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EU's Digital Services Reform

Herzog's Guide to Complying with the Digital Services Act



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The EU **digital services regulatory reform** is approaching. The [EU Digital Services Act](#) (the "DSA"), which will start to apply on 17 February 2024, will require businesses offering **digital services** in the European single market to comply with **groundbreaking rules and responsibilities**. In particular, the new requirements under the DSA will impose **content moderation** requirements, **transparency** and **reporting** obligations, protection from **online harms**, and **internal governance** and **accountability** standards.

The DSA would **completely overhaul the EU regulatory landscape for the operation of virtually any digital service**, including **hosting services, social networks, search engines, online marketplaces, communication services, media & content platforms**, as well as other **online intermediaries**.

The DSA is a part of wider legislative trend in the EU aimed at creating a safer digital space, safeguarding the fundamental rights of users and establishing a level playing field for businesses through uniform rules and standards, including the [Digital Markets Act](#), which will impose additional obligations and responsibilities on online "gatekeepers".

While the majority of the obligations under the DSA will into force in 2024, [online platforms are already obligated to some requirements, including the obligation to publish the number of monthly active users](#) in the EU since 17 February 2023.

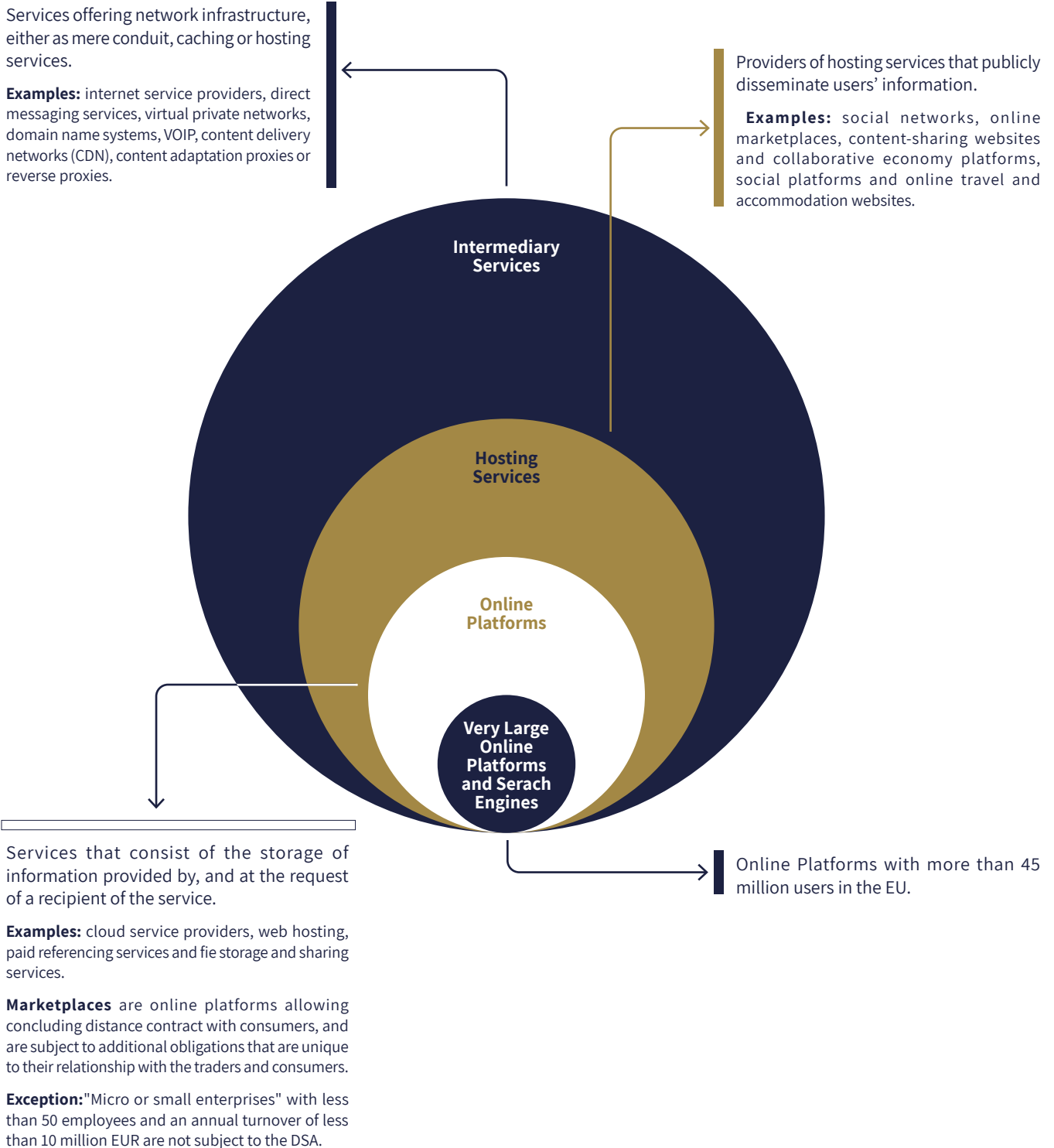
The DSA would apply not only to business established in the EU, but also to any business **offering services in the EU**, regardless of their place of operation. **Failure to comply with the DSA can result with substantial fines, up to 6% of the annual worldwide turnover of the business** as well as "periodic penalty payments" of up to 5% of average daily turnover for ongoing infringements.

To assist with understanding and navigating between the novel requirements under the DSA, we are pleased to share **Herzog's DSA Guide**, providing explanation about its scope, practical takeaways and insights.



WHICH BUSINESSES ARE SUBJECT TO THE DSA?

Under the DSA, the obligations of different online players vary, matching their role, size and impact in the online ecosystem, as reflected in the following diagram:





KEY OBLIGATIONS AND PRACTICAL TAKEAWAYS UNDER THE DSA

The DSA imposed various obligations, depending on the type of service you provide to your users. These responsibilities include, among others, **transparency** requirements; **reporting** and **monitoring of illegal content**; providing users with **redress mechanisms**; and many **additional requirements** that evolve based on the type of covered entity.

A comprehensive mapping of all obligations & responsibilities under the DSA is available [here](#).

Below we have included **practical recommendations** and **takeaways** for businesses, depending on the different roles (not including the unique case of "very large online platforms"). The responsibilities are categorized based on the following key:



Product / Technology



**Internal Policies
& Agreements**



**External Policies
& Reporting**



**Governance &
Accountability**



INTERMEDIARY SERVICES

If your business is an **intermediary service** (such as an internet service provider, direct messaging services, virtual private networks, domain name systems, etc.), the following key requirements apply:

Legal representative



Designate a point of contact (e.g. compliance officer) and provide the contact information of such person in an accessible manner (e.g. on user-facing policies).



Appoint an EU representative and communicate its details to the competent supervisory authority.

Terms and conditions



Publish and update Terms and Conditions, including explanation on content restrictions, the company's content moderation policy and complaint handling process; notify users of any significant changes.



Act in a diligent, objective and proportionate manner in applying and enforcing any content restrictions.

Transparency & reporting obligations



Adopt internal policy and controls addressing complaint handling and escalation process, including recording of complaints, investigative measures employed, types of restrictions employed (e.g. removal of content or restrict its visibility, as well as suspension, termination or restrictions of accounts, services, or ability to monetize information), communications with users, etc.



Adopt internal policy addressing cooperation with law enforcement bodies, including recording of notices/orders (and legal basis thereof), actions taken, etc.



Adopt internal policy and controls addressing content moderation, including the nature and level of content moderation and measures taken (e.g. human review, algorithmic decision-making tools, etc.) and remediation measures (e.g. suspension or termination of accounts, content removal, disabling of access to services, etc.).






Publish Transparency & Content Moderation reports on an annual basis, including the number of notices/complaints received from law enforcement bodies or other third parties, number of active users, and explanation on restrictions taken (removal of content, suspension of users, etc.) and measures taken (including use of automated tools, training, etc.).




HOSTING SERVICE

If your business is defined as a **hosting service** (such as cloud service providers, web hosting, paid referencing services, etc.), then in addition to the requirements applicable to any intermediary services, the following key requirements also apply:

Notice and action

-  Implement user-friendly electronic mechanism for notification/reporting of illegal content.
-  Adopt internal policy and controls addressing the processing of notices regarding illegal content and reporting thereof, including the information required for the purpose of investigating notices, issuance of warnings, remediation measures, communications with users and redresses mechanism.
-  Publish, on a case-by-case basis, a statement of the reasons for any restrictions adopted in response to notices regarding illegal or non-compliant content, as well as including additional information on said content (legal or contractual grounds, redress mechanism, etc.).

Suspicious Criminal Activity






-  Report to competent law enforcement or judicial authorities, on a case by case basis, any incidents indicating criminal offence involving the threat to life or safety of individuals.






ONLINE PLATFORMS

If your business is an **online platform** (such as social networks, search engines, online marketplaces, content-sharing websites and collaborative economy platforms, etc.), **then in addition to the requirements applicable to hosting services**, the following key requirements apply:

Complaint handling system and out-of-court settlement


-  Implement user-friendly electronic complaint handling system, allowing users to lodge complaints against decisions taken (e.g. removal of content or restrict its visibility, as well as suspension, termination or restrictions of accounts, services, or ability to monetize information), for at least 6 months following the decision.
-  Handle complaints in a timely, non-discriminatory, diligent and non-arbitrary manner, and inform complainants without delay of the reasoned decision, including out-of-court dispute settlements and redress mechanisms.
-  Adopt internal policy and controls addressing the complaint handling system, including appointment of qualified staff to oversee complaints, response time, communications and response templates for users, referral to redress mechanisms (e.g. out-of-court dispute settlement), etc.
-  Identify certified out-of-court dispute settlement mechanism.
-  Publish on an online interface clear and user-friendly information about access to out-of-court dispute settlement.

Measures and actions against misuse




-  Enhance internal policy concerning reporting of illegal content by "trusted flaggers" including identifying and employing trusted flaggers, treating notices with priority and communications with coordinators.
-  Adopt internal policy to identify abusive users, given relevant factors (e.g. numbers of items of manifestly illegal content or manifestly unfounded notices or complaints, proportion thereof, gravity of misuse, etc).
-  Implement automated controls to suspend abusive users.




Transparency & reporting obligations

-  Update terms and conditions to include policy regarding misuse, including examples of the facts and circumstances that are taken into account when assessing whether certain behavior constitutes misuse and the duration of the suspension.
-  Publish additional information in the Transparency & Content Moderation reports, including the number of disputes submitted to the out-of-court dispute settlement bodies, the outcomes thereof and the media time needed for completing the dispute procedures, as well as the number of suspensions imposed, distinguishing between different parameters.
-  Publish the number of average monthly active users in the European Single Market by February 17th, 2023, and each six months thereafter.
-  Respond to inquiries and requests for information from Digital Services Coordinators.
-  Submit to the Commission statement of the reasons for any restrictions adopted in response to notices regarding illegal or non-compliant content.

Online interface design and organization







-  Amend design in online interface that may distort or impair the ability of the customers to make free and informed decisions (such as giving more prominence, repeated or intrusive "pop-ups", etc.), in accordance with applicable guidelines.
-  Adopt internal guidelines for developers and UX/UI designers to ensure that manipulative methods are not being used when developing products/guidelines.
-  Train and educate your relevant stakeholders (e.g., developers, marketing or monetization teams) to ensure they are aware to the requirement of the DSA to avoid using manipulative methods in your UX/UI.

Protection of minors

-  Put in place internal policies with regards to ensuring a high level of privacy, safety and security of minors, in accordance with relevant guidelines.



Advertising and recommender systems




-  Adopt internal policies for advertising practices, including avoiding the use of profiling, use of sensitive information, user choice and protection of minors.
-  Update agreements with advertising platforms and publishers.
-  Implement a functionality that will inform users, in real-time, of the nature and source of advertisements, as well as targeting parameters used and exercising choice.
-  Implement a functionality that will allow users to declare whether their content they provide includes commercial communications, which shall trigger prominent marking.
-  To the extent you utilize a recommender system, update your terms and conditions and disclose the main parameters used as well as additional information (e.g. criteria, relative importance, etc.).
-  To the extent you utilize a recommender system, implement an easily accessible functionality to allow users to select and modify the system's parameters.





MARKETPLACES

If your business is an online platform that allows consumers to conclude **distance contract** (such as **online marketplaces**), **then in addition to the requirements applicable to online platforms**, the following key requirements apply:



Collection and monitoring of traders' information

-  Obtain and verify information from existing and future traders, including contact information.
-  Put in place an internal procedure for vetting traders, including collection of information, verifying identity and use of databases or resources to assess reliability and completeness, investigation and suspension of traders, data retention and complaints handling.
-  Publish clear and accessible information on the traders, products or services promoted, including identifying the traders and labeling or marking products pursuant to product safety or compliance rules.

Compliance by design

-  Ensure you comply with copyrights legal frameworks to utilize the safe-harbor protection when presenting your traders logos and symbols on your platforms.
-  Implement a routine examination of the products offered by traders, including random checks, to ensure compliance

Information on illegal products

-  Inform consumers or publish information, on a case-by-case basis, regarding illegal or non-compliant products or services, the identity of the trader and any relevant means of redress.
-  Put in place an internal procedure for investigating complaints regarding illegal products, informing consumers of illegal products and redress mechanisms.



WHAT ARE THE NEXT STEPS?

All businesses offering digital services in the EU should consider the following steps in order to achieve compliance with the requirements of the DSA:

1. Assess the application of the DSA: businesses should assess the scope of applicable requirements under the DSA, in light of their products and services, as well as their role, size and impact in the online ecosystem.
2. Gap Analysis: businesses should conduct a gap analysis of the newly introduced requirements under the DSA, against the business' existing practices and controls, in order to evaluate whether they comply with the news rules and standards and identify discrepancies.
3. Remediation Plan: businesses should carry out a risk-based remediation plan, including:
 - Reviewing and amending your existing terms of use to ensure they comply with the requirements of the DSA;
 - Adopting a clear policy regarding publishing a periodical content moderation report on your service;
 - Establishing internal governance mechanisms, such as reporting procedures, internal compliant handling system and policy, appointing stakeholders, implement and create content moderation practices, etc.
 - Maintaining internal records of all complaints, content removal or account suspensions; and
 - Entering into agreements with third-part vendors that will assist you to comply with the requirements of the DSA.
 - Training your employees to be familiar with the new requirements of the DSA and with the measures you will implement to meet these requirements.
4. Ongoing Compliance and Audits: business should reevaluate their internal accountability and governance measures to make sure their compliance efforts meet industry standards on an ongoing basis.

Feel free to contact us if you have any questions regarding the new law and its potential effects on your company's compliance efforts.



Article	Obligation	Applicability				
		Intermediary Services	Hosting Services	Online Platforms	Very Large Online Platforms & Search Engines	Marketplaces
General Obligations						
Art. 11	Provide Point of Contact Information	✓	✓	✓	✓	✓
Art. 13	Designate a representative within the EU	✓	✓	✓	✓	✓
Art. 14	Publish terms and conditions	✓	✓	✓	✓	✓
Art. 15	Publish public content moderation report	✓	✓	✓	✓	✓
Hosting Services Obligations						
Art. 16	Implement notification mechanism on illegal content		✓	✓	✓	✓
Art. 17	Publish a public statement of reasons ("Community Guidelines")		✓	✓	✓	✓
Art. 18	Notification of suspicious criminal activity to law enforcement		✓	✓	✓	✓
Online Platforms Obligations						
Art. 20	Internal complaint-handling system			✓	✓	✓
Art. 21	Out-of-court dispute settlement mechanism			✓	✓	✓
Art. 22	Trusted flaggers			✓	✓	✓
Art. 23	Measures against misuse (suspension of users)			✓	✓	✓
Art. 24	Increased diligence in the content moderation reports			✓	✓	✓
Art. 25	Avoid deceptive/manipulative UX/UI			✓	✓	✓
Art. 26	Transparency regarding advertising			✓	✓	✓
Art. 27	Recommender system transparency			✓	✓	✓
Art. 28	Implement increased protection on minors			✓	✓	✓
Very Large Online Platforms and Search Engines Obligations						
Art. 34	Conduct risk assessments				✓	✓
Art. 35	Adopt risk mitigation measures				✓	✓
Art. 36	Create a crisis response mechanism				✓	✓
Art. 37	Perform independent audits				✓	✓
Art. 38	Provide at least one non-profiling based option within the recommender system				✓	✓
Art. 39	Adhere to additional transparency requirements on advertising				✓	✓
Art. 40	Provide information to the Digital Services Coordinator				✓	✓
Art. 41	Establish a compliance function				✓	✓
Art. 42	Publish content moderation reports				✓	✓
Art. 43	Pay a supervisory fee				✓	✓
Marketplaces Obligations						
Art. 30	Obtain personal information from new and existing traders					✓
Art. 31	Implement compliance by design; Assess the legality of the products randomly					✓
Art. 32	Notify consumers if the products are illegal					✓



HERZOG'S TECHNOLOGY & ECOMMERCE REGULATION DEPARTMENT

Herzog's [Technology & eCommerce Regulation Department](#) is a recognized market leader in its field. The team is led by domain experts who possess a unique set of vital, **interdisciplinary** and **global** regulatory advisory skills, and are uniquely positioned to advise a range of clients, including leading multinational technology companies as well as start-ups and disruptive technologies vendors, on applicable regulatory and compliance considerations in numerous technological areas.

We understand that the **regulatory exposure** and scope of required **attention** of almost any company operating in the **digital and technological sphere** are much wider than one specific jurisdiction or legal discipline. As our clients are often on the forefront of this ever-evolving landscape, we further understand the impact of industry trends and compliance demands on our clients' businesses. eCommerce, digital advertising, content and marketing have all become integral to almost every company's business model these days. Advising on these matters requires a high degree of know-how and expertise in order to navigate interdisciplinary and often conflicting requirements of the law, platforms' rules and guidelines, along with technological considerations and our clients' commercial needs.

Our team possesses in-depth knowledge of the increasing volume of regulations, enforcement actions, legislative and industry trends in a **myriad of jurisdictions, digital platforms** and leading **self-regulatory** guidelines. This enables our team to offer **practical, holistic** and **comprehensive** solutions for complex situations often presented by innovative technologies and disruptive business solutions, providing "hands-on" support to our clients on the strategic, corporate and operational aspects of their business, with the aim of mitigating our clients' legal and business risks.

This document does not constitute an exhaustive legal opinion or regulatory overview of all applicable regulatory requirements regarding the topics addressed by it, but rather, only outlines the key issues arising from the regulatory requirements. Since we are not licensed to practice law outside of Israel, this document is intended to provide only a general background regarding this matter. This document should not be regarded as setting out binding legal advice, but rather a general overview which is based on our understanding of the practical interpretation of the applicable laws, regulations and industry guidelines.



Ariel Yosefi | Partner

Head of Technology & eCommerce Regulation
yosefia@herzoglaw.co.il



Ido Manor | Partner

Technology & eCommerce Regulation
manori@herzoglaw.co.il



Dan Shalev | Partner

Technology & eCommerce Regulation
shalevd@herzoglaw.co.il



Ruly Ber | Partner

Technology & eCommerce Regulation
berr@herzoglaw.co.il



Eden Lang | Associate

Technology & eCommerce Regulation
lange@herzoglaw.co.il



Dima Zalyalyeyev | Associate

Technology & eCommerce Regulation
zalyalyeyevd@herzoglaw.co.il



Or Noy | Associate

Technology & eCommerce Regulation
noyo@herzoglaw.co.il



On Dvori | Associate

Technology & eCommerce Regulation
dvorio@herzoglaw.co.il



Kevin David Gampel | Associate

Technology & eCommerce Regulation
gampelk@herzoglaw.co.il



Oded Kramer | Associate

Technology & eCommerce Regulation
kramero@herzoglaw.co.il



Liron Adar | Intern

Technology & eCommerce Regulation
adarl@herzoglaw.co.il



Mai Arlowski | Intern

Technology & eCommerce Regulation
arlowskim@herzoglaw.co.il



Kobi Plotkin | Intern

Technology & eCommerce Regulation
plotkiny@herzoglaw.co.il