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Standards for duty of care? Debating intermediary liability from a sectoral perspective

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Current liability exemptions - Ecommerce Directive (ECD)

- passive, mere technical activity (conduit, caching, hosting)
- no active knowledge
- expeditious removal (notice-and-takedown NTD)
- specific infringement prevention, but no general monitoring
- duties of care may be imposed

EU 2016 - Public consultation on online platforms

- horizontal vs vertical (sectoral)
- leave ECD 2000/31 as is
- sectorial, problem driven approach - review substantive law
- proposals on copyright, hate speech/child protection (AVMSD)
Statement

➢ EU proposals *de facto* limit availability of safe harbour (active role)
➢ Filtering obligations conflict with ECD, out of touch with realities
➢ Private agreements (self regulation) may impact speech, competition

Alternative

➢ replace current ECD regime with standardized sectoral duties of care
➢ examples from product and anti-money laundering (AML) regulations

Structure: compare current sectoral approaches in

➢ Copyright; Trademarks; Hate Speech/Child Protection/(Fake news)
➢ Product regulation (medicines, food, consumer electronics), AML
Copyright - EU Directive Proposal

- active role of ISP requalified > limits safe harbour defense in ECD?
- mandated use of protection technologies > conflict with ECD?
- information requirements on ISPs to rightsholders excessive

Trademarks (counterfeit, passing-off…)

- No regulatory proposal - no problems?
- MoU between EU, platforms and rights holders - little progress (2011)

- Continuing unclarity over (technical) role of platforms > ECD
- Filtering obligations unclear > where does duty of care come in?
- Promotes private agreements > competition, speech concerns
Intermediary Liability – Hate Speech, Child Protection, Fake News – When is it obviously infringing?

Audiovisual Media Services Directive (AVMSD) draft amendment (VSPs*)

- protect organization of content but not content "as such"?
- protective measures in line with ECD?
- European Regulators Group for (AVMS) to facilitate codes of conduct

Content on other platforms

- EU Code of conduct - voluntary, self-regulatory, NTD based
- National: DE - draft law to combat hate speech/fake news - NTD based

- Fragmentation: VSPs vs other platforms, law vs self-regulation
- VSPs: technical role/control over content unclear
- Filtering obligation for VSPs unclear
- Content removal (non-VSPs) decided by private actors?

*Video Sharing platforms (VSPs)
Fake medicines (2011)
- Registration/labelling requirements for online sellers of medicines

Food retail (2011)
- Online labelling & registration requirements online food retailers

Consumer electronics
- CE product legislation and labelling requirements adopted to distance selling (2014, 2012)
  - All: Surveillance bodies (MSAs) do online surveillance, cooperate with ISPs
Financial Institutions (incl. E-Payment providers, )

- Madatory risk management and monitoring processes
- Know-your-customer (KYC), transaction monitoring, reporting
- Known to platforms with payment services and card issuers

Lessons?
- Product regulation: Tools to create due ISP diligence processes
- AML: adaptable to duty of care standards for ISPs
- create technical safe harbour standards with all stakeholders
- MSAs (state) to supervise co-regulatory efforts
Intermediary Liability – Conclusion
From actual knowledge towards technology safe harbour?

Shift away from:
▪ Focus on filtering and the specific vs broad filter trap
▪ “Actual knowledge/passivity” test for safe harbour defence

What about:
▪ A horizontal “Technological safe harbour” protection in ECD
▪ Standardized, sectoral duties of care in substantive law
▪ based on KYC, Risk based monitoring, NTD, regulatory reporting
▪ take account of role intermediaries play today

✓ Broad stakeholder involvement
✓ Adaptable to technology and market trends
✓ Can be mandated by legislation
✓ EU experience in standardization