LUISS Guido Carli
LIBERA UNIVERSITÀ INTERNAZIONALE DEGLI STUDI SOCIALI

**DIPARTIMENTO DI GIURISPRUDENZA**
**CATTEDRA DI INTELLECTUAL PROPERTY**

# THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN THE DIGITAL ERA: FROM THE E-COMMERCE DIRECTIVE TO THE DIGITAL SERVICES ACT

**RELATRICE**
Chiar.ma Prof.ssa
Silvia Scalzini

**CORRELATORE**
Chiar.mo Prof.
Christophe Geiger

**CANDIDATO**
Alessia Albini
Matr. 147503

ANNO ACCADEMICO 2020/2021

# TABLE OF CONTENTS

# List of Abbreviations

| | |
|---|---|
| CDSM | Copyright Directive in the Digital Single Market |
| DSA | Digital Services Act |
| ECD | E-Commerce Directive |
| IP | Intellectual Property |
| IPR | Intellectual Property Right |
| ISP | Internet Service Provider |
| OCSSP | Online Content Sharing Service Provider |
| VLOP | Very Large Online Platform |

# Introduzione

Il moderno processo di digitalizzazione, l'avvento delle nuove tecnologie e la diversità dei nuovi servizi digitali offerti stanno completamente rivoluzionato le dinamiche economiche e la vita di ogni cittadino Europeo[1]. In questo contesto, le "piattaforme" online rappresentano oggi non solo dei servizi di intermediazione, ma anche delle architetture socio-tecnologiche con delle ramificazioni tanto pervasive e capillari in tutti gli ambiti della vita individuale ed associata che alcuni studiosi parlano di una vera e propria "piattaformizzazione della società"[2]. Se da un lato però l'innovazione tecnologica ha aumentato il benessere collettivo garantendo la possibilità di svolgere digitalmente ogni (o quasi) servizio essenziale, questa rappresenta allo stesso tempo anche un potente mezzo tramite cui svolgere attività illecite e disseminare materiale illegale online.

La protezione dei diritti di proprietà intellettuale, tra cui in particolare marchi registrati e diritto d'autore, risulta essere un settore particolarmente soggetto a "violazioni digitali". L' European Union Intellectual Property Office (EUIPO)[3] rileva l'importanza della proprietà intellettuale nell'attuale scenario economico - tanto che le industrie ad alta intensità di diritti di proprietà intellettuale hanno nel 2019 contribuito a quasi il 45% del PIL Europeo - ma rende allo stesso tempo noto che molte delle conversazioni online sarebbero legate ad attività illegali di contraffazione di prodotti fisici e pirateria di contenuti digitali. Il diffuso utilizzo delle piattaforme digitali pone quindi anche la questione del contrasto ad un'ampia disseminazione di materiale illecito online.

[1] Per comprendere a fondo l'importanza ed essenzialità delle moderne piattaforme digitali, basti pensare alle singole azioni che ogni individuo svolge quotidianamente. Acquistare beni online tramite tecnologie di e-commerce, interagire "virtualmente" tra utenti grazie ai popolari social networks, intrattenersi in grandi piattaforme fruendo di contenuti digitali caricati dagli stessi destinatari del servizio digitale, sono solo alcune delle possibili attività da svolgere online e che danno assoluto rilievo alle infrastrutture di internet.

[2] Si veda la discussione nell'ambito del Convegno della LUISS School of Law, *The Social Dilemma: come disciplinare le piattaforme digitali? Sintesi del convegno inaugurale della IX edizione del Master di II livello in Diritto della Concorrenza e dell'Innovazione*, 19.03.2021, available at: https://lsl.luiss.it/sites/lsl.luiss.it/files/The%20Social%20Dilemma%20sintesi%20inaugurazione%20master%20concorrenza%20innovazione%202021.pdf, p. 4.

[3] EPO-EUIPO, *Intellectual property rights intensive industries and economic performance in the European Union. Industry-Level Analysis Report*, III ed., Munich and Alicante, EPO and EUIPO, 09.2019.

L'Europol[4] ha rilevato che le violazioni digitali si sarebbero in più ampiamente giovate della situazione di crisi dovuta alla diffusione del Covid-19. Nella primavera del 2020, infatti, primo periodo di lockdown forzato dovuto alla propagazione della pandemia, milioni di cittadini europei sono rimasti confinati nelle loro abitazioni, l'utilizzo di infrastrutture digitali è notevolmente aumentato e con esso anche lo svolgimento di attività illegali online come violazioni di diritti di proprietà intellettuale.

A fronte dell'estesa presenza di illeciti veicolati in particolare tramite i servizi delle piattaforme digitali, le istituzioni europee hanno ritenuto fondamentale per il funzionamento del Mercato Unico Digitale prevedere delle regole certe ed efficaci capaci di governarne tali attività. L'analisi di seguito svolta si propone di esaminare i principali strumenti legislativi proposti a livello Europeo destinati alla regolazione della responsabilità delle piattaforme digitali, prestando allo stesso tempo particolare attenzione alla protezione dei diritti fondamentali. È essenziale, infatti, che l'applicazione delle regole concepite dal legislatore tuteli non solo i titolari dei diritti di proprietà intellettuale, ma che salvaguardi adeguatamente anche gli interessi degli utenti e delle stesse imprese che offrono servizi di intermediazione digitale.

Nel primo Capitolo verrà approfondita la Direttiva E-Commerce *i.e.*, Direttiva 2000/31/EC, primo atto normativo contenente norme trasversali – "orizzontali" – destinato alla disciplina di tutti i servizi della società dell'informazione, indipendentemente dal loro settore di specializzazione. Seppur il regime da questa proposto sia da sempre considerato centrale nella regolazione delle infrastrutture digitali, l'analisi svolta mostrerà luci ed ombre della Direttiva, constatando la sua attuale inadeguatezza ed incapacità di fronteggiare alcune delle nuove sfide che si presentano a fronte dell'evoluzione tecnologica.

Il secondo Capitolo esaminerà la nuova Direttiva Copyright nel Mercato Unico Digitale *i.e.*, Direttiva 2019/790/EC, approfondendo con particolare attenzione il suo Articolo 17, considerato *lex specialis* rispetto alla generale Direttiva E-Commerce per quanto riguarda la responsabilità dei "prestatori di

[4] EUROPOL, *Pandemic Profiteering: how criminals exploit the COVID-19 crisis*, 03.2020.

servizi di condivisione dei contenuti" protetti da diritto d'autore. L'Articolo sarà oggetto di una dettagliata analisi che permetterà di coglierne gli aspetti principali, inclusi quelli derivanti dal suo rapporto con la protezione dei diritti fondamentali.

Il terzo capitolo studierà la recente proposta di Regolamento relativa a un mercato unico per i servizi digitali volta a modificare la Direttiva E-Commerce *i.e.*, "Legge sui Servizi Digitali". La trattazione prospetterà i principali emendamenti apportati alla ormai "matura" Direttiva 2000/31/EC ed in nuovi obblighi introdotti dal Regolamento per la disciplina degli intermediari digitali.

Si esporrà poi il risultante quadro legislativo per la protezione dei diritti di proprietà intellettuale nelle piattaforme online, con lo scopo di analizzare e comprendere l'interazione tra le diverse norme attualmente applicabili e le norme proposte.

.

# Introduction

The modern digitalization process, the advent of new technologies and the variety of new digital services currently offered online have completely revolutionized the economic dynamics among businesses and the daily life of every European citizen[5]. Within this context, nowadays digital platforms can be defined not only as digital intermediation services but also as socio-technological architectures with such pervasive and widespread ramifications in all spheres of individual and associated life. For this reason, some scholars have talked about a sort of "platformization of society"[6]. However, if on the one hand technological innovation has increased the collective wellbeing by allowing users to perform every (or almost every) essential activity online, on the other hand it also represents a powerful mean by which to carry out illicit activities and to disseminate illegal material online.

The protection of Intellectual Property Rights, with a special focus on trademarks and copyright, turns out to be an area particularly prone to "digital infringements". The European Union Intellectual Property Office[7], stressing the importance of Intellectual Property - so much so that in 2019 IPRs' intensive industries accounted for almost 45% of Europe's GDP -, has also reported that many of the conversations taking place online would be related to physical products' counterfeits and digital content's piracy. The widespread use of digital platforms raises therefore the issue of combating the dissemination of undue

[5] To fully understand the importance and essentiality of the modern digital platforms, suffice to think about the single actions that each individual carries out every day. Buying goods online through e-commerce technologies, interacting "virtually" between users on popular social networks, entertaining themselves on large platforms enjoying contents uploaded by users, are just some of the possible activities to be performed online that give importance to internet infrastructures.

[6] See the conference organized by the LUISS School of Law, *The Social Dilemma: come disciplinare le piattaforme digitali? Sintesi del convegno inaugurale della IX edizione del Master di II livello in Diritto della Concorrenza e dell'Innovazione*, 19.03.2021, available at: https://lsl.luiss.it/sites/lsl.luiss.it/files/The%20Social%20Dilemma%20sintesi%20inaugurazione%20master%20concorrenza%20innovazione%202021.pdf, p. 4.

[7] EPO-EUIPO, *Intellectual property rights intensive industries and economic performance in the European Union. Industry-Level Analysis Report*, III ed., Munich and Alicante, EPO and EUIPO, 09.2019.

material online. Europol[8] indeed has found that online violations would have benefited from the Covid-19 crisis. During the spring of 2020 indeed, period in which millions of European citizens were confined to their houses due to the pandemic, the use of digital infrastructures increased significantly and with it also violations on digital platform.

Considering the broad presence of infringements and abuses on digital platforms, it is fundamental to implement certain and effective rules able to enhance the functioning of the Digital Single Market and to govern digital service providers' activities. The following analysis aims to examine the main European Union's legislative tools for the regulation of the liability and the accountability of digital platforms, with special attention to the protection of fundamental rights. It is essential in fact that the application of the relevant provisions safeguard not only IPRs' owners, but also users' interests and fundamental rights and the interests of the businesses carrying out the intermediation activities that is at the core of online platforms.

The first Chapter will examine the E-Commerce Directive *i.e.*, Directive 2000/31/EC, the first package of transversal – "horizontal" – rules intended to regulate all the information society services, independently of their specialization sector. Even if the regime proposed by the E-Commerce Directive has always been considered crucial to the regulation of digital infrastructures, this analysis will show lights and shadows of the Directive, noting its current inadequacy to face the new challenges posed by technological innovation.

The second Chapter will deal with the new Copyright Directive *i.e.*, Directive 2019/790/EC, scrutinizing in particular its Article 17, considered as *lex specialis* to the general E-Commerce Directive for the regulation of the liability of the "online content sharing services providers" protected by copyright law. The provision will be the subject of a detailed analysis that will allow to grasp its main aspects, including those arising from its relationship with the protection of fundamental rights. This thesis will therefore fully analyze the main relevant aspects of this provision, including those arising from its relationship with the protection of fundamental rights.

[8] EUROPOL, *Pandemic Profiteering: how criminals exploit the COVID-19 crisis*, 03.2020.

Finally, the third Chapter will study the recent Proposal for a Regulation on a Single Market for Digital Services and amending the E-commerce Directive *i.e.*, the "Digital Services Act". This analysis will examine the main amendments made to the now "old" Directive 2000/31/EC and the new obligations introduced by the proposed Regulation for the governance of digital intermediaries.

It will illustrate the resulting legislative framework for the protection of Intellectual Property Rights online, with the aim of analyzing and understanding the interaction between the different provisions currently applicable and the proposed provisions.

# CHAPTER 1

# ONLINE INFRINGEMENTS OF INTELLECTUAL PROPERTY RIGHTS AND THE E-COMMERCE DIRECTIVE

SUMMARY: 1.1. Why Intellectual Property: an overview – 1.2. The problem: IPRs infringements on the Internet – 1.3. The E-Commerce Directive – 1.3.1. Preamble – 1.3.2. Information Society Services – 1.3.3. The liability regime of Internet Service Providers: the safe harbours – 1.3.4. Mere Conduit Service Provider – 1.3.5. Caching Service Provider – 1.3.6. Hosting Service Provider – 1.3.6.1. *«Illegal activity or information»* – 1.3.6.2. "Passive" vs "active" role of ISPs – 1.3.6.3. «*Knowledge or awareness*» – 1.3.6.4. Notice-and-takedown mechanism – 1.3.7. Prohibition on general monitoring obligation – 1.3.8. Injunctions – 1.3.9. Codes of conduct and self-regulation – 1.3.10. A critical approach to the ECD: Is it still enough?

## 1.1. Why Intellectual Property: an overview

Intellectual Property Rights generally refer to the protection of immaterial goods, which are the result of a creative mental human activity in the industrial, scientific, literary, and artistic fields[9]. When we talk about Intellectual Property Rights (hereinafter referred to as 'IPRs') we usually distinguish them in different categories, each of which need specific requirements for obtaining legal protection[10]: copyright for literary, artistic and scientific works; related rights of

[9] G. OLIVIERI – S. SCALZINI, *Sistema e fonti della proprietà intellettuale*, in A. F. GENOVESE – G. OLIVIERI, *Trattato Omnia su La Proprietà Intellettuale*, Utet, 2021. A. KUR – T. DREIER – S. LUGINBUEHL, *European Intellectual Property Law: Text, Cases and Materials*, II ed., Edward Elgar Publishing Limited, 2019, p. 2. J. PILA – P. L. C. TORREMANS, *European Intellectual Property Law*, Oxford University Press, 2016, p. 4. Cfr. J. PILA – P. L. C. TORREMANS, *European Intellectual Property Law*, II ed., Oxford University Press, 2019. Cfr. T. PRIME – D. BOOTON, *European Intellectual Property Law*, Taylor and Francis Publishing, 2017. Cfr. A. OHLY (ed.), *Common Principles of European Intellectual Property Law*, Mohr Siebeck Publishing, 2012. C. GEIGER, *The Construction of Intellectual Property in the European Union: Searching for Coherence*, in C. GEIGER (ed.), *Constructing European Intellectual Property: Achievements and New Perspectives*, EIPIN Series, Vol. I, Issue V, Cheltenham, UK / Northampton, MA, Edward Elgar, 2013.

[10] Works under copyright protection must be original and must be characterized by a certain amount of creativity; inventions under the patent regime must be novel, inventive and industrially applicable and the main requirement for trademarks is the distinctiveness to identify their commercial source.

copyright, granted for performing artists, producers of phonograms, broadcasting organizations; patents, granted for inventions; industrial designs, which refer to the «*eye appeal*»[11] of products; and trademarks, specific signs used in the course of trade to recognize the commercial source of services or goods[12]. These rights are protected by the legal system in the sense that the owner *i.e.* the holder of the IPRs, has the power to use and prevent others from utilizing them without his or her consent[13].

The rationale for IPRs protection is well explained by the legislators in Recital 2 of the Directive 2004/48/EC on the enforcement of intellectual property rights, which states *«The protection of intellectual property should allow the inventor or creator to derive a legitimate profit from his/her invention or creation. It should also allow the widest possible dissemination of works, ideas and new knowhow. At the same time, it should not hamper freedom of expression, the free movement of information, or the protection of personal data, including on the Internet»*[14]. Hence, the legislation strives for a balanced system, taking care not just of the protection of IPRs but also safeguarding fundamental rights.

Reflecting on the role and the importance of IPRs in the current European landscape, we must admit that such intangible assets, *i.e.* inventions, artistic and cultural creations, brands, software, knowhow, business processes and data are the pillars of today's economy[15]. Annual investments in intellectual property products in fact increased even more in the European Union[16], industrial products and processes rely on intangibles protected by IPRs and sound intellectual property management has become an essential component of any successful business strategy[17]. In a study carried out by the European Union Intellectual Property

[11] A. KUR-T. DREIER-S. LUGINBUEHL, op. cit., p.3.
[12] *Ibid.*
[13] *Ivi*, p. 2.
[14] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.
[15] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, *Making the most of the EU's innovative potential. An intellectual property action plan to support the Eu's recovery and resilience*, Brussels, 25.11.2020, COM (2020)760, final, p.1.
[16] A. THUM-THYSEN - P. VOIGT - B. BILBAO-OSORIO - C. MAIER - D. OGNYANOVA, *Unlocking Investment in Intangible Assets*, Luxemburg, Publications Office of the European Union, 2017, p.12
[17] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, *Making the most of the EU's*

Office (EUIPO) in partnership with the European Patent Office (EPO) in 2019[18], it was found that in the same year not only the total contribution of IPRs' intensive industries[19] accounted for almost 45% of Europe's GDP, but also, they have directly contributed to the creation of 30% of all jobs[20]. In this regard, the EUIPO and the EPO have analyzed that companies that hold IPRs earn 29% more income per employee and pay 20% more compensation than companies that do not own IPRs[21]. Generally speaking, in addition, from a consumer's perspective IPRs are a fundamental mean to assure the reliability of quality and origin of the products, safeguarding European Union's industry from unfair copying made by competitors that have not invested in creativity, research, and development[22].

It emerges that Intellectual Property is particularly significant for the European Union[23] and it is a critical asset for being able to compete globally[24] which need to be protected from each type of infringements through a strong legal framework. In this regard, the revolutionary panorama characterized by the advent of the Internet, the development of new business models such as the platform economy[25], the growth of e-commerce[26] and the digitalization[27] have clearly

---

*innovative potential. An intellectual property action plan to support the Eu's recovery and resilience*, cit., p. 1.

[18] EPO-EUIPO, *Intellectual property rights intensive industries and economic performance in the European Union. Industry-Level Analysis Report*, III ed., Munich and Alicante, EPO and EUIPO, 09.2019.

[19] EUIPO, *2020 Status Report on IPR Infringement. Why IP are important, IPR infringement, and the fight against counterfeiting and piracy*, European Union Intellectual Property Office, 2020, p. 5.

[20] EPO-EUIPO, *Intellectual property rights intensive industries and economic performance in the European Union. Industry-Level Analysis Report*, cit., p. 7.

[21] *Ivi*, p. 77. Cfr. N. LOMBA – T. EVAS, *Digital services act. European added value assessment*, European Parliamentary Research Service, 10.2020, p. 102.

[22] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, *Evaluation of the Application of the Regulation (EU) No 386/2012 of 19 April 2012*, Brussels, 24.11.2020, COM (2020)755, final, p.1.

[23] *Ibid.*

[24] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, *Making the most of the EU's innovative potential. An intellectual property action plan to support the Eu's recovery and resilience*, cit., p. 1.

[25] Platform Economy generally refers to economic and social activity that is facilitated by platforms. Wikipedia contributors, *Platform Economy*, Wikipedia, The Free Encyclopedia, last update: 17.07.2021, available at: https://en.wikipedia.org/w/index.php?title=Platform_economy&oldid=1034048999.

[26] Nowadays the e-commerce as an enormous potential. A 2020 study of the Policy Department for Economic, Scientific and Quality of Life Policies declares that the «*E-commerce is an enabler of trade. Digital technologies facilitating online exchanges reduce trade costs associated with geographical distance compared with offline commerce. In addition to the most typical barriers to*

shown the necessity of having robust, innovative, and reliable rules to deal with the challenges that new technologies pose to the enforcement of IPRs[28]. Modern technological advancement, indeed, like most things has some downsides to face. On the one hand innovation, particularly in the economic field, has the undeniable potential to generate growth and employment by opening opportunities for investment, resulting in expanded markets, more choice in goods and services at lower prices[29]. It further creates a better flow of information which can improve health, food safety and security, resource efficiency to energy and intelligent transport[30]. Digital innovation generally makes a great contribution to economic expansion[31] as well as to the betterment of society and, along with a careful use of new technologies, it could be crucial to improve the application of IPRs, enhancing transparency[32] and creating new technical means for their protection. However, on the other hand, new forms of Intellectual Property's infringement have arisen on the Internet and others, such as counterfeiting and piracy, are still thriving by taking advantage of digital technologies[33].

---

*trade, such as tariffs and non-tariff barriers, geographical distance can increase trade costs through a number of channels, notably high transport costs, limited access to information and lack of trust.*». N. IACOB – F. SIMONELLI, *How to Fully Reap the Benefits of the Internal Market for E-commerce? New economic opportunities and challenges for digital services 20 years after the adoption of the e-Commerce Directive*, Study for the committee on the Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020, p. 11. N. LOMBA – T. EVAS, op. cit., p. 6. Cfr. Flash Eurobarometer 439, *Report. The use of online marketplaces and search engines by SMEs*, European Union, 04.2016. Cfr. *E-commerce statistics for individuals*, Eurostat, data extracted: 06.2021, planned update: 01.2022, available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=E-commerce_statistics_for_individuals.

[27] Digitalization is considered as the use of digital technologies to change a business model and provide new revenue; this is the process of moving to a digital business. Gartner Glossary, available at: https://www.gartner.com/en/information-technology/glossary/digitalization.

[28] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, *Making the most of the EU's innovative potential. An intellectual property action plan to support the Eu's recovery and resilience*, cit., p. 1.

[29] Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for Europe*, Brussels, 6.5.2015, COM (2015)192, final, p. 4.

[30] *Ibid.*

[31] *Ibid.*

[32] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, *Making the most of the EU's innovative potential. An intellectual property action plan to support the Eu's recovery and resilience*, cit., p.7.

[33] *Ivi*, p.3.

## 1.2. The problem: IPRs infringements on the Internet

During the last few years, in fact, Internet media have transformed our world «*affecting all sectors of activity*»[34], changing the daily lives of all Europeans[35] and bringing along with it a concrete risk of having unpredictable abuses on the net. The latter concern not just IPRs infringement, but also the spreading of fake news, the use of the Internet for terroristic purposes by criminal organization and the presence of hate speech on blogs and social networks[36].

The enormous growth of e-commerce through online platforms and marketplaces in some cases exposes to IPRs violations. The proliferation of copyrights and trademark violations, of the sale of counterfeit goods online and of the piracy of digital content is a clear example of this phenomenon[37].

On social media platforms, for example, a study conducted by the EUIPO between 2020 and 2021[38] identified that 11 % of conversations regarding physical

[34] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, *A European strategy for data*, Brussels, 19.2.2020, COM (2020)66, final, p.1.
[35] *Ibid.*
[36] B. ALLGROVE-J. GROOM, *Enforcement in a digital context: intermediary liability* in *Research Handbook on Intellectual Property and Digital Technologies*, Aplin, Tanya ed., Edward Elgar Publishing, 2020, p. 507.
[37] Lomba and Evas report that «*online marketplaces are the main distribution channel for counterfeit goods in the EU, of which about 70 % come from China.*». N. LOMBA – T. EVAS, op. cit., p. 102. Cfr. EUIPO - EUROPOL, *2017 Situation Report on Counterfeiting and Piracy in the European Union. A joint project between Europol and the European Union Intellectual Property Office*, 06.2017. Cfr. EUIPO, *2020 Status Report on IPR Infringement. Why IP are important, IPR infringement, and the fight against counterfeiting and piracy*, cit. The European Commission specifies that illegal activities online carried out using digital services include «*the sale of illegal goods, such as dangerous goods, unsafe toys, illegal medicines, counterfeits, scams and other consumer protection infringing practices, or even wildlife trafficking, illegal sale of protected species, etc*.». European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, p. 12. A «*survey*» conducted in 2018 «*testing user perception of the frequency and scale of illegal activities or information online*» affirms that «*60% of respondents thought they had seen at least once some sort of illegal content online. 41% experienced scams, frauds or other illegal commercial practices. 30% thought they had seen hate speech (according to their personal understanding of the term), 27% had seen counterfeited products and 26% has seen pirated content*». European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 14. Cfr. *Ivi*, p. 20-21.
[38] EUIPO, *Monitoring and analysing social media in relation to IP infringement*, European Union Intellectual Property Office, 2021.

products could be related to counterfeits, while «*35 % of conversations on digital content could be possibly related to piracy*»[39]. In this research, in particular, the difficulty of detecting piracy was hampered by the fact that both legal and illegal content is frequently provided to users for free, with the platform earning money through advertising or other means. In this way, consumers may have found it difficult to distinguish between legal and illegal content on the Internet. They may have wrongly believed that the site or application they were using offered lawful material, goods, or services[40], while reality was different. According to the EUIPO, the most affected products by counterfeiting and piracy are not only clothing, footwear, jewelry, but also E-books, TV shows and music in a digital form. The same study underlines that Social Networks as Instagram, Twitter and Reddit have the highest rate of interactions that were discovered to be possibly related to Intellectual Property infringements. Contrarily, Facebook presented a lower volume of conversations, «*which could be explained by an efficient approach from the platform to recognize and delete infringing content*»[41].

Online misuse of IPRs belonging to other «*is often built on the use of domain names and others digital identifiers*»[42]. Cybersquatting[43], for instance, represents a real problem for brands and consumers. It could be a serious issue for Small and medium-sized enterprises who frequently lack the means to monitor

[39] *Ivi*, p. 7. The OECD and the EUIPO estimate that «*total imports of counterfeit goods in Europe amounted to EUR 121 billion in 2016, and 80% of products detected by customs authorities involved small parcels, assumed to have been bought online internationally through online market places or sellers' direct websites. Consumers are buying increasingly more from producers based outside of Europe (from 14% in 2014 to 27% in 2019)*». European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 13.

[40] *Memorandum of Understanding on Online Advertising and Intellectual Property Rights*, Brussels, publication date: 21.06.2018, last update: 21.06.2018, available at: https://ec.europa.eu/docsroom/documents/30226, p. 1.

[41] EUIPO, *Monitoring and analysing social media in relation to IP infringement*, cit., p. 8.

[42] Deloitte Advisory, S.L. (curated by), *Research on Online Business Models Infringing Intellectual Property Rights – Phase 1. Establishing an overview of online business models infringing intellectual property rights*, Spain, European Union Intellectual Property Office, 2016, p. 5.

[43] Cybersquatting is the practice of buying an internet domain name that is desired by another person, company, or organization with the goal of reselling it for a profit. Collins English Dictionary, available at: https://www.collinsdictionary.com/dictionary/english/cybersquatting.

their web presence to detect cybersquatting and safeguard their brands' reputations[44].

Law scholars, among other things, have noticed that, going forward over the years, the borderline between IPRs infringement and cybercriminal activities online are even more confusing[45]. IPRs, in fact, are being used to disseminate ransomware and other kind of malware regardless of society, businesses and ordinary users of the Internet[46].

Generally, it must keep in mind that any IPRs' breaches have absolute negative consequences that affects every field of activity. «*Revenue loss*»[47], «*drop in employment*»[48], «*high enforcement costs*»[49], negative effects on competition, «*diminished incentive to innovate*»[50] and create in fact are only a part of the consequences that ongoing violations cause[51]. The propagation of «*counterfeit goods*»[52] primarily impacts SMEs that are unable «*to compete in term of prices*»[53]. According to the Nordic Commerce Sector in fact «*the current legal*

[44] EUIPO, *RISKS AND DAMAGES POSED BY IPR INFRINGEMENTS IN EUROPE. Awareness campaign 2021*, 06.2021, p. 7.
[45] Deloitte Advisory, S.L. (curated by), op. cit., p. 9.
[46] *Ivi*, p.5. Cfr. European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 16, paragraph 42.
[47] European Commission, *Report on the functioning of the Memorandum of Understanding on the sale of counterfeit goods on the internet*, Brussels, 14.8.2020, SWD (2020)166, final/2, p. 4. From the «*EUIPO data from 2020 referring to detentions in EU borders in 2018*» it emerges «*that around 70% to 80% of counterfeit goods were purchased in online marketplaces*» so that «*between €35 and €40 billion in legitimate sales would be directly lost every year in the EU through e-commerce*». N. LOMBA – T. EVAS, op. cit., p. 102. Cfr. EUIPO, *2020 Status Report on IPR Infringement. Why IP are important, IPR infringement, and the fight against counterfeiting and piracy*, cit.
[48] European Commission, *Report on the functioning of the Memorandum of Understanding on the sale of counterfeit goods on the internet*, cit., p. 4.
[49] *Ibid.*
[50] European Commission, *Report on the functioning of the Memorandum of Understanding on the sale of counterfeit goods on the internet*, cit., p. 4. In cases in which there are IPRs illicit, «*companies do not receive the expect returns from their investments in innovation, reducing them in the long run*.». N. LOMBA – T. EVAS, op. cit., p. 103. Cfr. EUIPO, *2020 Status Report on IPR Infringement. Why IP are important, IPR infringement, and the fight against counterfeiting and piracy*, cit.
[51] IPRs' infringements indeed «*are potentially harmful to the health and safety of consumers, to the environment, and also damage the economy by reducing revenue for legal business, resulting in job destruction*». N. LOMBA – T. EVAS, op. cit., p. 102.
[52] N. LOMBA – T. EVAS, op. cit., p. 103.
[53] *Ibid.* Cfr. OECD, *The Economic Impact of Counterfeiting and Piracy*, 19.06.2008, pp. 95-153. Cfr. European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The*

*framework also affects the competitiveness of European companies, especially SMEs*»[54]. A study conducted by the Finnish Commerce Federation has estimated that «*the average purchasing price for a (on the surface) comparable product that does not comply with European product safety legislation can be sold to consumers at a significantly lower price and still be profitable*»[55]. It would emerge an impossibility for European businesses «*to compete with the price of the products sold without complying with the EU-regulation on product safety*»[56]. From a governmental point of view, IPRs infringements as counterfeiting mean a «*loss in tax revenues and social security contributions*»[57]. These violations could have adverse environmental effect as well «*because counterfeiters do not tend to respect environmental regulations*»[58]. In addition, consumers who access content that infringes IPRs or buy counterfeit goods of lower quality can be obviously harmed[59]. Therefore, from this point of view, a good deal of public health, safety and security can only be preserved by combating IPRs infringements.

It is worth noting that during the global lockdown due to the spread of COVID-19 pandemic, online platforms played a key role, being the only way to communicate with the rest of the world, to work from home and to buy products[60]. Starting from this time frame, we have witnessed a significant rise of online shopping and consumption of digital content that have shed new light on the dangers and harms that IPRs infringement can cause[61]. It is not surprising

---

*Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 20, paragraph 61-62.

[54] Nordic Commerce Sector, *Revision of the E-commerce Directive/Digital services act. The position of the Nordic Commerce Sector*, available at: https://www.danskerhverv.dk/siteassets/mediafolder/dokumenter/04-politik/2021/final---revision-of-the-e-commerce-directive_dsa_the-position-of-the-nordic-commerce-sector.pdf.

[55] *Ibid.*

[56] *Ibid.* N. LOMBA – T. EVAS, op. cit., p. 103.

[57] European Commission, *Report on the functioning of the Memorandum of Understanding on the sale of counterfeit goods on the internet*, cit., p. 4.

[58] *Ibid.*

[59] *Memorandum of Understanding on Online Advertising and Intellectual Property Rights*, cit., p. 1.

[60] Lomba and Evas evidence that «*the coronavirus pandemic has (…) highlighted the usefulness of e-commerce and the potential for its further development while also demonstrating the hurdle*». Cfr. N. LOMBA – T. EVAS, op. cit., p. 3.

[61] EUIPO, *RISKS AND DAMAGES POSED BY IPR INFRINGEMENTS IN EUROPE. Awareness campaign 2021*, cit., p. 3. The European Commission describes that «*the COVID-19 crisis has also cast a spotlight on the proliferation of illegal goods online, breaching EU safety and protection requirements or even bearing false certificates of conformity, especially coming from*

indeed that Europol's COVID-19 Report[62] notes that during the spring of 2020, where millions of European citizens were confined to their houses due to the pandemic, the violations on digital platform increased[63].

In view of these premises and given the importance of IPRs, it is understandable how the implementation of a strong legal regime in an online environment is a critical mean of limiting infringements and thus protecting IPRs[64]. However, the mere existence of a specific legislation is not sufficient. An effective legal structure in fact must be able to strike a fair balance between the protection of IPRs, defending the interests of right holders; the regulation of Internet Intermediaries, imposing them obligations and/or exemptions from liability in consideration of their structure and the activity they perform; and the preservation of fundamental rights set out in the Charter of Fundamental Rights of the European Union.

The E-commerce Directive *i.e.* Directive 2000/31/EC, is considered the cornerstone of the European legal regime for online services[65]. It defines the liability of Internet Service Providers, establishing a framework for their regulation in the Internal Market.

---

*third countries. The coordinated action of the CPC authorities targeting scams related to COVID-19 obliged online platforms to remove millions of misleading offers aimed at EU consumers*».

[62] EUROPOL, *Pandemic Profiteering: how criminals exploit the COVID-19 crisis*, 03.2020.

[63] EUIPO, *2020 Status Report on IPR Infringement. Why IP are important, IPR infringement, and the fight against counterfeiting and piracy*, cit., p. 19. Cfr. United Nations Office on Drugs and Crime, *RESEARCH BRIEF. Covid-19-related Trafficking of Medical Products as a Threat to Public Health*, 2020, available at: https://www.unodc.org/documents/data-and-analysis/covid/COVID-19_research_brief_trafficking_medical_products.pdf. Also, the European Commission underlines that «*societal trends related to how we use technology, work, learn or shop are changing rapidly. While these trends were already unfolding before the COVID-19 outbreak, we are seeing an acceleration of the digitalization trend, which is likely to lead to a 'new normal' after the COVID-19 crisis and an even more important role for digital services in our daily lives in the future. Online sales of basic goods alone have grown by 50% on average in Europe since the offset of the pandemics. At the same time, the crisis has exposed the weaknesses of our reliance on digitalization, as we have seen an important growth in platform-enabled crime, such as COVID-19-related scams and exchange of child sexual abuse material*». European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 10. Cfr. EUROPOL, *Pandemic Profiteering: how criminals exploit the COVID-19 crisis*, cit.

[64] Obviously a precise and punctual regulation of ISP's «*obligations and liabilities towards removing listings of potentially illegal and counterfeit goods*» would also have great economic benefits for the European Union. N. LOMBA – T. EVAS, op. cit., p. 103.

[65] P. VAN EECKE, *Online service providers and liability: A plea for a balanced approach*, in *Common Market Law Review*, Vol. XLVIII, 2011, p. 1457.

## 1.3. The E-Commerce Directive

### 1.3.1. Preamble

In the 1990s, when the public began to utilize the Internet in growing numbers, the European Commission decided to build a framework to eliminate barriers to cross-border online services in the Internal Market[66]. At that time, legal barriers were significant resulting in a lack of legal clarity for online businesses[67]. The E-Commerce Directive was adopted in 2000 to solve this issue, as well as to promote electronic commerce in the European Union and the development of the information society by defining minimum rules on the roles and responsibilities of certain players[68]. Since its implementation, in order to keep the rule up to date and to interpret the words of the legislator, the Court of Justice of the European Union has had an important role, clarifying the content of several key concepts of the Directive[69].

The following paragraphs will deal specifically with the provisions of the E-Commerce Directive, considering also the most relevant clarifications provided by the European jurisprudence for its comprehension. In this way, it will go through the most important Articles of the Directive, trying to understand the exact extent and scope of its institutions. To sum up, the last paragraph will be concerned with some considerations about the real effectiveness of the legal structure of the E-Commerce Directive (hereinafter referred to as 'ECD') twenty years after its adoption, also considering the possibility of new amendments and revisions of certain aspects.

---

[66] E. CRABBIT, *La Directive sur le commerce électronique: le project "*Méd*iterranée"*, in *Revue du droit de l'Union européenne: revue trimestrelle de droit européen*, Bruxelles, Bruylant, 2000, p. 753.
[67] *Ibid.*
[68] A. DE STREEL – M. HUSOVEC, *The e-commerce Directive as the cornerstone of the Internal Market. Assessment and options for reform*. *Study for the committee on Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies*, European Parliament, Luxembourg, 2020, p. 14.
[69] *Ivi*, p. 18.

### 1.3.2. Information Society Services

As the ECD applies horizontally to all Information Society Services, independent of the sector[70], it is fundamental to understand their precise meaning to determine the scope of the Directive[71].

The definition of Information Society Services can be found in the current Directive 2015/1535/EC[72] of the European Parliament and of the Council. The ECD, in fact, referring to old versions of Directive 2015/1535/EC, describes Information Society Services as *«any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service*[73]*»*[74] and Directive 2015/1535/EC further contains an Annex of services outside the definition's scope[75]. Recital 18 of the ECD explains that Information Society Services cover a wide range of economic activities that take place on the Internet, including selling items on the Internet. It excludes instead some commercial actors like those who provide delivery of goods as such or services off-line and broadcasters, who usually determine when and what transmission occur[76]. Furthermore, the legislator specifies that services that do not charge their users can fall under the definition of Information Society Service only[77] *«in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line*

[70] A. HOFFMANN – A. GASPAROTTI, *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"*, 03.2020, p. 17.
[71] A. DE STREEL – M. HUSOVEC, op. cit., p. 18.
[72] Directive 2015/1535/EC of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services. This directive has replaced Directive 98/34/EC and Directive 98/84/EC mentioned in Recital 17 of the ECD.
[73] 'Recipient of the service' refers to "*any natural or legal person who, for professional ends or otherwise, uses an information society services, in particular for the purposes of seeking information or making it accessible*". Article 2 of the ECD.
[74] Recital 17 of the ECD.
[75] *Ibid.*
[76] G. B. DINWOODIE, *Who are Internet Intermediaries?*, in G. FROSIO (ed.), *Oxford Handbook of Online Intermediary Liability*, Oxford University Press, 05.2020, p. 3.
[77] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, *Hosting intermediary services and illegal content online. An analysis of the scope of article 14 ECD in light of developments in the online service landscape*, Luxembourg, Publications Office of the European Union, 29.01.2019, p. 30.

*information or commercial communications, or those providing tools allowing for search, access and retrieval of data»*[78]. The validity of this last provision has been reconfirmed by the Court of Justice of the European Union in *Papasavvas*[79] case, dealing with a defamation issue, and in *Tobias McFadden v. Sony Music*[80] case, about a copyright proceeding[81]. In those venues the judges established that the Information Society Services does not have to be remunerated by the recipient of the service and can be free for her, but the service can be paid with income generated by advertisements[82].

The Court intervened also in the context of shared economy, determining whether platforms that provide collaborative services can be deemed providers of Information Society Services and hence benefit from the ECD's rights[83]. In *Uber Spain*[84] and *Uber France*[85] in fact the CJEU stated Uber's intermediation service is an integral part of an overall service whose principal component is a transport service[86]. Against this, Uber's online intermediation was defined as merely accessory and so classified as a transport service rather than an Information Society Service[87]. Conversely, in *Airbnb Ireland*[88] the CJEU, considering that platforms such as Airbnb have another business model, affirmed that intermediation via the Internet can be the main service provided by Airbnb and that it cannot be regarded as forming an integral part of an overall service, the main component of which is the provision of accommodation[89]. Overall, it emerges that the ECD's regime only harmonizes safe harbours[90] for services by providers that qualify as Information Society Services, while when a service falls

[78] Recital 18 of the ECD.
[79] Case C-291/13. Paragraphs 29-30.
[80] Case C-484/14. Paragraphs 42-43.
[81] A. DE STREEL – M. HUSOVEC, op. cit., p. 18. Cfr. Case 325/95, *Bond van Adverteerders and others v The Netherlands State,* 26.04.1988. Cfr. S. F. SCHWEMER – T. MAHLER – H. STYRI, *Liability exemptions of non-hosting intermediaries: Sideshow in the Digital Services Act?,* in *Oslo Law Review*, Vol. VIII, No. I, Scandinavian University Press, 2021, pp. 10-13.
[82] A. DE STREEL – M. HUSOVEC, op. cit., p. 18.
[83] *Ibid.*
[84] Case C-434/15. Paragraph 40.
[85] Case C-320/16. Paragraph 22.
[86] A. DE STREEL – M. HUSOVEC, op. cit., p. 19. M. COLANGELO - M. MAGGIOLINO, *Uber: A New Challenge for Regulation and Competition Law?,* in *Market and Competition Law Review*, Vol. I, No. II, 10.2017, pp. 55-59.
[87] A. DE STREEL – M. HUSOVEC, op. cit., p. 19.
[88] Case C-390/18. Paragraph 69.
[89] A. DE STREEL – M. HUSOVEC, op. cit., p. 19.
[90] See *infra*, § 1.3.3.

outside that qualification - because it forms an integral part of or is linked to an overall service that is of a different nature and subject to a specific regulation - it is not covered by the ECD's protection, and the question of liability will have to be resolved under national law[91]. From this point of view, the ECD's harmonization regime is incomplete[92].

Generally, when it comes to Information Society Services, we are referring to tools that give access to the world wide web, allowing users to store and publish content[93]. It goes without saying that, because of their relevance, they need to be strictly regulated by law. For what is of interest here, the notion of Information Society Services is fundamental in the ECD because it functions as a threshold that must be cleared to invoke EU-level exemptions from liability *i.e.* the safe harbours[94].

### 1.3.3. The liability regime of Internet Service Providers: the safe harbours

The ECD provides for a liability regime of Internet Service Providers (hereinafter referred to as 'ISPs') that is based on limitations and safe harbours, safe zones in which intermediaries, under a number of conditions[95], cannot be deemed liable for illegal activities committed by others. These provisions have been enacted to create an atmosphere of confidence in which e-commerce may flourish[96]. The immunity, in fact, typically prevents monetary liability, even if injunctive reliefs could still be possible[97] [98]. Some scholars have considered it as a "negative" approach according to which the Courts, instead of focusing on whether the intermediary's actions show sufficient fault to impose liability, concentrate on whether the service provider met the legal requirements for

[91] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 31.
[92] *Ibid.*
[93] J. BAYER, *Liability of Internet Service Providers for Third Party Content*, in *Victoria University of Wellington Law Review*, Working Paper Series, Vol. I, 01.01.2007, p. 1.
[94] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 30.
[95] See *infra*, § 1.3.4., 1.3.5., 1.3.6.
[96] G. B. DINWOODIE (editor), *Secondary Liability of Internet Service Provider*, Ius Comparatum – Global Studies in Comparative Law, Springer International Publishing, 2017, p. 31.
[97] *Ibid.*
[98] See *infra*, § 1.3.8.

immunity[99]. However, one has to admit that ISPs generally transmit and store amounts of users' information, being much more visible in the market than them. For this reason, if there were not liability exemption, intermediaries would be an easy target for third parties who have been injured by the action of an end user[100]. Moreover, although there are trends of change underway[101], it would be inappropriate to apply the traditional liability criteria to intermediaries which process a large volume of information because they would not be able to monitor everything[102]. Assuming that information, for instance, is almost never illegal in itself, it would be also very difficult for intermediaries to assess the potentially unlawful nature of an activity or information[103]. To do this, in fact, knowledge of the actual circumstances and of the applicable regulation would be required[104].

Going deeper and analyzing the Directive in its particularities, we can see that in Articles 12, 13 and 14 it differentiates three types of intermediary activities[105]. Information Society Services providers carrying out one of these activities are exempted from liability under some conditions[106].

### 1.3.4. Mere Conduit Service Provider

In Article 12 of the ECD, the legislator establishes a set of rules for mere conduit Service Provider's safe harbours. These intermediaries create the fundamental connection between a person and the Internet, allowing them to both download and upload any content[107]. The ECD states indeed that Mere Conduit is when «*an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service,*

[99] *Ivi*, p. 19.
[100] P. VAN EECKE, op. cit., p. 1455.
[101] See *infra*, § 2.
[102] P. VAN EECKE, op. cit., p. 1456.
[103] *Ibid.*
[104] *Ibid.*
[105] EUIPO, *IPR ENFORCEMENT CASE-LAW COLLECTION. THE LIABILITY AND OBLIGATIONS OF INTERMEDIARY SERVICE PROVIDERS IN THE EUROPEAN UNION*, 08.2019, p. 12.
[106] *Ibid.*
[107] J. BAYER, op. cit., p.1.

*or the provision of access to a communication network»*[108]. Concerning their liability exemptions, the ECD further provides that *«Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider: (a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission.»*[109]. Moreover, paragraph 2 specifies *«The acts of transmission and of provision of access referred to paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission»*[110].

### 1.3.5. Caching Service Provider

Caching refers to the provision of an Information Society Service that *«consists of the transmission in a communication network of information provided by a recipient of the service»*[111]. Concerning the conditions to benefit from safe harbors, Article 13 of the ECD establishes that *«Member States shall ensure that the service provider is not liable for 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, on condition that: (a) the provider does not modify the information; (b) the provider complies with conditions on access to the information; (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry; (d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and (e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the*

[108] Article 12 of the ECD, paragraph 1.
[109] *Ibid.*
[110] Article 12 of the ECD, paragraph 2.
[111] Article 13 of the ECD, paragraph 1.

*information at the initial source of the transmission has been removed from the network, or access to it has been disable, or that a court or an administrative authority has ordered such removal or disablement»*[112]. Reading Recital 43 and 44 of the ECD it can find out that an intermediary can benefit from exemptions for mere conduit and caching service providers only when he is not involved with the information transmitted; this requires that the intermediary does not modify the information he transmits[113]. It is also specified that this requirement does not apply to technical manipulations that occur during transmission if they do not affect the integrity of the information contained in the transmission[114]. Furthermore, Recital 44 states that if mere conduit and caching service providers deliberately collaborate with one of the recipients of their service to undertake illegal acts going beyond their activities, then they cannot profit from the safe harbours' protection[115].

### 1.3.6. Hosting Service Provider

Article 14 of the ECD contains the safe harbor for hosting service providers and it specifies the conditions under which the liability exemption can be implemented[116]. The legislators, in fact, determine that *«Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that: (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.»*[117].

[112] *Ibid.*
[113] Recital 43 of the ECD.
[114] *Ibid.*
[115] Recital 44 of the ECD.
[116] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 29.
[117] Article 14 of the ECD, paragraph 1.

Regarding the activities performed by hosting service providers, Article 14 only refers to the *«storage of information provided by the recipient of the service»*. However, one must admit these types of ISPs can performed various activities and not just the classic category which allows their users to store content online[118]. They can indeed also do networking and collaborative production services (in which the platform not merely store content online but also connects producers and users around debate and discussions or market transactions) and selection and referencing (which refers to intermediaries that help to provide a further value[119]) [120]. In this regard, a first complicating issue for the regulation of hosting service providers concern the activity of selection and referencing because, although this one exists, it is not totally covered by the liability exemption of Article 14 as clear as the other two categories of activities are[121].

Generally speaking, and apart from the legislative uncertainty just mentioned, it should be anticipated that there is a lack of transparency about hosting service providers' legal framework[122]. Article 14 has indeed received the greater attention by the judges of the CJEU which tried to interpret this provision and the extent and scope of liability exemptions and in several cases[123].

#### 1.3.6.1. *«Illegal activity or information»*

According to Article 14(1) of the ECD, a hosting service provider must remove illegal information after obtaining actual knowledge or awareness of it[124]. In addition to the question of what constitutes actual knowledge or awareness which will be discussed later[125], hosting companies will need to determine what does and does not constitute illegal activity or information in order to decide

[118] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 12.
[119] Price comparison or review sites select service providers and producers helping consumers; Search engines, building an index of information and marketing offers, assist users to navigate the Web and help them access information. J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 12.
[120] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 12.
[121] *Ibid.*
[122] *Ivi*, p. 26.
[123] B. DINWOODIE editor, *Secondary Liability of Internet Service Provider*, cit., p. 35.
[124] P. VAN EECKE, op. cit., p. 1465.
[125] See *infra*, § 1.3.6.3.

whether or not to deny access to or remove certain information[126]. Anyway, the legislators do not specify what is the precise meaning of illegal content and such an evaluation is extremely difficult to make for intermediaries because of various reasons[127].

As pointed above[128], most information is not unlawful in itself but its potential illegality is determined by the situations in which it is used, forcing the hosting provider to do an additional expertise to identify the illicit. For instance, depending on the rights holder's position and on the copyright's exceptions recognized by the Member State considered (such as the right to parody, home copy, education, quote, etc.), the identical digital copy of a movie may be legal for one user and illegal for another user[129]. Another example could be related to the possibility of counterfeited products offered for sale on an online platform[130]. In this situation, in order to determine whether a good infringes trademark law, the hosting service provider must first ascertain if the user is operating in the course of the trade[131]. Yet this is not enough because the real infringement may be identified only on the basis of particular characteristics (such as deviations in colour or mismatching stitches) which will be difficult to determine for someone who is not familiar with the product in question[132]. Additional difficulties lie in the fact that the illicit can be presumed by providers only on a photograph on the platform, while physically checking it would be optimal to recognize it but very hard at the same time[133]. The assessment, furthermore, frequently necessitates a significant amount of legal knowledge which is something that most technically oriented online service providers lack[134]. And whether or not content can be deemed unlawful, is also established differently in the various Member States[135].

As a result, hosting providers run into serious difficulties in assessing whether content is illegal, its extension and whether it is sufficiently illegal to take

[126] P. VAN EECKE, op. cit., p. 1465.
[127] *Ibid.*
[128] See *supra*, § 1.3.3.
[129] P. VAN EECKE, op. cit., cit., p. 1465.
[130] *Ibid.*
[131] *Ivi*, p .1466.
[132] *Ibid.*
[133] *Ibid.*
[134] *Ibid.*
[135] *Ivi*, p .1467.

it down[136]. Thus, in the light of all these considerations it appears that there is a need for a broader and more detailed definition of what constitutes *«illegal activity or information»* in the context of Article 14 of the ECD[137]. In this regard, the new legislative Proposal for a *Digital Services Act* by the European Commission seeks to shed light on the subject, providing for a pinpoint delineation of «*illegal content*»[138].

### 1.3.6.2. "Passive" vs "active" role of ISPs

Reading the ECD, it can be deduced that only "passive" intermediaries are shielded by the safe harbours' regime[139]. It is argued that only "passive" hosting service providers are covered by the concept of hosting as used in Article 14 and so that they only can enjoy the immunity protection[140]. The notions of "passive" or "neutral" service providers have been developed by the European case-law on the basis of the ECD's wording[141]. The distinction between a "neutral" and an "active" intermediary was indeed created referring to Recital 42 of the ECD[142]. The latter states that in order to benefit from the liability's exemptions, the

---

[136] *Ibid.*

[137] *Ivi*, p .1468. The need for clarity in this regard does not diminish even considering that in the Recommendation on measures to effectively tackle illegal content online, the Commission «*defines "illegal" content as "any information which is not in compliance with Union law or the law of a Member State concerned"* ». A. HOFFMANN – A. GASPAROTTI, op. cit., p. 23. European Commission, *Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online*, Brussels, 01.03.2018, COM (2018) 1177, final. Cfr. European Commission, Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, *Tackling Illegal Content Online. Towards an enhanced responsibility of online platforms*, Brussels, 28.09.2017, COM (2017) 555, final.

[138] See *infra*, § 3.

[139] G. SARTOR, *Providers Liability: From the eCommerce Directive to the future*, 15.09.2017, p. 24. G. COLANGELO, *Responsabilità degli intermediary online ed enforcement del diritto d'autore*, itmedia consulting, Roma, 02.2018, available at: http://www.itmedia-consulting.com/DOCUMENTI/dirittodautore.pdf, p. 14. V. MOSCON, *Free circulation of information and Online Intermediaries – Replacing One "Value Gap" with Anothe*r, in *International Review of Industrial Property and Copyright*, 2020, p. 978. Cfr. C. GOMMES – E. DE PAUW, *Liability for trade mark infringement of online marketplaces in Europe: are they 'caught in the middle?'*, in *Journal of Intellectual Property Law & Practice*, Vol. XV, No. IV, 2020, p. 281.

[140] *Ibid.*

[141] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 32.

[142] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 32. G. COLANGELO, *Responsabilità degli intermediary online ed enforcement del diritto d'autore*, cit., p. 14. Cfr. J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, Policy Department for Economic, Scientific and Quality of Life Policies, Luxembourg, 06.2020, p. 38.

*«activity of the information society service provider»* must be *«limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient»* and «*of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored*».

In *Google France*[143] case, the CJEU relied on Recital 42 to held that in order to qualify for protection, a provider's activity must be of a «*of a mere technical, automatic and passive*», such that the provider «*has neither knowledge of nor control over the information which is transmitted or stored*»[144]. This condition was deemed as a prerequisite not just for cases of hosting, but also for caching[145] and mere conduit[146] services[147]. However, it is worth noting that this interpretation is debatable[148]. Advocate General Jääskinen, in fact, argued that

[143] Case C-236/08.

[144] *Ivi*, paragraphs 112-113. CF – Grimaldi Studio Legale – 21c Consultancy, *Overview of the legal framework of notice-and-action procedures in Member States. SMART 2016/0039*, Luxembourg, Publications Office of the European Union, 29.01.2019, p. 163. G. COLANGELO, *Responsabilità degli intermediary online ed enforcement del diritto d'autore,* cit., p. 14. V. MOSCON, *Free circulation of information and Online Intermediaries – Replacing One "Value Gap" with Anothe*r, cit., p. 978.

[145] See *supra*, § 1.3.4.

[146] See *supra*, § 1.3.5.

[147] CF – Grimaldi Studio Legale – 21c Consultancy, op. cit., p. 163.

[148] *Ibid.* Nordemann also reports that «*Some argue that recital 42 and its outset of neutral and passive intermediary service providers only relates to Article 12 and Article 13 E-Commerce Directive and not to the hosting provider privilege of Article 14. Article 14 would not actually require a passive role of the hosting provider in order for the liability privilege to apply – as long as the hosting provider does not have knowledge or control over the data being stored*». J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 39. Christina Angelopoulos instead affirms that the «*Court's interpretation might (…) have been the one intended by the legislator*». C. ANGELOPOULOS, *European Intermediary Liability in Copyright: a Tort-Based Analysis*, in *Kluwer Law International*, Vol. XXXIX, Milano, 2016, p. 74. Moreover, «*another argument against the exclusion of "active role" hosting providers from Article 14 E-Commerce Directive is a possible contradiction to the aim of making the hosting provider proactively remove infringements. Taking away the liability privilege from "active role" providers would disincentivize them to proactively remove infringements*». J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 39. Cfr. *Infra* § 1.3.10. Cfr. J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 39. Cfr. C. ANGELOPOULOS, *On Online Platforms and The Commission's New Proposal for a Directive on Copyright in the Digital Single Market*, in *SSRN Electronic Journal*, 01.01.2017, pp. 43-44. Some authors debate «*that the distinction between active and passive intermediaries would be too vague*». J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 39. Cfr. J. HOBOKEN –

Recital 42 of the ECD was written only referring to mere conduit and caching service providers, not hosting. In his Opinion in the *L'Oréal*[149] case he affirmed that «*even if Recital 42 of the directive speaks of exemptions in plural, it would seem to refer to the exemptions discussed in the following Recital 43. The exemptions mentioned there concern – expressly - mere conduit and caching. When read this way, Recital 42 becomes clearer: it speaks of the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient*»[150] . Thus, to his mind this refers precisely to mere conduit and caching mentioned in Article 12 and 13 of the ECD[151]. Regardless, the Advocate General's view was rejected by the Court which sustained that, as already noted in the abovementioned *Google France* case, to establish whether the liability of a hosting service provider could be limited, it is necessary to examine whether the role it plays is neutral *i.e.* whether its conduct is merely technical, automatic, and passive with a lack of knowledge or control of the data which it stores[152].

In any case, studying the CJEU's case law from a critical point of view, it can see that the concepts of "neutral" and "passive" are not absolute[153]. On the contrary, they include a range of activities up to a point where the platform's services must be considered "active"[154]. The area of hosting platform's activities that bring them out of the scope of Article 14 has only partly been elucidated by the European Commission and the Court's case-law[155]. According to the Communication from the Commission to the European Parliament, the Council,

---

J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 31 et sq. Cfr. M. HUSOVEC, *Injunctions against Intermediaries in the European Union: Accountable but not Liable?*, in *Cambridge Intellectual Property and Information Law*, Cambridge, Cambridge University Press, 2017, p. 56.

[149] Case C-324/09.

[150] *Ivi*, paragraphs 138-141. J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 32.

[151] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 32. G. COLANGELO, *Responsabilità degli intermediary online ed enforcement del diritto d'autore,* cit., p. 14.

[152] CF – Grimaldi Studio Legale – 21c Consultancy, op. cit., p. 163. Cfr. J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 39.

[153] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 34.

[154] *Ibid.*

[155] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 34. V. MOSCON, *Free circulation of information and Online Intermediaries – Replacing One "Value Gap" with Another*, cit., p. 979.

the European Economic and Social Committee and the Committee of the Regions on *Tackling Illegal Content Online*[156], when a hosting service provider «*takes certain measures relating to the provision of its services in a general manner*», this «*does not necessarily mean that it plays an active role in respect of the individual content items it stores*»[157]. In the *L'Oréal* case, the fact that an online sales platform such as Ebay, «*sets the terms of its service, is remunerated and provides general information to its customers*»[158] does not imply that it is actively involved[159]. At the same time, however, if Ebay helps users in «*optimising the presentation of the offers for sale in question or promoting those offers*»[160], then it must be considered as an active platform[161]. It emerges that certain hosting providers' activities do not cross the threshold from passive to active, whilst others do[162]. In this regard, the Courts have identified factors that can be used to analyze and evaluate the nature of such activities[163]. In *Google France* the judges stated that the function played by a platform in the drafting of a commercial message that goes with an advertising link or in the establishment or section of keywords is relevant in determining whether the platform is active or passive[164]. Thus, it will be up to national courts to assess the relevance of providers' activities for the qualification of the role played by them, whether active or passive[165]. In some situations, obviously, this qualification may be difficult[166]. In Italy, for example, the distinction between these two conditions is relevant not

[156] European Commission, Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, *Tackling Illegal Content Online. Towards an enhanced responsibility of online platforms,* cit.
[157] *Ivi*, p. 11. A. KUCZERAWY, *Active vs passive hosting in EU intermediary liability regime: time for a change?*, 7.08.2018, available at: https://www.law.kuleuven.be/citip/blog/active-vs-passive-hosting-in-the-eu-intermediary-liability-regime-time-for-a-change/.
[158] Case C-324/09, cit., paragraph 115.
[159] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 34.
[160] Case C-324/09, cit., paragraph 116.
[161] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 34. G. COLANGELO, *Responsabilità degli intermediary online ed enforcement del diritto d'autore*, cit., p. 14. For a decision ruled by the European Court of Human Rights on the topic see also V. MOSCON, *Free circulation of information and Online Intermediaries – Replacing One "Value Gap" with Anothe*r, cit., p. 979.
[162] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 34.
[163] *Ibid.*
[164] Case C-236/08, cit., paragraph 118. J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 34.
[165] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 34.
[166] *Ibid.*

only in the context of IPRs but also in the field of unfair commercial practices[167]. In the *Viagogo* case[168], the Italian Competition Authority (AGCOM) qualified as "active" a secondary marketplace for tickets regarding live events and sanctioned it for misleading practices performed by its users[169]. Then, however, the Italian Supreme Administrative Court[170] reformed the AGCOM decision, identifying the hosting provider as a "passive" one[171].

Moreover, other difficulties in the distinguishing line between active and passive ISPs can be found, for instance, referring to activities of search engine[172] – as link providers – and online media sharing platforms[173].

Concerning search engine, it can be seen that the ECD does not provide ad hoc liability exemptions for these activities[174]. In such an absence, both the CJEU and national courts have dealt with them predominantly in the context of hosting safe harbour[175]. In particular, in the judgement of *Google France* case, the Court has applied the safe harbour to a search engine's paid for advertising links. *i.e.* Google's advertising service "Adwords"[176]. Nevertheless, it is uncertain whether

---

[167] V. MOSCON, *Free circulation of information and Online Intermediaries – Replacing One "Value Gap" with Anothe*r, cit., p. 979. Cfr. R.M. HILTY – V. MOSCON, *Digital markets, rules of conducts, and liability of online intermediaries-analysis of two case studies: unfair commercial practices and trade secret infringement*, in G. FROSIO (ed.), *Oxford Handbook of Online Intermediary Liability*, Oxford University Press, 05.2020.

[168] AGCOM, VIAGOGO – *Secondary Market*, PS10610 (It.).

[169] V. MOSCON, *Free circulation of information and Online Intermediaries – Replacing One "Value Gap" with Anothe*r, op. cit., p. 979

[170] *i.e.* Consiglio di Stato

[171] V. MOSCON, *Free circulation of information and Online Intermediaries – Replacing One "Value Gap" with Anothe*r, op. cit., p. 979

[172] A search engine is «*a software program that helps people find the information they are looking for online using keywords or phrases*». Available at: https://www.bdc.ca/en/articles-tools/entrepreneur-toolkit/templates-business-guides/glossary/search-engine.

[173] An online media sharing platform is a «*website that enables users to store and share their multimedia files (photos, videos, music) with others*». Available at: https://www.pcmag.com/encyclopedia/term/media-sharing-site. J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 34.

[174] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 34. Generally speaking, this problem concerns not only search engine, but also the so called «*non-hosting service providers*». S. F. SCHWEMER – T. MAHLER – H. STYRI, *Liability exemptions of non-hosting intermediaries: Sideshow in the Digital Services Act?*, cit., pp. 4-29. Lomba and Evas explain that for «s*ervices such as upstream providers, CDN providers, domain name services or search engines (…) – which have gained special importance only after the ECD entered into force – there seems to be some legal uncertainty regarding the application of the provisions of the ECD, in particular whether Article 12 ECD or Article 14 ECD applies*». N. LOMBA – T. EVAS, op. cit., p. 287.

[175] *Ibid. See* S. F. SCHWEMER – T. MAHLER – H. STYRI, *Liability exemptions of non-hosting intermediaries: Sideshow in the Digital Services Act?*, cit., pp. 4-29.

[176] *Ibid.* The CJEU has indeed explained that search engines (defined as "referencing service providers" by the Court) «*fall within Article 14 ECD for their paid-for links, i.e. the links*

the provision by a search engine of links outside the context of advertising is covered by Article 14 of the ECD[177]. In the context of copyright, the field in which infringements form the most prominent part of total IPRs illicit on the Internet[178], the issue is extremely significant[179]. In this area, the Court's case law has evolved to include the posting of hyperlinks within the scope of the exclusive right of communication to the public provided by Article 3[180] of the Information Society Directive[181]. In *GS Media*[182] case the CJEU stated that if a link allows access to a work published online without the copyright holder's authorization and the individual «*knew or ought to have known*»[183] about the lack of consent, the link itself infringes the right of communication to the public[184]. By doing so, the judges introduced a sort of knowledge test in the infringement analysis of the

*advertising third-party products and services*». N. LOMBA – T. EVAS, op. cit., p. 290. Cfr. Case C-236/08, paragraph 110.

[177] J. NORDEMANN, *Liability of Online Service Providers for Copyrighted Content – Regulatory Action Needed?*, Study prepared for the European Parliament, 2017, pp. 15-16. Lomba and Evas underline in the same way that «*It is not clear (...) whether Article 14 ECD also applies to editorial, i.e. non-advertising, links made publicly available in search engines. According to one opinion, search engines are not caught by Article 14 ECD; they needed to follow their own liability regime for published editorial links. Others argue that Article 14 ECD did apply to editorial links in particular of search engines.*». N. LOMBA – T. EVAS, op. cit., p. 290. Against the application of Article 14 see N. LOMBA – T. EVAS, op. cit., p. 290. Actually, «*the most important argument against an application of Article 14 E-Commerce Directive comes from the E-Commerce Directive itself. Article 21(2) E-Commerce Directive requires the Commission to regularly examine and analyse "the need for proposals concerning the liability of providers of hyperlinks". This implies that providers of hyperlinks are not regulated by the E-Commerce Directive*.». N. LOMBA – T. EVAS, op. cit., p. 290. In favor of applying Article 14 to search engines please see N. LOMBA – T. EVAS, op. cit., p. 290.

[178] *Ivi*, p. 7.

[179] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 35.

[180] Article 3 establishes the «*Right of Communication to the public of works and right of making available to the public other subject-matter*» as follow: «*1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. 2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them: (a) for performers, of fixations of their performances; (b) for phonogram producers, of their phonograms; (c) for the producers of the first fixations of films, of the original and copies of their films; (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite. 3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.».*

[181] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

[182] Case C-160/15.

[183] *Ivi*, paragraph 49.

[184] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 35. Cfr. Case C-527/15, *Filmspeler* case. Cfr. Case C-610/15, *Ziggo/Brein* Case *i.e. The Pirate Bay*.

exclusive right. They designed a juris tantum legal presumption for links pointing to unauthorized content which is based on whether the posting of hyperlinks is done for profit[185]. It is indeed established that «*if the posting of hyperlinks is carried out for profit, it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, so that it must be presumed that that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder*»[186]. Consequently, failure to refute the presumptions results in the qualification of the link in question as a communication to the public under Article 3 of the Information Society Directive[187]. One implication of this view is the possibility of applying the exclusive right to link aggregators, like search engines[188].

Online media sharing platforms, instead, have been classified for years as benefiting from the hosting safe harbor by national courts[189]. These intermediaries are often qualified in this way because of their compliance with duties of care in national law, as well as with the evaluation of their knowledge or awareness of the illegal nature of the information hosted[190].

Overall, it can be noted again that the concepts of "neutral" and "passive" intermediaries are not absolute[191]. Also considering different interpretations, these notions are sometimes more restrictive others more permissive, allowing the service provider to carry out a number of activities in relation to the content they host[192].

#### 1.3.6.3. «*Knowledge or awareness*»

[185] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 35.
[186] Case C-160/15, cit., paragraph 51. J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 35.
[187] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 35.
[188] *Ibid.*
[189] *Ivi*, p. 36.
[190] *Ibid.*
[191] *Ivi*, p. 35.
[192] *Ibid.*

From Article 14 emerges a further condition to benefit from hosting service providers' liability exemption. As already observed, the ECD specifies that, with reference to the «*illegal activity or information*»[193] stored, platforms are not attackable if they do not have «*actual knowledge*» or are «*not aware of facts or circumstances from which the illegal activity or information is apparent*»[194]. In this regard, in fact, Article 14 contains two distinct knowledge standards: "actual knowledge" and "awareness", this latter also referred to as "constructive" knowledge[195]. In order to effectively understand the extent of liability exemptions, the CJEU has given some guidance in identifying what is the meaning of these two notions.

Historically, the European judges have interpreted "actual knowledge" as "specific knowledge"[196]. In the *L'Oréal*[197] case, the Court has defined that for the host provide, to have real knowledge of the infringement, a notification of illegal content hosted must be sufficiently precise and properly substantiated[198]. This means that not every notification of illegal received by the platform automatically causes a loss of safe harbour protection if not matched by removal of the content at issue[199]. On the contrary, the notification has to be precise and specific.

When we talk about "specific" knowledge, we generally refer to knowledge relates to the unlawfulness of specific elements of the hosted content, while "general" knowledge relates to the use of the service to host illegal content[200]. Many platforms may in fact have a general knowledge that their service is being used to distribute illicit content but may not have information about individual violations unless they are reported[201]. In this regard, today, some authors have noticed a movement towards a "generic" knowledge-based approach[202]. As an example, it could be claimed that in order to remove content, an intermediary does

[193] See *supra*, § 1.3.6.1.
[194] Article 14(1) of the ECD.
[195] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 37.
[196] *Ibid.*
[197] Case C-324/09.
[198] *Ivi*, paragraph 122. J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 38.
[199] *Ivi*, p. 39.
[200] *Ivi*, p. 38.
[201] *Ibid.*
[202] *Ibid.*

not need to know the name of the infringer or the infringed copyright-protected work, rather, more generic knowledge of the infringement would suffice[203].

About the concept of "awareness", the Court seems to have been more explicit in its definition. In the famous and aforementioned *L'Oréal* case, the CJEU established that a platform has awareness «*if it was aware of facts or circumstances on the basis of which a diligent economic operator should have realised*»[204] that the content was unlawful and, as Article 14 requires, did not act expeditiously to take it down[205]. It could be thus said that the judges disavow hosting's safe harbour for conduct engaged in bad faith or for uncooperative behaviors[206].

The CJEU acknowledges that there are two methods to obtain knowledge or awareness of illegal activity or information[207]. A first proactive method, which is the result of «*investigations undertaken on the intermediary's own initiative*»[208] and a second reactive one, that comes from «*a situation in which the operator is notified of the existence of such an activity or such information*»[209]. In *L'Oréal v. Ebay* it is generally stated indeed that these situations include those where «*the operator of an online marketplace uncovers, as the result of an investigation undertaken on its own initiative, an illegal activity or illegal information, as well as a situation in which the operator is notified of the existence of such an activity or such information*»[210]. From a legal perspective, it can easily see that there are

---

[203] *Ibid.*

[204] Case C-324/09, paragraph 124.

[205] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 38. G. COLANGELO, *Responsabilità degli intermediary online ed enforcement del diritto d'autore*, cit., p. 14. Cfr. J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 44.

[206] J. NORDEMANN, *Liability of Online Service Providers for Copyrighted Content – Regulatory Action Needed?*, cit., pp. 12-13.

[207] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 39.

[208] Case C-324/09, paragraph 122.

[209] *Ibid.* J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 39.

[210] Case C-324/09, paragraph 122. Referring to the situation in which the operator is notified an illegal activity or information, in this paragraph the Court establishes also that «*although such a notification (...) cannot automatically preclude the exemption from liability provided for in Article 14 of Directive 2000/31, given that notifications of allegedly illegal activities or information may turn out to be insufficiently precise or inadequately substantiated, the fact remains that such notification represents, as a general rule, a factor of which the national court must take account when determining, in the light of the information so transmitted to the operator, whether the latter was actually aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality*», in this way being a point of reference for the identification of the "awareness" requirement. CF – Grimaldi Studio Legale – 21c Consultancy, op. cit., p. 163.

few incentives for intermediaries to take proactive action, thereby investigating illicit content and obtaining knowledge of them. According to the legal structure of the ECD, in fact, such behavior could lead platforms to steer away from passive and neutral model preferred by the legislators[211], bringing them closer to an active host status, with the risk of losing the safe harbour protection[212]. Proactively seeking knowledge about IPRs infringements on the platform, in addition, may go against Article 15 of the ECD[213] which establishes a prohibition on imposing general monitoring obligations on intermediaries[214]. It follows that the situation envisaged is a real paradox, namely the "Good-Samaritan" paradox which we will discuss about below[215].

In the light of these premises, one can understand why reactive approaches, such as third-party alerts and notifications, are the most common source of knowledge or awareness in the context of the ECD[216]. In this regard, the legal framework encourages the adoption of Notice-and-takedown procedures *i.e.* procedures which require hosting providers to remove infringing content they host if alerted, or risk losing the safe harbor protection provided by Article 14.

#### 1.3.6.4. Notice-and-takedown mechanism

Article 14 of the ECD provides indeed the legal basis for European Member States to adopt Notice-and-takedown (hereinafter referred to as 'NTD') mechanisms, even if it does not regulate those procedures[217]. As it has been analyzed[218], once the intermediary acquires the knowledge or awareness thanks to a notice from a third-party, then he must «*acts expeditiously to remove or to disable access to the information*»[219] which infringes IPRs[220]. The precise

[211] See *supra*, § 1.3.6.2.
[212] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 39.
[213] See *infra*, § 1.3.7.
[214] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 39.
[215] See *infra*, § 3.
[216] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 39.
[217] CF – Grimaldi Studio Legale – 21c Consultancy, op. cit., p. 140. A. KUCZERAWY, *From 'Notice and Takedown' to 'Notice and Stay Down': Risks and Safeguards for Freedom of Expression*, in G. FROSIO (ed.*), Oxford Handbook of Intermediary Liability*, Oxford University Press, 05.2020, p. 2.
[218] See *supra*, § 1.3.6.3.
[219] Article 14(1) of the ECD.

meaning of "expeditious action" is not clear. Its significance is sometimes suggested by some national legal systems, Codes of Conducts or institutional documents. Such sources take into consideration *e.g.* the nature of the subject providing the notice, the kind and the obviousness of the infringement[221]. As an example, it can be mentioned the European Commission's Communication on *Tackling Illegal Content Online*[222], in which the European Commission does not establishes a specific time for the action, but it generally states that notices by the so called "trusted flaggers"[223] «*should be addressed more quickly than others*»[224].

One of the main problems is that the ECD has introduced the NTD system as a condition of an ISP using the immunity regime[225] without adjusting it in its operation[226]. Such a lack of a complete and harmonized procedure obviously «*leads to legal uncertainty for all parties involved*»[227] *i.e.* intermediaries, right holders, users and also authorities[228]. Referring to specific national implementations, in fact, Member States have enacted several and different "Notice and Action"[229] mechanisms that, because of their main purpose (of removing or blocking illegal content) can also threaten the right of freedom of

---

[220] European Commission, Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, *Tackling Illegal Content Online. Towards an enhanced responsibility of online platforms*, p. 14.
[221] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 40.
[222] European Commission, Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, *Tackling Illegal Content Online. Towards an enhanced responsibility of online platforms,* cit.
[223] A trusted flagger is «*an individual or entity which is considered by a hosting service provider to have particular expertise and responsibilities for the purposes of tackling illegal content online*». Cfr. European Commission, *Commission Reccomendation of 1.3.2018 on measures to effectively tackle illegal content online*, cit., p. 10. European Commission, Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, *Tackling Illegal Content Online. Towards an enhanced responsibility of online platforms,* cit., p. 12.
[224] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 40. European Commission, Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, *Tackling Illegal Content Online. Towards an enhanced responsibility of online platforms,* cit., p. 14.
[225] B. DINWOODIE editor, *Secondary Liability of Internet Service Provider*, cit., p. 40.
[226] A. KUCZERAWY, *From 'Notice and Takedown' to 'Notice and Stay Down': Risks and Safeguards for Freedom of Expression*, cit., p. 2.
[227] *Ibid.* P. VAN EECKE, op. cit., p. 1484.
[228] P. VAN EECKE, op. cit., p. 1484.
[229] According to A. KUCZERAWY, the notion of "Notice and Action" (N&A) encompasses that of NTD system, "Notice and Notice" (NN), and "Notice and Stay Down" (NSD). Cfr. A. KUCZERAWY, *From 'Notice and Takedown' to 'Notice and Stay Down': Risks and Safeguards for Freedom of Expression*, cit.

expression[230]. In the absence of any legislation, in addition, some systems are growing up organically as part of a negotiated agreement between intermediaries and interested e-commerce players[231] with an emerging role for self-regulation - that is also promoted by the ECD in Article 16[232] - to create voluntary NTD standards[233]. In this regard, one of the most well-known tools is the *Memorandum of Understanding on the sale of counterfeit goods on the internet*[234] (the "MOU"), agreed between different brand owners and Internet platforms in Europe regarding their respective roles in tackling counterfeiting online[235]. The MOU concerns the services provided inside of the European Economic Area and it deals only with counterfeit goods[236], not also with parallel imports or selective distribution systems[237]. Furthermore, the agreement does not concern all Internet platforms, but only «*information society service provider whose service is used by third parties to initiate online the trading of physical goods*»[238]. Generally, the fact of having NTD standards such as those developed in the MOU, albeit created on a voluntary basis, is a benefit to both intermediaries and right holders and one more step towards achieving a «*fair balance*»[239] with fundamental rights[240]. An advantage for hosting providers, on the one hand, because they are, precisely, intermediaries which play a central role between right holders and users, carrying usually the majority of the legal risks[241]. For right holders, on the other hand, because they must demonstrate they have sufficiently alerted the hosting provider about an infringement in order for it to be removed[242]. In the absence of precise

[230] *Ivi*, p. 1. See *infra* § 2. Cfr. A. MARSOOF, *'Notice and Takedown': a copyright perspective*, in *Queen Mary Journal of Intellectual Property*, Vol. V, No. II, Edward Elgar Publishing, 2015, pp. 183-184. C. ANGELOPOULOS – S. SMET, *Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability*, in *Journal of Media Law*, Taylor & Francis Publishing, 21.10.2016, p. 2.
[231] B. DINWOODIE editor, *Secondary Liability of Internet Service Provider*, cit., p. 41.
[232] See *infra*, § 1.3.9.
[233] P. VAN EECKE, op. cit., p. 1485.
[234] *Memorandum of Understanding on the sale of counterfeit goods on the internet*, Brussels, 21.06.2016.
[235] B. DINWOODIE editor, *Secondary Liability of Internet Service Provider*, cit., p. 40.
[236] *Memorandum of Understanding on the sale of counterfeit goods on the internet*, cit., p. 1.
[237] B. DINWOODIE editor, *Secondary Liability of Internet Service Provider*, cit., p. 41.
[238] *Memorandum of Understanding on the sale of counterfeit goods on the internet*, cit., p. 2.
[239] C. ANGELOPOULOS – S. SMET, *Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability,* cit., p. 2.
[240] *Ibid.*
[241] P. VAN EECKE, op. cit., p. 1485.
[242] *Ibid.*

rules from legislation, «*rightholders should employ sufficiently strong notification channels to inform the hosting providers about infringements identified on the platform*»[243].

An interesting consideration is related to yet another issue briefly anticipated before. The fact that, as found, in the ECD there is not an accurate NTD structure, has led to create incentives for ISPs to sometimes take down the content too easily without the proper oversight[244]. In order not to lose immunity from liability, in fact, ISPs are often induced to eliminate all suspicious content, thus inevitably affecting the freedom of expression of the users[245] «*as well as businesses' ability to reach consumers and their freedom to conduct a business*»[246]. Practically speaking, the platforms have to decide themselves whether the content is illegal or not, so as to remove it[247]. The result is that they must balance the danger of being too careful, while safeguarding fundamental rights, with the risk of being less cautious than is required, thus having a higher probability of benefiting from liability exemptions[248].

Together with all these considerations, it is however worth underline that in Article 21(2) of the ECD the legislators have foreseen the need to implement a

---

[243] *Ibid.*

[244] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 27. A. KUCZERAWY, *From 'Notice and Takedown' to 'Notice and Stay Down': Risks and Safeguards for Freedom of Expression*, cit., p. 2.

[245] Cfr. C. ANGELOPOULOS – S. SMET, *Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability*, cit. A. KUCZERAWY, *From 'Notice and Takedown' to 'Notice and Stay Down': Risks and Safeguards for Freedom of Expression*, cit.

[246] European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 20.

[247] J. BAYER, op. cit., p. 96.

[248] *Ibid.* The European Commission sheds light (over and over again) on this important issue explaining that «*When platforms remove users' content, services or goods offered for sale, or de-rank them or otherwise limit access, or suspend user accounts, this can have severe consequences on the rights and freedoms of their users. This affects in particular their freedom of expression and limits access to information, but also on freedom of businesses and their ability to reach customers. These decisions are often not based on an assessment of the legality of the content, nor are they accompanied by appropriate safeguards, including justifications for the removal or access to complaints mechanisms, but they are solely governed by the discretionary powers of the platform according to the terms of services that are part of their contractual terms*». European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 18.

comprehensive and harmonized NTD system. In this regard, the legislative *Proposal for a Regulation of the European Parliament and of the Council on A Single Market For Digital Services*[249] seems to take up this issue. Amending the ECD, the latter establishes in Article 14 a «*Notice and action mechanism*» applicable to providers of hosting services, including online platforms.

### 1.3.7. Prohibition on general monitoring obligation

Article 15 of the ECD stresses that a duty to monitor may not be imposed upon ISPs[250]. The legislators expressly state that «*Member States shall not impose a general monitoring obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity*»[251]. As specified in Recital 47, however, «*Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature*» but «*this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation*». From this wording it clearly follows that it is made a distinction between "general" and "specific" monitoring obligations, the first being prohibited and the second allowed under Recital 47[252]. This raises the question of what actions intermediaries may be legitimate to do in order to address their users' unlawful behavior[253]. This problem is particularly significant in the field of copyright infringements[254]. For example, can intermediaries only be demanded to remove a single and identified copy of a protected work or can they also be requested to delete all copies of a given work from a depository, thus causing them the burden

[249] See *infra*, § 3.
[250] R. JULIÀ-BARCELÓ – K. J. KOELMAN, *INTERMEDIARY LIABILITY IN THE E-COMMERCE DIRECTIVE: SO FAR SO GOOD, BUT IT'S NOT ENOUGH* in *Computer Law & Security Report*, Vol. XVI, No. IV, Elsevier Science Ltd., 2000, p. 232.
[251] Article 15(1) of the ECD.
[252] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 46.
[253] G. SARTOR, *Providers Liability: From the eCommerce Directive to the future*, cit., p. 26.
[254] *Ibid.*

of identifying these copies? To answer this question and many others[255], it is fundamental to define the margins of "general" monitoring, clarifying the obligations that can be imposed on intermediaries to terminate or prevent an IPR infringement. In this task, neither the ECD itself nor the legal doctrine offer any criteria[256]. The CJEU's case law, instead, helps this analysis providing some useful guidelines[257]. Before examining the various relevant cases, it is pointed out that Article 15 does not impose restrictions on obligations to takedown unlawful content after a hosting provider get knowledge of the same following a precise and adequate notification by a third party. On the contrary, obligations to take proactive and preventive measures, such as filtering, are more complex in this light[258].

First, in the *L'Oréal*[259] case the Court states that Article 15 prohibits «*active monitoring of all the data of each of [a platform's] customers in order to prevent any future infringement of intellectual property rights*»[260]. This point is further developed in *Scarlet Extended SA v SABAM*[261] and *Netlog*[262] cases[263]. In the first one, the Court stated that demanding an Internet access provider to install a filtering[264] ignores the need to strike a balance between the protection of IPRs and the freedom of business and it does not respect the prohibition of a general obligation to actively seek for infringing content[265]. On the same lines, in *Netlog*

[255] Cfr. G. SARTOR, *Providers Liability: From the eCommerce Directive to the future*, cit., p. 26.
[256] P. VAN EECKE, op. cit., p. 1486.
[257] *Ibid.*
[258] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 46.
[259] C-324/09.
[260] *Ivi*, paragraph 139.
[261] Case C-70/10.
[262] Case C-360/10.
[263] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 46.
[264] It should be note that, in reference to the definition of "general" monitoring, in *Scarlet Extended SA v SABAM* case the judges specify that «*it is common ground that implementation of that filtering system would require:*
– *first, that the ISP identify, within all of the electronic communications of all its customers, the files relating to peer-to-peer traffic;*
– *secondly, that it identify, within that traffic, the files containing works in respect of which holders of intellectual-property rights claim to hold rights;*
– *thirdly, that it determine which of those files are being shared unlawfully; and*
– *fourthly, that it block file sharing that it considers to be unlawful.*». Case C-70/10, paragraph 38.
[265] EUIPO, *IPR ENFORCEMENT CASE-LAW COLLECTION. THE LIABILITY AND OBLIGATIONS OF INTERMEDIARY SERVICE PROVIDERS IN THE EUROPEAN UNION*, cit., p. 15.

the CJEU established that a general obligation to monitor violates the platform's freedom to conduct a business and may infringe users' fundamental rights[266]. Therefore, the general prohibition should assist in finding a fair balance between the fundamental rights at stake in the particular cases[267]. Some authors, like the legal scholar Van Eecke, have tried to give their interpretation of the monitoring obligations' meaning in "specific" case provided by Recital 47, saying that «*in order to distinguish general from specific monitoring obligations, it should be considered that (1) as an exception, specific monitoring obligations must be interpreted narrowly, (2) both the scope of the possible infringements and the amount of infringements that can be reasonably expected to be identified, must be sufficiently narrow, and (3) it must be obvious which materials constitute an infringement*»[268]. However, despite several attempts to clarify this issue, it may be noticed that there remains a contested area as to what types of "specific" measures are allowed under Article 15[269]. The further clarification required by the CJEU on this grey area will probably be influenced by the specific filtering technology available at stake and the balancing of fundamental rights on a case-by-case basis[270]. About filtering technology, in particular, the challenge of identifying the dividing line between "general", which delimits the sphere of admissible orders, and "specific" obligations is made even more complicated by the fact that these notions are susceptible to change on the basis of the available technologies[271]. For instance, filtering obligations that were considered "general" years ago, when some content identification technologies where not available, may no longer be viewed as "general" today[272]. In the same way, the obligation to remove or preventively block classes of items may appear less general in certain sectors, such as copyright infringements, where more cost-effective automated methods

[266] *Ibid.*
[267] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 46.
[268] P. VAN EECKE, op. cit., p. 1455. CF – Grimaldi Studio Legale – 21c Consultancy, op. cit., p. 213.
[269] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 46.
[270] *Ibid.*
[271] G. SARTOR, *Providers Liability: From the eCommerce Directive to the future*, cit., p. 26.
[272] *Ibid.*

for detecting illegitimate material exist, rather than domains where no such means are available[273].

Despite the strong and clear statement of a general monitoring prohibition, the ECD contains a Recital that seems to contradict Article 15[274]. Recital 48, in fact, establishes that the ECD «*does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities*». Thus, Article 15(1) forbids imposing an obligation to monitor, while Recital 48 allows for the establishment of a duty to detect unlawful material[275]. In this respect, the duties of care mentioned may relate to *ex ante* or *ex post* measures[276]. On the one hand, *ex post* measures concern the elimination or disabling of content after obtaining knowledge of the same, as in the context of an NTD system[277]. Such duties are the result of the regime of Article 14(1) of the ECD and, as such, do not appear to be per se problematic[278]. On the other hand, instead, *ex ante* measures concern duties of care as obligations on the platform to prevent infringement before obtaining knowledge or awareness of the same[279]. We are referring to proactive measures which are difficult to reconcile with the prohibition to actively to seek facts or circumstances indicating illegal activity in Article 15[280]. With this in mind, it can be understood why Recital 48 may have specific implications that raise spontaneous questions. The legal scholars Julià-Barceló and Koelman, for example, wonder about this issue in their study[281], asking themselves «*could the duty of care mentioned in the recital require intermediaries to implement and operate filtering and control mechanisms?*» Or «*could those service providers who fail to implement such mechanisms be held liable for failure to comply with the mentioned duty of care? (…) will host service providers be held liable if they fail to detect and remove material that, according*

[273] *Ibid.*
[274] R. JULIÀ-BARCELÓ – K. J. KOELMAN, op. cit., p. 232.
[275] *Ibid.*
[276] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 45.
[277] *Ibid.*
[278] *Ibid.*
[279] *Ibid.*
[280] *Ibid.*
[281] R. JULIÀ-BARCELÓ – K. J. KOELMAN, op. cit., p. 232.

*to certain (yet undefined) standards, they should have been able to identify?*». The truth is that, as Nordemann points out[282], «*the prevention duties for hosting providers have been*»[283] (and still is) a highly debated topic. The German Federal Supreme Court[284], relying on the CJEU's statements[285], identifies a hosting intermediaries' duty of care «*after notification of a clear intellectual property rights infringement for (1) takedown, (2) staydown and (3) prevention of similar clear rights infringements of the same kind*»[286]. The consequence is that to satisfy these duties of care, intermediaries will inevitably be called upon to implement precautionary «*filtering solutions*»[287]. Although the possibility of taking such preventive measures against IPRs online wrongdoing has been widely criticized[288], some authors argue that their implementation does not contravene Article 15 insofar as they are instituted for specific cases or for «*similar infringements of the same obvious kind*»[289] rather than to prevent any future

[282] J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit.

[283] *Ivi*, p. 42.

[284] BGH

[285] The CJEU in the *L'Oréal* case states that «*the prevention duty includes the duty to ensure that an online market place takes measures which contribute not only to stopping infringements of these rights by users of the market place, but also preventing further infringements of that kind*». J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 42. C-324/09, paragraphs 127-134.

[286] J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 42.

[287] J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 42. Nordemann recalls also when «*sharehosters for the prevention of future infringements have been obliged by German and Italian courts to apply word filters, after having been notified about a specific title of a copyright work made illegally publicly available by a user*». *Ibid.*

[288] Cfr. *La société Google France c. La société Bach films* Case, Première chambre civile de la Cour de cassation, 12.07.2012. Also Christina Angelopoulos identifies this view «*as the correct interpretation of Article 15 as Staydown obligations "can only be achieved by screening all (even non-infringing) content passing through its servers for infringing copies, i.e. practicing general monitoring"*». J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 42. Cfr. C. ANGELOPOULOS, *On Online Platforms and The Commission's New Proposal for a Directive on Copyright in the Digital Single Market*, cit., p. 27.

[289] J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 42.

violations[290]. This thesis seems to be «*confirmed by the CJEU*»[291] in the *Eva Glawischnig-Piesczek/Facebook Ireland Limited*[292] case. There, the Court has stated that «*Article 15 ECD did not preclude an injunction requiring Facebook to takedown (1) identical information and (2) equivalent information to the defamatory information at trial*»[293], clarifying at the same time that that «*such an injunction specifically does not impose on the host provider an obligation to monitor generally the information which it stores, or a general obligation actively to seek facts or circumstances indicating illegal activity, as provided for in Article 15(1) of Directive 2000/31*»[294]. In any case, legislative uncertainties remain surely to be resolved. Ultimately, analyzing Recital 48 of the ECD and considering that it provides for such an additional duty of care[295], it is worth noting that it might also expand the ways by which hosting service providers acquire the requisite of knowledge[296] to render ISPs liable[297].

In the light of these findings, it emerges an undeniable need to provide answers on Article 15, Recital 48 and all their inconsistencies. There is a necessity to delimit the boundaries of "general" and "specific" obligations thus creating a

[290] Cfr. Case C-70/10, paragraph 69; Case C-360/10, paragraphs 38-39; Case C-484/14, paragraph 87. Nordemann underlines that «*It does not seem convincing that the Staydown and even more prevention duties for specific infringements are always made impossible by the prohibition of general monitoring duties pursuant to Article 15 E-Commerce Directive. If one would apply Article 15 E-Commerce Directive in all cases that involve any processing of general data, no room for cases outside of Article 15 E-Commerce Directive would remain*». J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 43. This situation still shifts the reader's focus to what is actually meant by "general" and "specific" monitoring. It is therefore important that the legislator draws a clear dividing line between these two terms.

[291] J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 43.

[292] Case C-18/18.

[293] J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 43. The CJEU has specified that equivalent information «*contains specific elements which are properly identified in the injunction, such as the name of the person concerned by the infringement determined previously, the circumstances in which that infringement was determined and equivalent content to that which was declared to be illegal. Differences in the wording of that equivalent content, compared with the content which was declared to be illegal, must not, in any event, be such as to require the host provider concerned to carry out an independent assessment of that content*.». Case C-18/18, paragraph 45.

[294] Case C-18/18, paragraph 47.

[295] See *supra* in this paragraph.

[296] See *supra*, § 1.3.6.3.

[297] R. JULIÀ-BARCELÓ – K. J. KOELMAN, op. cit., p. 232.

precise parameter with which even admissible injunctions[298] and duties of care can be compared[299].

Finally, as it will be analyzed later dealing with the Directive on Copyright in the Digital Single Market[300], in contrast to what is set out in Article 15 of the ECD, there is an opposite trend of imposing monitoring and filtering obligations characterized by *ex ante* measures.

### 1.3.8. Injunctions

The last paragraphs of Articles 12, 12(3), 13, 13(2) and 14, 14(3), of the ECD provide for the possibility of injunctions against intermediaries, stating that it shall not be affected «*the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement*». In this connection, Recital 45 of the Directive considers that «*the limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it*». As a result, the fact that intermediaries are immune from liability does not preclude injunctions of different kinds against ISPs whose services are being used to infringe IPRs[301]. Obviously, as it is required by the Directive, the injunctions claims may be enforced in the context of the ECD only if the service in question is an Information Society Services[302], only under the limitation of

[298] See *infra*, § 1.3.8.
[299] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 46.
[300] See *infra*, § 2.
[301] EUIPO, *IPR ENFORCEMENT CASE-LAW COLLECTION. THE LIABILITY AND OBLIGATIONS OF INTERMEDIARY SERVICE PROVIDERS IN THE EUROPEAN UNION*, cit., p. 7. Cfr. J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 29.
[302] See *supra*, § 1.3.2.

Article 15[303] and only with an eye towards the safeguarding the fundamental rights. The CJEU has made this clear in several cases.

Concerning the "prerequisite" of being an Information Society Service to request an injunction, in *Mc Fadden*[304] case, the CJEU stated that a business owner who operates a free anonymous Wi-Fi connection is an Information Society Service when he or she does so for the purpose of advertising his goods or services[305]. Such an operator is exempted from liability for infringements committed by third parties via that Internet connection when the process is technical, automatic and passive[306]. Thus, because of its status, while no compensation claims are possible, proportional injunctions are[307].

The importance of striking a fair balance with fundamental rights (even if it is particularly complex in case of preventive and filtering measures[308]) even in the relationship with injunctions is found, among various cases, in *Telekabel*[309]. Here, the Court sustained that the European law does not preclude an injunction requiring an Internet access provider to block access to infringing websites when the injunction does not identify the specific measures to be adopted[310]. An injunction, in particular, is consistent and compatible with fundamental rights when it does not unnecessarily deprive users of the possibility of lawfully accessing information and when it has the effect of discouraging, hampering or preventing unauthorized access to infringing material[311].

Regarding injunctions aimed at protecting IPRs, Article 8(3) of the Information Society Directive[312] and Article 11 of the Enforcement Directive[313],

---

[303] See *supra*, § 1.3.7.
[304] Case C-484/14.
[305] EUIPO, *IPR ENFORCEMENT CASE-LAW COLLECTION. THE LIABILITY AND OBLIGATIONS OF INTERMEDIARY SERVICE PROVIDERS IN THE EUROPEAN UNION*, cit., p. 18.
[306] *Ibid.*
[307] *Ibid.*
[308] See *infra*, § 2.
[309] Case C-314/12.
[310] EUIPO, *IPR ENFORCEMENT CASE-LAW COLLECTION. THE LIABILITY AND OBLIGATIONS OF INTERMEDIARY SERVICE PROVIDERS IN THE EUROPEAN UNION*, cit., p. 15.
[311] *Ibid.*
[312] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.
[313] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

*lex specialis* with respect to the ECD, are noteworthy. Article 8(3) contains specific rules for copyright infringements and recites that «*Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right*». Recital 59 of the same Information Society Directive provides for a longer statement, establishing that «*In the digital environment (…) the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network*». Article 11 of the Enforcement Directive, instead, covers injunctions concerning IPRs in general and states that «*Member States shall ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement or related right. (…) Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC* »[314]. These provisions are relevant because they may be applicable to give relief in situations where an intermediary is between the zone of domestically decided liability and the EU-guaranteed safe space[315]. In fact, they might offer the possibility of injunctive relief even when the ISP is within the safe harbor and thus immune from monetary liability[316].

## 1.3.9. Codes of conduct and self-regulation

[314] Cfr. Recital 23 of Enforcement Directive.
[315] B. DINWOODIE editor, *Secondary Liability of Internet Service Provider*, cit., p. 51.
[316] *Ibid.*

As mentioned at the beginning of this work[317], the Internet of the digital world has allowed consumers and citizens to have access to all online information and creative works immediately, letting them think that anything available is free and can be reused[318]. This has caused not just tension between the rightsholders and the expectations of many citizens, but it has also created a complex enforcement environment in which existing legal norms haven't always kept up with the rate at which technologies and practices evolve[319]. In fact, as the enforcement authorities cannot be expected to be on top of every IPRs' violation, they have looked for other options such as self-regulation of intermediaries and voluntary collaboration practices[320]. The latter are meant to comply with the law as well as with citizens' fundamental rights, combating at the same time online infringements of IPRs[321]. Self-regulation includes codes of conduct and, as it has been examined[322], practices for taking down infringing sites[323]. It is not surprising in fact that most of them cover copyright, trademarks and hate speech[324]. To better understand this institution, however, it might be useful to frame it. According to the study on the *Overview of the legal framework of notice-and-action procedures in Member States*[325], self-regulation refers to the substitution approach, which can be used as a replacement regulation until state regulation is adopted. Once the state intervenes, in fact, it must take precedence over self-regulatory efforts and activities. Self-regulation, unlike co-regulation, is developed independently of state regulation[326].

Against this background, Article 16 of the ECD deserves to be mentioned. It encourages in fact «(a) *the drawing up of codes of conducts at Community level, by trade, professional and consumer associations or organisations, designed to*

[317] See *supra*, § 1.2.
[318] EUIPO, *Study on voluntary collaboration practices in addressing online infringements of trade mark rights, design rights, copyright and rights related to copyright*, 09.2016, p. 8.
[319] *Ibid.*
[320] *Ibid.*
[321] *Ibid.*
[322] See *supra*, § 1.3.6.4.
[323] EUIPO, *Study on voluntary collaboration practices in addressing online infringements of trade mark rights, design rights, copyright and rights related to copyright*, cit., p. 8.
[324] ICF – Grimaldi Studio Legale – 21c Consultancy, op. cit., p. 220.
[325] ICF – Grimaldi Studio Legale – 21c Consultancy, op. cit.
[326] *Ibid.*

*contribute to the proper implementation of Articles 5 to 15*»[327]. It establishes also Member State shall encourage «*(b) the voluntary transmission of draft codes of conduct at national or Community level to the Commission; (c) the accessibility of these codes of conduct in the Community languages by electronic means; (d) the communication to the Member States and the Commission, by trade, professional and consumer associations or organisations, of their assessment of the application of their codes of conduct and their impact upon practices, habits or customs relating to electronic commerce; (e) the drawing up of codes of conduct regarding the protection of minors and human dignity*» and «*the involvement of associations or organisations representing consumers in the drafting and implementation of codes of conduct affecting their interests and drawn up in accordance with paragraph 1(a). Where appropriate, to take account of their specific needs, associations representing the visually impaired and disabled should be consulted*»[328].

### 1.3.10. A critical approach to the ECD: Is it still enough?

Looking at the ECD in its generality, also considering its effectiveness during and after all these years, some overall reflections seem inevitable. Obviously, like all things, even the ECD has negative and positive sides. Here, however, the negative ones sometimes seem to prevail making the need for a new reform feel strong.

On the one hand, as the Professor Teresa Rodríguez de las Heras Ballell observes, the ECD has surely succeeded in «*paving the way for the development and the consolidation of the digital market in Europe*»[329]. Its rules have addressed and overcome the major roadblocks to electronic commerce growth, trying to strike a balance between the various interest at stake: the promotion of digital service provisions (particularly of intermediary services), the societal interest that illegal information is taken down quickly and the protection of colliding

[327] Article 16(1) of the ECD.
[328] *Ibid.*
[329] T. RODRÍGUEZ DE LAS HERAS BALLELL, *The background of the Digital Services Act: looking towards a platform economy*, ERA Forum, 04.02.2021, p. 2.

fundamental rights[330]. Thus, it is not surprising that the ECD remains still today the pillar of the European Union's legislative framework for digital services[331].

On the other hand, despite its pivotal role, the ECD has started to reveal «*regulatory loopholes*»[332]. This continues to create persisting legal uncertainty regarding in particular the application of the special liability regime and conflicting court rulings between Member States do not help to clarify[333]. Some flaws simply arise form an inharmonious implementation by the Member States, while others reveal gaps to be filled or unsuitability of certain provisions to manage new problems posed by the platform economy[334]. The ECD has begun indeed to show shortcomings in dealing with the emerging challenges of today's digital economy[335] and from the analysis carried out so far it generally emerges that it leaves unsolved certain important issues[336].

First, as found in § 1.3.2., the definition of Information Society Service *i.e.* the *sine qua non* condition to benefit from the liability exemption, is unclear[337]. The case law at national and European levels has in fact revealed that there are divergences in many ways[338]. As an example, the ECD establishes that the safe harbours are applicable to services «*normally provided for remuneration*», but in various cases the judges have stated that the qualification of Information Society Service can be acquired also by intermediaries that, not charging their users, are paid with income generated by advertisements[339]. Again, as the *Uber*[340] and *Airbnb Ireland*[341] cases have shown, the CJEU has ruled in different ways in the context of collaborative economy, particularly on the question of whether the service provided must be classified as Information Society Service[342].

---

[330] *Ibid.* A. HOFFMANN – A. GASPAROTTI, op. cit., p. 26.
[331] T. RODRÍGUEZ DE LAS HERAS BALLELL, op. cit., p. 2.
[332] A. HOFFMANN – A. GASPAROTTI, op. cit., p. 26.
[333] T. MADIEGA, *Reform of the EU liability regime for online intermediaries: Background on the forthcoming digital services act*, Brussels, 30.04.2020, p. 4. A. HOFFMANN – A. GASPAROTTI, op. cit., p. 26.
[334] See *supra*, § 1.1. T. RODRÍGUEZ DE LAS HERAS BALLELL, op. cit., p. 2.
[335] T. RODRÍGUEZ DE LAS HERAS BALLELL, op. cit., p. 2.
[336] R. JULIÀ-BARCELÓ – K. J. KOELMAN, op. cit., p. 233.
[337] T. MADIEGA, op. cit., p. 5.
[338] *Ibid.*
[339] *Ibid.*
[340] Case Uber Spain C-434/15; Case Uber France C-320/16.
[341] Case C-390/18.
[342] T. MADIEGA, op. cit., p. 5.

Second, even if ISPs are covered by the liability exemption, it is unclear when they meet the conditions to benefit from it[343]. The concepts of «*illegal activity or information*» or «*actual knowledge or awareness*», according to which hosting intermediaries have to act «*expeditiously*» to remove or to disable access to the unlawful content, and the notions of "passive" and "active" ISP developed by the CJEU, are not precisely outlined[344]. The same is true for the NTD mechanism: Article 14 of the ECD indirectly provides for such a mechanism to eliminate illegal material, but the legislators do not really regulate it in its operation. The result is that Member State have developed completely different rules on notice and action procedures so that it is difficult for both intermediaries and victims of illegal content or right holders to determine which one applies[345]. These legislative uncertainties have inevitably led to loopholes in the practical application of the Directive, also implying a difficult balance with fundamental rights[346]. As Geiger, Frosio and Izyumenko evidence, in fact, the «*implications of online intermediaries' liability and regulation raise important questions relating to the preservation of the fundamental rights of users, OSPs, and Intellectual Property*»[347]. The latter three categories of subjects are rightly unwilling to see their rights compromised just to make room for other and different interests. The legislator should be able to counterbalance the users' rights to freedom of expression - protected by Article 10 of the European Convention of Human Rights[348] and Article 11 of the Charter of Fundamental Rights of the European

[343] A. HOFFMANN – A. GASPAROTTI, op. cit., p. 26.
[344] T. MADIEGA, op. cit., p. 6.
[345] Commission Staff Working Document. *Online services, including e-commerce, in the Single Market*, Brussels, 11.01.2012, SEC (2011) 1641, final, p. 25.
[346] Cfr. C. GEIGER - G. FROSIO - E. IZYUMENKO, *Intermediary Liability and Fundamentals Rights*, in G. FROSIO (ed.), *Oxford Handbook of Online Intermediary Liability*, Oxford University Press, 05.2020. J. GRIFFITHS, *Fundamental rights and European IP law: the case of Art 17(2) of the EU Charter*, in C. GEIGER (ed.), *Constructing European Intellectual Property*, Cheltenham UK, Edward Elgar Publishing, 31.01.2013. G. FROSIO – C. GEIGER, *Taking Fundamentals Rights Seriously in the Digital Service Act's Platform Liability Regime*, in *European Law Journal*, 2021. Cfr. N. LOMBA – T. EVAS, op. cit., p. 105.
[347] C. GEIGER - G. FROSIO - E. IZYUMENKO, *Intermediary Liability and Fundamentals Rights*, cit., p. 10.
[348] Article 10 of the European Convention of Human Rights establishes that «*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are*

Union[349] - and to privacy - protected by Article 7 of the Charter of Fundamental Rights of the European Union[350] - together with the ISPs' and the Intellectual Property owners' conflicting interests[351]. The ISPs are entitled to be free to conduct a business, as provided by Article 16 of the Charter of Fundamental Rights of the European Union[352] and right holders are legitimated to fight for their right to property that is established in Article 17(2) of Charter of Fundamental Rights of the European Union[353] and in Article 1 of Protocol No. 1 of the European Convention of Human Rights[354]. The ECD, instead, does not establish either what is the exact meaning of "constructive knowledge" or the circumstances under which private notices given to intermediaries alerting them of the existence of unlawful material are reliable enough to act thereon, removing it[355]. As a result, if ISPs are not certain about the boundaries of their liability, or they have to decide what is illegal and what is not, «*they are likely to shoot at*

---

*prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary*.».

[349] Article 11 of the Charter of Fundamental Rights of the European Union establishes that «*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected*.».

[350] Article 7 of the Charter of Fundamental Rights of the European Union establishes that «*Everyone has the right to respect for his or her private and family life, home and communications*.».

[351] C. GEIGER - G. FROSIO - E. IZYUMENKO, *Intermediary Liability and Fundamentals Rights*, cit., pp. 2-7.

[352] Article 16 of the Charter of Fundamental Rights of the European Union establishes that «*The freedom to conduct a business in accordance with Community law and national laws and practices is recognised*.».

[353] Article 17(2) of the Charter of Fundamental Rights of the European Union establishes that «*Intellectual property shall be protected.*».

[354] Article 1 of Protocol No. 1 of the European Convention of Human Rights establshes that «*1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. 2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties*.». Cfr. EUROPEAN COURT OF HUMAN RIGHTS, *Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights. Protection of property*, last update: 30.04.2021, available at: https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf. C. GEIGER - G. FROSIO - E. IZYUMENKO, *Intermediary Liability and Fundamentals Rights*, cit., pp. 8-10. Cfr. G. GHIDINI – A. STANZI, *Freedom to conduct a business, competition and intellectual property*, in C. GEIGER (ed.), *Research Handbook on Human Rights and Intellectual Property*, Edward Elgar Publishing, 25.02.2015.

[355] R. JULIÀ-BARCELÓ – K. J. KOELMAN, op. cit., p. 232.

*everything that moves and remove more content than strictly necessary*»[356]. On the one hand they are understandably incentivized to take down material without hearing from the party whose material is removed[357]. On the other hand, in doing so they infringe not only the party's right to evidence its lawful use of the material, but also the right to freedom of expression, the right to freedom of speech, hindering fair competition and due process[358]. And despite the ECD tries to prevent this danger by stating in its Recital 47 that the removal or disabling of access to illegal information «*has to be undertaken in the respect of the principle of freedom of expression and procedures established for this purpose at a national level*», it would be foolish to expect host service providers will not eliminate material that is potentially unlawful for protecting freedom of expression[359]. Clearly, in this context it is not the duty of ISPs to guard the freedom of information[360]. Intermediaries are not like publishers: they do not have say about the allegedly illegal material and their business does not relate to content, but to the provision of technical facilities for its dissemination[361]. Consequently, they do not have the capabilities, knowledge, or personnel to determine whether any particular information among the millions or billions of bytes passing over their networks is infringing IPRs[362]. In particular, small ISPs which are still prevalent in Europe, may find this task very difficult, almost impossible[363]. Intermediaries, have neither the ability nor the obligation to take in account the numerous legal and public policy considerations that a court must considers in deciding a case of allegedly illegal information or activity[364]. However, even if they wanted to take proactive measures *i.e.* "good Samaritan actions", as it has been pointed out[365], they would be discouraged from doing so[366]. Although the ECD, in fact, does not prohibit proactive monitoring on the service provider's own initiative, the problem is that such activities may result in

[356] J. BAYER, op. cit., p. 99.
[357] R. JULIÀ-BARCELÓ – K. J. KOELMAN, op. cit., p. 232.
[358] *Ivi*, p. 232.
[359] *Ivi*, p. 233.
[360] *Ibid.*
[361] *Ivi*, p. 234.
[362] *Ibid.*
[363] *Ibid.*
[364] *Ibid.*
[365] See *supra*, §1.3.6.3.
[366] A. HOFFMANN – A. GASPAROTTI, op. cit., p. 27.

obtaining knowledge of the illegal content or activity, or at least becoming aware of facts or circumstances from which the illegality is apparent[367]. As a result, this could lead hosting providers to lose their liability exemption if they do not promptly ban or remove the relevant content[368]. This contradiction is also defined as "Good Samaritan paradox", to which, *inter alia*, the Proposal for a Regulation concerning Digital Services seeks to regulate[369].

Third, as it has been analyzed[370], Article 15 of the ECD prohibits Member States from imposing on online intermediaries a general obligation to monitor information that they transmit or store[371]. This prohibition refers solely to monitoring of general nature and does not concern monitoring obligation in a specific case[372]. In fact, national courts can impose injunctions on ISPs to prevent particular IPRs' infringements and this obviously requires a certain degree of monitoring[373]. However, the legislation does not specify what is the limit between the duties of care and general monitoring and distinguishing "general" from "specific" supervising is very problematic[374]. One of the main consequences in this regard is that there is a lack of detailed regulation of the permissible scope of injunctions[375] and the fact large internet platforms frequently use automated filtering systems on the basis of ECD's Recital 40 adds to the legal uncertainty surrounding online content monitoring[376]. Recital 40, in detail, states that the liability rules «*does not preclude the development and effective operation (…) of technical surveillance instruments made possible by digital technology*»[377]. In this respect, the evaluation of the case law concerning the Directive and the new legislations on national and European level show that there is a certain tendency to impose more or stricter specific obligations on ISPs to act to tackle illegal

[367] *Ibid.*
[368] *Ibid.*
[369] See *infra*, § 3.
[370] See *supra*, §1.3.7.
[371] T. MADIEGA, op. cit., p. 6.
[372] *Ibid.*
[373] *Ibid.*
[374] *Ibid.*
[375] A. HOFFMANN – A. GASPAROTTI, op. cit., p. 10.
[376] T. MADIEGA, op. cit., p. 6.
[377] *Ibid.*

content, examples emerge from the Directive on Copyright in the Digital Single Market[378] [379].

Fourth, each of the aforementioned legal uncertainty is compounded by the fact that the ECD provisions have been differently transposed into national legal system[380]. This could have caused different interpretation of the solution outlined in the Directive or just a diverse development of those issues for which the ECD does not contain specific rules[381]. In such cases, obviously, national disparities increase in the absence of a harmonized regime at European level[382] and legal divergence is hardly reconcilable with the global nature of digital models.

Moreover, the ECD manifests limits due to digital economy which has profoundly transformed during the two-decade life of the Directive, exceeding the adaptability margin of the ECD provisions[383]. The evolution of digitalization, in fact, has revealed additional hard-to-fix gaps against which even interpretative efforts are not enough[384]. In this regard, in Chapter § 3, it will see in detail how the legislator is trying to run to the remedies proposing the new *Digital Services Act* (hereinafter referred to as 'DSA'). Setting new «*horizontal rules covering all services and all types of illegal content, including goods or services*»[385], the DSA amends and updates the ECD[386]. It aspires to foster a better environment for innovation, to eliminate old legislative paradigms at the same time protecting users and safeguarding fundamental rights[387]. The transformation of today's social and economic environment in fact is too significant and far-reaching to merely force current rules to conform[388]. Reinvigorated context-specific and sector-specific solutions are without doubt needed[389].

---

[378] See *infra*, § 2.
[379] A. HOFFMANN – A. GASPAROTTI, op. cit., p. 26.
[380] T. RODRÍGUEZ DE LAS HERAS BALLELL, op. cit., p. 2.
[381] *Ivi*, p. 3.
[382] *Ibid.*
[383] *Ibid.*
[384] *Ivi*, p. 4.
[385] European Commission, *Digital Services Act – Questions and Answers*, Brussels, 15.12.2020, p. 2.
[386] *Ibid.*
[387] *Ibid.* Cfr. G. FROSIO – C. GEIGER, *Taking Fundamentals Rights Seriously in the Digital Service Act's Platform Liability Regime*, cit.
[388] T. RODRÍGUEZ DE LAS HERAS BALLELL, op. cit., p. 4.
[389] *Ivi*, p. 3. Cfr. N. LOMBA – T. EVAS, op. cit., p. 239.

In the face of this latter need, it must be remarked that the solid horizontally approach of the ECD (and the DSA) may gradually start fragmenting with the adoption of sectoral rules intended to strike a fair balance between conflicting interests[390]. Since the entry into force of the ECD, in fact, many sectoral rules have been adopted in the European Union. One of the most relevant examples in this regard, and a very important piece of legislation for this study, is the *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC*, also named as Copyright Directive that is a *lex specialis* with respect to the ECD and the DSA.

[390] T. RODRÍGUEZ DE LAS HERAS BALLELL, op. cit., p. 5.

# CHAPTER 2

# THE COPYRIGHT DIRECTIVE IN THE DIGITAL SINGLE MARKET: FOCUS ON ARTICLE 17

SUMMARY: 2.1. The birth of the Directive on Copyright in the Digital Single Market – 2.2. Article 17 of the CDSM – 2.2.1. The rationale behind Article 17: The value gap – 2.2.2. The OCSSPs – 2.2.3. The notion of communication to the public and the authorization models – 2.2.4. Derogating from Article 14 of the ECD: The specific liability regime in the absence of authorization – 2.2.4.1. Article 17(4)(a): «*best efforts to obtain an authorisation*» – 2.2.4.2. Article 17(4)(b): «*best efforts to ensure the unavailability of specific works and other subject matter (…)*» – 2.2.4.3. Article 17(4)(c): Notice-and-takedown and Notice-and-staydown – 2.2.5. The exceptional liability regime for new OCSSPs – 2.2.6. The protection of users' rights and the complaint and redress mechanism – 2.2.7. Article 17(8): No obligation to monitor and the need for «*transparency*» – 2.3. A closer look to Article 17: The «*triangular dilemma*» and the difficult balance with fundamental rights

## 2.1. The birth of the Directive on Copyright in the Digital Single Market

As it has been underlined in § 1.2., IPRs infringements on online platforms largely involve copyright. Digital technologies and the widespread use of the Internet have changed the way creative content is created and distributed [391]. Today, it is very easy to make copies of content digitally, so much so that people often expect access to it anytime and anywhere in the Digital Single Market and when this is not possible, «*they find it hard to understand why*»[392]. European copyright rules need thus to be updated and adjusted to this innovative environment and the option of new obligations on ISPs shall be considered[393].

[391] Cfr. Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Region, *Towards a modern, more European copyright framework*, Brussels, 9.12.2015, COM (2015) 626, final, p.2.
[392] *Ibid.*
[393] G. FROSIO, *Digital piracy debunked: a short note on digital threats and intermediary liability*, in *Internet Policy Review*, Vol. V, Issue I, 23.03.2016., p. 1.

New rules should be built not just to make the most of the good opportunities that digitalization can offer, but also to make sure that the legislation continues «*to provide a high level of protection for right holders*»[394], safeguarding at the same time other interests and fundamental rights at stake.

It is true that the background of the Directive on Copyright in the Digital Single Market (hereinafter referred to as 'CDSM') is just «*the new digital environment framed by the European Union*»[395]. Starting from the first decade of 2000s, the EU identified the digitalization as a fundamental element in its political agenda[396]. Launching the strategy of *Europe 2020*[397], the intention was to create and implement a Digital Single Market and the importance of having a valid copyright's regulation was evident from the beginning[398]. More precisely, reading the 2010 Communication from the Commission *A Digital Agenda for Europe*[399], it emerges that the absence of a precise legislative framework on copyright across European Union was complicating the online availability of knowledge and cultural goods[400]. In order to achieve a Digital Market, *inter alia*, it was necessary to maximize the online distribution's potential by reconciling the need to increase the availability of creative content with the rights holders' interest for «*an adequate remuneration and protection for their works*»[401]. On this trail, the idea of modifying «*long-lasting*»[402] pieces of copyright legislation which were no longer fit to administrate an environment based on internet «*was never abandoned*»[403]. Among those acts there is the *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society*, the

[394] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Region, *Towards a modern, more European copyright framework*, cit., p. 2.
[395] F. FERRI, *The dark side(s) of the EU Directive on copyright and related rights in the Digital Single Market*, in *China-EU Law Journal*, 23.10.2020, p. 2.
[396] *Ibid.*
[397] Communication from the Commission, *EUROPE 2020. A strategy for smart, sustainable and inclusive growth*, Brussels, 3.03.2010, COM (2010), final.
[398] F. FERRI, op. cit., pp. 2-6.
[399] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Agenda for Europe*, Brussels, 19.05.2010, COM (2010), 245, final.
[400] *Ivi*, p. 8.
[401] F. FERRI, op. cit., p. 3.
[402] *Ibid.*
[403] *Ivi*, p. 4.

Information Society Directive[404]. The latter, that is a «*milestone in the field of copyright*»[405], introduces minimal harmonization norms on some areas of copyright and related rights in the context of digital information society, establishing also exclusive author rights and several discretionary exceptions that Member States are free to adopt into national law[406]. However, as already noted in this and other[407] paragraphs, the way in which users interact with elements protected by IPRs, in this case by copyright, has changed over the years. Digital piracy has evolved exposing rights and creators to significant risks and the Information Society Directive is not able to adequately «*tackle acts of illegal uploading of copyrighted materials on platforms sharing those content with the wider public*»[408]. The ECD regulates in parallel the ISPs' liability for online IPRs infringements but, as it has been discussed at length in the previous Chapter, it too needs an amendment being no longer up to date. In a nutshell, «*taking steps*»[409] towards an effective copyright regulation in the Digital Single Market necessitates modernizing the legislative framework outlined in the Information Society Directive[410].

The adoption of the CDSM has been a very long and contested process. Despite its creation «*was considered an urgent step to take*»[411], until 2016 no official ideas were presented[412]. In 2018, Members of the European Parliament voted not to proceed to the negotiation stage for the approval of the 2016's Proposal, but to reopen the debate on it[413]. Then, on 12 September 2018 a revised document was approved by the Parliament and the final version, which resulted from the negotiations during formal trilogue meetings, was presented on 13

[404] *Ibid.*
[405] *Ibid.*
[406] *Ibid.*
[407] See *supra*, § 1.2.
[408] F. FERRI, op. cit., p. 4.
[409] *Ibid.*
[410] *Ibid.*
[411] *Ivi*, p. 5.
[412] Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, Brussels, 14.09.2016, COM (2016), 593, final. F. FERRI, op. cit., p. 5. J. QUINTAIS, *The New Copyright in the Digital Single Market Directive: A Critical Look*, in *European Intellectual Property Review 2020(1)*, 14.10.2019, p. 2.
[413] G. FROSIO – S. MENDIS, *Monitoring and Filtering: European Reform or Global Trend?*, in G. FROSIO (ed.), *Oxford Handbook of Online Intermediary Liability*, Oxford University Press, 05.2020, p. 10.

February 2019[414]. The CDSM was so approved by the Council of the European Union on 15 April 2019[415]. The path to it enter into force has been marked by many discussions and oppositions. In particular, the clash was, and still today is, between major tech companies, most Internet users and many human rights advocates who demand to enable the free movement of internet content to its fullest extent possible, worrying about the protection of fundamental rights and media groups, newspaper and publishers who want to ensure a high level of protection for the material that circulate on online platforms[416].

The CDSM is a *lex specialis* with respect to the ECD and the forthcoming *Digital Services Act*[417]. Both the latter and the CDSM in fact regulate the liability of ISPs for infringements committed online but, because of its special nature concerning copyright law, the CDSM overrides the horizontal *Digital Services Act i.e. lex generalis.*

Analyzing the CDSM, it can be said that it aims at pursuing a fourfold intervention in the following areas:

a) exceptions and limitations to the right of reproduction with respect to purposes of education and public interest;

b) facilitation of licensing agreements;

c) extension of the rights referred to in Articles 2 and 3 par. 2 of Information Society Directive to newspaper publishers for the digital use of their publications.

d) creation of new and more precise obligations for hosting service providers[418].

---

[414] European Parliament Press Release, *Parliament to review copyright rules in September*, 05.07.2018, available at: https://www.europarl.europa.eu/news/en/press-room/20180628IPR06809/parliament-to-review-copyright-rules-in-september.

[415] J. QUINTAIS, *The New Copyright in the Digital Single Market Directive: A Critical Look*, cit., pp. 2-3.

[416] See *infra*, § 2.3. J. QUINTAIS, *The New Copyright in the Digital Single Market Directive: A Critical Look*, cit., pp. 2-3.

[417] See *infra*, § 3. The Commission establishes that the DSA «*leaves (…) other acts, which are to be considered lex specialis in relation to the generally applicable framework set out in this Regulation, unaffected*». Recital 9 of the DSA. DSA's Recital 11 specifies also that the new proposed Regulation «*is without prejudice to the rules of Union law on copyright and related rights, which establish specific rules and procedures that should remain unaffected*».

[418] M. C. DAGA – A. DE GAETANO, *Direttiva UE sul diritto d'autore, gli impatti in Italia: pro e contro*, in *Network Digital 360*, 05.04.2019, available at: https://www.agendadigitale.eu/cultura-digitale/direttiva-ue-sul-diritto-dautore-gli-impatti-in-italia-pro-e-contro/.

With reference to the point d) just mentioned, it must be reported that the draft Article 13, which corresponds to Article 17 of the current CDSM, is one of the most, if not the most, controversial provision of this Directive. This Article refers to the use of copyright protected content by online content-sharing service providers (hereinafter referred to as 'OCSSPs') and it establishes specific and complex rules for their liability. This Article is a *lex specialis* to Article 14 of the ECD[419] and, according to some authors, also to Article 3 of the Information Society Directive[420]. For what concern the act of communication to the public provided for in Article 3 of the Information Society Directive, the CDSM «*does not introduce a new right in the European Union's copyright law*»[421], but it «*specifically regulates the act of 'communication to the public' in the limited circumstances covered by this provision 'for the purposes of this Directive'*»[422]. Thus, the European Commission specifies that «*the Member States should specifically implement this provision rather than relying simply on their national implementation of the Article 3 of Directive 2001/29/EC*»[423].

Article 17 of the CDSM will be studied in the subsequent paragraphs in each of its complex 10 paragraphs. It will be discovered below what is the rationale behind Article 17, who are OCSSPs, what the legislator means for «*an act of communication to the public*»[424] in the CDSM, what he is referring to talking about an «*authorisation from the rightholders*»[425] required to ISPs and how is the specific liability regime designed for OCSSPs in the absence of such an authorisation. This Chapter will also deal with the exceptional ability regime established for new OCSSPs, with the examination of the exceptions and

[419] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, Brussels, 4.06.2021, COM(2021) 288, final, p. 2.
[420] Cfr. E. ROSATI, *Five considerations for the transposition and application of Article 17 of the DSM Directive*, in *Journal of Intellectual Property Law & Practice*, Vol. XVI, No. III, 2021. Cfr. V. FALCE – N. M. F. FARAONE, *Direttiva Copyright e line guida: focus sll'articolo 17*, in *Network Digital 360*, 24.11.2021, available at: https://www.agendadigitale.eu/mercati-digitali/direttiva-copyright-e-linee-guida-focus-sullarticolo-17/.
[421] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, Brussels, 4.06.2021, COM(2021) 288, final, p. 2.
[422] *Ibid.* Article 17(1) of the CDSM.
[423] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, cit., p. 2.
[424] Article 17(1) of the CDSM.
[425] *Ibid.*

limitations provided for the users' safeguard in Article 17(7) and with the Article 17(9)'s complaint and redress mechanism in this regard envisaged. The paragraph will also make a reference to Article 17(8). Finally, it will be critically evaluated and studied the resulting balance between the monitoring and filtering online measures provided by the CDSM and the (needed) protection of fundamental rights. It will emerge a sort of «*triangular dilemma*»[426] to solve that imply an intricate interplay between users', intermediaries', and rightholders' interests.

## 2.2. Article 17 of the CDSM

### 2.2.1. The rationale behind Article 17: the value gap

Dussolier points out that «*the essential aim of Article 17 is to alleviate a perceived unfairness in exploitation of works on the Internet*»[427]. The traditional content industry, including main commercial TVs, audiovisual producers, and major publishers, argue that, with the advent of Internet and social media, a good part of their value is now "snatched" by large online platforms – such as YouTube, Instagram and eBay - hosting content uploaded by users and earn in various ways, including through online advertising[428]. The rationale of Article 17, in fact, assumes that ISPs operating on the basis of «*an ad-funded*»[429] business model do not obtain licenses from rightsholders for the works they store on their platforms[430]. Considering YouTube for example, this situation acquires enormous

[426] C. GEIGER – B. J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, in *GRUR International*, Vol. LXX, No. VI, 30.01.2021, p. 63.
[427] S. DUSSOLIER, *The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition*, in *Common Market Law Review*, Vol. LVII, No. IV, 08.2020, p. 1008.
[428] I. GENNA, *Ombre (più che luci) della riforma europea del copyright*, in lastampa.it, publication date: 20.06.2018, last update: 24.06.2019, available at: https://www.lastampa.it/economia/2018/06/20/news/ombre-piu-che-luci-della-riforma-europea-del-copyright-1.34025995.
[429] T. SPOERRI, *On Upload-Filters and other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market*, in *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* (JIPITEC), 2019, p. 184.
[430] *Ivi*, p. 174. M. HUSOVEC, *The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which is Superior? And Why?,* in *Columbia Journal of Law & Arts*, publication date:

dimensions. «*The primary source for access to music*»[431] in Europe in fact «*is not streaming services like Spotify*»[432] (even if this is on rise), but the video sharing platform YouTube[433]. The latter in fact is a large platform used by more than 1.300.000.000 persons on which nearly 5 billion videos are watched every day and 300 hours uploaded each minute[434]. The content that is on YouTube is uploaded autonomously by the users and not by the platform so that the videos that appear are a «*mix*»[435] of copies of existing material and content created directly by users[436]. Despite Google, which operates YouTube, affirms that between October 2017 and September 2018 the OCSSP has paid more than 1.8 billions of dollars to the music industry, this seems to be not enough and the right holders are still demanding for more returns from tech giants[437]. Therefore, with the goal of closing the so-called "value gap", Frosio and Mendis evidence that the CDSM will require «*OCSSPs to engage in a more proactive role in preventing the availability of copyright-infringing content over services provided by them in order to enable rightholders to receive appropriate remuneration for the use of their works*»[438]. The CDSM indeed forces OCSSPs to put their «*best efforts*»[439] to enter into licensing agreements with right holders, trying in this way to strengthen their negotiation powers[440]. Before getting to that, however, it is necessary to fix some fundamentals in Article 17, starting from the identification of OCSSPs.

---

23.09.2018, last update: 13.12.2018, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3239040, p. 3.

[431] S. DUSSOLIER, op. cit., p. 1008.

[432] *Ibid.*

[433] *Ibid.*

[434] Cfr. *Ibid.*

[435] *Ivi*, p. 1010.

[436] Cfr. *Ibid.*

[437] T. SPOERRI, op. cit., p. 175. Cfr. J. QUINTAIS, *The New Copyright in the Digital Single Market Directive: A Critical Look*, cit., p. 20.

[438] G. FROSIO – S. MENDIS, *Monitoring and Filtering: European Reform or Global Trend?*, cit., p. 11. Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, Brussels, 14.09.2016, COM (2016), 593, final. Part 1 of the Explanatory Memorandum of to the CDSM Proposal states that «*Evolution of digital technologies has led to the emergence of new business models and reinforced the role of the Internet as the main marketplace for the distribution and access to copyright-protected content. (…) It is therefore necessary to guarantee that authors and rightholders receive a fair share of the value that is generated by the use of their works and other subject matter*».

[439] Article 17(4). See *infra*, § 2.2.4.

[440] Cfr. Recital 61 of the CDSM. T. SPOERRI, op. cit., p. 175.

### 2.2.2. The OCSSPs

Article 17 of the CDSM applies to OCSSPs. The first paragraph of Article 2(6) of the CDSM identifies an OCSSP as a «*provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organizes and promotes for profit-making purposes*». The first requirement to be fulfilled refers to the necessity that the intermediary is an Information Society Service «*as defined in Article 1(1)(b) of Directive (EU) 2015/15357*»[441]. The Commission specifies that the terms of «*main purpose*» or «*one of the main purposes*» provided for in Article 2(6) should be understood to be the «*predominant function*»[442] of the OCSSP and that it should also be «*technology and business model neutral in order to be future proof*»[443]. The need to «*store and give the public access*» correspondingly refer to the «*content storage that is more than temporary*»[444] and «*to access to the content stored which is given to the public*»[445]. For what concern the «*large amount*», the legislators do not provide for any qualification and the Commission suggests that «*Member States should refrain from quantifying 'large amount' in their national law in order to avoid legal fragmentation through a potentially different scope of service providers covered in different Member States*»[446]. Recital 63 explains in this regard that «*the assessment of whether an online content-sharing service provider stores and gives access to a large amount of copyright-protected content should be made on a case-by-case basis and should take account of a combination of elements, such as the audience of the and the number of files of copyright-protected content uploaded by the users of the service*». Another requirement that fall under the definition of OCSSPs is to organize and promote the content

[441] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 4. See *supra*, § 1.3.2.
[442] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 4.
[443] *Ibid.*
[444] *Ibid.*
[445] *Ibid.*
[446] *Ibid.*

uploaded by users for profit-making purposes. The legislators provide that the «*profit*»[447] from the content uploaded «*may be obtained either directly or indirectly from its organization and promotion in order to attract a larger audience, including by categorizing it and using targeted promotion within it*»[448]. The profit motive should not be assumed just because the service is an economic operator or because of «*its legal form*»[449] and «*it has to be linked to the profits made from the organization and promotion of the content uploaded by the users in a manner to attract a wider audience, for example, but not exclusively, by placing advertisement next to the content uploaded by their users*»[450].

In turn, the second paragraph of Article 2(6) provides for non-exhaustive list of ISPs or services that are not included in the definition of OCSSPs «*within the meaning*»[451] of the CDSM, being in this way «*excluded from the application of Article 17*»[452]. It refers in particular to «*not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and-sharing platforms, providers of electronic communications services as defined in Directive (EU) 2018/1972, online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use*»[453]. Recital 62 specifies in fact that are not covered by the CDSM «*services that have a main purpose other than that of enabling users to upload and share a large amount of copyright-protected content with the purpose with obtaining profit from that activity. The latter services include, for instance, electronic communication services within the meaning of Directive (EU) 2018/1972 of the European Parliament and of the Council, as well as providers of business-to-business cloud services and cloud services, which allow users to upload content for their own use, such as cyberlockers, or online marketplaces the main activity of which is online retail, and not giving access to copyright-protected content*». The same Recital 62 adds also that «*in order to ensure a high*

[447] Article 2(6) of the CDSM.
[448] Cfr. Recital 62 of the CDSM. Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 5.
[449] *Ibid.*
[450] *Ibid.*
[451] *Ivi*, p. 3.
[452] *Ibid.*
[453] Second paragraph of Article 2(6) of the CDSM.

*level of copyright protection, the liability exemption mechanism provided for in this Directive should not apply to service providers the main purpose of which is to engage in or to facilitate copyright protection*», evidently meaning «*operators like the Pirate Bay or other websites*»[454] that make infringing content easily available[455].

In sum, Article 17 of the CDSM is addressed to OCSSPS that «*play an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences*»[456]. By writing this, the legislator seems to be clearly referring to «*platforms like YouTube, Facebook, and DailyMotion*»[457]. The CDSM tries indeed to close the abovementioned "value gap" «*by compelling platforms which obtain commercial profit through the sharing of copyright-protected content uploaded by users to appropriately remunerate rightholders*»[458]. The problem, however, lies not in the «*legitimate objective*»[459] pursued by the legislators, but rather in how they try to achieve it[460]. As it will be studied further below, in fact, an imperfect regulation that does not take into account the various interests at stake could lead to a serious imbalance between users', intermediaries' and rightholders' positions, threating the protection of their fundamental rights[461].

### 2.2.3. The notion of communication to the public and the authorization models

[454] S. DUSSOLIER, op. cit., p. 1012.
[455] *Ibid.*
[456] Recital 62 of the CDSM.
[457] G. FROSIO – S. MENDIS, *Monitoring and Filtering: European Reform or Global Trend?*, cit., p. 11. K. GRISSE, *After the storm—examing the final version of Article 17 of the new Directive (EU) 2019/790*, in *Journal of Intellectual Property Law & Practice*, Vol. XIV, No. XI, 2019, p. 2.
[458] G. FROSIO – S. MENDIS, *Monitoring and Filtering: European Reform or Global Trend?*, cit., p. 11. See *supra* § 2.2.1.
[459] G. FROSIO – S. MENDIS, *Monitoring and Filtering: European Reform or Global Trend?*, cit., p. 11.
[460] *Ibid.*
[461] *Ibid.* Cfr. J. QUINTAIS, *The New Copyright in the Digital Single Market Directive: A Critical Look*, cit. Cfr. C. GEIGER – B. J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit. See *infra* § 2.3.

Article 17(1) of the CDSM establishes that «*Member States shall provide that an online content-sharing provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users*». OCSSPS shall thus «*obtain an authorization from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter*»[462]. According to Grisse, the right to prohibit or authorize an act of communication to the public or making available of protected subject matter «*is an exclusive right of authors and related rightholders, contained in and harmonized by Article 3(1)+(2) of*»[463] the Information Society Directive. Because there is not a specific definition of communication to the public in the CDSM, to understand this notion it must refer to the Information Society Directive[464] and to the CJEU case-law, who has strived to make this concept increasingly clear[465]. In particular, the judges have essentially built the concept of communication to the public around the notions of "act of communication" and "public"[466]. As for the first, the orientation according to which the act of communication occurs both in the hypothesis of transmission or re-transmission of a protected work and in the case in which the mere making available of the work allow the public to have access to it is now consolidated[467]. In the latter case, the CJEU focused indeed on the "indispensable" or "essential" role of the ISPs and on the intentional nature of their intervention[468]. «*The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of*»[469] the Information Society Directive, but the same cannot be said in the case in which the installation of these physical facilities allow users to access

[462] Article 17(1) of the CDSM.
[463] K. GRISSE, op. cit., p. 3. See *supra*. Cfr. J. KOO, *The Right of Communication to the Public in EU Copyright Law*, Hart Publishing, 17.12.2020.
[464] See *supra*, § 1.
[465] Cfr. G. COLANGELO, *Responsabilità degli intermediari online ed enforcement del diritto d'autore*, cit., p. 26.
[466] *Ibid*. K. GRISSE, op. cit., p. 3.
[467] Cfr. G. COLANGELO, *Responsabilità degli intermediari online ed enforcement del diritto d'autore*, cit., p. 26.
[468] *Ibid.*
[469] Recital 27 of the Information Society Directive.

the protected works[470]. It is worth noting, however, that, referring to the concept of «*indispensable*» and «*essential*» already mentioned, in the last few years the judges have broadened the hypotheses in which a hosting service provider does an act of communication to the public[471]. As evidenced by the *Filmspeler*[472] and the *Pirate Bay*[473] cases, indeed, an act of communication will take place when the intermediary intervenes with the full knowledge of the consequences of his behavior to give his users access to a protected work, both in the case in which, in the absence of his intervention, such users would not be able to consult the work disseminated and when that access would simply be more difficult[474]. In addition, despite, traditionally, the profit-making purpose is not relevant in the identification of an act of communication, the above-mentioned *GS Media*[475] case has strengthened its relevance[476]. In the sentence's paragraph 51, the CJEU established in fact that «*when the posting of hyperlinks is carried out for profit, it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, so that it must be presumed that that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder*»[477]. In these cases, and «*in so far as that rebuttable presumption is not rebutted*»[478] the judges explain, «*the act of posting a hyperlink to a work which was illegally placed on the internet constitutes a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29*»[479]. Regarding the notion of "public", instead, the judges have specified that it concerns an unspecified and

[470] Cfr. Case C-527/15 *Filmspeler*. G. COLANGELO, *Responsabilità degli intermediari online ed enforcement del diritto d'autore*, cit., p. 26.
[471] G. COLANGELO, *Responsabilità degli intermediari online ed enforcement del diritto d'autore*, cit., p. 26.
[472] Case C-527/15, paragraphs 31 and 41.
[473] Case C-610/15, paragraphs 36 and 37.
[474] G. COLANGELO, *Responsabilità degli intermediari online ed enforcement del diritto d'autore*, cit., p. 27.
[475] Case C-160/15. See *infra* § 1.3.6.2.
[476] G. COLANGELO, *Responsabilità degli intermediari online ed enforcement del diritto d'autore*, cit., p. 27.
[477] *Ibid.* Cfr. S. DUSSOLIER, op. cit., p. 1029.
[478] G. COLANGELO, *Responsabilità degli intermediari online ed enforcement del diritto d'autore*, cit., p. 27. Cfr. S. DUSSOLIER, op. cit., p. 1029.
[479] G. COLANGELO, *Responsabilità degli intermediari online ed enforcement del diritto d'autore*, cit., p. 27. Cfr. S. DUSSOLIER, op. cit., p. 1029.

considerable number of potential viewers (above a certain threshold)[480]. Moreover, in order to be qualified as act of communication to the public, «*a protected work must be communicated using specific technical means, different from those previously used or, failing that, to a 'new public', that is to say, to a public that was not already taken into account by the copyright holders when they authorised the initial communication to the public of their work*»[481]. After having briefly analyzed the concept of communication to the public, however, a question arises spontaneously. One wonder about the true nature of the relationship between Article 3 of the Information Society Directive and Article 17 of the CDSM. As it has been already written in § 2.1., the Commission declares that the CDSM, together with its Article 17, is *lex specialis* to the Information Society Directive[482]. This would mean «*that Member States would not be able to rely, in their transpositions of Article 17, on their earlier implementations of either directive with regard to the notion of 'authorization' or 'communication to the public'*»[483]. Some authors like Jan Bernt Nordemann and Julian Waiblinge, arguing about the German implementation Proposal of the CDSM[484], suggests however that only components of Article 17 are a special case[485]. Also Eleonora

[480] G. COLANGELO, *Responsabilità degli intermediari online ed enforcement del diritto d'autore*, cit., p. 27. Case C-160/15, paragraph 36. Case C-610/15, paragraph 27. Case C-527/15, paragraph 45.

[481] Case C-160/15 (*Gs Media* case), paragraph 37. Cfr. *Svensson and Others* Case, C-466/12, paragraph 24. Cfr. Case C-610/15, paragraph 28. Cfr. Case C-527/15, paragraph 47. G. COLANGELO, *Responsabilità degli intermediari online ed enforcement del diritto d'autore*, cit., p. 28.

[482] See *supra*, § 2.1. Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, cit., p. 3.

[483] E. ROSATI, *Five considerations for the transposition and application of Article 17 of the DSM Directive*, cit., p. 267. European Commission, *Targeted Consultation Addressed to the Participants to the Stakeholder Dialogue on Article 17 of the Directive on Copyright in the Digital Single Market*, 2020, available at: https://ec.europa.eu/newsroom/dae/document.cfm?doc_id.68591, p. 3.

[484] Second Draft Act adapting copyright law to the requirements of the Digital Single Market, available at: https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_II_Anpassung%20Urheberrecht_digitaler_Binnenmarkt_englischeInfo.pdf;jsessionid=84FAC41AEF1CD4D70C008EED64C26246.2_cid324?__blob=publicationFile&v=4.

[485] M. HUSOVEC – J.P. QUINTAIS, *Article 17 of the Copyright Directive: Why the German implementation proposal is compatible with EU law – Part 1*, in *Kluwer Copyright Blog*, 26.08.2020, available at: http://copyrightblog.kluweriplaw.com/2020/08/26/article-17-of-the-copyright-directive-why-the-german-implementation-proposal-is-compatible-with-eu-law-part-1/. Cfr. J. B. NORDEMANN – J. WAIBLINGE, *Art. 17 DSMCD: a class of its own? How to implement Art. 17 into the existing national copyright acts, including a comment on the recent German*

Rosati seems to be of the same opinion[486]. Effectively, concerning the notion of communication to the public, Recital 64 of the CDSM specifies that «*online content-sharing providers perform an act of communication to the public or of making available to the public when they give the public access to copyright protected works or other protected subject matter uploaded by their users*». This does not imply that only OCSSPs «*perform acts of communication to the public or other restricted acts*»[487]. The same Recital 64 refers to a «*concept of communication to the public or of making available to the public elsewhere under Union Law*», affirming that «*the possible application of Article 3(1) and (2) of Directive 2001/29/EC to such service providers for purposes falling outside the scope of this Directive*» are not affected. It emerges that the notion of communication to the public should be interpreted in accordance with the equivalent concept in the Information Society Directive[488]. Therefore, Article 17 does not provide for a «*sub-category of Article 3*»[489] or «*a sui generis right*»[490], it refers to the same right and Member States cannot «*alter the scope thereof or introduce exceptions and limitations to Article 17 beyond what the law of the European Union does allow*»[491].

OCSSPs who perform «*an act of communication to the public or making available to the public*»[492] should obtain an «*authorisation*»[493] from right holders. This latter term is not specifically described in the CDSM; the legislator in fact

---

*Discussion Draft – Part 2*, in *Kluwer Copyright Blog*, 17.07.2020, available at: http://copyrightblog.kluweriplaw.com/2020/07/17/art-17-dsmcd-a-class-of-its-own-how-to-implement-art-17-into-the-existing-national-copyright-acts-including-a-comment-on-the-recent-german-discussion-draft-part-2/?doing_wp_cron=1597144877.2035028934478759765625. Cfr. E. ROSATI, *The legal nature of Article 17 of the Copyright DSM Directive, the (lack of) freedom of Member States and why the German implementation proposal is not compatible with EU law*, in *Journal of Intellectual Property Law & Practice*, Vol. XV, Issue XI, 11.2020, pp. 874-878.

[486] E. ROSATI, *Five considerations for the transposition and application of Article 17 of the DSM Directive*, cit., p. 267.

[487] *Ibid.*

[488] *Ibid.* Cfr. K. GRISSE, op. cit., p. 5.

[489] E. ROSATI, *Five considerations for the transposition and application of Article 17 of the DSM Directive*, cit., p. 267.

[490] *Ibid.*

[491] *Ibid.* Cfr. Association Littéraire et Artistique Internationale, *Second Opinion on Certain Aspects of the Implementation of Article 17 of Directive (EU) 2019/790 of 17 April 2019 on Copyright and Related Rights in the Digital Single Market*, publication date: 18.09.2020, last update: 17.02.2021, available at: https://www.alai.org/en/assets/files/resolutions/200918-second-opinion-article-17-dsm_draft_en. pdf.

[492] Article 17(1) of the CDSM.

[493] *Ibid.*

does not define «*how authorisations may be obtained from rightholders*»[494]. It is possible to notice that both the text of Article 17 and the corresponding Recital 64 of the CDSM «*are drafted in an open-ended way and refer to 'authorisation…including [via] a licensing agreement'*»[495]. The Member States can provide for different authorization models to encourage the growth of the «*licensing market*»[496], which is one of the main goals of Article 17, but at the same time they should also keep the option for right holders to refuse to grant permission to online content-sharing services[497]. Recital 61 states indeed that it is important to «*foster the development of the licensing market between rightholders and online content-sharing service providers*» and that those licensing agreement should be fair «*fair and keep a reasonable balance between both parties*», at the same time never affecting the contractual freedom. Rightholders in fact shall not be obliged to «*to give an authorisation or to conclude licensing agreements*»[498]. Anyway, to encourage and enable the creation of these agreements between the two parties, the Commission incites Member States to «*maintain or establish voluntary mechanism to facilitate negotiations*»[499]. Falce and Faraone stress that Article 17 is to be understood as the legal basis and "architecture" aimed at allowing rightholders to authorize the use of their works when they are uploaded by OCSSPs users and to promote the development of the licensing market between rightholders and OCSSPs[500].

«*Users' acts of communication (through uploading) and OCSSPs' acts of communication through giving access are in principle considered independent acts that trigger independent liability*»[501]. However, in order to «*ensure legal certainty for as many users as possible when they upload copyright-protected*

---

[494] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 6.
[495] *Ibid.*
[496] *Ivi*, p. 1.
[497] *Ivi*, p. 6-10.
[498] Recital 61 of the CDSM.
[499] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 6.
[500] V. FALCE – N. M. F. FARAONE, *Direttiva Copyright e line guida: focus sll'articolo 17*, cit.
[501] K. GRISSE, op. cit., p. 5. Cfr. A. LUCAS - SCHLOETTER, *Transfer of Value Provisions of the Draft Copyright Directive (recitals 38, 39, article 13)*, Munich, 03.2017, available at: https://authorsocieties.eu/content/uploads/2019/10/lucas-schloetter-analysis-copyright-directive-en.pdf.

*content*»[502], Article 17(2) of the CDSM lengthen the effect of license agreements reached between OCCSPs and right holders to users' acts on the platform covered by Article 3 of the Information Society Directive under some conditions[503]. More explicitly, Article 17(2) establishes that «*Member States shall provide that, where an online content-sharing service provider obtains an authorisation, for instance by concluding a licensing agreement, that authorisation shall also cover acts carried out by users of the services falling within the scope of Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or where their activity does not generate significant revenues*». The requirement of «*not acting on a commercial basis*»[504] could include «*the sharing of content without any profit-making purpose, such as users uploading a home video with music in the background*»[505], while the second condition (to perform an activity that «*does not generate significant revenues*»[506]) could cover «*users uploading tutorials including music or images*»[507] that produce «*limited advertising revenues*»[508]. The consequence is thus that if there is not the presence of even one of these two conditions, the user will be «*outside the scope of*»[509] and not shielded by that authorization[510]. Moreover, if reference were to be made to the way in which the Member States should implement Article 17(2), then it should mention Recital 69 of the CDSM[511]. The latter indeed expressly states that «*where online content-sharing service providers obtain authorisations, including through licensing agreements, for the use on their service of content uploaded by the users of the service, those authorisations should also cover the copyright relevant acts in respect of upload of users within the scope of the authorisation granted to the service providers, but only in cases where those users act for non-commercial*

[502] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 7.
[503] K. GRISSE, op. cit., p. 5.
[504] Article 17(2) of the CDSM.
[505] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 7.
[506] Article 17(2) of the CDSM.
[507] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 7.
[508] *Ibid.*
[509] *Ibid.*
[510] *Ibid.*
[511] *Ibid.*

*purposes, such as sharing their content without any profit-making purpose, or where the revenue generated by their uploads is not significant in relation to the copyright relevant acts of the users covered by such authorisations*»[512]. In cases in which «*the rightholders have explicitly authorised users to upload and make available works or other subject matter on an online content-sharing service, the act of communication to the public of the service provider is authorised within the scope of the authorisation granted by the rightholder*»[513]. In any case, the Commission specifies at the same time that «*there should be no presumption in favour of online content-sharing service providers that their users have cleared all relevant rights*»[514].

A careful reading of Article 17 of the CDSM suggests the analysis of an additional important aspect. Article 17 indeed clearly derogates from the safe harbours' liability exemptions built in Article 14(1) of the ECD[515]. Both Recital 65[516] and Article 17(3)[517] of the CDSM, in fact, establish that when an OCSSP carry out an act of communication to the public or makes available to the public a protected work in accordance with Article 17(1) and 17(2) of the CDSM, «*the limitation of liability establishes in Article 14(1) of Directive 2000/31/EC shall not apply*»[518]. When, instead, an ISP fall outside the scope of the CDSM, then Article 14(1) of the ECD can obviously be applied.

---

[512] *Ibid.*
[513] *Ibid.*
[514] Cfr. M, HUSOVEC – J. QUINTAIS, *How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms*, in *GRUR International*, Issue IV, 01.2021.
[515] See supra § 1.3.6.
[516] Recital 65 provides that «*When online content-sharing service providers are liable for acts of communication to the public or making available to the public under the conditions laid down in this Directive, Article 14(1) of Directive 2000/31/EC should not apply to the liability arising from the provision of this Directive on the use of protected content by online content-sharing service providers. That should not affect the application of Article 14(1) of Directive 2000/31/EC to such service providers for purposes falling outside the scope of this Directive*».
[517] Article 17(3) provides that «*When an online content-sharing service provider performs an act of communication to the public or an act of making available to the public under the conditions laid down in this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply the situation covered by this Article. The first subparagraph of this paragraph shall not affect the possible application of Article 14(1) of Directive 2000/31/EC to those service providers for purposes falling outside the scope of this Directive*».
[518] Article 17(3) paragraph 1.

In cases where OCSSPs have not obtained the needed authorization[519] provided in Article 17(1)(2) of the CDSM, the legislator constructs for them a particular and unique liability regime contained in *«paragraphs 3 to 5 of Article 17»*[520]. In the CDSM in fact the legislator *«carves out a specific liability regime for OCSSP for their making available of protected works and subject matters that derogates from the exemption laid down for hosting service providers in Article 14 of the e-commerce Directive*»[521]. This "immunity" system is based on the OCSSPs' compliance with three different conditions and obligations, each of which results *«contentious in its own way»*[522].

In the light of these premises, it only remains to analyze the following paragraphs of Article 17.

### 2.2.4. Derogating from Article 14(1) of the ECD: The specific liability regime in the absence of an authorisation

In Article 17(4) the legislators are explicit in establishing that «*If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless the service providers demonstrate that*» they have met some specific requirements. Before studying thoroughly these latter, however, reference should be made to the nature of Article 17(4). From a certain point of view, Article 17(1) and Article 17(4) are related and some authors argue that there could be different «*ways of*

[519] Cfr. S. DUSSOLIER, op. cit., p. 1015. They could have not obtained the license either because it was too difficult or because of the unwillingness of Intellectual Property's owner to grant it.
[520] S. DUSSOLIER, op. cit., p. 1015. T. SPOERRI, op. cit., p. 177. P.Y. GAUTIER, *Why internet services which provide access to copyright infringing works should not be immune to liability*, in *European Intellectual Property Review*, Vol. XLII, No. VIII, 2020, p. 4. C. GEIGER – B. J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 40. Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, cit., p. 8. K. GRISSE, op. cit., p. 4. The European Copyright Society, *Comment of the European Copyright Society. Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law*, in *JIPITEC*, 2020, p. 119.
[521] S. DUSSOLIER, op. cit., p. 1015.
[522] *Ibid.*

*systematic classification*»[523] of Article 17(4)[524]. Article 17(1) provide for «*primary liability for acts of communication to the public jointly committed by the OCSSP and its users*»[525] that «*morphs into secondary liability if the OCSSP has failed to obtain the necessary licenses*»[526]. On the one hand is possible to comprehend Article 17(4) as a «*release from strict primary liability*»[527] when the OCSSP «*made best efforts to obtain authorization, but no authorization was granted*»[528]. Then, «*the liability shifts to a liability for secondary infringement when neglecting the duties of care established in Article 17(4)(b)+(c)*»[529]. Recital 66 of the CDSM provides in fact that «*taking into account the fact that online content-sharing service providers give access to content which is not uploaded by them but by their users, it is appropriate to provide for a specific liability mechanism for the purposes of this Directive for cases in which no authorisation has been granted*»[530]. On the other hand, the fact that Recital 62 of the CDSM refers to «*the liability exemption mechanism provided for in this Directive*» suggests that the system contained in Article 17(4) represents a safe harbour

[523] K. GRISSE, op. cit., p. 6.
[524] *Ibid*. C. GEIGER – B. J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 40. M. LEISTNER, *European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?*, in *Intellectual Property Journal*, Issue 2, 16.06.2020, p. 12.
[525] C. GEIGER – B. J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 40
[526] *Ibid*. M. LEISTNER, *European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?*, in *Intellectual Property Journal*, Issue 2, 16.06.2020, p. 12. Cfr. M. HUSOVEC, *How Europe Wants to Redefine Global Online Copyright Enforcement* in T. E. SYNODINOU (ed), *Pluralism or Universalism in International Copyright Law*, Kluwer Law 2019, 14.05.2019, last update: 17.09.2019. Cfr. J. QUINTAIS, *The New Copyright in the Digital Single Market Directive: A Critical Look*, cit. Cfr. G. FROSIO, *To Filter or Not to Filter? That Is the Question in EU Copyright Reform*, in *36(2) Cardozo Arts & Entertainment Law Journal*, 25.10.2017. Cfr. E. ROSATI, *The Direct Liability of Intermediaries*, in G. FROSIO (ed.), *Oxford Handbook of Online Intermediary Liability*, Oxford University Press, 05.2020. Cfr. C. ANGELOPOULOS, *Harmonizing Intermediary Copyright Liability in the EU: A Summary*, G. FROSIO (ed.), *Oxford Handbook of Online Intermediary Liability*, Oxford University Press, 05.2020, pp. 11-12.
[527] K. GRISSE, op. cit., p. 6
[528] *Ibid.* Cfr. § 2.2.4.1., § 2.2.4.2., § 2.2.4.3.
[529] K. GRISSE, op. cit., p. 6
[530] *Ibid.*

regime[531]. Hosting providers in fact are exempted from liability if they demonstrate that they have "obeyed" to particular conditions and Article 17(4) could be considered as a *lex specialis* to the ECD[532]. These observations, however, have obviously only «*theoretical*»[533] relevance and do not affect the practical application of CDSM's Article 17[534].

As it has been clarified, the liability regime provided for in Article 17(1) is not «*absolute*»[535] but limited to the cases in which the hosting provider does not comply with the Article 17(4)(a)(b)(c)'s requirements. Realistically, in fact, «*OCSSPs are unlikely to obtain authorization for all content uploaded on their platforms*»[536] and the legislator «*offers an alternative to avoid liability*»[537]. Thus, the CDSM establishes other and different conditions than those provided in Article 14(1) that OCSSPs must meet in order not to be held liable. In particular, they must demonstrate that they have «*(a)made best efforts to obtain an authorisation, and (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information; and in any event (c) act expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their website, the notifies works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b)*»[538].

#### 2.2.4.1. Article 17(4)(a): «*best efforts to obtain an authorisation*»

[531] *Ibid.* Cfr. M. HUSOVEC, *How Europe Wants to Redefine Global Online Copyright Enforcement*, cit.
[532] K. GRISSE, op. cit., p. 6. Cfr. M. HUSOVEC, *How Europe Wants to Redefine Global Online Copyright Enforcement*, cit. See *supra* § 2.1.
[533] K. GRISSE, op. cit., p. 6.
[534] *Ibid.*
[535] *Ivi*, p. 3.
[536] *Ivi*, p. 6.
[537] *Ibid.* D. J.G. VISSER, *Trying to Understand Article 13*, publication date: 18.03.2019, last update: 19.09.2019, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3354494.
[538] Article 17(4) of the CDSM.

The first condition for OCSSPs to obtain "immunity" in the case in which «*no authorisation is granted*»[539] is «*made best efforts*»[540] to get that license[541]. The term "best efforts" present both in Article 17(4)(a), Article 17(4)(b)[542] and Article 17(4)(c)[543] is not precisely defined in the CDSM and there is also «*no reference*»[544] to national law[545]. The *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*[546] prepared by the European Commission however offers some food for thought on the subject and helps to unravel this complex provision. It could be said that the concept of "best efforts" «*is an autonomous notion of EU law*»[547] which «*should be transposed by the Member States (…) and interpreted in light of the aim and the objectives of Article 17 and the text of the entire Article*»[548]. The actions performed by the different OCSSPs should be considered on a «*case-by-case basis*»[549] in order to determine whether they have actually done everything materially possible to obtain the authorization. This assessment should be guided by rationality and by the «*principle of proportionality*»[550], considering also «*the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service*»[551] and «*the availability of suitable and effective means and their cost for service providers*»[552]. In fact, while it is understandable that

[539] *Ibid.*
[540] *Ibid.*
[541] K. GRISSE, op. cit., p. 6.
[542] See *infra*, § 2.2.4.2.
[543] See *infra*, § 2.2.4.3.
[544] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 8.
[545] *Ibid.*
[546] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit.
[547] *Ivi*, p. 9.
[548] *Ivi*, p. 9. Cfr. K. GRISSE, op. cit., p. 6.
[549] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 9.
[550] Article 17(5) of the CDSM.
[551] *Ibid.*
[552] *Ibid.* Cfr. Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 9. Cfr. K. GRISSE, op. cit., p. 7. Cfr. J. QUINTAIS, *The New Copyright in the Digital Single Market Directive: A Critical Look*, cit. Cfr. J. AXHAMN, *The New Copyright Directive: Collective Licensing as a Way to Strike a Fair Balance Between Creator and User Interests in copyright legislation (Article 12)*, in *Kluwer Copyright Blog*, 25.06.2019, last update: 19.09.2019, available at: http://copyrightblog.kluweriplaw.com/2019/06/25/the-new-copyright-directive-collective-

OCSSPs ask for an authorisation to the most known rightsholder of music labels and other societies, it is instead very difficult to comprehend how hosting providers could contact each rightholder or each author of each «*unknown work*»[553]. And considering that «*it is the user who upload the content, the provider does not know in advance which and whose content is made available on the platform and thus needs to be licensed*»[554]; new content is in fact always available online[555]. In this regard it is interesting to observe that, as Grisse suggests, in the case in which the rightholder is willing to grant the authorisation it would be useful to conceive a licensing agreement that extends «*to a rightholder's full repertoire, including future works*»[556]. ISPs should in addition «*engage proactively with rightholders that can be easily identified and located*»[557]. In any case, «*elements such as the specific market practices in different sectors*»[558] or some escamotage that Member States have designed to «*facilitate authorisations*»[559] should also be viewed to consider whether OCSSPs have made their "best efforts"[560]. Falce and Faraone suggest that the need to proactively contact collective management bodies in order to obtain an authorization should be considered as a minimum requirement for all OCSSPs, to the extent that, in order to make easier the identification of rightholders and the granting of authorizations, Member States should ensure the establishment of registers of rightholders that can be consulted by OCSSPs[561]. Analyzing the notion of Communication to the public and the authorisation models in § 2.2.3. and referring to Recital 61 of the CDSM, it emerges not just that right holders can

licensing-as-a-way-to-strike-a-fair-balance-between-creator-and-user-interests-in-copyright-legislation-article-12/.

[553] K. GRISSE, op. cit., p. 7.

[554] *Ibid.*

[555] *Ibid.* Cfr. D. J.G. VISSER, op. cit., paragraph 5.

[556] K. GRISSE, op. cit., p. 7.

[557] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 9. The Commission specifies also at page 9 that «*In order to facilitate the identification of rightholders and the grant of authorisations, the Member States may encourage the development of registries of rightholders that could be consulted by online content-sharing service providers, in compliance with data protection rules, when applicable*».

[558] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 9.

[559] *Ibid.*

[560] *Ibid.*

[561] V. FALCE – N. M. F. FARAONE, *Direttiva Copyright e line guida: focus sll'articolo 17*, cit.

refuse to grant the authorisation to disseminate the protected material online, but also that «*those licensing agreement should be fair and keep a reasonable balance between both parties*»[562]. Therefore, when an OCSSP «*contacts a rightholder but the latter refuses to engage into negotiations to grant an authorisation for its content*»[563] the "best efforts" condition may still be fulfilled[564]. On the contrary, if an OCSSP rejects to «*conclude a licence offered on fair terms and which maintains a reasonable balance between the parties*»[565] then this could be symptomatic of an absence of the demanded requisite[566].

#### 2.2.4.2. Article 17(4)(b): «*best efforts to ensure the unavailability of specific works and other subject matter (…)*»

The second cumulative condition for OCSSPs to take advantage of the liability exemption regime of Article 17(4) is having made «*in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information*»[567]. Recital 66 specifies in fact that in the case in which «*no authorisation has been granted to service providers*» then OCSSPs «*should make their best efforts in accordance with high industry standards of professional diligence to avoid the availability on their services of unauthorised works and other subject matter, as identified by the relevant rightholder*». In making this assessment, «*account should be taken of whether the service provider has taken all the steps that would be taken by a diligent operator to achieve the result of preventing the availability of unauthorised works or other subject matter on its website, taking into account best industry practices and the effectiveness of the steps taken in light of all relevant factors and developments, as well as the*

[562] Recital 61 of the CDSM.
[563] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 10.
[564] K. GRISSE, op. cit., p. 7. D. J.G. VISSER, *op. cit.*, paragraph 5.
[565] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 10.
[566] *Ibid.* K. GRISSE, op. cit., p. 7.
[567] Article 17(4)(b) of the CDSM.

*principle of proportionality*»[568]. In fact, as it has been written in the previous paragraph and as it will be underlined again below[569], in order to determine the "best efforts" to the effect of Article 17(4)(b) one must refer to Article 17(5) which establishes exactly that «*in determining whether the service provider has complied with its obligation under paragraph 4, and in light of the principle of proportionality, the following elements, among others, shall be taken into account: (a) the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service; (b) the availability of suitable and effective means and their cost for service providers*».

In the framework of Article 17(4)(b) the Intellectual Property's owners *i.e.* the rightholders should play a fundamental active role, cooperating also with OCSSPs[570]. Indeed, both Article 17(4)(b) and Recital 66 of the CDSM provide that «*rightholders should provide the service providers with relevant and necessary information*»[571] in the absence of which «*OCSSPs cannot act*»[572]. The Commission explain that rightholders «*submit this information through third parties authorised by them*»[573] and that «*whether any information provided by rightholders is both 'relevant' and 'necessary' should be assessed on a case-by-case basis*»[574]. At the same time, however, the given information should be at least precise about the «*rights ownership of the particular work or subject matter in question*»[575] and sufficiently «*"necessary"*»[576] considering the technological «*solutions deployed by service providers*»[577] in question.

---

[568] Recital 66 of the CDSM.
[569] See *infra*, § 2.2.4.3.
[570] K. GRISSE, op. cit., p. 5. Cfr. J. QUINTAIS, *The New Copyright in the Digital Single Market Directive: A Critical Look*, cit. Cfr. J. AXHAMN, *The New Copyright Directive: Collective Licensing as a Way to Strike a Fair Balance Between Creator and User Interests in copyright legislation (Article 12),* cit. Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 11.
[571] Recital 66 of the CDSM.
[572] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 11.
[573] *Ibid.*
[574] *Ibid.*
[575] *Ivi*, p. 14.
[576] *Ibid.*
[577] *Ibid.*

The provision of Article 17(4)(b) obviously serves as a «*major incentive for OCSSPs to increase their efforts and improve their filters*»[578] and, together with the need to have made «*best efforts to prevent*»[579] the «*future uploads in accordance with point (b)*»[580] of unauthorised content as established in Article 17(4)(c) of the CDSM, it is one of the most controversial paragraphs[581]. The requirement of «*best efforts to ensure the unavailability of specific works and other subject matter*» to protect the rightholders' copyright in fact can easily result in upload excessive filter and over blocking content online, threating in this way different fundamental rights[582]. Despite it is clearly stated in both Recital 66 of the CDSM[583], Article 17(7)[584], Article 17(8) of the CDSM[585] as well as in

[578] T. SPOERRI, op. cit., p. 178.
[579] Article 17(4)(c) of the CDSM.
[580] *Ibid.*
[581] Cfr. M. HUSOVEC, *The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which is Superior? And Why?*, cit. Cfr. C. GEIGER – B. J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit. Cfr. G. FROSIO – S. MENDIS, *Monitoring and Filtering: European Reform or Global Trend?*, cit. Cfr. C. ANGELOPOULOS – S. SMET, *Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability*, in *Journal of Media Law*, Taylor & Francis Publishing, publication date: 4.04.2017, last update: 14.07.2017, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2944917. European Copyright Society, *General Opinion on the EU Copyright Reform Package*, 27.01.2017, available at: https://perma.cc/ZHR9-LLGE. S. STALLA-BOURDILLON – E. ROSATI – G. SARTOR – C. ANGELOPOULUS – A. KUCZERAWY et al., *Open Letter to the European Commission—On the Importance of Preserving the Consistency and Integrity and of the EU Acquis Relating to Content Monitoring Within the Information Society*, 30.09.2016, available at: https://perma.cc/9ZHM-6Z3Z. (against); CREATe, *Open Letter on the EU Copyright Reform Proposals for the Digital Age to members of the European Parliament and the European Council*, 24.02.2017, available at: https://perma.cc/L45T-LLJ9. Association Littéraire et Artistique Internationale, *Second Opinion on Certain Aspects of the Implementation of Article 17 of Directive (EU) 2019/790 of 17 April 2019 on Copyright and Related Rights in the Digital Single Market*, cit. Association Littéraire et Artistique Internationale, *Résolution Relative aux Propositions Européenes du 14 Septembre 2016*, available at: https://perma.cc/JC9Q-ZKL7.
[582] There is the risk to affect the freedom to conduct a business protected by Article 16 of the Charter of Fundamental Rights of the European Union and freedom of expression and information protected by Article 11 of the Charter of Fundamental Rights of the European Union. T. SPOERRI, op. cit., p. 178. Cfr. J. QUINTAIS, *The New Copyright in the Digital Single Market Directive: A Critical Look*, cit. Cfr. J. AXHAMN, *The New Copyright Directive: Collective Licensing as a Way to Strike a Fair Balance Between Creator and User Interests in copyright legislation (Article 12)*, cit. Cfr. C. GEIGER – B. J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible* Match, cit. See infra § 2.3.
[583] Recital 66 of the CDSM clarifies that the OCSSPs' activities in cooperation with rightholders should not prevent the availability of licit content, such as protected works or other subject matter that is protected by a licensing agreement or by an exception or limitation to copyright and related rights. The legislators specify also that the user's right to upload content or to have access to lawful information shall not be affected. No general monitoring obligation shall be imposed on platforms.

Article 15(1) of the ECD[586] and in the forthcoming Article 7 of the DSA[587] that a general monitoring prohibition shall be respected and that the freedom of expression and information of users shall be protected, the conditions established in Article 17(4)(b) and in the entire Article 17(4) can only be view «*as an obligation to filter and block*»[588] the «*specific works with the use of filtering technology*»[589], in the absence of which it would be indeed infeasible apply to these provisions[590]. Moreover, the reference to «*high industry standards of professional diligence*» in Article 17(4)(b) necessarily implies an evaluation on «*the available industry practices on the market at any given point in time*»[591] and on «*the use of technology or particular technological solutions*»[592]. That said, although the assessment of "best efforts" should be made in consideration of the principle of proportionality, although OCSSPs «*should remain free to choose the technology or the solution to comply with the best efforts obligation in their specific situation*»[593] and although there are specific cases in which the hosting providers are not required to implement filtering measures[594], the technological instruments required by the legislator to «*ensure the unavailability of specific works and other subject matter*»[595] require an economic commitment that not everyone can afford so that it risks affecting the freedom conduct a business of

---

[584] Similarly to Recital 66 of the DSA, Article 17(7) of the CDSM establishes that the «*the cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation*».

[585] Article 17(8) of the CDSM states explicitly that the Article 17's application shall «*not lead to any general monitoring obligation*».

[586] See *supra* § 1.3.7.

[587] See *infra* § 3.

[588] T. SPOERRI, op. cit., p. 178.

[589] *Ibid.*

[590] *Ibid.* Cfr. G. FROSIO – S. MENDIS, *Monitoring and Filtering: European Reform or Global Trend?*, cit., pp. 12-15.

[591] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, cit., p. 11.

[592] *Ibid.*

[593] *Ibid.*

[594] See *infra* § 2.2.5. Cfr. Article 17(5) and Article 17(6) of the CDSM. Cfr. Recital 66 of the CDSM which provides that «*Different means to avoid the availability of unauthorised copyright-protected content could be appropriate and proportionate depending on the type of content, and, therefore, it cannot be excluded that in some cases availability of unauthorised content can only be avoided upon notification of rightholders*».

[595] Article 17(4)(b) of the CDSM.

small enterprises and intermediaries[596]. It is worth underlining however that, in this regard, some authors point outs that the Commission's Guidance on Article 17 of the CDSM do not go so far as to recommend the use of any specific technology or solution. On the contrary, the European Commission only acknowledges that content recognition technology is nowadays commonly used to manage the use of copyrighted content and, moreover, that the ISPs' most widely used technology is the "fingerprinting"[597].

### 2.2.4.3. Article 17(4)(c): Notice-and-takedown and Notice-and-staydown

Even if an OCSSP managed to fulfill the second condition, the hosting provider will still not be able to achieve the liability exemption unless it has «*acted expeditiously, upon receiving a sufficiently substantiated notice from rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b)*». This is the third cumulative requirement provided by the legislator in Article 17(4)(c). The first part of the provision refers to the NTD mechanism *i.e.* the removal of the content (that, as it has been analyzed, is implied also in the ECD[598]) and the second part establishes a Notice-and-staydown (hereinafter referred to as 'NSD') system *i.e.* an obligation to avoid the future upload of the infringing material «*in accordance with point (b)*»[599]. This provision has created a great deal of uncertainty in the public opinion and in

[596] Cfr. Article 16 of the Charter of Fundamental Rights of the European Union. T. SPOERRI, op. cit., p. 178. Cfr. G. FROSIO – S. MENDIS, *Monitoring and Filtering: European Reform or Global Trend?*, cit., pp. 12-15. Cfr. A. MAXWELL, *Article 13: YouTube CEO is Now Lobbying FOR Upload Filters*, 15.11.2018, available at: https://torrentfreak.com/article-13-youtube-ceo-is-now-lobbying-for-upload-filters-181115/.

[597] Cfr. S. CARUSO, *Il fingerprinting del browser: cos'è e come funziona il tracciamento delle nostre attività online*, in *Network Digital 360*, 29.07.2019, available at: https://www.cybersecurity360.it/nuove-minacce/il-fingerprinting-del-browser-cose-e-come-funziona-il-tracciamento-delle-nostre-attivita-online/. Cfr. V. FALCE – N. M. F. FARAONE, *Direttiva Copyright e line guida: focus sll'articolo 17*, cit. Cfr. Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, cit., pp. 12 et sq. Among other things, the Commission mentions also other technologies enabling the detection of unauthorized content such as the hashing, watermarking and the use of metadata.

[598] See *supra* § 1.3.6.4.

[599] Article 17(4)(c) of the CDSM. Cfr. Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, cit., p. 15.

Intellectual Property law scholars who have shown their perplexity especially towards the possible combination between NSD mechanism and the protection of fundamental rights[600]. This thesis will deal with the latter below in the last paragraph of this Chapter to focus here on the functioning and the understanding of the NTD and the NSD mechanisms.

First, in Article 17(4)(c) the legislators require a «*sufficiently substantiated notice from rightholders*»[601] for the act of taking down content, and, referring to Article 17(4)(b), «*relevant and necessary information*»[602] to prevent future uploads. It is necessary thus to «*clearly differentiate the type of information rightholders*»[603] should «*provide*»[604]. While for the information concerning the NSD system it must refer to Article 17(4)(b), and so to what has been studied in § 2.2.4.2., the Commission suggests that «*as regards the information to be provided for the fulfilment of the take down obligation under paragraph 4(c)*»[605] it should consult the *Commission Recommendation on Measures to Effectively Tackle Illegal Content Online*[606]. The latter specifies in fact that «*the notices should be*»[607] «*sufficiently precise and adequately substantiated to enable the service providers to take an informed and diligent decision in respect of the content to which*

[600] Cfr. J. QUINTAIS, *The New Copyright in the Digital Single Market Directive: A Critical Look*, cit. Cfr. J. AXHAMN, *The New Copyright Directive: Collective Licensing as a Way to Strike a Fair Balance Between Creator and User Interests in copyright legislation (Article 12)*, cit. Cfr. G. FROSIO – S. MENDIS, *Monitoring and Filtering: European Reform or Global Trend?*, cit. Cfr. C. ANGELOPOULOS – S. SMET, *Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability*, cit. European Copyright Society, *General Opinion on the EU Copyright Reform Package*, cit. Cfr. S. STALLA-BOURDILLON – E. ROSATI – G. SARTOR – C. ANGELOPOULUS – A. KUCZERAWY et al., *Open Letter to the European Commission—On the Importance of Preserving the Consistency and Integrity and of the EU Acquis Relating to Content Monitoring Within the Information Society*, cit. CREATe, *Open Letter on the EU Copyright Reform Proposals for the Digital Age to members of the European Parliament and the European Council*, cit. Association Littéraire et Artistique Internationale, *Second Opinion on Certain Aspects of the Implementation of Article 17 of Directive (EU) 2019/790 of 17 April 2019 on Copyright and Related Rights in the Digital Single Market*, cit. Association Littéraire et Artistique Internationale, *Résolution Relative aux Propositions Européenes du 14 Septembre 2016*, cit.

[601] Article 17(4)(c) of the CDSM.

[602] See *supra* § 2.2.4.2.

[603] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 15.

[604] *Ibid.*

[605] *Ibid.*

[606] European Commission, *Commission Reccomendation of 1.3.2018 on measures to effectively tackle illegal content online*, cit.

[607] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 15.

*the notice relates, in particular whether or not that content is to be considered illegal content*»[608]. The information contained in the notice should also include «*an explanation of the reasons why the notice provider considers that content to be illegal content and a clear indication of the location of that content*»[609]. To understanding whether the "best efforts" condition provided by Article 17(4)(c) has been respected, (also in this case) the assessment shall be carried out in consideration of the criteria laid down in Article 17(5), in counterbalancing at the same time the possible negative effect on users as set out in Article 17(7) and Article 17(9) of the CDSM[610]. Moreover, although it may seem difficult, Article 17(4)(c), in particular the functioning of the NSD and NTD mechanisms, must be reconciled with the general monitoring prohibition established in Article 17(8)[611].

Practically speaking, the NTD and the NSD systems are two different alternative procedures[612]. As Husovec suggests, the NTD «*refers to a two-stage online enforcement process, where right holders are expected to identify and notify the content, and intermediaries to review notifications and act upon them if the content is unlawful*»[613]. This mechanism can be viewed as a sort of compromise between, on the one hand, «*an effective system of enforcement of right holder's rights*»[614] and, on the other hand, «*freedom of expression of users and platform's ability to innovate*»[615]. The NSD system, instead, is not «*a continuous two-stage two-person process*»[616] but it provides that the right holders send only a single notice concerning a specific copyright protected work «*which then triggers a time-limited obligation to prevent re-infringing on the right to the same object*»[617] and it can have different forms[618]. It is interesting to notice in fact

[608] European Commission, *Commission Reccomendation of 1.3.2018 on measures to effectively tackle illegal content online*, cit., p. 9.
[609] *Ibid.*
[610] See *infra* § 2.2.6. Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, cit., p. 15. K. GRISSE, op. cit., p. 11.
[611] Cfr. G. FROSIO - S. MENDIS, *Monitoring and Filtering: European Reform or Global Trend?*, cit., p. 12.
[612] M. HUSOVEC, *The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which is Superior? And Why?*, cit., p. 4.
[613] *Ibid.*
[614] *Ibid.*
[615] *Ibid.*
[616] *Ibid.*
[617] *Ibid.*

that, as the NTD mechanism requires right holders to send a lot of time-consuming notifications, some artists have proposed to «*revisit*»[619] it. A precise example is a Proposal supported by different authors like Lady Gaga, Taylor Swift, U2 and Paul McCartney before the U.S. Congress[620]. This artists' petition sustains that: «*Small independent film makers spend their time not making movies, but sending out 50,000 take down notices in a vain attempt to sweep aside the tide of recurrent copyright infringement. We need to change the laws to make sure that artists spend their time making art, not sending take down notices. It is time that a take down notice be sent once, and only once. Thereafter it should be the duty of the website to prevent the reposting of the same material. The technology to do this is available. What is lacking is the legal directive to use this technology to prevent the wholesale theft of artistic creations*»[621]. In Europe, as it has been studied *supra*, the acceptance of mechanisms such as the NSD moved from different premises and was established to fill the so called "value gap"[622]. However, the results and the implications following its adoption are not the best. The only way to make a NSD system work is indeed to introduce «*mechanisms for the monitoring of all user-submitted information*»[623] indeed «*screening out illegal content cannot occur without filtering the totality of content*»[624]. The consequence is a collision with the general monitoring prohibition provided in Article 15 of the ECD[625] and Article 17(8) of the CDMS, provoking in this way a big deal for the protection of fundamental rights[626]. As evidenced in the previous

---

[618] Cfr. *Ibid.* Cfr. Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, cit., p. 15.

[619] M. HUSOVEC, *The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which is Superior? And Why?*, cit., p. 2.

[620] Cfr. U.S. Copyright Office, *Section 512 Study: Notice and Request for Public Comment*, 80 Fed. Reg. 81865, 31.12.2015. Cfr. E. HARMON, *"Notice and Staydown" is Really "Filter-Everything"*, ELECTRONIC FRONTIER FOUNDATIONS, 21.01.2016, available at: https://perma.cc/X3AA-CPQA.

[621] M. HUSOVEC, *The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which is Superior? And Why?*, cit., p. 2. Cfr. *TAKE DOWN AND STAY DOWN*, 2016, available at: https://perma.cc/NQ3F-9CJG.

[622] See *supra*, § 2.2.1. Cfr. M. HUSOVEC, *The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which is Superior? And Why?*, cit., p. 2.

[623] C. ANGELOPOULOS – S. SMET, *Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability*, cit., p. 17.

[624] *Ibid.*

[625] See *supra* § 1.3.7.

[626] *Ibid.* See *SABAM* Case (Case 324/09) and *Netlog* Case (Case 360/10).

paragraph, the implementation of filtering measures requires also an important economic effort by small companies which impose them «*a significant burden*»[627]. Moreover, through the establishment of monitoring technologies, end users' freedom of speech and expression will almost certainly be harmed, as false positives *i.e.* «*erroneous removal of lawful content*»[628] cannot be ruled out[629]. In this regard, Ken D. Kanayama underlines how the fact that the users are aware of being "monitored" on the Internet can lead them «*to refrain from commenting even when their intended comments would not be illegal*»[630]. A system such as NSD, through the continuous information analysis and processing, *inter alia*, implies «*the identification of users, whether they are implicated in the notified wrongdoing or not*»[631], in this way affecting their right to protection of personal data secured by Article 8 of the Charter of Fundamental Rights of the European Union[632].

Today, both NTD and the NSD refers more and more to a copyright enforcement that takes place through algorithmic and automated monitoring systems[633]. These latter, even if on the one side offer «*many opportunities*»[634] and should be encouraged as an innovation, on the other side represent particular tools to handle that could create (and indeed is creating) difficult problems to face[635]. It

---

[627] C. ANGELOPOULOS – S. SMET, *Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability*, cit., p. 17. Cfr. T. SPOERRI, op. cit.
[628] C. ANGELOPOULOS – S. SMET, *Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability*, cit., p. 17.
[629] *Ibid. Ivi*, p. 18. See *infra* § 2.3.
[630] C. ANGELOPOULOS – S. SMET, *Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability*, cit., p. 18. K. D. KANAYAMA, *A Right to Pseudonymity*, in *Arizona Law Review*, Vol. LI, No. II, 2009, pp. 427-464.
[631] C. ANGELOPOULOS – S. SMET, *Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability*, cit., p. 18.
[632] *Ibid.* Cfr. K. GRISSE, op. cit., p. 10.
[633] Cfr. C. GEIGER – B. J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 70. Cfr. C. ANGELOPOULOS – S. SMET, *Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability*, cit. Cfr. M. HUSOVEC, *The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which is Superior? And Why?*, cit. Cfr. T. SPOERRI, op. cit.
[634] M. HUSOVEC, *The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which is Superior? And Why?*, cit., p. 32 Cfr. *Ibid*., p. 2.
[635] Cfr. C. GEIGER – B. J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 70. Cfr. C. ANGELOPOULOS – S. SMET, *Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability*, cit. Cfr. M. HUSOVEC, *The*

has been affirmed that the liability exemption's conditions under Article 17(4) «*would compel OCSSPs to engage in the monitoring and filtering of user-generated content*»[636]. «*If this is the case*»[637], Frosio and Mendis argue, «*Article 17 would signal a transition of EU copyright law from existing 'negligence based' intermediary liability system – grounded on the principle of 'no monitoring obligations' – to a regime that requires OCSSPs to undertake proactive monitoring and filtering content, and would almost certainly lead to the widespread adoption of automated filtering and algorithmic copyright enforcement systems*»[638]. Among other things, a closer look seems to suggest that monitoring has become a real «*trend*»[639].

Therefore, one of the most important things that remain to be understood is how these systems can work without becoming a «*filter-everything*»[640] *i.e.* a totally detrimental instruments for a fair balance between ISPs', users' and right holders' interests and for the defense of their fundamental rights[641]. It is not surprising that some authors such as Christina Angelopoulus and Stijn Smet make their displeasure with the filtering obligations clear, recalling that in France, the place where this the NSD was born, the *Cour de Cassation* has refused it because considered «*disproportionate to the aim pursued*»[642].

Before analyzing the "mitigated", one might say, requirements of certain new OCSSPs to take advantage of the liability exemption in the absence of authorization for the act of communication to the public envisaged in this Chapter, it is worth remembering that the Article 17(4)(c), as well as Article 17(4)(a) and 17(4)(b) must be interpreted in accordance with Article 17(5)[643]. The latter in fact stresses out the importance of taking in consideration the «*principle of*

---

*Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which is Superior? And Why?*, cit. Cfr. T. SPOERRI, op. cit.

[636] G. FROSIO – S. MENDIS, *Monitoring and Filtering: European Reform or Global Trend?*, cit., p. 2.

[637] *Ibid.*

[638] *Ibid.*

[639] G. FROSIO, *The Death of 'No Monitoring Obligations'. A Story of Untameable Monsters*, in *JIPITEC*, No. VIII, 2017, p. 1.

[640] E. HARMON, *"Notice and Staydown" is Really "Filter-Everything"*, cit.

[641] See *infra*, § 2.3.

[642] C. ANGELOPOULOS – S. SMET, *Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability*, cit., p. 18. Cfr. *La société Google France c. La société Bach films* Case, Première chambre civile de la Cour de cassation, 12.07.2012.

[643] For the full text of Article 17(5) see *supra* § 2.2.4.2.

*proportionality*», the «*availability of suitable and effective means as well as their cost*» and other features such as «*the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users*» when assessing the possible "immunity" of OCSSPs[644]. To put it another way, «*if there are no suitable and effective means, or simply not enough financial resources*»[645] then it is possible that ISPs won't neither have to monitor content nor be compelled to apply filtering technology in order to ensure that non-licensed content is unavailable[646]. This option is surely very important for the safeguard of hosting service providers' right to freedom to conduct a business and it can be seen as an «*exception from the filtering requirement*»[647]. As such, it seems to be, however, «*exceptional*», as Spoerri remembers[648]. This mean that there are very few cases in which the just mentioned implications of Article 17(5) apply in favour of an OCSSP.

### 2.2.5. The exceptional liability regime for new OCSSPs

Another sort of «*exception from filtering requirement*»[649] is rooted in the legitimate and understandable concern that Article 17(4)'s conditions may preclude new and smaller business from investing and entering in the market[650]. For this reason, Article 17(6), referring to new OCSSPs having an annual turnover of less than 10 millions of EUR and whose services have been available to the European Union's public for less than three years, limit the application of the Article 17(4)'s conditions under the liability regime. The legislator in particular specifies that the new OCSSPs can be immune from liability just complying with Article 17(4)(a)[651] and «*acting expeditiously, upon receiving a sufficiently substantiated notice, to disable access to the notified works or other subject*

[644] Article 17(5).
[645] T. SPOERRI, op. cit., p. 178.
[646] *Ibid.* D. J.G. VISSER, op. cit., p .7.
[647] T. SPOERRI, op. cit., p. 178. Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 15.
[648] T. SPOERRI, op. cit., p. 178.
[649] *Ibid.*
[650] K. GRISSE, op. cit., p. 10.
[651] See *supra* § 2.2.4.1.

*matter or to remove those works or other subject matter from their websites*»[652]. However, the CDSM specifies that in cases where the new OCSSP's monthly average number of unique visitors surpass 5 million, then, in order to obtain the liability exemption, the intermediary shall also prove that it has made best efforts to avoid additional «*uploads of the notified works and other subject matter for which the rightholders have provided relevant and necessary information*»[653]. In particular, the CDSM specifies in Recital 67 that the Article 17(6) is built taking «*into account the specific case of start-up companies working with user uploads*» to allow them «*to develop new business models*»[654]. This regime is indeed «*applicable to new service providers with a small turnover, (...) new businesses (...)*»[655]. At the same time, to avoid abuses and misuses in the application of the new OCSSPs' liability regime, the legislator points out that the Article 17(6)'s benefit shall not be extended beyond their first three years of existence. In particular, the provision shall not apply to «*newly created services or to services provided under a new name but which pursue the activity of an already existing online content-sharing service provider which could not benefit or no longer benefits from that regime*»[656]. The sense of this provision can be then summarized as follows. In the case in which, cumulatively, a service of a new OCSSPs is available in the European Union for less than three years and its annual turnover is below EUR 10 million, the Article 17(4)'s conditions to obtain the liability exemption are limited to having made best efforts to obtain an authorisation *i.e.* «*to enter into licensing agreements with rightholders*»[657] and having supplied an «*efficient*»[658] NSD mechanism[659]. However, when the OCSSP's average number of monthly unique visitors exceeds 5 million, then «*they do not benefit from the exception*»[660] established in Article 17(6) first paragraph and must put in place a NSD mechanism[661]. The difference between the two regime lies thus in the «*the*

[652] Article 17(6) of the CDSM.
[653] *Ibid.*
[654] *Ibid.*
[655] Recital 67 of the CDSM.
[656] *Ibid.*
[657] T. SPOERRI, op. cit., p. 179.
[658] *Ibid.*
[659] *Ibid.*
[660] *Ibid.*
[661] *Ibid.*

*number of monthly unique visitors*»[662]. For what concern the way of calculating the «*annual turnover*»[663], it must refer to the *User Guide to the SME Definition*[664] indicated by the Commission[665]. Moreover, in identifying the cases in which the «*new*»[666] OCSSPs have respected the requirements provided by Article 17(6) to reach the liability exemption, one must take in consideration the principle of proportionality and the above cited Article 17(5)[667]. When the law requires ISPs to prevent future uploads of infringing content, it is important to also consider and apply Article 17(7) and Article 17(9) of the CDSM in order to safeguard «*legitimate users*»[668]' interests[669].

From a critical point of view, however, the "exceptional" liability regime for new OCSSPs of Article 17(6) and in particular the «*exception from filtering requirement*»[670] seems to be «*a drop in the ocean*»[671]. An enterprise who can benefit from this provision, in fact, is «*presumably not a competitor of a big tech company or even an established*»[672] OCSSP and when, after three years, Article 17(6) will be no longer applicable, then the small ISP will be obliged to implement filtering technology to comply with Article 17(4)'s requirements[673]. It emerges that the liability regime of Article 17(6) is in practice very rare to fully apply, and it is generally not so «*helpful to start-up companies or to help increase competition amongst*»[674] hosting service providers in the market of the European Union[675].

---

[662] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 17.
[663] Article 17(6) of the CDSM.
[664] Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, *User Guide to the SME Definition,* 16.02.2017, available at: https://op.europa.eu/en/publication-detail/-/publication/79c0ce87-f4dc-11e6-8a35-01aa75ed71a1.
[665] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 17.
[666] Article 17(6) of the CDSM.
[667] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 17.
[668] *Ibid.*
[669] *Ibid.*
[670] T. SPOERRI, op. cit., p. 178.
[671] *Ivi*, p. 179.
[672] *Ibid.*
[673] *Ibid.*
[674] *Ibid.*
[675] *Ibid.*

## 2.2.6. The protection of users' right and the complaint and redress mechanism

The users' interest and the legislator's concern about the fact that the different fundamental rights at stake, including the freedom of expression and the right to property, are protected is «*reflected in Article 17(7)*»[676] and Article 17(9) of the CDSM.

Article 17(7) tries to avoid the risk of an illegitimate «*over blocking*»[677] of users' online content. In the context of the current discussion involving monitoring measures, in fact, there is a shared fear that the filters may not be capable of adequately distinguishing illegal from legal information online in this way blocking also lawful content[678]. CDSM's Article 17(7) first paragraph clearly states that the OCSSPs and rightholders' cooperation shall not impede the users' access to legal content online and content protected by an exception or limitation. This provision indeed references expressly «*to uses subject to exceptions and limitations*»[679] and it further establishes in its second paragraph that Member States shall guarantee that users «*uploading and making available*»[680] content on OCSSPs can rely on specific exception or limitations[681]. The legislators refer in particular to «*quotation, criticism, review*»[682] and «*use for the purpose of caricature, parody or pastiche*»[683]. According to Recital 70, these exceptions and limitations should «*be made mandatory in order to ensure that users receive*

[676] C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 42.
[677] E. ROSATI, *Five considerations for the transposition and application of Article 17 of the DSM Directive*, cit., p. 269. Cfr. K. GRISSE, op. cit., p. 13. T. SPOERRI, op. cit., p. 183.
[678] *Ibid.*
[679] C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 42.
[680] Article 17(7) of the CDSM.
[681] Cfr. V. FALCE – N. M. F. FARAONE, *Direttiva Copyright e line guida: focus sll'articolo 17*, cit.
[682] Article 17(7) of the CDSM.
[683] *Ibid*. Cfr. Cfr. G. FROSIO, *To Filter or Not to Filter? That Is the Question in EU Copyright Reform*, cit., p. 353. Cfr. M.L. MONTAGNANI, A New Liability Regime for Illegal Content in the Digital Single Market, in G. FROSIO (ed.), *Oxford Handbook of Online Intermediary Liability*, Oxford University Press, 05.2020, p. 3.

*uniform protection across the Union*»[684]. The Commission, relying on the *Deckmyn* case's sentence[685], specifies that those Article 17(7)'s exceptions and limitations «*should be read as autonomous notions of EU law and should be considered in the specific context of this provision*»[686]. They need therefore to be specifically implemented and transposed in national legislation[687].

Considering the obligations that Article 17(4) implies for OCSSPs and the provisions for the protection of users established in Article 17(7), however, it emerges a sort of «*internal conflict within the systematic structure of Article 17*»[688]. According to Quintais and Schewemer[689], the safeguard contained in Article 17(7) can be considered as an «*obligation of result*»[690] which must be respected despite the provision of Article 17(4)'s *ex ante* measures. Following this point of view, the two provisions could be seen as hierarchically different: while Article 17(4) require "best efforts" obligations, Article 17(7) enshrines a «*higher-*

---

[684] Cfr. J. P. QUINTAIS - G. FROSIO - S. VAN GOMPEL - P. B. HUGENHOLTZ - M. HUSOVEC - B. J. JUTTE, M. SENFTLEBENET, *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations From European Academics*, in *JIPITEC*, 11.2019. Cfr. K. GARSTKA, *Guiding the Blind Bloodhonds: How to Mitigate the Risks Article 17 of Directive 2019/970 Poses to the Freedom on Expression*, in P. TORREMANS (ed.), *Intellectual Property Law and Human Rights*, Wolters Kluwer Law & Business, p. 335.

[685] Case C-201/13, at paragraph 14 states that «*the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question*».

[686] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 19.

[687] *Ibid.* Grisse explains that even if these exception and limitations are specifically mentioned, this does not mean that users can only rely on them. Instead, «*they can rely on any exception or limitation implemented in national law*». K. GRISSE, op. cit., p. 11.

[688] C. GEIGER - B.J. JUTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 42. C. GEIGER - B.J. JUTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit. It is important to remember also that Article 17(7) and Article 17(9)'s obligations are very important «*for the application of 'best efforts' under Article 17(4)».* Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 23. The Commission specifies that «*Article 17(7), according to which the cooperation between rightholders and service providers must not result in the prevention of availability of legitimate content, must be read together with the 'best effort' provisions laid down in Article 17(4), since it is in that context that the cooperation takes place, in relation to content for which no authorisation has been granted.».* Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 23.

[689] J. P. QUINTAIS – S. F. SCHWEMER, *The Interplay between the Digital Services Act and Sector Regulation: How Special is Copyright?*, 7.05.2021, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3841606#references-widget.

[690] *Ivi*, p. 7

*level obligation*»[691]. This could also be symptomatic of the fact that, to observe Article 17 of the CDSM, it is not sufficient to confidence in *ex post* complaint and redress mechanism *ex* Article 17(9)[692], but it is necessary to have *ex ante* measures avoiding the over blocking of material uploaded online by technological monitoring filters utilized by OCSSPs[693].

Article 17(9) of the CDSM, however, seems to "soften" the conflict between Article 17(4) and Article 17(7) by ensuring that, as Recital 70 specifies, OCSSPs shall «*operate an effective complaint and redress mechanism to support use for*» specific exceptions and limitations safeguarded by Article 17(7).

As Quintais and Schwemer underline, Article 17(9) provides for «*ex post procedural safeguards*»[694] at both platform level and out-of-court level. Referring to cases in which there are disputes concerning the «*disabling of access to, or removal of, works or other subject matter*»[695] uploaded by users, the legislators state that Member States shall establish that OCSSPs adopt «*effective and expeditious complaint and redress mechanism*»[696] available to their services' users[697]. The complaints submitted in the context of this mechanism shall be processed as quickly as possible – «*without undue delay*»[698]– and decisions to

[691] *Ibid.*
[692] See *infra* in this paragraph.
[693] J. P. QUINTAIS – S. F. SCHWEMER, *The Interplay between the Digital Services Act and Sector Regulation: How Special is Copyright?*, cit., p. 7. Cfr. M. HUSOVEC, *(Ir)Responsible Legislature? Speech Risks under the EU's Rules on Delegated Digital Enforcement*, 17.09.2021, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3784149. Cfr. Geiger and Jütte on this topic; they sustain that, the resolution of the "conflict" between Article 17(4) and Article 17(7) can be found in Article 17(9). C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 42. This thesis sustaining the necessity of having not only *ex post* measures, but also *ex ante* measures to comply with Article 17 CDSM just exposed, then, was at the basis of the Poland action to request the annulment of Article 17 of the CDSM before the CJEU because not safeguarding fundamental rights. Cfr. *Republic of Poland vs European Parliament and Council of the European Union*, See *infra* § 2.3.
[694] J. P. QUINTAIS – S. F. SCHWEMER, *The Interplay between the Digital Services Act and Sector Regulation: How Special is Copyright?*, cit., p. 7.
[695] Article 17(9) of the CDSM.
[696] *Ibid.*
[697] Recital 70 of the DSA clarifies that OCSSPs shall «*put in place effective and expeditious complaint and redress mechanisms allowing users to complain about the steps taken with regard to their uploads, in particular where they could benefit from an exception or limitation to copyright in relation to an upload to which access has been disabled or that has been removed*».
[698] Article 17(9) of the CDSM.

restrict access to or remove uploaded content shall be subject to human review[699]. This last requirement *i.e.*, the fact that the decisions «*shall be subject to human review*»[700], suggests that OCSSPs can process «*everything leading up to a dispute*»[701] using algorithms in an automated manner. Regarding rightholders, then, the legislators state that they must «*duly justify*»[702] their request to «*have access to their specific works or other subject matter disabled or to have those works or other subject matter removed*»[703]. The platform level's complaint and redress mechanisms are without prejudice to possible out-of-court dispute resolution. Member States in fact «*shall ensure that out-of-court redress mechanism are available for the settlement of disputes*»[704] in an impartial manner. The European Commission guarantee that this mechanism shall not «*deprive the user of the legal protection afforded by national law*»[705] and it does not affect the users' rights «*to have recourse to efficient judicial remedies*»[706]. In particular, regarding copyright and related rights' exceptions or limitations, users shall have access «*to a court or another relevant judicial authority to assert*»[707] their use[708]. Garstka sustains that Article 17(9) of the CDSM has been created to «*to mitigate the damage to Freedom of expression*»[709]. In this regard, although some legal scholars argue that this provision is «*a weak weapon and that users are unlikely to*

[699] V. FALCE – N. M. F. FARAONE, *Direttiva Copyright e line guida: focus sll'articolo 17*, cit. the authors underline that the human intervention would find its happiest application in the case of particularly time-sensitive content such as previews of music or movies or highlights of recent broadcasts' sporting events.
[700] Article 17(9) of the CDSM.
[701] J. P. QUINTAIS – S. F. SCHWEMER, *The Interplay between the Digital Services Act and Sector Regulation: How Special is Copyright?*, cit., p. 8.
[702] Article 17(9) of the CDSM.
[703] *Ibid.*
[704] *Ibid.*
[705] *Ibid.*
[706] *Ibid.*
[707] *Ibid.*
[708] Article 17(9) also adds that the CDSM «*shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law, and shall not lead to any identification of individual users nor to the processing of personal data, except in accordance with Directive 2002/58/EC and Regulation (EU)2016/679*». Furthermore, through their terms and conditions, OCSSPs must inform their users that «*they can use works and other subject matter under exception or limitations to copyright and related rights provided for in Union Law*». Article 17(9) of the CDSM.
[709] K. GARSTKA, *Guiding the Blind Bloodhonds: How to Mitigate the Risks Article 17 of Directive 2019/970 Poses to the Freedom on Expression*, cit., p. 335. C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 42.

*step up against the unjust filtering*»[710], Article 17(9)'s mandatory complaint and redress mechanism seems to somehow reinforce the users' position[711]. In practice, Article 17(9) reemphasizes that the CDSM should have no bearing on legitimate uses, including those covered by exceptions and limitations, and that personal data must only be used in conformity with Directive 2002/58/EC[712] and Regulation 2016/679 of the European Union (GDPR)[713]. This provision ensures that users have the chance to appeal OCSSPs' decisions to «*block or remove*»[714] their uploaded files through a complaint and redress mechanism[715]. The latter, as evidenced, «*shall be processed without undue delay, and decisions to disable access to or remove uploaded content shall be subject to human review*»[716] . This means that to guarantee the system's efficiency and to avoid a right to freedom of expression's violation, hosting providers and rightholders must respond to users complaints in a reasonable amount of time[717]. In particular, the Commission explains how depending on the specifics and intricacies of each case, «*different deadlines*»[718] may be required and when rightholders do not reply expeditiously, then ISPs «*should make a decision without*»[719] their input «*on whether the content which has been blocked or taken down should be made available or be restored*

[710] K. GRISSE, op. cit., p. 12. Cfr. L. FIALA – M. HUSOVEC, *Using Experimental Evidence to Design Optimal Notice and Takedown Process*, in *TILEC Discussion Paper*, No. 2018-028, 23.01.2018, p. 3. Cfr. J. M. URBAN – J. KARAGANIS – B. SCHOFIELD, Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice, in 64 J. Copyright Soc'y 371, 1.11.2017, p. 393. Cfr. J. QUINTAIS, *The New Copyright in the Digital Single Market Directive: A Critical Look*, cit.

[711] K. GRISSE, op. cit., p. 12.

[712] The so-called *Software Directive.*

[713] C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 42.

[714] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 24.

[715] Please note that the decision to «*block or remove*» by OCSSPs was made possible by «*the application of Article 17(4)(b) in compliance with Article 17(7) as well as to content removed ex post following a sufficiently substantiated notice submitted by rightholders under Article 17(4)(c)*». Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 24. See *supra* § 2.2.4.2., § 2.2.4.3. Cfr. J. P. QUINTAIS - G. FROSIO - S. VAN GOMPEL - P. B. HUGENHOLTZ - M. HUSOVEC - B. J. JUTTE - M. SENFTLEBENET, *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations From European Academics,* cit., p. 281.

[716] Article 17(9) of the CDSM.

[717] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 24.

[718] *Ibid.*

[719] *Ibid.*

*online*»[720]. Moreover, to «*duly justify the reasons for their requests*»[721] to deactivate and remove the allegedly infringing work, it is not sufficient that rightholders «*resubmit the same information as submitted under Article 17(4)(b) or (c)*»[722]. Rather, in the context of Article 17(9), it will be necessary that they «*justify the infringing nature of the specific upload*»[723] precisely because if no further verification would not be required, then the complaint and redress mechanism herein provided would be useless[724]. The necessity to subject the «*decisions to disable access to or to remove uploaded content*»[725] to «*human review*»[726] is consistent with the fact that not just online platforms have to face a lot of uploads every day, but also filters daily make a significant number of mistakes, so that even if «*expensive*»[727], the human intervention is essential[728]. It was the President of the European Commission Ursula von der Leyen that, on January 20, 2020, declared «*We cannot accept a situation where decisions that have a wide-ranging impact on our democracy are being made by computer programs without any human supervision*»[729]. In any case, when, after performing the complaint and redress system, the decision concerning a «*content that is blocked is*»[730] to prevent its access, the legislator requires the availability of an impartial «*out-of-court redress mechanism*»[731] «*for the settlement of the disputes*»[732]

---

[720] *Ibid.*
[721] Article 17(9) of the CDSM.
[722] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 24. See *supra* § 2.2.4.1., § 2.2.4.2., § 2.2.4.3.
[723] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 24.
[724] *Ibid.* The complaint and redress mechanism shall be «*transparent*». A transparent complaint and redress mechanism can bring nothing but benefits to its application. J. P. QUINTAIS - G. FROSIO - S. VAN GOMPEL - P. B. HUGENHOLTZ - M. HUSOVEC - B. J. JUTTE - M. SENFTLEBENET, *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations From European Academics,* cit., p. 281. Cfr. CREATe, *Copyright in the Digital Single Market Directive – Implementation. An EU Copyright Reform Resource*, available at: https://www.create.ac.uk/cdsm-implementation-resource-page/.
[725] Article 17(9) of the CDSM.
[726] *Ibid.*
[727] T. SPOERRI, op. cit., p. 184.
[728] *Ibid.*See *infra* § 2.3.
[729] C. GEIGER - B.J. JUTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 1.
[730] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 25.
[731] Article 17(9) of the CDSM.

*i.e.* a location where users can challenge the negative judgement[733]. Specifically, «*Member States shall ensure that users have access to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright and related rights*»[734]. In any case, the CDSM expressly requires that users are always well informed about both OCSSPs' terms and conditions and the possibility of use «*works and other subject matter under exception or limitations to copyright and related rights provided for in Union Law*»[735].

### 2.2.7. Article 17(8): No obligation to monitor and the need for «*transparency*»

Before coming to analyze the «*transparency*»[736] required to OCSSPs who shall provide certain information to rightholders, it is worth making a few considerations on the first part of Article 17(8) of the CDSM. The latter states that the application of the obligations established in the previous paragraphs of Article 17(4)[737], or rather the entire application of CDSM's Article 17, «*shall not lead to any general monitoring obligation*»[738]. This provision, that among other things echoes what the legislator has set in Article 15 of the ECD[739] and in the forthcoming Article 7 of the DSA[740], does not seem however to be so credible that some authors have questioned about a presumed «*general monitoring obligation*»[741] while others have even written about «*the death of 'no monitoring*

[732] *Ibid.*
[733] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 25. Cfr. J. P. QUINTAIS - G. FROSIO - S. VAN GOMPEL - P. B. HUGENHOLTZ - M. HUSOVEC - B. J. JUTTE - M. SENFTLEBENET, *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations From European Academics*, cit., p. 281.
[734] Article 17(9) of the CDSM.
[735] *Ibid.*
[736] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 25.
[737] See *supra* § 2.2.4.1., § 2.2.4.2., § 2.2.4.3.
[738] Article 17(8) of the CDSM.
[739] See *supra* § 1.3.7.
[740] See *infra* § 3.2.2.
[741] G. FROSIO – S. MENDIS, *Monitoring and Filtering: European Reform or Global Trend?*, cit., p. 12.

*obligations'*»[742]. Indeed, the fact that intermediaries are in the "uncomfortable" position of being directly liable for copyright infringement committed by the users on the platform and the fact that Article 17 puts «*emphasis on the adoption of upload-filters*»[743] and encourage «*to invest in such technologies*»[744] come into conflict with the provisions establishing a prohibition on general monitoring[745]. In the face of this reading, Spoerri observes that the first paragraph of Article 17(8) «*only makes sense if you argue that monitoring obligation for*»[746] OCSSPs «*does not apply to "any content", but only to content for which the rightholders have provided*»[747] the hosting providers with the relevant information[748]. However, this scenario is very difficult to imagine and Article 17(4) remains a problem because it «*de facto imposes a general monitoring obligation as in order to filter unwanted content, all content must be monitored*»[749]. Regarding the filtering technologies, in particular, it is worth noting that, as Birdy reports, «*they work by screening every piece of user-uploaded content in real time against that universe of works. No file escapes the system's surveillance*»[750]. So that «*if such functionality does not amount to general monitoring, it is hard to imagine what would*»[751]. It is thus clear that Article 17 of the CDSM is in contrast not just with Article 15 and Article 7 of the DSA, but also with its own "good intentions" of avoiding general filtering measures. It we will be studied further below in § 2.3. the impact that such a situation has on the protection of fundamental rights.

About the second paragraph of Article 17(8) of the CDSM, suffice to say that it states the need for OCSSPs to «*provide rightholders, at their request, with adequate information on the functioning of their practices with regard to the*

---

[742] G. FROSIO, *The Death of 'No Monitoring Obligations'. A Story of Untameable Monsters*, cit.
[743] T. SPOERRI, op. cit., p. 177.
[744] *Ibid.*
[745] M. L. MONTAGNANI - A. TRAPOVA, *New obligations for Internet intermediaries in the Digital Single Market safe harbours in turmoil?* in *Journal of Internet Law*, Vol. XXII, Issue VII, 1.01.2019, p. 1. See *supra* § 2.2.4.1, § 2.2.4.2., § 2.2.4.3. G. FROSIO – S. MENDIS, *Monitoring and Filtering: European Reform or Global Trend?*, cit., p. 12.
[746] T. SPOERRI, op. cit., p. 177.
[747] *Ibid.*
[748] *Ibid.*
[749] G. FROSIO, *To Filter or Not to Filter? That Is the Question in EU Copyright Reform*, cit., p. 118. T. SPOERRI, op. cit., p. 177.
[750] A. BIRDY, *EU Copyright Reform: Grappling With the Google Effect,* in *Vanderbilt Journal of Entertainment and Technology Law*, 30.06.2019, p. 15. T. SPOERRI, op. cit., p. 177.
[751] A. BIRDY, *EU Copyright Reform: Grappling With the Google Effect, cit., p. 15.*

*cooperation referred to in paragraph 4 and, where licensing agreements are concluded between service providers and rightholders, information on the use of content covered by the agreements*». Always in compliance with Article 17(7), with the first paragraph of Article 17(8) and with Article (9) of the CDSM, the Member States are invited to give intermediaries guidance on the type of information they should provide[752]. In particular, the information should be specific enough to provide «*enough transparency to rightholders, without affecting business secrets of online content-sharing service providers*»[753]. At the same time, however, Recital 68 specifies that OCSSPs should «*not be required to provide rightholders with detailed and individualized information for each work or other subject matter identified*» and that this should occur regardless of «*contractual agreements, which could contain more specific provisions on the information to be provided where agreements are concluded between service providers and rightholders*»[754].

## 2.3. A closer look to Article 17 of the CDSM: The «*triangular dilemma*» and the difficult balance with fundamental rights

It has already been mentioned that the path towards the approval of the CDSM has been accompanied by countless criticisms and discussions concerning in particular its Article 17 and the balance with different fundamental rights[755].

[752] Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 25.
[753] Recital 68 of the CDSM. The Commission helps this thesis in understanding that «*Such information could for example include a description of the type of technologies (if any) or other means used by the service providers, information on third party technology providers whose services they may use, the average level of efficiency of these tools, any changes to the tools/services used (such as possible updates or changes in the use of third party services)*». Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 25.
[754] Recital 68 of the CDSM. Cfr. Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* cit., p. 26.
[755] See *supra* § 2.1., § 2.2.4. Cfr. G. COLANGELO, *Responsabilità degli intermediari online ed enforcement del diritto d'autore,* cit. pp. 21-30. Cfr. C. ANGELOPOULOS – S. SMET, *Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European*

This Directive in fact seems to cause so much collateral damages suggesting that, maybe, it should be reconsidered in some respects[756]. It is not surprising that some human and digital rights organizations, software developers, some ISPs as well as some subject matter experts such as Tim Berners-Lee, Vincent Cerf, Tim Wu and David Kaye have expressly opposed the CDSM, showing their concern for the protection fundamental rights[757]. Indeed, although publishers and record companies supported by authors like Davide Guetta strongly encouraged the entry into force of the Directive, its application seems to affect both small starts-up and users[758]. Due to the filtering obligations set in Article 17(4) of the CDSM[759], that, as studied, infringe the general monitoring ban established in the CDSM' Article

---

*Intermediary Liability*, cit. European Copyright Society, *General Opinion on the EU Copyright Reform Package*, cit. Cfr. S. STALLA-BOURDILLON – E. ROSATI – G. SARTOR – C. ANGELOPOULUS – A. KUCZERAWY et al., *Open Letter to the European Commission—On the Importance of Preserving the Consistency and Integrity and of the EU Acquis Relating to Content Monitoring Within the Information Society*, cit. CREATe, *Open Letter on the EU Copyright Reform Proposals for the Digital Age to members of the European Parliament and the European Council*, cit. Association Littéraire et Artistique Internationale, *Second Opinion on Certain Aspects of the Implementation of Article 17 of Directive (EU) 2019/790 of 17 April 2019 on Copyright and Related Rights in the Digital Single Market*, cit. Association Littéraire et Artistique Internationale, *Résolution Relative aux Propositions Européenes du 14 Septembre 2016*, cit. C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 23. Cfr. C. FREDIANI, *Secondo I Padri della Rete la direttiva Ue sul copyright minaccia Internet*, Agi Agenzia Italia, 18.06.2018, available at: https://www.agi.it/economia/copyright_minaccia_internet_gdpr_lettera-4039043/news/2018-06-18/. Cfr. C. GEIGER - G. FROSIO - E. IZYUMENKO, *Intermediary Liability and Fundamentals Rights*, cit. Cfr. M. SENFTLEBEN – C. ANGELOPOULOS – G. FROSIO – V. MOSCON – M. PEGUERA – O. A. ROGNSTAD, *The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform*, in *European Intellectual Property Review*, Vol. XL, Issue III, 17.10.2018, pp. 149-163. Cfr. Index of Censorship, *Directive on copyright in the Digital Single Market "destined to become a nightmare"*, 26.04.2018, available at: https://www.indexoncensorship.org/2018/04/digital-single-market-nightmare/. Cfr. *Protests greet Brussels copyright reform plan*, BBC News, available at: https://www.bbc.com/news/technology-44482381. Cfr. I. GENNA, *Ombre (più che luci) della riforma europea del copyright*, cit.

[756] I. GENNA, *Ombre (più che luci) della riforma europea del copyright*, cit.

[757] *Ibid.* Cfr. *Protests greet Brussels copyright reform plan*, cit. Cfr. Index of Censorship, *Directive on copyright in the Digital Single Market "destined to become a nightmare"*, cit.

[758] L. BRANDLE, *David Guetta and all three major labels are among industry giants pushing for copyright reform*, the Industry Observer, 29.06.2018, available at: https://theindustryobserver.thebrag.com/david-guetta-and-all-three-major-labels-are-among-industry-giants-pushing-for-copyright-reform/. M. BANKS, *MEPs rally against planned EU Copyright Reform*, The Parliament Magazine, 08.06.2018, available at: https://www.theparliamentmagazine.eu/news/article/meps-rally-against-planned-eu-copyright-reform. Cfr. C. FREDIANI, *Secondo I Padri della Rete la direttiva Ue sul copyright minaccia Internet*, cit. I. GENNA, *Ombre (più che luci) della riforma europea del copyright*, cit.

[759] See *supra* § 2.2.4.

17(8) and in the ECD's Article 15[760], the Internet risk to be no longer a free space where exchange ideas, experiment creativity and new business models[761].

Geiger and Jütte, in their paper named *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*[762] report the words that the Advocate General Saugmandsgaard Øe has expressed in the *YouTube* case[763], explaining how these actually summarize all the possible inconsistencies that the CDSM could have with respect to the safeguard of fundamental rights[764]. The Advocate General firstly refers to the SABAM case[765], explaining that, according to the CJEU, a general obligation to monitor the content upload online would not only go against Article 15 of the ECD, but it would also not adequately safeguard the «*fair balance*»[766] between the protection of rightholder's IPRs and the ISPs' right to freedom to conduct a business enshrined by Article 16 of the Charter of Fundamental Rights of the European Union the European[767]. Imposing a filtering obligation on OCSSPs would in fact mean forcing small intermediaries to implement «*complicated, costly, permanent computer system*»[768] at their own expense, affecting in this way their business opportunities. Moreover, as the monitoring tool cannot satisfactorily distinguish between lawful or unlawful content uploaded online, it risks blocking also legal information thus infringing the right to freedom of expression pursuant to Article 11 of the Charter of Fundamental Rights of the European Union[769]. A general filtering obligation towards online platforms would also be a threat to online creativity and Article 13

[760] See *supra* § 1.3.7., § 2.2.4., § 2.2.7.
[761] I. GENNA, *Ombre (più che luci) della riforma europea del copyright*, cit.
[762] C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit.
[763] Case C-683/18, paragraphs 240-244.
[764] C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 23.
[765] Case C-70/10. See *supra* § 1.3.7.
[766] C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match,* cit., p. 23.
[767] See *supra* § 1.3.10.
[768] C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 23.
[769] See *supra* § 1.3.10.

of the Charter[770]; the Advocate General warns in fact that «*maximum protection of certain forms of intellectual creativity is to the detriment of other forms of creativity which are also positive for society*»[771]. The intervention of Saugmandsgaard Øe is fundamental to frame the issue regarding the protection of various fundamental rights in the CDSM. The Advocate General in fact sheds light on the "crux of the matter" and He mentions all the inalienable rights that could be affected by the CDSM provisions. Precisely because the CDSM's and the Article 17's construction is essentially aimed at the online protection of copyright, trying at the same time to adequately balance the other fundamental rights at stake, the main question that should be asked in this regard is whether the intent to protect Intellectual Property is effectively balanced with other equally fundamental rights. This paragraph therefore will examine the equilibrium between Article 17 and some of the essential rights protected by the Charter of Fundamental Rights of the European Union and by the European Convention of Human Rights, namely the right to property, the freedom to conduct a business, the freedom of expression and speech, mentioning also the right to an effective remedy and to a fair trial, and with the right to protection of personal data, family and private life The analysis will be subsequently followed by a general assessment of the raised issues.

As exposed in Chapter 1, § 1.3.10, the right to property, meaning in this case in particular the right to IPR protection, is safeguarded by Article 17(2) of the European Charter of Fundamental Rights[772] and by Article 1 of Protocol 1 of the European Convention of Human Rights[773]. At the same time, as the right to property's enforcement must be necessarily balanced with other unavoidable rights, the legislators provide for the possibility of limiting it. The European Charter of Fundamental Rights states indeed that «*the use of property may be regulated by law in so far as is necessary for the general interest*»[774] and European Convention of Human Rights establishes «*no one shall be deprived of*

[770] See *infra* in this paragraph.
[771] Case C-683/18, paragraphs 240-244. C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 23.
[772] See *supra* § 1.3.10.
[773] See *supra* § 1.3.10.
[774] Article 17(1) of the European Convention of Human Rights.

*his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law*»[775]. Furthermore, Article 51(2) of the European Charter of Fundamental Rights generally states that «*any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms*»[776]. Not just the legislator but also the judges reaffirm these principles. To give an example, in the already cited *YouTube* case[777], Saugmansgaard Øe affirmed that the right of communication to the public mentioned in Article 3(1) of the Information Society Directive «*does not necessarily have to be interpreted in a manner which ensures maximum protection for rightholders*»[778]. In other and different cases, the CJEU has envisaged the possibility of restrictions on the property right[779]. Reaching a compromise between the protection of the copyright and the safeguard of other fundamental rights should be the *sine qua non* condition for the existence of any regulation concerning the enforcement of IPRs, especially online where everything seems to be allowed. Such a balance should thus be achieved in the CDSM as well as in the creation and implementation of any other norm in this field.

Article 16 of the Charter of Fundamental Rights of the European Union[780] protects the freedom to conduct a business which, «*together with the freedom to choose an occupation and to engage in work (Article 15) and the right to property (Article 17)*»[781], represents «*one of the three economic*»[782] fundamental rights of

---

[775] C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 33.
[776] C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 33.
[777] Case C-683/18.
[778] C-683/18, paragraphs 238-239. C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 33.
[779] For reference to other cases ruled by the CJEU see The *Pelham and others* case, C-476/17, paragraph 31. The *Funke Medien NRW* case, C-469/17, paragraph 72; The *Mc Fadden* case, C-484/14, paragraph 90. The *GS Media* case, C-160/15 paragraph 45. The *UPC Telekabel Wien* case, C-314/12, paragraphs 46-47. The *SABAM v Netlog* case, C-360/10, paragraphs 41-42. The *Scarlet Extended* case, C-70/10, paragraph 44. The *Promusicae* case, C-275/06, paragraph 65. Cfr. C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 33. Cfr. *Ivi*.
[780] See *supra*, § 1.3.10.

the Charter. Article 16 wants to safeguard the entrepreneurs' freedom and «*reflects the EU's principle of an open market economy with free competition*»[783]. The problem related to the application of CDSM's Article 17 lies in the fact that, in order to fulfil the monitoring obligation provided for therein, OCSSPs are forced to make use of complex and expensive filtering measures. In particular, to guarantee the enforcement of right holders' IPRs, making sure at the same time that users are not limited in «*sharing and accessing information*»[784] on the platform, it is not sufficient to implement just any technological measure, but it is necessary to adopt extremely sophisticated technologies which require «*significant resources*»[785]. Considering the «*relative economic capacities*»[786] of each OCSSP, this requirement can obviously have different impact on them with the risk of affecting the small companies' business. YouTube, for example has invested more than USD 100 million in its personal filtering system named "Content ID", while other small platforms have spent over USD 5 million[787], showing that, contrary to what the CDSM'S proponents claim, these technologies require a large economic commitment[788]. While big techs can develop their own mechanisms because they have the sufficient «*financial power, technological knowledge, and internal structure*»[789], small and medium businesses cannot adequately compete. The latter may at most license a filtering measure from third-party, such as the "Audible Magic" system, but also in this case the license fee can amount to exorbitant prices[790]. It should not be forgotten, *inter alia*, that Article 17(4) makes reference to «*high industry standards*»[791] and Recital 66 of

---

[781] C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 28.
[782] *Ibid.*
[783] *Ibid.*
[784] *Ivi*, p. 46.
[785] T. SPOERRI, op. cit., p. 180.
[786] C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 49.
[787] Spoerri underlines that «*for instance, Soundcloud spent over EUR 5 million to build its own filtering technology and dedicates seven full-time employees - out of approx. 300 employees - to maintain the technology*». T. SPOERRI, op. cit., p. 180.
[788] *Ibid.*
[789] *Ivi*, p. 184.
[790] *Ivi*, p. 185.
[791] See *supra* § 2.2.4.2.

the CDSM establishes that the "best efforts" requirement must be assessed taking into consideration «*the evolving state of the art of existing means, including future developments, for avoiding the availability of different types of content*»[792]. It is clear that «*the standard of due diligence expected from OCSSPs will increase in relation to future technological innovations*»[793] implying the adoption of more effective (and expensive) «*means of identifying and blocking unauthorized copyright-protected content from online platforms*»[794]. Therefore, going forward over the years the companies' investment in such technologies will become more and more significant. The legislators should then provide for a balanced solution that gives any ISP «*access to upload-filters against a reasonable fee*»[795] or exempt some of them from the monitoring obligations[796]. Otherwise, having access to a valid screening system will become a stronger market entry barrier that pushes small entrepreneurs out[797]. Given these implications, the European Union will most likely not be in the investors' sights as they will certainly prefer to focus their resources on businesses «*offering content filtering technologies*»[798] such as, for example, those emerging in the United States.

The right to freedom of expression and speech is protected by Article 11 of the European Charter of Fundamental Rights[799] and by Article 10 of the European Convention of Human Rights[800]. A society cannot call itself democratic unless the exchange of «*cultural, political and social*»[801] ideas is naturally permitted within it[802]. The Articles just mentioned in fact subsume this concept, safeguarding under

---

[792] See *supra* § 2.2.4.2.
[793] G. FROSIO – S. MENDIS, *Monitoring and Filtering: European Reform or Global Trend?*, cit., p. 12.
[794] *Ibid.*
[795] T. SPOERRI, op. cit., p. 186.
[796] *Ibid.*
[797] *Ibid.*
[798] *Ibid.* Cfr. M. C. LE MERLE – T. J. LE MERLE – E. ENGSTROM, *The Impact of Internet Regulation on Early Stage Investment*, 11.2014, available at: https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/572a35e0b6aa60fe011dec28/1462384101881/EngineFifthEraCopyrightReport.pdf.
[799] See *supra*, § 1.3.10.
[800] See *supra*, § 1.3.10.
[801] C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 16.
[802] *Ibid.* Cfr. C. GEIGER – E. IZYUMENKO, *Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression*, in *International Review of Intellectual Property and Competition*, Vol. XLII, No. III, 2014, pp. 316-342. Cfr. C. GEIGER – E.

the right to freedom of expression the opinions, the ideas «*and in general all types of information that can be communicated*»[803]. Article 13 of the European Charter of Fundamental Rights[804] protects the right to freedom of artistic creativity and expression. In this regard, it is worth remembering that the European Court of Human Rights has stated that the «*distribution or exhibition of artistic creation online*»[805] is also defended and the legislator is obliged to not affect it with the copyright legislation[806]. By analyzing Article 17 of the CDSM, it seems unavoidable that the use of expensive filtering systems to fulfill the Article 17(4)'s "best efforts" have a negative impact on the protection of the right to freedom of expression. The concern, as the protests for the adoption of the CDSM mentioned at the beginning of this paragraph have showed, is indeed that «*such filters could also prevent the upload of lawful content*»[807]. Dussolier for instance underlines that very often the content posted on OCSSPs represents users' creations that might include only a part of «*protected images or sounds*»[808]. Despite this case is completely different from the one in which the content uploaded is an entire copy of other copyright protected works, however, the distinction between them is sometimes so «*thin*»[809] that a filtering system could not recognize it[810]. It can easily happen that, to get the immunity provide in Article 17(4), some OCSSPs put in place «*not too costly*»[811] algorithmic tools that

---

IZYUMENKO, *Intellectual Property before the European Court of Human Rights*, in C. GEIGER - C. A. NARD - X. SEUBA (eds.), *Intellectual Property and the Judiciary*, Cheltenham, Northampton, Edward Elgar Publishing, 2018, pp. 36 sq.

[803] C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 16.

[804] Article 13 of the European Charter of Fundamental Rights establishes that «*The arts and scientific research shall be free of constraint. Academic freedom shall be respected*.».

[805] C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 28.

[806] *Ibid.* ECtHR (Second Section), 29.04.2005, Case of Alınak v. Turkey, Appl. no 40287/98, para. 42. Cfr. C. GEIGER, *When Freedom of Artistic Expression allows Creative Appropriations and Opens up Statutory Copyright Limitations*, in S. BALGANESH - N. L. WEE LOON - H. SUN (eds.), *The Cambridge Handbook of Copyright Limitations and Exceptions*, Cambridge, Cambridge University Press, 2021, p. 174.

[807] K. GRISSE, op. cit., p. 1.

[808] S. DUSSOLIER, op. cit., p. 1018.

[809] *Ibid.*

[810] *Ibid.*

[811] *Ibid.*

result «*incapable of assessing a possible fair use of creative content*»[812] being in this way «*indiscriminate and indifferent to*»[813] the material uploaded. The risk is thus to prevent some lawful content from appearing[814]. The right to freedom of expression, speech and creativity on online platform can be undermined by the functioning of technology itself. The existing filtering systems in fact are not enough sophisticated «*to make complex decisions on the lawfulness or unlawfulness of uploads in an automated way*»[815] and bring with them the danger of the so called "false positives"[816]. Automated techniques can only recognize complete or partial matches between two or more file while they are unable to determine whether a specific match constitutes a reproduction of an authorial work or a related right[817]. The monitoring mechanisms cannot discern the nuances that lie in the difference «*between a simple reproduction of a part of a work, and the reproduction of the same part for a use that is parodic or that constitutes a permitted quotation*»[818]. The same "Audibel Magic", one of the most important and known filtering systems, affirmed that «*its technology is accurate to about 99%*»[819]. The consequence is that there is no monitoring mechanism «*developed as far as it would be necessary to fulfil the obligations under Article 17*»[820]. Additionally, as in the CDSM the protection of the right to freedom of expression, of speech and of artistic creativity sometimes "wavers", it is fundamental for users that their right to an effective remedy and to a fair trial protected by Article 47 of

[812] *Ibid.*
[813] *Ibid.*
[814] *Ibid.*
[815] C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 47.
[816] *Ibid.* B. DEPOORTER - R. K. WALKER, *Copyright False Positives*, in *Notre Dame Law Review*, Vol. LXXXIX, Issue I, 2013, pp. 319-359.
[817] C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 47.
[818] *Ivi*, p. 48.
[819] T. SPOERRI, op. cit., p. 183. Cfr. *Ivi*, p. 181.
[820] C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 47. Cfr. T. SPOERRI, op. cit., p. 183. Cfr. S. JACQUES - K. GARSTKA - M. HVIID – J. STREET, *An Empirical Study of the Use of Automated Anti-Piracy Systems and Their Consequences for Cultural Diversity*, in *SCRIPTed*, Vol. XV, Issue II, 2018, p. 287.

the European Charter of Fundamental Rights[821] and Article 6(1) of the European Convention of Human Rights[822] is stronger than ever. In this regard, even if Article 17(9) of the CDSM[823] provide for a complaint and redress mechanisms at OCSSPs ensuring also the possibility to address to an impartial out-of-court for the settlement of disputes, Geiger and Jütte suggest that «*a properly designed alternative dispute resolution (ADR) would be best placed to ensure user's right to an effective remedy*»[824].

Article 7[825] and 8[826] of the European Charter of Fundamental Rights, together with Article 8 of the European Convention of Human Rights[827] correspondingly safeguard the right to private life, the right to data protection and the right to respect for private and family life. As the users usually needs a personal account to post their content on the OCSSP, their personal data risk to be

[821] Article 47 of the European Charter of Fundamental Rights establishes that «*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*».

[822] Article 6(1) of the European Convention of Human Rights establishes that «*1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*».

[823] See *supra* § 2.2.6.

[824] C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 36. Cfr. G. FROSIO – C. GEIGER, *Taking Fundamentals Rights Seriously in the Digital Service Act's Platform Liability Regime*, cit., p. 28.

[825] See *supra*, § 1.3.10.

[826] Article 8 of the European Charter of Fundamental Rights establishes that «*1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority.*».

[827] Article 8 of the European Convention of Human Rights establishes that «*1. Everyone has the right to respect for his private and family life, his home and his correspondence.2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*». Cfr. Regulation (EU) 2016/679.

unlawfully processed[828]. The automated filtering information measures used «*to identify the infringers*»[829] in fact, unavoidably process users' personal data affecting their right to data protection. It was the European case-law to affirm in the *Scarlet Extended SA v SABAM* case that a general obligation to monitor unlawful content «*would infringe the right to protection of personal data*»[830]. On this point, however, Grisse interestingly finds that «*the connection between the uploaded content and the account exists independently from any possible filtering measures*»[831] and it is not the monitoring tool that establishes it[832]. Since the users generally accept the General Terms and Conditions on the platform and «*upload content to make it public*»[833], the European Data Protection Supervisor also evaluated that the fact of uploading content and work on the OCSSP «*to make it publicly available does not constitute a protected confidential communication under Article 7 of the*»[834] European Charter of Fundamental Rights[835]. According to this reading it could be thus argued that when OCSSPs, in respect of the GDPR[836] and the ePrivacy Directive[837], through their General Terms and Conditions «*explicitly inform users about the possibility of filtering for copyright protection (as most OCSSPs probably do) and users agree*»[838], then data protection's infringement would not constitute a problem[839]. It would then follow that, in this case, CDSM's Article 17(4) does not provide for a «*general*

[828] K. GRISSE, op. cit., p. 11.
[829] C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 31.
[830] *Ibid.* Case C-70/10, paragraphs 50-51. Cfr. *Netlog* Case, C-360/10, paragraph 49.
[831] K. GRISSE, op. cit., p. 11.
[832] *Ibid.*
[833] *Ibid.*
[834] *Ibid.*
[835] *Ibid.* G. BUTTARELLI, *Formal Comments of the EDPS on a Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, publication date: 03.07.2018, last update: 19.09.2019, available at: https://edps.europa.eu/ data-protection/our-work/publications/comments/edps-comments-pro posal-directive-copyright_en.
[836] The Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.
[837] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector. Also named as the *Directive on privacy and electronic communications*.
[838] K. GRISSE, op. cit., p. 11.
[839] *Ibid.* Cfr. G. BUTTARELLI, *Formal Comments of the EDPS on a Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, cit.

*monitoring obligation incompatible with fundamental rights of the OCSSPs and their users, but a monitoring of uploaded data for specific subject matter for the protection of intellectual property rights*»[840].

What generally emerge from this cumulative analysis is the presence of undeniable contradictions and difficulties in balancing the different, and equally worthy of protection, fundamental rights and interests at stake. In a nutshell, rights holders cannot be deprived of a valid copyright protection for their works, just as small intermediaries must be free to exercise their business according to their financial resources without being subjected to onerous obligations, just as users have the sacrosanct right to be able to exercise their freedom of expression, speech and creativity on online platforms. The balance of this «*triangular dilemma*»[841] appears very complex and the CDSM does not seem to provide detailed guidance on how to perform it, quite the contrary[842]. One of the most controversial aspects in this regard is properly the fact that the equilibrium between various fundamental rights is entrusted to private OCSSPs who, *inter alia*, «*have to provide a quasi-judicial appeals infrastructure to mediate between rightholders and users*»[843]. Intermediaries have in fact their personal interests that «*will most likely influence their decision making*»[844], undermining in this way the safeguard of other interests[845]. Geiger and Jütte suggest that the introduction of an institutional intermediate developed in the context of Article 17(9) would be a feasible solution to try to solve this conundrum[846]. The reference in particular is to the «*out-of-court redress mechanism*»[847] or «*to a court or another relevant*

---

[840] K. GRISSE, op. cit., p. 11. Cfr. G. BUTTARELLI, *Formal Comments of the EDPS on a Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, cit.

[841] C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 63.

[842] Cfr. *Ibid.* Cfr. G. SARTOR – A. LOREGGIA, *The Impact of algorithms for online content filtering or moderation. "Upload filters"*, Policy Department for Citizens' Rights and Constitutional Affairs, 09.2020, p. 64.

[843] C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 63.

[844] *Ibid.*

[845] *Ibid.*

[846] *Ibid*. Cfr. G. FROSIO – C. GEIGER, *Taking Fundamentals Rights Seriously in the Digital Service Act's Platform Liability Regime*, cit., pp. 42-44.

[847] Article 17(9) of the CDSM.

*judicial authority to assert the use of an exception or limitation to copyright and related rights*»[848]. The Professors claim that «*an independent institution that sits firmly at the intersection of the various interests could more realistically contribute, through several mechanisms, to maintaining a fair and proper balance between the FR at stake*»[849]. Effectively, the establishment of such an autonomous figure who can define «*the standards that apply to targeted filtering obligation*»[850], who can, by always referring to up-to-date information, identify on behalf of ISPs what constitutes illegal or manifestly infringing content to be removed, who can independently manage the NTD and the NSD decisions, who can be an 'intermediary' in «*the cooperation between users and rightholders*»[851], who can also settle the disputes between rightholders, platforms, and users, developing best practices and recommendations for filtering and who can develop more concrete and binding guidelines for OCSSPs and rightholders to count on while executing Article 17(4)'s obligations, turns out to be a valid option that the legislators should seriously consider[852]. Without adopting an amendment to Article 17 it is hard to even imagine how this could be saved from a possible annulment by the CJEU[853]. Indeed, in the context of the *Case 401/19*[854], Poland, which was supposed to implement the new CDSM, launched a «*challenge*»[855] to Article 17 before the CJEU's judges, asking for the annulment of Article 17(4)(b) and Article 17(4)(c) in reference to the words «*and made best efforts to prevent their future uploads in accordance with point (b*)». Otherwise, if the CJEU finds that Article 17 cannot be adequately amended, Poland demands its complete annulment. The grounds for this request include precisely the concerns on fundamental rights outlined so far: the adoption of automatic preventive filters of the uploaded online material required in Article 17(4) would lead to infringe, among other interests, the inalienable right to freedom of expression and

[848] *Ibid.*
[849] C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 64.
[850] *Ibid.*
[851] *Ivi*, p. 65.
[852] *Ivi*, pp. 63-65.
[853] *Ivi*, p. 68.
[854] *Republic of Poland vs European Parliament and Council of the European Union.*
[855] E. ROSATI, *Five considerations for the transposition and application of Article 17 of the DSM Directive*, cit., p. 270.

information protected by the Charter of Fundamental Rights of the European Union and by the European Convention of Human Rights[856]. The Poland's action before the CJEU, however, «*relate to the application of the provision, not its very existence*»[857]. It will be thus «*left to national courts and authorities to address*» this tricky situation[858].

The Poland case is still pending, meanwhile, the «*triangular dilemma*»[859] involving the balance of users', intermediaries', and right holders' interests in the CDSM remain a complex issue to face. The legislators should find a remedy as soon as possible, otherwise, the entire credibility of the CDSM will be totally undermined and, for what particularly interests this thesis, an effective protection of copyright will never be enforced. The lawmakers will have also to make an effort to take «*fundamental rights seriously in the*»[860] forthcoming «*Digital Service Act's platform liability regime*»[861].

[856] *Ibid.*
[857] *Ibid.*
[858] *Ibid.*
[859] C. GEIGER - B.J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, cit., p. 63.
[860] G. FROSIO – C. GEIGER, *Taking Fundamentals Rights Seriously in the Digital Service Act's Platform Liability Regime*, cit.
[861] *Ibid.*

# CHAPTER 3

# THE NEXT DIGITAL SERVICES ACT

SUMMARY: 3.1. What is the Digital Services Act? – 3.2. Towards an amendment of the ECD – 3.2.1. The Digital Services – 3.2.2. The safe harbours and the definition of illegal content – 3.2.3. The Good-Samaritan paradox vs Article 6 of the DSA – 3.2.4. Specific Orders: Article 8 and 9 of the DSA – 3.2.5. Due Diligence obligations for Digital Services Providers – 3.2.5.1. Provisions applicable to all ISPs – 3.2.5.2 – Obligations for Hosting Services Providers: the new Notice-and-action procedure – 3.2.5.3. Further provisions applicable to online platforms – 3.2.5.4. VLOPs: definition and regulation – 3.2.6. Voluntary Standards, Codes of conduct and Special competent Authorities – 3.3. The new legislative framework for the protection of Intellectual Property online

## 3.1. What is the Digital Services Act?

In the than twenty years after the entry into force of the E-Commerce Directive, something has surely changed. The world has become – and is becoming every day more – digital[862] and online platforms are now a "constant" in everyone's daily life without which each citizen would probably feel lost. What was thought to be *avant-garde* in the 2000s, today is obviously dated. Nowadays in fact there are many types of ISPs who operate in an increasingly sophisticated manner, providing always completer and more transversal digital services[863]. Platforms that until few years ago simply provided for a blog or a place where users could relate and exchange ideas, today are at the same time organized e-commerce, delivery systems of all kinds, TV series producers and allow users to

[862] See *supra* § 1.1.

[863] The European Commission stresses that since 2000 «*the nature, scale, and importance of digital services for the economy and society has dramatically changed*» and that these «*have evolved considerably over the past 20 years as many new ones have appeared. The landscape of digital services continues to develop and change rapidly along with technological transformation and the increasing availability of innovation*». European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 6 and p. 8.

listen to music[864], finding their soulmate and anything else can be searched for in daily lives. Digital technologies are affecting the life of each of Europeans, they "accompany" the actions that every citizen carries out every day changing the way people work and socialize. The European Union is totally aware of this transformation and stimulates it while stressing at the same time the importance of creating effective and updated legislations. The latter would be necessary not only to fight new types of illicit content and violations appearing online, but also to properly exploit the enormous potential of new digital technologies[865]. Nowadays, the European Union's aim is precisely to shape «*Europe's Digital Future*»[866]. The European Commission has explicitly admitted that «*digital communication, social media interaction, e-commerce, and digital enterprises are steadily transforming our world*»[867] and it wants to lay the foundation for becoming «*digitally sovereign in an open and interconnected world, and to pursue digital policies that empower people and businesses to seize a human centred, sustainable and more prosperous digital future*»[868]. Generally speaking, «*Europe's Digital Compass*»[869] provides the achievement of a "Digital Europe" by relying on «*four cardinal points*»[870] concerning: «*digitally skilled citizens and highly skilled digital professionals*»[871],

[864] See for example Amazon platform.
[865] Cfr. European Commission, *Shaping Europe's Digital Future*, 19.02.2020, available at: https://ec.europa.eu/info/sites/default/files/communication-shaping-europes-digital-futurefeb2020_en_4.pdf. Cfr. European Commission, *Europe's Digital Decade: Commission sets the course towards a digitally empowered Europe by 2030*, Brussels, 9.03.2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_983. Cfr. U. VON DER LEYEN, *A union that strives for more. My Agenda for Europe. Political Guidelines for The Next European Commission 2019-2024*, 09.10.2019, available at: https://op.europa.eu/en/publication-detail/-/publication/43a17056-ebf1-11e9-9c4e-01aa75ed71a1. Cfr. European Commission, *Proposal for a Regulation of The European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, COM(2020) 825, final, pp. 1-5. Cfr. A. HOFFMANN – A. GASPAROTTI, op. cit., p. I. Cfr. T. RODRÍGUEZ DE LAS HERAS BALLELL, op. cit., p. 6. Cfr. C. BERTHÉLÉMY – J. PENFRAT, *Platform Regulation Done Right. EDRi Position Paper on the EU Digital Services Act*, EDRi, Brussels, 9.04.2020, pp. 4-8.
[866] European Commission, *Shaping Europe's Digital Future*, cit.
[867] *Ivi*, p. 2. The EU has also evidenced that «*digital technologies are profoundly changing our daily life, our way of working and doing business, and the way people travel, communicate and relate with each other*». *Ibid.*
[868] European Commission, *Europe's Digital Decade: Commission sets the course towards a digitally empowered Europe by 2030*, cit., p. 1.
[869] *Ibid.*
[870] *Ibid.*
[871] *Ibid.*

«*secure, performant and sustainable digital infrastructures*»[872], «*digital transformation of businesses*»[873], and «*digitalisation of public services*»[874]. The tension towards these purposes however shall be accompanied by the protection fundamental rights, guaranteeing that «*the same rights that apply offline can be fully exercised online*»[875].

The global digital metamorphosis has been defined even «*as fundamental as that caused by the industrial revolution*»[876], which calls «*for a profound reflection at all levels of society*»[877]. It goes without saying that this transformation requires new rules not only for the ISP's regulation and the online protection of IPRs, but also for the functioning of every sector of society. In the absence of an update legislative framework, it is difficult to imagine how the EU can actually be a competitor in the global market and how it can properly handle new digital challenges. As evidenced, the digital technologies' revolution affects everyone and everything and the European Commission seems determined to have a «*technology that work for people*»[878] trying to reach «*a fair and competitive economy*»[879] and «*an open democratic and sustainable society*»[880].

---

[872] *Ibid.*
[873] *Ibid.*
[874] *Ibid.*
[875] *Ibid.* Cfr. European Parliament, *Digital Services Act and fundamental rights issue posed. European Parliament resolution of 20 october 2020 on the Digital Services Act and fundamental rights issues posed (2020/2022(INI))*, Brussels, 20.10.2020, available at: https://www.europarl.europa.eu/doceo/document/TA-9-2020-0274_EN.html. Cfr. G. FROSIO – C. GEIGER, *Taking Fundamentals Rights Seriously in the Digital Service Act's Platform Liability Regime*, cit., pp. 1-5.
[876] European Commission, *Shaping Europe's Digital Future*, cit., p. 2.
[877] *Ibid.* As evidenced, indeed, the European Commission has considered that as «*citizens are exposed to increasing risks and harms online – from spread of illegal activities, to risks for their fundamental rights and other societal harms*», as «*these issues are widespread across the online ecosystem, but they are most impactful where very large online platforms are concerned, given their reach*», as «*the supervision of online platforms more broadly is to a large extent uncoordinated and ineffective in the EU, despite the systemic importance of such services*», as «*the limited administrative cooperation framework set by the E-Commerce Directive for addressing cross-border issues is underspecified and inconsistently used by Member States*», and as «*Member States have started regulating digital services at national level leading to new barriers in the internal market*» leading «*to a competitive advantage for the established very large platforms and digital services*», some of the ECD's Article shall be revised. Cfr. European Commission, *Commission Staff Working Document. Executive Summary of the Impact Assessment Report. Accompanying the document Proposal for A Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 349, final, p. 2.
[878] European Commission, *Shaping Europe's Digital Future*, cit., p. 2.
[879] *Ibid.*
[880] *Ibid.*

Regarding to the "fight" against IPRs infringements online, the ECD is currently the only horizontal legislative tool regulating digital platforms and establishing a liability regime for ISPs[881]. While the European Commission does not miss an opportunity to stress that «*malicious cyberactivity may threaten*»[882] the Europeans' «*personal well-being or disrupt*»[883] their «*critical infrastructures and wider security interests*»[884], making thus clear that illegal online activities need to be contained through efficient legislative provisions, however, the ECD seems to be outdated and unable to meet the new digital age's challenges[885]. In fact, in the face of the drastic transformation that is being witnessed and in consideration of the increasing proliferation and differentiation of various ISPs[886], it is difficult to imagine how IPRs infringements online can be tackled by a twenty-year-old Directive[887]. There is thus the need for a new piece of legislation capable of providing reliable tools to fight illicit on the Internet, enforcing IPRs online while balancing other fundamental rights at stake[888]. The European Commission's President Ursula von der Leyen, with the goal of reaching «*a Europe fit for the digital age*»[889], creating new rules and obligations for digital

[881] See *supra* § 1.
[882] European Commission, *Shaping Europe's Digital Future*, cit. p. 3.
[883] *Ibid.*
[884] *Ibid.* The fact that online platforms are used to carry out illegal activities which have very negative impacts on society is now well established. Sartor and Loreggia stress that «*(…) platforms contribute to the fulfilment of legitimate individual interests, enable the exercise of fundamental rights (such as freedom of expression and association), and support the realisation of social values (such as citizens' information, education, and democratic dialogue), but they also provide opportunities for harmful behaviour: uncivility and aggression in individual exchanges, disinformation in the public sphere, sectarianism and polarisation in politics, as well as illegality, exploitation and manipulation*». G. SARTOR – A. LOREGGIA, *The Impact of algorithms for online content filtering or moderation. "Upload filters"*, cit., p. 9.
[885] See *supra* § 1.3. Cfr. European Commission, *Europe's Digital Decade: Commission sets the course towards a digitally empowered Europe by 2030*, cit., p. 2.
[886] Cfr. European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., pp. 5-9.
[887] See *supra* § 1.3.10.
[888] See *infra* in this Chapter. Cfr. G. FROSIO – C. GEIGER, *Taking Fundamentals Rights Seriously in the Digital Service Act's Platform Liability Regime*, cit., p. 31 sq. Cfr. European Parliament, *Digital Services Act and fundamental rights issue posed. European Parliament resolution of 20 october 2020 on the Digital Services Act and fundamental rights issues posed (2020/2022(INI))*, cit. See *supra* § 1.3.10.
[889] U. VON DER LEYEN, *A union that strives for more. My Agenda for Europe. Political Guidelines for The Next European Commission 2019-2024*, cit., p. 13.

services[890], at the end of 2020 has proposed a new Regulation, the so-called *Digital Services Act*[891]. In her *Political Guidelines for The Next European Commission 2019-2024*[892], the President declares that «*a new Digital Services Act will upgrade our liability and safety rules for digital platforms, services and products, and complete our Digital Single Market*»[893]. This new initiative has obviously raised various opinions. While some people in fact express their concern about the protection of fundamental rights in the forthcoming Regulation[894], others see its adoption as an opportunity not to be missed. Måns Sjöstrand, «*global head of IP and brand protection at Daniel Wellington*»[895], for example, has declared that the DSA is a good chance that «*could hand brand owners their best opportunity in two decades to tackle online counterfeiting*»[896].

At present, the DSA is a legislative proposal issued by the European Commission, and therefore it is not in force. Its adoption will depend on the codecision procedure's outcome. The latter, also referred to as ordinary legislative procedure after the adoption of the Lisbon Treaty, is the main decision-making procedure for the adoption of the EU legislation and it is legally based on Articles 289 and 294 of the Treaty on the Functioning of the European Union. Once the European Commission *i.e.*, the institution having the right of legislative initiative, proposed a legislative text, the ordinary legislative procedure requires that the

---

[890] The field of the digital services and online platforms' regulation instrumental to the protection of IPRs online and the fight against illegal activities on digital platforms.

[891] European Commission, *Proposal for a Regulation of The European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, cit.

[892] U. VON DER LEYEN, *A union that strives for more. My Agenda for Europe. Political Guidelines for The Next European Commission 2019-2024*, cit.

[893] U. VON DER LEYEN, *A union that strives for more. My Agenda for Europe. Political Guidelines for The Next European Commission 2019-2024*, cit., p. 13. According to «*an internal Commission note leaked in summer 2019*» the DSA is «*a potential new initiative (…) to update the horizontal regulatory framework for all digital services in the single market, in particular for online platforms*». Cfr. A. HOFFMANN – A. GASPAROTTI, op. cit., p. 5. Internal Commission Note, available at: https://cdn.netzpolitik.org/wp-upload/2019/07/Digital-Services-Act-note-DG-Connect-June-2019.pdf, p. 1.

[894] Cfr. Amnesty International, *Amnesty International position on the Proposal for A Digital Service Acts and A Digital Markets Act*, 03.2021, available at: https://www.amnesty.eu/wp-content/uploads/2021/04/Amnesty-International-Position-Paper-Digital-Services-Act-Package_March2021_Updated.pdf. See *infra* in this Chapter. Cfr. C. BERTHÉLÉMY – J. PENFRAT, *Platform Regulation Done Right. EDRi Position Paper on the EU Digital Services Act*, cit.

[895] M. SJÖSTRAND, *EU Digital Services Act: winds of change?*, Managing Intellectual Property, publication date: 4.09.2020, last update: 3.10.2021, available at: https://www.managingip.com/article/b1n7b8rgq4vqjy/eu-digital-services-act-winds-of-change.

[896] *Ibid.*

European Parliament and the Council of the European Union reach an agreement for its approval. The codecision procedure gives the European Parliament and the Council the same weight and it provides they can adopt the legislative proposal either at the first reading or at the second reading. In cases where the two bodies do not reach an agreement on a common legislative text after the second reading, then a conciliation committee is convoked. The latter is made up of European Parliament's members and Council's members in equal number and it has to come up with a text that is acceptable to both institutions. If, during the third reading, both the European Parliament and the Council agree on the validity of the text proposed by the conciliation committee, the legislative act can be adopted[897]. In any case, if a legislative proposal is rejected at any point during the procedure, or if the Parliament and the Council are unable to achieve an agreement, the proposal is not enacted, the procedure is terminated.

The DSA has been proposed by the European Commission on 15 December 2020 and it aims to amend certain aspects of ECD[898]. To achieve this goal, the legislators have opted for the legislative tool of the Regulation, instead of the Directive, because it is considered suitable to ensure a high level of protection among the Union, to avoid divergences impeding the free provision of relevant services inside the internal market and to ensure uniform protection of rights and

[897] Cfr. European Council of the European Union, The ordinary legislative procedure, available at: https://www.consilium.europa.eu/en/council-eu/decision-making/ordinary-legislative-procedure/. Cfr. About Parliament European Parliament, available at: https://www.europarl.europa.eu/about-parliament/en/powers-and-procedures/legislative-powers.

[898] In order to amend the ECD, in the context of the new DSA, the Commission has considered also the option of a «*sector-specific approach*» instead of a horizontal one, but this turned out to be «*limited in his ability to address the systemic, horizontal problems identified in the single market for digital services and would not address comprehensively the risks and due process challenges raised by today's online governance*». Indeed, despite sector-specific approaches are fundamental «*in addressing targeted issues in spec sectors or in regards to specific content*», this option has been discarded because: «*i) the E-Commerce Directive is horizontal in nature and its revision requires a horizontal approach; (ii) the identified risks and problems are systemic and lead to cross-sectoral societal concerns; (iii) sector-specific legislation can lead to inconsistencies and uncertainties; and (iv) only horizontal rules ensure that all types of services and all categories of illegal content are covered*». European Commission, *Commission Staff Working Document. Executive Summary of the Impact Assessment Report. Accompanying the document Proposal for A Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, p. 48.

obligations for businesses and consumers throughout the internal market[899]. In a nutshell, the Regulation was considered the most appropriate instrument to provide legal certainty, transparency, accessibility and «*consistent monitoring of the rights and obligations*»[900] in the online environment[901].

To fully comprehend the new regime for the regulation of ISPs established in the DSA, this last Chapter will focus on the analysis of its most relevant provisions. It should be noted that, during the ordinary legislative procedure for the approval of the proposed Regulation, on 20 January 2022 the European Parliament has adopted some amendments to the DSA[902]. The study of the DSA's most relevant provisions proposed below will thus be conducted considering the new legislative text as amended by the European Parliament. This examination will then be followed by a final general overview on the resulting new legislative framework for the protection of IPRs online.

## 3.2. Towards an amendment of the ECD

As briefly mentioned in the previous paragraph[903], despite the ECD «*has played an important and largely positive role in the development of the digital economy and online information environment*»[904], it is now being imposed in a technologically, economically, and socially modified environment[905]. Today, indeed, the presence of new technological advancements such as «*cloud platforms and AI systems*»[906] and the fact that «*access to information and social*

[899] European Commission, *Proposal for a Regulation of The European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC,* cit., p. 7.
[900] *Ibid.*
[901] See *infra* § 3.3.
[902] The reference is to the ordinary legislative procedure's first reading. See supra in this paragraph.
[903] See *supra* § 1.3., § 3.1.
[904] G. SARTOR – A. LOREGGIA, *The Impact of algorithms for online content filtering or moderation. "Upload filters"*, cit., p. 9. Cfr. N. LOMBA – T. EVAS, op. cit., p. 11. They also underline that «*the ECD proved to be a successful and powerful tool, facilitating the provision of online services*».
[905] Cfr. *Ibid.* Cfr. N. LOMBA – T. EVAS, op. cit., pp. 86-88.
[906] G. SARTOR – A. LOREGGIA, *The Impact of algorithms for online content filtering or moderation. "Upload filters"*, cit., p. 9.

*interaction*»[907] is mostly online, leads to great change in internet users' habits and in the importance of the digital services providers' role[908].

With respect to the new digital services developed after the entry into force of the ECD, they include not only cloud computing systems[909] *e.g.* Google Drive's, Apple iCloud's or Dropbox's services[910] (as illustrated *supra* in this paragraph), but also *content delivery networks*[911] as Amazon Web Services, services of social media[912], collaborative or sharing economy services[913] *e.g.*

---

[907] *Ibid.*

[908] A. HOFFMANN – A. GASPAROTTI, op. cit., p. 12. Moreover, As Sartor and Loreggia underline, from 2000 – year of the entry into force of the ECD – to present, «*some Internet businesses*» have grown into «*global players*» with significant «*financial and technological resources*» and «*economic and other activities increasingly exploit the integration of digital and physical resources*». G. SARTOR – A. LOREGGIA, *The Impact of algorithms for online content filtering or moderation. "Upload filters"*, cit., p. 9.

[909] «*'Cloud computing' in simplified terms can be understood as the storing, processing and use of data on remotely located computers accessed over the internet. This means that users can command almost unlimited computing power on demand, that they do not have to make major capital investments to fulfil their needs and that they can get to their data from anywhere with an internet connection*». Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, *Unleashing the Potential of Cloud Computing in Europe*, Brussels, 27.09.2012, COM(2012) 529, final, p. 2. Cfr. N. LOMBA – T. EVAS, op. cit., p. 11.

[910] A. HOFFMANN – A. GASPAROTTI, op. cit., p. 11. See *supra* in this paragraph. The transformation and the «*evolution*» of the digital services' sector involve also «*online intermediaries providing the technical infrastructure of the internet, technological developments and improvement of capabilities (...). The core internet infrastructure set by internet access services and DNS operators is now also supported by other types of technical services such as content delivery networks (CDN), or cloud infrastructure services. They are all fundamental for any other web application to exist and their actions have a major impact on the core access to internet services and information. The resilience, stability and security of core services such as DNS are a precondition for digital services to be effectively delivered to and accessed by internet users*». European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 9.

[911] A. HOFFMANN – A. GASPAROTTI, op. cit., p. 11. According to Hooffmann and Gasparotti, content delivery networks can be defined as «*networks of geographically distributed servers that replicate, store (cache) and deliver websites and other web content, especially large media files, to internet users*». Thanks to these services online users can «*access a copy of the content at a location that is geographically close to him. This allows faster content delivery than the traditional method of storing content on just one, central server, which all clients would access, and avoids bottlenecks near that server*». Cfr. F. ALTOMARE, *Content Delivery Network Explained*, GlobalDots, 21.04.2021, available at: https://www.globaldots.com/resources/blog/content-delivery-network-explained/.

[912] See for example Facebook, Instagram, Twitter, YouTube, WhatsApp or TikTok. A. HOFFMANN – A. GASPAROTTI, op. cit., p. 11.

[913] The European Commission has specified that «*the term "collaborative economy" refers to business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals. The collaborative economy involves three categories of actors: (i) service providers who share assets, resources, time and/or skills — these can be private individuals offering services on an*

*AirBnB or Uber*, online advertising[914] and other «*digital services built on electronic contracts*»[915] as the blockchain[916]. The appearance of new and different from one another online platforms bring with it a halo of mystery and uncertainty regarding the effective application of the ECD for their regulation[917]. As noted in Chapter 1[918] in fact most new digital services «*were not known or common when the ECD was adopted*»[919] and «*it is (…) unclear whether they are generally covered by the ECD (…) or whether the providers of these new services may benefit from the liability exemptions for intermediaries*»[920]. In this regard, Lomba and Evas underline that the mere «*categorization*»[921] of the safe harbors regime provided for access, mere conduit and hosting service providers by Articles 12, 13 and 14 of the ECD[922] risk remaining «*superficial*»[923] and insufficient to adequately differentiate «*the (…) grades of control exercised by platforms (…)*»[924].

---

*occasional basis ('peers') or service providers acting in their professional capacity ("professional services providers"); (ii) users of these; and (iii) intermediaries that connect — via an online platform — providers with users and that facilitate transactions between them ('collaborative platforms'). Collaborative economy transactions generally do not involve a change of ownership and can be carried out for profit or not-for-profit.*». It is worth noting that collaborative or sharing economy services «*may involve some transfer of ownership of intellectual property*.». Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, *A European Agenda for the collaborative economy*, Brussels, 2.06.2016, COM(2016) 356, final, p. 3.

[914] *Ibid.* Examples of online advertising services are Google Ads, Facebook Ads, Twitter or Instagram Ads. A. HOFFMANN – A. GASPAROTTI, op. cit., p. 11. Cfr. N. LOMBA – T. EVAS, op. cit., pp. 70-73.

[915] A. HOFFMANN – A. GASPAROTTI, op. cit., p. 11.

[916] *Ibid. Cfr.* N. LOMBA – T. EVAS, op. cit., pp. 84-85.

[917] The European Data Protection Supervisor (EDPS), referring to «*new and innovative digital services*», underlines that «*the use of those services has also become the source of new risks and challenges , both for society as a whole and individuals using such services*». European Data Protection Supervisor, *Opinion 1/2021 on the Proposal for a Digital Services Act*, cit., p. 5.

[918] See *supra* § 1.3.6.1, § 1.3.6.2., § 1.3.6.3., § 1.3.10.

[919] A. HOFFMANN – A. GASPAROTTI, op. cit., p. 12.

[920] *Ibid.*

[921] N. LOMBA – T. EVAS, op. cit., p. 185.

[922] See *supra* § 1.

[923] N. LOMBA – T. EVAS, op. cit., p. 185.

[924] *Ibid.* According to Lomba and Evas «*a mere analysis of liability privileges would be too short-sighted as phenomena like social networks or platforms curating content (in the sense that content uploaded by their users is being sorted, monitored, and pushed to other users) cannot be coped with by using the simple safe harbour privilege of the ECD. In particular, the impact on fundamental freedoms of users like freedom of speech or access to information and the role of the platforms as gatekeepers would be ignored.*». Cfr. P. NOOREN – N. VAN GORP – N. VAN EJIK – R. O FATHAIGH, *Should We Regulate Digital Platforms? A New Framework for Evaluating Policy Options*, in *Policy & Internet*, Vol. X, No. III, 09.2018, pp. 267 – 275.

The relentless digitalization[925] process and the great growth of online platforms has progressively increased the social and economic role of ISPs[926]. Considering that digital platform «*are today connecting an increasing number of users, information and services*»[927], Hoffmann and Gasparotti evidence how social media is commonly used by online users to create «*content and network with other users*»[928], allowing them to obtain and share as much information as possible. As said in the previous paragraphs[929], even if on the one hand this mechanism «*facilitate the propagation of content and thus also the exercise of related fundamental rights*»[930] as the rights of freedom of expression and information, on the other hand online platforms make the spread of «*illegal content infringing*»[931] individual's fundamental rights easier[932]. To aggravate this picture there is the fact that illicit information shared through platforms, in particular through VLOPs[933], «*can be amplified to reach wide audiences*»[934], which makes its repression very challenging. This situation highlights more than ever the need of clarifying the ECD's legal uncertainty related to the regulation of

[925] See *supra* § Chapter 1.
[926] Lomba and Evas evidence the economic relevance of new digital services like search engines, social media, collaborative economy platforms. N. LOMBA – T. EVAS, op. cit., pp. 70-81.
[927] A. HOFFMANN – A. GASPAROTTI, op. cit., p. 12.
[928] *Ibid.*
[929] See supra § Chapter 1, § Chapter 2.
[930] A. HOFFMANN – A. GASPAROTTI, op. cit., p. 12.
[931] *Ibid.*
[932] Cfr. § 2. See *supra* § 1.3.10. Cfr. T. RODRÍGUEZ DE LAS HERAS BALLELL, op. cit. Cfr. S. F. SCHWEMER – T. MAHLER – H. STYRI, *Liability exemptions of non-hosting intermediaries: Sideshow in the Digital Services Act?*, cit. Cfr. C. BERTHÉLÉMY – J. PENFRAT, *Platform Regulation Done Right. EDRi Position Paper on the EU Digital Services Act*, cit. Cfr. T. MADIEGA, op. cit. Cfr. N. LOMBA – T. EVAS, op. cit. Cfr. European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit. Cfr. Scientific Foresight Unit (STOA), *Online Platforms: Economic and societal effects, European Parliamentary Research Service*, 03.2021. Cfr. S. B. MICOVA – A. DE STREEL, *DIGITAL SERVICES ACT: DEPENDING THE INTERNAL MARKET AND CLARIFYING RESPONSIBILITIES FOR DIGITAL SERVICES*, CERRE – Centre on Regulation in Europe, 12.2020. Cfr. European Data Protection Supervisor, *Opinion 1/2021 on the Proposal for a Digital Services Act*, cit. Cfr. G. SARTOR – A. LOREGGIA, *The Impact of algorithms for online content filtering or moderation. "Upload filters"*, cit. Cfr. G. FROSIO – C. GEIGER, *Taking Fundamentals Rights Seriously in the Digital Service Act's Platform Liability Regime*, cit. Cfr. C. GEIGER - G. FROSIO - E. IZYUMENKO, *Intermediary Liability and Fundamentals Rights*, cit.
[933] See *infra* § 3.2.5.4.
[934] European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 16.

online platform providing digital services[935]. Despite the CJEU has attempted to solve the doubts regarding the concrete application of the ECD in various cases[936], it is fundamental to have clear and defined rules governing ISPs[937].

The ECD's «*regulatory loopholes*»[938], the «*inharmonious solutions*»[939] provided therein, the «*legislative fragmentations*»[940] resulting from the different Directive's implementations «*by Member States*»[941] and the many «*nuances of meaning*»[942] that over the years the CJEU has attributed to fundamental concepts concerning the ECD's liability regime[943] combined with the advent of new digital services[944], have a negative impact on the efficiency of the Directive and make it

---

[935] See *supra* § 1.3.10.

[936] *Ibid.* Please also note that, in addition to the ECD's legislative loopholes and doubts about whether the latter is capable of addressing the risks and the implications of online activitIES, according to «*various studies and public consultations*» there are «*large variances in the way the E-commerce Directive has been implemented throughout the EU and national jurisprudence on liability regimes remain very fragmented*». There is also a «*persisting legal uncertainty regarding the application of existing national norms and conflicting court rulings between Member States and even within the same jurisdiction*». T. MADIEGA, op. cit., p. 8.

[937] A. HOFFMANN – A. GASPAROTTI, op. cit., p. 12. Cfr. § Chapter 1, § Chapter 2.

[938] A. HOFFMANN – A. GASPAROTTI, op. cit., p. 26. Cfr. § 1, § 1.3.10.

[939] T. RODRÍGUEZ DE LAS HERAS BALLELL, op. cit., p. 7. Cfr. European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 24.

[940] T. RODRÍGUEZ DE LAS HERAS BALLELL, op. cit., p. 7. The Commission underlines that «*The largest source of fragmentation comes from the rules established at national level for procedural obligations for online platforms to address illegal information and activities conducted by their users*». European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 28. See also *Ivi*, p. 28-29.

[941] T. RODRÍGUEZ DE LAS HERAS BALLELL, op. cit., p. 7. Some authors consider in fact that an «*harmonised regulatory approach is the biggest defiance of the platform economy*» and «*(…)policy disparities raise obstacles to international trade, arouse uncertainties, increase risks in electronic commerce transactions conducted through online platforms and pose an obstacle to the flourishing of innovative and disruptive business models.*». The consequence is that «*not only cross-border activities and electronic transactions are discouraged, but, above all, efficiencies deriving from and opportunities associated with the resort to platforms are missed and the trust-creating potential of online platforms is seriously undermined.*». T. RODRÍGUEZ DE LAS HERAS BALLELL, op. cit., p. 7. Lomba and Evas underline that «*within the EU there is a great divergence in how the e-Commerce Directive is implemented. Broadly speaking, there is a largely fragmented landscape of national law and approaches.*». N. LOMBA – T. EVAS, op. cit., p. 7.

[942] A. HOFFMANN – A. GASPAROTTI, op. cit., p. 27.

[943] Cfr. § Chapter 1.

[944] Professor Rodríguez de las Heras Ballell evidences that «*In confronting the transformation of the digital economy, the prominent role of platforms and their increasing power in the market have highlighted the limitations of the ECD to address effectively the needs of a platform economy. (…) The platform economy claims harmonised platform-orientated rules sensitive to the transformational impact of algorithm/artificial intelligence-driven systems on the liability*

difficult to successfully protect fundamental rights[945]. Lomba and Evas help this study by suggesting that the «*gaps (…) identified*»[946] in the ECD essentially coincide with a «*weak enforcement*»[947] of the Directive, with a «*lack of an effective (…) cross-border cooperation*»[948] to fight online IPRs infringements and with a widespread uncertainty[949] and fragmentation[950] in the application of the relevant provisions[951]. It emerges a "lame" system that disincentivize the proper functioning of the Digital Single Market and benefit the dissemination of illegal content online[952].

A comprehensive view of the issues facing the horizontal ECD suggests that a precise and focused review of the latter «*would create new value for EU*»[953] from both an economic and social point of view[954]. While on the one side in fact the «*economic benefits of the measures already approved will be achieved by*

---

*exemption regime as conceived in the ECD.*». T. RODRÍGUEZ DE LAS HERAS BALLELL, op. cit., p. 6.

[945] Lomba and Evas similarly evidence that «*The protection of citizens' fundamental rights when using digital services (both their rights as consumers and their fundamental rights) is the last main challenge that current regulation has not properly addressed yet. The absence of effective enforcement mechanisms aggravates the negative consequences of these challenges.*». N. LOMBA – T. EVAS, op. cit., p. 157.

[946] N. LOMBA – T. EVAS, op. cit., p. 7.

[947] *Ivi*, p. 8. «*Weak enforcement*» refers to a «*lack of accountability of third-country providers; absence of effective enforcement mechanisms; absence of clear mechanisms to remove unsafe/counterfeit goods and illegal content.*». N. LOMBA – T. EVAS, op. cit., p. 8.

[948] *Ivi*, p. 115.

[949] *i.e.* «*lack of common and clear definitions of digital services; unclear information on obligations for providers (service terms and conditions, knowledge of business customers); unclear transparency obligations regarding commercial information; lack of transparency of algorithms; absence of clear mechanisms to remove unsafe/counterfeit goods and illegal content*». N. LOMBA – T. EVAS, op. cit., p. 8.

[950] *i.e.* «*differences in information obligations for providers (service terms and conditions, knowledge of business customers); differences in transparency obligations regarding commercial information; lack of alignment of accountability mechanisms*». *Ibid.*

[951] In an article written by Bruno Saetta, talking about the problems that plague the regulation of intermediaries and digital services, reference is made to: «*norme frammentarie e divergenti*», «*regole obsolete e lacune normative*», «*incentivi insufficienti per affrontare il problema dei contenuti illeciti*», «*supervisione pubblica inefficace*», «*elevate barriere all'ingresso per i servizi innovativi*». B. SAETTA, *Digital Service Act: L'Europa prepara le nuove regole per le piattaforme online*, cit.

[952] Cfr. LOMBA – T. EVAS, op. cit., p. 59-60. The uncertainties and the regulatory gaps in this field indirectly promote the non-enforcement of IPRs online and, consequently, the spread of illegal activities online.

[953] LOMBA – T. EVAS, op. cit., p. 91.

[954] Cfr. European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 9, paragraphs 22-30.

*ensuring more effective implementation*»[955], on the other side, an amendment of the ECD could be an opportunity to reduce the hazards posed by the digital services' misuses which now jeopardize the freedoms and the protection of fundamental rights[956].

From this perspective, the intent of the proposed DSA is not a total distortion of the ECD but rather a modernization and modification of the same which tries to incorporate the case-law's interventions in the field.

In the course of the following paragraphs, this dissertation will focus primarily on those DSA's aspects that relate to the regulation of ISPs in the fight against IPRs online infringements. As Nordemann underlines, in fact, the intent of the European Commission is to «*increase and harmonise the responsibility of intermediary service providers*»[957], seeking to regulate the activities of hosting service providers, online platforms and VLOPs *i.e.* very large online platforms through due diligence obligations[958]. More generally, the novelties brought by the

---

[955] N. LOMBA – T. EVAS, op. cit., p. 91. Considering the DSA, The European Commission «*expects*» that its «*economic impacts (…) include:*

- *Common rules for the whole EU and greater legal certainty for users and service providers would increase consumption and boost the ability of innovative European SMEs to scale up across borders within the internal market.*
- *Greater competitiveness thanks to a level playing field for all stakeholders would result in a stronger and more innovative digital service sector.*». N. LOMBA – T. EVAS, op. cit., p. 91.

[956] Cfr. *Ibid.* See *supra* § 1.3.10., but also § 2.3. In particular, as analyzed *supra* in this paragraph and as underlined by Lomba and Evas, a strong protection of fundamental rights can be achieved including in the ECD a «*clear and standardized notice-and-action procedures to deal with illegal and harmful content*», enhancing at the same time «*transparency on content curation and reporting obligations for platforms*» and reinforcing «*out-of-court dispute settlement on content management, particularly on notice-and-action procedures*». N. LOMBA – T. EVAS, op. cit., p. 93. Cfr. G. FROSIO – C. GEIGER, *Taking Fundamentals Rights Seriously in the Digital Service Act's Platform Liability Regime*, cit. Cfr. N. IACOB – F. SIMONELLI, *How to Fully Reap the Benefits of the Internal Market for E-commerce? New economic opportunities and challenges for digital services 20 years after the adoption of the e-Commerce Directive*, cit.

[957] J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 8. Referring to the DSA, the European Commission also specifies that «*this initiative proposes new rules to frame the responsibilities of digital services, to tackle the risks faced by users and to protect their rights. It follows an evaluation of the e-Commerce Directive. The new obligations also aim to ensure enhanced supervision of platforms and effective enforcement*». European Commission, *REGULATORY BOARD OPINION. Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, 6.11.2020, SEC(2020) 432, p. 2.

[958] Cfr. Camera Dei Deputati – Ufficio Rapporti con l'Unione Europea, Documentazioni. Please note the chart showing the intermediaries subject to the differentiated obligations envisaged by the DSA at p. 4. Cfr. European Commission, *Proposal for a Regulation of The European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, cit., pp. 2-3.

presented Regulation aim to «*ensure the proper functioning of the digital market*»[959] by guaranteeing «*the best conditions for innovative cross-border digital services to develop in the European Union*»[960]. The Commission wants to preserve «*a safe online environment with responsible and accountable behaviour of online intermediaries*»[961], to empower *users* and to protect their fundamental rights while establishing an «*appropriate supervision of online intermediaries and cooperation between authorities*»[962]. The specific DSA's provisions are contained in five different Chapters outlined below. In Chapter I, the European Commission «*sets out general provisions, including the subject matter and scope of the Regulation*»[963] while defining «*the key terms used in the*»[964] Proposed Regulation. Chapter II echoes the ECD's safe harbors regime for ISPs. Chapter III, characterized by five Sections, provides for «*the due diligence obligations for a transparent, accessible and safe online environment*»[965]. Chapter IV, made up of five Sections, «*contains the provisions concerning the implementation and*

[959] «*in particular in relation to the provision of cross-border online intermediary services*», the Commission adds. European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 36. Cfr. European Commission, *Proposal for a Regulation of The European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, cit., p. 2.

[960] European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 36.

[961] *Ivi*, p. 37.

[962] *Ibid.* Lomba and Evas report that the DSA-related «*policy options*» refer to an «*enhanced consumer enhanced consumer protection and common e- commerce rules; a framework for content management and curation that guarantees the protection of rights and freedoms; specific regulation to ensure fair competition in online platform ecosystems; cross-cutting policies to ensure enforcement and guarantee clarity*». N. LOMBA – T. EVAS, op. cit., p. 92. Cfr. Cfr. European Data Protection Supervisor, *Opinion 1/2021 on the Proposal for a Digital Services Act*, cit., p. 5.

[963] *Ibid.* See Article 1 of the DSA.

[964] European Commission, *Proposal for a Regulation of The European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, cit., p. 13. See Article 2 of the DSA.

[965] European Commission, *Proposal for a Regulation of The European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, cit., pp. 13-14 as modified by the European Parliament. See Articles 10-37 of the DSA.

*enforcement*»[966] of the proposed Regulation and Chapter V deals with its «*final provisions*»[967].

The DSA's study will be carried out with a view to comparison with the ECD. The analysis will begin by mentioning the subjects to which the DSA applies – the Information Society Services –, the liability regime structure for ISPs and an explanation of the main concepts that define the safe harbours regime. It will proceed then by examining the new Article 6 of the DSA – which probably represents one of the major innovations brought by the proposed Regulation –, the orders to act against illegal content and to provide information established in Articles 8 and 9 and the due diligence obligations for a transparent, accessible and safe online environment. The DSA's analysis will end with an overview on voluntary Standards, Codes of conduct and Special competent Authorities[968] referred to in Chapter III's Section 5 and Chapter IV of the Proposed Regulation.

### 3.2.1. The Digital Services

In the first Recital of the DSA, the European Commission admit that, the «*Information society services and especially intermediary services have become an important part of the Union's economy and daily life of Union citizens*»[969]. Twenty years after the adoption of the ECD, the legislator explains, «*new and innovative business models and services, such as online social networks and marketplaces, have allowed business users and consumers to impart and access information and engage in transactions in novel and innovative ways*»[970]. This digital transformation however has «*also resulted in new risks and challenges, for*

[966] European Commission, *Proposal for a Regulation of The European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, cit., pp. 15-16. See Articles 38-70 of the DSA.
[967] European Commission, *Proposal for a Regulation of The European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, cit., pp. 15-16. See Articles 71-74 of the DSA.
[968] As it will be analyzed in the subsequent subparagraphs these figures are the National Digital Services Coordinators and the European Board for Digital Services.
[969] Recital 1 of the DSA.
[970] *Ibid.*

*individual users, companies and for society as a whole*»[971], showing the need for a legislative reorganization in the field of ISPs' regulation.

As well as the ECD Directive, the Proposed Regulation generally applies «*to providers of certain Information Society Services as defined in Directive 2015/1535 of the European Parliament and of the Council*»[972]. Given their increasing importance, the legislator specifies that the Proposal should particularly refers to mere conduit, caching and hosting service providers[973]. Article 2(f) of the DSA describes mere conduit services as those «*that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network including technical auxiliary functional services*»; caching service providers as the ones consisting «*of the transmission in a communication network of information provided by a recipient of the service, involving 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 upon their request*» and hosting providers as those dealing with «*the storage of information provided by, and at the request of, a recipient of the service*»[974]. With regard to hosting service providers, the DSA provides also a definition of "*online platforms*", explaining that they refer to «*a provider of a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information, unless that activity is a minor or a purely ancillary feature of another service of functionality of the principal service and, for objective and technical reasons cannot be used without that other service, and*

[971] *Ibid.*
[972] Recital 5 of the DSA. See *supra* § 1.3.2.
[973] The Commission underlines indeed that «*this Regulation should apply to providers of intermediary services, and in particular intermediary services consisting of services known as 'mere conduit', 'caching' and 'hosting' services, given that the exponential growth of the use made of those services, mainly for legitimate and socially beneficial purposes of all kinds, has also increased their role in the intermediation and spread of unlawful or otherwise harmful information and activities*.». Recital 5 of the DSA. See *supra* § 1.3.
[974] Unlike ECD, in the new legislative Proposal the term "recipient of the service" is simply described as «*any natural or legal person who uses the relevant intermediary service in order to seek information or make it accessible*». Article 2(b) of the DSA.

*the integration of the feature or functionality into the other service is not a means to circumvent the applicability of this Regulation*»[975].

The DSA basically applies to the same Information Society Services *i.e.*, intermediary services, to whom the ECD is addressed. However, considering the need to create new and more specific rules for certain ISPs[976], the proposed Regulation seems to be more explicit, mentioning in detail some types of intermediaries and establishing for them some new obligations[977]. The DSA indeed provides specific due diligence obligations applicable to all intermediary services providers, to hosting service providers, to online platforms and to very large platforms[978].

The Regulation seems also to reiterate the content of the CJEU's decisions *Uber Spain*[979], *Uber France*[980] and *Airbnb Ireland*[981] fully analyzed in § 1.3.2. Considering that certain digital services providers «*intermediate in relation to services that may or may not be provided by electronic means*»[982], the legislator specifies that the DSA «*should apply only to intermediary services and not affect*

[975] Article 2(h) of the DSA. Through Recital 13 the legislator is even more explicit, explaining not only online platforms are a «*subcategory*» of hosting service providers but also «*online platforms, such as social networks or online marketplaces, should be defined providers of hosting services that (...) store information provided by the recipients of the service at their request*» and «*disseminate that information to the public, again at their request*». At the same time, however, «*in order to avoid imposing overly broad obligations, providers of hosting services should not be considered as online platforms where the dissemination to the public is merely a minor and purely ancillary feature of another service and that feature cannot, for objective technical reasons, be used without that other, principal service, and the integration of that feature is not a means to circumvent the applicability of the rules of this Regulation applicable to online platforms*». For instance, the Commission gives the example of «*the comments section in an online newspaper*» that «*could constitute such a feature where it is clear that it is ancillary to the main service represented by the publication of news under the editorial responsibility of the publisher*».
[976] See *supra* § 3.1., § 3.2.
[977] See *infra* § 3.2.5. The definition of "digital services" *i.e.*, Information Society Services, refers to online intermediaries including infrastructure services, hosting services, platforms and very large platforms. European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, cit. Cfr. Camera Dei Deputati Ufficio Rapporti con l'Unione Europea, *Legge sui servizi digitali (Digital Services Act), Dossier n 15*, 12.05.2021, available at: http://documenti.camera.it/leg18/dossier/pdf/ES051.pdf, p. 4. Cfr. J. P. QUINTAIS – S. F. SCHWEMER, *The Interplay between the Digital Services Act and Sector Regulation: How Special is Copyright?*, cit., p. 13.
[978] See *infra* § 3.2.5.
[979] Case C-434/15.
[980] Case C-320/16.
[981] Case C-390/18.
[982] Recital 6 of the DSA. The reference is to «*remote information technology services, transport of persons and goods, accommodation, or delivery services*».

*requirements set out in Union or national law relating to products or services intermediated through intermediary services, including in situations where the intermediary service constitutes an integral part of another service which is not an intermediary service as specified in the case law of the Court of Justice of the European Union*»[983].

It is important to acknowledge that the Information Society Services *i.e.*, digital services are «*inherently cross-border services*»[984]. As well as citizens are increasingly demanding the ability «*to provide and access any*»[985] Information Society Service in the Union, so they expect «*to be well protected from illegal content and activities*»[986] online[987]. However, achieving such a goal through a fragmentary – and sometimes divergent – legislative paradigm[988], lacking a common applicable law governing the new ISP's activities online seems very difficult. Thus, referring to the rules contained in the DSA, the legislator establishes that «*those (…) should apply to providers of intermediary services irrespective of their place of establishment or residence, in so far as they provide services in the Union, as evidenced by a substantial connection to the Union*»[989], in this way ensuring greater effectiveness of the DSA.

---

[983] Recital 6 of the DSA. Cfr. *Supra* § 1.3.2. The Commission itself have admitted that «over the years, an important area of legal uncertainty for digital service providers has been the scope of the definition of information society services. Especially in the area of collaborative economy, but also in the area of sales of goods online, the line between the online services, offered at a distance, and the underlying services, usually offered offline, has not always been clear». European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, cit., p. 31.

[984] European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, cit., p. 9.

[985] *Ibid.*

[986] *Ibid.*

[987] In this regard, it is worth noting that the Commission observes that «*this raises the stakes when barriers arise for the provision of digital services, in particular to maintain a rich, diverse, and competitive landscape of digital services that can thrive in the EU*». *Ibid.*

[988] The European Commission underlines that Member States across the Union are «*increasingly legislating to protect their citizens from those risks generated by online platforms established in a different Member State*». *Ivi*, p. 23.

[989] Recital 7 of the DSA. Recital 8 of the DSA completes this provision work by clarifying that «*such a substantial connection to the Union should be considered to exist where the service provider has an establishment in the Union or, in its absence, on the basis of the directing of activities towards one or more Member States. The directing of activities towards one or more Member States can be determined on the basis of all relevant circumstances, including factors*

### 3.2.2. The safe harbours and the definition of illegal content

The ISPs' liability regime outlined in the DSA remains unchanged from that analyzed in the ECD[990]. Corresponding to what is stated in Articles 12, 13 and 14 of the ECD indeed, Articles 3, 4 and 5 of the DSA establish a liability exemption under specific conditions for Mere Conduit, Caching and Hosting service providers[991]. The 2000s safe harbours structure designed in the ECD is considered

---

*such as the use of a language or a currency generally used in that Member State, or the possibility of ordering products or services, or using a national top level domain. The directing of activities towards a Member State could also be derived from the availability of an application in the relevant national application store, from the provision of local advertising or advertising in the language used in that Member State, or from the handling of customer relations such as by providing customer service in the language generally used in that Member State. A substantial connection should also be assumed where a service provider directs its activities to one or more Member State as set out in Article 17(1)(c) of Regulation (EU) 1215/2012 of the European Parliament and of the Council. On the other hand, mere technical accessibility of a website from the Union cannot, on that ground alone, be considered as establishing a substantial connection to the Union*».

[990] Cfr. *supra* § 1.3.3., § 1.3.4., § 1.3.5., § 1.3.6.

[991] *Ibid.* Article 3 of the DSA provides that «*1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, the service provider shall not be liable for the information transmitted, on condition that the provider: (a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission. 2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission. 3. This Article shall not affect the possibility for a judicial court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.*». Article 4 of the DSA establishes that «*1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, the service provider shall not be liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient or secure the information's onward transmission to other recipients of the service upon their request, on condition that the provider: (a) does not modify the information; (b) complies with conditions on access to the information; (c) complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry; (d) does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and (e) acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement. 2. This Article shall not affect the possibility for a judicial court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.*». Finally, Article 5 states «1. *Where an information society service is provided that consists of the storage of information provided by a recipient of the service the service provider shall not be liable for the information stored at the request of a recipient of the service on*

as a real «*shield against liability*»[992] that is not worth overhauling. The legislator itself explained that «*the legal certainty provided by the horizontal framework of conditional exemptions from liability for providers of intermediary services, laid down in Directive 2000/31/EC, has allowed many novel services to emerge and scale-up across the internal market*»[993] so that it «*should (…) be preserved (…) and incorporated*»[994] in the DSA. To be honest, in the drafting of the new Regulation, the European Commission had considered modifying the ISP's liability regime, but this option was «*discarded at an early stage*»[995]. The Commission has described the ISPs' safe harbours as «*a cornerstone for the fair balance of rights in the online world*»[996]. Other models «*placing more legal risks on intermediaries would*»[997] in fact «*potentially lead to severe repercussions for citizens' freedom of expression online and traders' ability to conduct their businesses online and reach consumers*»[998], at the risk of being «*prohibitive for*

---

*condition that the provider: (a) does not have actual knowledge of illegal activity or illegal content and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or illegal content is apparent; or (b) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the illegal content. 2. Paragraph 1 shall not apply where the recipient of the service is acting under the authority or the control of the provider. 3. Paragraph 1 shall not apply with respect to liability under consumer protection law of online platforms allowing consumers to conclude distance contracts with traders, where such an online platform presents the specific item of information or otherwise enables the specific transaction at issue in a way that would lead a consumer to believe that the information, or the product or service that is the object of the transaction, is provided either by the online platform itself or by a recipient of the service who is acting under its authority or control. 4. This Article shall not affect the possibility for a judicial court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement*.».

[992] N. LOMBA – T. EVAS, op. cit., p. 12.

[993] Recital 16 of the DSA.

[994] *Ibid.*

[995] European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 48.

[996] Moreover, according to the ECHR this system «*is "in line with the standards on international law" that ISSPs should not be held responsible for content emanating from third parties unless they failed to act expeditiously in removing or disabling access to it once they became aware of its illegality*». European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 48. Cfr. Case 3877/14, Tamiz v. The United States, 19.09.2017.

[997] European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 48.

[998] *Ibid.*

*any new business, reinforcing the stronghold of very large players, able to sustain and (…) externalize costs*»[999].

As well as for the entire structure of the liability exemption regime, also the existence of the distinction between "passive" and "active" role of hosting service providers - extensively analyzed in § 1.3.6.2 - remains unaltered in the DSA[1000]. As "active" intermediaries generally «*intervene into third party information and make the information part of their business models*»[1001], it is understandable that the moment «*they build their business model on the content uploaded by their users*»[1002], then «*they are facing a different level of responsibilities and duties of care than mere neutral and passive providers of technical services*»[1003]. Thus, not without opposing views[1004], the DSA echoes the difference between "active" and "passive" role, granting only to passive ISPs the chance to benefit from the liability exemption[1005]. This is the position of the European Commission which in this regard states in Recital 18 of the DSA that «*the exemptions from liability*

[999] *Ibid.* Referring to hosting service providers, also Nordemann evidences that «*it is recommended to not generally change the liability privilege of Article 14 E-Commerce Directive for hosting providers*». J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 46.

[1000] See *supra* § 1.3.6.2.

[1001] J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 45.

[1002] *Ibid.*

[1003] *Ibid.* Cfr. J. NORDEMANN, *Liability of Online Service Providers for Copyrighted Content – Regulatory Action Needed?*, cit., p. 10.

[1004] See *supra* § 1.3.6.2. Some critics refers to Recital 42 of the ECD *i.e*. the Recital «*from which the "passive" language derives*». Some authors believe that it «*does not relate to Article 14, but only to Articles 12 and 13 of the ECD*». N. LOMBA – T. EVAS, op. cit., p. 288. See Case C-236/08. See Case C-324/09. Cfr. J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., pp. 30 et sq. Cfr. A. KUCZERAWY, *Active vs passive hosting in EU intermediary liability regime: time for a change?*, cit. Moreover, «*another argument against the exclusion of "active role" hosting providers from Article 14 ECD is a possible contradiction to the aim of making the hosting provider proactively remove infringements*». N. LOMBA – T. EVAS, op. cit., p. 288. Cfr. J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 40. Cfr. J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 40. Cfr. C. ANGELOPOULOS, *On Online Platforms and The Commission's New Proposal for a Directive on Copyright in the Digital Single Market*, cit., pp. 43-44.

[1005] According to some authors, as for example Nordemann, the distinction between passive and active hosting service providers is «*justified and should not be abolished*». J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 45. The Commission underlines also that the CJEU case-law in this field is sufficiently varied to understand the difference between active and passive intermediaries. Cfr. N. LOMBA – T. EVAS, op. cit., pp. 289-294.

*established in this Regulation should not apply where, instead of confining itself to providing the services neutrally, by a merely technical and automatic processing of the information provided by the recipient of the service, the provider of intermediary services plays an active role of such a kind as to give it knowledge of, or control over, that information*»[1006]. In this regard, the European Parliament has specified in the context of its amendments that the fact of ranking or merely displaying in an order or the fact of using a recommender system should not be considered «*as having control over an information*»[1007].

Even though, as it has just been pointed out, in the new proposed Regulation the ISPs' liability regime remains unchanged, as well as the safe harbours still applies only to passive intermediaries[1008], some concepts regarding the liability exemption of digital services providers need to be clarified. The legislator, aware of this necessity, provides in the DSA an explanation of the concepts of «*illegal content*»[1009] and «*knowledge and awareness*»[1010], missing in the ECD.

In Chapter 1, § 1.3.6.1., it has been specified that, according to Article 14(1) of the ECD, hosting service providers must remove illegal information after obtaining actual knowledge or awareness of it[1011]. There, however, it has been also found that the legislators do not explain what the precise meaning of «*illegal activity or information*»[1012] is, forcing in this way hosting companies to determine

---

[1006] The Commission continues providing that «*those exemptions should accordingly not be available in respect of liability relating to information provided not by the recipient of the service but by the provider of intermediary service itself, including where the information has been developed under the editorial responsibility of that provider*». Recital 18 of the DSA. Cfr. N. LOMBA – T. EVAS, op. cit., pp. 289-294.

[1007] Recital 18 of the DSA.

[1008] As emerged from the ECD. See *supra* in this paragraph. See *supra* § 1.3.6.2.

[1009] See *supra* § 1.3.6.1., § 1.3.10. See Recital 12 of the DSA and Article 2(g) of the DSA.

[1010] See *supra* § 1.3.6.3., § 1.3.10. See Recital 22 of the DSA.

[1011] Cfr. P. VAN EECKE, op. cit., p. 1465.

[1012] It is recalled that Article 14 of the ECD establishes that «*1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that: (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information. 2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider. 3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information*.».

for themselves what does and does not constitute illegal activity or information to decide whether or not to deny access to or remove certain information[1013]. The concrete application of the ECD[1014] has made clear the task of tackling illegal content online – *i.e.* IPRs' infringements online - without having an explicit definition of the latter is very problematic for ISPs[1015]. As Hoffmann and Gasparotti evidence, furthermore, this difficulty has recently increased and the questions regarding the exact identification of "illegal content" are becoming «*more and more important as today's use of digital services, and in particular online platforms, is characterised by the creation of enormous amounts of user generated content*»[1016]. At the state of art, there is a fragmentation across Member States not only on the concept of illicit content but also on its manifestly or not manifestly illegal nature[1017]. «*The unlawfulness of the content*»[1018], in fact, «*is*

[1013] Cfr. Article 14 of the ECD and Article 5 of the DSA. Cfr. P. VAN EECKE, op. cit., p. 1465. See *supra* § 1.3.6.1. Furthermore, as evidenced in Chapter 1, making such an evaluation is extremely difficult to do for intermediaries because of various reasons. See *supra* § 1.3.6.1.

[1014] Please note that the ECD has been written more than twenty years ago.

[1015] Cfr. P. VAN EECKE, op. cit., p. 1465.

[1016] A. HOFFMANN – A. GASPAROTTI, op. cit., p. 5.

[1017] Cfr. ICF – Grimaldi Studio Legale – 21c Consultancy, op. cit., p. 172. According to Madiega, it is necessary to clarify not only the concept of illegal content and the concept of manifestly or non-manifestly illegal content, but also to consider «*the opportunity to address both both 'illegal' and 'harmful' content (…) under the revised liability regime for online intermediaries*». The author underlines that while «*'Illegal content' arguably encompasses a large variety of content categories that are not compliant with EU and national legislation, including on online violations of copyright, trademark and trade secrets; counterfeiting and unauthorised parallel distribution via the internet; on consumer protection violations, privacy, libel and defamation law violations; data protection violations; hate speech and incitement to violence (e.g. terrorism content); and child sexual abuse material and disclosure of private sexual images without consent ('revenge porn')*», «*potentially 'harmful content' refers to content which often does not strictly fall under the prohibition of a law, but might nevertheless have harmful effects*» and it should be taken into consideration when talking about illegal content online. At the same time, however, Madiega admit that «*this approach requires distinguishing what is 'illegal content' online from content which is 'harmful' but not illegal, while the concept of 'harmful' is subjective, depends greatly on context and can vary considerably between Member States*». In this regard «*fundamental rights defenders argue that introducing rules to address online harmful content into EU law would have grave consequences for freedom of expression, freedom to seek information, and other fundamental rights and therefore seek to strictly limit the scope of the digital services act to illegal content*». It emerges that «*setting a robust framework and ensuring legal certainty will rest on defining precise concepts that comply with EU fundamental rights principles*». T. MADIEGA, op. cit., pp. 10-11. In Recital 5 of the DSA, the legislators mention the notion of "harmful content", writing that «*this Regulation should apply to providers of intermediary services, and in particular intermediary services consisting of services known as 'mere conduit', 'caching' and 'hosting' services, given that the exponential growth of the use made of those services, mainly for legitimate and socially beneficial purposes of all kinds, has also increased their role in the intermediation and spread of unlawful or otherwise harmful information and activities*». Recital 5 of the DSA. Cfr. A. HOFFMANN – A. GASPAROTTI, op. cit. Cfr. J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., pp. 30-31. Cfr. L. WOODS – W. PERRIN, *Online harm reduction – a statutory duty of*

*assessed on a case-by-case basis by national legislation* and «*there is no consistent approach across Member States*»[1019]. Against this background, the DSA tries to clarify the notion of illegal content. Article 5 of the DSA (ex-Article 14 of the ECD) no longer talks about «*illegal activity or information*»[1020], but it refers to «*illegal activity or illegal content*»[1021]. The legislators establish in Article 2(g) that "illegal content" «*means any information which, in itself or by its reference to an activity, including the sale of products or provision of services which is not in compliance with Union law or the law of a Member State, irrespective of the precise subject matter or nature of that law*». As emerges from Recital 12 of the DSA, in the clarified definition of illegal content there is the whole horizontal regulatory essence of the new Regulation. In addition to states clearly that what is illegal offline should be illegal also online, the Commission explain in fact «*to achieve the objective of ensuring a safe, accessible, predictable and trusted online environment, (…) the concept of "illegal content" should be defined appropriately*»[1022], covering also «*information relating to illegal content, products, services and activities*»[1023]. To be more explicit, this notion «*should be understood to refer to information, irrespective of its form, that under the applicable Union or nationa law is either itself illegal, such as illegal hate speech or terrorist content and unlawful discriminatory content, or that is not in compliance with Union law since it refers to activities that are illegal, such as the sharing of images depicting child sexual abuse, unlawful non-consensual sharing of private images, online stalking, the sale of non-compliant or counterfeit products, illegal trading of animals, plants and substances, the non-authorised use of copyright protected material or activities involving infringements of consumer protection law, the provision of illegal services in particular in the area*

---

*care and regulator*, Carnegie Trust UK, 04.2019. Cfr. J. BAYER, *Between Anarchy and Censorship Public discourse and the duties of social media*, in *Liberty and Security in Europe*, No. 2019-03, 05.2019. Cfr. EdiMA, *Responsibility Online*, 2020, available at: https://doteurope.eu/wp-content/uploads/2020/01/Responsibility-Online.pdf. Cfr. EDRi, *More responsibility to online platforms – but at what cost?*, 19.07.2019, available at: https://edri.org/our-work/more-responsibility-to-online-platforms-but-at-what-cost/.

[1018] ICF – Grimaldi Studio Legale – 21c Consultancy, op. cit., p. 172.

[1019] *Ibid.*

[1020] See Article 14(1) of the ECD.

[1021] Article 5 of the DSA.

[1022] Recital 12 of the DSA.

[1023] *Ibid.*

*of accommodation services on short-term rental platforms non-complaint with Union or national law*»[1024]. Some authors however have criticized this definition of illegal content, believing that it is not clear enough. Allegri, for instance, considers that Recital 12 gives an overly broad interpretation of the concept; She observes that no information is illegal per se as emerges from Recital 12, but it is illegal because it infringes the law as specified in DSA's Article 2(g)[1025]. According to the author, then, an insufficiently delineated notion of "illegal content" would not only move away from the goal of legal harmonization pursued to foster the European Digital Single Market, but it would also mean that the hosting provider, when assessing the opportunity to make certain information inaccessible, would have to take account of a very vast body of legislation, with the risk of generating further uncertainty[1026].

Recital 22 of the DSA deals with elucidating the concept of "actual knowledge" or "awareness" provided in Article 5 of the DSA[1027]. Actually, the legislator is doing here nothing more than incorporating and absorbing into the Regulation what the CJEU had already stated in the *L'Oréal* case[1028]. According to the European Commission an intermediary can acquire «*actual knowledge or awareness of the illegal nature of the content through (…) its own-initiative investigations or notices submitted to it by individuals or entities in accordance with this Regulation in so far as those notices are sufficiently precise and adequately substantiated to allow a diligent hosting service provider to reasonably identify, assess and where appropriate act against the allegedly illegal*

[1024] *Ibid.* The legislators specify also that it is irrelevant «*whether the illegality of the information or activity results from Union law or from national law that is consistent with Union law and what the precise nature or subject matter is of the law in question*». *Ibid*. Cfr. European Data Protection Supervisor, *Opinion 1/2021 on the Proposal for a Digital Services Act*, cit., p. 9. The DSA's definition of illegal content is then enriched by Recital 47 that, referring to «*measures and protection against misuse*» online ex Article 20 of the DSA, explains an information can be considered as illegal and the misuse of digital services can be established with regard to frequently provided illegal content «*where it is evident that that content is illegal without conducting a detailed legal or factual analysis*». Recital 47 of the DSA.

[1025] M. R. ALLEGRI, *Digital Services Act, il "rebus" dei contenuti illeciti: la Ue rischia di aumentare il caos*, agendadigitale.eu, 14.05.2021, available at: https://www.agendadigitale.eu/mercati-digitali/digital-services-act-il-rebus-dei-contenuti-illeciti-la-ue-rischia-di-aumentare-il-caos/.

[1026] *Ibid.*

[1027] See *supra*, § 1.3.6.3. It has been already studied that in order to obtain the liability exemption hosting service providers must not have "actual knowledge" or must not be "aware" of facts or circumstances from which the illegal activity or information is apparent. Cfr. Article 5 of the DSA.

[1028] Case C- 324/09. See *supra*, § 1.3.6.3. Cfr. N. LOMBA – T. EVAS, op. cit., p. 290.

*content*»[1029]. In this regard, it is worth underlining that if "knowledge or awareness" obtained through «*own-initiative investigations*»[1030] seemed very uncertain and contradictory read in the light of the ECD, in the DSA it seems more fitting[1031]. Indeed, while the ECD lacks a provision allowing ISPs who carry out voluntary own-initiative investigations to benefit from the liability exemption of Articles 12, 13 and 14, the DSA introduces in its Article 6 a real "Good-Samaritan clause"[1032].

Before looking at the latter, however, a further consideration concerning the DSA's liability regime of ISPs seems necessary. As noted in Chapter 1[1033], the application of the ECD's liability regime to the so-called «*non-hosting intermediaries*»[1034] *e.g* search engines, domain name system (DNS), top-level domain name registries, certificate authorities, content delivery networks (CDNs), cloud processing, live streaming etc., is unclear[1035]. Lomba and Evas underline that «*there is some legal uncertainty for*»[1036] such «*specific sub-groups of intermediary service providers that play an "in- between" role between access providers (Article 12 ECD) and hosting providers (Article 14 ECD)*»[1037]. In particular, it is uncertain «*whether Article 12 ECD or Article 14 ECD applies*»[1038] to «*these business model*»[1039]. The European Commission, aware of the existence of this «*grey areas*»[1040] regarding the extension of the safe harbours' provisions,

---

[1029] Recital 22 of the DSA. The legislator makes clear also that the liability exemptions should apply to providers who act after obtaining actual knowledge. Recital 22 of the DSA.
[1030] Article 6 of the DSA.
[1031] Cfr. *supra*, § 1.3.6.3.
[1032] See *infra* § 3.2.3.
[1033] See *supra* § 1.3.6.2.
[1034] S. F. SCHWEMER – T. MAHLER – H. STYRI, *Liability exemptions of non-hosting intermediaries: Sideshow in the Digital Services Act?*, cit.
[1035] Cfr. *Ibid.* Cfr. N. LOMBA – T. EVAS, op. cit., p. 287; p. 216 et sq. it is important to underline however that, with strict regard to cloud computing services, when the European Parliament has amended the DSA Commission's Proposal it has specified in Recital 13 that cloud computing should not be considered a an online platforms for the purposes of the DSA «*in cases where in cases where allowing the dissemination of specific content constitutes a minor or ancillary feature*». It is clarified also that «*cloud computing services, when serving as infrastructure, for example, as the underlining infrastructural storage and computing services of an internet-based application or online platform, should not in itself be seen as disseminating to the public information stored or processed at the request of a recipient of an application or online platform which it hosts*». Recital 13 of the DSA.
[1036] N. LOMBA – T. EVAS, op. cit., p. 287.
[1037] *Ibid.*
[1038] *Ibid.*
[1039] *Ibid.*
[1040] *Ibid.*

had already pointed out in the ECD's Article 21 the «*need for proposals concerning the liability of providers of hyperlinks and location tool services*»[1041]. Today more than ever the need for an upgraded, «*updated and reinforced*»[1042], «*future proof and (…) even more technology neutral*»[1043] liability legal systems for digital services providers is felt[1044]. Linking providers *e.g.* search providers, for instance, are playing a very «*important role in the functioning of internet*»[1045]; they facilitate access to content and, what is more relevant, they are in a «*key position to find and disseminate illegal information*»[1046] online. Clarifying the applicability of the liability exemption's regime to the «*non-hosting intermediaries*»[1047] is thus certainly functional to the fight against IPRs' infringements on the net[1048]. In the DSA proposal, the legislator acknowledges the advent of new technologies and new digital services providers and states that «*providers of services establishing and facilitating the underlying logical architecture and proper functioning of the internet, including technical auxiliary functions, can also benefit from the exemptions from liability set out in this Regulation, to the extent that their services qualify as "mere conduits", "caching" or hosting services*»[1049]. DSA's Recital 27 goes on providing a «*non-exhaustive list of examples, including*»[1050] «*wireless local area networks, domain name system (DNS) services, top–level domain name registries, certificate authorities that issue digital certificates, Virtual Private Networks, cloud infrastructure or*

[1041] Article 21 of the ECD. Cfr. *supra* § 1.3.6.2.
[1042] N. LOMBA – T. EVAS, op. cit., p. 287.
[1043] S. F. SCHWEMER – T. MAHLER – H. STYRI, *Liability exemptions of non-hosting intermediaries: Sideshow in the Digital Services Act?*, cit., p. 27.
[1044] Cfr. *Ibid*. Cfr. N. LOMBA – T. EVAS, op. cit., p. 287 et sq.; p. III of Annex 3. Kuczerawy underlines that «*Explicitly clarifying the broad scope of the exemption is necessary in light of the constant development of new types of online services. (…) New types of platforms often adopt more innovative approaches to attract and engage users.*». A. KUCZERAWY, *Active vs passive hosting in EU intermediary liability regime: time for a change?*, cit.
[1045] J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 50.
[1046] *Ibid.*
[1047] S. F. SCHWEMER – T. MAHLER – H. STYRI, *Liability exemptions of non-hosting intermediaries: Sideshow in the Digital Services Act?*, cit.
[1048] Cfr. J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 50.
[1049] Recital 27 of the DSA.
[1050] S. F. SCHWEMER – T. MAHLER – H. STYRI, *Liability exemptions of non-hosting intermediaries: Sideshow in the Digital Services Act?*, cit., p. 28.

*content delivery networks, that enable or improve the functions of other providers of intermediary services*»[1051]. The latter, together with «*services used for communications purposes, and the technical means of their delivery*»[1052] that have given rise «*to online services such as Voice over IP, messaging services and web-base e-mail services, where the communication is delivered via an internet access service*»[1053] are included in the Regulation's safe harbours structure[1054]. The European Parliament has added a new letter (a) in Recital 27 of the DSA, specifying that in cases where a single webpage include elements qualifying differently between mere conduit, caching or hosting services providers, then the liability rules should apply to each accordingly[1055].

It is worth noting that to adequately fight illegal content online while protecting fundamental rights, it is not sufficient to take efficient measures, but it is also necessary for these to be proportionate[1056]. In order to strike a fair balance between the various interests at stake indeed it is important to establish a «*trade-off between mitigating content risks and ensuring that measures against illegal content remain proportional*»[1057]. Despite the intermediary liability's context is complicated and «*involves a variety of actors and stakeholders*»[1058], as Schwemer, Mahler and Styri underline «*the lawmaker should weigh benefits (the protection from impacts of unlawful content) against costs (the negative effects of protection measures on other fundamental rights)*»[1059]. To reach it, illegal content should be addressed by the actor who has the best chance of caching it without in any case undermining the protection of fundamental rights *e.g.* adopting an

[1051] Recital 27 of the DSA.
[1052] *Ibid.*
[1053] *Ibid.*
[1054] Cfr. S. F. SCHWEMER – T. MAHLER – H. STYRI, *Liability exemptions of non-hosting intermediaries: Sideshow in the Digital Services Act?*, cit., p. 28. J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., pp. 50 et sq.
[1055] In this regard, the European Parliament gives the example of search engine that could act «*solely as 'caching' service as to information included in the results of an inquiry*» but «*elements displayed alongside those results, such as online advertisemtns, would however still qualify as a hosting service.*». Recital 27(a) of the DSA.
[1056] Cfr. S. F. SCHWEMER – T. MAHLER – H. STYRI, *Liability exemptions of non-hosting intermediaries: Sideshow in the Digital Services Act?*, cit., p. 12.
[1057] *Ibid.*
[1058] S. F. SCHWEMER – T. MAHLER – H. STYRI, *Liability exemptions of non-hosting intermediaries: Sideshow in the Digital Services Act?*, cit., p. 12.
[1059] *Ivi*, p. 13.

excessive taking down of content[1060]. In few words, «*measures against illegal content should be targeted primarily at actors who can take proportional action*»[1061], possibly including also the «*non-hosting intermediaries*»[1062]. This means that «*more remote intermediaries should not be targeted, or they should be targeted only as a last resort*»[1063]. The European legislators have shared this idea in Recital 26 establishing that «*where possible, third parties affected by illegal content transmitted or stored online should attempt to resolve conflicts relating to such content without involving the providers of intermediary services in question*»[1064]. When it is appropriate indeed «*other actors, such as group moderators in closed and open online environments, in particular in the case of large groups, should also help to avoid the spread of illegal content online, in accordance with the applicable law*»[1065]. In cases where is necessary to involve Information Society Services providers, «*any requests or orders for such involvement should (…) be directed to the specific provider that has the technical and operational ability to act against specific items of illegal content, so as to prevent and minimise any possible negative effects for the availability and accessibility of information that is not illegal content*»[1066]. It emerges that, as the European Parliament has specified, ISPs should act when they are in the best place to do so[1067].

### 3.2.3. The Good-Samaritan paradox vs Article 6 of the DSA

As anticipated in Chapter 1, § 1.3.6.3., a Good-Samaritan paradox emerge from the application of the ECD. The latter in fact provides that only passive - or neutral – intermediaries can benefit from the liability exemptions, thus

[1060] Cfr. *Ibid.* Cfr. SAI ON CHEUNG, *Dispute Avoidance Through Equitable Risk Allocation*, in SAI ON CHEUNG (ed), *Construction Dispute Research Conceptualisation, Avoidance and Resolution*, 2014, p. 99. See *supra* § 1.3.10, § 2.
[1061] S. F. SCHWEMER – T. MAHLER – H. STYRI, *Liability exemptions of non-hosting intermediaries: Sideshow in the Digital Services Act?*, cit., p. 13.
[1062] S. F. SCHWEMER – T. MAHLER – H. STYRI, *Liability exemptions of non-hosting intermediaries: Sideshow in the Digital Services Act?*, cit.
[1063] *Ibid.*
[1064] Recital 26 of the DSA.
[1065] *Ibid.*
[1066] *Ibid.*
[1067] *Ibid.*

discouraging any proactive activity in the search for illegal material online[1068]. The fact is that, as Madiega explains, «*the prohibition on playing an active role as a hosting provider may lead hosting providers to avoid making all necessary efforts to assess whether the content they host is illegal in order precisely to avoid being considered as playing an active role*»[1069]. In this way, ISPs are spurred to turn a «*blind eye*»[1070] on IPRs' infringements «*in order to not*»[1071] lose the safe harbours protection[1072]. The consequence of the absence of a «*Good Samaritan defence*»[1073] indeed is that, as a 2018 study also underlines, «*hosting intermediaries are exposed to a higher risk of liability if they decide to be more active in addressing illegal content proactively*»[1074].

In view of this reading, for a long-time legal scholar have been discussing the possibility of introducing in the ECD a Good-Samaritan clause that legitimizes digital services providers to carry out «*voluntary own-initiative investigations*»[1075] without incurring the inapplicability of Articles 12, 13, 14 of the ECD – new Articles 3, 4, 5 of the DSA -[1076].

---

[1068] See *supra*, § 1.3.6. Cfr. P. VAN EECKE, op. cit. Active hosting service providers are in this way excluded from the safe harbours' regime established by the legislators in the ECD.
[1069] T. MADIEGA, op. cit., p. 17.
[1070] J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 40.
[1071] *Ibid.*
[1072] Cfr. *Ibid.* Cfr. T. MADIEGA, op. cit., pp. 17 et sq. Cfr. J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., pp. 40 et sq. Cfr. G. SARTOR, *Providers Liability: From the eCommerce Directive to the future*, cit., p. 16 et sq. Cfr. N. LOMBA – T. EVAS, op. cit., p. 289-294. Cfr. European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, cit., p. 32. Cfr. B. SAETTA, *Digital Service Act: L'Europa prepara le nuove regole per le piattaforme online*, cit. Cfr. European Data Protection Supervisor, *Opinion 1/2021 on the Proposal for a Digital Services Act*, p. 9. Cfr. S. B. MICOVA – A. DE STREEL, *DIGITAL SERVICES ACT: DEPENDING THE INTERNAL MARKET AND CLARIFYING RESPONSIBILITIES FOR DIGITAL SERVICES*, CERRE – Centre on Regulation in Europe, cit., p. 9. Cfr. T. RODRÍGUEZ DE LAS HERAS BALLELL, op. cit., p. 6 et sq. See *supra* § 1.3.6. Cfr. A. KUCZERAWY, *The EU Commission on voluntary monitoring: Good Samaritan 2.0 or Good Samaritan 0.5?*, Ku Leuven, 24.04.2018, available at: https://www.law.kuleuven.be/citip/blog/the-eu-commission-on-voluntary-monitoring-good-samaritan-2-0-or-good-samaritan-0-5/.
[1073] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 7. T. MADIEGA, op. cit., pp. 17 et sq.
[1074] *Ibid.*
[1075] Article 6 of the DSA.
[1076] Cfr. T. MADIEGA, op. cit., p. 18. Cfr. C. ANGELOPOULOS, *On Online Platforms and The Commission's New Proposal for a Directive on Copyright in the Digital Single Market*, cit.

According to many legal scholars, the introduction of such a Good-Samaritan clause should be supported. Various authors indeed underline that such a provision «*could reassure intermediaries that they will not be held liable for hosting illegal material of which they obtained knowledge through their voluntary, proactive efforts*»[1077]. Sartor notes that the fact that ISPs «*may take initiatives against illegal, inappropriate or irrelevant content or activity, should not affect their protection from secondary liability*»[1078]. Sartor points out that conditioning the application of the safe harbours regime to the "passivity" of intermediaries risks leading to a «*hands-off approach that would result in an increased quantity of online illegalities and in the failure to satisfy the users that prefer not to be exposed to objectionable or irrelevant material*»[1079]. The provisions contained in the ECD in fact seem «*creating contradictory incentives*»[1080] for ISPs. According to Article 14 of the ECD, once the ISP has come across illegal content, in order to benefit from the liability exemption, it is not enough for them to do their best to remove it, but it is necessary that the infringing information is actually removed, otherwise the provider is liable. In this sense, it is obvious that those who take proactive measures have an incentive to remove as much as possible, especially uncertain content, while small companies (for whom filtering systems are an excessive cost) have an incentive not to use such systems[1081]. The European Commission itself makes it clear the fact that

[1077] T. MADIEGA, op. cit., p. 18. Cfr. J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit. Cfr. A. DE STREEL – M. BUITEN – M. PEITZ, *Liability of Online Hosting Platforms – should exceptionalism end?*, 09.2018, available at: https://www.cerre.eu/sites/cerre/files/180912_CERRE_LiabilityPlatforms_Final_0.pdf. Cfr. G. SARTOR, *Providers Liability: From the eCommerce Directive to the future*, cit., pp. 16 et sq.

[1078] G. SARTOR, *Providers Liability: From the eCommerce Directive to the future*, cit., p. 27.

[1079] *Ibid*. Cfr. *Ivi*, pp. 27 et sq. Sartor evidences also that «*what justifies the exemption from secondary liability is not the passivity of intermediaries, but rather their function as communication enablers. This function would be incompatible with initiating the communications at issue, but may allow or even require playing an active role in creating an environment in which users' communications can be delivered and made accessible (…)*». *Ibid*. Cfr. A. KUCZERAWY, *Active vs passive hosting in EU intermediary liability regime: time for a change?*, cit.

[1080] European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 32.

[1081] B. SAETTA, *Digital Service Act: L'Europa prepara le nuove regole per le piattaforme online*, cit. See *supra* § 1.3.6. As studied in Chapter 2, instead, in the Copyright Directive the implementation of filtering measures is substantially, but not formally, mandatory to comply with Article 17. This creates problem with the balancing of different fundamental rights. Cfr. *Ibid.* See *supra* § Chapter 2.

«*proactive measures taken to detect illegal activities (even by automatic means)*»[1082] are used as an argument to exclude the intermediaries from the immunity regime, could put small online businesses in a difficult position. The latter in fact cannot «*afford the legal risk*»[1083] that the application of such a system brings with it and, compared to «*large online players which do apply content moderation processes to varying degrees of quality*»[1084], they are at a distinct disadvantage[1085]. The consequence is that even if small ISPs want to put in place measures to safeguard online users, in order not lose the applicability of the "safe harbours", they «*avoid doing so*»[1086]. In general, as emerges from the *EuroISPA Consensus Position: Principles for the Future of the EU Intermediary Liability Framework*[1087] both small and large intermediaries and online platforms support the introduction in the ECD of a Good Samaritan clause extending the «*protection from liability in cases where internet intermediaries have actual knowledge of allegedly illicit content when they apply in good faith procedures designed to tackle such content*»[1088]. Similarly, the statements contained in the Commission's Communication on *Tackling Illegal Content Online*[1089] seem supporting the adoption of a true Good Samaritan provision. Within this official document the Commission states indeed that taking «*voluntary, proactive measures 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*»[1090].

---

[1082] European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 32.

[1083] *Ibid.*

[1084] *Ibid.*

[1085] *Ibid.*

[1086] European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 32.

[1087] *EuroISPA Consensus Position: Principles for the Future of the EU Intermediary Liability Framework*, 06.2019, available at: https://www.euroispa.org/wp-content/uploads/2019EU2.pdf. Cfr. T. MADIEGA, op. cit., p. 18.

[1088] T. MADIEGA, op. cit., p. 18.

[1089] European Commission, Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, *Tackling Illegal Content Online. Towards an enhanced responsibility of online platforms,* cit.

[1090] *Ivi*, p. 10. According to the Commission: «*This suggests that the mere fact that an online platform takes certain measures relating to the provision of its services in a general manner does not necessarily mean that it plays an active role in respect of the individual content items it stores*

This position is also «*reiterated*»[1091] in the following *Recommendation on measures to effectively tackle illegal content online*[1092]. The European Commission explains that even if proactive measures «*result in obtaining knowledge or awareness of illegality, the hosting platform*»[1093] maintain «*the possibility to act expeditiously to remove or to disable access to the information in question upon obtaining such knowledge or awareness*»[1094]. It is worth mentioning that also some case law does not support the «*fear*»[1095] that a proactive approach by hosting service providers would lead to «*a loss of the liability privilege*»[1096]. An example is the case ruled by the Court of Appeal of Hamburg of 1.07.2015[1097] where the German judges have stated that the use by YouTube of a filtering measure named Content-ID software *i.e.*, «*a paradigmatic "Good Samaritan" "filtering measure"* »[1098] does not cause the platform to be

---

*and that the online platform cannot benefit from the liability exemption for that reason. In the view of the Commission, such measures can; and indeed should, also include proactive measures to detect and remove illegal content online, particularly where those measures are taken as part of the application of the terms of services of the online platform. This will be in line with the balance between the different interests at stake which the E-Commerce Directive seeks to achieve. Indeed, it recalls that it is in the interest of all parties involved to adopt and implement rapid and reliable procedures for removing and disabling access to illegal information. Although that Directive precludes online platforms from being obliged to engage in general active fact-finding, it also acknowledges the importance of voluntary measures.*». *Ivi*, p. 11. Cfr. J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 41. Cfr. J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 41. Cfr. N. LOMBA – T. EVAS, op. cit., p. 294. Cfr. A. HOFFMANN – A. GASPAROTTI, op. cit. Cfr.

[1091] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 41.

[1092] European Commission, *Commission Reccomendation of 1.3.2018 on measures to effectively tackle illegal content online,* cit. Cfr. J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 41. Cfr. J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 41. Cfr. N. LOMBA – T. EVAS, op. cit., p. 294. Cfr. A. HOFFMANN – A. GASPAROTTI, op. cit.

[1093] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 41.

[1094] European Commission, Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, *Tackling Illegal Content Online. Towards an enhanced responsibility of online platforms,* cit., p. 12.

[1095] J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 41. Cfr. N. LOMBA – T. EVAS, op. cit., p. 294.

[1096] J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 41.

[1097] Case of the Court of Appeal (Oberlandesgericht) of Hamburg of 1.07.2015, 5 U 87/12, paragraph. 198.

[1098] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 41.

identified as playing an active role[1099]. Similarly, the Spanish court of appeals has established that «*the editorial activity or tasks of YouTube did not mean it had active knowledge of the unauthorised status of the files uploaded by its users, or proactive control over the same*»[1100]. Looking at the CJEU's case law, Lomba and Evas evidence that thesis according to which proactively removing or banning illegal content will not result in an active involvement of the ISP seem to be the most persuasive[1101]. From the *L'Oréal v. Ebay* case emerges that "active role" hosting service providers cannot benefit from the ECD's liability exemption when *promote* access to illegal content «*be it through directly advertising specific content or through indexing, suggesting or branding third party information*»[1102]. According to the European judges, it is the active role to «*promote*»[1103] the content that led to lose the liability exemption, not the «*"active role" to identify infringements*»[1104]. In support of the adoption of a Good-Samaritan clause, then, it is worth observing that there are already examples of the existence of such a clause in the current legislative landscape. In the UK, for instance, the *IPO Code of Practice on Search and Copyright*[1105] establishes in Article 22 that «*No action undertaken in furtherance of these practices shall impute knowledge, create or impose liability, rights, obligations or waiver of any rights or obligations for any*

[1099] Cfr. *Ibid.* Cfr. J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, cit., p. 41. Cfr. N. LOMBA – T. EVAS, op. cit., p. 293. In this case the German court has stated that «*the fact that the Defendant (YouTube) continuously checks its stock of videos using content - ID processes and in certain cases blocks them cannot be used against it. This is because those checks are, firstly, also a measure which the Defendant (YouTube) does not undertake solely in its own business interest but which the Defendant (YouTube) uses to meet its legal responsibility so that the content recognised as rights infringing no longer remains available to the public. That type of knowledge cannot, by its very nature, lead outside the scope of Article 14 E-Commerce Directive because otherwise any type of prevention or removal would inherently be impossible for the service provider because the provider would not be allowed to obtain knowledge of the information hosted on its service, without jeopardizing its status as hosting provider. Such a consequence cannot have been intended by the legislature*». Case of the Court of Appeal (Oberlandesgericht) of Hamburg of 1.07.2015, 5 U 87/12, paragraph. 198..

[1100] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 41. AP Madrid (sec.28), 14.01.2014, Case *Telecinco v. Youtube*.

[1101] N. LOMBA – T. EVAS, op. cit., p. 293.

[1102] *Ibid.* Case C-324/09, paragraph 114.

[1103] N. LOMBA – T. EVAS, op. cit., p. 293. Cfr. Case C-324/09.

[1104] N. LOMBA – T. EVAS, op. cit., p. 293.

[1105] *IPO Code of Practice on Search and Copyright*, 17.01.2017, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/609478/code-of-practice-on-search-and-copyright.pdf.

*parties*»[1106]. Similarly, the French *Charter for the Fight against the Sale of Counterfeit Goods on the Internet*[1107], while providing for «*monitoring obligations*»[1108], states that the signing of this Charter and its implementation of measures therein «*shall not prejudice the legal status of the signatories nor their current or future liability regime…[and]…have no consequences on current or future legal proceedings*»[1109]. Particularly relevant then is the US Section 230(c)(2) of the Communications Decency Act containing a true Good Samaritans protection[1110].

Following lengthy considerations, the European Commission has decided to introduce in the DSA's Article 6 a Good Samaritan clause, considered as one of the most relevant amendments made to the ECD. The Article regulates «*voluntary own-initiative investigations and legal compliance*»[1111] and it states that «*Providers of intermediary services shall not be deemed ineligible for the exemptions from liability referred to in Articles 3, 4 and 5 solely because they carry out voluntary own-initiative investigations or take measures aimed at detecting, identifying and removing, or disabling of access to, illegal content, or take the necessary measures to comply with the requirements of national and Union law, including the Charter and the requirements set out in this Regulation*»[1112]. To be clearer, with the introduction of Article 6, the legislator's intent is to «*create legal certainty*»[1113] while not discouraging «*activities aimed at detecting, identifying and acting against illegal content that providers of*

[1106] *IPO Code of Practice on Search and Copyright*, cit., Article 22. J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 41.
[1107] *Charter for the Fight against the Sale of Counterfeit Goods on the Internet*, available at: http://www.uibm.gov.it/attachments/Charter_engl_Internet.pdf.
[1108] J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 41.
[1109] *Ivi*, pp. 41-42. *Charter for the Fight against the Sale of Counterfeit Goods on the Internet*, cit., Paragraph 6 of the Preamble and Article 3.
[1110] As Kuczerawy explains in her analysis, the protection of "Good Samaritans" comes from the US Section 230(c)(2) of the Communications Decency Act. The latter states that intermediaries shall not be held liable based on «*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* (…)». A. KUCZERAWY, *The EU Commission on voluntary monitoring: Good Samaritan 2.0 or Good Samaritan 0.5?*, cit. Cfr. J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 42.
[1111] Article 6 of the DSA.
[1112] *Ibid.*
[1113] Recital 25 of the DSA.

*intermediary services may*»[1114] now «*undertake on a voluntary basis*»[1115]. Recital 25 specifies in this regard «*the mere fact that providers undertake such activities does not lead to the unavailability of the exemptions from liability set out in this Regulation, solely because they are carrying out voluntary own-initiative investigations, provided those activities are carried out in good faith and in a diligent manner and are accompanied with additional safeguards against over-removal of legal content*»[1116]. Article 6 is indented to ensure that any measures or activities that an ISPs «*may have taken should not be taken into account when determining whether the provider can rely on an exemption from liability, in particular as regards whether the provider provides its service neutrally and can therefore fall within the scope of the relevant provision, without this rule however implying that the provider can necessarily rely thereon*»[1117]. With the intention of regulating in more detail the applicability of the new Article 6 and aware of the threat such a measure could pose to the protection of fundamental rights, the European Parliament have then added a new paragraph 1(a) to the provision. Intermediaries shall in fact carry out the relevant investigations and take the relevant measures *ex* Article 6(1) in an effective and specific manner. It is fundamental that their actions are «*accompanied*»[1118] by any safeguards demonstrating that those investigations and measures are non-discriminatory, accurate, proportionate, transparent and do not result in an over-removal of content[1119]. Moreover, in cases where ISPs use automated tools to conduct investigations, they shall make best efforts to ensure the relevant technology is sufficiently reliable to avoid «*to the maximum extent possible*»[1120] errors concerning the identification of illegal content online.

---

[1114] *Ibid.*
[1115] *Ibid.*
[1116] *Ibid.* The European Commission adds that «*the mere fact that those providers take measures, in good faith, to comply with the requirements of Union law, including those set out in this Regulation as regards the implementation of their terms and conditions, should not lead to the unavailability of those exemptions from liability*». *Ibid.* the European Parliament has also extended Recital 25, clarifying that ISPs should make «*best efforts*» to ensure that the automated tools' technology is reliable to limit to the «*maximum extent*» errors concerning the possible removal of – allegedly- illegal information. *Ibid.*
[1117] *Ibid.*
[1118] Article 6(1)(a) of the DSA.
[1119] Cfr. *Ibid.*
[1120] *Ibid.*

After having provided for the long-awaited Good Samaritan clause for "active" intermediaries, the legislators specify that this protection is not equivalent to impose «*a general monitoring obligation or active fact-finding obligation, or (…) a general obligation for providers to take proactive measures to relation to illegal content*»[1121]. «*Nothing*»[1122], the European Commission explains, «*in this Regulation should be construed as an imposition*»[1123] to perform one of the activities mentioned in Article 6 of the DSA. It emerges that, although reduced in its letter, the essence of the ECD's Article 15 remains unchanged in the DSA[1124]. New Article 7 of the DSA in fact states that «*no general obligation to monitor, neither de jure, nor de fact, through automated or non-automated means, the information which providers of intermediary services transmit or store, nor actively to seek facts or circumstances indicating illegal activity or for monitoring the behavior of natural persons shall be imposed on those providers*»[1125]. The legislator provides here for a prohibition on general monitoring obligation as that established in the ECD, without in any case prejudice to «*monitoring obligations in a specific case where set out in Union acts and, in particular, (…) orders by national authorities in accordance with national legislation that implement Union legal acts*»[1126] and «*with the conditions established*»[1127] in the DSA. The European Parliament has specified that a general monitor obligation shall not be imposed to ISPs «*neither de jure, nor the de facto*»[1128]. As it has emerged from Chapter 2, such a clarification is even more important in the light of the implicit

[1121] Recital 28 of the DSA. Cfr. European Data Protection Supervisor, *Opinion 1/2021 on the Proposal for a Digital Services Act*, cit., p. 9. Cfr. European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 49. Cfr. European Commission, *Proposal for a Regulation of The European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, cit., p. 13.
[1122] Recital 28 of the DSA.
[1123] *Ibid.*
[1124] See *supra* § 1.3.7. Cfr. Article 15 of the ECD.
[1125] Article 7 of the DSA. The general monitoring prohibition is then reiterated in Recital 71 of the DSA which, referring to the drawing up of voluntary crisis protocols, states that those measures «*should not amount to a general obligation for the participating of very large online platforms to monitor the information which they transmit or store, nor actively to seek facts or circumstances indicating illegal content.*».
[1126] Recital 28 of the DSA.
[1127] *Ibid.*
[1128] *Ibid.*

obligation to filter provided for in Article 17 of the CDSM[1129]. The European Parliament's amendments to the proposed Regulation adopted on 20 January 2022 have also included in Article 7 that ISPs shall «*not be obliged to use automated tools for content or for monitoring the behavior of natural persons*»[1130]. Furthermore, Article 7 of the DSA now provides at paragraph 1(b) and 1(c) that Member States shall not limit the offering of end-to-end encrypted services[1131] and they shall not limit the anonymous use of intermediary services[1132]. The Article establishes that digital services providers shall make reasonable efforts to enable the use of and payment for a digital service «*without collecting personal data of the recipient*»[1133].

As evidenced in Chapter 1 and Chapter 2 of this thesis work, it is essential to reiterate such provision in the new Regulation because it is «*core the balance of fundamental rights in the online world*»[1134]. «*No general monitoring*»[1135] rule in fact has a positive impact not only on the users' right to freedom of expression and freedom to receive information, but also on the right to freedom to conduct a business and on the protection of personal data and privacy, limiting also «*online surveillance*»[1136]. In all fairness, the European Commission has reported that,

---

[1129] See *supra* § 2.

[1130] Article 7(1)(a) of the DSA.

[1131] The Parliament clarifies indeed that end-to-end data's encryption is «*essential for trust in and security on the Internet, and effectively prevents unauthorised third party access*». Recital 28 of the DSA.

[1132] Cfr. B. SAETTA, *Digital Services Act: cosa prevede il testo del Parlamento europeo*, valiguablu.it, 2.02.2022, available at: https://www.valigiablu.it/digital-services-act-parlamento-europeo/.

[1133] Article 7(1)(d) of the DSA. Cfr. Recital 28 of the DSA.

[1134] European Data Protection Supervisor, *Opinion 1/2021 on the Proposal for a Digital Services Act*, cit., p. 9. Cfr. European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 49. Cfr. S. F. SCHWEMER – T. MAHLER – H. STYRI, *Liability exemptions of non-hosting intermediaries: Sideshow in the Digital Services Act?*, cit., p. 27.

[1135] Article 7 of the DSA.

[1136] European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 49. The European Commission underlines that the prohibition on general monitoring obligations «*ensures that Member States do not impose general obligations which could disproportionately limit users' freedom of expression and freedom to receive information, or could disproportionately burden service providers excessively, and thus unduly interfere with their freedom to conduct a business. It also limits online surveillance and has positive implications in the protection of personal data and privacy.*

during the construction of the DSA, it has considered options for «*changes to general monitoring obligations*»[1137], but these were immediately discarded because in contrast with the safeguard of fundamental rights[1138].

### 3.2.4. Specific Orders: Article 8 and Article 9 of the DSA

The last two Articles of the DSA's Chapter II *i.e.*, Article 8 and 9, respectively provide for specific orders to act against illegal content and to provide information. According to the European Commission, indeed, «*national judicial or administrative authorities may order providers of intermediary services to act against certain specific items of illegal content or to provide certain specific items of information*»[1139].

Article 8 expressly states that «*providers of intermediary services shall, upon the receipt via a secure communications channel of an order to act against one or more a specific items of illegal content, received from and issued by the relevant national judicial or administrative authorities, on the basis of the applicable Union or national law, in conformity with Union law, inform the authority issuing the order of the effect given to the orders, without undue delay, specifying the actions taken and the moment when the actions were taken.*». Member States at the same time shall ensure that the order meet some conditions enumerated in Article 8's paragraph 2. First of all, the order shall contains:
« *– a reference to the legal basis for the order;*

---

*Allowing such a disproportionate burden would likely lead to numerous erroneous removals and breaches of personal data, resulting in extensive litigation*». *Ibid.* Cfr. European Commission, *Proposal for a Regulation of The European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, cit., p. 13.

[1137] European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 49.

[1138] *Ibid.* Cfr. European Commission, *Proposal for a Regulation of The European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, cit., p. 13.

[1139] Recital 29 of the DSA.

*– a sufficiently detailed statement of reasons explaining why the information is illegal content, by reference to the specific provision of Union or national law in conformity with Union law;*

*– identification of the issuing authority including the date, timestamp and electronic signature of the authority, that allows the recipient to authenticate the order and contact details of a person of contact within the said authority;*

*– a clear identification of the exact electronic location of that information, such as the exact URL or URLs where appropriate or when the exact electronic location is not precisely identifiable; one or more exact uniform resource locators and, where necessary, additional information enabling the identification of the illegal content concerned;*

*– easily understandable information about redress available to the provider of the service and to the recipient of the service who provided the content, including the deadlines for appeal;*

*– where necessary and proportionate, the decision not to disclose information about the removal of or disabling of access to the content for reasons of public security, such as the prevention, investigation, detection and prosecution of serious crime, not exceeding six weeks from that decision;*»[1140]. Secondly, the order to act against illegal content's territorial scope shall not exceed what is necessary to achieve its goal[1141]. It shall be limited to the territory of the Member States who issue the legal order unless the unlawfulness of the content come from Union law or the interests at stake require a wider territorial scope[1142]. Thirdly, the order shall be written in the specific language declared by the digital intermediary – or in one of the official languages of the Member States issuing the order against illegal content – and it shall be sent to the point of contact *ex* Article 10 of the DSA[1143]. The European Parliament has specified that, according to Article 8(2)(ca) and Article 8(2)(cb), the order to act against illegal content shall respect Article 3 of the ECD and that, in cases where there is more than one digital service provider responsible for hosting the illegal content's items, then the legal

[1140] Article 8(2)(a) of the DSA.
[1141] Cfr. Article 8(2)(b) of the DSA.
[1142] *Ibid.*
[1143] Article 8(2)(c) of the DSA. See *infra* § 3.2.5.1.

order is «*issued to the most appropriate provider that has the technical and operational ability to act against those specific items*»[1144]. Then, the Digital Services Coordinator[1145] coming «*from the Member State of the judicial or administrative authority issuing the order shall, without undue delay, transmit a copy of the orders referred to in paragraph 1 to all other Digital Services Coordinators through the system established in accordance with Article 67*»[1146].

DSA's Article 9 concerns instead the disclosure of information[1147]. In particular, the legislators regulate an order to provide information which shall contain specific elements. The Article specifies that «*providers of intermediary services shall, upon receipt via secure communications channel of an order to provide a specific item of information about one or more specific individual recipients of the service, received from and issued by the relevant national judicial or administrative authorities on the basis of the applicable Union or national law, in conformity with Union law, inform without undue delay the authority of issuing the order of its receipt and the effect given to the order*»[1148]. The European Commission mandates Member States to be sure that the order meets specific conditions. It shall contain:

*«– the identification details of the judicial or administrative authority issuing the order and authentication of the order by that authority, including the date, time stamp and electronic signature of the authority issuing the order to provide information;*

*– a reference to the legal basis for the order;*

---

[1144] Article 8(2)(cb) of the DSA.

[1145] See infra § 3.2.6.

[1146] Article 8 of the DSA. Moreover, the Commission adds in paragraph 4 that «*the conditions and requirements laid down in this article shall be without prejudice to requirements under national criminal procedural law in conformity with Union law*». New Article 8(4)(a) also obliges Member State to ensure the relevant authorities may, «*at the request of an applicant whose rights are infringed by illegal content, issue against the relevant provider of intermediary services an injunction order in accordance with this Article to remove or disable access to that content*»

[1147] Cfr. P. VAN EECKE, op. cit., pp. 1492 et sq. Cfr. EUIPO, *STUDY ON LEGISLATIVE MEASURES RELATED TO ONLINE IPR INFRINGEMENTS. A project commissioned by the European Union Intellectual Property Office*, 2018, p. 40 et sq. Cfr. J. RIORDAN, *A Theoretical Taxonomy of Intermediary Liability*, in G. FROSIO (ed.), *Oxford Handbook of Online Intermediary Liability*, Oxford University Press, 05.2020, p. 25. Cfr. G. FROSIO – M. HUSOVEC, *Accountability and Responsibility of Online Intermediaries*, in G. FROSIO (ed.), *Oxford Handbook of Online Intermediary Liability*, Oxford University Press, 05.2020, p. 5.

[1148] Article 9(1) of the DSA.

*– a clear indication of the exact electronic location, an account name, or a unique identifier of the recipient on whom information is sought;*

*– a sufficiently detailed statement of reasons explaining the objective for which the information is required and why the requirement to provide the information is necessary and proportionate to determine compliance by the recipients of the intermediary services* «*with applicable Union or national rules, unless such a statement cannot be provided for reasons related to the prevention, investigation, detection and prosecution of criminal offences;*

*– where the information sought constitutes personal data within the meaning of Article 4, point (1), of Regulation (EU) 2016/679 or Article 3, point (1), of Directive (EU) 2016/680, a justification that the order is in accordance with applicable data protection law;*

*– information about redress available to the provider and to the recipients of the service concerned including deadlines for appeal;*

*– an indication on whether the provider should inform without undue delay the recipient of the service concerned, including information about the data being sought; where information is requested in the context of criminal proceedings, the request for that information shall be in compliance with Directive (EU) 2016/680, and the information to the recipient of the service concerned about that request may be delayed as long as necessary and proportionate to avoid obstructing the relevant criminal proceedings, taking into account the rights of the suspected and accused persons and without prejudice to defence rights and effective legal remedies (…)*»[1149]. The order to provide information shall then «*only requires the provider to provide information already collected for the purposes of providing the service and which lies within its control*»[1150] and, also in this case, it shall be written in the specific language declared by the digital intermediary – or in one of the official languages of the Member States issuing the order against illegal content – and it shall be sent to the point of contact *ex* Article 10 of the DSA[1151]. The Digital Services Coordinator shall transmit a copy of the order to provide information to «*all Digital Services Coordinators through the system established*

[1149] Article 9(2)(a) of the DSA.
[1150] Article 9(2)(b) of the DSA.
[1151] Article 9(2)(c) of the DSA.

*in accordance with Article 67*»[1152]. Referring to such an order, the European Commission echoes Article 8 of the Directive 2004/48/EC *i.e.*, the Directive on the enforcement of IPRs. As Van Eecke notes in fact, the Enforcement Directive establishes a «*right of information*»[1153] that «*can be invoked by a rightholder to oblige an online intermediary to make certain user data available*»[1154]. It is important to stress that, despite it could be considered as a «*difficult exercise*»[1155], in this context it is critical to find the right balance between different fundamental rights *e.g.*, the right to data protection[1156] and the rightholders' interests[1157]. In this regard, the legislators, referring to the DSA's orders to act against illegal content and orders to provide information, expressly precise that «*the national judicial or administrative authority issuing the order should balance the objective that the order seeks to achieve, in accordance with the legal basis enabling its issuance, with the rights and legitimate interests of all third parties that may be affected by the order, in particular their fundamental rights under the Charter*»[1158].

---

[1152] Article 9(4) of the DSA.

[1153] Article 8 of the Enforcement Directive. This Article in particular states that «*1. Member States shall ensure that, in the context of proceedings concerning an infringement of an intellectual property .Member States shall ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided by the infringer and/or any other person who: (a) was found in possession of the infringing goods on a commercial scale; (b) was found to be using the infringing services on a commercial scale; (c) was found to be providing on a commercial scale services used in infringing activities; or (d) was indicated by the person referred to in point (a), (b) or (c) as being involved in the production, manufacture or distribution of the goods or the provision of the services. 2. The information referred to in paragraph 1 shall, as appropriate, comprise: (a) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers; (b) information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question. 3.Paragraphs 1 and 2 shall apply without prejudice to other statutory provisions which: (a) grant the rightholder rights to receive fuller information; (b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article; (c) govern responsibility for misuse of the right of information; or (d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to his/her own participation or that of his/her close relatives in an infringement of an intellectual property right; or (e) govern the protection of confidentiality of information sources or the processing of personal data.*».

[1154] P. VAN EECKE, op. cit., pp. 1490-1491.

[1155] *Ivi*, p. 1492.

[1156] See Article 7 of the European Charter of Fundamental Rights.

[1157] Cfr. P. VAN EECKE, op. cit., p. 1492.

[1158] Recital 31 of the DSA. Cfr. EUIPO, *STUDY ON LEGISLATIVE MEASURES RELATED TO ONLINE IPR INFRINGEMENTS. A project commissioned by the European Union Intellectual Property Office*, 2018, p. 40 et sq. Cfr. J. RIORDAN, *A Theoretical Taxonomy of Intermediary Liability*, in G. FROSIO (ed.), *Oxford Handbook of Online Intermediary Liability*, Oxford

With reference to both Article 8 and Article 9 of the DSA, moreover, the European Commission explains that, as «*the orders in question relate to specific items of illegal content and information, respectively, where they are addressed to providers of intermediary services established in another Member State, they should not in principle restrict those providers' freedom to provide their services across borders*»[1159]. Recital 33 provides that the competent authority should transmit orders to act against illegal content and to provide information directly to the relevant addressee via any electronic means capable of producing a written record under conditions allowing the intermediary to establish authenticity, including the accuracy of the date and time of sending and receipt of the order, such as secured email and platforms or other secured channels, including those made available by the ISP, according with the protection of personal data[1160]. After its first reading of the DSA draft, the European Parliament has provided that the intermediary who received both an order to act against illegal content or an order to provide information shall have in any case the right of an effective remedy[1161]. This includes for example the right to challenge the order before the judicial authorities of the Member State of the issuing competent authority[1162]. Similarly, new Article 9a provides effective remedies for recipients of the services in cases in which their (lawful) content was removed or their information was sough according to Article 8 and 9 of the DSA[1163].

## 3.2.5. Due diligence obligations for Digital Services Providers

University Press, 05.2020, p. 25. Cfr. G. FROSIO – M. HUSOVEC, *Accountability and Responsibility of Online Intermediaries*, in G. FROSIO (ed.), *Oxford Handbook of Online Intermediary Liability*, Oxford University Press, 05.2020, p. 5.

[1159] Recital 33 of the DSA.

[1160] See also Recital 33(a) and (b) of the DSA as amended by the European Parliament during the first reading of the ordinary legislative procedure.

[1161] Cfr. Article 8(2b) of the DSA. Cfr. Article 9(2b) of the DSA.

[1162] Cfr. Article 8(2b) of the DSA and Article 9(2b) of the DSA. The European Parliament has also specified in Article 8 (2c) Article 9(2c) of the DSA that when the digital service provider cannot comply with the order issued because it contains errors or it does not contain sufficient information for its execution, then it shall inform without delay the – judicial or administrative – authority issuing the order and asking for clarification.

[1163] Cfr. Article 9a of the DSA.

Chapter III of the DSA is dedicated to the due diligence obligations for online platforms. Here, with the intent of achieving a «*transparent, accessible and safe online environment*»[1164], the legislators provide for different «*reasonable and non-arbitrary*»[1165] obligations designated for various type of ISPs[1166]. As Recital 34 of the DSA explains indeed, «*it is necessary to establish a clear, effective, predictable and balanced set of harmonised due diligence obligations for providers of intermediary services*». Those obligations are essentially prepared to «*guarantee different public policy objectives such as a high level of consumer protection, the safety and trust of the recipients of the service, including minors and vulnerable users, the protection of relevant fundamental rights enshrined in the Charter, the meaningful accountability of those providers and the empowerment of recipients and other affected parties, whilst facilitating the necessary oversight by competent authorities*»[1167].

To be honest, considering that the ECD establishes only a safe harbours regime *i.e.*, an immunity regime for ISPs, Lomba and Evas have observed that a "liability" regime for intermediaries could have been «*explored*»[1168] «*as a policy option*»[1169]. However, as clearly emerges from the new DSA Proposal, the European legislators have not opted for the creation of a new "liability" regime for ISPs but for the institution of new obligations parameterized to the digital platforms' size. Thus, - as anticipated *supra* in this Chapter[1170] and recalled in this paragraph[1171] -, the proposed Regulation provides for «*basic obligations applicable to all*»[1172] ISPs, for obligations applicable to hosting intermediaries, for additional obligations applicable to online platforms and for rules tailored on very large platforms[1173]. These provisions will be analyzed in detail in the subsequent paragraphs.

---

[1164] Chapter III of the DSA.
[1165] Recital 35 of the DSA.
[1166] See *supra* § 3.2.
[1167] Recital 34 of the DSA.
[1168] N. LOMBA – T. EVAS, op. cit., annex 3, p. III.
[1169] *Ibid.*
[1170] See *supra* § 3.2.
[1171] See *supra* at the beginning of this paragraph.
[1172] Recital 35 of the DSA.
[1173] Cfr. *Ibid.* The legislators specify also that «*to the extent that providers of intermediary services may fall within those different categories in view of the nature of their services and their size, they should comply with all of the corresponding obligations of this Regulation.*». *Ibid.*

### 3.2.5.1. Provisions applicable to all ISPs

About the first Section of the DSA's Chapter III containing «*provisions applicable to all providers of intermediary services*»[1174], the Regulation provide for the establishment of a single point of contact for Member States' authorities, the Commission and the Board and the designation of legal representatives while clarifying the regulation of the ISPs' terms and condition and establishing transparency obligations. Article 10 and Article 10a states indeed «*providers of intermediary services shall designate a single point of contact*»[1175] which enable them to communicate directly, by electronic means, with Member States' authorities, the Commission and the Board and a single point of contact enabling recipients of the service to communicate with digital services providers[1176]. Article 11 explains then that ISPs «*which do not have an establishment in the Union but which offer services in the Union shall designate, in writing, a legal or natural person to act as their legal representative in one of the Member States where the provider offers its services*» which «*(...) can be held liable for non-compliance with obligations under this Regulation, without prejudice to the liability and legal actions that could be initiated against the provider of intermediary services*»[1177]. As it emerges from Article 12, in addition, the

[1174] Chapter II's Section 1 of the DSA.

[1175] Article 10 of the DSA states that «*1. Providers of intermediary services shall designate a single point of contact enabling them to communicate directly, by electronic means, with Member States' authorities, the Commission and the Board referred to in Article 47 for the application of this Regulation. 2. Providers of intermediary services communicate to the Member States' authorities, the Commission and the Board, the information necessary to easily identify and communicate with their single points of contact, including the name, the email address, the physical address and the telephone number, and shall ensure that the information is kept up to date. 2a. Providers of intermediary services may establish the same single point of contact for this Regulation and another single point of contact as required under other Union law. When doing so, the provider shall inform the Commission of this decision. 3. Providers of intermediary services shall specify in the information referred to in paragraph 2, the official language or languages of the Union, which can be used to communicate with their points of contact and which shall include at least one of the official languages of the Member State in which the provider of intermediary services has its main establishment or where its legal representative resides or is established.*».

[1176] Cfr. Article 10a of the DSA.

[1177] Article 11 of the DSA states that «1. *Providers of intermediary services which do not have an establishment in the Union but which offer services in the Union shall designate, in writing, a legal or natural person to act as their legal representative in one of the Member States where the provider offers its services. 2. Providers of intermediary services shall mandate their legal representatives to be addressed in addition to or instead of the provider by the Member States'*

legislator obliges all intermediaries to include in their terms and conditions[1178] «*any restrictions*»[1179] imposed on the use of their services[1180]. The platform and the European citizen *i.e.*, the user, have indeed a contractual relationship in which the digital platform has usually a dominant position because it can at any time decide to modify its terms of the service[1181]. Users in fact rarely have the ability to negotiate the terms and conditions under which they can upload content[1182] and there is the risk of having an evident imbalance between the two parties. The Commission states thus in the DSA the information provided by the ISP shall include «*any policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making and human review*»[1183]. The ISPs' content moderation activities, either automated or not automated defined by the legislators as those «*aimed at detecting, identifying and*

*authorities, the Commission and the Board on all issues necessary for the receipt of, compliance with and enforcement of decisions issued in relation to this Regulation. Providers of intermediary services shall provide their legal representative with the necessary powers and sufficient resources in order to guarantee their efficient and timely cooperation with the Member States' authorities, the Commission and the Board and comply with any of those decisions. 3. The designated legal representative can be held liable for non-compliance with obligations under this Regulation, without prejudice to the liability and legal actions that could be initiated against the provider of intermediary services. 4. Providers of intermediary services shall notify the name, postal address, the electronic mail address and telephone number of their legal representative to the Digital Service Coordinator in the Member State where that legal representative resides or is established. They shall ensure that that information is kept up to date. he Digital Service Coordinator in the Member State where that legal representative resides or is established shall, upon receiving that information, make reasonable efforts to assess its validity. 5. The designation of a legal representative within the Union pursuant to paragraph 1 shall not amount to an establishment in the Union. 5a. Providers of intermediary services that qualify as micro, small or medium-sized enterprises (SMEs) within the meaning of the Annex to Recommendation 2003/361/EC, and who have been unsuccessful in obtaining the services of a legal representative after reasonable effort, shall be able to request that the Digital Service Coordinator of the Member State where the enterprise intends to establish a legal representative facilitates further cooperation and recommends possible solutions, including possibilities for collective representation*».

[1178] According to Article 2(q) of the DSA terms and conditions refer to «*all terms and conditions or specifications, by the service provider irrespective of their name or form, which govern the contractual relationship between the provider of intermediary liability and the recipients of the services*».

[1179] Article 12 of the DSA. See Recital 38 of the DSA as amended by the European Parliament.

[1180] Cfr. European Data Protection Supervisor, *Opinion 1/2021 on the Proposal for a Digital Services Act*, cit., pp. 10-11. Cfr

[1181] B. SAETTA, *Digital Service Act: L'Europa prepara le nuove regole per le piattaforme online*, cit. Cfr. E. DOUEK, *YouTube's Bad Week and the Limitations of Laboratories of Online Governance*, laewfareblog, 11.06.2019, available at: https://www.lawfareblog.com/youtubes-bad-week-and-limitations-laboratories-online-governance.

[1182] The reference is to the right to access and to upload content. N. LOMBA – T. EVAS, op. cit., p. 194.

[1183] Article 12(1) of the DSA. Cfr. European Data Protection Supervisor, *Opinion 1/2021 on the Proposal for a Digital Services Act*, cit., pp. 10-11.

*addressing illegal content or information incompatible with their terms and conditions, provided by recipients of the services, including measures taken that affect the availability, visibility and accessibility of that illegal content or that information, such as demotion, disabling of access to, delisting, demonetisation or removal thereof, or the recipients' ability to provide that information, such as the termination or suspension of a recipient's account*»[1184], may impact the protection of fundamental rights and that is why their implementation is much discussed[1185]. As an example, the European Data Protection Supervisor has claimed that the content moderation's activity can entail the processing of personal data, affecting «*the rights and interests of the individuals concerned*»[1186]. Indeed, with reference to different «*categories of data that are processed and nature of the processing*»[1187], automated content moderation may have a substantial influence on both the right to freedom of expression and the right to data protection[1188]. Furthermore, it may have an impact on the right to access information protected by Article 11 of the European Charter of Fundamental Rights[1189] and on the freedom to conduct a business; users working with online platforms in fact rely on as many people as possible to see their content in order to make income, but when their material disappear from the platform, their right is directly affected[1190]. The fact that content moderation may have an impact on fundamental rights is then confirmed by Article 12(2), which establishes that ISPs shall operate «*in a fair, transparent, coherent, diligent, timely, non-arbitrary, non-discriminatory and proportionate manner in applying and enforcing the restrictions to in paragraph*

[1184] Article 2(p) of the DSA.
[1185] Cfr. European Data Protection Supervisor, *Opinion 1/2021 on the Proposal for a Digital Services Act*, cit., pp. 10-11. Cfr. European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 20-21. Cfr. § 2.3.
[1186] European Data Protection Supervisor, *Opinion 1/2021 on the Proposal for a Digital Services Act*, cit., p. 10.
[1187] *Ibid.*
[1188] *Ibid.* Cfr. European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 20-21.
[1189] See *supra* § 1.3.10.
[1190] Cfr. N. LOMBA – T. EVAS, op. cit., pp. 193 et sq. Cfr. Ivi, p. 203-207. See *infra* § 3.2.5.3., § 3.2.5.4.

*1, with due regard to the rights and legitimate interests of all parties involved, including the applicable fundamental rights of the recipients of the service as enshrined in the Charter*»[1191]. In light of this, and despite the new Article 12(2e) states terms and conditions shall comply with the essential principle of fundamental rights, the provision of the DSA's Article 13 introducing «*transparency reporting obligations*»[1192] for ISPs is welcomed. As stated in the proposed Regulation, in fact, all providers of intermediary service, except for «*micro or small enterprises providers as defined in Commission Recomendation 2003/361/EC which do not qualify as very large online platforms*»[1193], are obliged to annually report «*in a standardized and machine-redable format (…) on the content moderation they engage in, including the measures taken as a result of the application and enforcement of their terms and conditions*»[1194]. The legislator specify that the report shall be clearly, «*easily comprehensible and detailed*»[1195] written and it must contain specific information[1196]. Along the same lines, the

[1191] Please note that the European Parliament have enriched the terms and conditions' regulation to the point of establishing in Article 12(2f) that the terms and conditions that do not respect the same Article 12 «*shall not be binding on the recipients*». Cfr. European Data Protection Supervisor, *Opinion 1/2021 on the Proposal for a Digital Services Act*, cit., p. 10-11.
[1192] Article 13 of the DSA.
[1193] Recital 39 of the DSA.
[1194] *Ibid.*
[1195] Article 13 of the DSA.
[1196] Article 13(1) states in fact that the reports «*shall include, in particular, information on the following, as applicable: (a) the number of orders received from Member States' authorities, categorised by the type of illegal content concerned, including orders issued in accordance with Articles 8 and 9, and the average time needed to inform the authority issuing the order of its recepeit and the effect given to the order; (aa) where applicable, the complete number of content moderators allocated for each official language per Member State, and a qualitative description of whether and how automated tools for content moderation are used in each official language; (b) the number of notices submitted in accordance with Article 14, categorised by the type of alleged illegal content concerned, the number of notices submitted by trusted flaggers, any action taken pursuant to the notices by differentiating whether the action was taken on the basis of the law or the terms and conditions of the provider, and the average and median time needed for taking the action; providers of intermediary services may add additional information as to the reasons for the average time for taking the action; (c) meaningful and comprehensible information about the content moderation engaged in at the providers' own initiative, including the use of automated tools, the number and type of measures taken that affect the availability, visibility and accessibility of information provided by the recipients of the service and the recipients' ability to provide information, categorised by the type of reason and basis for taking those measures, as well as, where applicable, measures taken to provide training and assistance to members of staff who are engaged in content moderation, and to ensure that non-infringing content is not affected; (d) the number of complaints received through the internal complaint-handling system referred to in Article 17, the basis for those complaints, decisions taken in respect of those complaints, the average and median time needed for taking those decisions and the number of instances where those decisions were reversed.».*

legislators add in Article 23(1)(c) that, referring to the online platforms' transparency obligations[1197], the transparency report shall include «*any use of automatic means for the purpose of content moderation including a specification of the precise purposes, indicators of the accuracy of the automated means in fulfilling those purposes and any safeguards applied*»[1198]. Moreover, as it will be analyzed below, in the context of the provisions applicable to VLOPs[1199], the European Commission requires VLOPs to publish and report the results of their risk assessment – DSA's Article 26 -, mitigation of risks – DSA's Article 27 – and independent audit – DSA's Article 28 -[1200]. A new relevant provision concern then the regulation of online interface[1201] design and organisation. Article 13a of the DSA in fact prohibit digital intermediaries to use their online interface in such a way as to affect users' decisions by restricting their ability to make a «*free, autonomous and informed choice*»[1202], for example by visually emphasizing «*any of the consent options when asking the recipient of the service for a decision*»[1203]. The provision requires that online platforms shall also refrain from insistently asking for consent to data processing when it has already been denied[1204].

### 3.2.5.2. Obligations for Hosting Service Providers: the new Notice-and-action procedure

In Chapter 1, § 1.3.6.4., it was noted that already in the ECD the legislator had expressed the need to define the, until now unclear, NTD procedure[1205]. In drafting Article 14 of the new proposed Regulation, the European Commission,

[1197] See *infra* § 3.2.5.4.
[1198] Cfr. European Data Protection Supervisor, *Opinion 1/2021 on the Proposal for a Digital Services Act*, cit., p. 11.
[1199] See Chapter II's Section 4 of the DSA. See infra § OBLIGATIONS FOR VLOPS
[1200] Cfr. European Data Protection Supervisor, *Opinion 1/2021 on the Proposal for a Digital Services Act*, cit., p. 11. Cfr. *infra* § due diligence obligations for online platforms and VLOPs.
[1201] Online interface are defined by Article 2(1)(k) as «*any software, including a website or a part thereof, and applications, including mobile applications which enables the recipients of the service to access and interact with the relevant intermediary service*».
[1202] Article 13a(1) of the DSA.
[1203] *Ibid.*
[1204] Cfr. *Ibid.* Cfr. B. SAETTA, *Digital Services Act: cosa prevede il testo del Parlamento europeo*, cit.
[1205] See Article 21(2) of the ECD.

aided by a new definition of «*illegal content*»[1206], seems to give voice to this need, outlining a detailed NTD system. As analyzed during this work[1207], without such a mechanism it would be impossible to have a «*prompt and coordinated removal of illegal content at EU level, such as*»[1208] IPRs infringements online[1209]. The actual NTD system seems to be inefficient and not precisely defined; a lot of users (the 54% according to the European Commission[1210]) notifying illegal content to a digital platform have expressed «*their dissatisfaction*»[1211] with the mechanism, affirming not only that they «*were not aware of any action taken by the platform as a follow up on their reporting*»[1212] but also that, in general, transparency is lacking[1213].

As hosting service providers play a fundamental role in tackling illegal content online because «*they store information provided by and at the request of the recipients of the service and typically give other recipients access thereto*»[1214], it is crucial that each of them implements a «*user-friendly*»[1215] NTD system. As exposed in § 1.3.6.4., such a procedure is essential to facilitate the communication by users of the presence of (alleged) IPRs illicit online – the «*'notice'*»[1216] - and to allow then the digital service providers to establish whether or not «*the content in question is clearly illegal without additional legal or factual examination of the information indicated in the notice and remove or to disable access to that*

[1206] Article 2(g) of the DSA. See *supra* § 3.2.2. Cfr. N. LOMBA – T. EVAS, op. cit., p. 89.
[1207] See *supra* § 3.2.2., § 2.2.4.3.
[1208] N. LOMBA – T. EVAS, op. cit., p. 105.
[1209] Cfr. Ivi, pp. 105 et sq. Cfr. European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 20-21. Cfr. C. ANGELOPOULOS – S. SMET, *Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability*, cit. Cfr. R. JULIÀ-BARCELÓ – K. J. KOELMAN, op. cit., p. 238. Cfr. B. DINWOODIE editor, *Secondary Liability of Internet Service Provider*, cit., p. 72. Cfr. . J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, op. cit., p. 27.
[1210] European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 20.
[1211] *Ibid.*
[1212] *Ibid.*
[1213] *Ivi*, pp. 20-21.
[1214] Recital 40 of the DSA.
[1215] *Ibid.*
[1216] *Ibid.*

*content*»[1217] - «*'action'*»[1218] -. In the DSA, the legislators refer to a real «*obligation*»[1219] to put in place NTD systems, explaining that this should apply, for example, «*to file storage and sharing services, web hosting services, advertising servers and paste bins, in as far as they qualify as providers of hosting services covered by*»[1220] the proposed Regulation.

Article 14 makes clear that the NTD mechanisms shall be, first of all, clear and «*easy to access*»[1221]. On the basis of the notices coming from «*any individual or entity*»[1222], a diligent and careful economic operator may be able to detect the illegality of the content in question. According to the legislators in fact valid notices shall be «*sufficiently precise and adequately substantiated*»[1223] and they shall contain:

«*(a) an explanation of the reasons why the individual or entity considers the information in question to be illegal content;*

*(aa) where possible, evidence that substantiates the claim;*

*(b) where relevant, a clear indication of the electronic location of the exact information, for example, the exact URL or URLs, or, where necessary, additional information enabling the identification of the illegal content as applicable to the type of content to the specific type of hosting service;*

*(c) the name and an electronic mail address of the individual or entity submitting the notice, except in the case of information considered to involve one of the offences referred to in Articles 3 to 7 of Directive 2011/93/EU;*

*(d) a statement confirming the good faith belief of the individual or entity submitting the notice that the information and allegations contained therein are accurate and complete*»[1224]. The new DSA's NTD procedure requires then that in cases where the notice includes the name and electronic mail address of the person or entity who submitted it, the ISP shall inform the other party that the

[1217] *Ibid.* Article 14(1) specifies that the NTD mechanisms shall «*allow for the submission of notices exclusively by electronic means*».
[1218] Recital 40 of the DSA.
[1219] *Ibid.*
[1220] *Ibid.*
[1221] Article 14(1) of the DSA.
[1222] *Ibid.*
[1223] Article 14(2) of the DSA.
[1224] *Ibid.*

notification has been properly received[1225], advising them also, if present, of the use by the intermediary of «*automated means (...) for decision-making*»[1226]. DSA's Article 14 explains that, once the notice has been sent and received by the hosting provider, the latter shall take his decision «*in respect of the information to which the notices relate*»[1227] in a «timely, *diligent, non-discriminatory and non-arbitrary manner*»[1228] and communicate it «*without undue delay*»[1229]. In cases where the hosting providers are not equipped with the «*technical, operational or contractual ability to act against specific items of illegal content*»[1230], then they «*may hand over*»[1231] a notice to the intermediary having «*the direct control of specific items of illegal content, while informing the notifying person or entity and the relevant Digital Services Coordinator*»[1232]. The European Parliament's amendment to the DSA legislative text has also added a paragraph 3(a) and a paragraph 5(a) to Article 14. The first one ensures that the information subject to a notice shall remain accessible while its legality's assessment is pending and that, referring to the same period, hosting services providers shall not be held liable for failure to remove notified information. The second ensure the anonymity of individuals submitting notices, specifying however that it is not granted in cases of «*alleged violations of personality right or intellectual property rights*»[1233].

The provision of a specific procedure regulation the removal or the disabling of access to – allegedly – illegal information is critical to adequately protecting «*the right and legitimate interests of all affected parties*»[1234] *i.e.*, their fundamental rights. In the context of the NTD system and its implications, in fact, the legislators expressly admit that, «*as the case may be*»[1235], the fundamental

[1225] Article 14(4) of the DSA. The communication is made by sending a «*confirmation of receipt of the notice*». *Ibid.*
[1226] Article 14(6) of the DSA.
[1227] *Ibid.*
[1228] *Ibid.*
[1229] Article 14(5) of the DSA. Cfr. Recital 41(a) of the DSA.
[1230] Article 14(6) of the DSA.
[1231] *Ibid.*
[1232] *Ibid.* Cfr. Recital 40(a) of the DSA. Recital 40(b) precises also that hosting provides should act only against specific notified items and their removal or disabling of their access is not possible for legal o technological reasons, then the intermediary shall inform the recipient of the service of the notification and seek action. Recital 40(b) of the DSA.
[1233] Article 14(5)(a) of the DSA.
[1234] Recital 41 of the DSA.
[1235] *Ibid.*

rights involved include not only the right to protection of property, in particular IPRs, but also the right to non-discrimination of parties harmed by illegal content, the right to respect for private and family life, the right to protection of personal data, the right to freedom of expression and information, the right to freedom to conduct a business of ISPs, the rights of the human dignity and of the child, the right to non-discrimination and the right to an effective remedy of the recipients of the service[1236].

It is worth also underlying that the NTD procedure established in Article 14 of the DSA can affect the application of the safe harbours regime[1237]. The European Commission clarifies in fact that the notices submitted *ex* Article 14(2) of the DSA[1238] according to which a diligent intermediary can establish the illegality of the content in question without conducting a legal or factual examination, «*shall be considered to give rise to actual knowledge or awareness for the purposes of Article 5 in respect of the specific item of information concerned*»[1239]. New Recital 41 of the DSA as amended by the European Parliament however, referring to notices submitted by anonymous individuals, precises that such notices should «*not give rise to actual knowledge, except in the case of information considered to involve one of the offences referred to in Directive 2011/93/EU*».

Article 15 of the DSA provide then for a safeguard for the recipients of the digital services *i.e.*, the users. Considering that after having received a notice, or through their own initiative, the hosting services providers may decide – also utilizing automated methods – to remove or disable access to, or to demote or to impose other specific measures concerning a specific information online, the legislators establish that they «*shall inform*»[1240] the users of their decision providing at the same time «*a clear and specific statement of reasons*»[1241].

[1236] Cfr. *Ibid.* See *supra* § 1.3.6.4., § 1.3.10., § 2.3.
[1237] See *supra* § 3.2.2.
[1238] See *supra* in this paragraph.
[1239] Article 14(3) of the DSA. See *supra* § 3.2.2.
[1240] Article 15(1) of the DSA.
[1241] *Ibid.*

According to the proposed Regulation, the statement of reason shall («*at least*»[1242]) specify:

«*(a) whether the action entails either the removal of, or the disabling of access to, the demotion of, or imposes other measures with regard to information and, where relevant, the territorial scope of the action and its duration, where an action was taken pursuant to Article 14, an explanation about why the action did not exceed what was strictly necessary to achieve its purpose;*

*(b) the facts and circumstances relied on in taking the action, including where relevant whether the decision was taken pursuant to a notice submitted in accordance with Article 14 or based on voluntary own-initiative investigations or to an order issued in accordance with Article 8 and where appropriate, the identity of the notifier;*

*(c) where applicable, information on the use made of automated means in taking the action, including where the action was taken in respect of content detected or identified using automated means;*

*(d) where the action concerns allegedly illegal content, a reference to the legal ground relied on and explanations as to why the information is considered to be illegal content on that ground;*

*(e) where the action is based on the alleged incompatibility of the information with the terms and conditions of the provider, a reference to the contractual ground relied on and explanations as to why the information is considered to be incompatible with that ground;*

*(f) clear, user-friendly information on the redress possibilities available to the recipient of the service in respect of the action, in particular, where applicable through internal complaint-handling mechanisms, out-of-court dispute settlement and judicial redress*»[1243].

It is fundamental the recipients of the digital services are put in a position to exercise their right to an effective remedy[1244] and their «*redress possibilities referred to in point (f)*»[1245].

[1242] Article 15(2) of the DSA.
[1243] Article 15(2) of the DSA.
[1244] See *supra* § 1.3.6.4., § 1.3.10., § 2.3. Cfr. Article 47 the European Charter of Fundamental Rights.

As extensively highlighted in the course of this long analysis, indeed, despite through the Notice-and-action procedure the legislators try to avoid IPRs infringements are perpetrated online, its application risks at the same time to affect online users' fundamental rights, including their right to freedom of expression[1246]. In this perspective, communicating to digital users the reasons why their content has been removed or disabled, and, in parallel, how they can challenge this decision, seems to be democratically correct. Recital 42 of the DSA does not fail to point out that these "obligations to inform" «*should apply irrespective of the reasons for the decision, in particular whether the action has been taken because the information notified is considered to be illegal content or incompatible with the applicable terms and conditions*»[1247]. The European Parliament has however pointed out in the last paragraph of Recital 42 of the DSA and in Article 15(1) that this obligation should not apply when «*the content is deceptive or part of high-volume of commercial content*»[1248], or for example when «*it has been requested by a judicial or law enforcement authority to not inform*»[1249] because of an ongoing criminal investigation until the same is closed. It is worth noting then that, in amending the ECD, the legislator is careful also to take actions also to prevent the commitment of crime online. Recital 42a and new Article 15a of the DSA as amended by the European Parliament[1250] in fact oblige the online platforms becoming «*aware of any information giving rise to a suspicion that a serious criminal offence involving a threat to the life or safety of persons has taken place, is taking place or is likely to take place*»[1251] to inform the interested Member States' law enforcement or judicial authorities, or alternatively, the Member States' law enforcement authorities where the online

[1245] Article 15(3) of the DSA. Article 15(4) specifies in fact that the hosting services providers must publish their decisions and their statements of reasons «*in a publicly accessible machine-readable database managed and published by the Commission*» not containing personal data.
[1246] Cfr. Recital 42 of the DSA. See *supra* § 1.3.6.4., § 1.3.10., § 2.3.
[1247] Cfr. *supra* § 3.2.5.1. According to Recital 42, moreover, it is possible always to contest the ISP's decision also through judicial redress.
[1248] Recital 42 of the DSA.
[1249] *Ibid.*
[1250] In the legislative text proposed by the Commission, the provision of «*notification of suspicions of criminal offences*» was contained in Article 21 of the DSA.
[1251] Article 15a(1) of the DSA.

platform is established or Europol, so as to eventually contrast the relevant illicit[1252].

### 3.2.5.3. Further provisions applicable to online platforms

In the wake of what has been so far analyzed regarding the NTD for hosting services providers, DSA's Chapter II Section 3 enriches this legal framework by providing further specific rules «*applicable to online platforms*»[1253]. The latter, which include hosting service providers[1254] and - for the application of this Regulation's Section - exclude micro or small businesses «*within the meaning of the Annex to Recommendation 2003/361/EC*»[1255] operating as online platforms, are the protagonist of additional obligations aiming at safeguarding the online environment and protecting users from illegal content. In order to ensure the application of these rules does not represent an undue burden on smaller platforms, moreover, the European Parliament[1256] have introduced in Article 16(2) of the DSA (and correspondingly in Recital 43(a)) the possibility of benefiting from a "waiver" to the requirements of Chapter III Section 3 for non-profit ISPs or medium-size intermediaries that do not present any systemic risk related to illegal content and have limited exposure to it. In order to obtain the waiver, the digital services providers involved should justify their reasons and send their application to their Digital Services Coordinators of establishment for a preliminary evaluation. The European Commission will then decide whether to issue a waiver or not[1257].

To adequately protect the user's right to an effective remedy against the online platform's decision on the content uploaded online[1258] - the legislators

[1252] Cfr. Article 15a(2) of the DSA. Cfr. Recital 42(a) of the DSA.
[1253] Chapter II's Section 3 of the DSA.
[1254] Cfr. Article 2(h) of the DSA. See supra § 3.2.1.
[1255] Article 16 of the DSA. This essentially happens «*to avoid disproportionate burdens towards small enterprises*». It would be unbalanced in fact to apply the same obligations to small platforms as to large ones. Despite that, small or micro enterprises operating as online platforms can «s*et up, on a voluntary basis, a system that complies with one or more*» of the obligations provided in Chapter II's Section 3 of the DSA. Recital 43 of the DSA.
[1256] The reference is to the amendments made by the European Parliament to the DSA's legislative text proposed by the European Commission. See *supra* § 3.1.
[1257] Cfr. Recital 43(a) of the DSA. Cfr. Article 16(2)(3)(4)(5)(6)(7) of the DSA.
[1258] See *supra* § 3.2.5.2.

specifically refer to «*(a) decisions to remove, demote, disable access to or impose other measures that restrict visibility availability or accessibility of the information; (b) decisions to suspend or terminate, or limit the provision of the service, in whole or in part, to the recipients; (c) decisions to suspend or terminate the recipients' account; (ca) decisions to restrict the ability to monetise content provided by the recipients*»[1259] - the proposed Regulation ensures that for at least six months after the day the recipients of the services have been informed of the decision referred to Article 15, they can («*easily*»[1260] and in an «*user-friendly*»[1261] manner) have access to «*an effective internal complaint-handing system*»[1262]. It is noted in this regard that such a mechanism was absent in the ECD, which only provides for the general possibility of appealing to out-of-court dispute settlement[1263].

At the same time, to successfully decide the disputes relating to the online platforms' decisions referred to Article 17(1) of the DSA and the complaints that cannot be satisfactorily resolved through the internal complaint-handling system[1264], Article 18 of the DSA entitles the recipients of the service «*to select any out-of-court dispute settlement body that has been certified in accordance with paragraph 2*»[1265]. DSA's Article 18(2) in fact calls in the «*Digital Services Coordinator of the Member State where the out-of-court dispute settlement body is established*»[1266], providing that it shall verify both the out-of-court dispute settlement and the dispute settlement itself[1267]. With regard to out-of-court dispute settlement body, the Digital Service coordinator shall certify that it is «*impartial and independent*»[1268] both towards online platforms, towards the recipients of the service and towards individuals or entities submitting the notices. The body shall

[1259] Article 17(1) of the DSA.
[1260] Recital 44 of the DSA. Cfr. Article 17(2) of the DSA.
[1261] Article 17(2) of the DSA.
[1262] Article 17(1) of the DSA. Cfr. European Data Protection Supervisor, *Opinion 1/2021 on the Proposal for a Digital Services Act*, cit., p. 12. The European Parliament has included in Article 17(2) that the digital platforms shall specify in their terms and conditions the rules of their internal complain handling system.
[1263] See Article 17 of the ECD.
[1264] See *supra* in this paragraph.
[1265] Article 18(1) of the DSA.
[1266] Article 18(2) of the DSA. See *infra* § 3.2.6.
[1267] Cfr. Article 18(3),(4),(5),(6) of the DSA.
[1268] Article 18(2)(a) of the DSA.

have «*the necessary expertise in relation to the issues arising in one or more particular areas of illegal content, or in relation to the application and enforcement of terms and conditions of one or more types of online platforms (…)*»[1269] and its members shall be remunerated independently of the outcome of the procedure[1270]. Article 18 requires also that the persons in charge of dispute resolution shall not have any connection to the digital platform that makes them "incompatible" with holding this office[1271]. Referring to the dispute settlement itself, the Digital Services Coordinator shall verify that it is easily accessible through electronic communication technology also to persons with disabilities[1272], that it is «*capable of settling dispute in a swift, efficient and cost-effective manner and in at least one official language of the Union*»[1273] and that it can occur in accordance with clear, fair, clearly visible and publicly accessible rules of procedure[1274]. The Digital Services Coordinator shall (on a yearly basis) evaluate the out-of-court dispute settlement's compliance with the afore-mentioned conditions[1275] and it shall write up a report aiming at monitoring the functioning out-of-court dispute settlement bodies and procedure[1276]. The proposed Regulation precise in any case that the out-of-court dispute settlement's procedure just described is without prejudice to «*the possibility to seek judicial redress in accordance with the laws of the Member State concerned*»[1277] and to Directive 2013/11/EU which ensures «*alternative dispute resolution procedures and entities for consumers*»[1278].

The NTD procedure *ex* Article 14 of the DSA seems to be facilitated and simplified by the presence of the so-called trusted flaggers mentioned in the context of the due diligence obligations applicable to online platforms[1279]. While

[1269] Article 18(2)(b) of the DSA.
[1270] Article 18(2)(ba) of the DSA.
[1271] Article 18(2)(bb) of the DSA.
[1272] Article 18(2)(c) of the DSA.
[1273] Article 18(2)(d) of the DSA.
[1274] Article 18(2)(e) of the DSA.
[1275] Eventually it can also revoke the status of out-of-court dispute settlement. Cfr. Article 18(2a) of the DSA.
[1276] Cfr. Article 18(2b)(2c) of the DSA.
[1277] Recital 44 of the DSA.
[1278] Article 18(6) of the DSA.
[1279] Article 19 of the DSA. Cfr. T. RODRÍGUEZ DE LAS HERAS BALLELL, op. cit., p. 10. The author considers that in order to achieve a balanced removal of information online, it is necessary to "call into question" the trusted flaggers, cooperating with them. For the definition of trusted flaggers,

retaining the obligation to «*decide and process upon all notices submitted (…) in an objective manner*»[1280] indeed, the DSA assures priority and promptness in decision to notifications coming from the trusted flaggers[1281]. According to Article 19 of the DSA, it is possible for the applicant to obtain the qualification of "trusted flaggers" by demonstrating (cumulatively): thoughtfulness toward collective interests; independence from any online platforms; particular expertise and competence for the purpose of detecting, identifying and notifying illegal; the ability of to carry out their own activities «*for the purposes of submitting notices in an accurate and objective manner*»[1282]; it has a transparent funding system; and it publishes annually a «*clear, easily, comprehensible detailed and standardized reports on all notices submitted*»[1283] referred to Article 14[1284]. Only after having verified all the relevant conditions, then the Member State's Digital Services Coordinator in which the applicant is based awards the «*status of trusted flagger*»[1285] of that Member State[1286]. The Regulation clarifies that the trusted flaggers can be public entities as well as «*non-governmental organisations, consumer organisations and semi-public bodies*»[1287]. For what strictly regard IPRs, this role can be fulfilled by industry and rights holders' organisations that have demonstrated to meet the conditions required by Article 19(2) of the DSA[1288] and, more importantly, to respect exceptions and limitations to IPRs[1289]. The trusted flaggers' status, however, is not permanent and irrevocable. The same Article 19(5) and 19(6) states indeed that, following an appropriate reporting

---

cfr. European Commission, *Commission Reccomendation of 1.3.2018 on measures to effectively tackle illegal content online*, cit., p. 10.

[1280] Recital 46 of the DSA.

[1281] According to Article 19(1a), digital platforms should also take «*the necessary technical and organisational measures*» to guarantee priority to notices to restore information that has been incorrectly removed or in relation to which an incorrect restriction or disabling to content, or suspensions or terminations of accounts has been made.

[1282] Article 19 of the DSA.

[1283] Article 19(2)(cb) of the DSA.

[1284] Cfr. Article 19(2)(cb) for all the relevant element that shall the trusted flagger shall include in its the report.

[1285] Article 19 of the DSA.

[1286] Trusted flaggers are in fact defined by Article 2(ka) of the DSA as entities that have been awarded such a status by a Digital Services Coordinators.

[1287] Recital 46 of the DSA.

[1288] See *supra* in this paragraph.

[1289] Cfr. Recital 46 of the DSA as amended by the European Parliament.

procedure by the online platforms[1290] and adequate investigations on the case, the Digital Services Coordinator – eventually guided by the European Commission[1291] - that has previously certified the trusted flagger's status, can later revoke it[1292]. In general terms, it is worth pointing out that, already in 2000, date in which the ECD entered into force, legal scholars wondered about a better solution for improving the NTD system and the correspondent redress mechanism. Given that a NTD procedure was absent in the ECD, Julià-Barceló and Koelman proposed the creation of special bodies that could deal with the distribution of illegal material online[1293]. Such an institution, eventually created by the legislators or through the adoption of voluntary codes of conduct, would had evaluated the infringing information online and once considered it as illegal, it would had asked the ISPs to take down the relevant content[1294]. The authors have explained the advantage of the creation of a special body lies in the fact that unbased notifications would be «*filtered out*»[1295] by it, in this way not burdening the intermediary with the task of deciding what should or should not remain online[1296]. Julià-Barceló and Koelman evidence that such a system would have brought «*more warranties in respect to freedom of speech*»[1297].

In the course of the ordinary legislative procedure for the adoption of the DSA, the European Parliament have added in the proposed Regulation a new Article 19a aiming at ensuring *accessibility* to the digital environment. The European Parliament has made clear in fact the application of universal design to the new technological infrastructures and digital services shall guarantee «*full,*

[1290] In particular the legislator explain that the online platform shall inform the Digital Services Coordinator when the trusted flagger has «*submitted a significant number of insufficiently precise or inadequately substantiated notices through the mechanisms referred to Article 14, including information gathered in connection to the processing of complaints through the internal complaint-handling systems referred to in Article 17(3)*». Article 19(5) of the DSA. Cfr. § 3.2.5.2.
[1291] Cfr. Article 19(7) of the DSA.
[1292] Cfr. Article 19(5) and 19(6) of the DSA. Obviously, before revoking the certified flagger's status, the Digital Services Coordinators «*shall afford the entity an opportunity to react to the findings of its investigation and its intention to revoke the entity's status as trusted flagger*». Article 19(6) of the DSA. With regard to the unfounded notices in the context of the NTD system and the consequent redress mechanism, it is worth mentioning that already in 2000 legal scholars were searching for a better solution.
[1293] Cfr. R. JULIÀ-BARCELÓ – K. J. KOELMAN, op. cit., p. 237.
[1294] *Inter alia*, Julià-Barceló and Koelman affirm that Argentina has adopted a similar procedure for copyright infringement's claims. Cfr. R. JULIÀ-BARCELÓ – K. J. KOELMAN, op. cit., p. 237.
[1295] R. JULIÀ-BARCELÓ – K. J. KOELMAN, op. cit., p. 237.
[1296] *Ibid.*
[1297] *Ibid.*

*equal and unrestricted access for all potential consumers*»[1298], taking consideration also persons with disabilities. The legislators have acknowledged that it is fundamental that digital services providers «*design and provide*»[1299] their services in agreement with the accessibility requirement referred to Directive (EU) 2019/882[1300].

It has been acknowledged in the previous paragraphs[1301] that the need to fight online infringements, to regulate digital services providers' activity while at the same time protecting the various fundamental rights at stake is certainly very pressing in the DSA. The European legislators openly admit that the online platforms services' «*misuse*»[1302] by «*frequently providing illegal content or by frequently submitting manifestly unfounded notices or complaints under the mechanisms and systems (…) established under*»[1303] the proposed Regulation *e.g.*, the NTD procedure, «*undermines trust and harms the rights and legitimate interests of the parties concerned*»[1304]. In the context of the already exposed NTD procedure[1305], for example, the existence of baseless notifications according to which it is possible to justify the (potential) disabling of access or removal of users' content online would be detrimental to the protection of fundamental rights, in particular the right to freedom of expression. In order to try to overcome this situation, the proposed Regulation, integrating and enriching the illegal content's definition provided in Article 2(g)[1306], states that an information is «*illegal*»[1307] and a notice or a complaint is «*manifestly unfounded*»[1308] when, without any detailed legal or factual analysis or any substantial investigation, it is obvious that the content is prohibited, and that the notices or complaints are unjustified[1309]. In

[1298] Recital 46a of the DSA.
[1299] *Ibid.*
[1300] Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services. Cfr. Recital 46a of the DSA and Article 19a of the DSA.
[1301] See *supra* § 3.1., § 3.2., but also § 1.3.10.
[1302] Article 20 of the DSA.
[1303] Recital 47 of the DSA.
[1304] *Ibid.*
[1305] See *supra* § 3.2.5.2.
[1306] See *supra* § 3.2.2.
[1307] Recital 47 of the DSA.
[1308] *Ibid.*
[1309] *Ibid.*

this regard, Article 20 of the DSA allow online platforms to «*suspend*»[1310] their services' provision to recipients of the services that «*frequently provide illegal content*»[1311]. The digital platforms may suspend the service when the unlawfulness of the relevant content can be «*established without conducting a legal or factual examination*»[1312] or when, referring to the illegal information, «*they have received two or more orders to act regarding illegal content in the previous 12 months, unless those orders were later overturned*»[1313]. Article 20(2) of the DSA relates to both Article 14[1314] and Article 17[1315] of the DSA. The legislators establish in fact that online platforms can suspend the «*the processing of notices and complaints submitted*»[1316] by individuals, entities or by complainants that use to present «*manifestly unfounded*»[1317] notices or complaints. These suspensions, possible only for a «*reasonable period of time*»[1318] and after the online platform has issued a prior warning against individuals or complainants, can be taken considering the «*absolute numbers of items of illegal content or manifestly unfounded notices or complaints submitted in the past year*»[1319] in proportion to the «*total number of items of information provided or notices submitted in the past year*»[1320]; «*the gravity of the misuses*»[1321] committed; their consequences; the recipient's, individual's, entity's or complaint's intention where identifiable; and an indication suggesting whether a notice «*was submitted by an individual user or by an entity or persons with specific expertise related to the content in question or following the use of an automated content recognition system*»[1322]. In some specific cases the suspension can be then declared as permanent. It is interesting to underline that, showing

[1310] Article 20(1) of the DSA.
[1311] *Ibid.*
[1312] *Ibid.*
[1313] *Ibid.*
[1314] The reference is to the NTD system. See *supra* § 3.2.5.2.
[1315] The reference is to the internal complaint-handling system. See *supra* in this paragraph.
[1316] Article 20(2) of the DSA.
[1317] *Ibid.*
[1318] Article 20(1) of the DSA.
[1319] Article 20(3) of the DSA.
[1320] *Ibid.*
[1321] *Ibid.*
[1322] Article 20(3)(da) of the DSA. In particular, the evaluation of these circumstances shall be made by the online platform «*on a case-by-case basis and in a timely, diligent and objective manner*». Article 20(3) of the DSA.

particular attention to the protection of IPRs online, the European Parliament have included in such specific cases also situations in which «*a trader has repeatedly offered goods and services that do not comply with Union or national law*»[1323]. The reference to illicit "goods" or "services" offered online in fact immediately recalls, among other possible violations, the sale of counterfeit goods and the spread of copyright protected works online[1324]. To complete the framework of the DSA measures and protection against misuse, then, the last paragraph of Article 20, Article 20(4), establishes that the platforms shall explicitly define their online misuses' policy in their terms and conditions, including the suspension's duration and «*examples of the facts and circumstances that they take into account when assessing whether certain behaviour constitutes misuse*»[1325].

The DSA Chapter III's Section 3 tries to guarantee a secure, safe, transparent, accessible and «*trustworthy*»[1326] online environment for all players "in the game" (*i.e.* online businesses, IPRs owners and users) not only ensuring consumers protection through a system of traceability of traders[1327] *ex* Article 22 of the DSA, but also obliging online platforms to fulfil transparency reporting obligations[1328], including those related to online advertising.

First of all, with regard to the traders' traceability online regulation, the legislators make clear that, to ensure the protection of IPRs on digital environment, to safeguard competing traders and holder of IPRs and «*to deter traders from selling products or services in violation of the applicable rules*»[1329], digital platforms allowing consumers to conclude distance contracts with the traders shall acquire additional information regarding the traders itself and the products and services they want to sell and offer on the platform[1330]. In addition to

[1323] Article 20(3a)(c) of the DSA. The other cases in which a suspension can be declared as permanent are where: «*(a) there are compelling reasons of law or public policy, including ongoing criminal investigations; (b) the items removed were components of high-volume campaigns to deceive users or manipulate platform content moderation efforts; (…) (d) the items removed were related to serious crimes.*».
[1324] See supra § 1.
[1325] Article 20(4) of the DSA. Cfr. Recital 47 of the DSA.
[1326] Recital 49 of the DSA.
[1327] Article 22 of the DSA.
[1328] Cfr. Recital 51 of the DSA.
[1329] Recital 49 of the DSA.
[1330] Cfr. *Ibid.*

specific information necessary to identify the traders[1331], Article 22 require the latter to provide information containing: «*the name, address, telephone number and electronic mail address of the economic operator*»[1332] (…), including in the product safety area; a trader's self-certification that commits to only offer products or services in compliance with the applicable rules of Union law and that, where possible, confirms «*all products have been checked against available databases, such as the Union Rapid Alert System for dangerous non-food products (RAPEX)*»[1333]; and «*the type of products or services the trader intends to offer on the online platform*»[1334]. Once having received all relevant information and before offering its service to the trader, the legislators provide that the digital platform shall make its best efforts to check and ensure the reliability of these information[1335]. This obligation can be fulfilled also using specific online databases, online interface or directly requesting the trader to show additional reliable documents[1336]. In cases in which the platform (has reasons to) believe that any information provided by the trader is inaccurate or incomplete, then the intermediary can request the trader to revise it. If he fails to comply with the correction, then Recital 22(3) states the digital platform can «*swiftly suspend the provision of its service to the trader in relation to the offering of products or services to consumers located in the Union until the request is fully complied with*»[1337]. The legislators precise that, in order to control online platforms' activities and guarantee a safe environment on the internet, ISPs shall make their best efforts «*to identify and prevent the dissemination, by traders using its service, of offers for products or services which do not comply with Union or national law*»[1338], in any case never going against the general monitoring prohibition *ex* Article 7 of the DSA[1339]. In addition to the above-mentioned obligations in fact, to avoid the spread of illicit content online, intermediaries

[1331] See Article 22(1)(a)(b)(c)(e) of the DSA.
[1332] Article 22(d) of the DSA.
[1333] Article 22(1)(f) of the DSA.
[1334] Article 22(1)(fa) of the DSA.
[1335] The platform shall also ensure the information ex Article 22(1)(a)(d)(e)(f)(fa) shall be easily accessible to digital users. Cfr. Article 22(6) of the DSA.
[1336] Cfr. Article 22(2) of the DSA. Cfr. Recital 50 of the DSA.
[1337] Article 22(3) of the DSA. In this case, or when a digital platform «*rejects an application for services*», the trader can recourse to Article 17 and Article 43 of the proposed Regulation. *Ibid.*
[1338] Article 22(2a) of the DSA.
[1339] See *supra* § 3.2.3.

shall take adequate measures such as random checks against products and services offered to consumers[1340]. Furthermore, to combat the proliferation of counterfeit goods over digital platforms, intermediaries shall make it certain that the trademark or the logo of the business users that provide goods, content or services online is clearly visible and they shall «*establish a standardised interface for business users*»[1341]. To achieve the same goal then, Article 22a of the DSA provide a specific procedure for cases where an ISP allowing the conclusion of distance contracts between traders and consumers on its platforms become aware of the illegality of a product or a service offered by a trader on its interface. In such a situation, the European Parliament has established the digital platform shall proceed following three main steps. Firstly, it shall remove expeditiously the illicit service or product on its interface and, eventually, it shall communicate the decision to the competent authorities such as the authority of market surveillance or the custom authority[1342]. Secondly, if the online platform has the users' contact details, then it shall inform them about the illegality of the services or the goods they have acquired, also communicating the trader's identity and options for seeking redress[1343]. Thirdly, digital intermediaries shall «*compile and make publicly available*»[1344] a repository that contains information concerning the illicit services and products removed from the platforms during the past twelve months, the relevant trader and redress possibilities[1345]. From the point of view of the enforcement of IPRs online, the amendment of Article 22 and the introduction of Article 22a in the DSA legislative text by the European Parliament seem crucial. Through the regulation of the relationship between digital platforms and traders offering services and products online in fact, these provisions place specific obligations on online platforms to facilitate traceability and contrast of IPRs illicit disseminated on new technological infrastructures.

With regards to Article 23 of the DSA, it can be observed that, as anticipated in § 3.2.5.1., it enriches the list of information to include in the online

[1340] Cfr. Article 22(2a) of the DSA.
[1341] Article 22(3b) of the DSA.
[1342] Article 22a(1)(a) of the DSA.
[1343] Article 22a(1)(b) of the DSA.
[1344] Article 22a(1)(c) of the DSA.
[1345] *Ibid.*

platforms' transparency report. This provision indeed mentions not only the indications contained in Article 13(1)[1346], but also the number of disputes brought to the out-of-court dispute settlement bodies *ex* Article 18 of the DSA, the dispute settlement's outcomes and the average amount of time it takes to complete the dispute resolution procedures[1347]. The Article requires to indicate also «*the number of suspensions imposed pursuant to Article 20*»[1348], distinguishing them between «*suspensions enacted for the provision of manifestly illegal content, the submission of manifestly unfounded notices and the submission of manifestly unfounded complaints*»[1349]. Moreover, after its first reading, the European Parliament[1350] have provided that online platforms shall include in their transparency report also (aa) the number of complaints received through the internal complaint-handling system *ex* Article 17 of the DSA, the basis of the complaints, the decisions taken in reference to such complaints, «*the average and median time needed for taking those decisions, (…) the number of instances where those decisions were reversed*»[1351] and (ca) the number of ads that has been removed, disable or labeled by the digital intermediaries, as well as the reasoning behind these decisions[1352]. Considering then the (negative) impact that automated content moderation could have on the protection of fundamental rights[1353], the legislator imposes then digital platforms to indicate in their transparency report «*any use made of automatic means for the purpose of content moderation, including a specification of the precise purposes, indicators of the accuracy of the automated means in fulfilling those purposes and any safeguards applied*»[1354]. In

[1346] See *supra* § 3.2.5.1.
[1347] Article 23(1) of the DSA.
[1348] *Ibid.*
[1349] *Ibid.*
[1350] The reference is to the first reading of the European Parliament in the context of the ordinary legislative procedure.
[1351] Article 23(1)(aa) of the DSA.
[1352] The European Parliament has also specified in Article 23(2a) that, other than specific demands in connection with the exercise of their supervisory functions, Member States shall refrain from imposing new transparency reporting duties on online platforms.
[1353] See *supra* § 3.2.5.1. Cfr. N. LOMBA – T. EVAS, op. cit., pp. 203 et sq.
[1354] Article 23(1) of the DSA. In the subsequent paragraphs, the European legislators require the digital platforms to publish, «*at least once every six months, information on the average monthly active recipients of the service in each Member State, calculated as an average over the period of the past six months (…)*». Then, the legislation requires that intermediaries communicate, if requested by the Digital Services Coordinator, the same information update to the moment of such request. Additionally, it is established Digital Services Coordinator may require the online

consideration of the main relevance that the curation of content has on the protection of fundamental rights[1355] indeed, it is very important to establish transparency obligations on which business and users can rely[1356]. Article 23(1) represents in this regard a benefit for the recipients of the services: if users and content providers indeed know what information is or not supported by the platforms, then they can parametrize their self accordingly. The negative impacts of algorithms on online platforms could in this way diminish[1357]. In the UK, for example, although without a positive response, in 2020 the *British Centre for Data Ethics and Innovation* has called on legislators to introduce additional transparency provisions concerning content moderation on digital and social platforms[1358].

The DSA pays particular attention to the regulation of online advertising[1359]. In 2020 the European Commission had already stated that online advertising services are an «*area of particular evolution*»[1360] involving an «*enormous industry*»[1361], with several types of ISPs dealing with the placement of ads[1362].

---

platform to provide additional information regarding the already mentioned calculation, «*including explanations and substantiation in respect of the data used*». No personal data shall be included. Article 23's paragraph 4 finally clarifies that the European Commission «*may adopt implementing acts to lay down templates concerning the form, content and other details of reports pursuant to paragraph 1*». Article 23(2)(3)(4) of the DSA.

[1355] See *supra* § 3.2.5.1.

[1356] Cfr. N. LOMBA – T. EVAS, op. cit., pp. 203 et sq.

[1357] Cfr. N. LOMBA – T. EVAS, op. cit., p. 204. For additional benefits of transparency obligations cfr. *Ivi*, pp. 204 et sq.

[1358] N. LOMBA – T. EVAS, op. cit., pp. 205 et sq. CDEI, *Independent Report. Online targeting: Final report and reccomendations*, 4.02.2020, available at: https://www.gov.uk/government/publications/cdei-review-of-online-targeting/online-targeting-final-report-and-recommendations, paragraph 8. Cfr. M. MARTINI, *Fundamentals of a Regulatory System for Algorithm-based Processes*, Speyer, 01.05.2019, available at: https://www.politico.eu/wp-content/uploads/2019/07/Martini-Regulatory-System-final_11-6-MAR.pdf.

[1359] The DSA defines the concept of 'advertisement' as «*information designed and disseminated to promote the message of a legal or natural person, irrespective of whether to achieve commercial or non-commercial purposes, and displayed by an online platform on its online interface against remuneration specifically in exchange for promoting that message*». Article 2(n) of the DSA.

[1360] European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 8.

[1361] *Ibid.* Recital 52 of the DSA openly admit that new advertising model have changed the way information is presented and «*have created new personal data collection patterns and business models that might affect privacy, personal autonomy, democracy, quality news reporting and facilitate manipulation and discrimination*.». In the light of these considerations more transparency in the field is surely needed.

According to statistical researches indeed, the online advertising's growth rate during 2019 was around 12.3% and in the first period of the same year the related revenue amounted to 28.9 billion Euros[1363]. What is particularly relevant is the fact that, given his great growth, online advertising can be an important vehicle for disseminating illegal material online, including counterfeit products or copyrighted content. Online advertisement indeed can not only be itself illegal content, but, as the DSA underlines, it can contribute to «*financial incentives for the publication or amplification of illegal or otherwise harmful content and activities online, or the discriminatory display of advertising*»[1364] with the risk of affecting «*the equal treatment and opportunities of citizens*»[1365]. To prevent this scenario from increasingly becoming a reality, the proposed Regulation establishes online advertising transparency obligations for online platforms. In particular, in addition to the «*information to be provided*»[1366] on the basis of Article 6 of the ECD[1367], Article 24 of the ECD mandates that digital platforms displaying an advertisement on their online interfaces take steps to ensure recipients of the service can identify[1368] clearly, unambiguously, in a concise

[1362] Cfr. *Ibid.* Today, for example, several platforms use the so called "influencer marketing" *i.e.*, a sub-form of the original marketing. This commercial activity amplifies the visibility of certain products creating problems for the protection of IPRs case these are, for example, counterfeited. Cfr. N. LOMBA – T. EVAS, op. cit., pp. 216 et sq. Cfr. *Ivi*, pp. 70-73.

[1363] Statista Research Department, *Digital Advertising in Europe – statistics & facts*, 15.11.2021, available at: https://www.statista.com/topics/3983/digital-advertising-in-europe/#dossierKeyfigures. Cfr. European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 8.

[1364] Recital 52 of the DSA.

[1365] *Ibid.* Please note that the European Parliament's amendments to the DSA have strengthened the transparency obligations for new advertising models and the protection of users against targeted advertising.

[1366] Article 6 of the ECD.

[1367] In the context of commercial communications, the ECD require that Member States ensure that «*commercial communications which are part of, or constitute, an information society service comply at least with the following conditions: (a) the commercial communication shall be clearly identifiable as such; (b) the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable; (c) promotional offers, such as discounts, premiums and gifts where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions which are to be met to qualify for them shall be easily accessible and be presented clearly and unambiguously; (d) promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.*». Article 6 of the ECD.

[1368] «*For each specific advertisement displayed to each individual recipient*». Article 24 of the DSA.

manner and «*in real time*»[1369] that the material showed is an advertisement. Users shall also be able to recognize «*the natural or legal person on whose behalf*»[1370] the advertisement is displayed and significant and clear information concerning the «*parameters used to determine the recipient to the whom the advertisement is displayed*»[1371]. In cases where the person financing the advertisement is different from the natural or legal person on whose behalf the "adv" is displayed, then it shall also be easily identified by the recipients of the service[1372]. One last reference concerns the new provision enshrined in Article 24(1a), Article 24(1b) and Article 24a of the DSA. While Article 24(1a) regulates the so called "cookie wall"[1373], Article 24(1b) provides for a ban on targeting minors personal data or data referred to Article 9 of the GDPR[1374]. The Legislators acknowledge then that a core part of a digital platform's business is «*the manner in which information is prioritised and presented on its online interface to facilitate and optimise access to information for the recipients of the service*»[1375]. This can have an important impact on dissemination of information as well as on the amplification of certain messages[1376]. For these reason Article 24a states that digital platforms should clearly, in an easily comprehensible and accessible manner indicate when content is recommended, the main parameters used in their recommended systems[1377] and any options for the users to modify or influence those main parameters[1378].

### 3.2.5.4. VLOPs: definition and regulation

[1369] Article 24 of the DSA.
[1370] *Ibid.*
[1371] *Ibid.* Similar obligation is required for VLOPs. See infra § 3.2.5.4. Cfr. Article 30 of the DSA. Cfr. European Data Protection Supervisor, *Opinion 1/2021 on the Proposal for a Digital Services Act*, cit., p. 15.
[1372]
[1373] The "cookie wall" (also referred to as tracking wall) allow users to use a website only having "agreed" or "accepted" all the relevant cookies.
[1374] General Data Protection Regulation *i.e.*, Regulation (EU) 2016/679. Cfr. B. SAETTA, *Digital Services Act: cosa prevede il testo del Parlamento europeo*, cit.
[1375] Recital 52a of the DSA.
[1376] Cfr. *Ibid.*
[1377] See Article 24a(2) for the main element that shall be included in the indication of the main recommender system's parameters. Recommender system are defined by Article 2(1)(o) of the DSA as «*a fully or partially automated system used by an online platform to suggest, prioritise or curate in its online interface specific information to recipients of the service, including as a result of a search initiated by the recipient or otherwise determining the relative order or prominence of information displayed*».
[1378] Cfr. Article 24a(1) of the DSA.

It has been widely observed in the course of this work that online platforms are present in different (and increasing) facets of our daily and they can easily be associated «*to public spaces for expression and economic transactions*»[1379]. Nowadays, most of the users' online activity is concentrated in a restricted number of "very large platforms" which leads them to have a great market power[1380]. As on VLOPs there are many users interacting with each other, they risk becoming an uncontaminated place to spread illegal material and commit crimes online[1381]. VLOPs in fact can reach a wide audience and their strategies have important impacts on the safety of citizens, influencing the fairness of businesses' commercial activities online and shaping the public opinion and discourse[1382]. In light of this, the DSA considers as urgent to establish clear, easy, proportionate, and specific standard rules for VLOPs parametrized to their characteristics. The legislators envisage in fact in Recital 56 of the DSA that in the absence of an effective regulation of VLOPs, the latter can «*set the rules of the game*»[1383] and it would be very difficult to successfully identify and mitigate «*the risks and the societal and economic harm they can cause*»[1384].

The DSA's due diligence obligations include thus specific provisions for VLOPs which shall apply in addition to those – already studied – applicable to online platforms[1385]. In particular, given that the "systemic risks" large platforms

[1379] European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 28. Cfr. *Ivi*, pp. 28 et sq.

[1380] European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 28. Recital 53 of the DSA admit that VLOPs are very important because they attract an enormous number of recipients of the service and they facilitate the public debate, economic transactions, the dissemination of information, opinions and ideas and they generally influence the way users obtain and communicate information online. Recital 53 of the DSA.

[1381] Cfr. European Commission, *Proposal for a Regulation of The European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, cit., pp. 31-34.

[1382] *Ivi*, p. 28. Cfr. Recital 56 of the DSA.

[1383] Recital 56 of the DSA.

[1384] *Ibid.*

[1385] Cfr. Recital 53 of the DSA.

pose «*have a disproportionately negative impact in the Union*»[1386], the European legislators have developed a set of obligations[1387] that apply to intermediaries providing their services «*to a number of average monthly active recipients of the service in the Union equal to or higher than 45 million*»[1388] *i.e.*, 10% of the European Union's population[1389]. Also a simple hosting service provider may suddenly expand, reaching the dimension required to be identified as a Very Large Platform[1390]. In view of this, the Digital Services Coordinators has the task of verifying if an ISP has exceeded «*the number of average monthly active recipients of the service in the Union of online platforms under their jurisdiction*»[1391] to be classified as VLOP[1392]. If that is the case, the (no longer) "small" digital platforms will be subject to the VLOPs due diligence obligations *ex* Chapter III's Section 4 of the DSA. Some authors consider that, in constructing the VLOPs' due diligence obligations, the European legislators have opted for an asymmetric regulation that affect the major holders of the digital power[1393] *i.e.*, VLOPs, and benefit smaller ISPs with the intent of bringing out the "innovators of tomorrow"[1394]. Following this thesis, the VLOPs' due diligence obligations could

[1386] Recital 54 of the DSA.
[1387] Also defined as «*the highest standard of due diligence obligations*» that is proportionate to the societal impact and the means of VLOPs. Recital 54 of the DSA. The European Parliament has indeed specified that the number of average monthly VLOP's users should correspond to the «*recipients actually reached by the service either by being exposed to content or by providing content disseminated on the platforms' interface in that period of time*». Recital 54 of the DSA.
[1388] Article 25(1) of the DSA.
[1389] Cfr. Recital 54 of the DSA. The calculation to verify the qualification of VLOPs is done by the European Commission on the basis of «*delegated acts*». Article 25(2)(3) of the DSA. Article 25(1) as modified by the European Parliament provides the calculation's methodology shall consider in particular: «*(i) the number of active recipients shall be based on each service individually; (ii) active recipients connected on multiple devices are counted only once; (iii) indirect use of service, via a third party or linking, shall not be counted; (iv) where an online platform is hosted by another provider of intermediary services, that the active recipients are assigned solely to the online platform closest to the recipient; (v) that automated interactions, accounts or data scans by a non-human ("bots") are not included*.».
[1390] Cfr. Recital 55 of the DSA. Cfr. Article 25(4) of the DSA.
[1391] Article 25(4) of the DSA.
[1392] See *supra* in this paragraph. Cfr. Recital 55 of the DSA.
[1393] Cfr. G. GIACOMINI – N. STRIZZOLO, *Potere alle piattaforme e rischi per le democrazie: tutti i paradossi del digitale*, agendadigitale.eu, 27.03.2019, available at: https://www.agendadigitale.eu/cultura-digitale/potere-alle-piattaforme-e-rischi-per-le-democrazie-tutti-i-paradossi-del-digitale/.
[1394] Cfr. LUISS School of Law, *The Social Dilemma: come disciplinare le piattaforme digitali?. Sintesi del convegno inaugurale della IX edizione del Master di II livello in Diritto della Concorrenza e dell'Innovazione*, 19.03.2021, available at: https://www.agendadigitale.eu/cultura-digitale/potere-alle-piattaforme-e-rischi-per-le-democrazie-tutti-i-paradossi-del-digitale/.

lead to a form of protectionism creating a protective barrier for certain platforms. Pitruzzella, Advocate General of the CJEU, and Parcu, Director Communications & Media Area of the European University Institute, however, argue that in designing these provisions the Commission's ambition is to set standards of behavior for digital services that can become a model for global digital regulation[1395].

As anticipated at the beginning of this paragraph, it is fundamental to regulate VLOPs to contrast the risks of having illegal activities and misuses online. Without identifying and assessing «*the systemic risks stemming from the functioning and use of*»[1396] VLOPs' services, it is indeed impossible to avoid digital illicit[1397]. For this reason, the DSA imposes on VLOPs obligations regarding their risks assessment and mitigations of risks, respectively provided in Articles 26 and 27 of the Regulation.

At least four months after a platform has been identified as VLOPs and its name has been included in a dedicated list published on the Official Journal of the European Union's list[1398], the legislator requires the large intermediary - at least once a year and before launching new services - to «*effectively and diligently identify, analyse and assess*»[1399] any relevant risks related to the «*intrinsic characteristics*»[1400], to the functioning and to use made of its digital services in the European Union[1401]. The European legislators mention in Article 26[1402] «*four categories of systemic risks*»[1403] on which the risk assessment shall focus, in any case never carrying out a general monitoring of the material uploaded online[1404]. These coincide with the spread of illegal content or content breaching the

---

https://lsl.luiss.it/sites/lsl.luiss.it/files/The%20Social%20Dilemma%20sintesi%20inaugurazione%20master%20concorrenza%20innovazione%202021.pdf, p. 4.

[1395] Cfr. LUISS School of Law, *The Social Dilemma: come disciplinare le piattaforme digitali?. Sintesi del convegno inaugurale della IX edizione del Master di II livello in Diritto della Concorrenza e dell'Innovazione*, cit., pp. 3-4.

[1396] Recital 56 of the DSA.

[1397] Cfr. *Ibid.*

[1398] Cfr. Article 25(4) of the DSA.

[1399] Article 26(1) of the DSA.

[1400] Article 26(1) refers in this regard also to the «*design*» and to the «*algorithmic systems*» used by the VLOP.

[1401] Cfr. *Ibid.*

[1402] The original version of Article 26 presented by the European Commission included only three categories of systemic risks.

[1403] Recital 57 of the DSA.

[1404] Cfr. Article 26(2c) of the DSA.

service's terms and conditions; with «*any actual and foreseeable negative effects for the exercise of the fundamental rights, including for consumer protection, to respect for human dignity, private and family life, the protection of personal data and the freedom of expression and information, as well as the freedom and the pluralism of the media, the prohibition of discrimination, the right to gender equality, and the rights of the child*»[1405]; with «*any malfunctioning or intentional manipulation*»[1406] of the VLOPs' services, such as the amplification of illicit content[1407]; and with any actual or foreseeable negative effects on the public health's protection, as well as «*negative consequences to the person's physical, mental, social and financial well-being*»[1408]. To explain the meaning of the illegal content's dissemination and amplification online, the DSA refer not only to the «*dissemination of child sexual abuse material or illegal hate speech*»[1409], but, mentioning illegal activities «*such as the sale of products or services prohibited by Union or national law, including dangerous and counterfeit products (…)*»[1410], it takes into consideration also IPRs infringements[1411]. To involve in the risk assessment users, groups potentially impacted by the digital platforms' services, independent experts and civil society organisations, the legislators require that VLOPs «*shall consult, where appropriate*»[1412], representative of each of the mentioned groups.

Once the relevant risks have been assessed, in order to «*discourage and limit*»[1413] the dissemination of illegal material online, the proposed Regulation demand VLOPs to «*diligently*»[1414] mitigate them, safeguarding at the same time the protection of fundamental rights[1415]. According to Article 27 of the DSA, such

[1405] Article 26(1)(b) of the DSA. Cfr. Article 7, 11, 21, 24 of the Charter of Fundamental Rights of the European Union.
[1406] Article 26(1)(c) of the DSA.
[1407] Cfr. Article 26(1)(c).
[1408] Article 26(1)(ca) of the DSA.
[1409] Recital 57 of the DSA.
[1410] *Ibid.*
[1411] The legislators specify also that in cases in which there are on VLOPs accounts with a wide reach, the spread of illegal content can be amplified constituting in this way a «*significant systematic risk*». Recital 57 of the DSA.
[1412] Article 26(2a) of the DSA.
[1413] Recital 58 of the DSA.
[1414] *Ibid.*
[1415] Recital 56 of the DSA specifies in fact that VLOPs should take «*appropriate mitigating measures where mitigation is possible without adversely impacting fundamental rights*».

aim can be achieved adopting «*reasonable, transparent, proportionate and effective*»[1416] countermeasures. The latter include the adaptation of content moderation, recommender systems and online interfaces, algorithmic systems, as well as the VLOP's decision-making processes and the functioning of their services or of their terms and conditions[1417]. According to Article 27(1)(aa) VLOPs shall ensure adequate resources to deal with notices and internal complaints and they shall adopt «*targeted measures*»[1418] capable of limiting the display of advertisements associated to the services they provide[1419]. The VLOPs' mitigation measures shall also include measures aiming at «*adapting online interfaces and features to protect minors*»[1420] and measures able to reinforce the supervision on their activities «*in particular as regards detection of systemic risks*»[1421]. Among the counter measures established to mitigate the VLOPs' systemic risks then, the ISP shall ensure cooperation with trusted flaggers referred to Article 19 of the DSA[1422] and with other online platforms, stipulating code of conducts[1423] or through the crisis protocol referred to Article 37 of the DSA[1424]. The risks mitigation shall not take the form of a online general monitoring[1425]. As well as provided in Article 26(2a) of the DSA[1426], VLOPs shall involve in the design of their risk mitigation measures assessment representatives of users, of groups potentially impacted by the digital platforms' services, independent experts and civil society organizations. The Commission, together with the DSA Authorities, also having regard to the protection of fundamental rights, may aid the VLOPs to put in place the measures through «*general guidelines*»[1427]. Moreover, the large platforms risks' mitigation is supported by the *European Board for Digital Services*, which, once a year, shall publish a report containing

[1416] Article 27(1) of the DSA.
[1417] *Ibid.*
[1418] *Ibid.*
[1419] Or, according to the European Parliament's amendment, «*the alternative placement and display of public service advertisements or other related factual information*». Article 27(1)(b) of the DSA.
[1420] Cfr. Article 27(1)(ba) of the DSA.
[1421] Article 27(1)(c) of the DSA.
[1422] See *supra* § 3.2.5.3. Article 27(1)(d) of the DSA.
[1423] See *infra* § 3.2.6.
[1424] Cfr. Article 35 and 37 of the DSA.
[1425] Cfr. Article 27(3a) of the DSA.
[1426] See *supra* in this paragraph.
[1427] Article 27(3) of the DSA.

not only information useful to identify the «*most prominent and recurrent systemic risks*»[1428] assessed by VLOPs (or recognized through other sources of information) but also best practices to follow in order to mitigate risks[1429].

The DSA confirms that the risk mitigations measures adopted in the context of the VLOPs obligations should be coherent with the due diligence requirements established in the Regulation. Such measures should be proportionate to the respect of fundamental rights[1430] and, in general, adequate and efficient for the purpose of mitigating the specific risks previously identified[1431]. Despite the VLOPs' due diligence obligations – in particular the assessment and mitigation of risks obligations *ex* Article 26 and 27 – presented and described by the European legislators does not seem to create any problems, some authors express their disappointment to the systemic risks related measures. Some argue that these obligations are too vague and provide an insufficient protection for fundamental and human rights[1432]. Besides a general uncertainty about what effectively constitutes a "*systemic risk" ex* Article 26 and how platforms will concretely address any threat to the protection of fundamental rights online, there is a particular element that raises doubts. According to the proposed Regulation indeed, VLOPs shall assess *inter alia* «*any (…) negative effects*»[1433] for the exercise of several fundamental rights at stake. However, as it has been observed in Chapter 1 referring to the application of the ECD's NTD system[1434] and in Chapter 2, referring to the system enshrined in Article 17 of the CDSM[1435], the Commission and legislators have adopted during the years different understanding on how to deal with the spread of illegal content while safeguarding fundamental

[1428] Article 27(2) of the DSA.
[1429] Cfr. *Ibid.*
[1430] Recital 58 explains indeed that any measure should safeguard public order, protect privacy and fight «*fraudulent and deceptive commercial practices*». Measures shall also be «*proportionate in light of the very large online platform's economic capacity and the need to avoid unnecessary restrictions on the use of their service, taking due account of potential negative effects of fundamental rights of recipients of the service*». Recital 58 of the DSA.
[1431] Cfr. Recital 58 of the DSA. See *supra* in this paragraph.
[1432] Cfr. Article 19, *Due diligence obligations in the EU's Digital Services Act. Article's 19 recommendation to lawmakers*, 21.05.2021, available at: https://www.article19.org/wp-content/uploads/2021/05/Regulation-of-due-diligence-in-the-EU-DSA-1.pdf.
[1433] Article 26(1)(b) of the DSA.
[1434] See *supra* § 1.3.6.4., § 1.3.10.
[1435] See *supra* § 2.2.4, § 2.2.4.1, § 2.2.4.2., § 2.2.4.3., § 2.3.

rights[1436]. Some authors evidence that, in order to detect infringing material online, there is by the legislators a constant tendency to implement automated filters able to identify and detect suspicious content, adopting in this way a general monitoring strategy[1437]. Article 26 and 27 of the DSA do not expressly mention the use of such filtering measures but they grant discretionary powers. According to the DSA indeed, in order to implement the VLOPs risks mitigation's measures, the Commission «*may issue general guidelines*»[1438], for example through the conclusion of codes of conduct. Some considers that, by virtue of this possibility, the Commission may introduce automated monitoring measures for digital platform, in this way potentially affecting fundamental rights[1439]. Thus, against this eventuality, some authors wonder if it might be more appropriate to adopt such filtering measures after an explicit and accountable approval procedure by the Commission, rather than through codes of conduct[1440]. With a view to paying particular attention to the protection of inalienable rights, it is noted then that the mitigations measures to assess the systemic risks (and protect fundamental rights) are defined by Article 27 as «*reasonable*»[1441], rather than "*necessary*"[1442]. According to some, this could also raise questions about the degree of protection afforded to fundamental rights in the DSA. It is interesting instead to observe that, while before the European Parliament's amendments the DSA provided that VLOPs should have identified their systemic risks and correspondingly «*design*»[1443] their mitigation measures with the participation of «*representatives of the recipients of the service, independent experts and civil*

[1436] Cfr. Article 19, *Due diligence obligations in the EU's Digital Services Act. Article's 19 recommendation to lawmakers*, cit.
[1437] Cfr. Article 19, *Due diligence obligations in the EU's Digital Services Act. Article's 19 recommendation to lawmakers*, cit.
[1438] Article 27(3) of the DSA.
[1439] Cfr. Cfr. Article 19, *Due diligence obligations in the EU's Digital Services Act. Article's 19 recommendation to lawmakers*, cit.
[1440] *Ibid.* This can be seen beyond the fact that the (new) Article 35(1) of the DSA as modified by the European Parliament requires to pay particular attention to avoid «*negative effects negative effects on fair competition, data access and security, the general monitoring prohibition and the protection of privacy and personal data*», encouraging at the same time regular review and adaptation of Codes of conduct to ensure they are fit for purpose.
[1441] Article 27 of the DSA.
[1442] Cfr. Article 19, *Due diligence obligations in the EU's Digital Services Act. Article's 19 recommendation to lawmakers*, cit.
[1443] Recital 59 of the DSA.

*society organisations*»[1444] but in practice - once the codes of conduct and the relevant countermeasures have been endorsed and adopted - it did not contain any provisions allowing them to express their disappointment neither to the Commission nor to the DSA special competent authorities[1445], Article 35(1) now encourages and facilitates «*regular review and adaptation of the Codes of conduct to ensure that they are fit for purpose*»[1446].

In addition to the provisions set out so far, the DSA requires VLOPs to be subject to audits carried out by independent and trustworthy auditors. The legislators provide the need to verify the VLOPs' compliance with the Chapter III's due diligence obligations and with all undertakings made in accordance with the adopted codes of conduct and the crisis protocol[1447]. The auditors having specific requirements listed in Article 28(2) of the DSA[1448], shall verify the VLOPs and «*establish an audit report*»[1449]. The latter shall include, among other information, a positive[1450] or negative opinion on whether or not VLOPs have respected their obligations under Article 28(1) of the DSA[1451]. The audit report shall be sent to the Digital Services Coordinator and to the European Board for Digital Services accompanied by the systemic risks assessment *ex* Article 26 of the DSA, the mitigation of risks measures *ex* Article 27 and, in case the auditors' opinion is negative, his «*recommendations on specific measures to achieve compliance*»[1452].

---

[1444] *Ibid.*
[1445] i.e., the Digital Service Coordinators and the European Board for Digital Services
[1446] Article 35(1) of the DSA.
[1447] Cfr. Article 28 of the DSA. Cfr. Recital 60 of the DSA. Cfr. Article 35, 36 and 37 of the DSA. See *infra* § 3.2.6.
[1448] The auditors organisations shall (a) be «*legally and financially independent from, and do not have conflicts of interest with the very large online platform concerned and other very large online platforms*»; (aa) «*have not have not provided any other service to the very large online platform audited 12 months before the audit and commit not to work for the very large online platform audited or a professional organisation or business association of which the platform is a member for 12 months after their position in the auditing organisation has ended*»; (b) «*have proven expertise in the area of risk management, technical competence and capabilities*»; (c) «*have proven objectivity and professional ethics, based in particular on adherence to codes of practice or appropriate standards*». Article 28(2) of the DSA.
[1449] Article 28(3) of the DSA.
[1450] The European Parliament has specified in cases in which the audit is positive, then the VLOP is entitled to request from the European Commission a «*seal of excellence*». Article 29(4b) of the DSA.
[1451] Cfr. Article 28(1) of the DSA. Cfr. Recital 60 and 61 of the DSA.
[1452] Article 28(3) of the DSA. Cfr. Recital 61 of the DSA.

To complete the VLOPs due diligence obligations legal framework, the DSA specifically establishes additional rules for the use of recommender systems through which intermediaries prioritize and present the information they display[1453]. The Regulation provides rules concerning data access and consequent scrutiny[1454] and it establishes further transparency obligations for VLOPs. The legislators also institute compliance officers to monitor the VLOPs' compliance with the DSA obligations[1455]. Looking at the transparency obligations, in particular, the European legislators state that in order «*to facilitate (…) research into emerging risks*»[1456] and control the ISPs' online activity, VLOPs displaying advertising on their online interfaces are obliged to compile a repository and ensure it public access[1457]. Paying particular attention to the legislative measures constructed to contrast IPRs infringements online, it is worth noting that among the information to be included in the "*advertising transparency repository*" referred to Article 30(1) of the DSA, the legislator lists «*the content of the advertisement, including the name of the product, service or brand*»[1458] and the advertisement's object. According to Article 30(2) of the DSA, the register shall also contain at least information concerning the natural or legal person on whose behalf it is displayed and, if different, the person who paid for the advertisement[1459]. It shall also include the period during which it was showed and whether it was intended to be displayed to one or more specific categories of service recipients (and eventually what the main parameters were, including those used to exclude particular groups)[1460]. Article 30(2)(e) provides that the repository shall also specify «*the total number of service recipients reached, as well as aggregate numbers for the group or groups of recipients to whom the advertisement was expressly targeted*»[1461]. Moreover, considering the higher risks associated with the VLOPs' activities, in addition to the transparency measures

[1453] Cfr. Article 29 of the DSA. Cfr. Recital 61 of the DSA. These rules shall apply additionally to the provisions set out in Article 24a of the DSA. See *supra* § 3.2.5.3.
[1454] Cfr. Article 31 and Recital 64 of the DSA.
[1455] Cfr. Article 32 and Recital 65 of the DSA.
[1456] Recital 63 of the DSA.
[1457] Cfr. Article 30 and Recital 63 of the DSA.
[1458] Article 30(1)(a) of the DSA.
[1459] Cfr. Article 30(2)(b)(ba) of the DSA.
[1460] Cfr. Article 30(2)(c)(d) of the DSA.
[1461] Cfr. Recital 63 and Article 30 of the DSA.

included in the DSA Chapter III's Section 1 applicable to all ISPs[1462], Article 33 provides for specific transparency reporting obligations. VLOPs indeed shall ensure public access and transmit to the Digital Services Coordinator of the country and to the Commission also: a report containing the risk assessment's results *ex* Article 26, the related risk mitigation measures *ex* Article 27 of the DSA, the audit report *ex* Article 28(3) and the report concerning the audit implementation *ex* Article 28(4) of the DSA. If appropriate, the VLOP should also disclose information concerning the representatives of the recipient of the service, independent experts and civil society organisations consulted for the purpose of Article 26[1463].

As clearly emerges from the analysis of the relevant provisions, VLOPs are "*in the eye of the storm*". They are attracting the European legislator's attention who wants to establish global regulatory standard for them[1464] and they are often the focus of the public debate because they are considered as potential means of dissemination of illicit material online. For these reasons, the DSA does not merely oblige VLOPs to comply with the said due diligence obligations, but to ensure that these are really implemented, the Regulation also gives the Commission broad powers of control[1465]. Although in the respect of fundamental rights and the principle of proportionality[1466] in fact, the European Commission has investigative, monitoring and enforcement powers over the Regulation[1467]. The Commission is invested with the power to initiate proceedings against a VLOP that has infringed – or is suspected of infringing – its due diligence obligations[1468], to «*request any relevant information from any public authority, body or legal person*»[1469] as well as to interview any consenting natural or legal person with the intent of collecting useful information for the investigation[1470].

[1462] See *supra* § 3.2.5.1., see in particular Article 13 of the DSA.
[1463] Cfr. Article 33 and Recital 65 of the DSA.
[1464] Giovanni Pitruzzella and Pierluigi Parcu support this view. Cfr. LUISS School of Law, *The Social Dilemma: come disciplinare le piattaforme digitali?. Sintesi del convegno inaugurale della IX edizione del Master di II livello in Diritto della Concorrenza e dell'Innovazione,* cit.
[1465] Chapter IV's Section 3 of the DSA indeed provides for rules concerning «*Supervision, investigation, enforcement and monitoring in respect of very large online platforms*».
[1466] Cfr. Recital 98 and 105 of the DSA.
[1467] Cfr. Recital 98 and Article 50 of the DSA.
[1468] Cfr. Recital 99 and Article 51 of the DSA.
[1469] Recital 99 of the DSA.
[1470] Cfr. Article 53 of the DSA.

The European Commission can also conduct on-site inspections pursuant to Article 52(1) of the DSA and ask the VLOP for explanations about its «*organisation, functioning, IT system, algorithms, data-handling and business conducts*»[1471]. The Commission can issue interim measures against VLOPs in urgent cases[1472] and the large platforms can be subject to financial penalties. According to Recital 100 indeed, compliance with the established obligations «*should be enforceable by means of fines and period penalty payments*» which are regulated in detail by Article 59, 60 and 61 of the DSA[1473]. Finally, while ensuring to the Commission great "freedom of action" to monitor the observance of the VLOPs due diligence obligations, the legislators specify also that the right of defense of the parties that may be influenced by the *supra* mentioned Commission's activities is unaffected. In the context of the proceeding opened by the European Commission *ex* Article 51, in fact, the parties shall have the right to be heard and access to the file[1474] and the relevant decision shall be published[1475].

### 3.2.6. Voluntary standards, Codes of conduct and Special Competent Authorities

As the analysis of the new Proposed Regulation has come to an end, this work cannot fail to mention the last - but relevant - provisions of the DSA. As well as the ECD, the legislators regulate here to standards and codes of conducts, adding the provision of crisis protocol and the institution of two special competent authorities *i.e.*, the Digital Services Coordinator and the European Board for Digital Services.

---

[1471] Article 54(3) of the DSA.
[1472] Article 55(1) of the DSA. This could happen «*in the context of proceedings which may lead to the adoption of a decision of non-compliance pursuant to Article 58(1)*». Article 55(1) of the DSA. The legislators also ensure that, in cases where all the Commission's mentioned powers «*have been exhausted, the infringement persists and causes serious harm which cannot be avoided though the exercise of other powers available under Union or national law, the Commission may request the Digital Services Coordinator of establishment of the very large online platform concerned to act pursuant to Article 41(3)*» of the DSA. Article 65 of the DSA. Cfr. *supra* in this paragraph.
[1473] See Recital 100 as amended by the European Parliament.
[1474] Cfr. Article 63 and Recital 101 of the DSA.
[1475] Cfr. Article 64 of the DSA.

It is fundamental that ISPs support the DSA due diligence obligations, in particular the transparency obligations, drawing up standards[1476] and codes of conducts. As analyzed in § 3.2.5.4., the codes of conducts have a special importance in the DSA because they are considered as one of the mitigation measures to be adopted against the VLOPs systemic risks[1477]. Recital 68 of the DSA indeed include the «*risk mitigation measures concerning specific types of illegal content*»[1478] and «*the possible negative impacts of systemic risks on society and democracy*»[1479] in an area of consideration for codes of conduct. In the context of IPRs infringements online, furthermore, the legislator hopes the rules provided in Article 35[1480] and 36[1481] of the DSA could be a basis «*for already established self-regulatory efforts at Union level*»[1482], such as the *Product Safety Pledge*[1483] and the *MoU*[1484].

The European Commission include in the Regulation also «*crisis protocols*»[1485], measures that were not present in the ECD. The reference is to «*extraordinary circumstances*»[1486] that affect public security or health[1487] and therefore justify extraordinary actions. The legislator clarifies these exceptional procedures can only be implemented for a limited period and to what is strictly necessary to address the situation[1488]. It is also established that these should neither result in a general monitoring on the content upload online nor in a

[1476] Cfr. Article 34 of the DSA.
[1477] See *supra* § 3.2.5.4.
[1478] Recital 68 of the DSA.
[1479] *Ibid.*
[1480] Article 35 of the DSA provides rules concerning codes of conduct.
[1481] Article 36 and Recital 70 of the DSA contains provision concerning codes of conduct for online advertising. They focus in particular on the obligations concerning the transmission of information by online platforms and VLOPs.
[1482] Recital 70 of the DSA.
[1483] *Product Safety Pledge. Voluntary commitment of online marketplaces with respect to the safety of non-food consumer products sold online by third party sellers*, 02.03.2021, available at: https://ec.europa.eu/info/sites/default/files/voluntary_commitment_document_2021_v5.pdf.
[1484] *Memorandum of Understanding on the sale of counterfeit goods on the internet*, cit. Cfr. Recital 69 of the DSA. For more about codes of conduct see also *supra* § 1.3.9. Cfr. A. HOFFMANN – A. GASPAROTTI, op. cit., pp. 22-23. Cfr. Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, *A European Agenda for the collaborative economy*, cit., pp. 7 et sq.
[1485] Article 37 of the DSA.
[1486] Recital 71 of the DSA. Example of extraordinary circumstances is the misuse of online platforms for the rapid dissemination of illegal content.
[1487] Cfr. *Ibid.*
[1488] Cfr. *Ibid.*

measure to actively seek facts or circumstances suggesting illegal content; all details surrounding the writing of crisis protocols – which *may* include civil (and other relevant) organisations – shall then be clearly expressed and outlined, including «*safeguards to address any negative effects on the exercise of the fundamental rights enshrined in the Charter, in particular the freedom of expression and information and the right to non-discrimination*»[1489]. Despite all the clarifications and protections just mentioned, however, one might think that the crisis protocol can turn into an opportunity to infringe fundamental rights by failing to comply with the rules mentioned so far[1490]. The reference to "*extraordinary circumstances*" in fact may seem too vague, opening the way to possible manipulation of this term. In any case, more certain answers will arise following the legislative procedure[1491].

The DSA's context is characterized by a cross-borders scenario in which, in order to ensure an optimal application of the Regulation, it is fundamental for Member States to cooperate. The need to guarantee an appropriate supervision to the enforcement of the proposed Regulation – in particular the due diligence obligations provided therein – is "satisfied" with the introduction of two special competent authorities: the Digital Services Coordinators and the European Board for Digital Services[1492]. The first, chosen from one of the Member States' competent authorities[1493], is an independent authority having the task of supervising the application and the enforcement the DSA[1494]. It shall operate in an «*impartial, transparent and timely*»[1495] manner, cooperating at the same time with other Digital Service Coordinators across the Union to avoid DSA's

[1489] Article 37 of the DSA.
[1490] See *supra* § 3.2.1. - § 3.2.5.4.
[1491] At the state of art in fact the DSA is a legislative proposal.
[1492] Several legal scholars agree with the legal option of improving the Regulation enforcement measures in the DSA. Dr. Melanie Smith, for example, has proposed the creation of a central regulatory authority dedicated to monitoring compliance with the Regulation, verify online platform and generally ensure a better enforcement. Cfr. M. SMITH, *Enforcement and cooperation between Member States. E-Commerce and the future Digital Services Act*, STUDY requested by THE IMCO committee, 04.2020, pp. 26-29. Cfr. N. LOMBA – T. EVAS, op. cit., pp. 303-304.
[1493] Cfr. Article 38(1) of the DSA.
[1494] Cfr. Article 38, 39 and Recital 73, 74 of the DSA.
[1495] Article 39(1) of the DSA. The European Parliament has specified that Digital Services Coordinators shall also have «*adequate, technical, financial and human resources to carry out their tasks*».

infringements[1496]. Considering their role, the legislation gives Digital Services Coordinators several powers to investigate[1497] and to enforce the Regulation[1498]. Moreover, in cases where - despite the efforts made and the powers exercised – a DSA's infringement «*persists or is continuously repeated and causes serious harm which cannot be avoided through the exercise of other powers available under Union or national law*»[1499], the DSA attributes to Digital Services Coordinators additional power to take particular measures[1500]. The Digital Services Coordinators shall evaluate the complaints coming from recipients of the

[1496] Cfr. Recital 73 of the DSA. Cfr. Article 45 of the DSA.

[1497] The legislators refers to: «*(a) the power to require those providers, as well as any other persons acting for purposes related to their trade, business, craft or profession that may reasonably be aware of information relating to a suspected infringement of this Regulation, including, organisations performing the audits referred to in Articles 28 and 50(3), to provide such information without undue delay, or at the latest within three months; (b) the power to carry out on-site inspections of any premises that those providers or those persons use for purposes related to their trade, business, craft or profession, or to request other public authorities to do so, in order to examine, seize, take or obtain copies of information relating to a suspected infringement in any form, irrespective of the storage medium; (c) the power to ask any member of staff or representative of those providers or those persons to give explanations in respect of any information relating to a suspected infringement and to record the answers*.». Article 41(1) of the DSA. Moreover, the Digital Service Coordinators may participate in joint investigations with the European Board for Digital Services according to Article 46(1a)(1b) of the DSA. Then, in cases where there is a suspicion that a VLOP has infringed the Regulation, the Digital Services Coordinators can ask the Commission «t*o take the necessary investigatory and enforcement measures to ensure compliance*» with the DSA. Article 46(2) of the DSA. Cfr. Article 41(3) of the DSA.

[1498] The legislation refers to: «*(a) the power to accept the commitments offered by those providers in relation to their compliance with this Regulation and to make those commitments binding; (b) the power to order the cessation of infringements and, where appropriate, to impose remedies proportionate to the infringement and necessary to bring the infringement effectively to an end; (c) the power to impose fines in accordance with Article 42 for failure to comply with this Regulation, including with any of the orders issued pursuant to paragraph 1; (d) the power to impose a periodic penalty payment in accordance with Article 42 to ensure that an infringement is terminated in compliance with an order issued pursuant to point (b) of this paragraph or for failure to comply with any of the orders issued pursuant to paragraph 1; (e) the power to adopt proportionate interim measures or to request the relevant judicial authority to do so, to avoid the risk of serious harm.*». Article 41(2) of the DSA.

[1499] Article 41(3) of the DSA.

[1500] The possible measures to adopt, according to the legislation, are the following: «*(a) require the management body of the providers, within a reasonable time period, which shall in any case not exceed three months, to examine the situation, adopt and submit an action plan setting out the necessary measures to terminate the infringement, ensure that the provider takes those measures, and report on the measures taken; (b) where the Digital Services Coordinator considers that the provider has not sufficiently complied with the requirements of the first indent, that the infringement persists or continuously repeated and causes serious harm, and that the infringement entails a serious criminal offence involving a threat to the life or safety of persons, request the competent judicial authority of that Member State to order the temporary restriction of access of recipients of the service concerned by the infringement or, only where that is not technically feasible, to the online interface of the provider of intermediary services on which the infringement takes place*.». Article 41(3) of the DSA.

service towards the ISPs[1501]. According to Article 43 of the DSA in fact, users have «*the right to lodge a complaint*»[1502] against the intermediary «*alleging an infringement of the DSA*»[1503]. The Digital Services Coordinators is in charge of assessing this complaint and, eventually, send it to the Digital Services Coordinator of establishment[1504]. Article 44 of the DSA requires then Digital Services Coordinators to write a public annual report regarding their activities under the DSA, communicating it also to the Commission and the Board[1505].

The European Board for Digital Services, on the other hand, is «*an independent advisory group of Digital Services Coordinators*»[1506] having the tasks of supporting the Digital Services Coordinators and the Commission in the application and enforcement of the DSA, in the supervision of VLOPs and in providing a guidance «*on emerging issues across the internal market with regard to matters covered by*»[1507] the proposed Regulation. In order to fulfill its mission, the European Board has specific "powers" such as the possibility to draw up recommendations, opinions or advice to the Digital Services Coordinators[1508]. From the analysis of the DSA enforcement measures to ensure an efficient oversight on online platforms' activities and to generally safeguard the online environment, it emerges that the keyword is *cooperation*. Cross-borders situations

[1501] Cfr. Article 43 of the DSA.
[1502] *Ibid*.
[1503] *Ibid*.
[1504] Cfr. *Ibid*. See Article 43(1a) of the DSA.
[1505] Article 44(2) of the DSA contains the information that must be included in the report.
[1506] Article 47(1) of the DSA.
[1507] Article 47(2) of the DSA.
[1508] The Commission explains that, despite these are not legally binding, in cases where a Member State decide not to comply with them, the Commission can take it into account when assessing their compliance with the DSA. Cfr. Recital 90 of the DSA. Moreover, the European Board shall «*(a) support the coordination of joint investigations; (b) support the competent authorities in the analysis of reports and results of audits of very large online platforms to be transmitted pursuant to this Regulation; (…) (ca) issue specific reccomendations for the implementations of Article 13a; (d) advise the Commission to take the measures referred to in Article 51 and adopt opinions on draft Commission measures concerning very large online platforms in accordance with this Regulation; (da) monitor the compliance with Article 3 of Directive 2000/31/EC of measures taken by a Member State restricting the freedom to provide services of intermediary service providers from another Member State and ensure that those measures are strictly necessary and do not restrict the application of this Regulation; (e) support and promote the development and implementation of European standards, guidelines, reports, templates and code of conducts in close collaboration with relevant stakeholders as provided for in this Regulation, including by issuing opinions, reccomendations or advice on matters related to Article 34, as well as the identification of emerging issues, with regard to matters covered by this Regulation*». Article 49 of the DSA. The Board shall also draw up annual report concerning its activites *ex* Article 49a of the dsa.

indeed require competent authorities to work not only with each other, but also with other bodies in the Union. The European Board is a clear example of this necessity. Considering cross-cutting elements that can also be relevant for other legal frameworks across the European Union, in fact, the Commission declares that «*the Board should be allowed to cooperate with other (…) offices, agencies and advisory groups with responsibilities in fields such as equality, including equality between women and men, and non-discrimination, gender equality and non-discrimination, eradication of all forms of violence against women and girls and other forms of gender-based violence, data protection, (…), electronic communications, audiovisual services, market surveillance, detection and investigation of frauds against the EU budget as regards custom duties, or consumer protection, as necessary for the performance of its tasks*»[1509]. It is worth underlining that among the most relevant fields just mentioned, the European Parliament has mentioned also the «*respect for intellectual property*»[1510].

## 3.3. The new legislative framework for the protection of Intellectual Property online

The advent of digitalization and, with it, the advent of a new – technological – way of living, has completely changed the everyday routine of Europeans, revolutionizing, and shifting it toward a virtual word. The so-called Digital Era has reshaped the way of visualizing the world, of living social relations, of exchanging goods, of conceiving commerce. The progressive growth of different types of online platforms and the wide variety of digital services offered by ISPs has brought new challenges to face. The dissemination of illegal content, the spread of copyrighted works, the sale of counterfeit goods online, in few words the presence of IPRs infringements on digital platforms, all this has highlighted the urgency of adopting homogeneous and up-to-date legislative tools capable of regulating online platforms while protecting the various fundamental rights at

[1509] Recital 91 of the DSA. Cfr. European Data Protection Supervisor, *Opinion 1/2021 on the Proposal for a Digital Services Act*, cit., p. 19.
[1510] Recital 91 of the DSA.

stake. The «*social dilemma*»[1511] *i.e.*, the need to regulate online platforms in an efficient manner, in fact, call the European legislators to draft certain rules for the safeguard of the interests of right-holders, businesses and users.

Reconstructing the path traced so far by this work, it emerges that, at the state of art, the main legislative instruments regulating ISPs' activities are the E-Commerce Directive (Directive 2000/31/EC), The Copyright Directive in the Digital Single Market (Directive (EU) 2019/790), and the new proposed Regulation for a Digital Services Act seeking to amend the ECD. Since its entry into force, the ECD has played a key and pivotal role in providing legal guidelines for online intermediaries; by establishing the popular safe harbours regime for access, mere conduit, and hosting service providers[1512], it has soon become a benchmark for the governance of ISPs online activities. However, considering the growth and modernization of platforms as well as the variety of digital services currently offered online, a more than 20-years-old Directive turns out to be incapable of tackling IPRs illicit on the internet and it needs to be modified and updated. As a result, if the DSA will come into effect[1513], the study of the legal framework for the protection of IPRs online shall mainly focus on the CDSM and on the forthcoming DSA[1514] with an impact on how content covered by IP are disseminated online[1515].

The enforcement of IPRs in the Digital Era involve thus the application of two different legal regimes. While the DSA provide for a review of the "antiquated" ECD and it applies horizontally, the CDSM is considered as a *lex*

---

[1511] Cfr. LUISS School of Law, *The Social Dilemma: come disciplinare le piattaforme digitali?. Sintesi del convegno inaugurale della IX edizione del Master di II livello in Diritto della Concorrenza e dell'Innovazione*, cit., pp. 3-4. The term social dilemma is used here to refer to the need to regulate online platforms, questioning about which is the best way to do it.

[1512] See *supra* § Chapter 1.

[1513] See *supra* § Chapter 3.

[1514] The DSA is part of the REIFT *i.e.*, a European Union's program aiming at simplifying and making more easier the existing EU law for the benefit of citizens and businesses. Cfr. European Commission, *REFIT – making EU law simpler, less costly and future proof*, available at: https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-less-costly-and-future-proof_en.

[1515] For a depth analysis of the negative impact of counterfeiting (in particular against businesses) please note *Un'analisi della proposta di Regolamento "Digital Services Act" sotto il profilo della protezione dei diritti di Proprietà industriale*, 28.10.2021, available at: https://uibm.mise.gov.it/index.php/it/settimana-anticontraffazione-2021/28-ottobre-webinar-un-analisi-della-proposta-di-regolamento-digital-services-act-sotto-il-profilo-della-protezione-dei-diritti-di-proprieta-industriale.

*specialis* to the proposed Regulation[1516]. As widely evidenced *supra* in this Chapter, the DSA has a larger scope compared to the ECD[1517], it clarifies and completes some unsolved aspects – *e.g.,* the NTD mechanism[1518] – establishing a procedural framework and it introduces additional due diligence obligations for online platforms and VLOPs. Article 17 of the CDSM[1519], on the other hand, is a very long and complex provision – even considered by some authors as an «*explosive cocktail*»[1520] or a «*monster provision both by its size and hazardousness*»[1521] – establishing a discussed copyright-specific regime for the use of protected works by OCSSPs[1522]. As noted in Chapter 2, indeed, the OCSSPs' liability exemption conditions required by Article 17(4) of the CDSM for cases in which the platform has not obtained the authorisation to give public access to a copyright-protected work, raise some doubts regarding the protection of fundamental rights, in particular freedom of expression, and regarding its consistency with the general DSA[1523]. In fact, although academics and legal scholars have underlined that to properly address IPRs violations online it is fundamental to have a coherent legislative approach across different regulatory tools, Article 17(4) of the CDSM *de facto* require OCSSPs to implement filtering measures, apparently going against the general monitoring prohibition imposed by Article 7 of the DSA[1524]. The "conflict" between these two provisions is even more evident when considering that Article 7 of the DSA – *ex* Article 15 of the ECD – is the most relevant provision for the protection of fundamental rights. Thus, while Poland filed an action for annulment against Article 17 of the CDSM for failing to adequately protect users' right to freedom of expression, legislators

[1516] Article 17(3) states indeed that when an OCSSP gives public access to a copyright-protected works, the liability exemption regime *ex* Article 14 of the ECD shall not apply. The CDSM provides in Article 17(4) its own conditions for the immunity of OCSSPs. See *supra,* § 2.1, § 2.2.
[1517] Cfr. Article 1 of the DSA.
[1518] See *supra* § 3.2.5.2.
[1519] Article 17 of the CDSM is the provision on which this analysis focused because it regulates OCSSPs. See *supra* § Chapter 2.
[1520] Cue taken from Marco Giorello in the LUISS Webinar *The Directive Copyright in the Digital Single Market: ways forward. The challenges for Art. 17*, 05.05.2021, available at: *https://www.luiss.it/evento/2021/05/05/the-directive-copyright-in-the-digital-single-market-ways-forward.*
[1521] S. DUSSOLIER, op. cit., p. 1008.
[1522] See *supra* § Chapter 2.
[1523] *Ibid.*
[1524] See *supra* § 2.2.4, § 2.3. It goes also against the same Article 17(8) of the CDSM.

could take this opportunity to rethink the structure this provision, trying to ensure greater consistency and uniformity to the legislative framework regulating ISPs.

In analyzing the interaction between the DSA and Article 17 of the CDSM[1525], some authors[1526] question whether, and if so how, the proposed Regulation can apply to OCSSPs. As the DSA is a horizontally applicable Regulation, the rules contained therein are conceived to not only contrast IPRs infringements online, but also to tackle hate speech, child sexual abuse material, terroristic content online or any information that is not in compliance with Union law or the law of a Member State[1527]. The CDSM, instead, refers only to copyright infringing material disseminated by OCSSPs. As it is already evident from what has been written so far, the European Commission intends that the DSA to be complementary the CDSM; meaning that other legislative acts, such as the Copyright Directive, remain «*unaffected*»[1528] by the proposed Regulation. An in-depth analysis of the relevant legal provisions governing ISPs suggests in any case that the OCSSPs regulated by the CDSM are not a sort of new category of ISPs, rather they are hosting service providers regulated by different legislative tools depending on the illegal content referred to. The same Article 17(3) of the CDSM clarifies that the liability exemption regime provided for hosting services providers in Article 5 of the DSA (*ex* Article 14 of the ECD) can apply to those digital services providers falling outside the scope of the CDSM[1529]. YouTube, for example, can be considered as both an OCSSP and a VLOP: when the platform hosts copyrighted material, then CDSM Article 17 applies, while when it is used to disseminate and offer counterfeited goods online, as well as any other illegal information on the internet[1530], the ECD safe harbours regime – *i.e.*, the DSA

[1525] Cfr. I. LEONE - A. GULLO - G. COLANGELO - S. SCALZINI, studio presentato alla Settimana Anticontraffazione, *Un'analisi della proposta di Regolamento "Digital Services Act" sotto il profilo della protezione dei diritti di Proprietà industriale*, 28.10.2021, available at: https://uibm.mise.gov.it/index.php/it/settimana-anticontraffazione-2021/28-ottobre-webinar-un-analisi-della-proposta-di-regolamento-digital-services-act-sotto-il-profilo-della-protezione-dei-diritti-di-proprieta-industriale.

[1526] See for example P. QUINTAIS – S. F. SCHWEMER, *The Interplay between the Digital Services Act and Sector Regulation: How Special is Copyright?*, cit.

[1527] Cfr. Article 2(g) of the DSA. See *supra* § 3.2.2.

[1528] Recital 11 of the DSA. Cfr. Recital 10 of the DSA.

[1529] Article 17(3) of the CDSM.

[1530] This is in fact also true for hate speech, fake news, child sexual abuse material as well as for the spread of terroristic content online.

liability regime – can be applied. It emerges that, while there would be no room for the application to OCSSPs of the DSA hosting service providers' safe harbours because expressly excluded by the CDSM's Article 17(3), it might be possible to apply certain DSA due diligence obligations to fill in the gaps of the Copyright Directive[1531]. The reference is, for example, to the provisions applicable to all ISPs[1532] as the establishment of points of contact, legal representatives, terms and conditions and transparency obligations *ex* Article 10 and 13, but also *ex* Article 23[1533] and 33[1534] of the DSA.

Doubts arise instead regarding the NTD mechanism[1535]. While Article 14 of the DSA clearly provide for a specific Notice-and-action procedure, the CDSM does not seem to do the same. The fact that the CDSM's NTD system is not precisely defined[1536] could pave the way for the application of the DSA Article 14 to OCSSPs. In fact, when information shared on OCSSPs regards the sale of counterfeit physical goods or any other illegal activity online, the mechanisms that are put in place are the DSA horizontals NTD and complaint and redress procedures rather than those established by the CDSM. In light of this, the application of a more accurate Notice-and-action procedure could be a benefit for a successful implementation of the CDSM Article 17's liability regime. In this way, the efforts in the drafting of a long and meticulous NTD mechanism[1537] could be put to good use, making its application reasonable and comprehensible even to digital platforms regulated by a *lex specialis* as the CDSM. According to Quintais and Schwemer, however, the possible application of the DSA NTD

[1531] Cfr. *Ibid. See supra* § 3.1. Please note that the legislative tool of the Regulation is considered by the legislators as the most suitable to ensure a high level of protection across the Union, to safeguard the online environment by guaranteeing legal certainty, transparency and «*consistent monitoring of the rights and obligations, and equivalent sanctions in all Member States, as well as effective cooperation between the supervisory authorities of different Member State and at union level*». European Commission, *Proposal for a Regulation of The European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC,* cit., p. 7. For these reasons it could be appropriate to apply it to regulate certain aspect of other ISPs although regulated by other Directives.
[1532] See *supra* § 3.2.5.1.
[1533] See *supra* § 3.2.5.3.
[1534] See *supra* § 3.2.5.4.
[1535] Article 14 of the DSA. See *supra* § 3.2.5.2.
[1536] Article 17(4)(c) of the CDSM indeed refers only to «*sufficiently substantiated notice from the rightholders*».
[1537] Article 14 of the DSA.

system to OCSSPs would depend on the «*nature*»[1538] of Article 14 of the DSA, or better whether it is to be considered as «*supplement*»[1539] to the hosting's liability exemption *ex* Article 5 of the DSA «*or as a due diligence obligation applicable to hosting service more broadly*»[1540]. The authors conclude considering that, specifically for the purpose of obtaining knowledge or awareness[1541], Article 14(3) of the DSA[1542] refer directly to the hosting service providers' safe harbours so that it cannot directly apply to OCSSPs in the context of copyright protection[1543]. The same it has been observed looking at the CDSM's NTD and at the DSA's Notice-and-action procedure, it is true also for the digital platform's dispute settlement. Comparing the internal complain-handling system and the out-of-court dispute settlement respectively regulated by Article 17 and 18 of the DSA and Article 17(9) of the CDSM; the proposed Regulation letter seems once again to be more detailed. The existence of «*similar but different*»[1544] complaint and redress mechanisms provided by different legal regime governing the relevant content in question – be it the online spread of protected copyright works, the sale of counterfeit goods online, hate-speech on digital platforms etc. – surely militate against the need to «*put an end to fragmentation of the internal market and to ensure legal certainty (…) reducing uncertainty for developers, protecting consumers and fostering interoperability*»[1545], as Recital 4 of the DSA requires[1546]. According to this reasoning, the applicability of the DSA's Article 17

[1538] J. P. QUINTAIS – S. F. SCHWEMER, *The Interplay between the Digital Services Act and Sector Regulation: How Special is Copyright?*, cit., p. 16.
[1539] *Ibid.*
[1540] *Ibid.*
[1541] See *supra* § 3.2.2. Cfr. Article 5 of the DSA.
[1542] See *supra* § 3.2.5.2.
[1543] Cfr. J. P. QUINTAIS – S. F. SCHWEMER, *The Interplay between the Digital Services Act and Sector Regulation: How Special is Copyright?*, cit., pp. 15-16. The authors sustain then that a similar rationale applies to Article 15 of the DSA providing for statement of reasons.
[1544] *Ibid.*
[1545] Recital 4 of the DSA. In this regard, *inter alia*, the European Parliament's amendments have added a new letter in Recital 4 of the DSA. Recital 4(a) indeed now ensures specific protection to the right to access to digital services for all recipients of the services. It states that «*Given the importance of digital services, it is essential that this Regulation ensures a regulatory framework which ensures full, equal and unrestricted access to intermediary services for all recipients of services, including persons with disabilities. Therefore, it is important that accessibility requirements for intermediary services, including their user interfaces, are consistent with existing Union law, such as the European Accessibility Act and the Web Accessibility Directive and that Union law is further developed, so that no one is left behind as result of digital innovation*.».
[1546] Cfr. J. P. QUINTAIS – S. F. SCHWEMER, *The Interplay between the Digital Services Act and Sector Regulation: How Special is Copyright?*, cit., pp. 16-17.The fragmentation of the regulatory

more precise complaint and redress mechanism to OCSSPs could be thus considered as a valid option[1547]. Analyzing other relevant provisions, Article 19 of the DSA states online platforms shall cooperate with some trusted flaggers notifiers *i.e.,* specific notifiers which are intended to have an important role in combating illegal content online[1548]. Besides their importance in identifying any illicit information that the DSA's rules are intended to contrast, these figures could also contribute to strengthen the enforcement of copyright protection on digital platforms. DSA Article 19(1), however, seems to be directly connected to the NTD mechanisms, which brings the issue back to the original question *supra* posed, namely whether Article 14 of the DSA is applicable to OCSSPs regulated by the *lex specialis* CDSM[1549]. In any case, while admitting the inapplicability of Article 14 of the DSA, it is worth noting that, in the matter of trusted flaggers, the European Commission encourage the voluntary collaboration between hosting services providers and reliable notifiers. Recital 29 of the *Recommendation on measures to effectively tackle illegal content*[1550] online in fact states that «*cooperation between (…) trusted flaggers and hosting service providers should be encouraged, in particular by treating the notices that they submit also as a matter of priority and with an appropriate degree of confidence as regards their accuracy*». Quintaias and Schwemer suggest then that no doubts seem to exist for the application to OCSSPs of the VLOP's risk mitigations measures *ex* Article 26 and 27 of the DSA[1551]. The authors observe that, as the CDSM does not deal with the systemic risks addressed by the DSA in any way and as VLOPs are also OCSSPs, it might be reasonable to apply Article 26 and 27 of the DSA to

framework for the provision of digital services is considered as one of the key drivers of the existing problems and «*a common action to tackle the current issues on the provision of digital services at the EU level could yield more benefits for EU citizens and businesses (…)*» Cfr. N. LOMBA – T. EVAS, op. cit., p. 92.

[1547] Cfr. To observe thesis supporting the non-applicability of the DSA complaint and redress mechanisms see J. P. QUINTAIS – S. F. SCHWEMER, *The Interplay between the Digital Services Act and Sector Regulation: How Special is Copyright?*, cit., pp. 16-17.

[1548] See *supra* § 3.2.5.3.

[1549] This logic can also be valid for the application of Article 20 of the DSA. Cfr. J. P. QUINTAIS – S. F. SCHWEMER, *The Interplay between the Digital Services Act and Sector Regulation: How Special is Copyright?*, cit., p. 19.

[1550] European Commission, *Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online*, cit.

[1551] See *supra* § 3.2.5.4.

OCSSPs[1552]. A general view on the interplay between the DSA and the CDSM points out that, although the CDSM is *lex specialis* to the proposed ECD amendment, this may not prevent the application of certain relevant procedural rules contained in the Regulation to OCSSPs. Thus, waiting for the European Commission to publish guidelines clarifying any conflict between the DSA and other legal acts and explaining which legal act should prevail[1553], there is no forgetting that the DSA's main aim is to provide for *uniform* and *harmonised* rules for a safe, accessible, predictable, and trusted online environment where fundamental rights are effectively protected[1554].

Online platforms are surely the protagonist of the Digital Era the European Union is living. From a sociological point of view, digital platforms can be defined as a "total fact", they are socio-technological architectures with such pervasive and widespread ramifications in all spheres of individual and associated life that the diaphragm between platforms and society disappears[1555]. Online platforms have increased citizens' individual and collective well-being, they allow to carry out a wide variety of online activities but at the same time they are powerful means to easily collect and disseminate illicit material, threatening in this way the safety of the entire Digital Single Market system[1556]. The need to adopt certain and precise rules applicable to ISPs while respecting fundamental rights is thus one of the greatest challenges to be faced in the modern society[1557]. A keen eye suggests that, today, this necessity is no longer felt only by the legislators, but also probably by the regulated themselves, namely, by digital platforms.

---

[1552] It might be possible to apply to OCSSPs also other relevant VLOPs measures as data access and transparency obligations. See *supra* § 3.2.5.4. Cfr. Cfr. J. P. QUINTAIS – S. F. SCHWEMER, *The Interplay between the Digital Services Act and Sector Regulation: How Special is Copyright?*, cit., p. 19.

[1553] Recital 9 of the DSA.

[1554] Cfr. Article 1(2)(b) of the DSA.

[1555] Cfr. LUISS School of Law, *The Social Dilemma: come disciplinare le piattaforme digitali?. Sintesi del convegno inaugurale della IX edizione del Master di II livello in Diritto della Concorrenza e dell'Innovazione,* cit., p. 5. See in particular the intervention of Elisa Giomi, Commissioner of AGCOM.

[1556] This phenomenon is referred to as a "platformization of society". Cfr. LUISS School of Law, *The Social Dilemma: come disciplinare le piattaforme digitali?. Sintesi del convegno inaugurale della IX edizione del Master di II livello in Diritto della Concorrenza e dell'Innovazione,* cit., p. 5.

[1557] See *supra* § Chapter 1, § Chapter 2.

# Conclusion

The advent of technological innovation and the modern process of digitalization have rapidly transformed the business dynamics and the daily life of every citizen, soon attracting the interest of scholars and legal experts. By allowing users to carry out many activities online, Digital platforms, are now a valuable tool capable not only to increase the collective and individual Europeans' well-being, but also to facilitate the dissemination of illegal material online by their users, such as counterfeit goods and copyright protected works.

This study has focused on the analysis of online IPR infringements, trying to examine and understand the main legislative tools regulating the liability and the accountability of digital service providers. The stakeholders of the new "digital" world so far analyzed are not only digital platforms and every user who utilizes them, but also IPRs' owners. This dissertation has deepened the main legislative provisions addressed to the regulation of platforms' liability, by starting from the first attempts of regulation up to the final and most innovative proposals. This work has analyzed firstly the E-Commerce Directive, a legislative instrument drafted more than 20 years ago, secondly, the Copyright Directive, entered into force in 2019, and finally the Digital Services Act, a new Legislative Proposal for the regulation of digital services providers.

The E-Commerce Directive examined in the first Chapter has always played a pivotal role in the regulation of digital intermediaries. Addressed to all Information Society Services, its provisions introduce a "safe harbours" regime for mere conduit, caching and hosting services providers. Articles 12, 13 and 14 of the Directive in fact correspondingly state that digital intermediary who merely transmit in a communication network of information provided by a user or give access to a communication network[1558], who transmit[1559], or store[1560] information provided by a recipient of the service, are, subject to strict conditions, exempt from liability for information transmitted, stored temporarily, or stored at the

[1558] Mere Conduit or Access service providers. Article 12 of the E-Commerce Directive.
[1559] Caching Service Providers. Article 13 of the E-Commerce Directive.
[1560] Hosting Service Providers. Article 14 of the E-Commerce Directive.

request of the users on their platform. The analysis has underlined that, although these are precisely enumerated, the requirements according to which ISPs can be immune from liability give rise to interpretative uncertainties in their practical application. The concepts of "illegal activity or information", legal basis for the identification of illegal material online, or "actual knowledge or awareness" do not appear to be accurately described in the E-Commerce Directive. Article 14 obliges hosting providers to remove unlawful information online immediately or disable access to it once they become aware of its presence on the platform. In the absence of a definition of "actual knowledge or awareness" or even of a Notice-and-takedown mechanism however it is hard not to consider the Directive as affected by legislative gaps. The digital intermediaries in fact, lacking an adequate "Notice-and-takedown" mechanism and driven by the fear of incurring liability, are incentivized to remove the – allegedly – illegal content too easily and without the necessary supervision, thereby undermining the right to freedom of expression and the right to freedom of business. Businesses that profit from the publication of digital content on online platforms, in fact, may be prejudiced by an unfair removal of the material they upload, as well as users whose may benefit from an applicable exception or limitation to copyright. The fact then that the E-Commerce Directive's liability exemption is granted only to "passive" intermediaries and not to the "active" ones, would lead to talk about a real dilemma. Paradoxically, while Internet Services Providers who are "neutral" with respect to knowledge of illegal activity online do not incur liability, "active" intermediaries – also referred to as "Good Samaritans" – engaging in proactively searching for illegal material may be instead exempted from the immunity benefit for the information stored. The first Chapter has analyzed the main provisions aimed at regulating digital service providers, focusing also on Article 15 of the Directive. The latter, considered as one of the most important provisions safeguarding fundamental rights, establishes a general monitoring prohibition of the material uploaded online but it allows at the same time to monitor in specific cases. Although the E-Commerce Directive has paved the way for the development and consolidation of the Digital Single Market in Europe, it appears to be affected by deep legislative "loopholes" that need to be filled. In addition, by

not providing any specific discipline for new and diversified digital intermediaries – such as, for example, very large online platforms – the E-Commerce Directive seems inadequate to deal with the widespread distribution of illegal material online, IPRs infringements, and with the new challenges that the Digital Era today poses.

The second Chapter has analyzed the Copyright Directive *i.e.*, Directive 2019/790/EC, paying particular attention to its long and complex Article 17. The latter, considered by some authors even as a «*monster provision both by its size and dangerousness*»[1561], describes a special regime for the regulation of online content sharing service providers storing and disseminating copyrighted works for profit-making purposes[1562]. To ensure that rightholders receive fair compensation for the exploitation of their works, Article 17 encourages the stipulation of licensing agreements between digital intermediaries and Intellectual Property Rights owners for the purpose of communicating[1563] or making available to the public specific works or other protected subject matter. The Copyright Directive is considered as *lex specialis* to the E-Commerce Directive and its subsequent amendments - for example, the new Digital Services Act - because, by establishing specific requirements for the online content sharing service providers' liability exemption, it expressly derogates from the conditions provided for in Article 14 of the E-Commerce Directive. Indeed, in cases where rightholders grant no authorization to online content sharing service providers for making copyrighted works available to the public, the intermediaries can be exempted from liability for the disclosure if: (a) they demonstrate that they have made their best efforts to obtain the relevant authorization; (b) they demonstrate that they have made their best efforts to ensure the unavailability of specific works or other materials for which they have received relevant and necessary information from rights holders; (c) they have adopted a Notice-and-Takedown system to remove or disable access to protected works and a Notice-and-Staydown system to prevent their future uploads[1564]. These conditions, including

[1561] S. DUSSOLIER, op. cit., p. 1008.
[1562] Article 2(6) of the CDSM.
[1563] In particular when OCSSPs perform an act of communication to the public.
[1564] Article 17(4) of the CDSM.

the implicit request to implement technical measures to prevent subsequent online uploads of the copyrighted materials, have raised and are raising concerns[1565] about a fair balance of fundamental rights at stake. One wonders in fact whether these provisions conflict with the general monitoring prohibition referred to Article 15 of the E-Commerce Directive, and whether they can be reconciled with the safeguard of the right to freedom of expression and the smaller platforms' right to freedom of business. Article 17(5) then anchors the Article 17(4) conditions' assessment to specific elements and provides for an "exceptional" liability regime for new online content sharing service providers. The legislator provides at the same time rules protecting users, clarifying that the cooperation between rightholders and digital platforms shall not affect the users' right to access lawful material online as well as works covered by exceptions or limitations. In the event of disputes relating to the removal of material uploaded online or to its access' disabling, Article 17(9) allow users to appeal to a complaint and redress mechanism at both platform level and at out-of-court level. This provision does not affect in any case the users' right to recourse to judicial remedies. The analysis of Art. 17 CDSMD has shown that, in addition of being an extremely articulated provision, it also risks threating the fair balance of fundamental rights at stake. The implicit request to online content sharing service providers to implement filtering measures to remove and prevent the subsequent upload of IPRs' infringing material, in fact, seems to be in contrast with the need to safeguard – besides copyright holders – also users and digital platforms themselves.

Chapter 3 has examined the new proposed Digital Services Act and intended to amend the E-Commerce Directive. As evidenced during the first chapters, the illegal content's disseminators benefit from the presence of new and different digital services currently offered online and digital platforms need to be regulated by innovative and stricter legislative rules. The Digital Services Act Proposal, aiming at ensuring a safe, transparent and accessible online environment

[1565] Case C-409/19, *Republic of Poland vs European Parliament and Council of the European Union.*

with responsible and accountable behaviors of digital intermediaries[1566], is an "horizontal" Regulation applicable to all digital services providers. Compared to the "outdated" E-Commerce Directive, the new set of rules proposed by the European Commission on 15 December 2020 leaves the liability regime for mere conduit, caching and hosting services providers unchanged but it clarifies some fundamental concepts improving the "safe harbours" functioning and it overcomes the "Good Samaritan" dilemma. The legislator provides for a new definition of illegal content and "actual knowledge or awareness" referred to the new Article 5 of the DSA. Article 6 of the Regulation, provision considered as one of the major innovations made to the E-Commerce Directive, allows "Good Samaritans" - *i.e.*, digital providers who actively and voluntarily carry out investigations or other activities aimed at identifying, detecting and removing or disabling access to illegal content[1567] - to benefit from the liability exemption unlike the past. The Digital Services Act in any case reaffirms the prohibition of a general obligation to monitor the information uploaded online. The entire Regulation is dedicated to the legal discipline of online platforms, providing for them specific due diligence obligations. These provisions, applicable according to their content to all digital intermediaries, hosting service providers, online platforms and very large platforms, outline, *inter alia*, a specific Notice-and-action mechanism for the liability exemption of hosting service providers and facilitate notifications coming from "trusted flaggers". The numerous obligations contained in the new Digital Services Act aiming at tackling illegal content on digital platforms are particularly strict for Very Large Online Platforms. The latter, in addition to complying with the provisions established for other and smaller digital intermediaries, are in fact required to respect additional and more stringent obligations, including those relating to the assessment and mitigation of significant systemic risks arising from the functioning and the use of their services in the European Union[1568]. With specific regard to the protection of intellectual

[1566] European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final, cit., p. 36.
[1567] Article 6 of the DSA.
[1568] Article 26 of the DSA and 27 of the DSA.

property rights online, the Digital Services Act reinforces the measures to contrast digital infringements by introducing for online platforms duties of traceability of traders[1569] operating on platforms and obligation to inform consumers and authorities about illegal products and services[1570] offered online. Following the amendments made by the European Parliament to the proposed Regulation[1571], the legislator seems to have taken a step forward towards an effective protection of intellectual property rights online. With the intention of ensuring a safe and reliable digital environment for consumers, competing traders and intellectual property rights holders, the Digital Services Act now requires online platforms to obtain specific information concerning the trader who concludes distance contracts with online users or promotes messages concerning products or services on behalf of brands[1572]. Such information includes, *inter alia*, details about the product or service that is indented offered online. Digital service providers should "make their best efforts" to verify the reliability of information provided by traders, possibly by carrying out random checks to avoid the dissemination of illegal material on the platform. The trademark or logo, in general the identity of the commercial user providing content should then be clearly visible on the platform, so as not to incur counterfeiting online[1573]. The legislator also requires the digital service providers themselves to be able to demonstrate that they have "done their best" to prevent the appearance of infringing material on the platform[1574].

The study conducted has made it possible to investigate the legal discipline of digital platforms and the presence intellectual property rights infringements online. The analysis has highlighted businesses providing digital intermediation services could be subject to a double regulatory regime which includes, on the one hand, the new proposed Digital Services Act addressed to all digital services providers, and, on the other hand, the Directive on Copyright and Related Rights in the Digital Single Market addressed to online content sharing services

[1569] Article 22 of the DSA.
[1570] Article 22a of the DSA.
[1571] In the context of the ordinary legislative procedure, the European Parliament has amended the original legislative text drafted by the European Commission.
[1572] Recital 49 of the DSA.
[1573] Article 22(3b) of the DSA.
[1574] Recital 50a of the DSA.

providers. In analyzing the interplay between the two sets of rules, one wondered whether, and if so how, the proposed Regulation might apply to online content sharing services providers. It was pointed out that online content sharing service providers regulated by the Copyright Directive are not a sort of "new category" of Internet Services Providers, but rather they are hosting service providers governed by different legislative instruments depending on the illegal content they host. Some businesses could for instance, can be considered as an online content sharing services providers, from the one side, and a very large online platform, from another side,: when the platform hosts copyrighted material, then Article 17 of the Copyright Directive will apply, while when it is used to disseminate counterfeit goods online, the Digital Services Act "safe harbors" regime will apply. It was found that, while there would certainly be no room for the application to online content sharing services providers of the E-Commerce hosting services providers liability regime - because it is expressly excluded by Article 17(3) of the Copyright Directive - it might be possible to apply to them certain due diligence obligations outlined in the new (proposed) Digital Services Act. The absence of a specific Notice and takedown mechanism in the Copyright Directive, for example, could pave the way for the application of Article 14 of the (proposed) Digital Services Act to online content sharing services providers. It has been noted that when information shared on online content sharing platforms concerns regards, rather than copyrighted works, the sale of counterfeit goods or any other illegal online activity, the mechanism that is put in place is the "notice and action" mechanism provided for in the Digital Services Act. In view of this, it has been hypothesized that the application of a meticulously described "notice and action" procedure - such as that established in the legislative proposal for a Digital Services Act - could be a benefit for a successful implementation of the liability regime of online content sharing service providers provided in Article 17 of the Copyright Directive. In this way, in addition, the legislator's efforts in the drafting of a long and detailed "notice and action" procedure could be useful. It might be considered reasonable, therefore, to apply the Notice-and-takedown provided by article 14 of the Digital Services Act also to online content sharing service providers disseminating copyrighted material.

Even though there could be two different legislative instruments applicable, *i.e.*, the Copyright Directive and the new proposed Digital Services Act, an effective legislative framework for the protection of intellectual property rights online shall contain coordinated provisions. This analysis has evidenced that the Copyright Directive may be for some aspects in "conflict" with the (proposed) Digital Services Act. The main problem in this regard lies in the liability exemption's conditions provided for online content sharing services providers by the Copyright Directive. As noted, in order not to incur liability, the Copyright Directive implicitly obliges digital intermediaries to implement technical measures to avoid the subsequent online uploading of copyrighted material. Such a provision seems to be in contrast with Article 7 of the Digital Services Act which, with the intention of safeguarding fundamental rights - in particular the protection of users' rights - expressly prohibits a general monitoring of the material uploaded on digital platforms. The question arises as to what extent the need to safeguard intellectual property rights' holders may affect online users and their freedom of expression. The answer should coincide with the need to strike a fair balance of different interests at stake. An efficient legislative framework should aim to build a balanced set of rules capable of ensuring an adequate protection for both IPR owners, users, and online platforms.

The analysis carried out has shown that the existence of uncoordinated legislative instruments for the protection of intellectual property rights online may militate against the need to ensure legal certainty across the European Union and avoid fragmentation of legal rules[1575]. Hoping that the European Commission will publish clear guidelines detailing the interaction between the new Digital Services Act and the Copyright Directive[1576], one cannot fail to note that an efficient protection of intellectual property rights in the modern "Digital Age" can only be achieved by implementing uniform and harmonized rules able to ensure a safe and trustworthy online environment where fundamental rights are effectively protected[1577].

[1575] Recital 4 and 4a of the DSA.
[1576] Recital 9 of the DSA.
[1577] Cfr. Article 1(2)(b) of the DSA.

# Conclusione

L'evoluzione tecnologica ed il moderno processo di digitalizzazione hanno velocemente trasformato le dinamiche tra imprese e la quotidianità di ogni cittadino, attirando presto l'interesse di studiosi ed esperti del diritto. Le piattaforme digitali, mezzi che permettono ormai di svolgere molteplici attività online, rappresentano oggi un valido strumento in grado non solo di aumentare il benessere collettivo, ma anche di favorire da parte degli utenti delle stesse la circolazione di materiale illecito online come beni contraffatti ed opere protette dal diritto d'autore.

Lo studio sin qui condotto ha analizzato il problema delle violazioni del diritto di proprietà intellettuale online, cercando di esaminare e comprendere i principali strumenti legislativi atti a regolamentare la responsabilità dei fornitori di servizi di intermediazione digitale. The stakeholders of the new "digital" world so far analyzed are not only digital platforms and every user who utilizes them, but also IPRs' owners. This dissertation has deepened the main legislative provisions addressed to the regulation of platforms' liability, by starting from the first attempts of regulation up to the final and most innovative proposals

Gli stakeholders del nuovo mondo "digitale" non solo le piattaforme online ed ogni utente che se avvale, ma anche i titolari di diritti di proprietà intellettuale. L'analisi svolta ha approfondito le principali disposizioni legislative che disciplinano la responsabilità delle piattaforme digitali, esaminando tutte le più rilevanti norme in materia. La trattazione si è infatti confrontata in primo luogo con lo studio della Direttiva E-Commerce, strumento legislativo emanato più di venti anni fa, in secondo luogo con l'esame della Direttiva Copyright, entrata in vigore nel 2019, ed infine con la Legge sui Servizi Digitali, nuova proposta legislativa per la regolazione delle piattaforme online.

La Direttiva E-Commerce esaminata nel corso del primo capitolo rappresenta un vero e proprio punto di riferimento per la disciplina dei fornitori dei servizi digitali. Indirizzate a tutti i servizi della società dell'informazione, le disposizioni in questa contenute introducono un regime di "safe harbours" per i fornitori di servizi di mere conduit, caching e hosting. Gli Articoli 12, 13 e 14

della Direttiva prevedono corrispondentemente che gli intermediari digitali che trasportino semplicemente o diano accesso ad una rete di comunicazione[1578], che trasmettano[1579] o che memorizzino[1580] delle informazioni fornite da un destinatario del servizio siano, d'accordo con il rispetto di precisi requisiti, esenti da responsabilità per le informazioni trasmesse, memorizzate temporaneamente o memorizzate a richiesta degli utenti sulla loro piattaforma. Si è rilevato nel corso di questa analisi che, seppur precisamente enumerati, i requisiti sulla base dei quali ottenere l'esenzione di responsabilità diano adito nella loro applicazione pratica a delle incertezze legislative. I concetti di "attività o informazioni illecite", base identificativa per la presenza di materiale illegale online, o di "effettiva conoscenza" non sembrerebbero essere infatti accuratamente descritti dalla Direttiva E-Commerce. L'Articolo 14 prevede che l'hosting service provider sia obbligato a rimuovere immediatamente le informazioni indebite online o a disabilitarne l'accesso una volta venutone a conoscenza. In assenza però di una chiara definizione di «*actual knowledge or awareness*»[1581] o, addirittura, della regolamentazione di un vero e proprio meccanismo di Notice-and-takedown, risulta difficile non considerare come la Direttiva sia in realtà affetta da lacune legislative. Sprovveduti di un adeguato meccanismo di "notifica e rimozione" e spinti dal timore di incorrere in responsabilità, infatti, gli intermediari risultano incentivati ad eliminare il – presunto – contenuto illegale troppo facilmente e senza la necessaria supervisione, rischiando così di inficiare la libertà di espressione e la libertà di iniziativa economica. Le aziende che traggono profitto dalla pubblicazione di contenuti digitali su piattaforme online, infatti, rischiano di essere pregiudicate da un'ingiusta rimozione dei materiali da loro caricati, così come gli utenti che possono beneficiare di un'eccezione o di una limitazione applicabile al diritto d'autore. La considerazione che l'esenzione di responsabilità, poi, sia concessa solo agli intermediari "passivi" e non a quelli "attivi", porterebbe a parlare di un vero e proprio dilemma. Paradossalmente, mentre i fornitori di servizi digitali "neutrali" rispetto alla conoscenza di qualsiasi tipo di attività

[1578] Mere Conduit o Access service providers. Articolo 12 della Direttiva E-Commerce.
[1579] Caching service providers. Articolo 13 della Direttiva E-Commerce.
[1580] Hosting service providers. Articolo 14 della Direttiva E-Commerce.
[1581] Articolo 14 della Direttiva E-Commerce.

illecita online non incorrono in responsabilità, gli intermediari "attivi" – anche definiti come "Buoni Samaritani" – impegnati nella ricerca proattiva di materiale illegale risultano invece esonerati dal beneficio dell'immunità per le informazioni memorizzate. Nel corso del primo capitolo si sono analizzate le principali disposizioni atte a regolare i fornitori dei servizi digitali, concentrandosi anche sull'Articolo 15 della Direttiva. Quest'ultimo, considerato come il più importante strumento di salvaguardia dei diritti fondamentali, sancisce un divieto generale di imporre obblighi di monitoraggio del materiale caricato online, ammettendo però allo stesso tempo la possibilità di effettuare un monitoraggio in casi specifici. Seppur la Direttiva E-Commerce abbia aperto la strada allo sviluppo ed al consolidamento del mercato digitale in Europa, questa appare in realtà affetta da alcune lacune che necessitano di essere sanate. In più, non prevedendo nessuna disciplina specifica per i nuovi e diversificati intermediari digitali – come, ad esempio, le piattaforme online di dimensioni molto grandi –, la Direttiva risulta inadeguata a fronteggiare la capillare distribuzione di materiale illegale online, le violazioni di diritti di proprietà intellettuale, e le nuove sfide che l'Era Digitale oggi pone.

Il secondo Capitolo ha analizzato la Direttiva Copyright *i.e.,* Direttiva 2019/790/EC, prestando particolare attenzione al suo lungo e complesso Articolo 17. Quest'ultimo, considerato finanche da alcuni autori persino come una previsione "mostruosa" per le sue dimensioni e per la sua pericolosità[1582], descrive uno speciale regime per la regolazione dei fornitori di servizi di condivisione di contenuti online che memorizzano e divulgano opere protette dal diritto d'autore per trarne profitto. Per assicurare ai titolari dei diritti il giusto compenso per lo sfruttamento delle loro opere, l'Articolo 17 incentiva la conclusione di accordi di licenza tra gli intermediari digitali ed i proprietari del diritto d'autore al fine di comunicare o rendere disponibili al pubblico specifiche opere od altri materiali protetti. La Direttiva Copyright è considerata *lex specialis* rispetto alla Direttiva E-Commerce ed alle sue successive modifiche – per esempio, La proposta per una nuova Legge sui Servizi Digitali – perché, istituendo specifici requisiti per l'esenzione di responsabilità delle piattaforme, deroga espressamente al rispetto

[1582] S. DUSSOLIER, op. cit., p. 1008.

delle condizioni previste dall'Articolo 14 dell'ECD. Nei casi in cui infatti, per la messa a disposizione del pubblico di opere protette dal diritto d'autore, nessuna autorizzazione sia concessa ai fornitori di servizi di condivisione di contenuti online, questi sono considerati "immuni" da responsabilità per la loro divulgazione se: a) dimostrino di aver compiuto i massimi sforzi per ottenere la relativa autorizzazione; b) dimostrino di aver compiuto i massimi sforzi per assicurare l'indisponibilità di opere o materiali specifici per i quali abbiano ricevuto informazioni pertinenti e necessarie da parte dei titolari dei diritti; c) abbiano adottato un sistema di Notice-and-Takedown per rimuovere o disabilitare l'accesso ad opere protette ed un sistema di Notice-and-Staydown per impedirne il futuro caricamento[1583]. Tali condizioni, tra cui in particolare la richiesta implicita del legislatore di implementare delle misure tecniche per evitare un successivo caricamento online di materiali protetti da copyright, hanno destato e stanno destando[1584] preoccupazione rispetto ad un giusto bilanciamento dei diritti fondamentali. Ci si domanda infatti non solo se le misure di filtraggio automatico che i servizi di intermediazione stanno elaborando per tutelare i titolari dei diritti di proprietà intellettuale e per evitare di incorrere in responsabilità, siano in contrasto con il divieto generale di sorveglianza *ex* Articolo 17(8) della CDSM ed Articolo 15 della Direttiva E-Commerce, ma anche se queste siano o meno conciliabili con la protezione della libertà di espressione e con la a libertà di iniziativa economica, specialmente delle più piccole piattaforme. L'Articolo 17(5) ancóra poi la valutazione del rispetto delle condizioni previste dal suo comma 4 a degli specifici elementi e prevede un regime di responsabilità "eccezionale" per i nuovi fornitori di servizi di condivisione di contenuti online. Allo stesso tempo il legislatore prescrive disposizioni a tutela degli utenti, chiarendo che l'intesa tra i proprietari dei diritti e le piattaforme digitali non deve impedire il diritto degli utenti di consultare materiale lecitamente presente online così come opere coperte da eccezioni o limitazioni. In caso di controversie relative alla rimozione dal materiale condiviso online o alla restrizione al suo accesso, il comma 9 dell'Articolo 17 attribuisce poi agli utenti la possibilità di appellarsi ad un

[1583] Articolo 17(4) della Direttiva Copyright.
[1584] Case C-409/19, *Republic of Poland vs European Parliament and Council of the European Union.*

meccanismo di reclamo e ricorso garantito sia dalla stessa piattaforma digitale, sia da organi stragiudiziali. Questa previsione non inficia comunque il diritto di avvalersi di mezzi di ricorso giurisdizionali. Una scrupolosa analisi dell'Articolo 17 della Direttiva Copyright evidenzia, come, oltre ad essere una norma estremamente articolata, essa rischi di rappresentare una minaccia per un giusto bilanciamento dei diritti fondamentali. La richiesta implicita ai fornitori di servizi di condivisione di contenuti online di adottare misure di filtraggio per rimuovere ed evitare il successivo caricamento di materiale illecito, infatti, mal si concilierebbe con la necessità di salvaguardare – oltre che i titolari del diritto d'autore – anche gli utenti e le stesse piattaforme digitali.

Nel Capitolo 3, questo studio si è concentrato sull'esame della proposta di Regolamento recante norme per la disciplina dei fornitori di servizi digitali ed intento a modificare la Direttiva E-commerce (Digital Services Act). Se come rilevato nel corso dei primi capitoli i divulgatori di materiale illecito online beneficerebbero della presenza dei sempre più diversificati servizi digitali offerti, le piattaforme necessiterebbero oggi di essere regolate da innovative e più rigide norme legislative. La Legge Sui Servizi Digitali, con l'obiettivo di assicurare un ambiente online accessibile, sicuro e trasparente e garantire un comportamento responsabile da parte dei fornitori di servizi digitali, è un Regolamento "orizzontale" applicabile a tutte le piattaforme online. Rispetto all' "obsoleta" Direttiva E-Commerce, il nuovo pacchetto di norme presentato dalla Commissione Europea il 15 dicembre 2020 lascia impregiudicato il regime di responsabilità per mere conduit, caching e hosting services providers ma chiarisce dei concetti fondamentali per il suo funzionamento e supera il dilemma del "Buon Samaritano". Il legislatore fornisce una nuova definizione di contenuto illegale e di "effettiva conoscenza" di cui al nuovo Articolo 5 del Digital Services Act. L'Articolo 6 del Regolamento, considerato come una delle maggiori modifiche apportate alla Direttiva E-Commerce, permette ai "Buoni Samaritani" - *i.e.,* ai fornitori digitali che svolgono attivamente e volontariamente delle indagini od altre attività intese a identificare, rimuovere o disabilitare l'accesso a contenuti illegali - di beneficiare dell'esenzione di responsabilità contrariamente a quanto

avveniva in passato[1585]. Si ribadisce comunque un generale divieto di monitoraggio del materiale caricato sulla piattaforma. L'intera proposta di Legge sui Servizi Digitali è dedita al regolamento dei fornitori di servizi digitali, prevedendo per loro dei veri e propri obblighi in materia di diligenza. Queste previsioni, applicabili in base al loro contenuto a tutti gli intermediari, ai prestatori di servizi di hosting, alle piattaforme online e alle piattaforme di dimensioni molto grandi, delineano, *inter alia*, uno specifico meccanismo di Notice-and-action per l'esenzione di responsabilità degli hosting service providers e favoriscono le notifiche provenienti da segnalatori attendibili. Le numerose disposizioni contenute nella nuova Legge sui Servizi Digitali atte ad evitare il compimento di illeciti digitali[1586] risultano essere particolarmente rigide per le grandi piattaforme. Queste, infatti, oltre a doversi conformare alle previsioni indirizzate agli altri intermediari digitali di minori dimensioni, sono chiamate al rispetto di supplementari e più rigorosi obblighi, inclusi quelli relativi alla valutazione e mitigazione di rischi sistemici significativi derivanti dal funzionamento e dall'uso dei loro servizi nell'Unione Europea[1587]. Con particolare riferimento alla protezione dei diritti di proprietà intellettuale online, il Digital Services Act rafforza le misure di contrasto agli illeciti introducendo in capo agli intermediari digitali doveri di tracciabilità degli operatori commerciali operanti nelle piattaforme[1588] ed obblighi di informazione ai consumatori e alle autorità in merito a prodotti e servizi illegali[1589]. A seguito degli emendamenti apportati dal Parlamento Europeo al proposto Regolamento[1590], il legislatore sembra infatti aver fatto un passo avanti verso la protezione dei diritti di proprietà intellettuale online. Con l'intenzione di assicurare un ambiente sicuro ed affidabile per i consumatori, per gli operatori commerciali concorrenti e per i titolari di diritti di proprietà intellettuale, la Legge sui Servizi Digitali richiede ora alle piattaforme online di ottenere specifiche informazioni sull'operatore commerciale che

[1585] Articolo 6 della Legge sui Servizi Digitali.
[1586] Le quali includono, ad esempio, anche norme recanti misure per contrastare e proteggere dagli abusi all'Articolo 20.
[1587] Articolo 64 della Legge sui Servizi Digitali.
[1588] Articolo 22 della Legge sui Servizi Digitali.
[1589] Articolo 22bis della Legge sui Servizi Digitali.
[1590] Nell'ambito della procedura legislativa ordinaria di approvazione del Regolamento, il Parlamento Europeo ha nel corso della sua prima lettura apportato delle modiche all'originario testo legislativo proposto dalla Commissione Europea.

conclude contratti a distanza con utenti online o che promuove messaggi concernenti prodotti o servizi per conto di marchi[1591]. Le indicazioni richieste includono, *inter alia*, dettagli riguardati il prodotto o il servizio che si intende offrire online. I fornitori di servizi digitali si dovrebbero "adoperare al massimo" per verificare l'attendibilità delle informazioni fornite dagli operatori commerciali, eventualmente effettuando controlli a campione per prevenire la diffusione di materiale illecito sulla piattaforma. Il marchio commerciale o il logo, in generale l'identità dell'utente commerciale che fornisce contenuti dovrebbe poi essere chiaramente visibile nella piattaforma, così da non incorrere in contraffazione online[1592]. Il legislatore richiede anche agli stessi fornitori di servizi digitali di poter dimostrare di "essersi adoperati al meglio" per prevenire la comparsa di materiale illecito nella piattaforma[1593].

Lo studio condotto ha permesso di approfondire l'articolata questione della regolazione della responsabilità delle piattaforme digitali e della presenza in esse di violazioni di diritti proprietà intellettuale. L'accurata analisi delle norme esaminate ha evidenziato che le imprese che forniscono servizi di intermediazione digitali potrebbero essere oggi soggette ad un doppio regime di regolazione che include, da un lato, la nuova proposta Legge per i Servizi Digitali indirizzata tutti i fornitori di servizi digitali, dall'altro la Direttiva sul diritto d'autore e sui diritti connessi nel mercato unico digitale diretta ai fornitori di servizi di condivisione di contenuti online. In primo luogo, nell'analizzare l'interazione tra i due pacchetti di norme, ci si è chiesti se, e se sì in che modo, il regolamento proposto possa applicarsi ai fornitori di servizi di condivisione di contenuti online. Si è rilevato che i fornitori di servizi di condivisone online disciplinati dalla Direttiva Copyright in realtà non rappresentano una "nuova categoria" di Internet Services Providers, bensì fornitori di servizi di hosting disciplinati da strumenti legislativi diversi a seconda del contenuto illegale ospitato. Lo stesso articolo 17(3) della Direttiva Copyright chiarisce che il regime di esenzione di responsabilità previsto per i fornitori di servizi di hosting dall'Articolo 5 della proposta Legge sui Servizi Digitali (ex-articolo 14 della Direttiva E-Commerce) si applica agli intermediari

[1591] Considerando 49 della Legge sui Servizi Digitali.
[1592] Articolo 22(3 ter) della Legge sui Servizi Digitali.
[1593] Considerando 50bis della Legge sui Servizi Digitali.

digitali che non rientrino nel campo di applicazione della Direttiva Copyright. YouTube, ad esempio, può essere considerato sia un fornitore di servizi di condivisione di contenuti online sia una piattaforma di grandi dimensioni: nei casi in cui YouTube diffonde materiale protetto da diritto d'autore, troverà applicazione l'Articolo 17 della Direttiva Copyright, mentre quando lo stesso viene utilizzato per offrire online merci e prodotti contraffatti, allora si applicherà il regime di "safe harbors" previsto dalla proposta Legge sui Servizi Digitali. Si è constatato che, mentre non ci sarebbe sicuramente spazio per l'applicazione ai fornitori di servizi di condivisone di contenuti online del regime di responsabilità disciplinato dalla Direttiva E-Commerce - perché espressamente escluso dall'articolo 17(3) della Direttiva Copyright - potrebbe essere possibile applicare nei loro confronti alcuni obblighi in materia diligenza delineati dalla nuova proposta di Legge sui Servizi Digitali. L'assenza di uno specifico meccanismo di "Notice and takedown" nella Direttiva Copyright, per esempio, potrebbe aprire la strada all'applicazione dell'articolo 14 della Legge sui Servizi Digitali ai fornitori di servizi di condivisione di contenuti online. Si è rilevato infatti che, quando le informazioni condivise su piattaforme di condivisione di contenuti online riguardano, anziché opere protette dal diritto d'autore, la vendita di beni contraffatti o qualsiasi altra attività illegale online, il meccanismo che viene messo in atto è quello di "notifica e azione" previsto dalla proposta di Legge sui Servizi Digitali. In considerazione di ciò, si è ipotizzato che l'applicazione di una procedura di "notifica e azione" minuziosamente descritta – come quella delineata dalla proposta Legge sui Servizi Digitali - potrebbe in realtà risultare vantaggiosa per un'efficace implementazione del regime di responsabilità dei fornitori di servizi di condivisione di contenuti online *ex* Articolo 17 della Direttiva Copyright. In questo modo, in più, gli sforzi effettuati da parte del legislatore nel redigere un lungo e dettagliato meccanismo di "Notice-and-action" potrebbero essere messi adeguatamente a frutto. Nell'eventualità della sua entrata in vigore, si potrebbe ritenere ragionevole, dunque, l'applicazione della procedura di Notice-and-takedown prevista dalla Legge sui Servizi Digitali anche alle piattaforme di servizi di condivisione di contenuti online che diffondano materiali protetti dal diritto d'autore.

Pur constando l'applicabilità di due differenti strumenti legislativi *i.e.*, la Direttiva Copyright e la Legge sui Servizi Digitali, un efficace quadro legislativo per la protezione dei diritti di proprietà online non può prescindere dalla necessità che le norme in esso esistenti siano coordinate tra loro. L'esame svolto ha evidenziato che la Direttiva Copyright potrebbe risultare in "conflitto" con la nuova Legge sui Servizi Digitali. La principale criticità risiede sicuramente nelle condizioni di esenzione di responsabilità previste nella Direttiva Copyright per i fornitori di servizi di condivisione di contenuti online. Come rilevato, al fine di non incorrere in responsabilità, la Direttiva Copyright richiede implicitamente agli intermediari digitali di implementare delle misure tecniche atte ad evitare un successivo caricamento online di materiali protetti dal diritto d'autore. Una tale previsione però sembrerebbe in contrasto con l'articolo 7 della Legge sui Servizi Digitali che, con l'intento di salvaguardare i diritti fondamentali – in particolare la protezione dei diritti degli utenti online - vieta espressamente un generale monitoraggio del materiale caricato dai recipienti del servizio. Ci si chiede fino a che punto l'esigenza di salvaguardare gli interessi dei proprietari di diritti di proprietà intellettuale possa inficiare degli utenti online e la loro libertà di espressione. La risposta dovrebbe coincidere con il raggiungimento di un giusto equilibrio. Un valido ed efficiente quadro legislativo dovrebbe infatti tendere alla costruzione di un equilibrato pacchetto di norme che sia in grado di assicurare un' adeguata protezione ai titolari di diritti di proprietà intellettuale, agli utenti, ed alle stesse piattaforme online.

L'analisi svolta ha evidenziato che l'esistenza di simili ma differenti strumenti legislativi per la protezione dei diritti di proprietà intellettuale online non adeguatamente coordinati fra loro potrebbe militare contro l'esigenza di garantire certezza del diritto[1594] nell'Unione Europea ed evitare la frammentarietà delle norme giuridiche. Nella speranza che la Commissione europea pubblichi delle chiare linee guida che illustrino nel dettaglio l'interazione tra la nuova proposta di Legge sui Servizi Digitali e la Direttiva Copyright[1595], non si può non rilevare che un'effettiva protezione dei diritti di proprietà intellettuale nella moderna "Era Digitale" può essere attuata solo implementando delle regole

[1594] Considerando 4 e 4bis della Legge sui Servizi Digitali.
[1595] Considerando 9 della Legge sui Servizi Digitali.

uniformi e armonizzate che garantiscano un ambiente online sicuro ed affidabile in cui i diritti fondamentali siano effettivamente protetti[1596].

.

[1596] Cfr. Articolo 1(2)(b) della Legge sui Servizi Digitali.

# BIBLIOGRAPHY

## Literature


B. ALLGROVE-J. GROOM, *Enforcement in a digital context: intermediary liability* in *Research Handbook on Intellectual Property and Digital Technologies*, Aplin, Tanya ed., Edward Elgar Publishing, 2020.

B. SAETTA, *Digital Service Act: L'Europa prepara le nuove regole per le piattaforme online*, valigiablu.it, 12.06.2020, available at: https://www.valigiablu.it/europa-nuove-regole-piattaforme/.

B. SAETTA, *Digital Services Act: cosa prevede il testo del Parlamento europeo*, valigiablu.it, 2.02.2022, available at: https://www.valigiablu.it/digital-services-act-parlamento-europeo/.

F. ALTOMARE, *Content Delivery Network Explained*, GlobalDots, 21.04.2021, available at: https://www.globaldots.com/resources/blog/content-delivery-network-explained/.

C. ANGELOPOULOS – S. SMET, *Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability*, in *Journal of Media Law*, Taylor & Francis Publishing, 21.10.2016.

C. ANGELOPOULOS, *European Intermediary Liability in Copyright: a Tort-Based Analysis*, in *Kluwer Law International*, Vol. XXXIX, Milano, 2016.

C. ANGELOPOULOS – S. SMET, *Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability*, in *Journal of Media Law*, Taylor & Francis Publishing, publication date: 4.04.2017,

last update: 14.07.2017, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2944917.

C. ANGELOPOULOS, *On Online Platforms and The Commission's New Proposal for a Directive on Copyright in the Digital Single Market*, in *SSRN Electronic Journal*, 01.01.2017.

J. AXHAMN, *The New Copyright Directive: Collective Licensing as a Way to Strike a Fair Balance Between Creator and User Interests in copyright legislation (Article 12)*, in *Kluwer Copyright Blog*, 25.06.2019, last update: 19.09.2019, available at: http://copyrightblog.kluweriplaw.com/2019/06/25/the-new-copyright-directive-collective-licensing-as-a-way-to-strike-a-fair-balance-between-creator-and-user-interests-in-copyright-legislation-article-12/.

J. B. NORDEMANN, *Liability of Online Service Providers for Copyrighted Content – Regulatory Action Needed?*, Study prepared for the European Parliament, 2017.

J. B. NORDEMANN, *The functioning of the of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services. Challenges and opportunities*, Policy Department for Economic, Scientific and Quality of Life Policies, Luxembourg, 06.2020.

J. B. NORDEMANN – J. WAIBLINGE, *Art. 17 DSMCD: a class of its own? How to implement Art. 17 into the existing national copyright acts, including a comment on the recent German Discussion Draft – Part 2*, in *Kluwer Copyright Blog*, 17.07.2020, available at: http://copyrightblog.kluweriplaw.com/2020/07/17/art-17-dsmcd-a-class-of-its-own-how-to-implement-art-17-into-the-existing-national-copyright-acts-including-a-comment-on-the-recent-german-discussion-draft-part-2/?doing_wp_cron=1597144877.2035028934478759765625.

G. B. DINWOODIE (editor), *Secondary Liability of Internet Service Provider*, Ius Comparatum – Global Studies in Comparative Law, Springer International Publishing, 2017.

S. B. MICOVA – A. DE STREEL, *DIGITAL SERVICES ACT: DEPENDING THE INTERNAL MARKET AND CLARIFYING RESPONSIBILITIES FOR DIGITAL SERVICES*, CERRE – Centre on Regulation in Europe, 12.2020.

M. BANKS, *MEPs rally against planned EU Copyright Reform*, The Parliament Magazine, 08.06.2018, available at: https://www.theparliamentmagazine.eu/news/article/meps-rally-against-planned-eu-copyright-reform.

J. BAYER, *Liability of Internet Service Providers for Third Party Content*, in *Victoria University of Wellington Law Review*, Working Paper Series, Vol. I, 01.01.2007.

C. BERTHÉLÉMY – J. PENFRAT, *Platform Regulation Done Right. EDRi Position Paper on the EU Digital Services Act*, EDRi, Brussels, 9.04.2020.

L. BRANDLE, *David Guetta and all three major labels are among industry giants pushing for copyright reform*, the Industry Observer, 29.06.2018, available at: https://theindustryobserver.thebrag.com/david-guetta-and-all-three-major-labels-are-among-industry-giants-pushing-for-copyright-reform/.

G. BUTTARELLI, *Formal Comments of the EDPS on a Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, publication date: 03.07.2018, last update: 19.09.2019, available at: https://edps.europa.eu/data-protection/our-work/publications/comments/edps-comments-pro posal-directive-copyright_en.

M. C. LE MERLE – T. J. LE MERLE – E. ENGSTROM, *The Impact of Internet Regulation on Early Stage Investment*, 11.2014, available at: https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/572a35e0b6aa60fe011dec28/1462384101881/EngineFifthEraCopyrightReport.pdf.

M. C. DAGA – A. DE GAETANO, *Direttiva UE sul diritto d'autore, gli impatti in Italia: pro e contro*, in *Network Digital 360*, 05.04.2019, available at: https://www.agendadigitale.eu/cultura-digitale/direttiva-ue-sul-diritto-dautore-gli-impatti-in-italia-pro-e-contro/.

S. CARUSO, *Il fingerprinting del browser: cos'è e come funziona il tracciamento delle nostre attività online*, in *Network Digital 360*, 29.07.2019, available at: https://www.cybersecurity360.it/nuove-minacce/il-fingerprinting-del-browser-cose-e-come-funziona-il-tracciamento-delle-nostre-attivita-online/.

M. COLANGELO - M. MAGGIOLINO, *Uber: A New Challenge for Regulation and Competition Law?*, in *Market and Competition Law Review*, Vol. I, No. II, 10.2017.

G. COLANGELO, *Responsabilità degli intermediary online ed enforcement del diritto d'autore*, itmedia consulting, Roma, 02.2018, available at: http://www.itmedia-consulting.com/DOCUMENTI/dirittodautore.pdf.

E. CRABBIT, *La Directive sur le commerce électronique: le project "*Méd*iterranée"*, in *Revue du droit de l'Union européenne: revue trimestrelle de droit européen*, Bruxelles, Bruylant, 2000.

K. D. KANAYAMA, *A Right to Pseudonymity,* in *Arizona Law Review*, Vol. LI, No. II, 2009.

A. DE STREEL – M. BUITEN – M. PEITZ, *Liability of Online Hosting Platforms – should exceptionalism end?*, 09.2018, available at:

https://www.cerre.eu/sites/cerre/files/180912_CERRE_LiabilityPlatforms_Final_0.pdf.

A. DE STREEL – M. HUSOVEC, *The e-commerce Directive as the cornerstone of the Internal Market. Assessment and options for reform*. *Study for the committee on Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020.*

B. DEPOORTER - R. K. WALKER, *Copyright False Positives*, in *Notre Dame Law Review*, Vol. LXXXIX, Issue I, 2013.

E. DOUEK, *YouTube's Bad Week and the Limitations of Laboratories of Online Governance*, laewfareblog, 11.06.2019, available at: https://www.lawfareblog.com/youtubes-bad-week-and-limitations-laboratories-online-governance.

S. DUSSOLIER, *The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition*, in *Common Market Law Review*, Vol. LVII, No. IV, 08.2020.

S. F. SCHWEMER – T. MAHLER – H. STYRI, *Liability exemptions of non-hosting intermediaries: Sideshow in the Digital Services Act?*, in *Oslo Law Review*, Vol. VIII, No. I, Scandinavian University Press, 2021.

V. FALCE – N. M. F. FARAONE, *Direttiva Copyright e line guida: focus sll'articolo 17*, in *Network Digital 360*, 24.11.2021, available at: https://www.agendadigitale.eu/mercati-digitali/direttiva-copyright-e-linee-guida-focus-sullarticolo-17/.

F. FERRI, *The dark side(s) of the EU Directive on copyright and related rights in the Digital Single Market*, in *China-EU Law Journal*, 23.10.2020.

L. FIALA – M. HUSOVEC, *Using Experimental Evidence to Design Optimal Notice and Takedown Process*, in *TILEC Discussion Paper*, No. 2018-028, 23.01.2018.

C. FREDIANI, *Secondo I Padri della Rete la direttiva Ue sul copyright minaccia Internet*, Agi Agenzia Italia, 18.06.2018, available at: https://www.agi.it/economia/copyright_minaccia_internet_gdpr_lettera-4039043/news/2018-06-18/.

G. FROSIO, *Digital piracy debunked: a short note on digital threats and intermediary liability*, in *Internet Policy Review*, Vol. V, Issue I, 23.03.2016.

G. FROSIO, *To Filter or Not to Filter? That Is the Question in EU Copyright Reform*, in *36(2) Cardozo Arts & Entertainment Law Journal*, 25.10.2017.

G. FROSIO, *The Death of 'No Monitoring Obligations'. A Story of Untameable Monsters*, in *JIPITEC*, No. VIII, 2017.

G. FROSIO – S. MENDIS, *Monitoring and Filtering: European Reform or Global Trend?*, cit., p. 11. K. GRISSE, *After the storm—examing the final version of Article 17 of the new Directive (EU) 2019/790*, in *Journal of Intellectual Property Law & Practice*, Vol. XIV, No. XI, 2019.

G. FROSIO (ed.), *The Oxford Handbook of Online Intermediary Liability*, Oxford University Press, 2020.

G. FROSIO – C. GEIGER, *Taking Fundamentals Rights Seriously in the Digital Service Act's Platform Liability Regime*, in *European Law Journal*, 2021.

K. GARSTKA, *Guiding the Blind Bloodhonds: How to Mitigate the Risks Article 17 of Directive 2019/970 Poses to the Freedom on Expression*, in P. TORREMANS (ed.), *Intellectual Property Law and Human Rights*, Wolters Kluwer Law & Business.

P.Y. GAUTIER, *Why internet services which provide access to copyright infringing works should not be immune to liability*, in *European Intellectual Property Review*, Vol. XLII, No. VIII, 2020.

C. GEIGER, *The Construction of Intellectual Property in the European Union: Searching for Coherence*, in C. GEIGER (ed.), *Constructing European Intellectual Property: Achievements and New Perspectives*, EIPIN Series, Vol. I, Issue V, Cheltenham, UK / Northampton, MA, Edward Elgar, 2013.

C. GEIGER – E. IZYUMENKO, *Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression*, in *International Review of Intellectual Property and Competition*, Vol. XLII, No. III, 2014.

C. GEIGER – E. IZYUMENKO, *Intellectual Property before the European Court of Human Rights*, in C. GEIGER - C. A. NARD - X. SEUBA (eds.), *Intellectual Property and the Judiciary*, Cheltenham, Northampton, Edward Elgar Publishing, 2018.

C. GEIGER, *When Freedom of Artistic Expression allows Creative Appropriations and Opens up Statutory Copyright Limitations*, in S. BALGANESH - N. L. WEE LOON - H. SUN (eds.), *The Cambridge Handbook of Copyright Limitations and Exceptions*, Cambridge, Cambridge University Press, 2021.

C. GEIGER – B. J. JÜTTE, *Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, in *GRUR International*, Vol. LXX, No. VI, 30.01.2021.

I. GENNA, *Ombre (più che luci) della riforma europea del copyright*, in lastampa.it, publication date: 20.06.2018, last update: 24.06.2019, available at: https://www.lastampa.it/economia/2018/06/20/news/ombre-piu-che-luci-della-riforma-europea-del-copyright-1.34025995.

G. GHIDINI – A. STANZI, *Freedom to conduct a business, competition and intellectual property*, in C. GEIGER (ed.), *Research Handbook on Human Rights and Intellectual Property*, Edward Elgar Publishing, 25.02.2015.

G. GIACOMINI – N. STRIZZOLO, *Potere alle piattaforme e rischi per le democrazie: tutti i paradossi del digitale*, agendadigitale.eu, 27.03.2019, available at: https://www.agendadigitale.eu/cultura-digitale/potere-alle-piattaforme-e-rischi-per-le-democrazie-tutti-i-paradossi-del-digitale/.

C. GOMMES – E. DE PAUW, *Liability for trade mark infringement of online marketplaces in Europe: are they 'caught in the middle?'*, in *Journal of Intellectual Property Law & Practice*, Vol. XV, No. IV, 2020.

J. GRIFFITHS, *Fundamental rights and European IP law: the case of Art 17(2) of the EU Charter*, in C. GEIGER (ed.), *Constructing European Intellectual Property*, Cheltenham UK, Edward Elgar Publishing, 31.01.2013.

E. HARMON, *"Notice and Staydown" is Really "Filter-Everything"*, ELECTRONIC FRONTIER FOUNDATIONS, 21.01.2016, available at: https://perma.cc/X3AA-CPQA.

J. HOBOKEN – J. QUINTAIS – J. POORT – N. VAN EIJK, *Hosting intermediary services and illegal content online. An analysis of the scope of article 14 ECD in light of developments in the online service landscape*, Luxembourg, Publications Office of the European Union, 29.01.2019.

M. HUSOVEC, *Injunctions against Intermediaries in the European Union: Accountable but not Liable?*, in *Cambridge Intellectual Property and Information Law*, Cambridge, Cambridge University Press, 2017.

M. HUSOVEC, *The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which is Superior? And Why?*, in *Columbia Journal of Law & Arts*, publication date: 23.09.2018, last update: 13.12.2018, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3239040.

M. HUSOVEC, *How Europe Wants to Redefine Global Online Copyright Enforcement* in T. E. SYNODINOU (ed), *Pluralism or Universalism in International Copyright Law*, Kluwer Law 2019, 14.05.2019, last update: 17.09.2019.

M. HUSOVEC – J.P. QUINTAIS, *Article 17 of the Copyright Directive: Why the German implementation proposal is compatible with EU law – Part 1*, in *Kluwer Copyright Blog*, 26.08.2020, available at: http://copyrightblog.kluweriplaw.com/2020/08/26/article-17-of-the-copyright-directive-why-the-german-implementation-proposal-is-compatible-with-eu-law-part-1/.

M. HUSOVEC – J. QUINTAIS, *How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms*, in *GRUR International*, Issue IV, 01.2021.

M. HUSOVEC, *(Ir)Responsible Legislature? Speech Risks under the EU's Rules on Delegated Digital Enforcement*, 17.09.2021, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3784149.

N. IACOB – F. SIMONELLI, *How to Fully Reap the Benefits of the Internal Market for E-commerce? New economic opportunities and challenges for digital services 20 years after the adoption of the e-Commerce Directive*, Study for the committee on the Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020.

D. J.G. VISSER, *Trying to Understand Article 13*, publication date: 18.03.2019, last update: 19.09.2019, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3354494.

S. JACQUES - K. GARSTKA - M. HVIID – J. STREET, *An Empirical Study of the Use of Automated Anti-Piracy Systems and Their Consequences for Cultural Diversity*, in *SCRIPTed*, Vol. XV, Issue II, 2018.

R. JULIÀ-BARCELÓ – K. J. KOELMAN, *INTERMEDIARY LIABILITY IN THE E-COMMERCE DIRECTIVE: SO FAR SO GOOD, BUT IT'S NOT ENOUGH* in *Computer Law & Security Report*, Vol. XVI, No. IV, Elsevier Science Ltd., 2000.

J. KOO, *The Right of Communication to the Public in EU Copyright Law*, Hart Publishing, 17.12.2020.

A. KUCZERAWY, *The EU Commission on voluntary monitoring: Good Samaritan 2.0 or Good Samaritan 0.5?*, Ku Leuven, 24.04.2018, available at: https://www.law.kuleuven.be/citip/blog/the-eu-commission-on-voluntary-monitoring-good-samaritan-2-0-or-good-samaritan-0-5/.

A. KUCZERAWY, *Active vs passive hosting in EU intermediary liability regime: time for a change?*, 7.08.2018, available at: https://www.law.kuleuven.be/citip/blog/active-vs-passive-hosting-in-the-eu-intermediary-liability-regime-time-for-a-change/.

A. KUR – T. DREIER – S. LUGINBUEHL, *European Intellectual Property Law: Text, Cases and Materials*, II ed., Edward Elgar Publishing Limited, 2019.

M. LEISTNER, *European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?*, in *Intellectual Property Journal*, Issue 2, 16.06.2020.

I. LEONE - A. GULLO - G. COLANGELO - S. SCALZINI, studio presentato alla Settimana Anticontraffazione, *Un'analisi della proposta di Regolamento "Digital Services Act" sotto il profilo della protezione dei diritti di Proprietà industriale*, 28.10.2021, available at: https://uibm.mise.gov.it/index.php/it/settimana-anticontraffazione-2021/28-ottobre-webinar-un-analisi-della-proposta-di-regolamento-digital-services-act-sotto-il-profilo-della-protezione-dei-diritti-di-proprieta-industriale.

N. LOMBA – T. EVAS, *Digital services act. European added value assessment*, European Parliamentary Research Service, 10.2020.

LUCAS - SCHLOETTER, *Transfer of Value Provisions of the Draft Copyright Directive (recitals 38, 39, article 13),* Munich, 03.2017, available at: https://authorsocieties.eu/content/uploads/2019/10/lucas-schloetter-analysis-copyright-directive-en.pdf.

M. L. MONTAGNANI - A. TRAPOVA, *New obligations for Internet intermediaries in the Digital Single Market safe harbours in turmoil?* in *Journal of Internet Law*, Vol. XXII, Issue VII, 1.01.2019.

J. M. URBAN – J. KARAGANIS – B. SCHOFIELD, Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice, in 64 J. Copyright Soc'y 371, 1.11.2017.

T. MADIEGA, *Reform of the EU liability regime for online intermediaries: Background on the forthcoming digital services act*, Brussels, 30.04.2020.

J. MARCUS – G. PETROPOULOS – T. YEUNG, *Contribution to growth: The European Digital Single Market. Delivering economic benefits for citizens and business*, Policy Department for Economic, Scientific, and Quality of Life Policies, Luxembourg, 15.01.2019.

A. MARSOOF, *'Notice and Takedown': a copyright perspective*, in *Queen Mary Journal of Intellectual Property*, Vol. V, No. II, Edward Elgar Publishing, 2015.

M. MARTINI, *Fundamentals of a Regulatory System for Algorithm-based Processes*, Speyer, 01.05.2019, available at: https://www.politico.eu/wp-content/uploads/2019/07/Martini-Regulatory-System-final_11-6-MAR.pdf.

A. MAXWELL, *Article 13: YouTube CEO is Now Lobbying FOR Upload Filters*, 15.11.2018, available at: https://torrentfreak.com/article-13-youtube-ceo-is-now-lobbying-for-upload-filters-181115/.

V. MOSCON, *Free circulation of information and Online Intermediaries – Replacing One "Value Gap" with Anothe*r, in *International Review of Industrial Property and Copyright*, 2020.

P. NOOREN – N. VAN GORP – N. VAN EJIK – R. O FATHAIGH, *Should We Regulate Digital Platforms? A New Framework for Evaluating Policy Options*, in *Policy & Internet*, Vol. X, No. III, 09.2018.

A. OHLY (ed.), *Common Principles of European Intellectual Property Law*, Mohr Siebeck Publishing, 2012.

G. OLIVIERI – S. SCALZINI, *Sistema e fonti della proprietà intellettuale*, in A. F. GENOVESE – G. OLIVIERI, *Trattato Omnia su La Proprietà Intellettuale*, Utet, 2021.

G. OLIVIERI, relazione al convegno della LUISS School of Law, *The Social Dilemma: come disciplinare le piattaforme digitali? Sintesi del convegno inaugurale della IX edizione del Master di II livello in Diritto della Concorrenza e dell'Innovazione*, 19.03.2021, available at: https://www.agendadigitale.eu/cultura-digitale/potere-alle-piattaforme-e-rischi-

per-le-democrazie-tutti-i-paradossi-del-digitale/.https://lsl.luiss.it/sites/lsl.luiss.it/files/The%20Social%20Dilemma%20sintesi%20inaugurazione%20master%20concorrenza%20innovazione%202021.pdf.

SAI ON CHEUNG, *Dispute Avoidance Through Equitable Risk Allocation*, in SAI ON CHEUNG (ed), *Construction Dispute Research Conceptualisation, Avoidance and Resolution*, 2014.

J. P. QUINTAIS, *The New Copyright in the Digital Single Market Directive: A Critical Look*, in *European Intellectual Property Review 2020(1)*, 14.10.2019.

J. P. QUINTAIS - G. FROSIO - S. VAN GOMPEL - P. B. HUGENHOLTZ - M. HUSOVEC - B. J. JUTTE, M. SENFTLEBENET, *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations From European Academics*, in *JIPITEC*, 11.2019.

J. P. QUINTAIS – S. F. SCHWEMER, *The Interplay between the Digital Services Act and Sector Regulation: How Special is Copyright?*, 7.05.2021, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3841606#references-widget.

J. PILA – P. L. C. TORREMANS, *European Intellectual Property Law*, Oxford University Press, 2016.

J. PILA – P. L. C. TORREMANS, *European Intellectual Property Law*, II ed., Oxford University Press, 2019.

T. PRIME – D. BOOTON, *European Intellectual Property Law*, Taylor and Francis Publishing, 2017.

M. R. ALLEGRI, *Digital Services Act, il "rebus" dei contenuti illeciti: la Ue rischia di aumentare il caos*, agendadigitale.eu, 14.05.2021, available at:

https://www.agendadigitale.eu/mercati-digitali/digital-services-act-il-rebus-dei-contenuti-illeciti-la-ue-rischia-di-aumentare-il-caos/.
T. RODRÍGUEZ DE LAS HERAS BALLELL, *The background of the Digital Services Act: looking towards a platform economy*, ERA Forum, 04.02.2021.

E. ROSATI, *The legal nature of Article 17 of the Copyright DSM Directive, the (lack of) freedom of Member States and why the German implementation proposal is not compatible with EU law*, in Journal of Intellectual Property Law & Practice, Vol. XV, Issue XI, 11.2020.

E. ROSATI, *Five considerations for the transposition and application of Article 17 of the DSM Directive*, in *Journal of Intellectual Property Law & Practice*, Vol. XVI, No. III, 2021.

I. LEONE - A. GULLO - G. COLANGELO - S. SCALZINI, studio presentato alla Settimana Anticontraffazione, *Un'analisi della proposta di Regolamento "Digital Services Act" sotto il profilo della protezione dei diritti di Proprietà industriale*, 28.10.2021, available at: https://uibm.mise.gov.it/index.php/it/settimana-anticontraffazione-2021/28-ottobre-webinar-un-analisi-della-proposta-di-regolamento-digital-services-act-sotto-il-profilo-della-protezione-dei-diritti-di-proprieta-industriale.

G. SARTOR, *Providers Liability: From the eCommerce Directive to the future*, 15.09.2017.

G. SARTOR – A. LOREGGIA, *The Impact of algorithms for online content filtering or moderation. "Upload filters"*, Policy Department for Citizens' Rights and Constitutional Affairs, 09.2020.

M. SENFTLEBEN – C. ANGELOPOULOS – G. FROSIO – V. MOSCON – M. PEGUERA – O. A. ROGNSTAD, *The Recommendation on Measures to Safeguard Fundamental*

*Rights and the Open Internet in the Framework of the EU Copyright Reform*, in *European Intellectual Property Review*, Vol. XL, Issue III, 17.10.2018.

M. SJÖSTRAND, *EU Digital Services Act: winds of change?*, Managing Intellectual Property, publication date: 4.09.2020, last update: 3.10.2021, available at: https://www.managingip.com/article/b1n7b8rgq4vqjy/eu-digital-services-act-winds-of-change.

M. SMITH, *Enforcement and cooperation between Member States. E-Commerce and the future Digital Services Act*, STUDY requested by THE IMCO committee, 04.2020.

T. SPOERRI, *On Upload-Filters and other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market*, in *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* (JIPITEC), 2019.

S. STALLA-BOURDILLON – E. ROSATI – G. SARTOR – C. ANGELOPOULUS – A. KUCZERAWY et al., *Open Letter to the European Commission—On the Importance of Preserving the Consistency and Integrity and of the EU Acquis Relating to Content Monitoring Within the Information Society*, 30.09.2016, available at: https://perma.cc/9ZHM-6Z3Z.

A. THUM-THYSEN - P. VOIGT - B. BILBAO-OSORIO - C. MAIER - D. OGNYANOVA, *Unlocking Investment in Intangible Assets*, Luxemburg, Publications Office of the European Union, 2017.

P. VAN EECKE, *Online service providers and liability: A plea for a balanced approach*, in *Common Market Law Review*, Vol. XLVIII, 2011.

U. VON DER LEYEN, *A union that strives for more. My Agenda for Europe. Political Guidelines for The Next European Commission 2019-2024*, 09.10.2019,

available at: https://op.europa.eu/en/publication-detail/-/publication/43a17056-ebf1-11e9-9c4e-01aa75ed71a1.

L. WOODS – W. PERRIN, *Online harm reduction – a statutory duty of care and regulator*, Carnegie Trust UK, 04.2019. Cfr. J. BAYER, *Between Anarchy and Censorship Public discourse and the duties of social media*, in *Liberty and Security in Europe*, No. 2019-03, 05.2019.

## EU Documents

Commission Staff Working Document. *Online services, including e-commerce, in the Single Market*, Brussels, 11.01.2012, SEC (2011) 1641, final.

Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, *Unleashing the Potential of Cloud Computing in Europe*, Brussels, 27.09.2012, COM(2012) 529.

Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, *A European Agenda for the collaborative economy*, Brussels, 2.06.2016, COM(2016) 356, final.

Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, *Making the most of the EU's innovative potential. An intellectual property action plan to support the Eu's recovery and resilience,* Brussels, 25.11.2020, COM (2020)760, final.

Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions,

*A Digital Single Market Strategy for Europe*, Brussels, 6.5.2015, COM (2015)192, final.

Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, *A European strategy for data*, Brussels, 19.2.2020, COM (2020)66, final.

Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Region, *Towards a modern, more European copyright framework*, Brussels, 9.12.2015, COM (2015) 626, final.

Communication from the Commission, *EUROPE 2020. A strategy for smart, sustainable and inclusive growth*, Brussels, 3.03.2010, COM (2010), final.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Agenda for Europe*, Brussels, 19.05.2010, COM (2010), 245, final.

Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, Brussels, 4.06.2021, COM(2021) 288, final.

European Commission, *Shaping Europe's Digital Future*, 19.02.2020, available at: https://ec.europa.eu/info/sites/default/files/communication-shaping-europes-digital-futurefeb2020_en_4.pdf.

European Commission, *Europe's Digital Decade: Commission sets the course towards a digitally empowered Europe by 2030*, Brussels, 9.03.2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_983.

European Commission, *REGULATORY BOARD OPINION. Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, 6.11.2020, SEC(2020) 432.

European Commission, *REFIT – making EU law simpler, less costly and future proof*, available at: https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-less-costly-and-future-proof_en.

European Commission, *Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Regulation of the European Parliament and of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, SWD(2020) 348, final.

European Commission, *Report on the functioning of the Memorandum of Understanding on the sale of counterfeit goods on the internet*, Brussels, 14.8.2020, SWD (2020)166, final/2.

European Commission, *Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online,* Brussels, 01.03.2018, COM (2018) 1177, final.

European Commission, Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, *Tackling Illegal Content Online. Towards an enhanced responsibility of online platforms,* Brussels, 28.09.2017, COM (2017) 555, final.

European Commission, *Digital Services Act – Questions and Answers*, Brussels, 15.12.2020.

European Parliament Press Release, *Parliament to review copyright rules in September*, 05.07.2018, available at: https://www.europarl.europa.eu/news/en/press-room/20180628IPR06809/parliament-to-review-copyright-rules-in-september.

European Commission, *Targeted Consultation Addressed to the Participants to the Stakeholder Dialogue on Article 17 of the Directive on Copyright in the Digital Single Market*, 2020, available at: https://ec.europa.eu/newsroom/dae/document.cfm?doc_id.68591.

Flash Eurobarometer 439, *Report. The use of online marketplaces and search engines by SMEs*, European Union, 04.2016.

*Memorandum of Understanding on Online Advertising and Intellectual Property Rights*, Brussels, publication date: 21.06.2018, last update: 21.06.2018, available at: https://ec.europa.eu/docsroom/documents/30226.

*Product Safety Pledge. Voluntary commitment of online marketplaces with respect to the safety of non-food consumer products sold online by third party sellers*, 02.03.2021, available at: https://ec.europa.eu/info/sites/default/files/voluntary_commitment_document_2021_v5.pdf.

Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, *Evaluation of the Application of the Regulation (EU) No 386/2012 of 19 April 2012*, Brussels, 24.11.2020, COM (2020)755, final.

## Other Documents

Amnesty International, *Amnesty International position on the Proposal for A Digital Service Acts and A Digital Markets Act*, 03.2021, available at: https://www.amnesty.eu/wp-content/uploads/2021/04/Amnesty-International-Position-Paper-Digital-Services-Act-Package_March2021_Updated.pdf.

Article 19, *Due diligence obligations in the EU's Digital Services Act. Article's 19 recommendation to lawmakers*, 21.05.2021, available at: https://www.article19.org/wp-content/uploads/2021/05/Regulation-of-due-diligence-in-the-EU-DSA-1.pdf.

Association Littéraire et Artistique Internationale, *Résolution Relative aux Propositions Européenes du 14 Septembre 2016*, available at: https://perma.cc/JC9Q-ZKL7.

Association Littéraire et Artistique Internationale, *Second Opinion on Certain Aspects of the Implementation of Article 17 of Directive (EU) 2019/790 of 17 April 2019 on Copyright and Related Rights in the Digital Single Market*, publication date: 18.09.2020, last update: 17.02.2021, available at: https://www.alai.org/en/assets/files/resolutions/200918-second-opinion-article-17-dsm_draft_en. pdf.

Camera Dei Deputati – Ufficio Rapporti con l'Unione Europea, Documentazioni.

Camera Dei Deputati Ufficio Rapporti con l'Unione Europea, *Legge sui servizi digitali (Digital Services Act), Dossier n 15*, 12.05.2021, available at: http://documenti.camera.it/leg18/dossier/pdf/ES051.pdf.

CDEI, *Independent Report. Online targeting: Final report and reccomendations*, 4.02.2020, available at: https://www.gov.uk/government/publications/cdei-review-of-online-targeting/online-targeting-final-report-and-recommendations.

CF – Grimaldi Studio Legale – 21c Consultancy, *Overview of the legal framework of notice-and-action procedures in Member States. SMART 2016/0039*, Luxembourg, Publications Office of the European Union, 29.01.2019.

*Charter for the Fight against the Sale of Counterfeit Goods on the Internet*, available at: http://www.uibm.gov.it/attachments/Charter_engl_Internet.pdf.

CREATe, *Open Letter on the EU Copyright Reform Proposals for the Digital Age to members of the European Parliament and the European Council*, 24.02.2017, available at: https://perma.cc/L45T-LLJ9.

CREATe, *Copyright in the Digital Single Market Directive – Implementation. An EU Copyright Reform Resource*, available at: https://www.create.ac.uk/cdsm-implementation-resource-page/.

Deloitte Advisory, S.L. (curated by), *Research on Online Business Models Infringing Intellectual Property Rights – Phase 1. Establishing an overview of online business models infringing intellectual property rights*, Spain, European Union Intellectual Property Office, 2016.

Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, *User Guide to the SME Definition*, 16.02.2017, available at: https://op.europa.eu/en/publication-detail/-/publication/79c0ce87-f4dc-11e6-8a35-01aa75ed71a1.

*E-commerce statistics for individuals*, Eurostat, data extracted: 06.2021, planned update: 01.2022, available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=E-commerce_statistics_for_individuals.

EdiMA, *Responsibility Online*, 2020, available at: https://doteurope.eu/wp-content/uploads/2020/01/Responsibility-Online.pdf.

EDRi, *More responsibility to online platforms – but at what cost?*, 19.07.2019, available at: https://edri.org/our-work/more-.

EPO-EUIPO, *Intellectual property rights intensive industries and economic performance in the European Union. Industry-Level Analysis Report*, III ed., Munich and Alicante, EPO and EUIPO, 09.2019.

EUIPO, *Study on voluntary collaboration practices in addressing online infringements of trade mark rights, design rights, copyright and rights related to copyright*, 09.2016.

EUIPO, *STUDY ON LEGISLATIVE MEASURES RELATED TO ONLINE IPR INFRINGEMENTS. A project commissioned by the European Union Intellectual Property Office*, 2018.

EUIPO, *IPR ENFORCEMENT CASE-LAW COLLECTION. THE LIABILITY AND OBLIGATIONS OF INTERMEDIARY SERVICE PROVIDERS IN THE EUROPEAN UNION*, 08.2019.

EUIPO, *2020 Status Report on IPR Infringement. Why IP are important, IPR infringement, and the fight against counterfeiting and piracy*, European Union Intellectual Property Office, 2020.

EUIPO, *Monitoring and analysing social media in relation to IP infringement*, European Union Intellectual Property Office, 2021.

EUIPO, *RISKS AND DAMAGES POSED BY IPR INFRINGEMENTS IN EUROPE. Awareness campaign 2021*, 06.2021.

European Copyright Society, *General Opinion on the EU Copyright Reform Package*, 27.01.2017, available at: https://perma.cc/ZHR9-LLGE.

European Copyright Society, *Comment of the European Copyright Society. Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law*, in *JIPITEC*, 2020.

EUROPEAN COURT OF HUMAN RIGHTS, *Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights. Protection of property*, last update: 30.04.2021, available at: https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf.

EUROPOL, *Pandemic Profiteering: how criminals exploit the COVID-19 crisis*, 03.2020.

Index of Censorship, *Directive on copyright in the Digital Single Market "destined to become a nightmare"*, 26.04.2018, available at: https://www.indexoncensorship.org/2018/04/digital-single-market-nightmare/.

Internal Commission Note, available at: https://cdn.netzpolitik.org/wp-upload/2019/07/Digital-Services-Act-note-DG-Connect-June-2019.pdf.

*IPO Code of Practice on Search and Copyright*, 17.01.2017, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/609478/code-of-practice-on-search-and-copyright.pdf.

LUISS School of Law, *The Social Dilemma: come disciplinare le piattaforme digitali? Sintesi del convegno inaugurale della IX edizione del Master di II livello in Diritto della Concorrenza e dell'Innovazione*, 19.03.2021, available at: https://www.agendadigitale.eu/cultura-digitale/potere-alle-piattaforme-e-rischi-per-le-democrazie-tutti-i-paradossi-del-digitale/.https://lsl.luiss.it/sites/lsl.luiss.it/files/The%20Social%20Dilemma%20sintesi%20inaugurazione%20master%20concorrenza%20innovazione%202021.pdf.

Nordic Commerce Sector, *Revision of the E-commerce Directive/Digital services act. The position of the Nordic Commerce Sector*, available at: https://www.danskerhverv.dk/siteassets/mediafolder/dokumenter/04-politik/2021/final---revision-of-the-e-commerce-directive_dsa_the-position-of-the-nordic-commerce-sector.pdf.

OECD, *The Economic Impact of Counterfeiting and Piracy,* 19.06.2008.

*Protests greet Brussels copyright reform plan*, BBC News, available at: https://www.bbc.com/news/technology-44482381.

Scientific Foresight Unit (STOA), *Online Platforms: Economic and societal effects, European Parliamentary Research Service*, 03.2021.

Second Draft Act adapting copyright law to the requirements of the Digital Single Market, available at: https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_II_Anpassung%20Urheberrecht_digitaler_Binnenmarkt_englischeInfo.pdf;jsessionid=84FAC41AEF1CD4D70C008EED64C26246.2_cid324?__blob=publicationFile&v=4.

*TAKE DOWN AND STAY DOWN*, 2016, available at: https://perma.cc/NQ3F-9CJG.

U.S. Copyright Office, *Section 512 Study: Notice and Request for Public Comment,* 80 Fed. Reg. 81865, 31.12.2015.

United Nations Office on Drugs and Crime, *RESEARCH BRIEF. Covid-19-related Trafficking of Medical Products as a Threat to Public Health,* 2020, available at: https://www.unodc.org/documents/data-and-analysis/covid/COVID-19_research_brief_trafficking_medical_products.pdf.

*Un'analisi della proposta di Regolamento "Digital Services Act" sotto il profilo della protezione dei diritti di Proprietà industriale*, 28.10.2021, available at: https://uibm.mise.gov.it/index.php/it/settimana-anticontraffazione-2021/28-ottobre-webinar-un-analisi-della-proposta-di-regolamento-digital-services-act-sotto-il-profilo-della-protezione-dei-diritti-di-proprieta-industriale.

## Legislative References

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

Directive 2015/1535/EC of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services.

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

European Convention of Human Rights.

European Charter of Fundamental Rights.

Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, Brussels, 14.09.2016, COM (2016), 593, final.

European Commission, *Proposal for a Regulation of The European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020, COM(2020) 825, final.

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 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.

Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

Directive 2015/1535/EC of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services.

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 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).

## Courts' decisions

CJEU, Case C-683/18.

CJEU, Case C-201/13.

CJEU, Case C-324/09.

CJEU, Case C-360/10.

CJEU, Case C-70/10.

CJEU, Case C-476/17.

CJEU, Case C-484/14.

CJEU, Case C-160/15.

CJEU, Case C-314/12.

CJEU, Case C-275/06.

CJEU, Case C-434/15.

CJEU, Case C-320/16.

CJEU, Case C-390/18.

CJEU, Case C-236/08.

CJEU, Case C-291/13.

CJEU, Case C-325/95.

CJEU, Case C-236/08.

CJEU, Case C-527/15.

CJEU, Case C-18/18.

CJEU, Case C-401/19.

CJEU, Case C-610/15.

CJEU, Case C-466/12.

CJEU, Case C-469/17.

Case of the Court of Appeal (Oberlandesgericht) of Hamburg of 1.07.2015, 5 U 87/12.

AP Madrid (sec.28), 14.01.2014, Case *Telecinco v. Youtube*.

*La société Google France c. La société Bach films* Case, Première chambre civile de la Cour de cassation, 12.07.2012.

## Websites

https://www.pcmag.com/encyclopedia/term/media-sharing-site.

https://en.wikipedia.org/w/index.php?title=Platform_economy&oldid=1034048999.

https://www.gartner.com/en/information-technology/glossary/digitalization.

https://www.collinsdictionary.com/dictionary/english/cybersquatting.

https://www.bdc.ca/en/articles-tools/entrepreneur-toolkit/templates-business-guides/glossary/search-engine.

https://www.consilium.europa.eu/en/council-eu/decision-making/ordinary-legislative-procedure/.

https://www.europarl.europa.eu/about-parliament/en/powers-and-procedures/legislative-powers.