

## **Position of The Broadband Association ANGA (Germany) on the EU Commissions consultation on the Digital Services Act package**

### **I. Introduction and background**

On 2 July 2020 the EU Commission published an online consultation on the Digital Services Act package that runs until 8 September 2020. The scope of this package is broad and aims to address different aspects of potential regulatory areas regarding online platforms. ANGA is especially interested in the questions on the **evaluation of the E-Commerce directive (eCD)** and its liability regime. This position paper will only answer the corresponding questions of the Commission's questionnaire.

The eCD will soon be twenty years old. Since the law was adopted in 2001, the digital ecosystem has changed dramatically, with advent and evolution of social media platforms, which now act as primary channels for content, communication and commerce for millions of users. Focus has recently shifted to the harmful effects of the growth of these platforms, primarily relating to the dissemination of illegal material (in breach of copyright rules, counterfeit goods or hate speech/incitement to violence) and the underlying role of the platform provider in enabling the spread of such material.

The European Commission has proposed a number of legislative and non-legislative measures over the past four years to tackle the spread of illegal material online. The eCD includes obligations for caching and hosting providers to remove content expeditiously upon becoming aware of illegal content in order to benefit from liability exemptions. In 2016 the Commission launched a Code of Conduct on Countering Illegal Hate Speech Online. Two and a half years after its adoption, the Code of Conduct is delivering continuous progress. The fourth round of regular monitoring undertaken by the Commission showed that companies are now assessing 89% of flagged content within 24 hours and 72% of the content deemed illegal hate speech is removed.

However, the consensus among policy makers is that these measures are still not going far or fast enough considering the scale of the problem. Therefore in 2018, the European Commission presented a Recommendation on measures to effectively tackle illegal content online which significantly enhanced the existing notice and take down regime in the EU, encouraging operators of online platforms to take greater responsibility for illegal material on their sites.

More recently, the European Commission introduced a proposal for a Regulation preventing the dissemination of terrorist content online. The draft regulation contained a very broad scope, encompassing Hosting Service Providers (HSPs) offering services in the EU. According to the draft regulation, such HSPs bear a responsibility for terrorist content they make available (by allowing users to upload and store this material). As such, HSPs should be required to remove this content within one hour of being made aware of its availability and to deploy proactive measures to prevent the content from being re-uploaded once it has been removed.

It is ANGA's view that there needs to be proportionate and targeted changes to the underlying liability regime for online intermediaries to enable and encourage them to play a more active role in ridding their platforms of illegal and harmful material. Such a change could be achieved by adding a duty of care for hosting service providers, requiring them to take a more active role in addressing such content.

## II. Answers to questions of part II. Reviewing the liability regime of digital services acting as intermediaries

### 1. Question 2

*The liability regime for online intermediaries is primarily established in the Ecommerce Directive, which distinguishes between different types of services: so called 'mere conduits', 'caching services', and 'hosting services'. In your understanding, are these categories sufficiently clear and complete for characterising and regulating today's digital intermediary services? Please explain.*

The Commission should reopen and amend article 14 of eCD for hosting service providers recognising the **emergence of a new category of 'active' hosts** who play a direct role in dissemination, organisation and monetisation of end user content. Active hosting service providers should face higher responsibility rules (c.f. below). Hosting service providers who do not cross this threshold should be subject to the current liability regime (safe harbour + notice and take down). It is unreasonable to impose provisions that aim at reducing broad dissemination of illegal content to services that do not reach a broad audience or do not have the technical means to detect specific user content (e.g. cloud services).

ANGA considers an active hosting service to exhibit the following characteristics: instead of confining itself to providing a service neutrally by a merely technical and automatic processing of the data provided by its customers, **the hosting service provider plays an active role of such a kind as to give it knowledge of, or control over, those data, for example by tagging, organising, promoting, optimizing, presenting or otherwise curating specific content for profit making purposes** (compare recent CJEU case law, e.g. LVMH v. Google France, L'Oreal v. eBay). ANGA considers that an Active Hosting Service Provider within the meaning of the eCD encompasses all service providers who allow users to upload and share content with a wide audience and take additional, unprompted measures to organise, optimise, tag, personalise, recommend and otherwise curate the content posted by end users, usually for profit making purposes.

Other than that the categories found in the eCD are still valid and should be kept unchanged.

### 2. Question 3

*Are there elements that require further legal clarification?*

The Commission should preserve the underlying legal principle that online intermediaries should not be held directly liable for the acts of their users, as this would be counterproductive and lead to an over removal of content. This should be made clear if the liability regime is amended in certain aspects to provide legal certainty.

### 3. Question 4

*Does the current legal framework dis-incentivize service providers to take proactive measures against illegal activities? If yes, please provide your view on how disincentives could be corrected.*

The Commission should amend the current liability regime in a way that balances the rights and obligations of various parties effectively and provides an **incentive for hosting service providers to act more responsibly** with regards to the content they store and provide access to.

As mentioned already above in answer to question 2 active hosts should face higher liability rules than passive ones. Active hosts should not lose their limitation from liability, but as per Copyright Directive, **should have to do more to qualify for those safe harbours and should be legally incentivised rather than legally penalised** for taking more responsibility for the content they make available to the

public. Application of these additional measures hinges on whether an online intermediary is playing an 'active' of 'neutral/passive' hosting function (see above, answer to question 2).

Active Hosting Service Providers should be subject to a Duty of Care that should impose a responsibility to take reasonable steps to address the dissemination of both illegal and harmful content via the online platform. This should be risk based, moving from reactive to proactive steps as follows:

- **Notice and takedown (and put back) procedures:** Obligations should center on the identification and expeditious removal of content which is deemed to be in breach of either the applicable law, or the Active Hosting Service Provider's own terms of service. Content that is falsely flagged/removed should be restored expeditiously
- **Content Policy:** Active Hosting Service Providers should be required to implement an end user policy on harmful content.
- **Tools for reporting:** Provision of tools to allow end users to report and block content.
- **Advertising and Political Content:** Commercial and political content should be appropriately labelled to end users.
- **Proactive monitoring:** Active Hosting Service Providers should take proactive, voluntary measures to monitor and remove illegal material (without losing their liability exemption by doing so).
- **Transparency:** Active Hosting Service Providers should be required to provide clear and simple information about the measures they take to address harms.

For Active Hosting Service Providers over a specified threshold, content moderation procedures should be subject to regular reporting obligations. In addition, any Duty of Care should expressly include an obligation to share tools, data, expertise and resources deployed in content moderation with third parties, to prevent this being a barrier to new entrants.

The consequence for **failing to apply the Duty of Care** for Active Hosting Service Providers should be the **loss of the limitations on liability** enshrined under Article 14 of the eCD. As such, Active Hosting Service Providers who are negligent in their duty to safeguard users could be held liable for the content posted by end users, and therefore subject to further sanctions under applicable national law.

#### 4. Question 5

*Do you think that the concept characterising intermediary service providers as playing a role of a 'mere technical, automatic and passive nature' in the transmission of information (recital 42 of the E-Commerce Directive) is sufficiently clear and still valid? Please explain.*

#### 5. Question 6

*The E-commerce Directive also prohibits Member States from imposing on intermediary service providers general monitoring obligations or obligations to seek facts or circumstances of illegal activities conducted on their service by their users. In your view, is this approach, balancing risks to different rights and policy objectives, still appropriate today? Is there further clarity needed as to the parameters for 'general monitoring obligations'? Please explain.*

The prohibition on imposing a general monitoring obligation set out in Article 15 of the eCommerce Directive should be maintained under the DSA. Compatibly with Article 15, active hosting service providers should be encouraged to take targeted pro-active measures to detect and remove illegal content (see above, answer to question 4).

#### 6. Question 7

*Do you see any other points where an upgrade may be needed for the liability regime of digital services acting as intermediaries?*

There should be **no change to liability regime for mere conduits under article 12 or caching under article 13**. ISPs/caching providers should not be liable for content that they deliver, transmit or

temporarily store as they have no control over this material (and indeed are prohibited from actively blocking content without a legal requirement to do so under the Open Internet Regulation). Under the eCD, ISPs are not subject to a notice and take down regime, but can receive blocking injunctions from a relevant authority/court. The Commission should issue **guidance on the imposition of blocking injunctions and underline that such injunctions should always be a last resort** (and in theory diminish over time as other actors take more responsibility for removing content).

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