**Between Compliance and Control: German Implementation of Article 17 of Directive on Copyright in the Digital Single Market and Self-Regulation of Online Content-Sharing Service Providers**[1]

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**Abstract:** As a part of the Digital Single Market Strategy actions to make European Union copyright rules fit the digital age, The Directive on Copyright in the Digital Single Market was published in the official journal in 2019. However, Article 17 of this Directive, with its "best efforts" obligations, faced heavy criticism. In order to meet the requirements of this Article and avoid liability for copyright-infringing content, platforms need to use automated content recognition tools, also known as "upload filters." These technologies often disproportionately interfere with users' freedom of expression. This is a significant issue that Member States should take into consideration when implementing the Article, particularly given the emphasis on effective safeguards for these systems in the *Poland* decision by the CJEU.

This article aims to provide recommendations for a fundamental rights-compliant implementation of the Article by examining the German implementation together with the current self-regulation of Online Content Sharing Service Providers. This analysis will provide different perspectives on Article 17 and insight into the problems with Article 17.

Keywords: EU Copyright Law, Copyright in the Digital Single Market Directive, Upload Filters, Online Content Sharing Platforms, Fundamental Rights and Copyright

## A. Introduction

In time, digital platforms became the heart of communications; and consequently, these platforms replaced the physical stores as being the leading marketplace for the distribution of copyright-protected works. This digitalisation helped creative industries grow by creating new opportunities, but this innovation was not without its challenges. The new uses of

[1] This paper summarises and builds on material from my PhD thesis, *The Challenge of Balancing Competing Fundamental Rights in Online Enforcement of Copyright: A Study on Copyright in the Digital Single Market Directive*, completed at the University of Hertfordshire in 2023.

copyright-protected works within the cross-border platforms brought problems regarding the harmonisation and modernisation of EU copyright rules.[2] Most notably, in the context of hosting platforms, the hosting safe harbour of E-Commerce was found to be outdated regarding striking the fair balance between the platforms and the rightholders and a need for *"achieving a well-functioning marketplace for copyright"* has arisen.[3] These were detected as the main issues to tackle by adopting The Digital Single Market Strategy (DSM Strategy).[4] One of the most significant developments among the DSM Strategy actions was the Proposal for a Directive on Copyright in the Digital Single Market, released in 2016 by the Commission.[5] The other is the Digital Services Act which amends a key directive for the online platforms as intermediaries, the E-Commerce Directive (ECD).[6]

After three years from the Proposal and long discussions, this long-awaited reform, the Directive on Copyright in the Digital Single Market was published in the official journal in 2019.[7] This Directive constitutes a significant piece of legislation that emerges from the European Commission's efforts to keep the copyright rules up with the fast-developing technology.

Article 17 was in the spotlight of the criticism that the Directive on Copyright in the Digital Single Market (CDSMD) received, primarily because of its best effort obligations for the online content-sharing service providers (OCSSPs). According to Article 17 of the CDSMD, OCSSPs should obtain authorisation from the rightholders for the making available of copyright content uploaded by users of their service.[8] This shows that traditional hosting safe

[2] European Commission, 'Commission Staff Working Document – Impact Assessment on the Modernisation of EU Copyright Rules, SWD(2016) 301 final, Brussels, 14 September 2016. (hereinafter 'Impact Assessment')
[3] Impact Assessment, p. 132.
[4] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "A digital single market strategy for Europe", (COM(2015) 192 final) of 6 May 2015. http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication_en.pdf
[5] European Commission, 'Proposal for a Council Directive on Copyright in the Digital Single Market' COM (2016) 593 final.
[6] Regulation (EU) 2022/2065 of The European Parliament And of The Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) ('DSA') [2022] OJ L 277/1, p. 1 – 102. (hereinafter 'DSA')
[7] Directive 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 L 120/92, 17.5.2019. (hereinafter 'the CDSMD)
[8] Article 17 of the CDSMD

harbour rules of ECD, which are restated in DSA[9], shall not be applied to OCSSPs unless they fulfil the significant obligations of Article 17.[10]

According to Article 17 of CDSMD, if a licence is not concluded, these providers must demonstrate that they have made "best efforts" to obtain an authorisation (Article 17(4)(a)); to ensure the unavailability of specific works and other subject matter (Article 17(4)(b)); to prevent of future infringing uploads (Article 17(4)(c)). Thus, with Article 17, the imposition of direct liability for copyright infringement has been combined with a three-tiered standard of care and due diligence, and OCSSPs have been left with only one alternative in the absence of umbrella licencing agreements to avoid liability; filtering.[11]

## B. Background

In order to fulfil the best efforts requirement of Article 17, platforms should implement automated content recognition tools, namely "upload filters." These tools sit at the core of the criticism that the Article receives, accompanied by the ambiguity around the key concepts and the lack of robust safeguards.[12] Article 17's filtering obligations raised many concerns regarding its possible effects on fundamental rights, especially on freedom of expression and information.[13] Any disproportionate enforcement action arising from these obligations can

[9] However, it is important to note that while DSA maintains the liability rules for providers of intermediary services set out in the ECD, it introduces stronger obligations regarding fundamental rights and transparency. See Articles 14, 15, 16 and 17 of DSA.
[10] Article 6 of DSA.
[11] Giancarlo Frosio, 'Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity'(2020) 51 IIC - International Review of Intellectual Property and Competition Law 709 <https://doi.org/10.1007/s40319-020-00931-0> accessed 14 March 2022.
[12] Martin Senftleben and others, 'The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform' (2018) 40 European Intellectual Property Review 149 <https://www.ssrn.com/abstract=3054967> accessed 29 March 2022; Natalia E Curto, 'EU Directive on Copyright in the Digital Single Market and ISP Liability: What's Next at International Level?' (2019) SSRN Scholarly Paper ID 3434061 <https://papers.ssrn.com/abstract=3434061> accessed 14 March 2022.; Mark Hyland and Thomas Perry, 'The Knottiest of Gordian Knots: Article 17 of the Copyright Directive' (2023) 45 European Intellectual Property Review 15.
[13] Felipe Romero Moreno, '"Upload Filters" and Human Rights: Implementing Article 17 of the Directive on Copyright in the Digital Single Market' (2020) 34 International Review of Law, Computers & Technology 153 <https://www.tandfonline.com/doi/full/10.1080/13600869.2020.1733760> accessed 14 March 2022; Sevra Guler Guzel, 'Article 17 of the CDSM Directive and the Fundamental Rights: Shaping the Future of the Internet' (2021) 12 European Journal of Law and Technology <https://ejlt.org/index.php/ejlt/article/view/817> accessed 14 March 2022.

negatively affect the rights and freedoms protected by the EU Charter of Fundamental Rights (Charter).[14] The implementation of upload filters by OCSSPs has a significant risk of causing harm to the users' fundamental rights, and with their cost and availability issues, there is a serious potential of harming platforms' conduct a business freedom.

The interferences of upload filters with fundamental rights and their clashes with legal mechanisms such as general monitoring ban, fair balance and proportionality pointed out in various decisions by the Court of Justice of the EU (CJEU)[15], and a rich literature on the topic has been developed by the academics.[16] These complex and costly filters, due to their operation, monitor all uploads from all the users for any future infringement of intellectual property for an unlimited time and decide on which uploads will be uploaded on the platform or not with their opaque, context-blind algorithms that are incapable of distinguishing between lawful content that benefits from statutory copyright exceptions and infringing content.[17] The most problematic shortcoming, context-blindness, has been underlined many times by the experts[18] and also disclosed by the creators of the upload filter software within the stakeholder dialogues.[19] For that reason, a crucial necessity for safeguards against the possible effects of the Article's obligations on fundamental rights arises. The article tries to satisfy this need with copyright exceptions and limitations in Article 17(7), the general

[14] Charter of Fundamental Rights of the European Union [2012] *OJ C 326, 26.10.2012*, p. 391–407(‘hereinafter: Charter)
[15] C-324/09 *L’Oréal SA and Others v eBay International AG and Others* (*L’Oréal*)[2011] EU:C:2011:474,; C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) (Scarlet Extended),* [2011] EU:C:2011:771.; C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV (Netlog)* [2012] EU:C:2012:85.; Case C-275/06, *Productores de Música de España v Telefónica de España SAU, (Promusicae)* [2008], ECLI:EU:C:2008:54.
[16] João Quintais and others, ‘Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations From European Academics’ (2019) 10 Journal of Intellectual Property, Information Technology and Electronic Commerce Law 277 <https://www.ssrn.com/abstract=3484968> accessed 14 March 2022; Felipe Romero Moreno, ‘Upload Filters’ and Human Rights: Implementing Article 17 of the Directive on Copyright in the Digital Single Market’ (2020) 34 International Review of Law, Computers & Technology 153; Martin Senftleben, ‘Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market’ [2019] SSRN Electronic Journal <https://www.ssrn.com/abstract=3367219> accessed 14 March 2022 ; Cambridge Consultants, ‘Use of AI in Online Content Moderation’ (Ofcom 2019) <https://www.ofcom.org.uk/__data/assets/pdf_file/0028/157249/cambridge-consultants-ai-content-moderation.pdf>,
[17] Sevra Guler Guzel, ‘Article 17 of the CDSM Directive and the Fundamental Rights: Shaping the Future of the Internet’ (2021) 12 European Journal of Law and Technology <https://ejlt.org/index.php/ejlt/article/view/817>
[18] Evan Engstrom and Nick Feamster, ‘The Limits of Filtering: A Look at the Functionality and Shortcomings of Content Detection Tools’ (Engine 2017) <http://www.engine.is/the-limits-of-filtering/.>.
[19] Paul Keller, ‘Article 17 Stakeholder Dialogue (Day 3): Filters Do Not Meet the Requirements of the Directive’ (*International Communia Association*, 3 December 2019) <https://www.communia-association.org/2019/12/03/article-17-stakeholder-dialogue-day-3-filters-not-meet-requirements-directive/> accessed 22 June 2020.

monitoring ban in Article 17(8), the complaint and redress mechanisms in Article 17(9) and lastly, the stakeholder dialogues in Article 17(10). However, most academic opinions state that the Directive failed to frame the best efforts obligations with robust and practical safeguards that would help with real-life solutions.[20] For instance, the most important safeguard, Article 17(7), makes copyright exceptions such as parody, pastiche, quotation and review mandatory for the Member States to implement and requires platforms to ensure the legitimate uses of copyright-protected works, including copyright exceptions and limitations, would not be caught in the nets of upload filters and makes.[21] However, the aforementioned shortcomings of upload filters, such as context-blindless which result in over-blocking, make it impossible for platforms to enforce this safeguard in practice and therefore cause Article 17(7) to fail to constitute an effective safeguard for freedom of expression of users.

The lack of clarification before the implantation deadline strengthened the validity of the criticism regarding the compatibility of this obligation with fundamental rights. The Commission's guidance, which was released just a day before the implementation deadline, aimed to clarify these essential concepts regarding the liability of OCSSPs and the enforcement of copyright exceptions and limitations. As a critical remark, the Guidance clarified that Article 17(7) is an "obligation of result", which is a stronger legal norm than Article 17 (4)'s "obligation of best efforts." According to this conclusion, ensuring the availability of legitimate works prevails the duty of preventing the availability of specific works.[22] Therefore, the duty of not preventing the availability of legitimate uses such as copyright exceptions and limitations has precedence over ensuring the unavailability of potentially infringing works for OCSSPs to avoid liability under Article 17. Consequently, the Guidance also clarified that the automated blocking should be limited to manifestly infringing uploads, and other uploads should go online.

However, contrary to the above conclusion, the Guidance also suggests that *ex-ante* blocking of lawful content could take place in some cases where the content is “earmarked” by the

[20] Christophe Geiger and Bernd Justin Jütte, ‘Platform Liability Under Art. 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match’ [2021] GRUR International <https://doi.org/10.1093/grurint/ikab037> accessed 10 March 2022.;
[21] Article 17(7) of CDSMD
[22] European Commission, ‘Communication From The Commission To The European Parliament And The Council Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market Brussels, 4.6.2021 COM(2021) 288 Final. (hereinafter ‘Guidance’) p.20.

rightholders as "*content whose availability could cause significant harm*."[23] However, there is no limit to the works that can be subject to earmarking provided within the Guidance, and the duration of this blocking also does not seem to be limited in an objective way which leaves this mechanism incompatible with the Charter.[24] The potential "*high risks of significant economic harm"*[25] to rightholders does not sufficiently justify the irreparable harm to users' freedom of expression and information.[26]

Even though the same guidance suggests that the *ex-ante* blocking should be only limited to the uploads that are "manifestly infringing" by providing rightholders with a new tool to tackle this limitation and raises the risk of "over-complaining"[27] as it also fails to provide effective user protection in the cases of over-blocking.[28] With this self-contradicting nature, the Guidance takes one step forward and two steps back regarding showing the way to a fundamental rights-compliant implementation of Article 17 to the Member States.

The most important event regarding the national implementation of Article 17 was the CJEU decision in the *Poland*[29] case, which concerns the annulment of Article 17(4)(b) and Article 17(4)(c) of the CDSMD brought by the Republic of Poland. Poland Government argued that the obligations in Article 17(4)(b) and the second part of paragraph (c) require platforms to perform *ex-ante* review and filtering that would disproportionately affect freedom of expression and information enshrined in Article 11 of the EU Charter of Fundamental Rights, and therefore, should be annulled.[30] The substance of this claim required a fundamental rights compliance assessment for the Article, and CJEU undertook this within their decision by following the Advocate General Saugmandsgaard Øe's opinion closely. In his opinion, AG underlined that the safeguards within Article 17 should be implemented and applied carefully and broadly to ensure proportionate enforcement[31], which is the essential requirement the validity of Article 17 is subject to according to the CJEU.[32]

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[23] Guidance, p.22
[24] *Yıldırım v. Turkey* Application no. 3111/10 (ECtHR, 18 December 2012)
[25] Guidance
[26] Case C-401/19, *Poland v Parliament and Council* ECLI:EU:C:2021:613, Opinion of Saugmandsgaard Øe,.(hereinafter 'AG Opinion')
[27] AG Opinion, Footnote 246.
[28] AG Opinion [166]
[29] Case C-401/19 *Republic of Poland v European Parliament and Council of the European Union* (*Poland v European Parliament*) [2022] ECLI:EU:C:2022:297 (hereinafter 'Poland case')
[30] *Poland v European Parliament*
[31] AG Opinion [150]
[32] *Poland v European Parliament* [85-95]

The CJEU acknowledged the potential negative impact of Article 17(4) on the exercise of the right to freedom of expression and information; however, added that the cautious implementation of the safeguards of Article 17 can ensure that the essence of that fundamental right and the principle of proportionality is respected.[33]

As an important clarification, CJEU acknowledged that points (b) and (c) of Article 17(4) of CDSMD require platforms to *de facto* carry out a prior review which can be undertaken via automatic recognition and filtering tools as there are no possible alternatives to such tools.[34] Despite the wording of the Directive avoiding specifying these tools, there is a consensus in academia that to comply with Article 17's obligations, platforms have no choice other than employing these upload filters[35], and this consensus has been confirmed by the decision.[36] CJEU also confirmed the concerns regarding the negative impact of these tools on the freedom of expression of the users and underlined the importance of enabling the exercise of this right online, which makes limiting the limits that upload filters bring on the freedom of expression vital for the Article 17's compatibility with the Charter, therefore for its validity.[37]

CJEU underlined how, especially regarding freedom of expression, established case law designates a particularly tight legal framework that requires ensuring tight control over the scope of bans and effective judicial review.[38] Therefore, to prevent the specific liability regime in Article 17(4) from imposing a disproportionate restriction on the right to freedom of expression and information of users of OCSSPs, the implementation of the automated

[33] *Poland v European Parliament* [58]
[34] *Poland v European Parliament* [53]-[54]
[35] Martin Senftleben, 'Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market' [2019] SSRN Electronic Journal <https://www.ssrn.com/abstract=3367219>. 8; Thomas Spoerri, 'On Upload-Filters and Other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market' (2019) 10 Journal of Intellectual Property, Information Technology and E-Commerce Law 173.; Giancarlo Frosio, 'Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity'(2020) 51 IIC - International Review of Intellectual Property and Competition Law 709 <https://doi.org/10.1007/s40319-020-00931-0>. ; Felipe Romero Moreno, '"Upload Filters" and Human Rights: Implementing Article 17 of the Directive on Copyright in the Digital Single Market' (2020) 34 International Review of Law, Computers & Technology 153 <https://www.tandfonline.com/doi/full/10.1080/13600869.2020.1733760>. 2; Sevra Guler Guzel, 'Article 17 of the CDSM Directive and the Fundamental Rights: Shaping the Future of the Internet' (2021) 12 European Journal of Law and Technology <https://ejlt.org/index.php/ejlt/article/view/817>.
[36] *Poland v European Parliament* [54]
[37] *Poland v European Parliament* [58]ff
[38] *Poland v European Parliament*, [64]

recognition systems should be limited to cases when it is strictly necessary and proportionate for the platform, and not just *ex-post*, *ex-ante* safeguards also should be placed to guarantee the efficient protection for the freedom of expression.[39]

CJEU underlines the importance of limiting the filtering that OCSSPs operate and limits the suitable tools to implement to comply with Article 17 to those that do not filter and block lawful content when uploading.[40] While within the decision, there is no specification in terms of limits to content, AG opinion provides detailed guidance regarding the limitation of filtering and states that the rights of users under Article 17(7) of the Directive, which provides protection for the legitimate uses such as exceptions and limitations, must be taken into account *ex-ante*, and not only *ex-post* and therefore all transformative uses of works should be excluded from the automatic preventive blocking to limit the instances of over-blocking.[41]

Therefore, this decision underlines how crucial the strict and efficient implementation of safeguards for the validity of Article 17 is. It also clarifies how this importance should be reflected in the implementations by confirming the position of the obligation of result in Article 17(7) over Article 17(4), by excluding filters which filter and block lawful content during upload and by providing some information regarding what would constitute a fundamental right compliant filtering.

As can be seen from this background, there is no step straightforward when it comes to Article 17. Therefore, it is important to examine the current situation with the implementations of Article 17 and its impacts on platforms, users and rightholders to see the future of Article 17 and provide plans to build a better one. This examination is also essential for perceiving whether the concerns regarding the Article, especially expected adverse effects on fundamental rights, are taking place in practice to assess the efficiency of the safeguards.

These discussions regarding Article 17 may be regarded as merely academic; however, their impact on the implementation, therefore, their practicality, should not be underestimated. That is why this paper aims to provide different perspectives on Article 17 with the

[39] *Poland v European Parliament* [85]-[95]
[40] *Poland v European Parliament* [85]
[41] AG Opinion, [206]

examination of German national implementation and the self-regulation of platforms to provide an insight into the current picture with Article 17. These perspectives constitute great value for providing recommendations for the fundamental right-compliant implementation of Article 17. Moreover, looking at the DSM strategy as a whole, it examines the relationship between CDSMD and DSA and provides implementation recommendations for potential overlaps between these two pieces of legislation.

In 2022, less than half of the EU Member States have implemented the Directive. In the current implementation environment, after 4 years since the Directive passed the parliament, in early 2023, Bulgaria**,** Denmark**,** Finland**,** Latvia**,** Poland and Portugal have been referred to the CJEU following their failure to notify complete transposition measures on CDSMD.[42] Currently, all Member States have implemented the CDSMD. However, in light of *Poland* decision, the Member States which already implemented Article 17 may need to amend their implementations.

### C. German Implementation: A Model for Fundamental Right-Compliant Implementation of Article 17?

The CDSMD has been implemented as a standalone act in Germany; the legislature chose this over selective modification of each of the relevant affected sections of the German Copyright Act.[43] Germany implemented Article 17 of the CDSMD with the Act on the Copyright Liability of Online Content Sharing Service Providers (UrhDaG)[44] , which came into force in August 2021.

UrhDaG includes a structured yet complex procedural mechanism regarding user uploads. The clarification of the OCSSP liability regarding the acts of communication to the public via

[42] 'CDSM Implementation Resource Page – CREATe' <https://www.create.ac.uk/cdsm-implementation-resource-page/> accessed 27 July 2023.; '11 Member States Referred to the Court of Justice of the EU' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_704> accessed 27 July 2023.

[43] Julian Waiblinger and Jonathan Pukas, 'Implementation of Art. 17 DSM Directive into German National Law – the German Act on the Copyright Liability of Online Content Sharing Service Providers (UrhDaG)' (*Kluwer Copyright Blog*, 28 February 2022) <http://copyrightblog.kluweriplaw.com/2022/02/28/implementation-of-art-17-dsm-directive-into-german-national-law-the-german-act-on-the-copyright-liability-of-online-content-sharing-service-providers-urhdag/> accessed 11 March 2022.

[44] 'Act on the Copyright Liability of Online Content Sharing Service Providers (Urheberrechts-Diensteanbieter-Gesetz – UrhDaG)*' <https://www.gesetze-im-internet.de/englisch_urhdag/englisch_urhdag.html> (hereinafter 'UrhDaG')

their users can be found in Section 1, mostly following the CDSMD's wording, followed by the definition for which platforms would fall into the scope of OCSSP in Section 2(1). The controversial "best efforts" obligations of Article 17 can be found under three different segments: Section 4, which regulates licencing obligations according to Article 17(4)(a) and Sections 7-11, which contain the obligation to ensure the unavailability of specific works according to the Article 17(4)(b) and (c). Failure to comply with these sections brings civil law liability, injunctions and damages, according to Sec. 97 of the Act on Copyright and Related Rights (Urheberrechtsgesetz – UrhG).[45]

In efforts to eliminate the criticism regarding the licensing obligation under Art 17(1), UrhDaG provides a defined framework for liability regarding "best efforts" obligations for obtaining authorisation from rightholders. First, Section 4 underlines that licensing obligation does not mean that OCSSPs should obtain licences for the worldwide repertoire, and it specifies a proportionate requirement regarding the effort that OCSSPs need to show to obtain these licences. This clarifies that platforms do not have to actively search for all kinds of licences from unknown rightholders; platforms must obtain the licence to avoid liability only when rightholders offer a license agreement that meets Section 4's standards.

Second, sections 7-11 set out the blocking obligations for OCSSPs under two different types of blocking: simple (Section 8) and qualified (Section 7). While section 7 corresponds to the preventive blocking obligation, which requires the employment of upload filters, section 8 corresponds to the takedown obligation, which requires rightholder notification for blocking to take place. Following these provisions, the Act provides special sections for qualified blocking. Sections 9-11 constitute the most attention-grabbing part of the implementation, and these sections regulate the preventative filtering for blocking unauthorised content. These provisions can be seen as a reflection of the German lawmaker's efforts to tackle the challenges that preventive filtering via automated tools brings, such as over-blocking.

### *1. The Case of Presumably Authorised Uses*

CJEU clarified that the enforcement of Article 17(4) in compliance with Article 17(7) and (9) safeguards and the Charter requires automated blocking to be limited in its *Poland* decision.[46]

[45] 'Act on Copyright and Related Rights (Urheberrechtsgesetz – UrhG)' <https://www.gesetze-im-internet.de/englisch_urhg/index.html> .
[46] *Poland v European Parliament* [85]-[95]

This limit has been specified as 'manifestly infringing uploads' by the AG in his Opinion for the case, meaning that other uploads should go online in principle.[47] In line with that, Guidance and AG Opinion have also accepted that restoring legitimate content which does not infringe the copyright or related rights in an *ex-post* matter is not enough to meet the requirements of Article 17(7).[48] The adverse effects of over-blocking on freedom of expression cannot always be avoided with such ex-post mechanisms. Considering the special place online platforms have regarding current affairs and political debates, time is a crucial element for their users.[49]

Therefore, by satisfying these outcomes and limiting the instances of over-enforcement, the German implementation introduces the concept of 'uses presumably authorised by law' and provides a pre-flagging opportunity for users to provide their input regarding the copyright exceptions in their uploads for the decision-making process. While there is no explicit mention of manifestly infringing uploads, the concept of "uses presumably authorised by law" constitutes a rule on "manifestly non-infringing" uploads.[50] Thus, UrhDaG tries to prevent the e*x-ante* automated blocking for uses presumably authorised by law which is not manifestly infringing and provides a *delayed takedown* until the infringing nature of the content is confirmed through the conclusion of the complaints procedure.[51]

In order to benefit from this presumption, UrhDaG defines some requirements and states that these requirements should be met cumulatively. According to Section 9, to fall within the scope of 'uses presumably authorised by law', a user-generated content should: first, contain less than half of one or several other works or entire images and combine this work with other content; second, the use the third party works should be only to a "minor extent" or it should be pre-flagged by the user as legally authorised. As one of the 'uses presumably

[47] Guidance, p.20.; AG Opinion [188]
[48] Guidance, p.20; AG Opinion [188]
[49] *Yıldırım v. Turkey* [47]
[50] Christina Angelopoulos, 'Articles 15 & 17 of the Directive on Copyright in the Digital Single Market Comparative National Implementation Report' (CIPIL 2022) <https://informationlabs.org/wp-content/uploads/2022/09/Angelopoulos-Report-Full-Report.pdf>, p.44.; This concept is the most significant reason why this implementation was deemed to be the most user right friendly and balanced national implementation. See Matthias Leistner, 'The Implementation of Art. 17 DSM Directive in Germany – A Primer with Some Comparative Remarks' [2022] (forthcoming) GRUR International. 7
[51] Section 9 of UrhDaG; Matthias Leistner, 'European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?' [2020] Zeitschrift für Geistiges Eigentum/Intellectual Property Journal 123.

authorised by law', thresholds for minor use have been defined in Section 10 for different media.[52]

In addition to meeting these quantitative thresholds, these uses should not serve commercial purposes or only serve to generate insignificant income to benefit from this exception. Uploads that fall within the scope of minor use should not be subject to automated blocking and should stay online until the conclusion of a complaint procedure.[53] However, how the upload filters detect these uses and identify them as "minor" remains unanswered. Especially in the cases where the content includes different types of media, this constitutes a big practice problem regarding the enforcement of this exception. Considering that user-generated content usually consists of the combination of several traditional media formats, detecting minor uses will not be so straightforward in practice with upload filters. Currently, there is no content detection tool available that can filter different types of content; upload filters are designed to operate on a single media type, and for the widely-used fingerprinting algorithms, this is usually audio.[54]

However, legitimate content includes copyright-protected work broader than what the threshold allows when it benefits from a copyright exception. For instance, in terms of parody or pastiche, most of the time, the entirety of the copyright-protected work is subject to transformative use.[55] Therefore, where the use of work is not 'minor', Section 11 provides a pre-flagging tool for users to flag their uploads as including 'uses authorised by law' to ensure Article 17(7) is implemented as an effective safeguard. UrhDaG requires platforms to allow users to pre-flag the legitimate use of third-party content at the point of upload to prevent it from being subject to the preventive automatic blocking and help to reduce the instances of false positives. In this way, users can declare the lawfulness of their use of copyright-protected work, such as copyright exceptions and limitations, before the assessment of the

[52] Section 10 of UrhDaG states: *1. uses of up to 15 seconds in each case of a cinematographic work or moving picture, 2. uses of up to 15 seconds in each case of an audio track, 3. uses of up to 160 characters in each case of a text, and 4. uses of up to 125 kilobytes in each case of a photographic work, photograph or graphic*
[53] Section 9 of UrhDaG
[54] This will be the case in the near future as well. See Evan Engstrom and Nick Feamster, 'The Limits of Filtering: A Look at the Functionality and Shortcomings of Content Detection Tools' (Engine 2017) <http://www.engine.is/the-limits-of-filtering/.>.p. 17
[55] Case C-469/17, *Funke Medien NRW GmbH v Bundesrepublik Deutschland*, ECLI:EU:C:2019:623; Case C-476/17, *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben*, ECLI:EU:C:2019:624; Case C-516/17, '*Spiegel Online GmbH v Volker Beck'* [2019] ECLI:EU:C:2019:625.

automated systems regarding the legitimacy of the upload takes place. On this point, it is important to note that, to maintain the fair balance, UrhDaG introduces a new compensation claim for the caricatures, parodies and pastiches by requiring OCSSPs to pay appropriate remuneration for the acts of communication to the public while introducing this concept of presumably legal uses.[56]

In addition to the obligation to provide a pre-flagging tool, Section 11 provides detailed notification obligations for the OCSSPs. First, OCSSPs need to inform the user about the rightholder's blocking request and second, they need to notify the user about the need to have legal permission regarding their use of a work set out in Section 5. Section 5, together with Section 44 ff. of UrhG, sets out the mandatory exceptions of Article 17(7), namely quotations, caricatures, parodies and pastiches, and obliges OCSSPs to draw the user's attention to these uses authorised by law in their general terms and conditions. Therefore, Section 11 ensures that uploads which include the use of a third-party work more than minor use according to Section 10 but flagged by the user as lawful use should go online. Where the user upload includes a use presumably authorised by law, the relevant rightholder must be notified with the information regarding their right to lodge a complaint via internal complaints procedure for this presumption to be reviewed by impartial natural persons to satisfy the 'human review' obligation of Article 17 of CDSMD.[57]

Thus, under UrhDaG's 'delayed takedown' system, users are allowed to flag their uploads before and if the blocking request follows the upload within a 48-hour period after the upload to declare that their use of copyright-protected content falls within the scope of copyright exceptions protected by Article 17(7). The option to utilise the "delayed takedown regime" is only applicable in situations where content is blocked before being uploaded and can remain blocked through the use of upload filters. Additionally, this option is only available for content that is not time-sensitive and is limited to the length of the complaint and redress process. Therefore, the delayed takedown ceases when the decision is delivered, which should occur within one week of submitting the complaint, as per Section 14.

[56] Section 5(2) of UrhDaG.
[57] Section 9(3) and 14 of UrhDaG.

However, not every kind of content can benefit from this; an exception has been provided in Section 7(2) by the lawmaker regarding the *"uses of cinematographic works or moving images until the completion of their first communication to the public, in particular during the simultaneous transmission of sporting events."* This provision corresponds to Guidance's "time-sensitive content" concept, which argues that these types of content bring high risks of significant economic harm and, therefore, require heightened care.[58]

For all types of content besides what is stated in Section 7(2), rightholders can use complaint and redress mechanisms to argue the infringing nature of the upload. However, these presumably legal uses should also stay online during the complaints procedure. An exception to this rule can be found within Section 14, where the Act sets out the internal complaints procedure that OCSSPs have to provide.

This procedure includes a *"red button"* tool for 'trustworthy rightholders' under Section 14(4) to stop presumably legal user-generated content from being available online if they consider the use within the content as harmful. According to this section, where a trustworthy rightholder reports a presumably legal use as harmful to their copyright, it must be blocked immediately by the platform until the conclusion of the complaints procedure. This reflects Guidance's "earmarking" mechanism, which was found incompatible by the AG in the *Poland* case.[59] While whether the CJEU inexplicitly acknowledged this finding within the decision is open to debate, considering the stress that the decision put on the filtering that is limited to the unlawful content, one can say that CJEU supports AG's opinion in this regard.[60] Most importantly, by stating Article 17 does not oblige platforms to block uploads in cases where detecting the unlawfulness of the content *"would require an independent assessment … in the light of the information provided by the rightholders and of any exceptions and limitations to copyright"*[61] it disregards the earmarking since this mechanism imposes an additional duty on platforms to exercise diligence with regard to earmarked content and

[58] Guidance, p. 22
[59] AG Opinion [223]
[60] João Pedro Quintais, 'Article 17 Survives, but Freedom of Expression Safeguards Are Key: C-401/19 - Poland v Parliament and Council' (*Kluwer Copyright Blog*, 26 April 2022) <http://copyrightblog.kluweriplaw.com/2022/04/26/article-17-survives-but-freedom-of-expression-safeguards-are-key-c-401-19-poland-v-parliament-and-council/> accessed 9 May 2022.
[61] *Poland v European Parliament* [90]

assess their "economic harmfulness" to satisfy the best effort standards of the Article.[62] However, unlike the Guidance's version, the German earmarking has stricter limits regarding the type of content and the duration.

There are many concerns regarding the operation of this tool as the Act is quiet regarding the criteria for being trustworthy. Also, with these types of tools, there is always the risk of abuse; these tools, such as privileged takedown mechanisms that some platforms offer to big rightholders, historically have many problems resulting in fraudulent claims such as false claims from rightholders for third-party works to get the monetisation revenue[63] or false claims generated by rightholders' automated takedown tools such as claims even for works in the public domain.[64] That is why to eliminate this high risk of misuse, there should be dissuasive and effective sanctions in place within the national transposition. For the misuse of pre-flagging and red button tools by rightholders or users, UrhDaG sets forth the exclusion of the users or rightholders from these tools for an appropriate period in Section 18.

The importance of sanctions comes into play also regarding the enforcement of these obligations. German implementation has been criticised regarding its failure to provide sufficient sanctions for platforms in the case of a failure to safeguard the user rights and interests; there is no sanction within the UrhDaG for the cases of non-compliance of the platforms.[65] For example, there is a civil liability under UrhG if they fail to protect rightholders' interests; however, a provision for this liability is missing for protecting user interest. The concept of 'uses presumably authorised by law' lacks an unambiguous enforcement regime which brings the risk of UrhDaG being ineffective regarding user rights protection, and this shortcoming is reflected in practice already.[66]

The so-called delayed takedown system with pre-flagging also faces its share of criticism. It has been argued that liability rules around the "delayed takedown" system can bring the risk

[62] Guidance, p.14
[63] Kristelia García, 'Monetizing Infringement' (2020) 54 Davis Law Review 73 <https://scholar.law.colorado.edu/articles/1308>.
[64] Jennifer M Urban, Joe Karaganis and Brianna Schofield, 'Notice and Takedown in Everyday Practice' (UC Berkeley 2017) UC Berkeley Public Law Research Paper ID 2755628 <https://papers.ssrn.com/abstract=2755628>
[65] Jasmin Brieske and Alexander Peukert, 'Coming into Force, Not Coming into Effect? The Impact of the German Implementation of Art. 17 CDSM Directive on Selected Online Platforms' <https://zenodo.org/record/5865619> accessed 11 March 2022.
[66] ibid.

of being incompatible with the Directive. In scenarios where content identified through pre-flagging is determined to be infringing only after the complaint and redress procedure concludes, Online Content Sharing Service Providers (OCSSPs) are granted immunity from liability throughout the complaint process, in contrast to the users.[67] If the content falls under 'minor uses', neither the user nor the OCSSPs will be held liable during the complaints process.[68] After a decision is reached, should OCSSPs fail to carry out the complaint procedure per Section 14, they become liable for damages under copyright law. However, this exemption from liability does not extend to the user; they remain liable according to the general rules. Therefore, it has been argued that Section 12(2) indemnifies OCSSPs beyond the limits of the Directive and creates an imbalance in the risk of liability.[69]

Despite the criticisms, when we consider the UrhDaG in its entirety - particularly with the introduction of the concept of "uses presumably authorised by law" and the pre-flagging mechanism - it becomes clear that the German implementation prioritises safeguarding user rights by focusing on reducing false positives and over-blocking. This is the first time for an implementation to offer a procedural mechanism designed to ensure that the OCSSPs are not preventing legitimate content on their platforms and that the instances of over-blocking are limited. While increasing the effectiveness of the user safeguard in Article 17 (7), this mechanism also helps OCSSPs meet their obligation of result, which trumps the obligation of "best efforts" to block and prevent infringing uses of works.[70] That is why this implementation has been recognised as one of the most ambitious implementations of the CDSMD and the first implementation that focuses on providing the user rights protection imposed by Article 17 in practice with the potential of becoming a model for the platforms.[71] While its care for user rights protection is clear, there are still conflicting opinions on whether

[67] Sections 11(2) of UrhDaG.
[68] Sections 12(2) and (3) of UrhDaG.
[69] Matthias Leistner (n 15), 8.
[70] Guidance, p.20; AG Opinion, [165]
[71] Even though YouTube has not clarified if the rules of UrhDaG are being applied globally, considering the worldwide availability of these new tools shortly before entry into force of the German law, and a similar statement from the platform's Brussels branch indicates that this might be the case. This is also sensible from an economic standpoint for the platforms, given that no national legislation currently mandates them to act otherwise. See Marco Pancini, 'YouTube's Approach to Copyright' (*Google - The Keyword*, 31 August 2021) <https://blog.google/around-the-globe/google-europe/youtubes-approach-to-copyright/> accessed 17 November 2021.

this approach could be considered a model for other Member States to follow as an "ideal" implementation.

### *2. Just Enough or A step too far?*

Some argue that German implementation goes a step too far, considering the highly prescriptive language of Article 17, which does not leave the Member States too much space for their interpretation.[72] Proponents of this argument suggest that because of the legal nature of Article 17, Member States have little to no space to manoeuvre, contrary to the approach that accepts Article 17 as a *sui generis* right.[73] Based on a mere literal reading of Article 17's wording, this argument defends that the general principles, including the exceptions, would remain subject to the InfoSoc regime, making the UrhDaG's newly introduced exceptions incompatible.[74]

In line with this outcome, the criticism of the German implementation focuses the UrhDaG's provisions regarding copyright exceptions and limitations and accepts the concept of "Presumably Authorised Uses" as a step too far. Article 17 (7) states that the Member States shall ensure that users should be enabled to rely on the quotation, criticism, review, and caricature, parody or pastiche, therefore making these exceptions mandatory to implement.[75] However, while implementing these exceptions, Member States need to follow the golden mean of the InfoSoc Directive.[76] Therefore, it has been argued that the exceptions within the UrhDaG, such as minor uses, go beyond what is permitted under Article 5 of InfoSoc, which can jeopardise the harmonisation goal of the CDSMD.[77]

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[72] Eleonora Rosati, 'The Legal Nature of Article 17 of the Copyright DSM Directive, the (Lack of) Freedom of Member States, and Why the German Implementation Proposal Is Not Compatible with EU Law' (*The IPKat*) <https://ipkitten.blogspot.com/2020/08/the-legal-nature-of-article-17-of.html> accessed 14 March 2022.; Amy Bishop, 'Article 17 of the Directive on Copyright in the Digital Single Market - Has Anyone Managed to Sufficiently Protect Legitimate Uses?' (2023) 45 European Intellectual Property Review 354.
[73] Martin Husovec and João Pedro Quintais, 'How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms under the Copyright in the Digital Single Market Directive' (2021) 70 GRUR International 325.
[74] Eleonora Rosati, 'The Legal Nature of Article 17 of the Copyright DSM Directive, the (Lack of) Freedom of Member States, and Why the German Implementation Proposal Is Not Compatible with EU Law' (*The IPKat*) <https://ipkitten.blogspot.com/2020/08/the-legal-nature-of-article-17-of.html>
[75] Article 17 (7) of the CDSMD
[76] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society *OJ L 167, 22.6.2001, p. 10–19*
[77] Eleonora Rosati, 'The Legal Nature of Article 17 of the Copyright DSM Directive, the (Lack of) Freedom of Member States, and Why the German Implementation Proposal Is Not Compatible with EU Law' (*The IPKat*) <https://ipkitten.blogspot.com/2020/08/the-legal-nature-of-article-17-of.html>

However, a review of the Directive, relevant case law and the literature show the importance of these copyright exceptions and limitations and their direct relationship with freedom of expression. First and foremost, Recital 70 states that *"users should be allowed to upload and make available content generated by users for the specific purposes of quotation, criticism, review, caricature, parody or pastiche"* and requires these legitimate uses to be supported with an effective complaint and redress and out-of-court mechanisms.[78] Moreover, in the landmark cases such as *SABAM*[79], *Painer, Deckmyn*[80]*,* and more recent ones such as *Funke Medien*[81]*, Pelham*[82], *Spiegel Online*[83], CJEU underlined that copyright exceptions fall within the scope of the right to freedom of expression of users[84] and emphasised their purpose as "*to contribute to the exercise of the freedom of information and the freedom of the media.*"[85] Most importantly, in *Poland* decision, the CJEU clarified that exceptions and limitations are not just defences, they are user rights.[86] It is worth mentioning that the practical implications of how exceptions' "rights" status would be implemented are still unclear.[87]

Thus, considering the importance and aim of these exceptions and how the CDSMD paves the way for the Member States to adopt broader exceptions or limitations[88], one can say that the concept of "uses presumably authorised by law" in UrhDaG is within the limits of the *acquis.* Exceptions in Part 4 of UrhDaG require a transformative use to be applied, and these

[78] Recital 70 of the CDSMD
[79] Case C-70/10 '*Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*' [2011] ECLI:EU:C:2011:771 [52] ; Case C-360/10 '*Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV'* [2012] ECLI:EU:C:2012:85 [50]
[80] Case C-201/13, *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, ECLI:EU:C:2014:2132.
[81] Case C-469/17, *Funke Medien NRW GmbH v Bundesrepublik Deutschland*, ECLI:EU:C:2019:623.
[82] Case C-476/17, *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben*, ECLI:EU:C:2019:624
[83] Case C-516/17, '*Spiegel Online GmbH v Volker Beck'* [2019] ECLI:EU:C:2019:625
[84] C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others*. [2013] EU:C:2011:798, [132]; *Deckmyn,* [35].
[85] *Spiegel Online* [72]; *Painer*, [113]; Case law of ECtHR also suggested that these expressions benefit from the protection of Article 10 of the Charter see *Delfi AS v. Estonia,* App no.64569/09, (ECtHR, 16 June 2015*),* [131]*; Ashby Donald and Others v. France*, App no. 36769/08, (ECtHR, 10 January 2013) [34]
[86] *Poland v European Parliament* [87]
[87] It has been argued that users should be able to enforce their rights imposed by Article 17 (7) against OCSSPs by enabling users to hold OCSSPs liable where they fail to not to prevent legitimate uploads.; *Poland v European Parliament,* AG Opinion, para 161; Tito Rendas, 'Are Copyright-Permitted Uses "Exceptions", "Limitations" or "User Rights"? The Special Case of Article 17 CDSM Directive' (2022) 17 Journal of Intellectual Property Law & Practice 54.; Michel M Walter and Silke von Lewinski (eds), *European Copyright Law: A Commentary* (Oxford University Press 2010). p. 1022.
[88] Article 25 of CDSMD states that: "*Member States may adopt or maintain in force broader provisions, compatible with the exceptions and limitations provided for in Directives 96/9/EC and 2001/29/EC, for uses or fields covered by the exceptions or limitations provided for in this Directive*."

transformative uses can be placed in the scope of one of these mandatory exceptions regarding user-generated content (UGC).[89]

The transformative uses of third-party work within the UGC should benefit from the protection of freedom of expression, which also protects artistic expressions and the right to receive and impart information. Through UGC, more people are using these platforms every day to be part of the democratic society by commenting on matters of general interest, sporting issues, or performing artists and political debates, in which freedom of expression offers its highest level of protection.[90] Therefore, Member States are obligated not to interfere with this right and accommodate the practice of this right online, just like offline. In order to ensure that equal treatment is placed, online uses of copyright-protected works should be able to benefit from copyright exceptions just like the traditional ways [91] On this point, CJEU, by incorporating the fundamental rights' standards into its interpretations of copyright exceptions and limitations, argued that the protection of exceptions could cover some unorthodox uses.[92] For instance, in *Spiegel*, CJEU held that hyperlinks are covered by the quotation exception, and this reading has been provided by following the fundamental rights enshrined in the Charter to ensure the exceptions are meeting their aim of contributing to the exercise of the freedom of expression and information also in the online environment.[93]

Lastly, in connection with the criticism above, another criticism directed at the *ex-ante* safeguards of German implementation concerns their pre-flagging mechanism. The proponents of this criticism argue that to comply with the best effort obligations, Member States do not have to introduce *ex-ante* safeguards; merely implementing an *ex-post* complaint and redress mechanism would be enough.[94] However, as confirmed in the *Poland*

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[89] User-generated content platforms which fall within Article 17's liability regime became highly popular nests for users' artistic and creative expressions where users exercise their right to freedom of expression. See Ofcom, 'Online Nation 2020 Summary Report' (2020) <https://www.ofcom.org.uk/__data/assets/pdf_file/0028/196408/online-nation-2020-summary.pdf>.; 'Keeping the Internet up and Running in Times of Crisis' (*OECD*) <https://www.oecd.org/coronavirus/policy-responses/keeping-the-internet-up-and-running-in-times-of-crisis-4017c4c9/>.

[90] *Axel Springer AG v. Germany* App no. 39954/08 (EctHR, 7 February 2012) [90]

[91] Case C-555/19, '*Fussl Modestraße Mayr GmbH v SevenOne Media GmbH and Others*' [2021] ECLI:EU:C:2021:89

[92] *Spiegel Online* [80]

[93] *Spiegel Online*, [80]-[84].

[94] French High Council for Literary and Artistic Property, 'Mission Report on Content Recognition Tools on Digital Sharing Platforms: Proposals For The Implementation of Article 17 of The EU Copyright Directive' (January 2021) <https://www.culture.gouv.fr/Thematiques/Propriete-litteraire-et-artistique/Conseil-superieur-de-la-propriete-litteraire-et-artistique/Travaux/Missions/Mission-du-CSPLA-sur-les-outils-de-reconnaissance-des-contenus-et-des-oeuvres-sur-les-plateformes-de-partage-en-ligne-II> accessed 14 March 2022.

decision, Article 17(7) constitutes an obligation to achieve a result, which is more binding than the obligation of 'best efforts' in Article 17(4).[95] Article 17(7) obliges platforms and the Member States while implementing the Article, to consider the collateral effect of the filtering measures they implement and not only focus on the goal of preventing infringing uploads from going online, therefore constitutes an important safeguard.[96] The Court also clarified that the Member States and platforms must keep in mind that the application of statutory copyright exceptions also determines whether a transmission is lawful while deciding the measures to implement to satisfy Article 17(4)(b) and (c) and accordingly excluded the measures that filter and block the lawful uploads.[97]

Therefore, considering the central position of this confirmed hierarchy between the obligation of result in Article 17(7) and the obligation of best efforts in Article 17(4) for Article 17's validity as a fundamental right complaint provision in addition to the exclusion of measures that filter and block lawful content when uploading, it is clear that implementations should pay specific attention to the measures that ensure Article 17(7) be enforced in practice. In light of AG Opinion which states that compliance with Article 17(7) requires *ex-ante* safeguards to be placed to ensure the result of not preventing legitimate uses[98] CJEU's approach in *Poland* can read as, in the absence of a mechanism which enables users to upload content for the purposes of copyright exceptions, which have been accepted as their rights, it is impossible to mention a satisfactory and valid implementation of Article 17.

The main reason for the necessity of this positive effort by the Member States and the platforms is the fact that in practice, it is challenging to provide the necessary protection for user rights, including copyright exceptions and limitations[99], as OCSSPs, in line with Article 17(4), prevent the uploads from publication altogether via upload filters with the assumption of infringement rather than initially made available and blocked at when the content's illegality has been determined, and this preventive blocking applies to all uploads.[100] As

[95] *Poland v European Parliament,* [78]
[96] Advocate General Opinion [191-193]
[97] *Poland v European Parliament* [85]; Advocate General Opinion [164-165], [191-193]
[98] AG Opinion [207]; Guidance, p.15.
[99] While the previous case law draws an ambiguous picture, in *Poland* case, CJEU explicitly acknowledged copyright exceptions and limitations as user rights [88] and in line with that excluded filtering systems that are not capable of distinguishing legitimate uses [85]
[100] Felix Reda, Joschka Selinger and Michael Servatius, 'Article 17 of the Directive on Copyright in the Digital Single Market: A Fundamental Rights Assessment' (Gesellschaft für Freiheitsrechte 2020) <https://freiheitsrechte.org/home/wp-content/uploads/2020/11/GFF_Article17_Fundamental_Rights.pdf>.

mentioned previously, due to their operation, all the current automated content recognition tools, no matter how sophisticated, are not capable of distinguishing lawful and unlawful content adequately; they can simply, and at best, detect the existence of a copyright-protected work in the uploaded content and block the upload.[101] This means that the uploads with legitimate uses of copyright-protected works will also be subject to *ex-ante* filtering and blocking, and users will be "punished" by the platform despite being lawful users who are trying to exercise their freedom of expression and information by benefiting exceptions and limitations to copyright.

Moreover, merely recovering the access to the legitimate upload according to the complaint and redress decision would not constitute a recovery in terms of the practice of the user's freedom of expression and information and the negative effects of over-blocking on freedom of expression are not always can be averted with such *ex-post* mechanisms.[102] Considering the importance of online platforms regarding current affairs and political debates, especially for the users who want to be informed or contribute to these, time is a crucial element. As constantly underlined by the ECtHR *"news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest."*[103] The importance of being able to express your opinions or impart information is crucial as now the online platforms are the places which public form their opinion regarding the current affairs. If there is a scandal about a politician, the public wants to discuss and share their opinion timely, to create an impact which is a significant component of democracy.

However, the photos or text included within the commentary of the users will get caught into the context-blind nets of upload filters despite these works might be subject to an exception such as criticism, review or quotation which are set to be mandatory with Article 17 or additional national exceptions that the Member States have. Therefore, contrary to what has been suggested by the Spanish and French Governments in the *Poland* case, users' freedom of expression is the fundamental right that would be most likely to suffer from "irreparable

[101] Evan Engstrom and Nick Feamster, 'The Limits of Filtering: A Look at the Functionality and Shortcomings of Content Detection Tools' (Engine 2017) <http://www.engine.is/the-limits-of-filtering/.>.
[102] AG Opinion [188]
[103] *Observer and Guardian v. the United Kingdom* Application No. 13585/88, (*ECtHR, 26 November 1991)*, [60]*; Yildirim v. Turkey,* [47]

harm" considering that most of the big platforms offer monetisation which rightholders can claim and redeem easily and whenever they require.[104]

Without ensuring the availability of legitimate uploads, an implementation which only contains *ex-post* safeguards regarding the automated filtering would fail to ensure a proportionate exercise and would create the critical need for *ex-ante* safeguards for *ex-ante* enforcement of copyright.[105] It is important to note that if the EU lawmaker's intention was merely following the previous regime of only requiring ex-post mechanism to be placed for over-blocking cases, the significant changes between proposed Article 13 and the Article 17 in the final draft would not take place. A significant step of the legislative evolution of this provision, the redrafted JURI report by the Parliament, added "*Cooperation between online content service providers and right holders shall not lead to preventing the availability of non-infringing works or other protected subject matter, including those covered by an exception or limitation to copyright"* to the previous version which only states that *"Member States shall ensure that the service providers referred to in paragraph 1 put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 1."*[106] Also, as argued above, due to the operation of upload filters, achieving the compatible implementation of automated recognition and filtering systems is not a straightforward task and it would most likely require Member States to provide additional safeguards. For instance, the emphasised requirement to respect copyright exceptions and limitations by the Court in *Poland* can be seen as a reflection of a requirement to limit automated *ex-ante* filtering only to the manifestly infringing uploads in line with AG opinion for the case and Guidance.[107]

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[104] On the contrary, the economic harm to the rightholders does not always take place when there is a technical infringement, and most of the time the harm is not 'irreparable'. For instance, user-generated content has the benefit of generating a revenue stream, most of the time the net benefits accrue to authors and publishers. In addition to that, currently, the market is focused on digital advertising which mainly relies on user-generated content. See Kristelia García, Monetizing Infringement, 54 U.C. DAVIS L. REV. 265 (2020), available at https://scholar.law.colorado.edu/articles/1308.

[105] AG Opinion [166]

[106] See European Parliament, 'Amendments adopted by the European Parliament on 12 September 2018 on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market' COM(2016)0593 – C8-0383/2016 – 2016/0280(COD), <https://www.europarl.europa.eu/doceo/document/TA-8-2018-0337_EN.pdf?redirect>

[107] João Pedro Quintais, 'Between Filters and Fundamental Rights' (*Verfassungsblog*) <https://verfassungsblog.de/filters-poland/>.

Therefore, to ensure the filtering is limited, a mechanism such as pre-flagging is necessary. Pre-flagging ensures the required respect to copyright exceptions and limitations and as an implementation would not respect these exceptions would conflict with Article 17 and overall, the Directive.[108] One can argue that the German approach is trying to help the outdated application of exceptions to ensure that the regulation still satisfies the aim of safeguarding the fair balance between competing fundamental rights.[109] Indeed, Member States are able to determine the parameters governing the copyright exceptions or limitations only if they are doing it in a harmonised manner[110] and providing the required high level of protection.[111] Meaning that, where these conditions are met, legislative and judicial balancing of interests should be able to take place. UrhDaG's new concept of 'uses assumed authorised by law' can be identified as an effort to meet their duty *"to rely on an interpretation of the directive which allows a fair balance to be struck between the various fundamental rights protected by the European Union legal order"* [112] when implementing the exceptions and limitations.

Most importantly, CJEU's decision in the *Poland* case by clarifying the key principles for achieving the desired implementation of Article 17 for the Member States, strengthened the validity of German implementation. The Court underlined that there is a precise limit laid down by the EU legislature regarding the risk that the use of automatic recognition and filtering tools entails for the right to freedom of expression and information of users of online content-sharing services that the Member States need to follow.[113] Failure to apply this limit to the operation of the filtering systems results in a disproportionate practice which is incompatible with the right to freedom of expression and information, guaranteed in Article 11 of the Charter, and would not respect the fair balance between that right and the right to intellectual property.[114] In order to reach the fundamental rights-compliant implementation of Article 17 there must be *ex-ante* protection imposed by the national laws for user rights

[108] Recital 66 of CDSMD states that 'Steps taken by such service providers should … not affect users who are using the … sharing services in order to lawfully upload … information on such services', Recital 70; AG Opinion [174]
[109] *Spiegel Online,* [40]; C-161/17, '*Land Nordrhein-Westfalen v Dirk Renckhoff*, [2018] EU:C:2018:634, [41]
[110] *Funke Medien* [46]; *Painer* [104]; *Deckmyn and Vrijheidsfonds* [16]
[111] Recital 9 of the Directive 2001/29
[112] *Spiegel Online*, [38]; C-314/12, *UPC Telekabel Wien* [2014] EU:C:2014:192, [46],; C-149/17, *Bastei Lübbe* [2018] EU:C:2018:841 [45]
[113] *Poland v European Parliament* [85]
[114] *Poland v European Parliament* [85]-[86]

against the upload filters' interferences.[115] Therefore, by ensuring the preventive filtering would stay limited to the unlawful content in an ex-ante manner, pre-flagging satisfies this requirement.

Therefore, one can say that this decision has strengthened the German implementation's position as the German UrhDaG incorporates *ex-ante* safeguards following Article 17(7) in line with the decision. In light of this decision, despite potential harmonisation and unity problems,[116] it seems like German implementation has great potential to be a model for national implementations. Therefore, German implementation might be acknowledged as a guide for upcoming implementations which would minimise and perhaps eliminate the problems with harmonisation. It is important to note that, although YouTube has not clarified if the rules of UrhDaG are being applied globally, considering the worldwide availability of these new tools shortly before entry into force of the German law, and a similar statement from the platform's Brussels branch indicates that this might be the case in the near future.[117]

As an important outcome of the *Poland* decision, it is possible for the Member States which have already implemented Article 17 by simply re-stating the wording of the Article without providing efficient *ex-ante* safeguards that would prevent over-blocking to reconsider their implementation and update it according to the decision and they might be liable for damages under the *Francovich* principle because of the insufficient implementation of Article 17 where conditions of this principle are met.[118]

Yet, some argue that as Article 17 is acknowledged as valid by the Court, a word-by-word implementation would be enough to satisfy the requirements of the decision and ensure compliance with EU law.[119] However, the decision investigates the alleging infringement of the right to freedom of expression and information by Article 17(4)(b) and (c) and confirms

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[115] *Poland v European Parliament* [85]; AG opinion [193].
[116] C-399/11, *Melloni* [2013] EU:C:2013:107 [60]; C-617/10, *Åkerberg Fransson* [2013] EU:C:2013:105 [29]
[117] As the German implementation was the first implementation with detailed safeguards, following German implementation would be also sensible from an economic standpoint for the platforms, given that no national legislation currently mandates them to act otherwise. See Marco Pancini, 'YouTube's Approach to Copyright' (*Google - The Keyword*, 31 August 2021) <https://blog.google/around-the-globe/google-europe/youtubes-approach-to-copyright/> accessed 17 November 2021.
[118] AG Opinion, [234]; Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*'[1991] ECLI:EU:C:1991:428.
[119] Eleonora Rosati, 'What Does the CJEU Judgment in the Polish Challenge to Article 17 (C-401/19) Mean for the Transposition and Application of That Provision?' (*The IPKat*) <https://ipkitten.blogspot.com/2022/05/what-does-cjeu-judgment-in-polish.html> accessed 18 May 2022.

that the limitation on this fundamental right is provided for by law and respects the essence of that right by stressing the dependency of this on the strict application of safeguards. Therefore, national implementations can[120] and, considering the significant stress of the Court on safeguards, need to go a step further and specify the essential safeguards that need to be placed for Article 17's compliance while staying within the limits of the Directive in line with the decision.[121] Moreover, having word-by-word transpositions which lack the essential guidance that would constitute an ideal application of Article 17 brings different challenges for the authorities and courts of the Member States.

Member States must not act based on an interpretation of Article 17 that conflicts with fundamental rights or other general principles of EU law, such as the principle of proportionality when implementing measures related to that provision.[122] Therefore, a more detailed version of the provision in line with the CJEU's interpretation and which accurately reflects its validity should be embraced. Therefore, in light of CJEU's stress on the general principle of interpretation, providing *ex-ante* safeguards would not constitute adding something that is not in the Directive; on the opposite, it would ensure that the measures in Article 17(4) do not affect its validity and in conformity with the provisions of the Charter.[123]

Although these debates hold a significant position in the body of literature, gaining a comprehensive grasp of the law requires a thorough examination of practice. Hence, this paper shifts its attention towards the regulatory frameworks governing platform practices concerning the obligations stipulated in Article 17, particularly focusing on their terms and conditions.

### D. Control: Self-regulation of Platforms

Looking at the current picture, one can say that the authority of self-regulation is more powerful than ever, and the impact of the in-force national implementations of the CDSMD is

[120] Article 288(3) of Treaty on the Functioning of the European Union (TFEU) states that 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.'
[121] *Poland v European Parliament* [99]
[122] *Poland v European Parliament* [99]
[123] *Poland v European Parliament* [70]: '*in accordance with a general principle of interpretation, an EU measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter.*'

yet to be seen. Instead of taking action regarding the new implementations of the CDSMD, most platforms follow and enforce their own "statutes", namely their terms and conditions (T&C) more strictly than ever.

In exercising the freedom to conduct a business and the freedom of contract, these platforms as private operators may devise a content policy and exercise a form of "self-regulation" in terms of use of their services or "community standards."[124] These may include deciding the information they wish to be distributed via their services and the content that would be blocked. However, these voluntary controls by OCSSPs based on soft law mechanisms have posed risks to the protection of users' fundamental rights, such as freedom of expression and data protection and privacy.[125]

In time, the efficiency and liability concerns pushed platforms to *"become the police, judge, jury and executioner with regard to alleged infringements"* and start policing their users under the name of "self-regulation."[126] The transfer of the enforcement of the law and semi-judicial powers to platforms is problematic on many different levels, and this way of copyright enforcement impacts various fundamental rights such as the right to a fair trial, conduct a business and freedom of expression.[127] Most importantly, they interfere with the requirements of the protection of fundamental rights as the limits on the users' fundamental rights are placed without following the EU law requirements, such as proportionality.[128] The practices of platform policies create a reign of fear in the users and a suitable environment for chilling effects[129], despite the fact that these decisions result from non-judicial mechanisms.

This self-regulation movement is an outcome of the many direct and indirect obligations and initiatives for platforms to avoid liability that is increasing dramatically. Therefore, it is understandable why platforms take further cautions and introduce different mechanisms to

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[124] AG Opinion [82]
[125] *Delfi AS v Estonia*; *Yildirim v Turkey*; Declaration on freedom of communication on the Internet adopted by the Committee of Ministers on 28 May 2003, Available at <https://cli.re/mrE5Vb>
[126] Joe McNamee, 'The Slide from Self-Regulation to Corporate Censorship' (European Digital Rights 2011) <https://www.edri.org/files/EDRI_selfreg_final_20110124.pdf>.
[127] Joined Cases C-682/18 and C-683/18 *Frank Peterson v Google LLC, YouTube LLC, YouTube Inc., Google Germany GmbH (C-682/18) and Elsevier Inc.v Cyando AG (C-683/18)* [2020] ECLI:EU:C:2020:586, [187]-[188]; *Poland v European Parliament* [197]
[128] *Yildirim v Turkey*
[129] Casey Fiesler, Jessica L Feuston and Amy S Bruckman, 'Understanding Copyright Law in Online Creative Communities', *Proceedings of the 18th ACM Conference on Computer Supported Cooperative Work & Social Computing* (ACM 2015) <https://dl.acm.org/doi/10.1145/2675133.2675234> accessed 21 February 2022.

strengthen their copyright enforcement. However, while defining and enforcing their T&C, these platforms must respect the fundamental rights of the users and adopt the "positive measures of protection", which guarantees that the freedom in relations between the users and platforms is enjoyed efficiently.[130] These positive obligations arise from Article 10 of the Convention and they are supported by rich case law.[131] In line with these obligations, primarily, they should respect the copyright exceptions and limitations by allowing their application within their T&C and sufficiently informing the users regarding these copyright exceptions and limitations. They should also clarify that within their T&C, a mere allegation by rightholders of infringement of copyright is not sufficient for the platform to block or remove the upload. These are essential to support the exercise of freedom of expression of the platform users, and these practices would help reduce the risk of unintentional infringements of copyright.[132]

While informing users via T&C is desirable, especially under the Article 17 regime, putting T&C above the legislation and enforcing these rules more effectively than the national implementations is definitely not. T&Cs are not reliable and their negative impacts are even worse when users of the platform have a limited understanding of what specific terms truly represent in practice.[133]Thus, it is clear that the platform's self-regulation should not be seen as a substitute for copyright legislation as it lacks clarity and enforceability and fails to safeguard fundamental rights and, therefore, achieve fairly balanced enforcement. However, in the current picture, big platforms regulate their content with their imbalanced T&Cs and negatively affect user creativity and internet culture as these regulations provide extra-judicial punishments for the alleged infringements. In an environment where platforms have become gatekeepers for the majority of the content available on the internet without proper accountability, enforcement practices should not be handed to platforms, especially if they mainly rely on their imbalanced T&Cs.[134] Although these self-regulations do not constitute a

[130] AG Opinion [82].
[131] *Appleby v. the United Kingdom*, App no 44306/98 (ECtHR, 6 May 2003) [39]; *Khurshid Mustafa v. Sweden*, App no 23883/06 (ECtHR, 16 December 2008) [31].
[132] AG Opinion [163].
[133] Amy Thomas, '21 for 2021: User Creativity in Online Platforms – Copyright or Contract? – CREATe' (*CREATe*, 28 May 2021) <https://www.create.ac.uk/blog/2021/05/28/21-for-2021-user-creativity-in-online-platforms-copyright-or-contract/>
[134] Corinne Hui Yun Tan, 'Terms of Service on Social Media Sites' (2014) 19 Media and Arts Law Review 195 <https://papers.ssrn.com/abstract=2485981> accessed 16 March 2022.

duologue between the platforms and the users, they operate as legal obligations to modify the law without the legislative process.[135]

Although the implementation of the CDSMD would stop the self-regulatory nature of filtering and blocking as content moderation is an obligation under Article 17, the private companies will continue to handle and assess the legality of the content with the opaque content recognition mechanisms that they developed or implemented. Considering its practicality, self-regulation should not be something that should be ignored entirely; however, it is important that the self-regulation that OCSSPs apply to seek to strike a fair balance and be transparent, as in most cases, it includes the operation of automated decision making which interferences with users' fundamental rights.[136]

By looking at the current picture, one can say that the authority of self-regulation is more powerful than ever. In 2022, Brieske and Peukert reported that none of the investigated platforms (YouTube, Rumble, TikTok, Twitter, Facebook, Instagram, SoundCloud and Pinterest) meets the mandatory duties under the UrhDaG, and the ones that are close to satisfying these requirements were the two big tech companies which already had filtering mechanisms in place before the CDSMD.[137] Similarly, a report delivered by *Der Spiegel,* which includes the most prominent platforms, shows that YouTube was the only platform that confirmed its plans to comply with the German implementation, UrhDaG.[138] According to the report, while Twitch and TikTok refused to share any information, Facebook referred to their existing takedown systems and tools for the rightholders to show its compliance; they did not provide any information on how and when they will incorporate the "pre-flagging" tool into their filtering.

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[135]Amy Thomas Amy Thomas, '21 for 2021: User Creativity in Online Platforms – Copyright or Contract? – CREATe' (*CREATe*, 28 May 2021) <https://www.create.ac.uk/blog/2021/05/28/21-for-2021-user-creativity-in-online-platforms-copyright-or-contract/>

[136] Digital Services Act's implementation might help improving this imperfect picture for the OCSSPs which fall into the scope of very large online platforms (VLOPs), as Article 12 of this directive aims to ensure more transparent terms and conditions are set down by the platforms.

[137] Jasmin Brieske and Alexander Peukert, 'Coming into Force, Not Coming into Effect? The Impact of the German Implementation of Art. 17 CDSM Directive on Selected Online Platforms' <https://zenodo.org/record/5865619> accessed 11 March 2022.

[138] Patrick Beuth, 'Urheberrecht: Was sich jetzt mit dem Uploadfilter-Gesetz ändert' *Der Spiegel* (1 August 2021) <https://www.spiegel.de/netzwelt/web/urheberrecht-was-sich-jetzt-mit-dem-uploadfilter-gesetz-aendert-a-82670dc4-5398-4f68-a36b-022d47388455> accessed 17 March 2022.

In contrast, YouTube stated that they would introduce a new pre-flagging tool for users and creators in parallel to their compliance announcement in their blog.[139] According to this announcement, this tool will be introduced to enable them to indicate the "uses presumably authorised by law" within their uploads according to Section 11 of UrhDaG. Also, where there is a use presumably authorised by law, the platform stated that the content would not be taken down accordingly to the UrhDaG until the dispute has been resolved.[140] However, there is no sign of this pre-flagging tool in practice yet; instead, YouTube introduced a new tool named "*Checks*", which informs users whether their video contains copyrighted material that would automatically be blocked by Content ID prior to uploading.[141] Also, the platform noted that they expanded the availability of their "*Copyright Match Tool*", which scans YouTube uploads for potential matches to the videos reported in the approved takedown requests.[142] Although the rightsholders granted access to YouTube's Content ID tool represent a small minority (less than 2% of all complaining rightsholders), this group accounts for over 99% of all copyright claims on the platform. Notably, for the first time, YouTube processed more than a billion Copyright ID claims in a six-month period, flagging a total of 1,016,137,305 potential infringements between July and December 2023. Despite this significant increase, the rise in Content ID challenges—from 0.40% to 0.42%—highlights the lack of effective safeguards for users and underscores the potential for abuse inherent in automated content recognition tools. YouTube acknowledges the substantial impact of these tools, stating, "While a single copyright removal request from the webform affects only one or a handful of videos, a single invalid reference file in Content ID can impact thousands of videos and users, stripping them of monetisation or blocking them altogether."[143]

There seems to be no change in the lack of practical impact on the proposed protection of users' rights and interests under the German OCSSP Act, which was highly praised. By

[139] Sabine Frank, 'Das neue Urheberrechtsgesetz in Deutschland und die Position von YouTube' (*YouTube Offical Blog*, 1 August 2021) <https://blog.youtube/intl/de-de/news-and-events/das-neue-urheberrechtsgesetz-deutschland-und-die-position-von-youtube/> accessed 17 March 2022.
[140] ibid.
[141] 'New "Checks" Step in the Upload Flow on Desktop - YouTube Community' (*Google Support*, 16 March 2021) <https://support.google.com/youtube/thread/102365314/new-%E2%80%9Cchecks%E2%80%9D-step-in-the-upload-flow-on-desktop> accessed 17 November 2021.
[142] 'Use the Copyright Match Tool - YouTube Help' (*Google Support*) <https://support.google.com/youtube/answer/7648743?hl=en&ref_topic=9282364> accessed 17 November 2021.
[143] Ernestro Van der Sar, 'YouTube Processed a Billion Content ID Copyright Claims in Six Months' <https://torrentfreak.com/youtube-processed-one-billion-content-id-copyright-claims-in-six-months-240506/> accessed 11 October 2024.

looking at the current information available by the leading platforms regarding their content management, one can say that the required protection of users' fundamental rights and the desired fair balance between competing interests of different actors of copyright enforcement by CDSMD is missing.[144]

The analysis of the information available content management practices of three of the biggest user-generated content platforms (YouTube, Facebook and X (formerly) Twitter) shows the persistence of these platforms enforcing their self-regulation, which is significantly not in compliance with Article 17 of the CDSMD. All three platforms limit their liability regarding their users' acts of communication to the public or making available via their uploads and show no effort to ensure balanced enforcement by prioritising their interests and rightholders' rights at every step. There are references to EU copyright exceptions and limitations within all platforms' terms and conditions, the clear one being Facebook's, yet there is no indication of how users can benefit from these rights and what the platforms would do to protect users' fundamental rights. There is no update regarding how the automated filtering would respect these uses by limiting the blocking only to manifestly infringing uploads; on the contrary, Facebook enables rightholders to set the criteria for automated blocking. Similarly, complaint and redress mechanisms fail to meet Article 17's requirements as, besides YouTube, they mostly follow the DMCA counter-notice process instead of providing effective and expeditious in-platform appeal instruments. The operation of human review is unclear in most of the platforms as there is no clear indication of how the complaints are being processed. Thus, the current picture shows that besides YouTube, there are no procedural updates or new tools introduced within these platforms to comply with Article 17's requirements. The only obligation that most platforms have the means to follow is Article 17(4); however, without adopting the essential procedural safeguards of Article 17, only implementing these filtering systems disturbs the fair balance and results in incompliance with the Article and Charter.[145] Therefore, with Article 17 being in force in the majority of Member States, the enforcement of these T&Cs becomes acts of non-compliance.

[144] See Appendix B: Self-regulation and the Non-Compliance of Online Content-Sharing Service Providers in Sevra Güler Güzel, 'The Challenge of Balancing Competing Fundamental Rights in Online Enforcement of Copyright: A Study on Copyright in the Digital Single Market Directive' (2023) <http://uhra.herts.ac.uk/handle/2299/28034> accessed 16 July 2024.
[145] *Poland v European Parliament*, paras 69, 98-99.

There are different reasons behind this lack of compliance of OCSSPs with the rules of the CDSMD, many of which are underlined within this study. First, the uncertainty regarding the scope of OCSSPs. Many platforms, depending on the unclear definition of OCSSPs, assume that they are out of the scope of the liability, and even the ones that clearly fall into the scope of large content-sharing platforms aim to benefit from the lack of sanctions within the national implementations for the failure of protecting user rights. Second, most of the platforms do not have YouTube's resources to employ software, hardware and human teams to be able to comply with the obligations of Article 17. Third, even though recent developments such as the *Poland* decision helped clarify the framework, practical solutions for the implementation are still unclear. Especially the deep-scaled practical problems with upload filters which bring challenges with providing Article 17's safeguards in practice, do not look like they are going away anytime soon. Considering the risks of *delegating the review of online legality* to online platforms on freedom of expression of the users, which includes collateral censorship via platforms, the lack of efficient safeguards in practice is alarming.[146] Therefore, compliance with Article 17 requires these platforms to provide safeguards that limit the interference of Article 17(4)'s measures to all their users, irrespective of the Member State in which they are located.[147] However, the rules regarding the application of these safeguards have to be specified by the Member States within their implementation and by the Commission with their updated guidance, as this duty cannot be left to private parties, namely rightholders or platforms, entirely.[148]

However, most national implementations fall short of ensuring the practical applicability of the safeguards. While failure to comply with Article 17(4)'s requirements regarding the employment of automated content recognition tools for copyright enforcement results in liability, most of the national implementations do not impose a liability where the cooperation between online content-sharing service providers and rightholders prevents the legitimate content of users going online. For example, even the most celebrated implementation in terms of user rights protection, German implementation, ensures total civil liability, including the duty to pay damages for the failure to comply with Article 17(4)'s requirements[149] but for the

[146] AG Opinion in *Poland v European Parliament*, para 115; Joint Dissenting Opinion of Judges Sajó and Tsotsoria in *Delfi v Estonia* App no 64569/09 (ECtHR, 16 June 2015), p 2; *Ahmet Yildirim v. Turkey*, para 47.
[147] Article 114 Treaty on the Functioning of the European Union; AG Opinion in *Poland v European Parliament,* para 152; *Poland v European Parliament,* para 69.
[148] AG Opinion in *Poland v European Parliament*, paras 210-212.
[149] Section 97 of German Copyright Act (*Urheberrechtsgesetz)*.

failure to protect user rights it only provides sanctions against the abuse of rightholders or platforms. According to Section 18, a service provider who repeatedly performs over-blocking may be subject to injunctive relief if claimed by a registered user rights association[150], and a rightholder who intentionally or negligently requests blocking is obliged to compensate the service provider and the user concerned for the resulting damage.[151] While these would, at their best, provide *ex-post* protections regarding the user rights, there is no liability on the OCSSP which fails to ensure Article 17(7)'s enforcement. As a result, after the implementation came into force, platforms preferred making changes in line with Article 17(4)'s obligations and employed or improved automated content recognition tools without ensuring the applicability of safeguards, especially Article 17(7), as the consequences of failing to ensure the protection of copyright are clearly defined within the national implementations unlike ailing to ensure the protection of user rights.

### E. CDSMD and Digital Services Act[152]

One important thing to ask: Can the toothless tiger, CDSMD find its teeth with Digital Services Act? DSA amends a key directive for the online platforms as intermediaries, the E-Commerce Directive, and building on the key principles set out in the ECD, it aims to "*empower users and protecting their fundamental rights online* as well as other important aims.*"*[153] It maintains the liability rules for providers of intermediary services set out in the ECD, yet it introduces strong obligations regarding fundamental rights and transparency.

For instance, Article 15 of DSA introduces transparency reporting obligations in relation to the removal and the disabling of information considered to be illegal content or contrary to the provider's terms and conditions in Article 13, which is likely to apply to operations under Article 17(4) of CDSMD. Also, DSA's 'notice and action' system requires providing a

[150] Section 18(6) of Act on the Copyright Liability of Online Content Sharing Service Providers **(***UrhDaG*).
[151] Section 18(2) of UrhDaG.
[152] An extended version of this chapter can be found in Sevra Guler Guzel, 'The Challenge of Balancing Competing Fundamental Rights in Online Enforcement of Copyright: A Study on Copyright in the Digital Single Market Directive' (University of Hertfordshire).
[153] European Commission, Proposal for a Regulation (EU) 2022/2065 of The European Parliament And of The Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) ('DSA Proposal') COM(2020) 825 final.

statement of reasons (Article 17) when a provider decides to remove or disable access to specific information provided by a recipient of the service, which is stronger than the obligation of providing "relevant and necessary information" of Article 17(4)(b) of CDSMD.

Most importantly, Section 5 lays down additional obligations for very large online platforms to manage systemic risks and further transparency duties, which are identified as online platforms and online search engines which have a number of average monthly active recipients of the service in the Union equal to or higher than 45 million in Article 33. This section also has the potential to complement the safeguards that need to be placed for the fundamental right-compliant implementation of Article 17 of CDSMD, as it requires them to conduct risk assessments on the systemic risks brought about by or relating to the functioning and use of their services (Article 34) and to take reasonable and effective measures aimed at mitigating those risks (Article 35). These, in practice, would require them to place effective procedural measures to limit false positives generated by automated content recognition and management tools. This result is obliged by the safeguard in Article 17(7) of CDSMD regarding automated operations of OCSSPs to filter the copyright-infringing content, but DSA introduces wider and more demanding obligations regarding the functioning and use of services for very large online platforms (VLOPs).

To ensure the effective application of these additional obligations for VLOPs, Chapter IV, while regulating the overall implementation and enforcement, in Section 4, introduces additional enforcement rules and means to ensure the compliance of these platforms and search engines. As an important power which could serve to ensure transparency for the users in the context of Article 17(4), the Commission can order VLOPs to provide access to, and explanations relating to, its databases and algorithms to monitor the effective implementation and compliance with DSA.[154] Lastly, the teeth of the regulation can be found at the end of Section 4 of Chapter IV. According to Article 74, where a VLOP infringes the relevant provisions, it fails to comply with a decision ordering interim measures or a commitment made binding by a decision, intentionally or negligently, the Commission may impose fines. These might provide a model for Member States for the non-compliance of OCSSPs regarding Article 17, including its safeguards.

[154] Article 72 of DSA.

Thus, the main areas that the CDSMD and DSA intersect are platform liability, notice and takedown and stay down (notice and action in DSA), in-platform appeal and out-of-court dispute solutions, trusted flaggers and transparency rules. Therefore, it is important to consider relevant sections of DSA while applying CDSMD since there is an intersection between these two pieces of legislation regarding online copyright enforcement. DSA complements existing sector-specific legislation, which applies as *lex specialis* and underlines that it is without prejudice to the rules laid down by Union law on copyright and related rights.[155] However, DSA underlines the possibility of application of the Act in respect of issues that are not or are not fully addressed by those other acts or where Member States have the margin of discretion.[156] This intersection may bring forth the issue of being obliged to follow different rules, one being more specific than the other, regarding the same concepts or mechanisms that apply to OCSSPs, which fall into the scope of very large online platforms (VLOPs).[157] For instance, this issue can arise from the notice and takedown of CDSMD and the notice and action of DSA, which both require a notification to trigger the liability, while the latter contains more specific rules surrounding the notification.[158] Rosati argues that the *lex specialis* will need to be supplemented by the *lex generalis* where notice and takedown and notice and action intersect; however, when it comes to notice and stay down, which is unique to CDSMD, the *lex specialis* character of Article 17 means that the *lex generalis* will not find application.[159] Similarly, very large online platforms of DSA are under the obligation of detailed transparency provisions in Articles 29-33, which would apply with respect to copyright content moderation of OCSSPs. This might oblige these platforms to provide detailed information regarding the legitimate uses of content on the platform under DSA by filling the gap of CDSMD, which requires information only on the functioning of upload filters and the use of content covered by the licensing agreements with Article 17(8).[160]

Moreover, DSA includes a wide selection of actions under "content moderation" obligations that require adopting automated tools similar to Article 17(4) CDSM.[161] As underlined by

[155] Article 15 (c) and Recitals 9, 10, 11 of DSA.
[156] Recital 9 of DSA.
[157] Article 25 of DSA defines VLOP as online platforms with "*a number of average monthly active recipients of the service in the Union equal to or higher than 45 million."*
[158] Alexander Peukert and others, 'European Copyright Society – Comment on Copyright and the Digital Services Act Proposal' (2022) 53 IIC - International Review of Intellectual Property and Competition Law 358.
[159] Eleonora Rosati, 'The Digital Services Act and Copyright Enforcement: The Case of Article 17 of the DSM Directive' (European Audiovisual Observatory 2021).
[160]Alexander Peukert and others, 'European Copyright Society – Comment on Copyright and the Digital Services Act Proposal' (2022) 53 IIC - International Review of Intellectual Property and Competition Law 358.
[161] Art. 2(p) of DSA.

CJEU, the fundamental right-compliant use of automated tools requires their impact on fundamental rights to be strictly limited.[162] However, it has been argued that DSA fails to provide limits to these acts that require the operation of automated tools, which increases the risk of impacting users' fundamental rights.[163] Therefore, one can say that the limits provided by Article 17, the safeguards in Article 17(5)-(10), might provide these limits where applicable, which makes the efficient implementation of safeguards even more important.

Thus, even though it is clear that Article 17 of CDSMD is *lex specialis* to the DSA as CDSMD regulates a more specialised area, copyright infringements, one should keep in mind that certain Articles of the DSA would come into play and influence how the CDSMD, especially Article 17, is interpreted and applied.[164] Rosati suggests that to answer the questions of when, to whom and how to apply the regime of Article 17 of CDSMD, DSA rules will be of great relevance.[165] Quintais and Schwemer argue that as the DSA regulates matters that are not covered or given a margin of discretion to the Member States by Article 17, it will be applicable to the OCSSPs of CDSMD.[166] Thus, the intersections between two regulations will affect the practical applications of Article 17 of CDSMD as, in some cases, DSA rules can be applied to decide whether Article 17 is applicable, to shape the content of its obligations or the application of the *lex specialis* regime rather than the *lex generalis* one.[167]

## F. Conclusion

The challenge with the national implementations was a long time coming. Every step of law-making indicated that a challenging task for the Member States to tackle was in the making; first with the heavily debated and criticised proposal[168]; then, the unproductive stakeholders

[162] *Poland v European Parliament* (n 48).
[163] Alexander Peukert and others, 'European Copyright Society – Comment on Copyright and the Digital Services Act Proposal' (2022) 53 IIC - International Review of Intellectual Property and Competition Law 358.
[164] Eleonora Rosati, 'The Digital Services Act and Copyright Enforcement: The Case of Article 17 of the DSM Directive' (European Audiovisual Observatory 2021) 59-60.
[165] Eleonora Rosati, 'The Digital Services Act and Copyright Enforcement: The Case of Article 17 of the DSM Directive' (European Audiovisual Observatory 2021). 60.
[166] João Quintais and Sebastian Felix Schwemer, 'The Interplay between the Digital Services Act and Sector Regulation: How Special Is Copyright?' (2022) European Journal of Risk Regulation Forthcoming <https://papers.ssrn.com/abstract=3841606> accessed 10 February 2022.
[167] Eleonora Rosati, 'The Digital Services Act and Copyright Enforcement: The Case of Article 17 of the DSM Directive' (European Audiovisual Observatory 2021). 74.
[168] European Liberties Platform, 'Article 13 Open Letter – Monitoring and Filtering of Internet Content Is Unacceptable' (*Liberties.eu*, 16 October 2017) <https://www.liberties.eu/en/news/delete-article-thirteen-open-letter/13194> accessed 14 March 2022.

dialogues[169]; and lastly, the late Guidance release. Even after a year from the implementation deadline, the challenge continues; there are still 16 Member States that have not completed their implementation yet.[170] In addition to the complexity of the implementation process itself, the global pandemic also affected the timeline of the national implementations and made this challenge even more extreme. Moreover, the implementation chapter might not be closed even for the Member States that have already implemented Article 17 into their national laws. Following the judgment of the CJEU in the *Poland* case, some Member States might need to update their implementation following the decision. For instance, as mentioned above, there is a high chance for the Member States which followed a literal approach to amend their implementation to meet the high standard for the implementation of safeguards as described within the decision to avoid liability for incorrect transposition.

The problems with practicality add another layer of complexity to the implementation challenge. There are different reasons behind this lack of applicability of Article 17 of the CDSMD. The first and most important reason is the vague definitions and the lack of liability surrounding this vagueness. For instance, many platforms, depending on the unclear definition of OCSSPs, assume that they are out of the scope of liability, and even the ones that clearly fall into the scope of OCSSPs aim to benefit from the lack of liability sanctions within the CDSMD regarding the failure of protecting user rights. Second, most platforms do not have YouTube's resources to employ software, hardware and human teams to comply with Article 17, which would bring practical problems with satisfying the best effort obligations. Third, although the recent developments helped clarify the framework, practical solutions for the implementation, especially regarding safeguards, are still unclear. Thus, the deep-scaled practical problems with upload filters, such as not being able to distinguish between lawful and unlawful content, do not look like they are going away anytime soon. Unfortunately, the *Poland* decision did not help with these problems as it 'remained sufficiently vague'[171] on the issue. As there is no technology which can accurately filter

[169] Paul Keller, 'Article 17 Stakeholder Dialogue (Day 6): Hitting a Brick Wall' (*International Communia Association*, 13 February 2020) <https://www.communia-association.org/2020/02/13/article-17-stakeholder-dialogue-day-6-hitting-brick-wall/> accessed 14 March 2022.
[170] Communia Association, 'DSM Directive Implementation Portal' (*Notion*) <https://www.notion.so> accessed 18 March 2022. However, the data also shows that currently all Member States have made some kind of effort to start the implementation process.
[171] Martin Husovec, 'Internet Filters Do Not Infringe Freedom of Expression If They Work Well. But Will They?' (*www.euractiv.com*, 2 May 2022) <https://www.euractiv.com/section/digital/opinion/internet-filters-do-not-infringe-freedom-of-expression-if-they-work-well-but-will-they/> accessed 5 June 2022.

content, there should be additional measures placed to convert the use of the upload filters to be suitable to satisfy Article 17(4)'s obligations.

Thus, the perspectives provided within this article further clarified the need for the effective and fundamental rights-compliant implementation of Article 17, consequently detailed and careful transposition of safeguards of Article 17. It is important for implementations to include robust safeguards for applying copyright exceptions and limitations according to Article 17(7) 's obligation of result. Notably, as confirmed by the *Poland* case, the implementation of the automated recognition systems should be limited to cases when it is strictly necessary and proportionate for the platform and not just *ex-post*, *ex-ante* safeguards also should be placed to guarantee the efficient protection for the freedom of expression.[172] These safeguards should ensure that users' lawful uses are not getting blocked automatically.[173] UrhDaG's pre-flagging mechanism, by providing an opportunity for users to provide their input regarding the copyright exceptions in their uploads for the decision-making process in addition to preventing minor uses from being subject to the automated preventive filtering and constitutes an effective ex-ante safeguard.[174] In addition to that, an ideal implementation should also provide safeguards for users' data protection and their right to a fair trial with effective complaint and redress mechanisms in line with Article 17 (9) to ensure proportionate practice. Therefore, national implementations can[175] and, considering the stress on safeguards, which constitutes the core of the *Poland* decision, need to go a step further and specify the essential safeguards that need to be placed for Article 17's validity while staying within the limits of the Directive in line with the decision.[176]

Moreover, to provide proportionate and effective enforcement that respects the fair balance of different fundamental rights, the critical imbalance between the sanctions regarding the failure to implement sufficient copyright moderation practices and the failure to protect user rights and interests must be resolved. The implementation must consider that the protection guaranteed to the right to property has its limits and as an economic right, it has to be

[172] *Poland v Parliament and Council* [85-95]
[173] *Poland v Parliament and Council* [85]; Advocate General Opinion [164-165], [191-193]
[174] 'Act on the Copyright Liability of Online Content Sharing Service Providers (Urheberrechts-Diensteanbieter-Gesetz – UrhDaG)*' <https://www.gesetze-im-internet.de/englisch_urhdag/englisch_urhdag.html> (hereinafter 'UrhDaG')
[175] Article 288(3) of Consolidated version of the Treaty on the Functioning of the European Union (TFEU) *OJ C 326, 26.10.2012, p. 47–390*
[176] *Poland v Parliament and Council* [99]

balanced against social rights.[177] Therefore, Member States should underline the importance of ensuring the application of Article 17(7) just like they ensure the application of Article 17(4) 's preventive measures for OCSSPs to satisfy the 'best efforts' obligations. That is why implementations should also include persuasive sanctions for the failure to enable lawful uses in the same way they provide for the failure to prevent infringements.

To achieve a fundamental rights-compliant implementation of Article 17, there are many checks that the Member States to tick as well as sources that they can take into account. Member States should consider, primarily, the *Poland* decision and the case law concerning online enforcement of copyright and fundamental rights, the rich literature within academia, and, if possible, Member States should hold stakeholder dialogues by ensuring the user rights associations' involvement to provide a clear and fundamental right compliant implementation of Article 17. In line with that, T&Cs should follow these carefully drafted implementations of the Article closely and not extend the application of the preventive measures; on the contrary, they should provide necessary safeguards for users, and platforms should be transparent about their operation.

There is an exciting new chapter for Article 17 with the upcoming national implementations, amendments according to the *Poland* decision and the decisions of national courts. One thing is certain, this is not the final chapter of Article 17's implementation adventure as there are lots of burning questions left unanswered. Now, the real-life effects of the Article on platforms and their operation, on users and most notably on the freedom of expression online will be visible, which will be an accurate indicator of whether the Article succeeds in allowing a fair balance to be struck between the competing fundamental rights protected by the Charter.

Most importantly, the impact of DSA should be not overlooked. As an Act with more detailed obligations for VLOPs, DSA can ensure the enforcement regarding the main areas that the CDSMD and DSA intersect. These are platform liability, notice and takedown and stay down (notice and action in DSA), in-platform appeal and out-of-court dispute solutions, trusted flaggers and transparency rules. Thus, considering the impact of the *Poland* decision

[177] Article 52(1) of Charter of Fundamental Rights of the European Union *OJ C 326, 26.10.2012*, p. 406

and DSA coming into force, there is hope that the CDSMD will find its teeth without biting the user rights.