

**The functioning of the Internal Market for digital services:
Responsibility and duty of care of providers
of digital services. Challenges and
opportunities.**

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Structure of the Presentation

1. Why responsibility and duty of care for providers?
2. How to construct harmonized rules for responsibility and duty of care on the EU level?
3. Duty of care for platforms to directly address the violation
4. Duty of care to counteract illegal business models
5. Duty of care for transparency?

1. Why responsibility and duty of care for providers?

Violations of law on the Internet:

- Infringing users difficult to identify or anonymous
- High number of violations by users
- It far more efficient to prosecute violations at the provider ("bottleneck")
- Maintain "trust in digital services, and ultimately in the Digital Single Market" (European Commission, Communication Tackling Illegal Content Online, 28.9.2017)

1. Why responsibility and duty of care for providers?

Duty of care for providers:

- Proportionate obligations to support efficient prosecution
- Civil duties (but also administrative and criminal duties possible)
- Concept of duty of care known from the non-internet world
Example: Duty of shop owner to look on his shop floor for banana peels, thrown away by customers

2. How to construct harmonized rules for responsibility and duty of care on the EU level?

Rules to establish liability:

- Only partly harmonized
- Sector-specific harmonization

Example: Copyright law (Art. 3 InfoSoc-D 2001/29 and Art. 17 DSM-D 2019/790)

Rules to shield against (established) liability:

- Harmonized on the EU level by Art. 12-14, 15 E-Commerce-D 2000/31

2. How to construct harmonized rules for responsibility and duty of care on the EU level?

The differentiation between establishing and shielding against liability is not academic:

- If no full harmonization to establish liability (but only for shield against liability), no full level playing field in the Digital Single Market

Example: According to the Court of Appeal of Hamburg, YouTube due to its active role no longer came under the liability shield of Article 14 E-Commerce-Directive. But German law did not provide for copyright rules which granted damage claims to rightholders in cases where such active-role hosting providers like YouTube provide infringing user content to the public (1 July 2015; 5 U 87/12; legal situation changed in the meantime i.p. due to DSM-Directive)

3. Duty of care for platforms to directly address the violation

3-fold duty after notice for efficient prosecution:

- Take down
- Stay down
- Duty to prevent violations, which are not identical, but equivalent
 - Hate speech: allowed under Art. 15 E-Commerce-Directive CJEU 03.10.2019, C-18/18 - *Eva Glawischnig-Piesczek/Facebook*
 - Copyright: Specific rules in Art. 17 (4) lit. b) and c) DSM Directive

4. Duty of care to counteract illegal business models

Illegal business models on the internet (e.g. structurally infringing websites)

- Usually such websites breach Art. 5 E-Commerce-D (obligation to provide general information e.g. imprint)
- Website usually provides no accurate data to EU provider to be able to prosecute website operator

Duty of care - Know your (business) customer:

- EU providers should not provide services for illicit anonymous business models in breach of Art. 5 E-Commerce-D
- Proportionate duties to identify customer

5. Duty of care for transparency?

Thank you for your attention!

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