

Blocking and filtering

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**Blocking and filtering
one and the same thing?**

Do we want both?

Can we have both?

Let's assume that we have the
green light to further
harmonise

If we want to further
harmonise ...

It's because we are not happy
with what we have!?!

But why would we be
unhappy?

What do we have?

1. ECD

“This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.” (Art. 14(3))

It's only a possibility... not
necessarily a reality!

2. Infosoc Dir

“Member States shall ensure that rightholders are in a position to apply for an **injunction against intermediaries** whose services are used by a third party to infringe a copyright or related right.” (Art. 8(3))

What is an injunction?

A court order requiring the addressee to perform, or restraining the addressee from performing a particular act.

What can a MS court order?

A background of red curtains with gold trim on the sides and a gold carpet at the bottom. The curtains have a textured, slightly wrinkled appearance.

Part I

CJEU Sabam/Netlog 2012

Sabam requested “that Netlog be ordered immediately **to cease unlawfully making available** musical or audio-visual works from SABAM’s repertoire and to pay a penalty of EUR 1000 for each day of delay in complying with that order.” (para. 21)

“Netlog claimed, without being contradicted by SABAM, that the granting of such an injunction could result in the imposition of an order that it introduce, for **all its customers, *in abstracto* and as a preventative measure**, at its **own cost** and for an **unlimited period**, a **system for filtering** most of the information which is stored on its servers in order to identify on its servers **electronic files containing** musical, cinematographic or audio-visual work in respect of which SABAM claims to hold rights, and subsequently that it block the exchange of such files.” (para. 23)

Filtering?

Content restriction at the
application level

An injunction requiring an online service provider to install a system for filtering:

- information which is stored on its servers by its service users;
- which applies indiscriminately to all of those users;
- as a preventative measure;
- exclusively at its expense; and
- for an unlimited period,

which is capable of identifying electronic files containing musical, cinematographic or audio-visual work in respect of which the applicant for the injunction claims to hold intellectual property rights, with a view to preventing those works from being made available to the public in breach of copyright: **NOT COMPATIBLE** WITH EU LAW!

CJEU

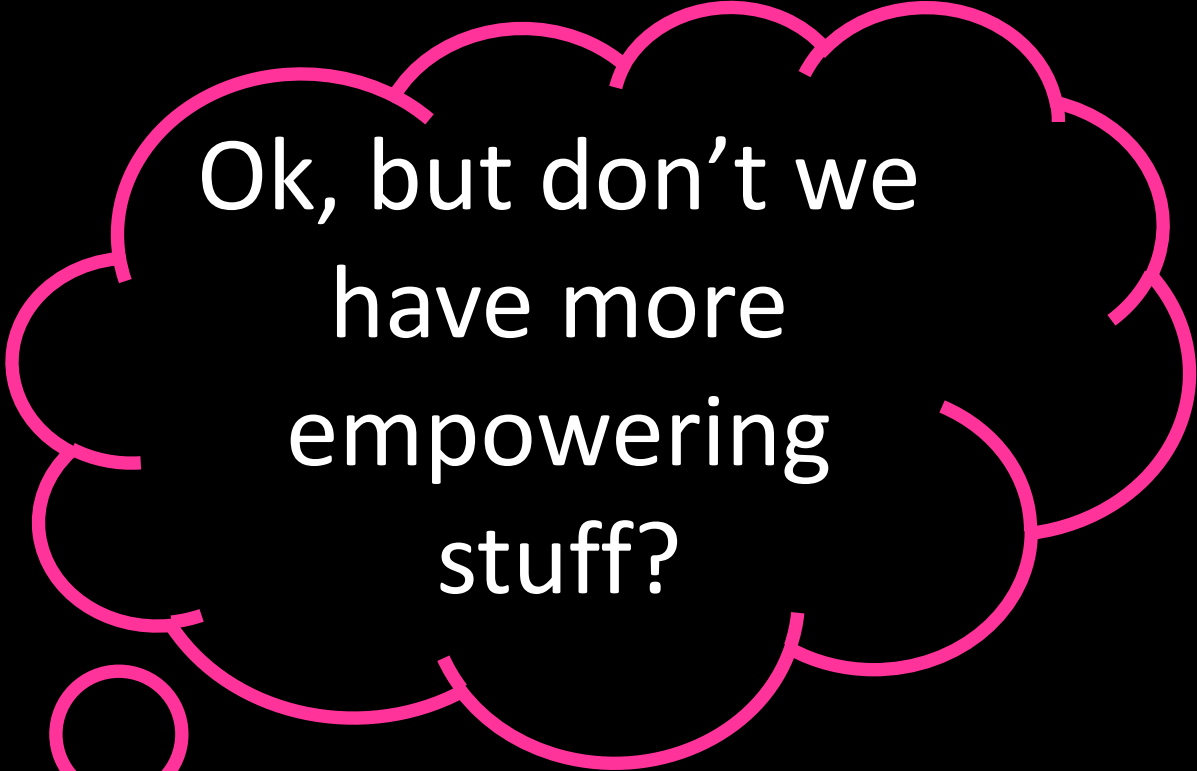
“It follows that that injunction would require the hosting service provider to carry out **general monitoring**, something which is prohibited by Article 15(1) of Directive 2000/31.” (para. 38)

“the injunction requiring installation of the contested filtering system would involve **the identification, systematic analysis and processing of information connected with the profiles created on the social network by its users**. The information connected with those profiles is protected personal data because, in principle, it allows those users to be identified.” (para. 49)

What about the principle of
confidentiality of
communications?

“The **protection of the confidentiality** of electronic communications and related traffic data, guaranteed in Article 5(1) of Directive 2002/58, applies to the measures taken by all persons other than users, whether private persons or bodies or State bodies.”
(CJEU in Tele2 Sverige, para. 77)

“Electronic communications data shall be confidential. Any interference with electronic communications data, such as by listening, tapping, storing, **monitoring**, scanning or other kinds of interception, surveillance or processing of electronic communications data, **by persons other than the end-users**, shall be prohibited, except when permitted by this Regulation.” (EC in proposed ePrivacy Regulation, Art. 5)



Ok, but don't we
have more
empowering
stuff?



Someone in
the crowd

A background of red curtains with gold trim on the sides. The curtains have a textured, slightly wrinkled appearance. The gold trim is visible on the left and right edges, featuring small, circular details.

Part II

CJEU Telekabel 2014


“an order enjoining UPC Telekabel, an internet service provider, to **block the access of its customers to the website at issue**, inasmuch as that site makes available to the public, without their consent, cinematographic works over which they hold a right related to copyright.”

Blocking?

Content restriction at the
network level

A reactive or preventive
order?

“the existence of an act of making a work available to the public presupposes only that the work was made available to the public; it is not decisive that persons who make up that public have actually had access to that work or not.” (para. 39)

A blue thought bubble with a scalloped border, containing text. Three smaller blue circles of increasing size lead from the bottom left of the bubble to the main body.

An order to
terminate an
infringement!

CJEU


Question: is an injunction that does not specify the measures which that access provider must take when that access provider can avoid incurring coercive penalties for breach of that injunction by showing that it has taken all reasonable measures compatible with EU law?

CJEU



Of course!!!

“it is therefore necessary to take account in particular of the requirements that stem from the protection of the applicable fundamental rights, and to do so in accordance with Article 51 of the Charter of Fundamental Rights of the European Union (‘the Charter’)”



Of course... as long
as you are
compliant with
fundamental rights!

CJEU

“the measures adopted by the internet service provider **must be strictly targeted**, in the sense that they must serve to **bring an end to a third party’s infringement** of copyright or of a related right but **without thereby affecting internet users** who are using the provider’s services in order to lawfully access information.” (para. 56)

So much for the theory!

What does that mean in
practice?

Modalities of blocking

- 
- A red bracket is positioned to the left of the list items, spanning from the top of the first item to the bottom of the third item.
1. DNS Blocking
 2. IP address Blocking
 3. URL Blocking

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1. ~~Blocking the DN~~
2. ~~Blocking the IP address~~
3. Blocking the URL?

Does URL blocking =
terminating infringements?

URL blocking = preventing all users from accessing the material under the URL

Does URL blocking = general
monitoring?

URL blocking = monitoring all
users so that they do not
access the URL

Well...



No general
monitoring!

Arnold J.

“If ISPs could be required to block websites **without having actual knowledge** of infringing activity, that would be tantamount to a general obligation to monitor.” (Cartier, para. 141)

But what would Art. 15 ECD
really add then?

Does URL blocking = strictly
targeted?

Maybe not since the CJEU seems to adopt a right-based approach and not an effect-based approach!

Well...



I am for
an effect-based
approach!

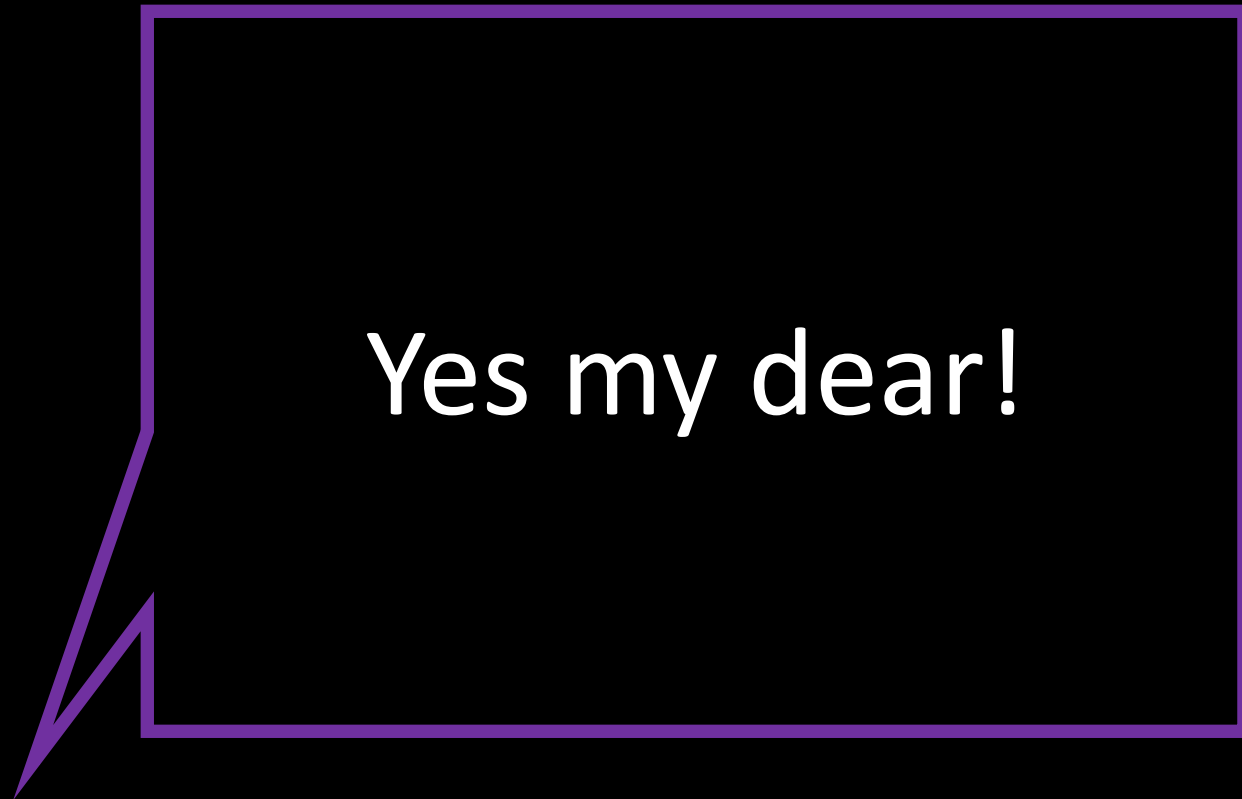
Arnold J.

“I recognise that the order would potentially prevent BT subscribers from making use of Newzbin2 for non-infringing uses. On the evidence, however, **the incidence of such uses is *de minimis***” (Newzbin2 para. 186)

But whom should we listen
to?

Does URL blocking =
interference with the principle
of confidentiality of
communications?

EC



Yes my dear!



Yes!



CJEU in Tele2 Sverige



Read my brand new
ePrivacy
Regulation!

EC

Guess what?

This is fun!

What is a URL?



Communication
content!

UK

Or the ISP has the consent of
its subscriber

Or

Union law or MS law add a
restriction by legislation!

But restrictions to the principle of confidentiality of communications can only be based on general public interests listed in Art. 23 (a to e) GDPR

Here is the list

- national security
- Defence
- public security
- the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security
- other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation matters, public health and social security

Conclusion

Shouldn't we be happy with
what we have?