

# EDPS Publishes Opinion on Digital Services Act and Digital Markets Act

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On February 10, 2021, the European Data Protection Supervisor ("EDPS") published two opinions on the European Commission's proposals for a [Digital Services Act](#) ("DSA") and a [Digital Markets Act](#) ("DMA"). The proposed DSA and DMA are part of a set of measures announced in the [2020 European Strategy for Data](#) and have two main goals: (1) creating a safer digital space in which the fundamental rights of all users of digital services are protected, and (2) establishing a level playing field to foster innovation, growth and competitiveness in the European Single Market and globally.

## The DSA

The DSA introduces new rules and responsibilities for providers of online intermediary services (including hosting services, online platforms and network infrastructure). The DSA, among other things, sets forth:

- Enhanced online advertising transparency requirements for online platforms;
- The obligation to put in place notice and action mechanisms to fight illegal content online;
- New obligations on traceability of business users in online marketplaces to fight the sale of illegal goods;
- Specific rules for very large online platforms aimed at preventing the dissemination of illegal content and societal harms;
- Requirements around safeguards that must be provided to users, such as the possibility to challenge platforms' content moderation decisions;
- A framework for data of key platforms to be made accessible to researchers for audit and risk assessment purposes; and
- An obligation for online intermediaries that are established outside the EU to appoint a legal representative.

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EU Member States will have a primary role in overseeing the DSA and must appoint a Digital Services Coordinator who will be responsible for ensuring compliance with the DSA. With respect to enforcement, the DSA introduces fines of up to 6% of the online intermediary services providers' global turnover.

## **The EDPS Opinion on the DSA**

The EDPS welcomes the DSA proposal but recommends additional measures to better protect individuals, particularly with respect to content moderation, online targeting and recommender systems used by online platforms (including social media and marketplaces).

Key recommendations of the EDPS include:

- Content moderation must be in line with the law, and profiling for content moderation purposes should be prohibited unless the online service provider can demonstrate that it is strictly necessary to address the systemic risks explicitly identified in the DSA. The EDPS also calls upon the legislators to further specify the information that must be provided to individuals, particularly when using automated means for content moderation.
- Taking into account the number of risks associated with online targeted advertising, the EDPS calls on the legislators to lay down additional rules beyond transparency, including (1) the gradual introduction of a ban on online targeted advertising based on pervasive tracking and restrictions as to the types of data that can be processed for that purpose; (2) the types of data or criteria on the basis of which ads may be served or targeted; and (3) the types of data that may be disclosed to advertisers or third parties enabling or facilitating targeted advertising.
- Recommender systems (i.e., “fully or partially automated system[s] used by an online platform to suggest in its online interface specific information to recipients of the service, including as a result of a search initiated by the recipient or otherwise determining the relative order or prominence of information displayed”) should, by default, not be based on profiling. The EDPS also recommends clearly informing online users about the use of a recommender system and implementing user controls that enable individuals to choose between the available options (such as to delete any profile used to curate content that they see) in a user-friendly manner.
- Introducing minimum interoperability requirements for very large online platforms and promoting the development of technical standards at the EU level.
- A clear legal basis and structured cooperation to ensure complementarity between the relevant authorities responsible for overseeing compliance with the DSA (including the data protection, consumer protection and competition authorities).

## **The DMA**

The DMA introduces new rules for certain core platforms services acting as “gatekeepers” (including search engines, social networks, messaging services, operating systems and online intermediation services) in the digital sector and aims to prevent them from imposing unfair conditions on

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businesses and consumers and to ensure the openness of important digital services.

There are three main cumulative criteria to take into account when determining whether an organization falls within the scope of the DMA. These criteria relate to (1) the size of the organization; (2) whether it controls an important gateway for business users towards the ultimate consumer; and (3) whether it has an (expected) entrenched and durable position in the market. Organizations that qualify as gatekeepers under the DMA will need to proactively implement certain actions, such as:

- Allowing third parties to inter-operate with their own services;
- Providing advertisers with performance measuring tools enabling them to comply with their own independent verification obligations;
- Providing business users access to data generated by their activities on the gatekeeper's platform; and
- Allowing business users to promote their offers and conclude contracts with their customers outside the gatekeeper's platform.

The DMA will also require gatekeepers to refrain from engaging in unfair behaviors, such as:

- Blocking users from uninstalling any pre-installed software or apps;
- Using data obtained from business users to compete with these business users; and
- Restricting users from accessing services that may have been acquired outside of the gatekeeper's platform.

Infringements of the rules imposed by the DMA will be sanctioned with fines of up to 10% of the organization's total worldwide annual turnover as well as periodic penalty payments of up to 5% of the organization's total worldwide annual turnover. Additional remedies also may be imposed in case of systematic infringements. To ensure compliance with the DMA, the European Commission will have the power to conduct market investigations.

## **The EDPS Opinion on the DMA**

The EDPS welcomes the DMA proposal and insists on the importance of giving users better control over their data to reinforce contestability in digital markets. The EDPS also stresses the importance of increased interoperability to address user lock-in and create opportunities for services to offer better data protection. The EDPS also makes specific recommendations to help ensure that the DMA effectively complements the EU General Data Protection Regulation ("GDPR").

Key EDPS recommendations include:

- Specifying that gatekeepers must provide end-users with an easy-to-use and accessible solution for consent management;
- Clarifying the scope of the data portability obligation envisioned in the proposed DMA.

Particularly, the provision on data portability should be reviewed to ensure consistency with the GDPR's definition of personal data;

- More attention should be paid to the need for effective anonymization and re-identification tests when sharing query, click and view data in relation to free and paid searches generated by end users on online search engines of gatekeepers;
- Introducing minimum interoperability requirements for gatekeepers and promoting the development of technical standards at the EU level; and
- Clarifying that the Digital Markets Advisory Committee will include representatives of the European Data Protection Board, and more generally, calling for an institutionalized and structured cooperation between the relevant authorities responsible for overseeing compliance with the DMA.

Read the EDPS' opinion on the [Digital Services Act](#) and the opinion on the [Digital Markets Act](#).

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