Joint Industry Statement by European Media Associations on the Digital Services Act trilogue negotiations

Brussels, 14 February 2022

As the Digital Services Act (DSA) reaches its final phase, Europe's media sector reaches out to the negotiating teams with the aim of ensuring that our activities can not only survive, but thrive online. As online platforms have become important gateways to access and consume professional media content, their behaviour has serious impacts on media organizations' online activities. This is why we now draw the attention of EU decision-makers to business-critical points of the DSA text, in anticipation of the next inter-institutional negotiations. *Below you will find our main policy asks, followed by technical comments in Annex*.

Protection of editorial content (Article 12, Recital 38)

Social networks, search engines and video-sharing platforms have become important gateways for citizens to access editorial media content (press, audiovisual, radio) online. Many of these players, however, restrict the dissemination of lawful media content, based on unilaterally imposed terms and conditions (T&Cs). Platforms' decisions can create serious blockages to the editorial reach of the media organizations we represent. More so, it defies existing EU and national media rules which already establish content standards and dissemination criteria.

The European Parliament tried to alleviate these concerns by inserting **a minimum standard in Article 12 paragraph 1** of the DSA proposal. This would make intermediary service providers' T&C bound by fundamental rights, including media freedom, and rules applicable to the media in the Union. **We call on all policymakers to:**

- **uphold this principle as a redline for the trilogues**
- **enshrine this general principle in the final DSA text**
- **provide further guidance in the accompanying Recital 38 on how intermediary service providers should implement this requirement.**

Media brand attribution (Article 22)

The DSA should ensure that the identity (e.g. logos/branding) of media organizations as well as all other business users is clearly visible alongside the content, goods and services offered on third-party platforms. When consumers access media content through social networks,

news aggregators, or search engines, they must be able to easily identify who bears the editorial responsibility.

We therefore call on policymakers to support Article 22 paragraph 3b new of the European Parliament's report which introduces a brand attribution obligation. To make the provision meaningful to media organizations, its scope should, however, be **extended** so that not only online marketplaces, but all other kinds of platforms that play a significant role for the access to content, are covered.

Interplay between DSA and sector-specific rules and Member States' prerogative (Article 1, Recitals 9 and 10)

Rules on copyright and specific rules for audiovisual media safeguard and promote our diverse and pluralistic European culture. Such rules also guarantee that the media can play its role as a fourth pillar of a functioning democracy. Neither the Council nor the European Parliament have so far introduced the necessary clarifications concerning the relationship between the DSA and sector-specific rules, such as the DSM Copyright Directive and the AVMSD. Co-legislators also fall behind an important principle of the eCommerce Directive (Article 1.6) leaving room to Member States to adopt measures to promote cultural and linguistic diversity as well as media pluralism online.

Hence, we call on policymakers to ensure that the DSA's horizontal rules do not undermine the specific rules and regulatory achievements provided by the lex specialis or the prerogative of Member States to regulate cultural issues in Article 1 and Recitals 9 and 10.

Liability for search engines (Article 4)

Search engines play a crucial role in how information is being distributed and consumed online. We therefore find it beyond comprehension why EU co-legislators would grant an outdated liability exemption to search enginges without submitting them to notice and action obligations. The new safe-harbour proposed by the Council in Article 4 of its General Approach, which assimilates search engines to 'caching services', removes their obligation to act upon notices. In fact, it removes all incentives for them to contribute to the fight against illegal content. The negative impact would be significant, clearly undermining the stated goal of the DSA to create a safer, more accountable online environment.

This remains ever more incomprehensible since the European Commission in its impact assessment debates the fact that search engines belong to neither category, which is a situation that certainly worked in their favour. **We therefore call on policy makers to not take a huge step backwards by mischaracterizing the role of search engines as being equal to 'caching services' and to delete their inclusion from Article 4 of the Council's General Approach. Instead, policy-makers should reassess the legal qualification of search engines.**

Targeted advertising (Articles 13a and 24)

Personalized advertising remains an indispensable source of revenue for the media sector. It is a way, in particular for commercial media, to keep online content open and accessible to all.

We have taken note of the concerns in relation to data processing for advertising purposes expressed, in particular, by Members of the **European Parliament** during the DSA discussions. While we recognise the European Parliament's efforts to address dark patterns and to create a safer internet and protect minors, we are concerned that **Article 13a** and particularly **sub-paragraphs 1 (b) and (e)** will adversely affect the capacity of digital offerings, including those of the media to obtain user consent and monetise their content legitimately through advertising. These provisions as well as **Article 24 (1a new)** go further than the current GDPR data protection provisions, leading to a conflict of rules and enforcement challenges. It is our view that the DSA is not the appropriate piece of legislation to regulate data protection, due to the risk of pre-empting the ongoing negotiations on the e-Privacy Regulation and the margin for legal uncertainty.

Furthermore, we know it is significantly easier for digital gatekeepers to obtain consent from users. Instead of targeting the largest platforms, these requirements will put media at an even greater competitive disadvantage and go against the initial objectives of the DSA. Restricting mass data collection must focus on those who cause the most harm, namely the digital gatekeepers via their data supremacy. Article 6 (1) (aa) in the adopted European Parliament's report on the Digital Markets Act addresses this issue by focusing on gatekeepers and applying consent requirements consistent with the GDPR, as well as a prohibition on the processing of minors' data.

Therefore, we call on the co-legislators to maintain the wording proposed by the European Commission and agreed in Council, that both focus advertising requirements on very large online platforms, and caution against over descriptive rules going beyond the provisions of the GDPR.

Know-Your-Business-Customer

In today's economy, businesses should not be able to operate without accurately identifying themselves. This applies equally to the offline and to the online world, which is why the e-Commerce Directive 2000/31/EC (ECD) introduced an obligation on businesses to identify themselves on their websites (Article 5). Unfortunately, businesses that have the intention of making a profit out of illegal content have so far escaped this obligation without suffering consequences.

The Digital Services Act is an opportunity for the European co-legislators to address this shortcoming of the ECD. Many Member States have indicated their support for Italy and Spain's Joint Statement, calling for Know-Your-Business-Customer (KYBC) provisions to be addressed during the interinstitutional negotiations. The European Parliament has also demonstrated majority support for a broad KYBC provision (see also corrected RCV on amendment 514). **We urge policy makers to ensure that all intermediary service providers – not just online marketplaces – know who their business customers really are.**

Country-of-Origin principle

The Country Of Origin principle (COO) is one of the core principles of the e-Commerce Directive (Article 3) and for twenty years, it has been an effective as well as necessary prerequisite for the cross-border distribution of press and media content. It ensures that providers of media content can provide their services cross-border in any EU Member State and, in fact, is a safeguard against censorship and legal uncertainty. It is important to continue to ensure a high level of protection for freedom of expression and intellectual property. As such, the COO as provided by the ECD must be maintained in the DSA, rather than allowing a Member State to remove content lawfully published in another Member State on the grounds of its stricter laws.

ACT – Association of Commercial Television and Video on Demand
AER – Association of European Radios
EBU – European Broadcasting Union
EGTA – Association of Television and Radio Sales Houses
EMMA – European Magazine Media Association
ENPA – European Newspaper Publishers' Association
EPC – European Publishers Council
NME – News Media Europe