Court of Justice of the European Union: Poland seeks annulment of Article 17 of the DSM Directive

IRIS 2019-9:1/5

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On 12 August 2019, Poland's application to the Court of Justice of the European Union (CJEU) seeking annulment of a provision in the recently adopted Directive 2019/790 on Copyright in the Digital Single Market (DSM Directive) was published in the Official Journal of the European Union. The DSM Directive was adopted on 17 April 2019 (see IRIS 2019-4/5), and Poland's action was brought on 24 May 2019. The application seeks annulment of two provisions under Article 17 of the DSM Directive concerning the liability of "online content-sharing service providers" for content uploaded by users.

First, the application seeks annulment of Article 17(4)(b) and Article 17(4)(c), which (in lengthy wording) provides that content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works, unless the service providers demonstrate that they have done the following: "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 rightsholders have provided the service providers with the relevant and necessary information; and in any event, acted expeditiously, upon receiving a sufficiently substantiated notice from the rightsholders, 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)".

Poland argued that these provisions infringe the right to freedom of expression under Article 11 of the Charter of Fundamental Rights of the European Union. In particular, it argued that the imposition on online content-sharing service providers of the obligation to make best efforts to ensure the unavailability of specific works for which rightsholders have provided the service providers with the relevant and necessary information, as well as the imposition of the obligation to make best efforts to prevent the future uploads of protected works for which the rightsholders have lodged a sufficiently substantiated notice, make it necessary for the service providers (in order to avoid liability) to carry out prior automatic verification (filtering) of content uploaded online by users. This makes it necessary to introduce "preventive control mechanisms". According to the application, such mechanisms "undermine the essence of the right to freedom of expression" and "do not comply with the requirement that limitations imposed on

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that right be proportional and necessary".

Poland seeks the annulment of Article 17(4)(b) and Article 17(4)(c), *in fine* (that is, the part containing the following wording: 'and made best efforts to prevent their future uploads in accordance with point (b)'); and in the alternative, should the Court find that the provisions cannot be deleted from Article 17 without substantively changing the rules contained in the remaining provisions of that article, the Court should annul Article 17 in its entirety.

Skarga wniesiona w dniu 24 maja 2019 r. – Rzeczpospolita Polska przeciwko Parlamentowi Europejskiemu i Radzie Unii Europejskiej (Sprawa C-401/19)

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Action brought on 24 May 2019 — Republic of Poland v European Parliament and Council of the European Union, Case C-401/19, 12 August 2019

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