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EMMA-ENPA COMMENTS ON DIGITAL SERVICES ACT CONCEPT NOTE

EMMA and ENPA would like to comment on the basis of the internal Commission concept note (V7 from 9/4/2019) proposing a Digital Services Act (DSA) which could serve as a basis for a potential initiative for the new legislature. Such an Act would update the regulatory framework for all digital services in the Single Market, in particular for online platforms. In practice, the update would encompass a Regulatory Fitness and Performance (REFIT) of the e-Commerce directive and could have a wide-ranging impact to the press publishing sector.

Inter alia, such an initiative could potentially touch upon **legal and illegal content**, represent a reset of the regime regulating the **responsibilities of platforms and hosting services**, regulate (political) **advertisement**, update the **home state control principle** and impose new **transparency obligations** notably on algorithms.

While some of the ideas reflected in the concept note would constitute long awaited and necessary updates and would open new opportunities for the press sector, others need to be treated with caution. We firmly believe that some of the provisions of the e-Commerce Directive (such as articles 3 and 4) are necessary preconditions for the press to be disseminated online across borders and should therefore be maintained.

Press publishers are the main investors in professional journalism in Europe and represent a sector that is essential for European democracy. In a time of ongoing digital transition, it is essential to provide for a legal regime that would allow and incentivise the press publishing sector to thrive in order to continue investing in quality content and to innovate in their online offerings.

To support the free and independent press, EMMA and ENPA invite EU legislators to establish an appropriate regulatory environment in the years to come and to take the following recommendations into consideration.

1. PRESERVE THE HOME COUNTRY CONTROL PRINCIPLE

European press publishers strongly support the home country control principle as laid out in Article 3.1 and 3.2 of the e-Commerce Directive. It is of utmost importance for this principle to be maintained as it stands so that the European press items can continue on being legislated upon by the law of the country where they originate from. This is not only still valid, but increasingly warranted in a networked environment and even more in the context of e-Commerce where online publications can be accessed in all 28 European Member States.

Against this background, only the home country control principle provides the legal certainty that is the necessary precondition for a vibrant and critical online press. It is not only unfeasible but also unseemly in view of the importance of press freedom as a fundamental right to consider the laws of all Member States before publishing an article. A publisher needs the absolute certainty that he cannot be prosecuted because of an article that is legal

according to the laws of his country of origin on the basis of laws applicable in another Member State.

A change to the current system would pose a severe threat for publishers and a direct attack on press freedom and diversity. The consequences for such a loss of this type of journalism for our democratic society and an informed public would be devastating and would simply be incompatible with press freedom and freedom of expression. We therefore must urge the European institutions to refrain from bringing changes that could have such alarming consequences on fundamental rights and ultimately, on European democracy.

2. UPHOLD THE PRINCIPLE EXCLUDING PRIOR AUTHORISATION

The principle excluding prior authorisation as set out in Article 4.1 of the e-commerce Directive should be upheld as it allows the digital press or written editorial content to be disseminated online without prior authorisation or any other requirement with an equivalent effect. This is a crucial pillar which safeguards press freedom online as it prohibits censorship as well as the possibility of requests for licenses before content is shared online.

3. LIABILITY AMONG INTERMEDIARIES

The current **liability provisions** of the e-Commerce Directive **should be maintained for editorial content producers when they host discussion forums and/or comment sections**. Content producers are already currently regulated at EU level and therefore fall under EU jurisprudence.

If the liability regime is to be updated, we find it necessary for the future legislation to take into account the incredible diversity of platforms. **Introducing thresholds** based on the size and nature of the service provider and the nature of the potential obligations to be imposed on the various types of platforms **should be considered** as a way not to over-burden already heavily regulated press, while targeting market dominant platforms which have been exempted from respecting long-established rules. For instance, a percentage of relevant users or an absolute number of users could be considered as regulatory threshold.

In particular, dominant **platforms should be liable for third party content in particular if the originator has evaded effective law enforcement through anonymity** or by omitting to indicate an identifiable address or a responsible person for its content.

4. LEGAL, ILLEGAL AND HARMFUL CONTENT

It is of utmost importance to clearly **distinguish between illegal and harmful but legal content**. In fact, **legal speech** – even if harmful - is protected by fundamental rights of press and media freedom, as well as freedom of expression. Initiatives by authorities aimed at tackling harmful but legal content would therefore be an attack on rule of law and fundamental freedoms. Hence, the limits of press freedom and freedom of expression **should continue being determined only by national laws** of Member States and their application by national independent courts on a case-by-case basis. Any initiative, even of a non-regulatory nature, could have significant consequences on press freedom.

The current regime of the e-Commerce Directive where all information society services (including press publishers) have to take **illegal content** down in compliance with national provisions **should be maintained**.

When it comes to **legal content**, however, it is important to preserve the freedom for information society services (including press publishers) to decide on the content published or shared on their service according to their terms and conditions and their entrepreneurial freedom. In other words, **it must remain up to the discretion for the service provider to decide, which legal content is admissible thereon, and which isn't.**

Nevertheless, if changes to the current regime ought to be made, then it must be focused on **platforms which due to their dominant position play a vital role in shaping public debates.** Due to their considerable power over the citizens' formation of opinion, those players can be considered as a specific market. In such scenarios it would be feasible to introduce **an obligation for dominant players TO NOT remove any legal content** from their services in order to preserve the freedom of forming an opinion.

5. DISINFORMATION

Similarly, to the risks outlined under point 4, **any initiative against legal content by the authorities would seriously jeopardize fundamental freedoms. Any regulatory initiatives on (legal) disinformation aimed at platforms should be avoided.** In any case, **it must be ensured that** representatives of the press and media sector are duly consulted for any possible initiative.

Platforms play a central role in the way content is imparted, shared and made available on the internet and any guidelines that would influence these processes will have significant effects on the digital press. EMMA and ENPA has been advocating that the only legitimate way to prevent disinformation is aiding the dissemination of more reliable news by the free and independent press and other media. The latter must encounter a regulatory environment which allows them to develop freely in an environment of journalistic, editorial and economic competition, independent from any state or other content-related interference.

At the same time, initiatives to arbitrarily assess lawful, legal publications based on the quality of their content and depending on the result of the assessment, to remove or also to flag them as "Fake-News" with tags or color codes would put the freedom of expression and the freedom of the press at stake.

6. TRANSPARENCY AND NON-DISCRIMINATION OBLIGATIONS ON RANKING CRITERIA ETC. ("ALGORITHMS") FOR DOMINANT PLATFORMS

Algorithms play a decisive role in the way information flows. By making among others ranking decisions of search engines, they channel the users to some specific type of content. Especially with regard to **market dominant platforms** it has proven to have a serious impact on how information is consumed and used. Press publishers are heavily impacted by algorithms' results. **It is therefore important to introduce a right to non-discriminatory access, as well as the necessary transparency and accountability of automated content moderation systems for market dominant platforms and search engines.** Search engines, social media and other types of platforms that achieve a significant market position in the field of referring to content, products or services by others, should at the very least be transparent about which parameters are used. It must be very clear how results on these services are prioritized and what data is gathered from the services about the content that is distributed and about the private and professional users of the platform service. A comprehensive right for all legal publications and offerings to have **non-discriminatory**

access to market dominant digital platforms is therefore of utmost importance for the sustainability of the free press and the internet ecosystem as a whole.

7. ONLINE ADVERTISING AS MAIN SOURCE OF REVENUES FOR THE ONLINE PRESS IS TO BE PRESERVED

Online advertising - which accounts for most of on-line revenue for publishers - currently plays a crucial part in safeguarding the future of cross-border sales. **Any restriction on advertising** whether in the form of bans, restrictions or requirements (e.g. labelling), **directly impacts on press revenues** across Europe. We invite policy makers not to deprive the press from vital resources through further measures hampering advertising in the press sector.

To conclude, a reopening of the e-Commerce directive will set the rules of the digital single market for many years to come. It is essential to keep press freedom and freedom of expression at the heart of this reform. This is a unique opportunity to redress abuse or misuse of non-liability provisions by market dominant platforms which is an essential precondition for guaranteeing media pluralism in the European Union.

***EMMA**, the European Magazine Media Association, is the unique and complete representation of Europe's magazine media, which is today enjoyed by millions of consumers on various platforms. EMMA represents 15,000 publishing houses, publishing 50,000 magazine titles across Europe in print and digital. Website: www.magazinemedi.eu*

***ENPA**, the European Newspaper Publishers' Association (ENPA) is the largest representative body of newspaper publishers across Europe. ENPA advocates for 16 national associations across 13 European countries, and is a principal interlocutor to the EU institutions and a key driver of media policy debates in the European Union. See: www.enpa.eu*