Digital Services Act Human Rights Alliance: Don't compromise on the protection of fundamental rights in the ongoing negotiations

Introduction

On behalf of the DSA Human Rights Alliance, we are writing to you to share our human rights centric recommendations for the ongoing negotiations of the Digital Services Act. As the final political trilogue is approaching, we see several positive outcomes the negotiation teams have achieved in the process. However, there are a number of outstanding issues listed below that cause further concerns.

The Digital Services Act Human Rights Alliance is a group of 27 civil society organizations that came together around the central tenet that the Digital Services Act must adopt human rights based approach to platform governance; and that the European Union should craft the DSA with global impacts in mind. Many members of the alliance know firsthand why this is necessary.

We urge EU co-legislators to support the following recommendations proposed by the alliance during the final stage of DSA trilogue negotiations.

1. Limits of automated decision making and risks of content over-removals

We welcome that the conditional model of intermediary liability is preserved by negotiators. However, we want to reiterate that short deadlines for content removals have no place in the modern, human rights centric model of platform governance that the DSA represents. We strongly recommend negotiating teams to p**reserve Article 7 (1a) as proposed by the European Parliament, which prohibits legally mandated automated decision making to be imposed on online platforms.** We urge negotiators **to uphold safeguards for the right of users to safe private communication** as currently proposed and defended by the European Parliament. It is important to make sure that no provision in the DSA, including the measures on risk mitigation, should lead to a legal or de-facto obligation to monitor users' communication and speech.

2. Transparency reporting obligations for providers of intermediary services

The inclusion of the **requirement to report on "the complete number of content moderators allocated for each official language and a qualitative description of whether and how automated tools for content moderation are used in each official language" is a particularly**

positive outcome of negotiations. Relatedly, we also note approvingly the addition of language and region specific risk assessment in Article 26. The negotiators should ensure that these requirements will remain in the final version of both articles and will not be deleted as currently proposed by the Council of the EU.

In our previous statement, we underlined the ongoing problems created by insufficient content moderation resources in specific regions, countries, languages, and dialects that we have experienced in our policy work across the globe. As a common practice, Very Large Online Platforms (VLOPs) funnel all content to a small number of content moderators, many of whom are based outside that country or region in question and do not have proper dialect expertise. As we previously stated, this results in completely unacceptable error rates, such as 77% of "counter terrorism" moderation being incorrect and illegitimate takedowns. **The ongoing war in Ukraine demonstrates the need to establish sustainable and proportionate rules that support proper content moderation practices and preservation of documentation of human rights abuses, atrocities and war crimes. Therefore, we urge the negotiation teams to keep the aforementioned safeguards in the operative part of the law and support the wording proposed by the European Parliament.**

3. Risks assessment and mitigation of risks measures

We are pleased to see that the negotiators are in agreement to include the **reference to language and region specific risks in Article 26**. It is also encouraging to see that the role of algorithms, both in reference to platform-designed systems that can impact the distribution and reach of illegal and potentially harmful content and actors, remains in the agreed text. Problems like poor coverage for languages especially in countries of the Global South lead to improperly trained algorithms. Since algorithms are used so widely, and their effect is compounded, the problems increase exponentially, often without proper notice to users.

We are, however, concerned about the wording of the newly added Recital 58a, which calls on VLOPs to commit to processing of valid notices for removal of illegal hate speech in less than 24 hours as stated in the 2016 Code of Conduct on countering illegal hate speech online. **Many international experts underlined problems with the Code of Conduct, including its too broad definition of illegal hate speech, lack of freedom of expression safeguards and due process guarantees, and its ability to promote more censorship committed by VLOPs.** Furthermore, there are serious obstacles in monitoring the impact of the Code. Annual reports on monitoring the Code's implementation issued by the European Commission heavily rely on the speed and number of content removals rather than on their accuracy as the main evidence of the Code's success. Even when the Code becomes a co-regulatory tool after adoption of the DSA, it needs to be seriously revised before it can serve as a benchmark of VLOPs' due diligence. The

process of the revision of the Code has to be transparent and all relevant stakeholders need to be consulted throughout the process.

4. Crisis response mechanism

The alliance fully supports the EU's decisive action to ensure that VLOPs deploy adequate due diligence measures to address the ongoing crisis and national emergencies, including war conflicts. However, we are concerned about the proposed crisis response mechanism (CRM) recently incorporated into the DSA proposal in response to the war in Ukraine. **The CRM's overly broad scope enables the European Commission to unilaterally assess whether a situation amounts to a "crisis". Consequently, the Commission can demand VLOPs to implement an undefined specific set of measures to prevent their systems from contributing to such a situation.**

Due to the lack of checks & balances and procedural safeguards, such as specific and clear definition of crisis or strictly prescribed sunset clause, this measure would impose disproportionate restrictions on freedom of expression and adequate access to information. **Civil society organizations have already delivered the list of recommendations on how to revise and advance the wording of the CRM clause. We urge negotiating teams to give them serious consideration and incorporate them to their full extent.**

Enforcement Overreach and Access to Users' Data

Several provisions of the DSA have the potential to legitimize problematic practices of enforcement overreach.

We are particularly worried about Article 9, which regulates procedural aspects related to the mandatory disclosure of users' data to authorities. Compelling intermediaries to unmask their users or disclose their data is a highly intrusive act, which should be subjected to strict legality, necessity and proportionality requirements. We recognize that protective language has been introduced, but we remain concerned that without additional safeguards, the DSA could disrespect users' right to privacy and legitimize surveillance measures by national authorities. We urge the negotiators to respect the legality principle, which demands that any interference with the right to privacy must not only be authorized by law but also be "sufficiently precise and specify in detail the precise circumstances" in which any such interference may be permitted. Unfortunately, the current version of Article 9 falls short of this requirement.

At the very least, negotiators should only agree on a text that specifically refers to fundamental rights, such as the respect for private and family life and data protection, and

make sure that the final agreement refers to important procedural safeguards, including the right to remedies of intermediaries and users facing access to data requests.

Conclusion: Protect fundamental rights in the negotiations

We urge you to take our concerns and suggestions into account for the final negotiations and work to make sure that the Digital Services Act follows an international human rights approach.

Signatures

Access Now

Electronic Frontier Foundation (EFF)

Global Forum for Media Development (GFMD)

Ranking Digital Rights (RDR)

Mnemonic

Center for Democracy and Technology (CDT)

European Center for Not-for-Profit Law (ECNL)

New America's Open Technology Institute (OTI)

Association for Progressive Communications (APC)

Civil Liberties Union for Europe (Liberties)