A risk-based approach towards infringement prevention

adopting the anti-money laundering framework to online platforms

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Intermediary Liability

Are there alternatives to the current system?

Key issues with Intermediary Liability

A risk-based approach...

Intermediary Liability - Current EU Regulatory Framework
Intermediary Liability
- Current EU Regulatory Framework
**Horizontal:** E-Commerce Directive (2000/31) (ECD)
- third party / intermediary content liability conditions (Articles 12 - 15)
- protects **passive** intermediaries with **no control/knowledge 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
A risk-based approach focusing on duty of care

Intermediary Liability

Intermediary Liability - Current EU Regulatory Framework

Are there alternatives to the current system?

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?
Are there alternatives to the current system?

Intermediary Liability

A risk-based approach... focusing on duty of care

Intermediary Liability - Current EU Regulatory Framework

Key issues with Intermediary Liability
Are there alternatives to the current system?
EU Regulatory Initiatives

- **Sectoral, self-regulatory**

**Problems:**
- Traction
- Transparency
- Motivation

<table>
<thead>
<tr>
<th>Initiative</th>
<th>Area</th>
<th>Year</th>
<th>Type</th>
</tr>
</thead>
<tbody>
<tr>
<td>Memorandum of Understanding on the sale of Counterfeit Goods over the Internet</td>
<td>Trademarks</td>
<td>2011, 2016</td>
<td>Self-regulation</td>
</tr>
<tr>
<td>Code Of Conduct On Countering Illegal Hate Speech Online</td>
<td>Hate Speech</td>
<td>2016</td>
<td>Self-regulation</td>
</tr>
<tr>
<td>Draft Copyright Directive (Article 13)</td>
<td>Copyright</td>
<td>2016</td>
<td>Enforced self-regulation</td>
</tr>
<tr>
<td>Audiovisual Media Directive draft amendment</td>
<td>Hate Speech, Violence</td>
<td>2016</td>
<td>Co-regulation (maybe)</td>
</tr>
<tr>
<td>Goods Package (Draft regulation on Compliance and Enforcement for Goods)</td>
<td>Product Law</td>
<td>2017</td>
<td>Co-regulation</td>
</tr>
<tr>
<td>Commission recommendation on Tackling illegal content</td>
<td>All</td>
<td>2018</td>
<td>Self-regulation</td>
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</table>

**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
A risk-based approach...
leaning on duty of care
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)
### The Model

#### AML Compliance Framework

<table>
<thead>
<tr>
<th>Risk Identification</th>
<th>Risk assessment</th>
<th>Risk rated Enforcement</th>
</tr>
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<tbody>
<tr>
<td>Customer due diligence - Know – Your – Customer (KYC) Identification checks, beneficiary owner, business purpose verification</td>
<td>Risk-based Transaction and Status monitoring (according to customer and business due diligence)</td>
<td>Suspicious Transaction Reporting</td>
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#### Online Intermediaries: Risk-based Infringement Prevention

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<td>Risk-based Transaction Monitoring Focus on High Risk activities</td>
<td>Takedown (automated, notice-based, counter notice); Statutory Reporting on Takedowns and Enforcement</td>
</tr>
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</table>
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/activity/ popularity/financial impact/ context...
- Document risk assessment process
- Variable by type of platform/content

Legal considerations:
- Mac Padder - passport protection/ ID disclosure (copyright)
- T3Newt / eBay - prevent repeat infringements & act as diligent economic operators (trademark)
- Delfy - content-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 audits/ 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 redflag (should have known) high risk content/site/ (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 not 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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- DeFi: content-based user anonymity (data speech)

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**Risk-based Transaction Monitoring**

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- Define risk management process for high risk activities
- Demonstrate due diligence (due diligence of card)
- Create standardised & transparent processes

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**Legal considerations**
- Risk-based monitoring is not general monitoring — arguably, procedence for redflagging should have known high risk context/use (incuts in Germany, US, China)

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**Enforcement & Reporting**

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- Transparent enforcement for all users and rights owners
- Safeguard due process, accountability, fundamental rights

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<th>E-Commerce - Trademarks</th>
<th>Social Media – Hate Speech/Violence</th>
<th>News Portal – Hate Speech/Violence</th>
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<tr>
<td>Password ID/Email Risk assess by commercially popular content</td>
<td>Commercial Seller ID verification Private seller Email Risk assess by seller provenance, product group, transaction volume</td>
<td>Password / Email Context based risk assessment</td>
<td>Anonymous/Hidden User Name Context-based/news category risk assessment</td>
</tr>
<tr>
<td>Content monitoring for high-risk/commercially successful content</td>
<td>Content/transaction monitoring by high risk product category/seller risk profile (AML) / transaction volume</td>
<td>Keyword filtering for comments in contexts most at risk/high ad revenue</td>
<td>Keyword filtering for comments in news contexts most at risk</td>
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<td>Takedown conditions/user rights Reporting on No. Takedowns, Counterclaims, SLAs, Follow-the money actions Algorithmic audits</td>
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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
Questions please!