

## Briefing on the Digital Services Act & Digital Markets Act

### Part I

25 November 2020

#### Introduction

In her July 2019 [political guidelines](#), European Commission president Ursula von der Leyen proposed a new Digital Services Act package that would upgrade the legal framework for digital services and help to complete the EU's Digital Single Market. By February 2020, the Commission Communication "[Shaping Europe's digital future](#)" was published, in which the Commission committed to not only increase and harmonise the responsibilities of online platforms and information service providers, but to propose new *ex ante* rules that would help to ensure that markets characterised by certain platforms acting as "gatekeepers" remain fair and contestable for innovators, businesses and new market entrants.

On 9 December, the European Commission will present the Digital Services Act (DSA). However, after several months of studies, reports and public consultations, the expected package is somewhat different from its original conception. What was once a DSA with two pillars, to be accompanied by a New Competition Tool (NCT), has become a one-pillared DSA and a separate legislative instrument known as the Digital Markets Act (DMA). The scope and content of both packages has shifted, and while certain elements have become more defined, others are still quite speculative.

**So, what do we know about this raft of new legislation that aims to help Europe achieve its digital ambitions?** In this two-part briefing, Lighthouse Europe outlines the background and development of the DSA and DMA, and explains some of the anticipated lobbying battlegrounds as these new keystones of Europe's digital economy take shape.

#### The E-Commerce Directive: What is it and why do we care?

[Directive 2000/31/EC](#) (the E-Commerce Directive or "ECD") has been the foundation of Europe's digital economy for the past twenty years. Its intention was to remove obstacles for cross-border digital services, facilitate the free movement of information and information society services between EU Member States, and create legal certainty for online intermediaries.<sup>1</sup> It sought to achieve this goal through the harmonisation of core rules and requirements for online services, and the introduction of what were at the time three novel principles:

- 1) **The country of origin principle**, stipulating that a provider of information society services is subject only to the rules of the Member State in which it is established



- 2) A prohibition on obliging online intermediaries to actively monitor all content on their services in order to detect and prevent any illegal activity by users (“**general monitoring prohibition**”)
- 3) **The limited liability or “safe harbour” principle**, which exempts digital services from being liable for hosting illegal content, providing they were either unaware of the content or – after being made aware – acted expeditiously to remove or block access to such content

Although stakeholders believe broadly that these founding principles are still fit for purpose, the online platform economy now is significantly different from what it was twenty years ago. Not only has the e-commerce market expanded considerably, with an additional acceleration during the coronavirus crisis,<sup>ii</sup> but today there are new actors who simply did not exist when the ECD was first conceived. Furthermore, both the European Parliament and European Commission have identified several issues created through the uneven application of the ECD across Member States, including legal fragmentation and uncertainty, a lack of transparency and weak enforcement of existing standards.<sup>iii</sup> Emerging issues around the sale of counterfeit goods, the spread of illegal content, and the use of automated tools are also increasingly prevalent.<sup>iv</sup> While the European Commission has revisited the ECD occasionally over the past twenty years, it has done so through a sectoral approach, revising specific aspects around certain topics (e.g. [online sexual abuse](#) or [copyright infringement](#)) rather than the full Directive. The DSA is therefore, first and foremost, a revision of the ECD, meant to re-evaluate its core principles and update it to match the new opportunities and risks of the present digital economy.

### The Digital Services Act: Expansion, Contraction and Anticipated Battlegrounds

In early 2020, shortly after the von der Leyen Commission formally took office, the European Parliament Committees for Internal Market & Consumer Protection (IMCO) and Legal Affairs (JURI) announced that they would begin work on non-binding legislative-initiative reports on the DSA to request a legislative proposal from the Commission. The European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) announced its own-initiative report as well, calling on the Commission to introduce new rules for content management, content curation and online advertising.<sup>v</sup> All three reports were approved during the 20 October plenary session.<sup>vi</sup> To collect further feedback from external stakeholders, the European Commission also launched two public consultations on the [DSA](#) and [NCT](#) over the summer, both of which closed on 8 September. In total, over 3000 consultation responses were received by the Commission.

As studies, reports and stakeholder feedback rapidly multiplied, the DSA was increasingly criticised for looking more like an unwieldy Christmas tree than an early Christmas present, one on which everyone wanted to hang their own unique idea ornament with little perspective on the final product. Perhaps due in part to these critiques, the European Commission decided in October 2020 to divorce pillars one and two of the DSA, combining the second pillar with the NCT to create the new Digital Markets Act.<sup>vii</sup> While the resulting DSA is still expected to tackle a broad range of issues related to the responsibilities of digital services, including content moderation and algorithmic transparency, it will leave the *ex ante* competition aspects to the DMA. The DSA will also likely affect all actors in a range of digital sectors, including e-commerce platforms, online marketplaces, social networks, search engines, sharing economy platforms and online advertisers. The DMA, on the other hand, is intended to apply predominantly to those platforms with a “gatekeeper” role.

Although considerably scaled back from its earlier form, there are still several aspects of the DSA that have not yet been made clear by the Commission, and certain key areas that will likely be the subject of debate as the file passes through the normal legislative process. Lighthouse Europe anticipates some of these key battlegrounds:

- **The liability issue:** All three Parliament reports endorse the general principles of the ECD, including the limited liability clause. At the same time, they also suggest that platforms improve their efforts to detect and take down illegal content.<sup>viii</sup> The tension, however, is that under the current rules, digital platforms may only benefit from the protections of limited liability if they are unaware that they are hosting illegal content, or can otherwise be classified as “passive” intermediaries. Taking more of an active role in content management may, therefore, risk forfeiting their right to the safe harbour principle. Moreover, while there has already been some discussion on the introduction of a “Good Samaritan” clause to encourage platforms to take more proactive steps against illegal content,<sup>ix</sup> MEPs still take the broad view that they “do not want private companies to police the internet.”<sup>x</sup> Balancing the desire to encourage more proactive intervention against the fear of user censorship by private (and often non-European) companies will also be an interesting space to watch in the coming months. In addition, some of the European Parliament’s suggestions, such as enhanced and enforceable notice-and-action mechanisms, greater cooperation with national supervisory authorities or obligations to “know your business customer”<sup>xi</sup> may risk data privacy concerns and running afoul of the principle of data minimisation established by the General Data Protection Regulation (GDPR). The suggestion that platforms may face fines or sanctions if they consistently fail to manage illegal content online effectively<sup>xii</sup> will also need to be balanced with proportionality, to ensure smaller intermediaries with more limited content management resources are not unduly disadvantaged by new obligations.
- **The issue of harmful content:** There are some Member States who would prefer that the DSA also include rules and prohibitions on the dissemination of harmful content, such as hate speech or deliberate disinformation, in addition to illegal content.<sup>xiii</sup> However, there is no agreement among Member States of what may constitute harmful content, and some worry that any attempt to prohibit it may threaten citizens’ fundamental freedom of expression. Accordingly, the European Parliament suggested that harmful content should be addressed through “enhanced transparency obligations and by helping citizens to acquire media and digital literacy”<sup>xiv</sup> but it remains to be seen whether Council will agree with this assessment and how such literacy may reasonably be achieved. It is also worth noting that even illegal content has no common EU definition, and it will likely be necessary to find some agreement to avoid further fragmentation of the Digital Single Market.
- **The enforcement issue:** While national supervisory authorities are established in several Member States, it is unclear whether they will have the ultimate responsibility of enforcement, if a new EU-wide regulator will be established or if it will be up to the European Commission to oversee the successful implementation of these new obligations. In addition, the DSA is expected to apply to all digital providers offering services to European consumers or users, even if they are established outside of the EU. It is not yet clear how any European regulator might enforce new transparency obligations, for example, on third-party companies, particularly if they have no legal representative in the EU (N.B. At a 24 November [Bruegel conference](#), European Commissioner for the Internal Market, Thierry Breton, stated that companies will be required to have a legal representative in Europe in order to offer their services here). Apart from creating significant enforcement gaps, applying new rules

disproportionately to European businesses over third-party companies may unfairly disadvantage Europeans within their home market.

Resolving the liability paradox, confirming and harmonising definitions across the EU, and determining who will enforce these new obligations and how, are all likely to be key battlegrounds in the upcoming DSA debates.

**To learn more about the DSA and the services we can offer your business, please feel free to contact us ([info@lighthouseeurope.com](mailto:info@lighthouseeurope.com)).**

Or, if you have more questions about the DMA, keep checking this space for Part II of our briefing, which will be published in the coming days.

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<sup>i</sup> [https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/659278/EPRS\\_ATA\(2020\)659278\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/659278/EPRS_ATA(2020)659278_EN.pdf)

<sup>ii</sup> <http://www.oecd.org/coronavirus/policy-responses/e-commerce-in-the-time-of-covid-19-3a2b78e8/>

<sup>iii</sup> [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654180/EPRS\\_STU\(2020\)654180\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654180/EPRS_STU(2020)654180_EN.pdf)

<sup>iv</sup> <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12417-Digital-Services-Act-deepening-the-Internal-Market-and-clarifying-responsibilities-for-digital-services>

<sup>v</sup> <https://www.europarl.europa.eu/legislative-train/theme-a-europe-fit-for-the-digital-age/file-digital-services-act>

<sup>vi</sup> <https://www.europarl.europa.eu/news/en/press-room/20201016IPR89543/digital-eu-must-set-the-standards-for-regulating-online-platforms-say-meps>

<sup>vii</sup> [https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-executive-vice-president-margrethe-vestager-building-trust-technology\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-executive-vice-president-margrethe-vestager-building-trust-technology_en)

<sup>viii</sup> <https://www.europarl.europa.eu/news/en/press-room/20200925IPR87924/meps-spell-out-their-priorities-for-the-digital-services-act>

<sup>ix</sup> [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS\\_IDA\(2020\)649404\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS_IDA(2020)649404_EN.pdf)

<sup>x</sup> <https://www.europarl.europa.eu/news/es/press-room/20200925IPR87926/digital-services-managing-harmful-content-while-protecting-freedom-of-expression>

<sup>xi</sup> [https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/659278/EPRS\\_ATA\(2020\)659278\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/659278/EPRS_ATA(2020)659278_EN.pdf)

<sup>xii</sup> <https://www.euractiv.com/section/digital/news/eu-commission-to-introduce-sanctions-regime-for-illegal-content-in-digital-services-act/>

<sup>xiii</sup> <https://www.politico.eu/article/france-renews-social-media-regulation-push-at-eu-level-in-wake-of-terror-attack/>

<sup>xiv</sup> <https://www.europarl.europa.eu/news/en/press-room/20200925IPR87924/meps-spell-out-their-priorities-for-the-digital-services-act>