

W nawiązaniu do prośby o uwagi do Rodziału III DSA przekazujemy następujące propozycje zmian w odniesieniu do poszczególnych przepisów (w języku angielskim):

## I. Advertising

### Article 24

1. We recommend the following amendments in point (c):

(c) meaningful information about **all parameters** used to determine the recipient to whom the advertisement is displayed.

**The parameters shall include, if applicable, the optimisation goal selected by the advertiser, information on the use of custom lists and in such case – the category and source of personal data uploaded to the online platform and the legal basis for uploading this personal data pursuant to Regulation (EU) 2016/679, information on the use of lookalike audiences and in such case – relevant information on the seed audience and an explanation why the recipient of the advertisement has been determined to be part of the lookalike audience.**

2. We recommend adding point (d) to the catalogue of required information:

**(d) if applicable, meaningful information about the online platform’s algorithms or other tools used to optimise the delivery of the advertisement, including a specification of the optimisation goal and a meaningful explanation of reasons why the online platform has decided that the optimisation goal can be achieved by displaying the advertisement to this recipient.**

Justification:

Limiting the scope of information to “main parameters” creates a risk for obfuscating the targeting process for users. In particular, “main” parameters can be interpreted as those that apply to the highest number of users (e.g. demographic information), which would lead to hiding potentially more sensitive and more precise targeting criteria which apply to unique features of a particular user. For this reason users should be provided with the same granularity of information that is available for advertisers in the online platforms’ advertising interface.

It is also crucial that the explanation provided to users includes both the parameters used by advertisers (selected via the online platforms’ advertising interface) and by the platform itself, particularly when it comes to the process of algorithmic ad delivery and lookalike targeting. In both of these processes the platform and its machine-learning algorithms play a key role in determining the actual recipients of the advertisement from a larger group of all users who fulfil the advertiser’s parameters (please see our previous remarks from 20 January 2021).

## New provisions

We recommend adding the following new provision which introduces requirements and restrictions for targeted advertising that goes beyond transparency:

### Article 24a

1. **Online platforms shall present personalised advertising only on the basis of data explicitly provided to them or declared by recipients of service and provided that they have granted consent within the meaning of Article 4 (11) of Regulation (EU) 2016/679 for the use of this data for the purposes of delivering personalised advertising.**
2. **Online platforms shall respect the communication of consent referred to in paragraph 1 through automated means, in particular through the settings of software placed on the market permitting electronic communications, including the retrieval and presentation of information on the internet.**

Justification:

There is a wealth of research demonstrating the negative impact of microtargeted behavioural advertising on users' fundamental rights. In order to address these challenges and ensure that users' fundamental rights are protected it is crucial that the DSA introduces specific restrictions for online platforms as to what type of personalised advertising is permitted.

There are already many proposals for prohibiting behavioural advertising altogether, formulated for instance by the European Parliament's initiative report on the DSA. Our proposal acknowledges that there might be some forms of personalised advertising which do not exceed users' expectations and may be effectively controlled. Therefore, we propose for the DSA to make explicit that personalised advertising is permitted, as long as it does not rely on data other than that directly provided or declared by users (e.g. in their profile or data management settings). This would outlaw personalised advertising based on pervasive and systemic monitoring of user behaviour beyond their control. As such, this creates a balance between the protection of users' fundamental rights and information autonomy and the needs of advertisers and online platforms. Users' expectations vis-à-vis the protection of their personal data is ensured by the fact that they will have full control over their data used for advertising purposes.

The proposed paragraph 2 is designed to lighten the burden on users with respect to responding to consent requests, further specify the GDPR's provisions on privacy by design and by default, and limit the growing problem of consent fatigue, thus improving users' online experience.

### Article 24b

**Online platforms that use algorithms to deliver advertisements shall set out in their terms and conditions, in a clear, accessible, and easily comprehensible manner, relevant information on the functioning of these algorithms, including the goal of the algorithm, information on how relevance of the advertisement is established, including the main criteria used by the algorithm and how they are weighed against each other, categories and sources of input data, sources of training data, and an explanation of how potential errors and biases of the algorithm have been mitigated.**

Justification:

Online platforms frequently use algorithms to assess the targeting criteria selected by the advertiser and optimise the delivery of the advertisement, i.e. ensure that the advertisement is presented to those users for whom it is the most relevant. Currently this process is opaque, as users are not informed about how and on the basis of what data algorithms assess this relevance and decide that the advertisement should be presented to a particular person.

## II. Recommender systems

### Article 29

We recommend the following amendments (underlined and in bold)

1. **Online platforms** that use recommender systems **or any other systems used to determine the order of presentation of content, including that which decrease the visibility of content**, shall set out in their terms and conditions, in a clear, accessible and easily comprehensible manner, the main parameters used in **these** systems.
2. **The main parameters referred to in paragraph 1 shall include, at minimum:**
  - (a) **the main criteria used by the relevant recommender system.**
  - (b) **how these criteria are weighted against each other.**
  - (c) **the optimisation goal of the relevant recommender system.**
  - (d) **explanation of the role that the behaviour of the recipients of the service plays in how the relevant recommender system functions.**
3. Very large online platforms **shall provide options for the recipients of the service to modify or influence parameters referred to in paragraph 2.** including at least one option which is not based on profiling, within the meaning of Article 4 (4) of Regulation (EU) 2016/679.
4. Very large online platforms shall provide an easily accessible functionality on their online interface allowing the recipient of the service:
  - (a) to select and to modify at any time their preferred option for each of the recommender systems that determines the relative order of information presented to them,
  - (b) **to select third party recommender systems.**

Justification<sup>1</sup>:

First, the obligation to explain recommender systems should not apply only to very large online platforms, but to all online platforms which use them, as it is important to ensure basic transparency for users in all instances. It is also important to include main parameters used not

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<sup>1</sup> W kontekście Art. 29 polecamy Państwa uwadze artykuł autorstwa badaczy z Institute for Information Law na Uniwersytecie w Amsterdamie, którzy zwracają uwagę na niedociągnięcia i problemy związane z obecnym kształtem tego przepisu. Artykuł ten prosimy potraktować jako uzupełnienie naszego uzasadnienia dla proponowanych zmian: <https://policyreview.info/articles/news/regulation-news-recommenders-digital-services-act-empowering-david-against-very-large>

only to recommend content (i.e. amplify or prioritise certain content) but also to limit the visibility of certain pieces of content (the phenomenon of so-called shadow bans).

Second, the definition of “main parameters” should be made more specific. We propose including a non-exhaustive catalogue of information that should be revealed.

Third, in order to increase users’ choice, safety, and control over their experience, they should always be able to modify parameters of recommender systems, not only when the platform grants them this right on the platform’s own initiative. The scope of available options may remain at a platform’s discretion.

Also with this goal in mind, very large online platforms should enable users to select third party recommender systems, i.e. mandate another provider to curate content for them, if they do not like the parameters used by the platform. This would imply that very large online platforms must make their recommender systems interoperable with third parties. In order to create appropriate technical standards, we recommend introducing specific competences for the European Commission or another appropriate body to oversee and approve technical requirements for interoperability.

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Warszawa, 25 marca 2021 r.

W nawiązaniu do prośby o uwagi do Rodziału III DSA oraz uzupełniając dokument przesłany 19 marca 2021 r., przekazujemy drugą część naszych propozycji zmian do poszczególnych przepisów projektu rozporządzenia w obszarze dotyczącym moderacji treści przez usługodawców internetowych (w języku angielskim, wprowadzone zmiany zaznaczono pogrubioną i podkreśloną czcionką):

## **I. Article 12**

We recommend adding a new paragraph to this Article:

1. Providers of intermediary services shall include information on any restrictions that they impose in relation to the use of their service in respect of information provided by the recipients of the service, in their terms and conditions. That information shall include information on any policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making and human review. It shall be set out in clear and unambiguous language and shall be publicly available in an easily accessible format.

### **2. Any restrictions referred to in paragraph 1 must respect fundamental rights enshrined in the Charter.**

~~3.2.~~ Providers of intermediary services shall act in a diligent, objective and proportionate manner in applying and enforcing the restrictions referred to in paragraph 1, with due regard to the rights and legitimate interests of all parties involved, including the applicable fundamental rights of the recipients of the service as enshrined in the Charter.

#### **Justification:**

Terms and conditions concerning acceptable and non-acceptable content shall not be imposed in an entirely arbitrary manner by providers of intermediary services, and in particular by very

large online platforms. Providers' discretion in this respect shall be limited by the principles enshrined in the EU Charter of Fundamental Rights. This would prevent, for example, imposing terms and conditions that would be discriminatory or otherwise contradictory with values of the Charter. It should be therefore crystal clear that providers' internal regulations are not only applied and enforced in conformity with the Charter (current Article 12.2) but also are established with due regard to its standards.

## II. Article 15.1 and 17.1

### Article 15.1

Where a provider of hosting services engages in any content moderation ~~decides to remove or disable access to specific items of information provided by the recipients of the service,~~ irrespective of the means used for detecting, identifying, ~~or~~ removing or disabling access to or otherwise addressing that information provided by the recipients of the service and of the reason for its decision, it shall inform the recipient, ~~at the latest at the time of~~ **prior to enforcing the decision,** ~~the removal or disabling of access, of the decision~~ and provide a clear and specific statement of reasons for that decision. **The obligation of prior notification shall not apply to content constituting hate speech, incitement to violence and child sexual abuse - in that case the provider of hosting services should inform the recipient of its decision at the latest at the time of the removal or disabling of access to the content.**

### Article 17.1

Online platforms shall provide recipients of the service, for a period of at least six months following the decision referred to in this paragraph, the access to an effective internal complaint-handling system, which enables the complaints to be lodged electronically and free of charge, against the following decisions taken by the online platform on the ground that the information provided by the recipients is illegal content or incompatible with its terms and conditions:

- (a) decisions to remove or disable access to the information;
- (b) decisions to suspend or terminate the provision of the service, in whole or in part, to the recipients;
- (c) decisions to suspend or terminate the recipients' account;
- d) any other decisions that affect the availability, visibility or accessibility of that content and/or the recipient's account or the recipient's access to significant features of the platform's regular services.**

### Justification

First of all, the proposed procedure for removing content does not impose an obligation for a hosting service provider to notify and hear the affected user's arguments before the content is removed. The notification and the possibility of addressing such a decision by the user is foreseen only *post factum*. In our opinion, introducing an obligation of a prior notification and possibility for a user to respond to it before any content moderation action is taken would further increase the guarantees of procedural fairness and improve safeguards protecting freedom of expression online. The only exception to the rule of prior notifications should be instances where platforms have to respond to most harmful categories of content such as hate speech, incitement to violence and child sexual abuse.

Secondly, the proposed 'due-process safeguards' currently apply only to platforms' decision to remove content or remove / suspend an account. In our opinion they should cover every action of the platform that leads to a limitation of the visibility of a questioned content or otherwise reduces its reach (this applies, for example, to the so-called 'shadow bans' or limitations

concerning promoting content or monetizing it). We believe that all those measures should meet the same standards of transparency and accountability as currently provided for content/account removal or suspension. Although these measures may seem less 'intrusive', in practice they often lead to an equally serious interference with the freedom of expression, especially as at the moment they are often imposed without any notification of the user, not only making it impossible to question such a restriction, but even to gain knowledge about its imposition. At the same time, the sole obligation to provide statistical information on activities reducing the visibility of content (Article 13.1c) provided for in the draft Regulation does not constitute a sufficient guarantee against the abuse of these measures, as it does not sufficiently protect the interests of individual users against whom such measures are applied.

### **3. Article 18**

We recommend adding a new paragraph to this Article:

1. Recipients of the service addressed by the decisions referred to in Article 17(1), shall be entitled to select any out-of-court dispute that has been certified in accordance with paragraph 2 in order to resolve disputes relating to those decisions, including complaints that could not be resolved by means of the internal complaint-handling system referred to in that Article. Online platforms shall engage, in good faith, with the body selected with a view to resolving the dispute and shall be bound by the decision taken by the body.

The first subparagraph is without prejudice to the right of the recipient concerned to redress against the decision before a court in accordance with the applicable law.

[...]

**7. Member States shall establish a mechanism enabling the recipients of the service to contest decisions of out-of-court dispute settlement bodies before a national judicial authority relevant for resolving disputes related to freedom of expression.**

### **Justification**

The Regulation should clearly establish an obligation for Member States to set up a judicial redress mechanism for users who would like to question the decision of the out-of-court dispute settlement body. Access to judicial remedy in content moderation-related cases should be explicitly guaranteed by the Regulation and not left up to Member States' discretion (currently not all national legal systems allow for such a judicial review).