Regulation of Social Media Intermediary Liability for Illegal and Harmful Content

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Abstract: The discussion focuses primarily on the manner in which the distribution of social media content needs to be governed in ensuring illegal and harmful content is limited (e.g. not accessible to children) whilst ensuring freedom of expression and speech. Closely linked to intermediary liability is the manner in which social media platforms self-regulate harmful content on their platforms. Since the European Union (EU) and the United States of America (US) implemented legislation pertaining to intermediary liability, technologies and business models have evolved to such an extent that legislation will have to be reformed to provide for the changes in the way users communicate today and the manner in which social media companies deal with content, especially harmful content. Whilst the United Kingdom (UK) is considering implementing the Online Safety Bill, the EU is considering updating the e-Commerce Act of 2000 by means of the Digital Services Act (DSA) and the US is re-evaluating section 230 of the Communications Decency Act (CDA) of 1996. The discussion explores the impact the proposed legislation will have on intermediary liability and self-regulation of content.

Keywords: social media intermediary liability; illegal and harmful content; Digital Services Act (DSA); Online Safety Bill; section 230 of the Communications Decency Act (CDA); social media self-regulation

1. Introduction

The discussion focusses on the reform that is required in respect of intermediary liability and/or content regulation to curb illegal and/or harmful content on social media.

There appears to be a correlation between the business model of large social media companies and harmful content. Although the platforms are free, they are profit-driven. Large social media companies have a specific business model, namely an engagement-driven advertisement-reliant business model. The platforms use algorithms to identify users' preferences allowing for the promotion of highly personalised content in addition to maximising scroll time, which incentivises customised, and thus potentially more harmful, content.

It is not only the business model of large social media companies that may contribute to harmful content, but some users may exploit social media platforms for illegal and harmful content. There are compelling arguments for reforming the liability regime for online intermediaries. Closely linked to intermediary liability is the manner in which social media platforms self-regulate content. Companies may not be incentivised to address harmful content on their platforms without legislation compelling them to do so.

Following the UK, both the EU and the US are looking to reform intermediary liability, and other countries may follow suit. In 2021, India implemented legislation governing intermediary liability. It is preferable to develop a set of policies that social media companies can apply globally. The internet is borderless and therefore government regulation should aim for a universal cyberspace in which free speech is protected and people feel safe to exercise their right to free speech but at the same time, this space must not allow illegal and/or harmful speech.

As governments are considering the reform of social media liability and self-regulation of content, consideration should be given to the following inter-linked issues:

- How should social media intermediary liability for illegal and harmful content be regulated?
- How should a government regulate illegal and harmful content on social media?
- Which human rights' safeguards pertaining to social media content and intermediary liability should government regulation have in place?

Each of the inter-linked topics could justify a discussion on its own. The purpose of the discussion is to provide an overview of the issues that a government should take into consideration when determining the manner in which government regulation should deal with social media liability for content and self-regulation.

2. Understanding the necessity for reform of intermediary liability

Social media plays a huge role in providing all users with freedom of speech. Prior to social media, main stream media controlled the conversation. Social media changed this and provides users, who may have been voiceless, a platform to share ideas and opinions (Smith and Van Alstyne, 2021).

Unfortunately, not all voices are harmless and there have been many examples over the years of communication that is harmful. For content that is harmful, but not illegal, social media platforms self-regulate through "community standards" and "terms of use" that users agree to when joining.

There are numerous examples of instances where self-regulation has not been successful in disabling access to harmful content, which has led to calls for statutory regulation (Woodhouse, 2021a). The UN found that Facebook had been a major platform for spreading hatred against the Rohingya in Myanmar, which in turn led to ethnic cleansing and crimes against humanity (Joseph, 2018). The video sharing site, YouTube, seems to automatically guide viewers to the extreme versions of what they might be searching for, for example, a search on vegetarianism might lead to veganism; jogging to ultra-marathons and Donald Trump's popularity to white supremacist rants (Joseph, 2018). According to research conducted in September 2021 by the Campaign for Accountability's Tech Transparency Project, Facebook allowed advertisers to target teen users as young as 13-years-old with inappropriate and dangerous content. Such content included advertisements promoting "pill abuse, alcoholic beverages, anorexia, smoking, dating services and gambling" (Smith, 2021). In September 2021, the whistle blower Frances Haugen, a former data scientist with Facebook, accused Facebook of failing to make changes to Instagram after internal research showed apparent harm to some teens and of being dishonest in its public fight against hate and misinformation (Milmo and Paul, 2021).

Joseph (2018) opines that human rights abuses might be embedded in the business model that has evolved for large social media companies in their second decade. In 1996, when section 230 of the US CDA was passed and in 2000, when the EU e-Commerce Directive came into operation, the internet was made up of largely chat rooms run by small start-ups. Now, large social media companies such as YouTube, Twitter and Facebook have become information gatekeepers that have vast control over what information users see and how that information is organized.

Several characteristics of the business model of large social media platforms have raised serious concerns. Social media platforms, such as Facebook and Twitter, are free, but they still need to make money which they generate from advertisements. The problem is not the advertisements, but the manner in which users are targeted with personalised advertisements. The business model only works if the companies collect large quantities of personal data from their users to understand their preferences, behaviour and choices. The companies use this to promote advertisements. The business model of social media platforms is therefore built on engagement and popularity which are linked to advertisement revenue. To build engagement, social media platforms amplify content to get attention (Edelman, 2021). Platforms make more money when users spend more time on the platform, reveal more information about themselves and see more ads. Algorithms on the platforms can actively direct users from the mainstream to the fringe, subjecting users to divisive and emotional content which are aimed at maintaining user engagement (Edelman, 2021).

It has been alleged that Facebook and Instagram give more credence to profit than protecting users against harmful content (Smith and Van Alstyne, 2021). In 2020, civil rights groups organized a boycott, called #StopHateForProfit, in which they urged companies to stop paying for advertisements on Facebook to protest the platform's handling of hate speech and misinformation (Watney, 2020). Despite these calls, it does not appear to have had an effect on profit. In 2020, Facebook reported a net income – a US measure of profit – of more than $29bn (£21bn) (Milmo and Paul, 2021).

Not all social media companies have a similar business model to large social media companies and when reform is discussed, it should not only focus on social media companies such as Facebook, Instagram or YouTube (Sankin, 2021). The business model plays a major contributing role to harmful content, but users may also exploit social media platforms to post illegal and harmful communication. It has become clear that there must be legislative rules in place that serve as oversight to incentivize social media companies to remove harmful content. The low incentive of social-media platforms to curb harm impacts negatively on public trust with the

consequence being that society cannot fully benefit from these services, making it harder for legitimate online businesses to profit from providing them (Smith and Van Alstyne, 2021).

It is against the above-discussed background that the UK, EU, the US and other countries are now looking at intermediary liability for illegal and harmful content and how it may be reformed to address the concerns discussed. In February 2021, India implemented the Intermediary Guidelines and Digital Media Ethics Code Rules in response to serious incidents of online incitement to violence (see Internet Freedom Foundation, 2021; United Nations Human Rights, 2021).

3. Reform proposed in respect of social media intermediary liability for user-generated content

3.1 Introduction

Johnson and Castro (2021) identify the different approaches to intermediary liability that are currently applicable are under scrutiny. In general, the intermediary is not liable for user-generated content. Some countries provide for a take-down notice or removal where they have "actual knowledge" of the harmful content, but legislation does not outline in detail the obligations of social media companies (Watney, 2018).

As indicated, both the UK and the EU are seeking to tighten the statutory rules applicable to online intermediaries to ensure trust, accountability and transparency, but the approach to achieving it is different (Moynihan, 2021; see par. 3.2 and 3.3 hereafter).

- The EU is adopting an asymmetrical model imposing specific and defined obligations with broad exceptions whereas the UK is proposing to capitalise on the existing English law concept of a "duty of care", with more onerous monitoring obligations and a potentially narrower set of exceptions (Moynihan, 2021; see par. 3.2 and 3.3 hereafter).
- The UK Online Safety Act addresses illegal and harmful content and uses an umbrella concept of "harms" whereas the DSA focuses only on content that is illegal. It is important that harmful content is addressed and not only illegal content. Defining the concept of harmful may prove to be challenging (see par. 3.2).
- In terms to the proposed DSA, the intermediary will not be held liable for user content if the intermediary complies with the legislative obligations. General monitoring or active fact-finding obligations will be prohibited. The UK government has reviewed the safe harbour exceptions provided by the e-Commerce Directive. Moynihan (2021) indicates that the government is of the opinion that the current regime is "not the most effective mechanism for driving behavioural change by companies. The existing liability regime only forces companies to take action against illegal content once they have been notified of its existence" (Moynihan, 2021). Moynihan (2021) indicates that it is likely that the UK government will introduce specific monitoring obligations for limited categories of illegal content.

It is important to note that UK and EU legislation distinguishes between large social media platforms and other platforms, with large platforms complying with more obligations. India's legislation, the Intermediary Guidelines and Digital Media Ethics Code Rules, distinguishes between a social media intermediary and a "significant social media intermediary". The latter consists of 50 lakh (5 million) registered users and as such, the intermediary will have to comply with additional obligations (Internet Freedom Foundation, 2021).

3.2 Brief summary of the UK Online Safety Bill

The discussion hereafter provides a broad outline of the proposed bill which has undergone vigorous consultations since 2019 (Woodhouse, 2021a and 2021b; Lomas 2021).

The Online Safety Act (available at https://www.gov.uk/government/publications/draft-online-safety-bill) will provide a single regulatory framework to tackle a range of harms. Online harms includes behaviour that may hurt a person physical or emotionally (Woodhouse, 2021a). It could be hurtful information that is posted online, or information sent to a person.

At the core of a company should be a duty of care that takes reasonable steps to protect users from illegal and harmful content (Milmo, 2021; Woodhouse, 2021a). The reasonable steps that companies are expected to take are proportionate to their service's known risks and resources, and social media platforms will only be held accountable if they fail to meet the duty of care. Companies will be required to moderate user-generated content in a way that prevents users from being exposed to illegal and harmful content or activity online (Lomas, 2021). An

independent regulator, Office of Communications (Ofcom), will oversee and enforce compliance with the duty of care.

The bill distinguishes between category 1 and category 2 services. Category 1 services refer to companies that provide high risk, high-reach services and these companies will have additional duties. The largest and most popular social media sites (category 1 services) will need to act on content that is lawful but still harmful, such as abuse that falls below the threshold of a criminal offence, encouragement of self-harm and mis-/disinformation. The social media companies would be required to publish transparency reports about the steps taken to tackle online harms.

The duty of care is split into three parts, namely (Milo, 2021):

1. preventing the proliferation of illegal content and activity, such as child pornography, terrorist material and hate crimes (such as racial abuse);
2. ensuring children are not exposed to harmful or inappropriate content; and,
3. ensuring that adults are protected from legal but harmful content. Category 1 services provided by large social media platforms, such as Facebook, Twitter and YouTube, will have to explicitly specify how they will address legal harms in their terms and conditions and Ofcom will hold them to account.

The processes that companies need to adopt to fulfil the duty of care would be set out in codes of practice published by Ofcom after consultation. Companies would need to comply with the codes or be able to demonstrate to Ofcom that an alternative approach was equally effective. Ofcom would enforce compliance and its powers would include being able to fine companies up to £18 million or 10% of annual global turnover, whichever is higher, and have the power to block access to sites (Woodhouse, 2021b).

For users, three new criminal sanctions will be brought for the offences of sending messages or posts that "convey a threat of serious harm"; posting misinformation – "false communications" – intended to cause non-trivial emotional, psychological or physical harm; and sending posts or messages intended to cause harm without reasonable excuse (Milo, 2021).

3.3 Brief summary of the EU Digital Services Act (DSA)

In 2020 the European Commission introduced the Digital Services Act (DSA, available at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A825%3AFIN) (European Commission, 2021). The DSA is not intended to replace the e-Commerce Directive but proposes to update the e-Commerce Directive by imposing obligations on social media companies.

Gerritzen et al (2020) and O'Sullivan (2020) highlight the following provisions which are relevant for the purposes of this discussion:

- The DSA requires every hosting provider or online platform to put in place a user-friendly notice and takedown mechanisms that allow for the notification of illegal content. Online platforms will need to establish internal complaint-handling systems, engage with out-of-court dispute settlement bodies to resolve disputes with their users, give priority to notifications of entities that have been qualified as so-called trusted flaggers by the authorities and suspend repeat infringers. Users may contest the decisions taken by the online platforms to remove their content, including when these decisions are based on platforms' terms and conditions. Users can complain directly to the platform, choose an out-of-court dispute settlement body or seek redress before courts.

4. The DSA provides new and far-reaching transparency obligations for online platforms relating to the measures taken to combat illegal information. If content is removed, an explanation needs to be provided to the person who uploaded that content. Online platforms must also publish detailed reports on their activities relating to the removal and the disabling of illegal content or content contrary to their terms and conditions.
5. There is an obligation on online intermediaries to include in their terms and conditions information on any restrictions on the use of data provided by the users, with reference to the content moderation mechanisms applied, algorithmic decision-making and human review.
6. There are also transparency obligations concerning online advertisements. As indicated, the business model of intermediaries is based on advertisements (discussed at par. 2).
7. An intermediary that does not comply with the DSA provisions faces steep fines for non-compliance of up to 6% of the annual income or turnover of the provider of intermediary services and periodic penalty

payments for continuous infringements of up to 5% of the average daily turnover of the intermediary in the preceding financial year per day.

In addition to the rules set out above, very large platforms must also comply with additional rules. Very large online platforms are those platforms which have more than 45 million active monthly users in the EU and they pose a particular risk in the dissemination of illegal content and societal harm. The large platforms will have to analyse any systemic risk stemming from the use of their platforms and put in place effective content moderation mechanisms to address the identified risks (e.g. illegal content, privacy violations, etc). They will have to provide transparency on the main parameters of the decision-making algorithms used to offer content on their platforms (the rankings mechanism) and the options for the user to modify those parameters. They will have to establish and maintain a public repository with detailed information on the online advertisements they featured on their platforms in the past year. They have to designate a dedicated compliance officer responsible for the compliance with obligations under the DSA and undergo an annual independent audit. They may also, upon request of the competent authority, give access to the data necessary to monitor their compliance with the DSA to the competent authority but also to vetted academic researchers that perform research into the systemic risks. The European Commission will have supervisory and enforcement powers in relation to very large platforms.

Enforcement of the DSA will be the responsibility of various resourced Member State-level agencies, but with the Commission monitoring progress and retaining some power to step in if required.

3.4 US intermediary liability legal position

As indicated, the problem with section 230 of the CDA is that when platforms are granted complete legal immunity for the content that their users post, it also reduces their incentives to remove content causing social harm (discussed at par 2). Section 230 does not protect platforms in criminal cases or in cases involving copyright claims, sexual exploitation of children and sex-crimes work (Johnson and Carson, 2021).

The way forward pertaining to section 230 reform is uncertain. The US could consider the approaches taken by the EU and the UK (discussed at par. 3.2 and 3.3) and decide if one or a combination of the approaches would work within the context of the U.S. legal landscape.

Zuckerberg has been calling for new regulations for social media platforms (Sankin, 2021). In March 2021, Zuckerberg gave testimony to Congress in which he made the following statement, “Platforms should be required to demonstrate that they have systems in place for identifying unlawful content and removing it. Platforms should not be held liable if a particular piece of content evades its detection—that would be impractical for platforms with billions of posts per day—but they should be required to have adequate systems in place to address unlawful content” (Zuckerberg, 2021). Zuckerberg’s submission is tied to the common law standard of duty of care. In the US, businesses have a common law duty to take reasonable steps to not cause harm to their customers, as well as to take reasonable steps to prevent harm to their customers (Smith and Van Alstyne, 2021). Social media companies will not face litigation if they exercise a reasonable duty of care.

The following considerations should be noted:

- The duty of care proposed by Zuckerberg is not a new concept. The UK’s proposed Online Safety Bill has the standard of duty of care at its core (discussed at par. 3.2).
- The regulations cannot focus only on large social media companies but should also consider smaller social media platforms that may not have the same business model as the large social media companies. In this regard, the reform proposed for the UK and EU draw a clear distinction between small and large social media companies. India’s statutory social media rules also draw such a distinction (see par. 3.2).
- There needs to be transparency in respect of social media platforms’ use of algorithms and advertisements. Algorithms may steer a user towards harmful content and in this regard, the EU reform provides clear guidance.
- Whether there should be an oversight body to ensure enforcement is open to debate (Moster and Rosen, 2021). In my opinion, similar to the EU and UK proposed legislation, there must be an agency that should oversee enforcement. The fear is that if government has such authority, it could abuse the power and restrain or criminalize speech with which it disagrees (Moster and Rosen, 2021). Although such fears may be justifiable, there are civil organisations that can hold such an oversight body accountable (see par. 5 hereafter).

4. Government regulation of specific forms of social media content

Some governments are of the opinion that social media self-regulation is not effective and therefore they have implemented legislation that governs specific forms of social media content.

In 2017, Germany passed the Germany's Network Enforcement Act (Netzwerkdurchsetzungsgesetz, or "NetzDG") which requires social networks with at least two million German users to remove "manifestly unlawful" content within 24 hours of receiving a complaint, with fines of up to €50 million for non-compliance (Watney, 2018). The law applies not only to hate speech, but also to other forms of unlawful content, such as defamation, incitement to crime, non-consensual pornography and depictions of violence. In 2020, the Bundestag passed a reform to the NetzDG that added more obligations. The amendment requires social networks to report certain types of unlawful content to Germany's Federal Criminal Police Office (Johnson and Carson, 2021).

In March 2019, the Christchurch mosque shooting took place in New Zealand in which a lone Australian gunman killed 51 worshippers and injured an additional 49. The shooter live-streamed the attack on Facebook and the video quickly spread across the Internet, continuing to circulate on social media even after Facebook removed it. Before the attack, the shooter had also uploaded an 87-page anti-immigrant and anti-Muslim manifesto to 8chan, an anonymous online forum popular among white supremacists and other extremists (Johnson and Carson, 2021).

In response to the live-streaming of the video of Christchurch mosque shooting, Australia implemented the Sharing of Abhorrent Violent Material Act targeting violent content on social media in 2019 (Johnson and Carson, 2021). The definition of "abhorrent violent material" includes acts of terrorism, murder, attempted murder, torture, rape, and kidnapping (Johnson and Carson, 2021). The Act requires content, internet and hosting providers to, within a reasonable time, report to the Australian Federal Police abhorrent violent conduct that is happening in Australia and accessible through their services or hosted on their services. If they fail to comply, they will be penalised. The Act also creates a new offence for content and hosting service providers around the world who fail to expeditiously remove abhorrent violent material.

In June 2021, the EU also responded to the live-streaming of the Christchurch shooting by implementing rules on addressing the dissemination of terrorist content online. Platforms will have to remove terrorist content referred by Member States' authorities within 1 hour. The rules will also help to counter the spread of extremist ideologies online - a vital part of preventing attacks and addressing radicalisation (European Commission, 2021b).

5. Human rights safeguards

Social media provides a valuable platform for interactive social interaction. Unfortunately, some of the interaction is harmful and illegal. Social media intermediary liability reform is aimed at eliminating illegal and harmful speech in a transparent manner by holding both the provider and user accountable.

Users have the right to free speech, but there are limitations to free speech and expression. It cannot include propaganda for war, incitement of violence or advocacy of hatred (Watney, 2021). Smith and Van Alstyne (2021) opines in respect of section 230 reform that, "There are no First Amendment protections for speech that induces harm (falsely yelling "fire" in a crowded theatre), encourages illegal activity (advocating for the violent overthrow of the government), or that propagates certain types of obscenity (child sex-abuse material)." Providers should not provide users with a platform that allows harmful and illegal content under the guise of free speech.

Proposed legislation aims to provide a cyberspace in which all users are protected against harmful and illegal content without eroding speech to such an extent that legitimate speech is restricted. The aim of the reform is commendable and needed, but the challenge facing governments is the manner in which they achieve this aim.

Hicks indicates that social media liability legislation must have a human rights-based approach (United Nations, 2021). The UN Human Rights (2021) makes various recommendations that may serve as human rights safeguards, namely that regulation should focus on content moderation rather than content-specific restrictions; that decision-making should not only be made by algorithms but have a human component; that

moderation should be transparent and that there must be an appeal procedure with the courts being the final adjudicator on the lawfulness of content.

As indicated, the proposed EU and UK reform have different approaches. The EU reform focuses primarily on illegal content, but harmful content will have to be addressed. It may be that EU member countries will implement legislation to address specific forms of harmful content (see par. 4). I support the UK reform in providing for illegal and harmful content. The problem is identifying what may constitute harmful content. Where someone live-streams, for example a murder-suicide, such content must be removed. The EU's detailed social media platforms' obligations are commendable (see par. 3.3).

The safeguards must ensure trust, transparency and accountability. To ensure free speech, legislation must provide the user with reasons for the removal and an appeal procedure. In my opinion, enforcement of the legislation and oversight are important to ensure accountability and trust. I am not in favour of general monitoring obligations (see par. 3.1) as it may result in restricting legitimate speech.

6. Conclusion

The reform of social media intermediary liability is needed to bring liability into the 21st century.

Hicks warned in 2021, "When democracies start regulating, there is a ripple effect across the world, and other countries may follow. The internet does not have borders - we need to aim for a global digital space where it is safe for people to exercise their rights" (UN Human Rights, 2021). With reference to Hicks' warning, the greatest drawback to the proposed reform is that various countries will each have their own intermediary liability legislation. This means that social media companies will have to comply with legislation in different jurisdictions. I am of the opinion that countries - in consultation with social media companies, civil organizations and affected business - should have discussed the reform on a global level and that they should have come to some agreement on the approach. This would have resulted in a harmonized approach.

The proposed reform will soon be implemented. It will be interesting to see which countries follow the EU or UK approach to liability and self-regulation. Once implemented, the effectiveness and impact of the regulation on social media platforms, users and free speech may be determined.

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