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Intermediaries' liability in the online provision of services in light of the upcoming EU law reform in the sector: legal issues in view of illegal content removal

Master's Thesis

Olomouc 2022

I hereby declare that this Master's Thesis on the topic of "Intermediaries' liability in the online provision of services in light of the upcoming EU law reform in the sector: legal issues in view of illegal content removal" is my original work and I have acknowledged all sources used.

In Olomouc on the 13 July 2022,

ACKNOWLEDGEMENTS

Thanks to my mother, who has been by my side throughout these months, giving me moral support and strength to keep on with my research.

Thanks to my beloved friends and, in particular, to Anna and Christina, for their constant advice and caring words, which have encouraged me to challenge myself and pursue my educational dreams.

Thanks to Palacký University, to the professors I have had the fortune to learn from and, specially, to my supervisor Mr. Stehlík.

This project would not have been possible without their support, and for that reason I would like to express my sincere gratitude to them.

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ABSTRACT

The development of electronic commerce in the internal market made clear the need for a coherent and harmonised regulation at the European level. This was subsequently translated into the adoption of the Directive 2000/31/EC, of 8 June 2000, also known as the E-Commerce Directive (ECD). Nevertheless, taking account of the spread and growth of the electronic commerce in the last decades and the emergence of new actors in the online environment, the need for adopting a more up-to-date framework has been reinsured, leading to the imminent entry into force of the Digital Services Act (DSA) in the context of the strategy "Shaping Europe's Digital Future". The analysis undertaken throughout this study will address both, the presently applicable and prospected legal regime, in order to bring forward some existing legal and practical issues and offer an in-depth perspective, notably in the field of content filtering and removal. The current study comes at a convenient stage, since the proposal on a DSA is expected to be adopted and published in the following months in the Official Journal of the European Union.

KEY WORDS

Active, automated means, DSA, ECD, filtering, illegal content, intermediary, liability, notice, online platform, online provider, proactive, remove, safe harbour, service.

LIST OF ABREVIATIONS

AI	Artificial Intelligence
CJEU	Court of Justice of the European Union
DSA	Digital Services Act
ECD	E-Commerce Directive
ECtHR	European Court of Human Rights
EU	European Union
GDPR	General Data Protection Regulation
ISSP	Information Society Services Provider
NN	Notice-and-Notice
NSD	Notice-and-Stay-Down
NTD	Notice-and-Take-Down
OI	Online Intermediary
OP	Online Platform
VLOP	Very Large Online Platform

INTRODUCTION

Terms and scope of the study

Throughout the paper we will adopt a narrow scope, by limiting the subject of study to online intermediaries and its object to the liability regime set for these, all while addressing the substantial differences between the current regulatory framework and the prospected one[1].

From a subjective angle, as laid down in the Regulation 2019/1150, of 20 June 2019, an online intermediary consists of any natural or legal person providing online intermediation services in favour of business users, being the latter considered as information society services arising from a contractual relationship between online intermediaries and business users and implemented for the sake of their transactions with consumers[2].

From an objective approach to the topic, it should be stressed that the legal basis prescribed by the ECD regarding online intermediaries' liability is sustained by the safe harbour regime, consecrated in article 12 to 14 ECD -which offers a liability exemption to OI when performing activities of mere conduit, caching, and hosting- and the prohibition to general monitoring, preconised in article 15 ECD. Such a system would define a conditional opt-out in terms of liability while ensuring the enjoyment of fundamental rights of both users and business operators -namely and respectively, freedom of expression and freedom to conduct a business-.

Nevertheless, as we will examine along the study, the current framework has been object of substantial interpretations by the CJEU and, in light of the changes in the online environment, is about to be amended by the DSA regulation. Considering the existing framework, including jurisprudential landmark decisions concerning intermediaries' main features, as well as providing a comparative approach in the face of the upcoming legislative reform, appears as the pertinent methodologic approach to the current paper.

Throughout the study, attention will be given to both general and specific features within the online intermediaries' liability system, as a solid background is deemed suitable before facing

[1] Given that, at the current state of the legislative procedure the final text on a DSA has not been adopted, when considering the upcoming legislative framework throughout the study we will take into account the provisions contained in the provisional agreement reached on 15th June 2022. The use of terms "DSA", "agreed text" or "provisional agreement", for instance, will be used indistinctly throughout the study.

[2] Parliament and Council regulation (EU) 2019/1150 of 20th June 2019, on promoting fairness and transparency for business users of online intermediation services. OJ L 186/57, 11.7.2019, p. 57 et seq., art. 2.2-3.

selected issues of utmost concern. In this regard, such an overall perspective will be essential for the subsequent in-depth assessment of the duties of care regime and the usage of automated means in the filtering of illegal content in terms of necessity, adequacy, and effectiveness.

Main research questions

Considering the foregoing scope and reasoning, we will attempt to offer a suitable answer to the following main research questions, which are set at the core of our study:

RQ No. 1: "In light of the upcoming reforms in the field, will the online intermediaries' liability regime foreseen by the DSA implement substantial changes as to "override" the ECD framework principles?".

RQ No. 2: "To which degree may the proactive actions adopted by online intermediaries in good faith result into their qualification as active providers and the consequent loss of the safe harbour?".

RQ No. 3: "Following a duty to act, with an aim to remove or disable access to illegal content, is an online intermediary required to recourse to automated content detection and filtering systems whether this proves to be the most effective means to counter an infringement?".

Research design

In order to approach the posed questions, the current research presents four differentiated chapters, which will provide a clear overview of the ECD regime and the foreseeable legal reform, identifying its main gaps in the light of the new categories of service providers which have appeared since its entry into force.

The **first chapter** will offer the reader a general picture on the ECD liability regime and introduce ISSPs and their key aspects, while highlighting the cornerstones of the regime, namely the safe harbour foreseen in articles 12-14 ECD and the prohibition to general monitoring as provided in article 15 ECD.

Once presented the legal context enclosed by the ECD, we will turn to the regulation of online platforms (OP), which will be subject to several duties after the entry into force of the upcoming legislative reform. Throughout the **second chapter** we will compare the regulatory provisions contained in the ECD and DSA, in order to provide a comprehensive overview between the current and prospected legal regimes.

The **third chapter**, considering the need to react to illegal content online, will address the means of response which are available to online providers. In this regard, attention will be given to the notice-and-action regime and the implementation of proactive measures on a voluntary basis, the display of which makes providers aware of content reported as online within their services and triggers a duty to act upon such knowledge.

Lastly, the substantial role of automated means in providers content filtering activity will be reviewed throughout the **fourth chapter**. In particular, it is convenient to determine whether its usage is susceptible of being imposed on providers, provided that it ensures effective and proportionate response to counter illegal content.

Objectives and methodology

Before going further into the topic here presented, it is convenient to draw attention on the grounds which shape the *raison d'être* of the current paper. The main rationale laying below the approach of this technology-based area from a legal perspective points out to the boundless opportunities that come with it. In fact, the evolving nature of the field leads to grey areas and loopholes, which require action from the legal discipline and leaves room for research.

Besides, taking account of the constant and rapid developments in the online environment, and under the light of a context of upcoming reforms, the present time appears to be optimal in order to carry out the envisaged study.

Concerning the methodology, we will deal with the online intermediaries' liability from a legal, doctrinal and judicial perspective. To this regard, among the sources which will be mentioned it is possible to mention both the current and prospected legal framework, judgements awarded by the CJEU on the matter (which have provided guidance on controversial aspects), as well as several articles and reports providing a ground for discussion in this legal field.

SECTION 1: GENERAL OVERVIEW ON THE LIABILITY REGIME OF ONLINE INTERMEDIARIES

CHAPTER 1: INTERMEDIARIES AND THE ECD LIABILITY REGIME

1. Preliminary considerations

With a view to safeguard the smooth functioning of the internal market, the ECD establishes a legal framework playing a substantial part in "the free movement of information society services between the Member States"[3], the latter being defined as "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services"[4]. Even though the current paper focuses on the category of online intermediaries, in so far as the notion of information society services provider (ISSP) is common to all type of providers, it will be addressed given that meeting the criteria and qualifying as such is required to enter within the scope of the ECD and, inter alia, the safe harbour regime[5].

As Schwemer et al. affirm, there is not a given definition on OI within the EU legal corpus. On the contrary, the ECD draws attention on specific functions whose performance is attributed to OI, and which are settled in broad terms[6].

In particular, the ECD enumerates three functions performed by intermediary service providers which, indeed, are excluded from liability in the safe harbour regime preconised by the Directive (whether they fulfil certain different conditions, depending on the type of activity considered[7]). The foreseen acts include those relating to:

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[3] Parliament and Council directive 2000/31/EC of 8th June 2000, on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce). OJ L187, 17.7.2000, p. 1 et seq., art. 1.1.

[4] Parliament and Council directive (EU) 2015/1535 of 9th September 2015, laying down a procedure for the provision of information in the field of technical regulations and of rules in Information Society services (codification). OJ L 241, 17.9.2015, p. 1 et seq., art. 1 (b).

[5] MADIEGA, Tambiama, et al. Reform of the EU Liability Regime for Online Intermediaries: Background on the Forthcoming Digital Services Act : In-Depth Analysis. (2020): 4.

[6] SCHWEMER, Sebastian Felix, et al. Liability Exemptions of Non-Hosting Intermediaries: Sideshow in the Digital Services Act?, *Oslo Law Review*, Vol. 8, No. 1 (18 May 2021): 6-7.

[7] Judgement of the Court of 15th September 2016, *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH*, C-484/14, ECLI:EU:C:2016:689, paragraph 57.

I. Mere conduit (article 12 ECD), which refers to the "transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network".

II. Caching (article 13 ECD), consisting of the "automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request".

III. Hosting (article 14 ECD), which points at the "storage of information provided by a recipient of the service".

The liability exemption regime, as Hoffman and Gasparotti observe, reflects the importance of the intermediaries performing these functions, as they allow for free communication and enable different type of activities to be carried out online. This justifies, therefore, the existence of a common legal framework in the shape of a Directive, reducing thereon the risk of divergencies among EU member states' regulations on the matter[8]. However, the ECD has led to some criticism among the doctrine, who has considered its approach as limited, based on the necessity of prior technology-related knowledge which results from the ECD configuration, and despite its -in principle- technology-neutral legal nature[9].

2. Common features

Despite the differing conditions imposed to each one of the identified intermediaries, it is convenient to remark the common features applying to all of them within the liability framework, namely the nature of the provider, the horizontal character of the regime, the possibility to issue injunctions against these providers and the prohibition of imposing on providers a general obligation to monitor information.

[8] HOFFMANN, Anja, GASPAROTTI, Alessandro. Liability for Illegal Content Online: Weaknesses of the EU legal framework and possible plans of the EU Commission to address them in a "Digital Services Act". Centre for European Policy (3 March 2020): 8

[9] SCHWEMER, Sebastian Felix, et al. Liability Exemptions of Non-Hosting Intermediaries (…): 7.

2.1. Nature of the provider

Based on the aforementioned definition concerning ISSPs, it is possible to identify certain key criteria which must be fulfilled by online intermediaries with a view to assuring its permanence within the ECD framework. They must provide their services:

- At a distance
- By electronic means
- At the individual request of a recipient of services
- "Normally" for remuneration

Albeit the three first criteria have been identified by the doctrine as non-conflicting, in so far as there has been no CJEU case-law in this respect[10], it should be noted that the remunerative aspect has indeed given rise to legal uncertainty, where the Court's judgement has played a substantial role.

2.1.1. Remuneration

The remunerated character of the service presupposes that, with a view to qualify as an ISSP, the service provided must "represent an economic activity", albeit it may not be paid by its recipients[11]. This approach has been confirmed by the CJEU in *Papasavvas* (C-291/13)[12] and *Bond van Adverteerders* (C-352/95). In the latter case, the Court concluded that, even if the program transmission allowed by cable network operators lacked remuneration from the side of broadcasters, this could not rule out the paid character of the service, provided that cable network operators were being paid by way of fees charged to the broadcasters' subscribers[13].

Accordingly, the Court admitted in *McFadden* (C-484/14) the remunerated character of services free of charge, provided that their gratuity arises from an advertising function of other services, to which the cost of the prior service is charged[14]. Nevertheless, it may be discussed

[10] SCHWEMER, Sebastian, et al. Legal Analysis of the Intermediary Service Providers of Non-Hosting Nature: Final Report. European Commission. (2020): 30-31.
[11] Directive on electronic commerce, recital 18.
[12] Judgement of the Court of 11th September 2004, *Sotiris Papasavvas v O Fileleftheros Dimosia Etaireia Ltd and Others*, C-291/13, ECLI:EU:C:2014:2209, paragraph 29.
[13] Judgment of the Court of 26th April 1988, *Bond van Adverteerders and others v The Netherlands State*, C-352/85, ECLI:EU:C:1988:196, paragraph 16.
[14] *McFadden* (C-484/14), paragraph 42.

whether "non-profit or non-economic activities" may fall within the broad interpretation deriving from the CJEU's case law[15].

It is important to note, likewise, that control over the remuneration -as one of the conditions surrounding the provision of the service- has been essential for upholding the exclusion of certain providers from the category of ISSP. In that regard, it was confirmed in *Uber Systems Spain SL* (C-434/15), that Uber's "decisive influence" over some remuneration-related conditions of the service, such as the determination of the maximum fares or the ex-ante collection of its clients' payments, led to consider the intermediation service provided by Uber "as forming an integral part of an overall service whose main component is a transport service". This determined, consequently, its disqualification as an ISSP and subsequent inclusion as a "service in the field of transport"[16] under the framework of the Services Directive[17].

The stance adopted by the Court in the prior case differs from its judgement in *Airbnb Ireland*, where the Court ruled that Airbnb was to be considered as an ISSP under the ECD and that, unlike Uber, it did not exercise decisive influence over the service conditions referring, *inter alia*, to the fact that Airbnb did not fix the "rental price charged"[18]. As Chapuis-Doppler and Delhomme indicate, based on the Court's decision, it is possible to infer that the decisive influence of the platform over the offline service would largely depend "on the extent to which the platform is willing to control the price of the service"[19].

In the context of referencing services and in link with the notion of control and intermediaries' liability, it should be recalled the Court asserted in *Google France SARL v Louis Vuitton et al.* that, neither the remunerated character of a referencing service, nor the setting of

[15] Madiega points out the existing ambiguity regarding the acknowledgement of a remunerated character in the case of "activities sponsored by advertisements", "entirely free models" (such as Wikipedia) and "freemium models" (when the service is offered to users free of charge and only a certain percentage of its users provide a sort of payment). MADIEGA, Tambiama, et al. Reform of the EU Liability Regime (…): 4.
[16] Judgement of the Court of 20th December 2017, *Asociación Profesional Elite Taxi v Uber Systems Spain, SL*, C-434/15, ECLI:EU:C:2017:981, paragraphs 39, 40, 42.
[17] Parliament and Council directive 2006/123/EC, on services in the internal market. OJ L 376, 27.12.2006, p. 36 et seq., art 2.2(d).
[18] Judgment of the Court of 19th December 2019, *criminal proceedings against X* (intervention Airbnb Ireland et al.), C-390/18, ECLI:EU:C:2019:1112, paragraphs 68-69.
[19] CHAPUIS-DOPPLER, Augustin, DELHOMME, Vincent. A regulatory conundrum in the platform economy, case C-390/18 Airbnb Ireland. (2020).

payment terms or the provision of general information to its clients by Google can result into its exclusion from the safe harbour regime[20].

2.2. Horizontal character of the regime

As Rózenfeldová and Sokol outline, the liability regime imposed on intermediaries applies horizontally, covering therefore a vast range of legal disciplines and applying to different kinds of illegal activities perpetrated online[21]. Taking account of the immutable technical character of intermediaries, the horizontal application of the safe harbour is regarded by Angelopoulos and Smet as a "holistic tool" which, instead of weighing responsibility based on the distinctive wrongdoing, offers intermediaries an overarching protective framework[22].

Nevertheless, legal fragmentation with regards to the horizontal application has been exposed by Rodríguez de las Heras Ballell, who highlights the repercussion of recent sectorial legislation on the approach settled by the ECD. As Vasudevan asserts, in light of decisions from the CJEU and the ECtHR, it is possible to affirm that a "fair balance" approach has been applied in terms of intermediary liability, requiring a "notice and action" system to be set in place depending on the degree of harm arising from the illegal activity[23]. This shift towards vertical liability could have been equally considered by the European Commission, as it expressly indicated in its 2015 Digital Single Market Strategy that intermediaries would be required to take effective action in the face of identified illegal content containing "information related to illegal activities such as terrorism/child pornography or information that infringes the property rights of others"[24].

In this sense, although some instruments explicitly recognise the ECD safe harbour enforceability -such as the 2018 Audio-Visual Media Services Directive (AVMSD)[25]-, others have

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[20] Judgment of the Court of 23rd March 2010, joined cases *Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08)*, ECLI:EU:C:2010:159, paragraph 116.

[21] RÓZENFELDOVÁ, Laura, SOKOL, Pavol. Liability Regime of Online Platforms New Approaches And Perspectives. *EU and Comparative Law Issues and Challenges Series* (3), 2019: 870.

[22] ANGELOPOULOS, Christina, SMET, Stijn. Notice-and-fair-balance: how to reach a compromise between fundamental rights in European intermediary liability. *Journal of Media Law*. Vol. 8, No. 2 (6 December 2016): 4.

[23] VASUDEVAN, Amrita. Taking down cyber violence supreme Court's emerging stance on online censorship and intermediary liability. *Economic and Political Weekly*, 54. (2019): 7.

[24] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Digital Single Market Strategy for Europe, 6 May 2015, COM(2015) 192 final, p. 12.

[25] Parliament and Council directive (EU) 2018/1808 of 14th November 2014, amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities. OJ L 303, 28.11.2018, p. 69 et seq., recital 48.

opted for a partial derogation of such liability regime. For instance, the 2019 Copyright Directive holds inapplicable the liability exemption foreseen in article 14 (1) ECD[26], considering that online content-sharing service providers must be hold accountable when they perform "an act of communication to the public or an act of making available to the public under the conditions laid down in [the Copyright Directive]"[27]. The distinct assessment on intermediaries in the context of copyright, by enhancing liability of hosting providers -regarded to be "communicators of work to the public"[28]-, impacts notably the horizontal safe harbour regime, making liability exemptions reliant on the infringement legal category.

In cases of child pornography, Anchayil and Mattamana acknowledge, in view of national case law among Member States, a trend towards imposing a stricter liability on intermediaries[29]. In this connection, Directive 2011/92/EU aims at preventing the display and dissemination of child pornography by requiring Member States to act for the sake of the effective removal of web sites committing such offenses[30]. Consequently, given that illegality is likely to result apparent in most cases, Vasudevan points out that in these cases online intermediaries might be entitled to automatic takedowns in view of the gravity of the misconduct[31].

Concerns have also been raised regarding the diffusion of terrorist-related speech online, which has been denounced to constitute a misuse of the internet capable of seriously menacing the European safety and security. In relation to the role of online intermediaries, Bechtold has drawn attention on the current shift aiming to impose on them regulatory obligations relating to third-party content[32]. Awareness should be raised on the recently enforced Regulation 2021/784, concerning the dissemination of terrorist content online. The appointed legal instrument obliges hosting providers, *inter alia*, to adopt specific measures aimed at protecting their services from the

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[26] RODRÍGUEZ DE LAS HERAS BALLELL, Teresa. The background of the Digital Services Act: looking towards a platform economy. *ERA Forum*, Vol. 22, No. 1 (April 2021): 79.

[27] Parliament and Council directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC of 17 April 2019, on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC. OJ L130, 17.5.2019, p. 92 et seq., art. 17.3.

[28] SOOGUMARAN, Krishen. Article 17 of the EU Copyright Directive (2019/790) and its Impact on Human Rights. *University of Malaya Law Review* (5 May 2021).

[29] ANCHAYIL, Anjali, MATTAMANA, Arun. Intermediary liability and child pornography: A comparative analysis. *Journal of international commercial law and technology*, Vol.5, No.1 (2010):52-53.

[30] Parliament and Council directive 2011/92/EU of 13th December 2011, on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA. OJ L335, 17.12.2011, p.1 et seq., art. 25.

[31] VASUDEVAN, Amrita. Taking down cyber violence (…): 7.

[32] BECHTOLD, Eliza. Terrorism, the internet, and the threat to freedom of expression: the regulation of digital intermediaries in Europe and the United States. *Journal of Media Law*, Vol. 12, No. 1, (2 January 2020): 24-25.

public dissemination of terrorist content[33] and to comply with orders requiring the removal of or disabling of access to terrorist content "as soon as possible and in any event within one hour of receipt of the removal order"[34]. Notwithstanding, the strict duties imposed on intermediaries by the highlighted framework have raised concern, as they can potentially affect the freedom of expression[35].

In the context of hate speech, a tendency towards imposing on online platforms duties to tackle this type of illegal content has been reaffirmed[36]. In parallel with the European Union's acknowledgment of the manifest illegality of hate speech and the resulting acceptance to limiting free speech[37], it is essential to point out, in the context of the European Court of Human Rights (ECtHR), the Court's decision in *Delfi AS v Estonia*. Despite the establishment of a notice-and-take-down system by Delfi AS, the failure to "remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties" was considered by the Grand Chamber a sufficient criterion to uphold Internet news portals' liability. To reach its decision, the ECtHR pondered the harms posed by hate speech -which does not amount to protected speech and, therefore, exceeds the framework of article 10 ECHR- and the need to safeguard the interests and rights at issue[38]. The judgement has, nevertheless, raised certain criticism, as the role of intermediaries has been denounced to be excessively vague as to amount to active monitoring of infringing activities online[39].

2.3. Issuing of injunctions

The ECD allows the issuing of injunctions by national courts and administrative authorities in relation to the three functions listed above, requiring providers "to terminate or prevent an infringement"[40] – or settling procedures for the removal or disabling of information access, with regards solely to hosting functions-. In words of Kohl, in line with the liability framework

[33] Parliament and Council regulation (EU) 2021/784 of 29 April 2021, on addressing the dissemination of terrorist content online. OJ L172, 17.5.2021, p. 7 et seq., art. 5 and recital 22.
[34] *Ibidem*, art. 3 and recital 17.
[35] BECHTOLD, Eliza. Terrorism, the internet, and (…): 27.
[36] YU, Wenguang. Internet intermediaries' liability for online illegal hate speech. *Frontiers of Law in China*, vol. 13, No. 3 (2018): 349.
[37] VASUDEVAN, Amrita. Taking down cyber violence (…): 7.
[38] Judgment of 16th June 2015, ECtHR, *Delfi AS v Estonia* [GC], No. 64569/09, paragraphs 155-159.
[39] FROSIO, Giancarlo. The European Court of Human Rights holds Delfi.ee liable for anonymous defamation. (2013).
[40] Common articulate to articles 12, 13 and 14 from the Directive on electronic commerce.

established, an ISSP may be forced to comply with an order even though no proven wrongdoing may derive from its activity[41].

As Schwemer et al. affirm, the imposition of injunctions has given rise to an extensive case law -notably concerning internet access service providers (IAPs)[42]. Its use against online intermediaries has progressively increased, requiring providers, under certain circumstances, "not only to take down actual illicit content, but also to prevent further uploading of the same (or even similar) content (stay-down obligations)"[43]. The rationale for its granting could be economic, as Rosati indicates by bringing forward the reasoning in *Cartier v Sky*. In the proceedings, the English High Court highlighted that requiring ISSPs to take action would be "economically more efficient"[44] than to requiring rightsholders to directly proceed against infringers[45].

Injunctions have been likewise foreseen in Article 8(3) of the Directive 2001/29/EC (InfoSoc Directive)[46], in the context of copyright infringements. With regards to the provision, the CJEU assesses the notion of "intermediaries" in a broad way, without further requirements, whose ultimate goal is to ensure "a high level of protection"[47] for rightsholders.

Nonetheless, instead of delimiting the conditions and procedures through which it is possible to claim for injunction relief, the CJEU has reiterated in several judgments -among others, *Telekabel*[48], *L'Oréal and Others v. eBay*[49] and *SABAM v. Scarlet*[50]- that this remains a subject concerning each national legal system. The outlined approach is in line with, among others, recital 59 of the

41 KOHL, Uta. The rise and rise of online intermediaries in the governance of the Internet and beyond – connectivity intermediaries. *International Review of Law, Computers & Technology*, Vol. 26, No. 2–3 (November 2012): 194.
42 SCHWEMER, Sebastian Felix, et al. Liability Exemptions of Non-Hosting Intermediaries (…): 8.
43 MOSCON, Valentina. Free Circulation of Information and Online Intermediaries – Replacing One "Value Gap" with Another. *International Review of Intellectual Property and Competition Law*, Vol. 51 (2020): 978, 980.
44 Judgement of 13th June 2018 of the English High Court, *Cartier International AG and others v British Sky Broadcasting limited and others*, UKSC 2016/0159, paragraph 251.
45 ROSATI, Eleonora. Intermediary IP injunctions in the EU and UK experiences: when less (harmonization) is more?, *Journal of Intellectual Property Law & Practice*, Vol. 12, No. 4 (April 2017): 340.
46 Article 8.3 of the Directive 2001/29/EC allows rightsholders to obtain injunctive relief in the face of such a breach committed by a third party while using an intermediaries' service. In this sense, it should be mentioned that Recital 16 of the Directive 2001/29/EC establishes a clear nexus with the ECD articulate, envisaging a "timescale similar" implementation and acknowledging that it is "without prejudice to provisions relating to liability in that Directive [the ECD Directive]". Parliament and Council directive 2001/29/EC of 22nd May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society. OJ L167, 22.6.2001, p.10 et seq.
47 Judgment of the Court of 27th March 2014, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, C-314/12, ECLI:EU:C:2014:192, paragraph 35.
48 *Ibidem,* paragraph 43.
49 Judgment of the Court of 12th July 2011, *L'Oréal SA and Others v eBay International AG and Others*, C-324/09, ECLI:EU:C:2011:474, paragraph 135.
50 Judgment of the Court of 24th November 2011, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, C-70/10, ECLI:EU:C:2011:771, paragraph 32.

referred InfoSoc Directive[51] and recital 23 of the Directive 2004/48/EC on the enforcement of intellectual property rights.

Granting a wide margin of appreciation to Member States may be problematic, as it can give rise to disparities among national legal systems transposing the ECD Directive. This has been reported by Angelopoulos, who points out at the heterogeneous national approaches to intermediaries' liability and the resulting legal uncertainty. As the author indicates, the lack of harmonised guidelines on a European level seriously impairs coherence on the matter and gives rise to doctrinal tensions. National judges are obliged to take into consideration basic tort law principles, leading to divergent approaches to the notion of "duties of care", which are rooted in civil and common law systems. Despite Angelopoulos envisages a certain degree of lateral harmonisation emanating from the ECD safe harbours, she does not exclude, nevertheless, the need for a more homogeneous and comprehensive framework, capable of ruling out the conflicting interpretations among Member States[52].

Regarding the scope of application, article 15 ECD and the respect for fundamental rights play a key role on the restriction on the imposition of injunctions[53]. As it was emphasized by the CJEU in *Promusicae*[54] and subsequently, in *Scarlet v SABAM*[55], *Telekabel*[56] and *McFadden*[57], when several fundamental rights are at issue, it is convenient to ensure a fair balance among them, interpreting national law in accordance with those fundamental rights and other general principles of EU law, such as the principle of proportionality. Equity must be ensured, in particular, among "users' protection of personal data and privacy (Articles 7 and 8 CFR) as well as the freedom of expression and information (Article 11 CFR) and intermediaries' freedom to conduct a business (article 16 CFR) vis-a-vis e.g., rights holders' protection of intellectual property (Article 17(2) CFR)"[58].

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[51] *Telekabel* (C-314/12), paragraph 43.
[52] ANGELOPOULOS, Christina. Beyond the safe harbours: harmonising substantive intermediary liability for copyright infringement in Europe. *Intellectual Property Quarterly*, Vol. 2013-3 (28 November 2013): 270-274.
[53] SCHWEMER, Sebastian, et al. Legal Analysis of (…): 38.
[54] Judgment of the Court of 29th January 2008, *Productores de Música de España (Promusicae) v Telefónica de España SAU*, C-275/06, ECLI:EU:C:2008:54, paragraph 68.
[55] *Scarlet v SABAM* (C-70/10) paragraph 46.
[56] *Telekabel* (C-314/12), paragraph 46.
[57] *McFadden* (C-484/14), paragraphs 81-83.
[58] SCHWEMER, Sebastian, et al. Legal Analysis of (…): 38.

It is important to note that, while general injunctions which impose indiscriminate targeting of content are not allowed[59], the CJEU has lately admitted the issuing of injunctions which go beyond a specific violation, the so-called dynamic injunctions. The European Commission has expressly acknowledged the effectiveness of dynamic injunctions, for instance, to prevent the appearance of mirror websites using a different IP address or URL than the website towards which the injunction has been launched and, subsequently, upholding the continuing infringement[60].

With regards to the CJEU case law, the Court admitted, among others, in *L'Oréal and Others v. eBay*[61], *Scarlet Extended SA v. SABAM*[62] and *SABAM v. Netlog*[63], in relation to intellectual property infringements, that an injunction relief may contain, not only an obligation requiring the service provider to take measures to deter the actual violation, but also to prevent further infringements. The issuing of blocking dynamic injunctions was likewise foreseen in *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, where the Court admitted a restriction on freedom of expression and allowed national courts to issue injunctions against host providers requiring them to remove information accessed worldwide of identical or equivalent content to information previously declared as unlawful[64].

Milczarek has highlighted that, while covering repeated infringement, blocking measures are meant to be endowed with flexibility and effectiveness[65]. However, the author criticises severely the Court stance in the latter case. In particular, she maintains that preventive content monitoring arising from the implementation of dynamic blocking injunctions has a negative impact on the freedom of expression and should be restricted to "hate speech" situations[66].

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[59] SAVIN, Andrej. The EU Digital Services Act: Towards a More Responsible Internet. Copenhagen Business School, CBS LAW Research Paper No. 21-04, *Journal of Internet Law* (16 February 2021): 19.

[60] European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee providing guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights, 29 November 2017, COM(2017) 708 final.

[61] *L'Oréal and Others v. eBay* (C-324/09), paragraph 131.

[62] *Scarlet Extended SA v. SABAM* (C-70/10), paragraph 31.

[63] Judgment of the Court of 16th February 2012, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV*, C-360/10, ECLI:EU:C:2012:85, paragraph 29.

[64] The equivalence in content, as established by the CJEU, requires that it *"remains essentially unchanged compared with the content which gave rise to the finding of illegality and containing the elements specified in the injunction, and provided that the differences in the wording of that equivalent content, compared with the wording characterising the information which was previously declared to be illegal, are not such as to require the host provider to carry out an independent assessment of that content"*. Judgment of the Court of 3rd October 2019, *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, C-18/18, ECLI:EU:C:2019:821, paragraph 53.

[65] MILCZAREK, Ewa. Preventive content blocking and freedom of expression in the European law – conflict or symbiosis? *Journal of Media Law*, Vol. 13, No. 2 (2021): 265.

[66] *Ibidem*, 263, 273.

Concerning the measures constituting injunctive relief, it stems from the reasoning of the CJEU in *Telekabel* that intermediaries are entrusted with the choosing of the appropriate measures in order to comply with the injunction[67]. In the view of the Court, the ultimate goal of the measure set in place is to prevent "unauthorised access to the protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users (…) from accessing the subject-matter (…) in breach of the intellectual property right"[68], inasmuch as rightful access to the displayed information is enabled for internet users. The provider must satisfy, furthermore, the burden of proof regarding transparency and fair balance of rights in light of its decision[69].

Even though intermediaries dispose of margin of action, it should be recalled that the measure set in place by the provider must be "strictly targeted" and not affect users' lawful access to the information, as this would enshrine an unjustified interference with their fundamental rights, in particular with the freedom of information[70]. In this regard, it is important to note that whether the solution adopted is deemed to be intrusive or excessive with relation to Internet users' rights, it can always be subjected to ulterior assessment by national courts[71].

2.4. Against the general monitoring of information

Along with the three highlighted functions, article 15 ECD completes the general picture of the intermediaries' liability regime, by referring to the prohibition to impose a general obligation to monitor information on ISSP. According to Schwemer et al., the proscription of general monitoring obligations ensures "a fair balance of interests and rights", given the limited stance of intermediaries to take measures to tackle illegal content, which could otherwise impact negatively on the openness and freedom that characterise the online framework[72].

The general prohibition, however, does not preclude the possibility open to Member States to impose specific duties of care aiming at the prevention of illegal activities, neither the issuing of injunction by national authorities, which can be regarded as monitoring obligations of a "specific"

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[67] ANGELOPOULOS, Christina, SMET, Stijn. Notice-and-fair-balance (…): 6.
[68] *Telekabel* (C-314/12) paragraph 64.
[69] STALLA-BOURDILLON, Sophie. Internet Intermediaries as Responsible Actors? Why It Is Time to Rethink the E-Commerce Directive as Well (2017): 289. In: TADDEO, Mariarosaria and FLORIDI, Luciano (eds.), *The Responsibilities of Online Service Providers*. Online. Cham: Springer International Publishing., pp. 275–293. Law, Governance and Technology Series.
[70] *Telekabel* (C-314/12) paragraph 56.
[71] STALLA-BOURDILLON, Sophie. Internet Intermediaries as (…): 290.
[72] SCHWEMER, Sebastian Felix, et al. Liability Exemptions of Non-Hosting Intermediaries (…): 27.

nature[73]. The allowance of dynamic injunctions involving monitoring measures of a singular nature has already been acknowledged and would be in line with recital 47 ECD[74] and the CJEU case-law, as expressed in *Eva Glawischnig-Piesczek v Facebook Ireland Limited*[75]-.

It should be noted that the prohibition to impose a general monitoring is exclusively addressed to Member States[76], meaning that the latter should not require intermediaries to determine "the standard for lawfulness and thereby accessibility of contents and implement overreaching enforcement measures targeting lawful contents"[77]. Nevertheless, online service providers are encouraged to enact self-regulatory instruments with a view to facing illegal content[78]. In this sense, recital 40 ECD expresses that this kind of measures adopted on a voluntary basis "should be encouraged by Member States" and that their implementation is "in the interest of all parties involved in the provision of information society services".

Such an approach has been denounced by Arroyo Amayuelas, which upholds that it would grant, in turn, providers with a power to decide how must users behave online[79]. The availability of voluntary monitoring to be implemented by providers has been reproached to risk, additionally, their permanence in the safe harbour regime, as they may obtain constructive knowledge upon the proactive monitoring. The relation between liability and voluntary monitoring measures, which relates directly to the notion of the "Good Samaritan" protection, will be object of further assessment throughout the third chapter.

Lastly, to complete a general overview on the general surveillance prohibition, it is precise to offer guidance on the effects that recent sectorial legislation may have on article's 15 ECD provision. Article 17 of the Directive 2019/790, on Copyright in the Digital Single Market (DSM), has been reported by Spoerri to seriously compromise article 15 ECD. As the author indicates, in

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73 HOFFMANN, Anja, GASPAROTTI, Alessandro. Liability for Illegal Content Online (…): 9-10.
74 According to recital 47 ECD, the prohibition of imposing a general monitoring information "does not concern monitoring obligations in a specific case".
75 *Eva Glawischnig-Piesczek v Facebook Ireland Limited* (C-18/18), paragraphs 33-53.
76 KUCZERAWY, Aleksandra. The EU Commission on voluntary monitoring: Good Samaritan 2.0 or Good Samaritan 0.5? (24 April 2018).
77 STALLA-BOURDILLON, Sophie. Sometimes one is not enough! Securing freedom of expression, encouraging private regulation, or subsidizing Internet intermediaries or all three at the same time: the dilemma of Internet intermediaries' liability. *Journal of International Commercial Law and Technology*, vol. 7, No. 2, (2012): 163
78 CHERCIU, Nicoleta-Angela, et al. Liability of online platforms. European Parliament. Directorate General for Parliamentary Research Services. (2021): 30.
79 ARROYO AMAYUELAS, Esther. La responsabilidad de los intermediarios en internet ¿puertos seguros a prueba de futuro? *Cuadernos de Derecho Transnacional*, Vol. 12, No. 1 (5 March 2020): 831.

accordance with Frosio[80], despite the legal restriction of the filtering obligation to content "for which the rightholders have provided the service providers with the relevant and necessary information"[81], in practice the filtering of unwanted content requires content-sharing service providers to monitor *de facto* all content made available. This would derive, additionally, from the factual impossibility to obtain the pertinent license from all the rightsholders[82].

3. The liability exemption regime

As Schwemer et al. note, for the purpose of circumventing liability and entering within the safe harbour regime, ISSPs are required to satisfy the following two conditions:

- On the one side, the activity performed by the provider must be regarded as "neutral", entailing that its role in the provision of service is of a passive nature.
- On the other side, a specific form is legally prescribed by the ECD, as long as the intermediaries' activities must be classified as mere conduit, caching or hosting services[83].

3.1. Passive role

Classifying the intermediary's role as active or passive is essential under the ECD framework, since whether its activity would be regarded as active, this would establish its liability and dismantle the protection afforded by articles 12 to 14 ECD. The concept has been repeatedly reviewed by the CJEU in its case-law, notably in *Google France SARL v Louis Vuitton et al.* and *L'Oréal v. eBay*. In light of both judgments, the Court has concluded that only providers playing a "neutral role" -that is, lacking knowledge or control over the data they store- or acting expeditiously to remove or disable that data upon knowledge of its unlawful nature, can resort to the liability shield foreseen by the ECD[84].

On the one side, in *Google France SARL v Louis Vuitton et al.*, although leaving to national judges the task of determining whether Google's role fell within the requirements of a "neutral"

[80] FROSIO, Giancarlo. To Filter or Not to Filter? That Is the Question in EU Copyright Reform. *Cardozo Arts & Entertainment Law Journal*, Vol. 36, No. 2 (25 October 2017): 346.
[81] Directive on copyright and related rights, article 17.4 (b).
[82] SPOERRI, Thomas. On Upload-Filters and other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, Vol. 10 (2019): 177.
[83] SCHWEMER, Sebastian Felix, et al. Liability Exemptions of Non-Hosting Intermediaries (…): 10.
[84] *Google France SARL v Louis Vuitton et al.* (C-236/08), paragraph 114, and *L'Oréal and Others v eBay* (C-324/09) paragraph 124.

provider, the Court acknowledged Google's control over the conditions governing the ads displayed and, in particular, its role "in the drafting of the commercial message which accompanies the advertising link or in the establishment or selection of keywords"[85]. On the other side, in relation to *L'Oréal v. eBay*, the Court acknowledges the active role of an e-commerce platform when providing sellers' assistance and promoting products regarded as counterfeits or commercialised without the right-holder consent[86].

Nevertheless, apart from few guidelines provided in some CJEU individual rulings, a common regulation clarifying the distinction between active and passive role is lacking. This leads, in the view of Hoffman and Gasparotti, to legal fragmentation among Member States, as national courts' interpretations on the CJEU jurisprudence may differ[87]. For this reason, the authors have upheld that this approach could be replaced, in the upcoming DSA regulation, for more suitable concepts, such as "actual knowledge, editorial functions, and a certain degree of control"[88]. Other authors, such as Kuczerawy, advocate likewise to abolish the passive and active distinction, but recommend broadening the liability exemption as encompassing also host providers with an "active" role[89].

3.2. Specific activities

For a better understanding, an individualised analysis is required, by looking at the specific conditions laid down for each function exempted and the CJEU jurisprudence contributions.

3.2.1. Mere conduit

Article 12 ECD comprises two separate scenarios, namely "transmission" and "provision of access" with regard to a communication network[90]. Though the concept has been traditionally linked to internet access providers (IAPs)[91], within the category we may subsume likewise transit

[85] *Google France SARL v Louis Vuitton et al.* (C-236/08), paragraph 115, 118.
[86] ARROYO AMAYUELAS, Esther. La responsabilidad de los intermediarios (…): 815.
[87] HOFFMANN, Anja, GASPAROTTI, Alessandro. Liability for Illegal Content Online (…): 9, 38.
[88] *Ibidem*, 2.
[89] KUCZERAWY, Aleksandra. Active vs. passive hosting in the EU intermediary liability regime: time for a change? (7 August 2018).
[90] The report elaborated by Schwemer, Mahler and Styri exposes the lack of a common definition to the notion of "communication network" in the ECD, while indicating that it has been, nevertheless, object of definition by certain national legislators. In this sense, the authors affirm that, as a result of the implementation of the ECD in Denmark, "communication network" was defined as "*a system that is being used to for the transmission of information between connected terminals*". SCHWEMER, Sebastian, et al. Legal Analysis of (…): 32.
[91] *Ibidem.*

networks, carriers, internet exchange points (IXPs), virtual private networks (VPNs) and Wi-Fi hotspots, which underscore the recent significant developments in the technologic field[92].

As noted by O'Sullivan, on account of the passive nature of access providers -as in the case of intermediaries performing mere conduit functions-, the immunity from liability is ensured as long as the ISSP does not initiate the transmission, select its receiver or select or modify the information contained in it[93].

Indeed, it should be stressed that the liability exemption covering intermediaries performing mere conduit functions relates directly to their scarce scope regarding detection and action in the face of illegal content. On the one hand, their activity is, as indicated in recital 42 ECD, "of a mere technical, automatic and passive nature" and, therefore, their knowledge on the content transmitted may be limited or absent. This has been noted, for instance, in the Regulation (EU) 2015/2120 laying down measures concerning open internet access, where IAPs' capability to block content voluntarily, in the absence of a legal basis, has been restricted[94]. However, as highlighted by Hynönen, although the lack of knowledge or awareness with regards to the infringing content is not listed among the condition laid down in article 12 ECD, taking into account the wording of recital 42 ECD, it must be inferred that knowledge or control over the illegal character of the information transmitted would result into the disqualification of the intermediary from the safe harbour regime[95].

On the other hand, in their capacity of facilitators running automatic services where human intervention is residual or inexistent, these intermediaries lack of discretion to act or control users' activities, as to react to unlawful behaviour[96]. Nevertheless, this does not exclude – as well as with regards intermediaries performing caching and hosting functions[97]-, in accordance with article 12.3 ECD, the issuance of injunctions on the part of national courts or administrative authorities.

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92 *Ibidem*, 13-14.
93 O'SULLIVAN, Kevin T. Copyright and Internet Service Provider "Liability": The Emerging Realpolitik of Intermediary Obligations. *International Review of Intellectual Property and Competition Law*, Vol. 50 (2019): 531.
94 SCHWEMER, Sebastian Felix, et al. Liability Exemptions of Non-Hosting Intermediaries (…): 8.
95 HYNÖNEN, Kalle. No More Mere Conduit? Abandoning Net Neutrality and Its Possible Consequences on Internet Service Providers' Content Liability. *Journal of World Intellectual Property*, Vol. 16, issue 1-2 (20 May 2013): 79.
96 STALLA-BOURDILLON, Sophie. Liability Exemptions Wanted! Internet Intermediaries' Liability under UK Law, *Journal of International Commercial Law and Technology*, Vol. 7, issue 4 (2012): 292, 296.
97 See articles 13.2 and 14.3 from the Directive on electronic commerce.

Injunctions must be imposed in compliance with the principle of proportionality[98], and in this sense, it has been claimed that providers performing mere conduit functions should benefit from a "telecoms-style broad shield"[99], notably in comparison with hosting providers. This can be exemplified by the German Federal Supreme Court approach in the *Case No. I ZR 174/14*, where it affirmed that a claim directed towards an access provider can only be taken into consideration as long as the plaintiffs have previously filed a claim against the website operators and in the event that it "has no prospect of success"[100]. In this sense and taking account of the ability to react to illegal content of the three types of intermediaries, Schwemer et al. have equally claimed that more remote intermediaries targeting should be limited and considered as "a last resort", in appliance of proportionality and in view of their technical characteristics[101].

In light of the CJEU case-law, however, it appears possible that an injunction was raised against a mere-conduit provider without conducting the claim before the most adequate provider to act. On this point, the Court maintained in *Google Spain SL v Mario Costeja González*, with a view to safeguard data subjects' fundamental rights, that national authorities may order a search engine to remove links conducing to third-party content relating to a person and displayed upon search of its name, without the need of a prior order requiring those host providers to erase beforehand or simultaneously that name or information[102].

3.2.2. Caching

The temporary storage of information is shielded from liability by article 13 ECD, as long as the intermediary respects certain conditions, namely: (a) non-modification of the information stored; (b) compliance with conditions on information access; (c) compliance with rules regarding the information uploading; (d) non-interference with the lawful use of technology, and; (e) promptly action to remove or disable access to information upon actual knowledge that it has been removed from the network, that its access has been disabled, or based on an order to do so issued by a court or an administrative authority.

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98 MAC SÍTHIGH, Daithí. The road to responsibilities: new attitudes towards Internet intermediaries. *Information & Communications Technology Law*, Vol.29, No. 1 (2020): 4.
99 *Ibidem*.
100 Decision of the German Federal Supreme Court (Bundesgerichtshof), 26th November 2015, *Case No. I ZR 174/14*.
101 SCHWEMER, Sebastian Felix, et al. Liability Exemptions of Non-Hosting Intermediaries (…): 27.
102 Judgment of the Court of 13th May 2014, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, C-131/12, ECLI:EU:C:2014:317, paragraphs 82-83.

The performance of caching functions has not raised special concern, as it has barely emerged in the course of proceedings before national jurisdictions. In particular, article 13 ECD has been only referred in judicial decisions relating to certain UseNet and CDN providers. This framing, nevertheless, does not benefit from a uniform approach -e.g., certain national courts have considered UseNet to be access providers-[103].

3.2.3. Hosting

The liability exemption established in article 14 ECD with respect to hosting providers envisages a conditional approach[104]. Indeed, the ISSP is regarded to be exempted from liability for storing information provided by its recipients in so far as it (a) neither has knowledge of illegal information or activity, nor is aware of facts or circumstances evidencing its unlawfulness, and if (b) it acts expeditiously to remove or disable access to that information as soon as he obtains the knowledge or awareness referred.

Considering the CJEU case-law, and with regard to the kind of knowledge which article 14 refers to, the Court has established in *YouTube* and *Cyando* that abstract knowledge on the unlawful availability of protected content within a platform does not suffice to dismantle the safe harbour regime, as specific knowledge on illegal information and activities is required[105].

It should be remarked that the conditions expressed above are established in a cumulative manner[106]. This has been illustrated, in the context of internet service referencing providers, when the CJEU concluded in *Google France SARL v Louis Vuitton et al.* that the granting of exemption from liability must be maintained as long as the service provider does not have knowledge, neither control, over the data stored, and on condition that he has promptly acted to remove or disable access to this data on grounds of its acknowledged unlawful nature[107].

The lack of knowledge and control over the illegal information stored by the hosting providers would be in line with the passive role envisaged by the Directive to uphold exemption

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[103] NORDEMANN, Jan Bernd. The functioning of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. European Parliament. (May 2020): 35.
[104] KUCZERAWY, Aleksandra. The EU Commission on voluntary (…).
[105] Judgment of the Court of 22nd June 2021, joined cases *Frank Peterson v Google LLC and Others and Elsevier Inc.v Cyando AG*, C-682/18 and C-683/18, ECLI:EU:C:2021:503, paragraphs 111-112.
[106] DINWOODIE, Graeme B. Secondary Liability of Internet Service Providers. 1st ed. (2017): 248. In: *Ius Comparatum - Global Studies in Comparative Law*, Vol. 25.
[107] Joined cases *Google France SARL* (C-236/08 to C-238/08), paragraphs 113-120.

from liability. Aiming at a harmonised application of the Directive, the CJEU case-law has shed light on the matter, clarifying when does the hosting provider's performance amount to an active role. In this regard, in *Stichting Brein v Ziggo BV, XS4ALL Internet BV*, the Court acknowledged that, when granting access to protected works "in full knowledge of the consequences", the hosting provider's role should be regarded as "indispensable" or "essential", subsequently amounting to an active role and its exclusion from the safe harbour regime[108].

Further guidance on which activities may qualify as hosting services under the ECD regime have been likewise provided by the CJEU case-law. On the one side, the Court excluded Uber's services from the ECD framework in *Uber Systems Spain SL*, considering that the intermediation service provided formed "an integral part of an overall service" and that the latter fell within the scope of Directive 2006/123, being regarded as a transportation service[109]. On the other side and contrarily, in *Airbnb Ireland* the Court asserted that the intermediation service, though enabling the renting of accommodation, portrayed a separate nature, justifying therefore its maintenance within the ECD regime[110]. In particular, the Court considered that some additional services provided by Airbnb Ireland -such as photography services or rating systems- would not account for an equivalent degree of control to the one inferred in cases concerning Uber, as they do not substantially modify the specific characteristics of Airbnb Ireland's service, that is, "connecting hosts and guests via the electronic platform of the same name"[111].

The conditions laid down in the Directive justify, in the view of Kuczerawy, "the legal basis of notice and take down mechanisms in the EU countries"[112]. It is important to note that hosting providers have traditionally been considered to be the most propitious providers to act in the face of a wrongdoing, notably in comparison to non-hosting providers. Substantial differences between hosting and non-hosting providers justify the referred stance, given the limited potential of the latter to take down content and the risk of over-blocking if they decide to do so[113]. Nevertheless, consequences arising from host providers' initiatives to tackle illegal content have led to the dilemma of the "good Samaritan paradox", which will be dealt in depth throughout the third chapter.

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[108] Judgment of the Court of 14th June 2017, *Stichting Brein v Ziggo BV and XS4All Internet BV*, C-610/15, ECLI:EU:C:2017:456, paragraphs 26 and 37.
[109] *Uber Systems Spain SL* (C-434/15), paragraph 40.
[110] *Airbnb Ireland* (C-390/18), paragraphs 50-52
[111] *Ibidem*, paragraphs 59, 64-67.
[112] KUCZERAWY, Aleksandra. The EU Commission on voluntary (…).
[113] SCHWEMER, Sebastian Felix, et al. Liability Exemptions of Non-Hosting Intermediaries (…): 9.

4. Novelties introduced by the upcoming Digital Services Act

Despite acknowledging that the ECD objectives have not been fully attained[114], the DSA has expressly maintained its applicability[115], while foreseeing substantial changes, notably by excluding online platforms from the safe harbour regime envisaged for hosting providers[116] and imposing asymmetrical obligations on very large online platforms (VLOPs), taking account of their higher capability to comply[117].

The overall approach to the conditions that -renamed- providers of intermediary services performing mere conduit, caching and hosting services need to fulfil in order to qualify within the safe harbour regime has remained unchanged, namely the imposition of liability on a horizontal basis[118], the prohibition of general monitoring obligations[119] and the passive and neutral role to be played by providers -to the extent that neither knowledge nor control is given over the information provided by service recipients-[120]. Likewise, the DSA reiterates that the deliberate collaboration with service recipients in the commission of illegal activities would automatically override the liability exemptions recognised to them[121].

Notwithstanding, the DSA proposal settles certain principles which had not been foreseen in the ECD framework. On the one side, the regulation would equally apply to providers having its residence outside the EU territory but directing its services towards the internal market, as long as a substantial connection to the Union is evidenced -namely, when the provider activities target one or more member states, or a considerable number of the recipients of such service, in relation to the state's population, is located in one or more member states-[122].

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114 European Parliament and Council proposal for a regulation on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, 15th December 2020, COM/2020/825 final, p.7.
115 European Parliament and Council proposal for a regulation on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (provisional agreement resulting from interinstitutional negotiations), 15th June 2022, COM(2020)0825 – C9-0418/2020 – 2020/0361(COD), art. 1a. 3.
116 In line with recital 23 of the provisional agreement on a DSA, the activities undertaken by online platforms should not be able to fall within the safe harbour regime for hosting service providers.
117 Proposal for a regulation on a DSA (15th December 2020), p. 11.
118 Provisional agreement on a DSA, recital 17. Nevertheless, according to recitals 10 and 11, the Regulation for a DSA would not derogate the « existing sector-specific legislation », notably with regards to copyright, which would be considered as *lex specialis*.
119 *Ibidem*, art. 7.
120 *Ibidem*, recital 18.
121 *Ibidem*, recital 20.
122 *Ibidem*, art. 1a, recitals 7-8.

On the other side, with reference to injunctions, the proposal envisages as a general rule that orders restricting access to information must be issued against "the specific provider that has the technical and operational ability to act against specific items of illegal content" with a view to guarantee access to rightful information and taking into account that the targeted provider is in a "reasonable position" to attain such aim[123]. Moreover, articles 8 and 9 of the proposal lay down specific criteria to be complied with by Member States and intermediaries in relation to orders. In particular, these articles establish the content, territorial scope, and linguistic conditions to be considered by Member States when issuing orders which oblige providers of intermediary services to duly inform these authorities upon receipt of the order, for instance, of the actions they have taken to tackle illegal content[124].

Looking at the three intermediaries included in the safe harbour, the DSA has preserved the liability exemption covering activities of mere conduit, caching and hosting, while expressly admitting its different scope "as interpreted by the Court of Justice of the European Union"[125]. Nevertheless, in pursuit of a uniform implementation by all Member States ensuring coherence with the existing CJEU case-law on the matter, the proposal takes the shape of a regulation and provides for the explicit derogation of articles 12 to 15 of the ECD, which are replaced by articles 3, 4, 5 and 7 of the Regulation, respectively[126].

Lastly, the proposal establishes an unbalanced and gradual series of due diligence obligations depending on the nature and the size of service providers. As concerns the current chapter, it is convenient to address the duties applying to all kind of providers and, moreover, those related solely to hosting providers -not falling under the scope of an OP-.

On the one hand, the envisaged DSA obliges all providers to establish a single point of contact (article 10), to include in their terms of conditions any restriction which they may impose regarding the use of their services and considering the information provided by their recipients (article 12) and to publish on a yearly basis reports relating to any content moderation undertaken by the provider (article 13)[127]. In addition, article 11 requires providers not established in the

123 *Ibidem*, recitals 26, 82, 83.
124 *Ibidem*, arts. 8-9.
125 *Ibidem* recital 19.
126 The explicit derogation is foreseen in article 71.1 of the provisional agreement.
127 It should be noted that article 13.2 of the provisional agreement on a DSA expressly excludes "micro or small enterprises" which do not qualify as VLOPs from the transparency reporting obligations.

Union's territory to appoint and vest with sufficient power and resources a legal representative "in one of the Member States where the provider offers its services" (article 11).

On the other hand, and in relation exclusively to hosting providers not classified as OP, articles 14 and 15 lay down compulsory notice-and-action mechanisms and the ulterior duty to inform the recipients upon the removal or disabling of access affecting items of information made available online by the recipients[128].

[128] Further assessment on the topic will be provided throughout the third chapter.

CHAPTER 2: ONLINE PLATFORMS ACTING AS INTERMEDIARIES

The utmost importance of platforms in the online environment justifies a separate approach to this category. As the ECD regime did not foresee any particularities for OPs, given the non-existence of main platforms -such as Google or Amazon- at the date, review will take into consideration the main novelties arising from the proposal agreement on a Digital Services Act.

1. What is an online platform?

As Rózenfeldová and Sokol affirm, there is not a uniform definition on OPs as consensus is lacking among professionals or legislators. Therefore, the existing definitions which may be found in academic literature point out to diverging criteria[129].

Nevertheless, as the authors have stressed, a list of the "most common characteristics" related to OPs has been put forward by the European Commission, in particular, relating to their:

a) "capacity to facilitate, and extract value, from direct interactions or transactions between users;
b) ability to collect, use and process a large amount of personal as well as nonpersonal data in order to optimize, inter alia, the service and experience of each user;
c) capacity to build networks, where any additional user will enhance the experience of all of the existing users (the so-called 'network effect'), and;
d) ability to create and shape new markets and to regulate or control the access to them;"[130]

Attending to the diversity of existing OPs, Ducci foresees as one of their distinguishing features the fact that they are linked by "indirect network effects". This is to be interpreted, with regards to platforms playing an intermediary role, as creating a dependence on the side of OPs, whose value is made dependent on the presence of different categories of users joining the platform[131]. For instance, in the context of ride-hailing networks -such as Uber-, an OP would be entirely dependent on the usage of its intermediary services by both drivers and passengers.

[129] RÓZENFELDOVÁ, Laura, SOKOL, Pavol. Liability Regime of Online Platforms (…): 868.
[130] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on online platforms and the digital single market: Opportunities and Challenges for Europe, 25 May 2016, COM(2016) 288 final. p. 3.
[131] DUCCI, Francesco. Gatekeepers and platform regulation: is the EU moving in the right direction? Sciences Po. (March 2021): 7.

1. Online platforms in the context of the ECD

In accordance with Rudohradská and Treščáková and bearing in mind that the new regulatory package has not yet been approved, the ECD represents the "basic regulatory legal framework" when it comes to Ops and services[132]. In the context of OPs playing an intermediation role, these have traditionally been included, in light of their hosting functions, within the safe harbour foreseen for hosting providers under article 14 ECD, as illustrated by CJEU case-law[133]. The categorisation of platforms as intermediaries -rather than, for instance, providers of services- and, subsequently, the ability to fall within the ECD liability exemption regime, benefits substantially OPs, being the issue of labelling an aspect of major concern for companies[134].

Nevertheless, Rudohradská and Treščáková have outlined, in line with the European Commission's position in the European Agenda for the Collaborative Economy, that in order to determine whether the platform is providing a service or acts as a mere intermediary, it is required to proceed with a case-by-case analysis. Such an approach may be deduced likewise from the CJEU case-law, notably by considering the Court's approach in *Star Taxi App* and *Uber*, both cases concerning collaborative economy platforms in the field of ride-hailing services[135]. Unlike its position in *Uber*, already discussed in the prior section, the Court acknowledged in *Star Taxi App* that the platform had to be considered as an ISSP, rather than a "service in the field of transport", in view that (1) customers were solely put into contact with authorised taxi drivers already engaged in the transportation activity, rather than non-professional drivers, and that (2) the platform did not have control over, among others, the selection of the taxi drivers or the determination of the journey fares[136].

The lack of a separate and distinct regulation for OPs in the ECD, in view of the precondition that providers' activity must be of a "mere technical, automatic and passive nature" in order for them to qualify within the safe harbour regime, has been criticised as it may

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132 The authors highlight likewise the importance of the so-called business-to-business regulation (B2B) in the context of online intermediation services. RUDOHRADSKÁ, Simona, TREŠČÁKOVÁ, Diana. Proposals for the Digital Markets Act and Digital Services Act: broader considerations in context of online platforms. In: *EU 2021 – The future of the EU in and after the pandemic* (2021): 492.

133 See, among others, *Airbnb Ireland* (C-390/18), *YouTube and Cyando* (C-682/18 and C-683/18), *Google France SARL v Louis Vuitton et al.* (236/08), *L'Oréal v. eBay* (C-324/09).

134 CHAPUIS-DOPPLER, Augustin, DELHOMME, Vincent. Regulating Composite Platform Economy Services: The State-of-play After Airbnb Ireland. *European Papers - A Journal on Law and Integration*, Vol. 5 (12 May 2020): 416.

135 RUDOHRADSKÁ, Simona, TREŠČÁKOVÁ, Diana. Proposals for the (…): 493.

136 Judgment of the Court of 3rd December 2020, *Star Taxi App SRL v Unitatea Administrativ Teritorială Municipiul București prin Primar General and Consiliul General al Municipiului București*, C-62/19, ECLI:EU:C:2020:980, paragraphs 50-55.

disincentivise platforms to adopt proactive measures to fight against illegal content. Indeed, this has resulted, as noted by Chapuis-Doppler and Delhomme, into a loosening -and, in some cases, rejection- of control on the side of platforms, giving rise to serious and considerable market failures[137].

Taking into consideration the role of platforms in the current online ecosystem, and in light of certain "negative externalities"[138] arising from the platform economy, a deep reassessment on EU rules applying to digital services has been deemed necessary[139]. In this connection, the upcoming sub-sections will approximate the legislative changes included in the DSA and which impose additional duties on OPs.

3. Online platforms in the context of the DSA

3.1. The addressees

The DSA foresees two sets of obligations which apply to OPs depending on their size: (1) a first set of duties who applies to all OPs, and (2) certain specific obligations which will only apply to VLOPs, in addition to the prior ones. In this regard, the European legislator has taken into account public policy concerns to ensure compliance of VLOPs, who are considered as capable of causing societal risks and have a disproportionate impact in the Union by reason of their size and reach[140].

As stated in article 25 of the provisional agreement, an OP will qualify as a VLOP as long as it provides its services "to a number of average monthly active recipients of the service in the Union equal to or higher than 45 million". In addition, the regulation requires the Commission to determine an adequate methodology to identify those recipients and to adjust the quantitative criteria based on fluctuations of the EU population, both by adopting delegated acts to this regard. Furthermore, biannual verification on the qualification of VLOP is to be carried out by the Digital Services Coordinator, so as to keep the list of designated VLOPs published in the OJEU updated.

137 CHAPUIS-DOPPLER, Augustin, DELHOMME, Vincent. Regulating Composite Platform Economy Services (…): 425.
138 *Ibidem*, 428.
139 RODRÍGUEZ DE LAS HERAS BALLELL, Teresa. The background of (…): 76.
140 Provisional agreement on a DSA, recital 54.

The proposal on a DSA justifies the adoption of a separate set of obligations applying solely to VLOPs on the basis of a proportionality test and the absence of "alternative and less restrictive measures" capable of ensuring an equivalent and effective result[141]. Contrarily, some authors, such as Laux, Wachter and Mittelstadt, have claimed that the establishment of thresholds may be unfounded, since it disregards the smaller platforms' ability to pose societal risks by, for instance, disseminating infringing content[142]. Subsequently, the imposition of additional duties by reason of size rather than in light of the seriousness of the infringement may impair the enforcement of the regulation, as platforms of a smaller size disclosing illegal content would be required to comply with a lower standard of protection.

3.2. Supplementary obligations for online platforms

While explicitly excluding micro or small enterprises as to "avoid disproportionate burdens"[143], the agreed text on a DSA lays down a series of duties applying to all OPs with a view to reinforce transparency and accountability, in particular with regards to platforms' practices in the context of content removal[144].

From the one side, the regulation may be deemed to better protect and even empower recipients of the service in the face of platforms' infringements. In this regard, the regulation requires platforms to make available an internal complaint-handling system, for the purpose of allowing recipients of the service to lodge complaints "electronically and free of charge" in light of content removal practices[145]. Furthermore, the establishment of out-of-court dispute settlement means is encouraged to enhance recipients' protection, while expressly acknowledging that the possibility to seek for judicial redress remains unaffected[146]. In the context of advertisement, recipients of the service are likewise given a stronger stance, as platforms are prescribed to provide individualised information on the advertisements presented to them and the main parameters used to that end[147].

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141 *Ibidem*, recital 53.
142 LAUX, Johann, et al. Taming the few: Platform regulation, independent audits, and the risks of capture created by the DMA and DSA. *Computer Law & Security Review*, Vol. 43 (November 2021): 7.
143 Provisional agreement on a DSA, art. 16, recital 43.
144 KIRK, Niamh, et al. The Digital Services Act Package: A Primer. UCD Centre for Digital Policy.
145 Provisional agreement on a DSA, art. 17.
146 *Ibidem*, art. 18.1.
147 *Ibidem*, art. 24.

From the other side, while precluding an obligation to general monitoring on the side of OPs[148], the Proposal enhances their accountability and makes the imposition of responsibility dependent on effective and timely-fashion action against infringements. In this connection, an OP is expected to treat with priority notices submitted by trusted flaggers[149] and to "promptly inform" the competent authorities in the face of any actual or potential commission of "a criminal offence involving a threat to the life or safety of a person or persons"[150]. Furthermore, providers of OPs are entitled to temporarily suspend their provision of services with regards to recipients who, by frequently providing illegal content, engage in abusive behaviour[151].

It is important to note that, unlike the initial proposal submitted by the Parliament and the Council in December 2020, the agreed text conceives, in a separate sub-section, additional duties to be imposed on providers of OPs which allow consumers to conclude distance contracts with traders. In this regard, articles 24(c) to 24(e) require these providers to ensure traceability of traders, appropriate design of its online interface to comply with their information duties, as well as consumers' right to information.

3.3. Additional specific duties for VLOPs

Among the complementary duties imposed on VLOPs, the notion of "risk assessment" acquires a prominent character. According to article 26 of the agreed text, these platforms need to "identify, analyse and assess any systemic risks stemming from the design, including algorithmic systems, functioning and use made of their services in the Union (…) at least every year (…)" and, in particular: (1) risks related to the misuse of their services in terms of dissemination of illegal content, and (2) any "actual or foreseeable" negative impact which the service may have on fundamental rights protected by the Charter, civic discourse, electoral processes, public security, gender-based violence, public health, minors and human physical and mental well-being[152]. Alongside, "reasonable, proportionate and effective" measures must be enforced as to mitigate the outlined systemic risks[153].

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148 *Ibidem*, art. 7,

149 According to the regulation, the status of trusted flaggers *"should only be awarded to entities, and not individuals, that have demonstrated, among other things, that they have particular expertise and competence in tackling illegal content and that they work in a diligent, accurate and objective manner". Ibidem*, art. 19, recital 46.

150 *Ibidem*, art. 15a.

151 *Ibidem*, art. 20, recital 47.

152 *Ibidem*, art. 26.

153 *Ibidem*, art. 27.

In terms of enhanced accountability, the Proposal sets out a vast array of additional obligations, such as yearly independent audits, transparency duties with relation to online advertising, recommender systems, the provision of data access and the establishment of a compliance function[154].

[154] *Ibidem*, art. 28-32.

SECTION 2: PARTICULAR ISSUES ARISING FROM THE LIABILITY REGIME OF ONLINE INTERMEDIARIES

CHAPTER 3: MEANS OF RESPONSE TO ILLEGAL CONTENT AVAILABLE ONLINE

Once the general framework has been established for both legal regimes, it is convenient to address within this chapter the intermediaries' ability to react to illegal content, which they may get awareness of by the notice-and-action mechanisms or proactive measures adopted on a voluntary basis.

1. Notice-and-action regime

1.1. Types of notice-and-action procedures available to providers under the current framework

As the Commission notes, there does not exist a harmonised legal framework foreseeing a common notice-and-action procedure, but these mechanisms have been adopted at a national level. In this regard, Member States' approach varies significantly in terms of the illegal content which may be reported, the procedural requirement and the minimum content to provide when engaging in the mechanism[155].

Despite the divergent national legislations, Kuczerawy has identified three main mechanisms which are at the disposal of intermediaries in order to offer a suitable remedy following rights holder's claims reporting illegal or infringing content available on the internet. These complaint mechanisms, which will be dealt in-depth below, are notice-and-take-down, notice-and-notice, and notice-and-stay-down.

A common feature to all of them is that they ensure relief-seeking to those who may consider their rights to have been infringed and that the procedure starts always by way of a notice. The actions adopted by the intermediary upon notice will determine the procedure followed, whose

[155] ICF et al. Overview of the legal framework of notice-and-action procedures in Member States SMART 2016/0039: executive summary. European Commission. Directorate General for Communications Networks, Content and Technology. (2018): 3.

consequences (notably in the case of removal or blocking of content) may conflict with the right to freedom of expression or the prohibition to general monitoring enshrined in the ECD[156].

1.1.1. Notice-and-take-down

By implementing the notice-and-take-down (NTD) mechanism, the internet provider must decide, upon direct notice by a private entity of an infringement impairing its rights, whether the content is infringing or illegal and, consequently, whether it should be removed, or it may be kept available[157].

Throughout the last decade, the NTD mechanism has been object of sectoral EU regulations aiming at ensuring a minimal standard of rights protection, notably in the field of data protection and copyright.

In the context of data protection, the GDPR allows immediate restriction of information publicly accessible upon notice by the data subject in this regard[158]. After the provider's assessment, the information may be definitively removed, being this decision necessarily notified to the data subject and other parties affected in order to ensure contestability. It should be stressed that the "erasure" of content must be proportionate and only apply when there are "no overriding legitimate grounds for the processing", in light of article 17 (c) GPDR and as follows from the *Google Spain* judgement[159].

With regards to copyright, article 17 from the Copyright Directive places further obligations on OPs to prevent the uploading of copyright-infringing[160], as they can be deemed liable in the event that they fail "to disable access to, or to remove from their websites, the notified works or other subject matter"[161].

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156 KUCZERAWY, Aleksandra. From 'Notice and Take Down' to 'Notice and Stay Down': Risks and Safeguards for Freedom of Expression (19 December 2018): 2. In FROSIO, Giancarlo (ed), The Oxford Handbook of Intermediary Liability Online (2019).
157 *Ibidem*, 3.
158 European Parliament and Council regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). OJ L119, 4.5.2016, p. 1 et seq., art. 18.
159 KELLER, Daphne. The Right Tools: Europe's Intermediary Liability Laws and the EU 2016 General Data Protection Regulation (2018): 327-335.
160 SOOGUMARAN, Krishen. Article 17 of the EU Copyright Directive (…).
161 Directive on copyright and related rights, Article 17 4 (c).

With respect to the existing framework under the ECD, Kuczerawy denounces the lack of further provisions providing guidance in the implementation of NTD procedures. On the contrary, the author claims that the EU legal framework "incentivises over-compliance and interference with fundamental human rights", as it leaves the decision on taking down content in the hands of intermediaries, who have, in turn, adopted a cautionary approach when acting upon any evidence of illegality[162].

1.1.2. Notice-and-notice

The notice-and-notice (NN) procedure differs from the previous one in as much as it does not place on the intermediary an obligation to take-down the illegal content but requires it solely to forward the notice to the indicated end-user. This method, therefore, departs from the self-regulatory approach and foresees intermediaries to perform their traditional role as "middlemen"[163].

The fact that the removal decision is not taken by intermediaries but left at the discretion of courts has been considered to ensure an adequate degree of fairness at the procedural level. This contributes, ultimately, to uphold the legitimacy of this procedure[164].

From a practical perspective, Angelopoulos and Smet have affirmed that the NN mechanism is the most suitable procedure to counter copyright infringements, as it offers copyright holders the possibility to reach directly the alleged primary wrongdoer, who will be granted a limited lapse of time to either remove the content reported as illegal or contest the notification[165].

1.1.3. Notice-and-stay-down

The notice-and-stay-down (NSD) mechanism foresees for intermediaries not only an obligation to remove illegal content (such as in the NTD regime), but also to ensure that it is not subsequently reuploaded, either by the former wrongdoer or by different users[166].

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[162] KUCZERAWY, Aleksandra. Intermediary liability & freedom of expression: Recent developments in the EU notice & action initiative. *Computer Law & Security Review*, Vol. 31, Issue 1 (February 2015): 49.
[163] ANGELOPOULOS, Christina, SMET, Stijn. Notice-and-fair-balance (…): 22.
[164] KUCZERAWY, Aleksandra. From 'Notice and Take Down' to (…): 10.
[165] ANGELOPOULOS, Christina, SMET, Stijn. Notice-and-fair-balance (…): 22.
[166] KUCZERAWY, Aleksandra. From 'Notice and Take Down' to (…): 13.

This procedure, which was first formulated in *L'Oréal v. eBay* and re-coined as "upload-filters" in accordance with Nordemann[167], has been included within the Copyright Directive framework, placing an obligation on providers to make "best efforts" to prevent future uploads of reported infringing content by rightsholders[168]. Such an approach, nevertheless, has been the object of different views among doctrine.

On the one side, some academics have considered the establishment of a NSD duty to be in line with the acquis Communautaire. For instance, Lucas-Schoetter justifies its adequateness on the ground that it respects the rights recognised within the Charter of Fundamental Rights of the European Union and it does not constitute general monitoring, but a temporary one whose object is "content identified by rightholders as being infringing"[169].

On the other side, the risks which may pose the usage of content recognition and filtering systems has given rise to criticism by, among others, Angelopoulos and Smet, Stalla-Bourdillon, Frosio, and Senftleben[170]. In this regard, Angelopoulos and Smet have considered this mechanism to be disproportionate to the effect that it inevitably amounts to general monitoring, which is forbidden in line with article 15 ECD[171].

1.2. The prospected procedures regulated within the DSA

Article 14 of the DSA proposal obliges hosting providers and OPs to put in place mechanisms allowing any individual or entity to submit notices to report the existence of illegal content on the provider services. In line with the provision, the mechanism foreseen by the regulation is required to be "easy to access, user-friendly" and allow for the exclusively electronic submission of notices[172].

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167 NORDEMANN, Axel. Upload Filters and the EU Copyright Reform. *International Review of Intellectual Property and Competition Law*, Vol. 50, No. 3 (March 2019): 276.
168 Directive on copyright and related rights, article 17.4 (c)
169 LUCAS-SCHLOETTER, Agnès. Transfer of Value Provisions of the Draft Copyright Directive (recitals 38, 39, article 13). (March 2017): 19-21.
170 ROMERO-MORENO, Felipe. 'Notice and staydown' and social media: amending Article 13 of the Proposed Directive on Copyright. *International Review of Law, Computers & Technology*, Vol. 33, No. 2 (4 May 2019): 203-204.
171 ANGELOPOULOS, Christina, SMET, Stijn. Notice-and-fair-balance (…): 17.
172 Likewise, the proposed text establishes that providers must make sure that individuals and entities are able to notify, through a single notice, multiple specific items of allegedly illegal content. Provisional agreement on a DSA, art. 14, recital 40.

It should be stressed that the proposed text explicitly stresses that the receipt of a notice reporting illegal content amounts to "actual knowledge or awareness" on the side of the provider. Consequently, the failure of a provider to process and decide on the reported content "in a timely, diligent and objective manner" may give rise to liability.

Finally, whether a provider decides to remove or disable information, either upon notice or acting on its own initiative, article 15 of the agreed text imposes a duty to inform the recipient, on a clear and comprehensible manner, of the decision taken, the reasons justifying its adoption and the available mechanisms to contest the decision, including in all cases judicial redress[173].

2. Solving the "Good Samaritan" paradox

2.1. What does it refer to?

As it has been discussed throughout the first chapter, the ECD requires online intermediaries to act expeditiously in order to remove or disable access to information of an unlawful character, being excluded from the liability exemption whether they fail to do so. This duty to act, which is triggered upon obtention of knowledge or awareness of facts or circumstances evidencing the unlawfulness of such information, may emanate from -in line with the CJEU decision in *L'Oréal v. eBay*[174]- (a) notices submitted by third parties, or (b) proactive investigations on the side of intermediaries with a view to detect and tackle illegal content which may be available on their services. The latter scenario, which has been referred as "Good Samaritan" activities[175], will be discussed in-depth along the present subsection.

It has been stressed that, by way of implementing proactive measures voluntarily, providers risk departing from the safe harbour afforded to them within the ECD, to the extent that those activities may amount to an active role or, alternatively, give rise to awareness of illegal content and place the provider under the additional duty to react upon such knowledge[176]. This situation has developed into the so-called "Good Samaritan" paradox, as the provider may be on a less favourable position despite having voluntarily undertaken steps to tackle illegal content online.

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173 Provisional agreement on a DSA, art. 15.2, recital 42.
174 *L'Oréal and Others v. eBay* (C-324/09), paragraph 122.
175 WILMAN, Folkert. *The responsibility of online intermediaries for illegal user content in the EU and the US*. Cheltenham, UK Northampton, MA, USA: Edward Elgar Publishing. Elgar information law and practice. (2020).
176 RIIS, Thomas, SCHWEMER, Sebastian Felix. Leaving the European Safe Harbor, Sailing Towards Algorithmic Content Regulation. *Journal of Internet Law*, Vol. 22, No. 7 (December 2018): 19.

With a view to address this legal paradox, "Good Samaritans" have traditionally been protected within the US legal system, which grants providers, in the US Section 230(c)(2) of the Communications Decency Act (CDA), a liability exemption for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected (…)".

Regarding "Good Samaritans"' protection under the EU legal framework, although we find no explicit provision in the ECD to this regard, it should be noted that the EU Commission has encouraged hosting providers to implement "appropriate, proportionate and specific"[177] proactive voluntary measures, ensuring that those do "not automatically lead to the online platform losing the benefit of the liability exemption provided for in Article 14 of the E-Commerce Directive"[178].

Nevertheless, such an approach has been object of concern among the doctrine. For instance, Kuczerawy has denounced that it only guarantees partial protection to Good Samaritans, who will lose their immunity whether they fail to act upon knowledge or awareness of illegal content[179]. In this connection, Riis and Schwemer have upheld that, although the enforcement of proactive measures does not *de jure* restrict the safe harbour protection, the latter is reduced *de facto* by way of making intermediaries' liability dependant "on the effectiveness of the measures"[180] that they will take to counter the unlawfulness.

2.2. A particular safeguard to be included in the DSA proposal

In the midst of the upcoming legislative change, it is worth mentioning that the provisional agreement on a DSA has remedied the legal lacuna existing in the ECD by introducing a specific provision aimed at overcoming the "Good Samaritan" paradox. To this effect, article 6 of the proposal acknowledges that the liability exemptions granted to providers of intermediary services performing mere conduit, caching and hosting functions will not cease to apply, as long as they act "in good faith and in a diligent manner", even though they undertake, on a voluntary basis, actions

[177] European Commission. Commission recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online. OJ L63, 6 March 2018, p. 50 et seq., recital 18.
[178] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Tackling Illegal Content Online: Towards an enhanced responsibility of online platforms. 28 September 2017, COM(2017) 555 final, point 10, paragraph 2.
[179] KUCZERAWY, Aleksandra. The EU Commission on voluntary (…).
[180] RIIS, Thomas, SCHWEMER, Sebastian Felix. Leaving the European Safe Harbor (…): 19.

aimed at detecting, identifying and tackling illegal content. Acting in the referred manner, according to the proposed text, would imply operating in "an objective, non-discriminatory and proportionate manner, with due regard to the rights and legitimate interests of all parties involved, and providing the necessary safeguards against unjustified removal of legal content"[181].

Consequently, although not ascertaining an absolute liability exemption for providers who undertake proactive measures, the proposed text guarantees that "Good Samaritan" activities will no longer be taken into account in order to determine whether the service is provided neutrally by the intermediary[182]. In this regard, we may infer that the drafted provision, apart from broadening and at the same time restricting the "Good Samaritan" protection to providers who accomplish mere conduit, caching and hosting functions, may likewise shed light on the already highlighted doctrinal concerns.

[181] Provisional agreement on a DSA, recital 25.
[182] *Ibidem.*

CHAPTER 4: THE USAGE OF AUTOMATED CONTENT RECOGNITION AND FILTERING TECHNOLOGIES TO TACKLE ILLEGAL CONTENT ONLINE

In line with technology advancement, we can observe greater implementation of content detection and filtering mechanisms, which already play a substantial role in certain fields such as copyright protection or fight against terrorist content[183], to the detriment of traditional governance mechanisms, which have been argued to be insufficient to tackle illegal and harmful practices[184]. In this regard, its usage has even been claimed to be "inescapable", provided its ability to process "massive amounts of user-generated content" while ensuring uniformity and particularity[185].

Nevertheless, the usage of automated means has likewise raised severe criticism, noting the opaque and dynamic character of machine learning algorithms[186] and the difficulty in providing "context-specific assessments"[187]. The bad functioning of automated means may, in turn, lead to over-blocking, based on the removal of lawful content erroneously identified as illegal (false positives)[188].

In view of the opportunities and risks at stake with regards to the usage of automated means, it is convenient to address in-depth whether its implementation, in the event that it proves to be effective, may be regarded as compulsory for online intermediaries.

1. The adequateness test

Prior to introducing a filtering system susceptible of identifying and removing unlawful content online, a provider is required to ensure that such a measure can sufficiently ensure a fair balance between all parties' rights. In particular, attention must be drawn to the consequences which the referred system could have with respect to, on the one side, the right to protection of personal data and the right to freedom of expression and information (respectively, articles 8 and

183 MADIEGA, Tambiama, et al. Reform of the EU Liability Regime (…): 15.
184 SAGAR, Sander, HOFFMANN, Thomas. Intermediary Liability in the EU Digital Common Market – from the E-Commerce Directive to the Digital Services Act. *Revista d'Internet, Dret i Política*, No. 34 (December 2021): 5.
185 ELKIN-KOREN, Niva. Contesting algorithms: Restoring the public interest in content filtering by artificial intelligence. *Big Data & Society*, Vol. 7, no. 2 (July 2020): 4.
186 Ibidem, 2.
187 WILMAN, Folkert. *The responsibility of online intermediaries for* (…).
188 MADIEGA, Tambiama, et al. Reform of the EU Liability Regime (…): 16.

11 CFR) and, on the other side, the freedom to conduct a business and the right to intellectual property (respectively, articles 16 and 17 CFR)[189].

The importance of ensuring a fair balance among fundamental rights arises from the CJEU case-law, as it denied in *Scarlet Extended v. SABAM* and *SABAM v. Netlog* the necessity of implementing a filtering system, arguing that it would amount to active monitoring of all customers' data, without limitation on time, covering existing and future works to be uploaded within the service[190]. Additionally, the Court acknowledged a lack of fair balance considering that the provider would be obliged "to install a complicated, costly, permanent computer system at its own expense"[191].

Nonetheless, in the context of defamatory content, the Court adopted in *Eva Glawischnig-Piesczek v Facebook Ireland Limited* a particular stance on the matter, allowing specific monitoring obligations, which considered reasonable on the grounds that Facebook had "recourse to automated search tools and technologies"[192]. The Court granted national courts the power to issue dynamic blocking injunctions ordering providers to remove or block access to information with identical or equivalent meaning to previously declared unlawful information, also with a view to prevent "any further impairment of the interests involved". At the same time, it expressly declared that such an obligation would not amount to general monitoring[193].

Considering the role of filtering systems in the effective implementation of such an injunction, Milczarek has raised its concern on the consequences that the screening of information may have on the right to freedom of expression. In particular, the author has upheld that the judgement fails to observe a balance between "the general interest of the community and the interests of the individual" and has regarded preventive content monitoring systems to compromise freedom of expression[194].

In light the abovementioned case-law, it is manifest that proportionality must not be overlooked in the adoption of automated filtering means. Nevertheless, it is worth considering whether the usage of such means could be imposed on providers. In this regard, Sartor, while

189 SENFTLEBEN, Martin. Institutionalized Algorithmic Enforcement—The Pros and Cons of the EU Approach to UGC Platform Liability. *FIU Law Review*, Vol. 14, no. 2 (1 January 2020): 309-310.
190 RIIS, Thomas, SCHWEMER, Sebastian Felix. Leaving the European Safe Harbor (…): 12.
191 *Scarlet v SABAM* (C-70/10), paragraph 48.
192 *Eva Glawischnig-Piesczek v Facebook Ireland Limited* (C-18/18), paragraph 46.
193 *Ibidim,* paragraph 37.
194 MILCZAREK, Ewa. Preventive content blocking and (…): 273.

acknowledging that moderation is "required in online communities" and should be legally encouraged in good faith, adopts a cautionary approach to the matter, considering that imposing liability on providers for the existence of unlawful content on their services (even as a failure of its duties of care) could be detrimental, as providers would be compelled to adopt "excessively strict screening tools and procedures"[195].

Nevertheless, considering the Court's case-law and the development of filtering technologies, Sartor forecasts that "general monitoring" is likely to be restricted in favour of specific obligations to monitor content. To ensure the proper functioning of the latter, the author points at several conditions which would need to be safeguarded, namely clear and non-ambiguous identification of the unlawful items and certainty that automated tools are accurate, cost-effective, at the disposal of the provider, and allow for a fair balance of the interests at stake[196].

A similar perspective on the obligation to monitor has been brought forward by Frosio in the framework of copyright infringements, considering that such a duty would raise concern in terms of appropriacy and proportionality. The author notes, *inter alia*, that a provision in this regard would imply a departure from the current negligence-based regime, making the acquisition of knowledge on illegal content irrelevant, leading towards a "strict liability regime"[197].

To conclude, and as the traditional alternative to automated filtering within the context of online moderation, it is convenient to refer to human oversight. In line with the European Commission's views on its White Paper on Artificial Intelligence (2020), human involvement is essential to guarantee "trustworthy, ethical and human-centric" implementation of artificial intelligence means. By ensuring human review at a prior, current, or posterior phase in relation to the usage of automated technologies (or even within the design phase of such means), adverse effects arising from its enforcement can be offset, while reinforcing human autonomy throughout the monitoring process[198]. Additionally, Senftleben has emphasised that human oversight may play a major role in the improvement of self-learning algorithms, as filtering systems "may be able to learn from decisions on content permissibility taken by humans"[199].

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195 SARTOR, Giovanni. The impact of algorithms for online content filtering or moderation: "Upload filters". European Parliament. (September 2020): 54, 58.
196 *Ibidem*, 63.
197 FROSIO, Giancarlo. To Filter or Not to Filter? (…): 365.
198 European Commission, White Paper on Artificial Intelligence - A European approach to excellence and trust, 19 February 2020, COM(2020) 65 final, p. 21.
199 SENFTLEBEN, Martin. Institutionalized Algorithmic Enforcement (…): 324.

2. Resorting to automated means within the current legal framework

Within the ECD framework, despite the lack of an explicit mention on the usage of automated means, it should be stressed that the Directive allows providers under a duty to act to adopt, based on voluntary agreements, "rapid and reliable procedures for removing and disabling access to illegal information"[200]. Subsequent sectorial legislation, particularly in the context of copyright infringements, has taken a more precise approach on the matter. In particular, article 17.4 from the Copyright Directive requires providers in paragraphs (b) and (c) to make best efforts in order to render inaccessible specific protected works lacking rights-holders' authorisation, as well as to "prevent their future uploads".

In light of the article's potential (and, to some extent, necessity) for the usage of automated means, in 2019 the Polish government filed an action for annulment against the provision on the grounds that it required providers to install monitoring and filtering systems susceptible of affecting lawful uploads and, consequently, it undermined the right to freedom of expression. In its opinion, the Advocate General (AG) Saugmandsgaard Øe provided clearance on the limits to permitted filtering of user's uploads, circumscribing this to manifestly infringing content and submitting the lawfulness of non-manifestly infringing content to judicial decision[201].

Following the AG's reasoning, the Court acknowledged the lawfulness of specific filtering obligations which may require, in some instances, the recourse to automatic recognition and filtering tools. Nonetheless, with a view to ensure a fair balance between the right to freedom of expression and the right to intellectual property, the Court recalled the inadequacy of a filtering mechanism which may fail to distinguish between unlawful and lawful communications, being susceptible of blocking the latter[202].

3. Enforcement of automated means in the upcoming DSA

Unlike the ECD, the proposal on a DSA explicitly takes into account the implementation of automated means in the context of notice and action mechanisms. Although it allows providers to develop and effectively introduce automated recognition systems, the proposed text adopts a

[200] Directive on electronic commerce, recital 40.
[201] JÜTTE, Bernd Justin, PRIORA, Giulia. On the necessity of filtering online content and its limitations: AG Saugmandsgaard Øe outlines the borders of Article 17 CDSM Directive. (20 July 2021).
[202] Judgment of the court of 26th April 2022, *Republic of Poland v European Parliament and Council of the European Union*, C-401/19, ECLI:EU:C:2022:297, paragraph 86.

cautionary approach towards content blocking, stating that it can solely concern illegal content and imposing mandatory safeguards on providers when users' information is erased[203]. For instance, providers of intermediary services are required to publicly report whether they have engaged in content moderation including, with regards to the automated means implemented, "a qualitative description, a specification of the precise purposes, indicators of the accuracy and the possible rate of error of the automated means (…)"[204]. In the context of content removal, the provider is obliged to inform the user on the usage made of automated means in taking the decision or for reasons of identifying the removed content[205]. Additionally, with reference to the internal complaint-handling system, providers must ensure that their decision is taken "under the control of appropriately qualified staff, not solely on the basis of automated means"[206].

Nevertheless, the highlighted transparency obligations with regards to the usage of automated means have been considered insufficient by the European Audiovisual Observatory, which denounces the lack of further guidance on the design and enforcement of these technologies[207]. To counter this situation, the Observatory has proposed to compel automated moderation systems to respect the seven key requirements proposed by the EU High-Level Expert Group on AI, namely: "human agency and oversight; technical robustness and safety; privacy and data governance; transparency; diversity, non- discrimination and fairness; societal and environmental wellbeing; and accountability"[208].

[203] Proposal for a regulation on a DSA (15th December 2020), p. 4, 12.
[204] Provisional agreement on a DSA, art. 13.1 (e).
[205] *Ibidem*, art. 15.2 (c).
[206] *Ibidem*, art. 17.5.
[207] BARATA, Joan, et al. Unravelling the Digital Services Act package. European Audiovisual Observatory. (2021): 20.
[208] Ibidem, 40-41.

CONCLUSIONS

Throughout this research, a two-fold approach to online intermediaries' liability has been displayed, by way of analysing the theoretical and practical issues arising from both the current and prospected legal regimes. As it was already stated in the introductory chapter, in the absence of a definitive text on the Digital Services Act, it has been necessary to recourse to the recently published provisional agreement on a DSA between the Parliament and the Council. Nevertheless, in light of the insubstantial differences of the latter as compared with the initial proposal, it is likely that the final version will alter significantly the provisions on the basis of which we have worked.

Three research questions have been object of an in-depth analysis all along this paper and will now be individually discussed on the basis of the doctrinal views, legal documents and judicial decisions that support the portrayed results.

The initial two chapters have provided clearance on the first research question, worded as it follows: "in light of the upcoming reforms in the field, will the online intermediaries' liability regime foreseen by the DSA implement substantial changes as to "override" the ECD framework principles?". Admittedly, this part of the study has required a broad comparative review on the ECD and the DSA basic premises, outlining the novelties contained in the latter, notably in relation to OPs.

Upon thorough assessment of both texts, we may conclude that the ECD basic framework is maintained by the proposed DSA, which for instance reproduces without major alterations the traditional safe harbour regime and the three providers' functions which fall within it. Nonetheless, the upcoming legislative reform foresees several additional safeguards and obligations for providers, taking notice of issues arising from the ECD implementation over the years (e.g., the assimilation of OPs as hosting providers and subsequent inclusion within the safe harbour regime) and of the contributions made by the CJEU jurisprudence on the matter.

In terms of safeguards and from a comprehensive perspective, the fact that the DSA is proposed under the shape of a regulation already marks a turning point, as it shows the European legislator's aim to ensure a uniform and coherent legal framework for all Member States while addressing former doctrinal concern on the existing legal fragmentation. Additionally, and from a more insightful approach, the proposed text seeks to reinforce users' rights by, in turn, increasing

the burden of compliance which all kind of providers (and, specially, OPs and VLOPs) must comply with, following a logical progressive trend on liability thresholds.

The above-mentioned outcome leads us to uphold that, although not overriding the current framework (as the ECD provisions, in broad terms, remain in force), the proposed reform provides significant advancement with regards to user protection, requiring providers to ensure an adequate online environment for all under penalty of liability imposition.

The second study question refers to the imposition of duties of care on providers and the "Good Samaritan" paradox, which has been developed all along the third chapter. In view of the serious concerns arising from this legal problem, the following has been disputed: "to which degree may the proactive actions adopted by online intermediaries in good faith result into their qualification as active providers and the consequent loss of the safe harbour?".

As a starting point, it is convenient to point out the overall differences with regards to liability claims resulting from both the notice-and-action mechanism and the enforcement of proactive measures. On the one side, the notice-and-action regime may raise knowledge on potential illegal content upon receipt of a notice (forcing the provider, subsequently, to react to it), and has been imposed on hosting providers and OPs by the agreed text on a DSA. On the other side, the adoption of proactive measures is a voluntary means, not required albeit encouraged by the European legislator, which may nonetheless lead to online intermediaries' liability on the grounds that they fail to deter illegal content which they would not have been aware of whether they had not implemented such proactive actions.

As a result, we may infer that the EU approach to the "Good Samaritan" paradox, unlike the American one, makes the adoption of voluntary detection means highly unattractive. In the context of the legislative reform, it should be stressed that the proposed text explicitly addresses the legal lacuna and, particularly, dissociates the acknowledgment that the intermediary has played an active role from the implementation of proactive actions. Nevertheless, to my view, the envisaged text does not confront all the vagueness surrounding the paradox and, consequently, fails to provide the legal certainty necessary to effectively encourage and safeguard the voluntary adoption of measures destined to detect and counter illegal content.

For that reason, it is possible to conclude that both, the current and the prospected legal frameworks, fail to provide appropriate safeguards to intermediaries who adopt proactive measures, given that the more illegal content they detect, the more liability risks they will incur (based on a potential failure to act).

With regards to the last issue, we have aimed to determine whether the usage of automated means is susceptible of being imposed in light of an effectiveness criteria, by posing the following research question: "following a duty to act, with an aim to remove or disable access to illegal content, is an online intermediary required to recourse to automated content detection and filtering systems whether this proves to be the most effective means to counter an infringement?".

Taking proportionality as a benchmark of the subsequent line of reasoning, the usage of automated means has undergone a prior adequateness test. As a result of it, we may infer a change on the judicial approach to the matter, which at first precluded the imposition of automated filtering in the view that it does not ensure a fair balance among rights at stake. In particular, since *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, the Court admits specific monitoring obligations which may also imply the prevention of further infringements and, thereafter, the required usage of automated means (1) on the fact that the order does not appear to be excessive in relation to the provider's capacity, and (2) contingent on the filtering system's ability to effectively distinguish between lawful and unlawful content.

The agreed text on a DSA allows for greater transparency in the usage of automated means and additional safeguards (e.g., it proscribes the provider to take the decision on content removal based solely on the grounds of automates means' usage). Nonetheless, the explicit acknowledgment of legal guarantees to the correct enforcement of these means does not suffice to affirm that a general obligation in this regard exists. Conversely, resorting to automated systems would still amount to a legal option, which could only be imposed on providers, in accordance with the recent case-law, if certain conditions are fulfilled.

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