THE EUROPEAN UNION REACHES A MAJOR MILESTONE IN REGULATING THE DIGITAL WORLD

The European Union has taken a significant step towards regulating digital services, ranging from websites, to internet infrastructure, social media, online marketplaces and other online platforms that operate the European Union. In March, political agreement was reached between the European Parliament and the EU Member States (working through the Council of the European Union) on the text of the Digital Markets Act ("DMA") and, this past weekend, political agreement was reached on the Digital Services Act ("DSA").

This package of legislation represents the first initiative to regulate the digital and information space, premised on the principle that what is illegal offline must also be illegal online, and recognizes the significant growth trajectory of e-commerce. The European Union, once again, has taken the lead in regulation that will have global effect, as was the case with its General Data Protection Regulation ("GDPR"). Taken together, the DMA and DSA will establish a comprehensive set of new rules for digital services.

In short:

- The DMA will govern "gatekeeper" online platforms, namely digital platforms with a systemic role that serve as gateways for businesses to reach consumers and other end users in providing digital services and that, in some cases, control entire ecosystems that cover online marketplaces, operating systems, cloud services and online search engines. The DMA is intended to prevent gatekeepers from imposing unfair conditions on businesses and end users (in the words of the European Commission ("EC"), gatekeepers that create "bottlenecks"), by setting forth a series of dos and don'ts. Being deemed a gatekeeper for purposes of the DMA depends on both meeting qualitative criteria and providing services deemed "core platform services."

  Examples of changes that gatekeepers will have to implement include ensuring end users can easily unsubscribe from core platform services or uninstall pre-installed core platform services, stopping the installation of software by default alongside the operating system, providing advertising performance data and ad pricing information, allowing developers to use alternative in-app payment systems and allowing end users to download alternative app stores.

- The DSA aims to create a safer digital space in which users' rights are protected. It does so by introducing a series of harmonized EU-wide obligations for digital services, applicable to online intermediaries and platforms and focused on the ways in which these intermediaries and platforms interact with customers and other end users. The DSA will provide for a cascading set of rules depending on status:

  - intermediary services;
  - hosting services (a subset of intermediary services);
  - online platforms (a subset of hosting services); and
  - "very large online platforms" ("VLOPs") and "very large online search engines" (VLOSEs") (*i.e.*, online platforms/search engines reaching more than 10% of the population of the European Union (45 million users)).

This cascading approach allows for regulation proportionate to the services offered and tailored to the number of end users.

The DSA will provide rules for the removal of illegal goods, services or content online; safeguards for users whose content has been erroneously deleted by platforms; obligations for VLOPs/VLOSEs to take risk-based action to prevent abuse of their systems; transparency measures, including on online advertising, content moderation and the algorithms used to recommend content to users; powers to scrutinize how platforms work, including by facilitating access by researchers to key platform data; and rules on traceability of business users in online market places, to help track down sellers of illegal goods or services.

The December text of the DMA is available here and the December text of the DSA is available here. The December 15, 2020 press release announcing the two proposals is available here. The proposed European Parliament amendments to the DMA are available here, and the proposed European Parliament amendments to the DSA are available here. The texts of both are now subject to final approval by the Council and the European Parliament. The DMA and DSA are EU Regulations, meaning that they will have direct effect, and will not require implementing legislation in Member States.

The Digital Markets Act

Gatekeepers

The DMA will apply only to companies that are identified as "gatekeepers," based on objective criteria. These companies will need to be identified as a gatekeeper for at least one of the so-called "core platform services" listed in the DMA. A company can be identified as a gatekeeper for one or several core platform services. There are three cumulative criteria under which a company comes within the scope of the DMA (the following creating rebuttable presumptions of coverage):

a. ***Size that impacts the internal market***: presumed to be the case if the company achieves an annual turnover (revenue) in the European Economic Area (EEA) equal to or above €7.5 billion in each of the last three financial years, or where average market capitalisation or equivalent fair market value was at least €75 billion in the last financial year, and if it provides a core platform service in at least three Member States.

b. ***Control of an important gateway for business users towards final consumers***: presumed to be the case if the company operates a core platform service with more than 45 million monthly active end users organized or located in the European Union, and more than 10,000 yearly active business users organized in the European Union, in the last financial year.

c. ***An entrenched and durable position***: presumed to be the case if the company meets the two criteria of clause (b) in each of the last three financial years.

The ten "core platform services" subject to the DMA are:

- online intermediation services;
- online search engines;
- online social networking services;

- video-sharing platform services;
- number-independent interpersonal communication services;
- operating systems;
- cloud computing services;
- advertising services;
- web browsers; and
- virtual assistants.

The EC may launch targeted market investigations to assess in more detail the specific situation of a given company and decide to nonetheless identify the company as a gatekeeper on the basis of a qualitative assessment, even if it does not meet the quantitative thresholds. Market investigations will also enable the EC to update dynamically gatekeeper obligations when necessary (possibly resulting in supplementary acts), identify whether new digital sectors should be added to the list of core platform services, and design remedies to address systematic infringements of DMA rules.

Consequences of coverage

The DMA sets out a series of proactive requirements as well as a series of prohibitions to address unfair practices in the digital services market.

Among other things, gatekeepers will be required to:

- allow end users to easily un-install pre-installed apps or change default settings on operating systems, virtual assistants or web browsers that steer them to the products and services of the gatekeeper and provide choice screens for key services;
- allow end users to install third party apps or app stores that use or interoperate with the operating system of the gatekeeper;
- allow end users to unsubscribe from core platform services of the gatekeeper as easily as they subscribe to them;
- allow third parties to inter-operate with the gatekeeper's own services;
- provide business users advertising on their platform with access to the performance measurement tools of the gatekeeper and the information necessary for advertisers and publishers to carry out their own independent verification of their advertisements hosted by the gatekeeper;
- allow business users to promote their offers and conclude contracts with their customers outside the gatekeeper’s platform; and
- provide business users with access to the data generated by their activities on the gatekeeper’s platform.

Among other things, gatekeepers will be prohibited from:

- using the data of business users when gatekeepers compete with them on their own platform;
- ranking the gatekeeper’s own products or services in a more favourable manner compared to those of third parties;

- requiring app developers to use certain of the gatekeeper's services (such as payment systems or identity providers) in order to appear in app stores of the gatekeeper; and
- tracking end users outside of the gatekeeper's core platform service for the purpose of targeted advertising, without effective consent having been granted.

Entry into force

Once formally adopted, the DMA will enter into force 20 days after publication in the EU Official Journal and will apply six months later.

A company that meets the quantitative thresholds for gatekeeper status will have two months to notify those quantitative thresholds to the EC. The EC will have 45 working days to make a decision designating such company as a gatekeeper for each of its relevant core platform services that meet the quantitative thresholds individually. In limited circumstances where a company rebuts the presumption of gatekeeper status, the EC would have five months to assess the matter and to reach a decision on whether or not to designate the company as a gatekeeper.

A designated gatekeeper will have up to six months after designation to meet its obligations under the DMA. For a gatekeeper that does not yet enjoy an "entrenched and durable position," but is expected to do so in the near future, only those obligations apply that are necessary and appropriate to ensure that the gatekeeper does not achieve, by unfair means, that entrenched and durable position in its operations.

Enforcement

The EC will have sole enforcement authority under the DMA, working in cooperation with Member State authorities. The EC will be able to impose penalties and fines of up to 10% of a company's worldwide turnover and, in the event of repeated infringements, up to 20% of worldwide turnover. In the case of systematic infringements, the EC will also be able to impose any behavioural or structural remedies necessary to ensure the effectiveness of the obligations, including a ban on further acquisitions relevant to the infringement.

Digital Services Act

The DSA establishes a horizontal framework to regulate those in the digital ecosystem digital services that act as intermediaries between providers of goods, services and content, on the one hand, and end users, on the other. Among other things, the DSA will clarify the basis for legal immunity for intermediaries and envisions setting a benchmark for regulation of online intermediaries at a global level, as it applies not only to intermediaries organized in the European Union but also to non-EU intermediaries that offer services in the EU single market.

The DSA does not supplant sector-specific EU rules (*e.g.*, rules governing digital copyrights, consumer protection or online dissemination of terrorist content).

As noted above, the cumulative obligations under the DSA will vary by category of service. In short, the obligations are:

	Intermediary Services	Hosting Services	Online Platforms	VLOPs/ VLOSEs
Transparency reporting on content moderation	X	X	X	X
Requirements on terms of service	X	X	X	X
Cooperation with national authorities following orders	X	X	X	X
Points of contact and, where necessary, legal representative	X	X	X	X
"Notice and action" mechanism to remove illegal content; obligations to provide information to users on content removal		X	X	X
Internal complaint and redress mechanism; out-of-court dispute settlement			X	X
Trusted flaggers, including awarding status			X	X
Measures against abusive notices and counter-notices			X	X
Vetting credentials of third party suppliers			X	X
User-facing transparency of online advertising			X	X
Reporting criminal offences			X	X
Risk management obligations and compliance officer				X
External risk auditing and public accountability				X
Transparency of "recommender systems" (algorithms that determine what users see), including obligation to have at least one not based on profiling, and user choice for access to information				X
Data sharing with authorities and researchers				X
Codes of conduct				X
Crisis response cooperation				X

The EC notes that the DSA, through rules on how platforms moderate content, on advertising, algorithmic processes and on risk mitigation, aims to ensure VLOPs/VLOSEs are addressing the dissemination of disinformation. Specific challenges posed by disinformation are to be addressed in an updated Code of Practice on Disinformation and new EC guidance (foreshadowed in the European Democracy Action Plan, which has three core goals: promoting free and fair elections, strengthening media freedom and pluralism, and countering disinformation).

Intermediaries will be required to disclose in clear and unambiguous language restrictions on use of service as well as their policies, procedures, measures and tools used for content moderation, including "algorithmic decision-making and human review."

Oversight and enforcement of the DSA will fall within the jurisdiction of authorities of the Member States, notably new bodies to be established under the DSA, known as Digital Services Coordinators. The Digital Services Coordinators will be able to draw upon the support of a new European Board for Digital Services (the "Board"). In view of the heightened requirements applicable to VLOPs/VLOSEs, the EC will have exclusive supervision and enforcement authority over them in respect of the obligations unique to them, working with the Digital Services Coordinators and the Board. This removes enforcement authority from Member States for the large platforms/search engines, as is the case for oversight and enforcement of the DMA.

According to the Council press release announcing political agreement on the DSA, the DSA will ban so-called "dark patterns" on platforms and interfaces covered by the DSA. While the GDPR should cover dark patterns, it is not clear that it does. Experts agree that one of the

challenges of regulating dark patterns is the absence of an agreed upon definition. In March, the European Data Protection Board issued Guidelines that offer practical recommendations to designers and users of social media platforms on how to assess and avoid dark patterns in social media interfaces that infringe on GDPR requirements. The Board defines "dark patterns" as "interfaces and user experiences implemented on social media platforms that lead users into making unintended, unwilling and potentially harmful decisions regarding the processing of their personal data."

Concluding Thoughts

The European Union brings to an end an era of self-regulation by tech platforms, which so many have found wanting. While the broad outlines of both the DMA and DSA are known, both have been subject to amendment that will only be known in the coming weeks. It remains to be seen how these rules will fit with regulation (or the absence thereof) in other jurisdictions, notably the United Kingdom and the United States. In view of the globalized nature of digital services, it is fair to ask whether EU legislation in effect will become the *de facto* global standard.

The DSA incorporates long-proposed solutions to tackling disinformation, including among others requiring global online platforms/search engines to provide transparency around their algorithms, to provide access by researchers to key platform data, to provide transparency around content moderation decisions and to undergo independent audits of risk management systems. Particularly given the pernicious effect of disinformation and growing concerns about the impact of disinformation on democracy (see my prior briefing note, available here), the sense of urgency around regulation is understandable and welcome, and a reasonable question is whether the proposed rules will go far enough.

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