

Article 17 and the New EU Rules on Content-Sharing Platforms

-- State of Play

BVA-ABA Lunch-causerie, 29 March 2021 (Webinar)

João Pedro Quintais,
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ReCreating Europe



**Copyright in the Digital Single Market Directive -
Implementation**

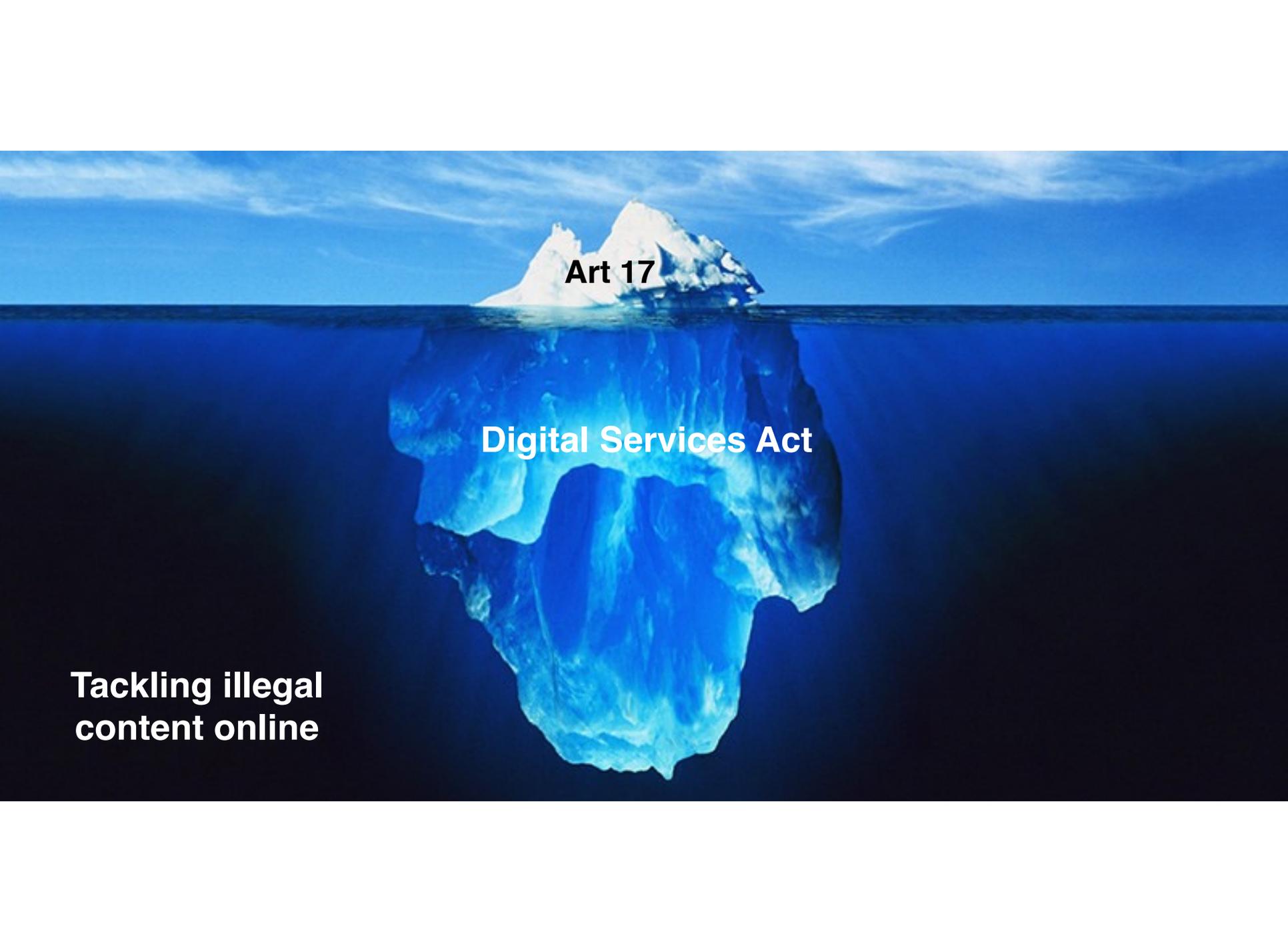
An EU Copyright Reform Resource

Outline

- Timeline of events
- Mechanics of Article 17
- --- Authorization
- --- Preventive Measures vs User Rights or Freedoms
- --- Interaction w/ DSA (preliminary thoughts)

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An iceberg floating in a blue ocean under a blue sky. The tip of the iceberg is above the water, and the much larger base is submerged. The text 'Art 17' is on the tip, and 'Digital Services Act' is on the submerged part. The overall image is a metaphor for the relationship between the two legal provisions.

Art 17

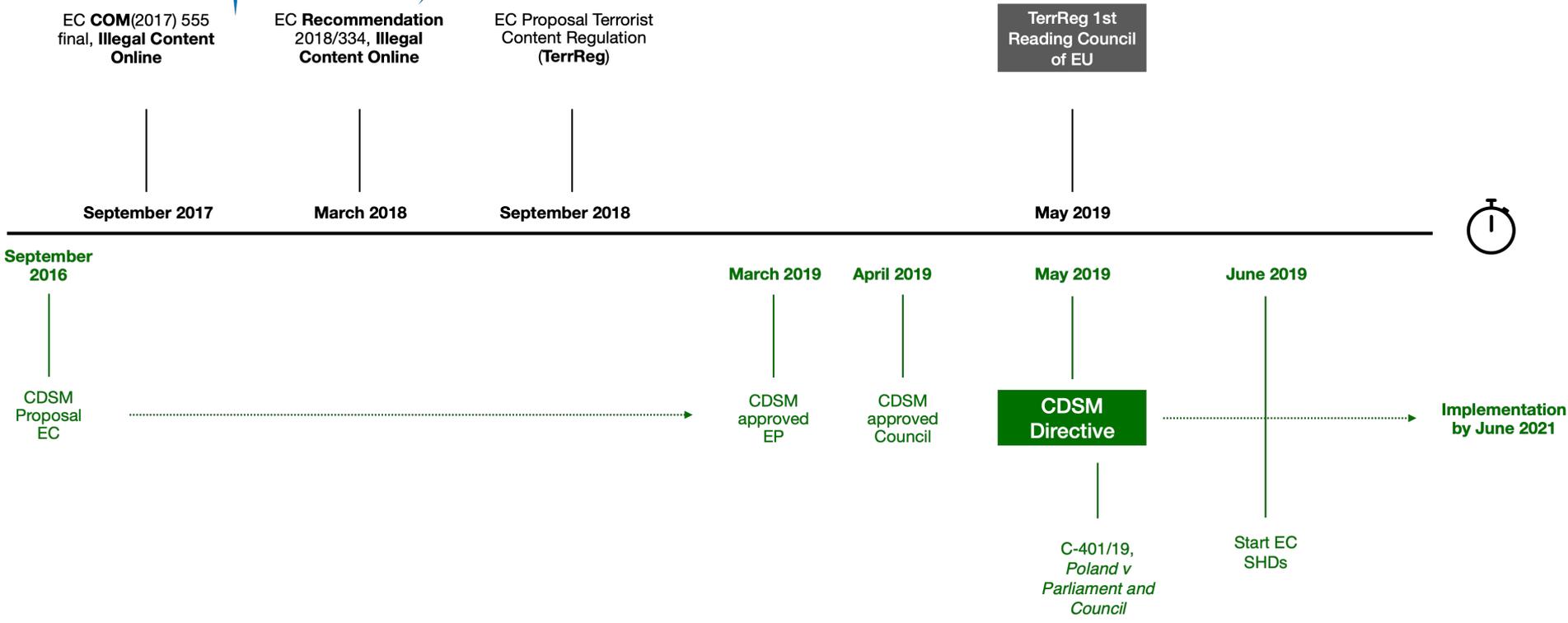
Digital Services Act

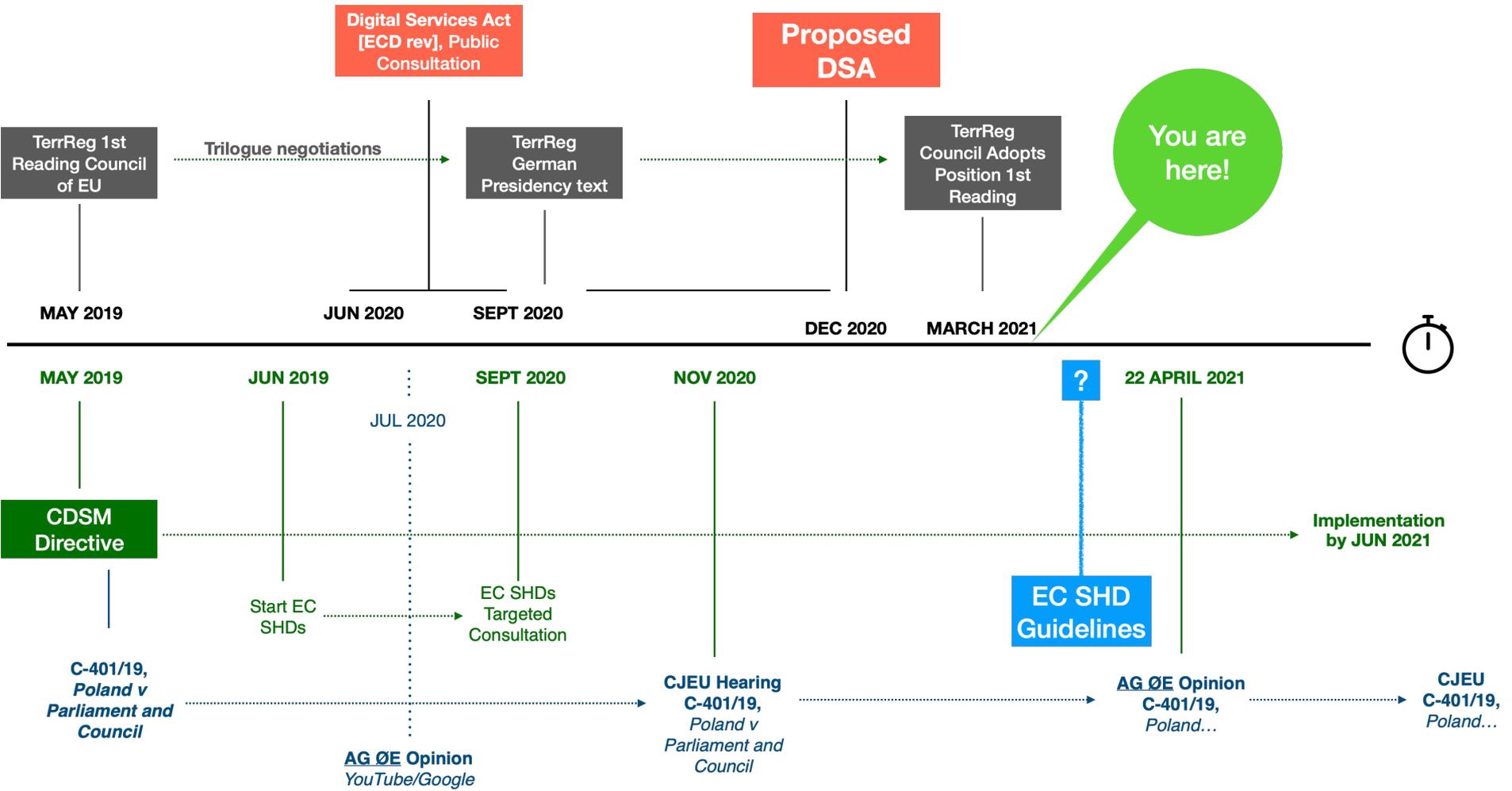
**Tackling illegal
content online**

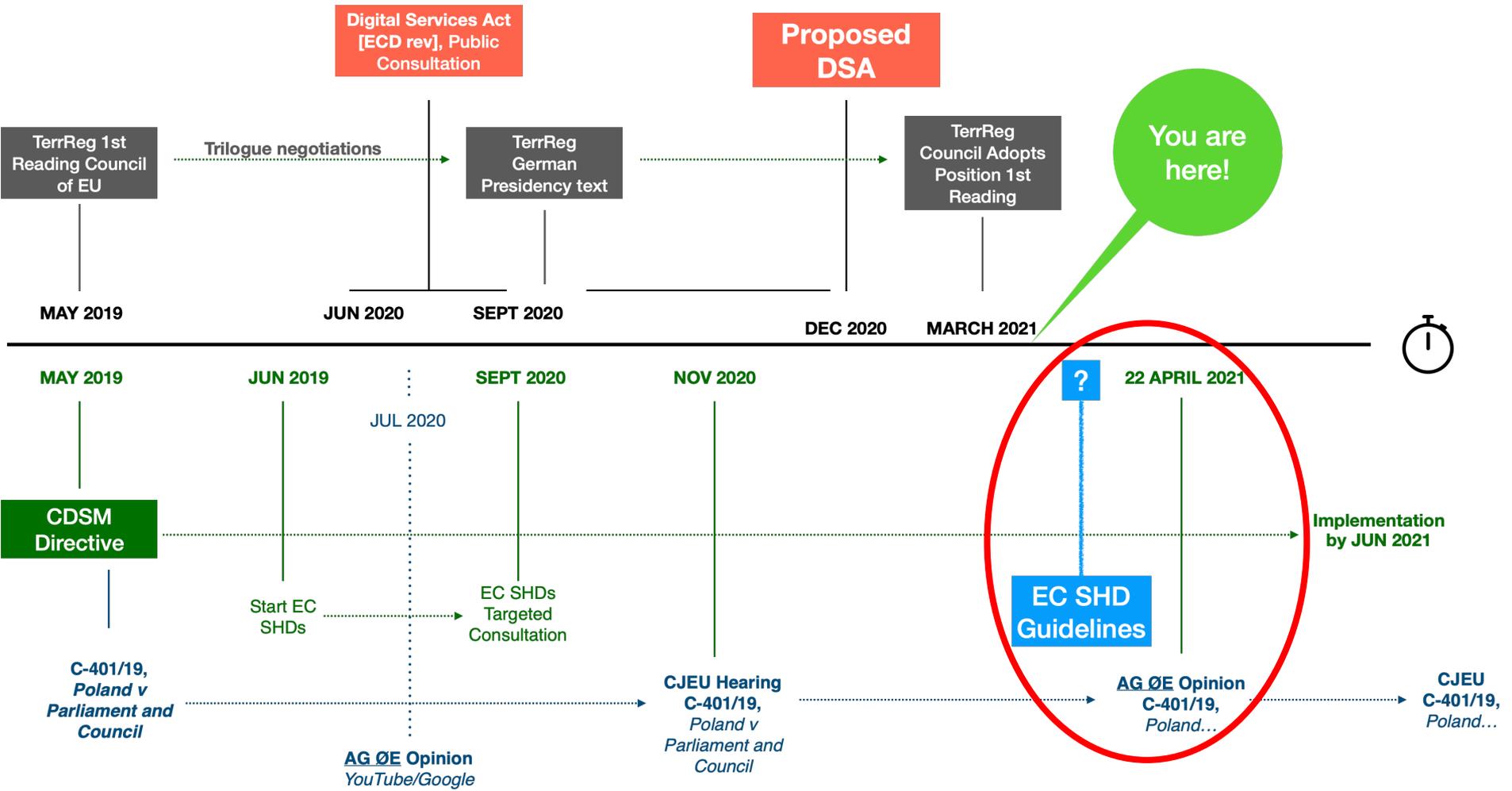
Illegal content: "any information which is not in compliance with Union law or the law of a Member State concerned"...

Focus: terrorist content, hate speech, child sexual abuse material, IPR infringements, consumer protection

Encourages "proactive measures" against illegal content, incl. via automated means (if appropriate, proportionate, and w/ safeguards), and trusted flaggers







Today (29 March)

source: Communia DSM Directive Implementation Tracker

Country Pages

Adopted:

-  [Netherlands](#) 🏆
- [France](#) (Article 15)
- [Hungary](#) (Article 5)

Delegation legislation adopted:

-  [France](#)

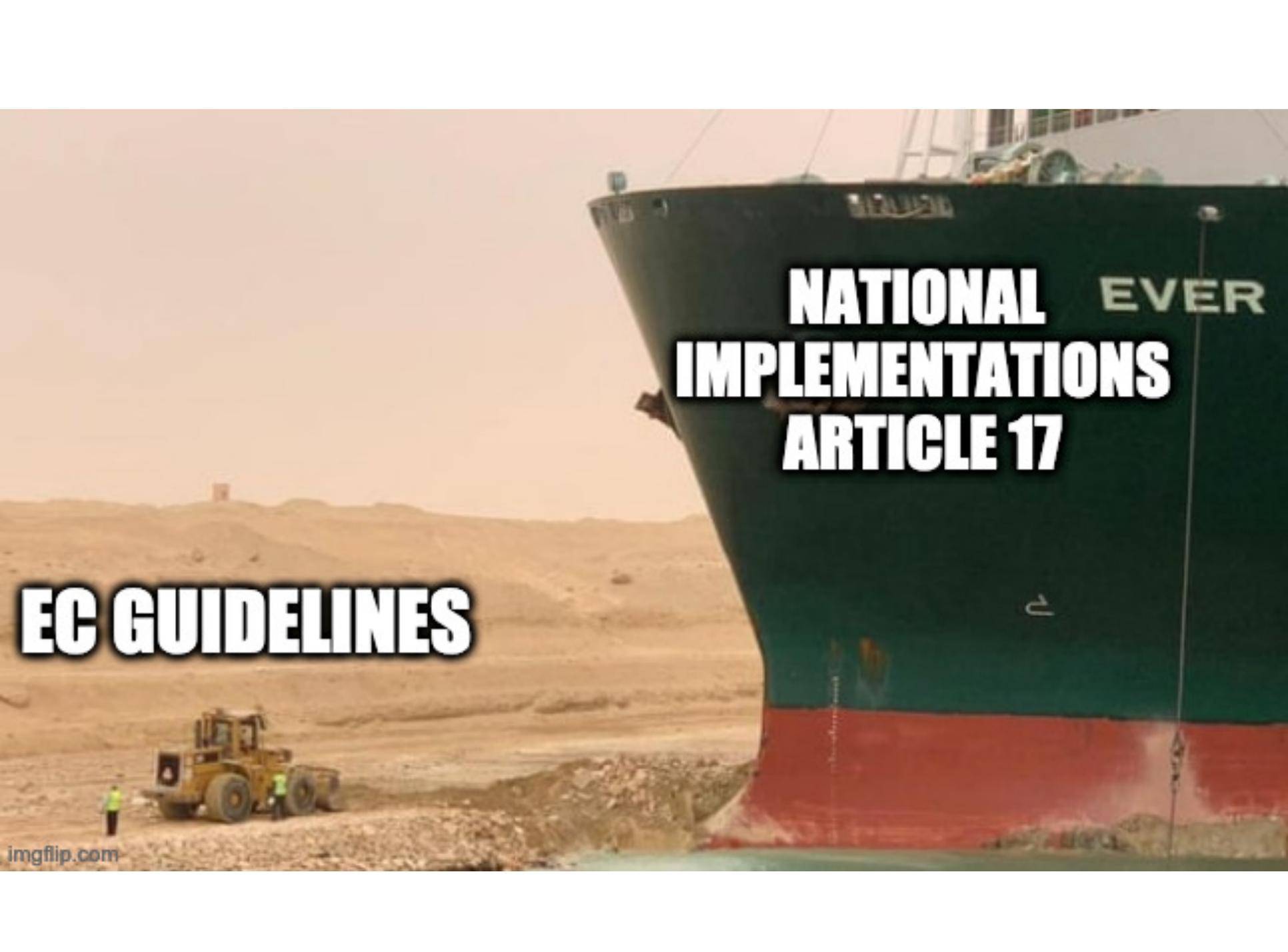
In Parliament:

Draft laws publicly available:

-  [Germany](#)
-  [Croatia](#)
-  [Cyprus](#)
-  [Czechia](#)
-  [Hungary](#)
-  [Austria](#)
-  [Denmark](#)
-  [Luxembourg](#)

Ongoing process:

-  [Belgium](#)
-  [Bulgaria](#)
-  [Greece](#)
-  [Estonia](#)
-  [Finland](#)
-  [Ireland](#)
-  [Italy](#)
-  [Latvia](#)
-  [Lithuania](#)
-  [Malta](#)
-  [Norway](#)
-  [Poland](#)
-  [Portugal](#)
-  [Romania](#)
-  [Slovakia](#)
-  [Slovenia](#)
-  [Spain](#)
-  [Sweden](#)



**NATIONAL
IMPLEMENTATIONS
ARTICLE 17**

EVER

EC GUIDELINES

Outline

- Timeline of events
- **Mechanics of Article 17**
- --- Authorization
- --- Preventive Measures vs User Rights or Freedoms
- --- Interaction w/ DSA (preliminary thoughts)

**THE 2019 DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE
MARKET: SOME PROGRESS, A FEW BAD CHOICES, AND AN
OVERALL FAILED AMBITION**

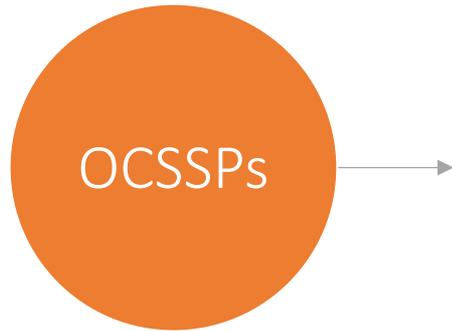
SÉVERINE DUSOLLIER*

Then comes Article 17 of the CDSM Directive, certainly its monster provision, both by its size and its hazardousness. During the whole process of adoption of the Directive, this was the focus of all attention, the provision everybody was talking about, even far beyond the EU copyright circles or aficionados.

Who does it apply to?



Who does it apply to?



Positive definition

- UGC platform
- Large amount of works
- Organise and promote
- Commercial / competitive effect



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Exclusions

- Electronic comms services
- B2B Cloud Services + cloud services
- Online market places
- Non-profit online encyclopedias
- Non-profit educational and scientific repositories
- OS Sw developing & sharing platforms



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outside CDSM Directive



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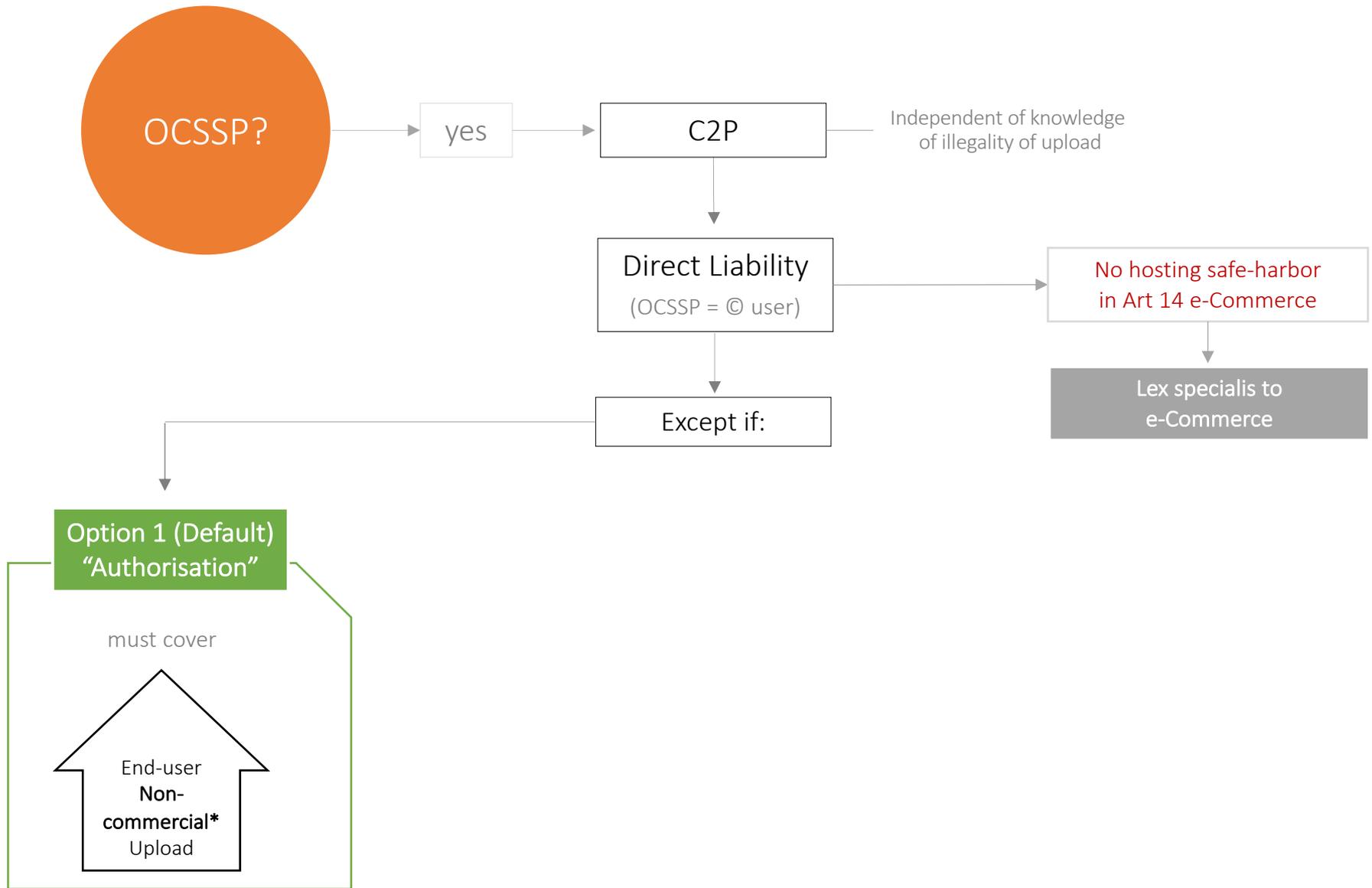
→ If not



outside CDSM Directive

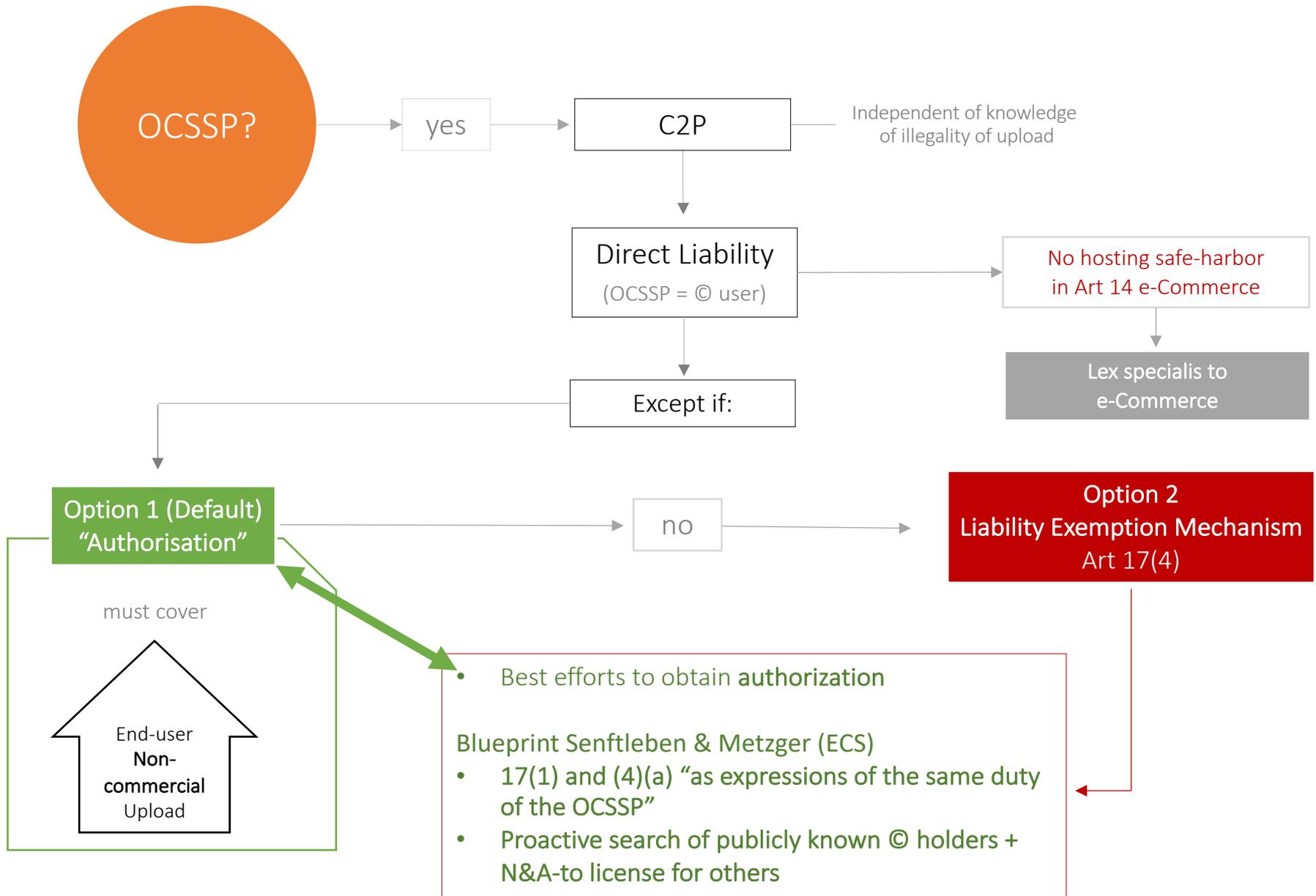


What and how?

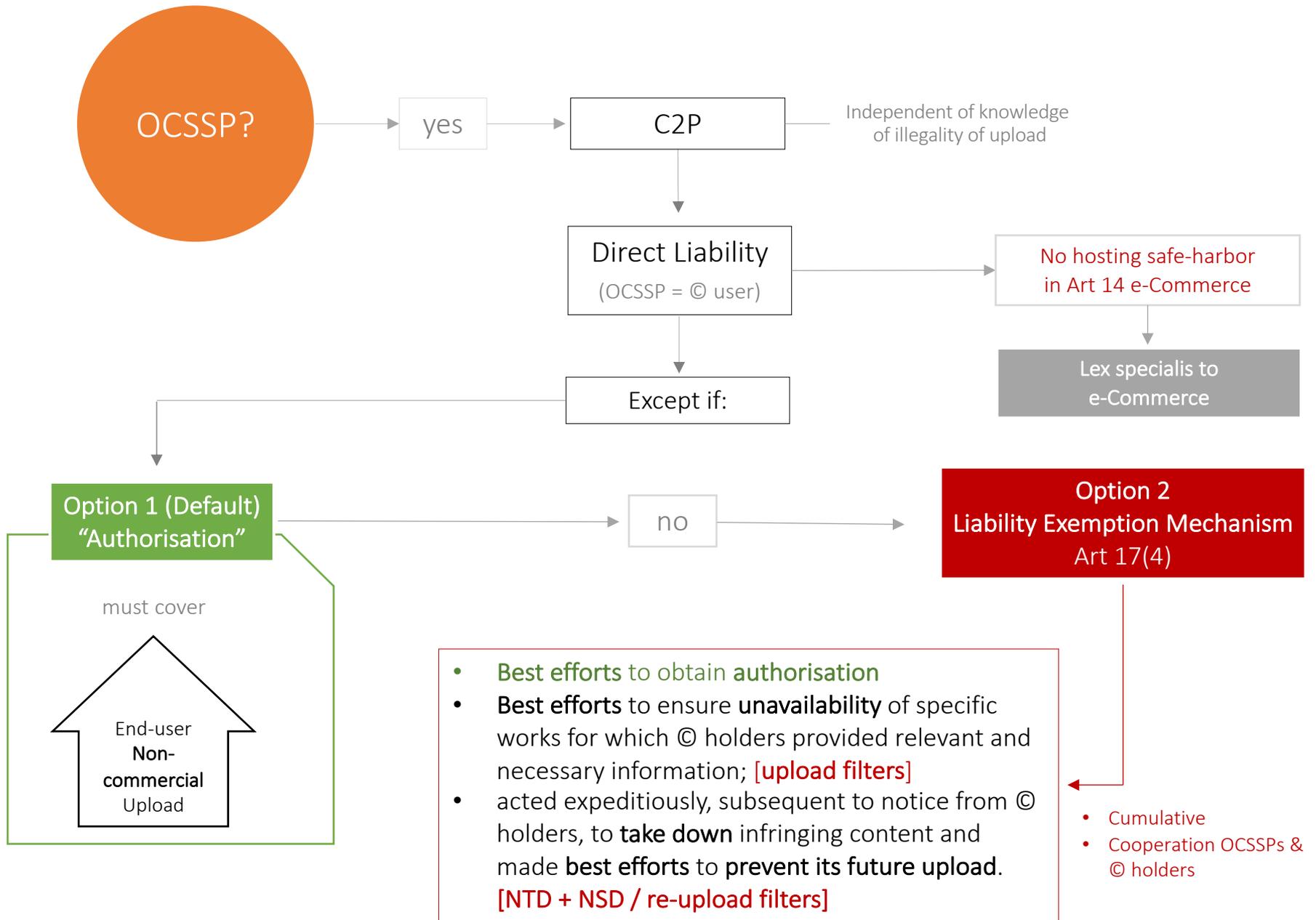


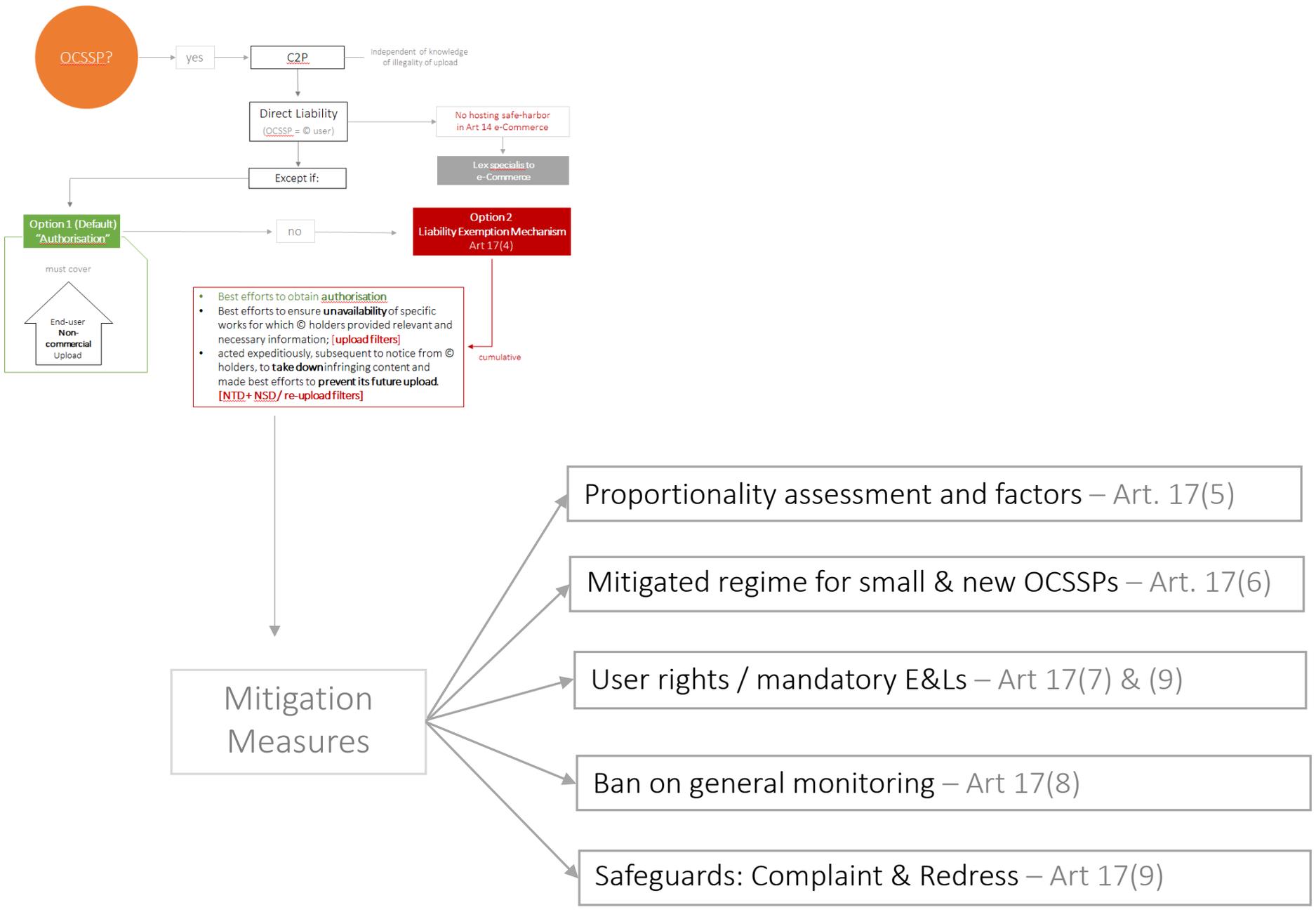
**or commercial but w/out generating "significant revenues" (priced into license)*

What and how?



What and how?





OCSSP?

yes

C2P

independent of knowledge of illegality of upload

Direct Liability

(OCSSP = © user)

No hosting safe-harbor in Art 14 e-Commerce

Lex specialis to e-Commerce

Except if:

Option 1 (Default) "Authorisation"

no

Option 2 Liability Exemption Mechanism Art 17(4)

must cover

End-user Non-commercial Upload

- Best efforts to obtain **authorisation**
- Best efforts to ensure **unavailability** of specific works for which © holders provided relevant and necessary information; [**upload filters**]
- acted expeditiously, subsequent to notice from © holders, to **take down** infringing content and made best efforts to **prevent its future upload**. [**NTD+ NSD/ re-upload filters**]

cumulative

Mitigation Measures

Proportionality assessment and factors – Art. 17(5)

Mitigated regime for small & new OCSSPs – Art. 17(6)

User rights / mandatory E&Ls – Art 17(7) & (9)

Ban on general monitoring – Art 17(8)

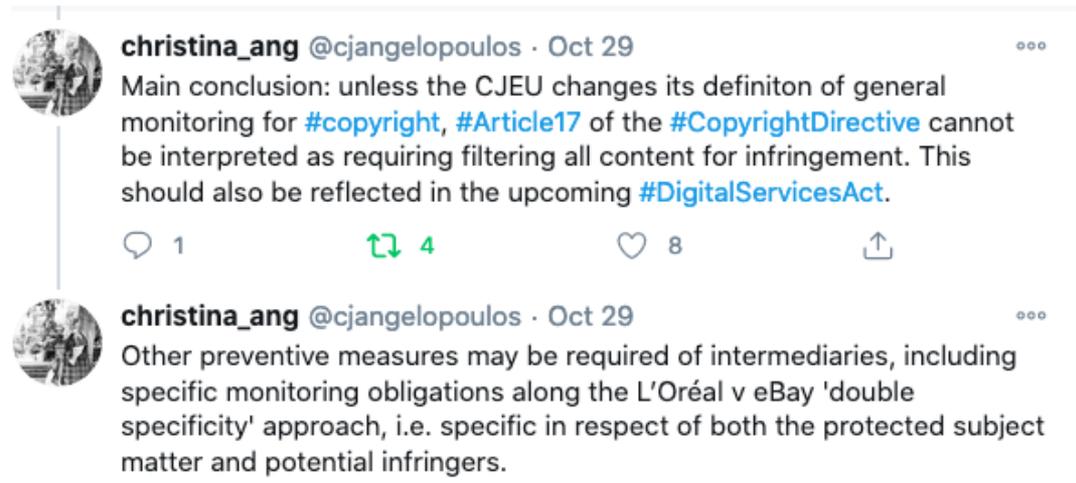
Safeguards: Complaint & Redress – Art 17(9)

**THE ODYSSEY OF THE PROHIBITION ON
GENERAL MONITORING OBLIGATIONS
ON THE WAY TO THE DIGITAL SERVICES ACT:
BETWEEN ARTICLE 15 OF THE E-COMMERCE DIRECTIVE
AND ARTICLE 17 OF THE DIRECTIVE ON COPYRIGHT
IN THE DIGITAL SINGLE MARKET**

Prof. Dr. Martin Senftleben
Institute for Information Law (IViR)
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Dr Christina Angelopoulos
Centre for Intellectual Property and Information Law (CIPIL)
University of Cambridge

Amsterdam/Cambridge, October 2020



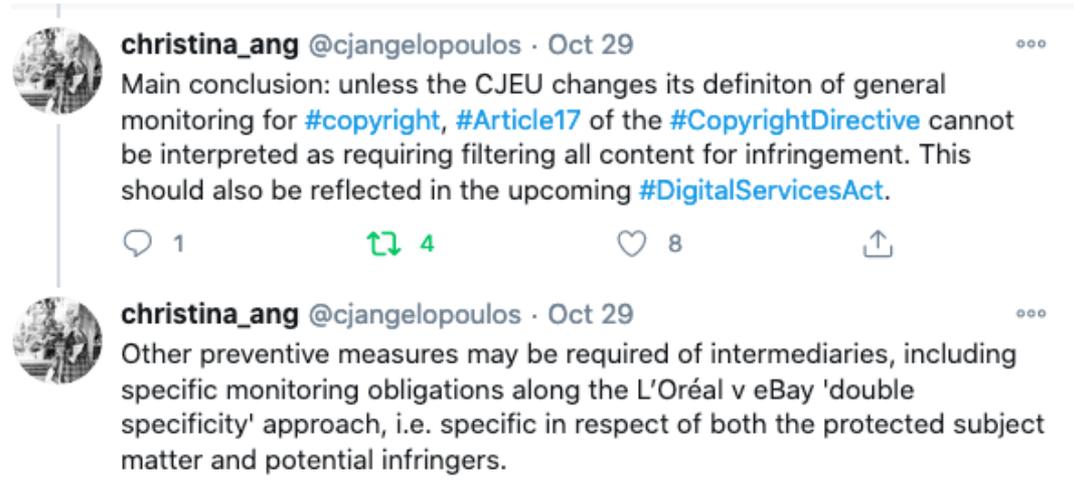
Ban on general monitoring – Art 17(8)

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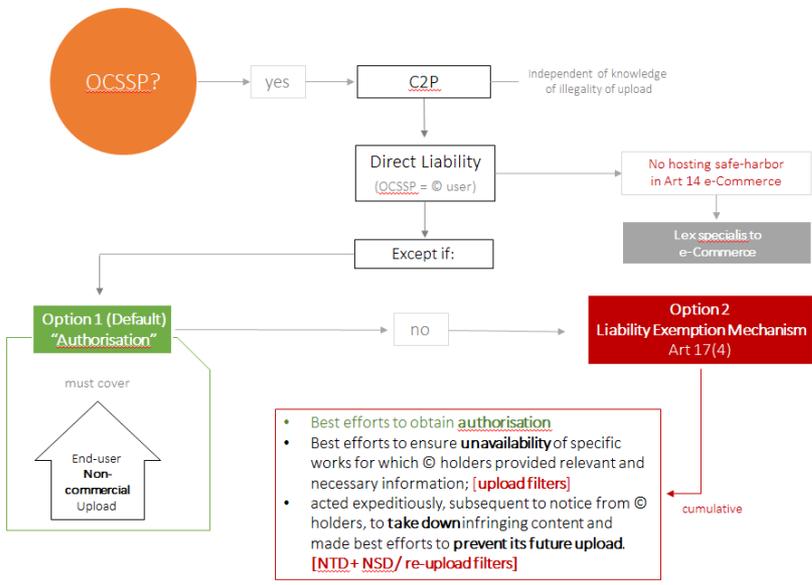
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Ban on general monitoring – Art 17(8)

See art 15 e-Commerce → art. 7 DSA



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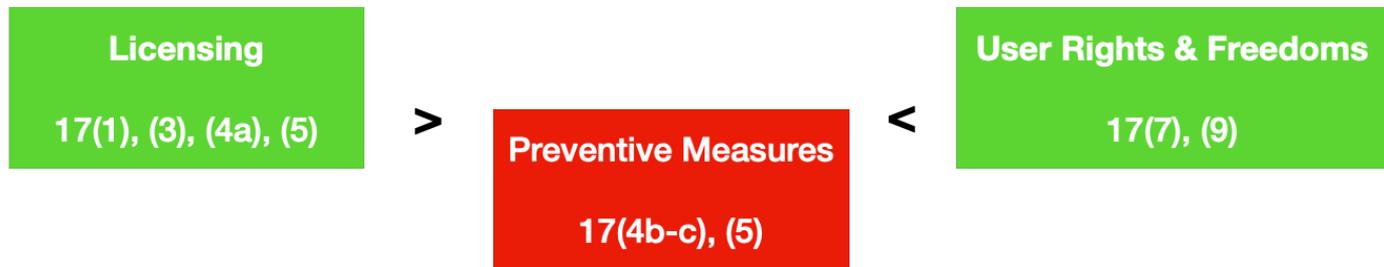
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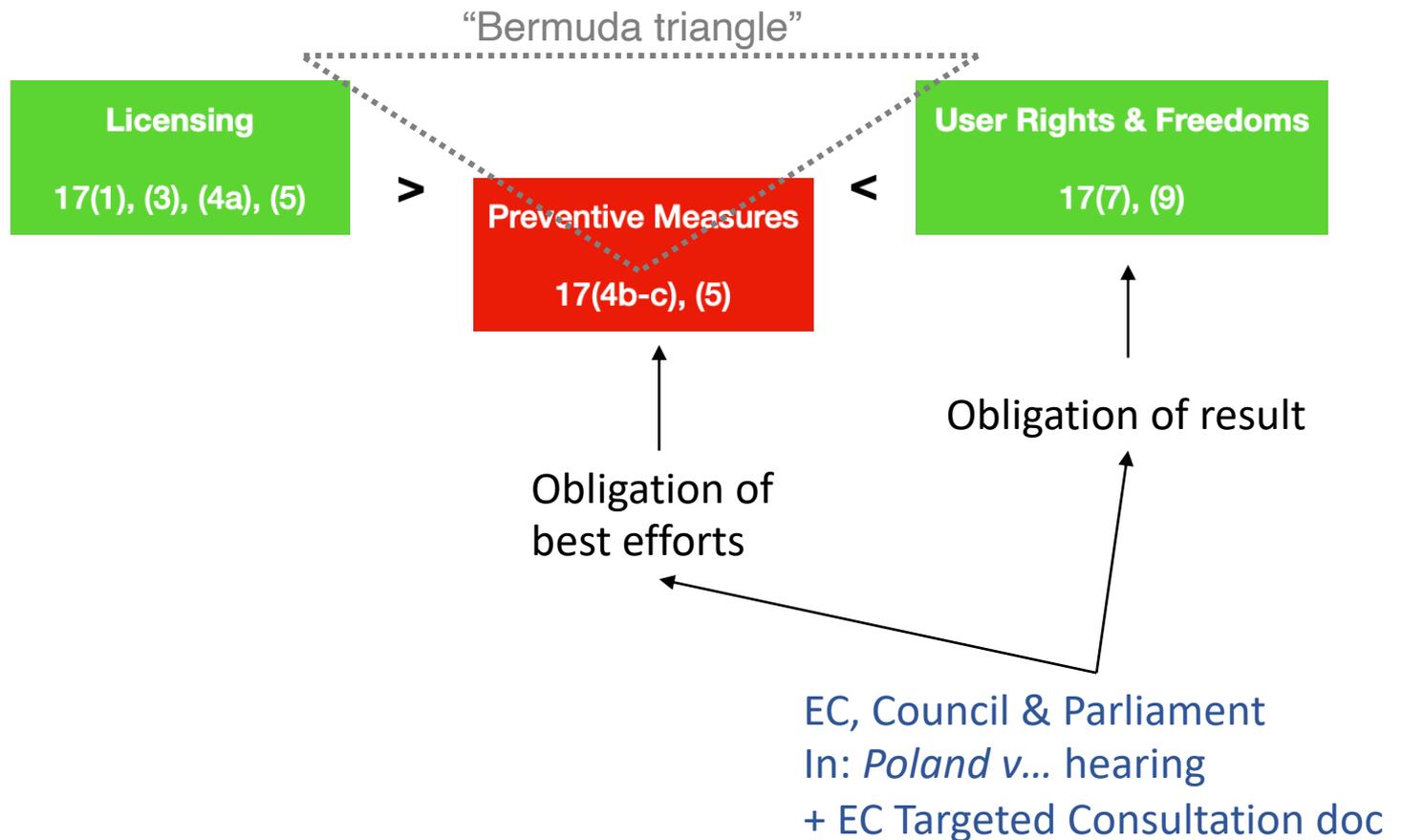
Article 17

Normative hierarchy



Article 17

Normative hierarchy



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What is the nature of the right in Article 17?

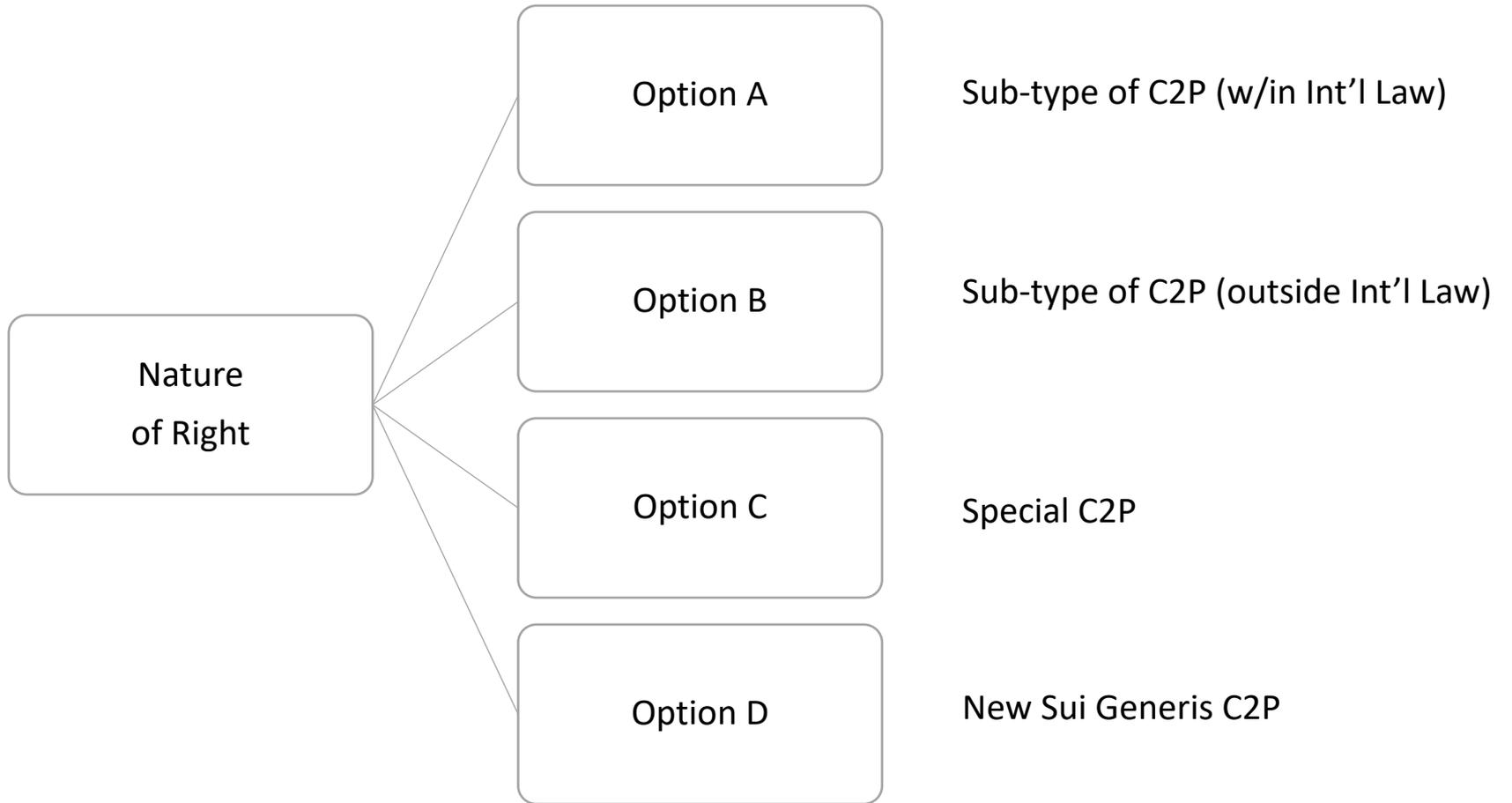
How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms under the Copyright in the Digital Single Market Directive

Martin Husovec, João Pedro Quintais ✉

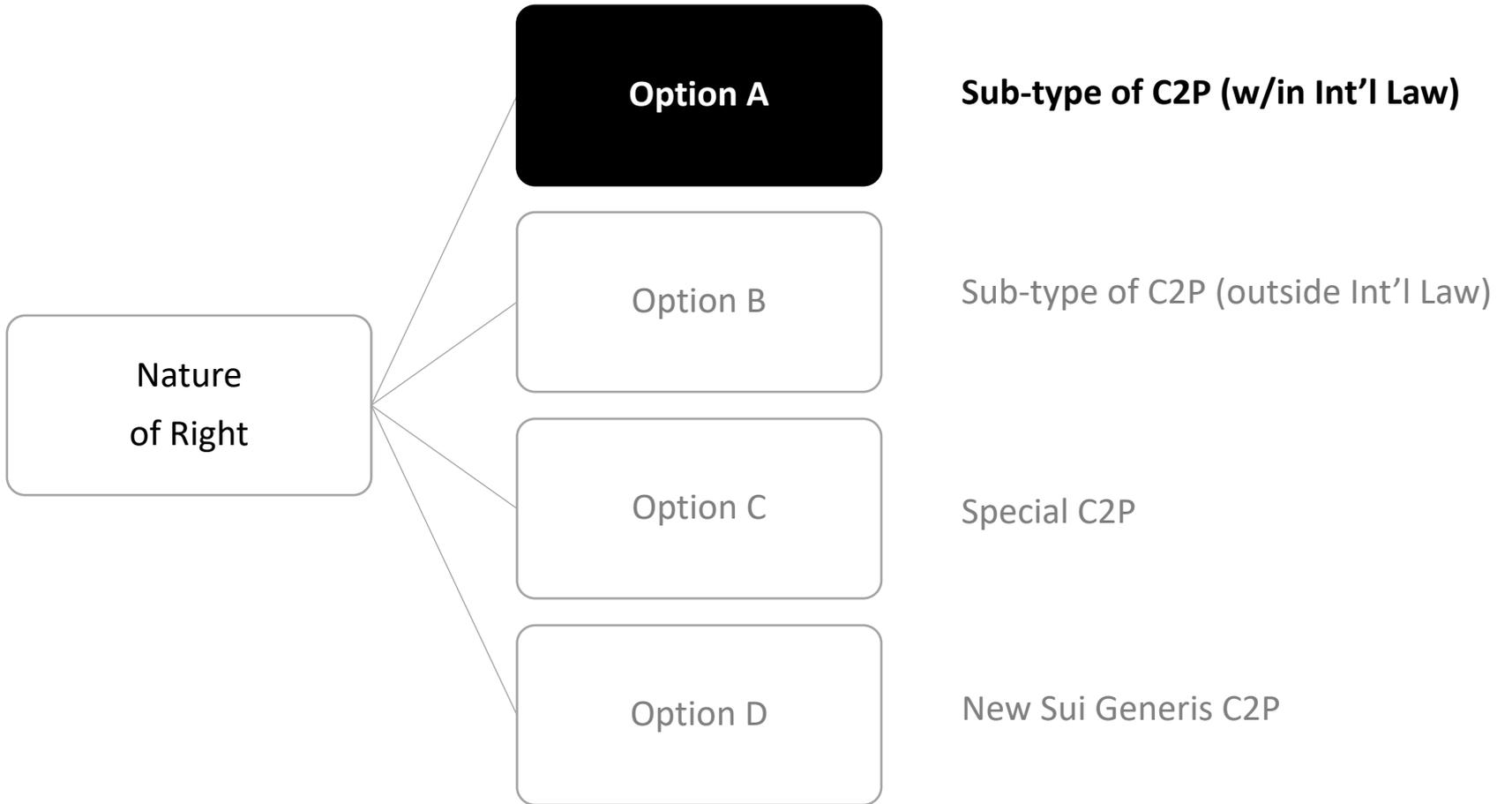
GRUR International, ikaa200, <https://doi.org/10.1093/grurint/ikaa200>

Published: 18 February 2021

Interpretation Options



Interpretation Options

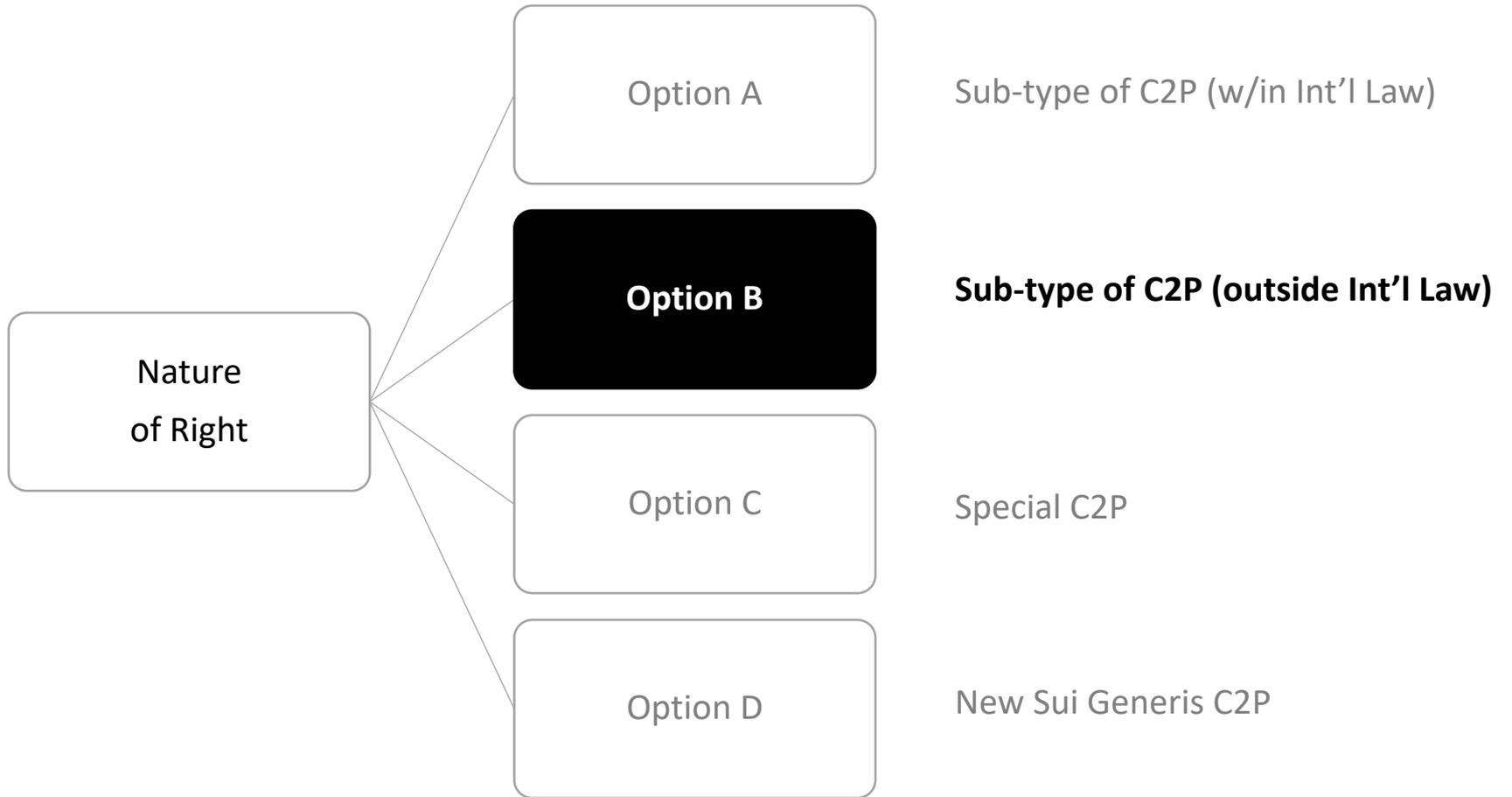


Option A

sub-type of C2P within International minimum standards

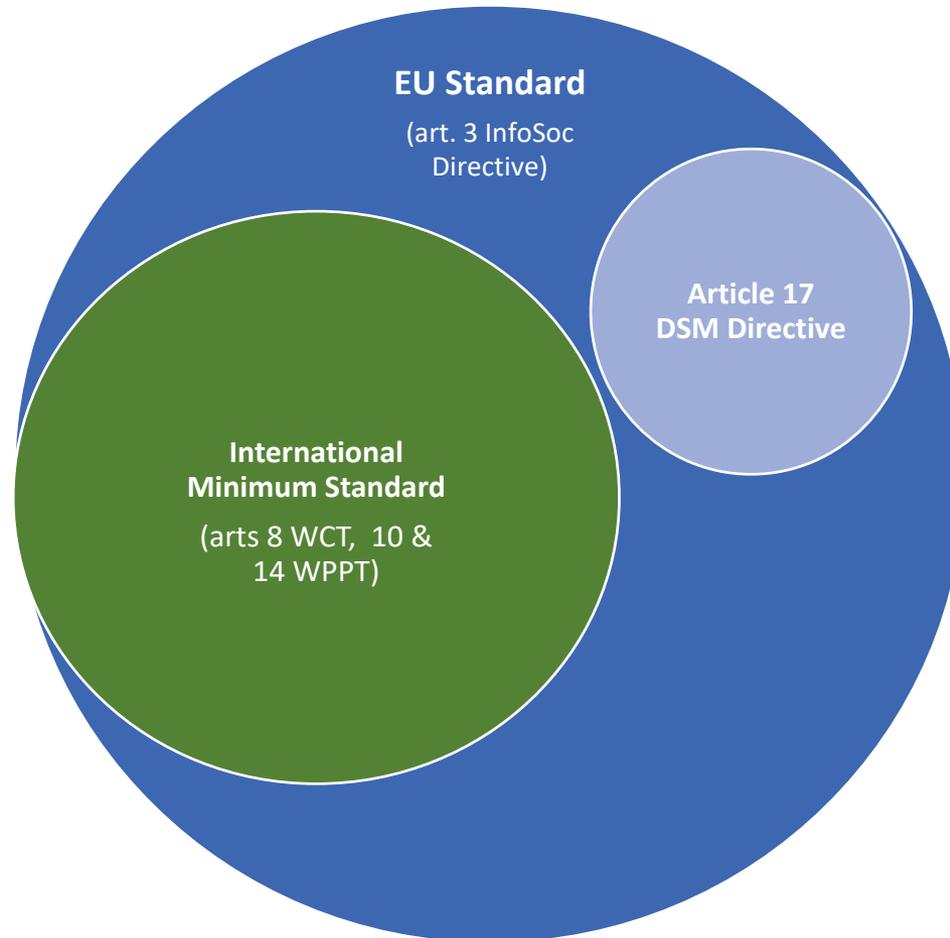


Interpretation Options

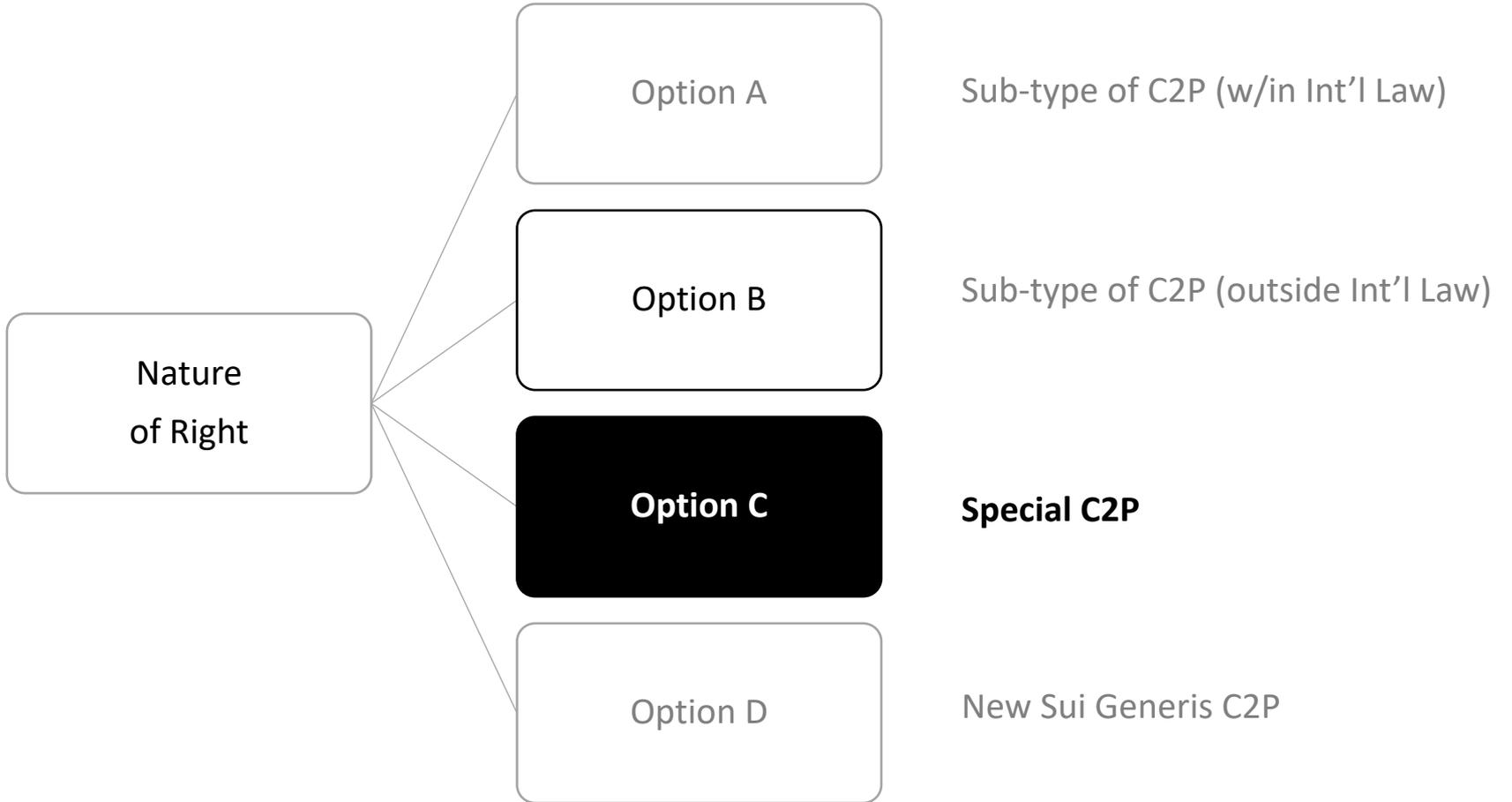


Option B

sub-type of C2P *within* the EU concept
but *outside* international minimum standards

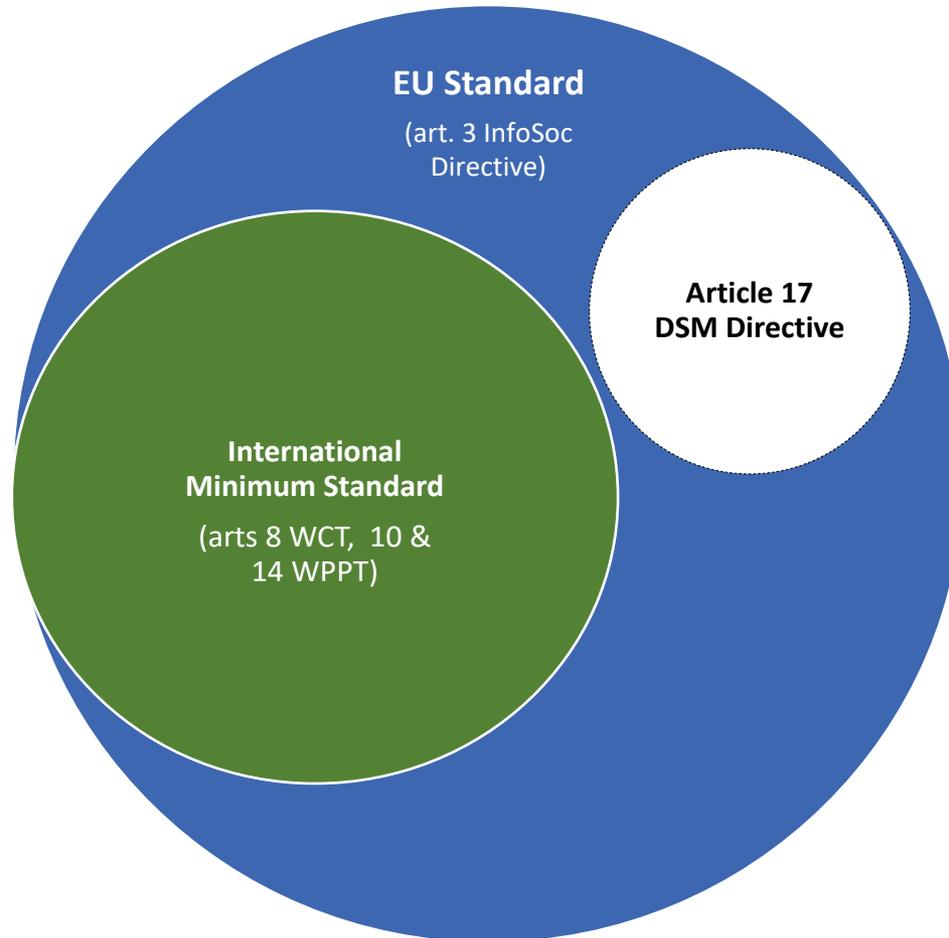


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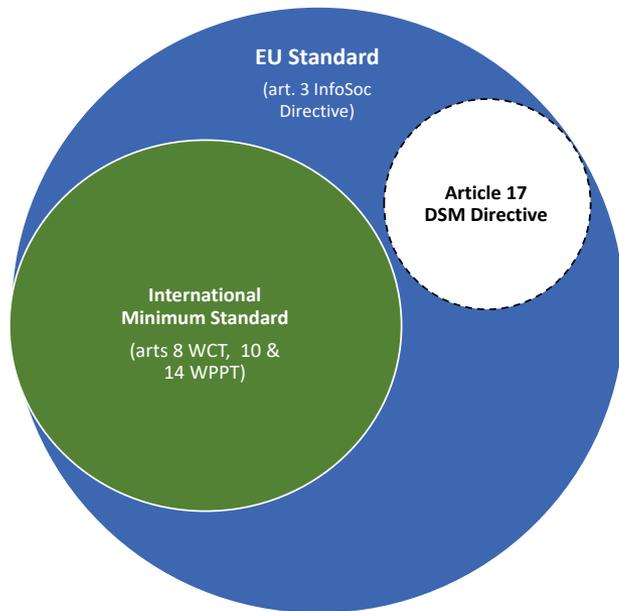
Option C

sub-type of C2P *within* the EU concept but *qualified as lex specialis*



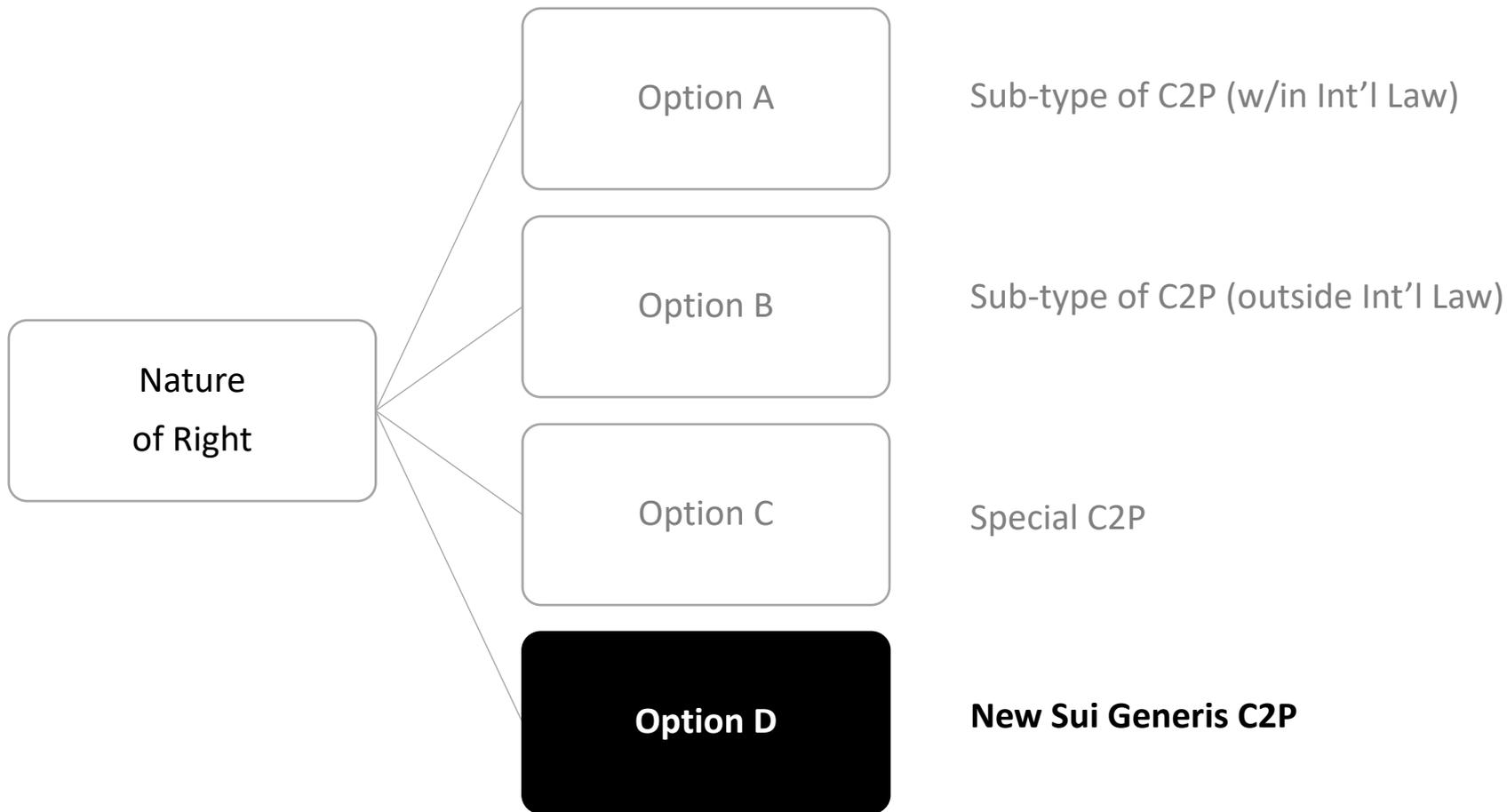
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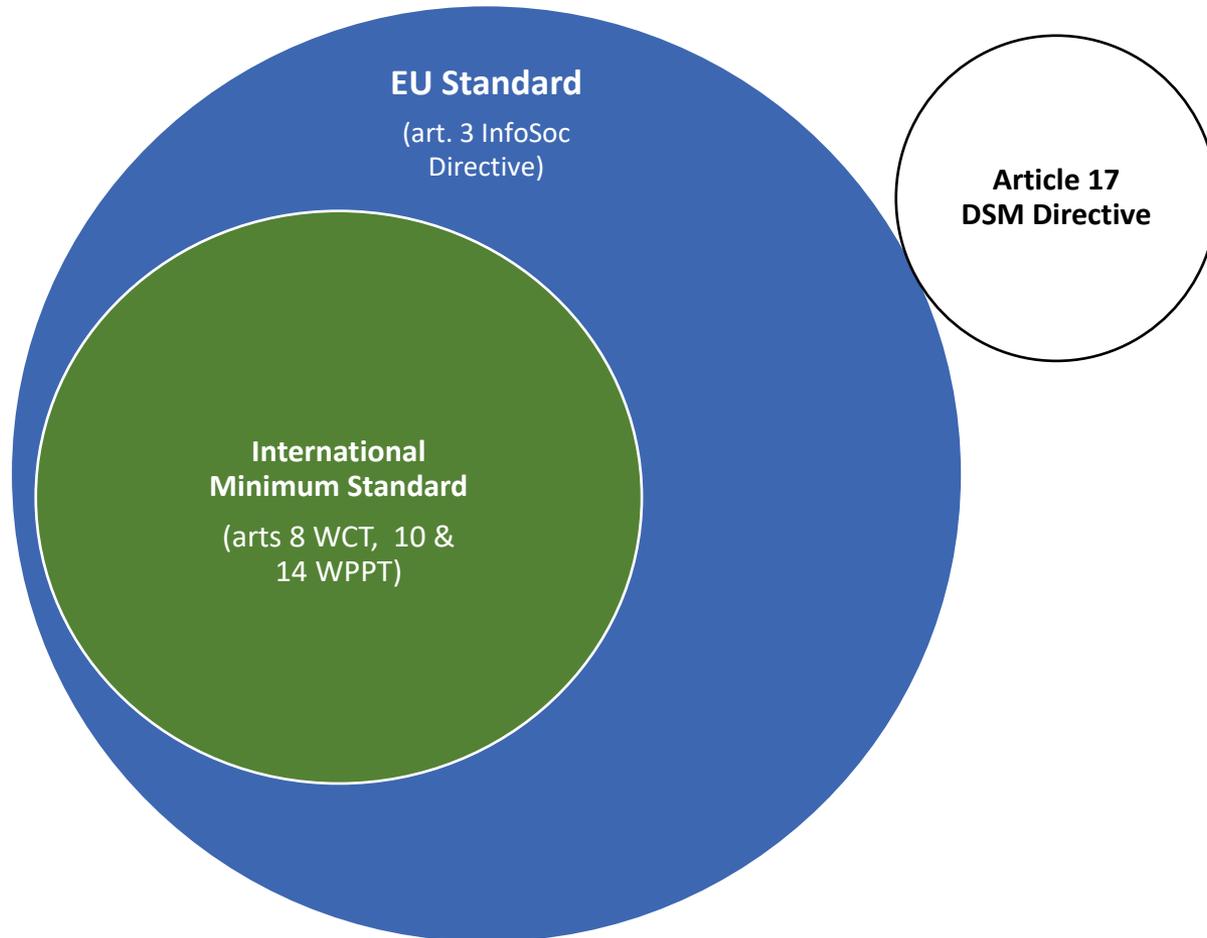
- Same as Option B but...
- ... not subject to InfoSoc Directive rules or case law (?) ...
- ...including on CRM & E&Ls
 - Think: Soulier, 3ST
- Why important?
- Authorisation mechanisms!
 - Wider margin of discretion

Interpretation Options



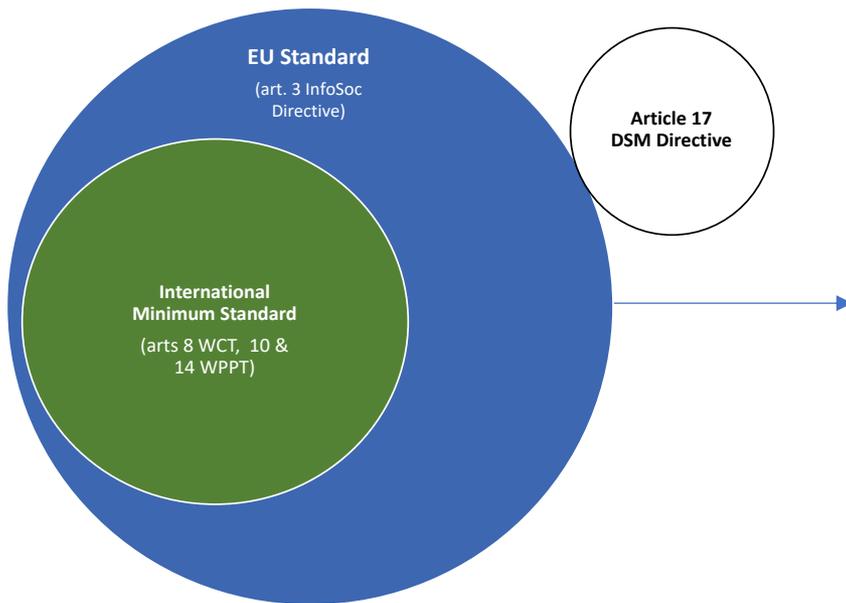
Option D

new sui generis right of C2P *outside* the EU concept



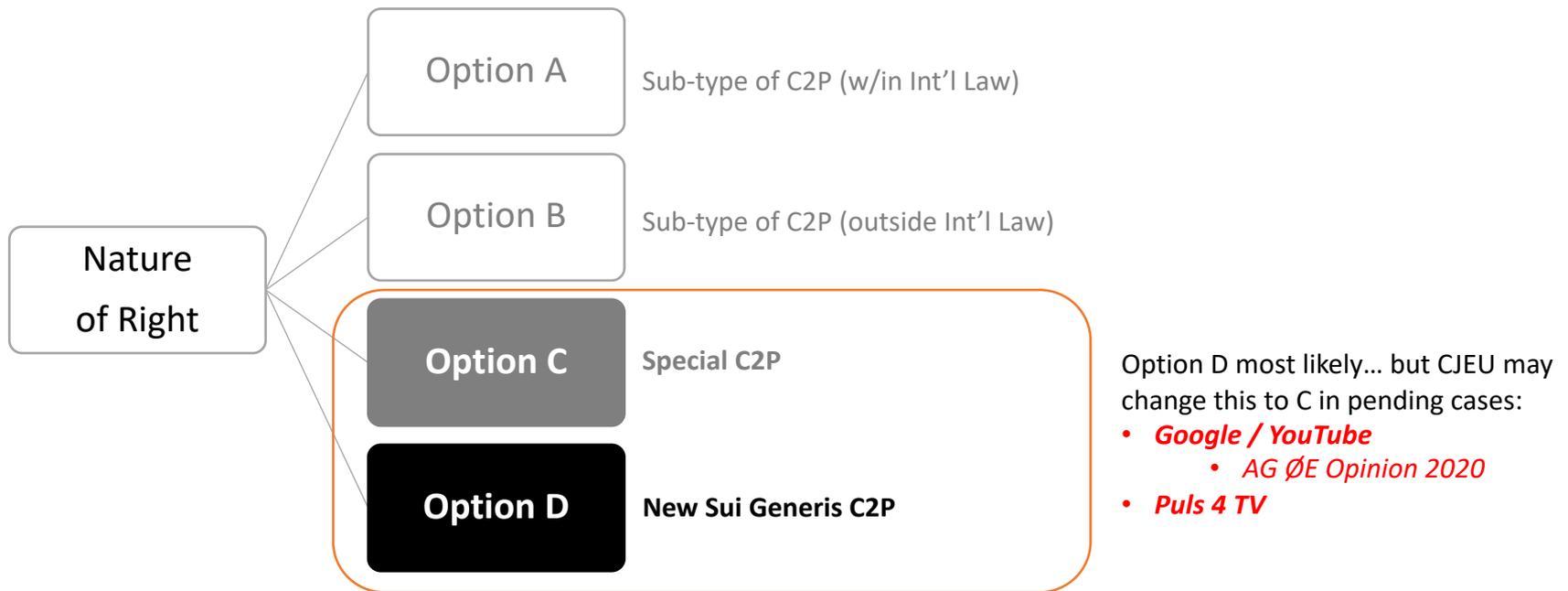
Option D

new sui generis right of C2P *outside* the EU concept



- Activities covered wholly outside CJEU-extended scope of art. 3 InfoSoc
- Why? Focus is not on mental elements but on services' effects (rec. 62) + distinction from art. 3 InfoSoc scope (paras 1 & 2, rec. 64)
- Tentative consequences outlined for Option C) are clear here
- Freedom of MS to play around with authorisation mechanisms

My (our) view

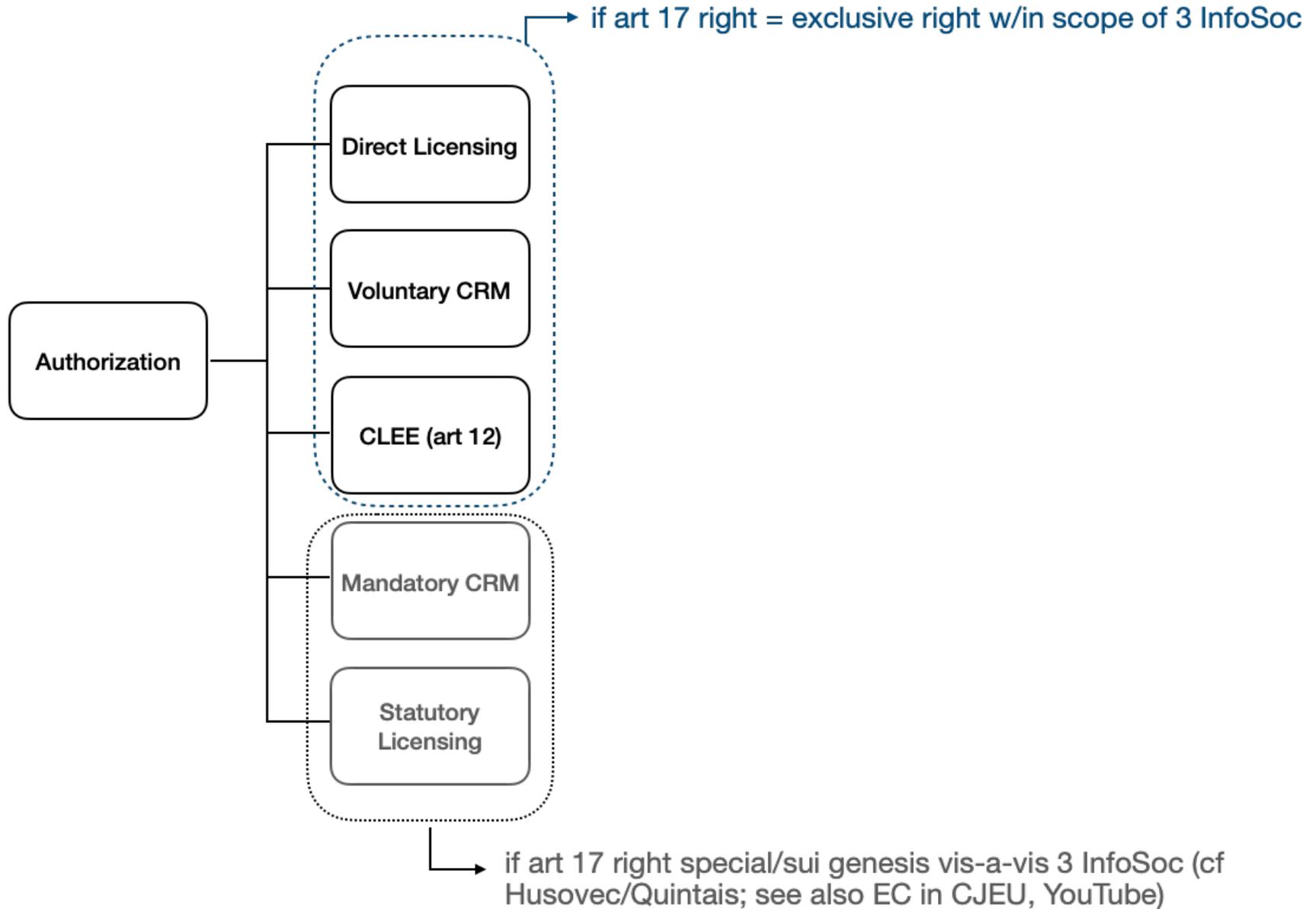


EC Targeted Consultation

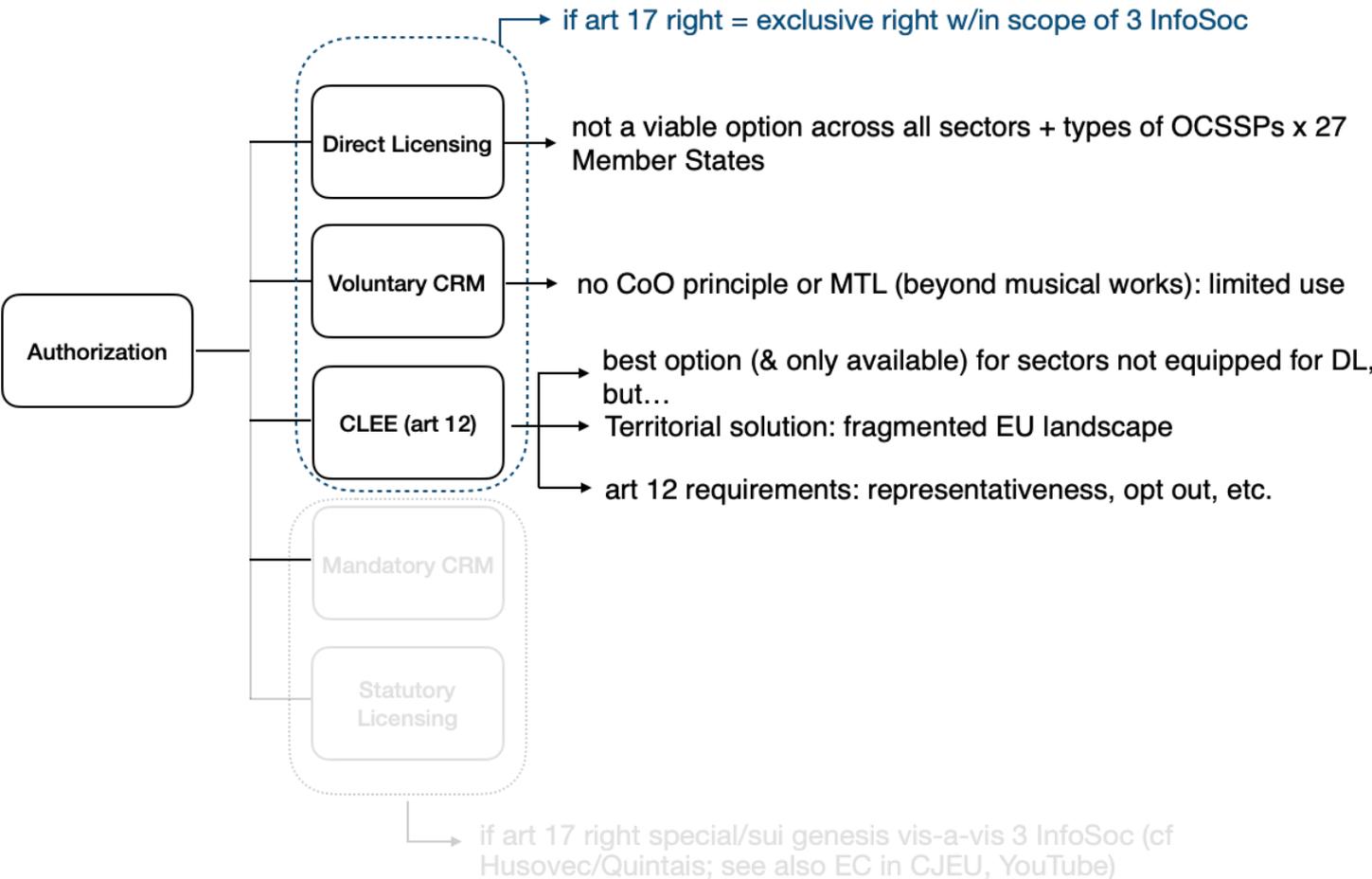
Article 17 is a *lex specialis* to Article 3 of Directive 2001/29/EC and of Article 14 of Directive 2000/31/EC. This is confirmed by Recital 64, which states clearly that Article 17

Why does it matter?

1 size does not fit all + art 17 does not mandate it!



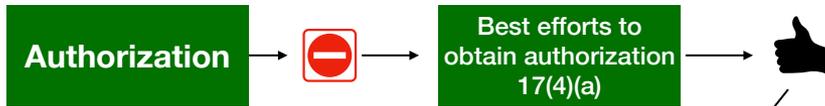
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- new / clarified mandates advised (Amend CRM Acts: 3 InfoSoc mandates extend to 17 CDSM)
- Low threshold below "systemic" OCSSPs, i.e. flexible interpretation of best efforts in 17(4)(a), in light of 17(5) proportionality & factors **(NL!)**
- e.g. non-obvious (c) holders → passive OCSSP OK (also valid for direct licensing)

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Preventive Measures 17(4)(b-c)

NTD?
Others?



CRTs
(Filters, NSD)

not suited for 17(7) uses

How Filters fail (to meet the requirements of the DSM directive)

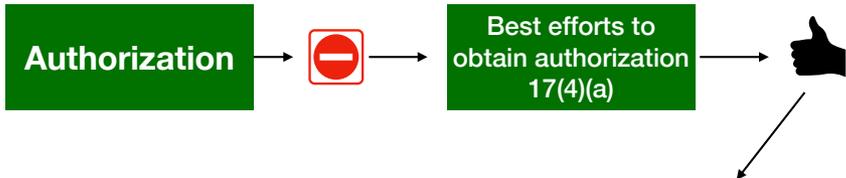


Three common failure modes of upload filters

June 12, 2020 – Paul Keller

Share this article:  

- Incorrect rights information (bad metadata)
- Inability to recognise legitimate uses (context blind)
- Inability to accurately identify works (false positives)



Preventive Measures
17(4)(b-c)

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User Rights & Freedoms
17(7), (9)

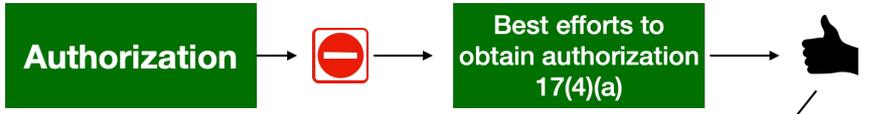
- covers most “transformative” UGC
- Mandatory
- Unremunerated
- No contractual or TPM override
- Contextual & dynamic (x 27)

+

Other E&Ls and lawful uses
17(7), (9)

+

Complaint & Redress
(Procedural Safeguards)
17(9)



Preventive Measures
17(4)(b-c)

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NL v1 approach

User Rights & Freedoms
17(7), (9)

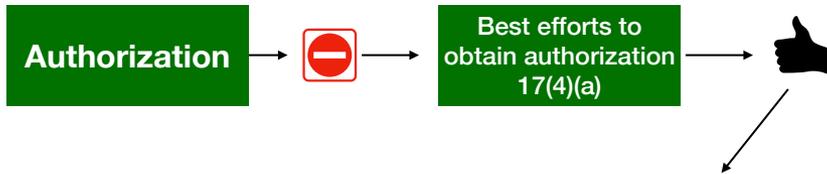
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Complaint & Redress
(Procedural Safeguards)
17(9)



Preventive Measures 17(4)(b-c)

NTD?
Others?



CRTs
(Filters, NSD)

not suited for 17(7) uses

- incompatible 17(7) and FoE
- Inconsistent w/ CRT capabilities & empirical evidence counter notices
- proportionality (alternatives exist)

User Rights & Freedoms 17(7), (9)

- covers most UGC
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+

Other E&Ls and lawful uses 17(7), (9)

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Complaint & Redress (Procedural Safeguards) 17(9)



Authorization



Best efforts to obtain authorization 17(4)(a)



Preventive Measures 17(4)(b-c)

NTD?
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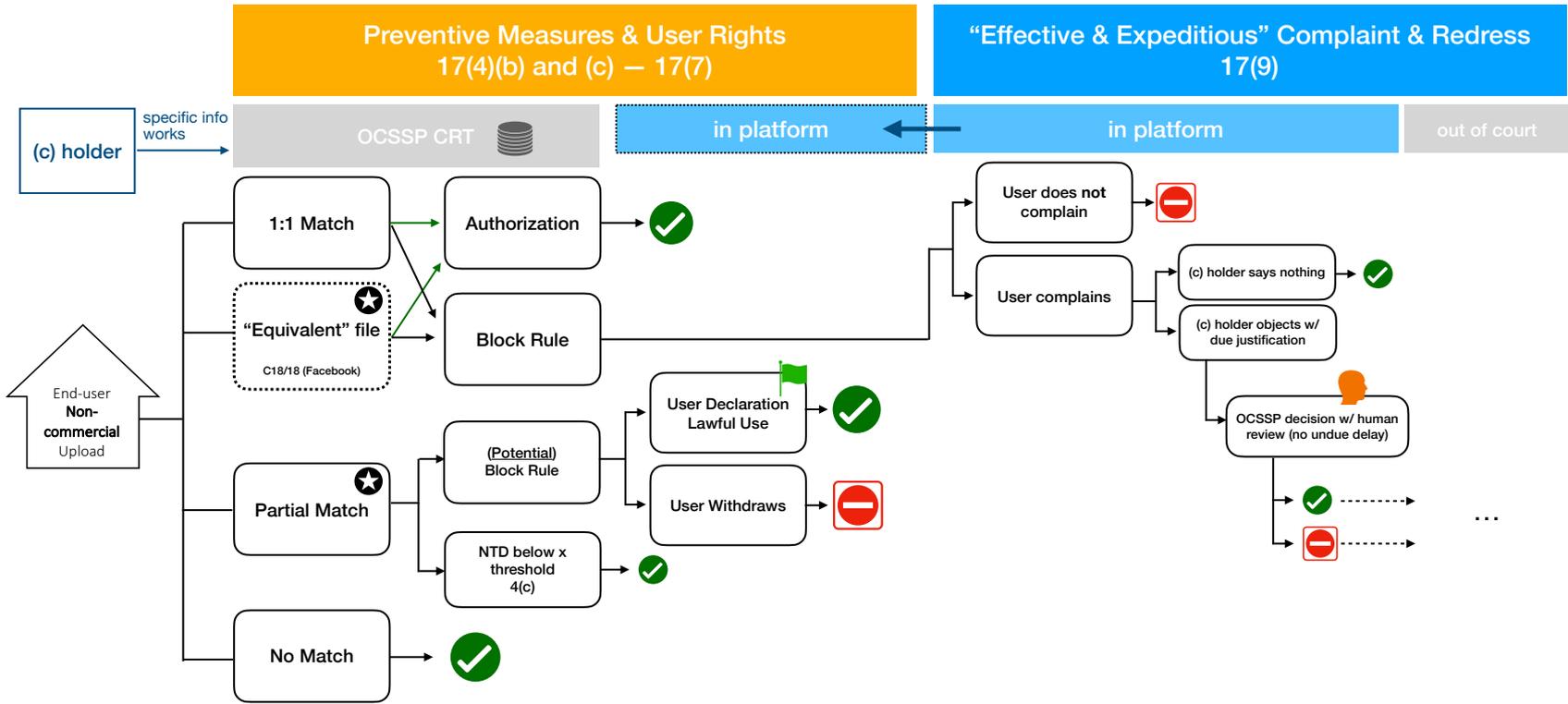


How?
Ex ante safeguards

⋮
▼ +
Other E&Ls and lawful uses 17(7), (9)

⋮
▼ +
Complaint & Redress (Procedural Safeguards) 17(9)

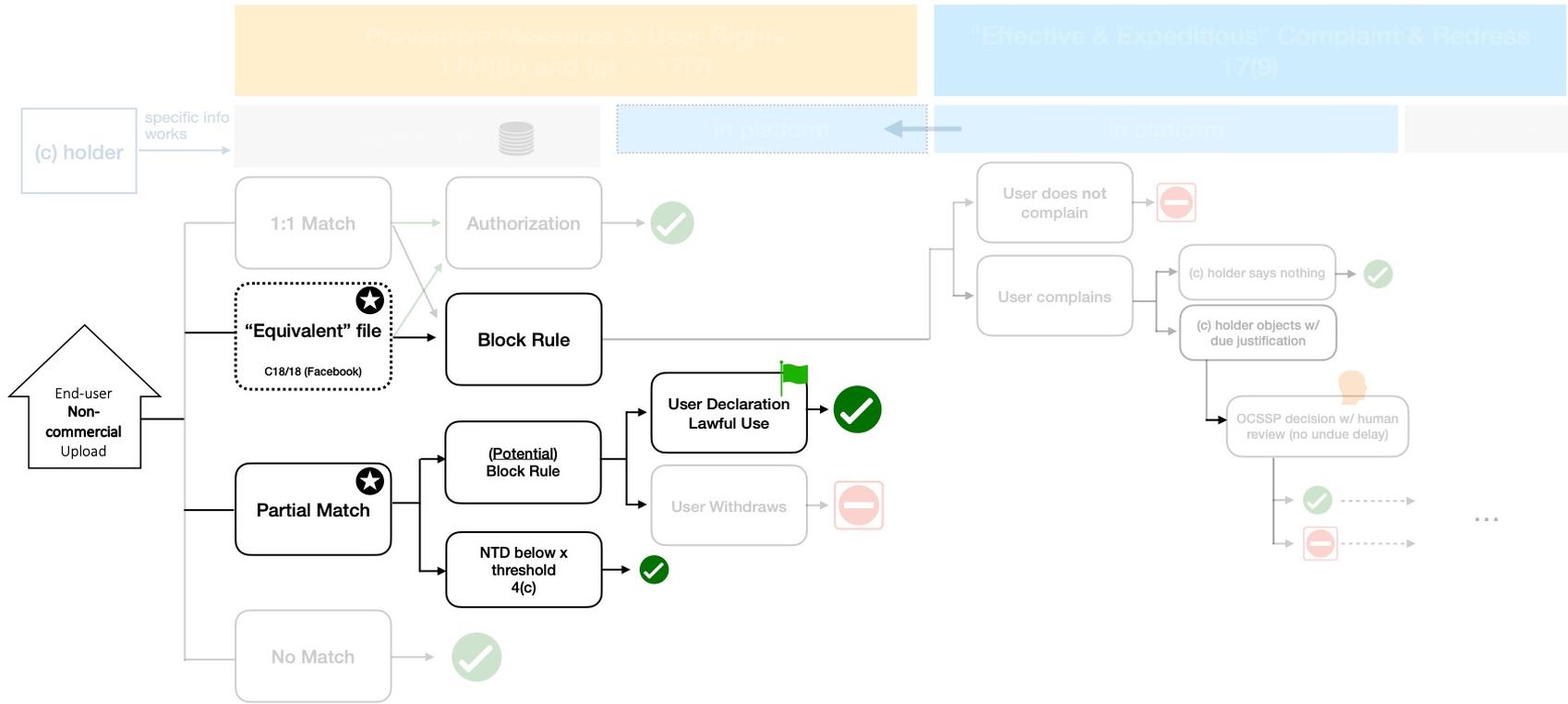
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- ✓ Uploaded content available to public on platform
- ✗ Uploaded content blocked - not available to public on platform

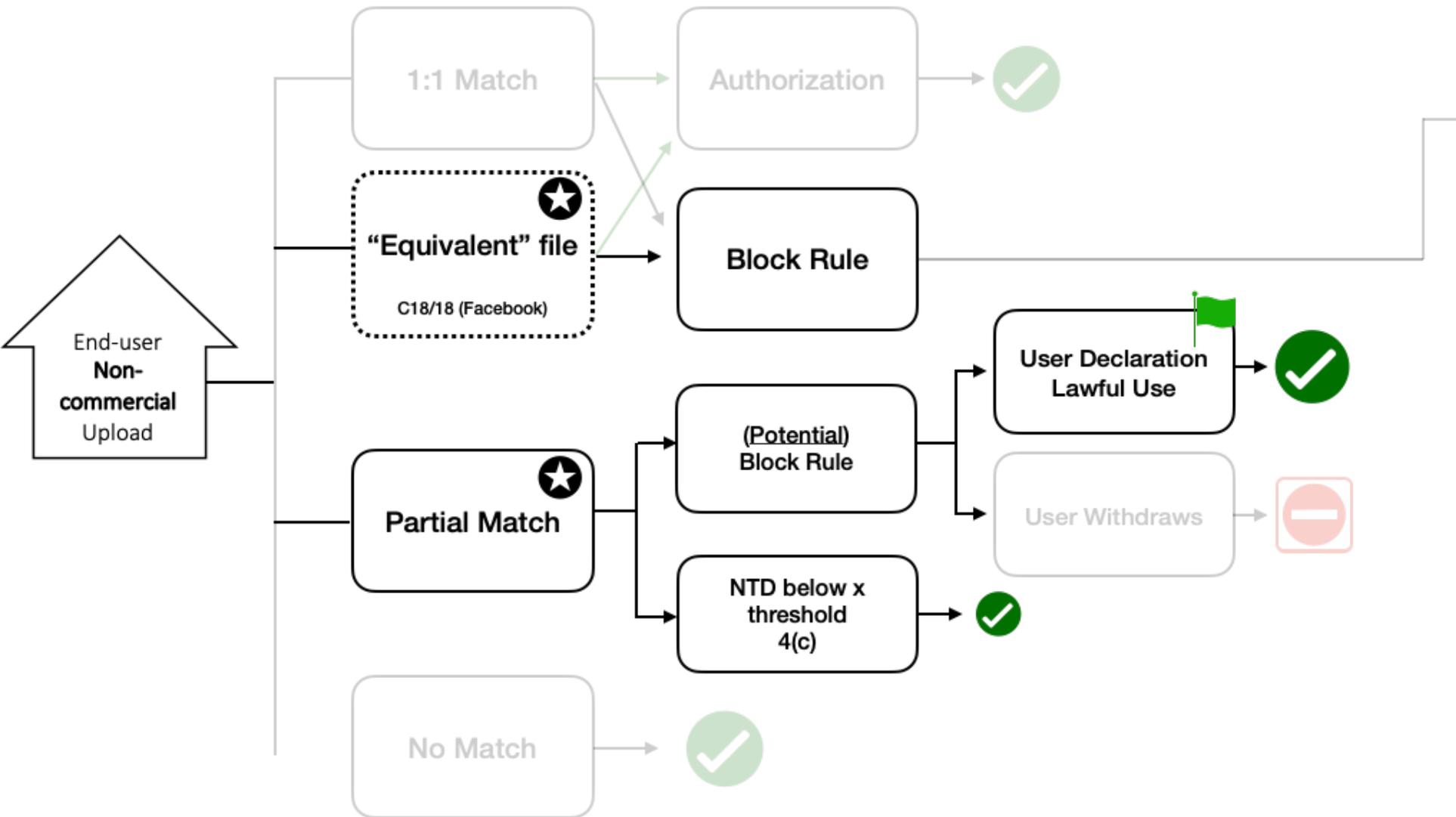
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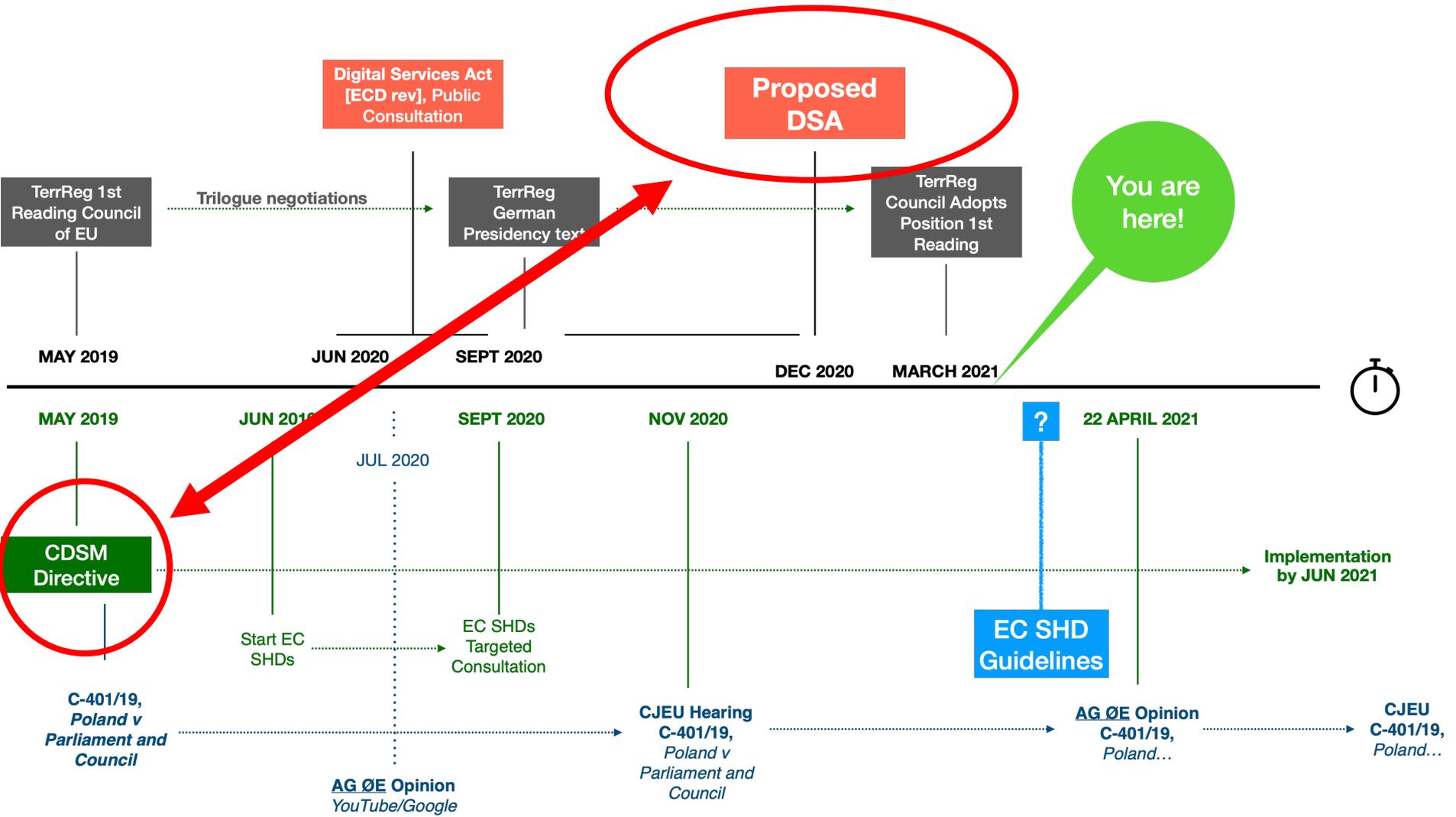
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Some References

see also: <https://www.ivir.nl/employee/quintais/>

- Husovec, Martin and Quintais, João, *How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms*, GRUR International, ikaa200, <https://doi.org/10.1093/grurint/ikaa200> Also Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3463011
- João Pedro Quintais, Giancarlo Frosio, Stef van Gompel, P. Bernt Hugenholtz, Martin Husovec, Bernd Justin Jütte, Martin Senftleben, *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics*, 10 (2020) JIPITEC 277 para 1. <https://www.jipitec.eu/issues/jipitec-10-3-2019/5042>
- Quintais, João, *The New Copyright in the Digital Single Market Directive: A Critical Look* (October 14, 2019). European Intellectual Property Review 2020(1). Available at SSRN: <https://ssrn.com/abstract=3424770> or <http://dx.doi.org/10.2139/ssrn.3424770>
- Christina Angelopoulos, João Pedro Quintais, *Fixing Copyright Reform: A Better Solution to Online Infringement*, 10 (2019) JIPITEC 147 para 1. <https://www.jipitec.eu/issues/jipitec-10-2-2019/4913>
- Quintais, João, *Untangling the Hyperlinking Web: In Search of the Online Right of Communication to the Public*. J World Intellect Prop. 2018;1–36; Amsterdam Law School Research Paper No. 2018-16; Institute for Information Law Research Paper No. 2018-02. Available at SSRN: <https://ssrn.com/abstract=3199733> and <https://onlinelibrary.wiley.com/doi/abs/10.1111/jwip.12107>

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