

# The Digital Services Act

**Making digital opportunities work for people and the public good**

## **Key messages:**

The Digital Services Act should:

- Ensure cities have access to data to enforce local regulations and enhance policy development
- Develop robust cooperation obligations to protect the public interest under the country of origin principle
- Resolve the lack of clarity for online platforms as information society services
- Enhance the limited liability regime to recognise the role that hosting service providers should play in removing illegal goods and services
- Establish a single European regulatory authority tasked with ensuring compliance with the Digital Services Act



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## Introduction

Digital services have transformed our society and economy since the adoption of the e-Commerce Directive (ECD). This has brought large benefits and reshaped the provision and consumption of content, goods, and services across the European Union. New market players and business models have arrived with the emergence of cloud services, content delivery networks, social media, and collaborative economy platforms, among others. We view the Digital Services Act (DSA) as a critical opportunity to integrate these developments. As such, it is a cornerstone in Europe's framework for a digital transformation, which support public interests, while protecting and empowering people and business to make the most of the opportunities ahead.

The emergence of new digital opportunities has had significant and positive impacts yet have created challenges for cities. We cannot be blind to the negative consequences that have grown under the current legislative framework. An explosion in short-term holiday rentals and an inability for cities to enforce applicable regulations have led to housing shortages and increases in rent. Failures in regulating unlicensed private hire rental drivers operating in streets have placed citizen safety at risk. Scarce city authority resources have been unnecessarily spent in addressing these challenges and others.

The patchwork of ad hoc, temporary, and voluntary agreements that have been initiated in response have failed. The DSA can bridge this gap. This paper outlines our views on how to achieve that.

## Ensure access to data to enforce the law

Data is necessary to enforce local regulation and improve efficacy in the allocation of public resources. A lack of access to data from online platforms by cities is a persistent challenge, who have been unable to enforce local rules, taxes, and levies, especially in the fields of housing and mobility – as recognised by the European Committee of the Regions<sup>1</sup>.

Unfortunately, requests for data to enforce local regulation have often been refused. Cities are instead unnecessarily required to spend considerable time and resources to identify non-compliant users of digital services that fall under the ECD, for example investigations into unlicensed drivers<sup>2</sup> or investigations into illegal short-term holiday rental practices.

The European Commission has recognised the challenges that lack of access to data from online platforms can have for cities. In March 2020, an agreement<sup>3</sup> was reached with several large collaborative economy platforms<sup>4</sup> to publish data on short-stay accommodations. The agreement sets out a non-legally binding obligation for those platforms to share reliable and regular data on the number of nights booked and number of guests staying, aggregated at the level of municipalities.

Local regulations cannot be enforced with aggregated data. The Commission agreement with a limited number of collaborative economy platforms can only serve as a proxy for broader trends on the market

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<sup>1</sup> [https://eurocities.eu/wp-content/uploads/2020/09/COR\\_collaborative\\_economy.pdf](https://eurocities.eu/wp-content/uploads/2020/09/COR_collaborative_economy.pdf)

<sup>2</sup> <https://tfl.gov.uk/info-for/media/press-releases/2019/november/uber-london-limited-found-to-be-not-fit-and-proper-to-hold-a-private-hire-operator-licence>

<sup>3</sup> [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_194](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_194)

<sup>4</sup> Airbnb, Booking.com, Expedia and TripAdvisor

development of short-term holiday rentals and not as a basis for the enforcement of local regulation. Regulations that cannot be enforced with aggregated data include application of taxes and duties, building regulations, regional planning, registrations, and the exclusion of short-term rental in social housing<sup>5</sup>.

Online platforms must be obliged to provide information to competent authorities, in compliance with the General Data Protection Regulation (GDPR). Provisions should ensure that city authorities have information in sufficient quality and frequency to fulfil tasks that relate to the provision of public services and enforcement of applicable regulations.

- **Recommendations:**

- Data must be available by online platforms to competent authorities of a sufficient quality and frequency to enforce applicable laws
- Online platforms must ensure data portability through clearly defined interfaces

## Data for the public good

The European Commission has recognised the shortfall of private sector data available to support evidence-based policymaking by public authorities<sup>6</sup>. Data used for the public good can enhance decision-making, provide scientific insights, and improve efficacy in the allocation of scarce public resources.

Recommendations of the European Commission High-Level Expert Group on Business-to-Government Data Sharing<sup>7</sup> have laid the foundations for an effective framework for business-to-government (B2G) data sharing partnerships, which include the creation of national governance structures, establishment of data stewards and collaboration through sandboxes, pilots and public-private partnerships (PPPs).

The current landscape of B2G data sharing is voluntary and ad-hoc. There are numerous and laudable examples of digital service providers sharing access to data with city authorities, but this is fragmented and limited relative to the potential. We recommend the creation of clear access conditions to data for the specific purpose of policy development to enhance decision-making in cities.

- **Recommendations:**

- Recognise business-to-government data sharing principles in the Digital Services Act
- Establish access conditions for city authorities to utilise data for policy development

## A country of origin principle that works for all

The Country of Origin principle has been a success in the growth of digital services yet must be underscored by robust member state cooperation mechanisms to maintain trust in institutions and protect public interest. Deviations from this principle should be considered in areas that are vital for the protection of public interest.

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<sup>5</sup> <https://fairdigitaleurope.eu/fde/wp-content/uploads/2020/06/Municipal-DSA-Toolbox.pdf>

<sup>6</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1593073685620&uri=CELEX%3A52020DC0066>

<sup>7</sup> [https://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=64954](https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=64954)

ECD Art. 3(1) obligates member states to ‘ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the member state in question’. We should however recognise the limitation of this provision, which has resulted in lengthy delays or nonaction with complaints brought by cities. Cooperation between member states should therefore be strengthened with deadlines for compliance and unambiguous procedures. This should include explicit provisions for member states to provide the country of destination competent authorities with all relevant information and data to enforce applicable regulations.

ECD Art. 3(4) gives member states the power to apply derogations to the country of origin principle for reasons of criminal offences, protection of minors, public health, and consumers, among other areas. We recommend extending this principle to include other critical or sensitive areas to safeguard socio-economic and environmental quality in cities; namely, protection of the public interest, environment, and workers.

- **Recommendations:**

- Establish deadlines for compliance and strengthened procedures for member state countries of origin to comply with requests from countries of destination
- Include an explicit provision for member state countries of origin to assist countries of destination to enforce applicable regulations
- Extend derogations from the country of origin principle to include protection of the public interest, environment, and workers

## Regulate by type of service

The DSA should differentiate obligations on platforms by the type of service offered. Product safety and ensuring that the provision of services do not harm public interest are distinct issues from the specificities of content, which touches on a broad range of social and political challenges. These must be treated separately to ensure that we can be ambitious in our approach to the DSA. As many intermediaries can provide content, goods, and services across one platform, it is however important to regulate by service and not by platform.

- **Recommendations:**

- Differentiate obligations for platforms by type of service offered (i.e. content or goods and services)

## Information society services still unclear

Case law has revealed the limits of the information society service definition. The ECD established the legal framework for information society services, which are those that ‘normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services’. As digital services have evolved, fundamental questions on their legal status and the resulting applicability of EU legislation have been left to national and European courts to resolve.

Collaborative economy platforms are one such example. In the cases of Uber business model ‘UberPOP’<sup>89</sup>, the CJEU ruled that UberPOP does not qualify as an ‘information society service’ and is therefore not subject to the provisions of the ECD. This is on the basis that Uber ‘exercises a decisive influence over the conditions under which drivers provide their service’<sup>10</sup>. This stands in contrast to the CJEU case of Airbnb Ireland, in which the platform was ruled to be an information society service, as services offered by users are ‘ancillary to the intermediation service provided’. The threshold beyond which ‘decisive influence’ has been achieved on the conditions of service remains unclear and undefined in EU law.

The DSA should tackle this ambiguity. We recommend the establishment of criteria for decisive influence and clarity on the inclusion of ‘composite services’<sup>11</sup>, which combine an intermediary service with a service not provided by electronic means at a distance.

- **Recommendations:**

- Clarify the definition of information society services for new market players that have emerged since the adoption of the ECD
- Define ‘decisive influence’ criteria for online intermediary platforms
- Provide clarity on the inclusion of composite services under the ECD

## Limited liability, limited action

The limited liability regime established by the ECD should be modernised to reflect the digital world as it is today. Art. 12, 13 and 14 established safe harbours for ‘mere conduit’, ‘caching’ and ‘hosting service providers’ to prohibit the application of general monitoring obligations on service providers to monitor illegal activity by users of their service. Hosting service providers receive a limited liability exemption if they do not have ‘actual knowledge’ of illegal activities and act quickly to remove or disable access to illegal activity to which they have obtained actual knowledge.

An incentive is thereby created for online platforms to not play an active and engaged role in the removal of illegal activities or information. If online platforms that act as hosting service providers play an active role in the removal of illegal activity, they may lose their safe harbour protection. This can be problematic in the case of transportation services. For instance, a platform would not necessarily be required to check whether a driver is compliant with local regulatory requirements, such as a clean criminal record or social security certificate.

Online platforms that have the capacity to obtain actual knowledge and control of information on their services should be recognised as such in the DS and not entitled to safe harbour protections.

Hosting service providers that intermediate the sale of goods and services (as opposed to content services) should be obligated to ensure the unavailability of illegal goods and services. Art. 17b of the Copyright Directive<sup>12</sup> has established a precedent for intermediary liability regimes in which service

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<sup>8</sup> ECJ Judgement of 20 December 2017, case C-434/15, Elite Taxi versus Uber Systems Spain SL

<sup>9</sup> ECJ Judgement of 10 April 2018, case C-320/16, Uber France SAS versus Nabil Bensalem

<sup>10</sup> <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-12/cp170136en.pdf>

<sup>11</sup> <http://curia.europa.eu/juris/document/document.jsf?docid=190593&doclang=EN>

<sup>12</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L0790&rid=1>

providers can be held liable, if they have not ‘made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works’.

- **Recommendations:**

- Remove safe harbour protections for hosting service providers that have a sufficient degree control of information on their services
- Require hosting service providers that intermediate the sale of goods and services to ensure the unavailability of illegal goods and services with robust due diligence obligations

## Strengthening notice and action

An accessible, harmonised and legally enforceable notice and action regime is necessary to support cities that flag illegal goods and services and prevent further national divergence, which has flourished in the absence of harmonised procedures. A lack of legal clarity results in delays and inconsistent application of notice and action mechanisms across the EU.

Requests by city authorities to flag illegal goods and services have been often ignored. Access conditions should be created for city administrations to flag illegal goods and services as trusted actors, with obligations on intermediaries to cooperate within a fixed timeframe and act on requests. It should be recognised that, for certain categories of goods and services, access to data is a necessary precondition for city authorities to initiate notice and action requests.

Inaction will perpetuate costs for cities and competent authorities, for example firefighters in some cities have spent considerable resources requesting the repeated removal of goods that have been recalled by manufacturers on health and safety grounds, which has been exacerbated by the lack of a uniform approach to notice and action. However, content should be treated separately from goods and services in specific circumstances<sup>13</sup>.

- **Recommendations:**

- Establish access conditions for city authorities as trusted actors to flag illegal goods and services
- Harmonise procedures for effective ‘notice and action’ system for reporting illegal goods and services

## Regulate services from third countries

Cities face challenges from service providers that operate from third countries, for which there remains limited means to ensure compliance.

ECD Recital 58 notes that provisions ‘do not apply to service providers established in a third country’. The territorial scope of the DSA should be enlarged to cover all intermediaries that provide goods and services within the EU. For those third country service providers who been found to be in breach of

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<sup>13</sup> <https://www.beuc.eu/publications/2012-00543-01-e.pdf>

obligations under the DSA, sanctions could include ISP blacklisting by competent regulatory authorities.

- **Recommendations:**

- Include all service providers in third countries within scope of the ECD
- Consider new forms of sanctions for third country service providers that are in breach of compliance with obligations under the ECD

## Supervision and enforcement

We support the establishment of a single European regulatory authority tasked with ensuring compliance with the DSA. Competencies of the regulator should, as a minimum, include monitoring, enforcing compliance and issuing sanctions to intermediaries. This is necessary to oversee cross-border disputes, improve fragmented monitoring and strengthen the European Union's ability to sanction non-compliance.

Dispute mechanisms should be available for instances in which courts or competent authorities cannot act in a timely manner. This mechanism should be accessible, independent and their decisions should be binding on intermediaries and users.

An effective sanction regime should be established for intermediaries that fail to meet their obligations under the DSA. This should include fines for non-compliance of a size judged to be a sufficient deterrent and obligations to cease or modify behaviour that was found to be in breach of the DSA.

- **Recommendations:**

- Establish a single European regulatory authority tasked with ensuring compliance with the DSA
- Establish an effective sanction regime for non-compliance with fines of a sufficient deterrent
- Implement a dispute settlement mechanism, with decisions binding on all relevant parties

## Artificial intelligence and algorithmic systems

Artificial intelligence (AI) is a powerful tool for the transformation of cities into sustainable, smart, and inclusive places for people to live<sup>14</sup>. Systems that employ AI-driven services can improve decision making and efficient allocation of limited resources, through advanced analysis and prediction of key challenges in the urban environment. However, despite the advantages that AI systems bring, we should recognise challenges that can emerge in the provision of digital services and moderation of content.

AI services have the potential to negatively impact the labour market, safety, and digital rights. AI can impact human rights and place freedom of expressive, privacy, equality, and fairness in jeopardy, while

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<sup>14</sup> [https://eurocities.eu/wp-content/uploads/2020/08/EUROCITIES\\_statement\\_on\\_AI\\_final.pdf](https://eurocities.eu/wp-content/uploads/2020/08/EUROCITIES_statement_on_AI_final.pdf)

displacing works and perpetuate bias and risk with the use of flawed datasets. This should be adequately addressed in the DSA.

- **Recommendations:**

- Establish transparency, reporting and audit obligations on algorithmic systems for AI-driven services to ensure fairness, privacy, and security

## Regulate market players with significant network effects

Cities are innovation ecosystems and bring together governments, researchers, businesses, and citizens to drive digital transformation at the local level and across the EU. The upscaling of local solutions can often be impeded by online platforms with significant network effects, which obstruct the development of socially responsible innovation.

Without obligations levied on online platforms with significant network effects, the development and upscaling of innovative digital solutions for the benefit of the public can be negatively impacted. We therefore encourage measures that ensure platforms are open, fair, accessible and increase social gain, including data access obligations in compliance with the GDPR and data portability and interoperability requirements. Thresholds should be considered based on a range of representative criteria to differentiate between platforms with significant network effects and SMEs. Competent regulatory authorities should have access to relevant information from online platforms and oversight on areas such as market concentration.

- **Recommendations:**

- Establish an effective ex-ante mechanism to pre-emptively avoid unfair market practices for platforms with significant market effects, with measures to ensure data access, data portability and interoperability
- Develop criteria to distinguish between networks with significant market effects and SMEs, based on a range of representative criteria

## Information gathered in eCommerce transactions

Information gathered by online platforms to provide services or goods should be subject to the principles of necessity and proportionality, as specified in the GDPR. These principles are fundamental in delineating the scope of data that can justifiably be processed, while protecting consumer privacy. The gathering of information that is extraneous to the provision of the relevant service or sale of good should not be permitted. This can represent a breach of privacy of the consumer (i.e. requiring location-based data or personal contact information) and grant online platforms a competitive advantage, allowing them to leverage extensive datasets for commercial gain within applicable sectors.

- **Recommendations:**

- Embed the principles of necessity and proportionality in the provision of services or sales of goods by online platforms