

Article 17 DSM Directive: Best Efforts to Ensure Unavailability

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What is Article 17?

- Article 17 imposes conditional strict liability:

OCSSPs are liable [for user-uploaded content], unless:

(a) made best efforts "to obtain an authorisation", *and*

(b) made best efforts "**to ensure the unavailability**" of specific subject matter for which RH provided relevant information; *and*

(c) removed/disabled expeditiously upon receiving a notice from RH

- Art 17(4)(b) requires preventive measures:

- (A) manual OR (B) automated

- Polish challenge assumes filtering = preventive measures; IMHO this is incorrect.

- "made best efforts to prevent their future uploads" (Art 17(4)(c))

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- Art 17(4)(b) requires **preventive measures**:

- "to ensure the unavailability" (Art 17(4)(b))

- "made best efforts to prevent their future uploads" (Art 17(4)(c))

- **(A)** manual, **(B)** automated, **(C)** both

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Art 17 & preventive measures

- Requirements:
 - only proportionate efforts (Art 17(5))
 - no general monitoring (beyond Art 15 ECD compliance (Art 17(8); Rec. 66))
 - avoiding over-blocking of legitimate uses (Art 17(7) / (9))
 - "MS shall ensure that users in each Member State **are able to rely** on any of the following existing exceptions or limitations"
 - "**shall not result in** in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright"
 - differs for size, type of content, audience, available tools (Art 17(5))
 - GDPR-compliance (Art 17(9))
- Can MSs implement Article 17(4)(b) **in different ways?**
- Article 17(7) + (9) has **strongly-worded (outcome) safeguards**, but without fully harmonizing them = leaving the 'effective' design to MSs

CJEU & preventive measures of hosts

[non-Art 17, compatible with Art 15 ECD]

- *Netlog* (2010) denied indiscriminate filtering

- unspecified existing & future works
- unspecified type of infringements
- irrespective of the infringer



- *L'Oreal v eBay* (2011) accepted targeted preventive measures

- specific trademarks
- same kind of infringement
- same infringer



- *Facebook* (2019) accepted automated enforcement

- specific content (picture + text)
- identical & 'in-essence-unchanged' infringements
- irrespective of the infringer
- provided that the court determines illegality of a specific instance of illegal content, specifies its defining features so that automated compliance is possible w/ independent review



CJEU & preventive measures [Post-Art 17]

Facebook v Glawischnig-Piesczek (2019), Art 15 ECD does not preclude:

- “(a) ordering a host provider to remove information which it stores, the content of which is identical to the content of information which was previously declared to be unlawful, or to block access to that information, irrespective of who requested the storage of that information;

= **block identical content irrespective of the infringer** (e.g. reposting)




CJEU & preventive measures [Post-Art 17]

Facebook v Glawischnig-Piesczek (2019), Art 15 ECD does not preclude:

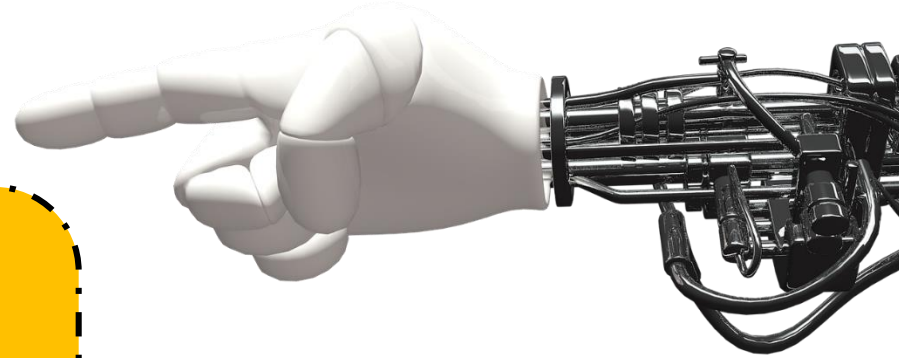
- (b) ordering a host provider to remove information which it stores, the content of which is equivalent to the content of information which was previously declared to be unlawful, or to block access to that information, provided that the monitoring of and search for the information concerned by such **an injunction are limited to information conveying a message the content of which remains essentially unchanged compared with the content which gave rise to the finding of illegality and containing the elements specified in the injunction, and provided that the differences in the wording** of that equivalent content, compared with the wording characterising the information which was previously declared to be illegal, **are not such as to require the host provider to carry out an independent assessment of that content”**

= block ‘in-essence-unchanged’ content irrespective of the infringer as long no independent review is required (e.g. due to context)

CJEU & preventive measures [Post-Art 17]

- BEST EFFORTS "to ensure the unavailability"& "to prevent future uploads"
 - specific works? **YES** >> Art 17(4)(b))
 - same infringer? **UNLIKELY** >> suggests irrespective of the infringers
 - **same kind of infringement?** **MAYBE** >> absolute/relative
- Readings
 -  (1) Article 17 requires preventing any infringement from the same infringer
 - IMHO: wrong, it limits specific monitoring L'Oreal, but Art 17 is a legislative over-ruling
 -  (2) Article 17 requires preventing any type of infringement, as *Netlog/L'Oreal/Facebook* do not apply (this is not Art 15 ECD case)
 - IMHO: wrong, it limits specific monitoring to specific works, why then Art 17(8)?
 -  (3) Article 17 requires preventing some type of infringements by anyone
 - Arguably linking back to proportionality, available tools, costs, type of content, etc.

automated enforcement \neq filtering

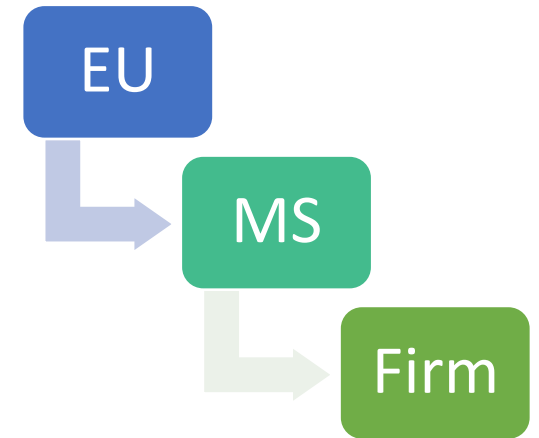


Automated enforcement

Filtering



Polish challenge



- **Poland:** Article 17(4)(b) is incompatible with Article 11 of EU Charter
 - IF impossible to disentangle, then entire Article 17
 - SO, the world without Article 17(4)(b) is not ECD world, but strict liability & NTD.
- *Poland v EP/Council (C-401/19)*:
 - **A:** is filtering constitutional?
 - **B:** is it constitutional given the safeguards of the DSM Directive?

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