European Commission: Guidance on Article 17 of Directive on Copyright in the Digital Single Market

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On 4 June 2021, the European Commission released its Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market (DSM).

According to the Commission, the aim of this guidance is to support a correct and coherent transposition of Article 17 across the member states, paying particular attention to the need to balance fundamental rights and the use of exceptions and limitations, as required by Article 17(10). The guidance could also be of assistance to market players when complying with national legislations implementing Article 17.

Among the issues clarified by the guidance, the following can be highlighted:

- Article 17 DSM is a lex specialis to Article 3 of Directive 2001/29/EC (InfoSoc Directive) and Article 14 of Directive 2000/31/EC (e-commerce Directive). It does not, however, introduce a new right in the Union's copyright law. Rather, it fully and specifically regulates the act of "communication to the public"' in the limited circumstances covered by this provision.

- With regard to definitions, member states should explicitly set out in their implementing laws the definition of online content-sharing service provider" in Article 2(6) (first paragraph) in its entirety and explicitly exclude the service providers listed in Article 2(6) second paragraph, while specifying that this list of excluded service providers is not exhaustive. They should also refrain from quantifying "large amount" in their national law in order to avoid legal fragmentation through a potentially different scope of service providers covered in different member states. The acts of communication to the public and making content available in Article 17(1) should be understood as also covering reproductions necessary to carry out these acts. Member states should not provide for an obligation on online content-sharing service providers to obtain an authorisation for reproductions carried out in the context of Article 17. The notion of "best efforts" is not defined and no reference is made to national law, hence it 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.

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- Regarding best efforts, service providers should, as a minimum, proactively engage with rightsholders that can be easily identified and located, notably those representing a broad catalogue of works or other subject matter. In particular, proactively contacting collective management organisations (CMOs) to obtain an authorisation should be considered as a minimum requirement for all online content-sharing service providers.

- Automated blocking should in principle be limited to manifestly infringing uploads. Uploads, which are not manifestly infringing, should in principle go online and may be subject to an ex post human review when rightsholders oppose by sending a notice. There is an exception to this principle regarding content earmarked by rightholders. Rightsholders may choose to identify specific content, the unauthorised online availability of which could cause significant economic harm to them. Service providers should exercise particular care and diligence in application of their best efforts obligations before uploading content, which could cause significant economic harm to rightholders. This may include a rapid ex ante human review. This would apply for content which is particularly time sensitive (e.g. pre-released music or films or highlights of recent broadcasts of sports events). This heightened care for earmarked content should, however, be limited to cases where there is a high risk of significant economic harm, which ought to be properly justified by rightholders. Moreover, this mechanism should not lead to a disproportionate burden on service providers or to a general monitoring obligation. Online content-sharing service providers should be deemed to have complied, until proven otherwise, with their best efforts obligations if they have acted diligently as regards content which is not manifestly infringing, taking into account the relevant information from rightsholders. By contrast, they should be deemed not to have complied, until proven otherwise, with their best effort obligations and be held liable for copyright infringement if they have made uploaded content available disregarding the information provided by rightholders, including – as regards content that is not manifestly infringing content - the information on earmarked content.

According to the Commission, the guidance as such is not legally binding, and it may need to be reviewed following the coming judgment of the Court of Justice of the European Union in the case C-401/19 (see IRIS 2019-9/5).

Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market, COM/2021/288 final

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