ISPA contribution: towards a new framework for online intermediaries

I. Introduction

ISPA Belgium wishes to clarify its views in light of ongoing discussions at European and national level on the upcoming Digital Services Act to reform the regulatory framework for digital services operating in Europe. ISPA Belgium commends the European Commission's initiative and supports the introduction of a framework that harmonises and strengthens the European Single Market.

The establishment of a secondary liability regime for online intermediaries in the E-Commerce Directive has served to this day as an important cornerstone of our vibrant digital economy and flourishing ecosystem. In the past two decades, this horizontal framework has helped transform a nascent sector into one of the main contributors of the European economy by shielding digital companies from liability for third-party content, prohibiting Member States from imposing a general monitoring obligation on content they store or transmit and, allowing companies to establish themselves in the Member States of their choice. Despite being a main driver of freedom of expression and innovation in the European Union, the emergence of the digital economy has also led to new challenges to which the Digital Services Act could and should provide the answers.

It is important that the Digital Services Act clearly distinguishes between illegal content and harmful content (such as the unauthorized publication of copyrighted material or defamatory affirmations, for example, which are only prosecuted if the very person whose rights are violated complains) as both types of content have a different impact on society and fundamental rights, and require very different policy solutions. We believe that other instruments such as the European Commission's European Democracy Action Plan is a more appropriate instrument to address challenges arising from harmful content.

II. Liability regime for online intermediaries

When adapting the E-Commerce Directive to today's digital landscape, legislative initiatives should continue to uphold the principle of limited secondary liability for online intermediaries and thread carefully when considering a framework to tackle illegal content more effectively. A strict liability regime for online intermediaries would *de facto* delegate the moderation of free exchange of information online to a handful of intermediaries which possess the scale and resources to face economic costs and legal risks. Being held liable for content published by third parties would set the wrong incentives for online intermediaries forcing them to err on the side of caution and lead to the unjustified removal of lawful content. Therefore, the limited liability regime should be strengthened rather than abandoned as the latter would unravel the main achievements of the E-Commerce Directive, namely the emergence of smaller online intermediaries and promoting freedom of expression.

A key driver for the success of the limited liability regime established in the E-Commerce Directive is its simplicity. The framework defines the rules and activities that services storing or transmitting third-party content should comply with to fall under the limited liability regime namely, mere conduit, caching and hosting service providers. The provisions that lay down the rules for mere conduit and caching service providers remain as robust as they were twenty years ago due to the fact that the nature and impact of these activities have not changed in any fundamental way since their conception. These services neither host nor have actual knowledge or control over the content they store or transmit but play an important role in the Internet value chain and make an important contribution in the speed, security and efficiency of the Internet; elements that have proven to be paramount in response to the global pandemic that swept the continent. Against this backdrop, these services should not be imposed with unnecessary burdens. This also applies to cloud (infrastructure) providers which do not have the technical capabilities to monitor and remove distinct pieces of content.

With regards to the third category of online intermediaries, hosting service providers, the emergence of various forms of digital services that have emerged and thrived in the past two decades have made it increasingly difficult to squeeze this rich ecosystem with their specific characteristics and models into one single category. The E-Commerce Directive's approach to distinguish digital services in active and passive digital services and the relevant CJEU case law has led to a situation where many services are uncertain on whether they fall within or without the existing scope. Therefore, any modernisation of the current legal framework would benefit from much needed legal certainty by moving away from this dichotomy and clarifying that hosting service providers can enjoy protection from the secondary liability regime established in the E-Commerce Directive as long as they act expeditiously once they obtain actual knowledge of manifestly illegal content.

Whereas we call for more robust and legally sound limited liability regime for online intermediaries, we also believe a more nuanced and effective approach necessities a shift from liability to responsibility whereas service providers that have a certain degree of knowledge or control over the content they store trigger some responsibility obligations.

III. A framework of responsibility for hosting service providers

A new and more nuanced framework is needed that addresses the intricacies of today's digital ecosystem and sets out technology-neutral and principle-based roles and responsibilities for online hosting providers to tackle illegal content online while striking the right balance with fundamental rights. In order to ensure such a responsibility framework does not quickly becomes outdated and effectively targets illegal content, it should encompass all digital services that host third-party content and make it publicly available to the public.

The responsibility framework should lay down a baseline to which all hosting service providers would be subject to. Additional responsibilities should be attributed depending on the type of digital services: being the user segment it targets, the type of service it offers or the business model it operates on. It should also be a proportional framework that takes into consideration each digital service's unique characteristics such as the scale and impact of illegal content on society, the prevalence of illegal content online and the type of activity of the hosting service provider. Additional compliance obligations might be easier to meet for bigger and established players than for smaller companies or newcomers. This can lead to market barriers in particular for small and medium-sized companies. This is a trade-off that should be considered when imposing additional obligations. It depends on the type of obligation whether it is in the public interest to impose such an obligation on everyone. Yet, where the protection of fundamental rights is concerned, the outcome of such considerations should not lead to lesser protection for individuals depending on market size.

Digital services wishing to move beyond their set of responsibilities and voluntarily take steps to shield their users from illegal content online should be encouraged to do so. Digital services should therefore be allowed to monitor, disable or remove illegal content without risking to lose protection from the limited liability regime or be subject to more obligations. Evidently, to ensure that actions taken by hosting service providers remain proportionate and are conducted in good faith, such voluntary measures should be done in a transparent manner and in close cooperation with public authorities.

Failing to systemically comply with the obligations within the responsibility framework should not lead to a loss of liability as this would create negative incentives leading to the over removal of content and hence harm fundamental rights. Instead, we believe that stricter rules should be considered and proportionate administrative sanctions to be considered as a last resort.

IV. A formal Notice and Action mechanism

The existing limited liability framework of the E-Commerce Directive would greatly benefit from increased legal and procedural clarity. We warmly welcome the call from D9+ Member States in its position from May 2020 to *"consider introduction of a framework for notice and action mechanisms across the EU, with measures that are proportionate to the nature and impact of the harm committed"*[1].

We encourage the European Commission to table a proposal that would harmonise notice-and-action procedures across the Union. As service providers are expected to remove or disable illegal content when obtaining actual knowledge, it is imperative that notices are clear, sufficient and

[1] D9+ non-paper on the creation of modern regulatory framework for provision of online services in the EU - https://www.gov.pl/attachment/bda96ca7-f4b5-476e-9c0f-c6fe95282b46

trustworthy in order to avoid any unnecessary delay in the process. Against this backdrop, digital services can only be expected to comply expeditiously with lawful notices when these meet minimum requirements tailored to the specific service (e.g. DNS location, specific URL address, grounds of the notice and credentials of the notifier) and exclude automated complaints without human revision. Not only would this drastically accelerate the notice-and-action procedure, it would ensure a more trustworthy mechanism that protects users and digital services from notices made in bad faith. In case notifiers have systemically submitted bad-faith notices, the digital service should reserve the right to discard further notices without this amounting to obtaining actual knowledge and thus risk losing protection from the limited liability regime.

When considering a new notice-and-action framework, it is important to underscore that different type of services can generate different outcomes when acting upon notices. In order to ensure a proportional, targeted and effective enforcement of horizontal rules, intermediaries at the source of content should always bear the responsibility to remove or disable the content. Intermediaries with no control over the content (e.g. Internet access providers) should only be expected to complicate access to illegal content as a last resort, when these measures are deemed proportional, on the explicit request of a judicial authority and when the host providers fails to comply with its obligations. Similarly, different types of illegal content have different impact on society and require different management processes. It is therefore important to have a horizontal framework that is technology-neutral and future-proof that allows for a differentiated approach and accommodates each type of service and illegal content.

V. Upholding fundamental rights

When considering tools and measures to combat more effectively illegal content online either through a harmonised notice-and-action mechanism or through a tailored and proportional responsibility framework, certain foundational principles should be preserved in order to respect fundamental rights:

- Maintain the prohibition on a general monitoring obligation – Obligations should not amount to general monitoring obligations. Such an obligation would not respect important underlying fundamental rights of users, and would not be proportionate and respectful of industry's freedom to conduct business activity. Although ISPA believes that a general monitoring obligation should not preclude specific monitoring, we believe that such requirements should have a clearly defined and narrow scope, not covering entire categories of data and be limited in time.
- Prohibit any obligation to introduce automated filtering obligations – Although automated content moderation tools have made great strides in terms of speed and accuracy, they remain susceptible to manipulation and not apt for contextual analysis. Automated content moderation tools are no silver bullet in the fight against illegal content, let alone harmful content, but can be a great asset when used under supervision and on a voluntary basis to minimise the impact on fundamental rights.

- International coordination on content removal policies – The Glawischnig-Piesczek v. Facebook case demonstrates that when content is made available globally, differing national content laws lead to onerous geo-blocking burdens or lead services to apply the most restrictive content policies worldwide. The net effect is a jurisdictional conflict resolved only by overinclusive restriction of speech, or by limiting access to services by geography. Either case undermines free and fair access to the open internet. Because the Internet is global, access to content is rarely confined to national borders. Unilateral efforts to regulate online content, therefore, run the risk of creating conflicts with the laws of other jurisdictions. To minimize these conflicts, definitions of illegal content should be aligned with international norms wherever possible. Also, to provide appropriate deference to other governments' laws and cultural norms, any content moderation obligations should respect jurisdictional limits and not apply to content made accessible outside the EU.

VI. Regulatory oversight

A harmonised approach requires evidently that regulatory oversight and enforcement bodies act in a coordinated fashion. Although ISPA does not oppose the establishment of an EU supervisory agency, it remains premature at this stage of the legislative process to discuss what agency (whether existing or new) at what level would be best fitted to oversee and enforce the Digital Service Act. What is clear, however, competences of the competent authority should be clearly delineated and that any cooperation mechanism between Member States should operate in a transparent way without prejudice to the well-established country-of-origin principle.

About ISPA Belgium

ISPA Belgium (Internet Service Providers Association) brings together stakeholders of the Internet industry and represents the collective voice of the Internet community in Belgium. Founded in 1997, ISPA is the brainchild of several pioneers of the Belgian Internet sector who saw the need to establish a forum where digital players could come together to promote and defend this flourishing industry. Today, ISPA Belgium continues to be active in these various sectors of activities and acts as the contact point of the Internet industry in Belgium, aiming to fulfil the economic and social potential of the Internet.