THE EU’S CONSULTATION RAISES MORE QUESTIONS THAN ANSWERS - WE WONDER WHY

The big question to address regarding illegal content online is how can a credible decision about the legality of the content be taken when an accusation is made. What level of knowledge of the actual illegality of the content should trigger liability from the Internet Service Provider (ISP)? Does the quality of the notice matter - does it need to be specific about what content it is referring to or exactly where the content is located? Should there be automatic onward reporting to law enforcement in relation to notices of serious criminal content? These fundamental questions are not asked at all.

The Commission defined things that didn’t need to be defined and then failed to define this very unclear notion.

Search engines existed in 2001, when the Directive was adopted. Also, if the Commission really cared about a balanced approach, it would ask if it is appropriate that Google (and Facebook and Twitter) impose US copyright law on Europe.

It is remarkable that the question is asked – if the content you upload is accused of being illegal – or even criminal – should you have a right to defend yourself?

The big question really is – does a valid notice need to provide knowledge of the illegality of the content, or knowledge of content which might subsequently be adjudged illegal? This is the key question and, unsurprisingly, it is not asked.

The Commission explained at the time the Directive was adopted that a recital cannot change the meaning of the Directive and it was meant to cover things like complaint systems and hotlines, not additional monitoring like general obligation duties.

The objective of a Directive is to avoid barriers to the single market, NOT homogenous application. The Commission is redefining the purpose of the legislation to make it appear like it needs to be updated. It then fails to explain WHY homogenous application (based on diverse rules of what is illegal) is even possible, let alone necessary.

It is not the role of a supposedly neutral consultation to tell the responder what they should have in mind.

The European Commission is well aware that there were no voluntary enforcement measures in place when the Directive was adopted and this is NOT what was meant at the time.

The big question in this consultation is "How can a credible decision about the legality of the content be taken when an accusation is made?" What level of knowledge of the actual illegality of the content should trigger liability from the Internet Service Provider (ISP)? Does the quality of the notice matter - does it need to be specific about what content it is referring to or exactly where the content is located? Should there be automatic onward reporting to law enforcement in relation to notices of serious criminal content? These fundamental questions are not asked at all.

The previous paragraph explains that “any communication is a notice. So, this paragraph adds no additional information at all!

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