

Deciphering Article 17 of the Digital Copyright Directive and its compatibility with freedom of expression and information following case C-401/19

Summary

In the case of *Republic of Poland v European Parliament and Council (C-401/19)*, the Court of Justice of the European Union confirmed the compatibility of Article 17 of the Digital Copyright Directive with the right to freedom of expression and information as set forth in Article 11 of the EU Charter of Fundamental Rights. The Court pointed out that Article 17 provides a new liability regime for platforms acting as online content sharing service providers and stressed that its application must be in compliance with fundamental rights. It is a ruling of high importance because it provides clarity in thorny issues that revolved around Article 17 and comes at an opportune time in the context of the transposition of the Directive into the national legal systems of the Member states.

I. Introduction

Article 17 of the Digital Copyright Directive¹ seems to be one of the most controversial provisions in the history of copyright law. It provides a new regulatory framework for online content sharing service providers based on primary liability rules and liability exemptions that incentivize the use of filtering tools. Such filters might place the fundamental rights of internet users in jeopardy.

Civil society organisations with thousands of people protested about its negative implications for users' fundamental rights while key public figures have also emphasised its detrimental effect on the internet. Felix Reda, in his role as a Member of the European Parliament, noted, "The new copyright law as it stands threatens a free internet as we know it".² Meanwhile, the founder of the world wide web, Sir Tim Berners-Lee, stated that the Digital Copyright Directive "...transforms the internet from an open platform for sharing and innovation, into a tool for the automated surveillance and control of its users"³.

Following the approval of the Directive at the Council, on 4 May 2019, Poland filed an action for annulment of Article 17 of the Digital Copyright Directive against the EU Parliament and Council,

¹ Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market [2019] OJ L 130.

² Ernesto van der Sar, 'EU Parliament Adopts Copyright Directive, Including 'Article 13'' (torrent freak, 26 March 2019) is available at < <https://torrentfreak.com/eu-parliament-adopts-copyright-directive-including-article-13-190326/> > last accessed 14.2.2023

³ Copyright reform in the EU v. Tim Berners-Lee, is available at < <https://blogs.library.unt.edu/copyright/2018/06/15/copyright-reform-in-the-eu-v-tim-berners-lee/> > last accessed 14.02.2023

arguing that Article 17 conflicts with Article 11 of the EU Charter of Fundamental Rights and does not comply with the limitations on that right to be proportional and necessary.⁴

On 26 April 2022, in its much-awaited ruling, the Court of Justice of the European Union (CJEU) confirmed that Article 17 is compatible with freedom of expression and information as set forth in Article 11 of the EU Charter of Fundamental Rights. The Court provided clear guidance with regard to thorny features concerning Article 17, but some questions remained unanswered and were left to be handled by individual EU member states. In this light, this article aims to reflect on the key topics of this decision and to address potential implications for the implementation of Article 17 across all EU member states.

II. Factual and legal background of the case C-401/19

After the approval of the Directive by the Council of Ministers, the Polish Government objected to the adoption of Article 17 of the Digital Copyright Directive and filed an action for annulment. As per Article 589 of the Treaty on the Functioning of the European Union (TFEU), a member state can request the annulment of part, or overall, provision of an EU legislative act or provision. In its annulment action, Poland argued that the obligation placed on online content sharing service providers to make their best efforts to prevent the availability of infringing works (as per Article 17 (4) para. b), and to prevent any future uploads of infringing works (as per Article 17 (4) para. c), would undermine the essence of freedom of expression and fail to meet limitations in terms of proportional and necessary measures.

III. Judgment

In April 2021, the CJEU responded to the questions posed by the Polish Government.⁵ The Court began its analysis by stating that until Article 17 of the Digital Copyright Directive comes into force, the liability of platforms that host content was governed by Article 14 of the E-Commerce Directive⁶ and Article 3 of the InfoSec Directive.⁷

⁴ Action brought on 24 May 2019 — Republic of Poland v European Parliament and Council of the European Union (Case C-401/19)

⁵ Case C-401/19, *Republic of Poland v European Parliament and Council* (2022) ECLI:EU:C:2022:297.

⁶ Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178.

⁷ Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167.

The Court explained that the complexities of the operation of online content market along with the high number of content available online warranted the introduction of a new liability regime under Article 17 of the Digital Copyright Directive.⁸

The Court pointed out that the specific liability regime under Article 17(4) of Directive 2019/790 entails a limitation on the exercise of the right to freedom of expression and information of users of those content-sharing services as set forth in Article 11 of the EU Charter of Fundamental Rights.

However, as the Court explained, there are justified limitations. More specifically, according to the Court, the limitation on the exercise of the right of freedom of expression and information is provided by law, as set out in Article 17 (4) of Directive 2019/790, but “ this does not preclude the legislation containing that limitation from being formulated in terms which are sufficiently open to be able to keep pace with changing circumstances.”⁹

The Court continues its reasoning and notes that the limitation on the exercise of freedom of expression and information respects the essence of the right at stake.¹⁰ More specifically, according to the Court, Article 17 (7) prescribes a specific result to be achieved because it states,

cooperation between online content-sharing service providers and rightsholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation.

The Court indicates that the imposition of obligations on online content sharing service providers as set forth in Article 17 (4) appear necessary to protect the rights of intellectual property holders. Other measures might be less restrictive but ‘not be as effective in terms of protecting intellectual property rights as the mechanism adopted by the EU legislature.’¹¹

The Court points out that the obligations on online content sharing service providers do not disproportionately restrict the exercise of the right to freedom of expression and information¹² and identifies six safeguards under Article 17 that ensure the protection of the right at stake.¹³

⁸ Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market [2019] OJ L 130.

⁹ Case C-401/19, *Republic of Poland v European Parliament and Council* (2022) ECLI:EU:C:2022:297, para. 74.

¹⁰ Case C-401/19, *Republic of Poland v European Parliament and Council* (2022) ECLI:EU:C:2022:297, para. 76.

¹¹ Case C-401/19, *Republic of Poland v European Parliament and Council* (2022) ECLI:EU:C:2022:297, para. 83.

¹² Case C-401/19, *Republic of Poland v European Parliament and Council* (2022) ECLI:EU:C:2022:297, para. 84.

¹³ Case C-401/19, *Republic of Poland v European Parliament and Council* (2022) ECLI:EU:C:2022:297, para. 85-96.

IV. Analysis of the case C-401/19

Whilst the judgment clarifies the new legal regime introduced in Article 17 of the Digital Copyright Directive for the liability of online content sharing services providers, thorny issues remain unaddressed. The following section makes a critical analysis of the main points of the judgment and addresses its implications for the fundamental rights of both internet users and online content sharing service providers.

A. Article 17 introduces a specific liability regime

The CJEU held that article 17 of the Digital Copyright Directive endorses new liability rules in the digital environment. More specifically, the CJEU clarified, in para. 29 of its judgment, that in light of the complex operation and massive dissemination of online content “it was necessary to provide for a specific liability mechanism in respect of the providers of those services in order to foster the development of the fair licensing market between rightsholders and those service providers”.¹⁴

Those new rules are dictated in para. 1 of Article 17 of the Digital Copyright Directive. As per the new rules,

Member States shall provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.

This means that online content sharing service providers communicate the works to the public. However, the right of communication to the public is one of the exclusive rights of copyright holders and has been set forth in Article 3 of the InfoSec Directive.¹⁵ Thus, communicating the work to the public without the permission of copyright holders amounts to copyright infringement. As a corollary, once the copyright violation takes place, online content sharing service providers can be subject to liability for copyright infringement.

In addition, this specific liability regime provides opportunities for online content sharing service providers to escape from liability. As per Article 17 para. 4, in order to avoid liability for copyright infringement, online content sharing service providers must demonstrate that they made their best

¹⁴ The establishment of a specific liability regime goes also in line with the imposition of obligations to online content sharing service providers, such as the transparency obligation. As per the transparency obligation in Article 19, of the Digital Copyright Directive authors and performers are required to receive on a regular basis information about the exploitation of their works, all revenues generated and remuneration due.

¹⁵ Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 167, 22.6.2001.

efforts to license the content, or to align with industry practices and prevent the availability of unlawful content, or to terminate or prevent the availability of infringing content within their networks.

Crucially, by confirming that Article 17 addresses a new liability regime for online content sharing service providers, the CJEU signalled the shift from a secondary liability framework to a primary liability framework for those platforms that host copyright protected content. This means that online content sharing service providers cannot resort anymore to the defence of lack of knowledge of the infringing content as set forth in Article 14 (1) of the E-Commerce Directive. Instead, they will be liable, regardless of whether they have knowledge of the copyright infringement taking place within their service.

This understanding has already been reinforced by the Advocate General in para. 33 of this opinion stating, “the EU legislature took the view that it was appropriate to provide for a specific liability mechanism for those providers”. Meanwhile, in para. 137 of the opinion it is noted that, “Those aspects tend, to a certain extent, (166) to bring those providers into line with traditional intermediaries such as editors, and therefore it may be proportionate, so far as they are concerned, to adopt a specific liability regime which is different from that applicable to other host providers”.¹⁶

B. The use of filtering tools and justified limitations to freedom of expression

Another point that has been addressed by the CJEU is the correlation between filtering and the fundamental right of internet users to free speech. In this light, in para. 98, the CJEU explicitly held that article 17 is compatible with freedom of expression. However, it has been acknowledged that the scope of the provision provides justified limitations on free speech. In particular, the CJEU concluded that copyright protection requires the limitation of freedom of speech, therefore rejecting Poland’s annulment action in its entirety. According to the Court, “... in the context of online content-sharing services, copyright protection must necessarily be accompanied, to a certain extent, by a limitation on the exercise of the right of users to freedom of expression and information”. This understanding refers to the exercise of a fundamental right and its possible limitations as per Article 52 (1) of the EU Charter of Fundamental Rights which states that “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms.”

Essentially, the various fundamental rights are equal, and one does not take priority over any other. Indeed, as Buss aptly points out,

¹⁶ Case C-401/19, Opinion of Advocate General SAUGMANDSGAARD ØE on *Republic of Poland v European Parliament, Council of the European Union* (2021) ECLI:EU:C:2021:613.

Nevertheless, in Europe both freedom of expression and copyright are considered not only constitutional rights, but also human rights. Consequently, human rights are of equal importance. As a result, neither the ECHR nor the domestic courts are entitled to give precedence to only one particular right. Instead, both domestic and international courts are required to balance the two conflicting rights.¹⁷

This understanding has been endorsed in CJEU case-law. More specifically, in *Scarlet v Sabnam*,¹⁸ the Court concluded that intellectual property rights are not inviolable, therefore their protection is not absolute. This means that the right to property and the right to freedom of expression have equal importance and the one cannot be prioritized over the other.

In the present case, the Court held that Article 17 of the Digital Copyright Directive imposes limitations to the essence of the right of freedom of expression and information. This is due to the use of filtering-based technology by online content sharing service providers in order to prevent the availability of unauthorized content online. Acknowledging the AG's position on filtering,¹⁹ the CJEU held that Article 17 of the Digital Copyright Directive requires online content sharing service providers to use automated technology due to the lack of alternatives.

Yet, any limitations on the exercise of the right to free speech must be justified. More specifically, referring to Article 52 of the EU Charter, the Court pointed out that such limitations must be necessary, proportionate, and justified in law.²⁰ In addition, a vast array of decisions have referred to these limitations. A telling example can be found in the *Delfin v Estonia* case where the European Court of Human Rights examined the compatibility of the use of filtering tools with the freedom of expression and information and elaborated on the limitations to the free speech, as set forth in Article 8 (2) of the European Court of Human Rights (ECHR).²¹

In the present case, the CJEU held that the limitations on the exercise of the right to freedom of expression and information are justified because they are necessary, proportionate, and provided by law. In particular, they are provided by law as they stem from the specific result of obligations imposed on online content sharing service providers. As per Article 17 (4) (b) (c), online content sharing service

¹⁷ K. Buss, 'Copyright and free speech: the human rights perspective'. (2015) 8 Baltic Journal of Law & Politics 182–202

¹⁸ Case C-70/10, *Scarlet Extended SA v. Société bilge des auteurs, compositeurs et editors SCRL (SABAM)* [2011] ECR-I 11959, para. 43.

¹⁹ Case C-70/10, *Scarlet Extended SA v. Société bilge des auteurs, compositeurs et editors SCRL (SABAM)* [2011] ECR-I 11959, para. 54, "Furthermore, as the Advocate General observed in points 57 to 69 of his Opinion, in order to be able to carry out such a prior review, online content-sharing service providers are, depending on the number of files uploaded and the type of protected subject matter in question, and within the limits set out in Article 17(5) of Directive 2019/790, required to use automatic recognition and filtering tools. In particular, neither the defendant institutions nor the interveners were able, at the hearing before the Court, to designate possible alternatives to such tools."

²⁰ Case C-401/19, *Republic of Poland v European Parliament and Council* (2022) ECLI:EU:C:2022:297, para. 76.

²¹ ECtHR, Grand Chamber, *Delfin AS v Estonia* (16 June 2015) Application no. 64569.

providers must demonstrate that they made their best efforts to terminate and prevent the availability of infringing content. Under these obligations, online content sharing service providers must take into consideration copyright exceptions when removing or preventing the appearance of the allegedly infringing content.

Furthermore, the limitations to the right to free speech respect the freedom and rights of others. While the Court has acknowledged that alternative measures are available, they will not be that effective with regard to the protection of intellectual property rights. In the Court's words,

In particular, although the alternative mechanism proposed by the Republic of Poland, under which only the obligations laid down in point (a) and the beginning of point (c) of Article 17(4) would be imposed on online content-sharing service providers, would indeed constitute a less restrictive measure with regard to exercising the right to freedom of expression and information, that alternative mechanism would, however, not be as effective in terms of protecting intellectual property rights as the mechanism adopted by the EU legislature.²²

Finally, the Court held that the limitations to freedom of speech are proportionate and explained that Article 17 foresees six safeguards that ensure the protection of the right to freedom of expression and information.

The first point, as the Court indicated in para. 85, is that the use of filtering must not block the lawful content that is disseminated online. In this way, legitimate uses of works will not be removed from the networks. The second point is that the Court observed that the online content sharing services providers must, in reference to their terms and conditions, ensure that users will not be prevented from uploading content for the specific purposes of quotation, criticism, review, caricature, parody, or pastiche. The third point reveals that the provision of relevant and necessary information by rights holders to the online content sharing service providers will exclude lawful content by making it unavailable. The fourth point is that the Court referred to the prohibition of general monitoring obligations and held that the prohibition requires that online content sharing service providers do not undertake an individual assessment in order to assess the nature of the content. Finally, the court noted that safeguards are already in place, such as the complaints procedure and the out of court mechanism, while as a last point the Court held that collaboration between industry and rights holders would also be considered a safeguard.

This ruling reveals the need to interpret Article 17 and in particular the use of filtering tools in light of resolving the value gap between creators and online platforms as well as enabling creators to receive

²² Case C-401/19, *Republic of Poland v European Parliament and Council* (2022) ECLI:EU:C:2022:297, para. 83.

appropriate and proportionate remuneration as set forth in Article 18 of the Digital Copyright Directive. This understanding is reinforced in Recital 60 of the Digital Copyright Directive which states that ‘It is therefore important to foster the development of the licensing market between rightsholders and online content-sharing service providers. Those licensing agreements should be fair and keep a reasonable balance between both parties. Rightsholders should receive appropriate remuneration for the use of their works or other subject matter...’

Yet, it remains unclear how filtering tools can meet the limitations posed by Article 52 of the EU Charter of Fundamental Rights. This is because the lack of parameters under which this technology might operate could prompt concerns with regard to compatibility with the right to freedom of expression and information. Indeed, the CJEU noted in para. 73 of its judgment that,

Admittedly, that provision does not define the actual measures that those service providers must adopt in order (i) to ensure the unavailability of specific protected content for which the rightsholders have provided the relevant and necessary information, or (ii) to prevent protected content that has been the subject of a sufficiently substantiated notice from those rightsholders from being uploaded in the future.

This might lead to diverse outcomes that could be biased in favour of the rightsholders or the online content sharing service providers. Leaving the measures to the discretion of online content sharing service providers might lead to biased outcomes because they are operating their own businesses and clearly prioritise their interests, while in other cases bias might appear. For instance, a telling example can be found in the case of YouTube which rejected consideration of a counterclaim for the removal of a video. YouTube held that it cannot examine counter-notifications that relate to its business partners and rejected the counter-notification.²³

What is more, the use of filtering technology might lead to the over-enforcement of copyright. A high number of academic scholarship and empirical studies demonstrate that filtering tools cannot distinguish between legitimate and illegitimate content.²⁴ A recent conference dedicated to the use of filtering tools confirmed their non-compatibility with freedom of expression, outlining the risks of over-blocking and its impact on fundamental rights, such as the right to education and culture. This means that creators of works as well as internet users might be deprived of the opportunity to impart or receive information respectively. This understanding has also been reinforced in para. 86 of the

²³ See M. Peril and N. Elkin-Koran, ‘Accountability in algorithmic copyright enforcement’ (2016) 19 Stanford Technology Law Review 507.

²⁴ Communio at < <https://communia-association.org/event/filtered-futures/> > last accessed 17 January 2023; Jennifer Urban, Joe Karagianis and Brianna Schofield, ‘Notice and takedown in everyday practice’ (2017) UC Berkeley Public Law Research Paper No. 2755628; S. Jacques, K. Garstka and others, “An Empirical Study of the Use of Automated Anti-Piracy Systems and their Consequences for Cultural Diversity” (2018) 15 Scripted 277 at 308.

judgment where the Court recognised the flaw in the filtering tools that means they cannot distinguish between unlawful and lawful content.²⁵ In the Court's words,

In that context, it must be borne in mind that the Court has already held that a filtering system which might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications, would be incompatible with the right to freedom of expression and information, guaranteed in Article 11 of the Charter, and would not respect the fair balance between that right and the right to intellectual property.

Yet, in para. 90, the Court reinforced the need to introduce measures to identify copyright infringement without individual assessment. In this way, the CJEU draws parallels with the *Gashing* ruling,²⁶ in which the Court held that host ISPs must remove identical content of information that has already been declared unlawful, and equivalent information, without requiring the host ISPs to conduct an independent examination of that content. To do so, the content identification system is allowed. In the Court's words, "defamatory content of an equivalent nature does not require the host provider to carry out an independent assessment, since the latter has recourse to automated search tools and technologies".²⁷

However, as already addressed in the judgment, one might wonder how it is possible to identify copyright infringement without individual assessment.²⁸ This is mainly because copyright violations are contextual infringements. Indeed, the identification of copyright violations requires a set of criteria to be fulfilled. Such criteria amount to the knowledge of societal circumstances, such as copyright exceptions or parodies, and the knowledge of external public information, such as the year of the death of the creator or whether the contested work belongs in the public domain. This implies that online platforms must collect all this information from rightsholders before performing the assessment of the infringements and decide whether to take down the content or not. Any failure to investigate would result in over-blocking of lawful content and would thus violate article 11 of the EU Charter of Fundamental Rights. In addition, over-blocking might also have a detrimental effect on online creativity. This understanding has been reinforced in the AG's Opinion on *YouTube/ Peterson*²⁹ which stated that the use of filtering technology "would introduce a risk of undermining online creativity, which would be contrary to Article 13 of the Charter. The danger in that regard is that maximum

²⁵ Case C-401/19, *Republic of Poland v European Parliament and Council* (2022) ECLI:EU:C:2022:297, para. 86.

²⁶ Case C 18/18, *Eva Glawischnig-Piesczek* [2019] ECLI:EU:C:2019:821.

²⁷ Case C 18/18, *Eva Glawischnig-Piesczek* (2019) ECLI:EU:C:2019:821, para. 46.

²⁸ Z. Krokida, 'Towards a wider scope for the duty of care of host internet service providers: The case of *Eva Glawischnig-Piesczek v Facebook*' (2021) 5 *European Intellectual Property Review* 313.

²⁹ Para. 243

protection of certain forms of intellectual creativity is to the detriment of other forms of creativity which are also positive for society". Therefore, depriving users from accessing lawful content can trigger violation of Article 13 of the EU Charter of Fundamental Rights.

What is more, the use of filtering tools might also prompt concerns with regard to the privacy of internet users. Indeed, this understanding has been reinforced in a line of case law. For instance, in *scarlet v Sabam*,³⁰ the CJEU held that the use of filtering tools entail risks for privacy and noted that in para. 51 of the judgement that 'would involve a systematic analysis of all content and the collection and identification of users' IP addresses from which unlawful content on the network is sent. Those addresses are protected personal data because they allow those users to be precisely identified.'

C. Prioritizing ex-ante over ex-post safeguards for internet users' rights

Further issues addressed in the judgment are the ex-ante and the ex-post safeguards for users' fundamental rights. Such safeguards amount to provisions available in order to ensure the protection of users' rights to receive and impart information.

Developing its argumentation, the CJEU held that limitations to the freedom of expression are proportionate. Amongst their reasons, the Court identified that safeguards for users' rights are in place. Such safeguards are ex-ante and ex-post.³¹ The former amount to the mechanisms that enable the dissemination of content that falls within the copyright exceptions, such as parody, pastiche, and quotation. If the works fall within one of these categories, the online content sharing service providers must not remove them. In this way, the rights of internet users to receive and impart information are ensured. On the other hand, ex-post safeguards amount to procedural mechanisms that aim to handle complaints about the erroneous removal of lawful content or the reinstatement of the lawful content on the platform.³²

Interestingly, the Court differentiated between the effects of the ex-ante and ex-post safeguards. In this light, the CJEU pointed out that,

... the first and second subparagraphs of Article 17(9) of Directive 2019/790 introduce several procedural safeguards, which are additional to those provided for in Article 17(7) and (8) of

³⁰ Case C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] ECR-I 11959, para. 43.

³¹ Case C-401/19, *Republic of Poland v European Parliament and Council* (2022) ECLI:EU:C:2022:297, para. 93.

³² Ex-post safeguards have meticulously introduced in the Digital Services Act. For instance, very large online platforms must deploy transparency obligations and mitigation risks such as the use of content moderation systems, independent audit as well as appoint compliance officers in order to control the compliance of online platforms with the rules and safeguards users' fundamental rights. This is depicted in Section 4 of the Digital Services Act and reflects Articles 27, 28 and 32 respectively.

that directive, and which protect the right to freedom of expression and information of users of online content-sharing services in cases where, notwithstanding the safeguards laid down in those latter provisions, the providers of those services nonetheless erroneously or unjustifiably block lawful content.

This implies that ex-post mechanisms are also important for safeguarding users' rights, but their role is complementary to the ex-ante safeguards. In other words, the ex-ante safeguards are the principal ones and the ex-post safeguards are seen as additional measures to the existing ones. Indeed, it has been argued that "Hence, these ex post measures – allowing corrections of wrong filtering decisions after the harm has occurred – cannot be considered sufficient"³³. As a corollary, once the ex-ante safeguards fail to protect users' rights, ex-post safeguards come to the forefront in order to ensure freedom of speech online.

The same approach has been followed by the Advocate General in his Opinion on the case with reference to the ex-post safeguards for internet users' rights. More specifically, in para. 188, he downgrades the role of ex-post safeguards, arguing that the delay in reinstating the contested content to the online platform will make the content irrelevant or of no interest to the public. As a result, "possible restoration of content following the examination of users' complaints is not capable of remedying the damage caused to those users' freedom of expression".

Furthermore, the CJEU's ruling seems to contradict the guidance provided by the European Commission on users' safeguards.³⁴ This is because the Guidance addresses the concept of earmarking as an ex-ante safeguard. Earmarked content amounts to the content flagged by rights holders in order to prevent the availability of infringing content online. This implies that the use of filtering tools would be required. Yet, as noted by the Court in para. 86,

In that context, it must be borne in mind that the Court has already held that a filtering system which might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications, would be incompatible with the right to freedom of expression and information, guaranteed in Article 11 of the Charter, and would not respect the fair balance between that right and the right to intellectual property.

³³ M. Senftleben, 'The Meaning of "Additional" in the Poland ruling of the Court of Justice: Double Safeguards – Ex Ante Flagging and Ex Post Complaint Systems – are Indispensable' (Kluwer Copyright blog, 1 June 2022) is available at < <http://copyrightblog.kluweriplaw.com/2022/06/01/the-meaning-of-additional-in-the-poland-ruling-of-the-court-of-justice-double-safeguards-ex-ante-flagging-and-ex-post-complaint-systems-are-indispensable/> > last accessed 17 January 2023.

³⁴ European Commission. 'Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market COM/2021/288 final.

This implies that the earmarking process does not seem to be compatible with freedom of expression.

This understanding has already been noted by the Advocate General who expressed his disagreement with earmarking and stated that,

If it is to be understood as meaning that those same providers should block content ex ante simply on the basis of an assertion of a risk of significant economic harm by rightsholders – since the guidance does not contain any other criterion objectively limiting the ‘earmarking’ mechanism to specific cases – even if that content is not manifestly infringing, I cannot agree with this, unless I alter all the considerations set out in this Opinion.³⁵

Finally, the CJEU refrains from elaborating on ex-ante safeguards for users’ rights and leaves the matter to the discretion of EU member states. This means that EU member states must transpose the provision and add the ex-ante safeguards. References to ex-ante safeguards can be drawn from the AG’s Opinion where he cited parameters in the operation of content recognition tools which need to be installed. Such parameters could be the match rates of allegedly infringing content and thresholds detected by the technology and trusted users which would flag content that falls within the category of copyright exceptions or limitations.³⁶

Interestingly, looking at the implementation of Article 17 of the Digital Copyright Directive, it seems that most of the EU member states have adopted verbatim the provision and refrained from providing ex-ante safeguards for internet users’ rights. It is only Germany and Austria that have transposed additional ex-ante safeguards. In particular, under the heading ‘presumably authorized uses’, section 9 of the German Copyright Act states that user-generated content must remain online if less than half of the uploaded work comprises the work of a third party (or parties) and the use is a permitted minor use of a work or is flagged by trusted users. Any removal of the content is subject to the final decision of the complaints’ procedure.³⁷ Likewise, § 89b (2) of the Austrian Copyright Act requires online content sharing service providers to provide information to users about the adopted measures to prevent unlawful content online. Any work that comprises less than half of the copyrighted work, 15 seconds of a film, 15 seconds of a soundtrack, or up to 160 characters of a text shall not be taken down.³⁸

³⁵ In addition, national implementation seems to reject the earmarking content. For instance, looking at the Finnish transposition, Melart notes that ‘While the earmarking was not even mentioned in the second draft bill, the first draft implicitly rejected it by referring to the postscript in the Opinion of the AG that such a process would significantly increase the risk of preventing access to lawful content’.

³⁶ Case C-401/19, Opinion of Advocate General SAUGMANDSGAARD ØE on *Republic of Poland v European Parliament, Council of the European Union* (2021) ECLI:EU:C:2021:613, para. 211.

³⁷ Urheberrechts-Diensteanbieter-Gesetz (UrhDaG).

³⁸ Bundesgesetz, mit dem das Urheberrechtsgesetz, das Verwertungsgesellschaftengesetz 2016 und das KommAustria-Gesetz geändert werden (Urheberrechts-Novelle 2021)

Overall, one might extrapolate that the CJEU attempted to provide solid interpretations to the conundrum that revolves around Article 17 of the Digital Copyright Directive. In particular, the CJEU clarified that Article 17 endorses a new set of legal rules for online content sharing service providers, confirmed the compatibility of filtering tools with freedom of expression, although not without scepticism, and finally outlined the importance of ex-ante safeguards for internet users' rights over the ex-post safeguards. Nevertheless, thorny issues have remained unanswered and the CJEU gave leeway to the EU member states. This understanding brings us to the dilemma that EU member states are currently facing in the course of the transposition of Article 17 into their national legal systems, namely, to adopt a minimalist or a maximalist approach.

V. The dilemma between minimalist and maximalist implementation of Article 17 of the Digital Copyright Directive

As already discussed, the CJEU refrained from clarifying the parameters under which the filtering tools might operate in order to meet the limitations of Article 52 of the EU Charter of Fundamental Rights. Neither did it specify ex-ante safeguards for internet users' rights. Instead, the CJEU left the issues to the discretion of the EU member states. Indeed, in para. 71, the Court stated that,

In addition, the present examination, in the light of the requirements laid down in Article 52(1) of the Charter, concerns the specific liability regime in respect of online content-sharing service providers, as established by Article 17(4) of Directive 2019/790, which does not prejudice any examination which may subsequently be carried out in relation to the provisions adopted by the Member States for the purposes of transposing that directive or of the measures determined by those providers in order to comply with that regime.

This understanding brings us to the question of implementation. That is, should the EU member states follow a minimalist or a non-minimalist transposition of Article 17 of the Digital Copyright Directive? So far, the majority of the EU member states have adopted article 17 verbatim, at the time of writing however, some member states are still in the process of transposition while in February 2023, the European Commission has decided to refer Bulgaria, Denmark, Finland, Latvia, Poland and Portugal to the CJEU for failing to transpose the Digital Copyright Directive into their national legal systems.³⁹

From a normative perspective, a minimalist approach to the transposition of an EU Directive amounts to the implementation of its minimum standards. This means that the EU member state transposes the Directive verbatim into its national legal system. In other words – and as the UK Government

³⁹ Bulgaria, Denmark, Finland, Latvia, Poland and Portugal, <https://www.notion.so/DSM-Directive-Implementation-Tracker-361cfae48e814440b353b32692bba879>.

dictates – the aim of a minimalist implementation “should be to avoid going beyond the minimum requirements of the measure being transposed”.⁴⁰ Interestingly, this approach entails advantages alongside flaws. On the one hand, it ensures that unnecessary legislative burdens have been avoided. On the other hand, if the Directive in question does not provide a clear scope, its national implementation might lead to questions with regard to the interpretation of certain provisions. This means that the national courts might refer to the CJEU in order to clarify the interpretation of specific EU provisions and thus overburden the CJEU with preliminary references. As aptly pointed out by Weatherall, “The less precise the material scope and/or substantive content, the heavier the burden, the higher the costs” as well as ‘....the more influential the role allocated to the Court of Justice’.⁴¹

In the context of Article 17, a minimalist transposition of the provision in question cannot heal the controversy that continues to revolve around it. This is because the transposition would not go beyond the minimum requirements and would not take into consideration any guidance provided by the European Commission and the CJEU. Therefore, the implementation into the national legal system might lack the necessary safeguards for the protection of users’ fundamental rights, while at the same time it might prevent new players from gaining entry to the Digital Single Market. In particular, the minimalist transposition means that online content sharing service providers can be held liable once a copyright infringement occurs. In order to escape liability, they must demonstrate that they made their best efforts to license the content, align it with industry practices, and prevent the availability of unlawful content, or to terminate or prevent the availability of infringing content within their networks. However, as already discussed, the online content sharing service providers might resort to the use of filtering-based technology. As a corollary, this might violate users’ free speech, as per Article 11, and online content sharing service providers’ right to conduct business, as per Article 16 of the EU Charter of Fundamental Rights.

On the other hand, there is the maximalist approach in the course of transposing an EU Directive. The maximalist implementation is also known as gold-plating. This is defined by the European Commission in the context of the Better Regulation Strategy as a “process by which a Member State which has to transpose EU legislation into its national law, or has to implement EU legislation, uses the opportunity to impose additional requirements, obligations or standards on its national law that go beyond the requirements or standards of the EU legislation”.⁴² That interpretation entails both advantages and flaws. For instance, it would impose additional requirements that might be necessary for the smooth

⁴⁰ HM Government, ‘Transposition Guidance: How to implement European Directives effectively’ (2018) para. 22.2.

⁴¹ S. Weatherill, ‘Maximum versus Minimum Harmonization: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market’ in Niamh Nic Shuibhne (ed.), Laurence W. Gormley (ed.), *From Single Market to Economic Union: Essays in Memory of John A. Usher* (Oxford University Press, 2012) 187.

⁴² European Commission, ‘Better Regulation Guidelines’ (2015) SWD/2015/0111 final.

implementation of the Directive to the national legislation. At the same time, it seems that this approach is considered to be “bad practice”⁴³ as it may impose additional avoidable costs, burdens, and rules.⁴⁴ This understanding has been supported by the European Commission in the Better Regulation guidelines which highlight the negative effects on businesses by noting, “Similarly, burdens for business may be increased beyond what is foreseen by the legislation if the Member States impose unjustified additional obligations (so-called “gold-plating”) or implement the legislation inefficiently”.⁴⁵

However, it could be argued that the maximalist approach would manage to accommodate the guidance provided by the CJEU. For instance, the maximalist approach could ensure that safeguards over internet users’ rights would be put in place. Otherwise, failure to implement the guidance provided by the CJEU might open a floodgate of lawsuits. More specifically, making use of vertical direct effect, citizens might wish to enforce their rights on the Digital Copyright Directive and seek redress in front of the national courts.⁴⁶

At the same time, national courts might not be able to solve disputes on the Digital Copyright Directive and send preliminary references to the CJEU. In this way, preliminary references might be accumulated. Whilst this could enable the CJEU to further develop this area it might also increase the already heavy workload of the CJEU. As a corollary, the workload of CJEU might restrict its effectiveness in delivering justice and place the right to an effective remedy in peril. This understanding has been reinforced by scholars who linked the high number of the preliminary references with efficiency in delivery of the preliminary judgments. For example, Wailer notes that the increasing workload of the CJEU might lead to delays, while at the same time there is a risk of dilution of the normative effect that the CJEU plays, i.e., “the classical role of some supreme courts such as the House of Lords in the UK...”.⁴⁷ Likewise, in pre-Brexit times, the House of Lords published a report on the CJEU workload and expressed UK Government concerns on the delays in delivering the court’s rulings.⁴⁸ In particular, the report referred to the old English adage, “justice delayed is justice denied”, and accentuated the implications of delays for British businesses.

⁴³ E. Magrani, N. Alija and F. Andrade, ‘Gold-plating’ in the transposition of EU Law’ (2021) 8 e-Pública 63.

⁴⁴ Ibid, 67.

⁴⁵ European Commission, ‘Better Regulation Guidelines’ (2015) SWD/2015/0111 final.

⁴⁶ M. Patakyova, ‘Is There a Distinction Between Vertical and Horizontal Direct Effect of Directives?’ in MALÍKOVÁ E.V. (ed.), Paneurópske právnické fórum. Bratislava: Paneurópska vysoká škola (2016) 344-345.

⁴⁷ J.H.H. Weiler, ‘The European Court, National Courts and References for Preliminary Rulings – The Paradox of Success: A Revisionist View of Article 177 EEC’, in H.G. Schermers et al. (ed.) *Article 177 EEC: Experiences and Problems* (Amsterdam: Asser, 1987) 366-378.

⁴⁸ House of Lords, “Workload of the Court of Justice of the European Union: Follow-Up Report, European Union Committee” (2013) para. 7; See also E. Gipini-Fournier, ‘Preliminary References and the Workload of the Court of Justice: ‘Eh Bien, Dansez Maintenant!’ (2014) Maastricht Journal of European and Comparative Law 776.

What is more, a maximalist approach might lead to further fragmentation since EU member states could entail additional provisions that amend the rationale of the Directive. Consider, for instance, the Italian transposition which even goes beyond the scope of Article 17. Article 102 decides of the Copyright Act states:

Paragraph 2. Providers of online content sharing services shall establish and make available to users of the services expeditious and effective complaint mechanisms for challenging decisions to disable access to or to remove specific words or other material uploaded by them. To this end, the Communication Authority shall adopt guidelines.

Paragraph 3. Pending a decision on the complaint, the contested contents shall remain disabled.⁴⁹

This means that the disputed content will remain unavailable until the decision of the Communication Authority with regard to its nature. As Salvagnini notes, that provision demonstrates that “the Italian legislature appears to be taking a direction different from that indicated by the European Commission’s guidelines and by the Advocate General in his Opinion on the challenge by the Republic of Poland against Article 17 of the Directive”.⁵⁰

In similar fashion, the Spanish implementation seems to go beyond the scope of Article 17 in relation to the efforts that online content sharing service providers need to demonstrate in order to avoid liability. More specifically, Article 73 (4) RDL 24/2021 states that

without prejudice to the above, right holders will be able to exercise legal actions aiming to compensate the economic harm, such as the action of unjust enrichment, where even though the service providers had made their biggest efforts to remove the unauthorized content, such content continues to be exploited by them, causing a significant prejudice to right holders.⁵¹

This implies that no matter the efforts taken by online content sharing service providers to avoid the availability of infringing content online, they would still be subject to compensatory claims by copyright holders. As Segueria notes, “this provision essentially transforms the best efforts obligations in Art. 17 (4) into exactly the opposite – obligations in result”.⁵²

⁴⁹ English translation provided by S. Lavagnini in S. Lavagnini, the Italian implementation of Article 17 of the Directive 2019/790. (2022) 17 Journal of Intellectual Property Law and Practice 444; Law Decree No 177 of 8 November 2021- Implementation of the Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market [2019] OJ L 130.

⁵⁰ S. Lavagnini, the Italian implementation of Article 17 of the Directive 2019/790. (2022) 17 Journal of Intellectual Property Law and Practice 444.

⁵¹ English translation provided by M. Peguera, ‘Spanish transposition of Arts. 15 and 17 of the DSM Directive’ (2022) 17 Journal of Intellectual Property Law and Practice 454-455.

⁵² M. Peguera, ‘Spanish transposition of Arts. 15 and 17 of the DSM Directive’ (2022) 17 Journal of Intellectual Property Law and Practice 454-455.

The current Czech draft proposal on the implementation of Article 17 seems also to go beyond the scope of Article 17 with regard to the repeated erroneous removal of lawful works.⁵³ In particular, the latest draft states that platforms that remove or block authorized works will be shut down. This understanding might lead to further implications for the business model of online content sharing service providers and infringe their right to conduct business as per Article 16 of the EU Charter of Fundamental Rights. At the same time, this approach in the implementation of the Directive would undermine one of the aims of the Digital Copyright Directive, namely to “ensure a well-functioning marketplace for the exploitation of works and other subject matter”.⁵⁴ This is because the termination of the operation of online content sharing service providers would deprive copyright holders from circulating their works online to reach their audiences.

Finally, the task of national courts seems very complicated in the context of a maximalist implementation. This is because national courts would be asked to interpret EU Law with limited guidance. This understanding might be subject to two different scenarios. Firstly, the national courts might resort to the CJEU through the preliminary references’ procedures. As already pointed out by EU scholars, this procedure enhances the unity, the development, and the harmonisation of EU Law across the EU member states, thus reducing the appearance of a puzzled legal framework.⁵⁵ On the other hand, national courts might not resort to the preliminary reference procedure and argue that the specific EU Law provision is *acte clair*,⁵⁶ even though the specific provision is not obvious. *Acte clair* might be open to abuse and could undermine the purpose of the preliminary references.⁵⁷ This might lead to different interpretations along the EU borders and, therefore, interfere with the aim of EU harmonization.

VI. Conclusion

Undoubtedly, the judgment reveals a successful attempt by the Court to put an end to the ongoing controversy around Article 17 of the Digital Copyright Act and its compatibility with the right to freedom of expression and information. The Court provides guidance in certain aspects of Article 17, such as the new set of liability rules and their compatibility with Article 11 of the EU Charter of Fundamental Rights.

⁵³ Czech draft Proposal, <https://www.psp.cz/sqw/historie.sqw?o=9&t=31>

⁵⁴ Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market [2019] OJ L 130.

⁵⁵ B. Bogusz, M. Homewood, and E. Berry, *Complete EU Law: Text, Cases, and Materials* (5th edn, OUP 2019) 260.

⁵⁶ The definition of *acte clair* doctrine comes from the French administrative law and means that if the answer to a question of law is clear there is no question of interpretation for the court to decide.

⁵⁷ A. Anrull, ‘The Use and Abuse of Article 177 EEC’ (1989) 52 *The Modern Law Review* 622-639

However, it seems that the CJEU left the interpretation of ex-ante and ex-post to the discretion of the EU national courts.

It is now the national courts that are required to undertake the burden of deciphering Article 17 of the Digital Copyright Directive and shape its implementation accordingly. Whether or not the national implementations, either via a minimalist or a maximalist approach, can heal the problematic features of Article 17 is open to discussion. This is mainly because, as Angelopoulos has rightfully pointed out, “an excellent national transposition of bad EU law will result in bad national law”.⁵⁸

It remains to be seen how the EU member states comply with the judgment and, therefore, whether they will make the appropriate amendments in the transposition of Article 17 into their national legal systems. Undoubtedly, the elements of the judgment must be taken into consideration by the EU member states. Otherwise, lawsuits from citizens along with different interpretations of Article 17 across the EU member states might take place; thus jeopardising the aim of further harmonisation in digital and cross-border use of protected content.

⁵⁸ C. Angelopoulos, ‘Comparative national implementation report on Articles 15 & 17 of the Directive on Copyright in the Digital Single Market’ (2022) 50.