



2020/2019(INL)

22.4.2020

DRAFT 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)

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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 services¹,
 - 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)²,
 - 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 European Parliament resolution of 3 October 2018 on distributed ledger technologies and blockchains: building trust with disintermediation³,
 - 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 Article 10 of the European Convention on Human Rights,
 - 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 balances

¹ OJ L 186, 11.7.2019, p. 57.

² OJ L 119, 4.5.2016, p. 1.

³ OJ C 11, 13.1.2020, p. 7.

central concerns like respect for fundamental rights and other rights of citizens, with the need to support development and economic progress;

- B. whereas a number of key civil and commercial law aspects have not been addressed satisfactorily in Union or national law, and whereas this situation is exacerbated by the rapid and accelerating developments over the last decades in the field of digital services, in particular the emergence of new business models;
- C. whereas some businesses offering digital services enjoy, due to strong data-driven network effects, market dominance that makes it increasingly difficult for other players to compete;
- D. whereas ex-post competition law enforcement alone cannot effectively address the impact of the market dominance of certain online platforms on fair competition in the digital single market;
- E. whereas content hosting platforms evolved from involving the mere display of content into sophisticated bodies and market players, in particular in the case of social networks that harvest and exploit usage data; whereas users have reasonable grounds to expect fair terms for the usage of such platforms;
- 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 respects fundamental rights and the civil law rights of the users;
- G. whereas upholding the law in the digital world does not only involve effective enforcement of rights, but also, in particular, ensuring access to justice for all; whereas delegation of the taking of decisions regarding the legality of content or of law enforcement powers to private companies can undermine the right to a fair trial and risks not to provide an effective remedy;
- H. whereas content hosting platforms often employ automated content removal mechanisms that raise legitimate rule of law concerns, in particular when they are encouraged to employ such mechanisms pro-actively and voluntarily, resulting in content removal taking place without a clear legal basis, which is in contravention of Article 10 of the European Convention on Human Rights, stating that formalities, conditions, restrictions or penalties governing the exercise of freedom of expression and information must be prescribed by law;
- I. whereas the civil law regimes governing content hosting platforms' practices in 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 on content hosting platforms and in the enforcement mechanisms of the various civil law regimes; whereas this situation requires a response at Union level;
- J. 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 often leads to the amplification of content based on addressing emotions, often giving rise to sensation in news feed and recommendation systems;

- K. whereas offering users contextual advertisements requires less user data than targeted behavioural advertising and thus is less intrusive;
- L. whereas the choice of algorithmic logic behind such recommendation systems, content curation or advertisement placements remains at the discretion of the content hosting platforms with little possibility for public oversight, which raises accountability concerns;
- M. whereas dominant content hosting platforms 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;
- N. 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;
- O. whereas the terms and conditions of platforms, which are non-negotiable, often indicate both applicable law and competent courts outside the Union, which represent an obstacle as regards access to justice; whereas the question of which private international law rules relate to rights to data is ambiguous in Union law as well as in international law;
- P. whereas access to data is an important factor in the growth of the digital economy; whereas the interoperability of data can, by removing lock-in effects, play an important part in ensuring that fair market conditions exist;

Digital Services Act

1. Requests that the Commission submit without undue delay a set of legislative proposals comprising a Digital Services Act with a wide material, personal and territorial scope, including the recommendations as set out in the Annex to this resolution; considers that, without prejudice to detailed aspects of the future legislative proposals, Article 114 of the Treaty on the Functioning of the European Union should be chosen 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;

Rights as regards content moderation

3. Considers that any final decision on the legality of user-generated content must be made by an independent judiciary and not a private commercial entity;
4. Insists that the regulation must proscribe content moderation practices that are discriminatory;
5. Recommends the establishment of a European Agency tasked with monitoring and enforcing compliance with contractual rights as regards content management, auditing any algorithms used for automated content moderation and curation, and imposing penalties for non-compliance;
6. Suggests that content hosting platforms regularly submit transparency reports to the European Agency, concerning the compliance of their terms and conditions with the provisions of the Digital Services Act; further suggests that content hosting platforms publish their decisions on removing user-generated content on a publicly accessible database;
7. Recommends the establishment of independent dispute settlement bodies tasked with settling disputes regarding content moderation;
8. Takes the firm position that the Digital Services Act must not contain provisions forcing content hosting platforms to employ any form of fully automated ex-ante controls of content, and considers that any such mechanism voluntarily employed by platforms must be subject to audits by the European Agency to ensure that there is compliance with the Digital Services Act;

Rights as regards content curation, data and online advertisements

9. 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;
10. 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 extensive tracking of user interaction with content;
11. Recommends, therefore, that the Digital Services Act set clear boundaries as regards the terms for accumulation of data for the purpose of targeted advertising, especially when data are tracked on third party websites;
12. Calls on the Commission to assess the possibility of defining fair contractual conditions to facilitate data sharing with the aim of addressing imbalances in market power; suggests, to this end, to explore options to facilitate the interoperability and portability of data;
13. Calls for content hosting platforms to give users the choice of whether to consent to the use of targeted advertising based on the user's prior interaction with content on the same content hosting platform or on third party websites;

14. Further calls for users to be guaranteed an appropriate degree of 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;
15. Suggests that content hosting platforms publish all sponsored advertisements made visible to their users;
16. Regrets the existing information asymmetry between content hosting platforms and public authorities and calls for a streamlined exchange of necessary information;

Provisions regarding smart contracts and blockchains

17. Calls on the Commission to assess the development and use of distributed ledger technologies, including blockchain and, in particular, of so-called smart contracts, namely the questions of legality and enforcement of smart contracts in cross border situations, and make proposals for the appropriate legal framework;
18. Strongly recommends that smart contracts include mechanisms that can halt their execution, in particular to take account of concerns of weaker parties and to ensure that the rights of creditors in insolvency and restructuring are respected;

Provisions regarding private international law

19. Considers that non-negotiable terms and conditions should neither prevent effective access to justice in Union courts nor disenfranchise Union citizens or businesses and that the status of access rights to data under private international law is uncertain and leads to disadvantages for Union citizens and businesses;
20. 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;
21. 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;

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22. Instructs its President to forward this resolution and the accompanying detailed recommendations to the Commission and the Council.

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 proposals 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 strengthen the contractual rights in relation to content moderation and curation.
- The proposal aims to further address unfair terms and conditions used for the purpose of digital services.
- The proposal raises the question regarding aspects of data collection in contravention of fair contractual rights of users.
- The proposal addresses the importance of fair implementation of the rights of users as regards interoperability and portability.
- The proposal addresses the necessity for the proper regulation of civil and commercial law aspects of distributed ledger technologies, including block chains and, in particular, 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 apply to content management, including content moderation and curation, with regard to content accessible in the Union.
- It should provide principles for content moderation, including as regards discriminatory content moderation practices.
- It should provide formal and procedural standards for a notice and action system.
- It should provide for an independent dispute settlement mechanism.

- It should fully respect Union rules protecting personal data as well as fundamental rights.

A European Agency on Content Management should be established with the following main tasks:

- regular auditing of the algorithms employed by content hosting platforms for the purpose of content moderation as well as curation;
- regular review of the compliance of content hosting platforms with the Regulation and other provisions that form part of the Digital Services Act, in particular as regards the correct implementation of the standards for notice-and-action procedures and content moderation in their terms and conditions, 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;
- imposing fines for non-compliance with the Digital Services Act. Fines should be set at up to 4% of the total worldwide annual turnover of the content hosting intermediary and take into account the platform's overall compliance with the Digital Services Act. The fines should contribute to a special dedicated fund intended to finance the operating costs of the dispute settlement bodies described in the Regulation. Instances of non-compliance should include:
 - o failure to implement the notice-and-action system provided for in the Regulation;
 - o failure to provide transparent, accessible and non-discriminatory terms and conditions;
 - o failure to provide access for the European Agency to content moderation and curation algorithms for review;
 - o failure to submit transparency reports to the European Agency;
- publishing biannual reports on all of its activities.

Transparency reports regarding content management should be established as follows:

The Digital Services Act should contain provisions requiring content hosting platforms to regularly provide transparency reports to the Agency. Such reports should, in particular, include:

- information on notices processed by the content hosting intermediary, including the following:
 - o the total number of notices received,

- 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,
- 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.

Content hosting platforms should, in addition, publish their decisions on content removal on a publicly accessible database.

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.

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 limit 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.
- Users of content hosting platforms should be given the choice to opt in or out of receiving targeted advertisements.
- Content hosting platforms should make available an archive of sponsored advertisements that were shown to their users, including the following:
 - whether the advertisement is currently active or inactive,
 - the timespan during which the advertisement was active,
 - the name and contact details of the advertiser,
 - the total number of users reached,
 - information on the group of users targeted,

- the amount paid for the advertisement.

The path to fair implementation of the rights of users as regards interoperability 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 and portability of data.

The path to the proper regulation of civil and commercial law aspects of distributed ledger technologies, including block chains 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 making use of distributed ledger technologies, including block chains, and in particular for smart contracts,
- measures ensuring that smart contracts are fitted with mechanisms that can halt their execution, in particular given concerns of the weaker party and in respect for the rights of creditors in insolvency and restructuring.

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

- include measures ensuring that non-negotiable terms and conditions do not include provisions regulating private international law matters to the detriment of access to justice,
- include measures clarifying private international law rules as regards data in a way that is 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 providers of information society services 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 growth and innovation.
- (4) Given the detrimental effects of the fragmentation of the digital Single Market, the international character of content hosting and the dominant position of 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) In order to ensure, inter alia, that users can assert their rights they should be given an appropriate degree of influence over the curation of content made visible to them, including the possibility to opt out of any content curation altogether. In particular, users should not be subject to curation without specific consent.
- (8) 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 in order to display automatically curated content to the user.
- (9) This Regulation should not contain provisions forcing content hosting platforms to employ any form of fully automated ex-ante control of content.
- (10) This Regulation should also include provisions against discriminatory content moderation practices, 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.
- (11) 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. A content hosting platform should, however, be able to block a user who repeatedly issues false notices from issuing further notices.
- (12) After a notice has been issued, the uploader should be informed about it and in particular about the reason for the notice, 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.
- (13) 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.
- (14) Given the immediate nature of content hosting and the often ephemeral purpose of content uploading, it is necessary to establish 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.
- (15) In order to ensure that users and notifiers to make use of referral to independent dispute settlement bodies as a first step, it must be emphasised that such referral should not preclude any subsequent court action. Given that content hosting platforms which enjoy a dominant position on the market can particularly gain from the introduction of

independent dispute settlement bodies, it is appropriate that they take responsibility for the financing of such bodies.

- (16) Users should have the right to referral to a fair and independent dispute settlement body to contest a decision taken by a content hosting platform following a notice concerning content they uploaded. Notifiers should have this right if they would have had legal standing in a civil procedure regarding the content in question.
- (17) 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.
- (18) 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.
- (19) 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 established pursuant to this Regulation should submit reports on the number of referrals brought before them, including the number of referrals dealt with.
- (20) 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.
- (21) Action at Union level as set out in this Regulation would be substantially enhanced with the establishment of a Union agency tasked with monitoring and ensuring compliance by content hosting platforms with the provisions of this Regulation. The Agency should review compliance with the standards laid down for content management on the basis of transparency reports and an audit of algorithms employed by content hosting platforms for the purpose of content management –

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

This Regulation applies to the management by content hosting platforms of content that is accessible on websites or through smart phone applications in the Union, irrespective of the place of establishment or registration, or principal place of business of the content hosting platform.

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 Council¹ 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 website or application;
- (2) ‘content’ means any concept, idea, expression or information in any format such as text, images, audio and video;
- (3) ‘content management’ means the moderation and curation of content on content hosting platforms;
- (4) ‘content moderation’ means the practice of monitoring and applying a pre-determined set of rules and guidelines to user-generated content in order to ensure that the content complies with legal and regulatory requirements, community guidelines and terms and conditions, as well as any resulting measure taken by the platform, such as removal of the content or the deletion or suspension of the user’s account, be it through automated means or human operators;
- (5) ‘content curation’ means the practice of selecting, prioritising and recommending content based on individual user profiles for the purpose of its display on a website or application;
- (6) ‘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;
- (7) ‘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;
- (8) ‘uploader’ means a natural or legal person that adds content to a content hosting platform irrespective of its visibility to other users;
- (9) ‘notice’ means a formalised notification contesting the compliance of content with legal and regulatory requirements, community guidelines and terms and conditions.

Article 4

¹ 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).

Principles for content management

1. Content management shall be conducted in a fair, lawful and transparent manner. Content management practices shall be appropriate, relevant and limited to what is necessary in relation to the purposes for which the content is managed.
2. Users shall not be subjected to discriminatory content moderation practices 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.
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 specific consent.

Article 5

Eligibility for issuing notices

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

A content hosting platform may block a user who repeatedly issues false notices from issuing further notices.

Article 6

Notice procedures

Content hosting platforms shall include in their terms and conditions sufficient 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 take a decision;
- (d) the deadline for the content hosting platform to inform both parties about the outcome of the decision.

Article 7

Content of notices

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

- (a) a link to the content in question;

- (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 infringed upon, or someone acting on behalf of that person.

Article 8

Information to the uploader

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;
- (b) sufficient information about the procedure to follow;
- (c) information on the possibility to appeal and issue a counter-notice; 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.

Article 9

Decisions on notices

1. Content hosting platforms shall ensure that decisions on notifications are taken without undue delay following the necessary investigations.
2. Following a notice, content hosting platforms shall decide to remove, take down or make invisible content that was the subject of a notice, if such content does not comply with legal and regulatory requirements, community guidelines or terms and conditions.

Article 10

Information about decisions

Once a decision has been taken, content hosting platforms shall inform all parties involved in the notice procedure about the outcome of the decision, providing the following information:

- (a) the reasons for the decision taken;
- (b) whether the decision was made by a human or an algorithm;
- (c) information about the possibility for review as referred to in Article 11 or judicial

redress for either party.

Article 11

Review of decisions

Where a content hosting platform has set up a review mechanism, the final decision of the review shall be undertaken by a human.

Article 12

Stay-up principle

Without prejudice to judicial or administrative orders regarding content online, content that has been the subject of a notice shall remain visible until a final decision has been taken regarding its removal or takedown.

Article 13

Independent dispute settlement

1. Member States shall establish 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 agreement.
4. Content hosting platforms that enjoy a dominant position on the market shall contribute financially to the operating costs of the independent dispute settlement bodies through a dedicated fund.

Article 14

Procedural rules for independent dispute settlement

1. The uploader shall have the right to refer a case of content moderation to the competent independent dispute settlement body where the content hosting platform has decided to remove or take down content or otherwise to act in a manner that is contrary to the action preferred by the uploader as expressed by the uploader.
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.

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.

5. 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 in accordance with Regulation (EU) 2016/679 of the European Parliament and of the Council² and Directive 2002/58/EC of the European Parliament and of the Council³.

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,

² 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).

³ 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).

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 the independent dispute settlement bodies;
- (b) the number of cases settled by the independent dispute settlement bodies, categorised according to outcome.

Article 19
Entry into force

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.

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.