Digital Services Act: ARTICLE 19 briefing on IMCO's draft report

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ARTICLE 19's concerns with IMCO's draft report

On 28 May 2021, the rapporteur for the Internal Market and Consumer Protection ('IMCO') Committee, Ms Christel Schaldemose, published her draft report on the Digital Services Act ('DSA').

ARTICLE 19 welcomes many improvements to the text, particularly on users' due process rights, online advertising and recommender systems. In particular, proposed Article 24a (1) is a positive step towards no profiling by default and profiling only as an opt-in. We also welcome the extension of the scope of the no-profiling obligation to all online platforms and not Very Large Online Platforms only. The type of information that platforms have to provide about recommender systems is also spelled out, which is equally positive.

At the same time, ARTICLE 19 has serious concerns about a number of proposed amendments to the DSA, which in our view are misguided and would threaten the right to freedom of expression. Our concerns include, but are not limited to, the following:

- **Unduly short time limits in notice and action procedure:** The revised notice and action procedure imposes unduly short timelines (24 hours) for the removal of certain categories of allegedly illegal content under a new Article 5 (1) (a). In practice, this would inevitably involve over-reliance on automated filters in order to meet those deadlines, raising significant privacy and free speech concerns. In particular, it is well-known that filters are far from perfect and prone to false positives and false negatives. Most importantly, the test being used for removal is in our view unduly broad and would fail the legal certainty test under European human rights law. To our knowledge, illegal content that is merely 'seriously harmful to public policy' does not correspond to any known legal test, which tends to focus on 'manifestly illegal content'. That legal test itself was found by the French *Conseil constitutionnel* to be insufficiently precise for the purposes of the draft Avia law on countering hate speech online, which also involved content removals within 24 hours.

- **Judicial authorisation for suspension of public interest accounts:** a new article 20 (4) (a) in the DSA would provide for judicial authorisation for the suspension of public interest accounts. This provision is problematic for two reasons. First, it creates a highly impractical category of public interest accounts. In practice, the public interest should be understood very broadly, so that any account engaging in public debate ought to be covered. Secondly, by contrast, the draft

report suggests that such public interests accounts would in fact concern those of politicians. That is extremely high-handed in suggesting that only politicians should enjoy high levels of protection (i.e. judicial authorisation) for their accounts whilst ordinary users should have to make-do with the second-rate decisions of platforms, often made by their filters in the first place. Courts should always be in the position to decide whether or not an account should be suspended if the owner of the account is indeed violating *the law*. This should not be the preserve of politicians. If a company decides to suspend the account of a user as a result of a breach of its *terms of service*, it should do so whilst having regard to international standards on freedom of expression and the public interest in the speech remaining available. In our view, if such speech crosses the line so that it incites violence, it may well be appropriate for a company to suspend the account of its own motion on an emergency basis. If the owner of the account wishes for it to be reinstated, a cause of action should be available so that relief may be sought in court.

- **Recommender systems and must-carry obligations:** the draft report proposes a "must-carry obligation" ensuring that recommender systems display information from trustworthy sources, such as public authorities or scientific sources as first result following search queries in areas of public interest in a new Article 24 a (6). In our view, this proposal raises two issues from a freedom of expression perspective. First, it suggests that government/public authorities' information is inherently trustworthy and secondly, that it should come on top of search results in response to queries on the widest possible range of subjects. This is reminiscent of authoritarian governments who are only too prone to suggest that only their position is the right one as opposed to others that may well be critical of the government. It is entirely contrary to the objective of democratic societies that should be the promotion of a *diverse* information ecosystem. Such a provision could have a devastating impact in countries that are already dominated by government information sources.

- **Platform blocking as sanction for failing to comply with the DSA's obligations**: A new Article 41 (2) (ea) would enable Digital Services Coordinators to request the blocking of platforms by judges as an interim measure for repeatedly failing to comply with their obligations under the DSA or 'to avoid the risk of serious harm'. The same power would be granted to the European Commission under Article 55. In our view, this is a both a disproportionate and potentially dangerous proposal. Sanctions should be commensurate with the obligations that are violated. Blocking access to an entire platform is almost always disproportionate as it is highly unlikely that all of its content would be illegal. The fact that such orders would be made in the interim by the courts is an important safeguard but, in our view, is insufficient to remedy the fundamental flaw with this approach. In practice, such a sanction would penalise users and prevent them from exercising their right to freedom of expression. The proposed test of 'risk of serious harm' is also overly broad, particularly in the absence of

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a definition of 'serious harm' or what constitutes a sufficient risk of such harm. Moreover, it is concerning that such powers could also be exercised by the Commission, i.e. the executive arm of the European Union rather than the judicial branch. Such proposals would set a deeply worrying precedent beyond Europe and would embolden non-democratic countries to do the same with the inevitable result that minority voices and those critical of governments would be silenced. The global standard-setting role of the EU as a defender of human rights and civic space would be diminished.

Recommendations to IMCO Committee members:

- **Delete amendments providing for new obligations under Article 5 (1) (a) and related recitals to remove 'illegal content that is seriously harmful to public policy' etc. within 24 hours or 7 days for other types of (allegedly) illegal content;**
- **Delete amendments providing for preferential treatment being given to public interest accounts, such as those of politicians, so that they would be suspended following judicial authorisation under new Article 20 (4) (a);**
- **Delete amendments proposing 'must-carry obligations' in recommender systems, particularly those that require the display of trustworthy sources of information 'such as public authorities or scientific sources' in response to search queries on public interest issues in new Article 24a (6) and related recitals;**
- **Delete amendments to Article 41 that would grant Digital Services Coordinators power to request the interim blocking of platforms as a sanction for repeat infringements or to prevent a 'risk of serious harm'. The same should apply to the interim blocking powers granted to the European Commission under new Article 55.**

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