

Copyright and related rights in the EU's Digital Single Market

seminar proceedings

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Introduction

The Directive on copyright and related rights in Digital Single Market is the most significant attempt to harmonize copyright laws of the member states after the InfoSoc Directive. It is an extensive document, quite complicated at times, which covers issues of great importance for right holders, digital platforms, users, and the public in general.

CDSM has attracted lots of attention from right holders and rights management organizations, users and business community, particularly online service providers. Copyright legislation has always attracted various interests' groups, this time however the debate was very intense, and various conflicting interest groups have clashed over multiple CDSM provisions.

The Directive is an ambitious attempt to adjust copyright laws to the reality of the digital market. Among the areas of copyright law covered are provisions dealing with new types of limitations and exceptions in copyright law (text and data mining; educational uses); measures aimed at improving licensing practices and ensuring access to content; provisions related to contract law, particularly fairness of remuneration and transparency; introduction of a new related right, namely right of press publishers.

Contractual copyright provisions for the first time in EU law have been regulated in a more comprehensive manner. The clear purpose of these regulations is to protect the interests of authors as weaker parties in the copyright agreements. So far copyright contracts have been regulated only in a very limited manner by, for instance, the software and database directives.

CDSM envisages for example additional remuneration when the proceeds from the exploitation of a copyrighted work exceed the remuneration initially agreed upon by the parties to the contract. Additionally, the CDSM provides for greater transparency in contractual relations. It obliges licensors to provide licensees with information, which constitutes the basis for calculating the amount of royalties due. Finally, the lack of exploitation of the work coupled with transfer of rights might result in the work not being available on the market to anyone willing to get acquainted with the copy of such work. CDSM introduces the right of revocation.

The Directive adopts a different approach to limitations and exceptions. Unlike the exceptions and limitations in the Infosoc Directive, this time member states are not free to decide whether to implement an exception or not. Thus, member states are obliged to introduce text & data mining exception. CDSM also requires member states to allow for the digital use of works for the teaching purposes. This marks a significant change of approach of the EU legislator towards exceptions and limitations – a shift from focusing on harmonizing the scope of exclusive right only towards greater emphasis on the interests of users. Issues related to these specific exceptions have been addressed in the presentations of Tatsuhiro Ueno and Giulia Priora.

CDSM also introduces a new right to the EU copyright law. Article 15 requires the member states to provide for press publishers' rights. Interestingly, the right, though exclusive just like other IP rights, covers only online uses of press publications and is only effective towards information society service providers. Ula Furgał explains the nature of the new right and assesses its possible effects.

However, the provisions that have attracted the most attention are the provisions concerning the use of copyright protected content by the online service providers. The introduction of Article 17 of the CDSM is indeed of great significance. It marks, at least to an important extent, a departure from the consensus widely accepted at the very beginning of the 21st century, which created conditions for growth of internet industry. This consensus was

largely reflected in the provisions of the E-commerce directive, which explicitly banned member states from imposing monitoring and filtering obligations on the online service providers.

Implementing Article 17 clearly requires very careful balancing of the interests of rightholders, as well as digital platforms' operators and users. After all, this is where such fundamental rights as freedom of speech, artistic expression, right to intellectual property and freedom to conduct business are all involved at the same time. Balancing these rights and interests is a challenge. This is even more important, as the compliance of Article 17 with fundamental rights is currently being challenged by Poland before the CJEU. Insights on issues related to Article 17 are addressed by Joao Pedro Quintais, Christopher Geiger and Bernd Justin Jutte. Additionally, Peter Mezei analyzes Article 17 from the perspective of rights and limitations.

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[The following texts are the transcripts of the oral presentations made during the conference, the characteristics of such a presentation has been preserved. Texts have been edited by the authors for clarity and accuracy]

Article 17 CDSM Directive: On a road to... somewhere



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In order to have a good baseline understanding of the topic, firstly I would like to discuss the timeline and the current state of the discussion surrounding Article 17 of the Copyright in the Digital Single Market (CDSM) Directive. Next, I will cover the complex regime of Article 17. Finally, I will move on to the issue of preventive measures versus user rights and safeguards – the most exciting topic within the discussions concerning Article 17, in my opinion.

With time, quite a complex picture emerges. The discussion on Article 17 must be seen in the broader context of the Commission's efforts to tackle illegal content online, which have included multiple proposals at an European Level, especially the Digital Services Act. As regards copyright in particular, since the approval of the CDSM Directive, a number of developments have occurred. One of them, as per Article 17.10, is that the European Commission had to come up with a Guidance for the interpretation and implementation of Article 17 (COM COM/2021/288 final). This guidance was published and became public a single working day before the implementation deadline. Since many member states waited for this Guidance to be published in order to implement Article 17 better, this delay by the Commission, was one of the main causes for the delay of national implementations of the Directive. Another main cause for the delay was the fact that Polish government filed an action of annulment against Article 17 of the Directive in Case C-401/19. The main question underlying this action for annulment is whether the balance struck by Article 17 within its internal mechanisms (namely, between preventive measures and user rights and safeguards) is compatible with the fundamental right of freedom of expression in art. 11 of the Charter of Fundamental Rights. And finally, quite ironically, we also had the development of the interpretation of Article 3 of the Information Society Directive by the Court of Justice of the EU (CJEU), in particular in its judgment in *YouTube and Cyando* (joined cases C-682/18 and 683/18). In simple terms, this judgment examines whether we need Article 17, or whether the pre-existing *acquis* already establishes direct liability to platforms like YouTube. In short, the Court states that, based on the facts concerning the case and the current design of YouTube, the platform is not liable for direct communication to the public. Instead, it benefits from the hosting safe harbor in Article 14 of the e-Commerce Directive.

This is the kind of complex reality that we are in right now. In the light of this complexity, it is unsurprising that multiple member states delayed their implementation of Article 17, waiting not only for the Commission's Guidance, but also for the AG opinion on Case C-401/19 and the CJEU's judgment in *YouTube/ Cyando* case. At the same time, the Commission has sent letters to many Member States starting pre-infringement procedures for lack of implementation of the Directive. As far as the Commission's position is understandable (since member states have an obligation to implement the directive in a timely manner), it is also criticizable, since the Commission itself is to blame in part for this delay, at least as it regards the later publication of its Guidance.

At this timepoint, most countries have not adopted the CDSM Directive in their national laws or proposed a clear provision transposing Article 17. Interestingly, despite the Commission's Guidance having been published, it does not seem to have had a major impact. Based on the implementations we've seen so far, the ones that came out before the release of guidance obviously did not take it into consideration, while the ones that have come after publication of the Guidance are mostly a verbatim copy of Article 17, which ignore the detailed recommendations in the Commission's Guidance. This leads to the question of what role the Guidance will actually have in the future.

Moving on to the mechanics of the provision, I believe they can be roughly divided into two groups; the first discussing the type of service providers that Article 17 applies to, and the second covering the scope and liability issues.

What type of service providers does Article 17 apply to?

To address the first, Article 17 applies to a type of hosting service provider, so called “Online Content Sharing Service Providers” (OCSSPs). Article 2(6) of the CDSM Directive contains a positive definition of OCSSPs, based on the concepts that were already present in the intermediary liability case law of the CJEU when interpreting the e-Commerce Directive, as well as the direct liability case law for copyright infringement as regards Article 3 InfoSoc Directive. OCSSPs are in essence user-generated content platforms or a user upload platforms, hosting large amount of works, which they organize and promote for commercial purposes with some sort of competitive effect. This definition clearly applies to major video sharing platforms, and not quite as clearly to other types of platforms that I will discuss later on.

Article 2(6) of CDSM Directive also contains a negative definition that explicitly excludes a number of players that may not meet some of the criteria of the primary definition. Importantly however, some of them have also effectively lobbied themselves out of the scope of OCSSPs. The crux of the matter is that any entity either qualifies as an OCSSP or it does not. In the latter case, it is considered, for lack of a better term, as a “non-OCSSP” platform hosting copyright protected content. This means that such platforms are not regulated by Article 17 of the CDSM Directive. Instead, they are regulated by Article 3 of the Infosoc Directive and Article 14 of the e-Commerce Directive (to be replaced by Article 5 of the DSA). This all means that such a platform is basically subject to the case law of the CJEU on the right of communication to the public up to and including *YouTube/Cyando*, which set a different type of liability and obligations as compared to Article 17 of the CDSM Directive, despite the similarities between both regimes. So, we get this bifurcation of legal regimes that is now the new norm. Importantly, the main platform that gave rise to the *YouTube/Cyando* case – i.e., YouTube – is now clearly an OCSSP, whereas under the previous regime it would likely not have been directly liable for communication to the public.

What is the scope and liability of Article 17?

If you are an OCSSP, the new regime states that you are communicating works to the public, independent of knowledge or the illegality of the upload. Differently from what results from the *YouTube/Cyando* judgment, you are subject to direct liability. In other words, you are treated as a copyright user. As such, you are excluded from the hosting safe harbor in Article 14 of the e-Commerce Directive.

There are a number of mitigation measures that are embedded in Article 17.5 to 17.9 that try to claw back some of the excesses that might be caused by this very strong approach to liability in Article 17, including the liability exemption mechanism in 17.4. The mitigation measures include: proportionality assessment and factors that must be taken into consideration when applying the preventive measures in paragraph 4 (17.5); a mitigated regime for small and new OCSSPs (17.6); user rights and mandatory exceptions and limitations (17.7); a statement on the prohibition on general monitoring obligations that restates the same prohibition in Article 15 of the e-Commerce Directive (17.8); and safeguards in the form of in and out of platform complaint and redress mechanisms (17.9).

The crux of the discussion are the latter three measures, with the main question being: how do we strike the proper balance between competing rights, obligations and interests? What is the internal mechanism for balancing preventive measures versus user rights and safeguards? The departure point to answer these questions is the recognition that there is a normative hierarchy in Article 17, in what Senftleben has called a “Bermuda triangle” of entitlements of right holders, platforms and users. This hierarchy results clearly from the different nature of obligations in the provision. Whereas the preventive measures that are imposed in 17.4 are obligations of best efforts, the user rights and freedoms in 17(7) in particular are obligations of result. This has been recognized by the Commission and European Parliament at different stages and is also clearly stated in the Commission’s Guidance on Article 17 and the AG opinion in C-401/19.

This hierarchy has consequences, which I will illustrate briefly. How to address the issue of preventive measures and user rights? When you get into the application of the liability exemption mechanism you are faced with the need to use content recognition technologies to comply with the legal requirements of Article 17(4). The Commission has tried to soften and nuance this obligation in its Guidance at different levels. Still, when reading the Guidance, it is clear that in the Commission’s view, the best solution for platforms of a certain size or larger to comply with their obligations is to employ filtering technologies. Such technologies are currently predominantly based on matching algorithms, meaning that they are not really capable of the type of contextual assessment required to recognize and privilege “transformative uses”, as mandated in Article 17.7. This means that the type of national implementation that allows filtering by platforms and only ensures that users have a right of redress through the use of complaint and redress mechanisms is not sufficient to comply with the requirements of Article 17.7. This has now been recognized by both the AG in C-401/19 and by the European Commission in its Guid-

ance, making the compatibility of the use of automated filtering measures with the freedom of expression the key legal issue regarding the validity of Article 17. If the current state of the technology is such that these systems are mostly based on matching algorithms incapable of recognizing the uses that are identified in Article 17.7, then we must set out a nuanced interpretation that safeguards users' rights, since these are of a higher level than the obligation to comply with preventive measures.

How to do that? In the Commission's view, the way to preserve the normative hierarchy of Article 17 is two-fold. First, the Commission proposes a nuanced interpretation of what constitutes admissible preventive measures for OCSSPs. In its Guidance, the Commission goes to great lengths to say how we can use the proportionality assessment and factors to comply with these obligations, taking into consideration the reality of this technology. Second, there is a need for ex ante safeguards.

The main thrust of these ex-ante safeguards in the Guidance is to develop and identify two categories of content, for which the application of preventive filtering is acceptable: "manifestly infringing" content and "earmarked" content. An important aspect to mention is that for the most part these categories are self-standing and do not overlap. The category of "manifestly infringing" content aligns better with CEJU case law and the newly developed category of "earmarked" content, refers to a content the dissemination of which creates a high risk of economic harm.

Due to the late publication of the Commission's Guidance, the AG in Case C-401/19 could for the most part not take it into consideration when drafting their opinion. However, in a rare "post-script to the Opinion", the AG did explicitly state that allowing filtering measures for "earmarked" content that does not also qualify as "manifestly infringing" should not be considered compatible with the right to freedom of expression. Although the AG considered that these measures can be permitted for "manifestly infringing" content, it did interpret that category has a narrower scope than that proposed by the Commission in its Guidance. From my perspective, then, this is the main battleground regarding the compliance of Article 17 of the CDSM Directive with the freedom of expression right.

In conclusion, the legal debate surrounding Article 17 has come a long way from the blanket acceptance of the broad use of content recognition technologies for preventive filtering of potentially copyright infringing content. We are now at a more thoughtful and nuanced stage of the debate, which increasingly considers the importance of freedom of expression risks associated with filtering technologies. In this context, the emerging trend is to consider use of filtering technologies as acceptable only for "manifestly infringing" content, and as prohibited in all other cases.

The Challenge to Article 17 CDSM before the CJEU;

Platform Liability Automated Filtering and Fundamental Rights: An Impossible Match



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In our presentation, we wish to expand the discussion on Article 17 in the light of fundamental rights raised in the Polish challenge to Article 17 of the Directive on Copyright in the Digital Single Market (CDSM Directive). We will also go beyond the scope of the challenge itself, as some fundamental rights arguments were not raised by the Polish Government in the challenge, but which are nevertheless important to consider. We will address them as they might play a role at a later stage, particularly when applying Article 17 in the courts, and therefore we will expand on the fundamental rights reasoning and address the different documents that were mentioned previously in the other presentations - the Guidance issued by the European Commission on Art. 17 CDSM, the *YouTube/Cyando* decision of the CJEU, and also the AG's Opinion in C-401/19. We are going to make some proposals based on two papers that we have written together, published this year in GRUR International (Ch. Geiger and B.J. Jütte, 'Platform liability under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match', GRUR International (2021), Vol. 70, Issue 6, 517) and in European Intellectual Property Review (Ch. Geiger and B.J. Jütte, 'Towards a Virtuous Legal Framework for Content Moderation by Digital Platforms in the EU? The Commission's Guidance on Article 17 CDSM Directive in the light of the *YouTube/Cyando* judgement and the AG's Opinion in C-401/19', European Intellectual Property Review (2021), Vol. 43, Issue 10, 615).

The main message that we would like to convey is that Article 17, as it stands, raises some major fundamental rights issues, and that it would be possible for the CJEU to come to the conclusion that Article 17 is not compatible with the Charter. If this happens to be the case, we consider that this is not so dramatic, because the legal

framework that was built via a combined reading of the Guidance, the *YouTube/Cyando* decision and the Opinion of the Advocate General is interesting, balanced and sufficiently flexible to deal with the issues raised by Article 17 of the CDSM Directive.

Should we want to have a legislative intervention, perhaps we may include the Digital Service Act currently under discussion, as it also deals with platforms' liability for content, proposing a horizontal approach in the same way that the E-commerce Directive has regulated platform liability since the early 2000s. **What is the outline of the fundamental rights issues in the challenge?**

Let us begin by providing some background on the legal context to the challenge and by describing what the challenge actually is about and what the Court of Justice is supposed to answer here. Then we will map the fundamental rights and their substance that are at stake here.

In essence, in 2019 Poland suggested, by launching an action for annulment, that Article 17, or at least certain parts of it, are in violation of the right to freedom of expression, arguing that because Article 17 would require from online-content-sharing service providers (OCSSPs) to install filtering mechanisms, it would prevent the upload of certain copyright protected material, which would then lead to a suppression of speech. Our argument is much more extensive. We consider that not only is Article 17(4), as Poland argues, in violation of freedom of expression, but article 17 as a whole, in fact violates a number of fundamental rights.

The challenge only relates to Article 17(4). It suggests that OCCSPs would have to use filtering technology in order to ensure the unavailability of specific works and subject matter on platforms of OCSSPs, and OCSSPs would also have to ensure that once such content has been blocked or taken down, it will not appear on the platforms again in the future. The claims under the Polish challenge are twofold. The main claim is that Article 17(4)(b) and Article 17(4)(c) make up the latter part of Article 17 a violation of the right to freedom of expression. But there is also an interesting part in the Polish challenge, which is often overlooked. Taking Article 17(4)(b) and certain parts of 17(4)(c) out of Article 17 might not, according to the Polish Government, result in a legal construct that in itself would be stable. In that case, Article 17, in its entirety, would need to be taken out of the directive, and not be considered to be a good law anymore. This is the direction in which our argument is going. But we need to widen the scope of the analysis a bit beyond freedom of expression and also include other fundamental rights.

To summarize, Poland argues that certain parts of Article 17(4), or Article 17 in its entirety violates the right to freedom of expression, and therefore should be annulled. We will suggest that there is a much more complex interplay of fundamental rights involved. One thing that we should be reminded of is that historically and consistently, the Court of Justice has held that any limitation of a fundamental right, in this case freedom of expression, is in principle permitted, but such limitation cannot attack the essence of that right, or, put differently any limitation must respect the essence of the rights and freedoms that are being limited. And if such limitation touches upon the essence of the fundamental rights, that would go too far and would constitute an unjustifiable limitation of the fundamental rights in question and would not result in a fair balance between the various rights and freedoms considered. One thing that we also have to keep in mind is that there is no hierarchy between the various fundamental rights that we can find in the EU Charter or the European Convention on Human Rights, which we also, of course, have to consider. And we have other cases before the Court of Justice, where the balance between multiple fundamental rights have been discussed. One example is the recent "Spiegel Online" case, but also the majority of the copyright enforcement case law, "Scarlet Extended" and so on and so forth. The cases show how the Court of Justice tries to balance online copyright enforcement against a variety of fundamental rights.

We will demonstrate - in relation to a number of fundamental issues in Article 17 - that there are indeed problems with the essence of the fundamental rights. But in general, any interpretation of this article should seek to find an appropriate balance between the fundamental rights involved, which is not always possible, but all the fundamental rights should at least be preserved in their essence by the Court.

The rights we discuss specifically are mainly five. Article 17, as Poland suggests, and quite obviously, touches on the right to freedom of expression by potentially filtering online content that should not be filtered. Attached to this will be the right to privacy online - filtering mechanisms will deal with personal data. OCSSPs will incur additional obligations which touch upon the right to their freedom to conduct their business, and right to fair trial will also have to be considered. And most importantly, as a counterweight to all these fundamental rights, we cannot forget those of right-owners.

The entire purpose of Article 17 is the protection of the right to property, to ensure that it can be properly exercised in an online environment and on OCSSP platforms in particular. However, the Polish challenge, and this is one of the main dangers, is limited to the interplay between users and their right to freedom of expression. Of course, one problem here is that the Court of Justice, in most of the cases, tends to answer the question it is being asked and does not stray much beyond the analysis it is expressly asked to conduct. But we suggest that the Court of Justice might – or even should – look into other fundamental rights. When examining the Advocate General’s Opinion on the challenge, it relatively closely stuck to the interplay between the obligations arising out of article 17(4) and the right to freedom of expression.

Going back to the substance of Article 17: One important aspect is that article 17(4) cannot be looked into in isolation, because Article 17 is a complex interplay of rights and obligations. It has internal hierarchies that we also have to consider. There is almost unanimous consensus that Article 17(4) will require online platforms to install automated filtering systems. Merely looking at the amount of information that will have to be processed and to be checked against infringing uploads, this will inevitably require the installation of automatic filtering mechanisms. Otherwise, the task simply cannot be managed. We have not read a single submission which stated that there is any way other than automated filtering mechanisms. The Court of Justice has also recognized this in *YouTube/Cyando*, and the Advocate General has also recognized in their opinion that this is seemingly the only way to ensure that Article 17(4) can work.

Strangely, however, the Court of Justice in numerous instances has ruled that the installation of general filtering and monitoring obligations would violate European Union law. And this is also restated in article 17(8) of the CDSM Directive.

The problem with automated filtering mechanisms is that they cannot distinguish reasonably between lawful and unlawful uses. Automated filtering mechanisms today are context insensitive. Automatic filtering will eventually lead to the prevention of lawful users. This seems to collide with Article 17(7) of the CDSM Directive. It will lead to preemptive filtering of uploads that are protected by the right to freedom of expression and therefore will constitute an infringement of that right. This already constitutes an internal conflict between Article 17(4) and Article 17 of the CDSM Directive. And this creates a relatively uncomfortable situation for OCSSPs, in that they incur a double burden, as all OCSSPs are required to license content uploaded by their users. But, in addition, they have to develop, buy and use technology that prevents unlawful uploads. They also have to take action within an environment that – at least relation to copyright limitations and exceptions in the European Union – is still largely unharmonized. So, what should be filtered in one country might not necessarily be filtered in another country. Escalated to 27 member states, the intellectual work that OCSSPs have to perform in combination with supporting automatic filtering mechanisms is very burdensome.

This is partially mitigated by the requirements of “best efforts”, but this notion has not been properly defined and adds at least to a certain amount to legal uncertainty that OCSSPs are facing. It is important to understand how far fundamental rights can be limited in order to still give full effect to them, or to preserve their essence. And the first fundamental right, the one that really is at stake, is the right to freedom of expression. Here we can rely on a very rich jurisprudence, not only of the Court of Justice, but more importantly of the European Court of Human Rights in Strasbourg. And when interpreting the fundamental right to freedom of expression, one should consider that the European Court of Human Rights has consistently ruled that freedom of expression is one of the most essential foundations of a democratic society and one of the most basic conditions for its progress and for the development of every man and woman. The Court of Human Rights has ruled in a number of cases that ex ante filtering is very problematic and should be avoided. Most importantly, ex ante filtering, filtering or blocking of content before it being uploaded, should only be allowed in very specific situations, under a very strict legal framework. Therefore, there must be very precise rules in place in order to allow ex ante filtering. Any restriction of expression requires a very stable and strict legal framework.

Of course, the right to freedom of expression has a number of dimensions and includes the right to inform, but also the right to be informed. Therefore, it is not only the freedom of expression of uploaders, whose content will eventually be blocked, that ex ante filtering is violating, but also the recipients of information – people who want to access such content and who would be limited in their right to receive information. This dimension can also not be overlooked, while it does not really become apparent from the formulation of the Polish challenge. Filters that recognize similarities in content uploaded are not able to distinguish based on semantic differentiations and cannot distinguish context. For example, the reproduction of one image in one context might be copyright infringement, while in the other context, it might be considered a parody, a pastiche or a quotation that would fall under a specific exception certainly protected by the right to freedom of expression. But the technology does not

exist, yet that can replace human lawyers. Automated technology will eventually create false positives, and therefore, block content that should not be blocked or filter content that should not be filtered.

Again, this is what the Advocate General in *YouTube/Cyando* quite recently has stressed - lawful content will eventually be blocked.

But as much as the rights of users will be limited, the rights of platforms will equally be restricted. Article 17 itself determines how OCSSPs have to conduct their business, they dictate to a certain extent, what type of measures OCSSP would have employ to fulfill their obligations. And it is also quite obvious that these measures are either directly or indirectly connected to substantial investments that OCSSPs will have to make in order to develop or purchase technology that will enable them to fulfill the obligations arising under Article 17. Not only will they be required to invest in filtering technology (development or purchasing), but they will also have to make sure that there is appropriate dispute settlement mechanism in place, that there is the opportunity or the possibility of human review, which of course also requires them to employ personnel and requires them to spend their resources in a specific way. And for these reasons they cannot exercise their economic preferences in an unfettered way. In principle, prescribing a certain behavior is unproblematic, but the scale of the intervention is something that has to be considered with care. Specifically for smaller platforms, or platforms that maybe address a niche audience, this might become fundamentally problematic. As mentioned before, the fact that copyright in the EU is still not fully harmonized will also require European-wide operating platforms to have regard to a multitude of legal contexts that would have to be applied to one operational platform. This increases the complexity of their operations and increases the information and transaction costs incurred by OCSSPs.

The right to a fair trial is also something that needs to be taken very seriously in this context. The right to a fair trial, as laid down in Article 47 of the EU Charter, states that if a limitation or violation of fundamental rights or any right occurs, an individual should have the right to an effective remedy before a tribunal. The question here is if we can consider private dispute settlement mechanisms on platforms as a tribunal? Certainly, after an internalized dispute settlement mechanism, users should have the right to a review by a court. And in our opinion, it should be a relatively quick review, especially when the dispute concerns time-sensitive content. How platforms should safeguard this is still something that is very much unclear. The fact that platforms will be the first line of defense for users in order to challenge unlawful takedowns or filtering of their content is problematic: at some point in time, a court of law has to step in. This should be clearly integrated into the structure of Article 17, and at this point, this Article 17 is still relatively vague. The user rights expressed in Article 17(7) of the CDSM Directive must be taken much more seriously, in particular in order to safeguard the rights to a fair trial. And of course, this is also an European problem, because Article 17(9) which mentions alternative dispute settlement mechanisms to secure those user rights is so extremely vague. It will most likely create different dispute settlement mechanisms or different dispute settlement structures in the various member states.

Finally, the right to privacy is, of course, also affected because filtering will automatically and eventually result in the storing of information. How this will happen is something we should keep a very, very close eye on.

The Court of Justice has also set relatively tight limits on the way information of private users for the purpose of copyright enforcement has to be considered under EU law. Of course, enforcement has to be efficient. But the enforcement of copyright and related rights on the internet must be respectful of the fundamental rights of users and platforms. And historically, we have seen that the Court of Justice has been willing to limit the right to property, for example, by establishing the exhaustion doctrine. As a result, the right to property can be limited when important competing rights are at stake.

It is worth considering at this point what the European Commission in its Guidance on Art. 17 of the CDSM had stated about Article 17 and how it should be implemented. It is interesting, first, to note that the Guidance came very late, actually too late to be decisive because it was published the week before the deadline for implementation of the Directive by the member states. We see here that there has been a strong hesitation. And that it was extremely sensitive for the Commission to come up with some sort of interpretation guideline that was mindful of all the interests. But what is clear is that the Commission in the Guidance admits that automated filtering would lead to false positives, meaning that the filtering is not representing a legal assessment of the legitimacy of the upload. What the Commission proposes here is that automated filtering of content is in principle limited to “manifestly infringing uploads”. There are also additional criteria that can’t be found in the directive and that came as a surprise.

It is thus a little bit more defined what could be filtered and what could not be, although it is not very clear up to today what a “manifestly illegal upload” is, and we will surely have to discuss this in the future. The Opinion of the Advocate General also came late. It seems that the position on the topic was delayed. But finally, on July

15th, 2021, the Advocate General also recognized that automatic content recognition tools, in order to filter content of users, are inevitable in order to basically fulfill the obligations of Article 17.

This leads to an interference in the exercise of users' freedom of communication. So even though the Advocate General eventually come to the conclusion that Article 17 provides sufficient safeguards and is a proportionate limitation of the right to freedom of expression, they stress the fact that there is an interference with freedom of expression, and therefore we have to examine how to make this interference acceptable and proportionate. The Opinion is certainly a call for caution. In fact, the Advocate General is trying to propose some criteria. And it is interesting to see that the criteria he proposed seem similar to what the Commission proposed in its, but they are a bit more precise. In the Advocate General's Opinion, in order to prevent excessive blocking, an intermediary may only be required to filter and block information which has first been established by a court as being illegal; or otherwise, inform about the unlawfulness which is obvious from the outset, that is to say "manifest", without the need of content contextualization. Here, The Advocate General is much more specific than the Guidance. However, there are many examples where an entire work can be lawfully reproduced for information purposes; context therefore always matters.

We know for example that Article 17 prevents general monitoring. The Advocate General states that it does not preclude all types of monitoring. So, they are more specific in this case and in stating that if only manifestly illegal content is being targeted, this constitutes targeted monitoring and this should be allowed in the context of Article 17. The interesting issue is that the Advocate General seems to say that this is genuinely compatible with the Charter, but some safeguards of the rights of users have to be implemented - some practical safeguards. And the member states, when they implement the Directive, and the Commission, when verifying if they did this correctly, will need to check that these safeguards are really in place and well-functioning. What the Advocate General also specifies is that this can clearly not be left either to right holders or to the internet service provider, it cannot be something that is dealt with among these parties. This is very important because of the high standard of freedom of expression. It needs to be a transparent process; it needs to be under the supervision of a public authority.

This is an extremely important message to all the member states and also to the Commission in order to check if the member states have implemented the safeguards correctly. There need to be very strong safeguards for this, and they need to be controlled by public authorities.

Again, we have to recall that Article 17 is not providing legal certainty, exceptions and limitations are not harmonized among the 27 member states. So, it is very difficult to know what is allowed and what is not.

As we have seen, Article 17 also violates other fundamental rights that are not challenged by Poland, but have a direct impact on the exercise of freedom of expression.

So, our conclusion here is that there is still room for improvement of Article 17 given these uncertainties. This would give the European legislator an opportunity to elaborate a balanced liability regime for platforms. We know that article 17 has been extremely contested. It is still very difficult to implement, we will probably have various scenarios in different member states, which will be extremely difficult for users, for platforms, for everyone to understand. And we would have the opportunity to look this through again in the Digital Service Act. It is not going in this direction right now, but maybe the Court of Justice will take a courageous decision and bring this to the agenda again. But even without the Digital Service Act, when reading the Guidance, the Court of Justice judgment in *YouTube/Cyando* and the Opinion of the Advocate General, there is the premises of a more flexible and balanced framework for content moderation. Perhaps we actually do not even need Article 17 anymore because you can refer to quite a sophisticated body for content moderation resulting from a combined reading of these recent documents.

With regard to the definition of what is manifestly illegal and could be blocked upfront, time sensitive content could be one of the situations, but it is not written anywhere. And most importantly: who should make this determination? We posit that an independent EU institution would have the legitimacy to do so and perhaps also to conduct some studies in order to see what are the contents which need to be blocked upfront, and whether ex post moderation of uploads is really harmful.

This institution could also take jurisdiction over disputes regarding automated content moderation, in the sense of an alternative dispute resolution mechanism, which WIPO is, according to its latest study, strongly encouraging. We have stressed in some of our papers, that the human review is sometimes something that we should watch with caution - who is this human that masters 27 copyright laws in Europe, speaks many languages, and

knows exactly when a parody is there upfront in 10 minutes, and can decide about it? We need independent mechanisms to check the content.

This institution could also develop binding best practices and moderate stakeholder dialogues in a more efficient way than the Commission does. It could provide for empirical studies. There is a strong move towards evidence-based IP legislation, we need to transfer this into practice. The fact that the solution will be backed by economists or even by social studies would make the solutions more acceptable. Content moderation is becoming such an important topic in the EU, that more concrete data is required. Perhaps such an institution could gather academics to function as a think-tank and propose improvements to Article 17, or to the Directive in general.

This brings us to an idea that is almost dream-like, that in the future we might have an independent Regulation Authority like we often have in competition law, such as a new EU copyright council, that will not be restricted only to the fact that we need an oversight over content moderation, but more generally, to secure a fair balance of interest in copyright law. We face problems of legitimacy of the system, because artists do not participate sufficiently in the copyright game. And this is something that some scholars are working on, trying to conceptualize the building of an independent Regulation Authority, an EU copyright council that would have the role to come up with better policies in the future.

EU legislature's responsibility

Martin Husovec



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I will split the presentation into three different sections and a conclusion.

First of all, I'd like to talk about the scope of Article 17. Christoph and Justin covered the debate about what are the preventive duties under Article 17, and I think most of the conversation these days is about that. It's about what preventive duties are implied in Article 17; which means that we are not really discussing the scope of licensing obligations and that these obligations are, perhaps, having some fundamental rights issues as some authors, like Professor Spindler were arguing in literature. We're only discussing the filtering part. But I just want to highlight this because the member states can do all sorts of things, and they might not always end up in the same place. So, we are discussing the purpose and scope of preventive duties.

You have heard from Christophe about the conversation which the Advocate General, and the Commission, and academics have about what actually article 17 requires. In a nutshell, the law is very vague. We do not know what kind of thresholds or what kind of limits there should be on technology. But we all understand that those limits are important to prevent the overuse of technology in the areas where technology is not up to the task.

I, personally, am not concerned with the question of this threshold. But with the question of *who should actually determine* the threshold?

The Advocate General says that it is the role of the member states and the Commission to determine the detailed rules when it comes to the threshold and the scope of the preventive duties.

Now, first of all, I take the issue with this being the Commission's role. I don't think it's up to the Commission to do this. I welcome that the Commission is refers to this in its guidance, but I don't think it has any mandate to do this. There's nothing in Article 17 saying that the Commission can specify the threshold. It cannot issue binding acts. The question has to be determined either by the member states or the EU legislation as interpreted by the Court of Justice. There is no room for the Commission to set up those thresholds.

In the light of the recent CJEU case law about the validity of soft law instruments, I think it's quite clear that if they tried to go too far, someone could easily attack the guidance as just overstepping the mark. So that's my first issue. I don't think it's up to the Commission. The Commission can brainstorm and inspire, but that's all it can do. It's clear that it's then up to the member states because the EU legislation is so vague on this point.

The Advocate General argues that it is the member states who should set the scope and thresholds. Member states may incorporate content recognition tools if they distinguish what is a manifest infringement; and what is big news, this should be done in the national legislation. I agree with that.

The problem is that the reality is that most of the member states are saying: "We don't care, we are not going to set up these parameters in the national legislation." So far, we have one national legislature that decided to do this even before the AG Opinion was out, but most of the legislatures in the member states are not doing anything. They are just copying and pasting the Directive.

So, the principle is good, but it's just entirely disregarded by the member states. So, is that a good enough outcome? Let's see. Let's discuss this at the end.

Second, on procedural safeguards. Because, obviously, one thing is to narrow the scope of preventive duties, but the second thing is to introduce safeguards to prevent abuses even within the situations that occur when these preventive duties apply.

Here the Advocate General is really thoughtful on many different safeguards. The Advocate General says that safeguards as such are useful, but he also said that the guards on their own are insufficient to create a fair balance. The reality is that the most of the member states are not really capable of delivering any effective safeguards. Because if you only copy and paste a provision of the Directive saying something should not happen, and you copy and paste a provision saying a provider should have effective redress mechanisms, without actually introducing some mechanism to supervise this and perhaps a sanction when providers don't do this, then that's just not an effective remedy. You just have it on paper, and it doesn't really do anything for the users. And unfortunately, this is what is happening in most of the Member States. They do anchor the principle that you have a complaint and that it should be effective and fast, but they don't do anything in terms of the supervision, and transparency, and sanctions to actually make sure that it happens.

It's like saying you have rights to equal pay without saying that there are any instruments to enforce that claim and that obligation. I think that's deeply problematic. And it just shows that it is nice to have safeguards but they can't be only copy and paste of the Directive's provisions. Copying and pasting Article 17 just doesn't do the job and won't be compliant with the national constitutions and the EU charter.

A similar thing is happening with the alternative dispute resolution. Article 17 only alludes to ADR and it leaves all the details to the member states. And basically, most of the member states only say: "Oh, and you can agree on arbitration and mediation." How is that helping anyone? They could have always agreed, even prior to this directive — it's nothing. There's no value in that kind of provision.

Judicial recourse? Some member states might anchor this specifically in their implementations. Again, they're not helping anyone to be able to enforce this, with the exception of some member states where you have some collective redress mechanism for this sort of things. And transparency is entirely missing because the directive itself doesn't require much of it, so the member states legislatures are not really rushing to do much there.

This brings me to my overall point about supervision. I think the Advocate General proposes that all of these procedural safeguards should be implemented by the member states. And that the scope should be also specified by the member states and that there should be supervision on all of these aspects on the national level. In fact, they say that Article 17 obliges those providers, and also the administrative and judicial authorities of the member states, when supervising the implementation of that article, to consider the collateral effect of filtering measures they implement.

Now, in many member states, there's no such thing. There is no supervision. Unless you say that only supervision is that maybe some user sometime in the distant future will sue a platform. That's the only safeguard that you get. There's no administrative oversight. And in most countries, we don't even try to create collective redress, we don't try to create some sort of oversight from the ministries when it comes to the handling of the complaints of users. So again, it sounds nice, but it's just not there.

This brings me to my main point and a conclusion about this. I think the Advocate General's Opinion is very thoughtful, and it really goes in the right direction. The problem I have with it is that it assumes that the member states will do something. This is despite the fact that the Advocate General states, as a principle, that the EU legislature dragging the member states to the situation of a very serious interference with the freedom of expression has responsibility for such situation; it is responsibility of the EU legislature to introduce safeguards on the EU level. At the same time, Advocate General also says that much of the job has to be done by the member states. In fact, if you read the Opinion, you get the message that EU legislature did something, but not enough to make this survive on the national level, even from the perspective of the EU Charter.

I think the serious question we should ask ourselves is in what situation do we end up if the court would follow the Advocate General's opinion. I think the result is as follows. The result will be that the Member States will implement this legislation and then, on the national level, you will have constitutional complaints about insufficient implementation in these member states. Most of the member states will have a problem when it comes to procedural safeguards, which means that those constitutional courts, in a dialogue with the Court of Justice, would conclude that the national legislatures didn't do enough to remedy and to safeguard against abuses.

But the strange effect of this is that none of the blame would come back to the European legislature.

The European legislature, if the Advocate General's advice is followed, would be seen as doing a sufficient job to pass a legislation that is constitutionally compliant, but the member states have to do the biggest work and they would be seen as constantly underperforming. And in that situation, if this is happening in many member states, one keeps asking why didn't the EU legislature do a better job and shouldn't it? And did the EU legislature really do a sufficient job in this case?

And this is where I'm skeptical because particularly when it comes to supervision and when it comes to transparency and supervision of the safeguards that are in the Directive, there's just nothing specific enough in the Directive language. And the same goes for the scope and supervision of preventive duties.

Now, is it acceptable that EU legislation does that and just implicitly passes the ball to the member states and they have to figure out in the conversation within its constitutional courts what the problem is? And do we accept that EU legislation can be designed in this way? I think that's for us to answer.

I think that we should really expect a lot from the EU legislature, because otherwise we have some systemic risks for future legislations. While I'm very sympathetic to the proposal of the Advocate General, I think structurally the problem I see is that the Advocate General imposes a lot of responsibility on the member states and less responsibility or limited responsibility on the EU legislature. I think the Union legislature should be more responsible.

And I think this is what this legislation is — it's flawed. I don't disagree in terms of what is proposed as a potential reading of Article 17. I don't have doubts with that. I'm totally supportive of that actually. I have always said that some form of Article 17 would be constitutionally acceptable from where I stand. But in the form that it's designed at the moment with the safeguards that it has, and hasn't, I think that we have a problem.

I think it's actually a deep constitutional question because it will influence how the EU legislature has to do its job in the coming years. And so far, the Court of Justice is rather famous for not properly disciplining the EU legislature — the only exception being the area of the fundamental right to data protection and privacy, where the Court has done some work.

And actually, the data protection area offers an analogous situation to this one, which is a little bit easier to understand because it is a vertical situation. Data retention was scrutinized by the member states and their constitutional courts for many years. Until after many years it finally arrived in Luxembourg and Luxembourg said: "Well actually, the whole directive is invalid."

I think here we have an inverse of that scenario. We have first the Court of Justice looking at the validity of a directive. And then the member states, their constitutional courts, figuring out whether the member state legislatures did enough.

I think this is useful to some extent, but it offers some risks, particularly that the Court of Justice says too early that it was enough what the EU legislature did; because I don't think it is enough.

Press publishers' right: implementing Article 15

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Firstly, I would like to briefly introduce how Article 15 came to be, because I think it's quite important to remember what the original context of Article 15 was and how it relates to the discussions that we're having now. Secondly, I will discuss Article 15 in the context of the ongoing implementation. As we heard before, the implementation is not even half-way done. Even though the deadline was in June 2021, not even half of the member states have implemented the Copyright Directive. Not even half of the member states have implemented the press publishers' right (because some of them have implemented only press publishers' right). Which means we are still to see the most of the national transpositions.

What is the problem that press publishers' right attempts to address, or what was the problem that the European Commission stated it was attempting to address when it proposed the press publishers' right? The problem was quite simple and was connected to a single service of a single platform. And that was the problem of news aggregators. Press publishers were essentially saying that their content was being used by Google and they were not being remunerated for it. And that the scope of the right of communication to the public was uncertain. As a result, they were unable to license their content. Thus, the European institutions, back in 2015 and 2016 said: "Okay, we'll do something about that." But already in 2016, the problem that the European institutions saw, grew. We started to get a little bit more of a context, and that context was not only that of licensing, remuneration, and enforcement of copyrights. It was the broader context of the democratic values such as the threat to a free and pluralistic press and the need to support quality journalism. We didn't only have this single service anymore, we had it in the background, but we also had those democratic values coming to the fore.

Of course, once the right was introduced, a lot of discussion sprung up. And we had those two very strong camps: for and against press publishers' right. Those camps are still standing. The values that we were discussing here, were users' freedoms, i.e., freedom to share content online and freedom to receive information (for users to have access to the plurality of sources of information online), which opponents of the press publishers' right were arguing will be threatened once the cost of accessing news goes up, when the new right is introduced. On the other hand, we had publishers saying that they need the new right and that its introduction wouldn't be revolutionary. They were arguing that because they were being treated unequally compared to other content producers, the new right would provide them with legal certainty, clarity as to who can enforce the rights and ask platforms for remuneration. At that point, we were only considering Google.

What is the solution that the European Commission has proposed? Article 15 of our Directive on Copyright in the Digital Single Market, which used to be Article 11 at the time when it was proposed back in 2016. This article didn't go through as many changes as Article 17 during the legislative process, but it did go through quite a few changes which considerably limited its scope. What the press publishes' right is, is basically a neighboring right on press publications that is gifted to the publishers of those press publications, with respect to online users of their content by information society service providers. This right is not effective *erga omnes* but is effective only in the online sphere towards information society service providers. There are multiple carve-outs from its scope. Private and non-commercial uses are not covered. Acts of hyperlinking are not covered, as well as uses of

individual words and very short extracts. And this right is quite limited in time, because it lasts for only two years following the publication.

Even though we refer to this right as the right of press publishers, this is actually a right on press publications. Press publication is a central concept of Article 15. The Directive does provide a definition of a press publication. Essentially, a press publication is a collection with an informative purpose. We are considering collections that are composed mainly of literary works of a journalistic nature – publications issued in a periodical manner under a single title and providing information, but not only about news, but also other topics, and published in any media, which means the definition applies to both online communications and traditional legacy news publishers. Those publications need to be published under the initiative, control and editorial responsibility of a service provider. This is quite a broad definition. Even though it has multiple clauses that need to be fulfilled, those clauses invite a lot of subjective judgments. And those clauses are quite open. What does it mean that information is related to news or other topics, would that be any type of information?

Are there any issues with the press publishers' right? If there weren't any, I wouldn't have spent a couple of years discussing it. There are quite a few issues on the table. I will discuss all those issues in reference to the implementation process.

As I've mentioned, the implementation process is still ongoing. At this very moment, press publishers' right has been implemented in nine member states. We also have multiple draft implementations on the table. Five drafts are already in the parliaments of member states while other were made publicly available. And as you see, we still have a couple of white spots on the map, and one of them is our host country, Poland. This is because the implementation draft of the press publishers' right in Poland hasn't been made publicly available. Maybe there is a draft, but we cannot know. Thus, only three countries are lagging behind: Poland, Greece, and Latvia. Those drafts are not on the table. So, for the rest of my presentation, I will be building on the implementations which have already been made available to the public.

What are the issues with the press publishers' right? Or what are the issues which the implementation is showing? Unfortunately, I will continue the theme of the first session by saying that in theory, we have harmonization, but in practice, not much harmonization is happening. And the implementation emphasizes that even further. When it comes to the basic concept of the press publishers' right, a press publication, member states implement that provision by simply copy-pasting this broad definition that we have on the table. I think it's important to remember that the definition of press publication, and copyright and neighboring rights in general, are ambivalent when it comes to the quality of works that they are protecting, which means that even though the argument for the press publishers' right was that of protecting quality journalism, a definition of a press publication doesn't recognize whether journalism is of a particular quality. Basically, both fake news or disinformation and quality journalism will meet the criteria of the definition. And member states can't really do anything with that on the implementation level. So, what are they doing? They are copy-pasting.

The other element that they are copy-pasting is the rightholder: a person who holds the rights. The Directive hints that this includes service providers such as news publishers and news agencies. Consequently, most of the member states copy-paste. However, we have exceptions, such as implementations in France and Croatia. Those implementations try to link to how press publishers are defined in national press and media laws, saying that only publishers who fulfill the criteria set by press and media regulation of the member state can benefit from the press publishers' right. Whether this is consistent with the Directive is questionable, however, this is the approach Croatia and France decided to take.

What is the most interesting from the implementation perspective, is the scope of the press publishers' right. What the publishers of press publications are getting from this right, what actions are covered by their monopoly, and against whom, and in which way they can enforce their rights. Our publishers of press publications are gifted with two rights: the right of making available and the right of reproduction applied to online uses by information society service providers. And as I've mentioned, there are very important carve-outs from the scope of this right. The right doesn't apply to the acts of hyperlinking, and it doesn't apply to single words and very short extracts. However, we need to remember that this is a neighboring right, which means that those acts, in theory, can still be restricted by copyright. Because even though European legislators and press publishers were arguing that we were introducing the new right for the sake of legal certainty, we're not really solving any of the problems that exist. We're simply introducing a second layer of protection. We have copyright, but we also have neighboring rights on top of that. Certain acts are carved out, but those acts are still governed by copyright.

Looking at the scope of this right - what does it mean that something is an online use? There is not much to discuss, it is more or less quite obvious to all the member states. However, some of the member states decide to expand on this issue in the explanatory memoranda that accompany the implementation proposals, essentially stating that only the acts of reproduction with the end result being the online use are covered. This means that reproductions made only to facilitate crawling or indexing, are not covered by the press publishers' right.

What's more, when it comes to hyperlinks: the right does not apply to any acts of hyperlinking. And most of the academic literature, commentators, and member states are okay with the fact that it doesn't cover any types of hyperlinks. This means, that one of the elements on which news aggregators are based, which publishers were mainly concerned about, is not covered by the press publishers' right. We have one member state that decided to be more restrictive in its interpretation, saying that only "genuine redirection", a particular type of hyperlink, is not covered by the press publishers' right. This is the Danish proposal. We don't know how it will work in practice, but there's this idea in there that only certain types of hyperlinks are excluded.

What does it mean in practice? Originally two elements of news aggregators were problematic (in theory, at least): hyperlinks and short extracts of text that are commonly referred to as snippets. With hyperlinks excluded, the most important thing in the context of the press publishers' right's scope are those very short extracts and the ability of press publishers to limit the online sharing of those very short extracts.

The Directive doesn't really say what very short extracts are. We only know that there is no originality requirement as we are on the level of neighboring rights and not copyright. It's basically up to the member states to decide what amount of content can be freely copied without triggering the press publishers' right. What are the member states doing in that regard? A lot of different things.

While there is no common approach, we have a broad theme of member states saying that whether something is or is not a very short extract, needs to be assessed on a case-by-case basis. Member states avoid stipulating an exact number of words which make up a snippet. Till now, we have only one exception. The Lithuanian implementation proposal provides that it should be permitted to copy up to 200 characters. Still, the majority of the member states say that a case-by-case assessment is required, and they indicate a number of different factors that need to be taken under consideration when making this assessment. First of all, member states say that a very short extract cannot lead to a substitution effect. It cannot make it redundant for a reader to go to the full article because they got enough information from this very short extract. Secondly, this exception cannot impede the effectiveness of the right and investment that the publisher put into the content.

The third issue concerning very short extracts, which is a bit problematic when it comes to the implementation, is whether only literary or also non-literary content can be a part of a snippet. Is it okay to have a thumbnail, three minutes of an audio file or a short video or not? Most of the member states remain silent on the non-literary content being included in a very short extract. Still, we have two member states which address this issue explicitly, in a contradictory manner. Croatia says "no, you cannot." And Estonia says "yes, you can." There is no harmonization, with countries adopting diverging approaches to the same issue. Thus, we do not know if we can rely on this exception when including a photo, a video, or other non-literary forms in a very short extract.

And now something that is becoming more and more problematic. And that partially links to the discussion that we are having on the fundamental rights and Article 17.

As I've mentioned earlier, press publishers' right is not a right effective *erga omnes*. This is a right which is effective only towards online uses by information society service providers. And here, we need to remember that originally the only services which were supposed to be covered by the right were news aggregators. The Copyright Directive doesn't include a definition of an information society service provider but refers to a definition which was already a part of the EU law. It is a service which is normally provided for remuneration at a distance by electronic means at the individual request of the recipient. The Directive offers examples of those services: news aggregators, whose activities motivated the European Commission to act, and media monitoring companies. On top of that, we know that this definition covers also search engines, because that results from the Court of Justice decision in the case of German press publishers' right. The Finnish implementation also indicates that, in some situations, press publishers themselves can be considered information society service providers. Thus, their uses are also covered by Article 15.

At that point, it's quite important to remember that, on top of this general rule that the right only applies to uses by the information society service providers, to further ensure that the right doesn't cover uses by individuals, the Directive has this next carve-out for non-commercial or private uses by individual users. Recital 55 further specifies that users' ability to share press publications should remain unaffected by the press publishers' right. This is crucial when we consider the current debate on whether social media platforms such as Facebook and Twitter are covered by press publishers right. We do not have consensus when it comes to this issue, neither among member states, nor when it comes to social media platforms themselves.

Some of the member states emphasize in the explanatory memoranda that people are free to share their content online. Others state that social media are an example of an information society service provider, thus they should be covered by the press publishers' right. Also, Facebook is not quite consistent when it comes to its own behavior. Because on one hand, in June this year, when Danish press publishers were arguing that Facebook should start paying licensing fees pursuant to the press publishers' right, it has changed its policies explicitly saying that it is not covered by the press publishers' right. On the other hand, in October, so only a couple months later,

Facebook entered an agreement with French publishers, saying that it would start paying them not only for the inclusion of press publications in their News Tab, but also pursuant to the press publishers right.

My personal view on this issue is that social media are not covered. And why is that? First of all, we need to take into consideration the fact that the content finds its way onto social media in a different manner than into search engines or news aggregators. Social media platforms are not the ones communicating content to the public or making content available to the public. It's users who share the content on social media, making this content available to the public. Secondly, we need to have a second look at the exceptions to the right's scope. If our European legislator, in two ways, tried to limit the scope of press publishers' right so as not to affect the ability of users to share content, firstly, by saying that the press publishers' right only concerns uses by information society service providers, and secondly, by saying that private and non-commercial uses are out; agreeing that social media are within the scope of the press publishers' right would indirectly affect the user's ability to share content online. And that we know, from the very beginning, was against the intentions behind the press publishers' right. Thirdly, we should remember that introduction of the press publishers' right was motivated by the activities of a single service of a single platform, a news aggregator of Google, and it was not connected to social media in any way. Even though today we are having a broader discussion on regulating the relationship between press and platforms, and we talk about advertising revenue and even bargaining powers, these topics were not a part of the conversation when the right was introduced. Thus, I would say "no" to the attempts to extend the scope of press publishers' rights, so that it covers also social media.

Currently, the big question concerning the press publishers' right is how does a publisher use the right in practice. We need to remember that Article 15 is silent when it comes to the process of negotiation and licensing. What Article 15 does, is to give publishers a right. It doesn't tell them: "You're entitled to receive remuneration;" it just tells them, this is a right and on the basis of this right, you can license and negotiate. What are the member states doing here? Some of the member states are simply copy-pasting provisions of the Directive, without introducing any practical solutions. Others are specifying licensing mechanisms or setting some principles for the publishers and platforms to follow when they negotiate payments for the press publishers' right.

There are a couple of member states that envisage collective bargaining. Mostly, this is for small publishers, so that they can come together and negotiate with platforms. Others provide for a collective management of rights, meaning that there is a collective management organization (CMO) that publishers can become members of and this CMO can negotiate in their name. And they do allow, to some extent, licensing with an extended effect. What needs to be remembered, however, is that even if a member state decides on the collective management, there needs to be a possibility to opt-out. There was a parliamentary question from one of the MEPs back in 2020 in that regard. While answering the question, the European Commission specified that indeed, Article 15 can be subject to collective management, but there always needs to be an option to opt-out because press publishers' right is in fact a right. In other words, publishers need to have an option to say: "We don't want any payment for our content," or "We don't want our content to be included in a particular platform." Publishers need to be able to exercise their rights. There are also other approaches that set negotiation principles, obliging platforms, most of the time only platforms and not the publishers, to enter into negotiations in a fair and non-discriminatory manner, respect competition rules and not to abuse their monopoly, their market power. To some extent, we can also see transparency obligations. Some of the member states require that during the negotiation process, platforms need to disclose particular information to the publishers, so that they know how much remuneration they should be able to ask for. On top of that, some implementations provide a set of principles which need to be taken under consideration when the amount of remuneration is set.

I would like to discuss one of the most contentious implementations of the press publishers' right which we have on the table: Italy. This implementation is "brand new" as the decree was published in the official gazette only last week, and it enters into force on 12th of December. Italy has decided to change the press publishers' right into an entitlement to fair compensation. What Italy says is that whenever a publisher or a platform asks to enter a negotiation, there is an obligation to enter this negotiation. And if an agreement is not reached between the parties within 30 days, then each party can file with the Communications Authority, which will then make an authoritative decision on the level of compensation. This is quite harsh and far-reaching solution, and there is a very lively debate in Italy about whether such solution is compliant with both the EU and Italian law. In my personal opinion, I do not think so. A right is a right, and obligation is an obligation. There is a clear difference between them. They are two very different concepts.

And where does the inspiration for Italians to do that come from? It actually comes from Australia. What did Australia do? Australia did establish the obligatory arbitration mechanism. Back in February 2021, Australia introduced its own solution to the problem of relationship between press publishers and platforms, the so-called News Media Bargaining Code. I'm always cautioning against comparisons between Europe and Australia, because the solution adopted in Australia does not belong to the domain of intellectual property or copyright. This is a code that establishes a way to negotiate, saying that certain platforms, "designated platforms", have an obligation to negotiate with registered news providers, registered news businesses. And this is because platforms

make news content available. This is not the right of making available that we have in Europe that we adopted from the WIPO Copyright Treaty. It's a concept that is autonomous for the News Media Bargaining Code. Thus, it is not possible to make those direct comparisons. Additionally, a thing to remember is that all the agreements that are now being struck in Australia, are not being made according to the News Media Bargaining Code, because up to this date, not a single platform has been designated by the Australian Government. Even though the Australian government was planning to and creating this Code with Facebook and Google in mind, neither Facebook, nor Google has been designated to this day. This means that the Code doesn't apply in practice.

And why are all current implementations in Europe very sensitive when it comes to the negotiation mechanism? Because of what happened in France. France was the first member state to implement press publishers' right in 2019 and from the very beginning, Google opposed the idea of making any payments. Even before the French implementation entered into force, Google stated that it will cease displaying previews of content, and it will only display snippets for those press publishers, who allow them to do it for free. They were still displaying titles, and they were still displaying links. This change in policy resulted in a procedure in front of the French Competition Authority which, in its interim decision, forced Google to negotiate with the French publishers. This is an ongoing case which is waiting for a final decision on whether Google's refusal to negotiate with French publishers constitutes an abuse of Google's dominant position.

What is the current European and global situation in terms of the deals between publishers and platforms? Back in October 2020, Google announced its new initiative, which is a new program, new licensing opportunity and a product for press publishers: Google News Showcase. To this day, as far as I am aware, publishers in 14 countries have signed agreements for their content to be used in the Google News Showcase. Out of those 14 countries, 6 countries are member states. If and when press publishers' right appears in those agreements, it is only ancillary to the Google News Showcase. And since those agreements are not publicly available, we don't know how much money is being paid for Google News Showcase, and how much on the basis of the press publishers' right. What we do know is that a number of publishers are protesting and saying: "We don't want to sign agreements if those agreements are about your new product. We only want to sign agreements with you when it comes to the new press publishers' right." That happened in Denmark. And now we have reactions from France, where the Competition Authority said publishers should be able to sign agreements only for the neighboring rights. And we have an implementation proposal in Spain that puts this requirement into the law.

The last important element of the press publishers' right is the authors' share. The press publishers' right in Article 15 guarantees that an appropriate share of the revenues which the publishers receive will be distributed to the authors of works and other protected subject matter that are included in this informative collection that a press publication is. Again, the Directive doesn't really say what the appropriate share is, or how it should be distributed. And member states are not treating this provision, unfortunately, with proper care, because most of the time, we only have this copy-paste solution of simply stating that journalists should receive an appropriate share. And if they are introducing any mechanisms, those mechanisms are vastly different. If a member state decides to provide a percentage for an appropriate share, the rates vary from two and five percent in Italy, through a one third in Germany, to fifty percent as proposed in Poland and Lithuania. There's this huge dissonance between 2% and 50%. As a result, there is a significant difference between what journalists can expect to receive in different countries. Also, the mechanisms are different. In some countries, we have obligatory collective management. This is quite popular. But again, most countries say nothing, or they just say this is for the journalists to discuss with their employer or to discuss with a person that they signed a freelance agreement with. This is basically to be agreed between the parties.

One interesting fact before conclusions. As I've said, press publishers' right, in theory, is very narrow and applies only to online uses by information society service providers. Then we have a Croatian implementation (that has already been adopted). Croatia introduced two neighboring rights. They introduced one right, which is the implementation of Article 15. And on top of that, they introduced a second neighboring right for press publishers that applies to all the uses, both online and analog, and thus providing press publishers with rights of distribution, rental and lending, also with respect to library lending, lasting 20 years. This is something that is not particularly discussed, but we have this anomaly. In the official document there is no explanation provided for why they decided to introduce these extra rights and what is the purpose of it.

Now, a couple of words to summarize. Comparing to Article 17, Article 15 leaves far less room for interpretation for member states, and still the level of harmonization is not high, particularly when it comes to the right's scope. Is social media a part of it or not? What are the licensing mechanisms? Is there an obligation or not? Also, when it comes to our journalists, they sometimes get nothing, sometimes get 2% and sometimes they're supposed to get 50%. We can observe that member states are trying to broaden the scope of the press publishers' right by including social media and they are also seeing the issues with enforcing the right. This last problem has been emphasized by the opponents of the press publishers' right from the very beginning, as they were saying press publishers' right only provides a basis for negotiation, but does not create an obligation to license. Thus, it is incapable of tackling what it was enacted for. Last but not least, agreements between publishers and Google cover

both Google Showcase and the new neighboring right, and as they are not publicly available, we do not know what exactly is the impact of the press publishers' right on the level of remuneration.

Teaching exception in the CDSM Directive



Dr Giulia Priora

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Article 5 is not only one of my very own personal favorite provisions of the directive, but also a topic on which I have had the pleasure to work on and discuss extensively with several colleagues over the past two years. I think most importantly, for the sake of our discussion today, we need to realize that Article 5 is a provision that has a lot to tell us, if we take the time to look at its legislative wording and beyond its legislative wording. I will try to sum up the observations that we can draw from this provision using four main keywords.

The first one is *mandatory*. We already heard from previous presentations today that the CDSM directive fundamentally introduces mandatory exceptions, which is quite a novelty for EU copyright law. Actually, it's not only a novelty, but these marks are also a real transition within the regime and conception of copyright exceptions in the EU. And here I quote Prof. Séverine Dusollier: "A transition from a conception of mere limitations of exclusive rights to proper enabling devices, sustaining socially beneficial uses of works and creation."

Among the new exceptions, we have already heard about the text and data mining exceptions. Also, the cultural preservation is a provision on which a lot of attention can be paid within the systematization of existing copyright exceptions at EU and national levels. Alongside these two provisions, thanks to Article 5 of the CDSM directive, we now have a specific exception for digital teaching activities, an exception that applies in all 27 member states and cannot be overridden by way of private contracts. This is a development to be welcomed, in my opinion, not only as a policy or legislative design choice that we might prefer for Europe or consider appropriate for the European scenario, but also, and most importantly, because it is an effective solution to the deepest fragmentation we experienced in Europe when it comes to teaching exceptions.

As has been thoroughly studied and displayed by several research efforts (Recreating Europe, Communia, and commissioned studies released by the WIPO being notable examples), the pre-CDSM scenario on the harmonization of teaching exceptions was deeply wanted, to say the least. This is not because we faced a neat divide in Europe between member states that decided to implement a teaching exception, picking it from the release of optional exceptions in Article 5 of the Infosoc Directive, and those member states that didn't want to do so. This was not the case. Surprisingly enough, or maybe unsurprisingly enough, the fragmentation stems from divergent interpretations across the member states of what specifically can be permitted under the purpose of teaching. In other words, what and how much is tolerable as a free or permitted use for teaching and learning environments. Here we have a little lesson to learn. Now, with Article 5 and its mandatory nature, we have the legal certainty that all member states provide for a digital teaching exception. But what digital teaching really encompasses might still remain subject to national variations. What we know for sure is that the activities and uses of protected materials, in order to fall within the scope of Article 5 and be permitted, must occur under the responsibility of the educational institutions and via secure electronic systems. Something that schools and universities need to find themselves not only equipped for as of today, but also ready to keep monitoring in the long run in the future.

The second keyword I'd like to bring to the table today with regards to Article 5 is the word *licensing*. This aspect is crucial to understand the harmonizing potential of the norm itself. In fact, despite its mandatory nature that I already presented, Article 5 also allows member states to make an exception to the exception. It creates room for a market-oriented logic to prevail over the free use of protected materials in educational environments. This option enables member states to exclude from the scope of the exception certain types or certain uses of works for which a reasonable and easily accessible license is available on the market. And this formulation could easily embrace the whole bundle of materials that a single teacher is planning to rely on for an entire year of lecturing, exam preparation included. As a result, there is a trade-off between the scope and purpose of the digital teaching exception and its licensing options.

This choice suggested by the EU has met with the national legislators' difficulties in grappling with this balancing exercise. The debates and puzzlement around the prevailing nature of market licenses arose very early in the history of the CDSM Directive. Questions, such as how to guarantee a minimum core or harmonization and effectiveness of the digital teaching exceptions were pretty much a common thread in the specific debates on teaching exceptions back in 2016, 2018, 2019, up until the adoption. Among the most pressing issues and points of uncertainty is, who gets to decide whether the licensing offered on the market is appropriate? That's a question that mostly remains unaddressed by the CDSM Directive itself. National and local legislators right now are trying to build sustainable responses to queries and practical problems like this one. The policy decision on what to do is not an easy one. National parliaments are showing difficulties in this regard. I bring to you the example of my own home country, Italy, which has recently adopted the Directive, operating some meaningful maneuvering on some of its provisions. In Italy, during the drafting process of implementation, the national application of this licensing carve-out has changed from covering any use for which a license is available on the market to only sheet music and educational materials for which a license is easily available. This also displays the political difficulties in drafting of such a provision. I said at the beginning that I have four keywords for you to fully decrypt the relevance of Article 5. We now have two more keywords to go.

One is *cross-border*. Here, I believe lies the real core meaning of what we refer to as the process of modernization of copyright in Europe. One of the most significant contributions that Article 5 brings to the entire EU copyright legal framework is the introduction of a legal fiction, the principle of country of origin. Laying down fictitiously a little flag on the map, the provision ties the online use of protected material to the country where the education institution is based. Article 5, I believe, courageously moves a step forward towards overcoming the anachronism of the territoriality of copyright in the digital era. I think on this point there is little left to say, except that probably this choice by the legislator points to one of the viable options that we might have to explore in the future to move past the territoriality of copyright, to better address the needs of the online environment - from a broader application of the country of origin, as it is here the case to fantasizing about an EU digital copyright code for our future.

And finally, I have a very last keyword, which, inevitably, is *education*. And hereby I want to conclude by posing two questions to you and sharing my own preliminary answers. With respect to Article 5, the first question I would have for you is: Have we managed to move the spotlight on the longstanding and often overlooked problem of defining a specific fair balance between copyright and education? And my short answer would be: Yes, the debate that the CDSM Directive has stirred up and brought to multiple tables, not only the academic one, in a meaningful way has embraced Article 5 and some crucial aspects of it. This has aided in the development of the heading "copyright and education", as well as the complicated relationships between copyright and the public sphere, broadly intended. Education perhaps didn't become the protagonist of the entire season of copyright reform, but definitely, I would call it a starring character of this story. I would say that there is something to cherish about this, in light of the fact that we had occasions in the past, and I'm referring particularly to the CJEU Renckhoff decision of 2018, where we could probably have better exploited the occasion to start a constructive debate on copyright and education with stakeholders and the general public.

The second and very final question that I would like to share with you is: Thanks to Article 5, do we know a little better to what extent and how to use protected material in our schools and universities? I must admit, I am a little bit less optimistic on this front, and my short answer would be: Probably not. What we know is that, despite the digital infrastructure being used, the idea of education that Article 5 promotes is still an idea of education between the school walls, closely tied with the responsibility of a certain institution, leaving little imagination for us to draw analogies with the idea of private study or education outside schools, outside universities. I think that to have and to reach the legal certainty we hope for, in terms of what falls within the scope of this new provision, what we might expect are some guidelines and some uniform interpretation stemming from the Court in Luxembourg, with regards to the definition of digital teaching activities, or even more specifically, probably sharing autonomous concepts of EU law to better define the extent to which the educational purpose limits Article 5 now that it has become a reality.

Text-and-Data Mining Copyright Exception



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What is text and data mining? I'm sure you know that TDM is often defined as a process of deriving new knowledge from text and data. As you can see, the European CDSM directive has a definition of text and data mining. Allow me to present some examples. If you analyze a massive number of medical articles, you might be able to investigate the underlying causes of researched issues. You might be able to discover new methods of medical treatment. Analyzing a massive number of recent books, or a large number of tweets on Twitter might make it possible to know people's interest, which would be valuable for business marketing. Another example is artificial intelligence. If you train an AI through machine learning, using a large number of images, or vast amounts of text, you can improve AI systems, such as image recognition AI, or machine Translation AI. Furthermore, AI can create works. If an AI has learned all of Rembrandt's paintings, or all of the Beatles' albums, the AI can generate a new artwork or new musical work in the style of Rembrandt, or the Beatles. Therefore, text and data mining can foster the development of new products and new services.

However, if you conduct TDM, in many cases, you will copy the data containing copyrighted works or protected subject matter. Hence, TDM activities might constitute copyright infringement. TDM activities often entail permanent reproductions of works, and TDM activities are usually conducted in organizations or companies. These copyright exceptions are not enough.

Of course, licensing can work well, in some cases. However, in case of TDM using a larger number of contents such as images available on the internet, it's highly likely that there are too many unknown copyright holders. Obviously, it's very hard to obtain authorization from all rights holders. Licensing works well in some cases, but not all. That's why our specific copyright exception for text and data mining plays an important role in this regard.

In fact, text and data mining exception is now one of the major topics of heated discussions in the field of copyright law. TDM exception is already introduced in some jurisdictions, the UK introduced the provision for texts and data analysis in 2014. But this provision, as you can see, only applies to the analysis for the sole purpose of research for non-commercial purposes. Actually, according to the UK IP Office, the research output can be used for commercial purposes. But the original purpose of carrying out the TDM must be solely non-commercial.

CDSM Directive includes TDM exceptions as a mandatory exception. Article 3 allows reproductions and extractions made by research organizations and the cultural heritage institutions in order to carry out for the purpose of scientific research of works or other subject matter to which they have lawful access. Additionally, under Article 4, even if you conduct TDM activities for commercial purposes, you are allowed to do so, provided that the use of works has not been expressly reserved by their right holders in an appropriate manner. Rightholders can opt out. In addition, the directive also prohibits the technological overload for TDM. There are member states, including Germany, that have already implemented the directive whereas some other member states haven't done that yet.

The Swiss Copyright Act was amended in 2019 to introduce a kind of TDM exception. This exception applies to not only commercial scientific research, but also commercial TDM activities. But a computer program is excluded from the exception and there seems to be no lawful access requirement.

Finally, let me introduce the Japanese TDM exception, first introduced in 2009 and extended in 2018. When compared to the CDSM Directive, the Japanese TDM exception is applicable not only to non-commercial scientific research, but also commercial TDM activities and the right holders cannot opt out of that. Secondly, in terms of allowed acts under the CDSM Directive, reproductions are allowed. On the other hand, under Japanese

law, it is permissible to exploit a work in any way to the extent considered necessary. That means an exploitation other than reproduction, for instance, the distribution and the communication to the public of a training data set containing copyrighted works can be permitted insofar as it is conducted for another versions of TDM activities and to the extent considered necessary. Thirdly, no lawful access requirements. Under the CDSM directive, it is allowed to use lawfully accessible works. On the other hand, the Japanese TDM exception has no such requirement. Therefore, even if you download a number of movies from an obviously illegal website, you are still allowed to copy them for the purpose of text and data mining. So that's why I usually say Japan is a 'paradise' for machine learning. However, it should be noted that there is no provision in Japan on the unenforceability of a contractual provision contrary to copyright exceptions. That means a contract prohibiting TDM activities would be enforceable under Japanese law.

Additionally, there is no provision on the technological override in the Japanese law. So, by using technological means it might be able to prevent users from conducting TDM. The Japanese TDM exception is applicable unless it would unreasonably prejudice the interests of the copyright owner. So, for instance, the Japanese TDM exception is not applicable to a data set prepared for the use of TDM.

Not a few European courts criticize the TDM exception in the CDSM Directive and they remain in favor of the exception. The problem we have to look at here is why TDM activities should be allowed? What is the justification for a TDM exception?

From my point of view, there are three possible ideas. The first idea would be enhancing innovation and competition. Actually, the TDM activities can foster the development of new products and services, and consequently enhance innovation and the competition. An appropriate empirical study might be required, but the enhancement of innovation and competition can be the reason for permitting TDM activities insofar as it contributes to promoting public interest. In fact, the result of Recital 18 of the CDSM Directive states that in order to encourage innovation also in the private sector, this Directive should provide for an exception or limitation for the purposes of text and data mining.

However, some may wonder, why right holders have to give way to innovation, and competition. So then, the second idea would be the 'right to research'. Some scholars are in favor of a broader TDM exception by invoking the right to research grounded in the fundamental rights to information. So, if the right to research would be grounded in the fundamental's rights, that might be the reason for permitting TDM activities from the viewpoint of striking the balance between the fundamental rights. The third idea would be the internal limit to copyright the scope of the copyright. So now, let me introduce the justification for the Japanese TDM exception. The Japanese TDM exception belongs to the so-called 'flexible' copyright exception for non-enjoyment purposes introduced in 2018. Which allows an exploitation of a work that is not aimed at enjoying or causing another person to enjoy a work. According to the Japanese government the basic idea behind this provision is that copyright is a right protecting only an interest in the inherent exploitations which are aimed at enjoying or causing another person to enjoy a work; if an exploitation of work is aimed at enjoying or causing the public to enjoy a work such as a book publication, or a movie screening. Copyright should cover such exploitation. On the other hand, if an exploitation of work is not aimed at enjoying, such as text and data mining, copyright doesn't need to cover such exploitation. Therefore, the Japanese TDM exception seems to be based on the idea of the internal limit to the scope of copyright, rather than the external limit to copyright as a result of striking the balance with our other fundamental rights.

There are three possible ideas on why TDM activities should be permitted. In my opinion, TDM activities do not seem to matter for individual human authors and performers, even though TDM activities matter for enterprise copyright holders, such as publishers. I think that the enhancement of innovation and competition, and the internal limit to the scope of copyright can be the reason for permitting TDM activities, and at the same time, the justification for the TDM exception.

To conclude, TDM exception is extremely important and quite useful and TDM activity can foster the development of new products and new services. Of course, that problem is the reason why TDM activities using copyrighted works should be allowed. We have to closely reexamine the justification for the TDM exception, but I can recommend you to introduce a very broad exception for TDM, such as the Japanese TDM exception, which can be justified theoretically. However, I'm wondering about the latitude of EU member states in legislation. In my understanding, Articles 3 and 4 under the CDSM Directive have mandatory exceptions. EU member states have to introduce the TDM exception. But I'm wondering if EU member states may introduce the TDM exception that is broader than the CDSM Directive like the Japanese one, or if EU member states have no choice but to copy and paste Articles 3 and 4 into their national laws. That is my question. Considering that the Infosoc Directive provides for the exhaustive list of exceptions and limitations in Article 5, the answer seems to be the latter.

Limitations and Exceptions and Article 17 CDSM – An Empirical Perspective



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This time, I would like not to discuss the doctrinal dimensions of the Limitations and Exceptions, but rather to introduce comparative and empirical findings that me and my colleague, István Harkai, in Szeged have carried out within the frames of a very important European Union funded project called reCreating Europe.

Whenever the age of the platform regulation is considered, we cannot overlook a specific aspect of copyright law, which is a fair balance between the interests of the various stakeholders. The CDSM Directive, including its Article 17, has tried to take steps toward balancing the interest of right holders, intermediaries and users. At the same time, Article 17 has introduced a system which is *per se* designed to be a combination of obligations for private parties, private platforms, including obligations that platforms have to carry out privately within the frames of their end user license agreements. This system is therefore a complex one, which has to be analyzed on an empirical level, too. We also spotted with my colleague that the literature with respect to the comparative, as well as empirical aspects of regulation of and by platforms as well as user flexibilities is limited. We wanted to contribute to this field of literature a bit in the frames of reCreating Europe. As such, we are carrying out two main tracks of our research in two different work packages of reCreating Europe. The first one is focusing on the

comparative legal perspectives of the legislative framework of Article 17 with respect to intermediaries and end users. The second one is focusing on the empirical evidence related to end user flexibilities.

Let's start with comparative research. I must stress that this research is going to be carried out in two main phases. The first phase is already completed. The second phase is under planning, and it will be carried out next year. As you will see, its purpose is very much connected to the time frame of the implementation of the CDSM Directive. In our research within Work Package 6, we are focused on intermediaries in general. Therefore, the questionnaire is focusing on multiple aspects of intermediaries.

The first group of questions was related to the hosting service providers as users. One of the questions was focused on whether good-face hosting service providers are liable under civil law for the content uploaded by their users. It is very important that platform operators are functioning in a way that they allow end users to act on their infrastructure. Findings of our research on the question of whether platforms are directly liable for end users' activities indicate that there is a significant difference with respect to the period preceding the implementation deadline of the CDSM Directive. Related to this question, there were a couple of countries that answered with an absolutely clear yes. Some countries stress that platforms' liability stands in line with e-commerce provisions. And a couple of countries have highlighted that there is no direct liability at all. With the CDSM Directive, things will slightly change, as the liability of online content-sharing service providers is codified by the EU. The general liability that these service providers might face in the member states can - and practically do - force them to reconsider what they allow for the end users to do over their systems.

Another set of questions considered hosting service providers' roles as intermediaries. We also raise the question of whether intermediaries are liable indirectly for end-user activities. Here the major finding was more convincing. 70% of the countries confirmed that there is a clear yes to the question. Therefore, there are many more countries with indirect liabilities than with direct liabilities. The next question was related to the platforms' steps against end users' illegal behavior; whether they do content moderation or not? Very interestingly, our findings showed a significantly divergent answer from the member states to this question. There were at least six different types of answers to the question, ranging from statutory provisions to internal mechanisms to duty of care solutions and even no answer at all.

The third group of questions is the most important for today's discussion. This research is also focused on what users might face under the pre-CDSM legal *status quo* in the 10 selected member states. The answer was unanimous with respect to the liability of end users who are uploading content to intermediaries: all national reporters confirmed that end users are liable either under the concept of communication or under the making available to the public right. What's much more interesting is that almost no countries could report civil law liability case with respect to end user uploads. It is known that Article 17 is focusing on various limitations and exceptions such as quotation, criticism, review, caricature, parody and pastiche. Under the CDSM Directive, these have to be mandatorily implemented by the member states. And these are at least those limitations and exceptions that must be defended by intermediaries and hosting service providers as well, with respect to the end users' activities. We carried out research on the question whether countries have already had these exceptions in place. It was well-known that the parody exception wasn't unanimously implemented by the member states, at least not in those countries that we focused on.

What is much more interesting, is how member states treat limitations and exceptions. Something that has already been mentioned by the Court of Justice in earlier cases seems to become a reality: limitations and exceptions will be treated as user rights. This is present in the CDSM Directive, but also in the Commission's Guidance on Article 17. We nevertheless raised the question to our national reporters, whether that's already the case, or that was already the case in the pre-CDSM world. Very interestingly, the answer to this question was mainly negative. The majority of the countries argue that limitations and exceptions are mainly defenses rather than affirmative or substantive rights. I must again stress that our first phase questionnaire was answered earlier in 2021, by the time when only a very small number of countries have taken serious steps to implement Article 17. Since then, many more countries have transplanted Article 17.

Within the framework of Work Package 2, we carried out empirical research on how selected intermediaries reflect end user flexibilities. End user is quite an easy concept to understand, but flexibility is a little bit different expression and concept than what limitations and exceptions might mean. In this research, we focused on multiple dimensions of end user flexibilities or possibilities. Not only the codified exceptions and limitations were considered, but also other certain internal limitations, like duration and quality of rights management, as well as procedural safeguards of end users, with respect to the use and the taking down or filtering of their contents from the platform's system.

We grouped platforms into four main groups. We focused on their end user license agreements from the perspective of 15 variables. We have to admit, almost half of these variables were dropped at the end of the research for one simple reason - there was no comparable data with respect to variables such as citation or parody. In some way, this is also an important finding. End user license agreements are practically silent on multiple flexibilities,

especially limitations and exceptions before the CDSM Directive was implemented, or at least requested to be implemented in member states. Ultimately, we could carry out a systematic and analytical research of the remaining eight variables.

These were: the extent of end users access rights; provisions on the restricted uses; express provisions on the restricted uses; allowance of (the upload of) UGC to the given platform; the license terms that the end users grant to the platform or other users of the contents; the technological restrictions on access; secondary dissemination activities such as family sharing, or other types of transfers; the modification of terms and conditions and termination of the agreements; finally, the procedural safeguards. We decided to grade the selected platforms with respect to the variables on a one to five grading scale.

The research focused on platforms categorized as either streaming platform with hosting services, streaming platform without hosting services, online marketplaces, or social media. The results have shown that top-ranked platforms in terms of our understanding of flexibility of their end users license agreements were the social media ones. The streaming platforms without hosting were all ranked in the bottom half of the results.

I wish to talk about the three groups of key findings resulting from the research. The first one is coined as “UGC effect”. Our empirical data shows that platforms being the most flexible are the ones allowing for posting of UGC. Of course, flexibilities come with obligations as well. And of course, these platforms understand that they have to introduce the technological framework that does not allow everything. Practically, there are internal technological limitations with respect to the use of UGC both on the side of uploaders and on the side of final user. Importantly, we found that these platforms are quite open and have quite detailed setting on the notice and take-down procedures, but they are quite shy on addressing complaints and redress mechanisms. Amendments and terminations are asymmetric in favor of the platforms, and users either use or give up using the entirety of the available content. At the same time, if they want to terminate their account, they have to accept that some contents might still remain alive in the system. They cannot either negotiate on various aspects of termination and amendments. Terminology also happens to be misleading with respect to e.g., “sales” and might lead to consumer protection concerns. There is a final point I have to mention with respect to the *UGC effect*. We based our analysis on Pascal Chapdelaine’s pyramid scheme with respect to the scope of end user rights. Prof. Chapdelaine argued that people having full access to contents have the broadest control. She also argued that social media platform users have the most limited flexibility. We believe that our empirical findings indicate that this is not necessarily correct. We believe that platforms allowing UGC grant the broadest rights for end users, especially social media platforms.

We call the second group of our key findings *Regulatory lock-in effect*. Many activities are regulated by copyright law, and therefore platforms have to comply with public rules. This is the reason why social media cannot be extremely open either. Significant legal provisions are relevant for their functioning, and there will be even more under the CDSM Directive. Since the major platforms we use in Europe are primarily American, we also think that the case law from the United States has significant relevance with respect to the end-user license agreements, as well as the coding of the platforms. Resharing social media content is therefore going to be more complicated. We also argued that the end user license agreements should be updated more related to freedom of expression-oriented limitations and exceptions, e.g., parody and quotation.

Finally, the last point here is *Business flexibility effect*. We believe that end-user license agreements are “as is” contracts, and, as a result, end users are almost universally unable to negotiate the contracts’ details. But we pointed out that platforms are competing with each other in order to generate a more compelling environment for end users to enjoy the content. This competition inevitably leads to new and broader flexibilities for the benefit of end users.