

Principles of the Guidelines elaborated for the transposition of Article 17

By Eva Simon • Senior Advocacy Officer

The Commission, in the spirit of better regulation and transparency, invited user organizations, such as digital rights and fundamental rights organizations and the knowledge community, to seek feedback on the transposition of Article 17 of the Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (DSM Directive) and to ensure that the guidelines help national implementation processes to comply with the Charter of Fundamental Rights.

Therefore, Liberties here submits its opinion about basic principles the Commission should follow in the process of elaborating the guidelines described in the DSM Directive Article 17 (10).

Article 17 left a significant margin of discretion for the EU Member States when implementing Article 17 into national law. This margin of discretion should be used to ensure that member states implement measures for fundamental rights and safeguards, including in the design of the complaint and redress mechanisms in Article 17(9).

To achieve the best possible unified legislation, Liberties encourages the Commission to promote harmonization and avoid diverging national implementations if possible in order to ensure the protection of fundamental rights across the world. The guidelines will also have a spill-over effect beyond the borders of the EU and will have an impact on online content-sharing service providers' (OCSSPs) activity in relation to freedom of expression and personal data protection of the users.

1. Exceptions and Limitations in Article 17 (7) and the procedural safeguards 17 (9)

Exceptions and limitations (E&Ls) play a significant role in ensuring freedom of expression and freedom to receive information for the users. Licensing and preventive obligations in Article 17 must be interpreted in the context of E&Ls.

The guidelines should clarify how E&Ls set out in the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive) relates to the DSM Directive, such as the incidental use set out in Article 5(3)(i) of the InfoSoc Directive. Liberties is of the opinion that member states should implement the full list of E&Ls to ensure the same level of freedom of expression across Europe and help OCSSPs work in relation to user privileges to which Article 17(7) of DSM refers.

DSM (Recital (70) emphasizes the need for the preventive obligations to be implemented without prejudice to the application of E&Ls, “in particular those that guarantee the freedom of expression of users”.

It is important to underline in the guidelines that it is not sufficient for users to merely inform them or force their consent by accepting terms and conditions of OCSSPs and derogate users’ rights in the terms and conditions. As the European **Commission stated** in September 2019, in an answer to a question from the European Parliament on this subject: “(...) the Commission considers that the obligations provided for in paragraphs 7 and 9 cannot be considered fulfilled by Member States by seeking to rely on any general provision informing users about existing exceptions and limitations in the terms of use of the OCSSPs.”

2. Effective and expeditious complaint and redress mechanism to safeguard the rights of the users to challenge decisions of OCSSPs

Under Article 17(9), first subparagraph, OCSSPs must implement “effective and expeditious” complaint and redress mechanisms for users in the event of disputes over the disabling of access to, or the removal of, uploaded content. This could mean self-regulatory mechanisms, out of court dispute mechanisms, and judicial redress mechanisms as listed in the DSM Directive.

In order to avoid platforms bypassing the users' rights provided by Article 17 and the Charter of Fundamental Rights, especially regarding the complaint and redress mechanisms, it's important to outline in the guidelines that OCSSPs can't require users to waive their right to a remedy using their terms and conditions. Self-regulatory and out-of-court mechanisms should be i) easily accessible, ii) transparent, iii) free of charge, iv) trustworthy, v) and meet the accountability requirements.

In order to protect the fundamental rights of the users, OCSSPs must optimize preventive measures for user rights/freedoms. The guidelines should refer to them.

The preventive measures should:

- a) meet the proportionality requirement in paragraph (5);
- b) respect the mandatory nature and fundamental rights paragraph (7) Recital (70) and (84);
- c) comply with the prohibition of a general monitoring obligation in paragraph (8);
- d) comply with the requirements stated in paragraph (9), that the Directive shall in no way affect legitimate uses; and,
- e) fully respect the protection of personal data of the users Recital (85).

In order to ensure effective mechanisms, OCSSPs and rightholders are both obliged to inform users i) how they arrived at the decision of the removal of content, ii) which user data is collected and iii) how it is used when content is removed, and the iv) extent to which user activity is monitored.

3. Sanction wrongful copyright claims

The minimum requirement is that rightholders who request the disabling or removal of content must "duly justify" their requests. Besides justification requirements, further measures should be taken to prevent legitimate content from being wrongfully taken down. These sanctions should especially target repeat offenders. The guidelines could encourage the Member States to introduce the notion of 'improper notifications'.

4. Transparency requirements

To ensure the effective application and continued improvement of the complaint and redress mechanisms, Member States must require transparency of the operation of OCSSPs and rightholders. A transparent complaint and redress procedure is necessary to enable effectiveness and to respect the fundamental rights of the users. We recommend that the guidelines require that national laws set up reporting duties for OCSSPs and rightholders regarding the functioning of i) information-sharing between them and ii) the complaint and redress mechanisms iii) and their decision-making process. National laws should also ensure that users' organisations have access to adequate information about the above-mentioned activities.

Besides the transparency of the redress and complaint mechanisms, general transparency rules are also part of the basic requirements in relation to algorithms used by OCSSPs. Audit and assessment tools, such as algorithm audits, are essential for content curation and preventive measures. These requirements should be part of the guidelines.

In some cases, copyright claims are used to silence political opinion or competing political parties. Transparency could also serve as a protection against using copyright as a form of censorship tool. Transparency would also allow EU institutions, user's organizations, and researchers to assess the impacts of the application of Article 17 on users' freedom of expression, data protection, and freedom of information.

5. Limit the application of preventive measures: avoid mandatory upload filter

In order to harmonize the application of the DSM Directive, we suggest clarifying in the guidelines that the DSM Directive does not impose general monitoring obligations on member states, and mandatory upload filters are avoidable. Member states should limit the application of preventive measures in Article 17 paragraphs (4) b) and c) . Therefore, it is important to clearly state that "best efforts to prevent their future uploads" does not mean a filtering obligation in any way. While Liberties understands that automation is necessary for handling a vast amount of content shared by users, the consequences are far-reaching. Automated decision-making tools, such as filtering techniques, are contextually blind, and they are therefore unable to assess the context of expressions accurately and assess E&Ls. It's a must to apply human intervention in any automation used by OCSSPs during the decision-making process. Human intervention is also essential for transparent appeal mechanisms. There cannot be an effective remedy without human intervention.

6. GDPR requirement for human intervention

The General Data Protection Regulation (GDPR) is horizontal legislation and applicable for the operation of OCSSPs and rightholders concerning Article 17 in case personal data is processed Recital (85). Safeguards for personal data protection and freedom of expression are connected. The GDPR does not let OCSSPs apply fully automated upload filters.

Any algorithm-curated content moderation concerning Article 17 paragraph (4) b) c) will automatically link to personal data processing. Under Article 22 of the GDPR, users have the right not to be subject to a decision based solely on automated processing which produces legal effects concerning him/her or similarly significantly affects him/her unless it is based on i) a contractual relationship ii) authorized by law iii) or it is based on the users' explicit consent. Number i) and ii) are not applicable. For i) Accepting terms of services are not considered contractual relationships. For ii) DSM Directive and national legislation can not be considered as authorization of the law because the legitimate interest principle set out in the GDPR is missing in relation to upload filters.

Therefore, data processing in relation to the automated decision-making process can only rely on users' explicit consent under Article 4 (11) of the GDPR. The right of the users to contest to an automated decision-making process entitles them not to give consent to any kind of automated filtering method without human intervention. Users must be able to understand decisions made about them as well as understand how automated decision-making affects them and to contest the decisions if necessary according to Article 21 (1) of the GDPR.

Liberties is of the opinion that the above mentioned safeguards would ensure that the implementation of Article 17 is in line with the Charter of Fundamental Rights and serves the interest not only of OCSSPs and rightholders, but of the European public and creative industry as well.

The Civil Liberties Union for Europe (Liberties) is a non-governmental organisation promoting and protecting the civil liberties of everyone in the European Union. We are headquartered in Berlin and have a presence in Brussels. Liberties is built on a network of national civil liberties NGOs from across the EU. Unless otherwise indicated, the opinions expressed by Liberties do not necessarily constitute the views of our member organisations.

Website:

liberties.eu

Contact info:

info@liberties.eu

The Civil Liberties Union for Europe e. V.

Prinzenstr. 103.

10969 Berlin

Germany