FOREWORD

Despite the fact that we all have been dealing with the internet for more than 20 years, many of the legal problems surrounding the use of the internet remain unresolved. The responsibility of internet intermediaries constitutes one of the best examples in this respect, demonstrating that by relying exclusively on the existing and traditional legal framework, we will never arrive at just and equitable solutions.

The legal issues analysed by Folkert Wilman in his book constitute enormous challenges for law-makers, courts, legal practitioners and academics. Let me name just some, and the most essential questions, which remain within the scope of his analysis.

As we all know, the liability of intermediaries is normally of secondary nature. Tortfeasors who are primarily responsible are those who place illegal content on the internet. Nevertheless, almost all legal measures that could effectively aim at removing such content, must be – by the very nature of the internet – addressed against intermediaries. Therefore, we are dealing here with the responsibility of those, who are, in principle, innocent.

All measures addressed at intermediaries constitute a double-edged weapon. They lead to the elimination of illegal content, but at the same time, they may affect the rights, often fundamental rights, of third parties. This is the reason for one of the author’s submissions that the duty of care imposed on intermediaries should be ‘double-sided’.

Another fundamental question that does not escape the author’s attention is the nature of illegality. Should we treat in the same way all sorts of illegality, like the infringement of intellectual property rights, hate speech, terrorism or child pornography? Clearly, a one-size-fits-all solution is not an appropriate solution. In this context, one should ask an additional question, i.e., to what extent the intermediaries’ responsibility could depend on whether the liability is of a criminal, administrative or private law nature.

The author also accurately raises the question whether a one-size-fits-all solution may be workable with respect to another issue: should all intermediaries be treated in the same way? To what extent should we differentiate the scope of responsibility when it comes to the capacity of a particular intermediary to tackle potentially illegal content?

The internet is essential and has become a vector of change for social, economic, cultural and political exchanges and interaction. It now genuinely constitutes a ‘modern public square’. Yet, as the author correctly points out, at the same time, the internet is not public at all. And here comes another fundamental challenge, which is thoroughly discussed in his book. How to regulate the responsibility of intermediaries in this ‘privatised public sphere’? To what extent could one rely on non-binding rules or self-regulation? To what extent could disputes involving this type of responsibility be delegated to intermediaries themselves?

Folkert Wilman invites us to a journey into a virtual world where it is easy to formulate questions, but extremely difficult to answer them. In his analysis he displays remarkable knowledge, coupled with professional experience. As a member of the Legal Service of the European Commission he has been involved in law-making process at the EU level. He has
represented the European Commission in proceedings before the Court of Justice, also in cases in which I acted as Advocate General.

His book will definitely contribute to the ongoing discussion not only on both sides of the Atlantic, but in the entire world. It will constitute an extraordinarily valuable point of reference for law-makers and courts, including, I believe, the Court of Justice.

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