The role of the intermediary liability exemption for startups & scaleups

[Brussels, 3 October] Allied for Startups consulted its members on the role of the intermediary liability exemption for startups & scales in the EU.

Online platforms transform the way we purchase, communicate, move and work - everybody enjoys their services everyday. Startups benefit from this thriving platform economy - it helps them to grow, operate with little cost and connect easily with consumers and users. Instead of doing repetitive tasks, platforms allow entrepreneurs to innovate.

To be able to offer these manifold services, platforms need legal certainty to ensure that they would not be held liable for actions outside their control, such as acts by their users (e.g. via posting illegal content or selling counterfeit goods). In 2000 the E-Commerce Directive laid down how startups could use an intermediary liability exemption, which made this directive a foundational part of the digital economy that has grown since. This, in turn, has provided users with countless freedoms and means of self-expression.

As more and more users and devices partake the digital economy, it is natural that undesirable behaviour grows too, raising new challenges. These have diverse causes and varying magnitudes of severity. Examples are copyright infringements or terrorist content online, which are extensively regulated by sectoral law. Issues pertaining to fundamental rights, the collaborative economy or hate speech have also been raised. Considering that platforms operate across borders by default, many of today's challenges are regulated differently in nearly every Member State.

Platforms show their responsibility by: implementing strong terms of services, community guidelines as well as close collaboration with users and authorities through flagging or notice and takedown procedures. Yet, simply shifting liability by definition to platforms is a lot like Russian roulette. While some cases are clear, others are some shade of grey. Just like no car-manufacturer is liable for speeding drivers, no platform can be made liable for rogue users. In the end, humans behaving illegally online is not an online problem but a human problem.

Allied for Startups always welcomes when policy makers discuss how to tackle potential challenges raised by the growth of the platform economy. In this process it is equally important to identify and strengthen the policies that work, including the intermediary liability exemption and the aforementioned actions already taken by platforms.

Allied for Startups' membership of startups associations span across the entire EU. Their respective memberships consist of thousands of startups that use platforms and startups that are platforms. Concerning the debate around a potential revision of the E-Commerce Directive, an approach that takes into account startup ecosystems would include:
An overhauled and harmonised EU liability exemption can provide more legal clarity and simplicity for innovative startups. Updating the E-Commerce Directive is an opportunity to take into account startups and their contribution to European economies and societies. The harmonisation of a broad and robust intermediary liability exemption will avoid fragmentation of the Single Market, and give startups better opportunities to scale. Vice versa: Without this, innovation is affected adversely in many ways, for instance through less entrepreneurship, lower founding rates, less competition with incumbents and decreased investments.

“A food platform isn’t literally liable for the food couriers are delivering.” - AFS member

“Increased liability has an indirect correlation with funding” - AFS member

New rules should be proportionate by focusing on the problem or the problem-maker, and try not to impact all types of digital services. If there are issues with social media, then this should be openly stated and tackled head on with targeted rules. In the case that social media cannot be specifically targeted and the scope needs to be wider, regulators should be very cautious of the impact this might have on the broad platform economy and startups. In any case, the application of new rules should be proportionate to the extent that a platform is actually contributing to a problem.

“If this is about social media, we need a clear and narrow definition of social media” - AFS member

The prohibition of a general monitoring obligation must be maintained. Startup entrepreneurs neither have the funding, the human resources or the technology to monitor 24/7, nor is it advisable to ask them to do so if there is to be a thriving digital economy. There are countless opportunities for innovation that might not even be considered by entrepreneurs if filtering was required.

“For some startups like 3D printing platforms, filters don’t exist” - AFS Member

“We’d have missed a lot of good ideas if there was a general monitoring obligation. The internet is a colourful place. Startups are born in this environment.” - AFS Member

A new layer of legislative measures should only be added on top if it adds legal clarity and makes it easier for startup entrepreneurs to navigate. To support innovation, the ambition of new rules should be that they improve the ease of founding a startup. This works when there is a clear hierarchy between horizontal and sectoral laws. Overlapping or even contradictory laws make it harder for startups to comply with EU legislation and operate easily in Europe.

“We need to make this operational to comply with other EU rules like Copyright” - AFS Member

“Startup-friendly legislation addresses one problem with one solution” - AFS member

“Keep the rules strict and simple for entrepreneurs” - AFS member
• Any liability exemption should positively take into account proactive measures startup entrepreneurs make to remove illegal content online. Proactive measures should be encouraged and incentivised. Entrepreneurs that make proactive efforts to prevent the misuse of their service should be encouraged. All such measures (proportionate to the company size) should be taken into account favorably when assessing the intermediary liability exemption for platforms. They should not be considered an admission of liability.

“Platforms should make a certain minimum efforts to prevent illegal content online” - AFS member

• Innovation sandboxes provide a powerful toolkit for the application of a startup-friendly intermediary liability exemption. The development of regulatory sandboxes will facilitate the safe entry of new services on the market while keeping users and consumers safe. With innovation sandboxes, startups have the opportunity to innovate new services or products, which bring value to European societies and economies, hand-in-hand with regulatory institutions. They would never bypass any existing laws.

“Legislators should see sandboxes as a tool for better policy making.” - AFS member

Making startup-friendly legislation only works if you know how startups work, and the role they play on the market. This includes comprehending the source of the value they create, and their relationship to customers and competitors.

Startups are the most innovative and diverse actors in our modern economy - they decrease complexity for users and businesses by innovating new products or services. Allied for Startups wants startup entrepreneurs to have as much time as possible to focus on what there are good at - innovation - and not be buried in costly liability measures. Startups should be given the same opportunity to scale up that today's tech giants received by benefiting from a simple and affordable intermediary liability regime. Not doing so would ringfence big incumbents and diminish the chances of startups to challenge them.

Without the intermediary liability exemption, the European platform economy would not be close to the size it is today, including the value to consumers and jobs it has brought. The E-Commerce Directive from 2000 may well need to be updated. In that process we encourage legislators to think of startups as prime constituents to involve and listen to. To that end, we challenge policy makers to reach out and understand some of the platforms from their startup ecosystem.