

Divergence instead of guidance: the Article 17 implementation discussion in 2020 - Part 2

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Part 1 of this post summarised the conclusion of the European Commission's stakeholder dialogue on the implementation of Article 17 and the presentation of the German proposal in a user rights preserving way. It concluded with the Commission's targeted consultation on the implementation of Article 17 which gave a first glimpse of the Commission's own interpretation of the diverging obligations contained in Article 17.



Pushback from rightsholders

The closure of the Commission's targeted consultation in September (which received more than 100 responses that, months later, are yet to be published by the Commission) was accompanied by angry rightsholder pushback:

In an open letter to Commissioner Breton, a broad coalition of organisations representing rightsholders complained that "in its Consultation Paper, the Commission is going against its original objective of providing a high level of protection for rightsholders and creators and to create a level playing field in the online Digital Single Market" and that "By interpreting Article 17 in a manner that is contrary to the intent of the EU legislature and the EU copyright acquis, the proposed guidance amounts to an attempt to rewrite the Directive and amend EU copyright law without due legislative process."

Over the next few weeks similar statements emerged, first from the French government and later in the form of a non-paper issued by Croatia, Denmark, France, Greece, Portugal and Spain. This created even more pressure on the Commission to retract its position.

A new player enters the arena

A new dynamic emerged at the end of October, with the CJEU announcement that it would hear the parties in Case C-401/19 on the 10th of November. In this case, which results from the Polish government's challenge to Article 17 right after the implementation of the DSM Directive, France (together with Portugal and Spain) and the Commission (together with the Council and the Parliament) suddenly found themselves on the same side, opposing the Polish argument that Article 17 violates fundamental rights and must be annulled.

While it is clear that the Commission's controversial guidance on Article 17 is still far from adoption, the hearing forces the Commission to go on the record about its interpretation of the conflict at the heart of Article 17. In line with the arguments presented in the consultation document, the Commission argues that Article 17 does not infringe on the fundamental rights of users precisely because the provisions protecting user rights ultimately prevail over the requirement to block uploads upon the request of rightsholders. In the words of the lawyers representing the Commission: "The obligation of result" to ensure that legitimate uses remain available in Article 17(7) prevails over the "obligation of best effort" to prevent the availability of works in Article 17(4). According to the Commission, this conflict of norms could be reconciled by a mechanism that limits automated filtering to "manifestly infringing" uses of works and that requires human review in all other cases.

While agreeing with the Commission that Article 17 does not violate fundamental rights and that the Polish complaint should be rejected, France and Spain presented an entirely different argument. According to their testimony, any limitations of the fundamental rights of users would be "merely temporary" and are justified by an overarching objective of the article to strengthen the rights of creators and other rightsholders.

The ruling in C-401/19 is unlikely to come down until after the implementation deadline of the Directive (the AG opinion is due on the 22nd of April, which is less than 50 days before the deadline). Nevertheless, the CJEU hearing provided a clear confirmation that the Commission remains committed to the position it has taken in the guidance consultation. Given that much of the hearing focused on the conditions under which Article 17 could be reconciled with users' fundamental rights, it also seems possible that the eventual ruling will provide more binding guidance for the implementation of Article 17 than the Commission's guidance could ever achieve on its own.

Legislative progress in the Member States

The final two months of 2020 were marked by further steps at the Member State level. In early December, France adopted the DDADUE delegation law, opening the door for implementation of Article 17 by decree. Shortly afterwards, on the 16th of December, the Netherlands became the first (and so far only) Member State to fully adopt its implementation law. The changes to the copyright act will only take effect on the 7th of June and the implementation of Article 17 includes a clause that allows the Ministry of Justice to issue further rules on the practical application of the articles. In discussions with Parliament, the Ministry has indicated that it would consider using this clause to implement additional user rights safeguards contained in the upcoming Commission guidance.

At the other end of the spectrum, the Austrian Ministry of Justice published a discussion draft of a law implementing Article 17 that borrows core elements from the German proposal (a minor use threshold, a pre-flagging mechanism, and a direct remuneration right for authors and performers) but implements them more traditionally directly into the existing copyright act.

In the week before Christmas, Finland presented another approach to implementing Article 17 in a user rights preserving way. The Finnish Ministry of Culture's "blocking procedure" entirely does away with a requirement on platforms to automatically block user uploads. The procedure relies instead on mandatory use of content recognition technology by platforms and the rapid notification of rightsholders of uploads that match works for which rightsholders have provided platforms with reference information. However, platforms are only required to disable access to uploaded content after rightsholders have provided them with a properly justified request to block a particular upload. Users have the ability to challenge blocks through an independent alternative dispute resolution mechanism, completely freeing platforms from making decisions on the legality of individual user uploads.

Meanwhile, in Germany the discussion about the Article 17 implementation is still ongoing. As a result of massive pressure from rightsholders and platforms and as part of the coordination with other government ministries, the Ministry of Justice has retracted one of the most controversial elements of its implementation proposal: a new draft of the final implementation law proposal from November is missing the "de minimis" exception (that would have legalised uses of works shorter than 20 seconds of audio or video or 1000 characters of text). However, the same threshold remains in the form of a new mechanism that protects "presumably legitimate uses" from automated blocking.

The months ahead

As we enter the last months of the implementation period, it is increasingly clear that there are two different camps of Member States. On the one hand, France and its allies ("the originalists"), who seek to preserve a purported "original intent" of the article (which they falsely attribute to the original draft instead of the final compromise of the DSM Directive). The originalists are championing simple transpositions of Article 17 that lack any ex-ante user rights safeguards. In doing so, they are ignoring mounting signs that this approach fails to meet the requirements established by the text of the DSM Directive itself.

On the other hand, a growing group of Member States composed of Germany, Austria and Finland ("the textualists") that are driven by the realisation that honouring the conflicting legislative objectives embedded in Article 17 of the DSM Directive requires the introduction of checks and balances that ensure the functioning of the user rights safeguards required by that directive.

The Commission's intervention in case C-401/19 has made it clear that the Commission should be seen as aligned with the second camp of Member States.

By now, the mounting delays to the publication of the Commission's implementation guidance can be best understood as an effort to avoid further provoking France and its allies. As a result, the guidance will likely provide very little practical help for the majority of Member States who have delayed their implementation in anticipation of the guidance from Brussels. Instead, as we enter 2021, all eyes are increasingly turned towards Luxembourg in anticipation of a ruling in C-401/19 that may settle some of the issues that the EU legislator has failed to answer, since it rushed to push the Directive across the finish line almost two years ago.