

Case C 401/19**Republic of Poland**

v

**European Parliament
and
Council of the European Union****Judgment of the Court (Grand Chamber), 26 April 2022**

(Action for annulment – Directive (EU) 2019/790 – Article 17(4), point (b), and point (c), *in fine* – Article 11 and Article 17(2) of the Charter of Fundamental Rights of the European Union – Freedom of expression and information – Protection of intellectual property – Obligations imposed on online content-sharing service providers – Prior automatic review (filtering) of content uploaded by users)

1. *Actions for annulment – Subject matter – Partial annulment – Condition – Severability of the contested provisions – Objective criterion – Condition not met – Inadmissibility (Art. 263 TFEU; European Parliament and Council Directive 2019/790, Art. 17)*
(see paragraphs 17-21)
2. *Approximation of laws – Copyright and related rights – Directive 2019/790 – Harmonisation of rights in the digital single market – Use of protected content by online content-sharing service providers – Specific liability regime in respect of those providers – Scope (European Parliament and Council Directive 2019/790, recitals 61 and 66 and Arts 2(6) and 17)*
(see paragraphs 29-31, 35)
3. *Approximation of laws – Copyright and related rights – Directive 2019/790 – Harmonisation of rights in the digital single market – Use of protected content by online content-sharing service providers – Specific liability regime in respect of those providers – Obligation imposed on those providers to carry out a prior review of the content uploaded by users – Justified limitation on the exercise of the right to freedom of expression and information (Charter of Fundamental Rights of the European Union, Arts 11, 17(2) and 52(1); European Parliament and Council Directive 2019/790, Arts 17(4) to (10))*
(see paragraphs 45, 48-58, 72, 76, 80-99)

Résumé

Directive 2019/790 on copyright and related rights in the digital single market ([1](#)) established a new specific liability mechanism in respect online content-sharing service providers ('the providers'). Article 17 of that directive lays down the principle that the providers are directly liable where works and other protected subject matter are unlawfully uploaded by users of their services. The providers concerned may nevertheless be exempted from that liability. To that end, they are, *inter alia*, required, in accordance with the provisions of that article, ([2](#)) actively to monitor the content uploaded by users, in order to prevent the placing online of the protected subject matter which rightholders do not wish to make available on those services.

The Republic of Poland brought an action seeking, principally, the annulment of point (b) and point (c), *in fine*, of Article 17(4) of Directive 2019/790 and, in the alternative, annulment of that article in its entirety.

It submits, in essence, that those provisions require the providers to carry out – by means of IT tools for automatic filtering – preventive monitoring of all the content which their users wish to upload, without providing safeguards to ensure that the right to freedom of expression and information is respected. (3)

The Court of Justice, sitting as the Grand Chamber, gives a ruling for the first time on the interpretation of Directive 2019/790. It dismisses Poland's action, holding that the obligation of the providers, laid down by that directive, to carry out a prior automatic review of the content uploaded by users, is accompanied by appropriate safeguards in order to ensure respect for the right to freedom of expression and information of those users and a fair balance between that right and the right to intellectual property.

Findings of the Court

Examining, first of all, the admissibility of the action, the Court finds that point (b) and point (c), *in fine*, of Article 17(4) of Directive 2019/790 are not severable from the remainder of Article 17 and that, consequently, the head of claim seeking annulment of point (b) and point (c), *in fine*, only is inadmissible. Article 17 of Directive 2019/790 establishes a new liability regime in respect of the providers, the various provisions of which form a whole and seek to strike a balance between the rights and interests of those providers, those of users of their services and those of rightholders. Consequently, such partial annulment would alter the substance of Article 17.

As to the substance of the case itself, next, the Court examines Poland's single plea in law, alleging a limitation on the exercise of the right to freedom of expression and information, arising from the liability regime introduced by Article 17 of Directive 2019/790. First of all, the Court points out that the sharing of information on the internet via online content-sharing platforms falls within the scope of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 11 of the Charter. It observes that, in order to avoid liability where users upload unlawful content to the platforms of the providers for which the latter have no authorisation from the rightholders, those providers must demonstrate that they meet all the conditions for exemption from liability, laid down in Article 17(4), points (a), (b) and (c) of Directive 2019/790, namely that they have:

- made their best efforts to obtain such an authorisation (point (a)); and
- acted expeditiously to bring to an end, on their platforms, specific copyright infringements after they have occurred and after receiving a sufficiently substantiated notice from rightholders (point (c)); and
- made their best efforts, after receipt of such a notice or where those rightholders have provided them with the relevant and necessary information prior to the occurrence of a copyright infringement, 'in accordance with high industry standards of professional diligence' to prevent such infringements from occurring or reoccurring (points (b) and (c)).

Those obligations therefore require *de facto* the providers to carry out a prior review of the content that users wish to upload to their platforms, provided that they have received from the rightholders the information or notices provided for in points (b) and (c) of Article 17(4) of Directive 2019/790. In order to carry out such a review, the providers must use automatic recognition and filtering tools. Such a prior review and prior filtering are liable to restrict an important means of disseminating online content and thus to constitute a limitation on the right to freedom of expression and information guaranteed in Article 11 of the Charter. In addition, that limitation is attributable to the EU legislature, since it is the direct consequence of the specific liability regime. Accordingly, the Court concludes that that regime entails a limitation on the exercise of the right to freedom of expression and information of the users concerned.

Lastly, as regards the question whether the limitation at issue is justified in the light of Article 52(1) of the Charter, the Court notes, first, that that limitation is provided for by law, since it results from the obligations imposed on the providers of the abovementioned services by a provision of an EU act, namely point (b) and point (c), *in fine*, of Article 17(4) of Directive 2019/790, and respects the essence of the right to freedom of expression and information of internet users. Secondly, in the context of the review of

proportionality, the Court finds that that limitation meets the need to protect intellectual property guaranteed in Article 17(2) of the Charter, that it appears necessary to meet that need and that the obligations imposed on the providers do not disproportionately restrict the right to freedom of expression and information of users.

First, the EU legislature laid down a clear and precise limit on the measures that may be taken in implementing those obligations, by excluding, in particular, measures which filter and block lawful content when uploading. Secondly, Directive 2019/790 requires Member States to ensure that users are authorised to upload and make available content generated by themselves for the specific purposes of quotation, criticism, review, caricature, parody or pastiche. Furthermore, the providers must inform their users that they can use works and other protected subject matter under exceptions or limitations to copyright and related rights provided for in EU law. ⁽⁴⁾ Thirdly, the liability of the providers can be incurred only on condition that the rightholders concerned provide them with the relevant and necessary information with regard to that content at issue. Fourthly, Article 17 of that directive, the application of which does not lead to any general monitoring obligation, means that the providers cannot be required to prevent the uploading and making available to the public of content which, in order to be found unlawful, would require an independent assessment of the content by them. ⁽⁵⁾ In that regard, it may be that availability of unauthorised content can only be avoided upon notification of rightholders. Fifthly, Directive 2019/790 introduces several procedural safeguards, in particular the possibility for users to submit a complaint where they consider that access to uploaded content has been wrongly disabled, as well as access to out-of-court redress mechanisms and to efficient judicial remedies. ⁽⁶⁾ Sixthly, that directive requires the European Commission to organise stakeholder dialogues to discuss best practices for cooperation between the providers and rightholders, and also to issue guidance on the application of that regime. ⁽⁷⁾

Accordingly, the Court concludes that the obligation on the providers to review, prior to its dissemination to the public, the content that users wish to upload to their platforms, resulting from the specific liability regime established in Article 17(4) of Directive 2019/790, has been accompanied by appropriate safeguards by the EU legislature in order to ensure respect for the right to freedom of expression and information of users, and a fair balance between that right, on the one hand, and the right to intellectual property, on the other. It is for the Member States, when transposing Article 17 of that directive, to 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 Charter. Further, when implementing the measures transposing that article, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with that article but also make sure that they do not act on the basis of an interpretation of the article which would be in conflict with those fundamental rights or with the other general principles of EU law, such as the principle of proportionality.

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 2019 L 130, p. 92).

² See Article 17(4), point (b), and point (c), *in fine*, of Directive 2019/790.

³ As guaranteed in Article 11 of the Charter of Fundamental Rights of the European Union ('the Charter').

⁴ Article 17(7) and (9) of Directive 2019/790.

⁵ Article 17(8) of Directive 2019/790.

[6](#) The first and second subparagraphs of Article 17(9) of Directive 2019/790.

[7](#) Article 17(10) of Directive 2019/790.