

## Annex: Technical comments

### Protection of editorial content

Considering the impact of intermediary service providers' T&Cs and decisions taken in relation to lawful media content (e.g. content removal/suspension, suspension of business accounts, re-labelling content suitable for certain age groups, shadow banning, etc), the EP has made important improvements to Article 12.

**Article 12 paragraph 1 of the EP's positioning** aimed to find a compromise between the platforms' freedom to conduct a business and the fundamental rights and legitimate interests of other parties, including media organizations. By explicitly recognizing that the restrictions provided in T&Cs have to be drawn up, applied and enforced in compliance with existing media rules, including content standards that serve to protect, for example, minors as well as, more broadly, the freedom of expression and information and the freedom of the media (Article 11 of the Charter), the DSA can at least help to put an end to arbitrary and unjustified removals of legal media content by platform operators. **We call on co-legislators to enshrine this general principle in the final DSA agreement.**

We note, however, that some further guidance is needed on how intermediary service providers should implement the legal requirement laid down in Article 12 paragraph 1. We would argue that the freedom of expression and the freedom of the media are only given proper justice if intermediary service providers put in place specific procedures and direct communication channels allowing media organizations to swiftly react to and/or challenge content moderation decisions before implementation. This could be clarified by including the following wording suggestion in Recital 38:

**Recital 38:**

***Terms and conditions should not restrict freedom and pluralism of the media as enshrined in Article 11 of the Charter. This implies that intermediary service providers should pay utmost regard to relevant rules applicable to the media and put in place specific procedures, ensuring that the media are promptly informed and have the possibility to challenge any content moderation measure before its implementation.***

### Media brand attribution

Only the European Parliament's position includes a brand attribution rule. Yet by inserting it in Article 22 (traceability of traders), which is limited to online marketplaces, the rule becomes meaningless for media organizations. All kinds of intermediaries where business users can offer content, goods and services - such as social networks, video-sharing-platforms and search engines - should fall in the scope of the provision. **We therefore advocate for creating a self-standing new Article 13a provision as follows (changes based on EP text):**

Article **13a new 22—paragraph 3 b (new)**

**Display of business users' identity**

**13b. Intermediary service providers ~~Online platforms allowing consumers to conclude contracts with traders~~ shall ensure that the identity, such as the trademark or logo, of the business user providing content, goods or services is clearly visible alongside the content, goods or services offered.**

**2. For this purpose, intermediary service providers ~~the online platform~~ shall establish a standardised interface in order to allow ~~for~~ business users to upload the necessary information.**

### **Interplay between DSA and sector-specific rules and Member States' prerogative**

To preserve the EU copyright and media acquis, it is paramount to clarify that sector-specific Union law prevails over the DSA horizontal rules. Following both the Council's General Approach and the EP's position, the DSA would, however, take precedence in respect of "issues that are not or not fully addressed by those other acts as well as issues on which those other acts leave Member States the possibility of adopting certain measures at national level", at least to the extent that these rules pursue the same objective as the DSA. This implies that the DSA would fill all regulatory gaps and prevail over national rules taken in accordance with sector-specific EU law and addressed to intermediary service providers.

Furthermore, we would like to underline that the DSA currently runs the risk of undermining the prerogative of Member States to regulate cultural matters. Similarly to what was done in the eCommerce Directive (Article 1 paragraph 6), it should be specified that the DSA does not affect Member States' competence to regulate issues related to cultural diversity and media pluralism and that Member States are free to adopt such measures. **Consequently, we call on co-legislators to fine-tune Recitals 9 and/or 10 and Article 1 of the DSA proposal (changes based on Recital 10 of the Council text and Article 1a of the EP text):**

**(10) This Regulation should ~~not affect be without prejudice to~~ other acts of Union law regulating the provision of information society services in general, other aspects of the provision of intermediary services in the internal market or specifying and complementing the harmonised rules set out in this Regulation such as Directive 2010/13/EU of the European Parliament and of the Council ~~as amended~~, including the specific objectives set out in that Directive as regards video-sharing platforms, Regulation (EU) 2021/784 of the European Parliament and of the Council proposed Terrorist Content Online Regulation, Regulation (EU) 2019/1148 of the European Parliament and of the Council, Regulation (EU) .../.... [on European Production and Preservation Orders for electronic evidence in criminal matters]; [...]. ~~However, to the extent that these rules pursue the same objectives laid down in this Regulation, the rules of this Regulation apply in respect of issues that are not or not fully addressed by those other acts as well as issues on which those other acts leave Member States the possibility of adopting certain measures at national level.~~**

## Article 1a

### Scope

[...]

**3. This Regulation ~~shall not affect is without prejudice to~~ the rules laid down by the following:**

**(a) Directive 2000/31/EC;**

**(b) Directive 2010/13/EC;**

**(c) Union law on copyright and related rights, in particular Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market;**

**(d) Regulation (EU) 2021/784 on addressing the dissemination of terrorist content online;**

**(e) Regulation (EU) .../...on European Production and Preservation Orders for electronic evidence in criminal matters and Directive (EU) .../...laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings [e-evidence once adopted]**

[...].

**~~4. By [12 months after the entry into force of this Regulation] the Commission shall publish guidelines with regard to the relationship between this Regulation and the legal acts referred to in Article 1a (3).~~**

**4 (new). This Regulation shall not affect measures taken at Union or national level in relation to intermediary service providers that promote cultural and linguistic diversity and ensure the freedom and pluralism of the media.**

## Liability for search-engines

The stated goal of the DSA is to create a safer, more accountable online environment. We therefore find it beyond comprehension why EU co-legislators would take a giant step backwards by granting search engines an outdated liability exemption without submitting them to notice and action obligations. The new safe-harbour proposed by Council in Article 4, which assimilated search engines to 'caching' removes the obligation for search engines to act upon notices and removes all incentives for them to contribute to the fight against illegal content. Hence, we suggest removing "online search engines" from the safe harbour regime as follows (changes based on Recital 27a and Article 4 of the Council text):

**(27a) Intermediary services span a wide range of economic activities which take place online and that develop continually to provide for transmission of information that is swift, safe and secure, and to ensure convenience of all participants of the online ecosystem. For example, 'Mere conduit' intermediary services include generic categories of services such as internet exchange points, wireless access points, virtual private networks, domain name system (DNS) services and resolvers, top-level domain name registries, registrars, certificate authorities that issue digital certificates, voice over IP and other interpersonal communication services, ~~while generic examples of 'caching' intermediary services include the sole provision of content delivery networks, reverse proxies or content adaptation proxies. Such services are crucial to ensure smooth and efficient transition of information delivered on the internet.~~ The same applies to online search engines in view of their important role in locating information online. Examples of "hosting services" include categories of services such as cloud**

*computing, web hosting, paid referencing services or services enabling sharing information and content online, including file storage and sharing. Intermediary services may be provided in isolation, as a part of another type of intermediary service, or simultaneously with other intermediary services. Whether a specific service constitutes a mere conduit, caching, hosting or online search engine service depends solely on its technical functionalities, that might evolve in time, and should be assessed on a case-by-case basis.*

#### Article 4

##### 'Caching' *and online search engines*

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, ~~or of an online search engine~~, the service provider shall not be liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, ~~or for the search results locating the information related to the content requested by the recipient of the service~~, on condition that:

- (a) the provider does not modify the information;
- (b) the provider complies with conditions on access to the information;
- (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
- (d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
- (e) the provider acts expeditiously to remove or to disable access to the information it has stored, ~~indexed or located~~ upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered, *directly to the provider or to third parties*, such removal or disablement.

2. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

### **Know-Your-Business-Customer**

Although the e-Commerce Directive 2000/31/EC (ECD) introduced an obligation on businesses to identify themselves on their websites (Article 5), many businesses that have the intention of making a profit out of illegal content have so far escaped this obligation without suffering consequences. The DSA should correct this short-coming of the ECD and adopt a **wide Know-Your-Business-Customer principle (KYBC) applicable to all online intermediaries**. No business should be able to operate in the EU without accurately identifying itself. That is why **we advocate for the inclusion of the following wording suggestion in the final DSA text:**

## **Article 13 a**

### **Traceability of business users**

**1. A provider of intermediary services shall ensure that business users can only use its services if the provider of intermediary service has obtained the following information:**

**(a) the name, address, telephone number and electronic mail address of the business user;**

**(b) a copy of the identification document of the business user or any other electronic identification as defined by Article 3 of Regulation (EU) No 910/2014 of the European Parliament and of the Council<sup>1a</sup>;**

**(c) the bank account details of the business user, where the business user is a natural person;**

**(d) where the business user is registered in a trade register or similar public register, the trade register in which the business user is registered, and its registration number or equivalent means of identification in that register;**

**2. The provider of intermediary services shall, upon receiving that information and until the end of the contractual relationship, make reasonable efforts to assess whether the information referred to in points (a) and (d) of paragraph 1 is reliable and up-to-date through the use of any freely accessible official online database or online interface made available by a Member States or the Union or through requests to the business user to provide supporting documents from reliable sources.**

**3. Where the provider of intermediary services obtains indications that any item of information referred to in paragraph 1 obtained from the business users concerned is inaccurate or incomplete, that provider of intermediary services shall request the business user to correct the information in so far as necessary to ensure that all information is accurate and complete, without delay or within the time period set by Union and national law. Where the business user fails to correct or complete that information, the provider of intermediary services shall suspend the provision of its service to the business user until the request is complied with.**

**4. The providers of intermediary services shall store the information obtained pursuant to paragraph 1 and 2 in a secure manner for the duration of their contractual relationship with the business user concerned. They shall subsequently delete the information.**

**5. Without prejudice to paragraph 2, the providers of intermediary services shall only disclose the information to third parties where so required in accordance with the applicable law, including the orders referred to in Article 9 and any order issued by Member States' competent authorities or the Commission for the performance of their tasks under this Regulation.**

**6. The providers of intermediary services shall make the information referred to in points (a) and (d) of paragraph 1 available to the recipients of the service, in a clear, easily accessible and comprehensible manner.**

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<sup>1a</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).