

# 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 II

Christophe Geiger (Luiss Guido Carli University) and Natasha Mangal (University of Strasbourg) · Wednesday, May 18th, 2022

Part I of this post discussed Grand Chamber judgment on the validity of Article 17 CDSMD and explained the need for a more concrete strategy to meet the challenge of implementing that provision in national laws. This part II discusses the growth of public regulators as a check on the rise of private power in the online environment, addresses new institutional arrangements in the EU for regulating conduct online, and highlights our proposal for a new EU copyright institution.



### Counterbalancing the rise of private power in the online environment: The growth of public regulators

Photo by Aneeqe Ahmed, NounProject.com

In recent years the rapid growth of online services and platforms has exposed numerous gaps and shortcomings in regulatory arrangements worldwide. Institutions and regulatory arrangements developed in an analogue age have long been challenged by the borderless and often opaque nature of activities taking place online. Since the early days of the internet, the high costs and limited territorial scope of state-centred regulation have proved inefficient for regulating conduct in the online environment.

Thus, to circumvent the costly, and at times politically sensitive, task of regulating conduct online, governments rather encouraged private actors themselves to structure, implement and enforce their own sets of rules and procedures preventing illegal conduct. This approach, referred to as “private ordering” or “self-regulation”, has been reflected in several EU Directives, and has long provided a useful workaround for governments by empowering industry actors to design and implement their own rules and methods of enforcement (given that they comply with existing law). Of course, this flexible, industry-led approach was also favoured by the private actors (i.e., online platforms), as it allowed systems of enforcement to evolve quickly and in line with changes in the relevant industry. Moreover, this private ordering centred approach was complemented by measures which shielded private actors from liability for the illegal acts of users.

Today, we can observe online services that have grown exponentially since their early days. The significant size and influence of these services have likewise exposed the limitations of public regulators in ensuring that the design of online enforcement remains fair, balanced, and compliant with relevant law and fundamental rights concerns. As policymakers now seek new ways of scrutinizing the reach of private power in the public sphere, they must also confront the realities of an institutional and regulatory arrangement that was built upon a different set of assumptions: the task of maintaining a bordered “single market” is very different from the task of maintaining a borderless “digital single market.”

### **New Institutional Arrangements in the EU for Regulating Conduct Online: An Example for Copyright?**

In an effort to improve the regulation of several key sectors operating within the online sphere, EU lawmakers have started to adopt new institutional arrangements to facilitate cross-border oversight and enforcement measures. These arrangements, usually taking the form of a centralized EU body paired with competent national-level authorities, have appeared in both the GDPR and in the proposed DSA.

In 2012, one key pillar of data protection reform in the EU recognized that a new degree of centralization and coordination was required to administer data protection laws more effectively EU-wide. This gave rise to the construction of a new EU-level body in the form of the [European Data Protection Board](#) (EDPB). The Board, unlike its predecessor (WP29), was granted legal personality as well as some legally binding powers. However, at the negotiation stages of the GDPR, it was agreed that the exercise of the Board’s regulatory powers would be strictly limited to situations where national data protection authorities (DPAs) cannot come to an agreement in the handling of a cross-border case. In reality, while this has left the EDPB with few opportunities to substantively intervene in cross-border data protection disputes thus far, its centralized positioning within the regulatory framework has proved useful, particularly with respect to its [supervisory and advisory functions](#).

Likewise, in 2020, legislative reform over the EU’s legal framework for online enforcement included a [proposal for a Digital Services Act](#), which features a new institutional arrangement mirroring that found in the GDPR. The European Board for Digital Services (EBDS) is mentioned in the proposal text as an independent advisory group comprised of (national) Digital Services Coordinators (DSCs), operating at the EU level and in coordination with the European Commission. According to the DSA proposal, the general aims of the Board are to promote coordination among MS authorities, issue advisory opinions, and help centralize and manage tasks related to dispute resolution. The Board will also be tasked with several oversight responsibilities, including those which are aimed at facilitating the DSCs with cross-border supervision and investigation of matters involving multiple MS. Most importantly, the Board shall be tasked with monitoring the compliance of digital service providers with the provisions of the DSA, [which will likely include evaluations of services’ compliance with fundamental rights](#).

Turning to copyright reform, with the recent [institutionalization of algorithmic enforcement](#) measures via Article 17 CDSMD, it seems that national level regulators will be tasked with an immense challenge of overseeing platforms’ compliance with copyright and related fundamental rights as they operate within a multi-national online context. Unlike the regulations described

above, what seems to be missing from the CDSMD is any consideration for a system of coordination between national level regulators to be able to effectively enforce the new Article 17 regime, even though similar cross-border issues are at stake. Thus, we propose a solution in the form of introducing a new EU-level institution. Among other related aims, such an institutional actor can help to guarantee the consistent application and enforcement copyright and related fundamental rights in the online environment.

### **A New EU Copyright Institution**

As in the fields of data protection and platform regulation, the challenges of administering and enforcing copyright law in the online environment have also called for serious reform. In 2019, the CDSMD was passed after a hard-fought battle between copyright stakeholders in the EU legislature, and is now one of the lengthiest pieces of EU copyright legislation to-date. With several new obligations outlined in the directive text, however, it seems like an oversight not to have included more specific attention towards how public regulators should develop their competences to ensure that such obligations are fulfilled. While national level policymakers have the freedom to adopt and improve national regulatory arrangements as they see fit, it does not change the reality that cross-border conflicts will also need to be addressed.

For example, in implementing the Article 17 regime, it is already anticipated that MS will adopt a [range of regulatory approaches](#) for overseeing platforms' use of algorithmic enforcement and assessing its impact on the balance of copyright and fundamental rights. Furthermore, some experts point to the fact that ensuring a standard of accountability over platforms would require introducing greater levels of [cooperation between the platforms and public regulators](#). We argue that such a task may be better administered centrally, by an independent actor situated at the EU level. At the very least, introducing a new EU-level authority may assist national authorities in coordinating their oversight over platforms operating throughout the EU. On the part of platforms, such an arrangement may provide a more streamlined means of demonstrating compliance with EU law.

There are several other potential functions for an EU-level authority for copyright outlined in our article, which encompass several advisory, enforcement, dispute resolution and copyright management-related functions which are vital for regulating copyright in the online environment. Such suggestions include advising MS on the interpretation of open terms in EU copyright as they arise (e.g., defining standards of “best practices”, “best efforts”, and other similar provisions in EU directives), introducing an alternative dispute resolution platform for online conflicts, and managing a public database for rights information. In addition to supporting the implementation of several key aspects of the CDSMD, these proposed functions of an EU-level regulator seem crucial for achieving a truly “digital single market” in the EU in the long term.

### **Conclusion**

At the end of their “[Comment on Copyright and the Digital Services Act Proposal \(2022\)](#)”, members of the European Copyright Society raise a critical question: “Who is the regulator?” Their inquiry, stemming from a broader discussion on the new oversight and enforcement measures proposed in the DSA, is raised specifically with copyright and fundamental rights concerns in

mind. Similarly, in responding to *Poland v. Parliament and Council*, Husovec [remarks](#) that “[t]he Court now says that filters should only be used where the technology is of high quality. But who will judge that it is?”

There doesn’t seem to be a satisfactory answer yet as to *how* public regulators should approach developing their competences, particularly given the difficulties of enforcing conduct online.

Given the Article 17 implementation process underway, it seems like the time is right to reform institutional configurations in the EU as well, this time to ensure copyright remains a system that can promote a fair balance of private and public interests in a cross-border, multinational, and digital context.

According to our proposal, a new EU-level regulator for copyright and related rights can likely provide a broad range of services to facilitate the implementation of core regulatory aspects of the CDSMD’s new Article 17 regime, as well as address the numerous other cross-border issues related more generally to the understanding, scope and enforcement of copyright and related fundamental rights online.

A draft version of our forthcoming article can be accessed on SSRN [here](#).

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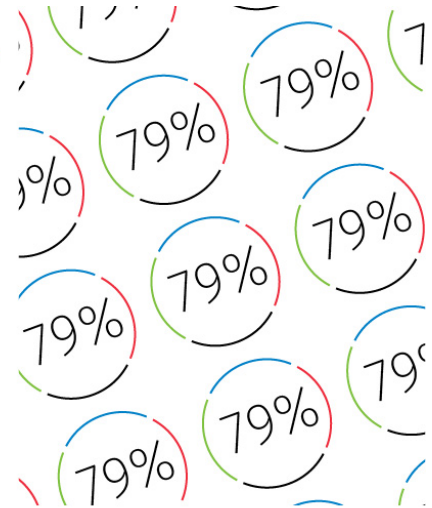
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