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ONLINE PLATFORMS AND COPYRIGHT: ANALYZING THE LIABILITY REGIME UNDER THE DIGITAL SINGLE MARKET DIRECTIVE AND THE DIGITAL SERVICES ACT IN THE LIGHT OF CJEU JURISPRUDENCE

1. INTRODUCTION

Over five years have elapsed since the European Commission, in its Communication of 6 May 2015, undertook the commitment to conduct a comprehensive assessment of the role of online platforms[1], leading up to the EU legislature illuminating a normative concept of the same in the Digital Services Act[2] (hereinafter referred to as DSA). Indeed, by that time, a set of key characteristics shared by online platforms[3] had already been identified, along with a broad range of activities they would encompass, such as online advertising platforms, marketplaces, search engines, social media and creative content outlets, application distribution platforms,

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[1] European Commission: *A Digital Single Market Strategy for Europe*, COM(2015) 192 final, Brussels, 6 May 2015, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015DC0192 (accessed: 9.2.2024).

[2] 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 (OJ 2022, L 277, pp. 1–102).

[3] In particular: the ability to create and shape new markets and to organize new forms of participation or conducting business based on collecting, processing, and editing large amounts of data; operating in multisided markets with varying degrees of control over direct interactions between groups of users; using of information and communications technologies to reach their users, instantly and effortlessly; playing a key role in digital value creation, facilitating new business ventures and creating new strategic dependencies. See European Commission: *Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, COM(2016) 288 final, Brussels, 25 May 2016, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016DC0288 (accessed: 9.2. 2024), pp. 2–3.

communications services, payment systems and platforms for the collaborative economy[4].

The fulfillment of said commitment and the increasing significance for the digital economy of online platforms — as their continuous development occurs at a pace unprecedented in any other economic sector[5] — have paralleled the rise in, on one hand, serious concerns regarding the important spread of illegal content that can be uploaded and therefore accessed online[6], and on the other hand, decisions by the Court of Justice of the European Union (hereinafter, CJEU) in recent years in response to requests for preliminary rulings regarding the activities of these platforms. Illustrative of this are, *inter alia*[7], the judgment of 26 June 2021, YouTube and Cyando, C-682/18 and C-683/18 (hereinafter, the YouTube and Cyando judgment), and the judgment of 26 April 2022, Poland/Parliament and Council, C-401/19 (hereinafter, the Poland/Parliament and Council judgment).

We highlight these two judgments as they have, as we shall see, played a crucial role in the CJEU's interpretation of the liability regime for intermediary service providers in relation to content protected by copyright, as provided by the service users.

[4] European Commission: *Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, COM(2016) 288 final, pp. 2–3.

[5] In fact, as a response to the significant legal challenges presented by the burgeoning platform economy (in regards to this, see C. Busch, H. Schulte-Nölke, A. Wiewiórowska-Domagalska, F. Zoll: *The Rise of the Platform Economy: A New Challenge for EU Consumer Law?*, Journal of European Consumer and Market Law 2016, Volume 5, Issue 1, pp. 3–10), a research group of European academics convened and drafted a proposal for an EU directive on online platforms. The complete text of this proposal was published in 2016, see Research Group on the Law of Digital Services: *Discussion Draft of a Directive on Online Intermediary,* Journal of European Consumer and Market Law 2016, Volume 5, Issue 4, pp. 164–169 (available at https://ssrn.com/abstract=2821590, accessed: 9.2.2024). Subsequently, a book was published which comments on the main lines of reasoning for the choices that the research group made in formulating their directive proposal and explains how these should be applied, see C. Busch, G. Dannemann, H. Schulte-Nölke, A. Wiewiórowska-Domagalska, F. Zoll (eds.): *Discussion Draft of a Directive on Online Intermediary Platforms. Commentary*, Krakow 2019.

[6] In fact, in its Communications of 2016 and 2017, the Commission stressed the need for online platforms to act more responsibly and step up EU-wide self-regulatory efforts to remove illegal content, see European Commission: *Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, COM(2016) 288 final, pp. 8–11, and European Commission: *Mid-Term Review on the implementation of the Digital Single Market Strategy — A Connected Digital Single Market for All*, COM(2017) 228, Brussels, 10 May 2017, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017DC0228 (accessed: 9.2.2024), pp. 8–9. Furthermore, the Commission pointed out that those serious concerns need forceful and effective replies since 'what is illegal offline is also illegal online', see European Commission: *Tackling Illegal Content Online — Towards an Enhanced Responsibility of Online Platforms*, COM(2017) 555 final, Brussels, 28 September 2017, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0555 (accessed: 9.2.2024), p. 2.

[7] See e.g. judgments of CJEU of 15 September 2016, Mc Fadden, case C-484/14, ECLI:EU:C:2016:689; of 20 December 2017, Asociación Profesional Élite Taxi, case C-434/15, ECLI:EU:C:2017:981; of 19 December 2019, Airbnb Ireland, case C-390/18, ECLI:EU:C:2019:1112 and of 22 December 2022, Louboutin, cases C-148/21 and C-184/21, ECLI:EU:C:2022:1016. The growing list of judicial decisions is proportional to the surge in internet operations, where information society service providers play a pivotal role. Evidence of this is the European Commission's commitment in February 2020 to update the horizontal rules defining the responsibilities and obligations of digital service providers, especially online platforms; see Communication from the European Commission: *Shaping Europe's Digital Future*, Luxembourg, 19 February 2020, https://commission.europa.eu/system/files/2020-02/communication-shaping-europes-digital-future-feb2020_en_4.pdf (accessed: 9.2.2024).

In this paper, we will undertake a normative and jurisprudential analysis of this regime, which so far has undergone two distinct phases, the turning point of which could be identified with the coming into force of the Digital Single Market Directive[8] (hereinafter, DSMD), as it introduced a specific liability regime for 'online content-sharing service providers' (hereinafter, OCSSP).

2. CONCEPTUAL CLARIFICATIONS

The notion of OCSSP was introduced by the DSMD, inherently involving an 'act of communication to the public' for the purposes of this directive — as highlighted by its Article 17[9], thereby to apply to the OCSSP the liability regime envisaged in such a provision — which (clarifies Recital 64 DSMD) does not affect the concept of communication to the public elsewhere under Union law, nor does it affect the possible application of Article 3 of the Copyright Information Society Directive[10] (hereinafter, InfoSoc) to other service providers using copyright-protected content.

Indeed, the DSMD makes it clear (Article 17.1 and Recital 64) that OCSSP perform such an act of communication when they provide the public with access to copyright-protected works or other protected subject matter uploaded by their users. The very definition of OCSSP focuses precisely on the public, widespread, and profitable provision of such protected content, it being understood that they carry out the aforementioned act of communication at the moment such offering materializes.

Thus, the DSMD (Article 2.6) conceptualizes OCSSP as providers of an information society service whose main or one of the main purposes is to store and provide the public with access to a large amount of copyright-protected content uploaded by their users. This content, in addition to being available for sharing, must be organized by the service and promoted for profit-making purposes. According to the European Commission[11], it should be understood that:

[8] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (OJ 2019, L 130, pp. 92–125).

[9] For an in-depth analysis of Article 17 DSMD see E. Rosati: *Copyright in the Digital Single Market. Article-by-Article Commentary to the Provisions of Directive 2019/790*, Oxford 2021, pp. 301–359; J.P. Quintais, P. Mezei, I. Harkai, J. Vieira Magalhães, C. Katzenbach, S.F. Schwemer, T Riis: *Copyright Content Moderation in the EU: An Interdisciplinary Mapping Analysis*, reCreating Europe Report, August 2022 (available at https://ssrn.com/abstract=4210278, accessed: 9.2.2024), pp. 87–112.

[10] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (OJ 2001, L 167, pp. 10–19).

[11] European Commission: *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, COM(2021) 288 final, Brussels, 4 June 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0288 (accessed: 9.2.2024), pp. 4–5. Whilst this guidance is not legally binding, it was formally adopted as a Communication by the Commission and fulfils the mandate given to the Commission by the Union legislature under Art. 17.10 DSMD (*ibidem*, p. 1).

i) 'Main purpose': the (or one of the) chief or predominant function, role of the service provider[12], also the assessment of the 'main or one of the main purposes' should be technology and business model neutral in order to be future proof;
ii) 'Store and give the public access': 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;
iii) 'Large amount': a deliberately unquantified concept that requires a case-by-case basis[13]; also 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;
iv) 'Profit-making purposes': the aim of deriving a benefit, either directly or indirectly, from the organization and promotion of content uploaded by users 'in order to attract a larger audience, including by categorizing it and using targeted promotion within it'[14]; a purpose which should not be assumed merely because the service is an economic operator as such or based on its legal form, as the profit-making purpose must be linked to the profits made from such organisation and promotion in a manner intended to attract a wider audience[15].

According to Article 2.6 DSMD, the definition should focus on online services that play a significant role in the online content market. This means that OCSSP, as mentioned in Article 1.1.b) of Directive 2015/1535[16], fall under the category of

[12] The European Commission cites the example of online marketplaces: these may provide access to a large amount of copyright-protected works, but this is not their main activity, which is online retail. It is precisely for this reason that online marketplaces are excluded from the notion of OCSSP as per Article 2.6 DSMD.

[13] As explained in Recital 63 DSMD, that assessment should take account of a combination of elements, such as the audience of the service and the number of files of copyright-protected content uploaded by the users of the service.

[14] Recital 62 DSMD. As per the European Copyright Society, while the elements of the OCSSP concept do not seem to pose particular implementation challenges, the substantive requirement of organizing and promoting copyright-protected works raises the question of the requisite degree of organization and promotion activities: Is it sufficient to offer a general website infrastructure that allows users to organize content more or less independently? Is the integration of a search tool sufficient? Or does the requirement of content organization imply that an OCSSP must provide a fixed framework of categories and be actively involved in the consistent organization of protected material in accordance with its own organization principle? If the latter, stricter standard is applied, social media services may fall outside the OCSSP definition because they leave a considerable degree of organization options and duties to their users; see A. Metzger, M. Senftleben: *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*, 27 April 2020, https://europeancopyrightsocietydotorg.files.wordpress.com/2020/04/ecs-comment-article-17-cdsm.pdf (accessed: 9.2.2024), p. 3.

[15] For example, but not exclusively, as pointed out by the European Commission: *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, COM(2021) 288 final, p. 6, by placing advertisement next to the content uploaded by their users. The mere fact of receiving a fee from the users to cover the operating costs of hosting their content or soliciting donations from the public should not be considered as such an indication of a profit-making purpose.

[16] 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 (OJ 2015, L 241, pp. 1–15). According to said article, 'information society service' means any service

service providers as defined in Article 2.5 DSMD, which outlines the concept of 'information society service'.

To the same provision of Directive 2015/1535 refers the DSA in its Article 3.a), although it goes further by defining in Article 3.g) 'intermediary service' as one of the following information society services: 'mere conduit', caching, and hosting. This latter service is defined in Article 3.g.iii) DSA as 'consisting of the storage of information provided by, and at the request of, a recipient of the service'.

The DSA provides examples of these three types of intermediary services, including among the hosting services 'services enabling sharing information and content online', that is, those provided by OCSSP with the particularity that in this case the content being shared is protected by copyright.

Accordingly, providers of the three types of intermediary services are subject, with the exception of OCSSP (which have their own regime established in the DSMD), to the horizontal framework of exemptions from liability pursuant to Articles 12 to 15 of the E-Commerce Directive[17] (hereinafter, ECD). The existing framework is still in place, but specific provisions are subject to changes under the DSA[18]. The DSA is expected to take effect (Article 93.2 DSA) on 17 February 2024 for intermediary service providers operating in the internal market. However, for a specific category known as 'Very Large Online Platforms' (hereinafter, VLOP), designated as such by the European Commission before the mentioned date, the DSA will be applicable earlier, starting from 25 August 2023, based on the Commission's initial designation decisions[19].

Applying the DSA on either the mentioned earlier dates or the general effective date results in the removal of Articles 12 to 15 ECD. However, the broad exemptions outlined in those provisions are still upheld, and now they should be considered in relation to Articles 4 to 6 and 8 DSA[20]. This preservation is justified (according to Recital 16 DSA) both by the legal certainty provided by such a framework and by

normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. However, in the case of OCSSP, the service must necessarily be provided in a non-altruistic manner, either by charging the user and/or receiving income through other means (e.g., advertising) beyond covering costs, or by obtaining more users or audience and vice versa.

[17] 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 (OJ 2000, L 178, pp. 1–16).

[18] Not to be confused with its entry into force, which occurred on 16 November 2022, following its publication in the Official Journal of the European Union on 22 October 2022, in accordance with Article 93.1 DSA.

[19] Article 92 DSA provides for the early application of the DSA for Very Large Online Platforms (VLOP) and very large online search engines starting from four months after the Commission made the designation decision, which it did on 25 April 2023 for seventeen platforms (Alibaba, AliExpress, Amazon Store, Apple AppStore, Booking.com, Facebook, Google Play, Google Maps, Google Shopping, Instagram, LinkedIn, Pinterest, Snapchat, TikTok, Twitter, Wikipedia, YouTube, and Zalando) and two online search engines (Bing and Google Search) with at least 45 million monthly active users, according to data that these providers were required to publish by 17 February 2023 at the latest: see official press release of 25 April 2023 accessible at https://ec.europa.eu/commission/presscorner/detail/es/ip_23_2413 (accessed: 9.2.2024).

[20] The aforementioned repeal and new reference to provisions are established in Article 89 DSA, in the first and second subparagraphs, respectively.

the case-law of the CJEU in this regard, which must be duly observed. Specifically, the YouTube and Cyando judgment, which examined the liability rules for online sharing service providers under the ECD and InfoSoc, is a crucial part of the legal body that should still be taken into account. This is because we now have the coexistence of the 'safe harbour' under Article 6 DSA, closely resembling what is outlined in Article 14 ECD, along with the provisions of Article 17 DSMD for OCSSP engaging in unauthorized use of copyright-protected content.

Therefore, it is important to differentiate among hosting service providers by considering the subgroup of 'online platforms' within the broader category, as defined by Recital 13 DSA. These are hosting providers that not only store information provided by the recipients of the service at their request, but also disseminate that information to the public at the request of the recipients of the service, provided that the 'dissemination to the public'[21] is not a minor and purely ancillary feature of another service or a minor functionality of the principal service. Otherwise, the hosting provider will not be considered an 'online platform', according to the concept offered by Article 3.i) DSA[22], in order to avoid imposing overly broad obligations[23].

Note that while Article 3.i) DSA defines 'online platform' as a type of hosting service, Recital 13 DSA categorizes it as a subcategory within the broader category of hosting service providers. Therefore, there will be instances where the reference to the online platform will be made solely as a service, and others where it will encompass both the service and the provider. In the latter case, it will suffice to speak of online platforms without further qualification, whereas in the former, the mention

[21] According to Article 3.k) DSA, 'dissemination to the public' means making information available, at the request of the recipient of the service who provided the information, to a potentially unlimited number of third parties; a concept that, according to Recital 14 DSA, 'should entail the making available of information to a potentially unlimited number of persons, meaning making the information easily accessible to recipients of the service in general without further action by the recipient of the service providing the information being required, irrespective of whether those persons actually access the information in question'. It should be noted that Recital 13 DSA warns in its second subparagraph that 'cloud computing services and web-hosting services, when serving as infrastructure, such as the underlying infrastructural storage and computing services of an internet-based application, website or online platform, *should not in themselves be considered as disseminating to the public information stored* or processed at the request of a recipient of the application, website or online platform which they host' (emphasis added).

[22] That is to say, '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 and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of this Regulation'.

[23] Indeed, this is the justification provided in Recital 13 DSA for introducing into the concept of an online platform the exception, present in Article 3.i) DSA, regarding the minor or ancillary nature of the activity. An example of this, according to the Recital, would be the comments section in an online newspaper where it is clear that it is ancillary to the main service represented by the publication of news under the editorial responsibility of the publisher. In contrast, the storage of comments in a social network should be considered an online platform service 'where it is clear that it is not a minor feature of the service offered, even if it is ancillary to publishing the posts of recipients of the service'.

of 'providers' of online platforms should be added, as the DSA does when referring at times to the VLOP[24]. However, the DSA also interchangeably speaks of these as providers of the specific hosting service including the service itself.

Platforms will be considered as VLOP when designated as such by the European Commission in accordance with Article 33.4 DSA, concerning platforms with a number of average monthly active recipients of the service in the Union equal to or higher than 45 million[25]. It should be noted that:

i) In the first designation decisions under the DSA adopted by the European Commission, YouTube was included — precisely the platform that, a few years before being designated as a VLOP, was a party in case C-682/18 examined by the CJEU along with case C-683/18 (Cyando);
ii) Irrespective of the open nature of the terms used by Article 2.6 DSMD to define OCSSP, it is clear from that definition that Article 17 DSMD concerns the 'large' sharing service providers deemed to be linked to the 'Value Gap' (which we will discuss further in paragraph 4.2) and whose operation that definition is clearly intended to reflect[26]; therefore, there will be cases in which large online platforms will be considered as VLOP and/or OCSSP[27].

The DSA cites (in Recital 13) as examples of online platforms the social networks and online platforms allowing consumers to conclude distance contracts with traders. However, it should be noted that these latter will not be eligible for the safe harbour of Article 6 DSA when the circumstances set out in paragraph 3 of that provision are met, as we will see below.

3. FROM THE UNIFIED CATEGORY TO THE SPECIFIC DIGITAL PROVIDERS AND THEIR APPLICABLE REGIME

Following the preceding discussion, several clarifications could be made to establish an overall view. Thus, it could be stated that:

i) Online platforms and OCSSP are providers of intermediary services (the parent category); in particular, they fall under the general category of providers of

[24] E.g., Recitals 47, 48, 75, 76, 79, 80, 81, 84–94 DSA.

[25] The number established in Article 33 DSA, paragraph 1, to which paragraph 4 refers, although paragraph 2 envisages the possibility of adjusting this number so that it corresponds to 10% of the Union's population when this increases or decreases by at least 5% in relation to the population in 2020, or the population after adjustment by means of a delegated act in the year in which the latest delegated act was adopted.

[26] Opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, Poland/Parliament and Council, case C-401/19, ECLI:EU:C:2021:613, point 26.

[27] YouTube could be an example of an online platform that meets the dual criteria of being both VLOP and OCSSP, especially if we consider Recital 62 DSMD, which states that the concept of OCSSP covers services that 'play an important role in the online content market by competing with other online content services, *such as online audio and video streaming services*, for the same audiences' (emphasis added).

'hosting service', that is, the storage of information provided by, and at the request of, a recipient of the service;

ii) Every online platform — a subcategory within the general category of hosting providers — provides an information society service, specifically hosting, but not every hosting service is provided by an online platform. This will be so when the provider, in addition to storing content provided by the recipients of the service at their request, disseminates that content to the public — whether the content is protected by copyright or not, and regardless of the amount — with this activity being carried out primarily;

iii) Online platforms can be considered OCSSP when they play an important role in the online content market by competing with other online content services for the same audiences and additionally give the public access to a large amount of copyright-protected content, which is organized and promoted for profit-making purposes.

For all providers of intermediary services, the DSA sets out a liability regime, differentiated by service ('mere conduit', caching, and hosting, as per Articles 4, 5, and 6, respectively), as well as basic due diligence obligations (Articles 11 to 15). Descending a level to the category of hosting providers:

a) Apart from the specific liability regime (Article 6 DSA and previously Article 14 ECD) and the aforementioned basic obligations, the DSA provides for additional due diligence obligations (in Articles 16 to 18) applicable to all hosting providers, therefore including online platforms, as well as, particularly for these, other cumulative obligations (established in Articles 20 to 28 DSA) — with the exception of online platforms that qualify as micro or small enterprises as defined in Recommendation 2003/361/EC[28], in the terms of Article 19 DSA[29] — which are even more extensive for VLOP[30] (in Articles 33–43 DSA), all these harmonized due diligence obligations being reasonable and not arbitrary[31];

[28] Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ 2003, L 124, pp. 36–41). According to Article 2 of its Annex: i) the category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding 50 millions of euros, and/or an annual balance sheet total not exceeding 43 millions of euros; ii) within the SME category, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed 10 millions of euros; iii) within the SME category, a microenterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed 2 millions of euros.

[29] However, it notes in paragraph 2 that these obligations will apply to platforms that have been designated as VLOP, irrespective of whether they qualify as micro or small enterprises.

[30] On these platforms, given their special role and reach, additional requirements are imposed regarding information and transparency of their terms and conditions, as provided by Recital 48 DSA. Section 5 of the DSA is dedicated to the additional obligations for VLOP to manage systemic risks.

[31] As indicated by Recital 41 DSA, while it states that such obligations are needed to address the identified public policy concerns, such as safeguarding the legitimate interests of the recipients of the service, addressing illegal practices, and protecting fundamental rights. The same Recital also notes that all due diligence obligations,

b) The DSMD (Art. 17) establishes a regime exclusively dedicated to OCSSP, both in terms of liability and obligations. Thus, the regime contemplated in the DSA — as mentioned in (a) — would complement this in terms of the due diligence obligations of the online platforms that may be considered OCSSP, but not in terms of liability, where the provisions established by Article 17 DSMD prevail as a *lex specialis*. This is without prejudice to the fact that OCSSP, as hosting providers, may benefit from the general safe harbour provided for such providers in Article 6.1 DSA, previously Article 14.1 ECD, the latter being cited by Article 17.3 DSMD, second subparagraph, to save the non-application of the general safe harbour — as established in the first subparagraph in the case of use of copyright-protected content by OCSSP — for purposes falling outside the scope of the DSMD.

Thus, for online platforms that are not considered OCSSP, the due diligence obligations of the DSA always apply — which will be more or less extensive depending on whether we are dealing with VLOP — and they can benefit from the liability exception mechanism pursuant to Article 6 DSA. However, as we have already anticipated, this does not apply to online platforms that allow consumers to conclude distance contracts with traders, insofar as those online platforms present the relevant information relating to the transactions in question in such a way as to lead consumers to believe that this information was provided by those online platforms themselves or by traders acting under their authority or control[32].

For online platforms that can be considered OCSSP, the following applies:

i) In addition to the due diligence obligations of the DSA, the provisions of Article 17 DSMD[33], which requires OCSSP that effectively give the public access to copyright-protected content — thus performing an act of communication to the public, as per Article 17.1, first subparagraph, DSMD — to obtain an authorization from the rightholder (Article 17.1, second subparagraph, DSMD[34]).

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both basic and additional, are independent of the question of liability of providers of intermediary services, which therefore need to be assessed separately.

[32] Exception introduced by Article 6.3 DSA, with Recital 24 DSA providing examples of such behaviour, includes instances where an online platform fails to clearly display the identity of the trader, or an online platform withholds the identity or contact details of the trader until after the conclusion of the contract concluded between the trader and the consumer, or an online platform markets the product or service in its own name rather than in the name of the trader who will supply that product or service. In this respect, it must be objectively determined, based on all relevant circumstances, whether the presentation could lead an average consumer to believe that the information in question was provided by the online platform itself or by traders acting under its authority or control.

[33] Article 17 DSMD contains, *inter alia*, two types of obligations: to obtain authorization to make available copyright-protected works — as outlined in paragraphs 1 and 4(a) of this article — and to prevent the availability of copyright-protected works — as specified in paragraphs 4(b) and 4(c). Further information regarding the second type of obligation will be examined in paragraph 4.2. Additionally, Article 17 DSMD establishes — in paragraph 9 — the obligation to establish complaint and redress mechanisms, as well as the obligation for OCSSP to inform their users in their terms and conditions that they can use works under exceptions or limitations to copyright and related rights provided for in Union law.

[34] Referring to the rightholders referred to in Article 3 InfoSoc, first and second paragraphs. In any case, such authorization shall cover both the acts of the OCSSP and those of their users as per Article 17.2 DSMD, when these

In the absence of such authorization, OCSSP will be liable each time a work or protected subject matter is illegally uploaded to their services (a liability that is direct and a priori strict, adding to that of the users who upload the protected content[35]). However, given the likelihood that OCSSPs may not be able to obtain authorization from all rightholders[36] for all of the protected works, present and future, which could therefore be uploaded to them[37], they may exempt themselves from all liability if they comply with the conditions of Article 17.4 DSMD, which thus constitutes, as we have already mentioned, a specific safe harbour for OCSSP;

ii) The safe harbour of Article 17.4 DSMD in the case of unauthorized use of copyright-protected content (except in the case of service providers whose main purpose is to engage in or to facilitate copyright piracy[38]), or the safe harbour of Article 6.1 of the DSA in any other case, including logically the exclusion from the notion of OCSSP pursuant to Article 2.6 of the DSMD. Its second subparagraph clarifies that not-for-profit online encyclopaedias, not-for-profit educational and scientific repositories, open-source software-developing and-sharing platforms, providers of electronic communications services[39], online marketplaces[40], B2B cloud services, and cloud services that allow users to

users are not acting on a commercial basis or where their activity does not generate significant revenues. 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 authorization unless the parties have explicitly agreed to cover these users contractually, an exception noted by the European Commission: *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, COM(2021) 288 final, p. 7.

[35] Opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, Poland/Parliament and Council, case C-401/19, ECLI:EU:C:2021:613, points 30 and 31, notes in footnote 35 that the liability of OCSSP for unauthorized acts of communication to the public carried out through their services does not replace, but is additional to, the liability of users who upload content, who themselves perform separate acts of communication to the public. According to A. Ohly: *The Liability of Intermediaries for Trademark Infringement* (in:) *Research Handbook on Trademark Law Reform*, G.B. Dinwoodie, M.D. Janis (eds), Cheltenham 2021, p. 397, the liability regime created for OCSSP by Art. 17 DSMD combines elements of primary and secondary liability. Also see opinion of Advocate General Saugmandsgaard Øe of 16 July 2020, YouTube and Cyando, cases C-682/18 and C-683/18, ECLI:EU:C:2020:586, points 100 and 101.

[36] Who, moreover, should not be obliged to give an authorization or to conclude licensing agreements, as pointed out by Recital 61 *in fine* DSMD, on the basis that contractual freedom should not be affected by the provisions of Article 17 DSMD.

[37] Opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, Poland/Parliament and Council, case C-401/19, ECLI:EU:C:2021:613, footnote 45, explains that while it will be relatively easy for sharing service providers to conclude licences, where appropriate, with the 'heavyweights' or with collective management organisations, this will be more complex with regard to the myriad of 'small' rightholders and individual authors; the complexity is compounded by the fact that the content uploaded to sharing services is likely to involve many different types of rights and that copyright and related rights are subject to the principle of territoriality, which multiplies the number of authorizations which must be obtained.

[38] As noted in Recital 62 *in fine* DSMD, this is to ensure a high level of copyright protection.

[39] According to the definition of such services provided in Article 2.5 of the Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ 2018, L 321, pp. 36–214).

[40] Whose main activity is online retail, and not giving access to copyright-protected content, as per Recital 62 DSMD. Therefore, online marketplaces like Amazon, Alibaba AliExpress, or Zalando, designated by the European

upload content for their own use are not considered as such[41], and therefore are excluded from the application of Article 17 DSMD.

Note should be taken of the distinct approach of the EU legislature in creating the liability rules and safe harbour outlined in Article 17 DSMD. This is specialized for OCSSP and falls under vertical regulation. This differs from the framework introduced in Article 14 ECD and upheld in Article 6 DSA, following a horizontal regulatory model. In simpler terms, the latter applies universally to all types of content and liability across different legal areas like intellectual property, defamation, online hate, and so forth[42], except when it comes to the protection of copyright and related rights in the Internal Market[43]. In such case (if there is illegal content in such matter, stored at the behest of users of a service that gives the public access to that content along with a large amount of copyright-protected works), this horizontal regulation would be superseded by the vertical regulation of Article 17 DSMD as a *lex specialis*[44], as we have already seen.

4. STAGES OF THE LIABILITY REGIME APPLICABLE IN RELATION TO COPYRIGHT

We will now address the coexistence of the two aforementioned variants of the liability regime and their effects, bringing into discussion both the doctrine established in the YouTube and Cyando judgment regarding the legal framework prior to the entry into force of the DSMD, as well as the interpretation made in the Poland/

Commission as VLOP, would not be considered as OCSSP, and consequently, the safe harbour of Article 17 DSMD would not apply to them.

[41] The European Commission: *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, COM(2021) 288 final, p. 4 clarifies that this list of excluded service providers is not exhaustive and that 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.

[42] Thus, in opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, Poland/Parliament and Council, case C-401/19, ECLI:EU:C:2021:613, footnote 22, referring to Article 14 ECD.

[43] In relation to this, J.P. Quintais, S.F. Schwemer: *The Interplay between the Digital Services Act and Sector Regulation: How Special Is Copyright?*, European Journal of Risk Regulation 2022, Volume 13, Issue 2, (available at https://doi.org/10.1017/err.2022.1, accessed: 9.2.2024) point out the specific rules and procedures contained in Article 17 DSMD for OCSSP are likely to be considered *lex specialis* to the DSA. Conversely, the DSA would apply to OCSSP insofar as it contains (1) rules that regulate matters not covered by Article 17 DSMD and (2) specific rules on matters where Article 17 leaves a margin of discretion to Member States, the latter category being more challenging, see further details on pp. 204–215.

[44] O. Bulayenko, G. Frosio, N. Mangal, A. Ławrynowicz-Drewek: *Cross Border Enforcement of Intellectual Property Rights in the EU*, Study for the Committee on Legal Affairs (JURI) of the European Parliament, PE 703.387 — December 2021, https://www.europarl.europa.eu/RegData/etudes/STUD/2021/703387/IPOL_STU(2021)703387_EN.pdf (accessed: 9.2.2024), pp. 29–30, highlight that, while the generalized liability exemption regimes of Articles 12–14 ECD applying horizontally to all forms of illegal activity and content, obliging information society service providers to remove or disable access to illegal content once known or upon court order, the Article 17 DSMD elaborates rules on the liability of OCSSP for the infringement of copyright and related rights online, thus creating a vertical liability regime that applies as *lex specialis* next to the general ECD liability regime.

Parliament and Council judgment about the specific regime for OCSSP established by the DSMD through vertical regulation, in contrast to that horizontal framework which continues to be present in the DSA.

4.1. FIRST STAGE AND ITS TRANSLATION TO THE DSA

Before the entry into force of the DSMD, the applicable legal framework consisted of Article 3 InfoSoc and Article 14 ECD.

Article 3.1 InfoSoc grants authors the exclusive right to authorize or prohibit any 'communication to the public' of their works, including the 'making available to the public' of those works in such a way that members of the public may access them from a place and at a time individually chosen by them. This provision therefore contains, strictly speaking, a 'right of communication to the public' for the author, which means that a third party cannot 'communicate to the public' a work or subject matter without having first obtained authorization from the rightholders of that work or subject matter[45]. Consequently, if a protected work is published online by a third party without the prior authorization of its author and that publication is not covered by the exceptions and limitations laid down in Article 5 InfoSoc, there is an infringement of the exclusive right of 'communication to the public' conferred on the author by Article 3.1 InfoSoc.

Article 14 ECD contains a 'safe harbour' for providers of information society services that consists of the storage of information provided by third parties. That provision establishes, in essence, that the provider of such a service is exempt from any liability which may arise from illegal content which it stores at the request of the users of that service, provided that it is unaware of it or, where it becomes aware, it removes it expeditiously.

Under that applicable legal framework, the copyright liability of online platforms for the acts of their users was unclear[46]. Indeed, although there was no controversy regarding the fact that, when a protected work is shared online on a platform, that work is 'made available to the public' for the purposes of Article 3.1 InfoSoc, the question was who (the user uploading the work concerned, the platform operator, or both of them together) carried out that 'communication' and bore any potential liability for it. There was also controversy over whether online platforms could benefit from the exemption in the field of copyright pursuant to Article 14 ECD.

In this context of certain uncertainty, the *Bundesgerichtshof* (Federal Court of Justice, Germany) dealt with two proceedings that gave rise to cases C-682/18 and

[45] Opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, Poland/Parliament and Council, case C-401/19, ECLI:EU:C:2021:613, point 17 and footnote 16.

[46] European Commission: *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, COM(2021) 288 final, p. 1.

C-683/18 through the submission by this judicial body of respective preliminary questions to the CJEU, which it resolved jointly in the YouTube and Cyando judgment.

In the litigation that gave rise to the first case (C-682/18), a music producer sued YouTube and Google — the legal representative of YouTube — for infringement of intellectual property rights held by the plaintiff, specifically for the uploading of works from an album of an artist with whom the plaintiff had an exclusive exploitation contract. This publication was carried out by users of YouTube on the eponymous internet platform without the producer's authorization. In the proceeding that led to the second case (C-683/18), an international publisher sued Cyando, operator of the Uploaded platform, because on this platform, works of which the plaintiff publisher held exclusive exploitation rights were uploaded without authorization and made available through download links. Given these circumstances, and both proceedings having reached appeal on a point of law (Revision), the *Bundesgerichtshof* raised preliminary questions regarding the legal framework prior to the entry into force of the DSMD.

The first preliminary question asked whether the operator of a video-sharing platform (YouTube) and the operator of a file-hosting and -sharing platform (Uploaded) carry out an act of 'communication to the public' within the meaning of Article 3.1 InfoSoc[47] when a user of their platforms uploads a protected work there. The CJEU's response to this question was that they do not, unless the operator, beyond merely making that platform available, contributes to giving the public access to the protected contents thereby infringing copyright rights. To this end, the CJEU provided three examples of such contribution that would allow considering that the platform operator makes a 'communication to the public' of said contents[48]:

i) When, having knowledge of the illegal provision of the protected content, the operator refrains from promptly removing it or blocking access to it;
ii) When, despite knowing or having reason to know that generally users of the platform illegally make available to the public protected content, the operator refrains from implementing appropriate technical measures that could be expected from a diligent operator in order to credibly and effectively combat copyright infringements on the platform;
iii) When the operator participates in the selection of protected content communicated to the public illegally, provides on the platform tools specifically intended for the illicit exchange of such content, or knowingly promotes such exchange.

[47] It is an autonomous concept of EU law, whose meaning and scope must be determined in light of the wording of that provision, the context in which it is set, and the objectives pursued by the InfoSoc, as in opinion of Advocate General Saugmandsgaard Øe of 16 July 2020, YouTube and Cyando, cases C-682/18 and C-683/18, ECLI:EU:C:2020:586, point 54, referring to the judgment of CJEU of 7 August 2018, Renckhoff, case C-161/17, ECLI:EU:C:2018:634, paragraph 17 and the case-law cited.

[48] Judgment of CJEU of 22 June 2021, YouTube and Cyando, cases C-682/18 and 683/18, ECLI:EU:C:2021:503, paragraph 102.

Evidence of this could be the fact that the operator had adopted an economic model that encourages users to illegally proceed with the communication to the public of protected content on the platform.

Note that the CJEU, in responding to the first preliminary question raised, did not delve into the detail of whether Article 3.1 InfoSoc regulates not only direct or primary liability but also the possible indirect or secondary liability of persons facilitating the carrying out, by third parties, of illegal acts of 'communication to the public'. This analysis was indeed undertaken by Advocate General Saugmandsgaard Øe, who held that indirect liability is not actually harmonized in EU law[49] and therefore would be governed by the rules on civil liability provided in the law of the Member States[50].

On the other hand, the second and third question referred in each of the two cases, the *Bundesgerichtshof* asked whether the activity of the operators of platforms like YouTube or Uploaded falls within the scope of Article 14.1 ECD insofar as that activity covers content uploaded to their platforms by platform users. If that is the case, that court also wished to know whether, for those operators to be excluded from the exemption from liability provided for in that provision, they must have knowledge of specific illegal acts committed by their users relating to protected content that was uploaded to their platforms.

Let us recall that Article 14.1 ECD established (as Article 6.1 DSA continues to do) that Member States shall ensure that the hosting provider is not liable for the information stored at the request of a recipient of the service, on condition that the provider complies with a) — that is to say, that it does not have actual knowledge of illegal activity or information and, as regards claims for damages, does not have knowledge of facts or circumstances from which the illegal activity or information is apparent — or b) for that provision — that is to say, that the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove the information or to disable access to it.

The CJEU proceeded on the basis that, for the purposes of assessing whether Article 14.1 ECD applies, the question of whether such an operator makes a 'communication to the public' within the meaning of Article 3.1 InfoSoc was not, in itself, decisive for those purposes. This follows the opinion of Advocate General Saugmandsgaard Øe, who held that Article 14.1 ECD — unlike Article 3.1 InfoSoc — would cover all forms of liability of the providers in question, both primary and secondary liability for the information provided and the activities initiated by users of their services[51].

[49] In the same vein, opinion of Advocate General Szpunar of 2 June 2022, Louboutin, cases C-148/21 and C-184/21, ECLI:EU:C:2022:422, point 8.

[50] See opinion of Advocate General Saugmandsgaard Øe of 16 July 2020, YouTube and Cyando, cases C-682/18 and C-683/18, ECLI:EU:C:2020:586, points 65 and 94–103.

[51] See opinion of Advocate General Saugmandsgaard Øe of 16 July 2020, YouTube and Cyando, cases C-682/18 and C-683/18, ECLI:EU:C:2020:586, point 138 and Judgment of CJEU of 22 June 2021, YouTube and Cyando,

For the CJEU, the key factor in determining whether the provider of a service on the internet falls within the scope of Article 14.1 ECD would be that it be an 'intermediary service provider' within the meaning intended by the legislature in the context of Articles 12–15 ECD. In that regard, it follows from Recital 42 ECD that the exemptions from liability established therein cover only cases where the activity of the information society service provider is of a mere technical, automatic, and passive nature, which means that the service provider has neither knowledge of nor control over the information which is transmitted or stored[52].

Consequently, in order to ascertain whether the operator of a platform like YouTube or Uploaded could be exempted from liability for the protected content which users illegally communicate to the public via its platform, it would be necessary to examine[53]:

i) Whether the role played by that operator is neutral — that is to say, whether its conduct is merely technical, automatic, and passive, which means that it has no knowledge of or control over the content it stores — or whether, on the contrary, that operator plays an active role that gives it knowledge of or control over that content. In such a case, the operator concerned would not be able to rely on the exemption from liability pursuant to Article 14.1 ECD if, beyond merely providing its platform, that operator contributes to giving the public access to protected content in breach of copyright;
ii) If the operator does not play such an active role, it should be checked whether it complies with the conditions laid down by that provision governing the exemption from its liability. The condition laid down in Article 14.1.a) ECD[54]

cases C-682/18 and 683/18, ECLI:EU:C:2021:503, paragraph 108. Previously, opinion of Advocate General Szpunar of 16 March 2016, Mc Fadden, case C-484/14, ECLI:EU:C:2016:170, point 64, had already held that Article 12.1 ECD would apply horizontally to all forms of liability (under criminal law, administrative law and civil law) of the service provider, also direct liability and secondary liability, for acts committed by third parties. For an analysis of both types of liability, see A. Ohly: *The Liability…*, *op. cit.*, pp. 396–430; J. Riordan: *Liability of internet intermediaries*, Oxford 2016, Part 1; C. Ullrich: *Unlawful Content Online: Towards a New Regulatory Framework for Online Platforms*, Baden-Baden 2021, pp. 356–363; G. Sartor: *Providers Liability: From the eCommerce Directive to the future*, In-Dept Analysis for the IMCO Committee, P/A/IMCO/2017-07, October 2017, https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/614179/IPOL_IDA(2017)614179_EN.pdf. (accessed: 9.2.2024), pp. 26–27.

[52] Judgment of CJEU of 22 June 2021, YouTube and Cyando, cases C-682/18 and 683/18, ECLI:EU:C:2021:503, paragraph 105, with reference to the judgment CJEU of 23 March 2010, Google France and Google, cases C-236/08 to C-238/08, ECLI:EU:C:2010:159, paragraphs 112 and 113.

[53] See judgment of CJEU of 22 June 2021, YouTube and Cyando, cases C-682/18 and 683/18, ECLI:EU:C:2021:503, paragraphs 106, 107, 110–113, 117 and 118.

[54] Namely the situation where the service provider concerned has 'actual knowledge of illegal activity or information' and the situation where such a provider is 'aware of facts or circumstances from which the illegal activity or information is apparent'. According to opinion of Advocate General Jääskinen of 9 December 2010, L'Oréal and Others, case C-324/09, ECLI:EU:C:2010:757, points 162–164, 'actual knowledge' means knowledge (not a mere suspicion or assumption regarding) of past or present information, activity or facts that the service provider has on the basis of an external notification or its own voluntary research, it is not enough that the service provider ought to have known or has good reasons to suspect illegal activity; from this consideration Advocate General Saugmandsgaard Øe in opinion of Advocate General Saugmandsgaard Øe of 16 July 2020, YouTube and

cannot be considered unfulfilled solely on the ground that the operator has an abstract knowledge that protected content is being made available illegally on its platform, given that Article 14.1.a) of the ECD refers to specific illegal information and activities, and considering that Article 15.1 of the ECD prohibits — as does Article 8 of the DSA — imposing a general obligation on operators to monitor the information which they transmit or store, or a general obligation actively to look for facts or circumstances indicating illegal activity.

In summary, the doctrine established by the YouTube and Cyando judgment could essentially be summarized in the following points:

1) The operator of online platform does not make a 'communication to the public' of protected content, within the meaning of article 3.1 InfoSoc, unless that operator contributes, beyond merely making that platform available, to giving access to such content to the public in breach of copyright;
2) For the operator of an online platform to be able to invoke the safe harbour pursuant to Article 14.1 ECD, the role played by that operator has to be neutral — in such a case, its activity is understood to be included within the scope of application of that provision, unlike if the role played by that operator is active — and, in addition, that operator has to comply with the conditions laid down by that provision, understanding that the lack of 'actual knowledge' (Art. 14.1.a ECD) is required with respect to specific illegal acts.

Although this doctrine was established before the entry into force of the DSMD, it should still be taken into account, with the new reference to Article 6 DSA, for online platforms that are not considered OCSSP. And while there were doubts about the nature of liability pursuant to Article 14 ECD, with the DSA it can be perceived that the EU legislature intended to clarify this aspect with regard to the new reference (Article 6 DSA), as Recital 17 DSA indicates that the exemptions from liability established in the DSA should apply in respect of 'any type of liability as regards any type of illegal content, irrespective of the precise subject matter or nature of those laws'. This should be kept in mind when examining the possible application at the national level of Article 6 DSA, a provision that is directly applicable in the Member States, unlike Article 14 ECD[55], and which brought the following main novelties with respect to this latter provision:

i) In order to ensure the effective protection of consumers when engaging in intermediated commercial transactions online, Article 6.3 DSA, as we have already seen, excludes the application of the safe harbour pursuant to Article 6.1 DSA for online platforms that allow consumers to conclude distance con-

Cyando, cases C-682/18 and C-683/18, ECLI:EU:C:2020:586, point 179, deduces that in order to demonstrate such 'actual knowledge', attention should be paid not to the fact that the provider would have known had it been diligent, but to what it really knew.

[55] As the DSA is a regulation and the ECD is a directive, in accordance with Article 288 of the Treaty on the Functioning of the European Union (consolidated version, OJ 2012, C 326, pp. 47–390).

tracts with traders, insofar as those online platforms present the relevant information relating to the transactions in such a way as to lead consumers to believe that that information was provided by those online platforms themselves or by traders acting under their authority or control;

ii) The doctrine of the YouTube and Cyando judgment is incorporated, as Recital 18 DSA notes that the exemptions from liability established in the DSA 'should not apply where, instead of confining itself to providing the services neutrally by a merely technical and automatic processing of the information provided by the recipient of the service, the provider of intermediary services plays an active role of such a kind as to give it knowledge of, or control over, that information'[56];

iii) In relation to the above, in order to create legal certainty, and not to discourage activities that aim to detect, identify, and act against illegal content, it is established in Article 7 DSA, following the criterion of the CJEU expressed in the YouTube and Cyando judgment, that providers of intermediary services do not lose the possibility of invoking the safe harbour (pursuant to Article 6 DSA, previously Article 14 ECD) simply by carrying out those activities, provided they are done in good faith and in a diligent manner[57].

Indeed, let us recall that according to the YouTube and Cyando judgment, the platform operator cannot benefit from the safe harbour when it plays an active role that gives it knowledge of or control over that content[58]. However, the CJEU noted that the fact that the operator implements technological measures aimed at detecting content which may infringe copyright does not mean that, by doing so, that operator plays such an active role[59]. The DSA, as we have just seen, brings this doctrine into consideration with regards to the application of the safe harbour provided in its Article 6, and Recital 22 DSA makes some clarifications that we will comment on below:

Firstly, the Recital points out that in order to benefit from the exemption from liability for hosting services, the provider should, upon obtaining actual knowledge

[56] Consequently, as per Recital 18 DSA, those exemptions should not be available in respect of liability relating to information provided not by the recipient of the service but by the provider of the intermediary service itself, including where the information has been developed under the editorial responsibility of that provider.

[57] Recital 26 DSA clarifies that the condition of acting in good faith and in a diligent manner should include acting in an objective, non-discriminatory and proportionate manner, with due regard to the rights and legitimate interests of all parties involved, and providing the necessary safeguards against unjustified removal of legal content; to that aim, the providers concerned should, *v.gr.*, take reasonable measures to ensure that, where automated tools are used to conduct such activities, the relevant technology is sufficiently reliable to limit to the maximum extent possible the rate of errors.

[58] Judgment of CJEU of 22 June 2021, YouTube and Cyando, cases C-682/18 and 683/18, ECLI:EU:C:2021:503, paragraph 106 and the case-law cited by analogy.

[59] Unless information society service providers who adopt measures which seek specifically to combat such infringements are to be excluded from the rules on exemption from liability under Art. 14.1 ECD (Judgment of CJEU of 22 June 2021, YouTube and Cyando, cases C-682/18 and 683/18, ECLI:EU:C:2021:503, paragraph 109).

or awareness of illegal activities or illegal content, act expeditiously to remove or to disable access to that content — as set forth in Article 6.1.b) DSA and as was already the case in Article 14.1.b) ECD — with removal or disabling of access needing to be carried out in observance of the fundamental rights of the recipients of the service, including the right to freedom of expression and of information. Indeed, such respect was already taken into account by the EU legislature in laying down exemptions from liability in the ECD, as it intended[60] to strike a balance between the different interests at stake: on one hand, under Article 15.1 ECD (the new reference being Article 8 DSA), it was not possible to impose on providers of intermediary services a general obligation to monitor the information which they transmit or store or a general obligation to actively look for facts or circumstances indicating illegal activity; on the other hand, those same providers must, as soon as they obtain actual knowledge or awareness of illegal information, act expeditiously to remove or to disable access to that information, in observance of the principle of freedom of expression and of procedures established for this purpose at the national level (Recital 46 ECD).

Secondly, Recital 22 DSA points out that the provider can obtain such actual knowledge or awareness of the illegal nature of the content, *inter alia*, through its own-initiative investigations or through notices submitted to it by individuals or entities in accordance with the DSA, insofar as such notices are sufficiently precise and adequately substantiated to allow a diligent economic operator to reasonably identify, assess, and, where appropriate, act against the allegedly illegal content. It should be noted that the DSA replicates in its Article 6.1 the logic of 'notice and take down' that underlay Article 14.1 ECD[61], and with which it was sought, in addition to striking a balance between the different interests at stake, to safeguard the freedom of expression of users[62].

Thirdly, Recital 22 DSA concludes by warning that, notwithstanding the foregoing, such actual knowledge or awareness cannot be considered to be obtained solely on the ground that the provider is aware, in a general sense, of the fact that its service is also used to store illegal content[63].

[60] See opinion of Advocate General Saugmandsgaard Øe of 16 July 2020, YouTube and Cyando, cases C-682/18 and C-683/18, ECLI:EU:C:2020:586, point 175.

[61] As in opinion of Advocate General Saugmandsgaard Øe of 16 July 2020, YouTube and Cyando, cases C-682/18 and C-683/18, ECLI:EU:C:2020:586, point 176, the purpose of Article 14.1 ECD was to form a basis for the development, at Member State level, of so-called 'notice and take down' procedures and, consequently, the conditions laid down in points (a) and (b) thereof reflect the logic of those procedures: where specific illegal information is brought to the attention of a service provider it must expeditiously remove it.

[62] What Advocate General Saugmandsgaard Øe (opinion of Advocate General Saugmandsgaard Øe of 16 July 2020, YouTube and Cyando, cases C-682/18 and C-683/18, ECLI:EU:C:2020:586, point 186) pointed out in point 187 was that, in this context, the logic of notifications was not only intended to enable a service provider to discover the existence and the location of illegal information on its servers, but also to provide it sufficient evidence to verify the illegal nature of the information.

[63] Recital 22 DSA clarifies that the fact that the provider automatically indexes information uploaded to its service, that it has a search function or that it recommends information on the basis of the profiles or preferences

Compared to this regime, which follows the horizontal regulatory model of the ECD and is therefore applicable — to providers of intermediary services — regardless of the subject matter, the DSMD came to establish a liability regime and specific safe harbour for OCSSP in relation to a specific matter, the protection of copyright rights. We will examine this next.

4.2. SECOND STAGE: THE ARRIVAL OF THE DSMD AND THE CONTROVERSIAL LIMITATION OF FREEDOM OF EXPRESSION

The regime introduced by Article 17 DSMD provided legal certainty as to whether online platforms engage in copyright relevant acts in relation to the acts of their users, as well as legal certainty for users[64].

Indeed, with respect to the controversy that existed in the first stage (see *supra* paragraph 4.1) and that was reflected in the joined cases C-682/18 and C-683/18, about whether the providers of sharing service performed an act of 'communication to the public' with respect to the use of copyright-protected content uploaded by their users, and therefore whether such providers should themselves conclude licensing agreements and remunerate rightholders, under Article 17 DSMD, there is no longer any doubt that a certain type of providers, the OCSSP, perform that act when they give the public access to copyright-protected content uploaded by their users, and precisely for that reason have the obligation to obtain an authorization from the rightholders[65] (Article 17.1 DSMD, first and second subparagraphs respectively).

This obligation is directly related to the general objective pursued by Article 17 DSMD[66] — as per Recital 3 DSMD — thus aiming to reinforce the position of the rightholders during the negotiation of licensing agreements with the OCSSP, in order to ensure that those agreements are 'fair' and maintain a 'reasonable balance between both parties' (as indicated in Recital 61 DSMD), and, in doing so, to remedy the 'Value Gap'[67], that is to say, the difference between the value that online

of the recipients of the service is not a sufficient ground for considering that provider to have 'specific' knowledge of illegal activities carried out on that platform or of illegal content stored on it.

[64] As stated by the European Commission: *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, COM(2021) 288 final, p. 1.

[65] Although Recital 64 DSMD states that this is a 'clarification', Advocate General Saugmandsgaard Øe in opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, Poland/Parliament and Council, case C-401/19, ECLI:EU:C:2021:613, footnote 36, argues that in reality the EU legislature has redefined the scope of the right of 'communication to the public' within the meaning of article 3 InfoSoc for the (sole) purpose of the application of Article 17 DSMD.

[66] As per Recital 3 DSMD 'to achieve a well-functioning and fair marketplace for copyright'.

[67] Opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, Poland/Parliament and Council, case C-401/19, ECLI:EU:C:2021:613, point 28.

content-sharing service providers extract from copyrighted works hosted on the corresponding platform and the income that rightholders receive in return[68].

The 'Value Gap' had emerged under the legal framework prior to the entry into force of the DSMD, which, as we have already seen, generated doubts in response to which some providers did not feel obliged to conclude licensing agreements with rightholders. Meanwhile, those who did enter into such agreements often did so by imposing their conditions when negotiating the remuneration of the rightholders; conditions which the latter considered inequitable. Moreover, under this previous legal framework, rightholders had to monitor sharing services and inform their providers, by means of notifications, of infringing content found on the service so that providers could remove it. That is to say, a system of 'notice and take down', as set out in Article 14.1 ECD, which the EU legislature considered, when adopting Article 17 DSMD, placed too heavy a burden on rightholders and did not allow them to effectively control the use of their works. This was intended to be resolved through paragraphs b) and c) *in fine* of Article 17.4 DSMD, provisions that transfer to the service providers the responsibility for monitoring this service[69].

The EU legislature's concern to ensure that rightholders received equitable compensation for the exploitation of their works was reflected in the Explanatory Memorandum of the then Proposal for a Directive on copyright in the Digital Single Market[70] (hereinafter, the Proposal). The Proposal aimed to enable rightholders to more easily control the use of their works. In this regard, Article 13 of the Proposal — the precursor to Article 17 DSMD — required sharing service providers to use automatic content recognition tools, that is to say, IT tools, which may be used *inter alia* when a user uploads content (hence such tools commonly being referred to as an 'upload filter') in order to verify, through an automated process, whether that content includes a work and, if that is the case, to block its dissemination[71].

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[68] For more detail in relation to the music industry, see International Federation of the Phonographic Industry: *IFPI Digital Music Report 2015*, https://www.musikindustrie.de/fileadmin/bvmi/upload/06_Publikationen/DMR/ifpi_digital-music-report-2015.pdf (accessed: 9.2.2024) pp. 22 and 23.

[69] Opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, Poland/Parliament and Council, case C-401/19, ECLI:EU:C:2021:613, point 53.

[70] European Commission: *Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market*, COM(2016) 593 final, Brussels, 14 September 2016, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0593 (accessed: 9.2.2024). On page 3 of the Proposal, it is stated that 'Evolution of digital technologies has led to the emergence of new business models and reinforced the role of the Internet as the main marketplace for the distribution and access to copyright-protected content. In this new framework, rightholders face difficulties when seeking to license their rights and be remunerated for the online distribution of their works. This could put at risk the development of European creativity and production of creative content. It is therefore necessary to guarantee that authors and rightholders receive a fair share of the value that is generated by the use of their works'.

[71] Thus, opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, Poland/Parliament and Council, case C-401/19, ECLI:EU:C:2021:613, 2021, point 22, with reference to the third paragraph of Recital 38, Recital 39 and Article 13.1 of the Proposal. For more detail on those IT tools see opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, Poland/Parliament and Council, case C-401/19, ECLI:EU:C:2021:613, points 57–59.

The reactions in defense of freedom of expression were immediate, moving into a legislative process — during which Article 13 of the Proposal underwent various amendments — marked by intensive lobbying campaigns against the imposition of 'upload filters'[72]. This included reports from the Special Rapporteur of the United Nations on freedom of expression[73] and analyses from the academic community about the potential impact on human rights[74] .

Although Article 13 of the Proposal was ultimately adopted as Article 17 DSMD using substantially different wording, with the 'apparent' removal of the imposition of 'upload filters', the Republic of Poland filed on 24 May 2019 an action for annulment on the basis of Article 263 TFEU, asking the CJEU, principally, to annul Article 17.4(b) and (c) *in fine* DSMD and, alternatively[75], to annul Article 17 in its entirety, alleging infringement of the right to freedom of expression and information guaranteed by Article 11 of the Charter of Fundamental Rights of the European Union (hereinafter, CFR).

That action, which was resolved in the Poland/Parliament and Council judgment, provided the CJEU with the opportunity to examine the question of the liability borne by providers of online sharing services under the regime of Article 17 DSMD. Paragraph 4 of this Article, as we have already mentioned, contemplates a specific safe harbour for OCSSP, according to which they may, in the event of unlawful 'communication to the public' through their services, exempt themselves from all liability by demonstrating that they have:

i) Made 'best efforts' to obtain an authorization, as per Article 17.4(a) DSMD, and to ensure the unavailability of unauthorized works identified by rightholders, as per Article 17.4(b) DSMD[76]; and in any event

[72] One of the most significant ones was the crowdfunding campaign 'Stop the censorship-machinery! Save the Internet!', available at www.change.org/p/european-parliament-stop-the-censorship-machinery-save-the-internet; see also website https://savetheinternet.io/en/ (accessed: 9.2.2024).

[73] See D. Kaye: *Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, OL OTH 41/2018, 13 June 2018, https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/Legislation/OL-OTH-41-2018.pdf (accessed: 9.2.2024).

[74] A compendium of relevant bibliography can be consulted at www.create.ac.uk/policy-responses/eu-copyright-reform/article-13-research/ (accessed: 9.2.2024).

[75] Should the CJUE consider that those provisions cannot be severed from the other provisions of Article 17 DSMD without altering the substance thereof.

[76] "Recital 66 DSMD points out, on one hand, that in assessing whether the OCSSP had made their 'best efforts' in accordance with 'the high industry standards of professional diligence' (Article 17.4.b), 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 unauthorized works, taking into account best industry practices and the effectiveness of the steps taken in light of all relevant factors and developments. On the other hand, it notes that where rightholders do not provide OCSSP with the 'relevant and necessary information' (Article 17.4.b) on their specific works, or where no notification concerning the disabling of access to, or the removal of, specific unauthorized works (Article 17.4.c) has been provided by rightholders, and, as a result, those OCSSP cannot make their best efforts to avoid the availability of unauthorized content on their services, such OCSSP should not be liable for unauthorized acts of communication to the public or of making available to the public of such unidentified works".

ii) Complied expeditiously with the 'notice and take down' system in primis set out in Article 17.4(c) DSMD, which in fine contemplates the duty to make 'best efforts' to prevent future uploads of those works, following the logic of 'notice and stay down'.

According to the Republic of Poland, in order to satisfy the conditions laid down in the contested provisions — Article 17.4(b) and (c) *in fine* DSMD — OCSSP must carry out preventive monitoring of the information uploaded by users. In order to perform such monitoring, OCSSP will have to use software tools that enable the automatic filtering of that content. Therefore, the contested provisions entail a limitation on the exercise of the right to freedom of expression guaranteed by Article 11 CFR, on the ground that preventive monitoring of content uploaded involves an interference with that content, and its possible blocking, even before it is disseminated[77].

Thus, it would be highlighted that:

i) In practice, the conditions for exemption laid down in the contested provisions constitute genuine 'obligations' for OCSSP. As eloquently pointed out by the Advocate General, recourse to the exemption mechanism provided for in Article 17.4 of the DSMD will be a necessity rather than an 'option' for OCSSPs, otherwise they will bear a disproportionate risk of liability[78];

ii) Being constrained to that mechanism, the 'obligations' pursuant to Article 17.4 DSMD de facto require OCSSP to carry out a prior review of the content that users wish to upload to their platforms, as recognized in paragraph 53 of the Poland/Parliament and Council judgment. This paragraph warns that such prior review is conditional upon the OCSSP having received from the right holders the information or notices provided for in points (b) and (c) of Article 17.4 DSMD;

iii) In order to carry out this prior review, OCSSP find themselves obliged to use content recognition tools. The imposition of these tools, present in Article 13 of the Proposal, seemed to have disappeared from Article 17 DSMD. However,

[77] As per C. Geiger, B.J. Jütte: *The EU Commission's Guidance on Article 17 of the Copyright in the Digital Single Market Directive — A Guide to Virtue in Content Moderation by Digital Platforms?* SSRN, 29 June 2021, https://ssrn.com/abstract=3876608 (accessed: 9.2.2024), p. 10; C. Geiger, B.J. 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*, European Intellectual Property Review 2021, Volume 43, Issue 10, p. 635, the problem of automated filtering and the right to freedom of expression is that the inability of automated systems to distinguish between lawful and unlawful uses inevitably will result in the blocking of lawful speech without an initial judicial determination, and that the technological limitations and the anticipated amount of earmarked content and user complaints as a result cast in doubt whether the mechanisms required under Article 17 DSMD are able to provide sufficient reassurances that the rights of users are respected, putting in question whether OCSSP will realistically be able to implement technological solutions that prevent the upload of earmarked content while at the same time ensuring an ample level of human review.

[78] Opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, Poland/Parliament and Council, case C-401/19, ECLI:EU:C:2021:613, point 86.

in reality, the EU legislature has simply changed its approach between the Proposal and its adoption as the DSMD. That is, rather than directly providing for an obligation to put those tools into place, it has indirectly imposed their use by means of the conditions for exemption from liability laid down in those provisions. This opinion of the Advocate General[79] was accepted by the Poland/Parliament and Council judgment. It adds, contrary to those who argued that OCSSP could decide the measures to be implemented in order to comply with the contested provisions[80], measures or techniques which at the hearing before the CJEU, no one was able to designate possible alternatives to automatic recognition and filtering tools[81].

As a result, the Poland/Parliament and Council judgment ultimately recognizes that such prior review and filtering are likely to restrict an important means of disseminating online content and thus constitute a limitation on the right guaranteed by Article 11 CFR. Therefore, it must be concluded that the specific liability regime established in Article 17.4 DSMD entails a limitation on the exercise of the right to freedom of expression and information of users of content-sharing services. This limitation is attributable to the EU legislature since it is the direct consequence of that specific liability regime established in respect of OCSSP[82], thus resulting in an 'interference by public authority' proscribed both by Article 11 CFR and by its predecessor, that is to say, Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, ECHR).

The Republic of Poland was therefore justified in arguing that filtering, by nature, is a 'preventive measure' to monitor the information disseminated on those services, and the blocking measures which may result from it constitute 'prior restraints' within the meaning of the case-law of the European Court of Human Rights (hereinafter, ECtHR) relating to Article 10 ECHR[83]. In this regard, it should be noted that, under Article 52.3 CFR, the rights guaranteed in Article 11 thereof

[79] See opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, Poland/Parliament and Council, case C-401/19, ECLI:EU:C:2021:613, points 62 and 87.

[80] With the argument that the contested provisions do not formally require specific measures or techniques in order to attain the objectives they pursue.

[81] Judgment of CJEU of 26 April 2022, Poland/Parliament and Council, case C-401/19, ECLI:EU:C:2022:297, paragraph 54. This thus validated not only the position of the Advocate General but also that of many experts in the field who had pointed out that Article 17.4 DSMD in fact obliges OCSSP to use these tools. See, to that effect, K. Grisse: *After the storm—examining the final version of Article 17 of the new Directive (EU) 2019/790*, Journal of Intellectual Property Law & Practice 2019, Volume 14, Issue 11, pp. 894–895, as well as the authors cited in opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, Poland/Parliament and Council, case C-401/19, ECLI:EU:C:2021:613, footnote 71.

[82] Judgment of CJEU of 26 April 2022, Poland/Parliament and Council, case C-401/19, ECLI:EU:C:2022:297, paragraphs 55, 56 and 58. As per opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, Poland/Parliament and Council, case C-401/19, ECLI:EU:C:2021:613, 2021, footnote 94, the very fact that OCSSP are required indirectly to carry out such monitoring of their services constitutes, in itself, an 'interference' by the EU legislature with the freedom of expression of those providers.

[83] Argument of the Republic of Poland, as recalled in opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, Poland/Parliament and Council, case C-401/19, ECLI:EU:C:2021:613, point 79.

have the same meaning and scope as those guaranteed in Article 10 ECHR. It follows that Article 11 CFR must be interpreted in the light of Article 10 ECHR and the related case-law of the ECtHR, and in fact, this is what the CJEU did in the Poland/Parliament and Council judgment.

Having recognized the limitation on the exercise of the right to freedom of expression and information of users of content-sharing services, the CJEU was left to examine whether this limitation would find justification under Article 52.3 CFR. To this end, it was necessary to examine compliance with the requirements set out in Article 52.1 CFR. And since, under Article 53 CFR, the level of protection afforded by that instrument can never be lower than that guaranteed by the ECHR, the CJEU had to adopt an interpretation of the conditions laid down in Article 52.1 CFR which is at least as strict as the ECtHR's interpretation of the conditions set out in Article 10.2 ECHR[84].

Although the limitation on the exercise of the right to freedom of expression and information of users of content-sharing services would meet the first requirement of Article 52.1 CFR and Article 10.2 ECHR[85], the Republic of Poland submitted that such a limitation would be incompatible with the CFR because Article 17 DSMD does not contain safeguards to ensure that the essence of that fundamental right — the second requirement under Article 52.1 CFR — and the principle of proportionality are respected when the obligations provided for in point (b) and point (c) *in fine* of Article 17.4 DSMD are being implemented. According to the Republic of Poland, the contested provisions undermine the 'essence' of the right to freedom of expression, as, in accordance with those provisions, preventive monitoring of content uploaded must be carried out by OCSSP. This is said to call into question that right as such, on the ground that it involves an interference with that content, and its possible blocking, even before it is disseminated. Furthermore, it was argued that Article 17, paragraphs 7 to 9, DSMD would not, when those obligations are being implemented, prevent lawful content from also being automatically blocked and its dissemination to the public being at the very least significantly delayed, with the risk that that content would lose all its interest and informative value before dissemination.

In response to this argument, the CJEU pointed out, on one hand, that from Article 17, paragraphs 7 to 9, and from Recitals 66 and 70 DSMD, it is evident that the EU legislature has stipulated that the implementation of the obligations imposed on OCSSP in point (b) and point (c) *in fine* of Article 17.4 DSMD cannot lead to the latter taking measures which would affect the essence of that fundamental right of

[84] According to Article 52.1 CFR, a limitation on the exercise of that freedom of expression is permissible, provided that such a limitation is 'provided for by law and respects the essence' of that freedom. In turn, Article 10.2 ECHR requires that the limitation be 'prescribed by law' and 'necessary in a democratic society'.

[85] Since such a limitation results from obligations imposed on OCSSP in Article 17.4 DSMD, it is therefore 'provided for by law' (see Judgment of CJEU of 26 April 2022, Poland/Parliament and Council, case C-401/19, ECLI:EU:C:2022:297, paragraph 72).

users who share content on their platforms which does not infringe copyright[86]. On the other hand, in the context of the review of proportionality referred to in Article 52.1 CFR, the limitation on the exercise of the right to freedom of expression and information of users of online content-sharing services meets the need to 'protect the rights and freedoms of others' (a sub-condition of the condition relating to compliance with the principle of proportionality[87]) within the meaning of Article 52.1 CFR; that is, in this case, the need to protect intellectual property guaranteed in Article 17.2 CFR. Furthermore, the liability mechanism referred to in Article 17.4 DSMD appears 'necessary' to meet the need to protect intellectual property rights. Although an alternative mechanism to the one provided in the contested provisions — under which only the obligations laid down in point (a) and the beginning of point (c) of Article 17.4 DSMD would be imposed on OCSSP — would constitute a less restrictive measure with regard to exercising the right to freedom of expression and information, that alternative mechanism would, however, not be as effective in terms of protecting intellectual property rights as the mechanism adopted by the EU legislature[88].

However, considering that this liability mechanism entails significant risks for the freedom of expression — especially the risk of 'over-blocking' lawful content[89] — it is necessary to provide sufficient safeguards to minimize those risks. In the

[86] As per the CJEU, DSMD indeed reflects the Court's case-law according to which measures adopted by service providers, such as the OCSSP, must comply with the right to freedom of expression and information of internet users and must, in particular, be strictly targeted in order to enable effective protection of copyright but without thereby affecting users who are lawfully using those providers' services (see Judgment of CJEU of 26 April 2022, Poland/Parliament and Council, case C-401/19, ECLI:EU:C:2022:297, paragraph 81 and the case-law cited). From the above, B.J. Jütte, G. Priora: *CJEU rejects Poland's challenge to preventive upload filtering to combat copyright infringement on online platforms (Case C-401/19)*, European Intellectual Property Review 2022, Volume 43, Issue 10, pp. 634–635, determine that the CJEU limits the filtering obligation to instances in which very specific targeted filtering is possible, even though it still remains unclear what 'targeted' filtering means and what type of information rightholders have to provide OCSSP with in order to have infringing content removed and blocked. This is due to CJEU not adopting notions such as 'manifestly infringing content' as standards for justified blocking and filtering, being of the opinion that shedding light on such notions that are further subject to the pressures of technological development would have been an important contribution to the shaping of the EU's future online copyright enforcement regime.

[87] The condition relating to compliance with the principle of proportionality, which, according to article 52.1 CFR, is subdivided into two sub-conditions: the limitation at issue must, first, be 'necessary' and, secondly, 'genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'. In this case, there was no controversy over the compliance with the second sub-condition, however the parties disagree as to whether the limitation at issue complies with the first sub-condition, that is to say, whether such limitation was 'necessary'. Regarding the application of the principle of proportionality in the context of respect for the CFR in copyright cases that limit the exercise of fundamental rights, see R. Markiewicz: *Zasada proporcjonalności w prawie autorskim w Unii Europejskiej*, Warsaw 2023.

[88] See judgment of CJEU of 26 April 2022, Poland/Parliament and Council, case C-401/19, ECLI:EU:C:2022:297, paragraphs 76–84.

[89] Opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, Poland/Parliament and Council, case C-401/19, ECLI:EU:C:2021:613, points 142 and 143, and footnote 173, points out that such a risk of an 'over-blocking' exists, generally, where public authorities hold intermediary providers liable for illegal information provided by users of their services and, in order to avoid any risk of liability, those intermediaries may tend to be overzealous and excessively block such information where there is the slightest doubt as to its lawfulness; in this

view of the CJEU (but not of the Republic of Poland[90]), the EU legislature has done this by establishing the right to legitimate uses of protected subject matter under Article 17.7 DSMD[91], the prohibition of general monitoring obligations under Article 17.8 DSMD[92], and the complaint mechanism under Article 17.9 DSMD[93].

Thus, the Poland/Parliament and Council judgment concludes (paragraph 98) that the obligation on OCSSP to review, prior to its dissemination to the public, the

case, the risk is, more specifically, that, in order to avoid any risk of liability vis-à-vis rightholders, OCSSP systematically prevent the making available, on their services, of all content which reproduces works for which they have received the 'relevant and necessary information' or a 'sufficiently substantiated notice' from those rightholders, including content which does not infringe their rights, particularly since, on the one hand, in accordance with article 17.4 DSMD, OCSSP bear the burden of proof to demonstrate that they have made 'best efforts' to prevent infringing content being uploaded and, on the other, they bear a considerable risk of liability, having regard to the 'large amount' of content to which those services provide access. Advocate General Saugmandsgaard Øe in opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, Poland/Parliament and Council, case C-401/19, ECLI:EU:C:2021:613, points 147 and 148, also warns that risk of 'over-blocking' is increased by the fact that the conditions for exemption laid down in Article 17.4(b) and (c) *in fine* DSMD in fact require OCSSP to use automatic content recognition tools, which detect content and not copyright infringements and are currently not capable of assessing the context in which the reproduced work is used and, in particular, of identifying the application of an exception or limitation to copyright, also the ability of automatic recognition tools to identify infringing content depends on the accuracy and veracity of information provided by rightholders, *ergo* the use of those tools may lead to unjustified complaints on the basis of incorrect or improper reference information (so-called risk of 'over-complaining').

[90] In its view, the contested provisions are not accompanied by any safeguards capable of circumscribing the extent of the interference with the freedom of expression of users of sharing services.

[91] In relation to it, J.P. Quintais, P. Mezei, I. Harkai, J. Vieira Magalhães, C. Katzenbach, S.F. Schwemer, T Riis: *Copyright…*, *op. cit.*, p. 123, highlight that one of the most important implications of the Poland/Parliament and Council judgment is that the CJEU recognizes that Article 17.7 includes an 'obligation of result', which means that Member States must ensure that these exceptions or limitations are respected despite the preventive measures in Article 17.4, qualified as mere 'best efforts' obligations, pointing out that the different nature of the obligations, underscored by the fundamental rights-basis of the exceptions, indicates a normative hierarchy between the higher-level obligation in paragraph 7 and the lower-level obligation in paragraph 4.

[92] As per which the application of Article 17 DSMD shall not lead to any general monitoring obligation, that is a specification of the provision in Recital 66, second subparagraph, DSMD, according to which 'the obligations established in this Directive should not lead to Member States imposing a general monitoring obligation', prohibition that was already present in Article 15.1 ECD and continues to be provided for in Article 8 DSA. In regards to this and with a critical vision of the conflicting interpretations on the scope of the prohibited general monitoring by the EU legislators and the CJEU, see T.H. Oruç: *The Prohibition of General Monitoring Obligation for Video-Sharing Platforms under Article 15 of the E-Commerce Directive in light of Recent Developments: Is it still necessary to maintain it?*, JIPITEC 2022, Volume 13, Issue 3, https://www.jipitec.eu/issues/jipitec-13-3-2022/5555/oruc_13_3_2022.pdf (accessed: 9.2.2024), pp. 176–199.

[93] See the development in this regard in the judgment of CJEU of 26 April 2022, Poland/Parliament and Council, case C-401/19, ECLI:EU:C:2022:297, paragraphs 85–95. In paragraph 96, it is noted that Article 17.10 DSMD supplements the system of safeguards provided for in Articles 17.7 to 9 DSMD by requiring the Commission to organise, in cooperation with the Member States, stakeholder dialogues to discuss best practices for cooperation between OCSSP and rightholders. P. Pakutinskas, T.L. Šepetys: *Algorithmic Parody Protection in the European Union: CDSM Directive and DSA Regulation Perspective*, Baltic Journal of Law & Politics 2023, Volume 16, Issue 1, p. 91, point out that in terms of practical implementation, interpretation of the content of Article 17.7 DSMD with respect to Article 17.9 DSMD likely does not provide any additional safeguards beyond the right to judicial protection, highlighting that the problem is that the DSMD does not detail further and particular requirements for complaint and redress mechanisms' functioning, which leaves the space for the OCSSP to construct the complaint and redress mechanisms in an economically viable way, i.e. handling the complaints by using algorithmic content moderation and matching notified content with flagged protected content where overlaps of copyrighted content for parody purposes will not be identified.

content that users wish to upload to their platforms, resulting from the specific liability regime established in Article 17.4 DSMD, and in particular from the conditions for exemption from liability laid down in its points (b) and (c) *in fine*, has been accompanied by appropriate safeguards by the EU legislature[94]. These safeguards are in place to ensure, in accordance with Article 52.1 CFR, respect for the right to freedom of expression and information guaranteed by Article 11 CFR, and a fair balance between that right, on one hand, and the right to intellectual property, protected by Article 17.2 CFR, on the other[95].

5. CONCLUSIONS

Having endorsed the specific liability regime established in Article 17.4 DSMD for OCSSP, particularly the conditions for exemption from liability laid down in the contested provisions, we can conclude that the current situation of online platforms in relation to the use of copyright-protected content is essentially as follows:

Firstly, insofar as they are considered OCSSP — in this case, large online platforms linked to the 'Value Gap', including VLOP — they are subject to the liability regime established in Article 17.4 DSMD for unauthorized acts of communication to the public of copyright-protected content. They must comply with the conditions for exemption from liability laid down in that provision; otherwise, they will bear a disproportionate risk of liability. These conditions:

i) Whose compliance must be examined on a case-by-case basis, in the light of the principle of proportionality in accordance with Article 17.5 DSMD;
ii) Constitute genuine 'obligations', which de facto require OCSSP to carry out a prior review of the content that users wish to upload to their platforms. This prior review, in turn, necessitates the use of automatic recognition and filtering tools. Such prior review and prior filtering constitute a limitation on the right

[94] Before knowledge of the ruling of Poland/Parliament and Council judgment, C. Geiger, B.J. Jütte: *Platform liability under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, GRUR International 2021, Volume 70, Issue 6, pp. 542–543, were certain that the annulment of Article 17 DSMD was a great opportunity for the European legislator to elaborate a balanced liability regime for platforms and to implement it in a manner compliant with fundamental rights. This could have been done, in their opinion, in the context of the then DSA proposal (COM (2020) 825 final), creating a unified, horizontal and clearer approach to dealing with illegal content online, coupled with an appropriate independent EU institutional monitoring and control mechanism, this being a 'judicial intermediary' which should be tasked with developing guidelines and good practices that OCSSP can rely on and when determining whether they comply with the 'best efforts' requirement under Article 17.4 DSMD and making it hard for the authors to imagine how the provision could be 'saved' from a complete annulment by the CJEU in the absence of mentioned institution.

[95] Judgment of CJEU of 26 April 2022, Poland/Parliament and Council, case C-401/19, ECLI:EU:C:2022:297, paragraph 98, indicating in paragraph 99 that the Member States must, when transposing Article 17 DSMD into their national law, take care to act on the basis of an interpretation of that provision which allows a fair balance to be struck between the various fundamental rights protected by the CFR.

to freedom of expression and information — guaranteed by Article 11 CFR — of users of content-sharing services. However, this limitation is deemed admissible by the CJEU in light of the 'system of safeguards' provided for in Article 17, paragraphs 7 to 9, DSMD.

Secondly, when online platforms do not qualify as OCSSP — this includes online platforms whose main purpose is not to disseminate copyright-protected content to the public or which, even with such a purpose, do not give the public access to a large amount of that content or do not play an important role in the online content market; nor are considered as such not-for-profit platforms, providers of electronic communications services, online marketplaces, B2B cloud services, and cloud services that allow users to upload content for their own use — they are subject to the horizontally applied liability regime for hosting providers (the general category in which online platforms, as a subcategory, are included), first under Article 14 ECD and then under Article 6 DSA, the new reference. According to this regime — considering the CJEU's interpretation of the applicable legal framework prior to the DSMD — these providers, in relation to liability that may arise from illegal content stored at the request of their users, can only resort to the safe harbour established in this horizontal framework when:

i) Their activity is neutral, that is, merely technical, automatic, and passive, without knowledge or control of the content they store, and
ii) They fulfill the alternative requirements for exemption from liability, namely, the lack of actual knowledge of specific illegal acts, or the expeditious removal of illegal content as soon as they are notified of its existence. Such notification is generally a factor to consider in determining whether the provider was actually aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality.

In conclusion, the evolving legal standards offer a nuanced view of digital platform responsibilities, ensuring that while copyright protection remains robust, it does not unnecessarily impinge upon the fundamental freedoms in the digital domain. The jurisprudence of the CJEU plays a critical role in interpreting and guiding these standards, ensuring that the legal framework remains responsive to the challenges and opportunities presented by the digital economy.

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ONLINE PLATFORMS AND COPYRIGHT: ANALYZING THE LIABILITY REGIME UNDER THE DIGITAL SINGLE MARKET DIRECTIVE AND THE DIGITAL SERVICES ACT IN THE LIGHT OF CJEU JURISPRUDENCE

S u m m a r y

This paper discourse delves into the nuanced dynamics between online platforms, copyright, and their respective liability regimes under the Digital Single Market Directive (DSMD) and the Digital Services Act (DSA).

The DSMD, particularly Article 17, introduces a pivotal shift in the liability landscape for Online Content-Sharing Service Providers (OCSSP), addressing the 'Value Gap' — the discrepancy between the revenue generated by online platforms from copyrighted works and the compensation received by rightholders. Under Article 17, OCSSP are required to make 'best efforts' to obtain authorization from rightholders and to prevent the availability of unauthorized content. This requirement has sparked concerns over potential 'over-blocking' of lawful content, thereby affecting freedom of expression. The Republic of Poland's challenge to this regime emphasized that it effectively necessitates automatic filtering by OCSSP, thus impinging on freedom of expression. The CJEU recognized this limitation but justified it as necessary for safeguarding intellectual property rights, emphasizing the need for a balance between copyright protection and freedom of expression.

In contrast, the DSA governs online platforms that do not qualify as OCSSP. It continues the horizontal framework of the E-Commerce Directive for intermediary service providers,

outlining specific due diligence obligations and exemptions from liability. The DSA applies to these online platforms in terms of liability that may arise from illegal content stored at the request of their users. The CJEU's jurisprudential body of work, established before the DSMD came into force, remains relevant for these platforms and must be considered. This paper will also analyze this aspect, highlighting the complexities and developments in the legal frameworks governing online platforms, both OCSSP and non-OCSSP, while balancing intellectual property rights and freedom of expression in the digital environment.

Key words: online platforms, online content-sharing service providers, copyright, liability regime, safe harbour, freedom of expression.