

# SNAPSHOT

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## Digital Services Act: Europe seeks to determine global platform rules

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2020 will be a year of hitherto unprecedented upheaval for tech companies and web platforms, and time to have a say on what content regulation will look like is running out fast. In the second half of 2020, the European Commission will overhaul rules governing Internet service providers including search, cloud services and social media platforms as part of its long-anticipated Digital Services Act (DSA).

When appearing before the European Parliament on 14 November, Commissioner-designate Thierry Breton, who will be a key player shaping digital regulation in the EU, pledged to be “a data Commissioner” and to design his mandate along three pillars: protection (workers’ rights), transformation (industrial and digital), and looking to the future (technological sovereignty). **The DSA is a key component of this approach: it’s meant to bring European platform regulation up to speed with a new economy** where Europeans increasingly shop, get their news, communicate and share their views online.

While Executive Vice-President designate Margrethe Vestager will co-ordinate the drafting of the DSA, Breton is to play the lead role in determining the design of the new rules as part of his internal market and industry portfolio. In practice, the DSA may yet comprise one or several regulatory initiatives, could include hard and soft law components, and **the legislative process may stretch out over several years**. Whatever its precise shape, it’s clear that the potential business – and reputational – impact of the new rules would be significant for companies across the globe.

*Alessio Grassi and Boris Ajeganov are Senior Consultants in Brussels and work in the Telecom, Media and Technology (TMT) practice.*

### Why now?

While the platform economy has accelerated at rapid speed, the regulatory framework has largely stood still. The European Commission believes that the EU’s current regulatory framework, the eCommerce Directive from 2000, is no longer adequate. So far, the Commission has only introduced carveouts for specific regulatory areas in the liability regime afforded to web platforms (copyrighted material, terrorist content). Now, the Commission and the EU’s largest member states, Germany and France, are pushing to update the legislative framework in order to get Europe back onto the front foot, rather than respond to new developments with a reactive piecemeal approach.

### What we can expect

The DSA will be a wide and far reaching regulatory initiative which is set to be among the most controversial tech policy battles in the EU over the next five years. **We can expect difficult and protracted negotiations, not unlike the battles witnessed on the Copyright directive**. In fact, the ongoing process to clarify how the monitoring obligations of the Copyright directive should be applied in practice will influence the debate on the Digital Services Act.

#### ➤ Industry view

While the Commission has not yet set out the precise contents of the impending legislation, industry stakeholders have been proactive in expressing their views on key provisions of the Digital Services Act. In their view, the priority is to **maintain the general principle of limited liability of the eCommerce directive**, under which platforms are not

responsible for the content they host if they do not exercise editorial control over it. The argument is that this principle is a fundamental tenet of the internet economy which needs to be preserved in order to safeguard innovation. Rather than a detailed set of rules, platforms advocate for a risk-based approach, which would allow for flexibility in adopting the most suited solutions.

**The country of origin principle is another factor of fundamental importance for industry.** It means a company within the European Single Market is subject to the regulatory authority of the EU member state where it is established, even when it provides its services and products in other member states. Platforms favour EU-level harmonisation: the DSA would bring about legal certainty and predictability of procedures, as opposed to having to abide by a set of different legislations which carries heavier compliance costs.

Finally, platforms would like the Digital Services Act to make clear that if they enlist proactive measures to ensure compliance with the regulation, this will not expose them to increased liability. In other words, **compliance will not amount to editorial control and thus general responsibility for the content they host—the good Samaritan principle.**

➤ **Civil society view**

Civil society, like industry representatives, has taken a proactive approach on the Digital Services Act. It's already highlighting the need to **defend fundamental rights, such as the freedom of expression**, as part of any new regulation. Concerned that the new rules may, intentionally or otherwise, give too much of a mandate to platforms to moderate content by way of automatic filters, or decide what news is real or 'fake', **NGOs and political groups in the European Parliament are already campaigning to fight what they bill a creeping "privatisation of law enforcement"**.

Civil rights groups have also expressed concerns about automated decision-making (ADM) which, while cost-effective, is deemed to be particularly prone to errors. NGOs have indicated that they consider fundamental that the moderation and review mechanisms adopted by platforms are made as transparent as possible, include humans in the decision-making process (human-in-the-loop) and that citizens are guaranteed adequate redress mechanisms to prevent unjustified cases of censorship.

➤ **Political view**

The major political groups represented in the European Parliament have all taken to setting out their vision for European digital policy. It is understood that the European People's Party (EPP) group believes the DSA should remove

barriers in the supply of digital services while ensuring responsible behaviour by platforms in line with European values. In addition, any **new obligations on platforms should be proportional and clear to avoid unnecessary regulatory burdens or restrictions on fundamental rights**, including free speech.

### **What will be regulated**

*The Digital Services Act is expected to span a range of issues that, taken at face value, don't have much in common. Among the areas likely to be regulated, the DSA is expected to cover the following topics: illegal content and hate speech; fake news, disinformation, political advertising; counterfeit goods; and platform workers.*

### **Illegal content**

Under the current legal framework, when it comes to illegal content – such as incitement to violence or child pornography – platforms take part in voluntary self-regulation measures where flagged material is assessed and removed in line with an EU code of conduct. While the creation of the code is regarded as a positive development, the Commission believes that companies, especially social media platforms, should be held more responsible for this type of content. The **Digital Services Act will likely impose mandatory removals for platforms when they are given notice and takedown orders from authorities**, with companies incurring fines for failure to comply with such orders within a pre-determined timeframe.

### **Hate speech**

Hate speech is another challenge which the Commission may address with the Digital Services Act. Certain EU member states such as France and Germany have introduced national legislation to regulate the phenomenon, whereas in other countries platforms are only subject to voluntary rules. This causes a **problem of regulatory fragmentation within the single market that the Commission wants to correct**. The DSA will aim to provide common rules across the EU, but it is **not clear whether all hate speech will be considered illegal content**. To reach a compromise, considering the different sensitivities in the member states, the Commission might opt to focus only on certain types of racism and xenophobia, which would have to be removed by platforms under the threat of fines.

## Fake news, disinformation and political advertising – within or outside DSA?

Propelled by how the Cambridge Analytica case and the Brexit referendum resonated with voters, the new Commission wants to show it has the resolve to act at a time when citizens expect platforms to take on more civic responsibility. This includes tackling the problem of disinformation and increasing transparency in political advertising. It is unclear at this stage whether the DSA or another legislative instrument will address this. It is worth noting that addressing the problem of disinformation is also one of the objectives of the European Democracy Action plan, an initiative which will be led by the Czech Commissioner-designate Věra Jourová.

## Tackling counterfeit and unsafe goods

In addition to regulating content, the Digital Services Act is also intended to address the problem of counterfeit and unsafe physical goods that are sold on online platforms. The Commission believes there is an enforcement gap when it comes to EU rules that aim to ensure that products that reach European consumers are safe for consumption and do not violate intellectual property rights. **Online platforms are under scrutiny for their ability to enforce these rules vis-à-vis some third-country traders that sell through their websites.** The regulatory response from the Commission could involve enhancing the cooperation of platforms with member state authorities, as well as tighter cooperation between regulatory authorities in different member states.

## Improving the conditions of platform workers

On the heels of growing economic and political polarisation, the new Commission is eager to make sure that “no one and no place is left behind” in the transition to an increasingly digitalised service economy. Commission President-elect von der Leyen’s political programme is progressive on social and environmental issues with clear emphasis on alleviating citizens’ concerns about disruption caused by digitalisation, including on labour markets. Mirroring the concerns of several member states, **the DSA will seek to provide greater social protections for workers whose professional activity is facilitated by platforms,** including upgrading skills and education.

## Looking ahead and next steps

While the DSA is the next big moment that will show the world the EU’s overall approach to the regulation of tech companies, what that precisely looks like, and the business impact on companies is far from set. Yet an intense debate about the DSA has already started, which means all actors are drawing their battle lines and getting ready to influence the upcoming legislation. The time to join the debate is now. **Draft legislation is expected in the second half of 2020, and a series of public consultations on the constituent policy issues will start in the beginning of 2020.** Importantly, the Commission is already gathering expertise and input from industry via its expert group on e-commerce and its own platforms observatory.

*“Looking forward also means having our own European rules which can become global standards.”*

*– Thierry Breton, Commissioner-designate, Internal Market*

## Why you should care

Aside from affecting the larger platforms, the DSA could have much wider impact covering smaller, specialised platforms, forums, as well as e-commerce storefronts and media outlets featuring comment sections. Taken together, the European Union’s significant market power, its role as a global rule-setter, its first-mover advantage on digital regulation as well as the legislative gridlock in Washington D.C. mean that new EU rules will effectively have global effect on platforms (and beyond) as soon as they are in place, wherever those companies may be based.

## Authors



Alessio Grassi  
+32 (0) 484215126  
[alessio.grassi@fticonsulting.com](mailto:alessio.grassi@fticonsulting.com)



Boris Ajeganov  
+32 (0) 477562712  
[boris.ajeganov@fticonsulting.com](mailto:boris.ajeganov@fticonsulting.com)



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