



Recommendations for compromise amendments to the Digital Services Act¹

Following the open letter² on the need to regulate online platforms' algorithms in the Digital Services Act, signed by 50 civil society organisations, Panoptykon Foundation strongly recommends you to adopt the following compromise amendments:

1. Introduce limits to surveillance-based advertising

Recommendation: support AM 746 or AM 1019 in order to create an enabling regulatory framework for the advertising ecosystem based on contextual advertising, rather than pervasive tracking and profiling of users.

➔ **If not feasible, we propose the following compromises (from best to worst):**

Option 1: limit the prohibition from AM 746 or AM 1019 to online platforms.

Option 2: limit the prohibition from AM 746 or AM 1019 to the most harmful form of targeted advertising - behavioural ads based on inferred personal data (i.e. results of algorithmic profiling) - and mandate that the only personal data that may be used for advertising is the data explicitly provided/authorised by users for this purpose, following their explicit consent.

Proposed text of the compromise amendment³:

Article 2a (new) OR 23a (new)
Targeted advertising

- 1. Providers of information society services (best scenario) OR Online platforms*** that display advertising to the recipients of the service shall not use inferred data resulting from the profiling of the recipients or any personal data collected about them in services provided by third parties. ***Providers of information society services OR Online platforms*** can present targeted advertising on the basis of personal data explicitly provided to them or declared by recipients of the service and provided that they have been granted consent within the meaning of Article 4(11) of Regulation (EU) 2016/679.
- 2. Providers of information society services OR Online platforms*** shall ensure that the

¹ Recommendations prepared by Karolina Iwańska and Katarzyna Szymielewicz.

² <https://en.panoptykon.org/fix-algorithms-letter>

³ Compare AM 612 in the LIBE Committee: *Article 24a (new) Online platforms shall present personalised advertising only on the basis of data explicitly provided to them or declared by recipients of services and provided that they have granted consent for the use of this data for the purposes of delivering personalised advertising.*

option that does not require the use of personal data is activated by default.

3. *Providers of information society services OR Online platforms shall, where applicable, provide an easily available functionality on their online interface allowing the recipients of the service, at any time, to declare, modify and delete their personal data referred to in paragraph 1.*

Option 3: combine the requirement for consent to behavioural advertising (in line with AM 92, AM 1485 and AM 1512), with a prohibition of dark patterns (in line with AM 972, AM 959, AM 1013, AM 1014, AM 1125, AM 1485) **and** the possibility to communicate consent through independent tools, such as browser signals (in line with AM 972 (paragraph 3) and AM 1013 (paragraph 3)). Only a combination of these three elements will ensure that users have genuine free choice over how information about them will be used.

2. Increase transparency of algorithms used for delivering adverts

Recommendations:

- **support AM 1481** to introduce **general**, publicly available transparency of algorithms used for **both** the delivery of advertisements⁴ and recommending content,
- clarify **individual** (user-facing) ad transparency requirements (Article 24) by including the following elements in the compromise amendment:
 - a clear distinction between advertisers' targeting parameters and the platform-controlled ad delivery/optimisation and a requirement to include an explanation of both (**support AM 1492** and **AM 1498**),
 - a requirement to disclose information about the use of custom audience and lookalike tools (**support AM 1504**)⁵.

3. Increase transparency and user control over recommender systems

Recommendations:

- prohibit the use of inferred data for profiling purposes in recommender systems used by all online platforms and mandate that consent is required for the use of any other types of personal data. To this end, **combine paragraph 3 of AM 1518 with paragraph 1 of AM 130 and add a new sentence to include the proposed prohibition** (see the proposed new text below)
 - if not feasible, mandate that explicit consent (not an opt out) is required to use any personal data (incl. inferred data) for the purposes of recommending content, **by supporting AM 130 (paragraph 1)**
- increase transparency of algorithms used in recommender systems of all online platforms, by **supporting AM 1481, AM 1518, AM 1696 or AM 130 (paragraph 3)**

⁴ As explained in the Financial Times article, the ad delivery process itself, controlled by the platform, not by the advertiser, can lead to harmful consequences (such as discrimination or exploitation of users' vulnerabilities) which justifies the need for more transparency of algorithms used in this process: <https://www.ft.com/content/d5dcfece-4e3c-4937-81ac-20dc736c4c27>

⁵ Note that this does not apply if a prohibition on behavioural advertising or the use of inferred and third-party data is introduced.

- mandate that at least very large online platforms (and in the ideal scenario all online platforms) **must, and not only may**, enable users to modify recommender systems and specify which options should be subject to user control, **in line with AM 1518 (paragraph 3) or AM 1699**

In summary, we propose the following text of the compromise amendment which takes into account the above mentioned recommendations and combines relevant parts of AM 130 and AM 1518:

Article 24a (new)
Recommender systems

1. *Online platforms that use recommender systems or any other system used to select and determine the order of presentation of content shall not make the recipients of their services subject to a system based on profiling, unless the recipient of the service has expressed a freely given, specific, informed and unambiguous consent, in line with the requirements established under Regulation (EU) 2016/679. Online platforms shall ensure that the option that is not based on profiling is activated by default. **In any case online platforms shall not use, for the purpose of profiling, inferred personal data of the recipients or any personal data collected about them in services provided by third parties.***
2. *Online platforms shall set out in their terms and conditions, in a clear, accessible and easily comprehensible format, the parameters used in their recommender systems, as well as the options provided to the recipients of the service to select or modify those parameters.*
3. *The parameters referred to in paragraph 1 shall include at least the following information:*
 - a. *the criteria and logic used by the recommender systems, including input data and performance metrics;*
 - b. *how these criteria are weighted against each other;*
 - c. *the optimisation goal of the recommender systems;*
 - d. *an explanation of how the behaviour of the recipients of the service may impact the functioning and outputs of the recommender systems.*
4. *Online platforms shall provide options for the recipients of the service to access their profile to select and modify the parameters of the relevant recommender system.*

4. Empower users and promote innovation through interoperable third-party recommender systems

Recommendations:

- **support AM 1703** which:
 - enables users of very large online platforms to choose their preferred third-party recommender system, independent of the very large online platform,

- ensures that third-party recommender systems are interoperable with core functionalities of the very large online platform (namely that providers of such systems are offered “access to the same operating system, hardware or software features that are available or used in the provision by the platform of its own recommender systems”)
- **support AM 1705** which ensures that access to third-party recommender systems cannot be arbitrarily suspended or limited by very large online platforms,
- **support AM 1706**⁶ which creates a safeguard against appropriation and commercialisation of data generated by third-party providers of recommender systems by the very large platform,
- **support AM 1707 (paragraph 3)** which ensures an adequate standard of data protection, data security as well as diversity and quality of recommended information in the provision of third party services (to be specified by the European Commission in delegated acts),
- **support AM 1806** which ensures interoperability of core functionalities of very large online platforms which would make third-party recommender systems technically possible,
 - modify the proposed text of Art. 33a as suggested below in order to distinguish between the obligation for VLOPs to document and maintain open APIs (further specified by the implementing measures) and the need to develop open standards and protocols, which will be independent from VLOPs’ interfaces (it is a standard-setting process which cannot be mandated but can be facilitated by the European Commission).

Proposed text of compromise amendments:

Article 29

Recommender systems of very large online platforms

1. **(AM 1703)** *In addition to the obligations applicable to all online platforms, very large online platforms shall offer to the recipients of the service the choice of using recommender systems from third party providers, where available. Such third parties must be offered access to the same operating system, hardware or software features that are available or used in the provision by the platform of its own recommender systems.*
2. **(AM 1705)** *Very large online platforms may only limit access to third-party recommender systems temporarily and in exceptional circumstances, when justified by an obligation under Article 18 of Directive (EU) 2020/0359 and Article 32(1)(c) of Regulation (EU) 2016/679. Such limitations shall be notified within 24 hours to affected third parties and to the Agency. The Agency may require such limitations to be removed or modified where it decides by majority vote they are unnecessary or disproportionate.*
3. **(AM 1706 - redundant if AM 1806 receives majority, as it corresponds to Art. 33a (3))** *Very large online platforms shall not make commercial use of any of the data that is generated or received from third parties as a result of interoperability activities for purposes other than enabling those activities. Any processing of personal data related to*

⁶ Note that this provision is redundant if AM 1806 is adopted.

those activities shall comply with Regulation (EU) 2016/679, in particular Articles 6(1)(a) and 5(1)(c).

4. **(AM 1707)** *The Commission shall, after consulting the Board, adopt delegated acts laying down the requirements for third party providers referred to in paragraph 2 to ensure an adequate standard of data protection, data security as well as diversity and quality of recommended information in the provision of third party services.*

AM 1806

Article 33a (new)

Interoperability

1. *Very large online platforms shall make the core functionalities of their services interoperable to enable cross-platform exchange of information with third parties. Very large online platforms shall publicly document all application programming interfaces they make available to that end.*
2. *Very large online platforms may only limit access to their core functionalities temporarily and in exceptional circumstances, when justified by an obligation under Article 18 of Directive [XX] on measures for a high common level of cybersecurity across the Union, repealing Directive (EU) 2016/1148 or Article 32(1)(c) of Regulation (EU) 2016/679. Such limitations shall be notified within 24 hours to affected third parties and to the Agency. The Agency may require such limitations to be removed or modified where it decides by majority vote they are unnecessary or disproportionate.*
3. *Very large online platforms shall not make commercial use of any of the data that is generated or received from third parties as a result of interoperability activities for purposes other than enabling those activities. Any processing of personal data related to those activities shall comply with Regulation (EU) 2016/679, in particular Articles 6(1)(a) and 5(1)(c).*
4. *The Commission shall adopt implementing measures specifying the nature and scope of the obligations set out in paragraph 1, including open standards ~~and protocols~~ such as application programming interfaces.*
5. **(new)** *The Commission shall promote and facilitate the development of technical standards for protocols and ontologies to enable syntactic and semantic interoperability between third-party recommender systems and the very large platforms.*

5. Subject algorithms to scrutiny by civil society and journalists

Recommendation: support AM 1754 which extends access to data necessary for identification, mitigation and understanding of systemic risks to vetted not-for-profit organisations and media organisations as they have in the past proved to play a crucial role in identifying and exposing these risks.