



Solving the Puzzle: Removing Illegal Content Online While Protecting Human Rights

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Introduction and framing of the discussion:

The issue of illegal and/or controversial content online is extremely topical, divisive and difficult. Various policy makers, industry groups, NGOs and media outlets are increasingly pushing for technical and legislative means to control, filter, monitor, remove, censor and moderate these types of content. The content industry has for decades pushed legislation and technology mandates to prevent copyright-infringing content from appearing online. The proposed DSM Copyright Directive's Article 13 is the most dramatic and urgent example of this push. More recent concerns over online content include concerns over so-called 'terrorist content', which is feared to contribute to radicalisation and violent extremism, incitement to hatred, and over the past year, the phenomenon of so-called 'fake news'.

Many of these concerns are legitimate, but some proposed solutions, such as mandatory filtering, violate the fundamental right to freedom of expression, in particular the imparting of information. Europe is moving quickly to address these issues and a number of policy initiatives are ongoing in this space, but it is clear that these issues are also being discussed globally. In this context, it is crucial to recall that European policy solutions have consequences in other regions. When the EU or its Member States draft laws that impact fundamental rights, such as the UK's Investigatory Powers Act, the German Social Media Law (NetzDG), or the proposal to impose upload filtering across the Internet, it emboldens governments with less strong human rights records to introduce similar regulations.

International human rights law defines the scope of legitimate government action and provides useful criteria to analyse the issue of illegal / controversial content, and assess responses to it. Such criteria are that restrictions on rights such as free expression must be provided for by law, and must be necessary and proportionate to meeting a legitimate purpose.

In this context it makes sense to think about the appropriate division of labour between governments/legislators/courts and the companies hosting content. Is self-regulation sufficient, do we need guidelines to guide these self-regulation efforts or do governments need to impose hard regulation? Where should judicial oversight come in? How do we ensure that legislation does not lead to overregulation and censorship, and stop legal content from being censored? What discretion should companies have to make decisions based on terms of service? Finally, it is important to consider the impact of legislation on competition and innovation. They will suffer if legislation and notice-and-action processes impose disproportionate costs on start-up companies and entrench a few global players. This leads in turn to less choice and freedom for users/individuals.

Section I: Intermediary liability under threat: is the E-commerce directive still fit for purpose

The main principles behind the ECD remain sound and fundamental to the digital economy. However, since the adoption of the e-Commerce Directive (ECD), some important changes have taken place. Underlying the ECD was the notion of passive intermediaries responding to notices. The principle of 'no obligation to monitor proactively' and determining the precise conditions which should trigger knowledge on the part of hosting providers have been challenged, and in some cases led to stay-down decisions (e.g. Germany). The basic consensus that underpinned the ECD is clearly under pressure, and there is a tendency towards demanding more proactive moderation by content hosts. New concerns from policy makers could be addressed by building more guidance and standardising processes, since the ECD contains very limited detail to provide guidance / certainty about notice and action procedures.

Several speakers reinforced the point that the fundamental principles of the ECD remain critical to the functioning of the internet, new 'controversial content' challenges notwithstanding. These principles have enabled the opportunities we have today for information, education and innovation. Challenging these principles and eroding liability protections would endanger innovation, openness and free expression in the internet ecosystem. This is what Art. 13 of the DSM Copyright Directive is threatening to do. It impacts such a broad range of platforms and services, and a potentially limitless amount of content, with serious unintended consequences. An example is the restrictive impact it could have on open source software development and

deployment, often in non-profit environments. Filtering mandates and new legal liabilities resulting from Art. 13 would have serious cost consequences for start-ups and entrepreneurship, and research shows these filtering technologies are not sophisticated enough to avoid capturing legal and legitimate content.

From an innovation and economic perspective EU law makers should consider the impact of proposed rules such as Art. 13 on the environment for digital start-up companies in Europe. A heavy regulatory and technology burden that creates costs and legal risks for start-ups will make it hard for them to scale up and attract funding from investors that review investment opportunities globally. Successful 'unicorns' might have to leave the European Union to get the rapid growth that is necessary to succeed. It was noted that several Member States have fundamental concerns about the Commission's approach to Art. 13 and question its legality and compatibility with the Charter's provisions on free expression, the freedom to do business as well as with the ECD's general monitoring prohibition. Many in the European Parliament have the same concerns.

Some participants stated that the important question is not about whether the ECD should be reopened. (Some argued that the erosion of its core concepts is already going on 'by a 1000 cuts'). Rather, the question is how the ECD principles should be interpreted in going forward. There was widespread criticism of the European Commission's approach in the DSM Copyright Directive. It is not sensible to introduce a separate legislative instrument for dealing with copyrighted content, when as discussed, the challenges involve such diverse types of content and expression. The Commission should take a more holistic approach, setting out a coherent framework and guidance for a fundamental rights respecting set of processes for hosts to deal with allegedly illegal content, and define obligations for notices and notifiers. The need for an EU-wide framework was also underscored by the emergence of national initiatives such as the German NetzDG and a new draft law that is being put forward in Poland. The risk of further fragmentation of the digital single market is clear.

Section II: Solutions to removing illegal content while safeguarding fundamental rights: need to review notice and action procedures

Fundamental changes in the structure of the internet ecosystems over the past several years were noted, especially the evolution of a few, global platforms intermediating a large proportion of web traffic. Further, policy makers get confused about the capabilities and the limits of new technology. A widespread reaction is to exaggerate the role technology can play in solving public policy problems such as online radicalisation, hate speech, and 'fake news'. Frequently, online phenomena attract disproportionate attention and mask the fact that they are merely symptoms

of deeper societal, social and political issues. Removing disputed content cannot deal with these underlying problems. There appears to be a shift in social norms as well: a greater acceptance of restrictions on speech, and a greater willingness to compromise on some fundamental rights.

It was noted that the framework for the European Commission's work on notice-and-action guidelines and/or legislation is undertaken within the limits of the ECD. Some speakers mentioned the distributed impact of content removal practices, which may affect some groups in different ways. It was noted that notice and action processes today are very data intensive and that automation and analytics are widely used but that those practices are not without drawbacks. Speakers noted that platforms are taking their own self-regulatory measures within the framework of the ECD, but more detailed guidance could help avoid fragmentation and ensure rights-protective practices, transparency and accountability. The framework would need to address the responsibility of notifiers and ensure a high quality of notices.

Some speakers pointed to the limits of self regulation and insisted that clear legislative guidelines are indispensable for a rights-protective system. Private actors cannot be expected to make judgements that strike the right balance between rights of individuals. There must be recourse to appeals and remedies for those affected. Many politicians overestimate the potential of self-regulation and are tempted to leave companies with the responsibility of making difficult decisions with significant consequences for free expression. Policy makers should not shirk the responsibility of setting the limits of the law and ensure transparency, judicial oversight and accountability.