

# CJEU hearing in the Polish challenge to Article 17: Not even the supporters of the provision agree on how it should work

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On Tuesday, November 10, the Court of Justice of the European Union (CJEU or Court) heard case C-401/19. This case is a request by the Polish government to annul the filtering obligation contained in Article 17 of the Copyright in the Digital Single Market (DSM) Directive on the grounds that it will lead to censorship and will limit the freedom of expression and the freedom to receive and impart information guaranteed in Article 13 of the EU Charter of Fundamental Rights (Charter).



The defendants in this case are the European Parliament and the Council of the European Union. In addition, the European Commission and the governments of France and Spain intervened in the case on the side of the defendants. Advocate General Saugmandsgaard Øe was also present at the hearing.

Even for astute followers of the discussions around the implementation of Article 17, the hearing contained a number of surprises. While several Member States have been soldiering on with their national implementation proposals with little regard for the fundamental rights implications of Article 17, the hearing showed that the Court is taking Poland's complaint very seriously and that the compliance of the contested provisions of Article 17 with the Charter is far from evident. Frequent reference was made during the hearing to the recent opinion of Advocate General Saugmandsgaard Øe in the YouTube and Cyando cases, which is highly critical of extensive obligations on platforms to police the copyright infringements of their users.

On the face of it, the case is about Poland's request to annul Articles 17(4)(b) and (c) of the DSM directive. Poland argued its case, which essentially rests on the observation that while not explicitly mandating them, Article 17(4)(b) and (c) effectively require platforms to implement upload filters because there are no other effective means to comply with the obligations contained therein. Poland argues that this will lead to censorship and will limit the freedom of information of the users of online platforms.

According to Poland, the key problem with the directive is the move away from active participation of rightholders (as initiators of removal requests in the context of notice and takedown procedures) and instead handing the responsibility of removing infringing uploads over to platforms who will have to develop private enforcement systems to avoid liability for copyright infringement. Because they are not facing any comparable risk when they limit user rights by blocking access to legal content, this creates strong incentives for over-blocking. This in turn will result in censorship and violation of the fundamental rights to freedom of expression and information under the Charter. Consequently, the problematic parts of Article 17 should be annulled by the Court.

All other parties intervening in the case objected to this line of argument and stated that in their view Article 17 does not violate any fundamental rights. However, they presented strikingly contradictory interpretations of what Article 17 actually requires of platforms. There are two distinct lines of argument: The Commission, the Council and the European Parliament argued that that Article 17 contains enough internal safeguards to prevent users' fundamental rights from being unduly limited. On the other hand, France and Spain argued that some limitations of fundamental freedoms are justified by the objective that Article 17 seeks to achieve.

## Best efforts obligation vs an obligation of result

At the core of the issue is the uneasy relationship between the obligation to make best efforts to prevent the availability of specific works contained in Article 17(4)(b) and the requirement in Article 17(7) that any measures implemented by platforms must not lead to the prevention of the availability of works that do not infringe copyright. In its interventions the Commission made it clear that it views Article 17(7) as an "obligation of result" that establishes the stronger legal norm, which therefore takes precedence over the weaker "obligation of best efforts" in Article 17(4). In the course of the hearing both the Council and the Parliament backed this assessment. In other words, all three EU institutions made the case that where there is a conflict, the protection of the fundamental rights of users must be prioritised over requests by rightholders to block the availability of their works.

In response to questions about the mechanism proposed by the Commission in its guidance consultation, both the Commission and the Council expressed their belief that this conflict of norms can be reconciled by a mechanism that limits automated filtering to "manifestly infringing" uses of works and that requires human review of any matches where there is any likelihood that the use is legitimate. Given the absolute nature of the result obligation in Article 17(7), this would further mean that user uploads must remain available while they are under review and can only be removed once a platform has established that a use is indeed infringing.

In making these arguments in front of the Court, the European Commission effectively doubled down on the approach outlined in its guidance consultation, which has recently been subject to heavy criticism from a group of seven national governments including France and Spain. The Commission's position is further strengthened by the Council and the Parliament's interventions in front of the Court, which provided support for the Commission's reasoning. While it remains to be seen whether the CJEU will be convinced by these arguments (the ruling is not expected until the summer of 2021), it seems clear that the Commission will have to build its implementation guidance on this line of argument. This could have considerable impact on how Member States have to implement the provisions of the directive.

## A temporary inconvenience vs irreparable harm

While formally on the same side of the case, the two Member States intervening in the case (France and Spain) brought forward an entirely different line of argument to defend the legality of the directive, which at key points contradicted the arguments brought forward by the EU institutions. According to France and Spain, the proportionality of any limitations of freedom of expression in the directive must be established in relation to the purported objective of the directive. Both France and Spain argued that the directive seeks to address a power imbalance between certain platforms (online content-sharing service providers) and rightholders by bringing the first into the scope of copyright. In simple terms, this is done by establishing that these platforms are directly liable for communication to the public when they make available works uploaded by their users. As I have argued elsewhere, this view is based on a misunderstanding of the "true intent" of the legislator on the part of those national governments, who seem to consider the significant changes that have been made to the text of Article 17 from its inception to its final adoption to be a historic accident rather than an expression of the legislator's will to protect users' fundamental rights.

While both Member States concede that their interpretation of Article 17 will ultimately result in situations where measures to prevent the availability of works limit the freedom of expression of users, they argue that in such cases the ex-post complaint and redress mechanism contained in Article 17(9) provides sufficient protection for users' rights. Both Member States disagreed vehemently with the position of the EU institutions and argued that any conflict between the fundamental rights of rightholders and users must always be resolved in favour of rightholders. Both argued that the harm to rightholders that can be caused by temporary availability of infringing works on platforms is much greater than any harm to users caused by the temporary blocking of non-infringing uploads. They further claimed that while infringing works could "go viral in mere seconds" causing "massive economic harm" to rightholders, requiring users to file complaints when non-infringing uploads are blocked and keeping these uploads offline while the complaints are reviewed would merely constitute a "temporal inconvenience" that is justified given the purported overall objective of the directive to strengthen the position of rightholders vis-a-vis platforms. Consequently, both France and Spain reject the mechanism proposed by the Commission in its guidance consultation as "incompatible with Article 17".

It remains to be seen how far the Court will be convinced by this line of argument that hinges more on a proclaimed "original intent" of the directive than on its actual text. It is clear that France and Spain are effectively fighting a two-front battle. On one front, they argue that the Polish case is without merit. On the other, they attempt to undermine the EU institutions' arguments on why the Polish case is without merit in order to defend their own maximalist interpretation of the provision. This contradiction was not lost on the Polish Government, which in its final remarks observed that the interpretation of Article 17 put forward by the Commission and the Council goes directly against what France has argued and that "this clearly shows that there is a problem with Article 17 as such".

## Questions by the Court

A substantial number of the questions from the Court and from the Advocate General focussed on better understanding the relationship between the best efforts obligation in Article 17(4) and the results obligation in 17(7) and the mechanism proposed by the Commission in its guidance consultation. Particular attention was paid to the question of whether uploads must remain available while they are under review or should be blocked until their legality has been confirmed. This strong focus on the guidance consultation almost gave the impression that the hearing was not so much held for the purpose of determining whether the contested provisions must be annulled, but rather to understand if the mechanism proposed by the Commission would achieve an internal balance of Article 17 that offers sufficient protection for the fundamental rights at stake.

One key weakness shared by all parties defending Article 17 was a total failure to point to any measures other than upload filters to effectively comply with the best efforts obligation contained in paragraphs (4)(b) and (c). Despite repeated questions from the bench, none of the parties could name alternatives to the use of filtering technologies. The Commission made a weak attempt to list a number of different methods for filtering (fingerprints, hashes, metadata, keywords), the Council invoked artificial intelligence (without providing any specifics) and Spain pointed to "fuzzy hashing". In the end, none of the interventions managed to undermine the Polish claim that (at least given the current state of technology) the only effective way to comply with Article 17(4)(b) and (c) is the use of filters. As Poland pointed out in its final statement, the different technological approaches mentioned constitute different types of filtering technology, rather than alternatives to filtering technology.

A final set of questions revolved around the prohibition of general monitoring obligations in Article 15 of the E-Commerce Directive. The Court showed interest in the relationship between the blocking obligation outlined in Article 17(4) and the ban on general monitoring obligations contained in Article 17(8). On this issue, the AG seemed particularly sceptical that Article 17(4)(b) and (c) would not result in general monitoring. At one point he called the European Parliament "naïve" for doubting that "major rightholders would submit long lists with 1000s of works to be blocked" as soon as the directive were in effect.

## A long wait ahead

Based on yesterday's hearing, it remains plausible that the CJEU might strike down the contested provisions in Article 17. If it does, this would likely be on the grounds that they constitute a general monitoring obligation in violation of the E-Commerce Directive and, consequently, the Charter of Fundamental Rights.

It is also conceivable that the Court could identify minimum criteria for the protection of the fundamental

rights of users. While these could fall along the lines of the mechanism put forward by the Commission, this is far from certain at this stage. A decision along those lines could, however, turn elements of the Commission guidance from non-binding recommendations to legal obligations on Member States.

Given that a ruling will not take place until after the implementation deadline for the directive (the AG opinion is due on the 22nd of April 2021 which is only 6 weeks before the implementation date), the Commission will need to publish its guidance before the Court has ruled and Member States will need to make implementation choices without having access to the Court's judgment.