26 March 2018

Feedback to the European Commission (EC)'s Inception Impact assessment on measures to improve the effectiveness of the fight against illegal content online[1]

European Digital Rights (EDRi) is an organisation with 35 NGO members. We promote and defend fundamental rights in the digital environment.

General comments

We welcome that the EC acknowledges the need to avoid that legal content is taken down. However, the section as it stands is somewhat misleading. Current liability rules *already* constitute "a regime that encourages removal without safeguards". The decision to be made by providers is always the choice between, on the one hand, liability attached to secondary legislation encouraging removal of content and defending free speech and privacy[2] on the other. We recommend binding rules to address this prior to which appropriate assessments need to be made.[3] The Commission should extract lessons from 20 years of voluntary measures in relation to different types of illegal activity online. We believe the addition of such experience would be constructive in helping better frame and address the current problem. We would also welcome reliable evidence upon which policy will be built, particularly as quick removal is only one element of the issue.

Responsibility for illegal content

There is an over-emphasis on "voluntary" measures for the removal of content by private companies. Yet, the more serious the infringement, the less proportionate it is that the responsibility should be on private companies to deal with what is arguably the most superficial aspect of the crime, namely its availability.

To give "enhanced responsibility" to platforms would be to institutionalise the role of private companies in censoring free speech, falling below the standards of Art. 10 of the ECHR and Arts. 11 and 52 of the Charter. This presents a threat to freedom of expression; companies should not have a role in regulating free speech and certainly not without rigid compliance with Article 52 of the Charter.

Similarly, to incentivise companies to comply or to sanction for non-compliance is nonconstructive. We would advise that the EC give consideration to the need for precautions to avoid "voluntary" measures interfering with ongoing investigations or evidence.

---

1 https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-1183598_en

2 https://edps.europa.eu/sites/edp/files/publication/12-09-13_comments_dg_markt_en.pdf

3 https://edri.org/edri-writes-to-eu-commissioner-gabriel-about-tackling-illegal-content-online/ https://edri.org/files/ecworkshop_fundamentalrightsanddigitalplatforms_edricontributionv2_20170612.pdf See also the obligation to ensure that the appropriate balance is struck in case 275/06 (para 68) and the obligation to have rules in place to allow individuals to defend themselves against arbitrary breaches of fundamental rights in case C-314/12 (para 57)

Furthermore, there is nothing in secondary law nor practice that would require Member States or companies themselves to implement any "adequate safeguards". The EC should not rely on "safeguards" being spontaneously put in place by companies that have not already felt the need to do so. Any measures to manage the removal of content on the grounds of illegality must be subject to democratic scrutiny and judicial challenge.

Time frame for review and removal of content

The proposed time frames as referenced in **Option 1** as "swift removal upon notice or referrals" and in **Option 2** as "timeframes for certain types of content" are unrealistic.

The proposed timeframes thus far have appeared vague, short, and arbitrary. There is also insufficient data or evidence on the effectiveness of privatised enforcement in order to justify these.

We would urge the speed and proportion of takedowns not to be prioritised over the quality i.e. whether it is productive to do so, and whether the content being deleted is illegal.

Methods for review and removal

There is an unexplained assumption that all "trusted flagger" schemes are the same, are equally effective, and have no inherent flaws that need to be addressed. Unfortunately, this is not the case. Additionally, clearer definitions are needed, not least with regard to the nebulous concept of "duty of care" in this context.[4]

There is a significant gap between the way the EC refers to upload filtering and the fact that the CJEU has said that "the need for safeguards is all the greater where personal data is subjected to automatic processing" (Case C-362/14, para91).[5]

Conclusions

Any measures considered must protect citizens' fundamental rights to privacy, freedom of expression and the protection of personal data. We recommend that the EC take heed of the Council of Europe's recommendation on the roles and responsibilities of internet intermediaries[6] as an example of good practice in this area.

4 https://www.asktheeu.org/en/request/2250/response/7914/attach/2/letter%20Mogg%20to%20MEP.pdf
5 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0362
6 https://edri.org/council-europe-takes-world-leading-step-towards-protecting-online-rights/