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ITI views on the future framework for digital services in Europe

Introduction

Online platforms and intermediaries play a foundational role in driving innovation and growth in the economy, supporting the smooth operation of digital supply chains and creating market opportunities and access for businesses of all sizes. Policymakers around the world are grappling with real challenges caused by the scale, speed, and complexity of various types of platforms, the roles they play regarding content and activities online, and their ability to shape public opinion. At ITI, representing all the segments of the tech industry, we understand and recognize the shared responsibility to maintain a safe, inclusive, and innovative online environment. Harmful and illegal content can be found online and policymakers in Europe and around the world have rightfully committed to safeguarding citizens and economies. We believe it will be paramount that all relevant players work together to ensure that the internet has sufficient protections for users, smaller businesses and brands.

We support the goals of the European Commission's announced Digital Services Act to increase legal certainty, clarify roles, and define responsibilities for actors in the online context, i.a. by reviewing and bringing more clarity to the framework. We are committed to working with the European Institutions to forge a balanced framework preserving the current limited intermediaries' liability rules and rights of third parties, for a healthy online ecosystem. We support the European Commission's thoughtful consideration of the existing legal principles underpinning digital services and products and acknowledging their importance for the economy at large. We welcome plans to gather robust stakeholder input and develop well-tailored solutions for specific, well-defined challenges.

Key Principles

The differentiation between illegal and harmful content needs to be maintained. Regulatory efforts should focus on illegal content as defined by existing law – including both civil and criminal infringements, with no distinction being made in the application of the liability rules. **Harmful, but not illegal, content** should continue to be addressed separately through voluntary or co-regulatory approaches. For example, we welcome the continued efforts to work jointly with the European Commission and industry players on the EU code of conduct on countering illegal hate speech online. The decision on whether content is harmful and should be removed is greatly influenced by regional or national cultural context. Policymakers should cooperate with companies to develop harmonious solutions vis-a-vis harmful content that fit a certain society through self-regulatory or co-regulatory approaches that promote trust between companies, policymakers and users, and support innovation.

Internet platforms are transversal actors across a global economy and supported by complex supply chains. As the internet allows consumers to increasingly benefit from fully integrated products and services, it also creates diverse types of relationships between different suppliers. Companies and the technology they supply sit at different points in this supply chain and play different technical roles in enabling a service to individual users. In the majority of cases, the removal of illegal content or activities in such a multi-partner system affects more than one business. Any future initiative on oversight of illegal or harmful online content should focus on a company's role and its interaction with the content so as to identify the actors best placed to take action – differentiating where services may have the ability or right (contractual, legal or otherwise) to edit, moderate, or manage content versus where they have technical control but often no access or capability to alter or remove the data. There are countless types of digital platforms that offer different sorts of products and services, and the DSA should provide legal certainty in this constantly changing landscape.

As it seeks to improve incentives for companies to take proactive steps to create a safer online environment, the EU should seek to preserve features of the e-commerce directive (ECD) proven to work including the country-of-origin principle, and liability provisions. The Commission should retain proven elements of the ECD such as the country-of-origin principle (also referred to as Internal Market clause), ensuring that online service providers are subject to the law of the Member State in which they are established and not the various legal systems of the Member States where the service is accessible. The country-of-origin principle is a fundamental principle that has supported the uptake of online services across the EU over the past 20 years by reducing regulatory barriers and addressing fragmentation. Recent case law allowing rightsholders to bring trademark infringement actions in Member States Courts (EUCJ C-172/18, *AMS Neve Ltd*) should also be maintained. The underlying general liability provisions for caching, hosting, and mere conduit are an additional mechanism under the ECD that should be maintained. We strongly urge policymakers to retain these key principles.

Legal fragmentation in the European Single Market needs to be avoided. National governments have surged ahead with legislative approaches to the online content oversight debate. Further, new collaborative economy services are reluctant to set foot in many European markets, due to diverging national and at times even regional or local rules. Legal fragmentation hinders the ability of start-ups to scale up and compete globally. Europe is well placed to lead discussions around challenges that policymakers, industry, and civil society need to address head on. A thoughtful approach should take account of existing legislation when identifying needs for horizontal or sector-specific approaches. Any reform of the ECD should take the opportunity to harmonise the horizontal aspects via a Regulation, to ensure the avoidance of fragmented national approaches.

Creating a framework that removes illegal content and encourages good faith actions requires partnership between stakeholders. Tackling the proliferation of illegal content must be a shared responsibility between platforms, authorities, and users. Platforms have an important role to play, including proactive measures and effective notice and take-down (N&T) processes. While intermediary service providers cannot be compelled by a Member State to provide general monitoring of content or activities, this does not imply that service providers cannot initiate certain proactive activities on their own. A number of service providers currently perform voluntary oversight activities to enforce their terms of service or to protect users. However, there may be concerns particularly by intermediaries that such proactive measures risk depriving service providers of the safe harbor protection provided by the ECD. For example, the ECD does not clarify that when an intermediary has voluntarily reviewed content or activities for a specific unlawfulness (or specific

violation of community guidelines), it is not deemed to have knowledge of any other ways in which the reviewed content or activities might be unlawful. We recommend providing this clarity.

Notice-and-takedown models should have incentivising provisions. An effective N&T process should remain an important part of the new regime. Whilst platforms with effective control have the responsibility to make the N&T processes efficient, accessible, and transparent, notifiers must also use them responsibly. In addition, activities by parties with effective control, such as actively taking down content that is either harmful or illegal, should be endorsed through provisions that protect and support good faith efforts by companies to advance online safety, as clarified above, whilst maintaining their responsibility to act appropriately once notified of illegal content by rightsholders or other interested parties.

Oversight of systems and processes can complement liability provisions. Companies need clear rules and responsibilities that do not disincentivise their proactive actions to limit distribution of illegal content online. To most effectively achieve the goal of removing illegal content or activities without delay, any new regime should allow companies to develop effective and responsible systems of content oversight, tailored towards their specific risk, exposure, and technical capabilities. At the same time, a more coordinated oversight of systems and processes would provide an important, meaningful complement to fundamental liability provisions. Given ongoing legislative initiatives launched by a number of Member States, there is value in exploring a single EU-wide coordinated oversight model, be it a body or a process within the current institutional setting, that would enhance legal certainty by providing guidance to consumers and companies, and help the latter take reasonable, feasible, and proportionate measures. The oversight mechanism should not interfere with responsibilities within the jurisdiction of the Courts. This model should be co-regulatory in nature, providing a consultative role for industry and civil society.

Companies have an interest in maintaining the trust of their stakeholders. In order to foster trust, internet companies have an interest in providing information regarding their content moderation tools and measures to users and governments in a transparent manner. However, consideration of potential reporting obligations should take into account the significant burden on the companies involved, many of which are SMEs and start-ups. Existing non-legislative efforts and memoranda of understanding, as well as co-regulatory efforts like the EU's code of conduct on countering illegal hate speech online, have demonstrated success and should continue to be a vehicle for dialogue between Internet companies and policymakers.

The EU can play a central role for global policy leadership on the framework of digital services. Moving beyond the EU level, we also observe that a pragmatic approach towards content oversight and intermediary liability that allows for greater global regulatory convergence would make obvious sense, as it would help protect citizens around the world more evenly, while allowing companies to deploy consistent actions addressing these challenges worldwide. As the EU debate moves ahead, it should aspire to contribute to a system which is viable for companies, protects users from identified harms, and takes into account its global impact.

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