



# Legal Alert

May 2, 2022

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### Digital Services Act

The European Commission has published on its website a press release on the agreement reached by the European Parliament and EU Member States in the penultimate week of April 2022 on the proposal for a **Digital Services Act (DSA)**. This was submitted to the European Commission in December 2020 and sets a new standard for the liability of online platforms in relation to illegal and harmful content. Its aim is to protect the digital space from the proliferation of **illegal goods, content and services** and to provide a higher level of protection for users purchasing or consuming online content, as well as to unify the fragmented legislation in this area across the EU. Although the proposed regulation still lacks formal approval, given the aforementioned announced agreement between the EP and Member States, it is expected to be more of a formality.

The main addressees of DSAs are providers of intermediary (online) services, which include simple transmission services, caching services, hosting services and online platforms. These intermediary services, which are provided by, for example, hosting providers, internet search engines, online platforms and online marketplaces, will be further differentiated under the DSA into **'very large online platforms'** and **'very large internet search engines'** (these are platforms **used by more than 45 million users per month in the EU**). The relevant "BigTech" providers will be primarily (though not exclusively) subject to the obligations under the DSA.

In order to preserve the development of start-ups in the internal market, the Council and the European Parliament have agreed to exempt micro and small enterprises with less than 45 million monthly active users in the EU from some of the new obligations.

#### New obligations

##### Online marketplaces

The DSA will tighten the obligations applicable to online marketplaces, which will be required to inspect sellers they allow to sell products or services on their online platforms. Before allowing a particular seller to sell online, **marketplaces must verify with the utmost rigour that the seller has provided all relevant information, in particular the origin of the goods and any licence** for the products in question, in order to limit the spread of illegal content online. Market-

places will also have to collect and display information about the products and services sold, such as the brand and the conformity of the quality of the product with Union law.

Specifically, the DSA provides that the consumer liability exemptions do not apply to the provider of these services if the overall presentation of the service gives the impression that the consumer is contracting with the online platform itself or an entity under its control.

##### Recommender systems

In order to improve user awareness and choice, the DSA imposes obligations regarding transparency of the parameters and procedures of the recommender systems used by some online platforms and e-shops. Very large platforms and very large search engines will be required under the DSA to, inter alia, offer users a content recommender system that is **not based on profiling**.

#### Other changes

##### Intermediary (online) service providers

In terms of providers' liability, the DSA maintains the main pillar of the current legislation, namely the 'notice and take down' system. In simple terms, this means that **providers are not liable in principle for content** transmitted or stored by users of their services if they are **not aware** of its illegality and if they remove or prevent access to it (take down) if they become aware of it (typically from a user notification - notice).

The prohibition on imposing general surveillance obligations or obligations to actively seek out illegal content also remains - so providers will not have to proactively introduce content filters. In order to maintain the incentive to implement such systems voluntarily, the DSA provides that voluntary action by providers in this regard does not in itself preclude the application of the above-mentioned exceptions to liability.

##### Tools against illegal content

The DSA provides a new definition of illegal content - this is **any information, goods or service that contravenes EU law or the law of an EU Member State** - regardless of its exact subject matter or nature. This broad definition includes, for example, dangerous products, counterfeit goods or services provided by unlicensed entities. Platforms will need to examine the context of the information that



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users (whether consumers or traders) impose on them and will need to carry out additional investigations in this respect. Other tools in the fight against illegal content include:

**Mechanisms for electronic reporting of illegal content**, where such reporting must offer the user the opportunity to explain why they consider the content to be illegal. The provider must inform the user of the receipt of the report and of the action taken. If the content is removed or made unavailable, the provider must then inform the user who placed the content or service on its marketplace, including information on the remedies available.

Establishment of a **publicly accessible database**, managed by the Commission, where removal or disqualification decisions and other information on individual providers will be collected and published.

### Crisis response mechanism

In the context of the Russian aggression in Ukraine, a new Article 27a was inserted into the DSA, which introduced the Crisis response mechanism (**CRM**). This is to be activated by a Commission decision on the recommendation of the Committee of National Digital Service Coordinators and will allow the impact of the activities of very large platforms and very large search engines on a given crisis to be analysed and appropriate and effective measures to be implemented in accordance with fundamental rights.

Given the recent inclusion of CRM in the DSA, the rules for the application of this mechanism are not yet fully clarified. According to the proposals discussed, the definition of this crisis must meet the principles of clarity and specificity and should not empower the Commission to maintain crisis measures for an indefinite period of time; the proposed mechanism should include a time limit on crisis measures and the CRM must ensure that any bilateral dialogue with platform providers during which specific measures are discussed is transparent and does not escape public scrutiny.

### Conclusion

The stated main objectives of the DSA are, in short, to provide an easy and understandable way to report illegal content, goods or services on online platforms, to improve awareness of the real end sellers of the products that users buy on online marketplaces, to ensure greater control over the legality of the content, goods and services

offered, and to better protect consumers by public authorities by supervising the platforms and enforcing the rules uniformly across the Union.

Once the Regulation is in force, it will be directly applicable throughout the EU. The DSA **will apply fifteen months after entry into force or from 1 January 2024**, whichever is later.

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