Kluwer Copyright Blog

Article 17's impact on freedom to conduct a business – part 2

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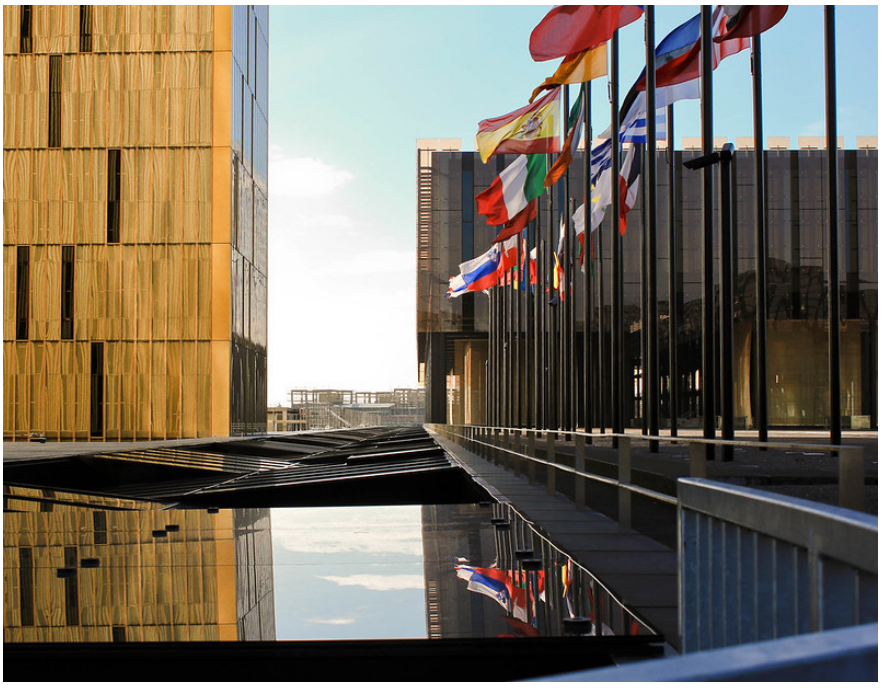

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Having established in part 1 of this blog post that Article 17 will place significant economic burdens on platforms large and small, and that those burdens create incentives for platforms to further impact the freedom of expression and information of users, we go on to examine in part 2 whether those burdens constitute a restriction of the freedom to conduct a business, and whether such restriction is justifiable in the context of the overall balance of affected fundamental rights. As we have shown in part 1, although the action for annulment of certain central provisions of Article 17 DSM Directive before the CJEU only asserts a violation of the freedom of expression and information of users, the standard of review of the provision by the CJEU is the entirety of primary law, including all affected fundamental rights, which must be brought into balance.

Balancing the freedom to conduct a business with other fundamental rights

According to the relevant CJEU case law, the protection afforded by Article 16 of the Charter covers the freedom to exercise any economic or commercial activity, the freedom of contract and free competition. More specifically, the freedom to conduct a business includes the right for any company or individual to be able to freely use the economic, technical and financial resources available to it. For the platform operators – and consequently for the question whether Article 17 amounts to a restriction of their fundamental rights – it is only relevant that the Directive directly places an economic burden on their operations, limiting their freedom to use resources at will.

It follows from Article 17 (4) (b) and (c) that in order to benefit from a liability exemption platforms have to make best efforts to filter unlicensed content and prevent its upload or re-upload, based on the information the rightsholders provide. Despite its technology-neutral wording, most commentators agree that in order to meet these requirements, larger platforms at least will have no choice but to implement automated filtering systems. Article 17 therefore subjects the platforms to a considerable cost burden which leads in turn to an interference with the freedom to conduct a business. Consider that in *Netlog*, the CJEU found that an injunction which required the host-provider Netlog to install a filtering system at its own cost would result in a "***serious infringement of the freedom of the hosting service provider to conduct its business*** *since it would require that hosting service provider to install a* ***complicated, costly, permanent*** *computer system* ***at its own expense".***

The freedom to conduct a business is not an absolute right. Instead, it can be subjected to legitimate restrictions. The Charter allows restrictions to be imposed on Article 16, provided that such restrictions correspond to objectives of general interest pursued by the EU and do not constitute a disproportionate and intolerable interference in relation to the aim pursued, impairing the very substance of the right (see Article 52 (1) of the Charter). The scope of the freedom to conduct a business is further determined by the other fundamental rights and values enshrined in the Charter that in practice often need to be balanced with the freedom to conduct a business. When it comes to balancing the freedom to conduct a business with intellectual property rights, the CJEU has found in *Scarlet* and *Netlog* that the contested injunctions, which required the installation of filtering systems, violated the fair balance between the right to intellectual property of the copyright holders and the right to conduct a business of the host or service-providers. The CJEU considered the contested injunctions to be disproportionate to the aim of protecting intellectual property rights, because they required Netlog and Scarlet to "monitor all or most information […] in the interest of those rightholders" at the service providers' own expense, as a preventative measure and for an unlimited time.

Can proportionality save the day?

Taking these decisions as reference points, it becomes clear that the obligations imposed on platforms by Article 17 (4) (b) and (c) are very close to the injunctions in the cases of *Scarlet* and *Netlog*. The main proceedings in *Scarlet* even concerned the use of the same third-party music filtering software, Audible Magic, that has been hailed by the European Commission as a relatively cheap solution for compliance with Article 17. Still the Court found the costs disproportionate, irrespective of Scarlet's factual financial and economic potency.

The difference from those cases is, however, that Article 17 prescribes these obligations by law and that these obligations are subject to a proportionality clause laid down in Article 17 (5). The

proportionality clause is supposed to scale down the burden that the best efforts obligation puts on the platforms and thereby mitigate the interference with their freedom to conduct a business. While the European legislator was well aware that Article 17 would place an economic burden on the platforms, it seemingly underestimated the costs. The Commission's impact assessment suggests that Article 17 would only require the installation of costly filtering systems by large companies which could either afford the expense or already relied on automated filtering technologies on a voluntary basis, and that a proportionality requirement would mitigate the effects on smaller businesses. As was explained in part 1, these assumptions are unlikely to hold true.

The proportionality test enshrined in Article 17 (5) is much too vague to provide platform operators with meaningful protection of their freedom to conduct a business. For example, it does not clearly limit the obligation to prevent copyright infringements to a single category of protected works that is prevalent on a platform. Platforms could be required to apply best efforts to block all types of copyright-protected content. Thus, even large platforms that already operate *one* filtering system may be required to implement several others. This reading is reinforced by the Commission's draft guidance on the implementation of Article 17, which suggests that platforms should "*as a rule enter into negotiations with those rightholders that wish to offer an authorisation for their content,* ***irrespective of whether their type of content (eg. Music, audio-visual content, images, text, etc…) is prevalent or is less common".*** Here lies a central difference from the injunctions in *Scarlet* and *Netlog* that were at least limited to the filtering of music recordings.

The protection of intellectual property is a legitimate purpose pursued by Article 17. However, the interference with other fundamental rights introduced by that provision is disproportionate, as the legislator has failed to ensure that the rights of the platform operators and the ensuing consequences for the rights of users are sufficiently taken into account. According to settled case-law, the principle of proportionality requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question. The way Article 17 is designed, the provision is likely to leave platforms no viable alternative choice to filtering content on a wide scale and spending considerable resources to do so.

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