

The DMA's pre-emption effects are to be understood in relation to the scope of the regulation. That is, Member States can only regulate "digital" conduct when it is not related to undertakings acting as gatekeepers in the sense of the regulatory instrument and when they aim to regulate matters falling outside of the scope of the DMA.[36] Since the subject matter of the regulation is that of addressing fragmentation and of securing contestable and fair markets, pre-emption effects are quite comprehensive in terms of their scope. Therefore, pre-emption effects touch upon the ability of Member States to introduce DMA-like instruments at the national level. Bearing in mind that the Spanish NCA opposed the adoption of new regulations when the European Commission first proposed the New Competition Tool back in 2020, the CNMC's current institutional position demonstrates the NCA is not particularly prone to proposing regulation which would overlap with the DMA.[37]

The only potential overlap that remains within the Spanish competition law regime is that relating to the Spanish NCA's application of Article 3 of its Competition Act, that is, its prohibition of abuse of economic dependence. In principle, Article 1(6)(b) DMA establishes its complementarity with the DMA's application. Notwithstanding, this pathway may be the option the Spanish NCA chooses to capture conduct within digital markets. The case law and decisional practice in applying this provision do not, however, support the choice, since most cases have been annulled in their judicial review or have demonstrated to be highly resource-intensive to determine the presence of an infringement.[38]

Question 5

Aside from the amendment introduced to Article 18 of the Competition Act via Decree-Law 5/2023, no other related legislative acts are being considered nor adopted at the national level regarding the DMA.

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[36] Nowag, Julian, and Patiño, Carla Valeria. "Enough of Fairness: Pre-emption and the DMA." *SSRN*, 2024, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4769198. Accessed 10 Jun. 2024. Preprint.

[37] *Comisión Nacional de los Mercados y la Competencia*. CNMC Position Paper for the Public Consultation on the Digital Services Act (DSA) and a New Competition Tool (NCT), 2020, https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2020/CNMC%20position%20paper%20on%20DSA%20and%20NCT.pdf. Accessed 10 Jun. 2024.

[38] Cabrera Zaragoza, Susana, and Escudero Puente, Alberto. "La aplicación del artículo 3 de la Ley de Defensa de la Competencia ¿La reactivación del ilícito?" *Anuario de la Competencia*, vol. 1, 2011–2012, pp. 223–248, *Dialnet*, https://anuariocompetencia.fundacionico.es/files/original/a758e05b11a661184046983d4a6db070d81282e9.pdf

Section 3: Vertical and horizontal public enforcement-related cooperation under DSA/DMA

Question 1

As provided under Article 38 DMA, the NCA cooperates with other national competent authorities of other Member States via the institutional structure established in the ECN. To that end, the amendment of Article 18 via Decree-Law 5/2023 does not establish any additional provision working on top of the current configuration of the ECN stemming from the introduction of Regulation 1/2003.[39] On the side of its cooperation with the European Commission, the NCA has adopted a specific MoU to cooperate with the EC via a joint investigation unit.

Question 2

The amendment of Article 18 of the Competition Act does not establish any measure to secure that the mechanisms under Article 39 DMA apply at the national level. The principle of direct applicability of the DMA does not hinder the EC's capacity to intervene as *amicus curiae* to national proceedings by the absence of rules modifying the terms of Organic Law 6/1985 on the Judiciary or the Spanish Competition Act.[40]

Such powers are already recognised under the second supplementary provision to the Spanish Competition Act for those cases involving the private enforcement of Articles 101 and 102 TFEU, which include the potential intervention of the EC, the Spanish competition authority and other regional competition authorities in such proceedings.[41] It follows that those amendments, therefore, would not be directly incorporated to the Spanish Competition Act, but to the dedicated acts relating to the organisation of the judiciary.

Question 3

Based on its advocacy and enforcement action, the Spanish competition authority will be particularly useful in contributing its expertise to four different types of core platform services (CPSs): online advertising services,

[39] European Union. Regulation (EU) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. *OJ* L 1, 4 Jan. 2003, pp. 1–25.

[40] Spanish Parliament, Ley Orgánica, de 1 de julio, del Poder Judicial. No. 6/1985, 2 Jul. 1985, https://www.boe.es/eli/es/lo/1985/07/01/6/con. Accessed 17 Jun. 2024.

[41] Those powers were recognised as an amendment to Spanish Parliament. Ley, de 7 de enero, de Enjuiciamiento Civil. No 1/2000, 8 Jan. 2000, https://www.boe.es/eli/es/l/2000/01/07/1/con. Accessed 17 Jun. 2024.

online social networking services, online intermediation services and number-independent interpersonal communication services. On one side, the Spanish competition authority issued in 2021 one of the most extensive analyses performed by a competition authority within the EU on the topic of advertising services. The study analysed the advertising sector's competition conditions as well as the risks surrounding the market's opacity and concentration levels.[42] Moreover, aside from its mandate as the competition authority, the CNMC is also the regulator of the telecommunications sector in Spain. When exercising its capacity, the CNMC collects every year data from a representative sample of households and individuals living in Spain about the sectors it supervises (Panel de Hogares or Household Panel). Regarding its supervision of the telecommunications sector, the Spanish competition authority has previously reported on the high usage of NIICS such as WhatsApp or on the most popular social networking services used in Spain, namely Facebook and Instagram.[43] Therefore, the European Commission may exchange information regarding all of these CPSs with the Spanish competition authority so as to determine the real-life impact of their relevance in the market as well as to measure the impact of the DMA's obligations in terms of market outcomes (whether, for instance, other entrants access the markets of those CPSs).

On the side of enforcement, the Spanish competition authority has in-depth knowledge of the competitive dynamics of online intermediation services, since it already sanctioned both Amazon and Apple for their agreements imposing brand gating obligations to the detriment of third-party sellers.[44] Insights deriving from these sanctioning proceedings may also be particularly illuminating for the European Commission when metering conduct taking place within these CPSs, especially with regards to gatekeeper Amazon. This tenet can be particularly important in the context of the investigatory actions the European Commission is pursuing against Amazon's potential breach of the self-preferencing prohibition under Article 6(5) DMA.[45]

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[42] *Comisión Nacional de los Mercados y la Competencia*. Study on the competition conditions in the online advertising sector in Spain. 7 Jul. 2021, https://www.cnmc.es/sites/default/files/3696007_0.pdf. Accessed 17 Jun. 2024.

[43] *Comisión Nacional de los Mercados y la Competencia*. Ocho de cada diez internautas usan la mensajería instantánea diariamente en su smartphone. 26 May 2023, https://www.cnmc.es/prensa/panel-usos-internet-servicios-ott-cnmc-20230526. Accessed 17 Jun. 2024.

[44] *Comisión Nacional de los Mercados y la Competencia*. Summary of the Decision adopted by the Council of the CNMC on 12 July 2023 in Case S/0013/21 Amazon/Apple Brandgating. 12 July. 2023, https://www.cnmc.es/sites/default/files/4899034.pdf. Accessed 17 Jun. 2024.

[45] *Directorate-General for Competition, Directorate-General for Communications Networks, Content and Technology*. Commission opens non-compliance investigations against Alphabet, Apple and Meta under the Digital Markets Act. 25 Mar. 2024, https://digital-markets-act.ec.europa.eu/commission-opens-non-compliance-investigations-against-alphabet-apple-and-meta-under-digital-markets-2024-03-25_en. Accessed 17 Jun. 2024.

Section 4: Private enforcement of DMA/DSA

Question 1

As of the moment of writing, pending the adoption of DSA implementing legislation, no private enforcement of the DSA has taken place. Likewise, to the extent of our knowledge no private parties have actioned against any of the gatekeepers under the DMA before the national courts.

Question 2

Private enforcement of the DSA may take two forms. First, there is the option of individual civil claims and, secondly, there is the option of collective civil claims. Individual civil claims are provided by Art. 54 DSA which states that "recipients of the service shall have the right to seek, in accordance with Union and national law, compensation from providers of intermediary services, in respect of any damage or loss suffered due to an infringement by those providers of their obligations under this Regulation." Following the reasoning of the ECJ in the *Österreichische Post AG* case of 4 May 2023,[46] the right to compensation arises when three requisites are met. First, there is an infringement of the DSA, purportedly because of an infringement of its due diligence obligations, second, there is a damage caused by that infringement, and third, there is a relation of causality between them. The legal avenue provided by Spanish law in non-contractual cases is a general one, set out in Art. 1902 of the Civil Code, which is traditionally labelled as non-contractual liability.

However, contractual liability may arise also after the DSA infringement if, for example, the damage takes place regarding a B2C online platform activity (Chapter III, Section 4 DSA). As mentioned above, the right to compensation provided by Art. 54 DSA may arise if the due diligence obligations set out in Section 4 are infringed. If this is the case, according to consumer law,[47] the online platform may have to assume contractual liability because of the infringement of the underlying contract between the consumer and the seller, mainly organised around alternative dispute resolution.[48] The infringement of the due diligence obligations may also lead to online platform liability based

[46] ECLI:EU:C:2023:370.

[47] Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, C/2021/9320 (OJ C 526, 29.12.2021, p. 1).

[48] Ley 7/2017, de 2 de noviembre, por la que se incorpora al ordenamiento jurídico español la Directiva 2013/11/UE, del Parlamento Europeo y del Consejo, de 21 de mayo de 2013, relativa a la resolución alternativa de litigios en materia de consumo, *Boletín Oficial del Estado*, núm. 268, de 4 de noviembre de 2017, p. 105693.

on unfair competition practices, according to the LUC (quoted above). These unfair competition activities may give way to the ensuing claims in terms of cessation measures and compensation for damages and losses.[49]

Pursuant to Art. 86 DSA, recipients of intermediary services have the right to mandate a body, organisation or association to exercise the rights conferred by the DSA on their behalf.[50] Those rights have been identified by Recital 149 of the DSA but should also include the right to compensation as stated in Art. 54 DSA. However, this representation is "without prejudice to Directive (EU) 2020/1828[51] or to any other type of representation under national law." Therefore, there are two paths to introduce collective complaints in this field, and both avenues are complementary. First, the representation regarding the responsibility of intermediary service providers, as set out in Art. 86 DSA, and second, the representation regarding consumer rights, as set out in Directive 2020/1828.

After DSA implementation, applicable law has not been modified. Representative actions may only be initiated according to the general mechanisms provided for in Spanish law. Collective actions in Spanish law are mainly regulated in the Civil Prosecution Law (Ley de Enjuiciamiento Civil- LEC). Particular attention should be paid to article 11 LEC which provides for the legal standing of consumer and user associations for the exercise of class actions, also according to Arts. 24.1 and 37 c) of General Law for the Defence of Consumers and Users (GLDCU).[52] In this vein, it is interesting to remember the ECJ interpretation in the *Meta Platforms Ireland Limited v Bundesverband der Verbraucherzentralen* case of 2022,[53] about the relationship between the representation provided in Art. 80(2) of GDPR and the representation allowed by Directive 2020/1828. Like this relationship, it is reasonable to think that Art. 86(1) DSA does not preclude the ability of MS to authorise consumer law associations to initiate claims against DSA infringements through provisions devoted to protecting consumers or fighting against unfair competition practices, as provided by Directive 2020/1828. It is interesting to note again that

[49] Paredes Pérez, I., "Aspectos internacionales de la responsabilidad civil de las plataformas en línea b2c frente a los contenidos ilícitos en materia de protección de consumidores," in Castelló Pastor, J. J. (dir.), *Análisis del Reglamento (UE) de servicios digitales y su interrelación con otras normas de la Unión Europea*, Aranzadi, Madrid, 2024, pp. 253–254.

[50] Provided the body, organisation or association meets all of the following conditions: (a) it operates on a not-for-profit basis; (b) it has been properly constituted in accordance with the law of a Member State; (c) its statutory objectives include a legitimate interest in ensuring that this Regulation is complied with.

[51] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (OJ L 409, 4.12.2020, p. 1).

[52] Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias, *Boletín Oficial del Estado*, núm. 287, de 30/11/2007.

[53] ECLI:EU:C:2022:322.

an infringement of the DSA may also imply an infringement of consumer law, but both avenues of collective representation remain open and are available simultaneously.[54]

Question 3

Under the assumption that the DMA does not fall within the scope of the Damages Directive,[55] the regulation provides for two different ways in which private parties may bring actions against the gatekeepers before the Member States' national courts.

On the one hand, the DMA, if it adheres to the principle of direct effect, may provide sufficient grounds for individuals to bring actions before national courts based on the violation of any one of its provisions.[56] The applicable procedural framework and safeguards are not, however, those corresponding to the Damages Directive. In the Spanish legal regime, those actions will take place via the means of civil liability determined through national law for damages caused by the breach of European law.[57] The main problem with the application of this procedural route is that it is, in turn, based on the action for damages arising from non-contractual liability, as set out under Article 1902 of the Civil Code.[58] This type of liability relies on a negligence-based system which has caused practical problems for private enforcement in the area of antitrust in a myriad of ways, notably regarding the quantification of damages, limitation periods and the complexity in meeting the threshold of evidence to prove the presence of harm.[59]

On the other hand, Article 42 DMA provides that individuals may also pursue collective actions before the national courts through the procedural pathway

[54] Paredes Pérez, I., note 51, p. 256.

[55] European Union. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. *OJ,* L 349, 5 Dec. 2014, pp. 1–19.

[56] The determination of whether that principle applies in the context of the DMA must be determined with reference to the references in Court of Justice. *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, I-3. ECR, 1963.

[57] Suderow, Julia. "Capítulo 3. ¿Aplicación Privada de la Ley de Mercados Digitales?" Mercados Digitales y Competencia, edited by Juan Ignacio Ruiz Peris, Francisco González Castilla and Carmen Estevan de Quesada, Tirant, 2024, pp. 63–94. This approach builds upon Court of Justice. *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, I-5357. ECR, 1991; and Court of Justice. *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, I-1029. ECR, 1996.

[58] Spanish Parliament. Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil. 25 Jul. 1889, https://www.boe.es/eli/es/rd/1889/07/24/(1)/con. Accessed 17 Jun. 2024.

[59] Underlining those problems, see Martí Miravalls, Jaume. "La responsabilidad civil por infracción del Derecho de la Competencia." *Revista CEF Legal*, vol. 225, October 2019, pp. 5–44. http://dx.doi.org/10.51302/ceflegal.2019.9771.

set out by the Representative Actions Directive.[60] Spain has, as of the moment of writing, failed to transpose the Representative Actions Directive in time. Members of Parliament are still drafting the final text to be submitted before both legislative chambers.[61] Therefore, this procedural track will not apply until the transposition is made into law on the national stage.

On top of both alternatives, the Spanish legal regime also establishes an additional possibility for private parties to action against other private parties (i.e., the gatekeepers) for the breach of other laws as grounds demonstrating their liability regarding unfair competition, as established by the Act 3/1991 of Unfair Competition.[62] This course of action is concerned with the artificial advantage derived to an undertaking as a consequence of the breach of the law. In any case, however, the violation must be demonstrated separately before the Commercial Court, as opposed to the Civil Court (ruling on all matters relating to actions deriving from Act 3/1991), so that the latter then interprets whether that breach caused any significant advantage thereof.[63]

Against this background and given that the DMA provides great scope for leeway for "forum shopping" at the EU level, private parties are not likely to seek private redress within the Spanish territory.[64] The two types of private actors that are the most likely to engage in private enforcement are both consumer associations and business users. In light of the procedural pathways to seeking redress, the Spanish legal regime provides narrow grounds in which to sustain their standing.

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[60] European Union. Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC. *OJ*, L 409, 4 Dec. 2020, pp. 1–27. For an extensive analysis of these collective actions, see Hornkohl, Lena and Ribera Martínez, Alba. Collective Actions and the Digital Markets Act: A Bird Without Wings. 30 Nov. 2023, *SSRN*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4637661. Accessed 17 Jun. 2024.

[61] Congreso de los Diputados. Proyecto de Ley Orgánica de medidas en materia de eficiencia del Servicio Público de Justicia y de acciones colectivas para la protección y defensa de los derechos e intereses de los consumidores y usuarios, 22 Mar. 2024, https://www.congreso.es/public_oficiales/L15/CONG/BOCG/A/BOCG-15-A-16-1.PDF#page=1. Accessed 17 Jun. 2024.

[62] Spanish Parliament. Ley, de 10 de enero, de Competencia Desleal. No. 3/1991, 11 Jan. 1991, https://www.boe.es/eli/es/l/1991/01/10/3/con. Accessed 17 Jun. 2024. This possibility was first mentioned by Bueso Guillén, Pedro José. "Mecanismos de aplicación del Reglamento de Mercados Digitales, su aplicación privada y responsabilidad civil de los guardianes de acceso: Una primera aproximación." La responsabilidad civil por servicios de intermediación prestados por plataformas digitales, edited by Esther Hernández Sáinz, Loreto Carmen Mate Satué and María Teresa Alonso Pérez, Colex, 2023, pp. 81–110.

[63] Massaguer Fuentes, José. "Treinta años de Ley de Competencia Desleal." *Actualidad Jurídica Uría Menéndez*, vol. 55, 2021, pp. 64–94. https://www.uria.com/documentos/publicaciones/7434/documento/art03.pdf?id=12262&forceDownload=true.

[64] On this topic, see Margvelashvili, Tamta. "Charting the Course of DMA's Private Enforcement: Unveiling the Forum Shopping Challenge". *European Competition Journal*, 2024, pp. 1–22. https://doi.org/10.1080/17441056.2024.2340863.

According to Article 11 of Act 1/2000, consumer associations may bring actions before the courts in the general interest in two different ways. Either they designate the groups of consumers and users they represent, or they can leave them undefined. In the former case, any legal entity with the objective of protecting consumers and defending the individuals who remain impacted may stand before the national courts. In the latter case, their standing will depend on the fact that they are sufficiently "representative" within the whole range of groups of consumer associations and users and that they are sufficiently recognised by law. In this sense, Article 24 of Decree-Law 1/2007 explicitly references as sufficiently representative those recognised within the Council of Consumers and Users (Consejo de Consumidores y Usuarios).[65] At the moment of writing, only nine consumer associations at the national level are part of the Council, despite that some regions may accept others.[66] Alternatively, the provision also sustains the standing of those groups of users impacted by the same type of conduct even if they lack legal status, based on the fact that they might have been individually affected by it and that the group is the largest part of the broader mass of individuals impacted.

Question 4

As of the moment of writing, no provisions relating to the DMA's private enforcement have been adopted or proposed nor have any amendments to the current Spanish legal system been brought forward. It remains, thus, uncertain what specific courts will be allocated the cases regarding the DMA's private enforcement.

Question 5

As of the moment of writing, the national procedural law does not allow for the intervention of civil society organisations in pending private disputes in support of the public interest.

[65] Spanish Parliament. Real Decreto Legislativo, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias. No. 1/2007, 30 Nov. 2007, https://www.boe.es/eli/es/rdlg/2007/11/16/1/con. Accessed 21 Jun. 2024.

[66] As listed on *Consejo de Consumidores y Usuarios*. Organizaciones, https://consumo-ccu.consumo.gob.es/representacion/organizaciones.asp. Accessed 21 Jun. 2024.

Section 5: General questions

Question 1

The recent DSA implementing legislation in Spain (Royal Decree Law 2/2024) has included several paragraphs in the already extant LSSICE regarding the orders provided for in Arts. 9 and 10 DSA. First of all, they are mentioned in new Art. 7.1 LSSICE, but only to state the obvious: "The orders to take action against illegal content and to provide information provided for in Regulation (EU) 2022/2065, when addressed to intermediary service providers established in another Member State, do not in principle restrict the freedom to provide services."

Second, there is another mention that is a bit troubling, specifically, in Art. 8 LSSICE on "restrictions to the provision of services and intra-EU cooperation procedure." According to new Art. 8.2, "Orders to provide specific information on one or more individual recipients of an intermediary service shall be made under the terms provided for in Article 10 of Regulation (EU) 2022/2065, irrespective of the place of establishment of the service." This is the main reference made by the implementing legislation to the "Orders to provide information" of Art. 10 DSA. To the contrary, there is no specific mention in this provision to the "Orders to act against illegal content" of Art. 9 DSA. It is true that, before the recent implementing legislation, Art. 8 LSSICE already provided for a mechanism to act against illegal content. That mechanism is explained in a detailed way in paragraphs 1 to 6 of Art. 8. Indeed, in order to protect several principles (the safeguarding of public order, criminal investigation, public security and national defence; the protection of public health or the protection of natural or legal persons having the status of consumers or users, including when acting as investors; respect for the dignity of the individual and the principle of non-discrimination on grounds of race, sex, religion, opinion, nationality, disability or any other personal or social circumstance; the protection of youth and children; the safeguarding of intellectual property rights), Art. 8.1 LSSICE provided for the possibility to restrict the provision of services, on the condition of respect for fundamental rights and judicial oversight. Art. 8.2 LSSICE even allowed public authorities to request to services providers the transfer of personal data. However, as demonstrated by the intra-EU cooperation procedure provided for in Art. 8.4 LSSICE, this mechanism is based on Art. 3(4)(a) of Directive 2000/31/EC, that is, it is based on a restriction to the provision of services imposed by national authorities as an exception to the freedom to provide services' principle. In other words, the Spanish legislator has incorporated Art. 10 DSA in a wrong way, as Art. 8 LSSICE is meant for a different purpose, specifically, to suspend the freedom to provide services.

Therefore, there is the question of how the "orders to act against illegal content" and the "orders to provide information" have been rightly incorporated as such in the implementing legislation. Turning to the Section on the "Obligations of providers," Art. 11 LSSICE has been slightly modified. Paragraphs 1 and 2 of this provision have been blended to incorporate Art. 9 DSA. The resulting Art. 11.1 LSSICE states: "The competent bodies, in the exercise of the powers legally conferred on them, may issue orders to intermediary service providers to cease the provision of an information society service or to remove illegal content. Orders issued against one or more specific items of illegal content, irrespective of the place of establishment of the intermediary service provider, shall be in accordance with Article 9 of Regulation (EU) 2022/2065." The same caveat regarding the protection of fundamental rights and judicial oversight has been preserved in the resulting legislation, including respect for the proportionality principle (Art. 11.2 to 4 LSSICE).

However, this implementing legislation fails to incorporate in a right way the spirit of Arts. 9 and 10 DSA. The incorporation has been made using the "referral" technique, but this referral is included in the wrong place within the national legislation. Even if Art. 11.1 LSSICE includes a proper mention to Art. 9 DSA, the former provision also refers to the possibility to cease the provision of services, as is the case with Art. 8.2 LSSICE regarding Art. 10 DSA. Therefore, neither Art. 8.2 nor Art. 11.1 LSSICE properly incorporate the regulation provided in Arts. 9 and 10 DSA as a mechanism to harmonize the orders among EU Member States.

The Spanish implementing legislation, if it finally becomes law in force, has not incorporated any specific reference to the injunctions set out in Articles 4(3), 5(2) and 6(4) DSA. Indeed, new Art. 13.2 LSSICE states that "The liability of intermediary service providers shall be governed in accordance with Regulation (EU) 2022/2065." This referral to the liability regime set out in the DSA is even more complete if we consider that several provisions of the extant LSSICE have been derogated. Those derogated provisions are Arts. 14, 15, 16 and 17. Before their elimination, those derogated provisions regulated, respectively, the liability of network operators and access providers; the liability of service providers who make temporary copies of data requested by users; the liability of providers of data hosting or storage services; and the liability of service providers who provide links to content or search tools. It seems that the national legislator has opted for the direct applicability of the DSA in Spain, so that national authorities will not have the chance to apply national legislation on liability but instead will have to apply directly the DSA.

The implementing legislation (repealed Royal Decree 4/2024) has modified Art. 9 bis Law 3/2013 which now vests powers on the CNMC to transmit a copy of the orders to act against illegal content or the delivery of information received by it to other Digital Service Coordinators, *ex* Articles 9 and 10 DSA.

Question 2

To our knowledge, there are no services of legal representatives according to Article 13 DSA being provided in Spain.

Question 3

After DSA implementing legislation, the CNMC has been vested the power to process the complaints filed against providers of intermediary services via Royal Decree 4/2024, and no further rules have been implemented at the moment. As stated before, the competence attribution does not hold any legal value yet, although it is expected that it will be law in force very soon.

Question 4

No political controversy has arisen during the implementation of the DSA/DMA at the national level.

Question 5

The CNMC was vested with powers to: (i) certify out-of-court dispute resolution bodies in the Spanish territory and elaborate a biannual report regarding the functioning of such bodies in line with Article 21 DSA; and (ii) grant, suspend and withdraw the condition of a trusted flagger, ex Article 22 DSA. The measures were introduced via the repealed Royal Decree Law 4/2024, which does not hold any legal value at the moment of writing.

Question 6

With regards to the DMA, academics have highlighted the implementation of the regulation at the national level may entail problems due to the lack of a clear reference to any rule relating to how private enforcement should work

in practice.[67] Moreover, both academics and practitioners have signalled the risks arising from the European Commission's role as a sole enforcer vis-à-vis the interaction of the NCA's application of competition law rules. The potential overlaps with the merger control regime are also a source of preoccupation amongst practitioners.[68]

[67] Velasco San Pedro, Luis Antonio. "El papel del Derecho de la Competencia en la era digital." *Revista de Estudios Europeos*, no. 78, july-december 2021, pp. 93–110. https://dialnet.unirioja.es/descarga/articulo/7980449.pdf

[68] On both these notes, see, for example, Herguera, Íñigo. "Competencia y regulación de (algunas) plataformas digitales en la UE". *FEDEA*, no. 2021/10, jun. 2021, pp. 1–37. https://dialnet.unirioja.es/servlet/articulo?codigo=7963706&orden=0&info=link; and *Miguel Troncoso Ferrer.* La Ley de Mercados Digitales (DMA), cuestiones abiertas. 22 Feb. 2021, https://www.ga-p.com/en/blog/la-ley-de-servicios-digitales-dma-cuestiones-abiertas/. Accessed 21 Jun. 2024.

Sweden

*Max Hjärtström**

Section 1: National institutional set-up

Question 1

Article 49 of the Digital Services Act (DSA) provides flexibility for Member States to determine how tasks should be allocated between the competent authorities.

The material obligations set forth in the DSA primarily pertain to consumer protection, product safety, marketing, as well as freedom of expression and other fundamental rights. The Swedish government and legislator have hence considered it important and valuable to utilise the knowledge and expertise of pre-existing authorities within their respective areas of responsibility.[1] The overarching objective of the institutional implementation of the DSA has been to ensure that supervisory and enforcement responsibilities are allocated to authorities with relevant expertise[2] – a *functional* allocation of competences. The initial Swedish Government Official Report concluded that no single Swedish authority currently holds responsibility for all areas covered by the DSA. Instead, several authorities are tasked with duties within their relevant areas. To leverage existing expertise across these authorities, a model with multiple competent authorities was chosen.[3]

The enforcement of the DSA in Sweden is shared between three authorities:

(i) *The Swedish Post and Telecom Authority* (PTS), which has been designated Digital Services Coordinator (DSC);
(ii) *The Swedish Consumer Authority* (KOV), and;
(iii) *The Swedish Agency for the Media* (Mediemyndigheten).

Whilst the DSA enforcement responsibilities are, in principle, integrated into the existing institutional framework, certain authorities have experienced an expansion of their competences. For instance, the PTS, as the DSC, has been granted additional supervisory and enforcement powers.[4]

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[1] Se Prop. 2023/24:160; lag med kompletterande bestämmelser till EU:s förordning om digitala tjänster; Lag (2024:954) med kompletterande bestämmelser till EU:s förordning om digitala tjänster; Förordning (2024:958) med kompletterande bestämmelser till EU:s förordning om digitala tjänster.

[2] SOU 2023:2 En inre marknad för digitala tjänster – ansvarsfördelning mellan myndigheter, 69.

[3] SOU 2023:2 (n 2), 66.

[4] SOU 2023:2 (n 2), 19.

Following a period of implementation and enforcement of the DSA and related Union acts, the division of competencies among the authorities should be reevaluated. This assessment should encompass the allocation of resources and explore alternative funding mechanisms. The Inquiry proposes that such a reassessment, including a review of responsibilities, resource needs, and funding arrangements, be conducted no later than February 2027.[5]

1.1. The Swedish Post and Telecom Authority (PTS)

PTS has been assigned as DSG according to Article 49 of the DSA.[6] In this capacity, PTS is responsible for enforcement and supervision in all areas not explicitly assigned to another competent authority. These responsibilities include oversight of obligations related to the organisation of providers of intermediary services, information and transparency requirements, and the reporting of suspected criminal offenses and measures for crime prevention and protection according to the DSA.

When the PTS was proposed as the responsible authority, it was highlighted that PTS already is tasked with supervisory powers under Swedish laws, EU regulations, and its own regulatory decisions in areas such as postal services, the Swedish top-level domain (.se), competition, privacy, radio interference, operational disruptions and outages, security protection, critical services in the digital infrastructure sector, digital services, and market surveillance of radio equipment.[7] Moreover, under the Swedish Electronic Communications Act (LEK), PTS has established extensive contacts with providers of intermediary services classified as "mere conduit" under the DSA.[8] These existing relationships were seen as integral to its new responsibilities under the DSA.

Additionally, PTS brings expertise in international collaboration and coordination, particularly within the framework of the Body of European Regulators for Electronic Communications (BEREC), in which the Commission is an active participant.[9] This experience was considered to strengthen PTS's capacity to fulfill its role as DSC under the DSA.

1.2 The Swedish Consumer Authority

KOV has been entrusted with responsibilities under the Digital Services Act (DSA) that align with its core responsibility for consumer protection. These responsibilities include oversight of companies' marketing practices, the terms of business-to-consumer contracts, and specific market surveillance activities.

[5] Ibidem, 20.
[6] See Förordning (2007:951) med instruktion för Post- och telestyrelsen.
[7] SOU 2023:2 (n 2), 62.
[8] Ibidem.
[9] Ibidem, 99.

KOV is charged with the supervision and enforcement of DSA provisions that directly or indirectly pertain to consumer protection.[10] These responsibilities encompass, but are not limited to: advertising for commercial purposes addressed to consumers; terms and conditions in business-to-consumer relationships; product safety and provisions and related provisions aimed at consumer protection.[11]

Thus, the scope of KOV's new powers is limited to cases involving infringements of the DSA that result in direct or indirect harm to consumers. Relevant DSA articles in this context include Articles 25, 26.1, 26.3, 27, 28.2.[12]

In addition to its supervisory and enforcement responsibilities, KOV will handle questions and matters from the European Commission (Articles 9–42) and the European Board for Digital Services (Articles 44, 45, 48). Its duties align with national supervision rules (Articles 11–32) and its regulatory responsibilities. The agency will also assist the Commission upon request (Articles 64, 66, 67, 69, 72).[13]

1.3 Swedish Agency for the Media

The Swedish Agency for the Media is, according to its mandate, tasked with promoting freedom of expression within its area of operation and enhancing opportunities for diversity and accessibility in press, radio, and television.[14] The Agency is competent for matters related to registration, permits, fees, and supervision regarding radio, television, and video-sharing platforms, provided these tasks are not assigned to the government or another authority. Additionally, the agency also oversees publishing certificates and press and media support.[15]

In relation to the provisions of the DSA, the Agency's role in safeguarding freedom of expression and promoting diversity in press, radio, and television was highlighted as particularly relevant for its role under the DSA. This includes supervisory duties regarding regulations on, among other things, advertising and the protection of children, particularly with respect to video-sharing platforms.[16]

According to the above-mentioned functional division powers, the Swedish Agency for the Media has been assigned supervisory and enforcement powers

[10] Section 5 of Förordning (2024:958) (n 1).
[11] SOU 2023:2 (n 2), 14.
[12] Ibidem, 120.
[13] Section 7 of Förordning (2024:958) (n 1).
[14] Section 1 of Förordning (2023:844) med instruktion för Mediemyndigheten.
[15] Se SOU 2023:2 (n 2), 14.
[16] Ibidem, 61.

for provisions concerning freedom of expression, media plurality, and other fundamental freedoms and human rights. These responsibilities extend to advertising for non-commercial purposes; advertising for commercial purposes addressing other recipients than consumer; dark patterns affecting others than consumers; recommender systems that do not affect consumers; and certain provisions relating to minors. The relevant provisions of the DSA are Articles 14, 25, 26.1 26.2, 26.3, 28, 28.1 and 28.2.[17]

The agency is further responsible for addressing questions and handling cases from the European Commission (under Articles 11–42) and the European Board for Digital Services (under Articles 44, 45, and 48). Its responsibilities align with the national oversight and compliance framework outlined in Articles 9–32 and its other areas of expertise as defined in this regulation. The authority will also assist the European Commission upon request, according to Articles 64, 66, 67, 69, and 72.[18]

Question 2

2.1 Rules adopted regarding supervisory, investigative and enforcement powers of competent authorities under the DSA

Whilst a functional approach has been adopted for the allocation of competences, two categories of additional powers have been conferred upon the competent authorities under the DSA.

Firstly, and evidently, certain powers are directly conferred on the authorities by the DSA itself. In particular, Articles 51.1-3 of the DSA grant specific powers to these authorities. As EU regulations are directly applicable and cannot not be transposed into national legislation, these provisions should not be incorporated into Swedish law.[19] However, supplementary national regulation is required to address optional provisions within the DSA regarding the powers of the authorities.

Secondly, to ensure effective enforcement, the Swedish complementary legislation to the DSA (the Complementary Act) includes provisions that supplement the power of competent authorities.[20] These supplementary provisions relate to coercive measures and other powers that may impact individual rights and freedoms. In Swedish law, such limitations may only be imposed under spe-

[17] Section 6 of Förordning (2024:958) (n 1).
[18] Section 7 of Förordning (2024:958) (n1).
[19] Prop. 2023/24:160 (n 1), 39.
[20] Chapter 3 of Lag (2024:954) (n 1).

cific conditions and must be established by law, in accordance with Chapter 2, Sections 6, 20, and 21 of the Instrument of Government, Chapter 8, Section 2 of the Instrument of Government, and Article 8 of the European Convention on Human Rights.

In summary, the preparatory works concluded that procedural and implementation provisions are required in Swedish law. However, there was no need to introduce provisions already in place to safeguard individuals' rights and freedoms during case management by Swedish authorities and administrative courts. Such protections are already provided in the Instrument of Government, the Administrative Procedure Act (2017:900), the Administrative Court Procedure Act (1971:291), and the Public Access to Information and Secrecy Act (2009:400, "OSL"). For instance, the principle of proportionality, as outlined in Section 5, third paragraph, of the Administrative Procedure Act, applies to all administrative activities. This principle requires that no measures in the public interest may be taken without considering the opposing interests of individuals.[21]

Nonetheless, the introduction of additional procedural rules to safeguard individual rights and freedoms may be justified in specific instances where the principle of proportionality requires further specification for the relevant procedure, which was the case, for instance, regarding inspections under the DMA.[22]

The new powers granted to the authorities are outlined in Chapter 3 of the Complementary Act.

Section 1 of the Act delineates, in its first point, the scope of enforcement and the powers of the DSC and any other supervisory authorities. The enforcement includes: the provisions of the DSA; legal acts adopted by the Commission under Articles 15.3, 24.6, or 87 of the DSA; the Swedish Complementary Act; Swedish regulations issued in connection with the Complementary Act; and commitments made binding by the supervisory authority under the DSA or the Complementary Act.

The second point outlines, in general terms, the powers of the supervisory authorities when exercising enforcement under the first section as specified in the DSA, the Complementary Act, and in regulations issued in connection with the Act.

Section 2 of the Act defined the powers granted to enforcement authorities under the DSA and the Complementary Act.

[21] Prop. 2024/24:260 (n 1), 40.
[22] Ibidem.

Initially, it identifies the powers directly conferred upon enforcement authorities under Article 51 of the DSA. These provisions are directly applicable and do not grant Member States discretion regarding the type of authority – whether a supervisory authority or a court – or the specific powers to be entrusted.

The section further outlines the powers conferred on supervisory authorities under the Complementary Act and pursuant to Article 51 of the DSA Regulation. These powers include instances where the DSA allows Member States to either directly confer certain powers upon a supervisory authority or authorise it to seek decisions from other authorities or courts regarding specific investigatory measures. The list also includes complementary powers necessary to ensure that the enforcement authority can exercise the powers established by the DSA. Examples include the power to require certain individuals to appear for questioning and to seal business premises during inspections.[23] The remaining points in the list refer directly to the powers granted to authorities under Articles 51.2 and 51.3 of the Digital Services Regulation.

2.2 How many staff are dedicated to DSA enforcement

Unfortunately, the author has not been able to collect this data. However, the Official Government Report's assessment estimated that the proposals would initially require funding of approximately SEK 24 million per year, primarily for recruitment, capacity building, and training.[24]

Question 3

To the best of the author's knowledge, initial experiences are limited, if any, as the law came into force in December 2024.

Question 4

The Swedish Competition Authority (KKV) has not been granted the authority to initiate and conduct its own investigations into potential non-compliance under Article 38(7) of the Digital Markets Act (DMA). Although the initial government report proposed granting such powers to the KKV, and referral bodies were generally supportive of this proposal, the Swedish government decided not to suggest to Parliament to implement this possibility at this stage.

[23] Prop. 2024/24:260 (n 1), 116-118.
[24] SOU 2023:2 (n 2), 108.

The primary rationale for this decision was that the DMA represents a new regulatory framework, and it remains uncertain how often investigations into Swedish-specific circumstances will be necessary, apart from those conducted by the European Commission. Instead, the KKV is considered already adequately equipped to support the Commission by assisting with investigations in Sweden and conducting investigations at the Commission's request.[25]

However, this new assistance role of the KKV required amendments to the Swedish Competition Act (2008:579), despite the regulation being directly applicable. These amendments include provisions for cooperation with other authorities. For instance, the KKV may request assistance from the Swedish Enforcement Authority (Kronofogdemyndigheten) to facilitate on-site investigations conducted by the Commission under the DMA or the EU Regulation on Foreign Subsidies.[26]

Additionally, the implementation of the DMA has led to legislative changes concerning the OSL (2009:400) to address confidentiality requirements.
In sum, the Swedish government has adopted a minimalistic approach, relying on existing cooperation mechanisms, such as the European Competition Network (ECN) and the High-Level Group for the Digital Markets Act, to ensure compliance and effective enforcement under the DMA.

Question 5

As previously noted, no additional rules have been adopted in this regard. From a resource allocation perspective, it remains unclear whether the enforcement of the DMA has been adequately accounted for. At present, a single unit comprising 16 agents is tasked with holding "strategic responsibility" for the DMA. Thus far, only a limited number of complaints have been received, all of which have been handled by the complaints unit at the KKV. Of these, only one was deemed substantiated and subsequently referred to the Commission.

Question 6

The KKV has undertaken extensive informational efforts to enhance awareness of the implications of the new regulatory framework under the DMA.[27]

[25] Lagrådsremiss, Kompletterande bestämmelser till nya unionsregler på konkurrensområdet, 27-28. Available at: https://www.regeringen.se/contentassets/75aac89915a94ed6b618bce7686a4ed5/kompletterande-bestammelser-till-nya-unionsregler-pa-konkurrensomradet.pdf

[26] See Chapter 5, Section 17.4 of Konkurrenslagen (2008:579).

[27] See information on the Authority's web site: https://www.konkurrensverket.se/konkurrens/lagar-och-regler/forordningen-om-digitala-marknader/

These efforts include updates to the Authority's website and the dissemination of information to the public through various channels.

The KKV has received inquiries and complaints from business organisations seeking to explore potential opportunities within the new regulatory framework. Additionally, the KKV received a tip concerning a gatekeeper, which was reviewed in consultation with the Commission and subsequently forwarded to the Commission. The Commission has expressed its commitment to collaboration and emphasised the importance of erring on the side of reporting more rather than less.

Finally, the KKV has underscored that Article 27 of the DMA grants the Authority full discretion to forward cases to the Commission. Whilst the KKV is not obligated to pursue follow-up actions on forwarded cases, it is required to report instances where there is reasonable suspicion of non-compliance with the provisions of the DMA.

Section 2: Use of national legislative leeway under the DMA/DSA

Question 1

The potential pre-emption effects of the DSA in Sweden are limited, with only two identified cases.[28] The affected legislation includes the BBS Act (1998:112) and the E-Commerce Act (2002:562).

Firstly, the BBS Act imposes criminal liability on providers of electronic bulletin boards (BBS) and those responsible for overseeing the service on behalf of the provider. Notably, the Act does not apply to services protected by the Fundamental Law on Freedom of Expression. A conflict was identified between Section 4 of the BBS Act, which imposes a duty of oversight on providers, and Article 8 of the DSA, which prohibits the imposition of general obligations for monitoring or active fact-finding on intermediary services.[29] This conflict would have affected undertakings subject to both the BBS Act and the DSA.

To address this issue, an amendment was introduced to the BBS Act. The amendment exempts intermediary services falling within the scope of the DSA from the oversight requirement, which had previously obligated providers to take reasonable measures to remove or prevent the further dissemination of certain messages.[30]

[28] Prop. 2024/24:260 (n 1), 101 ff.

[29] SOU 2023:39 En inre marknad för digitala tjänster – kompletteringar och ändringar i svensk rätt, 182.

[30] See Prop. 2024/24:260 (n 1), 104-107.

Secondly, the E-Commerce Act implements most provisions of Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, particularly electronic commerce, within the internal market (the "E-Commerce Directive"). Pursuant to Article 89 of the DSA, Articles 12–15 of the E-Commerce Directive have been repealed. References to Articles 12–15 in the Directive are now to be interpreted as references to Articles 4, 5, 6, and 8 of the DSA, respectively. Sections 16–18 of the E-Commerce Act have also been repealed.

Question 2

Yes, although no additional changes have been made beyond those outlined in the answer to the question above.

Question 3

To the knowledge of the author, no legislative acts specifically related to DSA have been adopted in Sweden. However, issues such as child exploitation through social media and related matters have been discussed in the Swedish Parliament.

Question 4

No pre-emption effects have been identified in this context. However, an upcoming government report ("new competition tools for well-functioning markets")[31] is expected to be published soon and will need to consider the implications of the DMA.

Question 5

No such legislative acts have been identified at this time.

Section 3: Vertical and horizontal public enforcement-related cooperation under DSA/DMA

Question 1

The cooperation between national authorities is based both on national legislation and the provisions of the DSA. As the DSA is directly applicable, it can be enforced by public authorities without requiring additional national legal provisions.

[31] See Dir.2023:136.

In Sweden, the DSC, which is the PTS, is tasked with leading a coordination mechanism comprising the relevant competent authorities. A provision establishing this coordination function is included in the Swedish Complementary Regulation to the DSA.[32] Additionally, the Swedish Complementary Regulation provides that the competent authorities must provide the DSC with information and support necessary for preparing the activity reports referred to in the DSA. The overarching goal of this mechanism is to ensure effective and consistent supervision and compliance monitoring. Each authority, within its respective area of responsibility, contributes to achieving this objective while maintaining full independence and decision-making autonomy.

Question 2

No specific measures have been adopted concerning the role of Swedish courts in relation to the DSA.

Question 3

Sweden does not have any designated gatekeepers under the DMA. However, there are major tech firms operating in Sweden, such as Spotify and several larger game developers. Larger tech companies may submit tips, and game developers who conduct transactions through platforms like the App Store could also become relevant in this context.

Section 4: Private enforcement of DMA/DSA

Question 1

No, not at this time.

Question 2

The author of the report has not identified any particularly controversial topics but notes that private redress mechanisms for enforcing the DSA are likely to be very limited.

[32] Section 4 of Förordning (2024:958) (n 1).

Question 3

See above. However, private enforcement of the DMA is expected to align with the enforcement of competition law, an area in which Sweden has limited experience. It is likely that competitors will be the primary parties engaging in such actions. The principles of equivalence and effectiveness will apply.

Question 4

No.

Question 5

Yes, third parties may intervene in civil cases.[33] The cost responsibility for submitting an intervention application is not explicitly regulated by law. However, it should be governed by the general procedural rules stipulating that the losing party bears the costs.

Section 5: General questions

Question 1

The Complementary Act provides that an injunction to act against illegal content, as referred to in Article 9 of the EU Digital Services Regulation, must meet the requirements set forth in Article 9.2 of the Regulation.

Injunctions to act against illegal content, as referred to in Article 9 of the EU Digital Services Regulation, have been formulated in accordance with the requirements of Article 9.2. The Complementary Act includes an informative provision clarifying that procedural rules following such injunctions are found in Article 9 of the Regulation.

Under the Complementary Act, decisions made by supervisory authorities may be appealed in the following cases: decisions under the EU Digital Services Regulation; legal acts adopted pursuant to the Regulation; the complementary act; or regulations issued in connection with the Act. Appeals to the Administrative Court of Appeal require leave to appeal.[34]

[33] Chapter 14, section 10 of The Swedish Code of Judicial Procedure (1942:740).
[34] Chapter 4 of Lag (2024:954).

Question 2

No.

Question 3

No.

Question 4

The adoption of national implementation measures was uncontroversial. As previously mentioned, only one referral body expressed concerns regarding the potential risks of granting the KKV new powers in relation to the DMA, citing the untested nature of the legal framework. Apart from this, there were no parliamentary speakers or debates during the implementation of the DMA or the DSA into Swedish law.

Question 5

The initial government report concluded that it is not currently justified to propose the establishment of an out-of-court dispute resolution body in Sweden under Article 21.6 of the DSA. The report recommended that an evaluation should conducted after the Regulation has been in effect for a period, followed by a renewed assessment of the potential benefits of such a body in relation to its resource requirements.[35]

The investigation considered three options for establishing an out-of-court dispute resolution body: (i) a body within an existing authority; (ii) an expanded mandate for an existing dispute resolution body; (iii) and the creation of an entirely new dispute resolution body.

The investigation concluded that each option would be resource intensive. At this stage, the anticipated benefits must be weighed against the cost-effectiveness of such an initiative at this stage.[36] The investigation also highlighted significant uncertainties regarding the number, scope, nature, subject matter, and party positions of future disputes. The same applies to procedural rules for dispute resolution. Further experience is needed.[37]

[35] SOU 2023:39 (n 29), 169, Prop. 2024/24:260 (n 1), 99.
[36] SOU 2023:39 (n 29), 174.
[37] Ibidem, 174–175.

Question 6

The academic discourse in Sweden has largely mirrored European trends, focusing on issues such as private enforcement and the interplay between the DMA and the antitrust legal framework.[38]

[38] See e.g., Daniel Pettersson, "Sektorspecifik förhandsreglering av digitala marknader – ett komplement eller substitut till konkurrensrättslig tillsyn?" (2022) (4) Europarättsligtidsskrift, p. 533; Magnus Strand,

"Private Enforcement Under the Digital Markets Act: Rights and Remedies Revisited" (2024) 7(2) Nordic Journal of European Law, p. 120.

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