

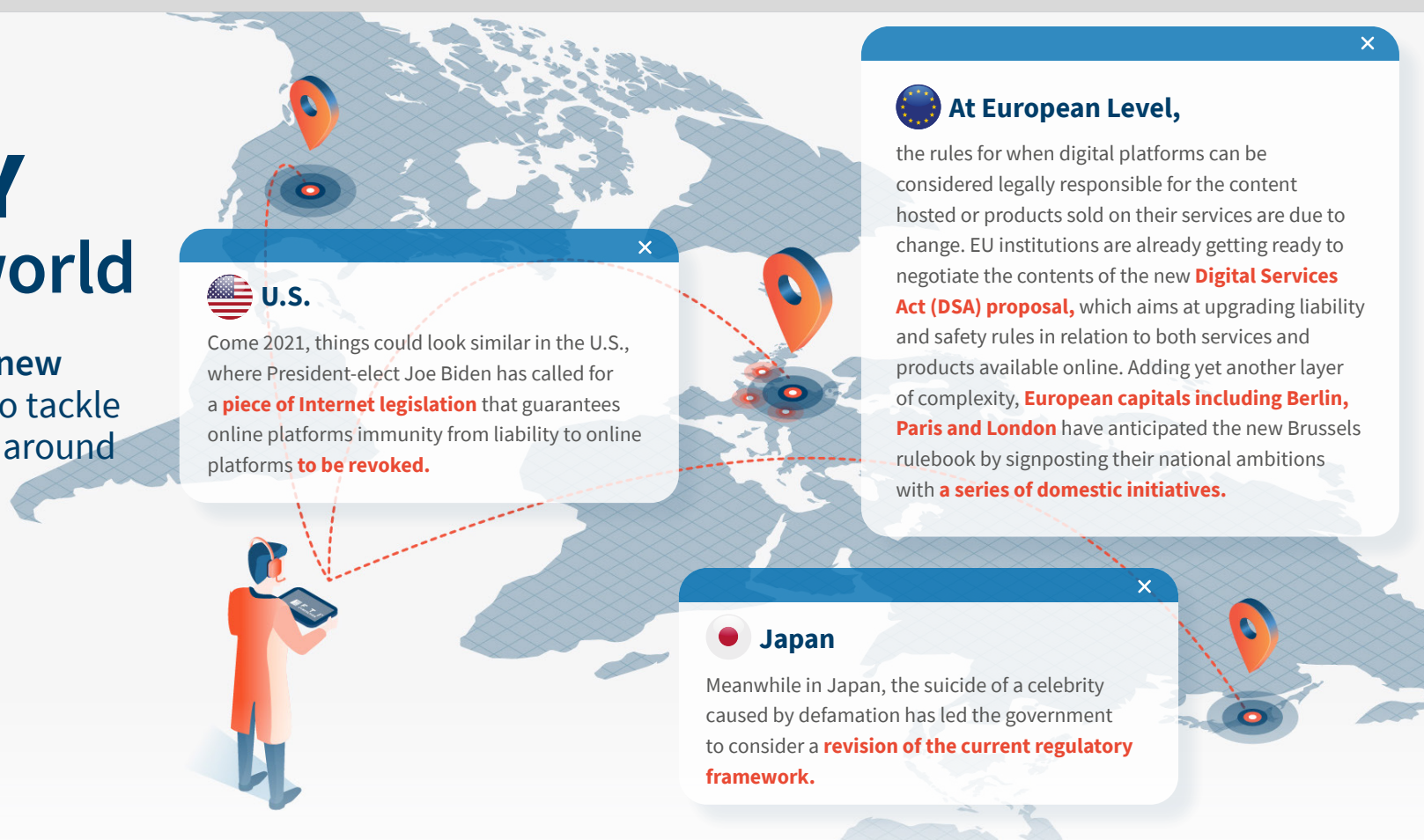



online liability regulations




ONLINE LIABILITY across the world

The appetite to develop new regulatory approaches to tackle online threats is growing around the world.




 **U.S.**

Come 2021, things could look similar in the U.S., where President-elect Joe Biden has called for a **piece of Internet legislation** that guarantees online platforms immunity from liability to online platforms **to be revoked.**

 **At European Level,**

the rules for when digital platforms can be considered legally responsible for the content hosted or products sold on their services are due to change. EU institutions are already getting ready to negotiate the contents of the new **Digital Services Act (DSA) proposal**, which aims at upgrading liability and safety rules in relation to both services and products available online. Adding yet another layer of complexity, **European capitals including Berlin, Paris and London** have anticipated the new Brussels rulebook by signposting their national ambitions with **a series of domestic initiatives.**

 **Japan**

Meanwhile in Japan, the suicide of a celebrity caused by defamation has led the government to consider a **revision of the current regulatory framework.**



In view of the borderless nature of the Internet and the emergence of new forms of risks and challenges in the online ecosystem,

FTI Consulting experts from offices in Brussels, Washington D.C., Berlin, Paris, London and Tokyo have worked together to shed some light on the state of play of the current discussions surrounding this important topic and on the main features of the existing laws.

In our overview we broke down, summarised and compared the most important provisions of the present legal frameworks, as well as key aspects of the political and policy debate surrounding such provisions. This helps to **understand where and how** these new legislative initiatives could lead to **regulatory convergence or divergence**, and provides the reader with an overview of the **existing regulatory solutions** implemented by policymakers to address online threats.



EU

The European Union’s 20-year-old legislation on internet liability allowed for the emergence of a dynamic online ecosystem. The current rules are however undergoing review, reflecting the emergence of new online threats.



Cornerstones of the current rules

- The E-commerce Directive (ECD) and sector-specific regulation (e.g. Copyright Directive, AVMSD).



Main existing provision(s)

- An exemption from liability for some services under specific circumstances.



Scope

- Broad definition of Information Society Service.
- Liability exemption only applies to “Mere conduit” (e.g. internet access providers); “Caching” (e.g. proxy servers); and “Hosting” services providers (e.g. e-commerce, social networks).



Liability exemption

- For “Mere conduit”, “Caching” and “Hosting” services, the exemption is conditional to passivity.
- Caching and Hosting service providers are also required to act “expeditiously” after becoming aware of illegality.
- Liability exemption for copyright protected material updated by recent Copyright Directive.



Monitoring obligation

- Member States cannot impose a general monitoring obligation on the providers of the three types of services (mere conduit, caching, hosting).



Notice and Action (e.g. takedowns)

- No clear “notice and action” regime, although a court or an authority can require to terminate or prevent an infringement.
- Member States can establish procedures governing the removal or disabling of access to information.



Proactive measures

- No obligations regarding proactive measures but Member States can require service providers to apply reasonably expected duties of care.
- Some believe the Copyright Directive will force platforms to implement upload filters.



Protection from liability in case of voluntary actions? (Good Samaritan protection)

- European Commission argued in 2017 that Good Samaritan protection exists under current rules, though this understanding has been criticised.



Criticisms

- Ranging from growing evidence of legal fragmentation in the Digital Single Market and some have pointed out that key concepts of the ECD would benefit from additional clarity. Some argue in favour of enlarging the scope to capture forms of harmful but legal content.



Potential for policy revision

- The EC is expected to revise the liability regime as part of the upcoming Digital Services Act package.
- EU institutions are also currently finalizing the negotiations over the Terrorist Content Online proposal, which will provide authorities with the power to issue removal orders and oblige service providers to take specific measures to address the dissemination of terrorist content.

For questions on the existing EU rules, on their upcoming revision or on global trends, as well as for general questions about this initiative please contact:

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US

In the US the necessity to change the current Section 230 regime is being discussed. A reform might be among one of President-elect Joe Biden's first actions.



Cornerstones of the current rules

- Section 230 of the Communications Decency Act (1996).



Main existing provision(s)

- “No provider or user of an interactive computer service shall be treated as the publisher or speaker...”



Scope

- Liability protections broadly extend to “any information service, system, or access software provider that provides or enables (...) access (...) to a computer server.”



Liability exemption

- Liability exemptions are not absolute, especially against intellectual property claims, if platforms edit third party content, for failures after voluntary commitments, or in relation to sex-trafficking.
- Conflicting rulings about liability for a defective or dangerous product.



Monitoring obligation

- With small exceptions noted above for protocols, and requirements related to intellectual property and sex-trafficking activity, no monitoring obligation.



Notice and Action (e.g takedowns)

- DMCA and sex-trafficking have their own protocols, but Section 230 broadly allows platforms to decide whether or not to monitor and perform takedowns.
- There are legal obligations concerning e.g. child exploitation materials.



Proactive measures

- With rare exceptions, platform operators do not have to take proactive measures to enjoy Section 230 protections.



Protection from liability in case of voluntary actions? (Good Samaritan protection)

- Section 230 is essentially designed around the concept of platform owners acting as Good Samaritans and ensuring that they are not confronted with perverse incentives.



Criticisms

- Most prominent criticisms argue that liability protection is a privilege that platform companies should earn by conforming their behavior; or that the exception that reinstated liability for sex-trafficking should also cover also activities such as the trafficking of illegal substances, and encouragement of violence by terrorists or extremists.



Potential for policy revision

- Several bills in Congress have proposed reform. President Donald Trump has called for changes and President-elect Joe Biden called for Section 230 to be revoked. Supreme Court Justice Clarence Thomas opined that courts may have interpreted the law too broadly .

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DE

Germany updated the EU rules on internet liability already in 2017, with the infamous NetzDG law- currently being amended.



Cornerstones of the current rules

- The Telemedia Act - TMG (2007) transposed the ECD in 2007, plus additional sector-specific interventions.



Main existing provision(s)

- Essentially those established by EU law and as defined by national interventions such as the Network Enforcement Act (NetzDG) and the new Media State Treaty (MStV)



Scope

- Essentially as established by EU law. The NetzDG only applies to operators of social networks that have more than two million registered users.



Liability exemption

- Essentially as established by EU law.
- Germany is working to transpose the Copyright Directive.



Monitoring obligation

- Essentially as established by EU law. In practice the Government does not consider upload filters as a form of “general monitoring”, especially for re-uploads.



Notice and Action (e.g takedowns)

- The NetzDG obliges providers to maintain a procedure for notifications and to remove or block access to “manifestly unlawful” content within 24 hours from notification. When illegality is not obvious they have a week. A proposal to amend the NetzDG would bind social networks to report some forms of criminal content to the authorities.



Proactive measures

- Essentially as established by EU law. With the amendment of the NetzDG, platform operators do have to take proactive measures.



Protection from liability in case of voluntary actions? (Good Samaritan protection)

- It is unclear whether any form of “Good Samaritan” protection exists under German law, in this context.



Criticisms

- The obligation for social networks to report illegal content, implemented in the NetzDG with the “draft law to combat right-wing extremism and hate crime”, has been particularly criticized. The EU Commission has warned the German government that its draft is partly incompatible with European law.



Potential for policy revision

- Because the NetzDG attracted a lot of criticism, a policy revision cannot be ruled out. Furthermore, a consultation on the draft bill implementing the Copyright Directive was recently carried out by the government.

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FR

Like Germany, France modernised the internet liability rules established by the EU with a national initiative (Avia law). However, some of the provisions of the law were struck down by the Constitutional Court.



Cornerstones of the current rules

- The Confidence in the Digital Economy Act -LCEN (2004) transposed the ECD, plus additional to sector-specific interventions.



Main existing provision(s)

- Essentially those established by EU law.



Scope

- Essentially as established by EU law.



Liability exemption

- Essentially as established by EU law.
- France is working to finalise the transposition of the Copyright Directive.



Monitoring obligation

- Essentially as established by EU law.



Notice and Action (e.g takedowns)

- LCEN stipulates that the host must check the legality of the notified content. The French Constitutional Council specified that this obligation is limited to obvious illegal content.

- The Constitutional Court struck down in June 2020 provisions of the Avia law mandating the removal of “clearly illegal” hateful content within 24 hours from notification (or one hour, in some cases).



Proactive measures

- Essentially as established by EU law.



Protection from liability in case of voluntary actions? (Good Samaritan protection)

- In 2004 the Constitutional Council argued that “provisions cannot have the effect of making a host provider liable for not having withdrawn information denounced as unlawful by a third party if the information is not manifestly of such a nature”.



Criticisms

- The recent rise of online hate speech has revived the debate on platform’s role in content moderation. It has also questioned the legitimacy of platforms as “judges”, and the technical means that platforms can deploy.



Potential for policy revision

- The French Conseil d’Etat expressed the need to revise the ECD. In 2019, the Avia Law introduced the obligation for platforms to remove hateful content under 24 hours, but this measure was struck down by the Constitutional Council.

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UK

Due to Brexit, a policy revision of the EU rules on internet liability will not affect the current UK framework. However, the UK also intends to roll out new rules soon.



Cornerstones of the current rules

- The Electronic Commerce (EC Directive) Regulations transposed EU's ECD in 2002, plus additional sector-specific interventions.



Main existing provision(s)

- As established by EU law. However new legislation updating the regulatory framework might impose a duty of care and grant powers to the Office of Communications (Ofcom) to oversee enforcement.



Scope

- Essentially as established by EU law. However new legislation will broaden this to all "companies that provide services or tools that allow, enable or facilitate users to share or discover user-generated content, or interact with each other online".



Liability exemption

- As established by EU law. The UK will not transpose the copyright Directive due to Brexit



Monitoring obligation

- Essentially as established by EU law.



Notice and Action (e.g takedowns)

- Essentially as established by EU law.



Proactive measures

- Currently as established by EU law, but new obligations are likely to include proactive use of technological tools.
- Online harms legislation will not impose on entities technically unable to perform proactive measures the same degree of regulation imposed on others.



Protection from liability in case of voluntary actions? (Good Samaritan protection)

- Essentially as established by EU law.



Criticisms

- The two major criticisms levelled centre on the burdensome nature of reporting requirements and the vagueness of the Government's broad definitions of harms.
- Some also argue that the new measures will grant too much power to platforms to censor citizens and curb freedom of speech.



Potential for policy revision

- The entire framework for content liability will be updated by the Government's Online Harms legislation, which is expected to be laid in Parliament early next year. Ofcom will subsequently need to codify its definitions of harms.

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JP

In Japan the government is also considering a legislative revision of the Provider Liability Limitation Act and new legislation to protect consumers. Bills are discussed in 2021.



Cornerstones of the current rules

- The Provider Liability Limitation Act - PLL (2002).



Main existing provision(s)

- An exemption from liability for online service providers when they block information that infringes on others' rights, and provisions regarding disclosure of identifiable information about offenders.



Scope

- Broad definition of specified telecommunications service providers which includes web hosting service providers and electronic bulletin board service providers.



Liability exemption

- ISPs cannot be held liable for any loss incurred unless they knew, or if there is reasonable ground to find that ISPs could know.
- ISPs are also shielded from liability in case of losses incurred by deletion, if they don't receive any complaint.



Monitoring obligation

- The Act doesn't require ISPs to monitor their services.



Notice and Action (e.g takedowns)

- There is no legal stipulation as regards notice and takedowns in the Act. The ISPs decide whether or not the information based on court decision.



Proactive measures

- This Act does not require ISPs to take proactive measures, such as comprehensive monitoring, introduction of blocking and detection technologies.



Protection from liability in case of voluntary actions? (Good Samaritan protection)

- The Act provides ISPs with a liability exemption when they delete information, in case there is reasonable ground for ISPs to believe that the rights of others were infringed; or in cases where ISP has not received any complaints within 7 days.



Criticisms

- Some prominent criticisms concern the difficulty of identifying the sender due to lack of information and of determining the existence of an infringement.



Potential for policy revision

- The government will submit a bill to revise the Act during next year's ordinary Diet session for further smooth procedure to disclose offenders' information.
- The Consumer Affairs Agency aims to submit a new bill in 2021 to obligate so-called Transaction Digital Platforms to take actions to protect consumers and disclose their according efforts.

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