

THE COURT OF JUSTICE OF THE EUROPEAN UNION'S DECISION IN POLAND V. EUROPEAN PARLIAMENT – THE LAST CHALLENGE DISMISSED, WHO WILL TAKE THE NEXT STEP FORWARD?

Paul-George BUTA*

Abstract

This article follows the Court of Justice of the European Union's decision in *Poland v. European Parliament and Council of the European Union* (C-401/19), the 'last-ditch' effort made by the Republic of Poland to annul (in part, at least) art. 17 of the Digital Single Market Directive, which famously captured both the legislative and public debate by proposing that online content sharing service providers be, where they have not secured a license from the relevant copyright and/or related rights holders, directly liable for the communication to the public of works or protected subject matter not by themselves but by their users. This very important shift in the liability regime for copyright infringement has naturally attracted a lot of criticism, with some of the critics' arguments being used by Poland in their briefing the present case. In response, Attorney General Øe and then the Grand Chamber of the Court, in following his findings, allow the provision to stand but, by highlighting its qualification as a serious interference with the right to freedom of expression and information, subject it to a series of very stringent conditions, which would seem to make it, at least in light of current technology, only exceptionally applicable.

Keywords: art. 17 of the Digital Single Market Directive, online content sharing service providers, liability regime for copyright infringement, the right to freedom of expression and information, the exclusive right of communication to the public.

1. Introduction

The very recent Court of Justice of the European Union's ("CJEU") decision of 26 April 2022 in *Poland v. European Parliament and Council of the European Union*¹ has been, although not surprising in its overall approach, one of significant importance for the shaping of the implementation of the highly contentious art. 17 of Directive 2019/790 on the Digital Single Market². The importance of the decision is further highlighted by the fact that the court has decided the issue in a Grand Chamber and, we could ironically say, the overall direction of the decision could have been hinted at by the fact that the decision was issued on World Intellectual Property Day (*i.e.* 26 April).

The decision concerned an application by the Republic of Poland for the annulment of art. 17(4), point (b), and point (c), *in fine*, of Directive 2019/790 and, in the alternative, if the Court were to consider that those provisions cannot be severed from the other provisions of art. 17 of the directive without altering the

substance thereof, to annul art. 17 of the directive in its entirety.

Art. 17 of Directive 2019/790 is, arguably, the most contentious provision of the copyright modernization package, initially envisaged by the Juncker Commission's Digital Agenda.³ The "monster provision" of the Directive, "both by its size and its hazardousness",⁴ "a major internet policy experiment of our decade",⁵ its provisions have already fueled the creation of a significant body of literature.⁶

2. Contents

2.1. The *status quo ante* and the problem identified

The provision was, in the words of Advocate General Øe, meant to "remedy the 'Value Gap', namely the perceived gap between the value that online sharing service providers derive from protected works and subject matter and the revenue they distribute to

* Lecturer, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: paul.but@univnt.ro).

¹ CJEU, Grand Chamber, Decision of 26 April 2022, *Republic of Poland v. European Parliament and Council of the European Union* (C-401/19), ECLI:EU:C:2022:297.

² 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, *OJ. L* 130/17.05.2019, p. 92.

³ See Communication from the Commission, *A Digital Agenda for Europe*, 26 August 2010, COM (2010) 245 final/2 in Séverine Dusollier, "The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a few Bad Choices, and an Overall Failed Ambition", *Common Market Law Review*, vol. 57 (2020), p. 980, note 4.

⁴ Séverine Dusollier, *The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a few Bad Choices, and an Overall Failed Ambition*, *Common Market Law Review*, vol. 57 (2020), p. 1008.

⁵ João Pedro Quintais, Martin Husovec, *How to License Article 17 of the Copyright in the Digital Single Market Directive? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms*, *GRUR International*, vol. 70, Issue 4, April 2021, pp. 325-348.

⁶ See, for some examples, *Idem*, note 11.

rightholders”⁷. Art. 13, as the provision was numbered when the proposal for a directive was made public, was part of a package meant to, first, adapt EU copyright and related rights rules to the evolution of digital technologies, and, secondly, to further harmonize these rights within the territory of the European Union “in a way that, whilst continuing to guarantee a high level of protection of intellectual property, ensures that creative content is widely available throughout the European Union and maintains a ‘fair balance’ with other public interests in the digital environment.”⁸

Basically, the problem that art. 17 was meant to resolve was that of a perceived imbalance in the level of remunerations paid by online content sharing service providers (or „OCSSPs”) for use of copyright/related rights protected works/subject matter, in their case, uploaded to their respective platforms by their users (and known as user-generated content) as opposed to the level of remunerations paid to rightholders by the music streaming services for, arguably, equivalent use of the same type of works.

While there has been (and will likely continue to be) a heated debate on whether this ‘value gap’ ought to have been the object of legislative resolution and whether the mechanism chosen is appropriate, the legal framework targeted by art. 17 was, as Advocate General Øe indicated in his opinion, based on two provisions: art. 3(1) and (2) of Directive 2001/29⁹ and art. 14 of Directive 2000/31.¹⁰

The first provision vested rightholders (in copyrighted works or subject matter of related rights) with an exclusive right of communication to the public, including in what concerns the making available of such in a way that members of the public may access them from a place and at a time individually chosen by them. This right was considered to have been infringed upon “the uploading, by a user, of a work or protected subject matter to a sharing service”¹¹ where such user did not secure the rightholder’s authorization for such. Under the copyright legal framework, the liability of the provider of the “sharing service” for the acts of the user would only be triggered, as the result of a direct infringement, where the provider itself makes an act of communication to the public.¹²

The second provision concerns the so-called ‘safe harbor’ under the e-commerce framework, which shields from liability hosting providers for information stored at the request of a recipient of the service where the provider of the service has no actual knowledge of illegal activity or information and, with regard to claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent, or the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

The CJEU has developed an encompassing approach of the two which it consolidated in its decision in *YouTube* and *Cyando*,¹³ holding that “the operator of a video-sharing platform or a file-hosting and -sharing platform, on which users can illegally make protected content available to the public, does not make a ‘communication to the public’ of that content, within the meaning of that provision, unless it contributes, beyond merely making that platform available, to giving access to such content to the public in breach of copyright. That is the case, inter alia, where that operator has specific knowledge that protected content is available illegally on its platform and refrains from expeditiously deleting it or blocking access to it, or where that operator, despite the fact that it knows or ought to know, in a general sense, that users of its platform are making protected content available to the public illegally via its platform, refrains from putting 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, or where that operator participates in selecting protected content illegally communicated to the public, provides tools on its platform specifically intended for the illegal sharing of such content or knowingly promotes such sharing, which may be attested by the fact that that operator has adopted a financial model that encourages users of its platform illegally to communicate protected content to the public via that platform.”

Therefore, prior to art. 17, the direct liability of the operators of such platforms was only exceptionally triggered, thereby leaving rightholders in the unenviable position of policing these platforms in

⁷ CJEU, Opinion of Advocate General Saugmandsgaard Øe delivered on 15 July 2021, *Republic of Poland v European Parliament and Council of the European Union* (C-401/19), ECLI:EU:C:2021:613, para. 13.

⁸ *Idem*, para. 12.

⁹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, *OJ L 167/22.06.2001*, pp. 10-19.

¹⁰ 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’), *OJ L 178/17.07.2000*, pp. 1-16.

¹¹ CJEU, Opinion of Advocate General Saugmandsgaard Øe delivered on 15 July 2021, *Republic of Poland v. European Parliament and Council of the European Union* (C-401/19), ECLI:EU:C:2021:613, para. 17.

¹² CJEU, Opinion of Advocate General Saugmandsgaard Øe delivered on 16 July 2020, *Frank Peterson v. Google LLC, YouTube LLC, YouTube Inc., Google Germany GmbH* (C-682/18) and *Elsevier Inc. v. Cyando AG* (C-683/18), ECLI:EU:C:2020:586, para. 65.

¹³ CJEU, Grand Chamber, Decision of 22 June 2021, *Frank Peterson v. Google LLC, YouTube LLC, YouTube Inc., Google Germany GmbH* (C-682/18) and *Elsevier Inc. v. Cyando AG* (C-683/18), ECLI:EU:C:2021:503.

search of “specific illegal acts committed by [the platform’s] users relating to protected content that was uploaded to [the] platform”¹⁴ and then proceeding to a notification and take-down procedure (“NTD procedure”), only a lack of response to such being (absent proof of direct participation, support or encouragement of/from the operator of the platform in the illegal sharing of content) likely to trigger the liability of the operator of the platform. This was also compounded by the fact that art. 15 of Directive 2000/31 prohibited the imposition of a “general obligation on providers [...] to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.”

2.2. The outcome of the legislative process

Following the intense legislative process, peppered with lobbying, protests and a negative vote in the European Parliament, the outcome was art. 17 as adopted, which provides that:

1. An OCSSP is itself making an act of communication to the public or an act of making available to the public, for the purposes of Directive 2019/790, whenever it gives the public access to copyright-protected works or other protected subject matter uploaded by its users. An authorization granted by the rightholders is therefore needed.

2. The authorization obtained by the OCSSP shall be deemed to also cover the acts carried out by its users and falling within the scope of art. 3 of Directive 2001/29, if the users act on a non-commercial basis or obtain insignificant revenues by this activity.

3. The safe harbor in the e-commerce Directive is inapplicable to the situations envisaged by art. 17 but remains applicable for situations falling outside this scope.

4. Where no authorization from the rightholders exists, the liability of the OCSSP for unauthorized acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter will be triggered unless the provides proof that it (a) has made best efforts to obtain an authorization, and (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of content for which the rightholders have provided relevant and necessary information; and in any event (c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from

their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).

5. Assessment of the provider’s qualification for the exception provided above must be made in light of the principle of proportionality and based on, at least, the following elements: (a) the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service; and (b) the availability of suitable and effective means and their cost for the service provider.

6. Para. 6 concerns a partial derogation for new OCSSPs the services of which have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million, such OCSSPs qualifying for the exception provided under para. (4) even if they only meet the first criterion (best efforts to secure authorization), and they act expeditiously, upon receiving sufficiently substantiated notice, to disable access/remove content. Where such OCSSP surpasses 5 million unique visitors per calendar year, qualification for the exception requires meeting in full criteria under (4)(a) and (4)(c).

7. In meeting the criteria under art. 17, the OCSSPs will not prevent the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation, these being “any of the following existing exceptions or limitations [...]: (a) quotation, criticism, review; [and] (b) use for the purpose of caricature, parody or pastiche.”

8. The application of the Article must not lead to any general monitoring obligation, OCSSPs needing to provide rightholders, at their request, with adequate information on the functioning of their practices with regard to the actions undertaken in application of para. 4 and, where licensing agreements are concluded between service providers and rightholders, information on the use of content covered by the agreements.

9. An effective and expeditious complaint and redress mechanism needs to be put in place by OCSSPs for the benefit of users who dispute the disabling of access to, or the removal of, works or other subject matter uploaded by them. Such mechanism is to be complemented with out-of-court redress mechanisms and needs to be without prejudice to the legal protection afforded by national law, including the rights of users to have recourse to efficient judicial

¹⁴ *Ibidem*.

remedies, especially to assert the use of an exception or limitation to copyright and related rights. Rightholders requesting to have access to their specific works or other subject matter disabled or to have those works or other subject matter removed, must duly justify the reasons for their requests and legitimate uses, such as uses under exceptions or limitations provided for in Union law shall not be affected. Complaints submitted under this mechanism must be processed without undue delay, and decisions to disable access to or remove uploaded content must be subject to human review. Moreover, regard for the safeguarding of personal data needs to be had and users need to be informed of their benefit of the exceptions or limitations to copyright and related rights provided for in Union law.

10. The European Commission must organize dialogues with stakeholders and issue guidance on the application of art. 17.

2.3. The legal challenge

The Republic of Poland filed a claim asking that the court either annul art. 17 in part, that is art. 17 para. (4) letter (b) – the condition that the OCSSP prove that it made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of content for which the rightholders have provided relevant and necessary information – and the second part of para. (4) letter (c) – the condition that the OCSSP prove that it made best efforts to prevent their future uploads in accordance with point (b) – or, were the court to find that the specific provisions referred to before cannot be severed from the other provisions of art. 17 without altering the substance thereof, annul art. 17 in its entirety.

The specific claim was that the imposition on OCSSPs of the obligation to make best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information and the imposition on OCSSPs of the obligation to make best efforts to prevent the future uploads of protected works or other subject-matter for which the rightholders have lodged a sufficiently substantiated notice would make it necessary for the providers – in order to avoid liability – to carry out prior automatic verification (filtering) of content uploaded online by users therefore making it necessary to

introduce preventive control mechanisms. Such mechanisms would undermine the essence of the right to freedom of expression and information and would not comply with the requirement that limitations imposed on that right be proportional and necessary.¹⁵

Therefore, the argument brought by Poland was essentially that the challenged provisions would cause the OCSSPs, in order for them to avoid direct liability, to carry out preventive monitoring of all the content their users try to upload onto their platforms. In order to do so, the OCSSPs would have to use filtering software which enables the prior automatic filtering of that content. Poland considered that the *de facto* imposition of such a preventive monitoring without providing safeguards to ensure that the right to freedom of expression and information is respected, constitutes a limitation on the exercise of that fundamental right, which respects neither the essence of that right nor the principle of proportionality and which could not, therefore, be regarded as justified.¹⁶

Oral arguments in the case were held on 10 November 2020, when in a four hour hearing (deemed “very long” by the President of the CJEU¹⁷), the court heard the parties as well as the representatives of the Kingdom of Spain, the French Republic, and the European Commission (who intervened in support of the respondents).

The court communicated some questions to the parties and intervenors, to be prepared in advance and discussed at the oral hearing. These questions were:¹⁸

“The Council and the Parliament having noted, in substance, that the wording of Article 17 (4) (b) and (c) of 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 (OJ 2019, L 130, p. 92) does not require adoption by online content sharing service providers, automatic content filtering mechanism (“upload filters”), these parties as well as the other participants in the hearing are invited to express themselves in their pleadings:

– on the possible necessity, in practice, of putting in place such mechanisms for the application of these provisions – the parties and other participants being invited to specify, in this regard, whether, to their knowledge, they exist, in the current state of technology, effective alternative solutions to meet the requirements provided for in these provisions and, that being the case, which ones;

¹⁵ Action brought on 24 May 2019 — *Republic of Poland v European Parliament and Council of the European Union*, (C-401/19), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=216823&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5031146>, accessed 4 May 2022.

¹⁶ CJEU, Grand Chamber, Decision of 26 April 2022, *Republic of Poland v European Parliament and Council of the European Union* (C-401/19), ECLI:EU:C:2022:297, para. 24.

¹⁷ Ted Shapiro, *Poland v. EU – The Battle for the Value Gap*, <https://www.wiggin.co.uk/insight/poland-v-eu-the-battle-for-the-value-gap/>, accessed 4 May 2022.

¹⁸ *Idem*, unofficial translation from French.

– on the risks associated with such an implementation in the particular context of freedom of information and communication on the Internet, this network being characterized by the speed of the exchange of information;

– on the question of whether art. 17 of Directive 2019/790 allows, impose or, on the contrary, opposes, a system in which only manifestly infringing content would be automatically blocked when it is posted online, while that the content likely to make a legal use of a work could only be so once an agent of the operator has raised their illegal nature – see European Commission, “Targeted consultation addressed to the participants to the speaker dialogue on art. 17 of the Directive on copyright in the digital single market”, section IV, subsection (ii), as well as

– on the specific measures put in place to mitigate these risks, in particular with regard to the requirements recalled by the Court in its judgment of 16 July 2020, Facebook Ireland and Schrems (C-311/18, EU: C:2020:559, point 175¹⁹).”

One of the main points raised in the hearing was the point made by the European Commission that the obligation in art. 17 para. (7) is an obligation of results while the one in art. 17 para. (4) is an obligation of diligence. The argument would be that priority should be given to free speech, *i.e.* only “likely infringing” (in the Commission’s words) or “manifestly infringing” (in the court’s questions) would be taken down. Also, a significant number of arguments were centered on the existence of safeguards to ensure that non-infringing content is not blocked (especially by reference to the mechanism envisaged by art. 17 para. (9)). Another point that was emphasized was that the directive does not envisage a preventive general monitoring but only a monitoring based on the information received from the rightholders (but the quality of such information to be provided to the OCSSP and which would cause the OCSSP to have been ‘informed’ is unclear²⁰).

2.4. The Advocate General’s Opinion

Advocate General Øe issued his Opinion in the case on 15 July 2021 (even though in the hearings he had indicated he would do so by 22 April). Importantly, in the meantime, the European Commission issued the guidance on the application of article 17²¹ that it was mandated to give pursuant to the provisions of art. 17(10). The AG has indicated that the essence of the guidance is in accordance with his findings and reflects the European Commission’s prior position made in the oral hearings in the case. The AG points out however that he finds the Commission’s suggestion that rightholders should have the possibility to ‘ earmark’ subject matter the unauthorised uploading of which ‘could cause significant economic harm to them’, with the consequence that OCSSPs should *ex ante* block such content solely because it was so ‘ earmarked’ (even if that content were not manifestly infringing), not in line with his Opinion.²²

First of all, the Advocate General determined that, unlike under the previous regime, in order to avoid liability where no authorization for the OCSSP exists, Article 17 imposes upon them an obligation of diligence – to use best endeavors – to prevent *ex ante* infringing content from being uploaded, and not just to have an *ex post* reaction to remove it.²³

Secondly, the Opinion argues that, even though the directive does not *directly* mandate the use of filtering software, such as automatic content recognition tools, it *indirectly* imposed the use thereof by the OCSSPs as a condition to avoid liability.²⁴ Even though there is a possibility that, by factoring in proportionality and suitability, use of such tools could not be mandated in certain cases, as a rule, the AG found, „ in all situations in which various appropriate and effective tools are available on the market and are not unreasonably expensive, sharing service providers are a priori required to put them into place in order to demonstrate that they have made ‘best efforts’ to prevent the uploading of illegal content and, therefore, to comply with the contested provisions.”²⁵

¹⁹ “Following from the previous point, it should be added that the requirement that any limitation on the exercise of fundamental rights must be provided for by law implies that the legal basis which permits the interference with those rights must itself define the scope of the limitation on the exercise of the right concerned (Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, para. 139 and the case-law cited). That previous point is as follows: “Furthermore, in accordance with the first sentence of Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. Under the second sentence of art. 52(1) of the Charter, subject to the principle of proportionality, limitations may be made to those rights and freedoms only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

²⁰ See, questions addressed by Advocate General Øe to the European Parliament and the European Commission - Ted Shapiro, “Poland v. EU – The Battle for the Value Gap – Rough Notes”, <https://www.wiggin.co.uk/app/uploads/2021/03/TS-Article-Post-on-CJEU-PL-v.-EU-Art-17-22-MAR-21.pdf>, pp. 9-10, accessed 4 May 2022.

²¹ European Commission, *Communication from the Commission, ‘Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market’*, COM(2021) 288 final/4.06.2021.

²² CJEU, Opinion of Advocate General Saugmandsgaard Øe delivered on 15 July 2021, *Republic of Poland v. European Parliament and Council of the European Union* (C-401/19), ECLI:EU:C:2021:613, para. 263.

²³ *Idem*, para. 52-53.

²⁴ *Idem*, para. 63.

²⁵ *Idem*, para. 68.

The AG then found that the mechanism of liability/exemption provided by para. (4) imposes upon the OCSSPs an obligation to preventively filter and block the content in question (*i.e.* the works and other protected subject matter identified by rightholders).²⁶ This makes the obligations incumbent upon OCSSPs ‘prior restraints’ or ‘preventive measures’ which constitute an ‘interference’ with the exercise of the users’ freedom of communication and with the public’s freedom to receive information.²⁷ Moreover, this interference is attributable to the EU legislature.²⁸

Having found that the obligations instituted by art. 17 para. (4) are an interference with the fundamental right to freedom of expression, the Opinion then goes on to examine whether this interference is compatible with the Charter by verifying whether the limitation is first, ‘provided for by law’, secondly, in respect of the ‘essence’ of that freedom and, thirdly, in respect of the principle of proportionality.

With regards to the first condition, the AG found that the limitation is provided by law since it clearly stems from provisions adopted by EU legislature and it is also sufficiently accessible and precise. In respect of the latter, the Opinion argues that even if the provisions make use of some open concepts which create some uncertainty, such use is meant to allow adaptation to different types of operators and situations, as well as changes in technology and practice.²⁹

In respect of the second condition, the Opinion argues that „preventive measures for monitoring information are generally regarded as particularly serious interferences with freedom of expression”³⁰ because of the fact that, by restricting information before dissemination, they impede any public debate on the contents thereof. This, the AG finds, is even more true in what internet communication is concerned, as platforms “play a role in a form of ‘democratisation’ of the production of information and [...] have in fact become essential infrastructures for online expression.”³¹ Thus, if authorities were to impose “the obligation preventively to monitor, in general, the content of users of their services in search of any kind of illegal, or even simply undesirable information, that freedom of communication would be called into question as such [and] the ‘essence’ of the right to

freedom of expression, as provided for in art. 11 of the Charter, would be affected”³². Importantly, the AG also notes that the prohibition of a general monitoring obligation (enshrined in art. 15 of Directive 2001/31) is a “*general principle* of law governing the Internet” which goes beyond the scope of the provision in Directive 2000/31 and is binding not only on the Member States, but also on the EU legislature.³³

However, in the given case, the AG found that the monitoring obligation was not ‘general’ but ‘specific’ and also provided references to the CJEU’s evolving practice on this distinction.³⁴ Thus, the AG found that the contested provisions concern “a matter of searching, among that content, for ‘specific works or other subject matter’ for which the rightholders will have already communicated to [OCSSPs] the ‘relevant and necessary information’ [...] or a ‘sufficiently substantiated notice’ [...]. those factors are sufficient, in my view, to demonstrate that those provisions do indeed lay down, indirectly, a ‘specific’ monitoring obligation and to rule out an infringement of the ‘essence’ of the right to freedom of expression.”³⁵

Therefore, the Opinion finds that while the EU legislature can’t delegate to online intermediaries the “carrying out [of a] general preventive monitoring of information shared or transmitted through their services”, the imposition of “certain active surveillance measures concerning certain specific illegal information, on certain online intermediaries” would be possible without undermining the essence of the freedom of expression. However, such imposition would always have to ensure respect of the principle of proportionality which presupposes the existence of sufficient safeguards for the users of such intermediaries.³⁶

With regards to proportionality, the Opinion notes that, according to art. 52(1) of the Charter,³⁷ this presupposes a meeting two sub-conditions: the limitation must be (1) necessary and (2) genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. As the meeting of the second sub-condition was not disputed (also because intellectual property is protected as a fundamental right), the Opinion has then focused on verifying whether the first sub-condition is met, which presupposes cumulatively meeting three

²⁶ *Idem*, para. 78.

²⁷ *Idem*, para. 80.

²⁸ *Idem*, para. 84.

²⁹ *Idem*, para. 95.

³⁰ *Idem*, para. 102.

³¹ *Idem*, para. 103.

³² *Idem*, para. 104.

³³ *Idem*, para. 106.

³⁴ *Idem*, para. 111-112.

³⁵ *Idem*, para. 114.

³⁶ *Idem*, para. 115.

³⁷ *Charter of Fundamental Rights of the European Union*, OJ C326/26.10.2012, p. 391.

requirements: that the limitation be (1) appropriate, (2) necessary, and (3) proportionate *stricto sensu*.³⁸

The AG found that the limitation is appropriate, under the test that “the Court must ascertain not whether that measure constitutes the *best means* of attaining the objective pursued, but whether it is *appropriate for contributing* to the achievement of that objective.”³⁹ The contested provisions were found to qualify, as they ‘strongly encourage’ OCSSPs to conclude licensing agreements in respect of the content uploaded by their users and as they also enable rightholders to “control more easily the use of their works and subject matter on those services.”⁴⁰

In respect of necessity, after indicating that the necessity test requires “verifying whether alternative measures exist which would be *as effective* as the measure chosen to attain the objective pursued whilst being *less restrictive*”,⁴¹ the AG finds that the elimination of the additional monitoring obligations from the requirements of article 17 would make those provisions not equally effective as those of article 17 as adopted, and therefore would not qualify as an alternative, even if less restrictive.⁴²

Finally, proportionality *stricto sensu* would require verifying whether “the disadvantages caused by the measure in question are not disproportionate to the aims pursued.”⁴³

In this regard, the AG argues that the EU legislature enjoys a broad discretion to choose to change the balance initially created by means of Directive 2000/31 and that the policy choice in favor of the creative industries is not disproportionate. The combination of factors cited by the Opinion as underlining the proportionality of the measures included: (1) the extent of the economic harm to rightholders caused by the upload of their works, especially given the huge amount of content uploaded and the speed at which this content is being exchanged; (2) the difficulties in getting the ‘notice and take down’ system to work in respect of these platforms; (3) the difficulties in litigating with the users responsible and, (4) the fact that the monitoring obligations concern specific intermediary providers.⁴⁴

The Opinion reminds that the risk entailed by these limitations concerns a possible over-blocking of

content, which would mean that “in order to avoid any risk of liability vis-à-vis rightholders, the sharing service providers systematically prevent the making available, on their services, of all content which reproduces works and other protected subject matter for which they have received the ‘relevant and necessary information’ or a ‘sufficiently substantiated notice’ from those rightholders, including content which does not infringe their rights”,⁴⁵ such risk being even higher as the provisions indirectly mandate the use of automatic content recognition tools and, also, allow for ‘over-complaining’ by the rightholders.

In light of this risk, the EU legislature must (itself, and not the Member States) also provide for the safeguards which need to be sufficient to minimize the risks to freedom of expression.⁴⁶ The AG has expressed the opinion that the system of safeguards provided by art. 17 is sufficient for meeting the requirements under art. 52(1) of the Charter.

However, in so finding, the AG makes some very important points. First of all, the Opinion argues that, by adopting art. 17(7), “the EU legislature has expressly recognised that users of sharing services have subjective rights under copyright law”⁴⁷ and, consequently, “[t]hose users now have the *right*, which is enforceable against the providers of those services and rightholders, to make legitimate use, on those services, of protected subject matter, including the *right* to rely on exceptions and limitations to copyright and related rights”,⁴⁸ such being, “in accordance with art. 17(7) [any] of the *exceptions and limitations provided for in Union law*, and in particular those set out in art. 5 of Directive 2001/29.”⁴⁹ The AG therefore holds that art. 17(7) has purposefully provided for a new right, previously inexistent, in favor of users of such OCSSPs, which right can be claimed under before courts, including courts of the Member States.⁵⁰ This would be a significant change in the long debate surrounding the legal nature of limitations and exceptions and a big boost to the users who benefit from these.

Secondly, for the AG, art. 17(7) “imposes an *obligation* on sharing service providers *to achieve a result: the result they must achieve* is not to prevent the making available on their services of content that

³⁸ CJEU, Opinion of Advocate General Saugmandsgaard Øe delivered on 15 July 2021, *Republic of Poland v. European Parliament and Council of the European Union* (C-401/19), ECLI:EU:C:2021:613, para. 116-118.

³⁹ *Idem*, para. 120.

⁴⁰ *Idem*, para. 121.

⁴¹ *Idem*, para. 124.

⁴² *Idem*, para. 125-127.

⁴³ *Idem*, para. 128.

⁴⁴ *Idem*, para. 137.

⁴⁵ *Idem*, para. 143.

⁴⁶ *Idem*, para. 153.

⁴⁷ *Idem*, para. 161.

⁴⁸ *Ibidem*.

⁴⁹ *Idem*, para. 162.

⁵⁰ *Idem*, note 197.

legitimately reproduces works and other protected subject matter, even if such works and subject matter have been identified by the rightholders. The limit of permissible filtering and blocking measures is therefore clearly defined: they *must not have the objective or the effect of preventing such legitimate uses.*⁵¹

Moreover, the AG argues that, in order for the safeguards to be proportional, the procedural safeguards under art. 17(9), aiming for an *ex post* remedial effect of over-blocking, would not be sufficient if the results obligation under art. 17(7) (*i.e.* making sure that no legitimate content is blocked) would not be considered *ex ante*, thereby objectively requiring OCSSPs that, as a result of their preventive monitoring, they do not block any legitimate content.⁵²

In continuation of this, the AG goes on to argue that, under art. 17(8), the OCSSPs can't be "expected to make 'independent assessments' of the lawfulness of the information"⁵³ and, therefore, should "only be required to filter and block information which has first been established by a court as being illegal or, otherwise, information the unlawfulness of which is *obvious from the outset*, that is to say, it is *manifest*, without, *inter alia*, the need for contextualisation",⁵⁴ meaning "content which is 'identical' or 'equivalent' to works and other protected subject matter identified by rightholders."⁵⁵

2.5. The Court's Decision

By its judgment of 26 April 2022, the Court first followed the AG's Opinion to find that the liability regime enshrined by art. 17(4) entails a limitation to the fundamental right to freedom of expression and information of the users of the platforms in question.⁵⁶

The Court went on to examine whether the limitation thus instituted meets the requirements set out by art. 52(1) of the Charter. Moreover, citing the ECtHR's decision in *Yildirim*,⁵⁷ the Court noted that in respect of a limitation to the right of freedom of expression and information which poses such a risk, "a particularly tight legal framework is required."⁵⁸

Nevertheless, the Court also indicated that its interpretation needs to be one that does not affect the

validity of the EU measure at stake but rather "renders the provision consistent with primary law"⁵⁹ while taking into account the "the legitimate objective pursued by the establishment of that regime, namely the protection of the holders of copyright and related rights, guaranteed, as intellectual property rights, in Article 17(2) of the Charter."⁶⁰

The Court confirmed the AG's assessment as to the limitation being "provided by law", noting that, even though the actual measures OCSSPs must take to avoid liability are not expressly indicated, "the requirement that any limitation on the exercise of a fundamental right must be provided for by law does not preclude the legislation containing that limitation from being formulated in terms which are sufficiently open to be able to keep pace with changing circumstances."⁶¹

The decision also follows the AG's findings in respect of the limitation not affecting the 'essence' of the right, again affirming the prevalence of the results obligation provided for in art. 17(7) and (9) over the 'best efforts' obligation provided for in art. 17(4), thereby confirming that OCSSPs "must comply with the right to freedom of expression and information of internet users and must, in particular, be strictly targeted in order to enable effective protection of copyright but without thereby affecting users who are lawfully using those providers' services."⁶²

After confirming the AG's findings on the sub-condition of 'necessity' of the limitation, the Court goes on to examine the proportionality *stricto sensu* of the limitation.

In this context, the Court held that the law must be interpreted as laying down six safeguards which ensure that the limitation meets the conditions for proportionality:

1. First of all, the Court held that "the EU legislature laid down a clear and precise limit, [...] by excluding, in particular, measures which filter and block lawful content when uploading." And therefore "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

⁵¹ *Idem*, para. 165.

⁵² *Idem*, para. 170-171.

⁵³ *Idem*, para. 197.

⁵⁴ *Idem*, para. 198.

⁵⁵ *Idem*, para. 201.

⁵⁶ CJEU, Grand Chamber, Decision of 26 April 2022, *Republic of Poland v. European Parliament and Council of the European Union* (C-401/19), ECLI:EU:C:2022:297, para. 58.

⁵⁷ ECtHR, Decision of 18 December 2012, *Ahmet Yildirim v. Turkey*, CE:ECHR:2012:1218JUD0003111110, para. 47, 64 and case-law cited therein.

⁵⁸ CJEU, Grand Chamber, Decision of 26 April 2022, *Republic of Poland v. European Parliament and Council of the European Union* (C-401/19), ECLI:EU:C:2022:297, para. 68.

⁵⁹ *Idem*, para. 70.

⁶⁰ *Idem*, para. 69.

⁶¹ *Idem*, para. 74, citing ECtHR, Decision of 16 June 2015, *Delfi AS v. Estonia*, CE:ECHR:2015:0616JUD006456909, para. 121 and case-law cited therein.

⁶² *Idem*, para. 81.

incompatible with the right to freedom of expression and information [...] and would not respect the fair balance between that right and the right to intellectual property.”⁶³

2. Secondly, the Court confirmed that “the exceptions and limitations to copyright, [...] confer rights on the users of works or of other protected subject matter” and that art. 17 made some of these, which were optional under Directive 2001/29, mandatory.⁶⁴ OCSSPs are also required to inform users of these rights.

3. Thirdly, the Court underlined that the OCSSP’s obligation to monitor and block/remove can only be triggered when they are provided with “undoubtedly relevant and necessary information”, in the absence of which, OCSSPs will not “be led to make the content concerned unavailable.”⁶⁵

4. Fourthly, the OCSSPs “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”, the notification by rightholders needing to “contain sufficient information to enable the online content-sharing service provider to satisfy itself, without a detailed legal examination, that the communication of the content at issue is illegal and that removing that content is compatible with freedom of expression and information.”⁶⁶

5. Fifthly, the Court refers to the complaint mechanism that is to be made available to users, including the need for requests by rightholders to be “duly justified”, the need to ensure that user

complaints are processed “without undue delay and be subject to human review”, the need to ensure access to out-of-court redress mechanisms as well as to a court or another judicial authority where users can “assert the use of an exception or limitation to copyright and related rights.”⁶⁷

6. Finally, the Court also refers to the obligation of the European Commission to organize stakeholder’s dialogues and issue guidance on the application of art. 17(4) in particular.

3. Conclusions

The Court’s decision on Poland’s challenge against art. 17 appears to impose a high threshold for the preventive monitoring mechanisms (which everyone has agreed would mean, at least at this point in time, filtering software) to be employed by OCSSPs.

As some commentators have indicated,⁶⁸ the ‘precision filtering’ required by the Court’s decision is only possible with today’s filters in some cases and it is unclear who (EU institutions or Member States) will indicate what these filters should be and behave like in order to comply with the CJEU’s decision. Member States seem to be waiting for Brussels to do that while the CJEU seems to have passed the ball to the Member States.

Meanwhile, Romania has transposed art. 17 by copy-pasting it in Law no. 69/2022,⁶⁹ which, according to some authors,⁷⁰ is the safest transposition method while awaiting that, by means of guidance, decision or legislation, the EU will, faced with either no application or a divergent approach by the Member States, take the Court’s decision one step forward and more precisely indicate what these ‘precision filters’ should be like.

References

- Dusollier, Séverine, *The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a few Bad Choices, and an Overall Failed Ambition*, Common Market Law Review, vol. 57 (2020);
- Husovec, Martin, *Internet filters do not infringe freedom of expression if they work well. But will they?*, in EurActiv, 2 May 2022, <https://www.euractiv.com/section/digital/opinion/internet-filters-do-not-infringe-freedom-of-expression-if-they-work-well-but-will-they/>, accessed 4 May 2022;

⁶³ *Idem*, para. 85, 86.

⁶⁴ *Idem*, para. 87.

⁶⁵ *Idem*, para. 89.

⁶⁶ *Idem*, para. 90, 91.

⁶⁷ *Idem*, para. 93-95.

⁶⁸ Martin Husovec, *Internet filters do not infringe freedom of expression if they work well. But will they?*, in EurActiv, 2 May 2022, <https://www.euractiv.com/section/digital/opinion/internet-filters-do-not-infringe-freedom-of-expression-if-they-work-well-but-will-they/>, accessed 4 May 2022.

⁶⁹ Law no. 69 of 28 March 2022 for the amendment and supplementation of Law no. 8/1996 concerning copyright and related rights, in Official Gazette of Romania no. 321/1.04.2022.

⁷⁰ Eleonora Rosati, *What does the CJEU judgment in the Polish challenge to Article 17 (C-401/19) mean for the transposition and application of that provision?*, in IPKat, 11 May 2022, <https://ipkitten.blogspot.com/2022/05/what-does-cjeu-judgment-in-polish.html>, accessed 12 May 2022.

- Quintais, João Pedro Husovec, Martin, *How to License Article 17 of the Copyright in the Digital Single Market Directive? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms*, GRUR International, vol. 70, Issue 4, April 2021;
- Rosati, Eleonora, *What does the CJEU judgment in the Polish challenge to Article 17 (C-401/19) mean for the transposition and application of that provision?*, in IPKat, 11 May 2022, <https://ipkitten.blogspot.com/2022/05/what-does-cjeu-judgment-in-polish.html>, accessed 12 May 2022;
- Shapiro, Ted, *Poland v. EU – The Battle for the Value Gap*, <https://www.wiggin.co.uk/insight/poland-v-eu-the-battle-for-the-value-gap/>, accessed 4 May 2022;

Official Acts referred to

- 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, *OJ L 130/17.05.2019*, p. 92;
- Communication from the Commission, *A Digital Agenda for Europe*, 26 August 2010, COM (2010) 245 final/2;
- Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, *OJ L 167/22.06.2001*, pp. 10-19;
- 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'), *OJ L 178/17.07.2000*;
- European Commission, *Communication from the Commission, 'Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market'*, COM(2021) 288 final/4.06.2021;
- *Charter of Fundamental Rights of the European Union*, *OJ C326/26.10.2012*;

Case-law of the CJEU

- Action brought on 24 May 2019 — *Republic of Poland v. European Parliament and Council of the European Union*, (C-401/19)
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=216823&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5031146>, accessed 4 May 2022;
- CJEU, Opinion of Advocate General Saugmandsgaard Øe delivered on 15 July 2021, *Republic of Poland v. European Parliament and Council of the European Union* (C-401/19), ECLI:EU:C:2021:613;
- CJEU, Grand Chamber, Decision of 26 April 2022, *Republic of Poland v. European Parliament and Council of the European Union* (C-401/19), ECLI:EU:C:2022:297;
- CJEU, Opinion of Advocate General Saugmandsgaard Øe delivered on 16 July 2020, *Frank Peterson v. Google LLC, YouTube LLC, YouTube Inc., Google Germany GmbH (C-682/18) and Elsevier Inc. v. Cyando AG (C-683/18)*, ECLI:EU:C:2020:586;
- CJEU, Grand Chamber, Decision of 22 June 2021, *Frank Peterson v. Google LLC, YouTube LLC, YouTube Inc., Google Germany GmbH (C-682/18) and Elsevier Inc. v. Cyando AG (C-683/18)*, ECLI:EU:C:2021:503;

Case law of the ECtHR

- ECtHR, Decision of 18 December 2012, *Ahmet Yildirim v. Turkey*, CE:ECHR:2012:1218JUD000311110;
- ECtHR, Decision of 16 June 2015, *Delfi AS v. Estonia*, CE:ECHR:2015:0616JUD006456909;

Romanian laws

- Law no. 69 of 28 March 2022 for the amendment and supplementation of Law no. 8/1996 concerning copyright and related rights, in Official Gazette of Romania no. 321/1.04.2022.