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Digital Markets Act (DMA) and Digital Services Act (DSA): New Rules for the EU Digital Environment

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The Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (known as DMA – "Digital Market Act") sets clear rules for large online platforms. It aims to ensure that no large online platform that is in a "gatekeeper" position - to many users - abuses that position to the detriment of businesses wishing to access those users. The most innovative elements are the introduction of the legal figure of the "gatekeeper" and the provision of specific duties imposed on the same. The Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (known as DSA "Digital Services Act") introduces a common set of rules on intermediaries' obligations and accountability across the single market, aiming to ensure a high level of protection to all users. This paper aims to analyse the new provisions introduced by the Digital Service Package in the framework of market regulation policies.

Keywords: *Digital markets; Intermediary service; Online platforms; Online search engines; Market regulation; EU policies Ombudsman; Constitutional Institution; Unwillingness of Bureaucrats*

Introduction

Since the adoption of Directive 2000/31/EC (the "e-Commerce Directive"), epochal changes have occurred that have transformed society and the market, giving rise to a "digital revolution"[1]. New and innovative digital services have emerged, changing our daily lives, shaping how we communicate, connect, consume goods, and do business[2]. This transformation is defined as the new digital revolution, which is as fundamental as that caused by the industrial revolution. At the same time, the use of digital services has also become the source of new risks and challenges, both for society as a whole and for individuals. This situation has been exacerbated by the pandemic emergency which has dramatically increased the use of online bargaining and the use of digital services. In the meantime, digitalisation has become one of the pillars of post-pandemic

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[1]Dąbrowski & Suska (2022).

[2]Quarta & Smorto (2020) at XI et seq.

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transformation of the EU. For this reason, given the immense importance of online platforms and digital services, European Institutions feel the need to introduce specific rules for the sector to improve online access to goods and services for consumers, to prohibit the dissemination of illegal content and products, as well as to facilitate innovation, competition and growth of the European digital ecosystem[3].

The goal of the European Union is to create a digital single market and to govern the digital transition underway. As part of the digital single market strategy, the European Commission has recently developed "*the Digital Service Act Package*", consisting of the Digital Service Act (DSA) and the Digital Market Act (DMA). It sets out a first comprehensive rulebook for the online platforms with the specific purpose of creating a safer digital space where the fundamental rights of users are protected and to establish a level playing field for businesses[4].

These acts were preceded by a series of Communications of the European Commission, the first of which is *A Digital Single Market Strategy for Europe*, published in 2015, which sets out the strategy for a digital single market. The strategy sets out several targeted actions based on these three pillars: (i) better access for consumers to digital goods and services across Europe; (ii) creating the right conditions and a level playing field for digital networks and innovative services to flourish; (iii) maximising the growth potential of the digital economy.

In 2016, the Commission approved the Communication *Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*[5], which underlines the impact of the role of online platforms for the digital single market, highlighting the need for the presence of competitive platforms in the EU[6]. When elaborating on responses to issues related to online platforms, the Commission considers the following principles: a level playing field for comparable digital services; responsible behaviour of online platforms to protect core values; transparency and fairness for maintaining user trust and safeguarding innovation; open and non-discriminatory markets in a data-driven economy.

Subsequently, in 2020 the Commission approved the Communication *Shaping Europe's Digital Future*[7] which indicated the three main pillars for European growth: (i) technology that works for the people; (ii) a fair and competitive digital economy; (iii) an open, democratic, and sustainable society. In this Communication, the Commission committed to updating the horizontal rules that define the

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[3]In argument, see the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for Europe*, 6 May 2015, COM (2015) 192 final.

[4]See, among others, Laux, Wachter & Mittelstadt (2021). See further references below in the paper.

[5]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Online Platforms and the Digital Single Market, Opportunities and Challenges for Europe*, 25 May 2016, COM (2016) 288 final.

[6]Palmieri (2019) at 43.

[7]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Shaping Europe's digital future*, 19 February 2020, COM (2020) 67 final.

responsibilities and obligations of providers of digital services, and of online platforms in particular.

That Communication proposed that –

> *"Based on the single market logic, additional rules may be needed to ensure contestability, fairness and innovation and the possibility of market entry, as well as public interests that go beyond competition or economic considerations*. It also announced that the Commission *'will further explore,[…], ex ante rules to ensure that markets characterised by large platforms with significant network effects acting as gatekeepers, remain fair and contestable for innovators, businesses, and new market entrants*".

Moreover, on March 9, 2021, the Commission approved the Communication *2030 Digital Compass: the European way for the Digital Decade*[8]. The *Digital Compass* is part of the EU's 2030 Policy Programme "*Path to the Digital Decade*" which sets out a 10-year roadmap for Europe's digital transition. It specifies and narrows down the objectives outlined in the Communication *Shaping Europe's Digital Future* of 2020.

Furthermore, on January 26, 2022, the Commission drew up a proposal for a declaration on digital rights and principles for a human-centred digital transformation, with the aim of raising awareness and creating an overall framework to govern this process[9].

The *Digital Service Package*

The European Commission proposed two legislative initiatives concerning digital services in the EU in December 2020 and on 25 March 2022 a political agreement was reached on the *Digital Market Act* and on 23 April 2022 on the *Digital Services Act*. Following the adoption of the *Digital Services Package* by the European Parliament and by the Council of the European Union, both texts have been published in the Official Journal of the European Union and put into force 20 days after publication[10].

Both the regulations are concerned with the size of digital platforms and aim at creating a safer and more open digital space in which the fundamental rights of all users of digital services are protected and also to establish a level playing field to foster innovation, growth and competitiveness[11].

These regulatory interventions aim to put an end to the legislative fragmentation existing in Europe, giving rise to a greater law harmonisation of

[8]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *2030 Digital Compass: the European way for the Digital Decade*, 9 March 2021, COM (2021) 118 final.
[9]*European Declaration on Digital Rights and Principles for the Digital Decade*, 26 January 2022, COM (2022) 28 final.
[10]See the timeline described by ten Thije (2022).
[11]Laux, Wachter & Mittelstadt (2021).

online activities[12]. Legal harmonisation makes the fight against illegal activities and the protection of citizens' fundamental rights more effective while normative fragmentation makes it easy to distort competition to the detriment of the evolution of new innovative services in the internal market.

In this perspective, see the *Explanatory Memorandum* of the DSA Proposal (par. 3), which reads:

> *"The legal fragmentation with the resulting patchwork of national measures will not just fail to effectively tackle illegal activities and protect citizens' fundamental rights throughout the EU, it will also hinder new, innovative services from scaling up in the internal market, cementing the position of the few players who can afford the additional compliance costs. This leaves the rule setting and enforcement mostly to very large private companies, with ever-growing information asymmetry between online services, their users and public authorities*".

The Impact Assessment accompanying the DSA proposal identifies an added value of legal harmonisation in a possible increase of cross-border digital trade of 1 to 1.8%, i.e. the equivalent of an increase in turnover generated cross-border of EUR 8.6 billion and up to EUR 15.5 billion.

For that we have to read the *Explanatory Memorandum* of the DSA Proposal (par. 3) which also says:

> "*With regard to added value in the enforcement of measures, the initiative creates important efficiency gains in the cooperation across Member States and mutualising some resources for technical assistance at EU level, for inspecting and auditing content moderation systems, recommender systems and online advertising on very large online platforms. This, in turn, leads to an increased effectiveness of enforcement and supervision measures, whereas the current system relies to a large extent on the limited capability for supervision in a small number of Member States*".

In that perspective, an important option is represented by the format for the new legislation: regulation instead of directive. The presence of two regulations is not by chance, since regulations are (pursuant to art. 288 TFEU) general in scope, compulsory and directly applicable in each of the Member States. The direct applicability of the regulations is expected to help overcome the divergences between the national legislations.

These two new pieces of legislation aim to regulate different profiles of online platforms. The DSA is about harmful and illegal goods, services and content online and will replace the e-Commerce directive (without repealing it). In contrast, the DMA is concerned with access to the digital market and will enrich the range of existing measures for investigating and correcting market practices by creating *ex ante* rules that prohibit specified behaviours.

The key values inspiring the regulatory interventions are the protection of fundamental rights, of free market and of competition. However, in terms of competition outcomes from reduced network effect and more trust in the digital

[12]Marchiafava (2021) at 246.

system, the impact and benefits of the EU DMA and DSA will depend on the digital endowments, the economic structure of the Member States and on the interplay with other regulatory tools.[13].

The "*Digital Market Act" (DMA)*

On 18 July 2022, the Council of Europe definitively approved the Digital Market Act (DMA), thanks to the previous presentation of the proposal for new rules on contestable and fair markets in the digital sector on 15 December 2020[14].

The DMA ensures a level playing field in the digital market, establishes clear rights and rules for large online platforms ("gatekeepers") and ensures that none of them abuse their position[15]. The regulation's purpose is to create a fair and competitive digital environment, enabling businesses and consumers to benefit from digital opportunities balancing between the respective freedoms of business providers of core platform services and their business users (Article 16 of the Charter of Fundamental Rights of the European Union)[16]. With this in mind, the regulation intends "to foster the emergence of alternative platforms, which could deliver high-quality, innovative products and services at affordable prices. Fairer and more equitable conditions for all players in the digital sector would allow them to take greater advantage of the growth potential of the platform economy"[17].

The adoption of a regulation, as it is directly applicable in Member States, arises from the national regulatory initiatives that cannot fully address the same effects, without norms at the EU level, the Internal Market is fragmented. There is a fragmentation of the Internal Market[18]. A regulation establishes the same level of rights and obligations for private parties and enables the coherent and effective application of rules in the online cross-border platform economy. Regulation is most suited to addressing the problems of fairness and contestability and to preventing fragmentation of the Single Market for core platform services provided or offered by a gatekeeper[19]. Without European harmonisation, the dissimilarities existing in national legislation have the power to lead to increased regulatory uncertainty of the platform space which is of an intrinsic cross-border nature[20].

[13]Erixon, Guinea, der Marel & Sisto (2022) at 2, 6-7.
[14]Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 15 December 2020, COM (2020) 842 final 2020/0374(COD). For a comment, see, among the others: Manganelli (2021) at 473 et seq.; Polo & Sassano (2021) at 501 et seq.; Manzini (2021) at 435 et seq, and Falce & Faraone (2022) at 5 et seq.
[15]About the role of gatekeepers in digital platforms, see Palmieri (2019) at 27 et seq.
[16]Proposal, *Explanatory memorandum*, 11. See, in argument, also Recital 107 of the DMA.
[17]Proposal, *Explanatory memorandum*, 10.
[18]Proposal, *Explanatory memorandum*, 1, 4. See, in argument, also Recital 107.
[19]Proposal, *Explanatory memorandum*, 6.
[20]Proposal, *Explanatory memorandum*, 4.

Therefore, since legal harmonisation at EU level is necessary, the legal basis for the DMA is found in Article 114 of the Treaty on the Functioning of the European Union[21].

The EU law is in accordance with the principle of subsidiarity, as set out in Article 5 of the Treaty on European Union; and in accordance with the principle of proportionality. As set out in that Article, the DMA does not go beyond what is necessary to achieve its objective[22].

The DMA builds on the existing P2B Regulation[23] and is aligned with other EU instruments, including the EU Charter of Fundamental Rights, the European Convention of Human Rights, the General Data Protection Regulation[24], EU competition rules and the EU's consumer law acquis.

It is also coherent with the *Digital Service Act,* which we will discuss later in this paper. The proposal is also coherent with other EU vertical regulations, including the rules applicable to electronic communication services or short-selling, as well as with existing initiatives targeting harmful trading practices in the offline world[25].

The purpose of the DMA is to ensure the proper functioning of the market through effective competition in digital markets, and to solve the critical issues of the market to facilitate innovation and consumer protection by combating unfair and anti-competitive behaviour[26]. It aims to allow platforms to unlock their full potential by facing the most critical issues at the EU level, so "as to allow end users and business users alike to reap the full benefits of the platform economy and the digital economy at large, in a contestable and fair environment"[27].

As pointed out in the *Explanatory Memorandum* of the Proposal, a small number of large online platforms have captured the lion's share of the overall value generated. Large platforms are the protagonists of today's digital economy, intermediating most transactions between business users and end users. These platforms act as "gateways"[28] or "gatekeepers"[29] between business users and end users. Their economic power is embedded in their own platform's ecosystem. As such, they have substantial control over the access to digital markets, leading to a significant number of business users becoming dependent on them, which thus correlates to unfair behaviour. This situation produces negative effects on the

[21]Proposal, *Explanatory memorandum*, 4.
[22]Recital 107.
[23]Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.
[24]Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).
[25]See, for example, Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.
[26]Marchiafava (2021) at 260.
[27]Proposal, *Explanatory memorandum*, 3.
[28]Recital 6.
[29]Recital 3.

contestability of the core platform services involved affected[30]. On the other hand, a very significant network effect characterises the functioning of digital platforms: it implies that the number of users, in itself, fosters the increase of those users: in this regard, it must be considered that since a service becomes more attractive on one side of the market, the more the users will go to the other side. Therefore, a rival platform company not only has to offer a better quality and/or cheaper service, but also to convince a very high number of users to switch *en masse* from the service of the incumbent platform to its own (*incumbency advantage*). If (or as long as) such a migration does not take place, its service will still be less attractive to consumers»[31].

The DMA tackles such problems because they lead to inefficient outcomes in the digital sector in terms of higher prices, lower quality, as well as less choice and innovation to the detriment of European consumers.

As Article 1, par. 1, points out, the purpose of the DMA is «to contribute to the proper functioning of the internal market by laying down harmonised rules ensuring for all businesses, contestable and fair markets in the digital sector across the Union, where gatekeepers are present, to the benefit of business users and end users». It applies «to core 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 residence of the gatekeepers and irrespective of the law otherwise applicable to the provision of service» (par. 2).

"Core platform services" are the most widely used services by business users and end users; these services are only those «where there is strong evidence of (i) high concentration, where usually one or very few large online platforms set the commercial conditions with considerable autonomy from their (potential) challengers, customers or consumers; (ii) dependence on a few large online platforms acting as gateways for business users to reach and have interactions with their customers; and (iii) the power by core platform service providers often being misused by means of unfair behaviour vis-à-vis economically dependent business users and customers"[32].

The definition of "core platform service" is given by Article 2, par. 2: it includes any online intermediation service, online search engine, online social network service, video-sharing platform service, number-independent interpersonal communication service, operating system, web browsers, virtual assistants, cloud computing service and online advertising service (including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by the undertaking that provides any of the core platform services listed before).

The DMA does not apply to markets related to electronic communications networks as defined in point 1 of Article 1 of Directive (EU) 2018/1972 of 11 December 2018 establishing the European Electronic Communications Code.

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[30]Manzini (2021) at 440.
[31]Manzini (2021) at 442.
[32]Proposal, *Explanatory memorandum*, 6.

The *DMA:* Notion and Duties of Gatekeepers

Analysing the structure, the DMA consists of six Chapters and one hundred and nine Recitals. Chapter I is devoted to *Subject matter, scope and definitions.* The DMA is binding only for those providers that meet clearly defined criteria for being considered "gatekeepers"[33]. Before the adoption of the DMA, the identification of "gatekeepers" and the related problems were currently not (or not effectively) addressed by existing EU legislation or national laws of Member States.

As pointed out in the *Explanatory Memorandum* of the Proposal, "[p]roviders of core platform services can be deemed to be gatekeepers if they: (i) have a significant impact on the internal market, (ii) operate one or more important gateways to customers and (iii) enjoy or are expected to enjoy an entrenched and durable position in their operations"[34].

Gatekeeper status is described in Chapter II of the DMA. It can be determined either with reference to quantitative metrics, which can serve as rebuttable presumptions, to determine the status of specific providers as a gatekeeper or based on a case-by-case qualitative assessment by means of a market investigation[35].

Furthermore, the DMA also establishes conditions under which a designation of a gatekeeper may be reconsidered and contains an obligation to regularly review such a designation[36].

Chapter III of the DMA is about *Practices of gatekeepers that limit contestability or are unfair.* It lays down self-executing obligations[37]; obligations that are susceptible to specification that the designated gatekeepers should comply with in respect to each of their core platform services listed in the relevant designation decision; and obligations for gatekeepers on the interoperability of number-independent interpersonal communications services[38].

Moreover, the Chapter contains the provisions concerning compliance with obligations of gatekeepers[39], by providing a framework for a possible dialogue between the designated gatekeeper and the Commission, relating to measures that

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[33]For a comparison with the undertaking in a dominant position, see Manzini (2021) at 443.
[34]Proposal, *Explanatory memorandum*, 2.
[35]Article 3. As it is pointed out in Recital 73 of the DMA, a provider of core platform services not meeting the quantitative thresholds laid down in the Regulation can be designated as a gatekeeper in case of systematic non-compliance and whether the list of obligations addressing unfair practices by gatekeepers should be reviewed and additional practices that are similarly unfair and limiting the contestability of digital markets can be identified. Such assessment should be based on clear procedures and deadlines, in order to support the ex-ante effect of DMA on contestability and fairness in the digital sector, and to provide the requisite degree of legal certainty
[36]Article 4. See also Recitals 30 and 31.
[37]Article 5. See Appendix - note 2.
[38]Article 7 introduces specific rules requiring a designated gatekeeper providing number-independent interpersonal communication services to provide interoperability for the benefit of other providers of such services. Different types of sub-services will progressively fall under the interoperability obligation at different points in time.
[39]Article 8.

the gatekeeper implements or intends to implement in order to comply with the obligations set out by DMA[40].

The obligations for an individual core platform service may be suspended in exceptional circumstances[41]; exemption can be granted also on grounds of public interest[42]. Additional provisions in this Chapter concern the reporting[43]; updating of the list of obligation[44]; a clarification about anti-circumvention[45]; an obligation to inform about concentrations[46]; and an obligation of an audit[47].

The power to supervise the fulfilment of the obligations and related implementation measures is given to the European Commission in the perspective of a centralised enforcement model. The Commission shall be assisted by the Digital Markets Advisory Committee composed of representative of Member States[48].

The DMA provides rules about market investigations (Chapter IV), notably the assumptions for the opening of a market investigation[49] and for different types of market investigations: (i) designation of a gatekeeper[50], (ii) investigation of systematic non-compliance[51] and (iii) market investigation of new services and practices[52].

The DMA contains provisions also concerning the opening of proceedings[53], the power of the Commission to request information[54], to carry out interviews and take statements[55], to conduct inspections[56] and to adopt interim measures[57]. The Commission is allowed to make voluntary measures binding on the gatekeepers[58] and to monitor compliance with the Regulation[59]. Third parties may inform the competent national authority about any practice or behaviour by gatekeepers

[40]See also Recital 58/60.
[41]Article 9.
[42]Article 10.
[43]Article 11.
[44]Article 10.
[45]Article 13.
[46]Article 14.
[47]Article 15. As it is explained in the *Explanatory memorandum* of the Proposal (4), transparency obligations on deep consumer profiling will help General Data Protection Regulation ('GDPR') enforcement, whereas mandatory opt-in for data combination across core platform services supplements the existing level of protection under the GDPR (Article 5, a). About profiling and transparency obligation, see also Recital 72. Gatekeepers must ensure that compliance with the obligations laid down in the DMA should be done in full compliance with other EU law, such as protection of personal data and consumer protection.
[48]Article 50.
[49]Article 16.
[50]Article 17.
[51]Article 18.
[52]Article 19.
[53]Article 20.
[54]Article 21.
[55]Article 22.
[56]Article 23.
[57]Article 24.
[58]Article 25.
[59]Article 26. See, in argument, Recital 68 et seq.

contrary to the scope of the DMA[60]. A compliance function for gatekeepers is also introduced in the same Chapter: it is independent from the operational functions of the gatekeepers and composed of one or more compliance officers, including the head of the compliance function[61]. Its task is to organise, monitor, and supervise compliance with the DMA.

The DMA provides rules for non-compliance: the Commission can adopt non-compliance decisions[62], as well as impose fines[63]. Fines cannot exceed 10% of total gatekeeper turnover in the preceding financial year if the non-compliance is intentional or negligent; fines to undertakings and associations of undertakings are not to exceed 1% of the total turnover in the preceding financial year. Periodic penalty payments are provided by the DMA: they are not to exceed 5 % of the average daily turnover in the preceding financial year, calculated from the date set by that decision[64].

Before adopting a decision, the Commission shall give the gatekeeper, undertaking or association of undertakings concerned the opportunity to be heard and to access the file[65].

Annual reporting on the implementation of the DMA by Commission to the European Parliament and to the Council is also regulated by a specific provision[66].

The DMA framework considers and protects fundamental rights: the Commission’s investigation powers would be subject to the full scope of fair process rights, such as the right to be heard, the right to a reasoned decision and access to judicial review, including the possibility to challenge enforcement and sanctioning measures[67]. Another procedural guarantee concerns professional secrecy[68].

The regulation also governs cooperation with national authorities, cooperation and coordination with national authorities enforcing competition rules, cooperation with national courts and "the high-level group" for the Digital Markets Act[69].

The DMA foresees the possibility for three or more Member States to request that the Commission open a market investigation pursuant to Article 15[70], while Articles 42 and 43 are about representative actions and reporting of breaches, as well as the protection of reporting persons.

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[60]Article 27.

[61]Article 28.

[62]Article 29.

[63]Articles 30.

[64]Article 31. The DMA contains also a limitation period for the imposition of penalties and for their enforcement: the powers conferred on the Commission for the imposition of penalties shall be subject to a three-year prescription; the limitation period for the enforcement of penalties is of five years (Articles 32 and 33).

[65]Article 34.

[66]Article 35.

[67]Proposal, *Explanatory memorandum*, 11.

[68]Article 36.

[69]Articles 37/40.

[70]Article 41.

The last provisions of the DMA are contained in Chapter VI and are general: an obligation to publish an identified set of individual decisions adopted under the Regulation[71], a clarification about the jurisdiction of the Court of Justice of the European Union in respect of fines and penalty payments[72] and the possibility to adopt implementing[73], guidelines[74], standardisation[75] and delegated acts[76]. Finally, the remaining provisions are about the committee procedure[77], the amendment of the Directive 2019/1937[78], amendment of the Directive 2020/1828[79], the review clause[80] and the specification of the entry into force and dates of application of the Regulation[81].

In short, the regulatory framework of the DMA is constituted by (a) a closed list of core platform services; (b) a definition of gatekeepers status given by quantitative and qualitative indices; (c) directly binding and applicable obligations, together with a regulatory dialogue to facilitate their enforcement; and (d) a possibility for the Commission to update the regulatory framework following a market investigation as regards the obligations on the gatekeeper and to amend the list of core platform services[82].

The "*Digital Services Act*" *(DSA)*

On 5 July of 2022 the European Parliament approved the *Digital Services Act*, presented by the Commission in December 2020[83] and on which a political agreement had already been reached on 23 April 2022. The *Digital Services Act* is a regulation that replaces and innovates the previous liability regime for information society service providers, constituted by the e-Commerce Directive (Dir. CE 2000/31)[84].

As well as the DMA, the *Digital Service Act* is a horizontal initiative which lays down harmonised rules on the provision of intermediary services in the internal market. The rules of regulation purport to ensure effective harmonisation across Europe and prevent legal fragmentation, ensuring the proper functioning of the internal market, in relation to the provision of cross-border digital services[85].

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[71]Article 44.
[72]Article 45.
[73]Article 46.
[74]Article 47.
[75]Article 48.
[76]Article 49. See, in argument, also Recital 66.
[77]Article 50.
[78]Article 51.
[79]Article 52.
[80]Article 53.
[81]Article 54.
[82]See Proposal, *Explanatory memorandum*, 9.
[83]Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Service Act) and amending Directive 2000/31/EC, 15.12.2020, COM (2020), 825 final, 2020/0361 (COD).
[84]Among the others, see Stanzione (2022) at 9 et seq.
[85]See Proposal, *Explanatory memorandum*, 7 and *Recital* 2, 4.

In line with this objective, the DSA aims to ensure legal harmonisation by addressing and preventing the emergence of obstacles to innovative cross-border services resulting from differences in the national laws. At the same time, it provides for the appropriate supervision of digital services and cooperation between authorities at the EU level, thereby supporting trust, innovation and growth in the internal market[86].

While the DMA is concerned with economic imbalances, unfair business practices by gatekeepers and their negative consequences, such as weakened contestability of platform markets, the DSA focuses on issues such as liability of online intermediaries for third party content, safety of users online or asymmetric due diligence obligations for different providers of information society services, depending on the nature of the societal risks such services represent[87].

As well as the DMA, the DSA is in accordance with the principles of subsidiarity and proportionality[88].

As was pointed out in the *Explanatory Memorandum* of the Proposal, the DSA complements existing sector-specific legislation (e.g., information society services, consumer and privacy law) and does not affect the application of existing EU laws regulating certain aspects of the provision of information society services, which apply as *lex specialis*[89]. It also introduces a horizontal framework for all categories of content, products, services and activities on intermediary services. The illegal nature of such content, products or services is not defined in the DSA, but instead results from Union law or from national law in accordance with Union law[90].

The legal basis for the DSA is found in Article 114 of the Treaty on the Functioning of the European Union, which provides for the establishment of measures to ensure the functioning of the Internal Market[91].

Analysing the normative framework, we can see that the DSA consists of five Chapters and one hundred and seven Recitals.

Chapter I sets out general provisions, including the subject matter and scope[92] and the definitions of key terms used in the Regulation[93]. The DSA establishes: (a) a framework for the conditional exemption from liability of providers of intermediary services; (b) rules on specific due diligence obligations tailored to certain specific categories of providers of intermediary services; (c) rules on the implementation and enforcement of the Regulation, including the cooperation and coordination between the competent authorities[94]. The DSA applies to intermediary services provided to recipients of the service that have their place of establishment

[86]See Proposal, *Explanatory memorandum*, 5-6.
[87]See Proposal, *Explanatory memorandum*, 1 et seq.
[88]See Proposal, *Explanatory memorandum*, 6.
[89]See Proposal, *Explanatory memorandum*, 4.
[90]See Proposal, *Explanatory memorandum*, 4.
[91]See Proposal, *Explanatory memorandum*, 5.
[92]Article 1-1a.
[93]Article 2.
[94]Article 1, par. 2.

or residence in the Union, irrespective of the place of establishment of the providers of those services[95].

Chapter II contains provisions on liability of providers of intermediary services. More specifically, it includes the conditions under which providers of mere conduit[96], caching[97] and hosting services[98] are exempt from liability for the third-party information they transmit and store, without affecting the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

A novelty can be found in Article 8 which governs *orders to act against illegal content*: providers of intermediary services, after receiving an order to act against one or more specific items of illegal content, issued by the relevant national judicial or administrative authorities, on the basis of the applicable Union or national law, in compliance with Union law, have to inform the authority issuing the order or any other authority specified in the order of the effect given to the orders, without undue delay, specifying if and when the order was applied[99]. In force to par. 2 of Article 8, the orders must contain specific elements. According to Art. 9, providers of intermediary services can receive orders (provided with reasons and information on remedies available to the provider and to the recipients of the service in question) to provide information.

Chapter III sets out the *Due diligence obligations for a transparent and safe online environment* in five different Sections. First of all, providers of intermediary services shall establish a single point of contact for direct communication, by electronic means, with Member States' authorities, the Commission and the European Board for Digital Services[100]. Moreover, providers of intermediary services also have to designate points of contact for recipients of services[101]. Furthermore, providers of intermediary services, which do not have an establishment in the Union, but which offer services in the Union, shall designate, in writing, a legal or natural person as their legal representative in one of the Member States where the provider offers its services[102].

Providers of intermediary services must include information in their terms and conditions on any restrictions that they impose in relation to the use of their service in respect of information provided by the recipients of the service.[103] The providers also have to publish clear, easily comprehensible and detailed reports at least once a year, on any content moderation they engaged in during the relevant period[104].

[95]Article 1a, par. 1.
[96]Article 3.
[97]Article 4.
[98]Article 5.
[99]Article 8, par. 1.
[100]Article 10, par. 1.
[101]Article 10a.
[102]Article 11, par. 1.
[103]Article 12, par. 1.
[104]Article 14, par. 1.

Additional provisions are applicable to providers of hosting services, including providers of online platforms[105]: providers of hosting services are obligated to introduce mechanisms able to allow any individual or entity to notify them of the presence on their service of specific items of information that the individual or entity considers to be of illegal content. Those mechanisms shall be easy to access, user-friendly, and allow for the submission of notices exclusively by electronic means[106].

In the meanwhile, providers of hosting services have to provide a clear and specific statement of reasons to any affected recipients of the service for any restriction imposed[107]. Notification of suspicions of criminal offences is regulated by Article 15a.

Additional provisions are applicable to providers of online platforms[108], except online platforms that qualify as micro or small enterprises as defined by the Annex to Recommendation 2003/361/EC[109]. All online platforms are required to furnish an *internal complaint-handling system* which enables the complaints to be lodged electronically and free of charge against the decisions taken by the online platform about illegal content or that which is contrary to terms and conditions[110]. Providers of online platforms are obliged to inform complainants without undue delay of decisions (which are not taken solely by automated means) taken regarding the information to which the complaint relates. The providers also have to inform complainants of the possibility to settle disputes out-of-court and of other available redress possibilities as provided for in Article 18[111].

Out-of-court dispute settlement is regulated by Art. 18. It does not prejudice the right of the recipient of the service to redress against the decision before a court in accordance with the applicable law (par. 1). Recipients of the service are permitted to select the out-of-court dispute settlement body from any out-of-court dispute service certified by the Digital Services Coordinator of the Member State, where the out-of-court dispute settlement body is established: Settlement bodies are certified if they meet all the conditions indicated by paragraph 2 of Art. 18 (impartiality, expertise, remuneration not linked to the outcome of the procedure, accessibility, effectiveness and the condition that the dispute settlement take place in accordance with clear and fair rules of procedure).

To further tackle illegal content, Trusted flaggers, acknowledged by the Digital Services Coordinators, are bodies whose notices are processed and decided upon urgently and expediently. After ruling on the figure and the role of *Trusted*

[105]Article 14 et seq.
[106]Article 14, par. 1
[107]Art. 15, par. 1. The restrictions indicated by the paragraph are: a) *any restrictions of the visibility of specific items of information provided by the recipient of the service, including removal of content, disabling access to content, or demoting content; b) suspension, termination or other restriction of monetary payments (monetisation); c) suspension or termination of the provision of the service in whole or in part; d) suspension or termination of the recipient's accounts.*
[108]Article 16 et seq.
[109]Article 16.
[110]Article 17.
[111]Article 17, par. 4 – 5.

flaggers[112], the DSA sets down the measures that online platforms are to adopt against the misuse by service recipients who frequently provide manifestly illegal content or by individuals or entities (or complainants) that frequently submit notices or complaints that are manifestly unfounded[113]. Such measures include issuing a warning of and the suspension, for a reasonable period, of the provision of the service.

In case of suspicion that a serious criminal offence involving a threat to the life or safety of persons has taken place, is taking place or is likely to take place, online platforms must inform the law enforcement or judicial authorities of the Member State or Member States concerned of such suspicion and provide all relevant information available[114].

The DSA also obliges online platforms to receive, store, and reasonably assess the reliability of and publish specific information on the traders using their services where those online platforms allow consumers to conclude distance contracts with those traders[115]. Those online platforms are also obliged to organise their interface in a way that enables traders to respect Union information duties and product safety law[116]. Online platforms are also obliged to publish reports on their activities relating to the removal and the disabling of information considered to be illegal content or contrary to their terms and conditions[117]. The DSA also foresees transparency obligations for advertising on online platforms[118]; it regulates the recommender system of transparency[119] and online protection for minors[120].

Section 3a of Chapter III contains provisions applicable to providers of online platforms allowing consumers to conclude distance contracts with traders: traceability of traders[121], compliance by design[122], right to information[123].

The *DSA: Very Large Online Platforms (VLOP) And Very large online search engines (VLOSEs)*

A novelty introduced by the DSA is the definition and regulation of very large online platforms (VLOP) and very large online search engines (VLOSEs). The first are defined as "online platforms which reach a number of average monthly active recipients of the service in the Union equal to or higher than 45 million, and which are designated as very large online platforms pursuant to paragraph 4"[124]. In turn, very large online search engines are described as those

[112]Article 19. See also Recital 46.
[113]Article 20.
[114]Article 21.
[115]Article 22.
[116]Article 22, par. 7.
[117]Article 23.
[118]Article 24.
[119]Article 24a.
[120]Article 24b. In argument, see Montinaro (2021) at 219 et seq.
[121]Article 24c.
[122]Article 24d.
[123]Article 24e.
[124]Article 25, par. 1. See Appendix Note 3.

engines "which reach a number of average monthly active recipients of the service in the Union equal to or higher than 45 million, and which are designated as very large online search engines in accordance with Article 25"[125].

According to Recital 53, "(...) it is necessary to impose specific obligations on the providers of those platforms, in addition to the obligations applicable to all online platforms. Due to their critical role in locating and making information retrievable online, it is also necessary to impose those obligations, to the extent they are applicable, on the providers of very large online search engines. Those additional obligations on providers of very large online platforms and of very large online search engines are necessary to address those public policy concerns, there being no alternative and less restrictive measures that would effectively achieve the same result." Furthermore, Recital 54 foresees: "[v]ery large online platforms and very large online search engines may cause societal risks, different in scope and impact from those caused by smaller platforms. Providers of such very large online platforms and very large online search engines should therefore bear the highest standard of due diligence obligations, proportionate to their societal impact. Once the number of active recipients of an online platform or a search engine, calculated as an average over a period of six months, reaches a significant share of the Union population, the systemic risks the online platform or the online search engine poses may have a disproportionate impact in the Union (…) "[126].

Section 4 of Chapter III of the DSA lays down obligations, additional to the obligations laid down in Sections 1 to 3, for very large online platforms and for very large online search engines to manage systemic risks. Very large online platforms are compelled to conduct risk assessments on the systemic risks related to their services[127] and to take reasonable and effective measures aimed at mitigating those risks[128]. A crisis response mechanism is also contemplated, and it is related to an event in which «extraordinary circumstances lead to a serious threat to public security or public health in the Union or in significant parts thereof»[129]. Providers of VLOP are also obliged to submit themselves to external and independent audits[130].

Section 4 of Chapter III, devoted to VLOP and VLOSE, also includes a specific obligation in case of very large online platforms using recommender systems[131] or displaying online advertising on their online interface[132].

Furthermore, Section 4 of the DSA establishes how providers of very large online platforms have to allow access to data to the Digital Services Coordinator of establishment or to the Commission and vetted researchers (i.e. academics with specific expertise in the DSA field)[133] and sets out the obligation to appoint one or

[125]Article 33a, par. 1.
[126]See also Recitals 55 et seq.
[127]Article 26.
[128]Article 27.
[129]Article 27a.
[130]Article 28.
[131]Article 29.
[132]Article 30.
[133]Article 31.

more compliance officers responsible for monitoring compliance with the obligations set forth in the Regulation[134] and specific, additional transparency obligations such as the publication of any content moderation reports (referred to in Article 13) every six months[135].

Section 5 of Chapter III of the DSA contains specific provisions concerning due diligence obligations, namely the processes for which the Commission will support and promote the development and implementation of harmonised European standards[136]; the procedure for the adoption of codes of conduct[137] and of specific codes of conduct for online advertising[138] and for accessibility[139].

Crisis protocols for addressing extraordinary circumstances affecting public security or public health are regulated by a specific provision which involves the Commission, Member States' authorities, Union bodies, offices and agencies, and encourages stakeholders to participate in the drawing up, testing and application of these protocols[140].

The *DSA*: Implementation and Enforcement

Chapter IV of the DSA contains the provisions concerning its implementation and enforcement. In this context we find the competent authorities and the national Digital Services Coordinators, regulated by Section 1. They are both the primary national authorities designated by the Member States for the consistent application and enforcement of the DSA[141]. The Digital Services Coordinators and the other designated competent authorities are independent authorities required to perform their tasks impartially, transparently and in a timely manner[142]. They comprise the European Board for Digital Services, an independent authority which advises and provides guidance on issues falling within the scope of the regulation and which also works in joint investigations and in the supervision of systemic platforms. The new authority is regulated by Section 2 and its structure and tasks are regulated by Articles 48 and 49.

Member States where the main establishment of the provider is located have jurisdiction to enforce the DSA[143].

The Digital Services Coordinators are granted specific powers of investigation and enforcement towards the providers of intermediary services. In the case of noncompliance with the requirements of the DSA, if the infringement persists and causes serious harm or entails a serious criminal offence involving a threat to the life or safety of persons, Digital Services Coordinators can request the competent

[134]Article 32.
[135]Article 33.
[136]Article 34.
[137]Article 35.
[138]Article 36.
[139]Article 36a.
[140]Article 37.
[141]Article 38. In argument, for the Digital service coordinator, see Recital 73 et seq.
[142]Article 39.
[143]Article 40.

judicial authority of that Member State to order the temporary restriction of access of recipients of the service concerned by the infringement or, only where that is not technically feasible, to the online interface of the provider of intermediary services on which the infringement takes place[144]. Furthermore, Member States have to lay down rules on penalties applicable to breaches of the obligations by providers of intermediary services under the DSA together with the extent of the penalty[145].

Digital Services Coordinators can receive complaints against providers of intermediary services for breaches of the obligations laid down in the DSA[146]; they are required to publish annual reports on their activities[147] and to cooperate with Digital Services Coordinators of other Member States[148]. They can also participate in joint investigations regarding matters covered by the DSA[149]. There is a prescription about compensation[150]: recipients of the service have the right to seek it from providers of intermediary services against any damage or loss suffered due to the conduct by those providers contrary to the DSA.

A specific system of supervision, investigation, enforcement and monitoring in respect of providers of VLOP and of VLOSEs is regulated in Section 3 (Articles 49a-66) of the DSA.

Some common provisions on enforcement are introduced in Section 4 which first lays down rules on professional secrecy[151] and on an information-sharing system supporting communications between Digital Services Coordinators, the Commission, and the Board[152] and includes the right of recipients of intermediary services to mandate a body, organisation or association to exercise their rights on their behalf[153].

Section 5 is about the adoption of delegated acts by Commission, in accordance with Article 290 of the Treaty on the Functioning of the European Union[154], and about the Digital Service Committee called in to assist the Commission[155].

Finally, Chapter V contains the last provisions of the DSA: the deletion of Articles 12 to 15 of the e-Commerce Directive[156], amendments to Directive 2020/

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[144]Article 41. The DSA provides for a system of limits and guarantees in conformity with the national laws, the Charter and the general principles of Union law: Member States shall ensure that any exercise of the powers pursuant to paragraphs 1,2 and 3 of Article 41 is subject to adequate safeguards; "in particular, those measures shall only be taken in accordance with the right to respect for private life and the rights of defense, 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" (Art. 41, par. 6).
[145]Article 42.
[146]Article 43.
[147]Article 44.
[148]Article 45.
[149]Article 46.
[150]Article 43a.
[151]Article 66a.
[152]Article 67. In argument, see also Recital 88 et seq.
[153]Article 68.
[154]Article 69.
[155]Article 70.
[156]Article 71.

1828/EC[157], evaluation of the Regulation[158] and its entry into force and application[159].

In short, the DSA establishes rules on 1) liability rules and exemption from liability of providers of intermediary services; 2) targeted asymmetrical due diligence obligations for a more transparent and safer online environment; 3) rules for implementation and enforcement which include the cooperation between authorities[160].

Some Conclusions

The EU's policy in the field of digital technologies is characterised by an evolution over the last thirty years[161]. A paradigm shift has occurred, offering pointers for legal experts to explain the birth of the "European digital constitutionalism"[162].

The issues of the digital ecosystem are not limited to the field of private or competition law, but are also inherent to a public law perspective[163], considering that "modern constitutionalism aims to protect fundamental rights and limit the emergence of powers outside any control."[164] Digital constitutionalism, in fact, consists of creating limits on exercising power in a network society, and is rising as a shield against the abuse of power in the digital environment[165].

That said, European policy has shifted from a liberal, economic perspective to a constitutional approach aimed at protecting fundamental rights and democratic values[166]. While at the beginning of this century, a liberal approach characterised EU's policy aimed at promoting the development of the internal market[167], this approach has ended up infringing upon fundamental rights and freedoms by

[157]Article 72.
[158]Article 73.
[159]Article 74.
[160]Buri, Van Hoboken (2021) at 7-8.
[161]Palmieri (2019) at 1 et seq.
[162]De Gregorio (2021) at 66.
[163]Civil, social and political rights are intertwined in this debate [see Stanzione (2019) at 1 et seq.].
[164]De Gregorio (2021) at 42.
[165]*Ibidem.*
[166]Stanzione (2019), at 2; Polo & Sassano (2021) at 502.
[167]We may consider as emblematic in this sense the Directive 95/46/EC ("Data Protection Directive") and Directive 2000/31/EC ("e-Commerce Directive"). The adoption of a paternalistic approach was considered able to frustrate the development of new digital services and, for this reason, EU was more concerned about economic freedoms and innovation rather than on the protection of individuals' rights and freedoms. While new technologies were supposed to innovate the entire society, a rigid approach to the online environment would have damaged the growth of the internal market. At the beginning of the Internet era, the EU approach was comprehensively far from "digital constitutionalism" because new digital technologies were considered as an opportunity to grow and prosper. Thus, new private powers challenging the protection of fundamental rights and competing with States' powers were not object of fear by EU Institutions. In argument see De Gregorio (2021) at 44, 45.

allowing strong undertakings to consolidate their powers and by empowering transnational corporations operating in the digital environment[168].

Given these challenges, the EU has introduced provisions to limit online abuse and illicit conducts, leading to regulatory solutions to protect fundamental rights, the smooth functioning of the internal market and democratic values[169]. This scenario is seen as the end of the liberal approach and a potential basis for promoting a democratic digital environment in the EU[170].

Within this framework, the importance of the DMA is evidenced by its ability to address unfair practices by gatekeepers that either fall outside the existing EU competition rules or cannot be effectively governed by these rules[171], since antitrust enforcement concerns the situation of specific markets - and thus intervenes after the restrictive or abusive conduct has occurred - and involves lasting procedures to ascertain the infringement. However, the DMA and competition policies are complementary: the DMA minimises the detrimental structural effects of unfair practices ex ante[172], without limiting the ability to intervene ex post under EU and national competition rules[173].

Therefore, this intervention is linked to antitrust and consumer legislation with the aim of encouraging innovation in the digital ecosystem, improving efficiency and reducing transaction costs for businesses and end users.

Noticeably, within platform business, problems arise for commercial users who cannot control the success factors of the company in the platform and SMEs who cannot do business profitably. Big players (e.g. the so-called GAFAM: Google, Amazon, Facebook, Apple and Microsoft) determine the rules of the system, generating contestability problems. For this reason, the *Digital Service Act Package* purports to prevent the digital system from continuing to reinforce advantages and strengths of big economies and big firms, in favor of developing tools to support smaller enterprises.

The characteristic of the DMA is to counteract the imbalances of power and the abuse of power by platforms that hold negative repercussions for commercial users and consumers.

In turn, the DSA's purpose is to produce a higher level of accountability for online platforms and intermediaries by introducing rules of transparency, due diligence requirements and third-party content liability, and by covering a wide range of policy, from online marketplace requirements to the protection of minors. The DSA establishes the passage in the configuration of the platforms, from de facto authority to legal authority, attempting to reduce the risk of abuse of contractual power[174]. According to the DSA, the online marketplace must ensure safety for end users, strengthening the obligations of business users. One of the most significant elements of the DSA is its requirement for algorithmic

[168]De Gregorio (2021) at 66.
[169]For an economic analysis of this change of policy, see Polo, Sassano (2021) at 501 et seq.
[170]De Gregorio (2021) at 67.
[171]See, among the others, Laux, Wachter & Mittelstadt (2021) at 4.
[172]Recital 73.
[173]Polo & Sassano (2021) at 509 et seq.
[174]Stanzione (2022), at 13.

transparency: Platforms will have to explain how their "recommendation system" works and produce their results to improve information for users and any choices they make[175]; While, on the user experience side, the DSA prohibits misleading interfaces or "dark patterns" which are designed to manipulate users into making certain choices[176].

Both the regulations are novel: they take an approach that has not been tried-and-tested before.

The DMA and the DSA obligations are like circles in a Venn diagram, since not all very large platforms and all very large search engines are necessarily also gatekeepers, though many will likely fall in that category as well[177].

In a civil law perspective, the Italian regulatory tool to counter the harmful consequences of the illegal conduct of the platforms is given by article 9 of Law n. 192 of 1998, because there is a network model which is vertically integrated with hierarchical relationships and cooperation needs, like those of economic dependence abuse. The abuse of economic dependence in the Italian system is governed by a rule of civil law that applies to vertical relationships between companies and which provides protection for the weak contractor, such as the nullification of the contractual clause that incorporates the abuse and compensatory remedies to counter the bargaining power of the strong contractor.

The prerequisite for the application of this institute is the economic dependence of one of the two parties of a negotiation relationship with another. Article 9, par. 1 of Law n. 192/98 defines economic dependence a situation in which a company may determine commercial relations with another company as an excessive imbalance of rights and obligations, taking into account the concrete possibilities for the party who suffers the abuse to find satisfactory alternatives in the market.

The recent Law n. 118 of 5 August 2022 aimed at amending the rules against the abuse of economic dependence deals with digital platforms[178]. The law explicitly introduces the reference to digital platforms in paragraph 1 of Article 9 of Law n. 192 of 1998[179] and, furthermore, it introduces an exemplary list of abusive practices in the text of paragraph 2 of the same article. Among these, there are those, made by digital platforms, that may "also consist in providing insufficient information or data regarding the scope or quality of the service provided and in requesting undue unilateral services not justified by the nature or content of the activity carried out, or in adopting practices that inhibit or hinder the use of different suppliers for the same service, also through the application of unilateral conditions or additional costs not provided for in the contractual agreements or existing licences". [180]

[175]Montinaro (2021) at 219 et seq.
[176] See Recital 68 of DSA.
[177]Laux, Wachter & Mittelstadt (2021) at 4.
[178]Bellomo (2022) at 1 et seq.
[179]See Appendix note 4.
[180]See Appendix note 5.

It will be necessary to combine this new legislation with the novelties of the *Digital Service Package* with specific reference to the extra-national scope of the platform business and digital regulations.

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Appendix

Note 1:

Unless the end user has been presented with the specific choice and has given consent, gatekeepers are not allowed: to process, for advertising purposes, personal data of end users using services of third parties that make use of core platform services of gatekeeper (par. 2, let. a); to do data combining (let. b); to do cross-use of personal data (let. c); to sign in end users to other services of the gatekeeper in order to combine personal data (let. d). The gatekeeper shall not prevent business users from offering, outside of its online intermediation service, the same products or services to end users at different prices or conditions than on its platform (par. 3). The gatekeeper shall allow business users to promote their offers, receive payments and conclude contracts with end users outside the gatekeeper's core platform service (par. 4). The gatekeeper shall allow end users to access and use, through its core platform service, content, subscriptions, features or other items by using the software application of a business user, including where these items have been acquired by the end users from the business user without using the gatekeeper's core platform service (par. 5). The gatekeeper shall not prevent or restrict business users or end users from raising any issue of non-compliance with relevant EU or national law by the gatekeeper with relevant public authorities, including national courts (par. 6). The gatekeeper shall not require business users or end users of a core platform service to use, offer, or interoperate with a gatekeeper's identification service, web browser engine or payment service in the context of services offered by a gatekeeper's business user through the gatekeeper's core platform service (par. 7). The gatekeeper shall not require business users or end users of a core platform service to also use another core platform service that has been listed in the designation decision or that meets the user number thresholds of the quantitative presumption expressed in Article 3(2)(b) (par. 8). The gatekeeper shall provide, free of charge and on a daily basis, advertisers (or their authorised third parties) who are customers of its online advertising services with a range of detailed information on, broadly speaking, the use of its advertising services and payments from publishers and advertisers (par. 9). The gatekeeper shall provide, free of charge and on a daily basis, publishers (or their authorised third parties) who are customers of its online advertising services with a range of detailed information on, broadly speaking, the use of its advertising services and payments from publishers and advertisers (par. 10).

Note 2:

Article 6: the gatekeeper shall not use in competition with business users any data not publicly available which is generated or provided by those business users in the context of their use of the relevant core platform service, including data generated or provided by the business users' end customers (par. 2); the gatekeeper shall allow and technically enable end users to easily un-install software applications on the operating system of the gatekeeper and allow end users to easily change default settings on the operating system (par. 3); the gatekeeper shall allow and technically enable the installation and effective use of third-party software applications or software application stores on its operating system (par. 4); the gatekeeper shall not treat more favourably in ranking and related indexing and crawling, its own services and products compared to similar services or products offered by third parties on its platform, and shall apply transparent, fair and non-discriminatory conditions to such rankings (par. 5); the gatekeeper shall not restrict the ability of end users to switch between, or subscribe to, different software applications and services to be

accessed using the gatekeeper's core platform service (par. 6); the gatekeeper shall allow providers of services and hardware, free of charge, effective interoperability with hardware and software features accessed or controlled via its operating system or virtual assistant (par. 7); the gatekeeper shall provide advertisers and publishers, and third parties authorised by them, upon their request and free of charge, with access to performance measuring tools of the gatekeepers and sufficient data for advertisers and publishers to carry out their own verification of the ad inventory (par. 8); the gatekeeper shall provide end users and third parties authorised by them, upon their request and free of charge, with effective portability of data provided by the end user or generated through the end user's activity on the core platform service, including by the provision of continuous and real-time access to such data (par. 9); the gatekeeper shall provide business users and third parties authorised by them, upon their request, free of charge with effective, high-quality, continuous and real-time access and use of data that is provided for or generated in the context of the use of the relevant core platform service (or related services) by those business users and their end users (par. 10); the gatekeeper shall provide, on fair, reasonable and non-discriminatory terms, competing online search engines with access to ranking, query, click and view data in relation to searches generated by end users on its online search engine (par. 11); the gatekeeper shall apply fair, reasonable and non-discriminatory general conditions for business users' access to software application stores, online search engines and online social networking services listed in the designation decision (par. 12) and the gatekeeper shall not use disproportionate general conditions for terminating a core platform service and not to make their exercise unduly difficult (par. 13).

The introduction of the possibility of tailored applications ensures that there is no over-regulation and, at the same time, allows to avoid a lack of intervention in relation to similar practices by the same gatekeepers, where practices may evolve over time (see the *Explanatory memorandum* of the Proposal, 6). Manzini (2021) at 439 et seq. considers weak this side of DMA since the obligations imposed on gatekeepers are seen as belonging to the general categories of antitrust law.

Note 3:

The text of par. 4 in Article 25 is as follows:

"The Commission shall, after having consulted the Member State of establishment or after taking into account the information provided by Digital Services.

Coordinator of establishment pursuant to Article 23(3a), adopt a decision designating as a very large online platform for the purposes of this Regulation the online platform which has a number of average monthly active recipients of the service equal to or higher than the number referred to in paragraph 1 of this Article. The Commission shall take its decision on the basis of data reported by the provider of the online platform pursuant to Article 23(2), or information requested pursuant to Article 23(3) or any other information available to the Commission. The failure by the provider of the online platform to comply with Article 23(2) or to comply with the request by the Digital Services Coordinator of establishment or by the Commission pursuant to Article 23(3) shall not prevent the Commission from designating that provider as a provider of very large online platform pursuant to this paragraph".

Note 4:

È vietato l'abuso da parte di una o più imprese dello stato di dipendenza economica nel quale si trova, nei suoi o nei loro riguardi, una impresa cliente o fornitrice. Si considera dipendenza economica la situazione in cui un'impresa sia in grado di determinare, nei

rapporti commerciali con un'altra impresa, un eccessivo squilibrio di diritti e di obblighi. La dipendenza economica è valutata tenendo conto anche della reale possibilità per la parte che abbia subito l'abuso di reperire sul mercato alternative soddisfacenti. Salvo prova contraria, si presume la dipendenza economica nel caso in cui un'impresa utilizzi i servizi di intermediazione forniti da una piattaforma digitale che ha un ruolo determinante per raggiungere utenti finali o fornitori, anche in termini di effetti di rete o di disponibilità dei dati.

Note 5:

Italian text: "Le pratiche abusive realizzate dalle piattaforme digitali di cui al *comma 1 possono consistere anche nel fornire informazioni o dati insufficienti* in merito all'ambito o alla qualità del servizio erogato e nel richiedere indebite prestazioni unilaterali non giustificate dalla natura o dal contenuto dell'attività svolta, ovvero nell'adottare pratiche che inibiscono od ostacolano l'utilizzo di diverso fornitore per il medesimo servizio, anche attraverso l'applicazione di condizioni unilaterali o costi aggiuntivi non previsti dagli accordi contrattuali o dalle licenze in essere".