

Poland v. EU – The Battle for the Value Gap (Ted Shapiro, Wiggin LLP, 22 March 2021)

On 10 November 2020, the Grand Chamber of the European Court of Justice (ECJ) heard oral arguments in the case of the *Republic of Poland v European Parliament and Council of the European Union* (Case C-401/19). This case concerns Article 17 of the 2019 DSM Copyright Directive (**the Directive**). The Advocate General's Opinion in the case is still expected on 22 April 2021, according to the ECJ's calendar. As I attended the hearing, I thought it might be interesting -- with AG's Opinion imminent and given the anti-copyright approach he took in the *YouTube/Uploaded* case -- to share my summary of the hearing and the notes I took on the day. I have never been a big fan of Article 17. I remain concerned about its potential to weaken copyright protection in the EU, but I continually hope to be proven wrong.

As a reminder, Article 17 provides that Online Content Sharing Service Platforms (**OCSSPs** or **platforms** in this post – as defined in Article 2(6) of the Directive) engage in an act of communication to the public/making available when they give the public access to copyright-protected works uploaded by their users. In such cases, the OCSSPs need authorisation from the relevant rightholders. OCSSPs also do not benefit from the hosting privilege in Article 14 of the E-Commerce Directive. However, Article 17 goes on to provide OCSSPs with a new safe harbour if they can demonstrate they have undertaken:

1. Best efforts to get authorisation (Article 17(4)(a)); and,
2. Best efforts to "*ensure the unavailability of specific works...for which the rightholders have provided the service providers with the relevant and necessary information*" (Article 17(4)(b)); and in any event
3. Best efforts to undertake takedown and staydown of notified content (Article 17(4)(c)).

Article 17(7) also says that rightholder and OCSSP cooperation "shall" not result in the blocking of non-infringing content which creates a measure of inconsistency within the body of Article 17. At the same time, Article 17(9) provides for a complaint and redress mechanism. Article 17(6) establishes additional safe harbours for baby and less popular platforms. Finally, Article 17(8) provides a prohibition on imposing a general monitoring obligation on OCSSPs (compare Article 15 of the E-Commerce Directive).

In May 2019, the Polish government brought an action against Article 17 of the Directive before the ECJ. The complaint refers to Article 17(4)(b) and the second part of (4)(c) (stay down) and alleges an "*infringement of the right to freedom of expression and information guaranteed by Article 11 of the Charter of Fundamental Rights of the European Union*". Poland further took the position that, should it not be possible to keep Article 17 without these elements, the whole of Article 17 should be annulled.

In advance of the hearing the ECJ asked a series of questions to the parties (Poland, Council, EP and the interveners European Commission (EC), France, Portugal and Spain). A rough translation of those questions which relate to content recognition technology, the EC's proposal to flip copyright upside down and fundamental rights are set out below. All parties except Portugal attended the hearing though France participated by remote link.

The EC argues that Article 17(4) is an obligation of means while Article 17(7) is an obligation of results. This position also featured in the EC's Consultation Document on its draft Article 17 Guidance (the provision of guidance arises as part of an obligation under Article 17(10) – release of the Guidance has been imminent for a while now).

What will the European Court of Justice (**ECJ**) make of a case which some see as pitting copyright against the freedom of expression -- both fundamental rights (FRs) guaranteed under the Charter of Fundamental Rights of the EU (**the Charter**). While these rights really should be seen as complementary to one another, where the Court believes there is a potential conflict, it will apply a balancing test. The Polish government argues that clearly freedom of expression must prevail. The intervening Member States (France, Spain and Portugal) argue copyright must win out. The EU institutions in defence of Article 17 of the DSM Copyright Directive appear to occupy 'middle' ground, although the European Commission (**EC**) position (backed by both the Council and the EP it seems) puts copyright exceptions before exclusive rights. That runs counter to existing EU and international copyright law.

It seems untenable that the ECJ would strike down all or even parts of Article 17 particularly at the behest of the current government of Poland. At the same time, the ECJ appeared a bit uncomfortable with at least certain aspects of the structure of Article 17. Who can blame them; it is riddled with inconsistency born of compromise. One judge even raised a question about whether there was free speech on a platform noting that they are "private" (see below under Wahl). In particular, the Court seemed concerned about the interface between Article 17(4) which requires platforms to undertake best efforts to protect copyright to avoid liability and Article 17(7) which requires that rightholder and platform cooperation to protect copyright must not result in the blocking of non-infringing content. It also seemed that at the time the Court had not yet taken a view on the pending *YouTube* case (the much-awaited decision was supposed to have popped before Christmas and there is still no date on the ECJ's calendar). The Court referred to the Advocate General (**AG**) Opinion in that case in several questions. This is the same AG who will render the Opinion in this case. AG Øe clearly understands the issues very well. However, his approach does not bode well for copyright protection in the EU. He seems to think that notice and takedown is actually an effective tool in this space. He had many questions for the parties. The Court (and Poland and the EC) cited his Opinion in *YouTube* on several occasions.

The EC believes it has developed a means of salvaging Article 17 – a way out for the ECJ. However, if the Poles and the Member State intervenors agree on one thing, it is that this way out is not in the Directive. The EC argues that Article 17(7) trumps Article 17(4). As such, the Commission's approach asserts that only "likely" infringing content can be blocked. The Court in its questions to the parties in advance of the hearing has changed "likely" to "manifestly" but the concept is the same (compare also the horrible attack on EU copyright which is being debated in Germany).

After a nearly four-hour oral hearing, it is not possible to rule out at least partial annulment of the Directive, but the more likely outcome appears to be that the Court either grabs the lifeline proffered by the EC or sides with the pro-copyright view put forward by the French. The robust argument put forward quite eloquently by France is that copyright wins and freedom of expression can weather a bit of temporal discomfort. If content is wrongly blocked, there is a mechanism in Article 17(9) to see it safely back up online. It seems clear however that the AG does not share the French view.

Questions to the Parties/Intervenors (unofficial translation from French):

The Council and the Parliament having noted, in substance, that the wording of Article 17 (4) (b) and (c) of 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 2019, L 130, p. 92) does not require adoption by online content sharing service providers, automatic content filtering mechanism ("upload filters"), these parties as well as the other participants in the hearing are invited to express themselves in their pleadings:

- on the possible necessity, in practice, of putting in place such mechanisms for the application of these provisions - the parties and other participants being invited to specify, in this regard, whether, to their knowledge, they exist, in the current state of technology, effective alternative solutions to meet the requirements provided for in these provisions and, that being the case, which ones;
- on the risks associated with such an implementation in the particular context of freedom of information and communication on the Internet, this network being characterized by the speed of the exchange of information;
- on the question of whether Article 17 of Directive 2019/790 allows, impose or, on the contrary, opposes, a system in which only manifestly infringing content would be automatically blocked when it is posted online, while that the content likely to make a legal use of a work could only be so once an agent of the operator has raised their illegal nature - see European Commission, "Targeted consultation addressed to the participants to the speaker dialogue on Article 17 of the Directive on copyright in the digital single market ", section IV, subsection (ii), as well as
- on the specific measures put in place to mitigate these risks, in particular with regard to the requirements recalled by the Court in its judgment of 16 July 2020, *Facebook Ireland and Schrems (C-311/18, EU: C: 2020: 559, point 175¹)*."

ANNEX - DETAILED (ROUGH) NOTES ON THE ORAL HEARING:

Poland (PL): We will concentrate on the questions of the Court. Q1 – Directive does not expressly require filtering but if we look at the conditions for the limitation on liability we conclude that upload filters have to be used – there is no other technical solution at current state of technology for OCSSPs to use to avoid liability. Thus, the answer to the first question is there are NO available alternatives to upload filters – which would work effectively. The defendants have not mentioned any – if they were any, they would have mentioned them. Q2 – I refer to our written *submission* – and let me quote the AG Opinion in *YouTube/Uploaded* – the fundamental rights of users of YT cannot be ignored – this platform does fall under the definition of OCSSP in the contested Directive – same applies to freedom of expression in Article 11 of the Charter of Fundamental Rights of the EU – requiring in abstract the checking of everything before upload would introduce a serious risk of undermining the fundamental rights given the volume of content – one cannot do it manually – the risk of liability would be excessive. In practice, small platforms would not survive – and those with money would have to do general filtering without judicial review – risk of over blocking – see AG Øe’s interpretation in the *YouTube* case. Other authorities agree with this position see AG Spzunar in *Facebook*, ECHR in *Delfi v. Estonia*. Q3 – whether the EC scheme could work – manifestly — the Directive does not make such a distinction [PL rejects the EC and German approach]. OCSSPs must make best efforts to prevent upload no matter whether the content is manifestly unlawful or lawful. The EC is trying to water down the Directive to make it less strict but that is *de lege ferenda* (proposed new law)– you still need automatic filters – they can distinguish between these two types of content. The proposal can only be *de lege ferenda* as such a distinction is not possible now. Human

¹ "Following from the previous point, it should be added that the requirement that any limitation on the exercise of fundamental rights must be provided for by law implies that the legal basis which permits the interference with those rights must itself define the scope of the limitation on the exercise of the right concerned (Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraph 139 and the case-law cited). That previous point is as follows: The previous point is " Furthermore, in accordance with the first sentence of Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. Under the second sentence of Article 52(1) of the Charter, subject to the principle of proportionality, limitations may be made to those rights and freedoms only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

assessment is required. This is not compliant with the Charter – hypothetical – Q4 –*Schrems II*– the interference which derives from the contested provisions is not based on clear specific rules – it is not proportionate. Any limitation must be provided by law – a legal act – basis – should determine the scope. The EU legislator was aware that tech means would need to be used but did not mention them thereby putting burden on Member States and OCSSPs. This does not meet *Schrems II*. PL does not question the need to increase liability – we see such a need, but reforms cannot curtail other rights and compromise their essence – need profound analyses – justified and proportionate – any changes must strike the right balance. The Directive does not. These issues are under discussion in other countries outside the EU. The US copyright office’s advice to US Congress on the §512 DMCA was that the US should not be the first to do staydown. The US should wait and see the negative consequences and practical impact in the EU – as a testing ground. The EU should not be a testing ground for US copyright law.

European Parliament (EP): The Directive was adopted in full respect of all interests. Article 17 clearly defines how OCSSPs should act while not infringing users’ rights. Specific tools will always be evaluated in light of the proportionality – the Member States in implementation and then the OCSSPs – dynamic internet meant Directive had to be general. Q1 – neutral and abstract so as not to impose specific solutions – choice and technological development. EP will not voice opinion on specific solutions and their effectiveness. Member States and individual OCSSPs will decide. EP notes there are no specific facts in this case – e.g., size, volume of content, or specific technology -we cannot evaluate whether the instrument is suitable. Comprehensive analysis is not possible -it depends on each case. There are many types of technology – not generic not one category and how they are used will differ what matters is if they comply with Articles 17(4) and 17(7) – all hypothetical tools have to be evaluated. The proportionality principle requires taking into account factors to check to see if they met their obligations – not abstract. Q2 depends on the case – how do they apply the measures – under the circumstances - the solution cannot lead to a lack of availability of non-infringing content – although you cannot estimate the scale. The EP is sure that the co-legislators were well aware of the specific context for adequate safeguards. Recall – tech progress happens fast. The legal framework requires the highest standards of profession diligence – made sense to be flexible within parameters and within the Charter – the specific internet context – this underlay the Directive and the rapidity of the spread of info is good or bad depending on your perspective – need to protect both copyright and freedom of expression. Q3 -- to verify obligations one should look at Article 17 it has clear legal requirements. Article 17(7) is a result requirement. Directive is only reference point. The EC consultation document was not the position of the EC and has not been formally adopted – was just for discussion for future guidelines -- it is not relevant. Both the Directive and guidelines will not operate in a vacuum – OCSSPs can choose solutions to adjust to 17 -- EP reiterates that it will discuss only the Directive – not possible equivocally evaluate that solution but we do not preclude that such a test by ECJ could be a solution. If the nature of the content is not evident, it could be left up until a decision is made. Q4 –Article 17(4) linked with the result in Article 17(7). They were designed to protect fundamental rights and respect copyright and vice versa. OCSSPs must do best efforts to protect copyright while respecting FRs – no limitation of FRs will occur. No law is perfect -- - see Article 17(9) [complaint and redress mechanism] to deal with mistakes – only foreseen where people or tools make mistakes but does not mean a lack of respect of copyright/FRs. The Directive meets *Schrems II* requirements. Defined in Article 17. EP reiterates the scope of obligations are clear and any infringement therefore can result from human error – not Article 17. Same with any law.

Council: The distinction which is highly pertinent – ISPs are mere conduits and OCSSPs are platforms. ISPs laid down the infrastructure for the Internet, but the business of platforms is different – they

organise uploads and make money. ISPs cannot see the content. The legislature cannot be blind to the realities of different platforms. Internet does not render certain things non-existent. Q1 – filtering – the applicant [PL] equates content recognition (CR) technology to an authoritarian state. Article 17 has nothing to do with that – not control of content. Article 17(4) allows limited liability under certain conditions. Platforms may feel compelled to use CR tech. Rightholders (RHs) need to give info. Platforms already do this – they customise content – it is all processed and analysed – CR is already used by platforms under Terms of Service (ToS) – e.g. adult nudity or violence. Platforms already use CR to comply with national laws- child porn – Platforms already use CR for copyright – because they already have license agreements. The primary goal of Article 17 is licensing. Article 17 does not impose a specific tech tool as EP said. The legislator is not best placed to choose – cannot give tech mandate as it could become obsolete – Platforms are best placed to choose. The legislator has set an objective (like for environmental legislation). Mix of algorithms for CR plus AI plus humans – not 100% perfect and some will be circumvented but in such case the platforms won't be liable. Example: A user willing upload an audio work without authorisation, devised a method to circumvent (slow speed), then the user restored the speed later. Platforms can fix later but at first not liable for this. Council considers that Article 17(4) fully respects *Schrems* – the obligations are precise enough. Q3 – is interesting – best efforts may be complicated but also due to the fact that copyright is a complex area of law. *Pelham* (C-476/17) shows this. The test of manifest illegality is not in the Directive and there are risks – for platforms to be eligible they must meet best efforts – Identify use of copyright content, and ascertain whether infringing or not – cannot be held liable if content remains available despite best efforts. Clear and strict obligation for providers. Legal content not prevent from being provided -- Article 17(7)) is strong – must avoid false positives – this structure shows the balance – of course some cases may be difficult - question of whether exceptions apply – regardless via platform or TV – the redress mechanism deals with this – which includes human review and even if that may require the courts. The objective of Article 17 is to offer a proportionate limitation on liability.

Spain: State legal service of the Kingdom. PL's complaint re filtering – Spain intervened in support of the Council and the EP –refer to written statement. Four key points (1) the Directive is result of wide ranging of political debate and the need for balance between stakeholders –(2) no prior authorisation then specific regime of liability (3) the liability regime reading Article 17 as whole strikes balance between copyright and other FRs – proportionality (4) OCSSPs only act at the justified request of RHs and not in regards to content covered by an exception – intervention occurs by prior notice. Article 17(4) does require filtering but rather an open-ended tech neutral approach – weighed up with the proportionality principle – can develop over time. It follows that there is no imposition of preventative filtering – no general monitoring. Means of proportionate response – hash comparison – fuzzy hashing – many companies make tools – in Spain we have two tools by comparing text – next question re balance – EU legislator opted for a balanced regime. The final decision to disable access is subject to human review. As regards the speed of exchange does not justify erosion of copyright – the damage to RHs outweighs temporary inconvenience to uploaders. Article 17 does not undermine freedom of expression – there may be some delays. Content can go viral. OCSSPs obligations are not a novelty – see *eBay* – and *Facebook*. The solution referred to in Q3 – is not a viable solution if we look at 17(4) – not compatible and it would remove the *effet utile* of the Directive – in Spain we believe the Directive provides sufficient safeguards – complaint and redress and Recital 70 – *ex post* approach - -does not preclude blocking – users have recourse (see *Pelham*) – even the smallest bit may be infringing – we should not qualify the term. Data protection – ACR tech – does not implicate personal data – no limitation on FRs – Spain believes wording fully respects FR.

France: we focus on the 4 questions –compliance with Article 17 and Article 11 of the Charter– this mechanism does not regulate these freedoms which are very important in France. It is economic regulation to restore balance in the relations between big OCSSPs and RHs for cultural diversity, functioning of the IM, protection of copyright etc. Q1 – the Directive itself does not require upload filters. It is true that in practice that they seem to be the best tool given the huge amount of content – 500 hours to YouTube every minute – exponential growth. It is essential for OCSSPs to filter – further the services covered by Article 17 already use them widely – it is the same tools that detect identity info. Unlike what PL says – Article 17 will not change this – it is wrong to claim Article 17 is focused on filtering. The Directive worked in terms of requirements rather than terms – diversity both in content and the platforms themselves – does not impose on start-ups. Facilitates licensing to encourage content for the public and remuneration of RHs – but Article 17 needs to incentivise. Q2- Risks with the mechanisms—Article 11 of the Charter – the Court has empathised that the internet is very important – (see para 81 of *Spiegel*) – incalculable amounts of info – speed – (1) no way Article 17 can affect general exchange of info – limited to OCSSPs which have a significant impact – precisely defined in Article 2(6) and start-ups are excluded – just certain platforms. Similar role as content distributors. (2)- freedom impart risk is highly circumscribed – can only affect uploaded content where the relevant and necessary info and no author – the range of content to be disabled will be narrow. Content flagging and parameters – laid down by RHs – Hadopi/CSPLA report – film allows wider range of sharing of content – safeguards are in place. (3)- the mechanism is proportionate due to the speed of the Internet – infringing content can do vast harm – in the absence of ex ante checking. On YT there are several billion hits every day – ECHR was mindful in *Delfi*. Time factor is crucial – either the court prioritises the immediacy for info with a big risk for content or it allows a potential short delay to avoid unauthorised content gets online. France urges the Court to adopt the former – to strike the right balance. *Ex post* control will be harmful to copyright which is also protected by FR. Instant access does not justify irreparable to damage of copyright. Recent events lead the French Gov to note that freedom of expression can be limited. Q4 compliance with Schrems – limits must be provided for by law – must define scope of the limits – the Court has asked the parties about the limits on freedom expression – the EU legislator anticipate cases of unjustified disabling because of exceptions – see Article 17(7) lays down the principle – in practice Recital 70 – complaint and redress systems in Article 17(9). ADR – and access to the courts. See *UPC Telekabel* example. Human review. The intention is praiseworthy. Manifestly infringing or likely to be lawful have no basis in copyright law – will generate legal uncertainty – these concepts are not relevant – to use them requires tech that does not exist – that premise is misguided – cannot identify a caricature – length is not relevant due to *Pelham*. The objective pursued by user is not evident – leaving content online would invert the preventative approach – no upstream control for RHs – just in case an exception might apply. Radically impairs Article 17. This proposal does not comply and is not proportionate.

EC: first two points – these provisions must be considered along with the rest of 17. Article 17(4) best effort while Articles 17(7) and (9) are result based. Article 17 meets the *Schrems* II test. Article 52 of the Charter any limitation must be provided for by law. This case concerns a Directive which must be implemented by the Member States – they are required to ensure adequate balance of FR – caselaw of *Funke Media* etc. Not only the Directive to be considered. Key guarantees – obligation of result in Article 17(7) and (9) -the Directive establishes mandatory exceptions – the Directive provides more legal certainty. **Exceptions confer rights on users like you have said.** A test of best efforts – tech, human resources or both – the only absolute obligation is to ensure availability of non-infringing content. The Directive is tech neutral as the Council has stressed. Tech progress. Q2 – risks – the Directive takes them into account – tech may result in false positives – guarantees under the

Directive – Article 17(7) does not allow blocking of legal content. In Q1, the court asks if ACR is necessary or if there are alternatives. Uploaded filters is a general term – negative connotations – it does not explain what tech can do – here are some examples – CR tech – fingerprinting, watermarking, metadata, key word search (the latter are not very effective). The tech must be accompanied by human review. The Directive itself says that best efforts may be met with range of measures – if no state of the tech can ensure compliance with Articles 17(7) and (9) – it may not be used in isolation but it can be used with humans – if proportionate. Q3 – your Court asks a question on the basis of a EC Consultation Document – that paper is not official – we are still at an early stage drafting – we’re still working on the guidance taking into the arguments in this case. Our test was slightly different. We focus on your approach. The correct interpretation of the Directive solution only manifestly infringing content can be blocked – best efforts – Articles 17(7), (8) and (9) do not allow for broader solution. This is adequate transposition of the Directive – examples specific works for which RH have provide relative and necessary info – it must be communicated in advance including where no authorisation or no exception – nearly identical or identical – only if the operator raises illegality – no – the Directive does not allow that – need another step. Content which is not manifestly illegal should be uploaded and then human review. The user should be notified in advance to challenge – RHs must justify under Article 17(9). Presumption of legality – the user interest should prevail – it is only way to be the obligation of result. See AG Øe in *YT* – para 222² – Article 17 is compliant.

Questions from the Court and the Advocate General

Judge Rapporteur (JR – Ilešič): questions – thanks to all the parties for their answers to the questions from the court – very useful but there are still things to be explained clarified – first to PL:

Para 3 of the complaint alleges the introduction of general automatic censorship of a preventative nature by private parties – in the Directive there is however Article 17(8) in which we read that the application of Article 17 shall not lead to general monitoring and no automatic filtering (cf., the *Sabam* cases). Can you explain what the PL means by censorship?

PL – the freedom of expression/info – includes freedom impart/receive – censorship destroys this right because the content is blocked or eliminated – this limitation may undermine the freedom and will occur in this case if auto filtering of content is applied to block certain types of content – it is possible to block unidentified content – at the moment Article 17(8) will be a dead letter – because the practical solution from Article 17(4).

JR – for the EP – I did not hear the answer to the Q1 – please explain

EP – we take the view that there is no such circumstance to guess which OCSSO will use which tech – see Article 17(5) [proportionality requirements], therefore we would not like to refer in a definitive matter. We cannot confirm in light of the Directive such filtering solutions will indeed be generally used – and in Article 17(5) draw attention to the specific circumstances must be taken into account.

² “222. Nevertheless, I note that the measures taken against an intermediary provider under an injunction must be proportionate. On that basis, account must be taken of the resources of that provider. In particular, although it seems relatively easy to block an identical copy of a file that is deemed to constitute an infringement, (207) it is much more complex to detect other files that use the work in question in the same way. (208) While YouTube claims to be able to do this, (209) not every provider has the necessary technology or the resources to acquire it. (210) I also note that the measures imposed by way of injunction must ensure a fair balance between the various rights and interests at play and must not create obstacles to the legal use of the service. In particular, the purpose or effect of an obligation to block cannot, to my mind, be to prevent users of a platform from uploading legal content and, in particular, legally using the work concerned. (211) It would be for the national courts to determine what can reasonably be expected of the provider in question.”

JR: EC said about relationship Article 17(4) v. Article 17(7), (8) and (9) – best efforts v. results. I did not understand this point. Does Article 17(7) take precedence over Article 17(4) or the contrary?

EC: in our opinion – Article 17(7) uses “shall” and talks about the obligation of result – it is a stronger obligation than Article 17(4) – merely a mechanism for exempting liability

Council: We agree.

JR: what do you think of the AG Opinion’s in para 188³ of the *YT* case– nature of some info but in copyright it is different assume knowledge – what does mean for Article 17(7)?

Council: this reflects what I have said before namely that copyright is one of the most complicated domains of law – sometimes it is difficult to interpret the situation. Article 17(7) means if we have doubts, we cannot disable access – this clearly result from Article 17(7) [co-operation language language]

JR: For the institutions – I quote a passage from his Opinion in *YT* p. 189⁴ –please comment. If I understand correctly, the wording of the Directive one thing but there is also a practical risk.

EP: In our opinion, if such a practice were practice or maintained by the OCSSP, then they would not be compliant with the Directive – If all content where there was doubt were to be removed, that would violate the Article 17(7) – universal deletion is not permitted under Article 17(7) as we have explained – there are mechanisms that may emerge to reconcile Article 17(4) and Article 17(7) if doubts arose then freedom of expression would be favoured – if any doubt leave it online.

Council: We do not share the pessimism of the AG that Article 17 will encourage hasty action to avoid liability – Article 17(7) prohibits that – furthermore economic logic which encourage platforms to post as much content as possible -- illegal content generates revenue – under Article 17 platforms will be exempted if best efforts but they can fail - they have no motivation beyond what is required that would shrink revenue. Council submits that Article 17 does not do that.

EC: We have already addressed the question. No over blocking under our interpretation of Article 17 –please remember that Article 17(4) applies based on collaboration with RHs – previously communicated info – does not require platforms to actively seek and remove content – similar or identical content. The coop is based on info communicated by RHs. Unlike in *Scarlet extended*. The Member State must implement Article 17 in such a way as to ensure conformity with Article 17(8).

Advocate General (AG): For the PL govt – you cannot see any other solution to comply with 17(4) beyond CR. Not suitable for complex judicial evaluations – need humans – could it not be a mixture

³ 188. While the illegal nature of some information is immediately obvious, (179) that is not the case with copyright as a rule. The assessment of the infringing character of a file requires a number of contextual elements and may call for thorough legal analysis. For example, in order to establish whether a video uploaded on a platform such as YouTube infringes copyright it is necessary, in principle, to determine whether, first, the video contains a work, second, the complaining third party holds rights to that work, and third, the use made of the work infringes his or her rights, the latter point requiring an evaluation whether, in the first place, the use was made with his or her authorisation, and, in the second place, an exception is applicable. The analysis is further complicated by the fact that any rights and licences for the work are likely to vary from one Member State to another, as are the exceptions, according to what law is applicable. (180)

⁴ 189. If a service provider were to be obliged to actively seek the information infringing copyright on its servers, without the assistance of the rightholders, that would compel it to assess itself, in general and without the necessary contextual elements, what constitutes such an infringement and what does not. While some situations leave little room for doubt, (181) many others are ambiguous. For example, it is rarely easy to determine who hold the rights over a work. (182) In addition, where an extract of a protected work is included in a video posted by a third party, certain exceptions could apply, such as where it is used for the purpose of criticism or parody. (183) The risk is that in all these ambiguous situations the provider tends towards systematically removing the information on its servers in order to avoid any risk of liability vis-à-vis the rightholders. It will often find it easier to remove information rather than having to claim itself in the context of a possible action for liability that an exception applies. Such ‘over-removal’ would pose an obvious problem in terms of freedom of expression. (184)

– see EC Consultation Document – if you had mechanism, then have humans show up where there are doubts. Then you only remove what is clearly illegal – could not that be a best effort? We already know that there are CRs in place for big platforms – could we say now have an improvement with some regulation?

PL: The combo is insufficient to deal with the quantity of data uploaded – the proportion taken to human review would still be unmanageable. We know now how to understand the Directive but the Council and EC interpretation conflicts with that of France – clearly there is a problem with Article 17. The move away from active contribution of RHs and leaving it to the platforms who will develop algorithms to avoid liability. The EP says they cannot block legal content but what are the sanctions – none. If a lawyer talks to a techie he will stress damages for failing to comply with Article 17(4). The fact that some of the big platforms are already using this tech – does not mean that system under the Directive which exempts liability is going to be easy – large operators have a selection of means at hand. The situation will not improve it will get worse because the system is too rigid and strict. A step back. The mere fact that big platforms do this does not make it compliant with the Charter.

AG: For Council –in point 8 of your rejoinder –referring to Article 17(4)(b) – match between file and notification per Article 17(4)(c) by any user – how would you do that without CR – if you tell me that I need to go Brussels and get there two hours no fine – would take a car or walk. You need some kind of mechanism to avoid having to pay RHs – who has the burden of proof – PL says no alternatives – you say there are – are there? Also, if we look at 17(7) are there any techs that are compliant on the market? You said if there is a doubt as to illegality, then what happens can we leave it online (like the Commission) or takedown (France) while we examine it?

Council: We said at present current state of tech we do have an efficient solution of combined algorithms, AI, CR and human review. A combination of these methods. The EC had just noted that RH give prior necessary info – it is not about filtering or checking all content – content matching to identify. 2nd question – need decision of the platform itself to determine lawfulness of the content, if it is lawful it should not be blocked. 3rd – reiterate that there two obligation in Article 17(4) and Article 17(7) – independent of each other -- both valid – no alternative – they work simultaneously – Article 17(7) is result – absolute obligation – sanctions will be imposed by Member States just like any infringement. As to Article 17(4), best effort to avoid liability vis a vis the RHs – if platform decides not to make best efforts, the platform will risk financial consequence – it is different from Article 17(7).

AG – that is not sufficient – if there is doubt, stay up (EC) or down (France)?? Would best effort – would it be sufficient for a platform to just takedown automatically what is manifestly infringing – is that best effort.

Council: We agree with the Commission. RH has responsibility to prove infringement. If the platform is in doubt, then the obligation under Article 17(7) means content cannot be eliminated.

AG – for EP – 17(8) – no general monitoring – what is the difference with Article 15 of the E-Commerce Directive – if similar how does the obligation under Article 17 distinguish from *Sabam v. Netlog* (C-360/10 see para. 36⁵). It looks like the same obligation is put on OCSSPs which the Court considered contrary to Article 15 in the *Sabam* case? Second query – specific works in Article 17(4) -

⁵ In that regard, it is common ground that implementation of that filtering system would require:

- first, that the hosting service provider identify, within all of the files stored on its servers by all its service users, the files which are likely to contain works in respect of which holders of intellectual-property rights claim to hold rights;
- next, that it determine which of those files are being stored and made available to the public unlawfully; and
- lastly, that it prevent files that it considers to be unlawful from being made available.

-what do we mean by that? If we take it overly literally – what happens if Universal Music send a list of thousands of titles -- does that become general monitoring. These examples complicate more than the easy examples.

EP: Addressees of the Directive are the Member States and ultimately OCSSPs – they don't have to search the internet to find copyright infringements on their own initiative – since Article 17(4) best efforts in itself limits the possibility to only where RH notify. On query 2 – communicating a long list is not enough – it is general – they have to be more specific to allow the platform to protect copyright. If a given platform uses filter, then the RH needs to watermark or filter. Going back to your first question – the general monitoring obligation for platforms can take be own initiative it is about relevant and necessary info. There are significant differences with the *Sabam* case it was about ISPs – [Note EP referring to wrong *Sabam* case]. See para 47⁶ of the judgment– but go back to 17(4) – relevant and necessary info!

AG: It does but you are naive -as from June 7 the big platforms risk likability if they have information. Big copyright owners will provide lists – I understood your position. For commission, Consultation Document is not official, but you pleaded that way.

EC: The question departs slightly from the consult paper “likely infringing” but in the question “manifestly”. That is the main difference.

Justice Safjan: For PL, could you clarify your position - as it clearly follows from both the detailed comments in your application and legal basis – PL recognises the nature of platform as being responsible for communicating to the public – you do not contest 17(1) or Article 17(4)(a) or (c) first part. You say operators have obligations to make best efforts to protect copyright, but PL is objecting the scope of best efforts obligation. Could you clarify? The prevention elements are what you don't like or is that obligation more of a higher standard – that goes beyond due diligence – which comes close to obligation of effect (result) which you contest. What efforts would PL understand that could be considered to ensure some sort of prevention? Or is nothing permitted?

PL: to clarify – PL contests the departure from notice and takedown replaced with a staydown. We do not oppose the need for authorisation. However, we are contesting the imposition of an obligation based on staydown – we are contesting prevention – concerning best efforts – indeed (a) does not mean it is not profession efforts that are required – platforms are professional therefore they must abide by strict rules.

Safjan: For EC (and maybe other in replies) – what are the implications of considering Article 17(7) to be result based. Could there be further reaching implications (beyond takedown of illegal content)– I am not so sure – excessive measures imposed to eliminate non-legal content might lead to Member States being held liable for infringing the Directive – or litigation to restore content? A Member State which imposes far-reaching filtering will they infringe? Will the Commission take action against filters?

EC: I would like to start with the first part of the question – content which is unlawful should be removed. Otherwise it should stay up. If Member State in their national law oblige OCSSPs to do otherwise that would be against the directive – the Directive is tech neutral –such solutions would infringe 17(7). Presumption of lawfulness should prevail.

⁶ 47 In the present case, the injunction requiring the installation of the contested filtering system involves monitoring all the electronic communications made through the network of the ISP concerned in the interests of those rightholders. Moreover, that monitoring has no limitation in time, is directed at all future infringements and is intended to protect not only existing works, but also future works that have not yet been created at the time when the system is introduced.

Justice Wahl: Re Article 17(4) v. Article 17(7) – it seems that for a platform, its best interest is to make available everything to make more money, but they do self-regulate – we are trying rebalance something (per France). The best way is a licence --- If no agreement, they have pay compensation – no free speech on platform – cost benefit analysis – let’s just fix our algorithm – let’s be on the safe side – they decide themselves. How does the obligation of result in Article 17(7) have any influence on that. The best interest of the company is to put a stop to it itself – there is no free speech on a platform – they are private.

Council: We agree – no freedom of expression on platforms – as far as best efforts. Platforms will find the right balance. Because Article 17(4) requires only best efforts. We do not think platforms tend to over blocking to be on the safe side because they want to make money – Article 17 encourages licensing. So, there won’t be much over blocking.

Wahl: cost/benefit analysis – safe side – question for a company. Article 17(7) is not of much use really! It does not apply to private enterprises – that is my point.

Council – difference between Article 17(4) and – economic analysis concerns only the former – however Article 17(7) obligation is absolute and cannot be ignored.

Wahl: Article 17(7) requires a private enterprise to leave space for freedom of speech?

Council – Member States cannot impose an obligation to remove legal content. Article 17(7) does not provide any rights for users.

Closing Arguments/Replies:

President Lenaerts: Long debate—if you absolutely want to reply – please do not reiterate

PL: France stressed the damage to RHs is greater – we think the opposite. Article 17 does not explain redress – the court must consider this in doing the balancing test. None of the parties demonstrated alternatives.

EP: Refer to the AG question – hoping to shed more light – info that RH should communicate under Article 17(4)b – we are talking about best efforts (*UPC Telekabel*) resources etc – thanks to that they can be freed from liability if they take all reasonable steps- not obliged to make unacceptable sacrifice – realistically. Not about generic statements – it is about very specific info that will allow identification.

Council: No comment.

Spain: Take into account the platforms – not these are not E-Commerce Directive ISPs – they are active that is their business model – cannot extrapolate the AG Opinion. Article 17 prior authorisation. Unlawful content must not remain online – it will go viral. France. Only inconvenience is temporal. Any restriction to FRs is proportionate.

France: Article 17 must not be distorted because of the fear of a conflict between freedom of expression and copyright – it could create limitations but in reality, they are proportionate in light of the balance that must be struck between copyright and the user (temporary). Article 17 does not contravene the Charter. How about doubts – what criteria – large amount of unlawful content will remain online. Only through a statement of platform or user or copyright will there be a doubt. The copyright owner has to be protected – proportionality means a temporary circumscribed blocking. Result – ex ante – freedom of practice – Wahl – political content –

EC: No more.

AG –I will render my Opinion on 22 April 2021.