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REGULATING DIGITAL PLATFORMS: WOULD THE DSA AND THE DMA WORK COHERENTLY?

Abstract

The Digital Services Act (the DSA) and the Digital Markets Act (the DMA) were proposed as part of the Digital Services Package with the goal of creating a more open, safer and fairer digital space in the European Union. To do so, both proposals establish new sets of horizontally applicable rules. These rules mostly consist of obligations that digital platforms shall fulfil. In this respect, both initiatives reflect a change in the approach adopted by the European legislators in regulating the digital world: establishing rather stringent and detailed rules and obligations for platforms to follow to create a fairer and safer digital space instead of leaving them to be the self-regulators as they have since been. In pursuit of this overarching and arguably ambitious goal, the DSA and the DMA are aimed at tackling different issues emerging from the digital world by focusing on different platforms. The DMA's focus is on gatekeeper online platforms that are considered to have a major economic and societal impact on the market. Their entrenched and durable position in the digital market is considered to negatively affect competition and fairness; hence the DMA sets out new codes of conduct for gatekeepers to satisfy. On the other hand, the DSA undertakes to update the law on intermediaries' liability from illegal content made available by third parties on their platforms, by replacing the existing liability exemptions with a more wide-ranging legal framework. The DSA's focus is on service providers of different sizes and services, namely intermediaries, hosting intermediaries including online platforms, online platforms and very large online platforms. By imposing asymmetric obligations on these certain platforms, the DSA aims to limit the availability of illegal content and to protect fundamental rights, whereas the DMA's objective is to establish a level playing field to foster innovation, growth as well as competitiveness in the digital market. The DSA recognises platforms as important and responsible actors in tackling online infringements given their strong position and infrastructural advantages. Hence, it obliges them to comply with the obligations established according to their sizes and the type of services provided. These obligations can be specified as transparency and accountability obligations. In the same vein, the DMA obliges gatekeepers to comply with more restrictive rules as they are considered to have a major impact and control over digital markets. The obligations established by the DMA are ex-ante measures concerning competition practices/unfair competition.

Nevertheless, the fact that the two analysed proposals focus on different platforms and pursue different direct goals does not mean that a service provider could not be subjected to the obligations of the DSA and the DMA at the same time. When a very large online platform is also a core service provider and qualifies as a gatekeeper within the meaning of the DMA, it might be subjected to the provisions of both

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Acts. This brings the question of how effectively and coherently the two Acts would apply in practice. The proposals explicitly state that both Acts complement each other and should work in coherence. However, the question of whether this goal is indeed achieved cannot be addressed without undertaking a detailed examination of the rules in question. With this in mind, the paper seeks to assess whether the DSA and the DMA would work coherently.

JEL CLASSIFICATION: K13, K2, K20, K10

SUMMARY

1. Introduction – 2. Regulating Digital Platforms: Imposing Different Obligations for Different Purposes – 3. Potential Compatibility – 4. Concluding Remarks

1. Introduction

The proposals of the Digital Services Act (the DSA)¹ and the Digital Markets Act (the DMA)² are the main legislative initiatives of the European Commission's digital strategy, namely, the Digital Services Package, which was introduced in December 2020. The main purpose of this agenda is to regulate digital services in the European Union (EU).³ In pursuit of this arguably ambitious goal, these two acts are aimed at dealing with different issues. The DSA is proposed to update the law on intermediaries' liability from illegal content made available by third parties on their platforms, and accordingly to replace the E-Commerce Directive 2000/31 (the ECD).⁴ The DMA on the other hand, focuses on certain actors in digital markets to create a level playing field to foster innovation, growth as well as competitiveness in the digital economy.

The DSA proposal establishes the rules to limit the availability of illegal content and to protect fundamental rights. In doing so, it does not fundamentally change the current rules on intermediaries' liability that are established by the ECD. As with the ECD, the DSA's approach in dealing with intermediaries' liability is to provide safe harbour rules for certain activities of intermediaries.⁵ These rules briefly stipulate that internet

¹ Commission, 'Proposal for a Regulation on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC' COM(2020)825 final (the DSA).

² Commission, 'Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act)' COM (2020) 842 final (the DMA).

³ For an analysis of their impact on the European Integration Policy, see Annegret Bendiek, 'The Impact of the Digital Service Act (DSA) and Digital Markets Act (DMA) on European Integration Policy: Digital Market Regulation as One of Five Major Digital Policy Projects of the EU', Research Division EU, Working Paper no. 02 (2021) ch 3.

⁴ Council Directive (EC) 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L178/1 (the ECD).

⁵ Those are mere conduit, caching and hosting intermediaries, as it is established in arts 12–15 of the ECD. The DSA does not fundamentally revise these rules.

intermediaries which provide mere conduit, caching and hosting services would be granted immunity from liability that might arise from third parties' illegal content which is made available on their platforms unless they contribute to the dissemination of illegal content themselves.⁶ While maintaining the immunity regime for intermediaries, the DSA, different from the ECD, importantly acknowledges their strong position and infrastructural advantages in tackling online infringements.⁷ Hence, it proposes new sets of due diligence obligations, some of which appear as ex-ante obligations, for digital services to fulfil.

More importantly, different obligations are proposed for digital platforms depending on their sizes and the nature of their services. Accordingly, the obligations are divided into four categories: obligations for all digital services; hosting intermediaries; online platforms⁸ and very large online platforms (VLOPs). Put simply, all digital services are required to establish a single point of contact or designate a legal representative if they do not have establishments within the EU to facilitate communication with relevant authorities (Articles 10–11); to include the relevant and necessary information related to the implemented measures, imposed restrictions as well as the procedures followed in the terms and conditions (Article 12) and to publish annual reports on their enforcement measures, more specifically on any content moderation they engaged in (Article 13). Further to these obligations of a general nature, hosting services are required to implement a notice-and-action mechanism in their services to limit the availability of illegal content (Article 14). In addition, transparency obligations are imposed on hosting intermediaries concerning their decisions on removing or blocking content (Article 15). The Article concerned requires hosting intermediaries to inform the recipient about the decision taken and to provide a clear and specific statement of reasons for that decision. In addition to these, online platforms (providers of hosting services that also disseminate information)⁹ have further obligations imposed on them (Articles 16–24). Briefly, they are required to make an internal complaint-handling system available on their platforms for their recipients to lodge complaints against the decisions taken by online platforms about the illegal content as well as to engage with out-of-court dispute settlement bodies if the recipient chooses to resolve the dispute

⁶ The immunity rules established in arts 3–5 of the DSA are almost a verbatim copy of the ECD's immunity rules.

⁷ Buri and van Hoboken argue that the imposition of accountability obligations might actually entrench the dominant position of the intermediaries although the exact opposite is aimed with such obligations. Ilaria Buri and Joris van Hoboken, 'The DSA Proposal's Impact on Digital Dominance', in Heiko Richter, Marlene Straub and Erik Tuchtfield (eds), *To Break Up or Regulate Big Tech? Avenues to Constrain Private Power in the DSA/DMA Package* (2021) Max Planck Institute for Innovation and Competition Research Paper No 21–25, 10 <<https://ssrn.com/abstract=3932809>> accessed 29 October 2022.

⁸ Art 2(h) DSA.

⁹ *ibid.*

that way. Besides, they are obliged to fulfil different information and transparency obligations, such as reporting obligations related to online advertising or implemented measures and procedures for illegal content. Finally, online platforms that have more than 45 million recipients are considered separately. These platforms are designated as VLOPs and they have further obligations imposed on them (Articles 25–33). These obligations briefly require VLOPs to conduct systematic risk assessments on the operation and the use of their services and to implement appropriate mitigation measures accordingly; to appoint a complaint officer to monitor their compliance with the obligations; to deploy recommender systems or display online advertising on their online interface in a transparent manner, and to fulfil additional reporting obligations.

A similar approach is adopted in the DMA. In creating a fair and innovative level playing field for digital services, the DMA differentiates the platforms according to their sizes as well as their presumed impact within the market. Then, the obligations are proposed to set out for the platforms which qualify as gatekeepers. A gatekeeper is defined as a provider of core services and those services are specified as follows:

*'(a) online intermediation services, (b) online search engines, (c) online social networking services, (d) video-sharing platform services, (e) number-independent interpersonal communication services, (f) operating systems, (g) cloud computing services, (h) advertising services, including any advertising networks, advertising exchanges, and any other advertising intermediation services, provided by a provider of any of the core platform services listed in points (a) to (g).'*¹⁰

It follows that providers of services other than these are exempted from the DMA's scope.

To be designated as a gatekeeper, however, a provider of core services shall also fulfil certain qualitative and quantitative criteria established by the DMA. Although these will be assessed later in detail, one of the quantitative criteria should be considered here to demonstrate the possible interaction between the DSA and the DMA. According to proposed Article 3(2)(b) DMA, a provider of core platform services is presumed to satisfy one of the qualitative criteria,¹¹ if a core platform service 'has more than 45 million monthly active end users established or located in the Union and more than 10.000 yearly active business users established in the Union in the last financial year'.¹² It follows that a core platform service that has more than 45 million monthly active end users would qualify as a gatekeeper under the DMA, whilst it could also be designated

¹⁰ Art 2 DMA.

¹¹ Art 3(1)(b) DMA: 'it operates a core platform service which serves as an important gateway for business users to reach end user.'

¹² This, however, is a rebuttable presumption, as stated.

as a VLOP under the DSA. Therefore, it would be subject to the different obligations that are imposed by both the DSA and the DMA.

The proposed DMA introduces new sets of rules for gatekeepers to comply with, as they are considered to have a major impact and control over the digital market and almost a regulatory power over the market. To create a level playing for all sizes of platforms and to protect competition, gatekeepers have ex-ante obligations imposed on them. These obligations are stipulated by Articles 5 and 6. These two sets of obligations are differentiated from each other as the obligations set out by Article 6 are 'susceptible of being further specified',¹³ while Article 5 obligations are 'self-executing', although these all are directly applicable. These articles introduce prohibitions as well as rules to be followed by gatekeepers, which are aimed at providing fairness, protecting contestability, and striking a balance between the interests of the parties involved such as end users, business owners, and digital platforms other than gatekeepers. Briefly, the obligations are as follows: the obligation not to combine personal data across the services, unless consent is given by a user (Article 5(a)); to allow business users to offer the same products or services to end users (Article 5(b)) as well as to allow them to promote offers to end users acquired via the core platform service and to conclude contracts with these end users (Article 5(c)); to provide advertisers and publishers with information concerning advertising services provided by the gatekeeper upon request (Article 5(g)); not to use private data generated through their business users' activities in competition with them (Article 6(1)(a)); not to restrict end users to switch between and subscribe to different software applications (Article 6(1)(e) as well as to allow them to install and use third-party software obligations (Article 6(1)(c)).

Against the general framework provided above, it is evident that the DSA and the DMA took on the task of enhancing different aspects of the digital world. That being said, and as underlined in the Digital Services Package, the Acts are also intended to work coherently. This begs the question of their coherence and compatibility with one another. Accordingly, whether these legislative initiatives indeed would work in coherence is the question that this paper aims to address. To do so, it first sets out in more detail what the proposals entail for online platforms. Second, and more important, it seeks to identify the interplay between the Acts and the obligations similar in nature to assess the compatibility and coherence of the two analysed proposals.

¹³ Although article 6 obligations are 'susceptible of being further specified', recital 58 DMA explains that the Commission might specify the measures for the gatekeeper in certain cases and if a dialogue with the gatekeeper concerned indicates to do so. However, such a cooperation between the Commission and a gatekeeper (a dialogue) is not a condition for the application of article 6 obligations and this might happen in certain cases. Therefore, how effectively gatekeepers would comply with these obligations is doubted in default of the clarification of the exact framework of the measures that should be applied.

2. Regulating digital platforms: imposing different obligations for different purposes

To fulfil the goal of regulating digital platforms, the proposals of the DSA and the DMA are aimed at regulating different aspects of the digital world. The DSA is proposed to update the rules governing digital platforms and provide a clear and harmonised legal framework that also protects the fundamental rights of the parties in the digital world. On the other hand, the DMA is introduced to make the digital market fairer and more balanced for all actors involved. To fulfil their respective objectives, the DSA recognizes digital platforms as responsible actors and imposes obligations on them, while the DMA focuses on one group of powerful actors in the digital market, namely gatekeepers. The DMA thus sets out obligations for gatekeepers in order to maintain a competitive market for all actors. That being said, as part of the digital agenda, these two legislations are proposed to complement each other in fulfilling the ambitious goal of regulating digital platforms.

Starting with the DSA, the proposal establishes a legal framework related to digital platforms' possible liability that might arise from third parties' infringing activities. To tackle liability issue, the DSA reproduces the rules on the immunity regime that are established by its predecessor, the ECD, with small adjustments.¹⁴ Additionally, the DSA establishes new sets of asymmetric due diligence obligations and enforcement rules to reach the aim of a more transparent and balanced online world. Although those obligations differ depending on the nature of the services provided as well as the sizes of the digital platforms, they mostly are transparency obligations of different nature. These are to be addressed now within the relevance of the paper's aim.

The transparency obligations can be categorised as follows: the obligations relating to the terms and conditions (TCs) of digital services, the obligations on transparency reporting, the obligations on advertising, and the obligations concerning risk

¹⁴ The addition is made concerning hosting intermediaries, more specifically online marketplaces. Briefly, the article (article 5(3)) excludes online marketplaces from immunity if their liability from customer protection law arises when an online marketplace *'lead[s] an average consumer to believe that the information [...] is provided either by the online platform itself or by a recipient of the service who is acting under its authority or control'*. Besides, there are some additions that are related to the immunity regime made in recitals such as the neutrality test in recital 20. For a detailed discussion on this see, Miriam Buiten, 'The Digital Services Act: From Intermediary Liability to Platform Regulation' (2021) 12 JIPITEC 361; Andrej Savin, 'The EU Digital Services Act: Towards a More Responsible Internet' (2021) Copenhagen Business School Research Paper No. 21-04 Journal of Internet Law <<https://ssrn.com/abstract=3786792>> accessed 29 October 2022; The European Consumer Organisation (BEUC), The Digital Services Act – BEUC position paper (BEUC, 9 April 2021) 9, <www.beuc.eu/publications/beuc-x-2021-032_the_digital_services_act_proposal.pdf> accessed 29 October 2022; Miquel Peguera, 'The Platform Neutrality Conundrum and the Digital Services Act' (2022) 53 IIC – International Review of Intellectual Property and Competition Law 681.

assessments and data. Starting with the first one, all providers of internet intermediaries are required to have certain clauses included in their TCs. As per Article 12, they are obliged to include any information relating to their content moderation, such as restrictions that might be imposed on users or policies to be followed in their TCs. Further, Article 13 requires intermediaries to publish annual and detailed reports on any content moderation they engaged in. These obligations are aimed at providing transparency on intermediaries' content moderation and compelling intermediaries to act in accordance with the rules in tackling illegal content. Article 12 also underlines the importance of protecting the fundamental rights of the parties who are subject to the actions taken by intermediaries as part of their content moderating. Hosting intermediaries are further required to provide a user, whose content is removed or blocked access to, with a statement of reasons about a decision (Article 15). This statement shall include information on the contractual or legal grounds relied upon in taking the decision and an explanation of why the content is not compatible with the TCs of the hosting intermediary if the decision is grounded in contractual provisions. In addition to that, online platforms –providers of hosting services that also disseminate information-¹⁵ are obliged to have a clause explaining the measures to be applied against the misuse in their TCs (Article 20). Finally, both online platforms and VLOPs have further transparency obligations imposed on them related to the recommender systems, if they are using them. The recommender system is defined in Article 2(o) of the proposed DSA as 'a fully or partially automated system used by an online platform to suggest, prioritise or curate in its online interface specific information to recipients of the service, including as a result of a search initiated by the recipient or otherwise determining the relative order or prominence of information displayed'. Since such systems can exert a significant influence on the users' ability to reach information and perhaps on their choices of information, the influence that online platforms and VLOPs could gain through the use of these systems is now limited by transparency obligations.¹⁶ In that regard, online platforms (Article 24(a)) and the VLOPs (Article 29) are obliged to clearly set out the parameters used for recommender systems as well as the options for their users to modify or influence these parameters in their TCs.

In terms of transparency reporting, all providers of internet intermediaries are subjected to a duty to publish annual reports providing detailed information on all relevant facts of their content moderation (Article 13). Online platforms and the VLOPs

¹⁵ Art 2(h) DSA.

¹⁶ Giovanni De Gregorio and Oreste Pollicino, 'The European Constitutional Road to Address Platform Power' in Heiko Richter, Marlene Straub and Erik Tuchteld (eds), *To Break Up or Regulate Big Tech? Avenues to Constrain Private Power in the DSA/DMA Package* (2021) Max Planck Institute for Innovation and Competition Research Paper No 21-25, 16, 20 <<https://ssrn.com/abstract=3932809>> accessed 29 October 2022.

are also obliged to publish additional reports and include more information on their reports in parallel with the further obligations imposed on them relating to content moderation, such as the implementation of internal complaint-handling systems or engaging with out-of-court dispute settlement bodies. In that regard, the transparency reports published by online platforms shall include information about the measures applied in tackling illegal content including disputes referred to the out-of-court dispute settlement bodies (Article 23),¹⁷ while the VLOPs are obliged to publish their reports every six months and to have information about their risk assessment, related mitigation measures and their audit and audit implementation reports included in those reports (Article 33).

With regard to online advertising activities, only online platforms and the VLOPs are made subject to the transparency obligations to tackle the possible risks that could be posed through the use of advertisement systems of platforms, such as facilitating the availability of illegal content, financially incentivising harmful or illegal content, or even displaying manipulative information or disinformation that would have a negative impact on the public. In fact, more stringent obligations are imposed on the VLOPs due to 'their scale and ability to target and reach recipients of the service based on their behaviour within and outside that platform's online interface'.¹⁸ Accordingly, they are obliged to create a repository that shall have certain information about advertisements displayed on their interfaces, such as the content of the advertisement, the period of its display and the natural or legal person on whose behalf the advertisement is displayed. This repository should also be made publicly available. Online platforms other than the VLOPs are however exempted from the obligation to create a repository for their online advertising. They are only required to provide users with information on each specific advertisement displayed that would help them to identify advertisements as well as the way the advertisements are displayed.

Finally, the VLOPs are subjected to further transparency obligations relating to risk assessments and data. 'Given the importance of very large online platforms, due to their reach, in particular as expressed in a number of recipients of the service, in facilitating public debate, economic transactions and the dissemination of information, opinions and ideas and in influencing how recipients obtain and communicate information online',¹⁹ the VLOPs are obliged to conduct systematic risk assessments (Article 26) and to put in place mitigation measures accordingly (Article 27). They are also made the subject of independent audits to assess their compliance with the obligations set out by

¹⁷ Pursuant to art 19 DSA, online platforms are also obliged to take the necessary technical and organisational measures with regard to the notices submitted by trusted flaggers.

¹⁸ Recital 63 DSA.

¹⁹ Recital 53 DSA.

the DSA. Such audits would assist in providing transparency as well as effective enforcement. Concerning data transparency, the VLOPs are required to allow certain people, namely vetted researchers who are affiliated with academic institutions, vetted not-for-profit bodies, organisations or associations and the Digital Services Coordinators (DSCs)²⁰ and the Commission to access the data required (Article 31). More significantly, the VLOPs are obliged 'to explain the design, logic and the functioning of the algorithms if requested by the Digital Service Coordinator of establishment'²¹ when it is necessary to assess the risks or the VLOPs' compliance with the rules. This obligation appears very crucial in limiting the VLOPs' discretion over the users' activities as well as protecting users' fundamental rights since information prioritisation is mainly done through algorithms used by the VLOPs.

Transparency obligations set out by the DSA proposal are aimed at establishing standards on content moderation practices of digital services as well as limiting providers' acquired power over users' activities and the dissemination of information through the algorithms or parameters implemented. Indeed, the transparency aimed by these obligations would be instrumental to understanding how these platforms work and would make it easy to assess the providers' compatibility with the rules by means of enforcement. This should also provide users with more understanding and transparency over the information made available including advertisements displayed on those platforms. Arguably, this would also lead users to have more control over how to obtain and communicate information hosted by digital services.²²

The DMA, by contrast, focuses on competitiveness within the digital market.²³ It accordingly aims to strike a balance between the digital platforms of different sizes and to 'minimise(s) the detrimental structural effects of unfair practices ex-ante'²⁴. As

²⁰ Art 38 DSA. Digital Services Coordinators are appointed by each member states as an authority responsible for the supervision of intermediaries in each member states.

²¹ Art 31(1a) DSA.

²² Eifert and others describe the position of platforms over information as looking through a 'one-way mirror', meaning that platforms know a lot of things about users whereas users' knowledge on how their information is processed and used and if they are influenced through algorithms of platforms is very limited. Martin Eifert, Axel Metzger, Heike Schweitzer and Gerhard Wagner, 'Taming the Giants: The DMA/DSA Package' (2021) 58 CML Rev, 987, 992.

²³ The legal framework established is also directly related to the matters of competition law and it is proposed to complement EU's competition law. For a detailed assessment of the DMA from a competition law perspective, see Pinar Akman, 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act' (2022) 47 E.L. Rev. 85; Pablo Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' (2021) 14–20 <<https://ssrn.com/abstract=3790276>> accessed 29 October 2022; Giorgio Monti, 'The Digital Markets Act – Institutional Design and Suggestions for Improvement' (2021) TILEC Discussion Paper No 2021–04 <<https://ssrn.com/abstract=3797730>> accessed 29 October 2022.

²⁴ Explanatory Memorandum to the DMA proposal, Commission, 'Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act)' COM (2020) 842 final, 4.

mentioned before, platforms are distinguished by their sizes as well as their presumed impact and power over the digital market by the DMA proposal and the obligations are imposed on the actors regarded as the most powerful, namely on gatekeepers. A gatekeeper is defined as a provider of core platform services that fulfils quantitative and qualitative criteria set out by the DMA. According to the qualitative criterion, a provider of core platform services is regarded as a gatekeeper if '(a) it has a significant impact on the internal market; (b) it operates a core platform service which serves as an important gateway for business users to reach end-users; and (c) it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future.' Following these, Article 3(2) DMA proposal sets out three different quantitative thresholds for each criterion above and establishes that if a provider of a core platform service fulfils one of those quantitative thresholds, then it is presumed to have satisfied the corresponding qualitative criterion. In relation to the paper's focus, Article 3(2)(a) DMA prescribes that if the provider 'achieves an annual EEA turnover equal to or above EUR 6.5 billion in the last three financial years, or where the average market capitalisation or the equivalent fair market value of the undertaking to which it belongs amounted to at least EUR 65 billion in the last financial year, and it provides a core platform service in at least three Member States',²⁵ then it is presumed to have a significant impact over the market, accordingly it is qualified as a gatekeeper. Similarly, Article 3(2)(b) DMA establishes that where a provider provides a core platform service that 'has more than 45 million monthly active end users established or located in the Union and more than 10.000 yearly active business users established in the Union in the last financial year' it is designated as a gatekeeper. However, as these quantitative criteria are based on the presumption, a qualifying platform may rebut these presumptions by presenting sufficiently substantiated arguments to the Commission for an assessment.²⁶

Once the platform qualifies as a gatekeeper, it becomes subject to certain rules of conduct set out by Articles 5 and 6 of the DMA. As mentioned above, the obligations specified by Article 5 are 'self-executing', while Article 6 obligations are categorised as 'susceptible of being further specified'. These obligations directly apply and must be fulfilled by a gatekeeper for each core service it provides. As briefly mentioned above,

²⁵ The threshold for annual turnover, however, appears to be amended as a result of the provisional agreement between the Council and the Parliament reached on 25 March 2020. Accordingly, the threshold is increased to 'an annual turnover of at least €7.5 billion within the European Union (EU) in the past three years or have a market valuation of at least €75 billion' according to the information publicly made available by the Council <www.consilium.europa.eu/en/press/press-releases/2022/03/25/council-and-european-parliament-reach-agreement-on-the-digital-markets-act/> accessed 29 October 2022.

²⁶ Art (3)(4) DMA. Akman claims that the rejection of the arguments on the rebuttal by the Commission may also be subject to the judicial review by the Court of Justice of the European Union. Akman (n 23) 92.

some obligations consider data protection and the gatekeeper's use of data such as prohibiting them to combine data without specific consent given by the user or the obligations and prohibitions on unfair practices.²⁷ However, this paper focuses on transparency obligations given that transparency obligations imposed by the DSA as well as the DMA may overlap. In this regard, Article (5)(g) DMA obliges gatekeepers to provide 'advertisers and publishers to which it supplies advertising services, upon their request, with information concerning the price paid by the advertiser and publisher, as well as the amount of remuneration paid to the publisher, for the publishing of a given ad and for each of the relevant advertising services provided by the gatekeeper'. With this obligation, the DMA establishes a transparency regime for advertising services and obliges gatekeepers to provide necessary information on advertisements, such as the price paid by the advertiser and publisher or the remuneration paid to them. This obligation would provide a fair and competitive market for advertisers and publishers through the transparency provided on platforms' advertising activities as they would be able to make informed decisions on advertising services based on the information provided. To fulfil the same purpose, Article (6)(g) DMA also requires gatekeepers to provide advertisers and publishers with access to 'the performance measuring tools of the gatekeeper and the information necessary for advertisers and publishers to carry out their own independent verification of the ad inventory' upon request.

Further, the DMA sets out reporting obligations for gatekeepers to comply with (Articles 12–13), although those are not as broad as the DSA's ones. Article 12 DMA obliges a gatekeeper to inform the Commission about any intended concentration involving another provider of core platform services or any other services provided in the digital sector as well as to inform about such concentration before its implementation and following the conclusion of the agreement. If such additional core platform service satisfies the quantitative criterion, a gatekeeper is also required to inform the Commission about that following the concentration. Besides, Article 13 DMA imposes an audit obligation on gatekeepers. Under this obligation, a gatekeeper is required to submit, within six months after its designation as gatekeeper and at least annually, an independent audited description of any techniques applied for consumer profiling. This description should include information on the followings: 'whether personal data and data derived from user activity is relied on, the processing applied,

²⁷ Arts (5)(a) and (b) DMA. Although art 5(a) requires a gatekeeper to obtain explicit consent from an end user to combine data, Graef asserts that a condition of explicit consent would still not ensure competition within the market as it is desired. She claims that gatekeepers' data-combining practices should be limited to the cases only where it is necessary to perform the contract. Inge Graef, 'Why End-User Consent Cannot Keep Markets Contestable' in Heiko Richter, Marlene Straub and Erik Tuchteld (eds), *To Break Up or Regulate Big Tech? Avenues to Constrain Private Power in the DSA/DMA Package* (2021) Max Planck Institute for Innovation and Competition Research Paper No 21–25, 78 <<https://ssrn.com/abstract=3932809>> accessed 29 October 2022.

the purpose for which the profile is prepared and eventually used, the impact of such profiling on the gatekeeper's services, and the steps taken to enable end users to be aware of the relevant use of such profiling, as well as to seek their consent'.²⁸ With this enhanced transparency on profiling, the aim is to 'facilitate contestability of core platform services, by putting external pressure on gatekeepers to prevent making deep consumer profiling the industry standard, given that potential entrants or start-up providers cannot access data to the same extent and depth, and at a similar scale' as well as to eliminate 'the potential negative effects of the observed practice of gatekeeper to collect and accumulate large amounts of data from end-users' on data protection and privacy rights of users.²⁹ Besides, the proposal highlights the importance of the fundamental rights of the parties who would be affected by the application of the rules set out by the DMA. In this regard, gatekeepers are given procedural rights,³⁰ such as the right to be heard and to access judicial review, while the right to freedom to conduct a business of the provider of core business services and their business users are also paid regard to. That being said, the DMA proposal does not set out further obligations for gatekeepers in terms of fundamental rights in contrast to the DSA proposal. This is understandable given that the DMA's main aim is to provide a legal framework ensuring fairness and competition within the digital market not to establish a framework to address the market players as well as the users' fundamental rights.³¹ The latter is ensured by the European Convention on Human Rights³² as well as the General Data Protection Regulation³³, among others. The DMA expressly stipulates that the Act is aligned with these regulations.

Finally, with regard to the DMA's obligations that this paper focuses on, Article 10 should be addressed. Article 10 expressly empowers the Commission to update the obligations set out by Articles 5 and 6, where the need for new obligations to address practices that limit contestability and that are unfair is identified as a result of the market investigation³⁴ conducted. Along with such regulatory power, the Commission

²⁸ Recital 61 DMA.

²⁹ *ibid.*

³⁰ Recital 75, art 30, art 25 DMA.

³¹ Leistner argues that the legislators' approach to addressing fundamental rights of the parties such as data protection under the broad concept of fairness or contestability is open for discussion. Matthias Leistner, 'The Commission's Vision for Europe's Digital Future: Proposals for the Data Governance Act, the Digital Markets Act and the Digital Services Act – A Critical Primer' (2021) 16 *JIPLP* 778, 781.

³² European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14.

³³ Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.

³⁴ Art 14 DMA sets out the rules on market investigation.

can also add new types of services and practices as core services (Article 17) as well as designate additional gatekeepers (Article 15) after a market investigation. This is understandable as the DMA centralises the enforcement through the Commission.³⁵ The Commission is given strong investigative and enforcement powers which allow it to investigate, enforce and monitor the rules set out by the DMA.³⁶ These powers, along with the aforementioned ones, include assessing gatekeepers' compliance with the rules and imposing appropriate measures on them in case of non-compliance (Article 7); carrying out market investigations to designate a gatekeeper (Article 15); finding out possible systematic non-compliance (Article 16) or finding out if there are new services that need to be included on the list of core platforms services (Article 17). More importantly and as an outcome of these powers, the Commission is empowered to start proceedings as a result of the investigations of non-compliance, etc. While carrying out these proceedings, the Commission would have the power to follow the necessary steps to be able to reach a decision. Hence, it could take on-site inspections, require and collect information from gatekeepers, carry out interviews and adopt interim measures.³⁷ In case of non-compliance with the obligations set out by Articles 5 and 6, the Commission could impose fines against a gatekeeper.³⁸ To strike a balance and ensure the protection of the fundamental rights of gatekeepers, it is explicitly made clear by Article 30 that the Commission should ensure that gatekeepers' right to be heard and to have access to the file are respected throughout the enforcement proceedings. Besides, with regard to the Commission's decisions to impose fines and penalties, the Court of Justice of European Union's unlimited jurisdiction to review such decisions is clarified and underlined by Article 35.

The DSA's proposed enforcement mechanism differs from the DMA's centralised enforcement approach. The DSA distributes the enforcement powers as well as the responsibilities through different actors: the DSCs, designated single point of contact (or legal representative, if a provider does not have an establishment in the EU), the board of Member States' digital service coordinators (the board) and the Commission.

³⁵ For a discussion on the enforcement regimes of the DSA and the DMA through the comparison with the General Data Protection Regulation 2016/679, see Suzanne Vergnolle, 'Enforcement of the DSA and the DMA – What Did We Learn from the GDPR?' in Heiko Richter, Marlene Straub and Erik Tuchteld (eds), *To Break Up or Regulate Big Tech? Avenues to Constrain Private Power in the DSA/DMA Package* (2021) Max Planck Institute for Innovation and Competition Research Paper No 21–25, 103 <<https://ssrn.com/abstract=3932809>> accessed 29 October 2022; Leistner, (n 31) 780–781.

³⁶ Recital 68 DMA.

³⁷ Arts 18–21 DMA.

³⁸ Arts 25–26 DMA.

In contrast to the DMA,³⁹ the DSA involves Member States in the enforcement process through the DSCs. The DSCs, as competent authorities, are appointed by each Member State.⁴⁰ Accordingly, they assume responsibility for coordinating relevant activities at the national level to ensure intermediary services' compliance with the rules in question as well as their consistency and effectiveness.⁴¹ To ensure effectiveness in coordination and communication, the DSA obliges all providers to designate a single point of contact or a legal representative (if a provider does not have an establishment within the EU).⁴² Besides the DSCs, there is also the board which is composed of the DSCs. The board's involvement in the process of enforcement of the rules however is limited by advising and assisting both the DSCs and the Commission on certain matters stipulated by Article 47(2) DSA. Finally, in case of the VLOPs' non-compliance with the rules and the decisions to impose fines, the Commission is empowered to carry out the relevant tasks. Similar to the DMA, here the Commission could take on-site inspections, require and collect information from a VLOP, carry out interviews and adopt interim measures.⁴³ The Commission also imposes fines and enforces penalties on the VLOPs.⁴⁴ Throughout the proceedings, the Commission should ensure that the VLOPs' right to be heard and to have access to the file are respected.⁴⁵ Besides, the Commission might be referred by the DSCs to assess the matter when a provider of intermediary services infringed the DSA in a manner involving at least three Member States.⁴⁶ Taking all these into account, it appears that the DSA's enforcement is to some extent centralised through the DSCs and the Commission depending on the type of the platforms, while other actors appear to have been involved in the enforcement for direct and effective communication and coordination, as they are not provided enforcement powers.

3. Potential compatibility

Finally, the focus shall be turned to the main question of the paper: whether the DSA and the DMA would apply in coherence as they are intended to. The proposed Acts

³⁹ Member states' involvement within the DMA's enforcement process is limited to the advisory function. Art 32 states that the Commission is assisted by the Digital Markets Advisory Committee which is composed of the representatives of the Member States. Further, art 33 equips the Committee with a right to ask from the Commission to open a market investigation on a certain provider of core platform services that should have been designated as a gatekeeper.

⁴⁰ Within two months from the date of entry into force of the Regulation as per art 38(3) DSA.

⁴¹ Arts 38–46 DSA.

⁴² Arts 10–11 DSA.

⁴³ Arts 51–58 DSA.

⁴⁴ Arts 59–66 DSA.

⁴⁵ Art 63 DSA.

⁴⁶ Art 45 DSA.

should indeed complement each other as they focus on different players of the digital world to address different issues. As addressed, the DMA considers gatekeepers which are the providers of core services that fulfil the established quantitative and qualitative criteria. On the other hand, the DSA's focus is on the providers of internet services of different sizes and services. This however does not mean that a service provider could not be subjected to the obligations of the DSA and the DMA at the same time. A VLOP, which is an online platform that has more than 45 million recipients, may also be designated as a gatekeeper if it provides one of the core platform services specified by the DMA.⁴⁷ For instance, Amazon as an online marketplace would qualify as a VLOP under the DSA, and as a gatekeeper under the DMA. Accordingly, it would be subject to the obligations established by both Acts which may not be compatible with each other. Thus, the prospects of the possible overlap between the application of the obligations of the DSA and the DMA should be considered here, even though a certain answer could only be given after these rules come into force and are applied by providers of this kind.

The first thing to be taken into account should be the criterion in determining the scope of the asymmetric obligations set out by the DSA and the DMA. Both instruments set the qualitative threshold to classify the platforms and impose the obligations, accordingly. Although the DSA takes the type of service provided into account, it establishes the 45 million monthly user threshold to separate a VLOP from other hosting intermediaries. Likewise, a gatekeeper may be designated based on the quantitative threshold of 45 million monthly recipients. As it is underlined in the proposal of the DMA, the same number (which represents 10% of the European population) is chosen to ensure the consistency as well as the compatibility of both instruments.⁴⁸ Given that both Acts establish asymmetric rules to apply according to the sizes of the platforms, the legislators' approach to establishing the same threshold seems appropriate and reasonable to provide consistency. However, when the DMA and the DSA are considered individually in light of their proposed aims, this approach could be criticised. In the case of the DSA, the effectiveness of the 45 million criterion in reaching the principal purpose of tackling online infringements is doubted. Intermediaries would indeed have more resources and infrastructural advantages in tackling infringements as they get larger, but the effectiveness of the rules does not only depend on the size or the resources of the intermediaries. Because the infringing activities do not have territorial limitations, how effectively the rules will be applied in practice cannot easily be predicted. That being said, asking for the establishment of a

⁴⁷ Although the quantitative criteria are based on the presumption and can be rebutted by a provider, there is nothing in the DMA suggesting that a provider rebuts the presumption before it is designated as a gatekeeper.

⁴⁸ Explanatory Memorandum to the DMA proposal, (n 24) 62.

criterion that would apply to the platforms which do not have an establishment within the EU would not be realistic either as the legislations have territorial limitations. However, the DSA could benefit from the DMA's approach on that point; accordingly, a provision that enables the Commission to review or update the criterion following a market investigation could be included in the DSA.⁴⁹

Furthermore, the Acts' approaches to enforcement should be addressed. It is evident from the above examination that the DSA and the DMA adopt different enforcement approaches. The DMA's enforcement is centralised through the Commission, whereas the DSA distributes enforcement powers through different actors although the DSCs and the Commission are the main ones. The different approaches can be justified under the main purposes of the Acts, however, their coherence might be questionable under some circumstances, for instance, when the Commission steps in for the enforcement of the DSA. As stipulated, although the Commission is not the only competent authority to enforce the DSA, unlike the DMA, the Commission has enhanced supervision powers to be used through the DSCs with regard to the VLOPs. It follows that if a VLOP is also a provider of a core platform service, the Commission would have enforcement powers under the DMA as well as the DSA. As part of the investigative powers that the Commission is granted by the DMA, the Commission could take on-site inspections, require and collect information from a gatekeeper or carry out interviews. It is however not clear whether the information collected as a result of these could be used for the DSA investigations.⁵⁰ As the Commission has capacity under both Acts, this question can also be asked vice versa. It should be further underlined that the Commission should have different expertise and appropriate competency in applying its powers by means of enforcement, although it is granted similar sorts of powers by the DSA and the DMA.⁵¹

⁴⁹ Eifert and others also propose that the criteria should be applied at national level, not the EU level. It is argued that vulnerable groups would be more effectively identified in smaller spheres of communications, so that the large platforms should be specified based on smaller territories such as one or two member states. Eifert and others (n 22) 998. Janal argues that the 45 million users threshold is too high, since only four Member States have a population larger than 45 million. Ruth Janal, 'Eyes Wide Open' in Heiko Richter, Marlene Straub and Erik Tuchtfield (eds), *To Break Up or Regulate Big Tech? Avenues to Constrain Private Power in the DSA/DMA Package* (2021) Max Planck Institute for Innovation and Competition Research Paper No 21-25, 62, 63 <<https://ssrn.com/abstract=3932809>> accessed 29 October 2022.

⁵⁰ Alexandre de Streel and Pierre Larouche, 'The European Digital Markets Act Proposal: How to Improve a Regulatory Revolution' (2021) University of Montreal Faculty of Law Research Paper Concurrences No 2-100432 46, 48.

⁵¹ Commission, 'Staff Working Document, Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)' SWD(2020) 364 final, paras 410-412.

Finally, the obligations on transparency should be considered. By imposing asymmetric and rather stringent transparency duties, both Acts aim for the same: to mitigate the unbalanced positions of different parties in the digital world in reaching, using as well as controlling the information. Indeed, as assessed, the DSA establishes different transparency obligations on online advertising, recommender systems as well as content moderation activities of digital platforms to ensure transparency in the relationship between the platforms and their users. Likewise, the DMA's transparency rules are aimed at promoting transparency within the relationships between end users, advertisers and business users with gatekeepers. Thus, although these two legislative initiatives address different risks and problems of the digital world, they both bring rules to control digital platforms' acquired power within the digital world and to align parties' abilities and powers. In this regard, the two Acts' transparency obligations appear to complement each other. The similar nature of transparency obligations may work in favour of the platforms which are both subject to the DMA and the DSA, as well. For instance, when a platform is obliged to provide information on the advertising services or the parameters and algorithms used in providing these services, the same report containing corresponding information could fulfil the obligations imposed by both Acts.

As a very last point, it should be stated that both Acts should be aligned with the European Convention on Human Rights, due to its binding nature, therefore they should complement each other in practice in ensuring the protection of fundamental rights within the digital world, although their effectiveness in protecting fundamental rights individually may be questioned.⁵²

4. Concluding remarks

The goal of this paper has been to examine the interplay between the two main legislative initiatives of the Digital Services Package, namely the DSA and the DMA proposals, since they are proposed to complement each other. The DMA's focus is on gatekeeper online platforms that are considered to have a major economic and societal impact on the market. Their entrenched and durable position within the digital market is proposed to be changed by the imposition of horizontally applicable ex-ante obligations as these are aimed to iron out the unfair practices, ensure compatibility and create a level playing digital environment for all. The DSA, on the other hand, focuses on providers of different sizes and services, namely internet intermediaries, hosting intermediaries, online platforms and the VLOPs. It is proposed to update the current law on intermediaries' liability. As demonstrated, this is done by establishing new sets of

⁵² *ibid*, para 362.

horizontally applicable rules, in addition to the current rules on immunity that are essentially reproduced by the DSA. The DSA's objective is to tackle online infringements and protect fundamental rights. As far as their objectives are concerned, the Acts should complement each other as they are intended to.

In fact, as the above examination has shown, the legislators adopted similar approaches to deal with different issues and to fulfil different aims. First of all, both proposals reflect the change in the approach adopted by the European legislator in tackling online issues.⁵³ The proposed frameworks are based on the prevailing idea of acknowledging digital platforms' responsibility within the digital world. Accordingly, tiered obligations are imposed on them according to their sizes and economic or societal impact to create a safer and more open digital space. In doing so, both Acts set out the same quantitative criterion to distinguish platforms from each other, and then impose asymmetric obligations on them. By virtue of that, an online platform that has more than 45 million recipients within the EU is considered a VLOP, whereas a provider of a core platform service that has more than 45 million end users within the EU is designated a gatekeeper. This approach seemingly ensures consistency and compatibility, although the convenience of the chosen number is open for discussion.

Likewise, the transparency obligations set out by the DSA and the DMA appear to be complementing each other, although they tackle different risks and problems of the digital world. These asymmetric obligations are set out for fulfilling the same purpose: to mitigate the unbalanced positions of different parties in the digital world in reaching, using as well as controlling the information. Besides, the transparency obligations of the DSA and the DMA may overlap in certain cases. The DSA imposes transparency obligations on the VLOPs concerning their online advertising activities and a VLOP could also be subjected to transparency obligations of the same sort under the DMA when it qualifies as a gatekeeper. However, these obligations do not appear to conflict with each other.

That being said, the paper has shown that further attention should be paid by the legislator to at least one matter. In terms of enforcement, the Commission would be the competent authority to investigate the platform's compliance with the DSA and the DMA when a VLOP is designated as a gatekeeper as well. However, the proposals overlooked the possible question that might be raised while the Commission performs its investigative and enforcement powers: Could the information collected by the Commission as a result of these investigations be used for the investigations conducted

⁵³ Luciano Floridi, 'The End of an Era: From Self-Regulation to Hard Law for the Digital Industry' (2021) 34 *Philosophy & Technology*, 619; Giancarlo Frosio, 'Regulatory Shift in State Intervention: From Intermediary Liability to Responsibility' in Edoardo Celeste, Amélie Heldt and Clara Iglesias Keller (eds), *Constitutionalising Social Media* (Hart Publishing, 2022) 154-155.

under the other Act? If yes, to what extent the collected information could be used? It is evident that the legislators should address this question before the proposals are finalised and come into force.

In light of these findings, it can be concluded that the DSA and the DMA appear to complement each other as far as their objectives are concerned. As these are aimed to tackle different but substantial issues of the digital world, they should work complementarily in reaching the legislators' ultimate purpose of establishing a safer, more open and fairer digital sphere. That being said, whether these two would apply in coherence could only be answered conclusively after these rules have come into force and are applied in practice. The paper has shown that there are still some issues that need to be addressed despite the appearing compatibility. Therefore, how the analysed Acts will be applied together in practice remains to be seen.