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*Plenary sitting*

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**A9-0000/2020**

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## REPORT

with recommendations to the Commission on a Digital Services Act: adapting commercial and civil law rules for commercial entities operating online (2020/2019(INL))

Committee on Legal Affairs

Rapporteur: Tiemo Wölken

(Initiative – Rule 47 of the Rules of Procedure)

## CONTENTS

	Page
MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION .....	3
ANNEX TO THE MOTION FOR A RESOLUTION: DETAILED RECOMMENDATIONS AS TO THE CONTENT OF THE PROPOSAL REQUESTED....	13
EXPLANATORY STATEMENT.....	31
OPINION OF THE COMMITTEE ON THE INTERNAL MARKET AND CONSUMER PROTECTION .....	34
OPINION OF THE COMMITTEE ON CULTURE AND EDUCATION.....	44

NOT OFFICIAL VERSION

## MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

**with recommendations to the Commission on a Digital Services Act: adapting commercial and civil law rules for commercial entities operating online (2020/2019(INL))**

*The European Parliament,*

- having regard to Article 225 of the Treaty on the Functioning of the European Union,
- having regard to Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services<sup>1</sup>,
- having regard to Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC<sup>2</sup>,
- having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)<sup>3</sup> (hereinafter referred to as the “General Data Protection Regulation”),
- having regard to the Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)<sup>4</sup>,
- having regard to Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters<sup>5</sup>,
- having regard to the proposal for a Regulation of the European Parliament and of the Council of 6 June 2018 establishing the Digital Europe Programme for the period 2021-2027 (COM(2018)0434),
- having regard to the Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online<sup>6</sup>,
- having regard to the European Parliament resolution of 3 October 2018 on distributed

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<sup>1</sup> OJ L 186, 11.7.2019, p. 57.

<sup>2</sup> OJ L 130, 17.5.2019, p. 92.

<sup>3</sup> OJ L 119, 4.5.2016, p. 1.

<sup>4</sup> OJ L 95, 15.4.2010, p. 1.

<sup>5</sup> OJ L 136, 24.5.2008, p. 3.

<sup>6</sup> OJ L 63, 6.3.2018, p. 50.

ledger technologies and blockchains: building trust with disintermediation<sup>7</sup>,

- having regard to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 19 February 2020 on A European strategy for data (COM(2020)66),
  - having regard to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 19 February 2020 on Shaping Europe’s digital future (COM(2020)67),
  - having regard to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 25 May 2016 on Online Platforms and the Digital Single Market - Opportunities and Challenges for Europe (COM(2016)288),
  - having regard to Article 11 of the Charter of Fundamental Rights of the European Union and Article 10 of the European Convention on Human Rights,
  - having regard to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>8</sup> and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,
  - having regard to Rules 47 and 54 of its Rules of Procedure,
  - having regard to the opinions of the Committee on the Internal Market and Consumer Protection and of the Committee on Culture and Education,
  - having regard to the report of the Committee on Legal Affairs (A9-0000/2020),
- A. whereas digital services, being a cornerstone of the Union’s economy and the livelihood of a large number of its citizens, need to be regulated in a way that guarantees fundamental rights and other rights of citizens while supporting development and economic progress, the digital environment and trust online, taking into account the interests of users and all market participants, including SMEs and start-ups;
- B. whereas some rules regarding online content-sharing providers and audiovisual media services have recently been updated, notably by Directive (EU) 2018/18081 and Directive (EU) 2019/790, a number of key civil and commercial law aspects have not been addressed satisfactorily in Union or national law, and whereas this issue is made more pressing by rapid and accelerating development over the last decades in the field of digital services, in particular the emergence of new business models, technologies and social realities; whereas in this context, a comprehensive updating of the essential provisions of civil and commercial law applicable to online commercial entities is required;
- C. whereas some businesses offering digital services enjoy, due to strong data-driven network effects, significant market power that enables them to impose their business

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<sup>7</sup> OJ C 11, 13.1.2020, p. 7.

<sup>8</sup> OJ L 339, 21.12.2007, p. 3.

practices on users and makes it increasingly difficult for other players, especially start-ups and SMEs, to compete and for new businesses to even enter the market;

- D. whereas ex-post competition law enforcement alone cannot effectively address the impact of the market power of certain online platforms, including on fair competition in the Digital Single Market;
- E. whereas content hosting platforms evolved from involving the mere display of content into sophisticated organisms and market players, in particular social networks that harvest and exploit usage data; whereas users have legitimate grounds to expect fair terms with respect to access, transparency, pricing and conflict resolution for the usage of such platforms and for the use that platforms make of the users' data; whereas transparency can contribute to significantly increasing trust in digital services;
- F. whereas content hosting platforms may determine what content is shown to their users, thereby profoundly influencing the way we obtain and communicate information, to the point that content hosting platforms have de facto become public spaces in the digital sphere; whereas public spaces must be managed in a manner that protects public interests, respects fundamental rights and the civil law rights of the users in particular the right to freedom of expression and information;
- G. whereas upholding the law in the digital world not only involves effective enforcement of fundamental rights, in particular freedom of expression and information, privacy, safety and security, non-discrimination, respect for property and intellectual property rights, but also access to justice and due process; whereas delegating decisions regarding the legality of content or of law enforcement powers to private companies undermines transparency and due process, leading to a fragmented approach; whereas a fast-track legal procedure with adequate guarantees is therefore required to ensure that effective remedies exist;
- H. whereas automated tools are currently unable to reliably differentiate illegal content from content that is legal in a given context and that therefore mechanisms, for the automatic detection and removal of content can raise legitimate legal concerns, in particular as regards possible restrictions of freedom of expression and information, protected under Article 11 of the Charter of Fundamental Rights of the European Union; whereas the use of automated mechanisms should, therefore, be proportionate, covering only justified cases, and following transparent procedures;
- I. whereas Article 11 of the Charter of Fundamental Rights of the European Union also protects the freedom and pluralism of the media, which are increasingly dependent on online platforms to reach their audiences;
- J. whereas digital services are used by the majority of Europeans on a daily basis, but are subject to an increasingly wide set of rules across the Union leading to significant fragmentation on the market and consequently legal uncertainty for European users and services operating cross-borders, combined with lack of regulatory control on key aspects of today's information environment; whereas the civil law regimes governing content hosting platforms' practices in content moderation are based on certain sector-specific provisions at Union and national level with notable differences in the obligations imposed and enforcement mechanisms of the various civil law regimes

deployed; whereas this situation has led to a fragmented set of rules for the Digital Single Market, which requires a response at Union level ;

- K. whereas the current business model of certain content hosting platforms is to promote content that is likely to attract the attention of users and therefore generate more profiling data in order to offer more effective targeted advertisements and thereby increase profit; whereas this profiling coupled with targeted advertisement can lead to the amplification of content geared towards emotions, often encouraging and facilitating sensationalism in news feed and recommendation systems, resulting in the possible manipulation of users;
- L. whereas offering users contextual advertisements requires less user data than targeted behavioural advertising and is thus less intrusive;
- M. whereas the choice of algorithmic logic behind recommendation systems, comparison services, content curation or advertisement placements remains not solely but also at the discretion of the content hosting platforms with little possibility for public oversight, which raises accountability and transparency concerns;
- N. whereas content hosting platforms with significant market power make it possible for their users to use their profiles to log into third-party websites, thereby allowing them to track their activities even outside their own platform environment, which constitutes a competitive advantage in access to data for content curation algorithms;
- O. whereas so-called smart contracts, which are based on distributed ledger technologies, including blockchains, that enable decentralised and fully traceable record-keeping and self-execution to occur, are being used in a number of areas without a proper legal framework; whereas there is uncertainty concerning the legality of such contracts and their enforceability in cross-border situations;
- P. whereas the non-negotiable terms and conditions of platforms often indicate both applicable law and competent courts outside the Union, which represent an obstacle as regards access to justice; whereas Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>9</sup> lays down rules on jurisdiction; whereas the General Data Protection Regulation, clarifies the data subject's right to private enforcement action directly against the controller or processor, regardless of whether the processing takes place in the Union or not and regardless whether the controller is established in the Union or not; whereas Article 79 of the General Data Protection Regulation stipulates that proceedings shall be brought before the courts of the Member State where the controller or processor has an establishment or, alternatively where the data subject has his or her habitual residence;
- Q. whereas access to and mining of non-personal data is an important factor in the growth of the digital economy; whereas appropriate legal standards and data protection safeguards regarding the interoperability of data can, by removing lock-in effects, play an important part in ensuring fair market conditions;
- R. whereas it is important to assess the possibility of tasking a European entity with the

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<sup>9</sup> OJ L 351, 20.12.2012, p. 1

responsibility of ensuring a harmonised approach to the implementation of the Digital Services Act across the Union, facilitating coordination at national level as well as addressing the new opportunities and challenges, in particular those of a cross-border nature, arising from ongoing technological developments;

#### *Digital Services Act*

1. Requests that the Commission submit without undue delay a set of legislative proposals comprising a Digital Services Act with an adequate material, personal and territorial scope, defining key concepts and including the recommendations as set out in the Annex to this resolution; without prejudice to detailed aspects of the future legislative proposals, Article 114 of the Treaty on the Functioning of the European Union should be considered as the legal basis;
2. Proposes that the Digital Services Act include a regulation that establishes contractual rights as regards content management, lays down transparent, binding and uniform standards and procedures for content moderation, and guarantees accessible and independent recourse to judicial redress; stresses that legislative proposals should be evidence-based and seek to remove current and prevent potentially new unjustified barriers in the supply of digital services by online platforms while enhancing the protection of consumers and citizens; believes that the legislative proposals should aim at achieving sustainable and smart growth, address technological challenges, and ensure that the Digital Single Market is fair and safe for everyone;
3. Further suggests that the measures proposed for content moderation only apply to illegal content rather than content that is merely harmful; suggests, to this end, that the regulation include universal criteria to determine the market power of platforms in order to provide a clear definition of what constitutes a platform with significant market power and thereby determine whether certain content hosting platforms that do not hold significant market power can be exempted from certain provisions; underlines that the framework established by the Digital Services Act should be manageable for small businesses, SMEs and start-ups and should therefore include proportionate obligations for all sectors;
4. Proposes that the Digital Services Act impose an obligation on digital service providers who are established outside the Union to designate a legal representative for the interest of users within the Union, to whom requests could be addressed in order, for example, to allow for consumer redress in the case of false or misleading advertisements, and to make the contact information of that representative visible and accessible on its website;

#### *Rights as regards content moderation*

5. Stresses that the responsibility for enforcing the law must rest with public authorities; considers that the final decision on the legality of user-generated content must be made by an independent judiciary and not a private commercial entity;
6. Insists that the regulation must prohibit content moderation practices that are discriminatory or entail exploitation and exclusion, especially towards the most vulnerable, and must always respect the fundamental rights and freedoms of users, in particular their freedom of expression;



- 7 Stresses the necessity to better protect consumers by providing reliable and transparent information on examples of malpractice, such as the making of misleading claims and scams;
8. Recommends that the application of the regulation should be closely monitored by a European entity tasked with ensuring compliance by content hosting platforms with the provisions of the regulation, in particular by monitoring compliance with the standards laid down for content management on the basis of transparency reports and monitoring algorithms employed by content hosting platforms for the purpose of content management; calls on the Commission to assess the options of appointing an existing or new European Agency or European body or of coordinating itself a network of national authorities to carry out these tasks (hereinafter referred to as “the European entity”);
9. Suggests that content hosting platforms regularly submit comprehensive transparency reports based on a consistent methodology and assessed on the basis of relevant performance indicators, including on their content policies and the compliance of their terms and conditions with the provisions of the Digital Services Act, to the European entity; further suggests that content hosting platforms publish and make available in an easy and accessible manner those reports as well as their content management policies on a publicly accessible database;
10. Calls for content hosting platforms to evaluate the risk that their content management policies of legal content pose to society, in particular with regard to their impact on fundamental rights, and to engage in a biannual dialogue with the European entity and the relevant national authorities on the basis of a presentation of transparency reports;
11. Recommends that the Member States provide for independent dispute settlement bodies, tasked with settling disputes regarding content moderation; takes the view that in order to protect anonymous publications and the general interest, not only the user who uploaded the content that is the object of a dispute but also a third party, such as an ombudsperson, with a legitimate interest in acting should be able to challenge content moderation decisions; affirms the right of users to further recourse to justice;
12. Takes the firm position that the Digital Services Act should not contain obligations on content hosting platforms to employ any form of fully automated ex-ante controls of content unless otherwise specified in existing Union law, and considers that mechanisms voluntarily employed by platforms must not lead to ex-ante control measures based on automated tools or upload-filtering of content and must be subject to audits by the European entity to ensure that there is compliance with the Digital Services Act;
13. Stresses that content hosting platforms must be transparent in the processing of algorithms and of the data which train them;

*Rights as regards content curation, data and online advertisements*

14. Considers that the user-targeted amplification of content based on the views or positions presented in such content is one of the most detrimental practices in the digital society, especially in cases where the visibility of such content is increased on the basis of previous user interaction with other amplified content and with the purpose of optimising user profiles for targeted advertisements; is concerned that such practices



rely on pervasive tracking and data mining; calls on the Commission to analyse the impact of such practices and take appropriate legislative measures;

15. Is of the view that the use of targeted advertising must be regulated more strictly in favour of less intrusive forms of advertising that do not require any tracking of user interaction with content and that being shown behavioural advertising should depend on users' freely given, specific, informed and unambiguous consent;
16. Notes the existing provisions addressing targeted advertising in the General Data Protection Regulation and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)<sup>10</sup>;
17. Recommends, therefore, that the Digital Services Act set clear boundaries and introduce transparency rules as regards the terms for accumulation of data for the purpose of offering targeted advertisements as well as their functioning and accountability, especially when data are tracked on third-party websites; notes that new measures establishing a framework for Platform-to-Consumers relations are needed as regards transparency provisions on advertising, digital nudging and preferential treatment; invites the Commission to assess options for regulating targeted advertising, including a phase-out leading to a prohibition;
18. Stresses that in line with the principle of data minimisation and in order to prevent unauthorised disclosure, identity theft and other forms of abuse of personal data, the Digital Services Act should provide for the right to use digital services anonymously wherever technically possible; calls on the Commission to require content hosting platforms to verify the identity of those advertisers with which they have a commercial relationship to ensure accountability of advertisers in the event content promoted is found to be illegal; recommends therefore that the Digital Services Act include legal provisions preventing platforms from commercially exploiting third-party data in situations of competition with those third parties;
19. Regrets the existing information asymmetry between content hosting platforms and public authorities and calls for a streamlined exchange of necessary information; stresses that in the spirit of the case law on communications metadata, public authorities must be given access to a user's metadata only to investigate suspects of serious crime and with prior judicial authorisation;
20. Recommends that providers which support a single sign-on service with significant market power should be required to also support at least one open and decentralised identity system based on a non-proprietary framework; asks the Commission to propose common Union standards for national systems provided by Member States, especially as regards data protection standards and cross-border interoperability;
21. Calls on the Commission to assess the possibility of defining fair contractual conditions to facilitate data sharing and increase transparency with the aim of addressing imbalances in market power; suggests, to this end, to explore options to facilitate the

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<sup>10</sup> (OJ L 201, 31.7.2002, p. 37).

interoperability, interconnectivity and portability of data; points out that data sharing should be accompanied by adequate and appropriate safeguards including effective anonymization of personal data;

22. Recommends that the Digital Services Act require platforms with significant market power to provide an application programming interface, through which third-party platforms and their users can interoperate with the main functionalities and users of the platform providing the application programming interface, including third-party services designed to enhance and customise the user experience, especially through services that customise privacy settings as well as content curation preferences; suggests that platforms publicly document all application programming interfaces they make available for the purpose of allowing for the interoperability and interconnectivity of services;
23. Is strongly of the view, on the other hand, that platforms with significant market power providing an application programming interface must not be permitted to share, retain, monetise or use any of the data they receive from third-party services;
24. Stresses that interoperability and interconnectivity obligations must not limit, hinder or delay the ability of content hosting platforms to fix security issues, nor should the need to fix security issues lead to an undue suspension of the application programming interface providing interoperability and interconnectivity;
25. Recalls that the provisions on interoperability and interconnectivity must respect all relevant data protection laws; recommends, in this respect, that platforms be required by the Digital Services Act to ensure the technical feasibility of the data portability provisions laid down in Article 20(2) of the General Data Protection Regulation;
26. Calls for content hosting platforms to give users a real choice of whether or not to give prior consent to being shown targeted advertising based on the user's prior interaction with content on the same content hosting platform or on third-party websites; underlines that this choice must be presented in a clear and understandable way and its refusal must not lead to access to the functionalities of the platform being disabled; stresses that consent in targeted advertising must not be considered as freely given and valid if access to the service is made conditional on data processing; reconfirms that the Directive 2002/58/EC of the European Parliament and of the Council<sup>11</sup> makes targeted advertising subject to an opt-in decision and that it is otherwise prohibited; notes that since the online activities of an individual allow for deep insights into their behaviour and make it possible to manipulate them, the general and indiscriminate collection of personal data concerning every use of a digital service interferes disproportionately with the right to privacy; confirms that users have a right not to be subject to pervasive tracking when using digital services;
27. Asks the Commission to ensure that, in the same spirit, consumers can still use a connected device for all its functions, even if consumers withdraw or do not give their

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<sup>11</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

consent to share non-operational data with the device manufacturer or third parties; reiterates the need for transparency in contract terms and conditions regarding the possibility and scope of data sharing with third parties;

28. Further calls for users to be guaranteed an appropriate degree of transparency and influence over the criteria according to which content is curated and made visible for them; affirms that this should also include the option to opt out from any content curation other than chronological order; points out that application programming interfaces provided by platforms should allow users to have content curated by software or services of their choice;
29. Underlines the importance for the Digital Services Act to prove legally sound and effective protection of children in the online environment, whilst refraining from imposing general monitoring or filtering obligations and ensuring full coordination and avoiding duplication with the General Data Protection Regulation and with Audiovisual Media Services Directive.
30. Recalls that paid advertisements or paid placement of sponsored content should be identified in a clear, concise and intelligent manner; suggests that platforms should disclose the origin of paid advertisements and sponsored content; suggests, to this end, that content hosting platforms publish all sponsored content and advertisements and make them clearly visible to their users in an advertising archive that is publicly accessible, indicating who has paid for them, and, if applicable, on behalf of whom; stresses that this includes both direct and indirect payments or any other remuneration received by service providers;
31. Believes that, if relevant data shows a significant gap in misleading advertising practices and enforcement between platforms based in the Union-based and platforms based in third country, it is reasonable to consider further options to ensure compliance with the laws in force within the Union; stresses the need for a level playing field between advertisers from the Union and advertisers from third countries;

*Provisions regarding terms and conditions, smart contracts and blockchains, and private international law*

33. Notes the rise of so-called smart contracts such as those based on distributed ledger technologies without a clear legal framework;
34. Calls on the Commission to assess the development and use of distributed ledger technologies, including blockchain and, in particular, of smart contracts, provide guidance to ensure legal certainty for business and consumers, in particular the questions of legality, enforcement of smart contracts in cross border situations, and notarisation requirements where applicable, and make proposals for the appropriate legal framework;
35. Underlines that the fairness and compliance with fundamental rights standards of terms and conditions imposed by intermediaries to the users of their services must be subject to judicial review; stresses, that terms and conditions unduly restricting users' fundamental rights, such as the right to privacy and to freedom of expression, should not be binding;

36. Requests that the Commission examine modalities to ensure appropriate balance and equality between the parties to smart contracts by taking into account the private concerns of the weaker party or public concerns such as those related to cartel agreements; emphasises the need to ensure that the rights of creditors in insolvency and restructuring procedures are respected; strongly recommends that smart contracts include mechanisms that can halt and reverse their execution and related payments;
37. Requests the Commission to in particular update its existing guidance document on Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights<sup>12</sup> in order to clarify whether it considers smart contracts to fall within the exemption in point (1) of Article 3(3) of that Directive, and, if so, under which circumstances, and to clarify the issue of the right to withdrawal;
38. Stresses the need for blockchain technologies, and smart contracts in particular, to be utilised in accordance with antitrust rules and requirements, including those prohibiting cartel agreements or concerted practices;
39. Considers that standard terms and conditions should not prevent effective access to justice in Union courts or disenfranchise Union citizens or businesses; calls on the Commission to assess whether the protection of access rights to data under private international law is uncertain and leads to disadvantages for Union citizens and businesses;
40. Emphasises the importance of ensuring that the use of digital services in the Union is fully governed by Union law under the jurisdiction of Union courts;
41. Concludes further that legislative solutions to these issues ought to be found at Union level if action at the international level does not seem feasible, or if there is a risk of such action taking too long to come to fruition;
42. Stresses that service providers established in the Union must not be required to remove or disable access to information that is legal in their country of origin;
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43. Instructs its President to forward this resolution and the accompanying detailed recommendations to the Commission and the Council.

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<sup>12</sup> OJ L 304, 22.11.2011, p. 64.

## **ANNEX TO THE MOTION FOR A RESOLUTION: DETAILED RECOMMENDATIONS AS TO THE CONTENT OF THE PROPOSAL REQUESTED**

### **A. PRINCIPLES AND AIMS OF THE PROPOSAL REQUESTED**

THE KEY PRINCIPLES AND AIMS OF THE PROPOSAL:

- The proposal sets out both acts that should be included in the Digital Services Act and that are ancillary to the Digital Services Act.
- The proposal aims to strengthen civil and commercial law rules applicable to commercial entities operating online with respect to digital services.
- The proposal aims to bring clarity on the contractual rights of users in relation to content moderation and curation.
- The proposal aims to further address inadmissible and unfair terms and conditions used for the purpose of digital services.
- The proposal addresses the issue of aspects of data collection being in contravention of fair contractual rights of users as well as data protection and online confidentiality rules.
- The proposal addresses the importance of fair implementation of the rights of users as regards interoperability and portability.
- The proposal raises the importance of private international law rules that provide legal clarity on the non-negotiable terms and conditions used by online platforms, as well as of ensuring the right to access data and guaranteeing the access to justice.
- The proposal does not address aspects related to the regulation of online market places, which should nevertheless be considered by the Digital Services Act Package to be proposed by the Commission.
- The proposal raises the need for assessment of the necessity of a proper regulation of civil and commercial law aspects in the field of distributed ledger technologies, including blockchains and, in particular, addresses the necessity of the proper regulation of civil and commercial law aspects of smart contracts.
- The proposal raises the importance of private international law rules that provide legal clarity and certainty with respect to non-negotiable terms and conditions used by online platforms and rights to access to data so that access to justice is appropriately guaranteed.

### **I. PROPOSALS TO BE INCLUDED IN THE DIGITAL SERVICES ACT**

The key elements of the proposals to be included in the Digital Services Act should be:

**A regulation on contractual rights as regards content management’ and that contains the following elements:**

- It should indicate a set of clear indicators to define the market power of content hosting platforms in order to determine whether certain content hosting platforms that do not hold significant market power can be exempted from certain provisions. Such indicators could include the size of its network (number of users), its financial strength, access to data, the degree of vertical integration, or the presence of lock-in effect.
- It should apply to content management, including content moderation and curation, with regard to content accessible in the Union.
- It should provide proportionate principles for content moderation.
- It should provide formal and procedural standards for a notice and action mechanism which are proportionate to the platform and the nature and impact of the harm, effective, and future-proof.
- It should provide for an independent dispute settlement in the Member States without limiting access to judicial redress.
- It should provide rules regarding the responsibility of content hosting platforms for goods sold or advertised on them taking into account supporting activities for SMEs in order to minimize their burden when adapting to this responsibility.
- It should make a clear distinction between illegal and harmful content when it comes to applying the appropriate policy options. In this regard, any measure in the DSA should concern only illegal content as defined in Union and national law.
- It should be based upon established principles as regards determining the law applicable to compliance with administrative law, and should - in light of the increasing convergence of user - clearly state that all aspects within its scope are governed by those principles.
- It should fully respect the Charter of Fundamental Rights of the European Union, as well as Union rules protecting users and their safety, privacy and personal data, as well as other fundamental rights.
- It should provide a dialogue between major content hosting platforms with significant market power and the European entity on the risk management of content management of legal content.

**Transparency reports regarding content management should be established as follows:**

The Digital Services Act should contain provisions requiring content hosting platforms to regularly publish and provide transparency reports to the European entity. Such reports should be comprehensive, following a consistent methodology, and should include in particular:

- information on notices processed by the content hosting intermediary, including the following:



- the total number of notices received and for which types of content, and the action taken accordingly;
- the number of notices received per category of submitting entity, such as private individuals, public authorities or private undertakings;
- the total number of removal requests complied with and the total number of referrals of content to competent authorities;
- the total number of counter-notices or appeals received as well as information on how they were resolved;
- the average lapse of time between publication, notice, counter-notice and action;
- information on the number of staff employed for content moderation, their location, education, and language skills, as well as any algorithms used to take decisions;
- information on requests for information by public authorities, such as those responsible for law enforcement, including the numbers of fully complied with requests and requests that were not or only partially complied with;
- information on the enforcement of terms and conditions and information on the court decisions ordering the annulment and/or modification of terms and conditions considered illegal by a Member State.

Content hosting platforms should, in addition, publish their decisions on content removal on a publicly accessible database to increase transparency for users.

The independent dispute settlement bodies to be established by the Regulation should issue reports on the number of referrals brought before them, including the number of referrals given heed to.

**The Commission should consider options for appointing a European entity tasked with ensuring compliance with the provisions of the proposal through the following measures:**

- regular monitoring of the algorithms employed by content hosting platforms for the purpose of content management;
- regular review of the compliance of content hosting platforms with the provisions of the regulation, on the basis of transparency reports provided by the content-hosting platforms and the public database of decisions on removal of content to be established by the Digital Services Act;
- working with content hosting platforms on best practices to meet the transparency and accountability requirements for terms and conditions, as well as best practices in content moderation and implementing notice-and-action procedures;
- cooperating and coordinating with the national authorities of Member States as regards the implementation of the Digital Services Act;



- managing a dedicated fund to assist the Member States in financing the operating costs of the independent dispute settlement bodies described in the regulation, funded by fines imposed on content hosting platforms for non-compliance with the provisions of the Digital Services Act as well as a contribution by content hosting platforms with significant market power;
- imposing fines for non-compliance with the Digital Services Act. The fines should contribute to the special dedicated fund intended to assist the Member States in financing the operating costs of the dispute settlement bodies described in the regulation. Instances of non-compliance should include:
  - failure to implement the provisions of the regulation;
  - failure to provide transparent, accessible, fair and non-discriminatory terms and conditions;
  - failure to provide the European entity with access to content management algorithms for review;
  - failure to submit transparency reports to the European entity;
- publishing biannual reports on all of its activities and reporting to Union institutions.

## II. PROPOSALS ANCILLARY TO THE DIGITAL SERVICES ACT

### **Measures regarding content curation, data and online advertisements in breach of fair contractual rights of users should include:**

- Measures to minimise the data collected by content hosting platforms, based on interactions of users with content hosted on content hosting platforms, for the purpose of completing targeted advertising profiles, in particular by imposing strict conditions for the use of targeted personal advertisements and by requiring freely given, specific, informed and unambiguous prior consent of the user. Consent to targeted advertising shall not be considered as freely given and valid if access to the service is made conditional on data processing.
- Users of content hosting platforms should be informed if they are subject to targeted advertising, given access to their profile built by content hosting platforms and the possibility to modify it, and given the choice to opt in or out and withdraw their consent to be subject to targeted advertisements.
- Content hosting platforms should make available an archive of sponsored content and advertisements that were shown to their users, including the following:
  - whether the sponsored content or sponsorship is currently active or inactive;
  - the timespan during which the sponsored content advertisement was active;
  - the name and contact details of the sponsor or advertiser, and, if different, on

behalf of whom the sponsored content or advertisement was placed;

- the total number of users reached;
- information on the group of users targeted.

**The path to fair implementation of the rights of users as regards interoperability interconnectivity and portability should include:**

- an assessment of the possibility of defining fair contractual conditions to facilitate data sharing with the aim of addressing imbalances in market power, in particular through the interoperability, interconnectivity and portability of data.
- a requirement for platforms with significant market power to provide an application programming interface, through which third-party platforms and their users can interoperate with the main functionalities and users of the platform providing the application programming interface, including third-party services designed to enhance and customise the user experience, especially through services that customise privacy settings as well as content curation preferences;
- provisions ensuring that platforms with significant market power providing an application programming interface may not share, retain, monetise or use any of the data they receive from third-party services;
- provisions ensuring that the interoperability and interconnectivity obligations may not limit, hinder or delay the ability of content hosting platforms to fix security issues, nor should the need to fix security issues lead to an undue suspension of the application programming interface providing interoperability and interconnectivity;
- provisions ensuring that platforms be required by the Digital Services Act to ensure the technical feasibility of the data portability provisions laid down in Article 20(2) of the General Data Protection Regulation;
- provisions ensuring that content hosting platforms with significant market power publicly document all application programming interfaces they make available for the purpose of allowing for the interoperability and interconnectivity of services.

**The path to the proper regulation of civil and commercial law aspects of distributed ledger technologies, including blockchains and, in particular, smart contracts should comprise:**

- measures ensuring that the proper legislative framework is in place for the development and deployment of digital services including distributed ledger technologies, such as blockchains and smart contracts;
- measures ensuring that smart contracts are fitted with mechanisms that can halt and reverse their execution, in particular given private concerns of the weaker party or public concerns such as those related to cartelisation and in respect for the rights of creditors in insolvency and restructuring procedures;
- measures to ensure appropriate balance and equality between the parties to smart

contracts, taking into account, in particular, the interest of small businesses and SMEs, for which the Commission should examine possible modalities;

- an update of the existing guidance document on Directive 2011/83/EU in order to clarify whether smart contracts fall within the exemption in point (I) of Article 3(3) of that Directive as well as issues related to cross-border transactions, notarisation requirements and the right to withdrawal;

**The path to equitable private international law rules that do not deprive users of access to justice should:**

- ensure that standard contractual terms and conditions do not include provisions regulating private international law matters to the detriment of access to justice, in particular through the effective enforcement of existing measures in this regard;
- include measures clarifying private international law rules concerning the activities of platforms regarding data, so that they are not detrimental to Union subjects;
- build on multilateralism and, if possible, be agreed in the appropriate international fora.

Only where it proves impossible to achieve a solution based on multilateralism in reasonable time, should measures applied within the Union be proposed, in order to ensure that the use of digital services in the Union is fully governed by Union law under the jurisdiction of Union courts.

## **B. TEXT OF THE LEGISLATIVE PROPOSAL REQUESTED**

Proposal for a

### **REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

#### **on contractual rights as regards content management**

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The terms and conditions that digital service providers apply in relations with users are often non-negotiable and can be unilaterally amended by those providers. Action at a legislative level is needed to put in place minimum standards for such terms and conditions, in particular as regards procedural standards for content management;
- (2) The civil law regimes governing the practices of content hosting platforms as regards content moderation are based on certain sector-specific provisions at Union level as well as on laws passed by Member States at national level, and there are notable differences in the obligations imposed by those civil law regimes on content hosting platforms and in their enforcement mechanisms.
- (3) The resulting fragmentation of civil law regimes governing content moderation by content hosting platforms not only creates legal uncertainties, which might lead such platforms to adopt stricter practices than necessary in order to minimise the risks brought about by the use of their service, but also leads to a fragmentation of the Digital Single Market, which hinders the growth and development of European businesses in the Digital Single Market.
- (4) Given the detrimental effects of the fragmentation of the Digital Single Market, and the resulting legal uncertainty for businesses and consumers, the international character of content hosting, the large amount of content and content requiring moderation, and the significant market power held by a few content hosting platforms located outside the Union, the various issues that arise in respect of content hosting need to be regulated in a manner that entails full harmonisation and therefore by means of a regulation.
- (5) Concerning relations with users, this Regulation should lay down minimum standards for the transparency and accountability of terms and conditions of content hosting platforms. Terms and conditions should include transparent, binding and uniform standards and procedures for content moderation, which should guarantee accessible and independent recourse to judicial redress.

- (6) User-targeted amplification of content based on the views in such content is one of the most detrimental practices in the digital society, especially when such content is amplified on the basis of previous user interaction with other amplified content and with the purpose of optimising user profiles for targeted advertisements.
- (7) Recalls that algorithms that decide on the ranking of search results influence individual and social communications and interactions and can be opinion-forming, especially in the case of media contents.
- (8) In order to ensure, inter alia, that users can assert their rights they should be given an appropriate degree of **transparency and** influence over the curation of content made visible to them, including the possibility to opt out of any content curation other than chronological order altogether. In particular, users should not be subject to curation without freely given, specific, informed and unambiguous prior consent. Consent in targeted advertising should not be considered as freely given and valid if access to the service is made conditional on data processing.
- (9) Content hosting platforms should be required to provide users with sufficient information on their content curation profiles and the individual criteria according to which content hosting platforms curate content for them, including information as to whether algorithms are used and on their objectives. (10) Consent given in a general manner by a user to the terms and conditions of content hosting platforms or to any other general description of the rules relating to content management by content hosting platforms should not be taken as sufficient consent for the display of automatically curated content to the user.
- (11) This Regulation should not contain obligations on content hosting platforms to employ any form of automated ex-ante control of content, unless otherwise specified in existing Union law, and provide that content moderation procedures used voluntarily by platforms do not lead to ex-ante control measures based on automated tools or upload-filtering of content.
- (12) This Regulation should also include provisions against discriminatory content moderation practices, exploitation or exclusion, for the purposes of content moderation, especially when user-created content is removed based on appearance, ethnic origin, gender, sexual orientation, religion or belief, disability, age, pregnancy or upbringing of children, language or social class.
- (13) The right to issue a notice pursuant to this Regulation should remain with any natural or legal person, including public bodies, to which content is provided through a website or application.
- (14) After a notice has been issued, the uploader should be informed thereof by the hosting platform and in particular about the reason for the notice and for the action to be taken, and should be provided information about the procedure, including about appeal and referral to independent dispute settlement bodies, and about available remedies in the event of false notices. Such information should, however, not be given if the content hosting platform has been informed by public authorities about ongoing law enforcement investigations. In such case, it should be for the relevant authorities to inform the uploader about the issue of a notice, in accordance with applicable rules.

- (15) All concerned parties should be informed about a decision as regards a notice. The information provided to concerned parties should also include, apart from the outcome of the decision, at least the reason for the decision and whether the decision was taken by a human, as well as relevant information regarding review or redress.
- (16) Content should be considered as manifestly illegal if it is unmistakably and without requiring in-depth examination in breach of legal provisions regulating the legality of content on the internet.
- (17) Given the immediate nature of content hosting and the often ephemeral purpose of content uploading, it is necessary to provide independent dispute settlement bodies for the purpose of providing quick and efficient extra-judicial recourse. Such bodies should be competent to adjudicate disputes concerning the legality of user-uploaded content and the correct application of terms and conditions. However that process should not prevent the user from having the right of access to justice and further judicial redress.
- (18) The establishment of independent dispute settlement bodies could relieve the burden on courts, by providing a fast resolution of disputes over content management decisions without prejudice to the right to judicial redress before a court. Given that content hosting platforms which enjoy significant market power can particularly gain from the introduction of independent dispute settlement bodies, it is appropriate that they contribute to the financing of such bodies. This fund should be independently managed by the European entity tasked with ensuring compliance with the provisions of this proposal in order to assist the Member States in financing the running costs of the independent dispute settlement bodies. Member States should ensure that such bodies are provided with adequate resources to ensure their competence and independence.
- (19) Users should have the right to referral to a fair and independent dispute settlement body, as an alternative dispute settlement mechanism, to contest a decision taken by a content hosting platform following a notice concerning content they uploaded. Notifiers should have that right if they would have legal standing in a civil procedure regarding the content in question.
- (20) As regards jurisdiction, the competent independent dispute settlement body should be that located in the Member State in which the content forming the subject of the dispute has been uploaded. It should always be possible for natural persons to bring complaints to the independent dispute settlement body of their Member States of residence.
- (21) Whistleblowing helps to prevent breaches of law and detect threats or harm to the general interest that would otherwise remain undetected. Providing protection for whistleblowers plays an important role in protecting freedom of expression, media freedom and the public's right to access information. Directive (EU) 2019/1937 should therefore apply to the relevant breaches of this Regulation. Accordingly, that Directive should be amended.
- (22) This Regulation should include obligations to report on its implementation and to review it within a reasonable time. For this purpose, the independent dispute settlement bodies provided for by Member States under this Regulation should submit reports on the number of referrals brought before them, the decisions taken – anonymising personal data as appropriate – including the number of referrals dealt with, data on systemic problems, trends and the identification of platforms not complying with



decisions of alternative dispute settlement bodies.

- (23) Since the objective of this Regulation, namely to establish a regulatory framework for contractual rights as regards content management in the Union, cannot be sufficiently achieved by the Member States but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.
- (24) Action at Union level as set out in this Regulation would be substantially enhanced by a European entity tasked with appropriate monitoring and ensuring compliance by content hosting platforms with the provisions of this Regulation. For this purpose, the Commission should consider the options of appointing an existing or new European Agency or European body or coordinating a network of national authorities in order to review compliance with the standards laid down for content management on the basis of transparency reports and the monitoring of algorithms employed by content hosting platforms for the purpose of content management (hereinafter referred to as ‘the European entity’).
- (25) In order to ensure that the risks presented by content amplification, are evaluated, a biannual dialogue on content management policies of legal content should be established between major content hosting platforms and the European entity together with relevant national authorities.
- (26) This Regulation respects all fundamental rights and observes the freedoms and principles recognised in the Charter of Fundamental Rights of the European Union as enshrined in the Treaties, in particular the freedom of expression and information, and the right to an effective remedy and to a fair trial –

HAVE ADOPTED THIS REGULATION:

#### *Article 1*

#### **Purpose**

The purpose of this Regulation is to contribute to the proper functioning of the internal market by laying down rules to ensure that fair contractual rights exist as regards content management and to provide independent dispute settlement mechanisms for disputes regarding content management.

#### *Article 2*

#### **Scope of application**

1. This Regulation applies to content hosting platforms that host and manage content that is accessible to the public on websites or through applications in the Union, irrespective of the place of establishment or registration, or principal place of business of the content hosting platform.
2. This Regulation does not apply to content hosting platforms that:
  - (a) are of a non-commercial nature; or



- (b) have fewer than 100,000 users.

### *Article 3* **Definitions**

For the purposes of this Regulation, the following definitions apply:

- (1) 'content hosting platform' means an information society service within the meaning of point (b) of Article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council<sup>13</sup> of which the main or one of the main purposes is to allow signed-up or non-signed-up users to upload content for display on a publicly accessible website or application;
- (2) 'content hosting platform with significant market power' means a content hosting platform with at least two of the following characteristics:
  - (a) the capacity to develop or preserve its user base because of network effects which lock-in a significant part of its users, or because of its positioning in the downstream market allows it to create economic dependency;
  - (b) being of a considerable size in the market, measured either by the number of active users or by the annual global turnover of the platform;
  - (c) it is integrated into an business or network environment controlled by its group or parent company, which allows for market power to be leveraged from one market into an adjacent market;
  - (d) it has a gatekeeper role for a whole category of content or information;
  - (e) it has access to large amounts of high quality personal data, either provided by users or inferred about users based on monitoring their online behaviour. Data indispensable for providing and improving a similar service, as well as being difficult to access or replicate by potential competitors;
- (3) 'content' means any concept, idea, form of expression or information in any format such as text, images, audio and video;
- (4) 'illegal content' means any information which is not in compliance with Union law or the law of a Member State in which it is hosted;
- (5) 'content management' means the moderation and curation of content on content hosting platforms;
- (6) 'content moderation' means the practice of monitoring and applying a pre-determined set of rules and guidelines to content generated, published or shared by users in order to ensure that the content complies with legal and regulatory requirements, community

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<sup>13</sup> Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1).

guidelines and terms and conditions, as well as any resulting measure taken by the platform, such as removal of a content or the deletion or suspension of the user's account, be it through automated means or human operators;

- (7) 'content curation' means the practice of selecting, optimising, prioritising and recommending content based on individual user profiles for the purpose of its display on a website or application;
- (8) 'terms and conditions' means all terms, conditions or specifications, irrespective of their name or form, which govern the contractual relationship between the content hosting platform and its users and which are unilaterally determined by the content hosting platform;
- (9) 'user' means a natural or legal person that uses the services provided by a content hosting platform or interacts with content hosted on such a platform;
- (10) 'uploader' means a natural or legal person that adds content to a content hosting platform irrespective of its visibility to other users;
- (11) 'notice' means a formalised notification contesting the compliance of content with legal and regulatory requirements, community guidelines and terms and conditions.

#### *Article 4*

### **Principles for content management**

1. Content management shall be conducted in a fair, lawful and transparent manner. Content management practices shall be appropriate, proportionate to the type and scale of content, relevant and limited to what is necessary in relation to the purposes for which the content is managed. Content hosting platforms shall be accountable for ensuring that their content management practices are fair, transparent and proportional.
2. Users shall not be subjected to discriminatory practices, exploitation or exclusion, for the purposes of content moderation by the content hosting platforms, such as removal of user-generated content based on appearance, ethnic origin, gender, sexual orientation, religion or belief, disability, age, pregnancy or upbringing of children, language or social class.
3. Content hosting platforms shall provide the users with sufficient information on their content curation profiles and the individual criteria according to which content hosting platforms curate content for them, including information as to whether algorithms are used and their objectives.
4. Content hosting platforms shall provide users with an appropriate degree of influence over the curation of content made visible to them, including the choice of opting out of content curation altogether. In particular, users shall not be subject to content curation without their freely given, specific, informed and unambiguous prior consent.

#### *Article 4a*

### **Structured risk dialogue on content curation**

As part of a structured risk dialogue with the European entity together with the relevant

national authorities, content hosting platforms with significant market power shall present a biannual report to the European entity on the fundamental rights impact and on their risk management of their content management policies and how they mitigate those risks.

#### Article 4b

#### **Transparency obligation**

1. Digital services providers shall take the measures necessary to enable the disclosure of the funding of any interest groups with which the users of the providers' digital services are associated, and of details of the nature of the relationship between such interest groups and users. Such disclosure shall enable the person who is legally responsible to be identified..
2. Commercial digital service providers who are established outside the Union shall designate a legal representative for the purposes of user interests within the Union and make the contact information of that representative accessible on their online platforms.

#### Article 5

#### **Eligibility for issuing notices**

Any natural or legal person or public body to which content is provided through a website, application, or other form of software, shall have the right to issue a notice pursuant to this Regulation.

Member States shall provide for penalties where a person acting for purposes relating to their trade, business, craft or profession systematically and repeatedly submits wrongful notices. Such penalties shall be effective, proportionate and dissuasive.

#### Article 6

#### **Notice procedures**

Content hosting platforms shall include in their terms and conditions clear, accessible, intelligible and unambiguous information regarding notice procedures, in particular:

- (a) the maximum period within which the uploader of the content in question is to be informed about a notice procedure;
- (b) the period within which the uploader can launch an appeal;
- (c) the deadline for the content hosting platform to expeditiously treat a notice and take a decision;
- (d) the deadline for the content hosting platform to inform both parties about the outcome of the decision including a justification for the action taken.

#### Article 7

#### **Content of notices**

A notice regarding content shall include at least the following information:

- (a) a link to the content in question and, where appropriate, such as regarding video content, a timestamp;
- (b) the reason for the notification;
- (c) evidence supporting the claim made in the notification;
- (d) a declaration of good faith from the notifier; and
- (e) in the event of a violation of personality rights or intellectual property rights, the identity of the notifier.

In the event of violations referred to in point (e) of the first paragraph, the notifier shall be the person concerned by the violation of personality rights, or the holder of the intellectual property rights that were violated, or someone acting on behalf of that person.

#### *Article 8* **Information to the uploader**

1. Upon a notice being issued, and before any decision on the content has been made, the uploader of the content in question shall receive the following information:
  - (a) the reason for the notice and for the action the content hosting platform might take;
  - (b) sufficient information about the procedure to follow;
  - (c) information on the right of reply laid down in paragraph 2; and
  - (d) information on the available remedies in relation to false notices.

The information required under the first paragraph shall not be provided if the content hosting platform has been informed by public authorities about ongoing law enforcement investigations.

2. The uploader shall have the right of replying to the content hosting platform in the form of a counter-notice.. The content hosting platform shall consider the uploader's reply when taking a decision on the action to be taken.

#### *Article 9* **Decisions on notices**

1. Content hosting platforms shall ensure that decisions on notifications are taken by qualified staff without undue delay following the necessary investigations.
2. Following a notice, content hosting platforms shall, without delay, remove, take down or disable access to content that was the subject of a notice , if such content does not comply with legal requirements. Without prejudice to Article 12(2), the fact that a content hosting platform has deemed a specific content to be non-compliant shall in no case automatically lead to content by another user being removed, taken down or made invisible.

*Article 10*  
**Information about decisions**

Once a content hosting platform has taken a decision, it shall inform all parties involved in the notice procedure about the outcome of the decision, providing the following information in a clear and simple manner:

- (a) the reasons for the decision taken;
- (b) whether the decision was made solely by a human or with the aid of an algorithm;
- (c) information about the possibility for review as referred to in Article 11 and judicial redress for either party.

*Article 11*  
**Review of decisions**

- 1. Content hosting platforms may provide a mechanism allowing users to request a review of decisions they take.
- 2. Content hosting platforms with significant market power shall provide the review mechanism referred to in paragraph 1.
- 3. In all cases, the final decision of the review shall be undertaken by a human.

*Article 12*  
**Stay-up principle**

- 1. Without prejudice to judicial or administrative orders regarding content online, content that has been the subject of a notice shall remain while the assessment of its legality is still pending.
- 2. Digital service providers shall act expeditiously to make unavailable or remove illegal content that has been notified to them and make best efforts to prevent future uploads of the same content.

*Article 13*  
**Independent dispute settlement**

- 1. Member States shall provide independent dispute settlement bodies for the purpose of providing quick and efficient extra-judicial recourse when decisions on content moderation are appealed against.
- 2. The independent dispute settlement bodies shall be composed of independent legal experts with the mandate to adjudicate disputes between content hosting platforms and users concerning the compliance of the content in question with legal and regulatory requirements, community guidelines and terms and conditions.
- 3. The referral of a question regarding content moderation to an independent dispute settlement body shall not preclude a user from being able to have further recourse in the courts unless the dispute has been settled by common agreement.

4. Content hosting platforms with significant market power shall contribute financially to the operating costs of the independent dispute settlement bodies through a dedicated fund managed by the European entity, in order to assist the Member States in financing those bodies. Member States shall ensure the independent dispute settlement bodies are provided with adequate resources to ensure that they are competent and independent.

#### *Article 14*

#### **Procedural rules for independent dispute settlement**

1. The uploader as well as a third party, such as an ombudsperson with a legitimate interest in acting shall have the right to refer a case of content moderation to the competent independent dispute settlement body in the event that a content hosting platform has decided to remove, take down or make invisible content, or otherwise to act in a manner that is contrary to the action preferred by the uploader as expressed by the uploader or constitutes an infringement of fundamental rights.
2. Where the content hosting platform has decided not to take down content that is the subject of a notification, the notifier shall have a right to refer the matter to the competent independent dispute settlement body, provided that the notifier would have legal standing in a civil procedure regarding the content in question.
3. As regards jurisdiction, the competent independent dispute settlement body shall be that located in the Member State in which the content that is the subject of the dispute has been uploaded. Natural persons shall be allowed in all cases to bring complaints to the independent dispute body of their Member States of residence.
4. Where the notifier has the right to refer a case of content moderation to an independent dispute settlement body in accordance with paragraph 2, the notifier may refer the case to the independent dispute settlement body located in the Member State of habitual residence of the notifier or the uploader, if the latter is using the service for non-commercial purposes.
5. Where a case of content moderation relating to the same question is the subject of a referral to another independent dispute settlement body, the independent settlement body may suspend the procedure as regards a referral. Where a question of content moderation has been the subject of recommendations by an independent dispute settlement body, the independent dispute settlement body may decline to treat the referral.
6. The Member States shall lay down all other necessary rules and procedures for the independent dispute settlement bodies within their jurisdiction.

#### *Article 15*

#### **Personal data**

Any processing of personal data carried out pursuant to this Regulation shall be carried out in accordance with Regulation (EU) 2016/679 of the European Parliament and of the Council<sup>14</sup>

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<sup>14</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data

and Directive 2002/58/EC of the European Parliament and of the Council<sup>15</sup>.

#### *Article 16*

### **Reporting of breaches and protection of reporting persons**

Directive (EU) 2019/1937 shall apply to the reporting of breaches of this Regulation and to the persons reporting such breaches.

#### *Article 17*

### **Amendments to Directive (EU) 2019/1937**

Directive (EU) 2019/1937 is amended as follows:

- (1) in point (a) of Article 2(1), the following point is added:

“(xi) online content management;”;

- (2) in Part I of the Annex, the following point is added:

“K. Point (a)(xi) of Article 2(1) - online content management.

Regulation [XXX] of the European Parliament and of the Council on contractual rights as regards content management.”.

#### *Article 18*

### **Reporting, evaluation and review**

1. Member States shall provide the Commission with all relevant information regarding the implementation and application of this Regulation. On the basis of the information provided and of public consultation, the Commission shall, by ... [three years after entry into force of this Regulation], submit a report to the European Parliament and to the Council on the implementation and application of this Regulation and consider the need for additional measures, including, where appropriate, amendments to this Regulation.
2. Without prejudice to reporting obligations laid down in other Union legal acts, Member States shall, on an annual basis, submit the following statistics to the Commission:
  - (a) the number of disputes referred to independent dispute settlement bodies and the types of content that were the subject of disputes;
  - (b) the number of cases settled by the independent dispute settlement bodies, categorised according to outcome.

#### *Article 19*

### **Entry into force**

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Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

<sup>15</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).



This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the Union.

It shall apply from XX.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

NOT OFFICIAL VERSION

## EXPLANATORY STATEMENT

The nature of digital services in the European Union is changing drastically, and at a dramatic pace. The current legal framework for digital services in the internal market was set in the year 2000. Since then, business models, technologies and social realities have evolved to an extent that requires a comprehensive update of the rules and laws governing the provision of digital services in the European Union.

The President of the European Commission, in her political guidelines, announced a Digital Services Act to adapt the Union's legal framework to the new social realities and business models in the digital economy of the 21st century. The necessity of such an initiative becomes apparent when considering that several Member States are beginning to take legislative measures at national level addressing issues that directly pertain to the provision of digital services in the European Union. However, when Member States take measures against issues that are cross-border in nature, the resulting fragmented set of rules throughout the Union is not only ineffective, but particularly harmful in stifling the growth of European companies in the Digital Single Market. In order to ensure the proper functioning of the single market for digital services as postulated by Article 114 TFEU, an update of civil and commercial rules applicable to commercial entities operating online is necessary.

In the course of the last decade, an increasing amount of social and commercial activity has moved to take place on online platforms, which serve as intermediaries for content, services and goods. In addition, social media and collaborative economy services are blurring the lines between providers and consumers of content and services, the delivery of which has become horizontal and diffuse rather than vertical and linear. With content hosting platforms establishing themselves as the dominant format for the exchange of content and services, the question of tackling illicit activities has moved into focus.

Furthermore, the acquisition of significant market power by dominant platforms has led to a situation in which “the winner takes it all”, and the market is composed of a small number of players each exerting market dominance over their competitors and imposing their business practices on users. Under currently existing legal regimes there is little regulatory oversight in how content hosting platforms deal with illicit activities. This results in a situation where the enforcement of laws on one hand, but also the safeguard of fundamental rights on the other hand, remains in the hands of private companies. Considering the freedom of expression protected by Article 11 of the European Charter of Fundamental Rights, Union law must guarantee transparent procedures for content moderation that allow for the access to justice of all parties involved.

The rapporteur takes the view that the Digital Services Act should render the principle of “notice and action” effective and workable, and establish it as the standard procedure for content moderation to follow throughout the Union. In order to do so, the rapporteur has identified two ways in which the Digital Services Act can strengthen the effectiveness of notice and action procedures: (1) laying down a clear procedural framework for notice-and-action procedures; and (2) ensuring that notice-and-action procedures allow for effective judicial redress. These provisions should be without prejudice to the application of the liability rules of intermediary service providers as provided for in Articles 12 to 15 of Directive 2000/31/EC.

Firstly, Union law should mandate for notice-and-action procedures to be enshrined in the

terms and conditions of content hosting platforms, laying down common standards for the way content hosting platforms moderate content. In this sense, an injunction from a court or a notice from a right-holder should lead to a content hosting platform taking proportionate action following a clear procedure laid down by provisions introduced as part of the Digital Services Act package. This way, notice-and-action procedures can be strengthened and given a clear procedural framework that ensures fairness and legal certainty for all parties.

Secondly, laying down clear standards for notice-and-action procedures also ensures that effective judicial redress is possible in case of disputes. Wrongful takedowns, due to overblocking or false notices, violate the freedom of expression of users, and the Digital Services Act must indicate clear ways for effective judicial redress in such situations. The rapporteur is of the view that this approach is preferable to asking content hosting platforms to “step up” and become more proactive especially in cases of emergency, which could lead to overblocking in practice and place the task of determining the legality of content entirely into the hands of private undertakings, with harmful effects for the exercise of fundamental rights online and the rule of law. To this end, the Digital Services Act must not contain any provisions that force or otherwise lead content hosting platforms to employ automated pre-control of content or other automated ex-ante content moderation tools. Instead, the final decision regarding the legality of content can only be taken by an independent judiciary. In order to ensure this, content moderation practices must be based on balanced cooperation between content hosting platforms and public authorities, which requires clear rules and procedures to be provided by the Digital Services Act.

Judicial redress must be effective and workable in practice. Therefore, content moderation disputes should not overburden the judicial systems of Member States. For this reason, the rapporteur suggests setting up independent dispute settlement bodies in the Member States, composed of legal experts tasked with settling disputes between content hosting platforms and users regarding content moderation decisions. Such a simplified legal procedure would be designed to fit to the nature of content moderation disputes, and at the same time ensure that national courts are not overburdened by such disputes. As these bodies would act as a sub-court system, they may not replace traditional courts and further redress before courts must remain possible in all cases. The financial burden for setting up and running such dispute settlement bodies should not be laid upon the taxpayers. Instead, the rapporteur suggests establishing a dedicated fund, to which content hosting platforms with a significant market position should contribute.

In order to monitor and ensure compliance with the provisions of the Digital Services Act, the rapporteur suggests creating a European Agency with the possibility to impose fines on those content hosting platforms who are found to disregard the required standards in their content management practices. Content hosting platforms should regularly transmit transparency reports to the Agency, detailing their adherence to the standards and procedures required for notice-and-action procedures by the Digital Services Act. Furthermore, content hosting platforms should publish information on their takedown decisions on a publicly accessible database so as to allow for research to be undertaken by journalists or scientists on the effects of content takedowns, in order to gain more insights into the effectiveness of content moderation practices. At the same time, the European Agency should be tasked with auditing algorithms employed by content hosting platforms for both content moderation and content curation, notably in cases when content hosting platforms voluntarily employ algorithms for automated ex-ante content monitoring. The European Agency should also be empowered to issue fines for non-compliance, which could feed into the dedicated fund for the independent

dispute settlement bodies mentioned above.

In addition to providing a clear framework for content moderation, the rapporteur believes it necessary to address some practices in content curation. Many content hosting platforms determine what content is more likely to be made visible to users based on profiles acquired by tracking users' interactions with content, for the purpose of offering targeted advertisements. In practice, this leads to the likely amplification of content that is attention-seeking and sensationalist in nature. This not only leads to a situation in which "clickbait"-content is more likely to appear prominently in news feeds and recommendation systems, it may also, more crucially, impact the freedom of information of users if they have little influence over how content is curated for them. The rapporteur takes the view that a business model that determines the visibility of content exclusively based on the aptitude of content to generate advertisement revenues is detrimental to digital societies, and therefore suggests, on one hand, measures to be taken to curtail the collection of data for the purpose of building targeted advertisement profiles, and on the other hand, for users to be given an appropriate degree of control over the content curation algorithms governing their social media experience. Similarly, algorithms used by content hosting platforms to curate content should also be subject to audits by the European Agency to be established by the Digital Services Act.

This practice becomes particularly more harmful when considering the dominant market position of some content hosting platforms. "Lock-in" effects of users occur due to the sheer size of content hosting platforms, and few platforms have the resources to offer identity verification infrastructure in order to access third party websites, thereby tracking users' interactions with content even outside the content hosting platform's own pages. The rapporteur urges the Commission to look into viable options to ensure fair market conditions for all players including the possibility of defining fair contractual conditions to facilitate data sharing among market players.

The rapporteur also takes the view that the Digital Services Act should include some provisions to facilitate the uptake of innovative instruments based on distributed ledger technologies. So-called smart contracts, blockchain-based self-executing protocols, are becoming increasingly popular. Wide-scale uptake of such technology, however, depends on legal certainty. The Digital Services Act provides an opportunity to assess the requirements in order for smart contracts to be considered legally valid. In particular, the rapporteur is of the opinion that smart contracts must contain mechanisms that can halt their execution in case the contract is void or needs to be terminated.

The Digital Services Act should aim to provide a regulatory ecosystem for the Union that governs the provision of all information society services. However, the international cross-border nature of digital services means that many providers of digital services accessible in the Union are based in third countries. This may raise jurisdictional concerns regarding the terms and conditions of digital services. The rapporteur therefore calls on the Commission to explore adequate international private law rules in order to ensure no European citizen or business is disenfranchised or put to disadvantage by the use of digital services, and that the use of digital services in the Union is governed by European laws and under the jurisdiction of European courts.

9.7.2020

## **OPINION OF THE COMMITTEE ON THE INTERNAL MARKET AND CONSUMER PROTECTION**

for the Committee on Legal Affairs

with recommendations to the Commission on Digital Services Act: adapting commercial and civil law rules for commercial entities operating online (2020/2019(INL))

Rapporteur for opinion(\*): Dita Charanzová

(Initiative – Rule 47 of the Rules of Procedure)

(\*) Associated committee – Rule 57 of the Rules of Procedure

### **SUGGESTIONS**

The Committee on the Internal Market and Consumer Protection calls on the Committee on Legal Affairs, as the committee responsible:

- to incorporate the following suggestions into its motion for a resolution:
- A. whereas the free movement of services, including digital services, is one of the four fundamental freedoms, enshrined in the Treaty on the Functioning of the European Union and is vital to the functioning of the Single Market, and needs to be enhanced by greater consumer protection and consumer welfare;
- B. whereas Directive 2000/31/EC<sup>1</sup> (“the E-commerce Directive”) is the legal framework for online services in the internal market and regulates content management by hosting intermediaries; whereas any fragmentation of that legal framework, resulting from the revision of the E-commerce Directive should be avoided;
- C. whereas the report by the Committee on Legal Affairs on “Digital services act: adapting commercial and civil law rules for commercial entities operating online” does not deal with the E-commerce Directive rules, which are the subject of a report being prepared by the Committee on the Internal Market and Consumer Protection;

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<sup>1</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (*OJ L 178, 17.7.2000, p. 1*).

- D. whereas Directive (EU) 2019/2161<sup>2</sup>, which amends Directive 2005/29/EC<sup>3</sup> (“Unfair Commercial Practices Directive”), , and Directives (EU) 2019/770<sup>4</sup> (“Digital Content Directive”) and (EU) 2019/771<sup>5</sup> on certain aspects concerning contracts for the supply of digital content and digital services and contracts for the sale of goods have only recently been adopted;
- E. whereas Regulation (EU) 2017/2394<sup>6</sup> has a pivotal role in enhancing cooperation amongst national authorities in the field of consumer protection;
- F. whereas the Digital Services Act package should be without prejudice to Regulation (EU) 2016/679<sup>7</sup> “(GDPR)” setting out a legal framework to protect personal data;
- G. whereas the Digital Services Act package should not affect Directive 2002/58/EC<sup>8</sup> which requires that Member States ensure a high level of protection of the right to privacy, with respect to the processing of personal data in the electronic communication sector;
- H. whereas in relation to the COVID-19 outbreak, the Commission welcomed the positive approach taken by the platforms in response to its letters, sent on 23 March 2020,

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<sup>2</sup> Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (OJ L 328, 18.12.2019, p. 7).

<sup>3</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’) (OJ L 149, 11.6.2005, p. 22).

<sup>4</sup> Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (OJ L 136, 22.5.2019, p. 1).

<sup>5</sup> Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (OJ L 136, 22.5.2019, p. 28).

<sup>6</sup> Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 (OJ L 345, 27.12.2017, p. 1).

<sup>7</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

<sup>8</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37)



requiring their cooperation in taking down ‘scam’ advertisements for products falsely claiming that they could prevent or cure a COVID-19 infection;

- I. whereas the legislative measures proposed as part of the Digital Services Act package should be evidence-based and whereas the Commission should carry out a thorough impact assessment, based on relevant data, statistics, analyses and studies of the different options available;
1. Welcomes the “CPC Common Position COVID-19”<sup>9</sup> issued by the Commission and the Consumer Protection Cooperation (CPC) authorities of the Member States on the most recently reported scams and on unfair practices in relation to the COVID-19 outbreak;
2. Stresses the necessity of better protecting consumers by providing reliable and transparent information on examples of malpractice, such as misleading claims and scams;
3. Calls on all platforms to cooperate with the Commission and the competent authorities of the CPC network and European Consumer Centres Network (ECC Net) to better identify illegal practices and to take down scams; asks the Commission to constantly review its guidelines for consumers and traders in order to contribute to avoiding the placement, the sale or the purchase of items and services of false, misleading or otherwise abusive content for consumers and, where necessary, to take legislative action;
4. Believes that such guidelines should not only seek to apply Union and national consumer law, but to proactively seek to put in place the means of reacting to the crisis in the market rapidly;
5. Encourages efforts to bring transparency concerning the functioning of and accountability to advertising online and considers that additional guidance is needed as regards professional diligence and obligations for platforms, when it comes to advertising online; outlines that new measures establishing a framework for Platform-to-Consumers relations are needed as regards transparency provisions on advertising, digital nudging and preferential treatment;
6. Recalls that paid advertisements or paid placement in a ranking should be identified in a clear, concise and intelligent manner; suggests that platforms should disclose the origin of paid advertisements, especially those of a political nature;
7. Points out that targeted advertising must be regulated more strictly in favour of less intrusive forms of advertising and that the Digital Services Act package should set clear boundaries as regards the conditions determining when accumulation of data for that purpose would be permitted, in order to better protect consumers;
8. Believes that, if relevant data show a significant gap in misleading advertising practices and enforcement between Union-based and third country-based platforms, it is

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<sup>9</sup> European Commission / Consumer Protection Cooperation (CPC) Network, Common Position of CPC Authorities, “Stopping scams and tackling unfair business practices on online platforms in the context of the Coronavirus outbreak in the EU”.



reasonable to consider further options to reinforce compliance with existing laws;

9. Considers that the options to reinforce compliance with existing laws should include an obligation for advertisers and advertisement intermediaries established in a third country to designate a legal representative, established in the Union, to whom requests could be addressed, in order, for example, to make it possible to obtain consumer redress in the case of false or misleading advertisements;
10. Stresses the need for a level playing field between advertisers from the Union and advertisers from third countries; asks, therefore, the Commission to evaluate the impact that reciprocal obligations from third countries adopted in reaction to the new Union rules would have on the provision of services by Union-based companies in third countries, while raising awareness on how consumer law applies to advertisers from third countries targeting the Union market;
11. Asks the Commission to clarify what sanctions or other restrictions those advertisement intermediaries and platforms are subject to, in accordance with Union and national laws, if they knowingly accept false or misleading advertisements;
12. Stresses the importance of clearly defining what constitutes false or misleading advertisement; recalls that online platforms should take measures to ensure they do not profit from false or misleading advertisements, including from influencer marketing content which is not being disclosed as sponsored;
13. Underlines that transparency requirements should include the obligation to disclose who is paying for the advertising, including both direct and indirect payments or any other remuneration received by service providers, and protect consumers from unsolicited communications online;
14. Underlines that advertisements for commercial products and services, and advertisements of a political nature, or public interest announcements are different in form and function and therefore should be subject to different, but complementary, guidelines and rules;
15. While recalling earlier efforts, asks the Commission to further review the practice of using pre-formulated standard clauses in contract terms and conditions, which are not individually negotiated in advance, including End-User Licensing Agreements (“contract terms and conditions”), and to seek ways of making them fairer and to ensure compliance with Union law, in order to allow easier engagement for consumers, including in the choice of clauses to make it possible to obtain more informed consent;
16. Recalls that restrictions on the use of digital content and digital services such as technical restrictions, including interoperability restrictions, or restrictions resulting from end-user licencing agreements, may be in breach of Union law if they do not meet the reasonable expectations of the consumer, protected under the Digital Content Directive;
17. Notes that contract terms and conditions are often accepted by users without reading them; moreover notes that when contract terms and conditions do allow for users to opt-out of clauses, service providers may require users to do so at each use in order to encourage acceptance of those terms and conditions;

18. Notes that the majority of contract terms and conditions can be unilaterally changed by the platforms without any notice to consumers, with pernicious effects in terms of consumer protection, and calls for better consumer protection through effective measures;
19. Asks the Commission to introduce guidance for platforms on how to better inform consumers about those contract terms and conditions, for example with a pop-up message comprising key information thereon;
20. Considers that a summary text of contract terms and conditions written in plain and clear language, including the option to "opt out" easily from optional clauses, should be displayed at the start of any such contract terms and conditions; believes that the Commission should establish a template for such summaries;
21. Underlines that contract terms and conditions should effectively ensure that the sharing of all data with third parties for marketing purposes is based on the consent of the user thus establishing a high level of data protection and security;
22. Recommends that any data access remedy should be imposed only to tackle market failures, be in compliance with the GDPR, give consumers the right to object to data sharing and provide consumers with technical solutions to help them control and manage flows of their personal information and have means of redress;
23. Asks the Commission to ensure that consumers can still use a connected device for all its primary functions, even if consumers do not give or withdraw their consent to share non-operational data with the device manufacturer or third parties; reiterates the need for transparency in contract terms and conditions regarding the possibility and scope of data sharing with third parties;
24. Calls for a better enforcement of the right of consumers to informed consent and freedom of choice when submitting data;
25. Underlines that Directive (EU) 2019/2161, Directive (EU) 2019/770 and Directive (EU) 2019/771 are still to be properly transposed and implemented; asks the Commission to take this into account when designing additional measures that respond to new market developments;
26. Notes the rise of "smart contracts" such as those based on distributed ledger technologies without a clear legal framework;
27. Asks the Commission to assess the development and use of distributed ledger technologies, including "smart contracts", in particular questions of legality, and enforcement of smart contracts in cross-border situations, provide guidance thereon to ensure legal certainty for businesses and consumers, and to take legislative initiatives only if concrete gaps are identified following that assessment;
28. Asks especially for the Commission to update its existing guidance document on Directive 2011/83/EU<sup>10</sup> ("the Consumer Rights Directive") in order to clarify whether it

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<sup>10</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive

considers smart contracts to fall within the exemption of point (1) of Article 3(3), and, if so, under which circumstances, and to clarify the issue of the right to withdrawal;

29. Asks for guidance on cross-border transactions and on the existing rules regarding notarisation requirements;
30. Stresses that any future legislative proposals should be evidence-based and seek to remove current unjustified barriers in the supply of digital services by online platforms, and prevent potentially new barriers arising, while enhancing consumer protection; believes that such proposals should be aimed at achieving sustainable and smart growth, address technological challenges, and ensure that the digital single market is fair and safe for everyone;
31. Underlines, at the same time, that new Union obligations on platforms must be proportional and clear in nature in order to avoid an unnecessary regulatory burden or unnecessary restrictions, be guided by consumer protection and product safety goals, ensuring a level playing field for companies, including small and medium enterprises (SMEs), and protect the health and safety of our citizens; underlines the need to prevent gold-plating practices of Union legislation by Member States;
32. Asks the Commission to explore the possibility of presenting, as part of the Digital Services Act Package several proposals, including on contractual rights in the context of supply of digital services, as referred to in recommendations set out in the Annex;

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1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22.11.2011, p. 64).

## ANNEX TO THE MOTION FOR A RESOLUTION:

### DETAILED RECOMMENDATIONS AS TO THE CONTENT OF THE PROPOSALS REQUESTED

#### A. PRINCIPLES AND AIMS OF THE REQUESTED PROPOSALS OF THE DIGITAL SERVICES ACT PACKAGE

The Digital Services Act package should consist of:

- a comprehensive legislative proposal, revising the E-commerce Directive with the aim to improve the functioning of the internal market and the free movement of digital services;
- a legislative proposal on *ex-ante* regulation of large platforms addressing market failures and strengthening transparency, building on the Platforms to Business Regulation;
- proposals on contractual rights in the context of supply of digital services, ancillary to the Digital Services Act, as part of a package, based on the recommendations set out in this Annex, following a thorough analysis of the transposition and implementation of recently adopted legal instruments in the area of consumer protection, as well as a revision of the Regulation (EU) No 910/2014<sup>11</sup> (“eIDAS Regulation”) in the light of the development of virtual identification technologies, in order to improve the efficiency of electronic interactions between businesses and consumers.

#### B. RECOMMENDATIONS

##### Recommendation 1. Purpose

The proposals should aim to strengthen civil and commercial law rules applicable to commercial entities operating online with respect to digital services, including, where concrete gaps are identified following a thorough impact assessment, civil and commercial law aspects of distributed ledger technologies and, in particular, smart contracts.

The proposals should also seek to make contract terms and conditions more understandable, and give individuals an effective option to opt-out of some clauses or to negotiate individual terms.

##### Recommendation 2. Scope

The proposals on contractual rights should only focus on civil and commercial law aspects and should not affect the E-commerce Directive. They should be consistent with the rules on advertising, set out by the Unfair Commercial Practices Directive and the rules on digital content and digital services, laid down by the Digital Content Directive.

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<sup>11</sup> Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ L 257, 28.8.2014, p. 73).

### Recommendation 3. General principles

#### Principle of transparency

Any terms and conditions or other clauses of use should be easily accessible and easy to understand, and clear and plain language should be used. Consumers should receive correct and adequate information about the functionalities and technical restrictions of digital content and digital services, in order to avoid incorrect and misleading advertising. If a connected product or a service depends on one or more services to function, or to function optimally, advertisers and advertising intermediaries must ensure that the consumers understand that the product or the service cannot be used without the additional service. The Commission should establish a template for a summary of the key contract terms and conditions or end-user licence agreements (EULAs) to be displayed in the beginning, in order for the consumers to be able to identify the most important points and to understand the consequences of their consent.

#### Principle of fairness

Any terms and conditions or other clauses of use that are not strictly essential to provide a digital service or that are not required by law should be amendable or removable before acceptance by an end-user ('opted-out').

Businesses should equally be able to limit some services if an individual decides to choose such 'opt-outs', but should not be able to deny access altogether or restrict essential elements of a digital service or a physical product linked or otherwise connected to a digital service.

#### Principle of legal certainty

It should be clearly established that whenever, *inter alia*, contract terms and conditions and smart contracts fall under the legal definition of a contract, all relevant provisions on consumer protection, set out in the Consumer Rights Directive, should apply.

It should be clarified whether informed consent can be assumed by the mere acceptance of terms and conditions or whether use of a digital service is done without evidence that an end-user has read such terms and conditions or other clauses of use.

#### Enforcement and penalties

Member States should better enforce the right of consumers right to informed consent and freedom of choice when submitting data to advertisers and advertisement intermediaries.

Member States should allow for consumer redress and lay down the rules on penalties applicable to infringements of rules on contractual rights and take all measures necessary to ensure that they are implemented. The penalties provided for need to be effective, proportionate and dissuasive.

## INFORMATION ON ADOPTION IN COMMITTEE ASKED FOR OPINION

<b>Date adopted</b>	7.7.2020
<b>Result of final vote</b>	<div style="display: flex; justify-content: flex-end; align-items: center;"> <div style="margin-right: 10px;">+:</div> <div>39</div> </div> <div style="display: flex; justify-content: flex-end; align-items: center;"> <div style="margin-right: 10px;">-:</div> <div>1</div> </div> <div style="display: flex; justify-content: flex-end; align-items: center;"> <div style="margin-right: 10px;">0:</div> <div>4</div> </div>
<b>Members present for the final vote</b>	Alex Agius Saliba, Andrus Ansip, Brando Benifei, Adam Bielan, Hynek Blaško, Biljana Borzan, Vlad-Marius Botoș, Markus Buchheit, Dita Charanzová, Deirdre Clune, David Cormand, Petra De Sutter, Carlo Fidanza, Evelyne Gebhardt, Alexandra Geese, Sandro Gozi, Maria Grapini, Svenja Hahn, Virginie Joron, Eugen Jurzyca, Arba Kokalari, Marcel Kolaja, Kateřina Konečná, Andrey Kovatchev, Jean-Lin Lacapelle, Maria-Manuel Leitão-Marques, Adriana Maldonado López, Antonius Manders, Beata Mazurek, Leszek Miller, Kris Peeters, Anne-Sophie Pelletier, Christel Schaldemose, Andreas Schwab, Tomislav Sokol, Ivan Štefanec, Kim Van Spillendael, Marion Walsmann, Marco Zullo
<b>Substitutes present for the final vote</b>	Pascal Arimont, Marco Campomenosi, Maria da Graça Carvalho, Edina Tóth, Stéphanie Yon-Courtin

## FINAL VOTE BY ROLL CALL IN COMMITTEE ASKED FOR OPINION

39	+
ECR	Adam Bielan, Carlo Fidanza, Eugen Jurzyca, Beata Mazurek
EPP	Pascal Arimont, Maria da Graça Carvalho, Deirdre Clune, Arba Kokalari, Andrey Kovatchev, Antonius Manders, Kris Peeters, Andreas Schwab, Tomislav Sokol, Ivan Štefanec, Edina Tóth, Marion Walsmann
GREENS/EFA	David Cormand, Petra De Sutter, Alexandra Geese, Marcel Kolaja, Kim Van Sparrentak
ID	Markus Buchheit, Marco Campomenosi, Virginie Joron, Jean-Lin Lacapelle
NI	Marco Zullo
RENEW	Andrus Ansip, Vlad-Marius Botoș, Dita Charanzová, Sandro Gozi, Svenja Hahn, Stéphanie Yon-Courtin
S&D	Alex Agius Saliba, Biljana Borzan, Maria Grapini, Maria-Manuel Leitão-Marques, Adriana Maldonado López, Leszek Miller, Christel Schaldemose

1	-
ID	Hynek Blaško

4	0
EUL/NGL	Kateřina Konečná, Anne-Sophie Pelletier
S&D	Brando Benifei, Evelyne Gebhardt

Key to symbols:

+ : in favour

- : against

0 : abstention



20.7.2020

## OPINION OF THE COMMITTEE ON CULTURE AND EDUCATION

for the Committee on Legal Affairs

with recommendations to the Commission on the Digital Services Act: adapting commercial and civil law rules for commercial entities operating online (2020/2019(INL))

Rapporteur for opinion: Petra Kammerevert

(Initiative – Rule 47 of the Rules of Procedure)

### SUGGESTIONS

The Committee on Culture and Education calls on the Committee on Legal Affairs, as the committee responsible, to incorporate the following suggestions into its motion for a resolution:

1. Recalls that free and pluralistic media are the backbone of democratic societies; recalls that traditional media services are strongly regulated in order to ensure freedom of expression and editorial freedom as regards the content they publish; calls for steps to be taken to in particular safeguard the availability and accessibility of lawful content in respect of which there is editorial responsibility and liability is recognised or which is produced by journalists, and all other media that are already subject to generally recognised independent oversight on other platforms or in other services, so that their content is not subject to any additional controls, while applying clear and effectively enforceable rules on platforms' transparency and liability with regards to data privacy, online security, and the enforcement of fundamental rights; notes therefore that compatible frameworks are needed for online and offline environments and that platforms' editorial decisions and algorithmic processes, and content removal by online platforms, can have a large impact on freedom of expression and access to information;
2. Considers that, due to rapid technological progress and the development of new products and services, any new legislative proposal for a Digital Services Act should offer futureproof long-term solutions upgrading and clarifying the liability and safety rules for digital platforms, services and products, without creating unjustified barriers that prevent growth in digital services; stresses that any new measures should be proportionate and that their practical implementation should take into account the financial capacity and market share of the respective providers concerned in the Member States and the Union in order to help ensure a level playing field and promote competition;

3. Emphasises that content that is legal and legally shared under Union or national law has to stay online and that any removal of such content must not lead to the identification of individual users, or to the processing of their personal data;
4. Recalls that transparency obligations applying to media platforms and services operating online should also apply to their ownership and their funding sources;
5. Considers that creating the right environment is vital to harnessing the full potential of the digital single market; highlights that the right framework would involve treating the online environment similarly to the offline one, including as regards advertising and taxation;
6. Calls for a safe digital environment with a balanced approach regarding fundamental rights to promote diversity of opinion, net neutrality, freedom of expression and information, as well as the protection of property; notes that communication always takes place in a given context, and that, at the same time, measures are needed to ensure that illegal content is promptly removed and does not re-appear; calls therefore for automated procedures to be subject to ethical principles, transparency, accountability as well as human oversight and control; stresses that such procedures must be complemented with efficient complaint and redress mechanisms for users, which ensure that complaints are processed without undue delay to safeguard fundamental communication freedoms;
7. Calls on the Commission to ensure that platform operators make available transparency reports with information about the number of cases in which content was misidentified as illegal or as illegally shared, and that the competent authorities make information available about the number of cases in which removals lead to the investigation and the prosecution of crimes;
8. Calls for the use of all technologically feasible means to combat illegal content on the one hand, as well as to counter harmful content, disinformation, propaganda and hate speech, on the other hand; stresses that the use of such means should be based on regulatory and judicial oversight; underlines that those measures cannot lead to any ex-ante control measures or upload-filtering, which do not comply with Article 15 of Directive 2000/31/EC of the European Parliament and of the Council<sup>1</sup>;
9. Points out that, in addition to obligations regarding transparency and fundamental rights, effective measures on the discoverability and detectability of content and restrictions on explicit self-referencing can make a significant contribution to the dissemination of lawful content, the promotion of information and media pluralism, cultural and linguistic diversity and access to quality, public value content; points to good practices of co- and self-regulation, which strengthen the cooperation between platforms, rights holders, fact-checkers, authorities and users and which allow users to have control by enabling them to flag questionable content; points out that social media services should increasingly flag misleading content;
10. Calls for sector-specific rules that serve to realise society-wide objectives and give

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<sup>1</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ L 178, 17.7.2000, p. 1).

tangible expression to them for certain sectors, such as Directives 2010/13/EU<sup>2</sup> and (EU) 2019/790<sup>3</sup> of the European Parliament and of the Council, to take precedence over general rules in order to ensure authors' and artists' rights in the digital environment;

11. Requests the Commission to consider recent national case law setting 30 minutes as the time span for service providers to take down infringing content and to clarify the notion of “expeditious” with regard to live content;
12. Reiterates that pro-competitive data access systems complementing competition law enforcement should seek to decentralise the data held by data holders, whilst maintaining incentives to innovate for the benefit of consumers;
13. Points to the fact that fundamental freedoms, such as freedom of speech, consumer choice and the right to privacy, should be at the heart of the new rules, with an aim to achieve a level playing field across the whole sector;
14. Stresses the importance of removing current and potential new barriers, restrictions and burdens in the supply of digital services, especially for SMEs and start-ups, while at the same time ensuring that platforms’ behaviour is responsible and non-discriminatory and that obligations are proportional, whether online or offline;
15. Strongly believes that there is a need to strengthen platform liability, when it comes to illegal and unsafe products, thus reinforcing the digital single market; recalls that in those cases, platforms’ liability should be fit for purpose, considering the consumer safeguards in place, which should be observed at all times, and the establishment of concomitant redress measures for retailers and consumers; believes that the system could only function if enforcement authorities had sufficient powers, tools and resources to enforce the provisions and efficiently cooperate for cases with a transnational element;
16. Stresses the need to update, modify, increase the comprehensiveness, clarity, and transparency of Union and national rules, while, at the same time, removing unnecessary and outdated regulatory provisions, rather than adding more regulatory provisions, with the aim of reflecting current technological advancements.

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<sup>2</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ L 95, 15.4.2010, p. 1).

<sup>3</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (OJ L 130, 17.5.2019, p. 92).

## INFORMATION ON ADOPTION IN COMMITTEE ASKED FOR OPINION

<b>Date adopted</b>	13.7.2020
<b>Result of final vote</b>	<div style="display: flex; justify-content: flex-end; align-items: center;"> <div style="margin-right: 10px;">+:</div> <div>27</div> </div> <div style="display: flex; justify-content: flex-end; align-items: center;"> <div style="margin-right: 10px;">-:</div> <div>1</div> </div> <div style="display: flex; justify-content: flex-end; align-items: center;"> <div style="margin-right: 10px;">0:</div> <div>2</div> </div>
<b>Members present for the final vote</b>	Asim Ademov, Christine Anderson, Andrea Bocskor, Vlad-Marius Botoș, Ilana Cicurel, Gilbert Collard, Gianantonio Da Re, Laurence Farreng, Tomasz Frankowski, Romeo Franz, Alexis Georgoulis, Hannes Heide, Irena Joveva, Petra Kammerevert, Niyazi Kızılyürek, Predrag Fred Matić, Dace Melbārde, Victor Negrescu, Niklas Nienab, Peter Pollák, Marcos Ros Sempere, Domènec Ruiz Devesa, Andrey Slabakov, Massimiliano Smeriglio, Michaela Sojdrová, Sabine Verheyen, Milan Zver
<b>Substitutes present for the final vote</b>	Isabel Benjumea Benjumea, Marcel Kolaja
<b>Substitutes under Rule 209(7) present for the final vote</b>	Angel Dzhabazki

## FINAL VOTE BY ROLL CALL IN COMMITTEE ASKED FOR OPINION

27	+
PPE	Asim Ademov, Isabel Benjumea Benjumea, Andrea Bocskor, Tomasz Frankowski, Peter Pollák, Michaela Šojdrová, Sabine Verheyen, Milan Zver
S&D	Hannes Heide, Petra Kammerevert, Predrag Fred Matić, Victor Negrescu, Marcos Ros Sempere, Domènec Ruiz Devesa, Massimiliano Smeriglio
RENEW	Vlad-Marius Botoș, Ilana Cicurel, Laurence Farreng, Irena Joveva
ID	Gilbert Collard
VERTS/ALE	Romeo Franz, Niklas Nienaf
ECR	Angel Dzhambazki, Dace Melbārde, Andrey Slabakov
GUE/NGL	Alexis Georgoulis, Niyazi Kizilyürek

1	-
VERTS/ALE	Marcel Kolaja

2	0
ID	Christine Anderson, Gianantonio Da Re

Key to symbols:

+ : in favour

- : against

0 : abstention

Key to symbols:

+ : in favour

- : against

0 : abstention