Obligations Imposed on Online Content-Sharing Service Providers and Freedom of Expression and Information

Judgment of the Court of Justice of the European Union of 26 April 2022, C-401/19[1]

The obligation on online content-sharing service providers to review, prior to its dissemination to the public, the content that users wish to upload to their platforms, resulting from the specific liability regime established in Article 17(4) of Directive 2019/790, and in particular from the conditions for exemption from liability laid down in point (b) and point (c), *in fine*, of Article 17(4) of that directive, has been accompanied by appropriate safeguards by the EU legislature in order to ensure, in accordance with Article 52(1) of the Charter, respect for the right to freedom of expression and information of the users of those services, guaranteed by Article 11 of the Charter, and a fair balance between that right, on the one hand, and the right to intellectual property, protected by Article 17(2) of the Charter, on the other.

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Commentary

1. Legal framework of online content-sharing service providers' liability

Directive 2019/790[2] was enacted to harmonize and modernize the copyright framework within the European Union's internal market, addressing the challenges posed by rapid technological advancements and the digital environment. The objective of Directive

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[1] ECLI:EU:C:2022:297.

[2] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, pp. 92–125.

2019/790 is also to balance the protection of rightholders with the promotion of cultural diversity and access to content and to reduce legal uncertainties concerning the use of works in digital and cross-border contexts, ensuring a fair, well-functioning marketplace for copyright.[3] Article 17, which stands out as the most controversial provision of this Directive and serves as the foundation for the judgment under review, pertains to the liability of online content-sharing service providers (OCSSPs). Until Article 17 entered into force, the liability of OCSSPs for giving the public access to protected content, uploaded to their platforms by their users in breach of copyright, was governed by Article 3 of Directive 2001/29[4] and Article 14 of Directive 2000/31.[5] Previously, service providers were exempt from liability, on the condition that: (a) the provider does not have actual knowledge of illegal activity or information and as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.[6] In the YouTube and Cyando ruling,[7] the Court of Justice of the European Union (CJEU) also clarifies that, in accordance with Article 3(1) of Directive 2001/29, the operator of a video-sharing platform or a file-hosting and file-sharing platform, on which users can illegally make protected content available to the public, does not make a "communication to the public" of that content, unless it contributes, beyond merely making that platform available, to giving access to such content to the public in breach of copyright. However, as indicated in recital 61 and 66 of Directive 2019/790, such rules of liability of service providers had to be modified due to recent changes in the functioning of the online content marketplace. The EU legislature decided that, since content-sharing services providing access to a large amount of copyright-protected content have become a main source of access to content online, it was necessary to provide a specific liability mechanism in respect of the providers of those services in order to foster the development of a fair licensing market between rightholders and those service providers. Instead, the mechanism introduced by Article 17 stipulates that the OCSSPs perform an act of communication to the public or an act of making available to the public when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users and that it must, therefore, obtain an authorisation from the rightholders for that purpose, for instance by concluding a licensing agreement. Accordingly, the awareness of OCSSPs that the files to which it has granted access contain illegally distributed works is irrelevant to its liability. In

3 Recitals 1–3 of the Directive 2019/790.

4 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, OJ L 167, 22.6.2001, pp. 10–19.

5 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, OJ L 178, 17.7.2000, pp. 1–16.

6 Article 14(1) of Directive 2000/31/EC.

7 Ruling in joined cases C-682/18 (YouTube) and C-683/18 (Cyando), ECLI:EU:C:2021:503.

addition, Article 17(4) of Directive 2019/790 introduces new rules for exemption from liability where authorization has not been granted. OCSSPs may exempt themselves from liability for acts of making available or communicating copyright-infringing content only under certain cumulative conditions, which are listed in paragraphs (a) through (c) of the provision. According to them, in the event of failure to obtain permission from the rightholders, such service providers shall be liable, unless they demonstrate 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)."[8] The new regulation thus includes an obligation to both take steps to obtain permission from rightholders and to take steps directed at blocking those works that have been reported by rightholders. While some of these obligations address existing violations, the majority are preventive in nature. Furthermore, these duties hinge on the provider's commitment to making "best efforts."

The introduction of Article 17 was widely commented on by European legal scholars. It was criticized, among other things, that this regulation is contradictory, ambiguous, and therefore difficult to implement, harmful to small and medium-sized enterprises, and, above all, that it interfered with fundamental rights, such as artistic freedom and the right to access information.[9]

2. Judgment of 26 April 2022 in case C-401/19

2.1. The Republic of Poland's challenge to Directive 2019/790: balancing copyright protection with fundamental rights

The Republic of Poland has asked the CJEU, principally, to annul Article 17(4), point (b), and point (c), *in fine*, of Directive 2019/790 and, in the alternative, should the Court consider that those provisions cannot be severed from the other provisions of Article 17 of Directive 2019/790 without altering the substance thereof, to annul Article 17 of

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[8] Article 17(4) of the Directive 2019/790.

[9] See: P. Samuelson, *Hearing on Copyright Law in Foreign Jurisdictions: How Are Other Countries Handling Digital Piracy?*, Before the United States Senate Committee on the Judiciary Subcommittee on Intellectual Property 116th Congress, 2020, https://www.judiciary.senate.gov/imo/media/doc/Samuelson%20Testimony.pdf, quoted in: R. Markiewicz, *9.3. Zagadnienia szczególne* [in:] *idem*, *Prawo autorskie na jednolitym rynku cyfrowym. Dyrektywa Parlamentu Europejskiego i Rady (UE) 2019/790*, Warszawa 2021 (unless indicated otherwise, all translations from Polish are made by the author of the article).

that directive in its entirety. The Republic of Poland claimed that the abovementioned provisions violate the right to freedom of expression and information, guaranteed by Article 11 of the Charter of Fundamental Rights (Charter), according to which, "everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."[10] The Polish plea was based on the argument that OCSSPs are required to monitor all user-uploaded content to avoid copyright violations, as mandated by Article 17(4) of Directive 2019/790. To achieve this, these platforms should employ technology that can automatically filter content beforehand. However, by enforcing such preemptive monitoring without ensuring the protection of freedom of expression and information, it is believed that the contested provisions "constitute a limitation on the exercise of that fundamental right"[11] and since this infringement does not meet all criteria indicated in Article 52(1) of the Charter (does not respect the essence of that right and principle of proportionality), it is thus viewed by the Republic of Poland as unjustifiable.

The Republic of Poland's legal action was not supported by any of the EU Member States. The Kingdom of Spain, the French Republic, the Portuguese Republic, and the European Commission were granted leave to intervene in support of the forms of order sought by the European Parliament and the Council of the European Union.

2.2. The ruling of the Court of Justice of the European Union

The CJEU ruled in the Grand Chamber due to the fundamental significance of the issue at hand. The Court disagreed with the argumentation presented by the Polish side and rejected the plea advanced by Poland in support of its action. The CJEU began its consideration of the admissibility of the action brought by the Republic of Poland. It pointed out that action for annulment of only part of Article 17 is inadmissible, as it would change the essence of the provision and create a liability system that would be more favorable to OCSSPs. However, the Polish claim submitted in the alternative (to annul Article 17 in its entirety) the Court found admissible.[12] The CJEU concluded that, contrary to the defendant's (European Parliament and Council of the European Union) claim, the liability regime, established in Article 17(4) of Directive 2019/790, entails a limitation on the exercise of the right to freedom of expression and information of users of content-sharing services guaranteed in Article 11 of the Charter.[13] The Court pointed out, however, that this limitation meets the requirements laid down in Article 52(1) of the Charter, i.e. it is provided for by law[14] and respects the essence of those

10 Charter of Fundamental Rights of the European Union, Article 11, OJ C 326, 26.10.2012, pp. 391–407.

11 Judgment of the CJEU of 26 April 2022 in Case C-401/19, Republic of Poland v. European Parliament and Council of the European Union, EU:C:2022:297 ("Case C-401/19"), para 24.

12 Case C-401/19, para 16–22.

13 Case C-401/19, para 56 and 58.

14 Case C-401/19, para 72.

rights and freedoms,[15] is necessary[16] and genuinely meets objectives of general interest recognised by the EU or the need to protect the rights and freedom of others[17] and also it does not disproportionally restrict the right to freedom of expression and information of users of those services.[18] The Court also identified the following arguments in support of the position that such limitation does not disproportionally restrict the right to freedom of expression and information of users of those services:

1. The EU legislature laid down a clear and precise limit on the measures that may be taken or required in implementing the obligations laid down in point (b) and point (c), *in fine*, of Article 17(4) of Directive 2019/790;[19]
2. Article 17(7) of Directive 2019/790 requires Member States to ensure that users in each Member State are authorised to upload and make available content generated by themselves for the specific purposes of quotation, criticism, review, caricature, parody, or pastiche;[20]
3. The liability of service providers can be incurred only on condition that the rightholders concerned provide them with the relevant and necessary information with regard to that content;[21]
4. Article 17(8) of Directive 2019/790 provides an additional safeguard for ensuring that the right to freedom of expression and information of users of online content-sharing services is observed by stating clearly that the application of this provision must not lead to any general monitoring obligation;[22]
5. Article 17(9) of Directive 2019/790 introduces several additional procedural safeguards, which protect the right to freedom of expression and the information of users of online content-sharing services in case such providers block content unlawfully;[23]
6. Article 17(10) of Directive 2019/790 supplements the system of safeguards by requiring the Commission to organize, in cooperation with Member States, stakeholder dialogues to discuss best practices for cooperation between OCSSPs and rightholders.[24]

On the basis of these findings, the CJEU pointed out that the obligation imposed on online content-sharing has been accompanied by appropriate safeguards by the EU legislature in order to ensure, in accordance with Article 52(1) of the Charter, "respect for the right to freedom of expression and information of the users of those services, guaranteed by Article 11 of the Charter, and a fair balance between that right,

[15] Case C-401/19, para 76.
[16] Case C-401/19, para 83.
[17] Case C-401/19, para 82.
[18] Case C-401/19, para 84.
[19] Case C-401/19, para 85.
[20] Case C-401/19, para 87.
[21] Case C-401/19, para 89.
[22] Case C-401/19, para 90.
[23] Case C-401/19, para 93.
[24] Case C-401/19, para 96.

on the one hand, and the right to intellectual property, protected by Article 17(2) of the Charter, on the other."[25]

3. Commentary on the judgment

Addressing the position expressed by the Court, it should first be noted that in the C-401/19 ruling, the Court of Justice of the European Union essentially performed a Dworkinian weighing of principles:[26] its interpretation focused on the conflict between the users' right to freedom of expression and information, guaranteed by Article 11 of the Charter and the need to protect intellectual property guaranteed in Article 17(2) of the Charter. In fact, it is worth mentioning that the ruling could also have been analyzed through the prism of violations of other fundamental rights, such as freedom to conduct business, freedom to communicate and receive information, freedom of artistic creativity, the right to privacy, the right to a fair trial or the right to property, but the Polish challenge was limited only to the issue of freedom of speech.[27] While the Court's judgment is regarded as the "CJEU's most significant digital speech ruling today"[28] and "one of the silent blocks of European digital constitutionalism,"[29] it was hoped that the ruling would clarify some of the ambiguous concepts contained in the provision in question.[30] However, one must note that the CJEU fell short of providing Member States with sufficient guidance on the implementation of this new liability framework.

The author endorses part of the C-401/19 ruling in which the CJEU clarified that the filtering adopted by OCSSPs applies to only those means that are "strictly targeted."[31] Although it is not clarified in the judgement what exactly the CJUE meant by this term, it needs to be highlighted that for OCSSPs this interpretation means that they must refrain from systematic, large-scale content blocking. One should also approve the Court's view that a filtering system that fails to accurately differentiate between lawful and unlawful content, potentially blocking lawful communication infringes upon the

[25] Case C-401/19, para 98.

[26] G. Maroń, *Dworkinowska wizja zasad prawa*, "Zeszyty Naukowe Uniwersytetu Rzeszowskiego" 2008, iss. 8, p. 107.

[27] Ch. Geiger, B.J. Jütte, *Platform liability under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, "GRUR International" 2021, vol. 70(6), pp. 523–530, quoted in: R. Markiewicz, *3.3. Art. 17 dyrektywy 2019/790 a zasada proporcjonalności* [in:] *idem*, *Zasada proporcjonalności w prawie autorskim w Unii Europejskiej*, Warszawa 2023.

[28] M. Husovec, *Mandatory Filtering Does Not Always Violate Freedom of Expression: Important Lessons from Poland v Council and European Parliament (C-401/19)*, "Common Market Law Review" 2023, vol. 60, no. 1, pp. 173–198.

[29] *Ibid.*

[30] R. Markiewicz, *Prawo autorskie na jednolitym rynku cyfrowym…*, p. 245.

[31] Case C-401/19, para 81.

right to freedom of expression and information as guaranteed by Article 11 of the Charter.[32]

Additionally, it needs to be noted that, although CJEU's attempt to protect users' rights should be endorsed, the expectation for a machine to tell the difference between lawful parody and unlawful infringement appears challenging. As indicated in the literature, contemporary algorithms are known to be "technically sophisticated but legally blind."[33] As an illustration of such a limitation, consider the case of the photograph titled "Napalm Girl," which ignited a discussion on the Internet several years ago regarding content moderation algorithms and their implications for online freedom of expression. The photograph taken by Nick Ut during the Vietnam War captures the harrowing moment when Phan Thị Kim Phúc, a young girl runs naked and terrified down a road after a napalm attack. This image, which won the Pulitzer Prize in 1973, has since become emblematic of the horrors of war and its profound impact on innocent civilians. In 2016, Facebook removed this photograph from a post made by the editor of the Norwegian newspaper *Aftenposten*, citing its policy against displaying nudity. This decision was met with widespread criticism, as many argued that the platform's algorithm failed to distinguish between explicit content and historically significant images.[34] In protest against this policy, many Facebook users, including the prime minister of Norway, posted this photograph on their Facebook pages; however, Facebook removed them as well. This incident sparked a broader discussion about the challenges of content moderation in the digital age, which is also relevant to the judgment in question. Relying on algorithms to make nuanced decisions about content appropriateness (in the case of the "Napalm Girl" photograph) or lawfulness (in the case of the CJEU judgment in question) is problematic at best. While artificial intelligence systems perform admirably in the face of many, often very complex tasks, it is difficult to expect them to become judges in their own case and to be able to distinguish between a parody that is permitted by law and unlawful acts of users, which is often a challenge even for humans. This is because artificial intelligence does not cope with contextual thinking, which is crucial in such matters. As a result, these technological systems may not work best in legally relevant situations and may provide false positives. In addition, OCSSPs may have an incentive to overblock content on their platforms due to the fear of being held liable for copyright infringement. In the context of the risk of excessive blocking, it is also worth noting the issue of "delegated law enforcement" within the European Union. This concept has been explored in scholarly literature and is described as a "situation when the law expects platforms to act as enforcers of the law, by entrusting them with various tasks, such as the removal of content."[35] This problem in relation to Directive 2019/790, was highlighted by Advocate

[32] Case C-401/19, para 86.

[33] M. Husovec, *Mandatory…*, pp. 173–198.

[34] https://www.bbc.com/news/technology-37318031 [accessed: 2024.04.05]; https://www.theguardian.com/technology/2016/sep/09/facebook-reinstates-napalm-girl-photo [accessed: 2024.04.05].

[35] M. Husovec, *Mandatory…*, pp. 173–198. See also: *idem*, *(Ir)Responsible Legislature? Speech Risks*

General (AG) Henrik Saugmandsgaard Øe. The AG argued that the EU legislator, by placing obligations on OCSSPs, essentially entrusts the duty of proper copyright law application to private entities.[36] Drawing a parallel, the AG referred to the judgment of the ECHR from 25 March 1993 in Costello-Roberts v. the United Kingdom, according to which "the State cannot evade its responsibility by transferring its obligations to private entities or individuals."[37] The CJEU followed the AG's opinion, pointing out that Member States when transposing Article 17 of Directive 2019/790 into national law, should interpret this provision in such a way as to ensure a fair balance between the various fundamental rights protected by Charter.[38] The CJEU's conclusion should be also approved. However, the Court does not say how to achieve this balance, which leaves Member States with discretion in implementing Article 17 into their national legal orders. Although some level of leeway with respect to national implementation is desired – especially considering the rapid development of advanced technologies – some directions from the Court on interpreting terms like "strictly targeting" would be desirable. Such guidance would be pertinent not only for Member States, but also for national courts, users, and the providers themselves. However, in the absence of a more detailed explanation from the CJEU, Member States must decide for themselves how to maintain this "fair balance."[39] As a result, despite the ruling, there is no consensus on how to implement Article 17 into national law. European Intellectual Property scholars have adopted two main ideas regarding the implementation process:[40] a "copy-paste" approach,[41] according to which the implementation should involve a literal transfer of the content of the Directive into national legislation, and the second, more proactive approach, emphasizing the need for such implementation, which will include a system of guarantees of users' rights.[42] Different ideas about how to implement this provision

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under the EU's Rules on Delegated Digital Enforcement, SSRN, September 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3784149 [accessed: 2024.04.05].

36 Opinion of Advocate General Saugmandsgaard Øe, Republic of Poland v. European Parliament and Council of the European Union (C-401/19), ECLI:EU:C:2021:613, para 84.

37 European Court of Human Rights ruling of 25 March 1993, Costello-Roberts v. the United Kingdom, CE:ECHR:1993:0325JUD001313487, para 27.

38 Case C-401/19, para 99.

39 B.J. Jütte, G. Priora, *CJEU Rejects Poland's Challenge to Preventive Upload Filtering to Combat Copyright Infringement on Online Platforms (Case C-401/19)*, "EIPR" 2022, vol. 44, no. 10, pp. 8–9.

40 K. Gliściński, *Gwarancje ex ante praw użytkowników na tle wyroku Trybunału Sprawiedliwości z 26.04.2022 r., C-401/19, Rzeczpospolita Polska przeciwko Parlamentowi Europejskiemu i Radzie Unii Europejskiej*, "Europejski Przegląd Sądowy" 2023, no. 3(210), pp. 30–31.

41 Postulated by, among others, E. Rosati, *The legal nature of Article 17 of the Copyright DSM Directive, the (lack of) freedom of Member States and why the German implementation proposal is not compatible with EU law*, "Journal of Intellectual Property Law & Practice" 2020, vol. 15, iss. 11, pp. 874–878, also: *eadem*, *What does the CJEU judgment in the Polish challenge to Article 17 (C-401/19) mean for the transposition and application of that provision?*, The IPKat, May 2022, https://ipkitten.blogspot.com/2022/05/what-does-cjeu-judgment-in-polish.html [accessed: 2024.04.05].

42 Postulated by, among others, by: F. Reda, P. Keller, *CJEU upholds Article 17, but not in the form (most) Member States imagined*, Kluwer Copyright Blog, April 2022, https://copyrightblog.kluweriplaw.com/2022/04/28/cjeu-upholds-article-17-but-not-in-the-form-most-member-states-imagined/ [accessed: 2024.04.05]; M. Senftleben, *The Meaning of "Additional" in the Poland ruling of the Court of*

will inevitably lead to a variety of legal solutions, creating potential legal uncertainties for users. In summary, the Court's conclusion that the implementation of Article 17 of Directive 2019/790 into national laws must strictly comply with the fundamental rights of users receives full endorsement. However, the judgment does not offer guidance on how to integrate these provisions into national legal systems, leaving the responsibility to achieve this "fair balance" to Member States.

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Summary

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Obligations Imposed on Online Content-Sharing Service Providers and Freedom of Expression and Information

The subject of the commentary is related to the judgment of the CJEU of 26 April 2022 in case C-401/19 Republic of Poland v. European Parliament and Council of the European Union, in which the court addressed one of the more widely discussed regulations in the doctrine of copyright law in the European Union, namely the new liability rules for providers of online content-sharing service providers. In essence, the issue concerns the relationship between intellectual property protection and Internet users' right to freedom of expression and information. The CJEU upheld Article 17 of Directive 2019/790, emphasizing that it contains the necessary safeguards to maintain a fair balance between the right to freedom of expression of information of the users of online content-sharing services, and the right to intellectual property.

Keywords: Directive 2019/790, overblocking, freedom of expression, delegated enforcement, Article 17 CDSM, Copyright, platform regulation, upload filters, OCSSPs.

Streszczenie

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Obowiązki nałożone na dostawców usług udostępniania treści online a wolność wypowiedzi i informacji

Tematem glosy jest wyrok TSUE z 26 kwietnia 2022 r. w sprawie C-401/19 Rzeczpospolita Polska przeciwko Parlamentowi Europejskiemu i Radzie Unii Europejskiej, w którym Trybunał odniósł się do jednego z szeroko dyskutowanych przepisów w doktrynie prawa autorskiego w Unii Europejskiej, a mianowicie nowych zasad odpowiedzialności dla dostawców usług udostępniania treści online. W istocie problem dotyczy relacji między ochroną własności intelektualnej a prawem użytkowników Internetu do wolności wypowiedzi i informacji. TSUE utrzymał w mocy art. 17 dyrektywy 2019/790, podkreślając, że jest on otoczony odpowiednimi gwarancjami w celu zapewnienia sprawiedliwej równowagi między prawem do wolności wypowiedzi i informacji a prawem własności intelektualnej.

Słowa kluczowe: dyrektywa 2019/790, nadmierne blokowanie treści, wolność słowa w Internecie, delegowane egzekwowanie prawa, art. 17 DSM, prawo autorskie, regulacja platform cyfrowych, DUUTO.