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Constitutional Safeguards in the "Freedom of Expression Triangle" – Online Content Moderation and User Rights after the CJEU's Judgement on Article 17 Copyright DSM Directive

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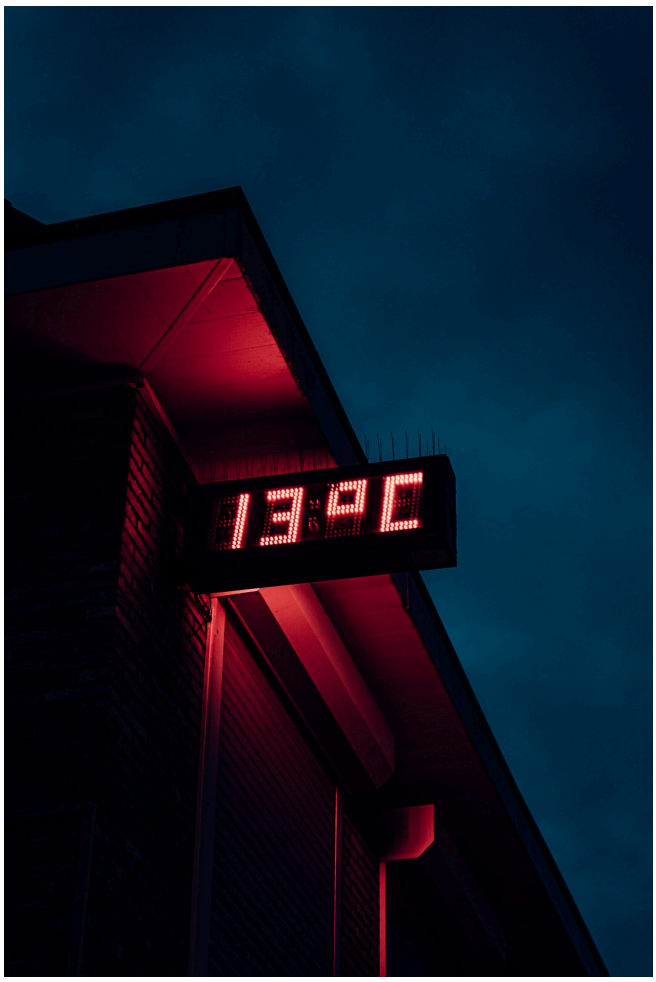
In this contribution, we look at the future of content moderation after the recent decision of the Grand Chamber of the CJEU of 26 April 2022 on the validity of Article 17 CDSM with regard to freedom of expression. This decision is a crucial turn for a number of reasons, the main one being that a proper implementation by the Member States of the user safeguards in Article 17 will be key in complying with the explicit requirement to respect freedom of expression (also from a procedural point of view), as these safeguards contained in the Directive remain vague and undetermined. Therefore, a copy-paste implementation of the provision during the implementation process is simply not an option if no additional guidelines are provided on how the safeguards can be made operational in practice. This article was first published on The Digital Constitutionist and is reposted here with the kind permission of the authors.



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With its ruling in Poland v Commission (C-401/19) on 26 April 2022 the Court of Justice of the European Union (CJEU) dismissed an action to annul Article 17 of Directive (EU) 790/2019 on copyright and related Rights in the Digital Single Market (CDSM Directive). At a time where the EU's legal framework for online intermediaries is undergoing major reform, the CJEU demands that filtering and blocking of online content must be subject to strict safeguards to protect freedom of expression but leaves the concrete formulation of such safeguards to its Member States when implementing the Directive. The Court thereby adopts an understanding of digital constitutionalism

that is flexible, technology neutral and has at its foundation the fundamental rights and their protection through substantive minimum standards and strong procedural safeguards for user rights (Geiger/Jütte).

Poland had challenged Article 17 CDSM Directive on the grounds that is violated the right to freedom of expression by requiring online content-sharing service providers (OCSSPs) to filter and block uploads by their users. While the Court acknowledged that filtering constitutes a particularly severe limitation of the right to freedom of expression protected by Article 11 of the EU Charter of Fundamental Rights, it found this limitation proportionate. In coming to this conclusion, the Court took into consideration that Article 17 did not only establish filtering obligations for OCSSPs in Article 17(4)(b) and (c), which were the heart of Poland's challenge. It stressed that Article 17 also contained substantive safeguards by requiring Member States to foresee certain mandatory limitations and exception to copyright's exclusive economic rights (Article 17(7)), as well as procedural safeguards that guarantee users access to platform-based complaint and redress mechanisms, out-of-court dispute settlement mechanism and ultimately access to the ordinary courts (Article 17(9).

The crux of Article 17 is its inherent uncertainty, which gives Member States a wide margin of discretion when casting the various requirement of the provision into their respective national laws. When doing so, they must, according to the Court, "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." This requirement is not only addressed to the Member States when implementing Article 17, but also to the authorities and courts of the Member States when the interpret and apply national rules based in Article 17. The legal framework that Article 17 established, and which will, for the foreseeable future govern the exercise of freedom of expression online, thereby built into a multi-level system of digital constitutionalism that integrates commercially operated online platforms into a two-tier legislative framework. Because of its vagueness in determining the concrete mechanisms to safeguards user's rights, it is to be anticipated that the result will be a patchwork of very different solutions at national level and therefore a procedural chaos with a lot of legal uncertainty. The aim of the directive, which is to harmonize the rules of content moderation, will therefore unfortunately not be achieved and the Court could have come to a more radical conclusion and invalidate the provision on the basis of a lack of competence as the legislator's activity according to the TFEU needs to lead to harmonization. A directive that does not harmonize – or on the contrary leads to further uncertainty because of its vagueness – inevitably loses its legitimacy (Geiger/Jütte 2021).

Admittedly, the scope of Article 17 only extends to certain types of platforms, as OCSSPs are only such platforms of "which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes". However, the constitutional dimension that the Polish Challenge has addressed will also apply in other contexts, including the Digital Services Act (DSA).

Two aspects are particularly relevant for the development of constitutional safeguards in the relation between online platforms and other intermediaries on the one side, and user of such services and parties that suffer injuries from their actions. And while freedom of expression was the only fundamental right that Poland saw injured by Article 17 CDSM Directive, the principles that can be derived from the ruling will also apply to other contexts.

First, the Court set very strict limits to the obligation for OCSSPs to prevent unlawful uploads from their users. Article 17 imposes a 'best efforts' obligation to prevent the availability of specific works in two situations: either, when rightholders have provided OCSSPs with the necessary and relevant information, or when OCSSPs have receive a sufficiently substantiated notice from rightholders. The prevention of uploads on OCSSPs, by definition platforms with a large user-base which generates a high volume of uploads, will require the use of automated content-recognition tools, and which will inevitably result in the prevention of lawful uploads. However, non-infringing uploads by users should expressly not be subject to preventive filtering and blocking, and Article 17(7) list specific uses covered by copyright exceptions and limitation which must be available to users of such platforms, including uses for the purposes of quotation, criticism and review and caricature, parody or pastiche. Automated tools cannot make the necessary legal distinctions (Engstrom/Feamster 2017), which is why the CJEU limits the obligations for OCSSPs arising under Article 17(4) to prevent uploads only insofar as such prevention does not "require an independent assessment of the content by them in the light of the information provided by the rightholders and of any exceptions and limitations to copyright." This means that only obviously unlawful uploads are subject to a preventive filtering obligation for OCSSPs. Unfortunately, what qualifies as obviously unlawful content is not explicated in the decision. However, the reference to the information provided by rightholders seems to indicate that rightholders would be liable if the information they provide, and which is at the origin of the blocking is incorrect (Geiger/Jütte 2021). The CJEU clarifies that the platforms cannot be required to provide an independent assessment of this information. It is thus to be hoped that rightholders will exercise self-restraint when requesting the blocking of content. Secondly, in case of doubt with regard to the lawfulness of the use due to a potential coverage by an exception and limitation (quotation, parody etc.), platforms should not be required to filter. At the end, the CJEU clarifies that filtering can take place in very exceptional and rather straight-forward circumstances, but to comply with freedom of expression any overblocking should be prevented and concrete safeguards implemented.

The Courts builds on established case law based on Article 14 of the E-Commerce Directive which only permits the blocking and filtering of content with measures that are strictly targeted (cf. C-18/18, *Glawischnig-Piesczek v Facebook Ireland*). This allows for an effective protection of copyright, in the case of the CDSM Directive, but also better respects freedom of expression. In the context of the CDSM Directive specifically, it prevents that the cooperation between rightholders and OCSSPs impacts negatively on the exercise of freedom of expression. Presumably for that reason, the Court, as well as AG Saugmandsgaard Øe in his Opinion (Jütte 2021) rejected the proposal of the Commission to allow the prevention of uploads that contain so-called 'earmarked content' i.e. "content whose availability could cause significant harm" to rightholders.

Second, the Court acknowledged that Article 17(9) foresees certain procedural safeguards that provides users whose content has been blocked or filtered with effective and expeditious platform-based complaints and redress mechanism, and access to impartial out-of-court dispute settlement mechanisms. Although the Directive ultimately foresees access to a court, the first fora to have disputes over the prevention of uploads settled are potentially, and certainly in the case of platform-based redress mechanism, operated by private actors. It is in these fora where (preliminary) decision on the exercise of freedom of expression will be made, and where potential chilling effects will be created. It should not be underestimated that multi-staged complaints and dispute-settlement processes can frustrate users and lead them to give up justified claims to have their uploads reinstated after it has been prevented.

This is why a proper implementation of Article 17 and oversight mechanisms over its application,

in compliance with fundamental rights and the general principles of EU law, is so important. The CJEU leaves this task to the Member States and opines that the safeguards put in place, amongst them this described above, are sufficiently precise to consider the limitation Article 17 created on the rights protected under Article 11 EUCFR justified and proportionate. The protection of EU fundamental rights is shifted to the level of the Member States and indirectly to OCSSPs and rightholders. As already stated above, the danger lies here of a disharmonious implementation of Article 17 in the various Member States, a danger that is very real looking at current implementation models (Reda/Keller 2021). But it also shows a cooperative and shared digital constitutional responsibility between the Member States and the EU legislator under the co-option of online platforms and rightholders.

The Member States and their national implementations are directly subject to fundamental rights review by the CJEU, and it can be anticipated that Article 17 will soon lead to a good number of preliminary references to the CJEU. However, online platforms and not subject to direct fundamental rights control and review of their actions can be a lengthy process. Therefore, a more direct oversight of the content moderation process of Article 17 CDSM would be desirable, but the Directive itself offers noting of that sort (Geiger/Mangal 2022). Here, the draft DSA foresees a solution, which can help to resolve the constitutional insufficiencies of the CDSM Directive if it is understood as a horizontal (which it is) *lex generalis* in relation to the gaps left by Directive (Quintais/Schwemer 2022).

Besides much more concrete procedural requirements for notice and action processes (Article 14 & 15), internal complaint handling mechanisms (Article 17) and out-of-court dispute settlement (Article 18), it requires Member States to designate Digital Services Coordinators (DSCs). One of the tasks of such DSCs is to certify out-of-court dispute settlement bodies. The silence of the DSA on the precise nature of DSCs is an opportunity to provide legitimacy to the procedural safeguards provides for (vaguely) by the CDSM and (more concretely) the DSA.

The concept of DSCs as independent institutions is interesting. These regulators will have to ensure that fundamental rights are respected in out-of-court dispute settlement proceedings. Their mission could, however, be expanded to function as general watchdogs for the respect for fundamental rights on online platforms in relation to harmful and unlawful content, including copyright infringements – after all, the problems raised by various types of ‘problematic’ content are similar to a certain extent, at least as far as their EU law dimension is concerned.

In relation to copyright, these independent regulators could be charged with the task to develop certain substantive standards, including what constitutes targeted filtering, how the cooperation between OCSSPs and rightholders must be structured within the scope of Article 17(4) and, gradually, what obviously and manifestly infringing content actually means. However, there are strong arguments in favor of situating these coordinators above Member State level in order to avoid a disparity between the various national approaches and prevent a fragmentation of legal frameworks for the liability of OCSSPs, and other intermediaries subject to the rules of the DSA for that purpose. Therefore, implementing an new EU institution to coordinate and lead the oversight over the content moderation regulations seems key in the future to secure a fundamental rights-compliant legal framework (Geiger/Mangal 2022).

In other words, such an institution could also help to channel the flexibility left by Article 17 CDSM Directive. This is an opportunity to progressively develop, outside of the time-consuming legislative process, a content moderation framework for the EU that is built on a respect for

fundamental rights and that ensures that this respect is also exercised by online platforms and rightholders through fundamental rights-compliant procedures and the proper application of substantive law. Within the limited scope of Poland's challenge, this could ensure a digital ecosystem that protects freedom of expression, and beyond the challenge respects a variety of other fundamental rights.

For the moment, the CJEU has loaded the responsibility entirely on the shoulders of the Member States. In their national implementations of Article 17, they must design and put into operation safeguards for freedom of expression on OCSSP-platforms. National legislatures will, for the foreseeable future have to adapt content moderation rules to industry practices and technological development. Currently, and unfortunately, they will not receive support from a coordinating institution, as the Guidance issued by the European Commission on Article 17 CDSM Directive (Geiger/Jütte 2021) itself seems not to be in compliance with the CJEUs ruling of 26 April and it is to be hoped that the European commission in the light of the ruling is incentivize to issue another guidance to clarify what safeguards have to be implemented by the Member states and to propose some sort of oversight at EU level. It can also only be hoped that, once the DSA has become law, national DSCs with the help of a new supranational authority will coordinate the efforts at Member State level to construct a legal regime for intermediary liability that respects and protected fundamental rights online.

For now, what seems clear is that there is still a huge task ahead for the EU and its Member States when transposing Article 17 and that a copy-paste implementation of the provision during the implementation process is simply not an option if no additional guidelines are provided on how the safeguards can be made operational in practice. In any case, the decision invites to reflect on means to avoid in the future the privatisation of content moderation and to exit the "freedom of expression- triangle" of platforms, rightholders and users. Freedom of expression is a matter of public interest, its exercise is to quote the ECtHR an "essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man", and therefore its respect online should be subject to strong regulatory scrutiny. In this line, we believe that digital constitutionalism is key to help defining a fundamental rights-compliant content moderation system for the online environment.

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