

## European Commission Workshop on Fundamental Rights and Digital Platforms EDRi's initial comments

European Digital Rights (EDRi) is an association of civil and human rights organisations from across Europe. We defend rights and freedoms in the digital environment.

EDRi welcomes this initiative conducted by DG CONNECT as it indicates a willingness to implement evidence-based policy-making on this topic.

This document represents EDRi's written contribution to the European Commission's Workshop on Fundamental Rights and Digital Platforms on 12 June 2017. The document provides comments to the different points contained in the background document shared by the Commission prior to the expert meeting and a proposed way forward.

### 0. Preliminary remarks

- While there are many fundamental rights implications in the activities of digital platforms, we understand the focus of this workshop is on freedom of expression and opinion (cf. Commission's background document). Nonetheless, we urge the Commission to consider all fundamental rights implications, e.g. the right to privacy, protection of personal data, freedom of thought, conscience and religion, freedom of assembly and association, freedom of the arts and sciences, right to an effective remedy, among others.
- It is important to consider the different implications and capabilities of digital platforms. When referring to digital platforms, the Commission should, in particular, consider small and medium companies. Such an approach would serve both to support competition and ensure that citizens have multiple options for exercising their freedom of expression.
- It is important to understand which actors the European Commission is seeking to address when referring to "digital platforms". As stated in [our response](#) to the 2015 public consultation on online platforms, "it is not useful to have AirBnB, Google News and YouTube categorised as being the same type of business" - to name but a few examples. In this sense, we suggest five classifications of platforms (P) based on the relationship with consumer (C) or business (B) and based on the transactional nature of the relationship:
  - ◆ Transaction\*-based platform to consumer (P2C) platforms, such as Netflix or Spotify (content licensed to platform by rightsholder) (transactions on both sides of platform)
  - ◆ Non-transaction-based P2C (e.g. Google news and other news aggregators or review services, such as Yelp) (content freely available online, no P2B transaction)(no transaction on either side of platform)

- ◆ Zero consumer value P2B services (promoted content on Twitter, etc) (transaction on business side of platform)
- ◆ Transaction-based consumer/business to consumer (C2C & B2C) platform (Ebay, AirBnB (B2P & C2B transactions))
- ◆ Non-transaction-based consumer to consumer (C2C) platform (UGC, blogging, micro-blogging, etc)

*\* Transaction=Financial transaction. The business model may be based on harvesting/reuse of personal data (non-financial) to some degree*

For the purposes of this workshop and document, when referring to "digital platforms", we will mostly refer to non-transaction-based consumer-to-consumer platform companies unless indicated otherwise.

## 1. Policy Context

- **EDRi welcomes that the focus** is on removals of illegal content. However, the Commission's online platforms communication (25 May 2016) refers to both illegal and "harmful" content. The decision on what is harmful or not does not comply with the legality principle. The term "harmful" is exceedingly vague and as such cannot form the basis for lawful restrictions on freedom of expression under European human rights law. Please note however that, as a matter of law, this only applies to legal instruments adopted by the EU. Companies remain free to remove "harmful content" under their terms and conditions, even if this may be sometimes unjustified and the companies can and should be publicly criticised for doing imposing undue restrictions. As a bare minimum, companies' community guidelines should be in line with international and European standards on freedom of expression.
- EDRi welcomes the fact that in its 2016 Communication, the Commission stated that the EU will "only address clearly identified problems related to a specific type or activity of online platforms" and that "such problem-driven approach should begin with an evaluation of whether the existing framework is still appropriate".
- We agree with the Commission on the **need for minimum procedural requirements** for notice and action procedures. This should be done **in the form of** a combination of EU and national legislation. In view of advancing the Digital Single Market in the EU, **a Directive** seems to be the most suitable mechanism for this.
- **Voluntary measures that are not voluntary or self-regulatory:** if encouraged by public entities, including the European Commission, they are not truly voluntary or self-regulatory. Both the Commission and Member States should stop misrepresenting them as such. We welcome as best practice, the European Commission's decision to sign the "follow the money" agreement, thereby having the courage to stand behind it both legally and

politically. Even if EDRI continues to have deep concerns about such arrangements, this is a meaningful step in the right direction.

- **Ensuring that voluntary measures are "in full respect of fundamental rights" is close to impossible.** From a legal perspective, companies are not bound by the Charter of Fundamental Rights of the European Union. States have positive and negative obligations with regard to human rights obligations, including in the digital environment. However, companies do not have these obligations. The legally, but not ethically or politically, grey zone between state responsibilities for fundamental rights and the rights and responsibilities of companies is being exploited in ways that border on cynicism.

According to the UN Special Rapporteur, corporations have responsibility to respect fundamental rights, even if enforcement instruments are lacking. However, companies are getting more and more pressure from public authorities to "do more", to remove and restrict access to certain content online, without the need to conduct a legality assessment, without any counterbalancing obligations for companies to respect human rights and fundamental freedoms. This is what we call 'privatised law enforcement' or 'privatised censorship'. Restrictions, imposed by states directly or indirectly, on fundamental rights must be provided for by law, be necessary and proportionate to the aims pursued. Member States must take measures to ensure respect of fundamental rights in any notice and action mechanism.

- **We welcome the procedural precautions, the call for checks and balances as well as transparency** in the notice-and-action process highlighted in the 2017 Communication.
- **A Good Samaritan short-cut is not the solution to fundamental rights violations; a Good Samaritan short-cut is designed to allow companies to restrict even more content even more easily and would further undermine citizens' fundamental rights.** This would lead to public entities to exert more pressure on private companies to deal with content that they deem unwelcome for whatever reason. This [approach was central in the failed SOPA proposal](#) in the US and pushed by certain American internet industry actors, who bizarrely argue for new opportunities to be coerced by governments. The core aim of the Good Samaritan short-cut is to provide exception of liability when companies take voluntary, lawless, law-enforcement action against perfectly legal content. If the Commission is concerned companies need to do "more" to end illegal behaviour online, this won't solve the problem. Indeed, a cursory look at how child protection online (where US companies do have a "Good Samaritan" "protection" for the past 21 years) is handled by companies in the EU and US shows that there is no perceptible benefit whatsoever to fighting serious content and, possibly, quite the contrary. See <https://edri.org/edriqramnumber9-16us-hotline-removal-child-abuse/>
- **We strongly caution against** any moves towards encouraging or requiring intermediaries to prevent possibly harmful or illegal content from appearing on their networks. **Regulation by algorithm** is untransparent, biased, unnecessary and contrary to the most basic requirements of predictability. Its effects, and possible counter-productive impacts, would also vary widely from policy area to policy area.

- With regard to the specific proposals and initiatives highlighted in the 2016 and 2017 Communication, we refer to **previous comments** made to the Commission, e.g. in [our response](#) to the online platforms consultation.

## 2. Legal context

- As stated above, the rights and freedoms concerned are **not only** related to **freedom of expression and opinion**. These include freedom of expression, opinion and information, media pluralism, freedom of thought, freedom of creation, the right to education, as well as the rights to privacy and the protection of personal data, among others.
- **Horizontal v vertical legislation; Charter v reality & current situation.** See <https://edri.org/endoritorial-commissioners-oath-a-broken-promise-on-fundamental-rights/> The E-Commerce Directive should not be changed by vertical legislation, such as the Copyright Directive, AVMSD, etc. As stated in our response to the 2010 public consultation on the future of electronic commerce, "content should be dealt with only at its hosting source, and any removal of content at source should only be ordered by a court, following due process of law." As stated in Articles 12 to 15 of the E-Commerce Directive and described in our response:
  - ◆ "where an intermediary is not hosting the content (acting as a mere conduit, an access provider or a search engine), it should have no liability for this content, nor should it have any obligations with regards to the removal or filtering of this content as an access provider, it should have neither liability nor obligations with respect to content;
  - ◆ where an intermediary acts as a hosting provider, its liability with respect to the content hosted should be restricted to its lack of compliance with a court order to take down this content.
  - ◆ Intermediaries should have no obligation to monitor content."

## 3. What's the issue? What are the relevant questions?

### 1. Data gathering

a) *Is there any evidence that freedom of expression is undermined by voluntary measures taken by digital intermediaries or by the application of Notice-and-Action Procedures established by national law?*

b) *Are there any studies or sources that could provide this evidence?*

### Answers

a) Standard guidelines of Online platforms do not necessarily follow the law or respect Fundamental Human Rights. Community guidelines often ban content, which is perfectly lawful and/or protected by European human rights law. Examples:

- Facebook deleting Vietnam napalm girl post or deleting the "Origine du monde" by Gustave Courbet.

- Multatuli experiments conducted by Bits of Freedom in 2004 and 2012:  
<https://www-old.bof.nl/docs/researchpaperSANE.pdf>  
<https://bof.nl/2012/12/21/onvoorspelbaar-en-onduidelijk-het-verwijderingsbeleid-van-hostingproviders/>  
<https://bof.nl/wp-content/uploads/20120401-overgeleverd-aan-willekeur-rapport.pdf>
- The EU Code of Conduct on Hate Speech does not require cooperation between private actors and public authorities or any legality assessment: see <https://edri.org/faq-code-conduct-illegal-hate-speech/> & <https://edri.org/new-documents-reveal-truth-behind-hate-speech-code/>.
- In September 2016 [Facebook restored an Iconic Vietnam War Photo It Censored for Nudity](#). This happened only because all the world started to talk about it. This is an example of how things can go wrong when the power to decide what is legal and what is not legal is left to private companies - and the extent to which business motives (bad publicity in this case) have a role to play in whether content is removed or put back.

b)

- The Guardian recently leaked the [guidelines given to the Facebook officers when dealing with nudity in art](#), and, according to some of them, they do not help a lot. The [situation becomes worse](#) when dealing with cyber bullying and sextortion.
- <https://onlinecensorship.org/> provides several examples of "what content is taken down, why companies make certain decisions about content, and how content takedowns are affecting communities of users around the world." For more information, please see [https://s3-us-west-1.amazonaws.com/onlinecensorship/posts/pdfs/000/000/044/original/Onlinecensorship.org\\_Report\\_-\\_31\\_March\\_2016.pdf?1459452553](https://s3-us-west-1.amazonaws.com/onlinecensorship/posts/pdfs/000/000/044/original/Onlinecensorship.org_Report_-_31_March_2016.pdf?1459452553)
- Dr. Sally Broughton Micova analysed the terms set by Facebook, Youtube and Snapchat. This leading researcher concluded that there are serious gaps and disparities in the terms of service. Cf. p. 3:  
[http://www.cerre.eu/sites/cerre/files/170322\\_CERRE\\_AVMSRevision\\_IssuePaper\\_final.pdf](http://www.cerre.eu/sites/cerre/files/170322_CERRE_AVMSRevision_IssuePaper_final.pdf)
- The documentary "The Moderators" shows evidence of some of the flaws of content removals in online platforms:  
<https://www.wired.com/2017/04/watch-people-learn-filter-awfulness-dating-sites/>  
<https://www.theverge.com/2017/4/16/15305562/the-moderators-documentary>
- The documentary "[Facebookistan](#)" also shows a covered interview with a content reviewer in Facebook.
- The prohibition of the word "kalar" in Myanmar led to a [wide range of unintended consequences](#).

- Europol Regulation, Article 4.1. m). This foresees the "voluntary" removal of content on the basis of terms of service, with no mention of illegality. There is no indication that the European Commission devotes any effort whatsoever to ensuring that the provision is implemented in line with the Charter. See <https://edri.org/europol-non-transparent-cooperation-with-it-companies/> <https://edri.org/oversight-new-europol-regulation-likely-remain-superficial/>

## **2. Legal impact of Fundamental Rights on Digital Intermediaries' operation**

*The Fundamental Rights Chapter is only legally binding for the EU and for Member States (Article 51). Private companies such as digital platforms are not directly bound to comply with them and could legally limit the content that they made available according to their own terms and conditions.*

*a) Are there counter-arguments to this reasoning that would imply that somehow digital platforms have also a legal obligation to respect (and promote) Fundamental Rights?*

*b) What is the impact on private companies of the fact that Fundamental Rights constitute general principles of the Union's law?*

### **Answers**

Member States are required to assure that private entities comply with the law, including human rights law. This does not happen when dealing with online companies as they are subject to a soft law approach. Unfortunately, even if the *UN Guiding principles on business and human rights* has been adopted by many Member States and companies, it seems its implementation is not really working. (cf. Rikke Frank Jorgensen (2017): Framing human rights: exploring storytelling within internet companies, Information, Communication & Society, p. 4, [hereafter referred to as "REP1"]). The same applies to other non-legally binding principles. One of the ways in which Member States can impose direct obligations on companies to respect fundamental rights is by adopting laws like e.g. data protection laws. Since one of the critical shortfalls of social media companies concerns due process and lack of effective remedies for wrongful removal of content, there is an argument to be made that at the very least States should provide an avenue of appeal once social media companies' internal mechanisms have been exhausted. This view appears to be supported by the CJEU in the Telekabel ruling (C-314/12) although this must not be taken as meaning that any amount of privatised enforcement is acceptable, as long as there is a theoretical appeals process.

## **3. Corporate responsibility of Digital Intermediaries in relation to Fundamental Rights**

*Beyond legal responsibility, reports from the UN and the Council of Europe have suggested that companies providing online services have a corporate responsibility to respect human rights. The [former] UN special rapporteur on this topic recommends intermediaries to:*

*(i) only implement restrictions to the rights of freedom of expression and privacy after judicial intervention;*

*(ii) be transparent about the measures taken;*

*(iii) minimise impact of measures taken strictly to the content involved;*

- (iv) notify users before implementing restrictions;*
- (v) put in place effective remedies for affected users;*
- (vi) establish clear and unambiguous terms of service.*

*a) What kind of problems do digital intermediaries face when they take up their responsibility of respecting and promoting Fundamental Rights?*

*b) What are the policies and actions they are putting in place to respect and promote Fundamental Rights?*

## **Answers**

a) Digital intermediaries are asked to act expeditiously to remove illegal content but to not interfere with the transmission (i.e. not to be involved in processes which would give effective knowledge of the potential illegality of the content) in order to benefit safe harbours provided by the e-commerce Directive (Rikke Frank Jorgensen et al. (2017), Case Study on ICT and Human Rights (Policies of EU), Fostering Human Rights among European Policies, Large-Scale FP7 Collaborative Project GA No. 320000, European Commission, p. 39 (hereafter referred to as "REP2").

Digital intermediaries make a distinction between terms of service violations and external requests made by governments and LEAs. In the latter case, they would need to check the legal basis for a request and its compliance with human rights standards, in order to guarantee the right to freedom of expression of their users. This does not happen when they have to deal with their internal rules (or community guidelines), which is not framed as a freedom of expression issue. For example, Google only includes external requests in its transparency report (p. 10, 11, REP 1). Some of them (e.g. Facebook and Google) don't see any privacy issue, when dealing with massive sharing of users' data (p. 6, REP1). According to them, once the user is in control of its privacy settings, the problem is solved, regardless of how unpredictable/incomprehensible these may be. In reality, the user must have meaningful control of how her/his data are shared, analysed and on how they are collected (p.12, REP1).

b) Some of them are part of the Global Network Initiative (GNI), created in 2008 and engage in the work of the Freedom Online Coalition. However, evidence shows that very little progress is made for the protection of fundamental rights and for the right to privacy and freedom of expression in particular. See, for example the [Ranking Digital Rights Corporate Accountability Index](#), which is based on publicly available material.

Facebook improved the interface that let users decide what kind of data share in order to use applications (p. 10, REP1). However, these features are not turned on by default, are very difficult to find and no meaningful information is provided to users. With regards to freedom of expression, these companies seem to prefer to restrict access to online content on the basis of terms of service in order to avoid liability. This leads to errors, legal content restrictions which have a negative impact on users. See <http://onlinecensorship.org/>.

Worryingly, nobody at all, whether governments or intermediaries, appear to feel morally or legally responsible/accountable for assessing the durability or potential counterproductive effects - including for the ostensible public policy goal - of any measures that are implemented. This lacuna is quite clear in, for example, the Commission's 2017 DSM Communication.



#### **4. Role of the EU in relation to corporate responsibility**

*a) Is there a case for the EU to act as a catalyser for voluntary initiatives by digital intermediaries to respect Fundamental Rights?*

*b) If so, what would be the appropriate means? (Facilitate multi-stakeholder dialogue, collect and disseminate good practices...).*

#### **Answers**

a) Member States and the EU institutions have positive and negative obligations to respect human rights. Exerting pressure on companies to deal with public policy objectives without a counterbalancing obligation for the companies to respect fundamental rights (nor obligations for states to foresee review mechanisms) is not the right approach. In 2012, the European Commission launched an initiative on Notice and Action procedures "to set up a horizontal European framework to combat illegality on the Internet, and to ensure the transparency, effectiveness, and proportionality of the employed procedures, as well as compliance with fundamental rights" (p. 17, REP2). This initiative by DG CNECT should lead to concrete results and deliver a Directive on Notice and Action, as already requested by EDRi. See for example [https://edri.org/files/EDRi\\_ecommerceresponse\\_101105.pdf](https://edri.org/files/EDRi_ecommerceresponse_101105.pdf). Any such initiative should take a holistic approach and include provisions on diligence such as the role of the state in terms of accountability for the processes put in place, playing its role in dealing with serious illegal content, review mechanisms that look at the overall impact on the public policy objective(s) being pursued and ensuring that counterproductive impacts for both fundamental rights and the public policy objective being pursued are minimised.

b) See our suggested way forward in point 4 of this document.

#### **5. Is there a case for legal intervention?**

*Digital platforms have de facto a role as gatekeepers in our society, and while they provide huge benefits, they are also in a position of power with the potential for censorship or control over the capacity of users to express themselves.*

*a) Is there a case for the EU or the Member States to legally intervene to ensure that Fundamental Rights, and in particular freedom of speech, are respected by digital platforms?*

*b) Are there other Rights at stake?*

#### **Answers**

a) The EU, including the Member States, should start by checking that the legislation, non-binding initiatives and activities they are adopting or encouraging comply with fundamental rights and freedoms. As EDRi wrote in its [expert paper for the Council of Europe \(2014\)](#), "States have the primary obligation to ensure that their legal systems provide adequate and effective guarantees of freedom of expression, which can be properly enforced". In the Telekabel ruling of the Court of Justice of the European Union (CJEU case UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH, WegaFilmproduktionsgesellschaft mb, C-314/12, 27 March 2014), the Court assumed that pressures put on the company via an injunction were counterbalanced by unspecified other obligations to uphold users' fundamental rights. If the Telekabel assumption is incorrect [and such



safeguards do not exist], the legal framework needs to be updated. It is dangerous to leave it to the private sector to decide over the proper balance between fundamental rights, as this leads to arbitrary decisions, most particularly when the incentives are imbalanced. It is also questionable whether intermediaries can reasonably be asked to make an arbitrary ruling of (il)legality with regard to statements made by third parties before anyone even contested them."

Unfortunately, as seen, e.g. in the ongoing Copyright debate, the EU often puts itself in a position that undermines fundamental rights, such as freedom of expression when they ask platforms to use technical means to restrict content (see [https://edri.org/files/copyright/copyright\\_proposal\\_article13.pdf](https://edri.org/files/copyright/copyright_proposal_article13.pdf) and <https://edri.org/civil-society-urges-eu-institutions-to-stop-the-censorship-machine-in-the-copyright-proposal/> ).

The Treaties offer Member States, the European Parliament and the Commission possibilities to request for a legal opinion from the CJEU. This could be an interesting avenue to explore.

If the Commission follows EDRI's recommendation on adopting a Notice and Action Directive (cf. point 4 of this document), meaningful action can be brought against companies that fail to respect binding commitments.

b) Absolutely. In the particular context of notice and action procedures, the Commission may want to pay particular attention at the contributions of the European Data Protection Supervisor in relation to the implications for the right to privacy and data protection. See for example [https://edps.europa.eu/sites/edp/files/publication/12-09-13\\_comments\\_dg\\_markt\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/12-09-13_comments_dg_markt_en.pdf) [https://edps.europa.eu/sites/edp/files/publication/10-05-10\\_child\\_abuse\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/10-05-10_child_abuse_en.pdf) [https://edps.europa.eu/sites/edp/files/publication/10-02-22\\_acta\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/10-02-22_acta_en.pdf)

As regards other rights, EDRI encourages the Commission to consider all fundamental rights implications, e.g. freedom of thought, conscience and religion, freedom of assembly and association, freedom of the arts and sciences, right to an effective remedy and right to a fair trial, among others.

## **6. Fundamental Rights and formal notice-and-action procedures**

*a) What cautions have to be taken in any formal notice-and-action procedure in order to ensure the respect of Fundamental Rights?*

*b) What are the Rights that could be affected by formal notice-and-action procedures?*

*c) How to design a "Notice-and-Action" procedure that respects Fundamental Rights?*

*d) What are the necessary checks and balances required to protect fundamental Rights?*

*e) What kind of restrictions to Fundamental Rights may be justified and in which circumstances (for instance, child pornography)?*

*f) What are the criteria to test if the procedure is balanced?*

## Answers

a) In order to ensure respect of Fundamental Rights act in a predictable way. It's also important that the company explains the reasons for content restrictions and inform the user in a meaningful way (not with vague, standard notifications) on how to appeal the decision and the timeframe available for doing that.

b) Freedom of expression can be affected when the decision is given to platforms (see, e.g. the Facebook guidelines above, on nudity in the art), even when following a notice-and-action procedure. For example, a politician could flag a harsh comment as defamatory to censor dissidents. Therefore, it's crucial that digital platforms follow binding legal criteria to ensure a balanced judgement. This can be achieved by a good Notice and Action Directive.

c) See point 4 of this document.

d) Many rights are asked to be balanced in the digital environment: the right to conduct a business (for ISP), right to enforcement of (Intellectual) property, freedom of expression, the right to privacy, etc. The guide for balancing should be Article 10(2) ECHR. Digital platforms should not arbitrarily restrict one right in favour for another when the solution is not clear. In this case it's important to have at least a way to redress the decision. We refer you to point 4 for more information.

e) According to Art. 10(2) ECHR and Article 52 of the Charter, restrictions must be provided for by law, be necessary and proportionate to the aim pursued. There are cases, like child abuse material (sometimes referred to as "child pornography"), when a restriction of fundamental rights can be justified. This is clear because the publication of child pornography cannot be included under the umbrella of the freedom of expression, because it affects children's rights. However, as the special UN Rapporteur on the promotion of freedom of expression said, this is possible only when "the national law is sufficiently precise and there are effective safeguards against abuse or misuse" (p. 20, REP2). It's important to point out that the Rapporteur refers to "the law". This means that a code of conduct is not sufficient alone to justify the removal of content. It is also absolutely crucial, when dealing with serious crimes against people that everybody play their role - it is not acceptable to have codes of conduct for removal of, for example, child abuse material without state authorities having specific obligations to support that action with investigations and prosecutions.

f) See point 4 of this document.

## ***7. Cross-jurisdiction issues***

*a) What are the issues with an impact on Fundamental Rights that have arisen due to cross-jurisdiction?*

*b) What could be the solution?*

### **Answers**

a) Digital platforms work in several Member States and have to face and comply several jurisdictions. Some of the national laws they are asked to comply with fail to respect human rights law, especially when talking about online content restrictions. See for example the German bill on Network Enforcement Law NetzDG:

<https://edri.org/eu-action-needed-german-netzdg-draft-threatens-freedomofexpression/>  
<https://edri.org/german-social-media-law-sharp-criticism-from-leading-legal-expert/>  
<https://www.article19.org/resources.php/resource/38723/en/germany:-draft-bill-on-social-networks-raises-serious-free-expression-concerns>

In addition, problems can arise in circumstances where the substantive law on a free speech issue, e.g. holocaust denial, differs from country to country across the EU. If a German national posts a Holocaust denial comment on the Facebook page of a British one, what law should apply? In practice, these difficulties are often solved by social media companies' application of their Terms & Conditions. Since companies tend to err on the side of caution, they often set lower free speech standards.

Three issues arise related to i. content which is illegal or criminal in the relevant jurisdictions, ii. content that is illegal in some jurisdictions but not in others and iii. content that is illegal, but subject to different definitions in different jurisdictions.

i. For content that is illegal in relevant jurisdictions, then diligent procedures, as described above should be implemented. With regard to serious crimes, such as child abuse material, the obligations of all relevant parties, including states, should be clearly defined.

ii. For content that is subject to diverse implementations and definitions, efforts should be made, at least on an EU level, to adopt a more harmonised and predictable approach. The lack of harmonisation produced by the Framework Decision on combating various forms of racism and xenophobia is a good example of a problem that could be minimised with an appropriate amount of political will (see [http://mandola-project.eu/m/filer\\_public/7b/8f/7b8f3f88-2270-47ed-8791-8fbfb320b755/mandola-d21.pdf](http://mandola-project.eu/m/filer_public/7b/8f/7b8f3f88-2270-47ed-8791-8fbfb320b755/mandola-d21.pdf)).

iii. For content that is illegal in some jurisdictions, but not in others, a deeper reflection is needed on to respect principles of democracy and ECtHR case law.

### **8. Other questions?**

*Are there other relevant questions that would be worth discussing in relation to digital platforms and Fundamental Rights?*

#### **Answers**

- What meaningful solutions to the questions identified is the Commission thinking about?
- What are the Commission's thoughts about the contributions received by EDRi?
- When can we expect the Commission to issue a reasoned legal opinion about the German bill NetzDG to uphold its duties?

Finally, EDRi wants to highlight the need to discuss a meaningful way forward.

### **4. Suggested way forward**

EDRi **encourages the European Commission to propose a Directive** that serves to bring activities in this area rigorously into line with the Charter - especially with regard to predictability. This can provide more legal certainty and precision for the E-commerce Directive and the vertical legislation that has recently been proposed (AVMSD and Copyright) and "voluntary" frameworks that have resulted from undue political pressure. The current framework is unclear and greatly interferes with fundamental rights and freedoms. This approach was supported by a [letter sent by 24 MEPs](#) to Vice-President Ansip recently and has been [supported by the EDPS already in 2012](#). The guidance announced in the Commission's background paper should result into a legislative proposal, based on a balanced, open consultation process and rigorous evidence-gathering. The Commission has produced several principles and guidance in this field (e.g. <https://ec.europa.eu/digital-single-market/en/news/principles-better-self-and-co-regulation-and-establishment-community-practice>). This has not led to solving the problems that are being discussed in this workshop. In order to fulfil with the European Commission's obligations under the Charter of Fundamental Rights, EDRi recommends that any follow-up action incorporates the following points:

#### **General requirements**

- Problem identification: what are the public policy objectives that are being addressed by "voluntary" arrangements? Where are the review processes? What predictability is ensured by the process? Where is the accountability? Where are the correction mechanisms if the outcome proves to be suboptimal?
- Solutions adapted to the problems identified: impact assessment needed. The implications of, for example, terrorism and illegal hate speech are different. The implications of copyright infringements and child abuse material are different. The implicit logic of the DSM Communication that the political, legal and practical responses to these different problems can be identical strategies. There is not a one-fits-all solution. As [stated by the EDPS](#), not all categories of illegal content have the same weight. There are certain categories of illegal content that should be notified to data protection authorities (e.g. data processing infringement), others to law enforcement authorities (e.g. when criminal offences are involved, such as child pornography), etc.

- Multistakeholder mapping:
  - ◆ Identify a comprehensive scope for stakeholder involvement. It is current practice of the Commission to propose legislation (e.g. <https://europeansting.com/2016/09/16/eu-is-giving-now-google-new-monopolies-to-the-detriment-of-european-citizens-and-internet-companies/> ) or codes of conduct (e.g. <https://edri.org/fag-code-conduct-illegal-hate-speech/> ) benefiting big players and excluding the views and issues faced by SMEs and citizens.
  - ◆ Specify what type of "digital platforms" the Directive would cover and the differences this implies. As stated above, we suggest five classifications of platforms (P) based on the relationship with consumer (C) or business (B) and based on the transactional nature of the relationship:
    - Transaction\*-based platform to consumer (P2C) platforms, such as Netflix or Spotify (content licensed to platform by rightsholder) (transactions on both sides of platform)
    - Non-transaction-based P2C (e.g. Google news and other news aggregators or review services, such as Yelp) (content freely available online, no P2B transaction)(no transaction on either side of platform)
    - Zero consumer value P2B services (promoted content on Twitter, etc) (transaction on business side of platform)
    - Transaction-based consumer/business to consumer (C2C & B2C) platform (Ebay, AirBnB (B2P & C2B transactions)
    - Non-transaction-based consumer to consumer (C2C) platform (UGC, blogging, micro-blogging, etc)
  - ◆ Identify the relevant competent authorities dealing with different types of content and potential sanctions;
- Funding allocation: which actors would need money to solve the problem, assessing progress and analysing the results?
- The promise of the better regulation agenda of "well-targeted, evidence-based and simply written" legislation should finally be fulfilled in this policy area.
- Fundamental rights focus. For example, the Commission should aim at achieving full compliance of the principle of legality, thereby avoiding removal of legal content, not just "over-removal".
- User focus: usually, these discussions focus on the commercial and political implications. Any action taken by the Commission on notice and action needs to have the user at its core.
- (Illegal) content removal at source following a court order should be the preferred scheme. Law enforcement authorities (i.e. administrative authorities), companies, trusted reporters

(e.g. NGOs) or users cannot be arbiters of illegality or harm.

- When complementary mechanisms are in place, safeguards must be in place.
- Law enforcement agencies should not be able to issue notice and take down requests when do not have the power to do so. If they have the power, that power comes with safeguards. Avoiding explicitly using the power to order the take down material means that the LEA is, deliberately or not, a circumvention of human rights safeguards.
- Define the type of mechanism chosen. As we have [stated in the past](#), "practices such as "notice and stay down" or, in some circumstances, "notice and notice" do not appear to better protect fundamental rights than the "notice and take down" scheme. Notice and stay down" implies in addition a monitoring obligation and algorithmic decision-making from Internet intermediaries, so as to ensure that the content does not appear elsewhere or reappear online. This is entirely unacceptable. "Notice and notice", is more sympathetic to freedom of expression, since it does not involve any content removal by the Internet intermediary, can lead to a chilling effect, to an even greater extent than "notice and action.

If notice and action is chosen, EDRi proposes that the Directive incorporates the following specific requirements:

### Specific requirements

- Quality criteria for notices: there is evidence showing that companies receive notices which do not fulfil minimum quality criteria.
- Counter-notice procedures: it would be useful to agree on clear procedures to ensure due process. For instance, EDRi-member Bits of Freedom [proposed a model](#) back in 2012. While the model fits better in cases of possible copyright infringement, it can serve of inspiration in other areas.
- Third-party consultation mechanism:
  - ◆ Publication of criteria and methodology. If we take the European Commission's Code of Conduct against Illegal Hate Speech as an example, we can see that the Commission states that a methodology was agreed, but the methodology under which organisations, including public bodies, send notices to the signatories of the Code has not been disclosed. Publishing it would enable accountability and would contribute to better legitimacy of the process.
  - ◆ Notice of allegedly illegal content only. It was been informally confirmed to us that some trusted reporters are referring legal content to companies that they do not believe to be illegal.
  - ◆ Lawyer-review requirement. It is important that the trusted flaggers or the authority referring the content is a lawyer specialised in the matter at hand. This will not solve all the issues, but will bring better safeguards for fundamental rights, including freedom of expression and opinion.

- ◆ Interaction between the trusted reporter and companies & public authorities needs to be defined.
- ◆ Independent oversight, in particular to ensure due process and predictability.
- ◆ Automatic reporting to public authorities in serious cases (criminal offences), with state authorities obliged to be transparent with regard to their subsequent enforcement measures.
- The right to remedy and a fair, independent and accessible dispute resolution system
  - ◆ Due process
  - ◆ Establishment of minimum requirements for predictability
- Counterproductive effects assessment. What are unintended consequences for fundamental rights when restricting online content? What are the possible counterproductive effects for the public policy objective being pursued? How durable is the process? What are the rights and freedoms concerned? Is the process sufficiently flexible to adapt to countermeasures being taken by criminals in order to circumvent the measures being taken?
- Transparency reporting obligations for all parties involved (e.g. companies, NGOs, public authorities, including the European Commission).
  - ◆ Reports must be timely and transparent and include accurate, thorough, consistent and comparable statistics over time. Stopleveline.at provides a good example of best practice with regards to consistency: <https://www.stopleveline.at/ueberuns/statistiken/>.
  - ◆ Reporting must be clear, consistent. Minimum requirements should be put forward.
  - ◆ Follow-up with national authorities is needed.
  - ◆ We suggest the Commission to assess consumer contract law (including unfair contract terms) and the provisions related to transparency reporting. If the current instruments are not serving their purpose, they should be reformed.
- Independent oversight.
  - ◆ Monitoring and enforcement of the Directive must be inclusive and transparent. For example, the EU Code of Conduct on Hate Speech monitoring would not comply with this requirement.
  - ◆ Development of a methodology in a transparent and inclusive way, including different actors, such as digital rights organisations;
  - ◆ Set specific deadlines and key performance indicators;
  - ◆ A thorough, credible human rights and fundamental freedoms assessment after 2 years (with the deadline being rigorously respected, unlike, for example, in the case of the Data Retention Directive). E.g. Something similar as what has been proposed in the Terrorism Directive, but in a shorter time frame.

This document represents EDRI's initial comments to the questions asked by the European Commission. This is work in progress. We commit to keep working together to achieve a better situation than the current one.



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