Kluwer Copyright Blog

The Challenge to Article 17 CDSM, an opportunity to establish a future fundamental rights-compliant liability regime for online platforms

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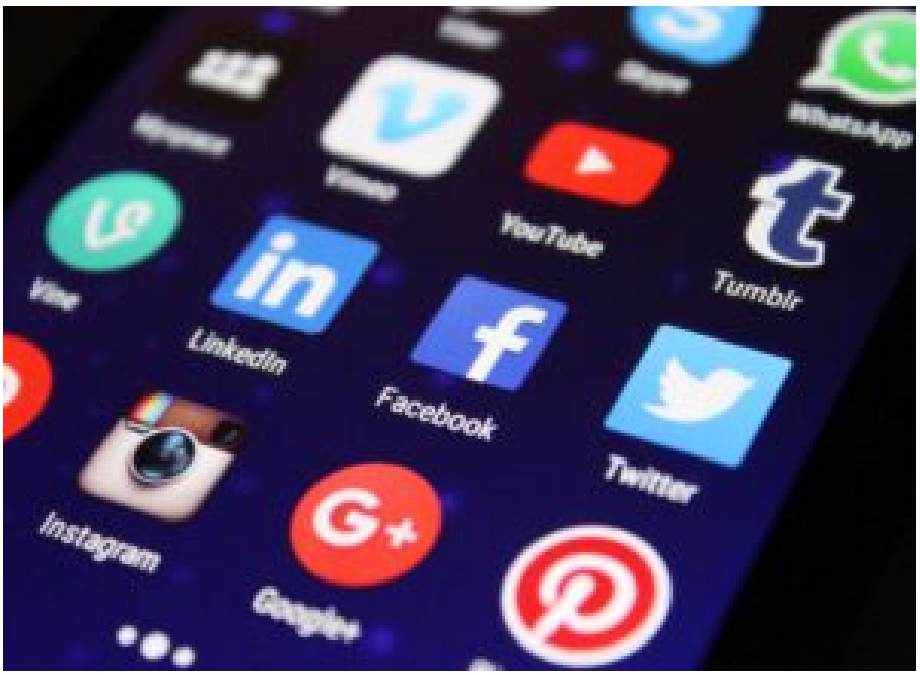

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The Directive on Copyright in a Digital Single Market (CDSM Directive, see here and here for an overview) is due to be implemented by the Member States of the European Union by 7 June 2021. The 27 Member States have struggled with transposing the CDSM Directive and have so far produced various transposition drafts, many of which differ greatly. This is the case in particular with regard to the implementation of Article 17 (see here and here), the most contested and debated provision of the CDSM Directive, which significantly reshapes the rules for the liability of platforms for uploads of their users. This provision is subject to a pending action for annulment initiated by

the Polish government (Case C-401/19) arguing its incompatibility with fundamental rights and in particular that the provision infringes the right to freedom of expression and information guaranteed by Article 11 of the Charter of Fundamental Rights of the European Union. Although the Polish challenge only alleges that parts of the provision (Article 17(4)(b) & (c)) constitute a restriction to the right to freedom of expression, the claim is broader as it specifies that "should the Court find that the contested provisions cannot be deleted from Article 17 of Directive (EU) 2019/790 without substantively changing the rules contained in the remaining provisions of that article, the Republic of Poland claims that the Court should annul Article 17 of Directive (EU) 2019/790 in its entirety". This is important, since Article 17 as a whole raises significant concerns whether the provision is compatible with the rights of the EU Charter of Fundamental Rights, but also with the basic principles of EU law such as proportionality

and legal certainty. These are the conclusions of a recent research project conducted by the authors of this post on Article 17 and its compatibility with the EU treaties, which was published online on 30 January 2021.

According to the main arguments of the challenge, the Republic of Poland argues specifically that Article 17(4) of the CDSM Directive and the obligations it imposes on certain types of platform operators, so-called "online content-sharing service providers" (OCSSPs), leaves them no other choice but to install preventive control mechanism through automated filtering of content uploaded by users to avoid liability. The hearing for the annulment action was held before the Court of Justice of the European Union (CJEU) on 10 November 2020. It raised a number of questions and also exposed the different understandings of how Article 17 should work, even among the supporters of the provisions (see here).

At the heart of the challenge lies the question of how OCSSPs can fulfil their obligations under Article 17 without restricting the rights of their users, which are bolstered by a guarantee in Article 17(7) that lawful uses, including such uses covered by an exception or limitation, should not be restricted. On one side of the argument, some proponents argue that content should be preventively blocked if uploaded content fully or partially matches corresponding data (provided by rightholders pursuant to Article 17(4)(b)) on works or other subject matter protected by copyright). On the other side of the argument are those who believe that any preventive blocking has a huge potential to infringe the right to freedom of expression and lead to over-blocking, and that content should only be removed if it is found to be infringing. In the middle of this dispute are online platforms, who are tasked with the protection of the rights of rightholders by blocking and removing (potentially) infringing content, but who also have to secure the rights of users, whose full benefit is guaranteed by the same provision.

Article 17(1) CDSM Directive makes OCSSPs directly liable for copyright protected content uploaded by their users. It stipulates that OCSSPs themselves perform acts of communication to the public within the meaning of Article 3 InfoSoc Directive. Under Article 17(4), OCSSPs can avoid this liability if they have:

"(a) made best efforts to obtain an authorisation, and

(b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information; and in any event

(c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b)."

Furthermore, Article 17(7) provides that users must be able to perform lawful uses consisting of the upload of works and other protected subject matter, including uses which fall within the scope of an exception or limitation. Article 17(8) reaffirms that the application of Article 17 must not lead to any general monitoring obligation (thus reiterating a fundamental principle of the E-Commerce directive) and Article 17(9) obliges Member States to ensure that OCSSPs make effective complaint and redress mechanisms available, in case disputes arise over the disabling of access to, or the removal of uploaded content.

It is of course impossible to discuss all aspects of Article 17 and the problems it raises in a single blogpost. Over the past few months, a number of important and extensive studies have been published on the implementation models of Article 17 and its compatibility with fundamental rights (see here and here, see also here).

In our article, we examined the effects of Article 17 on various fundamental rights, including the right to freedom of expression. We conclude that Article 17, in its current form, constitutes a disproportionate restriction to the right to freedom of expression. This right, including the right to receive and impart information, and the right to artistic freedom are significantly restricted if the obligations of Article 17 CDSM Directive can only be met by the use of automated filtering, as it leads to the inaccessibility of content shared on OCSSPs, thereby frustrating the rights of users in a significant manner. According to the current state of technology, it is almost certain that the automated filtering, whether general or specific in nature, cannot distinguish appropriately between illegitimate and legitimate use of content (e.g. because it would be covered by a copyright limitation). Hence, there is a serious risk of over-blocking of certain uses that benefit from strong fundamental rights justifications such as the freedom of expression and information or freedom of artistic creativity.

Furthermore, the obligations imposed on OCSSPs restrict platform operators in their right to conduct a business (see here and here). The obligation for OCSSPs to undertake “best efforts” to obtain authorization or otherwise to ensure the unavailability of such content and to remove it upon request not only potentially creates chilling effects for online speech and artistic expression, it also requires OCSSPs to invest significant resources into technology and human resources to manage a system that prevents and reactively removes unlawful content. At the same time, OCSSPs will have to ensure that lawful uses by their users in relation to copyright protected subject matter are possible, meaning that they have to ensure that they do not accidentally over-block or over-filter.

How precisely OCSSPs have to comply with the obligations does not become clear from the wording of Article 17, which leaves OCSSPs with (legal) uncertainty as to their precise obligations and potential liabilities. The procedural rights of users, whose lawful uploads might be removed, are also not sufficiently articulated, with consequences for the right to an effective remedy and a fair trial under Article 47 EU Charter. And how general filtering and monitoring ex ante, which seems unavoidable despite the express exclusion of such mechanisms in Article 17(8), should be squared with the right to privacy and the protection of personal data also seems unclear.

Two further general concerns cast the compatibility of Article 17(4) with fundamental rights and general EU law further into doubt. First, because of its vagueness, its complicated drafting and far too many unanswered questions, Article 17 fails to determine the balance between the various fundamental rights affected. However, pursuant to the recent Schrems II ruling by the CJEU, limitations on the exercise of fundamental rights within the scope of EU law must be determined by the legal basis (*viz*. the CDSM Directive) that permits such limitations. Second, the lack of

precision in formulating the partial overhaul of the copyright intermediary liability regime at EU level will most likely (as demonstrated by the widely diverging national transposition drafts) result in an unharmonized liability landscape across the EU Member States. In other words: The CDSM Directive would simply fail to achieve its purpose! This is problematic from a competence point of view as Article 114 TFEU enables the EU to act in order to pursue the objective of establishing the internal market, in this case the digital single market. History is repeating itself, as the 2001 InfoSoc Directive suffered from the same defects with regard to the harmonization of copyright exceptions, leading to a fragmented landscape of copyright limitations in the EU. This also significantly complicates the task of platforms, which will have to evaluate the legality of uploaded content by users according to 27 national laws to see whether or not the use is covered by an exception. Looking at the competence issue with respect to Article 17 and its challenge is of course important since, according to CJEU case law, the grounds of lack of competence of the EU must be raised by the Court *ex officio* (i.e. even if the parties failed to raise them).

In short, we come to the conclusion that severe doubts exist on the compatibility of Article 17 with fundamental rights and the basic principles of EU law such as proportionality and legal certainty. Most concerning is the likely suppression of lawful uploads as a collateral effect and the significant obligations put on OCSSPs. In particular, the fact that OCSSPs would largely have to make sensitive value judgments, e.g. whether a particular use constitutes a parody or falls under the quotation exception, is problematic. The economic pressure to avoid liability will most likely result in a decision to block or to filter in order to be on the safe side.

In any case, the decision as to what is available online and what is not should not be made solely by private economic actors, leaving users de facto with no choice other than to turn to unclear and burdensome redress mechanisms (managed by the same economic players) that most likely very few would use. We therefore suggest that one way to make Article 17(4) at least partially fundamental rights compliant is to establish an independent institution at EU level which would be tasked, amongst other functions, with adjudicating on disputes between users and rightholders in relation to uploaded content, but also to monitor the implementation and application of any future platform liability regime in a fundamental rights-compliant manner. In the absence of such an institution, it is hard to imagine how Article 17 could be "saved" from a complete annulment by the CJEU.

Before the CJEU casts its final judgment and determines the fate of Article 17 CDSM Directive, Advocate General Henrik Saugmandsgaard Øe will deliver his opinion. In light of his opinion in Joined Cases C-682/18 and C-683/18 *YouTube* (see comment here), there is hope that Article 17 is not, yet, set in stone. On the contrary, an annulment of this problematic provision would give the European legislator a great opportunity to elaborate a balanced, unified and clearer liability regime for platforms in the context of the proposed regulation on a Single Market for Digital Services (as the challenges in terms of fundamental rights in the DSA are similar, see here).

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