

April 27, 2015

Mr Andrus Ansip
Vice-President, Digital Single Market
European Commission
Berlaymont
1049 Brussels

Open letter on intermediary liability protections in the digital single market

Dear Vice-President Ansip,

As the European Commission (EC) considers action on intermediary liability, the undersigned stakeholders from civil society and the Internet industry, offer the following recommendations:

- We encourage the EC to reaffirm the basic principle underpinning the 2000/31/EC “e-Commerce Directive” that internet intermediaries must be afforded strong protection from liability for third party content. There is no doubt that this important principle has been a major factor in the development of online services in the EU for the past fifteen years. It must therefore continue to underpin the EC’s actions in the digital economy.
- As, in our view, the Directive has not gone as far as it might have in protecting the right to freedom of expression that is now enshrined in the EU Charter, there is no case for existing intermediary protections to be weakened. This was confirmed by the outcome of the EC’s latest public consultation on the Directive where a majority of stakeholders were not in favour of reopening these parts of the Directive. Rather than imposing new legal obligations, any new EU action in this area should, as a minimum, preserve the intermediary protections enshrined in the Directive, to boost online rights, online innovation, and digital growth.
- Before announcing any new actions, we encourage the EC to: 1) provide evidence; and 2) clearly define the perceived problems that it is trying to solve.
- We are concerned that the EC fails to distinguish between the different types of response that may be necessary for the prevention of serious crime, such as countering child pornography and terrorism, and those that may be used to deal with civil infringements such as infringement of copyright. The urgency of action by the intermediary as well as the urgency of corresponding action by the forces of the state is very different in both cases. In any event, it is clear that the EC should not confuse

unlawful content with lawful content which may have been used unlawfully.

- We would welcome greater harmonisation and transparency in the implementation of the Directive. In particular, we believe that the EC would be particularly well-placed to issue guidance - based on Member State best practice - that would reinforce procedural safeguards for the protection of fundamental rights whilst ensuring proportionate responses to illegal content and maintaining individuals' fundamental rights. Many responses to the consultation indicated that the current balance leans heavily towards the imposition of restrictions. The EC could for instance undertake a best-practices analysis of Member States' implementation of the Directive and provide guidelines. The EC could also convene a stakeholder discussion with the aim of promoting transparent guidelines for a more balanced approach. It is worth noting experience of existing self-regulatory initiatives such as the EU Memorandum of Understanding on the Sale of Counterfeit Goods via the Internet.
- We urge the EC to strike a better balance between restricting access to illegal content and protecting fundamental rights. As currently drafted, the Directive encourages intermediaries to remove content on the basis of third-party or law enforcement requests without a judicial determination of the legality of the content at issue. This has a chilling effect on the right to freedom of expression as there is a natural tendency for intermediaries to err on the side of caution and may remove perfectly legitimate content for fears of liability. Instead, the EC should consider introducing counter notice procedures for users to better challenge wrongful take down requests, without undermining intermediaries' liability protections.
- We strongly oppose any new "duty of care" requirements for intermediaries to proactively monitor, judge, and remove potentially illegal user and third party content on networks and hosting platforms. We remind the EC that, under Article 52 of the EU Charter, restrictions on fundamental rights must have a legal framework which is sufficiently clear to enable both natural and legal persons to regulate their conduct.

We welcome the EC's recognition of the importance of online intermediaries to the exercise of online rights and the Internet economy and the need to protect intermediaries from the burden of undue liability.

We remind the EC of its repeated public support for the principles of evidence-based policy-making and multi-stakeholder consultation on Internet policy. We strongly encourage the EC to consult with all stakeholders before considering any possible actions that risk severely damaging the Internet economy and online rights in Europe.

We remain at your disposal for further discussion on this important issue.

cc:

First Vice President Frans Timmermans
Commissioner Günther Oettinger
Commissioner Cecilia Malmstrom
Commissioner Elżbieta Bieńkowska
Commissioner Corina Crețu
Commissioner Phil Hogan
Commissioner Věra Jourová
Commissioner Pierre Moscovici
Commissioner Marianne Thyssen
Commissioner Vytenis Andriukaitis
Commissioner Jonathan Hill
Commissioner Carlos Moedas
Commissioner Tibor Navraicsics
Commissioner Margrethe Vestager

Signed by:

