

**Feedback to the European Commission's consultation on the draft proposal
on the Digital Services Act
31 March 2020**

The Centre for Democracy & Technology Europe (CDTE) welcomes the draft [proposal on the Digital Services Act](#) (the Draft) and the opportunity to provide feedback. The proposal includes a number of key elements of rights-protecting online content regulation: the '[Good Samaritan principle](#)', which provides intermediaries with liability protections for voluntarily taking action against abusive user-generated content, and the prohibition against general monitoring obligations, which has been a cornerstone of the e-Commerce Directive. Calls by CDTE and other human rights organisations for more transparency over algorithms and online advertising are also reflected in the Draft. CDTE is concerned, however, that a number of these rights-protecting elements are inadvertently undermined by other provisions.

International and European human rights law is clear that decisions on **the legality of speech** are the sole purview of the Courts. Yet, the Draft assigns this task to a range of non-judicial actors including private companies and state authorities. The Draft delegates decisions on the legality of speech to platforms in several places, including through their internal complaints handling system (Art. 17 (3)) and the out-of-court dispute settlement process (Art. 18), which does not meet the standard of a tribunal under the EU Charter of Fundamental Rights.

Equally, a broad range of **non-judicial actors can provide notice** that would be sufficient to expose hosts to liability for users' speech. Notices from any individual user, law enforcement, or other non-judicial actor (including mandatory 'trusted flagger' notifications, Art. 19) will defeat the safe harbor provision for hosting services (Art. 14(3)), creating significant liability risk and leading intermediaries to remove content simply upon receipt of such a notice. This poses a significant potential for abusive notices, and can pose a particular threat to civil society organisations and human rights defenders in areas where the rule of law is already under pressure in Europe.

CDTE generally supports robust human rights impact assessments but emphasizes that the vagueness in the Draft's risk assessment obligations (Art. 26), including the obligation to prevent the 'dissemination of illegal content', creates a conflict with the earlier provision prohibiting general monitoring and also with Art. 26(1)(b) on protecting fundamental rights.

In order to ensure the effective oversight of **algorithm and recommender systems**, the independence, expertise and competence of the body carrying out such audits requires further thought. CDTE concurs with the opinion of the European Data Protection Supervisor that recommender systems should by default not be based on profiling within the meaning of Art. 4(4) of the GDPR. Given the risks that micro-targeting and profiling pose in a democracy, CDTE equally agrees that advertising based on pervasive tracking should be phased out.

The lack of independence of the proposed **governance structures** is concerning. The European Commission will effectively be the oversight body (Chair of the Board for European Digital Services), but as the EU's executive arm, it does not have the requisite independence. Furthermore, it is the drafter of the voluntary codes of conduct concerning online content; this creates a conflict of interest as the codes cannot be truly voluntary when they are penned by the authority legally mandated to enforce the Regulation. In addition, Recital 68 explicitly states that refusing to apply codes of conduct can be taken into account when determining infringement of the Regulation.

Art. 21 would create a new obligation for platforms to '**notify of suspicious criminal offences**', but this is not an appropriate role for a private company. It risks undermining individuals' privacy in their digital communications, the right of presumption of innocence and EU criminal law's own protections with regard to notice that an individual is a suspect.
