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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.

Questions

I. Problem and baseline scenario

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

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	NO
Transparency rules	NO
Safeguards	NO

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)?

NO.
We do not have a mechanism in place. In case of illegal content, according to a court decision, the provider has the obligation to remove it.
In Romania, the measure of blocking or removing illegal content online may be enforced by a decision of the administrative authorities or of the courts of law.

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

We appreciate the usefulness of a legislative adjustment, which allows direct cooperation with and among the providers to identify and remove terrorist content online.

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

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

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

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>

In recent years, companies and authorities have taken steps to remove or disable access to terrorist content online. The online environment offers unlimited opportunities to publish terrorist content (including Darknet, DeepWeb). The terrorists use very dynamic and flexible tools, that they can easily move from an IT infrastructure to another.

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?

It could interfere. The companies should preserve all suspected illegal material and all the details related to that material prior to the removal, in order to make it available for competent authorities.

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 not aware of any cases of erroneous removal by platforms of legal content. If such an error occurs, we consider it as appropriate to have in place procedures, involving the human factor for additional evaluation and, in case the materials prove to be legal, the possibility to restore them should exist.

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?

Taking into account the dynamics of technological evolution, we consider necessary to continuously update the measures for combating illegal online content. Also, their application and further update might be implemented by agreements between companies and MS' institutions.

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)
5	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)
5	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 .
4	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)
3	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
5	Establishment of contact points, both in companies and Member States, to 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?

To encourage the cooperation between the providers to mutually raise the awareness.

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

The adoption of mandatory legal provisions could secure participation of all companies.

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?

It could be useful that public authorities and larger companies support small companies by providing training (lessons learned, best practices and ways forward) and logistics in order to better detect and combat illegal online content.

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

⁴ See point 40 of the Recommendation.

	No, it should be reinforced via legislation X
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III. Legislative options

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

We consider necessary to define illegal online content in the MS' legislations, as well as to stipulate the relevant obligations imposed upon the providers of online services.

One of the risks lies in the non-disclosure of elements that may be related to online terrorist / extremist content, in which case the authorities may not take legal actions.

Another risk is the ambiguous definition of the obligations imposed upon online service providers. This could have as a result their disengagement in preventing and combating illegal online content.

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?

It should include all types of materials identified and produced by terrorist organisations, listed by UN/EU.

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>)
5	Requirements regarding the companies' terms of service
5	General requirement for companies to put the necessary

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

	measures in place to ensure that they do not host terrorist content (complemented by self regulation)
5	Specific requirements in terms of action upon referral (including time limit of one hour)
5	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
5	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
4	Clarify that companies engaged in proactive measures benefit from the liability exemption (Good Samaritan clause)
4	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)
5	Nomination of point of contact within Companies
5	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
4	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?

NO.

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

Putting forward a Regulation setting out the measures to tackle illegal online content in order to level the legislation across the EU MS.

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?

We consider that the legislation should envisage all companies providing online services or performing activities in the online environment.

⁶ See point 41 of the Recommendation.

⁷ See points 16 and 17 of the Recommendation.

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?

Smaller companies should be covered by all obligations.

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?