

Emmanuel Cornu and Romain Meys | June 2022

On 26 April 2022, the Grand Chamber of the Court of Justice of the European Union (“CJEU”) judged that Article 17 of Directive (EU) 2019/790 (“Digital Single Market” or “DSM”) is compatible with the right to freedom of expression and information. In this much-awaited decision (available [here](#)), the CJEU issued useful guidance on filtering tools and how they should be implemented for user-generated content.

BACKGROUND

Article 17 of Directive (EU) 2019/790 on copyright and related rights in the digital single market (“Directive (EU) 2019/790”) provides that online content-sharing service providers are liable for making available to the public user-generated content that infringes copyright, unless these service providers actively monitor this content to prevent its placing online.

The Republic of Poland brought an action for annulment against points (b) and (c) in fine of Article 17(4) of Directive (EU) 2019/790 on the grounds that, in essence, those provisions require the providers to carry out automatic filtering of all content uploaded on their platforms, without adequate safeguards for the users right to freedom of expression and information, as guaranteed in Article 11 of the Charter of Fundamental Rights of the European Union (“Charter”).

KEY TAKE-AWAYS

1. Article 17 of Directive (EU) 2019/790 only targets large profit-driven platforms

The CJEU starts by recalling that Article 17 of Directive (EU) 2019/790 organises a **specific liability regime** for a certain type of platform operators, namely:

- the platform operator is a provider of information society services;
- one of the platform’s main purposes is to store and give the public access to a large amount of copyright-protected works uploaded by users;
- the platform operator organises and promotes these works for profit-making purposes.

ILLEGAL UPLOADS

COPYRIGHT
FILTERS AND
FREEDOM OF
EXPRESSION

Platform operators that do not meet one or more of these criteria remain subject to the **general liability regime** for intermediaries organised by Article 14 of Directive 2000/31 and Article 3 of Directive 2001/29. The guidance provided by the CJEU in its “YouTube & Cyando” decision of 22 June 2021 thus remains relevant in this regard (see our previous news [here](#)).

2. Article 17 of Directive (EU) 2019/790 requires prior filtering of unauthorised content

As a rule, “online content-sharing service providers” perform an act of communication to the public for which they must obtain an **authorisation** from the rightholders, for instance, by concluding a licensing agreement.

Concerning unauthorised content, online content-sharing service providers can still benefit from a **liability exemption** under Article 17(4) of Directive (EU) 2019/790, if they prove that:

- they made their best efforts to obtain an authorisation from the rightholders;
- they made their best efforts to ensure the unavailability of subject matter for which rightholders have provided relevant and necessary information; and
- they acted expeditiously to disable access and prevent re-upload of protected subject-matter upon notice from the rightholders.

Following the opinion of its AG and the Republic of Poland, the CJEU finds that this liability exemption does require a **prior review and filtering** of the platform’s user-generated content.

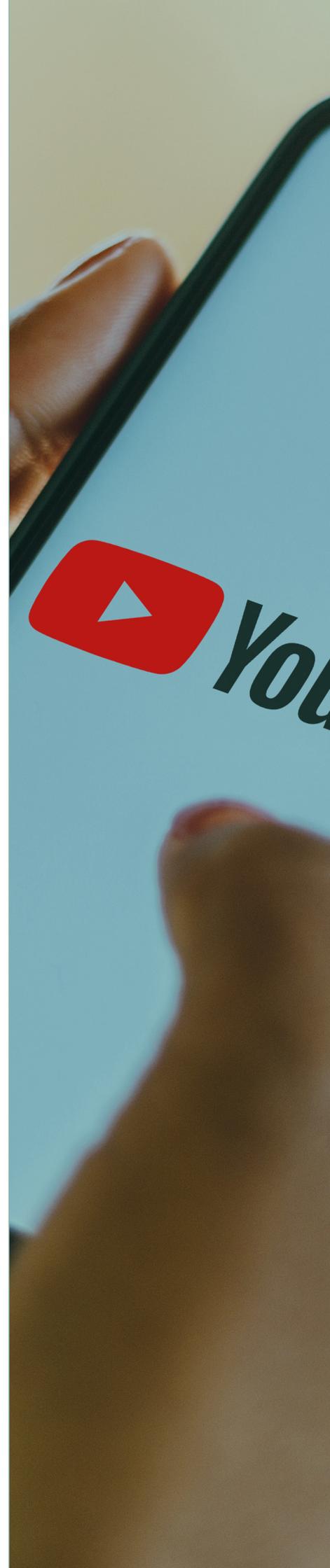
3. Appropriate safeguards have been taken to protect users’ freedom of expression

Turning to the safeguards foreseen by the EU Legislator, the CJEU concludes that this obligation to review and filter user-generated content is **compatible** with the users’ right to freedom of expression.

On the one hand, the CJEU finds that Article 17(4) of Directive (EU) 2019/790 has a legal basis and is **justified** by the need to protect IP rights. For the Court, an alternative mechanism would not be as effective for that purpose.

On the other hand, the CJEU considers that the following **safeguards** were sufficient to respect the users’ right to freedom of expression:

- Filters cannot prevent the user’s legitimate uses under copyright exceptions or limitations;
- Platform operators must make content unavailable only after receiving the relevant and necessary information from rightholders;
- Rightholders’ request to have content blocked or taken down must be duly justified;



- Users have the right to file a complaint with the platform, subject to human review and without undue delay, to restore their content blocked or taken down by mistake;
- Users must have access to efficient court and out-of-court redress mechanisms.

As a rule, the CJEU emphasises that platform operators cannot be subject to a general monitoring obligation. Therefore, platform operators subject to Article 17 of Directive (EU) 2019/790 must only prevent content uploads when it does not require an **independent assessment** of the content by them, based on the rightholders information or any copyright exceptions or limitations.

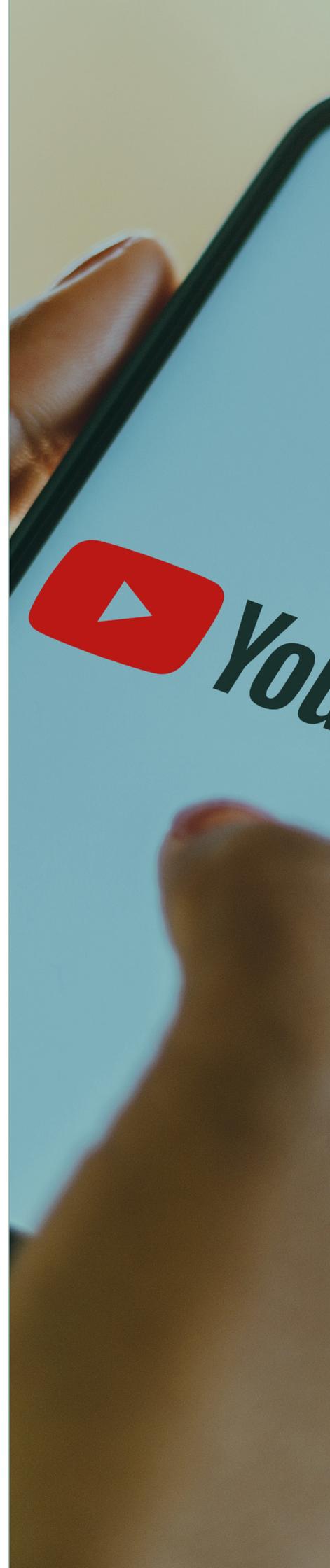
SO... WHAT SHOULD YOU DO?

As a platform operator, the first thing you need to determine is whether or not you qualify as an “online content-sharing service provider” in the sense of Article 17 of Directive (EU) 2019/790. If not, your liability for the content hosted on your platform will be assessed based on the **general regime** set in Article 14 of Directive 2000/31 and Article 3 of Directive 2001/29, in accordance with the guidance provided by the CJEU in its “YouTube & Cyando” judgment of 22 June 2021 (see our previous news [here](#)).

If your business falls within the specific regime of Article 17 of Directive (EU) 2019/790, the second thing you need to do is to contact collective management organisations (“CMOs”) to conclude a **licensing agreement** authorising you to make available to the public the copyright-protected subject-matter uploaded by your users.

If, despite your best efforts, you do not manage to conclude a licensing agreement with the relevant CMOs, you must set a **filtering tool** on your platform, showing that:

- You made your best efforts to ensure the unavailability of content that appears unlawful based on the information provided by rightholders. This information must allow you to verify that the content is illegal without independent assessment.
- You acted expeditiously to take down content for which rightholders have provided you with a duly justified notice. This notice must allow you to verify that the content is illegal without a detailed legal examination.
- You made your best efforts to ensure that content taken down upon notice cannot be uploaded again in the future.
- You did not block or take down the users’ legitimate uses under copyright exceptions or limitations, namely uses of subject matter for the specific purposes of quotation, criticism, review, caricature, parody or pastiche.
- You allowed users to file a complaint within your platform, subject to human review and without undue delay, in order to benefit from effective redress mechanisms to restore their content blocked or taken down by mistake.



AFTERTHOUGHT

When adopting Article 17 of Directive (EU) 2019/790, the EU Legislator wanted to develop a licensing market between rightholders and online content-sharing providers. As we can see from the CJEU judgment of 26 April 2022, this specific regime also requires technical changes in the way platform operators review and filter user-generated content. These changes will be further specified as the Commission issues additional guidance in the future. A close “monitoring” is therefore also advised in this regard.

For more information or any question, please contact the authors:

Emmanuel Cornu | emmanuel.cornu@simontbraun.eu

Romain Meys | romain.meys@simontbraun.eu

T: +32 (0)2 543 70 80

The information presented on this site is not legal advice or opinion. You should seek advice from a legal counsel of your choice before acting upon any of the information on this site.



SIMONT BRAUN

Avenue Louise 250 / 10
1050 Brussels

+32 (0)2 543 70 80

www.simontbraun.eu
Follow us on  