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Standards for duty of care? Debating intermediary liability from a sectoral perspective

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Current liability exemptions - Ecommerce Directive (ECD)

- passive, mere technical activity (conduit, caching, hosting)
- no active knowledge
- expeditious removal (notice-and-takedown NTD)
- specific infringement prevention, but no general monitoring
- duties of care may be imposed

EU 2016 - Public consultation on online platforms

- horizontal vs vertical (sectoral)
- leave ECD 2000/31 as is
- sectorial, problem driven approach - review substantive law
- proposals on copyright, hate speech/child protection (AVMSD)

EU Intermediary Liability - Introduction

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Statement

- EU proposals *de facto* limit availability of safe harbour (active role)
- Filtering obligations conflict with ECD, out of touch with realities
- Private agreements (self regulation) may impact speech, competition

Alternative

- replace current ECD regime with standardized sectoral duties of care
- examples from product and anti-money laundering (AML) regulations

Structure: compare current sectoral approaches in

- Copyright; Trademarks; Hate Speech/Child Protection/(Fake news)
- Product regulation (medicines, food, consumer electronics), AML

Intermediary Liability – IP: Copyright and Trademarks

Filter galore and laissez faire?

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Copyright - EU Directive Proposal

- active role of ISP requalified > limits safe harbour defense in ECD?
- mandated use of protection technologies > conflict with ECD?
- information requirements on ISPs to rightsholders excessive

Trademarks (counterfeit, passing-off...)

- No regulatory proposal - no problems?
- MoU between EU, platforms and rights holders - little progress (2011)
- **Continuing unclarity over (technical) role of platforms > ECD**
- **Filtering obligations unclear > where does duty of care come in?**
- **Promotes private agreements > competition, speech concerns**

Intermediary Liability – Hate Speech, Child Protection, Fake News – *When is it obviously infringing?*

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Audiovisual Media Services Directive (AVMSD) draft amendment (VSPs*)

- protect organization of content but not content "as such"?
- protective measures in line with ECD?
- European Regulators Group for (AVMS) to facilitate codes of conduct

Content on other platforms

- EU Code of conduct - voluntary, self-regulatory, NTD based
- National: DE - draft law to combat hate speech/fake news - NTD based
- **Fragmentation: VSPs vs other platforms, law vs self-regulation**
- **VSPs: technical role/control over content unclear**
- **Filtering obligation for VSPs unclear**
- **Content removal (non-VSPs) decided by private actors?**

*Video Sharing platforms (VSPs)

Intermediary Liability – Product Regulation

Technical standards as a duty of care model?

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Fake medicines (2011)

- Registration/labelling requirements for online sellers of medicines



Food retail (2011)

- Online labelling & registration requirements online food retailers



Consumer electronics

- CE product legislation and labelling requirements adopted to distance selling (2014, 2012)

- All: Surveillance bodies (MSAs) do online surveillance, cooperate with ISPs

Intermediary Liability – Anti-Money Laundering (AML)

Know-Your-Customer for content providers?

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Financial Institutions (incl. E-Payment providers,)

- Mandatory risk management and monitoring processes
- Know-your-customer (KYC), transaction monitoring, reporting
- Known to platforms with payment services and card issuers

Lessons?

- Product regulation: Tools to create due ISP diligence processes
- AML: adaptable to duty of care standards for ISPs
- create technical safe harbour standards with all stakeholders
- MSAs (state) to supervise co-regulatory efforts

Intermediary Liability – Conclusion

From actual knowledge towards technology safe harbour?

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Shift away from:

- Focus on filtering and the specific vs broad filter trap
- “Actual knowledge/passivity” test for safe harbour defence

What about:

- A horizontal “Technological safe harbour” protection in ECD
- Standardized, sectoral duties of care in substantive law
- based on KYC, Risk based monitoring, NTD, regulatory reporting
- take account of role intermediaries play today

- ✓ Broad stakeholder involvement
- ✓ Adaptable to technology and market trends
- ✓ Can be mandated by legislation
- ✓ EU experience in standardization



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