

POLICY RECOMMENDATIONS HOW TO IMPROVE THE LEGAL REGIME ON THE LIABILITY OF PROVIDERS OF HOSTING SERVICES

Centre on Regulation in Europe (CERRE) 2018 *Report Liability of Online Hosting Platforms - Should Exceptionalism End?* provides detailed recommendations how to improve the legal regime on the liability of providers of hosting services, based on the learnings of the economic analysis of law.



A. Tackling illegal material online is a shared responsibility

Tackling illegal material online is a problem of many hands and many rules. These rules (consumer protection, data protection, product safety, and antitrust rules **need to be consistent** internally at the national level and between the EU and the national levels, and effective in giving the many hands the right incentives to police the Internet **for an effective detection and removal of illegal material**.

The liability rules in this overall framework should **efficiently share the responsibility for the detection and the removal of illegal material online** among the many actors involved in the diffusion of such material.

The liability rules of providers of hosting services should be principles-based to be easily adaptable to technology and business models, which evolve quickly and often in unpredictable ways. These principles-based rules could be **clarified by the European Commission in delegated or implementing acts or interpretative guidance**, which can easily be adapted to technology and market evolutions. In particular, guidance prevents that the liability rules remain vague, and ensures that online intermediaries have the necessary knowledge and legal certainty to fulfil their obligations and responsibilities.

Liability rules may also be **complemented with co-regulation or self-regulation** such as codes of conduct. These codes should be drafted in collaboration **with all stakeholders**. **The implementation of these codes should be closely monitored** and in case of weak enforcement, remedial actions should be adopted either by the stakeholders or by the State.

B. Liability of providers of hosting

Regarding the liability rules of the providers of hosting services, they recommend to maintain the liability exemption of the e-commerce Directive but to link it with the provision of an infrastructure allowing effective detection and removal of illegal material.

The preferred approach would be a negligence-based system. The duty of care of the providers of hosting services should be determined on the basis of general criteria such as the instruments available to prevent harm and the social costs of these precautionary measures, the type and the extent of the harm and the type of the harmed party, and the social benefits that the activities of online intermediaries provide to the society. Based on these criteria, the required level of care would ideally be differentiated according to the type of illegal material. **These criteria for the duty of care could be specified at the EU level.** However, due to political economy considerations, **an EU harmonisation of the national rules for secondary liability of online intermediaries is probably not reachable at this stage. Therefore, the authors recommend a solution consisting of maintaining the current exemption system** with improvements to clarify at the EU level the conditions under which the providers of hosting services benefit from the liability exemption and to link these conditions to the provision of an infrastructure allowing effective detection and removal of illegal material. Many features of this infrastructure are already mentioned in the Commission Communication of September 2017 on tackling Illegal content online and in the Commission Recommendation of March 2018 on measures to effectively tackle illegal content online.

1. Improving the detection of illegal material

Illegal material can be detected by online platforms themselves with proactive monitoring measures or by users of the platforms notifying the illegality. EU rules should incentivise platforms and users to detect illegality while minimising the risks and the costs of errors and ensuring a fair balance between the different human rights at stake. While achieving such optimal rules may be challenging in practice, several concrete improvements may contribute to better detection of illegal material.

Regarding the **detection by providers of hosting services, proactive measures should be encouraged when they are appropriate, proportionate and specific** in order to reduce the risks of type II errors (under-removal).⁸⁴ This implies that the possible current dis-incentive to use proactive measure brought by Article 14 of the e-commerce Directive should be removed and a Good Samaritan clause should be affirmed explicitly to ensure that the providers of hosting services taking on proactive measures are not treated in a less favourable way than the ones not taking these measures.⁸⁵ Such a Good Samaritan clause should aid platforms when taking voluntary measures, by removing the risk of being sanctioned for under-removal. This

encouragement of specific and proportionate measures should not lead to a general monitoring undermining several fundamental rights.

Regarding the **detection by users, the notice-and-take down system should be facilitated and based on common principles defined at the EU level**. This has several consequences. First, providers of hosting services should set up mechanisms for notices that are easy to access, user-friendly and allow for automated submission. Secondly, they should clearly communicate this possibility to their users.

The progress in AI allows platforms and some large users to rely increasingly on automated tools to detect illegal activities on the Internet. Thus, **reliance on automated detecting tools by intermediaries or users should be encouraged as an effective detection means, provided some safeguards are in place**. Given the early developments of these technologies and their rapid improvement over time, it is probably too early to regulate the use of these automated tools. Moreover, this is part of the wider debate on the EU regulation of AI. However, stakeholders and authorities should **reflect upon at least three types of safeguards**.

- I. first, the **minimisation of errors** and the complementary action of humans when the risks and the costs of errors are considered to be too high;
- II. second, the **understandability of the process** and the possibility to give an explanation when content or a product is removed after an automated detection;
- III. third, the need to **share these technologies** between large intermediaries, which have the data, the expertise and the financial means to develop automated techniques, and the small or new intermediaries.

2. Improving the removal of illegal material

Once illegal content or product has been detected, the providers of hosting services **should act expeditiously**, especially when the harm can be important and quickly inflicted and/or when the illegality is notified by an enforcement authority or a trusted flagger. To reduce the risks of type I error (over-removal) and ensure an appropriate balance between human rights, the platform should, when practical and proportionate, first **inform the provider** of the intention to remove the supposedly illegal material and the reason of such removal as well as give them the possibility to contest such removal by submitting a **counter-notice**. Then, the platform should only remove the material after having assessed in a diligent manner, on the basis of the information given, the validity and the relevance of this counter-notice. However, in exceptional circumstances, when the illegality is manifest and relates to serious criminal offences involving a threat to the life or safety of persons, content may be removed immediately. Also, the platforms should not divulge information which may undermine public policy and public security.

Moreover, online platforms should be encouraged to contribute to the establishment of **out-of court dispute resolution mechanisms** allowing the material provider whose counter-notice was not followed to contest the removal with a mechanism which is easily accessible, effective, transparent and impartial and ensuring that the settlements are fair and in compliance with the applicable law.

3. The differentiation of care

The **efficient level of care for the provider of hosting services may vary depending of the level of harm or the dispersion of the victims**. Therefore, for material when the harm is particularly high and/or the victims are particularly dispersed, the level of care of the platforms should be higher. For instance, for terrorism content, the Commission Recommendation of March 2018 already provides for a stricter duty of care. Similarly, the revised Audiovisual Media Service Directive provides for a different duty of care according to the nature of the content, the harm it may cause, the characteristics of the category of persons to be protected and the rights and legitimate interests at stake.

For types of harm that affects users or consumers who have an interest in preventing or mitigating this harm, the policy focus could also be more on empowering these harmed parties to enforce their rights through, for instance, consumer protection mechanisms. Finally, in cases where the harm affects larger parties with sufficient means to enforce their rights, such as is often the case for intellectual property rights infringements, policy makers ought to keep in mind that notice-and-takedown systems work in a transparent and balanced way. The Report suggests complementing those reforms related to the baseline liability regime applicable to all types of illegal material **with effective co/self-regulation instruments for specific types of material where additional care is required**. Thus, for the types of material which justify a particularly high duty of care, industry, users and authorities should agree on Codes of conduct specifying in more detail the actions, the timing and the cooperation to ensure rapid detection and removal of particularly harmful content.

C. Responsibility of other actors and the public authorities

Finally, regarding the liability rules of the 'other hands' (the victims, the providers of material and the authorities), the rules should also give them incentives to contribute to the detection and the removal of illegal material.

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