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**The Balance Between Gatekeeper Rules and Free Speech in the EU
under the Digital Markets Act and Digital Services Act**



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The Balance Between Gatekeeper Rules and Free Speech in the EU under the Digital Markets Act and Digital Services Act

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Abstract

Purpose: This article investigates the intricate balance between free speech and content restrictions within the frameworks of the EU Digital Services Act (DSA) and the Digital Markets Act (DMA). It delves into the duties of 'gatekeepers' under the DMA, the challenges of content moderation, and the delicate equilibrium between fostering open communication and curbing harmful material. The primary aim is to contribute to the ongoing debate on digital platform regulation, particularly focusing on the gatekeeper designation under the DMA and its potential to enhance freedom of speech while mitigating excessive compliance and censorship.

Methodology: The study employs a mixed-methods approach to provide a comprehensive analysis of the regulatory landscape and its implications. It includes a literature review of academic journals, legal documents, and policy papers; in-depth document analysis of the DMA and DSA; case studies of landmark decisions such as GS Media and Delfi AS v. Estonia; interviews with key stakeholders; a survey of platform users; comparative analysis with other jurisdictions; policy impact assessment; and content analysis of platform policies. The research adheres to ethical guidelines, ensuring informed consent and data protection.

Findings: The findings reveal that the DMA's gatekeeper rules have the potential to significantly enhance freedom of speech by curbing platform dominance, promoting content diversity, and encouraging transparent content moderation. However, the risk of over-compliance leading to the suppression of free speech is also identified. The study highlights the importance of independent oversight, clear platform guidelines, and continuous dialogue among stakeholders to maintain a balance between open markets and free speech.

Unique Contribution to Theory, Policy and Practice: This article offers a novel perspective on how the DMA's gatekeeper designation improves freedom of speech while avoiding excessive censorship. It provides valuable insights for policymakers, digital platforms, and civil society organizations, emphasizing the need for a nuanced approach to content moderation that respects users' rights. The article also underscores the importance of ongoing review and adaptation of regulations to address the evolving digital landscape, thereby contributing to the development of a safer, more competitive, and fairer online environment.

Keywords: *Digital Services Act, Digital Markets Act, Gatekeepers, Content Moderation, Freedom of Speech, European Union.*

1. Introduction and Purpose

The growth of internet platforms in the digital era has greatly transformed how we communicate, access information, and engage with society. Currently, social media platforms such as Facebook, Twitter and YouTube and content-sharing websites serve as modern equivalents of public areas and town squares, providing a forum for different conversations and interactions. Just as town squares must be maintained and regulated, these platforms have a newly acquired authority and responsibility to moderate content and ensure that virtual spaces are safe and respectful. This means they must balance the free flow of information with community standards and legal requirements to ensure fairness, transparency and accountability.¹

Content moderation consists of supervising and handling user-created content to guarantee adherence to the platform's regulations and legal responsibilities. For example, they may remove hate speech or misinformation to protect users, in accordance with their terms and conditions and own policies and applicable laws. To maintain trust and integrity, their moderation must follow principles of fairness, transparency and accountability that allow users to understand and even challenge decisions that affect them.

While essential for upholding a secure and courteous online atmosphere, it also sparks notable worries regarding the freedom of speech.² The difficulty lies in finding a balance between encouraging open discussions and stopping harmful or illegal content regarding free speech and regulating content.

Too much moderation can limit free speech and lead to censorship, while too little moderation can lead to more harmful content.³ If platform providers of social media sites or forums are very serious about removing a large set of messages, they could be accused of violating freedom of expression. If they act too laxly, it will create legal issues in allowing negative content such as hate speech, fake news or offensive caricatures to spread without review. They need to find a middle ground that respects users' rights while following legal standards to avoid liability for users' words

¹ Maayan Perel (Filmar) and Niva Elkin-Koren, 'Guarding the Guardians: Content Moderation by Online Intermediaries and the Rule of Law' (23 February 2020) SSRN <https://ssrn.com/abstract=3542992> accessed 26 March 2024.

² UK Parliament, 'Digital Technology and the Resurrection of Trust Contents: Accountability and the technology platforms' Parliament Publications (2020). <https://publications.parliament.uk/pa/ld5801/ldselect/lddemdigi/77/7707.htm> accessed 26 March 2024.

³ Clifford Chance, 'Content Moderation and Online Platforms: An impossible problem? Regulators and legislators look to new laws' Clifford Chance (2020) available at <https://www.cliffordchance.com/insights/resources/blogs/talking-tech/en/articles/2020/07/content-moderation-and-online-platforms--an-impossible-problem--.html> accessed 26 March 2024.

and actions on their platforms. Therefore, platform providers aim to find the right balance to avoid potential liability.⁴

To tackle these challenges, the European Union has put into effect two important regulations: the Digital Services Act (DSA) and the Digital Markets Act (DMA). The goal of the DSA is to establish a more secure online environment, with defined duties for internet platforms, whereas the DMA aims to guarantee equitable and transparent digital markets.⁵ One important aspect of the DMA is the identification of specific major platforms as 'gatekeepers' under the DMA, which is different from the general understanding of a gatekeeper that is 'someone who has the power to decide who gets particular resources and opportunities, and who does not.'⁶ The definition of 'gatekeeper' and the designation as a gatekeeper under the DMA leads to increased regulation.

This article suggests that the DMA's gatekeeper designation, shaped by the European Commission's political goals and legal interpretations by the CJEU, strikes a balance between boosting free speech through preventing arbitrary content moderation and the danger of platforms over-complying and censoring lawful speech. The aim of this article is to examine this equilibrium, investigating how the Gatekeeper Rules, freedom of speech, and the larger aims of the DSA and DMA interact.

This article is structured as follows: After the opening, the following section will explore the emergence of digital platforms and the significance of content moderation. In this context, the article explores the challenges to freedom of expression in the digital environment and highlights the nature of the Internet as a promotional platform and the inaccuracy of information.

The next part will then turn to the EU's response through policy and legal frameworks designed to alleviate these challenges, including details of key policies and legislative decisions.

The article then evaluates the effectiveness of the content evaluation tool and the impact of misinformation on social and democratic processes. It then introduces and analyses the Digital Services Act (DSA) and the Digital Marketing Act (DMA) in the following section, focusing on their approaches to managing online content and creating forums. The significance of major case law such as Delphi is examined in the context of regulatory requirements. This is followed by an

⁴ Timothy Pinto, 'Liability for Online Comments: Chilling Decision or Storm in a Teacup?' (Taylor Wessing LLP, Practical Law UK 2015)

Regulation (EU

⁵ European Commission, "The Digital Services Act package" Digital Strategy. <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package#:~:text=The%20Digital%20Services%20Act%20and,level%20playing%20field%20for%20businesses.&text=Follow%20the%20latest%20progress%20and%20learn%20more%20about%20getting%20involved> accessed 26 March 2024

⁶ 'Gatekeeper' (April 3, 2024)

<https://dictionary.cambridge.org/dictionary/english/gatekeeper> accessed 3 April 2024

assessment of the balance between open digital markets and freedom of expression, a conclusion on the normative issues, i.e., both moral and legal, brought about by regulatory designations on content moderation and offers future research areas and directions for development in EU digital rights.

This article makes a valuable contribution to the current debate on freedom of speech and content moderation by highlighting that the Digital Marketing Act (DMA) plays an important role in governing the digital age despite different methodologies among scholars, varying legal frameworks across jurisdictions and the distinct political objectives of EU institutions' stakeholders. As digital platforms continue to evolve and integrate into social media and our public discourse, we need to deepen our understanding of these ecosystems, question and improve our rights. Based on a comprehensive analysis, this analysis aims to reveal micro-debates regarding the protection of freedom of expression and effective content control. In particular, it provides insight into achieving harmonization under the EU Digital Services Act (DSA) and the DMA. By explaining the impact of these controls, this article aims to stimulate discussion on the protection of democratic values in the Western digital world and thereby provide a perspective on current efforts to create a safe, open and fair online environment.

2. Methodology

This article employs a qualitative, doctrinal legal research methodology to analyze the balance between gatekeeper regulations under the Digital Markets Act (DMA) and freedom of speech considerations under the Digital Services Act (DSA). The methodology is based upon the interpretation and application of legal texts, case law, and EU policy documents.

The following key sources were reviewed:

1. Primary Legal Texts: The DMA and DSA, alongside relevant provisions of the Treaty on the Functioning of the European Union (TFEU) and judgments from the Court of Justice of the European Union (CJEU) related to digital platforms and intermediary liability.
2. Case Law Analysis: Examination of key cases such as *Delfi AS v. Estonia*, *GS Media*, and *Post Danmark*, which help contextualize the role of large digital platforms in content moderation and market regulation.
3. Secondary Literature: Scholarly articles, legal commentaries, and reports from EU institutions, including the European Commission's guidelines and communications on digital governance and competition law.
4. Policy Documents: The research also draws on relevant EU policy documents such as the Code of Practice on Disinformation and the European Media Freedom Act to understand the broader political and regulatory objectives influencing the DMA and DSA.

The methodology involves a critical analysis of how the DMA's gatekeeper rules interact with the DSA's content moderation provisions, assessing whether these frameworks effectively promote

a balanced approach to both fostering competition and protecting freedom of expression. Additionally, the research investigates potential risks of over-compliance by platforms and the broader implications for free speech in the digital marketplace.

3. The EU's Approach to Online Content Moderation

The Evolving Landscape of Free Speech and Content Moderation Online

This section explains the changing relationship between freedom of expression and content in the digital age, focusing on the EU's response to the problem of online disinformation and the impact of key policy decisions on digital services.

The digital realm and the emergence of improved digital technology such as artificial intelligence and machine learning have significantly changed the landscape for freedom of speech. Due to social media platforms and online forums, individuals now have unprecedented reach to a global audience. This has increased accessibility to sharing information and ideas, enabling previously unheard or suppressed voices to be heard.⁷ However, the digital world has introduced new challenges to the fundamental principles of freedom of speech.⁸ The convergence of internet anonymousness and the extensive scope of digital platforms has led to the rising propagation of hate speech, misinformation, and other damaging content. Given these challenges, the European Union (EU) has taken action to regulate online content, with a particular focus on overseeing material posted on digital platforms.⁹

This focus includes the EU's policy, including the (Strengthened) Code on the practice of disinformation (2018/2020), which has been dubbed 'mala tempora currunt ("bad times are upon us") for freedom of expression in the European Union'.¹⁰ These times began with the European Council's conclusions in March 2015, strengthening strategic communication in the fight against Russian disinformation efforts. The EEAS Action Plan for Strategic Communication, issued in June 2015, quickly strengthened the EU's information integrity. The European Parliament asserted this position in its November 2016 'Fotyg Report', which countered anti-European propaganda. The March 2018 HLEG Report and the April 2018 European Commission Communication

⁷ Taha Yasseri, 'From Print to Pixels: The Changing Landscape of the Public Sphere in the Digital Age' (School of Sociology, University College Dublin December 2023) DOI: 10.13140/RG.2.2.20652.44166.

⁸ John Huebler, 'Free Speech and the Internet' (2020) Student Research Submissions 338 https://scholar.umw.edu/student_research/338

⁹ Carr Center For Human Rights Policy Harvard Kennedy School, 'Freedom of Speech and Media: Reimagining Rights and Responsibilities in the US' (February 2021) https://carrcenter.hks.harvard.edu/files/cchr/files/free_speech.pdf

¹⁰ Vincenzo Zeno-Zencovich, 'The EU's Regulation of Speech: A Critical View' (2024) 55(2) University of the Pacific Law Review 175.

<https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1498&context=uoplwreview>

‘Tackling Online Disinformation: A European Approach’ provided a comprehensive taxonomy of disinformation and outlined a framework for cooperation. The June 2018 follow-up communication by the European Commission and the EEAS on ‘Increasing Resilience and Strengthening Capabilities to Address Hybrid Threats’, which coincided with the launch of the EU Code on Disinformation, marked a move towards more tangible policy instruments requiring platforms to take proactive measures to mitigate disinformation.

In the legal continuum, the revised Audiovisual Media Services Directive of November 2018 included digital platforms in its regulatory scope and set content standards.¹¹ With the December 2018 Communication ‘Action Plan Against Disinformation’, the EU codified an action-oriented strategy emphasising the intersection of media literacy, transparent advertising and the importance of verifiable information sources, thereby consolidating its position as a defender of democratic discourse and a sovereign digital policy.

Two important incidents have impacted those regulations on digital service oversight. Those include the *GS Media case*, as adjudicated by the Court of Justice of the European Union (CJEU) in 2016 and the German FCO (Federal Cartel Office) decision against Facebook:¹²

In *GS Media*, the central question was whether a hyperlink to copyrighted material published without the rightsholder's consent constituted ‘communication to the public’ under the Copyright Directive. The CJEU ruled that such hyperlinking could constitute copyright infringement if the linker were aware or reasonably believed to be aware (in the case of for-profit linking) that the content he or she linked had been published without consent or was illegal.

One significant complaint is that the Court should have considered the diversity of hyperlink providers, as well as the impact of its decision on smaller entities or individuals who may lack the means to verify the legality of each content they link to. This oversight could have a chilling effect on free speech online, as smaller content providers may refrain from hyperlinking to avoid legal consequences¹³. This avoidance of repercussions may be in line with the consequence of the earlier CJEU Case *Svensson v Retriever Sverige AB*, which introduced a complex set of rules to determine whether a hyperlink was lawful¹⁴. In *Svensson v Retriever Sverige AB*, hyperlinking was held to be within the scope of ‘making available; for a hyperlink to violate the law, it must use a different

¹¹ Directive - 2018/1808 - EN - EUR-Lex’ <https://eur-lex.europa.eu/eli/dir/2018/1808/oj> accessed 26 March 2024.

¹² Bundeskartellamt, “Bundeskartellamt prohibits Facebook from combining user data from different sources” https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html

¹³ P Radosavljev, ‘For Whom the Copyright Scale Tips: Has the CJEU Established a Proper Balance of Rights with its *GS Media Case* Judgement?’ (2017) 8(3) *European Journal of Law and Technology* <https://ejlt.org/index.php/ejlt/article/view/601/769>

¹⁴ ‘C-466/12, ECLI: EU:C:2014:76’ <https://curia.europa.eu/juris/liste.jsf?num=C-466/12>

technology than the original content or address a ‘new public’ not intended by the original copyright holder. Because the Court treated all Internet users as the same ‘public,’ links to open-access websites were not deemed to reach a new audience.¹⁵

Radosavljev further emphasised that the Court does not respect the right to do business in its deliberations in *GS Media*. By imposing liability on hyperlink providers, particularly those operating for profit, the decision may unintentionally impact legitimate business models that rely on linking to content. This aspect raises concerns about the fairness and feasibility of requiring hyperlink providers to bear the burden of copyright enforcement, particularly when the legality of linked content is uncertain or subject to change. Another point of contention is the adequacy of the copyright protection measures proposed by the Court. While the ruling seeks to strengthen copyright protections, it may not adequately address the reality of copyright infringement online, given how easily digital content can be shared and alternative means obtained.¹⁶

The Federal Cartel Office (FCO) decision against Facebook marked a major development in overseeing digital services, especially safeguarding user data. The German FCO looked into how Facebook utilised user data in its terms of service and discovered that the company had exploited its dominant position in the social networking industry.¹⁷ The FCO prohibited the utilisation and implementation of data processing detailed in Facebook's terms of service. This decision highlighted the importance of protecting user data and raised awareness about potential unethical behaviour by major online platforms.¹⁸ The FCO found that Facebook's terms of service violated GDPR, causing users to lose control over their rights to determine their own data.¹⁹ The FCO also stated that it had a negative effect on both competitors in the same market and on third markets. This case set the precedent that EU member states have the authority to require platforms to delete

¹⁵ Jane C Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) Columbia Law School Faculty Scholarship
https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3064&context=faculty_scholarship

¹⁶ P Radosavljev, 'For Whom the Copyright Scale Tips: Has the CJEU Established a Proper Balance of Rights with its *GS Media* Case Judgement?' (2017) 8(3) *European Journal of Law and Technology* <https://ejlt.org/index.php/ejlt/article/view/601/769>.

¹⁷ Kyriakos Fountoukakos, Marcel Nuys, Juliana Penz and Peter Rowland, "The German FCO's decision against Facebook: a first step towards the creation of digital house rules?" *The Competition Law Journal* (18)(2)55-65

¹⁸ Kerber, W., Zolna, K.K. The German Facebook case: the law and economics of the relationship between competition and data protection law. *Eur J Law Econ* 54, 217–250 (2022). <https://doi.org/10.1007/s10657-022-09727-8>

¹⁹ Thomas Thiede, Laura Herzog (Spieker & Jaeger), "The German Facebook Antitrust Case – A Legal Opera" *Kluwer Competition Law Blog* (February 2021)
<https://competitionlawblog.kluwercompetitionlaw.com/2021/02/11/the-german-facebook-antitrust-case-a-legal-opera/>

illegal content, signifying a major advancement in the oversight of digital services. It has now subsequently been scrutinised, as the Oberlandesgericht Düsseldorf (Higher Regional Court of Düsseldorf) has expressed reservations regarding the compatibility of the FCO's pioneering approach—merging data protection and competition law to ascertain an abuse of dominant market position by Facebook—with European law.

The Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) has applied to the Court of Justice of the European Union (ECJ) for a preliminary ruling on key legal issues arising from the decision of the Bundeskartellamt (Federal Cartel Office, FCO) against Facebook. These questions include whether the General Data Protection Regulation (GDPR) allows a national competition authority such as the FCO to treat a breach of the GDPR by a company based in another EU Member State as an abuse of a dominant market position. In addition, the Court seeks to clarify whether the use of a GDPR breach to claim market abuse is consistent with Article 4(3) of the Treaty on European Union (TEU), particularly when an investigation by a designated GDPR supervisory authority, in this case the Irish Data Protection Commission data processing is in progress. In addition, the legitimacy of a dominant firm's consent under the GDPR is subject to CJEU scrutiny, affecting the balance between data protection and competition law. The CJEU's resolution of these issues will critically affect the enforceability of the FCO's decision and the wider implications for digital regulation and market dominance on the Internet within the EU.²⁰

Concluding, the value of this section lies in its timely exploration of how the European Union is adapting legal frameworks to address the novel challenges posed by online content, with an innovative focus on protecting democratic discourse in the face of evolving digital technologies and their implications for free speech and content moderation, especially in the event of a major incident.

Impacts of Misinformation Online

This section on the impacts of misinformation clearly shows that social media has the ability to spread voices and words that can have a positive and negative impact on public debate, such as the spread of misinformation that can influence public opinion and elections, emphasising the balance between good content censorship and free content.

By providing individuals with a global audience, social media and online forums liberate the dissemination of information and amplify voices that were once marginalised. This change greatly improved public discourse, but also created new challenges regarding the sanctity of freedom of expression. For example, the anonymity provided by the internet, combined with the proliferation of digital platforms, makes it easier for negative content to spread. The consequences of this trend

²⁰ Maren Steiert 'German Federal Cartel Office against Facebook: Now the European Court of Justice Will Decide' (Bird & Bird). (2021)
<https://www.twobirds.com/en/insights/2021/germany/german-federal-cartel-office-against-facebook-now-the-european-court-of-justice-will-decide>

are huge, affecting everything from self-confidence to election results, including instances of election interference and advertising. The Internet is becoming increasingly influential in shaping the opinions and decisions of voters around the world. Thanks to their wide reach, messages (whether true or not) can spread quickly and reach large audiences within seconds. This phenomenon is especially true in politics, where the spread of misinformation or misrepresentation can have serious consequences.

Misinformation refers to as false or inaccurate information that is spread, usually unintentionally, resulting in misconceptions or misunderstandings.²¹ Misinformation during public health crises such as COVID-19 can have a negative impact on both individual responses and public health outcomes.²² Misinformation must be addressed promptly in order to avoid disastrous consequences and protect public health.²³ Misinformation can take many forms, including myths, sarcasm, and humour about a specific topic.²⁴ Misinformation's impact can be influenced by repetition and alignment with pre-existing beliefs.²⁵

Misinformation, especially in the forms of fake news and conspiracy theories pose a significant challenge: They can quickly disseminate through online platforms, connecting with a large number of people in a brief amount of time.²⁶ The impacts of false information have extensive reach, as they can erode trust in institutions as seen in the Covid-19 pandemic, worsen social divides, and impact election results.²⁷ In a global health emergency, misinformation about health can result in serious consequences, such as possible loss of life. For instance, in the early stages of the Covid-19 pandemic, nearly a 6,000 people were hospitalised and according to WHO 800 deaths were attributed to misinformation related to the Corona virus. The misinformation included

²¹ Elia Gabarrón, Sunday Oluwafemi Oyeyemi and Rolf Wynn, 'Covid-19-related misinformation on social media: a systematic review' (2021) 99 Bull World Health Organ 455, 463A <https://doi.org/10.2471/blt.20.276782>.

²² Ziaul Barua, Sifat Barua, Sumaiya Aktar, Nusrat Kabir and Mingnan Li, 'Effects of misinformation on covid-19 individual responses and recommendations for resilience of disastrous consequences of misinformation' (2020) 8 Progress in Disaster Science 100119 <https://doi.org/10.1016/j.pdisas.2020.100119>.

²³ Ibid.

²⁴ Ibid.

²⁵ Rachel Greenspan and Elizabeth F Loftus, 'Pandemics and infodemics: research on the effects of misinformation on memory' (2020) 3 Human Behavior and Emerging Technologies 8 <https://doi.org/10.1002/hbe2.228>.

²⁶ European Union Agency for Fundamental Rights, 'Online Content Moderation – Current Challenges in Detecting Hate Speech' (FRA 2013) https://fra.europa.eu/sites/default/files/fra_uploads/fra-2023-online-content-moderation_en.pdf

²⁷ Gitanjali Verma et al, 'Examining the impact of sharing covid-19 misinformation online on mental health' (2022) 12 Scientific Reports <https://doi.org/10.1038/s41598-022-11488-y>.

underestimating the seriousness of the virus to attempts of false cures, which directly impacted the patients' safety.²⁸ Content moderation tools, like algorithms that identify and delete harmful content, are essential in addressing these issues.²⁹

Nevertheless, these tools frequently have difficulty in accurately identifying and eliminating such content. There are numerous challenges: Algorithms might need help comprehending the subtleties of human language, leading to challenges in discerning between valid criticism and hate speech. In this context, it is particularly difficult for algorithms to discern the semantic features of language.³⁰ It can also be challenging for algorithms to confirm the accuracy of information of technical information, particularly concerning environmental and health impact and science and technology, making it hard to distinguish and delete false information.³¹

Furthermore, due to the speedy nature of digital communication, harmful content can easily circulate before being identified and taken down. Even if the content is eliminated, it can be easily reposted or shared, turning content moderation into a never-ending task similar to playing whack-a-mole.³² These obstacles emphasise the importance of strong and detailed content moderation policies. These policies must be clear, consistently implemented, and uphold users' rights to express themselves freely. They must also be flexible and able to adjust to the changing digital environment. This involves creating advanced content moderation tools, setting clearer user guidelines, and putting in place systems for user appeals and complaints.³³

Finally, despite the significant difficulties posed by the increase in hate speech and misinformation, the question remains whether a central authority regulating information flow is needed. Such organizations would have tremendous powers, including a significant potential for abuse and may further divide society.

²⁸ World Health Organization, 'Fighting misinformation in the time of COVID-19, one click at a time' (27 April 2021) <https://www.who.int/news-room/feature-stories/detail/fighting-misinformation-in-the-time-of-covid-19-one-click-at-a-time>.

²⁹ Zachary Laub, 'Hate Speech on Social Media: Global Comparisons' (Council on Foreign Relations June 2019) <https://www.cfr.org/backgrounder/hate-speech-social-media-global-comparisons>

³⁰ Jianxun Chu, Yuqi Zhu and Jiaojiao Ji, 'Characterizing the semantic features of climate change misinformation on Chinese social media' (2023) 32 *Public Understanding of Science* 845 <https://doi.org/10.1177/09636625231166542>.

³¹ *Ibid.*

³² NoToHate Fact Sheets, 'HATE SPEECH, MIS- AND DISINFORMATION' (UN) https://www.un.org/sites/un2.un.org/files/notohate_fact_sheets_en.pdf

³³ UNESCO, 'Addressing Hate Speech on Social Media: Contemporary Challenges' (UNESCO 2021) <https://unesdoc.unesco.org/ark:/48223/pf0000379177>

In that realm, the European Media Freedom Act,³⁴ despite its promising title that suggests positive intentions, raises concerns about over-regulation of freedom of expression. The law proposes a uniform approach for media services across the EU, which critics say exceeds the powers of the European Commission by violating national sovereignty and the principle of subsidiarity laid down in the EU treaties. The proposed regulation aims to establish a European Council for Media Services, effectively centralising control over the media sector under the influence of the EU Commission. The council, which is to replace existing regulatory groups, would extend its oversight to the press, but its independence is being questioned due to provisions requiring compliance with Commission directives.

The Act also includes measures to help the Commission monitor and evaluate compliance with media services, such as setting performance indicators and requiring Member States to report on their media regulatory measures. This has drawn criticism for potentially undermining media independence by subjecting it to the Commission's direct oversight, which is seen as overstepping national jurisdictions and potentially threatening the sector's ability to operate freely.

Critics also argue that while media companies, like any other business, seek to make a profit, referring to them as mere 'watchdogs' ignores the wider implications of such centralised control in an age where all forms of communication are saturated with information. This regulation has the potential to significantly increase the Commission's powers over the media sector, essentially making it the ultimate authority on matters previously dealt with by Member States or independent regulators.³⁵

This section on misinformation online articulated how misinformation poses significant challenges and impacts public discourse, potentially influencing elections and public opinion. It sets the stage for the introduction of the EU's regulatory response, highlighting the necessity for regulations that balance the freedom of expression with the need to manage harmful content. The interaction between misinformation's effects and EU laws underscores the urgency of discussing digital goods and services regulation, aiming to create a safer digital environment while respecting fundamental rights.

The Digital Services Act (DSA): Focus on Content Regulation

It is clear that regulatory measures such as digital services regulation are vital when dealing with the complexities of data corruption. The EU's regulatory response represents a significant change in content management and aims to create a safer digital environment by addressing illegal

³⁴ 'European media freedom act' (2024)

[https://www.europarl.europa.eu/thinktank/de/document/EPRS_BRI\(2022\)739202](https://www.europarl.europa.eu/thinktank/de/document/EPRS_BRI(2022)739202)

³⁵ Vincenzo Zeno-Zencovich, 'The EU's Regulation of Speech: A Critical View' (2024) 55(2) University of the Pacific Law Review 175.

<https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1498&context=uoplwreview>

content and issues. Against this background, the following chapters will examine the mechanics of the EU regulation Digital Services Act (DSA), its impact on digital platforms, and the balance it attempts to strike between control and expression.

The DSA was introduced by the European Commission to regulate the provision of digital services over the internet.³⁶ Additionally, the DSA provides a framework on the treatment of illegal and harmful content online. The DSA's approach to addressing inappropriate content and harmful behaviours is founded on several essential principles. Above all, it creates specific rules for removing unauthorised content. According to Article 14 of the DSA, 'Terms and conditions', digital service providers must establish procedures to quickly remove or block illegal content.³⁷ Providers must promptly remove or limit access to illegal content once they are informed about it. They must also disclose their methods for monitoring content, such as the quantity and categories of notifications received and the steps taken in reply. This obligation to report is aimed at guaranteeing transparency and accountability in the way providers manage illegal content.³⁸

The DSA includes measures to improve openness and support for users in managing content. As stated in Article 15, digital service providers must offer transparent and readily available details regarding their content moderation policies and procedures.³⁹ This includes guidance on reporting notices and complaints, providers' actions on their services, and the legal remedies available for users. People who do not agree with a content moderation decision can use an internal complaints system and seek resolution through an alternative dispute resolution process. This is created to offer users an easy way to question content moderation choices and seek a resolution if they think their rights have been infringed.⁴⁰

Nevertheless, the DSA may have restrictions on removing content under Article 20, 'Internal complaint-handling system'. Online platform providers must offer users a free electronic

³⁶ European Commission, 'Digital Services Act (DSA) Overview' European Commission. https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act_en#:~:text=The%20DSA%20regulates%20online%20intermediaries,and%20the%20spread%20of%20disinformation

³⁷ 'Regulation 2022/2065 - EN - DSA' [2022] OJ L 277/1 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.277.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A277%3AFULL accessed 26 March 2024, Article 14.

³⁸ European Commission, 'Questions and Answers on the Digital Services Act' https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348

³⁹ 'Regulation 2022/2065 - EN - DSA' [2022] OJ L 277/1 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.277.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A277%3AFULL accessed 26 March 2024, Article 15

⁴⁰ Aina Turillazzi, Mariarosaria Taddeo, Luciano Floridi, and Federico Casolari, 'The Digital Services Act: An Analysis of Its Ethical, Legal, and Social Implications' (2023) 15 Law, Innovation and Technology 83 <https://doi.org/10.1080/17579961.2023.2184136>

complaints system to challenge decisions to remove content or limit services. This system, available six months after a decision, covers disputes about the legality of content or violations of the terms of service. Complaints must be dealt with quickly, fairly and transparently, with the ability to overturn unfair decisions. Providers must also inform users of the decision and alternative dispute resolution options and ensure human oversight of the process. When it comes to certain types of content, like hate speech, the DSA fails to be precise.⁴¹ Although the DSA's Preamble 12, 40, 62, 80, 87, 106 and Article 35(1)(c) mandates that digital service providers must address illegal hate speech, it fails, for instance, to offer a precise definition of hate speech under Preamble 12.⁴² This may result in uneven enforcement of the regulations on various platforms and in various areas. Moreover, the DSA does not cover the problem of legal yet harmful content on platforms like misinformation and cyberbullying. This gap is important because content like this can have serious effects on society, even if it is not considered illegal.⁴³

Therefore, although the DSA offers a strong structure for addressing illicit content and damaging behaviour on the Internet, areas can still be enhanced. It will be crucial to regularly assess and adjust the DSA to keep it impactful and up to date as the digital environment changes. This includes addressing challenges from specific content, such as hate speech and legal yet harmful content, and ensuring the protection of users' rights.

The Relevance of *Delfi AS v. Estonia* (2015) ECtHR 64669/09

Delphi AS v. Estonia (2015) represents an important moment in understanding the balance between freedom of expression and the role of online platforms for user-generated content. This decision by the European Court of Human Rights (ECHR) is a significant shift in the debate on mediator liability and sets a precedent for how digital platforms can influence content while respecting users' right to freedom of expression. In this context, the case provided key guidelines for the EU's approach to governing the digital space and influenced the subsequent legal and negotiation process, including the creation of the Digital Services Regulation (DSA). This section outlines the reasons why the court held *Delfi* liable for user comments and highlights the role of the case in shaping the legal framework for digital content management. Discussions have continued over how these principles influence general policy, which demonstrates the changing role of online websites in the balance of freedom of expression and the need to control negative content.

⁴¹ Regulation 2022/2065 - EN - DSA' [2022] OJ L 277/1 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.277.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A277%3AFULL accessed 26 March 2024, Article 20

⁴² Joan Barata et al., 'Unravelling the Digital Services Act Package' (European Audiovisual Advisory) <https://su.diva-portal.org/smash/get/diva2:1605131/FULLTEXT01.pdf>

⁴³ TheLegal500, 'User Content Moderation Under the Digital Services Act - 10 Key Takeaways' <https://www.legal500.com/developments/thought-leadership/user-content-moderation-under-the-digital-services-act-10-key-takeaways/>

The 2015 ECtHR 64669/09 case of *Delfi AS* against Estonia sets a benchmark for intermediary liability and content supervision in today's technological age. *Delfi*, a popular Estonian internet news site, was held accountable for offensive comments made by its users in this scenario. The Court ruled that Estonia did not breach Article 10 of the ECHR by finding *Delfi* accountable for defamatory remarks in the comments section of its articles.⁴⁴

The EU's approach to content moderation is based on the factors enumerated in the *Delfi* case. These factors include the platform's ability to identify illegal content and their efforts to remove it.⁴⁵ The Court conducted a three-step assessment to ascertain if *Delfi*'s rights were violated. At first, it was determined that Estonia had infringed upon *Delfi*'s freedom of speech by issuing civil fines for the defamatory comments. Furthermore, the Court found that the granted remuneration was in line with legal standards after concluding that *Delfi* had violated the Civil Code Act and Obligations Act of Estonia. Furthermore, the Court recognised that the reason for imposing civil fines on *Delfi* was to protect the reputation and rights of individuals. It was foreseeable that a major media publisher would be liable under national law for user comments, and therefore, the interference with *Delfi*'s freedom of expression was deemed necessary and not in breach of Article 10 of the European Convention on Human Rights. The Court further recognised that the balance between freedom of expression and the control of defamatory or illegal publication is essential. While *Delfi* argued that it should not be liable if it removed illegal content upon notice, the Court insisted that the portal's business model and its control over the posting of comments gave it greater liability than a passive technical service provider.⁴⁶

The cases cited in *Delphi*, particularly *Papasavvas*,⁴⁷ *Google Spain*⁴⁸ and *Animal Defenders International*⁴⁹ reflect the evolving jurisprudence on the balance between privacy, freedom of expression and intermediary liability. *Google Spain*, for example, has introduced the "right to be forgotten", which has significant implications for online content moderation. The *SABAM* cases touched on the platforms' liability for copyright infringement. Together, these decisions inform the limits of freedom of expression and content control on the Internet and reinforce the principle that while platforms facilitate expression, they must also ensure that they are not vehicles for illegal or harmful content.

⁴⁴ *Ibid*

⁴⁵ Global Freedom of Expression, '*Delfi v Estonia*'

<https://globalfreedomofexpression.columbia.edu/cases/delfi-as-v-estonia/>

⁴⁶ '*Delfi AS v Estonia* (64569/09) [2015] 6 WLUK 504; [2015] EMLR 26; (2016) 62 EHRR 6; 39 BHRC 151 WL'

⁴⁷ EU:C:2014:2209; [2014] 9 WLUK 273; [2015] 1 CMLR 24; (2014) 158(36) SJLB 37.

⁴⁸ EU:C:2014:317; [2014] QB 1022; [2014] 3 WLR 659; [2014] 2 All ER (Comm) 301; [2014] 5 WLUK 394.

⁴⁹ [2013] 4 WLUK 468; [2013] EMLR 28; (2013) 57 EHRR 21; 34 BHRC 137; *Times*, April 25, 2013; (2013) 163(7564) NLJ 20

Delphi could have major consequences for how much liability platforms could face under the Digital Services Act (DSA). The goal of the DSA is to balance the duties of online platforms with their role as crucial intermediaries and important providers and influencers of information.⁵⁰ It acknowledges the important role that online platforms have in enabling access to information and communication in the current digital age. Nevertheless, it also recognises that these platforms must make sure that their services are not being utilised for sharing illegal content or participating in harmful activities.

In order to weigh these factors, the DSA suggests introducing new, unequal responsibilities for online platforms. These responsibilities are created to align with the scale and influence of the platform, ensuring that bigger platforms have to meet stricter criteria. For instance, bigger platforms must perform risk evaluations, put into place prevention measures, and designate compliance officers.⁵¹ At the same time, the DSA maintains the responsibility protection for hosting providers as described in the eCommerce Directive. This shows that online platforms are generally not held accountable for illicit content posted by users as long as they are unaware of the illegal activity and quickly take it down or restrict access when informed.⁵²

Nonetheless, the DSA provides a clearer distinction between the responsibility of online platforms and their accountability according to consumer law. It is specified that online platforms, like marketplaces, will still be held accountable under consumer law if they give the impression to an 'average consumer' that the information, product, or service being transacted is offered by them or by someone they are supervising. This clause aims to stop online platforms from avoiding responsibility by saying they are just middlemen. The Delfi case and the DSA mark important advancements in the areas of intermediary liability and content moderation. They emphasise the importance of finding a fair strategy that safeguards both individual rights and the common good while acknowledging online platforms' duties and influence in today's digital era.

As the digital environment keeps changing, it is crucial to regularly reassess and revise the DSA to maintain its efficacy and relevance. This entails dealing with the difficulties presented by particular types of content, like hate speech and legal but harmful content, while also guaranteeing that users' rights are properly safeguarded. The DSA marks a substantial advancement in

⁵⁰ Future of Free Speech, 'DELFI v. ESTONIA' <https://futurefreespeech.org/delfi-v-estonia/>

⁵¹ Oskar Josef Gstrein, 'Case Analysis of the ECtHR Judgment in Delfi AS v. Estonia (app. No. 64569/09), The Difficulties of Information Management for Intermediaries' <https://jean-monnet-saar.eu/?p=881>

⁵² Human Rights Law Center, "European Court of Human Rights examines the entitlement to freedom of speech Delfi AS v Estonia [2013] ECHR, Application No. 64569/09 (10 October 2013) <https://www.hrlc.org.au/human-rights-case-summaries/european-court-of-human-rights-examines-the-entitlement-to-freedom-of-speech>

overseeing digital services, yet it is just the start of a continuous effort to guarantee a secure and equitable digital space for every user.⁵³

Considering the Delfi case, the DSA may have to find a way to maintain a balance between intermediary liability and protecting freedom of expression. Although the DSA retains the defences of 'hosting,' 'caching,' and 'mere conduit' from the eCommerce Directive, it also introduces substantial new responsibilities for digital service providers.⁵⁴ These responsibilities consist of having a public 'contact point' for communication with other authorities and users and following the current 'notice and takedown' procedure.⁵⁵ These middlemen service providers will additionally gain from a new "Good Samaritan" clause, ensuring they do not forfeit these protections even if they conduct independent investigations to detect and delete unlawful material. Therefore, the Delfi case and the DSA are important advancements in intermediary liability and content moderation. They emphasise the importance of maintaining a fair strategy that safeguards the rights of people and the common good while acknowledging the duties and functions of online platforms in today's digital era.⁵⁶

The Delfi case has already been applied to further understand the obligations of free speech rights and regulatory online platforms. For example, the case was applied in *Standard Verlagsgesellschaft mbH v. Austria*, where the Court examined the liability of online news platforms in relation to user comments. The principle that platforms can be held responsible for user comments under certain conditions has been reinforced, as well as the need for a balance that respects freedom of expression while protecting individuals from harm.⁵⁷

⁵³ Faculty of Law, University of Oslo, 'Intermediary Liability for Copyright Infringement in the EU's Digital Single Market'

<https://www.duo.uio.no/bitstream/handle/10852/60876/1/Thesis-Intermediary-Liability-for-Copyright-Infringement-in-the-EU-s-DSM.pdf>

⁵⁴ E&G Economides LLC, 'NAVIGATING THE DIGITAL SERVICES ACT: INNOVATION AND ACCOUNTABILITY'

https://www.economideslegal.com/media/documents/Navigating_the_Digital_Services_Act.pdf

⁵⁵ Ceyhun Pehlivan and Peter Church, 'EU - The DSA: A New Era for Online Harms and Intermediary Liability' (Linklaters 2022)

<https://www.linklaters.com/en/insights/blogs/digilinks/2022/july/eu-the-dsa-a-new-era-for-online-harms-and-intermediary-liability>

⁵⁶ Neville Cox, 'Delfi v. Estonia: Privacy Protection and Chilling Effect'

<https://verfassungsblog.de/delfi-v-estonia-privacy-protection-and-chilling-effect/>

⁵⁷ *Standard Verlagsgesellschaft mbH v Austria* (39378/15) [2021] 12 WLUK 692; 53 BHRC 319 ECHR

In *X (A Child) Vs. Y* the principles set out in *Delfi* have been considered when examining platforms' obligations regarding potentially harmful content to children, demonstrating the broad applicability of the case in a variety of contexts, including sensitive family law matters.⁵⁸

The judgment in *Delfi* was also considered in cases such as *Hurban v. Belgium*⁵⁹ and *Mesic v. Croatia*,⁶⁰ which delves deeper into the nuances of intermediary liability and the scope of online freedom of expression. These cases explored how *Delfi* principles are applied in various scenarios, such as dealing with historical data and personal reputation.

While *Delfi AS v. Estonia* has set a precedent in holding online platforms accountable for user-generated content; it also highlights the balance between protecting freedom of expression and responsible moderation of content.

4. The DMA's Gatekeeper Rules and Their Impact on Free Speech

Definition and Designation of Gatekeepers under the DMA

The DMA brings in the idea of 'gatekeepers' to the digital market scene. Gatekeepers are characterised by various criteria, each of which demonstrates the platform's power and authority in the digital market across the European Union (EU).⁶¹ First and foremost, a platform should possess a substantial market share in the EU. This can be identified through its user base or its function as an access point to other online services. A platform that has a significant number of users can influence the digital market, and a platform acting as an entry point can regulate access to various online services, ultimately impacting market dynamics. In addition, the platform needs to firmly establish its position, creating obstacles for potential new rivals to enter the market. The extent of entrenchment can be evaluated based on factors like how long the platform has been around, how much its users depend on it, and the absence of other feasible options.⁶² A well-established platform can establish market norms and procedures, frequently at the expense of competition and innovation.

Furthermore, the platform should be capable of regulating the entry of businesses and users to its services and the broader digital market. This regulation can appear in different forms, like via the platform's terms of use, its algorithms for ranking and suggesting content, and its guidelines

⁵⁸ *X (A Child) v Y* [2021] EWHC 2139 (Fam); [2021] 7 WLUK 477; [2022] EMLR 13; [2022] 2 FLR 334 Fam Div.

⁵⁹ *Hurbain v Belgium* (57292/16) [2023] 7 WLUK 724; (2023) 77 EHRR 34 ECHR.

⁶⁰ *Mesic v Croatia* (45066/17) [2023] 6 WLUK 643; (2023) 77 EHRR 24 ECHR.

⁶¹ 'Commission Regulation (EU) 2022/1925' <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R1925> accessed 26 March 2024, Preamble Regulation (2).

⁶² European Commission, 'Digital Markets Act: Commission Designates Six Gatekeepers' (Press Release, 6 September 2023)

https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328

for data access and transferability.⁶³ Through managing entry, the platform can impact which companies thrive or collapse, which forms of content are visible or concealed, and how personal data is utilised and distributed.⁶⁴ It is the European Commission's responsibility to designate gatekeepers. Several factors can affect this decision-making process. Competition authorities in the EU will share market share and platform dominance information with the Commission to help evaluate the platform's market presence and strength.⁶⁵ The Commission is expected to conduct public consultations to gather feedback from platforms, user groups, and civil society organisations. These discussions can provide important perspectives on how the platform affects external parties and the broader online marketplace.⁶⁶

Nevertheless, even though the selection process should remain impartial, there is a risk of political interference. Political agendas can influence the Commission's focus and understanding of the DMA, specifically in relation to how content moderation is carried out. For example, worries about fake news and offensive language may result in gatekeepers having to adhere to stricter rules for filtering content, whereas concerns about censorship and free expression may result in more relaxed rules. Therefore, appointing gatekeepers is not only a technical procedure but also a political one that mirrors the EU's wider goals for the digital market.

The rules for identifying gatekeepers under the DMA are well backed by EU law in terms of market share and entrenched position. Article 101 of the Treaty on the Functioning of the European Union (TFEU) makes it illegal to create agreements that inhibit, limit, or manipulate competition in the internal market.⁶⁷ This clause has played a key role in influencing the European Commission's strategy towards dominant market positions.

United Brands Co. v Commission ([1976] ECR 1127) set a significant precedent by establishing a framework for evaluating dominance in the European Union.⁶⁸ The Court ruled that dominance

⁶³ Christophe Carugati, 'The Difficulty of Designating Gatekeepers under the EU Digital Markets Act' (Bruegel 2023) <https://www.bruegel.org/blog-post/difficulty-designating-gatekeepers-under-eu-digital-markets-act>

⁶⁴ European Commission, 'About the Digital Markets Act' https://digital-markets-act.ec.europa.eu/about-dma_en

⁶⁵ European Commission, 'About the Digital Markets Act' https://digital-markets-act.ec.europa.eu/about-dma_en

⁶⁶ Van Doorne, 'The Digital Markets Act (DMA): Rules for Digital Gatekeepers to Ensure Open Markets' <https://www.lexology.com/library/detail.aspx?g=dff5cdb3-7e2f-4ec2-9b7b-095bd156e7cd>

⁶⁷ 'The Treaty on the Functioning of the European Union, Article 101' <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX%3A12008E101%3AEN%3AHTML>

⁶⁸ 'Judgment of the Court of 14 February 1978, United Brands Company and United Brands Continental BV v Commission of the European Communities, Case 27/76' <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61976CJ0027> accessed 26 March 2024.

is determined by a company's share of the market, the level of competition, and the options available to consumers. United Brands Company was discovered to have taken advantage of their strong position in the banana market, breaking Article 101 TFEU.⁶⁹ This situation highlights the significance of market share in establishing dominance and backs up the DMA's focus on market share as a factor for recognising gatekeepers.⁷⁰

The legal question becomes more intricate when considering the impact on third parties. Although Article 56 TFEU ensures the freedom of service movement, the DMA focuses on instances where platforms serve as 'gatekeepers' and unfairly limit other businesses' access to the internal market. In the case of *Post Danmark A/S v Konkurrencerådet* the CJEU delivered a judgment, which started with the 2007 and 2008 competition decision of the Danish competition council (Konkurrencerådet) concerning a retroactive rebate scheme implemented by Post Danmark in respect of bulk advertising mail.⁷¹ The CJEU held that it was not appropriate to base the assessment of the anticompetitive exclusionary effect on the market caused by the rebate scheme on the 'as-efficient-competitor' test, involving a comparison of the dominant undertaking's prices and costs. This case, emphasises the readiness of the Commission to intervene when a dominant player's actions unfairly affect others, particularly in instances where platforms serve as 'gatekeepers' and unfairly limit other businesses' access to the internal market.

Additionally, a similar situation arose in case Case T-19/21 *Amazon.com, Inc. and Others v European Commission*.⁷² The European Commission alleged that Amazon had unfairly leveraged its dominant position in e-commerce to gain an advantage over rival companies. The Commission stated that Amazon used data from third-party sellers on its platform to boost the sales of its own products. This instance was significant as it highlighted the delicate balance between permitting platforms to oversee their services and preventing them from dominating market access excessively. The Commission's allegations against Amazon underline the significance of fair competition in the online retail industry. The situation underscored the potential anti-competitive actions of large tech companies and the need for regulatory oversight to ensure equal competition.

⁶⁹ Margaret H FitzPatrick, 'United Brands Company v. Commission of the European Communities: Window to Price Discrimination Law in the European Economic Community' (1979) 1 Nw J Int'l L & Bus 338.

<https://scholarlycommons.law.northwestern.edu/njilb/vol1/iss1/23/>

⁷⁰ Joseph J Norton, 'The European Court of Justice Judgement in United Brands: Extraterritorial Jurisdiction and Abuse of Dominant Position' (1979) 8 Denv J Int'l L & Pol'y 379. <https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=2071&context=djilp>

⁷¹ Judgment of the Court (Second Chamber) of 6 October 2015. *Post Danmark A/S v Konkurrencerådet*. Available at EUR-Lex - 62014CJ0023 - EN - EUR-Lex (europa.eu)

⁷² Order of the General Court (First Chamber) in Case T-19/21 *Amazon.com, Inc. and Others v European Commission* EUR-Lex - 62021T00019 - EN - EUR-Lex (europa.eu)

The Court's decision in this case reasserted the significance of competition law in overseeing dominant online platforms and safeguarding the interests of smaller businesses.

The principles of transparency and accountability set out in Article 15 of the TFEU are crucial for selecting gatekeepers in the DMA. These principles are evident in public debates that involve input from multiple stakeholders. They ensure that the European Commission's decisions are influenced not only by internal factors or political interests but also by a range of perspectives.

In previous instances, the Commission found that conducting public consultations in competition cases, like the probe into Google's Android, leads to favourable outcomes. In this instance, the Commission gathered input from a variety of sources, such as rivals, customers, and professionals, to aid in its inquiry into Google's purportedly anti-competitive behaviour.⁷³ This comprehensive approach not only boosted the credibility of the Commission's decision but also guaranteed that it was based on a thorough grasp of the market dynamics.

Nonetheless, the worry about political interference in the designation process persists. Although Article 17(3) TFEU highlights the Commission's autonomy, there is potential for political influence, especially concerning content moderation strategies. The Commission must balance these challenges while upholding its dedication to making decisions based on facts and evidence. Precautions are in place to prevent bias and maintain the Commission's autonomy. The CJEU has consistently supported the Commission's autonomy in competition matters, as seen in the case of C-416/17 *Commission v France*. In this case, the Court of Justice condemned France for the first time for a breach of Article 267 (3) TFEU in the context of an infringement action, after the French administrative supreme court (Conseil d'Etat) failed to make a necessary preliminary reference.⁷⁴ This case underscored the autonomy of the Commission in matters of competition law within the EU.

5. Gatekeeper Rules and Their Potential to Enhance Free Speech

These guidelines aim to prevent one platform from dominating and encourage a variety of content by ensuring interoperability, fair ranking, and transparent content moderation. Gatekeepers under the DMA must have interoperability as a crucial requirement. This implies that gatekeepers need to permit users to move data and engage with different platforms. Through promoting interoperability, the DMA has the ability to avoid platform lock-in, which traps users in one

⁷³ Dieter Paemen, 'The Google Android European Court Judgment and its Wider Implications' (Clifford Chance)

<https://www.cliffordchance.com/insights/resources/blogs/talking-tech/en/articles/2022/09/the-google-android-european-court-judgment-and-its-wider-implica.html>

⁷⁴ European Commission - Press Release, 'Designated Gatekeepers Must Now Comply with All Obligations under the Digital Markets Act Brussels, 7 March 2024'

https://europa.eu/newsroom/ecpc-failover/pdf/ip-24-1342_en.pdf

specific ecosystem. This can promote a wider variety of voices and perspectives by allowing users to access content and viewpoints beyond just one platform. Interoperability can promote competition and innovation by allowing new and smaller platforms to enter the market and engage with established platforms more seamlessly.

The gatekeepers also need to ensure fair ranking, which is crucial. Gatekeepers could be banned from unfairly favouring their own services or content over others in search results and platform features under the DMA. This can create fairer competition for smaller content providers, ensuring that users can hear various voices. The DMA can encourage a more varied and lively digital landscape by stopping gatekeepers from controlling rankings to boost their own content. Transparency in content moderation is also a crucial component of the Gatekeeper Rules in the DMA.

Gatekeepers must offer more transparent content moderation policies and procedures. This enables users to comprehend the reasons for content removal and possibly dispute unjust decisions. Transparency in content moderation helps to build trust between platforms and users by ensuring users have a clearer understanding of the rules that govern their online interactions.⁷⁵

These regulations may also motivate platforms to implement more impartial content moderation procedures. Platforms are currently dealing with the difficulty of maintaining a balance between allowing free speech and addressing concerns regarding harmful content. The DMA could discourage platforms from excessively moderating content or catering to specific user groups by fostering a competitive environment. This may result in a more fair and nuanced strategy for managing content, ensuring that legal and rightful speech is preserved while harmful content is dealt with efficiently.⁷⁶

In summary, the DMA's Gatekeeper Regulations have the potential to greatly improve freedom of expression by curbing platform dominance, championing a variety of content, and encouraging transparency and fairness in content moderation. Smaller content providers and new market entrants can also benefit from these regulations, leading to a more dynamic and competitive digital market. Nevertheless, careful oversight will be necessary to ensure that these rules effectively encourage free speech and competition while also avoiding stifling innovation or placing excessive burdens on platforms.

Risks of Over-Compliance and Potential for Suppressing Free Speech

⁷⁵ Aurelien Portuese, 'The Digital Markets Act: European Precautionary Antitrust' (Information Technology and Innovation Foundation 2021) <https://itif.org/publications/2021/05/24/digital-markets-act-european-precautionary-antitrust/> accessed 26 March 2024

⁷⁶ Global Partners Digital, 'The EU Digital Markets Act: Is Interoperability the Way Forward?' <https://www.gp-digital.org/the-eu-digital-markets-act-is-interoperability-the-way-forward/>

Although the Gatekeeper Rules in the Digital Markets Act (DMA) intend to boost free speech and encourage a variety of content, there is a potential danger of excessive compliance leading to the stifling of free speech.⁷⁷ This danger occurs when platforms become too careful in their content moderation practices avoiding penalties for not following the rules.⁷⁸ Excessive content moderation caution may result in platforms removing legal content due to potential sanctions. This could discourage users from freely expressing themselves, hindering genuine discussions on touchy subjects. Users might choose to censor themselves by not sharing legal content, which could spark controversy for fear of it getting deleted. This may result in online discussions becoming more uniform, as only the least contentious opinions are shared.⁷⁹

Platforms may prioritise technical efficiency over nuanced content moderation due to their emphasis on compliance. To avoid being penalised, platforms may choose to use basic content moderation algorithms that can quickly review and moderate a large amount of content but lack the subtlety and context understanding of human decision-making.⁸⁰ This may lead to the deletion of contentious yet important material, like political disagreements or cultural critique, which would continue to limit freedom of expression. Furthermore, the potential for legal responsibility may deter innovation. Platforms may start to hesitate to implement new features or functionalities that could potentially increase their liability. This might impede the creation of novel methods for linking and exchanging information, restricting the digital realm's ability to nurture innovation, teamwork, and societal transformation. Ultimately, although the DMA's Gatekeeper Rules could boost free speech and encourage varied content, there is a chance of excessive adherence leading to a constraint on free speech and the hindrance of innovation. It is essential that these regulations are put into effect and upheld to maintain an equilibrium between encouraging competition and safeguarding freedom of speech. This will need continuous monitoring and fine-tuning, along with a dedication to maintaining transparency, accountability, and proportionality principles.

6. Balancing Open Markets and Free Speech

⁷⁷ European Commission, 'Digital Markets Act: Commission Designates Six Gatekeepers' (Press Release, 6 September 2023)

https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328

⁷⁸ Gregory Day, 'Monopolizing Free Speech' (2020) 88 Fordham L Rev 1315

<https://ir.lawnet.fordham.edu/flr/vol88/iss4/3> accessed 26 March 2024.

⁷⁹ Niam Yaraghi, 'Regulating Free Speech on Social Media is Dangerous and Futile' (2018) <https://www.brookings.edu/articles/regulating-free-speech-on-social-media-is-dangerous-and-futile/> accessed 26 March 2024.

⁸⁰ Freedom and the Media 2019, 'Media Freedom: A Downward Spiral' (Freedom House 2019) <https://freedomhouse.org/report/freedom-and-media/2019/media-freedom-downward-spiral>

This section explains the Digital Services Act (DSA)'s aim to promote an open digital economy and protect freedom of expression, highlighting the challenges of striking this balance between clear guidance, independent monitoring and discussion of stakeholders and solutions.

Balancing the promotion of open digital markets with the protection of fundamental rights such as free speech is a complicated issue central to the Digital Services Act (DSA). The DSA aims to create a fairer digital market with more competition by placing extra duties on big online platforms referred to as ‘gatekeepers. Despite this, it also aims to safeguard users' basic rights, such as the right to freedom of expression. Achieving equilibrium between these two goals demands thorough reflection and precision.

One of the primary challenges in maintaining this fragile equilibrium is the conflict between clarity and flexibility. Having clearer instructions for platforms to differentiate between legal and illegal content can assist in maintaining consistent and effective content moderation processes. For example, the DSA mandates that platforms have systems in place to remove or block access to unlawful content quickly. Nevertheless, strict adherence to these rules may inhibit creativity and ability to respond to changing online risks. The online environment is ever-evolving, with continuous emergence of new harmful content and behaviours.⁸¹ Hence, the DSA must grant sufficient leeway for platforms to adjust their content moderation methods in response to these changing risks while maintaining specific guidelines to uphold fairness and consistency.

Independent supervision is also vital in maintaining an equilibrium between open markets and freedom of speech. Independent oversight bodies have an important role in making sure the DSA's Gatekeeper Rules are appropriately enforced and do not result in excessive limitations on freedom of speech.⁸² These entities can offer a fair assessment of platforms' content moderation techniques, making sure they adhere to the DSA and do not misuse their authority to regulate content or stifle freedom of speech. They can also offer a platform for users to challenge content moderation rulings, giving an extra level of responsibility.

Moreover, promoting communication among platforms, regulators, and civil society groups is crucial to balancing open markets and freedom of speech. This conversation can aid in recognising possible issues in the DSA's rules and establishing effective methods for moderating content that

⁸¹ Francesco Vogelezang, 'Illegal vs Harmful Online Content: Some Reflections on the Upcoming Digital Services Act Package' (Institute for Internet and Just Society 2020) <https://www.internetjustsociety.org/illegal-vs-harmful-online-content> accessed 26 March 2024.

⁸² Francesco Vogelezang, 'Illegal vs Harmful Online Content: Some Reflections on the Upcoming Digital Services Act Package' (Institute for Internet and Just Society 2020) <https://www.internetjustsociety.org/illegal-vs-harmful-online-content> accessed 26 March 2024.

maintains a balance between safety and freedom of speech.⁸³ For example, platforms can discuss their experiences and obstacles in applying the regulations of the DSA, regulators can offer advice and explanation on these regulations, and civil society organisations can give feedback on how these regulations affect users' rights and freedoms. This conversation can assist in guaranteeing that the DSA is executed in a manner that supports competitive markets and protects freedom of expression.

It is not easy to balance promoting open digital markets and protecting basic rights such as freedom of speech. Nevertheless, possible remedies and optimal methods can assist in attaining this equilibrium. Independent oversight bodies have the potential to be extremely important in this process.⁸⁴ These organisations can conduct an unbiased evaluation of how platforms moderate content to make sure they follow the DSA and do not exploit their authority to censor or limit free speech. They can also offer a platform for users to challenge content moderation choices, adding another level of responsibility. Autonomous monitoring organisations can carry out audits and inquiries on platforms' actions, ensuring transparency and responsibility. They can also offer advice and suggestions to platforms on how to enhance their protocols in order to safeguard users' rights more effectively.

Secondly, providing more explicit instructions for platforms to differentiate between legal and illegal content can be advantageous. These guidelines offer platforms a solid structure for content moderation, minimising the chance of making random or unfair decisions. Nevertheless, these recommendations must be flexible and able to adjust to the changing digital environment. Regularly reviewing and updating them is necessary to incorporate technological changes, societal norms, and legal standards. Clear guidelines can assist platforms in improving their content moderation systems by offering a precise standard for training algorithms and human moderators, resulting in more effective and efficient systems.

In summary, finding a middle ground between encouraging open digital markets and protecting freedom of speech within the DSA is challenging and requires meticulous examination of multiple factors. Independent monitoring organizations, more defined platform regulations, and communication among all parties are essential to this procedure. Through thoroughly examining these elements, the DSA can establish an impartial and competitive online market that safeguards users' fundamental rights. Nevertheless, it is crucial to remember that this process demands regular assessment and adjustment to the constantly changing digital environment. The Digital Services

⁸³ European Parliament, 'Online Platforms' Moderation of Illegal Content Online' [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652718/IPOL_STU\(2020\)652718_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652718/IPOL_STU(2020)652718_EN.pdf) accessed 26 March 2024

⁸⁴ Katarína Staroňová, 'Comparing the Roles of Regulatory Oversight Bodies in Central and Eastern European Countries' (2017) 8(4) Eur J Risk Reg 723 <https://www.jstor.org/stable/26363845> accessed 23 March 2024.

Act is just the start, not the final solution, in maintaining an equilibrium between open markets and free speech in the digital era.

7. Conclusion

Ultimately, the DSA and the DMA mark important progress in regulating digital services within the European Union. They strive to establish a digital marketplace that is both just and competitive while also safeguarding users' basic rights, such as freedom of speech. The discovery of how Gatekeeper Rules can improve freedom of speech is a major revelation in this article. The DSA seeks to prevent large online platforms known as "gatekeepers" from abusing their authority to censor content or stifle freedom of speech with new requirements. Nevertheless, there is a possibility of excessive adherence, as platforms lean towards being overly careful and eliminating more content than required to steer clear of consequences. This may result in unjust limitations on freedom of expression and suppress the free flow of ideas necessary for a functioning democracy.

Finding a balance between open markets and freedom of speech is crucial. Establishing more precise platform instructions, implementing unbiased monitoring, and fostering communication between all parties is essential to reach this equilibrium. Nevertheless, these measures must adjust to the changing digital environment and uphold users' rights and freedoms. Another important topic of this article is the EU's changing rules of content moderation. In light of ongoing changes in the digital environment, it will be crucial to regularly assess and revise these regulations to guarantee their effectiveness and relevance. The DSA and DMA mark the start of this process, with expected future developments as new challenges and opportunities emerge.

There are numerous possible areas for additional research on this subject. One aspect involves evaluating instances where the Commission has identified gatekeepers and the rationale for those choices. This could give important information on understanding the "impact on third parties" and other crucial concepts in the DMA. Another important area is the role of national courts in reviewing the Commission's gatekeeper designations. Analysing the DMA could lead to a more detailed legal understanding and guarantee its consistent and fair application throughout the EU.

Another crucial area for further research is the interaction of other EU regulations, like the DSA. This will help guarantee a consistent and successful regulatory structure for the digital market. Another crucial factor to consider is the potential harm to the Commission's reputation if its designation process is viewed as unfair or not transparent. This could result in heightened examination and impact upcoming policy choices.

In conclusion, examining collective redress lawsuits involving gatekeepers could offer useful perspectives on the Commission's comprehension of the impact on third parties in the process of designating gatekeepers. This could help ensure that the DMA is conducted just and effectively while respecting users' rights and freedoms. In conclusion, the DSA and the DMA play a crucial role in overseeing digital services in the EU. However, they present complex issues that require careful consideration and ongoing examination. By consistently addressing these issues and

engaging in conversations with various stakeholders, we aim to create a digital marketplace that is just, competitive and respects the fundamental rights of every user.

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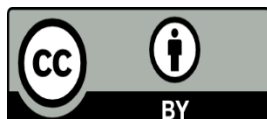
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