

Digital Services Act and Digital Markets Act

Unpacking the European Commission's Proposals

December 2020



Digital markets players in the European Economic Area (EEA)¹ potentially face new regulation to deliver greater competition and innovation for the use of data, while protecting consumers' rights. Social networks, search engines and e-commerce sites are just some of the digital platforms that will likely be most affected by these new potential regulations.

Under the European Commission's proposals, companies that act as market "gatekeepers" will also be subject to additional regulatory requirements. These anticipated new regulations will complement existing antitrust, data protection and electronic communications laws to further protect consumers, and ultimately ensure digital markets players act responsibly and are accountable. However, the European Commission's proposals are likely to be subject to intense lobbying and to amendments as they go through the co-legislative process. The European Parliament is likely to push for more stringent rules, while the Council (under the incoming Portuguese Presidency) is likely to focus on the division of competences between the EU and the member states in enforcing the new regulations. Companies, trade associations and their advisors will now study the proposals carefully to identify their potential impact. In particular, the issues where potential advocacy is likely to be more effective is the proportionality and coherence of these measures with other existing regulatory tools in the EU and abroad – given the global dimension of digital markets and their business models. These proposals come at a time when there is already a live debate within the EEA about the role of digital platforms in the economy and society, including digital taxation and end-to-end encryption.

Introduction

On 15 December 2020, the European Commission [published](#) its long-awaited rules for digital markets. The announcement represents a watershed moment for Ursula von der Leyen's Commission, which has made so-called "technological sovereignty," or efforts to bolster the bloc's role in digital markets, a central piece of its legislative agenda, to ensure better consumer protection and a fairer, safer and reliable digital market. The new rules consist of a [Proposal for a Regulation on Digital Services Act](#) and a [Proposal for a Regulation on Digital Markets Act](#).

The proposal for a Digital Services Act (DSA) will replace and expand the [e-Commerce Directive 2000/31/EC](#) and aims to harmonise the conditions that determine the responsibilities and liability regime for online intermediary services, notably large online platforms.

The proposal for a Digital Markets Act (DMA) introduces a new competition regime for online platforms acting as "gatekeepers" in digital markets.

This client alert provides an overview of the two legislative proposals that are likely to dominate the EU policy discussions in the years to come. If you have any questions about the impact of the DSA and DMA for your organisation, please do not hesitate to contact any of the lawyers listed in this client alert or your usual contact at the firm.

¹ EU27 member states and Iceland, Lichtenstein and Norway.

Proposal for a Digital Services Act

The DSA proposal introduces binding obligations applicable to all digital services that provide goods, services or content in the EEA, including new procedures for faster removal of illegal content and for protecting users' fundamental rights online. The rules are applicable to a broad range of online intermediaries offering services in the EEA, notably:

- **Intermediary services** offering network infrastructure, such as internet access providers and domain name registrars
- **Hosting services**, such as cloud and web hosting services
- **Online platforms** connecting sellers and consumers, such as online marketplaces, app stores, collaborative economy platforms and social media platforms
- **Very large online platforms** reaching more than 10% of 450 million consumers in the EU

Under the DSA proposal, member states should designate the primary national authorities responsible for overseeing the obligations laid out in the regulation as the Digital Services Coordinators.

The proposal for a DSA provides for a detailed list of due diligence requirements and sanctions for failure to comply with such requirements.

As a general rule, online intermediary services will become liable for the third-party content that they transmit and store, and they shall respond, without undue delay, to orders by member state authorities to provide information. However, pure transmission services without any editorial control, including content delivery and telecoms networks, are exempted.

Hosting services may also be exempted if the service provider can demonstrate to have had no knowledge of the illegal content, and if the content is removed or disabled as soon as the hosting service becomes aware of any such illegal activity.

Illegal content online has a broad remit, encompassing any information relating to illegal content, products, services and activities, and can include illegal hate speech or terrorist content and non-authorised use of copyright protected material or activities.

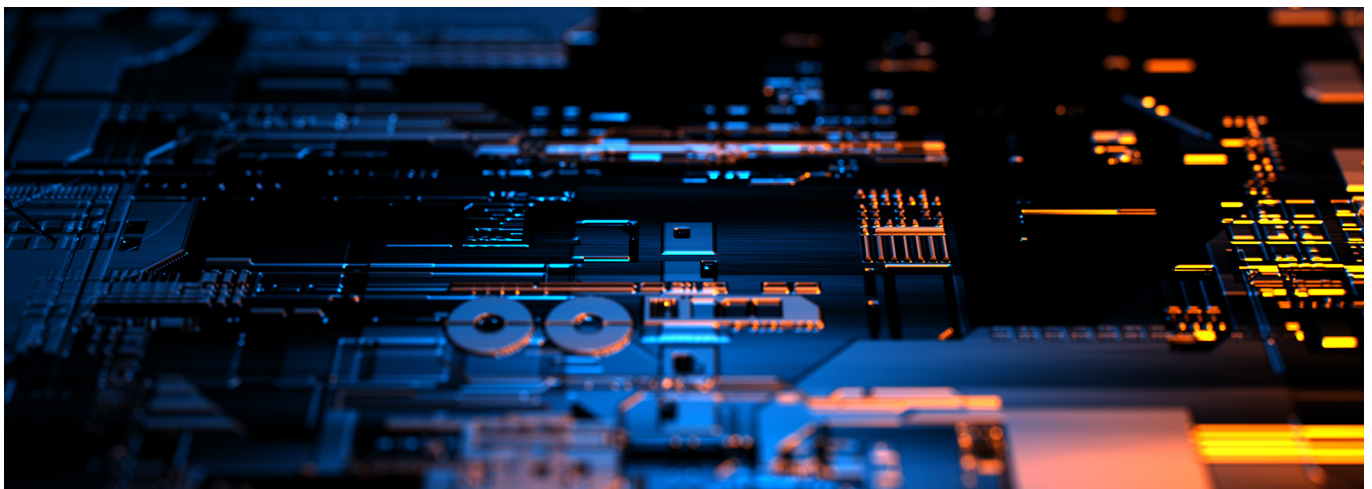
Due Diligence Obligations

The DSA proposal contains due diligence obligations applicable for **all providers of intermediary services**. These providers will be required to:

- Establish a single point of contact for the authorities in each member state.
- For providers operating in the EU but without having an establishment in the EU, designate a legal representative in one member state that can be held liable for non-compliance with the obligations of the DSA.
- Present a report at least once a year on any content moderation, including activities to detect, identify and address illegal content contrary to their terms and conditions in a relevant period. The reports should include information about (i) the number of orders to provide information received from member states' authorities; (ii) the number of notices submitted, outlined by type of alleged illegal content; (iii) the content moderation managed on their own initiative; and (iv) the number of complaints handled through internal complaint-handling systems. Intermediary services qualifying as micro or small enterprises would be exempted from these reporting obligations.

Additional due diligence obligations apply depending on the types of service providers, as detailed below.

Providers of hosting services, including online platforms, will be required to create a mechanism for individuals to notify the presence of illegal content on their platforms. When notified, a confirmation must be sent to the individual by the hosting services providers acknowledging the notification of the allegedly illegal content, as well as detailing the course of action proposed to take in order to deal with the allegedly illegal content.



In addition to the above obligations, **online platforms**, with the exception of those qualified as micro or small enterprises, will be subject to the following additional due diligence obligations:

- Creating an internal complaint-handling mechanism
- Providing for an out-of-court dispute settlement procedure
- Ensuring, through technical and organisational means, that notices submitted by entities granted the status of trusted flaggers would be treated with priority
- Adopting measures against misuse, such as the suspension of repeated offenders' accounts after issuing prior warning
- Notifying law enforcement and judicial authorities of any suspicions of a criminal offence, involving a threat to the life or safety of persons
- Vetting and publishing information on the reliability of the traders on their online marketplaces
- Publishing reports on their activities related to the removal and the disabling of information considered to be illegal content or contrary to their terms and conditions
- Ensuring transparency of online advertisements so the recipients of the service can easily identify the information displayed, as well as the person or entity behind the advertisement

In addition to the above obligations, **very large platforms**, i.e. platforms with 45 million users or more in the EU, will be subject to further due diligence obligations. The European Commission, through a delegated regulation, will set out a specific methodology for calculating the number of average monthly active recipients and designate "very large platforms." Designated very large online platforms will be required to:

- Conduct risk assessments on the systemic risks linked to their services, particularly in connection with illegal content, fundamental rights and manipulation of their service, and to take reasonable and effective measures to mitigate those risks
- Submit themselves to external and independent audits to assess their compliance with the due diligence obligations and any codes of conduct commitments once a year
- Outline their terms in a clear and comprehensive manner if they use recommender systems and increase transparency of online advertisement
- Provide access to data to the Digital Services Coordinators when requested
- Appoint one or more compliance officers to guarantee compliance with the DSA and delegated European Commission regulation

The European Commission anticipates supporting the development of harmonised European standards, the production of codes of conduct to facilitate compliance with the DSA, and tackling different types of illegal content and systemic risks, as well as on the transparency in online advertisements.

Enforcement and Sanctions

The member state-designated Digital Services Coordinators will have wide-ranging powers to enforce the DSA, including:

- Powers to require the disclosure and production of relevant information
- Dawn raid powers – i.e. the power to carry out on-site inspections of business premises
- Powers to request the cooperation of other Digital Services Coordinators in using such powers in connection with cross-border suspected infringements
- Powers to impose remedies proportionate to infringement of the DSA, to impose fines for failure to comply with the DSA or to adopt interim measures to avoid the risk of serious harm

Member states would be responsible to determine the rules for the calculation of any fines imposed by the Digital Services Coordinators. However, the DSA sets certain maximum statutory caps:

- The maximum fine for non-compliance must not exceed 6% of the infringer's annual total turnover
- The maximum fine for knowingly or negligently submitting incorrect, incomplete or misleading information in response to an information request must not exceed 1% of the infringer's annual turnover

The European Commission may, either upon notification by the board or on its own initiative, initiate proceedings against very large online platforms for non-compliance with the DSA. The European Commission could request information related to infringements and discuss with the platforms in question its preliminary findings before the adoption of a negative decision. In case of non-compliance, the European Commission may impose a fine on very large online platforms up to 6% of their annual total turnover.

A European Board for Digital Services will be set up to ensure the cooperation between national competent authorities and the consistent application of the DSA. The board will also serve as a forum for the coordination of the European Commission's and Digital Services Coordinators' enhanced supervisory powers over very large online platforms.

The DSA is expected to enter into effect three months after its publication in the Official Journal, once adopted.

Proposal for a Digital Markets Act

The DMA proposal presents a set of rules for platforms that act as “gatekeepers” in digital markets to prevent them from imposing unfair conditions to businesses and consumers.

The DMA would be applicable to large search engines, social networks, online intermediation services, video-sharing platforms, number-independent interpersonal communication services (such as instant messaging services), operating systems, cloud computing services and advertising networks services.

Designation of Gatekeepers

The definition of “gatekeeper” is potentially quite broad in the DMA proposal. It includes companies controlling at least one so-called “core platform service” (such as search engines, social networking services, certain messaging services operating systems and online intermediation services), and that have a lasting, large user base in multiple countries in the EU. Specifically, there are three main cumulative criteria that bring a company under the scope of the DMA:

- A company with a significant impact on the internal market satisfying the following thresholds:
 - Annual turnover in the EEA of €6.5 billion or more in the last three financial years;
 - Average market capitalization or equivalent fair market value amounted to at least €65 billion in the last financial year; and
 - A core platform service available in at least 3 Member States.
- A company serving as an important gateway for business users to reach end users presuming it has more than 45 million monthly active end users established or located in the EU and more than 10,000 yearly business users established in the EU in the last financial year; and
- A company with an entrenched and durable position, meeting the above two conditions in each of the last three financial years, or a company which is “foreseeable” (rather than expected) that it will enjoy such a position in the “near” future.

The European Commission will be responsible for designating platforms with a gatekeeper role and will be empowered to adopt a Delegated Act on the methodology determining the thresholds for the above criteria. However, it may also designate other gatekeepers with such role under special circumstances where the criteria are not met on a case-by-case basis: e.g. for example, with regard to a new emerging gatekeeper. The European Commission is empowered to reconsider, amend or repeal at any moment a decision with regard to the designation of a company as gatekeeper.

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Gatekeepers’ Obligations

To limit the contested practices of gatekeepers that may result in unfair treatment of competitors and customers, the DMA introduces the following requirements, regardless of any finding of abuse of their dominant position:

- General obligations applicable to all designated gatekeepers:
 - Refraining from combining personal data sourced from their core platform services with personal data from any other services offered by the gatekeeper or third-party services
 - Allowing third parties to work in conjunction with the gatekeeper’s own services in certain specific situations (interoperability)
 - Allowing their business users to access the data they generate in their use of the gatekeeper’s platform (data access)
 - Refraining from preventing or restricting business users from raising issues with any relevant public authority relating to any of the gatekeeper’s practices
 - Providing companies advertising on their platforms with the necessary tools and information to carry out their own independent verification of their advertisements hosted by the gatekeeper (transparency)
 - Informing the European Commission on any planned merger with another provider of core platform services or any other services provided in the digital sector – this would be in addition to the application of merger control rules
 - Submitting an independent audit to the European Commission on the techniques for profiling consumers

- Additional obligations for “special” gatekeepers designated by the European Commission:
 - Refraining from using, in competition with business users, any data not publicly available, which is generated through activities by those business users
 - Allowing end users to uninstall any pre-installed software applications on its core platform service
 - Not treating more favourably in ranking services and products offered by the gatekeeper itself or by any third party (self-preferencing prohibition)
 - Allowing end users to switch between and subscribe to different software applications and services
 - Allowing business users and providers of ancillary services access to and interoperability with the same operating system, hardware or software features
 - Allowing effective portability of data generated through the activity of a business user or end user (data mobility and portability)
 - Providing access, free of charge, to advertisers and publishers on their performance, as well as to business users, or to third parties authorised by a business user access to the data generated through their platform in full respect of the General Data Protection Regulation (GDPR)

In exceptional circumstances, following the request of the gatekeeper or on grounds of public interest, the European Commission may exceptionally suspend an obligation or part of an obligation.

The European Commission is empowered to adopt delegated acts, which would update the gatekeeper obligations where there is an imbalance of rights and obligations on business users or where the contestability of markets is weakened.

Enforcement and Sanctions

The European Commission will have wide-ranging powers to enforce the DMA, including:

- Request information
- Conduct interviews and take statements
- Carry out dawn raid-style on-site inspections
- Adopt interim measures
- Make voluntary measures to remedy an infringement of the DMA binding on the gatekeepers
- Monitor their compliance with the DMA and binding remedial measures
- Carry out market-wide investigations, either on its own motion or upon request of three or more member states, into specific aspects of digital markets that are suspected of not functioning well and adopt behavioural or structural measures to remedy such aspects to improve competition
- Sanctioning powers subject to the following statutory caps:
 - Up to 10% of total annual turnover for non-compliance with the DMA
 - Up to 5% of average daily turnover in the preceding financial year for failure to provide information in response to an information request, submit to on-site inspections, or respect interim orders

There is a limitation period of five years for the imposition of fines and for their enforcement.

Gatekeepers will have procedural rights similar to those available to them in antitrust enforcement cases, including the right to be heard and access to the file, confidentiality and professional secrecy.

A Digital Markets Advisory Committee will be set up to provide its opinion to the European Commission before adopting individual decisions addressed to gatekeepers.

The DMA is expected to enter into effect six months after its publication in the Official Journal, once adopted.



Next Steps

The two legislative proposals will now go through the EU decision-making process, opening up a lengthy negotiating procedure that would entail numerous amendments to the DSA/DMA. The two co-legislators, the Council of the EU and the European Parliament, have historically held different approaches when it comes to similar far-reaching pieces of legislation, something that can bring tensions in this lengthy process.

The European Parliament is expected to keep a more ambitious attitude on the DSA/DMA, as evidenced by the recently adopted non-binding resolutions on the DSA. In contrast to this, the Council will likely maintain a more conservative approach on the DSA/DMA in comparison to the European Parliament. Either way, both proposals will be high priority for the incoming Portuguese Presidency and the European Parliament, as well as many businesses, for the months and years to come, in what can potentially become the most lobbied pieces of legislation after the GDPR.



Commentary

The two proposals are ambitious and likely to be controversial. The DSA establishes a horizontal framework for content management, which clearly defines the accountability and obligations for companies operating online, either by managing content or by transmitting content through their services. The DMA, on the other hand, minimises the detrimental structural effects of unfair practices *ex ante* without limiting the ability to intervene *ex post* under EU and national competition rules. Inevitably, both proposals would impact a broad range of sectors. Companies, trade associations and their advisors will now study the proposals carefully to identify their potential impact.

In particular, the following open questions would merit attention:

- Are the proposed measures in line with the principle of proportionality and impact assessment?
- Are the proposed measures coherent with other overlapping regulatory tools, including, among others, EU competition rules, EU merger control rules, the Platform Regulation, the European Electronic Communications Code and the GDPR?
- Are the proposed enforcement, sanctions and cooperation mechanisms workable and sufficiently clear, having regard to the experience matured in the context of the enforcement of the other regulatory instruments listed in the above bullet point? Will the case law principles established in connection with such statutory instruments be applicable by analogy?
- Given the global dimension of digital markets, are the measures coherent with other similar regulatory initiatives outside the EEA, such as, for example, the recently announced UK Digital Markets Unit and code of conduct for digital advertising?
- Is there a risk that these proposals will eventually lead to the structural separation of very large platforms?

The proposals substantially define what the “duty of care” means in different dimensions of the digital marketplace. The objective is to protect consumers by making online platforms and service providers more accountable both for what they do, and for what others use their services to do. But paradoxically by doing so the regulations may also force such platforms and service providers to take a closer interest in what consumers do through their services.

How We Can Help

There is no doubt that the complex EU decision-making process would provide ample opportunities for stakeholders to engage with policymakers in furtherance of their advocacy ambitions. Both legislative proposals will be going through scrutiny by the two co-legislators, the European Parliament and the Council of the EU, for the next couple of years.

With us as your trusted advisors on your side, you will be able to spot, assess and understand the risks and opportunities for your organisation from the two far-reaching proposals. We will support you in devising and executing successful strategies to shape the policy debate.

Now is the right moment to start a discussion with us on how we can best help you at the EU level and/or the national level.

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Contacts



Wolfgang Maschek

Partner, Chair of European
Public Policy Practice, Brussels
T +322 627 1104
E wolfgang.maschek@squirepb.com



Francesco Liberatore

Partner, London
T +44 20 7655 1505
E francesco.liberatore@squirepb.com



Ann LaFrance

Partner, New York
T +1 212 872 9830
E ann.lafrance@squirepb.com



Brian Hartnett

Partner, Brussels
T +322 627 1101
E brian.hartnett@squirepb.com



Matthew Kirk

International Affairs Advisor, London
T +44 20 7655 1389
E matthew.kirk@squirepb.com



Michael Bartholomew

Senior Advisor, Brussels
T +322 627 1111
E michael.bartholomew@squirepb.com



Georg Serentschy

Senior Advisor, Brussels
T +322 627 1111
E georg.serentschy@squirepb.com



Christina Economides

Public Policy Advisor, Brussels
T +322 627 1105
E christina.economides@squirepb.com

SQUIRE 
PATTON BOGGS
squirepattonboggs.com