

The Future of European Intermediary Liability

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Or shall we speak of platform liability?

- <https://vimeo.com/132076290>



The wrong word?

- *“Platform regulation is not a useful phrase”*
- *“In the end, we are all platforms in some form or another.”*

Theo Bertram, Google’s European public policy manager

Outline: about *shifting!*

- From intermediary liability to *platform* regulation?
- From liability exemption to content responsibility?
- From a horizontal approach to vertical policies?
- From State law to self- & co-regulation?
- From black boxes to transparency?
- Concluding words

From intermediary liability to platform regulation?

You said 'platform' in the 2015 *DSM Strategy* (COM(2015) 192 final)

- Platforms enable:
 - consumers to find information/works
 - businesses to exploit e-commerce
- Platforms include:
 - Search engines
 - Social media
 - E-commerce platforms
 - App stores
 - Price comparison websites
 - Mobility, accommodation, tourism, recruitment, etc.= sharing economy services

'Platform' in the *DSM Strategy*

- Platforms (in general):
 - Accumulate/control an enormous amount of personal data
 - Use algorithms to transform this into usable information
 - Have a multiplier effect in fostering new SMEs
 - Improve efficiency and consumer choice
- 'Some platforms':
 - Need 'further analysis' (regulation?) 'beyond the application of competition law in specific cases'

DO YOU WANT REGULATION BY COMPETITION LAW?

**I'M ONLY
RESPONSIBLE
FOR WHAT I SAY
NOT FOR WHAT
YOU UNDERSTAND**

**DO YOU WANT EX ANTE
REGULATION?**

**What
Do You
Really
Want?**

DSM Strategy

- Platforms:
 - Need 'further analysis' (regulation?) 'beyond the application of competition law'
 - Transparency
 - Platform usage of the information collected
 - Relations between platforms and suppliers
 - Obstacles to platform portability
- Intermediaries:
 - Further analysis too: « *the Commission will analyze (...) whether to require intermediaries to exercise greater responsibility and due diligence in the way they manage their networks and systems – a duty of care* »
- Distinction between platforms and intermediaries?

May 2016 Communication

Online Platforms and the DSM

- Shift: *Ensuring that online platforms act responsibly*
 - “*greater transparency on platform content policy”*
 - “*proliferation on online video sharing platforms of content that is harmful to minors and of hate speech”*
 - “*sector-specific regulation in the area of copyright”: value gap*
 - “*engage with platforms in setting up and applying voluntary cooperation mechanisms”*
- Beyond liability? Appeal to corporate social responsibility (CSR)?

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From liability exemption to content responsibility?

Content (editorial) responsibility in the US debate

- Faked News/Facebook effect?
« *Facebook can no longer credibly describe itself as merely a platform for others' content, especially when it is profiting from micro-targeted ads. It has to take editorial responsibility.* »
– Prof. Frank Pascale, Jan. 2017

Content responsibility in the law (EU)

- Hate speech and protection of minors
 - Draft AVMS dir. on video-sharing platforms: art. 28 a = measures towards
 - “content which may impair the physical, mental or moral development of children”
 - >< content with incitement to violence or hatred
- Anti-terrorism
 - Draft directive on combating terrorism: offence of “public provocation to commit a terrorist offence”

Content responsibility in self- or co-regulation

- June 2016 Code of conduct on illegal hate speech online agreed with Facebook, YouTube, Microsoft, Twitter
 - Trap still there: *more active, more liable* (e-Com Dir.)
- Same trend in increasing *copyright responsibility* (> < liability)?
 - Sept. 2016 Copyright package

Draft Copyright in DSM dir. on online uses of content

- Art. 13(1): refers to « *information society providers that store and provide large amounts of works or other subject-matter* »
 - Is it about platforms?
- Art. 13(2): platforms should « *put in place complaints and redress mechanisms that are available to users* »
- Art. 13(3): Member States should facilitate cooperation through « *stakeholder dialogues to define best practices* »

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From a horizontal approach to vertical policies?

From horizontal approach to vertical implementing schemes

- Horizontality of e-Com dir.
- Differentiated schemes depending on the type of right and infringement?
 - Defamation, hate speech, copyright...
- Pro: the assessment is specific and the balance of interests varies
- Contra:
 - automated process used
 - convergence in the implementing process

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From State law to self- and co-regulation?

State law: blocking injunctions

Users

Directive 2009/140/EC
(art. 1(3)a)
= **Telecom package**

Directive 95/46/EC
= **Privacy Dir.**

**Internet freedom
Privacy**

Intermediaries

Directive 2000/31/EC
= **eCommerce Dir.**
(art. 12 and 15)

**No monitoring
Reactive**

(IP) Right Holders

Directive 2001/29/EC
= **Infosoc Dir.**
(art. 8(3))
Directive 2004/48/EC
(art. 11)
= **Enforcement Dir.**

**Protection of rights
Enforcement**

Laws define the framework, courts find the “fair balance”

Intermediaries

*Vacuous and
unhelpful?*

J. Griffith

*Adequate for
defining scope?*

J. Cabay



**Fairness
in
balancing**

(IP) Rights Holders

Users

The judicial sequence according to *UPC Telekabel*

Targeted
injunction
By court

Implementing
measure
By intermediary

Right to oppose
By user

Still room for the implementation
by national judges

Regulatory mix including self-regulation: RTBF

- Regulation by the fundamental rights and by the (common law) judge:
 - CJEU, 13 May 2014, *Google Spain* (C-131/12)
 - CJEU wording: « *inadequate, irrelevant or no longer relevant, or excessive* » with regard to purpose/time
- Vague Guidelines by regulators (DPAs)
- Implementation: self-regulation by Google
 - Online form to fill: countries to tick, name used to search + name of requester (+ ID), URL for results to be removed + why URL is « *irrelevant, outdated, or otherwise objectionable* »
- Criticism: Google = 'censor-in-chief'.

'Supreme court' for oblivion and newsworthiness!

- Google: « *When evaluating your request, we will look at whether the results include outdated information about you, as well as whether there's a public interest in the information — for ex., we may decline to remove certain information about financial scams, professional malpractice, criminal convictions, or public conduct of government officials* »
- Lawfulness, public interest and adequacy left to platform

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From black boxes to transparency?

Black box to transparency?

- Self-provided information: *Transparency Report* of Google: :
 - Numbers on 13 Jan. 2017: 673 155 requests about 1 859 417 URLs
 - Per country: FR, D, UK, etc.
 - Per type of sites with the top ten sites: Facebook, Profileengine, annuaire.118712.fr, YouTube,...
 - Not press publishers
 - No motivation or reasoning (but examples)
- Insufficient transparency!
- Advocacy for ADR system (at EU level)
 - Learning from success: domain name (UDRP)
 - How to bring the parties to the ADR system?

Online adjudication for small scale disputes

- Offers a 'judge', more transparency & fairness
 - Escalated process: mediation before arbitration
 - Effective and independent online provider of adjudication service
 - Fairness: possibility of hearing, appeal
- Should be cheap and fast
- Could complement RTBF, notice-and-action procedures, etc.

Concluding or *opening* words

- Online *platforms*: just a cosmetic change? Or the sign of a shifting policy?
- Sector-specific regulation in shaping content responsibility (>< liability exemption)?
- Clarification to solve the ‘double bind’ (conflicting imperatives) ‘*more action=more liability*’
- Need of online adjudication system for massive online micro-cases (not only RTBF) to complement measures taken by parties and court-made law



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Thanks for your attention

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