



SPECTRUM*

FAIRNESS, COMPETITION, CHOICE:

the Digital Markets Act and
Digital Services Act explained

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The European Parliament has recently passed two laws by a large majority that are intended to ensure stricter supervision and more consumer protection for online businesses such as large platforms, marketplaces and social networks offering services to EU users.

The legislative package aims to make these platforms more accountable, to fight illegal content more vigorously and to ensure fair digital markets.

Martina Hoffard, Head of Marketing at Spectrum Markets, explains the Digital Services Act package, with details on its implications for consumers and service providers.

Digital services are playing an increasingly important role both in the economy and in our social lives. While these services positively impact how we connect, communicate, consume and do business, they also result in new challenges.

Can we start by defining what types of service the Digital Services Act package will govern?

The Digital Services Act package comprises the Digital Markets Act (DMA) and the Digital Services Act (DSA). As the name suggests, the Digital Services Act package focuses on consumer protection online. The primary targets of this new legislation are the most influential tech firms – referred to as gatekeepers. The rules will apply to any gatekeeper that offers its services inside the EU, regardless of where in the world they are headquartered.

In reigning-in these powerful companies, the package should boost innovation, growth and competitiveness and will help smaller companies and start-ups compete with very large players.

The package will affect many types of online enterprise: internet service providers, domain name registers, hosting services and e-commerce services, including travel and accommodation platforms and online marketplaces that serve as a connection between buyers and sellers. Perhaps the most intense debate, however, is being generated by the impact of the package on app stores - with far reaching implications on competition – as well as search engines and social media platforms – where misinformation and illegal content are major sources of concern.

The DMA supplements competition law and limits the power of dominant digital corporations. In it, the EU Commission establishes a code of conduct for large digital companies. Stricter rules will then apply to central online platforms such as search engines, social networks or online brokerage services. For example, they will no longer be allowed to favour their own offers in the ranking. Previously, comparable regulations only existed in Germany with the GWB Digitisation Act, which came into force in 2021.

With this, Europe has agreed on the strictest rules in the world for more competition and fairness among the big digital players. The big platform companies will be subject to clear and tough rules and will no longer be able to unilaterally determine the rules of the game.

The DSA will regulate the handling of hate speech and illegal content – including terrorist propaganda or offers of the sale of counterfeit goods - on digital platforms. At the same time, the dominance of market-shaping companies such as Apple, Amazon, Facebook and Google is to be curbed and fair competition ensured¹.

The DSA ascribes more responsibility to platforms and is intended to ensure that content that breaches the rules disappears from the net more quickly. In conjunction with the DMA, the DSA prohibits big tech companies from merging data from different sources without explicit user consent. Major messenger services such as WhatsApp and iMessage must also open up to receiving messages from other apps in the future.

Is there a formal definition of a gatekeeper?

To be considered a gatekeeper, a platform must meet a few criteria laid out in the DMA. They must “have a significant impact on the EU internal market”, the threshold for this is either €7.5bn turnover in each of the last three years or a market value of at least €75bn. Secondly, gatekeepers must “provide a core platform service”, averaging at least 45 million average monthly active users in the EU and at least 10,000 annual active business across at least three EU member states. The final criteria is that gatekeepers must “enjoy an entrenched and durable position in its operations.” This sounds like a far more subjective criteria, but it simply means that the platform has reached the aforementioned financial and user-base thresholds in each of the last three years².

What is the goal of tightening regulation of these services?

The main goal is to create a safer, fairer and more transparent digital environment where users’ rights are protected, illegal content can be combatted directly, algorithms have to abide by transparency and conduct rules, where content is adequately moderated and where targeted advertising is limited. This includes measures to counter illegal products, services and content online and clearly defined procedures for removal of such items by the platform.

In addition, the DSA enables consumers who suffer damages from such services or content to claim compensation. Mechanisms such as recommendation systems (algorithms designed to statistically quantify the interest a user has in a given product or service) must undergo risk assessments and will be subject to more transparency.

By boosting the competitiveness of smaller companies and start-ups, levelling the playing field with large, entrenched platforms, the rules should foster growth across the EU.

Are these new rules really necessary?

It hardly needs repeating that the way we communicate, do commerce and access information has been totally transformed by digital technology. But it should also be said that digital technologies are constantly evolving. Therefore, legislation must evolve to keep pace.

We shouldn't forget that online platforms have created significant – and unforeseen – benefits for consumers. Their innovations have precipitated efficiency gains for the European Union's internal market while facilitating cross-border trading within the EU and beyond. However, the challenges created by online platforms are just as significant and unpredictable as the benefits.

A broad concern is the trade of illegal goods, services and content online. Another is the manipulative use of opaque algorithmic systems that tend to amplify the most divisive and damaging types of misinformation. We have seen the dramatic consequences of this in vaccine- and climate-denialism, as well as increasing levels of political polarisation. And from a trading perspective, the unregulated spread of poor-quality information is a real threat to members of the public who are trying their best to make well-informed investment decisions. Existing EU regulations do go some way to addressing some of these issues. But significant gaps and blind-spots remain.

The current situation has left a small number of gatekeepers in a position to wield de-facto rule-making power over digital markets. This sometimes results in unfair trading conditions for the businesses that use those platforms and less choice for consumers.

So yes, new rules are required to conclusively define and enforce the fundamental rights of users, to ensure their safety and to maintain a safe and transparent online environment.

Will the new rules apply to all functions of gatekeepers' platforms, do they apply to other online service providers, too?

The DMA will be applicable to specific core platform services offered by gatekeepers. These include online intermediation services such as marketplaces, search engines, social networking services, video-sharing services, “number-independent interpersonal communication services” such as messengers, operating systems, browsers, virtual assistants, cloud computing and online advertising services. If a service does not fall within any of these categories, it won't be subject to the DMA, even if the provider of the service is a gatekeeper.

The DSA applies to intermediary services, including caching and hosting services, search engines and “mere conduits” which are essentially what we know as internet service providers. In addition, the DSA is relevant for online platforms, “very large online platforms” and “very large online search engines” that have at least 45 million average monthly active users in the EU³.

How will the new rules affect these gatekeepers?

The DSA introduces obligations towards transparency, the empowerment of users, risk management and industry cooperation. For example, the interoperability rule will force messenger services such as WhatsApp to also receive messages from other applications. Imagine you want to leave the platform of a large provider for whatever reason. Currently, this means you will be cut-off from the community within that platform. Going forward, you will be able to leave a platform while keeping your contacts from that platform. This is not just a huge advantage for users, it will also foster competition: users will be able to switch to providers that offer higher levels of protection or better features.

Business users must also have access to their data on the gatekeeper's platform. Under the DMA, it will no longer be possible for large corporations to rate their own services or products better than those of their competitors. In addition, users can no longer be prevented from easily uninstalling pre-installed software or apps or from using third-party applications and app stores. Importantly, gatekeepers may no longer use personally identifiable information for targeted advertising unless the user has given express consent.

You've mentioned measures against illegal products or harmful content – how will these work?

The DSA introduces a “notice & action” regime according to which hosting service providers must maintain an electronic reporting mechanism facilitating the easy reporting of, for example, allegedly illegal content. It will be interesting to see how this unfolds in practice, but the service providers must process reports without undue delay and quickly remove content that is found to be in breach. They must notify affected users and formally explain any decision to restrict or remove content. Operators of online platforms will cooperate with so called trusted flaggers. Trusted flaggers are individuals or entities that have particular expertise in the field of tackling illegal content online. Where providers receive reports from trusted flaggers, they must be processed and decided upon on a priority basis.

There will also be a new rule that we know as KYC,⁴ which is familiar to us from the finance industry where there is the obligation to unambiguously identify the business counterparty. The DSA KYBC⁵ rule obliges online platforms to secure the traceability of merchants who are allowed to use these platforms to enter into distance contracts with consumers. To some extent, they must share this traceability information publicly with users. Platforms will be obliged to randomly check for illegal products or services and inform users if these checks return a positive result.

We know from experience that any legislation is only as good as its enforcement. How will the EU make sure the rules are followed?

At a national-level, each EU member state will be required to appoint a Digital Services Coordinator (DSC) with far-reaching investigatory and enforcement powers. The DSC will be able to carry out inspections and interviews and can demand documents and information, while users will also be able to lodge complaints directly with the DSC. The DSC will be empowered to order the cessation of infringements and levy fines of up to 10% of a gatekeeper's global annual turnover, repeated offences may result in a fine of up to 20% of global annual turnover.⁶

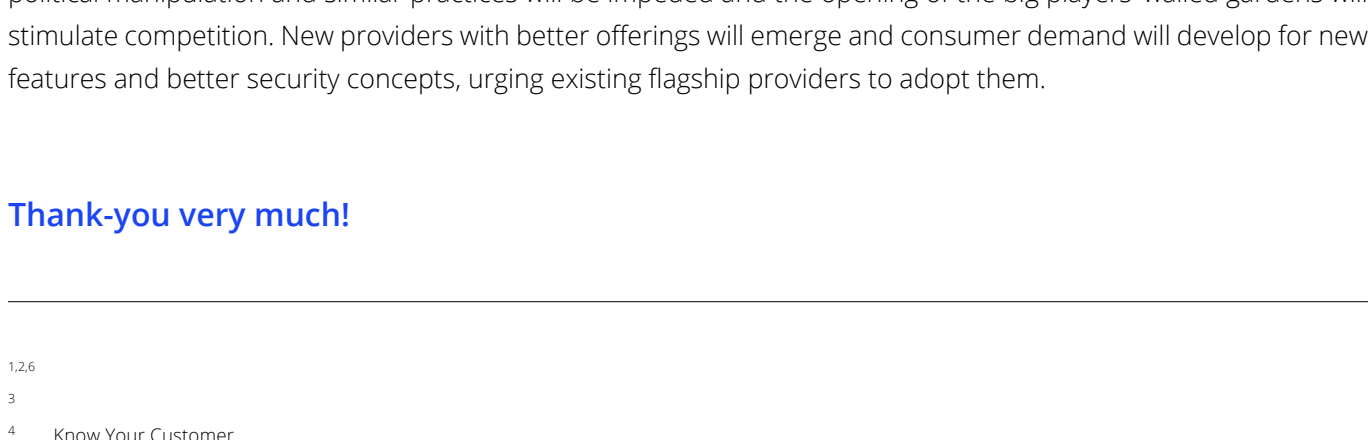
At an EU-wide level, the DSA proposes a European Board for Digital Services, made up of an advisory group of DSCs. This group will assist with joint investigations and will advise on the application of the regulations and the supervision of gatekeepers.

As an industry professional, what do you expect the wider consequences of these rules to be?

As mentioned previously, the package applies to any platform offering its services in the EU, regardless of where they are based. Tech giants Amazon, Meta and Google were founded in the US, while Chinese-based companies such as ByteDance are growing in influence. And many tech companies choose to be registered in territories that ease their tax and regulatory burdens. With this in mind, there is a perception that the EU's intervention in these companies' business-models could be a source of friction. However, there seems to be growing international consensus that the gatekeepers' influence needs to be checked (even if the motivation for this varies between governments).

Bottom-line, I expect the outcome to be positive. Consumer protection will be increased, mobbing, hate speech, political manipulation and similar practices will be impeded and the opening of the big players' walled gardens will stimulate competition. New providers with better offerings will emerge and consumer demand will develop for new features and better security concepts, urging existing flagship providers to adopt them.

Thank-you very much!



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