

Luxemburger Juristische Studien –
Luxembourg Legal Studies

21

Carsten Ullrich

Unlawful Content Online

Towards a New Regulatory Framework
for Online Platforms



Nomos

Luxemburger Juristische Studien –
Luxembourg Legal Studies

edited by

Faculty of Law, Economics and Finance
University of Luxembourg

Volume 21

Carsten Ullrich

Unlawful Content Online

Towards a New Regulatory Framework
for Online Platforms



Nomos

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

ISBN 978-3-8487-8315-1 (Print)
978-3-7489-2705-1 (ePDF)

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN 978-3-8487-8315-1 (Print)
978-3-7489-2705-1 (ePDF)

Library of Congress Cataloging-in-Publication Data

Ullrich, Carsten

Unlawful Content Online

Towards a New Regulatory Framework for Online Platforms

Carsten Ullrich

650 pp.

Includes bibliographic references and index.

ISBN 978-3-8487-8315-1 (Print)
978-3-7489-2705-1 (ePDF)

1st Edition 2021

© Carsten Ullrich

Published by

Nomos Verlagsgesellschaft mbH & Co. KG

Waldseestraße 3–5 | 76530 Baden-Baden

www.nomos.de

Production of the printed version:

Nomos Verlagsgesellschaft mbH & Co. KG

Waldseestraße 3–5 | 76530 Baden-Baden

ISBN 978-3-8487-8315-1 (Print)

ISBN 978-3-7489-2705-1 (ePDF)

DOI <https://doi.org/10.5771/9783748927051>



Onlineversion
Nomos eLibrary



This work is licensed under a Creative Commons Attribution
– Non Commercial – No Derivations 4.0 International License.

Preface

*“...Proactively overseeing
Day-to-day operations
Services and deliverables
With cross-platform innovation
Networking, soon will bring, seamless integration
Robust and scalable, bleeding-edge and next-generation...”*

Being a foreword to a scientific research work, source and background to this quote will obviously be explained, but I will do so at the end of my introductory words besides mentioning now already that it originates from a song. But the quote is very fitting to set the scene against which the Ph.D. thesis presented here was developed.

Platforms have completely changed, have shaped and are dominating the online environment. An environment that in 2000, when the regulatory approach towards platforms was defined for the area of the European Union with the E-Commerce Directive, was entirely different from what we experience today. In the words of above: through innovations brought by the emerging platforms, but even more, by not only allowing networking, but continuously expanding by benefitting from network effects, platforms have integrated all different kinds of services in a seamless manner – sometimes it is invisible to the users which services all belong to the same provider or are currently being used by them – and have become robust or, at least for the very large platforms, are in an entrenched market position. Which leaves us with the “next-generation” question from the above quote: after 20 years of watching this growth and fundamental change, it has become obvious and undisputed that platforms play a decisive role in the online user experience and, what’s more, have become a key factor also in what can be regarded as a new public sphere for content dissemination and communication. And connected to that is the need for a new approach in regulating these actors, thereby giving up the longtime prevailing mantra of not “opening Pandora’s box”, meaning that any change to the E-Commerce Directive would lead to unexpected difficulties and fundamental discussions about readjusting regulation for the online environment overall. Indeed, we are now witnessing the beginning of a “next-generation platform regulation”.

Preface

It is a lucky coincidence if an academic research project that starts out with the aim to analyse a status quo and derive conclusions about an improved future path, takes place exactly in alignment with the period when this is also debated in real. It is challenging because the project has to consider a steep increase in contributions to the debate, but rewarding because it offers potential for impact in the actual process. This is exactly what happened with *Carsten Ullrich*'s project on **“Unlawful Content Online – Towards a New Regulatory Framework for Online Platforms”**, the result of which we are happy to bring to a wider public attention by publication in the **„Luxemburger Juristische Studien – Luxembourg Legal Studies“** as volume 21 with Nomos as a publisher. When he started end of 2016 it had become evident that the light touch regulation of platforms was being challenged, but that on short notice no new legislative framework would be proposed by the European Commission. And nearly on the day of the defence of his Ph.D. thesis mid-December 2020 the Commission put on the table two Proposals for Regulations, a Digital Services Act and a Digital Markets Act attempting at exactly creating a “new regulatory framework for online platforms”. Obviously, this did not happen by coincidence but the research project was born out of the observation of the actual situation, the framing of a new doctoral training unit at the Department of Law of the University of Luxembourg (DTU REMS on regulatory enforcement in multi-level systems) and the background that *Carsten Ullrich* could bring to the project: having worked as manager for compliance and the notice-and-takedown operations of a large online platform he had the insights that allowed to shape the research in a way that promised practically applicable results. Nonetheless, the perfect timing at the end could not have been planned in advance, but offered and continues to offer the possibility of impacting the currently ongoing debate about how to best impose obligations on online platforms that increase their responsibility. Besides providing a thorough legal analysis based on some initial technical observations, this publication is finalized by developing a risk-based approach for due diligence obligations and is accompanied by concrete proposals for a standard concerning the removing and prevention of counterfeit on e-commerce platforms, which could serve as blueprint for application as a workable solution in practice.

More specifically, of this publication starts out in chapter 1 with explaining the background, the methodological approach and clarifying the key notions, while chapter 2 gives a summary overview of the socio-technical and economic role of platforms which are referred to as internet intermediaries. Chapter 3 details the emergence of rules about liability or – more

precisely – exclusion of liability for intermediaries under specific situations and does so by presenting legislation and interpretation by courts in the United States of America, several EU Member States and further national approaches to internet regulation. In order to illustrate the difficulties in answering the question of liability in specific contexts, chapter 4 introduces several sectoral frameworks that each deal with the question in a different manner. Besides looking at responses to defamation that violates personality rights or hate speech and terrorist content that endangers public order, the analysis covers the protection of economic rights in the intellectual property setting. More importantly, the publication also draws attention to sectoral solutions which are not discussed a lot in the literature due to their highly specialized character but allow for insightful conclusions: the area of product and food safety regulation. This is then applied to case studies in those two areas to demonstrate the structures of enforcement and challenges in market surveillance in these sectors. Finally, the publication moves to discussing proposals on how to reform the issue of intermediary liability before presenting a well-argued and profound proposal for a co-regulation system relying on duty of care expectations to be fulfilled by the intermediaries based on harmonised technical standards. The conclusion allows for a first evaluation of the Commission proposal for a Digital Services Act (DSA), which *Carsten Ullrich* could add after his defence in order to offer an updated version of the thesis for publication.

Besides working on his Ph.D. thesis, his research also contributed to two studies on the need for reform of the E-Commerce Directive and platform regulation in the EU as well as a more detailed evaluation of the mentioned DSA proposal, which both are also available as open access publications with *Nomos*.¹ In the best possible way the research of the thesis that the reader will find after this foreword, contributed to those studies and in turn the work on those studies could then be used for the further development of the thesis. This is the type of exchange between academic research work and practical application that a Ph.D. supervisor – certainly I can say that for myself, but I think many will share this perception – can be happy

1 *Cole/Etteldorf/Ullrich*, Cross-Border Dissemination of Online Content – Current and Possible Future Regulation of the Online Environment with a Focus on the EU E-Commerce Directive, *Schriftenreihe Medienforschung der Landesanstalt für Medien NRW* (Band 81), *Nomos* 2020, <https://doi.org/10.5771/9783748906438>; *Cole/Etteldorf/Ullrich*, Updating the Rules for Online Content Dissemination – Legislative Options of the European Union and the Digital Services Act Proposal, *Schriftenreihe Medienforschung der Landesanstalt für Medien NRW* (Band 83), *Nomos* 2021, <https://doi.org/10.5771/9783748925934>.

Preface

to witness as it proves the added value of fundamental research. Its quality is also underlined by having been awarded the prestigious "Prix Rolf Tarach" of the Amis de l'Université du Luxembourg for the best Ph.D. thesis of 2020.

This leaves us with the open answer to the background of the musical quote at the beginning. Typically, for nearly every topic one can find a song that offers suitable titles or quotes that one can use as a reference in any type of publication. And in the case of introducing this publication of a thesis it was an obligation considering that *Carsten Ullrich* also has a passion and talent for music. One would think that "platform" is a common expression in lyrics and that it would be easy to find the appropriate quote. However, most platform-references concern either platform soles (of those types of boots that were especially popular in the 1970s) such as in *Dire Straits'* "Sultans of Swing" or they refer to platforms in train stations such as in numerous Bob Dylan songs or *Cream's* "White Room". It took a more detailed research to find this one song "Mission statement", which by the way is in itself a fitting title in connection with a Ph.D. thesis as the research question could be regarded as the mission statement of a Ph.D. candidate, by "*Weird Al*" *Yankovic*. For those readers that are not very familiar with this artist (admittedly, I also only knew the artist, but not this specific song before I started the research), he is best known for his parodies of famous pop, folk and rock songs, for example on the same album of 2014 ("Mandatory fun", also a good motto for Ph.D. research which spans over several years and is easier to handle if it gives joy) a parody of *Robin Thicke's* "Blurred Lines" entitled "Word Crimes" (something that you will not find in this publication here). Thinking about it, it turned out to be a perfect match for a quote, even though the song may not have the same wide spread as the platforms you will be reading about in the following: the question of parody as an exception to exclusive rights of authors played an important role in the discussions on the introduction of a new form of platform responsibility with the Copyright in the Digital Single Market-Directive of the EU in 2019. And this is where Carsten Ullrich's thesis nicely ties together with the publications of previous Ph.D. students of mine in the „Luxemburger Juristische Studien – Luxembourg Legal Studies“ series: on "The Struggle in Online Copyright Enforcement – Problems and Prospects" (Sandra Schmitz, vol. 8, 2015), on freedom of expression standards in the "Regulation of Sexualized Speech in Europe and the United States" (Lawrence Siry, vol. 6, 2016), "Reconstructing European Copyright Law for the Digital Single Market – Between Old Paradigms and Digital Challenges" (Bernd Justin Jütte, vol. 10, 2017) and "Implementing the EU

Audiovisual Media Services Directive – Selected issues in the regulation of AVMS by national media authorities of France, Germany and the UK” (Jenny Weinand, vol. 13, 2018) analysing a first important approach of the EU towards regulating a specific type of platforms, namely video-sharing platforms.

I am sure Carsten Ullrich’s work will be a valuable read for you and hope it will receive the deserved attention, be an inspiration for future Ph.D. students as well as contribute to the further debate of a “next generation-regulatory framework for platforms”. And I am happy that the author will himself continue to follow the discussions about implementing such new regulatory steps, but now again from the inside perspective of a platform that in the years to come will likely have to adapt to these new rules!

Dr. Mark D. Cole

Professor for Media and Telecommunication Law
University of Luxembourg and
Director for Academic Affairs
Institute of European Media Law (EMR)

Abridged Table of Contents

Acknowledgements	25
Abbreviations and Acronyms	27
Chapter 1 - Introduction	31
A. General background	31
B. Structure	38
C. Methodology	46
D. Definitions, assumptions and limitations	49
Chapter 2 - The emergence of intermediaries on the internet – a socio-technical review	59
A. The early internet	59
B. The technical architecture of the internet	61
C. Internet intermediaries within the layered internet	65
D. Intermediary powerhouses	88
E. Summary: socio-technical and economic role of internet intermediaries	95
Chapter 3 - Intermediaries and unlawful content – challenges in internet regulation	98
A. The subject matter of internet governance	98
B. The emergence of internet intermediary liability	103
C. Regulatory Frameworks of internet intermediary liability	125
D. Enforcement challenges in internet intermediary liability	155
Chapter 4 - Sectoral frameworks and the E-Commerce Directive – the enforcement gaps	225
A. Introduction	225

Abridged Table of Contents

B. Personality rights and public order: defamation, hate speech and terrorist content	228
C. Economic rights: intellectual property	297
D. Product and food safety regulation	380
E. Summary: Sectoral frameworks and intermediary liability	414
Chapter 5 - Enforcement case studies	418
A. Introduction	418
B. Case study 1: Online market surveillance in product regulation	422
C. Case study 2: Online market surveillance in food safety regulation	436
D. Summary of MSA/FSA case studies	448
Chapter 6 - A new framework for online intermediary responsibility	453
A. Intermediary responsibility reform proposals – an overview	454
B. The regulatory choice of a new intermediary responsibility system	466
C. Primary and secondary responsibility and the sanctions regime	500
D. A co-regulatory duty of care based on harmonised technical standards	501
Chapter 7 - Conclusion	540
ANNEX I – Interview Questionnaire (Model)	550
A. Market surveillance and enforcement	552
B. Enforcement activity and the E-Commerce Directive	556
C. Cooperation with information service providers	558
D. Regulatory Cooperation	559
E. Additional data (not part of the interview)	561
ANNEX II – A sectorally adaptable, risk-based duty of care standard (model)	562
ANNEX III– A duty of care standard for E-Commerce platforms	563
A. Introduction	563

Abridged Table of Contents

B. Duty of care: risk assessment, prevention and removal	565
C. Duty of care: Notice-and-Takedown	573
D. Duty of care: transparency	573
Bibliography	580
A. Books, book sections, journal articles and public reports	580
B. Blog articles, internet news articles and webpages	614
C. Case law	626
D. Statutes & Bills	636
Index	643

Table of Contents

Acknowledgements	25
Abbreviations and Acronyms	27
Chapter 1 - Introduction	31
A. General background	31
B. Structure	38
C. Methodology	46
D. Definitions, assumptions and limitations	49
1. Definitions	49
I. Internet intermediaries – intermediary service providers	49
II. Online platforms	50
III. Illegal versus unlawful content	51
IV. Material content	52
V. Unlawful activity and unlawful content/information	53
VI. Harmful content	53
VII. Platform users	55
2. Assumptions	55
3. Limitations	55
I. Sanctions	55
II. Substantive law affecting online platforms	56
Chapter 2 - The emergence of intermediaries on the internet – a socio-technical review	59
A. The early internet	59
B. The technical architecture of the internet	61
C. Internet intermediaries within the layered internet	65
1. A typology of intermediaries	66
2. Internet access providers	68
3. Search engines	70
4. E-commerce platforms	73

Table of Contents

5. User generated content and social media platforms – the rise of Web 2.0	78
6. Sharing economy platforms	82
7. Messenger services, cloud platforms and other online intermediaries	85
D. Intermediary powerhouses	88
1. Multi-sided platforms	88
2. The leading players	90
I. Google (Alphabet)	90
II. Amazon	91
III. Facebook	92
IV. Apple	92
V. Microsoft	93
3. From content to infrastructure control	94
E. Summary: socio-technical and economic role of internet intermediaries	95
Chapter 3 - Intermediaries and unlawful content – challenges in internet regulation	98
A. The subject matter of internet governance	98
1. Infrastructure	98
2. Content regulation = intermediary regulation?	101
B. The emergence of internet intermediary liability	103
1. Justifications for internet intermediary liability in law	104
I. Moral justifications	104
II. Economic justifications	106
2. Primary and secondary liability	108
I. Primary liability for intermediaries	109
II. Secondary liability	110
a. Common law	111
b. Civil law jurisdictions	112
3. Early case law on internet intermediaries	114
I. Case law in the EU	115
a. United Kingdom	115
b. Germany	117
c. France	118
d. Italy	119
e. Belgium	120

II. Case in law in the US	121
a. Cubby, Inc v CompuServe, Inc.	121
b. Stratton Oakmont v Prodigy Services Co.	122
c. Playboy Enterprises, Inc. v Frena	123
d. Sega Enterprises, Ltd. v MAPHIA & Religious Technology Center v Netcom	124
C. Regulatory Frameworks of internet intermediary liability	125
1. US	125
I. Communications Decency Act 1996	126
II. The Digital Millennium Copyright Act 1998	128
III. Trademarks – The Lanham Act	130
2. EU	131
I. Setting the scene for an intermediary liability framework	131
II. The E-Commerce Directive	132
a. General principles and scope	132
b. The liability (exemptions) of intermediaries	136
3. Comparing the EU and US intermediary liability frameworks	143
4. Other jurisdictions	146
I. Australia	146
II. Canada	148
III. China	150
IV. India	151
D. Enforcement challenges in internet intermediary liability	155
1. Emerging challenges - EU reviews of the ECD	155
I. The 2003 and 2007 ECD evaluations	155
II. The 2012 public consultation	157
III. Reviews and initiatives under the Digital Single Market policy	158
IV. Main legal challenges of the ECD inhibiting enforcement against unlawful content	161
2. ECD intermediary liability – the main challenges through case law	163
I. The neutrality of internet intermediaries	164
a. Search engines	165
b. E-commerce marketplaces	166
i. National case law	166
ii. EU case law	169
iii. Application of CJEU rulings	170
iv. US developments	176

Table of Contents

c. UGC platforms and social networks	177
i. National case law	178
ii. EU case law	182
II. The intermediary's actual knowledge of illegal acts	184
a. Defining actual knowledge	184
b. Obtaining actual knowledge	185
i. Court or authority orders	186
ii. Notice-and-Takedown	186
iii. Awareness of illegal activity or information	191
III. The preventive obligations of intermediaries	196
a. National case law	199
i. France	199
ii. Italy	200
iii. Germany	202
iv. UK	204
b. CJEU and ECtHR case law	207
i. L'Oréal v EBay (C-324/09)	207
ii. Scarlet Extended (C-70/10) & Netlog (C-360/10)	208
iii. Mc Fadden (C-484/14)	213
iv. The ECtHR rulings in Delfi v Estonia & MTE v Hungary	214
v. Eva Glawischnig-Piesczek v Facebook Ireland (C18/18)	217
3. Summary of legal challenges of the ECD	219
I. Summary: The availability of the ECD protections	219
II. Summary: The knowledge standard	221
III. Summary: Specific versus general monitoring	223
Chapter 4 - Sectoral frameworks and the E-Commerce Directive – the enforcement gaps	225
A. Introduction	225
B. Personality rights and public order: defamation, hate speech and terrorist content	228
1. Defamation	228
I. Defamation online - background	228
II. The legal framework of defamation in the EU	230
III. Defamation, online intermediaries and the ECD in national law	232
a. UK	232

b. France	235
c. Germany	237
d. Differences in assessing the manifestly illegal nature of defamation	239
e. Defamation and the interactive, social web	241
IV. Summary and outlook	242
2. Hate speech	244
I. The phenomenon of hate speech on Web 2.0	244
II. The legal framework of hate speech	246
a. Fundamental rights at stake	246
b. EU regulation	247
i. The EU Code of Conduct on illegal hate speech online	248
ii. The AVMSD and the DSA proposal	252
c. Member States	254
i. England and Wales	255
ii. Germany	257
iii. France	264
III. Private regulation of hate speech	268
IV. Summary and outlook	271
3. Terrorist content	274
I. Background	274
II. Legal framework against terrorism online – EU and Member States	275
III. Private regulation of terrorist content and technological developments	281
IV. EU regulation	286
a. Proposal of a Regulation for preventing terrorist content online	286
b. Regulation 2019/1148 on marketing and use of explosives precursors	290
V. Summary and outlook	295
C. Economic rights: intellectual property	297
4. Copyright	297
I. Copyright and the information society	297
II. International law and EU set-up	301
III. Copyright enforcement and online intermediaries	304
a. Enforcement at Member State level	304
b. Enforcement against IAPs – blocking and filtering injunctions	306

Table of Contents

c.	Content hosting, sharing and the road towards primary liability	312
	P2P file sharing and hyperlinking	313
	Search engines, hyperlinking and auto-complete functions	317
	Content sharing platforms	323
IV.	Industry developments: enforcement by private actors	327
a.	Content recognition and identification technologies	328
	Fingerprinting	328
	Hashing	329
	Watermarking	330
	Metadata analysis	331
	Predictive analysis	333
	b. Platform activities addressing copyright infringements – the rise of automated prevention	334
V.	EU legal initiatives – the Digital Single Market Directive (DSMD)	341
VI.	Summary and outlook	347
5.	Trademarks	349
I.	Trademarks, counterfeiting and e-commerce	349
II.	EU Trademark protection, its widening scope and the internet	353
III.	Enforcement: primary infringers or intermediaries with responsibilities?	356
	a. Online intermediaries as primary infringers	356
	b. Secondary liability trends and consumer law	362
IV.	Private enforcement	365
V.	EU policy development	371
	a. Memorandum of Understanding on the Sale of Counterfeit Goods over the Internet	372
	b. Other EU policy initiatives	377
VI.	Summary and outlook	378
D.	Product and food safety regulation	380
6.	Product safety (non-food products)	380
I.	Background – product safety in e-commerce and online platforms	380
II.	EU product safety law and e-commerce	383
	a. The New Approach and the New Legislative Framework	383
	b. Responsibilities and liabilities of economic actors	387

III. Enforcement and e-commerce	388
a. Tackling the challenges of enforcement in e-commerce	388
b. Online intermediaries and product safety law	391
IV. Private enforcement	400
V. EU legislative initiatives	402
VI. Summary and outlook	405
7. Food safety	406
I. Background – food in e-commerce and on online platforms	406
II. Food safety and its enforcement in EU and national law	408
a. EU food safety law – responsible economic actors	408
b. Online intermediaries and food safety	411
III. Summary and outlook	413
E. Summary: Sectoral frameworks and intermediary liability	414
1. The multilevel regulatory picture of EU intermediary liability	414
2. Summary: Common trends in sectoral online intermediary liability	416
Chapter 5 - Enforcement case studies	418
A. Introduction	418
1. Rationale and objectives	418
2. Survey structure	419
3. Confidentiality	421
B. Case study 1: Online market surveillance in product regulation	422
1. Overview	422
2. Survey results – Online market surveillance - RED and EMC Directives	423
I. Section A: Market surveillance and enforcement	423
a. Enforcement scope: sector coverage	423
b. Enforcement vis-à-vis ISPs	424
c. Online market surveillance activity	425
d. Online market surveillance resources	428
II. Section B: Enforcement activity and the ECD	429
a. Use of the ECD by MSAs	429
b. The relation between product safety laws and the ECD	430
III. Section C: Cooperation with ISPs	431
a. Nature of cooperation between MSAs and ISPs	432
b. Obstacles to effective surveillance and enforcement	433
IV. Section D: Regulatory cooperation between MSAs	434

Table of Contents

C. Case study 2: Online market surveillance in food safety regulation	436
1. Overview	436
2. Survey results – Online market surveillance in the area of food safety	437
I. Section A: Market surveillance and enforcement	437
a. Enforcement scope: sector coverage	437
b. Enforcement vis-à-vis ISPs	437
c. Online market surveillance activity	438
d. Online market surveillance resources	440
II. Section B: Enforcement activity and the ECD	442
a. Use of the ECD by FSAs	442
b. The relation between food safety laws and the ECD	443
III. Section C: Cooperation with ISPs	444
a. Nature of cooperation between FSAs and ISPs	444
b. Obstacles to effective surveillance and enforcement	446
IV. Section D: Regulatory cooperation between FSAs	446
D. Summary of MSA/FSA case studies	448
1. Enforcement hesitation and unclarity over the relevance of the ECD	449
2. The technical role and legal classification of online platforms	450
3. Product and food safety enforcement expertise as a chance	451
4. Horizontal cooperation	451
 Chapter 6 - A new framework for online intermediary responsibility	 453
A. Intermediary responsibility reform proposals – an overview	454
1. Systemic approaches	455
2. Procedural approaches	462
3. Common and divisive features of current intermediary liability reform proposals	464
B. The regulatory choice of a new intermediary responsibility system	466
1. The current regulatory choice	466
2. Regulatory approaches for the internet	468
I. Self and co-regulation on the internet	470
a. Self-regulation	472
b. Co-regulation	475
II. Corporate (social) responsibility for online platforms	479
III. Duties of care	481
IV. Risk regulation and compliance	483

Table of Contents

V. Standardisation	487
3. Application to a new intermediary responsibility framework	492
I. Risks and pitfalls of flexible regulatory tools	495
C. Primary and secondary responsibility and the sanctions regime	500
D. A co-regulatory duty of care based on harmonised technical standards	501
1. Introduction	501
2. Changes to the ECD's online intermediary liability framework	502
3. Sectoral flexibility – the harms under a horizontal framework	505
4. The duty of care risk management system	508
I. Risk assessment	510
a. Risk identification	510
b. Risk analysis and evaluation	512
II. Risk control measures	515
a. Risk control: prospective responsibility for empowering safe platform use	516
b. Risk control: retrospective responsibility to contain unlawful content	523
III. Example of a duty of care standard for economic harms	524
5. Transparency and accountability obligations	528
I. Transparency	528
II. Accountability	530
III. Complementary regulatory approaches towards online platforms	531
6. The regulatory institution	533
7. Brief of evaluation of the Commission's DSA proposal of December 2020	536
Chapter 7 - Conclusion	540
ANNEX I – Interview Questionnaire (Model)	550
A. Market surveillance and enforcement	552
B. Enforcement activity and the E-Commerce Directive	556
C. Cooperation with information service providers	558
D. Regulatory Cooperation	559
E. Additional data (not part of the interview)	561

Table of Contents

ANNEX II – A sectorally adaptable, risk-based duty of care standard (model)	562
ANNEX III– A duty of care standard for E-Commerce platforms	563
A. Introduction	563
1. Principles	564
B. Duty of care: risk assessment, prevention and removal	565
1. Methodology: risk-based approach	565
2. Risk assessment	566
I. Harms definition	566
II. Risk identification & definition	567
III. Risk analysis	567
a. Risk drivers	567
b. Platform capabilities	568
IV. Risk evaluation	570
3. Risk control	570
C. Duty of care: Notice-and-Takedown	573
D. Duty of care: transparency	573
1. Terms & Conditions	573
2. Transparency reporting	574
Bibliography	580
A. Books, book sections, journal articles and public reports	580
B. Blog articles, internet news articles and webpages	614
C. Case law	626
1. National	626
I. France	626
II. Germany	628
III. Italy	630
IV. UK	630
V. US	631
VI. Other jurisdictions	632
2. EU and ECtHR	633
I. EU	633
II. ECtHR	636
D. Statutes & Bills	636
Index	643

Acknowledgements

It is impossible to mention all the people who have contributed, inspired and helped me to achieve this work over the last four years. First of all, my research mentor at the University of Luxembourg, Prof. Mark Cole, has been an invaluable support both on an academic and wider professional level. He provided for an open research environment and encouraged me to test and refine my ideas constantly through publications, conferences and workshops. Secondly, I would like to thank my other two research co-mentors, Prof. Elise Poillot and Prof. Herwig Hofmann, for their input and suggestions for improvements. This, and the various interactions I had with them over the last four years, helped in making this work what it is. I received other precious support and input during my research from the head of the Doctoral Training Unit on Enforcement in Multi-Level Regulatory Systems (DTU REMS I) at the University of Luxembourg, and Faculty Dean, Prof. Katalin Ligeti, but also from Prof. Joana Mendes, Prof. Jörg Gerkrath and the political science experts at the DTU, Prof. David Howarth and Prof. Robert Harmsen. Special thanks go to Dr. Andreas Heinz, who helped me design the survey questionnaire.

I am also deeply indebted to Assistant Professor Dr. Justin Jütte and Dr. Gavin Robinson for the time they spent on reviewing and commenting on earlier drafts of this work. The exchange and discussions with them were crucial to achieve important adjustments and improvements. They have also been of continued support and inspiration over my entire research work over the last four years.

This work would not have been completed without the constant, fruitful exchange and cooperation that took place in the research team of Prof. Cole, notably with Teresa Quintel, Dr. Annelies Vandendriessche, Angelica Fernandez, Juraj Sajfert, Dr. Sandra Schmitz and Dr. Andra Giurgiu. This statement can be extended to many other colleagues at the University, such as members of the DTU REMS I, Simona Demkova, Chrysa Alexandraki, Kelly Blount, Panagiotis Zinonos, Dr. Federico Bergamasco, Dr. Igor Tkalec, Ioannis Asimakopoulos, Dr. Dimitrios Kafferanis and other current and former colleagues, like Dr. Janine Silga, Dr. Julia Sinnig, Dr. Fatima Chaouche, Dr. Basak Baglayan or Dr. Hossein Nabilou, to name but a few.

Acknowledgements

Furthermore, I count myself lucky to have made the acquaintance of extremely dedicated and knowledgeable experts in national market surveillance and food safety authorities across several EU Member States as part of this research project. The interviews I conducted with them have provided me with empirical information that was crucial for the analysis and solution developed here. I am also grateful to the anti-counterfeiting organisation *REACT*, and particularly its managing director, Ronald Brohm, for giving me the opportunity to present, discuss, develop and test my ideas with the practitioners of his organisation.

Last, and by far not least, my family, above all my wife, my two children, my parents and my sister have provided me with inestimable encouragement and backup, not just over the last four years, but for far longer than that. Their support has been vital for the accomplishment of this work. This work is dedicated to them.

Abbreviations and Acronyms

AdCo	Administrative Cooperation Group (on market surveillance)
AG	Advocate General (of the Court of Justice of the European Union)
AML	Anti-Money Laundering
API	Application Programming Interface
AVMSD	Audiovisual Media Services Directive (2018/1808)
BGH	<i>Bundesgerichtshof</i> (Federal Court of Justice) (Germany)
CDA	Communications Decency Act (US)
CDPA	Copyright, Designs and Patents Act (UK)
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CSA	<i>Conseil Supérieur de l'Audiovisuel</i> (Electronic Media Regulator) (France)
CSR	Corporate Social Responsibility
CTIRU	Counter-Terrorism Internet Referral Unit (UK)
DMA	Digital Markets Act COM(2020) 842 final (EU Proposal)
DMCA	Digital Millennium Copyright Act (US)
DSA	Digital Services Act COM(2020) 825 final (EU Proposal)
DSM	Digital Single Market
DSMD	Copyright in the Digital Single Market Directive (2019/790)
EEA	European Economic Area
ECD	E-Commerce Directive (2000/31)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EDD	Enhanced Due Diligence
EFSA	European Food Safety Authority
EMCD	Electromagnetic Compatibility Directive (2014/30)
ERGA	European Regulators Group for Audiovisual Media Services
EUTMD	Directive relating to trade marks (2015/2436)
EUTMR	EU Trade Mark Regulation (2017/1001)
FBA	<i>Fulfillment by Amazon</i>

Abbreviations and Acronyms

FSA	Food Safety Authority
FSP	Fulfilment Service Provider
GAFAM	Google, Apple, Facebook, Amazon, Microsoft
GDPR	General Data Protection Regulation (2016/679)
GEMA	<i>Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte</i> (Society for musical performing and mechanical reproduction rights) (Germany)
GiFTC	Global Internet Forum for Terrorist Content
GPSD	General Product Safety Directive (2001/95)
GRC	Governance, Risk and Compliance
HTML	Hypertext Mark-up Language
HTTP	Hypertext Transfer Protocol
IAP	Internet Access Provider
ICANN	Internet Corporation for Assigned Names and Numbers
ICSMS	Information and Communication System on Market Surveillance (EU)
Infosoc Directive	Directive on harmonisation of certain aspects of copyright and related rights in the information society (2001/29)
IoT	Internet of Things
IP	Intellectual Property
IPRED	Intellectual Property Enforcement Directive (2004/48)
IRU	Internet Referral Unit (Europol)
ISP	Intermediary Service Provider
ISSP	Information Society Service Provider
TCP/IP	Transmission Control Protocol/Internet Protocol
KPI	Key Performance Indicator
KYC	Know-Your-Customer
LCEN	<i>Loi pour la confiance dans l'économie numérique</i> (France)
MSA	Market Surveillance Authority
MSM	Multi-Sided Markets
MSR	Market Surveillance Regulation (2019/1020)
NetzDG	<i>Netzwerkdurchsetzungsgesetz</i> (Network Enforcement Act) (Germany)
NLF	New Legislative Framework
OTT	Over-The-Top (communication service)
P2B	Platform-to-Business Regulation (2019/1150)
P2P	Peer-to-Peer

Abbreviations and Acronyms

SNEP	<i>Syndicat national de l'édition phonographique</i> (National Association of Phonographic Publishers) (France)
RAPEX	Rapid Alert System for Dangerous Non-Food Products
RED	Radio Equipment Directive (2014/53)
SIHD	Shared Industry Hash Database
TERREG	Proposal for a Regulation for preventing terrorist content online (EU)
TMG	<i>Telemediengesetz</i> (Germany)
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCPD	Unfair Commercial Practices Directive (2005/29)
UGC	User Generated Content
URL	Uniform Resource Locator
WIPO	World Intellectual Property Organisation

