The Finnish transposition of Article 17 of Directive 2019/790: progress or regress?

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Introduction

Article 17 of Directive (EU) 2019/790 on Copyright in the Digital Single Market[1] ('CDSMD') has been a highly controversial provision, prompting strongly polarized reception divided between creative industry sectors supporting it and the rest of the stakeholders, as well as academic researchers, mostly being against it.[2] The debate has been mostly focusing on Article 17(4)(b) and (c), which require online content-sharing service providers ('OCSSPs')[3] to make 'best efforts' to prevent users of their services from uploading certain copyright material 'for which the rightholders have provided the service providers with the relevant and necessary information'[4] or else lose their 'immunity'. While the provision does not indicate how this should be achieved, in practice, these measures have been considered to require the use of automated filtering.[5]

Simultaneously, Article 17(7) and (8) CDSMD impose restrictions prohibiting measures that prevent users from uploading lawful content but fail to provide sufficient detail and guidance on how to reconcile these competing

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

2 See Create, 'Copyright Reform: Open Letter from European Research Centres' (2017). Available at https://www.create.ac.uk/wp-content/uploads/2017/02/OpenLetter_EU_Copyright_Reform_24_02_2017.pdf (accessed 14 March 2022); Create, 'Statement by EPIP Academics to Members of the European Parliament in advance of the Plenary Vote on the Copyright Directive on 12 September 2018 - Vote for a balanced European copyright law' (2018). Available at https://www.create.ac.uk/wp-content/uploads/2018/09/Statement-by-EPIP-Academics.pdf (accessed 14 March 2022).

3 Definition for OCSSPs is provided in Article 2(6) CDSMD, but this is further developed in Article 17(5) and (6) sections. In practice, Article 17 targets 'YouTube-like' user-generated content hosting services operating for commercial purposes.

4 Article 17(4)(b) CDSMD.

5 Christophe Geiger and Bernd Justin Jütte, 'Platform Liability Under Art. 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match' 70(6) *GRUR International* (2021) 517–543, 531–533.

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Abstract

- The ongoing process to transpose Article 17 of Directive 2019/790 ('CDSMD') into national law has proven challenging in Finland. Policy fluctuations in the Finnish Ministry of Education and Culture have resulted in highly bipolar legislative drafting, which has produced two highly divergent approaches how to transpose Article 17. The difference shows especially in the provisions transposing the so-called filtering obligations of online content sharing service providers ('OCSSPs') under Article 17(4) and limits imposed on it by Article 17(7) and (8).
- The first Finnish draft bill of 2021 sought to transpose Article 17 by entirely rewriting its provisions. This was meant to rectify conceptual ambiguities and to mitigate fundamental right risks to the users of these OCSSPs. Following closely the Opinion of Advocate General in Polish challenge to Article 17, the first draft limited the use of automated blocking to 'completely equivalent' works.
- The second draft bill of 2022 retracted from rewriting Article 17 and instead switched to transposing it closer to its original wording following Danish and Swedish models. The freedom of expression emphasis and user right considerations of the first draft were largely removed and replaced with hollow reiterations of the Directive recitals.

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objectives with Article 17(4).[6] In sum, Article 17 has faced plenty of criticism along the way, inter alia for imposing filtering obligations,[7] threatening freedom of expression of the Internet users and being ambiguous and internally contradictory.[8]

These controversies and issues have carried over to the Finnish process of transposing Article 17 CDSMD. By mid-March 2022, Finland is still in the middle of drafting its national implementation of the provisions of the CDSMD. So far, the Finnish Ministry of Education and Culture, responsible for the legislative preparation in the field of copyright law, has published two highly divergent drafts to transpose Article 17: the first draft of September 2021 seeking to transpose Article 17 provisions by entirely rewriting them, and the second (current) draft bill that switched to follow the structure and wording of the CDSMD almost dogmatically.

This article will focus on this virtually bipolar process of transposing Article 17 into Finnish national law, describing and comparing the two approaches. First, it will briefly provide background and describe key developments in the context of this Finnish implementation process. Next, it will offer an overview of the implementation techniques and certain publicly presented arguments behind the complete change of direction. After that, the article will turn to substantive features, discussing the similarities and differences between the two approaches to reconcile the competing requirements between Article 17(4)(b) obliging OCSSPs to prevent access to certain copyright-infringing material and Article 17(7) and (8) prohibiting the measures taken under Article 17(4) from resulting in general monitoring obligation for the OCSSPs or in preventing platform users from uploading lawful content.

Broadly speaking, the first draft bill was an ambitious effort to mitigate the above addressed risks to the fundamental rights of the content uploading users. This was sought by rewriting the provisions of Article 17 based on the opinion of the Advocate General ('AG') in case C-401/19,[9] Commission guidelines[10] and the case law of the Court of Justice of the European Union ('CJEU'). The second (current) draft bill removed most of the expansive interpretations of the first draft and instead sought to closely follow the wording and structure of Article 17.

This article argues that the approach in the first draft bill represented better quality regulation in the sense that it further developed the conceptual constructions of the directive, introducing more concrete and functional standards that would improve the fundamental rights balance between the key stakeholders in these arrangements. This approach may also be seen as a gamble as its interpretations heavily lean on non-binding sources, such as the Opinion of AG and Commission guidelines. These constructions may later come into conflict with CJEU rulings.[11] In this respect, the second draft, with minimal changes to the provisions of Article 17 CDSMD, may ironically be better for the overall conformity with Article 17 and increase the degree of harmonization since the majority of the EU Member States have so far resorted to similar transposition techniques. However, as the second draft refrains from developing Article 17 provisions, all its controversies are carried over. These issues will remain until eventually resolved by national judiciary or, ultimately, the CJEU.

Background and the Finnish process to transpose Article 17

The Finnish path to nationally implement CDMSD Article 17 has been a long and rocky one. Since the initial approval of the CDSMD in the European Parliament, the Finnish Ministry of Education and Culture has been preparing the legislative bill with the support of inter-ministerial working groups. The Ministry arranged numerous public hearing sessions, discussions and working groups involving stakeholders.[12] Along the implementation of the DSM Directive, the Ministry has also been drafting legislation related to copyright infrastructure.[13]

6 Geiger and Jütte, "Platform Liability Under Art. 17" 542.

7 See, eg, Geiger and Jütte, "Platform Liability Under Art. 17"; Christina Angelopoulos and João Pedro Quintais, 'Fixing Copyright Reform A Better Solution to Online Infringement' 10(2) *JIPITEC* (2019) 147–72, 148.

8 Felix Reda et al., 'Article 17 of the Directive on Copyright in the Digital Single Market: a Fundamental Rights Assessment' *Gesellschaft für Freiheitsrechte* (2020), 6–10. Available at http://dx.doi.org/10.2139/ssrn.3732223 (accessed 14 March 2022).

9 Opinion in Case C-401/19 *Poland v Parliament and Council* EU:C:2021:613.

10 European Commission, 'Communication from the Commission to the European Parliament and the Council: Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market', COM(2021) 288 final. (hereon 'Commission Guidelines').

11 This is especially a serious concern for the Opinion of AG, which may get rounded by the CJEU.

12 The legislative process has been well documented in the project and legislation database of the Finnish Ministry of Education and Culture, such as the two draft bills discussed here, memorandums, stakeholder contributions in forms of presentation materials for various workshops and discussions and statements made during the public consultation round. Majority of documents are in Finnish. For more, see: Finland, Ministry of Education and Culture 'Reform of the Copyright Act - national implementation of the DSM directive', OKM018:00/2019. Available at https://okm.fi/en/project?tunnus=OKM018:00/2019 (accessed March 14 2022).

13 Finland, Ministry of Education and Culture, 'Copyright infra development (portal of dialogue): Developing the Copyright Infrastructure 2020–2022', OKM020:00/2020. Available at https://okm.fi/en/project?tunnus=OKM020:00/2020 (accessed March 14 2022).

In September 2021, the Ministry released a draft of the bill for public consultation round for comments.[14] The draft bill received strong criticism from the collective management organizations ('CMOs') and rightholder representative groups, with the implementation of Article 17 clearly being the most divisive matter. This was the turning point in the drafting procedurally and substantively. The draft bill, already behind the deadline for national implementation at the time, was supposed to be presented to the Finnish Parliament by December 2021. Regardless, after the rightholder representative groups had criticized the draft bill in public and discussed it with the ministry political heads,[15] presentation of the bill to the Parliament was further postponed to late spring 2022.

The subsequent months of the drafting process were marked by staff changes in the Ministry working on the CDSMD, total rewrite of the sections implementing Article 17 and criticism from civil rights organizations for lack of transparency, for not arranging a second public consultation round for commenting on the draft bill and for one-sided involvement of stakeholders. The Ministry published a new revised draft bill on 4 March 2022.[16] At the time of writing this article, the draft bill had been delivered to the Finnish Council of Regulatory Impact Analysis, scheduled to be presented to the Parliament during April 2022 and aimed to enter into force on 1 January 2023.

Implementation techniques and their justifications

The first draft bill did not follow the structure of Article 17 but instead transposed it by rewriting its provisions. This would have been a clear breakaway from the rest of the Nordic EU Member States—Sweden and Denmark, which have transposed or are planning to transpose Article 17 more closely to its wording. According to the first draft bill, Article 17 was considered challenging to implement. While it was viewed as insufficiently detailed, it also concerned highly sensitive fundamental rights questions. These insufficiencies concerned the process for disabling access to material, cooperation between OCSSPs and rightholders and legal protection of users.[17] The gaps explicitly identified in the first draft were as follows: which limitations and exceptions to the exclusive rights Article 17(7).1 concerns and what their relation to pre-existing limitations and exceptions would be; how to avoid the application of Article 17 leading to a general monitoring obligation; who is responsible for processing the complaints under Article 17(9); and what remedies should be offered to the users.[18]

Overall, Article 17 was deemed too ambiguous to be transposed by mere reference or incorporation. While these approaches to implementation were also considered during the drafting process, the conceptual gaps and their implications for the existing national legislation and fundamental rights were deemed to be problematic to the extent that the drafters considered rewriting to be *clearly* necessary in this case.[19]

The second draft bill backed away from this approach, rejecting the arguments supporting implementation by rewrite. The structure of this revision instead follows closely the structure of Article 17 as a whole and even on the level of sentences.[20] Unfortunately, the new draft bill does not construct new grounds in support of this change of approach beyond the criticism from the creative industry representative groups. The only explanations provided during a hearing concerning the second draft bill held by the Ministry in February 2022 were to follow the system and logic of the CDSMD more closely and to bring the Finnish implementation of Article 17

14 Draft government proposal for acts amending the Copyright Act and section 184 of the Act on Electronic Communications Services ('*hallituksen esitys eduskunnalle laeiksi tekijänoikeuslain ja sähköisen viestinnän palveluista annetun lain 184 §:n muuttamisesta*'/'*utkastet till regeringens proposition till riksdagen med förslag till lagar om ändring av upphovsrättslagen och 184 § i lagen om tjänster inom elektronisk kommunikation*'), Ministry of Education and Culture, Helsinki, 27.9.2021, 4. ('2021 Draft Bill') (In Finnish).

15 On the second page of the second draft bill, it is mentioned that the responsible minister led two round table meetings with stakeholders concerning the feedback on the first draft. Apparently, participants mostly comprised of representatives of the rightholder side. See Johannes Ijäs, 'Kurvinen about the draft bill that received crushing criticism: won't be presented to the Parliament this year—"I think it's likely that the draft bill will change still quite a lot"' ('Kurvinen murskakritiikkiä saaneesta lakiluonnoksesta: Ei esitellä eduskunnalle tänä vuonna – "Pidän todennäköisenä, että hallituksen esitys muuttuu vielä aika paljon"'), Demokraatti (30 November 2021). Available at https://demokraatti.fi/kurvinen-murskakritiikkia-saaneesta-lakiluonnoksesta-ei-esitella-eduskunnalle-tana-vuonna-pidan-todennakoisena-etta-hallituksen-esitys-muuttuu-viela-aika-paljon (accessed March 14 2022) (In Finnish).

16 Draft government proposal for acts amending the Copyright Act and section 184 of the Act on Electronic Communications Services, Ministry of Education and Culture, Helsinki, 4 March 2022 (hereon '2022 Draft Bill'). Available at https://api.hankeikkuna.fi/asiakirjat/ea5be8e5-c718-4049-8836-5d7fa9589c18/c615b559-c537-4cf1-a4c4-a1213b713adb/ESITYS_20220304114849.pdf.

17 2021 Draft Bill, 38.

18 Ibid, 58.

19 Ibid, 58–59.

20 As the section numbers between the draft bills are completely different, the current presentation refrains from referring to their sections by their numbers to reduce confusion.

in line with Swedish and Danish implementations.[21] This was also something that the representative groups of the rightholder side and CMOs were strongly promoting in their statements during the public consultation rounds of the first draft. The arguments behind the first draft bill seem much more convincing. They are in line with the instrumental nature of the directive as defined in Article 288 TFEU.[22]

Substantive aspects and features of the Finnish draft provisions

The first draft strongly emphasized the fundamental rights safeguard of users. In addition to strengthening the position of the rightholders in relation to the OCSSPs over the use of their works, the first draft highlighted that Article 17 is also *essentially* strengthening the position of the users by the requirements set in Article 17(7)-(9).[23] The Opinion of the AG in C-401/19 and the interpretations of the CJEU[24] and the European Court of Human Rights[25] formed the backbone of the fundamental rights assessments. The first draft adopted the positions of the AG that the liability mechanism of Article 17 'entails a significant risk to the freedom of expression, namely the risk of "over-blocking" lawful content.'[26]

The second draft retracted from the bold fundamental rights positions of the first draft. The central substantive focus of the second draft was to further strengthen the position of rightholders. This was a response to the feedback from the first public consultation round of the first draft. The rightholder side and their representatives were the ones most displeased with the first draft, criticizing it for not following the structure of the Directive and not aiming to pursue the objectives of the Directive, especially with regard to strengthening the position of the authors.[27] Effectively, this meant removing most constructions based on non-binding sources of interpretation, such as AG's opinion and Commission guidelines, and increasing hollow reiterations of the CDSMD.

Both draft bills had a number of minor conceptual differences vis-á-vis the CDSMD. For instance, instead of the word 'users' in Article 17, the first draft used the concept 'content provider' based on the pre-existing Finnish Act on Electronic Communication Services[28] to highlight the difference between plain consuming users and users of the service that upload content to the platform,[29] who may potentially be copyright holders.[30] The concept was mainly limited to those content providers, whose primary and principal purpose is not to pursue professional activities or trade.[31] The second draft bill dropped this and switched to 'user of service'.[32]

The second draft introduced highly problematic threshold for interpreting the act of communication to the public in the context of Article 17. The relevant section stated that 'when works are stored to the platform of the service provider, the service provider is communicating the works to the public'. This construction is in clear conflict with the established understanding of 'communication to the public' and 'making available to the public', as the act described here is not expressly requiring any 'communication' to any 'public'. Instead, in this phrasing, the conditions would already be met when a user has 'stored' a file to the platform. This anomality may be a mere oversight of the draft version. As such, it may still be rectified in the course of the remaining legislative process.

Monitoring obligations and disabling access to content

One of the key issues reconciling Article 17(4)(b) and (c) requirements with Article 17(7)(8) has been where to draw the line between prohibited general monitoring and specific monitoring obligation. Both draft bills opted to resolve this by following the criteria set by the CJEU in *Glawischnig-Piesczek* according to which an obligation that concerns specific elements and does not require OCSSPs to make an independent assessment of

21 This can be found in the presentation material for the meeting. Available at https://api.hankeikkuna.fi/asiakirjat/ea5be8e5-c718-4049-8836-5d7fa9589c18/92063543-7d10-404a-a437-0b36d4e4ef83/LIITE_20220211103613.pdf (accessed March 14 2022) (In Finnish).

22 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390; Quintais and Husovec have phrased it well: '*Their margin of discretion is, however, subject to the condition that they respect the effet utile of the CDSM Directive. That is the very point of directives, which are meant to harmonise certain areas of law while leaving a margin of discretion for national implementation.*' João Pedro Quintais ja Martin Husovec, 'How to License Article 17 of the Copyright in the Digital Single Market Directive? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms' 70(4) *GRUR International* (2021) 325–48.

23 2021 Draft Bill, 9.

24 Namely, Case C-18/18 *Glawischnig-Piesczek* EU:C:2019:821.

25 *Delfi AS v. Estonia* [GC], no. 64569/09, EHCR 2015-II) Judgment of the European Court of Human Rights, 16 June 2015.

26 2021 Draft Bill, 133; citing Opinion in Case C-401/19 *Poland v Parliament and Council* EU:C:2021:613, para 141.

27 2022 Draft Bill, 56–57.

28 Act on Electronic Communications Services, Act No. 917/2014, Section 184.

29 2021 Draft Bill, 47 and 103.

30 Ibid, 49.

31 Ibid.

32 2022 Draft Bill, 90.

their lawfulness does not constitute general monitoring obligation.[33]

The first draft bill was making its construction of *Glawischnig-Piesczek* via the Opinion in C-401/19. This is made apparent in the section of the explanatory memorandum concerning the fundamental rights compatibility of the draft. For instance, it is stated there that in order for a specific monitoring obligation to be in accordance with the Charter of Fundamental Rights and Freedom,[34] the following requirements must be met: the monitoring obligation must concern 'certain specific illegal information' and must be imposed 'on certain online intermediaries', the monitoring obligation must be substantively in accordance with the principle of proportionality and sufficient safeguards must be guaranteed to 'the users of their services'.[35]

Most notably, the first draft set a high threshold for the OCSSPs to be required to disable access to content for the public. According to it, if the identification measures used by the OCSSP show that the material stored on the platform by the content provider is *completely equivalent* with the work that the rightholder has required to be removed, the OCSSP would immediately have to disable access to it.[36] Conversely, if the content was not completely equivalent[37] to the work required to be removed, or based on statement by content provider, or for any other reason, which makes it possible that the use of the work is permitted by law or agreement, the OCSSP would have been required to notify the rightholder. In such a case, the rightholder would have been required to confirm that the use is infringing, after which the OCSSP would have been required to immediately disable access to the content for the public.[38]

The 'completely equivalent' standard used to measure similarity between the original and identified materials that the first draft used strongly resonates with the AG's opinion in C-401/19 that the use of automated filtering measures must 'be limited to content which is "identical" or "equivalent" to works and other protected subject matter'.[39] While the exact scope of this standard was not defined further in the explanatory discussion of the draft, references made to AG's opinion support the view that the concept would have been at least broader than a completely *identical* copy.

Furthermore, the applicability of preventive blocking measures was further limited in the first draft by the requirement that the users must be able to express the grounds for justifying the use of work before or at the latest while uploading it.[40] Whether this would have applied even if the work was completely equivalent is not addressed in the first draft bill.

The second draft bill adopted a vastly different approach. In the section concerning measures to ensure lawful uses, 'automatic blocking measures may be used only where there is presumably high likelihood […] copyright infringing communication of work to the public'. This is effectively a word-to-word translation of the Swedish proposal implementing Article 17.[41] The standard seems more open-ended compared to the first draft. Memorandum of the sections transposing Article 17(4), however, hint that the threshold to preventively block content is more closely connected to the sufficiency of the identification information in relation to the technology used by the OCSSP.[42] Unfortunately, the explanatory memorandum of the second draft bill does not provide further relevant guidance on this.

Interestingly, neither the first nor the second draft bill adopted any provisions allowing rightholders to 'earmark' content[43] with high risks of significant economic harm akin to German implementation. While the earmarking was not even mentioned in the second draft bill, the first draft implicitly rejected it by referring to the postscript in the Opinion of AG that such a process would significantly increase the risk of preventing access to lawful content.[44]

Conclusion

The Finnish implementation process demonstrates the susceptibility of the legislative drafting to external pressures from concerted practices of interest groups. Fundamental changes were made to the draft bill in the very late stage of the legislative drafting without second public

33 2021 Draft Bill, 60; referring to Case C-18/18 *Glawischnig-Piesczek* EU:C:2019:821, para 46.

34 Charter of Fundamental Rights of the European Union, OJ C 326, 26 October 2012, 391–407.

35 2021 Draft Bill, 132–133, referring to Opinion in Case C-401/19 *Poland v Parliament and Council* EU:C:2021:613, para 115.

36 2021 Draft Bill, Section 6a 55 a § 'Liability of the online content-sharing service provider for copyright infringing material stored to its service by content provider', first subsection.

37 Original term in in Finnish: 'täysin vastaava'.

38 2021 Draft Bill, Section 6a 55 a §, second subsection.

39 Opinion in Case C-401/19 *Poland v Parliament and Council* EU:C:2021:613, paras 200–201.

40 2021 Draft Bill, 133.

41 '*Metoder för automatisk blockering får endast användas för att hindra tillgång till innehåll som med en hög grad av sannolikhet kan antas medföra intrång i upphovsrätt.*' Cf. Sweden, Ministry of Justice, 'Copyright in the Digital Internal Market' ('Upphovsrätten på den digitala inre marknaden'), Ds 2021:30, 52 o § at page 33.

42 2022 Draft Bill, 92.

43 Commission Guidelines, 22.

44 2021 Draft Bill, 134; referring to postscript in Opinion in Case C-401/19 *Poland v Parliament and Council* EU:C:2021:613, 221–223.

consultation round. As the implementation is still ongoing, it is possible that the current draft could be amended in the Parliamentary stage of the legislative drafting.

The current approach, following in the footsteps of Sweden and Denmark, blends in among the many Member States that are implementing Article 17 with minimal changes. It remains agnostic towards any uncertainties and ambiguities within Article 17 without any attempt to resolve them by national legislation. From one perspective, it could be argued that implementing an EU directive in this manner could result in a higher degree of harmonization among the Member States and it is also less likely to conflict with the CDSMD itself as the CJEU will be able to fill in the gaps in its subsequent case law. That is not to say this reflects what is a good regulatory approach—especially, as we are discussing a directive here, not regulation.

As mentioned, Article 17 is silent on certain central means and processes to reach its objectives. While these were well recognized and accounted for in the first draft bill, which rewrote the provisions of Article 17 using the Opinion of AG, the current draft bill effectively leaves this on the shoulders of the judiciary and finally the rulings of the CJEU.