

CONTRIBUTION OF UNIFAB

**DG COMPETITION'S CALL FOR CONTRIBUTIONS
ON
SHAPING COMPETITION POLICY
IN THE ERA OF DIGITISATION**

The Union des Fabricants (Unifab) represents companies from all economic sectors, and provides them with an Association umbrella for promoting intellectual property (IP) and fighting counterfeiting. Today, Unifab includes more than 200 French as well as International companies and professional federations. It serves as unique guardian of IP rights (IPRs) of its members, and a platform for discussions on this topic. It closely monitors all sets of domains which in one way or another affects IPRs.

Our association is therefore happy to share its members view on a subject which needs to be discussed during the conference on “*Shaping competition policy in the era of digitization*”: how better protecting IP in the online world would help strengthening the competition.

Intellectual property rights are valuable assets for all businesses, especially on internet. Companies manage to increase their competitiveness in a variety of ways by dedicating time and resources to the importance of their intellectual property protection.

IP rights incentivize entrepreneurs to keep pushing for new advances in the face of adversity. It facilitates the free flow of information and leads to new innovations and improvements on existing ones.

As the digital world has grown to a scale in Europe where it is reshaping the way that markets operate, the EU digitization policy needs to look forward and take into account the different challenges that are needed for the next 15 years.

Internet has become the number one source of counterfeits. Fakes bought on the internet are increasing. Now more than half of the fake products seized come from online commerce.

It is clear that the current legal framework of the digital world is simply not adapted to the ongoing evolution of our environment. It is not sufficient to effectively address today's issues in the digital world in terms of protection of those so valuable IP rights.

That is the reason why UNIFAB has been long advocating for the creation of a new legal framework to better address this issue.

The European Union has always been in the vanguard regarding digital, data protection and the fight against illegal activities. Now it is high time it implemented new tools for the protection of internet and thereby set standards for its partners worldwide again. Revising the legal framework would enable to guarantee a real protection of the online economy.

Among the dispositions which would help strengthening the competition in the online world, we believe the questions of the involvement and transparency of actors should definitely be discussed during the conference:

I. INVOLVING ALL ACTORS

The fight against illegal content online calls for everybody's best effort and commitment and no one should be allowed to refrain from taking an active part in it.

The idea of shared responsibilities is not new. In general, businesses have to apply due diligence in all their actions and take precautions to avoid that their products harm others. However, when it comes to online content, some operators do not comply with this basic rule.

It is therefore necessary to write down in the law a specific standard of behavior for intermediaries.

- The legislation is outdated

Companies regularly reckon that the system of limited responsibility for intermediaries is not adapted to the current situation of illegal content online. Many of these actors even claim privileges that are de facto not intended for their actual activities. In practice, these actors are in no way encouraged to take measures to protect consumers from illegal content online. Intermediaries taking proactive measures are actually quite rare. It is obvious that the current legal framework has been applied to actors which were not supposed to benefit from it and that it has been misused as an apology for passivity.

- The jurisprudence is uncertain

Since the law is unclear and allows any intermediary to claim privileges regarding its liability, the courts have to decide on a case by case basis, if it is subject to the exemption or not. However, court decisions are diverging and often uncertain and have yet to provide a clear guideline as to which activities are covered by the privilege and which are not.

- The soft law is not sufficient

MOU's and best practices can be very useful. However, the exponential increase of illegal content online over the last years has shown their limits. Some stakeholders assume their responsibility, but unfortunately, a lot of intermediaries still refuse to join those initiatives and do not implement any measures against illegal content online.

When the collaborative approach fails to reach all its objectives, it is time to change policy.

- The « Follow the money » approach needs to be completed

The “follow the money” approach has shown to be difficult to implement in Europe and should be regarded as a complement to other measures and under no circumstances as the sole solution.

Affirming the responsibility of intermediaries would help to clarify and simplify the current system and certainly improve the cooperation between them and the right holders. In the end, everybody will benefit from clear provisions, this includes the users

Adapting the law to the era of digitization would allow the European legislator to rebalance the responsibilities between stakeholders and intermediaries, and therefore reinforce the competition.

- The consumers should be more protected

In the case of counterfeits, consumers buy online for various reasons: it is more convenient, it gives access to products unavailable elsewhere and it is often cheaper. On the other hand, the increase of e-commerce allows counterfeiters to sell fakes more easily.

Counterfeit products are offered en masse to the consumers in e-commerce. Consumers are confronted with a disrupted market where they cannot rely on obtaining a legitimate product anymore.

Our very recent study¹ revealed that in France 37% of consumers have bought a counterfeit product without knowing it.

And when we also know counterfeits often turn out to be dangerous to the health and safety of consumers or defective without any remedy for consumers², we can't leave them without an efficient solution.

¹ Sondage Ifop for UNIFAB: <https://www.unifab.com/wp-content/uploads/2018/06/R%C3%A9sultats.pdf>

² Examples being fake medicines, fake electrical goods, electronics or auto parts. Besides, it is obvious that consumers cannot benefit from illicit goods lacking in value and little possibilities of seeking redress

- The companies, especially SMEs, should be more supported

Not all companies have the resources and the knowledge to implement active measures against counterfeit.

Technology can be part of the solution, but it does not supersede a better legislation. Some companies and authorities already use technologies to optimize their anti-counterfeiting actions.

There are some inexpensive and simple tools which could help intermediaries to avert or at least significantly reduce the sale, promotion and distribution of counterfeits and other illegal content.

However, the use of these efficient measures will only spread if the legislator « rebalances the responsibilities » with regard to intermediaries, so that everybody plays its part.

- The healthy competition among stakeholders shall be reinstalled

The current system encourages intermediaries to do as little as possible and to rely on right holders to detect and act instead. By doing that, intermediaries:

- avoid costs,
- continue to deny any possibility of acting proactively,
- refuse to admit that their systems are systematically used and abused by counterfeiters.

Intermediaries doing more than what is required by law or court (which is not much) are currently put at a serious disadvantage compared to their passive competitors.

This is why, we believe the involvement of intermediaries is highly needed. We believe, it does not contradict the freedom of trade. On the contrary, it would rather enable a healthier competition.

2. IMPROVING TRANSPARENCY

Transparency is a critical factor for trust and competitiveness in the digital economy. How to reach more transparency online is a key question. This can notably be reached with some simple measures:

- Better informing consumers

We propose that once an online marketplace has removed a product from its platform after a notice has been received and accepted, it shall also inform those consumers who have already bought or ordered the product in question.

We believe that this would fill a gap in the current consumer protection framework, and help to empower consumers to better understand their potential exposure to illicit products and the

associated risks to their health and safety. This will ultimately lead to a more trusted ecosystem. Currently, genuine manufacturers are obliged to inform consumers who have bought an authentic product which is discovered to be defective - yet this does not currently apply when it is discovered that products are counterfeit, and so by definition not in conformity with EU product safety laws

- Asking professionals to better identify themselves

It is very worrying to see that consumers often do not know who their contractual counterpart is, when they shop through online.

Better upfront transparency on the true and actual identity of traders would increase consumer trust, and enable consumers to seek legal redress more easily and without dependency on intermediaries in case of conflicts over the conformity in transactions.

Small and medium-sized businesses are in favour of requirements to inform consumers about the identity and legal status of the contractual partner.

Therefore online marketplace should require third party suppliers of products on online marketplaces to always indicate their status as traders or non-traders and require traders to provide their details (identity, adress, contact details...) for the purposes of consumer law and legal redress.

- Keeping domain names information public

Since last May, the public information about who owns the domain name of a website or mail server has been substantially removed.

The ability to check which domains are connected to those identified as being used for fraud, cybercrime and to abuse the rights of others has also disappeared. This has been a vital tool in stopping botnet attacks, removing hundreds of thousands of sites used to sell fakes and many other anti-fraud activities, such as white-listing SME websites by cyber-crime protection tools used by corporate networks that might otherwise reject traffic from unknown sources.

As of now there is virtually no information available to the public.

It is now clear that these dispositions not only would help to reinforce the competition but are urgently needed, as the current legal framework not only doesn't stimulate the competition, but really weakens the competitiveness of the legit actors. The European Union needs in its policy, to better address this unbearable situation.

This is why we believe the question of how to better protect IP rights in the digital world in order to reinforce the competitiveness of legit actors in Europe, needs to be discussed at the conference on "*Shaping competition policy in the era of digitisation*".

UNIFAB is, of course, happy to offer its contribution in this regard.