



ReCreating Europe

WEBINAR

Public and Regulatory Framework of Online Intermediaries



WEBINAR HOSTS AND SPEAKERS



João Pedro Quintais

Postdoctoral Researcher

Institute for Information
Law (IViR), University of
Amsterdam

j.p.quintais@uva.nl



Peter Mezei

Associate Professor

Faculty of Law, University of
Szeged

mezei@juris.u-szeged.hu

WEBINAR SPEAKERS



Christian Katzenbach

Senior Researcher

Alexander von Humboldt
Institute for Internet and
Society

katzenbach@hiig.de



Istvan Harkai

Assistant Lecturer

Faculty of Law, University of Szeged

harkai.istvan89@gmail.com



João Carlos Magalhães

Postdoctoral Researcher

Alexander von Humboldt
Institute for Internet and Society

jcmagalhaes@gmail.com



Sebastian Felix Schwemer

Associate Professor

Centre for Information and
Innovation Law (CIIR), University of
Copenhagen

sebastian.felix.schwemer@jur.ku.dk

NOTES

- **The webinar is being recorded and slides will be made available on Zenodo.** All participants will receive a link to the recording and the slides after the webinar.
- **Questions?** Put them in the chat box. We'll put questions to the speakers at the end of the webinar.

Outline Webinar

1. WP 6 and Article 17 CDSM State of Play (JP Quintais)
2. Comparative Analysis of National Laws and Strategies on Intermediaries in the DSM: Methodology and Research Questions (P Mezei & I Harkai)
3. Emerging Structures of Platform Governance and Copyright: Methods and Challenges in Studying Content Policies (C Katzenbach and JC Magalhães)
4. Evolution from voluntary to mandatory copyright content moderation (SF Schwemer)

-- Discussion – Q&A



ReCreating Europe

WP 6: Intermediaries

Copyright Content Moderation at Scale in the Digital Single Market: What Impact on Access to Culture?

João Pedro Quintais
Institute for Information Law (IViR)
University of Amsterdam
@JPQuintais



5 May 2020 | Webinar

WP 6: Intermediaries //Introduction

- Title
 - Intermediaries – Copyright Content Moderation and Removal at Scale in the Digital Single Market: What Impact on Access to Culture?
- Research
 - Interdisciplinary: law and social sciences
- Team
 - IViR (Amsterdam): João Pedro Quintais
 - HIIG (Berlin): Christian Katzenbach, João Carlos Magalhães
 - CIIR (Copenhagen): Thomas Riis, Sebastian Felix Schwemer
 - USZ (Szeged): Péter Mezei, István Harkai
- Duration
 - M1–M33

WP 6: Intermediaries

//Aims and Objectives

- **Explain, critically examine and evaluate**
 - existing **legal frameworks** (public/private, existing/proposed) that shape the role of **intermediaries** in organising the circulation of culture and creative works in Europe, including **content moderation**...
 - existing **practices and technologies** that **intermediaries** deploy to organise the circulation of culture and creative works in Europe, including **content moderation**...
 - how the legislative framework conditions shape private models for **content moderation**.
- **Measure the impact of**
 - **legal frameworks, business practices and technologies**...
 - ...on access and diversity, the creation of culture value, and on creators' creative practices and users' consumption patterns.

WP 6: Intermediaries

//Concepts and Terminology ⁽¹⁾

- Intermediaries
 - Pre-CDSM Directive... vs Post CDSM vs Post-post... Digital Services Act
 - SSH non-legal understanding of ‘intermediaries’
- Content moderation [*at scale*]
 - ...

WP 6: Intermediaries

//Concepts and Terminology (2)

Platform Governance and Content moderation

- **Structures and Activities covered (e.g.)**
 - Platforms' Policy Documents: TOS, Community Guidelines etc
 - Practices and Technologies of Content Moderation
 - Moderation Process
 - Technological Measures / Algorithmic Moderation
 - Pre- or post-publication screening, categorisation, recommendation, approval, flagging, removal, blocking, and filtering of content
- Need for **interdisciplinary approach** for consistent definition
 - Debate on **platform governance** and **content moderation**, also outside ©
 - E.g. 'tackling illegal content online'
 - ≠ definitions across ≠ disciplines
 - e.g. 'platform governance' and FAT
 - **Complex** entanglements of regulations, practices and technologies shaped by companies' interests & public + policy pressure.

Article 17 CDSM Directive Background and State of Play

João Pedro Quintais
Institute for Information Law (IViR)
University of Amsterdam
@JPQuintais



5 May 2020 | Webinar

Outline

- Background
- Where we are today
- Mechanics of Article 17
- Some issues for our research

Outline

- **Background**
- Where we are today
- Mechanics of Article 17
- Some issues for our research

How de we get here and why?

The Short Story: lobbying & politics

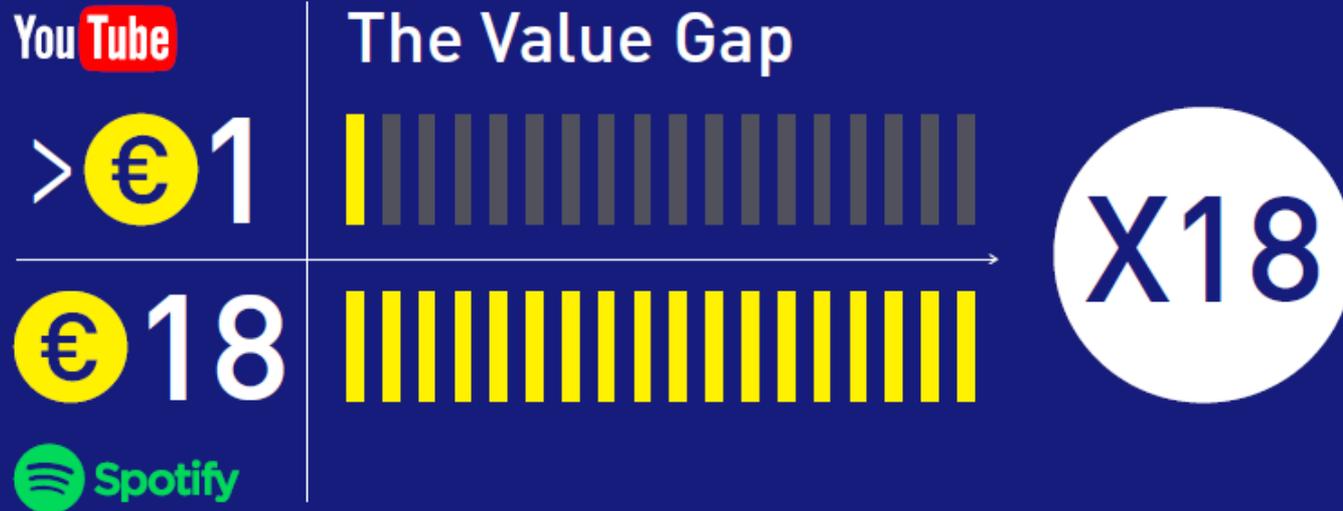


A Longer Story

‘value gap’ > ‘upload filters’

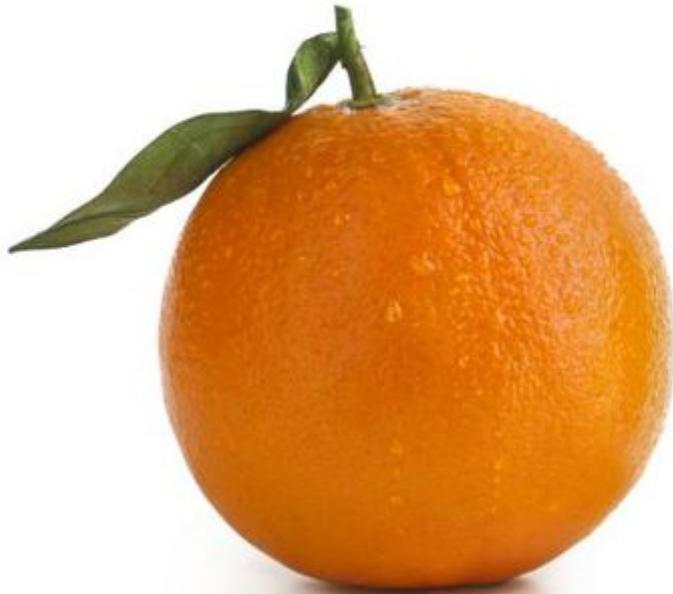
These 'User Uploaded Content' (UUC) platforms have become the largest on-demand music services, but they avoid paying creators fairly by claiming they are not responsible for the content distributed on their platforms. This is also an unjust advantage over other digital services.

YouTube, for example, pays less than €1 per user per year; in contrast, Spotify pays 18 times that figure. This gulf between the value of music exploited and compensation to creators is known as the Value Gap.



IFPI, *5 things you need to know about the European Copyright Directive*
https://www.ifpi.org/value_gap.php

?





Public



Online Music Provider

Arts 2 and 3 InfoSoc
Repro & C2P

Primary Liability



© holders

MTL
CRM Directive

Author's Rights

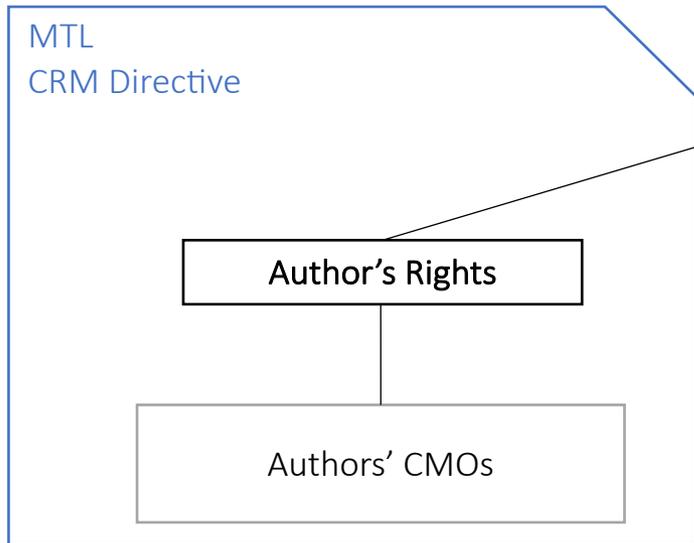
Authors' CMOs

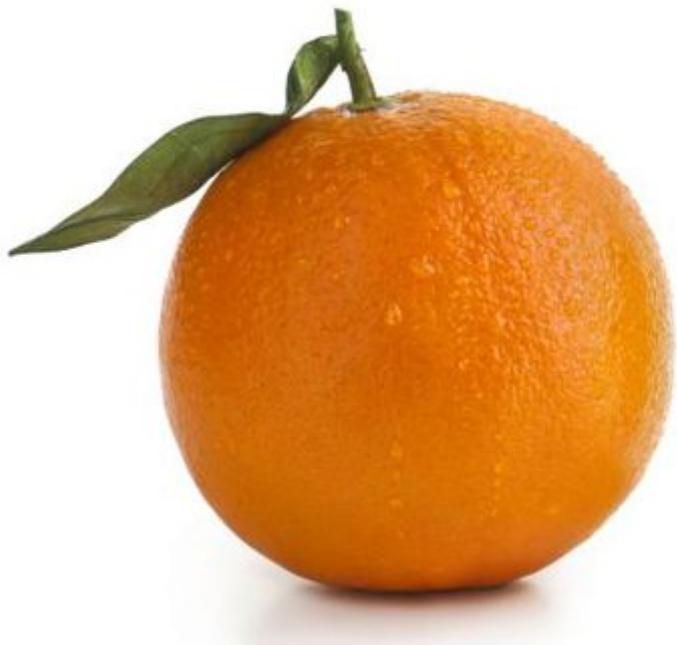
Record Producers' Rights

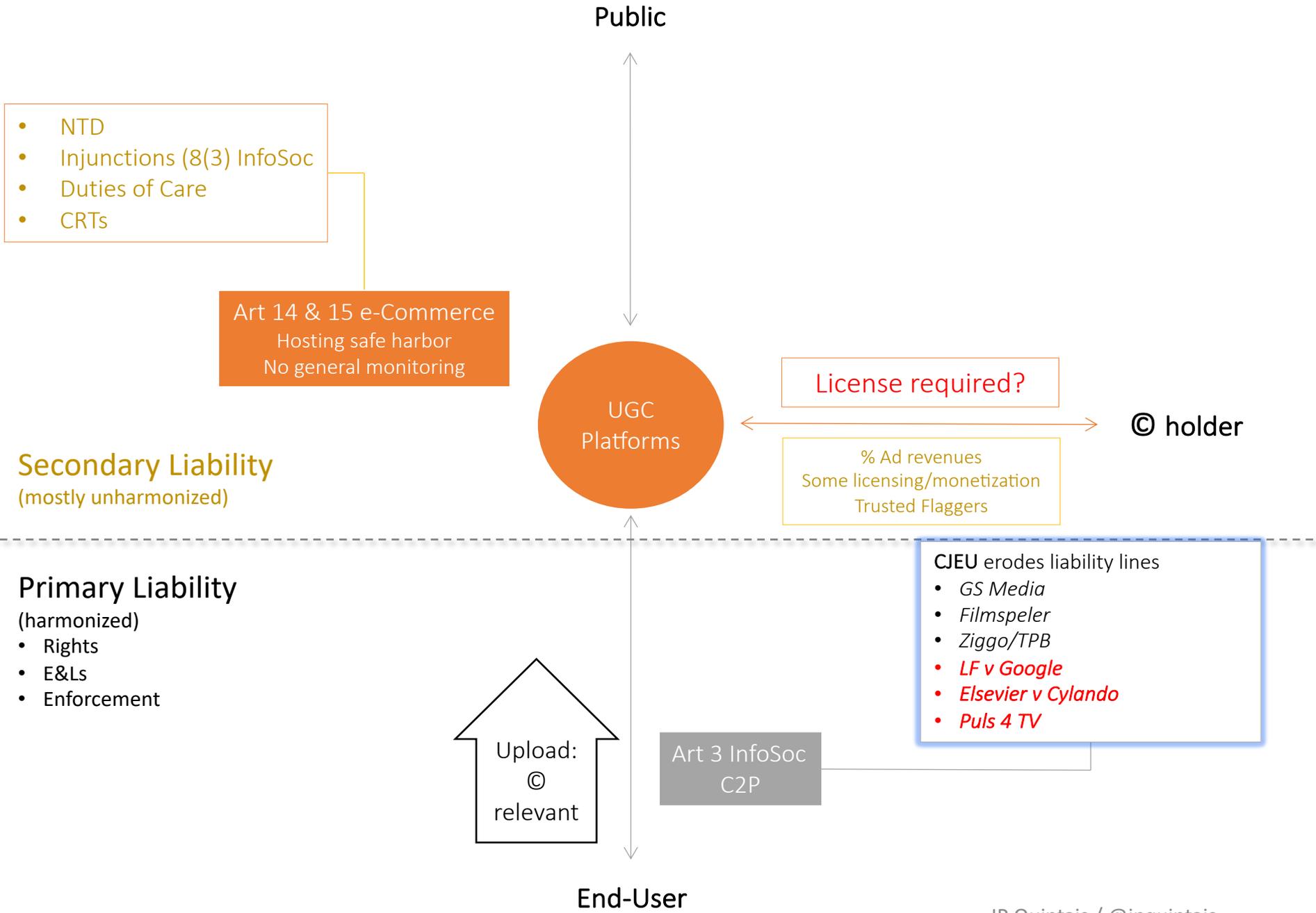
Performers' Rights

Record Producers

JP Quintais / @jpquintais







Outline

- Background
- **Where we are today**
- Mechanics of Article 17
- Some issues for our research

Where we are today

- Stakeholder Dialogues: 17(10)
 - 6 so far, 7th postponed... useful info but mostly unsuccessful
 - Waiting EC Guidelines
- National transpositions (by 7 June 2021)
 - Most countries in Public Consultation mode
 - Some draft implementation bills published or prepared (FR, NL, BG, DE)
- Academics
 - Recommendations European Academics: Safeguarding User Freedoms...
 - ECS Comments: Metzger & Senftleben on Art 17
 - ALAI *Executive Committee* Draft Opinion
 - Literature boom starting
- Numerous Stakeholder Statements
 - Civil Society / NGOs, CMOs, Tech Organisations, etc.

Want to know more?



CREATE

<https://www.create.ac.uk/cdsm-implementation-resource-page/>



<https://www.communia-association.org/category/eu-policy/eu-copyright-reform/>



ReCreating Europe

Outline

- Background
- Where we are today
- **Mechanics of Article 17**
- Some issues for our research

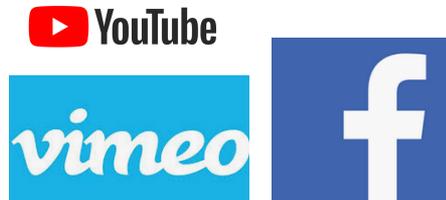
What is the regime of Article 17 CDSM Directive?

Who does it apply to?



Positive definition

- UGC platform
- Large amount of works
- Organise and promote
- Commercial / competitive effect



Exclusions

- Electronic comms services
- B2B Cloud Services + cloud services
- Online market places
- Non-profit online encyclopedias
- Non-profit educational and scientific repositories
- OS Sw developing & sharing platforms



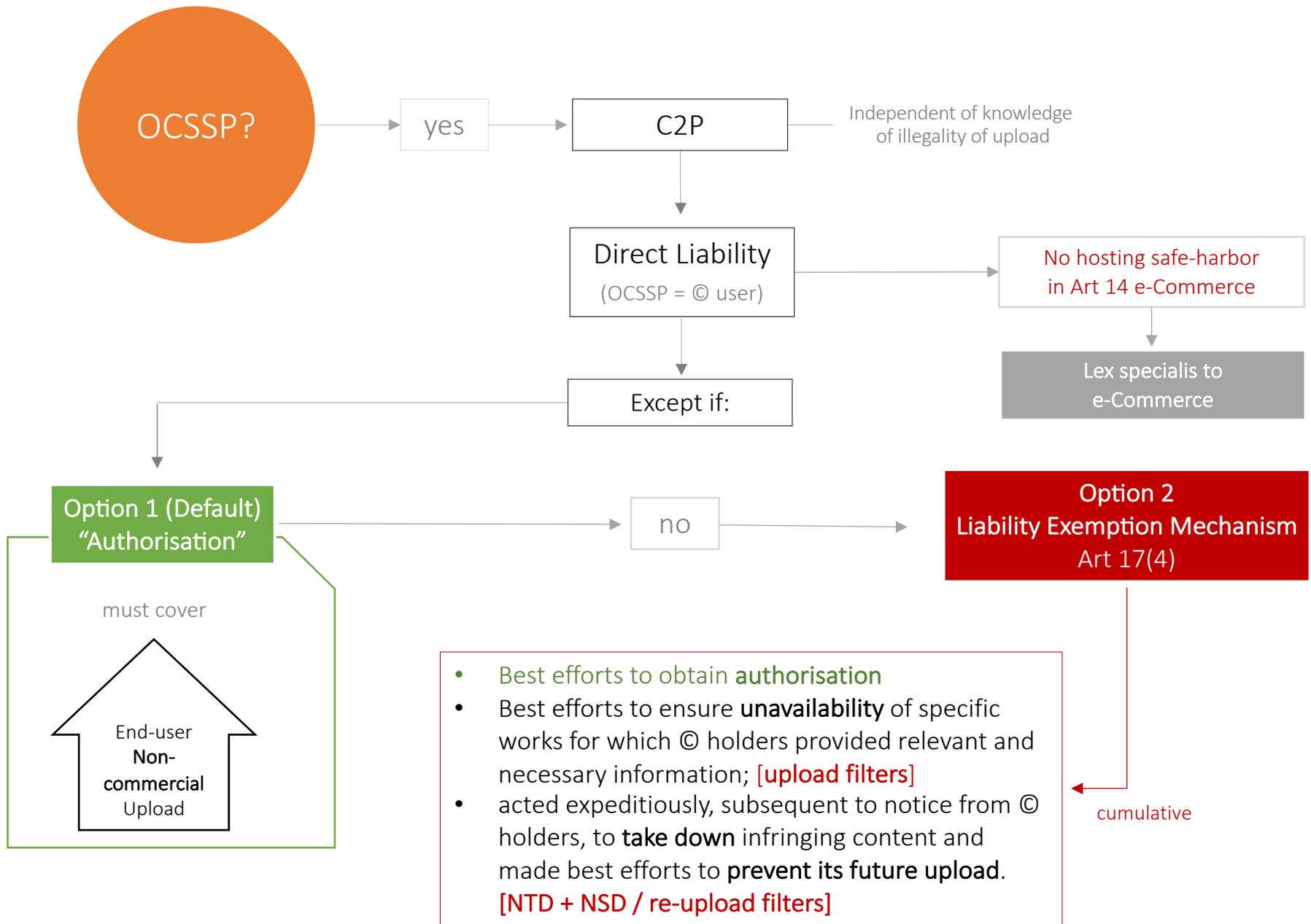
→ If not

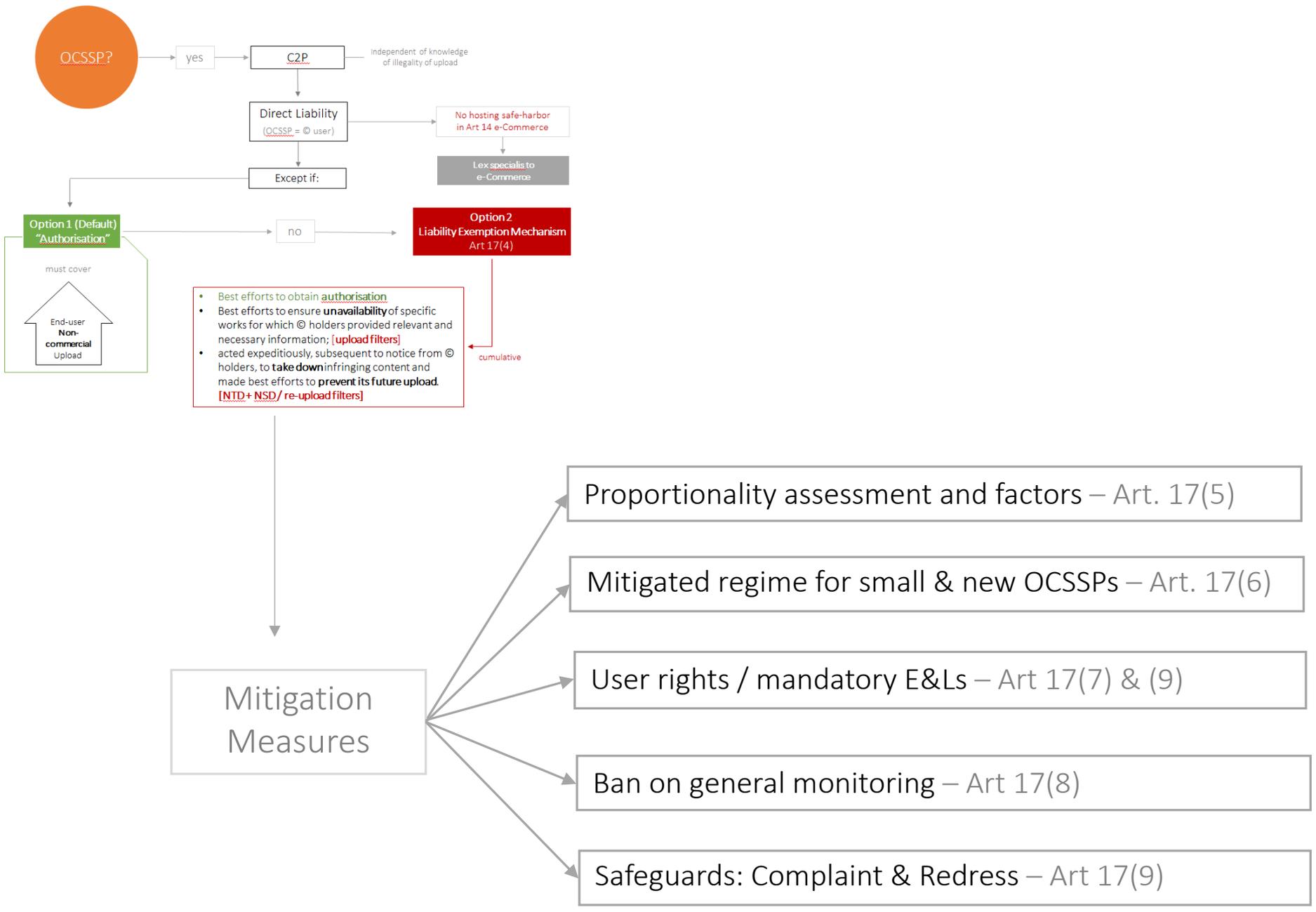


outside CDSM Directive



What and how?





In sum



Outline

- Background
- Where we are today
- Mechanics of Article 17
- **Some issues for our research**

Some issues for our research: a catalogue

- **Bifurcation legal regimes and definition/concept of platforms**
 - Art 3 InfoSoc vs CDSM... but also AVSMD, upcoming DSA [ECD Review], etc.
- **Nature of the right in Art 17**
 - Direct influence on licensing and preventive measures
- **Vague concepts**
 - e.g. best efforts
- **How to assess proportionality?**
- **Nature of E&Ls in 17(7)**
 - User rights? Freedoms? Defences? Relationship to InfoSoc "mother-provisions"
- **General monitoring obligation(s) vs Freedom of Expression**
 - See Polish challenge
- **Safeguards in 17(9)**
 - Interface w/ preventive measures, E&Ls, and fundamental rights
- **Normative hierarchy of the provision**
 - Fundamental rights vs exclusivity vs preventive measures
- **And many others...**
 - e.g. clash with DP law (Art. 22 GDPR?)

Thank you!

-- Quintais, João, The New Copyright in the Digital Single Market Directive: A Critical Look (October 14, 2019). European Intellectual Property Review 2020(1) (Forthcoming). Available at SSRN: <https://ssrn.com/abstract=3424770>

-- Husovec, Martin and Quintais, João, How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms (October 1, 2019). Available at SSRN: <https://ssrn.com/abstract=3463011>

-- João Pedro Quintais, Giancarlo Frosio, Stef van Gompel, P. Bernt Hugenholtz, Martin Husovec, Bernd Justin Jütte, Martin Senftleben, Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics, 10 (2020) JIPITEC 277 para 1. <https://www.jipitec.eu/issues/jipitec-10-3-2019/5042>

-- Christina Angelopoulos, João Pedro Quintais, Fixing Copyright Reform: A Better Solution to Online Infringement, 10 (2019) JIPITEC 147 para 1. <https://www.jipitec.eu/issues/jipitec-10-2-2019/4913>

João Pedro Quintais
Institute for Information Law (IViR)
University of Amsterdam
@JPQuintais



ReCreating Europe

5 May 2020 | Webinar



*Comparative Analysis of National Laws and Strategies on
Intermediaries in the Digital Single Market*

Methodology and Research Questions

as of May 5, 2020

by Péter Mezei and István Harkai

University of Szeged, Institute of Comparative Law and Legal Theory

WP6 Online Workshop

May 5, 2020





The structure of the presentation

- (1) Comparative research methodology;
- (2) The scope of research: negative aspects (what to omit) and positive aspects (what to discuss);
- (3) Schedule of the research.



Stages of a comparative research

- Setting the methodological parameters;
- Collection of data and other information;
- The act of comparing as such;
- The analysis of the findings (Wolff, 2019).



Core questions to establish a methodological framework

- What is the aim/goal of the research?
- What shall be compared?
- Which jurisdictions should be selected?
- How can comparability be ensured?
- How should the comparative work be conducted? (Wolff, 2019).



Methods of the research

The concurring methods of the toolbox (van Hoecke, 2015, p. 9-21.) we intend to use:

- **Functional method:** looking for functional equivalents and differences (*the backbone*);
- **Law-in-context method:** understanding the political-technological-economic environment, which formed the body of the law (*the supplementary*);
- **Common core method:** it “looks for commonalities and differences between legal systems in view of the question to what extent harmonization on certain points would be possible among the compared legal systems or the question how a European rule (...) could be interpreted in such a way that it fits best the different national traditions” (*the key*).



What shall be compared? / Levels of research

- *Micro level research.*
- *Focus on Art. 17 OCSSPs [in accordance with Art. 2(6) and Recital 62] – the “functional equivalent”.*
- *Law in books + (to a certain degree) law in action.*



Jurisdictions / Selection of countries #1

- ***All systems are eligible, but selection is inevitable;***
- ***Taking into account:***
 - *legal families; language knowledge and (financial) situation; interdisciplinarity;*
 - *GDP/population/PPP and national rankings in Global Innovation Index; main regions of Europe; size of Member States;*
 - *“Coincidence factor”: participants of the WP6 are from / work in Portugal, the Netherlands, Hungary, Germany and Denmark;*
- ***Nine countries to be selected (1/3 of MSs):***
 - *proposal: Estonia, France, Germany, Hungary, Ireland, Italy, the Netherlands, Portugal, Sweden;*
 - *open questions yet: Poland, Spain, Finland or Luxembourg?*



Research questions we intend to omit

- The history and evolution of CDSM-Directive („as it is” approach);
- Platforms in general (platforms other than Art. 17);
- Developments on the European Union’s level (but to a certain level: stakeholders’ dialogue);
- Private ordering mechanisms; including algorithmic enforcement (leaving space to other collaborators);
- User rights in practice (albeit Szeged does this under WP2);
- Data protection (other than what directly stems from Art. 17).



Research questions we intend to address

(1) Implementation track

- How will Member States implement the CDSM Directive? E.g.
 - Vague terms (e.g. „best efforts”, „large amounts”, „high industry standards”)?
 - With an authorisation-focus or filtering oriented?
 - Will Art. 17(4)(b) implemented in compliance with the ratio of the CJEU's Netlog ruling?
 - Will preventive measures be proportional and compliant with fundamental rights, will they effectively exclude general monitoring obligations, and leave legitimate uses intact?
 - What is the (exact) role of rightsholders (incl. CMOs, and extended collective licensing under Art. 12)?
 - Will Art. 17(7) and (9) safeguards effectively guarantee user freedoms/rights?
 - How will MSs set the appropriate fees to compensate rightsholders for 17(7) activities?
- Will there be differences between the various domestic rules?

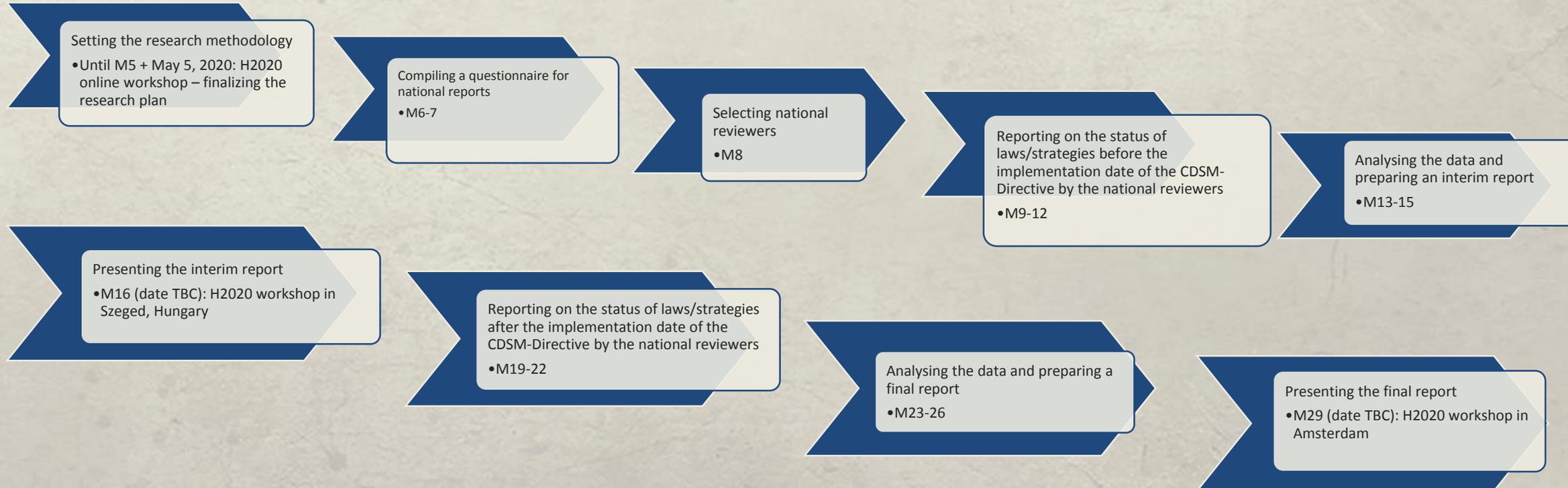


Research questions we intend to address

(2) Consequences/outcomes track

- Indirect/intermediary v. direct liability? Presumption of non-infringement v. presumption of infringement? Are the CDSM, the InfoSoc and the E-Commerce Directives compatible?
- Will the value gap be closed via / economic consequences of Art. 17(1) and (7)?
- Will Art. 17 promote creativity and ensure wider access of copyright-protected content online (as the Commission envisaged that)? Or will it lead to the end of free internet? [Will the EU and MSs law be (more) competitive environment (than that of the USA)?]
- Will MSs (who missed so far) implement Art. 17(7) L&Es be broadly or only in a UGC environment)?
- Balancing fundamental rights? Will expressive UGCs mushroom or diminish?

Schedule of the research





Stages of a this research

- Setting the methodological parameters, including the questionnaire (M1-8);
- Collection of data and other information (M9-12 + M19-22);
- The act of comparing (M13-16 + M23-26);
- The analysis of the findings (M17-18 + M27-29).



Emerging Structures of Platform Governance and Copyright

Methods and Challenges in Studying Content Policies

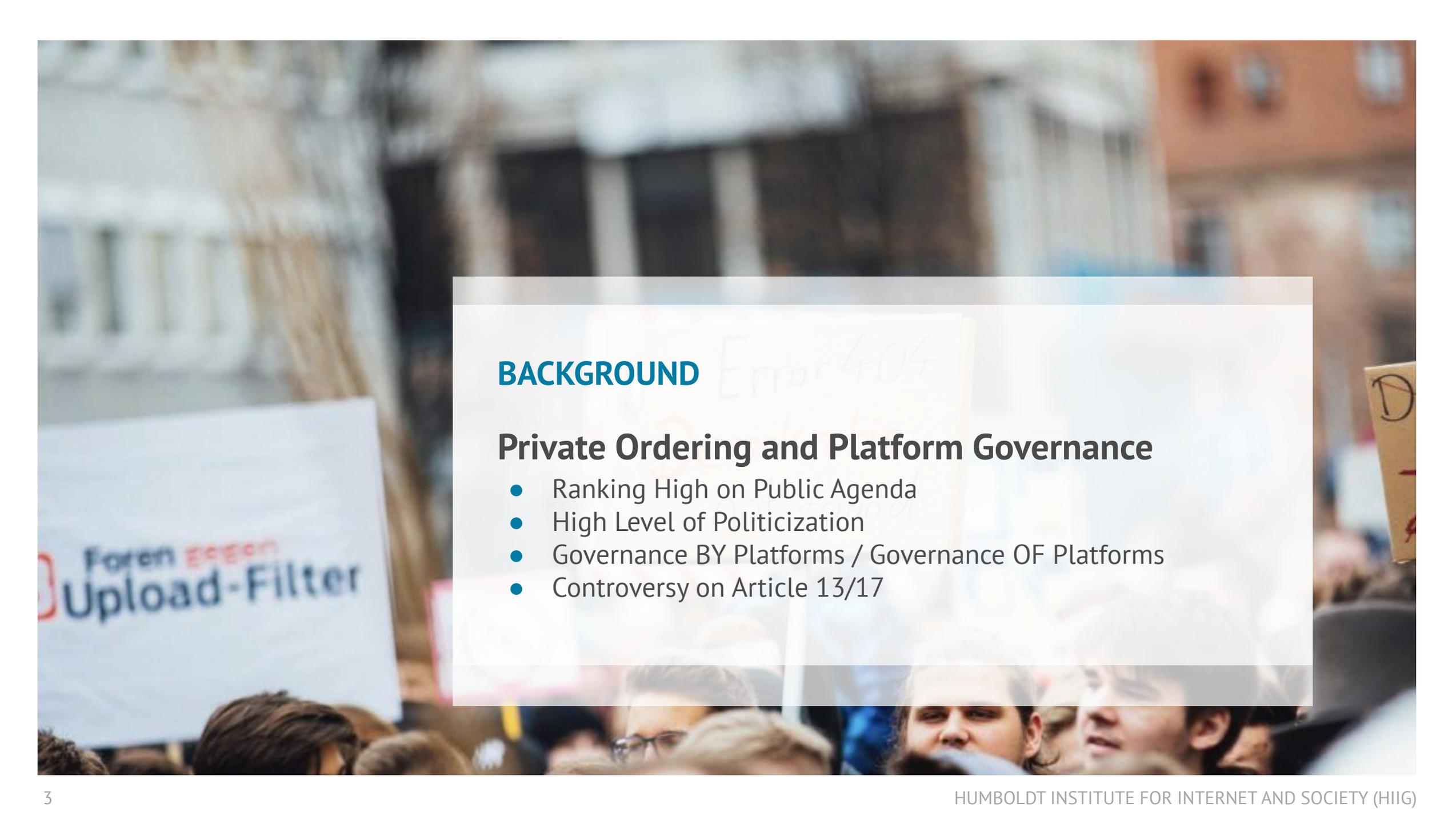
Christian Katzenbach and João Carlos Magalhães
Alexander von Humboldt Institute for Internet and Society

Workshop
05 Mai 2020



Agenda

- 1. Background: Private Ordering and Platform Governance**
- 2. Research Interest and Approach: The Emergence of Private Platform Governance (Process!)**
- 3. Methods: Collecting and analysing internal policies**
- 4. First Results: The case of Twitter Rules**
- 5. Next Steps: Scaling up the analysis, constructing a database**



BACKGROUND

Private Ordering and Platform Governance

- Ranking High on Public Agenda
- High Level of Politicization
- Governance BY Platforms / Governance OF Platforms
- Controversy on Article 13/17



Research Interest and Approach

The emergence of private platform governance: focus on the process and change, not on static policies

How this process is unfolding over time, across platforms and legislations

Where to look at? Organisational practices, public discourse, technologies and content policies (our focus here)



Methods: Data Collection

Selection of platforms: mainstream (e.g. YouTube), alternative (e.g. Mastodon), niche (e.g. Vimeo), industry-centred (e.g. Spotify)

Kinds of policies: ToS, Privacy Agreements, Privacy Policies, Community Guidelines, others (“Help” pages)

Fetching the documents: “WayBack Machine” to locate previous versions of policies, checking for all available changes

Limitations



Methods: Data Analysis

Action: added text, replaced text, deleted text, recategorized text

Nature of change: editorial, substantive

Kind of content: Principle, platform's / users' rights / obligations, definitions, information, presentation

Limitations



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Preliminary Findings: “Twitter Rules”, 2009-2020

Data: 24 versions of “Twitter Rules”, the platform’s community guideline, since 2009

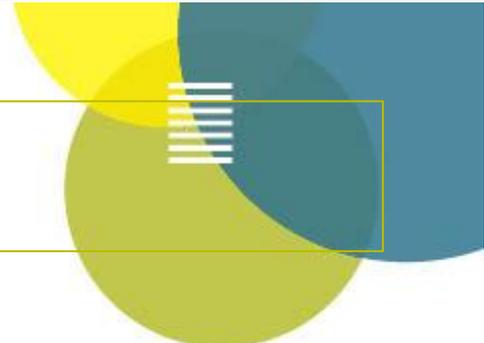
Broader focus: not only copyrights

Results: over 369 changes, of which 299 are substantive

- Jan 2009-April 2015: The Spam Years
- April 2015-November 2017: Policing Content
- November 2017-June 2019: A (Long) Response to the Techlash
- Since June 2019: A Bill of Obligations?

The emergence of an explicitly political institution

-



Preliminary Findings: Copyright policies in Soundcloud's ToSs

Data: 8 versions of Soundcloud's Terms of Services (ToSs) since 2008

Focus: Copyright provisions

Results: Ongoing -- but over 40 changes, most of them substantive

Example: How one element (“Procedure in Case of Alleged Rights Infringements”) changed between 2008 and 2010. Conclusion: addition of provisions made reporting of infringement costlier

2. In case USER believes that his/her Content has been used by other users of SOUNDCLLOUD'S Website in a way that constitutes copyright infringement, or a violation of other intellectual property rights, please provide SOUNDCLLOUD with the following information in writing: 1. a specific description of the relevant work protected by copyright or other intellectual property right (hereinafter the "Work"), and where the Work is located on SOUNDCLLOUD;

2. comprehensive evidence that USER claiming the infringement is the owner of the Work and all copyrights or intellectual property rights in and to the Work, or alternately, that USER is fully authorized to act on behalf of the owner of the Work and all related rights;

3. a detailed explanation of the facts and circumstances that constitute the alleged copyright infringement or violation of other intellectual property right

2. In case USER believes that his/her Content has been used by other users of SOUNDCLLOUD'S Website in a way that constitutes copyright infringement, or a violation of other intellectual property rights, please flag the Content you think is infringing using the "Report this track" button above the waveform of each player and provide SOUNDCLLOUD with the following information in writing via email to copyrights@soundcloud.com or via postal mail to SoundCloud Limited, Rosenthaler Str. 13, 10119 Berlin, Germany. I. a specific description of the relevant work protected by copyright or other intellectual property right (hereinafter the "Work"), and where the Work is located on SOUNDCLLOUD;

II. comprehensive evidence that USER claiming the infringement is the owner of the Work and all copyrights or intellectual property rights in and to the Work, or alternately, that USER is fully authorized to act on behalf of the owner of the Work and all related rights;

III. a detailed explanation of the facts and circumstances that constitute the alleged copyright infringement or violation of other intellectual property right; and IV. USER'S full name, postal address, telephone number and e-mail address. 3. Upon receipt of such notification and all required information and materials, SOUNDCLLOUD will examine the case, will contact the USER in due course, and will, in its sole discretion, determine if and (if so) what action to take in response to each such notification. For Infringement Notices from Copyright Owners in the United States, please follow the following procedure.



Next steps in our project

Data collection: finalize, Platform Governance Archive

Data analysis: scale up, refine coding frame

Thanks!

katzenbach@hiig.de

joao.magalhaes@hiig.de



Copyright Content

Moderation

...evolution from voluntary to mandatory?

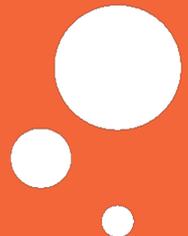
ReCreating Europe – This project has received funding from the European Union's Horizon 2020 research and Innovation programme under grant agreement No 870626

5.5.2020

Centre for Information and Innovation Law (CIIR)

sebastian.felix.schwemer@jur.ku.dk

@schwemer





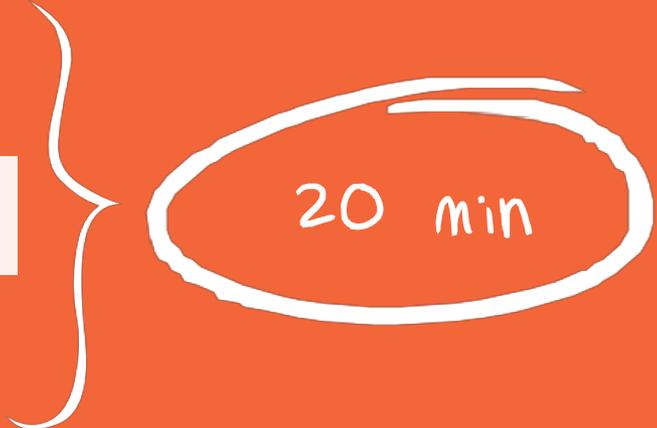
**University of Copenhagen
Centre for Information
and Innovation Law**

Our part in ReCreating Europe

Current work on Article 17 DSM Directive

Where we want to go

Discussion



20 min

**Our part in
ReCreating
Europe**

WP6: Intermediaries

**Mapping the regulatory
framework (law and
self-regulation)**

(T6.1)

Mapping practices

(T6.2)

**Recommendations
and Best Practices**

(T6.5)



**Evaluating Legal
Frameworks (T6.3)**

“normative assessment of how legal rules and contractual terms on the moderation and removal of copyright content on large-scale UGC platforms affect digital access to culture and the creation of cultural value.”

**On Article 17 &
other
tendencies...**

(Currently article in peer review)

In the context of injunctions



(59) In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end.

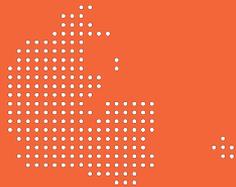
InfoSoc Directive 2001/29/EC

Intermediaries'

Liability



**Liability
exemption**



Art. 17(1) Directive (EU) 2019/790
C-682/18 - YouTube Hamburg?
C-500/19 - Puls TV4?

Liability exemptions Art. 12-15

Horizontal

”Information society service provider” Art. 1(1) lit. b
Directive (EU) 2015/1535

Scope: activity ”(...) is of a mere technical, automatic and **passive** nature (...)” (recital 42 + CJEU *Google Adwords* C-236/08 – C-238/08, *L’Oreal v Ebay* – C-324/09)

**Mere
conduit
(Article 12)**

**Caching
(Article 13)**

**Hosting
(Article 14)**

platforms

Prohibition of general monitoring obligation, Art. 15 ECD

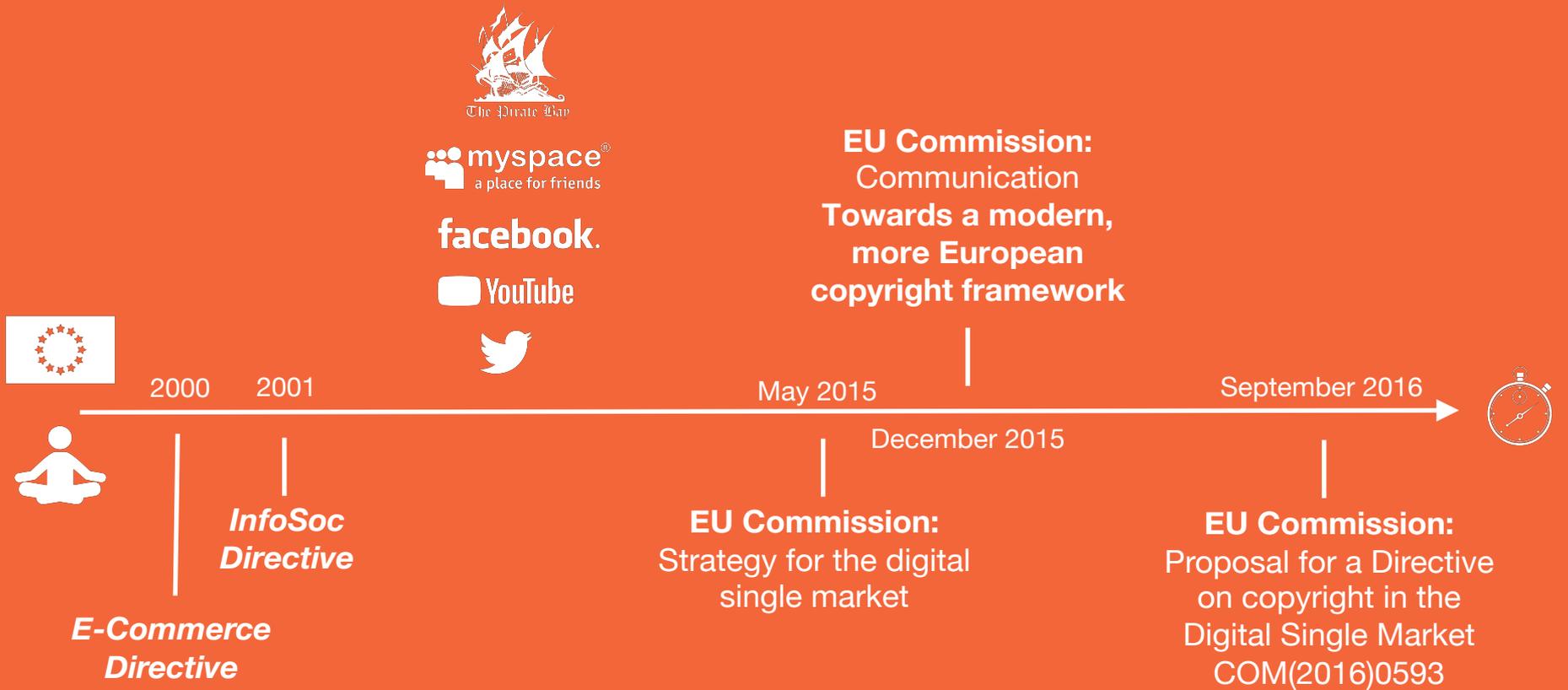
Hosting (i.e. platforms)

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider **is not liable** for the information stored at the request of a recipient of the service, on condition that:

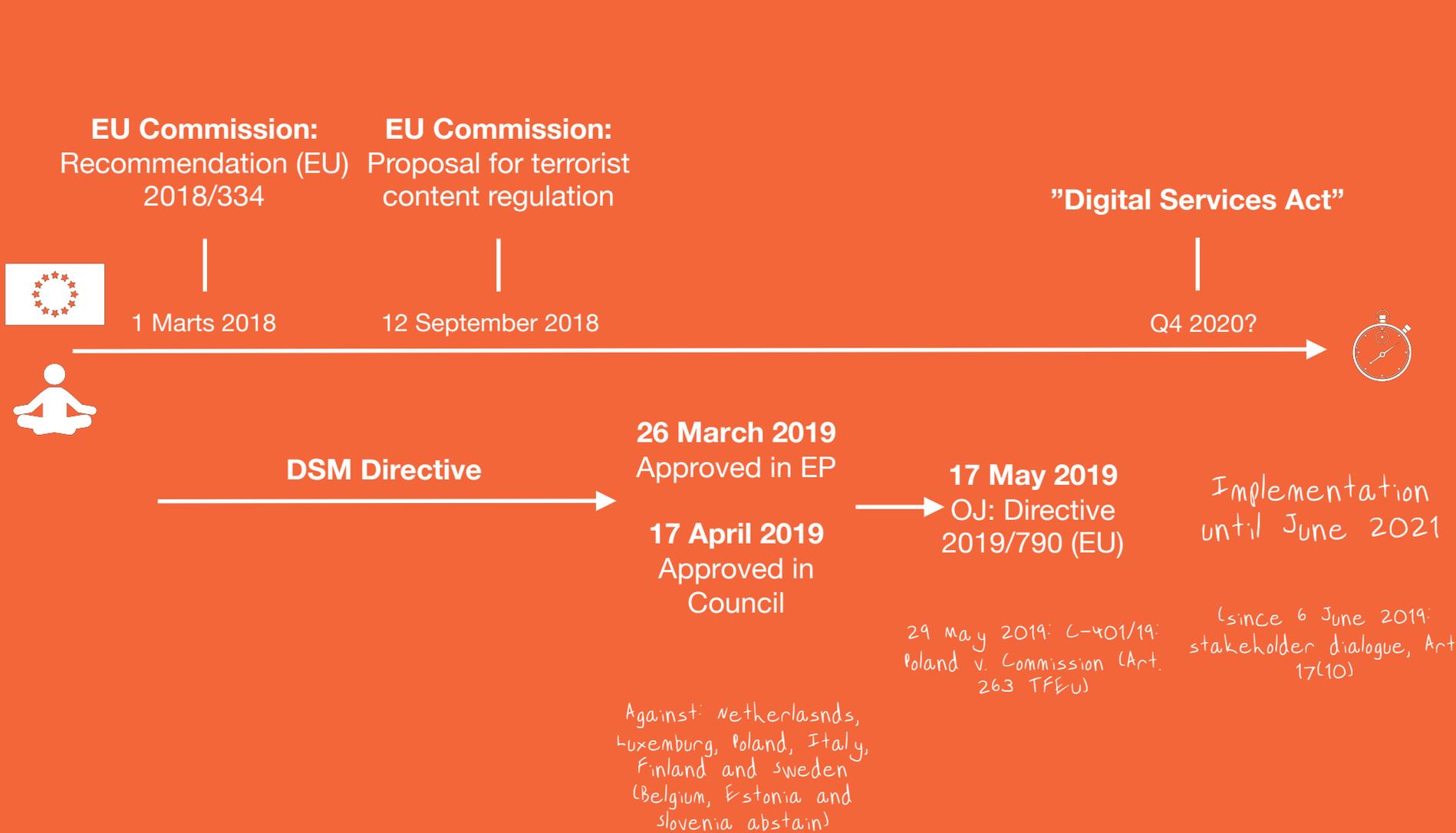
- (a) the provider **does not have actual knowledge of illegal activity** or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; **or**
- (b) the provider, upon **obtaining such knowledge** or awareness, **acts expeditiously to remove** or to disable access to the information.

(...)

Hosting (i.e. platforms)



Hosting (i.e. platforms)



The copyright “carve-out”

Article 17 Directive (EU) 2019/790

Article 17 DSM Directive

2. Member States shall provide that, where an online content-sharing service provider obtains an authorisation, for instance by concluding a licensing agreement, that authorisation **shall also cover acts carried out by users** of the services falling within the scope of Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or where their activity does **not generate significant revenues**.



Article 17 DSM Directive

But what if there are no licenses...?

On complexities of access and licensing in the Digital Single Market see S.F. Schwemer (2019). *Licensing and Access to Content in the European Union. Regulation between Copyright and Competition Law*. Cambridge University Press, <https://doi.org/10.1017/9781108653213>

Article 17 DSM Directive

3. When an online content-sharing service provider performs an act of communication to the public or an act of making available to the public under the conditions laid down in this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply to the situations covered by this Article.

The first subparagraph of this paragraph shall not affect the possible application of Article 14(1) of Directive 2000/31/EC to those service providers for purposes **falling outside the scope** of this Directive.



Article 17 DSM Directive

4. If no license then OCSSPs **liable**, unless:

- a) made **best efforts** to obtain an authorisation, **and**
- b) made, in accordance with high industry standards of professional diligence, **best efforts** to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information; **and in any event**
- c) **acted expeditiously**, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).



Article 17(4)(a) of DSM Directive (Directive 2019/790)				
Language version	Greater efforts	Best efforts	Greatest efforts	All efforts
Czech				✓ (veškeré úsilí)
Danish		✓ (bedste indsats)		
Dutch				✓ (alles in het werk hebben gesteld)
English		✓		
Finnish		✓ (parhaansa mukaan)		
French		✓ (meilleurs efforts)		
German				✓ (alle Anstrengungen)
Greek		✓ (κάθε δυνατή προσπάθεια)		
Italian			✓ (massimi sforzi)	
Polish		✓ (dołożyli wszelkich starań)		
Portuguese				✓ (todos os esforços)
Romanian				✓ (toate eforturile)
Spanish	✓ (mayores esfuerzos)			
Swedish				✓ (har gjort vad de har kunnat)

by Eleonora Rosati (May 2019)

to remedies under national law for cases other than liability for copyright infringements and to national courts or administrative authorities being able to issue injunctions in compliance with Union law. In particular, the specific regime applicable to **new online content-sharing service providers** with an annual turnover below EUR 10 million, of which the average number of monthly unique visitors in the Union does not exceed 5 million, should not affect the availability of remedies under Union and national law. **Where no authorisation has been granted to service providers**, they should make their **best efforts** in accordance with high industry standards of professional diligence to avoid the availability on their services of unauthorised works and other subject matter, as identified by the relevant rightholders. For that purpose, rightholders should provide the service providers with **relevant and necessary information** taking into account, among other factors, the size of rightholders and the type of their works and other subject matter. The steps taken by online content-sharing service providers in cooperation with rightholders should **not** lead to the prevention of the availability of **non-infringing content**, including works or other protected subject matter the use of which is covered by a licensing agreement, or an exception or limitation to copyright and related rights. Steps taken by such service providers should, therefore, not affect users who are using the online content-sharing services in order to lawfully upload and access information on such services.

In addition, the obligations established in this Directive should **not** lead to Member States imposing a **general monitoring obligation**. When assessing whether an online content-sharing service provider has made its best efforts in accordance with the high industry standards of professional diligence, account should be taken of whether the service provider has **taken all the steps that would be taken by a diligent operator** to achieve the result of preventing the availability of unauthorised works or other subject matter on its website, taking into account **best industry practices** and the effectiveness of the steps taken in light of all relevant factors and developments, as well as the **principle of proportionality**. For the purposes of that assessment, a number of elements should be considered, such as the **size of the service**, the **evolving state of the art** as regards existing means, including potential **future developments**, to avoid the availability of different types of content and the cost of such means for the services. Different means to avoid the availability of unauthorised copyright-protected content could be appropriate and proportionate **depending on the type of content**, and, therefore, it cannot be excluded that in **some** cases availability of unauthorised content can only be avoided **upon notification of rightholders**. Any steps taken by service providers should be effective with regard to the objectives pursued but should not go beyond what is necessary to achieve the objective of avoiding and discontinuing the availability of unauthorised works and other subject matter.

If unauthorised works and other subject matter become available despite the best efforts made in cooperation with rightholders, as required by this Directive, the online content-sharing service providers should be **liable** in relation to the specific works and other subject matter for which they have received the relevant and necessary information from rightholders, unless those providers demonstrate that they have made their best efforts in accordance with high industry standards of professional diligence.

In addition, where specific unauthorised works or other subject matter have become available on online content-sharing services, including irrespective of whether the best efforts were made and regardless of whether rightholders have made available the relevant and necessary information in advance, the online content-sharing service providers should be **liable** for unauthorised acts of communication to the public of works or other subject matter, **when**, upon receiving a **sufficiently substantiated notice**, they fail to **act expeditiously to disable access to**, or to remove from their websites, the notified works or other subject matter. Additionally, such online content-sharing service providers should also be **liable** if they fail to demonstrate that they have made their best efforts to prevent the **future uploading of specific unauthorised works**, based on relevant and necessary information provided by rightholders for that purpose.

Where **rightholders** do **not** provide online content-sharing service providers with the **relevant and necessary information** on their specific works or other subject matter, or where **no notification** concerning the disabling of access to, or the removal of, specific unauthorised works or other subject matter has been provided by rightholders, and, as a result, those service providers cannot make their best efforts to avoid the availability of



oh you lovely
recital 66
(858 words)

Article 17 DSM Directive

7. The cooperation between online content-sharing service providers and rightholders **shall not result in the prevention of the availability of works or other subject matter uploaded by users**, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation.

Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services:

- (a) **quotation, criticism, review;**
- (b) **use for the purpose of caricature, parody or pastiche.**

9. (...) OCSSPs shall **inform** their users in their **terms and conditions** that they can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law.

(...) This Directive shall in **no way affect legitimate uses**, such as uses under exceptions or limitations provided for in Union law, (...)





C. Michael Gibson MD
@CMichaelGibson

Folgen

Determining if an image is a Chihuahua or muffin is a tough problem in artificial intelligence



16:53 - 14. Mai 2017

7.665 Retweets 9.993 „Gefällt mir“-Angaben



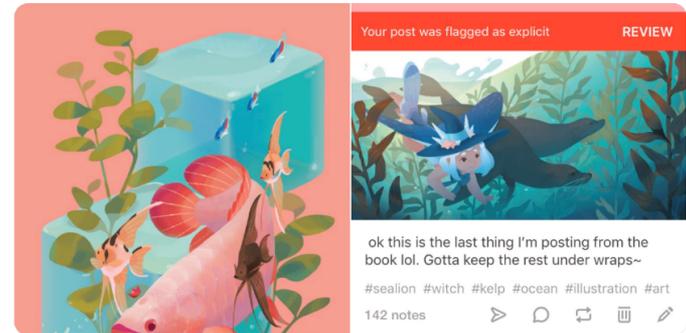
210 7,7 Tsd. 10 Tsd.



JesteniaS
@CitrusFoam

Follow

Tumblr's puritan bot is off as hell lmao



9:48 PM - 3 Dec 2018

127 Retweets 486 Likes



12 127 486



Daphne Keller @daphnehk · Mar 17

With content moderators staying home, YouTube shifts to more purely automated takedowns.
Interesting tidbit: because these are likelier to be wrong, most won't count as "strikes" toward account termination.



Creator Blog

Protecting our extended workforce and the community

Monday, March 16, 2020

Today, as the unprecedented COVID-19 situation continues, Google [outlined](#) how it's reducing the need for people to come into its offices while ensuring that its products continue to operate for everyone. We are committed to keeping the YouTube community informed about our actions related to COVID-19 in a dedicated location in our [help center](#). Here is our [update](#) from last week; below is some more information about the reduction of in-office staffing as it relates to YouTube:

We have teams at YouTube, as well as partner companies, that help us support and protect the YouTube community—from people who respond to user and creator questions, to reviewers who evaluate videos for possible policy violations. These teams and companies are staffed by thousands of people dedicated to helping users and creators. As the coronavirus response evolves, we are taking the steps needed to prioritize the well-being of our employees, our extended workforce, and the communities where they live, including reducing in-office staffing in certain sites.

Our Community Guidelines enforcement today is based on a combination of people and technology: Machine learning helps detect potentially harmful content and then sends it

 YouTube Creators YouTube 1M

 Labels ▾

 Archive ▾

 Feed

 Follow @YTCreators

Learn more in the [YouTube Help Center](#).

Article 17 DSM Directive

9. Member States shall provide that online content-sharing service providers put in place an **effective and expeditious complaint and redress mechanism** that is available to users of their services in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them.

Where rightholders request to have access to their specific works or other subject matter disabled or to have those works or other subject matter removed, they **shall duly justify the reasons** for their requests. Complaints submitted under the mechanism provided for in the first subparagraph shall be processed without undue delay, and decisions to disable access to or remove uploaded content shall be subject to **human review. (...) out-of-court redress mechanisms, access to a court or another relevant judicial authority** to assert the use of an exception or limitation to copyright and related rights.. (...)



Article 17 DSM Directive

Copyright's limitations and exceptions are intricate; **good luck, algorithms!** (or: false negatives unavoidable?)

Internalized balance (exceptions) *and* **externalized** system of procedural safeguards = limitations and exceptions are the 'only' tool for finding a fair balance between conflicting fundamental rights!

(see also C-476/17 - Pelham, C-469/17 - Funke Medien and C-516/17 - Spiegel Online)

Chilling effects and over-enforcement: are OCSSPs incentivized to enforce too much than too little?

Upstream issues: reconciliation with art. 15 ECD (Scarlet Extended/Netlog/Glawischnig-Piesczek)

YouTube ContentID – hello there, high industry standard (and market entry barriers?)

Broader tendencies

...towards (even) more pro-active mechanisms?

...beyond Article 17

Communication:
**Tackling Illegal Content
Online, Towards an
enhanced responsibility
of online platforms**



“set of guidelines and principles for online platforms to **step up the fight against illegal content online**”

“provide clarifications to platforms on their liability when they take proactive steps to detect, remove or disable access to illegal content (the so-called "Good Samaritan" actions)”

September 2017

1 March 2018

12 September 2018

Q4 2020 / Q1 2020



EU Commission:
Recommendation (EU)
2018/334

EU Commission:
Proposal for regulation
on terrorist content

**Digital Services Act
or
Digital Service Code for
the EU**

Chapter 2: General
Recommendations
relating to **all types**
of illegal content

Chapter 3: Specific
recommendations
relating to **terrorist**
content



Proactive measures

“Hosting service providers should be encouraged to take, where appropriate, proportionate and specific **proactive measures** in respect of illegal content. Such proactive measures could involve the use of **automated means** for the detection of illegal content **only** where appropriate and proportionate and subject to effective and appropriate safeguards, in particular the safeguards referred to in points 19 and 20.”



Chapter 2, point 18

19. In order to avoid removal of content which is not illegal content, without prejudice to the possibility for hosting service providers to set and enforce their terms of service in accordance with Union law and the laws of the Member States, there should be **effective and appropriate safeguards** to ensure that hosting service providers act in a diligent and proportionate manner in respect of content that they store, in particular when processing **notices** and **counter-notices** and when deciding on the possible removal of or disabling of access to content considered to be illegal content.

20. Where hosting service providers use **automated means** in respect of content that they store, effective and appropriate safeguards should be provided to ensure that decisions taken concerning that content, in particular decisions to remove or disable access to content considered to be illegal content, are accurate and well-founded. Such safeguards should consist, in particular, of **human oversight and verifications**, where appropriate and, in any event, where a detailed assessment of the relevant context is required in order to determine whether or not the content is to be considered illegal content.

21. Effective and appropriate measures should be taken to prevent the submission of, or the taking of action upon, notices or counter-notices that are submitted in **bad faith** and other forms of abusive behaviour related to the recommended measures to tackle illegal content online set out in this Recommendation.

Trusted notifiers/flaggers

“specialised entities with specific expertise in identifying illegal content, and dedicated structures for detecting and identifying such content online” (COM(2017) 555 final)

Both in relation to private actors and public actors (competent authorities), see e.g. Recommendation points 25-27

Principal-agent issue and further privatization of enforcement



In addition, the concept of **active/passive hosts** would be **replaced** by more appropriate concepts reflecting the technical reality of today's services, building rather on notions such as **editorial functions**, **actual knowledge** and the **degree of control**. (...) Finally, a binding "**Good Samaritan provision**" would encourage and incentivise proactive measures, by clarifying the lack of liability as a result of Such measures, on the basis of the notions already included in the Illegal Content Communication.

DG Connect note (leak)

HOSTING INTERMEDIARY SERVICES AND ILLEGAL CONTENT ONLINE

**An analysis of the scope of article 14
ECD in light of developments in the
online service landscape**



15.4.2020

DRAFT REPORT

with recommendations to the Commission
on the functioning of the Single Market
(2020/2018(INL))

Committee on the Internal Market and Consumer Protection

Rapporteur: Alex Agius Saliba

(Initiative – Rule 47 of the Rules of Procedure)

(Author of the proposal: **)

20. Notes that there is **no ‘one size fits all’** solution to all types of illegal and harmful content and cases of misinformation online; (...)

22. Calls on the Commission to address the increasing differences and fragmentations of national rules in the Member States and to propose concrete legislative measures including a **notice-and-action mechanism**, that can empower users to notify online intermediaries of the existence of potentially illegal online content or behaviour;

23. Stresses that maintaining **safeguards** from the legal liability regime for hosting intermediaries with regard to user-uploaded content and the **general monitoring prohibition** set out in Article 15 of the E-Commerce Directive are still relevant and need to be preserved;

Moving forward

Normative assessment and recommendations:
How to improve copyright content moderation and
removal practices toward better and more
diverse access to culture?

Normative assessment

Moderation of copyright content:
Impact on creation and access?



Value-based norms:

fundamental copyright balance
creation v. access (economic
rationale)

Role of **fundamental rights** and
cultural rights, e.g. UDHR Art. 27: the
right to participate in cultural life and in
scientific progress?

How do the rules and terms shape the design of
removal and moderation by UGC platforms?

User-generated law: "law that
accommodates the needs of the
knowledge society" characterized by (1)
flexible norms (2) with cross-border
scope and (3) which are industry- and
subject-specific (Riis, 2016)

Criteria in the qualitative assessment:
Rules (predictability) vs. **standards**
(flexibility: fair results in specific cases),
effectiveness, geographical scope
etc.

Normative assessment

“Voluntary” vs. mandatory content moderation

State-enacted law (statute/case law) vs. private regulation

What are the drivers that initiate and shape private regulation?

Normative assessment

Expectations concerning private regulation...

Fragmentation

- flexible norms (reflecting both complexity and pace of development)
- the capacity to be industry-specific and subject-specific (reflecting the heterogeneity of demand for legal solutions)

Unification

- Economies of scale in production of technology
- Global actors = cross-border scope

a conceptualisation of "rough justice"?

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)

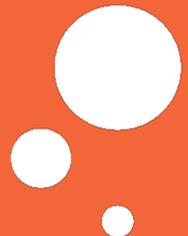
Literature

- Schwemer, S.F. (2020). *Article 17 at the intersection of EU Copyright and Internet Law*, NIR (under review)
- Schwemer, S.F. and Schovsbo, J. (2019). *What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime* (December 20, 2019). Forthcoming in Paul Torremans (ed), *Intellectual Property Law and Human Rights*, 4th edition (Wolters Kluwer, 2020). Available at SSRN: <https://ssrn.com/abstract=3507542>
- Riis, T. and Schwemer S.F. (2019). *Leaving the European Safe Harbor, Sailing Towards Algorithmic Content Regulation*, *Journal of Internet Law*, pp.1-21, https://papers.ssrn.com/abstract_id=3300159
- Schwemer, S.F. (2019). *Trusted notifiers and the privatization of online enforcement*, *Computer Law & Security Review*, <https://doi.org/10.1016/j.clsr.2019.105339>
- Schwemer, S.F. (2019). *Licensing and Access to Content in the European Union. Regulation between Copyright and Competition Law*. Cambridge University Press. <https://doi.org/10.1017/9781108653213>

Centre for Information and Innovation Law (CIIR)

sebastian.felix.schwemer@jur.ku.dk

@schwemer



THANKS!

Questions?

Please put them in the chat box.

Slides and a recording will be sent to all registered delegates.