

How could the Digital Services Act affect the digital economy in Germany?

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What is the Digital Services Act?

The European Commission is planning to update, clarify and harmonise the existing e-Commerce Directive (ECD). The new regulation, known as the Digital Services Act (DSA), will set the rules for trade in online services within the EU.¹ It has the potential to harmonise the single market for digital services, protect consumers and provide smaller businesses with legal clarity and a level playing field. However, if it creates imbalanced incentives, overextends the regulatory scope, or is unclear, the DSA could result in unintended consequences that harm businesses, consumers and wider society.

Scope: what is included?

The scope is expected to be wider than for the existing ECD, covering all digital services, including online platforms (e.g. social platforms and marketplaces), search engines, Internet service providers, cloud services, content delivery networks, domain name services, collaborative economy platforms, online advertising services, and services built on electronic contracts and distributed ledger technologies. It is likely to cover content, algorithms, data, and potentially business models. In addition, it may categorise services in scope on the basis of their market status—e.g. introducing a threshold based on the scale, scope, or reach of a service.

Intermediary liability and content moderation

Digital service providers in the EU are currently exempt from intermediary liability, as long as they have no knowledge of illegal content on their services. Policymakers are considering changing this. Proposed changes could range from extensive liability (meaning the provider must undertake moderation of all content and products offered), to obligations requiring certain processes be in place (such as notify-and-act mechanisms) in order for the provider to benefit from 'Safe Harbour' protection. Other proposals involve creating greater incentives for digital services to apply pro-active measures against illegal and harmful content (e.g. self- and co-regulatory moderation) while still exempting them from broad liability.

General monitoring

Until now there has been a 'no general monitoring obligation' on digital firms; however, the DSA could include changes to this. It may become mandatory to conduct upload checks and filtering, on top of due diligence obligations such as 'Know your business customer', as seen in financial services. Alternatively, there could be provisions governing algorithms for automated filtering technologies or mandatory external audits of such algorithms.

Country of origin principle

The ECD introduced this principle for selected areas of law. Where applicable, this means that EU digital services need only comply with the rules of the member state in which they are established. The DSA provides an opportunity to extend the scope of this principle to include consumer protection, commercial communications and contract law. This avoids EU digital services having to comply with 27 different legal regimes. However, digital services from outside the EU may face new regulation if the DSA extends the scope of the ECD to include services from third countries.

Introduction of a regulator

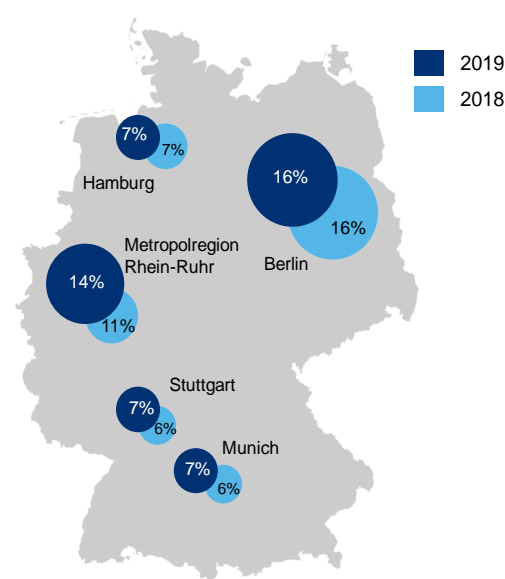
The DSA could introduce a spectrum of regulatory oversight: from an authority with wide-reaching powers to set ex ante regulation (e.g. mandatory audits of algorithms and codes of conduct or access to data), to a less strict system of rules covering transparency, guidance and oversight for service providers regarding adherence to their responsibility.

The importance of startups in Germany

In 2018, there were **70,000 startups in Germany**, up from 54,000 in 2016.¹ **Information and communication technology** is the largest sector, accounting for **30.2% of startups**.² The average German startup employs 17.2 people and plans to hire 9 more within a year.³

In 2019, in **Berlin, 1,958 tech startups** employed 78,000 people—**5.2% of total employment** in the city.⁴ Between 2017 and 2018, 12,000 new tech startup jobs were created in Berlin—an increase of 21%.⁵

Figure 1 Percentage of headquarters of startups by federal states and startup hotspots, 2018–19



Source: PWC (2019), 'Deutscher Startup Monitor 2019'.

Digital economy and platforms

The digital economy is important to businesses in Germany, both as a route to market and as a facilitator for new business models.

- **15% of turnover** of non-financial enterprises **came through e-commerce** channels in 2019.⁶
- In 2017, **the gig economy was estimated to account for 3.1% of employment**.⁷
- In 2017, **the collaborative economy was estimated to be worth €22.9bn**.⁸
- **48% of enterprises use social media—up from 33% in 2014**.⁹

Digital engagement

Millions of people across the country engage with platforms as both consumers and providers of content, goods, and services.

- **30m people are active on social media**, which is around 36% of the population.¹⁰
- In 2019, **81% of individuals ordered goods or services online—up from 71% in 2014**.¹¹
- In 2019, **22% of people used online peer-to-peer transactions for accommodation—up from 19% in 2017—and 3% used ride sharing—stable since 2017**.¹²

Sources:

- ¹ KfW Research (2019), 'KfW-Start-up-Report 2019: Zahl der Start-ups in Deutschland steigt weiter', Bank aus Verantwortung
- ² PWC (2019), 'Deutscher Startup Monitor 2019: mehr Mut, neue Wege'.
- ³ EU Startup Monitor (2018), 'European Startup Ecosystem Country Overviews', http://startupmonitor.eu/EUSM_Country-overviews.pdf
- ⁴ European Commission (2019), 'Labour market information: Germany – Berlin', <https://ec.europa.eu/eures/main.jsp?countryId=DE&acro=Imi&showRegion=true&lang=en&mode=text®ionId=DE0&nuts2Code=%20&nuts3Code=null&catId=375>; and Dealroom (2020), 'Startups job in Berlin', February, <https://blog.dealroom.co/wp-content/uploads/2020/02/Berlin-Employment-2020-vFINAL1.pdf>
- ⁵ Dealroom (2020), 'Startups job in Berlin', February, <https://blog.dealroom.co/wp-content/uploads/2020/02/Berlin-Employment-2020-vFINAL1.pdf>
- ⁶ Enterprises with fewer than ten employees are excluded from the sample. The financial sector is not included. Eurostat (2020), 'Share of enterprises' turnover on e-commerce - %', <http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=tin00110&lang=en>
- ⁷ Bonin (2017), 'The incidence of platform work in Germany: an analysis of a survey commissioned by the Federal Ministry of Labour and Social Affairs', BMAS-OECD-ISSA Workshop on the Future of Social Protection, https://www.oecd.org/els/soc/7_Bonin_The_Incidence_of_Platform_Work_in_Germany.pdf; and OECD(2019), 'GIG ECONOMY PLATFORMS: BOON OR BANE?', Economics Department, Working Papers, No. 1550, [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP\(2019\)19&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP(2019)19&docLanguage=En)
- ⁸ PwC (2017), 'Share Economy 2017 – Country Deep Dive', <https://www.pwc.de/de/digitale-transformation/share-economy-report-2017.pdf>
- ⁹ The percentage refers to 2019. Eurostat (2020), 'One in two EU enterprises use social media', February, <https://ec.europa.eu/eurostat/en/web/products-eurostat-news/-/DDN-20200224-1>
- ¹⁰ Hootsuite (2019), 'Digital 2019 – Germany', <https://hootsuite.com/resources/digital-2020>
- ¹¹ The percentage refers to 2019. Digital Agenda (2019), 'Country profiles, the relative position against all other European countries', eCommerce, <https://digital-agenda-data.eu/charts/country-profiles-the-relative-position-against-all-other-european-countries#chart={%22indicator-group%22:%22ecommerce%22,%22ref-area%22:%22IE%22,%22time-period%22:%222019%22}>
- ¹² The percentage refers to 2019. Eurostat (2020), 'Are you part of the collaborative economy?', February, <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20200205-1>

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