



**Illegal
Content Online
and the Role of
Intermediaries**

IPR CONFERENCE 2021 ANTI-COUNTERFEITING

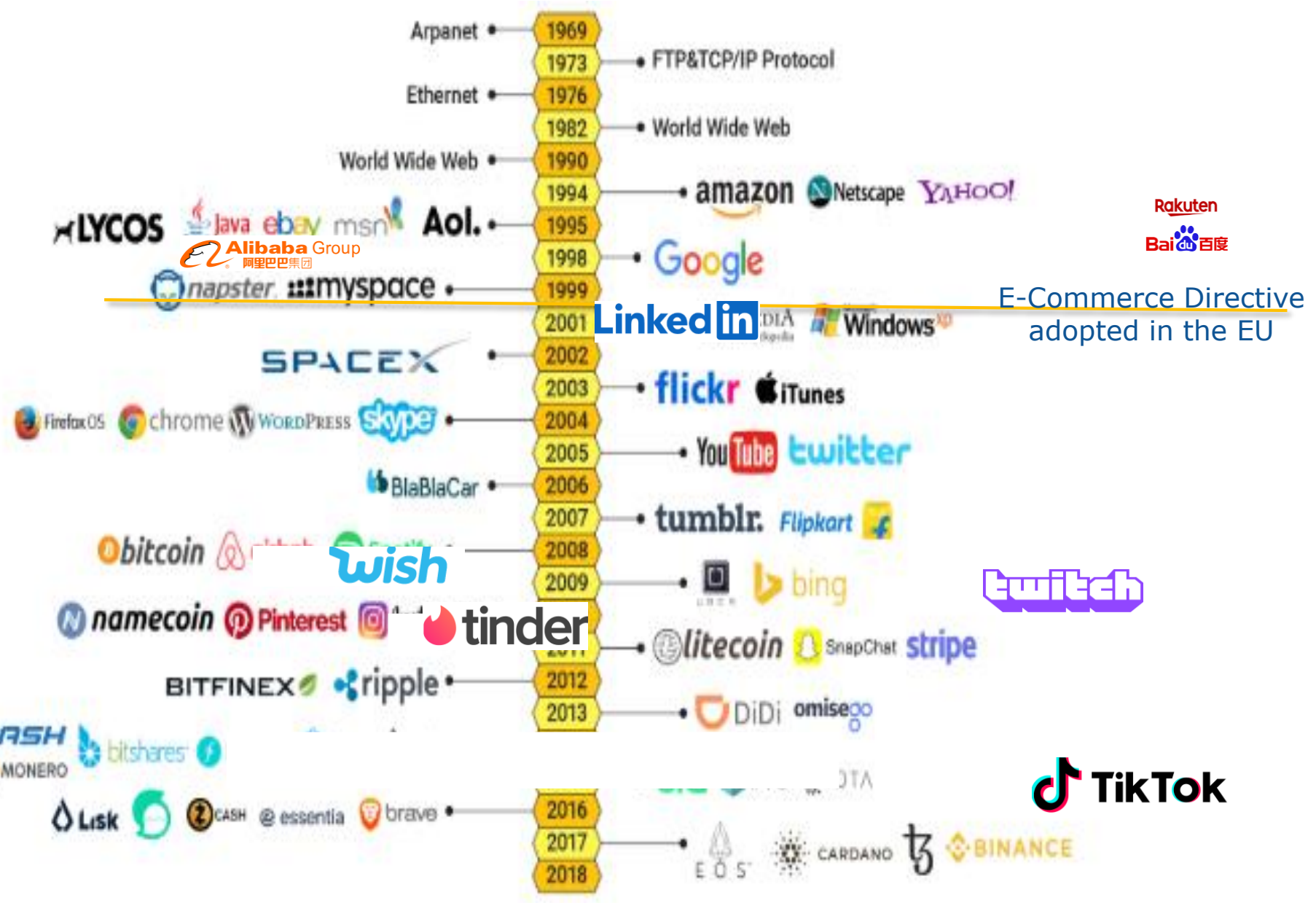
**ECCK - KIPO
18 October 2021**

*Benoit Lory
Minister Counsellor
EU Delegation to the Republic of Korea*

Towards a modernisation of the EU [digital] framework

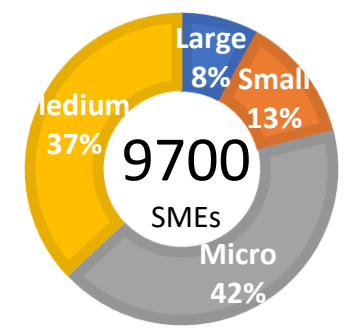
- EU IP Action Plan: 25 November 2020
- Modernisation of the e-commerce/digital framework:

DSA/DMA: 15 December 2020



AROUND 10.000 PLATFORMS IN THE EU

■ Large ■ Small ■ Micro ■ Medium

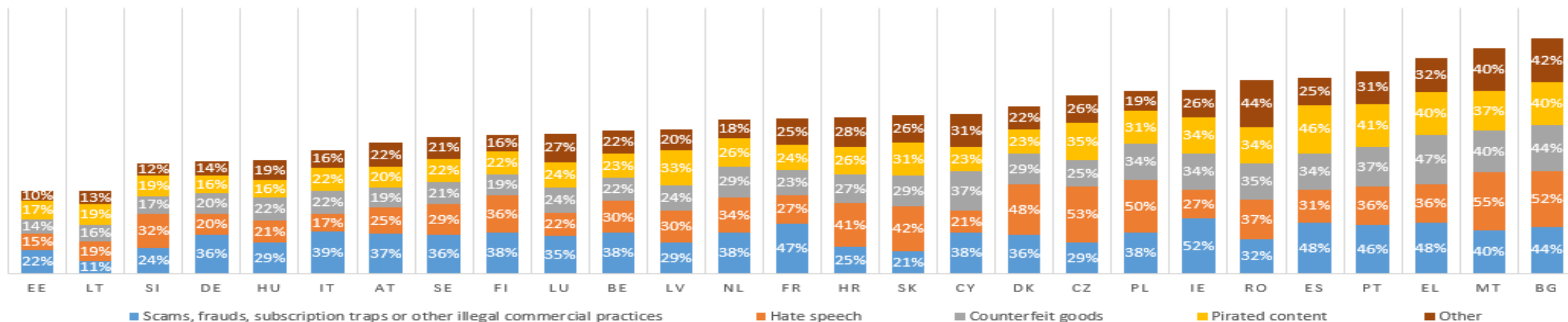


Illegal content spreads online

Indications of scale: moving target, with significant impacts on victims, society, economy. For example:

- Counterfeit products: EUR 121 billion loss
- CSAM: volumes of content identified doubled from 2016 to 2019

**MOST FREQUENTLY SEEN TYPES OF ILLEGAL CONTENT PER MEMBER STATE
(percentage of respondents per MS)**



of 8 June 2000

The current rules...

- Provide minimum harmonisation of the exemption of liability and for hosting services, the exemption is conditioned to their expeditious action
- Do not define what is illegal
- Prohibit to impose general monitoring obligations

E-commerce Directive 2000/31

Rules for information society services providers



DECATHLON

SPIEGEL
ONLINE



Liability exemption - intermediary services

Mere
conduits

Caching
services

Hosting
services

+ no general monitoring obligations

SECTOR
SPECIFIC
LEGISLATION:
COPYRIGHT,
IPRED...

Digital Services Act Rules for intermediary services

Precision on consumers and Good Samaritan
clause

Due diligence obligations

Common framework for enforcement:
Digital Services Coordinators + Commission

2000

2020

Asymmetric due diligence obligations

	VERY LARGE PLATFORMS	ONLINE PLATFORMS	HOSTING SERVICES	ALL INTERMEDIARIES
Points of contact	•	•	•	•
Legal representatives	•	•	•	•
Terms and conditions	•	•	•	•
Reporting obligations	•	•	•	•
N&A	•	•	•	
Statement of reasons	•	•	•	
Complaint handling	•	•		
OOC	•	•		
Trusted flaggers	•	•		
Abusive behaviour	•	•		
KYBC	•	•		
Reporting criminal offences	•	•		
Advertising transparency	•	•		
Reporting obligations	•			
Risk assessment and mitigation	•			
Independent audits	•			
Recommender systems	•			
Enhanced advertising transparency	•			
Crisis protocols	•			
Data access and scrutiny	•			
Compliance officer	•			
Reporting obligations	•			



Cumulative obligations

Very Large Online Platforms

- Need to assess the societal risks posed by their services
- Need to mitigate those risks
- Have an enhanced responsibility when tackling illegal content online
- Are subject to enforcement directly by the Commission

What benefits will the DSA bring for the protection of IP rights?

N&A procedures	Trusted flagger status	Standards for notices, also by trusted flaggers via APIs
Repeat infringer policy	General rules on transparency	KYBC obligations
Risk mitigation measures by very large online platforms	Codes of conduct	Removal and information orders

Notice and action procedures

- For all hosting services (big and small, technical or platforms)
- Standardised content of a notice, by electronic means
- If sufficiently precise and adequately substantiated, they trigger “actual knowledge”
- Acknowledgement of receipt and information on the decision taken, including redress mechanisms
- Promotion of standardised mechanisms

Trusted flaggers (Art 19)

2018 Recommendation
Chapter II, 25-27

Notice & Action – Art 14

Notice providers
(any individual or entity)



Easy to access, user-friendly
mechanism



Obligation to take decision in
a **timely**, diligent and
objective manner

Standards (Art 34),
including APIs

Trusted flagger – Art 19

Necessary technical and
organisational measures



Obligation to process and
decide **with priority and
without delay**

DECISION



NOT AUTOMATIC
REMOVAL

Repeat infringers' policy

- Platforms need to take effective measures to protect against misuse
- Suspension of accounts of recipients who frequently provide manifestly illegal content.
- Need to be transparent about their repeat infringers' policy

Increased transparency

- There are several layers of **transparency obligations**: rightsholders will get more **information** on how content is removed, ranked or recommended and advertised:
 - Transparency reports on number of notices, removals based on T&C, time taken, complaints received...
 - Possibility to standardise transparency reports, to get comparable data
 - For VLOPs, transparency on recommender mechanisms and advertising

VLOPs: risk-led enforcement

- Very Large Online Platforms need to mitigate identified risks, in particular as regards the spread of illegal content in their service.
- Possible measures: adapt content moderation and processes, demonetise content, reinforce supervision, cooperate with trusted flaggers, enter into codes of conduct...
- Codes of conduct to be supervised by the Commission, and used as a possible remedy under supervision of VLOPs

“Know Your Business Customer”

- Obligation for online platforms that allow consumers to conclude distance contracts with traders (online marketplaces)
- Need to identify the third party seller “at the gate”
- Deterring measure for rogue sellers, in particular from third countries

How can national authorities enforce their laws via providers established elsewhere?

Example: a Dutch court can ask **directly** Facebook to:

- **Remove the listing of a counterfeit product**
 - Article 8: under NL law, authorities can issue orders to act against illegal content
 - NL DSC should inform all other DSCs
- **Give information about a user (for instance selling counterfeit goods)**
 - Article 9: under NL law, authorities can issue orders to provide information on users when necessary to enforce compliance of national rules by users



In a nutshell

- DSA is not an IPR enforcement tool – it is general and horizontal
- But it includes a full toolbox which can be very useful for the enforcement of IPR
- These measures would apply without prejudice to existing IPR rules



THANK YOU