

INCEPTION IMPACT ASSESSMENT

Inception Impact Assessments aim to inform citizens and stakeholders about the Commission's plans in order to allow them to provide feedback on the intended initiative and to participate effectively in future consultation activities. Citizens and stakeholders are in particular invited to provide views on the Commission's understanding of the problem and possible solutions and to make available any relevant information that they may have, including on possible impacts of the different options.

TITLE OF THE INITIATIVE	<i>Measures to further improve the effectiveness of the fight against illegal content online</i>
LEAD DG (RESPONSIBLE UNIT)	DG CNECT, DG HOME, DG JUST, DG GROW
LIKELY TYPE OF INITIATIVE	To be determined
INDICATIVE PLANNING	<i>Possible measures in Q4 2018</i>
ADDITIONAL INFORMATION	

The Inception Impact Assessment is provided for information purposes only. It does not prejudice the final decision of the Commission on whether this initiative will be pursued or on its final content. All elements of the initiative described by the Inception impact assessment, including its timing, are subject to change.

A. Context, Problem definition and Subsidiarity Check

Context

The availability and proliferation of illegal content online remains an important public policy and security concern in the EU, notably with regards to the dissemination of terrorist content, as well as of illegal hate speech, child sexual abuse material, or illegal commercial practices and infringements of intellectual property rights, selling of illicit drugs, counterfeits or other illicit goods.

Following a series of terrorist attacks in the EU and the continued availability of terrorist content online, 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 last year. Similarly, the European Parliament, in its resolution on Online Platforms of June 2017 urged the platforms¹ concerned "*to strengthen measures to tackle illegal and harmful content*", and called on the Commission to present proposals to address these issues. In its work programme for 2018, the Commission announced that it would "*if necessary [...] propose legislation on removing terrorist content*".

The European Commission responded to the challenge of illegal content online in a variety of ways. In particular, it issued a Communication on Tackling Illegal Content Online COM(2017)288, and more recently in the Recommendation on Measures to effectively tackle illegal content online C(2018)1177. In these instruments, the Commission has encouraged Member States and service providers to act in this regard and, in particular, urged the latter to take greater responsibility for the illegal content they store. The Recommendation contains specific measures that online platforms should put in place to ensure that detection and take-down of illegal content is further improved while protecting fundamental rights online.

In the Communication, the Commission also committed itself to "*monitor progress and assess whether additional measures are needed, in order to ensure the swift and proactive detection and removal of illegal content online, including possible legislative measures to complement the existing regulatory framework*".

The Recommendation is another step in a consistent approach to intensify action against illegal content online. It includes recommendations applying to all types of illegal content and others specifically focussing on the urgent need to tackle online terrorist content. The objective of this Recommendation is to spell out more precisely and operationally which actions the Commission encourages Member States and online platforms to take, building on and further detailing the guidance previously issued in the Communication and the commitments already made by a number of platforms. It will also help the Commission to assess the pace and scale of progress based on information from Member States and service providers.

¹ Covered in the Recommendation by the definition "*online service providers*".

Besides these recent non-binding initiatives, the relevant legal framework includes the general provisions set out in the e-Commerce Directive, the Directive on Combatting Terrorism, the Directive against Child Sexual Abuse, the Directive on the Enforcement of Intellectual Property Rights, as well as the proposed measures in the context of the revision of the Audio-visual Media Services Directive (AVMSD), and the proposal for a Directive on Copyright in the Digital Single Market.

These existing and proposed legislative measures have been complemented by a range of non-legislative initiatives which show promising results, such as the work of the EU Internet Forum on terrorist content, the Code of Conduct on Countering Illegal Hate Speech Online, or the European Strategy for a Better Internet for Children, the WePROTECT Global Alliance to end child sexual exploitation online, the Joint Action of the Consumer Protection Cooperation Network Authorities concerning the protection of consumers on social media companies, and the guidance on the Directive on the Enforcement of Intellectual Property Rights, as well as Memoranda of Understanding e.g. against counterfeit goods in the area of protecting intellectual property. Such efforts might be complemented by other similar actions, e.g. to improve the safety of products sold online.

More specifically, following commitments undertaken in the EU Internet Forum on proactive measures and swift responses to referrals from the Internet Referral Unit in Europol, or commitments under the WeProtect Global Alliance against child sexual abuse online, online platforms participating in these initiatives have intensified their efforts to tackle illegal content online. More concrete action is however needed to improve outcomes against illegal content online, particularly on the most pressing issue of terrorist content.

Problem the initiative aims to tackle

The EU is committed to strong protection of fundamental rights and to creating a secure space for everyone to express themselves, to obtain information, to socialise and to participate. The dissemination of terrorist content, including 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, along with other types of illegal content which might be stored online, and endanger this objective. While measures to counter the dissemination of such content may have certain commonalities, the different nature and context of dissemination of specific types of content and of the importance of context to recognise their illegal nature require careful consideration.

The presence of illegal content online has serious negative consequences for users, for other affected citizens and companies, and for society at large. In particular, the availability of terrorist material online and the spreading of such content is a clear and present threat to security and safety and require urgent and specific action.

The recent results of the voluntary initiatives, notably in the case of the Code of Conduct on Countering Illegal Hate Speech Online, show progress in the rate and speed of removal of illegal content, and that online platforms have intensified their self-regulatory efforts to better detect, identify and remove illegal content also through cooperation with authorities (e.g. referrals to online service providers via Europol and national Internet Referral Units; "notice and action procedure" dedicated to CPC Authorities for the reporting of illegal commercial practices). In addition, the number of platforms that participate in the voluntary processes has increased over time.

Despite progress, illegal content continues to be uploaded and disseminated through online platforms with relative ease. In the light of their central role and the technological means and capabilities associated with the services that they provide, a range of online service providers have particular societal responsibilities to help tackle illegal content disseminated through the use of their services. In addition, when these platforms do implement voluntary measures (e.g. for content moderation and filtering, repeat infringers' policies or through partnerships with trusted flaggers and law enforcement authorities) the measures taken are not always consistently and transparently reported.

The Impact Assessment will analyse in more detail the available evidence and the underlying drivers, including the size and scale of the problem, as well as those drivers related to the legal framework and the businesses' behaviour and incentives. Some of these drivers may include the lack of awareness of the problem or means to intervene (especially for smaller platforms), fragmentation of the legal environment, and concerns about the legal and reputational risks involved in taking down users' content and loss of the liability exceptions of online service providers. It will assess as well potential differences between platforms intermediating the sale of goods and the provision of subsequent services that are often provided offline. The evidence gathered will also identify and attempt to overcome challenges in obtaining data on the overall volume of illegal content available online and removed in the EU. Furthermore the Impact Assessment will also take stock of what is known about online platforms' business models and about the effectiveness of fast-moving technological tools used for content filtering.

A preliminary analysis of the problem includes the following components, subject to further analysis:

- **The need for faster and more effective detection and removal of illegal content**

As far as reactive action is concerned (illegal content taken down upon notices or referrals), progress has been achieved in the various voluntary dialogues, but the pace and degree of progress varies between platforms and types of content, with large platforms tending to respond more quickly. Still, a clear margin for improvement exists. As far as terrorist content is concerned, for example, the response rate to referrals from the EU Internet Referral Unit varies from hours to days to longer. A related problem is that some companies – for various reasons – do not respond at all to referrals of terrorist content.

In addition, proactive measures and in particular automated tools to detect illegal content or prevent it from being re-uploaded, are not always used as and where appropriate. This significantly limits the possibility of achieving quicker and more durable results in reducing the amount of illegal content online and preventing it from spreading quickly across platforms. According to the Recommendation, such technologies should be used for detecting and preventing the re-upload of certain types of illegal content, in particular terrorist content, and can also be appropriate in other situations, for instance to remove known illegal content automatically when contextualisation is not necessary (such as child sexual abuse materials). They should be proportionate and specific and be subject to adequate safeguards depending on the type of content or measure at stake, in particular in terms of need for final human review before removal. In particular, to address the issue of removed illegal content being too easily re-uploaded, the industry has been developing hashing or fingerprinting technologies to help address this problem (including in the field of copyright, child sexual abuse and terrorist material²). The effectiveness, limitations and governance of such technologies, which can be very effective when contextualisation is not essential, is not well established.

Participation in the current voluntary schemes is also limited to a small number of mostly big players and it is unclear to what extent these tools are being fully utilised by both big and small platforms. This may limit the overall effectiveness of the technologies, could focus vulnerabilities on platforms that are not part of the collaborative schemes, and could also create competitive disadvantages for smaller players as well as for technology service providers. Smaller companies are also reported to have a problem of capacity to identify and remove illegal content which may be expensive in technology and human resources.

More generally, the Impact Assessment will analyse relevant differences between various types of illegal content (e.g. between illegal goods on one hand and services provided offline on the other) to assess proportionate responses by the online platforms concerned.

- **Need to avoid that legal content is erroneously taken down**

The longer illegal content stays online, the more damage it can do. However, a regime that encourages removal without further safeguards can be harmful to the rights and freedoms of users, and could be potentially open to abuse and unintended removal of legal content. A careful balance is therefore needed between measures to tackle illegal content and essential safeguards to promote and protect fundamental rights, such as freedom of expression and information, the protection of personal data, the freedom to conduct a business, and access to justice.

- **Need for transparency and sufficient reporting**

There are noticeable gaps and inconsistencies in the information provided by the online platforms concerned on the content removed through various mechanisms and the speed of removal even among platforms popular in Europe. Stakeholders also report diverging information as regards the speed of removal, in particular in the field of intellectual property rights. The Impact Assessment will assess the available evidence on the amount of content removed, the speed of removal, as well as on reporting practices. Progress on ensuring better reporting in the context of the ongoing dialogues, as well as of the Recommendation, will also be taken into account as part of the assessment.

- **In addition, the IA will analyse the evolving legal fragmentation in the field of notice-and-action procedures that risks harming the Digital Single Market and reducing the effectiveness of the fight against illegal content**

² The Database of Hashes is a tool which several companies have developed under the EU Internet Forum in order to prevent the dissemination of terrorist content across platforms. Those companies participating have agreed to share the hashes of terrorist content found on their platforms into a shared database, so that others can check that they are not storing the same content and can quickly identify it if there are attempts to re-upload the content.

Different approaches to removing illegal content exist in the EU depending on Member States, content category, or type of online platform. Some Member States have adopted legislation to stipulate more specific obligations on operators in terms of takedown of content³. The risk of fragmentation across the EU could in turn make it more difficult for the companies to respond to multiple but different requirements from national legislation.

The evidence underpinning this problem lies in diverging rules and case-law at national level, and will be assessed further with information from studies, as well as through evidence collected in the context of the voluntary dialogues.

Basis for EU intervention (legal basis and subsidiarity check)

The cross-border nature of the Internet through which illegal content is disseminated, the existing fragmentation on notice-and-action procedures and related measures, the diverging jurisprudence within and across Member States justify an analysis of the need for EU action.

The legal basis for a legislative proposal would depend on the scope of the proposal and could therefore be e.g. Article 83 TFEU (in case of proposals in relation to the Terrorism Directive), or Article 114 TFEU (internal market) where proposed legislative changes could focus rather on the functioning of the internal market.

B. Objectives and Policy options

The overall objective is to reduce the availability of illegal content online in conformity with the existing legal framework - in particular where it is justified to protect the security of EU citizens, while ensuring that measures to remove or disable access to allegedly illegal content do not also lead to unintended take down of legal content limiting the ability of users in the online world to express themselves freely. The intention is to make it harder for illegal content to be uploaded and disseminated across platforms and for users to easily access any such content, while improving the regulatory framework for the provision of information society services.

Baseline option: Comprehensive actions supporting online platforms combined with monitoring of the effects given to the Recommendation by Member States and online platforms and of the results under voluntary dialogues.

The Commission will monitor the effects given to the recommended measures set out in the Recommendation C(2018)1177 and in the Communication on Tackling Illegal Online Content. At the same time, potential legal fragmentation by national rules will be monitored through the Commission's enforcement powers (in particular as regards the country of origin principle).

For platforms engaged in voluntary dialogues with the Commission, the monitoring of results would be carried out also in the framework of those dialogues (i.e. the EU Internet Forum for terrorist content, the Code of Conduct on Countering Illegal Hate Speech, etc.). Under this option, the monitoring can be complemented where relevant by sector-specific recommendations related to certain types of illegal content at issue in the respective dialogues.

The baseline option will also include further efforts to encourage smaller companies to implement the various sets of general and sector-specific recommendations, as well as a set of actions dedicated to limit the burden for those smaller companies to identify and remove illegal content. A preliminary list of such actions could include (i) R&D support, (ii) access to database or other technological tools with the possibility of developing the necessary tools to remove illegal content more quickly and more effectively, (iii) training and other types of assistance.

In parallel, the possibility of further incentivising participation in such voluntary processes could be explored as part of this option, in cooperation with other industry partners (business associations, advertisers, etc.).

Option 1: Sector-specific legislation(s) on certain type(s) of illegal content, in particular terrorist content

This option would consist of binding obligations in relation to defined categories of illegal content, such as terrorist content, based in particular on considerations such as seriousness of their impact and urgency to act.

³ For instance, during the transposition of the E-commerce Directive some Member States introduced specific provisions on notice-and-action: Finland (Act No 2002/458); France (Law No 2004-575 of the 21 June 2004); Hungary (Act CVIII of 2001), Lithuania (The decree of 22 August 2007, No 881, based on based on the Law Nr. X-614); United Kingdom (Regulations 2002 S.I. 2002/2013), Spain (Royal Decree 1889/2011 and Law 21/2014); Sweden (Act on Responsibility for Electronic Bulletin Boards). More recently, Germany has introduced the NetzDG (Law on enforcement by social networks), and some other Member States has expressed their willingness to legislate (Poland, Belgium).

This could include imposing binding obligations based on the recommendations already issued by the Commission, notably those set out in the Recommendation C(2018)1177 and in the Communication on Tackling Illegal Online Content, taking also into account the more specific actions set out in voluntary dialogues (including inter alia measures related to specific proactive measures to detect certain types of illegal content online and prevent its re-upload, measures to ensure swift removal upon notice or referrals, provisions on trusted flaggers, regular and transparent reporting to law enforcement authorities on illegal content removed), in full respect of the existing acquis, and with appropriate safeguards in place.

It could also include an encouragement for online platforms operating in the EU market to participate in co-regulatory frameworks (as the follow-up of certain actions will necessarily be self-regulatory).

Option 2: Horizontal legislation addressing targeted issues

This would consist of a legislative instrument to follow up on the measures defined in the Recommendation, which could be complemented as appropriate by additional measures. This could include:

- harmonised rules to establish and increase the effectiveness of notice and action procedures: for instance possible binding notice and action procedures, counter-notices, obligation to appoint a point of contact in the EU, transparency rules, safeguards against over-removal, timeframes for certain types of content (e.g. terrorist content), defined role for trusted flaggers (option of fast-tracking their referrals). Sanctions in case of non-compliance and abuse could also be proposed.
- Possible measures related to proactive actions by the platforms concerned, including the use of automated tools for the detection and identification and preventing the re-uploading of illegal content, such as the use of automatic hashing databases or the use of specific monitoring tools (e.g. software to identify certain specific types of content could be explored, under defined conditions compatible with the e-Commerce Directive and in full compliance with the rules on the protection of personal data). Robust safeguards would also have to be put in place to ensure that such measures do not lead to removal of legal content, without prejudice to the possibility for these platforms to set and enforce their terms of service.
- Other targeted measures related to issues, including 'duty of care', mentioned in the Communication on Tackling Illegal Content could also be considered within the confines of the e-Commerce Directive.

Various combinations of the above-listed measures could be considered (also in respect of a more sectoral focus as in Option 1), depending on the conclusion of the evidence gathering and consultation process, in particular the progress made on the basis of the Recommendation and other relevant guidance issued by the Commission. In particular, the actions set out under the baseline option could be cumulated with Option 1 or 2.

C. Preliminary Assessment of Expected Impacts

All options address the policy objectives in diminishing of the spread of illegal content online and promoting and protecting fundamental rights. In addition, Options 1 and 2, involve wide obligations on online service providers, and should thus lead to compliance of a broader number of service providers than the self- and co-regulatory measures in place (under the Baseline). Both Options 1 and 2 would prevent regulatory fragmentation within their respective scopes. In the case of Option 2, the risks of an unfit approach to the specificities of the different types of illegal content would need to be mitigated by providing sufficient flexibility and ensuring proportionality, and by setting out appropriate governance principle and safeguards.

Likely economic impacts

Supporting measures targeting especially smaller companies, as presented under Option 1, are expected to have a positive impact on the service providers' capacity to tackle illegal content while relieving them of costs. At the same time, they are expected to have a positive impact on the market, allowing smaller companies to compete and bring new services in full security. The presence of illegal content negatively affects the trust and confidence of users of the services in question. Options on technology neutrality and interoperability need to be further assessed.

Options 1 and 2 are expected to have a positive effect on the Single Market through additional legal clarity and certainty, thus limiting compliance costs. However, certain obligations on companies may imply costs in technological developments and/or acquisition, infrastructure expenditure and expert staff recruitment and training which need to be further analysed against compliance costs models, in particular in what concerns potential burdens on smaller companies. This includes the impact on the development of the digital single market and the setting up and scaling up of new, innovative digital businesses. However, supporting measures and technology and expertise sharing across platforms could limit this potential burden. At the same time, such measures will help companies to become more resilient against illegal content through more effective and streamlined procedures,

<p>which could also lead to costs savings. They are also expected to have a positive reputational impact by promoting consumer confidence in their services.</p> <p>The economy would overall benefit from increased security.</p>
<p>Likely social impacts</p> <p>The proposed measures would help protect online users – particularly the young and vulnerable – and reduce for example the likelihood of these individuals being groomed or radicalised online, as well as generally creating more confidence in digital services and activities.</p> <p>Beyond Internet users, these measures will protect citizens in general (e.g. children for sexual abuse and their families, or any individual or community who might be object of hate speech). By increasing security, this initiative will have a positive impact on the society as a whole.</p>
<p>Likely environmental impacts</p> <p>No environmental impacts are foreseen at this stage.</p>
<p>Likely impacts on fundamental rights</p> <p>Respect for the fundamental rights as enshrined in the EU Charter of Fundamental Rights is of particular importance when addressing the challenges associated with tackling illegal content online. The options considered in the Impact Assessment will aim at reinforcing the protection of the rights of human dignity and life, the right to freedom of expression and of freedom of thought, conscience and religion, the right to property, including intellectual property, the rights to protection of privacy and personal data, non-discrimination as well as the rights of the child and freedom to conduct a business, including the freedom of contract of online service providers.</p> <p>Therefore, account should be taken of the fact that limits between illegal content and content which is objectionable is sometimes blurred and may depend on context; in particular when a regime encourages swift deletion, online platforms might err on the side of caution and tend to delete content without further consideration; for this reason, expeditious action needs to be accompanied by strong safeguards, to avoid abuse and wrong attributions of illegality. Measures adopted by the EU and by Member States to ensure an effective takedown of illegal content need to be carefully assessed against all applicable fundamental rights.</p>
<p>Likely impacts on simplification and/or administrative burden</p> <p>Transparency reporting at regular intervals on content identified and removed entails burdens on the online service providers concerned. In addition, a one-off cost for adapting the reporting system and of identification of illegal content would have to be supported by those providers.</p> <p>However, streamlined procedures for processing and reporting notices and referrals can be expected to lead to an overall reduction of administrative burden, through a limitation of fragmented reporting channels. This will be assessed in the Impact Assessment.</p> <p>Measures improving industry action in removing illegal content online could also make law enforcement referral mechanisms more effective and less resource-intensive (for instance by avoiding the need to notify the same content multiple times or the need to monitor the follow-up given to individual notices) thus freeing resources for investigative purposes.</p>
<p>D. Evidence Base, Data collection and Better Regulation Instruments</p>
<p>Impact assessment</p> <p>An impact assessment will be prepared to support the preparation of this initiative. It will look at the potential economic, social and environmental impacts of this initiative as well as of its potential impacts on fundamental rights.</p>
<p>Evidence base and data collection</p> <p>The Commission will continue monitoring the effects given to its Communication on tackling Illegal Content Online and the recent Recommendation C(2018)1177 as well as the results of the various ongoing voluntary processes with industry. This has included specific work to develop key indicators to measure progress under specific voluntary dialogues (e.g. EU Internet Forum).</p> <p>In particular, the Recommendation calls for Member States and service providers to submit to the Commission, upon its requests, in specific timeframes all relevant information on the effects given to this Recommendation, in order to allow for its monitoring. The effects given to the Recommendation will be an important element to decide on the need for additional action and the added value of each of the options.</p> <p>The Commission will continue its evidence gathering efforts, also with a focus on data on the spread of illegal content, building as much as possible on concrete quantitative and qualitative indicators. This will build on the</p>

reporting on progress in the various workstreams as well as on information from open sources and studies such as a study on an analysis of business models of online platforms with regards to the control and knowledge they have on content, as well as an analysis of the effectiveness of automatic tools. Research carried out on the topic, including from H2020 projects, and input from relevant agencies such as Europol will also be taken into account. It will also consider additional evidence gathering to fill in potential gaps and further develop the evidence base for this initiative. A specific analysis of the challenge that tackling illegal content represents for smaller companies will be carried out. It will include an analysis of possible actions to support smaller companies in this regards.

Consultation of citizens and stakeholders

In follow-up to the Recommendation, a public consultation and specific stakeholder consultations will be carried out to further explore the impacts of the options on all relevant stakeholders, as necessary, and ensure that those who would be affected by this initiative can provide their views and opinion. These consultations will draw on the opportunities presented by existing dialogues, taking into account the variety of interests and stakeholders involved.

In addition to these consultations, a Eurobarometer will be conducted to receive citizens' perceptions.

Will an Implementation plan be established?

Depending on the complexity of the proposal, an implementation plan could be envisaged.