

Targeted consultation addressed to the participants to the stakeholder dialogue on Article 17 of the Directive on Copyright in the Digital Single Market

Fields marked with * are mandatory.

INTRODUCTION

The Directive on Copyright in the Digital Single Market (Directive 2019/790/EC, the 'DSM Directive') requires the Commission to issue guidance on the application of Article 17, in particular regarding the cooperation between online content-sharing service providers and rightholders. The guidance should take into account the discussions held during the stakeholder dialogue meetings organised by the Commission pursuant to paragraph 10 of that article. The DSM Directive is addressed to the Member States who are required to transpose it by 7 June 2021. At this stage, the guidance will focus on assisting Member States in that task.

Following an open call for interest to participate in the stakeholder dialogue, the Commission organised six stakeholder dialogue meetings between October 2019 and February 2020 to gather the views of relevant stakeholders on the main topics related to the application of Article 17.

This consultation paper builds on the discussions at the stakeholder dialogue and presents the initial views of the Commission services with the view to finalising the Commission guidance.

We encourage the representative organisations to gather the views of their members and to provide, to the extent possible, a coordinated reply to the consultation. Where this is not possible, replies can be provided by individual members.

About yourself

* I'm giving my contribution as

- Organisation representing users, including fundamental rights organisations
- Organisation representing online content-sharing service providers
- Organisation representing rightholders
- Public authority
- Other

* Name of your organisation/authority

European Digital Rights

E-mail (this won't be published)

diego.naranjo@edri.org

* Are you registered in the Transparency Register of the EU?

- Yes
 No

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I. SCOPE OF SERVICES COVERED BY ARTICLE 17

Background

Article 17 applies to online content-sharing service providers as defined in Article 2(6) of the Directive. An online content-sharing service provider is defined as an information society service provider of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.

Article 2(6) also provides a non-exhaustive list of excluded providers of services, which are not online content-sharing service providers within the meaning of the Directive.

Special rules apply to new online content-sharing service providers, which meet the conditions in Article 17 (6).

Possible elements for the guidance

The guidance should indicate how to transpose the definition of 'online content-sharing service provider' into national law and explain the different elements of the definition itself, as well as of the list of service

providers, which are expressly excluded.

The non-exhaustive nature of the exclusion for particular online service providers by use of the term 'such as' denotes that other service providers could also qualify as an excluded service provider on a case-by-case basis.

In order to provide legal certainty, Member States should explicitly set out in their implementing laws all elements of the definition of 'online content-sharing service provider' in Article 2(6), including the excluded service providers set out in Article 2(6). As regards these excluded service providers, the guidance should state that the Union legislature has expressly excluded from the scope of the definition the particular examples set out in Article 2(6).

For other services, which are not identified as examples but which may also be excluded, a case-by-case assessment would be necessary.

Recital 63 states that a case-by-case assessment would be required in order to determine whether an online service provider falls within the scope of the rules in Article 17. This does not affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to excluded service providers using copyright-protected content, as recalled by recital 64.

Article 2(6) should be read in the light of recitals 62 and 63. In order to increase legal certainty as to the scope and as an aid to interpretation, Member States should be advised to also transpose elements of Recitals 62 and 63. Member States should apply the different elements of the definition, such as the concept of 'large amount of copyright protected content' in the light of these recitals, while they should refrain from further defining these elements going beyond the text of the directive, in order to avoid fragmentation.

Member States should bear in mind that the definition is drafted in a sufficiently neutral manner, which takes account of possible changes in modes of delivery, technology and usage and the fact that the DSM Directive will have to be applied in circumstances, which may change over time.

Question 1: Are there any additional elements related to the definition of an online content-sharing service provider, besides those outlined above, which you consider require some guidance? If yes, please indicate which ones and how you would suggest the guidance to address them.

2600 character(s) maximum

EDRi welcomes that the guidance explicitly states that the list of excluded service providers set out in Article 2(6) is non-exhaustive and that other services that are not explicitly excluded can be added on a case-by-case assessment.

Also positive is that the guidance provides for the incorporation of elements of recitals 62 and 63 into the definition of online content-sharing service providers. In particular the criterion 'playing an important role on the online content market by competing with other online content services for the same audiences' is important for a balanced implementation. This clarification ensures that only services are covered by Article 17 that significantly impact the economic interests of rightsholders by competing with those services that, rather than relying on user uploads, directly license copyright-protected content from rightsholders and make it available to users. It is very important for service providers that may meet all other criteria of the legal definition, but are not targeted by Article 17, such as dating portals or cooking recipe platforms. Therefore, the guidance should encourage the Member States to transpose this element of recital 62 in particular. Only a full transposition of the criteria laid down in the Directive, including the recitals, can ensure a harmonized transposition in the Member States and at the same time safeguard the balance of interests underlying the Directive.

In addition, it should be added that the 'not for profit' criterion should be interpreted broadly, in order to prevent national courts from interpreting this element differently than it was intended. It should be clarified that activities such as soliciting donations to cover server costs, or offering additional services for a fee (freemium models), should not trigger the application of Article 17, because they do not constitute the organization and promotion of user uploads for profit-making purposes. Otherwise, there is a risk of societally beneficial services ending up being covered by Article 17, although the European legislator explicitly sought to exclude them.

II. AUTHORISATIONS (Art. 17 (1-2))

Background

Article 17(1) requires Member States to provide that online content-sharing service providers, as defined in Article 2(6), perform an act of communication to the public or an act of making available to the public for the purposes of this Directive when they give the public access to protected content uploaded by their users and therefore need to obtain an authorisation from relevant rightholders, for instance by concluding a licensing agreement. Under Article 17(2) the authorisation obtained by the online content-sharing service providers must also cover the acts carried out by users, under certain conditions.

Possible elements for the guidance

(i) Authorisation models

The guidance should explain how Member States should approach the requirement of 'authorisation' in Article 17(1). The term 'authorisation' is not defined and it should be interpreted in the light of the aim and objective of Article 17.

Article 17 is a *lex specialis* to Article 3 of Directive 2001/29/EC and of Article 14 of Directive 2000/31/EC. This is confirmed by Recital 64, which states clearly that Article 17 does not affect the concept of communication to the public or of making available to the public elsewhere under Union law, nor does it affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to other service providers using copyright-protected content. As such, Member States would not be able to rely in their transposition

of Article 17 on their implementation of either of those directives in relation either to the notion of 'authorisation' or indeed for the notion of 'communication to the public'. Therefore, Member States should explicitly introduce into national law the notion of 'authorisation' for the *lex specialis* 'act of communication to the public' in Article 17(1).

Article 17(1) provides that an authorisation may for instance include a licensing agreement and this is also set out in Recital 64. Accordingly, an authorisation may take the form of a licensing agreement but may also take another form in national law. The guidance could give indications of different authorisation schemes that Member States could provide for, taking into account the specificities and practices of different sectors. Both individual and collective licensing solutions should be possible. Extended collective licences (ECL) could be considered in specific cases and for specific sectors, provided that they comply with the conditions of Article 12 of the DSM Directive.

The guidance would also recall that rightholders are not obliged to grant an authorisation to online content-sharing service providers, as explained in recital 61. Nevertheless, where rightholders do not grant an authorisation, online content-sharing service providers are not liable for copyright infringements if they comply with the conditions set out in Article 17(4) (see section III.1).

In order to foster the grant of authorisations in any chosen form at national level and to ensure the *effet utile* of Article 17(1), Member States could be recommended to maintain or establish voluntary mechanisms to facilitate agreements between rightholders and service providers. For example, voluntary mediation mechanisms could be considered in specific cases or sectors to support parties willing to reach an agreement but facing difficulties in the negotiations.

(ii) Authorisations covering users

Member States should implement explicitly in their legislation Article 17(2) under which an authorisation granted to online content-sharing service providers should also cover acts carried out by (i) users acting for non-commercial purposes or (ii) users whose activity does not generate significant revenues. It is important to bear in mind that these authorised uses are in addition to what else is authorised for content-sharing service providers.

Under this provision, authorisations granted to service providers are deemed to cover the acts, within the material scope of the authorisation granted, that are carried out by users falling in any one of these categories (non-commercial purpose or non-significant revenues). It is sufficient for a user to satisfy one of these conditions to be covered by the authorisation.

The guidance could illustrate this provision, which would for example cover users uploading a home video including music in the background or users uploading a tutorial generating limited revenues, which includes music or images when no exceptions apply. On the other hand, users acting on a commercial basis and deriving significant revenues from their uploads would be outside the scope of or not covered by that authorisation (unless the parties have explicitly agreed to cover also these users contractually). Member States should not set out quantitative thresholds when implementing the concept of 'significant revenues' which should be examined on a case-by-case basis. Member States should be recommended to assess the notion of 'significant revenue' by reference to all the circumstances of the user's activity in question, including whether there is a licence agreement where the parties have agreed on specific thresholds (which should however not go below what is authorised under Article 17(2)).

Member States should interpret the notion of authorisation in Article 17(2) in light of recital 69 according to which service providers do not have to obtain a separate authorisation when rightholders have already authorised users to upload specific content. In these cases, the act of communication to the public has already been authorised within the scope of the authorisation granted to the user. The same recital also indicates that service providers should not presume that their users have in all cases obtained all the necessary authorisations for the content they upload.

In order to enhance transparency and legal certainty, the guidance could encourage the Member States to put in place an exchange of information on authorisations between rightholders, users and service providers.

Question 2: Are there any additional elements related to authorisations under Article 17(1) and 17(2), which should be covered by the guidance? If yes, please explain which ones and how you would suggest the guidance to address them.

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EDRi shares the Commission's legal assessment that Art. 17 is *lex specialis* to Art. 3 of Directive 2001/29/EC (InfoSoc Directive) and to Art. 14 of Directive 2000/31/EC (E-Commerce Directive – ECD) and welcomes that this is made explicit in the guidance. The Commission's assessment is also in line with the Opinion of Advocate General (AG) in the joined cases YouTube (C-682/18) and Cyando (C-683/18) before the Court of Justice of the European Union (CJEU). In his Opinion, the AG argued emphatically that Article 17 cannot be a mere clarification of the right of communication to the public Article 3 of the InfoSoc Directive, but a *sui generis* extension of this right (paras 249 - 255).

As the concept of authorization of the *lex specialis* act of communication to the public introduced by Art. 17 can take other forms than that of an individual license, the guidance should clarify that these other forms of authorization are not limited by the constraints of the InfoSoc directive.

Beyond the clarification of the *lex specialis* nature of the notion of communication to the public in Art. 17, the guidance could provide concrete examples of legitimate forms of authorization. As the Commission highlights below, the ultimate aim of Art. 17 is to arrive at such authorizations and thus avoid the blocking of uploads, which always bears the risk of negatively affecting the fundamental rights of users. One such example of authorization could be the German proposal for a remunerated *de-minimis* exception. The *de-minimis* exception represents a real added value for the users of the platforms, as it is an easily understandable and clearly defined exception that should be easy to follow for laypeople. It removes incentives for the use of upload filters by legalizing many everyday uses of copyrighted material on platforms. As a remunerated exception, it also benefits rightholders while having much lower transaction costs than individual licensing arrangements.

EDRi agrees with the Commission that national implementations of Art. 17 should make explicit that authorizations granted to OCSSPs should also cover acts of communication to the public of users that are non-commercial or do not generate significant revenues, and that authorizations granted to users should also cover the acts of communication to the public of OCSSPs. In the latter case, it must be clarified that this applies not only for authorizations granted to users by rightholders, but also authorizations granted to users by the law, notably through exceptions and limitations.

Question 3: Do you have any concrete suggestions on how to ensure a smooth exchange of information between rightholders, online content-sharing service providers and users on authorisations that have been granted?

2600 character(s) maximum

Ideally, the information should be stored in a public database. This concept of a central, transparent rights management is already taken up by the guidance, but the guidance should not only encourage the member states to put in place such an exchange of information but provide concrete proposals and provisions for the exchange of information. Such a database could not only facilitate the authorization process and provide the required transparency for the system to work. The Member States could also create rules for rights clearance and thereby contribute to a fair balance of interests. Recent academic work has highlighted that the introduction of formalities in copyright law, such as mandatory rightholder information, can be reconciled with international copyright treaties within certain constraints (see van Gompel, Copyright Formalities in the Internet Age https://www.ivir.nl/publicaties/download/BTLJ_2014_3.pdf).

The guidance should explicitly encourage Member States to set these standards and define in this context requirements for the role of rightholders. For example, it should be made clear what obligations the rightholders have in the process of authorization. It would seem appropriate in this context that the rightholders, comparable to the service providers, are also bound to a 'best effort' standard, which excludes the possibility of unresponsive conduct by rightholders at the expense of the service providers and thus indirectly at the expense of the users. If rightholders refuse to give authorization on reasonable terms or fail to respond to a request, this should be considered as fulfillment of the best-effort obligation under Article 17.

In addition, the guidance in this regard could make it clear that conflicts of rights ownership between rightholders should not be to the detriment of the service providers or indirectly to the detriment of users. Neither should the service providers decide on these conflicts, nor should a dispute over rights ownership prevent content from being uploaded in the long term. Member States should therefore be encouraged to establish a dispute resolution mechanism that provides for a reasonably swift resolution.

Public databases are also a suitable element to ensuring that content that anyone can legally upload stays online in line with Art. 17 (7). The guidance should recommend the introduction of databases of public domain and openly licensed works (such as works under Creative Commons licenses), which should not be subject to removal or blocking.

III. SPECIFIC LIABILITY REGIME UNDER ARTICLE 17

Article 17(4) establishes a specific liability regime for online content-sharing service providers that have not obtained an authorisation from the relevant rightholders under the applicable national rules implementing Article 17(1). Therefore, the *effet utile* of this provision will depend on the system of 'authorisation' put in place by the Member State under Article 17 (1) and (2). As outlined in recital 61, the goal of Article 17 is 'to foster the development of the licensing market between rightholders and online content-sharing service providers'. Article 17(4) only becomes applicable in those cases in which the primary goal of authorisation of acts of communication to the public performed by online content sharing service providers within the meaning of Article 17(1), for instance by concluding a licensing agreement, could not be achieved.

In the absence of an authorisation, Article 17(4) sets out three cumulative conditions, which service providers may invoke as a defence against liability.

The conditions in Article 17(4) are subject to the principle of proportionality, as specified in Article 17(5). In this respect, the guidance should give indications to Member States on the practical application of the proportionality criteria to the conditions set in Article 17(4), notably how the type, size and audience of the service, the availability of suitable and effective means and the related costs, as well as the type of content uploaded by the users could be considered in different cases.

1. BEST EFFORTS TO OBTAIN AN AUTHORISATION (ARTICLE 17(4)(a))

Background

The first condition in Article 17(4) letter (a) is that service providers should be liable for unauthorised acts of communication to the public, including acts of making available to the public, unless they demonstrate they have made best efforts to obtain an authorisation. The principle of proportionality, as set out in Article 17(5), should be taken into account when assessing whether a service has made its best efforts under Article 17(4) letter (a). Pursuant to Article 17(8), the application of Article 17 should not lead to any general monitoring obligation.

Possible elements for the guidance:

The guidance could give non-exhaustive indications of actions carried out by service providers that could constitute best efforts to obtain an authorisation by the service providers. In particular, it should illustrate, which action on the part of service providers would constitute best efforts. This would include any action taken by service providers to seek out and/or engage with rightholders and the response, if any, to such solicitation and/or engagement by rightholders. Member States may wish to include such actions, which could, if relevant, vary from sector to sector, in their transposition law.

The authorisation models defined by Member States pursuant to Article 17(1) will have an impact on how easily service providers may be able to fulfil the requirement of 'best efforts' to obtain an authorisation. The threshold of 'best efforts' may be more easily satisfied where a Member State has taken measures to facilitate the grant of authorisations, for example with regard to licensing models, mediation mechanisms or exchange of information. Where a Member State has opted for a system, which leaves greater flexibility in the authorisation regime, service providers may need to adduce evidence that they have tried and been unable to get an authorisation. Keeping records of service providers' engagement with rightholders may help addressing this situation. The evidential standard to prove best efforts would depend therefore on the type of authorisation in national law. For example, participation in a voluntary mediation, where available, could be taken into account in order to satisfy best efforts.

The guidance should recall the importance of applying the best efforts obligation on a case-by-case basis and according to the proportionality principle and the criteria provided for in Article 17(5).

To illustrate the best effort obligation, the guidance should make clear that service providers have to engage proactively as a minimum with rightholders which can be easily identified and located, in order to seek an authorisation. This includes rightholders representing a broad catalogue of works or other subject matter, or their representatives with a mandate to act on their behalf such as collective management organisations (CMOs) acting in accordance with Directive 2014/26/EU.

At the same time, in accordance with the principle of proportionality, service providers should not be

expected to proactively seek out all rightholders whose content may be uploaded on their services, in particular those who are not easily identifiable by any reasonable standard. The guidance should however explain that online content-sharing service providers should as a rule enter into negotiations with those rightholders that wish to offer an authorisation for their content, irrespective of whether their type of content (eg. music, audio-visual content, images, text, etc...) is prevalent or is less common on the website of the service provider. Nevertheless, pursuant to the principle of proportionality, in certain cases (notably in case of smaller service providers) a lower level of effort to obtain an authorisation may be expected for types of content which are less common on the website of a given service provider (e.g. for images or texts on a video-sharing platform).

In the light of Recital 61, licensing agreements should be fair and keep a reasonable balance between both parties. That recital also states that rightholders should receive appropriate remuneration for the use of their works or other subject matter. As a consequence, service providers refusing to conclude a licence offered on fair terms and which maintains a reasonable balance between the parties should not be considered to have deployed their best efforts to obtain an authorisation. On the other hand, service providers should not be required to accept licensing offers that are not on fair terms and which do not keep a balance between the parties, including as regards the remuneration to be paid.

The guidance should refer to the relevant provisions of Directive 2014/26/EU applying to licences negotiated and concluded by CMOs, in particular Article 16 (conducts of negotiations and licencing terms) and Article 35 (resolution of disputes). As mentioned under Section II, Member States may also maintain or establish voluntary mechanisms aimed at facilitating the conclusion of licensing agreements between online content-sharing service providers and rightholders.

Question 4: In which cases would you consider that an online content-sharing service provider has made its best efforts to obtain an authorisation, in light of the principle of proportionality? Please give some concrete examples, taking into account the principle of proportionality.

2600 character(s) maximum

EDRi considers that the Commission does not sufficiently take account of the principle of proportionality regarding the obligation to make best efforts to obtain an authorization. The guidance should emphasize that this is an obligation of conduct, the fulfilment of which is to be measured by a specific conduct, not by a result.

Article 17 is based on the assumption that OCSSPs benefit from the upload of copyright-protected content by users and should therefore be obliged to make best efforts to obtain an authorization. For types of works that are not typically uploaded to a service, there is no benefit to the OCSSP, nevertheless it is impossible for the OCSSP to categorically prevent their upload. Regardless of their size, OCSSPs should not be obliged to make best efforts to obtain an authorization for content that is not typically uploaded to the service, even when actively approached by a rightholder.

For example, a video sharing platform should not have to seek software licenses, even if there is a theoretical possibility that users could upload them, regardless of the size of the platform. Similarly, a photo sharing platform should not have to accept a license offer from a rightholder of a literary work, merely because the OCSSP is unable to technologically prevent the theoretical possibility that a literary work could be embedded in an image. On the contrary, the principle of proportionality and the fair balance referred to in Recital 61 require that the obligation to make best efforts to obtain authorization be limited to cases where the platform can be expected to benefit from the presence of that type of work on the service, i.e. the type of works that are typically used. This is the approach taken by the German implementation proposal, which could serve as a model on this point.

Similarly, the guidance should not distinguish between easily identifiable rightholders and those that are not,

as this criterion is very subjective and would disadvantage smaller rightholders. There is a significant danger that “easy identifiability” would become a proxy for the economic power of the rightholder. The only fair solution that does not lead to economic discrimination would be to limit the obligation to actively approach rightholders for a license to collecting societies established in the same country as the service provider, as the German implementation proposal suggests.

Question 5: In your view, how should online content-sharing service providers, in particular smaller service providers, make their best efforts to obtain an authorisation for content, which is less common on their service?

2600 character(s) maximum

In these cases, the principle of proportionality requires a reduction in the requirements for 'best efforts'. In principle, it seems appropriate that service providers should only have to demonstrate best efforts for those types of work that are intended to be used on the platform. This corresponds to the scope of application of the Directive, which according to Recital 62 is limited to those service providers that are competing with other online content services for the same audience. In this respect, the 'best effort' requirement should only apply to those types of works for which a service provider falls within the scope of the Directive because it competes with other service providers for a certain audience.

In practice, this means that the best effort requirement for a platform intended and designed for video sharing is limited to the rights necessary for the communication of videos. The platform does not, however, have to demonstrate best efforts with respect to content whose use differs from its intended use, for example when users upload poems or software code. This approach, which is followed e.g. by the German implementation proposal, should apply regardless of the size of the service provider. The size of the service provider should rather be taken into account when determining whether a particular license offer is fair, because the principle of proportionality requires that the cost of obtaining licenses strike a fair balance with the revenues of the service provider, especially when taking into account the license offers of other rightholders that may also approach the same service provider.

Question 6: Are there any additional elements related to Article 17(4)(a), which should be covered by the guidance besides those outlined above? If yes, please explain which ones and how you consider the guidance should address them.

2600 character(s) maximum

The guidance mentions that the implementation of this obligation should not lead to general monitoring, but does not expand on this point. The academic literature (see Spindler on the compatibility of Article 17 with EU law, <https://perma.cc/A5YR-94ZJ>) has raised the concern that the best effort obligation could entail a general monitoring obligation if OCSSPs, as part of their best efforts, were required to actively seek facts regarding the presence of copyright-protected works on their services. Such an obligation would not only violate the ban on general monitoring obligations, but also place a disproportionate burden on service providers.

To address this concern, the guidance should explicitly state that the obligation to make best efforts to obtain an authorization should never entail a requirement on the service provider to monitor user uploads for copyright-protected works in order to subsequently approach the rightholders of those works for an authorization. Rather, it can be expected of rightholders, when approaching the service provider for license negotiations, to present evidence for the prevalence of that rightholder's works on the service, which should be taken into account when deciding whether a particular license offer is fair.

When determining whether a license offer is fair, not only the price of the license and the size of the service

provider should be taken into account, but also the conditions under which the content can be used. License offers that place unreasonable restrictions on the use of the content, for example regarding its geographical scope or the license modalities, should not be considered fair.

2. 'BEST EFFORTS' TO AVOID UNAUTHORISED CONTENT (Art. 17(4)(b))

Background

The second condition set out in Article 17(4) is that online content-sharing service providers should be liable for the use of unauthorised content unless they demonstrate that they have made their best efforts, in accordance with high industry standards of professional diligence, to ensure the unavailability of specific works and other subject matter for which the rightholders have provided them with the relevant and necessary information. The principle of proportionality, as set out in Article 17(5), and Article 17(7) should be taken into account. Pursuant to Article 17(8), the application of Article 17 should not lead to any general monitoring obligation.

Possible elements for the guidance:

Member States should bear in mind that these provisions are subject to the obligation on them in Article 17 (7) and (9) to ensure that legitimate uses remain unaffected by the cooperation of service providers with rightholders. The guidance should give indications to Member States on how this could be achieved, as explained in section IV.

The guidance should recommend that in their implementing laws Member States should not mandate the use of technology or impose any specific technological solutions on service providers in order to demonstrate best efforts. This would not only ensure a technologically neutral and future proof application of Article 17(4)(b) but also provide for a less intrusive approach. The service providers together with rightholders may cooperate on the best way to approach identification of the works in question, including by recourse to technology taking into account that the cooperation should not lead to any general monitoring obligation.

The guidance should underline that service providers have to act diligently when making their best efforts to implement any relevant solutions. As stated in Recital 66, to assess whether a given service provider has made its best efforts, account should be taken of whether the service provider has taken all the steps that would be taken by a diligent operator to achieve the result of preventing the availability of unauthorised works or other subject matter on its website taking into account best industry practices and the effectiveness of the steps taken in light of all relevant factors and developments. However, service providers should remain free to choose the technology or the solution that they consider the most appropriate to comply with the best efforts obligation in their specific situation, given that account should be taken of the principle of proportionality.

The stakeholder dialogue showed that content recognition technology is already used today to manage the use of copyright protected content, at least by the major online content-sharing service providers. Besides content recognition technology based on fingerprinting, other solutions, such as watermarking, solutions based on metadata and key word search or a combination of different technologies are currently deployed to detect unauthorised content.

Therefore, in most cases, it is expected that service providers will rely (or continue to rely) on technological tools in order to comply with their obligation under Article 17(4)(b) but it is not a prerequisite for the application of Article 17(4). The guidance should in this context recall that the deployment of any solution, including use of technology, such as content recognition technologies, has to respect Article 17(7) and 17(9), which lays down safeguards for legitimate uses (see section IV below).

The guidance should also recall the importance of applying the ‘best effort’ obligation on a case-by-case basis and according to the proportionality principle and the criteria provided for in Article 17(5). In this respect, the guidance should give indications to Member States along the following lines:

- The type, size and audience of the service: larger service providers with a significant audience may be expected to deploy more advanced and costly solutions/technologies than ‘smaller’ service providers, with more limited audiences and resources. It could be more proportionate to expect smaller service providers to resort to simpler solutions (like metadata or key word search) as long as these solutions are effective. In some cases, notably for small service providers, relying on ex post action following rightholders’ notifications (notice and take down) may be proportionate, as explained in recital 66.
- The availability of suitable and effective means and the related costs should also be considered, for example when service providers buy solutions from third parties/ technology providers, when these are developed in-house as well as the costs related to human review in the context of disputes (see Section IV). The cumulative cost of different solutions that may need to be implemented by a service provider should also be considered, as well as limitations of technologies depending on the type of content.
- The type of content uploaded by the users: when a service provider makes available different types of content, the level of efforts to be made may vary depending on whether the content is prevailing in their website or residual. It can be expected that service providers make more efforts regarding the former as compared to the latter.

In line with Article 17(4)(b), the guidance should underline that the best efforts to ensure the unavailability of specific unauthorised content are to be assessed on the basis of the ‘*relevant and necessary information*’ rightholders must provide to online content-sharing service providers. Whether any information provided by rightholders is “relevant and necessary information” in any given situation should be assessed on a case-by-case basis. Recital 66 specifies that if no such information is provided by rightholders, service providers are not liable for unauthorised uploads of unidentified content.

The guidance would provide some examples of what may constitute relevant and necessary information in different cases. Such information will vary depending on the solutions deployed by service providers (for example metadata on the work such as title, author/producer, duration; fingerprints or the actual content file). The information provided by rightholders should be relevant and accurate to allow service providers to take action on that basis. Member States should be free to define sanctions for abuse of the cooperation mechanism laid down in Article 17, such as the provision of false information.

Flexibility could be left to rightholders and service providers to agree on mutually convenient cooperation arrangements in view of ensuring the unavailability of unauthorised content, within the boundaries of the safeguards for legitimate uses.

Question 7: In which cases would you consider that an online content-sharing service provider has or has not made its best efforts to ensure the unavailability of specific unauthorised content in accordance with high industry standards of professional diligence and in light of the principle of proportionality and the user safeguards enshrined in Article 17(7) and (9)? Please give some concrete examples.

2600 character(s) maximum

EDRi has serious doubts about the compatibility of Art. 17 with the Charter of Fundamental Rights, especially as regards the liability for copyright infringements when an OCSSP has failed to make best efforts to ensure the unavailability of specific infringing content. The CJEU has grounded the ban on general monitoring in the Charter (see cases C-70/10 Scarlet and C-360/10 Netlog) and found that an obligation to monitor all user uploads for a possible copyright infringement constitutes a general monitoring obligation, even when the service provider is only required to monitor for infringement of a single, specific copyright-protected work (see case C-484/14 McFadden, para 87). Further, a Union act must not leave the protection of fundamental rights to the implementation by Member States but must itself include specific fundamental rights safeguards (see Cases C-293/12 and C-594/12, Digital Rights Ireland, para 54).

In this regard, EDRi welcomes that the Commission clarifies that Art. 17 does not mandate the use of content recognition technologies, and that any solution must comply with Art. 17 (7) and (9) and must therefore not lead to the deletion of legal content. Yet, we remain concerned that OCSSPs would see no other cost-effective option for compliance with Art. 17 (4)(b) than to engage in general monitoring of user uploads. In this case, the use of content recognition technology cannot be considered voluntary and would still adversely impact the fundamental rights of users and service providers. Consequently, the guidance should clarify that a service provider, regardless of its size, can never be found to have violated its obligation to make best efforts to ensure unavailability merely because it has failed to employ a technology that monitors all user uploads. Rather, the guidance should point out that an obligation to examine all content that is uploaded leads to a general monitoring obligation, which is prohibited under Art. 17 (8) and the case law of the CJEU.

In principle, EDRi agrees with the Commission that the size and resources of the OCSSP should be taken into account when determining what constitutes best efforts, but this determination must not lead to compromising the rights of users. Simpler solutions for ensuring the unavailability of infringing works may also be less effective at ensuring the availability of legal works. The guidance must highlight that the obligation to ensure the availability of legal works in paragraph 7 applies absolutely to all service providers, regardless of size, and is not limited to best efforts.

Question 8: Which information do you consider 'necessary and relevant' in order for online content-sharing service providers to comply with the obligation set out in Article 17(4)(b)?

2600 character(s) maximum

As highlighted by the Advocate General (AG) in his opinion on the joined cases YouTube (C-682/18) and Cyando (C-683/18), in order for a service provider to be able to determine the infringing nature of a specific use, the rightholder must provide, at minimum, information identifying the protected work or other protected subject-matter, establishing that it fulfils the criteria for copyright or related rights protection, information on the specific rights held by the rightholder in the content, including the territorial scope of those rights, as well as information establishing that the use in question infringes those rights, including why the rightholder considers that exceptions do not apply (paras 187 to 190). Information on the infringing nature of the use, however, cannot be provided ex ante and in abstracto, without the rightholder knowing the use in question. Therefore, "necessary and relevant information" must refer to a dialogue between the service provider and the rightholder, rather than a one-off information provision by the rightholder, and include all the information

listed above.

The inclusion of information about the specific rights held by the rightholder is particularly important in the context of works in the public domain. Content recognition technologies frequently falsely identify original performances of public domain musical works (especially classical music) as infringements of other, protected phonogram recordings of the same work. Service providers will only be able to avoid these mistakes if rightholders are required to specify the rights that they hold (i.e. that they only hold rights in the recording, not the composition).

The Commission states correctly that the information that must be transmitted varies according to the solution used. In the examples of what may constitute relevant and necessary information in different cases, the guidance should make it clear that the information and metadata must be checked and updated regularly by the rightholders, as this data is dynamic and therefore needs to be kept up to date to ensure its accuracy.

Question 9: Are there any other elements related to the best efforts to ensure the unavailability of unauthorised content, besides those outlined above, for which you think some guidance is needed? If yes, please explain which ones and how you consider the guidance should address them.

2600 character(s) maximum

The guidance should provide Member States with concrete mechanisms to sanction the abuse of the cooperation in Article 17 by alleged rightholders or rightholders that provide false information. EDRi welcomes that the Commission mentions this possibility, but considers that the introduction of sanctions against abuse should not be left to the discretion of Member States, but is rather a necessary precondition for ensuring the availability of legal content in compliance with paragraph 7. The guidance should therefore go into more detail beyond the statement that the Member States should be free to define sanctions for the abuse of the cooperation mechanism and propose concrete measures against abuse.

The German draft for the implementation of Article 17 (https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_II_Anpassung%20Urheberrecht_digitaler_Binnenmarkt_englischeInfo.html?nn=6712350) may serve as a reference point for concrete measures against abuse. In Article 19, the German draft proposes concrete measures for the provision of false information. Pursuant to this, rightholders that provide false information can be excluded from the possibility of demanding the blocking of content and can also be held liable for damages and injunctive relief to users affected by an abusive provision of false information. Such specific measures are necessary and required to safeguard the fundamental rights of the users (see also Q15).

3. NOTICES SUBMITTED BY Rightholders TO REMOVE UNAUTHORISED CONTENT AND THE RELEVANT AND NECESSARY INFORMATION TO PREVENT FUTURE UPLOADS (ART. 17(4)(c))

Background

The third condition set out in Article 17(4) (c), which is also subject to the principle of proportionality laid down in paragraph 5 and the safeguards for legitimate uses in paragraph 7, is that online content-sharing service providers should be liable for the use of unauthorised content unless they demonstrate that they have acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and that they have made best efforts to prevent their future uploads in accordance with Article 17(4)(b). Pursuant to Article 17 (8), the application of Article 17 should not lead to any general monitoring obligation.

Possible elements for the guidance:

The guidance should give indications to Member States on how they should implement Article 17(4)(c) in their national laws. Member States should bear in mind that the two conditions set in letter (c) are subject to the principle of proportionality provided for in Article 17(5). The ‘best efforts’ that service providers should make to prevent future uploads of notified works should be approached in the same way as in relation to Article 17(4)(b). The guidance should recall the importance of assessing whether the best efforts have been made by service providers on a case-by-case basis.

Member States should also bear in mind that the application of Article 17 should not lead to any general monitoring obligation and that legitimate uses have to be safeguarded as provided for in paragraphs 7 and 9, and as further explained in section IV. This is particularly relevant for the application of the second part of letter (c), according to which service providers have to make their best efforts to prevent future uploads of notified works.

The guidance should also indicate that when implementing Article 17(4) letter (c), Member States need to clearly differentiate the type of information rightholders provide in a ‘sufficiently substantiated notice’ for the removal of content (the ‘take-down’ part of letter (c)) from the “relevant and necessary information” they provide for the purposes of preventing future uploads of notified works (the ‘stay-down’ part of letter (c), which refers back to letter b).

With regard to the elements to be included in a ‘sufficiently substantiated notice’ submitted by rightholders, the guidance should recommend Member States to follow in their implementation the Commission Recommendation on Measures to Effectively Tackle Illegal Content Online[1]. The information provided should be specific and detailed in nature in a way in which it verifies not only the work or protected subject matter and the specific rights held by the rightholder but where it is alleged to be on the website in question. Points 6 to 8 of the Recommendation list elements that could be included in the notices. As the Recommendation is a horizontal non-binding instrument and therefore not copyright specific, existing national rules and current practices for copyright notices, which may contain more details, could also be applied.

Article 17(4) letter (c) second part (the ‘stay down’ obligation) refers back to letter (b) of the same paragraph. As a consequence, in order for the service providers to be able to deploy their best efforts to avoid future uploads under this provision, rightholders have to provide them with the same type of ‘relevant and necessary’ information which is relevant for the application of letter (b). This means for example that, if a service provider uses fingerprinting technologies to avoid future uploads of notified works, receiving as information only the title of a song and its location, as identified in a notice, would be insufficient. In this case, to allow service providers to avoid future uploads of notified works, rightholders would need to provide the services with fingerprints or content files. If rightholders have already provided the ‘necessary and relevant’ information under letter (b) of Article 17(4) with regard to a specific notified work, they should not be obliged to re-submit the same information for the purposes of ‘stay-down’, but this should be assessed on a case-by-case basis.

[1] See Commission Communication of 1 March 2018 available at: <https://ec.europa.eu/digital-single-market/en/news/commission-recommendation-measures-effectively-tackle-illegal-content-online>

Question 10: What information do you consider a sufficiently substantiated notice should contain in order to allow the online content-sharing service providers to act expeditiously to disable access /remove the notified content?

2600 character(s) maximum

An effective notice and take-down procedure requires that the notice contains specific information about the infringing upload and the circumstances giving the grounds for its unlawfulness.

In this respect, the guidance should reflect the Opinion of the Advocate General in joined cases C-682/18 and C-683/18 (paras 186-190):

The AG first points out that the purpose of the notice and takedown procedure is to strike a balance between the various interests involved and, in particular, to safeguard the freedom of expression of users (para 186). The notification therefore is not only intended to enable a service provider to localize illegal content on its servers but is also intended to give the service provider sufficient evidence to verify the unlawful nature of the information. The AG describes in detail the particular difficulties involved in establishing an infringement of copyright (paras 188 and 189). The assessment of copyright issues can cause considerable difficulties and regularly requires a thorough factual and legal examination, including a detailed weighing of interests on a case-by-case basis. Without sufficient information from the rightholders, such an assessment is not feasible for service providers. Particularly in ambiguous cases, vis-a-vis a potential liability of the service providers, there is a risk of systematic overblocking. In order to prevent this, the rightholders have to provide evidence, that would allow a 'diligent economic operator' to establish the infringing character of an upload without difficulty and without conducting a detailed legal or factual examination (para 190).

Therefore, a 'sufficiently substantiated notice' must (1) identify the protected work, and provide information about the identity and contact information of the notifying party, (2) describe the alleged infringement, including details of the location of the content (including a specific URL), (3) provide clear indication of the alleged rights to the work and if the application of an exception is not precluded, the rightholder should (5) be obliged to explain why it should be. The notice should furthermore (6) contain a declaration of good faith and (7) to ensure compatibility with the GDPR, provide the consent of the rightholder to the processing of his personal data to the extent required by the notification procedure.

Question 11: Are there any other elements related to the 'notice and take down' and 'notice and stay-down' systems provided for in Article 17(4)(c) that should be covered by the guidance? If yes, please explain which ones and how you would suggest the guidance to address them.

2600 character(s) maximum

With regard to the notice and stay-down procedure, the guidance should not only clarify that a distinction must be made between 'sufficiently substantiated notice' for the removal of content (the 'take-down' part of letter (c)) from the 'relevant and necessary information' (the 'stay-down' part of letter (c)). Moreover, the guidance should specify which information needs to be provided to meet the requirement of 'relevant and necessary information' and at the same time not lead to the introduction of an inadmissible general monitoring obligation.

The term 'relevant and necessary information' should be interpreted in line with the decisions of the CJEU in the cases C-484/14 (McFadden) and C-18/18 (Glawischnig-Pieszczyk). In these decisions the CJEU stated, that a request for deletion and the subsequent stay-down obligation may only extend to specifically identified, identical and similar acts. In this case, the service provider does not have to make an autonomous assessment of the legality of the content but can prevent identical and similar uses by automatic tools. This is a mandatory requirement in order to maintain the character of a permissible, specific monitoring obligation.

The request for a deletion and stay-down must therefore contain specific details pertaining to the infringing nature of the use of the protected content. According to the CJEU in the case C-18/18 this information must include a court's assessment and its circumstances in the individual case. Only then does the obligations to monitor and actively seek for this information not lead to an inadmissible general monitoring obligation. An obligation on a service provider to block all uses of the same copyright-protected work, without consideration of whether the specific use is infringing, does however constitute an inadmissible general monitoring obligation, even if the work in question has been specified by the rightholder (Case C-484/14, para 87), and must therefore be ruled out in the guidance.

4. SPECIFIC LIABILITY REGIME FOR START-UPS (ARTICLE 17.6)

Background

Article 17(6) provides for a specific liability regime for 'new' companies, with lighter conditions. This is in practice a two-tier regime applicable to services, which have been active in the EU for less than 3 years and have an annual turnover of less than 10 million euros with different rules applying to them depending on the audience they attract. In practice:

(i) If those 'new' services have less than 5 million unique visitors they are required to make their best efforts to obtain an authorisation (Art. 17 (4) (a)) and they have to comply with the 'notice and take down' obligation under Art. 17(4) (c), first part.

(ii) If those 'new' services have more than 5 million unique visitors they are subject to the same obligations of best efforts to obtain an authorisation and 'notice and take down' as services with a smaller audience but in addition, they also need to comply with the obligation to avoid future uploads of notified works under Article 17 (4) (c) second part ('stay down' obligation).

For both categories of services, the condition of best efforts to ensure the unavailability of unauthorised content, provided for in Article 17 (4)(b), is not applicable.

Possible elements for the guidance:

The guidance should provide indications to the Member States for the implementation of the specific liability regime set out in Article 17(6). It could focus on certain elements of the liability regime, which may raise practical questions, such as how to calculate the annual turnover of the services and the number of monthly unique visitors. It would remind for example that the annual turnover needs to be calculated in accordance with the Commission Recommendation 2003/361/EC for SMEs. It would also explain that the number of monthly unique visitors refers to visitors across the Union, as explained in recital 66, and not per Member State.

The guidance should also clarify that the principle of proportionality provided for in Article 17(5) and the safeguards for legitimate uses under Article 17(7) apply to the liability regime for 'new' services. In this context, the guidance could provide some examples of what best efforts could be expected from the 'new' services covered by Article 17(6) for obtaining authorisations and where applicable, for preventing future uploads of notified works, in the light of the principle of proportionality.

Question 12: What specific elements of the specific liability regime for “new” services, provided for in Article 17(6), should in your opinion be addressed in the guidance and how?

2600 character(s) maximum

EDRi considers that the specific liability regime for new services will be of very limited practical relevance, because very few service providers will fulfil all three cumulative criteria. In order to safeguard diversity of platforms and a wide array of choices for users, small service providers must not be burdened with costly obligations even after the first three years of their existence. Many special-interest platforms never grow beyond the size thresholds established in Art. 17(6) and should be excluded from the obligations established in Article 17 regardless of their age.

In the context of the special liability regime for new services, the Commission should therefore reiterate that the specific liability regime for new services should in no way be interpreted as establishing heightened obligations for any service providers that fail to meet the three cumulative criteria for the application of the special regime. In particular, due to their size, small service providers that are older than three years could be entirely excluded from the scope of application of Art. 17 because they do not play an important role on the content market by competing with other online services for the same audiences (see Q1), or their obligations could be limited to make best efforts to remove content upon notification (notice-and-takedown), because other solutions would be deemed disproportionate on a case-by-case basis, as recalled in recital 66.

IV. SAFEGUARDS FOR LEGITIMATE USES OF CONTENT (Art. 17(7)) and REDRESS MECHANISM FOR USERS (Art. 17(9))

Background

Article 17(7) and 17(9) lay down rules aiming to ensure that any action undertaken together by service providers and rightholders does not lead to the unavailability of content which does not infringe copyright. This is of particular importance (but not only) for the application of Article 17(4) letter (b) and second half of letter (c), whereby online content-sharing service providers need to make their best efforts to ensure the unavailability of unauthorised content and to prevent future uploads of notified works. Article 17(7) also provides that the Member States must ensure that users in each Member State are able to rely on the existing exceptions or limitations for quotation, criticism, review and use for the purpose of caricature, parody or pastiche when they upload and make available their content on online content-sharing service providers' websites. Under Article 5 of Directive 2001/29/EC these exceptions were optional and therefore not all Member States have implemented them. Article 17 (7) makes these exceptions mandatory for all Member States for the uses of copyright protected content covered by this provision.

Article 17(9) requires online content-sharing service providers to put in place a redress mechanism allowing users to challenge the blocking or removal of their content. Disputes can occur when content-sharing service providers disable or remove access to user uploaded content, whereas users consider their uploads legitimate, for example uses of third party content under an exception or limitation to copyright.

Article 17(9) further requires that the Directive shall in no way affect legitimate uses, and shall not lead to any identification of individual users nor to the processing of personal data, except in accordance with Directive 2002/58/EC and Regulation (EU) 2016/679. It also requires online content-sharing service providers to inform their users in their terms and conditions that they can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law.

Possible elements for the guidance:

The guidance should explain what Member States have to do to implement Article 17(7) and the relationship between that provision and Article 17(4). Article 17(7) is addressed to safeguarding any content uploaded by users that does not infringe copyright or related rights including by virtue of the application of any exception or limitation. Such non-infringing use is often referred to as 'legitimate use'. In addition, Article 17(7) second paragraph introduces certain mandatory exceptions for users that upload content online.

Member States should be recommended to explicitly transpose in their law the text of Article 17(7) first paragraph whereby the cooperation between online content-sharing service providers and rightholders, in particular under Article 17(4), must not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation.

Member States are required to transpose in their national laws the mandatory exceptions in Article 17(7) second paragraph covering the case of content uploaded by users on online content-sharing services for:

(a) quotation, criticism, review

(b) use for the purpose of caricature, parody or pastiche

Whilst the exceptions or limitations in Directive 2001/29/EC are optional in nature and addressed to any user, Article 17(7) applies to all users in all Member States who must be able to rely on these exceptions or limitations when they upload content on online content-sharing service providers' websites. Recital 70 explains that allowing users to upload and make available content generated by them for the purposes of the exceptions or limitations in Article 17(7) is particularly important for 'striking a balance between the fundamental rights laid down in the Charter of Fundamental Rights of the European Union ('the Charter'), in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property'.

(i) Legitimate uses under Article 17(7)

Examples of legitimate uses may include (1) uses under exceptions and limitations, (2) uses by those who hold or have cleared the rights in the content they upload or covered by the authorisation under Article 17 (2); (3) uses of content not covered by copyright or related rights, notably works in the public domain or for example content where the threshold of originality is not met.

The guidance could recall that uses under exceptions and limitations cover the upload and making available of content under the mandatory exceptions in Article 17(7) but also under other – optional - exceptions that Member States may have implemented under Article 5 of Directive 2001/29/EC. Some of those are particularly relevant for uses on online content-sharing services and Member States, which have not done so, could be recommended to implement them for uses covered by Article 17 (for ex. incidental use)[1].

Member States that may have already implemented the exceptions made mandatory by Article 17(7) under

Directive 2001/29/EC should review their legislation to make sure it complies with Article 17(7) and if needed, adapt it accordingly. Member States whose laws do not provide for these exceptions will have to transpose them as a minimum for the uses covered by Article 17.

The guidance should give indications to the Member States on the interpretation of the mandatory exceptions, in line with the case law of the Court of Justice of the European Union.

(ii) Practical application of Article 17(4) in compliance with Article 17(7)

The guidance should also give indications to the Member States as to how they can direct online content-sharing service providers and rightholders to apply in practice Article 17(4) in compliance with Article 17(7). The objective should be to ensure that legitimate content is not blocked when technologies are applied by online content-sharing service providers under Article 17(4) letter (b) and the second part of letter (c).

The guidance should explain that the balancing sought by the Directive requires, besides the effective complaint and redress mechanism discussed in the subsequent section, that the cooperation between service providers and rightholders does not result in blocking legitimate uses. Therefore, the guidance would take as a premise that it is not enough for the transposition and application of Article 17 (7) to only restore legitimate content ex post, once it has been blocked. When service providers apply automated content recognition technologies under Article 17(4), on the basis of the relevant and necessary information provided by the rightholders, legitimate uses should also be considered at the upload of content.

It should be born in mind that in the current state of the art, content recognition technology cannot assess whether the uploaded content is infringing or covered by a legitimate use. However, technology may assist service providers to distinguish uploads likely to be infringing for the purposes of Article 17(4) from uploads likely to be legitimate, based on the application of technical parameters as explained below. In order to ensure compliance with Article 17(7) in practice, automated blocking of content identified by the rightholders should be limited to likely infringing uploads, whereas content, which is likely to be legitimate, should not be subjected to automated blocking and should be available.

This distinction between likely infringing and likely legitimate uploads would not introduce any new legal concepts, nor would it imply a final legal assessment as to whether an upload is legitimate or not, but it would be a reasonable and practical way for service providers to apply Article 17(4) in line with Article 17(7) when they use content recognition technology. This mechanism should also not prevent the possible use of technology for reporting and remunerating the use of authorised content under contractual terms agreed by rightholders and service providers.

Under this approach, when uploads match with the relevant and necessary information provided to them by the rightholders, service providers should assess their legitimacy in compliance with Article 17(7) and proceed, where applicable, to block likely infringing uploads. In such a case users should still be able to contest the blocking under the redress mechanism provided for in Article 17(9), which requires human review for the contested content before a decision is taken whether it should stay down or be restored.

In cases when it is not possible for online content-sharing service providers to determine on a reasonable basis whether an upload is likely to be infringing and the service providers use content recognition technology, the service providers should notify the user that (part of) the upload matches with the information (e.g. fingerprint) provided by the rightholders. If the user contests the infringing nature of its upload, service providers should submit the upload to human review for a rapid decision as to whether the

content should be blocked or be available. Such content should remain online during the human review. If rightholders disagree with the decision of service providers to keep the content up, they would be able to submit a notice in compliance with Article 17(4) letter (c) to ask for the removal of the content that they consider infringing. If, on the other hand, upon being notified by the service provider, the user does not contest the infringing nature of the upload, the content could be blocked without further review, without prejudice to users' ability to rely on other available redress, including judicial review.

The human review process should be swift and allow both rightholders and users to provide their views. If, as a result of the human review, the service provider decides to disable or remove the uploaded content, it should inform the user of the outcome of the review; and the user should be able to have recourse to the out-of-court dispute resolution mechanism, provided for in Article 17(9).

The distinction between likely infringing and likely legitimate uploads could be carried out by service providers in cooperation with rightholders based on a number of technical characteristics of the upload, as appropriate. Relevant technical parameters could be, among others, the level of match with the reference file provided by rightholders for the purposes of Article 17(4), the length/size of third party content used in the upload and whether it is surrounded by user's own content. For example, in application of such technical parameters, the upload of a video of 30 minutes, where 29 minutes are an exact match to a reference file provided by a rightholder, could likely be considered an infringing one, unless it is in the public domain or the use has been authorised. On the other hand, a user generated video composed by very short extracts, such as one or two minutes of different scenes from third party films, accompanied by additional content such as comments added by the user for the purpose of reviewing these scenes could be more likely to be legitimate because potentially covered by an exception such as the quotation exception. Similarly still images uploaded by users which match only partially the fingerprints of a professional picture could be legitimate uploads under the parody exception, as they could be 'memes', i.e. new images created by users by adding elements to an original picture to create a humoristic or parodic effect.

The application of technical parameters should not be arbitrary and should be without prejudice to any legal decision on the nature of the content uploaded, i.e. whether it is an infringement of copyright or a related right or not.

Member States should remain free to introduce specific measures to discourage the abuse of this mechanism by users or rightholders.

Finally, in order to minimise the risk that authorised content uploaded with the authorisation of rightholders is blocked, Member States may consider recommending service providers to use the practice of 'whitelisting', which allows rightholders to indicate to the service providers users and uses that they have authorised. For example, in case of co-productions or partnerships, broadcasters can indicate to service providers which other broadcasters or partners are authorised to upload their content. Such uses would not require the application by service providers of content recognition technologies for blocking purposes.

(iii) Complaint and redress mechanism under Article 17(9)

Article 17(9) requires Member States to provide for a complaint and redress mechanism that online content-sharing service providers have to make available to users in the event of dispute over the blocking or removal of their content; it also requires Member States to ensure that out-of-court redress mechanisms are available for the settlement of these disputes. When approaching Article 17(9) Member States should

bear in mind that the obligation on service providers to put in place a complaint and redress mechanism should be implemented in line with the Union law rules on freedom to provide services, including the 'country of origin' principle provided for in Article 3 of Directive 2000/31/EC on e-commerce, when applicable.

The guidance should give indications to the Member States on how they could instruct service providers to apply the complaint and redress mechanism in practice. It could suggest that when content is blocked as a result of the application of the mechanism described above for the practical application of Article 17(4) in compliance with Article 17(7), the contested content, which is likely infringing should stay down pending the human review required under the redress mechanism. This would correspond to the approach that only uploads likely to be infringing could be automatically blocked under Article 17(4) in compliance with Article 17(7) and Article 17(9). Content that service providers remove ex post under the notice and take down procedure under Article 17(4) letter (c) should only stay down pending the redress, provided that the notice submitted by rightholders is a 'sufficiently substantiated' notice.

In line with the requirement of Article 17(9) that the complaints by users be processed without undue delay, the guidance should suggest that as a rule service providers and rightholders must react to complaints from users within a reasonably short timeframe to ensure that the mechanism is expeditious. If rightholders do not react in a reasonable timeframe, content which has been blocked or taken down should become available or be restored. The guidance should also recall rightholders' obligation to duly justify their requests to have content uploaded by users blocked or removed and encourage rightholders to provide this justification in clear and simple terms to make it understandable to an average internet user.

If the final decision by service providers is to keep the content unavailable, users must be able to contest this decision through the impartial out-of-court dispute settlement mechanism, which Member States have to make available. The guidance should indicate that the out-of-court dispute settlement mechanism can be an existing one but with relevant expertise to handle copyright disputes. It should also be easy to use and with no cost for users.

The guidance should also indicate to the Member States that they need to implement in their law the obligation on online content-sharing service providers to inform their users in their terms and conditions that users can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law.

The guidance could also recommend how service providers can increase users' awareness of what may constitute legitimate uses, as required by Article 17(9). For example, Member States could encourage the service providers to put in place standard forms for users to contest the blocking or removal of their content. This could also be accompanied by information aiming to foster users' awareness of copyright concepts and to encourage a responsible behaviour when uploading content online.

Finally, the guidance should underline that any processing of personal data and identification of users that may be required in the context of the application of Article 17 needs to be done in compliance Directive 2002/51/EC on e-privacy and Regulation 2016/679 on general data protection. Member States should monitor the correct application of these rules.

[1] Article 5.3 (h) of Directive 2001/29/EC

Question 13: Do you have additional suggestions to implement Article 17(7) to ensure a fair balance between different fundamental rights notably between copyright and freedom of expression? Would you agree with the approach presented above or do you consider other solutions could be used?

2600 character(s) maximum

EDRi welcomes the clarification that Art. 17(7) must be explicitly implemented and that restoring legitimate content ex-post is insufficient to protect fundamental rights. The ex-ante protection of legitimate uses against blocking is crucial. The proposal takes up a number of civil society demands, notably that content should generally remain online during review. However, the proposal still leads to the filtering of all uploads and thus to the introduction of a general monitoring obligation, which is expressly prohibited by Article 17 (8) and the case law of the CJEU.

The differentiation of uploads according to the criteria of 'likely legitimate'/'likely infringing' may lead to a reduction in false blocking of legal content, but it is not suitable for striking an appropriate balance between the affected fundamental rights. Even if the application of criteria results in a large proportion of legal uses being recognised as such, there will still be mass blocking of legal content that does not fall within the technically defined thresholds.

The threshold of 'likely infringing' has no basis in the Union law or the case law of the CJEU and should be replaced by a more restrictive threshold, e.g. 'manifestly infringing', which should be defined by objective criteria. It is unacceptable that these criteria be agreed between rightsholders and service providers, without representation of users, whose fundamental rights are at stake.

EDRi welcomes the clarification that all legitimate uses must be protected from blocking, not just those under the exceptions listed in Art. 17(7). However, the guidance is missing measures to achieve this goal for public domain content, or in case of false rightholder information. The German implementation proposal includes relevant provisions (see Q15).

The guidance should therefore make it clear that the use of content recognition systems is not suitable for fulfilling the obligation under Article 17(7) and (8), as long it cannot be ensured that only infringing content is blocked.

EDRi is concerned about the Commission's distinction between uses under the newly made mandatory exceptions in Article 17(7) on OCSSPs and in other contexts. These exceptions safeguard fundamental rights, as recital 70 clarifies. They should be implemented by Member States in all contexts, not just for uses on OCSSPs. We welcome the Commission's suggestion that Member States should implement additional optional exceptions such as incidental inclusion.

Question 14: Do you have additional suggestions on how the guidance should address the implementation of the complaint and redress mechanism and of the out-of-court dispute settlement under Article 17(9)?

2600 character(s) maximum

EDRi welcomes the Commission's clarification that Member States must explicitly implement the obligation on service providers to allow users to benefit from all exceptions and limitations in their terms & conditions. This obligation is crucial, because all user rights safeguards would be moot if service providers could circumvent them by blocking uploads on the basis of their terms & conditions, rather than Art. 17. The Commission should define additional safeguards to ensure that a recourse to a service provider's internal rules, such as "community standards" cannot be used to undermine the rights of users established in Art. 17.

The system of redress mechanisms and judicial redress envisaged by the Commission presents two shortcomings:

- Firstly, the Commission's proposal gives right holders an additional redress mechanism. In the event that an upload is classified as 'likely infringing' by a content-recognition system and this is disputed, a human review by the platform takes place. However, the proposal for the guidance provides that if a right holder disagrees with the decision of the human review, they can 'submit a notice in compliance with Article 17(4) letter (c)'. This gives them an advantage over the users who, in the event of a negative outcome of the human review, are left with only external redress mechanisms. However, it remains unclear why the rightholder should be entitled to a renewed internal review after a first negative review by the platform.

- Secondly, the guidance states that the complaint and redress mechanism under Article 17(9) should be implemented in line with the country of origin principle provided for in Article 3 of Directive 2000/31/EC, when applicable. This implies that in principle the complaint and redress mechanisms would be subject to the law of the EU Member State in which the service provider is established. This statement is misleading and leads to considerable legal uncertainty. As far as a consumer is involved, the country of origin principle from Art. 3 of the ECD is not applicable, because Art. 3 (3) Directive 2000/31/EC and annex excludes contractual obligations concerning consumer contracts from the scope of application of Art. 3 ECD. When users register on a platform, they conclude a consumer contract through the agreement to the general terms and conditions. This concerns the vast majority of cases, as the majority of platform users can be considered consumers. The guidance should therefore clarify explicitly that consumers have the right to go to court in their country of residence.

Question 15: Are there other elements than those outlined above that should be addressed for the concrete implementation of Article 17(7) and (9)? If yes, please explain which ones and how the guidance should address them.

2600 character(s) maximum

The guidance should address specific measures against abuse of the proposed mechanism for the transposition of Art 17 (4) in light of Art 17 (7). The proposed mechanism is not in itself sufficient to achieve the requirements of Art 17 (7). In order to achieve an implementation which is as far as possible in accordance with fundamental rights, the mechanism must be supported by additional procedural safeguards for the fundamental rights of users. As described above, the proposed mechanism has a detrimental effect to the fundamental rights of users, as it inevitably leads to the automated blocking of legal content and thus to an interference with their freedom of expression. Abuse of this mechanism can significantly aggravate such interferences. This is particularly true when users are not involved in the crucial issue of determining the parameters for classification as 'probably infringing' or 'probably legitimate'. This structural imbalance should be mitigated by concrete precautions against abuse.

Users are dependent on effective legal mechanisms for the protection against unauthorized blocking and deletion, as well as for the restoration of unlawfully blocked content. The guidance should go beyond the abstract reference to the possibility of including mechanisms against abuse and should provide concrete proposals. These should include possible sanctions for the unlawful registration of third-party or public domain content, as this does normally not have consequences under the copyright laws of the Member States.

The guidance should also provide safeguards for the protection of public domain works and licensed uses. Under the Commission's proposal, if right holders assert rights to such content, it will be classified as 'likely infringing' and initially blocked. In these cases, a pre-flagging mechanism, as provided for in Article 8 of the German draft transposition of Article 17, can provide adequate protection. In the case of works in the public

domain or under an individual or a Creative Commons license, the uploader can ensure, by means of prior flagging (which does not require a complicated legal assessment) that legal content cannot be automatically deleted.

The guidance should also ensure that the consultation process between rightholders and service providers is transparent. This can also contribute to a fair balance between the fundamental rights concerned and prevent abuse to the disadvantage of users.

V. INFORMATION TO Rightholders (Art. 17(8))

Background

Under Article 17(8), online content-sharing service providers need to provide rightholders, at their request, with information on the functioning of the tools used for ensuring the unavailability of content. Where they conclude licensing agreements with rightholders, the service providers also need to provide them with information on the use of their content, without however having to provide rightholders with detailed and individualised information for each work or other subject matter identified (recital 68).

Possible elements for the guidance

The guidance should recall the different elements set out in Article 17(8) and explain in particular how Member States should direct the parties to apply this provision in practice. It should give indications as to the information that service providers should provide to rightholders, if requested, to comply with it. For example, information on content recognition tools deployed by service providers to avoid unauthorised content could include descriptions on the efficiency of these tools, the general parameters used for their deployment, as well as any changes made overtime to the operation of these tools. As regards information on the use of content covered by the agreements concluded between service providers and rightholders, the guidance should recall that service providers are not required to provide detailed and individualised information on each work, and encourage the development of standardised reporting through voluntary cooperation between stakeholders. Some more specific requirements on reporting exist already under Article 17 of Directive 2014/26/EU and govern the relationship between users and CMOs.

In line with the Commission Recommendation on illegal content online, in order to ensure a high level of transparency to users, the guidance could recommend that Member States encourage online content-sharing service providers to publicly report on the functioning of their practices with regard to Article 17(4).

Question 16: What are the most important elements that the guidance should cover in relation to the information that online content-sharing service providers should provide to rightholders on the functioning of their tools to ensure the unavailability of unauthorised content and on the use of rightholders' content under Article 17(8)? Please provide examples of particular information that you would consider as covered by this obligation.

2600 character(s) maximum

EDRi supports the Commission's suggestion that OCSSPs should share transparency reports on the functioning of their practices publicly, but has doubts whether a mere encouragement of service providers to do so would be sufficient. The guidance should be extended to include additional information and transparency obligations of service providers, not only with regard to rightholders, but also with regard to user organizations, researchers and the general public.

Service providers must also inform users about the functioning of their tools to ensure the unavailability of unauthorized content, including the grounds and circumstances of blocking or deletion in individual cases. Only with this information will users be able to make use of their judicial remedies, including the complaint and redress mechanisms. This requires a notification from the service provider about the possibility of contesting the decision together with information about the reasons and the legal basis for blocking or deleting the content without the need for a corresponding request from the users.

In addition, users' organizations should also have a right to information. This is necessary in order to identify systematic abuses, as otherwise the organizations could only become aware of repeated abuses when they are informed by individual users. This is in line with the legal concept of Art. 17 (10). This provision shows that the Directive is designed to ensure that a minimum of information is available to all stakeholders on the practices between service providers and right holders. In practice, however, service providers have not provided user organizations with the information pursuant to Art. 17 (10) in the context of the stakeholder dialogue. In order to ensure that this obligation does not become moot, the Commission should instruct Member States to implement an information obligation of OCSSPs towards user organizations in their national laws.

Additionally, the Commission should advise Member States to collect information about the cooperation between rightsholders and OCSSPs in the context of Art. 17 in a mandatory public database. The voluntary Lumen Database by Harvard University, which collects information on the notice-and-takedown system, could serve as a blueprint for such a database. As was shown in the Lumen Database presentation during the stakeholder dialogues, the database has been a crucial resource for researchers and journalists, inter alia uncovering the systematic use of abusive takedown notices to suppress legal expression.

Question 17: Are there any other elements beyond the ones listed above which should be covered by the guidance? If yes, please explain which ones and how you would suggest the guidance to address them.

2600 character(s) maximum

The guidance should explore possibilities for Member States to equip consumer or user organizations with possibilities to directly intervene against service providers or (alleged) rightsholders in court on behalf of users. Individuals will often lack the means to assert their rights of use of particular content in front of a court. Collective representation is an important element to address structural imbalances of power not just between service providers and rightsholders, but also between service providers and users, or rightsholders and users. Consumer or user organizations could also seek redress against structural failures of service providers or rightsholders to meet their obligations under Art. 17.

The Commission should promote the systematic registration and whitelisting of content that can be freely re-used in a public, open database, to protect such content from wrongful blocking. This database should in particular include public domain works, as well as content that has been published under a free license, such as Creative Commons.

VI. OTHER TOPICS

Question 18: Do you think the guidance should address any other topic related to Article 17? If yes, please indicate which topics you consider should be included in the guidance and how you consider the guidance should address them.

2600 character(s) maximum

Experience from Member States shows that service providers are often able to evade legal obligations in the context of content moderation through a combination of interface design and private rules (community standards, terms and conditions), thus undermining user rights and public scrutiny (see Wagner et. al., Regulating Transparency? Facebook, Twitter and the German Network Enforcement Act <https://perma.cc/Y738-EFNF>). OCSSPs may adopt the same approach in order to avoid having to meet their obligations towards users in the context of Art. 17, opting to block content on the basis of their private rules rather than the law. In order to ensure that user rights under Art. 17 cannot be circumvented, the Commission should provide guidance on how to close this potential loophole. In particular, the Commission should advise Member States to protect all copyright exceptions from contractual or technological override, in particular those that play an important role for protecting freedom of expression in the context of Art. 17. In addition, it should require OCSSPs to always inform users about the legal basis for blocking decisions, in order to empower users and their representatives to effectively challenge those decisions.

In addition, the guidance should address data protection concerns, that arise if the implementation laws lead to the use of automated tools for the detection and deletion of illegal content. According to Art. 22 para. 1 GDPR, persons may not, as a matter of general principle, be subjected to an automated decision if that decision has any legal effect on them or significantly affects them in a similar way. Insofar as automated filters process personal data, they fall within the scope of the GDPR and are likely to result in the legal or significant effects envisioned by Art. 22 GDPR, as the blocking and deletion of legal content affects the users freedom of expression and information. The guidance should therefore clarify that any national implementation must include safeguards for the protection of the users data protection rights.

FINAL REMARKS

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