

Should digital exceptionalism end? An Analysis of the EU liability regime for online hosting platforms

This Centre on Regulation in Europe (CERRE) 2018 *Report Liability of Online Hosting Platforms - Should Exceptionalism End?* is concerned with the **EU liability regime for online hosting platforms** when they provide access to illegal material, content or products. The report analyses whether the liability exemption of the e-commerce Directive is still justified given the growing maturity and economic and societal importance of many online platforms. On the basis of a legal and economic analysis, the Report provides policy recommendations for improving the EU liability regime. These policy recommendations are briefly mentioned here, but they are in detail presented in a separate policy paper.



In 2000, the EU adopted the **e-commerce Directive with four main objectives**:

- (I) share responsibility of a safe Internet between all actors involved,
- (II) stimulate the development of Internet intermediaries and the e-commerce sector,
- (III) achieve a fair balance between conflicting fundamental rights and
- (IV) build the digital single market.

On liability, the Directive contains four key, complementary rules:

- An **internal market clause** which implies that Internet platforms are only subject to the legal regime, including the liability rule, of the Member State where they are established;
- **Harmonised conditions to get an exemption from the national liability regime** when illegal material is hosted. In a nutshell, the hosting platform can escape liability when it provides a service of a mere technical, automatic and passive nature which implies that it has neither the knowledge of, nor the control over, the material hosted; moreover, the platform should expeditiously remove illegal material when aware of it and should cooperate with public authorities in detecting and removing illegal material;
- **Prohibition on Member States imposing general monitoring measures** of the material hosted;
- **Encouragement of co- and self-regulation** to implement the rules and principles of the Directive.

However, with the growing importance of online platforms, **there are calls to increase their liability, or at least their responsibility, in policing the Internet**. At the European level, this has not resulted in a review of the e-commerce Directive but in a three-pronged policy strategy:

First, to **adopt or adapt sectoral laws** when a specific problem is identified. The EU legislature adopted two new directives, one to combat sexual abuses in 2011 and another one to combat terrorism content in 2017. In 2016, the Commission proposed to review two existing directives which impact the responsibility of video-sharing platforms and platforms hosting large amounts of copyrighted content;

Secondly, to provide **more guidance on the implementation of the e-commerce Directive in order to step up efforts in tackling illegal material**: in 2017 the Commission adopted a Communication, followed by a Recommendation in 2018 to improve the detection and the removal of illegal content;

Thirdly, to **develop effective co- and self-regulation schemes**: in 2011, a CEO Coalition was established, in 2012 an ICT Coalition for Children Online and in 2017 an industry alliance was founded to deal with cases of child sexual abuse; in 2015 an EU Internet Forum was initiated to counter terrorist content; in 2016 a Code of Conduct on countering illegal hate speech was adopted; and in that same year a pre-existing Memorandum of Understanding on the sale of counterfeit goods was updated.

Some of these reforms were useful and effective. Nevertheless, in light of the changing societal and economic importance of online platforms, the **fundamental question is whether the e-commerce Directive itself should be revised**. To answer this question, **this report evaluates the appropriate liability for online platforms based on an economic analysis**. From an economic perspective, liability rules should aim at minimising the total costs of harm that result from activities or transactions; market failures may lead to such harm.

In the context of online platforms, several well-known sources of market failure may come into play: information asymmetries, market power, and negative externalities may be present in isolation or in combination. Online platforms may want to, and be able to, mitigate some market failures. In particular, they may reduce asymmetric information problems and allow markets to function in a way that could not be sustained in the pre-Internet era. Online platforms may also take measures against negative externalities, insofar as they may suffer short-term economic losses or reputational harm, or based on a sense of public responsibility to intervene.

Determining the efficient level of care for online hosting platforms involves a difficult balancing act.

First, one has to consider the **instruments available to online intermediaries to prevent harm, and the social costs of these precautionary measures**. Generally, when monitoring costs for the platforms are low, they may be best placed to remove illegal material and prevent harm. In such cases, platforms may monitor on their own initiative as well, meaning that imposing a duty of care on them should not have a significant impact on their viability. The legal requirements for liability should also **induce online hosting platforms to monitor and remove illegal material in a diligent manner**. On the one hand, platforms could be encouraged to take proactive, voluntary measures to monitor and remove illegal material. This may warrant a clear 'Good Samaritan' clause exempting liability for voluntary action. On the other hand, the liability rule should discourage platforms from taking down too much content, as this would include legal material. A sanction on systematic over-removal may be appropriate to encourage online intermediaries to improve the quality of their notice-and-takedown systems and further develop automated detection technology.

Secondly, the **type and extent of the harm, as well as the type of harmed party**, may influence the need for liability of online hosting platforms. In cases where harm is serious, and where harm is scattered over a large group of parties, there is a stronger argument for some form of liability for online platforms. Different types of online intermediaries may be vulnerable to different types of harm, depending on the type of content hosted on their platforms, and more generally on their business model.

Thirdly, one has to balance the costs of monitoring and the extent of the harm with the **social benefits that the activities of online hosting platforms provide to society**. Liability for harm caused by the activities of platforms increases the costs of doing business, and may prevent some business models from being commercially viable at all. Moreover, small platforms or new entrants may need to be exempted from some obligations, in order to prevent a situation where the liability rules create a regulatory barrier to entry, harming competition in the market provided that there is a clear threshold for exemption.

Overall, from an economic perspective, there is likely no one-size-fits-all liability rule for all types of platforms and all types of harm. Ideally, the duty of care for online hosting platforms varies depending on several general factors, including the level of precaution costs of the platforms, the possibility for victims to notify or even prevent harm, and the extent of the harm. While, in practice, it may be neither possible nor desirable to impose liability exactly along the lines of economic determinants, these factors for differentiation may inform policy makers as to the appropriate type of duty of care for online hosting platforms.

On that basis, the Report makes the following **two sets of recommendations**: the first set is general and deals with the structure of the regulatory framework, while the second is specific and deals with the liability exemption of the online hosting platforms.

1. On the **structure of the regulatory framework**, the Report suggests that:

- As tackling illegal material online is a problem of many hands and many rules (some dealing with liability, others dealing with establishment and operations), **all these rules need to be consistent with each other and contribute, with their combined incentive effects, to effective detection and removal of illegal material online**;

- The **liability rules**, which are one important part of this regulatory framework, **should efficiently share the burden of policing the Internet among all the private and public actors** involved;

- These **liability rules need to be principle-based** to ensure an easy adaption to rapidly and unpredictably evolving technology and markets; however, to alleviate the drawbacks of legal uncertainty, these rules should be clarified using delegated or implementing acts or interpretative guidance, or supplemented with effective co-/self-regulation schemes.

2. On the **liability of hosting platforms** and more specifically their right to exemption, the Report suggests:

- **Requiring hosting platforms, in order for them to benefit from the liability exemption, to provide a practical and proportionate infrastructure allowing users to comply with their responsibilities, and ensuring an effective detection and removal of illegal material.** The required features of such infrastructure or system, which may vary according to the type of platforms, could be specified in a Commission legal act (either a delegated act or a Recommendation) and would include most of the characteristics identified by the Commission in its recent Recommendation and Communication on tackling illegal content online. In particular, such systems should (i) allow for effective and transparent notice-and-takedown processes, (ii) rely on appropriate, proportionate and specific proactive monitoring measures, which may be based on automated tools if safeguards are in place, and (iii) ensure that, upon knowledge, illegal material is removed expeditiously in a transparent and fair manner;

- Moreover, for **illegal material that justifies a more extensive duty of care**, the baseline regime of the revised e-commerce Directive should be complemented with **effective co-/self-regulatory schemes**.

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