Algorithmic transparency and accountability of digital services

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Algorithmic transparency and accountability of digital services

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Foreword

Do you remember the Machine's own statement when you presented the problem to him? It was: 'The matter admits of no explanation.' The Machine did not say there was no explanation, or that it could determine no explanation. It simply was not going to admit any explanation.

Isaac Asimov, *The Evitable Conflict*

In 2020, in the midst of the COVID pandemic, we published a report on the brave new world of artificial intelligence (AI). Among many other issues, we looked at the so-called 'black box problem' – the lack of transparency concerning how AI systems work and make decisions. Essentially, we are talking about nothing less than a machine making decisions about people's lives without human oversight or awareness of the reasons for those decisions. In the words of Isaac Asimov, *the matter admits of no explanation*.

There is no need here to *explain* the importance of algorithmic systems for society at large, or the need to regulate them. And yet, regulation is not possible (or at least not effective) if the object of regulation and its activities are not transparent. And the same goes for their accountability. Transparency is a prerequisite for assessing the real impact of algorithmic systems on individuals and society, and for enforcing other rules aimed at establishing accountability for the use of algorithms. For this reason, this IRIS *Special* focuses on the relevance of 'transparency' as a regulatory concept.

After an introductory chapter, the authors describe the standard-setting activities of the Council of Europe, the EU legal framework with particular emphasis on the importance of the Digital Services Act Package, discuss other international developments, present some case studies at national level and comment on the institutional structures in relation to the DSA. The publication concludes with a summary outlook and a glossary where the reader can find simplified explanations of terms used in this IRIS *Special*.

This publication reflects the work of the Institute of European Media Law in Saarbrücken, Germany, with Mark D. Cole and Christina Etteldorf as main authors, Jörg Ukrow for the country report and Sandra Schmitz for the annex. To all of them, I extend my warmest thanks for their personal commitment.

Strasbourg, December 2023

Maja Cappello
IRIS Coordinator
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1. Introduction

Mark D. Cole, Institute of European Media Law (EMR) and University of Luxembourg

Due to the rise and increasing public prominence of powerful applications such as ChatGPT, artificial intelligence (AI) is the buzzword of todays' debates, dominating conversations between individuals as well as on a legislative level attempts to gradually address the topic in regulatory terms. Discussions are focusing, *inter alia*, on questions related to the domains in which AI may (not) be implemented and purposes for which it may (not) be used, in particular the extent to which it may (not) determine the actions and decisions of society. However, such questions have been raised already for quite some time with regard to AI's less "intelligent" sisters: algorithmic systems and other automated (decision-making) processes. These systems have long been an integral part of the online environment and, in particular, of media- and opinion-forming-relevant consumption, communication and information behaviour. In the current debate, these are gaining further momentum. However, this should also apply to regulatory approaches that already exist and were introduced precisely for the purpose of gradually addressing various problems associated with the use of algorithms. Therefore, this IRIS *Special* aims at laying out the already existing multitude of regulatory approaches in view of the increasing use of algorithmic systems, especially relevant in the online content dissemination sphere. In that regard, the publication focuses on the relevance of "transparency" as a regulatory concept and increasingly used notion in legislation concerning the digital environment. Transparency can be regarded as the first step towards, or a precondition for, being able to both evaluate the actual impact algorithmic systems have on individuals and society and enforce other rules which are aimed at establishing accountability for the use of algorithms on the side of those undertakings that implement them. The idea behind this approach is that deployers of algorithmic systems, by providing insights into how the system works and how it affects the user of services offered by these undertakings, contribute to empowering the rights of users and the well-functioning of a more competitive market which is currently dominated by a few major players.

When drawing attention to how "hard law" – beyond aiming at policy recommendations concerning ethical use of algorithmic systems – addresses transparency and algorithmic accountability already, the first point to turn to is the still new Digital

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Services Act (DSA)[1] of the EU. This new law that entered into force in 2022 is already applicable in parts, will become fully applicable in February 2024, and can be regarded as a turning point in the way online intermediary services are treated in regulatory terms. The turning point here is not so much the underlying technological development, although that is also accelerating at breathtaking speed, but the new standard of regulatory approaches set with it. Transparency as a key notion and basis for the regulation of platforms is reiterated in numerous ways in the DSA. However, it is not the first legislative act with which the EU has imposed transparency obligations on relevant providers. And by no means is it only the EU that has been developing legislation and standards in this regard. Therefore, although the moment of "arrival in reality" of the DSA is taken as the timing for this IRIS *Special*, it will offer not only an analysis of that text and the regulatory environment of the EU, but will start out with the Council of Europe and the relevance of its activities in this regard over the past decade. In addition, more recent developments on the international level related to organisations such as the OECD and UNESCO will be presented in order to underline the increasingly common understanding of the relevance of transparency in relation to algorithmic systems.

While the relevance of transparency in establishing algorithmic accountability seems no longer a question, the way in which and extent to which such transparency should be implemented is the subject of ongoing debates – also in view of future, more general rules concerning AI. For this reason, it is essential to have a basic agreement on the meaning of key notions and terms used in these debates. This is why we have chosen to offer an "A-Z" type of glossary as an annex to this publication where readers can find simplified explanations of expressions used in this IRIS *Special* as well as in regulatory discussions. It is not meant to be an official glossary, nor does it rely only on legal definitions (where these exist), it is more guidance for those readers who have not yet been intensively confronted with the topics of this publication.

With the annex as a source for parallel reading when perusing the chapters, the aim of this IRIS *Special* can hopefully be achieved. It offers a wide overview of applicable and discussed future rules that refer to transparency of data and of the functioning of platforms, specifically in their use of algorithmic systems. Transparency is not just a regulatory tool, but it can also be linked to a fundamental rights basis in the context of technology regulation as can be shown in the work of the Council of Europe. While focusing on protecting rights of users, at the same time obligations on companies in relation to transparency may conflict with rights of businesses such as trade secrets which need to be considered. The Council of Europe has attempted in numerous ways to find the right balance in this regard.

Concerning the work of the EU, it may seem premature to analyse the functioning of the DSA in relation to transparency measures and the accountability provisions relating to algorithmic systems. Indeed, it is too early for a final evaluation of this new piece of legislation, but a stocktaking on the foreseen objectives of the Regulation at this moment

[1] 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 (Digital Services Act), OJ L 277, 27.10.2022, p. 1–102, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R2065.

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in time when its application is starting can be helpful in understanding the potential impact. So although it is a still-moving target and needs to be observed continuously in the future, we wanted to take the opportunity to lay out the extent to which the DSA will be contributing to more transparency and insight into the use of algorithmic systems: namely in the context of content dissemination, as well as the more overarching question of how accountability regarding the use and outcomes of applying algorithmic systems in a service is applied to the providers.

In that regard it is interesting that so far there have only been a few attempts on the national level to include specific rules on some form of responsibility regarding the use of algorithmic systems in a media context. Some of these legislative initiatives were still in the proposal stage when the DSA was proposed by the Commission or stem from legal systems where instruments comparable to those introduced in the EU context have a completely different aim and function which is why these were not included in the analysis in this IRIS *Special*. However, there is one notable exception in the EU, namely Germany, where quite detailed rules were put in place already in 2020, specifically because of the impact of new players and their systems on the media market. When the German Länder enacted the Interstate Media State Treaty replacing the previous broadcasting regulation, they extended the scope of the treaty to media intermediaries. The treaty introduced transparency and non-discrimination obligations for this new category of providers. Although questions have been raised about the compatibility of this national approach with EU law, especially once similar obligations are included in an EU legislative act, the specific provisions of this treaty have been applied by the competent authorities for quite a while now, which is why they are presented in more detail in this IRIS *Special*.

Finally, the enforcement structures and different layers of involvement of authorities regarding the supervision of compliance with the DSA between the European and national levels constitute another variation of the multi-level regulatory enforcement system in the EU and are therefore also explained in more detail below. Especially the work of the concerned authorities on ensuring the transparency that the substantive provisions of the DSA intend to achieve will be important and depends on these new structures and how efficiently they can work. Based on the observations in the chapters on the Council of Europe (2), on the EU legal framework (3), on the significance of the DSA and DMA (4), on the international development beyond the Council of Europe and the EU and in individual states (5), and on the institutional structures concerning the DSA (6), the publication concludes with a summarising outlook (7). The Annex can be found after this in chapter 8.

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2. Standard-Setting of the Council of Europe

Christina Etteldorf, Institute of European Media Law (EMR)

The Council of Europe (CoE) has put the topic of algorithms and developments concerning artificial intelligence (AI) high on its agenda, especially in the recent past. This is based on the recognition of the societal impact and the accompanying challenges that come with the use of algorithmic systems in a wide variety of sectors and fields of application. In order to be able to react to such challenges especially in view of the task of safeguarding fundamental rights, the CoE has devoted its work and continues to do so in several expert committees to both exploring scientifically the dimensions of the topic and to formulating governance approaches via recommendations and guidelines for its member states.

2.1. Algorithms and Human Rights

The protection of democracy, the rule of law and human rights as well as their effective enjoyment by citizens is at the heart of the mission of the CoE. Hence, standard setting in the field of algorithms (and AI more broadly) depends on and begins with the question of the potential impact of the use of such technologies on the free exercise of human rights as laid down in the European Convention on Human Rights (ECHR)[2] and the way the convention rights have been interpreted by the European Court of Human Rights (ECtHR).

2.1.1. Study on the human rights dimensions of automated data processing techniques

An early important study was prepared by the Committee of experts on Internet Intermediaries (MSI-NET Committee) in 2017 on the human rights dimensions of automated data processing techniques. It analysed the impact of algorithms on human

[2] European Convention on Human Rights, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, https://www.echr.coe.int/Documents/Convention_ENG.pdf.

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rights as well as regulatory implications following from that.[3] Besides general concerns related to the opacity and unpredictability of algorithms, which can affect all human rights or undermine their effective enjoyment, the study identified threats for specific human rights. Such concerned the right to a fair trial and due process (e.g. algorithms used in crime prevention or civil and criminal justice systems), privacy and data protection (e.g. algorithms used in the context of online tracking, profiling and behavioural advertisements)[4], freedom of assembly and association (e.g. profiling and crowd control of protesters via data collected on social media), the right to effective remedy (e.g. algorithms used in complaint mechanisms leading possibly to automated content removal processes), the prohibition of discrimination (e.g. individual variables in big data algorithms serving as 'proxies' for automated decision-making and relying on protected categories such as race, gender or age), social rights and access to public services (e.g. algorithmic recruitment methods or social scoring) and the right to free elections (e.g. algorithmic-based influence on voter behaviour or via political advertising).

With regard to freedom of expression, including the right to receive and impart information, the study highlighted not only potential harm for individuals but for the media environment per se. The core aim of Article 10 ECHR is to ensure a pluralistic public debate which can be threatened by specific use cases of algorithms. By way of example, algorithms in search engines are referred to in the study which, due to their importance in the ecosystem for media content and information, can lead to threats to the free and independent exercise and formation of opinion by fragmentation of public discourse or the creation of echo chambers. This can be the case if they are programmed in a biased manner or show biased results, i.e. if they favour or exclude certain content or certain providers. Similar concerns are raised with regard to the personalisation of information (displayed e.g. in news feeds, advertisements and content recommender systems) by social media platforms which could lead to filter bubbles compromising Article 10 ECHR. Similarly, the restriction of content through (semi-)automated moderation systems often operating based on opaque parameters could conflict with Article 10 ECHR.[5]

At this point, it should be duly noted that the existence of such filter bubbles, feedback loops or echo chambers leading to actual impairment of freedom of expression, being a danger to a pluralistic media landscape and maybe even harming the rule of law and democracy, is not evident. Rather, this is the subject of intensive controversy and arguments used against the assumption of such an effect are that users usually inform

[3] CoE study DGI(2017)12," Algorithms and Human Rights", study on the human rights dimensions of automated data processing techniques and possible regulatory implications, 2017, https://rm.coe.int/algorithms-and-human-rights-en-rev/16807956b5.

[4] For this specific issue the CoE's Guidelines on the Protection of Individuals with regard to the Processing of Personal Data in a World of Big Data, 17 January 2017, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806f06d0, already contain a general framework for applying appropriate policies.

[5] See on an extensive elaboration also Helberger et al., "A freedom of expression perspective on AI in the media – with a special focus on editorial decision making on social media platforms and in the news media", *European Journal of Law and Technology*, 2020, Vol 11 No. 3, https://ejlt.org/index.php/ejlt/article/view/752/1019.

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themselves from different sources and therefore in a free and diverse manner.[6] However, a lack of (current) evidence of such impairments as well as the (current) existence of certain user habits, which may be subject to continuous change, cannot remove the fear of potential harms that could arise, for example, from a biased algorithm employed by a search engine with a dominant market position. This is especially true when it comes to certain vulnerable groups of recipients such as minors who may not have the necessary media literacy skills nor an interest in pluralistic news to be aware of or able to counter one-sided information.[7] It is this harm potential that the legislators must keep in mind and be able to react upon and which also led the CoE to address the issue with a high level of attention. This is particularly true against the background of the strict requirements that the ECtHR applies, in the case of interference with Article 10 ECHR, to the existence of a legal framework impacting free speech and the public debate per se.[8] The Court requires the design of such legal frameworks to be based on clear and foreseeable criteria.[9] In this light, it is problematic that platforms only share little data about the mode of operation of the algorithmic systems employed and thus the effects of these are not transparent to users and the research community.[10] This makes a sound evaluation by legislators difficult.[11] With regard to aspects of ensuring pluralism in particular, it should be emphasised that the ECtHR understands pluralism in a media context as crucial within the democratic system[12] and considers the state as the ultimate guarantor[13] that has to ensure the pluralistic information landscape. There are numerous concerns that algorithms endanger the plurality of media and information in different ways.[14] It is proving to be problematic here as well that criteria on how algorithmic systems operate in different areas (due to a lack of uniform legal frameworks) are often untransparent, data is hardly available and therefore actual impacts are difficult to understand and measure (even the way in which diversity is to be measured in the

[6] See the detailed literature review and analytical assessment of the debate in Arguedas/Robertson/Fletcher/Nielsen, "Echo Chambers, Filter Bubbles, and Polarisation: a literature Review", Reuters Institute, 2022, https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2022-01/Echo_Chambers_Filter_Bubbles_and_Polarisation_A_Literature_Review.pdf.

[7] See on that Bodó et al., "Interested in Diversity", *Digital Journalism*, 2019 7:2, p. 206-229, https://doi.org/10.1080/21670811.2018.1521292.

[8] See *Association Ekin v. France*, no. 39288/98, para. 58, https://hudoc.echr.coe.int/eng?i=001-59603.

[9] See *Yildirim v. Turkey*, no. 3111/10, para. 57, https://hudoc.echr.coe.int/eng?i=001-115705.

[10] See on this European Commission, Directorate-General for Communications Networks, Content and Technology, Parcu, Brogi, Verza, et al., Study on media plurality and diversity online – Final report, Publications Office of the European Union, 2022, https://data.europa.eu/doi/10.2759/529019, p. 82, figure A1, where platforms are ranked based on wether thy clearly disclose how content is curated, ranked or recommended.

[11] See on this and on the topic in general Parcu et al, "Pluralism of news and information in curation and indexing algorithms", 2023, https://informationdemocracy.org/wp-content/uploads/2023/08/Report-on-Pluralism-Forum-on-ID.pdf.

[12] Stating that there can be no democracy without pluralism, ECtHR, *Manole and others v. Moldova*, no. 13936/02, para. 95, https://hudoc.echr.coe.int/eng?i=001-94075.

[13] ECtHR, *Informationsverein Lentia and others v. Austria*, no. 17207/90, para. 38, https://hudoc.echr.coe.int/eng?i=001-57854.

[14] See e.g. extensively Heitz/Rozgonyi/Kostic, "AI in Content Curation and Media Pluralism", in: Wagner/Haas, Spotlight on Artificial Intelligence and Freedom of Expression – A Policy Manual, Vienna: OSCE, 56-70, https://www.zora.uzh.ch/id/eprint/213723/1/RFoM%20%23SAIFE%20Policy%20Manual.pdf.

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algorithmic context is not uniformly assessed).[15] However, potential impacts are regarded as being likely to have a significant effect.[16]

2.1.2. Study on implications of advanced digital technologies for the concept of responsibility

A follow-up study conducted by the Committee of experts of the Council of Europe on human rights dimensions of automated data processing and different forms of artificial intelligence (MSI-AUT Committee) in 2019 focused on the implications of (the more broad term of) advanced digital technologies (including AI systems) for the concept of responsibility within a human rights framework.[17] In addition to reiterating the findings of the previous study as regards threats to human rights, the MSI-AUT Committee pointed to further problems such as the exercise of digital power without responsibility through advanced digital technologies. In particular, problems were identified here due to a lack of human oversight or the hidden privatisation of decisions about public values, as such systems invariably reflect the values and value priorities of the system/its developers and not collective values of the public or the democratic and constitutional values that human rights are designed to serve. Furthermore, the study pointed to potential harms through radical asymmetry in power between algorithmic systems and users: While the former are able to "sort and score" users and, based on that, influence their interactions in different ways, for the individual user it is hard to understand and navigate the complexity of the data ecosystems in which algorithmic systems are embedded.

2.2. Recommendations and Declarations by the CoE

The studies previously presented not only analysed possible threats to human rights stemming from algorithms and other advanced technologies including AI, but they also resulted in conclusions for the regulatory framework. It was stated *inter alia* that "the application of a human rights framework is crucial because it goes beyond just ensuring transparency and accountability, as it ensures that all rights are effectively considered in automated decision-making systems such as algorithms".[18] Issues related to algorithmic

[15] Ibid 106; see also Stark/Stegmann, "Are Algorithms a Threat to Democracy? The Rise of Intermediaries: A Challenge for Public Discourse", 2020, https://algorithmwatch.org/en/wp-content/uploads/2020/05/Governing-Platforms-communications-study-Stark-May-2020-AlgorithmWatch.pdf.
[16] European Commission, Study on media plurality and diversity online (n 10), p. 86; see also Mazzoli/Tambini, "Prioritisation uncovered. The Discoverability of Public Interest Content Online", Council of Europe, 2020, https://rm.coe.int/publication-content-prioritisation-report/1680a07a57.
[17] CoE study DGI(2019)05, "A study of the implications of advanced digital technologies (including AI systems) for the concept of responsibility within a human rights framework", prepared by the Expert Committee on human rights dimensions of automated data processing and different forms of artificial intelligence (MSI-AUT), 2019, https://rm.coe.int/responsability-and-ai-en/168097d9c5.
[18] CoE study DGI(2017)12 (n 3), p. 43.

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governance and/or regulation were seen as public policy prerogatives. Therefore, the task of devising comprehensive and effective mechanisms for ensuring algorithmic accountability should not be left to private actors alone but rather lies on the states. This responsibility should include the determination of areas where no algorithms should be used at all. The studies hence called for enhanced research, closer monitoring of technological developments, promoting public awareness and discourse and developing certification and auditing mechanisms as well as standards and guidelines. Although there might not be one right model of legal responsibility for the different technologies, their functions and fields of application, states' commitment to human rights would at least require the implementation of effective and legitimate governance mechanisms, instruments, and institutions.[19]

2.2.1. Recommendation (2020)1 on the Human Rights Impacts of Algorithmic Systems

Following up on this call for action, the Council of Europe Committee of Ministers Recommendation (2020)1 on the Human Rights Impacts of Algorithmic Systems[20] proposed a horizontal set of guidelines for both States and public and private sector actors in order to promote an environment of legal certainty in which both human rights and innovation can thrive. The guidelines cover a variety of aspects in the context of algorithmic systems[21] encouraging the states to develop legislative and regulatory frameworks, including fostering media and digital literacy. In addition to more general recommendations as regards transparent, accountable and inclusive legislation, ongoing review, democratic participation and awareness, and the implementation of appropriate institutional frameworks, one important aspect deals with transparency, accountability and effective remedies in the application of algorithmic systems: States should establish appropriate levels of transparency with regard to the public procurement, use, design and basic processing criteria and methods of algorithmic systems implemented by and for them, or by private sector actors. The legislative frameworks for intellectual property or trade secrets should not preclude such transparency, nor should States or private parties seek to exploit them for this purpose.

Recommendation (2020)1 promotes a risk-based approach when it comes to the level of transparency to be ensured: It should be as high as possible and proportionate to the severity of adverse human rights impact. Thus, algorithmic systems in decision-

[19] CoE study DGI(2019)05 (n 17), p. 78 et seq.

[20] Recommendation CM/Rec(2020)1 of the Committee of Ministers to member States on the human rights impacts of algorithmic systems, adopted by the Committee of Ministers on 8 April 2020, https://rm.coe.int/09000016809e1154#:~:text=Democratic%20participation%20and%20awareness%3A%20In,manipulate%2C%20exploit%2C%20deceive%20or%20distribute.

[21] Which are understood as applications that, often using mathematical optimisation techniques, perform one or more tasks such as gathering, combining, cleaning, sorting, classifying and inferring data, as well as selection, prioritisation, the making of recommendations and decision making.

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making processes that carry high risks should be subject to particularly high standards as regards the explainability of processes and outputs. This also includes that such selection processes or decisions taken or aided by algorithmic systems shall be identifiable and traceable as such at the initial interaction, in a clear and accessible manner. The transparency framework should moreover be complemented by providing effective means to contest relevant determinations and decisions, adequate oversight mechanisms and effective remedies including judicial and non-judicial review. Mirroring this, private sector actors, on the other hand, should themselves ensure that the use of algorithmic systems that can trigger significant human rights impacts is made known to all affected parties and the general public "in clear and simple language and in accessible formats". This includes adequate information about the nature and functionality of the algorithmic system as well as the possibilities for users to manage settings. To ensure contestability, the need for effective remedies is underlined. It should be ensured that qualified human reviewers remain accessible, that direct contact is made possible and that dispute resolution systems (online and offline, including collective redress mechanisms) are in place guaranteeing impartial and independent review. Transparency obligations directed to private actors do not, however, focus only on the algorithms themselves but also extend to transparency of the complaints received about them and their outcomes.

While Recommendation (2020)1 contains a broader framework to approach governance in the algorithmic environment irrespective of certain sectors of application, the Council of Europe Declaration by the Committee of Ministers on the manipulative capabilities of algorithmic processes is devoted to a more specific issue and possible dangers.[22] It is based on a premise which is of special interest also in a media-related context: due to the use of advanced digital technologies, in particular algorithmic-driven micro-targeting techniques, individuals may not be able to formulate their opinions and take decisions independently of automated systems. They may even be subjected to manipulation not only with regard to their economic choices but also in their social and political behaviours. The Declaration therefore calls on member states to pay attention to the capacity of algorithmic systems to use personal and non-personal data to categorise and micro-target people, identify individual vulnerabilities and exploit accurate predictive knowledge. That might cause a need for additional protective frameworks related to data that go beyond current notions of personal data protection.

2.2.2. Recommendation (2022)13 on the Impacts of Digital Technologies on Freedom of Expression

Highlighting the importance of aligning national frameworks with the aforementioned Recommendation (2020)1 and subsequent Declaration, the recent Committee of Ministers

[22] Declaration by the Committee of Ministers on the manipulative capabilities of algorithmic processes (Decl(13/02/2019)1), adopted by the Committee of Ministers on 13 February 2019, https://search.coe.int/cm/pages/result_details.aspx?ObjectId=090000168092dd4b.

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Recommendation (2022)13 on the impacts of digital technologies on freedom of expression, which was prepared in the Committee of Experts on Freedom of Expression and Digital Technologies (MSI-DIG Committee), also picks up on transparency and accountability issues in the context of algorithms.[23] It is mainly devoted to the question of how the internal policies of internet intermediaries and their implementation affect freedom of expression and how this should be tackled in regulatory terms. *Inter alia*, internet intermediaries should provide adequate transparency in the design and implementation of their terms of service and their key policies. This concerns information regarding removal, recommendation, amplification, promotion, "downranking", monetisation and distribution of content. If there are legitimate concerns that the providers' policies may lead to discrimination, internet intermediaries should give information that allows independent third parties to evaluate whether their policies are actually implemented in a non-discriminatory way. This would include disclosing the datasets upon which automated systems are trained in order to identify and correct sources of algorithmic bias.

As regards accountability and redress, States should ensure that both private individuals and news providers whose editorial freedom is threatened by the implementation of content policies of intermediaries (which regularly include algorithm-driven processes) have access to effective remedies. Although the Recommendation does not explicitly place this in the context of recommendation systems that display or hide certain content for certain users guided by algorithms, it is worth mentioning that it nevertheless to some extent counteracts this possible outcome by emphasising that States may introduce obligations for internet intermediaries to promote public interest content in ways that should be clear, non-discriminatory and transparently defined.

2.2.3. Recommendation (2022)11 on Principles for Media and Communication Governance

Finally, Committee of Ministers Recommendation (2022)11[24] on media and communications governance bridges the gap between the basic principles of Recommendation (2020)1 and the requirements of freedom of expression as outlined in Recommendation (2022)13. It is noteworthy that already the core term of "media and communication governance" is understood in a broad way including also technical solutions such as the design of algorithmic systems. Similarly, the term "platforms" is explicitly linked to their function to connect participants in multisided markets by relying

[23] Recommendation CM/Rec(2022)13 of the Committee of Ministers to member States on the impacts of digital technologies on freedom of expression, adopted by the Committee of Ministers on 6 April 2022, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a61729, in particular points 3. and 4.

[24] Recommendation CM/Rec(2022)11 of the Committee of Ministers to member States on principles for media and communication governance, adopted by the Committee of Ministers on 6 April 2022, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a61712.

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on algorithmic systems. Recommendation (2022)11, which was prepared in the Committee of Experts on Media Environment and Reform (MSI-REF Committee), first sets out procedural principles the member states are recommended to take into account when reviewing their national governance frameworks in light of Article 10 ECHR. The principle put at the top of those recommendations is the transparency and accountability of media and communication governance itself enabling public scrutiny of State and private sector decision making and activity as well as guaranteeing that it is accessible and understandable. But not only governance should be transparent but rather the media and communication landscape as a whole. As part of this, concerning substantive principles, member states must ensure that both content production (principle no. 9) and content moderation (principle no. 12) are transparent. Transparency in this regard entails, *inter alia*, disclosure of the use of and potential bias resulting from algorithmic systems as well as risk-based and human rights-compliant moderation of content disseminated via platforms when relying on algorithmic systems.

A separate principle is devoted to mitigating the risks posed by algorithmic curation, selection and prioritisation (principle no. 13): Media and communication governance must respect human rights and fundamental freedoms when regulating the design, development and ongoing deployment of algorithmic systems used for content dissemination. That involves enhancing the transparency and explainability of such systems as well as the accountability of those developing and implementing them. Following the idea also expressed in Recommendation (2022)13 in light of freedom of expression, promoting public interest content is seen here as a possible mitigation measure. In order to enhance exposure diversity, member states are recommended to take into consideration encouraging platforms to offer alternative forms of personalisation compatible with the public interest as well as strengthening the role of public service media in offering personalised services.

Unlike the horizontal concept of the EU's DSA (see below), which only specifies that there must be settings for users with regard to recommendation systems, the sector-based (media and communication) Recommendation already points to a possible direction in which this should go in light of fundamental rights (namely public value and diversity). Ensuring explainability of algorithmic systems is ultimately seen as a tool to empower users (principle no. 15).

2.3. On the Way to a CoE Convention on AI

The work of the CoE in the field of algorithmic accountability and transparency is "work in progress", i.e. it is further developed on the basis of the studies, declarations and recommendations presented above. This applies in particular to the work of the Ad Hoc Committee on Artificial Intelligence (CAHAI, 2019-2021), which is now succeeded by the Committee on Artificial Intelligence (CAI). Although the terminology in this context shifts more towards AI, thematically there is significant overlap between algorithms and AI which may be the reason why they are also grouped together as one pillar in the CoE's working area of 'internet governance'. This is a result of the fact that on the one hand an

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algorithm (which in the technical sense is simply an automated instruction) is a necessary building block for artificial intelligence and also machine learning. On the other hand, the terms are often used synonymously in the political, social and partly also legal debate to describe problems without having to differentiate in technical terms.

If a specific risk is inherent in an algorithm, the corresponding problems are therefore often also perpetuated in AI systems built based on this algorithm. It is therefore not surprising that a study prepared by CAHAI in 2020 on the future regulation of AI systems picks up aspects such as information personalisation via search engines, social media feeds or recommender systems too, and assigns them to the underlying use of AI as well as pointing to associated dangers for social and political discourse, access to information and voter influence.[25] Thus, proposals for a future regulatory framework for AI, where CAHAI especially recommended the introduction of provisions on robustness, safety, cybersecurity, auditability, and, "of paramount importance", transparency, explainability and accountability,[26] must be read also in the context of regulating algorithms.

Based on the preliminary work of CAHAI, CAI is now in charge of the ambitious and significant project of elaborating a legally binding instrument on the development, design and application of AI systems based on the Council of Europe's standards on human rights, democracy and the rule of law. The envisaged "[Framework] Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law" is in its drafting phase. It is aimed at being a Convention that is open for ratification not only by the CoE member states, but going beyond and therefore having the potential to be a first international baseline agreement on fundamental principles in relation to AI. A consolidated working draft was published (after a revised zero draft in January 2023)[27] on 7 July 2023,[28] which does not, however, reflect the final outcome of negotiations in the Committee. The working draft *inter alia* contains a set of principles to be applied in the design, development, use and decommissioning of "artificial intelligence systems" understood broadly[29] as "any algorithmic system or a combination of such systems that uses computational methods derived from statistics or other mathematical techniques and that generates text, sound, image or other content or either assists or replaces human

[25] Compilation of contributions DGI (2020)16, "Towards Regulation of AI Systems, Global perspectives on the development of a legal framework on Artificial Intelligence (AI) systems based on the Council of Europe's standards on human rights, democracy and the rule of law", 2020, https://rm.coe.int/prems-107320-gbr-2018-compli-cahai-couv-texte-a4-bat-web/1680a0c17a.

[26] CAHAI, "Possible elements of a legal framework on artificial intelligence, based on the Council of Europe's standards on human rights, democracy and the rule of law", 3.12.2021, CAHAI(2021)09rev, https://rm.coe.int/cahai-2021-09rev-elements/1680a6d90d, no. 30.

[27] CAI, revised zero draft [Framework] Convention on Artificial Intelligence, human rights, democracy and the rule of law, 7 July 2023, CAI(2023)01, https://rm.coe.int/cai-2023-01-revised-zero-draft-framework-convention-public/1680aa193f.

[28] CAI, consolidated working draft of the Framework Convention on Artificial Intelligence, human rights, democracy and the rule of law, 7 July 2023, CAI(2023)18, https://rm.coe.int/cai-2023-18-consolidated-working-draft-framework-convention/1680abde66.

[29] In a flexible approach, the draft foresees that the parties of the Convention, coming together periodically in a Conference of the Parties (Article 23), may, as appropriate, decide to give interpretation to this definition in a manner consistent with relevant technological developments.

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decision-making". Notably, the parties (which would later ratify the Convention) shall take appropriate measures to ensure that transparency requirements tailored to the specific contexts and risks are in place (Article 7) and take necessary measures to ensure accountability and responsibility for violations of human rights and fundamental freedoms (Article 8). With these measures general obligations, which shall be implemented for AI systems ensuring that they are compatible with human rights and non-discrimination (Article 5), shall be accomplished. The goal is that anyone be able to take informed decisions free from undue influence or manipulation through the use of AI systems and that AI not be used to undermine the integrity, independence and effectiveness of democratic institutions and processes (Article 6).

Finally, it should be underlined that although the impact of CoE recommendations depends mainly on their transposition or reflection in national law and policy, they nonetheless have a standard-setting signal function and in the field covered in this IRIS *Special* have many aspects in common with the regulation on EU level presented below. In this way they can even serve to complement the implementation of EU regulation, in particular the rules of the Digital Services Act.[30]

[30] See on this in light of the recommendation on the impact of digital technologies on freedom of expression e.g. Helberger/Borchardt/Vaccari, "Free speech in the digital age – a constructive approach", 20 September 2022, https://alexandraborchardt.com/free-speech-in-the-digital-age-a-constructive-approach/.

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3. The European Union Regulatory Framework

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3.1. The Fundamental Rights Context

Although regulatory approaches in the EU are commonly based on market-regulation solutions and regularly use the single market harmonisation clause as a legal basis, the underlying value and limiting framework for action are fundamental rights, too. As regards possible implications of employing algorithmic systems in relation to fundamental rights, one can therefore widely refer to the observations above for the explanation of how the CoE activity results from the need to protect fundamental rights. These fundamental rights are also guaranteed within the EU in the Charter of Fundamental Rights of the EU (CFR).[31] Insofar as the rights contained in the CFR correspond to those in the ECHR, the equality clause (Article 52(3) CFR) determines that they have to be applied in line with the interpretation of the Convention rights. Unlike the right to freedom of expression in Article 10 ECHR, Article 11 para. 2 CFR contains an explicit reference to pluralism of the media as a goal that is to be respected. While the CFR itself cannot be used as a legal basis for regulatory action of the EU and it is yet to be determined whether a risk to media pluralism exists and if so what degree of endangerment would necessitate action of the legislator based on its competences,[32] the commitment to the pluralism goal as well as the other fundamental rights guaranteed in the CFR, in particular freedom of expression and freedom of information, must also be considered in the context of algorithms and their regulation.

This observation also applies to transparency as one instrument of regulating algorithmic systems. In addition to the fact that transparency is anchored in EU primary

[31] Charter of Fundamental Rights of the European Union, OJ C 202, 7.6.2016, p. 389–405, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016P/TXT&rid=3.

[32] See on this extensively Cole/Ukrow/Etteldorf, "On the Allocation of Competences between the European Union and its Member States in the Media Sector", 2021, https://doi.org/10.5771/9783748924975, p. 147 et seq.

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law on many levels and in various shapes,[33] it plays an even greater role in the context of digital regulation against a fundamental rights background. As mentioned above, transparency of algorithms is a prerequisite in order to develop an understanding of how they work ('the black box problem'[34]), what results they may lead to and, ultimately, in order to assess their impact on fundamental rights based on this understanding.[35]

On the one hand, it is therefore a basic element for (further-reaching) regulation of algorithms, which must be oriented towards the need for protection of fundamental rights and freedoms. In this respect, algorithmic transparency is an important tool for digital policy and also for scientific research, which is directed towards ensuring individual protection and protection of society as a whole from potential dangers.

On the other hand, transparency obligations must also be considered in the context of the (fundamental) rights of providers addressed by these obligations. Companies invest significant resources in the development and enhancement of their algorithms/algorithmic systems in order to benefit from their functions, e.g. to speed up processes, minimise input of (human) resources or to offer a more attractive service to users. This gives them a competitive advantage that can be significantly impaired by the obligation to disclose information on functionalities of the algorithmic systems used, depending on how extensive the obligations are. This applies all the more if the business model is inherently based on the algorithm, as is the case with search engines, for example, which produce a response list to a user query driven by an algorithmic selection (and ordering) of possible results. The main conflict may arise concerning the freedom to conduct a business as guaranteed in Article 16 CFR and the freedom of property as guaranteed in Article 17 CFR, which guarantees the free use of one's own property (including intellectual property). An expression of this guarantee in secondary law can be found, *inter alia*, in the Trade Secrets Directive.[36] A number of algorithmic systems relevant in the media context are likely to be covered by this protection of trade secrets.[37] Under

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[33] See on this in more detail Zeitzmann, in: Cappello (ed.), "Transparency of media ownership", IRIS Special, European Audiovisual Observatory, Strasbourg, 2021, https://rm.coe.int/iris-special-2021-02en-transparency-of-media-ownership/1680a57bf0, p. 5 et seq.

[34] See on this de Streel et al., "Explaining the Black Box – When Law Controls AI", CERRE Issus Paper, February 2020, https://cerre.eu/wp-content/uploads/2020/03/issue_paper_explaining_the_black_box_when_law_controls_ai.pdf.

[35] See on the explainability of AI, Cappello M. (ed.), "Artificial intelligence in the audiovisual sector", IRIS *Special*, European Audiovisual Observatory, 2020, https://rm.coe.int/iris-special-2-2020en-artificial-intelligence-in-the-audiovisual-secto/1680a11e0b.

[36] Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, OJ L 157, 15.6.2016, p. 1–18, https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=celex%3A32016L0943.

[37] Article 2 of the Trade Secrets Directive requires that the information has to be secret, has commercial value due to its secrecy and be subject to reasonable steps to keep it secret, which companies can ensure by adopting non-disclosure agreements, including banning reverse engineering into their licencing agreements, or limit the number of possible licences altogether. See on that Huseinzade, "Algorithm Transparency: How to Eat the Cake and Have it Too", European Law Blog. 28. January 2021, https://europeanlawblog.eu/2021/01/27/algorithm-transparency-how-to-eat-the-cake-and-have-it-too/.

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both the Trade Secrets Directive (Article 2(1)b) and the CFR, however, restrictions in the form of transparency obligations are possible if they aim to protect the public interest. In addition to safeguarding competition, such a public interest includes, especially, freedom of expression and information as well as media pluralism.[38] Because any regulation is additionally bound by the principle of proportionality, it is required to consider conflicting interests and limit itself to what is necessary and adequate.

Transparency obligations are a comparatively moderate instrument of regulation and are regularly seen as particularly important in the context of algorithms and fundamental rights.[39] In addition to their relevance for legislation, regulation and research, they are also essential as an instrument of user empowerment, i.e. for the actual beneficiaries of fundamental rights on the application side. In the media context, this primarily concerns the right to freedom of opinion and access to information, as laid down in Article 11 CFR, as well as the right to protection of personal data and privacy according to Articles 7 and 8 CFR. These all contain in the scope of application certain transparency aspects as elements of protection that are also important in the context of algorithms. For the sake of illustration, the example of personalised recommendation systems can be chosen: A free formation of opinion and access to complete information may require that it be clear to the recipient why a certain piece of content is displayed and from whom it originates or who financed it. The right to protection of personal data in this context requires that the user have control over the data-processing operations underlying the recommendation, which presupposes knowledge (transparency) of them. While the fundamental rights describe the objective standard to be ensured, they do not contain specifics on how this is to be established. Questions as to which applications the transparency obligation is to be imposed on (i.e. for entire sectors, with regard to specific applications, only with regard to opinion-shaping systems etc.), to whom transparency is to be granted (i.e. the individual user, society as a whole, regulatory authorities or independent auditors), in which way this is to be realised (i.e. by human oversight, independent audits, publication of information, opening of interfaces in the systems etc.) and the extent of transparency (i.e. disclosure of basic parameters, differentiated reports on individual decisions etc.) as well as who is in charge of monitoring compliance with the obligations (i.e. users, non-governmental organisations, regulatory authorities, the applicants themselves etc.) are, in contrast, left to secondary law, which is presented in the following section.

[38] CJEU, case C-719/18, Vivendi SA / Autorità per le Garanzie nelle Comunicazioni, para. 57, 58, https://curia.europa.eu/juris/document/document.jsf;jsessionid=5F62194AF8904B31DCAFEC269FA18A08?text=&docid=230608&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=567889.

[39] See e.g. "Algortihm Watch, Putting Meaningful Transparency at the Heart of the Digital Services Act", 2020, https://algorithmwatch.org/en/wp-content/uploads/2020/10/Governing-Platforms_DSA-Recommendations.pdf; Simoncini/Longo, "Fundamental Rights and the Rule of Law in the Algorithmic Society", in: Micklitz et al., *Constitutional Challenges in the Algorithmic Society*, 2021, pp. 25-128, https://doi.org/10.1017/9781108914857.

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3.2. The Increasing Reference to Data and Algorithms in EU Secondary Legislation

In her 2020 State of the Union Address, European Commission President Ursula von der Leyen announced "Europe's Digital Decade", setting the work focus of the EU on different developments in a fast-evolving digital environment. AI is seen both as an opportunity opening up new worlds and a risk necessitating rules. Von der Leyen's conclusion that "[w]e want a set of rules that puts people at the centre" and that "[a]lgorithms must not be a black box and there must be clear rules if something goes wrong" mainly gave rise to the Digital Services Act (DSA)[40] and the Digital Markets Act (DMA),[41] which entered into force in 2022, started to be applicable partly in 2023, and will become fully applicable in 2024. Algorithms will play an even more significant role in future regulations such as the eminent Artificial Intelligence Act (AI Act) dedicated entirely to this topic. However, algorithms as a regulatory issue had already entered the sphere of EU regulation before, and they are playing an increasing role as the subject both of EU legislation and as case law of the CJEU. The need to address algorithms and their effects stems from different sectoral approaches and follows different objectives such as consumer protection, protection of freedom of expression and media, safeguarding functioning competition, achieving a Digital Single Market, data protection and guaranteeing the rule of law.

The different approaches in the EU address different forms of algorithmic transparency[42] and diverge as regards the question of for whom transparency should be ensured (individuals upon their request, the general public via public available information, public authorities, etc.). What they often have in common, however, are regulatory approaches and means that revolve around accountability and transparency when it comes to content relevant to opinion-forming. The following sections describe these different approaches, which have in common that, although they originate from different sectoral perspectives and have different objectives, they overlap in terms of the addressees of the obligations. This may result in a provider having to comply with different sets of rules for the same service provided.

[40] 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 (Digital Services Act), OJ L 277, 27.10.2022, p. 1–102, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R2065.

[41] 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 (Digital Markets Act), OJ L 265, 12.10.2022, p. 1–66, https://eur-lex.europa.eu/eli/reg/2022/1925.

[42] From a media-law-related perspective e.g. van Drunen/Helberger/Bastian, "Know your algorithm: what media organizations need to explain to their users about news personalization", *International Data Privacy Law*, 2019, Vol. 9, No. 4, p. 220-235, https://doi.org/10.1093/idpl/ipz011; differentiation between actor, source, process and output transparency as regards algorithms used in news personalisation.

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3.2.1. The P2B Regulation and Consumer Rights Directive

In 2019, with the Platform-to-Business Regulation (P2B regulation)[43] as well as the amended Consumer Rights Directive,[44] the EU established for the first time general rules addressing the transparency of ranking systems aiming for greater transparency, fairness, and effective remedies in the area of online intermediation services.

The P2B Regulation was motivated by a competition law approach and corresponding concerns regarding the actual market situation concerning online intermediaries and ranking systems: While the Unfair Commercial Practices Directive (UCPD)[45] obliges intermediaries to distinguish in their ranking system between "paid-for" results and "organic" search results, this was – although informative as a first step towards better understanding on the side of consumers – regarded as being insufficient for business users. Due to the intransparency of the underlying criteria and ranking outcomes, this form of limitation was not enough both for paying business users that had a contractual agreement on being displayed as well as for those business users that had not paid for a specific placement but wanted to assess the conditions of the ranking.[46] These concerns also apply to intermediaries relevant in the content distribution chain in a media-related context such as social media, so called 'smart speakers' (voice assistants) or search engines.[47] With such intermediary platforms, too, media providers (business users) often do not know which parameters influence whether and with what priority, for example, their news reports are inserted into a social media feed, their radio programmes are suggested by a smart speaker in case of a genre request by the users or their online media libraries are ranked in online searches.

It needs to be highlighted that transparency of algorithms in a P2B relationship is something different, and in particular consists of different information needs, compared to P2C (platform to consumer) relationships. The latter is the focus of the DSA, for example.[48] The P2B Regulation has a specific relationship between business parties as a

[43] Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.7.2019, p. 57–79, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019R1150.

[44] Directive 2011/83/EU on consumer rights as amended last by Directive (EU) 2019/2161 as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328, 18.12.2019, p. 7–28, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0083.

[45] 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 and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149, 11.6.2005, p. 22–39, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029.

[46] See European Commission. staff working document SWD(2018) 138 final, Impact assessment, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018SC0138, p. 14.

[47] See on an assessment of ranking parameters incorporated in selected search engines, smart speakers and social media platforms, their transparency and manageability, European Commission, Study on media plurality and diversity online (n 10), p. 75 et seq. The authors saw an "ample space for improvement".

[48] While a consumer might want to understand why content is recommended or displayed to him or her, a business user might be much more interested in exact data on the weighing of different parameters. See for a

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starting point. It establishes in Article 5 that providers of online intermediation services and online search engines must make the main parameters determining the listing or ranking of services clear and transparent. For online search engines this transparency is concretised by requiring information in an easily and publicly available description, drafted in plain and intelligible language. As this is essentially about describing the algorithms that partly or fully determine what is being displayed and with which priority to the different users, it is relevant in the present context in a twofold way. Firstly, the provision is interesting from the point of view of media and information providers, as it increases the transparency of their discoverability and findability, which in the context of safeguarding media pluralism facilitates an evaluation of the impact of platforms on the way content is disseminated.[49] Secondly, the P2B Regulation further contains more details on the degree and criteria of the transparency to be provided. It stipulates that transparency should be about the "main parameters" which individually or collectively are "most significant in determining ranking and the relative importance of those main parameters". This restriction to "main" parameters rather than details (Recital 27) is not mainly driven by the objective of taking into account commercial interests of the providers of intermediation services or search engines, as – in particular – the P2B rules are without prejudice to the Trade Secrets Directive. Rather, the justification, as expressed already in the Impact Assessment,[50] can be found in Article 5(6) P2B Regulation which addresses the concern that wide-ranging disclosure of ranking algorithms could be generally accompanied by attempts to manipulate the rankings (in a form of 'gaming'). Business users could be incentivised to gain a higher ranking without necessarily improving the quality of their products or services. Therefore Article 5(6) of the P2B Regulation states that providers are not required to disclose information which, with reasonable certainty, would result in future manipulation of the search results. The latter aspect is especially relevant from a media law perspective because it highlights the negative aspect of algorithmic transparency. A result of ranking manipulation can easily be, to a certain extent, opinion manipulation, too. Furthermore, based on democratic values and fundamental rights, in the media landscape the main focus should be on plural and high-quality content oriented towards public interest and not on content optimised along criteria set by private entities through their algorithms and acting mainly in the commercial interest.

Nevertheless, Article 5(2) P2B Regulation aims to ensure that business users are put in a position to understand how the algorithmic systems work in principle and if certain criteria play a role with regard to for example the characteristics of the product offered. This minimum information aims to enhance predictability and help users improve the presentation of their goods and services.[51] The notion of these main parameters of

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detailed assessment Di Porto/Zuppetta, "Co-regulating algorithmic disclosure for digital platforms", *Policy and Society* 2021 40:2, p. 272-293, https://doi.org/10.1080/14494035.2020.1809052.

[49] See on this aspect already Cole/Etteldorf, in: Cappello (ed.), "Media pluralism and competition issues", IRIS *Special*, European Audiovisual Observatory, Strasbourg, 2020, https://rm.coe.int/iris-special-1-2020en-media-pluralism-and-competition-issues/1680a08455, p. 32.

[50] Ibid, p. 15.

[51] Recitals 24 and 26 P2B Regulation.

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ranking ('ranking' understood as a form of data-driven, algorithmic decision-making) is therefore a key element, as it determines the scope of the obligation. However, the term is not further specified in the regulation and might concern a variety of different services, especially with regard to the broad term of intermediation services, which for example can include app stores as well as (parts of) social media services if there is an element of remuneration.

In order to facilitate compliance of providers addressed by the Regulation and to assist them in applying the requirements, the European Commission issued Guidelines on ranking transparency in 2020.[52] These Guidelines provide for detailed information on how Article 5 P2B Regulation should be applied in practice. Besides describing the nature and scope of the obligations, the term of ranking parameters is elaborated on.[53] In addition, it is described how the providers should select the main parameters. Besides the general principles on how providers should conduct the selection process (e.g. they should ask themselves what drove the design of the algorithm in the first place, for example the desire to ensure that consumers found goods or services that were local, cheap, of high quality, etc.), the Commission lists specific considerations which must be taken into account. *Inter alia* providers should consider as main parameters if (and to what extent) their algorithmic systems rely on personalisation, consumer behaviour and intent, to what extent they are linked with ancillary services or which measures the ranked results take against illegal content or do not. A separate chapter of the Guidelines deals furthermore with the question of how to avoid bad faith manipulation of ranking. Notably, it is stated that providers cannot refuse to disclose the main parameters based on the sole argument that they have never revealed any of their parameters in the past or that the information in question is commercially sensitive but rather they need to prove all the criteria set out in the Trade Secret Directive for this exception to apply. With regard to Article 5(6) P2B Regulation, the Guidelines require providers to strike a balance between countering manipulative and harmful behaviour on the one hand and the transparency required by the provision on the other hand.

Directive (EU) 2019/2161 essentially mirrors the rules on ranking transparency in favour of consumer protection and accordingly obliges online marketplaces to provide information also to consumers. For search engines which are different to intermediation services in general, there are already public disclosure obligations under the P2B Regulation. Furthermore, the UCPD amendment means the withholding of the information mentioned in Directive (EU) 2019/2161 about the main ranking parameters is also classified as a misleading omission and thus legally actionable for consumers.

The P2B Regulation became applicable on 12 July 2020. However, the practical effects of it so far are seen rather critically. An evaluation study on behalf of the European

[52] Commission Notice Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council 2020/C 424/01, OJ C 424, 8.12.2020, p. 1–26, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020XC1208%2801%29.

[53] Annex A of the Guidelines contains a (long) list of examples for ranking parameters containing more 'technical' parameters such as mobile-friendliness of an offer or page-loading speed as well as more "content-related" parameters such as keyword tags, uniqueness of content or personalisation (based on search history or user settings) as possible factors for ranking.

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Commission found an "uneven and insufficient implementation by platforms" and that full alignment with the requirements "remains rare".[54] It suggested low levels of awareness and a lack of effective enforcement were the main reasons for a low level of effectiveness. With regard to Article 5 P2B Regulation in particular, the study found that only around one third of online intermediation services reviewed (96 out of 290, or 33.1%) made their ranking parameters transparent. Even when this was done, descriptions of ranking practices could be classified as "well explained" only for a relatively small number (73 platforms, 25.2% of the total). Although not explicitly examining the impact of the P2B Regulation, a later-commissioned study on media plurality and diversity online took a media law-related view of the media landscape with reference to actors that are subject to the P2B Regulation, such as search engines. It also attested "ample space for improvement" as regards transparency of ranking systems driven by algorithms.[55] These potential gaps in effectiveness must be considered when assessing the new rules of the DSA, which came into force after the P2B Regulation. Similarly, the proposal for a European Media Freedom Act,[56] which even refers to the P2B Regulation, should be viewed in light of the earlier Regulation and its apparently limited practical effect so far.

3.2.2. Media-Related Approaches

The Audiovisual Media Services Directive (AVMSD)[57] as last amended by Directive (EU) 2018/1808 includes since this last revision rules for video-sharing platforms (VSPs) in addition to those concerning linear and non-linear audiovisual media services. The definition for VSPs already describes (explicitly) algorithms as a possible essential feature of a VSP falling under the scope of the AVMSD. The element that such platforms do not produce editorial content themselves but determine such content in their organisation "including by automatic means or algorithms in particular by displaying, tagging and sequencing" is precisely the reason for including VSPs in the scope of media regulation from the outset. The idea is that they exert a considerable influence on users' ability to shape and influence the opinions of other users, apart from the fact that they compete with traditional providers in attracting users and advertising partners.[58] Their aggregation

[54] European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, Gineikytė-Kanclerė, Klimavičiūtė, Kudzmanaitė et al., Study on evaluation of the Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services (the P2B Regulation) – Final report, Publications Office of the European Union, 2023, https://data.europa.eu/doi/10.2873/29212.

[55] European Commission, Study on media plurality and diversity online (n 10), p. 75 et seq.

[56] Proposal for a Regulation establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU, COM/2022/457 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0457.

[57] 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), OJ L 77, 20.3.2013, p. 20–22, as last amended by Directive (EU) 2018/1808, consolidated text available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02010L0013-20181218.

[58] Recital 4 Directive (EU) 2018/1808.

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of content, which in practice takes place largely via algorithms, justifies making them "accountable" to follow special rules at least similar to the ones for more traditional audiovisual media services.[59] Substantive rules that are included in the AVMSD for VSPs do not deal explicitly with algorithmic transparency. However, they address processes and mechanisms that are often handled via algorithms in practice. For example, according to Article 28b(3) lit. (d) to (g) AVMSD, VSPs shall establish "transparent and user-friendly" notification systems, systems for explaining how notifications are dealt with, age verification and rating systems, as well as systems for parental control. It is no secret that especially in content moderation on large platforms, algorithmic systems are widely employed.[60] Newer age verification techniques such as biometric recognition also use algorithms.[61] The rating of content often already runs with AI support, too.[62] Whether the general transparency requirement for the respective mechanisms means that an algorithm used in such a mechanism must also be made transparent is not clear. In any case, the AVMSD does not explicitly prescribe this dimension of transparency. However, if one considers the actual objective of the rules, for example that flagging and complaint systems should be transparent for users, such an outcome can certainly be argued.

The proposal for a European Media Freedom Act (EMFA) also does not address algorithmic transparency per se. However, a provision that could become relevant in this context is Article 23 EMFA. According to its paragraph 1, audience measurement systems and methodologies shall comply with principles of transparency, impartiality, inclusiveness, proportionality, non-discrimination and verifiability. Article 23(3) in addition requires transparent audits for these aspects of audience measurement systems. The proposal understands the term 'measurement systems' in a broad sense referring to the activity of collecting, interpreting or otherwise processing data about the number and characteristics of users of media services for the purposes of decisions regarding advertising allocation or prices or the related planning, production or distribution of content. Again, it is no secret that the media industry has undergone a process of significant transformation in which the gathering and analysis of information about audiences is increasingly performed by algorithmic systems.[63] Audience measurement, which directly affects advertising budgets and prices, is an important element of the

[59] See in more detail Cole/Etteldorf, Research for CULT Committee - Implementation of the revised Audiovisual Media Services Directive - Background analysis of the main aspects of the 2018 AVMSD revision, 2022, https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2022)733100, p. 23 et seq.

[60] See also Fernandez/Cole, "The Use of Algorithmic Decision-Making (ADM) Systems as a 'Quasi-Regulatory Tool' for Content Moderation by Online Platforms and Implications for Fundamental Rights", in: University of Luxembourg Law Research Paper Series, SSRN (forthcoming 2024).

[61] For example, the decision of the German media authorities approving an age verification system based on biometric age checks, see Klein, IRIS 2023-1:1/20, https://merlin.obs.coe.int/article/9627. See on this issue also Winder/Marsden/Rotundo, "Automated Content Classification Systems", 2023, https://www.ofcom.org.uk/__data/assets/pdf_file/0016/252151/ACC-Phase-2-Report.pdf.

[62] For example the cooperation between Netflix and the British Board of Film Classification (BBFC) in the course of which Netflix labels all of its content with a UK age rating generated by an algorithm, see BBC News, Netflix content given age rating by algorithm, 1 December 2020, https://www.bbc.com/news/technology-55146206.

[63] See on that in detail Kelly, "Television by the numbers: The challenges of audience measurement in the age of Big Data", in: *Convergence*, 2019-25(1), p. 113-132. https://doi.org/10.1177/1354856517700854.

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financing models of media services. However, new players, especially in the online sector, often provide their own measurement tools without providing sufficient information about the methods used and thus the representativeness of the data gathered. In addition to existing data protection concerns from the recipients' point of view,[64] the EMFA aims at changing this with its transparency requirement. This is primarily about the verifiability and reliability of the methods, which – as Recital 46 explicitly emphasises – can also include information about the definition of the indicators measured and the parameters applied. In practice, this concerns algorithmic transparency which finds its place alongside the obligations from the P2B Regulation and the DSA (Recital 46).

3.2.3. Data-Oriented Rules

Data is the basic essence of algorithms and algorithmic systems, and so legal rules dealing with its regulation are highly relevant also in the context of transparency and accountability. Depending on the function, programming and area of use, the algorithmic procedure can involve personal and non-personal data, which is a relevant distinction because for personal data a much higher level of protection applies according to the applicable rules.

The processing of personal data is often at the centre of such algorithmic systems, which are especially interesting to observe from a media law perspective. These include content recommendation systems or news aggregators that are based on user preferences and thus on tracking of the users' online behaviour. Audience measurements require at least a categorisation of audience groups and thus data on e.g. age or gender, too. Personalised advertising relies explicitly on such data, while automated content moderation processes user data at least as a side effect. The central ruleset for the protection of personal data in the EU is the General Data Protection Regulation (GDPR)[65] and the member state data (protection) laws that supplement and partly implement the GDPR. The GDPR contains numerous principles and requirements that every data processor must adhere to, including when using algorithmic systems for data processing. In addition to the general principle of transparency of processing (Article 5(1) GDPR), these obligations extend to specific provisions that oblige the processor to comprehensively inform the data subject about which elements of his or her data are processed for what purpose, how and on what basis (Articles 13 and 14 GDPR). This also applies to information about algorithmic processing and what it is used for. Accordingly, extensive explanations can therefore be found in the data policies of online platforms. However, this transparency refers "only" to the data processing and not necessarily to the

[64] See on that for example the evaluation project of the French data protection authority on audience measurement, https://www.cnil.fr/fr/solutions-de-mesure-daudience-exemptees-de-consentement-la-cnil-lance-un-programme-devaluation.

[65] 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, OJ L 119, 4.5.2016, p. 1–88, https://eur-lex.europa.eu/eli/reg/2016/679/oj.

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functioning of the algorithmic system, i.e. it concerns the starting point and the goal of the processing but not necessarily the way that goal is reached. For example, the provider of a content recommendation system has to explain which data it collects (e.g. gender, preferences indicated, websites viewed, etc.) and for what purpose (e.g. to display content relevant to the user), but not why – based on this data and its aggregation – specific content is displayed from which pool of content. The GDPR is not geared towards such a protection goal, because its focus is rather the right of self-determination of the data subject .[66]

One provision of the GDPR that is of particular relevance in the present context and has recently received a lot of attention due to the rise of algorithms is its Article 22 on automated individual decision-making, including profiling. According to this rule, the data subject shall have the right (with certain exceptions, *inter alia* if based on explicit consent) not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or affects him or her in a similarly significant way. For this type of processing, the European Data Protection Board demands "specific" transparency, which among other points requires information about the "logic involved",[67] as provided for in the corresponding right to information in Article 15(1)(h) GDPR. While a rather broad right to an explanation about automated decision-making has already been recognised at national level on the basis of this understanding,[68] the CJEU will soon have to decide on this question and the scope of transparency it involves. This case concerns mainly the right to information of a data subject affected by a negative scoring from a credit agency. Advocate General Pikamäe concluded in his Opinion delivered on 16 March 2023 that the obligation to provide “meaningful information about the logic involved” must be understood to include sufficiently detailed explanations of the method used to calculate the score and the reasons for a certain result, notably of factors taken into account for the decision-making process and of their respective weight on an aggregate level.[69] However, the significance of the provision for the media sector must be assessed along the criterion of "legal or similar effects". For example, such effects can easily be argued for credit institutions that assign a score to people on the basis of certain parameters, which is then decisive for obtaining a bank loan or renting a flat. For content recommendation or personalised advertising, which at most leads to the (still self-determined) viewing of that content or purchase of a product, this is difficult to argue. It is even more difficult if the consequence of the decision-

[66] See for a more detailed assessment of the GDPR rules in the context of algorithms and media van Drunen/Helberger/Bastian, “Know your algorithm” (n 42), p. 2020, 222 et seq.

[67] Guidelines on automated individual decision-making and profiling for the purposes of Regulation 2016/679 (wp251rev.01) adopted on 3 October 2017 as last revised and adopted on 6 February 2018, https://ec.europa.eu/newsroom/article29/items/612053, p. 10.

[68] See on a decision from the Netherlands e.g. Gellert/van Beckkum/Zuiderveen Borgesius, “The Ola & Uber judgments”, *EU Law Analysis*, 28 April 2021, http://eulawanalysis.blogspot.com/2021/04/the-ola-uber-judgments-for-first-time.html.

[69] Case C-634/21 OQ / Land Hessen, ECLI:EU:C:2023:220.

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making is "only" an influence on opinion formation or discrimination without further consequences.[70]

There are other rules dealing with non-personal data, such as Regulation (EU) 2018/1807,[71] which mainly relates to data localisation requirements, the availability of data to competent authorities and – comparable to portability possibilities mentioned in the GDPR – the "porting" of data for professional users. Although this Regulation already picks up on transparency issues especially in light of data portability and interoperability, the more comprehensive framework in the proposed Data Act agreed at the end of June 2023[72] is more interesting in the present context. The Data Act, addressing both personal and non-personal data, aims to maximise the value of data in the economy by ensuring that a wider range of stakeholders gain control over their data and that more data is available for innovative use, while at the same time preserving incentives to invest in the generation of data. Transparency plays a role in this context again, especially when it comes to the conditions set out under which data holders have to make available data to data recipients. They shall agree on the modalities in fair, reasonable and non-discriminatory terms and in a transparent manner. With regard to technical and organisational security measures to be included in this process by both parties, the Data Act (Recital 8) advocates applying special algorithms to the data in order to gain valuable insights without having to transfer the raw or structured data itself between the parties or copy it unnecessarily. This means that the focus here is not on the actual transparency of algorithms or techniques, but on the exchange of data, in which trade secrets and innovation in particular must be protected.

A similar approach in favour of the system developers is also followed by the Data Governance Act,[73] which, unlike the Data Act, does not refer to the economic use of data sets in interconnected product systems, but to the voluntary and altruistic exchange of data between actors in the Union. In that recently adopted Regulation, transparency in relation to data exchange also plays an important role. Especially in the context of Article 20, detailed recording and reporting obligations for recognised data altruism organisations exist. Even though these are not specified in relation to algorithms, they are aimed again at furthering the understanding of – in this case the overall position of a specific data altruism organisation – procedures and actors from the perspective of users.

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[70] See for an evaluation of this aspect, comparing it also to the DSA, "Gössl, Recommender Systems and Discrimination", in: Genovesi/Kaesling/Robbins (eds), "Recommender Systems: Legal and Ethical Issues". *The International Library of Ethics, Law and Technology*, vol 40. Springer, Cham. https://doi.org/10.1007/978-3-031-34804-4_2.

[71] Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union, OJ L 303, 28.11.2018, p. 59–68.

[72] COM/2022/68 final, see European Parliament, Provisional agreement resulting from interinstitutional negotiations, Proposal for a regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act), https://www.europarl.europa.eu/RegData/commissions/itre/inag/2023/07-14/ITRE_AG(2023)751822_EN.pdf.

[73] Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act), OJ L 152, 3.6.2022, p. 1–44, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R0868.

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3.2.4. Other Content-Oriented Regulation of Relevance

Questions about algorithmic transparency arise from a different perspective when obligations are imposed by law that the addressees can in fact only fulfil with the support of algorithmic systems.[74] Such obligations can be found in recent secondary law with a digital focus in relation to combating illegal content. Examples include the DSM Copyright Directive[75] with its requirements for appropriate measures that online content-sharing service providers have to adopt against the illegal use of content ('filtering obligations'[76]), the terrorist content online (TCO)-Regulation[77] with technical and content-related obligations for hosting services to combat terrorist content, and the proposed combatting child sexual abuse material (CSAM)-Regulation[78] with its much-criticised obligations to screen communication content in search of child abuse material ("chat control").[79] The implementation of all these obligations can lead to restrictions on media and communication content, and is thus a sensitive issue in light of fundamental rights.

It is noteworthy that the DSM Copyright Directive does not contain transparency provisions nor any other specific expectations concerning the technical systems which it does not itself explicitly require, but which are nonetheless implicitly required due to the reference to "customary standards" which providers have to match in their efforts to counter availability of illegal content. The TCO Regulation explicitly encourages in Recital 25 the recourse to automated tools in order to meet the expected level of measures of intermediaries in combatting terrorist content online. It also includes transparency obligations in particular in its Article 7: Hosting services providers are not only required to deliver meaningful explanations of the functioning of specific measures for handling terrorist content, including the use of automated tools, but also specific transparency reports. With a view to avoiding the removal of material which is not terrorist content, they are explicitly bound to fundamental rights and have to take further safeguards.

Under the currently discussed CSAM proposal, in the interest of transparency and accountability and to enable evaluation, providers of hosting services, providers of

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[74] See on this also Lennartz/Kraetzig, "Filtering fundamental rights: DSM, DSA and algorithms in digital architectures", VerfBlog, 2022/10/05, https://dx.doi.org/10.17176/20221005-230853-0.

[75] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, p. 92–125, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0790.

[76] Critical e.g. Schwemer/Schovsbo, "What is Left of User Rights? –Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime", in Torremans (ed), *Intellectual Property Law and Human Rights*, 4th ed. 2020, Chapter 18, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3507542.

[77] Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online, OJ L 172, 17.5.2021, p. 79–109, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R0784.

[78] Proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse, COM/2022/209 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A209%3AFIN.

[79] See for an overview and evaluation of problematic aspects Quintel, "Renewed Concerns About Compliance of the Proposed 'Regulation to Prevent and Combat Child Sexual Abuse' with Essence of Right to Data Protection: The Council Legal Service Opinion", *European Data Protection Law Review* 2023, pp. 173 – 183, https://doi.org/10.21552/edpl/2023/2/12.

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publicly available interpersonal communications services and providers of internet access services, Coordinating Authorities and the European Centre to prevent and counter child sexual abuse should be required to collect, record and analyse information, based on anonymised gathering of non-personal data and to publish annual reports on their activities under this planned Regulation. The technology that providers have to install and operate if they receive a detection order has to meet certain safeguards such as data minimisation or human oversight. They also have to inform users about the use of such technologies, although the transparency requirement and regular reporting obligation can be limited in case such transparency may reduce the effectiveness of the measures to execute detection orders. It is already apparent from these few examples that in the different sectoral areas different standards apply to transparency of algorithmic systems (and automated systems) in connection with content moderation.

A further important regulatory approach that is currently in the legislative procedure is the proposed Political Advertising Regulation.[80] Although this does not concern illegal content, it will potentially add another layer of transparency obligations for service providers. In its Articles 5 to 11 and 14 the proposal lays down rules to ensure that political advertising services shall be provided in a transparent manner. Providers of political advertising services *inter alia* have to make every political advertisement transparent based on detailed rules (labelling as such, identity of the sponsor, comprehensive transparency notice on objectives and background, etc.). They have to set up complaint systems for political advertisements that do not comply with these conditions and have certain reporting and transmission obligations for competent authorities. What is more interesting in the present context, however, are the proposed rules on targeting and amplification of political advertising (Article 12). In practice this is regularly done by means of algorithms. Targeting or amplification techniques that involve the processing of personal data in the context of political advertising are prohibited, except where this relies on explicit consent or refers to advertising within a party or similar setting.

This, at first, means that restrictions have to be implemented in such advertising algorithms. Furthermore, in cases where targeted political advertising is allowed (e.g. when consent was given), providers have to comply with further transparency obligations such as adoption and implementation of an internal policy describing clearly and in plain language their targeting and amplification techniques. Notably, they have to keep records on the use of targeting or amplification, the relevant mechanisms, techniques and parameters applied, and the source(s) of personal data used. Together with the political advertisement, additional information has to be provided in transparency notices which is necessary to allow the individual concerned to understand the logic involved and the main parameters of the technique used, as well as the use of third-party data and additional analysis techniques. Annex II of the proposed Regulation concretises the degree of algorithmic transparency by stating that this information must contain the

[80] Proposal for a Regulation of the European Parliament and the Council on the transparency and targeting of political advertising, COM/2021/731 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0731.

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specific groups of recipients targeted, including the parameters used to determine the recipients to whom the advertising is disseminated, with the same level of detail as used for the targeting. Furthermore, the categories of personal data used for and goals of the targeting and amplification as well as the mechanisms and logic behind them have to be made transparent. This even extends to the inclusion and exclusion parameters and the reasons for choosing these parameters. In view of the very broad concept followed in the proposal, which covers not only "genuine" advertising by political parties in election campaigns, but possibly also the political engagement from non-political actors, if these rules are adopted, they may have an even more significant impact on the media sector than that already mentioned.[81]

3.2.5. Looking Ahead: The Dawn of the EU AI Act

As already mentioned above in the context of the CoE's work, AI and algorithms, as necessary basic building blocks for AI, are closely interrelated, so that the proposal for an AI Act[82] which is still being negotiated between the legislative bodies of the EU, cannot go unmentioned here either. The proposal aims at creating harmonised rules for the placing on the market, the putting into service and the use of AI systems in the EU. In essence, it follows a layered approach, prohibiting certain AI systems which pose unacceptable risks such as social scoring, putting stricter obligations on high-risk AI such as biometric recognition and providing mainly for transparency as regards AI posing limited risks only.[83]

The original Commission proposal defined AI systems as software that is developed with one or more of the techniques and approaches listed in an annex and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with. This rather rigid definition, relying on fixed technical standards in a rapidly evolving sector, was strongly amended by the positions of the European Parliament and the Council of the EU.[84] One aspect of discussion already concerns if and how far generative AI systems shall be covered by the scope of the AI Act, too. All the positions have, however, in common that transparency of AI systems is regarded as being a centrepiece of the regulation.

The first area of interest is high-risk AI, which, according to the Parliament's position, would include, for example, the arbitrary extraction of biometric data from social

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[81] See in more detail Cole/Etteldorf, "Implementation of the revised Audiovisual Media Services Directive (n 59)", p. 45 et seq.

[82] Proposal for a Regulation laying down harmonized rules on Artificial Intelligence (Artificial Intelligence Act), COM/2021/206, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206.

[83] For a first analytical overview see Veale/Zuiderveen Borgesius, "Demystifying the Draft EU Artificial Intelligence Act — Analysing the good, the bad, and the unclear elements of the proposed approach", *Computer Law Review International* 2021 22:4, pp. 97-112. https://doi.org/10.9785/cri-2021-220402.

[84] See for a 3-colum synopsis in the course of the ongoing triologue, https://www.europarl.europa.eu/cmsdata/272920/AI%20Mandates.pdf.

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media to create facial recognition databases (e.g. Clearview AI). These systems would be subject to numerous intensive obligations, including recording in an EU database, *ex ante* compliance and risk assessment obligations, human oversight, cybersecurity, technical robustness and rules on training data. In particular the EU database would, according to the positions of the Parliament and the Council, also include information on the deployment of the AI system, thus enabling researchers to monitor their impact more closely. Provisions on data governance also play a decisive role, as they stipulate that training, validation and testing data sets must be subjected to a kind of quality test, thus preventing malfunctions that could lead to discrimination or incorrect conclusions.

Article 13 stipulates that high-risk AI systems must be designed and developed in a way ensuring that their operation is sufficiently transparent to enable users to interpret the system's output and use it appropriately. Thus, the AI Act understands transparency more in a way of "interpretability". According to the Parliament's position, it shall even be explicitly laid down that "[t]ransparency shall thereby mean that, at the time the high-risk AI system is placed on the market, all technical means available in accordance with the generally acknowledged state of art are used to ensure that the AI system's output is interpretable by the provider and the user. The user shall be enabled to understand and use the AI system appropriately by generally knowing how the AI system works and what data it processes, allowing the user to explain the decisions taken by the AI system to the affected person". An appropriate type and degree of transparency shall be ensured, with a view to achieving compliance with the relevant obligations, i.e. requirement of an assessment by providers. This shall be accompanied by instructions for use in an appropriate digital format or otherwise that include concise, complete, correct and clear information that is relevant, accessible and comprehensible to users. This includes, when appropriate, specifications for the input data, or any other relevant information in terms of the training, validation and testing data sets used, taking into account the intended purpose of the AI system.

More interesting from a media law perspective,[85] however, are probably the provisions of Title IV concerning AI systems posing certain limited risks. According to the original proposal (Article 52), transparency obligations would apply for systems that interact with humans (such as chatbots), are used to detect emotions or determine association with (social) categories based on biometric data, or generate or manipulate content (deep fakes). For example, if an AI system is used to generate or manipulate image, audio or video content that appreciably resembles authentic content, there should be an obligation to disclose that the content is generated through automated means, subject to exceptions for legitimate purposes (e.g. law enforcement, freedom of expression). However, this provision, too, is strongly amended in the positions of the Parliament and the Council. For instance, as regards deep fakes, the Parliament wants to ensure that information is given "in an appropriate, timely, clear and visible manner" and also extends this to the name of the natural or legal person that generated or manipulated the content. The European Parliament also suggests a specification of the

[85] See on the relevance of AI in specifically the audiovisual sector Cappello M. (ed.), "Artificial intelligence in the audiovisual sector (n 35)".

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term disclosure which shall mean "labelling the content in a way that informs that the content is inauthentic and that is clearly visible for the recipient of that content" relying on state-of-the-art and relevant harmonised standards and specifications. The Parliament would also concretise the exception foreseen regarding freedom of expression limiting clearly "creative, satirical, artistic or fictional cinematographic, video games visuals and analogous work or programmes" to the obligation to disclose the existence of such generated or manipulated content in an appropriate manner that does not hamper the display of the work.

Therefore, a final analysis of the AI Act in light of its impact on algorithmic transparency must be withheld until the final text is officially published. Although at the time of writing this IRIS *Special* a final agreement between the legislative bodies still had to be reached, the significance of the new ruleset was clearly foreseeable. The EU legislators reached a compromise agreement on the AI Act after a final round of lengthy negotiations on 9 December 2023,[86] but there were intensive and controversial further discussions about whether the textual work reflecting the political agreement would receive the necessary support by the institutions.[87] Finally, the provisional acceptance of the draft text by the Coreper was done on 2 February 2024 and that document was made publicly available.[88] The European Parliament's committee vote was foreseen for mid-February and once all language versions are available, the Act is set to be adopted in April 2024 by the plenary of the European Parliament and shortly after by the Council before being published in the Official Journal and entering into force.

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[86] See Council of the EU, Press release 986/23, Artificial intelligence act: Council and Parliament strike a deal on the first rules for AI in the world, 09.12.23, https://www.consilium.europa.eu/en/press/press-releases/2023/12/09/artificial-intelligence-act-council-and-parliament-strike-a-deal-on-the-first-worldwide-rules-for-ai/; European Parliament, Press release, Artificial Intelligence Act: deal on comprehensive rules for trustworthy AI, 09.12.2023, https://www.europarl.europa.eu/news/en/press-room/20231206IPR15699/artificial-intelligence-act-deal-on-comprehensive-rules-for-trustworthy-ai; European Commission, Press release IP 23/6473, Commission welcomes political agreement on Artificial Intelligence Act, 09.12.2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6473. See also Radel-Cormann, IRIS 2024-1:1/9, https://merlin.obs.coe.int/article/9934.

[87] See for background e.g. Volpicelli, EU countries strike deal on landmark AI rulebook, 2 February 2024, https://www.politico.eu/article/eu-countries-strike-deal-ai-law-act-technology/.

[88] E.g. through some of the persons closely involved in the negotiations, see https://www.kaizenner.eu/post/aiact-part3 and direct link https://download-files.wixmp.com/ugd/88fe02_277c24b6d3f244bd86093d16c8573417.pdf?token=eyJhbGciOiJIUzI1NiIsInR5cCI6IkpXVCJ9.eyJpc3MiOiJ1cm46YXBwOmU2NjYzMGU3MTRmMDQ5MGFhZWExZjE0OWIzYjY5ZTMyIiwic3ViIjoidXJuOmFwcDplNjY2MzBlNzE0ZjA0OTBhYWVhMWYxNDliM2I2OWUzMiIsImF1ZCI6WyJ1cm46c2VydmljZTpmaWxlLmRvd25sb2FkIl0sImlhdCI6MTcwNzY5OTkyMiwiZXhwIjoxNzA3NzM1OTMyLCJqdGkiOiJmMzk2ZTNkZi1kMGMxLTQwMDYtYjk4OC0yMzJlY2Q3YzIwYzEiLCJvYmoiOltbeyJwYXRoIjoiL3VnZC84OGZlMDJfMjc3YzI0YjZkM2YyNDRiZDg2MDkzZDE2Yzg1NzM0MTcucGRmIn1dXSwiZGlzIjp7ImZpbGVuYW1lIjoiQUlBIC0gVHJpbG9ndWUgLSBDb3JlcGVyLnBkZiIsInR5cGUiOiJhdHRhY2htZW50In19.xBYh2z1BpVOiKFE7ehrS0NJGdNgexLLfYRcZMp7KFY0, see also https://artificialintelligenceact.eu/ai-act-explorer/.

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4. A Major Milestone in the EU: The Digital Services Act Package

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The most important development in the regulation of the online environment on the level of the EU is the Digital Services Act Package which the European Commission had proposed in 2020.[89] Both Regulations of this package – the Digital Services Act (DSA) and the Digital Markets Act (DMA) – were published and entered into force in autumn 2022 with different application dates in 2023 and 2024. They have introduced numerous new transparency rules.

4.1. A New Standard for Transparency Online: The EU Digital Services Act

The DSA as a new framework for platform regulation, will become fully applicable in February 2024 and serve as a comprehensive, directly binding, and horizontal set of rules on EU level. This framework is based on three pillars: the continuation of conditional exemptions from liability for providers of intermediary services, rules on specific due diligence obligations tailored to certain specific categories of such providers, and rules on the implementation and enforcement of the Regulation itself. While issues concerning the enforcement and the institutional setting established for it will be presented in Chapter 6, this chapter focuses on the due diligence obligations of the DSA dealing with (algorithmic) transparency. These obligations apply irrespective and independent of the liability exemptions thereby creating accountability expectations.[90] It is noteworthy in light of the previous analysis of sectoral legislation that the DSA remains "without prejudice" to the EU rules presented above (Article 2(4) DSA). This means that these rules and the DSA essentially apply independently of each other without, however, determining

[89] Cf. for an overview Cappello (ed.), "Unravelling the Digital Services Act package", IRIS *Special*, European Audiovisual Observatory, 2021, https://rm.coe.int/iris-special-2021-01en-dsa-package/1680a43e45.
[90] See Recital 41 DSA, last sentence.

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a concrete relationship of precedence, although overlaps are certainly conceivable in the practical implementation.[91]

4.1.1. Focus on Transparency in the DSA

As is already obvious from the title of Chapter III of the DSA, the due diligence obligations aim to ensure a transparent and safe online environment. The beneficiaries of such transparency according to the different provisions should not only be users (consumers and business users), but also society as a whole; more specifically, research and regulatory authorities are mentioned. These additional dimensions beyond user focus might turn out as a significant step to address more efficiently different risks in the online environment.[92] The concept of transparency is inherent in almost all provisions and increases in volume of what is expected depending on the type and size of the service. It thereby follows the overall graduated approach of the DSA.

The first appearance of transparency is reflected in the obligations for all types of intermediary services to establish points of contact and legal representatives. This aims at creating in a clear and easily identifiable way a single entry port for users and regulatory authorities into the often complex platform structures. In a significant step forward in terms of framing more clearly the limits of private ordering of the online services environment, Article 14 DSA is of central importance. The provision obliges all intermediary service providers to include and maintain up-to-date information in their terms and conditions.[93] These information obligations pertain not just to general matters such as policies and procedures applied for the purpose of content moderation, but stretch to the measures and tools used, including algorithmic decision-making and how human review has to be ensured. In addition, rules of procedure of the internal complaint-handling systems have to be laid out. This comprehensive information has to be publicly available in an easily accessible and machine-readable format. For services primarily directed at or predominantly used by minors this latter requirement means that the information must be presented in a way understandable for them. Very large online platforms/search engines (VLOPs/VLOSEs)[94] shall even provide summaries of their terms

[91] Critical on aspects of coherence and consistency from the point of view of the AVMSD and with further references, Cole/Etteldorf, "Future Regulation of Cross-Border Audiovisual Content Dissemination", 2023, https://doi.org/10.5771/9783748939856, p. 92 et seq., 106 et seq.

[92] See e.g. Strowel/De Meyere, "The Digital Services Act: transparency as an efficient tool to curb the spread of disinformation on online platforms?", *JIPITEC* 2023 14:1, p. 66-83, https://www.jipitec.eu/issues/jipitec-14-1-2023/5708. However, the authors also conclude that questions remain regarding the information overload for the regulators and the effectiveness of the future DSA enforcement.

[93] See specifically for algorithms in content moderation Martínez, "Platform regulation, content moderation, and AI-based filtering tools: Some reflections from the European Union", *JIPITEC* 2023 14:1, p. 21-225, https://www.jipitec.eu/issues/jipitec-14-1-2023/5716; Fernandez/Cole, "The Use of Algorithmic Decision-Making (ADM) Systems (n 60)".

[94] On 25 April 2023, the European Commission designated as VLOSE Bing and Google Seach, as VLOPs Alibaba, AliExpress, Apple AppStore, Booking.com, Facebook, Google Play, Google Maps, Google Shopping, Instagram, LinkedIn, Pinterest, Snapchat, TikTok, Twitter, Wikipedia and YouTube, see https://digital-

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and make available the information in a multitude of languages. The aim of transparency as required by Article 14 clearly focuses on transparency for users. The users should be enabled to understand – both from the recipient's and the creator's perspective – how content is handled, to what extent automated processes are employed and what options users have to seek defence against the outcome of the procedures. However, it should be pointed out that this approach concerns transparency about the "where" and "how" of the integration of algorithms in the service provider's systems, but does not explicitly extend to transparency on the functioning of those algorithms.

Even more and stricter transparency obligations are contained in the specific provisions for VLOPs and VLOSEs. Namely in the framework of risk assessment and risk mitigation requirements transparency has to be established. Without going into the details of each of the in some respects rather flexible and openly formulated obligations in this area with regard to their significance in the context of (especially algorithmic) transparency, it should be emphasised that the DSA requires VLOPs and VLOSEs to carry out a risk assessment for the content distributed via their services. They have to evaluate threats posed, *inter alia*, by illegal content or to fundamental rights. This includes a review of the design of their recommender systems and other relevant algorithmic systems, including for content moderation and advertising, with a view to addressing this question (Article 34(2)(a)(b) and (d) DSA).

Explicitly mentioned is the risk of content manipulation. This relates on the one hand to disinformation (campaigns), but on the other hand also to the issue of deep fakes, which is often discussed in connection with algorithmic transparency – or even more as AI transparency.[95] The European Parliament's proposal in the legislative procedure[96] to impose labelling obligations on all online platforms with regard to deep fakes was not incorporated in the final text of the DSA. However, this was compensated for partly by the mentioned risk assessment obligations of VLOPs and VLOSEs, which are also linked to possible corresponding mitigation measures. For example, Article 35(1)(k) DSA provides that these providers might need to ensure that an item of information, whether it constitutes a generated or manipulated image, audio or video that appreciably resembles existing persons, objects, places or other entities or events and falsely appears to a person to be authentic or truthful, is distinguishable by prominently placed flagging when presented on their online spaces. In addition, an easy-to-use functionality has to be provided which enables recipients of the service to indicate such information so that it

strategy.ec.europa.eu/en/policies/dsa-vlops. Amazon (Amazon Store) and Zalando have been also designated as VLOPs but applied at the General Court against the Commission's decision (cases T-367/23 and T-348/23), Amazon being interim successful according to the provisional judgement.

[95] See in detail Fernandez, "Deep fakes": disentangling terms in the proposed EU Artificial Intelligence Act, in: UFITA 2021(85)2, p. 392-433, https://doi.org/10.5771/2568-9185-2021-2.

[96] European Parliament, Amendments adopted by the European Parliament on 20 January 2022 on the 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, P9_TA(2022)0014, https://www.europarl.europa.eu/doceo/document/TA-9-2022-0014_EN.html, Article 33a.

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can be labelled accordingly. This approach focuses essentially on the privacy aspect of the risks associated with deep fakes.[97]

The risks outside of privacy rights that not only deep fakes but also algorithmic systems in general may have for the formation of opinion and therefore freedom of expression and information, however, could (and probably will) be addressed in the future by linking the DSA to existing or still-to-be-developed codes of conduct. These are not only to be promoted (Article 45(1) DSA), in the case of systemic risks even to be developed on the invitation of the Commission (Article 45(2) DSA). Rather, such codes of conduct can also be recognised as a suitable regulatory instrument (Article 45(4) DSA), which in turn enables the Commission as the regulatory authority to demand from VLOPs and VLOSEs commitment to such codes in case of risks identified. For example, in this co-regulatory path, the EU Strengthened Code of Conduct on Disinformation[98] could be, as already signalled as the intention,[99] approved under the DSA and thus also the envisaged extension to labelling obligations for AI-generated content[100] could become quasi-legally binding.

In addition to the fact that the harmonisation and legal specification of, for example, notification and complaints systems can be seen as a further step towards more comprehensibility for users and thus as an expression of transparency, it is the specific obligations of online platforms that directly address transparency in a more problem-oriented approach. In order to tackle the growing problems of dark patterns and nudging techniques in the online environment, Article 25 DSA, which was added late in the trilogue procedure when negotiating a compromise text between Council and Parliament, obliges online platforms to design user interfaces in a specific way. They shall not design, organise or operate their online interfaces in a way that would deceive or manipulate their users or in a way that otherwise materially distorts or impairs the ability of them to make free and informed decisions. A very "popular" example of such techniques might be recurring pop-ups for cookie consent or calls for depositing the mobile number for security purposes, although the user had already made his or her (dismissive) choice, possibly even repeatedly. Specificities on what is expected of platforms in this rather vaguely formulated provision, i.e. what techniques are to be seen as manipulative and to what extent, will likely be found in future guidelines that the Commission is authorised to issue. While Article 25 might concern a variety of issues, also in the context of algorithms such as with recommender systems or advertising, Articles 26 and 27 are dedicated to specific issues of advertising and recommender systems and are presented in more detail in the following sections.

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[97] See on this comprehensively e.g. van Huijstee et al., "Tackling deepfakes in European policy", EPRS study, 2021, https://www.europarl.europa.eu/RegData/etudes/STUD/2021/690039/EPRS_STU(2021)690039_EN.pdf.
[98] 2018 Code of Practice on Disinformation, https://ec.europa.eu/newsroom/dae/redirection/document/87534, which was strengthened in the 2022 Strengthened Code of Practice on Disinformation, https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation.
[99] Press statement of Vice-President Jourova on the meeting with the Code of Practice on Disinformation Signatories, 26 September 2023, https://ec.europa.eu/commission/presscorner/detail/en/speech_23_4645.
[100] See European Commission German representation, press release of 5 June 2023, https://germany.representation.ec.europa.eu/news/verhaltenskodex-gegen-desinformation-unterzeichner-sollen-arbeit-intensivieren-und-kunstliche-2023-06-05_de.

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4.1.2. Transparency of Advertising on Online Platforms

Article 26 DSA answers the risks of online advertising identified in light of illegal advertisements, financial incentives for the publication or amplification of illegal or otherwise harmful content and activities online, or the discriminatory presentation of advertisements with an impact on the equal treatment and opportunities of citizens.[101] Providers of online platforms that present advertisements[102] on their online interfaces have to ensure for each specific advertisement presented to each individual recipient that users are able to identify, in a clear, concise and unambiguous manner and in real time, that the information is advertising, on whose behalf it is displayed and who paid for it. The labelling obligation extends to user-generated content, for which online platforms, although they are not the creators of the content, still have responsibilities in that they have to provide a corresponding notification function for uploaders of such content. This is especially relevant with regard to the rising relevance of influencer marketing.[103] Such notified content needs to then be labelled accordingly by the platforms when being disseminated.

Profiling, i.e. targeted advertising based on personal data, is forbidden when it relies on special categories of personal data (Article 9(1) GDPR) such as racial or ethnic origin, political opinions, health or data concerning a natural person's sex life or sexual orientation.[104] More relevant in the present context is the transparency obligation in Article 26(1)(e) DSA which requires online platforms to provide "meaningful information directly and easily accessible from the advertisement about the main parameters used to determine the recipient to whom the advertisement is presented and, where applicable, about how to change those parameters".

On the one hand, the regulation is intended to make advertising more transparent and predictable for the user. As a result, the user is put in a position from which his or her purchase decision or opinion formation can be based on a more informed footing. For example, this can dispel the illusion that a product is displayed to him or her because of its high popularity or a high level of customer satisfaction, but instead simply because he or she has previously viewed similar products on websites or was categorised into a certain target group (based on age, gender, hobby, etc.) and the payment for the advertisement includes this type of personalisation. On the other hand, the provision points to user empowerment. Users shall be enabled to manage advertising, or rather the

[101] Recital 68. See on risks posed also Cappello (ed.), "New actors and risks in online advertising", IRIS *Special*, European Audiovisual Observatory, 2022, https://rm.coe.int/iris-special-1-2022en-online-advertising/1680a744d7?c=199&traversed=1.

[102] The term the DSA relies on is neutral as regards the format, i.e. it can be audio, audiovisual, text-based or combinations thereof. See Article 3 lit. (r) DSA.

[103] See on this already in the context of similar obligations for VSPs under the AVMSD ERGA Subgroup on consistent implementation and enforcement of the new AVMSD framework, Analysis and recommendations concerning the regulation of vloggers, 2021, https://erga-online.eu/wp-content/uploads/2021/12/ERGA-SG1-2021-Report-Vloggers.pdf.

[104] This prohibition is significantly stricter than the GDPR which allowed so far such processing in Article 9 and 22 at least when the data subject freely gave their consent. Recital 69 places this provision in the context of possible threats for society through e.g. disinformation campaigns or discrimination.

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parameters on the basis of which it is displayed, if such a possibility of manual adaptation is provided by the online platform. In the latter case the functionality of the individual setting possibilities needs to be explained clearly. However, there is no general obligation to implement such a possibility for manual adaptation in the first place.

With regard to both aspects, the text of the DSA itself does not specify how far the transparency and user empowerment is supposed to reach. For example, with regard to the duty to inform, the question arises as to whether it is sufficient to indicate the parameters (i.e. the reason) why an advertisement is displayed (i.e. a juxtaposition of source parameters concerning the recipient and target parameters of the advertisement) or whether it should be disclosed additionally how these parameters are weighted, and why one advertisement may be preferred over another. With regard to the possibility of personalisation, on the other hand, the question may arise as to whether this only concerns the switching on and off of personalised advertising, certain individual parameters (e.g. by selecting and deselecting from a list), certain advertisements or certain advertising categories, or, in addition, their modification and supplementation by the user's own preferences or even their weighting which would be at the core of the respective programming of the algorithmic system. As Article 26 DSA only refers to the transparency of how to manage settings but does not oblige online platforms to provide a mechanism for users to manage advertising settings in the first place ("where applicable" only), it anyway depends on the platforms' advertising model. In the context of the transparency obligation Recital 68 refers to the "main parameters" – similar to the P2B Regulation using that term based on a broad understanding – and of "meaningful explanations of the logic used" – similar to the GDPR using the term in the context of automated decision-making. However, it seems to be based on a less technical and more user-friendly understanding by stating that such explanations should include information on the method used for presenting the advertisement, for example whether it is contextual or another type of advertising, and, where applicable, the main profiling criteria used. In the future this might be further specified via voluntary standards set by relevant European and international standardisation bodies with regard at least to the technical aspects. According to Article 44(1)(h) DSA, the Commission shall consult the European Board for Digital Services and support and promote the development and implementation of such standards in respect of technical measures to enable compliance with obligations relating to advertising contained in the DSA. Furthermore, according to Article 46 DSA, the Commission shall encourage and facilitate the drawing up of voluntary codes of conduct at Union level to contribute to further transparency for actors in the online advertising value chain beyond the requirements of Articles 26 and 39 DSA, the latter concerning VLOPs and VLOSEs.

Article 39 DSA lays down additional and more precise online advertising transparency for VLOPs and VLOSEs. They shall compile and make publicly available in a specific section of their online interface a repository containing certain information. While this shall cover information relevant for the user to assess the advertisement and make informed choices such as those about the origin of the advertisement (on whose behalf and paid for by whom), the further content of this repository makes clear that it shall mainly serve monitoring purposes of the general public, researchers and regulatory authorities in light of systemic risks posed by such platforms – in addition to a list of all

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commercial communications displayed and during which period the repository encompasses an overview of the reasons why and to whom commercial communications were targeted. The granularity of the repository goes into the detail of giving data about commercial communication within user-generated content which has been notified as such. VLOPs and VLOSEs namely shall provide information about whether the advertisement was intended to be presented specifically to one or more particular groups of recipients (target groups) and if so, the main parameters used for that purpose including, where applicable, the main parameters used to exclude one or more such particular groups. Transparency is also required concerning the total number of recipients of the service and, where applicable, aggregate numbers broken down by member state for the group or groups of recipients that the advertisement specifically targeted. To make this repository more accessible, providers are required to implement searchable and reliable tools that allow multicriteria queries and application programming interfaces.

Overall, this repository with the described functionalities opens an entire new dimension of transparency in connection with online content dissemination for individual users. The stricter rules for VLOPs and VLOSEs are based on the assumption that services with a broader reach not only pose risks to individuals, but systemic risks must be counteracted in advance of the risks being realised. This approach underlies the layered regulatory steps of the DSA in general. With regard to advertising specifically, these services with a large market share have not only a certain level of scale but also significant abilities to target and reach recipients based on their behaviour, both within and even outside of their own interfaces. Such broad reachability results in more serious threats through illegal advertisements or manipulative techniques and disinformation, simply due to the scale of numbers. The potential real and foreseeable negative impact on public health, public security, civil discourse, political participation and equality motivates the stricter obligations.[105] In this context it has to be noted that through such repositories it will be possible for monitoring entities (whether public or private) to get an understanding of targeting and delivery criteria in general, thus how their relation poses even greater risks. For example, it could be evaluated if an advertisement is delivered to vulnerable persons or persons in vulnerable situations such as minors. In conjunction with the risk assessment and mitigation measures that the VLOPs and VLOSEs are subject to anyway and that include independent auditing as well as more detailed information obligations vis-à-vis regulatory authorities (see more on this in Chapter 6), these obligations contribute to a concept of a more transparent and safer advertising environment.

4.1.3. Recommender System Transparency

A further core element of online platforms' business models is addressed in Article 27 DSA and concerns the manner in which information is prioritised and presented on their online interface to facilitate and optimise access to information for the recipients of the

[105] Recital 95 DSA.

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service. Such recommender systems concern, depending on the service, diverse types of content and information but have in common that they rely on algorithmically driven suggestions, ranking and prioritising of information, distinguishing content through text or other visual representations, or otherwise curating information provided by recipients.[106] Thus, they might have a significant impact on the formation of public opinion. To tackle this risk, Article 27(1) DSA introduces additional transparency obligations according to which providers of online platforms have to set out in their terms and conditions, in plain and intelligible language, the main parameters used in their recommender systems. Additionally, they have to explain any options they give to recipients of the service to modify or influence those main parameters.

While there is no specific definition of the term 'main parameters', Article 27(2) DSA provides for a non-exhaustive list of criteria that are regarded to be such main parameters as they have to be included in the information to the users as a minimum. These are the criteria which are most significant in determining the information suggested to the recipient of the service and the reasons for the relative importance of those parameters. The obligation to provide this information extends to situations in which the prioritisation is based on profiling and online behaviour. Although these specifications convey an understanding on what elements the transparency extends to, they still evolve around main parameters in the context of personalisation. What 'main parameters' could be beyond this application area might become clearer if in the future further details are laid down in voluntary standards set by European and international standardisation bodies. The Commission is tasked by the DSA to support and promote such standards with regard to choice interfaces and presentation of information on the main parameters of different types of recommender systems (Article 44(1)(i) DSA). However, information about the functioning of personalisation algorithms can be seen as only a small and possibly even less relevant part of the information that is important to achieve trust by individuals in the use of the services, which is ultimately one of the main goals of the transparency obligations.[107] Information about the data – this question is typically addressed in data protection law – or the source of the content which is used in personalisation systems – which is usually addressed by media law, but currently on EU level mainly in self-regulatory approaches or by national legislation – can be equally important if one takes an overall look at the matter and the DSA is only one part of the whole picture.[108] In light of the objective Article 27 DSA pursues and the obligation of online platforms to ensure such transparency "consistently"[109], it might be challenging for providers to guarantee the necessary up-to-date information (the "most significant" and that of "relative importance") if their recommender algorithms further develop on their own terms relying on machine learning or AI. Such 'self-learning' systems may make it less clear and therefore more difficult to explain even for the providers how the algorithmic systems function at a given moment in time or in a given situation.

[106] Recital 70 DSA.
[107] Van Drunen/Zarouali/Helberger, "Recommenders you can rely on: A legal and empirical perspective on the transparency and control individuals require to trust news personalisation", *JIPITEC* 2022 13:3, p. 302, 316.
[108] Ibid.
[109] Recital 70.

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Similarly to Article 26 DSA, Article 27(3) DSA picks up the aspect of user empowerment but in contrast to the area of advertising, which mainly concerns the commercial concept of a platform and thereby its financing model, goes further than Art. 26 DSA. In the context of content recommendation, transparency has a far-reaching function related to opinion-forming issues. It stipulates that, where several options are available in the recommender systems that determine the relative order of the information presented, providers of online platforms shall make available a functionality that allows recipients of the service to select and modify at any time their preferred options. That functionality shall be directly and easily accessible from the specific section of the online platform's interface where the information is being prioritised. Still, as explained already above, there is neither a concretisation of the options that have to be made available nor establishment of the degree to which users shall be given leeway to manage them, leaving the degree of user empowerment, to a certain extent, up to the platforms.

Again, VLOPs and VLOSEs have additional obligations in this context, too. According to Article 38 DSA they have to provide at least one option for each of their recommender systems which is not based on profiling. This shall at least concern the main parameters and the option should be directly accessible from the online interface where the recommendations are presented.[110] The obligations of these platforms regarding assessment and mitigation of risks (Articles 34 and 35) complement this by requiring them, on a case-by-case basis, to assess and, where necessary, adjust the design of their recommender systems. This could mean, for example, measures to prevent or minimise biases that lead to the discrimination of persons in vulnerable situations.[111]

4.1.4. Transparency of Content Moderation: Reports and EU Database

Finally, a central element of the DSA is the transparency reporting obligations it imposes on all providers of intermediary services except micro and small enterprises. The providers have to make publicly available, in a machine-readable format and in an easily accessible manner, at least once a year, clear and easily comprehensible reports on any content moderation they engage in (Article 15 DSA). This explicitly includes information on "any use made of automated means for the purpose of content moderation, including a qualitative description, a specification of the precise purposes, indicators of the accuracy and the possible rate of error of the automated means used in fulfilling those purposes, and any safeguards applied".

With this reporting obligation there is a clear reference to algorithmic transparency which goes beyond the information the platforms have to provide in their

[110] Recital 94.

[111] See on bias and discrimination in the context of big data also Cappello M. (ed.), §Artificial intelligence in the audiovisual sector (n 35)", p. 37 et seq.

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terms and conditions. The provision is to be read primarily in the sense of external transparency, available to society as a whole, but in practice likely being used mainly for research as well as in monitoring and supervision. This might be underlined by the fact that the Commission can adopt implementing acts to introduce templates concerning the form, content and other details of reports adapting them to the needs of research and/or regulatory authorities. For providers of online platforms, the transparency reporting obligation goes further (Article 24 DSA) and extends, in addition to content moderation, to dispute resolution procedures, the abusive use of complaint mechanisms as well as the number of active users, the latter primarily as a source for the assessment of potentially designating them as a VLOPs or VLOSEs. The latter types of platforms have to comply with even further transparency reporting obligations (Article 42 DSA). These necessitate reports in a shorter time period (every 6 months) and *inter alia* on the human resources (including their qualifications and language skills) they employ for content moderation. As regards automated means, the indicators of accuracy and related information must be broken down by each official language of the member states – a requirement which will ensure easy access for all researchers and authorities in the EU. Special reporting obligations apply to VLOPs and VLOSEs vis-à-vis regulatory authorities as regards information on their risk assessment and mitigation measures as well as independent audits they are subject to.

As a tool for monitoring the transparency of content moderation, an EU transparency database is to be created by the Commission according to the DSA. In conjunction with the reporting obligations this machine-readable database which has been launched in the meanwhile (and will be discussed in more detail in Chapter 6) will likely be a major instrument in furthering more transparency in this area while enabling the monitoring of the dissemination of illegal content on the internet. Providers of online platforms are obliged under Article 24 (5) DSA to provide the Commission with information on their decisions, including their reasoning, for content removal or other restrictive measures in relation to the availability of and access to information. This has to be uploaded in an automated way to the database. The providers must ensure that the information submitted does not contain personal data. In order to keep the database up to date, the information should be transmitted in a standard format without delay as soon as a decision has been taken. This shall allow for real-time updates where this is technically feasible and proportionate to the resources of the online platform concerned. Recital 66 of the DSA also refers to the need to structure the information and implement a search function. The operation of the database is mainly financed by supervisory fees that VLOPs and VLOSEs have to pay to the Commission according to Article 43 DSA.

4.2. Another Milestone for Transparency in Data Use Online: The EU Digital Markets Act

In competition law, transparency plays a decisive role in particular from two points of view: Firstly, in balanced markets between competitors of largely equal standing, a high degree of transparency of business practices vis-à-vis each other is rather unusual, and in

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relation to trade secrets even potentially unwanted. However, a lack of transparency, also vis-à-vis consumers, can become harmful and subject to competition law measures if it simultaneously proves to be an unfair business practice, for instance under the UCPD. Furthermore, in unbalanced markets or in the case of dependency relationships due to the dominance of one market participant, competition may be disrupted by non-transparent actions of this dominant actor on which other market participants and consumers still need to rely due to a lack of alternative offers. Secondly, transparency is also important for regulatory actions, because only if a market participant's competitive actions are transparent can a regulatory authority assess whether they represent abusive behaviour. Both aspects are all the more important in the online environment, which is permeated by algorithmic and often intransparent processes and dominated by companies operating on an international scale. While the use of algorithms can also mean more transparency for market participants, for example in terms of analytical possibilities and price transparency (which in turn can result in collusion problems under competition law),[112] concerns revolve primarily around the algorithmic preferencing of certain, especially own, services in connected network systems ('self-preferencing') of dominant providers.

A good example of the relevance of algorithmic transparency with respect to the two aspects mentioned – competition law and its enforcement – at EU level is the Google Shopping case.[113] In brief, this case can be summarised as follows: By entering product-related search terms in the general search as well as via the separate product search area ("Shopping" tab), Google's search engine displayed products from various partner shops together with their prices. In the general search, these were found in a delimited area of "sponsored content" above the actual web search results. After an investigation that took about seven years, the Commission decided in 2017 that Google violated Article 102 TFEU with the specific design of this mechanism. The decision found that Google had a dominant position in the market for online general search services and the market for online comparison shopping services. According to the Commission, this dominant position was abused by the (algorithm-driven) design of the Google Shopping offer leading to a decrease in traffic to competing price comparison services and an increase in traffic to Google's own price comparison service. This self-preferencing took place in such a way that competing price comparison services still appeared in the results in the general search via links and short snippets of their websites' content (but not highlighted in a box at the top of the search as for Google's own comparison service). However, they were downgraded in the ranking of generic results through the application of so-called "adjustment algorithms" (the so-called "Panda algorithm"). These adjustment algorithms were programmed (to explain it here in a simplified way) to analyse the characteristics of a website and, in particular, to assign a lower relevance and thus a lower ranking status to such websites not containing "original content" – which is regularly the case with price comparison and similar services that only gather third-party content and present it in a comparative way. For the consumer who expected a generic search to provide a neutral

[112] See on this problem extensively OECD, Algorithms and Collusion (n 124).
[113] Decision C(2017) 4444 final relating to proceedings under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.39740 – Google Search (Shopping)), https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf.

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display of suitable content on the internet, however, this algorithmic (de-)preferencing was not transparent and, therefore, enticed him or her to only rely on the Google Shopping service as the "most relevant" offer and not scroll through lower ranked results to look for alternatives. According to the Commission, this deprived competing services of the possibility to attract users to their own offer and prevented European consumers from really being able to choose between different services and fully benefit from the advantages of innovation through competition. As a result, the Commission imposed a fine of EUR 2.42 billion, which was also upheld by the General Court of the European Union.[114] Interesting here, however, are not only the remarks on algorithmic self-preferencing, but also the fact that Google had to provide information on the functioning of the adjustment algorithms within the Commission's investigation, i.e. make the way the ranking worked transparent in order for the Commission to be able to assess it.

However, as this case also shows, competition law is by no means able to ensure algorithmic transparency in general, but rather depends on determining anti-competitive behaviour on a case-by-case basis. With the DMA this is different: the instrument that entered into force in 2022 has strong links to competition law, but its focus is an *ex ante* regulation of the Digital Single Market.[115] The DMA seeks to ensure the contestability and fairness of markets in the digital sector, in particular to protect business users and end-users of core platform services provided by so-called gatekeepers from unfair practices of these large and powerful companies. In essence, it imposes a number of "do's" and "don'ts" on gatekeepers within the framework of a catalogue of obligations in Articles 5 to 7 DMA. Transparency plays a major role in the framework of the catalogues of duties, but especially concerning such mechanisms that regularly rely on algorithms in practice.

Of overriding and general relevance are the restrictions imposed on gatekeepers in relation to the merging of personal data and their use for advertising services. In the absence of consent or any other justification, gatekeepers are not allowed to use data of end-users using third party services within their online advertising services, to merge end-user data within or use them across their own different services (Article 5(2) DMA). In addition, Article 6(1) prohibits gatekeepers from using, in competition with business users, any not publicly available data generated or provided by those business users, including data of their end users, in the context of their use of the gatekeepers' relevant core platform services. This extends to any aggregated and non-aggregated data, including click, search, view and voice data. Accordingly, this has considerable relevance for personalised advertising and recommendation systems, especially the supplying of

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[114] Judgement of 10 November 2021, case T-612/17 - *Google and Alphabet v Commission (Google Shopping)*, ECLI:EU:T:2021:763, https://curia.europa.eu/juris/document/document.jsf?text=&docid=250881&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=571248. An appeal before the Court of Justice is pending, case C-48/22 P, https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C%2CT%2CF&num=C-48%252F22P&for=&jge=&dates=&language=en&pro=&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&oqp=&td=%3BALL&avg=&lg=&page=1&cid=4577843.

[115] On this specific nature of the DMA and its relation to competition law see Cole, in: Cappello (ed.), "Unravelling the Digital Services Act package", IRIS *Special*, European Audiovisual Observatory, 2021, https://rm.coe.int/iris-special-2021-01en-dsa-package/1680a43e45, p. 81 et seq.

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algorithmic systems with data, which must accordingly be kept separate across different services and may not be generated "from outside" the respective service for the purpose of personalisation.

The practical significance of these restrictions as well as their connection to competition law can be illustrated, for example, by the recent landmark decision of the CJEU in the Meta Platforms case, which originated in proceedings brought by the German Federal Cartel Office.[116] The Court not only ruled that competition authorities have the authority to investigate and sanction an infringement of the GDPR, if such an infringement simultaneously constitutes an exploitation of a dominant market position. It also set clear limitations to the processing and merging of data within the Meta Group in relation to its personalised advertising service, concerning both the internal merging of data from different Meta services, such as Facebook, Instagram or WhatsApp, and the merging of data from so-called "off-Facebook data" such as data collected by third-party websites, applications or social plugins. In particular, one might conclude from this decision, that neither relying on contractual purposes nor legitimate interest are a solid justification for Meta's data processing activities in the context of (personalised) online advertising. Rather it would require explicit and informed consent obtained from users. It needs to be noted that in the proceedings of the German Federal Cartel Office in particular the fulfilment of transparency obligations is on the negative list of unlawful behaviour leading to market disruptions by Meta. The impact this has on online advertising and recommender algorithms, even business models, can already be observed not only by data protection authorities prohibiting Meta from conducting this sort of personalised advertising[117] but by the company itself, which has reacted by announcing future reliance on consent or even switching to a subscription model. [118]

In addition to numerous rules on interoperability, which are intended to enable and simplify interaction between end users and business users or third-party service providers, and the data portability right for end users including real time access to their data, the detailed obligations on advertising transparency are also of relevance. Article

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[116] Judgement of 4 July 2023, case C-252/21 - *Meta Platforms a.o.*, ECLI:EU:C:2023:537.

[117] See the decision from Norway: *Datatilsynet*, No. 21/03530-16, 14.07.2023, https://www.datatilsynet.no/contentassets/36ad4a92100943439df9a8a3a7015c19/urgent-and-provisional-measures--meta_redacted.pdf, imposing a temporary ban on the processing of personal data for the purpose of behavioural advertising against Meta. See extensively on this decision with an assessment of its meaning for cross-border enforcement and cooperation mechanisms Cole/Kollmann, "Norwegian DPA Blocks Personalised Advertising on Facebook and Instagram in Urgency Procedure: Another Step towards a Departure from Meta's Business Model?" *European Data Protection Law Review* 2023, pp. 363–370, https://doi.org/10.21552/edpl/2023/3/14. Subsequently, the European Data Protection Board issued its binding decision in the urgent proceedings initiated by the Norwegian authority based on these proceedings. The Board ordered the Irish lead supervisory authority to take final measures regarding Meta within two weeks and to impose a ban on the processing of personal data for behavioural advertising on the legal bases of contract and legitimate interest across the entire European Economic Area (EEA). See press release of 1 November 2023, https://edpb.europa.eu/news/news/2023/edpb-urgent-binding-decision-processing-personal-data-behavioural-advertising-meta_en.

[118] See on both, for example, the (very critical) reporting by noyb, https://noyb.eu/en/5-years-litigation-meta-apparently-switches-consent-behavioral-ads and https://noyb.eu/en/meta-facebook-instagram-move-pay-your-rights-approach.

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5(9) and (10) DMA states that gatekeepers must provide information, daily and free of charge, to each advertiser as well as to each publisher for whom they provide online advertising services, about each advertisement placed. This extends to differentiated information about the prices and fees paid by the advertiser and the corresponding remuneration received by the publisher, as well as the metrics used to calculate each of them. Above all, the lack of transparency[119] in the context of real-time advertising bidding makes it very difficult for advertisers and publishers, including, above all, media companies financing their online offers through advertising, to evaluate the performance of advertising and the appropriateness of prices.[120] The disclosure of metrics, which will ultimately require an explanation of the parameters of the calculating algorithm, is therefore a significant step towards (algorithmic) advertising transparency – although not from the recipient's point of view. The fact that information has to be provided on a daily basis is important due to the fast-changing nature of the advertising environment which requires quick assessments and reactions. Article 6(8) further fosters this transparency by obliging gatekeepers to provide advertisers and publishers upon their request and free of charge with access to the performance-measuring tools of the gatekeeper and the data necessary for them to carry out their own independent verification of the advertisements inventory, including aggregated and non-aggregated data. In particular, if algorithmic systems or AI are used, these will be performance measures, such as accuracy data, or the click-through rate with regard to the advertisements. Such data shall be provided in a manner that enables advertisers and publishers to run their own verification and measurement tools to assess the performance of the core platform services provided for by the gatekeepers.

But also outside of online advertising, the DMA in its Article 6(10) aims for more transparency in the digital environment. According to this provision, gatekeepers shall provide business users with aggregated and non-aggregated data, including personal data when consented to, that they or their end users generate using the respective core platform service. This provision addresses the concerning development that the vast amount of data which is generated on platforms, including in multisided networks, fosters the dominant position of intermediaries while providing no or very limited access to business users although they play a major role in generating it through their offers. For example, app stores collect and analyse multiple sets of different data generated by app users which app providers need for carrying out, developing and improving their applications but lack access and application interfaces; online search engines are making use of their data advantage over competitors to raise barriers to entry as they, unlike their competitors, have access to a vast amount of query data, especially on long tail queries.. Notably, the transparency that Article 6(10) aims to ensure is accomplished by qualitative criteria. In particular, data has to be free of charge and include "effective, high-quality,

[119] See on the lack of transparency in the online advertising industry extensively the study of the UK Competition and Markets Authority, "Online platforms and digital advertising", 2020, https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf.

[120] See on the concept from an economic perspective Knapp in: Cappello (ed.), "Media pluralism and competition issues", IRIS *Special*, European Audiovisual Observatory, 2020, https://rm.coe.int/iris-special-1-2020en-media-pluralism-and-competition-issues/1680a08455, p. 9. 11 et seq.

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continuous and real-time access". This will probably require gatekeepers to install appropriate interfaces or tools that capture both the data that flows into the algorithmic systems and, potentially, the data that algorithmic systems produce.

Article 6(3) DMA should also be mentioned at least briefly in the present context due to its indirect relevance for algorithmic transparency in the overall picture. Gatekeepers shall allow and technically enable end users to easily un-install any (pre-installed) software applications on the operating system and to easily change default settings on the operating system, virtual assistant (e.g. smart speakers) and web browser of the gatekeeper that direct or steer end users to products or services provided by the gatekeeper. This is not only about the already-mentioned self-preferencing, but also the steering of the user in a certain direction and therefore influencing his or her free decision-making and activity. This is comparable to the situation with recommender systems. The most significant provision in this context, and probably also the one that will be most discussed in future, is at the same time the shortest that the DMA contains: Article 6(5) stipulates that gatekeepers shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by them, compared to similar services or products of a third party. While this only applies to self-preferencing, sentence 2 of that provision ensures that in general "transparent, fair and non-discriminatory conditions" are applied in ranking. Article 6(5) DMA itself is not restricted to any specific core platform service. However, the definition of ranking doesn't only specify what ranking means (the relative prominence given to search results, goods or services, Article 2(22) DMA) but also lists the services conducting such ranking activity (online intermediation services, online social networking services, video-sharing platform services, virtual assistants, online search engines). It applies irrespective of the technical means used, thus making the scope very broad. Recital 52 DMA even stipulates that ranking should cover all forms of relative prominence, including display, rating, linking or voice results. It should also include instances where a core platform service presents or communicates only one result to the end user, thus applying to web search results, social media newsfeeds, video recommendations, etc. Since all those services are primarily intended to mediate (third-party) content, the ranking of this content is often also the central component of the service, as for instance within video-sharing platforms, or even the core of the business model, as for instance within search engines. The quality and market advantage of such a service is therefore determined by how well the ranking works, how relevant the displayed content is and how functional the underlying algorithms are. End users and business users also rate the quality of a service in such a results-oriented manner. Replacing the design of ranking algorithmic systems, which has so far been primarily driven by commercial interests, with a component of socially and competitively relevant interests of transparency, fairness and non-discrimination, therefore means on the one hand a considerable interference with business models (as mentioned above also with the possibility of manipulation due to transparency). On the other hand, it creates a more clear-cut path for media and information content. However, Article 6(5) DMA does not contain any specifications regarding what transparency means in this sense. But, as Recital 52 DMA explicitly mentions, the guidelines adopted pursuant to Article 5 of the P2B Regulation should facilitate the implementation and enforcement of this obligation. Accordingly, a very high level of algorithmic transparency might be necessary under the DMA which has, however, at least in the context of the P2B

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Regulation not (yet) led to effective algorithmic transparency in practice, as was mentioned above. Furthermore Article 6(5) is one of the provisions subject to the compliance "dialogue" with the European Commission under Article 8 DMA which means the provisions may be further specified on a case-by-case basis.

As of now, the Commission has designated six gatekeepers along with different core platform services provided by them: Alphabet (Google Ads, Search, Maps, Play, Shopping, Alphabet's operating system, Chrome and YouTube), Amazon (Amazon Ads and marketplace), Apple (Appstore, iOS and Safari), ByteDance (TikTok), Meta (Meta Ads, Marketplace, Facebook, Instagram, Messenger, WhatsApp) and Microsoft (Windows PC OS and LinkedIn).[121] By March 2024, they will have to comply with the full list of do's and don'ts under the DMA.

[121] See press release of 6 September 2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328.

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5. Developments Beyond the CoE and EU as well as in National Law

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5.1. Developments on the International Level

5.1.1. The Approach of the OECD

Taking into consideration international developments relating to the potential regulation of algorithmic systems, also in view of transparency, there are organisations on the international level other than the Council of Europe that have contributed significantly to the discussion. Foremost, the Organisation for Economic Co-operation and Development (OECD) needs to be mentioned. This international organisation with 38 member states, originally mainly from North America and Europe, now also from South America and the Asia-Pacific region, has a history of early contributions to debates about human rights impacts of new technologies. An example of such a contribution were the OECD Privacy Guidelines in 1980[122] which predated the Council of Europe's Convention No. 108 from 1981[123] on this topic. Such non-binding principles are developed as part of the mission of the OECD with the aim of setting international standards which are then followed up either by organisations that create legally binding norms or by the member states of the OECD as well as other states.

Algorithms and the impact they have on society have been on the OECD's radar over the past years. Initially, the discussions had a focus on competition law, in particular the question of the extent to which algorithms can lead to collusion and how new technical developments can be dealt with in regulatory terms in antitrust law.[124] This discussion continues to be topical but was extended also to broader topics such as

[122] https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0188.
[123] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=108, direct access at https://rm.coe.int/1680078b37.
[124] OECD, "Algorithms and Collusion: Competition Policy in the Digital Age", 2017, www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm.

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unilateral conduct (e.g. algorithm-driven exclusionary and exploitative abuse of market power). For example, in June 2023, the OECD held a roundtable to discuss theories of algorithmic harm and whether existing competition law is sufficient to address exemplary cases for such harm. The role of competition authorities and how they should be empowered to investigate algorithms was also a topic in the debates.[125]

Of central importance in the context of algorithmic accountability and transparency is the early and far-reaching involvement of the OECD in the topic of AI. As early as May 2019, OECD countries in the OECD Council adopted the Recommendation on Artificial Intelligence[126] which provided for the first intergovernmental standard on AI and served as a basis for the G20 AI Principles[127] endorsed in June 2019. Currently, the 38 OECD member states and an additional eight non-member states have listed themselves as "adherents", meaning that they commit to follow the legally non-binding recommendations in their approach to AI and its regulation.

The Recommendation aims to foster innovation and trust in AI by promoting the responsible stewardship of trustworthy AI while ensuring respect for human rights and democratic values. It is built on two substantive sections, one laying down principles for responsible stewardship of trustworthy AI (so-called AI principles) and the second dealing with national policies and international co-operation for trustworthy AI. One of the main five AI principles of the OECD Recommendation is transparency and explainability, which, although in the broader scope of AI, essentially deals with algorithmic transparency. The principle states that AI actors should commit to transparency and responsible disclosure regarding AI systems. To this end, they should provide meaningful information, appropriate to the context, and consistent with the state of art, including to foster a general understanding of AI systems, to make stakeholders aware of their interactions with AI systems, to enable those affected by an AI system to understand the outcome, and to enable those adversely affected by an AI system to challenge its outcome based on plain and easy-to-understand information on the factors. It extends to transparency about the logic that served as the basis for the prediction, recommendation or decision delivered by the algorithm. Especially the emphasis on recommender systems, which include AI-driven recommendation systems, underlines the relevance of the OECD AI Principles in the media context.

Beyond laying down substantive principles in the Recommendation which are broadly based in order to set a general framework within which AI policies and regulation should be developed, the inclusion of practical steps is important. Not only does the second section foresee further developments on the international level to which the OECD should contribute, but it has additionally led to very concrete steps also in a structural sense: the newly set up OECD AI Policy Observatory (OECD.AI)[128] is charged with

[125] OECD, Algorithmic Competition, OECD Competition Policy Roundtable Background Note, 2023, www.oecd.org/daf/competition/algorithmic-competition-2023.pdf.
[126] OECD, Recommendation of the Council on Artificial Intelligence, OECD/LEGAL/0449, 2019, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449.
[127] G20 AI Principles, 2019, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/1066.pdf&Open=True.
[128] For further information see https://oecd.ai/en/about/what-we-do.

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putting the OECD AI Principles into practice and monitoring policy developments at country level.[129] Recently, the Observatory published an overview taking stock of the actions of states after four years of adopting the Recommendations.[130] In addition, the observatory serves as a forum hub for AI policy which convenes states and stakeholder groups in an effort to shape trustworthy AI.

In particular, the OECD.AI provides for tools and metrics which are designed to help AI actors develop and use trustworthy AI systems and applications that respect human rights and are fair, transparent, explainable, robust, secure and safe. This catalogue, which is searchable along the different purposes of tools along the OECD AI principles, operates with an open submission process, where tools are submitted directly by the organisations or individuals that created them and by third parties. These are then vetted by the OECD Secretariat to ensure accuracy and objectivity. There is a biannual review and updating process when organisations are encouraged to submit new initiatives and update existing ones. Without such updates by the creators the respective initiatives are removed from the catalogue in order to ensure it is a living and up-to-date repository.[131] Furthermore, the OECD Framework for the Classification of AI Systems, developed by OECD.AI, is intended to help policy makers, regulators, legislators and others to characterise AI systems in view of identifying policy opportunities and challenges.[132] For the principles of transparency and explainability, for instance, this framework provides for a list of questions to be considered in a risk assessment that should be undertaken for AI instruments.[133]

5.1.2. The Approach of UNESCO

Another important actor in the international arena when it comes to questions arising in the context of new technological developments is the United Nations Educational, Scientific and Cultural Organization (UNESCO). UNESCO is an organisation within the United Nations aimed at contributing to peace and security in the world by promoting collaboration between states with a focus on the areas contained in its name: education, science and culture including communication and information. This extends to work related to the fundamental right of freedom of expression and how this is relevant in (media) regulation. UNESCO has a global reach reflected by the 194 member states and

[129] For an overview of the work in light of the transparency and explainability principle see https://oecd.ai/en/dashboards/ai-principles/P7.
[130] OECD, "The state of implementation of the OECD AI Principles four years on", October 2023, https://www.oecd-ilibrary.org/deliver/835641c9-en.pdf?itemId=%2Fcontent%2Fpaper%2F835641c9-en&mimeType=pdf; see generally the overview of national AI policies listed at https://oecd.ai/en/dashboards/overview.
[131] Available at https://oecd.ai/en/catalogue/overview.
[132] OECD Framework for the Classification of AI systems, OECD Digital Economy Papers No. 323, 2022, https://www.oecd-ilibrary.org/docserver/cb6d9eca-en.pdf?expires=1697544403&id=id&accname=guest&checksum=66614B7110CDE4C1A2A317CF91B46686.
[133] Ibid, p. 43.

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contributes to developing standards for policy work for example by adopting guidelines and recommendations that are not legally binding but address states and other stakeholders in the context of regulatory issues. A prominent example of such work is the way UNESCO has addressed the role of social media companies in shaping the dissemination of opinions today and which responsibilities derive from this. Very recently an extensive set of Guidelines was published that address the governance of digital platforms and recommend action both for states and the platforms themselves.[134]

These 2023 Guidelines contain five main principles which are then further explained. In contextualising these principles the guidelines express the expectation that platforms have to adhere to human rights standards also when using automated means, for example in content moderation, and have to be transparent about the functioning of "tools, systems, and processes … including in regard to algorithmic decisions and the results they produce".[135] Moreover, transparency is regarded as a "common overarching principle".[136] Principle 3 is accordingly formulated in the most general way possible: "Platforms are transparent."[137] More specifically, transparency is then further detailed as extending to tools that "affect data harvesting, targeted advertising, and the sharing, ranking, and/or removal of content, especially election-related content" although the transparency does not necessarily have to include the coding according to which the tools operate.[138] Of similar relevance in the current context is Principle 5 stating that "[p]latforms are accountable to relevant stakeholders"[139] whereby this norm for platforms is clearly extended to accountability based on the use of automated systems and their outcome.[140] The focus on these two areas was already prepared via an earlier analysis of these two elements of governance that UNESCO had commissioned.[141]

Transparency is furthermore a core element of UNESCO's earlier-adopted instrument on artificial intelligence. Building on existing work and with the ambition of creating "an international standard-setting instrument on the ethics of artificial intelligence",[142] on 23 November 2021 the Recommendation on the Ethics of Artificial Intelligence was adopted.[143] Firstly, it is to be noted that in this Recommendation there is a broader approach addressing an ethical use of AI which not only concerns the development of binding rules but gives guidance on what is an appropriate use of AI tools. Accordingly, the Recommendations are meant to "…guide the actions of individuals, groups, communities, institutions and private sector companies to ensure the embedding

[134] UNESCO, Governance of Digital Platforms - Safeguarding freedom of expression and access to information through a multistakeholder approach, 2023, https://unesdoc.unesco.org/ark:/48223/pf0000387339.
[135] Ibid., Guideline 30, b) and c), p. 20-21.
[136] Ibid., Guideline 47, p. 25.
[137] Ibid., Principle 3, p. 42.
[138] Ibid., Guideline 136, p. 52.
[139] Ibid., Principle 5, p. 48.
[140] Ibid., Guideline 128, p. 49.
[141] Puddephatt, "Letting the sunshine in: Transparency and accountability in the digital age", UNESCO 2021. https://unesdoc.unesco.org/ark:/48223/pf0000377231.
[142] UNESCO, General Conference, 40th session, 40 C/Resolution 37, 2019.
[143] UNESCO, Recommendation on the Ethics of Artificial Intelligence, 2022, https://unesdoc.unesco.org/ark:/48223/pf0000381137.

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of ethics in all stages of the AI system life cycle".[144] Based on a number of values and principles, concrete areas for policy action are elaborated in detail. The values concerned are human rights, environmental impact, diversity and just societies, while the principles include proportionality and do no harm, safety, fairness, sustainability, privacy, human oversight, transparency and explainability, responsibility and accountability as well as literacy and multi-stakeholder approaches.

Transparency is formulated as a precondition for effective human rights protection including the effective functioning of liability rules while a lack of transparency is regarded as making it difficult for affected persons to challenge (negative) outcomes resulting from the use of AI systems.[145] The actual extent of transparency as laid down in the principles is formulated widely in that users should be "fully informed when a decision is informed by or is made on the basis of AI algorithms" which includes knowing about the reasons why a specific decision was reached and being able to contact "a designated staff member of the private sector company or public sector institution" potentially requesting a correction of the outcome.[146] Accountability, in the wording of the Recommendation in the context of responsibility formulated as "ethical responsibility and liability", is to be understood as the attribution of responsibility (and liability) to each actor in the lifecycle of an AI system according to the role with which they contributed to the use of the AI system. Therefore, different procedural safeguards need to be implemented according to the Recommendation such as oversight mechanisms, *ex ante* analysis of possible impact, *ex post* audits and others.[147]

5.2. Limited Implementation of Obligations towards Platforms in Advance of the EU Approach

EU member states will be adapting national frameworks or creating new rules in connection with the institutional structures needed for the implementation and enforcement of the DSA. Moreover, this trend will continue once the AI Act becomes applicable and institutional responses at national level are required. However, hardly any algorithmic systems-specific provisions were laid down in law in member states before the publication of the DSA proposal and the first steps also at national level to anticipate a final DSA version. The noteworthy exception in the EU was Germany where the Länder in charge of media regulation agreed on an Interstate Media Treaty that addresses "media intermediaries". These are obliged to ensure that in case of implementation of algorithmic systems these are applied in a non-discriminatory and fair manner. Therefore, in the first section of this part of the IRIS *Special* the German example will be presented in more detail. After that, further (sometimes very recent) examples of rules and institutional oversight mechanisms introduced in other member states, will be shown.

[144] Ibid., no. 8 b), p. 15.
[145] Ibid., no. 37, p. 22; cf. also no. 39.
[146] Ibid., no. 38, p. 22.
[147] Ibid., no. 42 and 43, p. 22-23.

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5.2.1. Germany: New Rules on Media Intermediaries and Transparency Obligations in the Interstate Media Treaty[148]

5.2.1.1. Introduction

With the Interstate Media Treaty (Medienstaatsvertrag - MStV)[149] of the German states (Länder), which have the legislative competence for media regulation in the Federal Republic of Germany, a new set of rules addressed to "media intermediaries" was introduced. The corresponding requirements for such intermediaries that are now included in this regulatory system have been in effect since 7 November 2020. They were a German specificity for quite some time, but this has changed with the DSA, which regulates platforms at an EU level. However, the regulatory approach of the EU is based on an internal market perspective and is not conceived of from a media diversity or pluralism perspective – as the rules in the Media State Treaty are.

Media intermediaries with a high market share (e.g. Google, Facebook and X) are of paramount importance as gatekeepers for the dissemination of information on the Internet and thus for the formation of public opinion. The algorithmic systems used by media intermediaries and their functionalities are kept rather opaque by the providers of these services, not least for economic reasons, and are therefore outside of the reach of external monitoring. This creates an information asymmetry in three directions: towards users (B2B and B2C) and towards supervisors and regulators – often coined as the black box problem.[150]

Against this background, the new rules of the Interstate Media Treaty are intended to ensure diversity of opinion with the help of transparency requirements. These regulations of Section 93 of the MStV are to be seen as additional and parallel rules besides the Union law transparency requirements of Articles 12 to 14 of the GDPR[151] and of Articles 15, 24 and 27 of the DSA. They do not replace them and are not replaced by them, but they are supplementary to each other.[152]

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[148] The German country chapter was written by Jörg Ukrow, Institute of European Media Law (EMR).

[149] Interstate Media Treaty (Medienstaatsvertrag) in the version of the third Media Amendment Treaty in force since 1 July 2023, available at https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Medienstaatsvertrag_MStV.pdf. A non-official translation of a former version (from 14 / 28 April 2020 not containing the amendments in 2023) is available at https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Interstate_Media_Treaty_en.pdf.

[150] See Schwartmann, Hermann & Mühlenbeck, *Transparenz bei Medienintermediären*, Leipzig 2020, p. 11

[151] Vgl. Schwartmann, Hermann & Mühlenbeck, *Transparenz bei Medienintermediären*, Leipzig 2020, pp. 11, 96 et seq.

[152] See extensively Cole/Ukrow/Etteldorf, "On the Allocation of Competences between the European Union and its Member States in the Media Sector", 2021, https://doi.org/10.5771/9783748924975, Chapter F.II.

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5.2.1.2. The rules on media intermediaries in the Media State Treaty

The scope of the rules on media intermediaries is determined by the definition of a media intermediary laid down in Article 2 para. 2 no. 16 MStV. According to that provision, "media intermediary" means any telemedia[153] that also aggregates, selects, and generally presents third-party journalistic-editorial offers without combining them into an overall offer. This definition therefore understands media intermediaries as services which collect journalistic and editorial content from third parties, take a selection and make it available to the general public. Media intermediaries within the meaning of the Interstate Media Treaty include in particular services such as search engines, social networks and other platforms on which the (media) content is typically provided by their users.

In Germany, around seven out of 10 people who use online offers use such media intermediaries, including for information purposes.[154] The outcome of the selection of results for a search query and their order in the list of the results are anything but irrelevant: with this functionality the providers have influence over which content is displayed to users and in which position and thereby which level of attention is generated. Media intermediaries thus construct reality by conveying, sorting and, in certain cases, hiding information. Media intermediaries distribute content that can influence societal opinion-forming and public communication. Therefore, their regulation is particularly important and was the motivation for the inclusion of the new provisions in the Media State Treaty.

As far as the territorial scope of the rules on media intermediaries is concerned, Article 1 para. 8 MStV deserves attention. According to this provision there is an extension of the scope concerning the other chapters: the Media State Treaty applies not only to media intermediaries if they are established in Germany, as would be the case with application of the country-of-origin principle, but rather to all media intermediaries if they are intended for use in Germany. Media intermediaries are to be regarded as intended for use in Germany in this sense if they are generally aimed at users in Germany, in particular through the language used, the content offered, or the accompanying marketing activities, or if they achieve a more than an insubstantial portion of their financing through turnover in Germany.

Thus, in accordance with the market location principle even providers of media intermediaries established outside of Germany (e.g. Google or Meta) must appoint an authorised representative for service in order to receive in a legally binding way orders from authorities or courts in Germany. The state media authority of the federal state in

[153] This core notion of the Media State Treaty in essence means 'online media' – broadly understood – which are not considered to be broadcasting or telecommunication.

[154] For a statistical illustration, see for example the quantitative study on the relevance of the media for opinion-forming in Germany commissioned by the German media authorities: "*Intermediäre und Meinungsbildung, GIM-Studie*" 2022-II, https://www.die-medienanstalten.de/fileadmin/user_upload/die_medienanstalten/Forschung/Intermediaere_und_Meinungsbildung/Intermediaere_Meinungsbildung_2022-II.pdf.

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which this representative as authorised recipient of orders to be served is established, is responsible for supervising the media intermediary represented by that person.

Substantively, the rules concerning media intermediaries focus on creating more transparency. Specifically, the requirements of Article 93 MStV concern information obligations towards users. According to paragraph 1 of Article 93, providers of media intermediaries must declare the following information to ensure diversity of opinion:[155]

- the criteria that serve as the basis for the decision as to whether content has access to a media intermediary and whether it remains that way,
- the central criteria of an aggregation, selection, and presentation of content and the weighting thereof, including information about the functionality of the implemented algorithms in plain language.

Users must therefore be able to understand why certain content is shown to them, why it is presented in the given order and why other content is not displayed.

With regard to the transparency requirement, the media intermediaries must also observe formal requirements. The information must be easily understandable, directly accessible, and continuously available. It should be as easy to access information about transparency as it is to access the contact details that have to be provided with an imprint.

According to Article 93 para. 2 MStV, providers of media intermediaries that provide a service with thematic specialisation are obliged to make this specialisation visible to the user by an according design of their offer. The aim of this provision is to ensure that a user is aware that only a selection from a limited amount of content will be presented, e.g. if a service only caters to, e.g., economic, ecological or cultural issues or to a specific ideological conviction.

According to Article 93 para. 3 MStV, any changes to the criteria stipulated in para. 1 as well as in the direction or specialisation according to para. 2 must be made immediately visible and in the same manner as the original information.[156]

In addition to the transparency requirements, there is a specific prohibition of discrimination in Article 94 MStV which applies to media intermediaries. According to that rule, media intermediaries are not allowed to disadvantage journalistic-editorial offerings. However, this only applies to media intermediaries that have a particularly high influence on the visibility of that content.[157]

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[155] The English wording of the provision is translated by the author and is not taken from the (unofficial) translation of the draft provision as it was notified to the Commission under the TRIS-procedure. This version is available at: https://technical-regulation-information-system.ec.europa.eu/en/notification/15957/text/D/EN.

[156] Providers of media intermediaries that offer social networks must ensure that telemedia are labelled in accordance with Article 18 (3) of the treaty; Art. 93 (4) of the treaty.

[157] Discrimination occurs, for example, if the media intermediary systematically deviates from the transparent criteria in favour of or to the detriment of an offer. In addition, criteria themselves may be inadmissible because they hinder or completely exclude certain offers.

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The supervision of media intermediaries and their compliance with these new rules were assigned to the state media authorities already in charge as regulatory authorities for the audiovisual media sector. These authorities usually take action based on complaints. However, they can also investigate compliance of services and intermediaries *ex officio*.

5.2.1.3. The rules in the Statute on media intermediaries of the state media authorities

The state media authorities are also called upon by Article 96 MStV to lay down more details concerning the transparency provisions of the Interstate Media Treaty by means of joint statutes and directives. In this process, they must consider what the Media State Treaty characterizes as the "orientation function" of media intermediaries for the respective user groups. This specification of the rules was achieved by means of the "Statute for the regulation of media intermediaries in accordance with Section 96 of the State Media Treaty" (MI Statute) which was passed by all authorities in parallel with the same wording and which entered into force on 1 January 2022.[158]

According to Section 4 of the MI Statute, which deals with the purpose and objective of the second section of the statute dedicated to transparency, the provisions of that section are intended to ensure that media intermediaries are appropriately transparent for their users with regard to the information listed in Article 93 (1) of the MStV and Section 6 of the MI Statute. This is intended in particular to enable an informed use of a media intermediary concerning the aggregation, selection and presentation of journalistic-editorial content. The section also addresses providers of journalistic and editorial content themselves.

Section 5 of the MI Statute contains formal requirements regarding transparency obligations. Section 5 para. 1 of the MI Statute requires that information in accordance with Article 93 (1) MStV must be made transparent in the German language just as any changes made by the providers in the sense of Article 93 (3) MStV and information in accordance with Section 6 of the MI Statute.

According to Section 5 para. 2 of the MI Statute, information that is to be made transparent fulfils the condition of being easily perceivable within the meaning of Article 93 MStV if it is positioned in a way that is easily perceptible for an average user, taking into account the usage situation that is typical for that media intermediary. This is usually the case if the information clearly stands out from the rest of the content and is directly related to input or navigation options that are essential for the use of the media

[158] Available at https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Satzungen_Geschaefts_Verfahrensordnungen/MI-Satzung_final.pdf. The draft statutes were also notified to the European Commission in the TRIS procedure, see https://technical-regulation-information-system.ec.europa.eu/en/notification/16339, an English translation of the notified text can be found at https://technical-regulation-information-system.ec.europa.eu/en/notification/16339/text/D/EN.

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intermediary. When using a web link that refers to the information to be made transparent, the above requirements apply accordingly.

Section 5 para. 3 of the MI Statute requires that information that is to be made transparent has to be perceivable to the user without significant intermediate steps in order to fulfil the condition of being directly accessible within the meaning of Article 93 MStV. This is particularly not the case if the information can be accessed only by following more than two web links (more than 'two clicks') and/or retrieving the information is dependent on prior registration or log-in. Permanent availability of the information to be made transparent within the meaning of Article 93 MStV is achieved as declared by Section 5 para. 4 of the MI Statute if the user can access it at any time.

Section 5 para. 5 of the MI Statute clarifies what availability of the information in understandable language within the meaning of Article 93 MStV means: if the information provides the average user with the basic understanding of the information mentioned in Article 93 (1) MStV required for informed use of the media intermediary. If the use of the media intermediary is predominantly voice-controlled, the information to be made transparent should also be reproduced acoustically at the user's request in accordance with Section 5 Paragraph 6 of the MI Statute. An acoustic indication of where the information to be made transparent is available is sufficient to fulfil this condition.

Section 6 of the MI Statute contains the substantive details of the information obligations in accordance with Article 93 MStV. In order to fulfil the obligation under Article 93 para. 1 no. 1 MStV to make transparent the criteria that determine access to a content, the provider of a media intermediary must, in particular, provide the following information pursuant to Section 6 para. 1 of the MI Statute:

1. A description of the technical, economic, provider-related, user-related and content-related requirements that determine whether content is made perceptible via a media intermediary,

2. If certain content is filtered or downgraded or upgraded in visibility when accessing and remaining in the media intermediary, in particular through the use of automatic systems, it must be stated which category of content is concerned and which objectives shall be reached by these measures,

3. Information on whether and, if so, how access and retention of content in the media intermediary is or can be influenced by payment of fees or other direct or indirect monetary benefits.

In order to fulfil its obligation under Article 93 para. 1 no. 2 MStV to make the central criteria for aggregation, selection and presentation of content and their weighting, including information on the functionality of the algorithmic systems used, transparent, the provider of a media intermediary must, in particular, provide the following information in accordance with Section 6 para. 2 of the MI Statute:

1. a description of the central criteria used by the media intermediary provider for aggregation, selection and presentation,

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2. a description of the relative weighting of the central criteria in relation to each other and in relation to non-central criteria, without the latter having to be made transparent,

3. a description of the optimisation goals that are pursued with the central criteria,

4. information on whether and, if so, how the discoverability of content in the media intermediary is or can be influenced by payment of fees or other direct or indirect monetary benefits,

5. a description of the basic process steps on which the aggregation, selection and presentation of content is based, including information about which data are included in the aggregation, selection and presentation,

6. information on the type and extent of personalisation used and whether and, if so, how the relevance of content is assessed for the respective user,

7. information about whether and, if so, in what way, user behaviour in the media intermediary can influence the aggregation, selection and presentation of content, including information about what options of influence are available to the user through settings and sub-functions,

8. information about whether and, if so, how the provider of a media intermediary treats its own content, the content of an affiliated enterprise[159] or the content of cooperation partners in particular during aggregation, selection and/or presentation.

Significant changes to the criteria to be made transparent in accordance with Article 93 para. 1 MStV must be made immediately noticeable. In accordance with Section 6 para. 3 of the MI Statute, the provider of a media intermediary should provide an overview showing the significant changes made over time. All other changes to the criteria to be made transparent in accordance with Article 93 para. 1 MStV must be disclosed no later than every four months after entry into force of the MI Statute.

[159] According to Section 15 of the German Stock Corporation Act (Aktiengesetz), to which the Interstate Media Treaty refers, affiliated enterprises are legally independent enterprises that, in their relationship *inter se*, are enterprises in which a majority ownership interest is held and enterprises which hold a majority of the ownership interest (section 16), controlled and controlling enterprises (section 17), group member companies (section 18), cross-shareholding enterprises (section 19), or parties to an inter-company agreement (sections 291, 292).

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5.2.1.4. Study on the implementation of the transparency requirements

The representative[160] online study "Media intermediaries transparent" by GIM Media on behalf of the state media authorities examined the extent to which mandatory transparency information requirements implemented by the providers are discoverable and understandable.[161]

According to this study, younger people (16-29 years of age) use most intermediaries predominantly or exclusively on mobile devices (tablets/smartphones), while older people (50-69 years of age) are more likely to also use PCs or laptops. There is interest in (41%) and knowledge about (53%) selection criteria; only a third of these persons have already actively searched for them. Less than half were (very) satisfied with the search results. At 63%, younger people are significantly more likely to say they know something about the selection criteria of media intermediaries than older people (47%).

The results of the study clearly show that users are definitely interested in transparency information: Over 80% of those surveyed would like to know why specific content is displayed to them. However, the legally required transparency information is difficult to find for the media intermediaries examined (Google, YouTube and Instagram). Only 16% of those surveyed found the desired transparency information on Google. However, the other media intermediaries surveyed performed even worse: 11% found it on YouTube and only 4% on Instagram.

The three intermediaries also performed differently when it comes to the comprehensibility of the transparency information. 20% of those surveyed found the two Google texts to be the least understandable. Although the information on transparency was much more difficult to find on Instagram, the comprehensibility was regarded to be at the highest level here, as 41% of those surveyed reported a high level of understanding after reading the two texts. With a share of 32% YouTube was in the middle of the two.

Based on the study results, there is also a need for improvement in the comprehensibility of the information. At 41%, less than half of those surveyed regard Instagram's transparency information to be easy to understand. With that figure Instagram was ahead of YouTube with 32% and Google with only 20%.

5.2.1.5. Outlook

Media intermediaries are primarily used on mobile devices. From the perspective of the state media authorities, improvements must be made as a priority, both in terms of the comprehensibility of the information and the route to the information, in this mobile

[160] The study was based on 3 000 interviews with the German-speaking resident population aged 16 to 69 who have used the internet in the last 3 months.
[161] The study results are available at https://www.die-medienanstalten.de/fileadmin/user_upload/Veranstaltungen/2022/2022_07_18_Medienintermediaere_transparent/ChartReport_MedienintermediaereTransparent_2022-07-18_final.pdf.

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context. From the regulatory authorities' perspective, providers must also use their expertise in developing customer-friendly offers to transparently inform their users.

The media authorities are continuing to work on establishing a nationwide adjudication practice for legally compliant design by providers and for improved protection for consumers. Despite its central importance, in the view of the authorities transparency alone cannot create plurality and diversity in the sense of a positive media order as it has to be set up by the legislator. Due to the position of media intermediaries regarding the perceivability of content, further regulatory considerations beyond prohibitions on discrimination should therefore also include regulation in the sense of a positive order that can effectively take potential threats to democracy into account.

5.2.2. Other Examples

As mentioned above, the regulation of algorithmic systems was a topic of discussions in other EU member states (and beyond) even before this issue was addressed more specifically by the legislative framework of the Union (as described above, 3.2.) and especially in the DSA (see above 4.). In the aftermath of the introduction of the latter, member states are in the process of adopting new or adapting existing rules, namely concerning institutional structure, because although the DSA as a regulation is directly applicable and binding as such, it necessitates member state action in regard to designating the competent authorities and equipping them with then necessary powers. Beyond the example of Germany where the Interstate Media Treaty clearly addressed the algorithmic accountability and transparency in direct connection with the audiovisual media regulation before the DSA was even proposed, there were no such parallel rules in other EU member states. Therefore, examples of other approaches to accountability and transparency, not directly in connection with media issues, as well as proposals for rules concerning AI more generally will be mentioned. Most approaches, however, have been self-regulatory codes or tools and instruments developed by the industry which will not be presented here due to their diversity and often remaining still in nascent stages.[162]

[162] For an example in the media sector: On 10 November 2023, Reporters Without Borders together with 16 other organisations made available the "Paris Charter on AI and Journalism" proposing to journalists and media companies on how AI should be appropriately used in their work, https://rsf.org/en/rsf-and-16-partners-unveil-paris-charter-ai-and-journalism; for a specific industry company see overview in Bauder, AP, other news organizations develop standards for use of artificial intelligence in newsrooms, August 17, 2023, https://apnews.com/article/artificial-intelligence-guidelines-ap-news-532b417395df6a9e2aed57fd63ad416a; in Europe the "European AI Alliance" provides a forum for discussions for multiple stakeholders and is organised and supported by the European Commission, https://futurium.ec.europa.eu/en/european-ai-alliance/pages/about; without regional restrictions the "Global Partnership on Artificial Intelligence (GPAI)" was launched in June 2020 as a multi-stakeholder initiative to bring together industry and civil society as well as policy-makers and academia and is hosted by the OECD, https://gpai.ai/; outside the European context in the U.S. several companies created the "Frontier Model Forum" to develop best practices in (self-regulating) the approach to using what they refer to as frontier AI models, https://openai.com/blog/frontier-model-forum, and previously on 21 July 2023 there was a voluntary commitment by seven AI companies made towards the President that these would help in reaching a "safe, secure, and transparent development of AI technology",

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Several EU member states have introduced specific rules concerning the use of algorithmic systems in connection with the work of public authorities, such as e.g. publicly accessible 'AI registers' which list the use of algorithms in different sectors of the executive.[163]

France, too, included already in its Digital Republic Law of 2016 a similar obligation which extends also to the basic functioning of these rules.[164] More importantly, with that law the Consumer Code was amended (Art. L. 111-7) and obligations were introduced for operators of online public communication services. Such platforms are defined as classifying or referencing "by means of computer algorithms" content, goods or services that are offered or put online by third parties or that serve as intermediaries bringing together several parties for the same purpose. The extension of the definition to the communication of content explains the relevance also for the communications sector including media services. The platform providers have to provide the consumer with "fair, clear and transparent information" on inter alia the terms of referencing or classification tools applied or the basic elements of comparison services (to be detailed further in a governmental decree).[165] It is noteworthy that these changes to the Consumer Code use a similar approach that was later also included in the DSA of the EU: they differentiate between obligations by relevance of platform (Art. 111-7-1) and introduce a threshold beyond which large platforms have to proactively communicate to users good practices on how they achieve the "fair, clear and transparent" goal mentioned in the previous Article.[166] This threshold – which was introduced through a decree amending another provision of the consumer code[167] – is defined by the number of unique visitors connecting to the platform per month and is set at five million to be calculated based on user numbers of the previous calendar year.

Beyond the use of algorithmic systems in the government context, France is not the only country to have established institutional structures to oversee the use of algorithmic systems with the aim of creating more transparency. Spain, for example, announced in 2022 the creation of an Agency for the Supervision of AI (AESIA) which

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https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/21/fact-sheet-biden-harris-administration-secures-voluntary-commitments-from-leading-artificial-intelligence-companies-to-manage-the-risks-posed-by-ai/.

[163] See, e.g., the Netherlands or Finland, overview in OECD, The state of implementation of the OECD AI Principles four years on (n. 128**Error! Bookmark not defined.**), p. 39.

[164] Art. 6 of the Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique (Law no. 2016-1321 of 7 October 2016 for a Digital Republic); https://www.legifrance.gouv.fr/eli/loi/2016/10/7/ECFI1524250L/jo/texte; see also the Guidelines given by the government agency Etalab, Expliquer les algorithmes publics, https://guides.etalab.gouv.fr/algorithmes/.

[165] ibid., Art. 49.

[166] ibid., Art. 50.

[167] Décret n° 2017-1435 du 29 septembre 2017 relatif à la fixation d'un seuil de connexions à partir duquel les opérateurs de plateformes en ligne élaborent et diffusent des bonnes pratiques pour renforcer la loyauté, la clarté et la transparence des informations transmises aux consommateurs (Decree no. 2017-1435 of 20 September 2017 relating to the setting of a threshold of connections beyond which online platform operators have to develop and disseminate good practices to consumers about strengthening the fairness, clarity and transparency), https://www.legifrance.gouv.fr/eli/decret/2017/9/29/ECOC1716648D/jo/texte, which added to the Consumer Code an Art. D. 111-15.-I.

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started its work in 2023.[168] The objective of the agency is to promote responsible, sustainable, and trustworthy AI and connect and exchange with other authorities involved in AI oversight. The Netherlands also recently introduced a body for supervision – again: not related directly to media or the DSA scope –, the "Department for the Coordination of Algorithmic Oversight" within the Dutch Data Protection Authority. In September 2023 its first "Algorithmic Risks Report" was published.[169] Its integration into the supervisory authority for data protection matters allows it to build on an existing and strong enforcement mechanism but has a clear focus on monitoring those algorithmic systems that process personal data. Within that scope the authority is in charge of promoting transparency.[170]

Institutions and structures for oversight such as the examples here given will become more common once the AI Act enters into force and needs to be implemented, as there is an obligation for member states to appoint national supervisory authorities that fulfil the function of market surveillance authorities in connection with AI, thereby also covering the oversight of algorithmic systems.[171]

5.3. The State of Play in Non-EU Member States

Algorithmic accountability and transparency has been discussed and partly integrated into national legislation in countries beyond the EU, too. In the following, two examples will be highlighted: the United Kingdom as a European non-EU member state and the United States of America.

5.3.1. The United Kingdom

In the United Kingdom there have been multiple developments of relevance. In June 2018 the government created the Centre for Data Ethics and Innovation (CDEI) as an advisory

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[168] See the constitution of the Governing Council of this new agency on 7 December 2023, https://espanadigital.gob.es/actualidad/constituido-el-consejo-rector-de-la-agencia-espanola-de-supervision-de-la-inteligencia; see also https://espanadigital.gob.es/lineas-de-actuacion/agencia-nacional-de-supervision-de-la-inteligencia-artificial.

[169] Dutch Data Protection Authority, Department for the Coordination of Algorithmic Oversight, Periodic insight into the risks and effects of the use of algorithms in the Netherlands, Algorithmic Risks Report of July 2023, https://www.autoriteitpersoonsgegevens.nl/uploads/2023-08/Algorithmic%20Risks%20Report%20Netherlands%20-%20July%202023_0.pdf. An overview of the activity can be found at https://www.autoriteitpersoonsgegevens.nl/themas/algoritmes-ai.

[170] A further activity in the Netherlands concerns the cooperation of the relevant government department (the Dutch Authority for Digital Infrastructure) with the UNESCO and the European Commission in developing a best practice model for structures that are charged with AI supervision, UNESCO, Designing Institutional Frameworks for the Ethical Governance of AI in the Netherlands, 4 October 2023, https://www.unesco.org/en/articles/designing-institutional-frameworks-ethical-governance-ai-netherlands-0.

[171] See OECD, The state of implementation of the OECD AI Principles four years on (n. 128), p. 46.

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body which has since produced guidance papers and reports, partly directed at governmental use of AI, partly addressed to the private sector. Although its work is of a non-binding nature, its goal has been to identify potential gaps in the regulation.[172] As such, one of the first important publications concerned a standard set up for public sector bodies about algorithmic transparency.[173]

Based on the goals of AI regulation as set out in the policy White Paper of the UK Government in March 2023,[174] the CDEI has published an "AI assurance portfolio".[175] AI assurance in this sense relates to measures that should be taken in order to build confidence in AI systems by users. It addresses the design, development and deployment of AI systems and how to ensure that they are trustworthy. These aspects contribute to more transparency about AI systems. The portfolio is set up as a dynamic website that categorises different approaches to meeting these requirements with the aim of convincing organisations involved in the different parts of the AI lifecycle to use these as orientation.[176]

Beyond these approaches that are elements of a potentially developing AI regulatory framework, the UK has seen the development of its own platform regulatory framework over the years. It was adopted only after the DSA had already entered into force, but the initial work for the bill had started even before the publication of the DSA proposal. The Online Safety Act of October 2023[177] creates a "new regulatory framework which has the general purpose of making the use of internet services … safer for individuals in the United Kingdom" (Part 1, sec. 1).

Similar to the DSA, it imposes duties on service providers to assess and manage risks emanating from their platforms[178] in view of illegal and harmful content while significantly enlarging the scope of competences of the pre-existing regulatory authority OFCOM. According to Sec. 1 para. 3 the duties imposed on providers require amongst other things that those services are "b) designed and operated in such a way that … (iii) transparency and accountability are provided in relation to those services". One example of far-reaching transparency and information requirements at least vis-à-vis the OFCOM is sec. 100 in Chapter 4, which can extend to the obligation to enable OFCOM to be able to conduct its monitoring in a remote way by viewing information in real time about the

[172] See https://www.gov.uk/government/organisations/centre-for-data-ethics-and-innovation/about.
[173] Available at https://www.gov.uk/government/publications/algorithmic-transparency-template.
[174] Department for Science, Innovation and Technology, "A pro-innovation approach to AI regulation", 29 March 2023, https://assets.publishing.service.gov.uk/media/64cb71a547915a00142a91c4/a-pro-innovation-approach-to-ai-regulation-amended-web-ready.pdf.
[175] https://www.gov.uk/guidance/cdei-portfolio-of-ai-assurance-techniques.
[176] See https://www.gov.uk/guidance/cdei-portfolio-of-ai-assurance-techniques and https://cdeiuk.github.io/ai-assurance-guide/ for more details.
[177] Online Safety Act 2023, 2023 Chapter 50, An Act to make provision for and in connection with the regulation by OFCOM of certain internet services; for and in connection with communications offences; and for connected purposes, 26 October 2023, https://www.legislation.gov.uk/ukpga/2023/50/enacted.
[178] The Act distinguishes in sec. 3 and 4 between so called user-to-user services, search services, Part 3 services and regulated services, but the definitions of these address platforms in a similar way to intermediaries according to the DSA.

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operation of the system in question, and certain processes or features, which include algorithms used by the service.

Transparency reports have to be submitted to OFCOM by certain categories of providers (depending on the reaching of certain thresholds of users) based on which the regulatory authority publishes its summarising reports. Schedule 8 of the Online Safety Act determines what information may be requested under the reporting obligation and mentions explicitly the "design and operation of algorithms" which are used in connection with (illegal and harmful) content concerning the display, promotion, restriction or recommendation of such content. It is also interesting to note that the legislation is placed under an evaluation condition after a period of 3-5 years in order to assess its effectiveness. According to sec. 178 para. 3 (a) (iii) Online Safety Act, this review has to consider whether it has led to systems and processes being used by operators that "provide transparency and accountability to users". This underlines the acknowledgment of the dynamics of development in the platform environment and the need to regularly assess the appropriateness of regulatory instruments. The regulatory goals as introduced in the context of this IRIS *Special* play an important role in this evaluation in the United Kingdom context, too.

5.3.2. The United States of America

The situation is not unsimilar in the United States of America. Here, again, there are numerous initiatives, partly aiming at self-regulatory approaches, partly with the aim of setting up structures that further analyse the situation around the increasing use of AI systems and connected risks. For example, the Federal Trade Commission's Bureau of Consumer Protection has dedicated special attention to algorithmic transparency.[179] Generally speaking, executive initiatives and standard-setting play a more important role as (federal) legislation with relevance to the field exists only to a very limited extent and numerous initiatives do not appear within reach of a majority adoption.

These executive policies initially focussed on defining some general principles which were laid down in the so-called "Blueprint for an AI Bill of Rights". This document was prepared by the White House Office of Science and Technology Policy (OSTP) in October 2022 and has the aim to give orientation for the design, use, and deployment of AI systems in the interest of the U.S. American public. It is only a voluntary instrument and does not define specific expectations. More concrete is the Artificial Intelligence Risk Management Framework of the National Institute of Standards and Technology (NIST)[180], published in January 2023. Although it is also only a voluntary guide directed at developers, designers, deployers and users of AI-related products and services, it goes into detail on what trustworthy systems should look like and emphasise the need for

[179] See https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection.
[180] Artificial Intelligence Risk Management Framework (AI RMF 1.0), NIST AI 100-1, January 2023, https://doi.org/10.6028/NIST.AI.100-1.

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accountability and transparency. The Framework underlines that "accountability presupposes transparency" and expands the elements of transparency broadly.[181]

Recently, another Presidential Executive Order on the "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence" was published.[182] This EO of October 2023 lays out how the current Administration intends to address the question of regulatory approaches to the use of AI systems, including what relevance transparency plays. The EO announces coming steps for which several executive agencies are mandated to develop proposals, but it additionally addresses policy goals in connection with AI systems. These steps are especially significant because legislative proposals to further the existing framework, in relation to platforms using algorithmic systems or in relation to AI more generally are unlikely to materialise as binding law any time soon. A National AI Initiative Act entered into force in 2021, but this mainly concerns efforts in research.[183]

There have been several proposals for acts creating accountability rules – e.g. the Algorithmic Accountability Act of 2023 which updates the original proposal of 2022[184] – but all of them are currently "only" introduced into the legislative process and have not received sufficient support yet for a majority decision. The proposal for the Algorithmic Accountability Act is interesting in as much as it would introduce transparency requirements for organisations using automated decision-making systems in a way comparable to that of the initiatives described above. The rules would also include obligations for explainability of the functioning of the algorithmic system. There are several other relevant proposals, one of which concerns the use of algorithms in ranking systems and potential rights of users so they are not being confronted with certain types of algorithm system usage: the Filter Bubble Transparency Act of 2019[185], which would require internet platforms that process user data for content personalisation to notify users and enable them to opt-out. Another proposal, the Algorithmic Justice and Online Platform Transparency Act of 2023[186], concerns general obligations of online platforms when using personal information in algorithmic processes including making this transparent, e.g. in relation to content moderation. Neither of these have progressed in the legislative procedure since their introduction.

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[181] ibid., p. 15-16.

[182] https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/.

[183] National AI Initiative Act of 2020, published as part of a package in Division E, Sec. 5001, p. 2136, https://www.congress.gov/bill/116th-congress/house-bill/6216.

[184] S.2892 - Algorithmic Accountability Act of 2023, 118th Congress (2023-2024), https://www.congress.gov/bill/118th-congress/senate-bill/2892/text; see for original version https://www.congress.gov/bill/117th-congress/house-bill/6580/text and for the senate https://www.wyden.senate.gov/imo/media/doc/algorithmic_accountability_act_text.pdf.

[185] S.2763 – Filter Bubble Transparency Act of 2019, 116th Congress (2019-2020), https://www.congress.gov/bill/116th-congress/senate-bill/2763/text.

[186] S.2325 - Algorithmic Justice and Online Platform Transparency Act - 118th Congress (2023-2024), https://www.congress.gov/bill/118th-congress/senate-bill/2325/text.

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6. Institutional Structures and Oversight

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6.1. The European Commission and the DSA

While the impact of new substantive provisions concerning transparency of algorithmic systems that are introduced by the DSA has been explained above and is in the focus of the legislative act, the institutional structures assigning competencies for oversight of the providers covered by the DSA and the enforcement of its provisions are highly relevant, too. Although the full complexity of the supervisory mechanism of the DSA does not have to be presented here, a brief overview of its functioning in relation to enforcing transparency obligations will be given.

Chapter IV of the DSA in its first five sections (Art. 49 to 86) lays out the institutional dimension of supervision and the actual procedures in enforcement and establishes e.g. the powers to issue sanctions in case of non-compliance of the providers with the rules of the DSA. It has already been mentioned in the context of the substantive provisions that there is a division of competences together with cooperation rules between the competent authorities in the member states and the European Commission.[187] In addition, a newly created European Board for Digital Services convenes representatives from all of the member states with the Commission chairing this independent advisory group. Member states have to designate one of the competent authorities tasked with supervision of the DSA or parts of it as a so-called Digital Services Coordinator (DSC) which is charged with coordinating the different authorities – if there is more than one designated body – at national level as well as taking a seat on the Board which is aimed at ensuring a consistent supervision effort across the EU. Although the member state authorities are in principle primarily tasked with supervision of those providers that fall under the competence of their member state (as formulated in Art. 51 (1) DSA), which are regularly the providers that have an establishment in that member state (Art. 56 (1) DSA),[188] the Commission is of central importance in the setup of the DSA.

[187] On the mixture of different vertical and horizontal coordination as well as composite administration approaches cf. Schneider, Sigrist, Oles, "Collaborative Governance of the EU Digital Single Market established by the Digital Services Act", University of Luxembourg Law Research Paper No. 2023-09, SSRN-id4561010.

[188] However, the DSA does not rely only on country-of-origin jurisdiction but includes competencies also for authorities of states where the service is available in the sense of a market destination principle.

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Not only does the Commission chair the Board, but it is also the principal competent authority for supervision and enforcement against VLOPs and VLOSEs (Art. 56 (2) et seq.), namely concerning their additional obligations and all other obligations the Commission can assume the supervision of for this category of providers. Besides the problem for member states of having to allocate the supervisory powers to one main DSC although the horizontal regulation of the DSA covers a variety of different types of content that is exchanged via the intermediaries, there is an ongoing discussion on how the Commission has to (re-)organise itself in practice to assume the supervision in a fundamental-rights-sensitive area that concerns also freedom of expression matters.[189] Because the VLOPs and VLOSEs have additional transparency requirements to fulfil compared to the other categories of platforms, the described role of the Commission is especially relevant in the context of the topic of this publication and by defining the standards for these providers it will also impact the functioning of the DSA and the work of the national competent authorities overall.

This position will be further strengthened as the Commission has explicit competences to create implementing acts that further shape the transparency reporting obligations, e.g. in laying down templates for the transparency reports of all intermediary service providers according to Art. 15 (3) DSA. As has been elaborated on above (Chapter 4.1.4.) these transparency reports present to the public, among other information, the way algorithmic systems have been used in content moderation and the accuracy of results these have produced (see Art. 15 (1) (e) DSA). Equally, for the more extensive reporting obligations of online platforms according to Art. 24 the Commission can adopt implementing acts to harmonise these reports. In addition, for the database listing decisions of hosting service providers about illegality or incompatibility with the provider's terms of service regarding user content, the Commission is tasked with the creation and management of that database. The statement of reasons that providers have to give their users in such cases of content moderation extends again to the way automated means were used in the procedure (Art. 17 (3) (c) DSA). In addition to the implementing acts, the Commission has an important role in encouraging the development of standards and codes of conduct (Art. 44 and 45) thereby making it an even more active body also in relation to the supervision of all categories of intermediaries. For VLOPs and VLOSEs specifically, additional and stricter reporting obligations are laid down in Art. 42 for which the Commission is the competent supervisory body. However, as the more general transparency obligations are applicable to this category of providers, too, the Commission is directly in charge of scrutinising their compliance with these obligations as well as handling the content moderation decisions of such providers in the database. Of the first group of VLOPs and VLOSEs that were designated (see Chapter 4.1.1.) a large part is also involved in content moderation and

[189] On the problem of potentially excluding media regulatory authorities from this task, especially where Member States do not have a converged regulator, cf. on the basis of the DSA Proposal Cole/Etteldorf/Ullrich, "Updating the Rules for Online Content Dissemination", 2021, doi.org/10.5771/9783748925934, p. 202 et seq. and 210 et seq. Generally in brief also Buri, A, "Regulator Caught Between Conflicting Policy Objectives - Reflections on the European Commission's Role as DSA Enforcer", in: Hoboken et al. (ed.) *Putting the Digital Services Act into Practice,* Berlin 2023, p. 75.

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therefore has to contribute to filling the database with its decisions. As an effect, this supervisory role of the Commission is the first to establish the application in practice of the DSA's transparency provisions with an impact for all types of providers.

The transparency database which had to be set up by the Commission according to Art. 24 (5) DSA was launched on 26 September 2023, coinciding with the first transparency reports of the VLOPs and VLOSEs.[190] The database is organised and made public by the Commission, but the data comes from the providers. These have to report in principle, for every content moderation decision, not only the decision itself but also the statement of reasons, which they are also obliged to communicate to the affected recipient of the service. In order to manage the volume of information and to make it comparable between providers, the database has to be machine-readable and the uploading of information should happen in an automated manner. The obligation to report without undue delay on the side of the providers is mirrored by the goal of having permanently up-to-date availability of data through the database as expressed in Recital 66 of the DSA. The standard format for the reporting shall facilitate this automated and timely reporting while the Recital acknowledges that this has to be proportionate to the resources of the online platform concerned. The Commission designed the reporting format in a structured way so that any visitor to the database can enter search queries into the database and receive categorised results, for example collecting decisions from different providers on one specific reason for suppression of information in a given time-period. The information entered into the form may not contain personal data, for example the name or contact details of the user affected negatively by a post which was subsequently blocked. It is again the responsibility of the providers to eliminate such data before the reporting.

While all online platforms will have to submit relevant information as of 17 February 2024 when the DSA will become fully applicable, the designated VLOPs and VLOSEs were already subject to the DSA obligations six months after their designation and accordingly, at least in parts, immediately started populating the database when it was made public. Although only a limited number of providers – compared to the figures that will apply after full applicability of the DSA – were concerned, the sheer number of reported decisions was remarkable: less than two weeks after its launch, more than 60 million entries could already be searched in the database; by the end of November 2023 this number had grown to around 641.5 million.[191] By then, the average hourly reporting was for more than half a million decisions. This data alone will allow for a far more transparent understanding of what is happening in the context of content moderation. However, notably in connection to algorithmic systems, the standard format requires the providers to declare whether the content in question was detected or identified using automated means and whether the decision was taken relying fully, partially or not at all on automated means. Taking the data mentioned above, by end of November and relying on the information supplied by the providers and assuming the answer to the search

[190] See the access page for the database at https://transparency.dsa.ec.europa.eu/.

[191] See for statistics https://transparency.dsa.ec.europa.eu/analytics as well as the possibility to search the database with an advanced search including time periods etc. https://transparency.dsa.ec.europa.eu/statement-search.

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query fully reflects the content of the database, roughly 580 million decisions were detected by automated means while about 380 million decisions were taken fully by automated means. Such statistical analysis can be supplemented by a more detailed look at the reasons that led to the decision and its outcome. The main search parameters are whether the decision is based on (claimed) illegality or incompatibility with terms of service; what measure was applied; what category of content is concerned; and a number of keywords that are used in the decisions. In addition, formal elements such as the territorial scope, the type of content (e.g. audio, video, image etc.) and the language of the content are searchable. Each platform has a "Plaform Unique Identifier (PUID)" under which it has to report and it can therefore be selected from a drop-down menu if the database user wants to identify the decisions by only one or those of several platforms.[192] The providers have more detailed explanations on what information is expected for the different elements of the form, such as e.g. which category of content is concerned. They also have free text fields in which the decision can be contextualised in more detail; these fields are then also visible when a specific item of the database is selected. However, not only due to the amount of data available, but also because of limitations in comparing and cross-relating as well as downloading data it has been argued that this tool will mainly be helpful for (professional) research rather than for the information of individual users.[193]

As the creation of the database, but also more generally the analysis of algorithmic systems and the competence to fulfil the supervisory function in the DSA context, necessitates acquiring specific expertise, the European Commission has created a specific unit to support it. The European Centre for Algorithmic Transparency (ECAT)[194] is aimed at hiring in-house experts and cooperating with external experts and is a research-based unit. It is hosted by the Joint Research Centre (JRC) and cooperates with the relevant Directorate General of the Commission on Communications Networks, Content and Technology (DG CONNECT) and was established in April 2023. It is still a growing unit, but especially in view of the risk management obligations of VLOPs and VLOSEs shall give technical assistance to the Commission, while additionally having the task to inform policy choices in the future.

[192] See on the indicators that the providers have to address in their reporting: https://transparency.dsa.ec.europa.eu/page/documentation.
[193] Cf. for example a first brief result from testing the database described by Miller, "First Transparency Reports Under Digital Services Act Are Difficult to Compare", 22 November 2023, https://www.techpolicy.press/first-transparency-reports-under-digital-services-act-are-difficult-to-compare/.
[194] See https://algorithmic-transparency.ec.europa.eu/index_en.

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6.2. Future Monitoring in EU Member States

The different moves at international level towards setting standards for AI rules which would include transparency and accountability of algorithms (see above 5.1), will likely lead to the development of national regulatory responses. These will either follow the agreements struck by the different groups of states or go beyond them when laying down specific domestic approaches, as was the case with the early legislative activity in Germany concerning media intermediaries (see above 5.1.). For the EU member states the situation is clear: besides the setting up of a new surveillance and governance architecture in relation to the AI Act, already now the finalisation of the supervision and enforcement structures concerning the DSA with its new transparency and accountability rules is eminent. By 17 February 2024 (Art. 49(3) DSA) the member states will have to notify the Commission which national authority or body will take the role of DSC and this accordingly will require prior establishment of a format for interaction between different authorities on the national level that contribute to the DSA enforcement and are coordinated by the respective DSC.

As described above (6.1.), the European Commission will itself have a central function in the DSA's enforcement, not only concerning certain categories of providers but also through its influence on e.g. transparency reports and creation of implementing acts.[195] Nonetheless, it is the competent authorities of the member states that are responsible for the supervision of intermediary service providers (Art. 49 (1) DSA). The question of jurisdiction, meaning which member state is competent for the enforcement concerning a specific provider, follows the country-of-origin approach by relying mainly (for EU-based providers) on the main establishment of the companies (Art. 56 (1) DSA) or the providers' legal representative (Art. 56 (6) DSA) – which non-EU-based providers offering services in the EU are obliged to appoint. Member states have the liberty to foresee a supervisory structure in which more than one authority is charged with the enforcement, e.g. depending on sectoral context or for specific substantive matters, as long as there is one coordinating DSC which then also represents the member state at EU level on the European Board for Digital Services.

Member states have a number of options in creating competent authorities and designating the DSC: they can either create new authorities or select existing ones e.g. from the area of electronic communications networks and services supervision, audiovisual media services regulatory authorities, or cartel authorities. Especially in member states with converged regulators that are in charge of several sectors and especially the telecommunications and media sector, these have been typically designated as DSCs where the decision has already been taken.[196] While the member states have wide discretion in the assignment of the authority and the institutional

[195] For an overview of the issues concerning the Commission's role according to the original proposal for the DSA see Cole/Etteldorf/Ullrich, "Updating the Rules for Online Content Dissemination (n. 161)", p. 223 et seq.
[196] E.g. AGCOM in Italy, ARCOM in France according to the draft law; for others it is the authority charged specifically with media such as the Comisiún na Meán (Media Commission) in Ireland; others rely on the cartel authority such as the *Autorité de la Concurrence* in Luxembourg according to the current draft of the legislation.

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structure, the DSA requires not only independence of these authorities, but also their equipment with the necessary powers especially according to Art. 51 DSA so that they may effectively conduct the enforcement. Although some procedural details especially on the cooperation of authorities with each other already follow from the DSA, it is the member states' duty to lay down in specific rules the functioning of the DSC and competent authorities. Besides the powers of the DSC listed in Art. 51 DSA, there are a number of other administrative tasks in provisions across the DSA which need to be included in the competencies that the member states create for the authorities. Examples are the forwarding of orders which have been issued by other authorities and need to be disseminated to the DSCs of all other member states (Art. 9 (4) and 10 (4) DSA), the certification of out-of-court dispute settlement bodies (Art. 21 (3) DSA) or the assignment of a trusted flagger status (Art. 22 (2) DSA).

The DSA also foresees cooperation avenues and obligations which are specified further in Chapter IV. There needs to be cooperation within each member state if the involvement of another authority is relevant,[197] between the member states in terms of mutually assisting each other on the level of the DSCs, at the EU level via cooperation on the Board and between the Board and other EU institutions, as well as finally and very importantly with the European Commission.[198] Art. 56 (5) DSA requires in this sense that the member states and the Commission "shall supervise and enforce the provisions of this Regulation in close cooperation". The latter therefore reached out to national authorities already in the phase of preparation of the full applicability of the DSA in order to formally agree on cooperation procedures.[199] The goal of the DSA to ensure consistent enforcement in cross-border cases which have relevance for member states beyond the state of establishment of the provider is reflected in a number of procedural possibilities that DSCs of member states of destination of a given service have vis-à-vis the DSC of the member state with jurisdiction. Interestingly, in case of disputes that arise in such situations over the adequacy of reaction, the Commission can potentially become a decisive actor in case of referral of a case under Art. 59 DSA.

In Section 5 of Chapter IV there are common provisions on enforcement which concern not only the member state level or the Commission, but apply to all levels and in view of all categories of providers. In order to be able to realise the cooperation as described, the Commission is tasked with introducing an information-sharing system (Art.

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[197] On this aspect see Van Cleynenbreugel/Mattioli, "Digital Services Coordinators and other competent authorities in the Digital Services Act: streamlined enforcement coordination lost?", Blogpost 49/2023 on europeanlawblog, 30 November 2023, https://europeanlawblog.eu/2023/11/30/digital-services-coordinators-and-other-competent-authorities-in-the-digital-services-act-streamlined-enforcement-coordination-lost/; Schneider, Sigrist, Oles, "Collaborative Governance of the EU Digital Single Market established by the Digital Services Act (no.159)", p. 50 et seq.

[198] See generally Cole/Etteldorf, "Future Regulation of Cross-Border Audiovisual Content Dissemination (no)", p. 170 et seq.; Schneider, Sigrist, Oles, "Collaborative Governance of the EU Digital Single Market established by the Digital Services Act (no 159), p. 46 et seq.

[199] See e.g. Memorandum with AGCOM, European Commission, Press Release, 30 October 2023, https://digital-strategy.ec.europa.eu/en/news/commission-services-sign-administrative-arrangement-italian-media-regulator-support-enforcement. For an overview https://digital-strategy.ec.europa.eu/en/policies/dsa-cooperation.

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85 DSA), as it exists in the European Competition Network[200] where the Commission and the national competition authorities exchange case-based information via a secure network.

The involvement of diverse authorities on member state level as well as bodies on the European level engaged in the supervision of algorithmic systems and related enforcement issues will become even more differentiated once the AI Act is passed and becomes applicable. According to the proposal for the AI Act and the final compromise reached, there will be an "AI Office" established within the Commission, which will be advised by a scientific panel of independent experts in relation to general-purpose AI systems, but there will also be an "AI Board" on the EU level made up of the representatives of member states which will have to assign supervisory powers to market surveillance authorities. Finally, there will also be an advisory forum of stakeholders to provide technical expertise to the AI Board.[201]

6.3. The Role of NGOs, Academic Researchers and other Actors

When it comes to algorithmic systems and their treatment in regulatory approaches, a trend can be observed that has become increasingly important in the digital environment. Besides an enforcement of normative values through the supervisory work of authorities that have been designated for this task, a number of other actors play an important role in achieving the aim of the rules. Foremost, as has been the case in media regulation for a long time – see especially the approach in Art. 4a AVMSD according to which the member states "shall encourage the use of co-regulation and the fostering of self-regulation" – the concerned providers themselves are involved in an important way. The risk-based approach of the DSA necessitates that the providers of intermediary services question the level of compliance they have to reach depending on the type of service they offer. In addition they contribute on a more industry-wide level through the creation of standards and codes of conduct to determining the state of the art of provider behaviour and procedures to meet compatibility with the DSA, this already in part in close cooperation with the regulatory authorities, namely the Commission.

The DSA expands this further by requiring from VLOPs and VLOSEs that they organise and finance regular audits to assess compliance of the concerned providers with certain elements of the DSA. This means the involvement of external actors, as the auditors have to be independent, whom the platforms have to assist in the preparation of the audit (Art. 37 DSA). The audit reports are not only to be shared with the competent

[200] See https://competition-policy.ec.europa.eu/antitrust-and-cartels/european-competition-network_en.

[201] See Council of the EU, Press release 986/23, "Artificial intelligence act: Council and Parliament strike a deal on the first rules for AI in the world", 09.12.23, https://www.consilium.europa.eu/en/press/press-releases/2023/12/09/artificial-intelligence-act-council-and-parliament-strike-a-deal-on-the-first-worldwide-rules-for-ai/.

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DSCs and the Commission, but have to be made public (Art. 42 (4) DSA), thereby contributing to more transparency around the functioning and compliance of these platforms. The auditors play a specific frontline role in ensuring compliance, and have other means for actual enforcement in case of non-compliance by the competent authorities.[202]

In a similar way, but with another new dimension, the DSA wants to enhance public scrutiny of the potential systemic risks inherent to the VLOPs and VLOSEs by introducing data access obligations. This provision of Art. 40 DSA has important potential in relation to algorithmic systems and how these could contribute to such systemic risks while allowing a better assessment of whether the risk mitigation measures that these categories of providers are obliged to introduce can be regarded as adequate and efficient. Art. 40 (3) DSA explicitly details the data access as having the purpose of requiring explanations of "the design, the logic, the functioning and the testing of their algorithmic systems, including their recommender systems". The data access not only gives DSCs and the Commission the right to access data, but this can also be requested for vetted researchers, as the DSA refers to them. Where researchers with the goal of undertaking research into the questions mentioned previously and under the condition of fulfilling certain requirements such as independence from commercial interests and making available the research results to the public, these can apply for the status of such a vetted researcher, which is assigned by the competent DSC (Art. 40 (8) DSA). Thereby, researchers are foreseen to play an important role in analysing the internal functioning of the providers in view of systemic risks, giving another group of experts special status in the supervision of compliance with the DSA.

Similarly, a number of non-governmental organisation (NGOs) have appeared over the last decades that deal with rights of individuals in the digital sphere and have an important role in lobbying for such interests in the process of legislation created in the EU. Already previously, for example in connection with the claiming of the rights of data subjects under the GDPR or concerning general issues such as the impact of algorithmic systems, it was often such NGOs that took on the defence of claims of individuals, either by conducting research and publishing critical results[203] or by actually bringing cases to competent authorities or courts on behalf of individuals.[204] The idea that individuals themselves may regularly not be in the position to defend their rights effectively, e.g. vis-à-vis platforms, is now also reflected in Art. 86 DSA. According to this provision individuals who are users ("recipients") of intermediary services have the right to be represented by organisations if these operate as non-profit, have been set up according to

[202] See the risk if the auditing process had involved complete outsourcing of the compliance assessment, Cole/Etteldorf/Ullrich, "Updating the Rules for Online Content Dissemination (n. 161)", p. 201 et seq. See also Art. 72 DSA on Monitoring Actions in the context of assigning external experts in the supervisory work.

[203] Take as one example of numerous organisations and publications a study by AlgorithmWatch: Loi/Spielkamp, "Towards Accountability in the use of Artificial Intelligence for Public Administrations, 2021, https://algorithmwatch.org/en/wp-content/uploads/2021/05/Accountability-in-the-use-of-AI-for-Public-Administrations-AlgorithmWatch-2021.pdf.

[204] See as one example of many the privacy rights organisation noyb and its strategic litigation approach: https://noyb.eu/en/our-detailed-concept.

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the law of a member state and their "objectives include a legitimate interest in ensuring that [the DSA] is complied with". This representation right exists besides other such possibilities under EU and national law.[205] It clearly underlines the idea that NGOs can play an important role in assisting individuals if they want to claim their rights under the DSA including contesting compliance e.g. because of a lack of transparency of algorithmic systems used for a decision that affected the individual.

[205] Further details in Cole/Ukrow, „Der EU Digital Services Act und verbleibende nationale (Gesetzgebungs-) Spielräume", 2023, https://freiheitsrechte.org/uploads/documents/Demokratie/Marie-Munk-Initiative/DSA_Gutachten_Cole_Ukrow.pdf, p. 49 et seq.

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7. Conclusion and Looking Ahead

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Algorithmic systems have a significant impact on the way users today interact with the online environment, consume media content and other types of information, actively find entry points to something they are looking for via a search engines or passively are confronted with more or less individualised recommendations or advertising. When it comes to the influence such systems have on decisions affecting individuals in their everyday life in or even outside of the online context, a recurrent point that is raised is the "black box problem". There has sometimes been a certain exhaustion or at least pessimistic view by observers, assuming that it is an unavoidable fact that reliance on algorithmic systems comes with a lack of knowledge about how these function and what makes them deliver the concrete output in a specific situation. It is not just now, in a period during which the technical possibilities of algorithms are gaining much more momentum due to artificial intelligence, that these discussions have started. Rather, there were attempts already earlier to consider a "right to explanation" on how such algorithmic systems work. In the context of the GDPR's provision that grants individuals the right not to be subjected to purely automated decision-making without their explicit consent, the existence of such a right has been intensively debated. Some argue that such a right would not be helpful for the data subject anyway, as the functioning of such an automated system would not be something that can be easily understood, others see limits due to the professional secrecy of the developers or users of such systems hindering the right. Although this – still ongoing – debate is only very recent, considering that the GDPR was passed in 2016, the development since has shifted attention to a core concept when it comes to regulating algorithmic systems and, more generally and even more currently, artificial intelligence: transparency. As was stated by one author: "Transparency is necessary, if not sufficient, for building and governing accountable algorithms."[206] And this connection was the theme of this IRIS *Special*.

With regard to transparency as a regulatory tool applied in the context of algorithmic systems, the observation made in the introduction that a turning point has been reached has been confirmed by the analysis presented of the applicable legal framework and the developments that lie ahead. Gradually, transparency obligations have become a standard at least in EU law, most notably with the passing of the DSA, which

[206] Kaminski, "Understanding Transparency in Algorithmic Accountability", U of Colorado Law Legal Studies Research Paper No. 20-34, 2020, https://ssrn.com/abstract=3622657, p. 2.

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was a focus area of this publication. However, the DSA was not the first instrument referring to transparency and obligations of providers to explain to (certain) users based on which criteria the algorithmic system determined specific results. Notably, the P2B Regulation was foundational in that regard, although the analysis has shown that the practical impact of it until now has been rather limited, partly because only a relatively short time has elapsed since it became applicable and partly likely due to its more limited scope. In that sense the DSA, even though not yet completely applicable, already is much more significant: implementation and enforcement activities started from the moment the provisions were applicable to certain types of providers, the VLOPs and VLOSEs. With the first transparency reports published on the basis of the DSA, the future standardisation of these reports, and with the accompanying transparency database concerning content moderation decisions based on standardised templates, a whole different level of understandability and – based on this – debate about the efficiency of regulation can be reached. At the same time it is to be noted that this is only the beginning. The actual impact of the enforcement measures and to what extent the DSA provisions – partly in interplay with those of the DMA as demonstrated above – will change the way intermediary service providers apply algorithmic systems, will have to be observed in the coming years and will remain an important point in the regulatory debate, irrespective of potential further rules being added in the future. In that sense it will be especially significant to assess the interplay of the planned AI Act with the DSA, if its new rules aiming for "interpretability" of AI enter into force and based on the final compromise that will have been struck by the legislative bodies. This IRIS *Special* gave a first outlook based on the proposed AI Act and the positions of the legislative bodies in order to provide a complete overview of the regulatory approaches of the EU. However, the AI Act must be embedded in an existing system of rules and read in their context which is why all the steps contributing to transparency and accountability of algorithms in other (partly sectorial) legislation were presented.

The EU arguably holds the legislative power with the strongest potential impact, as the DSA is not only a directly applicable regulation but has also been combined with a multi-level enforcement mechanism and assumes a market location jurisdiction of the EU member states for any service being offered in the EU. However, it is not the only contributor to the shaping of a regulatory framework around transparency and accountability. The Council of Europe has once again, as with data protection, proven to be an international organisation that draws attention at an early stage to potential human rights implications of technological developments. Besides the justification of developing regulation because of the impact of algorithmic systems on the way fundamental rights can be applied, the work of the Council of Europe has revolved around recommendations to its member states on addressing the topic. The preparatory work has culminated in the decision to develop an international binding standard, for those states that will then decide to ratify it, in the form of an AI Convention. Although this is still in the making, it is foreseeable that – possibly in combination with the AI Act of the EU – it will be a major reference point in the future within and outside Europe.

Not with the ambition of creating legally binding instruments themselves, but to give the impulse of creating rules on the domestic level and/or in other fora that can do so, the last years have seen important activities by regional and global international

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organisations relevant for the topic of this IRIS *Special*. Therefore, the recommendations and guidelines stemming from the OECD and UNESCO were also briefly presented, underlining how transparency has taken centre stage in the discussion around how to regulate algorithmic systems. While the activities on the international level have accelerated notably in the past months with more AI-related standards being approved by different organisations and bodies calling for the development of (new) rules, specific national approaches in Europe dedicated to addressing challenges arising from algorithmic systems were not very common. One member state, Germany, adapted its media regulation already in 2020, imposing transparency obligations on certain newly created categories of addressees of the law as well as holding them accountable for certain prohibited outcomes of algorithmic systems, especially in terms of non-discrimination. With the discussion around the DSA, before it was passed and in light of the involvement of the EU member states in its enforcement, new measures are being applied and it will be interesting to compare in the future how enforcement efforts differ between the states and to what extent this may correlate to the scope of competences assigned to competent authorities beyond the tasks following already from the DSA. It will be further relevant to assess whether the new role of the Commission in direct supervision and enforcement of the DSA provisions vis-à-vis certain providers and the DMA provisions as a whole has worked out after a few years of application of the Regulations' provisions.

At first view one may assume that transparency obligations are a light-touch regulatory approach. One could argue that being transparent is only a small step for the providers obliged to create this openness, while for example liability rules are much stricter. However, as this IRIS *Special* has illustrated, the extent of the transparency obligations already in place – at least in the EU context – as well as those in the making, actually imposes extensive obligations on providers and requires an active response in comparison to the situation as it existed before. Especially in a media law context, transparency is a first and decisive building block to pave the way for free democratic decision-making, from the point of view of both content recipients and creators. Similarly important, more transparency around the functioning of the algorithmic systems – or more precisely, about what effect that functioning has on the output – will likely facilitate decisions about whether existing accountability rules and obligations are being complied with and/or may need to be amended or extended in the future. There is also hope that the scholarly debate, if not public awareness, around the way algorithmic systems shape the digital lives of individuals will be more informed in the future based on this transparency. However, this goal is not self-evident, as transparency alone does not necessarily change practices and behaviours, if it is not followed up on with rules on how algorithmic systems have to be or are prohibited from being designed. Basic rules such as those relating to non-discrimination, human oversight or restrictions on legally permitted algorithmic parameters can already be derived from existing law and might be further extended the future. In that sense, the activities of the authorities and bodies in charge of overseeing the use of algorithmic systems especially by platforms will be decisive. Besides, the coherence of a regulatory framework for algorithmic systems will also depend on how in the near future the proposed standards and general rules for AI accountability will be formulated and placed in the network of existing rules.

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8. Annex: "A-Z" of Algorithm-related Terminology

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This section gives a terminology overview of brief explanations of key terms of relevance for understanding the algorithmic transparency and accountability context of this IRIS *Special*. The terms are explained based on common understanding or by reference to legal or technical definitions. They are listed alphabetically. This overview only serves the purpose of improving the understanding of core concepts underlying the theme of this IRIS *Special* and should not be understood as an official glossary.

Accountability

The concept of "accountability" refers to the idea that someone is responsible for their actions, meaning that a person has to explain and justify their decisions or acts, and then to make amends for any fault or error.[207] In law, accountability refers to legal responsibility for actions, decisions and their consequences, which is not necessarily linked to natural persons if understood broadly.

ADM - automated decision-making systems

"Automated decision-making (ADM) systems" are able to render decisions on behalf of human decision-makers; they may also be referred to as algorithmic decision-making systems. The term "decision" in the context of ADM systems simply refers to the output, finding, or outcome of a computational procedure. Based on the level of automation involved, one may distinguish between systems that operate in a purely "automated" manner without human involvement and those the output of which is offered to a human decision-maker as a recommendation rather than executing a pre-specified automated decision. EU data protection law, for instance, prohibits (with some exceptions) in Art. 22 GDPR ADM systems where a decision that produces legal effects or significantly affects an individual is based solely on automated processing without human intervention.

[207] Council of Europe, "A study of the implications of advanced digital technologies (including AI systems) for the concept of responsibility within a human rights framework", DGI(2019)05, p. 47.

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Algorithm

In simple terms, an "algorithm" is to be understood as a process or set of rules to be followed in calculations or other problem-solving operations. Algorithms are a key feature of our information ecosystem. However, the meaning and definition of the notion may vary depending on the context reflecting disciplinary perspectives i.e. whether it is used in the computer science community, among mathematicians, in communication and cultural media studies, etc.[208] A definition widely used in a variety of research fields refers to the term "algorithm" as a "set of encoded procedures for transforming input data into a desired output, based on specified calculations".[209] One can distinguish between deterministic algorithms and probabilistic algorithms: a deterministic algorithm will always produce the same output given the same input, whereas the results of probabilistic algorithms depend on probabilities of statistics.[210] The latter are for instance used in machine learning.

Algorithmic systems

"Algorithmic systems" are understood as applications that, often using mathematical optimisation techniques, perform one or more tasks such as gathering, combining, cleaning, sorting, classifying and inferring data, as well as selection, prioritisation, the making of recommendations and decision making.[211] Relying on one or more algorithms to fulfil their requirements in the settings in which they are applied, algorithmic systems automate activities in a way that allows the creation of adaptive services at scale and in real time.[212]

Artificial intelligence

The notion of "artificial intelligence" (AI) is colloquially used to describe the computational simulation of human intelligence processes by combing data, algorithms and computing power.[213] AI can also be described as a 'container term' for many computer applications, including applications that combine data and algorithms and other, non-data-driven approaches, e.g. knowledge reasoning and representation.[214] In law there is no common definition of AI for regulatory purposes, and regulation is only emerging. Proposed legal definitions of AI and such utilised in soft law have in common that they seek to define "AI

[208] See CoE, "Algorithms and Human Rights, Study on the Human Rights Dimensions of Automated Data Processing Techniques and Possible Regulatory Implications", DGI(2017)12, p. 5. For a comprehensive definition of algorithms, see Michael Latzer and Natascha Just, "Governance by and of algorithms on the Internet: Impact and consequences", in Oxford Research Encyclopaedia, Communication (OUP 2020).
[209] Tarleton Gillespie, "The Relevance of Algorithms", in: T. Gillespie, P. J. Boczkowski and K. A. Foot (eds.), *Media Technologies: Essays on Communication, Materiality and Society* (MIT Press 2014), p. 167.
[210] Dirk Brand, "Algorithmic Decision-making and the Law", [2020] JeDEM 114, 118.
[211] Appendix to CoE Recommendation CM/Rec(2020)1 (n 20).
[212] Ibid.
[213] For an overview of defining AI from a non-legal perspective see CoE, "Towards Regulation of AI Systems", DGI(2020)16, p. 22.
[214] Ibid.

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systems" based on the key functional characteristics of AI. Accordingly, these attempts to define an "AI system" in general refer to an algorithmic system or a combination of such systems that use computational methods (i.e. machine learning and/or logic- and knowledge-based approaches) to generate output such as content, or either assist or replace human decision-making.[215] Variations exist as regards the required level of autonomy of these systems.

Audience measurement systems

The term audience measurement systems is commonly understood as a methodological approach to a statistical analysis of how recipients come into contact with a particular medium (TV, radio, print media, etc.). Introduction into EU law of a definition of "audience measurement" is planned under the proposed European Media Freedom Act. If enacted in the way proposed by the Commission, the term "audience measurement" would refer to the activity of collecting, interpreting or otherwise processing data about the number and characteristics of users of media services. Under EU law, this definition would then apply to systems that collect this data for the purposes of decisions regarding advertising allocation or prices or the related planning, production or distribution of content, for which the goal of a high level of transparency is set.[216]

Bias

"Bias" is the inclination or prejudice for or against a person or group, often in a way considered to be unfair. The notion of "bias" in the context of algorithmic decision-making refers to a discriminatory impact by the decision made. The question of bias is closely linked to equality of opportunity. Machine-learning bias, also known as algorithm or AI bias, occurs when an algorithm produces results that discriminate for or against certain individuals. Often such outcomes reflect intended or unintended cognitive biases or real-life prejudices which were already contained in the training data for the algorithm.

Big data

In simple terms, "big data" refers to extensive datasets. Definitions of "big data" differ depending on the specific area of use. Most of them focus on the growing technological ability to collect, process and extract new and predictive knowledge from a great volume,

[215] Cf. CoE, Consolidated Working Draft of the Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law, CAI(2023)18, art. 3; OECD, Recommendation of the Council on Artificial Intelligence, C/MIN(2019)3/FINAL, p. 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, Art. 3(1).

[216] See European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU, COM/2022/457 final, Art. 2.

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velocity, and variety of data.[217] In general, big data identifies a huge collection of data that cannot be stored, managed and processed using conventional software.[218] Big data as a phenomenon was also used to describe the massive collection of data not necessarily with a specified purpose at the time of collection, which could then be used to derive all kinds of analysis and results.

Black box

A "black box" is generally understood as a system which can be viewed in terms of its inputs and outputs, but not in terms of its internal workings. In the context of algorithmic decision-making, this black box refers to the lack of transparency in how algorithmic or AI systems operate and make decisions, meaning that there is no way of explaining how an automated system achieved a particular decision.

Dark patterns

"Dark patterns" are deceptive and/or manipulative design patterns used to influence user choice online and it is claimed they interfere with the user's ability to make autonomous and informed choices or decisions. This means that the user interface of an online service is designed in such a way as to maliciously trick or persuade users into performing actions and making choices that they would otherwise not make, e.g., share more information about themselves than they would normally intend or desire. Accordingly, the user takes a decision that they would not have taken if they had been properly informed about the consequences, but the provider of the online service wants them to take exactly such a decision. Dark patterns often take advantage of the laziness or passiveness of users. A common example of dark patterns are selection mechanisms such as buttons that encourage selection ofone option over others via their placing, size or colour, or making the provider's preferred action the default option.

Data (personal data/non-personal data)

The broad concept of data generally covers signs summarised for the purpose of processing, which represent information (i.e. details of facts and processes) on the basis of known or assumed agreements. In data protection law "personal data" is mainly described as any information relating to an identified or identifiable individual (the data subject). In that regard "identifiable" refers to what may allow to individualise or single out one person from others.[219] "Non-personal data" is any data other than personal data. Even if data is anonymised, it is only considered non-personal as long as it is impossible to link

[217] CoE. Guidelines on the Protection of Individuals with regard to the Processing of Personal Data in a World of Big Data, 17 January 2017, p. 2; https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806f06d0.

[218] European Audiovisual Observatory, Artificial Intelligence in the Audiovisual Sector, IRIS *Special* 2020-2, p. 6.

[219] See Council of Europe, Explanatory Report to Convention 108+, para. 18 as an example.

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the data to a person or if the linkage would require unreasonable time, effort or resources.[220] The distinction between personal and non-personal data is especially relevant in the legal context as different rulesets apply to the different categories: e.g. the CoE Convention 108 and 108+ concern personal data as does the EU's GDPR. Non-personal data are addressed in the EU by a number of other legislative acts.

Data disclosure

"Data disclosure" refers to the release, transfer, provision of, access to, or divulging in any other manner of information outside the entity holding the data. If personal data is concerned, the disclosure of data constitutes an act of data processing in the meaning of data protection laws. According to these rules in principle personal data must not be disclosed unless the disclosure is expressly laid down by law or the data subject consented to the disclosure.

Data governance

In consideration of the economic and societal potential of data, availability of data is essential to capitalise on the potential. In that regard, data governance refers to the process of managing *inter alia* the availability or sharing of data. In that regard, data governance mechanisms often seek to assess and ensure the data accuracy, integrity, and security. A recent example for specific legislation addressing this question is the EU's Data Governance Act,[221] which seeks to increase trust in data sharing by creating a framework to facilitate data sharing by companies, individuals and the public sector.

Data law

"Data law" refers to the regulation of data access and use in the digital ecosystem. Beside governance structures for handling of, access to and use of data, this field covers a wide range of issues including connectivity, processing and storage of data, computing power and cybersecurity.[222] In that regard, data law for instance addresses questions such as the attribution of rights on data generated by connected devices.

[220] Council of Europe, Explanatory Report to Convention 108+, para. 19.

[222] Cf. European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Strategy for Data, COM/2020/66 final.

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Data protection

The notion of "data protection" refers to personal data and means that individuals are to be protected when their personal data is processed. Every individual (data subject) has the right to control his or her personal data and the processing of such data.

Data sensitivity

The concept of "data sensitivity" is an important element of data protection frameworks. The concept acknowledges that specific types of data require more protection because their processing may lead to encroachments on interests, rights and freedoms.

Such data might include, depending on the legal framework referring to it, genetic data, personal data relating to offences, criminal proceedings and convictions, and related security measures, biometric data uniquely identifying a person, as well as personal data revealing the racial or ethnic origin, political opinions, trade-union membership, religious or other beliefs, health or sexual life of a person.

Data sovereignty

The notion of "data sovereignty" refers to the concept that data is subject to the laws and governance structures of the jurisdiction in which the data is shared, processed and stored. This idea is for instance encompassed in the EU's GDPR.

Datafication

"Datafication" refers to the fact that with an increased use of digital technologies, many aspects of life are turned into data, meaning that the volume of data being produced is growing rapidly (see also "big data").

Deep fakes

Generally speaking, "deep fakes" is a term used to characterise audio or audiovisual content which seems to portray a real situation that did not exist. Typically such false audio or videos would show behaviour or put words into the mouth of a person in the voice of the person that in reality were never the behaviour or words of that person. Technically such "fake" content has been improving in quality, thereby raising the level of apparent authenticity and have become increasingly easy to produce using artificial intelligence. A first attempt at inserting a legal definition in EU legislation was in the European Parliament's position on the DSA, which was not retained in the final version.[223]

[223] European Parliament, Amendments adopted by the European Parliament on 20 January 2022 on the proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services, https://www.europarl.europa.eu/doceo/document/TA-9-2022-0014_EN.html. See Art. 30a where a deep fake was considered to be a "piece of content that is a generated or manipulated image, audio or video

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In the Proposal for an AI Act[224] there is a new attempt, whereby deep fakes are images, audio or video content generated or manipulated in such a way as to resemble existing persons, objects, places or other entities or events and that would falsely appear to a person to be authentic or truthful.[225]

Generative artificial intelligence

The term "generative artificial intelligence" (generative AI) refers to a certain group of AI models capable of generating text, images, or other media in response to prompts. Prominent examples for generative AI systems are large language model chatbots such as ChatGPT or Bard, or text-to-image-generating AI systems such as DALL-E. Generative AI models learn the patterns and structure of their input training data and are able to generate new data that has similar characteristics. The European Parliament defines generative AI as a type of foundation model that is specifically intended to generate content such as complex texts, images, audio or video; whereby a foundation model is defined as an AI system that is trained on broad data at scale, designed for generality of output, and which can be adapted to a wide range of distinctive tasks.[226]

Hosting platform

A "hosting platform" is an online intermediary service that stores and disseminates information provided by and at the request of a recipient of the service.[227] The definition emphasises that such a platform service is about managing third-party content and not (primarily) about providing own content.

Intermediary

Generally speaking, the expression "intermediary" has been used to address the function of service providers especially on the internet that serve as intermediary between and bring together third parties. In that way these intermediaries facilitate the offering of products, services, exchange of information etc. of one party producing or offering and another party purchasing or using, both being different from the intermediary. Such intermediary services can take a variety of forms which is why they have not been legally defined, but instead different types of intermediaries have been addressed. Typically,

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content that appreciably resembles existing persons, objects, places or other entities or events and falsely appears to a person to be authentic or truthful".

[224] 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.

[225] Art. 52 of the Proposal for an AI Act.

[226] European Parliament, Artificial Intelligence Act, Amendments adopted by the European Parliament on 14 June 2023 on the proposal for a regulation of 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), amendment 168 and 399.

[227] For a definition in EU law, cf. Art. 3 lit. g (iii) and lit. i DSA.

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three types of intermediary services are addressed in EU law: (a) a mere conduit service that only transmits third-party content in or provides access to a communication network; (b) a caching service, that not only transmits third-party content but also temporarily stores the information for the sole purpose of making the onward transmission more efficient; or (c) a hosting service, which consists of the storing of information provided by and at the request of a third party (the recipient of the service). The DSA adds additional categories of intermediaries by specifying according to their service or the size of the provider.

Machine learning

"Machine learning" refers to the development and study of algorithms and statistical models that computer systems use in order to perform a specific task effectively without using explicit instructions, relying on patterns and inference instead. The aspect of "learning" refers to the computational process of optimising the parameters of a model from data.[228] Thereby, the models are able, for instance, to adjust to new conditions or changes without human interference. The focus of machine learning is on prediction, which is based on known properties learned from the training data. Machine learning approaches include, for instance, supervised learning (with the goal to learn a general rule that maps inputs to outputs), unsupervised learning (where the learning algorithm finds structures in its input on its own) and reinforcement learning (where the learning algorithm interacts with a dynamic environment in which it has to perform a certain task). Examples of machine learning include face ID authentication to unlock mobile devices, self-driving vehicles or the recommender systems on trading platforms.

Nudging

In common language, "nudging" means to gently encourage someone to do something. In the context of dark patterns, "nudging" refers to the act of encouraging users with the help of design choices on the user interface to make a particular choice or decision that the provider of the service wants them to take. In simple terms, the design guides the user to behave in a certain way. Design choices can be very effective without users noticing. Nudging per se is not a dark pattern, but it can fall within the category of dark patterns when the user's autonomy to make a free choice is distorted or impaired (see dark patterns).

Online platforms

Typical examples of "online platforms" are social networks or websites that allow consumers to conclude distance contracts with traders. While previously there was no agreed definition in law – in contrast to discussion in economics on the specific role of

[228] Cf. European Parliament, Artificial Intelligence Act, Amendments adopted by the European Parliament on 14 June 2023 on the 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), amendment 19.

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such providers in multi-sided markets in the online environment – because of the variety of business models and technological solutions applied, in the EU this changed recently with the Digital Services Act (DSA)[229]: an online platform means a hosting service that, at the request of a third party (recipient of the service), stores and disseminates information to the public, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service.

Profiling

Generally speaking, "profiling" analyses aspects of an individual's personality, behaviour, interests and habits to make predictions or decisions about them. Personal information can be obtained from a variety of different sources. For instance, online platforms commonly monitor the behaviour of users in order to analyse or predict the user's personal preferences, behaviours and attitudes. The information collected is merged to create "profiles" of individuals, *inter alia* to enhance the user experience or to provide the user with personalised advertising or news items reflecting their identified or predicted preferences. Profiling necessarily involves the processing of personal data, and thus falls within the scope of data protection regulation. In EU data protection law, profiling is defined as "any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements".[230] The GDPR as well as the DSA in that regard introduce transparency obligations concerning the existence and consequences of profiling as well as the right to object to profiling or direct marketing based on profiling.[231] While the GDPR further introduces the right not to be subject to a decision based solely on profiling (unless expressly authorised by law),[232] the DSA also prohibits the presentation of advertisements based on profiling using special categories of data (sensitive data)[233] and the profiling of minors.[234] Under the DSA, VLOPs are also obliged to offer alternatives to recommender systems based on profiling.[235]

Recommender systems

The term "recommender systems", generally speaking, addresses the increasing use of software solutions that offer users of online services specific content or offers based on certain criteria, such as for example previous user behaviour. Such recommendations typically use algorithms to analyse which next suggestion could be the most fitting for

[229] 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 (Digital Services Act), [2022] OJ L 277/1.
[230] See Art. 4(4) GDPR.
[231] See as regards the right to object Art. 21 GDPR.
[232] Art. 22 GDPR.
[233] Art. 26(3) DSA.
[234] Art. 28(2) DSA.
[235] Art. 38 DSA.

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the user according to the criteria set by the provider. They can concern e.g. news content on news aggregation services or recommendations for audiovisual content on on-demand, streaming services or video-sharing platforms. A definition of a recommender system is now enshrined in Art. 3 lit. o DSA in EU law; a recommender system is "a fully or partially automated system used by an online platform to suggest in its online interface specific information to recipients of the service, including as a result of a search initiated by the recipient or otherwise determining the relative order or prominence of information displayed".

Social scoring

"Social scoring" is a practice by public authorities, on their behalf or private parties of evaluating or classifying the trustworthiness of natural persons based on their social behaviour in multiple contexts or known or predicted personal or personality characteristics. The social score obtained is then used for detrimental or unfavourable treatment in social contexts which are not related to the context in which the data was originally generated or collected.[236]

Transparency

In a business or governance context, transparency refers to being open and honest, i.e. to disclosing all or certain relevant information so that third parties can make informed decisions. Transparency enables those affected by a decision or action to know the reasons for that action or decision, and to enable the affected party to evaluate the quality of these reasons.[237] The more colloquial understanding of transparency has become an increasingly important element in regulations concerning the digital and online environment. For example, in data protection law, many instruments require transparency when personal data is being processed. In order to ensure fair processing and to enable data subjects to understand and thus fully exercise their rights they must be provided with certain essential information. In media law, transparency can concern the origin of information, e.g. the author, or explanations to the recipients on who financed the content or the disseminating media company. Similarly, where algorithmic systems are implemented, appropriate levels of transparency are recommended with regard to *inter alia* the use, design and basic processing criteria and methods of these systems.[238] For instance, in the EU, the Proposal for an AI Act requires that so-called high-risk AI systems be designed and developed in such a way to ensure that their operation is sufficiently transparent to enable users to interpret the system's output and use it appropriately.[239]

[236] Cf. Recital 17 of the Proposal for an AI Act.
[237] Council of Europe, "A study of the implications of advanced digital technologies (including AI systems) for the concept of responsibility within a human rights framework", DGI(2019)05, p. 47.
[238] Council of Europe, Recommendation CM/Rec(2020)1 of the Committee of Ministers to member States on the human rights impacts of algorithmic systems, para. 4.
[239] Cf. Art. 13 of the Proposal for an AI Act.

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Very large online platforms

The concept of "very large online platforms" is no longer only used to express an observation that the platform market is dominated by a few globally operating companies but is now a specific category of intermediaries in EU law. The DSA refers to such VLOPs as platforms that have more than 45 million active users in the EU and are designated by the European Commission. In view of their nature, size and potential societal impact, these platforms are subject to a special regulatory regime that includes *inter alia* transparency and information obligations, and duties in relation to illegal content.

Very large online search engines

Just like the term "very large online platforms" the term "very large online search engines" (VLOSEs) is no longer only used to express an observation that the search engine market is dominated by a few globally operating companies but is now a specific category of intermediaries in EU law. The DSA refers to online search engines as an intermediary 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. With regard to their categorisation as "very large" the same criteria apply as with VLOPS (see Very Large Online Platforms).

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