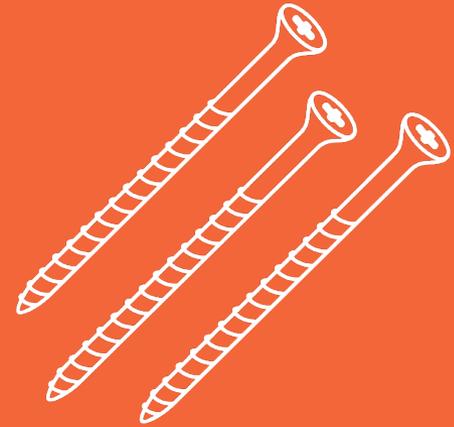


Reforming the liability

of non-hosting

intermediaries



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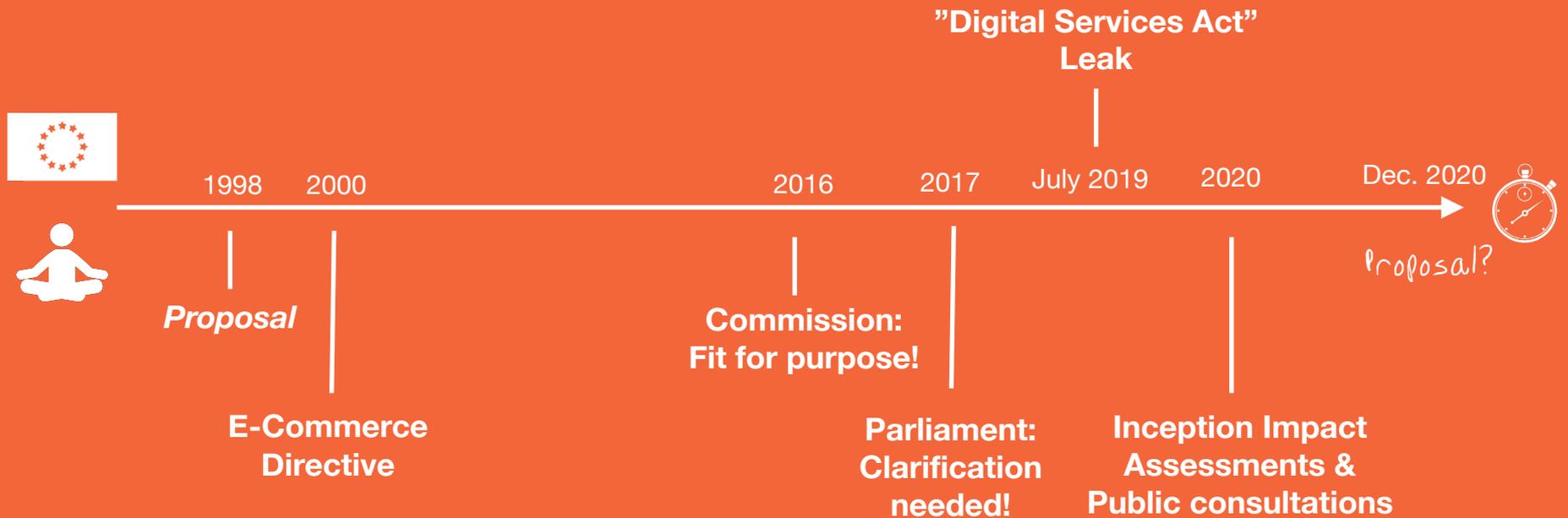
@schwemer

@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.

1. Introduction

2. Non-hosting internet intermediaries: between transnational private regulation and EU law

2.1 The regulatory landscape

2.2 What are “non-hosting” functions?

2.3 Conditions for liability exemptions in the EU framework

3. Non-hosting functions in the current EU framework

3.1 Intermediary functions related to the domain name system

3.2 Wifi hotspots

3.3 Content delivery networks (CDN)

3.4 Processing in the cloud

3.5 Live-streaming

3.6 Search engines

4. Filling in the missing parts of the liability exemption regime going forward

Non-hosting functions in the current framework

2. Non-hosting internet intermediaries: between transnational private regulation and EU law

2.1 The regulatory landscape

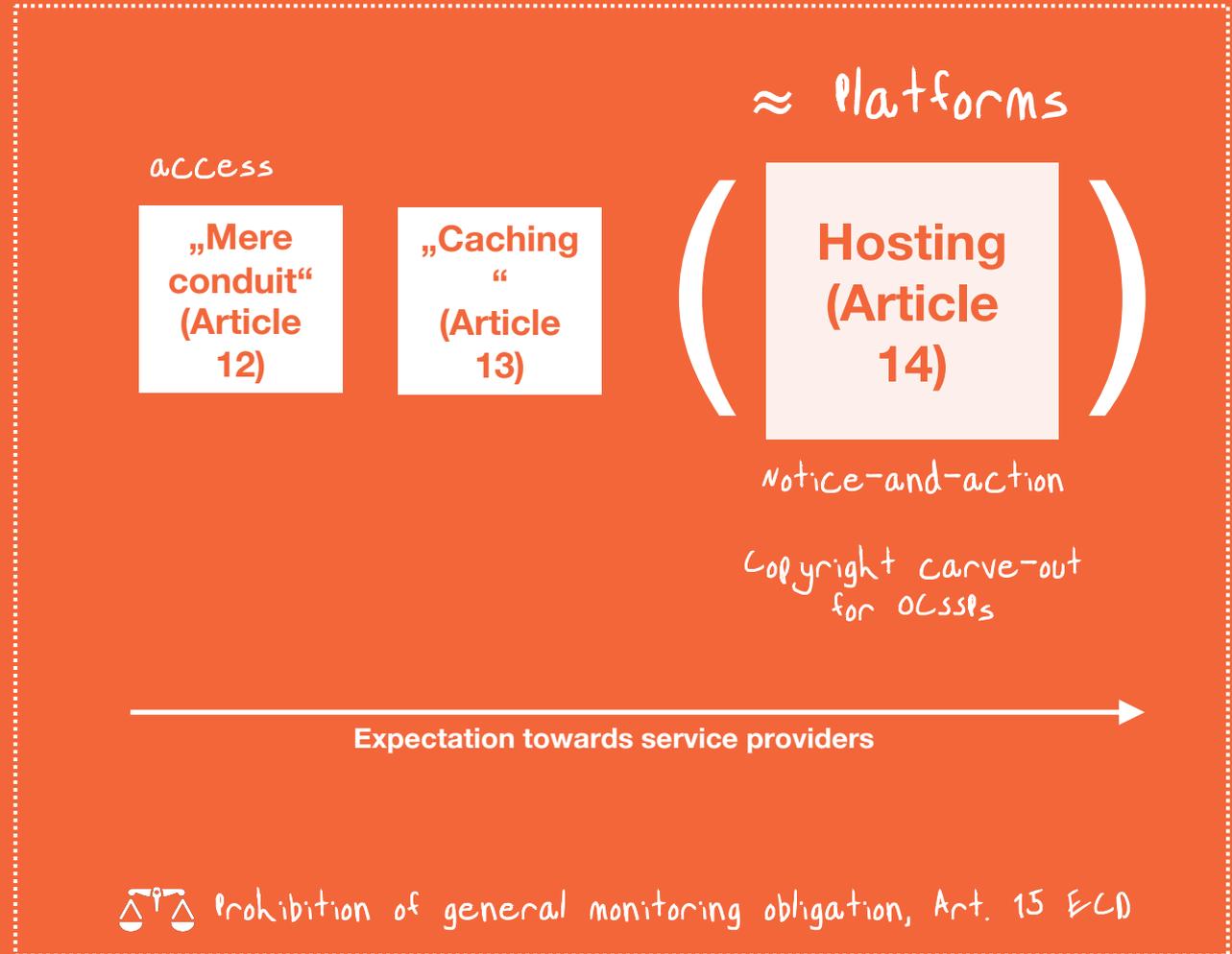
2.2 What are “non-hosting” functions?

2.3 Conditions for liability exemptions in the EU framework

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.”



Non-hosting functions in the current framework

3. Non-hosting functions in the current EU framework

3.1 Intermediary functions related to the domain name system

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3.1 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

3.3 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“?

3.2 WiFi hotspots



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

3.4 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?

3.5 Live-streaming

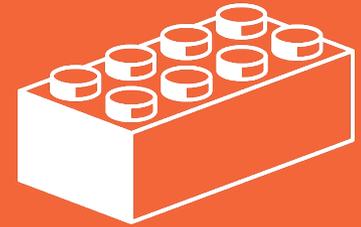
- ...

3.6 Search engines

-

Findings: missing pieces

- Current ECD: **transmission** in, or **access** to, a communication network as well as **storage**
- Several non-hosting functions currently **not** addressed:
 - „**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!
- **Beware spill-over effects from platform/hosting discussion but:**
 - what if a non-hosting intermediary “moderates” content (notice+action; trusted notifiers; proactive screening etc.)?



"proactive & private"

Credits

Creative commons attribution

Scale by Amelia (Noun Project)

Stopwatch by Veronika Krpciarova (Noun Project)

filter By Eucalyp (Noun Project)

Denmark by Chameleon Design (Noun Project)

yoga by Mariia Nisiforova (Noun Project)

european union by Federico Panzano, IT (Noun Project)

wifi by abderraouf omara from the Noun Project

internet by Richard from the Noun Project

screws by Oleksandr Panasovskyi (Noun Project)

lego by jon trillana, PH (Noun Project)

Literature:

Schwemer, S.F. (2021). Location, Location, Location! Copyright Content Moderation at Non-content Layers in: Rosati, E. (2021). *Handbook of European Copyright Law*, Routledge. (Forthcoming)

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Mahler, T. (2019). *Generic Top-Level Domains, A Study of Transnational Private Regulation*, Edward Elgar.

Schwemer, S. F. (2020). The regulation of abusive activity and content: a study of registries' terms of service. *Internet Policy Review*, 9(1). DOI: 10.14763/2020.1.1448

Schwemer, S.F. (2019). Trusted notifiers and the privatization of online enforcement. 35 *Computer Law & Security Review* 6, 105339

Schwemer, S.F., 'On Domain Registries and Website Content: Shift in Intermediaries' Role in Light of Unlawful Content or Just Another Brick in the Wall?' [2018] 26 *International Journal of Law and Information Technology*, 273–293

mostly on SSRN (or somewhere else)

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