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CCBE position paper on the Digital Services Act and the Digital Markets Act

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The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

On 15 December 2020, the European Commission published a proposal for a regulation on a single Market for Digital Services and amending Directive 2000/31/EC (hereafter, the "Digital Services Act", or "DSA"), as well as a proposal for a regulation on contestable and fair markets in the digital sector (hereafter, the "Digital Markets Act" or "DMA").

The CCBE welcomes that the Commission considered various aspects which the CCBE suggested during the preceding consultation process. The CCBE previously issued Responses to the open public consultation on the Digital Services Act Package.

With this paper, the CCBE wished to further develop its position in relation to several aspects of the DSA and the DMA proposals.

I. THE DIGITAL SERVICES ACT

A. Recitals

- ***Recital (12) and the notion of illegal content***

Recital (12) concerns the notion of illegal content and how it should be defined. According to the proposal, Member States are invited to adopt a sufficiently broad definition. Recital (12) stresses that the concept should be understood to refer to an information which is illegal under the applicable law or that relates to activities that are illegal.

The CCBE understands that such definition could include unauthorised practices of law and could apply to illegal activities such as those carried out by persons who are not qualified to offer professional legal services online, who make an unlawful use of the title of lawyer or who are subject to disciplinary sanctions (such as disbarment) by a professional competent body but are still active on third platforms, considered as intermediation services.

- ***Recital (44) and the out-of-court mechanism***

The proposal sets up a complaint system which gives an important role to out-of-court mechanisms. It states that "*online platforms should be required to provide for internal complaint-handling systems, which meet certain conditions*" and that "*provision should be made for the possibility of out-of-court dispute settlement of disputes by certified bodies that have the requisite independence, means and expertise to carry out their activities in a fair, swift and cost-effective manner*". Furthermore, the Recital stresses that "*the possibilities to contest decisions of online platforms thus created should complement, yet* ***leave unaffected in all respects, the possibility to seek judicial redress in accordance with the laws of the Member State concerned***".

The CCBE welcomes this provision and stresses that, according to the rights to an effective remedy and to a fair trial, such as laid down in Article 47 of the Charter of Fundamental Rights of the EU, the provisions of the DSA should not be designed to replace court procedures and should not prevent parties from exercising their right of access to the judicial system.

- ***Recital (79), (98) and following: fundamental rights and the protection of professional secrecy and legal professional privilege***

The CCBE considers that Recital (79) is of prime importance. Indeed, the proposal contains provisions on national Digital Services Coordinators and other competent authorities designated under the DSA, with powers and means to ensure investigation and enforcement of the DSA.

According to Recital (79) "***In the course of the exercise of those powers, the competent authorities should comply with the applicable national rules regarding procedures and matters such as the need for a prior judicial authorisation to enter certain premises and legal professional privilege***. ***Those provisions should in particular ensure respect for the fundamental rights to an effective remedy and to a fair trial, including the rights of defence, and the right to respect for private life***. *In this regard, the guarantees provided for in relation to the proceedings of the Commission pursuant to this Regulation could serve as an appropriate point of reference.* ***A prior, fair and impartial procedure should be guaranteed before taking any final decision, including the right to be heard of the persons concerned, and the right to have access to the file, while respecting confidentiality and professional and business secrecy, as well as the obligation to give meaningful reasons for the decisions***".

The CCBE stresses that the protection of professional secrecy and legal professional privilege is a cornerstone of the rule of law and the right to a fair trial. This protection must be ensured for all the provisions of the DSA concerning the exercise of their powers entrusted to the competent authorities, i.e. not only the Digital Services Coordinators and other national authority but also the European Commission.

Furthermore, the CCBE considers that Recitals (98) and following, concerning investigative and enforcement powers entrusted to the European Commission with regard to very large online platforms, should contain the same reference.

Indeed, it is mentioned in Recital (98) that the "*Commission should have strong investigative and enforcement powers […], in full respect of the principle of proportionality and the rights and interests of the affected parties*". The need to ensure the rights of defence of the parties concerned is only mentioned further in Recital (101).

The CCBE considers that such wording is not sufficient compared to Recital (79). It should also be mentioned in Recital (98) that a fair and impartial procedure should be guaranteed before taking any final decision, including the right to be heard, the right to have access to the file, the obligation to respect confidentiality, professional secrecy and legal professional privilege, and the obligation to hive meaningful reasons for the decisions.

The CCBE welcomes the Recital (105) which provides that the DSA respects the fundamental rights recognised by the Charter and the fundamental rights constituting general principles of Union law and should be interpreted and applied in accordance with those fundamental rights.

B. Articles of the DSA

a) Definitions (Article 2)

The CCBE welcomes the provisions of Article 2 of the broad definitions of the notion of "illegal content". As mentioned above, the CCBE considers that such a definition should be understood as including the unauthorised practice of law and could apply to illegal activities such as those carried out by persons who are not qualified to offer professional legal services online, who make an unlawful use of the title of lawyer or who are subject to disciplinary sanctions (such as disbarment) by a professional competent body but are still active on third platforms, considered as intermediation services.

According to Art 2 lit d, the applicability of the provisions to a service provider without an establishment in the Union shall be given if this service provider has "a significant number of users" in one or more Member States. The definition in lit d does not provide a threshold value. Although the circumstances mentioned in lit d are listed by way of example, the question of whether a person is subject to legal regulation should be as clear as possible. Therefore, it should be considered to replace the "significant number of users" with a threshold value, a minimum size would create more certainty for providers, as the Regulation imposes numerous obligations.

b) Orders to act against illegal content and to provide information (Articles 8 and 9)

The DSA imposes an obligation on providers of intermediary services in respect of orders from national judicial or administrative authorities to act against illegal content (Article 8) and to provide information about one or more specific individual recipients of the service (Article 9).

The CCBE notices that both articles provide that the conditions and requirements laid down in article 8 and 9 shall be without prejudice to requirements under national criminal procedural law in conformity with Union law (8(4) and 9(4)).

The CCBE considers that the reference to national criminal law is too restrictive. The framework of procedural guarantees provided by these provisions should be broader. Such guarantees must also take into account fundamental rights and principles, as guaranteed by the Charter of Fundamental Rights of the European Union, beyond those laid down in national criminal law. It could also be mentioned that under no circumstances may an order to provide information be issued to obtain information covered by professional secrecy or legal professional privilege, more specifically in the case of information relating to activities of a lawyer using an online platform.

c) Internal complaint-handling system (Article 17) and Out of court dispute settlement system (Article 18)

The DSA lays down the obligation for online platforms to provide an internal complaint-handling system in respect of decisions taken in relation to alleged illegal content or information incompatible with their terms and conditions (Article 17). It also obliges online platforms to engage with certified out-of-court dispute settlement bodies to resolve any dispute with users of their services (Article 18).

With regards to the information incompatible with the online platforms' terms and conditions, the CCBE notes that, in order to guarantee the user's right of defence in the internal complaint-handling system set forth in Article 17, in out of court dispute mechanism set forth in Article 18, and also in a Court proceeding it is necessary that the terms and conditions of the online platforms/service providers/social network are easily accessible and understandable by users. **Such terms and conditions shall also contain the exposition of the mechanisms and the procedures according to which the algorithms or other evaluation methods, including electronic ones, remove a certain content deemed not in compliance with the terms and conditions of the service**.

The CCBE welcomes the provision of Article 18 which state that the out-of-court dispute mechanism is "*without prejudice to the right of the recipient concerned to redress against the decision before a court in accordance with the applicable law*". Furthermore, the CCBE welcomes the requirement for certifying an out-of-court dispute settlement body which must be impartial and independent, have the necessary expertise, be easily accessible, settle dispute in a swift, efficient and cost-effective manner and in at least one official language; and which shall settle the dispute "*in accordance with clear and fair rules of procedure*".

The CCBE stresses that the conditions of "clear and fair rules of procedure" should be more developed and that the dispute settlement system provided for in the DSA shall not deprive the parties of their right to independent advice or to be represented or assisted by a lawyer at any stage of the procedure.

d) Trusted flaggers (Article 19)

The CCBE stresses that representative bodies of the legal profession, such as Bars and Law Societies, should be qualified as Trusted Flaggers. For instance, Bars and Law Societies are in the best position to identify certain illegal online activities and related content such as the unauthorised practice of law.

e) Implementation, enforcement and competent authorities under the Digital Services Act (Chapter IV)

i) Competent authorities

The CCBE would like to stress that the provisions of the DSA are unclear regarding the relationship and the respective powers of competent authorities under the proposed regulation. In particular, the scope of intervention of the European Commission and the national regulatory authority seems to overlap.

According to Article 38, the Member States shall designate one or more competent authorities as responsible for the application and enforcement of the DSA, including one Digital Services Coordinator. The CCBE stresses that the multiplication of the number of competent authorities could have harmful consequences. In view of the large powers given to the competent authorities under the DSA, the CCBE recalls the need for strong procedural safeguards.

ii) Procedural safeguards and rights of the defence

The CCBE stresses that the same guarantees should apply to all intermediary service providers, whether they are small or very large online platforms, whether the procedure is conducted by national authorities or by the European Commission.

- **Safeguards before the national authorities (Article 38 and following)**

At this regard, the CCBE welcomes the provisions of Article 38 (4) which provides that the requirements applicable to Digital Services Coordinators set out in Articles 39, 40 and 41 shall also apply to any other competent authorities that the Member States designate.

The CCBE also welcomes Article 41(6) according to which "*Member States shall ensure that any exercise of the powers granted to the Digital Services Coordinators is subject to adequate safeguards laid down in the applicable national law in conformity with the Charter and with the general principles of Union law*. *In particular, those measures shall only be taken in accordance with the right to respect for private life and the rights of defence, including the rights to be heard and of access to the file, and subject to the right to an effective judicial remedy of all affected parties.*"

However, the CCBE considers that Article 41(6) should be more protective in consideration of Recital (79). In particular, the mention of the need to protect professional secrecy and legal professional privilege only appears in the Recitals and not in the Articles themselves.

Therefore, Article 41 (6) should be amended to provide that "*those measures shall only be taken in accordance with the right to respect for private life and the rights of defence, <u>while respecting confidentiality, professional secrecy</u>* and legal professional privilege*, including the rights to be heard and of access to the file, as well as subject to the right to an effective judicial remedy of all affected parties*".

- **Safeguards before the European Commission (Article 50 and following)**

The CCBE notices that the safeguards provided for in relation to the procedures before the national authorities do not appear in a same way in relation to procedures before the European Commission, as mentioned in Article 52 and following. Indeed, in the case of very large online platforms, the Commission's powers appear to be even more extensive, while the guarantees for the right to a fair trial and the rights of the defence are not clearly specified.

Article 52 "Requests for information" allows the Commission by simple request or by decision to require the very large online platforms concerned, as well as any other persons acting for purposes related to their trade, business, craft, or profession that may reasonably be aware of information relating to the suspected infringement or the infringement, as applicable, to provide such information within a reasonable time. **The CCBE stresses that under no circumstances may the object of such a request be to ask a lawyer representing a very large online platform to provide documents covered by professional secrecy or legal professional privilege**.

Article 63 "Right to be heard and access to the file" is the only article which, at a later stage, provides for procedural safeguards and the rights of defence. Whereas this article mainly concerns the right to be heard and the right of access to the file, Article 63(4) states that "*the rights of defence of the parties concerned shall be fully respected in the proceedings*".

The CCBE considers that the powers of the European Commission should be more clearly framed. The CCBE stresses that a specific article could provide such a framework, as a new entry or as a rewording of Article 63.

<u>The DSA should provide that in the exercise of its powers granted by the Regulation, the Commission shall be subject to adequate safeguards such as those guaranteed by the Charter of Fundamental Rights of the European Union. In particular, the Commission shall exercise its powers in accordance with the right to respect</u>

for private life and the rights of defence, while respecting confidentiality, professional secrecy and legal professional privilege, including the rights to be heard and of access to the file, as well as subject to the right to an effective judicial remedy of all affected parties.

More generally, the CCBE stresses that the DSA could contain a more detailed article with respect to the right to a fair trial, the rights of the defence, including the protection of professional secrecy and legal professional privilege, the right to be heard and to have access to the file. The purpose of such an article could be to ensure respect for fundamental principles and rights, as mentioned in Recital 79, in all procedures provided for in the Regulation.

II. THE DIGITAL MARKETS ACT

A. Identification of Gatekeepers and core platforms (Article 3 and following)

The DMA proposal provides for the Commission to establish an initial list of core platform services and for gatekeepers to be identified either on the basis of "quantitative thresholds" set out in the Article 3 (2) of the proposal or, alternatively, on the basis of a "**qualitative case-by-case assessment**" as a result of a market investigation (Recital (63), Article 3 (6)). In order to do so, the Commission should take into account a number of elements provided for in Article 3 (6) and follow the procedure laid down in Article 15.

The CCBE suggests that the DMA should define not only the procedures but also the criteria to be taken into account by the Commission in assessing what is a core platform service or who is a gatekeeper. As this is an issue that has the potential to expose companies to significant market constraints, it is particularly important that there is a fair and open decision-making process and that it is transparent.

Furthermore, according to Article 4 of the DMA proposal, the Commission shall regularly, and at least every two years, review whether the designated gatekeepers continue to satisfy the requirements laid down in Article 3, or whether new providers of core platform services satisfy those requirements.

At this regard, the CCBE suggest that the process of identifying and defining the scope of services and platforms subject to the DMA should be as transparent and accessible to inputs from all stakeholders as possible.

B. Prohibited practices (Chapter III)

Chapter III of the DMA proposal, Article 5 and following, set out the practices of gatekeepers that limit contestability or are unfair. Article 5 lists several prohibited practices and Article 6 lists obligations for gatekeepers susceptible of being further specified. The proposal also lays down conditions under which the obligations for an individual core platform service may be suspended in exceptional circumstances (Article 8) or an exemption can be granted on grounds of public interest (Article 9).

The CCBE considers that the unfair practices listed in the proposal lack, at least in part, the necessary definiteness and clarity to provide companies with actionable guidance on legal risks. Therefore, detailed and market-specific (and in some cases business-model-specific) standards should be established and, where appropriate, reference should also be made to existing ECJ case law.

The CCBE recommends that the DMA sets out more clearly the factors and considerations that lead to a change in practices prohibited or required. The DMA should set out more clearly the criteria used to assess the need for exceptions.

C. Protection of the right of defence and of professional secrecy and legal professional privilege

The CCBE welcomes that the DMA proposal takes into account the need to ensure the right of defence and the confidentiality of communications between lawyers and their clients.

The CCBE notes that Recital (75) of the DMA proposal provides that "*In the context of proceedings carried out under this Regulation, the undertakings concerned should be accorded the right to be heard by the Commission and the decisions taken should be widely publicised. While ensuring the rights to good administration and the rights of defence of the undertakings concerned, in particular, the right of access to the file and the right to be heard, it is essential that confidential information be protected. Furthermore, while respecting the confidentiality of the information, the Commission should ensure that any information relied on for the purpose of the decision*

is disclosed to an extent that allows the addressee of the decision to understand the facts and considerations that led up to the decision. ***Finally, under certain conditions certain business records, such as communication between lawyers and their clients, may be considered confidential if the relevant conditions are met***."

The CCBE also welcomes the provisions of Article 30 regarding the "Right to be heard and access to the file" and the paragraph 4 which provides that "*the rights of defence of the gatekeeper or undertaking or association of undertakings concerned shall be fully respected in any proceedings*".

The CCBE would like to recall that the protection of professional secrecy and legal professional privilege is a cornerstone of the rule of law and the right to a fair trial. The CCBE stresses that the wording of Recital (75) of the DMA proposal is not sufficient to ensure the protection of the right of the defence and the confidentiality of communication between lawyers and their clients. This provision seems to make the protection of confidentiality conditional.

The CCBE recalls that professional secrecy and legal professional privilege, as a guarantee of the rights of the defence, cannot be conditioned. Therefore, the DMA should provide that in the exercise of its powers granted by the Regulation and in any proceedings, the Commission shall ensure a fair and impartial procedure before taking any final decision, including the right to be heard of the persons concerned, and the right to have access to the file, while respecting confidentiality, professional secrecy and legal professional privilege, as well as the obligation to give meaningful reasons for the decisions.

Further, the CCBE considers that it would not be sufficient to mention the need to protect professional secrecy and legal professional privilege only in the Recitals, but it must be mentioned in the Articles themselves.