INTERMEDIARIES' LIABILITY AND FREEDOM OF EXPRESSION

The right to freedom of expression is currently not protected effectively in the context of the notice and action mechanisms which have emerged following the adoption of E-Commerce Directive 2000/31. The Directive applies to any illegal or infringing content and envisages liability exemptions for three groups of Internet intermediaries depending on the type of service they provide: mere conduit, caching, or hosting. By providing the incentive of a liability exemption, states ensure cooperation of private entities in policing online content. The EU legal framework currently lacks any safeguards against arbitrary conduct and a number of organizations, including the Council of Europe, have expressed concerns about the possible "chilling effect" on free speech.

The ongoing review of the Directive is a good moment to address the problem. Moreover, policy makers face new challenges, such as different forms of misinformation, commonly referred to as "fake news".

Contemplating the adoption of an appropriate regulation "toolkit", Aleksandra Kuczerawy (Safeguards for freedom of expression in the era of online gatekeeping, 2018) draws attention to the practical measures that EU policy makers should consider in order to better protect freedom of expression in the context of notice and action. She suggests the following steps to be undertaken:

1. Passing a formal legal instrument. Rules established through jurisprudence, even though generally accepted by the ECtHR, have a limited scope. In order to achieve a sufficient degree of harmonization, the EU should adopt a Regulation on safeguards in notice and action mechanisms.

2. Formulating a clear and predictable law. In the rapidly developing IT environment, it is necessary to update intermediaries' classification from time to time.

3. Abolishing the distinction between active and passive hosts. The EU legislature should clearly include the active hosting providers in the scope of the exemption, under the condition that they are not the creators of the content and have no knowledge of its illegal character.

4. Providing a clear procedure describing the notification mechanisms, the order of events, and steps that have to be taken by the involved parties.

5. Assuring horizontal application of safeguards that apply to any type of content or activity endangering the protected values and interests. Certain types of values can be considered worthy of special protection (e.g., protection of minors or the prevention of serious harm) and may require the intermediary to take extra measures against "manifest illegality" (when the content is easily recognizable as such by a diligent operator). Not abiding by this rule should be the only situation when an intermediary can be held liable for not removing content without a court order.

6. Designing notice and action mechanisms that limit the interference with the right to freedom of expression to the necessary minimum. In addition to prevent excessive interference, the use of temporary measures that allow for certain removal or blocking measures to be taken pending resolution of a conflict can be envisaged.

7. Respecting procedural fairness. For example, notice and action procedures should include a mandatory notification to the content provider and allow the content provider to file a counter-notification. This step also includes punishment for misrepresentation, and an effective appeal mechanism.

8. Providing for judicial redress as an integral part of the rule of law. An injunctive relief should always be possible, even if there is no specific procedure introduced at the national level.

The functioning of these rules in practice should be monitored by gathering of evidence on the implementation and application of the law through transparency reports submitted by both intermediaries and states.

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