

Kluwer Copyright Blog

It's 23 April 2021, so where is the Advocate General opinion in Case C-401/19 Poland v Parliament and Council?

Paul Keller (Institute for Information Law (IViR)) · Friday, April 23rd, 2021

In May 2019 right after the adoption of the Copyright in the Digital Single Market Directive, the Polish Government initiated a legal challenge before the Court of Justice of the European Union (CJEU) requesting the annulment of (parts of) Article 17. The Polish challenge claims that the application of the filtering obligations contained in Article 17 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.

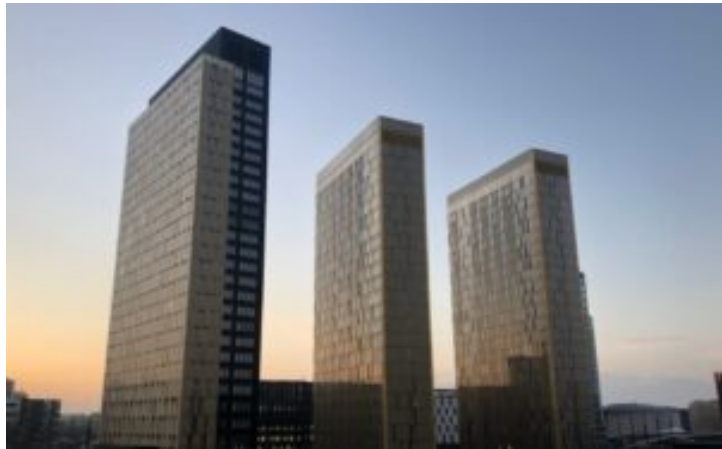


Photo by Paul Keller

At the end of the hearing of the parties in November of last year, Advocate General Saugmandsgaard Øe announced that he would deliver his opinion on 22 April 2021. Since then, his opinion has been eagerly awaited by commentators and Member States alike, who expected it to contain important clues on how Member States can implement Article 17 in a fundamental rights compliant way.

Last week Thursday the CJEU announced that the AG opinion would be postponed by almost 3 months and would now be delivered on the 15th of July. This delay means that the opinion will be published more than a month *after* the implementation deadline for the DSM directive on the 7th of June, precluding Member States of an initial indication how they should reconcile the conflicting obligations contained in Article 17 of the Directive. At the time of writing, the Netherlands is the only Member State to have implemented Article 17 into national law, and while a few others (Germany and Hungary) have implementation laws in advanced stages of the parliamentary adoption process, the majority of the Members States is still waiting for more legal clarity on how to implement Article 17.

While it is unclear why the AG has decided to delay his opinion by 3 months at the very last minute (the official reason given by a spokesperson is a lack of translation capacity), this decision

cannot be seen in isolation from the delay of the publication of another eagerly awaited document: the European Commission's Article 17 implementation guidance.

This guidance, which had originally been expected to be published at the beginning of the year, and has since been delayed multiple times, played an important role in [the Commission's arguments before the CJEU](#) as to why it considers Article 17 to be fundamental rights compliant. During the hearing the Commission argued that, in order to protect fundamental rights of users and in order to comply with the provisions of the directive, national implementations of Article 17 must contain ex-ante user rights safeguards, that limit the automated blocking of uploads to situations where an upload is "manifestly infringing".

In this context, the last-minute rescheduling of the AG opinion looks like an effort by the Advocate General to ensure that he can take the actual contents of the guidance into account before delivering the opinion. If this is true, then it puts the Commission in a conundrum: either it sticks to its defense of user rights in the final version of the guidance, or else it risks having the AG argue for the annulment of (parts of) Article 17.

Meanwhile the Commission is sending out mixed signals: Earlier this week Thierry Breton, the Commissioner responsible for the file, told Members of the CULT and JURI committees of the European Parliament that the guidance would be published "in the coming weeks". At the same time he refused to confirm that the contents of the guidance will be based on the legal interpretation that the Commission had presented in front of the CJEU. Such indications may be interpreted as suggesting that the Commission has watered down its commitment to ensuring that implementations of Article 17 must protect users' fundamental rights. In turn, this makes the AG's decision to postpone his opinion appear all the more reasonable.

But all this leaves the Member States who have six weeks left to implement the DSM Directive out in the cold: With the core contradiction contained in Article 17 still unresolved, it looks increasingly likely that less than a handful of Member States will manage to adopt Article 17 into national law before the implementation deadline.

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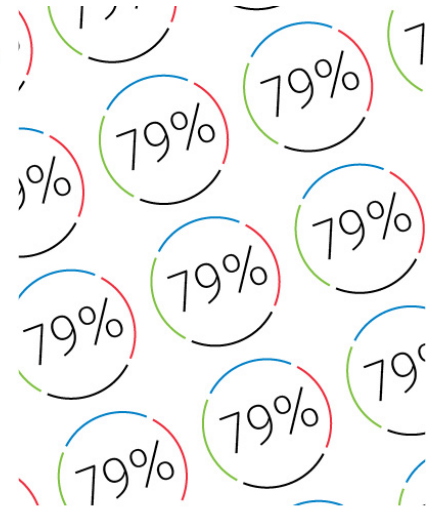
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