

Out-of-court dispute settlement for alleged copyright infringements on online platforms after CDSM and DSA

“Copyright and Justice”
Hellenic Copyright Organization
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A BALANCE WITHIN

“Fifthly, the first and second subparagraphs of Article 17(9) of Directive 2019/790 introduce **several procedural safeguards**, which are additional to those provided for in Article 17(7) and (8) of that directive, and which **protect the right to freedom of expression and information** of users of online content-sharing services in cases where, notwithstanding the safeguards laid down in those latter provisions, the providers of those services nonetheless erroneously or unjustifiably block lawful content.”

C-401/19, Poland v Parliament and Council, para.93

PROCEDURAL FAIRNESS

- Stricter liability regime mandates mechanisms to **preserve/defend rights of users**
- **Constitutional imperative** to ensure robust procedural framework to challenge limitations of fundamental rights
- Design of procedural mechanisms must ensure **constitutional legitimacy** of (*lex specialis*) Article 17 DSM Directive and (*lex generalis*) DSA regime

LEGAL FRAMEWORK (CDSM)

Article 17(9) CDSM

- Availability of effective and expeditious complaint and redress mechanism
- Rightholders must provide reasons for takedown requests
- User complaints shall be processed without undue delay
- Decisions to disable access to or remove uploaded content shall be subject to human review.
- Availability to out-of-court redress mechanisms (impartial)
- rights of users to have recourse to efficient judicial remedies. incl. access to a court/relevant judicial authority to assert the use of an exception or limitation to copyright and related rights.

LEGAL FRAMEWORK (DSA)

Articles 17-18 DSA

Efficient human-controlled internal dispute mechanisms

- Access to certified (by DSCs) out-of-court dispute settlement bodies (oocDSB)
- oocDSB (Art 18(2): impartial & (financially independent (a) + necessary expertise (b) + easily accessible via electronic means (c) + efficient with clear and fair procedural rules (d & e) --> require regular certification + reporting

THREATS FOR FAIRNESS

If the body decides the dispute **in favour of the recipient** of the service (...) **the online platform shall bear all the fees charged by the body and shall reimburse the recipient (...) for any other reasonable expenses that they have paid in relation to the dispute settlement.** If the body decides the dispute **in favour of the provider of the online platform,** the recipient (...) **shall not be required to reimburse any fees or other expenses that the provider of the online platform paid or is to pay in relation to the dispute settlement,** unless the body finds that the recipient acted manifestly in bad faith.

Article 18, Digital Services Act

DISPUTE-SETTLEMENT INCENTIVES

- No-risk approach for service recipients
 - Platform takes it all (the expense, that is...)
 - Intrinsic motivation for oocDSM-providers to attract business
- in-built potential for substantive unfairness?

QUESTIONS

- Forum shopping for rightholder/user friendly oocDSB?
- DSC must examine substance of decisions → important to monitor 'fairness' in institutional framework
- Assuming horizontal DSA is 'fairly' balanced → should standards for Article 17 DSM-providers be higher
- Consider: different FR-balance through 'interventionist' Article 17

CONCLUSIONS

- crucial role for DSCs to ensure procedural fairness
- DSCs must (also) consider substance of DSC-decisions (no appeal function!)
- Opportunity to shape substantive rules despite 'disharmonization'
- What role for ordinary 'judiciaries' → chilling effect on harmonizing role of CJEU preliminary references?

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