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Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market

I. INTRODUCTION

Article 17(10) of the Directive on Copyright in the Digital Single Market (Directive 2019/790/EC, the 'DSM Directive'[1]) requires the Commission to issue guidance on the application of Article 17, in particular regarding the cooperation between online content-sharing service providers and rightholders. The guidance takes into account the results of stakeholders dialogues organised in cooperation with Member States to discuss best practices for cooperation between online content-sharing service providers and rightholders.

Following an open call for interest, the Commission organised six stakeholder dialogue meetings between October 2019 and February 2020. A targeted written consultation was carried out from 27 July to 10 September 2020 to finalise the stakeholder dialogue.

The aim of this guidance is to support a correct and coherent transposition of Article 17 across the Member States, paying particular attention to the need to balance fundamental rights and the use of exceptions and limitations, as required by Article 17(10). The guidance could also be of assistance to market players when complying with national legislations implementing Article 17.

Whilst the present document is not legally binding, it has been formally adopted as a Communication by the Commission and fulfils the mandate given to the Commission by the Union legislature under Article 17(10). The judgment of the Court of Justice of the European Union in the case C-401/19[2] will have implications for the implementation by the Member States of Article 17 and for the guidance. The guidance may need to be reviewed following that judgment.

II. ARTICLE 17 - A SPECIFIC COPYRIGHT AUTHORISATION AND LIABILITY REGIME

Article 17 provides for a specific regime of authorisation and liability for copyright and rights related to copyright ("copyright") which applies to certain information society service providers defined as online content-sharing service providers under Article 2(6) of the Directive. Under the previously applicable legal framework[3], the copyright liability of these service providers for the acts of their users was unclear. Article 17 provides legal certainty as to whether online content-sharing service providers engage in copyright relevant acts in relation to the acts of their users, as well as legal certainty for users.

Article 17 aims to foster the development of the licensing market between rightholders and online content-sharing service providers. To that end, Article 17 creates a legal basis for rightholders to authorise the use of their works when uploaded by users of online content-

[1] The DSM Directive is addressed to the Member States who are required to transpose it by 7 June 2021.
[2] Poland vs Council and Parliament.
[3] Article 3 of Directive 2001/29/EC and Article 14 of Directive 2000/31/EC.

sharing service providers, thereby increasing their licensing and remuneration possibilities. It also introduces safeguards for users who upload their content that may include third party content, which is protected by copyright and rights related to copyright.

Article 17(1) and (2) provide that online content-sharing service providers carry out a copyright relevant act of 'communication to the public' when they give access to copyright-protected content uploaded by their users, and therefore need to obtain an authorisation from the relevant rightholders. In this case, Article 17(3) provides that, when the service providers carry out an act of communication to the public under these provisions, the limitation of liability established in Article 14(1) of Directive 2000/31/EC[4] does not apply.

Article 17 is a *lex specialis* to Article 3 of Directive 2001/29/EC and Article 14 of Directive 2000/31/EC. It does not introduce a new right in the Union's copyright law. Rather, it fully and specifically regulates the act of 'communication to the public' in the limited circumstances covered by this provision 'for the purposes of this Directive'. This is confirmed by Recitals 64 and 65. Recital 64 states that Article 17 does not affect the concept of communication to the public or of making content available to the public elsewhere under Union law[5], nor does it affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to other service providers using copyright-protected content. Recital 65 states that whilst Article 14 of Directive 2000/31 does not apply to the liability under Article 17, this should not affect its application to such service providers for purposes falling outside the scope of the Directive. Due to the *lex specialis* nature of Article 17, the Member States should specifically implement this provision rather than relying simply on their national implementation of Article 3 of Directive 2001/29/EC.

Where no authorisation is granted under Article 17(1) and (2), Article 17(4) provides for a specific regime that allows the online content-sharing service providers to avoid liability, under specific conditions, for the act of communication to the public within the meaning of Article 17(1). As Recital 66 notes, this specific regime takes into account the fact that online content-sharing service providers give access to content, which is not uploaded by them but by their users.

These specific conditions must be explicitly introduced in national law. Article 17(5) provides that the assessment of whether online content-sharing service providers comply with the conditions set out in Article 17(4) needs to be done in light of the principle of proportionality. Article 17(6) also provides for a different liability regime for new service providers, under certain conditions.

Article 17(7), (8) and (9) lay down overarching rules, which also need to be explicitly transposed in national laws. Article 17(7), (8) and (9) are formulated as obligations of result.

[4] Under the Commission proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM (2020) 825 final, Article 14 of Directive 2000/31/EC shall be replaced by Article 5 of that Regulation. According to Article 1(5)()c) and recital 11 of the DSA proposal, the Regulation applies *without prejudice to Union law on copyright and related rights, which establish specific rules and procedures that should remain unaffected*.

[5] See by analogy C-114/15, paragraph 29.

The Member States should therefore ensure in their implementing laws that these obligations prevail in case of conflict with the provisions set out elsewhere in Article 17 and in particular in Article 17(4).

Article 17(7) stipulates that, when online content-sharing service providers cooperate with rightholders under Article 17(4) to avoid unauthorised content, such cooperation shall not result in the unavailability of works and other subject matter uploaded by users, which do not infringe on copyright and related rights.

Article 17(8) provides that the application of Article 17 shall not lead to any general monitoring obligation. Article 17(9) provides, among other things, that the Directive shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law, and shall not lead to any identification of individual users nor to the processing of personal data, except in accordance with Directive 2002/58/EC and Regulation (EU) 2016/679. Recital 85 further specifies that any processing of personal data should respect fundamental rights, including the right to respect for private and family life and the right to protection of personal data and must be in compliance with Directive 2002/58/EC and Regulation (EU) 2016/679. When implementing Article 17, the Member States need to respect the Union's data protection acquis, in particular with regard to possible technological measures taken by service providers in cooperation with rightholders under Article 17(4) and in the context of complaints and redress mechanism for users under Article 17(9). The Member States should ensure the correct application of these rules when transposing Article 17.

III. THE SERVICE PROVIDERS COVERED BY ARTICLE 17 : ARTICLE 2(6)

Article 17 applies to online content-sharing service providers as defined in Article 2(6) (first paragraph) of the Directive. An online content-sharing service provider is defined as an information society service provider of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.

Article 2(6) (second paragraph) lays down a non-exhaustive list of providers of services and/or services that are not online content-sharing service providers within the meaning of the Directive and hence are excluded from the application of Article 17. These excluded services are: 'not-for-profit online encyclopaedias', 'not-for-profit educational and scientific repositories', 'open source software-developing and-sharing platforms', 'providers of electronic communications services, as defined in Directive (EU) 2018/1972', 'online marketplaces', 'business-to-business cloud services' and 'cloud services that allow users to upload content for their own use'.

In order to provide legal certainty, the Member States should explicitly set out in their implementing laws the definition of 'online content-sharing service provider' in Article 2(6)

(first paragraph) in its entirety and explicitly exclude the service providers listed in Article 2(6) second paragraph, while specifying, in light of Recital 62, that this list of excluded service providers is not exhaustive . There is no scope for the Member States either to go beyond i.e. widen the scope of application of the definition, or to reduce its scope.

Moreover, as an aid to interpretation, the Member States are advised to transpose and apply the different elements of the definition in the light of Recitals 61, 62 and 63, which provide important clarifications on the types of service providers included or excluded. As explained in Recital 62, Article 17 is aimed at online service providers that play an important role on the online content market by competing with other online content service providers, such as online audio and video streaming service providers, for the same audiences. Recital 62 also states that service providers whose main purpose is to engage in or to facilitate piracy should not benefit from the liability exception mechanism provided for in Article 17[6].

The Member States should also bear in mind that Recital 63 states that a case-by-case assessment is required in order to determine which online service providers fall within the scope of Article 17.

In order to fall within the definition of an online content-sharing service provider and the scope of the regime in Article 17, a service provider must cumulatively meet each requirement of the definition:

- be an information society service, as defined in Article 1(1)(b) of Directive (EU) 2015/1535[7];
- have as its main or one of its main purposes:
    - to store and give the public access to
    - a large amount of copyright-protected works or other protected subject matter
    - uploaded by its users,
    - which it organises and promotes for profit-making purposes.

The 'main purpose' or 'one of the main purposes' of the information society service should be understood to be the (or one of the) chief or predominant function, role of the service provider[8]. The assessment of the 'main or one of the main purposes' should be technology and business model neutral in order to be future proof.

The service provider needs to 'store and give the public access' to the content stored. The concept of 'store' refers to content storage that is more than temporary, and 'give the public access' relates to access to the content stored, which is given to the public.

[6] Several stakeholders highlighted that these elements in recital 62 as important for Member States to transpose in their national laws

[7] An information society service is defined as *any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*

[8] For example, as explained in recital 63, online marketplaces may give access to a large amount of copyright protected works but this is not their main activity, which is online retail.

As regards 'large amount', the directive does not provide for any quantification of this concept. The Member States should refrain from quantifying 'large amount' in their national law in order to avoid legal fragmentation through a potentially different scope of service providers covered in different Member States. As explained in recital 63, whether a service provider stores and gives access to the public to *a large amount* of copyright-protected works or other protected subject matter uploaded by its users needs be assessed on a *case by case basis, taking into account a combination of elements, such as the audience of the service provider and the number of files uploaded by users overall*. It would therefore not be sufficient to consider only one of the elements mentioned to bring an information society service within the scope of Article 17.

Finally, to fall under the definition, the information society service needs to 'organise and promote the content uploaded by users *for profit-making purposes'*. Recital 63 indicates that the profit from the content uploaded may be obtained either directly or indirectly from its organisation and promotion in order to attract a larger audience, including by categorising it and using targeted promotion within it. The profit-making purpose should not be taken for granted by the fact that the service is an economic operator as such or based on its legal form. The profit making purpose has to be linked to the profits made from the organisation and promotion of the content uploaded by the users in a manner to attract a wider audience, for example, but not exclusively, by placing advertisement next to the content uploaded by their users. The simple fact of receiving a fee from the users to cover the operating costs of hosting their content[9] or soliciting donations from the public, should not be considered as such as an indication of profit-making purpose[10]. As explained in Recital 62, service providers, whose main purpose is not to enable users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit from that activity, are not covered by the definition. Where the information society service provider provides more than one service, care should be taken to consider each service separately to determine which service providers fall within the scope of Article 17 or not.

IV. ARTICLE 17(1) and (2): AUTHORISATIONS

(i) Authorisation models under Article 17(1)

Online content-sharing service providers need to obtain an authorisation for the particular act of communication to the public or making available to the public set out in Article 17(1). The term 'authorisation' is not defined in the directive and should be interpreted in the light of the aim and objective of Article 17. Article 17(1) does not prescribe how authorisations may be obtained from rightholders. Indeed, both the text of Article 17(1) and the corresponding Recital 64 are drafted in an open-ended way and refer to 'authorisation…*including [via] a*

[9] This may be the case for research archives.
[10] Several organisations representing users underlined the need for further clarifications on this point.

licensing agreement'. The Member States can provide for different authorisation models in order to 'foster the development of the licensing market', which is one of the main goals of Article 17.

The acts of communication to the public and making content available in Article 17(1) should be understood as also covering reproductions necessary to carry out these acts. Member States should not provide for an obligation on online content-sharing service providers to obtain an authorisation for reproductions carried out in the context of Article 17.

The Member States should also retain the possibility for rightholders not to grant an authorisation to online content-sharing service providers, as outlined in Recital 61 according to which "*as contractual freedom should not be affected […] rightholders should not be obliged to give an authorisation or to conclude licensing agreements*".[11]

In certain cases, rightholders may for example authorise the use of their content on certain services in exchange for data or promotional activities. An authorisation can also be granted for free, under a Creative Commons licence, or can be given when rightholders upload or share their own content on online content-sharing services.

The Member States are also encouraged to maintain or establish voluntary mechanisms to facilitate agreements between rightholders and service providers. For example, voluntary mediation mechanisms could be considered in specific cases or sectors in order to support parties willing to reach an agreement but facing difficulties in the negotiations.

The Member States may rely on individual and voluntary collective licensing solutions. For example, stakeholders discussions indicated that today, in the music sector, certain rightholders, such as record companies for their own rights and where they hold the rights of performers and music publishers which hold the rights of authors (songwriters) generally license their rights directly. Remaining authors' rights are mainly managed by collective management organisations (CMOs). Collective licensing is also widely used in the visual arts sector (except for photographs) but it is little used in the film sector where direct licensing by film producers is more usual. Where rightholders have mandated CMOs to manage their rights, those CMOs can conclude licensing agreements with online content-sharing service providers for the repertoire they represent, under the rules defined in Directive 2014/26/EU. Collective licensing can thereby facilitate obtaining authorisations from a wide range of rightholders.

Collective licences with an extended effect could be considered in specific cases and for specific sectors, provided that they comply with all the conditions set out in EU law, notably in Article 12 of the Directive. These schemes could notably be applied where it is particularly difficult to identify all rightholders, and where the transaction costs of individual rights clearance are prohibitively high (recital 45). If the Member States wish to allow the use of collective licences with an extended effect in the context of Article 17, they will have to

[11] The specific liability regime applicable under Article 17(4) when no authorisation is granted is described in details under section III.1 below.

transpose Article 12 of the Directive, which provides for a number of safeguards for the use of collective licensing with an extended effect. The collective licensing schemes with an extended effect, which may be introduced at national level for the uses under Article 17, will only cover national uses[12].

(ii) Authorisations covering users

The Member States should implement explicitly in their legislation Article 17(2) under which an authorisation granted to online content-sharing service providers should also cover acts carried out by (i) users acting for non-commercial purposes or (ii) users whose activity does not generate significant revenues. The purpose of this provision is to ensure legal certainty for as many users as possible when they upload copyright-protected content.

Under this provision, authorisations granted to service providers should cover the acts, within the material scope of the authorisation, that are carried out by users falling in either one of these two categories (non-commercial purpose *or* non-significant revenues). The first situation could cover the sharing of content without any profit-making purpose, such as users uploading a home video including music in the background. The second situation could for example cover users uploading tutorials including music or images and which generate limited advertising revenues. It is sufficient for a user to satisfy either one of these conditions to be covered by the authorisation. On the other hand, users acting on a commercial basis and/or deriving significant revenues from the content they upload would be outside the scope of or not covered by that authorisation (unless the parties have explicitly agreed to cover these users contractually).

Member States should not set out quantitative thresholds when implementing the concept of 'significant revenues'. This concept should be examined on a case-by-case basis, by reference to all the circumstances of the user's activity in question.

Member States should implement the notion of authorisation in Article 17(2) in light of Recital 69, according to which online content-sharing service providers do not have to obtain a separate authorisation when rightholders have already explicitly authorised users to upload specific content. In these cases, the act of communication to the public including the act of making available have already been authorised within the scope of the authorisation granted to the users. Rightholders could be encouraged to provide information to service providers on the separate authorisations they have granted. Recital 69 also indicates that no presumption applies in favour of online content-sharing service providers that users have in all cases obtained all the necessary authorisations for the content they upload.

In order to enhance legal certainty, the Member States could encourage both online content-sharing service providers and rightholders to provide information to users on the content

[12] As provided for by Article 12(6), the Commission will present a report on the use of collective licenses with an extended effect in the course of 2021.

covered by rightholders' authorisations, leaving it to all those concerned to decide how to best to make it known that an authorisation is in place. Such transparency could contribute to avoid the risk of blocking of legitimate uses (see section VI).

V. ARTICLE 17(4) - A SPECIFIC LIABILITY MECHANISM IN THE ABSENCE OF ANAUTHORISATION

The specific liability mechanism under Article 17(4) only applies in the absence of an authorisation for acts of communication to the public performed by online content-sharing service providers in relation to acts of their users within the meaning of Article 17(1). As a consequence, the more authorisations granted under Article 17(1) and (2), the less frequent the recourse to the mechanism in Article 17(4) will be.

Article 17(4) sets out three cumulative conditions, which service providers may invoke as a defence against liability. They have to demonstrate that a) they have made their best efforts to obtain an authorisation; b) they have made their best efforts, in accordance with high industry standards of professional diligence, to ensure the unavailability of specific works and subject matter for which rightholders have provided them necessary and relevant information and c) they have acted expeditiously, upon receipt of a sufficiently substantiated notice from the rightholders, to disable access to or remove content from their websites, and made best efforts to prevent future uploads of notified works.

Article 17(4) is subject to the principle of proportionality provided for in Article 17(5), which provides that the following elements may, inter alia be taken into account:

(a) the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service; and
(b) the availability of suitable and effective means and their cost for service providers.

The notion of 'best efforts' is not defined and no reference is made to national law, hence it is an autonomous notion of EU law and it should be transposed by the Member States in accordance with this guidance and interpreted in light of the aim and the objectives of Article 17 and the text of the entire Article.

Member States should ensure that the principle of proportionality, as set out in Article 17(5), is taken into account when assessing whether an online content-sharing service provider has made its best efforts under Article 17(4)(a) and (b) and complied with 17(4)(c). This is relevant in particular to protect the service providers' freedom to conduct a business.

Member States should also bear in mind that Article 17(4) is subject to the obligations in Article 17(7) to ensure that legitimate uses remain unaffected by the cooperation of service providers with rightholders and in Article 17(8), whereby Article 17 should not be transposed or applied in a way, which leads to any general monitoring obligation. Article 17(4) is also subject to the overarching obligation in Article 17(9), whereby the Directive shall in no way

affect legitimate uses. Indications on how the best efforts could be achieved in practice are explained in section IV.

1. BEST EFFORTS TO OBTAIN AN AUTHORISATION (ARTICLE 17(4)(a))

The first condition in Article 17(4)(a) is that service providers should be liable for unauthorised acts of communication to the public, including acts of making available to the public content which is protected by copyright and related rights, unless they demonstrate they have made best efforts to obtain an authorisation.

The actions carried out by service providers to seek out and/or engage with rightholders need to be assessed on a case-by-case basis to determine whether they constitute best efforts to obtain an authorisation. For instance, elements such as the specific market practices in different sectors (e.g. whether or not collective management is a widespread practice) or measures that the Member States may have taken to facilitate authorisations, for example voluntary mediation mechanisms, should be taken into account.

To demonstrate their best efforts, service providers should, as a minimum, engage proactively with rightholders that can be easily identified and located, notably those representing a broad catalogue of works or other subject matter. In particular, proactively contacting collective management organisations (CMOs) acting in accordance with Directive 2014/26/EU to obtain an authorisation should be considered as a minimum requirement for all online content-sharing service providers.

At the same time, in accordance with the principle of proportionality and considering the volume and variety of content uploaded by users, service providers should not be expected to proactively seek out rightholders who are not easily identifiable by any reasonable standard. In order to facilitate the identification of rightholders and the grant of authorisations, the Member States may encourage the development of registries of rightholders that could be consulted by online content-sharing service providers, in compliance with data protection rules, when applicable.

The efforts to reach out to rightholders in order to obtain the necessary authorisations should be assessed on a case-by-case basis, taking into account in particular the size and audience of the service and the different types of content it makes available, including the specific situations where some types of content may appear only rarely on the service. While large service providers with a big audience in several or all Member States may be expected to reach out to a high number of rightholders to obtain authorisations, smaller service providers with limited or national audience may be expected to contact proactively only relevant CMOs and possibly a few other easily identifiable rightholders. These smaller service providers would need to make sure that other rightholders could contact them easily, for example by providing clear contact details or ad-hoc tools on their website. They would be required to engage with all rightholders approaching them to offer a licence.

Article 17(6) provides for a special liability regime for new online content-sharing service providers with an annual turnover below EUR 10 million (see Section IV). However, these

particular online content sharing service providers are, nevertheless, required to make their best efforts to obtain an authorisation in accordance with Article 17 (4) (a). A case-by-case assessment is therefore essential to make sure that this obligation imposed on start-ups does not create a disproportionate burden on them.

When a service provider contacts a rightholder but the latter refuses to engage into negotiations to grant an authorisation for its content, or dismisses reasonable offers made in good faith, the service provider should be considered to have complied with the best efforts obligation under Article 17(4)(a). However, in order not to be liable if the unauthorised content is available in its service, the service provider would still need to demonstrate best efforts for the purposes of Article 17(4)(b) and (c).

Online content-sharing service providers should engage with those rightholders that wish to offer an authorisation for their content, irrespective of whether their type of content (e.g. music, audio-visual content, images, text) is prevalent or is less common on the website of the service provider (e.g. images or text for a video-sharing platform).

Nevertheless, pursuant to the principle of proportionality, the amount and type of content, including whether it is prevalent or not on the website of the service provider, should be taken into account when assessing the best efforts to obtain an authorisation.

In the light of recital 61, when licensing agreements are negotiated, these should be fair and keep a reasonable balance between both parties. Rightholders and online content-sharing service providers should aim to conclude an agreement as swiftly as possible. Recital 61 also states that rightholders should receive appropriate remuneration for the use of their protected works or other subject matter.

The notion of best efforts should therefore also cover the efforts deployed by online content-sharing service providers, in cooperation with rightholders, to conduct negotiations in good faith and conclude fair licensing agreements. For this purpose, service providers should be transparent with rightholders with respect to the criteria they intend to use to identify and remunerate the content covered by the agreement, in particular when service providers use content recognition technology to report on the uses of content under licenses, and reach an agreement with rightholders to the extent possible.

Service providers refusing to conclude a licence offered on fair terms and which maintains a reasonable balance between the parties may be considered not to have deployed their best efforts to obtain an authorisation. On the other hand, service providers should not be required to accept offers to conclude contracts that are not on fair terms and which do not keep a balance between the parties. The question of what constitutes fair terms and a reasonable balance between the parties will be determined on a case by case basis.

Negotiations for the licensing of rights with CMOs are subject to the obligations set out in Article 16 of Directive 2014/26/EU, including the need to conduct negotiation in good faith and to apply tariffs determined on the basis of objective and non-discriminatory criteria[13].

2. 'BEST EFFORTS' TO ENSURE UNAVAILABILITY OF SPECIFIC PROTECTED CONTENT (ARTICLE 17(4)(b))

The second condition set out in Article 17(4) is that in the absence of an authorisation, online content-sharing service providers should be liable for acts of communication to the public, including making available to the public of their users, unless they demonstrate that they have made their best efforts, in accordance with high industry standards of professional diligence, to ensure the unavailability of specific works and other subject matter for which the rightholders have provided them with the relevant and necessary information ('relevant and necessary information').

When implementing Article 17(4)(b) in their national laws, the Member States should bear in mind it is subject to the principle of proportionality provided for in Article 17(5).

In line with Article 17(4)(b), the best efforts are only to be made to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the 'relevant and necessary information'. Recital 66 specifies that if no such information meeting the requirements of Article 17(4) is provided by rightholders, online content-sharing service providers are not liable for unauthorised uploads. Absent the provision of this information, online content-sharing service providers cannot act. Therefore, cooperation between online content-sharing service providers and rightholders is essential to ensure the effectiveness of Article 17(4)(b).

The concept of 'relevant and necessary information' should be transposed by the Member States in accordance with this guidance and the objectives of Article 17. Whether any information provided by rightholders is both 'relevant' and 'necessary' should be assessed on a case-by-case basis. It should also be possible for rightholders to submit this information through third parties authorised by them.

In the context of Article 17(4) (b), relevant and necessary information should be provided upfront.

Article 17(4)(b) should be implemented in a technologically neutral and future proof manner. Therefore, the Member States should not in their implementing laws mandate either the use of a technological solution nor impose any specific technological solutions on service providers in order to demonstrate best efforts.

[13] This obligation however does not prevent CMOs to provide individualised licences for innovative online service providers, which is an important element for the negotiations with new online content-sharing service providers.

Online content-sharing service providers have to act in accordance with high industry standards of professional diligence when making their best efforts to implement any relevant solutions aiming to ensure the unavailability of specific unauthorised content for which relevant and necessary information has been provided. As underlined in Recital 66, to assess whether a given service provider has made its best efforts, *'account should be taken of whether the service provider has taken all the steps that would be taken by a diligent operator to achieve the result of preventing the availability of unauthorised works or other subject matter on its website taking into account best industry practices and the effectiveness of the steps taken in light of all relevant factors and developments.'*

Therefore, in order to determine whether an online content-sharing service provider has made its best efforts in line with high industry standards of professional diligence, it is particularly relevant to look at the available industry practices on the market at any given point in time. This includes the use of technology or particular technological solutions. As clarified in Recital 66, *'any steps taken by the service providers should be effective with regard to the objectives pursued'*. However, online content-sharing service providers should remain free to choose the technology or the solution to comply with the best efforts obligation in their specific situation.

This guidance does not seek to recommend the use of any specific technology or solution. Flexibility should be left to rightholders and service providers to agree on mutually convenient cooperation arrangements in view of ensuring the unavailability of unauthorised content. These arrangements, in particular if based on technology, are likely to evolve over time. In principle using technology, such as content recognition, should not in itself require the identification of users uploading their content but if applicable, relevant data protection rules need to be respected, including the principles of data minimisation and purpose limitation.

With regard to current market practices, the stakeholder dialogue conducted by the Commission showed that content recognition technology is commonly used today to manage the use of copyright protected content, at least by the major online content-sharing service providers and as regards certain types of content. Content recognition technology based on fingerprinting appears to be widely used by the major service providers as regards video and audio content.[14] However, this particular technology should not be necessarily considered as the market standard, notably for smaller service providers.

Other technologies which allow the detection of unauthorised content were also referred to in the stakeholder dialogue. These include hashing,[15] watermarking,[16] the use of metadata[17],

14 This technology works on the basis of the fingerprint of a rightholder's work which is checked against the content uploaded by users on the service.

[15] *Hashing* is a technique whereby a file is transformed into a chain of figures called 'the hashcode'. That hashcode allows to identify an upload by a user and therefore detect potentially unauthorised content. The difference with fingerprinting is, according to certain views, that the detection of unauthorised content works in particular when the file uploaded is identical to the work that has been 'hashed' (contrary to fingerprinting which may recognise even differences).

keyword search[18] or a combination of different technologies. Some service providers have developed in-house solutions while others buy-in the services of third parties. Therefore, in many cases, it is expected that service providers will rely (or continue to rely) on different technological tools in order to comply with their obligation under Article 17(4)(b).

The assessment of whether an online content-sharing service provider has made its 'best efforts' under paragraph (b) in relation to specific protected content for which relevant and necessary information has been provided in advance should be made on a case-by-case basis, according to the proportionality principle set out in Article 17(5) and within the respect of Article 17(7) to (9). This means in practice that online content-sharing service providers should not be expected to apply the most costly or sophisticated solutions if this would be disproportionate in their specific case. This applies also in the case of content earmarked by the relevant rightholders as content whose availability could cause significant harm to them, as explained in section VI below. Moreover, as explained in Recital 66, it cannot be excluded that in some cases unauthorised content can be avoided only following a notification by rightholders[19]. This may be proportionate for example for content for which technology is not readily available on the market or is not developed at a given point in time.

Member States should consider the following elements :

- The type, size and audience of the service: larger service providers with a significant audience may be expected to deploy more advanced solutions/technologies than other service providers, with limited audiences and resources. It could be more proportionate to expect smaller service providers to resort to simpler solutions (like metadata or key word search) as long as these solutions do not result in over-blocking of content contrary to paragraphs (7) and (9).

- The availability of suitable and effective means and the related costs should also be considered, for example when service providers buy solutions from third parties/ technology providers and when these are developed in-house as well as the costs related to human review in the context of disputes (see Section IV). The cumulative cost of different solutions that may need to be implemented by a service provider should also be considered, as well as limitations of technologies depending on the type of content. For example, different solutions may be needed for different types of content (e.g. content recognition technologies for music may not be the same as for still images and may be developed by various technology providers). The cumulative cost should also be considered when rightholders have themselves developed different protection solutions,

[16] *Watermaking* is a solution whereby the original file is 'watermarked', and can therefore be recognised once uploaded, on the basis of that watermark which acts as a signature.
[17] The use of *metadata* allows to track whether a given work has been uploaded based on the metadata linked to the content, such as the name of the author, the title of the work.
[18] *Keyword search* was mentioned in particular as a solution for smaller service providers, which may not have the means to deploy more complex and costly technologies. This is the simplest technique whereby a service manually searches its website for titles of e.g. a given song/performer to detect potentially infringing content.

[19] This applies irrespective of whether the service in question meets the criteria of Article 17(6).

which require the service providers to use different software (e.g. for different watermarking solutions).

- The type of content uploaded by users: when a service makes available different types of content, the actions to be undertaken may vary depending on whether the content is prevalent on their website or is less common, provided that the best efforts obligation is met. It can be expected that service providers deploy more complex solutions regarding the former as compared to the latter.

Finally, online content-sharing service providers could, based on the scale of the content available on their services, choose to provide different tools to different rightholders, as long as the solutions meet their obligation of best efforts for the purpose of Article 17(4)(b).

The information in question must be accurate to allow an online content-sharing service provider to act**.** What may constitute 'relevant' information will vary depending on the works concerned and the circumstances that pertain to the specific works or other subject matter. The information should, as a minimum, be accurate about the rights ownership of the particular work or subject matter in question. What may constitute 'necessary' would vary depending on the solutions deployed by service providers. It should allow the service providers to apply effectively their technological solutions, where used. For example, when fingerprinting is used, rightholders may be asked to provide a fingerprint of the specific work/subject-matter or a file that will be fingerprinted by the service provider itself, together with information on the ownership of the rights. When metadata-based solutions are used, the information provided can for example consist in the title, the author/producer, the duration, the date, or other information that is relevant and necessary for online content-sharing service providers to take action. In this context, it is important that metadata provided by rightholders is not removed subsequently.

At the same time, given that cooperation is key, the concept of 'necessary and relevant information' presupposes that the service providers take into account the nature and quality of the information that rightholders can realistically provide. In that regard, rightholders and online content-sharing service providers should be encouraged to cooperate on the best way to approach identification of the works.

When providing the relevant and necessary information to the service providers, rightholders may choose to identify specific content which is protected by copyright and related rights, the unauthorised online availability of which could cause significant economic harm to them. The prior earmarking by rightholders of such content may be a factor to be taken into account when assessing whether online content-sharing service providers have made their best efforts to ensure the unavailability of this specific content and whether they have done so in compliance with the safeguards for legitimate uses under Article 17(7), as explained in part VI below.

3. 'NOTICE AND TAKE DOWN' AND 'NOTICE AND STAY DOWN' (ARTICLE 17(4)(c))

The third condition set out in Article 17(4)(c) is that online content-sharing service providers should be liable for unauthorised acts of communication to the public including making available to the public, unless they demonstrate that they have acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and that they have made best efforts to prevent their future uploads in accordance with Article 17(4)(b).

This notice and take-down and notice and stay down system applies when content that is not authorised has become available on the online content-sharing service providers' websites. In practice, the main scenarios where unauthorised content may become available and require action under Article 17(4)(c) are the following :

(i) Rightholders have not provided online content-sharing service providers in advance with the 'relevant and necessary' information under Article 17(4)(b) to avoid the availability of unauthorised content. They act *ex post*, once a given content has become available, to ask for its removal and stay down based on the necessary and relevant information from rightholders; or

(ii) Online content-sharing service providers have made their 'best efforts' to avoid unauthorised content under Article 17(4)(b) but despite these efforts unauthorised content becomes available for objective reasons, for example, when some content cannot be recognised due to the inherent limitations of technologies; or

(iii) in some specific cases online content-sharing service providers may be expected to act only after a notice has been submitted by rightholders, as explained in recital 66.

The 'best efforts' that service providers should make to prevent future uploads of notified works should be approached in the same way as in relation to Article 17(4)(b), as explained in subsection 2. The assessment of whether best efforts have been made by service providers needs to be carried out on a case-by-case basis and taking into account the principle of proportionality provided for in Article 17(5).

Member States should bear in mind that the application of Article 17 should not lead to any general monitoring obligation as laid down in paragraph (8) and that legitimate uses have to be safeguarded as provided for in paragraphs (7) and (9), as further explained in section VI. This is particularly relevant for the application of the second part of (c), according to which service providers have to make their best efforts to prevent future uploads of notified works.

As with Article 17(4)(b), the rightholders must provide certain information before the online content -sharing service provider can act.

When implementing Article 17(4)(c), the Member States need to clearly differentiate the type of information rightholders provide in a 'sufficiently substantiated notice' for the removal of content (the 'take down' part of (c)) from the 'relevant and necessary information' they

provide for the purposes of preventing future uploads of notified works (the 'stay-down' part of (c), which refers back to (b)).

As regards the information to be provided for the fulfilment of the take down obligation under paragraph 4(c), and specifically on the elements to be included in a 'sufficiently substantiated notice', the Commission recommends the Member States to follow in their implementation the Commission Recommendation on Measures to Effectively Tackle Illegal Content Online[20]. Points 6 to 8 of the Recommendation list elements that could be included in the notices. The notices should be *sufficiently precise and adequately substantiated to enable* the service providers *to take an informed and diligent decision in respect of the content to which the notice relates, in particular whether or not that content is to be considered illegal content*. In particular, the notices should contain *an explanation of the reasons why the notice provider considers that content to be illegal content and a clear indication of the location of that content*. This particular information would not necessarily be required under Article 17(4)(b) but should be required as a rule under Article 17(4)(c) first limb. The Recommendation also provides for the possibility for notice providers, if they so wish, to include their contact details in a notice.

As regards the so-called 'stay down' obligation, Article 17(4)(c) second part requires service providers to make best efforts to avoid future uploads of the works or other subject matter notified by rightholders. This provision refers back to (b) of the same paragraph, which means that in order for the service providers to be able to deploy their best efforts to avoid future uploads under this provision, rightholders have to provide them with the same type of 'relevant and necessary' information, as for the application of (b). This means for example that, if a service provider uses fingerprinting technologies to avoid future uploads of notified works, receiving as information only the information provided in a notice would be insufficient. In this case, to allow service providers to avoid future uploads of notified works, rightholders would need to provide the service providers with fingerprints or content files.

4. THE SPECIFIC LIABILITY REGIME FOR NEW SERVICE PROVIDERS (ARTICLE 17(6))

Article 17(6) provides for a specific liability regime with different conditions for 'new' companies, which have been active in the EU for less than 3 years and have an annual turnover of less than 10 million euros.

When implementing Article 17(6), the Member States should not go beyond the conditions set in the Directive and bear mind that this lighter liability regime is intended to take into account the specific case of new companies working with user uploads to develop new business models, as explained in recital 67.

[20] See Commission Communication of 1 March 2018 available at: https://ec.europa.eu/digital-single-market/en/news/commission-recommendation-measures-effectively-tackle-illegal-content-online

With regard to the annual turnover, Article 4 of Commission Recommendation 2003/361/EC is of main relevance. More detailed guidance on how to calculate the turnover, including in cases where an enterprise may have relationships with other enterprises, is provided in the *User Guide to the SME Definition* [21], prepared by the Commission services.

Article 17(6) provides for a two-tier system with different rules applying to the 'new' service providers depending on the audience they attract. In particular:

a) if those 'new' service providers have less than 5 million unique visitors, they are required to make their best efforts to obtain an authorisation (Article 17(4)(a)) and they have to comply with the 'notice and take down' obligation under Article 17(4)(c) first part;

b) if those 'new' service providers have more than 5 million unique visitors, they are subject to the same obligations of best efforts to obtain an authorisation and 'notice and take down' as service providers with a smaller audience but in addition, they also need to comply with the obligation to avoid future uploads of notified works under Article 17(4)(c) second part ('stay down' obligation).

For both categories of service providers, the condition of best efforts to ensure the unavailability of unauthorised content, provided for in Article 17(4)(b), is not applicable.

The important differentiating factor between the two categories of service providers is *the number of monthly unique visitors*. Article 17(6) specifies that the average number of monthly unique visitors of such service providers is to be calculated on the basis of the previous calendar year. As further explained in recital 66, visitors across all the Member States need to be taken into account in this calculation. Privacy and data protection rules have to be respected when calculating the number of unique visitors.

When assessing whether the 'new' service providers have complied with their respective obligations to avoid liability for unauthorised acts of communication to the public, as outlined above, the principle of proportionality, set out in Article 17(5) has to be taken into account[22]. This means that best efforts that can be expected from the 'new' service providers to obtain an authorisation may differ depending on their specific situation (as explained under section III).

With regard to the best efforts that 'new' service providers with *more* than five million monthly unique visitors need to make *to prevent future uploads of notified works*, less could be expected from them than from the service providers falling under Article 17(4). It would be proportionate for them to rely on less complex and less costly solutions.

When applying solutions to prevent future uploads, the safeguards for legitimate users contained in Article 17(7) and 17(9) need to be complied with as outlined in section IV below, notably if the 'new' service providers apply automated content recognition tools.

[21] https://ec.europa.eu/regional_policy/sources/conferences/state-aid/sme/smedefinitionguide_en.pdf
[22] Article 17(6) refers back to Article 17(4), which is referenced in Article 17(5)

VI. SAFEGUARDS FOR LEGITIMATE USES OF CONTENT (Article 17(7)) and COMPLAINT AND REDRESS MECHANISM FOR USERS (Article 17(9))

Article 17(7) and 17(9) provide that any action undertaken together by service providers and rightholders does not lead to the unavailability of content, which does not infringe copyright or related rights including because of the application of any exception or limitation. Such non-infringing use is often referred to as 'legitimate use'. In addition, Article 17(7) also provides that the Member States must ensure that users in each Member State are able to rely on the existing exceptions or limitations for quotation, criticism, review and use for the purpose of caricature, parody or pastiche when uploading and making available content generated by users on online content-sharing services. The obligations in Article 17(7) and 17(9) are of particular importance for the application of the 'best efforts' under Article 17(4).

Member States should explicitly transpose in their law the text of Article 17(7) first paragraph related to uses that do not infringe copyright.

Member States are also required to transpose in their national laws the mandatory exceptions in Article 17(7) second paragraph covering the use of content generated by users on online content-sharing service providers for:

(a) quotation, criticism, review;

(b) use for the purpose of caricature, parody or pastiche.

The exceptions or limitations in Directive 2001/29/EC are optional in nature and addressed to any user and, in the case of quotation, criticism and review, they are subject to the application of specific conditions. Conversely, the particular exceptions and limitations in Article 17(7) are mandatory for the Member States to implement, they apply specifically and only to the online environment and to all users when uploading and making available content generated by users on online content-sharing services, and there are no further conditions for their application.

It is important to bear in mind that in respect of the various fundamental rights at issue, the Union legislature has chosen to make these particular exceptions or limitations mandatory. Recital 70 explains that allowing users to upload and make available content generated by them for the purposes of the exceptions or limitations in Article 17(7) is particularly important for 'striking a balance between the fundamental rights laid down in the Charter of Fundamental Rights of the European Union ('the Charter'), in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property'.

(i) <u>Legitimate uses under Article 17(7) and (9)</u>

Legitimate uses which do not infringe copyright or related rights may include (a) uses under exceptions and limitations, (b) uses by those who hold or have cleared the rights in the content they upload or uses covered by the authorisation under Article 17(2) and (c) uses of content not covered by copyright or related rights, notably works in the public domain or, for example, content where the threshold of originality or any other requirement pertaining to the threshold for protection, is not met.

In relation to uses under exceptions and limitations, the above mentioned exceptions laid down in Article 17(7) should be read as autonomous notions of EU law and should be considered in the specific context of this provision[23]. Member States that may have already implemented these exceptions under Directive 2001/29/EC should review their legislation, and, if need be, amend it to make sure it complies with Article 17(7) especially for the online environment. Member States whose laws do not provide for these exceptions or limitations will have to transpose them as a minimum for the uses covered by Article 17.

With regard to the notions of quotation and parody, the Court of Justice of the European Union (CJEU) has indicated that as these notions are not defined in Directive 2001/29/EC, the meaning and scope of these terms must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part[24.] The same approach can be applied to the notions of pastiche, criticism and review, which are not defined in Article 17(7).

Member States should implement or adapt the mandatory exceptions and limitations in Article 17(7) in a manner that allows them to be applied consistently with the Charter of Fundamental rights[25] and ensures their effectiveness in line with the case law of the CJEU[26].

The reference to legitimate uses in Article 17(7) and (9) should also cover uses that may fall under other exceptions and limitations provided for in Directive 2001/29/EC, which are optional for the Member States. These exceptions and limitations will be applicable in the context of Article 17 if the Member States have implemented them in their national laws. The most relevant of such optional exceptions and limitations could for example be incidental use[27] and use of works, such as works of architecture or sculpture, made to be located permanently in public places[28].

Other legitimate uses for the purposes of Article 17(7) include authorised uses. These are uses where an uploader has all the relevant rights in the content uploaded, either because the

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[23] See C□201/13, Deckmyn, para 14 …. *the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question (judgment in Padawan, C-467/08, EU:C:2010:620, paragraph 32 and the case-law cited).*

[24] C-476/17 Pelham, para 70, and C-201/13 Deckmyn, para 19.

[25] For example, C-516/17 Spiegel online, para 52; C-314/12 UPC Telekabel Wien, para 46

[26] For example in C-145/10, Eva Painer para 133; C-117/13 and Darmstadt, para 43

[27] Article 5.3 (i) of Directive 2001/29/EC

[28] Article 5.3 (h) of Directive 2001/29/EC. The Commission specifically recommended Member States to transpose this exception in its Communication *Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market* COM(2016)592

uploader has created the content uploaded and it contains no third party content, or because they have obtained all the necessary authorisations from rightholders. The latter would for example cover uploads by professional users, such as broadcasters, when they have cleared all the necessary rights.

Finally, the concept of 'legitimate uses' also includes uses of content not covered by copyright or related rights, notably works in the public domain, that is works whose term of protection has expired and therefore are no longer protected by copyright; and material which does not meet the criteria for protection in the light of the CJEU's case law[29].

(ii) Application of Article 17(4) in compliance with Article 17(7) and (9)

Article 17(7), according to which the cooperation between rightholders and service providers must not result in the prevention of availability of legitimate content, must be read together with the 'best effort' provisions laid down in Article 17(4), since it is in that context that the cooperation takes place, in relation to content for which no authorisation has been granted. The need for service providers and rightholders to respect legitimate uses should be taken into account when assessing whether a service provider has made its 'best efforts' under Article 17(4)(b) and second part of (c), regardless of the specific solution or technology applied by the service.

The complaint and redress mechanism provided for under Article 17(9) (see section below) applies in addition to the obligations in Article 17(7). Therefore, it would not be enough for the transposition and application of Article 17(7) to restore legitimate content *ex post* under Article 17(9), once it has been removed or disabled.

The application of the obligation of result in Article 17(7) is particularly relevant when service providers apply automated content recognition technology under Article 17(4). In the present state of the art, no technology can assess to the standard required in law whether content, which a user wishes to upload, is infringing or a legitimate use. However, content recognition technology may identify specific copyright-protected content for which rightholders have provided relevant and necessary information to service providers.

Therefore, in order to ensure compliance with Article 17(7) in practice, and leave unaffected legitimate uses, including uses under exceptions and limitations, when an upload matches a specific file provided by rightholders , automated blocking, i.e. preventing the upload by the use of technology, should in principle be limited to manifestly infringing uploads.

As indicated more in details below, other uploads, which are not manifestly infringing, should in principle go online and may be subject to an *ex post* human review when rightholders oppose by sending a notice.

This approach, according to which service providers should determine at the upload whether content is manifestly infringing or not, is a reasonable practical standard to determine whether an upload should be blocked or go online, and to ensure the respect for Article 17(7), taking into account the existing limitations of technology. The identification of manifestly

[29] C-469/17 Funke Medien, paragraphs 18-20

infringing content and other content by automated means does not represent a legal assessment of the legitimacy of an upload, including whether it is covered by an exception. Therefore, the criteria applied to operate this distinction should not have an impact on the best efforts to be made by service providers to obtain an authorisation under Article 17.4 (a).

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In practice, when service providers apply content recognition tools, they should take into account the information provided by rightholders for their specific content in order to determine whether the specific upload is manifestly infringing or not[30]. At the same time, rightholders should take legitimate uses into account when providing their instructions to service providers. Content for which the rightholders have not given a blocking instruction to the online content-sharing service provider should not be considered manifestly infringing.

Relevant criteria to detect manifestly infringing uploads in practice could include the length/size of the identified content used in the upload, the proportion of the matching/identified content in relation to the entire upload (e.g. whether the matched content is used in isolation or in combination with other content) and the level of modification of the work (e.g. whether the upload matches only in part the identified content because it has been modified by the user). These criteria could be applied taking into account the type of content, the business model[31], as well as the risk of significant economic harm to rightholders.

Exact matches of entire works or of significant proportions of a work should normally be considered manifestly infringing (e.g. when the recording of a whole song is used as background in a user created video). This would also be the case for uploads of an original work, which has simply been technically altered/distorted to avoid its identification (like in the case of adding an outside frame to the picture or flipping it by 180°).

On the other hand, an upload which matches only partially with the information provided by the rightholders because the user has significantly modified the work in a creative manner, for example by adding elements to a picture to create a 'meme', would generally not be manifestly infringing (this example may be covered by the parody exception).

Another example of uploads which should generally not be considered manifestly infringing are those including short extracts which represent a small proportion of the entire work identified by rightholders (such use may be covered by the quotation exception). This could be the case of a user-generated video including an extract of a feature film or an extract of a

[30] This approach takes into account the current market practices of cooperation between rightholders and service providers For example, when rightholders provide the service providers with a fingerprint or a file with relevant rights' information for their specific content, they also provide the service providers with instructions as to whether and when this content should be blocked, if recognised in the users' uploads, taking into account the different characteristics of the upload. The stakeholder dialogue showed that already today some rightholders may instruct service providers to apply some margins of tolerance to permit the availability of some unauthorised content, for example extracts of films of a short duration.

[31] For example, a very large number of very short extracts uploaded on a service could cause significant harm to rightholders when taken together in an aggregated form. There are services that have structured their business model on the large scale use of short content, for example excerpts of music of very short duration.

song[32]. The length of an extract is not as such a legal criterion to determine whether a use is legitimate. This is however a relevant indication, together with the context of the use, that a given upload may be covered by one of the exceptions laid down in EU law. In line with the case law of the CJEU[33], it is for the Member States to safeguard the effectiveness of the exceptions and to permit observance of their purpose, in order to safeguard a fair balance of rights and interests between the different categories of rightholders and users of protected subject matter. It follows that the interpretation of Article 17 must allow the effectiveness of the exceptions to be safeguarded and their purpose to be observed, since such a requirement is of particular importance where those exceptions aim to ensure observance of fundamental freedoms.

There may also be more complex cases where additional criteria or a combination of criteria may need to be taken into account (besides the length of an extract used and whether it is used in a transformative manner), depending on the content and situation. Cooperation between service providers and rightholders and feedback from users will be key to progressively fine-tune the application of this mechanism.

In particular, service providers should exercise particular care and diligence in application of their best efforts obligations before uploading content, which could cause significant economic harm to rightholders (see section V.2 above). This may include, when proportionate and where possible, practicable, a rapid *ex ante* human review by online content-sharing service providers of the uploads containing such earmarked content identified by an automated content recognition tool. This would apply for content, which is particularly time sensitive (e.g. pre-released music or films or highlights of recent broadcasts of sports events)[34].

In order to ensure the right balance between the different fundamental rights at stake, namely the users' freedom of expression, the rightholders' intellectual property right and the providers' right to conduct a business, this heightened care for earmarked content should be limited to cases of high risks of significant economic harm, which ought to be properly justified by rightholders. This mechanism should not lead to a disproportionate burden on service providers nor to a general monitoring obligation. Whilst the concept of general monitoring is not defined in Article 17 (8), it is expressed therein in the same terms as in Article 15 of Directive 2000/31. However when applying Article 17(8) first paragraph the context, scheme and objective of Article 17 and the special role of online content-sharing service providers under this provision should be taken into account.

There should be no need for *ex ante* human review for content, which is no longer time sensitive[35]. Service providers who decide to include rapid *ex ante* human review as part of their compliance mechanism should include mechanisms to mitigate the risks of misuse.

As a result of the *ex ante* human review, the service provider may block the upload or make it available. Rightholders and users should be informed of the outcome of the review. If the content is blocked, users should be able to contest the blocking under the redress mechanism.

[32] Like a "10 best movie moments of the year" user-generated video.
[33] C-516/17 - Spiegel Online
[34] Other types of content may also be time-sensitive
[35] For example, in case of a football match the sensitivity may be a matter of days.

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When manifestly infringing uploads are identified and are blocked i.e. are not uploaded, users should be notified of this without undue delay and should still be able to contest the blocking, by giving reasons for their request, under the redress mechanism provided for in Article 17(9) (see below).

Content which is not manifestly infringing should go online at the upload, with exception of content earmarked by rightholders (when subject to a fast ex ante human review). Service providers should inform rightholders without undue delay that the content has been put online. If rightholders object, the service providers should carry out a swift *ex post* human review for a rapid decision as to whether the content should remain online or be removed. Rightholders should object by filing a notice. The information provided by rightholders ex ante should be taken into account when assessing whether the notice is sufficiently substantiated.

The *ex post* human review should allow the online content-sharing service provider to take a decision based on the arguments provided both rightholders and users. The content should stay online during the human review.

If, as a result of the *ex post* human review, based on the arguments provided by rightholders and users, the online content-sharing service provider eventually decides to disable or remove the uploaded content, it should inform the user and the relevant rightholders as soon as possible of the outcome of the review. The user should be able to have recourse to the out-of-court dispute resolution mechanism, provided for in Article 17(9).

If the content remains online, the rightholders can still send another notice later if new elements or circumstances arise, which justify a new assessment.

Online content-sharing service providers should be deemed to have complied, until proven otherwise, with their best efforts obligations under Article 17(4)(b) and (c) in light of Article 17 (7) if they have acted diligently as regards content which is not manifestly infringing following the approach outlined in this guidance, taking into account the relevant information from rightholders. By contrast, they should be deemed not to have complied, until proven otherwise, with their best effort obligations in light of Article 17 (7) and be held liable for copyright infringement if they have made available uploaded content disregarding the information provided by rightholders, including – as regards content that is not manifestly infringing content - the information on earmarked content as mentioned in section V.2 above.

Regular reports on the content blocked as a result of the application of automated tools in fulfilment of requests by rightholders[36] would allow the Member States to monitor whether Article 17 has been properly applied, in particular Article 17(8) and (9). This would also notably allow users' representatives to monitor and contest the application of parameters defined by service providers in cooperation with rightholders to detect systematic abuses.

[36] Following the approach proposed by the Commission in its proposal for the Regulation on the Digital Services Act

This could be based, for example, on the number and type of content blocked and complaints submitted by users.

The mechanism described in this guidance should not prevent the possible use of technology for reporting and remunerating the use of authorised content under contractual terms agreed by rightholders and service providers.

(iii) Complaint and redress mechanism under Article 17(9)

Article 17(9) requires the Member States to provide a complaint and redress mechanism that service providers have to make available to users in the event of dispute over the blocking or removal of their content. Under this mechanism, the decisions to disable access or to remove uploaded content have to be subject to human review to determine whether the use is legitimate or not and should be restored or not. It also requires the Member States to ensure that out-of-court redress mechanisms are available for the settlement of these disputes.

Member States should lay down rules on the complaint and redress mechanism. Users must be given the possibility to challenge the service providers' decisions to block or remove their uploads. This may apply to manifestly infringing content blocked as a result of the application of Article 17(4)(b) in compliance with Article 17(7) as well as to content removed *ex post* following a sufficiently substantiated notice submitted by rightholders under Article 17(4)(c). The content should stay down during the human review performed under the redress mechanism, except in the specific case mentioned above for content that is not manifestly infringing on Article 17(7).

In line with the requirement of Article 17(9) that the complaints by users be processed without undue delay, the Member States should provide that, as a rule, online content-sharing service providers and rightholders must react to complaints from users within a reasonably short timeframe to ensure that the mechanism is expeditious. Whilst no specific deadlines are given in Article 17(9) for processing the complaints by users, nevertheless, complaints should be dealt with expeditiously in order not to affect the fundamental right of freedom of expression. In practice, different deadlines may be necessary, depending on the specificities and complexities of each case. If rightholders do not react within a reasonable timeframe, online content-sharing service providers should make a decision without the input of rightholders on whether the content which has been blocked or taken down should be made available or be restored online.

The Directive requires the Member States to provide that within the context of the complaint and redress procedure (as opposed to 17(4)(b) or (c)), rightholders have to duly justify their requests to have works disabled or removed. This means that it would not be sufficient for rightholders to resubmit the same information as submitted under Article 17(4)(b) or (c). They would need to justify the infringing nature of the specific upload, otherwise, if further substantiation would not be necessary, the complaint and redress mechanism would be void of any *effet utile*.

In order to keep the redress mechanism effective and expeditious, it should be simple to use and free of charge for the users. Member States could recommend online content-sharing service providers to provide easy online forms to users to fill in and submit within the redress

system. Online content-sharing service providers, at least the major ones, could also allow exchanges between users and rightholders to take place within their redress system and not require the use of external resources (such as e-mails). This would keep the mechanism more expeditious. Any processing of personal data that may happen in the context of the redress mechanism needs to take place in accordance with Regulation (EU) 2016/679.

If the final decision by service providers in relation to content that is blocked is to keep the content unavailable, users must be able to contest this decision through the impartial out-of-court dispute settlement mechanism, which the Member States have to make available. The out-of-court dispute settlement mechanism can be an existing one but with relevant expertise to handle copyright disputes. It should also be easy to use and with no cost for users.

The Member States need to implement in their law the obligation of online content-sharing service providers to inform their users in their terms and conditions that users can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law.

Member States could give recommendations on how service providers can increase users' awareness of what may constitute legitimate uses, as required by Article 17(9). For example, service providers could provide accessible and concise information on the exceptions for users, containing as a minimum information on the mandatory exceptions provided for in Article 17. Besides providing this information in the general terms and conditions of the service providers, this information could be given in context of the redress mechanism, to raise the awareness of users of possible exceptions or limitations that can be applicable.

VII. TRANSPARENCY OF ONLINE CONTENT-SHARING SERVICE PROVIDERS -INFORMATION TO RIGHTHOLDERS (ARTICLE 17(8))

Article 17(8) requires online content-sharing service providers to provide rightholders, at their request, with adequate information on the steps taken in the context of the cooperation with rightholders. This includes:

(a) adequate information on the functioning of tools that they apply to ensure the unavailability of unauthorised content under Article 17(4) and;

(b) information, where licensing agreements are concluded between service providers and rightholders, on the use of their content covered by the agreements.

When implementing this provision, the Member States are encouraged to give indications to the service providers on the type of information to be provided by them, keeping in mind the need to respect Article 17(7) (8) first paragraph and (9).

The information provided should be sufficiently specific to provide transparency to rightholders on the functioning of the tools aimed at avoiding unauthorised content under paragraph 4 whilst respecting the need to ensure that there is no general monitoring obligation. Such information could for example include a description of the type of technologies (if any) or other means used by the service providers, information on third party

technology providers whose services they may use, the average level of efficiency of these tools, any changes to the tools/services used (such as possible updates or changes in the use of third party services). Service providers should not be obliged to give specific information which would go against their business secrets, such as detailed characteristics of the software used, which may be proprietary.

When authorisations are granted, online content-sharing service providers are required to provide, at the request of rightholders, adequate information on the use of content covered by the agreements concluded. In implementing this obligation, the Member States should require service providers to provide sufficiently specific information to achieve the objective of transparency towards rightholders as indicated by recital 68. Such information should include data on the exploitation of the rightholders' works and the revenues generated by the service providers. At the same time, the Member States should bear in mind that, in line with the same recital, service providers are not required to provide detailed and individualised information on each work. However, service providers and rightholders are free to agree on more specific and detailed reporting terms in their contractual negotiations. Regular and accurate reporting on the use of works and subject matter covered by a licensing agreement is important to ensure the rightholders' fair remuneration.

In view of increasing the efficiency of reporting and facilitating the processing of information reported, the Member States may encourage service providers to follow some best practices and industry standards on reporting formats, even if not imposed by the directive.

Finally, it should be noted that some more specific requirements on reporting exist under Article 17 of Directive 2014/26/EU. These requirements apply to the online content-sharing service providers in relation to collective management organisations.