OVERVIEW OF PRESENTATION

➤ Platforms and the techlash
➤ The DSM agenda
➤ AVMS Reform
➤ Terrorism
➤ Communication and Recommendation on Illegal Content
➤ Read my lips (logic/impact/power/shame) - a proactive obligations Directive?
PLATFORMS TODAY

➤ Changes in the social evaluation of the Internet (good or evil? enhancing communication or crimes and copyright infringements?), new techniques, and business models seem to have influenced legal practice and court decisions.
➤ (‘Study on the liability of Internet Intermediaries’ for European Commission, November 2007)
➤ “In respect of access to information and content for many parts of society, platforms are increasingly taking centre stage. This role, necessarily brings with it a wider responsibility.’
➤ Platforms Communication, COM(2016) 288
➤ For more than two decades internet platforms have largely been treated as intermediaries. They have been seen as more like telecom companies, which may transmit criminal material for which they are not liable, than media firms, which can be prosecuted or sued for what they publish
➤ (Economist 10 August 2017)
➤ ‘The open digital spaces [online platforms] provide must not become breeding grounds for … spaces that escape the rule of law’
➤ (Tacking Illegal Content Online, COM(2017) 555)
➤ ‘Now I address [the internet companies] directly. I call on you with urgency, to bring forward technology solutions to rid your platforms of this vile terrorist material that plays such a key role in radicalisation. Act now. Honour your moral obligations.’
➤ (Amber Rudd, Conservative party conference, October 2017)
The Guardian view on Google: overweening power

Editorial

Amber Rudd urges action from internet groups on extremist content

A home secretary says it is unacceptable that terrorists can use messaging services to avoid detection.

Google lets antisemitic videos stay on YouTube

Advertisements result after web giants' failure.

Spring Walks Guide


Eat! Superfish suppers

My life with Prince

Osborne gets editor's role

Facebook's darkest secret: a platform for paedophiles

Facebook is an admired social network for many of its users, but there are pages that host disturbing and potentially illegal content that most people would find alarming.
OBLIGATIONS AND THE DSM AGENDA

- Platforms Communication (COM(2016) 288, p 8)
  
  - ‘maintain a balanced and predictable liability regime for online platforms’ but ‘a number of specific issues relating to illegal and harmful content and activities online have been identified that need to be addressed to render this approach sustainable’

- Five specific issues identified: AVMS reform (minors, hate), copyright, voluntary (terrorism, CSA, hate), voluntary vs ECD, review of NTD

- ‘The Commission will also provide guidance on liability rules and support to platforms on voluntary measures taken by platforms when they work proactively to remove illegal content, acting in good faith’: DSM Mid-Term Review (COM(2017) 228, p 9)
‘video-sharing platform service’: a TFEU service made available by ECN, with a principal purpose (or that of a dissociable section) of ‘providing programmes and user-generated videos to the general public, in order to inform, entertain or educate’ consisting ‘of the storage of a large amount of programmes or user-generated videos, for which the video-sharing platform provider does not have editorial responsibility’, where the organisation of that content is ‘determined by the provider of the service including by automatic means or algorithms, in particular by hosting, displaying, tagging and sequencing;

Obligations:

‘protect minors from content which may impair their physical, mental or moral development’ and

‘protect all citizens from content containing incitement to violence or hatred directed against a group of persons or a member of such a group defined by reference to sex, race, colour, religion, descent or national or ethnic origin’

‘Practical and proportionate’ measures which can include T&C, user report/flag/rate (and feedback), age verification and parental controls (for first category only), media literacy

UK line - opposing new text, but “being pragmatic and assessing if the proposals would cause excessive burdens, as many of the requirements are already captured in the terms and conditions of existing social media platforms.”
AVMS AND VIDEO SHARING PLATFORMS (PROPOSED ART 28A/28B)

➤ Council

➤ majority support (minority: CZ, DK, FI, IE, LU, NL, SE, UK)

➤ would add ‘provocation to commit a terrorist offence’ clause (cf art 5 Dir 2017/541)

➤ would delete reference to ‘large amount’

➤ give greater scope to states to go further

➤ Parliament: draft resolution (after initial consideration in committees) that would

➤ rule out ‘any ex-ante control measures or upload-filtering of content’
GOALS

➤ In another case, while YouTube removed a video of a woman being forced by her husband to walk naked in the street for violation of YouTube's Community guidelines, the same video still appears on the website LiveLeak.com

➤ Subclauses and commas…

➤ But more seriously:

➤ What is illegal about the video? Is it AVMS?

➤ Who is at fault?

➤ How would the proposals affect LiveLeak?

➤ Meanwhile: implementation of DEA 2017…
DIR 2017/541, ART 21 (TERRORISM)

21(1) Member States shall take the necessary measures to ensure the prompt removal of online content constituting a public provocation to commit a terrorist offence, as referred to in Article 5, that is hosted in their territory. They shall also endeavour to obtain the removal of such content hosted outside their territory;

21(2) Member States may, when removal of such content at its source is not feasible, take measures to block access to such content towards the internet users within their territory.

21(3): Measures of removal and blocking must be set following transparent procedures and provide adequate safeguards, in particular to ensure that those measures are limited to what is necessary and proportionate and that users are informed of the reason for those measures. Safeguards relating to removal or blocking shall also include the possibility of judicial redress.

Expectation that industry will ‘develop new technology and tools to improve the automatic detection and removal of content that incites to terrorist acts’ with complementary legislative measures ‘if necessary’ (Council of the EU, June 2017, 22-23 June 2017)
‘TACKLING ILLEGAL CONTENT ONLINE’ COM(2017) 555

➤ Rights and responsibilities redux (pp 6/-7)
  ➤ ‘entitled to prevent that their infrastructure and business is used to commit crimes’
  ➤ ‘should ensure a safe online environment for users’
  ➤ ‘online platforms should also be able to take swift decisions without being required to do so’
➤ Trusted flaggers and rights-compliant criteria; make user flagging easier
  ➤ ‘effective proactive measures to detect and remove’
‘TACKLING ILLEGAL CONTENT ONLINE’ COM(2017) 555

➤ ‘A more aligned approach [to removing illegal content] would make the fight against illegal content more effective’ and ‘reduce the cost of compliance’

➤ ‘assess whether additional measures are needed … including possible legislative measures to complement the existing regulatory framework’ (by May 2018)

➤ ‘robust safeguards to limit the risk of removal of legal content also should be available, supported by a set of meaningful transparency obligations to increase accountability of the removal processes’ … and counter-notice?

➤ No consideration of Delfi
PROACTIVE MEASURES AND THE ECD

➤ *England And Wales Cricket Board v Tixdaq* [2016] EWHC 575 (Ch) [170] (Arnold J)

➤ My provisional view is that, in the light of *L’Oréal v eBay*, the Article 14 defence would be available to the Defendants in respect of user-posted clips which were not editorially reviewed, but not in respect of clips which were editorially reviewed.

➤ COM(2017) 555: It follows that proactive measures taken by an online platform to detect and remove illegal content may result in that platform obtaining knowledge or awareness of illegal activities or illegal information, which could thus lead to the loss of the liability exemption in accordance with [article 14(1)(a) ECD]. However, in such cases the online platform continues to have the possibility to act expeditiously to remove or to disable access to the information in question upon obtaining such knowledge or awareness. Where it does so, the online platform continues to benefit from the liability exemption pursuant to point (b) of Article 14(1). Therefore, concerns related to losing the benefit of the liability exemption should not deter or preclude the application of the effective proactive voluntary measures that this Communication seeks to encourage.
‘in order to safeguard the balanced approach that [the ECD] seeks to ensure’...

All illegal (EU/state) content, all hosts (directed to EU) (4a/4b)

The proactive package

- Encourages ‘proportionate and specific proactive measures’ though with caution around automation (18)

- Terrorist content referrals - NTD 1 hour plus ‘proportionate and specific proactive measures, including by using automated means’ including to prevent reappearance (35/36)

Other points (crossing NTD and proactive)

- Encourage MS to set up new reporting obligations (24)

- Refers back to Communication on the art 14 issue (Recital 26)

- Counter notice (for all removals) … but not if serious criminal offences involving threat to life / safety of persons (9/11)

- Transparency (16), bad faith (21)
➤ At times, the company seems to police videos primarily in response to public outcry, which makes its decisions inherently haphazard and potentially malleable. It’s a gargantuan task to try to moderate a site on which hundreds of hours of video are uploaded every minute—but it’s even harder if you don’t have clear, consistent rules about what’s allowed. (Louise Matsakis, ‘YouTube doesn’t know where its own line is’ (2 March 2018) https://www.wired.com/story/youtube-content-moderation-inconsistent/)
From August 2017 to January 2018, 688,000 Rohingya fled Myanmar due to an escalation of state violence in what has been a decades-long genocide.

In September 2017, multiple Rohingya activists reported seeing their posts removed or accounts blocked from Facebook after sharing information about attacks on the Rohingya.
POWER

➤ Chilling effect in the ECtHR: *Delfi* contrasted with *Pihl v Sweden*; see further Ó Fathaigh [2017] EHRLR 387

➤ Platforms as gatekeepers; e.g. ’gatekeepers control what content we access and the terms on which this content can be accessed. The terms on which this control is exercised are under-publicised and individuals therefore lack the knowledge and power to have a disciplining influence on gatekeepers’ (Lynskey 2017)

➤ Overall approach e.g. EU Select Committee, ‘Online Platforms and the Digital Single Market’ HL 129, 2015-16.

➤ “‘Tech” is not yet a four-letter word, but it could soon become one’ (Economist, 20 January 2018)
‘I am moved by the human fallout, as the companies react to falling revenues by cutting staff... It’s time for ISPs to start taking responsibility for the content they’ve profited from... We must shame them into helping us’ (Paul McGuinness, speech at MIDEM Cannes, 28 January 2008, reprinted in Sunday Times 16 March 2008)

‘The major social media companies are big enough, rich enough and clever enough to sort this problem out—as they have proved they can do in relation to advertising or copyright. It is shameful that they have failed to use the same ingenuity to protect public safety and abide by the law as they have to protect their own income’ (Home Affairs Select Committee, Hate crime: abuse, hate and extremism online, HC 69, 2016-17 [36]).