

# Kluwer Copyright Blog

## After the Decision of the CJEU on the Validity of Article 17 CDSMD, What's Next? The Regulatory Task Ahead and a Proposal for an Independent EU Copyright Institution – Part I

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This two-part blog post offers both an evaluation of the current regulatory challenge faced by MS implementing Art. 17 CDSMD after the CJEU's ruling in [Case C-401/19](#), as well as a fresh perspective on tackling the implementation challenge ahead. Part I of this post provides context to our analysis, explaining the need for a more concrete strategy to meet the challenge of implementing of Article 17 CDSMD in national laws in a harmonized way. [Part II](#) will offer a concrete proposal to address this challenge in the form of a new and independent EU copyright institution.

On 26 April 2022, the Grand Chamber of the CJEU in its much-awaited (and already commented on ([here](#) and [here](#))) judgment saved Article 17 Copyright in the Digital Single Market Directive (CDSMD) from the invalidity claim made by the Republic of Poland for a violation of the freedom of expression. The [initial challenge](#) to Article 17 was made with the following argument: the new obligations put on platforms to prevent infringing uploads will “make it necessary for the service providers — in order to avoid liability — to carry out prior automatic verification (filtering) of content uploaded online by users, and therefore make it necessary to introduce preventive control mechanisms. Such mechanisms undermine the essence of the right to freedom of expression and information and do not comply with the requirement that limitations imposed on that right be proportional and necessary” (additional analysis [here](#)). [The CJEU has dismissed the action](#), considering that “the obligation, on online content-



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sharing service providers, to review, prior to its dissemination to the public, the content that users wish to upload to their platforms, is accompanied by the necessary safeguards to ensure that that obligation is compatible with freedom of expression and information”.

While Poland formally lost the case, its arguments are upheld in the decision, as the Court clearly establishes the unlawfulness of using any filtering to prevent infringements that would result in over-blocking of content and thus undermine users’ rights. The Court states with authority that “a filtering system which might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications, would be incompatible with the right to freedom of expression and information” (para. 86). Yet the Court maintains that Article 17 introduces “several procedural safeguards (...) which protect the right to freedom of expression and information of users of the abovementioned services in cases where, nonetheless, the providers of the services erroneously or unjustifiably block lawful content” (para. 93). Nonetheless, Article 17 itself still doesn’t seem enough.

In a steady reminder of its line of reasoning since the *Promusicae* decision of 2008, the Court further holds that: “Member States must...take care to act on the basis of an interpretation of that provision which allows a fair balance to be struck between the various fundamental rights protected by the Charter...the authorities and courts of the Member States must not only interpret their national law in a manner consistent with [Art. 17] but also make sure that they do not act on the basis of an interpretation of the provision which would be in conflict with those fundamental rights or with the other general principles of EU law, such as the principle of proportionality.” (para. 99).

Thus, according to the Court, the situation is clear: the ball is in the court of the Member States (MS), which will have to ensure a fundamental rights-compliant interpretation of Article 17. This means that they will need to implement the provision in a manner that would resist a fundamental rights review (via, i.e., a preliminary ruling addressed back to the Court), and to introduce robust procedural safeguards for users’ rights. This seems a wise move, but also means that a lot is still to be done in the future to secure fundamental rights in the EU. In the wake of the judgment, national governments are left without much concrete guidance from the CJEU on how to approach integrating this complex legal provision into their domestic law. So, what’s next?

### ***Moving Forward with Article 17 Implementation – A Need for Strategy***

While it was generally maintained by the Court that the Article 17 text retains enough safeguards to justify its likely limiting effect on fundamental rights (i.e., platform providers’ necessary use of automatic recognition and filtering tools, albeit significantly limited in its effect by the Court), MS’ authorities and courts will still be charged with the responsibility of implementing and enforcing an

Article 17 system which can ensure providers' use of such measures actually achieves a fair balance between fundamental rights and other relevant EU law principles.

Recognising the significance of this regulatory challenge, AG Øe had already pointed out in his [Opinion](#) on the case that the task of designing automatic content recognition tools "... can neither be left to those [content] providers nor...be left entirely to rightholders. In view of the importance of those solutions for users' freedom of expression, they 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.*"

Indeed, what seems to still be missing from the discussion on Article 17 implementation is an appreciation of the magnitude of the regulatory challenge ahead: surprisingly little attention has been paid towards developing a harmonised regulatory strategy among MS which can ensure a balance of rights between EU copyright stakeholders. It is worth noting that although Art. 17(10) itself provides an avenue for the EU Commission to "issue guidance on the application of this Article," since its release on 4 June 2021 most MS have either [ignored](#) or directly [contradicted](#) this [guidance](#). This apparent lack of a coordinated regulatory strategy leads to the likely conclusion that MS regulatory approaches will diverge, perhaps considerably so, moving further away from the CDSMD's objective of a well-functioning "digital single market".

In our forthcoming article, "[Regulating Creativity Online: Proposal for an EU Copyright Institution](#)" we venture at an answer to the looming regulatory question by proposing one specific avenue of regulatory reform: introducing a new public regulator for copyright at the EU level.

After developing some legal/historical context explaining the nature of the limitations of EU-level regulatory competences thus far, Pwe highlight the examples of institutional reform in the fields of EU data protection law ([General Data Protection Regulation \(GDPR\)](#)) and EU platform regulation ([Digital Services Act \(DSA\) proposal](#)) to demonstrate a general trend towards recentralization of certain regulatory tasks at the EU level. Our analysis then identifies aspects of the [CDSMD](#) that could benefit from the introduction of an EU regulator and proposes several potential functions such a regulator could undertake. The article concludes with recommendations on how to improve the implementation of the CDSMD, as well as other important aspects of online copyright enforcement, through targeted and well-defined institutional and regulatory reform measures adopted at the EU level.

Part II of this post will provide additional detail on our proposal by discussing the growth of public regulators as a check on the rise of private power in the online environment, addressing new institutional arrangements in the EU for regulating conduct online, and highlighting our proposal for a new EU copyright institution.

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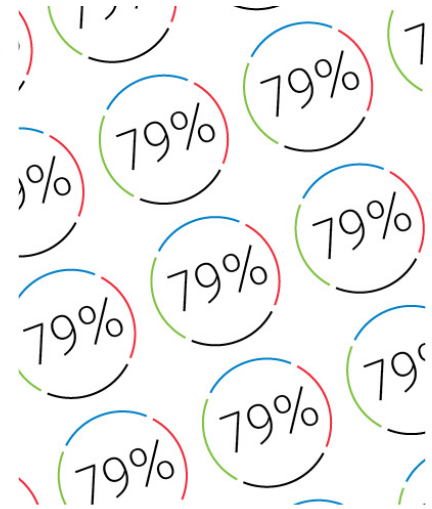
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