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Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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TAMING THE GIANTS: THE DMA/DSA PACKAGE

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Abstract

Digital platforms have become a core feature of the digital economy. They facilitate the exchange of goods, services, and information, and create much social value. But at the same time, they come with harmful structural features, namely the promotion of market concentration, the rise of new forms of power imbalances, the appropriation of user data on an unprecedented scale, the facilitation of infringements of protected rights and entitlements, and the endangerment of the integrity of public discourse. While the existing legal framework has not been able to address these problems and risks adequately, the EU legislature has experienced difficulties in capturing the specific regulatory challenges caused by digital platforms so far. Now the European Commission has attained a new level in the confrontation with a double strike: the proposals for a "Digital Services Act" (DSA) and a "Digital Markets Act" (DMA) are designed to provide a coherent regulatory framework for digital platforms. This article reflects on the DMA/DSA package and provides a normative analysis of the proposals structured along the lines of market failures.

1. Introduction: Novel intermediaries – novel challenges

1.1. *Platforms . . . and problems*

The platform business model has transformed and continues to transform economy and society. Platforms, in a broad sense – namely infrastructure facilities that connect individuals and/or businesses so that they can engage in

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value-creating interaction[1] – are not new. Combined with the irrelevance of time and space in the digital world and empowered by today's algorithm systems and means of data technology, they have now taken centre stage and increasingly displace the traditional linear value chains. The core value proposition of the platform business model is to facilitate the exchange of goods, services or information, among other things, by using the information generated on the platform to suggest the best matches available. This service will typically be more attractive to users as the scale of the platform, and consequently its ability to generate positive network effects among users on one side (direct network effects) and/or among users on different sides of the platform (indirect network effects) increases.[2] Positive network effects generate strong incentives for platforms to scale quickly and grow rapidly. The pace of growth will be accelerated where a platform manages to bypass former gatekeepers. Social media bypass traditional mass media and the sharing economy bypasses traditional industries in the provision of accommodation and transportation services. Undeniably, platforms have created enormous benefits in terms of participation, market integration, market expansion, choice and the efficiency of match-making based on vast amounts of user preference data.

We have come to learn, however, that the new informational and interconnected infrastructure is accompanied by unwanted side effects, namely by new informational imbalances, negative externalities and, sometimes, positions of entrenched market power. Platforms, benefiting from positive network effects and having disrupted the business model of former gatekeepers, may become gatekeepers themselves. Reach and scale of platforms amplify negative externalities, such as the amount and effects of harmful content. The basic value proposition of platforms to maximize the overall value of the platform for all users[3] may be distorted by conflicts of interest, for example in cases of vertical integration, embeddedness in a broader ecosystem with rent-seeking opportunities, or special arrangements with third parties. Eventually, the huge amount of well-shielded information on behavioural patterns and potential personality traits at the disposal of the

1. See Parker, Van Alstyne and Choudary, *Platform Revolution* (Norton & Company, 2017), p. 5; Cusumano, Gawer and Yoffie, *The Business of Platforms* (Harper Business, 2019), p. 13.

2. Generally on the economics of multi-sided platforms, Rochet and Tirole, "Platform competition in two-sided markets", (2003) *Journal of the European Association*, 996–1029; Evans, "The antitrust economics of multi-sided platform markets", 20 *Yale Journal on Regulation* (2003), 327–379; for a policy perspective see Crémer, de Montjoye and Schweitzer, *Competition Policy for the Digital Era* (European Commission, 2019), pp. 19–38.

3. See Engert, "Digitale Plattformen", 218 *Archiv für die civilistische Praxis* (2018), 304–376.

platforms entails the opportunity to steer demand and supply in a way that at least favours their own interests.

1.2. *The Commission's package: DMA and DSA*

The economic and societal implications of these findings, as well as possible legislative remedies, have been intensely debated over the last couple of years in different contexts and communities,[4] and social media developments in particular have triggered a proliferation of legislation in Member States.[5] Towards the end of 2020, the EU Commission published two important legislative proposals: the Digital Services Act (DSA)[6] and the Digital Markets Act (DMA).[7] The terminology reflects the Commission's ambitions: while, technically, both the DSA and the DMA will be regulations within the meaning of Article 288(2) TFEU, the proposals are marketed as "acts" – an expression of the Commission's wish to define the core framework for the digital economy with a global impact.[8]

The common thread running through the proposed legislative framework is an enhanced responsibility of digital platforms for addressing the different types of risk and harm that can result from their particular business models and market positions. The DSA comprises general rules on liability of providers of intermediary services and establishes a regime of due diligence obligations, with a special focus on "online platforms", including social media, aiming for content moderation. It also strengthens private enforcement and introduces public enforcement. The DMA targets "gatekeepers" which, due to strong positive network effects and economies of scale, have become an important gateway for business users to reach end users. It imposes a set of rules of conduct on these gatekeepers that are meant to ensure that markets where gatekeepers are present remain contestable and fair, and it empowers

4. See from the abundant literature Boston, "Neutrality, fairness or freedom? Principles for platform regulation", 7 *Internet Policy Review* (2018), DOI: 10.14763/2018.1.785; Martens, "An economic policy perspective on online platforms", Institute for Prospective Technological Studies, Digital Economy Working Paper 2016/05, JRC101501, available at <ec.europa.eu/jrc/sites/jrcsh/files/JRC101501.pdf> (all websites last visited 8 May 2021).

5. The German Network Enforcement Act (*NetzDG*) was enacted in 2017 (two amendments since then); the French so-called *Loi Avia* was enacted in May 2020, but was held partially unconstitutional by the *Conseil constitutionnel* shortly thereafter (June 2020); the Austrian Communications Platform Act (*Kopl-G*) is currently undergoing the EU notification procedure; see *infra* notes 51, 52.

6. Commission Proposal for a Regulation on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, 15 Dec. 2020, COM(2020)825 final.

7. Commission Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act), 15 Dec. 2020, COM(2020)842 final.

8. Cf. *infra*, section 6.

the Commission to adjust this "code of conduct" if needed, based on a market investigation. The Commission is charged with the task to enforce the DMA, based on strong enforcement and monitoring powers.

This article sets out to describe and discuss the approach chosen by the DSA and the DMA against the background of market failures in platform markets. Do the DSA and the DMA live up to the Commission's ambition of defining the ground rules for a digital economy that will ensure open, efficient, competitive and trustworthy markets, which ultimately benefit consumers? Will they deliver in terms of protecting fundamental rights (ranging from the freedom to conduct a business, freedom of expression, respect for privacy, to human dignity) and values of European societies? Does the new framework manage to address the broad array of issues that multi-sided markets in their different varieties – from innovation platforms to attention platforms and transaction platforms – raise?

First, section 2 sketches types of market failure that platform-markets involve. Section 3 then focuses on the regulatory framework and cross-cutting issues. Next, section 4 investigates how the DSA and the DMA work to combat the relevant market failures, and evaluates their effectiveness. Section 5 turns to the enforcement regimes; and conclusions are provided in section 6.

2. Market failures in platform markets

2.1. *Market power creates market regulators*

Digital platforms come with particular structural features that are prone to promote concentration.[9] First, positive network effects – both direct and indirect – mean that returns to scale can be extreme. Where these features are not counterbalanced by other market characteristics – such as a significant degree of heterogeneity in the demand for platform services and a readiness of users to multihome or switch – a "winner takes all" logic can set in, and the market can "tip", such that only one or very few platforms remain in the market. New entrants will not be able to compete successfully based on the better quality of their service alone. The position of the dominant platform is reinforced by the benefits from broad access to usage data which can be used to personalize the services, expand the ecosystem, and monetize the data on the basis of targeted advertising services as well as by the lock-in effect for the

9. For a summary see Crémer, de Montjoye and Schweitzer, op. cit. *supra* note 2, pp. 19–38.

consumers who are not willing to leave their contacts and network, reputation, and data stream behind.[10]

Second, once a platform gains control over one of the key intermediation services, such as a marketplace or a social network, the platform becomes a gatekeeper, which can set the rules of access to and business on the platform, making it a "market regulator".[11] This position can be used to maximize the utility of the platform for all its users. But it can also be used to favour platform subsidiaries that compete on the platform, and to exploit their competitors by way of excessive provisions, excessive prices for advertising, or disadvantageous terms and conditions.

Third, the position as gatekeeper and "market regulator" is particularly sensitive on markets for information and communication. It entails great – and mostly non-transparent – influence on public discourse, as it is shaping information flows, setting limits to the content available, thus curtailing diversity and potentially even transforming market power into societal and political power.[12] The "de-platforming" of individuals (e.g. Trump[13]) is the most obvious example. Yet, we should always bear in mind that communications markets differ from the markets for goods and services and need particular regulation.

2.2. *Information asymmetries: High degree and new kind*

Digital platforms raise new kinds of information asymmetries due to their activities on different interconnected markets. While serving as a transaction platform for traders and customers, they also sell advertising space to business customers and directly contact users with personalized advertisements and other communications. The resulting informational advantage cannot be matched by contracting partners who are only active on one side of the different markets. As such, it is different from traditional forms

10. See Shapiro and Varian, *Information Rules* (Harvard Business School Press, 1998), pp. 184–185.

11. Crémer, de Montjoye and Schweitzer, op. cit. *supra* note 2, pp. 60–63.

12. Cf. Klonick, "The new governors: The people, rules, and processes governing online speech", 131 *Harvard Law Review* (2018), 1598–1670, at 1630–1669; Arun, "Making choices" in Bollinger and Callamard (Eds.), *Regardless of Frontiers: Global Freedom of Expression in a Troubled World* (Columbia University Press, 2021), pp. 275–287.

13. Cf. <www.nytimes.com/2021/01/08/technology/twitter-trump-suspended.html?searchResultPosition=4>; <www.nytimes.com/2021/01/09/us/first-amendment-free-speech.html?searchResultPosition=2>.

of informational asymmetries known from analogue markets.[14] The position of the platform has been compared to that of an observer looking through a "one-way mirror": platforms know a lot about their customers on the different sides of the markets they serve (sometimes even more than the users know about themselves), while customers know next to nothing about how platforms use their knowledge to influence decisions that customers take.[15] It enables the platform to exploit users for its own gain.[16] It may do so through price discrimination, exploitation of cognitive biases, and locking-in customers in narrow behavioural patterns.[17]

It may be true that some of the most powerful of today's platforms are hesitant to abuse all their power *vis-à-vis* users, as the benefit of the platform to each side of the market increases with the number and quality of users on the respective other side. And indeed, particularly the most powerful platforms tend to offer even more preferable conditions than the law requires, such as taking the costs of returning goods after revocation of a distance sale contract upon themselves. But the incentive structure depends on the market situation. Where supply exceeds demand and sellers compete for buyers, as is often the case in markets for consumer goods, an additional consumer tends to be more valuable to the platform than an additional seller, and abuse of power can only be expected on the weaker side, here: the sellers' side.

Informational asymmetries resulting from the platform's occupying the position of a hub connecting various markets presents a systemic problem, which cannot be fully tackled by bilateral disclosure obligations, the well-established remedy in contractual relations.[18] Instead, customers, users – and the public at large – may have a legitimate claim for some transparency with a view to the functioning of the platform, and its matching or ranking algorithms, to overcome fundamental imbalances in the distribution of

14. For the classic economic analysis of information asymmetries see Fleischer, *Informationsasymmetrie im Vertragsrecht*, (C.H.Beck, 2001), pp. 175–177 and pp. 1000–1001; Shavell, *Foundations of Economic Analysis of Law* (Harvard University Press, 2004), pp. 332–334.

15. Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Harvard University Press, 2015); on the special role of platforms on different markets, see also Busch, "Small and medium-sized enterprises in the platform economy", (2020) *FES WISO DISKURS*, 5–9, available at <library.fes.de/pdf-files/wiso/15946.pdf>; Twigg-Flessner, "The EU's proposals for regulating B2B relationships on online platforms – Transparency, fairness and beyond", (2018) *Journal of European Consumer and Market Law*, 222–233, at 224.

16. For a general treatment, ignoring the particularities of the platform industry, Bar-Gill, *Seduction by Contract* (Oxford Scholarship Online, 2012).

17. For details cf. Wagner and Eidenmüller, "Down by algorithms: Siphoning rents, exploiting biases, and shaping preferences: Regulating the dark side of personalized transactions", 86 *University of Chicago Law Report* (2019), 581–609.

18. See also Twigg-Flessner, op. cit. *supra* note 15, at 230–233.

information. Making information publicly available may mitigate the existing uncertainty and enable a more informed discussion among competitors, regulators and the public about appropriate legal intervention.[19]

2.3. *Externalities: Facilitation, amplification, and the search of due diligence*

Platforms cause externalities, i.e. they contribute to infringements of other people's protected rights and entitlements, namely intellectual property and the right to privacy, committed by other users of the same platform. The easy access that platforms offer to users of any background and motivation has worked to facilitate harmful activity and to externalize costs to third parties on a large scale. The usual remedy is to internalize the external costs to the actor.

While lawmakers on both sides of the Atlantic remained anxious not to stifle innovation in the early days of the internet, and went to considerable length to isolate platforms from liability for unlawful content generated and posted by their users, externalities have by now become a pressing issue. This has resulted in a shift in platform regulation from liability exemptions to due diligence obligations.[20] However, the attempt to hold platforms accountable for user-generated content turns out to be anything but trivial. After all, platforms only facilitate and amplify the harmful activities of their users, and do not commit the wrongs themselves.

2.4. *Public interest: Protecting markets and public discourse as institutions of liberal democracies*

Platforms can raise issues of market power, impose – or allow their users to impose – external costs on others, and exploit informational asymmetries. But public debate on the effects of the platform economy is also driven by public interest goals, namely the impression of an increased need to protect the well-functioning of markets and the integrity of public discourse as basic institutions of liberal democracies.[21]

19. Graef, "Differentiated treatment in platform-to-business relations: EU competition law and economic dependence", 38 YEL (2019), 448–499, at 494.

20. Cf. for the American discussion Balkin, "Free speech is a triangle", 118 *Columbia Law Review* (2018), 2011–2056; Wu, "Is the First Amendment obsolete?", 117 *Michigan Law Review* (2018), 547–581, at 576–578; Khan and Pozen, "A skeptical view of information fiduciaries", 133 *Harvard Law Review* (2019), 497–541, at 497.

21. Cf. for the public discourse Sunstein, *#republic* (Princeton UP, 2017), pp. 59–97 and pp. 147–148; Citron and Norton, "Intermediaries and hate speech: Fostering digital citizenship for our information age", 91 *Boston University Law Review* (2011), 1435–1484, at 1447–1457.

This perspective on the systemic significance of platforms requires preventive remedies, which transcend the toolbox traditionally applied to well-established market failures. It aims to capture conduct and phenomena associated with platform-specific dynamics and enters uncharted regulatory waters when necessarily lowering the threshold for intervention compared to more traditional forms of legal intervention. Yet, determining appropriate rules to ensure competitive access to platforms before a market for goods or services has tipped is as difficult as devising obligations for social media in order to avoid or contain the spread of hate speech or the development of radicalized echo chambers that threaten to undermine public discourse. The high degree of uncertainty that characterizes platform behaviour has become a major driver in the quest for more transparency.

3. Regulatory approach

3.1. *A framework: Comprehensive but multi-faceted*

DSA and DMA are a turning point in European platform regulation. After years of monitoring, engaging in informal dialogue,[22] and conducting case-by-case investigations, a regulatory framework is to be set up, with a particular focus on the major platforms in the field. In principle, the approach accepts the position of platforms as market regulators as an inevitable trait of their business model. Thus, the objective must be to target and contain specific market failures associated with the platform economy. The design of such an approach needs to be comprehensive but multi-faceted, posing a challenge to consistency. The Commission's package basically sets different, yet complementary, foci for the DSA and the DMA, respectively, tying them together through cross-cutting perspectives.

Before we elaborate on this, it is worth briefly mentioning the sweeping alternatives, which are discussed in academia and politics, and which are implicitly rejected by the package, namely a novel form of "public utility regulation" and/or the breaking-up of the corporations that operate platforms and run the associated ecosystems. Some commentators draw heavily on similarities of the platform economy and the more traditional natural network

22. Cf. for online platforms, the EU had established the Internet Forum in 2015 which elaborated the Code of Conduct on Countering Illegal Hate Speech Online, available at <ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf>; the approach will be continued with regard to disinformation, see Code of Practice on Disinformation, available at <ec.europa.eu/newsroom/dae/document.cfm?doc_id=54454>; cf. for an assessment: EU Commission, SWD (2020)180 final (10. Sept. 2020) <ec.europa.eu/newsroom/dae/document.cfm?doc_id=69212>.

monopolies which, in the early 20th century, gave rise to public utility regulation.[23] A core feature of this regime was the public acceptance of monopoly power, but the imposition of public interest obligations in return. Yet, platform markets remain significantly more dynamic than the classic network monopolies. The DMA does not take platform monopolies to be inevitable, but strives to foster contestability and competition. Also, the traditional public utilities regime cannot match the new complexity of platform operations which – with their design and ranking and matching algorithms – unavoidably regulate interconnection and interaction across the platform and thereby affect the competitive odds of their business users. An alternative to regulating the platforms' power could have been to break them up. Yet, absent a strict prohibition of vertical integration, the platforms might still be able to defend and extend their gatekeeper power, given the special characteristics of platform markets. Structural remedies remain possible under the DMA as a measure of last resort (Art. 16(2) DMA). But for good reasons, the Commission strives to promote competition primarily through the imposition of "rules of conduct".

3.1.1. *Complementary foci of DSA and DMA*

The DSA's main focus is on the mitigation of externalities, together with the protection of the public interest in unfettered public discourse. At the outset, it confirms the general limitations on the liability of internet service providers known from the e-Commerce Directive. The vast majority of its provisions, however, set up a regulatory framework with a special focus on "online platforms", defined as "providers of hosting services which, at the request of a recipient of the service, stores and disseminates to the public information …" (Art. 2(h) DSA), making social media the paradigmatic field of application. These online platforms are notably subject to procedural and organizational requirements. These aim to ensure an effective notice and action mechanism for illegal content (Arts. 14, 15, 19, 20 DSA) and set up a two-step complaint-handling system, consisting of an internal review procedure (Art. 17 DSA), and a subsequent out-of-court dispute settlement mechanism (Art. 18 DSA).[24] Very large platforms – with at least 45 million active recipients in the EU – also need to engage in the assessment of systemic risks stemming from their services (Arts. 25–28 DSA) and undergo

23. Rahman, "Regulating informational infrastructure: Internet platforms as the new public utilities", 2 *Georgetown Law Technology Review* (2018), 234–251; id., "The new utilities: Private power, social infrastructure, and the revival of the public utility concept", 39 *Cardozo Law Review* (2018), 1621–1689; id., "Infrastructural regulation and the new utilities", 35 *Yale Journal on Regulation* (2018), 911–939.

24. As for the complaint-handling system and a number of transparency obligations, very small platforms are exempted (Art. 16 DSA).

independent audits (Art. 28 DSA). In addition, the DSA establishes various transparency obligations. They relate partly to content regulation and risks for the public interest, such as the duty to include information on content restrictions imposed by their terms and conditions (Art. 12 DSA), reporting requirements about the means and measures of content moderation (Arts. 13, 23 DSA) as well as orders issued by public authorities. Other requirements, however, address information asymmetries and focus on displayed advertising (Arts. 24, 30 DSA) and – in case of very large online platforms – the parameters of recommender systems and its options for the recipients (Art. 29 DSA). Finally, the DSA strengthens private enforcement and introduces public enforcement.

The DMA's main focus is on "gatekeeper" power as a special variety of market power. Gatekeepers are defined as "providers of core platform services" that have come to serve as "an important gateway for business users to reach end users". The core platform services are exhaustively listed in Article 2(2) DMA and include, *inter alia*, online intermediation services, online search engines, social networking services, and operating systems. Their commonality is that strong network effects, economies of scale, data driven advantages, and user lock-in pave the way towards strong market concentration. The gateway position of a gatekeeper can result from these characteristics, together with the absence or weakness of countervailing forces, such as product differentiation and multi-homing. In such settings, the DMA aims to ensure or re-establish the contestability of entrenched positions of market power (competition for the platform), to protect competition on the platform where the gatekeeper is vertically integrated, and to impede the leveraging of existing advantages to other markets to avoid a continuous expansion of platform ecosystems. Furthermore, in a manner to be further explored, it strives to protect "fairness" in the relations between gatekeepers and business users. It does so by imposing a uniform, "one size fits all" set of rules of conduct on gatekeepers. To a large degree, these rules generalize the remedies that have been developed in various competition law proceedings against platform operators at both the EU and the national level in recent years. However, contrary to the broad, principled-based wording of the prohibition of abuse of dominance in Article 102 TFEU, the DMA's rules of conduct come as concrete and specific prohibitions, and they do not allow for effects-based justifications. The enforcement of the DMA is to be centralized in the hands of the Commission.

Even though the two Acts clearly have complementary foci, they cannot be neatly distinguished at the level of their legislative objective, allocating a discrete goal to each Act. The DMA certainly aims to contain market power, but it also reacts to informational asymmetries and tries to ensure "fairness" of

some sort. The DSA, for its part, includes provisions that are closely connected to the market relations of transaction platforms and business models based on advertisements (e.g. Arts. 22, 24 DSA on the traceability of traders and online advertising transparency). Obviously, platform markets are characterized by a specific combination and overlap of market failures that need to be accounted for in any regime, irrespective of its primary focus.

3.1.2. *Challenge of consistency*

The most evident challenge for consistency in the proposed framework is the need to design a pattern of requirements which addresses as precisely as possible the different market failures, and still offers a sufficiently clear and implementable framework for the different actors in the market. The proposed framework does not replace any existing legislation, and its core definitions do not refer to existing ones, so it adds another set of requirements to the already crowded landscape of internet regulation. The additional regulatory patterns target a whole range of newly defined actors, such as suppliers of intermediary services of various kinds and sizes (DSA); they introduce the concept of a "trader", which remains close to, but not identical with the concept of "business user" (Art. 2(17) DMA, Art. 2(1) P2B Regulation[25]), and the concept of a "gatekeeper" (DMA) that again refers to size, among other features. The proliferation of categories of subjects of regulation makes some sort of consolidation even more urgent and contests the Commission's claims that the DSA/DMA package represents pieces of "horizontal" legislation.[26]

Conversely, attempting harmonization across the double package poses significant problems. The criterion of 45 million users within the European Union serves as an indicator for a (rebuttable presumption of a) gatekeeper position within the DMA, and is mirrored by the criterion of 45 million recipients as defining a very large online platform for the purpose of the DSA (Art. 25(1) DSA). In both instances, the threshold of 45 million users triggers tighter regulation, and it is obvious that the same number is chosen for reasons of consistency.[27] However, the goals of the respective regulations vary significantly and do not justify parallel quantitative thresholds. The DMA's rules are meant to constrain the abuse of intermediary power, and it is reasonable to take the number of users in the common market as an indicator for such power. In contrast, the specific regulation of very large platforms in the DSA is designed to minimize the risks of the dissemination of illegal

25. Regulation (EU) 2019/1150 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (P2B Regulation), O.J. 2019, L 186/57–79.

26. Cf. explicitly for the DSA Proposal, pp. 5 and 7, Recital 73; DMA Proposal, pp. 3 and 61; the DMA is designed as an important element of the Initiative "Shaping Europe's digital future" which is said to have a horizontal nature (cf. DMA Proposal, pp. 71 and 80).

27. Cf. DMA Proposal, p. 62.

content and to mitigate systemic risks for public discourse. It is already questionable whether the number of recipients is a suitable proxy for the amount and negative impact of illegal content, but it should be obvious that the common market is the wrong reference point for measuring the size of the user base. After all, the spheres of communications remain separated along national or at least language borders, so that negative effects, such as harming and intimidating vulnerable groups, can only be assessed in such smaller spheres of communications. Against this backdrop, there should be at least a possibility in the DSA to reclassify platforms following a market investigation analogous to the DMA, or to impose additional obligations on platforms that are "large" only in one or several national markets, but not the European market as a whole.

3.2. *Cross-cutting issues and perspectives*

Despite their different foci, DMA and DSA appear as a package not least because of cross-cutting perspectives and issues. Both acts tie regulatory intervention to the platform occupying a regulator-like position.[28] They aim to contain power in market relations (e.g. Arts. 5, 6 DMA; 12 DSA), to make the exercise of market power compatible with fundamental values (arguably Art. 5(a), (b), (d) DMA, Arts. 14 et seq. DSA), and to require powerful platforms to mitigate systemic adverse effects (Arts. 25 et seq. DSA).

In addition, both acts introduce a variety of knowledge-generating mechanisms to shed light on the existence and use of market power. The DMA rebuttably presumes platforms to be gatekeepers if they meet a set of criteria; it thereby reverses the burden of proof in order to incentivize platforms to come forward with insider knowledge of markets and business models. Furthermore, Article 6 DMA lists a set of obligations which may need to be specified in dialogue with the gatekeepers. This enables customized solutions embedded in the specific platform environment and allows regulators to gain more insight into business strategies and the costs and benefits associated with them. The DSA imposes a duty on very large platforms not only to identify, analyse, and assess periodically any significant systemic risk stemming from the functioning and use made of their services in the EU (Art. 26 DSA), but also to put in place mitigation measures and to publish a report on both. Besides, the Commission and Digital Services Coordinator can request very large platforms to provide access to data to vetted researchers (Art. 31(2)

28. Schweitzer, "Digitale Plattformen als Gesetzgeber: Ein Perspektivwechsel für die europäische 'Plattform-Regulierung'", (2019) *Zeitschrift für Europäisches Privatrecht*, 1–12, at 4–6; Cf. Cohen, "Law for the platform economy", 51 *U.C. Davis Law Review* (2017), 133–204, at 133.

DSA). Eventually, if significant systemic risks emerge and concern several large platforms, the Commission may invite the very large platform and other stakeholders to draw up a code of conduct (Art. 35(2) DSA).

A particularly salient area of regulatory overlap consists of the manifold transparency requirements contained in both acts. They aim to mitigate informational asymmetries in market relations between private parties and, at the same time, generate knowledge to be used for further regulation or public accountability. The DMA focuses on specific market relations – between advertisers and publishers in particular (see Arts. 5(g), 6(g) DMA) – and on the provision of information to the Commission when it comes to mergers (Art. 12 DMA) and profiling techniques (Art. 13 DMA). The DSA also promotes transparency in the relationship between the platform and its recipients (Art. 24 DSA), but also *vis-à-vis* the Commission (Art. 57 DSA). In addition, the DSA requires very large platforms to include information on recommender systems and advertising in their general terms and conditions, so that they become publicly available (Arts. 29, 30 DSA). Such public reporting enhances public accountability, which in turn is most appropriate with respect to factors influencing public discourse.

Finally, both acts are designed to enable the Commission to rely on the information accumulated in this way when it comes to a revision of the regulatory setting. As to the substantive rules, the DMA entitles the Commission to adapt the list of prohibitions (Art. 10 DMA), and the DSA requires the Commission to encourage and facilitate the development of codes of conduct (Arts. 35 et seq. DSA). With regard to the scope of regulation, however, only the DMA offers built-in flexibility, as it authorizes the Commission to amend the list of gatekeeper obligations or designate additional gatekeepers with the help of a market investigation (Arts. 10, 15, 17 DMA). As discussed above, the DSA should catch up on this issue.

Moving beyond these matters of information management, the DMA and the DSA differ significantly in their respective styles. The DMA imposes new substantive rules designed to protect open and contestable markets and to ensure fair competition on the platform. In contrast, the DSA focuses primarily on procedural and organizational requirements that sharpen already existing obligations to take down illegal content. In addition, the DSA makes platforms accountable to the public. The difference between the DMA and the DSA is rooted in different degrees of knowledge about negative effects and, above all, in human rights. We already have reasonable assumptions about how powerful platforms negatively affect competition, whereas we have nothing more than reasonable concerns about their negative effects on

communications.[29] Moreover, the negative effects on competition are caused solely by the actions of the gatekeeper platforms themselves, whereas the negative effects on communications are not directly caused by the platform, but by its users. This makes it much harder to define effective and appropriate rules for platform behaviour. Finally, and foremost, against the backdrop of human rights, public authority has considerable latitude in regulating business aspects of powerful platforms, but is tightly restricted if free speech and public discourse are at stake.[30]

3.3. *Regulatory approach under constraints: Limits of EU powers*

Despite the bold branding as "Acts", the DSA's and DMA's regulatory response to crucial challenges posed by the platform economy remains tied to the limited powers of the EU. Both, the DMA and the DSA are based on Article 114 TFEU, aiming at harmonizing rules for the functioning of the Single Market for digital services at EU level. The limits of Article 114 TFEU are reflected in both acts.

The DSA has a strong focus on externalities, but the EU lacks the competence to harmonize the law of torts or delict, including the right of privacy or personality protected by the national legal systems to varying degrees. The same applies to that part of criminal law that defines the limits of free speech, i.e. defamation, breach of confidence, etc. Therefore, the DSA lacks liability rules or even any definition of what constitutes "illegal content", but instead simply refers to the law of the Member States (Art. 2(g) DSA). Instead of laying down the requirements of platform liability, the DSA describes the limits of and exceptions to such liability. The strictly formal and uniform definition of illegal content forecloses the possibility to define especially harmful illegal content to be controlled and deleted as a priority by the platforms.

The DMA, for its part, was expected by some to be based on Article 103 TFEU. It would have allowed the Council to adopt a regulation giving effect to the principles set out in Article 102 TFEU. According to Article 103(2)(c) TFEU, such a regulation could define the scope of Article 102 TFEU in special branches of the economy. The choice of Article 103 TFEU as the legal basis would have come with significant political and legal risks, however. Politically, the role of the European Parliament would have been limited to consultation. Legally, it is not obvious that the DMA's rules of conduct for gatekeepers stay within the scope of Article 102 TFEU. Whether the type of intermediation power addressed by the DMA would amount, in all cases, to

29. Sunstein, op. cit. *supra* note 21.
30. Cf. Klonick, op. cit. *supra* note 12; Balkin, op. cit. *supra* note 20.

"dominance" within the meaning of Article 102 TFEU is unclear. According to the DMA proposal, market dominance is not a prerequisite for a "gatekeeper" designation.[31] In particular, a provider of core platform services can be designated as a gatekeeper even if it does not yet enjoy an entrenched and durable position, but will foreseeably do so in the future (Art. 15(4)). Likewise, contrary to the usual methodology of establishing an abuse of dominance, the rules of conduct set out in Articles 5 and 6 DMA, are intended to apply "independently from the actual, likely or presumed effects of the conduct of a given gatekeeper" on competition on a given market (Recital 10). Relying on Article 103 TFEU would have exposed the DMA to legal challenges that the Commission seeks to avoid.

However, the choice of Article 114 TFEU comes with disadvantages of its own. For the most part, the DMA is a measure of "preventive" harmonization. The 10th amendment to the German competition act (the GWB) with its special regime of gatekeeper regulation in section 19a GWB has just been passed – but will continue to apply alongside the DMA, as well as EU and national competition law (Art. 1(6)). It can therefore not serve as a justification for harmonization.[32]

4. The main topics and areas of platform regulation

4.1. *The DMA: Protecting competition or promoting fairness?*

The uncertainties surrounding the DMA's legal basis point towards a more fundamental question: What – beyond a specification of the special obligations of dominant platforms as they would already follow from Article 102 TFEU – is the DMA meant to do? Is the DMA about addressing a dominance-based market failure? Or does it pursue broader regulatory ambitions?

According to the DMA's recitals, it is intended to ensure that "markets where gatekeepers are present are and remain contestable and fair" (Recital 10) – two aims that likewise underlie European competition policy. The goal to keep markets open and any market position contestable is nothing less than the core and classic goal of EU competition law. "Fairness" can be understood to relate both to the principle of "competition on the merits" as a normative reference point for exclusionary abuses and to certain distributional standards

31. See Recital 5 of the draft DMA.

32. Wagner, "Plattformregulierung nach deutschem und europäischem Recht" in Joost, Oetker and Paschke (Eds.), *Festschrift für Franz-Jürgen Säcker*, (C.H.Beck, 2021) (forthcoming).

as they are known from the law of exploitative abuses. However, instead of referencing these goals, the DMA strives to distance itself: its objectives are said to be "complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition law terms". In other words, the DMA is not only about ensuring a more speedy and effective enforcement of Article 102 TFEU in a specific setting. Rather, it should react to the special features of markets where gatekeepers are present more broadly (Recital 5). But does it continue to be linked to the goal of protecting competition – even if outside the confines of competition law? Or does the DMA's fairness goal reach beyond competition policy and open European platform regulation up to broader normative ambitions? A clarification is critical: it matters for the interpretation and the effective enforcement of the rules of conduct as they are set out in Articles 5 and 6 of the DMA; it matters for the Commission's mandate to update the "code of conduct" under Article 10 DMA; and it has implications for the enforcement regime, both public and private. Simultaneously, an answer is difficult to find in the DMA: the regime as it stands remains ambiguous.

A look at the proposed regime for designating "gatekeepers" as the addressees of the DMA's rules suggests a competition policy agenda, yet coincidentally a distancing from competition law concepts and methodologies. According to Article 3(1) DMA, a provider of "core platform services", i.e. services like online intermediation services, online search engines, online social networking services or operating systems that are conclusively listed in Article 2(2) DMA, shall be designated a "gatekeeper" if it has a significant impact on the internal market, if it serves as an important gateway for business users to reach end users, and if it enjoys an entrenched and durable position or will foreseeably do so in the future. Under the DMA, there will therefore be no need to define markets or determine market dominance – competition law concepts that are difficult to apply in platform settings. At the same time, the DMA is geared towards addressing what has come to be called "intermediation power" or "gatekeeper power" in the academic debate[33] – arguably a subcategory of market dominance. However, the DMA's scope of application is supposed to extend to core platform service providers who operate in a setting where the market has not yet tipped but is about to tip. Beyond what may be qualified as an "abuse of dominance", it should thereby extend to anti-competitive acts of monopolization.

Article 3(2) DMA lays down a presumption for a gatekeeper position based on purely quantitative criteria, but it is framed as a rebuttable presumption.

33. Schweitzer, Haucap, Kerber and Welker, *Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen* (Bundesministerium für Wirtschaft und Energie, 2018), p. 85; Crémer, de Montjoye and Schweitzer, op. cit. *supra* note 2, p. 49.

According to Article 3(4) DMA, a provider of core platform services that meets the quantitative criteria can show that no relevant intermediation power exists, but has to come forward with relevant information. Conversely, a core service provider that does not meet the quantitative thresholds set out in Article 3(2) can – based on a market investigation (Art. 15 DMA) – nonetheless be designated as a gatekeeper where the preconditions of Article 3(1) are met. Additional criteria are listed in Article 3(6) DMA. Clearly, these criteria are informed by competition law. The fact that the DMA avoids traditional competition law terminology should therefore not be understood as a rejection of a competition policy agenda. Rather, it reacts to widely acknowledged deficits of the traditional competition law methodology when applied to platform markets.

According to traditional competition law methodology, potentially anti-competitive actions would need to be analysed case by case by reference to their likely effect on competition. The DMA breaks with such a case-by-case approach and replaces it with a uniform, one-size-fits-all code of conduct, which is binding on all gatekeepers alike. Article 5 lays down those rules of conduct which are thought to be self-explanatory, including, *inter alia*, a prohibition of combining personal data sourced from a core platform service with personal data from any other service offered by the gatekeeper or a third party without specific consent (Art. 5(a)), a prohibition of "Most Favoured Nation" (MFN) clauses (Art. 5(b)), and a prohibition to require business users to use, offer or interoperate with an ID service of the gatekeeper (Art. 5(e)). Article 6 sets out a list of obligations that – like the Article 5 obligations – will apply automatically but may need further specification. They include, for example, the obligation to refrain from using, in competition with business users, any data not publicly available which is generated through activities of those business users (Art. 6(a)), a prohibition to hinder end users to uninstall any pre-installed software applications on its core platform service where this software is not essential for the functioning of the operating system (Art. 6(b)), or a prohibition to engage in self-preferencing in the ranking of services or products (Art. 6(d)). The vast majority of these obligations can be linked to recent competition law cases either at EU or Member State level, including, in particular, the Commission's *Google Shopping*[34] and *Google Android* decisions,[35] as well as the *Bundeskartellamt's Facebook* decision.[36] Yet the DMA not only scraps the need to show

34. EU Commission, 27 June 2017, AT.39740, C(2017) 4444 final – *Google Search (Shopping).*

35. EU Commission, 18 July 2018, AT.40099, C(2018) 4761 final – *Google Android.*

36. Federal Cartel Office, 6 Feb. 2019, B6-22/16 – *Facebook.* For a list that matches the Arts. 5 and 6 DMA prohibitions with the relevant cases, see Caffarra and Morton, "The

anti-competitive effects or harm to consumers, but also does away with the possibility for gatekeepers to justify their behaviour – whether on efficiency grounds or with a view to predominantly positive effects on competition. The rules of conduct thereby gain a character that differs from competition law-based remedies. They do not react to a specified harm, but to special features of digital markets, thereby covering settings that would lie at or outside the boundaries of competition law; they are supposed to function proactively and ensure a (more) level playing field. While there is broad support for this approach generally, the one-size-fits-all methodology is widely criticized. More room for customization may be needed.[37]

Doubts as to the legal nature and objectives of the DMA arise, in particular, when looking at the Commission's mandate to update the Act. According to Article 10, the Commission is empowered to adopt delegated acts to update the obligations laid down in Articles 5 and 6 DMA. It may do so where, based on a market investigation, it identifies practices that limit the contestability of core platform services or that are unfair in the same way as the practices that are currently prohibited. Practices are to be considered "unfair" where there is "an imbalance of rights and obligations on business users", resulting in "disproportionate advantages" of the gatekeeper *vis-à-vis* business users (Art. 10(2)(a) DMA). This definition suggests a bilateral instead of a market-based conception of unfairness and could potentially open up the DMA to a sort of generalized control of unfair terms and conditions P2B (platform-to-business), with no clear normative reference point beyond a general proportionality criterion, i.e. with no normative anchoring in competition policy.

Cutting the DMA off from its obvious competition policy roots raises concerns. In a context as dynamic as the digital environment, a mechanism to flexibly adjust the DMA to newly arising practices is needed. Such flexibility comes at the price of arbitrariness, however, if it is not matched by a clear normative reference point. Imbalances of rights and obligations are ubiquitous. What is more, such an approach would potentially harm, rather than promote competition. The idea of the DMA is to protect and foster competition in highly concentrated platform settings wherever it remains feasible. If the DMA were to subject gatekeepers to very ambitious fairness obligations – including fairness obligations of a distributional kind – this

European Commission Digital Markets Act: A translation", available at <voxeu.org/article/european-commission-digital-markets-act-translation>.

37. See e.g. de Streel, Liebhaberg, Fletcher, Feasey, Krämer and Monti, "The European Proposal for a Digital Markets Act: A first assessment", CERRE Report Jan. 2021, pp. 7 and 22; Cabral, Haucap, Parker, Petropoulos, Valletti and Van Alstyne, "The EU Digital Markets Act: A report from a Panel of Economic Experts", 2021, pp. 12–13.

would hamper the opportunities for entry and expansion of competing platforms.

4.2. *The DSA as a legal mechanism to avoid or internalize the cost of externalities*

4.2.1. *Liability shield*

Liability for harm caused to others, including the general public, is a mechanism to internalize the cost of externalities and thus to provide for efficient deterrence.[38] Civil liability in damages *vis-à-vis* those parties that sustained harm as a consequence of some activity is but one way to accomplish this goal. Another instrument towards the same end is criminal law, which goes beyond mere monetary sanctions and thus generates even more powerful incentives to refrain from unlawful activity.[39] Current EU law protects platforms from both forms of liability, but only to a certain degree, withholding full immunity. Under the e-Commerce Directive 2000/31/EC, host providers such as platforms are not obliged to ban harmful content *ex ante*, before making it available to recipients, but only after obtaining actual knowledge of the illegal activity or information (Art. 14 e-Commerce Directive).[40] As Article 15 e-Commerce Directive makes clear, there is no general duty for platforms to monitor user-generated content and to take down unlawful information. This regime applies to user-generated content that may be illegal for any reason, whether infringement of copyright or personality rights or the violation of criminal statutes that protect public values.[41]

The DSA does not repeal the privileges that the e-Commerce Directive established for platforms and other internet service providers. This may be surprising to critics who believe that the internet companies that have grown into giants since the early 2000s deserve no further protection. Without a doubt, it is true that the industry does not need a "liability subsidy", regardless of whether such a subsidy was justified earlier.[42] Still, the policy of the DSA not to expose platforms to full liability for user-generated content, deserves

38. Shavell, op. cit. *supra* note 14, p. 178.

39. Ibid., p. 492.

40. Cf. Witman, *The Responsibility of Online Intermediaries for Illegal User Content in the EU and the US* (Elgar Information Law and Practice series, 2020), para 2.13.

41. Witman, op. cit. *supra* note 40, para 2.23.

42. As to liability subsidies in general cf. Galasso and Luo, "Punishing robots: Issues in the economics of tort liability and innovation in artificial intelligence" in Agrawal, Gans and Goldfarb (Eds.), *The Economics of Artificial Intelligence: An Agenda* (University of Chicago Press, 2019), pp. 493–504, at p. 495; Viscusi and Moore, "Product liability, research and development, and innovation", 101 *Journal of Political Economy* (1993), 161–184, at 167; but also Calabresi, "Some thoughts on risk distribution and the law of torts", 70 *Yale Journal on Regulation* (1961), 499–553, at 516.

support.[43] The limitations the e-Commerce Directive placed on the liability of platforms were not privileges at all, but rather reasonable specifications and delineations of the general duty of care, as applied to user-generated content. The essential point is that where and insofar as the platform does not commit wrongful acts itself but only publishes the output of third parties, it cannot be held fully responsible. However, platforms establish the necessary playing field for wrongful activities to occur and to unfold their harmful potential. They open up a space or sphere for the exchange of commercial as well as non-commercial information which is easily accessible for a large number of interested parties. While abusive and aggressive speech has always been part of human life, the internet has opened up a way for individuals to communicate their views to a vast audience, to do so at zero cost, and to hide behind anonymity.[44] Platforms curate information, making it more easily accessible to users, and they weed out content that is offensive or repugnant under their own standards; platforms do these things not for altruistic reasons, but for commercial gain. Finally, referring victims to seek recourse against the authors of illegal content is not a viable alternative. Legal action against the content creators will often be impossible, if only because the author remains anonymous; it may be fraught with serious risks, as when authors reside in far-off jurisdictions. In addition, it will usually come too late: a reputation may be lost on the internet long before a court has issued even an interim order.

It is thus for good reason that the DSA follows the policy of the e-Commerce Directive to shield platform operators from unlimited liability for user-generated content. Article 5 DSA is a verbatim replica of Article 14 e-Commerce Directive. Furthermore, the ECJ case law interpreting Article 14 e-Commerce Directive will remain intact and will continue to be binding for the interpretation of the DSA.[45] A more flexible approach, that applies a sliding scale to platform responsibility, with the duty to take care corresponding to the degree of control that the platform exercises over the information that it makes available, may look even more attractive. While it seems overly difficult for lawmakers to cast such flexibility into statutory rules, judges should remember that, ultimately, the degree of platform responsibility depends on its exercise of control, together with the benefits it generates from its own activities. In this context, Article 6 DSA embraces a

43. Cf. Wagner, "Haftung von Plattformen für Rechtsverletzungen (Teil 1)", (2020) *Gewerblicher Rechtsschutz und Urheberrecht*, 329–338, at 335; (Teil 2), 447–457, at 447.

44. Cf. Levmore, "The Internet's anonymity problem" in Levmore and Nussbaum (Eds.), *The Offensive Internet* (Harvard University Press, 2010), pp. 50–67, at p. 53: "When the offensive graffitist uses the bathroom wall he runs up against the medium's constraints; the Internet now provides a superior medium for one who wishes to spread juvenile or malicious speech."

45. DSA Proposal, at p. 3.

so-called "Good Samaritan principle", preserving the DSA's liability shields where the platform engages in efforts in good faith to identify and remove illegal user-generated content. In this way, platforms will not be discouraged from taking precautionary measures against the dissemination of harmful content. If platforms go further than that and actively curate user-generated content for their own gain, Article 6 DSA provides no defence. Thus, the distinction between user-generated content, to which the liability shield of Article 5 DSA applies, and the platform's own content and other behaviour, for which it is directly liable regardless, remains the overriding principle.

By retaining the basic policy choices of the e-Commerce Directive, the DSA does not follow the approach recently taken by the Copyright DSM Directive. For platforms that qualify as "online content-sharing service providers" within the meaning of Articles 2(6) and 17 of the recent Copyright DSM Directive,[46] the distinction between user-uploaded content and the platform's own activities seems to have abandoned, in order to hold the platform responsible for any illegal content that it makes available.[47] However, one can also read Article 17 Copyright DSM Directive as a reaffirmation of this distinction, in combination with a broadened concept of a platform's own content, for which it bears full responsibility.[48] The broadened notion of a platform's own actions or content is based on a set of circumstances, viz. (1) platforms which allow the online sharing of content such as text, music and video, create serious risks for copyright holders and the public interest that far exceed the risks they run in the analogous world; (2) these platforms engage in considerable efforts to solicit content from users, and organize and display such content so as to make access by third parties easy and attractive; and (3) platforms do all this with a view to generating revenue and earning profits. Under these assumptions, it seems plausible to impose comparatively stricter duties to monitor and control user-uploaded content, which is prone to infringe copyright, in contrast to, for example,

46. Directive (EU) 2019/790 on Copyright and Related Rights in the Digital Single Market, O.J. 2019, L 130/92.

47. As to the distinction between direct and indirect liability of a platform cf. Leistner and Ohly, "Direct and indirect copyright infringement: Proposal for an amendment of Directive 2001/29/EC (InfoSoc Directive)", (2019*) Journal of Intellectual Property Law & Practice*, 182–186; Leistner, "Intermediary Liability in a Global World", available at <papers.ssrn.com/sol3/papers.cfm?abstract_id=3345570>.

48. Husovec and Quintais, "How to license Article 17? Exploring the implementation options for the new EU rules on content-sharing platforms", *GRUR International*, Issue 4/2021, (forthcoming), available at <dx.doi.org/10.2139/ssrn.3463011>; Metzger and Senftleben, "Comment of the European Copyright Society selected aspects of implementing Article 17 of the Directive on Copyright in the Digital Single Market into national law", 115 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* (2020), para 16, available at <www.jipitec.eu/issues/jipitec-11-2-2020/5104>.

personality rights. Article 17 Copyright DSM Directive applies only to platforms optimized for the sharing of user-uploaded content. For all other platforms, the protections of the e-Commerce Directive – and, in future, of the DSA – remain in place, i.e. they continue to benefit from the liability shields.[49]

4.2.2. *Illegal content and the scope of liability*

Once more following the tradition of the e-Commerce Directive, the DSA does not define the basis and scope of liability of internet service providers or, for that matter, online platforms. The bases and elements of platform liability for user-generated content remain an affair of national law of tort or delict.

Article 2(g) DSA defines illegality broadly, as the concept is not limited to information as such but extends to the sale of products or the provision of services. It not only covers content that is in itself illegal (e.g. hate speech), but also content that is used for illegal purposes, such as online stalking. The defining feature of illegal content remains, however, its illegality, and in this respect Article 2(g) DSA refers to EU law and, absent EU law, to national law. While Union law does supply a legal framework on copyright, it fails to delineate protected legal interests of the person and to balance these interests against competing interests in freedom of speech. The EU Charter of Fundamental Rights certainly protects the basic interests of the individual (Arts. 1 et seq. CFR), together with freedom of speech (Art. 11 CFR), but it does not offer concrete legal parameters on how to balance these interests where they collide. Thus, the sources of illegality are to be found in the national law. The reference is to the criminal law, but also to entitlements of a private law nature. The general right of personality or privacy, together with its subcategories, come to mind.[50]

The second principal source of illegality under national law, is the criminal law of the Member States. In some measure, criminal law protects the same entitlements of individuals and businesses that private law created. However, criminal law goes far beyond private interests as it also protects public interests, such as the preservation and flourishing of civilized society, respect for other people, and the peaceful resolution of disputes, including those involving religion, politics, or culture. In such cases of "victimless crimes",

49. Directive (EU) 2019/790 on Copyright and Related Rights in the Digital Single Market, O.J. 2019, L 130/92.

50. As to German law cf. Wagner, "The protection of personality rights against invasions by mass media in Germany" in Koziol and Warzilek (Eds.), *Persönlichkeitsschutz gegenüber Massenmedien* (Springer, 2005), pp. 137–197; as to French law cf. Anterion and Moréteau, "The protection of personality rights against invasions by mass media in France", in ibid., pp. 117–136; as to Italian law cf. Zaccaria and Faccioli, "The protection of personality rights against invasions by mass media in Italy", in ibid., pp. 181–208.

where public interest is at stake, public authorities such as the police and the prosecution are called upon to protect it.

The Austrian Communications Platforms Act (*Kommunikationsplattformen-Gesetz, Kopl-G*)[51] and the German Network Enforcement Act (*Netzwerkdurchsetzungsgesetz, NetzDG*)[52] were designed not only to provide effective remedies to individuals whose personality rights were infringed by postings on social media platforms, but also to facilitate the enforcement of criminal law against hate speech within the context of social media platforms. In combining private entitlements such as the right of personality and the protections of criminal law under the concept of illegal content, the DSA follows the model of the *NetzDG*. However, a pending reform of the German statute aims to impose on social media platforms far-reaching obligations to notify the police of criminal content.[53] In contrast, Article 21(1) DSA limits the duty to notify to instances of serious criminal offences that involve a threat to the life or safety of others. The scope of this provision seems far too narrow, as it fails to address one of the most pressing problems of social media platforms, namely the broad and instantaneous distribution of hate speech.

4.2.3. *The redress mechanism of the DSA*

The core innovation of the DSA with a view to illegal content is of a procedural nature. While the limitations on platform liability enshrined in Articles 3 to 8 DSA are, for the most part, verbatim replicas of Articles 13 to 15 e-Commerce Directive, Articles 14 to 21 DSA break new ground as they impose duties on platforms to deal with complaints against illegal user-generated content. Articles 14 to 21 DSA apply to "information platforms" as defined in Article 2(h) DSA, i.e. to any hosting service that stores and disseminates information to the public, unless such dissemination is "a minor and purely ancillary feature of another service". Thus, it appears that Amazon would not qualify as a platform in that sense, as the dissemination of information is a mere side effect of that business's operation of an online store, while Facebook would be classified as a platform as a matter of course. Beyond social media platforms, the DSA also covers news channels and other internet sites that disseminate information. The new

51. *Bundesgesetz über Maßnahmen zum Schutz der Nutzer auf Kommunikationsplattformen*, BGBl. I 151/2020.

52. For an English translation of the recently reformed *Netzwerkdurchsetzungsgesetz* see <bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf;jsessionid=C37D887697E2FD3D45FB5FCDBCC10617.1_cid334?__blob=publicationFile&v=2>. For a critical view cf. Balkin, op. cit. *supra* note 20, at 2015.

53. Bill of an Act to Combat Hate Speech (*Entwurf eines Gesetzes zur Bekämpfung des Rechtsextremismus und der Hasskriminalität*, BT-Drucks. 19/17741, p. 13), § 3a *NetzDG*.

procedural redress mechanism of the DSA is composed of several steps. The first element is the notice of illegal content received by the platform (Art. 14 DSA), to which, in a second step, the platform must respond through a decision to remove the incriminated content or disable access to it (Art. 15 DSA). While these two elements basically reflect the current practice of notice-and-take-down, already established under Article 14 e-Commerce Directive, the next two steps are new, namely the internal complaint mechanism of Article 17 DSA and out-of-court dispute settlement under Article 18 DSA. Under Article 17 DSA, online platforms must offer an effective internal complaint-handling system to the author of the incriminated content, which must be easily accessible and user-friendly. The platform is bound to deal with the complaints of authors expediently and, in doing so, it must not rely exclusively on algorithms. Where the platform finds that the complaint is well-founded it must reverse its decision and reinstate the incriminated content (Art. 17(3) DSA). In that case, the remedy that remains available to the aggrieved party is recourse to a court of law. However, in the reverse scenario that the platform does not allow the complaint and refuses to make the content available again, it must offer out-of-court dispute settlement to the author pursuant to Article 18 DSA. The body conducting the out-of-court proceedings must meet basic requirements of neutrality, fairness and expertise that are familiar from Articles 6 to 9 Directive 2013/11/EU on alternative dispute resolution for consumer disputes (ADR Directive).[54]

If the ADR entity finds in favour of the party who lodged the complaint, i.e. the author of the incriminated content, and orders the platform to reinstate such content, the platform is bound by the decision. Article 18(1) second subpara DSA must be interpreted as meaning that the platform cannot challenge the decision of the ADR entity in a court of law. In addition, it must bear the cost of the ADR proceedings, and it must reimburse the author of the content for fees and expenses incurred (Art. 18(1) and (3) DSA). In the reverse scenario that the ADR entity finds in favour of the platform by rejecting the complaint, the author is not bound by the decision, but is free to seek recourse in court. In addition, the complainant is not liable to reimburse the platform for its fees and expenses.

4.2.4. *The asymmetric design of the redress mechanism*

The DSA provides for a two-step mechanism of complaint handling and independent ADR with respect to decisions of online platforms that remove or block access to supposedly illegal content or the author's account. However, it is only open to the author of the content or the owner of the account,

54. O.J. 2012, L 165/63; cf. Wagner, "Private law enforcement through ADR: Wonder drug or snake oil?", 51 CML Rev. (2014), 165–194, at 173.

respectively, and not to the party which is affected by a decision *not* to remove the incriminated content. While the aggrieved party has the right to initiate the process for the removal of illegal content, that same party remains excluded from subsequent proceedings. Furthermore, the DSA offers no out-of-court dispute settlement to a party who complains about illegal content infringing their personality rights but fails to persuade the platform to remove such content. The only recourse the aggrieved party has is to file suit in a court of law or apply to a court for an interim measure ordering the platform to take down harmful content. This applies to victims of, for example, defamatory, obscene or abusive statements, and revenge porn.

The Commission offers no explanation as to why the remedial options offered to the aggrieved party on the one hand, and to the author of the incriminated content on the other, are so different.[55] Forcing platforms to offer additional mechanisms of redress to users who generated allegedly harmful content seems well-founded. Without such remedies, platforms may have an incentive to "overblock" user-generated content that was flagged as illegal.[56]

This line of argument does not answer the question why the same remedies are withheld from the party who attempts to protect their rights by flagging infringing content and demanding its removal. The decision of the platform on whether or not the posting violated the personality rights of another party depends on the application of legal norms which strike a balance between the author's freedom of expression and the third party's right to privacy. Thus, the decision whether or not to remove requires the weighing and balancing of conflicting fundamental rights. The German Constitutional Court, in its recent decisions on the right to be forgotten, emphasized the duty of platforms to balance the competing interests, both constitutionally protected.[57] The procedural remedies provided by the DSA are corollaries to such a substantive duty.

Given that the constitutionally protected interests of both parties need to be balanced, both parties should have equal access to the procedures and to potential remedies against an unfavourable decision. Making an "easy to access, user-friendly" complaint-handling system and ADR mechanism

55. In its Explanatory Memorandum, the Commission talks about an "asymmetric approach", but this concept is not related to the asymmetry of the mechanisms for the handling of complaints against removal of illegal content by platforms of any nature, but instead to the distinction between platforms generally, which are subject to the obligations set out in Arts. 14–24 DSA, and so-called "very large online platforms" that need to comply with the additional due diligence obligations of Arts. 25–37 DSA. Cf. DSA Proposal, pp. 6 and 11.

56. Balkin, op. cit. *supra* note 20, at 2017; Wagner, op. cit. *supra* note 43, at 452.

57. *Bundesverfassungsgericht*, 6 Nov. 2019, 1 BvR 267/17, *"Recht auf Vergessenwerden II"*, para 96; available at <www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2019/11/rs20191106_1bvr027617en.html>; Case C-131/12, *Google Spain SL* v. *AEPD*, EU:C:2014:317, paras. 89–99.

available only to the author of purportedly illegal content, favours his or her position and generates an incentive to underblock. Of course, affected parties could seek redress in public court. But a reputation may be lost on the internet long before a public court even issues an interim order of protection. Therefore, the asymmetric design of the scheme of procedural remedies set out in the DSA is hardly consistent with the EU Charter, which does not only protect free speech (Art. 11), but also the right to privacy (Art. 7) and other personality rights (Art. 8 et seq.). The fact that the DSA turns a blind eye to the victim is surprising, particularly in light of the commitment of Article 1(2)(b) DSA to protect the fundamental rights enshrined in the Charter. It is noticeable that the amendment of the German Network Enforcement Act (§ 3b *NetzDG*) grants access to a complaint procedure also for the victim.[58]

The dispute settlement mechanisms of the DSA also lack consistency with regard to the statement of reasons. Whereas a decision of the provider to remove or disable access should be accompanied by a clear and specific statement of reasons that must be disclosed in a publicly accessible database pursuant to Article 15 DSA, all other decisions during the ADR process remain private. This applies particularly to the decision of the internal complaint-handling system to reinstate harmful content under Article 17 DSA.[59] Even the decisions of the ADR entities envisaged by Article 18 in out-of-court dispute settlement proceedings need not be disclosed to the victim, let alone to the public at large. Without disclosure of reasoned decisions, the complaint-handling and ADR mechanisms cannot provide any orientation for future behaviour, either of the provider or the recipient.

4.2.5. *Violations of the platform's terms and conditions*

The redress mechanism introduced by the DSA is the same, regardless of whether the decision is based on a violation of contractual terms and conditions or on a violation of statutory provisions. It is open to question, however, whether the two categories of cases should really be lumped together. Article 12 DSA requires providers to include information in their terms and conditions, covering any restrictions to the use of their service in respect of information provided by the recipients of the service. They must also apply and enforce them in a diligent, objective, and proportionate manner "with due regard to the rights and legitimate interests of all parties involved…". Obviously, the main objective is not to constrain the content of the terms and conditions, but to tie any restrictions to general rules, drafted *ex ante,* and

58. The Amendment provides also for an ADR procedure, but it is up to the platforms to participate in such proceedings (section 3c *NetzDG*).

59. Art. 17(4) DSA settles with a duty of the platform to inform the author of the harmful content of its decision.

known by the recipients. This approach is consistent with Article 7 P2B Regulation 2019/1150, and with Article 6(c), (d), (f) and (k) DMA, which both impose a duty of neutrality *vis-à-vis* recipients or, what amounts to the same, a prohibition to discriminate unfairly between groups of recipients.

However, the operator of the platform which created the terms and conditions is in a different position from a national lawmaker. It is by no means certain that the platform operator, in its terms and conditions, provides for a balanced account of the interests involved *in abstracto*. The promise of Article 1(2)(b) DSA to effectively protect the fundamental rights enshrined in the Charter could only be vindicated if the platform was under a duty to take these entitlements into account in drafting its terms and conditions.

In light of the wording of Article 12 DSA, it can only be the Charter itself, and not the DSA, that makes fundamental rights of the recipients binding for the drafting of terms and conditions. This touches on the tricky and unresolved question of horizontal effects of the Charter on private transactions and on the acts of private parties.[60] According to Article 51 CFR, its scope is confined to acts of the State, as defined in the provision. Even though the fundamental freedoms of the TFEU and Article 21 CFR (non-discrimination) have been applied to private parties,[61] there is no broadly accepted doctrinal basis for extending the scope of the Charter to relations between private parties. Thus, its effect on the process of drafting terms and conditions that specify the requirements for removal and reinstatement of undesirable content remains an open question.

It is plausible to assume that the Union has a duty to protect all fundamental rights when setting rules for the online environment. And if the online environment is shaped by powerful private actors, it is also plausible to assume that the duty to protect may encompass those private actors, making them responsive to the fundamental rights that their business practices may affect. It is at least doubtful whether the unfettered discretion that the DSA leaves to online platforms with respect to their terms and conditions is consistent with the Charter. This is especially true considering the potential consequences of Article 12 DSA. If it were interpreted to implicitly grant the platforms

60. Cf. Kühling, "Fundamental rights" in von Bogdandy and Bast, *Principles of European Constitutional Law*, 2nd ed. (C.H.Beck, 2009), pp. 479–515, at pp. 492–494; with regard to Art. 10 ECHR (in an extreme case) see also ECtHR, *Dink* v. *Turkey*, Appl. No. 2668/07 et al., judgment of 14 Sept. 2010, with broad wording in para 106: "…que l'exercice réel et effectif de la liberté d'expression ne dépend pas simplement du devoir de l'Etat de s'abstenir de toute ingérence, mais peut exiger des mesures positives de protection jusque dans les relations des individus entre eux. En effet, dans certains cas, l'Etat a l'obligation positive de protéger le droit à la liberté d'expression contre des atteintes provenant même de personnes privées…".

61. Cf. Case C-438/05, *The International Transport Workers' Federation* v. *The Finnish Seamen's Union*, EU:C:2007:772, para 42; Case C-414/16, *Vera Egenberger* v. *Evangelisches Werk für Diakonie und Entwicklung e.V.*, EU:C:2018:257, para 76.

freedom to enact terms and conditions of their choice, unrestrained by the fundamental rights guaranteed in the Charter, Article 12 DSA would even foreclose judicial review at the national level. This would result in a substantial decrease in the level of fundamental rights protection, which would be at odds with the ambitions of Article 1(2)(b) DSA and can hardly be consistent with the true intentions of the Commission. In order to bring the DSA in line with the Charter, it is necessary to include in the DSA a provision that explicitly authorizes the Member States to review platform terms and conditions in light of the fundamental rights enshrined in the Charter or national constitutional law.

4.3. *Informational asymmetries*

4.3.1. *The broader framework of B2B disclosure duties for platforms: The P2B Regulation disclosure duties in the interest of traders ("business users")*

The information and transparency requirements of both the DSA and the DMA must be analysed in the context of the already existing obligations of certain platforms under the so-called P2B Regulation 2019/1150 on fairness and transparency. The duties imposed by the P2B Regulation are mainly concerned with the information asymmetry between platforms and traders (called business users in the P2B Regulation). First, the P2B Regulation obliges "online mediation services" – i.e. services that allow business users to offer goods or services to consumers – to include certain conditions regarding the contractual relationship with the business user in their terms and conditions (Art. 3), and to abstain from other terms (Art. 8). Second, online mediation services are under an obligation to set out in their terms and conditions the main parameters determining rankings, and the reasons for the relative importance of those main parameters as opposed to other parameters (Art. 5(1)). Third, online mediation services must include in their terms and conditions a description of any differentiated treatment which they give in relation to goods or services offered directly by those online intermediation services and by other business users (Art. 7(1)). Finally, the P2B Regulation provides similar information duties for search engines with regard to rankings and differentiated treatment (Arts. 5(2) and 7(2)).

4.3.2. *DSA disclosure duties in the interest of recipients*

The DSA complements the existing disclosure obligations of the P2B Regulation with a set of new disclosure mandates for online platforms which aim at protecting the interests of consumers or other "recipients" of the platforms (and of other interested parties, such as competing traders and

holders of intellectual property rights, Recital 49). Online platforms are defined in the DSA as "hosting services which, at the request of a recipient of the service, stores and disseminates to the public information" (Art. 2(h)). The disclosure mandates address three different problems. First, Article 22 DSA requires online platforms to obtain, verify, and store information on traders who conclude contracts with consumers on that platform, and to provide such information to recipients of the service (traceability of traders). Second, online platforms that display advertising on their online interfaces must ensure that the recipients of the service realize that the information is in fact an advertisement, that they know who the person is on whose behalf the advertisement is displayed, and that they receive meaningful information about the main parameters used to determine to whom the advertisement is displayed (Online advertising transparency) (Art. 24). Very large platforms must disclose additional information in a "publicly available repository", including the parameters used for targeting specific user groups (Art. 30). Third, very large online platforms using recommender systems must set out in their terms and conditions the main parameters used in their recommender systems, as well as any options for the user to modify or influence those main parameters. One option must be without profiling in the sense of Article 29 General Data Protection Regulation (GDPR).[62]

4.3.3. *DMA disclosure duties in the interest of advertisers and publishers*

Transparency obligations are not the focus of the DMA. In fact, the DMA, at least to some extent, supplements the disclosure obligations of the P2B Regulation with substantive rules of conduct and per se prohibitions of certain behaviour. In addition, the DMA sets up a special transparency regime for advertising services, both with regard to the prices paid (Art. 5(g) DMA) and with a view to performance measurement tools (Art. 6(g) DMA). These disclosure mandates have a common goal, namely, to facilitate the switching of advertisers and publishers to alternative providers of online advertising services, and thereby to increase the competitive discipline on markets for advertising (Recital 42), as well as to enhance contestability and fairness. Notwithstanding this market-oriented function of the disclosure obligations, only the advertisers and publishers, i.e. the contracting parties of the gatekeepers, are eligible to request the pertinent information. In this regard, the P2B Regulation, but also the DSA, are more rigorous. Moreover, the regulatory style of the DMA differs from that of the other legal regimes. In contrast to the detailed provisions of the P2B Regulation and the DSA, the disclosure obligations of the DMA use rather broad and general language

62. Regulation (EU) 2016/679, O.J. 2016, L 119/1.

which may leave much wiggle room for the parties subject to these disclosure mandates, i.e. gatekeeper platforms.

4.3.4. *Reporting obligations in the DMA and the DSA*

The DMA and the DSA do not exclusively rely on information duties in bilateral relationships between the platform and its customers, but also provide obligations of transparency to the public at large. These broader information duties reflect a concept of platforms as public infrastructure for which different user groups, but also public authorities, are in need at least of general information about the functioning, policies, procedures, and tools used by the platform.[63] But the reporting obligations will of course also be useful for the preparation of further regulatory intervention.

The DSA introduces in Articles 12 and 13 obligations on providers of intermediary services to include in their terms and conditions information on any policies, procedures, measures, and tools used for the purpose of content moderation, including algorithmic decision-making and human review, and to publish, at least once a year, comprehensible and detailed reports on those content moderation measures. Article 23 extends this reporting obligation with regard to out-of-court-settlements, suspensions of users, measures taken against misuses, further content moderation tools, and average number of users. Finally, very large platforms are under additional reporting obligations (Arts. 30 and 33).

Many transparency requirements apply to services and systems of the platforms which are driven by algorithms, shedding light on the regulatory features of its technical architecture (Arts. 12(1), 23, 24(c) DSA, Art. 13 DMA). They do not require detailed information about the code, but focus on parameters and functions. This is in line with the discussion of the algorithm accountability regime in data protection law and the so-called right to explanation now enshrined in Articles 13, 15, 22 GDPR.[64]

4.3.5. *The wider picture of B2B disclosure obligations under the P2B Regulation, DSA and DMA*

The overall picture of this new framework of B2B information duties is chaotic at first sight. But on closer analysis, some basic structures emerge.

63. *Supra* section 2.4., section 3.2; for a more sceptical view see Leistner, op. cit. *supra* note 47.

64. For a discussion of this issue cf. Citron, "Technological due process", 85 *Washington University Law Review* (2008), 1249–1313, at 1308; Kaminski, "The right to explanation, explained", (2019) *Berkeley Technology Law Journal*, 189–218, at 201–207; for the national legislations in the EU Member States cf. Malgieri, "Automated decision-making in the EU-Member States: The right to explanation and other 'suitable safeguards' in the national legislations", 35 *Computer Law & Security Review* (2019), 1–26.

First, the three instruments address three different groups of customers on the multi-sided platform marketplace; the DSA provides disclosure duties in the interest of private and commercial customers ("recipients"); the P2B Regulation protects traders on platforms ("business users"); the DMA stipulates disclosure duties in the interest of advertisers and publishers. Second, the scope and depth of disclosure obligations ranges from very general obligations in the DMA to very detailed descriptions of specific information about traders and advertisers in the DSA, to parameters, mechanisms and – on a very general level – algorithms used in ranking tools, search engines, and recommender systems in the P2B Regulation and DSA. Third, the new instruments vary with regard to the eligible beneficiaries of the disclosure duties, ranging from bilateral, contract-based information duties in the DMA, to statutory information rights for all recipients of a service (e.g. in the case of the traceability of traders provision in Art. 22 DSA or online advertising transparency in Art. 24 DSA), to requirements to include information in the terms and conditions (e.g. Arts. 5 and 7 P2B Regulation), to disclosure duties *vis-à-vis* the broader public (e.g. online advertising transparency by very large platforms in accordance with Art. 30 DSA).

In light of the richness of these new information duties, the crucial question remains whether the DSA, P2B Regulation and DMA address the most urgent informational asymmetries caused by platforms and apply adequate means to overcome these asymmetries. This question is all the more pressing as the benefits and effectiveness of the disclosure mandates inaugurated by the P2B Regulation as a means to protect the business users of platforms, for example Amazon's marketplace sellers and booking.com's hotels,[65] are more than doubtful. During the legislative process leading up to the Regulation, the European Parliament suggested strengthening its "fairness" prong over its "transparency" prong, but with little success.[66]

While it seems that the P2B Regulation, in itself, achieves very little, it is ample proof of the concern that platforms may abuse their power *vis-à-vis* the businesses they transact with on the "left hand" side of the two-sided market, namely sellers, hotels and other businesses that make efforts to reach their customers through the platform. While the P2B Regulation settles on duties to disclose, the DMA supplies, in Articles 5 and 6 DMA, some of the substantive rules of conduct that the P2B Regulation is lacking. However, the DMA only applies to gatekeeper platforms, i.e. a handful or two of the most significant players on the internet. It seems that business users of other platforms that

65. *Supra* section 2.2.

66. Busch, "Towards fairness and transparency in the platform economy?" in Franceschi, Schulze, Graziadei, Pollicino, Riente, Sica and Sirena (Eds.), *Digital Revolution – New Challenges for Law* (C.H.Beck, 2019), pp. 57–74.

remain below the thresholds of the DMA, are left out. For them, the P2B Regulation retains its protective force. Business users of platforms that remain below gatekeeper size may want to link the information obtained under the disclosure mandates of the P2B Regulation with the prohibitions and safeguards spelled out in Articles 5 and 6 DMA. Even outside its scope of application, the DMA may inform antitrust courts and agencies of suspicious practices, and it may lead civil law courts to consider the overall fairness of general business terms under the applicable law of contract, provided that this law allows judicial review of standard business terms in commercial relationships, as is the case in, for example, Germany.

5. Enforcement

A special feature of the platform economy is speed: unlawful content can spread quickly. Where platforms exploit information asymmetries to their benefit, the effects on business users and consumers will likely be vast and will show up fast. The same is true where platforms exploit their gatekeeper power. A strong and speedy enforcement of the newly established legal framework is therefore a goal that the DMA and the DSA share.

At the same time, it is precisely on the enforcement side that the proposals for a DSA and a DMA need adjustment and refinement. Allowing for and facilitating a decentralized public enforcement remains a shared desideratum. For the DSA, third parties should be allowed to lodge complaints. For the DMA the role of private enforcement needs clarification.

5.1. *Enforcement of the DSA*

5.1.1. *Private enforcement*

As we have seen above, the DSA – like the e-Commerce Directive – builds on the principle that platform operators are not to be held liable for user-generated content. Instead, platforms are required to implement a "notice-and-take-down" procedure for illegal content, where the illegality is to be determined primarily on the basis of national tort and criminal law, including laws against hate speech and other forms of harmful communication.[67] While the DSA introduces new mechanisms for out-of-court resolution of disputes involving illegal content, the public courts remain the backbone of the private prong of the DSA's redress system. In short, the DSA inaugurates a system of private enforcement through tort

67. For a definition of the concept of illegal content see Art. 2(g) DSA.

liability and judicial remedies that is supplemented by important elements of alternative, i.e. out-of-court, dispute resolution.

Given that the DSA relies primarily on private enforcement, the asymmetry of the dispute settlement processes set out in the DSA weighs even heavier.[68] From the perspective of private enforcement, it is regrettable: that platforms must provide reasoned decisions if they remove supposedly illegal content, but not if they decide to leave it untouched (Art. 15 DSA); that victims remain excluded from both the complaint-handling system of Article 17 DSA and the ADR mechanism of Article 18 DSA; and that the decisions made in out-of-court dispute settlement under Article 18 DSA need not even be published. Why the Commission turns a blind eye to victims of illegal content when defining the terms of private enforcement remains a mystery.

The DSA's requirement to integrate certain information into the platform's terms and conditions may be classified as an additional, though indirect, instrument of private enforcement. This mechanism is applied with regard to recommender systems in Article 29 DSA. The same approach has already been used in Articles 5 and 7 P2B Regulation with regard to the terms and conditions of online intermediation services with a view to rankings. If the description of parameters used for recommender systems and the different choices for users are included in the platform's terms and conditions, those parameters will form a part of the standards that determine whether the digital service rendered conforms to the quality and features that the user may expect.[69] If the platform fails to supply those features as promised, the user may have a range of contract law remedies. In addition, the specific enforcement measures for unfair standard terms under the Unfair Terms Directive 93/13 and the even stricter national rules, which may also cover B2B contracts, may be invoked.

5.1.2. *Public enforcement*

Insofar as illegal content does not cause harm to the interests of individuals but violates criminal statutes that aim to protect the public interest, a private cause of action does not exist. Within the realm of criminal law, public prosecutors are charged with enforcement – but the general principle that platforms are not liable for user-generated content continues to apply. The German Network Enforcement Act (*NetzDG*) has come with an important innovation, however, by requiring platforms to diligently deal with notices of illegal content and subjecting them to civil fines where they fail to establish

68. *Supra* section 4.2.

69. See Arts. 6–8 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, O.J. 2019, L 136/1.

the necessary mechanisms. A failure to adequately deal with a specific notice of illegality is not subject to sanctions.

The DSA follows the same approach. A platform's failure to remove a discrete item of illegal content does not give rise to liability on its part. Yet a general business model or strategy that violates the specific due diligence obligations of Articles 14 et seq. constitutes an "infringement" that can trigger sanctions. Pertinent examples involve the failure of a platform to comply with its transparency obligations under Article 13 DSA, or to set up the internal complaint-handling mechanism required under Article 17 DSA at all. Chapter IV DSA requires Member States to determine the authorities charged with enforcement of the Act, and to designate a so-called Digital Services Coordinator (Art. 38(1), (2) DSA). Pursuant to Article 41(2) DSA, the competent Digital Services Coordinator does not only have the power to order the cessation of "infringements", but also to impose remedies, fines, and periodic penalty payments, alongside the power to order interim measures. The Digital Services Coordinator could also intervene in cases of non-compliance with the special obligations that Articles 25 et seq. DSA set out for "very large online platforms". Platforms of this size are subject to additional duties to organize and operate their businesses in a way that minimizes harm. While the Digital Services Coordinator may act on their own motion, the "recipients of the service", that is the users of the platform (Art. 2(b) DSA), are entitled to file a complaint with the Coordinator in order to bring an alleged infringement of the DSA to his or her attention (Art. 43 DSA). However, the right to lodge a complaint does not open up a second path towards enforcement of private entitlements.

It is sound policy not to burden Digital Services Coordinators or other public authorities with the authority to determine the lawfulness or illegality of content that platform users made public, if only because the granting of such authority would raise serious concerns under the guarantee of free speech. Still, it seems awkward that the DSA continues its asymmetric approach in allowing only platform users to lodge a complaint, but not other parties that are negatively affected by content disseminated by the platform. In the same vein, it seems wrong not to allow public prosecutors to lodge complaints against platforms with the Digital Service Coordinator. There seems to be an obvious mismatch between Article 41 DSA and the purpose of the Act to protect both individuals and the public at large against illegal content. The one-sidedness of Article 43 DSA will lead to one-sided enforcement of the DSA by Digital Services Coordinators.

Furthermore, as many platforms operate across borders and cover the whole of the internal market, the question arises as to the jurisdiction of the several Digital Services Coordinators of the Member States. Here, the DSA

follows the country-of-origin principle known from the e-Commerce Directive. Under Article 40(1) DSA, the Member State which hosts the main establishment of the platform operator shall have jurisdiction to enforce the due diligence obligations of the platform, as defined in Articles 10 to 37 DSA. Still, a complaint against the operator of a platform may be filed with the local Digital Service Coordinator of the Member State where the complainant resides (Art. 43 DSA). From there, it will be transferred to the Digital Service Coordinator at the seat of the platform (Art. 45(1) DSA). Thus, the Digital Services Coordinator of one Member State lacks the power to take action against a platform operator established in another Member State. If the Digital Services Coordinator in the State of establishment fails to act, the only remedy that their colleague in the Member State of the complainant has is to involve the European Board for Digital Services (Arts. 45(4) and 49 DSA).

Given the concentration of corporate headquarters for the European operations of American-based internet giants, such as Alphabet (Google), Amazon, Apple, and Facebook, in the Republic of Ireland, the Irish Digital Services Coordinator will be the decisive person to look at. It is therefore questionable whether following the country-of-origin principle with a view to the public enforcement of the DSA is sound policy. This allows platforms to benefit from regulatory arbitrage, if not with a view to the applicable legal rules, then with regard to enforcement. In addition, the concentration of the enforcement powers in the hands of a single Member State raises the issue of adequate resources and of responsiveness to public sentiments in different Member States. The framers of the DSA correctly abstained from the attempt to provide a pan-European definition of illegal content. But it would then make sense to also take the second step, namely, to abandon the country-of-origin principle and to allow for a decentralized enforcement of the DSA.

One may wonder whether local enforcement is a viable option given the delocalized activities of many platforms. While it is true that the most powerful platforms play globally, there are many platforms that cater to local markets and local needs, typically using the local language. For these platforms, decentralized enforcement clearly seems to be the better option. With a view to the global players, it is not clear that they roll out the same operations and mechanisms in each and every jurisdiction. Rather, Google, Facebook and others seem to have developed ways and means to adapt their services to local preferences – and local rules.[70] In order to address remaining concerns about uniformity and in an effort to keep the costs of diversity low, decentralized enforcement would need to be backed up by close cooperation between the competent national authorities, following the model of the

70. *Infra* section 6, notes 84 et seq.

European Competition Network (ECN) or the cooperation between national data protection authorities under the GDPR.

In addition to the public prosecution of a platform's systematic violation of its due diligence obligations under Articles 14 et seq., the DSA establishes yet another layer of initially internal safeguards, that can serve as a basis for subsequent public accountability. Very large platforms within the meaning of the DSA are required to engage in a yearly assessment of systemic risks relating to the dissemination of illegal content, any negative effects for the exercise of fundamental rights, and an intentional manipulation of their service (Art. 26 DSA). They must implement measures mitigating these risks if necessary (Art. 27 DSA), undergo a yearly independent audit (Art. 28 DSA) and appoint a compliance officer (Art. 32 DSA). This approach resembles long established standards in data protection law, now embodied in the GDPR.[71] Furthermore, the Commission will support and promote the development and implementation of voluntary industry standards with respect to many of the obligations imposed by the DSA on platforms more broadly (Art. 34 DSA), and to encourage and facilitate the drawing up of codes of conduct at Union level and contribute to the proper application of the DSA (Art. 35 DSA). Again, this approach resembles the approach of the GDPR (Art. 40 GDPR), but the institutional framework is more elaborate.

Finally, Article 50 DSA places very large platforms under "enhanced supervision" by the Commission itself, which is authorized to act on its own initiative, but through the Digital Service Coordinator at the place of establishment of the platform operator. This regime does not apply to all of the obligations imposed on these businesses by the DSA, but only to the special duties to develop and implement a system of internal risk assessment and control as set out in Articles 26 to 33 DSA.[72] While it seems appropriate that the Commission itself takes charge of the largest players in the platform market, it is surprising that the centralized enforcement regime for very large platforms remains limited in the way described and does not extend to the general obligations incumbent on platforms under Chapter III, Sections 1, 2, 3 DSA. In particular, the notice-and-take-down mechanism, together with its procedural requirements and safeguards as defined in Articles 14 to 21 DSA,[73] remains outside the scope of Article 50 DSA and thus the enforcement powers

71. Data protection impact assessment for likely high-risk processing including measures envisaged to address the risks (Art. 35(7)(d) GDPR); designation of a data protection officer *inter alia* for data controllers or processors where the core activities consist of processing operations, which by virtue of their nature, their scope and/or their purpose, require regular and systematic monitoring of data subjects on a large scale (Art. 37 GDPR); certification, which is however voluntary (Art. 42 GDPR).

72. *Supra* section 3.2.

73. *Supra* section 4.2.

of the Commission. Thus, very large platforms are subject to a divided system of enforcement.

5.2. *Enforcement of the DMA*

5.2.1. *Public enforcement*

The implementation and enforcement of the behavioural rules set out in the DMA currently appear to hinge entirely on enforcement action taken by the European Commission. The Commission will be in charge of the process for designating a gatekeeper (Arts. 3(3) to (7) DMA) and for reviewing the gatekeeper status (Art. 4 DMA), as well as for updating gatekeeper obligations (Art. 10 DMA) – tasks which arguably must be centralized in order to avoid regulatory fragmentation. Likewise, the Commission will – and arguably must – be exclusively competent to decide on the granting of a suspension or exemption, based either on a gatekeeper claiming that a specific obligation would endanger the economic viability of its operations (Art. 8(1) DMA) or based on overriding reasons of public interest (Art. 9 DMA).

It is less clear that the behavioural rules set out in Articles 5 and 6 DMA require the centralization of public enforcement. Not only would the per se nature of these rules seem to facilitate a decentralized enforcement. A decentralized public enforcement would arguably greatly contribute to the effectiveness of the new regulation and ensure a speedier intervention, in particular when it comes to infringements of Articles 5 and 6 DMA of a more regional nature. The emergence of an enforcement bottleneck at the EU level would be avoided. Parallel enforcement competences of the Commission and of national (competition) authorities with regard to Articles 5 and 6 DMA would therefore appear to be the first best option.

Given the vast and overwhelmingly positive experience with decentralized public enforcement of EU competition rules by national competition law agencies under Article 3 of Regulation 1/2003, it comes as a surprise that no such regime is currently foreseen in the DMA. The Commission's exclusive competence for granting exemptions under Articles 8 and 9 DMA would not be compromised: Articles 5 and 6 DMA would apply as long as no such exemption is granted. The procedural and sanctioning regime set out in Chapter V of the DMA with a view to establishing the requisite Commission's powers could easily be matched by similar national enforcement and sanctioning regimes.

Moreover, the Commission's competence to specify the measures to be taken to ensure effective compliance with the Article 6 obligations (Art. 7(2) DMA) need not be read as an exclusive competence to enforce Article 6. Article 7(3) DMA emphasizes that this procedure is without prejudice to the

Commission's power to adopt a non-compliance or fining decision. Likewise, it could be without prejudice to national authorities' enforcement action. The Article 7(2) procedure would then rather amount to an opportunity for the gatekeepers to engage in a regulatory dialogue with the Commission.[74] Obviously, close coordination between the Commission and national authorities would be needed. The European Competition Network (ECN) provides a model.

National competition authorities remain competent to enforce Articles 101 and 102 TFEU (Art. 1(6) DMA). Also, the DMA does not preclude national competition rules on unilateral conduct for gatekeepers that are stricter than Article 102 TFEU. With a view to Germany, it is submitted that some scope will remain for enforcement of section 19a GWB, as well as for the public and private enforcement of section 20 GWB.

5.2.2. *Private enforcement*

The draft DMA does not only centralize public enforcement. It also skips the important issue of private enforcement. While private enforcement is not explicitly excluded, nothing in the DMA indicates that effective enforcement of the DMA would require the Member States to ensure private enforcement. Clearly, national rules on private enforcement of competition rules, including the rules implementing Directive 2014/104/EU on cartel damages, will not be applicable to the DMA as they presuppose an infringement of competition law; and, although the DMA may be a measure of competition policy, it is not competition law in the technical sense.[75] Private enforcement may be feasible based on the Member States' general tort law provisions or, possibly, based on national unfair trading law. A specification of whether the *effet utile* principle will require Member States to ensure effective private enforcement may be useful, however.

6. Concluding observations

With the DMA and the DSA, the Commission has aimed for the stars. It proposes to define the ground rules for today's platform economy in two ways. First, by specifying the special obligations that come with the intermediary, regulatory, and information-spreading function that platforms assume. Second, by binding the most powerful platforms to a code of conduct, which is intended to ensure that markets remain open wherever feasible, that

74. This reading is supported by Art. 7(6) DMA which endows gatekeepers with a right to request an Art. 7(2) proceeding.

75. Wagner, op. cit. *supra* note 32.

even quasi-monopolistic market positions remain contestable, and that competition on the markets and on and for neighbouring markets remains fair. With both regulations being labelled as "Acts", observers may be reminded of the introduction of the US Securities Act and Securities Exchange Act in 1933 and 1934 respectively, establishing a legal framework for financial markets of global relevance. Similarly, the DSA and the DMA come with an ambition to define global standards.[76] They regulate the behaviour of some of the biggest, strongest, and most valuable corporations in the world, many of them with their principal place of business located in the United States.

Large parts of the DSA and the DMA can be conceptualized as reactions to well-known and broadly accepted market failures, which have, however, taken on a particular shape in the platform economy and overlap in novel ways. In addition, there is a perception of a special public interest in the platform economy, where platforms are perceived as important infrastructures of a novel kind.

With the DMA, the EU steps forward to propose a regime of rules of conduct for large gatekeeper platforms that provide a predefined set of core platform services. Implicit in this move is the belief that competition law alone is not sufficient to reign in, with sufficient effectiveness and speed, the novel forms of private power that the largest platforms possess. Much of the regulatory technique and detail is still subject to a transatlantic dialogue. However, a central problem of the DMA remains the ambiguity of its goals, and the fairness goal in particular.

The DSA comes with the promise of ensuring more fairness, transparency and accountability in the content moderation process and making sure "that fundamental rights are respected" by platforms that post user-generated content.[77] This promise seems a little overblown, if only because the EU lacks the power to define for itself the kinds of user-generated content and activities that are classified as "illegal" and thus are subject to removal. Also, under the DSA, the national legal systems will have to specify whether content posted, for example on social media platforms, that is defamatory, degrading, obscene, intrusive or otherwise harmful to the interests of others, can remain online or must be removed. The limitation of EU powers regarding the regulation of content poses serious problems with a view to the core obligation that the DSA defines for platforms. Namely, they must balance the interest in free speech of the user against the personality rights of a third party, while both interests are protected under the EU Charter of Fundamental Rights. The Commission could go no further than implicitly assuming that the platforms

76. For the so-called "Brussels Effect" see Bradford, *The Brussels Effect* (OUP, 2020), with Ch. 5 discussing the digital economy, pp. 131–169.

77. DSA Proposal, p. 2, and DSA, Recitals 31, 41, 105, 106.

are bound to respect the fundamental rights of persons involved in a dispute about allegedly illegal content.

Simultaneously, the DSA must be welcomed for aiming to introduce a system of out-of-court dispute resolution that promises the expedient settlement of conflicts involving harmful user-generated content. These disputes will take the shape of a triangle, with the platform, the user who authored the incriminated content, and the person who suffered harm, being situated at the corners. It is submitted that the ADR scheme proposed by the DSA is inadequate to resolve such disputes fairly and even-handedly, as the victim, i.e. the person who allegedly suffered harm as a consequence of illegal content, remains excluded from both the internal complaint-handling system to be set up by platforms and the ADR proceedings that platforms must participate in. As it stands now, the DSA forces the wrong parties – platforms and users – to argue and resolve disputes that involve the interests of the user who generated the harmful content and the victim who suffers harm as a consequence of its dissemination. The one-sidedness of this solution is obvious, serious, and incompatible with the DSA's commitment better to protect the fundamental rights of the individual enshrined in the EU Charter.

While the DMA and the DSA have been presented as "milestones in our journey to make Europe fit for the Digital Age",[78] both regulations reflect an awareness that the different groups of customers of platforms, the public at large, and the regulators, continue to face a considerable lack of knowledge about the functioning of internet intermediaries and its effects on economic markets and communications. Consequently, the Acts embrace various mechanisms, including transparency requirements, that may produce increased knowledge and a better understanding. All legislative ambitions notwithstanding, both Regulations are evidence of an evolutionary approach. The adjustment mechanism built into the DMA is more developed and convincing than the more static design of the DSA. Especially the trigger for obligations thus far confined to very large platforms above a quantitative threshold under the DSA should be designed more flexibly.

Does the proposed package have the potential to set the standard for platform regulation not only in Europe, but globally? Research suggests that global standard setting worked for the GDPR,[79] but it is far from clear whether this feat can be repeated in the case of platform regulation. The global impact of comparatively strict regulatory standards set by EU legislation is

78. See Executive Vice-President Vestager, "Statement on the Commission proposal on new rules for digital platforms", 15 Dec. 2020, available at <ec.europa.eu/commission/press corner/detail/en/STATEMENT_20_2450>.

79. Cf. Bradford, op. cit. *supra* note 76, pp. 132–155.

referred to as the "Brussels Effect",[80] echoing the so-called California effect described for the US market. For the Brussels effect to work, several elements must be present, most importantly the inelasticity or immobility of the addressees of regulation, and the non-divisibility of the goods and services offered by them.[81] Even if one assumes that the DSA and DMA will represent the high watermark of regulatory intervention for the foreseeable future, doubts remain as to whether Europe will be able to set the standard for the world at large. In essence, firms that serve the world market will adopt standards "made in Europe" to their global production only if they cannot evade European regulation by moving or producing elsewhere and if the costs of diversified production, i.e. of supplying goods and services of different quality or other characteristics to markets in jurisdictions with varying regulatory standards, outweigh the benefits. It is received wisdom that these two requirements are met in the case of goods sold to consumers, such as clothes, electronics, cars, and so on. It is equally well accepted that financial markets are different, as the costs for suppliers of financial products to set up shop in jurisdictions promising regulatory arbitrage are relatively low and so are the costs of differentiation, i.e. of adapting products and business practices to the regulatory standard in force in a given jurisdiction.

Where does this theory leave the platform industry? Most probably, somewhere in between. At its core, the DSA requires platforms to control and moderate user-generated content. This cannot be done irrespective of the particular language employed by the users whose contributions are subject to platform control. For example, Facebook needs to employ algorithms and people familiar with the French language in its effort to remove hate speech that is phrased in French, and the same is true for all other languages. Thus, in order to comply with the DSA, platforms will tailor safety measures and control mechanisms to the community using the same language. If this will be done anyway, it is not much of a problem, i.e. it does not impose prohibitive costs to develop and adopt different business and compliance strategies for different jurisdictions. YouTube had no difficulties in the past in blocking certain copyright infringing content for specific jurisdictions only. However, the ECJ has ruled that in the case of hate speech, Facebook may be forced to block the respective illegal content not only for its users in a particular Member State, but worldwide.[82] If this ruling, made under the e-Commerce Directive, continues to be valid under the DSA, as must be assumed, then platforms would in fact be forced to adopt the same standards worldwide.

80. Cf. Bradford, op. cit. *supra* note 76.

81. Ibid., pp. 4–6, pp. 48–65.

82. Case C-18/18, *Eva Glawischnig-Piesczek* v. *Facebook Ireland Limited*, EU:C:2019:821, paras. 50–53.

Against this background, it has been argued that European standards will be followed globally as well.[83]

Also with regard to the DMA, its global impact is difficult to predict. Facebook's decision to counteract regulation in Australia aimed at the protection of news publishers serves as an illustration of platforms' ability to adopt different strategies in different jurisdictions.[84] The willingness of the platform to block certain sites only for users based in Australia suggests that the cost of adaptation of the platform service to the particular regulatory regime in force in a single jurisdiction is modest. Another example is the decision of the European Commission to impose restrictions on the Google Shopping service.[85] Google complied with the Commission's ruling, but only for the European market, by spinning off the European operations into a separate legal entity.[86] As one observer noted: "Google is already used to playing a different game in every different country".[87] If these assumptions are correct, then it seems unlikely that the DMA and the DSA will be able to trigger the Brussels effect, in the sense of ever-stricter standards, in the area of platform regulation. The two legislative proposals would set the stage for the internal market only. And that may well be enough.

83. Bradford, op. cit. *supra* note 76, pp. 155–169.

84. <www.nytimes.com/2021/02/18/business/media/facebook-australia-news.html>.

85. Commission Decision of 27 June 2017 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area, AT.39740, C(2017)4444 final.

86. Bradford, op. cit. *supra* note 76, p. 63.

87. Vaidhyanathan, quoted at <www.nytimes.com/2021/02/17/technology/facebook-google-australia-news.html>.

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