

Digital Services Act Position Paper

March 2021



Rue de Trèves 45,
1040 Brussels, Belgium

 +32 2 792 4750

 www.ACTonline.org

 @ACTonline

 /ACTonline.org

Executive Summary

- The Digital Services Act should ensure better procedural safeguards for the smallest online platforms.
- The obligation that platforms of all sizes implement automated notice-and-action mechanisms presents a prohibitive and unnecessary burden for small businesses.
- The estimated cost to obtain legal representation in the European Union (EU) is too high for small businesses, and requirements should be adjusted to preserve an open, accessible, and competitive EU app market. The DSA should include further safeguards to ensure all actors can meet this obligation.
- The frequent reassessment of very large online platforms and lack of clarity around the process threatens legal certainty in the Digital Single Market. A cautious approach is necessary to ensure that these reviews do not have a chilling effect on innovation and growth.
- Establishing additional obligations targeting platforms largely based on their size risks disincentivizing growth. Small and larger platforms may decide not to scale up to avoid additional requirements and thus will not challenge existing dominant actors.

I/ Introduction

ACT | The App Association (“App Association”) welcomes the European Commission’s recent proposal on the Digital Services Act (DSA). The App Association represents thousands of small software application developers and connected device companies globally that create apps for mobile devices and enterprise systems. Today, the ecosystem the App Association represents—which we call the app economy—is valued at approximately 830 € billion and is responsible for millions of European jobs.¹ Alongside the world’s rapid embrace of mobile technology, our members create innovative hardware and software solutions that power the growth of the internet of things across all sectors of the economy.

The APP Economy in the EU



1,7 M JOBS

The app economy created between 1.3 million and 1.7 million jobs throughout all sectors



€187 BN

The app economy generated €187 billion in direct and indirect revenues in the EU



0.4% GDP

In terms of value-added, the app economy constituted 0.4% of European GDP in 2019

¹ The App Economy in the European Union A review of the mobile app market and its contribution to the European Economy (2020), Deloitte Finance <https://actonline.org/wp-content/uploads/Deloitte-The-App-Economy-in-the-EU-2020.pdf>

We support the Commission's desire to strengthen the Single Market for Digital Services. Increasing the responsibilities of larger platforms may create better safeguards for the security of consumers. It may also help to maintain an open and competitive market. For smaller actors to benefit, new regulation must preserve the existing trust in the online platform economy. The dynamic challenges of the digital age must be met with new co-regulatory models, as well as thoughtful, targeted, and proportionate legislation. We commend the overarching ambitions of the European Commission in this endeavour. We also welcome new voluntary, industry-led initiatives that aim to reduce the spread of illegal content.

However, there are features in the DSA proposal that threaten the currently well-functioning aspects of the online platform economy. In the app ecosystem, low entry barriers make it easy for app developers of all sizes to reach a global consumer base. Additionally, the app store review processes protect consumers from most illegal content and enable small developers to enjoy the same level of trust from which bigger brands benefit. Rather than enriching this ecosystem, some articles included in the DSA risk creating new harms.

In this position paper, the App Association outlines our impression of the proposed DSA and breaks down its most troubling aspects. At several points throughout this paper and in the succeeding annex we offer concrete recommendations to improve specific articles of the DSA. Although we are grateful for the exemptions provided for small and micro-enterprises, we remain disappointed by the lack of procedural safeguards in cases where smaller actors will face new obligations. Without proper safeguards in place, the Commission risks raising entry barriers. Building new barriers for start-ups and other innovative actors will hurt those who would otherwise have the capacity to grow to challenge larger players. We advocate for developing this text with the smallest players at the centre rather than as an afterthought. The European Commission must ensure that all players can unlock the advantages of the online platform economy instead of locking them out of it.

II/ Ensure proportionate expectations in the DSA

The App Association agrees with the European Commission's goal of making the digital environment safer for consumers. We are particularly grateful for the enhanced clarity that the Commission provided concerning the liability exemption from the E-Commerce Directive. We also support the aim to bring greater transparency to the Digital Single Market, particularly concerning dealings with very large online platforms. However, we have concerns that some aspects of the DSA proposal may not fully align with the principle of proportionality. Some of the proposed provisions may unintentionally erect new barriers that would disadvantage small and micro-enterprises.

a. Notice-and-action mechanisms

The obligation that even the smallest actors put in place notice-and-action mechanisms may come at an unreasonable cost, especially for new market entrants. The European Commission estimates that these new mechanisms will cost at least 1500 € to put in place.² While this amount may be reasonable for larger actors, it may be prohibitive for smaller hosting providers.

Moreover, the Commission fails to estimate the additional administrative burden on small or micro-enterprises if the DSA mandates the use of such systems. Responding to notices promptly, drafting and sharing statements of reasons, and publishing all decisions and statements in a publicly accessible database all require significant time. Even if a fully automated system managed all these processes, it would still require human oversight to ensure that the mechanism functions well. These additional obligations will steal time and money away from entrepreneurs, especially micro-enterprises, which only have a handful of employees and need all their resources to innovate and to survive in a dynamic and competitive digital landscape.

An App Association member recently recounted that in the late 1990s, a software company had to spend about 8 € million just to create a product and build a distribution network. Today, free or inexpensive cloud services, improved internet connectivity, software tools, and app stores' built-in services have allowed developers to build and publish an app for as little as €1000. Turning your app into a business can now be funded with a check of just 75,000 €. The lower overhead costs for developers in the app ecosystem have been instrumental to its exponential growth. The costs of implementing and maintaining notice-and-action mechanisms and retaining legal representation for non-EU businesses, as suggested in the DSA proposal, will re-introduce significant financial barriers for developers and, in particular, risk impeding market access



The App Association agrees that it is crucially important to protect consumers from illegal content and to inform them in cases where there may be a compromise of freedom of expression. However, safeguards must exist to protect small businesses from the unreasonable cost and liabilities of these new obligations. We recommend that the Commission consider exempting small and micro-enterprises from the requirement to put in place these automated systems. Alternatively, we recommend that the DSA include specific safeguards for small actors. These could include subsidised costs or more flexible response and reporting requirements.

² <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12417-Digital-Services-Act-deepening-the-Internal-Market-and-clarifying-responsibilities-for-digital-services>, Impact assessment report – SWD (2020)348, part 2/2, p. 51

b. Legal representatives

The App Association appreciates the rationale for having a duly appointed legal representative located inside the European Union to respond to requests for information from Digital Services Coordinators, other national judicial and administrative authorities, and the European Commission. However, the Commission estimates that the cost of maintaining a legal representative will be at least 50 000 € per annum.³ If a 1500 € implementation fee is already costly for a company, then an annual expense of 50 000 € is undeniably prohibitive. We would also like to clarify that lawmakers should not assume that app stores will act as the legal representatives for developers, since most developers use multiple distribution channels like other app stores and web applications. This scenario would only benefit larger developers that can afford to rely less on the benefits of app stores, while making smaller businesses more dependent on the services larger app stores provide and disadvantaging web app developers.

Without appropriate safeguards, the obligation to establish a legal representative in the EU would likely prevent many non-EU companies from conducting business in the Digital Single Market. This requirement will especially disadvantage small and micro-enterprises located in markets with huge growth potentials, such as Africa or neighbouring European countries. If the legal representative obligation keeps non-EU businesses out of the Digital Single Market, its competitiveness and overall attractiveness as a place to scale-up and expand a business will decrease.

To keep the Digital Single Market as open and globally competitive as possible, the App Association strongly advises against these proposed requirements. The suggested obligations will shrink the market and prevent innovative third-country companies from introducing services that could improve the lives of consumers in the EU. We recommend that the European institutions consider exempting small and micro-enterprises from the obligation to establish a legal representative in the EU or allowing them to use their point of contact function as their legal representative in the EU. Alternatively, we recommend that the Commission facilitate and coordinate the pooling of costs related to installing a legal representative.

³<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12417-Digital-Services-Act-deepening-the-Internal-Market-and-clarifying-responsibilities-for-digital-services>, Impact assessment report – SWD (2020)348, part 2/2, p. 52



A British App Association member developed a globally available gym planning app. The app primarily targets English-speaking countries but has been downloaded in 24 EU member states with the majority of its European users located in Ireland. In 2020, this new app generated over €110.000 in global revenues, €30.000 of which came from the EU. Under the proposed DSA, this non-EU app developer would need to establish legal representation in one of the EU Member States to continue providing its services to EU citizens or be subject to 27 different jurisdictions. The European Commission estimates such representation to cost 50.000 € a year. In this case, the cost of establishing a legal representation in the EU would outweigh our members' revenues generated in the region. Therefore, the DSA could force this app developer to stop providing its services in the EU to the detriment of European users.

Further, we suggest developing new safeguards for small and micro-enterprises that fail to appoint a legal representative in the EU, including more flexible response requirements as well as translation or consulting services. Our members operate in many different Member States, and they do not have the resources to comply with processing requests from all 27 states within a limited timeframe. Similarly, it is also unclear how the country-of-origin principle will be preserved in situations where an enterprise fails to appoint a legal representative. In general, it is not clear how the new oversight enforcement system interacts with the country-of-origin principle, or what liability regime applies if content law is infringed in one Member State, but the legal representative is based in another Member State whose law is not infringed. Although the DSA preserves the main principles of the E-Commerce Directive, we urge the Commission to clarify these aspects.

III/ Preserve legal certainty in the Digital Single Market

The DSA allows the Commission to use delegated acts to update the operational threshold for very large online platforms at frequent intervals. The App Association understands that such provisions seek to account for the dynamism of the online platform economy. However, we are concerned that a regularly shifting threshold may decrease legal certainty in the Digital Single Market. Subjecting platforms to additional obligations largely based on their size risks disincentivizing growth. This negative effect could impact small platforms with growth ambitions in particular. As medium-sized enterprises are not exempt from any of the obligations in the DSA, small platforms may refrain from scaling even in early growth stages. Small platforms may decide not to scale up to avoid additional requirements and compliance costs. New administrative burdens create additional overhead and move the focus and resources away from innovation and marketing. This reluctance to scale-up could lead to a chilling effect on innovation and further entrench the positions of very large platforms. Additionally, platforms on the threshold of becoming very large could also cause investor hesitation and thus reduce new innovative companies' ability to challenge existing dominant actors. Transitioning enterprises of any size heavily rely on the legal and economic certainty

provided by well-defined legislation and a stable market to prepare to meet additional obligations. The risk of their inclusion within the scope of shifting rules may cause significant damage to their growth ambitions.

Considering these disincentives to growth, the European Commission should at least grant more time for recently designated medium-sized platforms to adapt to new obligations or implement a mechanism that allows them to comply with the obligations on a sliding scale, e.g., one obligation in their first year as a medium-sized platform, two in their second year. Similarly, small and micro-enterprises need a longer period of time to adapt to the DSA requirements, particularly if they have to implement a notice-and-action mechanism and institute a legal representative. A more reasonable time horizon for compliance will not only decrease this risk but also help to increase legal certainty in the Digital Single Market.

The DSA only breaks down obligations for online intermediary services by size. Alternatively, the European Commission could consider a company's risk exposure. Platforms' business models differ fundamentally, and, therefore, they experience different levels of exposure to some of the harms the Commission seeks to address. For example, hospitality platforms like Airbnb or retail platforms like Vinted are not at risk for the same amount of illegal content or misinformation as a social media platform. Because of the nature of their business, this is true for app stores and developers as well, and yet the DSA would subject them to all the exact same content regulation obligations for something that is not an issue in their business model. The Commission must recognise the full nuance of the platform economy to make legislation that benefits all actors. The breadth of these obligations further serves as a disincentive for growth for all kinds of small businesses that may scale-up to become medium-sized online intermediary service providers.

IV/ Conclusion

The App Association appreciates that the European Commission has considered the capabilities and limitations of small and micro-enterprises in the context of the DSA. We support the overall initiative to enhance the due diligence obligations of online platforms and create a safer online environment for consumers. Nonetheless, we are concerned that certain aspects of this proposal risk creating new harms.

The App Association would welcome the opportunity to lend its support as the DSA passes through the ordinary legislative process. We stand ready to provide further insights and share our members' experiences with the functioning, the benefits, and the existing problems of the online platform economy. We encourage the European institutions to design a regulation with strong safeguards for the smallest actors. The DSA must protect and enhance the innovation potential of small app developers and others who design the software that improves consumers' lives every day.

V/ Annex: Improvement targets in the DSA

Notice and action mechanisms (Article 14)

Statement of reasons (Article 15)

The European institutions could improve the above articles by including proper tools and/or safeguards to protect small businesses from financial and administrative burdens. We recommend:

1. Exempting small and micro-enterprises from the obligation to implement automated notice-and-action systems
2. Alternatively, including specific safeguards for small actors (e.g., subsidized costs or more flexible response and reporting requirements)

Points of contact (Article 10)

Legal representatives (Article 11)

Jurisdiction (Article 40)

The Commission could improve the above articles by increasing the ease with which a small or micro-enterprise may establish legal representation in the EU or by removing the obligation entirely. We recommend:

1. Permitting small and micro-enterprises to use their point of contact as a legal representative in the EU or exempting them from the obligation
2. Alternatively, including specific actions in the text to reduce the cost of legal representation for small and micro-enterprises
3. Additionally, establishing new safeguards for small and micro-enterprises that fail to appoint a legal representative in the EU (e.g., more flexible response requirements, translation, or consulting services)

Exclusion for micro and small enterprises (Article 16)

Very large online platforms (Article 25)

Entry into force and application (Article 74)

When designating very large online platforms, the DSA must better balance efficiency with efficacy. Transitioning platforms require legal and economic certainty in a stable market to have the confidence to grow. We recommend:

1. Allowing sufficient time to fully analyse the predicted effect that each new designation of a very large online platform will have on the entire platform economy before that enterprise is subject to additional obligations
2. Allowing sufficient time to monitor the actual effect the designation of each very large online platform has had on the economy before considering further changes to obligations
3. Allowing sufficient time for the entire market to adapt to new obligations before the DSA becomes fully applicable

4. Limiting or regularly scheduling the frequency that the list of designated very large online platforms may be updated
5. Considering a platform's risk exposure in addition to its size when introducing new mandatory obligations
6. Consulting all stakeholders during the designation process of very large online platforms



Rue de Trèves 45,
1040 Brussels, Belgium

+32 2 792 4750

www.ACTonline.org

@ACTonline

/ACTonline.org