

7. A new liability paradigm for online platforms in EU copyright law

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1. INTRODUCTION

This chapter discusses the new regime for copyright liability of online platforms in art. 17 of the Copyright in the Digital Single Market Directive (CDSM) Directive.¹ The core argument of this chapter is that art. 17 represents a new liability paradigm for online platforms that host and provide access to copyright-protected works or subject matter, which in the Directive are known as “online content sharing service providers” (OCSSPs).² This new paradigm is the legal manifestation in the area of copyright of a broader concept of responsibility that is emerging elsewhere in EU law, as best exemplified by the mixed regime imposed on online platforms in the Digital Services Act (DSA),³ which combines liability rules with extensive and escalating due diligence obligations.⁴

Section 2 sets the baseline understanding for how EU copyright law has developed towards art. 17 CDSM Directive. It explains the legal framework of direct liability for copyright infringement under the right of communication

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 [2019] OJ L 130 (hereafter CDSM Directive).

² See art. 2(6) CDSM Directive.

³ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) (hereafter DSA).

⁴ On the DSA regime in general, see Martin Husovec and Irene Roche Laguna, ‘Digital Services Act: A Short Primer’ (2022), accessed 24 January 2025 at <<https://papers.ssrn.com/abstract=4153796>>; Folkert Wilman, ‘The Digital Services Act (DSA) - an Overview’ (2022), accessed 24 January 2025 at <<https://papers.ssrn.com/abstract=4304586>>.

to the public. The partial harmonisation of what intermediary liability entails and the exemption for providers of hosting services, as well as the prohibition of general monitoring obligations, are also discussed. Section 3 demonstrates how art. 17 CDSM Directive departs from the previous regime and translates into a new liability paradigm for copyright OCSSPs. Section 4 reflects on the implications of the new liability paradigm, including its consistency with the “enhanced responsibility” approach to platform regulation in the DSA, and the potential risks it poses to users’ fundamental rights. Section 5 concludes.

2. DEVELOPMENT OF EU COPYRIGHT LIABILITY

2.1 Background – How Did We Get Here?

Before diving into the new regime of OCSSPs, it is important to set the baseline legal framework from which art. 17 CDSM Directive departs. EU copyright law has been subject to a high level of harmonisation stemming from a large number of directives on copyright and related rights, the interpretation of which is determined by the case law of the CJEU. This copyright *acquis communautaire* often surpasses international minimum standards of protection. For our purposes, the most relevant instruments preceding the CDSM Directive are the 2001 InfoSoc Directive and the 2000 E-Commerce Directive (ECD).⁵ The latter, it should be noted, is now partly altered and replaced by the DSA.⁶

This section explains how the relevant provisions in these legislative instruments have been interpreted to impose liability on online platforms that host and provide access to copyright-protected content, and how such interpretation ultimately influenced art. 17 CDSM Directive.

⁵ See Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Information Society Directive, InfoSoc Directive) [2001] OJ L167 (hereafter InfoSoc Directive); 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 (E-Commerce Directive) [2000] OJ L171 (hereafter ECD). NB the ECD is not strictly part of the EU copyright *acquis*.

⁶ Article 89 DSA.

2.2 Conceptual Clarifications: Primary vs Secondary Liability and “Online Platforms”

To understand copyright liability for online platforms in EU law, it is first necessary to clarify certain concepts, which are crucial for the subsequent analysis. This section, therefore, offers a basic understanding of the concepts of primary and secondary liability as they relate to the legal status of whether online platforms are liable for copyright infringement.

The term primary liability, used here as a synonym for direct liability, refers to the legal consequence for the violation or infringement of statutorily defined exclusive rights (e.g. the right of communication to the public) as a primary wrongdoer.⁷ Traditionally, direct liability for copyright infringement is strict.⁸ As we shall see, however, the interpretation of EU copyright law by the CJEU has arguably changed that traditional approach for at least some of the acts covered by the right(s) of communication to the public in the online environment.

By contrast, secondary liability refers to situations where the scope of those rights is extended – usually through the operation of national tort laws – to capture the activity of other parties that are not the primary wrongdoers but have contributed to the violation or infringement.⁹ This concept relates to situations where someone participates in the copyright infringement of another. Some authors, like Angelopoulos, refer to this category in the context of copyright instead as “accessory” liability; while others, like Leistner, also use the term

⁷ Martin Husovec, ‘Remedies First, Liability Second: Or Why We Fail to Agree on Optimal Design of Intermediary Liability?’ in Giancarlo Frosio (Ed.) *The Oxford Handbook on Intermediary Liability* (OUP 2021), accessed 24 January 2025 at <<https://papers.ssrn.com/abstract=3829549>>.

⁸ Christina Angelopoulos, ‘Harmonising Intermediary Copyright Liability in the EU: A Summary’ in Giancarlo Frosio (Ed.) *The Oxford Handbook of Online Intermediary Liability* (Oxford University Press 2020), accessed 24 January 2025 at <<https://papers.ssrn.com/abstract=3685863>>.

⁹ Husovec, ‘Remedies First, Liability Second’ (n 8); Christina Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis* (Kluwer Law International 2016). See also Matthias Leistner, ‘Structural Aspects of Secondary (Provider) Liability in Europe’ (2014) 9 *Journal of Intellectual Property Law & Practice* 75. (“In many Member States, contributory liability is governed, on one hand, by the general principles of ‘joint tortfeasance’, ‘procurement’ or comparable heads of tortious liability and, on the other hand, by specific statutory provisions concerning contributory patent and trade mark infringement which establish specific rules on the liability of certain suppliers of technology and other indirect infringers”).

“contributory” liability.¹⁰ Whichever the preferred term, however, this type of liability typically incorporates a mental element in addition to a conduct element.¹¹ Such a mental element refers to a defendant’s “inner involvement in the infringement, i.e. whether they demonstrated the mindset of a culpable party”,¹² and includes consideration of the defendant’s intent or knowledge, the latter of which can be general or specific, actual or constructive.¹³ Relatedly, it is often the case that assessments of secondary liability by a provider depend on their compliance with reasonable or proportional duties of care to prevent direct infringements.¹⁴

EU copyright law has significantly harmonised exclusive rights and exceptions, and therefore primary or direct liability for copyright infringement. The situation is different regarding secondary or “accessory” liability, which is mostly the province of national laws, making it difficult to draw clear, common, and consistent rules governing online service providers in different Member States.¹⁵ Certain liability exemptions or “safe harbours” for providers of intermediary services were included in the ECD, which have mostly been replicated in the DSA.¹⁶ These include a safe harbour for hosting service providers and, therefore, online platforms, which is the focus of our analysis.

Moreover, some authors categorise specific regimes of intermediary injunctions (e.g. in art. 8(3) InfoSoc Directive) as a “third pillar” of liability, distinct from the previous ones but operating in parallel with them and helping to shape the contours of the liability regime for online platforms.¹⁷

¹⁰ Leistner, ‘Structural Aspects of Secondary (Provider) Liability in Europe’ (n 9). Note, however, the author’s nuanced characterisation of “secondary” liability as potentially including “actions on the basis of contributory infringement (including damages) and actions on the basis of secondary ‘interferer’ liability (limited to injunctions)”.

¹¹ Angelopoulos, ‘Harmonising Intermediary Copyright Liability in the EU’ (n 8).

¹² Christina Angelopoulos and João Pedro Quintais, ‘Fixing Copyright Reform: A Better Solution to Online Infringement’ (2019) 10 JIPITEC 147.

¹³ Angelopoulos and Quintais (n 12); Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis* (n 9).

¹⁴ See, e.g. Leistner, ‘Structural Aspects of Secondary (Provider) Liability in Europe’ (n 9).

¹⁵ Leistner, ‘Structural Aspects of Secondary (Provider) Liability in Europe’ (n 9); Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis* (n 9); Husovec, ‘Remedies First, Liability Second’ (n 7).

¹⁶ See Chapter II and art. 89 DSA.

¹⁷ The “third pillar” characterisation is made by Husovec, ‘Remedies First, Liability Second’ (n 7).

Finally, it is necessary to clarify what is meant by “online platform” in this chapter, and how that term relates to other types of service providers. Until the DSA, there was no EU law definition of the term. The ECD refers to different types of “service providers” of “information society services”,¹⁸ a term which is defined in the Technical Standards Directive.¹⁹ The ECD further stipulates three specific functions of information society service providers in the context of liability exemptions or “safe-harbours”, namely the provision of services related to: “mere conduit”, “caching”, and hosting.²⁰ The case law on intermediary liability discussed below in this section refers to these types of service providers.

The DSA largely takes up this scheme, with intermediary services defined as services of “mere conduit”, “caching”, and hosting.²¹ Hosting services are those that consist of the storage of information provided by, and at the request of, a recipient of the service. Furthermore, the DSA adds the category of “online platforms”, defined as providers of a hosting service that, at the request of a recipient of the service, stores and disseminates information to the public, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service.²² For our purposes, these are, in essence, user-upload or user-generated content platforms, which may host and provide access to copyright-protected content, such as YouTube, Facebook, or Instagram. OCSSPs pursuant to art. 17 CDSM Directive will also qualify as “online platforms” under the DSA, giving rise to additional regulatory complexity.²³

¹⁸ Riordan, for example, notes that the “information society service concept” is “a slightly narrower category than the field of internet services at large, but it remains a very broad genus, and may be wider than the class of persons who can be said to act as internet intermediaries”. See Jaani Riordan, *The Liability of Internet Intermediaries* (Oxford University Press 2016) 387. See the definitions in art. 2(a) and (b) ECD.

¹⁹ Article 2(a) ECD defines “information society services” as “services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC”. The current version of the Technical Standards Directive is Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015, laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (Technical Standards Directive).

²⁰ See arts 12–15 ECD.

²¹ See definitions in art. 3(g) DSA.

²² Article 3(i) DSA (with further specificity).

²³ João Pedro Quintais and Sebastian Felix Schwemer, ‘The Interplay between the Digital Services Act and Sector Regulation: How Special Is Copyright?’ (2022) 13 *European Journal of Risk Regulation* 191; João Pedro Quintais,

2.3 The Evolution of the Right of Communication to the Public

The InfoSoc Directive implements the WIPO Treaties into EU law and adapts them to the information society.²⁴ It recognises exclusive rights applicable to online use, namely reproduction and communication to the public (including making available), as well as number of exceptions or limitations to the same.²⁵ The case law of the CJEU traditionally interprets the exclusive rights broadly and the exceptions strictly, despite some occasional flexibility in case law.²⁶

Case law on the right of communication to the public in art. 3 InfoSoc Directive is particularly important in this context. The provision grants authors a broad right of communication to the public, including making available (art. 3.1), and holders of related rights a narrower right of making available (art. 3.2). The distinction is justified because the directive leaves intact specific rights of communication recognised for the holders of related rights elsewhere in the EU Copyright law *acquis*.²⁷

Christian Katzenbach, Sebastian Felix Schwemer, Daria Dergacheva, Thomas Riis, Péter Mezei, István Harkai and João Carlos Magalhães, 'Copyright Content Moderation in the European Union: State of the Art, Ways Forward and Policy Recommendations' (2024) 55 *IIC - International Review of Intellectual Property and Competition Law* 157–177. <<https://doi.org/10.1007/s40319-023-01409-5>>; Alexander Peukert, Martin Husovec, Martin Kretschmer, Péter Mezei and João Pedro Quintais, 'European Copyright Society – Comment on Copyright and the Digital Services Act Proposal' (2022) 53 *IIC - International Review of Intellectual Property and Competition Law* 358.

²⁴ Recitals 15, 19, 61 InfoSoc Directive.

²⁵ Articles 2–5 InfoSoc Directive.

²⁶ See e.g. João Pedro Quintais, *Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law* (Kluwer Law International 2017); Tito Rendas, *Exceptions in EU Copyright Law: In Search of a Balance Between Flexibility and Legal Certainty* | Wolters Kluwer Legal & Regulatory (Kluwer Law International 2021); Eleonora Rosati, *Copyright and the Court of Justice of the European Union* (Oxford University Press 2019). Recent flexibility can be identified, e.g. in the trilogy of Grand Chamber judgments in Case C-476/17 *Pelham and others* EU:C:2019:624; Case C-516/17 *Spiegel Online* EU:C:2019:625; Case C-469/17 *Funke Medien NRW* EU:C:2019:623. For an analysis of these cases, see e.g. Christophe Geiger and Elena Izyumenko, 'The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go!' (2020) 51 *IIC - International Review of Intellectual Property and Competition Law* 282.

²⁷ See art. 4 SatCab Directive and art. 8 Rental and Lending Rights Directive, which remain applicable by virtue of art. 1(2)(b) and (c) InfoSoc Directive.

The exclusive right applies to communication at a distance, covers online use, and is not subject to exhaustion.²⁸ The “making available” prong applies to interactive “on-demand” use (e.g. uploading) but does not require reception or access of the work by the public.²⁹

There is a vast body of CJEU case law interpreting different directives’ provisions on the right and concept of communication to the public, including its applicability online.³⁰ It is beyond the scope of this chapter to examine this case law in detail. However, it is important to highlight some of the main conclusions from these judgments, since they have a direct bearing on our analysis.

First, the right must be interpreted broadly.³¹ Second, “communication to the public” is an autonomous concept of EU law.³² Third, communication to the public involves different types of activities both offline and online. In the online context, the Court has confirmed that the exclusive right applies to myriad uses: the “live streaming” or broadcasting by a third party over the internet of signals from commercial television broadcasters (*ITV Broadcasting*); the provision of “clickable links” giving access to protected works (*Svensson*); the provision of framing links to protected works (*BestWater*); the direct broadcast

²⁸ Recital 25 InfoSoc Directive. See e.g. case C-135/10 *Società Consortile Fonografici (SCF) v Marco Del Corso (SCF)* EU:C:2011:431, para 59; case C-279/13 *C More Entertainment AB v Linus Sandberg (C More Entertainment)* EU:C:2015:199, para 26; case C-263/18 *Nederlands Uitgeversverbond en Groep Algemene Uitgevers tegen Tom Kabinet Internet BV e.a. (Tom Kabinet)* EU:C:2019:697.

²⁹ Article 3(3) and Recital 29 InfoSoc Directive. NB since the judgments in *Coditel I* and *II*, the CJEU has considered communication to the public to be a service and, therefore, not subject to exhaustion.

³⁰ See generally João Pedro Quintais, ‘Untangling the Hyperlinking Web: In Search of the Online Right of Communication to the Public’ (2018) 21 *The Journal of World Intellectual Property* 385; Eleonora Rosati, ‘When Does a Communication to the Public Under EU Copyright Law Need to Be to a “New Public”?’ (2020) 45(6) *European Law Review* 802–803, accessed 24 January 2025 at <<https://papers.ssrn.com/abstract=3640493>>.

³¹ See recital 23 InfoSoc Directive. See case C-607/11 *ITV Broadcasting Ltd v TVCatchUp Ltd (ITV Broadcasting)* EU:C:2013:147, para 20 (and case law cited therein); *OSA*, para. 23, case C-325/14 *SBS Belgium NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM)* EU:C:2015:764, para 14; case C-117/15 *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA)(Reha Training)* EU:C:2016:379, para 36.

³² Case C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA (Rafael Hoteles)* EU:C:2006:764, para 31.

of a sporting fixture on an internet site (*C More Entertainment*); the posting of hyperlinks to works on third-party websites without the rightholder's consent (*GS Media*); the sale of multimedia players with pre-installed add-ons that contain hyperlinks to websites making available works to the public without the consent of the rightholders (*Filmspelers*); the provision of an online peer-to-peer (p2p) platform that enables the sharing of protected files without the consent of rightholders (*Ziggo*); the embedding, by means of the technique of framing, in a third-party website page, of freely accessible protected content on another website, where that embedding circumvents technical protection measures (*VG Bild Kunst*); and the uploading by users of a p2p network of media files containing a protected work (*Mircom*).³³

Crucially, in 2021, the CJEU ruled that a video-sharing platform (YouTube) or a file-hosting and -sharing platform (Upload), "on which users can illegally make protected content available to the public, does not make a 'communication to the public' of that content, within the meaning of that provision, unless it contributes, beyond merely making that platform available, to giving access to such content to the public in breach of copyright".³⁴ This judgment is examined in greater detail below.³⁵

In any case, the Court's case law has significantly expanded the scope of the right of communication to the public, and as a result the scope of primary or direct liability for copyright infringement in EU law.³⁶ In doing so, the Court

³³ See case C-607/11 *ITV Broadcasting* EU:C:2013:147; case C-466/12 *Nils Svensson v Retriever Sverige AB (Svensson)* EU:C:2014:76; case C-348/13 *BestWater International GmbH v Michael Mebes and Stefan Potsch (BestWater)* EU:C:2014:2315; case C-279/13 *C More Entertainment* EU:C:2015:199; case C-160/15 *GS Media BV v Sanoma Media Netherlands BV and Others (GS Media)* EU:C:2016:221; case C-527/15 *Stichting BREIN v Jack Frederik Wullums (Filmspelers)* EU:C:2016:938; case C-610/15 *Stichting Brein v Ziggo (Ziggo)* EU:C:2017:99; case C-392/19 *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz (VG Bild Kunst)* EU:C:2020:696; case C-597/19 *Mircom International Content Management & Consulting (M.I.C.M.) Limited v Telenet BVBA (Mircom)* EU:C:2020:1063.

³⁴ CJEU 22 June 2021, Joined Cases C-682/18 and C-683/18 *Frank Peterson v Google LLC, YouTube Inc., YouTube LLC, Google Germany GmbH (C-682/18) and Elsevier Inc. v Cyando AG (C-683/18) (YouTube and Cyando)* EU:C:2020:586.

³⁵ See *infra* at Section 2.5.

³⁶ Giancarlo Frosio, 'It's All Linked: How Communication to the Public Affects Internet Architecture' (2020) 37 *Computer Law & Security Review* 105410; Matthias Leistner, 'European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?' (2020) 2 *Zeitschrift für Geistiges*

has engaged in a veritable legal jiu-jitsu, namely through the development of criteria and conditions to interpret art. 3 InfoSoc Directive. These can be summarised as follows.

A use infringes the exclusive right if it meets two cumulative conditions: it is first an act of communication and second, directed to the public. An “act of communication” in this sense has at least two sub-criteria. First, there must be an “indispensable role” of the user for that act to take place.³⁷ In addition, the intervention of that user must be deliberate. This means, for instance, that a “platform operator makes an ‘act of communication’ when it intervenes, in full knowledge of the consequences of its action, to give its customers access to a protected work, particularly where, in the absence of that intervention, those customers would not, in principle, be able to enjoy the broadcast work”.³⁸

That act is made “to the public” if it reaches an indeterminate and fairly large number of recipients as potential beneficiaries of the communication.³⁹ In addition, the public in question must either be a “new public” (i.e. a public not considered by the copyright holder when they authorised the initial communication) or a public reached through a separate or specific technical means.

In parallel to these cumulative conditions, the CJEU sometimes refers to the profit-making nature or purpose of the communication and other complementary and interdependent factors or sub-criteria, which are taken into consideration to varying degrees in order to make an individual assessment of the concept of communication to the public.⁴⁰

Most of the Court’s interpretative activity expanding the scope of this exclusive right takes place in the analysis of two separate criteria, pre-requisites or sub-factors: “deliberate intervention” and the “new public”. Under the shadow of these criteria, the Court has steadily included the consideration of elements of knowledge, commerciality, and technological restrictions in the assessment

Eigentum/Intellectual Property Journal (ZGE/IPJ) 123, accessed 24 January 2025 at <<https://papers.ssrn.com/abstract=3572040>>; Quintais, ‘Untangling the Hyperlinking Web’ (n 31).

³⁷ C-682/18 and C-683/18, *YouTube and Cyando*, paras 66–68.

³⁸ *YouTube and Cyando*, para 68 (citing *Stichting Brein* C-610/15 (14 June 2017) EU:C:2017:456, para 26 and the case law cited).

³⁹ On the definition of “public” in CJEU case law, see e.g. *YouTube and Cyando*, para 69.

⁴⁰ For a detailed analysis of the case law developing this conceptual framework, see Quintais, ‘Untangling the Hyperlinking Web’ (n 30). See also, incorporating later case law, Rosati, ‘When Does a Communication to the Public Under EU Copyright Law Need to Be to a “New Public”?’ (n 30).

of primary or direct liability.⁴¹ To be precise, after a steady stream of cases where the Court mostly developed in great minutiae the “new public” criterion (from *Svensson* to *VG Bild Kunst*), a separate strand of case law has taken aim at a refinement of the concept of “deliberate intervention” (*Mircom* and *YouTube and Cyando*).

In this context, it is important to emphasise an important development in the cases on “deliberate intervention”. In particular, the fact that mental elements are clearly imported into the assessment of the “act of communication” requirement of the concept of communication to the public – something that had only previously been done with any level of detail for the “new public” criterion. For instance, the CJEU in *Mircom* clarified the legal status of uploading in the context of a p2p network using the BitTorrent protocol, especially as regards the act of the uploading user. In essence, the CJEU states that if it is established (as a factual matter) by the national court that the user is aware of how the software works (i.e. that it automatically uploads pieces of files that have been downloaded by the user), and if the user has not actively turned off the “automatically upload” feature, then that user’s conduct can constitute an act of making available. In a departure from the AG’s Opinion in this case,⁴² the Court requires a mental element of knowledge when assessing the conduct of the user, i.e. that he or she acts “in full knowledge of the consequences of what he or she is doing”.⁴³ This shift is even more pronounced in *YouTube and Cyando*, as further explained below.

These judgments therefore solidify the Court’s gradual transformation of the exclusive right away from a traditional strict liability paradigm, incorporating elements that are more typical of the analysis of secondary or accessory

⁴¹ See e.g. Jane C. Ginsburg and Luke Budiardjo, ‘Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives’ (2018) 41 *Columbia Journal of Law & the Arts* 153; Angelopoulos and Quintais (n 12). On the consideration of technical protection measures as a precondition for the application of art. 3 in certain online scenarios, see *VG Bild Kunst*. For commentary on the latter case, see Sebastian Felix Schwemer, ‘Linking: Essential Functionality on the Internet and Never-Ending Story?’ in M. Rosenmeier (Ed.), *Festschrift til Jørgen Blomqvist* (Ex Tuto 2021), 623–640, accessed 24 January 2025 at <<https://papers.ssrn.com/abstract=3844548>>.

⁴² CJEU, 17 December 2020, Case C-597/19 *Mircom International Content Management & Consulting (M.I.C.M.) Limited v Telenet BVBA (Mircom)* EU:C:2020:1063, Opinion of Advocate General Szpunar, paras 54–61, suggested that actual knowledge of the consequences of the act of uploading by the user was not relevant since, in this situation such knowledge concerned not an intermediary service provider (as in the preceding case law) but end-users carrying out an initial and autonomous act of communication.

⁴³ C-597/19 *Mircom* para 49.

liability.⁴⁴ As a result, the Court has eroded the lines between primary and secondary liability in EU copyright law, especially as it regards the activities of online platforms hosting and providing access to copyright-protected content. Aside from the rhetoric surrounding the “value gap” – “the alleged mismatch between the value that online content-sharing platforms extract from creative content and the revenue returned to the copyright-holders”⁴⁵ – it is this legal development that is at the heart of the call for new legal rules for online platforms, which were eventually adopted in art. 17 CDSM Directive.

Still, to properly understand this development, we must first briefly examine two other pieces of the legal puzzle in EU copyright law, namely the rules on intermediary injunctions in the InfoSoc Directive and the liability exemption for hosting service providers in the ECD, now transplanted to the DSA. These are briefly discussed in the following subsection.

2.4 Injunctions against Intermediaries and Liability Exemptions

An additional piece of the legal puzzle is the InfoSoc Directive’s provisions on sanctions and remedies, and in particular, the rule in art. 8(3) obligating Member States to ensure that rightsholders can apply for injunctions against intermediaries whose services are used by a third party to infringe copyright, even if the intermediary is not itself directly liable for infringement (and, thus, for damages under art. 8(1) and (2)).⁴⁶ Husovec calls this regime a “third pillar of liability”, consisting of “injunctions against innocent third parties, [...] innocent intermediaries”.⁴⁷ He considers it a separate regime from primary and secondary liability because, in essence, these injunctions do not impose obligations on intermediaries to refrain from wrongdoing themselves, but rather to prevent activity by wrongdoers using their services. That is to say, intermediaries are held “accountable (for help), but not [necessarily] liable”.⁴⁸

⁴⁴ Angelopoulos, ‘Harmonising Intermediary Copyright Liability in the EU’ (n 8).

⁴⁵ Angelopoulos and Quintais (n 12).

⁴⁶ NB art. 8(3) InfoSoc Directive remains applicable despite the existence of a provision on injunctions in Article 11 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (Enforcement Directive) [2004] OJ L157 (hereafter Enforcement Directive). Despite the Enforcement Directive generally regulating interlocutory injunctions against intermediaries, the regulation of such injunctions for copyright infringement is dealt with by art. 8(3) InfoSoc Directive.

⁴⁷ Husovec, ‘Remedies First, Liability Second’ (n 7).

⁴⁸ Husovec, ‘Remedies First, Liability Second’ (n 7); Martin Husovec, *Injunctions against Intermediaries in the European Union: Accountable but Not*

However, this regime operates in tandem with the attribution of primary and secondary liability in copyright infringement scenarios.⁴⁹ As Angelopoulos notes, a bifurcation of regimes for attributing liability for intermediaries “occurs along the lines of intermediary culpability: injunctions may be issued against any intermediary, but substantive liability (i.e. for all other available remedies) requires active involvement that results in knowledge or control”.⁵⁰

As such, the regime for intermediary injunctions in art. 8(3) InfoSoc Directive plays an important role in understanding the scope of liability for intermediary service providers in general, and online platforms in particular. This role has been particularly significant in articulating the liability exemptions for intermediaries in the ECD. Although it is up to national law to determine the scope of and the procedures to seek intermediary injunctions, the Court has clarified that this margin of discretion is limited by the operation of fundamental rights recognised in the EU Charter. Such an injunction must strike a fair balance between conflicting fundamental rights: to copyright as property, on the one hand (art. 17(2) EU Charter), and to the protection of personal data and privacy of internet users, their freedom to receive and impart information, and intermediary service providers’ freedom to conduct a business (respectively, arts 7, 8, 11, and 16 EU Charter).⁵¹

A second piece of the legal puzzle refers to the ECD’s rules on intermediary liability.⁵² There is no comprehensive harmonisation of secondary liability in EU law. The ECD contains conditional liability exemptions, or “safe harbours” against claims for damages, for certain types of intermediary services: mere conduit (or access), caching, and hosting.⁵³ The directive further contains a prohibition on Member States against imposing general monitoring obligations on intermediary service providers.⁵⁴ Under this regime, intermediaries may still be required to take measures against the infringement of copyright,

Liabie? (Cambridge University Press 2017).

⁴⁹ See Leistner, ‘Structural Aspects of Secondary (Provider) Liability in Europe’ (n 9).

⁵⁰ Angelopoulos, ‘Harmonising Intermediary Copyright Liability in the EU’ (n 8).

⁵¹ Charter of Fundamental Rights of the European Union, art. 52, [2000] OJ C364 1, 21 (EC) (hereinafter Charter). On the CJEU case law on fair balancing in the copyright field, see e.g. Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis* (n 8); Husovec, *Injunctions against Intermediaries in the European Union* (n 48).

⁵² See, generally, Riordan (n 18).

⁵³ Articles 12–14 ECD.

⁵⁴ Article 15 ECD.

since it remains possible to subject intermediaries to injunctions (e.g. under art. 8(3) InfoSoc Directive) and duties of care.⁵⁵

The interpretation of this constellation of provisions is incredibly complex and far from settled.⁵⁶ The most relevant CJEU case law for online platforms – as types of hosting service providers – relates to art. 14 ECD. In that regard, the Court has applied art. 14 to a search engine’s advertising service (*Google France/Louis Vuitton*), an online sales platform (*L’Oréal/eBay*), and social networking platforms (*Netlog*; *Glawischnig-Piesczek*).⁵⁷ The Court has also refused to apply the liability exemption in art. 14 to a newspaper publishing company that operates a website on which the online version of a newspaper is posted.⁵⁸ While the teachings of these cases are important to draw the contours of the Court’s approach to the liability of online platforms, this must be done with caution. Only one of these judgments is on copyright law (*Netlog*), with the remaining focusing on trademark infringement in online settings (*Google France/Louis Vuitton*; *L’Oréal/eBay*) and defamation via a post on a social media network (*Glawischnig-Piesczek*). Therefore, as with the Court’s case law on the safe harbour for “mere conduit” services,⁵⁹ the applicability to online platforms that host and provide access to copyright-protected content is not “one to one”. Nevertheless, this line of cases provides useful guidance also for copyright purposes.

The CJEU has noted that safe harbours require a sufficient degree of “neutrality” from the intermediary. This approach creates a grey area for the

⁵⁵ See arts 13(2), 14(3), 18 ECD.

⁵⁶ See e.g. Christina Angelopoulos and Martin Senftleben, ‘An Endless Odyssey? Content Moderation Without General Content Monitoring Obligations’ (IViR; CIPIL 2021), accessed 24 January 2025 at <<https://papers.ssrn.com/abstract=3871916>>.

⁵⁷ See joined cases C-236/08, C-237/08 and C-238/08 *Google France SARL v Louis Vuitton Malletier SA* [2010] E.C.R. I-2417; case C-324/09 *L’Oréal SA v eBay International AG* [2011] E.C.R. I-6011; case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA v Netlog NV* EU:C:2012:85; case C-18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited* EU:C:2019:821.

⁵⁸ Case C-291/13 *Sotiris Papasavvas v O Fileleftheros Dimosia Etaireia Ltd and Others* EU:C:2014:2209.

⁵⁹ See e.g.: case C-70/10, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* EU:C:2011:771, on the interpretation of art. 12 ECD (“mere conduit”) and the admissibility of filtering measures to prevent copyright infringement through peer-to-peer file sharing; case C-484/14 *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH* EU:C:2016:689, also on art. 12 ECD but focusing on the liability of a provider of a commercial wireless local area network (WLAN) for copyright infringement of users of their services.

qualification of certain online platforms as “neutral” or “passive” vs “active” intermediaries for the purposes of the hosting safe harbour.⁶⁰

The approach finds its legal basis in Recital 42 of the ECD, according to which the directive’s safe harbours are applicable only if the provider’s activities are of “a mere technical, automatic and passive nature”. For instance, in *Google France/Louis Vuitton*, this meant that a platform should play a “neutral” role regarding the data it stores to enjoy safe harbour protection.⁶¹ When a provider plays “an active role of such a kind as to give it knowledge of, or control over, the data stored”, it falls outside of the scope of the safe harbour.⁶²

The distinction between “active” and “passive” roles in this context is unclear. The CJEU has provided some guidance in this respect. Thus, in *L’Oréal/eBay*, the Court stated that if the online sales platform eBay assists users in “optimising the presentation of the offers for sale in question or promoting those offers”, it does not merely play a neutral role but must be considered an active service provider.⁶³ However, the mere fact that eBay “sets the terms of its service, is remunerated for that service and provides general information to its customers” does not mean it plays an active role.⁶⁴ By contrast, in *Google France/Louis Vuitton*, the role played by a service provider in the drafting of a commercial message which accompanies an advertising link or in the establishment or selection of keywords was considered relevant in determining whether the provider is active or passive.⁶⁵

A further aspect of the legal framework is controversial. Article 15 ECD (supported by Recital 47) requires that a distinction be made between “general” monitoring obligations and obligations to monitor in “specific” cases. Whereas the former would be prohibited, the latter would be permitted. In *L’Oréal/eBay*, the CJEU found that “active monitoring of all the data of each of a [service provider’s] customers in order to prevent any future infringement of intellectual property rights” is not allowed under art. 15.⁶⁶ In line with *L’Oréal/eBay*, the CJEU found in *Scarlet Extended* and *Netlog* that requiring

⁶⁰ See generally J. van Hoboken, J.P. Quintais, J. Poort and N. van Eijk, *Hosting Intermediary Services and Illegal Content Online: An Analysis of the Scope of Article 14 ECD in Light of Developments in the Online Service Landscape* (Brussels: European Commission 2018), accessed 24 January 2025 at <<https://dare.uva.nl/search?identifier=db3fa078-e225-4336-95ec-5d6f25731799>>.

⁶¹ C-236/08, C-237/08 & C-238/08 *Google France/Louis Vuitton*, para 114.

⁶² C-236/08, C-237/08 & C-238/08 *Google France/Louis Vuitton*, para 120.

⁶³ C-324/09 *L’Oréal/Ebay*, para 116.

⁶⁴ C-324/09 *L’Oréal/Ebay*, para 115. See also C-236/08, C-237/08 & C-238/08 *Google France/Louis Vuitton*, para 116.

⁶⁵ C-236/08, C-237/08 & C-238/08 *Google France/Louis Vuitton*, para 118.

⁶⁶ C-324/09 *L’Oréal/Ebay*, para 139.

a platform to actively monitor “almost all the data relating to all of its service users in order to prevent any future infringement of intellectual-property rights” is also prohibited under art. 15.⁶⁷

But in the latter case of *Glawischnig-Piesczek*, which concerns not copyright but defamation, the Court took a different approach. In this judgment, the Court accepts that a hosting service provider may monitor all or most of the information uploaded by users if there is a court order identifying a “specific” illegality. Furthermore, the content at issue must be identical or “equivalent” to the content of information which was previously declared to be unlawful. The CJEU, however, identified a number of constraints on such monitoring, namely that it is: (1) “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 (2) “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”.⁶⁸ This suggests, for instance, that such a specific injunction must be carefully delimited and tailored, as it is also susceptible to being implemented via automated means by the provider (i.e. without a “human in the loop” making the decision).⁶⁹

It is not clear whether and to what extent the reasoning in *Glawischnig-Piesczek* applies to copyright law as well, especially given the differences in assessment of defamation via a short textual post on a social media network vs audio-visual material on a video-sharing platform.⁷⁰ Furthermore, considering all the above case law, it also remains unclear – in the framework of the ECD (and now the DSA) – precisely what type of “specific” (as opposed to

⁶⁷ C-360/10 *Netlog*, para 38. See also C-70/10, *Scarlet Extended*, para 40.

⁶⁸ Case C-18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited* EU:C:2019:821 (operative part).

⁶⁹ For a comment on this case, see Clara Rauchegger and Aleksandra Kuczerawy, ‘Injunctions to Remove Illegal Online Content under the eCommerce Directive: *Glawischnig-Piesczek*’ (2020) 57(5) *Common Market Law Review* 1495–1526, accessed 24 January 2025 at <<https://klwerlawonline.com/journal-article/Common+Market+Law+Review/57.5/COLA2020745>>.

⁷⁰ In this respect, see Marcella Favale, ‘Robots as the New Judges: Copyright, Hate Speech, and Platforms’ [2021] CIPPM / Jean Monnet Working Papers 1. The author concludes that “it is not legally viable to implement the same norms on such different areas of law [copyright infringement vs hate speech/defamation] as the consequences of these norms’ infringements are incomparable.”

“general”) monitoring duties may be lawfully imposed on providers to prevent infringement, namely in what concerns proactive measures like filtering.⁷¹

The *YouTube and Cyando* ruling has not fully elucidated this point. As noted by Angelopoulos,⁷² the Court restates pre-*Glawischnig-Piesczek* case law when it concludes that: “measures that consist in requiring a service provider to introduce, exclusively at its own expense, a screening system which entails general and permanent monitoring in order to prevent any future infringement of intellectual property rights [is] incompatible with Article 15(1) of the Directive on Electronic Commerce”.⁷³ On this basis, the Court concludes that German law may condition the obtaining of an injunction under the national version of art. 8(3) InfoSoc Directive to the requirements that: (1) rightsholders notify a host service provider of infringements on their platform; and (2) the intermediary fails to intervene expeditiously in order to remove and/or block access to the content in question, and to ensure that such infringements do not recur.⁷⁴ Importantly, the Court does not rely on *Glawischnig-Piesczek* for its interpretation or conclusion on the prohibition of general monitoring obligations, leaving the matter to be clarified in future cases.⁷⁵

⁷¹ Contrast e.g. Jan Bernd Nordemann, ‘The Functioning of the Internal Market for Digital Services: Responsibilities and Duties of Care of Providers of Digital Services’ (European Parliamentary IMCO Committee 2020), accessed 24 January 2025 at <[https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2020\)648802](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2020)648802)>, with Christina Angelopoulos, ‘Study on Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market’ (Greens/EFA Group 2017) Report, accessed 24 January 2025 at <<https://www.repository.cam.ac.uk/handle/1810/275826>>.

⁷² Christina Angelopoulos, ‘YouTube and Cyando, Injunctions against Intermediaries and General Monitoring Obligations: Any Movement?’ (*Kluwer Copyright Blog*, 9 August 2021), accessed 24 January 2025 at <<http://copyright-blog.kluweriplaw.com/2021/08/09/youtube-and-cyando-injunctions-against-intermediaries-and-general-monitoring-obligations-any-movement/>>.

⁷³ C-682/18 and C-683/18 *YouTube and Cyando*, para 135.

⁷⁴ C-682/18 and C-683/18 *YouTube and Cyando*, operative part. The Court further concludes that this law strikes a fair balance between the competing fundamental rights provided the conditions at issue do “not result in the actual cessation of the infringement being delayed in such a way as to cause disproportionate damage to the rightholder”, which is for the national court to determine.

⁷⁵ But see case C-401/19 *Poland v Parliament and Council*, Opinion of Advocate General Saugmandsgaard Øe delivered on 15 July 2021, EU:C:2021:613 (hereafter AG’s Opinion C-401/19, *Poland*), paras 111–[115], arguing that the standard for general monitoring obligations for copyright cases has indeed been changed in the wake of *Glawischnig-Piesczek*.

Article 17 CDSM Directive targets this uncertainty, namely by incentivising – within certain boundaries – proactive preventive measures to curtail copyright infringement. However, the new regime does not necessarily add clarity to this difficult question.

2.5 Direct Liability and Liability Exemptions at a Crossroad⁷⁶

The analysis thus far shows a trend toward expanding direct liability for communicating works to the public to cover players other than those that are the source or origin of the act of communication. This is often done through the introduction of a multi-factor analysis comprising mental elements (knowledge and intent) and duties of care. This expansion has taken place in the shadow of the horizontal rules on the ECD's safe harbours and their interpretation by the Court, in a dialectic relationship between the sector-specific (InfoSoc Directive) and horizontal (ECD) rules as they apply to online platforms hosting and providing access to copyright-protected content.

The expansion of the scope of art. 3 InfoSoc Directive has stopped short of clearly extending direct liability to mainstream hosting platforms, such as those covered by the new regime as OCSSPs.⁷⁷ This conclusion is clear from the multiple judgments that qualify them as hosting service providers under art. 14 ECD, and it appears unequivocal after the Court's judgment in *YouTube and Cyando* and the AG's Opinion in Case C-401/19.

The judgment in joined cases *YouTube and Cyando* is particularly relevant for our analysis. The first case concerned the video-sharing platform operated by YouTube and takedown and staydown requests of phonograms uploaded by its users. The second case involved a file-hosting and -sharing platform (Uploaded) operated by Cyando, and concerned files uploaded by users and hosted on Uploaded and accessible to the public via links in third-party websites (link collections, blogs, forums), some of which contained unauthorised copies of works. This complex judgment involved the joint interpretation of arts 3(1) and 8(3) InfoSoc Directive (regarding direct liability for communication to the public and injunctions, respectively), art. 14 ECD (regarding indirect liability and hosting safe harbours), and arts 11 and 13 Enforcement Directive (concerning damages). As the Court was careful to note, this judgment did not

⁷⁶ This section partly relies on the previous work of the authors, namely João Quintais and Christina Angelopoulos, 'YouTube and Cyando, Joined Cases C-682/18 and C-683/18 (22 June 2021): Case Comment' [2022] *Auteursrecht* 46.

⁷⁷ Martin Husovec and João Pedro Quintais, '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' (2021) 70 *GRUR International* 325.

concern the interpretation of art. 17 CDSM Directive,⁷⁸ even if this new provision will from the moment it comes into force govern the liability of at least some of the providers covered in the judgment, such as YouTube.

For our purposes here, the key question is whether *YouTube and Cyando* leads to an identical liability regime (under the InfoSoc and ECD) as that of art. 17 CDSM Directive. The answer is that it does not. In essence, the Court rules that providers such as YouTube and Uploaded are, in principle, not directly liable for copyright infringements resulting from uploads by their users. The crux of the analysis is found in the “act of communication” requirement, and in particular the “deliberate intervention” criterion. The Court states that end-users make the (primary) act of communication; the platform plays an “indispensable” but not necessarily a “deliberate” role. To assess whether there is a “deliberate intervention”, the Court develops a multi-factor test.⁷⁹

For instance, there is a deliberate intervention if the platform operator, despite general or constructive knowledge of illegal content available via its platform, refrains from putting in place the appropriate technological measures that can be expected from a reasonably diligent operator in its situation to credibly and effectively counter such infringements. It is also relevant whether such an operator: (1) participates in selecting protected content illegally communicated to the public and provides tools on its platform specifically intended for the illegal sharing of such content; or, alternatively, (2) knowingly promotes such sharing, which may be attested by the fact that it has adopted a financial model that encourages users to illegally make available infringing content on its platform.⁸⁰

The Court further notes that for the purposes of finding a “deliberate intervention” it is not enough to establish that the provider has “general knowledge” of illegal content on its platform or that it has a profit-making nature.⁸¹ The latter point is important, as the Court sets aside the application of the *GS Media* rebuttable presumption of knowledge to this effect.⁸² On the other hand, the Court also states that “actual knowledge” via a sufficiently substantiated notice, followed by the lack of appropriate (i.e. not expeditious) action by the platform provider, is sufficient to establish a “deliberate intervention”. In this

⁷⁸ C-682/18 and C-683/18 *YouTube and Cyando*, para 59.

⁷⁹ C-682/18 and C-683/18 *YouTube and Cyando*, paras 84ff.

⁸⁰ C-682/18 and C-683/18 *YouTube and Cyando*, para 84.

⁸¹ C-682/18 and C-683/18 *YouTube and Cyando* paras 85ff.

⁸² C-682/18 and C-683/18 *YouTube and Cyando* para 89. On the role of knowledge in the Court’s case law on communication to the public, see C. Angelopoulos, “Primary and Accessory Liability in EU Copyright Law” in E. Rosati (Ed.) *The Routledge Handbook of European Copyright Law* (Routledge 2021).

way, the Court attempts to align its assessment of direct liability with its prior considerations on the “active” role of intermediaries under art. 14 ECD.⁸³

In the end, it is up to the national court to assess the different factors to establish whether a platform operator carries out a deliberate intervention leading to direct liability. Still, the CJEU does offer some clarification in relation to the facts referred, suggesting that neither YouTube nor Cyando appear to have made a contribution that leads to the qualification of their activities as making a “communication to the public”.⁸⁴ Both the underlying complexity in the assessment of direct vs intermediary liability under this regime, and the exclusion of direct liability for platform providers like YouTube contrast with art. 17 CDSM Directive. The result is a bifurcation of legal regimes for online platforms hosting copyright-protected content, translating into different rules for platforms that are qualified as OCSSPs and therefore subject to the rules of art. 17 CDSM Directive, and those platforms that do not qualify as OCSSP, and are instead subject to art. 3 InfoSoc Directive, as interpreted in *YouTube and Cyando*.⁸⁵

In any case, it is important to note that art. 17 CDSM Directive preceded the judgment in *YouTube and Cyando*. In light of then-existing case law, the new provision was demanded by rightsholders to effectuate a change in the existing legal landscape, forcing OCSSPs outside the scope of the hosting safe harbour and into licensing agreements with copyright holders under the threat of direct liability for their core activities.⁸⁶ Although there were arguments made that art. 17 was a mere clarification of existing law on what constitutes a communication to the public, based on the wording of recital 64 CDSM Directive,⁸⁷

⁸³ See considerations *supra* at Section 2.4.

⁸⁴ C-682/18 and C-683/18 *YouTube and Cyando* paras 90–102.

⁸⁵ For the legal definition of OCSSP, see art. 2(6) CDSM Directive and the interpretative guidelines provided by the European Commission in Communication from the Commission to the European Parliament and the Council, Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market, COM/2021/288 final (EC Guidance art. 17).

⁸⁶ Husovec and Quintais (n 77) (and references cited therein).

⁸⁷ Jan Bernd Nordemann and Julian Wiblinger, ‘Art. 17 DSM-RL – Spannungsverhältnis Zum Bisherigen Recht?’ [2020] GRUR 569; Jan Bernd Nordemann and Julian Wiblinger, ‘Art. 17 DSMCD: A Class of Its Own? How to Implement Art. 17 into the Existing National Copyright Acts, Including a Comment on the Recent German Discussion Draft - Part 2’ (*Kluwer Copyright Blog*, 17 July 2020), accessed 24 January 2025 at <<http://copyrightblog.kluweriplaw.com/2020/07/17/art-17-dsmcd-a-class-of-its-own-how-to-implement-art-17-into-the-existing-national-copyright-acts-including-a-comment-on-the-recent-german-discussion-draft-part-2/>>; Eleonora Rosati, ‘The Legal Nature of Article 17 of the Copyright DSM Directive, the (Lack of) Freedom of Member States,

such an interpretation should be rejected in light of the ruling in *YouTube and Cyando*. In this line, the different legal nature of the right of communication to the public in art. 17 CDSM Directive is recognised by the European Commission in its Guidance, where it qualifies art. 17 CDSM as *lex specialis* to art. 3 InfoSoc Directive.⁸⁸

Finally, it is unclear if and how the regimes will translate in practice into significantly different legal content moderation obligations for major OCSSPs, such as YouTube. On the one hand, it can be argued that a platform such as YouTube, which has in place a sophisticated content moderation apparatus, comprising a suite of automated tools to prevent copyright infringement (e.g. ContentID, Copyright Match Tool, and Web Form),⁸⁹ will have to make few changes to its practices across the EU in order to comply with the obligations in art. 17 CDSM Directive.⁹⁰ On the other hand, it is likely that the new regime in art. 17 will force platforms like YouTube to change their licensing practices (due to their default direct liability status and best efforts obligations) and, at least partly, the operation of their copyright content moderation systems. This is mostly due to the necessity to customise these systems to different national implementations of the new rules.⁹¹ Perhaps the most well-known example of this is the German implementation law (UrhDaG), which changes the status quo by generally prohibiting the filtering of “presumably allowed” content, a category including partial uses, “marginal use” and uploaded content flagged by the user as non-infringing.⁹²

and Why the German Implementation Proposal Is Not Compatible with EU Law’ (*The IPKat*), accessed 24 January 2025 at <<http://ipkitten.blogspot.com/2020/08/the-legal-nature-of-article-17-of.html>>.

⁸⁸ EC Guidance art. 17 (n 85), p. 2. For a detailed analysis of the legal qualification of the right in art. 17 CDSM Directive, see Husovec and Quintais (n 77).

⁸⁹ For an overview of YouTube’s copyright practices, see YouTube Copyright Transparency Report (6 December 2021), accessed 24 January 2025 at <<https://blog.youtube/news-and-events/access-all-balanced-ecosystem-and-powerful-tools/>>.

⁹⁰ See e.g. D.J.G. Visser, ‘YouTube & Cyando Auteursrecht En Platformaansprakelijkheid (Annotatie)’ [2021] *Ars Aequi* 1022.

⁹¹ For an overview of different national implementations of art. 17 CDSM Directive and their implications, see Christina Angelopoulos, ‘Articles 15 & 17 of the Directive on Copyright in the Digital Single Market Comparative National Implementation Report’ (Coalition for Creativity (C4C); CIPIL 2022), accessed 24 January 2025 at <<https://informationlabs.org/copyright/>>.

⁹² Sections 10 and 11 UrhDaG. This regime contains a partial exemption for content flagged under certain conditions by “trusted rights holders”. On the German implementation of art. 17, see e.g. Jasmin Brieske and Alexander Peukert, ‘Coming into Force, Not Coming into Effect? The Impact of the German Implementation of Art. 17 CDSM Directive on Selected Online Platforms’

3. THE NEW LIABILITY PARADIGM

3.1 Guidance to Interpretation of Article 17 CDSM Directive

Article 17 CDSM Directive has already given rise to a substantial body of scholarship in Europe.⁹³ The purpose of the following analysis is to focus on

(CREATE 2022) CREATE Working Paper 2022/1, accessed 24 January 2025 at <<https://zenodo.org/record/5865619>>; Matthias Leistner, 'The Implementation of Art. 17 DSM-Directive in Germany – A Primer with Some Comparative Remarks' [2022] GRUR International, accessed 24 January 2025 at <<https://papers.ssrn.com/abstract=3989726>>.

⁹³ See e.g. Leistner, 'European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive' (n 36); Axel Metzger and others, 'Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law – Comment of the European Copyright Society' (European Copyright Society 2020) European Copyright Society Opinion ID 3589323, accessed 24 January 2025 at <<https://papers.ssrn.com/abstract=3589323>>; Sebastian Felix Schwemer, 'Article 17 at the Intersection of EU Copyright Law and Platform Regulation' (2020) 3/2020 *Nordic Intellectual Property Law Review* 400, accessed 24 January 2025 at <<https://papers.ssrn.com/abstract=3627446>>; Thomas Spoerri, 'On Upload-Filters and Other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market' (2019) 10(2) JIPITEC, accessed 24 January 2025 at <<https://www.jipitec.eu/jipitec/article/view/253>>; Giancarlo Frosio, 'Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity' (2020) 51 *IIC - International Review of Intellectual Property and Competition Law* 709, accessed 24 January 2025 at <<https://doi.org/10.1007/s40319-020-00931-0>>; Maxime Lambrecht, 'Free Speech by Design – Algorithmic Protection of Exceptions and Limitations in the Copyright DSM Directive' (2020) 11(1) JIPITEC, accessed 24 January 2025 at <<https://www.jipitec.eu/jipitec/article/view/272>>; Gerald Spindler, 'The Liability System of Art. 17 DSM and National Implementation – Contravening Prohibition of General Monitoring Duties?' (2019) 10(3) JIPITEC 334; Krzysztof Garstka, 'Guiding the Blind Bloodhounds: How to Mitigate the Risks Art. 17 of Directive 2019/790 Poses to the Freedom of Expression' in Paul L.C. Torremans (Ed.) *Intellectual Property and Human Rights* (4th edn, Kluwer Law International 2019) <<https://papers.ssrn.com/abstract=3471791>> accessed 8 April 2020; Séverine Dusollier, 'The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition' (2020) 57 *Common Market Law Review* 979; Nordemann and Wiblinger (n 87); Husovec and Quintais (n 77); Martin Husovec and João Quintais, 'Too Small to Matter? On the Copyright Directive's Bias in Favour of Big Right-Holders' in Tuomas Mylly and Jonathan Griffiths (Eds) *Global Intellectual Property Protection and New Constitutionalism. Hedging*

key aspects of art. 17 regarding the shift in the liability paradigm for online platforms in EU copyright law operated by this provision. This shift can be explained at different levels, addressed sequentially in this section: the attribution of liability to a specific category of providers (Section 3.2); and the novel authorisation and liability exemption mechanisms (Section 3.3). As a preliminary remark, it is important to note that art. 17(10) tasks the European Commission with organising stakeholder dialogues to ensure the uniform application of the obligation of cooperation between OCSSPs and rightsholders, as well as to establish best practices regarding the appropriate industry standards of professional diligence. These stakeholder dialogues resulted in the publication of a European Commission Guidance on the interpretation of art. 17.⁹⁴ The Guidance was adopted as a Communication, and is therefore not binding.⁹⁵ At the time of writing, the Guidance does not seem to have a

Exclusive Rights (OUP 2021), accessed 24 January 2025 at <<https://papers.ssrn.com/abstract=3835930>>; Sebastian Schwemer and Jens Schovsbo, 'What Is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime' in Paul Torremans (Ed.) *Intellectual Property Law and Human Rights* (4th edn, Wolters Kluwer 2020); Leistner, 'The Implementation of Art. 17 DSM-Directive in Germany – A Primer with Some Comparative Remarks' (n 92); Christophe Geiger and Bernd Justin Jütte, 'Platform Liability Under Art. 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match' (2021) 70(6) *GRUR International* 517, accessed 24 January 2025 at <<https://academic.oup.com/grurint/advance-article-abstract/doi/10.1093/grurint/ikab037/6169057?redirectedFrom=fulltext>>; Karina Grisse, 'After the Storm—Examining the Final Version of Article 17 of the New Directive (EU) 2019/790' (2019) 14 *Journal of Intellectual Property Law & Practice* 887.

⁹⁴ For early analysis of the EC Guidance art. 17 CDSM Directive, see João Pedro Quintais, 'Commission's Guidance on Art. 17 CDSM Directive: The Authorisation Dimension' (*Kluwer Copyright Blog*, 10 June 2021), accessed 24 January 2025 at <<http://copyrightblog.kluweriplaw.com/2021/06/10/commissions-guidance-on-art-17-cdsm-directive-the-authorisation-dimension/>>; Julia Reda and Paul Keller, 'European Commission Back-Tracks on User Rights in Article 17 Guidance' (*Kluwer Copyright Blog*, 4 June 2021), accessed 24 January 2025 at <<http://copyrightblog.kluweriplaw.com/2021/06/04/european-commission-back-tracks-on-user-rights-in-article-17-guidance/>>; Christophe Geiger and Bernd Justin Jütte, 'Towards a Virtuous Legal Framework for Content Moderation by Digital Platforms in the EU? The Commission's Guidance on Article 17 CDSM Directive in the Light of the YouTube/Cyando Judgement and the AG's Opinion in C-401/19' (2021) 43(10) *European International Property Review* 625, accessed 24 January 2025 at <<https://papers.ssrn.com/abstract=3889049>>.

⁹⁵ See arts 288 and 290 of the Treaty on the Functioning of the European Union (TFEU).

significant impact on national transpositions of art. 17. Still, it is a useful document to assist in the interpretation of an undeniably complex provision.

3.2 Attributing Liability to Actors rather than (just) Activities or Functions

A finding of liability for copyright infringement under the previous regime required an assessment of the activities, functions, or services of a certain provider. The logic of art. 17 CDSM Directive is different. Article 17 applies to OCSSPs, i.e. providers of an information society service whose main purpose is to store and give the public access to a large amount of protected content by its users, as long as it organises and promotes that content for profit-making purposes. The definition also contains a number of exclusions aimed at services that are either not aimed primarily at giving access to copyright-protected content and/or are primarily not-for-profit.⁹⁶

While this concept is new to the copyright *acquis*, OCSSPs are not a wholly new category of service providers in a technological or business sense. Rather, this is a new legal category covering a type of provider of hosting services whose activities or functions were previously regulated in different legal instruments, such as the ECD, InfoSoc, and Enforcement Directives. However, the legal design of art. 17 constitutes a new development. Until now, EU copyright law did not attach copyright liability to a legally specified category of providers but rather on the basis of acts (communication to the public) and services or functions (hosting). Now, direct liability for communication to the public is attached primarily to the legal qualification of a provider as an OCSSP. As a consequence, an OCSSP is directly liable for the user content it hosts and makes available to the public independently of the consideration of mental elements like intent or knowledge. This marks a difference from the assessment of direct liability for equivalent platforms under the CJEU's interpretation of art. 3 InfoSoc Directive post-*YouTube and Cyando*.

For the analysis of this new legal category, it is instructive to critically look at the European Commission's Guidance, which dedicates a separate section to the topic.⁹⁷

First, the Guidance states that the concept of OCSSP is maximum harmonisation: Member States may not widen or reduce the scope of application of the definition in art. 2(6). Apparently clear on its face, the statement is problematic insofar as the Guidance itself is unclear about the actual scope of the concept.

⁹⁶ OCSSPs are defined in art. 2(6) CDSM Directive, with further guidance in recitals 62 and 63.

⁹⁷ Guidance art. 17 CDSM Directive (n 85) 3–5 (Section III).

The inherent incentive for Member States is for a verbatim transposition, which many have taken up. However, that would apparently be insufficient, since the Guidance states that Member States should transpose into their laws the elements in Recitals 61, 62, and 63. But since the elements in the recitals are to some extent open to interpretation, it remains unclear what exactly is the scope of the OCSSP definition, from which Member States cannot deviate. As an example, Recital 63 explicitly requires a case-by-case assessment of which providers qualify as an OCSSP.⁹⁸

To mitigate these concerns and add clarity for national legislators, the Guidance addresses each requirement of the OCSSP definition. First, on the requirement of the “main purpose” of the service provider, it states that that main purpose (or one of the main purposes) must mirror the chief or predominant function or role of the service provider. This assessment “should be technology and business model neutral in order to be future proof”.⁹⁹

Second, on the requirement that a service provider must store a “large amount” of protected content, Member States should “refrain from quantifying” that amount in national law due to the risk of fragmentation of national approaches. Consequently, this too must be assessed on a case-by-case basis, combining elements mentioned in Recital 63.¹⁰⁰

Third, the requirement that the service provider pursues a “profit-making purpose” when organising or promoting content is not satisfied solely because the provider is an economic operator or is a corporation. Profits must be connected to “organisation and promotion of the content uploaded by the users in a manner to attract a wider audience”, e.g. via advertisement next to uploaded content.¹⁰¹ In addition, certain activities are insufficient to qualify as for profit. These include receiving a fee from users to cover the operating costs of hosting their content or soliciting donations.¹⁰²

Finally, in an interesting legal twist in the European Commission’s interpretation, the Guidance states that if a provider offers multiple services, then there is a need for service-by-service analysis to assess whether it qualifies as an OCSSP.¹⁰³ With this statement, the Guidance attempts to walk a legal tightrope by trying to fit the logic of art. 2(6) CDSM Directive – focused on

⁹⁸ For prior criticism of the OCSSP definition, including whether and to what extent it should cover social media networks, see Dusollier (n 93); Metzger and others (n 93).

⁹⁹ Guidance art. 17 CDSM Directive (n 85) 4.

¹⁰⁰ Guidance art. 17 CDSM Directive (n 85) 5. NB it remains unclear if all the elements in the recital must be combined in the assessment.

¹⁰¹ Guidance art. 17 CDSM Directive (n 85) 5.

¹⁰² Guidance art. 17 CDSM Directive (n 85) 5.

¹⁰³ Guidance art. 17 CDSM Directive (n 85) 5.

defining a certain type of service provider to whom direct liability is attributed – with traditional liability analysis under copyright law, which focuses on acts, services, or functions by/of providers.

In fairness, the Guidance does a good job of aligning the new regime with the existing framework and CJEU case law on communication to the public. However, it cannot square the circle. Such an effort can at best approximate the regimes and improve their consistency. It cannot change the fact that arts 2(6) and 17 CDSM Directive mark a conceptual departure from previous law on how to attribute liability to a subset of online service providers. In short, in the new regime, if a provider is an OCSSP, then direct liability follows; in the old regime, if the act of a provider qualifies as a communication to the public, then direct liability follows. How a provider is qualified as an OCSSP depends *inter alia* on a number of open-ended factors; some of these may be similar to the factors developed by the Court to establish direct liability in the old regime. Still, the structural differences in the legal design of both are undeniable, and they translate into distinct approaches to the attribution of liability and attendant obligations on service providers.

3.3 The Authorisation and Liability Exemption Mechanisms

3.3.1 General framework of article 17 CDSM Directive

Article 17 states that OCSSPs carry out acts of communication to the public when they give access to protected content uploaded by their users. As a result, these providers become directly liable for their users' uploads. They are also expressly excluded in art. 17(3) from the hosting safe harbour for copyright-relevant acts under art. 14(1) ECD.¹⁰⁴

A complex set of rules to regulate OCSSPs, including a liability exemption mechanism and a number of mitigation measures and safeguards, is included in art. 17(4). The liability exemption mechanism comprises best efforts obligations for preventive measures, including those aimed at filtering content *ex ante*, notice and stay-down, and notice and takedown measures.¹⁰⁵

To counterbalance these measures, art. 17 sets out a number of mitigation measures and safeguards. First, a proportionality assessment and the identification of relevant factors are required for preventive measures.¹⁰⁶ Second, a special regime is introduced for small and new OCSSPs.¹⁰⁷ Third, a set of mandatory exceptions to protect user rights or freedoms.¹⁰⁸ Fourth, a clarification

¹⁰⁴ The corresponding provision in the DSA is art. 6.

¹⁰⁵ Article 17(4)(b) and (c) CDSM Directive.

¹⁰⁶ Article 17(5) CDSM Directive.

¹⁰⁷ Article 17(6) CDSM Directive.

¹⁰⁸ Article 17(7) CDSM Directive.

that art. 17 does not entail general monitoring, in line with art. 15 ECD.¹⁰⁹ Fifth, a set of procedural safeguards, including an in-platform complaint and redress mechanism and rules on out-of-court redress mechanisms.¹¹⁰

At least two core features of this regime operate a shift in the way in which EU copyright law attributes liability for the hosting and sharing of protected content on online platforms: the authorisation rules, including the related best efforts obligation (Section 3.3.2); and the liability exemption mechanism (Section 3.3.3).

3.3.2 The authorisation dimension and best efforts obligation

As the European Commission's Guidance recognises, art. 17 "creates a legal basis" for rightholders to authorise the use of their works when uploaded by users. It is therefore more than a "clarification" of the existing law, as it changes the pre-existing legal framework, namely vis-à-vis art. 3 InfoSoc Directive.¹¹¹

The scholarly debate surrounding the legal nature of art. 17 set forth different interpretations.¹¹² These can be categorised as follows: (i) art. 17 is fully encompassed in the minimum international standard; (ii) art. 17 is fully encompassed in the EU standard of art. 3 InfoSoc Directive, as interpreted by the CJEU; (iii) art. 17 introduces a special right; and (iv) art. 17 introduces a *sui generis* right.¹¹³ A special right would mean that although the scope of acts it covers is within the pre-existing scope of the right of communication to the public in art. 3 InfoSoc Directive, it follows a separate regime with its own particular rules. Conversely, a new (*sui generis*) right would mean that it amounts to a wholly new right of communication to the public, which extends the concept beyond the already broad EU notion of communication to the public in

¹⁰⁹ Article 17(8) CDSM Directive. See, on this topic, Angelopoulos and Senftleben (n 56).

¹¹⁰ Article 17(9) CDSM Directive.

¹¹¹ Guidance art. 17 CDSM Directive (n 85), 2. The point is clear from the statement that art. 17 is *lex specialis* to arts 3 InfoSoc Directive and 14 ECD.

¹¹² See e.g. the different views espoused by Husovec and Quintais (n 77); Nordemann and Wiblinger (n 87); Eleonora Rosati, 'The Legal Nature of Article 17 of the Copyright DSM Directive, the (Lack of) Freedom of Member States, and Why the German Implementation Proposal Is Not Compatible with EU Law' (*IPKat*, 31 August 2020), accessed 24 January 2025 at <<http://ipkitten.blogspot.com/2020/08/the-legal-nature-of-article-17-of.html>>; Leistner, 'European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive' (n 38).

¹¹³ Husovec and Quintais (n 77). Leaning towards Option (ii), see Nordemann and Wiblinger (n 87); Rosati, 'The Legal Nature of Article 17 of the Copyright DSM Directive, the (Lack of) Freedom of Member States, and Why the German Implementation Proposal Is Not Compatible with EU Law' (n 112).

art. 3 InfoSoc Directive as interpreted by the CJEU.¹¹⁴ In its Guidance, the European Commission endorses option (iii) by stating that art. 17 is *lex specialis*, and rejects other options, including that the provision introduces a new right.¹¹⁵

An important consequence of the *lex specialis* nature of art. 17 is that the provision requires specific implementation into national law. It is not possible for Member States to rely on the previous implementation of art. 3 InfoSoc Directive. In this regard, a key aspect of the legal regime is that OCSSPs provide access to content originating from user uploads. As a result, national laws must explicitly introduce “specific conditions” that reflect this composite nature of the act of communication.¹¹⁶ Building on the qualifications above, it is important to further explore the concept and scope of the authorisations mentioned in arts 17(1) and (2).

3.3.2.1 The authorisation in article 17(1)

Article 17(1) does not define “authorisation”. It is viewed as an open-ended concept. Member States can therefore provide for different authorisation models.¹¹⁷ In line with the Guidance, it is argued that the acts of communication/making available to the public in art. 17(1) include any necessary reproductions for those purposes.¹¹⁸ In other words, there is a functional merger between reproduction and communication to the public. As a result, no separate permission should be required for reproductions in this context.¹¹⁹

¹¹⁴ Husovec and Quintais (n 77) (endorsing Option (iii) or (iv)).

¹¹⁵ Guidance art. 17 CDSM Directive (n 85) 3.

¹¹⁶ Guidance art. 17 CDSM Directive (n 85) 3.

¹¹⁷ Guidance art. 17 CDSM Directive (n 85) 5–6. An interesting clarification in this respect is that the concept of authorisation does not require a remunerative counter-performance. Indeed, it is also acceptable that authorisation is given for free (e.g. as with Creative Commons licenses) for “data or promotional activities”. *Id.*, 6.

¹¹⁸ Guidance art. 17 CDSM Directive (n 85) 5–7. Relatedly, the Guidance states that it should be possible for rightholders to not grant authorisation to OCSSPs for acts of communication to the public under art. 17. See also Recital 61 CDSM Directive, making reference to contractual freedom.

¹¹⁹ Arguing that a similar conclusion could be drawn from some of the CJEU cases on communication to the public, namely Case C-161/17 *Renckhoff* EU:C:2018:634, is reasonable. On which, see Tatiana Synodinou, ‘The Renckhoff Judgment: The CJEU Swivels the Faces of the Copyright Rubik’s Cube (Part I)’ (*Kluwer Copyright Blog*, 27 September 2018), accessed 24 January 2025 at <<http://copyrightblog.kluweriplaw.com/2018/09/27/renckhoff-judgment-cjeu-swivels-faces-copyright-rubiks-cube-part/>>.

Several authorisation models are possible for the right in accordance with art. 17(1). First, individual and voluntary forms of collective licensing qualify, provided the requirements of the Collective Rights Management Directive¹²⁰ are met.¹²¹ Likewise, collective licensing with extended effect is an option provided the authorisation at issue meets the requirements of art. 12 CDSM Directive, as transposed into national law.¹²²

The question of whether mandatory collective licensing and statutory licensing are viable authorisation models is more controversial since they are not voluntary for rightsholders, or at the very least do not include an opt-out safeguard. This should be a possibility if it is accepted that the right in art. 17(1) is *lex specialis*, since this theoretically opens the door for non-voluntary and hybrid authorisation models, within certain limits, namely the *effet utile* of the provision.¹²³ The European Commission's Guidance is silent on this topic, seemingly not endorsing such an option.

3.3.2.2 The authorisation in article 17(2)

The objective of art. 17(2) is legal certainty for as many uploading users as possible. Authorisations obtained by OCSSPs shall also cover acts carried out by users of the services. The scope of the authorisation for these users extends to all their uploading acts that: 1) are for non-commercial purposes; or 2) generate non-significant revenues.

In defining these concepts, Member States are not to pre-set quantitative thresholds for “significant revenues”, which instead must be defined on a case-by-case basis.¹²⁴ One important clarification is that if the user has explicit authorisation to upload content, there is no need for additional authorisation

¹²⁰ Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

¹²¹ Guidance art. 17 CDSM Directive (n 85) 6–7. NB at least in the context of individual agreements, the Guidance encourages Member States to use, establish, or maintain voluntary mechanisms to facilitate agreements between rightsholders and OCSSPs, perhaps nodding at mechanisms similar to those envisaged in art. 13 CDSM Directive. See *id.*, 6. On the topic of authorisation models for the right in art. 17, see also Husovec and Quintais (n 77).

¹²² Guidance art. 17 CDSM Directive (n 85). See also on the validity of collective licensing with extended effect as an authorisation model in this area, Husovec and Quintais (n. 79); Leistner, ‘European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive’ (n. 37).

¹²³ For a detailed argument, see Husovec and Quintais (n 77).

¹²⁴ Guidance art. 17 CDSM Directive (n 85) 7.

to the OCSSP.¹²⁵ The subsequent availability of content is considered to be within the scope of the initial authorisation, and not a presumption in favour of OCSSPs.¹²⁶ In other words, art. 17(2) merges the acts of the OCSSP with the non-commercial acts of their users. Once an authorisation is granted, these acts cannot be split.¹²⁷ This is a clear distinction from the pre-existing regime, where acts of platforms and users were assessed separately, and could only under specific scenarios be considered functionally merged.

3.3.2.3 *Best efforts to obtain an authorisation*

Article 17(4) CDSM Directive encompasses a series of cumulative “best efforts” obligations to: (a) obtain an authorisation; (b) ensure unavailability of specific protected content; and (c) put in place notice and take down and notice and stay down mechanisms. This section focuses on obligation (a), which is novel compared to the regime of art. 3 InfoSoc Directive. Indeed, the obligation has a dual role: it qualifies the extent of the authorisation requirement for OCSSPs in art. 17(1); and constitutes the first cumulative condition for OCSSPs to qualify for the liability exemption in art. 17(4).¹²⁸

Three important clarifications on best efforts obligations are included in the European Commission’s Guidance. First, “best efforts” is considered an autonomous concept of EU law. Second, “best efforts” obligations are hierarchically inferior to the obligations of result in arts 17(7), (8), and (9). Third, the proportionality principle in art. 17(5) should “be considered” when assessing all best efforts obligations in art. 17(4). This latter consideration is particularly important to protect OCSSPs’ freedom to conduct a business under art. 16 EU Charter of Fundamental Rights.¹²⁹

¹²⁵ See Recital 69 CDSM Directive.

¹²⁶ Guidance art. 17 CDSM Directive (n 85) 7–8. However, the Guidance adds that it is up to rightsholders to expressly exclude subsequent uploading from the authorisation to end-users. To do so, the European Commission encourages sharing of information to prevent blocking of legitimate uses.

¹²⁷ See, for a detailed analysis of the consequences of this qualification, Husovec and Quintais (n 77).

¹²⁸ For analysis of this obligation prior to the publication of the European Commission’s Guidance, see Axel Metzger and others, ‘Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law – Comment of the European Copyright Society’ (European Copyright Society 2020) European Copyright Society Opinion, accessed 24 January 2025 at <<https://papers.ssrn.com/abstract=3589323>>; Leistner, ‘European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive’ (n 35).

¹²⁹ Guidance art. 17 CDSM Directive (n 85) 8.

According to the European Commission, the obligation of “best efforts” to obtain authorisation in art. 17(4)(a) requires a case-by-case analysis of the actions of OCSSPs to seek out and/or engage with rightholders. More concretely, a minimum threshold is that OCSSPs engage proactively with rightholders who can be easily identified and located, notably those with broad catalogues (e.g. CMOs). On the flipside, OCSSPs should not be expected to proactively seek out rightholders “not easily identifiable by any reasonable standard”.¹³⁰

The Guidance further notes that the obligations under art. 17(4)(a) should be asymmetric depending on the OCSSP. Larger OCSSPs (“with a big audience in several or all Member States”) must seek out a “high number of rightholders”, at least for the predominant content on their services. Smaller OCSSPs, i.e. with a limited or national audience, must seek at least CMOs and “possibly a few other easily identifiable rightholders”. Those small and new OCSSPs covered by art. 17(6) must also seek out licences, although the extent of their obligations should be assessed on a case-by-case basis with consideration for the principle of proportionality. In any case, smaller OCSSPs must provide contact details to potential licensees and engage with them if contacted.¹³¹

The Guidance states that rightholders’ refusals to negotiate or unreasonable refusals to license result in OCSSPs meeting their obligation to seek authorisation under art. 17(4)(a). However, it is up to OCSSPs to demonstrate this, which might be challenging in practice, at least in the context of individual licensing deals.¹³² A relevant exception is suggested for cases where a type of content is present but not common or prevalent on the platform. Here, OCSSPs do not need to proactively seek out licences but must still “engage” with rightholders that offer them.¹³³

One key criterion to assess compliance with the obligation in art. 17(4)(a) is that licensing terms “should be fair and keep a reasonable balance between both parties” and be subject to the payment of “appropriate remuneration”.¹³⁴

¹³⁰ Guidance art. 17 CDSM Directive (n 85). To facilitate this, the Guidance suggests that Member States may encourage the development of registries of rightholders to be consulted by OCSSPs, in compliance with data protection rules. *Id.* p. 9 On how the structure of Art. 17 favours big rightholders, see Husovec and Quintais (n 94).

¹³¹ Guidance art. 17 CDSM Directive (n 85) 9.

¹³² Guidance art. 17 CDSM Directive (n 85) 9–10.

¹³³ For criticism, see Quintais, ‘Commission’s Guidance on Art. 17 CDSM Directive’ (n 94).

¹³⁴ Guidance art. 17 CDSM Directive (n 85) 10. The Guidance takes this to mean, first, that “fair terms” are to be assessed on a case-by-case basis. In addition, a fair licensing deal means that OCSSP must be transparent about criteria

As a result, OCSSPs must accept to conclude licences that are “offered on fair terms” and maintain “a reasonable balance between the parties”. Whether art. 17(4)(a) in practice is a “best efforts” obligation or a more far-ranging obligation to license will depend on how “fair terms” and “reasonable balance” are ultimately defined, as applied to different OCSSPs and types of content.¹³⁵ In any case, the best efforts obligation as a linchpin for OCSSPs’ potential liability exemption translates into a crucial element in the legal design of the copyright liability regime for platforms.

3.3.3 Embedding an exemption mechanism in the scheme of primary liability

Assuming OCCSPs are able to demonstrate best efforts to obtain an authorisation, they must then comply with art. 17(4)(b) and (c) to benefit from a liability exemption. These obligations include preventive, proactive, and reactive measures.

Preventive or proactive measures are triggered when OCSSPs receive “relevant and necessary information” from rightsholders, upon which they must either carry out “best efforts to ensure the unavailability of specific works” (art. 17(4)(b)) or ensure that works already taken down do not resurface on the platform (art. 17(4)(c)). The first obligation provides an incentive for adopting *ex ante* filtering measures, or so-called “upload filters”. The second institutes a notice-and-staydown (NSD) regime, also labelled “re-upload filters”. Another measure foreseen in art. 17(4)(c) is reactive: OCSSPs must put in place a notice-and-takedown (NTD) system, pursuant to which they must act “expeditiously” to remove or disable access to content they host upon receiving a “sufficiently substantiated notice from the rightsholders”.¹³⁶ This regime mirrors art. 14 ECD.

used to identify and remunerate the use of works, including as regards the use of content recognition technology. See also Recital 61 CDSM Directive.

¹³⁵ Guidance art. 17 CDSM Directive (n 85) 10. The situation is clearer and perhaps less problematic for licences that are negotiated with CMOs, which must comply with the requirements of art. 16 of the Collective Rights Management Directive. Arguing that “[f]or that reason alone, it might be worth seriously exploring collective authorisation models for the right in art. 17”, see Quintais, ‘Commission’s Guidance on Art. 17 CDSM Directive’ (n 94).

¹³⁶ See Guidance art. 17 CDSM Directive (n 85) 14–16, suggesting that what constitutes a “sufficiently substantiated notice” in this respect should follow the European Commission Communication of 1 March 2018, accessed 24 January 2025 at <https://ec.europa.eu/digital-single-market/en/news/commission-recommendation-measures-effectively-tackle-illegal-content-online>, points 6–8.

Best efforts obligations must be interpreted in accordance with the principle of proportionality, considering the factors described in art. 17(5) CDSM Directive: the type, audience, and the size of the service; the type of protected content uploaded by their users; and the availability and cost of suitable and effective means. Furthermore, art. 17(6) partially exempts OCSSPs that are “new service providers with small turnover and audience”. Such OCSSPs must comply with mitigated obligations to benefit from the art. 17(4) liability exemption mechanism.¹³⁷

On preventive or proactive measures, the European Commission’s Guidance states that information is considered “relevant” if it is “accurate about the rights ownership of the particular work or subject matter in question”. The consideration of whether it is “necessary” is trickier, and it will vary based on the technical solutions deployed by OCSSPs. In any case, such information must allow for the effective application of the providers’ solutions, where they are used.¹³⁸

The Guidance offers some detail on how to implement preventive or proactive measures. Any measures deployed must follow “high industry standards of professional diligence”, to be assessed against “available industry practices on the market” at the time, including technological solutions. OCSSPs have flexibility only in choosing between available solutions, assuming such a choice exists on the market.¹³⁹ When discussing current market practices that emerged from the Stakeholder Dialogues, the Guidance highlights content recognition based on fingerprinting as the main example, although recognising that it is not the market standard for smaller OCSSPs.¹⁴⁰ Other technologies identified include hashing, watermarking, use of metadata, and keyword search, which can be used in combination.¹⁴¹ Such technologies are sometimes developed in-house (e.g. YouTube’s ContentID or Facebook’s Rights Manager), and other times acquired from third parties (e.g. from Audible Magic or Pex). Ultimately, whether an OCSSP complies with its best efforts obligations regarding proactive measures will depend on a multi-factor case-by-case assessment in light of art. 17 (5), (7), and (9). This includes the consideration of the asymmetric nature of the obligations (depending on the size and type of platform), the cost

¹³⁷ On the interpretation of art. 17(6), see Guidance art. 17 CDSM Directive (n 85) 16–17.

¹³⁸ Guidance art. 17 CDSM Directive (n. 85) 14 (providing examples related to “fingerprinting” and “metadata-based solutions”).

¹³⁹ Guidance art. 17 CDSM Directive (n 85) 12.

¹⁴⁰ Guidance art. 17 CDSM Directive (n 85) 12.

¹⁴¹ Guidance art. 17 CDSM Directive (n 85) 12–13.

assessment of available technological solutions, and the type of content hosted by the platform in relation to the measure deployed.¹⁴²

The CJEU in case C-401/19 recognised that, depending on the scale of the task (i.e. “on the number of files uploaded and the type of protected subject matter in question, and within the limits set out in Article 17(5)”), review of uploads by OCSSPs requires automatic recognition and filtering tools. In certain cases – and certainly for the largest platforms – automated content filtering is required to comply with the best efforts obligations in art. 17(4) CDSMD.¹⁴³ In other words, at least where it matters most, art. 17 requires “upload filters”.

This analysis of art. 17(4) explains how it stands apart from the pre-existing regime of copyright liability for online platforms under art. 3 InfoSoc Directive. One crucial difference is that the new regime embeds a multi-pronged liability exemption mechanism within the scheme of direct or primary liability for OCSSPs. This mechanism contains several original features: cumulative best-efforts requirements; a gateway requirement of best efforts to obtain an authorisation as a pre-condition for the exemption; clear preventive/proactive obligations to avoid the availability of notified content in the first place (*ex ante* filters), and to prevent its reappearance (NSD); reactive obligations in the form of an NTD scheme that is located within the assessment of direct liability as opposed to being part of an external liability exemption (such as was the case under art. 14 ECD); a clear identification of the proportionality principle and assessment factors for the best-efforts obligations; a mitigated regime for small and new OCSSPs; and explicit statutory requirements to comply with substantive and procedural safeguards in art. 17(7) and (9).¹⁴⁴ The “hybrid character” of art. 17 in general,¹⁴⁵ and of its liability exemption mechanism in particular,

¹⁴² Guidance art. 17 CDSMD Directive (n 85) 13–14.

¹⁴³ C-401/19 para 54. For commentary, see Martin Husovec, ‘Mandatory Filtering Does Not Always Violate Freedom of Expression: Important Lessons from Poland v. Council and European Parliament’ (2023) 60 *Common Market Law Review* 173; João Pedro Quintais and others, ‘Copyright Content Moderation in the EU: An Interdisciplinary Mapping Analysis’ (2022) reCreating Europe Report, accessed 24 January 2025 at <<https://papers.ssrn.com/abstract=4210278>>.

¹⁴⁴ On this point, the CJEU has recognised that the mandatory exceptions, coupled with the safeguards in para (9), are “user rights”, not just mere defences. See C-401/99, para 87. In scholarship, see Tito Rendas, ‘Are Copyright-Permitted Uses “Exceptions”, “Limitations” or “User Rights”? The Special Case of Article 17 CDSMD Directive’ (2022) 17 *Journal of Intellectual Property Law & Practice* 54; Quintais and others (n 23).

¹⁴⁵ Leistner repeatedly refers to the hybrid character of the provision. See Leistner, ‘European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive’ (n 36) 8, 23, 34.

highlights the turn of the EU legislator towards a new liability paradigm for copyright content-sharing platforms.

4. A NEW LIABILITY PARADIGM AND ASSOCIATED FUNDAMENTAL RIGHTS RISKS

Article 17 CDSM Directive introduces a new liability regime for OCSSPs. Under the pre-existing copyright law *acquis*, these platforms were subject to a complex web of provisions, which situated them somewhere between primary and secondary liability. Pursuant to the CJEU case law on the exclusive right of communication to the public in art. 3 InfoSoc Directive, good-faith platforms would in principle not be directly liable for uploaded content. Instead, they would benefit from the hosting liability exemption in art. 14 ECD (now art. 6 DSA), while being subject to NTD – and in some national laws specific filtering and NSD – obligations, injunctions under art. 8(3) InfoSoc Directive, and variable duties of care. As the Court's case law evolved, the determination of platforms' liability for content they host and provide access to also increasingly incorporated mental elements, such as intent and knowledge, in the context of multi-factor case-by-case assessments of activities.

The core argument of this chapter is that art. 17 CDSM Directive operates a shift in the liability paradigm for such platforms regarding copyright-protected content, rather than a mere clarification of existing law. This shift is visible at different levels. First, through the automatic attribution of direct liability to providers that meet the legal definition of OCSSP. Second, due to the *lex specialis* nature of art. 17, which is characterised by a novel authorisation regime for the acts it covers. This regime subordinates acts of reproduction to the primary act of communication to the public by the platform, while at the same time merging the non-commercial uploading acts of users with the platforms' making available of those uploads to the public. In addition, the provision introduces an obligation for OCSSPs to carry out best efforts to obtain an authorisation, which functions simultaneously as a boundary to the right of communication in art. 17(1) and (2), and a gateway requirement for OCSSPs to benefit from a liability exemption. Third, art. 17(4) embeds a multi-pronged liability exemption mechanism within the scheme of direct or primary liability for OCSSPs, comprising obligations of best efforts for OCSSPs to deploy preventive/proactive (filtering, NSD) and reactive (NTD) measures.

To be sure, there are similarities between the old and the new regime. In particular, the introduction by the CJEU of mental elements imported from intermediary liability into the analytical framework for the interpretation of art. 3 InfoSoc Directive (as in *GS Media to YouTube and Cyando*) might allow the Court sufficient flexibility to approximate both regimes. But the differences between them are structural. There is now a bifurcation of legal rules

for copyright platforms: those that qualify as OCSSPs are subject to the new liability regime of art. 17 CDSM Directive; those that do not are subject to the still-evolving interpretation of art. 3 InfoSoc Directive, under which many of them will not be directly liable for the user content they host and provide access to.

To an important extent, the new liability paradigm expressed is influenced and shaped by the development of the pre-existing *acquis* and case law. But it is also something more: the legal manifestation in the area of copyright of a broader concept of responsibility that is emerging elsewhere in EU law. In particular, it can be viewed as a legal concretisation in EU law of a fuzzier concept of – legal, societal, political, and even moral – “responsibility” of online platforms¹⁴⁶ pushed for by the European Commission since at least its “Tackling Illegal Content Online” policy agenda¹⁴⁷ that culminated in the DSA. This is not without consequences. As Frosio and Husovec noted prior to the DSA, the new focus on “enhanced responsibility” at the EU level has the potential to “represent a substantial shift in intermediary liability theory”, as it could signal a “move away from a well-established utilitarian approach toward a moral approach by rejecting negligence-based intermediary liability arrangements”, practically leading to a “broader move towards private enforcement online”.¹⁴⁸

Building on this normative perspective, the DSA displays a novel regulatory approach to intermediaries by imposing not only liability rules for the (user) content they host and moderate, but also separate due diligence obligations for their own conduct in the design and functioning of their service. The DSA

¹⁴⁶ This movement has already been observed and characterised before art. 17 was enacted by Giancarlo Frosio and Martin Husovec, ‘Accountability and Responsibility of Online Intermediaries’, *The Oxford Handbook of Online Intermediary Liability* (OUP 2020), accessed 24 January 2025 at <<https://papers.ssrn.com/abstract=3451220>>. The authors argue that this emerging notion of responsibility combines legal liability rules with “a mixture of voluntary agreements, self-regulation, corporate social responsibility, and ad-hoc deal-making”. See also Mariarosaria Taddeo and Luciano Floridi, ‘New Civic Responsibilities for Online Service Providers’ in Mariarosaria Taddeo and Luciano Floridi (Eds) *The Responsibilities of Online Service Providers* (Springer 2017). <https://doi.org/10.1007/978-3-319-47852-4_1>.

¹⁴⁷ Communication “Tackling Illegal Content Online: Towards an enhanced responsibility of online platforms” COM/2017/0555 final; Recommendation of 1.03.2018 on measures to effectively tackle illegal content online, C/2018/1177.

¹⁴⁸ Frosio and Husovec (n 146). The authors identify the many ways in which this shift is already visible: “the deployment of miscellaneous self-regulation and voluntary measures—such as graduated response, monitoring and filtering, website-blocking, online search manipulation, payment blockades and follow-the-money strategies, and private DNS content regulation”.

draws a distinction between rules on the liability of providers of intermediary services (Chapter II) and due diligence obligations for a transparent and safe online environment (Chapter III).¹⁴⁹ The liability exemptions distinguish between functions or services, namely “mere conduit”, “caching”, and hosting. This regime resembles the system set forth in the ECD,¹⁵⁰ with certain additions, such as a “Good Samaritan”-type clause¹⁵¹ and provisions on orders.¹⁵² Separately, the DSA introduces horizontal due diligence obligations for a transparent and safe online environment,¹⁵³ which are novel compared to the ECD. This regime sets out asymmetric obligations for different categories of providers of information society services: (1) intermediary services, (2) hosting services, (3) online platforms, and (4) very large online platforms (VLOPs) and very large online search engines (VLOSEs).¹⁵⁴ The due diligence obligations are cumulative, meaning that as providers move along the spectrum, they are subject to an increasing number of obligations. Providers of intermediary services are subject to the fewest obligations, and VLOPs/VLOSEs are subject to the most obligations. In essence, the main targets of these obligations are Big Tech companies (VLOPs/VLOSEs), who are subject to the largest set of due process, risk assessment, and mitigation obligations. The obligations extend to algorithmic moderation systems and the effect of their services on users’ fundamental rights.

The regimes of the CDSM Directive and the DSA are not isolated. Despite the qualification of the EU copyright *acquis* as *lex specialis* to the DSA, significant portions of the DSA potentially apply to OCSSPs as “online platforms” or VLOPs, both regarding the liability framework and (more clearly) the due diligence obligations.¹⁵⁵ Issues regarding the potential overlap between the

¹⁴⁹ NB the liability exemption rules and due diligence obligations are separate from each other. That is to say, as a rule, the availability of a liability exemption is not dependent on compliance with due diligence obligations and vice-versa.

¹⁵⁰ i.e. the specific liability exemptions for “mere conduit”, “caching”, and hosting remain largely unchanged.

¹⁵¹ See e.g. Aleksandra Kuczerawy, ‘The Good Samaritan That Wasn’t: Voluntary Monitoring under the (Draft) Digital Services Act’ (*Verfassungsblog*, 12 January 2021), accessed 24 January 2025 at <<https://verfassungsblog.de/good-samaritan-dsa/>>.

¹⁵² Orders to act against illegal content (art. 9 DSA) and to provide information (art. 10 DSA).

¹⁵³ Cf. Recital 75 DSA and arts 11–48 DSA.

¹⁵⁴ NB, in the scheme of the DSA, hosting providers are a type of provider of intermediary services, online platforms a type of hosting provider, and VLOPs a type of online platform.

¹⁵⁵ Peukert and others (n 23); Quintais and Schwemer (n 23); Quintais and others (n 23). See also, on this topic, Eleonora Rosati, ‘The Digital Services Act and

regimes of art. 17 CDSM Directive and the DSA will likely keep courts busy for years to come and include the differing concepts of “public”, the delimitation of permissible automated content moderation measures in light of fundamental rights, the availability of enforcement provisions to all actors within the copyright ecosystem, and the pre-emptive nature of the DSA for private claims vis-a-vis other legal grounds (e.g. tort law and unfair competition law), and the articulation between the DSA’s due diligence obligations and national duties of care for assessing the liability of platforms.¹⁵⁶

From a conceptual perspective, art. 17 CDSM Directive sets out a hybrid regime that approximates – and is complementary to – the DSA approach to “enhanced responsibility” for platforms for the illegal content they host.¹⁵⁷ Through the legal design features explained in this chapter, the default position of platforms that qualify as OCSSP is now direct liability. To escape liability, they are subject to a framework of obligations to obtain authorisation for the content they host and, if that is not possible, to put in place strict proactive/preventive and reactive measures – within the framework of notice-and-action schemes – enabled by up-to-date technological tools or solutions. Furthermore, the assessment of these obligations is bound to the principle of proportionality and the multiple factors designed to allow a modular approach to the type, size and service provided by OCSSPs. Finally, OCSSPs must ensure users’ substantive rights and procedural safeguards, including as regards in-platform and out-of-court redress mechanisms. With these features, the obligations that art. 17 imposes on OCSSPs align well – at least conceptually – with the liability regime and asymmetric due diligence obligations online platforms (including VLOPs) are subject under the DSA for the illegal content they host.¹⁵⁸

Copyright Enforcement: The Case of Article 17 of the DSM Directive’, *Unravelling the Digital Services Act Package* (European Audiovisual Observatory 2021).

¹⁵⁶ For an analysis of some of these issues, see e.g. Alexander Peukert and others, ‘European Copyright Society: Comment on Copyright and the Digital Services Act Proposal’ (European Copyright Society 2022), accessed 24 January 2025 at <<https://europeancopyrightsociety.org/portfolio/comment-on-copyright-and-the-digital-services-act-proposal/>>.

¹⁵⁷ In this case, copyright-infringing content would qualify as a type of illegal content under art. 3(h) DSA proposal.

¹⁵⁸ NB the definition of “illegal content” in art. 3(h) DSA includes copyright-infringing content, as clarified in Recital 12 DSA. For an overview of the DSA regime and tiered due diligence obligations, see Wilman (n 4); Martin Husovec, ‘Rising Above Liability: The Digital Services Act as a Blueprint for the Second Generation of Global Internet Rules’ (2024) 38(3) *Berkeley Technology Law Journal*, accessed 24 January 2025 at <<https://papers.ssrn.com/abstract=4598426>>.

Still, this shift towards a new liability paradigm that translates into “enhanced responsibility” for platforms comes with trade-offs. In particular, the complexity of art. 17 does not bode well for legal certainty, and its framework of incentives favours big rightsholders¹⁵⁹ and pushes OCSSPs towards privatised algorithmic content moderation and enforcement, to the possible detriment of users’ fundamental rights.¹⁶⁰ This move echoes a broader push in the DSA for reliance on platform and user action to prevent fundamental rights violations, a type of outsourcing that may ultimately weaken fundamental rights protection online.¹⁶¹

The complex trade-offs between shifts in liability rules to increase the responsibility of platforms vs the protections of fundamental rights for their users are at the heart of the CJEU ruling in C-401/19.¹⁶² In this case, the Republic of Poland initiated an action for annulment against art. 17 CDSM Directive, arguing that it imposes unwarranted restrictions on the right to freedom of expression and information. Specifically, Poland asserted that OCSSPs are required to conduct preventive monitoring of user uploads using automatic filtering tools, lacking sufficient fundamental rights safeguards. The CJEU acknowledged the potential limitation on freedom of expression but deemed it justified for the purpose of protecting the fundamental right to intellectual property. The CJEU identified several safeguards in art. 17 that, in its view, adequately address the fundamental rights concerns it raises, provided Member States implement the provision in a fundamental rights-compliant manner. These safeguards include the requirement for platforms to distinguish between lawful and unlawful content, user rights, information provision by rightsholders, the absence of general monitoring obligation, complaint and redress mechanisms, and stakeholder dialogues. However, in examining these safeguards against the practice of copyright content moderation, the decision largely overlooked the risks associated with outsourcing fundamental rights balancing and enforcement to platforms and users, such as the provision’s incentives for overblocking by platforms and the potential abuse of the

¹⁵⁹ Husovec and Quintais (n 93).

¹⁶⁰ Geiger and Jütte (n 94).

¹⁶¹ Martin Senftleben, João Pedro Quintais and Arlette Meiring, ‘How the EU Outsources the Task of Human Rights Protection to Platforms and Users: The Case of UGC Monetization’ (2024) 38 *Berkeley Technology Law Journal*, accessed 24 January 2025 at <<https://papers.ssrn.com/abstract=4421150>>. Generally on the DSA and fundamental rights, see Giancarlo Frosio and Christophe Geiger, ‘Taking Fundamental Rights Seriously in the Digital Services Act’s Platform Liability Regime’ (2023) 29 *European Law Journal* 31.

¹⁶² CJEU, 26 April 2022, case C-401/19 *Poland v Parliament and Council*.

notification mechanism by rightsholders.¹⁶³ In doing so, the decision mostly rubber-stamped the liability design of art. 17, while missing an opportunity to critically assess and address the concerns it raises.

5. CONCLUSION

This chapter examines the impact of art. 17 CDSM Directive on the liability of online platforms, specifically OCSSPs. Its main argument is that art. 17 marks a shift in how platforms are held liable for hosting and providing access to copyrighted content. This shift aligns with a broader notion of platform responsibility in EU law, exemplified by the regulatory approach in the DSA, which combines liability rules with comprehensive due diligence obligations, serving as a reference point for understanding platform regulation.

The analysis first explores the evolution of EU copyright law leading up to art. 17. It clarifies the legal framework and interpretation of direct liability for copyright infringement, focusing on the right of communication to the public and the intermediary liability framework, including the exemption for hosting service providers and the prohibition of general monitoring obligations. The analysis then highlights how art. 17 differs from the previous regime, introducing a new liability paradigm tailored for OCSSPs. Finally, the chapter reflects on the implications of this shift, considering its alignment with the “enhanced responsibility” approach in the DSA and potential risks to users’ fundamental rights.

In particular, this liability shift brings with it important trade-offs that should not be ignored. First, the complexity of art. 17 poses challenges to legal certainty regarding the interpretation of its scope of application and requirements, as well as overlaps with the DSA. Second, the legal design of art. 17 and the DSA pushes platforms toward privatised algorithmic content moderation and incentivises the outsourcing of fundamental rights balancing and enforcement to platforms and users, with potentially negative effects on users’ freedom of expression. The CJEU ruling in case C-401/19 is a good illustration of this dynamic, as it largely affirmed the liability design of art. 17 while failing to adequately assess the fundamental rights risks it poses.

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¹⁶³ Senftleben, Quintais and Meiring (n 161).