

Kluwer Copyright Blog

What Member States can learn from the AG opinion on Article 17

Felix Reda (GFF (Society for Civil Rights)) and Paul Keller (Institute for Information Law (IViR)) · Monday, July 26th, 2021

Last week saw the long-awaited publication of Advocate General Saugmangsgaard Øe's opinion on the Polish request for annulments of parts of Article 17 of the Directive on Copyright in the Digital Single Market (DSM Directive) before the European Court of Justice (Case C-401/19). While [Bernd Justin Jütte](#) and [Giulia Priora](#) have already analyzed the opinion's most important elements [in this blog](#), our contribution addresses the complex interaction between the ongoing court case and the implementation of Article 17 into the national laws of Member States. As it stands, although the implementation deadline for the DSM Directive has passed, [only six Member States have implemented Article 17](#) into their national laws: [the Netherlands](#), [France](#), [Germany](#), [Hungary](#), [Denmark](#) and [Malta](#). With the vast majority of Member States still grappling with how to transpose the complex provision into their respective copyright law systems, the AG opinion serves as an important point of reference to inform their strategies.

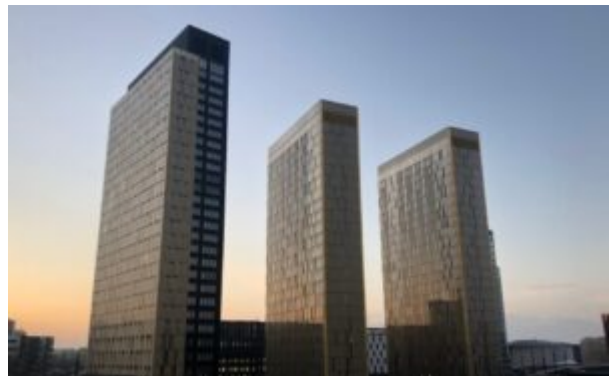


Photo by Paul Keller

Had the Advocate General recommended the annulment of Article 17, the recommendation for Member States would have been simply to put all implementation efforts on hold until the Court delivered its judgment, to avoid passing a law that would immediately conflict with the fundamental rights under the Charter. Similarly, had the Advocate General found that there was no interference of Article 17 with the right to freedom of expression, Member States could have proceeded with their implementation efforts as they saw fit.

Instead, the Advocate General has come to the conclusion that Article 17 does constitute an interference with the freedom of expression of users, but that the provision offers sufficient safeguards for users' rights to comply with the Charter, if interpreted in a particular, fundamental

rights-preserving manner. Crucially, the Advocate General argues that the Member States, in consultation with the European Commission, have an obligation to safeguard the ability of users of online platforms to exercise their freedom of expression. It is therefore worth comparing and contrasting the various transpositions of Article 17 that have been adopted to date with the interpretation proposed by the Advocate General. In our view, Member States should refrain from adopting any further implementations of Article 17 until the Court has delivered its judgment to be prepared for the likely event that it will follow his reasoning.

National implementations limited to re-stating Article 17 in national law

Five of the six Member States that have so far transposed Article 17 into national law have done so in a way that can best be characterized as re-stating the provisions of the directive. Instead of developing rules for the practical implementation of the article, the Netherlands, Hungary, France, Denmark and Malta have passed the obligations that the directive establishes on them (“Member states shall...”) on to the entities affected by the provisions (OCSSPs and rightholders). There are some differences between the Member States regarding details of their national implementations (most notably regarding who is assigned responsibility for the out-of-court redress mechanism), but when it comes to balancing the filtering obligations with the obligation to preserve legal uploads, all five Member States follow the same approach of simply re-stating both obligations and leaving it to OCSSPs to develop practical implementations. Only the Netherlands seems to have anticipated that this approach may not be sufficient and has included (in [Article 29c\(8\) of the copyright act](#)) the possibility for the Minister of Justice to issue “further rules on the application of this article”. During the parliamentary adoption process, the Ministry of Justice has indicated that this provision was intended to allow for the inclusion of elements of the Commission guidance on the application of Article 17.

Nevertheless it is clear that the approach of simply re-stating the provisions of Article 17 in national law is incompatible with key elements of the AG opinion. In point 210 AG Saugmangsgaard Øe makes it clear that he believes “it is for the Member States and the Commission to determine the detailed rules for [such] measures” employed by platforms to comply with the filtering obligation imposed on them. And in point 212 he observes that “the definition of [those] practical solutions [...] must not be defined by those private parties alone in a way which lacks transparency, rather the process should be transparent and under the supervision of public authorities.” Given that the national implementations in the above-mentioned Member States lack any rules for the practical implementation of the article, OCSSPs in those Member States have no choice other than defining those rules themselves.

It follows that if the CJEU adopts the reasoning of the AG, these Member States would need to revisit their implementation laws and incorporate at the minimum those elements of the Commission’s implementation guidance that the AG has endorsed in his opinion. For France, Denmark, Malta and Hungary this would mean re-opening the text of their implementation laws (Denmark, Hungary) or decrees (France, Malta), while the Netherlands could theoretically still achieve compliance via an additional administrative order (although it seems highly questionable whether such an instrument is an appropriate measure for balancing fundamental rights).

In the light of these issues other Member States would be well advised not to move ahead with national implementations that follow the approach taken by those Member States.

Ex-Ante Safeguards Against Overblocking: The German Approach

The German implementation of Article 17 has been by far the most ambitious national approach to reconciling the conflicting obligations on platform operators to make best efforts to block infringing uses of copyright-protected works, while leaving legal uses unaffected (although the Austrian and Finnish governments have also drafted implementations that go beyond merely restating the provisions of Article 17, neither country has adopted its implementation law to date). While some commentators have [praised the German implementation for carefully balancing the competing fundamental rights](#) of rightholders, users and platform operators, others have [accused Germany of undermining the very purpose of the DSM Directive](#), the harmonisation of the internal market, by defining its own ex-ante safeguards against overblocking in law through the concept of “presumably authorized uses”. Ironically, should the Court follow the AG opinion, it appears that Germany, which has been chastised by several rightholder associations for adopting a “Sonderweg” (deviant path), has chosen the only path to Article 17 implementation to date that has a chance of meeting the requirements for compliance with the Charter.

Many core elements of the Advocate General’s interpretation of Article 17 are remarkably similar to the German implementation law, the [Urheberrechts-Diensteanbieter-Gesetz \(UrhDaG\)](#). According to the AG, Article 17 must be interpreted to limit the use of automated blocking to cases of manifestly infringing uses of copyright-protected works. In ambiguous situations, where an infringement is not apparent, “the content concerned must be *presumed to be lawful* and, consequently, its uploading cannot be hindered” (point 208). The German “presumably authorized uses” are based on the same logic. Not only are platforms exempted from liability for communication to the public of presumably authorized uses, they are actually forbidden from blocking such uses on copyright grounds, or overriding this user rights safeguard in their terms and conditions. This feature of the German implementation is in line with the Advocate General’s recommendations, who holds that:

“sharing service providers are not legally authorised to block or remove content which makes lawful use of works or other protected subject matter *on the ground that that content infringes copyright*. In particular, they may no longer exclude the application of exceptions and limitations in their terms and conditions or in contractual agreements with rightholders by providing, for example, that a mere allegation by rightholders of infringement of copyright will be sufficient to justify such blocking or removal.”

Where the Advocate General diverges from the German implementation is when it comes to the question of which uses should be considered presumably authorized. In the eyes of the AG, this should cover all uses that are not manifestly infringing, including all transformative uses of works. The German concept of “presumably authorized uses” is decidedly narrower, limiting the ex-ante protection to uses which 1.) match with less than 50% of a protected work, 2.) combine it with other content, and 3.) use either very short extracts of the protected work or have been pre-flagged by the user as falling under an exception or limitation. Nevertheless, it is clear that the Advocate

General has paid close attention to the German implementation law, as he makes explicit reference to *de minimis* thresholds and pre-flagging as possible mechanisms that Member States should implement in order to protect legal uses from being blocked (point 211).

While it is unclear whether the specific parameters chosen by the German legislator to define “presumably authorized uses” are sufficient to protect users’ freedom of expression, given that uses under exceptions and limitations may well match with more than half of a protected work, for example, it is clear that Germany is on the right track with its decision to define the ex-ante safeguards in law. As highlighted above, the Advocate General states unequivocally that “it is for the Member States and the Commission to determine the detailed rules for such measures” (point 210), rather than delegating the definition of ex-ante safeguards to industry. A defining feature of the AG opinion is his conviction that platforms lack “the necessary expertise and, above all, the necessary *independence* to [assess the lawfulness of uses under copyright law] – particularly when they face the threat of heavy liability” (point 197). This is not only true for the definition of ex-ante measures, but more broadly. It is therefore questionable whether the German UrhDaG’s approach of requiring platforms to adjudicate copyright disputes in the context of the complaint and redress mechanism is compatible with the Charter. The platforms could systematically decide against the interest of users in edge cases to avoid liability, or to avoid paying compensation for the pastiche exception, which is coupled with a remuneration requirement placed on online platforms in the German UrhDaG.

The Advocate General also confirms Germany’s approach of trying to specify the definition of the platforms covered by Article 17 by incorporating elements of the Directive’s recitals, most notably the requirement for platforms to compete with online content services (streaming services like Spotify or Netflix, which upload copyright-protected content themselves based on a license, rather than relying on user uploads) for the same audiences. The Advocate General goes a bit further and states that given the original purpose of Article 17, its scope should be limited to platforms that contribute to the “value gap” (point 26). Both interpretations are quite similar and would likely leave many smaller, special-interest platforms such as dating websites, live streaming services or microblogging platforms out of scope.

Finally, the Advocate General considers that given the striking absence of provisions on liability or sanctions for the violation of user rights in Article 17, Member States must fill this gap through national rules (point 210, footnote 249). The German UrhDaG includes some provisions on liability of both rightholders and platforms towards users – § 18 of the UrhDaG provides that alleged rightholders who make false claims of exclusive rights that lead to the blocking of lawful content are liable towards users and platforms for damages. Where platforms fail to meet their obligation to keep legal content online, they are only liable for injunctions, but users’ associations are equipped with a right to collective redress to apply for such injunctions.

Conclusion

It remains to be seen whether the safeguards for user rights included in the German UrhDaG will be sufficient to meet the requirements of the Charter, provided that the CJEU follows the Advocate General’s recommendation to uphold Article 17 subject to a fundamental rights-preserving

interpretation. In any case, as our analysis shows, it is the only existing implementation that follows the broad strokes of the requirements outlined by the Advocate General. The German UrhDaG is about to enter into force on 1 August 2021. Those platforms that unequivocally fall within the scope of Article 17 may therefore be well advised to apply those user rights safeguards throughout the EU, including in those Member States that have simply re-stated the provisions of the directive and which – should the CJEU follow the AG opinion – will need to re-open their implementation laws to ensure compatibility with the Charter.

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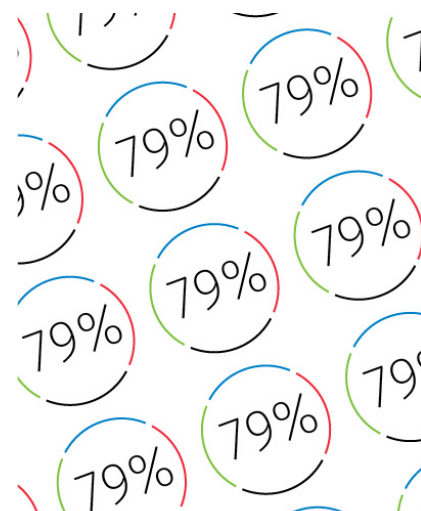
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