

The Digital Services Act and the Digital Markets Act - a forward-looking and consumer-centred perspective



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Abstract

These proceedings summarise the presentations and discussions that took place during the IMCO online workshop held on 26 May 2021 on the Digital Services Act (DSA) and the Digital Markets Act (DMA). The workshop was structured in two panels, each consisting of three presentations and two Q&A sessions. The first panel focused on the DSA. The second panel was devoted to the DMA.

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LIST OF ABBREVIATIONS

B2B	Business-to-Consumer
CDA	Communications Decency Act
DMA	Digital Markets Act
DMCA	Digital Millennium Copyright Act
DSA	Digital Services Act
DSC	Digital Service Coordinators
EC	European Commission
ECD	eCommerce Directive
ECN	European Competition Network
ECOSOC	Economic and Social committee
ECR	European Conservatives and Reformists Group in the European Parliament
EFDD	Europe of Freedom and Direct Democracy Group
ENF	Europe of Nations and Freedom
EP	European Parliament
EPP	Group of the European People's Party (Christian Democrats) in the European Parliament
EU	European Union
GDP	Gross Domestic Product
Greens/EFA	Group of the Greens/European Free Alliance in the European Parliament
GUE/NGL	European United Left - Nordic Green Left Group in the European Parliament
ID	Identity and Democracy Group in the European Parliament
IMCO	Internal Market and Consumer Protection committee in the European Parliament
KYBC	Know Your Business Customer
MEP	Member of the European Parliament
MGM	Metro Goldwyn Meyer
NRA	National Regulatory Agency
P2P	Peer-to-Peer
Q&A	Questions & Answers
RENEW	Renew Europe Group in the European Parliament

S&D	Group of the Progressive Alliance of Socialists and Democrats in the European Parliament
UN	United Nations
US	United States (of America)
VLOP	Very Large Online Platforms

EXECUTIVE SUMMARY

Background

These proceedings summarise the presentations and discussions that took place during the Internal Market and Consumer Protection (IMCO) online workshop held on 26 May 2021 on the Digital Services Act (DSA) and Digital Markets Act (DMA) with a focus on the European internal market and consumer protection issues. The workshop was structured in two panels, each involving three presentations followed by Question & Answer (Q&A) sessions with Members of the IMCO Committee. The first panel focused on the DSA. The second panel was devoted to the DMA.

Aim

The workshop was organised to explore possible conclusions and recommendations on the DSA and DMA proposals and gather evidence on the expected effects of the regulation of online intermediaries. The discussions of the workshop will feed into the DSA and the DMA reports of the IMCO committee, setting out the Parliament's political response.

The aim of the first panel was to explore in more depth some of the issues covered by the DSA proposal, namely the fragmentation of the single market for services, the responsibilities of intermediaries and problems faced by consumers when using online platforms and digital services or accessing illegal services or products, as well as issues related to supervision and enforcement.

The aim of the second panel was to explore some of the issues covered by the DMA proposal, namely the role that a few online platforms play in the digital economy and the need to ensure a fair and contestable online platform environment to the benefit of consumers.

Main discussions

First panel on the DSA

Prof. Joris VAN HOBOKEN argued that Articles 3 to 7 of the DSA offer continuity and simplicity, but that there are currently some gaps in the proposals. He continued by presenting specific recommendations for search engines, including the potential to add search-engine specific rules to Articles 3 to 5 of the DSA. He expressed concern that the DSA does not clearly classify infrastructural cloud services under the current 'online platform' definition for due diligence obligations. He also noted that interpersonal communications services currently do not fall under the scope of the DSA, but should in his opinion be included for the purposes of safe harbour and due diligence obligations in cases where they are actively moderated. In the context of online advertising, Prof. Van Hoboken noted that current expectations from regulators and politicians with respect to user-facing transparency are too high. Finally, he argued in favour of ensuring sufficient funding for researchers and journalists to turn simple transparency into accountability.

Prof. Teresa RODRÍGUEZ DE LAS HERAS BALLELL focused on key factors for effective enforcement of the DSA. Her analysis relies on a four point analytical framework consisting of: 1) a clear and unambiguous scope; 2) well-defined obligations; 3) effective remedies; and 4) a sound enforcement system. She pointed out that the current definition of online platforms is limited, but the scope of application of the DSA should be clear (personal, territorial, objective). She views platforms as self-regulating environments, determining their policies and internal rules (DSA Article 12). Furthermore, she provided several examples where the DSA mentions automation (e.g. Article 15, Article 17 (5), Article 20 and Article 22), but the scope is still unclear. Prof. Rodriguez de las Heras highlighted that, although significant reference is made of automation, it is not clear to which extent automation is

permitted and which are the legal effects (e.g. in relation to complaint handling). Finally, she addressed the question of whether there should be a new European Union (EU) agency in charge of enforcement or whether the European Commission (EC) should take sole responsibility for enforcement.

Prof. Daphne KELLER provided a United States (US) perspective on the topics addressed by the DSA. She noted that, in the context of intermediary liability laws, it is necessary to balance three major policy goals: 1) Preventing harm by incentivising platforms to remove harmful content; 2) protecting user rights by preventing platforms from removing too much content; and 3) promoting innovation and competition by limiting liability for large scale processing of user speech. Despite the fact that intermediary liability laws have been much debated against a fundamental rights backdrop in the EU, Prof. Keller considers that US law is not as well developed on these issues. She continued by explaining that the DSA's notice-and-action provisions do an excellent job in protecting user rights, but that some obligations could distort competition between large platforms and smaller platforms. Moreover, she recommended that it should be made clear that the DSA would not weaken protections for encryption and the security of commercial and private communications by e.g. introducing backdoors. On the issue of transparency, she noted that the DSA proposals were positive, but there was a need for civil society and experts to define which information was most important. She concluded her presentation by highlighting that in her view the marketplace provision in Article 22 appears broadly sensible, and also welcomed the fact that Article 29 on recommender systems is limited in scope.

Second panel on the DMA

Prof. Carmelo CENNAMO stressed that platforms are often viewed as the 'new utilities' and not as 'new collective organisations'. He stated that the concept of utilities follows an efficiency logic and views platforms as matchmakers in multi-sided markets. In his view this may not be the right focus as multi-sided platforms do not just perform a neutral role, but orchestrate the value creation of their ecosystems. If one takes the perspective of platforms as 'new collective organisations', this introduces an innovation logic, where 'ecosystem failures' can cause problems for innovation. According to Prof. Cennamo, a key question is who benefits from orchestration and in which domains. He noted that, if core platform services are considered as a contestability criterion, the focus would be too narrow, as decisions on the fringes of the ecosystem can affect the core platform service. He recommended that: 1) Promoting innovation should be included as objective, not only as a by-product of contestability; 2) regulators should acknowledge the orchestrator role of platforms and allow legitimate orchestration; and 3) obligations should be linked to specific objectives, as obligations for one objective might undermine another.

Focusing on enforcement and institutional mechanisms, Prof. Heike SCHWEITZER argued that the tool of 'market investigations' could be widened and improved even further. Prof. Schweitzer recommended that remedies in the DMA (Article 16) should not be imposed to sanction, but rather to react to the market failures that are at the root of a systematic non-compliance. Furthermore, in her view, the Commission should be able to identify new core platform services to the Article 2 list, without involving the legislator. She also stressed that tailoring of obligations will be very important in the future to ensure effectiveness of the regime, and suggested that it should be possible to make use of the market investigation regime to apply tailored remedies. She warned about the potential negative effects of a centralised enforcement model due to a case overload and recommended a more decentralised enforcement mechanism in which national authorities could take action in parallel. Furthermore, she noted that the DMA does not make reference to private enforcement, and proposed to clarify that this remains an option. Finally, Prof. Schweitzer noted that, especially if there is parallel enforcement, it could be useful to establish a central expert resource that could be relied upon by the Commission as well as national authorities.

Prof. Fiona M. SCOTT MORTON stated that progress in the US with respect to DMA-related issues is virtually non-existent, as political leaders have been distracted by the domestic policy situation. Despite the leap forward due to the anti-trust cases against Facebook and Google, there is currently no comprehensive digital regulatory framework in the US. Therefore, she concludes that there is a unique opportunity for the EU to be a thought-leader in this domain. She continued by stressing that she considered that the underlying principles are more important than lists of prohibitions and obligations. Understanding the goals in the DMA would allow other regulatory regimes to adopt the concept, while at the same time tailoring the solutions to their specific context. She argued that contestability is important for economists, as the concept implies low entry barriers and a reduction in network effects. Therefore, contestability can increase fairness, as users can leave a platform, which provides them with more bargaining power and, as a result, a larger share of the benefits. Afterwards she reflected on issues of interoperability. She recommended that there should be a more general requirement for interoperability and non-discrimination clauses to allow free access for business users and end-users.

1. INTRODUCTORY WORDS

Ms. Anna CAVAZZINI, Member of the European Parliament (MEP) and chair of IMCO committee, opened the event by introducing the topic of the workshop. She pointed out that the European Parliament (EP) is currently working on its input to shape the development of the DSA and DMA. Therefore, the audience and parliamentarians are keen to gain additional insights on pressing issues with respect to both legislative proposals and to pose their questions to renowned experts in the field.

Ms. Cavazzini thanked the Policy Department for Economic, Scientific and Quality of Life Policies for the organisation of the workshop. She welcomed and introduced all experts, thanking them for their participation.

Finally, she described the structure of the workshop, explaining there would be a first panel focused on the DSA and a second panel devoted to issues revolving around the DMA with individual Q&A sessions for each panel.

2. PANEL 1: DIGITAL SERVICES ACT

Ms. SCHALDEMOSE, MEP for the Group of the Progressive Alliance of Socialists and Democrats in the European Parliament (S&D) and rapporteur, opened the first panel by welcoming the speakers and highlighting that, following a discussion on competencies, the work on the content of the DSA proposal in the EP has begun.

She argued that digital services play an important role for the European economy and society. Digital services provide new opportunities for consumers and businesses, but may also create challenges for society with respect to e.g. product safety or algorithmic decision making. As big platforms are challenging the level playing field, issues like fairness and competition have to be addressed.

She considers the EC's proposal as a good starting point. However, an important question to her remains, as of how to prevent a fragmentation of the single market if different legislation is adopted in different Member States. She hoped that the experts in this panel would provide valuable insights into these topics.

2.1. Digital Services Act - Safe harbours, due diligence and online ads

Prof. Joris VAN HOBOKEN, Vrije Universiteit Brussel & University of Amsterdam

At the beginning of his presentation, Prof. Joris VAN HOBOKEN mentioned that he is leading a new project called the 'DSA Observatory'. The DSA Observatory aims to provide independent scientific input during the DSA debate and to engage different stakeholders on the DSA proposals. He invited everyone to follow their efforts and progress on the project website.

With respect to safe harbours, Prof. van Hoboken argued that Articles 3 to 7 of the DSA offer continuity and simplicity, but that there are currently some gaps in the proposals. He stressed that there is lack of clarity with respect to the position of certain services, which results in ambiguity of the scope of due diligence obligations.

He continued by presenting specific recommendations for search engines. Currently there is no harmonised EU level safe harbour clause, neither in the eCommerce Directive (ECD) nor the DSA proposal. Since search is an essential information service for the digital economy, clarity should be provided for this service category. He also considered that due diligence obligations should also be applied to search engines. As a simple fix, Prof. van Hoboken proposed that due diligence obligations could be applied to search engine providers as well. As a more robust solution, he suggested designing search-engine specific rules in addition to Articles 3 to 5 in the DSA.

Prof. van Hoboken considered that there were also gaps for other services such as infrastructural cloud services, as the DSA does not clearly classify these services under the current 'online platform' definition for due diligence obligations. He noted that the due diligence obligations had been written for platforms which have more active content moderation in contrast to infrastructural services.

Interpersonal communications services currently do not fall under the scope of the DSA, but should, in his opinion, be included for purposes of safe harbour and due diligence obligations if they are actively moderated.

In the context of online advertising, Prof. van Hoboken referred to the new provisions on transparency and accountability. However, he remarked that consideration was needed of the extent to which they fall under the scope of safe harbour. He considered that liability and responsibility for online advertising should be reconsidered for sponsored messages that have significant scale and reach.

As regards transparency, Prof. van Hoboken stressed that current expectations from regulators and politicians with respect to user-facing transparency are too high. He reported that scientific evidence suggests that more transparency would not provide significant benefits for users. Furthermore, the lines between content and advertising are becoming increasingly blurred by influencer marketing and there is currently a transparency and accountability gap that should be addressed. He recommended regulating tracking and targeting of consumers by limiting the collection of sensitive data, or limiting the level of granularity in which tracking data can be stored. Moreover, consumers should have the choice to opt-out of ad-tracking and personalised advertising when using platform services.

Finally Prof. van Hoboken argued in favour of providing more public data to researchers and journalists to turn simple transparency into accountability for Very Large Online Platforms (VLOPs). One crucial element in his opinion is additional support for those actors who use this data to hold platforms accountable.

2.2. Supervision and Enforcement in the DSA - Key Factors for Enhancing the Effectiveness of Enforcement: Analytical Framework and Proposals

Prof. Teresa RODRÍGUEZ DE LAS HERAS BALLELL, University Carlos III of Madrid

Prof. Teresa RODRÍGUEZ DE LAS HERAS BALLELL started her presentation by focusing on key factors for effective enforcement of the DSA. Her analysis relied on a four point analytical framework consisting of: 1) Clear and unambiguous scope; 2) well-defined obligations; 3) effective remedies; and 4) a sound enforcement system.

She pointed out that the current definition of online platforms is limited, but the scope of application of the DSA should be clear (personal, territorial, objective). Otherwise, there could be a risk of circumvention and lack of predictability. She views platforms as self-regulating environments, which determine their own policies and internal rules (DSA Article 12). However, the 'ancillary' services exclusion is currently vague and the term not well-defined. This would require a case-by-case analysis of the business model and an improved description of the exemption.

Prof. Rodriguez de las Heras noted that platforms have a duty to provide information to their business customers, but the scope of duty can be ambiguous, as there is no clear distinction between Business-to-Consumers (B2C) and Peer-to-Peer (P2P) business models. Furthermore, she pointed out that it is also unclear if the Know Your Business Customer (KYBC) principle applies if only pre-contractual stages are completed and how complaints by business users would be handled. There is a risk that platforms will comply with these duties based on a checklist approach and not based on the requirements of their business users. Business users are highly dependent on the accessibility of data. Platforms could address this issue with more automation, but ultimately there is a risk of discrimination. Therefore, she suggests clarifying the platform's liability in this regard.

She continued by providing several examples where the DSA mentions automation (e.g. Article 15, Article 17 (5), Article 20 and Article 22), but the scope is still unclear. Despite the significant reference to automation, it is not clear what automation means exactly, to which extent it is permitted, or which consequences and legal effects it will have when it is not explicitly provided for (e.g. in relation to complaint handling). Since the territorial scope of orders could lead to an overlap, there is need for further co-ordination at domestic and EU level. Since information sharing is critical and close coordination is required she suggested creating an online platform for national digital service coordinators that allows for immediate and aligned action.

Finally, she addressed the question of whether there should be a new EU agency in charge of enforcement or if the EC should have sole responsibility for enforcement. To answer this question, she suggested to rely on the following criteria: experience, specialisation, coordination and consistency, as well as effectiveness.

2.3. US Developments and the DSA

Prof. Daphne KELLER, Stanford Cyber Policy Center

Prof. Daphne KELLER provided a United States (US) perspective on the subjects addressed in the DSA. She pointed out that the legal responsibilities of platforms for content posted by users are defined by intermediary liability laws. In that context three major policy goals must be balanced: 1) Preventing harm by incentivising platforms to remove harmful content; 2) protecting user rights by preventing platforms from removing too much content; and 3) promoting innovation and competition by limiting liability for large scale processing of user speech. The third goal is particularly relevant in her opinion, but has received insufficient attention in the US, as well as in the EU.

She continued by briefly introducing three major components of the US intermediary liability law; Section 230 of the Communications Decency Act (CDA), the Digital Millennium Copyright Act (DMCA) and the federal criminal law. However, despite the fact that intermediary liability laws have been much debated against a fundamental rights backdrop in the EU, Prof. Keller considers that US law is not as well developed on these issues.

Section 230 of the CDA aims at correcting older defamation cases in the US that created perverse incentives to leave harmful or illegal content online. Specifically, the CDA sought to provide immunity from suits claiming wrongful takedowns or from suits over illegal content. Importantly, platforms do not have to be passive or neutral to benefit from immunity, and can benefit from immunity even if they know about illegal content. She clarified that this drastic approach is different from the EU approach, but aims to solve the problem of how to encourage action while also punishing platforms with losing immunity if they fail to take action.

Afterwards Prof. Keller reflected on potential future changes to section 230 of the CDA. She noted that there is a lot of speculation on this point, but no one knows for sure what will happen. However, it has become clear that section 230 of the CDA is controversial between Democrats and Republicans, and both parties have introduced bills to amend it. The Democrats are in favour of taking down more content, while Republicans generally want less content taken down. She speculated that this could be solved through a list of universally agreed upon harms, or a procedural solution. Nevertheless, recent court cases tend to deny immunity of online marketplaces (e.g. Amazon), essentially limiting section 230 of the CDA.

She continued by explaining that the DSA's notice-and-action provisions do an excellent job in protecting user rights, but that some obligations could distort competition between large platforms and smaller platforms. These procedural obligations create burdens for smaller platforms and therefore might deter the growth of innovators, as they may not be able to meet the obligations. She recommended that Article 18, concerning dispute resolution procedures, should be limited to large online platforms. She stressed that the EU should not pass regulations that are good for Facebook and bad for challengers.

Moreover, she recommended that it should be made clear in the DSA that it does not weaken protections for encryption and the security of commercial and private communications by e.g. enabling backdoors. Furthermore, she recommended that the DSA should not weaken platforms'

ability to protect consumers from misleading, high volume and often commercial content (spam).

Prof. Keller considers that the DSA is positive regarding transparency, but policy makers in the EU should take stock of the benefits and costs to ensure that transparency obligations are effective. There is a need for civil society and experts to define what information is most important, and what are the best mechanisms to provide this information to consumers.

She concluded her presentation by highlighting that in her view, the marketplace provision in Article 22 appears broadly sensible. In contrast, she welcomed the fact that Article 29 on recommender systems is limited in scope. She considers that we are currently at the very beginning of understanding how to regulate algorithmic recommendations and detailed rules would be premature.

2.4. Questions and answers

2.4.1. First round of questions and answers

Ms. Anna CAVAZZINI opened the first round of Q&A of the first panel by handing the word to Ms. Christel Schaldemose.

Ms. SCHALDEMOSE (S&D) asked the experts if it would make sense to differentiate between different types of platforms e.g. social media and marketplaces. Furthermore, she asked if the current proposal is doing enough to ensure that Member States will not compete to become a safe harbour from regulation. She also asked whether the DSA will set the global standards for regulation in general.

Mr. Pablo ARIAS, MEP of the Group of the European People's Party (EPP), detailed that dangerous products, harmful medicine and fake news can be found online. He wants to see more responsibility in the online environment. He asked the experts how this could be realised, as something that is illegal offline should also be illegal online. However, this would require identifying people clearly, which is currently not done by platforms. He asked the experts what they thought about a potential obligation to clearly identify yourself in order to be able to do transactions online.

Ms. Dita CHARANZOVA, MEP of Renew Europe (Renew), referred to the presentation of Prof. van Hoboken and pointed out that she agrees that there is a lack of clarity in the DSA with respect to cloud services and search engines. She asked him how he thought this could be made clearer in the text. She asked Prof. Rodríguez de las Heras Ballell how the barriers to entry she mentioned could be removed without creating further barriers. Finally, she asked Prof. Keller what she believes is lacking in the DSA with respect to transparency and action systems.

After the first round of questions time was given to the experts to respond in the order of their presentations.

Prof. Joris VAN HOBOKEN replied first to the question concerning the distinction between social media and marketplaces and argued that while it is possible to make a distinction, he did not see a need to make a distinction between these services in relation to the safe harbour provisions. In the context of due diligence certain provisions are written for eCommerce, while others have been written with social media in mind. He concluded that there is already a certain level of flexibility in the DSA. On the question of clear personal identification in online transactions, he strongly argued against more extreme measures. He noted that there are already new measures to deal with fake news and disinformation, and he recommended to the audience not to go beyond these measures. With respect to search engines, he recommended a clear definition of these services in the DSA and for safe harbour provisions to be applied for search engines and for infrastructural cloud services.

Prof. Teresa RODRÍGUEZ DE LAS HERAS BALLELL responded to the question of Ms. Schaldemose on safe harbours that a focus should be on mitigating the risk of jurisdictional arbitrage. She argued that the

DSA could allow countries to adopt flexible rules to make them a favourable safe harbour, which presents a risk. She noted that Article 8 opens that door for specific Member States, which implies a need for co-ordination amongst all Member States to avoid this situation. She continued by replying to the question on identifying individuals in online transactions. She supported the position of Prof. van Hoboken that more drastic measures would have a counter-productive effect and could erode the freedom of speech in the EU. On the question of how to avoid barriers to entry she responded that enhancing the role of data service co-ordinators and enforcement should be a key focus.

Prof. Daphne KELLER responded first to the question of whether the DSA will set a global standard and said she hopes this will be the case. The concern about the EU setting standards is that such a proliferation of legal measures could be difficult for businesses under these obligations. With respect to providing transparency, she suggested that specific language could be added to achieve transparency goals. On the question of how to protect smaller companies, she argued that this issue is a real challenge.

2.4.2. Second round of questions and answers

Ms. Anna CAVAZZINI opened the second round of Q&A of the first panel by handing the word to MEP Ms. Alessandra Basso of the Identity and Democracy Group (ID).

Ms. BASSO stated that the DSA has very ambitious goals, but that the consumer protection measures need to be improved. Article 22 includes a list of information that platforms should demand from commercial operators. She was concerned that this could be enforced through self-certification and noted that there are currently no consequences in the case of false reports. She asked the experts how one could check the accuracy of such information and what should be consequences in such cases.

Ms. Alexandra GEESE, MEP of the Group of the Greens/European Free Alliance (Greens/EFA), stated that her group supports the ban on targeted advertising not only for consumers but also to support competition. She referred to the recent case of Apple's iOS platform, which implemented stricter ad-tracking transparency guidelines and an opt-in for ad-tracking at the operating system level. She referred to sources from analytics companies and mentioned that approximately 90% of iOS users worldwide reject ad-tracking, but that companies nonetheless find a way to nudge users. She asked the experts if they would advise including language in the legislation on how to ask consumers for their consent. On the topic of messenger services she argued that there is a difference between e.g. group-chats with 20 people and 100,000 people. Certain services are clearly disseminating to the public, rather than private circles. She asked the experts if they thought the definition of these services is fit for purpose and if there was an opportunity for more meaningful obligations.

Mr. Adam BIELAN, MEP of the European Conservatives and Reformists Group (ECR), asked the experts whether the distinction between VLOPs and other platforms is suitable. Furthermore, he expressed concern that the country of origin principle would not solve the issue of jurisdiction. In his view, this is especially relevant to social networks. He asked the experts how this issue can be addressed and enforcement strengthened, without undermining the country of origin principle.

After the second round of questions time was given to the experts to respond in the order of their presentations.

Prof. Joris VAN HOBOKEN replied first to the question on targeted advertising. He is in favour of stricter rules, but does not support a ban on targeted advertising in general. He argued that in dealing with walled gardens, these environments are affected differently than e.g. the open Internet. In his view, it is important to create a meaningful choice for consumers, but also to make clear how they can make their choice freely instead of being exposed to targeted advertising and potentially misled. With

respect to messaging services, he replied that it is much harder to distinguish between private and public communications. Regulators should think about clear cut-off values to address this issue. However, this question would need to be addressed in the context of rules concerning ePrivacy and the telecommunications sector.

Prof. Teresa RODRÍGUEZ DE LAS HERAS BALLELL responded that she agreed with the MEP that Article 22 is vague and there were insufficient safeguards around self-certification. However, she also stressed that, in her view, adding additional sanctions would not be a good option. She continued by arguing in favour of more reliable measures to make platforms comply with the Regulation. She proposed that Digital Service Coordinators (DSC) should play a more active role in supporting platforms with providing data. They could also help them to verify information provided by traders. Moreover, there should be a close dialogue between platforms and DSCs. She further suggested that by combining the effects of Article 22 and Article 5 (3), it could be established that the perception of acting as traders, would imply liability.

Prof. Daphne KELLER agreed with Ms. Geese that it is difficult to distinguish between interpersonal communications and other forms of communications. She also pointed out that the DSA provisions in Article 12 and Article 14 (6) open the door to a potential fragmentation, which in her opinion would be easy to correct. She concluded her response by arguing that VLOP provisions push concrete solutions into the future, which could cause problems with democratic accountability.

3. PANEL 2: DIGITAL MARKETS ACT

Mr. Andreas SCHWAB, MEP of the EPP and rapporteur of the DMA panel remarked that it is important to consider both the DSA and the DMA in tandem. In his view there is a need to send a strong signal that Europe will build a strong digital internet market in which consumers' rights are respected. The principle of fairness must play an important role in this regard. After his opening statement he handed over the word to the first expert of the panel.

3.1. Digital Markets Act's Objectives - Efficiency vs. Innovation Logics

Prof. Carmelo CENNAMO, Copenhagen Business School

Prof. Carmelo CENNAMO opened his presentation by stressing that platforms are often viewed as the "new utilities" rather than "new collective organisations". He pointed out that considering platforms simply as utilities provides too narrow a perspective and ignores the value creation potential of platforms which can be achieved by orchestrating different players.

He stated that the concept of utilities follows an efficiency logic by considering platforms as matchmakers in multi-sided markets. As platforms connect multiple actors and provide access to different market-sides, they are thereby enhancing transactional efficiency. However, large platforms can take on a gatekeeper-role by exploiting these features as well.

Nevertheless, in his view, this may not be the right focus as multi-sided platforms do not just perform a neutral role, but orchestrate the value creation of their ecosystems. Therefore, the perspective of platforms as "new collective organisations" introduces an innovation logic, where "ecosystem failures" can cause problems for innovation. In that sense, platforms have the role of "gate-makers" by facilitating third-party innovation through shared assets and organising independent innovation by providing integrated solutions which enable value creation.

Prof. Cennamo highlighted that the goals of the DMA are fairness and contestability of markets. However, to him, it is not clear how these concepts relate to each other in the current version of the legislative proposal. He encouraged the audience to create a link between the two concepts.

Guaranteed equal access is expected to lead to greater fairness and contestability, but this presumption should be further explored. To him the most important question is who benefits from orchestration and in which domains. It is too narrow to focus on contestability in core platform services, as decisions on the fringes of the ecosystem can affect core platform services.

He concluded his presentation by recommending that: 1) Promoting innovation should be included as objective, not only as by-product of contestability; 2) regulators should acknowledge the orchestrator role of platforms and allow legitimate orchestration; and 3) obligations should be linked to specific objectives, as obligations for one objective might undermine another.

3.2. Digital Markets Act - Supervision and Enforcement

Prof. Heike SCHWEITZER, Humboldt University Berlin

Prof. Heike SCHWEITZER opened her presentation by stating that an allegedly ineffective enforcement of the existing competition rules has been one of the triggers for the call for the DMA, and that effective enforcement of the DMA will be key for its success. Among other things, it will depend on effective access to relevant information. To this end, the DMA proposes to introduce a new 'market investigations' tool, which in her view could be widened and improved even further. It should be clarified that remedies under Article 16 DMA (systematic non-compliance) are not imposed to sanction

companies, but rather to react to the market failures that are at the root of a systematic non-compliance. Furthermore, she recommended that the Commission should not only be able to add new obligations to the Article 5 and Article 6 list, but also to identify new core platform services to the Article 2 list, without involving the legislator. She also stressed that, in order to ensure the effectiveness of the regime, a tailoring of obligations will be very important, and that an additional market investigation regime should be introduced to develop remedies tailored to just one gatekeeper or core platform service.

Moreover, Prof. Schweitzer stressed that, currently, the DMA proposes a fully centralised enforcement model, as all enforcement would be under the remit of the European Commission. She warned about the risk of a case overload and resulting backlog of cases and recommended a more decentralized enforcement mechanism, which would involve empowering national authorities and allow for parallel enforcement on the national level. In her view, this approach would allow regulators to better deal with the complaints of smaller companies and country-specific contractual arrangements. Prof. Schweitzer considered that this approach (which is also reflected for example in competition law), is a strength of the EU model and should also be applied with respect to the DMA. It would however require a coordination regime, similar to the European Competition Network (ECN) model.

Prof. Schweitzer recommended that it should be clarified that private enforcement remains possible under the DMA, as the proposal is currently silent on this topic. Finally, she concluded by saying that in view of the additional data requirements in the DMA and especially if her proposal to permit parallel enforcement by national authorities was pursued, there could be some benefit in establishing a central point of technical expertise and support on which national authorities as well as the Commission could rely (e.g. in the case of analysing specific algorithms).

3.3. Digital Markets Act - A view from the United States

Prof. Fiona M. SCOTT MORTON, Yale University

At the beginning of her presentation, Prof. Fiona M. SCOTT MORTON stated that progress in the US with respect to DMA-related issues is virtually non-existent, as political leaders have been distracted by the domestic policy situation. Rather, for a long time, the focus in the US has been on antitrust enforcement. Despite the leap forward due to the anti-trust cases opened against Facebook and Google, there is currently no comprehensive digital regulatory framework in the US. Therefore, she concluded that there is unique opportunity for the EU to be a thought-leader in this domain.

She continued by stressing that she considers that the underlying principles are more important than lists of prohibitions and obligations, as currently included in the DMA. In her view, these principles are not sufficiently clearly defined in the DMA. Understanding the goals of the DMA would allow other regulatory regimes to adopt the same concept, while at the same time tailoring the solutions to their specific context. Furthermore, she called for more rigorous economic analysis to make the benefits of the DMA clear.

In that regard, Prof. Scott Morton considers that fairness and contestability have sound economic underpinnings. Each user has little power due to e.g. network effects, but if all users left a platform simultaneously, they could influence the overall ecosystem.

In this context, she argued that contestability is important for economists, as the concept implies low entry barriers and a reduction in network effects. Therefore, contestability can increase fairness, as users can leave a platform, which provides them with more bargaining power and, as a result, a larger share of the benefits. She concluded that every kind of competition counts to achieve this goal.

Thereafter, she reflected on issues regarding interoperability. In her view interoperability is a way to increase fairness and contestability, but is not sufficiently addressed in the DMA as it is only mentioned in Article 6 (1). She recommended that there should be a more general requirement for interoperability and associated non-discrimination clauses to facilitate free access for business users and end-users.

Finally, Prof. Scott Morton concluded that the DMA could increase innovation. To this end more competition in core platform services is good for innovation, as they have to fight for consumers. Fairness considerations would increase the share for business users, which is good for consumers as well, as prices would go down and the availability of local (including European) options would increase.

3.4. Questions and answers

3.4.1. First round of questions and answers

Ms. Anna CAVAZZINI opened the first round of Q&A of the second panel. She then handed the word to MEP Tomislav Sokol of the EPP.

Mr. SOKOL pointed out that we should not fall into the trap of diluting the current black-list (Article 5 & 6) in the DMA. In his view, a clear-cut list of rules of what should not be done is a good start. He asked Prof. Schweitzer if she thinks Article 8, which allows for the suspension of obligations, is specific enough, or if it could lead to a case-by-case logic, effectively undermining the clarity of provisions.

Ms. Evelyne GEBHARDT, MEP of the S&D, argued that principles instead of a list of obligations and prohibitions is a controversial topic. She pointed out that replacing these lists would not help the process, but adding them might make more sense. To her the question of enforceability and implementation remained. She asked the experts if they see a possibility to shorten the time for decision-making, as preventing the development of new gatekeepers is the core aim of the DMA.

Mr. Andrus ANSIP, MEP of RENEW, asked the experts about the designation of gatekeepers. He asked if gatekeepers should be defined by business model or by the respective core service. Some services make money by (targeted) advertising on a wide user base, while others derive their revenues from charging fees for transactions. He also mentioned that indicators like active users are not clearly defined and have no established cut-off criterion.

After the first round of questions time was given to the experts to respond in the order of their presentations.

Prof. Carmelo CENAMO replied to the question on designation methods. He considered them to be clear and clearly linked to the size of the firm. Firms that reach a defined threshold would be captured. In his judgement, current obligations sometimes speak to specific business models. He mentioned that there may be a need for a distinction between firms and business models, with a greater focus on the business model, to define the scope of the DMA more clearly. He pointed out that in his view issues may be raised when large-scale incumbents in traditional industries enter the digital sphere.

Prof. Heike SCHWEITZER responded first to the question of MEP Tomislav Sokol, by pointing out that she deems Article 8 clear enough. The Article would apply in only very exceptional circumstances with a very narrow scope. She continued by making a case for an even broader exemption. In her view a black-list is a good start, but recommended adding more flexibility to adapt the obligations to different circumstances, e.g. in form of a pro-competition defence. Finally, she talked about facilitating stability and enforcement by recommending extending the time between reviews of a gatekeeper position (to every 5 years, instead of what it is currently set at, which is every 2 years).

Prof. Fiona M. SCOTT MORTON responded to MEP Evelyne Gebhardt by clarifying that she does not argue in favour of replacing the lists with principles. Rather, her suggestion was to organise the lists

around key principles so that other countries could better understand which rules support which goals. She views this as a tool to export ideas. She argues that there will always be new business models raising new problems and challenges in the digital domain. If the foundation of DMA is built on principles, lists can be adapted based on those principles to address evolving situations, without having to go through a lengthy process.

3.4.2. Second round of questions and answers

Ms. Anna CAVAZZINI opened the second round of Q&A of the first panel by handing the word to MEP Ms. Virginie Joron of ID.

Ms. Virginie JORON asked the experts who would check the validity of the data of large platform providers. She expressed doubt as to whether Article 8 would be more of an exception than the rule. She stated that she is missing a reflection of national preferences and the digital autonomy of Europe. She asked about the legal models that are applied in countries such as China and Israel.

Mr. Rasmus ANDRESEN, MEP of the Greens/EFA, referred to news about Amazon buying the film studio Metro Goldwyn Meyer (MGM) in asking whether streaming services should be included as core services in the DMA. He also pointed out that there is a need for a common European approach, but that some European authorities are stronger than others. He asked the experts whether this fact would affect their judgement about favouring a more decentralised enforcement mechanism. Finally, he asked whether the experts believe that interoperability for messenger services would indeed be a driver for more innovation.

Mr. Adam BIELAN, MEP of the ECR, pointed out that many jurisdictions have looked into how to address issues with gatekeeper platforms. He called for consistency of enforcement in the EU, but was also in favour of a more prominent role for national authorities. Furthermore, he argued that there are differences between offline and online services. These differences should be reflected in the rules. Finally, he asked the experts how interoperability obligations should be imposed.

Mr. Martin SCHIRDEWAN, MEP of the European United Left - Nordic Green Left Group (GUE/NGL), observed that gatekeepers are financially-orientated monopolistic players that can have negative effects on consumers. In his view, the market investigation tool of the DMA will not be up to the task of limiting mergers and ensuring transparency. He asked the experts about their recommendations with respect to the market investigation tool. He continued by asking the experts about their views on breaking up hardware/software ecosystems and if they would consider such solutions, going beyond interoperability. Finally, he asked the experts what the EU could learn from the Big Tech lawsuits in the US with respect to unbundling and structural remedies.

After the second round of questions time was given to the experts to respond in the order of their presentations.

Prof. Heike SCHWEITZER started by addressing the question about including streaming as a core platform service. She pointed out that she does not see systemic gatekeeper and ecosystem problems in the domain of streaming services, and that in her view, all remaining competition problems should be left to competition law. The list in the DMA could be expanded if new gatekeeper or ecosystem problems emerge in the future. With respect to problems of an enforcement coordination, she recommended a system similar to the ECN, as well as frequent consultations with the EC. On the question of interoperability, she argued that in the context of social networks, such obligations could limit innovation. On the topic of market investigations, she pointed out that investigations which are specific to problems relating to a certain gatekeeper would bring the DMA close to what had been considered for a new competition law tool. She noted that merger control is currently a significant gap

but that it lies beyond the legal remit of the DMA.

Prof. Fiona M. SCOTT MORTON insisted that the best way to grow strong companies is to subject them to competition. She pointed out that it is part of the responsibility of the EU not to let in companies which do not respect European laws. She concluded by responding on the topic of interoperability. She recommended a standardised interface to standardised components such as text or video. At the same time, she argued in favour of allowing additional innovation through new features (e.g. user interface, content moderation) that may work only on specific platforms or services.

Ms. Anna CAVAZZINI closed the second round of Q&A and concluded the workshop by thanking all experts for their valuable inputs, the MEPs for their questions and the organisers for their time and effort in preparing this online workshop.

ANNEX 1: WORKSHOP AGENDA

POLICY DEPARTMENT FOR ECONOMIC,
SCIENTIFIC AND QUALITY OF LIFE POLICIES



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INTERNAL MARKET AND CONSUMER PROTECTION (IMCO)

WORKSHOP AGENDA

The Digital Services Act and the Digital Markets Act: A forward-looking and consumer-centred perspective

Chair: Anna Cavazzini (MEP)

26 May 2021, 16.45 – 18.45

József Antall Building (4Q1)

- 16.45** Welcome and introduction
– **Ms Anna Cavazzini (MEP)**, IMCO Chair
- PART 1** **Digital Services Act**
- 16.48** Introduction
– **Ms Christel Schaldemose (MEP)**, Rapporteur
- 16.50 - 17.14** Experts presentations:
- 16.50** Responsibilities of online intermediaries and new due diligence obligations
– **Prof. Joris van Hoboken**, University of Amsterdam and Vrije Universiteit Brussel

- 16.58** Supervision and enforcement
– **Prof. Teresa Rodriguez de las Heras Ballell**, Carlos III University, Madrid
- 17.06** International perspective
– **Prof. Daphne Keller**, Stanford University
- 17.14** **Questions and Answers with MEPs**
- PART 2** **Digital Markets Act**
- 17.45** Introduction
– **Mr Andreas Schwab (MEP)**, Rapporteur
- 17.47 – 18.11** Experts presentations:
- 17.47** Objectives, regulatory architecture and obligations
– **Prof. Carmelo Cennamo**, Copenhagen Business School
- 16.58** Supervision and enforcement
– **Prof. Heike Schweitzer**, Humboldt-University, Berlin
- 17.06** International perspective
– **Prof. Fiona Scott Morton**, Yale University
- 18.11** **Questions and Answers with MEPs**
- 18.42** Conclusion and closing remarks
– **Ms Anna Cavazzini (MEP)**, IMCO Chair

ANNEX 2: WORKSHOP PRESENTATIONS

1. **Digital Services Act - Safe harbours, due diligence and online ads,**
Joris van Hoboken, Vrije Universiteit Brussel & University of Amsterdam.
2. **Supervision and Enforcement in the DSA - Key Factors for Enhancing the Effectiveness of Enforcement: Analytical Framework and Proposals,**
Teresa Rodríguez de las Heras Ballell, University Carlos III of Madrid.
3. **US Developments and the DSA,**
Daphne Keller, Stanford Cyber Policy Center.
4. **Digital Markets Act's Objectives - Efficiency vs. Innovation Logics,**
Carmelo Cennamo, Copenhagen Business School.
5. **Digital Markets Act - Supervision and Enforcement,**
Heike Schweitzer, Humboldt University Berlin.
6. **Digital Markets Act - A view from the United States,**
Fiona M. Scott Morton, Yale University.

ACCESS TO THE FULL CONTENT OF THE PRESENTATIONS HERE:

<https://www.europarl.europa.eu/committees/en/the-dsa-and-dma-a-forward-looking-and-co/product-details/20210416WKS03461>

These proceedings summarise the presentations and discussions that took place during the IMCO online workshop held on 26 May 2021 on the Digital Services Act (DSA) and the Digital Markets Act (DMA). The workshop was structured in two panels, each consisting of three presentations and two Q&A sessions. The first panel focused on the DSA. The second panel was devoted to the DMA.

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