

Liability of online platforms

This briefing draws on the STOA study of the same title, which advocates a technology-specific, problem-based and functional approach to regulation. The study suggests six non-mutually exclusive solutions for shaping online platform (OP) liability: (i) maintaining the status quo; (ii) promoting awareness-raising and media literacy; (iii) promoting self-regulation; (iv) establishing co-regulation mechanisms and tools; (v) adopting statutory legislation; (vi) modifying OPs' secondary liability by (a) clarifying the conditions for e-Commerce Directive (ECD) liability exemptions, or (b) establishing a harmonised regime of liability.

Introduction

The policy options put forward could be used to shape OP liability, including that relating to the illegal/harmful content or products distributed and/or made available through their infrastructures. The options, identified based on the analysis of the European Union (EU) regulatory framework carried out in the study, are assessed according to their (i) cost, benefits, feasibility, effectiveness, sustainability, risks and coherence with EU objectives; (ii) ethical, social and regulatory impacts; (iii) effect on EU fundamental rights.

From a methodological standpoint, firstly, OP liability should be seen as **one element** in the effort to create a safe and secure digital environment, which cannot be considered in isolation from other regulatory tools. In some cases, other instruments can be more suitable for incentivising OPs to adopt an optimal level of content management and moderation, while OPs can be held strictly and absolutely liable as a single entry point for litigation, when they are in the best position to manage the risks ex-ante and ex-post, under a risk management approach (RMA). Secondly, OP liability should be 'technology-specific', i.e. address narrowly identified problems posed by specific types of platforms and infringements. Indeed, regulation should be seen as an evolving tool, to be modified together with technological advances through constant monitoring of emerging solutions and their social, economic and regulatory impact. This could be done by specifically designed bodies, representing the main reference point for proposing regulatory intervention and for coordination with national authorities and OPs across Europe, as well as for cross-fertilisation among different policies and objectives.

Policy options

1. Maintaining the status quo

The EU could refrain from taking any action and maintain the status quo (the ECD's liability exemption, sector-specific duties and liabilities, self-regulatory initiatives). This option would leave many issues that negatively impact OPs' capacity to step up the fight against illegal/harmful content online unaddressed, and leave space for national regulation – further exacerbating legal fragmentation and uncertainty in the field.

The study therefore suggests that this option should be discarded.

2. Awareness-raising and media literacy campaigns

The EU could direct its efforts at ensuring that OPs adopt measures that strengthen media literacy and empower users, enabling them to actively promote a safe digital environment.

The spread of online illegal/harmful content involves a plurality of subjects, and OP users must have the knowledge, sensibility and actual capacity to identify and report it. However, 'empowering tools' are often sub-optimal: users and members of the society have little incentive to control OPs through their choices or behaviour, while imposing extensive requirements of information, awareness-raising and transparency on OPs may not suffice to actually make users aware of their rights and duties.

The study therefore suggests that the option of promoting media literacy and user-empowerment is not used as a primary solution, but rather in synergy with other, more effective, policy options.

3. Promoting self-regulation

Under this option, EU institutions would further promote self-regulatory mechanisms, where industry actors adopt voluntary commitments.

This would allow a certain degree of cooperation and adequate solutions, and enhance OPs' involvement and responsibility, without hampering innovation. However, public-sector objectives are not always aligned with those of private companies, so that relying solely on self-regulation may lead to outcomes that do not match those of public regulators. Moreover, many factors – such as the limited range of participants, vaguely formulated commitments, absence of clear objectives and of measurable progress indicators, as well as the voluntary nature of the agreements, and the lack of significant incentives towards compliance – limit the capacity of self-regulatory tools to incentivise an optimal management of illegal and harmful content.

The study therefore suggests that promoting industry self-regulation should not constitute the primary solution to the regulation of OP liability, but rather work in synergy with more effective policy options.

4. Establishing co-regulation mechanisms and tools

Under this option, EU institutions and OPs would cooperate to reach optimal regulatory solutions, by providing governmental involvement, supervision and enforcement of self-regulatory tools, and/or by creating regulatory sandboxes enabling firms to test solutions – e.g. algorithm-based content filters for detecting hate speech – pursuant to plans agreed with, and monitored by, a competent authority.

These solutions would ensure stronger public oversight of OP practices, while enabling flexible and industry-driven regulatory schemes, subject to constant update and adjustment.

Co-regulation is therefore recommended and preferred to the promotion of self-regulatory tools. Ideally, it could be combined with different policy options, such as the adoption of statutory legislation.

5. Adopting statutory legislation

The EU would define OPs' duties and liabilities through binding regulation, under different models.

Establishing clear and narrowly tailored primary duties for OPs

The EU institutions could impose specific and narrowly tailored duties on OPs as to regulating the management of their infrastructure and on content monitoring tools. These duties can be associated with the OPs' primary (civil or administrative) liability. In particular:

- OPs could be obliged to adopt notice-and-take-down procedures, as well as counter-notices and instruments for contesting removal, which should ensure procedural fairness for all subjects involved. Common principles and essential requirements could be defined at EU level, while specific technical methods could be outlined in harmonised standards or in delegated acts, specifically designed for particular types of infringement/OPs;

- OPs could be subject to reporting obligations and harmonised rules of procedural accountability. Reporting obligations should be specific and concise, and clearly expose the results of any follow-up to removal decisions, to ensure that OPs do not engage in over-removal and impose excessive burdens on their users. Large OP content management policies and mechanisms could be made subject to public review and advisory oversight;
- OPs that allow the trading and supply of goods and services on their infrastructures could be subject to an obligation to verify the identity of the traders and provide such information to users and third parties that have a legitimate interest. Specific cooperation duties between OPs and market authorities could be strengthened, e.g. requiring removal within a defined timeframe after those competent authorities have found a product unsafe;
- While a general obligation to adopt automated filtering and content recognition should be excluded – as it could lead to over-removal and infringements of users' freedoms and fundamental rights – OPs choosing to adopt such tools could be made subject to rules on algorithmic transparency, ensuring a 'right to an explanation' and human oversight;
- OPs could be subject to an obligation to ensure transparency on content managing, being required to specify clearly in their terms of use what type of content is prohibited, and the associated sanction, as well as how review and reputational systems function;
- Essential requirements for the functionality of reputational systems could be imposed on OPs, to be set by binding regulation;
- Specific types of OPs could be required to maintain ideologically neutral services, creating algorithms that foster and promote diversity of content, rather than promoting information bubbles;
- OPs could be subject to a positively harmonised form of liability for failure to cooperate in removing the infringement.

This solution provides greater legal certainty and user protection, while monetary sanctions for infringement by OPs could finance an EU compensation fund, providing compensation under a RMA.

The establishment of clear and tailored primary duties for OPs is therefore highly recommended. Ideally, they could be combined with other solutions, such as a review of OPs' secondary liability.

Modifying OP secondary liability

Model A – Clarify the conditions for liability exemptions under the ECD

Under this option, the ECD regime would merely be adjusted, adopting the interpretations and practices developed by the Court of Justice of the EU (CJEU) and EU institutions. This option could serve in particular to:

- ensure that the ECD applies to OPs offering their services for free or under the 'freemium model', as well when users' personal data represent a de facto counter-performance;
- ensure that the ECD applies to OPs such as cloud computing and storage, online advertising platforms, search engines, collaborative platforms and social media, where their activity falls under the notion of 'hosting', as per Article 14 ECD;
- clarify whether activities such as ranking, indexing, provision of review systems, would turn an OP into an 'active intermediary', preventing the application of the liability exemptions set by the ECD; alternatively, the distinction between 'active' and 'passive intermediaries' could be removed, extending the exemptions to all providers of digital intermediation services;
- clarify that the adoption of pro-active measures to fight illegal content does not make OPs 'active' and deprive them of exemptions under the ECD; alternatively, a 'Good Samaritan' rule could be adopted;
- clarify what constitutes 'actual knowledge' or 'awareness' of 'illegal content or activity', as well as the timeframe within which a reaction to an infringement is considered 'expeditious';

- clarify the distinction between 'specific content monitoring obligations' and 'general duty of care', to ensure that OPs do not to adopt over-detecting activities due to fear of liability.

This solution would improve legal certainty, clarifying many critical issues in the application of the ECD, and is therefore highly recommended. Ideally, it could be complemented with other initiatives, such as the establishment of sectoral harmonised regimes of liability.

Model B – Establishing a harmonised regime of liability

Under this model, the EU institutions would harmonise (at least some of) the conditions under which OPs may be held liable for the illegal content/conduct of their users directly. In particular:

- OPs could be subject to specific duties to act when obtaining credible evidence of illegal conduct that is detrimental to other users, and to take adequate measures to prevent harm. Failure to do so would make them liable for damages. This could constitute the baseline regime, to be supplemented by sectoral liability systems, complementing or replacing the ECD's exemptions.
- OPs could be subject to specific sectoral liability regimes. Large transaction platforms could be held strictly and absolutely liable for the damages suffered by users due to the defective/harmful nature of the product/service offered therein, under the RMA. Conversely, in case of damage caused by a breach of peer-to-peer contracts, such a solution could be inadequate, because the reduced capacity to manage risk would create suboptimal incentives in policing users' activities, unless the platform itself takes up certain responsibilities – e.g. warranties on the quality and security of the transaction. Here, OPs may simply be obliged to ensure that they identify and ascertain the reliability of their users, and cooperate in identifying the infringer.

This solution would provide greater certainty and safety for companies, users, and society alike, in a more effective manner than entailed under a general duty of care, while also setting a level playing field for OPs across Europe. Moreover, case-by-case provision of OP duties and corresponding liabilities under an RMA could substantially improve user protection, further clarifying the applicable legal framework, thence ensuring maximum legal certainty.

Because of the associated greater legal certainty and uniformity, the modification of OP secondary liability constitutes the preferred solution. Ideally, it could be adopted in combination with other solutions, to create positive synergies among the various policy options proposed.

This document is based on the STOA study 'Liability of online platforms'. The study was written by Andrea Bertolini, Assistant Professor of Private Law of the Scuola Superiore Sant'Anna (Pisa), and Director of the Jean Monnet Centre of Excellence on the Regulation of Robotics and Artificial Intelligence (EURA), Francesca Episcopo and Nicoleta-Angela Cherciu, Research Fellows in Private Law of the Scuola Superiore Sant'Anna (Pisa), and Junior Fellows of the Jean Monnet Centre of Excellence (EURA), at the request of the Panel for the Future of Science and Technology (STOA), and managed by the Scientific Foresight Unit, within the Directorate General for Parliamentary Research Services (EPRS), European Parliament. STOA administrator responsible: Mihalis Kritikos.

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