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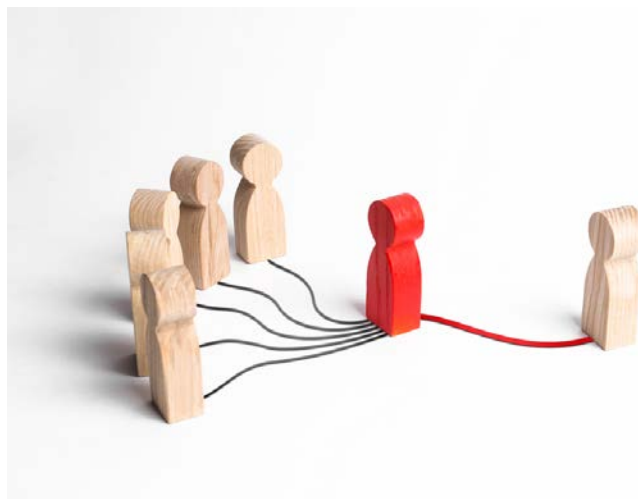
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# The functioning of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services

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Challenges and opportunities



Policy Department for Economic, Scientific and Quality of Life Policies  
Directorate-General for Internal Policies  
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# The functioning of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services

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## Challenges and opportunities

### **Abstract**

The paper reflects on responsibilities and duties of care of online intermediaries as set out in the E-Commerce Directive and gives recommendations for a possible future EU Digital Services Act.

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## CONTENTS

<b>LIST OF ABBREVIATIONS</b>	<b>5</b>
<b>LIST OF TABLES</b>	<b>7</b>
<b>EXECUTIVE SUMMARY</b>	<b>8</b>
<b>1. STARTING POINT</b>	<b>13</b>
1.1. Intermediary service providers of digital services: Only third-party infringements	13
1.2. Why responsibilities and duties of care?	15
<b>2. THE E-COMMERCE DIRECTIVE: GENERAL PRINCIPLES</b>	<b>18</b>
2.1. Mapping: The legal framework and current challenges	18
2.1.1. Articles 12 to 14 E-Commerce Directive : Mere limitations on liability (liability privileges)	18
2.1.2. Injunction and removal claims remain untouched by Articles 12-14 E-Commerce Directive	19
2.1.3. Prohibition to impose general monitoring duties (Article 15 E-Commerce Directive)	19
2.1.4. Specific Provisions to the E-Commerce Directive	20
2.2. The Commission's position	21
2.3. Recommendations	22
<b>3. PROVISIONS ESTABLISHING LIABILITY</b>	<b>23</b>
3.1. National Laws	24
3.2. EU law	26
3.3. The Commission's position	29
3.4. Recommendations	29
<b>4. ACCESS PROVIDERS – "MERE CONDUITS" (Article 12 E-Commerce Directive)</b>	<b>31</b>
4.1. Upstream Providers	32
4.2. Content Delivery Network (CDN) Providers	32
4.3. Domain Providers	33
4.4. The Commission's position	34
4.5. Recommendations	34
<b>5. CACHE PROVIDERS (Article 13 E-Commerce Directive)</b>	<b>35</b>
5.1. The legal framework	35
5.2. The Commission's position	36
5.3. Recommendations	36

<b>6. HOSTING PROVIDERS (Article 14 E-Commerce Directive)</b>	<b>37</b>
6.1. Active and Passive Hosting Providers (“false hosting providers”)	38
6.2. Good Samaritan Paradox	40
6.3. Staydown duties and duties to prevent infringements of the same kind	42
6.4. Knowledge and diligent economic operator (Article 14 (1) (a) and (b) E-Commerce Directive)	44
6.5. The Commission’s position	45
6.6. Recommendations	46
<b>7. LINK PROVIDERS, IN PARTICULAR SEARCH ENGINES</b>	<b>48</b>
7.1. The legal framework	48
7.2. Recommendations	50
<b>8. IDENTIFICATION OF THE INFRINGER (Article 5 E-Commerce Directive)</b>	<b>51</b>
8.1. No identification of the infringer in case of structurally infringing offers	52
8.2. Duties for intermediaries under national law in case of breach of Article 5 E-Commerce Directive	52
8.3. Recommendations	54
8.3.1. General Principle of “Know Your Customer” in financial law	54
8.3.2. Reasonable (more limited) customer identification and verification for intermediaries; prohibition to provide services to unverified customers	54
8.3.3. The relevant intermediaries	55
<b>REFERENCES</b>	<b>57</b>
<b>ANNEX</b>	<b>59</b>

## LIST OF ABBREVIATIONS

<b>AVIA</b>	French Law to fight online hate speech
<b>AML</b>	Anti-Money-Laundering
<b>BGH</b>	Bundesgerichtshof (German Federal Supreme Court)
<b>CD 2001/29</b>	Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society
<b>CDN</b>	Content Delivery Network
<b>CJEU</b>	Court of Justice of the European Union
<b>DSA</b>	Digital Services Act
<b>DSM</b>	Digital Single Market
<b>EBR</b>	European Business Register
<b>ECD</b>	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
<b>EGTL</b>	European Group for Tort Law
<b>EU</b>	European Union
<b>IP</b>	Intellectual Property
<b>IVIR</b>	Institute for Information Law
<b>KYBC</b>	Know Your Business Customer
<b>KYC</b>	Know Your Customer
<b>NetzDG</b>	Netzwerkdurchsetzungsgesetz (German Network Enforcement Act)
<b>OCSSP</b>	Online content-sharing service provider
<b>PETL</b>	Principles of European Tort Law
<b>P2B</b>	EU Regulation on platform-to-business relations

<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>TMG</b>	Telemediengesetz (German Telemedia Act)
<b>UBO</b>	Ultimate Beneficial Owner
<b>UWG</b>	Gesetz gegen den unlauteren Wettbewerb (German Act against Unfair Competition)
<b>XYZ</b>	Low-cost provider



## LIST OF TABLES

Table 1: Current system of liability on the EU and national level for intermediaries (simplified) 29

## EXECUTIVE SUMMARY

### Background

This study reflects on the need to reform the responsibilities and duties of care of online intermediaries according to the E-Commerce Directive and in a possible future EU Digital Services Act.

### Starting point

In this study, responsibilities and duties of care are only discussed for providers of digital services functioning as intermediaries. Responsibilities and duties of care for intermediary service providers arise in the case of third-party infringements. Other infringement scenarios with no role as an intermediary (e.g. the provider offering infringing content in its own name) are outside the scope of this study.

There are several good reasons to hold intermediary service providers responsible for third-party infringements. Intermediary service providers may create the risk of infringements by offering their services. Furthermore, intermediaries are in a good position to stop third-party infringements when their services are used to infringe. Hence, infringements can more efficiently be stopped by intermediary service providers in contrast to the legal pursuit of individual (and often anonymous) third-party infringers. Finally, by creating responsibilities and duties of care for intermediary service providers, they can become hubs of trust, necessary for a well-functioning internet.

### The E-Commerce Directive: General principles

As a general principle, the E-Commerce Directive only provides for liability shields (liability privileges) in Articles 12 to 14 E-Commerce Directive. The E-Commerce Directive does not provide for a basis to establish the liability of intermediary service providers.

Articles 12 to 14 E-Commerce Directive leave injunction and removal claims untouched. As to such claims, Article 15 E-Commerce Directive and its prohibition to impose general monitoring duties have to be observed.

There are sector specific provisions superseding as *lex speciales* the liability privileges of the E-Commerce Directive. One recent example is Article 17 (3) DSM Copyright Directive.

The European Commission has announced a general idea to increase and harmonise the responsibility of intermediary service providers.

### Recommendation

It is an option to harmonise the rules which establish liability of intermediary service providers on the EU level. This would signify a step towards a level playing field in the EU and against third-party rights infringements.

## Provisions establishing the liability of intermediary service providers

Usually, traditional national rules establish the liability of intermediary service providers.

So far, European law only provides for a sector specific harmonisation of the liability of intermediary service providers. The accountability merely for injunctions (based on helping duties of intermediaries as they are best placed to prevent the infringement) is harmonised in intellectual property law (Article 11 3<sup>rd</sup> sentence Enforcement Directive, Article 8 (3) Copyright Directive 2001/29).

With respect to ordinary liability, the sector specific provisions of Articles 11 and 13 Enforcement Directive may determine the concept of the “infringer” on the EU level.

This could be clarified by the CJEU in the pending YouTube case. Another sector specific rule establishing liability may be seen in Article 17 DSM Directive.

On a sector specific basis, EU law also decides when an intermediary may be treated as an infringer. This is for example true in copyright law according to the interpretation of Article 3 Copyright Directive 2001/29 by the CJEU.

The European Commission has not yet proposed to further harmonise the rules establishing liability of intermediaries on the EU level.

### Recommendation

Considering the long-standing tradition of national liability systems, EU rules could be explored which establish liability of intermediaries to a limited, but sufficient extent. This could be done even without changing the E-Commerce Directive and only where no sector specific rules already exist in EU law. For rules to establish liability, a distinction needs to be made between (1) the accountability for injunctions and (2) ordinary liability which entails the concept determining intermediaries as infringers.

(1) Concerning the mere accountability for injunctions (due to helping duties for intermediaries as they are best placed to prevent infringements), the model of intellectual property law in Article 11 3<sup>rd</sup> sentence Enforcement Directive and Article 8 (3) Copyright Directive 2001/29 should be followed. It is recommended to introduce a similar accountability for injunctions for intermediaries outside the area of intellectual property rights infringements. The intermediaries’ duties should be shaped according to the principle of proportionality.

(2) Concerning ordinary liability, it does not seem realistic to harmonise all national concepts of intermediaries’ fault and strict liability, e.g. for damages. However, it is recommended to harmonise the understanding of the term “infringer” regarding intermediaries, namely harmonising under which circumstances intermediaries can be classified as “infringers”. If the intermediary has to be classified as an “infringer”, the intermediary would be liable in the same way as a direct third-party infringer. A general rule could be introduced into EU law that “essential role” intermediaries which sufficiently intervene into third-party infringements intermediaries have to be treated as infringers themselves. In case the intermediary does not act with intent, one could discuss to limit this rule by a proportionate duty of care. The intermediary’s duties could be shaped in accordance with the principle of proportionality and would be comparable to the duties for a mere accountability for injunctions. The justification for this more extensive liability (which includes e.g. damages) lies in the fact that the “essential role” intermediary intervenes into third-party infringements and thus should face the same liability as the third-party infringer.

## Access providers – “Mere conduits” (Article 12 E-Commerce Directive)

Regarding access providers and the liability privilege in Article 12 E-Commerce Directive, some difficulties emerge concerning the sub-group of intermediary service providers playing an “in-between” role between access providers and hosting providers, such as upstream providers, CDN providers or domain providers.

### Recommendation

It should be left to the courts to determine whether Article 12, 13 or Article 14 E-Commerce Directive apply to the respective businesses. There seems to be no pressing need to establish further categories for these providers because business models will constantly evolve, leaving newly created categories out of date.

## Cache providers (Article 13 E-Commerce Directive)

For cache providers, the liability shield of Article 13 E-Commerce Directive has not gained larger practical importance. Article 13 E-Commerce Directive seems to provide an adequate regulation for this group of intermediaries.

## Hosting providers (Article 14 E-Commerce Directive)

Hosting providers are the most relevant group of intermediaries in legal practice. They deserve particular attention.

The differentiation between active and passive hosting providers – as set out by the CJEU case law – is justified. “Active role” service providers intervene in third-party information and make third-party content part of their business model. It seems justified that they are facing an increased level of responsibilities and duties of care compared to merely neutral and passive providers of technical services.

### Recommendation

Calls to abolish the distinction between active role and passive role hosting providers should not be followed.

Another topic of discussion is the “Good Samaritan Paradox”. The “Paradox” seeks to describe the following: The model provider needs to remain neutral and passive to come under the liability privilege of Article 14 E-Commerce Directive. This may disincentivise the provider from taking precautions against infringements due to its fear of playing an active role and losing the safe harbour protection. However, the distinction between active and passive role hosting providers is not based upon the provider’s role in discovering infringements. Rather, the “active role” follows from the promotion of content.

### Recommendation

The “Good Samaritan Paradox” should not lead to legislative activity as the argument underlying the “Paradox” is not convincing.

In order to prevent infringements on an efficient and sustainable level, the hosting provider should not only face takedown duties. Rather, intermediaries should also face staydown and prevention duties.

### **Recommendation**

A 3-fold duty after notification should also be implemented outside the scope of intellectual property rights infringements. This 3-fold duty after notification of the right infringement consists of: (1) takedown, (2) staydown and (3) prevention of similar clear rights infringements of the same kind.

According to the recent case law of the CJEU with regard to Article 15 E-Commerce Directive, such duties should also stay in line with the prohibition to impose general monitoring duties. The introduction of these duties establishing the liability of intermediary service providers is coupled with the advantage of achieving a complete harmonisation on the EU level.

## **Link providers, in particular search engines**

Linking providers and more specifically search engines play an essential role in the functioning of the internet. Nevertheless, any rule addressing the liability of search engines should provide adequate responsibilities and duties of care for search engines as search engines perform the role of gate keepers for the dissemination and the access to illegal information.

Consequently, rules establishing the liability of search engines deserve attention. The CJEU and national courts have found adequate and flexible solutions establishing the liability of search engines, especially in copyright law.

### **Recommendation**

Rules to establish liability of search engines should be created horizontally for all areas of law, where no such rules exist yet. Such rules could be based on the liability concept for search engines in copyright law.

## **Identification of the infringer – Article 5 E-Commerce Directive**

Illegal business models pose a major problem for the European internet by creating a massive amount of infringements.

Usually, such structurally infringing websites or offers do not respect the information duties of Article 5 E-Commerce Directive. They hide in anonymity. Yet, structurally infringing websites and offers should not be able to use legitimate EU intermediary service providers for their infringements.

### **Recommendation**

Against this background, it is recommended to create “Know Your Business Customer” (KYBC) duties for intermediary service providers. Such KYBC duties should be more limited than their equivalents fighting money laundering in the financial sector. But a duty for intermediary service providers to receive and verify customer data should be implemented; the verification could be carried out via e.g. the European Business Register (EBR) or the Ultimate Beneficial Owner (UBO) Register. These verification duties should be combined with a prohibition to provide services to customers, where a verification as outlined above has not been carried out or has failed.

Such duties could not only be imposed on hosting providers, but also on other intermediaries in order to effectively counteract structurally infringing websites and offers operating illegal business models.

## 1. STARTING POINT

### KEY FINDINGS

In this study, responsibilities and duties of care are only discussed for providers of digital services which are intermediaries. Consequently, the responsibilities and duties of care for such intermediary providers only relate to third-party infringements. Own infringements with no third-party infringements involved (e.g. the provider offering infringing content in its own name) are outside the scope of this study.

As third-party infringements are at stake, there are several good reasons to hold intermediary service providers responsible for such infringements. The intermediary service provider creates a source of danger. Furthermore, it is usually well-placed to avoid damage in contrast to going after the individual third-party infringers. Finally, by creating responsibilities and duties of care for intermediary service providers, they can become hubs of trust, necessary for a well-functioning internet.

### 1.1. Intermediary service providers of digital services

#### Only third-party infringements

Specific responsibilities and duties of care are usually only discussed for providers of digital services which have a particular character. They must be so-called intermediaries. This report only deals with this class of providers of digital services which act as intermediaries.

Intermediaries can be classified as middlemen, acting between one internet user and another party, also using the internet.<sup>1</sup> Consequently, specific liability rules for these intermediaries on the internet need to deal with internet user infringements as third party infringements.

Against this background, the E-Commerce Directive<sup>2</sup> only addresses intermediary liability – and not liability regarding other providers of digital services. Chapter II Section 4 E-Commerce Directive (see Annex) specifically uses the heading “Liability of intermediary service providers” to specifically regulate mere conduit (Article 12), caching (Article 13), hosting (Article 14) and the prohibition to impose general monitoring duties upon providers (Article 15). As recital 40 clarifies, the entire chapter II Section 4 E-Commerce Directive is only addressed to “service providers acting as intermediaries”.

It is interesting to note that member states in their national implementations of chapter II Section 4 E-Commerce Directive have specifically included language into national law which make it a requirement that they deal with “third party information”.<sup>3</sup>

<sup>1</sup> Christina Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, 2017, pages 15 to 16; Martin Husovec, *Injunctions against Intermediaries in the European Union – Accountable But Not Liable?*, 2017/2018, page 87.

<sup>2</sup> 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 (directive and electronic commerce), OJ L178/1 of 17 July 2000.

<sup>3</sup> See for example the German Telemedia Act (Telemediengesetz - TMG). Implementation of Article 12 E-Commerce Directive (sec. 8 TMG: “Third party information”); Implementation of Article 13 E-Commerce Directive (sec. 9 TMG: “Third party information”); Implementation of Article 14 E-Commerce Directive (sec. 10 TMG: “Third party information”).

Also, Article 8 (3) Copyright Directive 2001/29<sup>4</sup> defines intermediaries as providers whose services are used by a third party to infringe a copyright or related right.

As specific liability rules for digital services providers are limited to intermediaries, it is important to note that such specific liability rules do not apply if digital service providers does not act as an intermediary regarding third-party infringement. Such infringement provided by digital service providers do not fall under the specific liability rules of EU law, as currently included in Articles 12 to 15 E-Commerce Directive, because regarding such infringements, the digital service provider is no intermediary. In particular, the following groups of cases do not fall under the application of specific liability rules for intermediaries,

- **Own content of digital service provider:** If a digital service provider provides infringements as its own information, the service provider will be liable according to the general rules of liability. The provision of own content cannot be considered as a service of an intermediary.<sup>5</sup>

**Example:** One example in case law is the selling of a rights infringing DVD “Al Di Meola – in Tokyo (live)” through an own offering by Amazon. Amazon was liable according to the general liability rules for (related right) infringement in Germany and the specific liability rules for internet intermediaries did not apply.<sup>6</sup> In so far, the Amazon service may be in a double role: as far as Amazon sells in its own name, Amazon is not an intermediary and not subject to the specific liability rules of the E-Commerce Directive. As far as the Amazon Marketplace is concerned, however, Amazon plays the role of a middleman between third parties buying and selling on Amazon and may invoke the specific liability rules of the E-Commerce Directive;

- The group of own infringements will include cases where the intermediary service made (initially) third party content its own content.

**Example:** In a German case, the German Federal Supreme Court (BGH) did not apply the specific liability rules of the E-Commerce Directive to a platform who had made rights infringing photos for cooking recipes uploaded by third-parties its own content.<sup>7</sup>

Generally speaking, the same will be true for publishers on the internet, even if they publish journalistic articles with author names. The publisher, from the perspective of the internet user, will take over editorial control for the internet publication and thus make the internet journal its own content.<sup>8</sup> Indeed, the CJEU has held that a newspaper may not benefit from the liability privilege of Article 14, for its own articles, because it did not act as an intermediary;<sup>9</sup>

- **Active role of the intermediary service provider concerning the third party infringement:** According to the case law of the CJEU, intermediary service providers which play an active role concerning the third party infringement (e.g. hosting providers in particular by indexing, suggesting and branding) may be excluded from the application of Articles 12 to 15 E-Commerce Directive.

<sup>4</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L167 of 22 June 2001.

<sup>5</sup> Christina Angelopoulos, European Intermediary Liability in Copyright: A Tort-Based Analysis, 2017, page 16. See also CJEU of 2 April 2020, C-567/18 paras. 48, 49 – *Coty/Amazon*, where the CJEU does not allow own offerings to be treated under Article 14 E-Commerce Directive.

<sup>6</sup> German Federal Supreme Court (BGH) of 5 November 2015, I ZR 88/13 – *Al Di Meola*.

<sup>7</sup> German Federal Supreme Court (BGH) of 12 November 2009, I ZR 166/07 – *marions-kochbuch.de/marions-cookbook.de*.

<sup>8</sup> Jan Bernd Nordemann in Fromm/Nordemann, Urheberrecht Kommentar (Commentary to the German Copyright Act), 12th Edition 2018, § 97 German Copyright Act, note 149.

<sup>9</sup> CJEU of 11 September 2014, C-291/13 paras. 44, 45 – *Papasavvas*.



**Example:** Online marketplaces may in principle be categorized as a hosting provider in the sense of Article 14 E-Commerce Directive. But in a case before the CJEU, there was put into question for eBay as an auction platforms. The CJEU held it to be relevant if such platform was found to have provided support for a third party infringement, which included, in particular, optimising the presentation of the offers for sale in question or promoting those offers, for example through advertising third party eBay offers with own advertisements on the Google search engine. According to the CJEU, in case of an “active role” by such optimizing, eBay would no longer come under the liability privilege of the hosting provider in Article 14 E-Commerce-Directive.<sup>10</sup> The mere fact that the service provider is remunerated for the service and provides general information to its customers was, however, not sufficient to exclude the application of Article 14 E-Commerce-Directive.<sup>11</sup>

It fits into this picture that the CJEU has excluded service providers from the application of the E-Commerce Directive if they played an “integral part of an overall service”.<sup>12</sup>

The topic of “active role” intermediaries is dealt with in detail below (6.1.).

## 1.2. Why responsibilities and duties of care?

As seen above in chapter 1.1, for this study digital service providers are relevant in their role as intermediaries, i.e. as middlemen acting between internet users. In case of breaches of law, they will not commit such infringements themselves. Rather, their services will be used by others to infringe the law.

Such a use of the providers’ services will at least lead to a causation of the infringement by the provider. This is in particular true if causation is limited to the rule of *conditio sine qua non*.<sup>13</sup> Concerning intermediary service providers, *conditio sine qua non* is usually met when infringements are committed using their services, as the infringement would not have occurred without the services,

- **Hosting providers:** The infringing information is stored by the user on the service of the hosting provider. Without the storage the infringement would not have occurred;
- **Access providers:** For access providers, however, the *conditio sine qua non* rule has been somewhat stretched by the CJEU. Article 8 (3) Copyright Directive 2001/29 sets out the possibility for national courts to issue injunction orders against access providers in case their services are used to infringe a copyright. The CJEU held that the services are used to infringe the making available right in the sense of Article 3 Copyright Directive 2001/29, even if the access provider merely granted access to a copyrighted work already illegally made publicly available.<sup>14</sup> The CJEU argued that the goal of the Copyright Directive 2001/29 to provide a high level of protection to copyright owners would require such an extensive interpretation of Article 8 (3) Copyright Directive 2001/29.

That said, a mere causation (in the sense of *conditio sine qua non*) cannot be by itself sufficient to justify a duty of care for intermediaries for users’ infringements. In tort law, it is a generally recognised principle that only the person who himself caused the harm is in general liable.

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<sup>10</sup> CJEU of 12 July 2011, C-324/09 para. 114 - *L’Oréal/eBay*.

<sup>11</sup> CJEU of 12 July 2011, C-324/09 para. 115 - *L’Oréal/eBay*.

<sup>12</sup> See CJEU of 19 December 2019, C-390/18 para. 50 - *Airbnb Ireland*; CJEU of 20 December 2017, C-434/15 para. 40 - *Uber Spain*.

<sup>13</sup> The tort systems of EU national member states may require additional elements beyond *conditio sine qua non* to find causation such as a certain direct effect (France) or an “adequate” causation (Germany), see *Christina Angelopoulos*, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, 2017, page 349 et seq. with further references.

<sup>14</sup> CJEU of 27 March 2014, C-314/12 - *UPC Telekabel Wien*.

Uninvolved parties will not be held responsible. But if there is a “good reason”, third parties may face responsibility.<sup>15</sup> To identify such a “good reason” has been subject to different legal theories in the EU member states. While English law has developed “duties of care”, France has developed obligations to safeguard interests of others and Germany has developed the concept of *Verkehrssicherungspflichten* (literal translation: duties to make sources of risk safe). Two cases should serve as examples,

- Duty of care of cinema owners: The owner of an out-of-use cinema may have a duty to prevent third parties from breaking into the cinema and starting a fire;<sup>16</sup>
- Verkehrssicherungspflichten of shop owners: The shop owner has a strict duty to keep his shop floor in a condition to prevent customers from slipping e.g. on a wet floor.<sup>17</sup>

While the details of a “good reason” still differ among EU member states, there should be common ground as to certain general scenarios. The academic European Group for Tort Law (“EGTL”) has proposed Principles of European Tort Law (“PETL”), which set out the following four categories in Article 4: 103 *Duty to protect others from damage*. Accordingly, a duty to act positively to protect others from damage may exist in the following four scenarios,

- The law provides for a duty to protect others from damage;
- The actor creates or controls a dangerous situation;
- There is a special relationship between parties;
- The seriousness of the harm on the one side and the ease of avoiding the damage on the other side points towards such a duty.<sup>18</sup>

These four scenarios should also serve as a justification to justify and give a “good reason”<sup>19</sup> for responsibilities and duties of care of intermediary service providers. The third scenario – the special relationship between parties – will be less relevant because the intermediary service provider will not have a special relationship to the harmed party. But all three other scenarios seem to be particularly relevant for intermediary service providers,

- The intermediary service provider creates or controls a dangerous situation (second scenario): Providing services to internet users has to be regarded as creating a relevant risk for infringements. While the internet and its blessings have become part of our daily lives, the downsides of the internet, particularly in the form of violations of law, go along with it. One key reason relates to the nature of the internet itself. It is possible to commit the violating act anonymously and investigating the identity of the person or persons responsible is a costly, time-consuming process and is often even impossible;<sup>20</sup>
- Seriousness of the harm on the one side and the ease of avoiding the damage on the other side points towards a duty (fourth scenario): The difficulty to legally pursue internet users as infringers is also relevant for another scenario to justify responsibilities and duties of care. Individual infringers will have to be prosecuted individually. Looking at the sheer number of violations on the internet, this process can be very burdensome and expensive.

<sup>15</sup> Christina Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, 2017, page 328.

<sup>16</sup> *Smith vs Littlewoods* [1987] AC 241.

<sup>17</sup> German Federal Supreme Court (BGH) NJW 2617 (1994).

<sup>18</sup> See [www.egtl.org/docs/petl.pdf](http://www.egtl.org/docs/petl.pdf).

<sup>19</sup> Christina Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, 2017, page 328.

<sup>20</sup> Jan Bernd Nordemann, *Liability of online service providers for copyrighted content – Regulatory action needed? In-Depth analysis for the IMCO Committee*, 2018, page 6.

Legal action against the intermediary service providers, whose services are used for the infringements may have a much greater effect than against individual users as recognised already at the start of the internet age by courts.<sup>21</sup>

In this context, there is another “good reason” for responsibilities and duties of care: Intermediaries may become hubs of trust. Every legal system is based on trust. This can be created in an offline world using personal relationships which does not seem possible in an increasingly anonymised internet world. Therefore, there must be institutions which replace this trust and make the increasingly anonymous communication on the internet trustworthy. This may also serve as a justification for the responsibility of intermediaries;<sup>22</sup>

- The law provides so (first scenario): of course, responsibilities and duties of care of intermediary services providers may also result from sources of law. But such sources of law will only be created by the lawmaker if there is a “good reason” for intermediaries to be responsible and have a duty of care. Nevertheless, this scenario is particularly relevant in European law, as the European law may choose to harmonise responsibilities and duties of care of service providers and create a source of law.<sup>23</sup>

Against this background, it seems to be justified (due to “good reasons”) that the law provides for responsibilities and duties of care of intermediary service providers and in particular to look at the question how harmonised rules for responsibilities and duties of care should be constructed on the EU level.

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<sup>21</sup> See for example German Federal Supreme Court (BGH) of 12 July 2007, I ZR 18/04, GRUR 890 (2007), page 894 note 40 -*Jugendgefährdende Medien bei ebay*; Jan Bernd Nordemann, 59 (No. 4) Journal Copyright Society of the USA 773 (2012).

<sup>22</sup> Jan Bernd Nordemann, Liability of online service providers for copyrighted content – Regulatory action needed? In-Depth analysis for the IMCO Committee, 2018, page 6; Czychowski/Jan Bernd Nordemann, GRUR 986 (2013).

<sup>23</sup> Christina Angelopoulos, European Intermediary Liability in Copyright: A Tort-Based Analysis, 2017, page 340.

## 2. THE E-COMMERCE DIRECTIVE: GENERAL PRINCIPLES

### KEY FINDINGS

As a general principle, the E-Commerce Directive only provides for limitations on liability (liability privileges) in Articles 12 to 14 E-Commerce Directive. The E-Commerce Directive does not provide for a basis to establish liability for intermediary service providers.

Articles 12 to 14 E-Commerce Directive leave injunction and removal claims untouched. As to such claims, Article 15 E-Commerce Directive and its prohibition to impose general monitoring duties have to be observed.

There are sector specific provisions which supersede the liability shield of the E-Commerce Directive as *lex specialis*. One recent example is Article 17 (3) DSM Copyright Directive.

The European Commission has only announced a general idea to increase and harmonise the responsibility of intermediary service providers until now. There is no clear statement yet as to the details of an envisaged reform.

It is recommended to reflect on a reform of the liability rules for intermediary service providers. It will be important to harmonise the rules to establish liability on the EU level at least to a certain extent. This will be further outlined in chapter 3. below.

### 2.1. Mapping: The legal framework and current challenges

#### 2.1.1. Articles 12 to 14 E-Commerce Directive: Mere limitations on liability (liability privileges)

Articles 12, 13 and 14 E-Commerce Directive (see text in Annex) mean to regulate the limitations of liability for intermediary service providers. They provide for liability privileges in cases where intermediary service providers would be liable under the applicable civil, criminal or administrative law regime. This will be explored for access, cache and hosting providers in detail below (4., 5. and 6.).

Articles 12, 13 and 14 E-Commerce Directive, however, do not provide for a basis to hold intermediary service providers liable. In other words: The provisions of the E-Commerce Directive regulating “*liability of intermediary service providers*” (as the headline chapter II section 4 puts it) cannot be used to establish liability of intermediary service providers.<sup>24</sup> The rules establishing the liability of intermediary service providers are – generally speaking - rules outside the scope of the E-Commerce Directive. Such rules establishing the liability may be found in EU law or in national laws (see in detail below 3.1 and 3.2).

The difference between a liability shield on the one hand and rules to establish liability on the other hand is not of an academic nature.

**Example:** *The German Court of Appeal of Hamburg had to decide on the liability of YouTube for damages, because YouTube’s users had uploaded copyright infringing content on YouTube’s platform.*

<sup>24</sup> Martin Husovic, *Injunctions Against Intermediaries in the European Union – Accountable But Not Liable?*, 2017/2018, page 50.

*According to the Court of Appeal of Hamburg, YouTube due to certain features of its platform played an active role making its uploaders' content available to its users.*

*Consequently, YouTube according to the judges no longer came under the liability shield of Article 14 E-Commerce Directive. But German law did not provide for liability rules which would grant damage claims to the harmed rightholder in cases where such active role hosting providers like YouTube provided infringing content to the public.<sup>25</sup>*

The opinion of the Hamburg Court to deny a sufficient basis to establish liability for YouTube may today be called into question<sup>26</sup> and will be out of date for digital service providers, which come under Article 17 DSM Directive 2019/490.<sup>27</sup> Nevertheless, the case nicely illustrates how a "gap" may open up between the liability privilege of the E-Commerce Directive on the one hand and rules to establish liability on the other hand.<sup>28</sup>

### 2.1.2. Injunction and removal claims remain untouched by Article 12-14 E-Commerce Directive

As a recurrent theme, Articles 12 (3), 13 (2) and 14 (3) caves out one type of claims from the liability privileges: Articles 12, 13 and 14 do not affect the possibility for a court or administrative authority to require the intermediary service provider to terminate or prevent an infringement. Article 14 (3) furthermore clarifies that the hosting provider privilege does not affect the possibility for the member states to establish procedures governing the removal or disabling of access to information. Recital 45 E-Commerce Directive reads as follows,

*(45) 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.*

According to the Court of Justice, this means that in particular injunction claims are outside of the scope of the liability privileges.<sup>29</sup> The CJEU has even gone further and ruled that the E-Commerce Directive does not preclude ancillary claims to injunction claims such as reimbursement of costs of giving formal notice and court costs incurred by a claim to raising injunction claims.<sup>30</sup>

### 2.1.3. Prohibition to impose general monitoring duties (Article 15 E-Commerce Directive)

Besides the limitations on liability (privileges) of Articles 12, 13 and 14 E-Commerce Directive, the E-Commerce Directive also contains an explicit prohibition to impose general monitoring duties upon intermediary service providers (Article 15 E-Commerce Directive).

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<sup>25</sup> Court of Appeal (Oberlandesgericht) of Hamburg of 1 July 2015, 5 U 87/12, Juris paras. 163 at seq.

<sup>26</sup> See pending CJEU case – C-682/18 – *YouTube*.

<sup>27</sup> 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. According to Article 17 (4) DSM Directive 2019/790, online content-sharing service providers are directly liable for illegal content shared, unless the duties set out in Article 17 (4) are kept. YouTube should be such a service provider (see Article 2 No. 6 DSM Directive 2019/790).

<sup>28</sup> *Jan Bernd Nordemann*, Liability of online service providers for copyrighted content – Regulatory action needed? In-Depth analysis for the IMCO Committee 2018, page 21.

<sup>29</sup> CJEU of 15 September 2016, C-484/14 paras. 76-78 – *McFadden/Sony Music*.

<sup>30</sup> CJEU of 15 September 2016, C-484/14 para. 78. – *McFadden/Sony Music*.

The provision reads as follows,

#### Article 15

##### *No general obligation to monitor*

1. Member States shall not impose a general 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;

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

The main role of Article 15 E-Commerce Directive in practice is to regulate the duties imposed on intermediary service providers concerning injunction claims. As shown above (2.1.2.), such injunction claims are left untouched by the liability privileges of Articles 12 to 14 E-Commerce Directive. Consequently, by means of Article 15 E-Commerce Directive the E-Commerce Directive also sets limits on the scope of possible injunction claims upon intermediary service providers. Again, comparable with Articles 12 to 14 E-Commerce Directive, Article 15 is not a provision establishing accountability for injunctions for intermediary service providers. But if such injunction claims have been established, Article 15 E-Commerce Directive works as a shield against monitoring duties reaching too far.

Such rules establishing injunction claims may be found in EU law (for example Article 11 3<sup>rd</sup> sentence Enforcement Directive 2004/48<sup>31</sup> or in Article 8 (3) Copyright Directive 2001/129) or in national law (for example in national laws against defamation).<sup>32</sup> See below 3.1 and 3.2.

#### 2.1.4. Specific Provisions to the E-Commerce Directive

After Articles 12 to 15 E-Commerce Directive came into effect, some EU law provisions have created specific liability rules for intermediary service providers which explicitly rule out the application of the E-Commerce Directive. Usually, such liability rules will be *lex speciales* to Articles 12 to 15 E-Commerce Directive. In any case, the provisions of the E-Commerce Directive do not apply.

**Example:** Article 17 (3) DSM Copyright Directive explicitly disapplies Article 14 (1) E-Commerce Directive in case the service provider comes under Article 17 DSM Copyright Directive. Rather, Article 17 (4) DSM Copyright Directive provides for specific requirements for the service provider covered by Article 17. That said, Article 17 (3) 2<sup>nd</sup> Subparagraph DSM Copyright Directive clarifies that the service provider may still rely on the liability shield of Article 14 (1) E-Commerce Directive for purposes falling outside the scope of the DSM Directive. So, the setup for a service provider covered by Article 17 may be quite complex: For copyrighted material uploaded onto the service provider's platform, the liability privilege of Article 17 (4) DSM Copyright Directive applies, while for other violations of law (such as trademark law or defamation law), Article 14 (1) E-Commerce Directive continues to solely be relevant.

<sup>31</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

<sup>32</sup> CJEU of 3 October 2019, C-18/18 – *Eva Glawischnig-Piesczek/Facebook Ireland Limited*: in this case the injunction claim rooted in the Austrian law prohibiting defamations.

## 2.2. The Commission's position

Under the former Commission, the European Commission had issued a "Communication on Tackling Illegal Content"<sup>33</sup> and a "Recommendation on measures to effectively tackle illegal content online".<sup>34</sup>

As a Communication and a Recommendation, both documents were without prejudice to the position of service providers under the E-Commerce Directive (see item 3 Recommendation). But, to a certain extent, both documents contain a useful insight into the Commission's approach to provider liability.

Ursula von der Leyen (at the time President-Elect of the European Commission) published the political guidelines for the 2019-2024 Commission on 16 July 2019.<sup>35</sup> The 3<sup>rd</sup> political objective "A Europe fit for the digital age" addresses the liability of digital platforms as follows,

*A new Digital Services Act will upgrade our liability and safety rules for digital platforms, services and products, and complete our Digital Single Market.*

On 19 February 2020, the European Commission in its Communication "Shaping Europe's digital future" to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions of 19 February 2020 (below: "Communication 2020")<sup>36</sup> specifically addresses as "key actions",

*New and revised rules to deepen the Internal Market for Digital Services, by increasing and harmonising the responsibilities of online platforms and information service providers and reinforce the oversight over platforms' content policies in the EU. (Q4 2020, as part of the Digital Services Act package).*<sup>37</sup>

It also says,

*In this context, it is essential that the rules applicable to digital services across the EU are strengthened and modernised, clarifying the roles and responsibilities of online platforms. The sale of illicit, dangerous or counterfeit goods, and dissemination of illegal content must be tackled as effectively online as it is offline.*<sup>38</sup>

This is a clear statement in favour of clear and sound rules on the EU level for responsibilities and duties of care of intermediary service providers, wherever their services are used to breach the law.

The Commission's statement is to be welcomed. The intermediaries are the key players in the fight against illicit activity within their infrastructure. There are "good reasons" to hold intermediaries responsible, among them creation of risk, efficient position to avoid harm and trust building (see above 1.2.). Still, the details Commission's ideas remain vague. To summarise, there seems to be political will within the Commission to propose a general reform of the liability rules as contained in Articles 12 to 15 E-Commerce Directive. But as to these existing rules, it remains unclear what the Commission is planning.

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<sup>33</sup> Communication of 28.09.2017, Tackling Illegal Content Online - Towards an enhanced responsibility of online platforms, COM(2017) 555 final.

<sup>34</sup> Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online (C(2018) 1177 final).

<sup>35</sup> Ursula von der Leyen, A Union that Strives for More, My agenda for Europe, Political Guidelines for the next European Commission, 2019-2024, available at [https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf).

<sup>36</sup> European Commission, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions of 19 February 2020, 19.2.2020 COM(2020) 67 final, available at [https://ec.europa.eu/info/sites/info/files/communication-shaping-europes-digital-future-feb2020\\_en\\_3.pdf](https://ec.europa.eu/info/sites/info/files/communication-shaping-europes-digital-future-feb2020_en_3.pdf).

<sup>37</sup> European Commission, Communication 2020, page 12.

<sup>38</sup> European Commission, Communication 2020, page 11.

## 2.3. Recommendations

The provisions in Articles 12 to 15 E-Commerce Directive – both via shielding intermediary service providers against liability as well as the specific rule to prohibit general monitoring duties – play a very important role concerning liability in case intermediaries' services are used for infringements on the internet. As will be outlined in detail below, the rules in Articles 12 to 15 E-Commerce Directive, generally speaking despite some remaining open issues, have proven to be fit for daily practice.

Yet, Articles 12 to 15 only serve to limit liability. Without harmonising the establishment of liability, there will be no full level playing field in the Digital Single Market. Against this background, it seems an option to think about harmonising rules establishing liability on the EU level as well.

This harmonisation of the rules establishing liability seems feasible at least to a certain extent, as will be outlined now in chapter 3.2 and 3.4 below.

In principle, this should be in line with the Commission's position *"that the rules applicable to digital services across the EU are strengthened and modernised, clarifying the roles and responsibilities of online platforms"*.<sup>39</sup> Without tackling the side of establishing liability, there will be no clear rules for the responsibility of online platforms.

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<sup>39</sup> European Commission, Communication 2020, page 12.



### 3. PROVISIONS ESTABLISHING LIABILITY

#### KEY FINDINGS

The provisions of the E-Commerce Directive do not establish liability for intermediary service providers. They only provide a liability shield in case liability can be established otherwise.

Usually, the traditional national rules establish liability for intermediary service providers. This is true for both mere accountability for injunction and for (ordinary) liability including the concept which determines the infringer.

So far, European law only provides for a sector specific harmonisation of liability of intermediary service providers. Accountability for injunction (based on helping duties of intermediaries as they are best placed to prevent the infringement) is harmonised in intellectual property law (Article 11 3<sup>rd</sup> sentence Enforcement Directive, Article 8 (3) Copyright Directive 2001/29). To help find liability, the sector specific provisions of Article 11 and 13 Enforcement Directive may have established EU rules by determining the “infringer”. This could be clarified by the CJEU in the pending YouTube case. Another sector specific rule to establish liability may be seen in Article 17 DSM Directive.

On a sector specific basis, EU law also decides if an intermediary may be treated as an infringer. This is for example true in copyright law due to the interpretation of Article 3 Copyright Directive 2001/29 by the CJEU.

The European Commission has not yet proposed to harmonise the rules to establish liability on the EU level.

It is recommended to explore EU rules to establish liability of intermediaries to a limited, but sufficient extent. This could be done even without opening the E-Commerce Directive. For rules to establish liability, one needs to differentiate between (1) accountability for mere injunction and (2) liability also leading to damages including the concept determining the infringer.

Concerning a accountability for injunction (due to helping duties for intermediaries, as they are best placed to prevent infringements), the model of intellectual property law in Article 11 3<sup>rd</sup> sentence Enforcement Directive and Article 8 (3) Copyright Directive 2001/29 should be followed. It is recommended to introduce accountability for injunction for “best placed” intermediaries used to infringe by third parties also outside the area of intellectual property rights infringements. The duties by the intermediary should be shaped in accordance with the principle of proportionality.

As to a liability for intermediaries, it does not seem realistic to harmonise all national concepts of fault and strict liability. But it is recommended to harmonise the term of “infringer”. If the intermediary has to be classified as “infringer”, this will mean the intermediary would be liable, as if it was the direct third party infringer. More specifically, it is recommended to explore the possibility to introduce a general rule into EU law that “essential role” intermediaries which sufficiently intervene into third party infringements have to be treated as infringers themselves. In case the intermediary does not act with intent, one could discuss to limit this rule by a proportionate duty of care.

The intermediary’s duties could be shaped in accordance with the principle of proportionality and would be comparable to the duties for a mere accountability for injunctions. The justification for the more extensive liability would lie in the fact that the “essential role” intermediary intervenes into third-party infringements and thus should face the same liability as the third party. The harmonisation should leave out already existing sector specific EU rules.

The provisions of the E-Commerce Directive do not establish liability for intermediary service providers. They only provide a liability shield in case liability can be established (see above 2.1.1). There are rules establishing liability both on the EU level and on the national level. Such rules may establish accountability for injunction only.<sup>40</sup> Such a mere accountability for injunctions has to be differentiated from liability, which in civil law usually includes injunction and damages. The E-Commerce Directive and its Articles 12, 13 and 14 E-Commerce Directive shield against liability while they do not regulate accountability for injunctions (see above 2.1.2.). Article 15 E-Commerce Directive provides certain limits for injunctions (see above 2.1.3.).

The system of provisions to establish liability is complex. It is pulled in different directions between provisions on the national level and provisions on the EU level.

### 3.1. National Laws

Usually, the national rules establish liability for intermediary service providers.

First of all, the general principles establishing liability in tort law remain a national domain. National law decides, generally speaking, if the tortfeasor is liable according to fault liability (liability only established in case of faults) or under strict liability (no fault required for liability).<sup>41</sup> Also, accessory liability (abettors and aiders) is determined according to national principles.

This is of particular relevance for intermediary service providers. As we have seen (see above 1.1.), intermediary service providers are middlemen between actors on the internet. The question is whether they can be held liable for third party infringements. In particular, this will bring up the issue of accessory liability, but it can also bring up the question of fault liability or strict liability as a (joint) tortfeasor under national rules.

**Example:** *A user of an internet auction platform was selling products which deliberately obstructed a specific competitor. Assuming that this was a tort of unfair competition under the respective national regime, the third party offering the product was liable according to national rules as the tortfeasor. It would be an additional question under national law whether the intermediary service provider was liable under accessory liability rules or as a joint tortfeasor.*

It must be noted, however, that the different national liability rules for intermediary service providers do not in all cases lead to a jigsaw situation for the intermediary service provider in the different national EU member states. Article 3 E-Commerce Directive establishes a country of origin principle for “information society services”. For example, auction platforms (such as in the above-mentioned example) would come under Article 3 (1) E-Commerce Directive and its country of origin principle. The country of origin principle will in practice mean that the intermediary service provider caught by Article 3 (1) E-Commerce Directive will not suffer harsher liability rules in other EU member states than in his country of establishment.<sup>42</sup>

That said, the general rule to base liability concepts in national law may seem unsatisfying for intermediary service providers in particular for the following reasons,

- The national law may not be in line with the requirements of a liability shield in Articles 12 to 15 E-Commerce Directive. This may produce “gaps” in protection.

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<sup>40</sup> Martin Husovec, *Injunctions Against Intermediaries in the European Union – Accountable But Not Liable?*, 2017/2018.

<sup>41</sup> See for the „The variety of national rules” in the EU: Cees van Dam, *European Tort Law*, Second Edition 2013, page 133 at seq.

<sup>42</sup> CJEU of 25 October 2011, C-509/09 and C-161/10 para. 68 – *eDate Advertising*.

Specifically, Member States may have requirements establishing liability for intermediary service providers which are too strict; consequently, the requirements of Articles 12 to 15 E-Commerce Directive to establish a level playing field for intermediary service providers with regard to their liability will remain irrelevant, because the harsher national requirements will never produce any cases where Articles 12 to 15 E-Commerce Directive could achieve their harmonising effects.

**Example:** *Once again referring to the example of the Court of Appeal Hamburg above in a copyright case: It is possible that an intermediary service provider does not qualify for the liability shield of Articles 12 to 14 E-Commerce Directive (in the case because of a too active role). But still, national law may not provide for liability rules which would grant claims to the harmed party against the provider where it would provide infringing content to the public (see above 2.1.1.),*

- There seems to be a less pressing need for harmonisation with regard to the exceptions for the country of origin principle of Article 3 (1) E-Commerce Directive. In such areas, it is especially important to already reach a sector specific EU harmonisation establishing liability for intermediary service providers. But – generally speaking – EU law provides for such a sector specific harmonisation.

**Example:** *One example for a sector specific harmonisation are intellectual property rights, which are explicitly excluded from the application of Article 3 E-Commerce Directive by the Annex of the E-Commerce Directive. Nevertheless, the harmonisation of liability rules for intermediary service providers has reached a considerable standard for intellectual property rights infringements (see in detail below 3.2.). Consequently, the gaps left for the application of the country of origin principle (Article 3 E-Commerce Directive) seem to be rather limited;*

- Furthermore, the most recent national laws against hate speech and defamation on the internet have been seen as examples for a continuing lack of harmonisation on the EU level with respect to establishing the liability of intermediary service providers. Two examples are the French AVIA Law<sup>43</sup> and the German Netzwerkdurchsetzungsgesetz (below: “NetzDG”).<sup>44</sup>

The need for a harmonised approach on the EU level has been countered with a national need for national rules. The regulation of intermediary liability with regard to hate speech and defamation on the internet was fuelled by the fact that damage resulting from hate speech and defamation in particular on social networks occurred at a national level. Consequently, it is advocated by member states that the liability of social networks for hate speech and defamation should be organised at the level of member states. They would be more directly affected by abuses. Against this background, no country of origin principle, but rather a “destination country principle” should be established.<sup>45</sup> This destination country principle would require European co-operation nevertheless.<sup>46</sup>

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<sup>43</sup> Original Title: “Proposition de loi visant à lutter contre les contenus haineux sur internet”; adopted Text n° 388; the legislative process was still ongoing in April 2020.

<sup>44</sup> Available at <http://www.gesetze-im-internet.de/netzdg/index.html>; non-official English translation. available here: <https://germanlawarchive.iuscomp.org/?p=1245>.

<sup>45</sup> See for example “Creating a French framework to make social media platforms more accountable: Acting in France with a European vision”, Mission report of May 2019, page 15, available at <http://thecre.com/ReqSM/wp-content/uploads/2019/05/French-Framework-for-Social-Media-Platforms.pdf>.

<sup>46</sup> See for example „Creating a French framework to make social media platforms more accountable: Acting in France with a European vision”, Mission report of May 2019, page 14, available at <http://thecre.com/ReqSM/wp-content/uploads/2019/05/French-Framework-for-Social-Media-Platforms.pdf>.

**Example:** The German NetzDG requires to remove or block platforms to block obviously illegal content within 24 hours after having received a complaint. Non-obviously illegal content must be removed or blocked within 7 days after the respective complaint (Section 3 (2) NetzDG). The NetzDG defines “illegal content” as content in violation of statutory criminal offences (insults, defamation, dissemination of propaganda material of unconstitutional organisations, public incitement to crime; see Section 1 (3) NetzDG). Platforms which do not comply with these obligations may be fined for administrative offence with up to five million euro.

Some German commentators have argued that the NetzDG runs contrary to the country of origin principle of Article 3 E-Commerce Directive.<sup>47</sup>

### 3.2. EU law

Articles 12 to 14 E-Commerce Directive provide for limitations on liability, but they do not establish liability (see above 2.1.1.). There are only sector specific EU rules establishing liability for intermediary service providers. This is true for both, mere accountability for injunctions or liability, as set out below,

- **Mere injunction claims:** EU law provides for mere injunction claims in particular in the field of intellectual property. Article 11 3<sup>rd</sup> Sentence Enforcement Directive<sup>48</sup> obliges EU member states to 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. This injunction claim may be applied for infringements of patent, trademark or design rights. For copyrights and related rights, Article 8 (3) Copyright Directive 2001/29 provides for a parallel provision;

Such injunction claims do not require wrongdoing on the part of the intermediary service provider. Rather, they rely on the idea that the intermediary service providers are in the best position to help.<sup>49</sup> This can also be drawn from Recital 59 Copyright Directive 2001/29 which justifies Article 8 (3) Copyright Directive 2001/29 against the background that intermediaries are best placed to bring such infringing activities to an end.

**Examples:** For hosting providers, Article 11 3<sup>rd</sup> Sentence Enforcement Directive and Article 8 (3) Copyright Directive 2001/29 establish prevention duties, for example a duty for an online marketplace to measures which contribute not only to bringing infringements of these rights by users of the marketplace to an end, but also to preventing further infringements of that kind<sup>50</sup>(see in detail below 6.3. and 6.4.). Regarding access providers, Article 8 (3) Copyright Directive provides for prevention duties, which can lead to a duty of an access provider to block certain websites.<sup>51</sup>

The afore-mentioned duties of care of the intermediaries are ruled by a proportionality test, also taking into account the fundamental rights of the intermediary, the harmed party and the users involved;<sup>52</sup>

<sup>47</sup> Spindler, ZUM 473 (2017), page 474; Liesching, MMR 26 (2018), page 29; Feldmann, K&R 292 (2017), page 296; Wimmers/Heymann, AfP 93 (2017), page 96.

<sup>48</sup> DIRECTIVE 2004/48/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004 on the enforcement of intellectual property rights.

<sup>49</sup> Martin Husovic, Injunctions Against Intermediaries in the European Union – Accountable But Not Liable?, 2017/2018, page 64 with footnote 73; Ted Shapiro, Directive 2001/29 EC on Copyright in the information society, in: Copyright in the information society: a guide to national implementation of the European Directive, page 54 (Lindner/Shapiro, 2011); Jan Bernd Nordemann, Liability of online service providers for copyrighted content – Regulatory action needed? In-Depth analysis for the IMCO Committee, 2018, page 19.

<sup>50</sup> CJEU of 12 July 2011, C-324/09 paras. 127, 128-134 – *Loreal/eBay*.

<sup>51</sup> CJEU of 27 March 2014, C-314/12 para. 37 – *UPC Telekabel Wien*.

<sup>52</sup> CJEU of 27 March 2014, C-314/12 para. 37 – *UPC Telekabel Wien*.

- **Liability:** EU law also provides for harmonised rules to establish liability, which in particular include damages. But there is no general pan-EU concept of rules for liability. Specifically, there is no general harmonised EU concept determining the liability of tortfeasors (including joint perpetrator) or the liability of accessories (e.g. abettors or aiders).

Yet, certain sectors have seen harmonisation. Regarding infringements of intellectual property rights for civil liability, the Enforcement Directive may have brought harmonisation on the EU level.

For a wide variety of claims usually included in civil liability the Enforcement Directive uses the term “infringer”. This is for example the case for damage claims (Article 13), injunction claims (Article 11 1<sup>st</sup> sentence), legal costs (Article 14) or the right of information (Article 8). It is possible that the term “infringer” includes concepts of tortfeasorship and accessory liability. This seems to be the idea of the German Federal Supreme Court (BGH), when referring the pending *YouTube* case to the CJEU. Here, the BGH asked the CJEU if an intermediary service provider using the making available right of Article 3 Copyright Directive 2001/29 would have to be regarded as an “infringer” in the meaning of Articles 11 and 13 Enforcement Directive.<sup>53</sup>

Otherwise, the interpretation of sector specific rules may also lead to the result of a harmonisation of liability rules. In copyright law, the Copyright Directive 2001/29, according to the case law of the CJEU, provides for sector specific pan-EU rules to determine whether a service provider infringes an exclusive right. This is in particular true for the exclusive right to communicate copyrighted works to the public pursuant to Article 3 (1) Copyright Directive 2001/29. With the decisions *GS Media/Sanoma*,<sup>54</sup> *Filmspelers*<sup>55</sup> and *Ziggo/Brein*<sup>56</sup> the CJEU has provided a concept for infringement by intermediary service providers such as link providers and linking platforms. In particular, in the *Ziggo/Brein* case, the CJEU held a platform to connect users under the BitTorrent protocol to be infringing the exclusive right itself when the platform was used for activities by their users.<sup>57</sup> Until then, under national liability concepts, the activity of the relevant platform (*The Pirate Bay*) was only assessed under accessory liability as an aider because *The Pirate Bay* was not seen as an infringer.<sup>58</sup>

Due to the general language in particular in *The Pirate Bay*, the series of CJEU judgments could be interpreted as the starting point of EU rules to determine infringement for intermediary service providers. This concept would be constructed as follows<sup>59</sup>: firstly, the “communication” would be a sufficient intervention by the service provider. It must be in a sufficiently “indispensable role”<sup>60</sup> or “essential role”.<sup>61</sup> E.g. providing search functionalities, and indexing of works can be regarded as a sufficient intervention to fulfill the requirements of a communication.

<sup>53</sup> Case C-682/18 *YouTube*, see question 5: “Is the operator of an internet video platform under the conditions described in question 1 to be regarded as an infringer within the meaning of the 1<sup>st</sup> sentence of Article 11 and Article 13 of Directive 2004/48/EC?”.

<sup>54</sup> CJEU of 8 September 2016, C-160/15 – *GS Media/Sanoma*.

<sup>55</sup> CJEU of 26 April 2017, C-527/15 – *Brein/Wullems (Filmspelers)*.

<sup>56</sup> CJEU of 14. June 2017, C-610/15 – *Ziggo/Brein (“The Pirate Bay”)*.

<sup>57</sup> CJEU of 14 June 2017, C-610/15 para. 38 – *Ziggo/Brein (“The Pirate Bay”)*; see also *Jan Bernd Nordemann*, Liability of online service providers for copyrighted content – Regulatory action needed? In-Depth analysis for the IMCO Committee? 2018, page 22 to 23.

<sup>58</sup> See 1<sup>st</sup> instance decision: Stockholm Tingsrätt, DOM 2009-04-17, Mål nr B 13301-06; see also *Rosati*, The CJEU Pirate Bay Judgement and its Impact on the Liability of Online Platforms, 2017, page 11, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3006591](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3006591); *Jan Bernd Nordemann*, Recent CJEU case law on communication to the public and its application in Germany: A new EU concept of liability, 13 (No. 9) *JIPLP* 744 (2018), page 747.

<sup>59</sup> See in more detail: *Jan Bernd Nordemann*, Liability of Online Service Providers for Copyrighted Content – Regulatory Action Needed? In-Depth Analysis for the IMCO Committee, 2018, page 24.

<sup>60</sup> CJEU of 14. June 2017, C-610/15 para. 26 – *Ziggo/Brein (“The Pirate Bay”)*.

<sup>61</sup> CJEU of 14 June 2017, C-610/15 para. 37 – *Ziggo/Brein (“The Pirate Bay”)*.

Secondly, as to a communication “to the public”, this refers to duties of care as expressed by the CJEU with “*knew or ought to have known*”.<sup>62</sup>

If interpreted sufficiently flexibly, taking into account the fundamental rights at stake by rightholders, providers and users such a duty of care would also be capable of producing just results for a liability of intervening providers. Such a system of flexible duties of care is already known from injunction claims pursuant to Article 8 (3) Copyright Directive.<sup>63</sup>

In summary, the use of the exclusive right (and consequently its infringement in case of missing consent) relies on two factors: (1) essential role of the intermediary to provide access to the infringement and (2) breach of proportionate duties of care.<sup>64</sup>

All internet providers which do not perform an intervention (“essential role”) in the form described above would be liable for mere injunctive relief (to help) pursuant to Article 8 (3) Copyright Directive. The dividing line between a liability including damages on the one hand and accountability for a mere injunction pursuant to Article 11 3<sup>rd</sup> sentence Enforcement Directive and Article 8 (3) Copyright Directive (helping duties) on the other hand would be the criterion of sufficient intervention.

The *Pirate Bay* case has made the German Federal Supreme Court (BGH) refer its *YouTube* case to the CJEU, asking the CJEU if a platform such as *YouTube* (also) infringed copyright in case *YouTube’s* users infringed copyright.<sup>65</sup> Assuming that *YouTube* was an infringer, it would face liability under the general rules (as shown above e.g. of Article 11 and Article 13 Enforcement Directive).

Another sector specific rule in copyright that establishes liability for intermediaries is Article 17 DSM Copyright Directive. If the intermediary service provider qualifies as an online content-sharing service provider (OCSSP) in the sense of Article 2 no. 6 DSM Copyright Directive, it will be fully liable for copyright infringing uploads by its users (Article 17 (4) DSM Copyright Directive). However, the OCSSP may escape liability if it complies with the duties set out in Article 17 (4) DSM Copyright Directive.

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<sup>62</sup> CJEU of 8 September 2016, C-160/15 para. 49 – *GS Media/Sanoma*.

<sup>63</sup> *Jan Bernd Nordemann*, Liability of online service providers for copyrighted content – Regulatory action needed? In-Depth analysis for the IMCO Committee, 2018, page 16.

<sup>64</sup> *Jan Bernd Nordemann*, Liability of Online Service Providers for Copyrighted Content – Regulatory Action Needed? In Depth Analysis for the IMCO Committee, 2018, page 24. See further: *Ansgar Ohly*, The broad concept of “communication to the public” in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?, 13 (No. 8) *JIPLP* 664 (2018) pages 664-675; *Jan Bernd Nordemann*, Recent CJEU case law on communication to the public and its application in Germany: A new EU concept of liability, 13 (No. 9) *JIPLP* 744 (2018), pages 744–756.

<sup>65</sup> Case C-682/18, see question 1, pending.

Table 1: Current system of liability on the EU and national level for intermediaries (simplified)

	Accountability for injunctions (helping duties)	Liability (tortfeasor, accessories)	Rules to determine if intermediary is infringer	Liability privileges (liability shield)
National rules (not harmonised by EU law)	Yes	Yes	Yes	No
EU rules	No, but sector specific exceptions Examples: Article 11 3 <sup>rd</sup> sentence ECD, Article 8(3) CD 2001/29	No, but sector specific exceptions Examples: Article 11, 13 ECD (to be confirmed by CJEU), Article 17 DSMD	No, but sector specific exceptions Example: Article 3 CD 2001/29	Yes, ECD rules in Articles 12-15 ECD, some sector specific e.g. Article 17 DSMD

Source : Author's own elaboration

### 3.3. The Commission's position

There seem to be no specific proposals from the side of the European Commission regarding the DSA and a possible tackling of rules to establish liability. Still, in principle, this should be in line with the Commission's position, which wants to clarify the roles and responsibilities of online platforms.<sup>66</sup> To harmonise the side of establishing liability seems key for clear rules for responsibility of online platforms.

### 3.4. Recommendations

Articles 12 to 14 E-Commerce Directive only provide for liability privileges. This means that the E-Commerce Directive protects internet providers from being held liable in cases where liability may be established under the relevant liability doctrine. But Articles 12 to 14 E-Commerce Directive do not themselves establish liability (see above 2.1.1 and 3.). Concerning liability rules establishing liability, the EU system does not seem readily developed yet,<sup>67</sup>

- **Mere accountability for injunction:** on a sector specific basis, EU law has established mere accountability for injunctions for intermediary service providers whose services are used to infringe. Such a mere accountability for injunctions is based on helping duties and more specifically on the fact that intermediaries may be best placed to bring infringements to an end (see above 3.2.). This is indeed one of the reasons to establish responsibilities and duties of care for intermediaries (see further above 1.2.). As such a mere accountability for injunctions relies on helping duties and not on wrongdoing by the intermediary, this is not a specific form of liability, but rather should be called "accountability" (see above 3.2.). In particular for intellectual property rights infringements, such an accountability for injunctions for "best

<sup>66</sup> European Commission, Communication 2020, page 12.

<sup>67</sup> Jan Bernd Nordemann, Liability of Online Service Providers for Copyrighted Content – Regulatory Action Needed? In Depth Analysis for the IMCO Committee, 2018, page 24.

placed” intermediaries has been established for over a decade and has helped to efficiently and proportionately fight infringements on the internet (see above 3.2.).

It is recommended to introduce such a mere accountability for injunctions for “best placed” intermediaries used to infringe by third parties also outside of the area of intellectual property rights infringements. Leaving the already sector specific provisions intact, the concept could be extended to apply horizontally to all other relevant areas of the law – in effect to mirror the scope of the E-Commerce Directive. The duties of the intermediary could be shaped according to the principle of proportionality,

- Liability for intermediaries: Concerning liability (in particular for damages), there is also only sector specific harmonisation, which even goes less far than the harmonisation of mere accountability for injunctions. One example for sector specific harmonisation of liability also comes from the intellectual property area, where the term “infringer” seems to have been harmonised on the EU level (see above 3.2.). In copyright law, the CJEU in particular for intermediaries has defined cases in which intermediaries infringe an exclusive right although they only provide services as an intermediary for third party infringements. This is under the requirement that the intermediary plays a sufficiently “essential role” to provide access to the infringement. In such cases, the intermediary sufficiently “intervenes” into the third party infringement.

That said, it could be discussed to limit the liability of “essential role” intermediaries by proportionate duties of care. This could result to be the model of the CJEU for “essential role” intermediaries providing access to copyright infringements. Here, the CJEU held intermediaries liable, if they “knew or ought to have known” about the infringement (see above 3.2.). This model from copyright law could be extended to all other third-party infringements committed through an “essential role” intermediary.<sup>68</sup>

In summary, as to a liability for intermediaries, it does not seem realistic to harmonise all national concepts of fault and strict liability. But it is recommended to harmonise the term of “infringer” horizontally, where this has not been done in specific sectors yet. If the intermediary has to be classified as “infringer”, this will mean the intermediary would be liable, as if it was were the direct third-party infringer. It is recommended to explore the possibility to introduce a general rule into EU law – where such sector specific rule already exists - that “essential role” intermediaries which sufficiently intervene into third party infringements have to be treated as infringers themselves. This could be limited by a proportionate duty of care, if the intermediary does not act with intent.

This rule to establish liability should also not interfere with the current principles as laid out in the liability shield of Articles 12 to 14 E-Commerce Directive. Rules to establish liability could be done even without changing the E-Commerce Directive. Also, it should be possible to create a sound interface with Articles 12 to 14 E-Commerce Directive. Articles 12 to 14 rightly do not address “active role” providers, but only mere passive and neutral providers. The “essential role” could be shaped in a way that it is equivalent to an “active role”. Consequently, “essential role” providers would not be covered by the limitations on liability of the E-Commerce Directive anyway.

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<sup>68</sup> See proposal for a copyright sector specific regulation of establishing liability in Jan Bernd Nordemann, Liability of Online Service Providers for Copyrighted Content – Regulatory Action Needed? In-Depth Analysis for the IMCO Committee, 2018, page 25.



## 4. ACCESS PROVIDERS – "MERE CONDUITS" (Article 12 E-Commerce Directive)

### KEY FINDINGS

Regarding access providers and the liability privilege in Article 12 E-Commerce Directive, some difficulties emerge with the sub-group of intermediary service providers playing an "in-between" role between access providers and hosting providers, such as upstream providers, CDN providers or domain providers.

It should be the task for the courts to determine if Article 12, Article 13 or Article 14 E-Commerce Directive is the correct provision to regulate the respective business. There seems to be no pressing need to establish further categories for such providers because new business models will emerge in the future leaving newly created categories out of date.

With regard to access providers (called "mere conduits" by the E-Commerce Directive), Article 12 provides for the following rule,

#### Article 12

##### *"Mere conduit"*

*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, 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.*

*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 court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.*

In a nut shell, Article 12 E-Commerce Directive exempts access providers from liability if the access provider acted as a genuine neutral intermediary, i.e. as paragraph 1 puts it: (a) the access provider 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. According to paragraph 2, the liability privilege of paragraph 1 also extends to the automatic intermediate and transient storage of the information transmitted if this storage is only done for a period reasonably necessary for the transmission.

The aforementioned Article 12 (1) and (2) E-Commerce Directive serve in particular to rule out civil damage claims by harmed third parties and to exclude liability in administrative or criminal law for fines or imprisonment. The CJEU has interpreted the limitations on liability against damages quite extensively and even included a liability privilege against claims which are an ancillary to damage claims, for example for cost reimbursement claims for giving formal notice or court costs in relation to damage claims.<sup>69</sup>

As made clear by Article 12 (3) E-Commerce Directive, however, Article 12 does not provide immunisation regarding court or administrative orders requiring the service provider to terminate or prevent an infringement. Consequently, Article 12 E-Commerce Directive leaves (negative) injunction and (positive) removal claims against access providers intact.<sup>70</sup>

For access providers, the following challenges have come up.

#### 4.1. Upstream Providers

Article 12 E-Commerce Directive assumes a neutral access provider genuinely in a role as a “mere conduit”. There are new business models, however, at the border line between access providers and hosting providers, which have emerged in recent times. Access providers may play an important role when they disseminate live streams for their customers. This is in particular relevant where access providers are used to increase the bandwidth and the reach of live streams. In the non-live world, such providers would usually be treated as hosting providers. Regarding live streams, the technical service to disseminate live streams may be seen as access providing.

**Example:** *Live streams of football matches of European sports leagues are often hacked and retransmitted illegally as live streams. The illegal transmitter may use an upstream provider to disseminate the illegal live stream to a larger audience with sufficient bandwidth. Once notified, such upstream providers have been found to face a similar duty as hosting providers to take down the illegal live stream and to prevent further similar clear right infringements.*<sup>71</sup>

In such scenarios, there is a contractual link between the tortfeasor (illegal re-transmitter of the sport live stream) and the intermediary service provider. This makes the application of hosting provider duties more suitable as hosting providers usually also have a contractual link to the infringer.

Nevertheless, it seems that Article 12 (access provider liability privilege) and Article 14 (hosting provider privilege) of the E-Commerce Directive may adequately treat such scenarios. This is in particular true for Article 12 E-Commerce Directive. The knowledge about the infringement on the side of the access provider may exclude the requirement of Article 12 (1) lit. c) E-Commerce Directive that access providers must not have selected the information transmitted. This will make it impossible for the upstream provider to deliberately co-operate with the infringer without losing the privilege of Article 12 (see also Recital 44 E-Commerce Directive).

#### 4.2. Content Delivery Network (CDN) Providers

Another new form of intermediary service providing is the so-called content delivery network provider (CDN provider). They provide the service of proxy servers and data centers, which are geographically distributed. In case CDN providers provide services to make illegal content available, the question of responsibilities and duties of care of such CDN providers can come up.

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<sup>69</sup> CJEU of 15 September 2016, C-484/14 paras. 75, 79 – *McFadden/Sony Music*.

<sup>70</sup> See above 2.1.2.

<sup>71</sup> District Court (Landgericht) of Frankfurt/Main, ZUM 67 (2016).

Besides users with legitimate purposes, in particular operators of illegal offers may tend to use CDN providers in order to not operate openly on the internet and more specifically to disguise the IP address and the service providers used. According to the view point of the District Court (Landgericht) Cologne, a CDN provider does not come under the mere conduit liability privilege of Article 12 E-Commerce Directive in case it provides the following services to a structurally copyright infringing website: The CDN provider selects which users get access to the website to which they provide services to. The CDN provider does not only do transient copies, but retains content provided by the customer on different local servers. Furthermore, the CDN provider used certain firewall rules and filtering technology.<sup>72</sup> The Italian Court of Rome thought in a ruling of 24 June 2019 that certain services of a CDN provider would be caught by the liability privilege for cache providers (Article 13 E-Commerce Directive).<sup>73</sup>

### 4.3. Domain Providers

There are no specific EU level provisions for domain providers. This is in particular true for the E-Commerce Directive.

The CJEU ruled in *SNB-React/deepak mehta*<sup>74</sup> that the liability privileges of Articles 12, 13 and 14 E-Commerce Directive could apply to domain registries or domain registrars if the service could be seen as a mere conduit, caching or hosting service. The case concerned a domain service provider with an IP address rental and registration service, allowing his customers to use domain names and websites anonymously. The CJEU notably asked the national court whether such a service will have neither knowledge nor control over the information transmitted or cached by his clients and whether it does not play an active role by allowing them to optimise their online sales activity.<sup>75</sup> So, it remains an open question whether domain name service providers may come under the liability privileges of Articles 12 to 14 E-Commerce Directive, especially if they do not operate a dubious business model attracting clients that provide illegal content.

With regard to establishing liability for domain name services, legal practice still seems to be rather national. One example is the case law from the German Federal Supreme Court (BGH) which rules out any liability of domain name registries (including mere accountability for injunctions) if trademark infringements were not obvious for the registry.<sup>76</sup> Responsibilities and duties of care of registries according to the BGH are, generally speaking, linked to obvious cases of illegal conduct under trademark law. Comparable responsibilities and duties of care seem to exist also in case of copyright infringements of the client of the domain name service provider. This may lead to disconnection and even freezing orders for the domain name in case of obvious copyright infringements committed on the specific website.<sup>77</sup>

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<sup>72</sup> District Court (Landgericht) Cologne of 30 January 2020, 14 O 171/19 – *Cloudflare*.

<sup>73</sup> Court of Rome of 24 June 2019, which involved the CDN provider Cloudflare, see <https://www.lexology.com/library/detail.aspx?q=22b049b3-bb0a-42c5-b785-e01b18820a1c>.

<sup>74</sup> CJEU of 7 August 2018, C-521/17 para. 44 et seq. – *SNB-REACT*.

<sup>75</sup> CJEU of 7 August 2018, C-521/17 para. 50 – *SNB-REACT*.

<sup>76</sup> German Federal Supreme Court (BGH) GRUR 651 (2012), para. 24 et seq. – *Regierung-Oberfranken.de*.

<sup>77</sup> Court of Appeal (Oberlandesgericht) Cologne of 31 August 2018, 6 U 4/18 – *The PirateBay*: disconnection and freezing; Court of Appeal Saarbruecken (Oberlandesgericht) MMR 407 (2014) – *h33t.com*: disconnection; under further appeal at the German Federal Supreme Court (BGH), case no. I ZR 13/19.

#### **4.4. The Commission's position**

So far, concerning access providers, the Commission does not seem to have proposed changes to Article 12 E-Commerce Directive.

#### **4.5. Recommendations**

Article 12 E-Commerce Directive and its provisions to shield against liability have proven fit for daily practice for almost two decades since the E-Commerce Directive was enacted. Article 12 E-Commerce Directive should not be changed.

Some difficulties may emerge with respect to the sub-group of intermediary service providers playing an “in-between” role between access providers and host providers, such as upstream providers (see above 4.1.), CDN providers (see above 4.2.) or domain providers (see above 4.3.). The courts will have to determine whether Article 12 E-Commerce Directive (or Article 13 for caching providers or Article 14 for hosting providers) is the correct provision to regulate the respective business. There does not seem to be a pressing need to establish further categories of providers.<sup>78</sup> One should be careful to create new categories of intermediaries as the world of intermediaries and their factual set-up is constantly changing. So far, the courts seem to have properly played the role of applying the existing liability rules to the factual scenarios at trial.

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<sup>78</sup> See for the same result concerning Article 12 E-Commerce Directive: JB Nordemann, Liability of Online Service Providers for Copyrighted Content – Regulatory Action Needed? In-Depth Analysis for the committee on the Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, 2018, pages 13 to 14.

## 5. CACHE PROVIDERS (ARTICLE 13 E-COMMERCE DIRECTIVE)

### KEY FINDINGS

For cache providers, the liability shield of Article 13 E-Commerce Directive has not gained larger practical importance. Article 13 E-Commerce Directive seems to provide an adequate regulation for this group of intermediaries.

### 5.1. The legal framework

Article 13 E-Commerce Directive provides for similar rules regarding cache providers,

*Article 13*

*"Caching"*

*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, 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 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 court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.*

This liability privilege for cache providers did not have large practical significance in the practice of the courts of the EU member states since the implementation of the E-Commerce Directive. Merely in the context of the so-called "UseNet", some court decisions have worked with a national implementation of Article 13 E-Commerce Directive,<sup>79</sup> while other courts treated UseNet providers as access providers.<sup>80</sup> Also, some services of CDN providers have been treated under Article 13 (see above 4.2.).

<sup>79</sup> See for example Court of Appeal (Oberlandesgericht) of Düsseldorf, ZUM 332 (2008).

<sup>80</sup> Court of Appeal (Oberlandesgericht) of Hamburg, ZUM-RD 439 (2009) – *Use Net II*.

## **5.2. The Commission's position**

So far, there seem to be no Commission proposals to reform the liability shield for cache providers in Article 13 E-Commerce Directive.

## **5.3. Recommendations**

The liability shield of Article 13 E-Commerce Directive for cache providers has not gained large practical importance (see above 5.1.). This indicates that there is no pressing need to change it. Either Article 13 E-Commerce Directive lacks practical importance and/or all the cases which come under Article 13 E-Commerce Directive are adequately regulated without doubt.

## 6. HOSTING PROVIDERS (ARTICLE 14 E-COMMERCE DIRECTIVE)

### KEY FINDINGS

Hosting providers are the most relevant group of intermediaries in legal practice. They deserve particular attention.

The differentiation between active and passive hosting providers, as set out by the CJEU case law, is justified. “Active role” service providers intervene into third party information and make the information part of their business model – and not merely the technical service as the host. It seems justified that they are facing an increased level of responsibilities and duties of care compared to mere neutral and passive providers of technical services. Calls to abolish the distinction between active role and passive role hosting providers should not be followed.

Furthermore, the “Good Samaritan Paradox” should not lead to legislative activity. This means to describe the following: The model provider needs to remain neutral and passive to come under the liability privilege of Article 14 E-Commerce Directive. This may disincentivise the provider from taking precautions against infringements due to its fear of playing an active role and losing the safe harbour protection. However, the distinction between active and passive role hosting providers does not look at the provider’s role to discover infringements. Rather, it is the active role to promote, present or organise the content which creates “active role” providers and disapplies the liability privilege.

In order to prevent infringements on an efficient and sustainable level, the hosting provider should not only face takedown duties. Rather, the model in intellectual property law should be followed. There, the hosting provider has a 3-fold duty after notification of an intellectual property rights infringement: (1) takedown, (2) staydown and (3) prevention of similar clear rights infringements of the same kind. It is recommended to extend these takedown, staydown and prevention duties outside the area of intellectual property rights infringements.

According to the recent case law of the CJEU with regard to Article 15 E-Commerce Directive, such duties should also stay in line with the prohibition to impose general monitoring duties.

These duties should also be introduced on the EU level to establish liability for intermediary service providers in order to achieve a full harmonisation within the EU.

The liability privilege of Article 14 E-Commerce Directive for “hosting” has gained very extensive practical importance through the national implementations. Article 14 E-Commerce Directive (see text in Annex) reads as follows,

#### *Article 14*

#### *Hosting*

*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.

As Article 12 for access providers Article 14 sets out the requirements for the hosting provider to come under the liability privilege in paragraphs 1 and 2. Also, the liability exemption serves to make the hosting provider immune against civil damage claims and administrative or criminal fines, imprisonment or comparable sanctions here as well. Again, Article 14 (3) E-Commerce Directive makes clear that injunction and removal claims are left intact.

## 6.1. Active and Passive Hosting Providers (“false hosting providers”)

According to the CJEU case law, when the E-Commerce Directive was enacted in the year 2000, it envisaged neutral and passive providers. The activity of all intermediary service providers regulated by Articles 12 to 15 E-Commerce Directive had to be 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”.

The CJEU has continued to emphasise this principle of neutral intermediaries.<sup>81</sup> More specifically concerning hosting providers and Article 14 E-Commerce Directive, the CJEU understood neutrality of services as a mere technical and automatic processing of data provided to customers.<sup>82</sup> On the internet, however, not all hosting providers play such a passive role. Rather, a particular type of hosting providers plays an active role concerning the information stored.

This may be in particular through advertising third party offers with own advertisements.<sup>83</sup>

In other cases, the CJEU has assessed an active role according to the requirement if the intermediary had knowledge of, or control over, the data stored.<sup>84</sup> (Recital 42 E-Commerce Directive).

**Example 1:** Generally speaking, the auction platform allowing third parties to sell their goods may be seen as a hosting provider, hosting third party offers to sell products. But the auction platform eBay in some cases also provides assistance to its costumers which includes, in particular, to optimise the presentation of the offers for sale or the promotion of those offers, for example by advertising third party eBay offers with own eBay advertisements on the Google search engine. The CJEU raised the question, if, eBay in such cases played an “active role”. In this case, eBay would no longer come under the liability privilege for the hosting provider of Article 14 E-Commerce Directive.<sup>85</sup> The mere fact that the online sales platform eBay “sets the terms of its service, is remunerated for that service and provides general information to its customers” does, however, not mean that it plays an active role.

<sup>81</sup> See for example CJEU of 7 August 2018, C-521/17 para. 47 – *SNB-REACT*; CJEU of 15 September 2016 C-484/14 para. 62 – *McFadden*; CJEU of 23 March 2010, C-236/08 to C-238/08 para. 113 – *Google France and Google*.

<sup>82</sup> CJEU of 12 July 2011, C-324/09 para. 21 – *L'Oréal/eBay*; CJEU of 23 March 2010, C-236/08 to C-238/08 para. 114 – *Google and Google France*.

<sup>83</sup> CJEU of 12 July 2012, C-324/09 para. 114 – *L'Oréal/eBay*.

<sup>84</sup> CJEU of 23 March 2010, C-236/08 to C-238/08 para. 120 – *Google and Google France*.

<sup>85</sup> CJEU of 12 July 2012, C-324/09 para. 114 – *L'Oréal/eBay*.



**Example 2:** In a pending case before the CJEU, the German Federal Supreme Court (BGH) asked the CJEU if the business model of YouTube had to be classified as an “active role” through YouTube’s activity to index, suggest and brand the videos uploaded by YouTube’s users. Consequently, if the CJEU found such an “active role” by YouTube, Article 14 E-Commerce Directive could no longer be applied, where copyright law established full liability of YouTube.<sup>86</sup>

Another case referred to the CJEU and currently pending is regarding sharehosters, which run a dangerous business model, as the sharehoster has taken specific measures to attract infringements.<sup>87</sup>

The above differentiation by the E-Commerce Directive and the CJEU case law between active and passive hosting providers has been criticized. 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.<sup>88</sup> 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 disincentivise them to proactively remove infringements. This is also addressed as the “Good Samaritan Paradox”.<sup>89</sup> Others argue that the distinction between active and passive intermediaries would be too vague.<sup>90</sup>

Generally speaking, the criticism of the differentiation between passive role hosts (coming under Article 14 E-Commerce Directive) and active role hosts (not within the liability privilege) does not seem convincing. There is a difference between a hosting provider which merely stores content for a third party – and a host which takes an active role vis-à-vis the users content indexing it, suggesting it to users and branding it to be of a particular quality. Such “active role” services intervene into third party information and make the information part of their business model – and not the mere technical service as the host. But if they build their business model on the content uploaded by their users, it seems justified that they are facing a different level of responsibilities and duties of care than mere neutral and passive providers of technical services.<sup>91</sup>

The criterion of sufficient intervention into third party activity also does not seem to be too vague. Rather, this position seems to find support in the case law of the CJEU.

<sup>86</sup> CJEU C-682/18; question 2 of the BGH; see also referring decision by German Federal Supreme Court (BGH) of 13 September 2018, I ZR 140/15 para. 40 et seq. – *YouTube*.

<sup>87</sup> See pending CJEU case C-683/18 – *Cyando*, question 2; see below 6.4 for the facts of the case.

<sup>88</sup> *Joris van Hoboken/Joao Pedro Quintais/Joost Poort/Nico van Eijk* – Institute for Information Law (IVIR), Hosting intermediary services and illegal content online – an analysis of the scope of Article 14 E-Commerce Directive in light of developments in the Online service landscape, 2018, page 32 (item 4.3), available at [https://www.ivir.nl/publicaties/download/hosting\\_intermediary\\_services.pdf](https://www.ivir.nl/publicaties/download/hosting_intermediary_services.pdf); less critical: *Christina Angelopoulos*, European Intermediary Liability in Copyright: A Tort-Based analysis, 2017, page 74: The Court’s interpretation might indeed have been the intended one by the legislator.

<sup>89</sup> *Joris van Hoboken/Joao Pedro Quintais/Joost Poort/Nico van Eijk* – Institute for Information Law (IVIR), Hosting intermediary services and illegal content online – an analysis of the scope of Article 14 E-Commerce Directive in light of developments in the Online service landscape, 2018, page 39, available at [https://www.ivir.nl/publicaties/download/hosting\\_intermediary\\_services.pdf](https://www.ivir.nl/publicaties/download/hosting_intermediary_services.pdf); also *Christina Angelopoulos*, On Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market; January 2017, pages 43, 44, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2947800](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800).

<sup>90</sup> *Joris van Hoboken/Joao Pedro Quintais/Joost Poort/Nico van Eijk*, Institute for Information Law (IVIR), Hosting intermediary services and illegal content online – an analysis of the scope of Article 14 E-Commerce Directive in light of developments in the Online service landscape, 2018, page 31 et seq., available at [https://www.ivir.nl/publicaties/download/hosting\\_intermediary\\_services.pdf](https://www.ivir.nl/publicaties/download/hosting_intermediary_services.pdf); *Martin Husovec*, Injunctions against Intermediaries in the European Union – Accountable But Not Liable?, page 56.

<sup>91</sup> *Jan Bernd Nordemann*, „Liability of Online Service Providers for Copyright Content – Regulatory Action needed?“, In-Depth Analysis for the committee on the Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, 2018, page 10.

If an intermediary plays an “indispensable role”<sup>92</sup> or “essential role”<sup>93</sup> to gain access to infringements, the CJEU has held that such intermediaries even infringe e.g. copyrights if they breach certain duties of care (see above 3.2.). Such an essential role should also rule out the application of Article 14 E-Commerce Directive, as they play an active role (see below 6.1. example 2).

Furthermore, the CJEU has excluded service providers from the application of the E-Commerce Directive<sup>94</sup> if they played an “integral part of an overall service”,<sup>95</sup> which seems to be a similar criterion as “essential role”. Such service providers are no longer genuine intermediaries, which deserve specific rules (see above 1.1. and 1.2.).

Some propose to substitute the differentiation between active and passive by a criterion of editorial control.<sup>96</sup> Indeed, the CJEU has held that a newspaper may not benefit from the liability privilege of Article 14, for its own articles, because it played an active role.<sup>97</sup> But editorial control should not be the limit to find an active role. An active role does not require editorial control. Editorial control will already make a platform leave its role as an intermediary, making third-party content its own content (see above 1.1.). Rather the crucial factor is the active intervention of the intermediary to provide access to illegal content, be it with or without editorial control.

The issue of the “Good Samaritan Paradox” should also not stand in the way of excluding active role hosting providers from Article 14 E-Commerce Directive. This will be dealt with in detail below (see 6.2.).

On another note, excluding active role hosting providers from the liability privilege of Article 14 E-Commerce Directive is not sufficient to provide a sound system for responsibilities and duties of care for active role hosting providers on the EU level. Rather, a system of EU rules to establish liability for active role hosting providers should be envisaged. It may not seem realistic to harmonise all national concepts of fault and strict liability. But it is recommended to harmonise the term of “infringer” as for example for infringements of intellectual property rights. In copyright law, the CJEU seems to have found EU liability rules for intermediary service providers playing an “essential role” to determine the notion of infringement (see above 3.2.). But otherwise, no parallel EU rules exist. Rather, national rules provide for rules without a sound interface to Article 14 E-Commerce Directive (see above 3.1).

## 6.2. Good Samaritan Paradox

One point of criticism to exclude active role hosting providers from the liability privilege of Article 14 E-Commerce Directive is the so-called “Good Samaritan Paradox”. The “Good Samaritan Paradox” is meant to describe the following: Article 14 E-Commerce Directive with its model provider being neutral and passive may disincentivise the hosting provider from taking precautions against infringements due to its fear of losing safe harbor protection.

The prohibition to play an active role as a hosting provider may lead to hosting providers turning a blind eye on infringements in order to not get too close to an active role.<sup>98</sup>

<sup>92</sup> CJEU of 14 June 2017, C-610/15 para. 26 – *Ziggo/Brein* (“The Pirate Bay”).

<sup>93</sup> CJEU of 14 June 2017, C-610/15 para. 37 – *Ziggo/Brein* (“The Pirate Bay”).

<sup>94</sup> Because they would not be an information society service in the meaning of Article 2 E-Commerce Directive.

<sup>95</sup> See CJEU of 19 December 2019, C-390/18 para. 50 – *Airbnb Ireland*; CJEU of 20 December 2017, C-434/15 para. 40 – *Uber Spain*.

<sup>96</sup> *Martin Husovec*, Injunctions against Intermediaries in the European Union – Accountable But Not Liable?, page 56; against such an interpretation: *Joris van Hoboken/Joao Pedro Quintais/Joost Poort/Nico van Eijk* – Institute for Information Law (IVIR), Hosting intermediary services and illegal content online – an analysis of the scope of Article 14 E-Commerce Directive in light of developments in the Online service landscape, 2018, page 33, available at [https://www.ivir.nl/publicaties/download/hosting\\_intermediary\\_services.pdf](https://www.ivir.nl/publicaties/download/hosting_intermediary_services.pdf).

<sup>97</sup> CJEU of 11 September 2014, C-291/13 paras. 44, 45 – *Papasavvas*.

<sup>98</sup> *Christina Angelopoulos*, On Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market January 2017, page 11 with further references, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2947800](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800); *Joris van*

This, however, is in contrast to the European Commission's finding in the Communication of 28.09.2017 Tackling Illegal Content Online. Here, the Commission expresses the view that taking voluntary proactive measures against infringement would not lead to a loss of the benefit of the safe harbor.<sup>99</sup> Also, available case law does not support the fear that proactively working against the upload of infringements will lead to a loss of the liability privilege due to an "active role". For example, German courts have found that the most prominent "Good Samaritan" filtering system, YouTube's ContentID does not lead to YouTube playing an active role and being excluded from the application of Article 14 E-Commerce Directive,

*"In light of this, 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 jeopardising its status as hosting provider. Such a consequence cannot have been intended by the legislature".<sup>100</sup>*

In any case, it seems to be the correct approach that proactively removing or blocking illegal content will not lead to an active role excluding the application of Article 14 E-Commerce Directive in the sense of the case law of the CJEU. The CJEU has excluded "active role" hosting providers in case they play an active role by promoting access to illegal content.<sup>101</sup> This may be through directly advertising specific content or through indexing, suggesting or branding third party information. So, it is not the "active role" to identify infringements which leads to the hosting provider losing the liability privilege of Article 14 E-Commerce Directive. Rather, it is the active role to promote, present or organise the content. With such an understanding of "active role" no "Good Samaritan Paradox" will emerge from the Article

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Hoboken/Joao Pedro Quintais/Joost Poort/Nico van Eijk – Institute for Information Law (IVIR), Hosting Intermediary Services and Illegal Content Online, page 40 et seq. (item 4.5), available at [https://www.ivir.nl/publicaties/download/hosting\\_intermediary\\_services.pdf](https://www.ivir.nl/publicaties/download/hosting_intermediary_services.pdf).

<sup>99</sup> Communication of 28.09.2017 Tackling Illegal Content Online - Towards an enhanced responsibility of online platforms, COM(2017) 555 final, page 11: "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 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."

<sup>100</sup> Court of Appeal (Oberlandesgericht) of Hamburg of 1 July 2015, 5 U 87/12 Juris para. 198.

<sup>101</sup> CJEU of 12 July 2011, C-324/09 para. 114 – L'Oréal/eBay.

### 6.3. Staydown duties and duties to prevent infringements of the same kind

In case intermediary service providers are used to infringe, they should not only face the duty to disable the infringement after having been notified of the specific infringement. Rather, they should also face a duty to prevent further infringements of the same kind.

This is true for all types of providers, in particular both access providers<sup>102</sup> and hosting providers.<sup>103</sup> One specific example is establishing accountability for injunctions against access providers and hosting providers through Article 11 3<sup>rd</sup> sentence Enforcement Directive (for infringements of industrial property rights) and Article 8 (3) Copyright Directive 2001/29 (for infringements of copyrights and related rights).

In this area of infringements of intellectual property rights, in particular the prevention duties for hosting providers have been the subject of debate. The German Federal Supreme Court (BGH) has identified a duty of care by a hosting provider 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. This is established case law of the BGH.<sup>104</sup> The BGH relies on the L'Oréal/eBay case law of the CJEU. According to the Court, 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 to preventing further infringements of that kind.<sup>105</sup> The shaping of the prevention duties by the BGH implies that a hosting provider, once notified of a clear infringement, does not only face a duty to takedown, but also a duty to ensure staydown and prevent infringements which are just as clear. To fulfill these staydown and prevention duties, hosting providers will be required to implement filtering solutions. For example, 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.<sup>106</sup>

This has been criticized not to be in line with Article 15 E-Commerce Directive. The French Federal Supreme Court (Cour de Cassation) has rejected staydown obligations for hosting providers as conflicting with the prohibition of general monitoring duties.<sup>107</sup> This view was justified as the correct interpretation of Article 15 E-Commerce Directive 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*".<sup>108</sup>

<sup>102</sup> CJEU of 25 November 2011, C-70/10 para. 31 - *Scarlett/SABAM*; CJEU of 27 March 2014, C-314/12 para. 37 - *UPC Telekabel Wien*; CJEU of 15 September 2016, C-484/14 para. 81 - *McFadden/Sony Music*.

<sup>103</sup> CJEU of 16 February 2012, C-360/10 para. 29 et seq. - *SABAM/Netlog*; CJEU of 12 July 2011, C-324/09 para. 131 - *L'Oréal/eBay*.

<sup>104</sup> German Federal Supreme Court (BGH) GRUR 1030 (2013), para. 46 - *File-Hosting-Dienst I*; see for a detailed analysis of the BGH case law Jan Bernd Nordemann 59 (no. 4) *Journal Copyright Society of the USA* (2012), 773 and 778 et seq.; *Jan Bernd Nordemann*, Liability for Copyright Infringements on the Internet: Hostproviders (Contentproviders) - The German approach, 2 JIPITEC 37 (2011).

<sup>105</sup> CJEU of 12 July 2011, C-324/09 paras. 127, 128 to 134 - *L'Oréal/eBay*.

<sup>106</sup> German Federal Supreme Court (BGH) of 15 August 2013, I ZR 79/12 para. 56 - *File-Hosting-Dienst II*; BGH of 15 August 2013, I ZR 85/12 para. 61 - *File-Hosting-Dienst III*; see further for German case law: *Jan Bernd Nordemann* in Fromm/Nordemann, Urheberrecht Kommentar (Commentary to the German Copyright Act), 12<sup>th</sup> ed. 2018, Article 97 German Copyright Act note 163a; see also in Italy: Court of Rome, Verdict No. 8437/16.

<sup>107</sup> Cour de Cassation of 12 July 2012, Arêt No. 831, 11-13.669 - *Google France/Bach Films*; Cour de Cassation of 12 July 2012, Arêt No. 828 - *Google France/Bach Films*.

<sup>108</sup> *Christina Angelopoulos*, On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market January 2017, page 27, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2947800](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800).

Taking a closer look at Article 15 E-Commerce Directive, this view, however, is not convincing.<sup>109</sup> Prevention duties of hosting providers and in particular staydown obligations and obligations to prevent similar infringements of the same obvious kind should not conflict with Article 15 E-Commerce Directive.

According to the CJEU case law, Article 15 E-Commerce Directive helps to balance the fundamental rights at stake by the internet provider, its users and the rightholders.<sup>110</sup> Insofar, the CJEU has found that an injunction imposed on a hosting provider requiring it to install a filtering system to actively monitor all the data relating to all of its users in order to prevent any future infringement of intellectual property rights is incompatible with Article 15 E-Commerce Directive.<sup>111</sup>

But this CJEU case law relates only to a system that prevents “any future infringement”. 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. Rather, it must be possible to maintain filtering duties for *specific* scenarios.

This is been confirmed by the CJEU in *Eva Glawischnig-Piesczek/Facebook Ireland Limited (“Facebook”)*.<sup>112</sup> According to the CJEU, Article 15 did not preclude an injunction requiring *Facebook* to takedown (1) identical information and (2) equivalent information to the defamatory information at trial. The Court held that equivalent information may be defined as information which,

*“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.”*<sup>113</sup>

The necessary test seems to be that *Facebook* does not have to carry out a (new) independent assessment for equivalent information. The CJEU continued to state 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.”*<sup>114</sup>

This CJEU ruling makes clear that there is a differentiation necessary between the technical side of filtering on the one hand and the normative view on the other hand. While all filtering measures may make it technically necessary to look at all the data, specific filtering duties (only related to specific infringements occurred in the past) have to be separated under normative aspects. Normatively seen, specific filtering duties impose a lesser filtering duty than looking at all the infringements.

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<sup>109</sup> Jan Bernd Nordemann, Liability of online service providers for copyrighted content – Regulatory action needed? In-depth analysis for the IMCO Committee, 2018, page 17.

<sup>110</sup> CJEU of 14 April 2011, C-70/10 para. 69 – *Scarlett/SABAM*; CJEU of 16 February 2012, C-360/10 para. 39 – *SABAM/Netlog*; CJEU of 15 September 2016, C-484/14 para. 87 – *McFadden*.

<sup>111</sup> CJEU of 16 February 2012, C-360/10 para. 38 – *SABAM/Netlog*.

<sup>112</sup> CJEU of 3 October 2019, C-18/18 - *Eva Glawischnig-Piesczek/Facebook Ireland Limited*.

<sup>113</sup> CJEU of 3 October 2019, C-18/18 para. 45 - *Eva Glawischnig-Piesczek/Facebook Ireland Limited*.

<sup>114</sup> CJEU of 3 October 2019, C-18/18 para. 47 - *Eva Glawischnig-Piesczek/Facebook Ireland Limited*.

This differentiation between the technical approach and the normative approach is also necessary in order to leave Article 15 E-Commerce Directive open for technical progress in filtering, which in the future may no longer require for filtering to look at all the data processed by the hosting provider.

#### 6.4. Knowledge and diligent economic operator (Article 14 (1) (a) and (b) E-Commerce Directive)

The usual way for infringed parties to address the hosting provider is sending a notice and thereby informing the hosting provider that it hosts illegal information. Such a notice will have a legal effect on the liability privilege of Article 14 E-Commerce Directive.

Article 14 (1) lit. a) only provides for a liability shield in case the hosting provider does not have actual knowledge of illegal activity or information and – regarding damage claims – is not aware of facts or circumstances which make the illegal activity or information apparent. Furthermore, Article 14 (1) lit. b) obliges the hosting provider, upon obtaining such knowledge or awareness, to act expeditiously to remove or to disable access to the information.

In *L’Oréal/eBay*, the CJEU did not apply the liability shield of Article 14 E-Commerce Directive to a hosting provider which had been aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question and did not act expeditiously in accordance with Article 14 (1) lit. b) E-Commerce Directive.<sup>115</sup> Consequently, the “diligent economic operator” is the standard for hosting providers to keep up the liability shield.

It is another question, however, what level of “knowledge” is required pursuant to Article 14 (1) lit. a) E-Commerce Directive in order to exclude the liability shield for the hosting provider. The example of hosting providers running a dangerous business model illustrates that actual knowledge of the specific infringement may not be an adequate solution.

**Example:** *The sharehosting service “Uploaded” provides for storage space for users. The upload process takes place automatically and without being seen in advance or controlled by this hosting provider. In its terms of use, the hosting provider even indicates that copyright-infringing content may not be posted. The service also does not offer a directory of the content or a search function. But Uploaded’s users are provided with links which may be posted elsewhere on the internet.*

*The business model of Uploaded is attracting many infringements: The links are posted on the internet in link collections that contain information regarding the content of the files and make it possible to search for specific content. It is possible to upload files anonymously onto Uploaded. Furthermore, there is a remuneration scheme for the uploader; the uploader is paid for downloads depending on the quantity of demand. Thereby, Uploaded created an incentive to upload content protected by copyright that users could otherwise only obtain for a charge. This led to the result that copyright-infringing offerings accounted for 90% to 96% of the overall use of Uploaded.*<sup>116</sup>

The case of the aforementioned example is now before the CJEU, amongst others including questions concerning Article 14 E-Commerce Directive and its liability privilege. In particular, the referring court would like to know if a shared hosting service as described above can come within the scope of Article 14 (1) E-Commerce Directive – or if *Uploaded’s* role is too “active”.<sup>117</sup>

<sup>115</sup> CJEU of 12 July 2011, C-324/09 para. 120 et seq. – *L’Oréal/eBay*.

<sup>116</sup> German Federal Supreme Court (BGH) of 20 September 2018, I ZR 53/17 – *Uploaded*, referred to CJEU pursuant to Article 267 TFEU; pending at the CJEU as case C-683/18 – *Cyando*.

<sup>117</sup> See pending CJEU case C-683/18 – *Cyando*, question 2; see above 6.1 for an exclusion of Article 14 due to a too active role.

Furthermore, the third question of the referring court is as follows,

*“Must the actual knowledge of the unlawful activity or information and the awareness of the facts or circumstances for which the unlawful activity is apparent relate to specific unlawful activities or information pursuant to Article 14 (1) E-Commerce Directive?”.*<sup>118</sup>

The referring court thought that there was only a duty by the sharehosting provider to act as a “diligent economic operator” after it gained specific knowledge of the unlawful activities or information, here of infringing files being uploaded onto *Uploaded*.<sup>119</sup>

This, however, does not seem convincing. The standard of knowledge should be lowered in case of dangerous business models of hosting providers. Otherwise bad faith hosting providers could profit from the liability privilege of Article 14 E-Commerce Directive. The wording of Article 14 E-Commerce Directive should give room to treat the knowledge requirement with the sufficient flexibility. For the liability privilege to stand, not only the absence of action and knowledge is required, but also that the service provider “is not aware of facts or circumstances from which the illegal activity or information is apparent”.<sup>120</sup>

## 6.5. The Commission’s position

The Commission’s views are not clear yet, likely the internal discussions have not been finalised.

A proposal from the Institute for Information Law (IVIR) of Amsterdam University of 2018 to the European Commission problematises the so-called “Good Samaritan Paradox”.<sup>121</sup> With regard to the “Paradox”, the European Commission, in the Communication of 28.09.2017 Tackling Illegal Content Online, expressed the view that taking voluntary proactive measures against infringements would not lead to a loss of the benefit of the safe harbor.<sup>122</sup> Anyway, the “Good Samaritan Paradox” does not seem to pose any legal issues in practice (see above 6.2.) and should not lead to any legislative activity.

Also, the distinction between active role and passive role providers is justified and should not be abolished. As set out above (6.1.), such “active role” services intervene into third party information and make the information part of their business model – and not the mere technical service as the host. But if they build their business model on the content uploaded by their users, it seems justified that they are facing a different level of responsibilities and duties of care than mere neutral and passive providers of technical services.<sup>123</sup>

In particular, such active role hosting providers should not be able to escape liability based upon the mere fact that they do not have “actual knowledge” as considered by the European Commission.

<sup>118</sup> CJEU pending case C-683/18– *Cyando*, question 3.

<sup>119</sup> German Federal Supreme Court (BGH) of 20 September 2018, I ZR 53/17 para. 36 – *Uploaded*.

<sup>120</sup> *Jan Bernd Nordemann*, Liability of Online Service Providers for Copyrighted Content – Regulatory Action needed? In-Depth Analysis for the IMCO Committee, 2018, page 12.

<sup>121</sup> *Joris van Hoboken/Joao Pedro Quintais/Joost Poort/Nico van Eijk* – Institute for Information Law (IVIR), Hosting intermediary services and illegal content online – an analysis of the scope of Article 14 E-Commerce Directive in light of developments in the Online service landscape, 2018, page 31 et seq., available at [https://www.ivir.nl/publicaties/download/hosting\\_intermediary\\_services.pdf](https://www.ivir.nl/publicaties/download/hosting_intermediary_services.pdf).

<sup>122</sup> Communication of 28.09.2017 Tackling Illegal Content Online - Towards an enhanced responsibility of online platforms, COM(2017) 555 final, page 11: *“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 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”.*

<sup>123</sup> *Jan Bernd Nordemann* “Liability of Online Service Providers for Copyright Content – Regulatory Action needed?”, In-Depth Analysis for the committee on the Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, 2018, 2018, page 10.

It is possible to build a business model as an active role host provider with an active role focus to provide access to third party content without having actual knowledge about what is uploaded (see above 6.4.).

And finally, the distinction between active and passive providers should not create unnecessary legal uncertainty. The case law of the CJEU is quite far developed and will get more clarity with pending decisions, e.g. in the *YouTube* case (see above 6.2.). Creating new categories to differentiate intervening providers from other providers would certainly not create less legal uncertainty as long as no case would exist here.

## 6.6. Recommendations

In legal practice, hosting providers seem to be by far the most relevant category of intermediaries on the internet. They deserve well-balanced legislative attention. That said, while the provisions of Article 14 E-Commerce Directive are almost 20 years old, they do not seem outdated. Rather, until now, they provide for a decent legal framework to regulate the liability shield for hosting providers. Principle criticism as to the current status of Article 14 E-Commerce Directive – generally speaking – does not seem to be justified.

This is particularly true for the distinction between active and passive hosting providers. This differentiation seems to be justified as “active role” hosting providers intervene into third-party infringements and deserve stricter rules for liability than mere passive and neutral hosting providers (see in detail 6.1, 6.2. and 6.5.). The distinction between active and passive role providers should be maintained.

Furthermore, an introduction of new rules counteracting the “Good Samaritan Paradox” does not seem to be justified. There does not seem to be an issue in legal practice (see above 6.2.).

If legal legislative action is taken concerning hosting providers, it should not focus on the liability privilege of Article 14 E-Commerce Directive, but rather on rules establishing liability (see above 3.4.).

Here, an adequate solution for hosting providers will include a 3-fold duty after having been notified of a clear infringement: (1) takedown, (2) staydown and (3) prevention of similar clear infringements of the same kind (see above 6.3.). Such duties seem much more sustainable than mere takedown duties. Mere takedown duties would have the effect that the harmed party would have to keep on sending takedown notices when the infringer after takedown simply re-uploads the infringement. This would lead to a Whack-A-Mole game. In particular staydown and prevention duties as described above would make sure that the intermediary has the responsibility to make sure that the infringement is not re-uploaded.

Such staydown and prevention duties would also not be in conflict with Article 15 E-Commerce Directive and its prohibition to impose general monitoring duties on the hosting provider. According to the convincing case law of the CJEU, Article 15 E-Commerce Directive does not apply to monitoring duties in specific scenarios. Looking for specific infringements would thus not be contrary to Article 15 E-Commerce Directive (see above 6.3.).

In summary, it is recommended to not generally change the liability privilege of Article 14 E-Commerce Directive for hosting providers. The legislator could rather think of setting adequate rules to help establish liability for hosting providers by harmonising the notion of infringement and infringer; this could be done even outside the E-Commerce Directive, where no sector specific rules exist yet on the EU level (see above 3.4.).



Such rules to establish liability for hosting providers should include – beyond takedown duties – also staydown and prevention duties for infringements of the same kind in order to reach a sustainable solution to fight illicit content on hosting platforms. Otherwise, if legislation is considered, the distinction between active and passive role providers should be kept.

## 7. LINK PROVIDERS, IN PARTICULAR SEARCH ENGINES

### KEY FINDINGS

Linking providers and more specifically search engines play an important role for the functioning of the internet. But any rule addressing the liability of search engines should provide adequate responsibility and duty of care for search engines, as search engines are also gatekeepers for the dissemination and access to illegal information.

Rules to establish liability for search engines deserve attention. The CJEU and national courts have found adequate and flexible solutions to establish liability for search engines in particular in copyright law. This model to establish liability could also be used as a model to establish liability for search engines in other areas of law.

### 7.1. The legal framework

Linking to third party content signifies an important tool on the internet. This is not only true for individual references through linking. Many services aim at producing, collecting, or indexing links. Search engines are the most striking example for these services. They usually automatically generate links in order for their users to find relevant third-party information.

Nevertheless, it is not clear if services providing links can be classified as intermediary service providers. This is in particular true for search engines. On the one hand, search engines direct users to third party content, playing the typical role of a middleman between internet users, which is necessary for the role of an intermediary (see above 1.1.). On the other hand, the link generated is the search engine's own content as the search engine usually generates it itself.<sup>124</sup> The mixed case law for search engines and the liability privileges of the E-Commerce Directive mirrors this in-between starting point.

The CJEU has decided that search engines are covered by Article 14 E-Commerce Directive and its hosting provider privilege at least with respect to links advertising third party products and services.<sup>125</sup> The service at trial was Google's search engine and more precisely its "AdWords" service.<sup>126</sup> The "AdWords" service was an "information society service" as set out by Article 14 E-Commerce Directive. The AdWords service stored certain data (keyword selected by the advertiser, the advertising link, a accompanying advertising message and the address of the advertiser's website).<sup>127</sup>

It is disputed, however, if search engine services are also regulated by the hosting provider privilege of Article 14 E-Commerce Directive for their editorial (non-advertising) links. According to one opinion, search engines do not fall under Article 14 E-Commerce Directive and follow their own liability regime for published editorial links.<sup>128</sup> The most important argument against an application of Article 14 E-Commerce Directive comes from the E-Commerce Directive itself.

<sup>124</sup> German Federal Supreme Court (BGH) GRUR 178 (2018), para. 19 - *Vorschaubilder III (Thumbnails III)*.

<sup>125</sup> CJEU of 23 March 2010, joined cases C-236/08 to C-238/08 para. 110 - *Google and Google France*.

<sup>126</sup> Google was called "referencing service provider" by the CJEU.

<sup>127</sup> CJEU of 23 March 2010, joined cases C-236/18 to C-238/08 para. 111 - *Google and Google France*.

<sup>128</sup> German Federal Supreme Court (BGH) GRUR 209 (2016), para. 12 - *Haftung für Hyperlink*; BGH GRUR 178 (2018), para. 60 et seq. - *Vorschaubilder III (Thumbnails III)*.

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.

It is not convincing to not apply Article 14 E-Commerce Directive to editorial links in particular of search engines.<sup>129</sup>

But in any case, an application of Article 14 E-Commerce Directive would only regulate a possible liability privilege for link providers and particularly search engines. It would not cover rules establishing liability (see above 2.1.1). Without a harmonisation of EU law to establish liability, especially search engines will be subject to different national rules in order to establish liability.

In certain sectors, however, EU rules establishing the liability of linking providers and more specifically search engines have been harmonised on the EU level. The most striking example is copyright law. Here, the CJEU has developed its own liability rules for linking providers through its case law in *GS Media/Sanoma*,<sup>130</sup> *Filmspeler*<sup>131</sup> and *Ziggo/BREIN (“The Pirate Bay”)*.<sup>132</sup> These principles to establish liability for linking providers were developed within the exclusive right of communication to the public (Article 3 Copyright Directive 2001/29). In a nutshell, a link to copyrighted content published by a third party would constitute a communication. In case of a link to copyrighted content illegally communicated to the public the linking provider itself communicated the copyrighted work to the public if the linking provider knew or ought to have known that the link was illegally communicated. In particular the requirement of “ought to have known” allows a very flexible approach to establishing liability and more specifically adequate duties of care for linking providers. Thereby, a balancing of interests between the link providers, internet users and rightholders may take place. The CJEU case law to establish liability and the duties of care involved should provide for fair results in all specific linking scenarios beyond copyright law.<sup>133</sup>

This case law of the CJEU does not specifically address search engines, but national courts have applied the duties of care developed by the CJEU to search engine scenarios. In a case before the German Federal Supreme Court (BGH) involving the liability of search engines for Thumbnails illegally communicated to the public on the internet, the BGH further refined the concept of duty of care and in particular the balancing of interests to find adequate duties of care. In its *Thumbnails III* judgement, the BGH emphasised an essential role of search engines for the use of the internet. Accordingly, no monitoring obligations for search engines may be established as monitoring would endanger or substantially impair the operation of search engines.<sup>134</sup> Consequently, there may not be a presumption to the detriment of search engines operating for profit that they knew they were linking to content illegally communicated to the public.<sup>135</sup>

In *GS Media/Sanoma*, the CJEU had held that there was a rebuttable presumption that for profit linkers would have known that they were linking to content illegally communicated to the public.<sup>136</sup>

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<sup>129</sup> Jan Bernd Nordemann, Liability of online service providers for copyrighted content – Regulatory action needed? In-Depth Analysis for the committee on the Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, 2018, page 15; in favour of an application of Article 14 E-Commerce Directive *mutatis mutandis* Leistner GRUR 1145 at 1154 (2014); *Ohly* GRUR 1155 at 1157 (2016).

<sup>130</sup> CJEU of 8 September 2016, C-160/15 – *GS Media/Sanoma*.

<sup>131</sup> CJEU of 26 April 2017, C-527/15 – *BREIN/Wullems (Filmspeler)*.

<sup>132</sup> CJEU of 14 June 2017, C-610/15 – *Ziggo/Brein (“The Pirate Bay”)*.

<sup>133</sup> Jan Bernd Nordemann, Liability of online service providers for copyrighted content – Regulatory action needed? In-Depth analysis for the IMCO Committee, 2018, page 16.

<sup>134</sup> German Federal Supreme Court (BGH) GRUR 178 (2018), para. 62 – *Vorschaubilder III (Thumbnails III)*.

<sup>135</sup> German Federal Supreme Court (BGH) GRUR 178 (2018), para. 60 et seq. – *Vorschaubilder III (Thumbnails III)*.

<sup>136</sup> CJEU of 8 September 2016, C-160/15 para. 51 – *GS Media/Sanoma*.

It remains questionable that the BGH finally decided this issue on the national level without referring the case to the CJEU pursuant to Article 267 TFEU.<sup>137</sup>

The aforementioned case law by the CJEU establishing liability for search engines through shaping duties of care has been criticised by some commentators as reaching too far.<sup>138</sup> This criticism, however, does not seem justified. Particularly, the decision by the CJEU is now almost five years old, without making it impossible for search engines to operate their usual business model. Rather, national case law – e.g. from the German BGH – has shown that courts very carefully shape duties of care specifically for search engines, taking into account their important role on the internet. That said, search engines also play an important role in finding infringing information on the internet which justifies holding them responsible and develop adequate duties of care after carefully balancing the interests of link providers, internet users and rightholders. It would not seem appropriate to provide for stricter rules further limiting the liability of search engines. Rather, search engines – despite their important role for the legitimate use of the internet – are also an important tool to find illicit content on the internet. Their responsibilities and duties of care should not be reduced further.

## 7.2. Recommendations

It is undisputed that linking providers and more specifically search engines play an important role in the functioning of the internet. But due to their important role in facilitating access to content, search engines are also in a key position to find and disseminate illegal information. Any rule to address the liability of search engines should consequently provide for adequate responsibilities and duties of care of search engines.

Against this background, the focus should not lie on the liability privileges of the E-Commerce Directive. Instead, the rules to establish liability for search engines should be focused on. So far, the CJEU and the national courts have found adequate and flexible solutions establishing the liability of search engines in particular in copyright law (see above 7.1.). This model to establish liability could be used as a model to establish liability for search engines in other areas of the law as well.

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<sup>137</sup> Jan Bernd Nordemann in Fromm/Nordemann, Urheberrecht Kommentar (Copyright commentary), 12th edition 2018, section 97 German Copyright Act, para. 167a with further references.

<sup>138</sup> Joris van Hoboken/Joao Pedro Quintais/Joost Poort/Nico van Eijk – Institute for Information Law (IVIR) Hosting intermediary services and illegal content online – an analysis of the scope of Article 14 E-Commerce Directive in light of developments in the Online service landscape, 2018, page 36, available at [https://www.ivir.nl/publicaties/download/hosting\\_intermediary\\_services.pdf](https://www.ivir.nl/publicaties/download/hosting_intermediary_services.pdf).

## 8. IDENTIFICATION OF THE INFRINGER - ARTICLE 5 E-COMMERCE DIRECTIVE

### KEY FINDINGS

Illegal business models pose a major problem for the European internet creating a massive amount of infringements on the internet.

Usually, such structurally infringing websites or offers do not respect the information duties of Article 5 E-Commerce Directive. They hide in anonymity. Yet, such structurally infringing websites and offers should not be able to use legitimate EU intermediary service providers for infringements.

Against this background, it is recommended to create "Know Your Business Customer" (KYBC) duties for intermediary service providers. Such KYBC duties should be more limited than in provisions to counteract money laundering in the financial sector. But still, intermediary service providers should have a duty to receive and verify customer data; a verification could be done for example through the European Business Register (EBR) or the Ultimate Beneficial Owner (UBO) Register. These verification duties should be combined with a prohibition to provide services to customers, where a verification as outlined above has not been carried out or has failed.

Such KYBC duties could not only be imposed on hosting providers, but also on other intermediaries to effectively counteract structurally infringing websites and offers, operating illegal business models.

Infringers have ample opportunities to remain anonymous on the internet. This seems to be one of the most pressing issues in terms of protection against infringements on the internet. This is in particular true for intended infringements and more specifically for illegal business models. Websites operating an illegal business model are sometimes called structurally infringing websites. For infringements of intellectual property rights, the European Commission has pulled together a "Counterfeit and Piracy Watch List" in 2018. It presents examples of reported marketplaces or service providers whose operators or owners are allegedly resident outside the EU and which reportedly engage in, facilitate or benefit from counterfeiting and piracy. According to the Commission, infringements of intellectual property rights, in particular commercial scale counterfeiting and piracy, "*pose a major problem for the European Union*".<sup>139</sup>

<sup>139</sup> European Commission, Counterfeit and Piracy Watch List, 7.12.2018 SWD(2018) 492 final, page 2 et seq.

## 8.1. No identification of the infringer in case of structurally infringing offers

Since its adoption in the year 2000 Article 5 E-Commerce Directive forms the central provision on the European level concerning transparency regarding the identity of infringers, e.g. operators of structurally infringing websites. According to Article 5 E-Commerce Directive, service providers active on the internet (but not necessarily intermediaries) must give easily, directly and permanently accessible information to the recipients of the service and competent authorities as to their name, their geographic address, their email address and registration number in case the service provider is registered in a trade or similar public register. In short, Article 5 E-Commerce Directive requires the commercial entities active on the internet, e.g. through websites, to be easily identifiable.

However, Article 5 E-Commerce Directive only stipulates identification duties for the individual commercial service provider (e.g. website operator). There are no direct duties *for intermediaries* provided on the European level in case the website operator gives false or no identity information at all. Structurally infringing websites can therefore simply ignore the obligations stipulated in Article 5 E-Commerce Directive because there are no reasonable legal means for the infringed parties to enforce their rights against infringers, whereas intermediaries – providing services to commercial infringers – may commercially benefit from their business relationships with infringers.

**Example (simplified):** *The Dutch hosting provider XYZ is hosting the structurally copyright infringing website “The Pirate Bay”.<sup>140</sup> The website uses advertising to finance itself and therefore comes under the information obligation pursuant to Article 5 E-Commerce Directive. But “The Pirate Bay” does not provide these information on its website. Of course, the operators choose to stay anonymous. While the Dutch hosting provider may be identifiable, e.g. through the IP-addresses used by “The Pirate Bay”, the hosting provider will not be able to help identify the operators of “The Pirate Bay” because the Dutch hosting provider does not have any accurate data of its customer. Enforcement action has to stop at the hosting provider, and may not carry on to the genuine source of the infringement, i.e. the infringer operating the website. That said, the Dutch hosting provider will still secure payment for its services provided to “The Pirate Bay”.*

## 8.2. Duties for intermediaries under national law in case of breach of Article 5 E-Commerce Directive

As shown above, there is no harmonised approach on the European level regarding the establishment of liability of intermediaries; the E-Commerce Directive only provides for a liability shield once liability has been established (see above 2.1.1). Accordingly, the EU member states decide about the consequences for intermediaries, in case their customers breach Article 5 E-Commerce Directive, on the national level. This leads to a fragmentation of rights enforcement in the EU. Sometimes, such national rules may be in themselves rather complex and difficult to understand.

**Example:** *German law has implemented Article 5 E-Commerce Directive through Sec. 5 German Telemedia Act (TMG). A breach of Sec. 5 TMG / Article 5 E-Commerce Directive is considered to be unfair competition pursuant to Sec. 3a German Act against Unfair Competition (UWG) as a “breach of statutory law”. In case of a breach of unfair competition law, competitors, qualified associations active in the field of consumer protection and qualified associations with sufficient competitors as members have legal standing to bring an action against the website operator not complying with Sec. 5 TMG.*

<sup>140</sup> “The Pirate Bay” has been recognised by the CJEU as copyright infringing as a tortfeasor, see CJEU of 14 June 2017, C-610/15, – *Ziggo/Brein (“The Pirate Bay”)*; furthermore above 3.2.

*But for structurally infringing internet offers, this legal action will lead nowhere, as shown above due to the anonymity of the offering party.*

*In case a party with legal standing takes legal action against the hosting provider, it first has to notify the hosting provider that the information pursuant to Sec. 5 TMG / Article 5 E-Commerce Directive is missing on its customer's website. In terms of unfair competition law, duties of host providers arise after being notified about unfair commercial practices of their customers. This liability is construed by the principle of "competitive duties of care", which was introduced by the German Federal Supreme Court (BGH) in 2007 in the case "Jugendgefährdende Medien bei eBay – Youth-endangering media on eBay" which replaced the previously common "Störerhaftung" under German unfair competition law<sup>141</sup>. The decision concerned eBay as a platform operator in view of offerings placed by customers of eBay violating the German rules on youth protection. The BGH found that host providers like eBay have a competitive duty of care to take reasonable measures to avoid infringements of the interests of market participants protected by unfair competition law. These duties of care basically result in monitoring obligations as to the offering upon being notified of the infringement.*

*These competitive duties of care in German law should also apply to clear breaches of Sec. 5 TMG / Article 5 E-Commerce Directive in case a commercial website is directed to the German public without an imprint, with a wrong or with an imprint that does not probably identify the website operator.*

*But for domain name providers, these duties seem to be differently shaped in German law. According to two decisions of the Court of Appeal Hamm<sup>142</sup> and the Court of Appeal Hamburg<sup>143</sup>, competitive duties of care to cure missing information pursuant to Sec. 5 TMG / Article 5 E-Commerce Directive were found not to be applicable to domain name service providers. Particularly, the Court of Appeal Hamburg differentiated between the duties of care that can be reasonably expected to be complied with by domain administrators on the one hand and host providers/platform operator on the other hand. In contrast to the reasonable duties to be complied with by platform operators, Admin-Cs or domain administrators could not be expected to check and monitor websites being operated under the domains provided with respect to potential rights infringements, even after being notified. This was in particular true for breaches of Sec. 5 TMG / Article 5 E-Commerce Directive by the websites using the domain services.*

The above-described possibility to enforce breaches of Article 5 E-Commerce Directive against intermediaries of structurally infringing (anonymous) offers under German unfair competition law is just one example of a complex and fragmented approach on the national level. Apart from the fact that this fragmented approach may differ from those of other Member States, the indirect liability of host providers bears several disadvantages: It still allows website operators with illegal business models to remain anonymous when launching their websites. The indirect duties of care of host providers only come into play after infringements have already occurred. Taking down their legal websites would only cause the website operators to move their content to another host provider, thus enabling them to re-launch their online services ("host provider nomadism"). In fact, this sort of indirect liability remains widely ineffective in terms of rights protection and enforcement.

One idea would therefore be to secure accurate information with the intermediary before the intermediary starts to provide services to structurally infringing offers. Nevertheless, there are no strict identification and verification duties for intermediaries as to their customers comparable to those implemented in the financial sector as stipulated by the Anti-Money-Laundering Directive (AML

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<sup>141</sup> See German Federal Supreme Court (BGH) GRUR 809 (2007) – *Jugendgefährdende Medien bei eBay*.

<sup>142</sup> Court of Appeal (Oberlandesgericht) of Hamm MMR 175 (2014).

<sup>143</sup> Court of Appeal (Oberlandesgericht) of Hamburg of 17 January 2012 – 3 W 54/10.

Directive).<sup>144</sup> There are no direct obligations for the intermediary to know its business customer at all in EU law.

### 8.3. Recommendations

As shown above, the anonymity of website operators pursuing illegal online business models forms one of the most crucial challenges in terms of enforcement on the internet. The information duties provided in Article 5 E-Commerce Directive remain widely insufficient as operators of structurally infringing websites in most cases do not comply with the information duties and still remain in a relatively safe position. Indirect duties of care intermediaries might have to face in view of breaches of Article 5 E-Commerce Directive on the national level, if existing at all in the respective Member State, do not tackle the problem at its roots as the identity of the actual website operators remains unknown (even to the intermediary). Such indirect duties furthermore only come into play once breaches of law have already occurred. There are no proactive measures intermediaries have to take to ensure that website operators can be identified and held liable if required.

A significant improvement of this unsatisfying situation might be achieved when requesting relevant intermediaries being regularly involved in or benefiting from illegal online business models to identify their customers and verify the identity information obtained right at the outset of the business relationship.

Such duties should be constructed as primary and independent legal duties only linked to the question of identifying customers and taking reasonable measures to ensure that the obtained information is correct. As a part of the envisaged DSA reform process, identification and verification duties would form a strong tool for pulling illegal online businesses out of their anonymity, whereas at the same time imposing low burdens on legitimate businesses. The following gives a rough outline of how these specific duties of care could be established on the European level.

#### 8.3.1. General Principle of “Know Your Customer” in financial law

Such duties of care are commonly known as “Know Your Customer” (KYC) procedures, being applied in different sectors of the economy. The most prominent KYC duties on the European level concern the financial sector, following provisions set by the Anti-Money-Laundering Directive. In brief, the strict KYC duties provided by the AML Directive prescribe banks and other financial institutions to request certain information on their customer’s identity and to further verify the information obtained at the beginning of the business relationship. The information required from customers comprises i.a., with respect to business entities, the company name, legal status, registration number of respective company registers, business address and names of legal representatives. The company’s identity is verified through extracts from the respective commercial or company register, or by submission of the company’s founding documents or comparably evidential documents.

#### 8.3.2. Reasonable (more limited) customer identification and verification for intermediaries; prohibition to provide services to unverified customers

Potential KYBC duties to be imposed on online intermediaries would not have to be as strict as those applied in the financial sector (e.g. in anti-money-laundering). However, less strict KYBC duties would nevertheless include the collection and verification of commercial customers’ data at the beginning of the contractual relationship.

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<sup>144</sup> Currently 5<sup>th</sup> AML Directive of 30 May 2018, 2018/843/EU.



Appropriate verification measures should be found which enable the intermediary to prove the received information against easily accessible information provided by public registers.

Thus, as a first step at the stage of conclusion of the contract, the following information on the commercial customer's identity should be collected,

- Company name;
- Legal status;
- Registration number of respective company register;
- Business address;
- Names of legal representatives;
- Information about the "Ultimate Beneficial Owner" (UBO);
- VAT number.

The obtained data would then have to be verified against the respective company registers of the Member States in which the customer is established. This could be achieved via publicly accessible online registers, such as the "European Business Register" (EBR). Apart from the basic information concerning the respective commercial customer, it is further recommended to obtain information about the customer's UBO. This should also be feasible via publicly accessible online registers as the AML Directive obliges the EU Member States to establish and maintain a UBO register. Pursuant to the 5<sup>th</sup> AML Directive, after March 2021, all national UBO registers will be linked to each other and will be accessible from all EU Member States.

Subsequent identification and verification measures as well as disclosure duties would come into play in case interested persons (harmed parties, e.g. rightholders) notify the obliged intermediary of credible evidence that the operator of a site has failed to conform to legal requirements to disclose its identity, such as measures implementing Article 5 E-Commerce Directive. The intermediary would then have to re-verify its customer's identity and inform the requesting person about any information that is legally required to be disclosed (e.g. according to Article 5 E-Commerce Directive).

These verification duties should be combined with a prohibition to provide services to customers, where a verification as outlined above has not been carried out or has failed.

### 8.3.3. The relevant intermediaries

When considering appropriate KYBC duties to be complied with by online intermediaries, it should be kept in mind that the most pressing issues arise from illegal business models. Identification and verification duties should therefore mainly focus on business entities rather than private persons, thus resulting in "Know Your Business Customer" duties (KYBC). KYBC duties could be implemented as horizontal duties only concerning the question of commercial customer identification and verification, independent of any potential infringements by the customer. Generally speaking, commercial customers would be those acting in a commercial or professional capacity, thereby offering goods or services to consumers for purposes relating to their trade or business.<sup>145</sup>

It has furthermore to be discussed which categories of intermediaries should be subject to KYBC duties.

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<sup>145</sup> See, for example, the definition of "business users" in Article 2 (1) Reg. (EU) 2019/1150, "P2B Regulation".

As a starting point, host providers seem to belong to the most relevant intermediaries, irrespective whether they play an active or a mere passive role, thus enjoying the liability privileges of Article 14 E-Commerce Directive. Host providers play an essential role in the context of violations of IP rights on the internet as they provide the online infrastructure required for illegal business models to thrive. The implementation of KYBC duties on host providers would also counterbalance the quite broad liability privileges of Article 14 E-Commerce Directive, thus at least requesting host providers to have a certain and verified knowledge about their customers' identity.

Apart from host providers, additional categories of intermediaries regularly being involved in or benefiting from infringements on the internet should be included, such as domain name service providers, advertising service providers and proxy service providers.

## REFERENCES

- *Angelopoulos, Christina*, European Intermediary Liability in Copyright: A Tort-Based Analysis, 2017
- *Angelopoulos, Christina*, On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market; January 2017, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2947800](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800)
- *Czychowski, Christian/Nordemann, Jan Bernd*, Grenzenloses Internet – entgrenzte Haftung? Leitlinien für ein Haftungsmodell der Vermittler [Limitless internet - unlimited liability? Guidelines for a liability model of intermediaries], GRUR 986 (2013)
- *Feldmann, Thorsten*, Zum Referentenentwurf eines NetzDG: Eine kritische Betrachtung [On the ministerial draft of the German Network Enforcement Act: A critical examination], K&R 292 (2017)
- *Fromm/Nordemann*, Urheberrecht Kommentar [Commentary to the German Copyright Act], 12th Edition 2018
- *Husovec, Martin*, Injunctions against Intermediaries in the European Union – Accountable But Not Liable?, 2017/2018
- *Leistner, Matthias*, Urheberrecht an der Schnittstelle zwischen Unionsrecht und nationalem Recht [Copyright at the interface between EU law and national german law], GRUR 1145 (2014)
- *Liesching, Marc*, Die Durchsetzung von Verfassungs- und Europarecht gegen das NetzDG [The enforcement of constitutional and European law against the German Network Enforcement Act], MMR 26 (2018)
- *Nordemann, Jan Bernd*, Liability of online service providers for copyrighted content – Regulatory action needed? In-Depth Analysis for the committee on the Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, 2018, pages 13 to 14
- *Nordemann, Jan Bernd*, Recent CJEU case law on communication to the public and its application in Germany: A new EU concept of liability, 13 (No. 9) JIPLP 744 (2018)
- *Nordemann, Jan Bernd*, Internet copyright infringement: Remedies against intermediaries – The European perspective on host and access providers, 59 (No. 4) Journal Copyright Society of the USA 773 (2012)
- *Nordemann, Jan Bernd*, Liability for Copyright Infringements on the Internet: Host providers (Content Providers) – The German Approach, 2 JIPITEC 37 (2011)
- *Ohly, Ansgar*, The broad concept of “communication to the public” in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?, 13 (No. 8) JIPLP 664 (2018)
- *Rosati, Eleonora*, The CJEU Pirate Bay Judgement and its Impact on the Liability of Online Platforms, 2017, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3006591](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3006591)
- *Shapiro, Ted*, Directive 2001/29/EC on Copyright in the Information Society, in: Copyright in the Information Society: A Guide to National Implementation of the European Directive 54 (Lindner/Shapiro, 2011)
- *Spindler, Gerald*, Der Regierungsentwurf zum Netzwerkdurchsetzungsgesetz – europarechtswidrig [The government's draft of the German Network Enforcement Act – in breach of EU law]?, ZUM 473 (2017)

- *van Dam, Cees*, European Tort Law, Second Edition 2013
- *van Hoboken, Joris/Quintais, Joao Pedro/ Poort, Joost/van Eijk, Nico* – Institute for Information Law (IVIR), Hosting intermediary services and illegal content online – an analysis of the scope of Article 14 E-Commerce Directive in light of developments in the Online service landscape, 2018, available at [https://www.ivir.nl/publicaties/download/hosting\\_intermediary\\_services.pdf](https://www.ivir.nl/publicaties/download/hosting_intermediary_services.pdf)
- *Wimmers, Jörg/Heymann, Britta*, Zum Referentenentwurf eines Netzwerkdurchsetzungsgesetzes (NetzDG) – eine kritische Stellungnahme [On the ministerial draft of a German Network Enforcement Act (NetzDG) – a critical comment], AfP 93 (2017)

## ANNEX

### **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 ('Directive on electronic commerce')**

Official Journal L 178, 17/07/2000 P. 0001 - 0016

#### **(Extract)**

#### **CHAPTER II PRINCIPLES**

#### **Section 4: Liability of intermediary service providers**

##### **Article 12 "Mere conduit"**

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, 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.
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 court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

##### **Article 13 "Caching"**

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, 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 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 court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

#### **Article 14** **Hosting**

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.

#### **Article 15**

##### **No general obligation to monitor**

1. Member States shall not impose a general 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.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

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The paper reflects on responsibilities and duties of care of online intermediaries as set out in the E-Commerce Directive and gives recommendations for a possible future EU Digital Services Act.

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