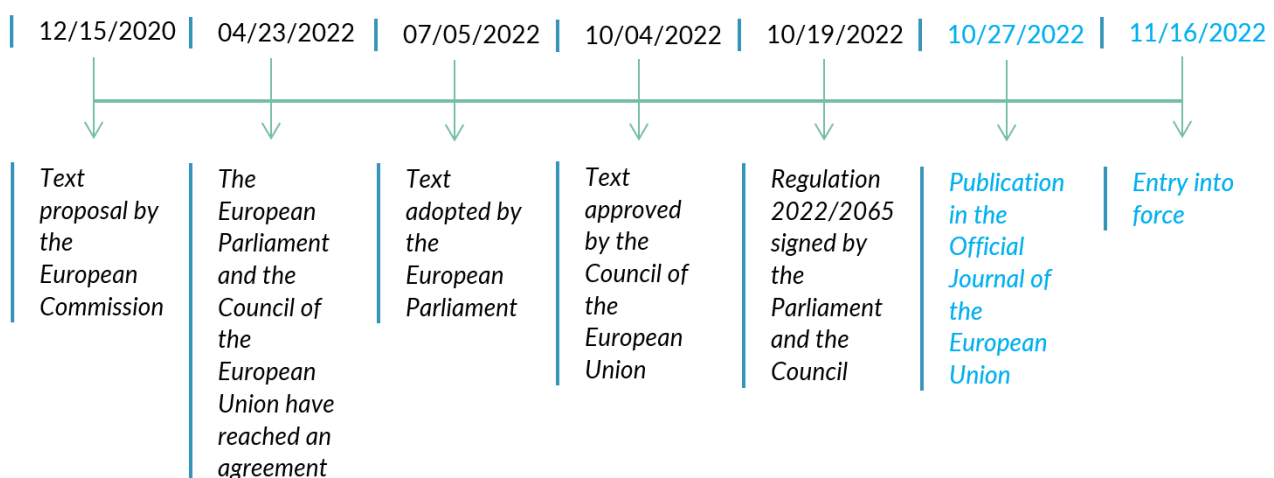


Second part of the European digital space reform project is coming to an end: *Digital Services Act (DSA)* entered into force on November 16, 2022

December 8, 2022

[Regulation 2022/2065](#) or Digital Services Act (DSA) was published on October 27, 2022 in the Official Journal of the European Union and entered into force on **November 16, 2022**. Under Article 93, the DSA will apply from **17 February 2024**. Certain provisions (Articles 24, 33, 37, 40, 43 and Sections 4, 5 and 6 of Chapter IV), however, are applicable from **November 16, 2022**.

The will of the European legislator is to establish more transparency, security, control and reduce the risks of disinformation and illegality in the digital space of the European Union.



What is the legal regime established by the DSA?

• BACKGROUND

The DSA is part of a major reform project led by the European Commission, since the end of 2020 with a legislative package including:

- i. **Digital Markets Act** or DMA Regulation (published on October 12, 2022)
→ *An article on the subject is already available on [Steeringlegal.com](#)*
- ii. **Digital Services Act** or DSA regulation (published on October 27, 2022)

The objective of this legislative package is to modernize the legal framework of the European digital space, which has remained unchanged since the entry into force of the [directive on electronic commerce of June 8, 2000](#). Indeed, over the last decades, the business models of digital technologies and services have greatly evolved and the need to regulate the European digital space has become apparent.

This legislative package must allow the establishment of a legal framework adapted to the economic footprint of the digital market giants. It also aims to introduce measures to protect users but also, at the same time, support innovation in the digital economy.

More specifically, the aim of the DSA is to guarantee European users a safe and transparent digital environment and to limit the distribution of illegal content online. The DSA allows a better protection of users and in particular of their fundamental rights and freedoms. It also allows for democratic control over the largest online platforms. Finally, the regulation aims to mitigate the risks of misinformation and manipulation of the user online.

• ACTORS TARGETED BY THE DSA

Article 2 of the DSA is intended to apply to **providers of online intermediary services** whose **recipients have their place of business in the European Union**. The place of establishment in Europe or elsewhere in the world of the providers of these intermediary services is therefore irrelevant.

The regulation refers to the following information society services in Article 3:

- These services may first of all be a "**mere conduit service**", i.e. consisting of the transmission, over a communication network, of information provided by a recipient of the service or the provision of access to a communication network.
- It can then be a "**caching service**", or what allows to transmit on a communication network, automatically stored information, in an intermediate and temporary way, provided by a recipient of the service to other recipients.
- Finally, it may be a "**hosting service**", i.e. a service for storing information that would be provided by a recipient of the service.

In concrete terms, the DSA targets internet service providers (ISPs), *cloud* services and online platforms (*marketplaces, app stores, social networks, content sharing platforms, travel, and accommodation platforms, etc.*).

Among the online platforms, the DSA indirectly targets the GAFAMs because of their preeminent position in the digital market: Google, Apple, Facebook, Amazon and Microsoft.

• ILLEGAL CONTENTS

The first objective of the DSA is the **fight against illegal content online**. To this end, the regulation introduces a variety of measures. According to Article 3 of the DSA, illegal content is **information that does not comply with European law and may be related to the sale of products or the provision of services**.

The DSA thus establishes an obligation to **remove illegal content after receiving an injunction** to act from national judicial or administrative authorities. This obligation is provided for in Article 9 of the Regulation.

These injunctions must meet a number of conditions:

- They must comply with a formalism including essential mentions. For example, they must mention the legal basis for the injunction, a statement of reasons explaining why the information constitutes illegal content, information allowing the issuing authority to be identified, etc.
- The territorial scope is limited to what is strictly necessary to achieve the objective.
- The language of the injunction must be one of the languages declared or agreed upon by the intermediary service provider.

The fight against illegal content is also reflected in the introduction of a **content moderation obligation** for hosting service providers and online platforms. However, this is not a general obligation to monitor or actively search for illegal content.

The duties of moderation of illegal content are as follows:

<p><i>Article 16</i> "Notice and Action Mechanisms"</p>	<ul style="list-style-type: none"> ➤ Establishment of effective, easy-to-access and easy-to-use electronic mechanisms for anyone to report illegal content ➤ The mechanism must include a set of elements to ensure effective reporting <i>E.g.:</i> sufficiently substantiated explanation of the infringement; clear indication of the electronic location of the infringing content ➤ Notifications must be processed and decided in a timely, expeditious, non-arbitrary and objective manner
<p><i>Article 17</i> "Statement of reasons"</p>	<ul style="list-style-type: none"> ➤ Provide clear and specific reasons why the content is unlawful or inconsistent with the Terms of Use ➤ These reasons must include certain information <i>E.g.:</i> specify whether it is a removal, denial of access, downgrading or restriction of visibility of the illegal information; specify the facts and circumstances of the decision
<p><i>Article 18</i> "Notification of suspicions of criminal offences"</p>	<ul style="list-style-type: none"> ➤ Obligation to inform law enforcement or judicial authorities if there is a suspicion that a criminal offence has been committed or is likely to be committed that threatens the life or safety of one or more persons ➤ Obligation to provide all available relevant information

- **INFORMATION, TRANSPARENCY AND DESIGN**

Information, design and transparency obligations are also foreseen by the DSA. Indeed, one of the wishes of the European legislator is to protect the rights of users on the Internet.

The information requirements are as follows:

<p><i>Article 26</i> "Advertising on online platforms"</p>	<ul style="list-style-type: none"> ➤ Clear, accurate, real-time information and identification of ads <i>E.g.:</i> to be able to see that it is an advertisement, to identify the person or company behind the advertisement, etc. ➤ Functionality to declare content with commercial communication
<p><i>Article 27</i> "Recommender system transparency"</p>	<ul style="list-style-type: none"> ➤ If recommender systems are used: the terms and conditions must indicate in simple, understandable language the main parameters used and the options for changing or influencing these parameters <i>E.g.,</i> most important criteria for determining suggested information, reasons for relative importance of parameters

<p>Article 15 "Transparency Reporting obligations (Intermediary Service Providers)"</p>	<ul style="list-style-type: none"> ➤ Clear and understandable reports on content moderation activities made available to the public once a year <u>E.g.</u>: number of injunctions, number of notifications of allegedly illegal content, information on content moderation activities, etc.
<p>Article 24 "Transparency Reporting obligations (Platform Providers)"</p>	<ul style="list-style-type: none"> ➤ Special provisions for online platform providers ➤ Transparency reports should also include information on disputes referred to alternative dispute resolution bodies and information on suspensions <u>E.g.</u>: number, deadline, results, etc.

The design requirements are as follows:

<p>Article 25 "Online interface design and organization".</p>	<ul style="list-style-type: none"> ➤ Absence of deception and manipulation of recipients in the design of online platforms ➤ Prohibition of substantial impairment or hindrance of recipients' ability to make free and informed decisions in the design of online platforms
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- **MAJOR PLAYERS: COMPLIANCE AND CRISIS RESPONSE**

The DSA contains specific provisions against **providers of very large online platforms and very large online search engines**. Indeed, these large digital players, because of their major and influential role, are subject to more stringent or additional obligations.

These very large platforms and search engines are defined in Article 33 of the DSA. They are characterized by an average monthly number of active recipients of the service in the European Union equal to or greater than **45 million**. Furthermore, these actors must be designated by the European Commission on the basis of data communicated by the platform provider or any other information at its disposal. The European Commission draws up this list of actors and ensures that it is published in the Official Journal of the European Union.

In concrete terms, this category is currently aimed exclusively at GAFAM (Google, Apple, Facebook, Amazon and Microsoft).

These specific obligations are as follows:

<p>Article 34 "Risk assessment"</p>	<ul style="list-style-type: none"> ➤ Identification, analysis and assessment of any systemic risks at least once a year <u>Example of risk</u>: dissemination of illicit content, any real or foreseeable negative effect on the exercise of fundamental rights ➤ Requirement to keep supporting documents for assessments for 3 years
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Article 35 "Mitigation of risks"	<ul style="list-style-type: none"> ➤ Implementation of reasonable, proportionate and effective risk mitigation measures <u>Example of measures:</u> adaptation of the design, characteristics or operation of services
Article 36 "Crisis Response Mechanism"	<ul style="list-style-type: none"> ➤ A crisis is an extraordinary set of circumstances that results in a serious threat to public safety or health ➤ In the event of a crisis, the European Commission may require certain actions <u>E.g.:</u> determine and apply specific, effective and proportionate measures
Article 37 "Independent Audit"	<ul style="list-style-type: none"> ➤ Be subject to independent audits at least once a year, at their own expense
Article 38 "Recommender Systems"	<ul style="list-style-type: none"> ➤ If using recommendation systems, then at least one option must be offered that is not based on profiling
Article 39 "Additional online advertising transparency"	<ul style="list-style-type: none"> ➤ To make available to the public via a reliable and efficient search tool, a register of information on the advertisements placed on the online interfaces <u>Ex. of information:</u> content of the advertisement, name of the product, service or brand, purpose of the advertisement, natural or legal person presenting the advertisement
Article 40 "Data Access and scrutiny"	<ul style="list-style-type: none"> ➤ Provide the European Commission with access to the data necessary to monitor and evaluate compliance with the DSA
Section 41 "Compliance Function"	<ul style="list-style-type: none"> ➤ Creation of an independent compliance function, consisting of one or more compliance officers ➤ These leaders have sufficient authority, size, resources and access to leadership
Article 42 "Transparency Reporting Obligations"	<ul style="list-style-type: none"> ➤ Publication of transparency reports at least every 6 months <u>Ex. of information:</u> human resources for the moderation of the contents, and the qualifications, linguistic knowledge, training, accompaniment of these people

- **PENALTIES**

Article 52 of the DSA provides that in the event of non-compliance with an obligation, a fine may be imposed in an amount not exceeding **6% of the annual worldwide turnover** of the intermediary service provider.

In the event of providing inaccurate, incomplete or misleading information or failing to respond, a fine of up to **1% of annual worldwide turnover** is also provided for.

- **SUPERVISION**

According to article 49 of the DSA, it is up to the member states of the European Union to designate one or more **competent authorities as responsible for the supervision and enforcement of the regulation.**

However, for each member state, a **coordinator for digital services** is designated. This authority will have to ensure the national coordination of the action, the monitoring and the execution of the obligations, falling within the framework of the DSA.

Section 43 of the DSA requires providers of very large online platforms and very large online search engines to pay an **annual monitoring fee** but not to exceed **0.05% of their annual worldwide turnover**.

At the European level, Article 61 of the DSA provides for the establishment of a **European Digital Services Committee**. This is an independent advisory group of coordinators overseeing intermediate service providers. This committee also advises the European Commission and the coordinators for digital services, with a view to the consistent application of the DSA and the effective cooperation of all these actors throughout the European Union.

- **OUTLOOK**

The European legislator has provided for a review procedure for the DSA. Indeed, numerous evaluation reports must be drawn up regularly by the European Commission, which may include possible draft amendments to the regulation (Article 91).

- The IP/IT/Data department of Steering legal -

Stéphanie BERLAND

Partner – Attorney-at-law
sberland@steeringlegal.com

+33 6 81 45 05 01

Leslie HERAIL

Lawyer
lherail@steeringlegal.com

+33 1 45 05 16 65

Sabrina AJILI

Paralegal
sajili@steeringlegal.com

+33 1 45 05 15 65
