

# ETUI Policy Brief

## European Economic, Employment and Social Policy

N°12/2020

### The Digital Services Act package: Reflections on the EU Commission's policy options

Aída Ponce Del Castillo

Aída Ponce Del Castillo is a Senior Researcher at the European Trade Union Institute in Brussels, Belgium.

#### Key points

- The forthcoming Digital Services Act package (DSA) is a legislative initiative to regulate online digital platforms, including online marketplaces, social media platforms, search engines, video gaming platforms and other information society services and internet service providers.
- As the first major piece of legislation for the sector since the e-Commerce Directive of 2000, it will define what the internet will be for years to come and impact internet governance not only in Europe, but globally.
- In addition to general rules applicable to all platforms, specific obligations will apply to 'very large online platforms' or 'gatekeepers'.
- The initiative comes at the right time: COVID-19 is making obvious how much citizens, workers, consumers and businesses depend on digital services and online digital platforms.
- Online digital platforms enable web-based jobs or digital labour. This key aspect is not covered by the DSA package, it will be addressed through an 'enhanced framework' in 2021. Given the negative impact of platform work on labour conditions, security and worker protection, the DSA should not remain blind to the responsibilities platforms have towards the people they employ and leave this issue for later.

## 1. Introduction

The COVID-19 crisis has made it obvious that the digital economy is and will remain central to the lives of many, and that numerous individuals, companies and states rely on e-commerce and digital services in many aspects of their lives. Beyond e-commerce, e-education, e-health or e-work, perhaps the time has come to talk about e-life?

In this context, the Digital Services Act package appears to be a landmark piece of legislation, intended to update a legal framework that has remained unchanged since the adoption of the e-Commerce Directive in 2000. In the past 20 years, online platforms have emerged, grown and become sources of both benefits and risks for citizens, including exposure to illegal contents. Some of these platforms have also gradually built up the ability to control huge parts of the digital ecosystems in which citizens now live and work (European Commission 2020b).

This Policy Brief pursues two aims: (i) to describe the proposed DSA package from the standpoint of the European Commission (EC), highlighting the envisaged policy options; (ii) to identify some policy dimensions that should be part of the reflexion.

## 2. What is the proposed DSA?

The Digital Services Act is one of the key building blocks of EC President Ursula von der Leyen's Digital Strategy. It is based on two key pillars:

1. New and revised rules to deepen the internal market and clarify responsibilities for digital services

The legal framework for digital services has remained unchanged since the e-Commerce Directive of 2000. The European Commission says that the time has come to review this and, in particular, to clarify a common set of responsibilities of digital services and online platforms, in order to:

**etui.**

- (1) keep users safe from illegal goods, content or services; and
  - (2) protect users' fundamental rights online.
2. An ex ante regulatory instrument of very large online platforms acting as gatekeepers

Over 10,000 online platforms operate in Europe's digital economy (most of which are SMEs). According to the Commission, however, a small number of very large online platforms account for a very large share of the digital economy in the EU and have become de facto gatekeepers between businesses and citizens/consumers. Some of these large online platforms exercise control over whole platform ecosystems, making it almost impossible for new actors to enter the market and compete. The Commission's aim is to regulate them and ensure a level playing field in European digital markets.

### 3. Complementary initiatives envisaged by the Commission

In addition to the DSA, the Commission has announced five complementary initiatives:

1. A possible New Competition Tool, intended to complement existing EU competition law and which would apply to all economic sectors, including digital markets.
2. A REFIT of the General Product Safety Directive (GPSD), to regulate challenges linked to new technologies, including AI and online markets.
3. A 'look at ways of improving the labour conditions of platform workers by launching a broader debate on working conditions in the context of the platform economy' (European Commission 2020a).
4. A review of the Code of Practice on Disinformation.
5. The Platform-to-Business Regulation 2019/11501 (which entered into force in June 2019 and applies from 12 July 2020), conceived as a first step to establish a fair and transparent business environment around online platforms, and to offer redress for SMEs using these platforms' services.

### 4. Comments on problems and policy options

This section describes the problems identified by the European Commission and the policy options it proposes. This is followed by comments and policy recommendations.

#### Pillar 1 Deepening the internal market and clarifying responsibilities for digital services

#### The three problems identified by the European Commission:

1. Fragmentation of the single market and a need for reinforced cross-border cooperation

Member States are increasingly adopting laws to regulate digital services, in particular to reduce the dissemination of illegal content or goods. Those laws vary from one country to another, which leads to fragmentation of the single market.

2. Risks to citizens' safety online and the protection of their fundamental rights

Online platforms have a role in the spread of illegal goods, services and content online. The responsibilities of digital services are not clear at EU level; hence citizens are not protected consistently, and their rights are not adequately defended.

There is a lack of accountability in the decisions taken by online platforms. The legal framework does not allow any scrutiny of how platforms shape information flows online.

Finally, services without legal establishment in the EU are increasingly gaining importance in the EU and remain unregulated.

3. Significant information asymmetries and ineffective oversight across the single market

There is a lack of oversight over digital services and information asymmetries, between services and their users and services and public authorities.

Online platforms take measures to counter the spread of illegal goods or content, but these are voluntary and only partial. When such measures are taken against 'harmful' (not illegal) content, they are difficult to scrutinise.

Finally, there is no platform accountability regarding possible manipulation of platforms' services, nor the algorithms they use.

#### The three policy options envisaged by the European Commission:

Option 1: a limited legal instrument to regulate online platforms' procedural obligations.

- The scope would be that of the e-Commerce Directive, focusing on services established in the EU.
- The instrument would lay out the responsibilities of online platforms with regard to the dissemination of illegal products and services, and the dissemination of illegal content of their users (notice-and-action mechanisms to report illegal content or goods).
- The instrument does not clarify/update the liability rules of the e-Commerce Directive for platforms or other online intermediaries.

Option 2: more comprehensive legal intervention, modernising the rules of the e-Commerce Directive.

- Upgrades the liability and safety rules for digital services. Removes disincentives for voluntary action to address illegal content, goods or services they intermediate.
- Harmonises binding obligations, which could include: 'notice-and-action' systems, cooperation with authorities and 'trusted

flaggers' (hotlines for swifter removal of content), risk assessments when services are used to disseminate harmful content, protection against unjustified removal for legitimate content.

- Imposes transparency, reporting and audit obligations for algorithms used, among others, in automated content moderation.
- Explores extending coverage of such measures to all services directed towards the European single market, including when established outside the Union.
- Establishes sanctions for systematic failure to comply with harmonised responsibilities or respect for fundamental rights.

Option 3: An effective system of regulatory oversight, enforcement and cooperation across Member States. This would be supported at EU level and complement options 1 and 2.

### Comments by the author on the policy options:

From a workers' protection point of view, the fragmentation of the market is not the main priority. Rather, protecting fundamental rights and ensuring people's safety are the most important aspect.

Option 3, which combines option 2 with a system of regulatory oversight, appears to be the way forward. We believe, however, that the EC should pay particular attention to the following aspects:

1. On the distinction between illegal and harmful content: 'harmful content' is a highly subjective concept, for which no conclusive definition exists. We believe the term should be avoided as it may be used by some to criticise and, potentially, silence valid expressions of opinion because they clash with the generally accepted opinion in a given society or environment. Freedom of expression should be preserved, and action should be taken against illegal, not harmful, content, expressions or behaviour.
2. On the protection of fundamental rights online. When talking about digital rights, we tend to limit our focus to privacy and the protection of personal data (Article 8 of the EU Charter of Fundamental Rights). We should also consider non-discrimination, gender equality, freedom of assembly and association, and freedom of thought, among other things.

As highlighted in the draft report by the EU Parliament Committee on Legal Affairs (European Parliament Committee on Legal Affairs 2020) entitled 'Digital Services Act: adapting commercial and civil law rules for commercial entities operating online', there is currently '*little regulatory oversight of how content hosting platforms deal with illicit activities*'.

This leads to a situation in which '*the safeguarding of fundamental rights remains in the hands of private companies*'. The DSA package must remedy this situation and ensure that fundamental rights are protected and that we avoid the risk, mentioned by a coalition of privacy advocates (Article 19 2020), of a '*small number of large online platforms not only acting as economic gatekeepers but also as "fundamental rights" gatekeepers*'.

3. On modernising liability rules. There is value in distinguishing between liability on content intermediation platforms and liability on online marketplaces (Berthélémy and Penfrat 2020).

The e-Commerce Directive regulates liability in its Articles 12 to 15. It enshrines a safe-harbour principle and establishes an exemption for online intermediaries who provide conduits, caching and hosting, who are therefore not liable for content shared by third parties, as long as they are not involved with the information transmitted or do not have knowledge or awareness of any illegal activities that may be taking place.

This exemption is key: liability lies with the content creator, not the intermediary. If this were to change, intermediaries would have to examine all the content that comes their way and, playing it safe, would probably remove or block anything potentially illegal, which would be detrimental to freedom of expression.

For trade unions and workers, intermediation platforms are of particular interest; the freedom that workers, union members and leaders have to express opinions on these platforms should not be threatened.

4. On automated content moderation, this exemption should not mean that they should not establish mechanisms to moderate content, provided such mechanisms – AI-based content moderation systems – are transparent, auditable and explainable. If fully automated, their adequacy and accuracy when removing content should be legally justified and requires a democratic debate. Authorities, as well as independent observers, should be able to monitor and assess these systems.

Recital 40 of the e-Commerce Directive encourages voluntary agreements or codes of conduct for removing and disabling access to illegal information. Studies have since shown, however, that there is no way for regulators to know what platforms are policing and how. Self-regulation lacks accountability and has proven to fail (Smith 2020). We consider that this provision should not be retained in the DSA.

To complement the content moderation mechanism mentioned above, a 'notice-and-action' mechanism system can allow people to flag illegal content, which the platform then has to remove, if it indeed considers that the content is illegal. This mechanism should be properly described in the DSA, ensuring that it does not lead to limiting online freedom of expression or access to information, but provides individuals with the power to notify behaviour or content that the intermediaries host.

5. On oversight and enforcement, the self-regulation approach favoured by platforms has shown its limits. For the DSA to be effective, accountability, enforcement and oversight are key. A comprehensive enforcement model similar to the GDPR should be established, with an EU centralised body (European Parliament Committee on Legal Affairs 2020) able to evaluate risks, enforce compliance, issue proportionate fines and audit intermediaries.

This centralized body would also collect information from large online platforms acting as gatekeepers, coordinate cooperation between Member States across borders, including national Data Protection Authorities, and monitor the cooperation of digital service providers with relevant authorities and 'trusted flaggers'. The model should take into account the challenges inherent in employment or work-related contexts.

## Pillar 2

### Ex ante regulatory instrument of very large online platforms acting as gatekeepers

#### The problem identified by the European Commission:

Large online platforms control increasingly important platform ecosystems in the digital economy. Their power comes from their ability to connect many businesses with many consumers, to bundle a large number of services, to accumulate large quantities of data, to easily access different technical assets, to easily expand into new markets, to take over competitors or to benefit from their financial power.

According to the EC, if left uncontrolled, this power can lead to problems:

1. Traditional businesses are increasingly dependent on a limited number of large online platforms.
2. Many innovative digital firms and start-ups find it difficult to bring forward innovative solutions.
3. Large online platforms easily enter and control adjacent markets (using the data they have collected).

The consequence is the risk of large-scale unfair trading practices and a reduction of the social gain from innovation. Interestingly, the EC also mentions here that *'the measures by the public authorities to confine the COVID-19 pandemic ... increased the dependency of smaller businesses on online platform ecosystems to reach out to consumers. A fair trading and transparent business environment online will therefore be important in supporting European businesses, heavily impacted by the confinement measures to tackle the COVID-19 pandemic, to recover and expand their business online'* (European Commission 2020c).

#### The three policy options envisaged by the European Commission:

Option 1: revise the Platform-to-Business Regulation (EU) 2019/1150, in particular by adding rules to regulate aspects currently addressed by transparency obligations.

Option 2: adopt a horizontal framework empowering a dedicated regulatory body at the EU level to collect information from large online platforms acting as gatekeepers. The rules would not allow this body to impose behavioural and/or structural remedies. It would have the power to act in case of refusal to provide the requested data, however.

Option 3: adopt a new and flexible ex ante (*before the event*) regulatory framework for large online platforms acting as gatekeepers.

The new framework would complement the horizontally applicable provisions of the Platform-to-Business Regulation (EU) 2019/1150, which would continue to apply to all online intermediation services. The ex ante framework would apply to the subset of large online platforms.

This option would include two sub-options:

- 3a. Prohibition or restriction of certain unfair trading practices by large online platforms acting as gatekeepers (*'blacklisted' practices*)
- 3b. Adoption of tailor-made remedies addressed to large online platforms acting as gatekeepers on a case-by-case basis where necessary and justified (examples of such remedies include: platform-specific non-personal data access obligations, specific requirements regarding personal data portability, or interoperability requirements).

#### Comments by the author on the policy options:

Here, we consider that, from a workers' protection point of view, option 3 (including 3a and 3b) is the preferred one: option 1, which involves simply revising the P2B regulation, barely a year after it came into force, would be insufficient. Option 2 would be just as insufficient, as the regulatory body would only have the ability to collect information.

Option 3 is the only option that would give the legislation the necessary ability to affect the behaviour of gatekeeper platforms and truly regulate their impact on society. We believe that the following aspects should be considered, however:

1. On the definition of 'very large platforms' or 'gatekeepers': there is a need for clarity and precision in defining a platform as a 'very large platform' or a 'gatekeeper', and hence subject to the ex ante rules. Will gatekeeper platforms be defined on the basis of objective criteria, applied objectively, or on the basis of a case-by-case approach, taking into account specific circumstances?

As show in the table below, online platforms are increasingly diverse and provide services that often span typological boundaries. Defining who is and does what will be essential to ensure that the DSA achieves its purpose.

2. Online platforms are active as de facto employers, but this dimension is not addressed in the proposed DSA package. Rather than postpone reflexion on platform work to 2021 and address the issue through an *'enhanced framework'*, it should be part of the debate around the DSA package today. The DSA should not remain blind to platforms' responsibilities to the people they employ. When dealing with this, an essential aspect will include defining 'labour platforms' (Silberman 2020).

## Possible typology of online platforms

Online marketplaces	Amazon, EBay, Allegro, Booking.com, Etsy, Bol
Collaborative or 'sharing' economy platforms	Uber, Airbnb, Taskrabbit, Bla-bla car
Communication platforms	Skype, WhatsApp
Social networks	Facebook, LinkedIn, Twitter, Tumblr, Weibo
Video-sharing social networks	Tik-Tok, Instagram
Search engines	Google search, TripAdvisor, Twenga, Yelp, DuckDuckGo
Maps	Google maps, Bing maps
News aggregators	Google News
Music platforms	Deezer, Spotify, Netflix, Canal Play, Apple TV
Video-sharing platforms	YouTube, Dailymotion
Payment systems	PayPal, Apple Pay
App stores	Google Play, Apple app store
Forums	Reddit

Source: House of Lords Select Committee on the European Union (2015).

3. On data collection and sharing by online platforms. Everything about online platforms revolves around data and depends on the flow of data. Data here is understood in a broad sense and includes personal data such as information, images posted on social media, users' search activity, interactions, travel time, and non-personal data such as anonymised individual data or aggregated data. Online platforms access a large, but at the same time fine-grained, amount of personal and non-personal data (European Commission 2018), which can be collected with or without people's consent. Data controllers subsequently claim a legitimate interest in collecting such data. They derive their revenue from aggregating and combining this data to build profiles, generate new knowledge or feed new data-driven technologies. They also have the ability to track, monitor and micro-target individuals in ways that people never see or know about. This is the power described by Shoshana Zuboff (2019) as 'surveillance capitalism'.

The General Data Protection Regulation (GDPR) is designed to regulate such processes and behaviours, at least where personal data is concerned. Even so, online platforms sometimes manage to circumvent the rules by presenting individuals with unclear data collection forms, obscure privacy policies and complex opt-out procedures. We consider that the DSA should strengthen existing requirements on personal data collection and sharing, and that complementarity between and mutual reinforcement of GDPR and DSA should be an objective.

This is particularly important given the importance of data sharing in the development of AI and the so-called 'Internet of Things', and the estimated value of data for the European and global economy. Speaking at the Hannover Messe on 15 July 2020, Commissioner Thierry Breton (2020) again insisted on the need for Europe to exploit data: *'To be ahead of the curve, we need to develop suitable European infrastructures allowing the storage, the use, and the creation of data-based applications or Artificial Intelligence services. I consider this as a major issue of Europe's digital sovereignty.'* Helping individuals to retain control over their personal data and feel confident that they can do so is one approach that can help to achieve this.

4. Blacklisting of unfair trading practices. Given the fast-changing nature of the environment in which large online platforms operate, a procedure is needed to ensure the regular and 'easy' updating of the blacklist.

More importantly, the blacklist should cover more than only unfair 'trading' practices and possibly include unfair 'employment' practices. Here, trade unions should be involved in the reflexion process.

5. Platform-to-Business Regulation. Under policy option 3, the Platform-to-Business Regulation (EU) 2019/1150 would be reviewed and continue to apply to all online intermediation services. In this revision, as developed by Silberman (2020), (1) the terms 'online intermediation services' and 'consumers' should be redefined more broadly, possibly to cover some categories of platform workers who are currently excluded; (2) the scope of the Regulation should be extended to apply to all transactions, not just transactions between business users and consumers acting in a private capacity.

## 4. Conclusions

According to the policy options proposed by the European Commission, the main aim of the DSA package is to improve the functioning of the single market and fair competition. The narrative and language used by the Commission revolves around 'trading practices', 'market competition', 'fragmentation' and 'asymmetries' in the single market. This is also evidenced by the simultaneous launch of the DSA package and the New Competition Tool consultation.

This approach is disappointing. Given the growing importance of digital services in the functioning of our societies, the Digital Services Act package should be more than that. It is a great opportunity for the European Union to foster transparency and fair play, but it has to look beyond the market and work

also for the benefit and protection of individuals, not only as consumers, but also as citizens and workers.

There is a need for an overarching goal beyond competition, with a focus on strategic enforcement and respect for legal standards by online platforms. Individuals, including workers, need to be enabled to exercise their digital rights and to challenge the use of their data, and authorities should be able not only to oversee platforms' activities, but also to impose behavioural and/or structural remedies.

The GDPR is a landmark piece of legislation and is changing the world, at least in terms of how people regard their privacy and data protection rights. The DSA package has the potential to reshape the internet, affect how individuals' rights online are respected, and in so doing profoundly transform the way the European Union – and possibly the world – communicates, buys, works and lives online.

In this second half of 2020, many trade unions are still totally focused on dealing with the impact of Covid-19. We believe that the DSA may have, in the long run, an impact on society that will be less visible, but just as powerful. The idea behind this Brief is to raise awareness about the DSA package, describe it and draw attention to some policy aspects, with a view to managing that impact more effectively.

## References

Berthélémy C. and Penfrat J. (2020) Platform regulation done right. EDRI Position Paper on the EU Digital Services Act, 9 April 2020. [https://edri.org/wp-content/uploads/2020/04/DSA\\_EDRIPositionPaper.pdf](https://edri.org/wp-content/uploads/2020/04/DSA_EDRIPositionPaper.pdf)

Breton T. (2020) Speech by Commissioner Thierry Breton at Hannover Messe Digital Days, 15 July 2020. [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_20\\_1362](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1362)

European Commission (2018) Proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services, 26 April 2020. <https://ec.europa.eu/digital-single-market/en/news/regulation-promoting-fairness-and-transparency-business-users-online-intermediation-services>

European Commission (2020a) Digital Services Act – deepening the internal market and clarifying responsibilities for digital services. <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12417-Digital-Services-Act-deepening-the-Internal-Market-and-clarifying-responsibilities-for-digital-services>

European Commission (2020b) The Digital Services Act package. <https://ec.europa.eu/digital-single-market/en/digital-services-act-package>

European Commission (2020c) Digital Services Act package: Ex ante regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union's internal market. <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers>

European Parliament Committee on Legal Affairs (2020) Digital Services Act: adapting commercial and civil law rules for commercial entities operating online. INL – Legislative initiative procedure, Luxembourg, European Parliament. [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2020/2019\(INL\)](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2020/2019(INL))

House of Lords Select Committee on the European Union (2015) Online Platforms and the EU Digital Single Market, London, House of Lords. <https://www.parliament.uk/documents/lords-committees/eu-internal-market-subcommittee/online-platforms/online-platforms-call-for-evidence.pdf>

Silberman M. (2020) Desirable rights for platform workers, regardless of employment status, and possible actions at EU level to realize those rights, [Forthcoming].

Smith M. (2020) Enforcement and cooperation between Member States, E-Commerce and the future Digital Services Act, Luxembourg, European Parliament.

Zuboff S. (2019) The age of surveillance capitalism: The fight for a human future at the new frontier of power: Barack Obama's books of 2019, London, Profile Books.

ETUI publications are published to elicit comment and to encourage debate. The views expressed are those of the author(s) alone and do not necessarily represent the views of the ETUI nor those of the members of its general assembly.

The *ETUI Policy Brief* series is edited jointly by Jan Drahoukoupil, Philippe Pochet, Aída Ponce Del Castillo, Kurt Vandaele and Sigurt Vitols.

The editor responsible for this issue is Jan Drahoukoupil, [jdrahoukoupil@etui.org](mailto:jdrahoukoupil@etui.org)

This electronic publication, as well as previous issues of the *ETUI Policy Briefs*, is available at [www.etui.org/publications](http://www.etui.org/publications). You may find further information on the ETUI at [www.etui.org](http://www.etui.org).

© ETUI aisbl, Brussels, September 2020

All rights reserved. ISSN 2031-8782



The ETUI is financially supported by the European Union.

The European Union is not responsible for any use made of the information contained in this publication.