

Regulation of notice and action procedures in the EU's Digital Services Act

ARTICLE 19's recommendations to lawmakers

21 May 2021

Article 14 of the draft Digital Services Act (DSA) contains updated provisions relating to notice and action procedures for the removal of allegedly illegal content by online platforms. This, together with other provisions in the draft Act, maintains the cornerstones of the E-Commerce Directive for the protection of freedom of expression, namely conditional immunity from liability for hosting content (Article 5).

ARTICLE 19 is however concerned by elements of the new proposed regulation, which pose a threat to freedom of expression and the rule of law.

Article 14(3) sets out that providers of hosting services would be fixed with 'actual' knowledge of illegality once they receive a notice in line with the requirements of Article 14(2). This means that they would lose their immunity shield and could be sued for failing to remove the notified content in a timely manner if a court subsequently decides that the content at issue is indeed illegal.

Why is proposed Article 14 a problem for freedom of expression and the rule of law?

In practice, notice and takedown systems create a strong incentive for companies to remove notified content. Many do not have in-house teams of lawyers able to identify whether content may be found illegal by a court, and tend to be risk-averse. It is much easier for them to remove content than risk being taken to court and facing financial penalties. This provision could therefore have a significant chilling effect on freedom of expression by encouraging the removal of content regardless of its legality.

Another significant problem with Article 14 is that it puts companies in charge of deciding whether content is illegal or not. While companies are required to give reasons and their decisions may be appealed, we are nonetheless concerned at the impact of this delegation of responsibility on the rule of law. We believe that decisions about legality should be taken by courts.

Recommendations for protecting freedom of expression and the rule of law

In order to prevent a move towards giving private companies responsibility to determine legality instead of courts in the first instance, and to mediate the risk to users' freedom of expression that is inherent in such mechanisms, we urge the European Parliament to amend Article 14.

The provision should instead create a **'notice to notice' procedure** that would take the decision whether or not to remove content away from hosting providers or platforms and instead put it in the hands of the uploader. In the case of a continuing dispute between the uploader and the complainant, they would have to take the matter to an out-of-court dispute settlement mechanism, such as the one provided under Article 18 of the draft DSA, or a court. Where there was inaction from the uploader for a set period of time, the hosting provider would only then have to take action or lose immunity from liability under Article 5 of the draft DSA. This system is particularly well-suited for private disputes such

as those relating to copyright or defamation and could be established alongside the judicial procedures foreseen in Article 8 of the draft DSA.

It is also important to note that alongside these procedures, platforms should seek to ensure the fair, transparent and consistent application of their content rules, with appropriate internal appeals mechanisms, which much of the time would apply to such content in any case.

Read ARTICLE 19's proposed amendment to Article 14: <https://bit.ly/3ffwVP9>

For more information, read our Q&A on intermediary liability: <https://bit.ly/2QKVD0a>