

Digital Services Act Package: Executive summary of the VAUNET answer to the consultation of the European commission

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A digital single market that benefits European media diversity

The COVID-19 pandemic has shown that European media companies are a reliable anchor in times of political and social insecurity among the population, especially in the fight against disinformation. They provide reliable fact-based information and news, they educate and entertain. Germany's private broadcasting companies, with revenues of around 11.4 billion euros in 2019, are a key cultural and economic factor. They represent a strategically important sector that will be essential for the recovery of the Union's economy.

However, the COVID-19 pandemic has posed unprecedented challenges for the entire value chain of the radio and television sector. Short and medium-term measures are essential to stabilize the sector. In the long run, a new legal framework preserving European media diversity must be created to enable media companies to continue to fulfil their existing important remit.

The deepening of the digital single market is a welcome development, as it enables European media companies to offer new services and reach a wider audience online. However, it is important to ensure that the European media sector effectively benefits from it. The realization of an economically and culturally balanced, and functioning internal market requires the creation of a level playing field in the online environment and fair competition in digital markets. In compliance with the principle of subsidiarity, VAUNET calls for a legal framework to be created with the so-called Digital Services Act Package that enables an innovative, technologically secure online world that prospers on the basis of fair and functioning competition. From the point of view of VAUNET, the following elements are prerequisite:

1. The legal framework of the E-Commerce Directive should be strengthened and not watered-down

Piracy is causing considerable damage to the European media industry. VAUNET considers that the creation of a better legal framework against piracy is therefore of utmost importance in the fight against illegal content.

Fast and efficient reporting and remedy systems: The reporting of illegal content should be simplified for rights holders. Information that – depending on the content – enables the platform to identify the illegal content should be sufficient to launch a reporting procedure. Reporting procedures for illegal content, which are already applied by a number of online platforms using so-called content recognition tools (e.g. Content ID), should be harmonized so they are used by all platforms.

More transparency / KYBC: VAUNET calls for more transparency and the obligation for intermediaries to identify their commercial users ("Know Your Business Customer"). Compliance with the general information obligations under Article 5 of the E-Commerce Directive should be ensured, among other things, by means of severe financial sanctions. To this end, the conditions for access to the WHOIS database should be designed in such a way that effective access is possible.

Extended use of automated systems for detecting illegal content: The prohibition of a general duty of surveillance is an important cornerstone of the E-Commerce Directive and should be maintained. However, it does not prevent the use of specific software for the detection of illegal content, which should thereby not be prohibited under any circumstances. Practice shows that the use of automated recognition technologies facilitates the fast and efficient recognition of illegal content.

Notice and Stay-Down mechanisms: The legal framework should ensure that service providers take effective measures, potentially on a mandatory basis, to remove illegal content from their offer and prevent it from being uploaded again.

Efficient complaint and redress mechanisms: Just like media companies, which are subject to strong regulation, online platforms should abide by transparency obligations in relation to the measures they take. There should also be an effective complaint and redress system for users whose content has been removed so that they can challenge incorrect or erroneous decisions.

Another material and territorial scope of application of the liability rules: In order to curb piracy, the territorial scope of the Digital Services Act should be defined in such a way that the obligations provided in the E-Commerce Directive also cover online platforms offering digital services based outside the EU. Any criteria / category for the application of the liability rules (e.g. definitions of "mere conduits", "caching services" and "hosting services") should also be able to cover future innovations.

Maintaining the liability of active platforms: The distinction between active and passive platforms developed by case law should be maintained. The liability of active platforms should not be watered-down. Foreseen limitations of liability should continue to apply only to purely passive digital services. Rules and principles developed by case law must continue to apply and should be codified where necessary.

There is no so-called "Good Samaritan Paradox" in the current European legal framework: The proactive removal or blocking of illegal content by a platform does not necessarily lead to its active role, which excludes the application of article 14 of the E-Commerce Directive in the sense of ECJ case law. The deceptive argument of the "Good Samaritan Paradox" must not justify a weakening of the liability rule.

The country of origin principle as a cornerstone of the digital single market: The country of origin principle of the E-Commerce Directive should be maintained. However, cooperation between national authorities, for example within ERGA, should be further strengthened. With regard to the subsidiarity principle, VAUNET rejects the creation of a new European authority.

2. Protection against harmful content: safer content and more transparency

Ensure effective access and visibility of a variety of authentic and professional

journalistic sources: To limit the impact of harmful content, such as disinformation, the privileged findability of professional and trustworthy content is the best solution. Providing the population with reliable information is of considerable importance for society.

No double regulation for media content: For potentially harmful (but not illegal) content, the question arises of who should assess the potential danger it generates and how.

VAUNET considers that no stricter rules should be established for online platforms with media content than the legal standards already in force. This is especially true regarding the protection of minors: TV and radio programs as well as their online offerings already establish and respect age ratings, for example, by way of regulated self-regulation.

Level-playing field in relation to political advertising: The general ban on political advertising for broadcasters and its associated lack of refinancing source constitutes unjustified unequal treatment, especially considering political advertising is permissible in other media or on online platforms. In any case, transparency with regard to political online advertising should be strengthened.

More transparency for users: It should be conclusive and easy for users to understand why they are being offered a particular type of content. This is particularly true regarding political advertising. Online platforms should be required to provide information in clear and plain language on key criteria regarding the aggregation, selection and presentation of content and their weight in the decision process. Through the effective implementation of the general information obligations under Article 5 of the E-Commerce Directive, users should also know who is offering them the content. If content is deleted or blocked on legal or the platforms' community standards basis, additional transparency requirements should apply.

3. An ex-ante legal framework that enables the media to make their content competitive in a fair digital environment

The access and findability of a diversified offer of quality content for users are central to a democratic discourse. However, large (global) online platforms acting as gatekeepers by determining the access to media content and their ranking for findability have detrimental implications for both users and the media.

A variety of genres of online platforms are relevant to address competition issues: A variety of platforms for content distribution are relevant to the media sector, e.g. browsers, video sharing platforms and social media, aggregators, search engines, language assistants, app stores and smart TV operating systems.

Limiting the ex-ante regulatory framework to large (global) platforms: VAUNET welcomes the limitation of the scope of the "gatekeeper position" to large (global) platforms. New rules should not cause collateral damage to European platforms by imposing new provisions on their businesses. Some of them are already highly regulated and their business models do not have the same impact on competition, innovation and society as those of the large tech platforms.

Ex-ante rules: VAUNET welcomes the comprehensive ex-ante legal framework for large online platforms proposed by the European Commission in the Impact Assessment, along which necessary measures can be taken before competition has been massively or even irreversibly damaged. VAUNET welcomes the dual approach taken by the European Commission, which aims, on the one hand, to identify frequent and systematic abusive trading practices in advance (defined obligations and prohibited practices) and, on the other hand, to prevent abusive behaviour by means of tailor-made remedies.

Fair trading practices, prohibition of self-preference, transparency of algorithms and access to data: The ex-ante legal framework should aim in particular at the following:

- **Fair trading practices** should, for example, ensure that no changes are made to contractual terms and conditions without notifying business users. Negotiation imbalances should not lead to unfair terms that cannot be challenged by commercial users. It should be possible to prohibit access restrictions imposed by major online platforms when refusing to give access to their services without legitimate reasons.
- Coupled with the **prohibition of self-preference** applying to the large online platforms acting as gatekeepers, a positive obligation of **transparency of the algorithms used** or of their functioning should also be imposed. Online platforms should be obliged to provide information in a clear and plain language on key criteria regarding the aggregation, selection and presentation of content and their weight in the decision process.
- **Access to data generated by the use of media content** should be guaranteed to media companies. This is particularly the case in the field of online advertising where the lack of transparency along the intermediary chain (including in the allocation of advertising revenue in the online advertising value chain and in relation to the verification of advertisements) prevents fair competition.

About VAUNET

VAUNET is the leading organization for private audio-visual media in Germany. Since May 21, 2018, the former VPRT (Verband Privater Rundfunk und Telemedien - Association of Private Media) has been operating under the name of VAUNET - Verband Privater Medien e.V., with headquarters in Berlin and an office in Brussels. TV, radio, web and streaming services are among the diverse business areas of the approximately 150 members.

With an annual turnover of around 11.4 billion euros in Germany, the private broadcasting companies are a significant cultural and economic factor, also in digital Europe. They employ around 43,000 people and also secure a 16-fold increase in jobs in upstream and downstream industries: The audio and audio-visual media industry as a whole represents around 830,000 employees in Germany - almost every 50th job. Private radio and TV stations reach over 30 million listeners and over 40 million viewers every day, while private TV and video portals reach over 31 million people on average every month. In total, they offer the public more than 347 million.