

Legal Update

New proposals for regulation of online platforms in Europe

On 15 December 2020, the European Commission published the long-awaited proposals for regulation of online platforms – the [Digital Services Act](#) (“**DSA**”) and the [Digital Markets Act](#) (“**DMA**”) – which form a part of its strategy to make Europe “*fit for the digital age*”. On the same day, the UK Government published its [response to the Online Harms White Paper](#) outlining its intention to introduce the Online Safety Bill in 2021 and confirming that Ofcom will become the online harms regulator in the UK.

All three proposals introduce new regulations for online platforms operating in Europe and, if approved, new regulatory frameworks to comply with. All three proposals also come with a threat of substantial fines for platforms that breach the proposed rules. Once approved, the new regulations are likely to be relevant not only to platforms based in Europe but also global platforms offering services to EU and / or UK customers.

Commentary

The DSA and the Online Safety Bill are proposing to reform the liability of online platforms with respect to illegal online content in the EU and UK respectively.

Unlike the DSA, the Online Safety Bill is also expected to capture the platform’s liability for “harmful” online content. The UK Government stated that the general definition of “harmful” content would be set out in the legislation with a list of priority categories of harmful content set out in secondary legislation to provide more legal certainty for companies and users. The definition is expected to encompass content which is harmful to children as well as content which is legal when accessed by adults but which may be harmful to them.

Both the DSA and the Online Safety Bill envisage a tiered approach to content moderation obligations depending on the size and reach of the online platform. Under the DSA, all hosting providers (including online platforms) based in the EU or offering services to EU-based customers would be required to put in place notice and action mechanisms for illegal content. The DSA would also impose additional requirements with respect to online advertising, dispute resolution, transparency and accountability.

While the DSA and the Online Safety Bill would have a wide application, the DMA is targeted at a limited number of “gatekeeper” online platforms with more than 45 million monthly active end users in the EU (c. 10% of the EU population). The DMA would build on the Platform to Business Regulation (EU) 2019/1150 also known as the “P2B Regulation” (see our [client alert](#) on the P2B Regulation). The DMA sets out “do’s” and “don’ts” for gatekeepers which are aimed at addressing structural problems in digital markets and “*promoting effective competition*”. If the DMA is approved in its current form, it would allow the European Commission to conduct market investigations and impose behavioural or structural remedies in the case of “*systematic non-compliance*” with the DMA obligations.

As a result of Brexit, the DMA is not expected to be directly applicable in the UK. However, the UK Competition and Markets Authority (“CMA”) is expected to benefit from new powers given to its new Digital Markets Unit to enforce a new statutory code of conduct to govern the behaviour of large online platforms. The new code of conduct forms one of three key pillars of enforcement that the CMA has proposed in respect of firms with “strategic market status”. Alongside the code, the CMA is proposing the use of pro-competitive enforcement measures (e.g. imposing interoperability requirements on firms) and tougher scrutiny of mergers involving such firms. The CMA’s Digital Markets Unit is expected to begin work in April 2021, and will form part of a new Digital Regulation Cooperation Forum, together with the UK Information Commissioner’s Office and Ofcom.

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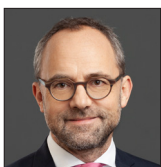
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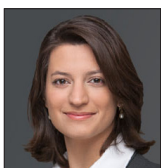
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IP/Technology

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Summary table

	Digital Services Act	Digital Markets Act	Online Safety Bill
Who has made the proposal?	European Commission	European Commission	UK Government
What is the stated aim?	To harmonise rules on the provision of intermediary services in the EU	To ensure that large online platforms acting as “gatekeepers” behave in a fair way online	To tackle illegal and harmful activity taking place online, including disinformation and misinformation
What businesses does it apply to?	<p>All providers of intermediary services offering services in the EU but specific obligations depend on the online player’s role, size and impact on the online ecosystem.</p> <p>The DSA distinguishes between:</p> <ul style="list-style-type: none"> • intermediary services; • hosting services; • online platforms; and • very large online platforms – i.e. online platforms with more than 45 million average monthly active users (c. 10% of EU population). <p>Small companies (with fewer than 50 employees and turnover less than €10 million) will be exempted from some obligations.</p>	<p>“Gatekeepers”, i.e. large online platforms that in each of the last three financial years:</p> <p>(i) had more than 45 million monthly active end users in the EU (c. 10% of EU population) and more than 10,000 active business users established in the EU; and</p> <p>(ii) provided a core platform service in at least three EU Member States and had annual EEA turnover of at least €6.5 billion or average market capitalisation of at least €65 billion.</p>	<p>Businesses whose services:</p> <p>(i) host user-generated content which can be accessed by users in the UK; and/or</p> <p>(ii) facilitate public or private online interaction between service users, one or more of whom is in the UK.</p> <p>B2B services and some low-risk businesses will be out of scope.</p>

	Digital Services Act	Digital Markets Act	Online Safety Bill
What is the proposal?	<p>The DSA will reform the liability regime for providers of intermediary services set out in Articles 12 to 15 of the e-Commerce Directive. The DSA preserves the prohibition on general monitoring.</p> <p>All providers of intermediary services will be required to:</p> <ul style="list-style-type: none"> designate a single point of contact and, for providers of intermediary services not established in the EU but offering services in the EU, a legal representative, for communication with authorities; include in their terms and conditions information on any policies and procedures for content moderation; and publish annual reports on any content moderation (transparency reporting). <p>In addition, providers of hosting services will be also required to put in place a notice and action mechanism to notify the provider of specific items that the person considers to be illegal content.</p> <p>In addition, online platforms will also be required to:</p> <ul style="list-style-type: none"> establish a complaint and redress mechanism and out of court dispute settlement; prioritise notices submitted by "trusted flaggers"; 	<p>The DMA is an <i>ex ante</i> regulation outlining specific "do's" and "don'ts" for gatekeepers in Articles 5 and 6 of the DMA. For example, under the proposal gatekeepers will be required, among others:</p> <ul style="list-style-type: none"> to obtain the user's consent for certain processing of personal data on the gatekeeper platform; to allow third parties to inter-operate with the gatekeeper's own services; to provide advertisers with tools allowing independent verification of advertisements hosted by the gatekeeper; and not to treat its own products and services in more favourable way than those of business users operating on the gatekeeper platform. 	<p>Duty of care obligation of online platforms towards their users with respect to illegal and harmful online content.</p> <p>Differentiated expectations on Category 1 (high-risk, high-reach services) and Category 2 services (all others within scope).</p> <p>Journalistic content is expected to be outside the scope of the legislation as well as below-the-line comments on articles on news publishers' sites.</p> <p>Ofcom will be the online harms regulator and will issue codes of practice that companies will be expected to follow to fulfil their duty of care.</p>

	Digital Services Act	Digital Markets Act	Online Safety Bill
	<ul style="list-style-type: none"> • put in place measures against abusive notices and counter-notices; • report any suspicion of criminal offences to law enforcement; • vet credentials of third party suppliers; and • ensure online advertising transparency. <p>Very large online platforms will be required to comply with additional requirements, including risk management obligations, appointing compliance officers, external risk auditing, increased transparency requirements, data sharing with authorities and researchers, and cooperation with authorities during crisis situations.</p>		
How will the rules be enforced?	<p>The obligations in the DSA will be enforced by authorities and Digital Services Coordinators in individual EU Member States.</p> <p>The fines under the DSA can amount to 6% of the annual income or turnover of the provider of the intermediary service.</p>	<p>The European Commission will be empowered to conduct market investigations, fine gatekeepers of up to 10% of the company's total worldwide annual turnover, impose periodic penalty payments of up to 5% of the average daily turnover, or designate additional remedies (including, as a last resort, behavioural and structural remedies, e.g. a divestiture of parts of a business).</p>	<p>Ofcom will have enforcement powers, including the right to issue fines of up to £18 million or 10% of global annual turnover (whichever is higher). Criminal sanctions for senior managers might also be applicable.</p>
Where can I find a copy of the proposal?	Draft DSA	Draft DMA	Yet to be published but the content of the Online Safety Bill is described in the UK Government's response to the Online Harms White Paper.
What are the next steps?	The European Parliament and EU Member States will discuss the draft DSA. Once adopted, the DSA will, as a Regulation, be directly applicable across the EU.	The European Parliament and EU Member States will discuss the draft DMA. Once adopted, the DMA will, as a Regulation, be directly applicable across the EU.	The UK Government will introduce the Online Safety Bill in the UK Parliament next year for approval.

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