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Deadline looms for digital logistics platforms to comply with European Digital Services Act

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Introduction

Digital or online platforms play a key role in today's commerce. In the logistics market, digital platforms (eg, Uber Freight, Maersk Go and Shyppl) connect the suppliers of logistics services (ie, carriers, freight forwarders, shipbrokers and non-vessel operating common carriers) with customers (ie, sellers or buyers of goods), as well as fellow carriers and freight forwarders.

Using these platforms, customers can book their transport needs, plus other related services such as warehousing, packing or repacking and customs clearance.

The European Commission is attempting to organise the digital economy in Europe with a series of regulations. Key among these is the Digital Services Act, the regulations of which will fully apply to both digital logistics platforms and their users from February onwards.

Digital Services Act

On 16 November 2022, the Digital Services Regulation (EU) 2022/2065 (also called the Digital Services Act (DSA)), came into force. Companies, subject to this regulation, have until 17 February 2024 to fully comply with the obligations set out in the DSA.

The DSA includes an extensive set of rules that apply to all (providers of) intermediary services offered in the European Union, including online platforms. This covers online marketplaces, app stores, sharing economy platforms and social media platforms.

The DSA only applies to intermediary services and not to transport services within the meaning of EU law. Following the European Court of Justice's decisions regarding UberPop and the Star Taxi App, it is likely that digital logistics platforms are seen as providing an information society service and not a transport service and are, therefore, subject to the Act. This is the case so long as the platform simply mediates between the shipper and the carrier and does not interfere with the content and conditions of the transport itself, such as for example the freight price.

The DSA prescribes:

- the liabilities of platform providers;
- their due diligence obligations (tailored to specific categories); and
- the rules concerning implementation and enforcement of the regulation.

Liabilities

Illegal information or activity carried out on platforms can give rise to liabilities. However, the DSA provides an important exemption from liability in cases where illegal information is stored on the platform, provided the platform:

- does not have actual knowledge of illegal activity or illegal content in the information; or
- once it does become aware, it acts quickly to remove the illegal content or make it inaccessible.

It is recommended that platforms attempt to detect, identify and remove illegal content. If they do this with care, voluntarily, on their own initiative and in good faith, platforms may rely on the liability exemption, according to the DSA.

By using strict methods of verification and identification of users, freight platforms can try to weed out criminal parties pretending to be bona fide carriers. Shipments that involve illegal products offered for transport are usually easier for freight platforms to detect.

Due diligence

The DSA imposes various due diligence obligations on platforms. Platforms must appoint a single point of contact to communicate with the competent authorities and with platform users. Platforms must notify users in the event that illegal information has been detected. The users of the platform must receive a clear explanation from the platform if restrictions are imposed on them in connection with illegal information.

If the platform suspects that a criminal offence has been or is being committed by a user, it must report it to the police authorities. The foregoing obligations are relevant for digital logistics platforms that have tracked down criminal or maleficent users of their platform, or have discovered that illegal cargo is being offered for transport.

The DSA also imposes certain requirements on the general terms and conditions used by the platform, which must contain information about how information provided by users is handled and about its internal complaints system. The information must be described in clear, plain, intelligible, user-friendly and unambiguous language and be publicly available in an easily accessible and machine-readable format.

Larger platforms must prepare an annual transparency report on measures taken to detect and tackle illegal information and have an internal complaint handling system in place. They are also subject to certain obligations in respect of their review or rating systems.

Enforcement

In terms of enforcement action, the authorities can impose fines and penalties. The fine for a platform for non-compliance with an obligation under the DSA may amount to up to 6% of global turnover.

The regulation also stipulates that users are entitled to damages if a platform fails to comply with the DSA.

Other regulations regarding digital economy

Digital Markets Act

The Digital Markets Regulation (EU) 2022/1925, also called Digital Markets Act (DMA), entered into force on 1 November 2022 and has been applicable since May 2, 2023.

The DMA attempts to curb the economic power of large platforms and to ensure a level playing field in order to promote competition.

However, the DMA only applies to so-called "gatekeepers", which are very large digital platforms. To qualify as a gatekeeper, the platform must have an annual turnover of at least €7.5 billion and have at least 45 million monthly active users.

It is unlikely that digital logistics platforms will be classified as gatekeepers, as they generally will not meet these thresholds.

Platform regulation

The so-called Platform Regulation (EU) 2019/1150, applicable as from 12 July 2020, applies to business users of online intermediation services and online search engines who offer their services or goods to consumers. The regulation expressly does not apply to business-to-business relationships where the services are not offered to consumers. Therefore, the digital logistics platforms discussed in this article fall outside the scope of the platform regulation.

Comment

The European Union is attempting to regulate the digital economy by introducing a new set of rules.

The Digital Services Act is highly pertinent to digital logistics platforms. It is recommended that platform providers read carefully and, if necessary, seek external legal assistance to identify their obligations, and adjust their business operations and general terms and conditions accordingly.

It is also advisable for users of digital logistics platforms to be aware of the rights and obligations they have under the DSA, including those surrounding information they provide to the platform.

However, it is unlikely that the DSA will bring major changes to the way in which shippers and carriers do business with each other and the execution of transport by carriers. The Act does not intervene in the actual transport that takes place or the content of the transport agreement that shippers and carriers conclude.

In principle, digital platforms cannot be held liable for damage or loss caused during transport. This principle remains the same under the DSA.

For further information on this topic please contact [Barbara Wilbrink](mailto:Barbara.Wilbrink@akd.nl) at AKD by telephone (+31 88 253 5000) or email (bwilbrink@akd.nl). The AKD website can be accessed at www.akd.nl