

Update on the Digital Services Act (“DSA”) – Important Dates and Deadlines Looming

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This article, relating to Irish law, was written by the team in our Dublin office for Browne Jacobson Ireland LLP.

[In our last article on the DSA](#), we introduced the main requirements of the upcoming legislation on targeted advertising. In this article, we take a step back and look at the key dates in the DSA, many of which are looming, with the earliest deadline being 17 February 2023. The dates (outlined below) impact “online platforms” in particular. The term “online platforms” captures familiar social networks, streaming platforms, and online marketplaces.

How is the definition of “online platforms” likely to be interpreted?

The DSA is structured to have special obligations for very large platforms which have a greater impact on society, and lesser obligations on smaller platforms. The obligations on “online platforms” in the middle of this sliding scale of small to large platforms will form the new bedrock of what is expected in the general sense of most platforms under the DSA. The definition of “online platform” is therefore quite broad, and the EU Commission is likely to encourage a broad interpretation of the Regulation given the narrative surrounding the DSA. The recitals to the DSA also make clear that the EU Commission is trying to standardise and harmonise regulation on online platforms across the internal market.

Exceptions

There is an exception to the definition of “online platforms” applying and this should be carefully explored before committing on a particular compliance path with the DSA.

A platform will not be an “online platform” within the meaning of the DSA where it meets the following cumulative criteria:

1. Where an activity is a minor and purely ancillary feature of another service and,
2. for objective and technical reasons, the ancillary feature cannot be used without that main service; and,
3. the integration of the feature into the main service is not a means to circumvent the applicability of this Regulation.

Care is needed in navigating this exception. One example given of an appropriate exception falling within the three parts above is the comments section in a newspaper. This would, in principle, fall within this exclusion on the basis that the newspaper website is hosting the content, and the comments section is merely providing the ancillary service of commenting on the news content provided.

If you are unclear as to whether your platform may come within the DSA or the exception above, our team is on hand to assist.

Key Requirements on 17 February 2023 for “online platforms”.

Online platforms have until the 17 February 2023, to report their average number of active recipients (AMARs). This will facilitate the designation of “very large online platforms” (platforms exceeding 45 million reach). This figure is to be calculated as a six-month average.

There is also an obligation to update this information at least once every six months, or more frequently for rapidly scaling platforms.

The DSA provides that the number of average monthly active recipients of an online platform should reflect all the recipients which are:

- engaging with the service at least once in a given period of time;
- exposed to the information disseminated on the online interface of the online platform; or
- providing information, such as traders on an online platform allowing consumers to conclude distance contracts with traders.

Calculating the total number of AMARs will no doubt present practical difficulties, particularly in regard to what constitutes exposure to and use of a platform. Online platforms will have to be careful in order to avoid unintentionally over or under reporting AMARs.

Commission Guidance on AMARs

The DSA states that the Commission can adopt delegated acts to supplement the DSA, this includes a methodology for calculating the number of average monthly active recipients of the service in the EU. Apparent headway is being made on that guidance, and on 24 January 2023, the Commission delivered a webinar to national authorities on the designation of very large online platforms. Commission guidance is still not published however, and until concrete guidance is provided, online platforms will have to create and adopt their own methodology to determine their AMAR reporting.

In selecting a methodology to calculate AMARs, it is important that online platforms keep a detailed record of the data utilised and should be able to justify the methodology adopted. It may be advisable for online platforms to seek external legal advice in determining the methodology behind and the limits of this calculation, given that it will be the basis of much of a platform's approach to compliance with the new DSA regime.

Contact

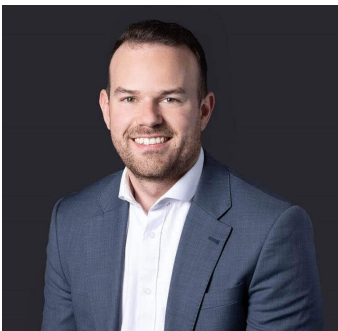


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