

# Interplay with OCSSP Rules in the Directive on Copyright in the Digital Single Market

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# Outline

- Brief context
  - Copyright in EU law's "regulatory clutter"
- How we got here
  - from the InfoSoc Directive to the CDSM Directive
- Where we are
  - Article 17 developments
- Where we are going
  - A bipolar copyright regime for online platforms

# Outline

- **Brief context**

- Copyright in EU law's "regulatory clutter" for moderation of illegal content

- How we got here

- from the InfoSoc Directive to the CDSM Directive

- Where we are

- Article 17 developments

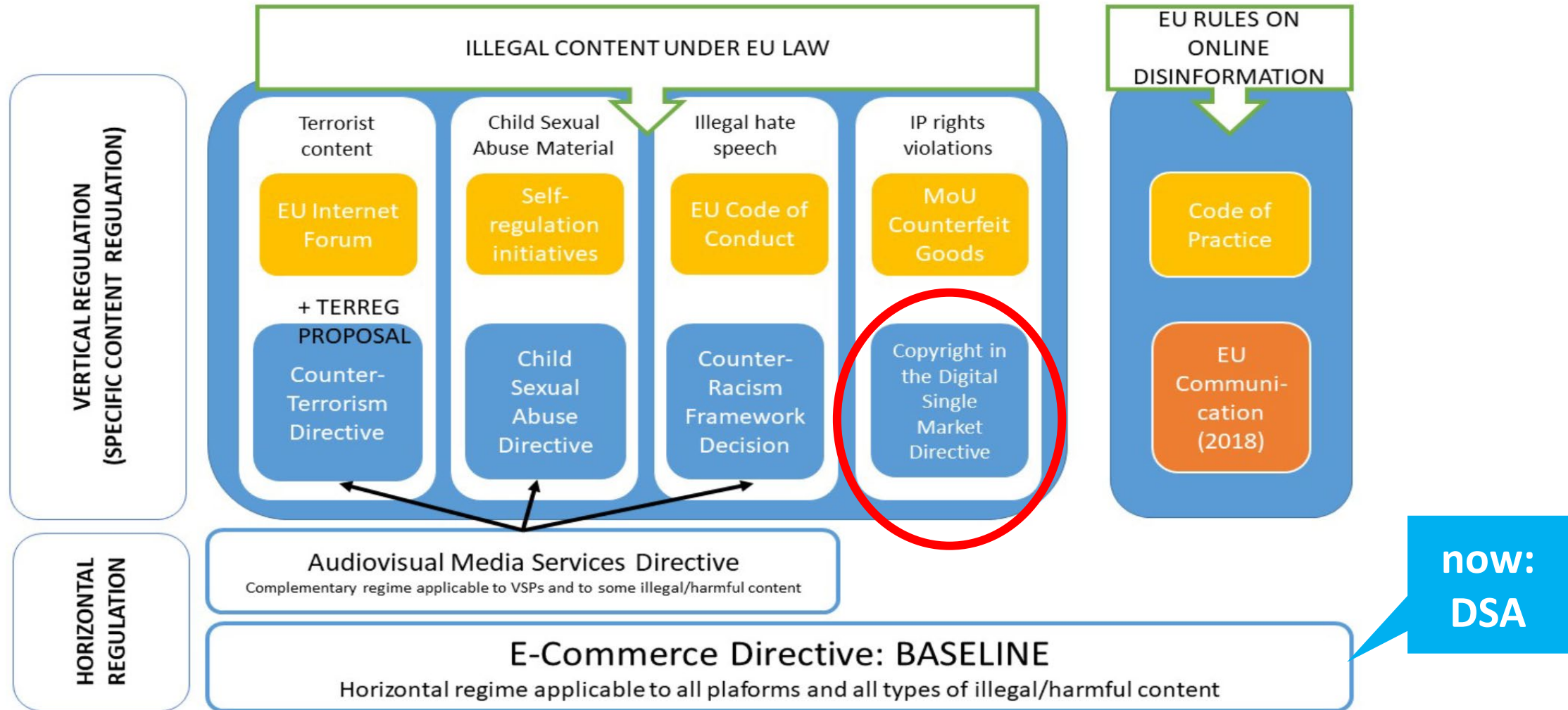
- Where we are going

- A bipolar copyright regime for online platforms

EU copyright law is not an island

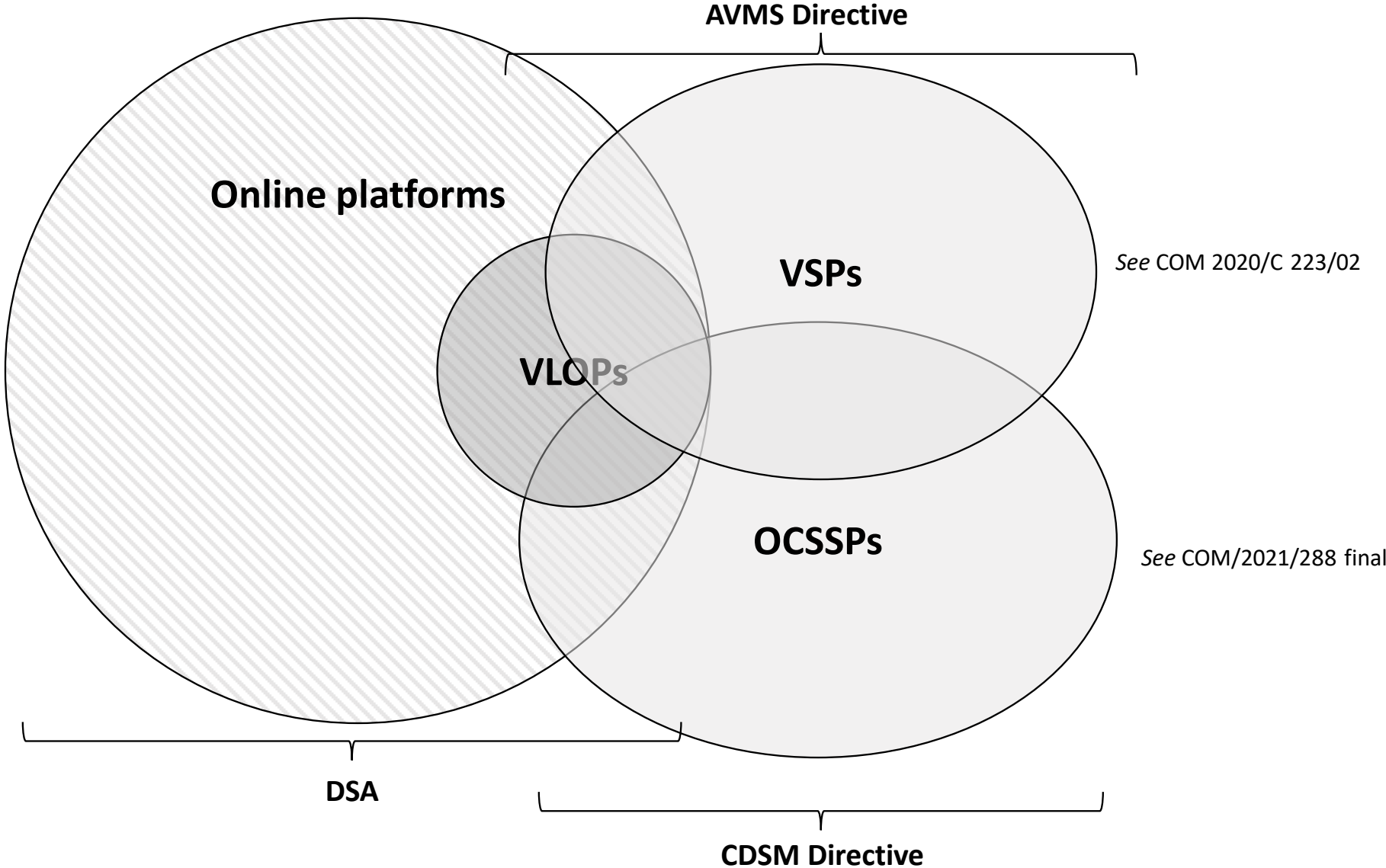
# “Regulatory clutter” pre-TERREG & pre-DSA

Figure 1: EU regulatory framework for online content moderation



# (Some of the) Overlapping regimes for Online Platforms

+ HSPs in  
TERREG, etc.



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**E-Commerce Directive**

2000

2021

**InfoSoc Directive**

05/2019

**CDSM Directive**

12/2020

**DSA Proposal**

06/2021

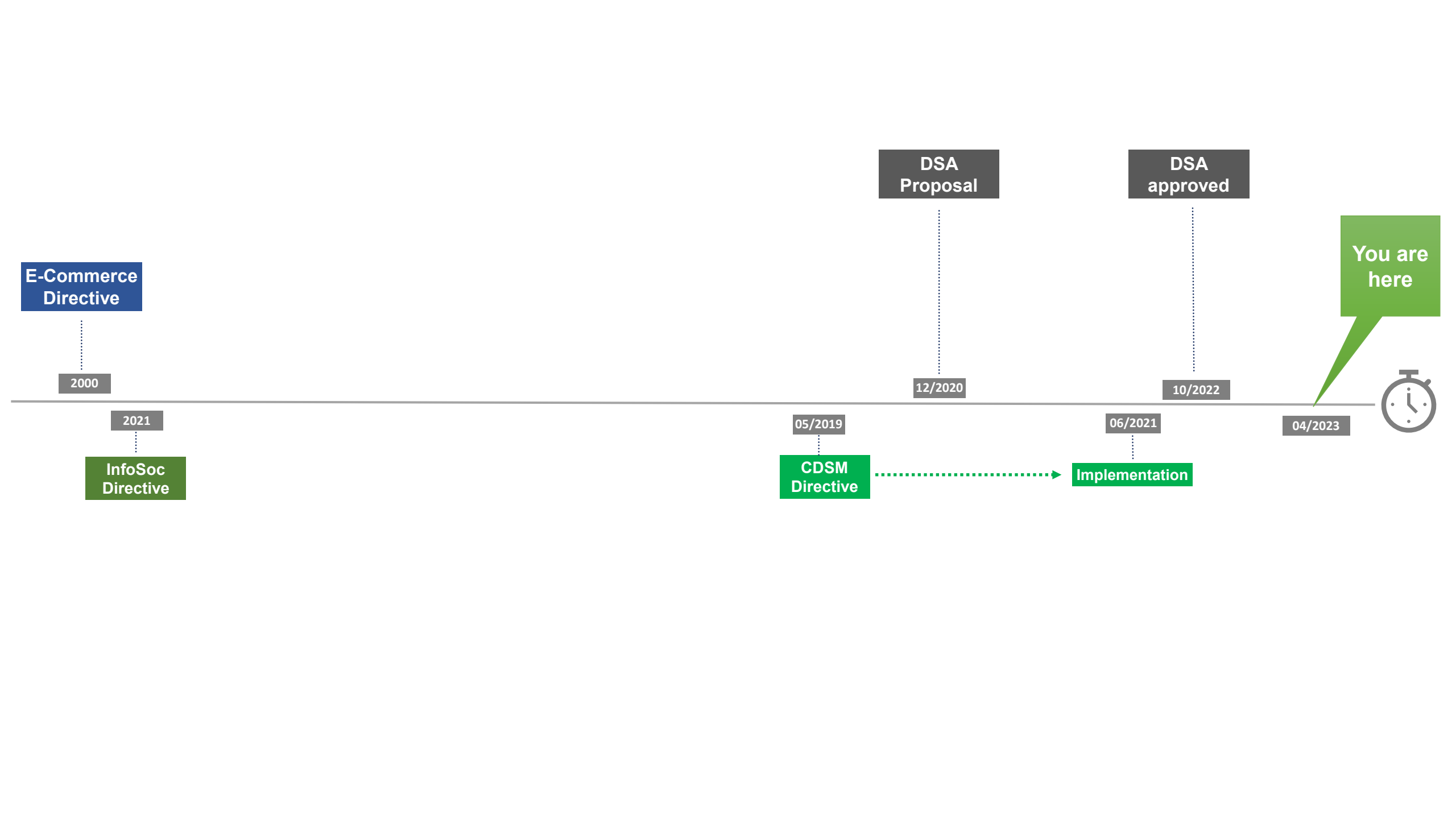
**Implementation**

10/2022

**DSA approved**

04/2023

**You are here**





E-Commerce Directive

2000

**CJEU: multiple cases interpreting safe harbors (& injunctions), including for online platforms (hosting) and in connection to IP / copyright**

DSA Proposal

12/2020

DSA approved

10/2022

You are here



04/2023

2021

InfoSoc Directive

05/2019

CDSM Directive

06/2021

Implementation

**CJEU: about 30 (!) cases interpreting right of communication to public and extending it to online use, including on platforms**  
(+ strange obsession w/ hotel rooms)

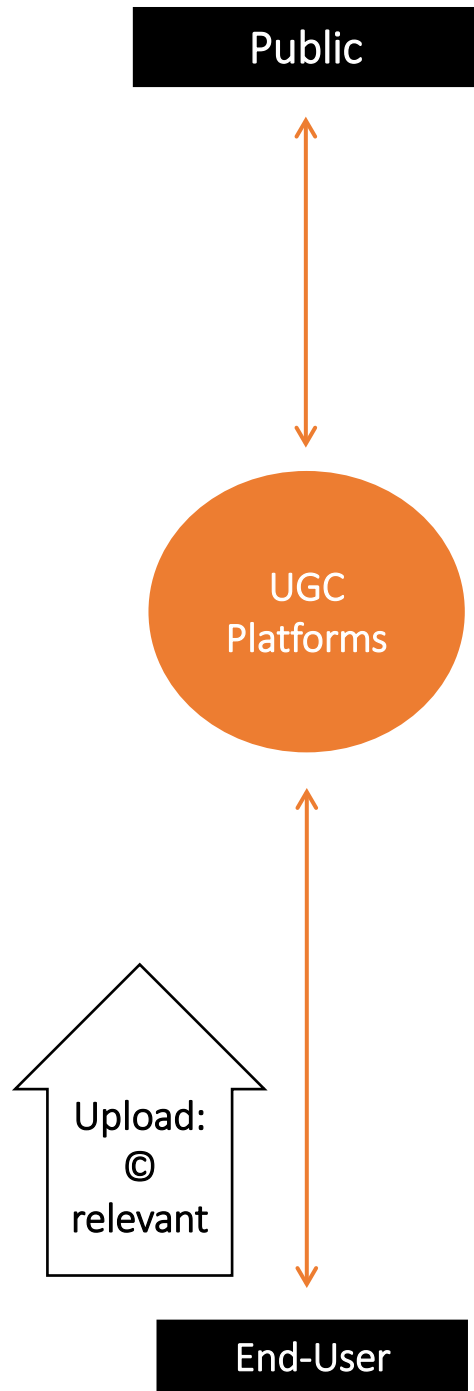


UGC  
Platforms

Public



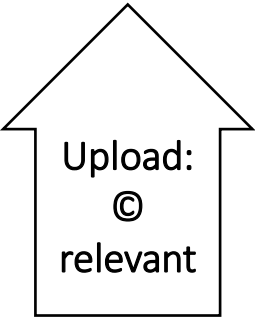
End-User



Public



UGC  
Platforms



Art 3 InfoSoc  
C2P

End-User

Primary Liability  
(harmonized)

- Rights
- E&Ls
- Enforcement

Public

- NTD
- Injunctions 8(3) InfoSoc
- Duties of Care
- CRTs

Art 14 & 15 e-Commerce  
 Hosting safe harbor  
 No general monitoring

UGC  
 Platforms

Secondary Liability  
 (mostly unharmonized)

Primary Liability  
 (harmonized)

- Rights
- E&Ls
- Enforcement

Upload:  
 ©  
 relevant

Art 3 InfoSoc  
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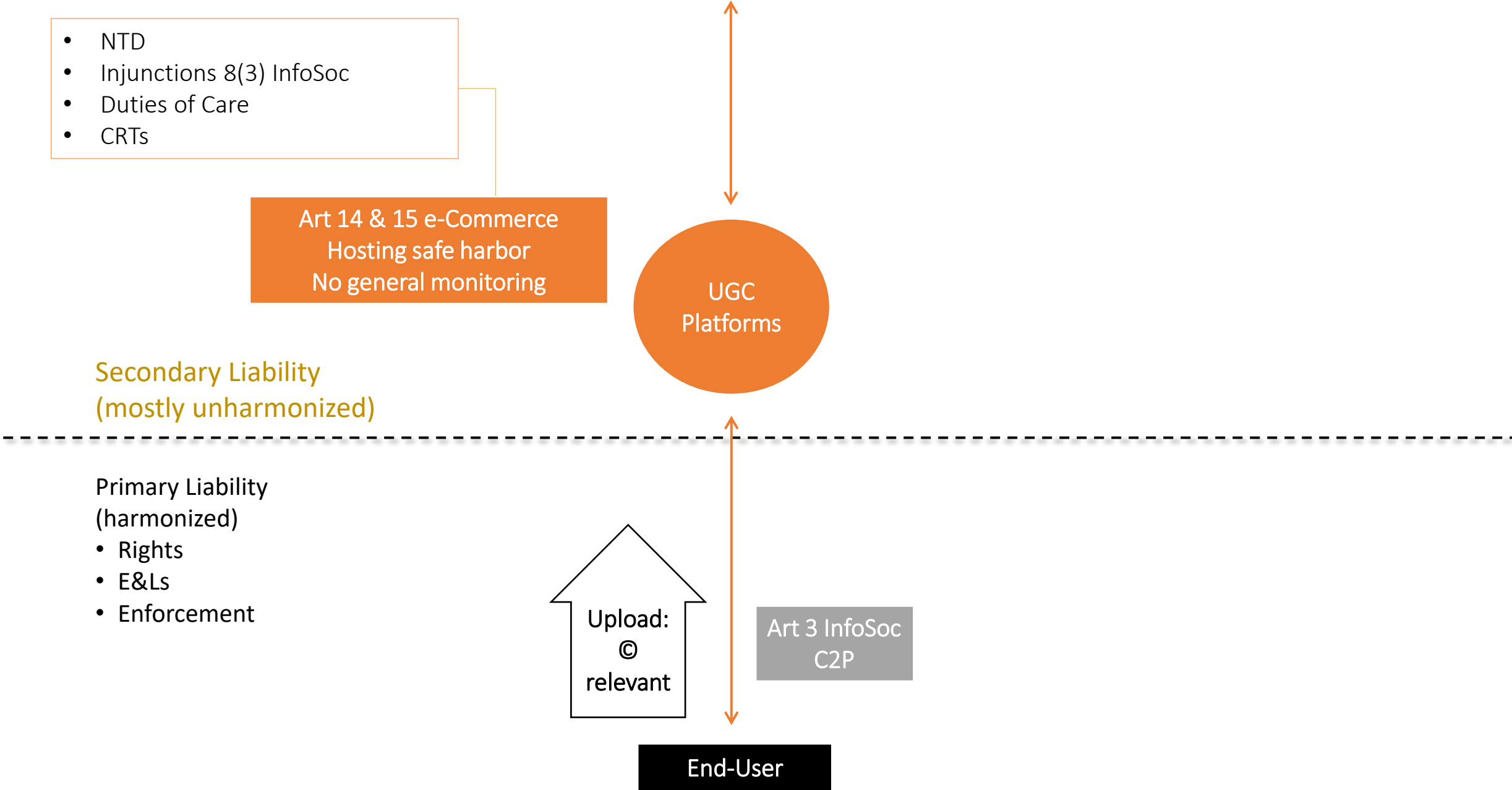
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© holder

Some licensing / monetization  
 (% Ad revenues)  
 Trusted Flaggers

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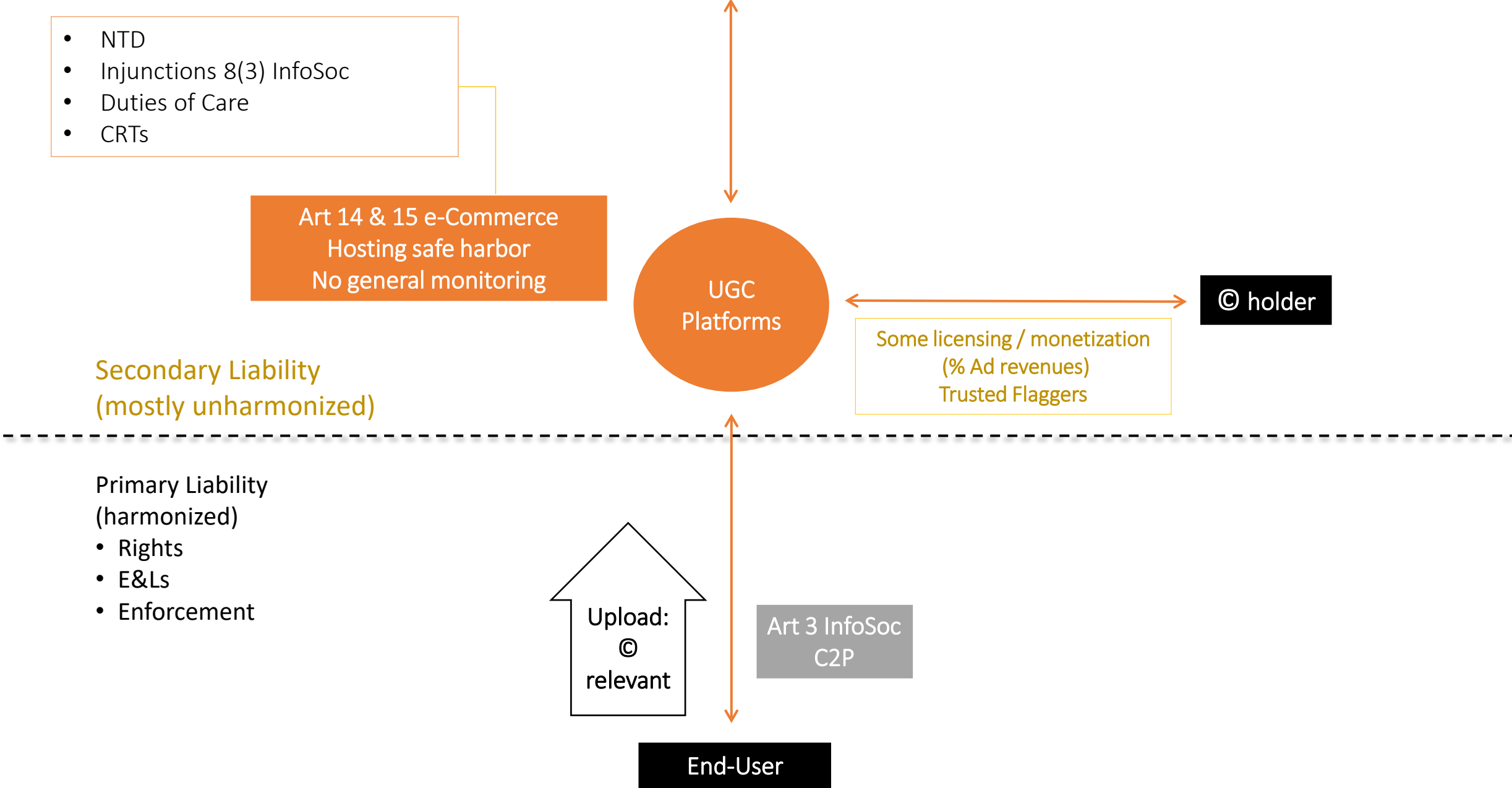
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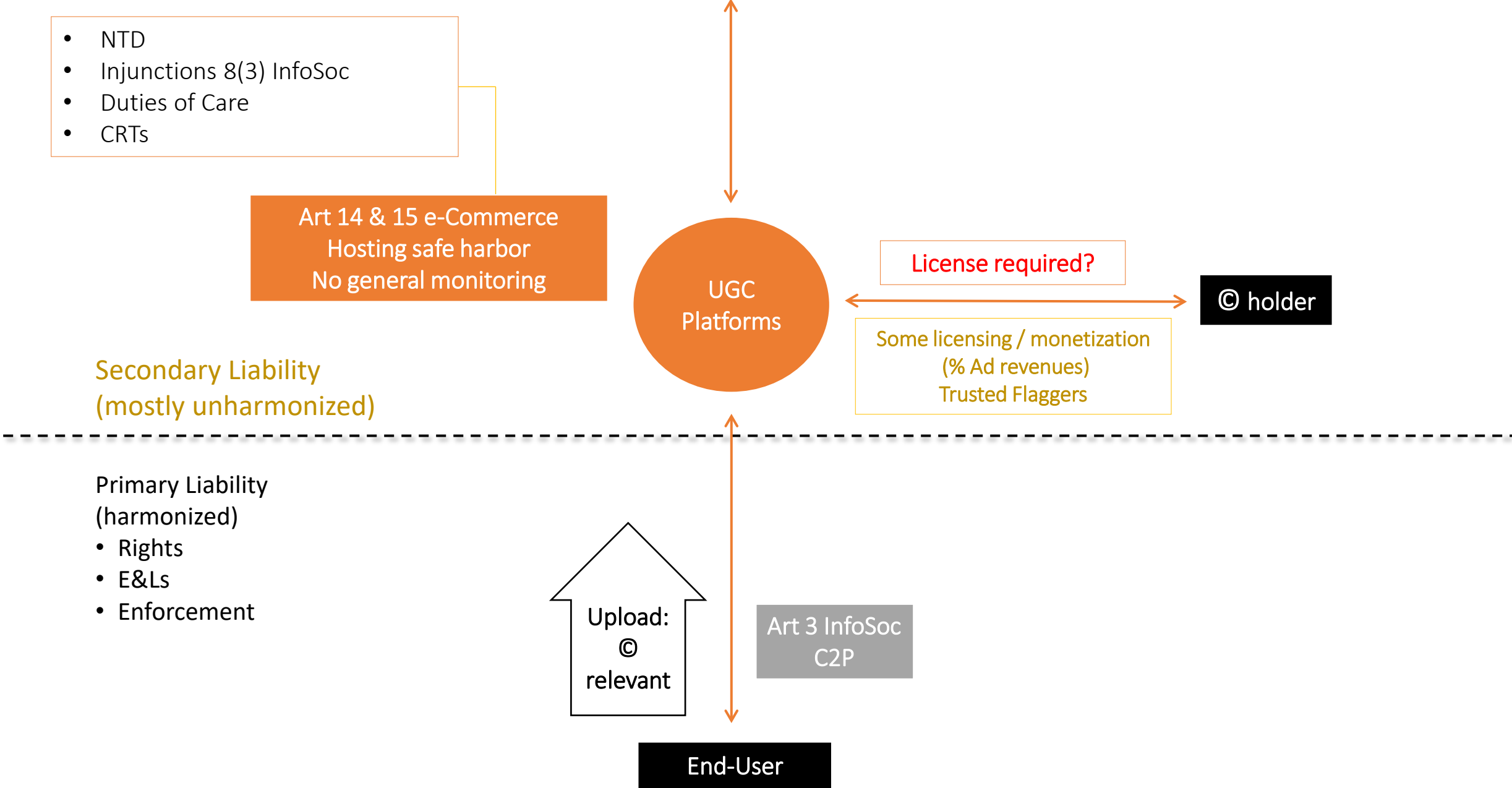
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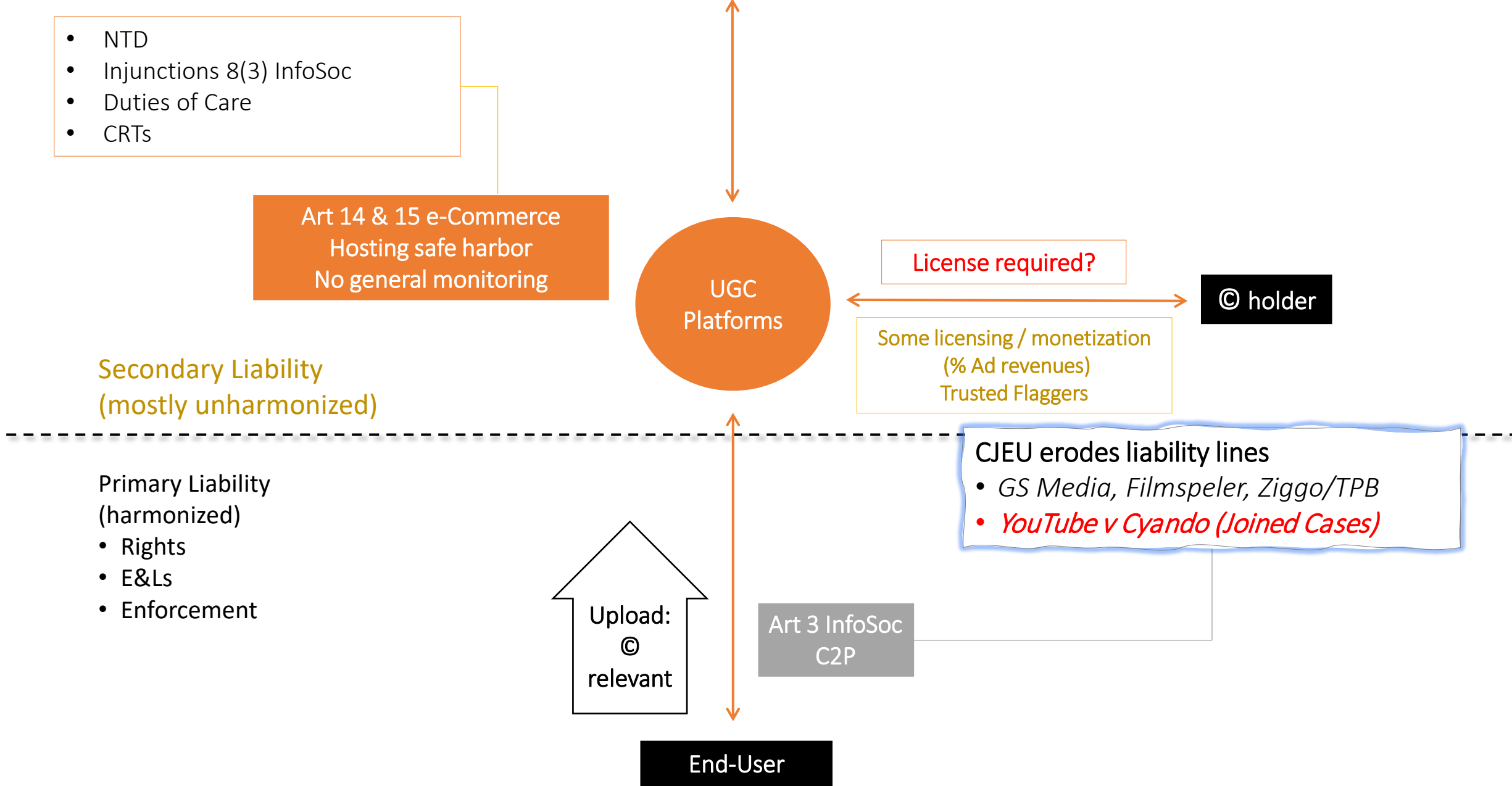
CJEU erodes liability lines

- *GS Media, Filmspeler, Ziggo/TPB*
- *YouTube v Cyando (Joined Cases)*

Upload:  
 ©  
 relevant

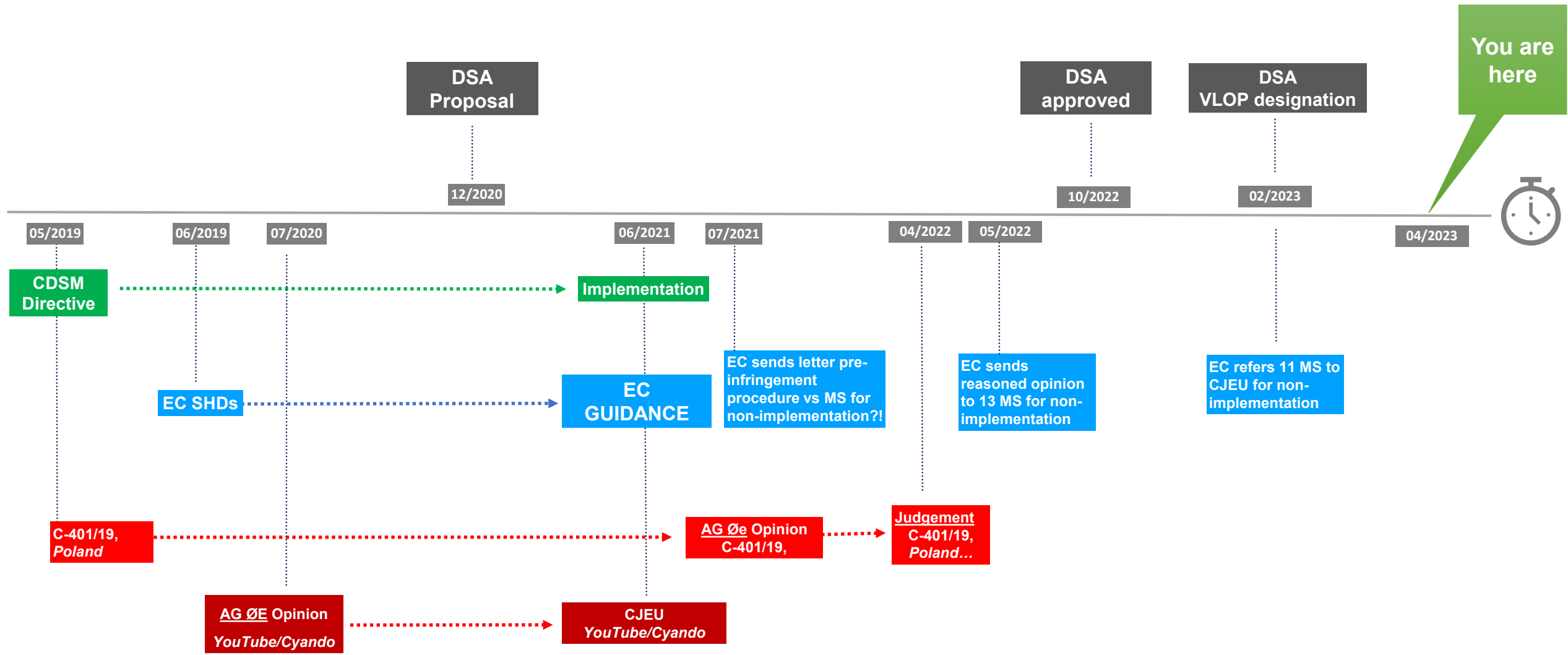
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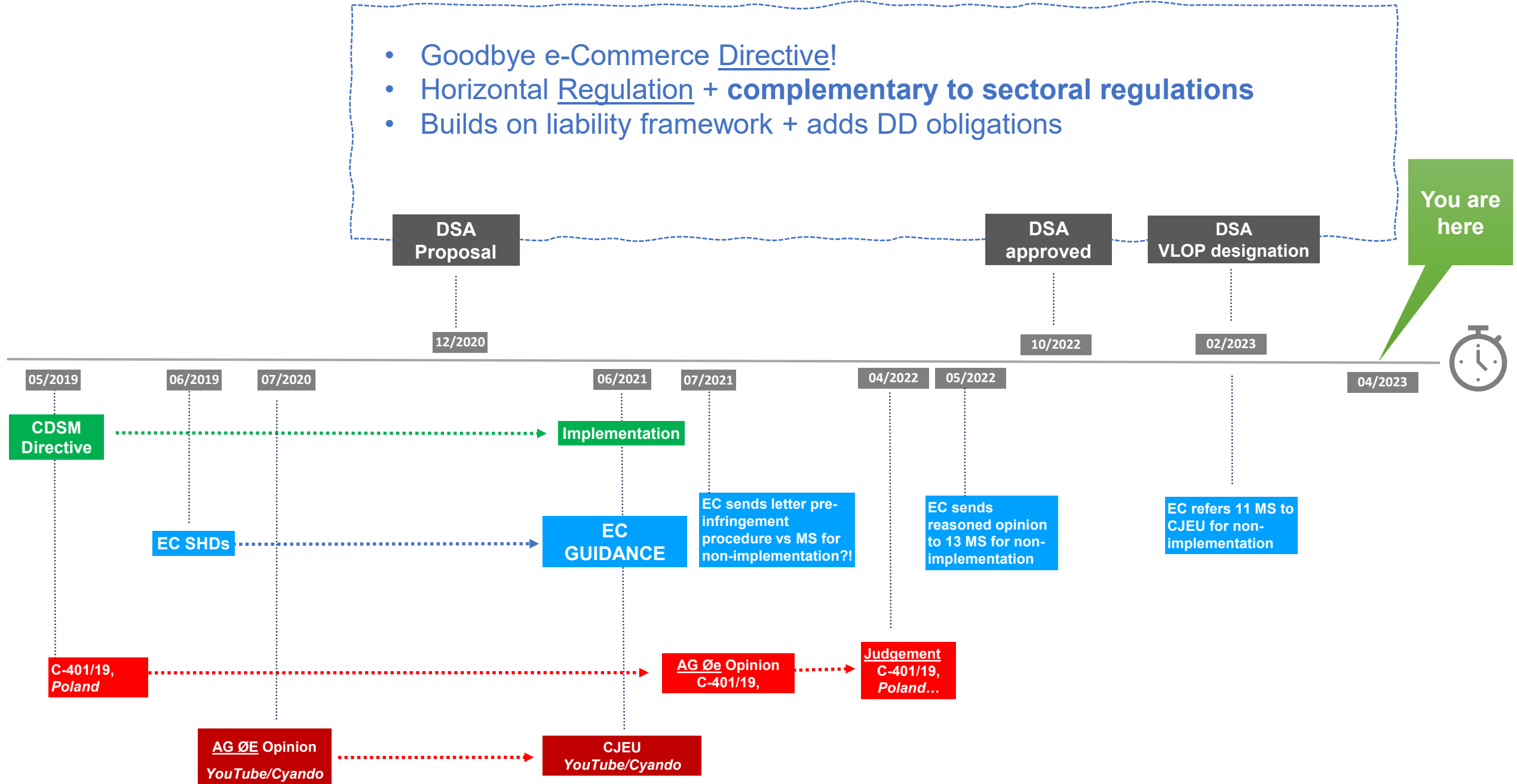


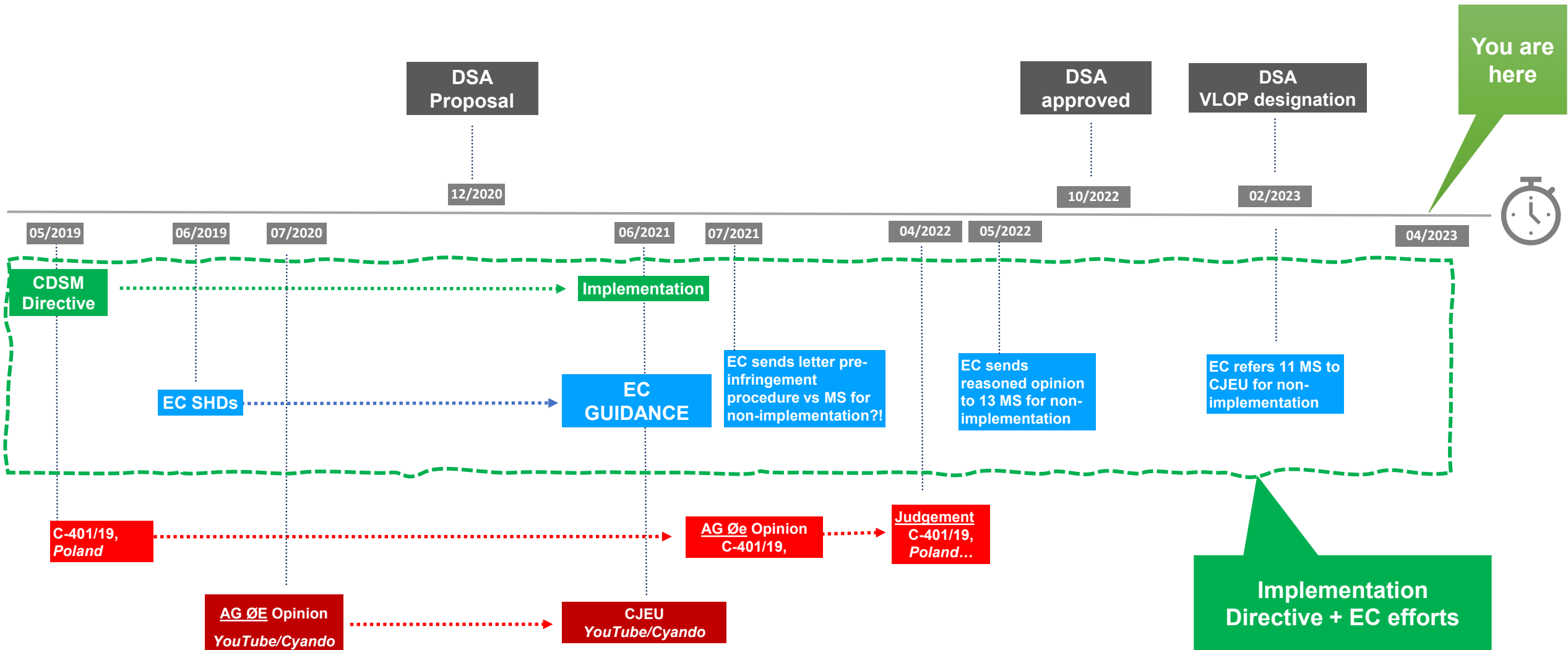
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- Goodbye e-Commerce Directive!
- Horizontal Regulation + **complementary to sectoral regulations**
- Builds on liability framework + adds DD obligations

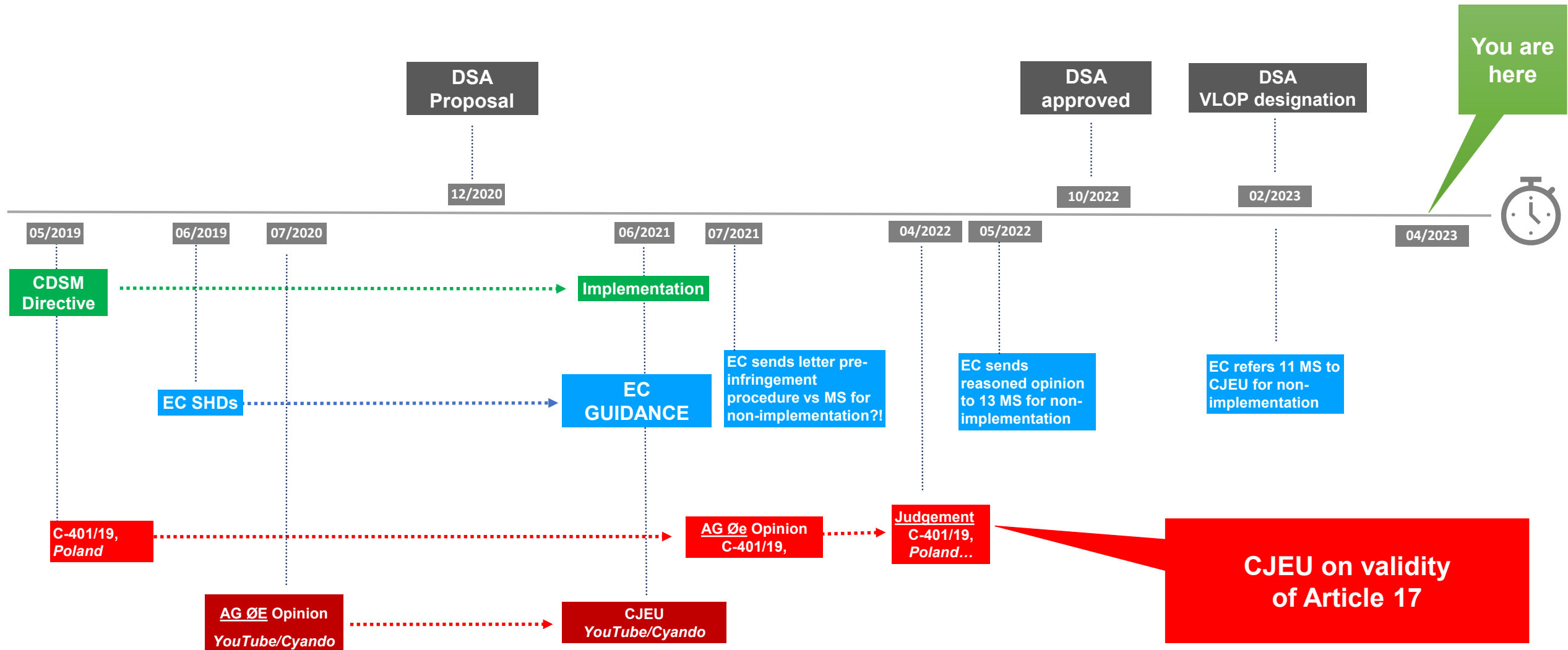




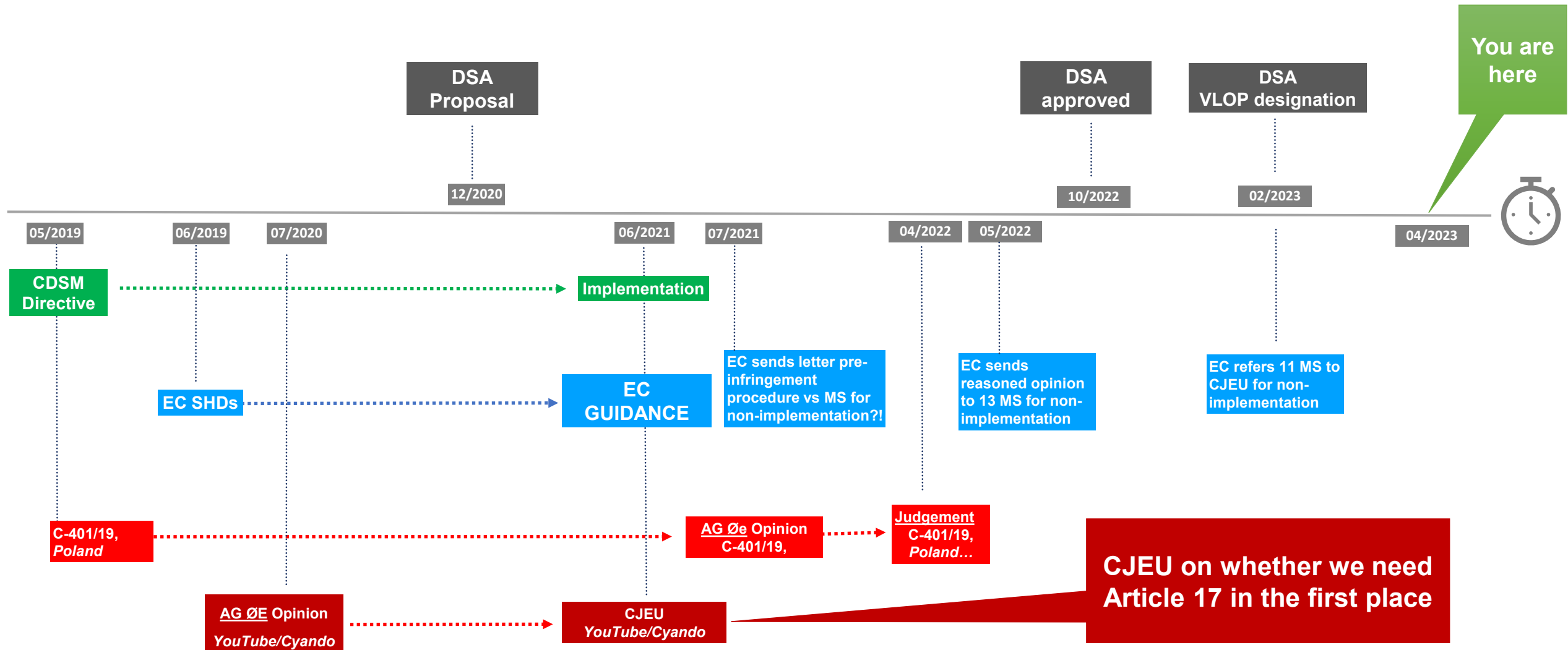
You are here



Implementation Directive + EC efforts



See Professor Rosati's presentation





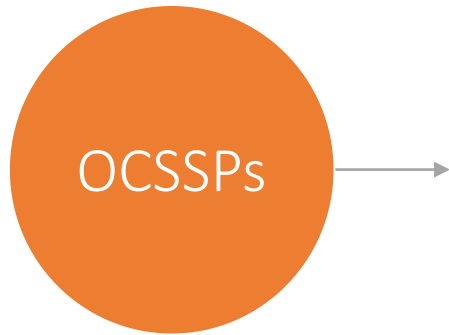
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**Who does Article 17 it apply to?**



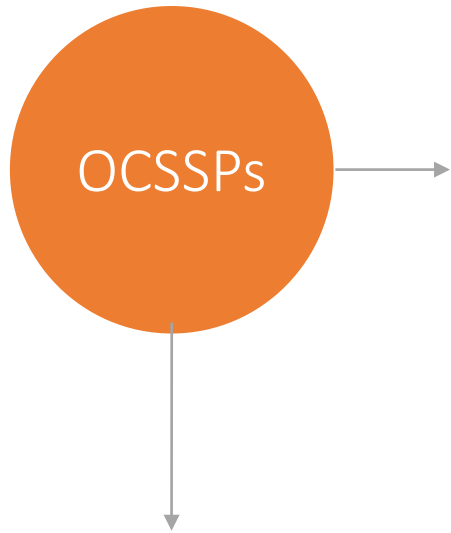
OCSSPs



**Positive definition**

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





### Positive definition

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



### Exclusions

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





**Positive definition**

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



If not



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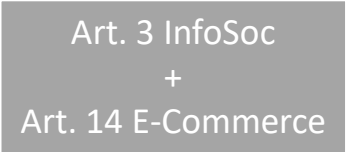
- Electronic comms services
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outside CDSM Directive





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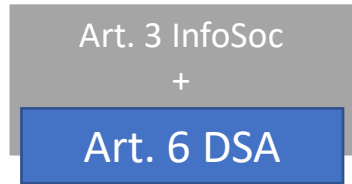
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If not



outside CDSM Directive



Do size and reach matter?



**VS**





# Do size and reach matter? Yes, but...



VS



Art. 17(6)  
CDSMD

- IF: > 3 years **and** > 10 M EUR revenue → only notice & takedown
- IF: < 5M visitors → also notice & stay-down

Do size and reach matter? Yes, but...



VS



Art. 19 DSA



Art. 17(6)  
CDSMD

- Excluded from obligations
- Except transparency reporting

- IF: > 3 years **and** > 10 M EUR revenue → only notice & takedown
- IF: < 5M visitors → also notice & stay-down



A bipolar copyright system



*Or:*

*an employment program for EU lawyers*

OCSSP or not?

substack



SSRN



twitch



YouTube



amazon

tumblr



Booking.com



ebay



PATREON



Etsy

Apple Search Ads

NETFLIX

dailymotion



box

Credit: Remy  
Chavannes

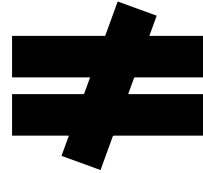
# A Bipolar © system

**Non-OCSSP**

Art. 3 InfoSoc + 14 e-Commerce (now DSA)

**Default: no direct liability**  
Hosting safe harbor + modulated duties of care

**Content Moderation**  
Modular duties of care based on YT case (tied to liability assess/) + national law



**OCSSP**

Art. 17 CDSM Directive

**Default: Direct liability**  
Specific liability exemption mechanism tied to best efforts obligations

**Content Moderation**  
Preventive measures (4) vs substantive & procedural safeguards (5-10)

**+ enter the DSA**

complementary role to sectoral legislation

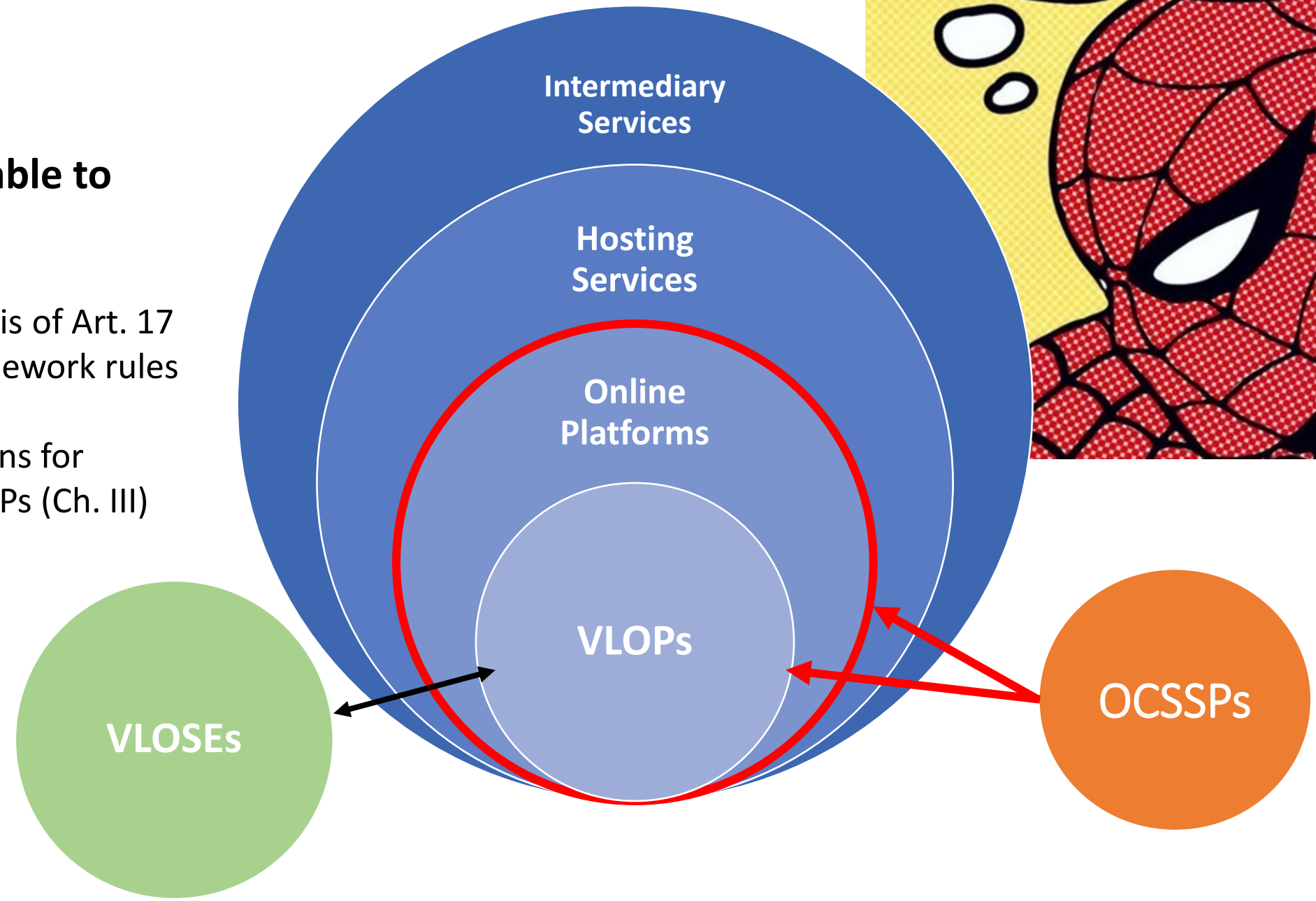
including copyright

See Professor Senftleben's presentation



## DSA Rules applicable to OCSSPs

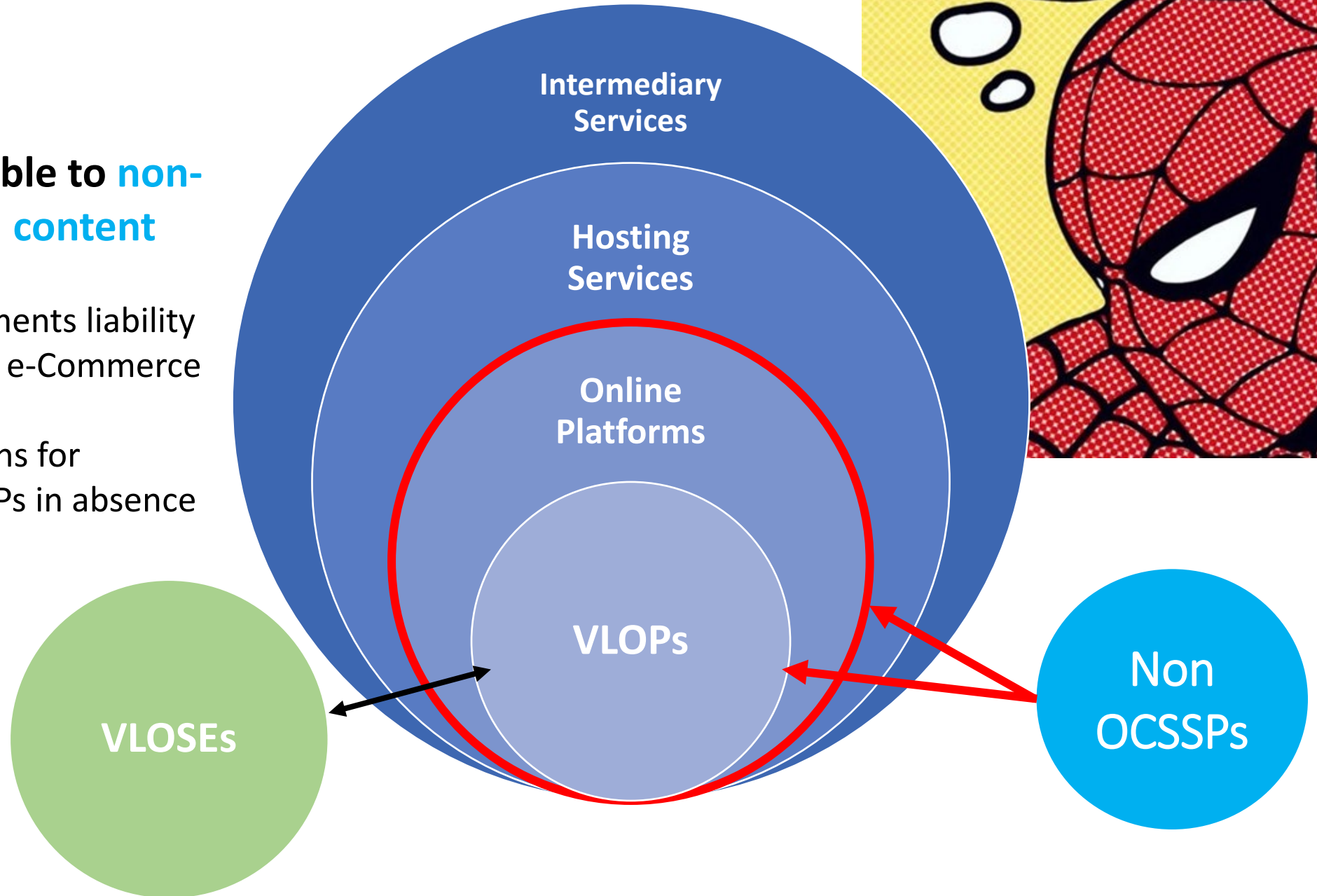
- Outside lex specialis of Art. 17
- Some liability framework rules (Ch. II)
- Many DD obligations for Platforms and VLOPs (Ch. III)





## DSA Rules applicable to **non-OCSSPs** hosting © content

- Replaces + supplements liability framework rules in e-Commerce Directive
- All (?) DD obligations for Platforms and VLOPs in absence of lex specialis?





**A (multi-dimensional?)  
Bipolar © system**

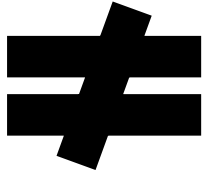
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Art. 17 CDSM Directive

**DSA +**



**DSA -**

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**Content Moderation**  
Preventive measures (4) vs substantive & procedural safeguards (5-10)

# Some resources

- **Interplay between Copyright Law and the DSA,**  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3841606](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3841606)
- **Copyright Content Moderation Interdisciplinary Mapping Report,**  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4210278](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4210278)
- **Copyright Content Moderation Impact on Access & Diversity Report,**  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4380345](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4380345)
- **Copyright Content Moderation Final Report: Conclusions & Recommendations,**  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4403423](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4403423)
- **How Platforms Govern Users' Copyright-Protected Content: Exploring the Power of Private Ordering and Its Implications,** [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4372293](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4372293)
- **DSA – Using Terms and Conditions to apply fundamental Rights,**  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4286147](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4286147)
- **Putting the Digital Services Act Into Practice: Enforcement, Access to Justice, and Global Implications,**  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4384266](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4384266)
- **IViR:** <https://www.ivir.nl/employee/quintais/> // **SSRN:** <https://ssrn.com/author=1833927>