

Balancing Article 17 CDSMD and the Freedom of Expression

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ABSTRACT

Accompanied by massive protests driven by concerns about the introduction of upload filters, Art. 17 of Directive (EU) 2019/790 on copyright in the Digital Single Market (CDSMD) came into force in 2019. Since then, a lot has happened: Poland filed an action for annulment, whose ruling was announced by the CJEU on 26 April 2022, Member States delivered transpositions with diverging approaches, and a political agreement on the Digital Services Act, which contains numerous regulations that are potentially also applicable to online platforms as addressees of Art. 17 CDSMD, was reached on 23 April 2022. With all these regulations, the question remains open as to how it can be ensured that Art. 17 CDSMD is compatible with the fundamental right to freedom of expression and information, enshrined in Art. 11 of the Charter of Fundamental Rights.

In order to answer this question, the origin of Art. 17 CDSMD and its ratio, its liability mechanism and its impact on the fundamental right will first be examined. In a further step, the safeguards laid down in Art. 17 CDSMD are analysed and the effects of the current ruling on national implementations are discussed. Finally, the focus is on the German approach, which contains farther-reaching ex ante safeguards and is considered as a model for further implementations, especially after the judgement of the CJEU.

It is concluded that the developments since the adoption of Art. 17 CDSMD overall strengthen the freedom of expression and information. In order to ensure effective protection of this fundamental right, however, it is necessary to define when content is to be regarded as manifestly infringing and can thus be blocked ex ante according to the recent judgement. Determining this, should not be left to the OCSSPs. The German implementation offers a first step in this regard but is also confronted with doubts about its compatibility.

This article takes the recent case law, national and EU legislation and offers a timely contribution to the debate on the compatibility of Art. 17 CDSMD with the fundamental right to freedom of expression and information.

1 INTRODUCTION

Nothing less than the demise of the internet was feared, and massive protests rallied behind the #SaveYourInternet to prevent the introduction of upload filters through Art. 17 of Directive the Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market.¹ It is the arguably biggest copyright reform at European level since the introduction of the InfoSoc Directive in 2001 and at the forefront is Article 17 CDSMD, which accentuates the responsibility of online platforms operators for the content of their users to support rightholders in protecting their rights online.²

Prior to its introduction, the safe harbour provisions in Articles 12-14 of the E-Commerce Directive were at the center of the liability regime for online intermediaries.³ Originally intended to harmonise an online intermediaries' limited liability for user-uploaded content to support the 'smooth functioning of the internal market',⁴ a lot has changed since the introduction of the ECD in 2000. Significantly, platforms like YouTube became more comprehensive, offering convenient and free access to copyright protected content. While platforms monetise their offer through advertising and user data, rightholders benefit from these significant market valuations only to a limited extent, as they do not necessarily have the possibility to conclude licensing agreements for the use of their content.⁵ This has been referred to as the 'value gap', a term which was used by the music industry and also in the legislative process.⁶ It refers to a perceived mismatch between the value that digital platforms gain from the music and the actual value returned to the rightholders.⁷ It is the declared aim of the CDSM Directive 'to guarantee that authors and rightholders receive a fair share of the value that is generated by the use of their works', or to put it differently, to decrease the 'value gap'.⁸

To this end, Article 17(1) CDSMD provides that online content-sharing service providers (OCSSPs) perform an act of their own in terms of communication to the public or making available to the public, when they give access to copyright protected works on their platform. OCSSPs are online platforms which store and make available content of users and which compete with other online content services like online audio and video streaming services.⁹ In order to make copyright protected works publicly available, OCSSPs shall obtain authorisation from the rightholders.¹⁰ Where an authorisation is not granted, according to Art 17(4) CDSMD, OCSSPs shall be liable for copyright infringing uploads, unless they demonstrate

that they made best efforts to obtain an authorisation (Art. 17(4)(a) CDSMD), ensure the unavailability of specific works (Art. 17(4)(b) CDSMD), and expeditiously remove content upon receiving a notice from the rightholders (Art. 17(4)(c) CDSMD).

In particular the obligation to ensure with best efforts the unavailability of copyright protected works in Art. 17(4)(b) CDSMD has been the subject-matter of debate. It has been suggested that it would effectively oblige online platforms to filter all content, because the technology cannot properly differentiate between unlawful and lawful content, which results in the prevention of the latter.¹¹ These concerns were also reflected in an action from Poland regarding a request to annul Art. 17(4)(b) and (c) CDSMD in fine.¹² It mainly argued that these provisions prescribe the use of automatic content recognition (ACR) tools, which carry the risk of blocking lawful content and this even before its dissemination and therefore its prescription constitutes a serious interference with the fundamental right to freedom of expression and information.¹³

Indeed, the best effort obligation in Art. 17(4)(b) CDSMD has been formulated very vaguely. As a matter of fact, national implementations tend to translate the term differently.¹⁴ Furthermore, the exact duty for OCSSPs remains unclear. This is also due to the development of the provision: in the first proposal of the EU Commission, 'effective content recognition technologies' were explicitly mentioned as exemplary measures to 'prevent the availability on their services of works or other subject-matter identified by rightholders'.¹⁵ To tackle the concerns which

arose after its first proposal, the legal text was not only extensively amended (the original proposal encompassed merely three paragraphs in comparison to today's ten, making it the lengthiest provision in the whole Directive) but also substantially altered, the explicit mention of content recognition tools stroke out, and safeguards for the user's freedom of expression introduced.¹⁶ In its Guidance on Art. 17 CDSMD, the Commission strives to present Art. 17 CDSMD as technologically neutral and emphasises that the use of technological solutions is not explicitly prescribed.¹⁷

That this does not reflect the full truth, however, is already clear from the Guidance itself. Pursuant to Art. 17(4)(b) CDSMD and Recital 66, industry practices are to be included in the assessment of 'best efforts'. According to the Guidance 'this includes the use of technology or particular technological solutions'.¹⁸

The same conclusion can be drawn from the case law of the Court of Justice of the European Union (CJEU). Already in *YouTube and Cyando*, the court considered the fact whether a platform put in place 'the appropriate technological measures that can be expected from a reasonably diligent operator in its situation in order to counter credibly and effectively copyright infringements on that platform' in its liability assessment of the platform operator.¹⁹ This outcome is also represented by the AG in *Poland v Parliament and Council*.²⁰ The CJEU endorses this perspective in its judgement, adding that 'neither the defendant institutions nor the interveners were able, at the hearing before the Court, to designate possible alternatives to such tools'.²¹

¹ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130, 92–125 ['CDSMD' or 'CDSM Directive'].

² *ibid*; Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167, 10–19 ['InfoSoc' or 'InfoSoc Directive'].

³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [Directive on electronic commerce] [2002] OJ L178, 1–16 ['ECD' or 'E-Commerce Directive']; Christina Angelopoulos, 'Harmonizing Intermediary Copyright Liability in the EU' in Giancarlo Frosio (ed), *Oxford Handbook of Online Intermediary Liability* (Oxford University Press 2020) 316.

⁴ ECD recital 40.

⁵ 'Commission Staff Working Document Impact Assessment on the Modernization of EU Copy-Right Rules' [14 September 2016] 138, SWD [2016] 301 final.

⁶ *ibid* 413; International Federation of the Phonographic Industry, 'Digital Music Report 2015' [2015] 22–23; Annemarie Bridy, 'The Price of Closing the Value Gap: How the Music Industry Hacked EU Copyright Reform' [2020] 22 *Vanderbilt Journal of Entertainment & Technology Law* 323, 326; Tambiama Madiaga, 'Copyright in the Digital Single Market' (June 2019).

⁷ International Federation of the Phonographic Industry (n 6) 22–23.

⁸ Commission, Commission Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market [14 September 2016] pt 1, COM [2016] 593 final ['CDSMD Proposal'].

⁹ Cf. Recital 62 CDSMD.

¹⁰ CDSMD art 17(1), para 2.

¹¹ Morgan Meaker, 'Inside the Giant German Protest Trying to Bring down Article 13' [*Wired UK*, 26 March 2019] <https://www.wired.co.uk/article/article-13-protests> accessed 24 May 2022.

¹² Case C-401/19 *Republic of Poland v European Parliament and Council of the European Union* [2022] EU:C:2022:297.

¹³ *ibid* [40]–[41].

¹⁴ Eleonora Rosati, 'DSM Directive Series #5: Does the DSM Directive Mean the Same

Thing in All Language Versions? The Case of "best Efforts" in Article 17(4)(a)' [*The IPKat*, 22 May 2019] <https://ipkitten.blogspot.com/2019/05/dsm-directive-series-5-does-dsm.html> accessed 24 May 2022.

¹⁵ CDSMD Proposal.

¹⁶ Martin Senftleben and Christina Angelopoulos, 'The Odyssey of the Prohibition on General Monitoring Obligations on the Way to the Digital Services Act: Between Article 15 of the E-Commerce Directive and Article 17 of the Directive on Copyright in the Digital Single Market' [SSRN Scholarly Paper, 22 October 2020] 22.

¹⁷ 'Communication from the Commission to the European Parliament and the Council Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market' [4 June 2021] 11, COM[2021] 288 final ['Guidance on Art 17 CDSMD'].

¹⁸ *ibid* 12.

¹⁹ Joined Cases C-682/18 and C-683/18 *Frank Peterson v Google LLC and Others and Elsevier Inc v Cyando AG* [2021] EU:C:2021:503 [102] ('*YouTube v Cyando*').

²⁰ C-401/19 *Poland* (n 12) [57]–[69].

²¹ *ibid* [54].



In conclusion, Article 17 CDSMD may neither explicitly prescribe the use of certain ACR technologies, nor oblige the Member States to do so in their national transposition. At the same time, however, the assessment of whether the OCSSP has made 'best efforts' must take into account which technological means and alternatives are available and what is feasible for the OCSSP 'in light of the principle of proportionality'.²² Therefore, it must be concluded that the legislator, at least indirectly, prescribes the use of automatic content recognition tools by implying this in its 'best efforts' clauses.²³ By setting the legal framework in a way that it requires the use of ACR technology to comply with the provision in Article 17(4) CDSMD and to avoid liability, the use and concomitant interference with the freedom of expression are attributable to the EU legislator.²⁴

The following discusses the impacts of Article 17 CDSMD on freedom of expression and information as enshrined in Article 11 of the Charter of Fundamental Rights of the European Union as well as the contained safeguards, implications from the judgement in *Poland v Parliament and Council*, and the German approach on Article 17 CDSMD.²⁵

2 SAFEGUARDING ARTICLE 17 CDSMD AND BALANCING FUNDAMENTAL RIGHTS

Art. 17 CDSMD is located in the triangle of interests of rights holders, platform operators and users. It is therefore hardly surprising that the rights to intellectual property law from Article 17(2) of the Charter, freedom to conduct a business from Article 16 of the Charter and, above all, freedom of expression and information from Article 11 of the Charter must be reconciled.

2.1 Article 17 CDSMD's impact on fundamental rights

Strengthening the negotiating position of rightholders and making the enforcement of their rights more efficient are declared aims of the CDSMD.²⁶ As the individual reporting of content to the platforms in the past led to considerable costs and was too inefficient, the liability mechanism and the use of ACR technology should support the rightholders. This reflects the shift of responsibility for monitoring from the rightholders to the OCSSPs.²⁷ In this course, the fundamental right to intellectual property, which is recognised as such in Article 17(2) of the Charter, supports the interests of the rightholders. It is not an absolute right and can be restricted in the same way the right to property can be subject to restrictions or limitations.²⁸ The CJEU confirmed this view in *Scarlet Extended*, stating that 'there is [...] nothing whatsoever in the wording of that provision or in the Court's case-law to suggest that that right is inviolable and must for that reason be absolutely protected'.²⁹

²² CDSMD art 17(5).

²³ Like this among others: Giancarlo Frosio, 'Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity' [2020] 51 IIC 709, 725; Christophe Geiger and Bernd Jütte, 'Platform Liability Under Art. 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match' [2021] 70 GRUR International 517, 532; Karina Grisse, 'After the Storm—Examining the Final Version of Article 17 of the New Directive (EU) 2019/790' [2019] 14 Journal of Intellectual Property Law & Practice 887, 894 with further references; C-401/19 *Poland* [n 12], Opinion of AG Saugmandsgaard Øe [62].

²⁴ C-401/19 *Poland* [n 12], Opinion of AG Saugmandsgaard Øe [84]; confirmed in C-401/19 *Poland* [n 12] 56.

²⁵ Council of the European Union, Charter of Fundamental Rights of the European Union [2007/C 303/01], 14 December 2007, C 303/1 ('CFR' or 'the Charter').

²⁶ CDSMD recital 61; 'Impact Assessment on the modernization of EU copy-right rules' [n 5] 140.

²⁷ C-401/19 *Poland* [n 12], Opinion of AG Saugmandsgaard Øe [53]; 'Impact Assessment on the modernization of EU copy-right rules' [n 5] 140.

²⁸ Geiger and Jütte [n 23] 527–28.

²⁹ Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] EU:C:2011:771 [43].

³⁰ 'Impact Assessment on the modernization of EU copy-right rules' [n 6] 140.

³¹ C-70/10 *Scarlet Extended* (n 29) [46]–[49]; See also Gustavo Ghidini and Andrea Stazi, 'Freedom to Conduct a Business, Competition and Intellectual Property' in Christophe Geiger (ed), *Research handbook on human rights and intellectual property* (Research handbooks in intellectual property, Paperback edition, Edward Elgar Publishing 2016) 416 arguing that 'IPRs should not be "used", in such a way that, while exceeding their essential anti-free riding function, their exercise would conflict with the goals of "public economic order" founded on overarching societal interests: in particular, the preservation of freedom of competition and freedom of expression and information'.

³² C-401/19 *Poland* [n 12] [41].

³³ Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] EU:C:2012:85 [50].

³⁴ CDSMD art 17(4).

³⁵ C-401/19 *Poland* [n 12], Opinion of AG Saugmandsgaard Øe [142] with further

references.

³⁶ Bridy [n 6] 346.

³⁷ Felix Reda and others, 'Article 17 of the Directive on Copyright in the Digital Single Market: A Fundamental Rights Assessment' [SSRN Scholarly Paper, 16 November 2020] 27.

³⁸ Guidance on Art 17 CDSMD 20.

³⁹ Cf. 'YouTube Copyright Transparency Report H1 2021' [December 2021] 10 <https://transparencyreport.google.com/report-downloads> accessed 24 May 2022.

⁴⁰ CDSMD art 17(4)(b).

⁴¹ C-401/19 *Poland* [n 12], Opinion of AG Saugmandsgaard Øe [55].

⁴² *ibid* [187]; Gerald Spindler, 'The Liability System of Art. 17 DSMD and National Implementation: Contravening Prohibition of General Monitoring Duties' [2019] 10 JIPITEC 344, 355 para 58; Reda and others [n 37] 28; Geiger and Jütte [n 23] 536 see fn 257.

⁴³ Cf. C-401/19 *Poland* [n 12] [55].

⁴⁴ Case C-476/17 *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] EU:C:2019:624 [34].

⁴⁵ Geiger and Jütte [n 23] 523.

⁴⁶ Cf. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS-5 ('ECHR'), art 10(1).

For OCSSPs Article 17 CDSMD entails some changes compared to the earlier legal situation. They are held directly liable within the scope of Article 17 CDSMD for copyright infringing content from their users if they cannot successfully make use of the exception regime of Article 17(4) CDSMD. Instead of the previously exercised voluntariness, which gave them a negotiating superiority, they are now obliged to take measures to protect the copyright of the rightholders.³⁰ As those measures must be 'in accordance with high industry standards of professional diligence', the OCSSPs are thus limited in their choice whether and how they want to encounter copyright infringing content on their platforms. On the one hand, the obligations from Article 17 CDSMD therefore entail restrictions on the freedom to conduct a business protected in Article 16 of the Charter. On the other hand, the CJEU's decision in *Scarlet Extended* showed the ability of the freedom to conduct a business as a limiting factor for the protection of intellectual property and made clear that technical possibilities can only be included to a certain extent in the balancing process.³¹

It is, however, the users of online platforms, which are facing the greatest concerns about Article 17 CDSMD and the de-facto obligation to introduce ACR technologies. Their interests are protected by Article 11 of the Charter. In its annulment action of Article 17(4) CDSMD, the Republic of Poland raises two main concerns. First, the technology carries the risk that lawful content will be blocked and second, the blocking is determined automatically by algorithms, enabling blocking of content even before its dissemination.³² Altogether these issues would limit the freedom of expression in a way that undermines the essence of Article 11 of the Charter.

The issue of overblocking

The risk of blocking lawful content due to the application of ACR technology was outlined by the CJEU in the case *SABAM*, where it held that an injunction requiring the installation of a filtering system 'could potentially undermine freedom of information, since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications'.³³ Its occurrence can be referred to as 'overblocking' which describes a practice in which content is blocked beyond the threshold of the legal framework.

In the case of Article 17 CDSMD it is caused by two factors. First, according to the liability mechanism of Article 17(4) CDSMD, the platforms must make their best efforts to ensure the unavailability of specific works in order to avoid its own liability.³⁴ This could lead to OCSSPs which, as the AG describes it in his opinion, 'may tend to be overzealous and excessively block such information where there is the slightest doubt as to its lawfulness'.³⁵

The second factor is the current state of the art. The exceptions and limitations to copyright, such as caricature, parody or pastiche, which are laid down in Article 17(7) CDSMD as mandatory for the member states, have in common that they can only be recognised in context. The technologies in use today, however, are merely matching

technologies. They can assist in identifying content by providing very accurate matches, but are not able to analyse whether an uploader's duplicate content falls under an exception and limitation.³⁶ That is because the content recognition technology is solely capable of quantitative distinctions regarding the amount of protected material, but missing the ability to perform a qualitative assessment and including the context to determine the applicability of an exception or limitation.³⁷ In its Guidance the Commission comes to a similar conclusion, stating that 'in the present state of the art, no technology can assess to the standard required in law whether content, which a user wishes to upload, is infringing or a legitimate use'.³⁸

The issue of blocking content before its dissemination

The second concern raised by Poland is blocking content before it is disseminated. Since the technology is highly developed and is able to scan and recognise content quickly, platforms are in the position to make an automated decision about permitting an upload of a particular content still during the upload process.³⁹ They are therefore able to block content before (ex ante) or after (ex post) it gets available to the public.

Assessing the text of Article 17(4)(b) and (c) CDSMD, it becomes clear that the ex ante blocking of content is inherent in the law: if the OCSSP has not obtained authorisation for a work, it must make best efforts to ensure the unavailability of specific works.⁴⁰ By obliging the OCSSPs to make 'best efforts to prevent [the] future uploads' of works, Article 17(4)(c) CDSMD is even more explicit in its wording. As AG Saugmandsgaard Øe points out, the phrase 'in accordance with point (b)' emphasises that both, Article 17(4)(b) and (c) require OCSSPs to prevent the uploading.⁴¹

In case of lawful content being wrongly blocked ex ante before its dissemination however, this requires the user to use a complaint mechanism, as provided for in Article 17(9) CDSMD, to bring their content online. Such an approach poses serious risks to the freedom of expression of users, as it entails 'chilling effects', i.e., a decrease in the activity of those users.⁴²

Limiting freedom of expression and information

It follows from the above that Article 17 CDSMD constitutes a limitation on the freedom of expression and information. In *Poland v Parliament and Council*, the CJEU concludes that 'such a prior review and prior filtering are liable to restrict an important means of disseminating online content and thus to constitute a limitation on the right guaranteed by Article 11 of the Charter'.⁴³

The fundamental right protects both sides of a discourse: the freedom of expression on the one side comprises the opportunity to take part in the public exchange of cultural, political, and social information and ideas of all kinds.⁴⁴ It covers opinions, ideas and all types of information that can be communicated.⁴⁵ The freedom to receive and impart information on the other hand protects the free access to information without interference by public authority.⁴⁶

It is, however, not an absolute right.⁴⁷ The possibility of restriction follows on the one hand from the interaction with Article 10(2) ECHR through Article 52(3) of the Charter and on the other hand from the general reservation of Article 52(1) of the Charter.⁴⁸ According to these provisions, in order to be justified, any limitation must be provided for by law, respect the essence of the right to freedom of expression and be proportionate, i.e. the limitation must be justified by objectives in the public interest and not exceed the limits of what is appropriate and necessary.⁴⁹

In the light of intellectual property the CJEU ruled in its *Promusicae* decision that Member States must, when transposing the directives, take care to rely on an interpretation which allows striking a fair balance between the various fundamental rights.⁵⁰ In *Poland v Parliament and Council* the CJEU repeated this.⁵¹ Even Recital 84 itself states that the Directive should be interpreted and applied in accordance with the fundamental rights and principles recognised in particular by the Charter.⁵²

2.2 Article 17 CDSMD's safeguards

In order to address the above mentioned concerns and to ensure that Article 17 CDSMD strikes indeed a fair balance between the fundamental rights, the European legislator has introduced numerous safeguards during the legislative process.

Preventing overblocking: Between the poles of paragraphs 4 and 7 of Article 17 CDSMD

First, Article 17(7) subparagraph 1 CDSMD states that 'the cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works [...] which do not infringe copyright [...], including where such works [...] are covered by an exception or limitation'. Article 17(9) subparagraph 3 CDSMD confirms this by repeating that 'this directive shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law'.⁵³

Second, Article 17(7) subparagraph 2 CDSMD obliges the Member States to introduce certain exceptions and limitations to copyright. In this way, some of the exceptions and limitations encompassed in the catalogue of Article 5(3) InfoSoc has now become mandatory and it has ascertained a minimum standard of exceptions and limitations. Additionally, according to Article 17(9) CDSMD, in fine, OCSSPs are required to 'inform their users in their terms and conditions that they can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law'.⁵⁴

At a first glance, these safeguards seem to be in contradiction to the obligations for OCSSPs from Article 17(4) CDSMD, as this liability regime creates an incentive to block more in case of doubt in order to avoid its own liability, as it is 'most likely the most cost-effective mechanism that would least restrict OCSSPs freedom to conduct a business'.⁵⁵ From the wording of the Article 17 CDSMD however, it becomes clear that paragraph 7 takes

precedence over paragraph 4. This is because Article 17(7) is formulated as an obligation of result ('shall not result in the prevention'), whereas Article 17(4) merely provides for an obligation of 'best efforts'.⁵⁶ This has also been indicated by the Commission during the hearing of *Poland v Parliament and Council*,⁵⁷ and was confirmed in the judgement, in which the CJEU held that the wording is 'unambiguous' and not limited to requiring best efforts to that end, 'but prescribes a specific result to be achieved'.⁵⁸ In conclusion, OCSSPs are in principle required to filter and block content preventively, but only to the extent that they do not concern content that is not copyright-infringing or covered by an exception or limitation. In regard to this, the CJEU in *Poland v Parliament and Council* established a test, whether the content in order to be found unlawful would require an independent assessment.⁵⁹

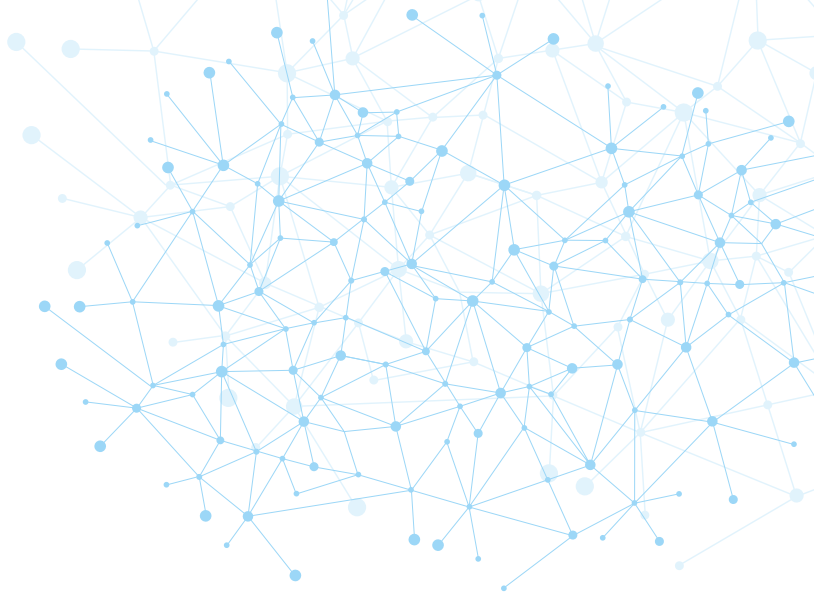
Ex ante measures

The fact that ex ante measures by OCSSPs are in any way compatible with freedom of expression is not a novelty from *Poland v Parliament and Council* but has already been established in the case law of the CJEU. In fact, the judgement represents a consistent further development of previous case law. In *UPC Telekabel*, for example, the CJEU held that preventive filtering and blocking access to a website by an Internet Service Provider (ISP) is reconcilable with the fundamental rights, provided the measure does not 'unnecessarily deprive internet users of the possibility of lawfully accessing the information available'.⁶⁰ In *L'Oréal*, the CJEU also ruled that it must in principle be possible not only to end infringements, but also to prevent further infringements.⁶¹ At the same time, however, it found 'that the measures required of the online service provider concerned cannot consist in an active monitoring of all the data of each of its customers in order to prevent any future infringement of intellectual property'.⁶²

In *Poland v Parliament and Council* the CJEU sharpened its jurisprudence, by stating 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'.⁶³ Although this barrier to the use of ACR technologies is found to be high, the CJEU has not closed the door for the usage of technical means entirely. Rather it found a way to set a precise limit for blocking content ex ante, which lies along the lawfulness of content. This is also in line with the case law of the European Court of Human Rights (ECtHR), which held that blocking an entire website without differentiating between legal and illegal content carries the risk that content will be arbitrarily and excessively blocked.⁶⁴

The general monitoring ban in Article 17(8) CDSMD

Next, Article 17(8) subparagraph CDSMD states that 'the application of this Article shall not lead to any general monitoring obligation'. This provision is similar to the general monitoring ban from Article 15(1) ECD. Since



Article 17(3) CDSMD excludes the application of Article 14(1) ECD, and Article 17 CDSMD is considered *lex specialis* compared to the InfoSoc and E-Commerce Directives, Article 15(1) ECD does not apply either to the framework of Article 17 CDSMD.⁶⁵ Nonetheless, due to its recurrence, Article 17(8) CDSMD is to be interpreted in the same way as Article 15(1) ECD, which gives relevance to the previous case law.⁶⁶

In the past, the term 'general monitoring' has given rise to many interpretations, such as being present when all or most of the information is handled by an intermediary or carving out when monitoring is done only in order to detect specific activities.⁶⁷ Nonetheless, it must be emphasised at this point that the use of ACR technology always requires all content, including non-infringing material, to be scanned, otherwise it cannot be determined which content is infringing and which is not.⁶⁸ As a consequence, 'general monitoring' cannot be interpreted literally in the sense that monitoring of all content per se is prohibited, without contradicting what Article 17(4) CDSMD imposes on OCSSPs. 'General monitoring' must therefore be understood as a technical legal term, whose meaning is determined by the interpretation of the courts.⁶⁹

In the cases *Scarlet Extended* and *SABAM*, the CJEU held that 'a system which would require the provider to actively monitor almost all the data relating to all of its service users [...] would require [it] to carry out general monitoring, something which is prohibited by Article 15(1) [ECD]'.⁷⁰ Later in *Glawischnig-Piesczek*, the CJEU, citing Recital 47, held that monitoring obligations are not prohibited by Article 15(1) ECD if they are 'in a specific case' instead of 'general'.⁷¹ In this case, the court found that requiring Facebook to filter out certain content that a court has found to be illegal does not fall under the

prohibition of general monitoring.⁷² The CJEU's approach has thus changed somewhat in the course of the judgements. While initially the focus was on the amount of information to be inspected, now it is the detail of searches.⁷³

In *Glawischnig-Piesczek*, 'specific' compassed not only the content that was found defamatory by a court in a Member State, but also equivalent content, as long as the differences were not 'as to require the host provider concerned to carry out an independent assessment of that content'.⁷⁴

In *Poland v Parliament and Council*, the CJEU now takes up the latter point, stating that Article 17(8) CDSMD clarifies that an OCSSP cannot be required to prevent uploading of content, 'which, in order to be found unlawful, would 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'.⁷⁵ Doing so, the court followed its AG who had pointed out that *ex ante* blocking is only permissible for

⁴⁷ *KU v Finland* ECHR 2008-V 125, para 49; Case C-479/04 *Laserdisken ApS v Kulturministeriet* [2006] EU:C:2006:549 [64].

⁴⁸ C-401/19 *Poland* (n 12), Opinion of AG Saugmandsgaard Øe [89]–[90].

⁴⁹ C-401/19 *Poland* (n 12) [63]–[65]; *Laserdisken* (n 48) [64]; *Vladimir Kharitonov v Russia* App no. 10795/14 (ECtHR, 23 June 2020), para 36; Oreste Pollicino and others (eds), *Copyright and Fundamental Rights in the Digital Age: A Comparative Analysis in Search of a Common Constitutional Ground* (Edward Elgar Publishing 2020) 111.

⁵⁰ Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] EU:C:2008:54 [68].

⁵¹ C-401/19 *Poland* (n 12) [99].

⁵² CDSMD, recital 84.

⁵³ CDSMD, art 17(9).

⁵⁴ *ibid.*

⁵⁵ Geiger and Jütte (n 23) 537.

⁵⁶ C-401/19 *Poland* (n 12), Opinion of AG Saugmandsgaard Øe [165].

⁵⁷ Paul Keller, 'CJEU Hearing in the Polish Challenge to Article 17: Not Even the

Supporters of the Provision Agree on How It Should Work' (*Kluwer Copyright Blog*, 11 November 2020) <http://copyrightblog.kluweriplaw.com/2020/11/11/cjeu-hearing-in-the-polish-challenge-to-article-17-not-even-the-supporters-of-the-provision-agree-on-how-it-should-work/> accessed 24 May 2022.

⁵⁸ C-401/19 *Poland* (n 12) [78].

⁵⁹ *ibid.* [90].

⁶⁰ Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* [2014] EU:C:2014:192 [63].

⁶¹ Case C-324/09 *L'Oréal SA and Others v eBay International AG and Others* [2011] EU:C:2011:474 [131].

⁶² *ibid.* [139].

⁶³ C-401/19 *Poland* (n 12) [85].

⁶⁴ *Vladimir Kharitonov v Russia* (n 49) para 38.

⁶⁵ Geiger and Jütte (n 23) 198; Grisse (n 23) 896.

⁶⁶ Matthias Leistner, 'European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in

the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?' [SSRN Scholarly Paper, 21 May 2020] 15; Geiger and Jütte (n 23) 198; C-401/19 *Poland* (n 12) [90].

⁶⁷ Compare e.g. the following, in which an attempt is made to find out what is meant by 'general monitoring', taking into account all the case laws of the CJEU and the ECtHR: Senftleben and Angelopoulos (n 16).

⁶⁸ *ibid.* 12; Leistner (n 66) 15; C-401/19 *Poland* (n 12), Opinion of AG Saugmandsgaard Øe [113].

⁶⁹ Leistner (n 66) 15.

⁷⁰ C-360/10 *SABAM* (n 33) [38]; C-70/10 *Scarlet Extended* (n 29) [40].

⁷¹ Case C-18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited* [2019] EU:C:2019:821 [34].

⁷² *ibid.* [35].

⁷³ C-401/19 *Poland* (n 12), Opinion of AG Saugmandsgaard Øe [111]–[112].

⁷⁴ C-18/18 *Glawischnig-Piesczek* (n 71) [45].

⁷⁵ C-401/19 *Poland* (n 12) [90].



content 'which [unlawfulness] is obvious from the outset, that is to say, it is manifest, without, inter alia, the need for contextualisation'.⁷⁶ In the same vein, the Commission also stated in its Guidance that 'automated blocking, i.e. preventing the upload by the use of technology, should in principle be limited to manifestly infringing uploads'.⁷⁷ This outcome is also in line with what the ECtHR judgement in *Delfi*, according to which 'clearly unlawful content' can, or even must, be blocked ex ante without unduly restricting the fundamental right of freedom of expression.⁷⁸

Concluding from the above it becomes clear that a provision in Member States transpositions does not contravene the general monitoring obligation ban of Article 17(8) CDSMD, if it is limited to manifestly infringing content, i.e. content which does not require an independent assessment to assess its unlawfulness.

The additional ex post procedural safeguards from Article 17(9) CDSMD

Article 17(9) subparagraphs 1 and 2 CDSMD introduce procedural safeguards, which contain ex post mecha-

nisms in the event of disputes over the disabling of access or the removal of content. Article 17(9) subparagraph 1 CDSMD mandates OCSSPs to provide an 'effective and expeditious complaint and redress mechanism'. According to Article 17(9) subparagraph 2 CDSMD, Member States are obliged to ensure that an out-of-court mechanism and access to relevant judicial authorities are in place according to Article 17(9) subparagraph 2 CDSMD.

The judgement in *Poland v Parliament and Council* made clear, that the complaint mechanism is considered only as an additional ex post safeguard, which applies in 'cases where notwithstanding the [ex ante] safeguards [...], the providers of those services nonetheless erroneously or unjustifiably block lawful content'.⁷⁹ Independently, the procedural safeguards are therefore not sufficient and they apply only in exceptional cases. It underlines also the general importance of the ex ante safeguards, which limit the use of technology to manifestly infringing content.⁸⁰

Clear and precise rules

Adding lastly on the need for clear and precise rules, the CJEU refers to its *Facebook Ireland ad Schrems* ruling in which it held that the need for safeguards is all the greater where the interference stems from an automated process.⁸¹ The provision in Article 17(4)(b) and (c) CDSMD, however, is far away from establishing clear and precise rules, as it is not defining the actual measures which OCSSPs must adopt to fulfil their obligations.⁸² According to the CJEU, this is justified by the fact that the clause is intended to be open to the development of industry and technology.⁸³ Furthermore, in order to preserve the freedom to conduct a business from Article 16 of the Charter, it should be up to the OCSSPs to decide which specific measures they use to achieve this goal.⁸⁴

This justification seems rather curious. For one thing, it has been repeatedly stated on all sides that there is hardly any way around the use of ACR technologies within the framework of the 'best efforts' regulation. For another, it is precisely the uncertainty about the extent to which technology may be used that led to the present doubts of

⁷⁶ C-401/19 *Poland* (n 12), Opinion of AG Saugmandsgaard Øe [198].

⁷⁷ Guidance on Art 17 CDSMD 20.

⁷⁸ *Delfi AS v Estonia* ECHR 2015-II 319, para 153.

⁷⁹ C-401/19 *Poland* (n 12) [93].

⁸⁰ Cf. also Felix Reda and Paul Keller, 'CJEU Upholds Article 17, but Not in the Form [Most] Member States Imagined' (*Kluwer Copyright Blog*, 28 April 2022) <http://copyrightblog.kluweriplaw.com/2022/04/28/cjeu-upholds-article-17-but-not-in-the-form-most-member-states-imagined/> accessed 24 May 2022.

⁸¹ C-401/19 *Poland* (n 12) [67]; Case C-311/18 *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems* [2020] EU:C:2020:559 [176].

⁸² C-401/19 *Poland* (n 12) [73].

⁸³ *ibid* [73]–[74]; *Delfi* (n 78) para 121.

⁸⁴ C-401/19 *Poland* (n 12) [75].

⁸⁵ Cf. C-314/12 *UPC Telekabel* (n 60) [56].

⁸⁶ *ibid* [52].

⁸⁷ *ibid* [55]–[56].

⁸⁸ C-401/19 *Poland* (n 12) [90].

⁸⁹ *ibid* [99].

⁹⁰ Reda and Keller (n 80).

⁹¹ C-401/19 *Poland* (n 12) [71].

⁹² Teresa Nobre, 'Case C-401/19: CJEU Limits the Use of Automated Filters and Protects User Rights at Upload' (*International Communia Association*, 26 April 2022) <https://www.communia-association.org/2022/04/26/case-c-401-19-cjeu-limits-the-use-of-automated-filters-and-protects-user-rights-at-upload/> accessed 24 May

2022; Reda and Keller (n 80).

⁹³ Cf. Consolidated version of the Treaty on European Union [2012] OJ C326/16, art 4(3) ['TEU'].

⁹⁴ Articolo 102-decies, comma 3 del D.Lgs. 8-11-2021 n. 177 Attuazione della direttiva [UE] 2019/790 del Parlamento europeo e del Consiglio, del 17 aprile 2019, sul diritto d'autore e sui diritti connessi nel mercato unico digitale e che modifica le direttive 96/9/CE e 2001/29/CE. Pubblicato nella Gazz. Uff. 27 novembre 2021, fn 283.

⁹⁵ Reda and Keller (n 80).

⁹⁶ Nobre (n 92).

⁹⁷ C-401/19 *Poland* (n 12) [94].

⁹⁸ Guidance on Art 17 CDSMD 24.

compatibility with fundamental rights. If OCSSPs are given too much leeway to take measures, it is to be feared that these will be in their favour rather than in the interest of the users. It is therefore necessary to set minimum requirements for the choice of means.⁸⁵ In *UPC Telekabel*, the CJEU held that it is up to the ISP to choose the means to achieve the objective,⁸⁶ but it must then also ensure that the freedom of information of the users is preserved, i.e. without affecting users who are using the service in order to lawfully access information.⁸⁷

3 IMPLICATIONS OF THE CJEU'S JUDGEMENT IN *POLAND V PARLIAMENT AND COUNCIL FOR THE NATIONAL TRANSPOSITIONS OF ARTICLE 17 CDSMD*

To determine whether content can be blocked ex ante, the CJEU established the test of manifestly infringing content, i.e. whether content, in order to be found unlawful, would require an independent assessment in the light of the information provided by the rightholders and of any exceptions and limitations to copyright.⁸⁸ Complying with this standard, is now the task of the Member States. In its final statements of the judgement in *Poland v Parliament and Council* the CJEU rules, that 'Member States must, when transposing Article 17 of Directive 2019/790 into their national law, 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'.⁸⁹ Considering this, Member States have to ensure that their transpositions contain sufficient ex ante safeguards to prevent OCSSPs from using technology for ex ante blocking which would result in the blocking of lawful content. It is doubtful that this is the case for all national transpositions.⁹⁰

3.1 Verbatim transpositions

In this context, the question arises whether Member States which choose to implement the Directive verbatim, meaning copy and paste the text of the Directive, need to adjust their national laws.

As the proceedings were an annulment action, i.e. not a question of referral, the CJEU only assessed Article 17 CDSMD itself as an EU provision, and expressly stated that its judgement is without prejudice to the transpositions of the Member States or the individual measures of the OCSSPs.⁹¹ In combination with the abovementioned reminder of the CJEU for Member States to strike a fair balance, this could imply an obligation for Member States to provide additional safeguards with clear provisions explicitly prohibiting overblocking, and thus go beyond what Article 17 CDSMD itself contains.⁹² The very existence of the case in front of the CJEU, as well as the positions taken by Spain and France in the case, according to which the ex post safeguards are sufficient, shows that Article 17 CDSMD is open to various interpretations, not all of which are in line with the ruling. It is the task of the Member States to create a clear legal framework here.

The CJEU clearly requires the Member States to review

their transposition to analyse whether they, in accordance with the judgement, provide sufficient ex ante safeguards. A verbatim transposition in national law, however, must in correlation with the ruling be considered as complying both with Article 17 CDSMD and with EU primary law, i.e., the fundamental rights concerned. Whereas the CJEU attested Article 17 CDSMD to be accompanied by appropriate safeguards by the EU legislature to ensure a fair balance of fundamental rights, the same must also apply to those national legislators who chose to copy and paste Article 17 CDSMD in national law. As in addition, the national courts, when interpreting national law with a basis in EU law, must ensure that it is interpreted in conformity with EU law, and must also have regard to the case law of the CJEU, a conforming interpretation of a verbatim transposition should be ensured.⁹³

3.2 Complaint mechanism

While some Member States like the Netherlands chose to transpose verbatim, most implemented an individual version of Article 17 CDSMD. One diverging aspect has been the ex post safeguard in the form of the complaint mechanism as established in Article 17(9) CDSMD.

One example is a provision in the Italian transposition, which states that contested contents shall remain disabled during the pending decision on a complaint.⁹⁴ In the aftermath of the judgement, it is argued that 'this requirement does not meet the standards developed by the Court'⁹⁵ and Member States with such a provision will therefore 'need to bring their implementation laws into compliance with the standards set by the CJEU'.⁹⁶

If Member States follow the requirements for the ex ante safeguards, however, a provision like this could be regarded as compatible with the judgement: In their national implementations, Member States must ensure that ex ante safeguards exist which prevent the blocking of content which is not manifestly infringing. Assuming OCSSPs follow the national obligations, they will only block content, which they, inter alia, consider to be manifestly infringing. In case of an allegedly wrong block, the complaint mechanism takes effect, through which users can demand the reinstatement of the content. The ex post complaint mechanism is intended to deal with cases in which the existence of manifestly infringing content is disputed. In this case, however, neither the judgement nor the text of the law foresee that the content at hand must remain online until the conclusion of such proceedings sought by the user. In fact, the judgement suggests that the content stays down during a pending decision, stating that 'users must be able to submit a complaint where they consider that access to content which they have uploaded has been wrongly disabled or that such content has been wrongly removed'.⁹⁷ This is also what the Commission's Guidance recommends to Member States, stating that 'the content should stay down during the human review performed under the redress mechanism, except in the specific case mentioned above for content that is not manifestly infringing on Article 17(7)'.⁹⁸

3.3 Earmarked content

Finally, the ruling casts doubt on the compatibility of earmarked content in the form envisaged by the Commission's Guidance.⁹⁹ The term relates to content flagged by rightholders that is particularly valuable and could cause significant harm to them, if it remains available without authorization (examples include pre-released music or films).¹⁰⁰ According to the Commission's Guidance the prior earmarking should be specifically taken into account when assessing whether the OCSSPs have made their best efforts to ensure the unavailability of specific content as obliged in Article 17(4)(b) CDSMD.¹⁰¹ This means in particular that the OCSSPs should exercise particular care and diligence in the application of their best efforts obligations before uploading such earmarked content.¹⁰²

Guidance needs revision in light of the judgement

After its release, this new mechanism was heavily criticized as being not specific enough in determining which content can be earmarked by the rightholders.¹⁰³ According to these concerns, the requirements to be met by the rightholders are too weak, as 'the mere claim that unauthorized use of a work 'could cause' significant economic harm is sufficient'.¹⁰⁴ Therefore 'earmarking could easily lead to a presumption for the platforms that the content is manifestly illegal and thus potentially to an over-blocking of all earmarked content to avoid liability or litigation'.¹⁰⁵

This is especially a big problem for the compatibility with the requirements of the judgement and freedom of expression, because according to the Commission's conception 'content which is not manifestly infringing should go online at the upload, with exception of content earmarked by rightholders (when subject to a fast ex ante human review)'.¹⁰⁶ This directly contravenes the outcome of the judgement in *Poland v Parliament and Council*, which does not foresee any exceptions to its requirement of only blocking manifestly infringing content ex ante. Previous critics see their concerns confirmed and conclude that the earmarking mechanism 'clearly does not comply with the Court's instruction that implementations must exclude 'measures which filter and block lawful content when uploading' [para 85]'.¹⁰⁷

Another aspect is the mentioned 'fast ex ante human review'. Following the concept of the Guidance, content which is earmarked should be subject 'when proportionate and where possible, practicable, [to] a rapid ex ante human review' by OCSSPs.¹⁰⁸ In *YouTube and Cyando*, the CJEU held that a provider must be able to remove content without a detailed legal examination, to remove it in compatibility with the freedom of expression.¹⁰⁹ The same follows from the judgement in *Glawischnig-Piesczek* according to which a monitoring obligation limited in a way that it does not require the hosting provider to carry out an independent assessment would not contravene the prohibition of a general monitoring obligation.¹¹⁰ In *Poland v Parliament and Council* finally, the CJEU referred to this by analogy stating that providers cannot be obliged to prevent uploading content, which would require them to perform an independent assessment of the content to

determine it as unlawful.¹¹¹ Although framed as 'rapid ex ante review', this is nothing else than a detailed legal examination.¹¹²

Proposal for a mechanism in compliance with Article 17 CDSMD

This closes the circle to what was outlined before: ex ante blocking of content is only permissible if no independent assessment is necessary, i.e., the content is manifestly infringing.¹¹³ This must not change even if content is earmarked by rightholders. Nonetheless, it does not follow from this that earmarking per se is incompatible with Article 17 CDSMD, but rather the provisions of Article 17(8) CDSMD must be respected.

On the contrary, earmarking could be used, for example, to carry out an accelerated procedure following the upload. This is because, according to the Commission's Guidance, when the content becomes available, rightholders will receive a notification if the ACR technology detects possible infringing content.¹¹⁴ The rightholders then have the possibility of a complaint and redress mechanism to have the content checked and, if necessary, blocked.¹¹⁵ If the content is earmarked, it is conceivable that this could be prioritised. Such a proposal takes a similar approach as the trusted-flagger mechanism envisaged by Article 19 of the upcoming Digital Services Act¹¹⁶ and would fulfil the requirements set by the CJEU.

4 THE GERMAN APPROACH

With the CJEU stating that OCSSPs cannot be required to prevent uploads of content which would require an independent assessment to be found unlawful,¹¹⁷ inevitably the question arises when content must be considered infringing without requiring an independent assessment.

In principle, it is either for the Member States or the Commission to provide greater detail under which circumstances content may still be blocked ex ante.¹¹⁸ In the sense of the overall goal of legal harmonisation, it is generally desirable for Member States to arrive at a uniform solution, which argues in favour of not defining individual solutions in the Member States, but rather at the EU level.¹¹⁹

Refraining from doing so would open the necessity for OCSSPs to develop a definition in practice, likely influenced by courts in the EU. It seems at least questionable to leave it up to the private OCSSPs to decide when content can be blocked ex ante, whereas the outcome has a direct impact on the liability of the OCSSP. There might be a risk that an OCSSP, in order to avoid liability, would interpret the boundary of what is manifestly infringing generously in order not to risk liability under Article 17(4) CDSMD when it concerns content that could have been blocked after all. This would raise the same concerns of overblocking and merely shift them to another level. In its opinion, the AG pointed out that OCSSPs are in general not independent and therefore cannot exercise an independent assessment of the lawfulness of a content.¹²⁰ It would have been therefore up to the EU legislature 'to set out the substance of the safeguards necessary to minimise the risks

posed to freedom of expression resulting from the contested provisions'.¹²¹

Consequently, it should be the public authorities defining the threshold for content being manifestly infringing.¹²² The *Poland v Parliament and Council* ruling emphasised the importance of lawful content being available *ex ante* for preserving the balance with freedom of expression and information.¹²³

More detailed regulations for OCSSPs with regard to the question of which content may not be blocked in the first instance were already enacted by Germany in its transposition long before the ruling of the CJEU and the Commission's Guidance and will therefore be examined in the following.

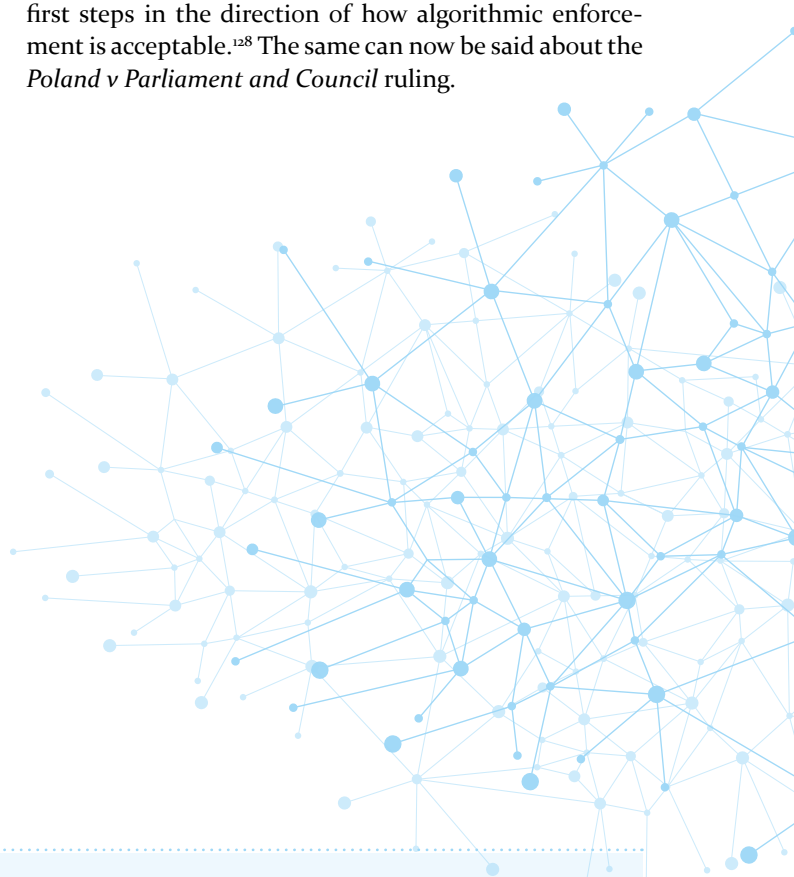
4.1 Upfront: Implications from the CJEU's case law

Before turning to the German approach, it is noteworthy to summarise the followings from the existing case law, in particular the *Glawischnig-Piesczek* and *Poland v Parliament and Council* cases. The CJEU held in the latter, that Article 17(8) CDSMD clarifies 'that the providers of those services cannot be required to prevent the uploading and making available to the public of content which, in order to be found unlawful, would 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'.¹²⁴ Thus, OCSSPs shall not block content which would require an independent assessment of the content in order to be found unlawful.

This idea was first brought up by the CJEU in its *Glawischnig-Piesczek* case, which, although being a defamation case, turned out to be also of importance in the context of copyright.¹²⁵ Here the court was concerned with an injunction about filtering and blocking *ex ante* content, which could be considered 'equivalent'. This

could be for example content which 'whilst essentially conveying the same message, is worded slightly differently, because of the words used or their combination, compared with the information whose content was declared to be illegal'.¹²⁶ Balancing the interests of the host provider and the interests of the victim of defamation, the Court found that the content of an equivalent nature does not require the host provider to carry out an independent assessment, since it had recourse to automated search tools and technologies.¹²⁷

Putting these two judgements together, it is possible to summarise that content can be considered manifestly infringing even if it is equivalent to infringing content. Already in the aftermath of the *Glawischnig-Piesczek* judgement, it could be concluded that the CJEU is taking the first steps in the direction of how algorithmic enforcement is acceptable.¹²⁸ The same can now be said about the *Poland v Parliament and Council* ruling.



⁹⁹ *ibid.*

¹⁰⁰ *ibid* 14, 22.

¹⁰¹ *ibid* 14.

¹⁰² *ibid* 22.

¹⁰³ C-401/19 *Poland* (n 12), Opinion of AG Saugmandsgaard Øe [223]; Christophe Geiger and Bernd Justin Jütte, 'Towards a Virtuous Legal Framework for Content Moderation by Digital Platforms in the EU? The Commission's Guidance on Article 17 CDSMD Directive in the Light of the YouTube/Cyando Judgment and the AG's Opinion in C-401/19' [2021] 43 EIPR 625, 6; Felix Reda and Paul Keller, 'European Commission Back-Tracks on User Rights in Article 17 Guidance' [*Kluwer Copyright Blog*, 6 April 2021] <http://copyrightblog.kluweriplaw.com/2021/06/04/european-commission-back-tracks-on-user-rights-in-article-17-guidance/> accessed 24 May 2022.

¹⁰⁴ Reda and Keller (n 80).

¹⁰⁵ Geiger and Jütte (n 103) 6.

¹⁰⁶ Guidance on Art 17 CDSMD 23.

¹⁰⁷ Reda and Keller (n 80).

¹⁰⁸ Guidance on Art 17 CDSMD 22.

¹⁰⁹ *YouTube and Cyando* [116].

¹¹⁰ *Glawischnig-Piesczek* (n 71) [46].

¹¹¹ C-401/19 *Poland* (n 12) [90].

¹¹² Cf. also: Reda and Keller (n 80).

¹¹³ C-401/19 *Poland* (n 12) [90].

¹¹⁴ Guidance on Art 17 CDSMD 23.

¹¹⁵ *ibid.*

¹¹⁶ Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, 2020/0361(COD) [Version of 16 May 2022]. Unless otherwise specified, it is referred to the text of the version of 16 May 2022 as 'DSA Proposal' and to the act itself as 'DSA'.

¹¹⁷ C-401/19 *Poland* (n 12) [90].

¹¹⁸ Reda and Keller (n 80).

¹¹⁹ Eleonora Rosati, 'What Does the CJEU Judgement in the Polish Challenge to Article 17 (C-401/19) Mean for the Transposition and Application of that Provision?' [*The IPKat*, 11 May 2022] <https://ipkitten.blogspot.com/2022/05/what-does-cjeu-judgement-in-polish.html> accessed 24 May 2022.

¹²⁰ C-401/19 *Poland* (n 12), Opinion of AG Saugmandsgaard Øe [197].

¹²¹ *ibid* [210].

¹²² Like this also: *ibid* [212].

¹²³ C-401/19 *Poland* (n 12) [93].

¹²⁴ *ibid* [90].

¹²⁵ Cf. *Glawischnig-Piesczek* (n 71) [41]–[46].

¹²⁶ *ibid* [41].

¹²⁷ *ibid* [46].

¹²⁸ Leistner (n 66) 16.

4.2 The German approach: excluding 'presumed legal use' from ex ante filtering

Under the same premise of preventing lawful content from being filtered and blocked ex ante using ACR technology, the German legislator has found a different solution, which also Austria has essentially followed. The provision of Article 17 CDSMD was implemented in a separate act, the Urheberrechts-Diensteanbieter-Gesetz (Copyright Service Provider Act 'UrhDaG')¹²⁹.

Sec. 7 UrhDaG, titled 'qualified blocking', thereby adopts the provision of Article 17(4)(b) CDSMD, i.e. the requirement for the OCSSPs to ensure by making best efforts the unavailability of specific works. What is special about this transposition is laid down in Sec. 7(2) sentence 2, according to which Sec. 9-11 applies, if automated means are used. According to Sec. 9(1) UrhDaG, in order 'to avoid disproportionate blockings', in other words, to avoid overblocking, presumed legal uses must remain online until the conclusion of a complaint procedure. It is therefore in accordance with Sec. 14 UrhDaG up to the rightholders to initiate a complaint and redress procedure. Presumed legal uses are defined in Sec. 9(2) UrhDaG as user generated content, which

1. 'contains less than half of a work of a third party or of several works of third parties,
2. combines the parts of the work referred to in No. 1 with other content, and
3. make only minor use of works of third parties (Sec. 10 UrhDaG) or are marked as legally permitted (Sec. 11 UrhDaG)'.¹³⁰

4.2.1 Minor uses

Section 9(2) number 3 UrhDaG thus opens the possibility for two sorts of contents to be presumed lawfully. On the one hand, this is minor use, which encompasses accor-

ding to Sec. 10 UrhDaG uses of up to 15 seconds each of a film work or motion picture, 15 seconds of a soundtrack, 160 characters of a text or 125 kilobytes of a photographic work, photograph or graphic.

The solution found by the German legislator can either be considered a rebuttable presumption or an exception to copyright.¹³¹ Defining this is of importance for the discussion of compatibility with its EU template. The mechanism has as a result that content from users which fulfil the requirements from Sec. 9(2) UrhDaG and have a maximum length or size as described in Sec 10 UrhDaG, must initially be regarded as legal, meaning they shall not be blocked automatically. What happens in practice at this point can be derived from Sec. 9(3) UrhDaG, which requires OCSSPs to notify the rightholders in the event of such use. The rightholder then has the opportunity to have the content reviewed. Until the conclusion of this procedure, which according to Sec. 14(5) UrhDaG 'must be taken by natural persons who are impartial', the content remains online in accordance with Sec. 9(1) UrhDaG.

4.2.2 Marked as legally permitted

On the other hand, users can flag content as legally permitted to categorize it as presumed legal use. As presented earlier in this chapter, ACR technology is now mature and fast enough to be able to match content against the provided information from the rightholders during the upload process.¹³² The German legislator has allegedly taken this into consideration and has established a regulation for this in Sec. 11 UrhDaG. According to its first paragraph, even when the content is not classified as minor use, the user can mark his use as legally permitted during the upload process, if the content would otherwise be blocked automatically.¹³³ If the requirements of Sec. 9(2) UrhDaG are fulfilled, i.e. the user content contains less than half of a work of a third party or third parties and combines the

¹²⁹ Urheberrechts-Diensteanbieter-Gesetz (2021) BGBl. I S. 1204, 1215 (Nr. 27) ['UrhDaG'].

¹³⁰ UrhDaG, s 9(2), translation by the author.

¹³¹ Matthias Leistner, 'The Implementation of Art. 17 DSM-Directive in Germany – A Primer with Some Comparative Remarks' [SSRN Scholarly Paper, 20 December 2021] 11.

¹³² 'YouTube Copyright Transparency Report H1 2021' (n 39) 10.

¹³³ See UrhDaG, s 11(1) Number 3.

¹³⁴ 'Draft Law of the Federal Government Draft Act on the Adaptation of Copyright Law to the Requirements of the Digital Single Market' [9 March 2021] 141, BT-Drucksache 19/27426.

¹³⁵ *ibid.*

¹³⁶ *ibid.* 46.

¹³⁷ For example, quotation, criticism, review; caricature, parody or pastiche as listed in Article 17(7) subparagraph 2 CDSMD; *ibid.* 140.

¹³⁸ C-401/19 *Poland* (n 12) [99].

¹³⁹ Eleonora Rosati, 'The Legal Nature of Article

17 of the Copyright DSM Directive, the (Lack of) Freedom of Member States and Why the German Implementation Proposal is Not Compatible with EU Law' [2020] 15 *Journal of Intellectual Property Law & Practice* 874, 876.

¹⁴⁰ Axel Metzger and Timm Pravemann, 'Der Entwurf Des UrhDaG Als Umsetzung von Art. EU_RL_2019_790 Artikel 17 DSM-RL – Ein Gesetzgebungstechnischer Drahtseilakt' [2021] 65 *ZUM* 288, 295.

¹⁴¹ Rosati, 'The legal nature of Article 17 of the Copyright DSM Directive, the (lack of) freedom of Member States and why the German implementation proposal is not compatible with EU law' (n 140) 876; Leistner (n 131) 15; Jan Bernd Nordemann and Julian Waiblinger, 'Art. 17 DSM-RL – Spannungsverhältnis Zum Bisherigen Recht?' [2020] 122 *GRUR* 569, 573; against: Martin Husovec and João Pedro Quintais, 'How to License Article 17? Exploring the Implementation

Options for the New EU Rules on Content-Sharing Platforms under the Copyright in the Digital Single Market Directive' [2021] 70 *GRUR Int* 325, 348.

¹⁴² Finn J Hümmer, 'The German Transposition of Article 17 of the Copyright DSM Directive and Its 'Presumed Legal Use': Incompatible with EU Law or a Model for Balancing Fundamental Rights in the Age of Upload Filters?' [2022] 17 *JiPLP* 22, 25.

¹⁴³ C-401/19 *Poland* (n 12) [90].

¹⁴⁴ 'Draft law of the Federal Government Draft Act on the Adaptation of Copyright Law to the requirements of the Digital Single Market' (n 134) 140.

parts of the work with other content, the content is then also presumed to be legal. The content, again, cannot be blocked automatically, but the burden of proof now lies with the rightholder, who must initiate the procedure and justify why the user content is considered to be infringing.

In Sec. 11(2) UrhDaG the law provides for the case in which an automated blocking takes place after the upload, that content is deemed to be presumably legal for the duration of 48h even without a mark of the user. The regulation is intended for cases in which, at the time of uploading, there was no reason to regard the content as infringing or to obtain a declaration from the user because the platform holds authorisation from the rightholder.¹³⁴ If this licence subsequently lapses, the original procedure is to be applied, thus giving the user the opportunity, for example, to invoke an exception and limitation and mark the content as legal.¹³⁵

Like the instrument of minor usage, this provision attempts to strike a balance between the interests of rights holders and users and, in particular, gives clear guidance to OCSSPs on the usage of their technology.

4.2.3 Balancing interests

With its mechanism, the German legislator intends to fulfil the requirements of Article 17(7) CDSMD for effectively guaranteeing user rights.¹³⁶ This shows what is too rarely mentioned in the general discussion but offers potential for further thought: A determination of how the ACR technology should distinguish between manifestly infringing and lawful content. By rebuttable presuming 'minimal uses' as legal, the use cannot be manifestly infringing at the same time. As a result, OCSSPs cannot automatically block them *ex ante*, even if the ACR technology may recognise them as infringing copyright.

The German system is based on the consideration that one of the exceptions in copyright law often applies to such minor uses.¹³⁷ Where the encompassed work exceeds the thresholds in Sec. 10 UrhDaG, and the ACR technology recognises a match, the user has the possibility to mark the content as legally permitted according to one or more of the exceptions and limitations to copyright.

Ultimately, a balance is found between the interests of the rightholders to block possible infringing content directly and the users' interests not having to bring legal content back online via the *ex post* mechanisms. In its ruling in *Poland v Parliament and Council*, the CJEU strengthened this approach by emphasising that Member States should design their national implementations in such a way that they allow for a fair balance to be struck between the different fundamental rights.¹³⁸

4.3 Considerations regarding the compatibility with Article 17 CDSMD after the Judgement in Poland v Parliament and Council

Especially the original draft of the German legislator for the transposition of Article 17 CDSMD has been criticised as not being compatible with its European template.¹³⁹



4.3.1 Exception and limitation or rebuttable presumption?

It is argued that the instrument of presumed legal use in fact contains typical elements of an exception and limitation, which are listed exhaustively in Article 5 InfoSoc.¹⁴⁰ If one accepts the almost unanimous view that Article 17 CDSMD contains indeed the same right of communication/making available to the public as Article 3 InfoSoc, it follows from this that an exception and limitation in national law, which is neither contained in Article 5 InfoSoc nor in Article 17 CDSMD itself, cannot be compatible with secondary EU law.¹⁴¹

This can be countered by the fact that Sec. 9(2) UrhDaG only provides for a rebuttable presumption. It is true that according to Sec. 12(3) UrhDaG, the user is not responsible for the use under copyright law until the conclusion of a complaint procedure. On the contrary, however, the presumption is rebuttable and therefore does not have a final effect.¹⁴² In practise, the mechanism leads to the OCSSPs not being allowed to *ex ante* block content covered by the presumption. This is in line with the CJEU's interpretation of Article 17 CDSMD, because the CJEU has ruled that content which requires an independent assessment may not be blocked preventively.¹⁴³

4.3.2 Fixed criteria for the design of OCSSPs algorithms

The German provision sets clear threshold values. Theoretically, it is not impossible that a 15-second video, even in its brevity and under the conditions of Sec. 9(2) UrhDaG, contains infringing content. According to the underlying assumption of the German legislator, this is just not very likely.¹⁴⁴ Ultimately, the legislator tries to define what can be considered infringing without the need for an independent assessment. It thus creates legal certainty for OCSSPs, which can adapt their algorithms accordingly. At the same time, rightholders are still able to pursue infringing content as they will be notified by the OCSSPs in case of 'presumed use' in accordance with Sec. 9(3) UrhDaG.

The criteria set out in Sec. 9(2) and Sec. 10 UrhDaG are by no means those with which Germany stands alone. In its Guidance the Commission formulates a similar approach as it defines, that relevant criteria to determine manifestly infringing content 'could include the length/size of the identified content used in the upload, the proportion of the matching/identified content in relation to the entire upload [...] and the level of modification of the work'.¹⁴⁵ AG Saugmandsgaard Øe argues similarly in his opinion, proposing to determine thresholds 'above which automatic blocking of content is justified and below which the application of an exception, such as quotation, is reasonably conceivable'.¹⁴⁶ In addition, he suggests a mechanism which allows users to flag whether they benefit from an exception or limitation at the time of uploading content.¹⁴⁷

This shows that the German mechanism might be the first, which was established into law, but the concept is by no means on its own. In fact, the Commission's Guidance and the AG's opinion suggest using similar criteria for defining manifestly infringing content.

4.3.3 Earmarking in the German transposition

Another aspect which has to be raised is the earmark-like re-exception of the German transposition in Sec. 7(2) sentence 3 UrhDaG. According to the above mentioned, ex ante safeguards of minor use and flagging during the upload in case when automatic means are used, shall not apply to uses of cinematographic works or moving images until the completion of their first communication to the public, in particular during the simultaneous transmission of sporting events, insofar as the rightholder requests this from the service provider and provides the information required for this purpose.¹⁴⁸

This provision allows rightholders to highlight specific content and therefore exclude it from the safeguards. As an effect, users can neither rely on the rebuttable presumption of lawful content for minor usage, nor mark

their content during the upload as lawful due to the application of an exception or limitation. In this case, the user content does not fall under what the legislator has assumed to be presumed lawful and can thus be blocked by the OCSSP.

As long as this provision is interpreted in line with standards by the CJEU, meaning that user content which contains earmarked content can only be ex ante blocked if it is manifestly infringing and not merely on the basis of being earmarked, this mechanism can be regarded as being compatible with Article 17 CDSMD.

4.3.4 Conclusion

The judgement in *Poland v Commission and Parliament* shifts the focus of the question of the compatibility of the German 'presumed legal use' mechanism with EU law in the direction of ex ante safeguards. The CJEU has made it clear that Member States must ensure that the balance of fundamental rights is maintained when transposing Article 17 CDSMD into national law.¹⁴⁹

If one follows the argument that it should not be left to the OCSSPs to decide when an independent assessment is required and when content may be blocked ex ante because it is manifestly infringing (enough), the German proposal does not seem to be that far away from the case law of the CJEU. It is also the court that will sooner or later have to decide whether the German legislator has gone too far with its implementation and thus thwarted the harmonisation efforts.

Furthermore, it can be concluded that the German mechanism represents the beginning of a detailed regulation and is suitable for protecting the fundamental rights of users. It would be welcomed if, in addition to regulating the circumstances under which may not be blocked, further indications could be found in the law as to when content is manifestly infringing, in order to provide OCSSPs with further criteria for the design of their algorithms.

¹⁴⁵ Guidance on Art 17 CDSMD 21.

¹⁴⁶ C-401/19 *Poland* (n 12), Opinion of AG Saugmandsgaard Øe [211].

¹⁴⁷ *ibid.*

¹⁴⁸ See Section 4.2.1 herein; UrhDaG, s 7(2) sentence 3.

¹⁴⁹ C-401/19 *Poland* (n 12) [99].

¹⁵⁰ C-401/19 *Poland* (n 12), Opinion of AG Saugmandsgaard Øe [69]; C-401/19 *Poland* (n 12)[54].

¹⁵¹ C-401/19 *Poland* (n 12) [85], [90].

5 FINAL REMARKS

Both the AG in his opinion and the Court in *Poland v Parliament and Council* have stated, that the obligations of Article 17(4) CDSMD *de facto* requires the use of technology.¹⁵⁰ The CJEU, however, has now attached a clear condition to its use: Blocking content *ex ante* using ACR technology, is only permissible as long as the technology can distinguish between lawful and unlawful content.¹⁵¹ This is derived from the safeguards of Article 17 CDSMD, which can thus preserve the balance between the fundamental right of freedom of expression and information and right to intellectual property.

It is therefore for OCSSPs and Member States to ensure that only manifestly infringing content, i.e. content that does not require an independent assessment, is blocked *ex ante* using ACR technology. The question, however, of how to determine whether an independent assessment is required remains open. Where does the line run? Providing an answer is crucial for the impact on the freedom of expression and information, as it determines how content is blocked in practice, aside from the legal requirements. Its definition should be the task of the national or EU legislator, to not leave the decision of when content should be assessed to the player who fears liability when coming to a wrong outcome in one way or another. The urgently necessary revision of the Commission's Guidance could serve as a platform for this task.

In this context, the German implementation of Article 17 CDSMD should be considered, which contains some additional *ex ante* safeguards that are not found in the EU template. They provide, however, important guidelines for the OCSSPs on how to design the algorithms. This pays off in terms of legal certainty, both for the OCSSPs, which are less tempted to overblock, and for the users, who do not have to fear that legal content will be blocked. The rightholders have to accept this solution in the sense of a balance of interests, they are free to block certain content via the complaint mechanisms, manifestly infringing content will be blocked *ex ante*.

The judgement in *Poland v Parliament and Council* also has implications for other national implementations. Most importantly, it is argued here, that a verbatim transposition would indeed stand up to the requirements derived from the fundamental rights, as Article 17 CDSMD was held to contain enough safeguards. Further, provisions which require content to stay down during a complaint mechanism must not be regarded as incompatible *per se*. Rather they would be compatible with Article 17 CDSMD and its interpretation from the CJEU, if they are limited to manifestly infringing content. Lastly, the assessment shows that the earmarking mechanism as proposed by the Commission is unlikely to 'survive' this ruling. From what follows from the CJEU's judgement, such a mechanism cannot be used to circumvent the *ex ante* availability of lawful content or content which requires an independent assessment to be determined as unlawful. Earmarking content, however, could be used to function as an indicator for a fast-track review for content that is of higher economic value to the rightholders. With these premises, the trusted flaggers regime from Article 19 DSA Proposal will be interesting to follow.



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