

Position paper on the Digital Service Act

March 2021

Introduction

On 15 December 2020, the European Commission has published its long-awaited **rules for digital services and digital markets**. The [Digital Services Act Package](#) aims at tackling some of the main issues which have been associated with large platforms: the spread of hate speech and illegal and unsafe products ([Digital Services Act](#)); and the dominance of gatekeeper platforms in certain markets ([Digital Markets Act](#)).¹

DIGITAL SME welcomes the proposals and that the European Commission is taking bold steps to bring back fairness to digital markets. DIGITAL SME believes that **Europe needs an open and competitive digital ecosystem that enables innovation.** We believe that the proposals are a step in the right direction to address the challenges that SMEs are facing in Europe's digital economy. DIGITAL SME's response in this **position paper focuses on the Digital Services Act** in response to the European Commission consultation on the proposal.

With the **Digital Services Act (DSA)**, the European Commission aims to create harmonised rules across Europe, e.g., for notice-and-action mechanisms. **DIGITAL SME strongly welcomes:**

- The general aim for further harmonisation of the Digital Single Market.
- That the Commission **refrained from taking a one-size-fits-all** approach.
- That the proposal foresees **exemptions for micro and small enterprises**, but we believe that the exemption should be **extended to medium-sized enterprises**.
- Further, we welcome that the DSA proposal upholds the benefits of the e-Commerce Directive in terms of
 - o the **Country-of-Origin principle**,
 - o the **prohibition of general monitoring obligations** and
 - o **limited liability**.

¹ In the public consultation, different types of harms associated with platforms are addressed in a set of questions. The consultation focuses on safety of users online, ranging from illegal goods (e.g. dangerous products), content (e.g. violence, hate speech) and services or practices infringing consumer law. The consultation also addresses the following topics: reviewing the liability regime of digital services acting as intermediaries; the gatekeeper power of digital platforms; other emerging issues and opportunities, including online advertising and smart contracts; challenges around the situation of self-employed individuals offering services through online platforms; the governance to reinforcing the Single Market for digital services. See: <https://ec.europa.eu/digital-single-market/en/news/consultation-digital-services-act-package>.

Proportionate obligations

DIGITAL SME welcomes the initiative for a Digital Services Act. We agree with proportionate rules, that define different obligations according to the sizes of a service provider. The regulation introduces a number of obligations for all intermediary services, including hosting services and online platforms, also medium-sized ones. The proposal foresees several additional obligations for very large platformsⁱ (Section 4), who have on average minimum 45 million EU-based users (10% of EU's population). Here, we believe that the user count should also include non-EU users to ensure a level-playing field with companies entering the EU Single Market with a large user base abroad.

SMEs have less resources to deal with additional administrative burden. We therefore **welcome exemption for micro and small enterprises (Art. 16) from some of the obligations** (Section 3, Articles 17 – 24). However, to be in line with the general [SME definition](#), **Article 16 (Exclusion for micro and small enterprises) should be extended to include medium-sized enterprises too**. In case this is not possible, we would welcome clear guidelines and information from national authorities to medium-sized enterprises on how to implement some of the provisions. Larger platforms have more resources and often inhouse legal departments to interpret the rules and develop guidelines, while SMEs do not have this type of resources. Therefore, clear guidelines by authorities could be an alternative to the proposal to extend the exemption of Article 16 to medium-sized enterprises.

Country of origin

As stated in our [initial position paper](#) on the Digital Services Act, the Single Market rules should apply equally to all digital service providers regardless of their origin of establishment.² We therefore welcome that, according to the proposal, the regulation will apply to online services offered in the Union and to those offered by providers established in a third country. Further, the regulation requires online service providers to nominate a representative for the EU if they do not have a legal establishment in the EU. This mechanism can help to ensure compliance of those service providers, which are not based in the EU and is therefore welcome.

Conflicts in terms of divergent national legislation on illegal content

Article 14 of the DSA asks providers to decide about the legality of content upon receipt of a substantiated notice of illegality. Article 14 applies to all hosting providers, which make, e.g.,

² One of the most relevant issues for retailers, especially SMEs, with regard to on-line sales, is that of compliance with national and European regulations even by non-EU retailers.

cloud computing services subject to it. This may require further clarification as cloud computing services are quite different from e.g., a social media platform.

While the draft proposal recognises that limiting "harmful content" would severely limit free speech, the term "illegal content" is subject to different national rules as no definition is provided in the proposal. While it is **generally welcome to create harmonised rules for illegal content removal**, there is a risk that this may lead to fragmentation. The attempt to create a unified mechanism may still lead to conflict based on divergent national views and legislation about illegal content. Many topics can be highly sensitive in national and cultural contexts, and some statements may be considered illegal in some countries, but not others. The role of the national authority that will have jurisdiction will be crucial. In any case, **the set-up must ensure that it contributes to a more harmonised digital space and does not contribute to further fragmentation of the Digital Single Market**. The potential need to tailor online services per country would be more difficult to deal with for smaller companies who want to develop new services to European consumers.

It may be helpful to revisit the different categories and definitions of illegal content and unsafe products and goods that may fall under this piece of legislation. Hate speech and the fine line towards illegal content in some countries would require a different approach than unsafe or illegal products, which may be more clear-cut.

Traceability of traders and transparency

DSA Art. 22 Traceability of traders is a well-done provision to secure the availability of publisher information. This will help to track illegal goods. When it comes to the transparency obligations and due diligence obligations, some of the rules may come in addition to existing provisions on VAT and the Platform to Business (P2B) regulation, which may pursue similar purposes. The European Commission should aim to avoid additional burden due to similar obligations that could potentially be combined.

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Intermediary services <i>(cumulative obligations)</i>	Intermediary services (cumulative obligations)	Hosting services <i>(cumulative obligations)</i>	Online platforms <i>(cumulative obligations)</i>	Very large platforms <i>(cumulative obligations)</i>
Transparency reporting	•	•	•	•
Requirements on terms of service due account of fundamental rights	•	•	•	•
Cooperation with national authorities following orders	•	•	•	•
Points of contact and, where necessary, legal representative	•	•	•	•
Notice and action and obligation to provide information to users		•	•	•
Complaint and redress mechanism and out of court dispute settlement			•	•
Trusted flaggers			•	•
Measures against abusive notices and counter-notices			•	•
Vetting credentials of third party suppliers ("KYBC")			•	•
User-facing transparency of online advertising			•	•
Reporting criminal offences			•	•
Risk management obligations and compliance officer				•
External risk auditing and public accountability				•
Transparency of recommender systems and user choice for access to information				•
Data sharing with authorities and researchers				•
Codes of conduct				•
Crisis response cooperation				•

Source: European Commission, "The Digital Services Act: ensuring a safe and accountable online environment", available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en