

EDiMA reaction to the European Commission's Communication on tackling illegal content online; towards enhanced responsibility of online platforms

Introduction

EDiMA represents online platforms and other innovative tech companies in Europe; we are business-model and technology-neutral and work across horizontal issues that are pertinent to both online platforms and users of the platform ecosystem. Our membership is diverse in nature and our members operate across many different types of services and with many different types of content. As such, the European Commission's Communication on tackling illegal content online raises pertinent questions about the core foundations of our members' operations in Europe: the electronic Commerce Directive (2000/31/EC) (e-Commerce Directive).

As the content of this Communication targets the types of services provided by many of our members, EDiMA takes this opportunity to acknowledge some of the steps taken by the Commission with the intention of providing clarity to existing notice and action processes, while addressing a number of outstanding concerns in this crucial and ongoing review of the removal of illegal content online, namely regarding:

- 1) The scope of the Communication and the necessity of confining the application of future initiatives only to services which seek the protections of Article 14 and 15 of the e-Commerce Directive.
- 2) The importance of recognising that different types of content require differentiated notice and action procedures in order to remain fit-for-purpose
- 3) The importance of recognising existing company best practices in all future initiatives and of encouraging the development of such practices, such as user reporting tools which allow online service providers to take action while safeguarding fundamental rights of the users.
- 4) The interplay between the voluntary measures taken by online service providers thus far and the e-Commerce Directive, particularly taking into account the importance of the limited liability regime for the service provider's freedom to operate online and the possibility of developing "Good Samaritan" principles in this regard.
- 5) The challenges presented by a Notice and Stay Down approach (page 3), taking into account the risks associated with an over-reliance on filtering technology and the impact such technology can have on the limited liability regime enshrined in the e-Commerce Directive.
- 6) The risks associated with taking an over-prescriptive approach to a Trusted Flaggers-based system for the development of new service and the practical implications of such an approach.

- 7) The necessity of keeping geographical differences in mind when it comes to respecting diverging rules on what can be considered illegal content across different EU Member States.
- 8) The risks associated with demanding that all online platforms regardless of their size engage in transparency reporting and the interplay between such obligations and EU privacy laws.
- 9) The implications of the constrained timeline set out in this Communication. Given the complexity of these issues and the variety of content that is disseminated online, each of which requires a specific notice and action approach, the development of any future initiatives will require effective stakeholder consultation that cannot be completed by May 2018.

EU-wide approach to notice and action provides framework for coordinated dialogue and actions

EDiMA acknowledges that some of the guidance from the Commission is targeted and pragmatic and could be helpful to Online Service Providers (OSPs) to reinforce clarity and efficiency of notices, and take action online. EDiMA welcomes that the Communication acknowledges the importance of distinguishing between different types of illegal content and we reiterate the importance of taking due account of the need to maintain different approaches for different types of content. EDiMA supports the European Commission's objective to provide a level of clarity on this issue across the EU, while recognising what industry has already proactively done to tackle illegal content with the aim of finding the right balance with the preservation of fundamental rights of EU citizens.

The document however falls short of the aspiration in some places and EDiMA would like to react to some areas relevant to our membership.

Scope

EDiMA welcomes the clarification that the European Commission provided in the Communication that the document only pertains to content deemed illegal across the EU, not broader categories of content which touch on broader and more complex issues, and which could differ from one country to the next, having implications for safeguarding free expression.

EDiMA would also like to point-out that despite statements made in the introduction of that Communication, the digital economy is diverse and providers monetise their services in a range of ways; not only via advertising but also through subscription, retail sales and other revenue models.

EDiMA:

- ***Suggests that the Commission clarify that the Communication applies only to platforms that seek the protections of the Articles 14 and 15 of the e-Commerce Directive.***
- ***Welcomes the Commission's objective that, as is the case under current law, the creation and use of a Notice and Action system should not in itself create liability on the intermediary where none exists under applicable law.***

Recognition of company practice already in place, while acknowledging that all platforms are different in terms of nature and scale

The Communication rightfully draws on the experience from some of the industry good practice that has been developed to tackle illegal content online. We welcome the reference to the existence of self-regulatory measures (and therefore the existence of clear evidence that the OSPs are invested in finding solutions to the problems at hand). The measures put in place by OSPs translated into an enhanced effort to remove known illegal terrorist content as highlighted by the European Commission in June this year¹ and would welcome further insight into the claim made that there is an ‘increasing availability of terrorist material Online’ (p2).

Most OSPs, in response to the challenges they experience on their respective networks, have created electronic means for the submission of legal notices – such as web forms – that facilitate the speedy processing of notices. The examples included in the **annex** of this document demonstrate this fact, while also highlighting the importance of allowing platform providers flexibility to establish their own individual reporting channels, aligned with their respective business processes and addressing the experiences of their users in the most effective way.

EDiMA believes that the European Commission significantly underplays the role users play in reporting suspect content and the offenders who have primary responsibility for illegal activity on platforms. The Commission must specifically acknowledge the crucial role online communities play - as they do in the offline world - and encourage the development of tools to empower them to take action where they have suspicions.

The interplay between measures undertaken by the OSPs and the limited liability regime for online intermediaries

The EU’s intermediary liability regime under the e-Commerce Directive is not only the ‘general framework for illegal content removal’ (p4), but the cornerstone to Europe’s digital economy. This has provided vital legal certainty and fostered an open Internet ecosystem to bring innovation, economic growth and other benefits to European businesses and citizens^{2 [2]}. Beyond its economic value, this regime provides a clear and adaptable framework that ensures that the Internet effectively serves users’ fundamental rights. The concept of ‘Notice and Action’ overlays the carefully balanced principles which comprise this regime. The Commission must clarify the interplay with this underlying legal framework by acknowledging that the challenges faced by all stakeholders in the fight against illegal content and activity online are not a problem of liability. In other words, the Commission must make clear that Notice and Action processes build on – and do not undermine - the underlying law.

The current intermediary liability regime, implemented by Member States under the e-Commerce Directive, establishes an appropriate balance of rights and responsibilities in the online environment and

¹ <http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=71674>

² <<http://www.europeandigitalmediaassociation.org/pdfs/EDiMA%20-%20Online%20intermediaries%20-%20EU%20Growth%20Engines.pdf>>

acknowledges that users and other third parties have primary responsibility for illegal behaviour. The framework limits the liability of intermediaries on whose platforms users and other third parties interact and establishes broad rules on how and when intermediaries must act against illegal content and activity on their platform. It is hard to overstate the importance of the limitations to liability. They are critically important to providers' freedom to operate. Actions of third parties on platforms can invoke a strict liability regime with a unique damages framework, and secondary liabilities for platforms. Absent of legal limitations, it could result in significant claims against internet companies, often for the very functions that enable the Internet itself to operate³. Business - and indeed the entire Internet sector - depends heavily upon limitations, which provide legal certainty in how to handle abuses of online services that may infringe others' rights. In this regard, we would welcome the Commission doing more in-depth work on the concept of 'Good Samaritan' acts by intermediaries.

The challenge with a requirement to keep previously-removed content off the web

The Commission notes that illegal content, once taken down, may be reposted online and that technical solutions have been developed to identify such content and tested on a voluntary basis by some platforms.

The safeguards enshrined in Article 15 of the e-Commerce Directive are intended to ensure that the rights of users are not over-ridden by intermediaries or other parties and to ensure that fundamental freedoms flourish online - as they do offline. In the Communication, there is a tension between the notion of 'notice and stay-down' and the second part of Article 15(1), which excludes a general obligation to "seek facts or circumstances indicating illegal activity", while overstating the availability and accuracy of the technology and the appropriateness of its use for specific types of illegal content, such as content which triggers speech offences in one context but not in another.

In addition, the expectations set in the Communication must be considered alongside the goals of the DSM. For example, sophisticated technical means referred to in the Communication to automatically identify and remove infringing content require advanced technical expertise and significant resources to deploy. They may not be suitable or necessary for all platforms and could constitute a barrier to market entry if the policy discussions set an expectation that all providers - even smaller platforms - could and should deploy such measures (this raises similar issues to the ongoing discussions around the proportionality of Article 13 of the proposed Copyright Directive).

There is, on the other hand, some voluntary deployment of technical solutions which are implemented in a way which safeguards the rights of other parties, including users. EDiMA believes that the Commission should ensure that such proactive measures benefit from Good Samaritan protection without undermining the safeguards in Article 15 of the e-Commerce Directive and the jurisprudence of the CJEU.

³ Booz & Company, Inc., The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment A Quantitative Study, at 22 (2011), available at <<http://www.strategyand.pwc.com/media/uploads/Strategyand-ImpactUS-Internet-Copyright-Regulations-Early-Stage-Investment.pdf>>

The Commission should request a study in consultation with stakeholders to look at each type of “illegal content”, to fully assess the issue. For example, the Commission must take care not to over-state the accuracy of these technologies. OSPs should not be held liable for the failures of such technology in preventing the subsequent re-upload of the same or substantially similar unlawful content which was previously notified (for example, where the uploader re-submits the content under a different unique identifier). Artificial intelligence is still far from being able to make ‘context-aware decisions’ (p19) to determine illegality.

EDiMA believes that any further consideration of Notice and Stay Down procedures need to be analysed at length as the implications of such procedures could be significant.

“Trusted Flaggers” and notification process

In addition to acknowledging the challenges around determining the legality of content and activity, the Commission also notes the emergence of so-called ‘trusted flaggers’. Trusted flaggers are third parties with particular expertise which may assist in identifying and reporting illegal content. Some platforms have developed relationships with trusted flaggers to test this as a notice and action approach.

Individual intermediaries - including some EDiMA members - have some useful experience in testing this approach which should inform the Commission’s thinking. The Communication recommends that these partnerships should become industry practice, but it is important that the Commission recognises the need to evaluate this approach and acknowledge the real challenges of scalability. For example, while trusted flaggers have prioritised partnerships with the largest platforms for a variety of reasons, the Commission should not assume that they can extend these partnerships to other platforms in the digital ecosystem. Also, the Commission should evaluate the impact that the search for more trusted flaggers could have on the quality and reliability of their flagging. It is not clear from the Communication who ultimately is responsible if a notice does not accurately identify content as illegal. Finally, the Commission should also not discount the appropriateness of complainants themselves making a reasonable effort, using the means and information publicly available, to contact the user, or other content provider in question, to have certain types of objectionable content removed (for example in cases of defamation or copyright infringement).

EDiMA believes that key principles for efficient notification process are:

- ***Obligation on users to notify via established process: any claimant notifying allegedly illegal content should do so using the relevant notification systems put in place by a platform for this purpose, where they exist.***
- ***Quality and quantity of information from the person giving notice: e.g. under the 1998 U.S. Digital Millennium Copyright Act (DMCA), service providers can be put on notice through the copyright holder’s written notification of claimed infringement to provider’s designated agent or in the case of IPR infringement the identity of the notifier is necessary to be able to identify their IP right. To be considered valid, the notice must specify particular information, for example, for copyright infringements identifying the infringing material and include a sworn***

statement (on pain of perjury) – with similar requirements existing in Europe⁴. The DMCA Notice and Takedown is, however, specific to copyright infringements, and a one-size-fits all approach is not appropriate.

- *Taking into account the nature of the intermediary's activities: as rightfully set in place in the e-Commerce Directive and confirmed by various national courts and the CJEU cases, the approach to Notice and Action should depend on the type of intermediary being notified and the type of content to which it pertains. A blanket approach on Notice and Action will likely be inappropriate due to the wide variety of content and business models it would need to cover.*
- *Taking into account the nature of the alleged illegal material: processes must vary depending on the alleged offence.*

Geographic applicability:

The Communication makes recommendations on the geographical scope of notice and action approaches and optimistically suggests that they could be extended EU-wide and even beyond EU jurisdiction with relative ease. This seriously understates the complexities involved a legal question is before Europe's courts regarding the way the right to be forgotten (RTBF) can impact Notice and Action processes. It is crucial to maintain the geographical boundaries of the scope of RTBF requests, as otherwise the result would produce an unworkable system which would lead to a global race to the bottom: restriction of content.

EDiMA strongly encourages that the limitation of the EU-wide geographical applicability of takedown requests is taken into account in instances where content is deemed illegal in one geography but not across the EU.

Not all content is the same therefore the same measures cannot always be followed:

The Commission acknowledges in the draft Communication that different types of illegal content and activity have specific characteristics and different interests must be weighed in order to determine legality. For example, a defamation claim requires an understanding of whether the statements are true and the author has a defence. When it comes to product safety, it is important to note that DG GROW's Online Safety Guidance is already in place. Additional guidance risks creating confusion both for industry as well as Member State authorities working on enforcement. In a copyright case, a right holder must provide assurance that no other rights or mandatory exceptions apply. The N&A procedures for hate speech and terrorist content must differ significantly and fundamentally from procedures to effectively address IPR infringements or technical product compliance matters. The latter two often need ad hoc investigation and a case-by-case analysis before taking action. The Communication's guidance is too broad and would result in companies being pushed into a universal approach that would be inappropriate for some infringements. This could result in sub-optimal procedures being used resulting in the overuse of take downs and unnecessary costs. The Communication furthermore goes on to define a range of approaches without an assessment of their suitability in some situations. This requires further work and refinement of the analysis before making recommendations on appropriate practices. It would not, for

⁴ See for e.g. Germany's FCJ case no. I ZR 57/09, <<http://lexetius.com/2011,4525>>.

example, be appropriate to recommend that automated detection and takedown of suspected violent extremist content take place without human review for context and the safeguarding of free expression rights.

EDiMA suggests that the difference between the kinds of content in terms of how to determine illegality is explicitly recognised. EDiMA suggests that further analysis is needed for the different types of content and how each might need a differentiated notice and action process that is fit-for-purpose. When N&A guidance is already in place as it is the case of product safety it should be out of the text's scope in order to avoid any risks of inconsistency. Furthermore, the limitations of solutions such as hash databases and fingerprints should be taken into account.

Transparency and reporting:

Many platforms take steps to be transparent with their users about how they engage with national authorities on the disclosure of user data and action against online content. These have evolved in a voluntary way and the Commission should support the further evolution of these efforts and recognise their value in enhancing user trust in online platforms. Setting an expectation that all platforms – regardless of their maturity – should be required to establish such processes would be a significant step.

Furthermore, it should be clarified if intermediaries are permitted – but not obliged - to forward any notice (including the contact details of the person submitting it) to the user or webmaster in question. In addition, the intermediaries cannot be held liable for not providing to the complainants the personal data of their users as it would be in breach of privacy laws.

Next Steps

EDiMA welcomes the Commission's intention to continue engaging with online platforms on this issue and commits to continuing to be a collaborative industry partner in the process. However, completing the work described in the Communication by May 2018 provides insufficient time for a full and balanced discussion and assessment of the measures taken by online platforms at large and individually. The Communication raises some very significant issues of law and ethics, and the Commission must address these first before setting targets for industry and revise its timetable accordingly to permit a detailed and robust discussion about appropriate next steps.

Annex - Examples of electronic means for submission of legal notices

Google maintains a public [web form](#) in multiple languages where anyone may submit legal notices 24 hours a day by answering a simple set of interactive questions, as well as bulk submission tools to streamline the submission of copyright notices. Based on the information received from right holders through the Notice and Action process, Google also acts to demote search results from sites receiving a high number of valid removal notices.

Facebook has put in place a number of measures to address infringing and otherwise unlawful content on its platform, including a robust Help Centre that addresses ways users and rights owners can report content on Facebook. Facebook has implemented a robust notice and takedown program to respond to reports of infringing content, including providing streamlined and accessible online reporting tools and establishing global teams that provide around-the-clock coverage in multiple languages that promptly respond to reports from rights owners of infringing content on the platform. Facebook has continued to expand its tools and functionality for rights owners, including importantly through collaboration with rights owners

Twitter's [Help Centre](#) offers a one-stop-shop for users, governments, and partners using the services. The Help Centre offers a detailed overview on [how to report take down](#) notices both through web forms as well as while on Twitter. Twitter has also recently published separate [guidelines](#) and an online request [portal](#) for law enforcement. Since 2012, Twitter has continued to expand the detail, insight, and analysis of take down requests through the annual [Transparency report](#).

If anyone believes that content available on Apple's services is in violation of their intellectual property rights, they can use the forms available on the web to submit a claim to the Legal Team (for the [App Store](#) and for [iTunes and Apple Music](#)). Apple will then contact the provider of the disputed content and, in most cases, ask that the provider work with the notifier directly to resolve the issue.

Microsoft provides [easy to use online tools](#) and information for right owners to submit copyright and trademark notices across its many online services – from services as diverse as Bing (its search engine) to online hosted services such as Hotmail, Azure, and Xbox live, to its Windows and Office app stores. For Bing, Microsoft provides tools enabling large submissions of copyright notices, and a “dashboard” that enables submitters to monitor the status of their notices, while also [providing public information](#) on the volume of notices it receives and subsequently takes action. Bing has taken voluntary steps to demote search results linking to sites dedicated to copyright infringement, as identified by the number of infringement notices received by Bing (see their blog post [here](#)). Bing also participates in voluntary measures that have been demonstrated to be effective in addressing infringement⁵.

⁵ See e.g. <<https://www.gov.uk/government/news/search-engines-and-creative-industries-sign-anti-piracy-agreement>>

Another example, eBay's Verified Rights Owner (VeRO) program allows the owners of intellectual property rights and their authorised representatives to report listings that may infringe on those rights in an easy and fast manner.

Regarding its online reviews, TripAdvisor does not publish them automatically. Before being published, all reviews have to go successfully through a strict process, including a combination of best-in-class filtration technology with a team of content specialists, to check if they meet TripAdvisor's Guidelines for publication⁶. In addition, the team examines every review that has been reported by a business owner or a user using the on-screen flagging tool or a web form.

Likewise, Yelp has developed [automated software](#) that goes through all the reviews submitted by Yelp users; the recommendation software looks at dozens of different signals to single out non-recommended reviews, including fakes (like the ones we see originating from the same computer) and reviews that suggest a bias (like the ones written by a friend of the business owner). Both users and business owners can flag reviews that they consider in breach of Yelp's content guidelines, simply by using the flag button next to each review. Yelp's User Support team will then examine reviews and if necessary, manually remove reviews that violate Yelp's Content Guidelines. Lastly, Yelp has developed a [free app for businesses](#) that allows business owners to respond to reviews publicly or in private.

⁶ <<https://www.tripadvisor.com/hc/en-us/articles/200614797-Our-guidelines-for-traveler-reviews>>