

SMEunited position paper on Digital Services Act (DSA) - COM(2020) 825 final

Introduction

SMEunited welcomes the opportunity to comment on the European Commission's proposal on the Digital Services Act (COM(2020) 825 final), published on 15 December 2020. We believe that the proposal is a step in the right direction to address the main challenges that SMEs are facing in the Digital Single Market (DSM), as we asked in our recent [position paper](#) on the DSA. This is also in accordance with the digital strategy of the Commission and the Platform to Business [P2B regulation](#).

New rules for digital services will help to ensure fairer and more transparent digital markets for the users and providers of digital services. Also harmonised rules at EU-level will decrease the regulatory burden of European companies and will create new opportunities also for smaller digital service providers.

The digital autonomy of SMEs should be encouraged in the digital transition and should be supported by fair competition rules, giving more rights to business users.

Digital Services Act

Consistency with existing policy provisions

It is important that the DSA is coordinated and closely aligned with all relevant instruments and initiatives, notably in the field of intellectual property, telecommunications, data and privacy, product liability, product safety, the audio-visual sector and, of course, the e-Commerce Directive.

Therefore, we ask for a clearer definition of some terms. The concept of "online platform" is defined in the proposal, however the concept of "platform" is not sufficiently defined but used in the P2B Regulation. The Digital Single Market Directive (2019/790) uses the concept of "online content-sharing service provider" and the Digital Markets Act proposal refers to "gatekeepers" and "core platform services". Given that some platforms such as IoT platforms can stifle competition by withholding business-relevant data to SMEs, SMEunited recommends defining the concept of what a platform actually is more clearly.

A proper overview is thus needed of how the different instruments and initiatives affecting the DSA can be integrated.

The country-of-origin principle, which is the basis of the e-Commerce Directive and the single market, should not be affected by the DSA. Companies, especially SMEs, cannot be forced to comply with 27 different sets of regulations. Thus, the illegality of an activity or content must be assessed primarily in the country of origin, with the exception established in the e-Commerce Directive, or under directly applicable European Union law.

New obligations tailor-made according to the company size

The requirements in the regulation take also into account the size of the company offering online services. This regulatory choice helps to reassure that the requirements for online service providers are proportionate and in relation to the size of the company.

The regulation also provides exemptions for micro and small online service providers. This is indeed necessary to limit the regulatory burden for the smallest service providers and enhance the growth capacity of small online service providers. Instead of strict regulatory requirements, these service providers should be encouraged to take part in achieving the goals of the regulation through voluntary measures. Exemptions for micro and small enterprises are in this case necessary to enable their entering and growth in the market. If the administrative burden is not factored in - leading to unworkable rules - this will in the end lead to a bigger market share and more market power for the very large online platforms.

The regulation introduces some additional requirements and obligations for very large online platforms, who have on average minimum 45 million EU-based users (10% of EU's population) monthly. These platforms will need to have in place internal systems for risk-management and also there will be strengthened supervision on them. We view it necessary to include users outside the EU in the counting of active monthly users of very large online platforms. If these non-EU users are left out, the regulation would give several platforms, whose size and impact amount de facto to that of a very large platform, an unfair competitive advantage over EU-based platforms as they first enter the Digital Single Market from third countries.

SMEUnited therefore supports these categorisations in size and nature of digital service providers. They enable a tailor-made approach to different types of online service providers.

Art. 11 - Third country online service providers

The regulation will apply to online services offered in the Union and to those offered by providers established in a third country. We welcome this provision as it was emphasised in our previous position paper. The requirement for online service providers to nominate a representative for the EU, if they don't have a legal establishment in the EU, is essential in order to ensure the efficient enforcement of the new rules also towards companies outside the EU.

It is important that such representative has sufficient resources and control to be able to comply with the provisions under the DSA. We therefore suggest including the following wording in Article 11 of the DSA: *“Third country service providers shall empower their legal representative*

with the necessary powers and resources to cooperate with the competent authorities and to comply with these decisions and orders.”

It is crucial to keep the third country service providers inside the scope of the rules of the regulation to ensure fair competition in the DSM. It is also necessary to have more emphasis on the concrete and efficient enforcement of the rules and even consider proposing new enforcement tools if necessary.

In order to guarantee an efficient enforcement of the rules, SMEUnited proposes to oblige very large platforms to provide for one legal representative per Member State and not for the whole EU. Examples of platforms with a legal representative already based in the EU show that it is very difficult to take legal actions because of translation issues and an insufficient number of interlocutors.

Art. 14 - Notice and action mechanisms

Hosting-service providers will have to implement a ‘Notice and Action’-mechanism to facilitate notification of illegal content in the service. SMEUnited considers that the system and its proposed minimum requirements are a good tool to tackle illegal content in online services and calls for a consistent understanding and application of ‘illegal content’ across the EU.

As set out by the 2019 Commission Communication on Trustworthy AI, human agency and oversight are essential requirements to increasing trustworthiness. Mechanisms used to identify and remove content must therefore avoid using solely automated tools and must include safeguards to minimise the potential for such erroneous removal of compliant content, which can lead to lengthy and costly redress processes for small businesses.

We do, however, believe that a differentiated approach is needed regarding notice & action procedures related to small hosting providers and online platforms. The system seems tailored to address illegal content on social media platforms, whereas e-commerce platforms differ greatly from those platforms. Freedom of speech is not affected by taking down unsafe products.

Especially to tackle false or fake reviews it is crucially to create a contact point for harmed users as a first step and as a second step a transparent procedure that gives all involved parties the clarity that their rights are fully respected.

Art. 15 – Statement of reasons

Article 15 concerning the statement of reasons by a provider of hosting services in case of removal or disabled access to illegal content offers sufficient information transparency to users whose content has been removed from the platform.

In fact, the suspension of accounts can take place without appropriate notice and adequate reasons, making it difficult for companies to identify the most suitable corrective actions (e.g.: where the suspension derives from reporting by third parties, not knowing the reason for the suspension may represent an obstacle to its solution)¹.

Art. 17 - Internal complaint-handling system

The obligation to provide reasons and to set up a complaints management system regarding the decisions taken by online platforms on alleged illegal content or content incompatible with the general conditions of the service are fundamental measures to allow operators to promptly identify any non-conformity and activate the most suitable corrective measures. It will also guarantee greater protection of commercial operators against platform decisions.

Art. 20 - Measures and protection against misuse

Article 20 regulates the measures and protection against misuse that the online platforms must take. Online platforms shall suspend, for a reasonable period of time and after having issued a prior warning, the provision of their services to recipients of the service that frequently provide manifestly illegal content. In cases where the suspension is not having the desired impact on the appearance of illegal products (especially unsafe products) and the misuse continues on a regular basis, it might be necessary to consider blocking the breaching party permanently from the platform.

Art. 22 - Traceability of traders

It is necessary that online platforms are able to identify the traders using their services. Only traders who have provided sufficient information should be allowed to provide their services or products to consumers via online platforms. Well-designed information provision requirements safeguard the liability of the information and protect businesses as well as consumers from fake products and therefore help the fight against counterfeits and IP-theft.

1. Professional qualifications

In order to reinforce transparency, trust, security but also to ensure a level playing field, we propose to add to these elements a requirement related to professional qualifications in respect of certain regulated professions where this reflects requirements for trading offline. An enterprise or an independent worker using a platform remains above all a professional. Therefore, nothing justifies different rules for traders using or not platforms.

¹ The problems reported by operators refer to the relationship with the Amazon marketplace but some of them, such as not always providing adequate reasons for a non-compliance, are also valid in the case of other platforms and where the intermediation concerns the sale of services.

For this purpose, we suggest to make use of the European Professional Cart (EPC), which is an electronic procedure already existing for certain categories² and could be accessible for platforms as well as for clients/patients. This must not however have the effect of adding barriers to traders seeking to provide their services via online platforms.

The information requirements should be proportionate so that they do not block the usage of service from smallest traders and discourage them from trading online. In order to facilitate the use of several platforms by micro and small enterprises without creating new administrative burden, a standard and proportionate approach could be implemented concerning the information that small businesses are required to provide. A risk-based approach could determine more stringent requirements as necessary depending on the sector and products or services supplied.

It is justified that the platform can suspend the provision of its service if the trader fails to correct or complete information that it has been requested to deliver within a reasonable timeframe. The new rules on traceability of traders will help to prevent misuse on online platforms and also help the identification of the trader conducting misuse.

2. Reminder of traders' obligations

Moreover, to help traders act in full knowledge of their rights and obligations, the online interface of platforms providing (Art. 22(7)) the reminder of obligations related to pre-contractual information and to product safety should include two other aspects of consumer law: the right of withdrawal, inherent in distance selling, and the guarantee on conformity of the products sold. The platform should also provide the required forms in order to properly implement these obligations.

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² Nurses responsible for general care, pharmacists, physiotherapists, mountain guides and real estate agents.