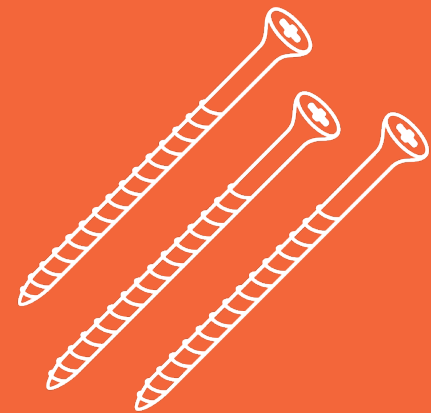


# Legal analysis of non-hosting intermediaries



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4.11.2020

UiO Senter for Europarett / MIC-lunsj

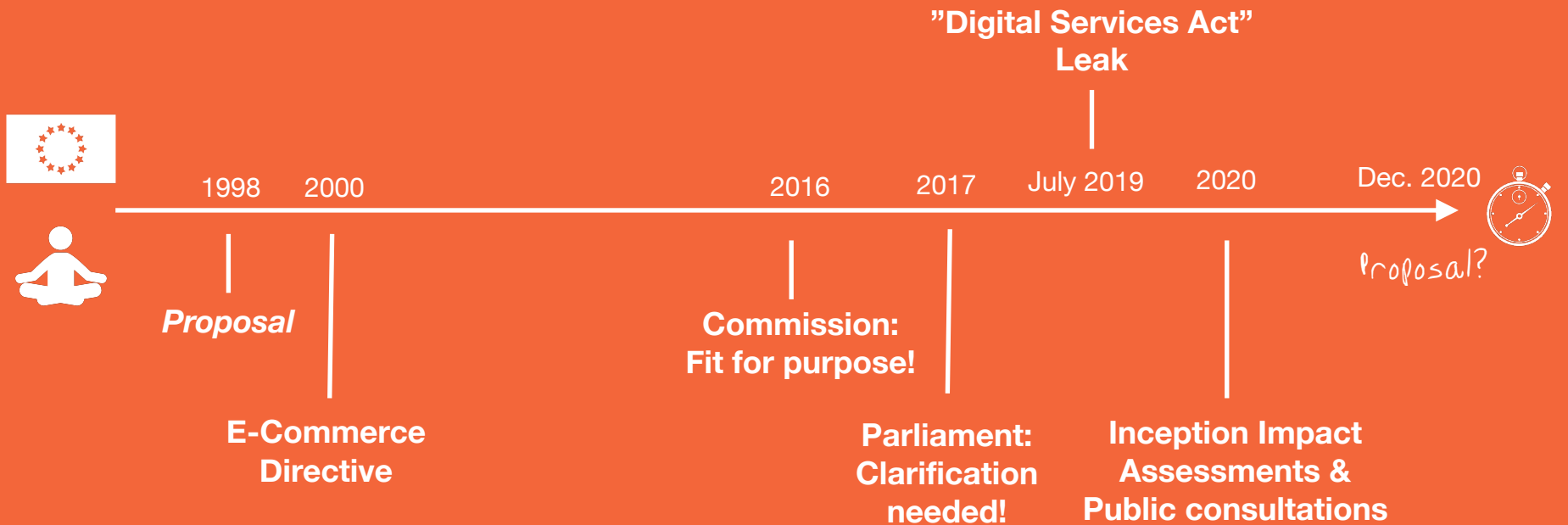
@schwemer

@tomahler



# Background

Schwemer, S., Mahler, T. & Styri, H. (2020). *Legal analysis of the intermediary service providers of non-hosting nature*. Final report prepared for European Commission (not yet published)



Aged well, but things have changed\*...

\* Not only for IP/copyright.

# Structure of the study

## Executive summary

### 1. Introduction

### 2. Typology of non-hosting intermediaries and functions

### 3. Legal framework

### 4. Parameters for regulation

### 5. Analysis of selected grey areas

### 6. Recommendations

## 2. Typology of non-hosting intermediaries and functions

### 2.1. The role of protocols and transnational private regulation

### 2.2. Technical overview

- 2.2.1 Mere conduit (intermediaries and functions; IXP; VPN)
- 2.2.2 Caching and proxy (Load balancing; Caching content; Reverse proxy; CDNs; content adaptation proxies)
- 2.2.3 From caching to CDN (Load balancing; Caching content; Reverse proxy; CDNs; content adaptation proxies)
- 2.2.4 Auxiliary network functions (DNS; IP addresses; other)
- 2.2.5 Combinations of various types and grey areas (peer-to-peer; interpersonal communication; OTT; IoT etc.)

### 2.3 Available mechanisms

### 2.4 Business models

## Legal framework

### 3.1 Structure of and conditions for liability exemptions

#### 3.1.1 Information society service provider and related notions

#### 3.1.2 Passive nature of the activity

### 3.2 Article 12 ECD

### 3.3 Article 13 ECD

### 3.4 Article 15 ECD

### 3.5 Injunctions

### 3.6 Self- and co-regulation

#### 3.6.1 Coordinated measures

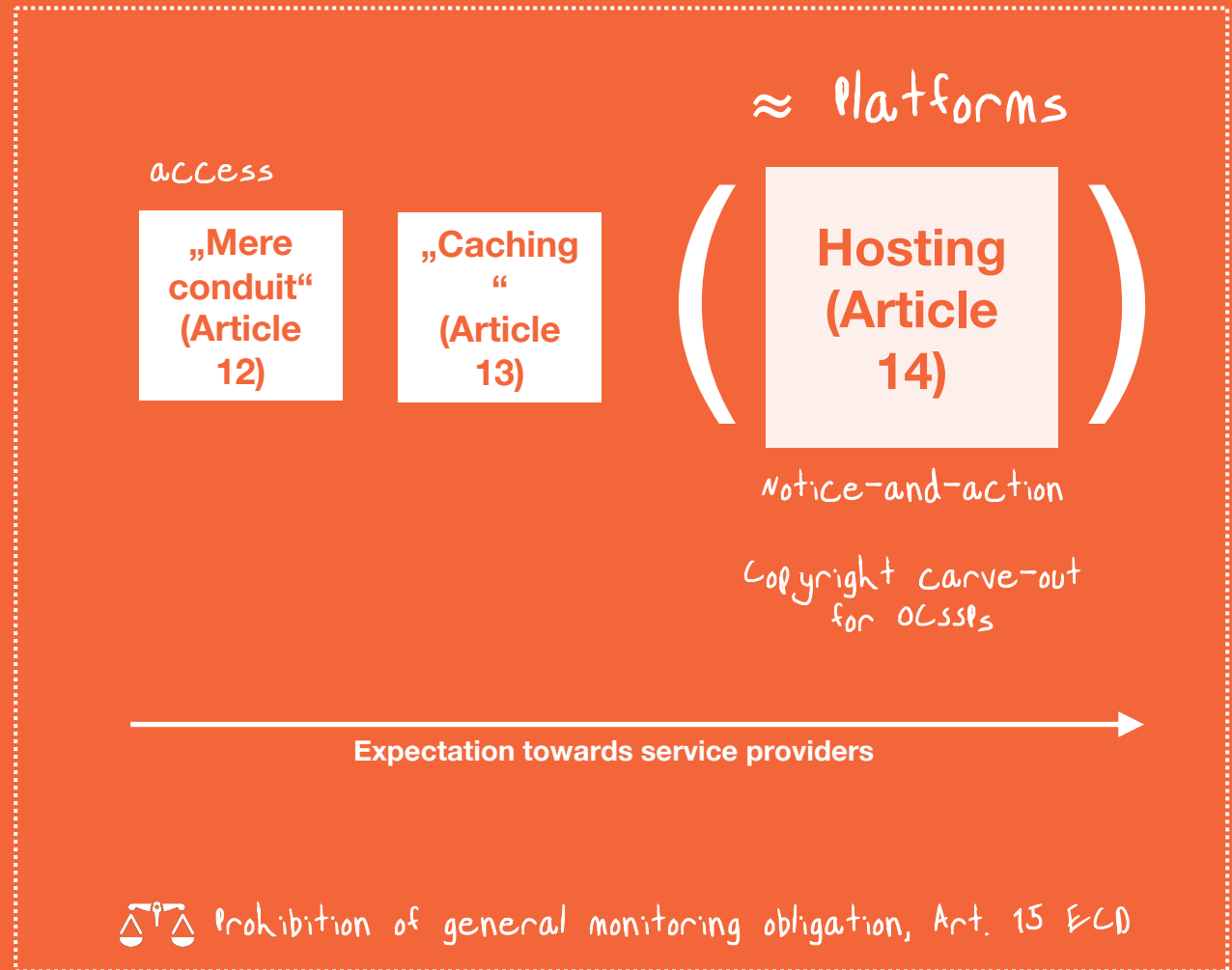
#### 3.6.2 Self-regulation/proactive measures at the company level

#### 3.6.3 Concerns and self- and co-regulation going forward

# Horizontal intermediary liability exemptions

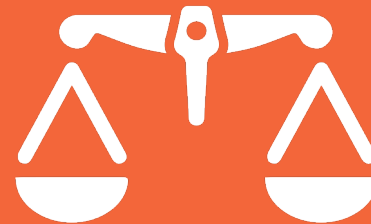


Liability



# Articles 12-15 Liability of intermediary service providers

- **Minimum** harmonisation
- Information society service provider
- Horizontal (criminal, civil and administrative liability for all kinds of illegal activities by third parties – not injunctions)
- Recital 42: activity of the service provider is “of a **mere technical, automatic and passive nature**, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.”



## **4. Parameters for regulation**

**4.1 Risks associated with illegal content**

**4.2 Governance of content risks**

**4.2.1 The service provider's proximity to the content**

**4.2.2 Proportional measures for risk treatment and fundamental rights**



## **5. Case studies / selected grey areas**

5.1 DNS

5.2 Wifi hotspots

5.3 Content delivery networks (CDN)

5.4 Processing in the cloud

5.5 Live-streaming

(Search engines)

## 5.1 Intermediary functions related to DNS

Not domain name but content...?



- IP addresses and domain names play crucial roles for the functioning of the internet but the ECD's intermediary liability provisions do not explicitly cover the addressing and naming functions...
  - C-521/17 – *SNB-REACT*: provider of an IP address rental and registration service; does not help!
  - → *De lege lata*: unclear

## 5.2 WiFi hotspots



Legal uncertainty has been resolved by CJEU (*C-484/14 McFadden*)?

## 5.3 Content delivery networks (CDN)

- Technological development
- Complex business models which offer a variety of functions that did not exist when ECD was adopted
- Difficult to locate within Art. 12-14 ECD. Not storage but “provision“ of information? Temporal dimension but not „caching“?

## 5.4 Processing in the cloud

- Cloud processing ≠ storage in Art. 14 ECD
- Modification conditions in Art. 12 and 13 ECD (modification of content as such vis-a-vis modification of content representation); analogy or teleological interpretation?

## 5.6 Live-streaming

- Art. 14 ECD challenging because streamed in a linear manner;
- “mere conduit” akin but different from envisaged functions by Article 12 (temporal and functional).
- May also involve Art. 13, but not necessarily “onwards transmission”. ISSP problematic, given i.a. “individual request”;
- close proximity but temporal aspects → should be resolved (but challenging!)

## Search engines

- Outside scope of study!
- Some Member States „mere conduit“ akin, some Member States “hosting akin“....
- Right to be forgotten as de facto notice-and-take-down?

## 5. Recommendations: Principles

Keep **horizontal** nature and focus on **illegal content**.

**Focus on intermediary functions** (not actors, similar to the current ECD-regime).

Keep an **enumeration** of liability exemptions (no “gliding scale”).

structure and  
scope

**Fair balance of interests and rights** (Article 15 ECD).

Clarify (in a recital) **why intermediaries are exempted from liability** (*facilitate a teleological interpretation in dubio pro intermediary, that enables intermediary functions not directly covered to be covered, given a similar degree of control*)

Criteria for conditions and obligations could be based on **degree of control** (*relevant parameters include the service provider’s **proximity to the content risk** and the **availability of proportional mechanisms** available for managing the risk → Actors with limited or no control over the content risk should be exempted with few/no conditions. Actors with more control over content risk are exempted only based on more extensive conditions, and subject to specific obligations*)

Fair balance

**Subsidiarity principle:** More remote intermediaries should not be targeted or a last resort.

Injunctions should avoid punitive effect.

Ensure legal certainty for notifiers and mitigate abuse by notifiers.

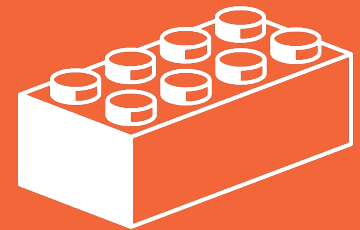
**Strengthen transparency and due process:** Voluntary measures should be subject to transparency obligations. Procedural safeguards as effective remedies should be available for users in order to safeguard fundamental rights.

## 5. Recommendations

- Current ECD: **transmission** in, or **access** to, a communication network as well as **storage**
- Several non-hosting functions **not** addressed/grey areas:
  - „**Auxiliary network functions**“: do not transmit or provide access (DNS, IP addresses, etc.) –*facilitation* of communication of information!
  - „**temporal provision and processing of information**“: different from storage!

### Suggestions

- Introduce a new broad concept of ”network intermediary”;
- New typology of network intermediary functions: [hosting], [search], “caching” (temporary storage); temporary provision and processing of information; direct network intermediary functions; auxiliary network intermediary functions;
- Liability exemption for **auxiliary network intermediary functions**;
- Clarify liability exemption for ”**temporary**” **provision of information** + introduce a liability exemption for **remote (cloud) processing**, including content adaptation



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mostly on SSRN (or somewhere else)

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