

~~Platform~~ Internet

regulation 2.0

The Digital services Act

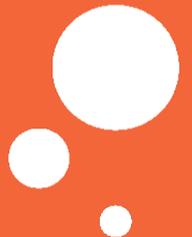
10.5.2021

NJFE

sebastian.felix.schwemer@jur.ku.dk

[@schwemer](https://twitter.com/schwemer)

jura.ku.dk/schwemer



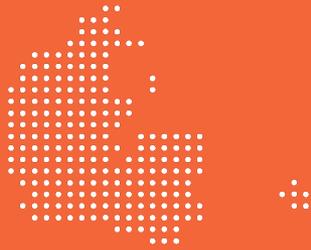
Disclaimers:
Involvement in preparatory works
some (selected) aspects
Thoughts in progress



Background + time travel...

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

InfoSoc Directive 2001/29/EC



Liability



Liability exemption

E-Commerce Directive

"**double**" **horizontal** (liability *and* kinds of information)

3 **functions** of an information society service provider: "mere conduit", "caching" and hosting (notice-and-action)

Prohibition of **general monitoring** obligations (art. 15 ECD)

NB: not about liability (or conditions for injunctions...)



2000



E-Commerce Directive



facebook.



Porn



Tik Tok



**EU Commission:
Communication
Towards a modern,
more European
copyright framework**

May 2015

December 2015

**EU Commission:
Strategy for the digital
single market**

May 2016

September 2016

**EU Commission:
Proposal for a Directive
on copyright in the
Digital Single Market
COM(2016)0593**

**EU Commission:
Proposal for AVMSD refit
COM(2016)**

**Code of Conduct
Countering illegal hate
speech**



Code of Practice on Disinformation

EU Commission:
Recommendation (EU)
2018/334

1 March 2018

EU Commission:
Proposal for terrorist
content regulation

12 September 2018 09/2018

P2B Regulation
(EU) 2019/1150

"Digital Services Act"
leak

2019



DSM Directive

Against: Netherlands, Luxemburg,
Poland, Italy, Finland and Sweden
(Belgium, Estonia and Slovenia abstain)

17 May 2019
OJ: Directive
2019/790 (EU)

C-401/19: Poland v.
Commission (Art. 263
TFEU)

Implementation
until June 2021



EP initiative reports

Q1/Q2 2020



Inception impact assessments

2 June 2020

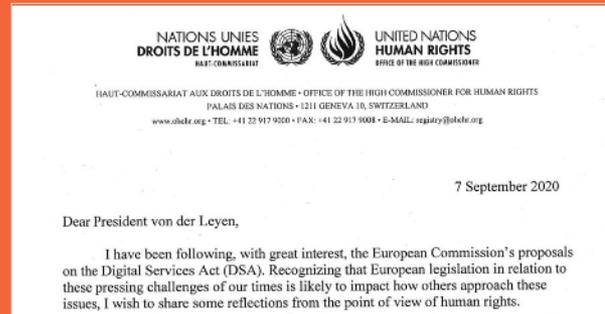
"Digital Services Act" package

15 December 2020

DSA
DMA



Public consultation → 8 September 2020



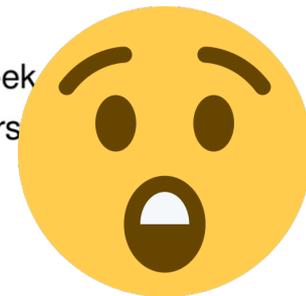
II. Reviewing the liability regime of digital services acting as intermediaries?

2 The liability regime for online intermediaries is primarily established in the E-Commerce Directive, which distinguishes between different types of services: so called 'mere conduits', 'caching services', and 'hosting services'.

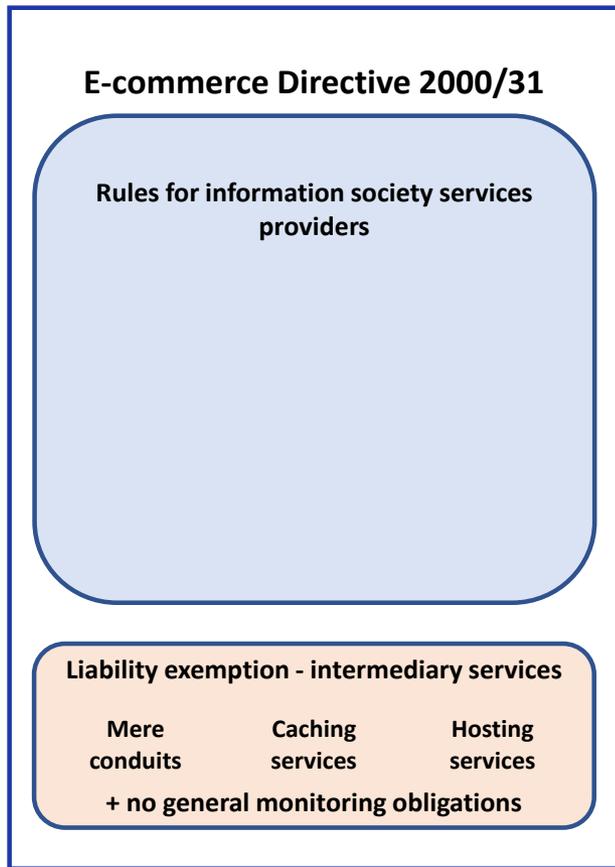
In your understanding, are these categories sufficiently clear and complete for characterising and regulating today's digital intermediary services? Please explain.

4 Does the current legal framework dis-incentivize service providers to take proactive measures against illegal activities? If yes, please provide your view on how disincentives could be corrected.

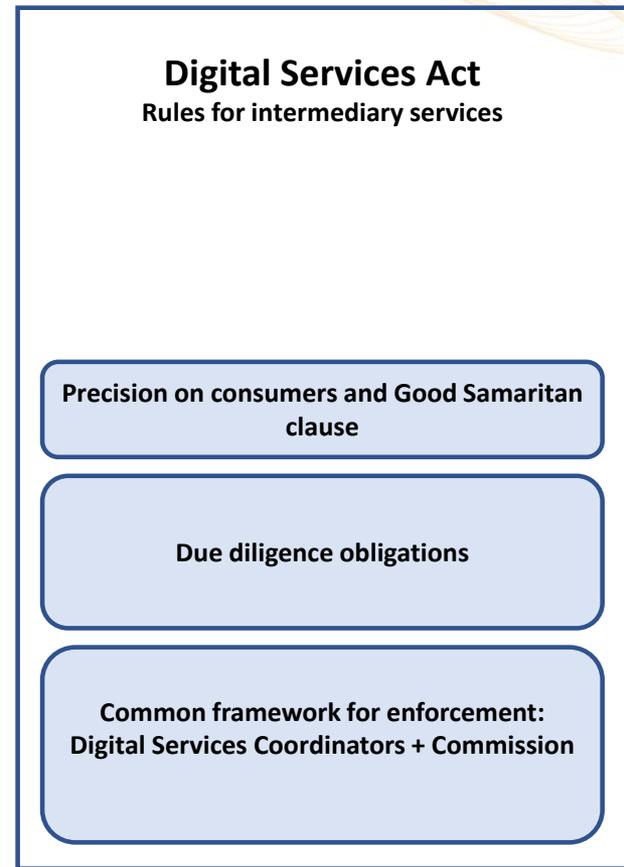
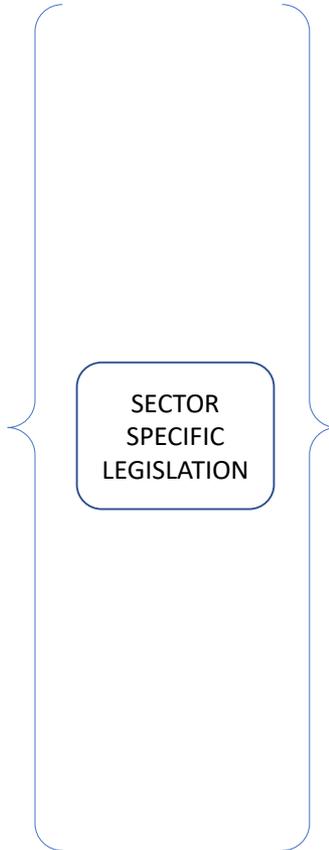
6 The E-commerce Directive also prohibits Member States from imposing on intermediary service providers general monitoring obligations or obligations to seek facts or circumstances of illegal activities conducted on their service by their users. In your view, is this approach, balancing risks to different rights and policy objectives, still appropriate today? Is there further clarity needed as to the parameters for 'general monitoring obligations'? Please explain.



so what's the DSA about?



2000



2020

1) Liability exemptions

Art. 12 ECD "mere conduit"



Art. 3 DSA

Art. 13 ECD "caching"



Art. 4 DSA

Art. 14 ECD hosting



Art. 5 DSA

Art. 6 DSA

"good" samaritan

A subsidiarity principle

- (26) Whilst the rules in Chapter II of this Regulation concentrate on the exemption from liability of providers of intermediary services, it is important to recall that, despite the generally important role played by those providers, the problem of illegal content and activities online should not be dealt with by solely focusing on their liability and responsibilities. Where possible, third parties affected by illegal content transmitted or stored online should attempt to resolve conflicts relating to such content without involving the providers of intermediary services in question. Recipients of the service should be held liable, where the applicable rules of Union and national law determining such liability so provide, for the illegal content that they provide and may disseminate through intermediary services. Where appropriate, other actors, such as group moderators in closed online environments, in particular in the case of large groups, should also help to avoid the spread of illegal content online, in accordance with the applicable law. Furthermore, where it is necessary to involve information society services providers, including providers of intermediary services, any requests or orders for such involvement should, as a general rule, be directed to the actor that has the technical and operational ability to act against specific items of illegal content, so as to prevent and minimise any possible negative effects for the availability and accessibility of information that is not illegal content.



Non-hosting intermediaries...

- (27) Since 2000, new technologies have emerged that improve the availability, efficiency, speed, reliability, capacity and security of systems for the transmission and storage of data online, leading to an increasingly complex online ecosystem. In this regard, it should be recalled that providers of services establishing and facilitating the underlying logical architecture and proper functioning of the internet, including technical auxiliary functions, can also benefit from the exemptions from liability set out in this Regulation, to the extent that their services qualify as ‘mere conduits’, ‘caching’ or hosting services. Such services include, as the case may be, wireless local area networks, domain name system (DNS) services, top-level domain name registries, certificate authorities that issue digital certificates, or content delivery networks, that enable or improve the functions of other providers of intermediary services. Likewise, services used for communications purposes, and the technical means of their delivery, have also evolved considerably, giving rise to online services such as Voice over IP, messaging services and web-based e-mail services, where the communication is delivered via an internet access service. Those services, too, can benefit from the exemptions from liability, to the extent that they qualify as ‘mere conduit’, ‘caching’ or hosting service.



"Good samaritan"?

Article 6

Voluntary own-initiative investigations and legal compliance

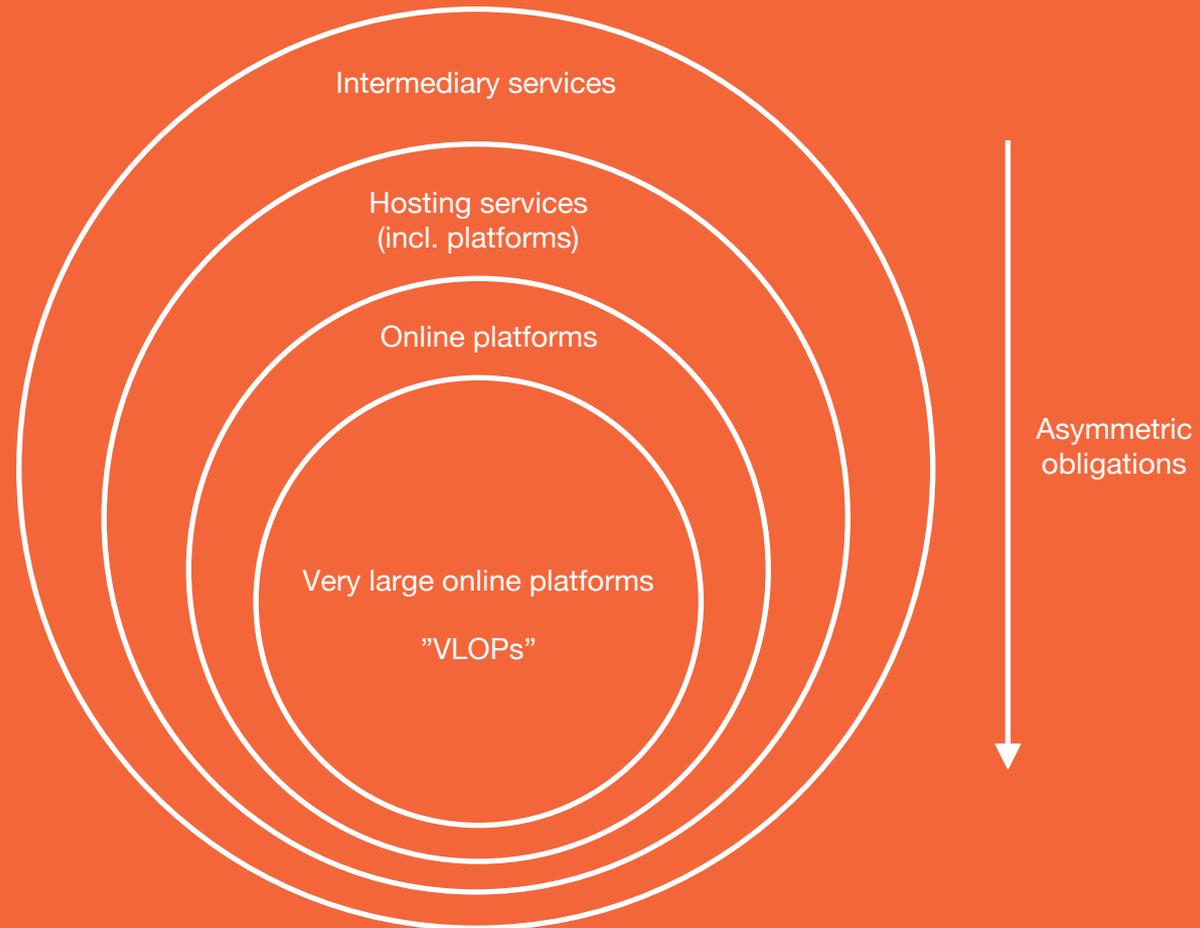
Providers of intermediary services shall not be deemed ineligible for the exemptions from liability referred to in Articles 3, 4 and 5 solely because they carry out voluntary own-initiative investigations or other activities aimed at detecting, identifying and removing, or disabling of access to, illegal content, or take the necessary measures to comply with the requirements of Union law, including those set out in this Regulation.



Recommendation (EU) 2018/334, point 18: **proactive measures:**

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

2) Due diligence obligations

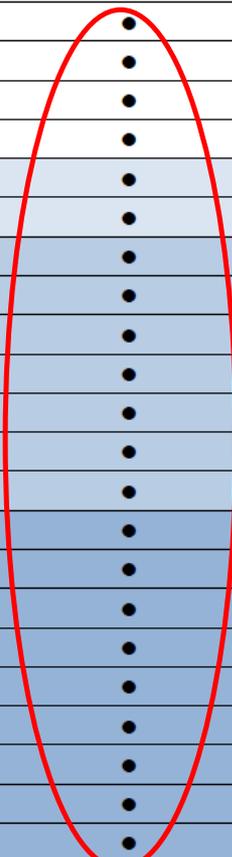


(f) 'intermediary service' means one of the following services:

- a 'mere conduit' service 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;
- a 'caching' service that consists of the transmission in a communication network of information provided by a recipient of the service, involving the automatic, intermediate and temporary storage of that information for the sole purpose of making more efficient the information's onward transmission to other recipients upon their request;
- a 'hosting' service that consists of the storage of information provided by, and at the request of, a recipient of the service;



	VERY LARGE PLATFORMS	ONLINE PLATFORMS	HOSTING SERVICES	ALL INTERMEDIARIES
Points of contact	•	•	•	•
Legal representatives	•	•	•	•
Terms and conditions	•	•	•	•
Reporting obligations	•	•	•	•
N&A	•	•	•	
Statement of reasons	•	•	•	
Complaint handling	•	•		
OOO	•	•		
Trusted flaggers	•	•		
Abusive behaviour	•	•		
KYBC	•	•		
Reporting criminal offences	•	•		
Advertising transparency	•	•		
Reporting obligations	•			
Risk assessment and mitigation	•			
Independent audits	•			
Recommender systems	•			
Enhanced advertising transparency	•			
Crisis protocols	•			
Data access and scrutiny	•			
Compliance officer	•			
Reporting obligations	•			



→ CUMULATIVE OBLIGATIONS!

Art. 12 DSA (all)

Terms and conditions

1. Providers of intermediary services shall include **information** on any restrictions that they impose in relation to the use of their service in respect of information provided by the recipients of the service, in their terms and conditions. That information shall include information on any policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making and human review. It shall be set out in **clear and unambiguous language** and shall be publicly available in an easily accessible format.

2. Providers of intermediary services **shall act in a diligent, objective and proportionate manner** in applying and enforcing the restrictions referred to in paragraph 1, with due regard to the rights and legitimate interests of all parties involved, including the applicable fundamental rights of the recipients of the service as enshrined in the Charter.



Art. 14 + 15 DSA (hosting)

Notice- and action mechanisms

[a specified process]

3. Notices that include the elements referred to in paragraph 2 shall be considered to give **rise to actual knowledge** or awareness for the purposes of Article 5 in respect of the specific item of information concerned.



Statement of reasons

[different information; i.a. „information on the use made of automated means in taking the decision“ + publicly available database!]



Art. 17 DSA (online platforms)

Internal complaint-handling systems

May not be solely taken on the basis of automated means

But: Why only online platforms?



Art. 19 + 20 (online platforms)

Trusted notifiers

Duty to ensure handling of trusted notifier notices (appointed by Digital Services Coordinator of MS)); duty to inform if „a significant number of insufficiently precise or inadequately substantiated notices“ etc.



Measures and protection against misuse

Suspension of recipients of the service „that frequently provide manifestly illegal content“

Suspension of notifiers (any kind?) that „that frequently submit notices or complaints that are manifestly unfounded“

But: Why only online platforms?

Art. 26 + 27 (VLOPs)

Basically +45mio users

Risk assessment : significant systemic risks? (e.g. negative effects for the exercise of the fundamental rights e.g. FoE Fol; or dissemination of illegal content through their services)

Risk mitigation: e.g. adapting content moderation or recommender systems etc.

Accountability of very large online platforms

Points of contact
Legal representatives
Terms and conditions
Reporting obligations
N&A
Statement of reasons
Complaint handling
OOB
Trusted flaggers
Abusive behaviour
KYBC
Reporting criminal offences
Advertising transparency
Reporting obligations
Risk assessment and mitigation
Independent audits
Recommender systems
Enhanced advertising transparency
Crisis protocols
Data access and scrutiny
Compliance officer
Reporting obligations

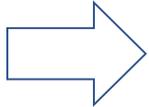
Annual independent audit covering compliance with all obligations and Codes of conduct

Board publishes reports on systemic risks once a year



Risk assessment (yearly):

- Illegal content and activity
- Fundamental rights, freedom of expression, unjustified discrimination
- Manipulation of their service (public health, electoral processes, protection of minors, etc)



Commission guidelines



Risk mitigation measures:

- Adapt services, terms and conditions
- Prevent advertising income to infringers
- Change moderation and recommender systems
- Codes of conduct

Article 29(1) Recommender systems

Very large online platforms that use recommender systems shall set out in **their terms and conditions**, in a clear, accessible and easily comprehensible manner, the **main parameters** used in their recommender systems, as well as **any options** for the recipients of the service **to modify** or influence those main parameters that they may have made available, including at least one option which is **not based on profiling**, within the meaning of Article 4 (4) of Regulation (EU) 2016/679.

EDPs: rather an opt-out?

(...) hosting service which, *at the request* of a recipient of the service, *stores and disseminates* to the public information (...)

*Art. 2(h) DSA

Systemic risk? (news vs. entertainment etc.?)

facebook.

YouTube

Spotify

NETFLIX

And much more...

e.g. online **advertising** transparency (platforms) and advertising repositories (VLAPs)

Enforcement: Mix of national and EU (Commission, European Board of Digital Services)



EDPS Opinions on the Digital Services Act and the Digital Markets Act

10 Feb 2021

EDPS Opinions on the Digital Services Act and the Digital Markets Act

The EDPS published Opinions today on the European Commission's proposal for the Digital Services Act and the Digital Markets Act. Both Opinions aim to ensure a digital future rooted in EU values, including the protection of fundamental rights and freedoms.



Digital Services Act Proposal
Recommendations for the EU Parliament and Council

MAKE YOUR VOICE HEARD ON THE DIGITAL SERVICES ACT (DSA)

On 15 December 2020, the European Commission presented its proposal for a new Digital Services Act (DSA). In the past years, online platforms have gained the power to impact our fundamental rights, our society and democracy. The DSA presents a chance to give people more rights and freedoms and start building a better internet, with clear rules for take-downs of illegal content, more transparency and choice for users.

Please help us improve the proposal by contributing comments and suggestions on the Commission proposal. Your contribution will be valuable for our work and amendments in the EU Parliament. The discussion will close on Sunday, 23 May at midnight. Our teams remain at your disposal for any questions or further comments at joseph.mcnamee@europarl.europa.eu.

Two ways to give feedback:

1. You can leave a general remark concerning the text as whole [here](#).
2. You can amend single paragraphs using the plus icons. Furthermore, you can comment while reading (and don't have to scroll to the very bottom). You can even discuss existing annotations.



France wants to widen the scope of the Digital Services Act to include live-streaming platforms of user-generated content (think Amazon's Twitch), search engines and private messaging services.



France wants to widen scope of Digital Services Act
23 Apr 2021 - Pro Alert - By Laura Kayali
api.politico.eu



Position zum Digital Services Act und Digital Market Act

18.12.2020

Die Europäische Kommission hat am Mittwoch den 16.12. einen Vorschlag für neue Regeln für Inhalte auf sozialen Medien veröffentlicht. Die Digitalpolitiker der EVP-Fraktion haben gemeinsam mit den Kollegen der CDU/CSU-Bundestagsfraktion dazu gemeinsame Vorschläge

entwickelt. Das Positionspapier finden Sie hier:

[Positionspapier DSA DMA Durz-Schipanski-Schwab-Voss](#)

Herunterladen

summarising (my 5c+s)

The good "old"

Principles remain! (focus on *illegal* information, gradual conditions, prohibition of general monitoring, liability exemption mechanism...)

The "new" stuff

A regulation!

Good Samaritan: opening the doors for (more) pro-active

Transparency / **due dilligence** (e.g. VLOPs)

[Enforcement]

But: "the devil is in the detail"

Things to consider...

Scope: What will the internet look like in 20 years?

More or less „private“ enforcement by (big) tech – enough safeguards?

Creative commons attribution

Scale by Amelia (Noun Project)

Stopwatch by Veronika Krpciarova (Noun Project)

filter By Eucalyp (Noun Project)

Denmark by Chameleon Design (Noun Project)

yoga by Mariia Nisiforova (Noun Project)

european union by Federico Panzano, IT (Noun Project)

screws by Oleksandr Panasovskyi (Noun Project)

Related writing:

- Schwemer, S.F., Mahler, T. & Styri, H. (2020). *Legal analysis of the intermediary service providers of non-hosting nature*. Final report prepared for the European Commission: <https://op.europa.eu/en/publication-detail/-/publication/3931eed8-3e88-11eb-b27b-01aa75ed71a1/language-en/format-PDF/source-179885922>
- Schwemer, S.F. (2019). 'Trusted notifiers and the privatization of online enforcement', *Computer Law & Security Review*, <https://doi.org/10.1016/j.clsr.2019.105339>
- Quintais, P. and Schwemer S.F. (2021). 'The Interplay between the Digital Services Act and Sector Regulation: How Special is Copyright?', https://ssrn.com/abstract_id=3841606
- Schwemer, S.F., Mahler, T., & Styri, H. (2021). 'Liability exemptions of non-hosting intermediaries: Sideshow in the Digital Services Act?' *Oslo Law Review (forthcoming)*

Centre for Information and Innovation Law (CIIR)

sebastian.felix.schwemer@jur.ku.dk

@schwemer

