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IMPACT ASSESSMENT ON ILLEGAL CONTENT ONLINE STAKEHOLDER CONSULTATION: MEMBER STATES

Introduction:

Following the initial discussion with Member States at the EU Internet Forum (EUIF), the Commission would like to get more detailed views on possible actions to more effectively tackle terrorist content online as part of the ongoing work on the Impact Assessment on Illegal Content Online. These views will complement the Open Public Consultation (OPC, available [here](#)), as well as the data collection exercise based on the table of indicators.

The Commission started work on an impact assessment outlining potential problems, objectives and options in the attached Inception Impact Assessment (IIA). As part of the options to be considered, the Commission will analyse the current situation (baseline scenario) as well as actions to reinforce the voluntary measures as well as possible sector-specific legislation (including in particular on terrorism content online) as well as horizontal legislation applicable to all types of illegal content.

The measures presented in the Inception Impact Assessment¹ are initial ideas, and additional actions and options could be considered. The actions to be undertaken would be mainly addressed to online platforms, but could also require further action by Member States.

Member States are kindly requested **to reply to the questions below and provide any additional considerations in writing by 13 June 2018**. The results of this questionnaire will be presented and discussed at the **forthcoming meeting on 15 June**. In parallel, the European Commission's Directorate-General for Communications Networks, Content and Technology convened its expert group under the eCommerce Directive also feeding into the work of the impact assessment.

¹ https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-1183598_en

Questions

I. Problem and baseline scenario

1. What are the **provisions, arrangements etc under national law addressing the removal of terrorist content² for preventive purposes** (e.g. do you have duty of care provisions³, specific notice and action procedures, provisions on transparency of companies' actions in relation to the removal of terrorist content, provisions on safeguards, etc.)? Please indicate below – where relevant – the applicable laws or other legal documents.

Notice and action procedures	Art. 33 + Art. 60 du Code de procédure pénale
Transparency rules	
Safeguards	

Do you have **specialised entities that notify/refer terrorist content** to hosting service providers? What is the **legal basis and benchmark for notification/referral** (illegality of content, terms of service of hosting service provider)?

Yes, Luxembourg has a national Internet Referral Unit (IRU) within the Grand-ducal Police. The content is referred through the EU IRU at Europol.

Do you consider them **sufficient** in terms of preventing accessibility of terrorist content? What are the limitations?

N/A

² For the purpose of this questionnaire, "terrorist content" is defined as in the Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online (C(2018) 1177 final).

<https://ec.europa.eu/digital-single-market/en/news/commission-recommendation-measures-effectively-tackle-illegal-content-online>

³ See recital 48 of the Directive on electronic commerce

<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32000L0031>

2. Do you consider that the **amount of terrorist content online** in the last [two] years has overall

	Decreased substantially
X	Decreased
	Continued at the same level
	Increased
	Increased substantially

Please indicate the basis for your assessment. What do you think has contributed to this trend?

Our assessment is based on the decreasing number of referrals made by the national IRU.

We believe that the detection and removal efforts taken by the consortium companies in the framework of the EU Internet Forum have contributed to this trend.

3. Do you see a **risk that removal by companies** on their own initiative could **interfere with investigations or intelligence gathering**? What would be the **mitigating measures** necessary to address any such risks?

Companies should be encouraged to remove terrorist content online. Nonetheless, removal of terrorist content due to proactive measures could indeed interfere with investigations or intelligence gathering. In order to ensure that digital evidence is appropriately stored for investigation or analytical purposes, companies using automated detection tools should be obliged to ensure transparent reporting mechanisms relating to removed content to competent authorities or through the EU IRU.

In this context, it should also be stressed that terrorist content prevented from being submitted due to automatic detection might undermine the understanding of terrorist activities online. Effective cooperation between online service providers and competent authorities is key in this field.

4. Do you see a risk of **erroneous removal** by platforms of legal content (e.g. removal of content misidentified as illegal, removal of content disseminated for research, educational or journalistic purposes, "over-removal")? Are you aware of **any cases** of over-removal? What would be the **mitigating measures** necessary to address any such risks?

We are currently not aware of any such cases. Appropriate safeguards are needed in order to prevent the unintended removal of content which is not illegal.

II. Non regulatory options: reinforcing voluntary action

1. Do you think that the work under the **EUIF** as reinforced and complemented by the **Recommendation** is **sufficient** action at EU level to effectively tackle terrorist content online?

Whilst important progress has been made by the consortium companies in the framework of the EUIF, it needs to be stressed that not all relevant companies are participating in the Forum. As the Recommendation is not legally binding for these companies, the effectiveness of the actions are limited.

2. Do you consider that the **EUIF's work should be further developed** in order to reinforce action at EU level to tackle terrorist content online e.g. through a Memorandum of Understanding in which companies and possibly Member States would sign up to concrete commitments (see possible measures below)?

Yes

3. Which of the following **possible elements** should in your view be addressed and further developed within a voluntary approach? Please indicate the need from a scale from 1 (unnecessary) to 5 (very necessary)

3	More specific objectives for companies' actions (e.g. request a certain percentage of content taken down within a certain time limit)
4	Stronger commitments in terms of internal processes and resource allocation (e.g. to have certain procedures in place, conduct risk assessments and establish mitigating procedures, content of Terms of Service, training, capacity to detect content in different languages)
4	Standardised working arrangements between companies, law enforcement and Europol to enhance understanding of how platforms are abused, to improve referral mechanism, avoiding unnecessary duplication of efforts, facilitating requests from law enforcement agencies in relation to criminal investigations ⁴ .
3	Stronger commitment on specific proactive and preventive measures (i.e. further development and participation in industry-led schemes, such as the database of hashes developed in the context of the EUIF)
5	More detailed requirements on transparency and reporting
3	More detailed requirements to companies on safeguards against over-removal
2	Establishment of an external audit/monitoring mechanism
3	Establishment of contact points, both in companies and Member States, to

⁴ See point 40 of the Recommendation.

	facilitate referrals (and feedback) and requests from law enforcement authorities in relation to criminal investigations.
4	Additional support (e.g. by Europol) to referral capacities in Member States

4. What other additional measures could be developed within a reinforced voluntary approach?

5. Which further actions could be taken to secure participation from those **companies** who have **not engaged**?

We consider that participation of those companies not willing to engage is difficult to achieve within a voluntary approach.

6. Which further actions could be taken to **support small companies** and start-ups in tackling terrorist content online effectively? Should these be taken by larger companies, public authorities or both?

Support for small companies is indeed necessary as they have limited resources and expertise to tackle terrorist content on their platforms. Therefore, the larger platforms should support the smaller ones to increase their resilience and make it harder for terrorist to exploit their platforms by sharing expertise and technological solutions among each other.

A national campaign could raise awareness among the smaller companies in order to become more active in tackling terrorist content online.

7. Do you think that the voluntary approach is **effective** and flexible enough to ensure that companies continue their efforts in the **long term**? Please indicate with which statement you would agree with:

	Yes
	No, it should be reinforced as presented above to obtain sufficient guarantees
X	No, it should be reinforced via legislation

III. Legislative options

1. Why would you consider **legislation necessary at this time**? What would be the concrete benefits? What **risks** could legislation entail?

Although the recent non-binding initiatives show promising results, legislation would have the benefit of establishing binding obligations for all hosting service providers in the EU. Moreover, a common legislation would be a means to overcome the current fragmented legislation at national levels.

It should be noted that legislative measures risk undermining the important progress made through the self-regulatory efforts taken recently by the companies in the context of the EUIF. Legislation could also entail administrative hurdles and charges. Furthermore, this competitive disadvantage could entail a risk of delocalisation of online service providers outside of the EU.

2. What should be the **material scope of legislation** (i.e. how should terrorist content be defined)? Do you consider that covering material inciting to commit terrorist acts (Article 21/Article 5 of the Terrorism Directive⁵) is sufficient or should the dissemination of material pursuing other terrorist purposes be included as well?

Material the dissemination of which pursues the following objectives should be included in legislative measures:

x	Recruitment for terrorism
x	Providing training for terrorism
x	Terrorist financing
	Other, please elaborate:

To what extent should material produced by UN/EU designated terrorist organisations be included?

N/A (the scope of the question is not clear)

3. Which **measures** (based in particular on the elements mentioned in the Inception Impact Assessment) do you consider as **necessary elements of legislation** to be impactful? Please indicate the need from a scale from 1 (unnecessary) to 5 (very necessary)

5	Definition of terrorist content (<i>see question above</i>)
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⁵ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017L0541>

4	Requirements regarding the companies' terms of service
4	General requirement for companies to put the necessary measures in place to ensure that they do not host terrorist content (complemented by self regulation)
4	Specific requirements in terms of action upon referral (including time limit of one hour)
3	More explicit and detailed obligations to deploy specific proactive measures (including automatic detection)
4	Specific requirements to cooperate with other hosting service providers to avoid the dissemination across platforms
1	Sanctions in case of non-compliance
5	Exchanges of information with law enforcement to limit any interference with investigations and to feed into the analysis of terrorist material
1	Clarify that companies engaged in proactive measures benefit from the liability exemption (Good Samaritan clause)
1	Requirement to Member States to increase referral capabilities, quality criteria for referrals and for referral entities in Member States to provide relevant support to companies in case of doubt about qualification as terrorist content (e.g. through points of contact)
3	Nomination of point of contact within Companies
4	Reporting obligations for companies ⁶
3	Transparency requirements for companies vis a vis their users ⁷
3	Compulsory safeguards, such as the ones in the general chapter of the Recommendation
2	The establishment of an external audit/monitoring mechanism for assessing compliance of companies.

Do you consider that minimum requirements could usefully be complemented by self-regulatory measures? And if so, which ones?

Yes, legal minimum requirements could be complemented by a code of conduct to be observed by the employees.

4. What **other additional measures** could be developed within legislation?

⁶ See point 41 of the Recommendation.

⁷ See points 16 and 17 of the Recommendation.

5. What should be the **personal scope of the legislation**? Only hosting service providers within the meaning of the Directive on electronic commerce or other service providers?

Only hosting service providers within the meaning of Directive on electronic commerce.

6. Do you think **smaller companies** should be covered by all obligations or should they be exempted from some of the obligations (e.g. proactive measures) but obliged by others (e.g. time-limits after referral)? Which companies could be partially exempted and from which obligations?

In order to avoid distortion of competition, the legal obligations should be binding to all the companies.

7. How do you see the **impact on fundamental rights** of the above-mentioned measures and which safeguards would be necessary to avoid undue interference with fundamental rights?