

The Digital Services Act

Context

In her Presidential candidacy speech Ursula von der Leyen announced the Commission should propose a new Digital Services Act (DSA), which she claims “will upgrade our liability and safety rules for digital platforms, services and products, and complete our Digital Single Market.”

While there is still a lack of clarity on the form and contents of the DSA, it is understood that the DSA will be based upon a revision of the e-Commerce Directive (Directive 2000/31/EC), despite the Commission acknowledging that the directive is fit for purpose and does not require revision as recently as 2016. The e-Commerce Directive has been key to the growth of e-commerce in the EU for the past two decades. Nevertheless, given how fast the online economy has evolved, the Commission claims that rules governing the online provision and purchase of goods and services must be revised

This led to a plethora of legislation coming through the EU over the last legislature, key of which were the:

- Audio Visual Media Services (AVMS) Directive
- Copyright Directive
- Platform-to-business Regulation
- Market surveillance Regulation
- Geo-blocking Regulation
- Revision of the Consumer laws

It is crucial that all these very recent laws are taken into consideration before taking further action.

Looking back to the e-Commerce Directive

The following e-Commerce Directive provisions have been key to the barrier-free trade in information society services¹ in the Single Market:

- **Article 1 (1)** establishing the objective of the Directive: to ensure the free movement of information society services
- **Article 3 (2)** establishing one of the cornerstones of the Directive – country-of-origin principle (where a service that is performed in one state and received in another then the law of the state from where the service was performed from applies)
- **Article 3 (6)** on the Commission’s possibility to check the compatibility of measures introduced by Member States with EU law. This ensures that the Commission has oversight to keep barriers within the Single Market to a minimum

¹ **What is an information society service?** The e-Commerce Directive defines an information society service as any service normally provided for remuneration, at a distance (without parties being simultaneously present), by electronic means and at the individual request of a recipient of services.

It is expected that this definition will be broadened by the Digital Services Act to include a larger amount of services.

- **Article 4** prohibiting Member States to require authorisation (or equivalent) to the provision of services: one of the most important principles guaranteeing deeper integration of the single market
- **Article 9** on validity of contracts concluded by electronic means. It lays out provisions that guarantee electronic contract validity across the EU
- Information requirements placed on information society services out under **Articles 5, 6 and 10** which are proportionate to the attainment of the Directive's objectives

Expectations

It is unclear which form the DSA would take, and preliminary discussions have hinted towards anything from a directly applicable regulation to a package of laws, likely to be proposed in the first half of 2021 (was meant for Q4 2020, but has since been pushed back due to Covid-19). It is envisaged that the DSA shall encompass two pillars:

1. Purely commercial (trading information society services without barriers) – **Single Market pillar**
2. Broader societal interests (redefining liability aspects, tackling hate speech, misleading information, terrorist content etc.) – **content pillar**

It is the intention of the MBB to mostly focus on the Single Market Pillar, however we will raise any urgent issues on the content pillar should they present themselves.

While at first glance, it has been earmarked as an update of the e-Commerce Directive, indications are that it will include a large amount of broader provisions which are highlighted hereunder:

- Update, clarify and harmonize rules for digital services
- Widen the scope from information society services to include grey areas and as a result of the broadening of digital services (e.g. ISPs, cloud services, content delivery networks, domain name services, social media, search engines, platforms, advertising, electronic contract services and blockchain services)
- Possibly reviewing the country of origin principle (where a service that is performed in one state and received in another then the law of the state from where the service was performed from applies)
- Ensure oversight and enforcement of rules, particularly in cross-border situations, either: centralized, de-centralized or extension of powers to existing authorities
- Contain reporting obligations for companies to empower authorities to take decisions.

Other more specific provisions could include:

- Update liability provisions for intermediaries (particularly for the collaborative economy, cloud services and content delivery networks).
- Transparent and accountable rules for automated and manual content moderation, including rules for removing illegal content (including hate speech, counterfeit goods)
- Specific obligations for cross border online advertising services

IMCO Report on the Digital Services Act

A legislative own-initiative report was presented in the Internal Market and Consumer Protection Committee in the European Parliament by the lead Rapporteur, MEP Alex Agius Saliba (MT, S&D). In summary, the Rapporteur has acknowledged the success of the e-Commerce Directive but understands that due to the expansion and adaptation of the digital economy, new challenges are presenting themselves and the directive is no longer fit for purpose. He maintains the principle that what is illegal offline should be illegal online and the digital and analogue economies should exist on equal terms.

MEP Agius Saliba identifies a major issue that exists, namely that companies carrying out illegal activities online can often avoid being identified, especially when established outside the Union. As such, he maintains the importance of strengthening the information and transparency requirements of the eCommerce Directive.

The Rapporteur proposes:

- That all digital services should be covered, and the provisions of the Digital Services Act should also apply outside the EU when goods and services are being sold to the EU.
- The inclusion of a “know your business customer” provision so that details are kept by the host platform in case follow-up actions are needed.
- More transparency for consumers in the way search results (paid, sponsored etc) are ranked
- Better enforcement of product safety for goods sold online
- The creation of a mechanism that allows regulatory authorities to impose remedies to address market failures, in cases of suspicion of breach of rules in the case of business to businesses and business to consumer relations
- The creation of a central regulatory authority to oversee the implementation and enforcement of the provisions of the Digital Services Act.

In addition, Transport and Tourism Committee in the European Parliament are considering a report for opinion by MEP Josianne Cutajar (MT, S&D) which seeks to introduce further assurances for the tourism industry by proposing the following:

- Improving cooperation between authorities and stakeholders in the short-term rental market
- Building upon the Platform to Business regulation to limit dominance of market giants (platforms such as booking.com, etc.)
- Increased transparency on platforms, specifically on algorithms affecting service, pricing and advertising

European Commission Public Consultation

In September 2020, the MBB submitted a reply to the European Commission’s public consultation on the Digital Services Act. The reply was formed based upon the results of a survey circulated among the membership of the parent organisations, focusing mainly upon the governance of the digital single market.

From the replies to the survey, it is clear that the lack of coordination between member states’ authorities on regulatory and legal issues is probably the current biggest obstacle to increasing the provision of goods and services across borders. Another issue highlighted was the lack of available information on procedures and requirements; contact points; timelines; detailed accounts of cases and outcomes (including fines and disciplinary action); clear information on the remit, authority, and

enforcement powers of regulatory bodies. It was also noted that adherence to transparency principles was very much lacking by national regulatory bodies. In addition, it was also lamented that sometimes, a few of these bodies are not fit to carry out their duties, due to an apparent lack of legal, technical, administrative and customer care capabilities, as well as a clear absence of commercial knowhow of day-to-day business relevant to particular sectors. It is acknowledged that sometimes the expertise is indeed there, but cooperation between member states is either not apparent, extremely limited, or even non-existent. Cases get even more messy due to the different legal requirements between Member States and the lengthy duration of disputes. Every Member State handles consumer protection differently, and this is getting harder and harder to comply with.

The need to ensure similar supervision of digital services provided to EU users by providers established outside the EU was also a sticking point in our research. It is not acceptable that non-EU service providers can offer services in the EU without needing to comply with the same obligations as EU providers. Supervision in this area could be set up through a mechanism consisting of automated monitoring with the ability to block IP addresses in the EU if service providers are found to not be in compliance with EU and Member States regulations.

It is for the above reasons that the most feasible solution, which was almost unanimously supported by our members, is the creation of a Single EU Authority, that is the final decision maker in this field, with over-arching competence and powers to enforce the legal principles that allow for the proper functioning of the Single Market. We believe this Authority should be responsible for both the Digital Single Market and the Single Market, compatible with our long-standing belief that the Single Digital Market should be considered as a single structure whether online or offline. In addition, non-EU providers should be obliged to register with the single EU authority potentially foreseen for governance in this area, with this Single Authority ultimately responsible for monitoring compliance. The Single Authority should also partner up with the third country competent authorities to ensure proper coordination and transparency.

Finally, on the country of origin principle, we are completely against it being touched upon in any way. We completely reject any protectionist notions that may undermine the benefits that the Single Market brings to EU citizens and businesses. At a worst case scenario, if changes must be made, they must be in the form of fine-tuning only for the specific purpose of bringing it up to date with today's economic realities to ensure a fair level playing field, and even then it should be handled in an extremely delicate manner. Sufficient assessment as to its impact should be ensured, while undesirable spill-over effects must be avoided at all costs in order to guarantee the proper functioning of the Single Market. In addition, the principle of proportionality should be respected at all decision making levels, be it European or national, and the principle itself should be enforced to ensure that any legislation introduced by Member States for reasons of public interest do not go beyond what is necessary to achieve the public interest objective.

For questions or more detailed information please contact EU Affairs Manager Daniel Debono and Senior Advisor Mark Seychell from the Malta Business Bureau's Brussels Representative Office on infobrussels@mbb.org.mt

