European Tech Alliance

EUTA Position for Trilogues on the Digital Services Act (DSA)

February 2022

The EUTA fully supports the EU's objective to curb the availability of illegal content, products or services online. The Digital Services Act (DSA) is a long, detailed piece of EU legislation which assigns obligations to digital actors. The proposed regulation clarifies obligations and will ultimately create trust for consumers online.

However, the EUTA would like to reiterate that certain obligations of the DSA, and especially obligations for VLOPs, were drafted with very specific actors in mind, namely social networks. **These obligations are often not well thought-through for other actors, which is regrettable given the DSA will regulate a huge variety of digital companies**. The horizontal nature of the DSA therefore remains a hurdle for proportionate law-making.

Adopting a risk-based approach to identify VLOPs would have been more appropriate to address the problems at hand. The EUTA calls on EU decision-makers to use the opportunity of the trilogues to further refine the obligations: it is necessary given that any platform surpassing 45 million users in Europe will fall into the VLOP category regardless of whether they create systemic risks to society. The EUTA suggests:

The European Tech Industry needs time for implementation

A) 18 months implementation deadline (art. 74): Given the prescriptive, detailed nature of the text, compliance with the DSA will be an arduous task for all digital actors, big or small. Compliance within 6 months is simply not feasible. The EUTA therefore supports the Council's decision to provide for an implementation deadline of 18 months. It is especially important for obligations requiring engineering adaptation.

The DSA should not amend the framework around data established by the GDPR and its guidance

B) Address dark patterns in other EU pieces of legislation, delete from DSA (art. 13a (new) and article 24.1.a (new), EP text):

The European Parliament proposal on dark patterns targets legitimate concerns over certain unfair or misleading business practices. However these concerns are relevant for all websites, and not only intermediaries targeted in DSA and should therefore be addressed through the Unfair Commercial Practices Directive or the GDPR, following an evaluation of potential existing gaps in EU legislation.

As drafted, these amendments would add great, unnecessary complexity. They go beyond the GDPR and contradict the existing guidance of Data Protection Authorities under the GDPR, in a framework already characterised by national divergence. It can only result in further fragmentation of the implementation of the GDPR and would create competition and regulatory distorsions among digital actors

For example, at article 24.1.a (new), transforming the concept of easily "withdrawing" consent in GDPR into easily "refusing" consent in the DSA is simply incoherent with the GDPR and its guidance. Similarly, the proposed obligation that recipients refusing consent or withdrawing consent should be given other fair and reasonable options to access the online platform is also inconsistent with the existing legal framework. These additional obligations go beyond what is required under GDPR and could have wide-ranging consequences for free digital services that rely on advertising to exist.

Today, the EUTA asks for a realistic approach: In order to align the DSA with existing legislation such as the GDPR and to preserve equality between online actors, we ask to reject these amendments. Principles already established in the GDPR and applied to all actors, are best reiterated in recitals, if necessary. This preserves the coherent, effective implementation of existing rules, through European and national guidance. Should modifications be needed, an evaluation by the European Commission could identify existing problems and gaps.

C) Ban on targeted advertising for minors or using sensitive data to be rejected from articles, but expressed in a recital (art. 24.1.b (new), EP):

The question of behavioural advertising to minors is complex and we recognise there are legitimate concerns in this area. However, a more balanced approach is needed than what has been proposed by the Parliament. A broad ban on advertising to anyone under 18 would negatively affect free digital services that younger audiences enjoy. This type of prohibitions also seems to go well beyond the intended scope of the DSA. We recommend it be removed from Article 24, and that any concerns from the Parliament be expressed in a Recital.

Obligations on the traceability of traders or information to consumers should be practical

D) Traceability of traders, no publication of email address & collection of bank details to be waived in specific cases (art. 22): The obligation to publish the email address of the trader on the product listing page will encourage free riding. In practice, it means a consumer could contact the trader, request a cheaper price and circumvent the platform. This is hugely problematic as it goes against the natural business interest of running a platform.

It will also confuse the consumer relationship, whenever the platform makes the choice to carry on customer management on behalf of traders. This is a feature actually welcomed by customers. On the contrary, providing the name and address of the trader increases trust in the trader and in the platform for the customer. Traceability can still be achieved by provision of all contact information at the request of authorities, while users can often communicate with sellers through channels provided by the platforms.

Similarly, the requirement to demand bank or payment account details is problematic for those online marketplaces that do not offer transactions. In particular, classifieds marketplaces do not have this information - and do not need this information - as payment for second-hand products often happen outside the platform. In light of the data minimisation principle in the GDPR, we think that this requirement should be lifted in such cases.

KYBC obligations in general (art. 22): Generally, the EUTA calls on legislators to adopt a practical approach to KYBC obligations. This will make implementation more effective.

E) Obligation to inform consumers about illegal products or services to apply to traders, and at last resort to platforms (article 22a (new), especially paragraph 1.b and 1.c (new), EP

- The responsibility to inform consumers about illegal products or services should primarily lie with the trader, and platforms should be the “last resort”. In turn, platforms should make best efforts to support traders in this information responsibility, unless the customer care is undertaken by the platform directly. The EUTA calls for a clarification of these responsibilities in the article.

- One practical difficulty for platforms lies in assessing what is an illegal product or service per se and with full legal certainty..
- In addition, the EUTA believes it is not desirable to have different systems or interfaces in place for keeping track of illegal products or services. We suggest making use of existing databases, such as RAPEX (in the future Safety Gate).
- Generally, the EUTA believes the original Commission proposal offered more clarity, with a view to effective implementation by all types of actors.

VLOP obligations will apply to very different companies, flexibility is necessary. The definition of active recipients of the service needs to take customers into account for e-commerce

F) The DSA should define active recipients of the service based on transactions for e-commerce actors (art. 25)

The EUTA urges the Parliament and the Council to clarify in the DSA that transactions - instead of website or app visitors - are the most relevant and accurate metric for accurately calculating the number of "active recipients of the service" for e-commerce, classifieds and all transaction-based platforms. **Technical details could be addressed in a delegated act.**

A definition based on "visitors" only will broaden the scope of application of VLOP obligations to much smaller e-commerce actors which are - by nature - not "Very Large Online Platforms" and do not cause a systemic risk.

For coherence, definitions in the DMA and DSA should be aligned - so that specific types of business models, including e-commerce, are appropriately reflected.

G) Recommender systems (Article 24a (new) in Parliament, Article 29 in Council and Parliament)

Recommender systems are the basis for any presentation of content online. They are crucial to the experience we provide to our customers, and hence crucial to running our businesses.

It is of paramount importance that the final text on recommender systems is clear and provides technical flexibility for different services to implement the obligations in a way that makes sense for their user experience. The rules should also not be overly prescriptive or crafted with specific business models or user interfaces in mind. In particular:

- The detailed list of parameters introduced by the Parliament (Art.24a) should be deleted. Some elements in this list, for example the obligations to disclose the relative importance of the parameters, are not technically feasible, if only because they can change constantly. The Council's text provides the appropriate level of detail for this obligation, knowing it will apply to many different types of businesses.
- We support the Parliament's clarification that transparency requirements do not prejudice rules on protection of trade secrets and IP rights. This recognises the central importance of these systems to the success of businesses and provides legal certainty.
- The Parliament provisions concerning the opt-out obligation in Art.24a and Art.29 contain some repetition that could create confusion for implementation. Specifically, the EP's requirement to provide "an easily accessible functionality on their online interface allowing the recipient of the service to select and to modify at any time their preferred option for each of the recommender systems that determines the relative order of information presented to them" already appears in Art.24a.3 and should therefore be deleted from Art.29.1.

H) Other points:

- **Stay-down obligations**: Stay-down obligations would have been hard to implement in practice, while possibly leading to general monitoring. The EUTA supports not including these obligations in the DSA, against the backdrop of strict rules on addressing notices or running KYBC checks on traders in the DSA or new updated product safety obligations in the GPSR.

- **Limited Liability (article 5.3):** Limited liability is a cornerstone of the current e-commerce direction. The EUTA welcomes that this principle is upheld in the DSA. It was critical for the continued growth of digital actors.

- **Priority of consent in context over browser level consent (article 13a(1)) :** Prohibiting companies to ask consent to individuals if browsers' technical settings have been set up to refuse consent by default may have a detrimental effect on individuals' access to products and services offered "in context" when browsing the Internet. In addition, this would enable browser providers (who will likely fall under the definition of gatekeeper under the DMA) to define and manage consent of individuals in a way that would most benefit themselves and the promotion of their own services, thereby harming competition and undermining the policy objectives of the DMA.

- **Trusted flaggers (art. 19, Council):** The EUTA supports the creation of "trusted flaggers", whereby specific organisations can have priority to request that illegal content, products or services be taken down. These organisations will have a role of pre-screening the legitimacy of notices. Such notices will still require investigation by digital platforms and an obligation of means (ie. investigation, information of the trusted flagger) is therefore most relevant.

- **Compliance by Design, Article 24.b (new), Council:** The EUTA suggests making a reference in this article to related existing rules, such as the GDPR, texts in the New Deal for Consumers and the Platform-to-Business regulation. The EUTA generally supports that platforms should make efforts to help traders fulfil their obligations.

- **Moderate approach to data access provisions (article 31.2)**: The EUTA believes extending data access rights to "not-for-profit bodies, organisations or associations", as suggested by the European Parliament, would provide unjustified rights to accessing business-relevant or confidential data - and any data - simply because a platform reaches a certain size. This is disproportionate and untargeted. The EUTA calls to support the more balanced approach of the Council.

- In addition, it is worth noting that article 31 is very much drafted with social media platforms in mind, without due consideration to its effect on other types of Very Large Online Platforms. For this reason, the EUTA had argued a risk-based approach to VLOPs would have been more appropriate.

Kristin Skogen Lund

Kristin Skogen Lund

President of the EUTA

Magdalena Piech

Magdelena Piech

Chair of the EUTA

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