



Centre on Regulation in Europe
Improving network and digital industries regulation

LIABILITY OF ONLINE HOSTING PLATFORMS SHOULD EXCEPTIONALISM END?

REACTION

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1. Negligent based liability

– no strict liability

- **Flexible duties of care** are the right approach – No strict liability



1. Negligent based liability

– no strict liability

- **Flexible duties of care** for internet providers are the right approach – No strict liability
- To establish duties in general: **prior notification** of provider
- Users, providers, victims, harm etc.: **scenarios** can be **very different**
 - Not only: “depending on the type and extent of harm”; other factors
 - E.g. business model of provider
 - E.g. Infringement clear/obvious

2. Scope of duties of care: prevention

- Scope of duties in case of **clear/obvious infringements**: duty to
 - **(1) Takedown**
 - **(2) Staydown**
 - **(3) Prevention of similar clear infringements**
- Case law in Germany since more than a decade:
 - E.g. Federal Supreme Court *“Internet Auction”* cases
 - Automated solutions (including filters), if proportionate and in line with Art. 15 E-Commerce Directive
- Prevention duties recognised by CJEU

3. Scope of liability: full or mere injunction

- Scope of liability should depend on role of provider
- **The more active role, the more liability**
- For example copyright, in case of violation of duty of care:
 - Mere passive/neutral hosting provider: only injunction claims
 - Art. 8 (3) Copyright Directive 2001/29
 - Active role hosting provider: full liability
 - CJEU 2017 (C-619/15) - *BREIN/Ziggo “ThePirateBay”*

4. Specific need for harmonising EU reform

- Isn't Art. 14 (and Art. 15) E-Commerce-Directive already fit?
 - Where did case law produce **unbearable results or gaps**?
 - Please leave the well-functioning EU provisions intact
- More necessary: **harmonisation** of the national systems **to establish liability** (national secondary liability regimes very different) – Directives/Regulations
 - Articles 12 to 15 E-Commerce-Directive do not establish liability - they just shield from liability.
 - In copyright law, harmonization through case law – and attempt by Art. 13 Draft DSM Directive
 - Audiovisual Media Services Directive 2018 - but only harmonisation of duties, not of liability regime as such