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Legal Development

MJ

Maastricht Journal of European and Comparative Law
2021, Vol. 28(5) 667–686
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DOI: 10.1177/1023263X211030434
maastrichtjournal.sagepub.com

The Commission's digital services and markets act proposals: First step towards tougher and more directly enforced EU rules?

Pieter Van Cleynenbreugel*

Abstract

On 15 December 2020, the European Commission presented its long-anticipated Digital Services and Digital Market Acts proposals. If and when adopted, those proposals would put in place a more stringent regulatory framework ensuring coordinated oversight over the online platform services and digital markets. They would also enhance EU coordinated and direct enforcement in the digital economy, by streamlining the organization and sanctioning powers of national administrative bodies and granting the European Commission far-reaching market supervision and enforcement powers. This legal development article analyses both Acts and calls on the EU legislator to pay sufficient attention to ensuring the feasibility of new regulatory obligations and to foreseeing better procedural safeguards accompanying Commission direct enforcement practices.

Keywords

Digital markets, online platforms, European Commission, direct enforcement, right to a fair trial, Digital Services Act, Digital Markets Act

* Professor of European Union law, Director, Liège Competition and Innovation Institute, University of Liège, Liège, Belgium

Corresponding author:

Pieter Van Cleynenbreugel, Professor of European Union law, Director, Liège Competition and Innovation Institute, University of Liège, Liège, 4000, Belgium.

E-mail: pieter.vancleynenbreugel@uliege.be

1. Introduction

After years of academic and political debates,[1] extensive studies and reports[2] and limited ad hoc legislation,[3] the European Commission on 15 December 2020 presented its ambitious Digital Services and Digital Markets Acts.[4] Those Acts, which at this stage are nothing more than legislative proposals for future EU Regulations, constitute a major step forward in the potential regulation of online platforms in the European Union. If and when adopted, they would fundamentally increase the way in which different kinds of online platforms, search engines, and social networks are regulated and governed in the European Union. The current proposals above all add an additional layer of specific regulatory obligations on certain categories of services providers and require them to take a more proactive risk assessment attitude in terms of content control and moderation. From an enforcement perspective, both Acts propose important coordinated and new direct enforcement upgrades in a field where enforcement has so far been left largely to Member States' discretion.

It of course remains to be seen whether the proposals will be adopted in their current form. Given their potential importance in changing both the substantive law norms and enforcement structures in place, it is nevertheless useful already to highlight the key changes and potential challenges they might bring. As it would be impossible to analyse all provisions in an in-depth manner, this article provides an introductory overview of the most salient and controversial substantive law (section 2) and enforcement (section 3) modifications proposed.

Although the substantive law proposals will undoubtedly give rise to intense lobbying efforts and face potential downplaying or modifications,[5] this article submits that the proposed coordinated and direct enforcement features should also be touched upon in on-going legislative and

1. See an overview and links on the Commission's website, https://ec.europa.eu/digital-single-market/en/online-platforms. For background, see A. Strowel and W. Vergote, 'Digital Platforms: To Regulate or Not to Regulate?', in B. Devolder (ed.), *The Platform Economy – Unraveling the Legal Status of Online Intermediaries* (Intersentia, 2018), p. 1, V. Hatzopoulos, 'The Internal Market and the Online Platform Economy', in S. Garben and I. Govaere (eds.), *The Internal Market 2.0* (Hart Publishing, 2020), p. 313 and P. Van Cleynenbreugel, *Plateformes en ligne et droit de l'Union européenne – un cadre juridique aux multiples visages* (Bruylant, 2020), p. 37.
2. Partially within the expert-focused EU Observatory on the online platform economy, see https://platformobservatory.eu/.
3. By way of example, Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, [2019] OJ L186/57 and Directive 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, [2018] OJ L303/69; in the field of consumer protection rules, new rules that do not only target online platforms as such, but that seek to facilitate online trading practices and subscription portability have also been adopted. By ways of example, Regulation 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, [2017] OJ L168/1 and Regulation 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, [2018] OJ LI60/1.
4. Commission Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM (2020) 825 final (hereafter 'DSA proposal') and Commission Proposal for a Regulation of the European Parliament and of the Council in contestable and fair markets in the digital sector (Digital Markets Act), COM (2020) 842 final (hereafter 'DMA proposal').
5. As envisaged by the Corporate Europe Observatory organization, see https://corporateeurope.org/en/2020/12/big-tech-brings-out-big-guns-fight-future-eu-tech-regulation.

political debates. That is the case especially with regard to the setup and organization of European Commission direct enforcement procedures.

2. The digital services and markets acts: A new rulebook for intermediary services providers?

The Digital Services and Markets Act contain different sets of rules. The Digital Services Act constitutes an update of and complement to e-Commerce Directive 2000/31.[6] It primarily aims to clarify intermediary services' providers' (exemption of) liability for contents published on their platforms or websites. As such, it would replace – although not fundamentally reconsider – the much-criticized Articles 12–15 of the e-commerce Directive and impose additional obligations on different kinds of online players (2.A.). The Digital Markets Act targets those large digital actors that have a 'gatekeeper' role and are or could, on relatively short notice, become (super-)dominant enterprises. Given that EU competition law can intervene only when harmful activities have taken place already, the DMA proposes the adoption of a Regulation that will impose clear behavioural obligations, even in the absence of proven anticompetitive behaviour (2.B.).

A. The Digital Services Act (DSA): New obligations imposed on many, but not all online intermediaries

For the past two decades, e-Commerce Directive 2000/31 has guaranteed the freedom to provide information society services across the EU internal market. The broad information society services definition relied on at that time in principle also covers online intermediation services. It is not surprising therefore that the DSA also relies on that notion to demarcate its scope of application. However, it is submitted that this notion is likely to raise unnecessary questions and give rise to avoidable litigation in the future (2.A.1.). For providers falling within its scope of application, the DSA would impose five different layers of regulatory obligations on specific categories of information society services providers, varying between transparency obligations and risk assessments that could result in fine-tuned content moderation responsibilities. The practical feasibility and enforceability of the latter obligations nevertheless remain to be seen (2.A.2.).

1. Information society services as a shaky starting point

Within the framework of the e-Commerce Directive, information society services had been defined as any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient.[7] A wide-ranging notion, it covers essentially all electronically offered services, including those offered by online sales platforms, communication services, search

6. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), [2000] OJ L178/1.
7. See for that definition, Article 2(a) Directive 2000/31, which refers to Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC; that 1998 Directive has been repealed and replaced by Directive 2015/1535 of the European Parliament and the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, [2015] OJ L241/1.

engines, social networks and online service providers such as Airbnb.[8] The DSA does not alter the definition of the information society services and relies on it to determine its own scope of application. In its essence, the Act's obligations would apply to those information society services that qualify as intermediary services, the recipients of which have their residence or establishment within the European Union.[9]

Unfortunately, however, the boundaries of the 'information society service' notion and its intermediary service subcategory are rather blurry and are very much likely to give rise to two important issues in practice.

First, the DSA will – inadvertently – exclude from its scope of application online intermediation services that are not information society services as a matter of EU law.[10] The strict reliance on the notion of information society service indeed has some perverse consequences in the light of the CJEU's case law on the legal status of some online services providers. It is to be remembered that the Court of Justice confirmed that Uber's UberPOP application, despite consisting in part of intermediating between drivers and clients, under EU law qualified as a service in the field of transport.[11] No information society service let alone an intermediary service was offered as a matter of EU law, despite the clear presence of online intermediation activities. Given that such activities do not legally qualify as information society services, the DSA Regulation would not extend to those services. It is at present unclear whether the Court would extend the same reasoning to other 'transport intermediation' activities such as services performed by Deliveroo or other platforms organizing in a rather decisive way offline services following on to online intermediation. All depends on whether or not the intermediation and related services are separable or not. The Court has made clear in its *AirBnb* judgment that this assessment needs to be completed on a case-by-case basis.[12] Absent a clear and final confirmation by the Court of the separate or integrated nature of intermediary and other services, some online intermediation activities may legally speaking remain outside the information society services definition and thus outside the DSA's scope. That is a most unwelcome evolution, as the Commission's ambition has been clearly to cover a wider range of digital actors within the scope of its proposal.

Second, the Act only applies to a new subcategory of information society services, so-called intermediary services. Within those intermediary services, stricter obligations apply to hosting services and, within the latter, to online platforms.

According to the proposal, intermediary services can be threefold: (1) a 'mere conduit' service that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, (2) a 'caching'

8. As confirmed by the Court of Justice in Case C-390/18 *Airbnb Ireland*, EU:C:2019:1112. See also P. Van Cleynenbreugel, 'Accommodating the Freedom of Online Platforms to Provide Services Through the Incidental Direct Effect Back Door: Airbnb Ireland', 57 *Common Market Law Review* (2020), p. 1216.
9. Article 1(3) DSA proposal.
10. Article 1(4) DSA proposal. For a similar exclusion in the framework of Regulation 2019/1150, see P. Van Cleynenbreugel, 'Will Deliveroo and Uber be Captured by the Proposed EU Platform Regulation? You'd Better Watch Out . . . ', *European Law Blog* (2019), https://europeanlawblog.eu/2019/03/12/will-deliveroo-and-uber-be-captured-by-the-proposed-eu-platform-regulation-youd-better-watch-out/.
11. Case C-434/15, *Asociación Profesional Elite Taxi*, EU:C:2017:981; Case C-320/16, *Uber France*, EU:C:2018:221. See also V. Hatzopoulos, 'After Uber Spain: The EU's Approach on the Sharing Economy in Need of Review?', 44 *European Law Review* (2019), p. 89; M. Finck, 'Distinguishing Internet Platforms from Transport Services: Elite Taxi v. Uber Spain', 55 *Common Market Law Review* (2018), p. 1619.
12. Case C-390/18, *Airbnb Ireland*, para. 64.

service that consists of the transmission in a communication network of information provided by a recipient of the service, involving the automatic, intermediate and temporary storage of that information, for the sole purpose of making more efficient the information's onward transmission to other recipients upon their request and (3) a 'hosting' service that consists of the storage of information provided by, and at the request of, a recipient of the service.[13] In general, providers of Wifi services, online sales or auction platforms, social networks and online search engines that transmit or collect users' data and store them somewhere on their services would above all be targeted by the proposal in their capacity as hosts or storage platforms of such data.

The DSA nevertheless also operates a further distinction between different categories of hosting services. In that context, hosting services that qualify as online platforms or very large online platforms would be subject to more stringent obligations. Online platform services are hosting services which also disseminate (part of the) stored information to the public at the direct request of the recipient having provided this information.[14] The notion of dissemination to the public remains open for interpretation. According to Recital 14 of the DSA, it implies the disclosure of information to a potentially unlimited number of persons, 'without further action by the recipient of the service providing the information being required, irrespective of whether those persons actually access the information in question'. Offering the possibility to disseminate information to a predetermined and finite number of people does not constitute a dissemination to the public. As a result, text messaging and email services as well as any other interpersonal communication service would not fall within the definition of a platform service covered by the DSA. At the same time, those services still constitute intermediary hosting services to the extent that they store data. In that capacity, they remain subject to the less stringent obligations the DSA imposes. By contrast, groups on social networks that could be found and accessed by an infinite number of people, would be part of online platform services within the framework of the DSA and would thus be subject to its more stringent 'online platforms' requirements.

At the same time, every hosting services provider will thus be required to determine which parts of its services qualify as online platform services and which do not. That assessment will be essential, as it determines the intensity with which those providers will be subject to the DSA. However, when such hosting and dissemination activities are merely ancillary to another principal online intermediary or offline service, the DSA does not extend the platform obligations to such ancillary services.[15] Recital 13 to the proposed Regulation makes clear that the mere fact of having a comments section allowing them to store and disseminate information outside of editorial control does not turn online newspapers automatically into online platforms for the purpose of applying the DSA.

In practice, it cannot be excluded, however, that boundary cases will emerge, given that the ancillary or principal presence platform services next to other hosting services offered by one and the same service provider will have to be assessed on a case-by-case basis. Given the case-by-case nature of that assessment and the legal uncertainty pending authoritative confirmation of the

13. Article 2(f) and 3–5 DSA proposal.
14. Article 2(h) DSA proposal.
15. Article 2(h) DSA proposal states more particularly that an activity that is a minor and purely ancillary feature of another service and, for objective and technical reasons cannot be used without that other service is not an online platform service, as long as the integration of the feature into the other service is not a means to circumvent the applicability of this Regulation.

ancillary or separable nature of those services, questions as to the exact scope of the DSA are likely to emerge, undermining its practical effectiveness.

Overall, the DSA's reliance on the 'information society service' notion will likely give rise to many avoidable questions regarding the Regulation's scope. It would have been better, for the sake of legal certainty, had the Commission opted for a clearer list of services covered by the DSA in a way similar to the DMA.[16] That option nevertheless has its own problems and would require a frequent updating of the regulatory framework in place.

2. The DSA's substance

Whenever intermediary services are offered to recipients situated within the European Union, the DSA's obligations will apply.[17] However, the DSA's application is without prejudice to regulatory obligations contained in more specific EU legal instruments, such as the Audiovisual Media Services Directive or consumer law instruments[18]. It remains to be seen to what extent those different rules could be respected cumulatively and how frictions between them will have to be resolved. It is a pity that the DSA did not pay more attention to ensuring coherence and conflict management in relation to those other instruments.[19]

The DSA distinguishes five categories of rules that apply to different categories of intermediary services providers and intervenes with varying degrees of intensity in their operations.

First, all intermediary services providers are subject to a liability exemption regime for any illegal information sent through or stored on their networks. Those liability exemptions for mere conduit, hosting and caching services existed previously within the framework of the e-commerce Directive as well, but gave rise to significant legal uncertainty. One of the main issues raised there was that the Directive seemed to remove the benefit of the liability exemption once the service provider played an active role in uncovering or removing illegal content.[20] The DSA, which replaces the current exemption provisions of the e-commerce Directive,[21] now maintains that '[p]roviders of intermediary services shall not be deemed ineligible for the exemptions from liability (. . .) solely because they carry out voluntary own-initiative investigations or other activities aimed at detecting, identifying and removing, or disabling of access to, illegal content, or take the necessary measures to comply with the requirements of Union law'.[22] All in all, however, the DSA does not fundamentally change or modify the exemptions featuring already in the e-commerce Directive.[23] As a result, the uncertainties and varying national approaches to interpreting the scope of those exemptions are not going to be resolved immediately simply by including those obligations in a new Regulation.[24] To the extent that a services provider hosts

16. See Article 2(2) DMA proposal, referring to different types of core platform services.
17. Article 1(3) DSA proposal.
18. As highlighted in Article 1(5) DSA proposal.
19. See also L. Woods, 'Overview of Digital Services Act', available at http://eulawanalysis.blogspot.com/2020/12/overview-of-digital-services-act.html.
20. See G. Spindler, 'Internet Intermediary Liability Reloaded – The New German Act on the Responsibility of Social Networks and its (In-) Compatibility with European Law', *JIPITEC – Journal of Intellectual Property, Information Technology and E-Commerce Law* (2017), www.jipitec.eu/issues/jipitec-8-2-2017/4567.
21. Article 71(1) DSA proposal.
22. Article 6 DSA proposal.
23. Articles 3–5 DSA proposal.
24. On those uncertainties, see G. Dinwoodie, 'Who are Internet Intermediaries?', in G. Frosio (ed.), *Oxford Handbook of Online Intermediary Liability* (OUP, 2020), p. 44.

information and presents a specific item of information or otherwise enables a specific transaction in such a way that would lead an average and reasonably well-informed consumer to believe that the information, or the product or service that is the object of the transaction, is provided either by the intermediary service provider itself or by a recipient of the service who is acting under its authority or control, the exemption no longer applies.[25] Service providers also have to take measures upon orders to act against specific items of illegal information issued by Member States' administrative or judicial authorities.[26] However, just like under the e-commerce Directive, no general obligation to monitor the information which providers of intermediary services transmit or store, nor actively to seek facts or circumstances indicating illegal activity is imposed on those providers.[27]

Second, the proposed Regulation outlines a series of regulatory obligations imposed on all intermediary services providers. Each provider has to communicate a single point of contact and, if not established within the EU, a legal representative in one of its Member States.[28] In addition, those providers have to be more transparent about their practices. Their terms and conditions need to include information on any policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making and human review. It shall be set out in clear and unambiguous language and shall be publicly available in an easily accessible format.[29] Contrary to very large online platforms, those intermediary services providers are not necessarily obliged to engage in content moderation,[30] but when they do, the terms of their moderation must be made clear. With the exception of micro and small enterprises,[31] a yearly report on their governance practices (notices and orders received, content moderation practices) needs to be published.[32] In addition, the proposal encourages services providers to agree on voluntary industry standards confirming compliance with the different requirements and calls for the setup of voluntary codes of conduct, including for online advertising.[33]

Third, the proposal outlines specific obligations for intermediary services providers engaged in hosting services, i.e. storing information at the request of the recipient of a service. Providing users with an account storing their data when using Google services, Facebook or any other online intermediation platform would result in such hosting service provision to be present. In that case,

25. Article 5(2) and (3) DSA proposal.
26. Articles 3(3), 4(2), 5(4), 8 and 9 DSA proposal.
27. Article 7 DSA proposal.
28. Articles 10–11 DSA proposal.
29. Article 12 DSA proposal.
30. Content moderation is defined as follows by Article 2(p) DSA proposal: the activities undertaken by providers of intermediary services aimed at detecting, identifying and addressing illegal content or information incompatible with their terms and conditions, provided by recipients of the service, including measures taken that affect the availability, visibility and accessibility of that illegal content or that information, such as demotion, disabling of access to, or removal thereof, or the recipients' ability to provide that information, such as the termination or suspension of a recipient's account
31. Article 13(2) DSA proposal. The definition of micro and small enterprises can be found in Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, [2003] OJ L124/36, Annex, Article 2: a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million; a microenterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million.
32. Article 13(1) DSA proposal.
33. Articles 34–36 DSA proposal.

the DSA proposal requires service providers to put in place notice and action mechanisms. Individuals should be able to notify the provider of illegal content and action should be taken to remove such content.[34] The provider will have to take a reasoned decision when it decides to disable or remove such content.[35]

Fourth, the proposal contains a series of additional obligations imposed on 'online platforms', i.e. providers of hosting services disseminating information to the public.[36] Social networks, search engines displaying results and online sales or sharing platforms showing information to potential clients all fall within that category. The proposal nevertheless excludes micro and small enterprises from the scope of this part of the Regulation.[37] Online platforms that fall within the scope of the DSA are subject to all requirements imposed on hosting services providers, but additionally also have to provide for an internal complaint-handling mechanism, take requests for disabling or removing information submitted by entities qualified as trusted flaggers more seriously, agree to suspend information and participate in investigations as to whether no misuse of removal requests has been made, participate in a certified out-of-court dispute settlement system, inform the authorities when it suspects criminal offences taking place and ensure the traceability of any trader offering goods or services through them.[38] They also have to be transparent with regard to search results or information displays that are actually advertisements and have to submit and publish reports highlighting their compliance with those obligations.[39]

Fifth, online platforms that provide their hosting services to a number of average monthly active recipients of the service in the Union equal to or higher than 45 million are considered very large online platforms.[40] Those platforms need to have in place compliance officers, have to complete risk assessments and put in place risk mitigation strategies and need to be subject, at their expense, to yearly independent audits as to their compliance with DSA obligations.[41] The risk assessment and mitigation obligations foreseen by the DSA would go very far. Every year, very large online platforms have to assess and report the dissemination of illegal content through their services, to report on any negative effects for the exercise of the fundamental rights to respect for private and family life, freedom of expression and information, the prohibition of discrimination and the rights of the child or on intentional manipulation of their service, with an actual or foreseeable negative effect on the protection of public health, minors, civic discourse, or actual or foreseeable effects related to electoral processes and public security. They have to present additionally how their content moderation systems, recommender systems and systems for selecting and displaying advertisement influence any of the systemic risks outlined above.[42] Additionally, they are to put in place reasonable, proportionate and effective mitigation measures, tailored to those specific systemic risks. They may include adapting content moderation or recommender systems, their decision-making processes, the features or functioning of their services, or their terms and

34. Article 14 DSA proposal.
35. Article 15 DSA proposal.
36. Article 2(h) DSA proposal.
37. Article 16 DSA proposal.
38. Articles 18–23 DSA proposal.
39. Article 24 DSA proposal.
40. Article 25 DSA proposal.
41. Articles 26–30 DSA proposal.
42. Article 26 DSA proposal.

conditions.[43] Very large platforms also have to give Member States' authorities access to those data allowing to verify compliance with those obligations.[44] Additional transparency requirements are also imposed regarding online advertisement and the parameters that underlie their recommendation and recommender systems.[45]

Overall the different layers of regulatory obligations impose a thick layer of rules and obligations on services providers. Those obligations, especially the ones in relation to very large online platforms, require a much more interventionist attitude on behalf of those platforms themselves. In essence, hosting services providers and above all online platforms have to act as if they were law enforcement authorities, scrutinizing and addressing key malfunctions in their platform operations. It remains to be seen whether those platforms will be up to that task and how those obligations will be enforced in practice. The DSA does not determine the exact nature of the content that would need to be moderated and provides only limited tools to ensure the effectiveness of internal complaint and settlement remedies against moderation decisions. The DSA offers services recipients the ultimate possibility to go to national authorities to file such a complaint. As will be shown in the next section, it remains questionable whether national authorities, will always be up to that task, in light of the many other new responsibilities they will have to accumulate. It therefore can be questioned legitimately whether the regulatory approach chosen would not risk to miss the mark and result in ineffective and diverging moderation and complaint-handling practices.

B. The Digital Markets Act (DMA): Regulating online gatekeepers

In addition to regulating the obligations intermediary services providers have vis-à-vis their users and third parties affected by their operations, the European Union also wants to be able to intervene before such services providers would become too powerful and start to abuse their freshly acquired dominant position as a result. Under EU competition law, becoming dominant in the absence of merging with another enterprise is not as such illegal.[46] Competition law only intervenes in an ex post manner, prohibiting and addressing anticompetitive practices that have already taken place. By contrast, the DMA seeks to ensure that such practices are not engaged in at the outset, in order to avoid that harm is done to markets. To avoid such future anticompetitive behaviour, the DMA proposes to have in place specific rules and oversight mechanisms that allow to ensure that digital markets remain contestable and fair whenever so-called gatekeepers are present.[47]

The DMA only applies to undertakings having gatekeeper status. The designation of an undertaking as a gatekeeper will be the prerogative the European Commission following a market investigation. In order to qualify as such, substantive and quantitative criteria are proposed.

First, a gatekeeper imperatively has to be an undertaking providing one or more so-called core online platform services provided or offered by gatekeepers to business users established in the Union or end users established or located in the Union, irrespective of the place of establishment or

43. Article 27 DSA proposal.
44. Article 31 DSA proposal.
45. Article 32 DSA proposal.
46. See on that issue J. Marcos Ramos, *Firm Dominance and EU Competition Law: The Competitive Process and the Origins of Market Power* (Kluwer, 2020).
47. Article 1(6) DMA proposal. According to Article 1(3), the proposal does not apply to electronic communications network markets and non-interpersonal communication services offered on such markets.

residence of the gatekeepers and irrespective of the law otherwise applicable to the provision of service.[48] Compared to the DSA, it is to be lauded that those services have been defined in the DMA without relying on the information society service notion. At least one of those services has to be offered in order to be qualified as a gatekeeper. The DMA distinguishes the following categories: (i) online intermediation services (including for example marketplaces, app stores and online intermediation services in other sectors like mobility, transport or energy), (ii) online search engines, (iii) social networking, (iv) video sharing platform services, (v) number-independent interpersonal electronic communication services, (vi) operating systems, (vii) cloud services and (viii) advertising services, including advertising networks, advertising exchanges and any other advertising intermediation services, where these advertising services are being related to one or more of the other core platform services.[49] It is also clear from this overview that platforms such as Uber or Deliveroo could be subject to the DMA obligations to the extent that they qualify as gatekeepers. That finding in itself is interesting and shows that the Commission wants those providers to be covered by its regulatory framework as well. It is unfortunate therefore that the DSA did not explicitly extend its scope to those providers too but remained centred on the blurry 'information society service' notion.

Second, in order to be qualified as gatekeepers, core online platform services providers need to (i) have a significant impact on the internal market, (ii) operate one or more important gateways to customers and (iii) enjoy or be expected to enjoy an entrenched and durable position in their operations.[50] Those criteria are met when a number of quantitative thresholds are present. a service provider has (i) a significant impact when the undertaking to which it belongs achieves an annual EEA turnover equal to or above EUR 6.5 billion in the last three financial years, or where the average market capitalization or the equivalent fair market value of the undertaking to which it belongs amounted to at least EUR 65 billion in the last financial year, and it provides a core platform service in at least three Member States. It operates (ii) an important gateway whenever it provides a core platform service that has on average throughout the last year more than 45 million monthly active end users established or located in the Union and more than 10 000 yearly active business users established in the Union in the last financial year. It enjoys (iii) an entrenched position whenever the previous two criteria have been fulfilled over the past three financial years.[51] Any gatekeeper meeting those criteria has to inform the Commission, which adopts a decision confirming or rejecting gatekeeper status. If not all quantitative criteria have been met, the Commission may still designate a core online platform services provider as a gatekeeper when it concludes, on the basis of a qualitative assessment, that the three substantive criteria have been met nonetheless. Inversely, a provider meeting all quantitative criteria can demonstrate that it does not act as a gatekeeper.[52] The gatekeeper designation procedure requires an in-depth factual assessment of the provider's role in a market. When doing so, the Commission needs to take the size, number of business users, specific barriers to entry or other market structure characteristics into account.[53] In case of substantial changes, and at least every two years, the Commission will

48. Article 1(2) DMA proposal.
49. Article 2(2) DMA proposal.
50. Article 3(1) DMA proposal.
51. Article 3(2) DMA proposal.
52. Article 3(4) DMA proposal.
53. Article 3(3) and 3(6) DMA proposal.

review the status of designated gatekeepers.[54] It cannot be excluded that the Commission will rely on more concrete and economics-informed elements when it develops a decision-making practice in this field.[55]

The DMA subsequently outlines in considerable detail the behaviour that cannot be engaged in by gatekeepers. It first of all a black list of prohibitions applicable to all gatekeepers. Those obligations are directly inspired by types of behaviour of which businesses such as Google, Facebook and Amazon have been accused and for which EU competition law provisions had been mobilized.[56] By ways of example, data drawn from core and non-core services cannot be combined, business users must be allowed to offer their services on different platforms, to promote their services through the platform and to have access to the aggregated data their activities generate to name but a few requirements.[57]

In addition, the proposed Regulation contains a grey list of obligations that can be specified and detailed further in every specific case by the European Commission. Among those obligations figure the requirements for gatekeepers to refrain inter alia from requiring businesses to use their supplementary services, rank their proper services over similar services offered by business users and from making interoperability between different platform services providers impossible.[58] Again, that list is directly inspired by current business practices engaged in by Google, Facebook and others. Service providers have to organize an independent audit confirming their compliance with those obligations vis-à-vis their consumers.[59] The European Commission could, by means of a delegated Regulation, modify or update those obligations and requirements.[60] To the extent that those gatekeepers do not comply with those requirements,[61] the Commission can impose sanctions or remedies on them.

The Commission also has to be informed of any concentrations mergers, acquisitions, creation of joint ventures) gatekeepers plan to engage in with another core online platform services provider or any other business providing any kind of information society services,[62] even when such transaction would not have a 'Community dimension' under concentration control Regulation 139/2004.[63] By referring to information society services, the DMA allows the Commission to have an additional control instrument over any concentration involving electronically provided services that extend well beyond core platform services. At the same time, however, the concentration between core platform services and services that do not legally qualify as information society services – such as transport services organized by UberPOP – does not fall under that

54. Article 4 DMA proposal.
55. For a proposal in that regard, see D. Geradin, 'What is a Digital Gatekeeper? Which Platforms Should be Captured by the EC Proposal for a Digital Markets Act?', https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788152.
56. See for that argument, C. Caffarra and F. Scott Morton, 'The Digital Markets Act: A Translation', https://voxeu.org/article/european-commission-digital-markets-act-translation.
57. Article 5 DMA proposal.
58. Article 6 DMA proposal.
59. Article 13 DMA proposal.
60. Article 10 DMA proposal.
61. Article 7 DMA proposal. Temporary suspensions or non-applications of requirements are possible in exceptional circumstances, see Articles 8–9 DMA proposal.
62. Article 12(1) jo. 2(4) DMA proposal.
63. Article 12 DMA proposal. See Article 1(2) of Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, [2004] OJ L24/1.

obligation. It is unfortunate that the unclear notion of information society services has been used in this context as well.

The DMA essentially contains the building blocks for a truly ex ante regulatory framework. Without having to prove the existence of a dominant position or of restrictive anticompetitive harm, the European Commission would be able to prohibit types of behaviour considered to be or lead to anticompetitive practices when a provider is considered a gatekeeper. Although the DMA would pursue a laudable cause, its approach is prone to criticism. The obligations it imposes have been inspired by ongoing or closed competition law investigations and market practices that have shown to be problematic in the past. However, it cannot be excluded that in a rapidly evolving market environment, other practices will soon become more problematic. At present, those practices are not included among the obligations imposed by the DMA. Questions can therefore be raised about the future proof nature of those obligations.[64] The proposal also does contain the possibility for the Commission to modify the gatekeeper designation methodologies and regulatory obligations by means of delegated acts.[65] It will thus depend on the Commission's willingness and ability to keep the DMA regime up to date. To achieve that objective, its introduction would have to be accompanied by the setup of a well-functioning group of civil servants who understand digital markets, its challenges and the technologies underlying them. It remains to be seen whether the Commission will be able to set up such a group in the short term. In addition, gatekeeper status is evaluated and reviewed every two years, but the Commission can also intervene on its own initiative or at the request of a current gatekeeper when another provider gains or loses gatekeeper status in those rapidly evolving markets. It can be questioned whether this review mechanism is sufficiently flexible.[66]

In any case, it is clear that the Commission's reactivity to new market developments will be crucial in order to make the DMA regime work in practice. At present, it remains to be seen whether the Commission will have sufficient resources to continue monitoring markets and to react sufficiently swiftly in that regard. In practice, all will depend on the resources the Commission is willing and able to devote to gatekeeper supervision and review.

3. Towards increasingly coordinated and even direct EU enforcement

In addition to the ambitious substantive law modifications, both proposals also constitute an important step forward in enhancing more coordinated and direct enforcement of EU rules at supranational level. The DSA proposal requires Member States to set up Digital Services Coordinators organized in compliance with different EU law independence, impartiality and effective judicial protection requirements. In exceptional cases and only in relation to very large online platforms, the Commission could step in and enforce the DSA directly. Combining different tools to insert Member States' administrations in an EU-structured enforcement framework, the DSA proposal builds upon a growing 'acquis' across different fields of EU regulation (3.A.). The DMA proposal entrusts the Commission with the exclusive authority to apply its provisions and puts in place enforcement procedures that mirror the ones the Commission relies on in the context of its Article 101 and 102 TFEU enforcement. Unfortunately, however, the fair trial issues that arise in

64. C. Caffarra and F. Scott Morton, https://voxeu.org/article/european-commission-digital-markets-act-translation.
65. Articles 3(5) and 10 DMA proposal.
66. A. De Streel et al., 'The European Proposal for a Digital Markets Act: A First Assessment', CERRE Report, https://cerre.eu/publications/the-european-proposal-for-a-digital-markets-act-a-first-assessment/, p. 27.

the context of the latter procedures have not been addressed directly in the DMA proposal and risk to be replicated there as well (3.B.).

A. Coordinated enforcement extended within the DSA

The current e-commerce Directive imposes no organizational requirements on Member States' authorities enforcing its norms. By contrast, the DSA proposal requires Member States to designate one or more competent authorities as responsible for its application and enforcement. One of those authorities has to be designated as Digital Services Coordinator. That coordinator is principally responsible for the DSA Regulation's enforcement in relation to those services providers established in the territory of the Member State concerned or having their legal representative present on that territory.[67]

Digital Services Coordinators need to perform their tasks under this Regulation in an impartial, transparent and timely manner. To achieve this, the Member States have to ensure that their Digital Services Coordinators have adequate technical, financial and human resources to carry out their tasks. On top of that, they need to act with complete independence and are required to remain free from any external influence, whether direct or indirect, or from instructions from any other public authority or any private party.[68] Coordinators need to have a minimum of investigation (power to take statements and to interview workers, to conduct or order authorities to conduct on-site inspections)[69] and enforcement (power to take cessation decisions, make commitments binding, order temporary interim measures and to impose fines and periodic penalty payments,[70] powers to order or have ordered temporary restriction of access to illegal services)[71] competences. Recipients of a service should have a right to lodge a complaint with the Coordinator.[72] In practice, the coordinators' measures taken need to be effective, dissuasive and proportionate, having regard, in particular, to the nature, gravity, recurrence and duration of the infringement or suspected infringement to which those measures relate, as well as the economic, technical and operational capacity of the provider of the intermediary services concerned where relevant. To do so, the DSA proposal requires that digital services coordinators have the power to impose fines of up to 6% of a services provider turnover[73] and periodic penalty payments of up to 5% of daily average turnover in the previous financial year.[74] When enforcing the DSA Regulation, Coordinators are required to act in conformity with the Charter and with the general principles of Union law, particularly with the right to respect for private life and the rights of defence, including the rights to be heard and of access to the file, and subject to the right to an effective judicial remedy of all affected parties. National administrative sanctioning procedures would have to be organized in compliance with those principles.[75]

67. Article 38(2) and 40 DSA proposal.
68. Article 39 DSA proposal.
69. Article 41(1) DSA proposal.
70. Article 41(2) DSA proposal.
71. Article 41(3) DSA proposal.
72. Article 43 DSA proposal.
73. Article 42 DSA proposal. Fines may be up to 1% for misleading information, see Article 42(3) DSA proposal.
74. Article 42(4) DSA proposal.
75. Article 41(6) DSA proposal.

Every Digital Services Coordinator is responsible for services providers established on or having their legal representative on the territory of a given Member State. In an attempt to streamline and coordinate enforcement between different authorities, an EU-structured network of national enforcement agencies will be set up: a European Board for Digital Services. High-level representatives of every Digital Services Coordinator will participate in the Board's meetings, which shall be chaired by a non-voting Commission representative.[76] The Board's role will be to exchange information, to ensure coordinated enforcement and to recommend a Digital Services Coordinator to take action, if the Coordinators of three other Member States identified important infringements of the DSA Regulation.[77] The Board can also coordinate cross-border investigations and infringements. However, it is not anticipated that the Board has binding decision-making powers. Should a recommendation by the Board to a Digital Services Coordinator to take action be ignored, the Commission and not the Board can request the Coordinator concerned to take action.[78] It would seem that such a request constitutes a binding Commission decision that is binding upon the Coordinator concerned and failure to comply with which could give rise to infringement procedures under Article 258 TFEU.[79]

In relation to very large online platforms, the Commission can intervene much more directly, either on recommendation from the Board or on its own initiative, whenever very large platforms do not comply with a Coordinator's enforcement actions or whenever Coordinators do not take appropriate enforcement action.[80] In both scenarios, the Commission can effectively supersede national authorities and adopt non-compliance decisions, accompanied by fines of up to 6% of a services provider turnover (or periodic penalty payments of up to 5% of daily average turnover).[81] Commission decisions can impose temporary interim measures, confirm non-compliance or make service providers' commitments binding upon them. The Commission can conduct interviews and inspections and will have to hear the platforms concerned before taking binding decisions, which can be subject to judicial review under Article 263 TFEU.[82] Most remarkably, despite the Commission's power to impose fines or periodic penalty payments, the proposal does not allow the Court of Justice to exercise unlimited jurisdiction over those fines. As a result, and contrary to the DMA proposal[83] or Commission-led enforcement of Articles 101 and 102 TFEU,[84] the EU Courts would not be able to reduce, cancel or increase the amount of the fine, for which Article 261 TFEU requires an explicit mandate in EU secondary legislation. In the same way, the Commission cannot impose final remedies in the context of the DSA. By contrast, it can do so under the DMA and Article 101 and 102 TFEU enforcement mandates.[85] In case of persistent non-compliance, that power remains with the Digital Services Coordinator or national courts. At that stage, the Commission can nevertheless intervene in writing, or if possible, orally, before those courts in such

76. Article 48 DSA proposal.
77. Article 45 DSA proposal.
78. Article 45(5) DSA proposal.
79. Article 45(7) DSA proposal.
80. Article 51 DSA proposal.
81. Articles 58–60 DSA proposal.
82. Articles 52–55 and 63 DSA proposal.
83. Article 35 DMA proposal.
84. Article 31 of Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1.
85. Article 16 DMA proposal and Article 7(1) Regulation 1/2003.

procedures.[86] Those powers only apply in relation to 'very large online platforms' as defined in the DSA proposal. Other online platforms remain subject only to Digital Services Coordinators' powers, coordinated by the Board in case of cross-border cases.

On top of all the foregoing, the European Commission can ask very large online platforms to take part in the setup of crisis protocols as well. Those protocols would permit more effectively to address crisis situations strictly limited to extraordinary circumstances affecting public security or public health and would help to ensure that very large online platforms can reach a large number of users instantaneously.[87] Online platforms that are not 'very large' are encouraged to take part in the crisis protocol setup as well.

The DSA coordinated enforcement in its very essence combines three techniques also used, separately or in combination in other fields of EU regulation and aimed at integrating EU rules and Member States' administrations.[88]

First, the proposal imposes a series of detailed institutional and procedural requirements on national administrations or authorities acting as Digital Services Coordinators. Imposing such requirements is not new and has been done in the past as well. Starting out in the field of agricultural policy,[89] the EU legislator over the past decade seems to rely increasingly on this approach in a wide variety of fields. Obligations of independence, impartiality and effectiveness that have also been imposed on national data protection authorities,[90] electronic communications authorities[91] and, more recently, competition authorities to name but a few examples.[92] In the interest of a coherent enforcement approach, Member States' administrative autonomy may be sacrificed according to the Commission, despite the impact this may have on internal administrative coherence and autonomy at Member State level.[93] The DSA extends a similar approach to Digital Services Coordinators as well. According to the Commission, a well-coordinated supervisory system, reinforced at Union level ensures a coherent approach applicable to providers of intermediary services operating in all Member States.[94] It is nevertheless problematic that the DSA

86. Article 65 DSA proposal.
87. Article 37 DSA proposal.
88. Those developments have been conceptualized in M. Scholten, 'Mind the Trend! Enforcement of EU Law has been Moving to "Brussels"', 24 *Journal of European Public Policy* (2017), p. 1348.
89. By way of example, see Article 41 of Commission Delegated Regulation 2018/273 of 11 December 2017 supplementing Regulation (EU) No 1308/2013 of the European Parliament and of the Council as regards the scheme of authorizations for vine plantings, the vineyard register, accompanying documents and certification, the inward and outward register, compulsory declarations, notifications and publication of notified information, and supplementing Regulation (EU) No 1306/2013 of the European Parliament and of the Council as regards the relevant checks and penalties, amending Commission Regulations (EC) No 555/2008, (EC) No 606/2009 and (EC) No 607/2009 and repealing Commission Regulation (EC) No 436/2009 and Commission Delegated Regulation (EU) 2015/560, [2018] OJ L58/1.
90. Articles 51–53 Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] OJ L119/1.
91. See Articles 5–6 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), [2018] OJ L321/36.
92. Articles 4–6 of Directive 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, [2019] OJ L11/3.
93. See M. Scholten and D. Scholten, 'From Regulation to Enforcement in the EU Policy Cycle: A New Type of Functional Spillover?', 55 *Journal of Common Market Studies* (2017), p. 925.
94. DSA proposal, p. 6.

only imposes those requirements on Digital Services Coordinators, but also allows other authorities to be involved in DSA enforcement. As a result, the objective of setting up a coherent enforcement framework is unlikely to be realized to its fullest extent as Member States do retain some autonomy in the designation of different authorities in this context.

Second, in addition to streamlining the organization of Digital Services Coordinators, the DSA requires an EU-sponsored network of coordinators to be set up. That network aims to streamline enforcement and ensure that information is exchanged.[95] EU-structured networks often do not take formal enforcement decisions, but may offer non-binding advices or recommendations. The network envisaged by the DSA is no different in that regard and would not seem to avoid the governance and accountability problems traditionally associated with network-based shared enforcement.[96] As such, it confirms an on-going administrative practice in many regulated fields.

Third, not unlike an increasing number of other EU regulated fields,[97] the European Union would be able to intervene directly to enforce the DSA provisions in a subsidiary manner. Should the Digital Services Coordinators fail to take effective measures or enforce them and in case a very large online platform is involved, the European Commission can intervene and impose sanctions on that platform. However, its sanctioning potential is subsidiary to the powers of national authorities. This again confirms a trend towards increasingly direct enforcement in cases where national authorities are less likely to be able to ensure the effective application of EU law.

The choice for the European Commission as a direct enforcer of DSA provisions is not as surprising as it might seem at first sight. In the absence of an EU agency devoted to digital markets, the Commission in accordance with Article 17(1) TEU remains responsible for ensuring the application of EU secondary legislation. It is not surprising that this institution has been chosen to ensure the enforcement of DSA provisions. Problems generally associated with delegating enforcement powers to EU agencies can be avoided in that way.[98] At the same time, however, the modus operandi of Commission enforcement procedures in the realm of competition law has also given rise to remarks and questions regarding its compatibility with the right to a fair trial, as the Commission accumulates both prosecuting and sanctioning powers within one institution.[99] The DSA proposal has not addressed that issue. It rather seems the Commission considers its direct enforcement powers to be compatible with the right to a fair trial, without having analysed the veracity of that claim. As will be explained in the next section devoted to the DMA, paying attention to those features may be useful to avoid questions as to the legitimacy of Commission interventions being raised in that context.

95. On network-based governance in EU law, see already M. De Visser, *Network-based Governance in EC Law* (Hart Publishing, 2009).

96. On those problems in general, see M. Egeberg and J. Trondal, 'National Agencies in the European Administrative Space: Government-driven, Commission-driven or Networked?', 87 *Public Administration* (2009), p. 779.

97. For a concise overview, see M. Scholten, M. Luchtman and E. Smidt, 'The Proliferation of EU Enforcement Authorities: A New Development in Law Enforcement in the EU', in M. Scholten and M. Luchtman (eds.), *Law Enforcement by EU Authorities: Implications for Political and Judicial Accountability* (Edward Elgar, 2017), p. 24.

98. In contrast with problems EU agencies often face, see M. Chamon, *EU Agencies. Legal and Political Limits to the Transformation of the EU Administration*, (Oxford University Press, 2016).

99. See on that issue on Member States' levels, T. Perroud, 'The Impact of Article 6(1) ECHR on Competition Law Enforcement: A Comparison between France and the United Kingdom', *Global Antitrust Review* (2008), p. 51.

B. Direct enforcement under the DMA: An enhanced role for the European commission

To establish gatekeeper status, systemic non-compliance with the DMA's requirements or the emergence of new services or practices, the European Commission would be able decide to initiate market investigations. Those market investigations can result in a decision designating a service provider as a gatekeeper, a gatekeeper that is not entrenched yet, in which case a less stringent version of DMA requirements has to be complied with[100] or in the establishment of systematic non-compliance resulting in the strengthening of a gatekeeper position.[101]

Once designated a gatekeeper, the European Commission will systematically monitor those platforms' practices. In case of failure to comply with DMA requirements, the Commission can open proceedings and adopt a remediation decision.[102] In the course of that procedure, the Commission shall communicate its preliminary findings within three months from the opening of the proceedings and explain the measures it considers to take or it considers that the provider of core platform services concerned should take.[103] A decision specifying the measures to be complied with will be adopted subsequently. The Commission can also decide directly to open proceedings with a view to adopting a formal non-compliance decision.[104] In that situation, interim measures can also be imposed for a limited duration.[105] To the extent that the gatekeeper concerned offers commitments for the relevant core platform services to ensure compliance with the DMA obligations, the Commission may make those commitments binding on that gatekeeper and declare that there are no further grounds for action.[106] Failure to respect those commitments can still result in the adoption of a non-compliance decision. A non-compliance decision requires the gatekeeper to cease and desist with the non-compliance within an appropriate deadline and to provide explanations on how it plans to comply with the decision.[107] That decision can be accompanied by a fine of up to 10% of the global turnover in the previous financial year of the core online platform service provider concerned.[108] Periodic penalty payments of up to 5% of the average daily turnover in the previous year can also be imposed in order to ensure swifter compliance with the decisions taken.[109] Those sanctions are essentially inspired by the framework the Commission applies in relation to Articles 101 and 102 TFEU.

In the case of systematic non-compliance, the Commission can initiate a new market investigation. Systematic non-compliance refers to a situation in which the Commission has issued at least three non-compliance or fining decisions against a gatekeeper in relation to any of its core platform services within a period of five years prior to the adoption of the decision opening a market investigation.[110] In that context, the Commission, by means of a decision adopted at the latest 12 months after opening the market investigation, impose on such gatekeeper any behavioural or structural remedies which are proportionate to the infringement committed and

100. Article 15(4) DMA proposal.
101. Article16 DMA proposal.
102. Article 24 DMA proposal.
103. Article 7(2) and (4) DMA proposal.
104. Article 7(3) DMA proposal.
105. Article 22 DMA proposal.
106. Article 23 DMA proposal.
107. Article 25 DMA proposal.
108. Article 26 DMA proposal.
109. Article 27 DMA proposal.
110. Article 16(3) DMA proposal.

necessary to ensure compliance with the DMA Regulation.[111] This provision allows to speculate that the Commission could break up big digital players and force them to have their different services provision activities separated. Such decision would amount to a structural remedy, whereby the Commission orders market structures to be changed. Although it is theoretically possible that this could be done, the DMA proposal states that the Commission 'may only impose structural remedies (. . .) either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the gatekeeper concerned than the structural remedy'.[112] It is clear that such far-reaching decisions having a direct impact on the way in which core platform service providers operate will have to be motivated extensively by the Commission.

In order to take that decision in the most informed way, the Commission may request information, take statements and conduct on-site inspections.[113] The DMA proposal outlines the different powers the Commission has, which in essence mirror those outlined in Regulation 1/2003 in relation to infringements of EU competition law.[114] During its inspections, unprecedented access into a providers' data-sets and the operations of algorithms and artificial intelligence-fuelled technologies will have to be given.[115] Somewhat remarkably, the Commission inspections foresees no intervention or assistance by national authorities in contrast with inspections in the framework of Article 101 and 102 TFEU infringement procedures.[116] In the same way, the DMA does not make clear whether a new unit will be established or whether the powers outlined here will be implemented by the Directorate-General for Competition. It remains to be seen whether Commission enforcement powers involving the DMA and DSA proposals will be entrusted to the same group of officials or not. The proposals do not shed light on those questions yet.

Commission decisions will be preceded by a right of access to the file and the right to be heard.[117] Once adopted, they would be reviewable acts before the Court of Justice of the European Union in accordance with Article 263 TFEU. Contrary to the DSA proposal, the DMA proposal additionally confirms that, in accordance with Article 261 TFEU, the Court of Justice of the European Union has unlimited jurisdiction to review decisions by which the Commission has imposed fines or periodic penalty payments. It may cancel, reduce or increase the fine or periodic penalty payment imposed.[118]

In its proposal, the Commission referred to the wide Member State and civil society support to entrust a supranational institution with those enforcement powers.[119] It remains to be seen which Commission Directorate-General (Competition, Connect or another DG – or a taskforce between different directorates)[120] will be entrusted with the enforcement role. It goes without saying that enforcement experience gained in EU competition law has inspired the powers entrusted to the Commission in the DMA.

111. Article 16(1) DMA proposal.
112. Article 16(2) DMA proposal.
113. Articles 19–21 DMA proposal
114. See Articles 17–22 Regulation 1/2003.
115. Article 21(3) DMA proposal.
116. Article 20(5) Regulation 1/2003.
117. Article 30 DMA proposal.
118. Article 35 DMA proposal.
119. DMA proposal, p. 7.
120. See A. De Streel et al., 'The European Proposal for a Digital Markets Act: A First Assessment', CERRE Report, p. 25.

However, what has not been debated so far in that regard is the question to what extent procedural safeguards throughout Commission procedures will be compatible fully with the Charter of Fundamental Rights. To that extent, the proposal guarantees core platform services providers subject to Commission investigations or procedures access to their file and the right to be heard.[121] At the same time, no explicit attention has been paid as to whether this is sufficient in terms of compliance with Article 47 of the Charter of Fundamental Rights, which guarantees the right to a fair trial. Article 47 of the Charter and Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) would require an independent and impartial body to impose sanctions of a criminal law nature. Fines and periodic penalty payments in administrative procedures are said to be criminal in nature, without being hard core criminal sanctions, from an ECHR point of view.[122] Although such fines can be imposed by a body that is not necessarily impartial and independent, its decisions need to be subject to sufficiently full judicial review.[123] In the realm of competition law enforcement, questions have been raised as to whether the legality review under Article 263 TFEU and the unlimited review of fine decisions in accordance with Article 261 would be sufficient in that regard.[124] Although the Court of Justice also seems to indicate that this is the case,[125] those questions remain lingering in the background when setting up enforcement mechanisms similar to the EU's competition law enforcement scheme.[126] One way to avoid those questions from re-emerging would be to foresee more stringent

121. Article 30 DMA proposal.
122. ECtHR, Cases 7299/75 and 7496/76, *Albert and Le Compte v. Belgium*, Judgment of 10 February 1983, para. 29; ECtHR, Case 8544/79, *Öztürk v. Germany*, Judgment of 21 February 1984, para. 56; ECtHR, Case 43509/08, *A. Menarini Diagnotics S.R.L. v Italy*; ECtHR, Case 5242/04, *Dubus v. France*, judgment of 11 June 2009; ECtHR, Case 30183/06, *Vernes v. France*, Judgment of 20 January 2011; ECtHR, Cases 32181/04 and 35122/05, *Sigma Radio Television Ltd. v. Cyprus*, Judgment of 21 July 2011; ECtHR, Case 21539/07, *Steininger v. Austria*, Judgment of 17 April 2012, para. 49 and ECtHR, Case 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, *Grande Stevens et al. v. Italy*, Judgment of 14 March 2014, para. 98. See also W. Wils, 'The Increased Level of Antitrust Fines, Judicial Review and the ECHR', 33 *World Competition* (2010), p. 5. I. Forrester nevertheless implies that the fines are hard core criminal sanctions in I. Forrester, 'A Challenge for Europe's judges: the review of fines in competition cases', 36 European Law Review (2011), p. 202.
123. ECtHR, Cases 32181/04 and 35122/05, Sigma Radio Television Ltd. v Cyprus, para. 147. See also, D. Slater, S. Thomas and D. Waelbroeck, 'Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?', 5 *European Competition Journal* (2009), p. 125.
124. Opinion of AG Sharpston in Case C-279/09 P *KME Germany*, [2011] ECR I-12860, para. 56.
125. Case C-272/09 P *KME Germany*, EU:C:2011:810, para. 56; Case C-386/10 P *Chalkor*, EU:C:2011:815, para. 49; Case C-389/10 P *KME Germany*, EU:C:2011:816, para. 63 with Case C-510/11 P *Kone Oyj et al. v Commission*, EU:C:2013:696, para. 27 and Case C-99/17P *Infineon Technologies v Commission*, EU:C:2018:773.
126. See, by way of analogy, I. Forrester, 'A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review', in C.D. Ehlermann and M. Marquis (eds.), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart 2011), p. 407. Ratliff on the other hand states that judicial review has overall been thorough, see J. Ratliff, 'Judicial Review in EC Competition Cases before the European Courts: Avoiding Double Renvoi', in C.D. Ehlermann and M. Marquis (eds.), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart 2011), p. 455 and 462. For a similar discussion, see M. Jaeger, 'The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?', 3 *Journal of European Competition Law & Practice* (2012), p. 295 and B. Nascimbene, 'Fair Trial and the Rights of the Defence in Antitrust Proceedings before the Commission: A Need for Reform?', 38 *European Law Review* (2013), p. 573 and P. Van Cleynenbreugel, 'Due Process in EU Commission Competition Law Proceedings. What Lessons (not) to Learn for Structuring the Rights of Defense at the National Level?', in C. Nagy (ed.), *The Procedural Aspects of the Application of Competition Law – European Frameworks, Central European Perspectives* (Europa Law Publishing, 2016), p. 36

independence requirements imposed on decision-makers. At Member State level, EU law now imposes such requirements directly on national competition authorities.[127] To the extent that such visible measures are taken, a fair trial would be guaranteed even more as long as sufficiently intense judicial review is offered afterwards against the authority's decisions in an adversarial procedure.[128] Such procedures would exist against Commission DMA decisions. However, at the European Commission level itself, it is submitted that the complete impartiality of the College of Commissioners taking the formal infringement and fining decisions cannot be guaranteed because of the fact that the College itself formally would take infringement and sanctioning decisions. The current proposals seem to highlight that, in the context of digital markets, no solutions to that issue would be offered either. Once again, the College of Commissioners will take Commission decisions that have been prepared by Directorates that operate under its responsibility and hierarchical control. As a result, it would be a matter of time before one of the core online platform services would invoke a potential violation of its right to a fair trial whenever the Commission takes an infringement decision against it. To avoid that similar debates would detract attention from the Commission's important mandate to ensure well-functioning markets even absent competition law infringements, it would be better to insert more explicit provisions that explain how investigations will be organized and conducted, what guarantees will be put in place in order to guarantee impartial decision-making and elaborate on the intensity of judicial review the EU Courts have to put in place. Absent more clarification on that point, one risks creating a situation whereby the Commission remains seemingly oblivious to fair trial-inspired criticism, which would result in questioning the legitimacy with which it engages in market investigations and related procedures. Those issues, it is submitted, at the very least also deserve to be addressed in on-going legislative debates. It can only be hoped that the DMA and DSA proposals will be clarified on that point as well.

4. Conclusion

The purpose of this legal development article has been to critically highlight the key features of the Commissions' Digital Services Act and Digital Markets Act proposals presented on 15 December 2020. It has been submitted, that, despite their ambition, the proposals reflect raise new questions, both from a scope of application and enforceability point of view. Given that legislative debates are still in full swing, it can only be hoped that more attention to those issues will come to play out more explicitly in the very near future.

Funding

The author benefited from financial support from a fundamental research grant (PDR) awarded by the Belgian Fonds de Recherche Scientifique FRS-FNRS (2018-2022) for the research, authorship, and/or publication of this article.

ORCID iD

Pieter Van Cleynenbreugel https://orcid.org/0000-0001-7388-6883

127. Article 4(2) of Directive 2019/1.
128. In competition law, that is now the case at Member State level, see Article 30 Directive 2019/1. Article 41(6) DSA proposal imposes similar requirements.