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Press and Information

Advocate General's Opinion in Case C-401/19
Poland v Parliament and Council

According to Advocate General Saugmandsgaard Øe, Article 17 of Directive 2019/790 on copyright and related rights in the Digital Single Market [1] is compatible with the freedom of expression and information guaranteed in Article 11 of the Charter of Fundamental Rights of the European Union

While Article 17 entails an interference with freedom of expression, that interference satisfies the conditions laid down in the Charter of Fundamental Rights

Article 17 of Directive 2019/790 on copyright and related rights in the Digital Single Market establishes the principle that providers of online sharing services (so-called 'Web 2.0' services) are directly liable when protected subject matter (works, etc.) is illegally uploaded by users of their services. However, the providers concerned may be exempt from that liability. To that end, they are in particular obliged, in accordance with the provisions of Article 17 of the directive, [2] actively to monitor the content uploaded by users in order to prevent the uploading of protected subject matter which the rightholders do not wish to make accessible on those services. In many situations, such preventive monitoring must take the form of filtering using automatic content recognition tools.

The Republic of Poland brought an action before the Court of Justice for annulment of Article 17 of Directive 2019/790. According to the applicant, that article infringes the freedom of expression and information guaranteed in Article 11 of the Charter of Fundamental Rights of the European Union ('the Charter'). In assessing the lawfulness of Article 17 of the directive, the Court will therefore have to determine whether, and if so under what conditions, imposing monitoring and filtering obligations on online intermediary service providers is compatible with that freedom.

In today's opinion, Advocate General Henrik Saugmandsgaard Øe proposes that the Court should find that **Article 17 of Directive 2019/790 is compatible with freedom of expression and information** and therefore dismiss **the action brought by Poland.**

In this respect, the Advocate General considers that the contested provisions do entail an interference with the freedom of expression of the users of online sharing services. Nevertheless, in his view, that interference satisfies the conditions laid down in Article 52(1) of the Charter and is therefore compatible with the Charter.

In particular, the Advocate General considers that the contested provisions respect the 'essence' of freedom of expression and information. While, in view of the particular importance of the Internet to that freedom, public authorities cannot oblige online intermediaries to monitor content shared or transmitted through their services in search of any kind of illegal or undesirable information, the EU legislator may, as in this case, choose to impose certain monitoring obligations, in respect of specific illegal information, on certain online intermediaries.

The Advocate General observes, moreover, that Article 17 of Directive 2019/790 meets an objective of general interest recognised by the Union, since it is intended to ensure effective protection of intellectual property rights.

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[1] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (OJ 2019 L 130, p. 92)
[2] See Article 17(4)(b) and (c), *in fine*, of Directive 2019/790

As regards compliance with the principle of proportionality, the Advocate General explains in particular that the EU legislator had a margin of discretion to reconcile freedom of expression with respect for the intellectual property rights of rightholders. In this context, the legislator could choose to modify the liability regime applicable to online sharing service providers, which initially resulted from Directive 2000/31 on electronic commerce, [3] by imposing monitoring obligations on some of them.

Nevertheless, that new regime entails a significant risk of 'over-blocking' lawful information. In order to avoid any risk of liability, online sharing service providers may tend to prevent the uploading of all content reproducing protected subject matter identified by the rightholders, including content making legitimate use of such subject matter, such as that covered by the exceptions and limitations to copyright. The use of automatic content recognition tools increases that risk, since those tools are not able to understand the context in which such protected subject matter is reproduced. The EU legislator therefore had to provide sufficient safeguards to minimise that risk.

According to the Advocate General, such safeguards have been provided for in Article 17 of Directive 2019/790.

Firstly, the EU legislator recognised the right of users of online sharing services to make legitimate use of protected subject matter, including the right to rely on exceptions and limitations to copyright. [4] In order for that right to be effective, providers of such services are not allowed to preventively block all content reproducing the protected subject matter identified by the rightholders, including lawful content. It would not be sufficient for users to have the possibility, under a complaints and redress mechanism, to have their legitimate content re-uploaded after such preventive blocking.

Secondly, the EU legislator stressed that Article 17 of Directive 2019/790 should not impose a general monitoring obligation on sharing service providers. [5] In this respect, according to the Advocate General, those providers cannot be turned into judges of online legality, responsible for coming to decisions on complex copyright issues.

Consequently, sharing service providers must only detect and block content that is 'identical' or 'equivalent' to the protected subject matter identified by the rightholders, that is to say content the unlawfulness of which may be regarded as manifest in the light of the information provided by the rightholders. By contrast, in all ambiguous situations – short extracts from works included in longer content, 'transformative' works, etc. – in which, in particular, the application of exceptions and limitations to copyright is reasonably foreseeable, the content concerned should not be the subject of a preventive blocking measure. The risk of 'over-blocking' is thus minimised. Rightholders will have to request the removal or blocking of the content in question by means of substantiated notifications, or even refer the matter to a court for a ruling on the lawfulness of the content and, in the event that it is unlawful, order its removal and blocking.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case.

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[3] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1)
[4] Article 17(7) of Directive 2019/790
[5] Article 17(8) of Directive 2019/790

Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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