

Von: [REDACTED]

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An: [REDACTED], VIA3

Betreff: Anmerkungen der MPA zur E-Commerce Expertengruppe (E01636) am 8. Oktober

[REDACTED],

ich hoffe, es geht Ihnen gut. Sie sind ja als Vertreter Deutschlands bei der Sitzung der "Expert Group on e-Commerce (E01636)" am 8. Oktober in Brüssel. Dabei soll es ja auch um die e-Commerce Richtlinie (ECR), der Frage einer Öffnung und Überarbeitung und den Digital Services Act (DSA) gehen.

Die MPA und ihre Mitglieder haben sich damit bereits intensiv auseinander gesetzt. Unten stehend finden Sie dazu einige Gedanken. Dabei sind zwei Kerngedanken maßgeblich:

1. Statt eines horizontalen Ansatzes befürworten wir einen komplementären, **problemorientierten** Ansatz, der nicht generell sondern spezifisch tatsächliche Fragestellungen lösen soll - und in Ergänzung der ECR entwickelt werden sollte.
2. Maßgeblich wird auch die Frage eines tatsächlichen sog. "**Know your Customer**"-Ansatzes sein, der den Namen auch verdient (anders als § 5 TMG heute beispielsweise). Noch immer ist die Identifizierbarkeit bei Diensten und der verantwortlichen Personen nahezu kaum gegeben da es an der Durchsetzung mangelt.

Für Rückfragen stehe ich natürlich jederzeit gern zur Verfügung.

Herzliche Grüße und einen schönen Feiertag

MPA briefing ahead of the meeting of the expert group on electronic commerce (E01636) on 8 October:

- Online intermediaries today play an important role in getting all sorts of (legal and illegal) content to citizens, including by hosting but also the selective presentation, promotion and ranking of content.
- They therefore should also have an increased and proactive role in preventing the avalanche of illegal and harmful content online.
- This is a complex issue and we are still studying it.
- However, we can already say at this stage that we **don't believe that an overhaul of the liability rules in the ECD is the right answer to deal with this issue.**
 - The existing liability privileges have been tested in court over many years to provide clarity and relief to rights owners. Revising these rules or adding new ones would lead to years of litigation and lack of legal certainty.
 - The political process around revising, defining and adopting such general rules would be difficult with a high risk of unintended consequences and manipulation of the process by certain actors.
 - There is also no "one size fits all" solution that would apply to the myriad of different harms, and the variety of online intermediaries that have emerged and are still emerging in our digital economy.
- Instead of replacing or updating the existing liability privileges of the ECD, we therefore suggest a **per problem approach.**

- Specifically, the Digital Services Act should create **complementary regulation to the ECD** that would create **positive legal obligations** to behave appropriately and that incentivize proactivity, **not in general but in specific situations**.
- Such affirmative legal obligations would tackle each harm separately.
- There are of course a very wide variety of harms to be considered for inclusion in such an instrument.
- **One cross-cutting measure that is critical to dealing with a wide range of online harms** is the creation of “know your customer” obligations making it impossible for EU-based hosting, payment, advertising, domain name, and proxy service providers (such as Cloudflare) to do business with unidentified commercial entities.
 - **Obliging commercial entities to reveal their identity on the internet would automatically lead to a reduction of illegal or harmful online commerce.**
 - Article 5 of the ECD already provides for a **Service Provider ID** rule, but commercial entities that engage in illegal or harmful online activities don't comply with it, and there is no functional means to enforce it.
 - A real, functional Service Provider ID mechanism is needed to deliver on the promise of Article 5.
 - **Know your customer (KYC) obligations are an ideal tool.** They impose minimal burdens on legitimate businesses, all of which are easily identifiable.
 - Making a defined set of intermediaries responsible for verifying the identity of commercial entities who need their services to start their online activity would be easy to implement as part of the sign-up process and would provide an important disincentive against illegal or harmful commercial activity.
 - **Similar KYC rules are already commonplace in the financial services sector**, where they have helped to discourage illegal activity.
 - Online intermediaries unfortunately do not currently know their customers in many cases.
 - For example, the MPA recently obtained a court order seeking the identity of the operator of two pirate websites hosted by a French hosting provider.
 - The hosting provider's response disclosed that in fact it had no reliable information on the identity of the customer behind the site, despite having received more than €17M in hosting fees.
 - It should be clarified that online business customer information should be made publicly available (as is the case for analogue businesses), so that consumers and third-party businesses may know who they are dealing with. Appropriate parameters for availability of the information can be established in legislation.
 - Service provider ID rules should only be applied to businesses (providers of information society services covered by Article 5).



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