



EUROPEAN COMMISSION

Communications Networks, Content and Technology Directorate-General

Digital Single Market
E-commerce and Platforms

Workshop on voluntary measures

Brussels, 6 April 2017

Participants:

- Representatives of information society service providers:
 - Apple
 - Seznam
 - Facebook
 - Ebay
 - Alibaba
 - Ratuken
 - TripAdvisor
 - PayPal
 - Proximus
 - Orange
 - Google
 - Naspers
 - Edima
 - Expedia
 - HomeAway
 - Liberty Global
 - CENTR

- Representatives of the European Commission:
 - I. Roche Lagune (DG CNECT)
 - M. Perez Guevara (DG CNECT)
 - W. Stengg (DG CNECT)
 - M. Mottl (DG CNECT)
 - A. Stanley (DG CNECT)
 - M. Cox (DG CNECT)
 - V. Nemiguentcheva-Grau (DG CNECT)
 - G. Eade (DG CNECT)
 - L. Klingvall (DG JUST)

- IFC
 - S.Frazzani (Grimaldi Studio Legale)
 - K.Noti (Grimaldi Studio Legale)

Overview

After an initial assessment of online platforms launched together with the adoption of the Digital Single Market Strategy, the Commission announced in its Communication of 25 May 2016 that it would explore the need for guidance on the liability of online platforms when putting in place voluntary, good-faith measures to fight illegal content online.

As part of this information gathering exercise, on 6 April 2017 DG Connect hosted a stakeholder engagement workshop to gather information from a wide range of online intermediaries about their views on voluntary measures. The stakeholders invited spanned a range of business models, including online e-commerce marketplaces, social media, review sites, collaborative economy representatives and internet service providers. During the meeting, the online intermediaries were invited to talk to the Commission about the form of any voluntary or proactive measures already put in place; whether they have encountered legal or financial risks or challenges with respect to such measures; and whether they might be willing to adopt other voluntary measures if they had

assurance that, by so doing, they would not risk being considered as “active” intermediaries and thus lose the benefit of the exemption of liability under the E-Commerce Directive – insofar as the latter exemption indeed applied to the intermediary in question.¹

Session 1: Voluntary measures to remove illegal content from online platforms – state of play

Tour de table

Participants highlighted that voluntary measures are adopted in order to gain and maintain consumers’ trust. Depending on the business model, and the problems encountered, some of the platforms invest heavily in voluntary measures, others less so.

A general shared view was that the liability exemption regime set out in the Directive is working; participants advised caution against overhauling the current system. At the same time, some stakeholders argued that clarifications in the form of guidelines could raise awareness in the Member States (both of authorities including judges, and of users) and help reduce the legal uncertainty that intermediaries face when asked to foster the adoption of voluntary measures. The main concern expressed was that, due to the adoption of voluntary measures, they might lose the benefit of the exemption of liability under the Directive and be considered “active” by national authorities and judges.² Intermediaries were also concerned that, if they were to go too far in the adoption of voluntary measures, they could be breaching fundamental rights as enshrined in the Charter of Fundamental Rights of the EU. Finally, participants shared the concern that voluntary practices were used as a baseline for future legislation, converting them into obligations, which discourages companies from adopting a more proactive approach.

The discussion then broke into four smaller working groups, allowing for more focused discussion.

Outcome of working group discussions

Stakeholders were asked to describe the voluntary measures that they already put in place, and to describe the financial burden (costs) of such measures and the legal risks that they fear assuming. Stakeholders present reported a wide range of relationships to the intermediary liability exemptions in the E-Commerce Directive. Some classified themselves as “mere conduits” under Article 12 of the Directive, others saw themselves as hosting but believed they could take no action until receiving a court order for fear of losing their liability exemption; however, the majority did carry out voluntary measures of different kinds (in particular offering parental control to customers and educational actions targeting children).

Many stakeholders reported legal uncertainty about how far they were able to apply voluntary measures without losing their exemption from liability. They also raised the question of the E-Commerce Directive being applied differently in different Member States, making reference to apparent court judgements confirming that voluntary measures did not affect an intermediary’s exemption from legal liability or to a complete lack of application of the Directive.

¹ Articles 12 to 15 of the E-Commerce Directive.

² The CJEU has given guidance as to the application of the exemption only to information society services providers having a passive, neutral role. It is up to the courts of the Member States to interpret such guidance.

A significant proportion of stakeholders said that they were keen to put voluntary measures in place, even at the risk of losing their exemption from liability, because maintaining a safe environment on their platform that consumers could trust was crucial to their business model and reputation. In this respect, the stakeholders also generally mentioned not to face significant civil litigation concerning intermediary liability at the moment. They were keen to maintain their exemption from liability, but emphasized that it would be impossible for them to continue to function without taking some voluntary measures, whatever the legal regime. Others were concerned that carrying out voluntary measures might risk both undermining the fundamental rights of users and losing the benefit of the hosting liability exemption under the Directive.

Several stakeholders raised the question of fundamental rights, and highlighted the danger of undermining these through over-removal of (legal) content. What is illegal content is not always obvious, and some participants suggested that they were uncomfortable with the fact that they were asked to make judgements about legality. Several stakeholders were resistant to the idea of being mandated to carry out policing and enforcement by the authorities.

Voluntary measures reported included education of users and businesses, filtering using algorithms and human intervention, pre-approval of sellers, Notice and Takedown systems, cooperation with the authorities and enforcement of Terms of Service. Costs reported included developing technology such as algorithms and the cost of human resources to filter or take down illegal content; this latter ranged from a few hours of a lawyer's time per month to hundreds of employees working full time on takedown. On the legal situation there was a range of responses; some stakeholders said they had been protected by the courts as exempt from liability despite their voluntary actions, others that some MS would not apply the E-Commerce Directive's exemptions fully or correctly.

Suggestions for ways forward which would be beneficial for intermediaries included more legal clarity on the extent of voluntary measures that platforms can take without losing their exemption from legal liability; and the provision of guidance to national authorities encouraging the harmonization of the form of notices, and the use of co-regulatory initiatives. Some stakeholders warned that mandating too much transparency could be counterproductive, as it might allow repeat infringers to work out how to bypass new measures. They argued that to prevent this, it was important that filtering mechanisms should be allowed to remain confidential. Several speakers emphasized that not all types of illegal content are alike, and this should be borne in mind when trying to find solutions; a one-size-fits-all approach will not be effective, and any solution needs to be future-proofed.

Session 2: Voluntary measures in the future – is more legal clarity required?

Tour de Table

Participants were generally supportive of the current E-Commerce Directive and the liability regime, and did not wish to change it. However, they said that they would welcome more clarity on how far they are able to implement voluntary measures without exposure to liability; some stakeholders further called for a "good Samaritan" style regime that would allow them to take more voluntary action without risking their legal status. Participants also asked for recognition that they implement voluntary measures despite the legal risk because they need to provide a safe environment for their customers – this is enlightened self-interest.

Some participants said that they would welcome more guidance on how to apply the E-Commerce Directive for national authorities (including courts, governments, and consumer protection and competition authorities), because there is currently a lack of clear understanding of how the exemptions from liability work, and a lack of consistency in the Directive's implementation. They requested that there should be limits on the level of policing, monitoring and enforcing that platforms can be asked to do by authorities.