BRIEFING

Requested by the IMCO committee

Study in Focus

European Parliament

The functioning of the Internal Market for Digital Services: responsibilities and duties of care of providers

Challenges and opportunities

The original full study[1] reflects on responsibilities and duties of care of online intermediaries as set out in Directive 2000/31/EC (E-Commerce Directive, ECD) and gives recommendations for a possible future EU Digital Services Act.

Check out the original full study by scanning this QR code!

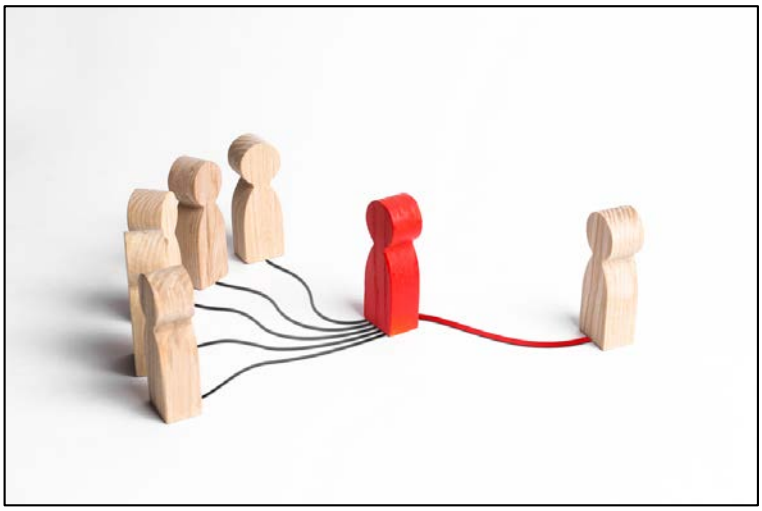
Background

In this study, responsibilities and duties of care are only discussed for providers of digital services functioning as intermediaries. Responsibilities and duties of care for intermediary service providers arise in the case of third-party infringements.

There are several good reasons to hold intermediary service providers responsible for third-party infringements. Intermediary service providers may create the risk of infringements by offering their services. Furthermore, intermediaries are in a good position to stop third-party infringements when their services are used to infringe. Hence, infringements can more efficiently be stopped by intermediary service providers in contrast to the legal pursuit of individual (and often anonymous) third-party infringers. Finally, by creating responsibilities and duties of care for intermediary service providers, they can become hubs of trust, necessary for a well-functioning internet.

As a general principle, the ECD only provides for liability shields (liability privileges) in Articles 12 to 14 ECD.

The ECD does not provide for a basis to establish the liability of intermediary service providers.



Articles 12 to 14 ECD leave injunction and removal claims untouched. As to such claims, Article 15 ECD and its prohibition to impose general monitoring duties have to be observed.

There are sector specific provisions superseding as *lex speciales* the liability privileges of the ECD. One recent example is Article 17(3) of Directive 2019/790 (Digital Single Market Copyright Directive, DSM-CD).

The European Commission has announced a general idea to increase and harmonise the

Policy Department for Economic, Scientific and Quality of Life Policies
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Author: Prof. Dr Jan Bernd NORDEMANN
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responsibility of intermediary service providers.

It is an option to **harmonise the rules which establish liability of intermediary service** providers on the EU level. This would signify a step towards a level playing field in the EU and against third-party rights infringements.

Key findings

Provisions establishing the liability of intermediary service providers

Traditionally, national rules establish the liability of intermediary service providers.

So far, European law only provides for a sector specific harmonisation of the liability of intermediary service providers. The accountability merely for injunctions (based on helping duties of intermediaries as they are best placed to prevent the infringement) is harmonised in intellectual property law (Article 11 3rd sentence of Directive 2004/48/EC (Enforcement Directive, ED), Article 8(3) of Directive 2001/29/EC (Copyright Directive, CD 2001/29). With respect to ordinary liability, the sector specific provisions of Articles 11 and 13 of the ED may determine the concept of the "infringer" on the EU level. This could be clarified by the Court of Justice of the European Union (CJEU) in the pending YouTube case. Another sector specific rule establishing liability may be seen in Article 17 DSM-CD.

On a sector specific basis, EU law also decides when an intermediary may be treated as an infringer. This is for example true in copyright law according to the interpretation of Article 3 CD 2001/29 by the CJEU.

	Accountability for injunctions (helping duties)	Liability (tortfeasor, accessories)	Rules to determine if intermediary is infringer	Liability privileges (liability shield)
National rules (not harmonised by EU law)	Yes	Yes	Yes	No
EU rules	No, but sector specific exceptions Examples: Art. 11 3rd sentence ECD, Art. 8(3) CD 2001/29	No, but sector specific exceptions Examples: Art. 11, 13 ECD (to be confirmed by CJEU), Art. 17 DSM-CD	No, but sector specific exceptions Example: Art. 3 CD 2001/29	Yes, ECD rules in Art. 12-15 ECD, some sector specific Example: Art. 17 DSM-CD

Source : Author's own elaboration.

- Recommendation

Considering the long-standing tradition of national liability systems, EU rules could be explored which establish liability of intermediaries to a limited, but sufficient extent. This could be done even without changing the ECD and only where no sector specific rules already exist in EU law. For rules to establish liability of intermediaries, a distinction needs to be made between (1) the accountability for injunctions and (2) ordinary liability which entails the concept determining intermediaries as infringers.

(1) Concerning the mere accountability for injunctions (due to helping duties for intermediaries as they are best placed to prevent infringements), the model of intellectual property law in Article 11 3rd sentence of the ED and Article 8 (3) CD 2001/29 should be followed. It is recommended to introduce a similar accountability for injunctions for intermediaries outside the area of intellectual property rights infringements. The intermediaries' duties should be shaped according to the principle of proportionality.

(2) Concerning ordinary liability, it does not seem realistic to harmonise all national concepts of intermediaries' fault and strict liability, e.g. for damages. However, it is recommended to harmonise the understanding of the term "infringer" regarding intermediaries, namely harmonising under which circumstances intermediaries can be classified as "infringers". If the intermediary has to be classified as an "infringer", the intermediary would be liable in the same way as a direct third-party infringer. A general rule could be introduced into EU law that "essential role" intermediaries which sufficiently intervene into third-party infringements intermediaries have to be treated as infringers themselves. In case the intermediary does not act with intent, one could discuss to limit this rule by a proportionate duty of care. The intermediary's duties could be shaped in accordance with the principle of proportionality and would be comparable to the duties for a mere accountability for injunctions. The justification for this more extensive liability (which includes e.g. damages) lies in the fact that the "essential role" intermediary intervenes into third-party infringements and thus should face the same liability as the third-party infringer.

Access providers – "Mere conduits" (Art. 12 ECD)

Regarding access providers and the liability privilege in Article 12 ECD, some difficulties emerge concerning the sub-group of intermediary service providers playing an "in-between" role between access providers and hosting providers, such as upstream providers, content delivery network providers or domain providers.

- Recommendation

It should be left to the courts to determine whether Article 12, 13 or Article 14 ECD apply to the respective businesses. There seems to be no pressing need to establish further categories for these providers because business models will constantly evolve, leaving newly created categories out of date.

Cache providers (Art. 13 ECD)

For cache providers, the liability shield of Article 13 ECD has not gained larger practical importance. Article 13 ECD seems to provide an adequate regulation for this group of intermediaries.

Hosting providers (Art. 14 ECD)

Hosting providers are the most relevant group of intermediaries in legal practice. They deserve particular attention.

The differentiation between active and passive hosting providers – as set out by the CJEU case law – is justified. "Active role" service providers intervene in third-party information and make third-party content part of their business model. It seems justified that they are facing an increased level of responsibilities and duties of care compared to merely neutral and passive providers of technical services.

- Recommendation

Calls to abolish the distinction between active role and passive role hosting providers should not be followed.

Another topic of discussion is the "Good Samaritan Paradox". The "Paradox" seeks to describe the following.

The model provider needs to remain neutral and passive to come under the liability privilege of Article 14 ECD. This may disincentivize the provider from taking precautions against infringements due to its fear of playing an active role and losing the safe harbour protection. However, the distinction between active and passive role hosting providers is not based upon the provider's role in discovering infringements. Rather, the "active role" follows from the promotion of content.

- Recommendation

The "Good Samaritan Paradox" should not lead to legislative activity as the argument underlying the "Paradox" is not convincing.

In order to prevent infringements on an efficient and sustainable level, the hosting provider should not only face takedown duties. Rather, intermediaries should also face staydown and prevention duties.

- Recommendation

A 3-fold duty after notification should also be implemented outside the scope of intellectual property rights infringements. This 3-fold duty after notification of the right infringement consists of: (1) takedown, (2) staydown and (3) prevention of similar clear rights infringements of the same kind.

According to the recent case law of the CJEU with regard to Article 15 ECD, such duties should also stay in line with the prohibition to impose general monitoring duties. The introduction of these duties establishing the liability of intermediary service providers is coupled with the advantage of achieving a complete harmonisation on the EU level.

Link providers, in particular search engines

Linking providers and more specifically search engines play an essential role in the functioning of the internet. Nevertheless, any rule addressing the liability of search engines should provide adequate responsibilities and duties of care for search engines as search engines perform the role of gate keepers for the dissemination and the access to illegal information.

Consequently, rules establishing the liability of search engines deserve attention. The CJEU and national courts have found adequate and flexible solutions establishing the liability of search engines, especially in copyright law.

- Recommendation

Rules to establish liability of search engines should be created horizontally for all areas of law, where no such rules exist yet. Such rules could be based on the liability concept for search engines in copyright law.

Identification of the infringer – (Art. 5 ECD)

Illegal business models pose a major problem for the European internet by creating a massive amount of infringements.

Usually, such structurally infringing websites or offers do not respect the information duties of Article 5 ECD. They hide in anonymity. Yet, structurally infringing websites and offers should not be able to use legitimate EU intermediary service providers for their infringements.

- Recommendation

Against this background, it is recommended to create "Know Your Business Customer" (KYBC) duties for intermediary service providers. Such KYBC duties should be more limited than their equivalents fighting money laundering in the financial sector. But a duty for intermediary service providers to receive and verify customer data should be implemented; the verification could be carried out via e.g. the European Business Register (EBR) or the Ultimate Beneficial Owner (UBO) Register. These verification duties should be combined with a prohibition to provide services to customers, where a verification as outlined above has not been carried out or has failed. Such duties could not only be imposed on hosting providers, but also on other intermediaries in order to effectively counteract structurally infringing websites and offers operating illegal business models.

[1] https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648802/IPOL_STU(2020)648802_EN.pdf

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Administrator responsible: Mariusz MACIEJEWSKI; Editorial assistant: Irene VERNACOTOLA
Contact: Poldep-Economy-Science@ep.europa.eu
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