Advocate General: Opinion on Case C-401/19

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On 15 July 2021, Advocate General (AG) Saugmandsgaard Øe delivered his highly awaited opinion on Case C-401/19. This case concerns an action brought on the basis of Article 263 TFEU by the Republic of Poland asking the Court to annul Article 17(4)(b) and (c), in fine, of Directive (EU) 2019/790 of the European Parliament and of the Council from 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC and, in the alternative, to annul Article 17 in its entirety. This provision imposes on those providers obligations to monitor the content posted by the users of their services in order to prevent the uploading of protected works and subject matter which the rightsholders do not wish to make accessible on those services. Such preventive monitoring will, as a general rule, take the form of filtering that content using software tools. According to the applicant, such filtering raises complex questions with regard to the freedom of expression and information of users of sharing services, guaranteed in Article 11 of the Charter of Fundamental Rights of the European Union ("the Charter"). That preventive monitoring would constitute a limitation on the exercise of the right to freedom of expression, guaranteed in Article 11 of the Charter. That limitation would not be compatible with the Charter since it would undermine the "essence" of that fundamental right or, at the very least, fail to comply with the principle of proportionality.

In his Opinion, the AG explained that the EU legislature may, while observing freedom of expression, impose certain monitoring and filtering obligations on certain online intermediaries, provided, however, that those obligations are circumscribed by sufficient safeguards to minimise the impact of such filtering on that freedom. The EU legislator had a margin of discretion to reconcile freedom of expression with respect for intellectual property rights. Nevertheless, the new regime entails a significant risk of "over-blocking" lawful information, and the use of automatic content recognition tools increases that risk, since these tools are not able to understand the context in which such protected subject matter is reproduced. The EU legislator therefore had to provide sufficient safeguards to minimise that risk. Accordingly, the EU legislator recognised that, for the right to make legitimate use of protected subject matter to be effective, providers of online sharing services are not allowed to preventively block all content reproducing the protected subject matter identified by the rightholders, including lawful content. It would not be sufficient for users to have the possibility, under a complaints and redress mechanism, to have their legitimate content re-uploaded

after such preventive blocking. Moreover, those providers cannot be turned into judges of online legality, responsible for coming to decisions on complex copyright issues. Consequently, sharing service providers must only detect and block content that is "identical" or "equivalent" to the protected subject matter identified by the rightholders, that is to say content the unlawfulness of which may be regarded as manifest in the light of the information provided by the rightholders. In ambiguous situations, the content concerned should not be the subject of a preventive blocking measure.

As Article 17 of Directive 2019/790 contained enough safeguards with regard to the rights of users, the AG proposed that the Court should rule that that provision is valid and, consequently, that it should dismiss the action brought by the Republic of Poland.

Subsequent to the drafting of this Opinion, two important documents were published:

- The judgment in YouTube and Cyando (see IRIS 2021-7/4) does not, in the AG's view, call into question the considerations developed in his Opinion.

- The Commission's Guidance on the application of Article 17 of Directive 2019/790 (see IRIS 2021-7/5) sets out what the Commission had submitted before the Court and reflects the explanations given in points 158 to 219 of the AG's Opinion. However, the AG disagrees with the possibility to "earmark" subject matter the unauthorised uploading of which "could cause significant economic harm to them". If, as the AG states in his Opinion, "this is to be understood as meaning that those same providers should block content *ex ante* simply on the basis of an assertion of a risk of significant economic harm by rightsholders – since the guidance does not contain any other criterion objectively limiting the 'earmarking' mechanism to specific cases – even if that content is not manifestly infringing, I cannot agree with this, unless I alter all the considerations set out in this Opinion."

Opinion of Advocate General Saugmandsgaard Øe delivered on 15 July 2021, Case C-401/19, Republic of Poland v European Parliament, Council of the European Union

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