D. The Commission Proposals for a DSA and a DMA

I. On the Digital Services Act Proposal

The DSA – as mentioned in the act and the accompanying Explanatory Memorandum – is intended to govern the responsibilities of digital services in the future, which act as intermediaries between recipients on the one hand and the providers of goods, services and content on the other. To this end, a horizontal setting is envisaged, containing rules for all relevant services and creating a harmonised cross-sectoral framework of rights, obligations, responsibilities, procedures and rules on jurisdiction throughout the EU, without the intention to replace sector-specific provisions, e.g. from audiovisual media services, electronic communications services, copyright and consumer protection law.

Following the aim to contribute to the proper functioning of the internal market for intermediary services and therefore set out uniform rules for a safe, predictable and trusted online environment, where fundamental rights enshrined in the Charter are effectively protected (Art. 1 para. 2 DSA Proposal), 74 provisions, detailed in 106 Recitals, propose new obligations for intermediary services.

However, these new obligations are initially prefaced by the liability privileges already known from the ECD, which will not be replaced by the DSA Proposal but merely amended, in particular by transferring the provisions on liability into the new legal act (Art. 3 to 5 and 7 DSA Proposal). The previous Art. 12 to 15 ECD are imported almost word by word, so that the technical terms (mere conduit, caching and hosting) are now also included in the DSA Proposal. However, the existing ECD system of liability exemption is supplemented by a provision on "voluntary own-initiative investigations and legal compliance" (Art. 6), which is aimed to address fears that providers might refrain from taking voluntary measures, for example to combat illegal online content, for fear of losing their privileges in the context of liability, which largely presupposes passivity and lack of knowledge. The rules on liability exemptions are further supplemented by provisions on orders to act against illegal content (Art. 8) and to provide information (Art. 9), the relevant requirements and legal bases which derive from national law and which are issued by the relevant national judicial or administrative authorities. The inclusion of these provisions shall not only

clarify the obligation to follow such orders but lead to at least an alignment of the orders across the Member States in formal terms by specifying a minimum content they need to contain.

Irrespective of the question of whether providers can invoke a liability exemption in individual cases and of the fact that no general monitoring obligations can be imposed on them, the DSA Proposal introduces a set of general "due diligence" obligations that apply to (all) providers of intermediary services as a new layer.

The nature and scope of the obligations depend on both the type and size of the platform addressed. The DSA Proposal covers "intermediary services" as a generic term for "mere conduit", "caching" and "hosting" services but subdivides them both in the context of the exemption from liability (here again into caching, mere conduit and hosting as in the ECD) and in the context of the imposition of obligations (hosting providers, online platforms, very large online platforms (VLOPs)) while providing for facilitation for micro and small enterprises. In the context of the territorial scope of application, the Proposal is based on the principle of market location, i.e. the rules would apply to any intermediary service provided to recipients of the service that have their place of establishment or residence in the Union, irrespective of the place of establishment of the provider of this service (Art. 1 para. 3). Offering of a service in the Union means that there is a "substantial connection to the Union" which is concretised in Art. 2 lit. d and concerns, in particular, having an establishment in the Union or a significant number of users or by the targeting of activities towards the internal market.

The new obligations include labelling obligations for illegal goods, services and content, the establishment of complaints systems for users and transparency requirements. But the DSA also intends to improve the enforcement of the law online and proposes in particular new supervisory structures that should also function in cross-border cases. The DSA Proposal suggests that certain obligations should be applicable to all intermediary services, which includes the obligations to establish a single point of contact allowing for direct communication by electronic means with the respective supervisory body (Art. 10). Where applicable, the way providers apply content moderation has to be disclosed in the services terms and conditions of the service (Art. 12), and there are transparency reporting obligations on a regular basis (Art. 13). In addition, there is an obligation to designate a legal representative in one of the Member States for providers without establishment in the EU which offer their services in the Union (Art. 11).

Additional provisions are applicable to providers of hosting services, including online platforms, which are defined in Art. 2 lit. h as providers of a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information, unless that activity is a minor and purely ancillary feature of another service and, for objective and technical reasons, cannot be used without that other service and unless the integration of the feature into the other service is not a means to circumvent the applicability of the proposed Regulation. These additional obligations cover the installation of easily usable notice and action mechanisms enabling users to submit sufficiently precise and adequately substantiated notices on illegal content (Art. 14). They are combined with concretised information obligations vis-à-vis recipients of the services whose content has been removed or if access to their content has been disabled (Art. 15). In both cases, the DSA Proposal is concerned with the creation of minimum standards that determine how notice mechanisms should be designed and what information must be provided to content producers, especially for the purposes of effectiveness and transparency.

A further layer of obligations is proposed for online platforms in Articles 17 to 24 excluding micro or small enterprises. This includes the provision of effective, user-friendly and easily accessible internal complaint-handling systems associated with information obligations regarding complaints that have been submitted (Art. 17) and the implementation of out-of-court dispute settlement procedures to resolve disputes relating to decisions on complaints taken by online platforms (Art. 18). Complaints from trusted flaggers – a status which can be given to entities under certain qualifying conditions on Member State level –should be given priority in the complaints mechanisms according to the DSA Proposal (Art. 19), whereby mechanisms to protect against abuse through the repeated flagging of actually lawful content are not only implemented in relation to trusted flaggers but also in relation to the use of complaints mechanisms as a whole (Art. 20). Furthermore, the section for online platforms includes a requirement to inform competent enforcement authorities in the event they become aware of any information giving rise to a suspicion of serious criminal offences involving a threat to the life or safety of persons (Art. 21) as well as the obligation to receive, store, make reasonable efforts to assess the reliability of and publish specific information on the traders using the respective service the online platform provides for when this service includes allowing consumers to conclude distance contracts with traders (Art. 22).

In addition to transparency and labelling obligations for online advertising (Art. 24), 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 (Art. 23). In contrast to the reporting obligations under Art. 13 of the DSA Proposal, Art. 23 provides for greater concretisation, especially in terms of the content of such reports, whereby the focus is on the level of detail of the information and the Commission is enabled to adopt implementing acts to lay down templates concerning the form, content and other details. In addition, the reporting obligation here also covers the publication, at least once every six months, of information on the average monthly active recipients of the service in each Member State. This allows monitoring for the purpose of assessing whether an online platform is a very large online platform (VLOP). These VLOPs are addressed in a separate section of the DSA Proposal with obligations beyond the ones just described to manage systemic risks emanating from them.

According to the description laid down in Art. 25 para. 1 of the DSA Proposal, VLOPs are online platforms which provide their services to a number of average monthly active recipients of the service in the Union equal to or higher than 45 million, which has to be calculated in accordance with the methodology to be laid down in delegated acts of the Commission. VLOPs shall be obliged to conduct assessments of the systemic risks, such as the dissemination of illegal content through their services, taking into account how different systems (e.g. content moderation, recommender systems, advertising tools) established on their platform pose risks (Art. 26). In a second step the Proposal obliges the VLOPs to also take reasonable and effective measures aimed at mitigating those risks (Art. 27). This is not only to be monitored at EU level by a board in cooperation with the Commission but also through the power to issue guidelines on what constitutes appropriate risk mitigation measures to be established by the Commission in cooperation with national authorities. The DSA Proposal further obliges VLOPs to submit themselves to external and independent audits performed by qualified and independent organisations (Art. 28) and, in case of a negative audit report, to take account of any operational recommendations addressed to them by the auditors via the adoption of an audit implementation report within one month. There are also specific obligations proposed in case VLOPs use recommender systems (Art. 29) or display online advertising on their online interface (Art. 30). The section dedicated to VLOPs closes with provisions about information requirements, in particular in light of cooperation with supervi-

sory authorities. VLOPs are obliged to provide access to data that are necessary to monitor and assess compliance within a specified period of time (Art. 31) and to appoint one or more compliance officers to ensure compliance with the proposed rules, these officers serving also as link to cooperation with supervision (Art. 32); furthermore they are subject to specific, additional transparency reporting obligations (Art. 33). Regarding the latter, these transparency obligations are more restrictive in terms of time (to be published every six months) than the reporting obligations of intermediary services (Art. 13) and online platforms (Art. 23). They are extended to include reporting on the results of the risk assessment as well as the related risk mitigation measures identified and implemented pursuant (Art. 26 and 27) and on the audit and audit implementation report (Art. 28).

In the context of these due diligence obligations contained in the DSA Proposal there are several mechanisms of self-regulation introduced. According to these rules, the Commission shall support and promote the development, implementation and also updating of voluntary industry standards, in particular regarding certain technical mechanisms of the proposed Regulation such as the electronic submission of notices or the auditing procedures vis-à-vis VLOPs (Art. 34).[75] It shall encourage and facilitate the drawing up of codes of conduct at Union level in order to contribute to the proper application of the proposed Regulation (Art. 35), in particular in the field of online advertising (Art. 36). In addition the Commission shall encourage and facilitate the participation of VLOPs and, where appropriate, other online platforms in the drawing up, testing and application of so-called "crisis protocols" for addressing crisis situations strictly limited to extraordinary circumstances affecting public security or public health (Art. 37).

Finally, the DSA Proposal contains a complex system of supervision that divides powers among several involved actors and establishes both general cooperation mechanisms and concrete and procedure-dependent ones at several junctures. Supervision is to remain essentially with the Member States' supervisory bodies, some of which are already established in various sectors, for which the DSA Proposal is now intended to provide a horizontal framework. However, the Proposal also provides for its own mechanisms as well as numerous challenges to this assignment of supervision at Member State level. For example, it introduces Digital Services Coordinators (DSCs) that must be given their own regulatory powers at national

75 E.g. the electronic submission of notices (Art. 14), the auditing of VLOPs (Art. 28) or the interoperability of ad repositories (Art. 30 para. 2).

level, with the minimum requirements already set by the DSA Proposal (Art. 41). These DSCs are central to supervisory activities and serve both as coordinators of different supervisory authorities at the national level and for cooperation at the supranational level within the newly created European Board for Digital Services (EBDS) and as a focal point for DSCs in other Member States and the European Commission.

The DSCs also shall be a central point for receiving complaints from citizens about violations of the proposed rules by intermediaries (Art. 43) and are required to publish annual reports on their activities (Art. 44). In this regard, the procedure of cross-border cooperation proposed in Art. 45 should also be particularly emphasised. This provides for the possibility, under certain conditions, for a DSC in a Member State or the EBDS to request the DSC of the provider's place of establishment to take action in case of suspected violations of the proposed rules of the DSA, subject to certain deadlines. In case of disagreement on the appropriate course of action among the DSCs concerned, participation and evaluation by the Commission is also foreseen.

The rules on supervision in Art. 38 to 49 are, however, modified by Art. 50 et seq. of the DSA Proposal with regard to the regulation of VLOPs. Within this framework, the Commission is placed as the centre of supervisory activity, although supervision of VLOPs is not per se transferred from the DSCs of the place of establishment in its entirety to the Commission. Rather, special procedures with strong participation and final decision-making powers of the Commission are provided for. This applies, on the one hand, to the enhanced supervision procedure (Art. 50) when it comes to the violation of the special rules for VLOPs, which provides for coordination between the Commission, EBDS and DSC before a DSC decision is finally enforced. On the other hand it applies to the intervention possibilities attributed to the Commission by Art. 51 of the DSA Proposal, within the framework of which it can react, for example, to what it considers to be a lack of action on the part of a competent DSC. In these cases, the Commission is entrusted with several investigatory powers, such as requests for information (Art. 52), interviews (Art. 53) and on-site inspections (Art. 54), and it can adopt interim measures (Art. 55), make binding commitments proposed by VLOPs (Art. 56) and monitor their compliance with the Regulation (Art. 57). In case of violations, the Commission can adopt non-compliance decisions (Art. 58), issue fines (Art. 59) and periodic penalty payments (Art. 60), whereas providers are granted procedural guarantees (Art. 63 and 64).

The DSA Proposal provides for several layers of cooperation mechanisms interconnecting the different levels of supervision (national regulatory authorities, DSCs and the Commission), the main forum for which is the EBDS. This advisory group, composed of the DSCs and chaired by the Commission, is established to contribute to achieving a common Union perspective on the consistent application of the proposed Regulation and to cooperation on the supranational level regarding appropriate investigation and enforcement measures, in particular by drafting relevant templates and codes of conduct and analysing emerging general trends in the development of digital services in the Union. Furthermore, different cooperation mechanisms concerning concrete investigations, procedures and decisions can be found throughout numerous provisions of the DSA Proposal linking DSCs between each other and with the Commission. The exchange of information plays a decisive role, which is why Art. 67 proposes an information sharing system to be established and maintained by the Commission.

II. On the Digital Markets Act Proposal

Unlike the DSA, the Commission's Proposal for a DMA aims to create "contestable and fair markets" in the digital sector, thus primarily addressing competition aspects. In doing so, the aim is also to open up growth opportunities for small and new players and to ensure that companies and consumers do not have to accept unfair conditions dictated by established providers and such with strong market power. In order to ensure this, certain providers with a large economic and therefore also social influence, thus posing a potential systemic risk, should be subject to clear and, above all, stricter rules than hitherto. This includes both active obligations to act and duties to refrain from certain practices for gatekeeper platforms.

Relying on the market location principle, the DMA Proposal addresses core platform services (which are, inter alia, online intermediation services, search engines, social networks and VSPs) provided or offered by gatekeepers to business users established in the Union or to end users established or located in the Union, irrespective of the place of establishment or residence of the gatekeepers (Art. 1 para 2). The status of a gatekeeper is, according to the DMA Proposal, designated (and may be reviewed regularly) by the Commission if the criteria laid down in Chapter II are met, either based on quantitative criteria (through a presumption subject to counter-demonstration) or following a case-by-case assessment

in a market investigation (Art. 3). Criteria that may play a role in the Commission's assessment are, for example, the size, including turnover and market capitalisation, the number of business users, entry barriers derived from network effects and data driven advantages, scale and scope effects the provider benefits from (including with regard to data) or business user or end user lock-in.

For these core platform services designated as gatekeepers, the DMA Proposal contains a list of practices that are assumed to limit contestability of the market and that are therefore unfair. In order to effectively counter such practices, the draft distinguishes between self-executing obligations (Art. 5) and obligations that are susceptible to further specification (Art. 6), the latter meaning that the provider has to conduct a self-assessment how to imply the rules for its service in an appropriate manner. For this purpose, Art. 7 proposes a framework for a possible dialogue between the designated gatekeeper and the Commission in relation to measures that the gatekeeper implements or intends to implement based on its self-assessment.

The obligations to act and to refrain from action contained in the provisions are manifold. In particular, gatekeepers are to refrain from merging personal data from the central services with data from other services and from preventing their business customers from complaining to supervisory authorities. Gatekeepers shall no longer prevent users from uninstalling pre-installed software or apps or from accessing services they may have purchased outside the gatekeeper platform. Gatekeepers shall not use data obtained from their business users to compete with those business users. They shall also not make the use of their services by end users and business users conditional on registration with another service of the same gatekeeper. On the other hand, they must allow business customers to offer their services and products through third party intermediary services at different prices and to advertise their offers and conclude contracts with their customers outside the gatekeeper's platform. Gatekeepers must provide businesses advertising on their platform with access to the gatekeeper's performance measurement tools and to the information (e.g. on prices) necessary to enable advertisers and publishers to conduct their own independent review of their advertising hosted by the gatekeeper. This also includes data generated by the business customer's use of the platform. These rules apply regardless of whether the relevant practice of the designated gatekeeper is of a contractual, commercial, technical or any other nature (according to the anti-circumvention rule in Art. 11).

To keep some flexibility, the Proposal empowers the Commission to adopt delegated acts to update the obligations where, based on a market investigation, it has identified the need for new obligations addressing practices that limit the contestability of core platform services or are unfair in the same way as the practices already addressed in the Proposal. However, according to Art. 8 and 9, under certain conditions obligations for an individual core platform service may also be suspended in exceptional circumstances or an exemption can be granted on grounds of public interest. Enabling in another way to react flexibly to developments, gatekeepers are obliged to notify the Commission of any intended concentration within the meaning of the EU Merger Regulation (Art. 12) – meaning in advance of the obligations under that Regulation, i.e. already at the stage of the plans for such a concentration – and to submit any techniques for profiling of consumers that the gatekeeper applies to or across its core platform services to an independent audit (Art. 13).

To ensure the appropriate and up-to-date adoption of the rules, the DMA Proposal entrusts the Commission with several powers to carry out market investigations, in particular on the designation of a core platform service as a gatekeeper (Art. 15), on investigation of systematic non-compliance (Art. 16) and of new core platform services and new practices (Art. 17) as well as with regulatory and enforcement powers. The powers, very similar as in the DSA Proposal, include the request of information (Art. 19), the conducting of interviews and taking statements (Art. 20), on-site inspections (Art. 21) on the investigatory level, the adoption of interim measures (Art. 22), the making binding of commitments of the gatekeepers (Art. 23), monitoring (Art. 24) and finally the issuing of non-compliance decisions (Art. 25) as well as the imposing of fines (Art. 26) or periodic penalty payments under certain conditions (Art. 27). The penalty cap is higher (10% of total turnover in the preceding financial year) compared to the DSA Proposal and the respective provisions (Art. 26 to 29 DMA Proposal) are more concrete regarding the different treatment of violations of different provisions. Art. 35 clarifies that the CJEU shall have unlimited jurisdiction in respect of fines and penalty payments.

The Commission performs the central function of supervision for the DMA in a nearly solitary manner. The DMA Proposal – in order to ensure that the adoption of implementing acts by the Commission is subject to

the control of Member States as required by Regulation (EU) No 182/2011[76] – provides for the establishment of the Digital Markets Advisory Committee. This Committee is composed of representatives of Member States and shall give opinions on certain individual decisions of the Commission, but it is not equipped with regulatory powers. Besides that, the DMA Proposal provides for a possibility for three or more Member States to request the Commission to open a market investigation pursuant to regarding the designation of (new) gatekeepers (Art. 33). Furthermore, the Commission is empowered to adopt implementing (Art. 36) and delegated (Art. 37) acts.

76 Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55, 28.2.2011, p. 13–18.