

## Digital Services Act



The Digital Services Act (DSA) is a regulatory initiative launched by the European Commission this year that is expected to have a significant impact on the legal framework for the digital economy in the European single market. The DSA is the centrepiece of a large-scale initiative by the Commission to establish Europe as a digital global player and to drive forward the expansion and legal harmonisation of the digital single market. According to the current state of discussion, the law will bring far-reaching changes for companies in a wide range of areas such as e-commerce, antitrust law, copyright law and data protection. At its core, the DSA is primarily concerned with regulating the responsibility for digital activities but also with structural-regulatory provisions for competition in the area of platform economy. For companies, the new law contains both risks and opportunities. This paper outlines the expected changes and the reasons why companies are well advised to follow the developments very closely.

## Q&A

### 1. What are the overall goals of the DSA and why should companies keep an eye on upcoming developments?

The DSA is a central project within the framework of the European Commission's digital strategy under President of the European Commission von der Leyen. The digital strategy aims at positioning the EU in the digital market in the long term by removing competitive constraints and by increasing investment in digital infrastructure and innovation in the field of artificial intelligence. Furthermore, a stricter regulation of platforms with regard to hate speech and illegal content is planned as well as more transparency regarding the functioning and logic of recommendation algorithms and liability for platforms.

The planned DSA pursues, in particular, the following goals:

- Harmonisation of EU-wide regulations on the responsibilities and obligations of digital services and adaptation of the existing regulations relating to the state of technology.
- Better protection of citizens and their rights in the digital environment.
- Strengthening of the digital single market to promote innovation, growth and competitiveness in the EU. Particular focus will be placed on start-ups and small and medium-sized enterprises and ensuring fair competition.

Why should companies keep an eye on these developments?

In the worst case, the new regulations could have drastic consequences for the business models of many companies in the digital economy. However, even if the business model as such is not called into question, companies could face extensive new obligations and liability risks in the future.

### 2. What are the goals of the DSA? Which problems are intended to be solved by the law?

The ongoing digitalisation has brought numerous advantages, but also challenges. The DSA is designed to address the following issues identified by the European Commission:

- The sale of counterfeits, illegal goods and dangerous products via the internet jeopardises the security of citizens and puts reputable companies at a disadvantage.
- Digital services are misused to distribute prohibited content such as child pornography or hate speech. The question is how to deal with content that is not illegal per se but harmful.

- Copyright infringements on the internet, which threaten entire business models of creators and distributors should be made more difficult.
- The systematic use of algorithms for disinformation campaigns, recommendation systems and online advertising poses risks to access to information for consumers and democratic institutions. At present, online platforms do not have to disclose their decisions with regard to which information is placed more prominently than other information. This leads to information asymmetry between platforms and their users, as well as public authorities.
- Risks for employees and private individuals when using digital platforms. In particular, possibilities for improving working conditions are to be investigated.
- Fragmentation of the legal field and insufficient cooperation between Member States.

### 3. What regulatory content is currently being discussed?

The DSA aims to introduce comprehensive EU-wide regulations for digital legal and business transactions. In particular, new liability regulations for platforms are currently being discussed. One of the issues under discussion here is a move away from the liability privilege and the "notice and take down" obligation for platform operators, which should ultimately make the use of automated filtering measures (such as so-called upload filters) more likely.

Broad regulatory content relates to online advertising, moderation rules to combat illegal user content, rules to create transparency on recommendation platforms and data portability between similarly oriented service platforms.

### 4. Which laws or other regulations are to be created or modified for the purposes listed above?

#### 4.1. Ex ante regulation of large online platforms and avoidance of gatekeeper and network effects

A few large online platforms currently dominate the digital market in the EU. They act as gatekeepers and control entire platform ecosystems, making it almost impossible for competitors or new market entrants to enter or compete. This not only has a negative effect on competition, but also inhibits innovation by new companies. To counteract this, the Commission is considering creating new ex ante regulation for large online platforms. The Commission is currently discussing three dif-

ferent regulatory approaches, which differ in their regulatory intensity:

- As a rather conservative approach an amendment of the EU-Platform2Business (“P2B”) Regulation is proposed. In this regard, essentially the mechanisms and transparency requirements of the P2B Regulation will be adapted. However, the so-called “self-preferencing” (i.e. giving preference to one’s own products and services) is to be newly regulated and unfair contractual regulations for business customers are to be tackled.
- As a mediatory approach, a new law could be created that would allow authorities to obtain information from companies with gatekeeper status. This approach would involve the creation of a new regulatory authority, which would only be allowed to collect information, but not to sanction violations.
- In the approach which would contain the most intensive regulation, a new law would include a regulatory authority with sanctioning options and include clear criteria as to when the scope of the law will apply. The differentiation could be based on possible network effects, number of users or market power. Conceivable in this regard is a blacklist of prohibited conduct as well as legal grounds allowing the authorities access to non-personal data on the platforms or specifying requirements for interoperability.

#### **4.2. “New Competition Tool” (see also Section 9 below)**

It is also feasible that a new competition law will be created in the future or that the existing European competition law will be supplemented. A new legal instrument is to be created to address certain structural competition problems that cannot be tackled, or which cannot be effectively tackled with the existing competition framework. Examples are monopolisation strategies of non-dominant companies with market power, or parallel leverage strategies of dominant companies in more than one related market.

#### **4.3. Reform of the Product Safety Directive**

One of the aims of the planned reform of the Product Safety Directive is to adapt the Directive to the challenges posed by new technologies and online sales. This means ensuring product safety and providing better enforcement and more efficient market surveillance.

#### **4.4. Revision of the Code of Practice on Disinformation**

The Code of Practice on Disinformation, signed in October 2018, sets standards on a voluntary basis. The signatory representatives of online platforms, leading social networks, advertisers and the advertising industry are committed to complying with these standards. The Commission plans to review the Code of Practice on Disinformation in order to tackle the spread of disinformation and reduce the opportunities for manipulation in the public arena. However, it is currently unclear to what extent this overlaps with the planned European Democracy Action Plan, which is also intended to crack down on disinformation campaigns and thereby protect democratic institutions and the freedom of the press.

#### **4.5. Reform of the E-Commerce Directive**

Currently, various regulation scenarios are being discussed which differ in their level of regulation. A limited revision of the Directive is possible as it only regulates the procedural obligations for online platforms and, thereby, essentially makes the principles of the European Commission Recommendation 2018 binding. However, a comprehensive reform that updates and modernises e-commerce is also possible. As part of the reform, liability for digital services could be newly regulated, while at least retaining the key principles of the directive.

### **5. Why should the E-Commerce Directive be revised?**

The E-Commerce Directive is now 20 years old and must be adapted to meet the market developments that have come about in the meantime and the current business environment. For example, the Directive does not cover all relevant digital services, and regulates central issues such as the liability or exemption from liability of host providers for user content in just two provisions. The recent discussion about the area exception in the Directive on copyright shows that there is an urgent need for clarification here. Furthermore, the E-Commerce Directive does not apply to services based outside the EU, even though it is precisely these players with the greatest market power that fall into this category. Should the European legislator decide to anchor the so-called marketplace principle in the DSA, its provisions would also apply to digital services based outside the EU, provided their offerings are aimed at the single European market.





#### 6. Who is covered by the scope of the new DSA?

The DSA is intended to cover all digital services including ISPs, cloud services, social media, content delivery networks, search engines, online advertising services, smart contracts and other block chain services and domain name services. However, it is also under discussion whether to differentiate between the services based on size and market power and to differentiate duties and responsibilities accordingly.

#### 7. How does the planned DSA relate to other initiatives at EU level?

The DSA is a measure within the framework of Europe's digital strategy. The European legal framework for digital services is essentially regulated by the E-Commerce Directive. In addition, other legal acts deal with specific problems relating to digital services and platforms in particular, including directives and regulations, communications and recommendations, and measures based on voluntary cooperation. In addition, there are sector-specific regulations that have only recently been adopted or are still in the legislative process, such as the Directive on Copyright in the Digital Single Market, the Audiovisual Media Services Directive, or the Regulation on Terrorist Online Content. The DSA is not intended to repeal or change the rules that are specifically standardised within the aforementioned regulations for certain areas. Instead, the new regulations aim at supplementing them and closing any gaps in protection where this is considered necessary. Due to the wide range of the targeted regulatory areas, there are numerous intersections with other initiatives such as the GDPR and the planned E-Privacy Regulation, or the P2B Regulation and the "New Deal for Consumers", to name just a few.

#### 8. Will there be another regulatory authority besides the EU Commission?

The DSA could make a greater distinction between platforms and, thus, possibly transfer the supervision of these to a central EU regulatory authority in the future. However, it is still completely open as to what powers this regulatory authority will be endowed with.

#### 9. What will be regulated in the "New Competition Tool"?

With the "New Competition Tool" (NCT), the European Commission has announced another initiative where a legislative proposal is expected by the end of the year. The NCT is intended to combat structural competition problems that cannot be effectively addressed with the current legal basis of Articles 101 and 102 TFEU. In particular, the European Commission is to be given the power to take remedial action against companies without a previous violation of the ban on cartels or abuses of market power having been established (so-called ex ante powers of intervention). Various options for action are currently being discussed which either address a company's existing market power or where the markets have a market structure that is particularly susceptible to abusive behaviour. With the new powers, the European Commission wants to address the risks posed by so-called "gatekeepers" and ensure fair competition in digital markets.

#### 10. As a company, do I have to prepare for the DSA (compliance, data protection, etc.)?

Digital service providers who may be affected by the DSA will need to keep an eye on the requirements of the planned liability regulations. For example, there are discussions about introducing uniform liability regulations for illegal content throughout Europe. These uniform liability regulations are to set high standards. The definitions of "caching" and "hosting service" could also be expanded. Similarly, the definitions of "passive and active hosting", for example, could be adapted to technical reality. There is a general call for proactive measures. Companies offering digital services should take the appropriate technical precautions at an early stage and be aware of their liability risks.

#### 11. Will my company incur any costs?

In principle, the respective cost burden is likely to depend on numerous individual factors, such as the respective size of the

company, the digital services provided and the measures already implemented to defend against illegal content by users. However, small and medium-sized companies in particular – since they are to be promoted by the DSA – could possibly also receive financial benefits. Nevertheless, the technical implementation of the aforementioned compliance with the liability possibilities should already be taken into account in cost planning.

**12. Timeline: When can a change in the law be expected? Where do we stand at the moment?**

At this stage, the final shape of the DSA is still pure speculation. At EU level, the Commission has the right of initiative in

the legislative process. However, it has not yet submitted an official draft, but has merely commissioned various expert opinions and published a so-called Inception Impact Assessment, which contains various regulatory scenarios. At the moment, the consultation phase is underway in which associations, companies and also private individuals can comment on the proposals. A first legislative proposal is not expected before the end of the year.

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