

The Digital Services Act package: proposals published



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Since our [last ezine](#) on this topic, a lot has changed. On 15 December 2020 (initially announced for 2 December 2020), the European Commission has published two long awaited proposals for regulation: a proposal for a Regulation on a Single Market For Digital Services (hereinafter, the Digital Services Act) and a proposal for a Regulation on Contestable and Fair Markets in the Digital Sector (hereinafter, the Digital Markets Act). Together, these legislative initiatives are referred to as the Digital Services Act package.

INTRODUCTION

The Digital Services Act package aims to strengthen the Single Market for digital services and foster innovation and competitiveness of the European online environment. This major legislative initiative is expected to have a considerable impact on all digital services providers in Europe. While the Digital Markets Act mainly focuses on fair competition and limiting the market power of the so-called 'gatekeepers', the Digital Services Act innovates the rules for online intermediaries and platforms and increases transparency for consumers. So, what are the main changes resulting from these proposals of regulation? We outline them for you.

WHAT IS THE IMPACT OF THE TWO PROPOSALS FOR REGULATION?

Digital Services Act

The Digital Services Act's main purpose is to replace the e-Commerce Directive of 2000 (2000/31/EC), which is outdated and no longer adequately deals with the challenges of today's digital environment. Illegal trade on the internet has significantly increased and platforms have taken on a major role in our daily lives. Therefore, the European Commission has recognised the need to modernise the current legal framework in order to ensure the safety of users online and to allow innovative digital businesses to grow, while at the same time respecting the basic principles underpinning the current legal framework of the e-Commerce Directive.

The rules set out in the proposal will be complementary to the consumer protection acquis and, more specifically, Directive (EU) 2019/2161, i.e. the Omnibus Directive (read our ezine).

The Digital Services Act will apply to all providers of intermediary services in the internal market, irrespective of their location, if their service recipients have their place of establishment or residence in the Union. A big misconception is that the Digital Services Act would only apply to foreign tech giants. To the contrary, the smaller players on the market will also have to take this regulation into account. However, the obligations of different online service providers will be dependent on their role, size, and impact on the online ecosystem, imposing more responsibilities to those qualified as 'very large platforms'. The Digital Services Act will apply to a wide range of intermediary services offering network infrastructure (e.g., Internet access providers, domain name registrars), hosting services (e.g., cloud and webhosting service providers), online platforms bringing together sellers and consumers (e.g., online marketplaces, app stores, collaborative economy platforms), social media platforms and very large online platforms.

All online platforms displaying advertisements online will be subject to certain due diligence obligations in order to ensure a transparent and safe online environment, such as new rules on traceability of business users in online marketplaces to help identify and track down sellers of illegal items. As 'very large platforms' are concerned, those will be subject to additional obligations such as to compile and make publicly available through application programming interfaces (APIs) a repository historic information as to the content and targeting of advertisements and the total number of recipients reached.

The current e-Commerce Directive prohibits imposing a general monitoring obligation on online providers for user generated content, making the freedom of expression of the users prevail. As expected, the Digital Services Act seizes the opportunity to refine the current rules. Contrary to the notice-and-takedown obligation, the Digital Services Act comes up with a notice-and-action obligation. Platforms must put in place mechanisms to allow third parties to notify the presence of alleged illegal content. Yet any takedown is accompanied by appropriate safeguards. The notices should be precise and adequately substantiated. If the platform decides to remove or disable access to specific information provided by a recipient of the service, the platform must provide that recipient with a statement of reasons.

As regards enforcement, the Member States will play an important role. So-called 'Digital

Services Coordinators' will be created and will be locally competent, inter alia, to investigate complaints about breaches of the regulation and impose interim measures and fines. The Member States will be supported by a new advisory body that will be created at EU level to coordinate compliance (the so-called 'European Board for Digital Services'). Platforms must appoint a single point of contact to facilitate direct communication with national authorities. 'Very large online platforms' will be subject to enhanced supervision and potential enforcement by the Commission. Non-compliance with the Digital Services Act may result in substantial fines (up to 6% of the annual income or turnover of the platform).

Digital Markets Act

The most important change that is introduced by the Digital Markets Act is the new role for online platforms as so-called 'gatekeepers'.

Gatekeepers are defined in the Digital Markets Act as providers of a core platform service with a significant impact on the internal market, a strong intermediation position and an entrenched and durable position on the market. The services envisaged by the Digital Markets Act are broad and include search engines, video-sharing platforms, and social networks.

The Digital Markets Act requires gatekeepers to observe certain do's and don'ts, such as:

- + they must make their own services accessible to third parties in certain situations;
- + they must provide effective portability of data generated through the activity of a business user or end user;
- + they must allow their business users to promote their offer and conclude contracts with their customers outside the gatekeeper's platform;
- they cannot treat products or services offered by the gatekeeper itself more favourably in ranking than similar products or services offered by third parties on the gatekeeper's platform;
- they cannot require business users to use, offer or interoperate with an identification service of the gatekeeper in the context of services offered by the business users using the core platform services of that gatekeeper; and
- they cannot prevent end users to un-install any pre-installed software applications.

The above rules are aimed at giving opportunities to small and medium enterprises and start-ups to innovate in the online platform environment. Also, business users who depend on gatekeepers will benefit from a fairer business environment.

The Digital Markets Act should not be taken too lightly by the gatekeepers, as the European Commission has provided for substantial fines of up to 10% of the company's total worldwide annual turnover as well as additional possible remedies such as divestiture of a business.

Next steps

The legislative process is far from complete and it will take a while until we will be able to examine the final versions of these new regulations. The proposals will be debated, amended, and ultimately approved by both the European Parliament and European Council. It is expected that both regulations will be finalised by the end of 2021 or 2022.