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Workshop on Digital Platforms and Fundamental Rights

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Report

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1. WHAT ARE WE DISCUSSING AND WHY?

How to find the right balance in the complex exercise of removing illegal content from the internet without falling into censorship? What are the legal boundaries and the responsibilities for Member States, for digital platforms and for citizens? In addition to freedom of speech, what are the other fundamental rights at stake?

As a departure point, we need to embrace complexity in this conversation. Complexity comes from the very different nature of illegal contents (from intellectual property infringements to illegal hate speech, incitement to terrorism or child abuse material), from the diversity of legislation and social traditions in each of the Member States and from the fact that digital intermediaries operate globally but there is no global legal framework for internet.

The latest [European Communication on the Digital Single Market](#) points in the direction of improving the efficiency of removal of illegal content both in the case of formal "Notice-and-Action" procedures and in the case of voluntary measures taken by digital intermediaries.

"Notice-and-Action" procedures are not harmonised by EU law. Therefore, several Member States have put in place their own mechanisms, mainly to tackle intellectual property infringements. The [latest e-commerce expert group](#) was devoted to explore the similarities and differences between the existing systems¹. The European Commission is working on guidance on such mechanisms. One of the aspects that this guidance should contain is the full respect of fundamental rights by any "Notice-and-Action" procedure. But how to design a "Notice-and-Action" procedure that respects fundamental rights? What are the necessary checks and balances required? What are the criteria to test if the procedure is balanced?

The Commission encourages voluntary measures by digital intermediaries to remove illegal content while ensuring that fundamental rights are not limited. But how far these measures can go without falling into the privatisation of enforcement of criminal laws?

The aim of this workshop was rather modest: identify the right questions and explore possible answers.

Commission Communication on the Mid-Term Review on the implementation of the Digital Single Market Strategy² (10 May 2017)

The Commission will ensure better coordination of platform dialogues within the Digital Single Market focusing on the mechanisms and technical solutions for removal of illegal content, with a view to enhancing their effectiveness in full respect of fundamental rights. Where applicable, the aim should be to underpin these mechanisms with guidance on coherent procedural aspects such as the notification and removal of illegal content while ensuring transparency and the necessary checks and balances to protect fundamental rights, avoiding over-removal of legal content. The Commission will also provide guidance on liability rules and support to platforms on voluntary measures taken by platforms when they work proactively to remove illegal content, acting in good faith. This work should produce first concrete results by end of 2017.

1 <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=1636>

2 http://europa.eu/rapid/press-release_IP-17-1232_en.htm

Commission Communication on online platforms and the Digital Single Market³ (25 May 2016)

There are important areas such as incitement to terrorism, child sexual abuse and hate speech on which all types of online platforms must be encouraged to take more effective voluntary action to curtail exposure to illegal or harmful content. (...)

The Commission will further encourage coordinated EU-wide self-regulatory efforts by online platforms. It will regularly review the effectiveness and comprehensiveness of such voluntary efforts with a view to determining the possible need for additional measures and to ensure that the exercise of users' fundamental rights is not limited.

2. SPEAKERS AND PARTICIPANTS

Around 45 civil servants from CNECT, GROW, JUST, FRA, HOME, DEVCO and EEAS participated in the internal workshop. The EP Think Tank and the EP Legal Service were also invited, but we received apologies from them.

The panel brought together the expertise from Academia, digital platforms and civil rights organisations:

- Joris V.J. van Hoboken, Senior Legal Researcher, Institute for Information Law (IViR), University of Amsterdam
- Joe Mcnamee, EDRi (European Digital Rights)
- Wolfgang Weber, Senior Director/Legal Counsel eBay
- Tanja Kerševan-Smokvina, Member of the Council of Europe Expert Committee on internet intermediaries

2. WHAT IS THE ISSUE? WHAT ARE THE RELEVANT QUESTIONS?

Speakers were proposed 8 questions, from which they were invited to select 3 or 4 for their intervention.

Under each question we summarise the discussion at the workshop. EDRi has also submitted written replies to the questions.⁴

³ <https://ec.europa.eu/digital-single-market/en/news/communication-online-platforms-and-digital-single-market-opportunities-and-challenges-europe>

⁴ https://edri.org/files/ecworkshop_fundamentalrightsanddigitalplatforms_edricontribution_v2_20170612.pdf

1. **Data gathering:** Is there any evidence that fundamental rights are unduly undermined by voluntary measures taken by digital intermediaries or by the application of "Notice-and-Action" procedures established by national laws? Are there any studies or sources that could provide this evidence? If so, what are there the fundamental rights affected and in which way?

- [Study on "Filtering, blocking and take-down of illegal content on the Internet"⁵](#) (12/2015) - The Council of Europe commissioned to the Swiss Institute of Comparative Law a comparative study in respect of filtering, blocking and take-down of illegal content on the internet in the 47 member states of the Organisation. This study describes and assesses the legal framework but also the relevant case-law and practice in the field.

- Study on [Fostering Freedom Online](#).

- [Study by Alessandro Bessi and Emilio Ferrara in 2016](#) on how social bots distorted US presidential election.

- [Bits of Freedom study](#) – 2004 and 2014 – shows how easily N&A can be abused.

- Project [OnlineCensorship.org](#) lists examples of takes down of legal.

2. **Legal impact of fundamental rights on Digital Intermediaires' operations**

The Fundamental Rights Charter is addressed to the EU Institutions and only addressed to Member States when they implement EU law (Article 51 TEU). Private companies such as digital platforms are not directly bound to comply with the Chapter and could legally limit the content that they made available according to their own terms and conditions.

Beyond these Fundamental Rights instruments that are addressed to states, are there other statutory obligations connected to fundamental rights that impact on Digital Intermediaires' operations? (E.g. duties to comply with non-discrimination laws or data protection regulations)

Joris explained that the matter is very complex, as documented in his [Study of fundamental rights limitations for online enforcement through self-regulation](#). States have the (negative) obligation not to interfere with fundamental rights. Any limitations have to be prescribed by law, pursue a legitimate aim and be necessary in a democratic society. States also have the (positive) obligation to create a favourable environment for the enjoyment of fundamental rights. These obligations concern the legislative, executive and judicial powers.

According to the above mentioned study "a State may be found to be in breach of its positive obligations for its failure to prevent violations of individuals' fundamental rights as a result of privatized law enforcement by online intermediaries". Criteria to evaluate a possible breach of this obligation include:

⁵ <http://www.coe.int/en/web/freedom-expression/study-filtering-blocking-and-take-down-of-illegal-content-on-the-internet>

- "- Existence or development by the State of relevant regulatory frameworks;
- Nature of the interference and its intrusiveness (specific techniques of blocking or filtering could prove determinative) and resultant chilling effect;
- Demonstrable degree of involvement or complicity of the State in the interference;
- Adherence to procedural safeguards by the actor (e.g. transparency, adequacy of information; accessibility of terms, conditions and procedures and foreseeability of their consequences, etc.);
- Availability of independent and impartial (judicial) review and redress;
- Dominant position of actor/availability of viable communicative alternatives;"

EU Member States are signatories of the European Convention for the Protection of Human Rights and therefore, bounded by the rulings of the European Court of Human Rights (ECtHR).

Joris pleaded for internal market harmonisation. Full harmonisation may not be possible, but it's important to focus on the most important issues where the Member States start to diverge and guidance can be helpful. Tanja endorsed his suggestion.

3. Corporate responsibility of Digital Intermediaries in relation to fundamental rights

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 UN⁶ 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.

What kind of problems do digital intermediaries face when they take up their responsibility of respecting and promoting fundamental rights? What are the policies and actions they are putting in place to respect and promote fundamental rights?

Wolfgang explained that he was speaking only on behalf of eBay. First of all, he underlined that removing illegal content online does not automatically solve the underline problems. Illegal content can easily reappear in another platform. Offline action is also needed. Joe also provided examples where illegal content was removed but

⁶ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HR/17/27, 16 May 2011.

it was not followed up by criminal investigations. Wolfgang explained how eBay works in partnership with the German police for instance to remove "Nazi music" online.

Wolfgang also spelt out eBay's vision of fundamental rights: human dignity is the most important fundamental right. In the EU, fundamental rights are understood in a hierarchical order. In USA, all of them are at the same level of importance and have to be balanced.

He also provided three examples on divergent decisions taken by eBay in relation to the balance between freedom of expression / freedom to conduct a business and blasphemy laws or social sensitivity towards religion matters:

- Shoes decorated with images of Buddha: This is considered as a blasphemy in Asian countries and in some, it is even a crime. Therefore, eBay decided not to allow the selling of those shoes;
- Catholic relics: The Code of Canon of law of the Catholic Church does not allow trading relics. Even if this is not transposed into civil laws, eBay decided not to allow the selling of Catholic relics;
- Vintage publications of Charli Hebdo magazine, containing drawings that some groups would consider as blasphemy: In this case, eBay decided that freedom of expression should prevail over possible offence to religious feelings. Therefore, selling these publications is allowed.

These three examples give an idea of the complexity and the wide-range of cases that a global company as eBay is facing when making decisions related to fundamental rights on matters linked to local or regional sensitivities and laws.

Tanja presented the work of the Council of Europe Committee of experts on Internet Intermediaries (MSI-NET). They are preparing standard setting proposals on the roles and responsibilities of Internet intermediaries. Their work will be submitted to public consultation during the summer⁷.

4. Role of the EU in relation to corporate responsibility

Is there a case for the EU to act as a catalyser for voluntary initiatives by digital intermediaries to respect fundamental rights? If so, what would be the appropriate means? (Facilitate multi-stakeholder dialogue, collect and disseminate good practices...).

There were no interventions on this question.

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

⁷ <https://www.coe.int/en/web/freedom-expression/committee-of-experts-on-internet-intermediaries-msi-net->

editorship or control over the capacity of users to express themselves. What would be the legal basis for the EU, within its competences, or for the Member States to intervene to ensure that fundamental rights, and in particular freedom of speech, are respected by digital platforms? Are there other rights at stake?

For Joris, the EU could take action when Member States' divergent legislations create obstacles for the internal market. The legal basis would be Article 114 of the TFEU (harmonisation of laws).

For Tanja, the issue is global, and should be solved at global level.

DG JUST, asked if one of the possible areas of intervention of the EU could be increasing the transparency on how platforms make decisions about fundamental rights. Joris agreed with this idea. Platforms should make clear and understandable for users the criteria and the procedures that they follow, the remedies available for users in case of disagreement, the amount of resources put in place to take those decisions. Information about the results would be also crucial, both at individual user level and social reporting.

Wolfgang explained that eBay's policy on Fundamental Rights is public. Their starting point is that everything that is legal is allowed to be sold through their market place.

6. Fundamental rights and formal notice-and-action procedures

What cautions have to be taken in any formal notice-and-action procedure in order to ensure the respect of fundamental rights? What are the rights that could be affected by formal "Notice-and-Action" procedures? How to design a "Notice-and-Action" procedure that respects fundamental rights? What are the necessary checks and balances required? What kind of restrictions may be justified and in which circumstances (for instance, child pornography)? What are the criteria to test if the procedure is balanced?

Joris stated that Member States have to ensure that any "Notice-and-Action" procedure has to be fully embodied by the respect of freedom of expression. In his reply to question 2, he spelt out the criteria to check if Member States are fulfilling this obligation.

Wolfgang explained that one of the difficulties for eBay when dealing with "Notices" is their different quality. Many lack any legal background. It is harder to deal with those than with well-prepared notices from trusted flaggers. An additional difficulty for eBay is its global operation versus divergent regional regulations on what it is considered as allowed or not.

For Joris, the approach of "one solution fits all" of the e-commerce directive is no longer valid. One of the key questions is transparency about the resources that platforms devote to deal with "Notice-and-Action". He mentioned that just focusing on removal of content takes away an opportunity to address the issue in more progressive ways. Sometimes is better to have problematic statements and have a discussion with different parts of society respecting our norms. Preventing people from speaking prevents from having a discussion. In this sense, Joe mentioned that promoting counter-narratives in isolation can be dangerous. Giving individuals the tools where they can engage in counter-narratives is more promising.

Joe reminded the work done by the Commission a few years ago on notice and action and described it as a best practice example of diligent work by the Commission. He believes this process can be promising.

He clarified that currently there is a misunderstanding regarding whose safe harbour we are talking about. The liability protections in the E-commerce Directive are being portrayed as a gift to internet companies. However, this is far from reality. Europe is experiencing a situation whereby companies are being pushed to deal with content (confusing between illegal, harmful and unwanted content). Once you push these companies to arbitrarily impose restrictions, you cannot pull them back when they go too far. It's important to ensure that the balance of incentives is such that you end up with restrictions that are predictable and with review processes that allow them to be assessed to show that they are genuinely achieving – and continue to achieve – objectives of general interest.

Finally, Joe warned against an assumption that the internet is just Facebook and Google. Little thought is being given to the openness of the internet for companies that are not Facebook and Google. If we keep regulating the internet as if it was just Facebook and Google, the internet will become just Facebook and Google.

7. Cross-jurisdiction issues

What are the issues with an impact on fundamental rights that have arisen due to cross-jurisdiction? What could be the solution?

What can we learn from other areas where cross-jurisdiction issues have been addressed in the past?

During the workshop, the tension between regional regulatory approaches and sensitivities and operation at global scale of platforms was mentioned several times. But there was no time to talk about possible solutions.

8. Other questions?

Are there other relevant questions that would be worth discussing in relation to digital platforms and fundamental rights?

For Joe, one of the big risks is the incentive that platforms may feel for "over-compliance" in the removal of alleged illegal content. This is a threat to freedom of expression. He also criticised the legal uncertainty introduced by the revision of the Audiovisual Media Services Directive, in relation to its articulation with the e-commerce directive.

Tanja underlined the need of empowering users through digital literacy, so they can also exercise their responsibility to exercise and protect fundamental rights.

2.1 Treaty on the European Union (TEU)

Article 2

The Union is based on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

Article 6

The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of [...] 12 December 2007, which shall have the same legal value as the Treaties.

Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

2.2 Charter of Fundamental Rights of the European Union

Article 51

The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

Article 52

While the Charter encompasses a number of rights, these are not granted unlimited protection. Article 52 allows for limitations on the exercise of rights, so long as these are provided for by law, respect the essence of the rights in question, and are proportionate and necessary to protect the rights of others or the general interest. Moreover, while some rights are framed in absolute terms, others are only granted 'in accordance with Union law and national laws and practices', signifying that the scope of such rights may be subject to additional limitations.

Article 11 – Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.

Article 47 – Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

2.3 European Convention for the Protection of Human Rights

Ratified by all EU Member States and in the process of being ratified by the EU.

Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

2.4 Universal Declaration of Human Rights

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Annex II – Recent conferences and documents on this topic

Freedom of Expression Online: Evolving European jurisprudence and standard setting activities in the digital age, 28 April 2017, Cyprus.

<http://www.humanrightseurope.org/2017/05/cyprus-conference-freedom-of-expression-in-the-digital-age/>

Joint Declaration on freedom of expression from the UN Special Rapporteur on Freedom of opinion and expression, David Kaye, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression, focusing this year on “fake news”, disinformation and propaganda, 3 March 2017.

<https://www.coe.int/en/web/media-freedom/-/joint-declaration-on-freedom-of-expression-and-fake-news-disinformation-and-propaganda>

Study of fundamental rights limitations for online enforcement through self-regulation, Institute for Information Law, Faculty of Law, University of Amsterdam (2016)

<https://www.ivir.nl/projects/study-of-fundamental-rights-limitations-for-online-enforcement-through-self-regulation/>

<https://openaccess.leidenuniv.nl/handle/1887/45869>

Publications from the Fundamental Rights Agency (FRA):

<http://fra.europa.eu/en/publication/2015/promoting-respect-and-diversity-combating-intolerance-and-hate> pp. 5–6 in particular about intolerance online.

Intolerance online

The online universe, especially social media, provides a forum for the free and open expression of ideas and as such promotes democracy and, in particular, freedom of expression. Conversely, though, the lack of any effective self-regulation also allows this forum to be used for promoting extremist and intolerant views. 73% of respondents to FRA's antisemitism survey thought that antisemitism online had increased over the past five years.

However, the anonymity afforded to internet users does not necessarily mean they can post racist or xenophobic material with impunity: in 2013, the Supreme Court in Italy found that managing a blog inciting racial hatred is equivalent to participating in a criminal association.

<http://fra.europa.eu/en/publication/2016/ensuring-justice-hate-crime-victims-professional-perspectives>, p. 8 on reporting.

Given victims' strong reluctance to come forward and report their victimisation to the police, it is crucial for police services to take action to lower the reporting threshold. Various Member States have adopted measures to address this. These include, for instance, IT applications that allow victims to report their victimisation to the police online and the establishment of specialised police units that proactively reach out to victims and ensure that those who do report are treated in a sympathetic and non-discriminatory manner. While reliable evaluations of such measures are scarce, Member States should be encouraged to adopt whatever mechanism they consider most promising and ensure that their impact on the number of victims who report hate crime to the police is reliably assessed.

Annex III

CVs of speakers

Joris V.J. van Hoboken

Senior Legal Researcher, Institute for Information Law (IViR), University of Amsterdam

Joe Mcnamee, EDRI (European Digital Rights)

Joe is Executive Director of European Digital Rights, where he has worked since 2009. Prior to that, he worked in the consultancy where he also wrote three studies for the European Commission. He holds an Master of Laws in Public International Law. He has a particular interest in privatised law enforcement online and has written two booklets on the subject. He has worked in various internet-related roles for almost all of the past 22 years.

Wolfgang Weber, Senior Director/Legal Counsel eBay

Wolfgang Weber is Senior Director Regulatory and Business Ethics Officer at eBay. He and his team manage eBay's prohibited & restricted items policies as well as relationships and cooperation with regulators, monitoring authorities, law enforcement and non-government organizations in this area around the world. Before joining eBay in 2003, he worked for several years in the telecommunication industry. He studied law at the University of Bonn and is admitted to the bar at the Higher Regional Court of Cologne.

Tanja Kerševan-Smokvina, Member of the Council of Europe Expert Committee on internet intermediaries

Tanja Kerševan Smokvina is a media regulation expert with background in journalism and media research. Before starting her independent career as an international media policy adviser, she spent 18 years in various positions in the Slovenian NRAs in the field of broadcasting, audiovisual media services and electronic communication. In Slovenia, she used to be a Member of the Expert Group for Law on RTV Slovenia (PSB) and Media Law, appointed by the Minister of Culture, and Member of the Expert Group on Media Literacy, also at the Ministry of Culture. Internationally, she has worked with the Council of Europe, the European Audiovisual Observatory, OSCE, OSF and EU TAIEX. From 2011-2013 she coordinated the EU co-funded transnational cooperation project SEE Digi.TV bringing together 15 institutions (mostly regulators) from 10 countries in the Adriatic region, aiming at harmonization of the digital switchover. In 2016 she chaired the ERGA Subgroup 3 developing the Digital European Toolkit for efficient and flexible regulation. For 2016-2017, she has been appointed Member of the Committee of Experts on Internet Intermediaries (MSI-NET), a sub-committee of the CoE Steering Committee on Media and Information Society (CDMSI). She holds a PhD in Communication Studies from University of Ljubljana and is a Visiting Professor at University of Maribor, where she teaches subjects related to media and media regulation.