Grand Chamber judgment on Article 17 of the DSM Directive

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On 26 April 2022, the Court of Justice of the European Union (CJEU) delivered its much-anticipated judgment in Case C-401/19, concerning Article 17 of the 2019 Directive on Copyright and related rights in the Digital Single Market (DSM Directive) (see IRIS 2019-4/5). The case originated in May 2019, a month after the DSM Directive was adopted, when Poland made an application to the CJEU, seeking annulment of two provisions under Article 17 DSM Directive concerning the liability of online content-sharing service providers (OCSSPs) for content uploaded by users (see IRIS 2019-9/5). In particular, Poland sought annulment of Article 17(4)(b) and (c), *in fine*, DSM Directive, which require OCSSPs to monitor the content uploaded by users, in order to prevent the uploading of protected subject matter which the rightholders do not wish to make accessible on those services. Poland argued that these provisions infringe the right to freedom of expression of users under Article 11 of the EU Charter of Fundamental Rights (EU Charter). Notably, in July 2021, Advocate General Øe delivered his opinion on the case, holding that Article 17 DSM Directive was valid, as it contained enough safeguards with regard to the rights of users, and the Court should dismiss the action brought by Poland (see IRIS 2021-8/7).

The CJEU has also now found that Poland's action should be dismissed, holding that the obligations under Article 17(4)(b) and (c) have been accompanied by appropriate safeguards "to ensure" respect for the right to freedom of expression of users, and a fair balance between freedom of expression and the right to intellectual property. First, the Court noted that Article 17 establishes the principle that OCSSPs are directly liable when protected subject matter is illegally uploaded by users of their services. However, OCSSPs may be exempted from liability, and the Court observed that in order to benefit from the exemption from liability under Article 17, OCSSPs are "de facto" required to carry out a prior review of the content that users wish to upload to their platforms, provided they have received from rightholders the relevant and necessary information. Crucially, the Court held that in order to be able to carry out such prior review, OCSSPs are, depending on the number of files uploaded and the type of protected subject matter, required to use automatic recognition and filtering tools. And as such, the Court held that the specific liability regime established under Article 17 DSM Directive entailed a limitation on the right to freedom of expression of users of OCSSPs.

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Importantly, the Court then examined the proportionality of the interference with freedom of expression, and held the obligations under Article 17 "do not disproportionately restrict" the right to freedom of expression of users, for a number of reasons. These included, first, in order to "prevent the risk" which the use of automatic recognition and filtering tools entails for freedom of expression, the EU legislature laid down a "clear and precise limit", on the measures that may be taken in implementing the obligations laid down in Article 17, by excluding, in particular, "measures which filter and block lawful content when uploading". Second, Article 17(7) requires Member States to ensure that users are authorised to upload and make available content generated by themselves for the specific purposes of quotation, criticism, review, caricature, parody or pastiche. Thirdly, under Article 17, the liability of OCSSPs for ensuring that certain content is unavailable can be incurred "only on condition" that the rightholders concerned provide them with the relevant and necessary information with regard to that content. Fourth, Article 17(8) stating that the application of Article 17 must not lead to any general monitoring obligation, provides an "additional safeguard" for ensuring the freedom of expression of users is observed. Finally, Article 17 includes several procedural safeguards (e.g., complaint and redress mechanisms), which protect the freedom of expression of users in cases where OCSSPs erroneously or unjustifiably block lawful content. As such, the Court concluded that the obligation under Article 17(4)(b) and (c) on OCSSPs, to review, prior to its dissemination to the public, the content that users wish to upload, was accompanied by "appropriate safeguards by the EU legislature in order to ensure respect for the right to freedom of expression and information of the users of those services".

As a final note, the Court also added that Member States must, when transposing Article 17 into their national law, "take care to act on the basis of an interpretation of that provision which allows a fair balance to be struck between the various fundamental rights protected by the Charter".

Judgment of the Court of Justice of the European Union (Grand Chamber) of 26 April 2022, Case C-401/19, Republic of Poland v European Parliament and Council of the European Union

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