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Taming the few: Platform regulation, independent audits, and the risks of capture created by the DMA and DSA ☆

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ABSTRACT

In its attempt to better regulate the platform economy, the European Commission recently proposed a Digital Markets Act (DMA) and a Digital Services Act (DSA). While the DMA addresses worries about digital markets not functioning properly, the DSA is concerned with societal harms stemming from the dissemination of (illegal) content on platforms. Both proposals focus on the relative size of platforms. The DMA applies to 'gatekeeper' platforms and the DSA has a special regime of scrutiny for 'very large online platforms' (VLOPs). Focusing on size, however, can have negative consequences for the enforcement of the DSA: First, risks disseminated by platforms below the VLOP-threshold reside in a regulatory blind spot. Second, VLOPs may leverage their market power against their new mandatory auditors and risk assessors, a threat theorised as 'audit capture' in this article. As a result, societal risks may remain undiscovered or downplayed and consumers and citizens may be harmed. This article traces the origin of the size criteria in the legislative history of the DMA and DSA proposals. It argues for safeguards against audit capture and adverse incentive structures in the DSA. The article draws on the debate on audit reform in the aftermath of the global financial crisis of 2007–2008 to provide blueprints for fixing the regulatory gap.

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1. Introduction

As digital platforms accumulate both vast amounts of data and market power, asymmetries of information arise vis-à-vis

their competitors, their consumers, and their regulators. Collecting more data than their competitors, platforms with market power are able to develop and deploy superior data analytics and thus outperform other services.¹ Utilising their troves of information, digital platforms can target consumers with predictive models of their mental states and bodily functions,

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¹ See, for example, Viktor Mayer-Schönberger and Thomas Ramge, 'A Big Choice for Big Tech: Share Data or Suffer the Consequences' (2018) 97 Foreign Aff 48.

exploiting weaknesses in consumers' ability to make rational decisions.² Regulators will often lack the institutional resources to match the expertise and skill of private enterprises and their software-engineering staff.³ Arguably, this development is transforming the market economy into a digital 'platform economy' which is 'ruled by data' and those who have command over data as a source of power.⁴

At the same time, their size creates challenges for big platforms to control the vast amounts of information they are transmitting. Take the social media platform Facebook as an example: faced with the costs of moderating content internally, the platform decided to automate as well as outsource the task of clearing up violent and hateful material flowing through its site.⁵ Accenture, the accounting and consulting firm, has reportedly become Facebook's biggest single partner in this endeavour.⁶ Despite internal debate about the psychological toll content moderation takes of its human moderators, Accenture allegedly continues moderation for Facebook because it does not want to lose the big platform as a client.⁷ After all, digital content moderation has become a multi-billion dollar industry.⁸ Such auditing services may not only consist of human moderators sifting through images but can also take the form of more technically sophisticated algorithmic auditing.⁹ In the digital platform economy, methods and approaches for algorithmic audits, risk assessments, and

impact assessments are still emerging and address not only content moderation, but also matters such as fairness, non-discrimination, and misinformation.¹⁰ Audits may be done internally by the provider of the algorithm or by an external auditor. While external auditors are supposed to be removed from the provider's organizational interests, they will often lack access to information about internal processes of the audited organization.¹¹

In light of these developments, the European Commission recently proposed a Digital Markets Act (DMA) and a Digital Services Act (DSA).¹² The DMA and the DSA comprise the EU's Digital Services Acts Package, aiming to "create a safer and more open digital space".¹³ Both proposals are designed as a fully coherent and complementary bundle.¹⁴ The DMA addresses concerns about markets not functioning properly and the economic harms resulting from 'gatekeeper' platforms that garnered considerable market power.¹⁵ It is designed to complement European competition law and aims to remedy economic imbalances, unfair business practices and their negative impact on the contestability of platform markets.¹⁶ On the other hand, the DSA is concerned with societal harms stemming from the dissemination of (illegal) content on platforms. It addresses issues such as liability of online intermediaries for third party content, safety of users online or asymmetric due diligence obligations for different providers of information society services depending on the nature of the societal risks such services represent.¹⁷ It builds on the so-called

² Johann Laux, Sandra Wachter and Brent Mittelstadt, 'Neutralising Online Behavioural Advertising: Algorithmic Targeting with Market Power as an Unfair Commercial Practice' (2021) 58 CML Rev 719.

³ European Commission, 'Commission Staff Working Document, Impact Assessment, accompanying the document Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC DSA, SWD (2020) 348 final, 15.12.2020, Part 1/2, para 167. See also: Alain Marciano, Antonio Nicita and Giovanni Battista Ramello, 'Big data and big techs: understanding the value of information in platform capitalism' (2020) 50 Eur JL Econ 345, 355.

⁴ Katharina Pistor, 'Ruled by Data: The End of Markets?' (2020) 83 L Contemp Probl 101; Julie E Cohen, 'Law for the Platform Economy' (2017) 51 UCD L Rev 133; Catherine Tucker, 'Digital Data, Platforms, and the Usual [Antitrust] Subjects: Network Effects, Switching Costs, Essential Facility' (2019) 54 Rev Ind Organ 683; Marciano, Nicita and Ramello (n 3).

⁵ Adam Satariano and Mike Isaac, 'The Silent Partner Cleaning Up Facebook for \$500 Million a Year' *The New York Times* (New York, 31 August 2021) <<https://www.nytimes.com/2021/08/31/technology/facebook-accenture-content-moderation.html>> accessed 12 September 2021.

⁶ Ibid.

⁷ Ibid. Facebook has been confronted with a class action lawsuit by content moderators who claim that Facebook failed to provide a safe workspace to protect them from the dangers of psychological trauma caused by reviewing posts featuring "child sexual abuse, rape, torture, bestiality, beheadings, suicide, and murder", cf., *Selena Scola et al. v. Facebook, Inc.*, Superior Court of the State of California in and for the County of San Mateo, Civil Action No. 18-CIV-05135, para 2.

⁸ Satariano and Isaac (n 5).

⁹ See, for example: Inioluwa Deborah Raji and others, 'Closing the AI Accountability Gap: Defining an End-to-End Framework for Internal Algorithmic Auditing' [2020] Proceedings of the Conference on Fairness, Accountability, and Transparency – FAT* '20 33.

¹⁰ See, for example: Shea Brown, Jovana Davidovic and Ali Hasan, 'The algorithm audit: Scoring the algorithms that score us' (2021) 1 Big Data & Society 1. For an overview of the major categories within the interdisciplinary work on fairness in automated systems, see the references in: Sandra Wachter, Brent Mittelstadt and Chris Russell, 'Why fairness cannot be automated: Bridging the gap between EU non-discrimination law and AI', (2021) 41 CLSR 105567, 4. For an explanation of the difference between audits and risk assessments, see: Ada Lovelace Institute and DataKind UK, 'Examining the Black Box: Tools for Assessing Algorithmic Systems' (London, 29 April 2020) <<https://www.adalovelaceinstitute.org/report/examining-the-black-box-tools-for-assessing-algorithmic-systems/>> accessed 12 September 2021. As regards the implementation of algorithmic impact assessments, see Andrew D. Selbst, 'An Institutional View of Algorithmic Impact Assessments' (2021) 35 Harv JL Tech (forthcoming), <https://privpapers.ssrn.com/sol3/papers.cfm?abstract_id=3867634> accessed on 12 September 2021.

¹¹ Raji et al. (n 9), 35. See also: Selbst (n 10); Making this point in relation to the DMA and DSA proposals: Caroline Cauffman and Catalina Goanta, 'A New Order: The Digital Services Act and Consumer Protection' [2021] EJRR 1, 13.

¹² European Commission, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM(2020) 842 final, 15.12.2020; European Commission, Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC COM (2020) 825 final, 15.12.2020.

¹³ European Commission, 'The Digital Services Act package' <<https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>> accessed 12 September 2021.

¹⁴ DMA, p 3; Commission (n 3), paras 285–288.

¹⁵ DMA, p 1.

¹⁶ DMA, p 3 and para 9.

¹⁷ Cf. DMA, p 3.

e-Commerce Directive (Directive 2000/31/EC) and focuses on the liability of intermediary services such as social media platforms and digital marketplaces.¹⁸ The DSA features special obligations for ‘very large online platforms’ (VLOPs) reaching at least 45 million average monthly active recipients in the European Union, subject to future adjustments.¹⁹ A novel institutional ecosystem is supposed to oversee these obligations: most importantly, independent audit organisations will perform mandatory yearly audits for VLOPs²⁰ and vetted researchers shall investigate systemic risks listed in Art. 26(1) DSA.²¹ This external audit structure is absent in the current e-Commerce Directive.

If enacted, the DMA and DSA would together address the market power of digital platforms, increase transparency in their data-driven practices, and manage risks that stem from the content they disseminate. In doing so, however, the regulatory choice to differentiate between platforms of different sizes in both proposed laws will, as this article argues, hamper the enforcement of the DSA. As will be shown, the decision to focus on VLOPs leaves regulatory blind spots and creates dependencies as well as adverse incentive structures for the novel auditors and assessors of VLOPs. Risks thus may remain undetected or become visible with too much delay to avoid harm. Consequently, consumers and citizens may not receive the protections they could and should expect from such ambitious legislative proposals. We argue that the proposal should therefore be amended to include safeguards for independent audits. Altogether, this article thus makes three contributions. First, it sheds more light on the regulatory choice to operate with two measures of platform size, the ‘gatekeeper’ (DMA) and the ‘VLOP’ (DSA) thresholds. Second, it explicates the consequences of this choice especially for the enforcement of the DSA. Third, the article proposes solutions to safeguard the quality and independence of the envisioned audits and risk assessments.

The article begins by tracing down the legislative history of the DMA and DSA proposals to reconstruct the regulatory choices as regards platform size and risk management (Section 2). Originally contrived as a single text, the separation of the DMA and DSA into independent proposals also saw a distinction emerge between the intended targets of each framework. Specifically, ‘gatekeepers’ (DMA) and ‘VLOPs’ (DSA) were subsequently defined as being “different in nature and in scope” and thus requiring bespoke frameworks to regulate.²² This normative stipulation appears to ignore the fact that many VLOPs will also have gatekeeper market power. Instead of being rooted in the DSA’s underlying theory of harm, i.e., the management of ‘systemic risks’ (Art. 26 DSA), the VLOP category is more likely to be based on pragmatic considerations regarding the implementation of the DSA’s regulatory oversight. At the same time, it also serves a policy choice to protect VLOPs’ European competitors. We will further show that from a risk management perspective, the VLOP category is not just unnecessary, but the focus on detecting those risks

only if they occur within big platforms leaves a dangerous regulatory blind spot.

Section 3 then turns to matters of enforcement and the novel regulatory ecosystem of auditors and risk assessors which the DSA seeks to introduce. The DSA requires VLOPs to be independently audited and have their risks assessed as regards the dissemination of illegal content, the impact on fundamental rights and the manipulation of their services.²³ However, in the current state of the DSA draft, auditors and assessors will be dependent on the big platforms to receive commissions as well as access to data. As we have seen in the example of Facebook’s outsourcing of content moderation, the social media platform’s market share incentivises its external moderators to keep its business despite significant backlash.²⁴ By drawing on the logic behind economic theories of regulation, the article will go further and describe the threat of ‘audit capture’, understood here as the ability of digital platforms to leverage their market power against their (mandatory) auditors. Capture theory seeks to predict the outcomes of regulation. It starts from the insight that politicians and regulators face agency costs and information problems when acting on particular issues in the public interest, opening the door for political advisors and lobbyists.²⁵ It was refined by Stigler’s seminal ‘Theory of Economic Regulation’, concluding that regulatory agencies are vulnerable to capture by special interest groups who shape regulatory outcomes so that they benefit the regulated industry itself at consumers’ expense.²⁶ Stigler’s special interest theory has since seen many extensions and empirical testing.²⁷ Important for our analysis here is that theories of regulatory capture are driven by standard economic incentives that push even well-intentioned regulators to cater to the interest of those they are tasked to regulate.²⁸ Drawing on the same economic logic allows us to hypothesise that auditors and risk assessors will be driven by very similar incentives as regulators when filling out their roles under the DSA. The VLOP-threshold will create a concentrated and powerful demand-side for audits and risk assessments that will amplify the economic incentive to cater to the interests of the audited. Moreover, it may also lead to a concentration on the supply-

²³ DSA, para 57.

²⁴ Cf. again the case of *Selena Scola et al. v. Facebook, Inc.*, (n 7).

²⁵ Bruce Yandle, ‘Bootleggers and Baptists in the theory of regulation’ in David Levi-Faur (ed.), *Handbook on the Politics of Regulation* (Edward Elgar 2011), 28–29.

²⁶ William F. Shughart and Diana W. Thomas, ‘Interest Groups and Regulatory Capture’ in Roger D. Congleton, Bernard Grofman and Stefan Voigt (eds.), *The Oxford Handbook of Public Choice, Volume 1* (OUP 2019), 585. See further: George J. Stigler, ‘The Theory of Economic Regulation’ (1971) 2 *Bell Journal of Economics and Management Science* 3; Sam Peltzman, ‘Toward a more general theory of regulation’ (1976) 19 *JLE* 211.

²⁷ Cf. Shughart and Thomas (n 26); Yandle (n 25), 28–31; Richard A. Posner, ‘The Concept of Regulatory Capture’: A Short, Inglorious History’ in Daniel Carpenter and David A. Moss (eds.) *Preventing Regulatory Capture: Special Interest Influence and How to Limit it* (CUP 2013); Karen Yeung, ‘The Regulatory State’ in Robert Baldwin, Martin Cave and Martin Lodge (eds.), *The Oxford Handbook of Regulation* (OUP 2010).

²⁸ Luigi Zingales, ‘Preventing Economists’ Capture’ in Daniel Carpenter and David A. Moss (eds.) *Preventing Regulatory Capture: Special Interest Influence and How to Limit it* (CUP 2013), 124.

¹⁸ DSA, p 2.

¹⁹ Art. 25(1) DSA.

²⁰ Art. 28(2) DSA.

²¹ Art. 31(2) DSA.

²² Commission (n 3), para 287.

side for audits and risk assessments if VLOPs should be able to repeatedly select their auditors of choice. This can in turn provide incentive structures which are detrimental to the expected quality of the audits.

VLOPs may hence garner a position of control over the enforcement of the DSA that poses itself as a systemic obstacle to the new law's success. The DSA proposal therefore appears to be incomplete. Section 4 takes inspiration from audit reforms in other sectors – namely reforms following the 2007–2008 global financial crisis – to suggest institutional solutions to mitigate the expected effects laid out in Section 3. Finally, a further complication will be addressed: judging whether or not independent audits and assessments are of sub-standard quality will be difficult in the absence of clear rules on the legality of targeted advertising and recommender systems.²⁹ The case-by-case legal assessments required by EU law do not provide a global benchmark that can be used to easily assess the quality of auditors and assessors.

2. Two conceptions of platform size

The DMA and DSA proposals are both concerned with the size of digital platforms, i.e., their market power and their reach over consumers. Usually, when the market power of a company is perceived as too big, competition law is considered as a remedy if it can be shown that the company abuses its dominant position (cf. Art. 102 TFEU).³⁰ It can do little, however, to remedy market failures that are not connected to firms' sanctionable behaviour.³¹ Especially in digital markets the emergence of dominant platforms is not solely due to the conduct of the firms but also the structure of the markets themselves. As the economic expert report to the DMA lists, several features distort markets even when incumbent firms do not engage in abusive conduct: economies of scale or scope, network effects, switching costs, asymmetric and limited information, and consumers' behavioural biases.³² The DMA is a response to the structural features of digital markets and the market power of some of the platforms that operate in them as well as the constraints of competition law.³³ It addresses practices that are deemed unfair but either fall outside of the scope of existing EU competition rules or cannot effectively be addressed by these rules.³⁴

The DSA also features a special regime for large platforms (the VLOPs mentioned above). On the one hand, this is the outcome of a legislative genesis in which the DMA and the DSA were originally contrived as a single text.³⁵ The DMA was split from the DSA at a later stage in order to introduce *ex ante* rules for gatekeeper platforms.³⁶ On the other hand, the gatekeepers-turned-VLOPs conception of market size now serves a different function, namely, to address *ex post* societal risks stemming from the content disseminated via large platforms. As will be shown in the next section, this move can have negative consequences for the effectiveness of the oversight mechanisms in the DSA, especially independent audits and risk assessments. Moreover, the special regime for VLOPs appears to also serve as a protection for emerging European competitors from some of the obligations that (especially) U.S.-American platforms will face. Insofar as this is the case, the VLOP-category is unrelated to the underlying theory of harm in the DSA, i.e., the management of 'systemic risks' (Art. 26 DSA).³⁷

Both proposals thus focus on the relative size of digital platforms, gatekeepers and VLOPs, albeit to different ends. While the DMA's criteria for gatekeepers are based on platforms' economic power, the DSA purposefully establishes a different category in which VLOPs "serve as *de facto* public spaces in terms of numbers of users".³⁸ Consequently, the obligations in the DSA and those in the DMA are behaving like circles in a Venn diagram: "[n]ot all very large platforms are expected to also be gatekeeper platforms, but many will likely fall also in that category under the Digital Markets Act."³⁹ While a social media site like Pinterest may only qualify as a VLOP, but not as a gatekeeper, Facebook will most likely qualify both as a VLOP and a gatekeeper. There is thus a significant overlap to be expected, which holds the potential to create its own systemic risks (see: Section 3).

forms Proposed' (2021) <<https://ssrn.com/abstract=3723188>> accessed 12 September 2021.

³⁵ See Andrej Savin, 'The EU Digital Services Act: Towards a More Responsible Internet' (2021) J Internet L (forthcoming) Copenhagen Business School Law Research Paper Series No. 21-04, 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3786792> accessed 12 September 2021.

³⁶ *Ibid.*, 3.

³⁷ The European Electronic Communications Code (Directive 2018/1972) features a special regime for communications providers with 'significant market power' (SMP). It does, however, apply concepts of competition law and not societal risks such as the DSA. Cf. Art. 64(2) Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) [2018] OJ L321.

³⁸ Commission (n 3), para 287. For the tensions between the goals and values advanced by EU competition law and the evolving dynamics in digital markets, see Ariel Ezrachi, 'EU Competition Law Goals and the Digital Economy' Oxford Legal Studies Research Paper No. 17/2018 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191766> accessed 12 September 2021.

³⁹ Commission (n 3), para 287.

²⁹ Laux, Wachter and Mittelstadt (n 2).

³⁰ Cf. Art. 102 Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/26.

³¹ Massimo Motta and Martin Peitz, 'Intervention triggers and underlying theories of harm: Expert advice for the Impact Assessment of a New Competition Tool' [2020], p 3.

³² Motta and Peitz (n 31), p. 8.

³³ For an overview on how the DMA and DSA address structural problems in the digital platform economy, see: Martin Eifert, Axel Metzger, Heike Schweitzer and Gerhard Wagner, 'Taming the Giants: The DMA/DSA package' (2021) 58 CML Rev 987. For a critique of the informational power the 'DSA bureaucracy' would gain, see: Alexander Peukert, 'Five Reasons to be Sceptical About the DSA' (Verfassungsblog, 31 August 2021) <<https://verfassungsblog.de/power-dsa-dma-04/>> accessed on 12 September 2021.

³⁴ DMA, p 4. See also: Pablo Ibáñez Colomo, 'What Can Competition Law Achieve in Digital Markets? An Analysis of the Re-

2.1. Gatekeepers and VLOPs

The DMA applies to ‘gatekeeper’ platforms which have significant impact on the internal market, serve as an important gateway for businesses to reach consumers, and whose market power is entrenched and durable.⁴⁰ The proposal features a ‘three criteria test’ to establish ‘gatekeeper’ status, screening for a platform’s “significant impact on the internal market”, its importance as a “gateway for business users to reach end users”, and its enjoyment of “an entrenched and durable position”.⁴¹ The three criteria are satisfied by way of presumption, namely if the platform surpasses several quantitative thresholds: if it “achieves an annual EEA turnover equal to or above EUR 6.5 billion in the last three financial years, or where the average market capitalisation or the equivalent fair market value of the undertaking to which it belongs amounted to at least EUR 65 billion in the last financial year, and it provides a core platform service in at least three Member States; [...] it provides a core platform service that has more than 45 million monthly active end users established or located in the Union and more than 10 000 yearly active business users established in the Union in the last financial year” and those latter thresholds were met in each of the last three financial years.⁴² De Streel, one of the legal experts consulted during the drafting of the propositions, expects that after its adoption, the DMA will apply to ten to fifteen globally operating digital platforms, including Google, Apple, Facebook, Amazon and Microsoft.⁴³

Once falling within the DMA’s regime for gatekeepers, those platforms are facing a blacklist of prohibited practices in Article 5 DMA (such as combining personal data sourced from core platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services)⁴⁴; a grey list of prohibitions and obligations in Article 6 DMA (such as the obligation to provide advertisers and publishers with access to the performance measuring tools of the gatekeeper)⁴⁵; and additional transparency obligations, including an obligation to provide independently audited descriptions of the consumer profiling techniques which they are using in Article 13 DMA.⁴⁶

The DSA has a special regime of obligations for VLOPs, i.e., online platforms which currently provide their service to at least 45 million average monthly active recipients, subject to future adjustments.⁴⁷ VLOPs are facing additional obligations under the DSA in Articles 25–33. Article 26(1) DSA requires VLOPs to “identify, analyse, and assess [...] at least once a year [...] any significant systemic risks” that emanate from their services. This obligation to self-assess covers certain risks that are deemed ‘systemic’: the dissemination of illegal content,

any negative effects for the exercise of several fundamental rights, and the intentional manipulation of their service.⁴⁸ VLOPs shall particularly take into account how their content moderation systems, recommender systems and systems for selecting and displaying advertisement influences any of the systemic risks.⁴⁹ Other obligations include the implementation of risk mitigation measures and yearly independent audits.⁵⁰ Recommender systems and online advertising are subject to special transparency obligations.⁵¹ Self-regulation also plays a role in codes of conduct (Art. 35 DSA and Art. 36 DSA for online advertising) and crisis protocols (Art. 37 DSA).⁵²

A number of external entities are supposed to oversee these obligations: trusted flaggers will have their notices following Article 14 DSA processed “with priority and without delay”.⁵³ Digital Service Coordinators in each Member State are responsible for the application and enforcement of the DSA and also compose the European Board for Digital Services, an “independent advisory group”.⁵⁴ Independent audit organisations will perform the mandatory yearly audits for VLOPs.⁵⁵ These auditors must be independent; have proven expertise in the area of risk management, technical competence and capabilities; and have proven objectivity and professional ethics.⁵⁶ Vetted researchers, i.e., academics with “proven expertise” in the relevant fields,⁵⁷ shall be given access to data, upon request by a Digital Service coordinator, to investigate those systemic risks listed in Art. 26(1) DSA.⁵⁸ VLOPs will also appoint compliance officers responsible for monitoring their compliance with the DSA.⁵⁹

Although the DSA creates this novel regulatory ecosystem, it does not provide it with protections to safeguard its independence vis-à-vis the VLOPs (see: Section 3). This raises a preceding question as to why the VLOP-category was incorporated into the DSA in the first place.

Before addressing the genesis of the DSA and the DMA proposals below, a brief reflection on the DSA’s chosen instruments of risk regulation appears to be useful. The DSA features both internal as well as external audits and risk assessments. As mentioned in the introduction, internal self-assessments (Art. 26(1) DSA) have the informational benefits of the platform’s full access to its own data, organisational structures, and direct user feedback.⁶⁰ They also let the VLOPs internalize the cost of producing regulatory informa-

⁴⁰ Art. 3(1) DMA.

⁴¹ Ibid.

⁴² Art. 3(2) DMA.

⁴³ Alexandre de Streel, ‘Digital Markets Act: Policy Choices and Conditions for Success’ (ProMarket, 13 January 2021) <<https://promarket.org/2021/01/13/digital-markets-act-explainer-european-regulation-big-tech/>> accessed 12 September 2021.

⁴⁴ Art. 5(1) DMA.

⁴⁵ Art. 6(g) DMA.

⁴⁶ For this overview, see de Streel (n 43).

⁴⁷ Art. 25(1) DSA.

⁴⁸ Art. 26(2) DSA. For a critique of the vagueness of Art. 26(1)(c) DSA (“intentional manipulation of their service”, see Peukert (n 33).

⁴⁹ Art. 26(3) DSA.

⁵⁰ Art. 27 and 28 DSA.

⁵¹ Art. 29 and Art. 30 DSA.

⁵² See also: Savin (n 35), p 12.

⁵³ Art. 19 DSA. Apart from priority, trusted flaggers do not seem to enjoy other substantive benefits, cf. Savin (n 35), p 9.

⁵⁴ Art. 38–46 DSA; and Art. 47–49 DSA for the European Board for Digital Services.

⁵⁵ Art. 28(2) DSA.

⁵⁶ Ibid.

⁵⁷ Art. 31(4) DSA.

⁵⁸ Art. 31(2) DSA.

⁵⁹ Art. 32(1) DSA.

⁶⁰ Cf again: Selbst (n 10); Cauffmann and Goanta (n 11), 13; Raji (n 9).

tion.⁶¹ This is an established strategy in European risk regulation.⁶² In the chemicals sector, for example, the REACH regulation established a “no data, no market” rule.⁶³ It reverses the burden of proof and lets industry provide the information necessary for risk assessments and risk management based on the precautionary principle. Without that data, chemicals covered by REACH cannot be marketed legally within the EU. While closing the informational gap between industry and regulators, scientific misconduct such as misuse of statistical tools frequently occurs in risk assessments.⁶⁴ Even where external audits and risk assessments are deployed by law, the methodologies of risk assessments are often developed and/or promoted by industry itself.⁶⁵ As important new methods and approaches of algorithmic audits and risk assessments are developed, heightened scrutiny towards their pedigree and impact on consumers and citizens is warranted.⁶⁶ In the platform economy, there is the added risk that the size of large online platforms lets failures in risk assessments quickly scale and reach a vast number of consumers.⁶⁷

2.2. The DSA-threshold as a policy choice

Several possible answers as to why the VLOP-threshold was included in the DSA draft exist, none of which are mutually exclusive. First, there is the common origin of the DSA and the DMA. As mentioned, the DMA was split off from the DSA as the conceptual differences between the envisioned competitive remedies and platform liability rules were seen as too persistent.⁶⁸

⁶¹ Cauffmann and Goanta (n 11), 13.

⁶² Note that the DMA even requires gatekeepers to internalize the costs of being categorised as a ‘gatekeeper’: To begin with, platforms need to supply the quantitative data for qualifying as a gatekeeper themselves (cf. Art. 3(3) DMA). The platforms may then rebut their classification as gatekeepers by providing information pertaining to more qualitative variables such as entry barriers derived from network effects and advantages in data collection and data analytics. Cf. Art. 3(6) DMA; see further: de Streel (n 43).

⁶³ Cf. Art. 5 Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC [2006] OJ L 396.

⁶⁴ Claire Robinson and others, ‘Achieving a High Level of Protection from Pesticides in Europe: Problems with the Current Risk Assessment Procedure and Solutions’ (2020) 11 EJRR 450, 454–470.

⁶⁵ Cf. exemplarily for European pesticides regulation: *ibid.*, 477. See also: Sari Autio and others, ‘Assessing assessors: proposal for a guidance for evaluating the scientific performance of a pesticide regulatory authority’ [2021] EJRR (forthcoming).

⁶⁶ For algorithmic, Big Data-driven risk assessments, see Stephen L Roberts, ‘Big Data, Algorithmic Governmentality and the Regulation of Pandemic Risk’ (2019) 10 EJRR 94.

⁶⁷ In the field of financial technology, for example, the use of a ‘regulatory sandbox’ has been proposed, in which new technology can be tested in its regulatory environment on a smaller scale, cf. Wolf-Georg Ringe and Christopher Ruof, ‘Regulating Fintech in the EU: the Case for a Guided Sandbox’ (2020) 11 EJRR 604.

⁶⁸ Cf. again Savin (n 35), p 10.

Second, some consider whether the VLOP-threshold reflects a lesson learned from the General Data Protection Regulation (GDPR) which arguably reinforced the market power of large firms like Google as smaller firms were disproportionately burdened with costs in meeting the regulation’s demands.⁶⁹ One may further think again of the basic tenets of capture theory: if a firm already has technology that is going to be required by regulation or has an advantage in building it, then there is no cost imposed on that firm but instead, the regulation raises rivals’ costs.⁷⁰ Whether or not big tech firms were indeed lobbying to be regulated by the GDPR and if so, to what degree and in what way must remain open questions in this article. However, three years after the GDPR came into force and by rolling out privacy-focused updates to their mobile phone software, Apple and Google have been labelled “the world’s biggest privacy regulators”.⁷¹ A look into the legislative history of the DSA reveals that stakeholder groups, especially business organisations and start-ups, stated that not all types of platforms should be facing all types of legal obligations.⁷² Press publishers did not want hosting services such as comments sections on newspapers’ websites to be covered.⁷³ It at least looks like with the DSA, interest groups other than the entities which would eventually fall into the VLOP-category were successful in avoiding some costs imposed by the new regulation.⁷⁴ At the same time, the prioritization and targeting of content on VLOPs was seen by many stakeholders as needing algorithmic accountability and transparency audits.⁷⁵ Independent system audits, risk assessments, reporting, and data access to researchers and regulators were seen as essential when countering the spread of disinformation on platforms.⁷⁶ Academic institutions in particular stated the difficulty of conducting research because of an inconsistent ac-

⁶⁹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1. See Mark Dempsey, Keegan McBride and Joanna J Bryson, ‘The Current State of AI Governance – an EU Perspective’ (21 April 2021) <<https://osf.io/preprints/socarxiv/xu3jr/>> accessed 12 September 2021, 8; themselves drawing on: Christian Peukert, Stefan Bechtold, Michail Batikas and Tobias Kretschmer, ‘European Privacy Law and Global Markets for Data’ (2020) <https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3560392> accessed 12 September 2021.

⁷⁰ Cf. Yandle (n 25). Yandle’s own theory of regulation, the theory of ‘Bootleggers and Baptists’, relies on the formation of political coalitions between the regulated industry itself and other, often socially or morally motivated interest groups, cf. Shughart and Thomas (n 26), 592. Privacy regulation would seem to be an interesting empirical test case for it.

⁷¹ Mark Scott and Vincent Manancourt, ‘Google and Apple are the world’s biggest privacy regulators’ *Politico* (Brussels, 27 April 2021) <<https://www.politico.eu/article/google-apple-privacy-regulators-gdpr-floc/>> accessed 12 September 2021.

⁷² Commission (n 3), para 167.

⁷³ *Ibid.*

⁷⁴ In other words, groups in the same industry may be split among some margin, creating a heterogeneous field of interest groups, cf. Shughart and Thomas (n 26), 593.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

cess to relevant data.⁷⁷ Start-ups and SMEs feared their growth being stifled if such obligations were not limited to big platforms.⁷⁸

Third, the DSA itself states that “very large online platforms may cause societal risks, different in scope and impact from those caused by smaller platforms. Once the number of recipients of a platform reaches a significant share of the Union population, the systemic risks the platform poses have a disproportionately negative impact in the Union.”⁷⁹ The proposal thus frames the VLOP-threshold as the outcome of a proportionality-based risk assessment. Proportionality-based reasoning, however, does not logically require thresholds.⁸⁰ Moreover, the threshold also implicitly assumes that smaller platforms do not pose risks as severe as those posed by VLOPs. This, however, is not self-evident. If a platform with less than 45 million monthly active users disseminates content that seriously infringes, for example, rights to non-discrimination, then the risk to society may well be higher compared to that of a VLOP with light infringements of non-discrimination rights.⁸¹ Or take heavily intrusive niche platforms as an example: so called “revenge porn” websites such as Texxxxan.com were sued for disseminating user-submitted pornographic pictures of usually ex-wives or ex-girlfriends, usually without the permission of the subjects.⁸² Here, the harm caused to the subjects does not depend on how many people actually saw the pictures.⁸³ Deep fakes – i.e., manipulated content that appreciably resembles existing persons or other entities or events⁸⁴ – or misinformation campaigns in general can similarly be severely harmful even with a lower number of active users being exposed to them.

Two question marks thus remain behind the VLOP-threshold. First, from a pure risk-assessment perspective, the

DSA-threshold appears to be unnecessary.⁸⁵ Simple pragmatic considerations may have played a role in its establishment. In light of scarce financial and human resources in those authorities tasked with the supervision of digital services,⁸⁶ it may seem sensible to focus on those entities that expose the largest number of people to risks regardless of their (relative) severity. Second, in as much as the category of VLOPs was created for the sake of protecting European competitors in the platform economy from regulatory obligations, the VLOP-threshold may prove counterproductive for the protection of European consumers and citizens. This aim would be more in line with the regulatory goals of the DMA, i.e., to increase the contestability of markets. There is ample support for the view that the informational power behind recommender systems and targeted advertising can cause harm to people.⁸⁷ The focus of detecting those risks only if they occur within big platforms leaves a blind spot. Finally, one may need to consider the potential option for a VLOP to spin off some of its functions to fall below the threshold and continue its service otherwise, and thereby escape regulation under the DSA.

This is not to say that platforms’ size is irrelevant for risk assessments. Quite the contrary; market power aggravates the problem that targeting consumers based on their behaviour siloes them in their choices based on their inferred preferences.⁸⁸ What is problematic about the DSA is that risk assessments and audits only kick in once a platform is big enough to be classified as a VLOP. The risks addressed by the DSA, however, are not rooted in platform size *per se* but in the use of Big Data analytics to boost traffic and advertising sales. At the same time, however, key VLOPs will also be gatekeepers under the DMA and thus appear capable of leveraging their market power against their auditors. Moreover, even VLOPs which are not gatekeepers will, by legislative design, control the demand-side for independent audits and hence be powerful actors in the commissioning of audits. The next section will take these points further and describe the implications of the ensuing regulatory dependency.

3. Pushing responsibility downstream: third-party audits

By making yearly audits mandatory, the DSA will almost inevitably contribute to the growth of algorithmic audits as well as risk and impact assessments as an industry.⁸⁹ As mentioned in the introduction, research practices and methods are still emerging.⁹⁰ Many of the existing approaches are not yet ready to be implemented and the evidence base and best-

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ DSA, para 54.

⁸⁰ Cf. Dempsey, McBride, Bryson (n 69), 11.

⁸¹ For the functioning of the proportionality principle, see: Giovanni Sartor, ‘The Logic of Proportionality: Reasoning with Non-Numerical Magnitudes’, (2013) 14 German LJ 1419. For a critique of proportionality reasoning in the digital domain, see Filippo Fontanelli, ‘The Mythology of Proportionality in Judgments of the Court of Justice in the European Union on Internet and Fundamental Rights’, (2016) 36 OJLS 630. For a discussion of online racial discrimination in search ads for background-check platforms, see Latanya Sweeney, ‘Discrimination in Online Ad Delivery’ (2013) 56 Communications of the ACM 44.

⁸² Nathan Ingraham, ‘“Revenge porn” site Texxxxan.com and host GoDaddy targeted in class-action lawsuit’ *The Verge* (21 January 2013) <<https://www.theverge.com/2013/1/21/3900852/revenge-porn-site-and-host-godaddy-targeted-in-class-action-lawsuit>> accessed 12 September 2021.

⁸³ Consider also pages such as BustedCheaters.com that allow people to anonymously accuse others of being fraudsters or paedophiles, cf. Kashmir Hill, ‘A Vast Web of Vengeance’ *The New York Times* (New York, 30 January 2021) <<https://www.nytimes.com/2021/01/30/technology/change-my-google-results.html>> accessed 12 September 2021.

⁸⁴ Cf. the definition in Art. 52(3) European Commission, Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts COM(2021) 206 final, 21.04.2021.

⁸⁵ For a critique of risk-based approaches to audit AI systems in general, see: Raji et al. (n 9), 37.

⁸⁶ Commission (n 3), para 167.

⁸⁷ Laux, Wachter and Mittelstadt (n 2); Hacker (n 2); Silvia Milano, Brent Mittelstadt, Sandra Wachter and Christopher Russell, ‘Epistemic fragmentation poses a threat to the governance of online targeting’ (2021) 3 Nature Machine Intelligence 466.

⁸⁸ Laux, Wachter and Mittelstadt (n 2).

⁸⁹ For an explanation of the two different approaches, see: Ada Lovelace Institute (n 10).

⁹⁰ See the references in n 10.

practice approaches are still in development.⁹¹ Information asymmetries between digital platforms and the social science research community continue to play a role. For example, social scientists require social media data for their research but often lack access. As one researcher puts it: “Sometimes you spend a lot of time trying to find things out that were already known in companies.”⁹² For example, in February 2020 Facebook gave social scientists access to data on 38 million URLs relating to civic discourse that were shared publicly on the social network between January 2017 and July 2019.⁹³ To protect the privacy of its users, Facebook deployed a novel method to ensure user anonymity, differential privacy (DP).⁹⁴ As DP injects noise into the data, researchers have to find ways to adapt their methods to differentially private data sets.⁹⁵

The previous section showed that the VLOP-category, though not entirely without merit, appears to incorporate a policy goal otherwise soundly pursued by the DMA, namely, to protect European SMEs and start-ups and reinstate the contestability of markets. This section begins by analysing how due to their size, VLOPs will be in a position to leverage their market power against their mandatory auditors, hence creating the risk of ‘audit capture’ (3.1). It has been argued before that the DSA does not feature a specific supervisory framework for the auditors to “audit the auditors”.⁹⁶ What has not been sufficiently appreciated thus far is the dependence created by the downstream role given to third-party auditors.

The problems that market power creates for external audits do not end there. By allowing VLOPs to choose their own auditors, a set of a few private auditors may become the auditors of choice for big platforms. The resulting supply-side concentration in the market for external audits can, however, negatively influence the expected quality of audits, as a brief excursion into the historical precedent of the global financial crisis of 2007–2008 will demonstrate (3.2.). Both effects predicted in this section are strong enough to require mitigation by law.

3.1. The risk of audit capture under the DSA

Tying algorithmic audits and risk assessments as well as the access to data to the size of the regulated entities in the DSA creates a new problem for the emerging field: the novel regulatory ecosystem with third-party auditors and risk assessors is itself dependent on their clients being big enough to be a VLOP according to the DSA if they want to receive commissions under the DSA. In other words, the VLOPs are bound to dominate the demand-side of the new market for audits. This dependency can impede the quality of the audits as it affects

the incentives for auditors to scrutinize their clients. Moreover, the DSA subjects VLOPs to yearly independent audits “at their own expense”.⁹⁷ There will thus be a clear need for auditors to ‘play ball’ to get hired.

As mentioned in the introduction, regulatory capture is a persistent phenomenon because it is driven by standard economic incentives, pushing even well-intentioned regulators to cater to the interest of those they are tasked to regulate.⁹⁸ To fulfil their role, regulators often depend on the regulated to receive the information they need and the regulated are often the only audience of their work.⁹⁹ Career incentives also play a role, as the most lucrative jobs for those with the skill specialisation required to regulate a certain industry will lie exactly within that industry.¹⁰⁰ The reasons for capture that apply to regulators also apply to career researchers. Making the case for economists, Zingales argues that access to proprietary data provides a unique advantage in a highly competitive academic market.¹⁰¹ In order to gain access to that data, academic economists are incentivised to develop a reputation to “treat their sources favorably” and cater to industry or the political authority that controls the data.¹⁰²

It is hard to see why any of the above should not apply to independent auditors and vetted researchers tasked to scrutinise digital platforms for societal risks under the DSA. The structure of the market for those audits, imposed by the VLOP-threshold and the concentrated structure of digital platform markets, may well exacerbate those tendencies. While auditors are not regulators themselves, emphasizing the risk of ‘audit capture’ under the DSA is helpful as it draws on the same economic logic as regulatory capture, interest group theory, and Zingales’ adaptation thereof to economists’ work. For auditors and risk assessors, it will be in their own best interest to continue to receive commissions from VLOPs under the DSA, either for monetary and careerist reasons or simply for access to data.

3.2. Supply-side concentration and the lessons from audits in finance

Relatedly, another consequence may follow from the DSA’s focus on VLOPs: auditors will only ever assess a small number of platforms in their capacities under the DSA. Some auditors will likely emerge as repeat players. This can, in turn, lead to market concentration in the emerging platform audit industry. Concentration within the audits market is potentially detrimental to the (perceived) quality of audits and assessments. Lessons learned in other industries such as accounting and finance can be instructive.

First, there is economic research on the market for accounting audits which shows that concentration at the

⁹¹ Ada Lovelace Institute (n 10), 4.

⁹² Heidi Ledford, ‘Facebook gives social scientists unprecedented access to its user data’ *Nature* (3 May 2019) <<https://www.nature.com/articles/d41586-019-01447-5>> accessed 12 September 2021.

⁹³ Jeffrey Mervis, ‘Researchers finally get access to data on Facebook’s role in political discourse’ *Science* (13 February 2020) <<https://www.sciencemag.org/news/2020/02/researchers-finally-get-access-data-facebook-s-role-political-discourse>> accessed 12 September 2021; Ledford (n 92).

⁹⁴ Mervis (n 93).

⁹⁵ Ibid.

⁹⁶ Cauffmann and Goanta (n 11), 14.

⁹⁷ Art. 28(1) DSA.

⁹⁸ Zingales (n 28), 124.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid., 124–125. Also similar is the fact that outside of academia, the natural audience of economists’ work is either people in business or the government officials who apply some of that knowledge, cf. *ibid.* Again, VLOP-auditors are likely not any different from economists in this regard.

demand-side of the market for audits can lead to concentration at the supply side.¹⁰³ This means that we may see a set of few private auditors becoming the auditors of choice for the big platforms. This would not be a trivial development. Regulators around the globe have been worrying for some time now about the effect on pricing and quality of four firms dominating the market for accounting audits (the ‘Big Four’: Deloitte, Ernst & Young, PricewaterhouseCoopers, and Klynveld Peat Marwick Goerdeler).¹⁰⁴

Second, credit rating agencies (CRAs) are widely seen as major contributors to the financial crisis in the 2000s by having assigned inflated ratings of subprime mortgages to increase their revenues.¹⁰⁵ In the time leading up to the crisis, the CRA market was highly concentrated with three companies having a combined market share of over 90% (the “Big Three”: Moody’s, Standard and Poor’s and Fitch).¹⁰⁶ Due to the oligopolistic structure of the market, CRAs were (and still are) concerned with their reputation – their most valuable asset – in relation to each other. This can lead to so-called “herding” behaviour: CRAs factoring the evaluations by rival CRAs into their own ratings.¹⁰⁷

These two examples show that merely establishing an obligation to be assessed by independent auditors does not necessarily guarantee high quality audits and effective governance. Assessing the conformity with regulatory standards through commercial third-party entities that are competing against each other for business (or in case of career researchers: access to data) is not a perfect solution. Relying on for-profit auditors has been criticised not only in accounting and finance but also in areas of products safety such as the EU Medical Devices Regulation.¹⁰⁸ Generally speaking, in many sectors the

European Union has previously created a European market amongst auditors and risk assessors in order to overcome obstacles to trade that were posed by Member States’ reliance on national auditors and assessors.¹⁰⁹

In the platform economy, it appears that the market power of platforms can significantly aggravate these issues. Market power matters not only for the contestability of markets (i.e., the DMA) but also for audits on societal risks (i.e., the DSA). Of course, the demand for algorithmic audits may also grow outside of the DSA, thus diversifying the client base of auditors. For this to happen, however, the DSA would itself have to rely on developments outside of its own scope. At this point in time, it thus seems prudent to install safeguards against ‘audit capture’ and concentration in the audit and risk assessment market. The following section presents several such suggestions.

Moreover, VLOPs may have a certain gravity effect on their auditors, pulling the emerging methods and approaches in the field towards bespoke solutions for the platform in question. Consider Facebook’s new oversight board. It is an in-house review mechanism to uphold or reverse Facebook’s content decisions in light of people’s right to free expression and online safety.¹¹⁰ The oversight board was staffed with mostly law professors, a move that has been interpreted as serving the goal of setting precedents through its decisions which real courts will consider in their own reasoning.¹¹¹ In this regard, it is interesting to note that David Kaye, a former UN rapporteur, fears that while the board features credibility and independence, “is already sucking the oxygen out of other initiatives from the UN and civil society to develop cross-industry oversight.”¹¹²

4. Improving audit structures in the platform economy

As mentioned, algorithmic audits and algorithmic risk/impact assessments are an emerging field that requires the development of novel methods and approaches. The field will most likely become relevant in many industries, not least in finance itself, where automation and artificial intelligence play

¹⁰³ See, for example, Markus Schaen and Steven Maijor, ‘The Structure of the Belgian Audit Market: the Effects of Clients’ Concentration and Capital Market Activity’ (1997) 1 Int J Audit 151.

¹⁰⁴ Joshua L. Gunn, Brett S. Kawada and Paul N. Michas, ‘Audit market concentration, audit fees, and audit quality: A cross-country analysis of complex audit clients’, (2019) 38 J Account Public Policy 1. For opposing results (i.e., concentration in the market for audits leading to better quality), see: Sanjay Kallapur, Srinivasan Sankaraguruswamy and Yoonseok Zang, ‘Audit Market Concentration and Audit Quality’ (3 February 2010) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1546356> accessed 12 September 2021.

¹⁰⁵ Stefano Lugo, Annalisa Croce and Robert Faff, ‘Herding Behavior and Rating Convergence among Credit Rating Agencies: Evidence from the Subprime Crisis’ (2015) 10 Rev Finance 1703, 1703; Francesco Sangiorgi and Chester S. Spatt, ‘The Economics of Credit Rating Agencies’ (26 January 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3055889> accessed 12 September 2021; Maurice Mullard, ‘The Credit Rating Agencies and Their Contribution to the Financial Crisis’ (2012) 83 Political Quarterly 77.

¹⁰⁶ Lugo, Croce and Faff (n 105), 1704, 1709. Drawing on market share data in: Lawrence J. White, ‘Markets: The Credit Rating Agencies’ (2010) 24 J Econ Perspectives 211, 216–217.

¹⁰⁷ Lugo, Croce and Faff (n 105), 1703.

¹⁰⁸ Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, amending Directive 2001/83/EC, Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009 and repealing Council Directives 90/385/EEC and 93/42/EEC [2017] OJ L117/1. For a critique of the conformity assessments therein: Chris Allan, Thomas J Joyce and Allyson M

Pollock, Europe’s new device regulations fail to protect the public: Commercial interests and lack of transparency remain key weaknesses, (2018) 363 British Medical Journal (Online) <<https://www.bmj.com/content/363/bmj.k4205>> accessed on 12 September 2021.

¹⁰⁹ Cf. Jean-Pierre Galland, ‘The Difficulties of Regulating Markets and Risks in Europe through Notified Bodies’ (2013) 4 EJR 365.

¹¹⁰ Facebook Oversight Board, ‘Ensuring respect for free expression, through independent judgement’ <<https://oversightboard.com>> accessed 12 September 2021.

¹¹¹ Kate Klonick, ‘Inside the Making of Facebook’s Supreme Court’ The New Yorker (New York, 12 February 2021) <<https://www.newyorker.com/tech/annals-of-technology/inside-the-making-of-facebooks-supreme-court>> accessed 12 September 2021.

¹¹² John Thornhill, ‘Don’t leave framing free expression to Facebook’s ‘Supreme Court’ Financial Times (London, 6 May 2021) <<https://www.ft.com/content/3ca54139-96d8-449f-98d4-72f14626ea27>> accessed 12 September 2021.

an ever-bigger role.¹¹³ Large platforms – ‘gatekeepers’ and ‘VLOPs’ – will almost certainly be important actors on the demand-side of audits. It is thus crucial to start thinking about safeguards against audit capture and adverse incentives in the DSA. Lessons learned in other industries and regulatory frameworks can provide blueprints. The following sub-section therefore looks at reforms in financial auditing in the aftermath of the global financial crisis, emphasising the importance of enlarging the set of auditors of large platforms (4.1). While there are no simple solutions on the horizon, assessing the quality of platform audits is further complicated by a lack of clear benchmarks for the legality of targeted advertising and recommender systems (4.2).

4.1. Providing safeguards against capture and adverse incentives

Generally speaking, safeguarding the independence of auditors and controlling the quality of their audits requires choosing legal instruments, which itself can turn into a hotly debated policy question.¹¹⁴ One main variable is the choice between *ex ante* regulation (including licencing and professional standards) and *ex post* liability.¹¹⁵ The aftermath of the financial crisis of 2008 saw a series of high-level inquiries into the role of auditors and the effectiveness of their audits.¹¹⁶ Concerns over concentration in the market for audit services led to regulators looking into rules for auditor rotation,¹¹⁷ joint audits,¹¹⁸ and appointment and remuneration,¹¹⁹ amongst other issues. The EU revised its Auditing Directive.¹²⁰ To safeguard independence, key audit partners have to rotate after a maximum period of seven years from the date of appointment and

are allowed to participate in the audit of the audited entity again after a period of at least two years.¹²¹ To prevent revolving doors, auditors shall not be allowed to take up a key management position in the audited entity before a period of at least two years has elapsed since he or she resigned as a statutory auditor or key audit partner from the audit engagement.¹²² A French system of joint audits, in which companies are required to appoint two different audit firms working together and jointly signing the audit report was considered by the European Commission.¹²³ Joint audits were seen as a means for smaller audit firms to enter the concentrated audit market and audit large corporations.¹²⁴ Similarly, it was suggested by the European Parliament that credit issuers should appoint at least one CRA with a market share below ten per cent in order to spur competition between CRAs and avoid herding behaviour.¹²⁵ The Commission further looked into a novel model, tested in German cooperatives and savings banks, wherein the appointment, remuneration and duration of the audit engagement would be the responsibility of a third party, such as a regulator, rather than the company itself.¹²⁶

Of course, we do not (yet) witness concentration in the market for algorithmic audits. However, enlarging the set of audit firms receiving commissions under the DSA would also disperse the access to data held by digital platforms. This is important as platforms’ granting and withdrawing of access to data can serve as a strategic means to incentivise auditors and vetted researchers to ‘play ball’.¹²⁷ Just recently, Facebook suspended the personal accounts of researchers from New York University’s Ad Observatory who studied ad transparency and misinformation.¹²⁸ Shortly after, Facebook shut down a research project by AlgorithmWatch which analysed prioritisation of pictures and videos on Instagram, which is owned by Facebook.¹²⁹ As mentioned, Art. 31(2) DSA provides for Digital Services Coordinators to request VLOPs to grant vetted researchers access to data, which, in turn, incentivises vetted researchers to establish good relationships with the respective Digital Services Coordinator.

¹¹³ On how financial auditing has been lagging behind this process, see Raji et al. (n 9), 36–37.

¹¹⁴ For the financial accounting industry, see exemplarily: Anna Samsonova-Taddei and Christopher Humphrey, ‘Risk and the construction of a European audit policy agenda: The case of auditor liability’ (2015) 41 Account Organ Soc 55.

¹¹⁵ Cf. seminally: Steven Shavell ‘Liability for Harms versus Regulation of Safety’ (1984) 13 JLS 357; Steven Shavell ‘A Model of the Optimal Use of Liability and Safety Regulation’ (1984) 15 Rand J Econ 271. On licencing, professional standards, and liability, see exemplarily: Marleen Willekens, Anthony Steele and David Miltz, ‘Audit Standards and Auditor Liability: A Theoretical Model’ (1996) 26 Account Business Research 249, 249.

¹¹⁶ See Michael Kend and Ilias Basioudis, ‘Reforms to the Market for Audit and Assurance Services in the Period after the Global Financial Crisis: Evidence from the UK’ (2018) 87 Australian Account Rev 589; Hatice Kubra Kandemir, ‘The EU law on auditing and the role of auditors in the global financial crisis of 2008’ (2013) 10 Int J Disclosure Governance 213.

¹¹⁷ Ibid., 219–220; Kend and Basioudis (n 116), 593; Association of Chartered Certified Accountants (ACCA), ‘Audit under fire: a review of the post-financial crisis inquiries’ (London, May 2011), 7–8, <<https://www.accaglobal.com/my/en/technical-activities/technical-resources-search/2011/may/audit-under-fire.html>> accessed 12 September 2021.

¹¹⁸ Kandemir (n 116), 219; ACCA (n 117), 8.

¹¹⁹ Kandemir (n 116), 219.

¹²⁰ Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts, [2014] OJ L158/196 (Auditing Directive).

¹²¹ Art. 42(2) Auditing Directive.

¹²² Art. 42(3) Auditing Directive.

¹²³ Kandemir (n 116), 219; citing: European Commission, Green Paper Audit Policy: Lessons from the Crisis COM(2010) 561 final, 13.10.2010.

¹²⁴ Kandemir (n 116), 219.

¹²⁵ Lugo, Croce and Faff (n 105), 1729.

¹²⁶ Kandemir (n 116), 219; citing: European Commission (n 123).

¹²⁷ As mentioned, Art. 31(2) DSA provides for Digital Services Coordinators to request VLOPs to grant vetted researchers access to data, which, in turn, incentivises vetted researchers to establish good relationships with the respective Digital Services Coordinator.

¹²⁸ Laura Edelson and Damon McCoy, ‘We Research Misinformation on Facebook. It Just Disabled Our Accounts’ *The New York Times* (New York, 10 August 2021), <<https://www.nytimes.com/2021/08/10/opinion/facebook-misinformation.html>> accessed 12 September 2021.

¹²⁹ Russell Brandom, ‘Facebook shut down German research on Instagram algorithm, researchers say’ *The Verge* (New York, 13 August 2021), <<https://www.theverge.com/2021/8/13/22623354/facebook-instagram-algorithm-watch-research-legal-threat>> accessed 12 September 2021.

Measures such as auditor rotation and joint audits likely both have upsides and downsides. For example, auditor rotation may also negatively influence the quality of audits, as new auditors will need time to gain information on their new client.¹³⁰ At least in financial auditing, there is empirical research that suggests that accounting fraud is more frequent in the first years of the audit-client relationship.¹³¹ The point here is not to suggest a particular model of audit regulation, *ex ante* or *ex post*, but to argue that without any such rules the DSA's enforcement is left vulnerable to capture, conflicts of interests, and incentive structures that lower the expected quality of audits. Selecting effective safeguarding rules will, however, not be a simple matter, for at least two reasons. First, with its introduction of several 'new' categories of auditors and assessors, the DSA has turned the required choice of instruments into an intricate task. Trusted flaggers such as Europol will very likely have different incentives from vetted researchers operating from a university campus. Independent auditors working for profit and in competition to each other will again diverge in their motivation. Second, judging whether the delivered audits and assessments are substandard or not is more difficult in the absence of clear rules on the legality of some of the most pervasive phenomena in the platform economy, targeted advertising, and recommender systems, as the following final sub-section argues.

4.2. The lack of a regulatory benchmark

It should be clear by now that the DSA proposal requires improvement as regards the influence of big platforms over its enforcement. Apart from questions around the choice of instruments another issue complicates this task: the DSA lacks substantive rules on targeted advertising, recommender systems, and content moderation that go beyond the *status quo* of current EU law.¹³² Without such rules, audits and risk assessments may lack a benchmark against which to measure their performance.

Take targeted advertising as an example. Both the DMA and the DSA directly address advertising as a key area of concern. The DMA states that "conditions under which gatekeepers provide online advertising services to business users including both advertisers and publishers are often non-transparent and opaque."¹³³ Advertisers and publishers often lack information about the effect of a given advert.¹³⁴ The DMA thus obligates gatekeepers to provide advertisers and publishers with free of charge access to the performance measuring tools of the gatekeeper and the information necessary to carry out their own independent verification of the provision of the relevant online advertising services.¹³⁵ Likewise, the DSA mainly

provides obligations for transparency and disclosure which aim to reduce the information asymmetry in digital platform markets. These rules will facilitate the auditing of platforms' consumer targeting.

Some, however, criticise the DSA for not going beyond the *status quo*, as consumers are already given basic information about ads and targeting and no additional limits on the manipulation of consumers through micro-targeted ads are introduced.¹³⁶ In fact, the legality of online behavioural targeting and the algorithmic manipulation of consumer decision-making remains largely an issue for consumer law and privacy/data protection law.¹³⁷ Of course, if practices of targeted advertising were found to be illegal under EU law, then the DSA would catch those practices as illegal content.¹³⁸ However, without an outright ban of behavioural targeting (and/or recommender systems), the legality of practices of online advertising will have to be decided on a case-by-case basis.¹³⁹

Moreover, from the perspective of consumer welfare, the economic effects of targeting on consumer welfare are ambiguous. Some consumers tend to gain from an increased matching of ads with their preferences and some consumers tend to lose through being exploited based on their behavioural predispositions.¹⁴⁰ The DSA does not list the economic exploitation of consumers as a systemic risk, that is, unless it was found to be illegal under consumer law or privacy law.¹⁴¹ Without a more comprehensive theory of harm for algorithmic targeting and behavioural exploitation, the European Commission's transparency approach lacks an important benchmark for the quality of its downstream audits and risk assessments.

4. Conclusion

While a step forward in protecting consumers and citizens, this article has shown that the DMA and DSA proposals introduce opportunities for large platforms to leverage their market power against their new auditors. This threatens to impede the quality of the audits and risk assessments under the DSA and to harm consumers and citizens. Moreover, the fo-

¹³⁰ Kandemir (n 116), 220.

¹³¹ See the references in: *ibid.*

¹³² Suggesting solutions regarding online advertising and recommender systems: Sandra Wachter, 'Affinity profiling and discrimination by association in online behavioural advertising' (2020) 35 Berkeley Tech LJ (forthcoming). On the European Commission's limited ability to regulate content, see Eifert, Metzger, Schweitzer and Wagner (n 33), 1025–1026.

¹³³ DMA, para 53.

¹³⁴ DMA, para 53.

¹³⁵ DMA, para 53; See Art. 5(g) DMA.

¹³⁶ See Dempsey, McBride and Bryson (n 69), 9, citing: Aline Blankertz and Julian Jaursch, 'What the European DSA and DMA proposals mean for online platforms' Brookings Tech Stream (Washington, D.C., 14 January 2021) <<https://www.brookings.edu/techstream/what-the-european-dsa-and-dma-proposals-mean-for-online-platforms/>> accessed 12 September 2021 and European Digital Rights (EDRI), 'The EU's attempt to regulate Big Tech: What it brings and what is missing' (Brussels, 18 December 2020) <<https://edri.org/our-work/eu-attempt-to-regulate-big-tech/>> accessed 12 September 2021.

¹³⁷ Laux, Wachter and Mittelstadt (n 2) and Hacker (n 2).

¹³⁸ Cf. Art. 2(g) DSA.

¹³⁹ Cf. Laux, Wachter and Mittelstadt (n 2), 738–739.

¹⁴⁰ Cf. *ibid.*, 724–726.

¹⁴¹ For an analysis of the legality of consumer exploitation under consumer law, especially the Unfair Commercial Practices Directive, see Laux, Wachter and Mittelstadt (n 2); Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2015] OJ L149/22.

cus on large-size platforms leaves a regulatory blind spot in the DSA, as smaller platforms with the ability to cause serious harm do not face a similar level of scrutiny.

The DSA thus needs to take its joint legislative history with the DMA seriously, acknowledge the 'gatekeeper' market power of its VLOPs, and include instruments that safeguard against capture by platforms and adverse incentive structures. The recent history of re-regulation of audits in finance may provide some blueprints for the platform economy. Auditor rotation, non-compete clauses, joint audits, and maximum market share thresholds are options worthy of consideration. More widespread access to research data can to some degree remedy the need for researchers to 'play ball' with dominant platforms. For the European Union's digital single market, the growth of a regulatory ecosystem with reliable independent auditors and risk assessors is of paramount importance. Waiting until audit failure occurs and harms consumers and citizens will inevitably lower the trust in digital services. This predictable outcome can and should be avoided by proactively amending the DSA to defuse VLOPs' potential for regulatory capture.

Declaration of Competing Interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

Data for reference

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