

in anti-competitive practices with regard to their competitors, based on their public funding.

94. An example of anti-competitive practice may be price undercutting. A public service broadcaster might be tempted to depress the prices of advertising or other non-public service activities (such as commercial pay services) below what can reasonably be considered to be market-conform, so as to reduce the revenue of competitors, insofar as the resulting lower revenues are covered by the public compensation. Such conduct cannot be considered as intrinsic to the public service mission attributed to the broadcaster and would in any event "affect trading conditions and competition in the Community to an extent which would be contrary to the common interest" and thus infringe the Amsterdam Protocol.

95. In view of the differences between the market situations, the respect of the market principles by public service broadcasters, in particular the questions whether public service broadcasters are undercutting prices in their commercial offer, or whether they are respecting the principle of proportionality with regard to the acquisition of premium rights [53], shall be assessed on a case-by-case basis, taking into account the specificities of the market and of the service concerned.

96. The Commission considers that it is, in the first place, up to the national authorities to ensure that

public service broadcasters respect market principles. To this end, Member States shall have appropriate mechanisms in place which allow assessing any potential complaint in an effective way at the national level.

97. Notwithstanding the preceding paragraph, where necessary, the Commission may take action on the basis of Articles 81, 82, 86 and 87 of the EC Treaty.

## 7. TEMPORAL APPLICATION

98. This Communication will be applied from the first day following its publication in the Official Journal of the European Union. It will replace the 2001 Communication from the Commission on the application of State aid rules to public service broadcasting.

99. The Commission will apply this Communication to all notified aid measures in respect of which it is called upon to take a decision after the Communication is published in the Official Journal, even where the projects were notified prior to that date.

100. In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid [54], the Commission will apply, in the case of non-notified aid,

- (a) this Communication, if the aid was granted after its publication;
- (b) the 2001 Communication in all other cases.
- (..)



[1] OJ C 320, 15.11.2001, p. 5.

[2] Judgment in Case C-280/2000 *Altmark Trans GmbH and Regierrungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH (Altmark)* (2003) ECR I-7747.

[3] Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67).

[4] Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4).

[5] COM(2007) 725 final.

[6] Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L 332, 18.12.2007, p. 27).

[7] COM(2005) 107 final.

[8] For the purpose of the present communication, the notion "audiovisual service(s)" refers to the linear and/or non-linear distribution of audio and/or audiovisual content and of other neighbouring services such as online text-based information services. This notion of "audiovisual service(s)" must be distinguished from the narrower concept of "audiovisual media service(s)", as defined in Article 1(a) of the Audiovisual Media Services Directive.

[9] OJ C 364, 18.12.2000, p. 1.

[10] Judgment in Case C-260/89 ERT, (1991) ECR I-2925.

[11] For the purpose of the present communication, and in accordance with Article 16 of the EC Treaty and the declaration (No 13) annexed to the final act of Amsterdam, the term "public service" as of the Protocol on the system of public broadcasting in the Member States has to be intended as referring to the term "service of general economic interest" used in Article 86(2).

[12] Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999 (OJ C 30, 5.2.1999, p. 1).

[13] Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions, approved by Council Decision 2006/515/EC of 18 May 2006. In accordance with Annex 2 to of the Council Decision, "the Community is bound by the Convention and will ensure its implementation."

[14] Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Article 6(1) and (2)(h).

[15] Recommendation CM/Rec(2007)2 of the Committee of the Ministers to Member States on media pluralism and diversity of media content, adopted on 31 January 2007 at the 985th meeting of the Ministers' Deputies.

[16] Recommendation CM/Rec(2007)3 of the Committee of Ministers to Member States on the remit of public service media in the information society, adopted on 31 January 2007 at the 985th meeting of the Ministers' Deputies.

[17] European Parliament Resolution of 25 September 2008 on concentration and pluralism in the media in the European Union, 2007/2253(INI).

[18] Cf. footnote 6 above.

[19] Commission Directive 2006/111/EC of 16 November 2006.

- [20] Cf. footnote 4 above.
- [21] Cf. footnote 3 above.
- [22] According to Article 2(1)(a) of the Decision, it applies to State aid in the form of "public service compensation granted to undertakings with an average annual turnover before tax, all activities included, of less than EUR 100 million during the two financial years preceding that in which the service of general economic interest was assigned, which receive annual compensation for the service in question of less than EUR 30 million".
- [23] Judgment in joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 "TV2" at 156.
- [24] Regarding the qualification of licence fee funding as State resources, see judgment in joined Cases T-09/04, T-317/04, T-329/04 and T-336/04 "TV2" at 158-159.
- [25] Cases C-730/79, Philip Morris Holland v Commission (1980) ECR 2671, paragraph 11; C-303/88, Italy v Commission (1991) ECR I-1433, paragraph 27; C-156/98, Germany v Commission (2000) ECR I-6857, paragraph 33.
- [26] Case C-280/2000, cf. footnote 2 above.
- [27] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).
- [28] Case C-44/93, Namur-Les Assurances du Cr dit SA v Office National du Dueroire and the Belgian State (1994) ECR I-3829.
- [29] See, for example, the decisions of the Commission in the following cases: E 8/06, State funding for Flemish public service broadcaster VRT (OJ C 143, 10.6.2008, p. 7); E 4/05, State aid financing of RTE and TNAG (TG4) (OJ C 121, 17.5.2008, p. 5); E 9/05, Licence fee payments to RAI (OJ C 235, 23.9.2005, p. 3); E 10/2005, Licence fee payments to France 2 and 3 (OJ C 240, 30.9.2005, p. 20); E 8/05, Spanish national public service broadcaster RTVE (OJ C 239, 4.10.2006, p. 17); C 2/04, Ad hoc financing of Dutch public broadcasters (OJ L 49, 22.2.2008, p. 1); C 60/99 Commission Decision of 10 December 2003 on State aid implemented by France for France 2 and France 3 (OJ L 361, 8.12.2004, p. 21); C 62/99 Commission Decision of 15 October 2003 on the measures implemented by Italy for RAI SpA (OJ L 119, 23.4.2004, p. 1); NN 88/98, Financing of a 24-hour advertising-free news channel with licence fee by the BBC (OJ C 78, 18.3.2000, p. 6) and NN 70/98, State aid to public broadcasting channels Kinderkanal and Phoenix (OJ C 238, 21.8.1999, p. 3).
- [30] Joined Cases T-195/01 and T-207/01, (2002) ECR II-2309.
- [31] For example, Commission Decisions NN 88/98 BBC 24-hours (OJ C 78, 18.3.2000), NN 70/98 "Kinderkanal and Phoenix" (OJ C 238, 21.8.1999).
- [32] For example, Commission Decision N 458/2004 State aid to Espacio Editorial Andaluza Holdings sl., OJ C 131, 29.5.2005.
- [33] NN 70/98, State aid to public broadcasting channels Kinderkanal and Phoenix (OJ C 238, 21.8.1999, p. 3).
- [34] Judgment in the Case 172/80 Zuechner; (1981) 2021.
- [35] Judgment in the Case C-242/95 GT-Link; (1997) 4449.
- [36] Judgment in the Case C-159/94 EDF and GDF; (1997) I-5815.
- [37] See, for example, the recent decisions of the Commission in the following cases: E 8/06, State funding for Flemish public service broadcaster VRT (OJ C 143, 10.6.2008, p. 7); E 4/05, State aid financing of RTE and TNAG (TG4) (OJ C 121, 17.5.2008, p. 5); E 3/05, Aid to the German public service broadcasters (OJ C 185, 8.8.2007, p. 1); E 9/05, Licence fee payments to RAI (OJ C 235, 23.9.2005, p. 3); E 10/05, Licence fee payments to France 2 and 3 (OJ C 240, 30.9.2005, p. 20); State aid E8/05, Spanish national public service broadcaster RTVE (OJ C 239, 4.10.2006, p. 17); C 2/04, Ad hoc financing of Dutch public service broadcasters (OJ L 49, 22.2.2008, p. 1).
- [38] Similar difficulties may also be encountered when public service broadcasting is addressed to linguistic minorities or to local needs.
- [39] Judgment in the Case T-442/03, SIC v Commission, (2008), paragraph 201, Judgement in joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 TV2/Denmark v Commission (2008) at 122 to 124.
- [40] These qualitative criteria are according to the Court of First Instance "the justification for the existence of broadcasting SGEIs in the national audiovisual sector". There is "no reason for a widely defined broadcasting SGEI which sacrifices compliance with those qualitative requirements in order to adopt the conduct of a commercial operator", T-442/03, SIC v Commission, paragraph 211.
- [41] Regarding the qualification, under the Audiovisual Media Services Directive, of prize games including the dialling of a premium rate number as teleshopping or advertising, see the judgment of the Court in Case C-195/06 KommAustria v ORF of 18 October 2007.
- [42] See judgment in joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 TV2 (2008) at 107-108.
- [43] COM(1999) 657 final, Section 3(6).
- [44] See judgment in the Case T-442/03 SIC/Commission (2008) at 212.
- [45] Article 4 of Directive 2006/111/EC.
- [46] This implies reference to the hypothetical situation in which the non-public service activities were to be discontinued: the costs that would be so avoided represent the amount of common costs to be allocated to non-public service activities.
- [47] Of course, this provision does not preclude public service broadcasters from earning profits with their commercial activities outside the public service remit.
- [48] Such special reserves may be justified for major technological investments (such as digitisation) which are foreseen to occur at a certain point in time and are necessary for the fulfilment of the public service remit; or for major restructuring measures necessary to maintain the continuous operation of a public service broadcaster within a well-defined time period.
- [49] As the Council of Europe provided, in its Recommendation on the remit of public service media in the information society, "(...) Member States may consider complementary funding solutions paying due attention to market and competition questions. In particular, in the case of new personalised services, Member States may consider allowing public service media to collect remunerations (...). However, none of these solutions should endanger the principle of universality of public service media or lead to discrimination between different groups of society (...). When developing new funding systems, Member States should pay due attention to the nature of the content provided in the interest of the public and in the common interest."
- [50] For example, the Commission considers that requiring direct payment from users for the provision of a specialised premium content offer would normally qualify as commercial activity. On the other hand, the Commission, for example, considers that the charging of pure transmission fees for broadcasting a balanced and varied programming over new platforms such as mobile devices would not transform the offer into a commercial activity.
- [51] For example, the Commission considers that some forms of linear transmission, such as the simultaneous transmission of the evening TV news on other platforms (e.g. Internet, mobile devices), may be qualified as not being "new" for the purposes of this Communication. Whether other forms of retransmission of public broadcasters' programs on other platforms qualify as significant new services, should be determined by Member States, taking into account the specificities and the features of the services in question.
- [52] See also at footnote 40 on the justification of a broadcasting SGEI.
- [53] For example, one of the relevant issues may be to consider whether public service broadcasters are consistently overbidding for premium programme rights in a way which goes beyond the needs of the public service mandate and results in disproportionate distortions on the marketplace.
- [54] OJ C 119, 22.5.2002, p. 22.

## COMMUNICATION FROM THE COMMISSION TACKLING ILLEGAL CONTENT ONLINE: TOWARDS AN ENHANCED RESPONSIBILITY OF ONLINE PLATFORMS (COM(2017) 555 FINAL) (28 SEPTEMBER 2017)

### INTRODUCTION

Online platforms are important drivers of innovation and growth in the digital economy. They have enabled an unprecedented access to information and exchanges as well as new market opportunities, notably for small and medium-sized enterprises (SMEs). Online platforms also provide the main access point to information and other content for most people on the internet today, be it through search engines, social networks, micro-blogging sites, or video-sharing platforms. The business models of platforms have also evolved recently towards closer links between users and content – notably for targeted advertisement. These platforms connect billions of users with vast quantities of content and information<sup>1</sup> and provide innovative services to citizens and business.

However, the important spread of illegal content that can be uploaded and therefore accessed online raises serious concerns that need forceful and effective replies. **What is illegal offline is also illegal online.** Incitement to terrorism, xenophobic and racist speech that publicly incites hatred and violence, as well as child sexual abuse material are illegal in the EU. The increasing availability of terrorist material online and the spreading of such content is a serious threat to security and safety, as well as to the dignity of victims. The European Union has responded to these concerns through a certain number of measures<sup>2</sup>. However, addressing the detection and removal of illegal content online represents an urgent challenge for the digital society today.

Concerned by series of terrorist attacks in the EU and proliferation of online terrorist propaganda, the European Council of 22-23 June 2017 stated that it “*expects industry to ... develop new technology and tools to improve the automatic detection and removal of content that incites to terrorist acts. This should be complemented by the relevant legislative measures at EU level, if necessary*”. These calls were echoed by statements issued by the leaders of the G7 and G20 at their recent summits<sup>3</sup>. Similarly, the European Parliament, in its resolution on Online Platforms of June 2017 urged these platforms “*to strengthen measures to tackle illegal and harmful content*”, while calling on the Commission to present proposals to address these issues<sup>4</sup>.

Those online platforms which mediate access to content for most internet users carry a significant societal responsibility in terms of protecting users and society at

large and preventing criminals and other persons involved in infringing activities online from exploiting their services. The open digital spaces they provide must not become breeding grounds for, for instance, terror, illegal hate speech, child abuse or trafficking of human beings, or spaces that escape the rule of law. Clearly, the spreading of illegal content online can undermine citizens’ trust and confidence in the digital environment, but it could also threaten the further economic development of platform ecosystems and the Digital Single Market. Online platforms should decisively step up their actions to address this problem, as part of the responsibility which flows from their central role in society.

The fight against illegal content online must be carried out with proper and robust safeguards to ensure protection of the different fundamental rights at stake. Given their increasingly important role in providing access to information, online platforms also have a key role to play in achieving such a balance. The fight against illegal content online within the EU should build on and also take into account EU actions at global level.

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**This Communication lays down a set of guidelines and principles for online platforms to step up the fight against illegal content online<sup>5</sup> in cooperation with national authorities, Member States and other relevant stakeholders.** It aims to facilitate and intensify the implementation of good practices for preventing, detecting, removing and disabling access to illegal content so as to ensure the effective removal of illegal content, increased transparency and the protection of fundamental rights online. It also aims to provide clarifications to platforms on their liability when they take proactive steps to detect, remove or disable access to illegal content (the so-called “Good Samaritan” actions).

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### 1. CONTEXT

The European Union has already responded to the challenge of illegal content online, through both binding and non-binding measures. These policy responses include the Directive to combat the **sexual abuse and**

<sup>1</sup> At present, every second around 8,000 tweets are posted on Twitter, 1,000 photos are posted on Instagram, 60,000 Google searches are performed, and 70,000 YouTube videos are viewed. See <http://www.internetlivestats.com/>

<sup>2</sup> See section 2.

<sup>3</sup> European Council Conclusions, ST 8 2017 INIT, 22 and 23 June 2017, G7 Taormina Statement, 26 May 2017, and G20 leaders declaration, 8 July 2017

<sup>4</sup> European Parliament resolution 15 June 2017 on online platforms (2016/2274(INI))

<sup>5</sup> The elements presented here have been informed by a broad series of public as well as targeted consultations and stakeholder workshops.

**sexual exploitation of children and child pornography**<sup>6</sup>, the **Terrorism Directive**<sup>7</sup>, the proposed measures in the context of the reforms of **copyright**<sup>8</sup> and the **Audiovisual Media Services Directive (AVMSD)**<sup>9</sup>.

These existing and proposed legislative measures have been complemented by a range of non-legislative measures, such as the Code of Conduct on Countering **Illegal Hate Speech Online**<sup>10</sup>, the work of the **EU Internet Forum**<sup>11</sup> as regards **terrorist propaganda**, the Memorandum of Understanding on the sale of **Counterfeit Goods**<sup>12</sup>, the Commission Notice on the **market surveillance of products sold online**<sup>13</sup>, online sale of **food chain products**, the EU Action Plan against **Wildlife Trafficking**<sup>14</sup>, the Guidance on the **Unfair Commercial Practices Directive**<sup>15</sup> or the joint actions of the national authorities within the Consumer Protection Cooperation Network<sup>16</sup>. The European Strategy for a **Better Internet for Children**<sup>17</sup> is a self-regulatory initiative aiming to improve the online environment for children and young people, given the risks of exposure to material such as violent or sexually exploitative content, or cyberbullying.

In its Communications of 2016 and 2017<sup>18</sup>, the Commission stressed the need for online platforms to act more responsibly and step up EU-wide self-regulatory efforts to remove illegal content. In addition, the Commission also committed to improve the coordination of the various sector-specific dialogues with platforms and to explore the need for guidance on formal notice-and-action procedures. This should be done in synergy with, and without prejudice to, dialogues already ongoing and work launched in other areas, such as under the European Agenda on Security or in the area of illegal hate speech.

Recent reports on some of these sector specific initiatives have shown some progress. For the case of illegal

hate speech, reports from June 2017 indicated an increase of removals from 28 percent to 59 percent of a sample of notified content across some EU countries over a six months period, but noting important differences across platforms<sup>19</sup>. Some improvements in the speed of removal were also recorded over the same period while still 28 percent of removals took place only after a week<sup>20</sup>. This shows that a non-regulatory approach may produce some results in particular when flanked with measures to ensuring the facilitation of cooperation between all the operators concerned. In the framework of the EU Internet Forum tackling terrorist content, approximately 80-90 percent of content flagged by Europol has been removed since its inception<sup>21</sup>. In the context of child sexual abuse material, the INHOPE system of hotlines reported already in 2015 removal efficiencies of 91% within 72 hours, with 1 out of 3 content items being removed within 24 hours<sup>22</sup>.

The various ongoing sector-specific dialogues also revealed a significant amount of similarity concerning the procedures that govern the detection, identification, removal and re-upload prevention across the different sectors. These findings have informed the present Communication.

At EU level, the general legal framework for illegal content removal is the E-Commerce Directive<sup>23</sup>, which *inter alia* harmonises the conditions under which certain online platforms can benefit from the exception from liability for illegal content which they host across the Digital Single Market.

Illegal content on online platforms can proliferate especially through online services that allow upload of third party content. Such 'hosting' services are, under certain conditions, covered by Article 14 of the E-Commerce Directive<sup>24</sup>. This article establishes that hosting service providers<sup>25</sup> cannot be held liable for the infor-

<sup>6</sup> See the recent Report from the Commission to the European Parliament and the Council assessing the implementation of the measures referred to in Article 25 of Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography.

<sup>7</sup> Terrorism Directive (EU) 2017/541 obliges Member States to take the necessary measures to ensure the prompt removal of online content inciting to commit terrorist acts (Article 21). In this area, in the context of the EU Internet Forum, platforms remove voluntarily terrorist content on the basis of referrals sent by the Europol Internet Referral Unit (IRU).

<sup>8</sup> COM(2016) 593

<sup>9</sup> COM(2016) 287

<sup>10</sup> [http://ec.europa.eu/justice/fundamental-rights/files/hate\\_speech\\_code\\_of\\_conduct\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf)

<sup>11</sup> [http://europa.eu/rapid/press-release\\_IP-15-6243\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6243_en.htm)

<sup>12</sup> <http://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/3-2016-3724-EN-F1-1.PDF>

<sup>13</sup> JO C 250 of 1.8.2017

<sup>14</sup> [http://ec.europa.eu/environment/cites/pdf/WAP\\_EN\\_WEB.pdf](http://ec.europa.eu/environment/cites/pdf/WAP_EN_WEB.pdf)

<sup>15</sup> SWD(2016)163 of 25.5.2016

<sup>16</sup> [http://ec.europa.eu/internal\\_market/scoreboard/performance\\_by\\_governance\\_tool/consumer\\_protection\\_cooperation\\_network/index\\_en.htm](http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/consumer_protection_cooperation_network/index_en.htm)

<sup>17</sup> Communication COM(2012) 196 final (Better Internet for Kids (BIK)): <https://ec.europa.eu/digital-single-market/en/alliance-better-protect-minors-online>

<sup>18</sup> COM(2016)288 and COM(2017)228.

<sup>19</sup> [http://europa.eu/rapid/press-release\\_IP-17-1471\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1471_en.htm)

<sup>20</sup> [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=71674](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=71674)

<sup>21</sup> [http://europa.eu/rapid/press-release\\_IP-17-544\\_en.htm](http://europa.eu/rapid/press-release_IP-17-544_en.htm).

<sup>22</sup> [http://www.inhope.org/Libraries/Annual\\_reports/INHOPE\\_Annual\\_Report\\_2015.sflb.ashx?download=true](http://www.inhope.org/Libraries/Annual_reports/INHOPE_Annual_Report_2015.sflb.ashx?download=true)

<sup>23</sup> E-Commerce Directive 2000/31/EC of 8 June 2000.

<sup>24</sup> It should be noted that, under the E-Commerce Directive, only those providers of information society services benefit from the liability exemption of Articles 12-14 that qualify as intermediary service providers (i.e. providing mere conduit, caching or hosting services, respectively). Recital 42 clarifies that, for activities to be covered by the liability exemption they must be "of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored."

<sup>25</sup> Most online platforms offer hosting services of content uploaded by their users.