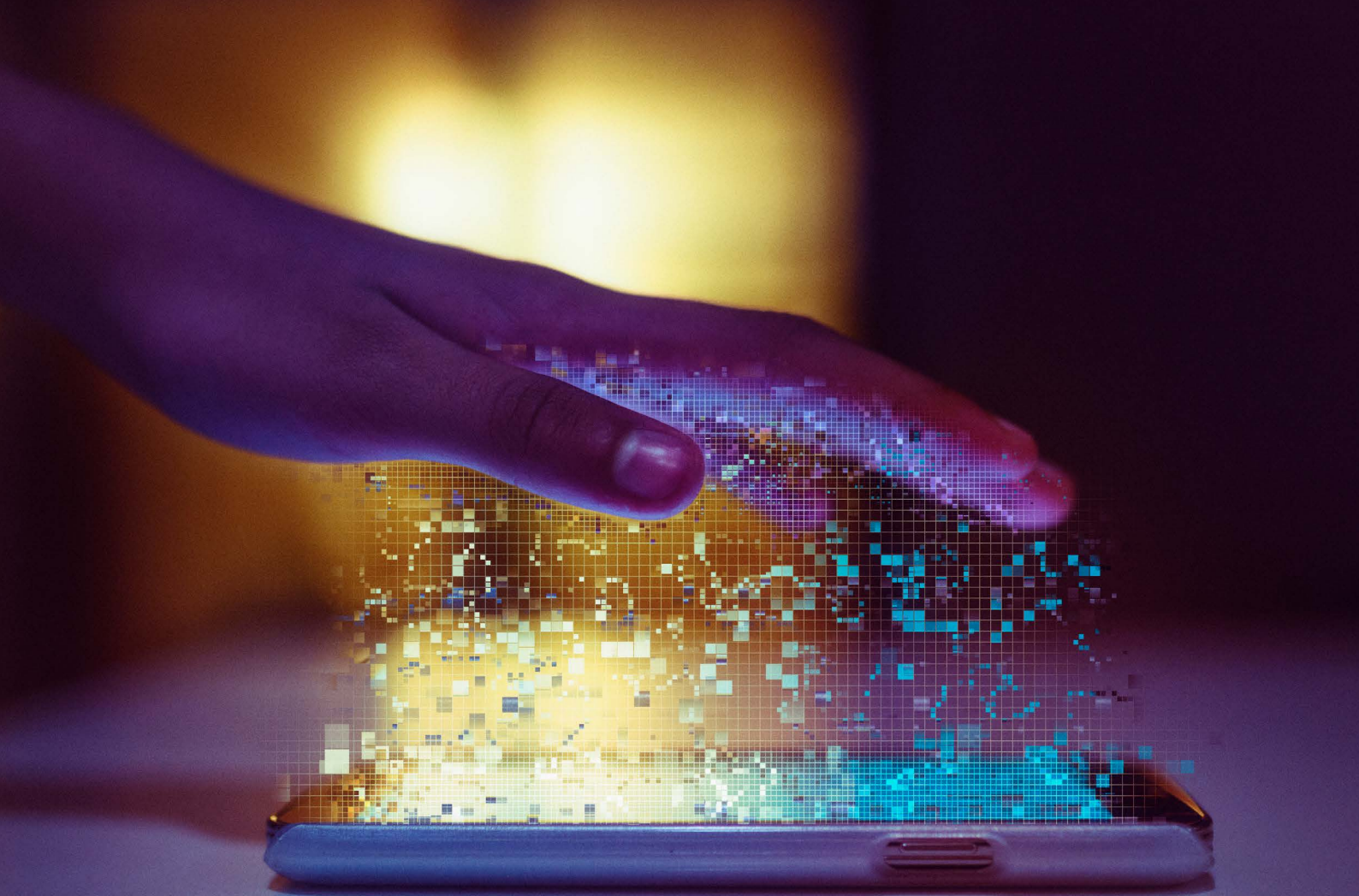


Digital Services Act and Digital Markets Act

Do You Know Your Potential Obligations and Penalties for Non-compliance?



This guidance is provided based on current proposals progressing through the EU legislative process and is subject to future change.

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations nor should they be considered a substitute for taking legal advice.

How the Policy Debate Is Progressing

The rapid development of digital services and digital markets carries many benefits; however, the EU Commission (EC) is concerned that this also leaves gaps in current legislation. For this reason, the EC proposed new rules governing digital services and digital markets with the aim to create a safer digital space and establish a level playing field across platforms in the European Economic Area (EEA).

Although the proposals are subject to change, being on the front foot in understanding your potential obligations and corresponding rights under the proposed new rules will not only ensure that you are positioned for compliance in 2023 (based on the EC's proposal), but it will also help you understand where the legislation may impact your business and whether you wish to become more actively involved in the negotiations as the proposals progress through the EU co-legislative process before the European Parliament and Council.

The EU co-legislative process has been gradually making progress on the Digital Services Act (DSA) and Digital Markets Act (DMA) with the aim to finalise the negotiations by 2022.

Due to the multilayered nature of the DSA and DMA, a number of parliamentary committees have been involved in the parliamentary negotiations, with the Internal Market and Consumer Protection (IMCO) Committee taking the lead on both legislative files. In total, four parliamentary committees are involved in the negotiations of the DSA, and three on the DMA as associated committees, which have primary responsibility in negotiating specific areas of the proposed laws. While this should enable a more holistic review of the legislative files by the European Parliament, it could become problematic during the trilogue negotiations phase – including the EC, Parliament and Council – where the final provisions of the proposed laws will be ironed out, in light of the multiple stakeholders involved in the process.

Digital Services Act

Thus far, the European Parliament has advanced in its negotiating stance on the DSA, with thousands of amendments being discussed throughout the parliamentary committees. The Civil Liberties, Justice and Home Affairs (LIBE) Committee already adopted its opinion, while the Industry, Research and Energy (ITRE) and Legal Affairs (JURI) Committees are expected to adopt their opinions by the end of September. The IMCO Committee is expected to continue discussions throughout the autumn with the aim to adopt its report in early November, followed by a possible plenary debate and formal endorsement by the European Parliament in December 2021.

The European Parliament advocates for stronger consumer protection guarantees to be incorporated into the proposed legislation. It also calls, among other things, for a level playing field, legal certainty with regard to the future delegated acts that will need to accompany the new regulations and reducing the administrative burden on small and medium enterprises.

From the Council's perspective, the Slovenian Presidency is currently proposing a number of targeted amendments to the proposed DSA that could bring search engines within the scope of the DSA and, thus, make search engine providers subject to the content moderations provisions set out in the DSA. In the latest compromise text, discussed in early September, it appears that targeted amendments have also been proposed to ensure that pre-existing national content moderation laws would not be implemented after the DSA enters into force. A dividing provision between member states, the so-called "country of origin" principle (which could enable one country to take action to remove content located in another member state), will be open for further discussion, as the Slovenian Presidency seems to propose leaving the possibility to maintain this provision in the DSA as long as the illegal content being targeted by cross-border investigations pursuant to the "country of origin" principle is within the remit of EU law.



Digital Markets Act

The European Parliament has divided the work on the DMA between the IMCO (as lead), the Economic and Monetary Affairs (ECON) and the ITRE Committees as associated committees. Negotiations have advanced on this file as well, with the leading IMCO Committee being expected to discuss amendments to the draft report in the end of September and the end of October. According to the current provisional timeline, the IMCO report on the DMA is scheduled to be adopted in November, followed by a joint DSA/DMA plenary debate in December. The two other associated committees have been gradually making progress in parallel, with the ITRE Committee currently being scheduled to endorse its draft opinion at the end of October 2021 and the ECON Committee proceeding with the consideration of amendments later in September and early October 2021.

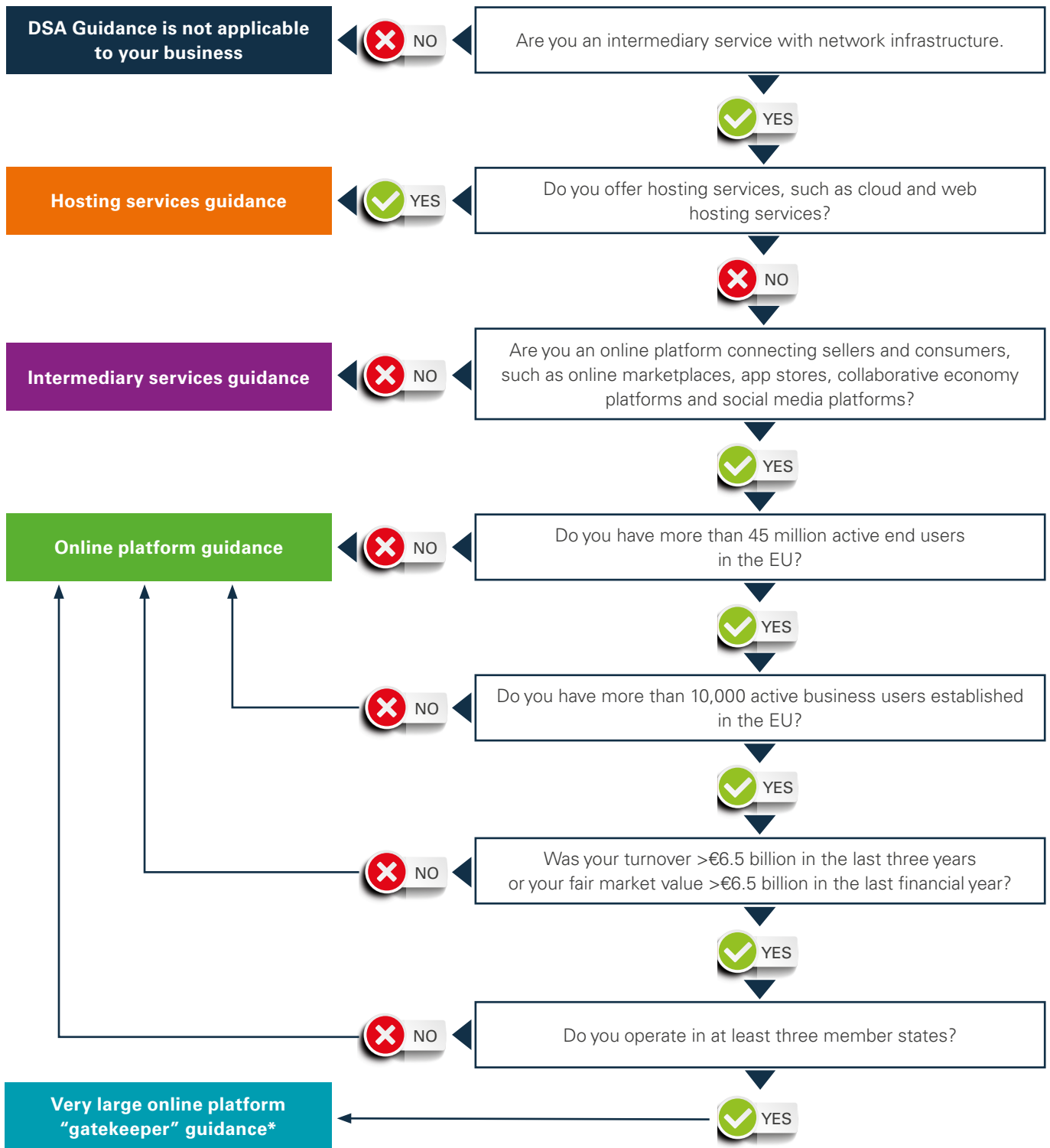
The Slovenian Presidency of the Council is also making progress on the negotiations of the DMA, with technical deliberations continuing in mid-September.

It appears that a broad part of the debate within the Council surrounding the proposed DMA currently focuses on the need to create tailored-made remedies for gatekeepers, an idea that has proven to be controversial, considering that not all the stakeholders involved in the negotiations are aligned with this line of thinking. Other contentious issues that will likely dominate the negotiations relate to the enforcement powers that would be given to national competition authorities and how the future DMA rules will interact with the GDPR and general competition rules.

The timing of the entry into effect of the DSA and DMA is difficult to predict with certainty at this point, as it will largely depend on the outcome of the ongoing negotiations. Despite having made progress, the EU legislative process may face delays when reaching the stage of final compromises through the trilogue on some of the most contentious provisions of the future laws. In any case, 2022 will be a critical year to define the final provisions of the future laws and to consequently determine the potential impact these new rules could have for companies active in digital services and digital markets.



What are your potential obligations under the proposed Digital Services Act and Digital Markets Act?



You need to be ready to comply with the relevant laws in the countries in which you operate, please contact us if you require assistance.

* In special circumstances, even companies who do not meet these criteria may be designated as "gatekeepers" for the purpose of the DMA- for example, this would be the case with an emerging gatekeeper who has not yet reached the above turnover thresholds.



Guidance for Intermediary Services

This guidance is provided based on current proposals progressing through the legislative process as of August 2021 and is subject to future change.

What Is the Digital Services Act (DSA)?

The DSA proposal, (if adopted) will introduce binding obligations applicable to all digital services that provide goods, services or content in the EEA, including new procedures for faster removal of illegal content and for protecting users’ fundamental rights online.

As a general rule, online intermediary services will become liable for the third-party content that they transmit and store, and they shall respond, without undue delay, to orders by Member State authorities to provide information. However, there are exceptions:

- Pure transmission services without any editorial control, including content delivery and electronic communications networks, are exempted.
- Hosting services may also be exempted if the service provider can demonstrate that it had no previous knowledge of the illegal content identified, and if the content is removed or disabled as soon as the hosting service provider becomes aware of any such illegal activity.

Who Are the Stakeholders?

<p>European Commission</p> <ul style="list-style-type: none"> • Will support the development of harmonised European standards and the production of codes of conduct to facilitate compliance with the DSA tackling different types of illegal content and systemic risks, as well as transparency in online advertisements. • May initiate proceedings against very large online platforms for non-compliance with the DSA. • Could request information related to suspected infringements and adopt a negative decision, including the imposition of sanctions. 	<p>Member States</p> <ul style="list-style-type: none"> • Should designate the primary national authorities responsible for overseeing the obligations laid out in the regulation as Digital Services Coordinators. • Will be responsible for determining the rules for the calculation of any fines imposed by the Digital Services Coordinators under the enforcement and sanctions. 	<p>European Board for Digital Services</p> <ul style="list-style-type: none"> • A European Board for Digital Services will be set up to ensure the cooperation between national competent authorities and the consistent application of the DSA. • Will also serve as a forum for the coordination of the European Commission’s and Digital Services Coordinators’ enhanced supervisory powers over very large online platforms.
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What Are Your Potential Obligations as an Intermediary Service?

- Establish a single point of contact within your business who can deal with the authorities from each Member State.
- For providers operating in the EEA but without having a permanent establishment in the EEA, designate a legal representative in one Member State that may be held liable for non-compliance with the obligations of the DSA.
- Present a report at least once a year on any content moderation, including activities to detect, identify and address illegal content in a relevant period. The reports should include information about:
 - The number of orders to provide information received from Member States’ authorities
 - The number of notices submitted, outlined by type of alleged illegal content
 - Voluntary content moderation activities, if any
 - The number of complaints handled through internal complaint-handling systems
- Intermediary services qualifying as micro or small enterprises would be exempted from these reporting obligations.



What Are the Enforcement Powers?

- Powers to require the disclosure and production of relevant information.
- Dawn raid powers – i.e. the power to carry out onsite inspections of business premises without a court warrant.
- Powers to request the cooperation of other Digital Services Coordinators in connection with investigations on suspected cross-border suspected infringements.
- Powers to impose proportionate remedies, to impose fines for failure to comply with the DSA or to adopt interim measures to avoid the risk of serious and irreparable harm.



What Are the Penalties?

The DSA sets the following maximum statutory caps:

- The maximum fine for non-compliance must not exceed 6% of the infringer's annual total turnover.
- The maximum fine for knowingly or negligently submitting incorrect, incomplete or misleading information in response to an information request must not exceed 1% of the infringer's annual turnover.

Contacts

If you have any questions about the impact of the DSA for your organisation, please do not hesitate to contact your usual Squire Patton Boggs contact or any of the following members of our firm:



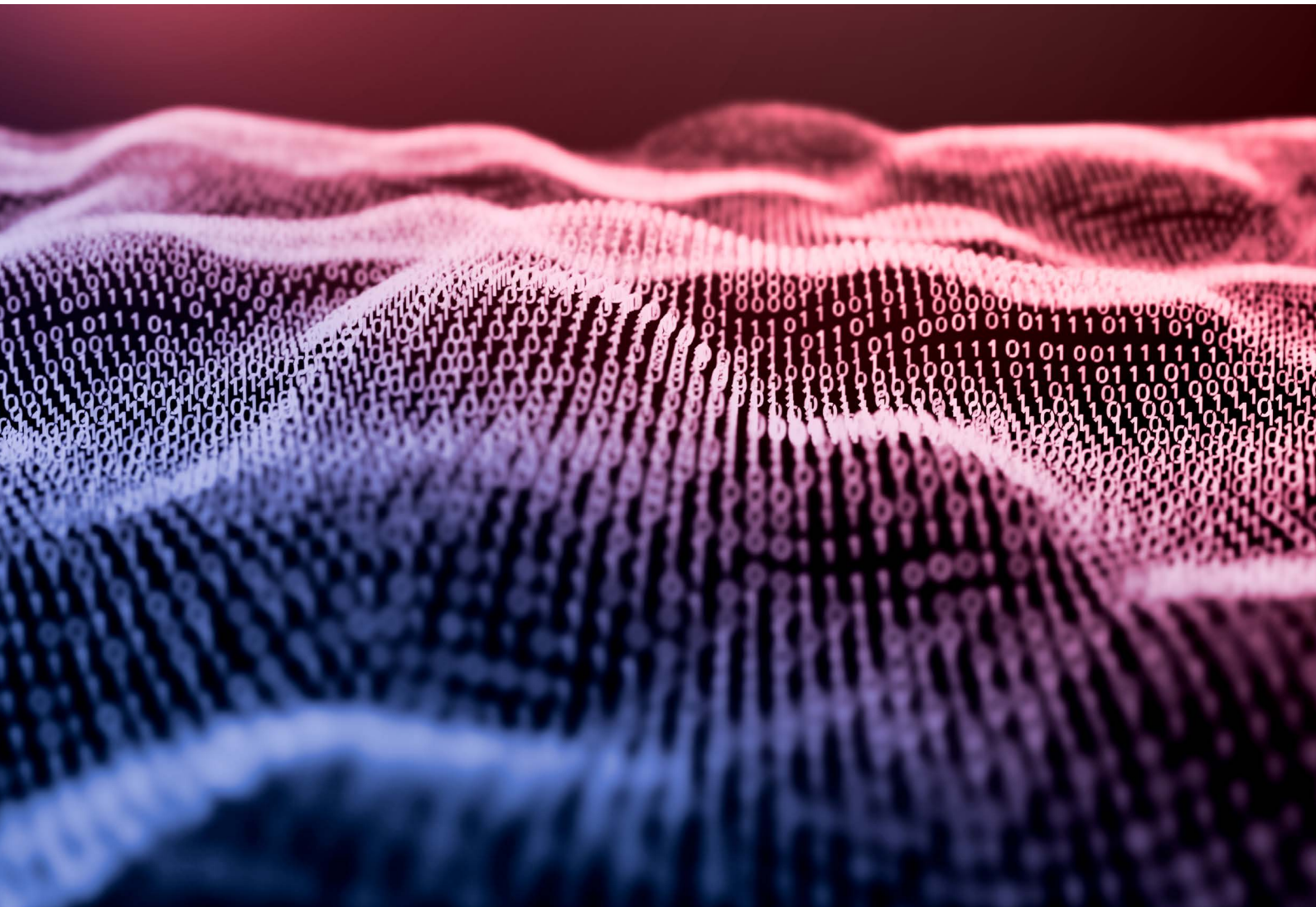
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Guidance for Hosting Services

This guidance is provided based on current proposals progressing through the legislative process as of August 2021 and is subject to future change.

What is the Digital Services Act (DSA)?

The DSA proposal, (if adopted) will introduce binding obligations applicable to all digital services that provide goods, services or content in the EEA, including new procedures for faster removal of illegal content and for protecting users' fundamental rights online.

As a general rule, online intermediary services will become liable for the third-party content that they transmit and store, and they shall respond, without undue delay, to orders by Member State authorities to provide information. However, there are exceptions:

- Pure transmission services without any editorial control, including content delivery and electronic communications networks, are exempted.
- Hosting services may also be exempted if the service provider can demonstrate that it had no previous knowledge of the illegal content identified, and if the content is removed or disabled as soon as the hosting service provider becomes aware of any such illegal activity.

Who Are the Stakeholders?

European Commission	Member States	European Board for Digital Services
<ul style="list-style-type: none"> • Will support the development of harmonised European standards and the production of codes of conduct to facilitate compliance with the DSA tackling different types of illegal content and systemic risks, as well as transparency in online advertisements. • May initiate proceedings against very large online platforms for non-compliance with the DSA. • Could request information related to suspected infringements and adopt a negative decision, including the imposition of sanctions. 	<ul style="list-style-type: none"> • Should designate the primary national authorities responsible for overseeing the obligations laid out in the regulation as Digital Services Coordinators. • Will be responsible for determining the rules for the calculation of any fines imposed by the Digital Services Coordinators under the enforcement and sanctions. 	<ul style="list-style-type: none"> • A European Board for Digital Services will be set up to ensure the cooperation between national competent authorities and the consistent application of the DSA. • Will also serve as a forum for the coordination of the European Commission's and Digital Services Coordinators' enhanced supervisory powers over very large online platforms.



What Are Your Potential Obligations as a Hosting Service?

- Establish a single point of contact within your business who can deal with the authorities from each Member State.
- For providers operating in the EEA but without having a permanent establishment in the EEA, designate a legal representative in one Member State that may be held liable for non-compliance with the obligations of the DSA.
- Present a report at least once a year on any content moderation, including activities to detect, identify and address illegal content in a relevant period. The reports should include information about:
 - The number of orders to provide information received from Member States' authorities
 - The number of notices submitted, outlined by type of alleged illegal content
 - Voluntary content moderation activities, if any
 - The number of complaints handled through internal complaint-handling systems
- Hosting services qualifying as micro or small enterprises would be exempted from these reporting obligations.
- Required to create a mechanism for individuals to notify the presence of illegal content on their platforms.
- When notified, a confirmation must be sent to the individual by the hosting services providers acknowledging the notification of the allegedly illegal content, as well as detailing the course of action proposed to take in order to deal with the allegedly illegal content.

What Are the Enforcement Powers?

- Powers to require the disclosure and production of relevant information.
- Dawn raid powers – i.e. the power to carry out onsite inspections of business premises without a court warrant.
- Powers to request the cooperation of other Digital Services Coordinators in connection with investigations on suspected cross-border suspected infringements.
- Powers to impose proportionate remedies, to impose fines for failure to comply with the DSA or to adopt interim measures to avoid the risk of serious and irreparable harm.

What Are the Penalties?

The DSA sets the following maximum statutory caps:

- The maximum fine for non-compliance must not exceed 6% of the infringer's annual total turnover.
- The maximum fine for knowingly or negligently submitting incorrect, incomplete or misleading information in response to an information request must not exceed 1% of the infringer's annual turnover.

Contacts

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Guidance for Online Platforms

This guidance is provided based on current proposals progressing through the legislative process as of August 2021 and is subject to future change.

What is the Digital Services Act (DSA)?

The DSA proposal, (if adopted) will introduce binding obligations applicable to all digital services that provide goods, services or content in the EEA, including new procedures for faster removal of illegal content and for protecting users' fundamental rights online.

As a general rule, online intermediary services will become liable for the third-party content that they transmit and store, and they shall respond, without undue delay, to orders by Member State authorities to provide information. However, there are exceptions:

- Pure transmission services without any editorial control, including content delivery and electronic communications networks, are exempted.

Who Are the Stakeholders?

European Commission	Member States	European Board for Digital Services
<ul style="list-style-type: none"> • Will support the development of harmonised European standards and the production of codes of conduct to facilitate compliance with the DSA tackling different types of illegal content and systemic risks, as well as transparency in online advertisements. • May initiate proceedings against very large online platforms for non-compliance with the DSA. • Could request information related to suspected infringements and adopt a negative decision, including the imposition of sanctions. 	<ul style="list-style-type: none"> • Should designate the primary national authorities responsible for overseeing the obligations laid out in the regulation as Digital Services Coordinators. • Will be responsible for determining the rules for the calculation of any fines imposed by the Digital Services Coordinators under the enforcement and sanctions. 	<ul style="list-style-type: none"> • A European Board for Digital Services will be set up to ensure the cooperation between national competent authorities and the consistent application of the DSA. • Will also serve as a forum for the coordination of the European Commission's and Digital Services Coordinators' enhanced supervisory powers over very large online platforms.



What Are Your Potential Obligations as an Online Platform?

- Establish a single point of contact within your business who can deal with the authorities from each Member State.
- For providers operating in the EEA but without having a permanent establishment in the EEA, designate a legal representative in one Member State that may be held liable for non-compliance with the obligations of the DSA.
- Present a report at least once a year on any content moderation, including activities to detect, identify and address illegal content in a relevant period. The reports should include information about:
 - The number of orders to provide information received from Member States' authorities
 - The number of notices submitted, outlined by type of alleged illegal content
 - Voluntary content moderation activities, if any
 - The number of complaints handled through internal complaint-handling systems
- Platforms qualifying as micro or small enterprises would be exempted from these reporting obligations.
- Required to create a mechanism for individuals to notify the presence of illegal content on their platforms.
- When notified, a confirmation must be sent to the individual by the hosting services providers acknowledging the notification of the allegedly illegal content, as well as detailing the course of action proposed to take in order to deal with the allegedly illegal content.

- Create an internal complaint-handling mechanism.
- Providing Provide for an out-of-court dispute settlement procedure.
- Ensure through technical and organisational means, that notices submitted by entities granted the status of trusted flaggers would be treated with priority.
- Adopt measures against misuse, such as the suspension of repeated offenders' accounts after issuing prior warning.
- Notify law enforcement and judicial authorities of any suspicions of a criminal offence, involving a threat to the life or safety of persons.
- Vet and publishing information on the reliability of the traders on their online marketplaces.
- Publish reports on their activities related to the removal and the disabling of information considered to be illegal content or contrary to their terms and conditions.
- Ensure transparency of online advertisements so the recipients of the service can easily identify the information displayed, as well as the person or entity behind the advertisement.



What Are the Enforcement Powers?

- Powers to require the disclosure and production of relevant information.
- Dawn raid powers – i.e. the power to carry out onsite inspections of business premises without a court warrant.
- Powers to request the cooperation of other Digital Services Coordinators in connection with investigations on suspected cross-border suspected infringements.
- Powers to impose proportionate remedies, to impose fines for failure to comply with the DSA or to adopt interim measures to avoid the risk of serious and irreparable harm.



What Are the Penalties?

The DSA sets the following maximum statutory caps:

- The maximum fine for non-compliance must not exceed 6% of the infringer's annual total turnover.
- The maximum fine for knowingly or negligently submitting incorrect, incomplete or misleading information in response to an information request must not exceed 1% of the infringer's annual turnover.

Contacts

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Guidance for Very Large Platforms also Known as “Gatekeepers”

This guidance is provided based on current proposals progressing through the legislative process as of August 2021 and is subject to future change.

What is the Digital Markets Act (DMA)?

In addition to the obligations, enforcements and sanctions set out in the DSA, the DMA proposal (if adopted) would introduce additional obligations for so-called “gatekeepers” to prevent them from imposing unfair conditions on businesses and consumers. The DMA would be applicable to large search engines, social networks, online intermediation services, video-sharing platforms, number-independent interpersonal communication services (such as instant messaging services), operating systems, cloud computing services and advertising networks services. The DMA would be applicable alongside the EU Electronic Communications Code, general competition law and GDPR.



What Are Your Potential Obligations Under the DMA as a Very Large Online Platform/Gatekeeper?

In addition to the cumulative obligations under the DSA set out further below, the DMA sets out the following additional obligations to limit certain practices that may result in unfair treatment of competitors and customers:

- Refraining from combining personal data sourced from their core platform services with personal data from any other services offered by the gatekeeper or third-party services.
- Allowing third parties to work in conjunction with the gatekeeper’s own services in certain specific situations (interoperability).
- Allowing their business users to access the data they generate in their use of the gatekeeper’s platform (data access).
- Refraining from, preventing or restricting business users from raising issues with any relevant public authority relating to any of the gatekeeper’s practices.
- Providing companies advertising on their platforms with the necessary tools and information to carry out their own independent verification of their advertisements hosted by the gatekeeper (transparency).
- Informing the European Commission on any planned merger with another provider of core platform services or any other services provided in the digital sector – this would be in addition to the application of merger control rules.
- Submitting an independent audit to the European Commission on the techniques for profiling consumers.
- Additional obligations for “special” gatekeepers designated by the European Commission.
- Refraining from using, in competition with business users, any data not publicly available, which is generated through activities by those business users.
- Allowing end users to uninstall any pre-installed software applications on its core platform service.
- Not treating itself or any of the products the gatekeeper offers more favourably in ranking services over third parties or third party products (self-preferencing prohibition).
- Allowing end users to switch between and subscribe to different software applications and services.
- Allowing business users and providers of ancillary services access to and interoperability with the same operating system, hardware or software features.
- Allowing effective portability of data generated through the activity of a business user or end user (data mobility and portability).
- Providing advertisers and publishers free of charge access to their performance data.
- Providing business users (or to third parties authorised by a business user) access to the data generated through its use of the platform in full respect of GDPR.

Potential Obligations Under the DSA That Gatekeepers Must Also Comply With

- Establish a single point of contact within your business who can deal with the authorities from each Member State.
- For providers operating in the EEA but without having a permanent establishment in the EEA, designate a legal representative in one Member State that can be held liable for non-compliance with the obligations of the DSA.
- Present a report at least once a year on any content moderation, including activities to detect, identify and address illegal content contrary to their terms and conditions in a relevant period. The reports should include information about:
 - The number of orders to provide information received from Member States' authorities
 - The number of notices submitted, outlined by type of alleged illegal content
 - The content moderation managed on their own initiative
 - The number of complaints handled through internal complaint-handling systems
- Create a mechanism for individuals to notify the presence of illegal content on their platforms.
- When notified, send a confirmation to the individual by the hosting services providers acknowledging the notification of the allegedly illegal content, as well as detailing the course of action proposed to take in order to deal with the allegedly illegal content.
- Create an internal complaint-handling mechanism.
- Provide for an out-of-court dispute settlement procedure.
- Ensure, through technical and organisational means, that notices submitted by entities granted the status of trusted flaggers would be treated with priority.
- Adopt measures against misuse, such as the suspension of repeated offenders' accounts after issuing prior warning.
- Notify law enforcement and judicial authorities of any suspicions of a criminal offence, involving a threat to the life or safety of persons.
- Vet and publish information on the reliability of the traders on their online marketplaces.
- Publish reports on their activities related to the removal and the disabling of information considered to be illegal content or contrary to their terms and conditions.
- Ensure transparency of online advertisements so the recipients of the service can easily identify the information displayed, as well as the person or entity behind the advertisement.
- Conduct risk assessments on the systemic risks linked to their services, particularly in connection with illegal content, fundamental rights and manipulation of their service, and to take reasonable and effective measures to mitigate those risks.
- Submit to external and independent audits to assess compliance with the due diligence obligations and any codes of conduct commitments once a year.
- Outline terms in a clear and comprehensive manner if recommended systems and increase transparency of online advertisement.
- Provide access to data to the Digital Services Coordinators when requested.
- Appoint one or more compliance officers to guarantee compliance with the DSA and delegated European Commission regulation.





What Are the Enforcement Powers?

- Request information
- Conduct interviews and take statements
- Carry out dawn raid-style onsite inspections on business premises without a court warrant
- Adopt interim measures
- Make voluntary measures to remedy an infringement of the DMA binding on the gatekeepers
- Monitor their compliance with the DMA and binding remedial measures
- Carry out market-wide investigations, into specific aspects of digital markets that are suspected of not functioning well and adopt behavioural or structural measures to remedy such aspects to improve competition



What Are the Penalties?

Sanctioning powers are subject to the following statutory caps:

- Up to 10% of total annual turnover for non-compliance with the DMA
- Up to 5% of average daily turnover in the preceding financial year for failure to provide information in response to an information request, submit to onsite inspections, or respect interim orders

Contacts

If you have any questions about the impact of the DMA for your organisation, please do not hesitate to contact your usual Squire Patton Boggs contact or any of the following members of the firm:



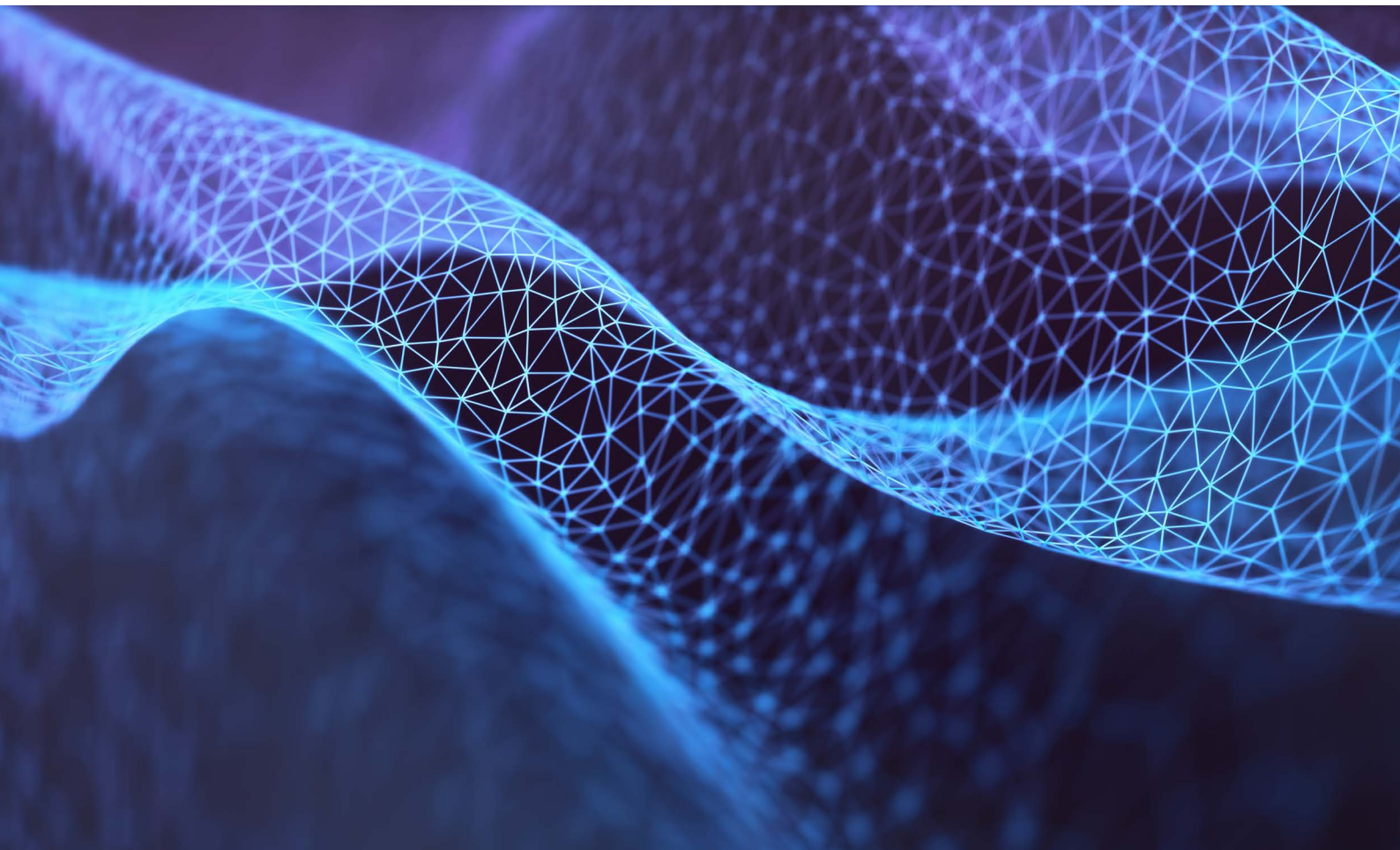
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