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Is the Spanish implementation of Art. 17 CDSM compatible with EU Law?

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Let's imagine that, in the near future, the Court of Justice of the European Union (CJEU) receives a request for a preliminary ruling referring the following question:

"Must Article 17(4) of Directive 2019/790 on copyright and related rights in the Digital Single Market be interpreted as precluding a national law which allows copyright holders to bring legal actions to compensate their economic harm, such as an action for unjust enrichment, against an online content sharing service provider which meets all the conditions laid down in Article 17(4) to be free from liability if, notwithstanding having made best efforts to remove it, unauthorized content keeps being exploited by that provider giving rise to meaningful harm to right holders?"

If such a question is ever referred to the CJEU, the odds are that the referring court will be a Spanish one.

Indeed, the Spanish transposition of the CDSM Directive, which was approved overnight by means of a Government Decree published on the 3rd of November and which entered into force the following day, came with some surprises, including an apparent carve out from the liability exemption granted in Art. 17(4) of the CDSMD.

As is well known, Art. 17 CDSMD establishes that online content sharing service providers (OCSSPs) perform an act of communication to the public or an act of making available to the public – for the purposes of that Directive – when they give public access to copyright-protected content uploaded by their users. It also determines that, for the situations covered by that provision, OCSSPs cannot resort to the hosting safe harbour laid down in the eCommerce Directive (ECD).

Art. 17(4) CDSMD declares OCSSPs liable for the unauthorised acts of communication to the public, *unless* they demonstrate having fulfilled the conditions laid down in the same paragraph.

Those conditions essentially consist of (a) making best efforts to obtain an authorization, (b) making best efforts to ensure the unavailability of specific works and other subject matter – as long as they receive the necessary information from right holders – and (c) removing expeditiously the unauthorized content upon sufficiently substantiated notice and making best efforts to prevent its future upload – also on the basis of the necessary information provided by right holders. The obvious mandate of this article is that, when OCSSPs meet those conditions, they are *not liable* for the unauthorised acts of communication to the public.

The liability limitation laid down in the ECD shelters hosting providers from any kind of liability – leaving aside the possibility of injunctions. As noted, the CDSMD expels OCSSPs from that safe harbour, and it does so regardless of whether or not they play an active role, as their acts are characterized as communication to the public *per se*, irrespective of the nuanced set of criteria developed by the CJEU under the InfoSoc Directive, recently recalled by the Court in *YouTube and Cyando*.

However some alternative form of liability limitation for OCSSPs was felt needed. Indeed, as Recital 66 CDSMD states, "[t]aking into account the fact that online content-sharing service providers give access to content which is not uploaded by them but by their users, it is appropriate to provide for a specific liability mechanism for the purposes of this Directive for cases in which no authorisation has been granted." Such a "liability mechanism" is the liability exemption set forth in Art. 17(4). That is, a *new safe harbour* based on much more stringent conditions than those in the ECD.

If an OCSSP fails to meet the conditions for the liability exemption, it will be liable as an infringer and the affected right holders will be able – in the terms provided for by the IP Rights Enforcement Directive (IPRED) and its national implementations – to claim appropriate damages from it. According to Art. 13(1) IPRED, such damages may be established either by taking into account all appropriate aspects, including "any unfair profits made by the infringer", or by setting "a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question." On the contrary, if the OCSSP meets the conditions laid down in Art. 17(4) and thus is shielded by the safe harbour established therein, right holders will not be able to claim damages. Particularly, they will not be able to claim compensation for "any unfair profits made by the infringer" under the IPRED.

Now, may a national legislation establish that right holders, notwithstanding Art 17(4) and its clear objective of precluding an action for damages against OCSSPs that meet its conditions, will still be able to claim from those OCSSPs the profits made in relation to unauthorized public communication by means of an action of "unjust enrichment"?

This is apparently what the Spanish law provides for. While the liability exemption in Art. 17(4) has been transposed into Spanish law almost verbatim, the provision adds the following paragraph:

"Without prejudice to the above, right holders will be able to exercise legal actions seeking to compensate the economic harm, such as the action for unjust enrichment, where, even though the service providers had made their best efforts to remove the unauthorized content, such content keeps being exploited by them, causing the right holders meaningful harm."

The language is not perfectly clear, but it arguably refers to situations where an OCSSP meets all

the requirements set forth in Art. 17(4) – which are transposed into the Spanish law –, and thus is *not liable* for the unauthorized communication or making available to the public.

This raises the question as to whether a national implementation such as the Spanish one, by seemingly allowing claims for damages against OCSSPs for the "unfair enrichment" when they are exempt from liability, effectively cancels the *effet utile* of Art. 17(4).

To be sure, Recital 66 CDSMD notes that "[the liability mechanism] should be without prejudice to remedies under national law for cases other than liability for copyright infringements and to national courts or administrative authorities being able to issue injunctions in compliance with Union law." However, can this be understood as allowing national legislators to effectively impose damages on a non-infringer OCSSP based on a different legal theory?

This is not the only surprise that came with the Spanish implementation, but is certainly one that needs a careful consideration as to its compatibility with the CDSMD.

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