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Position paper on the Digital Services Act proposal (DSA)

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News Media Europe represents the progressive news media industry in Europe – over 2,500 media companies including newspapers, radio, television and internet. News Media Europe is committed to promoting the freedom of the press, enhancing the freedom to publish, and to championing the news brands, which are one of the most vital parts of Europe's creative industries.

Recommendations

- Favour a function-orientated approach to the scope and clarify that press publishers are not intermediation services by nature and fulfill a specific democratic function that must be protected.
- Make online platforms genuinely more responsible and proactive in the fight against illegal content through a muscled secondary liability and better cooperation with press publishers.
- Stress that the notice-and-take-down mechanism strictly focuses on illegal content, as defined by national and European laws. As such, lawful press content should not be taken down by intermediaries.
- Prevent online intermediaries from imposing their terms and conditions or community standards on editorial news to avoid double scrutiny or conflict with editorial decisions.
- Address the impact of VLOPs on media freedom and access to information with more precise mitigation obligations (transparency and notification requirements and a rule of non-interference).
- Ensure that new responsible advertising rules do not undermine existing and effective laws and self-regulatory codes of conduct applied by the press sector.
- The country-of-origin principle should allow for the free dissemination of news content. Yet strengthened cooperation between national regulators should provide for effective enforcement and simplification of rules at EU level.

Promoting European digital, democratic and cultural sovereignty

News Media Europe welcomes the European Commission's Digital Services Act (DSA), a much needed and timely proposal to accompany the news media sector in its digital growth.

News Media Europe considers that the DSA is more than a rulebook for platform liability and content moderation. The DSA is really about European digital, cultural and democratic sovereignty and has a direct impact on the news media sector. We see the DSA as a unique opportunity for news media companies to get clarity over content moderation rules, further develop their business models online and be in a better position to innovate and enrich the European digital media landscape, while continuing to fulfil its democratic mandate. In this regard, transparency obligations, as well as increased liability, would have a positive effect on the position of platforms in the ecosystem vis-a-vis third parties, including news media companies.

In this paper, we address the main elements of the DSA in relation to the news media sector, including:

1. Rebalancing relations between news companies and very large online platforms;
2. Enhancing media freedom online;
3. Restoring trust and promoting responsible players online (liability and due diligence);
4. Enforcing existing responsible advertising rules;
5. Providing effective enforcement.

Rebalancing relations between news companies and very large online platforms

As Europeans increasingly consume news online, the relation between very large online platforms (VLOPs) and media companies will always be an important one. Platforms depend on press publishers to attract users through quality content while press publishers (in part) rely on platforms to reach their audiences. This is why we must ensure such relation is fair and transparent.

Recent events have proved that VLOPs can represent systemic risks on free speech and the broader protection of fundamental rights. Important content moderation decisions, illustrated by Twitter's account suspensions following the Washington Capitol riot or the creation of a Facebook Oversight Board, put an end to neutrality, a principle long used as a justification to passive behaviours. Also, recent decisions from Google and Facebook to manipulate their terms and conditions (T&C) and search results to avoid paying content in France and Australia demonstrates tech giants' disproportionate powers over the existence of journalism online. These examples show the importance of reflecting on third party scrutiny to avoid arbitrary decisions over what is considered legal or illegal.

We suggest:

- **Recognition of the role of some VLOPs as “digital public spaces” (Art 25, recital 52):** The internet is more than a utility: it has become a common good. Yet some VLOPs largely frame this public space, to the extent that they have become the digital agora of modern societies. Due to their audience reach and significant role in news dissemination, social interaction, or impact on shaping public opinion and discourse, the rules that emanate from very large online platforms deserve special attention. Without interfering with contractual freedom, it is fair to reflect on basic content moderation principles to govern these digital public spaces and to build an ethical internet based on common values
- **Establishing risks on access to information and media freedom (Art 26, recitals 56, 57):** In relation to the second category of risks concerning “the exercise of fundamental rights”, we suggest emphasising risks on access to information, freedom of expression and democracy.
- **Imposing mitigation obligations in relation to the above-mentioned risks (Art 27).** Mitigation measures would take the form of:
 - a) **Mandatory notification to editorial content producers:** Unilateral changes to VLOPs' terms and conditions and display parameters can represent systemic risks for access to information and freedom of expression. We advise that VLOPs shall notify at least 45 days in advance¹ the producer of editorial content of any algorithmic changes that affect

¹ Building up on and reinforcing Article 3 of the P2B Regulation (EU) 2019/1150 ([link](#))

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distribution (e.g. ranking, referral traffic, advertising placement, display, presentation, etc). As such, sudden and unilateral deletion of news content would be sanctioned by the mandatory independent auditing exercise (Art 28).

- b) **Transparency requirements:** The press sector is heavily reliant on VLOPs for content distribution and access to the audience. Protection of the reliant party requires relevant information from essential distributors about the use and value derived from editorial content in a transparent, objective and non-discriminatory manner². Hence, we suggest that VLOPs share with news media companies data about the use of their own editorial content, user consumption statistics and revenues derived in national markets.
- **Preservation of the self-regulation and editorial control of the press (Art 27):** When applying risk mitigation measures, VLOPs shall not use tools to assess, control or label journalistic content nor discriminate against professionally edited content. News content producers already adhere to national criminal and civil laws (e.g. libel, copyright, hate speech, fact checking, etc), legislation regulating the privileges and duties of publishers, and press ethical codes. It is therefore important that VLOPs do not exercise double scrutiny that would go against editorial decisions³.
 - **Protection of the visibility and integrity of news content (ban on unilateral removal):** As many citizens rely on social networks or news aggregators to consume news, we suggest a ban over the unilateral and sudden removal or blocking of news content under editorial responsibility, that could have serious consequences on society day-to-day functioning. This does not amount to a must-carry obligation nor to an obligation to conclude contracts with press publishers. Here we are talking about a duty for digital public spaces to anticipate any decision that would affect news media companies and inform them in a non-discriminatory manner with an opportunity to object.

Enhancing media freedom online

Recent events have illustrated risks to press freedom coming either from large platforms (e.g. delisting of French press titles from Google services in 2019, Facebook Australia news blackout in 2021) or from governments (e.g. Polish draft media laws⁴, Turkey's social media law⁵). We welcome that the DSA is without prejudice to media specific legislation. Yet the Charter deserves to be better enforced to ensure that the press remains free online⁶. Hence the DSA should set clear standards on how journalistic content is treated by platforms.

We suggest:

- **Emphasising the difference between editorial media and intermediation services (Recitals 6 and 13, Article 2):** Press publishers are not by nature intermediation services but professional content producers who already comply with national laws and strict editorial codes. So when

² Inspiration from the French Competition Authority's decision April 2020 ([link](#))

³ Schibsted 2019 report ([link](#))

⁴ Polish draft media laws imposing "an advertising revenue tax on media outlets and "protection of freedom of speech of social media users" ([link](#))

⁵ Turkey slaps ad ban on Twitter after new social media law, Reuters, 19 January 2021 ([link](#))

⁶ Article 11 of the European Charter of Fundamental Rights

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they decide to include third party content (e.g. advertising, user uploads, comment sections), press publishers work towards creating a safe environment in line with their editorial responsibility. It should further be clarified that the regime applicable to editorial media (primary liability, editorial responsibility) is different from that of online platforms (secondary liability, no editorial responsibility). Furthermore, self-regulatory mechanisms applicable to editorial media have proved very effective to uphold a free and pluralistic media landscape, e.g. with press councils, codes of editorial ethics, ombudsmen and advertising codes of conducts. Therefore, regulation designed specifically for online intermediaries should not incidentally regulate editorial media.

- **Exempting professional press content from intermediaries' content moderation policies or community standards (Art 12):** News content carries various legal responsibilities that should remain unique and distinct from intermediation services' T&C or community rules. Hence, we suggest a rule of non-interference binding on all intermediaries, regardless of size. This means that intermediation services' community standards should not apply to press content that has already been professionally edited to preserve media independence and editorial control (without prejudice to contractual freedom or the laws on the reuse of copyrighted materials). This also means that press content cannot be unilaterally treated as illegal content by intermediaries. Yet to maintain an open communication channel, we suggest a signing-in process with the contact details of the editor-in-chief and copies of the ethical codes to provide to the respective platform.
- **Notification of changes of terms and conditions that affect press content (Art 12):** The Australian Facebook news blackout has demonstrated the power of online platforms over the existence of content. To prevent sudden and unilateral deletion of news articles, or a decrease in its prevalence, all providers of intermediary services shall notify at least 45 days in advance the editorial content producer of any changes to terms and conditions or algorithmic changes that affect visibility, ranking, presentation and display of editorial journalistic content⁷. These 45 days should allow the editorial content producer time to object.

Restoring trust and promoting responsible players online

The rise of social networks has brought many opportunities for society but also given rise to filter bubbles, speech polarisation and distrust in public institutions and traditional media alike. In this context, it is essential to restore trust online and provide a safer space so that journalism can fulfil its broader democratic function. The DSA should contribute to creating a safer internet space and providing reliable information to citizens through a combination of upgraded platform liability regime and due diligence obligations.

Conditional liability

We appreciate that the internet will continue to function on liability exemptions by default (Art 5) and the ban on general monitoring obligation (Art 7). Yet to add value to the eCommerce Directive, the DSA must establish a clearer and strengthened secondary liability regime.

⁷ Building up on and reinforcing Article 3 of the P2B Regulation (EU) 2019/1150 ([link](#))

Intermediaries' liability for third-party content is particularly important for press publishers in cases where (i) illegal news content reproductions (articles, videos, infographics, etc) need to be removed from a platform that has not acquired the rights (ii) or when news content has been wrongly taken down⁸. In both instances, press publishers need direct and swift access to the platform's point of contact to preserve its fundamental rights (e.g. copyright, freedom of expression).

We suggest:

- **Clarification that curation may be an indication of “knowledge” that triggers secondary liability (Art 5):** Curation is an action meant to increase activity. The law should better define different degrees of curation, with flexibility to accommodate technological developments, e.g. promoting, tagging, notifying, personalising, suggesting, categorising to a certain audience based on certain features, etc. This would help drawing the distinction between passive (purely hosting) and active providers (with knowledge of and active relation to content).
- **Coupling the Good Samaritan principle with follow-up obligations (Art 6):** Encouraging intermediaries to be proactive and carry out voluntary own-initiative investigations is positive. Yet we must substantiate this trust zone and clarify what is meant by “voluntary actions”. We must also be careful to offer remedies to plaintiffs (e.g. rightsholders) whose rights have been infringed. Therefore, we should specify that Art. 6 cannot be used a shield against liability. In addition, intermediaries must directly inform interested parties of their findings and engage in active collaboration for the detection and removal of illegal content to avoid the Samaritan principle becoming an empty shell.
- **Making liability conditional upon genuine best effort obligation (Art 7):** While we agree with maintaining the ban on general monitoring obligations, hosting services should do their very best to detect illegal content, even more so when they have sufficient resources to carry out investigations. The level of best efforts must be assessed on a case-by-case basis, taking into account the proportionality principle (e.g. business size, resources) and against state of the art support technologies available (evolutive concept depending on market developments). Depending on the size of the business, getting equipped with technologies that provide for more and more accurate identification and investing in human review is also the cost of doing business.

Due Diligence Obligations

We welcome the DSA due diligence and process-based approach. As such, we make suggestions for increased procedural accountability of content distributors towards content producers to reduce the risk of arbitrary decisions and increase cooperation. This will ultimately help making the internet a more transparent and balanced marketplace for content, including for news services.

We suggest:

- **Facilitating open communication with responsible platforms via points of contact (Art 10):** We must ensure that platforms' points of contact are available in the same time zone and in the

⁸ Aftenposten Editor in Chief's letter to Mark Zuckerberg in reaction to Facebook's decision to take down the picture of the naked Napalm girl from the Vietnam war: “Dear Mark”, 2016 ([link](#))

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local language of the country of destination to communicate in the most efficient manner with users. Very concretely, every European newsroom should be able to connect with a platform representative who is able to make decisions, instantaneously, in the local language and through multiple channels (phone, email, chat, video call, 24 hours a day).

- **Better communication between rightsholders and platforms (Art 14):** Making the internet safe should be a two-way road whereby content producers and distributors mutually inform each other about alleged illegal uses. In our view however, the DSA fails to fix the dysfunctional and asymmetric notice-and-take-down regime. Consistent with copyright law, the platform should have a more proactive role towards the identification of illegal content instead of passively waiting for notifications. For instance, press publishers whose content has been illegally reproduced should receive notification from the platform. The press publisher would then decide whether to remove or authorise (licensing) where applicable.
- **Increased efficiency of the notice-and-take-down (NTD) mechanism (Art 14):** Under the current system, platforms are only obliged to remove uploads they are notified and require rightsholders to report URL by URL, a very inefficient and time-consuming process. The DSA should require platforms to remove similar illegal posts they have already been notified in that specific context, consistent with the decision *Eva Glawischnig-Piesczek v Facebook (2019)*⁹. Concretely, this means that a platform that removes an illegal file or post should immediately check any copy. From a freedom of expression point of view, human review, exercised by trained employees able to assess context, would provide adequate safeguards. From a practical point of view, it ensures single notification for multiple infringements, meaning press publishers do not have to send multiple forms or URLs for the same illegal content. Also, and without prejudice to privacy rules, it is worth considering the impact of large messaging services (e.g. WhatsApp, Telegram, VK) on the wide dissemination of pirate content through large user groups.
- **Providing inclusive channels of communication and clarify the qualification of “trusted flagger” (Art 19):** We would appreciate clarification about what types of organisation could qualify as trusted flaggers and which tasks they would perform. Moreover, in our view, the trusted flaggers system as it is designed now risks barring the opportunity for all interested parties to have direct access to platforms. At least to avoid risks on media freedom, media representatives (e.g. press councils, trade associations) should be able to qualify as trusted flaggers. When it comes to IP rights, trusted flaggers status could be granted to rightsholders or their representatives who have demonstrated particularly expertise in the field of tackling copyright violations (e.g. legal department of news media companies, collective management organisations, rightsholders’ associations, press associations).

Enforcing existing responsible online advertising rules

Press publishers welcome the harmonised notice and take-down rules for the removal of illegal advertising, which will reinforce their existing systems they have in place. However, additional advertising rules should not threaten an important source of revenues for press publishers. Rather, focus should be placed on making sure that the ad-tech market, largely dominated by Google and

⁹ *Eva Glawischnig-Piesczek v Facebook Case C-18/18 (2019)* ([link](#))

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Facebook, becomes more transparent and ensures a more effective transfer of value to press publishers, a proposal we further elaborate under the Digital Markets Act.

We suggest:

- **Recognition of existing advertising transparency obligations (Art 24):** The information level in the ad tech market is currently unbalanced. Hence transparency requirements should clearly target those online platforms that provide the advertisements to press publishers and which detain information about the advertiser and the targeting parameters. Moreover, the DSA should ensure proper enforcement of existing transparency rules (e.g. eCommerce Directive, Unfair Commercial Practices Directive, AVMS Directive) and self-regulatory codes of conduct.
- **Avoiding overlaps and conflicts during the development of codes of conduct (Art 35 and 36):** It is important that the new EU-level codes of conduct are without prejudice to existing and functioning national self and co-regulatory practices and codes.

Providing effective enforcement

We are satisfied that the DSA puts emphasis on enforcement. First, we welcome the choice of instrument (Regulation) to ensure direct effect into national legislation and increased harmonization. Second, we appreciate that national regulators – the “Digital Services Coordinators” - remain in the front line and are the ones imposing injunctions and sanctions to accommodate cultural and legal specificities of national markets (Art 38). Yet, with the experience of the Copyright Directive implementation, we realise that proactive communication and better information sharing practices between national regulators, especially from those that have sufficient resources, is crucial to anticipate violations or misconducts to spread to other markets. Thus, our suggestions focus on practical cooperation matters.

We suggest:

- **Keeping the country-of-origin principle (COO) conditional on strengthened and genuine cooperation between national regulators at EU level:** We agree with maintaining the rules of the country of establishment, a key principle of the free movement of digital services. In media terms, it means that a piece of content that is lawful in one member state can be shared more easily across borders. However, the COO principle should not translate in regulator forum shopping (e.g. GDPR lack of enforcement) nor in isolated and fragmented implementation. Therefore, we suggest strengthening cooperation between regulators on cross-border issues when it comes to definitions and interpretations (e.g. illegal content, media freedom concepts, etc), data sharing, investigations and enforcement actions.
- **Transparency in EU-level discussions and stakeholder engagements:** As digital markets are fast evolving and complex markets, the European Board for Digital Services should be a dynamic format, meet up regularly, operate in a transparent manner and keep an open door for stakeholders to engage and raise concerns in cross-border cases.

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