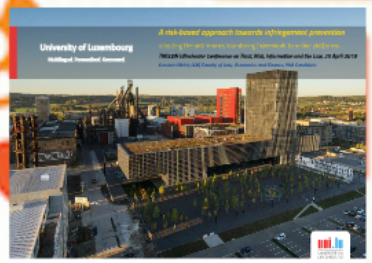
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A risk-based approach towards infringement prevention

adopting the anti-money laundering framework to online platforms

TRILCON Winchester Conference on Trust, Risk, Information and the Law, 25 April 2018

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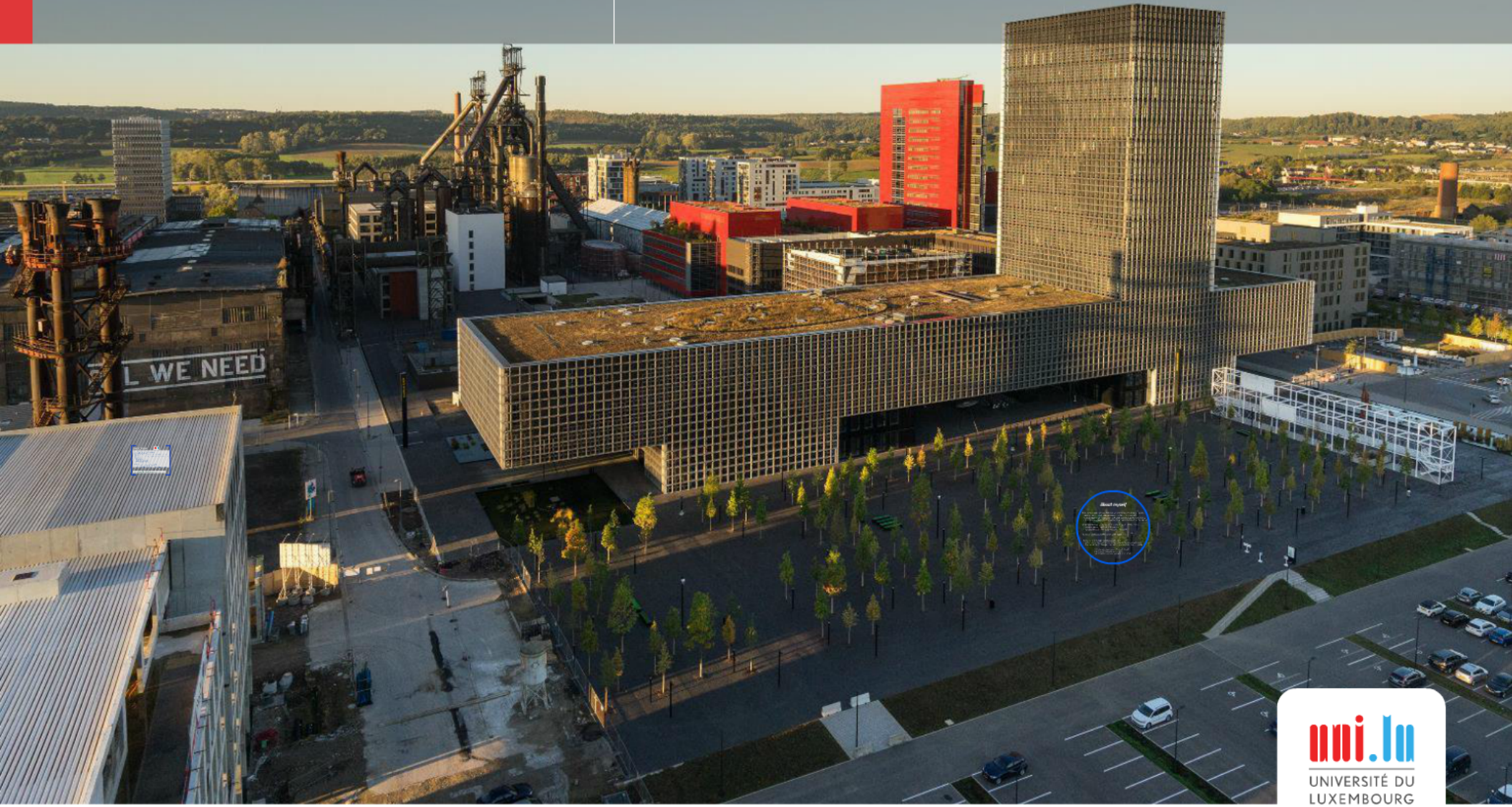

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A risk- based approach...

leaning on duty of care

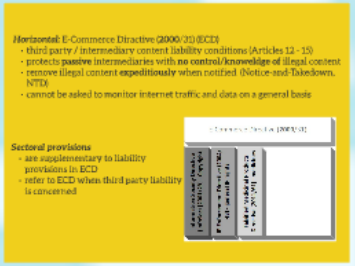
Are there alternatives to the current system?

Intermediary Liability

Intermediary Liability - Current EU Regulatory Framework

Key issues with Intermediary Liability

Intermediary Liability - Current EU Regulatory Framework



Horizontal: E-Commerce Diractive (**2000**/31) (ECD)

- third party / intermediary content liability conditions (Articles 12 - 15)
- protects **passive** intermediaries with **no control/knoweldge of** illegal content
- remove illegal content **expeditiously** when notified (Notice-and-Takedown, NTD)
- cannot be asked to monitor internet traffic and data on a general basis

Sectoral provisions

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

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Key issues with Intermediary Liability

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Platform economy is booming - illegal content remains a problem

- **reliance on reactive (ex-post) takedowns of illegal content**
- **little motivation /encouragement to be transparent about infringement prevention**
- **1990s know-how applied to Web 2.0/Web 3.0…**

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

› *big data, ad revenue, information gatekeepers, multi-sided markets › passive?*

› *CJEU:* Google France , C-236, 238/08, L'Oréal v EBay C-324/09

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

› is specific infringement prevention general monitoring, and does it matter?

› new fraud detection and content recognition technologies

› CJEU: Scarlet C-70/10, Sabam, C-360/10, MacFadden C-484/14, L'Oréal v EBay

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

› *unclear expectations for users and rights holders, diverging national standards*

4. Broad, inflexible horizontal framework

› diverse platform business models & content types › sectoral differentiation needed?

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EU Regulatory Initiatives

- Sectoral, self-regulatory

Problems:

- Traction
- Transparency
- Motivation

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 (Article 13)	Copyright	2016	Enforced self-regulation
Audiovisual Media Directive draft amendment	Hate Speech, Violence	2016	Co-regulation (maybe)
Unfair Commercial :Practices Directive (Implementation Guidance)	Consumer Law	2016	Enforced self-regulation
Goods Package (Draft regulation on Compliance and Enforcement for Goods)	Product Law	2017	Co-regulation
Commission recommendation on Tackling Illegal content	All	2018	Self-regulation

Academic proposals

- Verbiest/Spindler (2007) - technology safe harbours > duty of care/prevention/technical standards
- Helman/Parchomovsky (2011, copyright) - best available prevention technology safe harbour
- Waismann/Hevia (2011, search engines) - duty of care prevention standards based on reasonableness
- Lavi (2015, UGC, social media) - context based differentiation of liability immunities
- Valcke et al (2017) - professional ethical codes as basis for duty of care standards
- Citron et al (2017) - "Good Samaritan" protection for hosts applying duty of care in prevention/removal

- justifications of increased platform responsibilities
- use of duty of care
- review of current horizontal liability framework

Proposal

- Introduce **risk regulation** to intermediary liability
- Companies legally mandated to assess risks and deploy appropriate risks management measures
- Co-regulation - duty of care, compliance
- Use technical standards: *ISO 27000 (IT Security), ISO 9000 (Quality Management), FATF Standards*

- Already used in: e.g. 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

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

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The Model

	AML Compliance Framework	*Online Intermediaries: Risk-based Infringement Prevention*	
Risk Identification	Customer due diligence - Know – Your – Customer (KYC) *Identification checks, beneficiary owner, business purpose verification*	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 rated Enforcement	Suspicious Transaction Reporting	Takedown (automated, notice-based, counter notice); Statutory Reporting on Takedowns and Enforcement	Risk rated Enforcement

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

Common characteristics of both areas

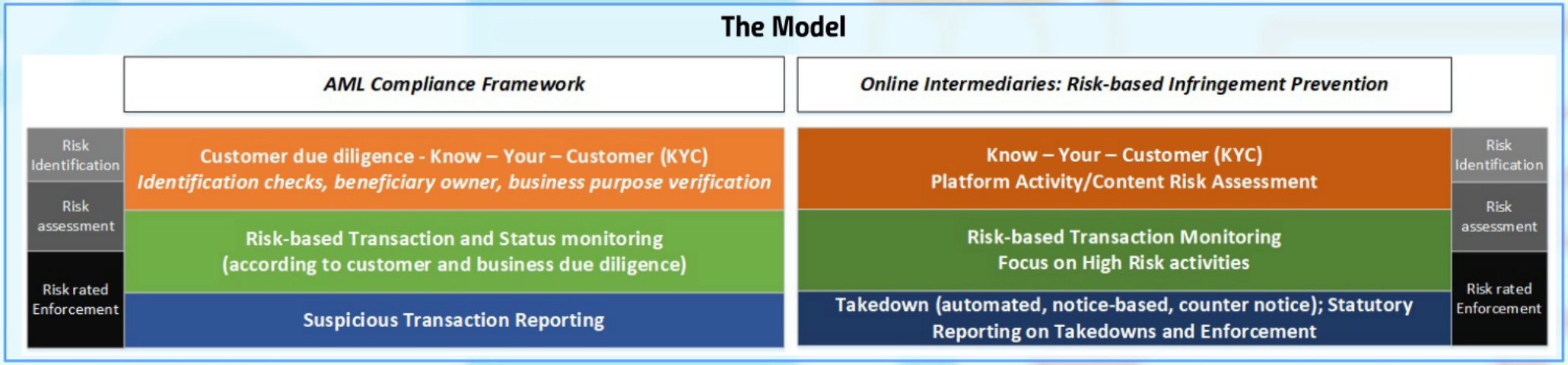
1. High volume, electronic transaction environment

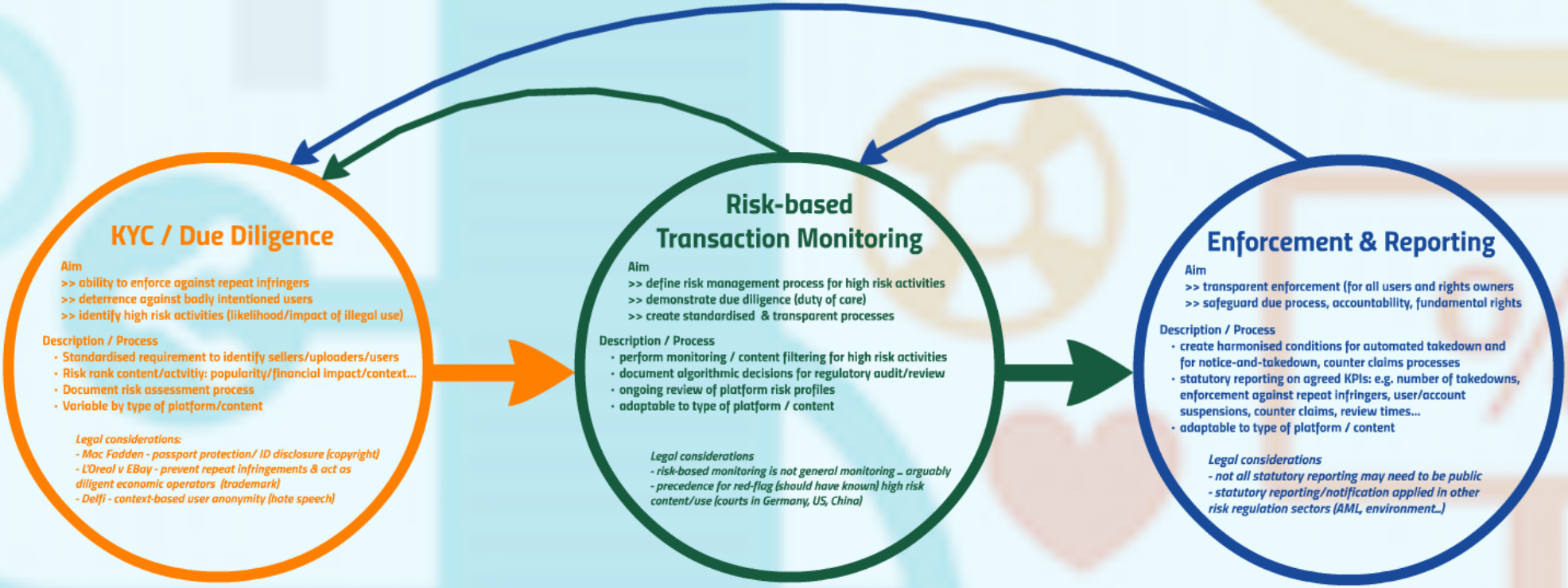
2. Complex and innovative business areas with constantly evolving fraud patterns

3. Global / cross - jurisdictional transactions

4. Overlap between AML scope and e - commerce (payments)

ning on duty of care




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
• Risk rank content/actvitiy: popularity/financial impact/context...
• Document risk assessment process
• Variable by type of platform/content
Legal considerations:
- 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 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) high risk 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, counter claims processes
• 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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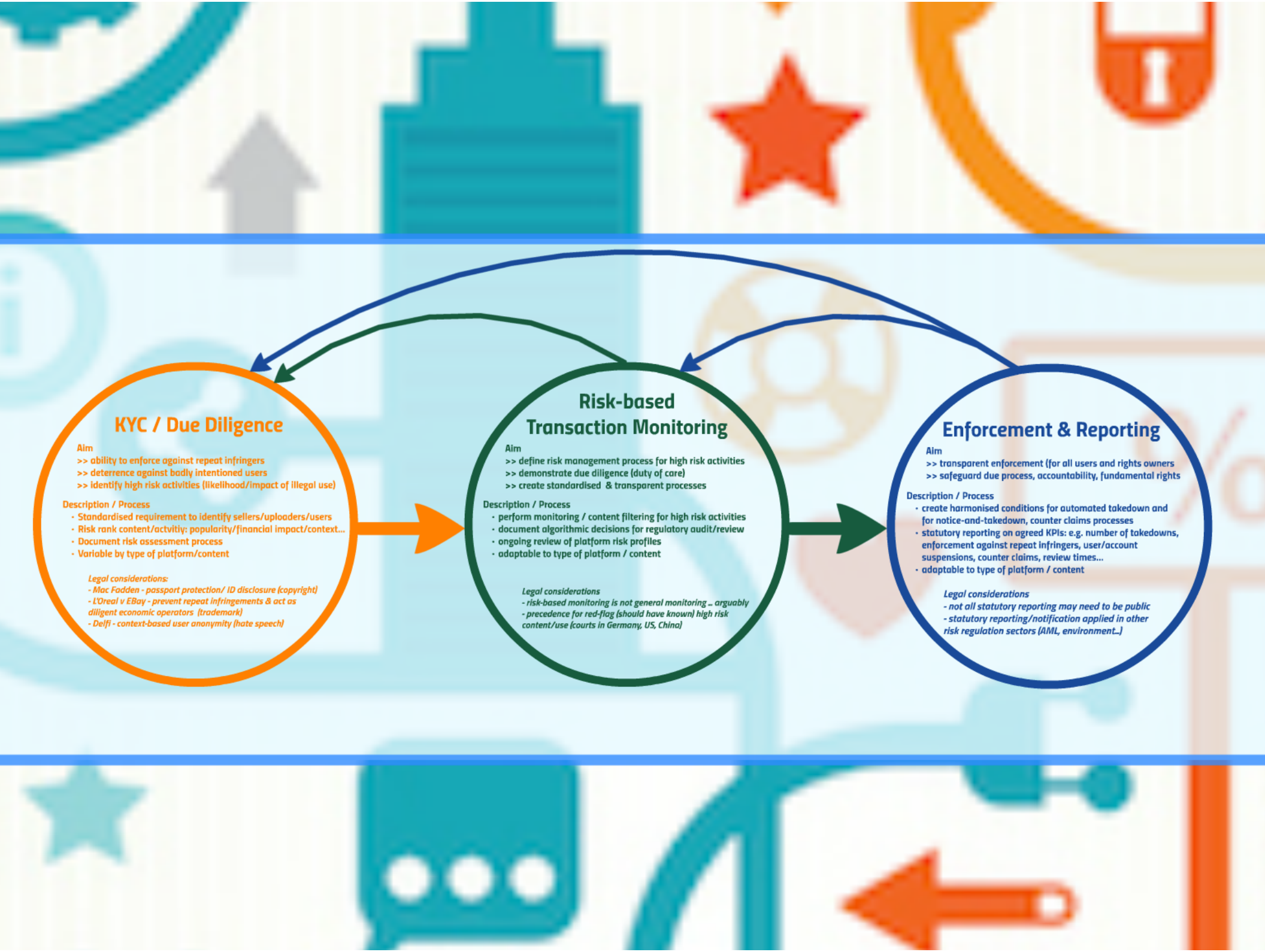
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Risk-based infringement prevention: vertically adaptable (examples)

UGC - Copyright	E-Commerce - Trademarks	Social Media – Hate speech/Violence	News Portal – Hate Speech/Violence	….	….
Password ID/Email Risk assess by commercially popular content	Commercial Seller ID verification Private seller Email Risk assess by seller provenance, product group, transaction volume	Password / Email Context based risk assessment	Anonymous/Hidden User Name Context-based/news category risk assessment		
Content monitoring for high-risk/commercially successful content	Content/transaction monitoring by high risk product category/ seller risk profile (AML) / transaction volume	Keyword filtering for comments in contexts most at risk/high ad revenue	Keyword filtering for comments in news contexts most at risk		
Takedown conditions/user rights Reporting on No. Takedowns, Counterclaims, SLAs, Follow-the money actions Alorithmic audits	Takedown conditions/user rights Reporting on No. Takedowns, Repeat Infringers, Seller Suspensions, SLAs, Follow-the money actions	Takedown conditions/user rights Reporting on No. Takedowns, Counterclaims/Re-instalments, SLAs Regular algorithmic audits	Takedown conditions/user rights Reporting on No. Takedowns, Counterclaims/Re-instalments, SLAs Regular algorithmic audits Journalistic standards reporting		

UGC = User Generated Content
SLA = Service Level Agreement

Risks

- Standard setting takes time
  > *but once in place flexible and adaptable to change*

- Democratic accountability of highly technical / industry led process
  > *need 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 prevention standards provides safe harbour
- Create level playing and transparency in infringement prevention
- Support through industry standards
- Future of E-Commerce Directive?
  - *> review active/passive host distinction*
  - *> review general monitoring prohibition*
  - *> mandate sector specific duty of care standards*

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Thank you!

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