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Reflection paper on the eCommerce Directive and a “Digital Services Act” (January 2020)

News Media Europe (NME) represents the progressive news media industry in Europe – over 2,500 news brands including newspapers, radio, television and internet. News Media Europe is committed to maintaining and promoting the freedom of the press, to upholding and enhancing the freedom to publish, and to championing news brands, which are one of the most vital parts of Europe’s creative industries.

Summary

- **NME supports adjustments in the liability framework because of concerns related to the basic level of incentive for platforms to tackle copyright infringements and disinformation;**
- **NME believes that the changing internet landscape has led to the emergence of platforms hosting content that have become systemic in nature, due to their broad impact on all aspects of social, economic and political life;**
- **NME supports the continued existence of a secondary liability framework that acknowledges that content hosts do not produce content, and that offers a safe harbour under certain conditions;**
- **NME stresses that at the same time, several systemic platforms continue to fall short of expectation in tackling content-based issues, and that increased incentive and thus regulation to address this problem is needed;**
- **NME recommends introducing a requirement for systemic platforms to meet well-defined duty of care obligations so that they can benefit from safe harbours, which would be verified through external auditing practices;**
- **NME recommends harmonising notice-and-takedown procedures, more incentive to develop supporting technology to tackle content-based issues, and developing accountability tools for duty of care performance reviews;**
- **NME recommends explicitly excluding media companies from the scope of a Digital Services Act, alongside the content they produce, to avoid damaging existing and effective regulatory frameworks;**
- **NME stresses the need for public authorities to build capacity in the field of algorithms, in particular with a view to developing accountability tools, notably through algorithmic auditing and responsibility practices.**

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The harmonised liability framework of the eCommerce Directive is important for the news industry because it clarifies the applicability of liability regimes in respect of content that may be copyright infringing, defamatory, constituting illegal advertising, or harmful by way of spreading disinformation (which can be illegal, where provided for by national law).

Our sector is in particular concerned about the basic lack of incentive for platforms hosting third-party content to tackle copyright infringements and the spread of disinformation. Ongoing copyright infringements damage the underlying business model of news organisations while disinformation damages trust in media and the information ecosystem as a whole.

Furthermore, we believe that the current liability framework for hosting third-party content allows certain platforms with major bearing on society to turn a blind eye to ongoing illegalities and harmful types of contents that may not be illegal per se. We therefore believe that adjustments to the liability framework for certain platforms acting hosting content are needed to account for these realities.

The changing internet landscape and role of hosting services providers in modern society makes this necessary. Some large platforms hosting third-party content now have major influence on politics (eg. disinformation), social life (hate speech), the economy (major online marketplaces) and culture (determining how content is consumed). Such platforms have thus become “systemic” in nature.

The stakes are therefore much higher than when the original Directive was conceived, and a revised framework needs to take this into consideration. We do not question the baseline principle that ensures that hosting services without knowledge of illegalities, or those who once aware of them have acted expeditiously to remove it, should benefit from a safe harbour.

In our view, a digital services act should seek to develop a framework that allows for the identification of hosting service providers are “systemic” in nature to determine when stricter liability for hosting content is warranted and desirable, possibly by developing a threshold-based system (eg. income or users) or using existing instruments under competition law (market dominance).

This would help address the broader concern of ensuring appropriate duty of care by “systemic” hosting service providers who repeatedly fall short of expectations when it comes to self-regulatory initiatives (eg. EU codes of conduct on hate speech, disinformation, and IPR enforcement). It follows that more regulation, possibly through co-regulation, may be a better way forward.

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Stricter liability should still reflect the fact that hosting providers do not produce content. Therefore, they should not be primarily liable or subject to rules governing content production. At the same time, it is also clear that insufficient incentive at a basic level to tackle illegal and harmful content. We therefore stress the need to find a middle ground approach that reconciles these dynamics.

In doing so, we propose that a possible way forward as regards the liability regime for “systemic” platforms. We believe their ability to benefit from a safe harbour under the existing framework for secondary liability should become conditional on meeting clear duty of care obligations. External auditing obligations should serve to verify whether such duties have been diligently carried out.

A “Digital Services Act” is therefore a good opportunity to address these fundamental issues. We note that large platforms argue that the lack progress in tackling illegal and harmful content is hindered by the absence of a “Good Samaritan” clause, as found in the US model. However, nothing in the US experience indicates that such a provision delivers tangible results in creating a safer online space.

Instead, we believe that large online platforms could better operate in the interest of a safer European online space if a digital services act would look to further harmonise notice and takedown practices, impose transparent external auditing obligations on systemic platforms in relation to their duty of care, and ensure good incentive to develop supporting technology to tackle problematic content.

In our view, the duty of care activities of larger, systemic platforms should also be addressed horizontally in the digital services act to address ongoing shortcomings in their level of ambition and implementation. It is in that context important to mandate measurable standards in developing better accountability tools when it comes to key performance indicators and performance reviews.

It is also desirable to consider whether including media in the scope of a digital services act is desirable as horizontal legislation could undermine sector-specific legislation and harm effective self-regulation, especially when it comes to the press sector. In general, our reasoning departs from the viewpoint that the media already has effective mechanisms in place to deal with content-based issues.

In addition, the media sector is sensitive to regulation due to its specificities and responds differently to horizontal regulation than other sectors of the economy. Therefore, the scope of a future act should explicitly exclude media companies, and the content they produce.

Last but not least, important questions remain to be reflected upon with more conviction as regards the notion of editorial control. As hosting platforms increasingly

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exert such control, even if this is largely confined to the curation of content rather than its production, this is becoming a pressing question. We do not necessarily believe that the degree of editorial control should determine liability.

However, a high degree of editorial control should in theory lead to the presumption of knowledge of content, which in turn has liability implications. For instance, many large platforms (eg. Facebook and Google) increasingly hire professional journalists to mix algorithmic news distribution with handpicked news content. This has important implications for how citizens engage in democratic processes.

We are closely following these developments and the main questions arising are important for democracy as news is increasingly consumed online and delivered via algorithms. Our sector has traditionally had editorial responsibility to make sure that citizens are informed. We are therefore assessing what the implications for platforms hosting news content may be.

In any event, we believe that in the longer-term it would be beneficial to address the growing role of algorithms in the digital space by way of ensuring that policy makers and regulators develop more capacity in the field. Given the effects of algorithms on fundamental rights, it is clear to us that the practices of responsibility and auditing need to be fostered in this area.

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