A Platform for Implementation

Online content liability, fundamental rights, and their way forward

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Abstract

This study evaluates the protection of fundamental rights within the liability framework of Article 17 of the CDSM Directive. The analysis is conducted under the questions: what are the defining features of the new liability framework of Article 17 CDSMD and its relation to fundamental rights? How has the implementation process of Article 17 affected the balance between fundamental rights? And finally, what can be expected of their interaction going forward? As such, the content of Article 17 was described and analysed alongside other legal and academic sources under the legal dogmatic and EU legal methods. Later, a systematization of academic opinions and the study of CJEUs case law was applied in determining how Article 17 may impact fundamental rights, as well as evaluating the effectiveness of implementation methods in mitigating these issues. It has been found that the Directive's new rules for liability exception and *ex ante* safeguards towards fundamental rights do not provide for practical solutions that digital actors may rely on to balance the fundamental rights involved. Furthermore, Member States' transpositions were not found to solve these issues at the EU level, leading to the need for a Union-wide authority that may coordinate supplementations of domestic transpositions in a harmonised manner.

Abbreviations

CDSMD	Copyright on the Digital Single Market Directive
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
DMA	Digital Markets Act
DSA	Digital Services Act
ECHR	European Court of Human Rights
EU	European Union
GDPR	General Data Protection Regulation
OCSSP	Online Content Sharing Service Provider
TEU	Treaty on European Union
TRIPS	Trade Related Intellectual Property Rights
UrhDaG	Urheberrechts-Diensteanbieter-Gesetz
VLOP	Very large online platform
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization

1. Introduction

1.1 Background

The late 20th century brought technological advancements that would forever change societal structures and, with it, challenges to legal frameworks. The digital revolution - as it would be later referred to - introduced individuals to a young internet as a space for sharing information across borders, cultures, and often, legal restrictions. Copyright has been a theme of conflict since these very early stages of the digital world. Authors and other rightsholders were quick to spot their works being shared without restrictions or compensation. With no remedies but uncertain multi-jurisdiction court proceedings to resort to, few rightsholders could battle widespread infringement.[1]

Under the pressure of the fast-paced character of this new world and new challenges, the European Union (EU) acted quickly to bring a harmonised treatment to digital copyright infringement between the years of 2000 to 2004, with Directive 2000/31 on certain legal aspects of information society services (the e-Commerce Directive), Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society (the InfoSoc Directive) and Directive 2004/48/EC on the enforcement of intellectual property rights (the Enforcement Directive). As Recital 10 of the InfoSoc legislation indicates, the block reiterated its historic treatment of copyright when asserting the high investment necessary to produce artistic content, and that "adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.".

While improving on the sensitive situation of rightsholders was a clear objective in the legislative process, the directives composed an enforcement framework in which liability for infringements was kept away from hosting and transmission services. As Articles 12 to 15 of the e-Commerce Directive indicate, the lack of knowledge and/or active engagement with the illegal content was

[1] Justine Plia, and Paul Torremans, European Copyright Law, (Second edition, Oxford University Press, 2019) p. 233 – 235.

sufficient to bar claims against these services and platforms. Over the following years, rightsholders would consider that this framework of exclusions hindered enforcement attempts of copyright[2], and a so-called "value gap" was identified between rightsholders and the platforms hosting their content, either legally or illegally.

With this in mind, a proposal for a revised directive was established. In 2019, this proposal gave rise to Directive 2019/790 on copyright and related rights in the Digital Single Market (CDSM Directive, or CDSMD)[3]. Notably, the new directive made significant changes to the liability framework in relation to a growing type of digital actor, the "online content-sharing service providers" (OCSSPs). Article 17, which encompasses the backbone of this new approach, postulates that OCSSPS are in fact performing acts of communication to the public of copyright-protected works and, therefore, are liable for their infringement under copyright law. The much-reduced exemptions would now only apply under the requirement that the OCSSPs have been granted authorization for the communication or, alternatively, made "best efforts" to obtain it or to make the content unavailable.[4]

Although well received by part of the market, many interested parties were quick to spot issues with the new liability framework, especially in relation to the respect of other fundamental rights protected under the Charter of Fundamental Rights of the European Union.[5] Particularly, the Case C-401/19 of *Poland v Parliament and Council* had the Member State questioning the compliance of Article 17 with the right to freedom of expression and information. The case has been finally ruled by the Court of Justice of the European Union (CJEU) in 2022, which, although dismissing the Polish claim, brings light to several aspects of the

[2] Sabastian Felix Schwemer. Article 17 at the Intersection of EU Copyright Law and Platform Regulation. (2020) Nordic Intellectual Property Law Review 3/2020. P.6-7.

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

[4] Ibid, Article 17(4).

[5] Christophe Geiger and Bernd Justin Jütte, 'Platform Liability Under Art. 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match' (2021) GRUR International.. p. 518.

implementation of Article 17 while leaving several questions to be further developed by Member States and EU institutions.[6]

In another relevant event, the Parliament of the European Union, in that same year, approved Regulation 2022/2065 on a Single Market for Digital Services Digital Services Act (DSA). Although the DSA is a far-reaching Regulation with an impact on a wide range of aspects relating to the digital space, scholars have noted that it may have a direct impact on the issues relating to Article 17 CDSMD.[7] Meanwhile, implementation processes by Member States have started, which brings further insights on the present and future balance-work between the liability framework and fundamental rights.

The extent to which these new developments offer solutions to the fundamental rights issues of Article 17 CDSMD is a key question with the potential to impact users on the protection of their fundamental rights, but also business strategies and procedures of big and small online actors in the Union. Furthermore, isolating and analysing the solution for issues that may remain has the potential to direct new steps by the EU legislature, institutions, and its Member States.

1.2 Purpose and research question

The purpose of this thesis is to evaluate the protection of fundamental rights within the liability framework of Article 17 CDSMD. In doing so, the following questions will be answered:

1.What are the defining features of the new liability framework of article 17 CDSMD and its relation to fundamental rights?

2. How has the implementation process of Article 17 affected the balance between fundamental rights?

3. What can be expected of their interaction going forward?

[6] Case C-401/19 Republic of Poland v European Parliament and Council of the European Union. [2019] C:2022:297.

[7] João Pedro Quintais and Sebastian Felix Schwemer, 'The Interplay between the Digital Services Act and Sector Regulation: How Special Is Copyright?' (2022) Journal of Risk Regulation.

1.3 Materials and method

To fulfil and respond to the purpose and research questions of this study, the relevant EU legislative, judicial, and doctrinal sources will be presented and analysed. Particularly, "safe harbour" provisions of the e-Commerce Directive (2000/31) and harmonised copyright rules of the InfoSoc Directive (2001/29) will be used to evaluate copyright enforcement in the digital space and the functioning of previous liability regimes, while legal instruments prior to the formation of the European Union will be used to expose the development of copyright frameworks which continue to be used.

Finally, different legal sources will be jointly analysed to assess conflicts and uncertainties in the EU legal framework. This will include provisions of the Charter of Fundamental Rights of the European Union - as required under Article 6 TEU for interpretation of secondary Union law - the Directive on copyright and related rights in the Digital Single Market (Directive 2019/790), the Digital Services Act (Regulation 2022/2065), the General Data Processing Regulation (GDPR), expert and academic opinions, and recent decisions of the European Court of Justice, such as in the case of *Poland v Parliament and Council*. Lastly, as to exemplify different approaches in the implementation of the CDSM Directive, national acts such as the German *UrheberrechtsDiensteanbieter-Gesetz* (UrhDaG) will be studied.

In this scenario, the legal dogmatic method will be employed. This approach entails the systematization of the rules, principles, and concepts, analysing their internal relations to fill legal gaps, uncertainties, and understand their function within that system.[8] In this context, the EU legal method is also used, as to consider the specific legal relations and hierarchies in EU law. The differences between primary law, secondary law, case law, agreements and doctrine will therefore be considered when analysing the core characteristics of liability regimes, their impact to other relevant provisions, and solutions to potential issues within the EU legal framework.

[8] Jan M. Smith. 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' (2015) Maastricht European Private Law Institute. p.5.

1.4 Delimitations

Although copyright remains largely a national right based on the principle of territoriality, the EU legislature has paid attention to the specific issues that this thesis proposes. Therefore, the description of copyright, instruments for its protection, and its relationship with other fundamental rights will be largely limited to legal considerations on the EU level, and selected national legislations will be analysed only when discussing how Member States can (and have) implement Article 17 CDSMD. Furthermore, given their unified treatment under Article 17 CDSMD, neighbouring rights of copyright, such as broadcasting and performances, will not be analysed separately from author's rights themselves.

1.5 Structure

This study has been divided into five chapters. After the Introduction, Chapter 2 takes aim at describing and analysing the harmonisation of copyright standards in the EU and its treatment under the previous liability framework and Article 17 CDSMD. That will be followed by Chapter 3, which analyses several arguments that have been brought up against the new liability framework as potentially incompatible with selected fundamental rights, such as the freedom of expression, freedom to conduct a business, and the right to data protection. Moreover, an evaluation of the Article's safeguards and their effectiveness is conducted under rulings from the CJEU. Chapter 4 is dedicated to an analysis of the solution to these issues, starting with the answers which are brought by the recently implemented Digital Services Act, followed by a description and analysis of implementation processes by Member States, and concluding with potential legal tools which may be considered by the EU and its Member States to provide balance to fundamental rights in the enforcement of Article 17 CDSMD. Finally, Chapter 5 presents conclusions and direct answers to the research questions of the study.

2. Copyright harmonisation and Article 17 CDSMD as a novel liability framework

2.1 Introduction to copyright and its protection under EU law

2.1.1 The harmonisation of copyright in the EU

Although initially based on essentially domestic efforts[9], attempts to grant copyright a certain level of international harmonisation could already be seen by the end of the 1800s. The Berne Convention of 1886[10] was established as the first multilateral international agreement on copyright. Initially, the agreement took effect in a limited amount (and mostly European) jurisdictions, but eventually became the backbone of international copyright enforcement with 181 as signatories.[11] Notably, the agreement assures the right to control the distribution, performance, or publishing of "every production in the literary, scientific and artistic domain, whatever the mode or form of its expression"[12] from the moment it is recorded in a physical meaning. Copyright protection therefore does not require any formal registration among signatory countries.

Furthermore, the protection of these works was settled to cover the whole life of the author plus 50 years, in which exclusive rights to translate, perform, recite, communicate, broadcast, and adapt are to be granted to copyright holders.[13] The convention also establishes a basic distinction of copyright as a moral right and an economic one, in which authors shall be entitled to claim authorship over their

[9] Pila and Torremans. (n 1) p.9 -14.

[10] Berne Convention for the Protection of Literary and Artistic Works (adopted 14 July 1967, entered into force 29 January 1970) 828 UNTS 22.

[11] WIPO. 'Berne Convention for the Protection of Literary and Artistic Works' https://www.wipo.int/treaties/en/ip/berne/ Accessed 20 May 2023.

[12] Ibid, Article 2(1).

[13] Ibid, Article 7(1).

works and "object to any distortion, mutilation or other modification"[14] even after transferring their economic rights to a third party.

In general, the use of copyright-protected material under the previously listed exclusive rights must be made under an authorization from the rightsholder. However, a number of exceptions to this rule were set by the Berne Convention. As shown by Articles 9 to 11, the so-called "free uses" of copyright-protected material include special cases which are regulated under national law, quotations, educational uses, reporting of current events, and others.

After several revisions ending in 1971, The contents of the Berne Convention would make space for negotiations that led to the WIPO Copyright Treaty (WCT)[15] and the TRIPS agreement[16]. As held by Szkalej, these new instruments incorporate provisions of the previous convention[17]. Taking part on the two new agreements, the European Union's legislature largely builds upon them as a starting point for the development of a framework for the single market.[18] Starting in the 1990s (as the European Community), efforts of greater harmonisation began to appear in the form of directives which further regulated certain aspects of copyright, such as the Computer Programs Directive, the Rental Right Directive, the Satellite and Cable Directive, and the Term Directive (increasing the protection time from the minimum 50 years as defined by the Berne Convention to 70 years).[19]

2.1.2 The copyright framework under the InfoSoc and e-Commerce Directives

As previously described, the beginning of the 21st Century and the digital era brought its own sets of challenges that culminated in the development of a new directives in relation to digital law enforcement, including copyright. Namely, the

[14] Berne Convention, (n 10) Article 6 bis.

[15] WIPO Copyright Treaty (adopted in Geneva on December 20, 1996).

[16] Agreement On Trade-Related Aspects Of Intellectual Property Rights (signed in Marrakesh on 15 April 1994).

[17] Kacper Szkalej. Copyright in the age of access to legal digital content. (Uppsala University 2021), p.67

[18] Ibid, p.67-68.

[19] Pila and Torremans, (n 1) p. 230.

e-Commerce[20], and InfoSoc Directives[21] are of special relevance for this trend in the EU.

Materially, the InfoSoc Directive harmonises several rights of authors and other rightsholders towards their work. Firstly, Article 2 establishes that Member States "shall provide for the exclusive right [to authors, performers, producers, and broadcasters] to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form". Following that, Article 3 provides that these rightsholders shall also authorize or prohibit acts of communication and making available where "members of the public may access them from a place and at a time individually chosen by them.". As made evident by Szkalej, rulings from the CJEU indicate that this right include live online transmissions (as a communication to the public), as well as on-demand content in publicly available servers (as making available to the public).[22] Finally, limitations on these rights are also present. Article 5 provides for exceptions and limitations, ranging from non-communication intermediaries to documentary, educational and generally non-commercial purposes.[23]

Furthering the topic, the e-Commerce Directive provides for a liability scheme for information society service providers (commonly referred to as safe-harbour provisions) and aims "to create a legal framework to ensure the free movement of information of society services between Member States"[24]. Section 4 of the Directive provides for rules of content liability of intermediary providers and, therefore, applies to the treatment of copyright-protected material for which no authorization, license, or exception is present. First, a "mere conduit" exception is provided for by Article 12, exempting providers from liability when only involved in a passive action of transmission of the protected data. Article 13 extends this exception to providers who automatically stores such data for a limited amount of time with the intention of improving the efficiency of a transmission. Finally,

[20] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L178/1.

[21] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

[22] Szkalej (n 17) p. 104, 105.

[23] InfoSoc Directive, (n 21) Article 5.

[24] E-Commerce Directive, (n 20) recital 8.

Article 14 establishes that providers who host data are also covered, as long as they do not know of the existence of the illegal content and act to remove it upon notification.

While treating the matters of transmission and hosting of the potentially illegal contents, a tendency can be drawn regarding the basic rationale of these provisions. While excluding the liability of providers that do not initiate, select, modify or interfere with the content in its transmission or hosting and act to disable it when notified, the e-Commerce Directive clearly creates a framework in which *direct and active* involvement with potentially illegal content is required for liability to be established for service providers.

Further explanation on the concepts of passive and active participation can be found on Recital 42 of the Directive, in that the exception should be limited to those actions of "mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.". As referenced by Mediega, acceptable levels of such passive stance vary based on the specific roles that providers play. Generally, 'mere conduit' providers are not liable for the content they convey as long as they do not initiate the transmission or select/modify the information contained in the transmission. Similarly, 'caching' providers are also not liable for the automatic and temporary storage of information they implement to make information transmission more efficient. On the other hand, 'hosting providers' take a more active stance and have more control over the content they host. As a result, these types of providers are held under tighter rules.[25]

The two directives relate to each other to the extent that the e-Commerce Directive acts as horizontal "safe-harbour" rules while the InfoSoc Directive acts as a sector-specific legislation.[26] As a result, this liability framework takes direct and complementary action on the provisions of the InfoSoc Directive, which is in turn aimed directly at harmonising the rights of reproduction, communication to the

[25] Tambiama Madiega. 'Reform of the EU liability regime for online intermediaries Background on the forthcoming digital services act' (2020) Directorate-General for Parliamentary Research Services (EPRS). p. 2 -3.

[26] Schuwemer, (n 2) p. 3.

public, including making available into the digital space of the single market.[27] This interaction would be tested and confirmed by the CJEU in the joint case of *YouTube/Cyando* (Case C-682/18). The proceedings were brought by a music producer and an academic publisher against large content sharing platforms.[28]

In both cases, the Federal Court of Justice of Germany referred to the CJEU to clarify if Article 3(1) of the InfoSoc Directive, which protects the right to communication to the public, would be applicable in the case of file-hosting and video-sharing platforms on which content protected by copyright is contained[29]. Moreover, the Court questioned whether the acts of the platforms could benefit from the liability exemption of Article 14 of the e-Commerce Directive, even if the service providers held a "general" understanding that illegal material was shared in its platform. Choosing a strict application of the referred Articles, the court indicated that it is "the act of intervening in full knowledge of the consequences of doing so, with the aim of giving the public access to protected works, which may lead that intervention to be classified as an 'act of communication".[30] As a result, the CJEU, concluded that, under the established framework, making a platform available in which an expectation of infringement content is expected does not exclude the exemption of Article 14 of the e-Commerce Directive.[31]

The relevance of the CJEU ruling can only be overshadowed by the time in which it was granted. 2021 would be a year that combined the exposure of the clarifying ruling with a complete overhaul of the liability framework for copyright by the entry into effect of the new Directive on Copyright in the Digital Single Market (the CDSM Directive, or CDSMD).

[27] InfoSoc Directive. (n 21) Art. 2 - 3.

[28] Case C-682/18 Frank Peterson v Google LLC and Others and Elsevier Inc.v Cyando AG [2021] OJ 320/2.

[29] Ibid. par.39 - 57

[30] Ibid. par. 81.

[31] Ibid, par. 117.

2.2 The CDSM Directive and Article 17

Although the CDSM Directive has only recently taken effect, the intentions of reforming the established copyright framework could already be seen in late 2013, when a public consultation was launched regarding a review of EU copyright rules. As indicated by Schwemer, the consultation was permeated by a general feeling of dissatisfaction from rightsholders towards the established framework, who extensively asserted the magnitude of infringement issues and the need for greater responsibility from intermediaries. Overall, an understanding grew that the safe-harbour provisions of the e-Commerce Directive could not provide a satisfactory basis for copyright enforcement online and should be substituted by narrower liability exemptions and requirements for providing data on illegal activity. [32]

On the other hand, the input given by consumers presented a very different picture. In general, potential users of these intermediary services showed concerns that an increment of liability and responsibilities of intermediaries would translate into an imbalance of interests between rightsholders and service users in aspects such as privacy and over-policing by liable intermediaries.[33] After these entries, a series of later reports culminated in a directive proposal in 2016. Following the ordinary legislative procedure, the proposal passed through parallel assessments by the Council of the European Union and the European Parliament, where a final approval was granted in 2019. The process was not any less controversial to Member States than that of the initial consultation for stakeholders. In the Counsel, several Member States such as Germany, France, the Netherlands, and Belgium brought up concerns on the interplay of Article 13 (later Article 17) with other fundamental rights.[34] Nevertheless, the directive would be later approved by the Parliament with voting results of 338 to 226. No consensus was found in the Council either, where some of the previously exposed concerns left Sweden,

[32] Schwemer. (n 2) p. 3-9.

[33] Ibid. p. 6 - 7.

[34] Ibid. p.8.

Finland, the Netherlands, Poland, Luxemburg, and Italy to vote against the implementation.[35]

The controversial proposal then turned into Directive 2019/790 on copyright and related rights in the Digital Single Market. Divided into five titles, the final text has provisions on a wide array of copyright related issues in the digital space, such as out-of-commerce works, video-on-demand access, visual art in the public domain, rights in publications, fair remuneration and, notably, "certain uses of protected content by online services", contained by Article 17. A close inspection of the numerous recitals of the new instrument paint a picture of the debates in its inception. Recital 6 revives the discussion on the balance of interests, acknowledging its importance:

> The exceptions and limitations provided for in this Directive seek to achieve a fair balance between the rights and interests of authors and other rightholders, on the one hand, and of users on the other. They can be applied only in certain special cases that do not conflict with the normal exploitation of the works or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholders.

The relation of the new directive with the existing framework is also taken into account. As Recitals 4 and 7 read, the CDSM Directive "is based upon, and complements, the rules laid down in the directives currently in force in this area" and "the protection of technological measures established in Directive 2001/29/EC remains essential to ensure the protection and the effective exercise of the rights granted to authors and to other rightsholders under Union law.". As a result, the CDSM Directive must be interpreted as largely complementary to the existing copyright legislation. The e-Commerce Directive is, however, a horizontal set of rules which applies not only to the copyright sector. Therefore, under the principle that *lex specialis* applies over *lex generalis*, its rules and exceptions on liability are applicable insofar as vertical (sector-specific) rules are not available, a role which the CDSM Directive can now fulfil.[36]

Furthermore, differently from the earlier InfoSoc Directive, the CDSM Directive stipulates a new, sector-specific, intermediary liability framework for copyright infringements online under Article 17(4). Nonetheless, it does so to a

[35] Ibid. p. 8 – 9.

[36] João Pedro Quintais et all, 'copyright content moderation in the eu: an interdisciplinary mapping analysis' (2022) p.88.

stricter type of entities, the "online content-sharing service providers", or "OCSSPs". OCSSPs are not a different category from the more general "information society service provider" present in earlier directives, but a sub-type within it. Its definition can be found under Article 2(6) of the CDSM directive as:

> (...) a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.

Furthering the definition, Recital 62 of the directive provides that OCSSPs shall encompass "only online services that play an important role on the online content market by competing with other online content services, such as online audio and video streaming services". As held by Quintais, this new category brought by the CDSM Directive is also innovative in that it, differently from its predecessors, attaches liability based on a limited and specific kind of provider, instead of general actions such as communication to the public or reproduction (such as storage, taking the form of hosting)[37]. This scope of OCSSPs is, however, not entirely clear. As Recital 63 indicates, the concept of a "large amount of copyright-protected work" may only be identified in a case-by-case assessment of the characteristics of each platform. That, along with a lack of limitation on types of copyright-protected works (such as music and art) may unintentionally broader the effect of the new liability rules by "pulling" many service providers into the concept of OCSSPs which have not been accounted for, such as non-artistic works of reviewing, codes, and sample images.[38]

In relation to its substance, Article 17 is a lengthy and complex provision that aims to "alleviate a perceived unfairness in exploitation of works on the Internet"[39]. The "value gap", as it would be referred to, describes a specific financial structure that is present in, most of all, platforms such as Google's *YouTube*, where users have a high degree of freedom to make direct uploads. Allied to the open access to the platform, this structure allowed *YouTube* to accumulate a market share of almost 50% in the music streaming market. However, the platform only

[37] Quintais et all. (n 36) p. 91.

[38] Schwemer, (n 2) p. 10.

[39] Severine Dusollier. The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition. (2020) Common Market Law Review, p.1008.

contributes with less than 10% in market pay-outs to rightsholders, which can partially be attributed to the availability of copyright-protected music content which rests unaccounted for royalty payments. As remarked by Dusollier, the understanding that liability exemptions provided to such platforms contribute to the value gap *phenomenon* lives in the core of Article 17.[40]

The way that Article 17 addresses the value gap problem is through a new "direct liability" model. In contrast to the previous framework laid down in the *YouTube/Cyando* Case, the CDSM Directive provision explicitly asserts that an OCSSPs performs an act of communication or making available to the public when it "gives the public access to copyright-protected works or other protected subject matter uploaded by its users."[41]. As a result, Article 17 allows for the application of Article 3(1) of the InfoSoc Directive to OCSSPs which merely "give access" to copyright-protected content, establishing a requirement for these platforms to obtain prior authorization for usage of the material. However, Article 17 does not provide a clear answer as to what may constitute an authorization, limiting itself to mentioning licencing contracts as an example.

Recognizing the need for further clarifications on this and other topics paragraph 10 of the referred Article provides that the Commission shall stimulate dialogues between stakeholders, from which a guidance should be issued. In 2021, the "Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market" (Guidance) was published. Other than providing insights on the nature of the CDSM and confirming its *lex specialis* status, the Guidance dedicates a detailed chapter for the issue of authorization. In summary, the Guidance proposes that specific authorization models would fall in the competence of Member States while implementing the directive.[42] However, certain guidelines are proposed to assure some degree of cohesion between Member States.

Firstly, it is clarified that the act of communication and making available to the public should be interpreted as also encompassing the reproductions required to perform such acts.[43] As a result, a single authorization would suffice the

[40] Dusollier. (n 39) p. 1010.

[41] CDSM Directive (n 3), Article 17(1).

[42] Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market (2021), p. 2-4.

[43] Ibid p.6.

authorization requirement under Article 17(1). Moreover, the Guidance seems to propose flexible solutions for the authorization by "encouraging" the development of voluntary conflict resolution mechanisms and providing for different types of licensing, such as individual and collective licenses (including those with extended effect), which has a great impact on musical content.[44]

In regard to the effects of authorization on the users of platforms, Article 17(2) indicates that authorizations granted to OCSSPs shall also cover those acts performed by the users of such platforms, as long as they are not "acting on a commercial basis or where their activity does not generate significant revenues.". On the contrary, authorizations to individual users shall also allow the platform in its act of communication to the public. However, no presumption of authorization to the end-user may be granted and, therefore, platforms are not able to rely on the provision to exclude liability without communication or evidence of the authorization. [45]

As expressively established by paragraph 3 of the provision under analysis, the limitations on liability provided by Article 14(1) of the e-Commerce Directive do not apply to OCSSPs within the scope of the CDSM Directive. As a result, Article 17 provides for a new set of limited exceptions and limitations to the new liability framework. As Article 17(4) shows, OCSSPs shall be held liable for infringing content, unless it is shown that they have:

> (a) made best efforts to obtain an authorisation, and
> (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information; and in any event
> (c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).

Under the Commission's Guidance, this liability structure in paragraph 4 is referred to as the "specific liability mechanism", meaning that its application is only granted once the previous scenarios of paragraphs 1 and 2 are not applicable. In structure, the presence of the term "best efforts" requires attention, as no explicit

[44] Guidance (n 42) p.6.

[45] Ibid, p. 7.

definition is given to the term in the directive's text. According to the Guidance, this had the effect that the concept "is an autonomous notion of EU law and it should be transposed by the Member States in accordance with this guidance and interpreted in light of the aim and the objectives of Article 17 and the text of the entire Article.".[46]

The presence of paragraph 4(a) may be justified by the fact that not even significantly flexible frameworks for authorization may cover all the instances of copyright use, as contacting individual rightsholders can pose a significant challenge in informal platforms such as *Youtube*. This issue is addressed by the Guidance, as the Commission suggests that the concept requires OCSSPs to engage with well-established rightsholders, but should not be expected to successfully establish contact with those who are not "easily identifiable by any reasonable standard.".[47] This consideration draws directly from the application of the principle of proportionality, which is provided for by the following paragraph. In addition, Article 17(5) contends that the principle should be fulfilled with considerations for the availability of suitable means, cost-effectiveness, service size, type, audience, and others.

Paragraphs 4(b) and 4(c) are equally affected by Article 17(5) and pose a cumulative obligation to OCSSPs. Platforms are therefore expected to act both preventively and reactively to indications of copyright infringement within the practical constraints of their operations. However, as recognized by the Guidance, the extent of concepts such as "relevant and necessary information" is not clarified in the CDSM Directive. As a result, The Guidance proposes that Member States should act subjectively in transposing the provision "in accordance with this guidance and the objectives of Article 17", while allowing for a case-by-case assessment of information being sufficiently relevant and necessary.[48]

In this regard, the nature of the CDSMD deserves consideration. Given the choice for a directive, instead of a regulation, it is expected to find a certain level of discretion and generality in its provisions, so to provide Member States with

[46] Guidance, (n 42) p. 8.
[47] Ibid. P. 9.
[48] Ibid, p.11.

flexibility while implementing them.[49] As seen above, this *phenomenon* is present in in article 17, which leave several key definitions and concepts for Member States to further clarify. In this scenario, the Guidance made a clear attempt to direct Member States in their implementation processes with a number of substantive definitions and application scenarios for concepts such as "authorization". However, other concepts such as "relevant and necessary information" were left for Member States to interpret.

Finally, the later provisions of Article 17 provide for differentiated treatments between small and large OCSSPs and a series of safeguards for the liability framework implementation. Notably, these provisions aim to prevent general monitoring practices[50] and keep the new liability framework from affecting copyright-compliant material, either authorized or exempted, such as in the cases of quotation, criticism, review, caricature, and parody.[51] Furthermore, requirements for implementation of appeal and dispute resolution mechanisms within the platforms, alongside transparency and data protection provisions[52] make it clear that the risk of overpowering certain stakeholders and the protection of rights of users have been accounted for in the drafting of the CDSM Directive. However, the generality of such safeguards has been held by scholars as potentially troublesome to their effectiveness in practice. As such, the next Chapter will focus on such provisions under fundamental rights considerations.

[49] Mirelle Van Eechoud et al. 'Harmonizing European Copyright Law – The Challenges of Better Lawmaking' (2009) Institute for Information Law Research Paper No. 2012-07. p. 21.

[50] CDSM Directive, (n 3) Article 17(8).

[51] Ibid, Article 17(7).

[52] Ibid, Article 17(9).

3. Article 17 safeguards and the protection of Fundamental Rights in the EU

3.1 Introduction to fundamental rights in the EU legal order

The protection of specific basic rights has been greatly important in international relations over the 20th century, which have risen to the modern concept of human rights. Multilateral agreements such as the Universal Declaration of Human Rights[53], the International Covenant on Civil and Political Rights[54], and the International Covenant on Economic, Social and Cultural Rights[55] have all played an important role on harmonizing certain fundamental rights such as the freedom of thought, religion, expression, and movement.

Simultaneously, the development of a set of fundamental rights has also taken place in the European Union. Initially, the formation of the European Economic Community after the Treaty of Rome had no clear political intention beyond the straightening of commerce.[56] The need for such approach would nevertheless be observed in the year 1970 with the ruling of *Internationale Handelsgesellschaft* (Case 11-70) by the European Court of Justice, when it was established that core constitutional traditions of Member States constituted principles of law for the Community and should therefore collectively direct the actions of its institutions.[57] A system of fundamental rights derived from its

[53] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

[54] International Covenant on Economic, Social and Cultural Rights (adopted. 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

[55] International Covenant on Civil and Political Rights (adopted 16 December. 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[56] Bernd Justin Jütte, 'Implementation Imperatives for Article 17 CDSM Directive' (Communia Association 2022).

[57] Case C-11/70 Internationale Handelsgesellschaft mbH mot Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] I 00503, par. 4.

Member States would therefore be placed on the Community's legal order and guide its actions.

Codification of the fundamental rights developed within the Court would only happen in the year 2000, under the recent creation of the European Union. The Charter of Fundamental Rights (CFR)[58], as it was named, would later be amended by the Lisbon Treaty to provide it with equivalent legal status to the founding treaties of the European Union[59]. As summarized by its preamble, the CFR aims at referencing its provisions on the constitutional traditions of Member States, while it also recognizes that "it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a CFR.".

The CFR is divided into seven chapters, covering rights of diverging natures such as dignity, freedoms, equality, solidarity, citizens' rights, and justice. These are then subdivided into relating rights, ranging from broader and expected provisions such as the freedom of expression, to more specific and cotemporary issues, such as data protection. Notably to the copyright field, the protection of intellectual property is expressively cited as a right to property[60], elevating its protection to the fundamental rights dimension.[61]

This aparent disparity on the "importance" of the protected right (for instance, the right to intellectual property against the right to life and dignity[62]) has been criticized, as it could result in a general "dilution" of the significance and meaning of fundamental rights.[63] This could play a significant role when applying Article 52(1) of the CFR, which provides for the possibility of limitations to the exercise of this set of rights. The provision establishes that limitations to fundamental rights are possible, but must be provided by law and respect the essence of the rights involved. They may also only be put in effect if necessary and

[58] Charter of Fundamental Rights of the European Union [2000] OJ C 364/1.

[59] Treaty on European Union (consolidated version) [2016] OJ C202/1 Article 6(1).

[60] CFR (n 55) Article 17.

[61] Maria Lillà Montagnani and Alina Trapova. 'US and EU: divirging or intertwined paths? In Oreste Pollicino, Giovanni Maria Riccio and Marco Bassini Copyright and Fundamental Rights in the Digital Age. (Edward Elgar 2020) p.201-215.

[62] CFR (n 58) Articles 1 – 2.

[63] Damian Chalmers,Gareth Davies, and Giorgio Monti., European Union Law (Fourth edition, Cambridge University Press, 2019) p. 256.

"genuinely meet objectives of general interest" or to "protect the rights and freedoms of others". As held by Chalmers (*et al*), The text implies that limitations must be well defined and cannot make it impossible for the right to be exercised in practice. Furthermore, conflicts between fundamental rights must be solved in a way to "draw a fair balance between them".[64]

The assessment of whether fundamental rights may be limited by other rights or interests is also subject to the principle of proportionality, which is applied by both the CJEU and the European Court of Human Rights as a three-step test. As it can be observed in Case C-331/88 (*Fedesa*), the assessment starts on determining if a certain measure is legitimate and appropriate to acchieve its own objectives. This is then followed by an analysis of whether these objectives could be reached through other, less onerous means. Finally, the interest of stakeholders are finally balanced agaist each other, which, in the case of *Fedesa*, took form in claims of "excessive disadvantages" towards certain parties.[65]

As held by Gaiger and Jütte, the concept of proportionality is essential to the digital sphere as the relationships between rightsholders, users and intermediaries cannot be precisely formulated into legal norms. Meanwhile, the concept has similar importance in the assesment of copyright issues by the CJEU, as it applies the principle "to help national courts shape appropriate remedies to fight copyright infringements" Consequently, proportionality plays a central role in reflecting on the limitations on the fundamental rights of stakeholders under Article 17 CDSMD.[66]

[64] Damian Chalmers,et al (n 63) p. 256.

[65] Case C-331/88 The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others. [1990] I-04023 par. 12.

[66] Christophe Geiger and Bernd Justin Jütte, 'Platform Liability Under Art. 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match' (2021) GRUR International. p. 522.

3.2 Initial concerns in Article 17 and its impact on fundamental rights

3.2.1 Automated filtering as a consequence of Article 17

As previously posed, Article 17 allows for OCSSPs to be exempted from liability in very selective situations. Assuming the failure to comply with the "best efforts" to obtain an authorization under Article 17 (4)(a), paragraphs 4(b) and (c) institute that OCSSPs must act towards making the unlawful content unavailable. This should happen in two instances. First, Article 17(4)(b) establishes an *ex ante* obligation to hinder the appearance of such content in the platform, given that "rightholders have provided the service providers with the relevant and necessary information". Secondly, *ex post* mechanisms must be put in place for the take-down of such content once its presence is observed[67].

The question of how these contents must be made unavailable is seemingly absent in the provision. The large amount of content being uploaded to OCSSPs servers may however provide for only one feasible solution. The implementation of automatic upload filters has been widely pointed by legal scholars as a natural result of these obligations. As claimed by Jütte and Geiger, although targeted take-down and account suspension models may be implemented, automated mechanisms are unavoidable under the pressure of constant and numerous user uploads, which makes single interferences ineffective towards the aims of the provision.[68] This is especially true in the case of reoccurring uploads of the same protected material for which information and take-down notices have already been provided, which in practice creates an obligation for platforms to implement "stay-down" mechanisms towards the content.[69]

In order to assess its compliance with fundamental rights, the functioning of automated filters must be understood. As held by Moreno, to fulfil their function, upload filters must be composed by, on one hand, a database of previously flagged

[67] CDSM Directive (n 3) Article 17(4).

[68] Geiger and Jutte (n 66) p.532.

[69] Felipe Romero Moreno, '"Upload filters" and human rights: implementing Article 17 of the Directive on Copyright in the Digital Single Market' (2020) International Review of Law, Computers and technology. P. 154.

content as protected under copyright. On the other, an algorithm capable of cross referencing the data which has been uploaded with such a database (also known as "content recognition") for all kinds of potentially protected media, such as text, audio, and video.[70]

The technology used for this task can be divided into a handful of popularly implemented options. The simplest manner in which OCSSPs may do so is through metadata. In this model, algorithms do not examine for the copyright protected characteristics of the content on themselves, but for parallel information which is carried with it, such as name, length, format, and others. The drawback is, naturally, the unreliability and easiness of manipulation related to these data types.[71]

As a more robust option, platforms may choose to implement a system capable of identifying actual fragments of content converted into numerical sequences (hashing). These can then be compared to the database of equally converted protected materials. Furthermore, algorithms may be implemented to identify "watermarks" imbedded in audio and video files, which can then identify specific sources of infringement. Both options, however, are limited to content which is identical to that of the source, making it ineffective against the upload of "cover songs" and certain recorded performances by users.[72]

These issues may lead to the preference for even more advanced alternatives, such as "fingerprinting" and the use of artificial intelligence models capable of detecting more complex set of patterns in the actual content of the uploaded file. These technologies have been put in place in large platforms such as *YouTube*, but their processing intensive nature does not allow for widespread use. These methods are therefore more likely to be used in parallel with other simpler methods, such as the ones previously described. In this case, uploads may go through a multistep assessment of their content, initiating with a general user's personal data and metadata analysis, hashing, fingerprinting, and finally, the most

[70] Moreno (n 69) p.157 – 158.

[71] Ibid. p.159.

[72] Ibid.

intensive algorithms, capable of providing a limited level of contextual values to the upload.[73]

3.2.2 The ban on general monitoring

Article 17 (8) CDSMD provides for a clear ban on general monitoring, but such a concept has been imposed and developed long before the new liability regime. As Article 15(1) of the e-Commerce Directive would already provide:

> Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

Although not directly protected under the CFR, this concept has been interpreted by the CJEU in its case-law. In *SABAM v. Netlog* (Case C-360/10), an association of musicians sued a social network where copyright protected songs where being unlawfully shared, and applied for an injunction to force the platform to implement filtering systems for uploads, in which all files would be verified against a database of protected material provided by rightsholders and assessed for their lawfulness.[74] The proposal would be dismissed by the Court, arguing that the mechanism would constitute a general monitoring obligation with potential violations of several fundamental rights, such as those of data privacy, freedom of expression and the freedom to conduct a business[75]. As such, an individual analysis of each of these rights and freedoms is necessary to establish the provision's compliance with the CFR.

3.2.3 The right to data protection

Although the rights of communication and making available to the public in copyright can be laid down in generally uncontroversial ways by the means of

[73] Moreno (n 69) p. 159 – 160.

[74] Case C-360/10 Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV [2012]. Par. 15 – 25.

[75] Ibid, Par. 45 – 51.

license agreements, it can also be heavily context-based when exceptions are present. Usual exceptions provided by Article 5 of the e-Commerce Directive such as educational and non-commercial uses are difficult to assess and almost always require a certain degree of investigation. In automated filters, this may impose the need for capturing IP addresses and other user-related information in determining if an authorization or exception is present and, therefore, the processing of personal data.[76]

Alongside online liability for infringements, the protection of personal data is a topic which has been given fierce attention with the growth of online interactions and the importance of data mining for certain digital business models.[77] As a result, the protection of personal data has been addressed in the CDSM Directive in Article 28. Its form is, however, limited to stating the necessity of observing data protection rules and with no indication of how these rights may be accounted for in practice.

On that note, Article 8 of the CFR provides that processing of such data sets must be based on consent or "some other legitimate basis laid down by law". This provision would later be supplemented by the General Data Protection Regulation (GDPR) of 2016, where Article 2 states that consent must be " freely given, specific, informed and unambiguous". On that note, it has been argued that a "consent clause" whitin terms of service of OCSSPs would lack an objective option for users, which is inconsistent with the requirement of "freely given consent"[78]. On the other hand, a legitimate interest requirement is present and further explained in Article 6(f):

> (...) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

To the extent that legitimate interest for processing must account for fundamental rights, case law from the CJEU suggests that the previously analysed

[76] Julia Reda, Joschka Selinger and Michael Servatius, 'Article 17 of the Directive on Copyright in the Digital Single Market: a Fundamental Rights Assessment' (2020) Gesellschaft für Freiheitsrechte e.V. p.49-50.

[77] David Souter. Inside the Digital Society: Privacy and the digital revolution (2020) APC.

[78] Sebastian Louven and Malte Engeler. Copyright Directive: does the best effort principle comply with GDPR? (2019).

proportionality test based on Article 52 of the CFR can be implemented to data processing interests in face of property rights. In Case C-13/16 (*Valsts policijas Rīgas reģiona pārvaldes Kārtības policijas pārvalde v. Rīgas pašvaldības SIA 'Rīgas satiksme*), the Court analysed the possibility of processing data for the purpose of obtaining information on a person accused of damaging property. The fundamental rights of property and data privacy have then been weighted based on the legitimacy of the processing interest, availability of other means, and a general balance between the interests, in compliance with the proportionality test.[79]

In the case of Article 17, it would seem that the fulfilment of the obligations under the provision would satisfy the first requirement (the protection of property rights). The second requirement seem to be equally fulfilled, as the filtering (and consequent processing) of data may often be the only viable option. The third requirement, however, deserves further investigation. As pointed out by Jütte and Geiger, the Court show, in general, "great reluctance to limit the rights of individual internet users too easily". [80] This can be seen in *SABAM v. Netlog*, when the Court asserts an unbalance in requiring such filters to be put in place, as "it would involve the identification, systematic analysis and processing of information connected with the profiles created on the social network by its users".[81] This assessment could indicate that it is difficult to develop a compliant filtering system, as the wide-spread processing of personal information is essential for the effectiveness of the mechanism.

3.2.4 The freedom to conduct a business

Apart from the protection of personal data concerns towards users, scholars have observed that the new liability regime may give rise to issues related to the freedom to conduct a business of the platforms themselves, which is protected under Article 16 CFR. The text of the CFR is not very descriptive to what such a freedom

[79] Case C-13/16. Valsts policijas Rīgas reģiona pārvaldes Kārtības policijas pārvalde v Rīgas pašvaldības SIA "Rīgas satiksme" [2017].

[80] Geiger and Jütte, (n 66) p. 527.

[81](SABAM) v Netlog (n 74) par. 49.

entails and how it may be implemented. Its action is therefore further developed on the CJEUs case law. In *Scarlet extended (*case C-70/10), a musicians' association brought claims of infringement against an internet service provider. The association proposed that the provider should "bring such infringements to an end by blocking, or making it impossible for its customers to send or receive in any way, files containing a musical work using peer-to-peer software without the permission of the rightsholders".[82]

Once more applying the proportionality test, the Court found that a requirement to install such a preventive filtering system would result in a serious infringement of the freedom of the hosting service provider to conduct its business, since it would require that hosting service provider to install a "complicated, costly, permanent computer system at its own expense"[83]. This led to the conclusion that a fair balance between property rights and the fundamental freedom could not be achieved through such an arrangement [84], and demonstrates the importance of practical economic viability when assessing the freedom to conduct a business.

The *de facto* imposition of filtering systems of Article 17 could therefore grant a similar analysis on its economic impact. The provision seems to recognize this issue when establishing diverging liabilities depending on the size of OCSSPs, as Article 17(6) provides that platforms younger than 3 years and with a yearly turnover of less than 10 million euros would be exempted from the "preventive" action requirements. However, as regarded by Reda, Selinger and Sevatius, the impact of such a distinction is likely to be minimal, as the cumulative nature of the exemption requirements exclude not only big platforms, but long-standing small players and young, high growth ones.[85] Article 17 therefore does not seem to provide effective safeguards on the well-established economic impacts of the new liability regime.

[82] Case C-70/10 Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) [2011] ECR I-11959, par. 20.

[83] Ibid, par. 48.

[84] Ibid, par. 54.

[85] Reda, Selinger and Sevatius (n 76) P. 43.

3.2.5 The right to freedom of expression and information

The right to freedom of expression and information is codified into the CFR in Article 11 and is directly related to the right to freedom of expression provided by the European Convention of Human Rights in its Article 10. The Convention took effect in 1953 and is mandatory for all members of the Counsel of Europe, regardless of their status as a member of the European Union. The effect of the Convention in the CFR is laid down in Article 53 of the CFR, where it is provided that "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.".

To that extent, a review of the interpretation given to the freedom of expression by the European Court of Human Rights (whose jurisdiction is attached to the Convention) is granted. In *Fredrik Neij and Peter Sunde Kolmisoppi v. Sweden* (40397/12), The operators of a content sharing website who were convicted for damages over the illegal sharing of copyright protected work on the platform, claimed that such a conviction impacted their right to freedom of expression under Article 10 of the Convention. Highlighting the importance of the internet in the dissemination of information, the Court went to find that the freedom of expression also extends to service providers as "any restriction imposed on the means necessarily interferes with the right to receive and impart information"[86].

In similar spirit, the CJEU accredited service providers with the freedom of expression and information. Again in *Scarlet Extended*, the Court found that the imposition of filtering restrictions towards an online platform could impact such a freedom in case an adequate distinction between illegal and legal content being uploaded is impossible.[87] The Court furthermore recognizes the difficult task of making such a distinction, observing that statutory exceptions and free uses of copyright protected material further complicates such filtering capabilities.[88]

[86] Neij and Sunde Kolmisoppi v Sweden [2013] ECHR.40397/12, Section A.

[87] Scarlet extended (n 82) par. 52 – 53.

[88] Ibid, par 47-48.

Furthering this *rationale,* Advocate General Villalón provided in the case that "no filtering and blocking system appears able to guarantee, in a manner compatible with the requirements of Articles 11 and 52 (1) of the CFR, the blockage only of exchanges specifically identifiable as unlawful"[89].

Once again, the legislator of the CDSM Directive seem to have taken knowledge of these issues, as Article 17(7) provides that the liability framework "shall not result in the prevention of the availability of works (…) 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". Furthermore, as recital 70 of the directive indicate, the freedom of expression is of special concern in its applicability:

> Users should be allowed to upload and make available content generated by users for the specific purposes of quotation, criticism, review, caricature, parody or pastiche. That is particularly important for the purposes of striking a balance between the fundamental rights laid down in the Charter of Fundamental Rights of the European Union ('the CFR'), in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property

Despite its mentioning of a duty to care for such rights and freedoms, these provisions of the Directive again fall short of developing *ex ante* mechanisms in which such a balance may be achieved while preventive filtering is applied. As a result, scholars have suggested that the practical necessity of flawed filtering systems would lead to *de facto* abuse on freedom of expression by the overblocking of legitimate content.[90]

3.3 The Case of Poland v Parliament and Council

To the backdrop of fundamental rights concerns, Poland brought action to the CJEU. In its plea, the Member State sought the annul Article 17(4) in its points (b) and (c) or, alternatively, annul Article 17 in its entirety. Despite the potential existence of effects to other fundamental rights, the plaintiff chose to challenge

[89] Opinion of Mr Advocate General Cruz Villalón. Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) [2011] par, 86.

[90] Reda at al (n 76) p.32 – 41.

Article 17 only to the extent that it would violate the freedom of expression and information, provided by Article 11 of the Charter of Fundamental Rights of the EU. In such, Poland's claims resemble that of past doctrine and case-law developed before and throughout the process of introduction of the new directive. Namely, it was asserted that points (b) and (c) imposed a *de facto* obligation to monitor and filter content before its upload to the services of OCSSPs. The Member State also pointed to a lack of safeguards, which would make the contested provision unjustifiable under the principle of proportionality and the established case law of the Court.[91]

At first, the Court recognized the legitimacy of part of Poland's claim. In respect to the case-law developed by the European Court of Human Rights, it was asserted that internet service providers are indeed entitled to protection of freedom of expression.[92] Moreover, the Court agreed that Article 17 entails to a *de facto* duty "to carry out a prior review of the content that users wish to upload to their platforms."[93]. On this matter, it was recognized that automatic filtering tools would often be the only option, as no defendants were able to present alternatives to such an approach.[94]

The CJEU went to find that the implementation of upload filters may restrict the dissemination of content online and, therefore, constitute a limitation on the right of freedom of expression. As a direct consequence of the new liability regime of Article 17, such a limitation on freedom of expression would also be attributable to the EU legislature, which is therefore impacted by the practical consequences of the framework.[95] The Court however observed that limitations on fundamental rights are foreseen by Article 52(1) of the CFR, so long as it is provided by law, respects the essence of the rights and freedoms, and respects the principle of proportionality. The Court responded in favour of Article's 17 compliance with such requirements, stating, in general, that:

[91] Poland v European Parliament and Council (n 6) par.12 – 24.
[92] Ibid par.46.
[93] Ibid par.53.
[94] Ibid par.54.
[95] Ibid par. 55 – 56.

1. The limitation is provided by law, as prior screening results from the provision.[96]

2. The essence of the freedom of expression is respected, given the statement of Article 17(7) that legal content, including the ones covered by exceptions, shall not be affected.[97]

3. The principle of proportionality is respected, insofar as:

(a) The mechanism of content moderation is both adequate to reach its goals and necessary, given its effectiveness in large-scale content sharing.[98]

(b) The balance of rights is respected, as the "EU legislature laid down a clear and precise limit, by excluding, in particular, measures which filter and block lawful content when uploading."[99]

The Court then concludes its judgement rejecting Poland's plea, asserting that the new liability regime shall maintain its validity:

> [the filtering obligation] has been accompanied by appropriate safeguards by the EU legislature in order to ensure, in accordance with Article 52(1) of the CFR, respect for the right to freedom of expression and information of the users of those services, guaranteed by Article 11 of the CFR, and a fair balance between that right, on the one hand, and the right to intellectual property, protected by Article 17(2) of the CFR, on the other.[100]

In essence, the Court ruled that Article 17 is to be interpreted as only allowing for the implementation of filtering mechanisms that correctly differentiate between lawful and unlawful content (to the contrary, the targeting would be general, and therefore affect the essence of other fundamental rights). On this regard, Quintais poses that the Court's ruling suggests that only "obviously", or "manifestly" infringing content may be blocked *ex ante*[101], which aligns with the

[96] Poland v European Parliament and Council (n 6) par.72.

[97] Ibid par.76 – 80.

[98] Ibid par.94.

[99] Ibid, par. 85.

[100] Ibid par.98.

[101] Ibid.

Guidance from the Commission.[102] On the other hand, The Guidance had added the possibility of rightsholders to prevent uploads with a high degree of economic impact (also known as "earmarked" content) more easily, which has seemingly not been accepted by the Court.[103]

Most importantly, scholars have pointed that this interpretation alone does not resolve the practical issues of automated filtering.[104] As previously discussed, the contextual nature on the use of copyright protected material poses a technical barrier to the automated distinction of unlawful from lawful content, especially in case of legal exceptions. While platforms are seemly required to incorporate these tools under Article 17(4)(b)), the implementation of these imprecise automated technologies would lead to overblocking and fundamental rights' unbalances under the interpretation of the CJEU. Valuable substantive safeguards must therefore provide for ways in which such a balance can be struck in compliance with both Article 17(4) and 17(7).

To this regard, Jütte describes the ruling as anticlimactic, claiming that "instead of describing how effective user safeguards must be designed, [it] merely underlines that these safeguards must be implemented in a way that ensures a fair balance between fundamental rights."[105] In the view of Reda, Selinger and Sevatius, this generality of safeguards, although seemly compliant with the nature of directives, cannot be grounded in case-law developed by the Court before on the protection of fundamental rights, and that the legislator has failed to fulfil its responsibilities.[106] In the case of Digital Rights Ireland, for instance, the Court seem to have held more demanding standards for "clear and precise" safeguards, when it upheld the arguments of the Advocate General:

> [The legislature] cannot content itself either with assigning the task of defining and establishing those guarantees to the competent legislative and/or administrative authorities of the Member States called upon, where appropriate, to adopt national measures implementing such an act or with relying entirely on the judicial authorities responsible for reviewing its practical application. It must, if it is not to render the provisions of Article 51(1) of the CFR meaningless, fully assume its

[102] Guidance (n 42), p.13.

[103] João Pedro Quintais. 'Between Filters and Fundamental Rights How the Court of Justice saved Article 17 in C-401/19 - Poland v. Parliament and Council' (verfassungsblog, 16 May 2022).

[104] Ibid.

[105] Jütte (n 56).

[106] Reda et al, (n 76) p.32.

> share of responsibility by defining at the very least the principles which must govern the definition, establishment, application and review of observance of those guarantees.[107]

The scope of the judgement also leaves some of the fundamental rights concerns unanswered, such as that of data protection and the freedom to conduct a business. Arguably, this is not to the detriment of the judgement in itself, as the Court did respond to all the pleas brought up by the Member State. On the other hand, an opportunity to answer all concerns before most countries implement the directive has been clearly missed. As a result, it continues to be unclear if the Court would find the economic impact or data processing of these filtering mechanisms to be acceptable under the requirements of Article 52(1) CFR.

It must be noted that, regardless of the assessment if the existing safeguards in Article 17 comply with the minimal thresholds established by the Court's case law, an essential issue persists. *Ex ante* safeguards in the new directive mostly consist of *obligations of result*, which, in the view of Reda, Selinger and Sevatius, lack practical enforceability and pose practical risks to fundamental rights.[108] In this scenario, the Court seem to have chosen to follow the same path as the directive itself, offering "flexibility" for Member States to develop more substantive measures themselves. The extent to which this flexibility resulted in substantive safeguards in the domestic level will be object of study later.

[107] Opinion Of Advocate General Cruz Villalón in Case C-293/12 (2012) Par. 120.

[108] Reda et al (n 76) p.40.

4. Developments on the "substance" of safeguards in Article 17

4.1 Indirect substance: the Digital Service Act as a new horizontal framework

In 2022, the EU Parliament and Council approved a new Regulation which updated the long-standing e-Commerce Directive. The Digital Services Act (DSA) is part of a package alongside the Digital Markets Act (DMA) brought by the block to further harmonise aspects of its internal digital market, such as rules for intermediaries and illegal content.[109] As Recitals 3 and 4 of the DSA contend, responsible behaviour by service providers on the digital space is essential for guaranteeing fundamental rights in the Union, thus "targeted set of uniform, effective and proportionate mandatory rules should be established".[110]

As it is the case with the e-Commerce Directive, the new regulation is applicable to a larger number of online intermediaries than Article 17 CDSMD, which is limited to OCSSPs. As such, it is also a horizontal regulation, covering a wide array of rules for intermediaries and unlawful content, divided into the chapters of "liability of providers" (Chapter 2), "due diligence obligations" (Chapter 3) and enforcement (Chapter 4). As a result, the DSA is *lex generalis* to the CDSMD in matters relating to the liability of OCSSPs. This setup is directly evidenced by Article 2(4)(b), when stating:

> This Regulation is without prejudice to the rules laid down by other Union legal acts regulating other aspects of the provision of

[109] European Commission, 'the Digital Services Act Package'.

[110] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance) OJ L 277. Recital 4.

> intermediary services in the internal market or specifying and complementing this Regulation, in particular, the following:
> (…)
> (b) Union law on copyright and related rights;
> (…)

In first sight, the applicability of the DSA within the scope of Article 17 would seem to be contrary to the legislator's intentions. However, as provided by recital 10, the DSA may still be applicable where the issue has not (either partially or fully) been addressed by the specialized act, or where such act leaves Member States to implement measures which are otherwise provided by the DSA.

In this scenario, two of the chapters would bear special relevance in regard to safeguards under Article 17, if they are found to be applicable. Chapter II on the "liability of providers" mimics a lot of what the e-Commerce Directive offered, including the safe-harbour provisions[111]. These are, just as they were with the E-commerce Directive, expressively set aside by Article 17(3), but could also be deduced from its *lex generalis* nature.

Later in Chapter II, Article 7 describes the possibility of voluntary investigation and compliance, referring directly to measures for making unlawful content unavailable and its possibility under the safe harbour provisions. Although the direct mention of the previous liability regime, Quintais claims that these voluntary measures can still be found to be applicable, so long as the voluntary measures in question surpass the "best efforts" exceptions of Article 17(4). However, the "case-by-case" nature of these liability exceptions makes it difficult to assess with precision when such a scenario would happen, and, most importantly, if a unified approach between Member States would ever exist.[112]

Given a lack of specific provisions on the matter in Article 17, the rules on orders against illegal content and to provide information of Articles 9 and 10 seem more likely, in practice, to be applied. These provisions are applicable to procedural rules on injunctions and how the platform shall respond to them. Similarly, Quintais argues that the ban on general monitoring in Article 8 seems to be applicable, as the "merely declaratory nature" of this same provision in Article 17 CDSMD does not cover the full scope given by the DSA when it provides that " no general obligation

[111] DSA (n 110) Articles 4 – 6.

[112] Quintais and Schwemer (n 7) p.207.

to monitor the information which providers of intermediary services transmit or store, nor actively to seek facts or circumstances indicating illegal activity shall be imposed on those providers.".[113]

Chapter III of the DSA departs from liability rules to describe due diligence obligations towards service providers. Most notably to OCSSPs, detailed rules on notice mechanisms, internal complaint systems, and dispute settlement are provided. For instance, while the CDSM Directive limits itself to requiring platforms to disclose to which extent users may share copyright protected works, Article 12 of the DSA oblige all intermediary services to be transparent about the banned content, potential blocking systems, and complaint mechanisms, for which specific procedural rules must be laid out in a user-friendly manner. In a similar complementary fashion, Articles 16 and 17 DSA go beyond the Article 17(9) CDSMD by providing specific elements which must be present in take-down notices sent to platforms and state of reasons to affected users. According to Quintais, the applicability of these provisions is therefore granted by the discretion that Member States would have in developing these specific safeguards in absence of the DSA.[114]

Furthering the availability of measures, the DSA provides intermediaries with the possibility of implementing systems of trusted "flaggers of illegal content", as well as applying suspensions and other measures to uploaders who "frequently provide manifestly illegal content". On the other hand, stronger control is imposed on what is referred to as "very large online providers" (VLOPs), who must conduct regular risk assessments and other measures to ensure a timely and quality response to notices and complaints.[115]

The DSA also provides for detailed specific measures relating to *ex post* mechanisms which could complement Article's 17 CDSMD liability framework. Furthering the declaratory disposition of Article 17(9), Articles 20 and 21 DSA require the assessment of complaints by staff members (and not automated mechanisms) and create certain timelines to be fulfilled in the process. Furthermore,

[113] DSA (n 110) Article 8.
[114] Quintais and Schwemer (n 7) p.210.
[115] DSA (n 110) Article 50.

obligations are set for Member States to appoint "Digital Services Coordinators" to overview, report, and certify alternative dispute resolution mechanisms to be made available to impacted parties.[116]

Overall, it is clear that the DSA should be applicable where the CDSMD fails to establish specific substantive safeguards. As provided by Jütte, "the DSA rules must form the floor of safeguards that Member States have to provide, and which should be elevated in relation to the activities of OCSSPs."[117]. In relation to *ex post* measures, the Regulation seem to have established several actionable safeguards, including mechanisms for overviewing the efficacy of dispute and complaint systems which are put in place. To this regard, it appears that the DSA successfully gives practical and harmonised rules on the matter.

Nevertheless, it could be disputed that the Regulation does not present an answer (arguably, of which it never intended) to some of the important questions left by the legislature and the CJEU about Article 17's liability exceptions and the lack of practical *ex ante* safeguards. Although it provides for several relevant tools, the DSA does not seem to further definitions to concepts such as "high industry standards", nor does it provide for actionable guidelines for platforms to correctly target infringements.

4.2 Direct substance: The different approaches to implementing Article 17

As seen in past sections, the timeline of legal developments relating to Article 17 and its relationship with fundamental rights has been permeated by directives, regulations, judgments, and guidances. These instruments of law have not only left relevant portions of the interaction between the new liability regime and fundamental rights unanswered, but in many cases were inconsistent among themselves when doing so. Member States have therefore been left with a complicated task of advancing the matter themselves, while having a regard for the harmonisation aims which gave birth to the CDSM Directive in the first place.

[116] DSA (n 110) Article 21(4).

[117] Jütte (n 56).

In an overview, 22 EU Member States have implemented Article 17 CDSMD into their domestic framework so far, while 6 countries have their processes underway.[118] Despite having an implementation deadline set to 7 of June 2021, many countries choose to wait[119], which could allow for the case of *Poland v Parliament and Council* and the Commission's Guidance to influence transpositions. However, to the most part, a look into national strategies indicate such a delay did not result in more detailed transpositions, nor a harmonised approach.

Firstly, this study identified that out of 22 Member States, a total 18 largely restates the original text of the directive. Countries such as Spain, France, Ireland, Croatia, and the Netherlands do not provide for any additional safeguards for fundamental rights[120]. On the other hand, some countries, such as Belgium and Hungary provide for slightly more detailed *ex post* safeguards, such as rules for mediators in out-of-court settlements and collective redress mechanism[121], while still leaving most of the provision untouched. Most surprisingly, the replicated vagueness which characterized the original text of Article 17 indicate that, faced with the task of evaluating diverging arguments and interpretations, Member States may have chosen to side with none at all.

Other Member States, however, have transposed Article 17 with further reaching and more descriptive safeguards, such as Germany, Austria and most recently, Sweden. These approaches have nuances which are relevant to a broader analysis of how fundamental rights can be accounted for in the implementation process, warranting them a more detailed analysis.

[118] COMMUNIA, 'DSM Directive Implementation Portal'.

[119] Ibid.

[120] In order, Decreto-ley 24/2021, projet de loi n°2488 relatif à la communication audiovisuelle et à la souveraineté culturelle à l'ère numérique, S.I. No. 567 of 2021, 50301-04/25-21-12, Besluit van 18 december 2020 tot vaststelling van het tijdstip van inwerkingtreding van de Implementatiewet richtlijn auteursrecht in de digitale eengemaakte markt.

[121] Economie. 'European Directive on copyright and related rights in the Digital Single Market – transposition in Belgian law'.

4.2.1 The German approach

Amid a large public interest on the topic, the German process of implementation was constituted by several drafts, each accompanied by comments and consultations on stakeholders[122]. In this scenario, a special regard to the contents of Article 17 was shown with the decision to implement it independently from the rest of the directive. In 2021, the *UrheberrechtsDiensteanbieter-Gesetz* (UrhDaG) was approved after extensive discussions in both chambers of Parliament.[123] With 22 sections divided into the themes of authorized uses, unauthorized uses, presumably authorized uses, and legal remedies a lot of gap-filling has been performed by the Member State.

Section 1 of the UrhDaG gives an overview of the new liability regime. Like Article 17, it provides that OCSSPs perform a communication to the public when giving access to copyright protected material. Liability is imposed for infringements of copyright in the same terms as in the CDSMD, while the ”best efforts” exceptions where broadened and further detailed. Firstly, Sections 4(1) and 4(2) relate to paragraph 4(1) of Article 17. Instead of simply stating the necessity of attempting to obtain an authorization, the UrhDaG provision describes what would in fact constitute an acceptable authorization, such as those directly offered to them, or which are obtained through representatives and collecting societies.[124]

As in Article 17(7), the exempted uses such as quotation and parody are also provided by the German transposition. Mentioning “uses authorized by law”, Section 5 makes reference to such exceptions and the need for them to be clearly laid down under the platforms’ terms and conditions. At the same time, it provides for greater protection to authors by requiring OCSSPs to pay them an “appropriate remuneration for the communication to the public pursuant to subsection (1) no. 2”.[125]

[122] COMMUNIA portal (n 118).

[123] Ibid.

[124] Act on the Copyright Liability of Online Content Sharing Service Providers of 31 May 2021 (Federal Law Gazette I, p. 1204, 1215) [2021], Section 4(1) and 4(2).

[125] Ibid, Section 5(3).

Next, Part 3 (Sections 7 and 8) on "unauthorized uses" once more bear close resemblance to those of the CDSMD (in Articles 17(4)(b) and (c)), but provide for a more convoluted framework. Namely, Section 8 on "simple blocking" require platforms to act on notices from rightsholders on illegal content (take-down notices), while Section 7 on "qualified blocking" establishes rules for preventive filtering. Notably, the German Act expands on exceptions for small OCSSPs to whom the obligation to implement preventive filtering measures is not applicable. Instead of targeting only young, high growth platforms, it is provided that any service provider with an annual turnover under one million euros shall be benefited from the exemption.[126]

Arguably, the most relevant German addition to its transposition are detailed rules specifically towards automatic filtering mechanisms, to which special attention is granted to "avoid disproportionate blocking". Part 4 of the UrhDaG provides that the use of less than half of an author's work combined with other content is to be regarded as "presumably authorised by law"[127]. The upload must also have been flagged as being covered by an exception by users or be considered of "minor extent" to which the law provides a in-depth explanation:

> The following uses of works are deemed to be minor [...], provided that they do not serve commercial purposes or only serve to generate insignificant income:
> 1. uses of up to 15 seconds in each case of a cinematographic work or moving picture,
> 2. uses of up to 15 seconds in each case of an audio track,
> 3. uses of up to 160 characters in each case of a text, and
> 4. uses of up to 125 kilobytes in each case of a photographic work, photograph or graphic[128]

Arguably in line with the Commission's Guidance[129], these guidelines form an *ex ante* safeguard framework that could potentially diminish the complexity and need for contextual analyses when asessing the lawfulness of uploads. As a result, the concept of "obvious" infringements, which appear as a requirement for automated filtering from the *Poland v Parliament and Council* case gain better delimitation and may allow for OCSSPs to operate under greater legal certainty.

[126] UrhDaG (n 124), Section 7(5).

[127] Ibid, Sections 9 – 12.

[128] Ibid, Section 10.

[129] Guidance. (n 42) p.20 - 22.

Lastly, the German Act also describes several *ex post* safeguards. The "legal remedies" of Section 5 range from specific internal complaint procedural rules to the possibility of using external bodies and arbitration institutions as alternative dispute resolution mechanisms. Furthermore, penalties for repeated incorrect reporting of lawful content by flaggers and rightsholders are described.[130]

4.2.2 Ex ante safeguards in Sweden and Austria

Later than the German process, The Swedish implementation of Article 17 was approved by parliament in November 2022, taking effect 2 months later in January 2023. The Swedish approach differs from that of Germany in that it only updates the past act on copyright (Lag 1960:729 om upphovsrätt till litterära och konstnärliga verk), including all changes related to the CDSM Directive.

In general, the Swedish implementation appears to be aligned to the *Poland v Parliament and Council* case, as it expressively provides that automatic filtering can only be employed to prevent access to content with a high probability of infringement, and any blocking of lawful content (including in scenarios of reviews and criticism) must take place to an insignificant extent.[131] However, no detailed standards are provided on what OCSSPs are to find an "obvious infringement". On the *ex post* end, Section 52 q provides for the availability of an internal complaint mechanism in line with Article 17(9) CDSMD. The following provisions then detail the penalties for overblocking[132] and corrective actions[133].

On a final note, not all implementations with more descriptive liability and safeguard structures do so in compliance with the CJEU ruling in *Poland v Parliament and Council*. As stressed by Reda and Keller, although the Austrian transposition provides for more overblocking safeguards and implements a sanction system against it, it also requires mechanisms of "earmarking". As previously exposed, the possibility for rightsholders to gain special protection against highly

[130] UrhDaG (n 124), Sections 13 – 17.

[131] Lag om upphovsrätt till litterära och konstnärliga verk [1960] 1960:729 Section 52 o.

[132] Ibid, Section 52 r.

[133] Ibid, Section 52 s.

damaging infringements was first proposed by the Commission in its Guidance, but later rejected in the *Poland v Parliament and Council* case.[134]

4.2.3 Preliminary outcomes of the implementation process

Since the *Poland v Parliament and Council* case, it was clear to scholars that the answers to the practical relationship between the new liability regime and fundamental rights had been left for Member States to resolve.[135] At first sight, this responsibility was denied by the national legislators, as a large majority of states implemented Article 17 in a "copy-and-paste" approach. This is not to be treated as an uncommon practice when Member States implement EU Directives.[136] However, developing substantive and actionable safeguards to the new liability framework has been shown to be an indispensable condition to achieve the balance between property rights and the other fundamental rights that are subject of this study. As a result, most Member States' legislatures may have left the matter to be resolved by judges in the domestic level, or OCSSPs themselves.

Germany, Sweden and Austria represent a different approach, as attention to the ruling from the CJEU and Commission Guidance can be spotted in their implementations. On that, the three countries have established *ex ante* safeguards, but Germany seems to have made the most detailed and nuanced attempt at balancing fundamental rights. It did so by providing actionable and quantifiable *ex ante* safeguards in which platforms can base themselves in designing automated filtering mechanisms which comply with the "obviousness" requirement derived from the Polish challange to Article 17. By diminishing the contextual component of copyright use exceptions, the German approach may have also made it possible for automated filtering technologies to correctly distinguish between lawful and unlawful content within the limits of their tecnical constraints. In this scenario, aided by the extended exception to small OCSSPs, this approach seemingly

[134] Felix Reda and Paul Keller, 'CJEU Upholds Article 17 but not in the form most Member States imagined' (Kluwer Copyright Blog, 28 April 2022).

[135] Ibid.

[136] Madiega (n 25), p.148.

provides for the highest chance of respecting the core of freedom of expression, freedom to conduct a business, and the right to data protection.

Ex post mechanisms have been granted procedural guidelines in all three countries. They describe many recourses for both users and rightholders to resolve disputes, such as internal complaints, the use of external bodies in dispute resolution, injunctions, penalties, and supervising rights. However, the positive impact of these provisions may be seen as more limited than those of *ex ante* measures, as the DSA has been shown to provide basic procedural rules for transpositions which do not venture into *ex ante* safeguards.

Although some of the implementation processes demonstrate what a balanced approach to fundamental rights *can be* in the legislative level of the new liability framework, the fact remains that most Member States have left the matter to be resolved in a later stage.[137] Naturally, this creates an unbalance that, by itself, could violate the very aims of the directive in working towards a ”Digital Single Market”. In light of this, a successful balancing of fundamental rights under the CDSM Directive must also be construed in the context of a harmonised EU implementation, as properly evidenciated by the CDSM Directive in Article 17(10).

4.3 Balancing fundamental rights: the way forward

On the analysis of Article 17 and fundamental rights going forward, this study identifies two separate questions to be answered: what *will* happen now, and what *should* happen going forward. The answer to the latter requires an objective, which shall be, as set out by the purpose of this study, the balancing of fundamental rights in the European Union.

Firstly, it is natural to believe that gaps in the safeguards of Article 17 will soon permeate preliminary references to the CJEU. However, assuming that the Court would be willing to engage more thoroughly into the essential definitions surrounding the topic and provide for the harmonisation of essential definitions, the

[137] Reda and Keller (n 134).

problem persists that the process of giving systemic and actionable standards to the safeguards will take a long time. In the environment of continuous and fast-paced internet relations, scholars have proposed that such a timescale may not suffice.[138]

In the short term, the COMMUNIA association[139] regards that the German implementation will become a *de facto* guidance for platform who seek compliance with Article 17 CDSMD. In this scenario, OCSSPs which operate in multiple European markets could see the benefits of becoming compliant under the German standards as a single strategy. As most other Member States, The German UrhDaG restates the mandatory provisions of the CDSMD, to which it adds extra requirements. As a result, mechanisms in compliance with the German law would likely be effective EU-wide.[140]

While the uniqueness of the German implementation was true at its entry into effect, this is not the case anymore. As previously demonstrated, other Member States (Namely, Sweden and Austria) have incorporated *ex ante* and *ex post* safeguards into their transpositions. This strategy could therefore lead to issues where these implementations effectively diverge, such as in timeframes for action on complaints and the scope of affected service providers. Moreover, as stated by Advocate General Øe in the *Poland v Parliament and Council* case, the limits to automatic filters should not be left with service providers. Under the important task of balancing fundamental rights, "the process should be transparent and under the supervision of public authorities."[141].

As a result of this perception, some scholars have proposed institutional approaches to the problem. As held by Jütte, an institutional answer to the problem could be developed from the DSA. Namely, the Digital Service Coordinators which are focused on the supervision of *ex post* measures of the DSA could in practice be also implemented to supervise the CDSMD framework and its relationship with

[138] Christophe Geiger and Bernd Justin Jütte 'Constitutional Safeguards in the Freedom of Expression Triangle: Online Content Moderation and User Rights after the CJEU's Judgement on Article 17 Copyright DSM Directive' (Kluwer Copyright Blog, 6 June 2022).

[139] The COMMUNIA association is a private institution that has been active on the debate of fundamental rights and Article 17 CDSMD.

[140] Communia Association, 'German Article 17 Implementation Law Sets the Standard for Protecting User Rights Against Overblocking' (Communia Association, 20 May 2021).

[141] Opinion of Advocate General Saugmandsgaard Øe. Republic of Poland v European Parliament and Council of the European Union [2021] ECLI:EU:C:2021:613, par. 202.

fundamental rights[142], "after all, the problems raised by various types of 'problematic' content are similar to a certain extent, at least as far as their EU law dimension is concerned."[143]

Still, it is hard to see how this approach, which is based in control on the domestic level, could lead to a harmonised framework to the fundamental rights safeguards of Article 17. For such, an international institution with EU-wide operations would be essential, performing duties in many fronts of the new liability framework. To this end, three main areas of action appear to be essential in defining basic standards of enforcement.

In relation to *ex ante* measures, such a body could work towards common understandings of essential concepts and general quantifiable exception thresholds between Member States' political institutions. As previously shown, the application of safeguards to the new liability framework developed a dependence on concepts such as "manifestly infringing", which by themselves do not offer actionable paths for platform compliance. Furthermore, it is essential that such a body would develop practical legal thresholds for exemptions which can be implemented into automated filtering technologies. As such, an EU body could be tasked with establishing active dialogue between Member States and coordinate the supplementation of the domestic transpositions in line with these discussions.

Furthermore, on the enforcement of *ex post* measures, the CDSMD accredits Member States with the responsibility of making out-of-court redress mechanisms available[144]. Yet, an EU body could serve as a centralized supervisor, directly licensing, vetting, and reporting on the operations of private third parties which provide these services. Additionally, such an institution could centralize and streamline the cooperation between domestic Digital Services Coordinators at the Union level, as provided by Article 38(2) of the DSA.[145]

[142] Jütte (n 56).

[143] Ibid.

[144] CDSM Directive (n 6) Article 17(9).

[145] "Digital Services Coordinators shall cooperate with each other, other national competent authorities, the Board and the Commission".

Finally, it is necessary to recognize that the legal issues of the digital space evolve alongside technology itself,[146] and its impact in the interests of the public has been a central part of this study. As established by Article 11 of the Treaty on European Union, "The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.". It follows that the development of these measures at the EU-level require not only transparency, but a permanent public forum for discussions between stakeholders in a level playing field.

[146] Giovanni De Gregorio and Roxana Radu. Digital constitutionalism in the new era of Internet governance. (2022) International Journal of Law and Information Technology. p.68 – 70.

5. Summary and conclusions

This thesis aimed at evaluating the protection of fundamental rights within the new liability framework towards intermediaries of Article 17 CDSMD. In doing so, Chapter 2 first demonstrated that attempts to harmonise copyright standards internationally gained traction with the Berne Convention, where minimum protection parameters and limitations thereof were present. With regards to other international instruments such as the WIPO Copyright Treaty, the European Union would later adopt some of these principles in its own legal framework, as the Charter of Fundamental Rights of the European Union protects copyright under the right to property, while the InfoSoc Directive makes descriptions of specific rights, limitations, and exceptions.

Meanwhile, the e-Commerce Directive provided for a liability framework for "service providers". Its "safe harbour" provisions meant that these providers could only be found liable if they had knowledge or *direct and active* involvement in the transmission of infringing material. Rightsholders would later protest that uploads of infringing content to online platforms were hard to counterbalance, generating no economic benefits but to platforms themselves. This *phenomenon* known as "value gap" influenced the EU legislature in reformulating the liability framework for intermediaries in a new Directive.

Responding to the first research question of this study (*what are the defining features of the new liability framework of article 17 CDSMD and its relation to fundamental rights?*) Chapter 2 demonstrated that Article 17 of the CDSM Directive provides that certain online service providers (OCSSPs) are to be held liable when providing the public with unlawful access to copyright-protected works. As such, Article 17 replaces the previous safe harbour with narrower set of exceptions, in which liability can only be evaded if OCSSPs demonstrate that they made "best efforts" to obtain authorization, acted to prevent the availability of the works, or acted to disable such access on notice from rightsholders. Anticipating

potential unbalances between fundamental rights, Article 17 also requires Member States to provide for certain safeguards.

As demonstrated in Chapter 3, fundamental rights concerns in the new framework arise from the practical necessity of OCSSPs to implement automated preventive filtering technologies in order to avoid liability. The use of such filters has been proven by rulings of the CJEU and ECHR to severely affect other fundamental rights, such as the freedom of expression, the freedom to conduct a business, and the right to data protection. In this scenario, the CJEU held successively that only filters "targeted" at illegal content and that could properly distinguish them from lawful uses would provide for a balance between fundamental rights.

It has been found that, given the contextual nature of use exceptions in copyright, filtering systems would not be effective in such distinction without more descriptive procedures for compliance. In this regard, none of the safeguards present in Article 17 have been found to provide for remedies to this issue *ex ante*, as they mostly institute obligations of result. On the matter, the recent ruling of the CJEU, while upholding such obligations of result as sufficient, does not provide for how OCSSPs may in practice comply with such requirements, leading to uncertainties that may result in overblocking. In light of this, the lack of *ex ante* rules governing the implementation of filtering systems has been found to be the main concern in the intersection of Article 17 and fundamental rights.

As a first recourse to this issue, this study has analysed the recent Digital Services Act. It has been found that the DSA shall be applicable to OCSSPs where the CDSM Directive is fully or partially silent, as well as where the directive leaves measures to be developed by Member States. As such, several provisions relating to due diligence, injunctions, and notice/complaints procedures, could be applied. Altogether, these provisions significantly develop the availability of specific procedural rules for *ex post* measures, but do not provide for the same detail on *ex ante* rules for implementing compliant filtering systems.

In response to question 2 (*How has the implementation process of Article 17 affected the balance between fundamental rights?*), Chapter 4 has proven that previous considerations from scholars, the Commission, and the CJEU were not

upheld by most Member States, as the majority of them have largely restated Article 17 in their transpositions. On the other hand, Germany, Austria and Sweden provided for more detailed approaches that included extra *ex ante* safeguards. In this regard, Germany's implementation stands out for including quantifiable "presumably lawful uses" and imposing requirements for platforms to allow users to indicate exceptions on their uploads. As a result, the German act diminishes the contextual complexity involved in automated filtering systems which can potentially avoid the overblocking of lawful content and, therefore, the unbalance of fundamental rights.

Finally, responding to question 3 (*What can be expected of their interactions going forward?*), Chapter 4 has demonstrated that the vagueness and lack of harmonisation of domestic implementations of Article 17 will result in references to the CJEU in the future. Although the Court may provide for gradual clarifications and actionable guidelines on the interpretation of Article 17, these developments may take too long to keep up with technological mechanisms and new digital challenges. As a result, the development of an EU centralized body for the coordination of safeguard supplementation may be the most effective way of ensuring the balance of fundamental rights. To be successful, such an institution has to serve as a forum for stakeholder discussions and provide Member States with a harmonised interpretations of the new liability framework in a way to supplement the existing transpositions of the CDSM Directive.

On a final note, it is clear that no parties benefit from the substantive uncertainties of the new liability framework. On one hand, OCSSPs face great legal uncertainty in designing compliance mechanisms, while users may observe high levels of overblocking and consequent issues relating to fundamental rights. Also affected, the European Union and its Member States may see their efforts to bring forward a "Digital Single Market" diminished by a lack of harmonised approaches to its essential features. As such, while this study points to fundamental characteristics for an effective regulatory body, routes for its implementation and general administrative regards must be further developed by active and broad discussions between these social actors and *academia*. This way, rules on the functioning of such a body are likely to better translate the many interests involved in the protection of different fundamental rights and political aims of the EU.

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