

PUBLIC STATEMENT

**ON NEW CRISIS RESPONSE MECHANISM
AND OTHER LAST MINUTE ADDITIONS TO THE DSA**

EDRi and the undersigned organisations express serious concerns regarding the “crisis response mechanism” in a new Article 27a Digital Services Act (DSA) that has been proposed by the European Commission as part of the closed-door trilogue negotiations. We are also concerned about the proposal for a new Article 25a DSA that would empower national Digital Services Coordinators (DSCs) to treat smaller online platforms as if they were very large ones in terms of their risk mitigation obligations. This could lead to a much wider application of the problematic and already overly broad measures in Article 27a.

Substantive concerns

While we support the political goal to encourage online platforms to do the right thing in times of crisis, the new “crisis response mechanism” for the DSA is not the right mechanism. **The proposed mechanism is an overly broad empowerment of the European Commission to unilaterally declare an EU-wide state of emergency.** It would enable far-reaching restrictions of freedom of expression and of the free access to and dissemination of information in the Union.

The proposed “crisis response mechanism” in a new Article 27a DSA must—at the very least—respect international human rights standards of legality, legitimacy, necessity and proportionality. Concretely this requires that:

- Decisions that affect freedom of expression and access to information, in particular in times of crisis, **cannot be legitimately taken through executive power alone.** As the Council of Europe's Venice Commission stresses, “State security and public safety can only be effectively secured in a democracy which fully respects the Rule of Law. This requires parliamentary control and judicial review of the existence and duration of a declared emergency situation in order to avoid abuse.”¹ Any crisis measures, including the decision whether a crisis is actually deemed to occur, **should therefore be under the scrutiny of the European Parliament** as soon as possible after it has been taken. International human rights law² and constitutional orders of Member States strictly define the legal grounds for such extraordinary measures and procedural rules that must be followed and reviewed by independent judicial bodies.

1 European Commission For Democracy Through Law (Venice Commission), “Rule Of Law Checklist” (2016), page 13, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e).

2 In particular Article 15 of the European Convention on Human Rights.

- The **definition of a crisis** (now broadly including pandemics, terrorism, or "emerging conflicts") **must fulfil the principles of clarity and specificity** and should not empower the Commission to uphold crisis measures for years on end.³ The definition should therefore be limited to threats that are capable of seriously destabilising the fundamental constitutional, political, economic or social structures of the Union or significant parts thereof.⁴
- The mechanism proposed must include a **time limit to crisis measures**. It should not give the Commission the unilateral power to quasi-permanently restrict the public access to and dissemination of information, until challenged in court. Any extraordinary measure must contain a short sunset clause, reviewable by the European Parliament.
- We welcome that the provision requires crisis measures to be "strictly necessary and proportionate", yet **we question whether the Commission is the right body to make such an assessment unilaterally**, especially during politically charged times and under strong political pressure from Member States. Instead this assessment must be undertaken by an independent judicial body or court; and not only once but in regular, short intervals for as long as the measures are in place.
- We welcome that the Commission decisions are foreseen to be made public eventually but the mechanism must also ensure that any bilateral dialogue with platform providers, during which specific measures would be discussed, weighed and eventually decided upon, **is transparent and does not elude public scrutiny**.
- Based on jurisprudence of the European Court of Human Rights,⁵ a crisis or danger must be exceptional to an extent that regular measures established by national constitutional orders or international human rights law are "plainly inadequate."⁶ The DSA proposal **already contains a set of due diligence measures that can mitigate and identify emerging crises** well in advance. Based on experience of civil society organisations operating in conflict areas, online platform providers—very large ones in particular—are very well able to identify early signs of emerging crises. They can almost always respond to them within their existing powers such as via terms of service, without requiring undue derogations from the right to freedom of expression and information.

Emergency clauses such as the one proposed have historically been and are often still used all over the world to erode the rule of law and to normalise restrictions of fundamental rights, and they often have a tendency to remain in place long after the perceived or actual emergency

3 The global Covid-19 pandemic is now raging in its third year. Other examples are the state of emergency in France which was originally enacted after the terrorist attacks of 2015 but then lasted for two years and many of its measures subsequently became common law before it was lifted.

4 See Court of Justice of the EU, *La Quadrature du Net*, para. 135.

5 See for example the ECHR cases *Lawless v. Ireland* (no. 3), *Ireland v. the United Kingdom*, and *Denmark, Norway, Sweden and the Netherlands v. Greece*.

6 European Court of Human Rights, "Guide on Article 15 of the European Convention on Human Rights. Derogation in time of emergency", 31 December 2021, https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf.



disappeared. Based on empirical evidence,⁷ hastily adopted emergency measures ultimately lead to lasting human rights abuses that are difficult to remedy in the long term.

We call on DSA negotiators to take the above arguments into account and include the safeguards necessary to protect Europeans' fundamental right in times of crisis.

Procedural concerns

Last year the EU co-legislators voted their respective positions on the DSA through established democratic processes, including a full plenary vote in which all Members of the European Parliament expressed their support for the compromise reached in the Parliament's committee responsible. **Neither of those positions includes far-reaching emergency powers for the Commission or DSCs nor did they include powers to declare small platforms to be like big ones through simple administrative act.**

When a small handful of **negotiators unilaterally add such new provisions during the closed-door trilogue, they do so without mandate and little democratic legitimacy.** This circumvents the democratic process, prevents public scrutiny and debate, and excludes the other 700+ elected Members of European Parliament from participation in the deliberations. Those MEPs will be left with a take-it-or-leave-it choice, where their only option to disagree with these broad executive powers is to oppose the DSA altogether. A choice not many are likely willing to make.

We therefore call on DSA negotiators to stop negotiating outside their respective mandates and respect the democratic process of the EU.

Signatories

ApTI Romania

Bits of Freedom

Centre for Democracy & Technology, Europe Office

Civil Liberties Union for Europe (Liberties)

Defend Democracy

European Digital Rights (EDRi)

Electronic Frontier Foundation (EFF)

Fair Vote UK

Homo Digitalis Greece

IT-Pol Denmark

Media4Democracy

Open Rights Group

The Coalition For Women In Journalism (CFWIJ)

Wikimedia Deutschland

Wikimedia France

⁷ See for example Amnesty international, "France's permanent state of emergency", 26 September 2017, <https://www.amnesty.org/en/latest/news/2017/09/a-permanent-state-of-emergency-in-france>.