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STATEMENT

On the draft Recommendation of the Committee of Ministers to member States of the Council of Europe on combating hate speech

Brussels, 06. August 2021

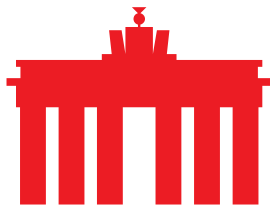
In June 2021, the Committee of Ministers to member States of the Council of Europe (CoE) presented draft recommendations on combating hate speech. The appreciation to combat illegal content, e.g. hate speech online, has become more important in recent years - it appears that hate speech is increasing in the digital sphere. In the course of hate speech, people are not only violated because of their attitude, gender or other characteristics, but also in the awareness of their fundamental rights.

As a result of these developments, various European states have developed specific and, in some cases, very far-reaching provisions to regulate digital content. Examples of these are the German Network Enforcement Act (Netzwerkdurchsetzungsgesetz, NetzDG), which came into force in 2017, or the French Avia Law, which came into force in 2020. Likewise, Austria has made a commitment to establish regulations against hate speech on the Internet. However, an assessment of all the legal bases shows that the provisions lack coordination with the other Member States. There is even contradicting legislation in some Member States. The same standards should be used for all Member States. A harmonised approach is essential, especially for cross border activities and cross border investigations.

eco - Association of the Internet Industry welcomes the Council of Europe's commitment to combating hate speech, even though the drafted recommendations are only intended to create standards without any binding character. With its Complaints Office – also known as hotline, eco actively supported the fight against illegal content on the Internet for 25 years and is aware of the specific challenges in the field of hate speech. The recommendations of the CoE draft a comprehensive package of measures that should be improved in some places. With regard to the Internet industry, the obligations for companies concerned e.g., Internet intermediaries and the Member States should be considered. eco would like to contribute the following comments to ongoing discussions on these draft recommendations:

- **Ensuring that the obligations on Internet intermediaries are proportionate**

In recent years, individual Member States of the European Union have adopted ambitious provisions for Internet intermediaries, in particular social network operators, to combat illegal content including libel, illegal hate speech and illegal



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propaganda which are illegal according to the legal framework of the respective member state. The social network operators have subsequently made great efforts and considerable investments to build up the necessary organisational, human, and technical resources.

With the NetzDG, the operators of social networks in Germany with more than 2 million active users have been obliged to implement a complaints procedure for reporting illegal content, to ensure the processing of complaints within the prescribed period and to regularly submit a transparency report on the activities related to the NetzDG. Last year, furthermore, two draft acts, the act to combat right-wing extremism and hate crime and the act to amend the NetzDG, were presented to adapt the NetzDG.

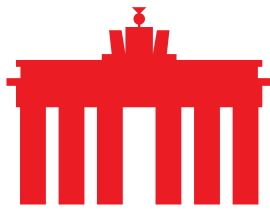
eco has examined the recommendations of the CoE with the obligations for social network operators in Chapter 3 and would like to raise some points for consideration.

In general, the term “Internet intermediaries” in the recommendations is too broad. A clear distinction and differentiation are needed between social network operators and other Internet intermediaries like Internet Service Providers. The Differentiation should also consider the possibilities to intervene for the various Internet intermediaries.

eco shares the position that the Internet is not, and should not become, a lawless space. Activities that are illegal in the analogue world must also be considered illegal in the digital world. Some recommendations on how to deal with hate speech at Internet intermediaries have already been implemented and applied in some of the Member States. The legislative proposals of the Member States, some of which are already in force, show the tendency that once sovereign tasks, e.g. the assessment of the criminal relevance of content from the complaints procedure, are increasingly being outsourced to the companies concerned in the digital sphere. eco criticises this form of outsourcing of legal powers because it is often accompanied by considerable legal uncertainties for the companies concerned - in this case, Internet intermediaries. It is often difficult to decide, whether a content violates fundamental rights or fulfil a criminal offence. This assessment should not be left to private companies, instead it should be decided by legal authorities.

In order to be able to efficiently combat illegal content, proportionate obligations must be agreed upon in coordination with the social network operators, including reliable and clear provisions for the rating of digital content, as well as for reporting obligations.

The recent discussions on the use of automated content recognition processes are concerning from the perspective of the Internet industry because they give the inaccurate impression that reliable processes for automatic content recognition are available. eco would like to contradict this assumption explicitly. On the one hand, these procedures refer to copyright-protected content on platforms. On the other hand, these procedures are at a stage of development that, especially in the case of context are very difficult to recognize in an automated proceeding. In these



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context-sensitive areas, a personal content evaluation is necessary and not substitutable. In addition, it should be noted that the evaluation of contextual content affects the freedom of opinion and the freedom of speech of the publisher.

- **Ensuring European data protection standards to combat hate speech**

In accordance with recommendations 22 and 68, combating hate speech on the Internet should be carried out in compliance with the applicable data protection regulations, including the EU General Data Protection Regulation, due to the big overlap of CoE and EU Member States and the impact of the Regulation even beyond the European Union. With the latest amendments in the German NetzDG, broad obligations have been created for the operators of social networks as well as powers for the Federal Criminal Police Office. While the notification obligation of social network operators to disclose illegal content and user data have been standardised in detail, the processing and deletion of the sensitive data transferred, and content obtained on the side of the Federal Criminal Police Office has only been insufficiently regulated.

eco welcomes the CoE's commitment to the current data protection regulations. From the perspective of eco, the provisions of data protection on combating hate speech must apply to both - the Internet intermediaries and the competent authorities. The permanent storage of (personal) data based on a lack of suspicion or in anticipation of criminal offences to be investigated later must be regulated and prevented. Combating hate speech and other illegal content should not be used as a basis for setting up extensive databases with content or user data on the side of the competent authorities.

Based on recommendation 66, the Member States should create a legal basis for independent stakeholders and researchers to provide data, information, and evaluations of hate speech. eco criticises the open wording of the recommendation of the CoE. In order to prevent misuse of information and data, e.g. linguistic adaptation of hate speech to avoid criminal prosecution, stakeholders and researchers should prove a legitimate legal interest. Based on a verifiable declaration of legitimate interest, Internet intermediaries, stakeholders and researchers are protected in the best possible way.

- **Member States must proactively contribute to combating hate speech**

Chapter 7 provides recommendations on the coordination and cooperation of Member States in combating hate speech. The Member States should develop strategies and action plans to combat hate speech, strengthen educational programmes to raise awareness and better equip the authorities for criminal investigation and prosecution.

eco welcomes the recommendations of the CoE for more commitment of the Member States in the fight against illegal content. As already described regarding the obligations of Internet intermediaries, more government action is needed to



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YESTERDAY. TODAY. BEYOND TOMORROW.



combat hate speech relevant under criminal law. In particular, a coordinated and harmonized approach would be preferable. Alongside eco has always highlighted the existing gaps in the technical and human resources of the law enforcement. Instead of shifting more and more responsibilities to Internet intermediaries, Member States should provide law enforcement and criminal investigation authorities with significantly better technical and human resources. Without strengthening these LEAs and resources, the obligations addressed to the Internet intermediaries alone will not be able to provide effective protection.

Moreover, the CoE recommends in Chapter 5 (Para. 61) that Member States encourage reporting of illegal content. At the same time, Member States should ensure that persons reporting illegal hate speech are protected against any adverse treatment or adverse consequence as a reaction to a complaint. In that regard, eco likes to point to the work of hotlines which allow for anonymous reporting of illegal content. Calling for additional/ongoing support of the important hotline work, would be a suitable supplement of the draft recommendations, also in the light of Chapter 7 (Para. 70) of the current draft recommendations.

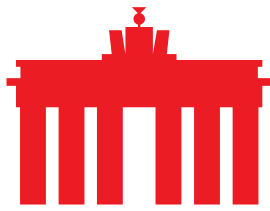
▪ **Prevent fragmentation**

During the last years, various Member States have developed and adopted legal frameworks to combat illegal content, e.g. hate speech. To prevent fragmentation, incidents and legal uncertainty due to cross-border cases, common, coordinated and harmonized standards should be agreed upon at the European (or even international) level to combat illegal content on the Internet.

The danger of fragmentation or contra dictional law is evident and will affect the effectiveness of the fight against hate speech. eco advocates that the necessary standards should be developed and coordinated, considering current European regulatory efforts, e.g. the second additional protocol to the Budapest Convention or the EU's e-Evidence Regulation and its Digital Services Act (DSA). The relation of these recommendations to the drafts of e-Evidence and the DSA should be made clearer. Several aspects made in the recommendations are already addresses in the DSA.

▪ **Conclusion**

eco supports the drafted recommendations of the European Council to combat hate speech on the Internet. We agree that an effective fight against hate speech will only succeed if all parties involved – competent authorities, civil society organisations and Internet intermediaries – contribute and work cooperatively with each other. To combat hate speech in a targeted manner, a common and mandatory set of rules agreed upon at the European level would be desirable. A harmonised set of rules for all Members States but also for cross border activities and cross border investigations will strengthens the combat against hate speech.



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The definition of Internet intermediary should be reviewed. The current very broad definition does not consider that social network operators, for example, have different information and possibilities to combat hate speech than Internet service providers. This differentiated scope of action should be reflected in the definition. Both mandatory and voluntarily implemented recommendations to combat hate speech must consider European law and the principles and standards that go with it. Possible risks of fragmentation or contradictory law should be prevented, also to ensure an effective fight against hate speech. Combating hate speech and other illegal content should not interfere with and suspend fundamental rights. It should be clear to all parties involved that the sole use of automated content recognition processes is considered questionable regarding fundamental rights, freedom of opinion and speech. To ensure a legally secure application of the drafted recommendations, clear provisions must be made which, in addition to the obligations of Internet intermediaries, also consider possible liability issues of third parties, e.g., regarding deleted content vis-à-vis Internet intermediaries. Especially questions of data protection should be critically discussed by all parties involved. The transfer of content, user data and other information may not lead to the creation of extensive databases with information on users of different platforms by competent authorities. Strict precautionary measures and safeguards are necessary, likewise clear, and binding provisions for deleting the data must be established. Further, the obligations for Internet intermediaries must be proportionate; combating hate speech or illegal content, in general, cannot be the exclusive task of the intermediaries. To be able to effectively combat hate speech and control user activities in the digital sphere, LEAs and the competent authorities must be equipped with the necessary personnel and technical capacities.

About eco

With more than 1,100 member companies, eco is the largest Internet industry association in Europe. Since 1995, eco has been instrumental in shaping the Internet, fostering new technologies, forming framework conditions, and representing the interests of members in politics and international committees. The focal points of the association are the reliability and strengthening of digital infrastructure, IT security, trust, and ethically-oriented digitalisation. That is why eco advocates for a free, technology-neutral, and high-performance Internet.