

Position Paper

Inception Impact Assessment on Measures to further improve the effectiveness of the fight against illegal content online

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Page 1

On 2018, March 1 the European Commission has published its Recommendation on measures to effectively tackle illegal content online. Bitkom appreciates the opportunity to give feedback on the Recommendation as well as on the inception impact assessment to further improve the effectiveness of the fight against illegal content online.

Liability regime in terms of the E-Commerce Directive

The online services which host content or data of third parties are diverse in nature, ranging from online content stores, cloud services, web hosting services to e-Commerce websites. Most of these services are considered information society services falling under the scope of the E-Commerce Directive (“eCD”). The current liability system determined in the eCD succeeds in striking a good balance for all parties. The liability regime of the eCD has proven itself strong and flexible. It has been aiming at promoting dynamic, competitive markets since its inception. Contributions of those intermediaries’ services covered by the eCD’s liability limitations, to the economy would not have been possible at current levels without the liability regime in this Directive. Within this liability framework, industry codes of conduct, self and co-regulation, and industry best practices have been developed to ensure a stable, well-regulated market. These different regulatory approaches are crucial to ensuring progress in the fight against illegal content while at the same time respecting fundamental rights.

Terrorist content/determination of tight deadlines by law for instant action:

Terrorist content is unacceptable – offline and online. Therefore we agree that terrorist content has to be removed as expeditiously as possible. However, working with fixed deadlines is dangerous and probably even counterproductive. Fixed deadlines could easily lead to wrong decisions and overzealous removals, as hosting service providers feel pressured to resolve cases quickly rather than with due diligence. Technically it would be a huge challenge to react within for instance one hour from the moment at which a notice has been received. And even if hosting service providers are able to react

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Position Paper on the Inception Impact Assessment „illegal content online“

Page 2|3

that fast from a technical perspective the risk that hosting service providers do not verify the content at all is very high. This would lead to chilling effects across society and on societal discourse. Therefore, a timeframe-focussed approach can only work well if the notice is sufficiently substantiated by third parties and when it is ensured that fundamental rights are respected.

— If the European Commission recommends fixed deadlines these deadlines have to be justified considering actual patterns of content sharing.

Referrals to law enforcement:

Many hosting service providers already voluntarily refer information to authorities where there are imminent threats to life, within appropriate legal considerations. New obligations to mandate these disclosures to law enforcement are unnecessary, and risk hindering existing voluntary practices.

Notice-and-action and liability protections:

— For a valid notice-and-take-down process further guidance is needed on what conditions a notice has to meet to be valid and what is necessary to prevent inactionable notices, mistakes and abuses. For instance, the notice should include reasonable information to contact the notice provider, as it is standard practice in many submission procedures around the world. Such information is necessary to determine the legality of the content. And for any redress and anti-abuse mechanisms information are crucial for identification.

Any hosting service provider who undertakes proactive voluntary measures to identify illegal content should be protected from liability for this action. To further encourage this practice, it must be beyond doubt that hosting service providers do not become liable for any of the information hosted simply because they take voluntary action in good faith, whether of an automated or a non-automated nature. It should also be clarified that such actions do not imply that the hosting service provider has knowledge of or control over the information which it hosts. This clarity is crucial to developing efficient and innovative ways for fighting and tackling illegal content

Liability on copyright infringement

Infringements of intellectual property rights cause debates not just on liability of hosting service providers but also access providers. Therefore, we would like to highlight some general concerns regarding their possible liability for copyright infringements:

Position Paper on the Inception Impact Assessment „illegal content online“

Page 3|3

The liability degree of access providers determined in Art. 12 eCD has been much over-stretched since jurisprudence of the CJEU defining blocking methods (“Kino.to”). Costs, effort, violation of third party rights incurred due to enforced measures are in most cases not proportionate with regard to the lack of effectiveness (cf. Art. 3 IPRED). Surveys prove that blocking methods are ineffective and do not prevent infringements; access providers are not “best placed to bring such infringing activities to an end” (Rec. 59 InfoSoc-D). Furthermore, the following aspects have to be taken into account:

- Art. 8 (3) InfoSoc-D does not refer to claims raised by right holders against access providers;
- blocking methods would always require (i) a legal framework for procedures (“sufficient and clear legal basis”, Rec. 59 InfoSoc-D, Art. 52 EU Charter of Fundamental Rights), (ii) inclusion of all stakeholders/those affected by action (cf. CJEU “kino.to”), (iii) provision on cost allocation to rightholders (cf. § 101 German Copyright Act), (iv) ISP-protection against claims for compensation (“collateral damages” are imminent in any ISP action);
- those situated next to the source of an infringing content must be addressed first, without effect (“subsidiarity”).

In a larger context besides the liability regime, Bitkom sees room for improvement by means of efficient concerted industry initiatives to fight copyright infringements at its roots and therefore endorses the Follow-the-Money approach on a pan-European level to dry out piracy.

Bitkom represents more than 2,500 companies of the digital economy, including 1,700 direct members. Through IT- and communication services only, our members generate a domestic turnover of 190 billion Euros per year, including 50 billion Euros in exports. Members of Bitkom employ more than 2 million people in Germany. Among the members are 1,000 small and medium-sized businesses, over 400 startups and nearly all global players. They offer a wide range of software technologies, IT-services, and telecommunications or internet services, produce hardware and consumer electronics, operate in the sectors of digital media or are in other ways affiliated to the digital economy. 80 percent of the companies’ headquarters are located in Germany with an additional 8 percent each in the EU and the USA, as well as 4 percent in other regions. Bitkom supports the digital transformation of the German economy and advocates a broad participation in the digital progression of society. The aim is to establish Germany as globally leading location of the digital economy.