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Preventing Infringements on E-Commerce Marketplaces

Proposal of a risk-based approach towards intermediary liability

REACT Annual Assembly, Amsterdam, 5 April 2018

Carsten Ullrich, LL.M., Faculty of Law, Economics and Finance





About the University of Luxembourg

- founded in 2003
- 6,000 students of which 640 PhDs / 250 teaching staff
- 113 different student nationalities
- **Ranked number 179** in the Times Higher Education (THE) World University Ranking 2017-2018
- **Ranked number 11** in the Times Higher Education (THE) Young University Rankings 2017
- Core research activities
 - *Materials science*
 - *Computer science & ICT security*
 - *European and international law*
 - *Finance and Financial Innovation*
- Faculty of Law, Economics and Finance, Research Unit in Law
 - Communications and Media Law Team, Prof. Mark Cole
 - Specialised areas: Media Law, Data Protection, IP Law, E-Commerce, Enforcement

- multilingual, international, research-oriented
- close to the European institutions and to Luxembourg's financial centre

University of Luxembourg

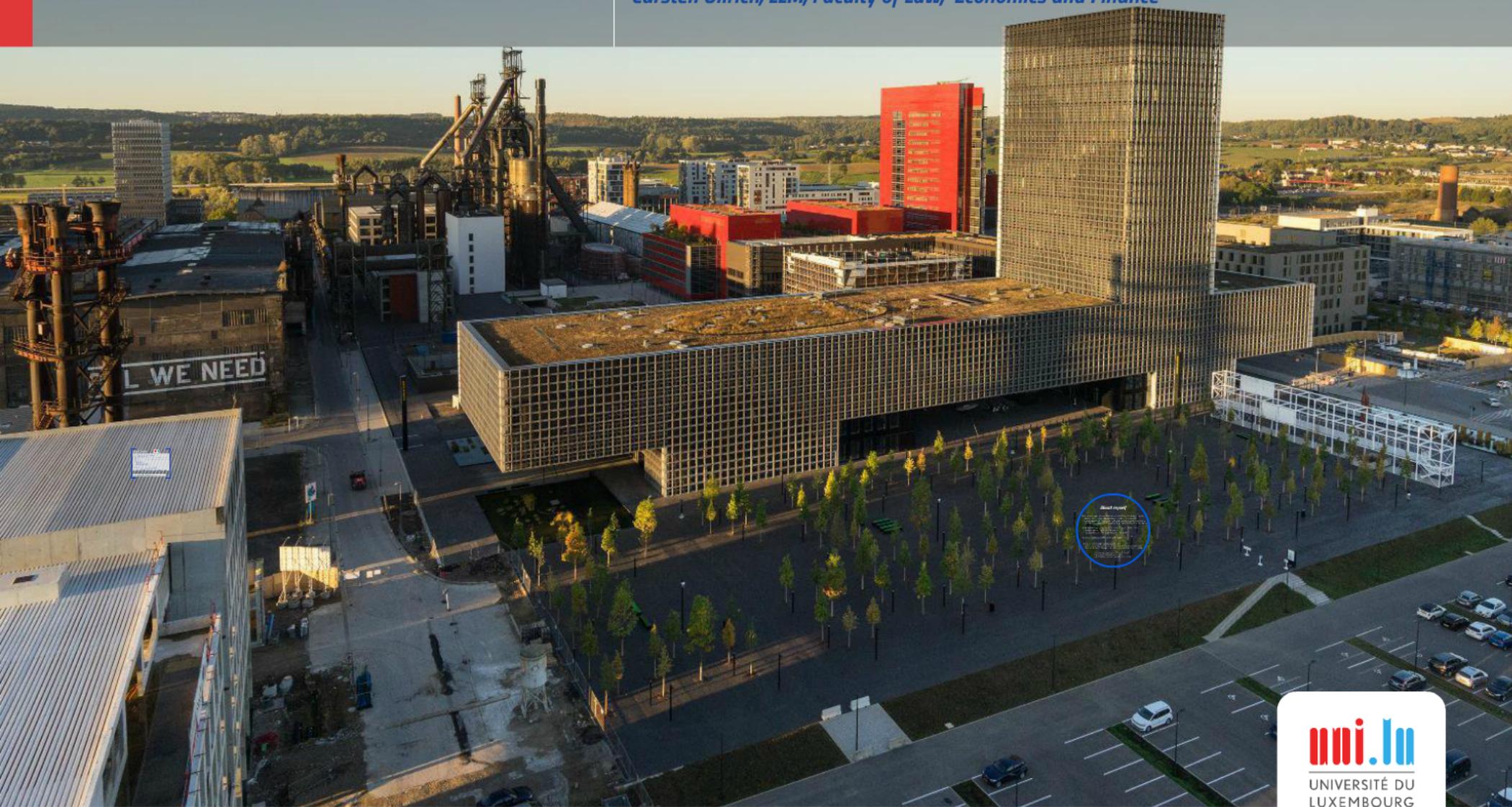
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About myself

Product Compliance and Fraud Detection Manager for Amazon (Europe) - 8 years

- manage notice-and-takedown operations; product safety and recalls
- oversee supply chain compliance > food safety, dangerous goods, environmental
- Memorandum of Understanding on the Sale of Counterfeit Goods on the Internet

Regulatory Policy Advisor, British and Canadian Embassies, Berlin - 7 years

- Economic, financial and trade policy analysis
- Manage and lobby on ICT policy (telecoms, internet, IT)

Positions in Strategic Consulting and Market Research

PhD Researcher, University in Luxembourg, since 2016

- explore new regulatory solutions for preventing illegal activity on online platforms
- Teaching activities: EU Economic Law; Supply Chain Compliance; Internet Litigation

LLM - Innovation, Technology and the Law (Edinburgh)

M.A. - Political Science and Economics (UCL)

B.A. - Humanities (Economic Geography), (West London)

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A risk-based approach...

leaning on duty of care



Are there alternatives to the current system?



E-Commerce, Online Marketplaces and Intellectual Property

Intermediary Liability - Current EU Regulatory Framework



Problems and Key Court Cases



Intermediary Liability

- Current EU Regulatory Framework

Current EU regulatory framework for information service providers aka intermediaries/platforms

Horizontal ECD

- third party / intermediary content liability conditions
- protects **passive** intermediaries with **no control** over information hosted and **no actual knowledge** of illegal activity/information
- need to remove illegal content **expeditiously** when acquiring knowledge (Notice and Takedown, NTIS)
- cannot be asked to monitor internet traffic and data on a general basis

Sectoral

- refer to ECD when third party liability is concerned
- ECD retains priority
- are supplementary to liability provisions in ECD



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Problems and Key Court Cases



Court of Justice of the EU (CJEU) and European Court of Human Rights (ECtHR)

Google France v Louis Vuitton, C-236/08 to C-238/08 [2010] (Trademark on search engine)
• guidance on **passive / active** intermediary definition

Scarlet Extended C-70/10 [2011] & Sabam v Netlog, C-360/10 [2012] (Copyright on social network / access provider)
• obligation to run filtering systems **monitoring** all customer data for **preventing** IP infringements in contrast with E-Commerce and IP Rights Enforcement Directives

L'Oréal v EBay C-324/09 [2011] (Trademark on E-Commerce platform)
• more guidance on **passive / active** intermediary definition
• online marketplace maybe ordered to **prevent** further infringements of the same kind
• responsibility of intermediary to act as **diligent economic operator**
• but: no obligation to actively **monitor** of all the data of customers

Mac Fadden C-484/14 [2016] (Copyright on access provider)
• requirement to **monitor** all user traffic on WiFi network for preventing illegal use is unlawful
• password protection as adequate means to deter illegal use and prevent total anonymity

Delfi AS v Estonia, no 65469/09 (ECtHR, 2016) (Hate Speech on New Portal)
• information hosts can be expected to **proactively assess risk** related to illegal activity

1. "passive" intermediaries with no "control" over the information hosted?

- > today's context: big data, ad revenue, information gatekeepers, multi-sided markets - are there still any passive hosts?
- > do we need to tie liability to "updated" conditions

2. no obligation to monitor for infringing content on a general basis

- > infringement prevention in specific, similar cases possible/obligatory?
- > in line with new fraud detection and content recognition technologies?

3. no (harmonized) standards for notice-and-take-down

- > unclear expectations for users and rights holders, diverging EU standards

4. Broad, inflexible horizontal framework

- > diverse platform business models & content types > sectoral differentiation?



- >> little motivation or encouragement to be transparent about infringement prevention activities
- >> no encouragement of "good Samaritan" measures
- >> protective legal framework from late 1990s applied to Web 2.0/ Web 3.0...



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EU Regulatory Initiatives

EU Commission: leave the current intermediary liability regime as it is for now "while implementing a sectoral, problem-driven approach to regulation"

Communication on 'Online Platforms and the Digital Single Market Opportunities and Challenges for Europe COM(2016) 288 Final'

EU Initiative	Area	Year	
Memorandum of Understanding on the Sale of Counterfeit Goods over the Internet	Trademarks	2011, 2016	Self - regulation
Code Of Conduct On Countering Illegal Hate Speech Online	Hate Speech	2016	Self - regulation
Draft Copyright Directive	Copyright	2016	Self-regulation
Audiovisual Media Services Directive Draft amendment	Hate Speech, Violence	2016	Co-regulation (maybe)
Unfair Commercial Practices Directive (Implementation Guidance)	Consumer Law/E-Commerce	2016	Enforced self-regulation
Draft Regulation on Enforcement and Compliance for Goods (Goods Package)	Product law	2018	Co-regulation
Commission recommendation on Tackling Illegal content	All	2018	Self-regulation

- Self regulatory approaches which promote co-operation between platforms (and rightsowners)
- Little regulatory oversight
- Lack of traction, transparency, consistency... and willingness?

Proposal

- Introduce **risk regulation** to intermediary liability
- Companies legally mandated to assess risks and deploy appropriate risks management measures
- Enforced self-regulation / co regulation > duty of care, compliance, technical standards
- Already used in: Data Protection (GDPR), Anti-Money Laundering (AML), Environmental law, Chemicals (REACH), Occupational Health & Safety, Food safety (HACCP)...
- Used in areas that are:
Technically complex / Fast-changing / cross traditional regulatory silos / costly to implement and enforce



- | | |
|---|--|
| + <i>Compliance is done by those who know the business</i> | - <i>Compliance is done by those who know the business (too well)</i> |
| + <i>Flexibility - as risk environment changes</i> | - <i>Strain on company financial and resource</i> |
| + <i>Save public resources</i> | - <i>Can cause democratic accountability/transparency challenges</i> |
| + <i>Internationally compatible (standards)</i> | - <i>Can cause market entrance / competition barriers</i> |



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The Model

	AML Compliance Framework	Online Intermediaries: Risk-based Infringement Prevention	
Risk Identification	Customer due diligence - Know - Your - Customer (KYC) <i>Identification checks, beneficiary owner, business purpose verification</i>	Know - Your - Customer (KYC) Platform Activity/Content Risk Assessment	Risk Identification
Risk assessment	Risk-based Transaction and Status monitoring (according to customer and business due diligence)	Risk-based Transaction Monitoring Focus on High Risk activities	Risk assessment
Risk related Enforcement	Suspicious Transaction Reporting	Takedown (automated, notice-based, counter notice); Statutory Reporting on Takedowns and Enforcement	Risk related Enforcement

ANTI-MONEY LAUNDERING

**Deter. Detect.
Prevent.**



Why the Anti Money-Laundering framework as a model for online infringement prevention?

Common characteristics of both areas

- 1. High volume, electronic transaction environment***
- 2. Complex and innovative business areas with constantly evolving fraud patterns***
- 3. Global / cross - jurisdictional transactions***
- 4. Overlap between AML scope and e - commerce (payments)***

...ing on duty of care

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KYC / Due Diligence

Aim

- >> ability to enforce against repeat infringers
- >> deterrence against badly intentioned users
- >> identify high risk activities (likelihood/impact of illegal use)

Description / Process

- Standardised requirement to identify sellers/uploaders/users
- Rank content by popularity/financial impact/context
- Variable by type of platform/content: e.g. marketplace, digital content, news portal, social media

Case Law guidance:

- *Mac Fadden* - passport protection/ ID disclosure (copyright)
- *L'Oreal v eBay* - prevent repeat infringements & act as diligent economic operators (trademark)
- *Delfi* - context-based user anonymity (hate speech)

Risk-based Transaction Monitoring

Aim

- >> define risk management process for high risk activities
- >> demonstrate due diligence (duty of care)
- >> create standardised & transparent processes

Description / Process

- perform monitoring / content filtering for high risk activities
- document risk assessment process for regulatory audit/review
- document algorithmic decisions for regulatory audit/review
- ongoing review of platform risk profiles
- adaptable to type of platform / content

Legal considerations

- risk-based monitoring is not general monitoring – arguably
- precedence for red-flag (should have known) content/use (courts in Germany, US, China)

Enforcement & Reporting

Aim

- >> transparent enforcement (for all users and rights owners)
- >> safeguard due process, accountability, fundamental rights

Description / Process

- create harmonised conditions for automated takedown and for notice-and-takedown
- statutory reporting on agreed KPIs: e.g. number of takedowns, enforcement against repeat infringers, user/account suspensions, counter claims, review times...
- adaptable to type of platform / content

Legal considerations

- not all statutory reporting may need to be public
- statutory reporting/notification applied in other risk regulation sectors (AML, environment...)

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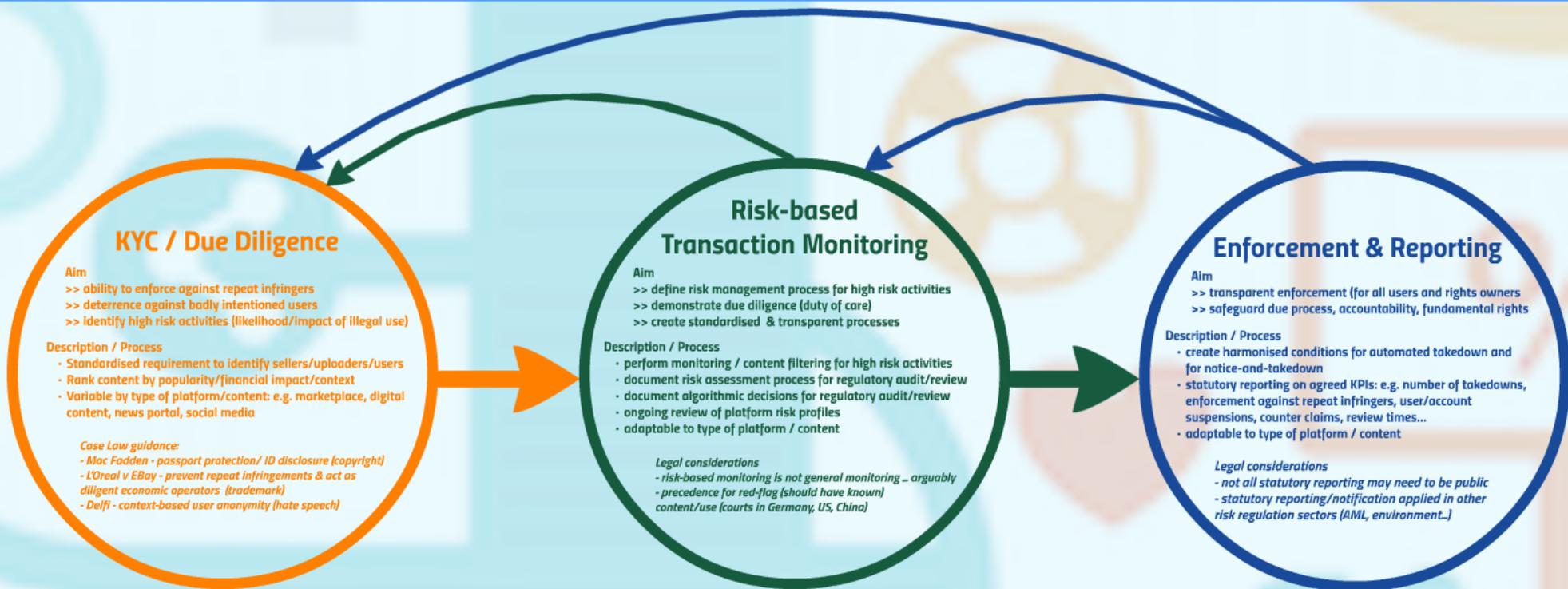
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Risks

- **Standard setting takes time**
 - > ***once in place flexible and adaptable to change***
- **Democratic accountability of highly technical / industry led process**
 - > ***regulatory review and audit, statutory reporting***
- **Competition: entry barrier for new players**
 - > ***create "sandbox" exceptions***

Summary

- **Enhanced responsibilities reflect the importance and power of platforms / online intermediaries**
- **Risk - based approach codifies platforms' duty of care / due diligence into standards**
- **Compliance with standards provides safe harbour**
- **Create level playing and transparency in infringement prevention**
- **Support through industry standards**
Examples: ISO 27000 (IT Security), ISO 9000 (Quality Management), FATF Standards
- **Future of E-Commerce Directive?**
 - > *review active/passive host distinction*
 - > *review general monitoring prohibition*
 - > *mandate sector specific duty of care standards*
- **REACT and BASCAP activities create data and knowledge which could inform risk assessment process**
- **Creation of "Should have known" or "red flag" knowledge for duty of care standards**

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Thank you!

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Questions please!

