



Revista Digital de Derecho Administrativo
ISSN: 2145-2946
Universidad Externado de Colombia

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Revista Digital de Derecho Administrativo, no. 31, 2024, pp. 329-356
Universidad Externado de Colombia

DOI: <https://doi.org/10.18601/21452946.n31.13>

Available in: <https://www.redalyc.org/articulo.oa?id=503877922012>

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Administrative Sanctioning Regime for Gatekeepers: Consequences for Non-Compliance with the Digital Markets Act

JUAN FRANCISCO RODRÍGUEZ AYUSO^{1/2}

ABSTRACT

The main objective of this research study is to offer a systematic analysis of the administrative sanctioning regime that applies to large digital platforms. These platforms, often referred to as super intermediaries, possess the power to disrupt the delicate balances *ad intra* and *ad extra* of markets, even within entire digital ecosystems that have emerged due to advancements in New Information and Communication Technologies. To this end, this paper explores the transformation brought about by the information society from a legal perspective and how, in response to the numerous challenges and questions arising from this new digital reality, it has led to regulations specifically designed to govern such platforms. The two key regulations in

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- 2 This work has been done within the framework of the Research Project "Los mercados para el intercambio de datos o data marketplaces. Situación jurídica y retos tecnológicos y empresariales", of the Universidad de Granada, funded by the Unit of Excellence "Sociedad Digital: Seguridad y protección de derechos", of which Dr. José Antonio Castillo Parrilla is Principal Investigator.

this regard are the Digital Services Act and, particularly relevant for this article, the Digital Markets Act. These regulations are instrumental in fostering competitive and equitable markets.

Keywords: Gatekeepers, Sanctions, Suspension, Non-compliance, Termination.

Régimen administrativo sancionador para los guardianes de acceso: consecuencias para el incumplimiento de la Digital Markets Act

RESUMEN

El objetivo principal del presente estudio de investigación consiste en ofrecer un análisis sistemático del régimen administrativo sancionador que recae sobre grandes plataformas digitales, en cuanto superintermediadores con poder de alterar los necesarios equilibrios, *ad intra* y *ad extra*, de mercados e, incluso, completos ecosistemas digitales surgidos al amparo de las nuevas tecnologías de la información y de la comunicación. Para ello, se ahondará en la transformación que imprime la sociedad de la información desde una perspectiva legal y cómo, para dar respuesta a los múltiples desafíos e interrogantes que propicia esta nueva realidad digital, nace una normativa que regula específicamente este tipo de plataformas: la Digital Services Act y, sobre todo, en lo que aquí interesa, la Digital Markets Act. Estas regulaciones son un instrumento para el fomento de mercados disputables y leales.

Palabras clave: *gatekeepers*, sanciones, suspensión, incumplimiento, extinción.

INTRODUCTION: THE POWER OF THE INTERNET AND REGULATORY INSTRUMENTS TO LIMIT THE HARMFUL EFFECTS OF LARGE DIGITAL PLATFORMS

The benefits of the multiple manifestations brought about by the arrival and continued presence of the New Information and Communication Technologies (commonly identified under the acronym ICTs) are well known nowadays³. We are also aware of the disadvantages or, at least, the risks that, in

3 Julián Valero Torrijos y Rubén Martínez Gutiérrez, "Las bases jurídicas de la modernización tecnológica en las Administraciones Públicas", *Derecho y Nuevas Tecnologías de la Información y la Comunicación*, Cizur Menor: Thomson Reuters Aranzadi, Javier Plaza

its multiple manifestations, the development of the digital reality can bring with it. At present, it occupies a large part of the relationships of all kinds (economic, social or, of course, legal) that take place between subjects who, born in the context of the information society have to adapt to the demands of this new context.

If we turn our attention to the field of law, it is possible to see how, on occasions, the internet favours a modernisation of traditional legal institutions. These institutions are now articulated or channelled digitally, and which will have to be harmonised with the new electronic form or coating, maintaining their nature unaltered. In other words, the worldwide web stimulates the emergence and, even more, the consolidation of innovative creations that require a response from national and supranational legal systems (in consideration of their strongly expansive effect), a response that frequently is not developed at the speed demanded by the pace of events in practice.

It is precisely in this context that we find ourselves when we speak of intermediated digital markets: They are spaces that encourage the interconnection between subjects who, with different but complementary objectives, allow the exponential multiplication of the rates of economic activity and the generation of previously unknown and unimaginable social relations. At the forefront of these markets (which can become true ecosystems) are the digital platforms. These platforms play a central role in the coordination of the underlying relationships between professional users and end users, as well in the distribution of all types of benefits. They also have a fundamental role in the case of sustainability and capacity for consolidation of this scenario. This is due to its attractiveness, to obstacles to the entry of new competitors or to their absence in the underlying relationships between the intermediation platform and the intermediated subjects.

For this reason, it is necessary to establish a legal framework capable of responding to the many questions that the emergence of these new structures (most of which have their origins in the United States) creates in the legal systems of the different States. If we are referring to the European Union, this need requires a harmonised and coherent response to the common objective of consolidating a single European market.

A new regulatory package, known as the Digital Services Act package, has emerged, focused on regulating the actions of platforms in the digital sector. This regulatory package is essentially composed of two fundamental pieces of legislation, as we will see below:

On the one hand, we find Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and

fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (the Digital Markets Act or "DMA")⁴.

Regarding the importance of the emergence of digital platforms, it is convenient to add the significant impact of those that, due to their power, penetration and influence (often accompanied by the large size they occupy in their respective sectors), dominate several of these markets at the same time. For this reason, the DMA seeks to impose obligations on these large super-intermediaries with the clear aim of generating greater contestability in these markets as a whole (by focusing, *ad extra*, on the real possibilities that digital platforms have to overcome obstacles preventing or obstructing their access to the market). It also aims to achieve greater fairness, by means of a higher degree of equality between digital platforms and the users of those platforms to access new clients or suppliers.

To ensure fairness in relations between digital platforms and professional users, this Regulation, as well as Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019, promotes fairness and transparency for business users of online intermediation services (P2B –Platform to Business- Regulation)⁵. However, it has a reduced scope of application, confined to two specific basic platform services (of all those listed in the DMA, as we will have the opportunity to analyse), which are certainly relevant: Online intermediation services and online search engines.

On the other hand, Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (the Digital Services Act or "DSA")⁶. As we can see, all of them have opted for the regulatory legal form⁷, which undoubtedly contributes to greater legal certainty and

4 Official Journal of the European Union (OJEU) L 265/1 of 12 October 2022. It is precisely the Digital Markets Act that clearly explains the reasons that justify the convenience of regulating this phenomenon by means of regulatory instruments that transcend the Member States, indicating a fundamental element, because "[...] while gatekeepers tend to adopt global or at least pan-European business models and algorithmic structures, they can adopt, and in some cases have adopted, different business conditions and practices in different Member States, which is liable to create disparities between the competitive conditions for the users of core platform services provided by gatekeepers, to the detriment of integration of the internal market": Recital 7 DMA.

5 OJEU L 186/57, of 11 July 2019.

6 OJEU L 277/1, of 27 October 2022.

7 For a further analysis of the differences in the nature of the rules produced within the European Union and in the field of administrative law that concerns us now, see Daniel Sarmiento Ramírez-Escudero, "El Derecho administrativo y el Derecho de la Unión Europea", *Lecciones de Derecho administrativo*, Cizur Menor: Civitas Thomson Reuters, Pablo Menéndez García and Antonio Ezquerro Huerva (dirs.), 2019, pp. 99-126; Eduardo Camero Casado and Severiano Fernández Ramos, *Manual básico de Derecho administrativo*, Madrid: Tecnos, 19 ed., 2022, pp. 45-52.

security and to a stronger regulatory uniformity (as opposed to the regulatory disparity inherent in the existence of numerous texts in one, several or all the European Union countries) in the digital context of the European Union. However, the above does not preclude, within the same paragraph and with regard to what is relevant here, Member States from having the power to impose "[...] obligations on undertakings, including undertakings providing core platform services, for matters falling outside the scope of this Regulation, provided that those obligations are compatible with Union law and do not result from the fact that the relevant undertakings have the status of a gatekeeper within the meaning of this Regulation"⁸.

From the previous regulation, and due to its great impact, this paper focuses primarily on the Digital Markets Act, with the aim of exposing the administrative sanctioning regime that this new regulation entails for those gatekeepers (thus called the providers of these super-intermediaries of information society intermediation services) capable, thanks to their relevance, of undermining the development of innovation in the sector in highly competitive conditions⁹. More particularly, it focuses on those cases that determine the breach of the system of obligations and prohibitions designed to guarantee contestable and fair markets within European Union territory. This, without detriment to competition law¹⁰, which has a narrower scope of application (aimed at ensuring the welfare of consumers in economic terms) and provides an *ex post* response^{11/12}.

8 Paragraph five of Article 1 of the Digital Markets Act.

9 Apol·lònia Martínez Nadal, "La Propuesta de Reglamento de Mercados Digitales ('Digital Markets Act'): una aproximación jurídica", *Plataformas digitales: aspectos jurídicos*, Cizur Menor: Thomson Reuters Aranzadi, Apol·lònia Martínez Nadal (dir.), 2021, pp. 116-117.

10 Juan José Montero Pascual and Matthias Finger, "La regulación de las nuevas industrias en red", *Revista General de Derecho de los Sectores Regulados: RSR*, num. 9, 2022, pp. 387-388.

11 Luis Antonio Velasco San Pedro, "El papel del Derecho de la competencia en la era digital", *Revista de Estudios Europeos*, num. 78, 2021, p. 107.

12 In contrast to the DMA, which seeks, *ex ante*, to anticipate the barrier of protection against potential anti-competitive behaviour in sectors of general interest. The above statement is reinforced by recital 11 of this Digital Markets Act, which confirms the objective to be pursued, which is nothing more than "[...] an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market. This Regulation therefore aims to protect a different legal interest from that protected by those rules and it should apply without prejudice to their application". As a complementary basis, see Comisión Nacional de los Mercados y la Competencia (CNMC), Spain, Documento de posición de la CNMC sobre la consulta pública de la Comisión Europea sobre la Digital Services

A preliminary explanatory introduction will start by presenting the basic platform services configured, in an initial regulatory provision, the DMA. Subsequently, we will examine the scenario that arises once obligations are imposed on gatekeepers, where it will be highlighted the positive exemption and updating of obligations, and the negative non-compliance scenarios. In a final part the administrative sanctioning regime is examined, just before sharing the conclusions that we consider are the most relevant in relation to the findings of this study.

1. INFORMATION SOCIETY INTERMEDIARIES' SERVICES SUBJECT TO OBLIGATIONS IMPOSED ON GATEKEEPERS: A BROAD AND EXPANDABLE LIST

The DMA starts from a basic concept around which it articulates the subsequent delimitation of the regime of obligations of those who, under certain conditions and safeguards, provide them. We refer to the term "core platform service" [Article 2(2) of the Digital Markets Act], which, instead of providing a definition of this general category, is limited to circumscribing it, including, as a *numerus apertus* list¹³, a series of services (many of which refer

Act (DSA) y la New Competition Tool (NCT). Disponible en <https://www.cnmc.es/sobre-la-cnmc/documentos-posicion/consulta-ce-plataformas-digitales> (accessed 13 March 2023). For the rest, and in view of the impediments that this economic regulation, as an administrative activity of market regulation, may generate, in practice, in competition law, see Luis Antonio Velasco San Pedro, "La regulación económica como barrera a la competencia: liberalización y política de mejor de su calidad", *Derecho de la competencia y regulación en la actividad de las Administraciones Públicas*, Cizur Menor: Thomson Reuters Civitas, Javier Guillén Caramés (dir.), 2011, pp. 25-47.

- 13 It has been included in the text of the regulation those services that, nowadays, are considered more relevant or that have a greater effect due to the power exercised by the gatekeepers that presumably intervene in this market. However, nothing prevents this group of core platform services from being subsequently expanded or reduced by the European Commission (which assumes an undisputed power in the regulation of these large platforms) by including other services of the digital sector [defined, this, in Article 2(4) DMA] or the removal of any of the existing ones, if the market investigation carried out in accordance with Article 19 DMA leads to a legislative proposal to amend Article 2(2) of the Regulation in order "[...] To ensure that this Regulation remains up to date and constitutes an effective and holistic regulatory response to the problems posed by gatekeepers" (recital 77 DMA).

Despite this, authors such as Juan José Montero Pascual, "La regulación de las plataformas digitales en la Propuesta de Ley de Mercados Digitales de la Unión Europea", *Nuevas Tecnologías 2022*, Valencia: Tirant lo Blanch, Enrique Ortega Burgos (dir.), 2022, p. 362, criticizes the definition of a closed list of services, in technology markets that evolve so rapidly, without a clause that allows the definition of new services to be regulated, since, he understands, this poses the risk that the Regulation becomes out-

to platforms that provide digital services, while others focus on controlling and influencing access to these services –as is the case, for example, with operating systems or virtual assistants¹⁴–), which, then, it defines and which, due to their relevance, we will list below:

Firstly, we have online intermediation services¹⁵ [Article 2(2)(a) DMA], defined [Article 2(5) DMA], by reference, in Article 2(2) of the P2B Regulation as those services which cumulatively satisfy three essential requirements:

a) They are information society services, a quality of the legal nature of these services that can also be extended to all other core platform services.

Information society services are defined in Article 1(1)(b) of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015. This directive establishes a procedure for the provision of information in the field of technical regulations and rules pertaining to Information Society services (codification)¹⁶, and it refers to Article 2(3) of the Digital Markets Act (DMA). In this definition, these services are succinctly categorized under the term “service”. They are identified by listing well-known services derived from the contributions of their regulatory predecessors, which this directive repeals¹⁷. These listed elements serve to specify the essential characteristics that information society services must possess:

dated and a new service emerges that is not included in the closed list and that creates competition problems.

14 European Parliament Research Service, *Regulating digital gatekeepers*, 2020.

15 This is the case, for example, of Airbnb or Amazon.

16 OJEU L 241/1, of 17 September 2015.

17 We are referring, in essence, to Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (Official Journal of the European Communities – OJEC L 204/37 of 21 July 1998–), revoked by Article 10 of Directive 2015/1535. After the amendment introduced by Article 1(2)(a) of Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations (OJEC L 217/18, 5 August 1998), the definition of information society service is added to the text of Directive 98/34/EC; and it does so in terms that, subsequently embodied, by reference, in the still in force Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, finally inherited by Directive (EU) 2015/1535. Directive 2000/31/EC is also known as the Directive on electronic commerce or “ECD” (OJEC L 178/1, of 17 July 2000) and establishes, for the first time, a legal regime for this type of services; it is transposed into Spanish law by Law 34/2002, of 11 July 2002, on information society services and electronic commerce (LSSICE, Official State Gazette –BOE– num. 166, of 12 July 2022), which, thanks to the amendments incorporated in the third final provision of Law 6/2020, of 11 November 2020, regulating certain aspects of electronic trust services (BOE num. 166, of 12 July 2022), is adapted to incorporate, internally, the amendments made by the P2B Regulation.

– They are usually provided in exchange for remuneration. Thus, services such as iOS are provided through the payment of a direct economic compensation; in others, on the other hand, remuneration only takes place on one side of the multilateral market (YouTube, for example) or even has a non-monetary or potential nature (Telegram, among others), as we will see below.

Indeed, the ECD specifically establishes the possibility that certain information society services may be classified even if they are not remunerated by their recipients, provided that they represent an economic activity for the service provider (for example derived from advertising revenue or from the collection and further processing of data subjects' data)¹⁸. This is particularly common in the context of digital platforms, which, as multi-sided marketplaces, may obtain remuneration from one side other than the other, which also benefits from the intermediation¹⁹.

– They are provided at a distance, that is, without the simultaneous and synchronous physical presence of the platform and the users who make use of the intermediation provided by the platform to enable interactions between the different sides of the market. This is what happens with digital platforms (for example Google, WhatsApp or Facebook), which provide their services at a distance, meaning that both the professional user and the end user do not physically and simultaneously coincide with the platform that intermediates them.

In this context, Directive (EU) 2015/1535 excludes certain services from its scope because they do not involve remote provision. These excluded services are those where both the provider and the recipient are physically present in the same location at the same time. This applies even when the delivery of these services involves the use of electronic devices, as is often the situation. It lists in Annex I.1 examples that can be extended to other cases of a similar

18 About the nature of these services and the relevance of the data processing in the digital environment, see Juan Francisco Rodríguez Ayuso, *Ámbito contractual de la firma electrónica*, Barcelona: Bosch, 2018; Juan Francisco Rodríguez Ayuso, *Privacidad y coronavirus: aspectos esenciales*, Madrid: Dykinson, 2020; Juan Francisco Rodríguez Ayuso, *Garantía administrativa de los derechos del interesado en materia de protección de datos personales*, Barcelona: Bosch, 2021; Juan Francisco Rodríguez Ayuso, "Estado de alarma y protección de la privacidad en tiempos de pandemia: licitud del tratamiento de categorías especiales de datos", *Revista de Derecho Político*, num. 110, 2021, pp. 299-318; Juan Francisco Rodríguez Ayuso, "La figura del data protection officer en la contratación pública en España", *Revista Digital de Derecho Administrativo*, num. 25, 2021, pp. 309-336; Juan Francisco Rodríguez Ayuso, "Sanciones relacionadas con la figura del delegado de protección de datos", *Análisis práctico de sanciones en materia de protección de datos –divididas por conceptos y sectores–*, Cizur Menor: Thomson Reuters Aranzadi, Elena Davara Fernández de Marcos y Laura Davara Fernández de Marcos (dirs.), 2021, pp. 663-686.

19 This is the case of services such as Google, which are not paid by the end users who access the searches provided by the web browser, but by the companies that remunerate the platform for inserting their advertising in the results that appear opportunely classified.

nature, with "[...] medical examinations or treatment at a doctor's surgery using electronic equipment where the patient is physically present; (with) consultation of an electronic catalogue in a shop with the customer on site; (with) plane ticket reservation at a travel agency in the physical presence of the customer by means of a network of computers (or with) electronic games made available in a video arcade where the customer is physically present".

– They must be provided by electronic means because they must be sent from the source and received by the recipient by electronic equipment for processing (including digital compression) and data storage, transmitted, channelled, and received entirely by wire, radio, optical means, or any other electromagnetic means. The examples mentioned in the previous point can be used to confirm that digital platforms, besides providing their intermediation services at a distance, also opt, within the modalities offered by this distance (telephony, fax, etc.), to do so through the internet.

In contrast, services whose content is material, even if electronic devices are used, will not be delivered electronically. Examples include automatic ticketing for banks, railways, buses, and similar services, as well as access to road networks or paid parking facilities. Even if electronic devices are employed at entrances or exits to manage access or facilitate payment, these services fall outside the scope of electronic delivery (Annex I.2 of Directive (EU) 2015/1535). Additionally, there are other services that are provided offline, such as the distribution of CD-ROMs or software on diskettes. These services are not delivered through electronic data-processing or storage systems. Examples also encompass voice telephony services, fax and telex services, services provided via voice telephony or fax, medical consultations conducted over the phone or via fax, and legal consultations or direct marketing conducted through these same means.

This is not the case for services transmitting data without first being requested by the user, since they are for an unlimited and unspecified number of persons, receiving them at the same time (point-to-multipoint transmission, instead of point-to-point transmission). This holds true for several types of services, namely television broadcasting services (which include near-video on-demand services) as defined in Article 1(1)(e) of Directive 2010/13/EU of the European Parliament and of the Council dated 10 March 2010. This directive concerns the coordination of specific provisions established by law, regulation, or administrative action within Member States regarding the provision of audio-visual media services, commonly referred to as the Audiovisual Media Services Directive²⁰. Similarly, this exemption

20 OJEU L 95/1, of 15 April 2010. As provided in this provision, we are in the presence of a linear audiovisual communication service, that is, an audiovisual communication service offered by a communication service provider for the simultaneous viewing of programs on the basis of a program schedule.

also applies to radio broadcasting services and teletext television services, as outlined in Annex I.3 of Directive (EU) 2015/1535.

Digital platforms, as market coordinators that facilitate the structure that connects different users with common interests, provide information society services of intermediation, which should not be confused (even though the terminology used by national or European legislation on the matter may be contradictory and misleading²¹, and despite the fact that, in the case of digital platforms, they cumulatively assume the status of providers of intermediaries' information society services of intermediation) with intermediaries' information society services. All of them have the characteristics listed in the previous paragraph. However, while the first ones are services that have a purpose in themselves and have their own substance for those who provide them, the second ones do not, because their purpose is, on the contrary, to facilitate "[...] the provision or use of other information society services or access to information" [Annex. b) LSSICE]²².

b) They allow businesses, that is, professional users²³ to offer goods or services to consumers (end-users), with the objective of facilitating the initiation of direct transactions between them, irrespective of where those transactions ultimately conclude.

21 Furthermore, Section 4 of the ECD uses the term "intermediaries services", while letter b) of the LSSICE annex, which transposes the ECD into Spanish law, uses the term "intermediation services" to refer to the same subcategory of information society services.

22 Among these intermediaries are included, par excellence and since their origin, the following: services relating to the provision of internet access (internet service providers); services that enable the transmission of data over telecommunications networks (mere conduit or routing); services relating to the temporary copying of internet pages requested by users (proxy caching or "buffer memory"); services that enable data, applications or services provided by others to be hosted on the servers themselves (hosting), or services that provide tools for searching, accessing and collecting data or links to other internet sites (searching and linking). For a more detailed description of these services, see Juan Francisco Rodríguez Ayuso, "Servicios de confianza en materia de transacciones electrónicas: el nuevo Reglamento europeo 910/2014", *Contratación electrónica y protección de los consumidores: una visión panorámica*, Madrid: Reus, Leonardo Pérez Gallardo (coord.), 2017, pp. 133-162.

23 Defined, previously, in Article 2(1) of the same P2B Regulation as "any private individual acting in a commercial or professional capacity who, or any legal person which, through online intermediation services offers goods or services to consumers for purposes relating to its trade, business, craft or profession". The DMA [Article 2(21)] expands this definition, in line with its comprehensive scope of application of a wider number of basic platform services, to conceive it as "any natural or legal person acting in a commercial or professional capacity using core platform services for the purpose of or in the course of providing goods or services to end users". Harmonizing both definitions, we could state that the end user will be, for the purposes of this service, that person, natural or legal, who, for professional purposes, offers goods or services to end users, thanks to the intermediation provided by the core online intermediation services platform, or uses the latter within the framework of such offering.

c) They are provided to professional users based on contractual relations between the service provider (the digital platform) and the professional users who offer the goods or services to end users. This last requirement is what really differentiates this type of core online intermediation service from others that we will see below (and which deepen, in their definition, in more singularising differentiating characteristics), which, as digital platforms, also share this intermediary and electronic aspect, although they lack, in many cases, the contractual link necessary for professional users to be able to access end users for an often commercial or promotional purpose. For this reason, it would have been appropriate, in my opinion, to use another name which, in a less confusing or at least more specific way, would have made it possible to distinguish this type of service from all the others legally provided for.

To these online intermediation services, besides the ECD, the DSA and the DMA (in the latter case, only when their providers are acting as gatekeepers), also apply the P2B Regulation and, possibly, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market²⁴. The same applies to online search engines, which will be described below, which are also covered by Regulation (EU) 2019/1150.

Moreover, within this apparently broad category of online basic intermediation services, e-commerce marketplaces or software application shops are included, which are defined in Article 2(14) DMA as that subcategory focused "[...] on software applications as the intermediated product or service", which is understood as "any digital product or service that runs on an operating system" [Article 2(15) DMA]. However, if we examine the definition of operating system in Article 2(10) DMA, we see that it conceives it as "[...] system software that controls the basic functions of the hardware or software and enables software applications to run on it".

Secondly, online search engines²⁵ [Article 2(2)(b) DMA], where, once again, the technique of cross-referencing is used to define them. In particular, we have to turn again to the P2B Regulation, Article 2(5) which clarifies that a search engine is a service "[...] that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found" [Article 2(6) DMA].

Thirdly, online social networking services²⁶ [Article 2(2)(c) DMA]. Here, the Regulation provides a definition of the service as one that "[...] enables end users to connect and communicate with each other, share content and

24 OJEU L 376/36, of December 27, 2006.

25 This is the case, for example, of Google.

26 This is the case, for example, of Facebook or TikTok.

discover other users and content across multiple devices and, in particular, via chats, posts, videos and recommendations" [Article 2(7) DMA]. Indeed, one of the distinctive features of core services of this nature is the absence of the typical connection between professional users and end users that characterizes the general operation of most intermediation services. Instead, in these core services, digital platforms typically connect professional users with each other. This principle also applies to number-independent interpersonal communication services. However, the above expression (allows) highlights the increasingly frequent possibility that professional users may also use them to promote their products or services to end users. In any case, this will not prevent the platform to act as gatekeeper, as rightly underlined in recital 15, *in fine*, of the DMA.

Fourthly, online video-sharing platform services²⁷ [Article 2(2)(d) DMA], where, once again, we turn to an alternative regulatory text to find its definition [Article 2(8) DMA]. This text is Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) which conceives it as that "[...] service, as defined in Articles 56 and 57 of the Treaty on the Functioning of the European Union²⁸, the principal purpose of which is itself or one of its severable parts, or the essential functionality of which is to offer programmes and/or user-generated videos to the general public, for which the platform provider has no editorial responsibility, for the purpose of informing, entertaining or educating, over electronic communications networks as defined in Article 2(a) of Directive 2002/21/EC²⁹, and the organisation of which is determined by the video-sharing platform provider, inter alia by means of automatic algorithms, in particular by means of display, tagging and sequencing" [Article 1(1)(a)*bis*³⁰].

27 This is the case, for example, of YouTube.

28 TFEU, hereinafter.

29 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive –OJEC L 108/33, of 24 April 2002–) defines electronic communications networks in Article 2(2)(a)). Specifically, it conceives them as those "[...] transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed".

30 This letter was incorporated thanks to the amendment made to this Directive by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 Novem-

Fifth, a number-independent interpersonal communication services, as defined in Article 2(2)(e) of the DMA. Once more, this definition is interlinked with another regulation, specifically Article 2(9) of the DMA, which refers to Directive (EU) 2018/1972 of the European Parliament and the Council dated 11 December 2018, establishing the European Electronic Communications Code (CECE)³¹. In Article 2(7) of CECE, this type of service is described as having a fundamental characteristic where it "[...] does not connect with publicly assigned numbering resources, namely, a number or numbers in national or international numbering plans, or which does not enable communication with a number or numbers in national or international numbering plans".

Sixth, operating systems³² [Article 2(2)(f) DMA], which have already been defined above.

Seventh, web browsers³³ [Article 2(2)(g) DMA], easily identifiable as those software applications that allow "[...] end users to access and interact with web content hosted on servers that are connected to networks such as the internet, including standalone web browsers as well as web browsers integrated or embedded in software or similar" [Article 2(11) DMA]. It specifically refers to Web 2.0, 3.0 or even 4.0 and beyond, where web users actively participate in the creation of their content and contribute to the development of the IT infrastructures that enable such intervention³⁴.

Eighth, virtual assistants³⁵ [Article 2(2)(h) DMA], which, also known as "digital butlers"³⁶ are "a software that can process demands, tasks or questions, including those based on audio, visual, written input, gestures or motions, and that, based on those demands, tasks or questions, provides access to other services or controls connected physical devices" [Article 2(12) DMA].

ber 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities (OJEU L 303/69, of 28 November 2018), taking into account the evolution of market realities. In Spain, it is Law 13/2022, of 7 July, General Audiovisual Communication (BOE num. 163, of 8 July 2022) which regulates audiovisual communication at the state level, and which establishes certain rules applicable to the provision of video-sharing service through platform, defining these, in very similar terms to those already indicated, in its Article 2(13).

31 OJEU L 321/36, December 17, 2018.

32 This is the case, for example, of Android, iOS or Microsoft.

33 This is the case, for example, of Safari, Google Chrome, Microsoft Edge, or Firefox.

34 Tim O'Reilly, "What is Web 2.0: design patterns and business models for the next generation of software", *Communications & Strategies*, num. 1, 2007, p. 17.

35 This is the case, for example, of Alexa or Siri.

36 See, for example, the contribution made by Javier Medina, Eduardo Eisman and Juan Luis Castro, "Asistentes virtuales en plataformas 3.0", *IE Comunicaciones. Revista Iberoamericana de Informática Educativa*, num. 18, 2013, pp. 41-49.

Ninth, cloud computing services³⁷ [Article 2(2)(i) DMA], which includes any information society service that enables access to a scalable and elastic pool of shareable computing resources [Articles 2(13) DMA and 4(19) of Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union³⁸]. Due to the functional nature of this type of services, there will be certain occasions where the concept of end users should also include those who, traditionally considered as professional users, make use of them to be able to supply products or provide services to other end users (recital 14, *in fine*, DMA).

Tenth and lastly, online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by an undertaking that provides any of the core platform services listed above [Article 2(2)(j) DMA]. This is the only core platform service that is not defined, either directly or indirectly, in the text of the Digital Markets Act.

In sum, it should be considered that the basic online intermediation services, online social networking services, video-sharing platform services, virtual assistants and online search engines will attribute relative prominence (or relevance, in the case of the latter services) to the goods or services (or search results –as defined in Article 2(23) DMA– regarding the latter services) intermediated by their providers. And they will do so by means of a classification in which such platforms will present, organise, or communicate them, “[...] irrespective of the technological means used for such presentation, organisation or communication and irrespective of whether only one result is presented or communicated” [Article 2(22) DMA].

2. FRAMEWORK OF OBLIGATIONS AND PROHIBITIONS UNDER THE DMA

As we briefly announced at the beginning of this paper, the new Digital Markets Act establishes a principled regulation of the set of obligations imposed on the economic operators acting as gatekeepers, thus previously designated. Indeed, the obligations and prohibitions contemplated are, in many cases, general measures that can be specified further and are tending to achieve the ultimate principle of guaranteeing contestability and fairness in the digital sector. In addition to allowing greater flexibility in the regulatory guidelines, which can be better adapted to the rapid technological and operational evolution of the sector, they make them more effective.

37 This is the case, for example, of Dropbox or Microsoft Azure.

38 OJEU L 194/1, of 19 July 2016.

To achieve this, they remove the formal constraints of the obligations included in the text to focus on the basic objective, which is to promote free entry and exit from the market and a more appropriate distribution of the network effects generated between the parties involved in the ecosystem as a whole. In this way, incorporating principles and techniques typical of administrative regulatory activity³⁹, it produces a certain de-legalisation in the intervention of the Public Administrations, such that the final content of a large part of the obligations that fall on the digital platforms named gatekeepers does not appear in a regulation with the status of Law, but, in this case, in the decisions of the European Commission⁴⁰.

This is the spirit of the obligations under Articles 6 and 7 DMA, which may be further specified under Article 8 DMA⁴¹. This provision requires that "the measures implemented by the gatekeeper to ensure compliance with those Articles shall be effective in achieving the objectives of this Regulation and of the relevant obligation", for which purpose the Commission may, at the request of the gatekeeper concerned⁴² or on its own initiative,

39 Regarding the administrative activity of economic regulation, see Juan José Montero Pascual, *Regulación económica: la actividad administrativa de regulación de los mercados*, Valencia: Tirant lo Blanch, 2020.

40 Juan José Montero Pascual, "La regulación de las plataformas digitales en la Propuesta de Ley de Mercados Digitales de la Unión Europea", *op. cit.*, p. 364.

41 And, as the Digital Markets Regulation states, sometimes, "[...] It may in certain cases be appropriate for the Commission, following a dialogue with the gatekeeper concerned and after enabling third parties to make comments, to further specify some of the measures that the gatekeeper concerned should adopt in order to effectively comply with obligations that are susceptible of being further specified or, in the event of circumvention, with all obligations. In particular, such further specification should be possible where the implementation of an obligation susceptible to being further specified can be affected by variations of services within a single category of core platform services. For this purpose, it should be possible for the gatekeeper to request the Commission to engage in a process whereby the Commission can further specify some of the measures that the gatekeeper concerned should adopt in order to effectively comply with those obligations" (recital 65 DMA).

42 And with the discretionary power of the European Commission, request which aims "[...] to implement or has implemented to ensure compliance with Articles 6 and 7 are effective in achieving the objective of the relevant obligation in the specific circumstances of the gatekeeper" (Article 8(3) DMA). To this end, the gatekeeper must submit to the European Commission a motivated written statement explaining the measures implemented or to be implemented, also providing a non-confidential version that may be shared with interested third parties, so that they may make any comments they may wish. These comments, it is understood, may be submitted once the European Commission has communicated its preliminary conclusions to the gatekeeper in question (within three months from the initiation of the procedure), in accordance with Article 8(5) DMA, or as soon as possible after having done so, as it will be at that time that the Commission will publish a non-confidential summary of the case, to which it will ac-

initiate a procedure under Article 20 DMA which will be concluded by an implementing act (to be adopted at the latest six months after initiation⁴³) specifying the measures to be implemented by the gatekeeper concerned to effectively fulfil the obligations contained in those Articles. This procedure may be re-initiated in the same way where the facts on the basis of which the Commission's decision was taken have changed significantly, or if it was based on incomplete, incorrect or misleading information, or if the measures previously adopted are ultimately not effective for the purposes of "[...] achieving the objectives of this Regulation and the relevant obligation, and proportionate in the specific circumstances of the gatekeeper and the relevant service" (Articles 8(7) and 8(9) DMA).

There will be other obligations, however, which will be applicable immediately and without the need for further specification by the European Commission. These are those provided for in Article 5 DMA, which, in line with Articles 6 and 7 of the Regulation, impose obligations ("DOs") and prohibitions ("DON'Ts") to discipline the actions of gatekeepers in order to achieve higher levels of contestability and/or fairness in the market.

Having explained the above and outlined the framework of obligations established by the Digital Markets Act for the entire territory of the European Union, we should now consider several relevant scenarios once these obligations have been imposed in the terms indicated above. We are referring, first, to the circumstances that would determine that these obligations could be suspended or, even more so, that the gatekeeper could be definitively exempted from their fulfilment, as well as to the possible updating of these obligations. Also, in a completely different stage, to that in which the digital platform does not comply with the obligations of the incumbent on it. It is precisely the latter case that will determine, as we will see in the third point, the activation of the administrative sanctioning regime set out in the DMA.

company the measures it intends to adopt to specify the obligations of Articles 6 and 7 DMA or those that the gatekeeper has to implement, setting a reasonable deadline for third parties to submit such observations (Article 8(6) DMA).

- 43 In it, it will be necessary to comply with the provisions of the advisory procedure under Article 50(2) DMA, which in turn refers to Article 4 of Regulation (EU) num. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJEU L 55/13, 28 February 2011). This provision requires an opinion of the Digital Markets Advisory Committee, which, in those cases where it has to be obtained in written form, "[...] shall be terminated without result when, within the time limit for delivery of the opinion, the chair of the committee so decides or a simple majority of committee members so request" (Article 50(2)(2) DMA).

2.1. SUSPENSION, EXEMPTION AND UPDATING OF OBLIGATIONS

The legal regime established for the obligations (contained, practically in their entirety, in Articles 5, 6 and 7 of the DMA⁴⁴) that apply to the gatekeepers includes two aspects that can have a decisive impact on them. We refer, in increasing degree of impact, to:

First, cases where specific obligations imposed on large digital platforms may be, in whole or in part, suspended.

Second, those cases in which, due to the nature of the reasons that triggered the imposition of the obligation, the gatekeeper is definitively exempted from compliance, in whole or in part, with one of those obligations.

We will examine each of these scenarios.

In relation to the first of the scenarios described (Article 9 DMA), it is necessary for the gatekeeper to demonstrate that compliance with a specific obligation (which, in its condition as gatekeeper, has been imposed on it) would compromise, due to circumstances that the gatekeeper cannot control, the economic viability of its operations within the European Union.

In such a case, the European Commission will, within a maximum period of three months from receipt of the request, give a reply. If it grants the request, it will adopt an implementing act (a decision, in accordance with the advisory procedure provided for in Article 50(2) DMA) to temporarily suspend, in whole or in part, compliance with a specific obligation. In this regard, it will indicate, when agreeing to the suspension (once the impact on the economic viability of the platform's operations and on third parties, such as businesses and consumers, has been estimated, and under the possibility that the suspension is subject to compliance with a certain number of conditions and obligations that achieve an appropriate balance between these interests and the objectives set out in the DMA), the exceptionality involved and will adjust its scope and duration to what is necessary to achieve the objective pursued.

This decision will be reviewed annually (unless its validity is limited to a period of less than twelve months) to determine whether it is maintained or, on the contrary, revoked in whole or in part. In addition, if the super-intermediary's request is made in a context of urgency, the European Commission may adopt the suspension of one or more core platform services prior to (at any time) and provisionally to the final decision to be implemented in accordance with the previous paragraph, extending its validity,

44 The DMA also includes obligations that lack their own substantive nature, so that, in many cases and in all those that concern the measures of Articles 5 to 7 of the DMA, their enforceability will be linked to the enforceability of the obligation to which they are attached, and they will not be enforceable if compliance with the latter is suspended or directly exempted.

it is understood, until the now known maximum period of three months of the final decision has ended.

With regards to the second aspect referred above (Article 10 DMA), the scope is even greater. If adopted it would imply exempting the gatekeeper who so requests in a reasoned manner from fulfilling, in whole or in part, a specific obligation that validly falls upon it in relation to a specific core platform service. In this case, to be valid, the implementing act consisting of the Commission's exemption decision must (in addition to complying with the advisory procedure of Article 50(2) DMA) be based on reasons of public health (for example, the recent global health emergency crisis resulting from the pandemic caused by covid-19) or public safety. With regard to the deadlines for its adoption and the periodicity of its review, both will coincide with those of the suspension, with which it is also identified in terms of the procedures to be followed in cases of proven urgency.

Finally, in addition to the suspensive or exemptive effects described above, the obligations on gatekeepers may also be updated, thanks to Article 12 of the DMA. Effectively, the European Commission is empowered to adopt delegated acts in accordance with Article 49 of the Digital Markets Act to supplement the obligations set out in Articles 5 and 6 (first paragraph) as well as, in relation to Article 7 of the DMA, to amend (by adding or deleting) the list of basic functionalities (third paragraph) or to supplement the obligations under this article (fourth paragraph).

All these measures by the European Commission will be preceded by a market investigation, as provided for in Article 19 of the DMA (in the same vein, recital 69 DMA), whose result suggests an update to provide a more adequate response to practices that endanger the contestability and fairness always pursued by the Regulation. This limitation of the above two basic principles, which inspire the text of the Regulation, will take place when the practice, depending on the case (fifth paragraph):

- Is exercised, in terms of contestability, by the gatekeeper and may represent an obstacle to innovation, as well as a limit to the options that professional users and end users have to choose from. This will require consideration of how a core service or other services in the digital sector either affects or threatens to affect contestability "[...] on a lasting basis due to the creation or strengthening of barriers to entry for other undertakings or to expand as providers of a core platform service or other services in the digital sector" (Article 12(5) DMA) or prevents other operators from having the same access to a key input as the super-intermediary.

- It implies and determines, in terms of fairness, an imbalance between the rights and obligations of the companies intermediated by the digital platform which acts as a gateway, obtaining from them an advantage which is disproportionate when compared with the service itself provided.

Initially, this involves extending the objective scope of an obligation that originally pertains to a particular core platform service, a service complementing or supporting core platform services, or specific data. This extension encompasses other services of a similar nature or different types of data.

Furthermore, it entails broadening the subjective scope of an obligation, thereby benefiting a wider range of professional users and end users.

Additionally, it involves specifying the manner in which providers of these services must adhere to the imposed obligations to ensure effective compliance.

Moreover, the introduction of new conditions comes into play when an obligation places specific requirements on the behavior of gatekeepers.

Lastly, it includes applying an obligation that governs the relationship between multiple core platform services within a super-intermediary, as opposed to solely regulating the relationship between a core platform service and other platform services.

2.2. NON-COMPLIANCE

Once the obligations of Articles 5 to 7 DMA have been imposed on a gatekeeper, it is possible that compliance with these obligations may take place without major problems or that, on the contrary, compliance may not take place, or at least not completely. If, in addition, the European Commission concludes, after the appropriate market investigation (to be carried out within a maximum period of twelve months from the date of opening—Article 16(3) (a) DMA—), that the non-compliance is repeated or systematic (by accumulating at least three Commission infringement decisions against the gatekeeper concerning any core service it provides and occurring within the eight years preceding the present time) and that in the meantime the super-intermediary has maintained, strengthened or extended its position as gatekeeper within the terms of Article 3(1) of the Digital Markets Act, it may adopt (pursuant to Article 50(2) DMA) an enforcement act (Article 18 DMA).

With this act, the European Commission may impose on the platform a disciplinary or structural measure (including a possible prohibition to be part of a concentration, for a specified period of time, affecting core platform services or other services in the digital sector or which enables the collection of data, reducing the generation of unlawful network effects) proportional and indispensable for the purposes of maintaining or restoring the fairness and contestability of the Rule, which will be reviewed periodically to see whether it is appropriate or whether it needs to be modified. Previously, it will communicate its preliminary conclusions to the non-complier, within the first six months of the previous period (although both periods may be extended if the circumstances of the case make it advisable, if the total of the

extensions does not exceed six months), where the European Commission may anticipate the decision it plans to adopt, publishing a non-confidential summary of the case and of such potential decision so that interested third parties may make any comments they consider appropriate.

In addition to the above, the European Commission may adopt [in accordance with the procedure described in Article 50(2) DMA] provisional measures under the terms of Article 24 DMA. To do so, it will be necessary that, in the framework of a procedure initiated for possible breach by the super-intermediary, there is a risk, requiring urgent action, of serious and irreparable damage to professional users or end users of gatekeepers due to a foreseeable breach of Articles 5, 6 and 7 of the DMA. These measures will only extend for a certain period of time but may be renewed if appropriate and convenient.

In this context, as outlined in Article 25 of the DMA, a platform that repeatedly fails to comply with its obligations may, as a remedy, propose the adoption of commitments aimed at ensuring compliance. If the European Commission deems these commitments suitable for their intended purposes, it can render them legally binding through an implementing act, as per Article 50(2) of the DMA. This declaration signifies that there are no grounds to initiate the corresponding sanctioning procedure. In such cases, the Commission also publishes a non-confidential summary of the case and the key content of these commitments, allowing interested third parties to submit comments within the specified timeframe, as governed by Article 18(6) of the DMA. Should the Commission find these commitments unsatisfactory, it will reject them by issuing a decision to terminate the procedure. Additionally, the Commission may reopen a procedure that concluded under the circumstances described above if the factual situation that prompted the decision undergoes a significant change, if the platform fails to uphold the commitments initially made and subsequently accepted, if the Commission's decision was based on incomplete or misleading information, or if the commitments are not ultimately implemented effectively.

However, prior to the recurrence of non-compliance, there must be an initial instance of non-compliance. This situation aligns with a preceding scenario envisaged in Article 29 of the DMA. In the event of confirmed non-compliance, it triggers the initiation of a procedure that may ultimately result in an enforcement action referred to as a "non-compliance decision". This decision is adopted within a maximum period of twelve months, following the procedures outlined in Articles 20 and 50(2) of the DMA. Additionally, during this process, consultation, and input from third parties may be sought. This procedure applies to any of the obligations specified in Articles 5 to 7 of the DMA, the measures outlined in the process described in Article 8(2) of the DMA, the corrective measures imposed pursuant to Article 18(1) of the DMA, interim measures ordered in accordance with Article 24 of the DMA, or

the legally binding commitments detailed in Article 25 of the DMA. In such cases, the European Commission will precede its actions with a preliminary communication of its findings. In this communication, the Commission will outline the measures it intends to implement, with a primary focus on instructing the gatekeeper to cease its non-compliant activities. Additionally, it will specify how it plans to ensure compliance with its decision, and, as a matter of course, it will detail any applicable fines in accordance with the provisions described in the subsequent section. These provisions are closely tied to the administrative sanctioning regime established by the Digital Markets Act.

2.3. ADMINISTRATIVE SANCTIONING REGIME

If we link the beginning of this section with the end of the previous one, we can see that one of the elements that integrate the Commission's decision of non-compliance will be the one concerning the fines. Fines are the main instrument for ensuring compliance with the regulatory content (that is, the obligations and procedural rules) emanating from the Digital Markets Act. For this reason, the configuration of this administrative sanctioning regime must provide guarantees for the parties concerned, guarantees which, in essence, require that it be subject to specific and appropriate limitation periods and respect for the principles of proportionality and *non bis in idem*⁴⁵.

DMA dedicates two articles, 30 and 31, to regulate sanctioning fines and coercive fines⁴⁶:

45 To this end, the European Commission must take into consideration all fines imposed on the same gatekeeper for identical facts and through a final decision in proceedings relating to infringements of other national or European Union legislation, in order to ensure that they are in proportion to the severity of the offence committed (recital 86 DMA). The contributions made by the doctrine on the impact of the principle of *non bis in idem* in the field of administrative sanctioning law are fundamental. Among them, those made by Tomás Cano Campos, "Derecho administrativo sancionador. Reserva de ley. Principio de tipicidad. Non bis in idem. Principio de proporcionalidad. Procedimiento sancionador", *Revista General de Derecho Administrativo*, num. 6, 2004; José Ignacio Cubero Marcos, "Las aporías del principio 'non bis in idem' en el Derecho administrativo sancionador", *Revista de Administración Pública*, num. 207, 2018, pp. 253-288; Antonio Pablo Rivas Sava, "El principio *non bis in idem* y su significación en el Derecho Administrativo sancionador", *Revista Jurídica de Castilla-La Mancha*, num. 19, 1993, pp. 33-60.

46 The difference between the sanctioning fine and the coercive fine has been sufficiently developed by doctrine and case law. In relation to the latter, and at the Spanish domestic level, the Judgment of the Constitutional Court num. 239/1988, of 14 December (ECLI:ES:TC:1988:239) stands out, which, in its second Legal Ground, expresses the defining contours of both in the following terms:
"The aforementioned infringements which, based on section 25(1) of the Constitution, the appellant denounces, are referred to the sanctioning power of the Administration

The first of these articles (Article 30 DMA) empowers the Commission to impose:

a) To gatekeepers [Article 30(1) and (2) DMA], sanctioning fines of up to 10% of their total worldwide turnover in the previous year, where the final amount to be paid will be determined based on the severity, duration, and repetition of the digital platform's actions [Article 30(4) DMA]. For this purpose, the intentional or negligent non-compliance of the obligations contained in Articles 5, 6 and 7 DMA (which may motivate an increase of the penalty fine up to 20% if, in relation to these same precepts, the same or similar infringement is committed in the same core platform service during the previous eight years) must be verified, including, in a related manner: the measures that, in accordance with Article 8(2) DMA, specify the compliance with the above obligations; those imposed by the European Commission (Article 18 DMA) or, provided by the gatekeeper, become a legally binding commitment

and their analysis is unnecessary in the present case, since the sanctioning presupposition that serves as a basis for the constitutional requirements of the aforementioned precept is lacking. The postulates of section 25(1) of the Constitution cannot be extended to areas other than those specific to criminal or administrative offenses, its extensive or analogical application being inappropriate, as is clear from Constitutional Court Judgments 73/1982, of 2 December; 69/1983, of 26 July 1983, and 96/1988, of 26 May 1988, to different cases or to acts, by their mere condition of being restrictive of rights, if they do not represent the effective exercise of the *ius puniendi* of the State or do not have a true sanctioning sense, as is the case of coercive fines, provided for as a means of forced execution of administrative acts by sections 104 c) and 107 of the Spanish Administrative Procedure Act (*Ley de Procedimiento Administrativo*).

In this type of fine, whose independence from the sanction is reflected in paragraph 2 of the aforementioned Article 107 of the Administrative Procedure Act, no fine is imposed. 107 of the Administrative Procedure Act does not impose a payment obligation with a repressive or retributive purpose for the performance of a conduct that is considered administratively unlawful, whose adequate regulatory provision from the constitutional requirements of the right to legality in sanctioning matters can be questioned, but consists of a measure of economic constraint, adopted after the appropriate warning, reiterated in periods of time and aimed at obtaining the accommodation of an obstructive behaviour of the addressee of the act to the provisions of the previous administrative decision. Therefore, these fines do not fall, therefore, within the exercise of the administrative sanctioning power, but rather within the exercise of the Administration's executive self-restraint, provided for in our legal system in general by section 102 of the Administrative Procedure Act, the constitutionality of which has been expressly recognized by this Court (Constitutional Court Judgments 22/1984, of 17 February; 137/1985, of 17 October, and 144/1987, of 23 September), and in respect of which the double basis of the sanctioning legality of section 25(1) Spanish Constitution. referred to in Constitutional Court Judgment 101/1988, of 8 June 1988, that is: of freedom (general rule of the lawfulness of what is not prohibited) and of legal certainty (knowing what to abide by), since, as has been said, a conduct is not punished because it is unlawful, but is constrained to the performance of a service or compliance with a specific obligation previously established by the administrative act that is to be executed, and with the appropriate warning or admonition".

(Article 25 DMA) in the event of systematic non-compliance, or those which, in short, include interim measures (Article 24 DMA).

b) To companies, including, where appropriate, gatekeepers, and associations of companies (Article 30, paragraphs 3 and 5, DMA, the latter only in relation to companies and associations of companies), sanctioning fines of up to 1% of their total worldwide turnover in the previous financial year (determining the specific amount of the fine after assessing the severity, duration, repetition and delay caused to the procedure –Article 30(4) DMA–) if, in an intentional or negligent manner:

They may breach various obligations, such as failing to provide accurate and timely information required to determine their designation as gatekeepers (Article 3 DMA) or neglecting their obligation to notify the European Commission (Article 3(3) DMA).

In addition, they might not properly provide information related to mergers (Article 14 DMA) or fail to supply an audited and independent description of consumer profiling techniques (Article 15 DMA).

They could also refuse access to data, algorithms, and test information or not comply with other information requests (Article 21(3) DMA, Article 22 DMA).

Furthermore, they might not rectify incorrect or incomplete information provided by their representatives or staff, or resist providing information during inspections (Article 23 DMA).

They may also disregard actions taken by the European Commission to ensure compliance with DMA obligations (Articles 5, 6, and 7 DMA), as well as decisions (Articles 8, 18, 24, 25, and 29 DMA).

Lastly, they might not properly configure the function of verifying DMA compliance (Article 28 DMA) or not adhere to the provisions when accessing the file (Article 34(4) DMA).

The second of these provisions (Article 31 DMA) gives the European Commission the power to impose coercive fines on the companies, including, where appropriate, gatekeepers, and associations of companies. In this case, such fines may amount to up to 5% of their total worldwide turnover in the preceding financial year, calculated from the date fixed by that decision (this last temporary provision, the reason for which is not known, is not included in the preceding article), in order to require them either to comply with the measures of Articles 8(2), the decisions of Articles 18(1), 24 and 29(1) and the binding commitments of Article 25(1), all of the DMA; or to provide the information requested in accordance with Article 21, to guarantee the access provided for in Article 21(3) or to submit to an inspection under the terms of Article 23, all of the DMA. If the obligated parties have complied with the obligation that was intended to enforce the coercive fine when it was imposed, the Commission may reduce, a posteriori, the final amount to be satisfied to a lower figure than that initially foreseen.

The imposition of either type of fine (sanctioning or coercive fine) will expire after five years, counting from the day on which the infringement was committed or, if it is repeated or continued over time, from the date on which it ceases to be committed (Article 32, first and second paragraphs, DMA). This limitation period will be suspended as long as the Commission's decision is the subject of proceedings pending before the Court of Justice of the European Union (Article 32(5) DMA) and will be interrupted by the opening of a market investigation or proceedings relating to the infringement, or by requests for information from the Commission (Article 21 DMA), with written authorisations for inspection issued by the European Commission to its officials (Article 23 DMA) or with the initiation of a procedure by the European Commission under Article 20 DMA [Article 32(3) DMA]⁴⁷. This interruption will mean a return to the beginning of the prescription period, which will, however, expire when a period equal to twice the prescription period has ended without the Commission having imposed a sanctioning fine or a coercive fine (Article 32, paragraph 4, DMA).

Likewise, the enforcement of the fines imposed will be subject to the same time limit as above, counting from the day on which the Commission's decision becomes final [Article 33(1) and (2), DMA]⁴⁸. As was the case with the imposition, enforcement may also be: suspended, for "(a) time to pay is allowed; or (b) enforcement of payment is suspended pursuant to a decision of the Court of Justice or to a decision by a national court" (Article 33(5) DMA), or interrupted "(a) by notification of a decision varying the original amount of the fine or periodic penalty payment or refusing an application for variation; or (b) by any action of the Commission or of a Member State, acting at the request of the Commission, designed to enforce payment of the fine or periodic penalty payment" (Article 33(3) DMA). Likewise, the interruption will cause the period, in this case of enforcement, to start to run again (Article 33(4) DMA), although now, no limitation is established with respect to this last provision.

47 For an analysis of the European Commission's role in European administrative law, see Isaac Martín Delgado, "El procedimiento administrativo en el Derecho de la Unión Europea", *Revista de Derecho de la Unión Europea*, num. 19, 2010, pp. 99-143; María del Carmen Chinchilla Marín, "El derecho de la Unión Europea como freno a la huida del Derecho administrativo", *Revista de Administración Pública*, num. 200, 2016, pp. 361-383; Matthias Ruffert, "De la europeización del Derecho administrativo a la Unión Administrativa Europea", *La Unión Administrativa Europea*, Madrid: Marcial Pons, Francisco Velasco Caballero and Jens-Peter Schneider (coords.), 2008, pp. 87-108.

48 In this matter, it is interesting to refer to what is established by Carmen Martín Fernández, "La ejecutividad de las sanciones administrativas", *Gabilex: Revista del Gabinete Jurídico de Castilla-La Mancha*, num. 22, 2020, pp. 91-198.

CONCLUSIONS

In light of the extensive insights presented in this study, we can derive several significant conclusions. First and foremost, we recognize the pivotal role played by the emergence of New Information and Communication Technologies, particularly the internet, in shaping the contemporary information society. These technologies have revolutionized the way individuals interact with information and with each other. This digital transformation has had profound legal implications. It necessitates a comprehensive understanding of the digital reality, involving the adaptation of traditional legal concepts to the digital environment and the introduction of entirely new legal institutions. These institutions are designed to address challenges that were previously unknown, brought about by the digital sector's rapid growth and innovation.

Within this context, the rise and consolidation of digital platforms stand out. These platforms serve as pivotal spaces for interconnecting individuals with diverse aspirations. Through the coordination of interests and the distribution of benefits, they facilitate exponential economic activity at previously unimaginable levels. However, as digital platforms acquire substantial market power, it becomes imperative to regulate their activities. Regulation is essential to ensure fairness, competition, and the protection of the rights and interests of all parties involved in these dynamic ecosystems. In response to these challenges, European regulations, particularly the Digital Services Act (DSA) and the Digital Markets Act (DMA), have been introduced. These regulations complement existing laws and provide essential tools for market regulation in the digital age. They are instrumental in promoting fair and competitive digital markets.

Key to the DMA's framework is the concept of core platform services, which determines the gatekeeper status. In line with DMA's regulations, providers of information society services of intermediation are subject to a range of obligations and prohibitions aimed at fostering competition and establishing a balanced framework for all stakeholders in digital ecosystems. Within this framework, various scenarios may arise, such as the suspension or exemption of obligations for gatekeepers, as well as the potential need for updates to adapt to evolving digital dynamics. Non-compliance with these obligations triggers the intervention of the European Commission, which may adopt various measures to address the situation. Indeed, the DMA outlines an administrative sanctioning regime in cases of non-compliance. This regime encompasses both monetary fines and coercive fines, which can be imposed on companies, gatekeepers, and associations of companies. These fines carry significant weight and serve as a deterrent against violations of DMA regulations.

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