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### The Odyssey of the Prohibition on General Monitoring Obligations on the Way to the Digital Services Act: Between Article 15 of the E-Commerce Directive and Article 17 of the Directive on Copyright in the Digital Single Market

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**THE ODYSSEY OF THE PROHIBITION ON  
GENERAL MONITORING OBLIGATIONS  
ON THE WAY TO THE DIGITAL SERVICES ACT:  
BETWEEN ARTICLE 15 OF THE E-COMMERCE DIRECTIVE  
AND ARTICLE 17 OF THE DIRECTIVE ON COPYRIGHT  
IN THE DIGITAL SINGLE MARKET**

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## EXECUTIVE SUMMARY

Since the turn of the century, the liability of online intermediaries in the EU has been governed by a regulatory system which, while not harmonising intermediary liability *per se*, contains a set of horizontal liability exemptions for intermediaries: the 'safe harbours' or 'immunities' that shield intermediaries from liability in a horizontal manner, i.e. from liability arising in all areas of law. The introduction of the safe harbour system rested on the idea that holding platforms liable for the illegal activity of their users would be too heavy a burden. Without the safe harbours, the liability risk would thwart the evolution of intermediaries dealing with third party content and frustrate the development of e-commerce. In the same vein, the safe harbours have been supplemented by a prohibition of general monitoring obligations. EU law provides explicitly that intermediaries may not be obliged to monitor their service in a general manner in order to detect and prevent the illegal activity of their users.

The jurisprudence of the Court of Justice of the European Union ('CJEU') has shed light on several aspects of this general monitoring ban, including its anchorage in primary EU law, in particular the right to the protection of personal data, the freedom of expression and information, the freedom to conduct a business (Articles 8, 11 and 16 of the Charter) and the free movement of goods and services in the internal market. Due to their higher rank in the norm hierarchy, these legal guarantees constitute common ground for the application of the general monitoring prohibition in secondary EU legislation, namely Article 15(1) of the E-Commerce Directive ('ECD') and Article 17(8) of the Directive on Copyright in the Digital Single Market ('CDSMD'). Accordingly, Article 15(1) ECD and Article 17(8) CDSMD can be regarded as exponents of the aforementioned fundamental rights and freedoms and the accompanying principle of proportionality. With regard to the Digital Services Act ('DSA'), this result of the analysis implies that:

- any further manifestation of the general monitoring ban in the DSA would have to be construed and applied – in the light of applicable CJEU case law – as a safeguard against encroachments upon the aforementioned fundamental rights and freedoms. To the extent that filtering would fail to provide adequate protection to rights protected under Articles 8, 11 and 16 of the Charter, it cannot be imposed on intermediaries;
- even if new legislation were to set forth obligations to monitor platform content generally, any filtering this allowed would nevertheless be excluded by the need to strike a 'fair balance' between all protected fundamental rights;
- if the final text of the DSA does not contain a reiteration of the prohibition of general monitoring obligations known from Article 15(1) ECD and Article 17(8) CDSMD, the regulation of internet service provider liability, duties of care and injunctions would still have to avoid inroads into the aforementioned fundamental rights and freedoms and observe the principle of proportionality.

As to the substance of the general monitoring ban, the analysis shows that a misunderstanding of the difference between monitoring specific content and monitoring *for* specific content is a recurrent theme in the debate on intermediary liability and a central driver of the controversy surrounding it. Rightly understood, a prohibited general monitoring obligation arises whenever content – no matter how specifically it is defined – must be identified among the totality of the content on a platform. The moment platform content must be screened in its entirety, the monitoring obligation acquires an excessive, general nature. Against this background, a content moderation duty can only be deemed permissible if it is specific in respect of both the protected subject matter and potential infringers. The wording of relevant provisions leaves room for this requirement of double specificity. Article 17(4)(b) CDSMD, for instance, obliges rightholders to furnish 'the relevant and necessary information' for ensuring the unavailability of notified works. Similarly, Article 17(4)(c) CDSMD requires a 'sufficiently substantiated notice' of an existing infringement. In the light of the need to safeguard fundamental rights and freedoms, a rightholder notifying only specific works, but failing to notify specific infringers, cannot be considered to have provided all 'relevant and necessary information' or a 'sufficiently substantiated notice'. As a result, the notification will be incomplete and incapable of imposing a valid filtering obligation on OCSSPs. It remains an open question whether and how the requisite degree of specificity with regard to both dimensions can be attained when automated content filtering systems are employed. Regardless, other options also exist, such as infringer suspension, community moderation and warning notices. Until workable solutions have been found, a cautious approach is necessary to avoid violations

of fundamental rights and freedoms, and the principle of proportionality. In particular, it is essential to prevent a snowstorm of notifications culminating in a filtering duty which *de facto* encompasses all kinds of protected subject matter, such as all kinds of currently exploited copyrighted works.

Finally, the analysis demonstrates that, even if the prohibition of general monitoring obligations would be expressed in a uniform manner in the ECD, the CDSMD and the DSA, its concrete meaning and impact would still depend on the nature and scope of the legal position, in respect of which a rightholder requests the imposition of duties of care, including the introduction of content moderation duties. An examination of general monitoring rules with regard to copyright, trade mark and defamation cases reveals substantial differences:

- the preventive content moderation duties arising from Article 17(4)(b) and (c) CDSMD must be reconciled with the general monitoring ban laid down in Article 17(8) CDSMD. While the initial version of Article 17 (Article 13 in draft versions of the later Directive) and, consequently, the debate surrounding it, focused on automated content recognition and filtering technologies, the subsequent evolution of the Directive indicates that the legislator recognised the legal problems inherent to their deployment. In light of alternative ways of abiding by the requirements of Article 17(4)(b) and (c), such as the aforementioned options of infringer suspension, community moderation and warning notices, it should be accepted that those provisions do not require automated filtering. It should also now be accepted that rightholder notifications are required to be specific not only in respect of works and other protected subject matter, but also in respect of the circle of potential infringers belonging to the audience of the content platform at issue. To the extent that filtering is employed as a way of abiding by the requirements of Article 17(4)(b) and (c), it should therefore be limited to the uploads of such limited circles. In any case, a degree of specificity is required that prevents rightholders from notifying long lists of protected works without tailoring the notification to a specific sub-group of the platform audience. Otherwise, individual notifications may reach such a volume that, adding up the total number of notified specific works, a filtering duty arises which *de facto* amounts to a prohibited general monitoring obligation even under laxer interpretations that seek to offer more room for filtering measures (the aforementioned risk of a snowball effect);
- in a trade mark context, preventive content moderation duties based on notifications of specific protected subject matter, as envisaged in Article 17(4)(b) CDSMD with regard to copyright works, are most probably incompatible from the outset with freedom of competition and the principle of the free movement of goods and services in the internal market. In *L'Oréal v eBay*, the CJEU clarified that a monitoring obligation could not have as its object or effect a general and permanent prohibition on the selling, on that marketplace, of goods bearing a specific trade mark.<sup>1</sup> Otherwise, the filtering obligation would impede legitimate trading activities, such as advertising and offers for sale relating to parallel imports from other EU Member States after the exhaustion of trade mark rights. Hence, any automated content moderation system based on the notification of a specific trade mark runs the risk of encroaching upon freedom of competition and the guarantee of the free movement of goods and services in the internal market;
- finally, defamation cases are more context-specific than copyright or trade mark cases. They differ substantially from copyright and trade mark scenarios because of the absence of holders of large right portfolios who could trigger a snowball effect by notifying long lists of protected subject matter. Filtering requests in copyright cases concern content that is fixed after publication; in trade mark cases the distinctive elements of the protected sign are fixed after registration. In defamation cases, by contrast, the legitimacy of a filtering request depends on the specific – defamatory – nature of uploaded content. Considering these substantial differences, case law in the area of defamation, such as the CJEU decision in *Eva Glawischnig-Piesczek*,<sup>2</sup> fails to provide guidance for the assessment of content moderation measures relating to trade marks or literary and artistic works.

If EU legislation intends to include a horizontal regulation of content moderation duties in the DSA, it is thus important to take differences between the scope of rights and the characteristics of infringement

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<sup>1</sup> CJEU, C-324/09, *L'Oréal v eBay International*, ECLI:EU:C:2011:474, 12 July 2011, para. 140.

<sup>2</sup> CJEU, C-18/18, *Eva Glawischnig-Piesczek*, 3 October 2019, para. 53.

into account. Only measures that lead to appropriate results across all problem scenarios addressed in the DSA can serve as a basis for a global, horizontal rule.

## **PREFACE**

In the context of the current debate on the potential further harmonisation of the responsibilities of online platforms and information service providers in the Digital Services Act, the following study seeks to clarify the correct interpretation of the scope of the prohibition of a general monitoring obligation in the E-Commerce Directive and the Directive on Copyright in the Digital Single Market in order to identify guidelines for the potential inclusion and further development of the general monitoring ban in the Digital Services Act.

The study was prepared by Prof. Dr. Martin Senftleben (Institute for Information Law (IViR), University of Amsterdam) and Dr Christina Angelopoulos (Centre for Intellectual Property and Information Law (CIPIL), University of Cambridge). Funding for this project was secured from Copyright for Creativity (C4C). However, the authors have carried out the study in complete academic independence.

## 1. Introduction

Since the turn of the century, the liability of online intermediaries in the EU has been governed by the E-Commerce Directive 2000/31/EC ('ECD').<sup>3</sup> While not harmonising intermediary liability *per se*, the ECD contains a set of horizontal liability exemptions for intermediaries: the 'safe harbours' or 'immunities' that shield intermediaries from liability in a horizontal manner, i.e. from liability arising in all areas of law. The safe harbours grant this protection to intermediaries when they engage in the provision of three types of services: 'mere conduit' (Article 12), 'caching' (Article 13) and 'hosting' (Article 14). Each safe harbour is governed by a separate set of conditions that must be met before the intermediary may benefit.

The introduction of the safe harbour system rested on the idea that holding platforms liable for the illegal activity of their users would be too heavy a burden. Without the safe harbours, the liability risk would thwart the evolution of intermediaries dealing with third party content and frustrate the development of e-commerce.<sup>4</sup> In the same vein, Article 15(1) ECD supplements the safe harbours by explicitly providing that intermediaries may not be obliged to monitor their service in a general manner in order to detect and prevent the illegal activity of their users:

*'Member States shall not impose a general obligation on providers, when providing [mere conduit, caching and hosting services], to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.'*

Article 15(1) extends to obligations imposed both through duties of care and injunctive orders. This is important, given that all three safe harbours contain express permissions in their final paragraphs regarding the imposition of injunctions on providers by courts and administrative authorities 'to terminate or prevent an infringement'.<sup>5</sup>

The most controversial of the three safe harbours has proven to be the hosting safe harbour. This provides immunity to intermediaries that store information posted by third parties, under the condition that the host does not have actual or constructive knowledge that the information is illegal or, upon obtaining such knowledge, removes it.<sup>6</sup> In other words, hosting providers need to have an efficient 'notice-and-take-down' system in place that allows them to react promptly when an infringement is notified. While the reach of the hosting safe harbour was contested in the early years after the adoption of the ECD, subsequent CJEU case law has confirmed that it has a broad field of application. Crucially, according to the CJEU, the hosting safe harbour covers modern platforms, ranging from online marketplaces to social media.<sup>7</sup>

The legal requirements for the notice-and-take-down procedures of host service providers are a hotly debated issue.<sup>8</sup> Nevertheless, the notice-and-take-down principle as such remained untouched until

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<sup>3</sup> 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 (Directive on electronic commerce) (OJ L 178, 17.7.2000, p. 1) (hereinafter ECD).

<sup>4</sup> Article 15(1) ECD.

<sup>5</sup> Articles 12(3), 13(2), 14(3) ECD. See also, Recital 45 ECD. Article 18 ECD also requires that Member States 'ensure that court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim injunctions, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.'

<sup>6</sup> Article 14(1) ECD. For commentary from a comparative EU/US perspective, see M. Peguera, "The DMCA Safe Harbour and Their European Counterparts: A Comparative Analysis of Some Common Problems", *Columbia Journal of Law and the Arts* 32 (2009), 481. For detailed commentary on the EU provisions, see C Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, Alphen aan den Rijn: Kluwer Law International 2016; M Husovec, *Injunctions Against Intermediaries in the European Union – Accountable But Not Liable?*, Cambridge: Cambridge University Press 2017; S Kulk, *Internet Intermediaries and Copyright Law – Towards a Future-Proof EU Legal Framework*, Utrecht: University of Utrecht 2018; M.R.F. Senftleben, "Breathing Space for Cloud-Based Business Models: Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions", *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 4 (2013), 87-103.

<sup>7</sup> CJEU, cases C-236/08-238/08, *Google France and Google v Louis Vuitton et al.*, ECLI:EU:C:2010:159, 23 March 2010, para. 114; CJEU, C-324/09, *L'Oréal v eBay International*, 12 July 2011, ECLI:EU:C:2011:474, para. 109-110 and CJEU, C-360/10, *SABAM v Netlog*, ECLI:EU:C:2012:85, 16 February 2012, para. 27.

<sup>8</sup> As to CJEU decisions dealing with this liability privilege, see CJEU, case C-236/08, *Google v Louis Vuitton*, 23 March 2010, para. 114-118; CJEU, case C-324/09, *L'Oréal v eBay*, ECLI:EU:C:2011:474, 12 July 2011, para. 120-122. For commentary, see C Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, Alphen aan den Rijn: Kluwer Law International 2016; M Husovec, *Injunctions Against Intermediaries in the European Union – Accountable But Not Liable?*, Cambridge: Cambridge University Press 2017; T Hoeren & S Yankova, "The Liability of Internet Intermediaries – The German

the adoption of the Directive on Copyright in the Digital Single Market ('CDSMD') on 17 April 2019.<sup>9</sup> Motivated by concern over the so-called 'value gap' (a perceived misalignment between the volume of creative content accessed online and the revenue this generates for copyright holders, compared to intermediaries), the EU legislator sought to curtail the broad scope of the hosting safe harbour. Article 17(3) CDSMD thus declares the liability shield of Article 14 ECD inapplicable to copyright infringements occurring on the platforms of providers of online content-sharing services ('OCSSPs'),<sup>10</sup> undermining the principle of horizontal applicability that underlies the ECD safe harbour system.

At the same time, Article 17(8) CDSMD confirms that the application of the new liability system in copyright law 'shall not lead to any general monitoring obligation.' Hence, the question arises whether 'general monitoring' in Article 15(1) ECD means the same thing as 'general monitoring' in Article 17(8) CDSMD. If not, whether the ban on general monitoring obligations known from Article 15(1) ECD has survived the introduction of a new copyright liability system as a horizontal principle of EU law has to be determined. This question is significant in the light of the connection drawn by the CJEU between the prohibition of general monitoring obligations and the protection provided by the Charter of Fundamental Rights of the EU ('Charter').<sup>11</sup> As the fundamental rights and freedoms in the Charter are higher-ranking norms of primary EU law, they are applicable horizontally and impact both Article 15(1) ECD and Article 17(8) CDSMD alike. This horizontal impact of the Charter is particularly relevant to the Commission's current work on a Digital Services Act ('DSA'), which may reconfigure altogether the approach to the liability of internet intermediaries for illegal content.

Against this background, the following analysis discusses the present status of the prohibitions on general monitoring obligations in the ECD (section 2) and the CDSMD (section 3). To this end, it will discuss court decisions in trade mark, copyright and defamation law, these being the areas in which decisions on the prohibition of general monitoring obligations have been handed down by the CJEU. It will also link the prohibition of general monitoring obligations to underlying principles of primary EU law in the form of fundamental rights protected by the Charter. From this discussion, the analysis shall seek to derive guidelines for the development of (potentially) new rules in the DSA (concluding section 4).

## 2. The prohibition of general monitoring obligations in Article 15(1) ECD

As already indicated, a significant limitation to the permissible scope of the measures that can be imposed on online intermediaries for the enforcement of third party rights is introduced by the prohibition on general monitoring obligations of Article 15(1) ECD. However, no definition of 'general monitoring' is given in the ECD. Recital 47 provides an indication by contrasting 'monitoring obligations of a general nature' with monitoring obligations imposed in a 'specific case'. 'Monitoring' clearly referring to the supervision of the service, the definition of 'general monitoring' therefore rests on the interpretation of the word 'general'. This has proved highly controversial. AG Jääskinen has balefully compared solving the problem to 'Odysseus' journey between the two monsters of Scylla and Charybdis.<sup>12</sup> The saga of the general monitoring prohibition has indeed proven Odyssean.

The debate has centred on the limits imposed by the general monitoring prohibition on obligations to take preventive measures against future infringements. The ECD is clear that such obligations should be possible. Recital 45 states that injunctions may be imposed on intermediaries in order both to terminate and to prevent infringements. Similarly, Recital 48 indicates that the imposition of duties of care specifically on hosting providers to detect and to prevent illegal activities should be allowed. While a variety of ways of taking preventive action can be envisaged, the most obvious option is the adoption of filtering systems, i.e. automatic content recognition technologies that process content managed by an intermediary either before or after it has been posted by the end user, in order to detect and exclude

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Perspective", *International Review of Intellectual Property and Competition Law* 43 (2012), 501; R Matulionyte & S Nerisson, "The French Route to an ISP Safe Harbour, Compared to German and US Ways", *International Review of Intellectual Property and Competition Law* 42 (2011), 55; M Peguera, "The DMCA Safe Harbour and Their European Counterparts: A Comparative Analysis of Some Common Problems", *Columbia Journal of Law and the Arts* 32 (2009), 481; C Alberdingk Thijm, "Wat is de zorgplicht van Hyves, XS4All en Marktplaats?", *Ars Aequi* 2008, 573; M Leistner, "Von 'Grundig-Reporter(n) zu Paperboy(s)'" *Entwicklungsperspektiven der Verantwortlichkeit im Urheberrecht*, *Gewerblicher Rechtsschutz und Urheberrecht* 2006, 801.

<sup>9</sup> 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, 17.5.2019, p. 92 (hereinafter CDSMD).

<sup>10</sup> As to the scope of this concept, see the definition in Article 2(6) CDSMD.

<sup>11</sup> Charter of Fundamental Rights of the European Union, opened for signature 7 December 2000, [2000] OJ C 364/01 (entered into force 1 December 2009) (hereinafter 'the Charter').

<sup>12</sup> Opinion of AG Jääskinen, C-324/09, *L'Oréal v eBay International*, ECLI:EU:C:2010:757, 9 December 2010, para. 171.

unlawful content.<sup>13</sup> But is the imposition of filtering duties compatible with the prohibition on general monitoring obligations?

As the analysis below shall show, in the years since the adoption of the ECD, three main schools of thought have emerged on the meaning of 'general monitoring':

- **Interpretative Option A – 'basic' interpretation:**

The ban on general monitoring prohibits the imposition of any obligation to monitor all or most of the information handled by an intermediary *in general*.

According to this approach, monitoring of this kind can never be classified as 'specific', regardless of its purpose or the authority requesting it.<sup>14</sup> This approach relies on the distinction in the wording of Article 15(1) ECD between 'a general obligation [...] to monitor the information which providers transmit or store' and 'general obligations actively to seek facts or circumstances indicating illegal activity'. If these sentences are to have a different meaning, the ban on 'a general obligation [...] to monitor' must cover all situations where platform content is screened in its entirety – even if this content screening is carried out to detect infringements of a specific right. It cannot refer to a requirement to proactively identify any unspecified illegality. This would instead be covered by the 'general obligation to seek out facts or circumstances indicating illegal activity'.

Under this interpretation, filtering obligations would be incompatible with the general monitoring prohibition even if they concern a *specific*, pre-identified right. The monitoring of all content on an online platform in search of infringements of a specific copyrighted work, for instance, would still amount to prohibited general monitoring because it requires the service provider to sift through all content on the platform.

- **Interpretative Option B – 'basic minus' interpretation:**

The ban on general monitoring prohibits the imposition of any obligation to monitor all or most of the information handled by an intermediary only in order to detect and prevent any unlawful activity *in general*. This interpretation leaves room for the imposition of monitoring obligations concerning all or most of the information handled by the intermediary, if this general monitoring is carried out in search of infringements of a specific right. In other words, according to this approach, the generality or specificity of the monitoring is not determined by what is being monitored, but by the generality or specificity of the subject matter which the monitoring seeks to identify in uploaded content.

This option can be broken down into two variants:

**B1: basic interpretation minus injunctions ('basic single minus'):**

This approach would permit obligations to monitor all the information handled by an intermediary, if that has been ordered by a court to address a 'specific' kind of illegality, e.g. infringements of a particular trade mark or copyright-protected work.

This view rests on the wording of Recital 47, according to which the prohibition on general monitoring obligations does not affect 'in particular' orders by national authorities in accordance with national legislation. Proponents of 'basic single minus' read the words 'in particular' as suggesting, not merely that specific monitoring should be allowed 'in particular' when ordered by a court, but that all court-ordered monitoring amounts to specific monitoring.<sup>15</sup>

Under this interpretation, filtering obligations focusing on a specific right would be compatible with the general monitoring prohibition if ordered by a court. The authority a court order bestows is seen as a guarantee that the monitoring is targeted at information that has in fact been confirmed to be illegal.

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<sup>13</sup> For a description of some of the most common filtering technologies, see E Engstrom and N Feamster, 'The Limits of Filtering: A Look at the Functionality and Shortcomings of Content Detection Tools', Engine, March 2017, available at: <https://www.engine.is/the-limits-of-filtering>.

<sup>14</sup> See, for example, M Senftleben et al, "Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform" (2018) 40(3) European Intellectual Property Review 149-163.

<sup>15</sup> See, for example, G Spindler, 'The Liability System of Art. 17 DSMD and National Implementation – Contravening Prohibition of General Monitoring Duties?' 10 (2020) JIPITEC 344.

## **B2: basic interpretation minus injunctions minus notifications ('basic double minus'):**

This approach would permit obligations to monitor all the information handled by an intermediary, if that has been ordered by a court to address a 'specific' illegality and/or such a 'specific' illegality has previously been brought to the intermediary's attention via a notification, e.g. by the rightholder.

This means that the monitoring of all of the information handled by the intermediary may still be 'specific', as long as it is targeted at searching for pre-identified illegal content.<sup>16</sup> This approach dispenses with the requirement of a court order and embraces any notification, regardless of the authority of the origin (including both courts and rightholders), as capable of triggering an obligation to monitor all or most of the content handled by an intermediary.

The following overview summarises the policy choices that are inherent in the different interpretative options:

	<b>OPTION A: BASIC INTERPRETATION What are you looking at?</b>	<b>OPTION B: BASIC INTERPRETATION MINUS What are you looking for and what is the authority of the requester?</b>	
		<b>B1: Basic Single Minus</b>	<b>B2: Basic Double Minus</b>
<b>INTERPRETATION</b>	The ban on general monitoring prohibits the imposition of obligations to monitor all or most of the information handled by an intermediary <i>in general</i> .	<u>Basic interpretation minus injunctions</u> = monitoring all of the information handled by an intermediary is ok, if there is a court order identifying 'specific' illegality, e.g. a particular defamatory attack or infringements of a particular copyright-protected work.	<u>Basic interpretation minus injunctions minus notifications</u> = monitoring of all information handled by intermediary ok, if there is a court order or rightholder notification identifying 'specific' illegality, e.g. infringements of a particular trade mark or copyright-protected work.
<b>CONSEQUENCES</b>	1. Monitoring all or most of the information handled by an intermediary <i>in general</i> can never be classified as monitoring 'in a specific case'; 2. General monitoring for the purpose of finding violations of a specific right is prohibited → <b>no filters</b>	Monitoring all or most of the information handled by an intermediary for the purpose of identifying violations of a specific right is not prohibited if <b>ordered by a court</b> → <b>court-ordered filters ok</b>	1. The generality of the monitoring is not determined by what is being monitored, but by the objective of the monitoring; 2. General monitoring for violations of a specific right is not prohibited if <b>ordered by a court or triggered by a notification</b> → <b>filters ok</b>

## **2.1 Interpretative case law of the CJEU**

The interpretations outlined above have emerged in the context of policy and academic debate. The CJEU jurisprudence on the topic has been more constant. Up until recently, the case law of the CJEU on Article 15(1) ECD had appeared to unambiguously embrace Option A: the 'basic' interpretation. The relevant decisions concentrated on the liability of intermediaries for the infringement of intellectual property rights. More recently, however, in the area of defamation, the CJEU has shifted to Option B1 ('basic single minus'), by carving out room from the general monitoring prohibition for injunctive orders to monitor all the content handled by the intermediary.

The following analysis shall examine this evolution. It has been organised according to area: the case law on general monitoring in trade mark law is first discussed, then that on general monitoring in copyright and finally that on general monitoring in defamation. Subsequently, the analysis shall look towards upcoming developments. The relevance of the Charter and the European Convention on Human Rights ('ECHR') shall also be considered.

<sup>16</sup> See, for example, J B Nordemann/J Waiblinger/J Tylewski, "Digital Services Act: Improving the Functioning of the Single Market", in: European Parliament, "Digital Services Act – European Added Value Assessment, Brussels: European Parliament Research Service, October 2020, Annex III, 247 (294-295); M Leistner, "European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?", *Zeitschrift für Geistiges Eigentum/Intellectual Property Journal* 2020, forthcoming, 15-16, available at: <https://papers.ssrn.com/abstract=3572040>; A Lucas-Schloetter, "Transfer of Value Provisions of the Draft Copyright Directive (recitals 38, 39, article 13)", available online at: <https://authorsocieties.eu/content/uploads/2019/10/lucas-schloetter-analysis-copyright-directive-en.pdf>.

### 2.1.1 Trade Marks: *L'Oréal v eBay*

The CJEU first applied itself to the question of general monitoring in *L'Oréal v eBay*.<sup>17</sup> The case concerned the permissible scope of injunctions intended to prevent future infringements of trade marks by customer-sellers using the services of eBay, an online marketplace whose website facilitates customer-to-customer sales. The Court, referring back to Article 18 ECD and Recital 24 of the Enforcement Directive,<sup>18</sup> accepted that preventive measures are permissible. At the same time, it cautioned that such measures must respect Article 15(1) ECD. According to the Court, this means that

*'the measures required of the online service provider [...] cannot consist in an active monitoring of all the data of each of its customers in order to prevent any future infringement of intellectual property rights via that provider's website.'*<sup>19</sup>

Substantiating this ban on comprehensive active monitoring, the CJEU referred to Article 3 of the Enforcement Directive. According to the Court, a general monitoring obligation would be incompatible, not only with Article 15(1) ECD, but with that provision as well, which requires that measures adopted for the enforcement of intellectual property rights must be fair and proportionate and must not be excessively costly.<sup>20</sup> The Court also addressed the concern articulated in Article 3(2) of the Enforcement Directive, namely the avoidance of barriers to legitimate trade. This is of particular importance in the trade mark context. To avoid an impediment of legitimate trading activities, injunctions aimed at preventing infringements must not have 'as its object or effect a general and permanent prohibition on the selling, on that marketplace, of goods bearing those trade marks.'<sup>21</sup>

In *L'Oréal v eBay*, the focus, thus, clearly was on a 'specific case' in the sense of a specific incident of infringement (measures targeted at a specific infringing activity) – and not on a 'specific case' in the sense of all incidents of using a specific trade mark (e.g. general monitoring for a specific trade mark). This understanding of Recital 47's 'specific case' requirement is confirmed by the two concrete examples of permissible preventive measures provided by the Court. According to the CJEU, the following would both prevent future infringement and respect the limitations set by EU law:

- the **suspension of the perpetrator** of the infringement of intellectual property rights in order to prevent further infringements of that kind by the same person in respect of the same right;<sup>22</sup> and
- the adoption of measures to make it **easier to identify users**, in particular infringers operating 'in the course of trade and not in a private matter'.<sup>23</sup>

In identifying these two possibilities, the Court drew clear inspiration from the analysis provided by AG Jääskinen. In his Opinion, the AG had made a distinction between, on the one hand, injunctions against the intermediaries to prevent *any* further trade mark infringements and, on the other hand, injunctions against the intermediaries requiring the prevention of the continuation of a specific act of infringement and of the repetition of *the same or a similar* infringement in the future. He concluded that the former should be prohibited, but advised that the latter does not challenge EU law, as long as

*'the intermediary can know with certainty what is required from him, and that the injunction does not impose impossible, disproportionate or illegal duties like a general obligation of monitoring.'*<sup>24</sup>

The AG suggested a rule of thumb for identifying the limit to the scope of permissible injunctions in what he called a '**double requirement of identity**'. According to this, injunctions should be permissible where they are targeted at the prevention of an infringement of a) the **same trade mark** by b) the **same**

<sup>17</sup> CJEU, C-324/09, *L'Oréal v eBay International*, ECLI:EU:C:2011:474, 12 July 2011.

<sup>18</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights (OJ L 157, 2.6.2004, p. 45) (hereinafter Enforcement Directive).

<sup>19</sup> CJEU, C-324/09, *L'Oréal v eBay International*, ECLI:EU:C:2011:474, 12 July 2011, para. 139.

<sup>20</sup> CJEU, id., para. 139.

<sup>21</sup> CJEU, id., para. 140.

<sup>22</sup> CJEU, id., para. 141.

<sup>23</sup> CJEU, id., para. 142.

<sup>24</sup> Opinion of AG Jääskinen, C-324/09, *L'Oréal v eBay International*, ECLI:EU:C:2010:757, 9 December 2010, para. 181.

**infringing third party.** The first measure suggested by the Court (the suspension of the perpetrator) clearly follows from the application of these conditions.<sup>25</sup>

The AG also noted that, in order to determine whether the infringer is the same, reasonable measures to reveal the true identity of the person behind a user name may be required. He concluded that such measures would constitute a specific, not a general, monitoring obligation.<sup>26</sup> This stipulation translates into the Court's second proposed measure concerning identification. Caution is necessary however, given that, as the Court acknowledged, such identification measures might conflict with the EU's data protection rules. The Court noted that, as pointed out above, the decision in *L'Oréal* concerned customer-sellers operating in the course of trade and not in a private matter, and who therefore must be clearly identifiable.<sup>27</sup>

The judgement offers a solid start to the disambiguation of the prohibition on general monitoring obligations. The definition adopted by the Court is compatible with both interpretative options A and B identified above, by only confirming that monitoring of all the data of all customers to prevent any future infringement amounts to general monitoring, but not clarifying whether that general purpose is necessary to make a monitoring obligation general. At the same time, the rest of the analysis leans heavily towards Option A. The AG's 'double requirement of identity' suggests that monitoring all of the content posted on the marketplace would not be considered in line with Article 15(1) ECD. It is likewise notable that both of the example measures provided by the Court are in line with the 'basic' interpretation of the general monitoring prohibition (Option A).

### 2.1.2 Copyright: *Scarlet*, *Netlog* and *McFadden*

While *L'Oréal* discussed measures that would be compatible with the general monitoring prohibition (namely, 'double identity' measures confined to a specific infringed right and a specific infringer), the subsequent *SABAM* judgments addressed measures that would be excluded. The first, *SABAM v Scarlet Extended*,<sup>28</sup> involved an internet access provider and the second, *SABAM v Netlog*,<sup>29</sup> a host service provider. Both cases examined the legality of injunctions ordering the implementation of filtering technology in order to prevent the infringement of copyright-protected works in the repertoire of Belgian collecting society SABAM.<sup>30</sup> The Court observed that the filtering system at issue would require the intermediaries to:

- identify, within all the content moving through their systems, the files which contained works in respect of which holders of intellectual-property rights claim to hold rights;
- determine whether those files were being shared unlawfully; and, if so,
- block or remove access to them.

The CJEU concluded that the contested system would require the 'active observation' of 'all information' provided by 'all users'. On this basis, it found that it would amount to general monitoring and would thus be excluded by Article 15(1) ECD. While the Court did then refer back to the *L'Oréal* definition of 'active monitoring of all the data relating to all customers in order to prevent any future infringement', the facts of the case make clear that the 'any future infringement' element was not relevant in the two cases: the court orders at issue would not require a filter to identify 'any infringement', but only the infringement of works owned by SABAM. The reference in the description of the relevant technology by the Court to a 'claim' by a rightholder also suggests that the Court had in mind measures to identify infringements post-notification, as opposed to on a pro-active basis.

Although seemingly straightforward, what the *SABAM* cases mean for filtering, and by extension the prohibition on general monitoring obligations, has engendered some doubt. Both injunctions required

<sup>25</sup> Indeed, the AG suggests it as an obvious solution, see Opinion of AG Jääskinen, C-324/09, *L'Oréal v eBay International*, ECLI:EU:C:2010:757, 9 December 2010, para. 181.

<sup>26</sup> Opinion of AG Jääskinen, C-324/09, *L'Oréal v eBay International*, ECLI:EU:C:2010:757, 9 December 2010, fn 81.

<sup>27</sup> CJEU, C-324/09, *L'Oréal v eBay International*, ECLI:EU:C:2011:474, 12 July 2011, para 142.

<sup>28</sup> CJEU, C-70/10, *Scarlet Extended*, ECLI:EU:C:2011:771, 24 November 2011.

<sup>29</sup> CJEU, C-360/10, *Netlog*, ECLI:EU:C:2012:85, 16 February 2012.

<sup>30</sup> In general, the term filtering may be said to apply to content-control software applications designed to automatically block the display or downloading of selected material on a web browser or other internet application. See: Council of Europe, "Report by the Group of Specialists on human rights in the information society (MC-S-IS) on the use and impact of technical filtering measures for various types of content in the online environment", CM(2008)37 add, 26 February 2008.

the installation of strikingly broad filtering mechanisms.<sup>31</sup> As AG Cruz-Villalón put it in his Opinion on *Scarlet*, they would have applied ‘systematically and universally, permanently and perpetually’. As such, their scope was general with regard to three different perspectives: *ratione temporis* (they applied for an unlimited period), *ratione materiae* (they applied to all content) and *ratione personae* (they applied to all end users).<sup>32</sup>

The broad nature of the *SABAM* measures has caused commentators to question whether narrower filtering mechanisms might be permissible. For example, the Commission has opined that ‘if filtering techniques had become flawless and costless, the need for a prohibition on imposing a general monitoring obligation would have become obsolete.’<sup>33</sup> Other commentators have suggested, in line with interpretations B1 (‘basic single minus’) and B2 (‘basic double minus’), that monitoring obligations are only general if the provider is under an obligation to proactively locate *all* potentially illegal content on its platform without clear instructions following from specific notifications or court orders. Proponents of this view reconcile it with the *SABAM* judgements by noting that the filter at issue in those cases would have enjoined the intermediaries to determine themselves whether or not content was infringing.<sup>34</sup>

These arguments are not convincing. Improved filtering technology could certainly mitigate costs, eliminate delays and limit the risk of over- and under-blocking, thus affecting fairness and effectiveness. This could help bring filtering better into line with some of the requirements of Article 3 of the Enforcement Directive. Under none of the definitions that have been proposed however, can it affect whether the monitoring is ‘general’ or not. Likewise, whether the intermediary is called upon to assess the lawfulness of the content itself might be relevant to matters of proportionality and fairness (especially given that it is likely to result in over-blocking by cautious providers), but not on its ‘general’ nature. Indeed, even where prior notification is provided by the rightholders, the intermediary will still be called upon to use its judgment in assessing whether they are correct in their legal analysis.

More importantly, it is clear from the judgments that the Court’s conclusion in the *SABAM* cases on the incompatibility of the contested filtering system with the general monitoring prohibition resulted from the need to monitor all the content posted or communicated by all the users. Although limitations can be imposed on the temporal reach of a filtering system, in the context of the ban on general monitoring obligations, the decisions do not focus on this aspect of the proposed filtering system.<sup>35</sup> Instead, as indicated above, the Court’s reasoning rests on the need for active observation of all activity by all end users (monitoring all the content for infringements of the specific works belonging to the *SABAM* repertoire). By the very definition of its functionality, no filter can shake off this quintessential generality *ratione materiae* and *ratione personae*. As AG Villalón Cruz noted, filtering is of a dual character, combining the blocking or removal of content with prior monitoring:<sup>36</sup> without the monitoring of all information handled by the intermediary the system cannot know which content to block or remove. Inevitably, this monitoring will affect some non-infringing content or users in the sense of checking and confirming that the content or users are non-infringing – indeed, if it is to be effective, all content posted by all users must pass through the filter. It is, after all, precisely from the grain of lawfully communicated information that filtering seeks to separate the chaff of infringements. This would suggest that, at most, the only truly ‘specific’ filtering measure that might be permissible under Article 15(1) ECD would be filtering that is limited to content posted by a pre-identified sub-group from among all of an intermediary’s users, e.g. users somehow labelled as particularly likely to post infringing material.<sup>37</sup> This conclusion is in line with the ‘double identity’ rule that emerged in *L’Oréal*: requiring preventive measures to be specific with regard to both the infringed right and the infringer (section 2.1.1).

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<sup>31</sup> The questions submitted by the referring courts described them as applying “for all [the intermediary’s] customers, in abstracto and as a preventive measure, exclusively at the cost of that ISP and for an unlimited period, a system for filtering all electronic communications, both incoming and outgoing, passing via its services”, see CJEU, C-70/10, *Scarlet Extended*, ECLI:EU:C:2011:771, 24 November 2011, para. 28; CJEU, C-360/10, *Netlog*, ECLI:EU:C:2012:85, 16 February 2012, para. 25.

<sup>32</sup> CJEU, Opinion of AG Cruz Villalón, case C-70/10, *Scarlet Extended*, ECLI:EU:C:2011:255, 14 April 2011, para. 53-59.

<sup>33</sup> Commission Staff Working Paper, ‘Online Services, Including E-Commerce, in the Single Market’, SEC(2011) 1641 final, 11 January 2012, p. 50.

<sup>34</sup> See e.g. A Lucas-Schloetter, “Transfer of Value Provisions of the Draft Copyright Directive (recitals 38, 39, article 13)”, available online at: <https://authorsocieties.eu/content/uploads/2019/10/lucas-schloetter-analysis-copyright-directive-en.pdf>. See also Spindler, id., 354-355.

<sup>35</sup> By contrast, the permanence of the contested system was relevant, according to the Court, to its compatibility with the providers’ freedom to conduct a business, see CJEU, C-70/10, *Scarlet Extended*, ECLI:EU:C:2011:771, 24 November 2011, para. 47-48; CJEU, C-360/10, *Netlog*, ECLI:EU:C:2012:85, 16 February 2012, para. 45-46.

<sup>36</sup> CJEU, Opinion of AG Cruz Villalón, case C-70/10, *Scarlet Extended*, ECLI:EU:C:2011:255, 14 April 2011, para. 46.

<sup>37</sup> S Kulk & F Borgesius, “Filtering for Copyright Enforcement in Europe after the Sabam Cases” (2012) 34(11) European Intellectual Property Review 791. Identifying these users may pose challenges in light of data protection laws, but this is not an issue that falls under the purview of Article 15(1) ECD.

Further developments in copyright law confirm this position. That filtering duties cannot overcome Article 15(1) ECD when they concern specific, pre-notified works was made explicitly clear in a subsequent copyright decision, *McFadden*.<sup>38</sup> This concerned an injunction requiring a Wi-Fi provider to prevent third parties from using its network to infringe copyright. The referring court had already pre-determined that only three mechanisms could be used to achieve that result: the termination of the network, the password-protection of the network and the examination of all communication passing through the network in order to ascertain whether the particular copyright-protected work is unlawfully transmitted again (i.e. 'filtering'). The third of these options clearly corresponds to interpretative option B1 ('basic single minus'). It thus raised questions of compatibility with the ban on general monitoring obligations in Article 15(1) ECD. In this respect, the CJEU took a clear position. The Court rejected filtering injunctions from the outset as contrary to Article 15(1) ECD. The Court noted that such measures would necessitate 'monitoring all of the information transmitted'. It then clearly identified injunctions to engage in such monitoring as prohibited general monitoring obligations:<sup>39</sup>

*'As regards, first, monitoring all of the information transmitted, such a measure must be excluded from the outset as contrary to Article 15(1) of Directive 2000/31, which excludes the imposition of a general obligation on, inter alia, communication network access providers to monitor the information that they transmit.'*<sup>40</sup>

Significantly, no qualification regarding the specificity of the material for the protection of which the measure would be employed was made. Indeed, the case concerned the infringement of producer Sony Music's related rights in a single pre-identified phonogram, about which the defendant had been notified.<sup>41</sup> The CJEU could thus have drawn a distinction between content monitoring concerning unlawful network communications in general, and monitoring with a focus on the specific phonogram at issue. Instead, what seems to have been decisive for the Court was that all network communications would have had to be checked to ban infringing traces of the pre-identified single phonogram. It was this, rather than the specificity of the targeted related right, which determined the generality of the monitoring.

While *McFadden* involved an access provider, there is no reason why a different conclusion would apply to other types of intermediaries, given that Article 15(1) ECD does not distinguish between different safe harbour services.<sup>42</sup> Indeed, the CJEU's decision in *Netlog* also concerned a hosting provider. It thus seems that, in copyright as well as trade mark law, the CJEU has embraced Option A and the 'basic' interpretation of the general monitoring prohibition: whenever content filtering requires the monitoring of all the information handled by an intermediary, it amounts to a general monitoring obligation that is incompatible with Article 15(1) ECD – regardless of its (potentially limited) purpose and regardless of the authority requesting it.

### 2.1.3 Defamation: *Eva Glawischnig-Piesczek*

*L'Oréal*, the *SABAM* cases and *McFadden* all point towards the CJEU's embracing of the 'basic' interpretation (Option A): a definition of general monitoring that covers the monitoring of all or most of the content handled by the intermediary on behalf of all or most of its users, even when this is carried out to identify infringements of a specific right. More recently, however, a ripple has appeared in this clear line of case law. In *Eva Glawischnig-Piesczek*, a defamation case, the CJEU held that an injunction ordering a host to remove content which is identical or equivalent to content that has previously been declared to be unlawful by a court would be compatible with Article 15(1) ECD, as long as the 'monitoring of and search for' the equivalent content covers only content which is essentially unchanged, so that the host provider would not have to carry out an independent assessment of its legality.<sup>43</sup> The ruling seems to fly in the face of the above-discussed earlier findings, as the location of such identical or equivalent future postings would require monitoring all of the content hosted by the

<sup>38</sup> CJEU, C-484/14, *McFadden*, ECLI:EU:C:2016:689, 15 September 2016.

<sup>39</sup> CJEU, id., para. 87.

<sup>40</sup> CJEU, id., para. 87.

<sup>41</sup> CJEU, id., para. 25-27.

<sup>42</sup> While Recital 48 ECD appears to reserve separate treatment for host service providers for the purposes of duties of care, this cannot affect the law with regard to injunctions. Regardless, Recital 48 should be interpreted as having merely declaratory value. There is no reason why other intermediary service providers should not also be subject to preventive duties of care, as long as the prohibition on general monitoring obligations is respected.

<sup>43</sup> CJEU, C-18/18, *Eva Glawischnig-Piesczek*, 3 October 2019, para. 53.

intermediary in precisely the way that was rejected in *McFadden*. It would thus shift, at least for the area of defamation, the CJEU-approved definition of general monitoring from interpretative option A ('basic') to Option B1 ('basic single minus').

The CJEU's approach appears to be based on an interpretation of the prohibition on general monitoring obligations as a reasonableness rule. It thus states that Article 15(1) ECD requires that an 'excessive obligation' may not be imposed on the provider.<sup>44</sup> The Court relies in this regard on Recital 41 ECD, that talks about balancing the different interests at stake. While Recital 41, however, confirms that the ECD 'strikes a balance between the different interests at stake', the CJEU treats this as aspirational: 'in adopting that directive, the EU legislature *wished* to strike a balance between the different interests at stake' (emphasis added). In this way, instead of accepting that the right balance was achieved in Article 15, the Court relies on the need for balance to mitigate the consequences of adopting a definition of 'general monitoring' that is driven (contrary to previous case law), not by the generality of what is being monitored, but by the reasonableness of the monitoring.

The Court has likely taken inspiration from the German doctrine of *Störerhaftung* and the *Kerntheorie* ('core theory') that accompanies this.<sup>45</sup> This relies on the existence of a 'reasonable duty to review' before imposing a monitoring obligation on intermediaries identified as *Störer* (i.e. persons interfering with protected rights) to identify content identical in its 'core' to content previously found to be unlawful. *Störerhaftung* thus relies on interpretative option B1 ('basic single minus') to contend compatibility with EU law. However, while *Störerhaftung* finds its basis in the general provisions in the German Civil Code, this approach finds no support in the text of the EU directives.<sup>46</sup> Potentially, a reasonableness analysis could be incorporated into a fundamental rights based 'fair balance' analysis (see below section 2.2). But Article 15(1) ECD does not offer similar flexibilities: 'general' is not the same as 'reasonable'.

Disconcertingly, it is not clear that the Court has fully appreciated the consequences of its decision. It is notable that the Court's wording appears to suggest that providers ought to only monitor the identical or equivalent content. It is not clear how the Court anticipates that this will be possible, given that the purpose of any monitoring injunction would be to identify that content among the totality of the content on the platform's website. A misunderstanding of the difference between monitoring specific content and monitoring *for* specific content appears to be a recurrent theme in the debate on intermediary liability and a central driver of the controversy surrounding it.

How to reconcile *Eva Glawischnig-Piesczek* with the CJEU's previous case law is not obvious. There are a number of options. Firstly, it is possible that the notion of 'general monitoring' has a different interpretation in the context of defamation than it does with regard to trade marks and copyright. While the horizontal nature of the ECD argues against this, the reasonableness approach adopted by the CJEU in *Glawischnig* suggests otherwise. It is relevant that in *Glawischnig* the CJEU emphasised that:

- with regard to identical content, the use of a particular piece of information renders each posting part of a single 'specific case';<sup>47</sup> and
- with regard to equivalent content, the host should not be compelled to carry out an independent assessment, but should rely on automated technologies.<sup>48</sup>

Neither of these arguments would be compelling in the context of intellectual property rights. While it is unlikely that different persons will engage in identical or equivalent defamatory attacks without any causal connection, different persons may copy and post the same protected content online for

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<sup>44</sup> CJEU, *id.*, para. 44.

<sup>45</sup> For more on this see J Bornkamm, 'E-Commerce Directive vs. IP Rights Enforcement – Legal Balance Achieved?' (2007) GRUR Int 642; A Bayer, 'Liability 2.0 – Does the Internet Environment Require New Standards for Secondary Liability? An Overview of the Current Legal Situation in Germany' in M J Adelman *et al.*, *Patents and Technological Progress in a Globalized World* (Springer 2009) 365; M Leistner, "Structural Aspects of Secondary (Provider) Liability in Europe", *Journal of Intellectual Property Law and Practice* 9 (2014), 75 (78-82); C Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, Alphen aan den Rijn: Kluwer Law International 2016; M Husovec, *Injunctions Against Intermediaries in the European Union – Accountable But Not Liable?*, Cambridge: Cambridge University Press 2017; C Angelopoulos, "On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market" (2017), available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2947800](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800).

<sup>46</sup> This was indicated already by the AG in his Opinion on *L'Oréal*, see Opinion of AG Jääskinen, C-324/09, *L'Oréal v eBay International*, ECLI:EU:C:2010:757, 9 December 2010, fn 82.

<sup>47</sup> CJEU, C-18/18, *Eva Glawischnig-Piesczek*, ECLI:EU:C:2019:821, 3 October 2019, para. 35. See also Opinion of AG Szpunar, case C-18/18, *Eva Glawischnig-Piesczek*, ECLI:EU:C:2019:458, para. 59-60.

<sup>48</sup> CJEU, C-18/18, *Eva Glawischnig-Piesczek*, ECLI:EU:C:2019:821, 3 October 2019, para. 46.

unconnected reasons. As a use of content protected by intellectual property rights may be unlawful for one user (e.g. one who does not have a license and cannot rely on an exception or limitation) and lawful for another (e.g. one who has a license or can rely on an exception or limitation), even re-postings of the same content by different parties in different contexts have to be approached as separate cases of infringement. For the same reasons, the ability of automated technologies to avoid problematic over-blocking is severely exacerbated in the area of intellectual property.<sup>49</sup>

#### 2.1.4 Moving forward: *Peterson v YouTube*

It is important to note that *Glawischnig* concerned an injunctive order. The CJEU's reasoning in that case rested heavily on the existence of a prior assessment by the national court that had declared the content at issue to be illegal. As a result, its conclusions on general monitoring would not necessarily be applicable to obligations arising from a duty of care to prevent unlawful activity. This means that, while *Glawischnig* may offer support for interpretative option B1 ('basic single minus'), it does not do so for interpretative option B2 ('basic double minus'), that views filtering based on a mere rightholder notification of unlawful content without court involvement as compatible with Article 15(1) ECD.

This latter issue is addressed by AG Saugmandsgaard Øe, in his Opinion on *Peterson v YouTube*, a case currently pending before the CJEU.<sup>50</sup> The case concerns the liability of hosting providers YouTube and Uploaded for copyright-infringing content posted onto their services by their users. The question arose as to whether these providers are obliged to monitor their services in order to ensure compliance with copyright law in order to enjoy the protection of Article 14 ECD. The AG opined that that should not be the case. The knowledge or awareness referred to in the safe harbour should be taken to be knowledge or awareness of specific illegal information, not general and abstract knowledge that the provider's services are used for illegal activities. The AG suggested that to find otherwise would conflict with Article 15(1) ECD.<sup>51</sup> The AG also emphasised that the safe harbour incorporates only a notice-and-take-down, not a notice-and-stay-down regime. While removing information requires the service provider to react to a notification, blocking information would necessitate the introduction of filtering technology.<sup>52</sup>

By contrast, the AG found that stay-down obligations may be imposed on providers by means of injunctions.<sup>53</sup> Taking cue from the Court's judgment in *Glawischnig*, the AG concluded that Article 15(1) ECD precludes injunctions to filter in order to detect any infringement, but does not prevent injunctions to block the reposting of content identical or equivalent to content that has been found to be unlawful by a court. The AG did emphasise that, in his view, such injunctions should be proportionate, so that account must be taken of the resources of the provider. In addition, users may not be prevented from using the content legally.<sup>54</sup>

While the AG's proposal does respect the CJEU's *Glawischnig* case law, it is not clear why filtering would be problematic in the context of a notice-and-stay-down system, but acceptable where there is an injunctive order. The AG emphasises that not all providers will have access to the necessary technologies.<sup>55</sup> But if that is the case, then injunctions should also not be allowed to impose monitoring obligations that can hardly be fulfilled without employing automated tools. It is also unclear how users'

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<sup>49</sup> For a description of some of the most common filtering technologies, see E. Engstrom and N. Feamster, 'The Limits of Filtering: A Look at the Functionality and Shortcomings of Content Detection Tools', Engine, March 2017, available at: <https://www.engine.is/the-limits-of-filtering>. For a discussion of the risk of over-blocking, see M Perel and N Elkin-Koren, 'Accountability in Algorithmic Copyright Enforcement', *Stanford Technology Law Review* 19 (2016), 473 (490-491). For empirical studies confirming the risk of over-blocking in respect of traditional notice-and-take-down systems, see S Bar-Ziv and N Elkin-Koren, 'Behind the Scenes of Online Copyright Enforcement: Empirical Evidence on Notice & Takedown', *Connecticut Law Review* 50 (2017), 3 (37): 'Overall, the N&TD regime has become fertile ground for illegitimate censorship and removal of potentially legitimate materials'; J Urban, J Karaganis and B Schofield, 'Notice and Takedown in Everyday Practice', *UC Berkeley Public Law and Legal Theory Research Paper Series*, Version 2, March 2017, available at <https://ssrn.com/abstract=2755628>, 2: 'About 30% of takedown requests were potentially problematic. In one in twentyfive cases, targeted content did not match the identified infringed work, suggesting that 4.5 million requests in the entire six-month data set were fundamentally flawed. Another 19% of the requests raised questions about whether they had sufficiently identified the allegedly infringed work or the allegedly infringing material.'

<sup>50</sup> Opinion of AG Saugmandsgaard Øe, 16 July 2020, joined cases C-682/18 and C-683/18, *YouTube and Cyando*, ECLI:EU:C:2020:586.

<sup>51</sup> AG Saugmandsgaard Øe, id. para. 185.

<sup>52</sup> AG Saugmandsgaard Øe, id. para. 194.

<sup>53</sup> AG Saugmandsgaard Øe, id. para. 195.

<sup>54</sup> AG Saugmandsgaard Øe, id. para. 221-222.

<sup>55</sup> AG Saugmandsgaard Øe, id. para. 194.

rights are to be defended from the over-blocking that is inherent to automated filtering systems.<sup>56</sup> It is hard to avoid the conclusion that, in an otherwise diligently researched and methodically thought-out Opinion, the AG is struggling to reconcile *Glawischnig* with Article 15(1) ECD and the prior case law of the CJEU.

## 2.2 Connection to the Charter

The CJEU's case law on general monitoring obligations does not rest solely on Article 15(1) ECD. A significant fundamental rights dimension also exists.<sup>57</sup> This Charter-based case law has been propelled forward by EU law on intellectual property rights. This is unsurprising given the greater harmonisation which that area of law enjoys at the EU level, providing a foothold for the application of the Charter.

The leading CJEU judgement in the area of intermediary liability was handed down in 2008 in *Promusicae*.<sup>58</sup> Here, the CJEU was called upon to clarify whether EU law requires that Member States impose a duty on internet access providers to retain and communicate, in the context of civil proceedings, the personal data of their users in order to ensure an effective protection of copyright. The Court found that, in principle, no such obligation exists. In view of the paucity of guidance in the directives,<sup>59</sup> the CJEU then turned to the only tool available in its interpretative arsenal: the law of fundamental rights. For this purpose, it interpreted the circumstances of the case as an instance of a clash between fundamental rights. The Court then stated that, in transposing the directives and implementing the transposing measures,

*'the Member States must [...] take care to rely on an interpretation of the directives which allows a 'fair balance' to be struck between the various fundamental rights protected by the Community legal order'*.<sup>60</sup>

In follow-on case law, the CJEU has confirmed this 'fair balance' approach. As a general rule, in cases of intermediary liability, the CJEU sets up a tripartite dynamic: the fundamental right of owners to the protection of their intellectual property under Article 17(2) of the Charter has to be balanced against the intermediary's freedom to conduct a business under Article 16 of the Charter, as well as the fundamental rights of end users, including their freedom of expression and information, under Article 11 of the Charter, and their right to the protection of their personal data, under Article 8 of the Charter.

Information on how to achieve such a balance has gained in detail over time. Often, the issue is considered in parallel to Article 15(1) ECD. So, in *L'Oréal*, after suggesting its example preventive measures, the Court went on to warn that any measure imposed in the form of an injunction on the intermediary to tackle online trade mark infringement must strike a 'fair balance' between the relevant rights and interests.<sup>61</sup> This suggests that fundamental rights operate as an additional safeguard: once the 'double requirement of identity' (section 2.1.1) is satisfied, compatibility with the Charter should also be ensured. This might, for instance, place limits on the identification measures that can be taken against end users.

The *SABAM* cases offer more concrete guidance. Here, the Court concluded that the contested filtering system would fail to achieve a 'fair balance'. On the one hand, it would impose too complex, costly and permanent burdens on the intermediary's business model, thereby violating Article 16 of the Charter.<sup>62</sup> On the other, it would also interfere with users' rights on two fronts. First, it would require the

<sup>56</sup> See the literature references, supra note 49.

<sup>57</sup> Cf. M Leistner, "European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?", *Zeitschrift für Geistiges Eigentum/Intellectual Property Journal* 2020, forthcoming, 15, available at: <https://papers.ssrn.com/abstract=3572040>, who confirms that fundamental rights concerns 'have to be taken very seriously'.

<sup>58</sup> CJEU, Case C-275/06, *Promusicae v Telefónica de España*, ECLI:EU:C:2008:54, 29 January 2008.

<sup>59</sup> Aside from the E-Commerce, Copyright and Enforcement Directives, the CJEU examined the relevant provisions in the E-Privacy Directive (Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L 201/37) and the Data Protection Directive (Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31).

<sup>60</sup> CJEU, Case C-275/06, *Promusicae v Telefónica de España*, ECLI:EU:C:2008:54, 29 January 2008, para 68.

<sup>61</sup> CJEU, C-324/09, *L'Oréal v eBay International*, ECLI:EU:C:2011:474, 12 July 2011, para. 143.

<sup>62</sup> CJEU, Case C-70/10, *Scarlet Extended v SABAM*, 24 November 2011, para. 46-49 and CJEU, C-360/10, *SABAM v Netlog*, 16 February 2012, para. 44-46.

identification, systematic analysis and processing of information concerning all users, including non-infringing ones. Given that that information allows for the identification of those users and therefore constitutes protected personal data, the measure would also infringe Article 8 of the Charter.<sup>63</sup> Secondly, it would run the risk of failing to distinguish adequately between lawful (e.g. parody) and unlawful (i.e. piracy) content, thus potentially leading to the blocking of lawful communications. This would bring it out of line with Article 11 of the Charter. In this regard, the Court emphasised the complicated and fragmented nature of European copyright law that makes the accurate identification of infringements difficult: as the Court noted, exceptions to copyright vary from one Member State to another, while works may also fall within the public domain at different times.<sup>64</sup> As a result, the Court rejected the contested measure as incompatible with the Charter.

This analysis bolsters the incompatibility of interpretative options B1 and B2 with the prohibition on general monitoring obligations. Clearly, an interpretation of Article 15(1) ECD that would be incompatible with the Charter cannot be accepted. To the extent that, at least in the area of copyright, filtering would fail to provide adequate protection to rights protected under Articles 8, 11 and 16 of the Charter, it cannot be imposed on intermediaries. What this means is that, even if interpretative options B1 ('basic single minus') and B2 ('basic double minus') were accepted, any filtering this allowed would nevertheless be excluded by the need to strike a 'fair balance' between all protected fundamental rights.

In *UPC Telekabel Wien*,<sup>65</sup> the CJEU once again applied the notion of 'fair balance'. The case concerned the imposition of an injunction on an internet access provider ordering the blocking of access to websites with copyright infringing content. The Court held that blocking injunctions imposed on an intermediary for the enforcement of copyright will strike a 'fair balance' with that intermediary's freedom to conduct its business, provided that the intermediary is given the right to choose the measure it will apply and is able to avoid incurring coercive penalties for breach of the injunction by showing that it has taken all reasonable measures.<sup>66</sup> The measures taken must, according to the CJEU, also take users' rights to freedom of expression into account. Echoing the conclusions of *L'Oréal*, the Court confirmed that they must be 'strictly targeted, in the sense that they must serve to bring an end to a third party's infringement, without thereby affecting internet users from accessing lawful information'.<sup>67</sup> In order to ensure this 'fair balance', the measures adopted must:

*'(i) [...] not unnecessarily deprive internet users of the possibility of lawfully accessing the information available and (ii) [...] have the effect of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject-matter that has been made available to them in breach of the intellectual property right, that being a matter for the national authorities and courts to establish.'*<sup>68</sup>

This break-down confirms that, while copyright must be protected, if a measure would have a disproportionate effect on other relevant rights, merely 'making difficulty' and 'seriously discouraging' infringement should be accepted as sufficient protection for copyright owners. Importantly, according to *Telekabel*, end users should be given *locus standi* to defend their rights against measures that do not strike a fair balance:

*'Accordingly, in order to prevent the fundamental rights recognised by EU law from precluding the adoption of an injunction such as that at issue in the main proceedings, the national procedural rules must provide a possibility for internet users to assert their rights before the court once the implementing measures taken by the internet service provider are known.'*<sup>69</sup>

While the decision did not discuss monitoring *per se*, it provides valuable insight into the balancing mechanism through which the permissibility of measures imposed on intermediaries for the online enforcement of information law should be assessed.

<sup>63</sup> CJEU, Case C-70/10, *Scarlet Extended v SABAM*, ECLI:EU:C:2011:771, 24 November 2011, para. 50-51 and CJEU, C-360/10, *SABAM v Netlog*, ECLI:EU:C:2012:85, 16 February 2012, para. 48-49.

<sup>64</sup> CJEU, C-70/10, *Scarlet Extended*, ECLI:EU:C:2011:771, 24 November 2011, para. 50 and 52 CJEU, C-360/10, *Netlog*, ECLI:EU:C:2012:85, 16 February 2012, para. 48 and 50.

<sup>65</sup> CJEU, case C-314/12, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH*, ECLI:EU:C:2014:192, 27 March 2014.

<sup>66</sup> CJEU, *id.*, para 48-54.

<sup>67</sup> CJEU, *id.*, para 56.

<sup>68</sup> CJEU, *id.*, para 64.

<sup>69</sup> CJEU, *id.*, para. 57.

No fundamental rights analysis was undertaken by the Court in *Glawischnig*. This is arguably a result of the fact that fundamental rights were not addressed by the referring court in the submitted questions, which instead concentrated exclusively on the interpretation of Article 15(1) ECD. Arguably, this explains the CJEU's willingness to depart from its previous 'basic' interpretation of 'general monitoring' (Option A).

AG Szpunar's Opinion on the case did suggest that permitting injunctions to search for identical content ensures a 'fair balance' between the fundamental rights involved. In other words, he considered interpretative option B1 ('basic single minus') to be compatible with the notion of a 'fair balance', though only where the monitoring is geared at identifying identical data. According to the AG, such injunctions would not require sophisticated technology and therefore would not represent an extraordinary burden on the intermediary. They would accordingly be compatible with Article 16 of the Charter. It is not clear why this would be the case, when a similar system was found by the CJEU in the *SABAM* cases to be complicated, costly and permanent and therefore incompatible with 'fair balance'. In *Glawischnig*, the AG also concluded that the removal of identical information would not impair third parties' freedom of expression, as it would only affect their ability to post illegal content. The AG acknowledged that the context in which the content is posted might affect this assessment, but did not consider the danger of over-blocking to be sufficient to disrupt 'fair balance'. At the same time, he did caution that third parties must be allowed to challenge the removal of the content before a court.<sup>70</sup>

The above being said, AG Szpunar was of the opinion that obligations to locate information equivalent to that declared to be illegal by a court would not be compatible with the 'fair balance' requirement. This was because the relevant solutions would be costly for the provider to develop and would lead to censorship, so that end users' freedom of expression and information might be systematically restricted.<sup>71</sup> Clearly, the Court either did not consider the issue or reached a different conclusion.

The AG in *YouTube* also subjected his findings to a rudimentary balancing exercise. Although (as noted above) accepting that stay-down obligations may be imposed via an injunction (i.e. interpretative option B1 ('basic single minus')), he cautioned that they must ensure a 'fair balance' between the various rights and interests at play and must not create obstacles to the legal use of the service. The AG noted that such obligations should not be such as to prevent users from uploading legal content to the platform.<sup>72</sup> While it is possible that this would be an attainable objective with regard to the areas of law in which illegality is easily ascertainable,<sup>73</sup> given the delicate balances at play in intellectual property law, it is hard to see how any technological tool – current or future – could satisfy this condition. Indeed, it was precisely for this reason that 'basic single minus' was rejected by the CJEU in the *SABAM* cases (section 2.1.2).

Based on the analysis of the CJEU case law in the area of general monitoring, it is now possible to draw connections between the three interpretative options identified earlier in the paper and their application by the CJEU:

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<sup>70</sup> Opinion of AG Szpunar, case C-18/18, *Eva Glawischnig-Pieszczeck*, ECLI:EU:C:2019:458, para. 62-65.

<sup>71</sup> AG Szpunar, *id.*, para. 74.

<sup>72</sup> Opinion of AG Saugmandsgaard Øe, joined Cases C-682/18 and C-683/18, *YouTube*, ECLI:EU:C:2020:586, 16 July 2020, para. 222.

<sup>73</sup> The AG gives the example of child pornography, see Opinion of AG Saugmandsgaard Øe, joined Cases C-682/18 and C-683/18, *YouTube*, ECLI:EU:C:2020:586, 16 July 2020, footnote 179. See also C Angelopoulos and S Smet, 'Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability' (2016) 8(2) *Journal of Media Law*, p. 266-309.

	<b>OPTION A: BASIC INTERPRETATION</b> <u>What are you looking at?</u>	<b>OPTION B: BASIC INTERPRETATION MINUS</b> <u>What are you looking for and what is the authority of the requester?</u>
		<b>B1: Basic Single Minus    B2: Basic Double Minus</b>
<b>INTERPRETATION</b>	The ban on general monitoring prohibits the imposition of obligations to monitor all or most of the information handled by an intermediary in order to detect and prevent any unlawful activity <i>in general</i> .	The ban on general monitoring prohibits the imposition of any obligation to monitor all or most of the information handled by an intermediary <i>in general</i> .
	The ban on general monitoring prohibits the imposition of any obligation to monitor all or most of the information handled by an intermediary <i>in general</i> .	<b>Basic interpretation minus injunctions</b> = monitoring all of the information handled by an intermediary is ok, if there is a court order identifying 'specific' illegality, e.g. a particular defamatory attack or infringements of a particular copyright-protected work.
		<b>Basic interpretation minus injunctions minus notifications</b> = monitoring of all information handled by intermediary ok, if there is a court order or rightholder notification identifying 'specific' illegality, e.g. infringements of a particular trade mark or copyright-protected work.
<b>CONSEQUENCES</b>	1. Monitoring all or most of the information handled by an intermediary <i>in general</i> can never be classified as monitoring 'in a specific case'; 2. General monitoring for the purpose of finding violations of a specific right is prohibited → <b>no filters</b>	Monitoring all or most of the information handled by an intermediary for the purpose of identifying violations of a specific right is not prohibited if <b>ordered by a court → court-ordered filters ok</b>
		1. The generality of the monitoring is not determined by what is being monitored, but by the objective of the monitoring; 2. General monitoring for violations of a specific right is not prohibited if <b>ordered by a court or triggered by a notification → filters ok</b>
<b>APPLICATION</b>	<ul style="list-style-type: none"> <li>• <i>L'Oréal v eBay</i> (trade mark law)</li> <li>• <i>SABAM cases + McFadden</i> (copyright)</li> </ul>	<ul style="list-style-type: none"> <li>• <i>Eva Glawischnig-Piesczek</i> (defamation);</li> <li>• <i>AG in Peterson</i> (copyright)</li> </ul>
		<ul style="list-style-type: none"> <li>• <i>Article 17 DSM Directive???</i></li> </ul>
<b>RATIONALE</b>	<ul style="list-style-type: none"> <li>• <i>L'Oréal v eBay</i>: double requirement of identity (same trade mark + same infringer);</li> <li>• <i>SABAM</i>: general monitoring = active observation of almost all of the information posted or transmitted by all end-users;</li> <li>• <i>McFadden</i>: even if focusing on infringements of a single work, if all network communications must be checked = general monitoring.</li> </ul>	<ul style="list-style-type: none"> <li>• <i>Glawischnig-Piesczek</i>: no general monitoring if not 'excessive' and if imposed by a court order monitoring for the purpose of identifying content identical or equivalent to content declared illegal by a court;</li> <li>• <i>AG in Peterson</i>: follows <i>Glawischnig</i> precedent, but rejects 'Basic Double Minus'.</li> </ul>

### 2.3 The case law of the ECtHR

Where does the ECHR stand in this debate? This is relevant, given that Article 51(3) of the Charter indicates that the meaning and scope of rights that are protected both in the Charter and the ECHR should be the same, unless the Charter provides more extensive protection.

The European Court on Human Rights ('ECtHR') has addressed the question of general monitoring from the ECHR perspective in three decisions: *Delfi v Estonia*,<sup>74</sup> *MTE v Hungary*<sup>75</sup> and *Pihl v Sweden*.<sup>76</sup> All three cases concerned the liability of online hosts for allegedly defamatory content posted by anonymous users in the comment sections below online articles published by the platforms. Like the CJEU, the ECtHR has also applied a 'fair balance' test to reason through the issue. This confirms that 'fair balance' and human rights are relevant to the discussion of general monitoring even outside the reach of EU law.

In *Delfi*, the ECtHR developed four specific factors to guide the balancing process:

- a) the context of the comments;
- b) the measures applied by the platform in order to prevent or remove the comments;
- c) the liability of the actual authors of the comments as an alternative to the platform's liability; and

<sup>74</sup> ECtHR, *Delfi v Estonia* [2015] ECHR 586. See also the Chamber judgment in ECtHR, *Delfi v Estonia* [2013] ECHR 941.

<sup>75</sup> ECtHR, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* [2016] ECHR 135 (hereafter *MTE v Hungary*).

<sup>76</sup> *Pihl v Sweden*, [2017] ECHR (application no. 74742/14, 7 February 2017).

d) the consequences of the domestic proceedings for the platform.<sup>77</sup>

In *MTE*, the content of the comments was included as an additional consideration under (a), while a fifth factor was also discussed:

e) the consequences of the comments for the victim.<sup>78</sup>

In applying these factors to the three cases, the ECtHR came to two very different conclusions. In *Delfi*, the Grand Chamber of the Court characterised the contested comments as hate speech and incitement to violence. The Court then decided that, in view of their particularly odious nature, the imposition of liability on the hosting provider by the domestic courts struck a 'fair balance'. It therefore did not entail a violation of the right to freedom of expression under Article 10 ECHR. In *MTE*, by contrast, the Fourth Section of the Court found that the impugned comments were merely offensive. On this basis, it concluded that the liability imposed on the intermediaries for their dissemination violated the right to freedom of expression. Likewise in *Pihl*, the refusal of the national authorities to impose liability on the operator of a website for defamatory content posted to that website was not found to interfere with the victim's right to privacy under Article 8 ECHR.

Notably, in *Delfi* the website operator had had three mechanisms in place for dealing with inappropriate comments: a notice-and-take-down system that allowed users to flag inappropriate comments for deletion; a filtering system that automatically deleted comments that included certain obscene words; and the occasional proactive removal of comments. In addition, 'rules of comment' warned that insulting or vulgar comments would be removed. The ECtHR's judgement in that case therefore set a notably strict standard that appears to require the (manual or automatic) pre-monitoring of all user-uploaded content in order to ensure the removal of hate speech in order to avoid liability. Thus, filtering incompatible with all three interpretative options outlined above (the 'basic' interpretation (Option A), 'basic single minus' (Option B1) and 'basic double minus' (Option B2)) was not only permitted, but *required* by the Strasbourg Court in order to achieve a 'fair balance'.

Nevertheless, the Court did observe in *Delfi* that, in many cases, diligent notice-and-take-down systems would be sufficient to achieve a 'fair balance'.<sup>79</sup> The outcome in *MTE* and *Pihl* confirms this.<sup>80</sup> As neither decision overruled *Delfi*, the consequence is that, in cases concerning 'clearly unlawful' content,<sup>81</sup> the *ex post* removal of unlawful content will not be sufficient and successful *ex ante* identification is instead necessary under the ECHR. Aside from hate speech, that could arguably be said to be the case for e.g. child abuse material.<sup>82</sup> That being said, as *MTE* and *Pihl* indicate, defamation appears to receive a very different treatment: these judgments *exclude* more severe measures than notice-and-take-down (including the adoption of monitoring activities falling under the 'basic' Option A interpretation) as incompatible with a 'fair balance'. Arguably, the same would be true for infringements of intellectual property rights, which are also (*inter alia*, in light of their context-specific exceptions and limitations) difficult to qualify as 'clearly unlawful'.<sup>83</sup> This raises the prospect of a potential clash between the case law of the ECtHR and CJEU. Of course, the CJEU's decision in *Glawischnig* and the AG's recommendation in *YouTube* concerned injunctions where the balancing exercise is influenced by the fact that the court authority issuing the monitoring order undertakes a prior judicial review of its scope and impact ('basic single minus' Option B1). However, if the CJEU were in future to extend its *Glawischnig* conclusion to duties of care arising from mere rightholder notifications ('basic double minus' Option B2), a conflict between the two legal orders could emerge. Indeed, this is arguably already the case, in light of Article 17 CDSMD.

<sup>77</sup> ECtHR, *Delfi v Estonia* [2015] ECHR 586, para. 142. See also ECtHR, *Pihl v Sweden*, application no. 74742/14, 7 February 2017, para. 28.

<sup>78</sup> ECtHR, *MTE v Hungary* [2016] ECHR 135, para. 68-69.

<sup>79</sup> ECtHR, *Delfi v Estonia* [2015] ECHR 586, para 159.

<sup>80</sup> See ECtHR, *MTE v Hungary* [2016] ECHR 135, paras 91.

<sup>81</sup> ECtHR, *MTE v Hungary* [2016] ECHR 135, para. 64; *Pihl v Sweden*, application no. 74742/14, 7 February 2017, para. 32 and 37.

<sup>82</sup> See also C Angelopoulos and S Smet, 'Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability' (2016) 8(2) Journal of Media Law, p. 266-309.

<sup>83</sup> See Opinion of AG Saugmandsgaard Øe, joined Cases C-682/18 and C-683/18, *YouTube*, ECLI:EU:C:2020:586, 16 July 2020, para. 188.

### 3. The prohibition on general monitoring obligations in Article 17(8) CDSMD

As already pointed out in section 1 of this study, Article 17 CDSMD leads to a climate change in the field of copyright law. Instead of maintaining the traditional safe harbour and notice-and-take-down approach known from Article 14(1) ECD, Article 17(1) CDSMD takes the strict, primary liability of OCSSPs as a starting point:

*'Member States shall provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public when it gives the public access to copyright protected works or other protected subject matter uploaded by its users.'*

Article 17(3) CDSMD explicitly declares Article 14(1) ECD inapplicable to OCSSPs liable under Article 17(1). Articles 17(1) and (4) make up for this by offering alternative escape routes. Under Article 17(1) *in fine*, OCSSPs can avoid liability by obtaining an authorisation from copyright holders to offer user-uploaded content on their platforms. If no authorisation is available, they can still avoid liability by showing that they took 'best efforts' to obtain that authorisation (under Article 17(4)(a)), taking measures to prevent the availability of works about which they have been notified (Article 17(4)(b)) and, if infringements nonetheless occur, removing these and taking measures to ensure they are not repeated (under Article 17(4)(c)).<sup>84</sup>

From the perspective of the general monitoring ban, the crux of the new copyright approach, then, lies in the content moderation duties that arise from Article 17(4)(b) and (c). Article 17(4)(b) requires OCSSPs to make

*'in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information;...'*<sup>85</sup>

If these efforts nonetheless allow infringing content to slip through, OCSSPs must also expeditiously take down infringements, upon receiving a sufficiently substantiated notice from the rightholders, and make

*'best efforts to prevent their future uploads in accordance with point (b).'*<sup>86</sup>

#### 3.1 Objective pursued by Article 17 CDSMD

As already indicated above, the so-called 'value gap' argument featured prominently in the legislative process leading to the adoption of Article 17 CDSMD. The argument rests on the policy objective of ensuring the payment of adequate remuneration for the online distribution of copyrighted content.<sup>87</sup> In its 2015 communication 'Towards a modern, more European copyright framework', the European Commission expressed the view that the application of the traditional safe harbour for hosting (Article 14(1) ECD) allowed OCSSPs to generate income without sharing profits with producers of creative content.<sup>88</sup> The value gap argument thus entered the EU debate. In line with this argument, the Commission's proposal for new copyright legislation – including the template for the content moderation

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<sup>84</sup> As to the cascade of best effort obligations and possibilities to escape liability, see M Leistner, "European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?", *Zeitschrift für Geistiges Eigentum/Intellectual Property Journal* 2020, forthcoming, 15-16, available at: <https://papers.ssrn.com/abstract=3572040>; European Copyright Society, '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', 4-9, available at: <https://ssrn.com/abstract=3589323>.

<sup>85</sup> Article 17(4)(b) CDSMD.

<sup>86</sup> Article 17(4)(c) CDSMD.

<sup>87</sup> For an overview of the discussion on uploaded content prior to the current copyright reform proposals in the EU, see J-P Triaille, S Dusollier, S Depreeuw, JB Hubin, F Coppens, A de Francquen, "Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society", prepared by De Wolf & Partners in collaboration with the Centre de Recherche Information, Droit et Société (CRIDS), University of Namur, on behalf of the European Commission (DG Markt), (Brussels: European Union 2013), 457-510.

<sup>88</sup> European Commission, *Towards a modern, more European copyright framework*, 9 December 2015, Doc. COM(2015) 626 final, 9-10.

system which was ultimately laid down in Article 17 CDSMD – sought to render the traditional liability shield inapplicable when content uploads concern copyrighted works.<sup>89</sup>

The underlying strategy seems to have been the following: deprived of the safe harbour for hosting and exposed to direct liability for infringing user uploads, OCSSPs would have to embark on licensing and filtering of content posted by users. In the face of the erosion of the legal certainty resulting from the traditional liability shield, a platform provider seeking to avoid liability risks would enter into agreements with copyright owners. The initial Commission proposal already contemplated that these agreements with rightholders would bring filtering obligations in their wake. Indeed, Article 13 (the earlier iteration of Article 17) of the proposal explicitly mentions the deployment of ‘effective content recognition technologies’ (i.e. filtering).<sup>90</sup> Green-lighting the employment of algorithmic enforcement measures, thus, played a role in the EU copyright reform agenda from the outset. The value gap argument and the intention to generate new revenue streams for copyright owners served as a vehicle to present content filtering obligations as a necessary evil that had to be accepted.<sup>91</sup>

The proposal gave rise to widespread criticism. As commentators noted, the introduction of an explicit obligation to adopt filtering technology sits uncomfortably alongside the CJEU’s prior case law on such systems (as analysed under section 2 above).<sup>92</sup> As a result of the considerable opposition mounted against this approach, despite the early focus on algorithmic enforcement, the text of the provision was subsequently substantially reworded. An unequivocal filtering obligation is sought in vain in the legislative text that evolved from the EU copyright reform. Instead, the final version of the Directive incorporates a number of safeguards for end users’ freedom of expression. To this end, Article 17(7) CDSMD of the final text underlines the need to safeguard copyright limitations that serve the purposes of a) quotation, criticism and review and b) caricature, parody and pastiche. Similarly, Article 17(9) introduces an obligation to ensure that complaint and redress mechanisms are available to end users in the event of disputes over the take-down of uploaded material. Article 17(5) accounts for OCSSPs’ freedom to conduct a business by subjecting the ‘best efforts’ required under Article 17(4) to the principle of proportionality and an indicative list of relevant factors. Finally, Article 17(8) CDSMD repeats the prohibition of general monitoring obligations.

The result is a complicated web of requirements. Clarity remains elusive. Has the filtering obligation for OCSSPs contemplated by Article 13 of the initial Commission proposal survived the final wording of the Directive? Although the text no longer explicitly references content recognition technologies as a method of taking the preventive action required by Article 17(4)(b) and (c), it is an obvious way of achieving that result.<sup>93</sup> It is relevant in this regard that, as shown in section 2 above, the meaning of general monitoring is highly contested. The question therefore emerges: does Article 17(4)(b) and (c) require automated filtering? If so, how can this filtering obligation be reconciled with the general

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<sup>89</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market* (DSM Directive), 14 September 2016, Doc. COM (2016) 593 final, Article 13.

<sup>90</sup> Article 13(1) of the Proposal for a CDSM Directive.

<sup>91</sup> Cf. M Senftleben, “Institutionalized Algorithmic Enforcement – The Pros and Cons of the EU Approach to Online Platform Liability”, *Florida International University Law Review* 14 (2020), 299 (301-303).

<sup>92</sup> As to the resistance which this approach triggered during the legislative process, see M Senftleben, *et al.*, “The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform”, *European Intellectual Property Review* 40 (2018), 149; C Angelopoulos, “On Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market” (2017), available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2947800](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800); G Frosio, “From Horizontal to Vertical: An Intermediary Liability Earthquake in Europe”, *Oxford Journal of Intellectual Property and Practice* 12 (2017), 565-575; G Frosio, “Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy”, *Northwestern University Law Review* 112 (2017), 19; RM Hilty & V Moscon V. (eds.), “Modernisation of the EU Copyright Rules – Position Statement of the Max Planck Institute for Innovation and Competition”, Max Planck Institute for Innovation and Competition Research Paper No. 17-12, Max Planck Institute for Innovation and Competition: Munich 2017; RM Hilty & V Moscon, “Contributions by the Max Planck Institute for Innovation and Competition in Response to the Questions Raised by the Authorities of Belgium, the Czech Republic, Finland, Hungary, Ireland and the Netherlands to the Council Legal Service Regarding Article 13 and Recital 38 of the Proposal for a Directive on Copyright in the Digital Single Market”, available at: <http://www.ip.mpg.de/>; CREATE et al., “Open letter to Members of the European Parliament and the Council of the European Union”, available at: <http://www.create.ac.uk/policy-responses/eu-copyright-reform/>; E Rosati, “Why a Reform of Hosting Providers’ Safe Harbour is Unnecessary Under EU Copyright Law”, CREATE Working Paper 2016/11 (August 2016), available at: <https://ssrn.com/abstract=2830440>; S Stalla-Bourdillon, E Rosati, et al. “An academic perspective on the copyright reform” (2017) 33(1) C.L.S. Rev 3-13.

<sup>93</sup> It is on this reasoning that, after the adoption of the CDSMD, Poland initiated a legal challenge before the CJEU seeking the annulment of Article 17(4)(b) and Article 17(4)(c), *in fine* or, in the alternative, Article 17 in its entirety (see Case C-401/19, *Poland v European Parliament and Council of the European Union*). According to the Polish position, Article 17(4)(b) and (c) *in fine* make it necessary for OCSSPs, in order to avoid liability, to filter content uploaded by users. Such mechanisms undermine the essence of the right to freedom of expression and information and do not comply with the requirement that limitations imposed on that right be proportional and necessary.

monitoring ban in Article 17(8)? Quite clearly, any monitoring activity required by Article 17(4)(b) and (c) would be expected to cover, more generally, all potential incidents of infringement that concern 'specific works and other [protected] subject matter' that have been notified by rightholders. In that case, Article 17(4)(b) and (c) would require the monitoring of all platform content for pre-identified works. Considering the spectrum of CJEU-approved approaches ranging from *L'Oréal* (limiting preventive duties to specific intellectual property-infringing activities by the same person in respect to the same right – Option A: the 'basic' interpretation), to *Glawischnig* (permitting court orders that require the prevention of infringing activities identical or equivalent to a specific earlier infringement – a twist on Option B1: the 'basic single minus' interpretation), it becomes apparent that, with the adoption of Article 17(4)(b) and (c) CDSMD, EU legislation risks going beyond the approaches which the CJEU deemed permissible in earlier copyright, trade mark and defamation cases. Article 17(4)(b) and (c) may be understood as an attempt to codify the 'basic double minus' interpretation (Option B2) that allows filtering obligations relating to all platform content not only on the basis of court orders, but also on the basis of rightholder notifications. Such an outcome would be particularly remarkable in a copyright context, as it neglects the position which the CJEU took in *McFadden*.

In this context, it is important to note that, while filtering would be one way of achieving the effects required by Article 17(4)(b) and (c) – and certainly those provisions encourage its adoption – other preventive measures that would comply with the wording of those paragraphs can also be envisaged that would arguably suffice. Most obviously, and taking direct inspiration from *L'Oréal*, the 'stay-down' element of Article 17(4)(c) would be satisfied by the suspension of the individual infringer. Compliance with Article 17(4)(b) could also take the form of community moderation, wherein users are asked to report instances they encounter of infringement of protected material and the provider removes this material in accordance with 'relevant and necessary information' received from rightholders. In addition, OCSSPs could deploy pop-up or banner notices warning users against infringement of such material. More generally, preventive measures in the form of terms and conditions warning against copyright infringement or a policy of only allowing trusted users (e.g. users who have been with the site for a certain amount of time) could also be considered.

Doubtless, the efficacy of these measures would disappoint hard-line supporters of the initial version of Article 17, which explicitly suggested content recognition technologies as effective preventive measures. However, it should be accepted that this example was removed from the text for good reason. In its stead, the EU legislator decided to emphasise the importance of freedom of expression and the need for proportionality. The final text also reiterated the prohibition on general monitoring measures. This decision should be taken seriously. The case law has emphasised that copyright, though protected as a fundamental right,<sup>94</sup> is not inviolable and does not attract absolute protection. As noted above, in *Telekabel*, the Court accepted that, in order to safeguard countervailing rights, preventive measures may have to be limited to those that have the effect

*'at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject-matter that has been made available to them in breach of the intellectual property right.'*<sup>95</sup>

Arguably, the aforementioned measures would achieve that result. While indubitably filtering would present the most effective way of enforcing copyright online, as the EU legislator accepted, the need for a 'fair balance' between all relevant rights and interests seems to preclude their imposition in a general fashion. As the examples provided above show, other approaches exist which, in conjunction with a notice-and-take-down system, make infringement more difficult or seriously discourage it. The text of the Directive itself accepts that 'in some cases availability of unauthorised content can only be avoided upon notification of rightholders.'<sup>96</sup>

This observation is important as it immediately indicates that filtering is not required by definition in order to comply with Article 17(4)(b) and (c). Once again: an explicit reference to content recognition technologies, as in the initial Commission proposal, is sought in vain in the final text. Consequently, automated filtering does not have to be accommodated within the context of Article 17(8) in order to give meaning to Article 17(4)(b) and (c). Other options exist.

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<sup>94</sup> See Article 17(2) of the Charter.

<sup>95</sup> CJEU, case C-314/12, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH*, ECLI:EU:C:2014:192, 27 March 2014, para 64.

<sup>96</sup> Recital 66 CDSMD.

### 3.2 Interplay with the prohibition of general monitoring obligations

As explained above, while Article 17 CDSMD departs from the traditional notice-and-take-down approach, it also confirms the ban on general monitoring obligations. This latter element of the traditional liability shield, thus, survived the erosion of the safe harbour approach to online hosts. Instead of abandoning the ban on general monitoring, Article 17(8) CDSMD contains a further manifestation of the overarching principle expressed in Article 15(1) ECD: an unspecified, general content monitoring obligation would be excessive and incompatible with EU law.

The combination of new content moderation duties (Article 17(4)(b) and (c) CDSMD) with the traditional ban on general monitoring (Article 17(8) CDSMD) raises delicate questions on the interplay of these two elements of the new regulatory approach in copyright law. Did the EU legislator intend to say that, by definition, content filtering – based on the notification of ‘specific works’ by rightholders under Article 17(4)(b) and (c) CDSMD – does not amount to general monitoring and does not violate the prohibition of general monitoring duties in Article 17(8) CDSMD? The result would be the adoption of an Option B2 ‘basic double minus’ interpretation of ‘general monitoring’. If so, the question arises whether this statement in copyright law has repercussions on the pre-existing horizontal ban on general monitoring obligations known from Article 15(1) ECD. Three options for answering these questions can be distinguished:

- **Interpretative Option I – ‘same meaning’ approach**  
The prohibition of general monitoring obligations has the same meaning in Article 15(1) ECD and Article 17(8) CDSMD. The latter is nothing more than a verbatim repetition of the general monitoring ban known from Article 15(1) ECD.

This approach offers the chance of ‘importing’ the traditional EU *acquis* that evolved under Article 15(1) ECD into the new copyright rules and aligning the regulatory design in Article 17 CDSMD with this *acquis*.

- **Interpretative Option II – ‘lex specialis’ approach**  
The prohibition of general monitoring obligations has a different meaning in Article 15(1) ECD and Article 17(8) CDSMD. The latter is a reconfigured manifestation of the general monitoring ban known from Article 15(1) ECD, in the sense of having a specific meaning and function with regard to copyright infringements uploaded onto the platforms of OCSSPs.

This approach keeps the new interplay of content moderation systems (Article 17(4)(b) and (c) CDSMD) and the ban on general monitoring obligations (Article 17(8) CDSMD) separate as a *lex specialis*. As a result, it also minimises the potential impact of Article 17(4)(b) and (c) CDSMD on other areas of law that fall under the horizontal rule expressed in Article 15(1) ECD, such as trade mark and defamation.

- **Interpretative Option III – ‘lex posterior’ approach**  
Article 17(8) CDSMD – read in conjunction with the new content moderation duties in Article 17(4)(b) and (c) CDSMD – is a further specification of the general monitoring ban that prevails and reconfigures Article 15(1) ECD, as the latest statement of the legislator on the matter (following the maxim *lex posterior derogat legi priori*).

This approach would mean that Article 15(1) ECD allows the imposition of content moderation duties, as codified in Article 17(4)(b) and (c) CDSMD, not only within the limited context of that provision, but across copyright law, as well as in other areas covered by the horizontal rule in Article 15(1) ECD, such as trade mark and defamation law.

#### 3.2.1 Rejection of ‘lex posterior’ approach (Option III)

From the outset, the ‘lex posterior’ interpretation (Option III) must be rejected. Article 1(2) CDSMD leaves no doubt that the legislator did not intend any changes to the *acquis* that has evolved under Article 15(1) ECD:

*'Except in the cases referred to in Article 24, this Directive shall leave intact and shall in no way affect existing rules laid down in the directives currently in force in this area, in particular Directives 96/9/EC, 2000/31/EC, 2001/29/EC, 2006/115/EC, 2009/24/EC, 2012/28/EU and 2014/26/EU.'*

Article 24 CDSMD only amends provisions of the Database Directive 96/9/EC<sup>97</sup> and the Information Society Directive 2001/29/EC ('ISD').<sup>98</sup> The ECD, however, remains untouched. In line with Article 1(2) CDSMD, its rules, including Article 15(1) ECD, are affected 'in no way.' Hence, the new regulatory approach set forth in Article 17(1) and (4)(b) CDSMD has no impact on the interpretation of the general monitoring ban in Article 15(1) ECD.

The preparatory work underlying Article 17 CDSMD supports this understanding. In its 2016 communication 'Online Platforms and the Digital Single Market – Opportunities and Challenges for Europe', the European Commission described its strategy for closing the value gap (section 3.1) as follows:

*'New forms of online content distribution have emerged that may make copyright-protected content uploaded by end users widely available. While these services are attracting a growing audience and gain economic benefits from the content distribution, there is a growing concern as to whether the value generated by some of these new forms of online content distribution is fairly shared between distributors and rights holders. The Commission intends to address this through sector-specific regulation in the area of copyright.'*<sup>99</sup>

From the beginning, the initiative that finally led to the adoption of Article 17 CDSMD, thus, was based on an approach that sought to solve the value gap problem within a very specific corner of copyright law. Instead of unleashing a general debate about established safe harbour principles, the Commission sought to leave existing e-commerce rules intact, such as the general monitoring ban in Article 15(1) ECD. The focus of the new legislative initiative was on sector-specific adjustments in the field of copyright relevant to a particular subset of hosting providers.

Earlier proposals at the national level pointed in the same direction. Prior to the Commission's 2016 communication, the French High Council for Literary and Artistic Property had published a research paper prepared by Pierre Sirinelli, Josée-Anne Benazeraf and Alexandra Bensamoun on 3 November 2015. The researchers had been asked to propose changes to current EU legislation 'enabling the effective enforcement of copyright and related rights in the digital environment, particularly on platforms which disseminate protected content'.<sup>100</sup> They arrived at the conclusion that a provision should be added to current EU copyright legislation making it clear that 'information society service providers that give access to the public to copyright works and/or subject-matter, including through the use of automated tools, do not benefit from the limitation set out by Article 14 [ECD]'.<sup>101</sup> Again, a sector-specific solution – the neutralisation of the traditional liability shield within copyright law and only for certain providers – occupied centre stage. There was no intention to recalibrate the horizontal, general rules of the ECD.

Finally, the 'lex posterior' approach would also lead to tensions and inconsistencies within the CDSMD. If the regulatory system of Article 17 CDSMD could impact the interpretation and scope of the traditional prohibition of general monitoring obligations in Article 15(1) ECD, far-reaching filtering duties arising from rightholder notifications of specific protected content, as laid down in Article 17(4)(b) and (c) CDSMD, could also be introduced in other fields where Article 15(1) ECD is applicable. In trade mark law, for instance, the application of the content moderation approach following from Article 17(4)(b) and (c) CDSMD could lead to a situation where online marketplaces, such as eBay, become bound by an obligation to make best efforts to ensure the unavailability of specific trade marks for which rightholders have provided 'the relevant and necessary information'.

<sup>97</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.3.1996, p. 20).

<sup>98</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10).

<sup>99</sup> European Commission, 25 May 2016, *Online Platforms and the Digital Single Market – Opportunities and Challenges for Europe*, Doc. COM(2016) 288 final, 8.

<sup>100</sup> High Council for Literary and Artistic Property of the French Ministry of Culture and Communication, 3 November 2015, "Mission to Link Directives 2000/31 and 2001/29 – Report and Proposals", 2.

<sup>101</sup> High Council for Literary and Artistic Property of the French Ministry of Culture and Communication, id., 11.

This result, however, would be irreconcilable with the explicit exclusion of 'online marketplaces' from the concept of OCSSPs in Article 2(6) CDSMD. Obviously, the EU legislator wanted to preclude an extension of the new content moderation duties arising from Article 17(4)(b) and (c) CDSMD to online marketplaces, such as eBay. The reason for this legislative decision can be found in the ruling of the CJEU in *L'Oréal*. As explained in section 2.1.1, the CJEU held that a monitoring obligation could not have as its object or effect a general and permanent prohibition on the selling, on that marketplace, of goods bearing a specific trade mark.<sup>102</sup> Otherwise, the filtering obligation would impede legitimate trading activities, such as advertising and offers for sale relating to parallel imports from other EU Member States after the exhaustion of trade mark rights. In other words: it would pose an obstacle to legitimate trade and encroach upon primary EU law by thwarting the free movement of goods and services in the internal market.<sup>103</sup>

The 'lex posterior' interpretation, thus, must be rejected for a variety of reasons. It is incompatible with several provisions of the CDSMD, finds no support in the *travaux* underlying Article 17 CDSMD, and violates primary EU law, in particular the guarantee of the free movement of goods and services in the internal market.

### 3.2.2 Common ground between the 'lex specialis' and the 'same meaning' approach (Options I and II)

In the debate about the relationship between the right of communication to the public following from Article 17(1) and (4) CDSMD, and the general right of communication to the public granted in Article 3 ISD, powerful arguments have been advanced that support the assumption that the right following from Article 17(1) and (4) CDSMD constitutes a *lex specialis* to Article 3 ISD. As Martin Husovec and João Pedro Quintais have argued, the provisions in Article 17(1) and 4 CDSMD establish a new right of communication to the public and making available that operates outside the framework of Article 3 ISD, allowing the concepts of 'communication to the public' and 'making available' which it introduces to diverge from those in Article 3.<sup>104</sup> The wording of Article 17(1) CDSMD confirms this interpretation by stating that OCSSPs, when giving the public access to works uploaded by users, perform an act of communication to the public or an act of making available to the public 'for the purposes' of the CDSMD.

Hence, the concepts of 'communication to the public' and 'making available to the public' need not be aligned with those underlying Article 3 ISD. Article 3 ISD and Article 17 CDSMD can operate independently from one another. In this vein, AG Saugmandsgaard Øe advised in his Opinion in *YouTube* and *Cyando* that Article 3(1) ISD must be understood to mean that the operator of a video-sharing platform and the operator of a file-hosting and sharing platform (i.e., in the language of the CDSMD: OCSSPs) do not carry out acts of 'communication to the public' within the meaning of Article 3 ISD when users upload protected works to their platforms.<sup>105</sup> If the CJEU follows this approach, this will mean that 'communication to the public' will have a different meaning in the ISD and CDSMD. Acts of OCSSPs may not amount to communication to the public in the sense of the ISD, but may still constitute actionable forms of communication to the public under Article 17 CDSMD.

In the light of these findings, one may be tempted to assume that the prohibition of general monitoring obligations in Article 17(8) CDSMD constitutes a *lex specialis* to Article 15(1) ECD as well (Option II). If the exclusive right regulated in Article 17(1) and (4) CDSMD has a specific nature, it is only a small step to arrive at the conclusion that the prohibition of general monitoring duties in Article 17(8) CDSMD also constitutes a special rule that must be separated from the global ban on general monitoring in Article 15(1) ECD.

Considering the above-described CJEU case law, however, it becomes apparent that the *lex specialis* question has less relevance in the context of the prohibition of general monitoring duties. Moreover, even if a 'lex specialis' approach is taken in the context of Article 17(8) CDSMD, the fact remains that the CJEU has identified various impact factors and guidelines stemming from primary EU law in its general monitoring jurisprudence. As explained in section 2.1.1, the *L'Oréal* decision led to the insight that the principle of proportionality must be observed. Moreover, the imposition of monitoring obligations

<sup>102</sup> CJEU, C-324/09, *L'Oréal v eBay International*, ECLI:EU:C:2011:474, 12 July 2011, para. 140.

<sup>103</sup> CJEU, *id.*, para. 140. Cf. M Senftleben, "Intermediary Liability and Trade Mark Infringement – Proliferation of Filter Obligations in Civil Law Jurisdictions?", in G Frosio (ed.), *Oxford Handbook of Online Intermediary Liability*, Oxford: Oxford University Press 2020, 381 (389-391).

<sup>104</sup> M Husovec & J Quintais, "How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms", available at: <https://ssrn.com/abstract=3463011>, 10-20.

<sup>105</sup> Opinion of AG Saugmandsgaard Øe, 16 July 2020, joined cases C-682/18 and C-683/18, *YouTube* and *Cyando*, ECLI:EU:C:2020:586, para. 94-106. See also case C-500/19, *Puls 4 TV*, currently pending.

must not create barriers to the free movement of goods and services in the internal market. Similarly, as discussed in section 2.2, the *SABAM* cases shed light on the fundamental rights dimension of general monitoring obligations. Given the corrosive effect on the protection of personal data, the freedom of expression and information, and the freedom to conduct a business, the Court concluded:

*‘Consequently, it must be held that, in adopting the injunction requiring the hosting service provider to install the contested filtering system, the national court concerned would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other (see, by analogy, Scarlet Extended, paragraph 53).’<sup>106</sup>*

Obviously, fundamental rights and freedoms, the free movement of goods and services, and the principle of proportionality are higher-ranking norms that impact the application of Article 17(8) CDSMD in the same way as they impact the application of Article 15(1) ECD. Rightly understood, the general monitoring ban is an exponent of overarching, primary EU law that informs the application of Article 15(1) ECD and Article 17(8) CDSMD alike. Even if Article 17(8) is qualified as a *lex specialis* to Article 15(1) ECD, a departure from fundamental rights and freedoms, and the accompanying principle of proportionality, is inconceivable. These higher-ranking norms form common ground for the application of Article 15(1) ECD and Article 17(8) CDSMD that renders the choice between the ‘*lex specialis*’ approach (Option II) and the ‘same meaning’ approach (Option I) pointless.

### 3.2.3 Risk of prohibited, excessive content moderation

In the light of CJEU jurisprudence, it can hardly be concluded that the imposition of a filtering obligation by Article 17(4)(b) and (c) CDSMD would be unproblematic from the perspective of the fundamental rights and freedoms guaranteed under Articles 8, 11 and 16 of the Charter. By contrast, it would be likely to encroach upon these fundamental rights. The *SABAM* cases described in section 2.1.2 can serve as reference points. Admittedly, these cases concerned a general monitoring obligation focused on eliminating the infringement of a large collection of content (all of *SABAM*’s repertoire). Against this background, the drafters of Article 17(4)(b) and (c) CDSMD might be seen to make an attempt to find refuge in interpretation B2 (‘basic double minus’) – that is to say, to escape the verdict of an infringement of fundamental rights by establishing an obligation to filter, as already pointed out, ‘specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information.’

However, the success of this strategy is doubtful. It would come as a surprise if the creative industry made a specific selection of works when sending copyright information to OCSSPs in line with Article 17(4)(b) and (c) CDSMD. It seems more realistic to assume that OCSSPs will receive long lists of all works which copyright holders have in their repertoire. Adding up all ‘specific works and other subject matter’ included in rightholder notifications, it may become apparent that Article 17(4)(b) and (c) *de facto* culminates in a comprehensive filtering obligation that corresponds with the filtering measures which the CJEU prohibited unequivocally in the *SABAM* cases.<sup>107</sup> Despite the focus on ‘specific’ works and other subject matter, Article 17(4)(b) and (c) CDSMD is likely to have a snowball effect that leads to excessive, prohibited general monitoring.<sup>108</sup>

Interestingly, this concern about Article 17(4)(b) and (c) CDSMD is broadly shared. Even proponents of the ‘basic single minus’ interpretation of the general monitoring ban (Option B1), who are thus willing to offer room for filtering on the basis of court orders,<sup>109</sup> have warned about the evolution of excessive filtering practices. Gerald Spindler, for instance, has pointed out that

<sup>106</sup> CJEU, 16 February 2012, case C-360/10, *SABAM v Netlog*, ECLI:EU:C:2012:85, para. 51.

<sup>107</sup> M Senftleben, “Bermuda Triangle: Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market” 41(8) (2019) *European Intellectual Property Review*, 480 (483-484); G Frosio, “Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity” 51 (2020) *International Review of Intellectual Property and Competition Law*, 709 (724-726).

<sup>108</sup> Cf. M Senftleben, “Content Censorship and Council Carelessness – Why the Parliament Must Safeguard the Open, Participative Web 2.0” [2018] *Tijdschrift voor Auteurs-, Media- & Informatierecht (AMI)*, 139 (142-145).

<sup>109</sup> G Spindler, “The Liability System of Art. 17 DSM and National Implementation – Contravening Prohibition of General Monitoring Duties?” 10 (2020) *Journal of Intellectual Property, Information Technology and E-Commerce Law*, 344 (354, para. 55).

*'there is reason to fear that, even under Art. 17(4)(b) [CDSMD], when restricting monitoring of the content supplied by rightholders, these lists of content will be so comprehensive that in fact a general monitoring of all content does occur.'*<sup>110</sup>

### 3.2.4 Risk minimisation strategies

Considering the risk of a snowball effect of rightholder notifications, the question arises how, if Article 17(4)(b) and (c) CDSMD are to be interpreted as requiring filtering, they could possibly be calibrated to avoid encroachments upon fundamental rights and freedoms. More specifically, the foregoing analysis has shown that, to achieve this goal, at least<sup>111</sup> two substantial hurdles would have to be surmounted:

- first, the filtering duty arising from Article 17(4)(b) and (c) would have to be reconciled with established CJEU case law (sections 2.1.1 and 2.1.2) that follows the 'basic' interpretation (Option A) to safeguard fundamental rights and freedoms;
- second, it would be necessary to prevent rightholders from causing a snowball effect and confronting OCSSPs with a quantity of notified works which, taken together, equals a general monitoring duty that violates fundamental rights and freedoms.

#### 3.2.4.1 Long shot: from 'basic' interpretation (Option A) to 'basic double minus' (Option B2)

As already indicated, Article 17(4)(b) and (c) CDSMD can be interpreted to codify a regulatory system that corresponds to the 'basic double minus' interpretation (Option B2) of the general monitoring ban. Under this interpretation, rightholder notifications of specific works or infringements, as envisaged in Article 17(4)(b) and (c), do not violate the general monitoring prohibition, even though the search for infringing use of notified works requires the examination of all content and the activities of all users (see overview of interpretative options at the beginning of section 2). It should be recalled that, as established above, the judgments of the CJEU in *L'Oréal* (section 2.1.1), the *SABAM* cases and *McFadden* (section 2.1.2) followed the stricter, 'basic' interpretation (Option A) to prevent inroads into fundamental rights and freedoms (section 2.2). Under this stricter interpretation, a conflict with the prohibition of general monitoring duties arises whenever all platform content is examined – even if this general content screening is carried out to find infringements of only one specific work. In *McFadden*, the Court explicitly rejected an obligation to screen all network communication in search of one pre-identified phonogram. In the *SABAM* cases, the Court rejected an obligation to check all network or social media for traces of works belonging to the SABAM repertoire.

Quite clearly, the notification and content moderation system arising from Article 17(4)(b) and (c) is a legislative departure from this established CJEU case law. Against this background, the reconciliation of the regulatory design of Article 17(4)(b) and (c) with CJEU jurisprudence is a long shot. It requires an abrupt shift from one pole of the spectrum of interpretative options (the 'basic' Option A) to the other (the 'basic double minus' Option B2). Surveying existing CJEU case law, the only decision that could potentially serve as a catalyst to bring about this abrupt change is the ruling in *Glawischnig*. As explained in section 2.1.3, the Court held in this defamation case that it would be compatible with the general monitoring ban in Article 15(1) ECD to impose an obligation to remove content which is identical or equivalent to content that has previously been declared to be unlawful by a court. The monitoring task arising from such a court order, however, requires the examination of all content on a platform and the activities of all users to identify identical or equivalent defamatory posts. In *Glawischnig*, the Court itself thus departed from the 'basic' Option A approach which it has applied consistently in intellectual property cases and, instead, adopted the 'basic single minus' Option B1 approach which allows general monitoring for one specific work on the basis of court orders.

The differences between *Glawischnig*, previous CJEU case law and Article 17(4)(b) and (c) are obvious: *Glawischnig* was about defamation, the described established CJEU case law evolved from intellectual property cases; *Glawischnig* concerned filtering on the basis of an injunctive order, Article 17(4)(b) and (c) paves the way for filtering on the basis of mere rightholder notifications.

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<sup>110</sup> Spindler, id., 356, para. 64.

<sup>111</sup> For a more detailed analysis of potential conflicts with fundamental rights and measures that are necessary to avoid such conflicts, see F Romero Moreno, "Upload filters' and human rights: implementing Article 17 of the Directive on Copyright in the Digital Single Market", *International Review of Law, Computers and Technology* 34:2 (2020), 153 (174-175).

These differences are relevant from at least two perspectives:

a) The difference between court orders and rightholder notifications.

Even if the *Glawischnig* ruling in the area of defamation could readily be extended to copyright cases, one would still not arrive at the pole of interpretative approaches that consider notification-based filtering compatible with the general monitoring prohibition. *Glawischnig* concerned an injunctive order ('basic single minus', Option B1), whereas Article 17(4)(b) and (c) CDSMD concerns a general duty of care that emerges automatically from notifications received from rightholders ('basic double minus', Option B2). Arguably, from a volume perspective, injunctive relief following from a court order will hardly ever reach the proportions of filtering obligations that can arise from mere notifications, the scope of which rightholders can determine (and maximise) themselves without court control. The difference between general monitoring for specific content based on a court order and general monitoring for specific content in reaction to mere rightholder notifications is thus significant. The transition from Option B1 to Option B2 is far from a small step. In particular, the risk of a snowstorm of notifications *de facto* leading to prohibited general monitoring obligations even according to definition B2 ('basic double minus') must not be underestimated. Even if *Glawischnig* could serve as a basis for accepting general monitoring of all platform content for specific pre-notified content, the volume of rightholder notifications following from Article 17(4)(b) and (c) can easily reach proportions which would be out of line with the logic behind the more restrictive definition of 'general monitoring' espoused by the proponents of 'basic double minus'. As such, its effects on Articles 8, 11 and 16 of the Charter would equal to those against which the Court objected in the *SABAM* cases (section 2.2).

b) The difference between defamation and intellectual property.

A further problem arises from the different nature of defamatory content and uploads that infringe copyright. As noted in section 2.1.3, defamation scenarios are more context-specific than copyright scenarios. Filtering requests in copyright cases concern content that is fixed after publication. Moreover, they concern acts of copying in a broad, general sense.<sup>112</sup> In defamation cases, by contrast, the 'specific subject matter' to be defended against potential future infringements, *a priori* depends on a specific – defamatory – context. While it is unlikely that different persons will engage in identical or equivalent defamatory attacks without any causal connection, different persons may copy and post the same copyrighted content online for unconnected reasons. The inherent requirement of a defamatory nature adds a degree of specificity to notifications of defamation that can hardly ever be attained in the case of notifications that merely contain information about works enjoying copyright protection. As long as the operation of Article 17(4)(b) and (c) is simply based on notifications of works – without details of specific infringing circumstances – resulting monitoring duties and content removals will inevitably be broader than those arising from notifications of defamatory content. The fact that the legislator adopted Article 17(7) CDSMD to safeguard the freedom of users to make quotations and parodies shows that it also saw the risk of overbroad (i.e. not sufficiently context-specific) monitoring duties arising from notifications under Article 17(4)(b) and (c). As a solution, the legislator introduced complaint and redress mechanisms in Article 17(9) CDSMD. This *ex post* remedy, however, does not reduce the monitoring task that results from notifications of copyrighted works. Apart from the considerable broadening of monitoring duties which the switch from court orders ('basic single minus') to rightholder notifications ('basic double minus') brings in its wake, the extension of the *Glawischnig* approach to copyright scenarios is thus also problematic because of the substantially lower degree of context-specificity of notifications concerning copyrighted works. The risk of inroads into fundamental rights and, in particular, freedom of expression and information, is self-evident.

On balance, it becomes obvious that the use of *Glawischnig* as a vehicle to declare filtering compatible with CJEU jurisprudence so as to enable the imposition of a filtering obligation via Article 17(4)(b) and (c) faces significant challenges. Scylla and Charybdis again raise their heads: even if *Glawischnig* could be invoked to demonstrate that the Court is willing to accept notification-based general monitoring in search of specific content (which is not clear because the case concerned injunctive orders), the fact remains that the Court – in light of the *SABAM* decisions – cannot permit a *de facto* general obligation to screen platform content for all kinds of copyrighted material. This monitoring obligation – general in respect of both dimensions: the platform content to be examined and the notified content to be traced – can easily flow from a flood of rightholder notifications with long lists of protected repertoire. Hence, the above-described snowball effect of a notification-based filtering system thwarts the attempt to

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<sup>112</sup> See the broad right of reproduction granted in Article 2 ISD, which covers 'direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part.'

transition from one pole of the interpretative spectrum ('basic' Option A) to the other ('basic double minus' Option B2) in the area of copyright law. Court acceptance would depend on the CJEU radically changing its interpretation of 'general monitoring'. As the monitoring obligation arising from a snowstorm of rightholder notifications would, arguably, give rise to precisely the same violations of primary EU law, namely Articles 8, 11 and 16 of the Charter (section 2.2) that were identified in no uncertain terms in the *SABAM* cases, the Court would have to reconsider the position taken in this earlier case law.

As to the risk of a snowball effect and prohibited general monitoring evolving from Article 17(4)(b), the difference between defamation and copyright, again, is crucial. In the area of defamation, there are no holders of comprehensive right portfolios that could send long lists of protected subject matter to be included in content filtering systems. In the copyright arena, the situation is markedly different. Owners of large copyright repertoires can initiate the above-described snowstorm of notifications leading to prohibited general monitoring duties. As no comparable risk of long lists of rights in the hands of individual rightholders arises in the field of defamation, the CJEU had room for the adoption of the 'basic single minus' approach (Option B1) in *Glawischnig* without considering fundamental rights. In a copyright context, this room is sought in vain. As the *SABAM* rulings demonstrate, the bundling of large copyright portfolios in the hands of individual rightholders prevents the Court from extending the *Glawischnig* approach to copyright – let alone adopting the even broader 'basic double minus' approach (Option B2). Otherwise, the risk of prohibited general monitoring violating Articles 8, 11 and 16 of the Charter becomes too problematic to ignore.

Therefore, *Glawischnig* must be accepted as a dead end. Article 17(4)(b) and (c) cannot be reconciled with current CJEU jurisprudence on this basis.<sup>113</sup> This result also seems appropriate in light of the aforementioned risk of a clash with the ECHR. As pointed out in section 2.3, ECtHR case law casts doubt upon the appropriateness of extending the approach taken in *Glawischnig* to the imposition of measures through, not court orders, but duties of care. Before generalising and broadening aspects of the *Glawischnig* ruling and considering its extension to copyright cases, it seems indispensable to clarify first on which conditions the *Glawischnig* approach can be deemed compatible with the ECHR and whether the application of filtering tools under Article 17(4)(b) and (c) CDSMD would meet these conditions.

### 3.2.4.2 Back to 'basic' (Option A): cautious interpretation of Article 17(4)(b) and (c) in line with *L'Oréal*

In contrast to *Glawischnig*, the *L'Oréal* decision of the CJEU offers signposts that can be put to good use when seeking to calibrate Article 17(4)(b) and (c) CDSMD in an appropriate way. As explained in section 2.1.1, the CJEU, inspired by the AG's 'double requirement of identity' suggestion, proposed the suspension of the infringer as an appropriate way to prevent further infringements of the same kind by the same person in respect of the same right.<sup>114</sup> The same rule could be applied to filtering tools. If they are to be adopted, these tools must be specific in two respects: the infringer *and* the infringed right. In a copyright context, this formula would mean double specificity in respect of the copyright infringer and the protected work. As Article 17(4)(b) and (c) CDSMD already requires specificity with regard to 'works and other subject matter', it clearly covers the dimension of a specific work to be shielded against infringement. Nonetheless, it is necessary from the perspective of *L'Oréal* to add the dimension of a specific infringer to the equation.

Of course, Article 17(4) does not itself explicitly require the adoption of filtering measures (cf. section 3.1). However, considering current content moderation practices, it is important to discuss the double specificity requirement against the backdrop of OCSSPs developing algorithmic content recognition systems (which are *de facto* filtering measures) to ensure the unavailability of notified works on their

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<sup>113</sup> For a different interpretation, see J B Nordemann/J Waiblinger/J Tylewski, "Digital Services Act: Improving the Functioning of the Single Market", in: European Parliament, "Digital Services Act – European Added Value Assessment, Brussels: European Parliament Research Service, October 2020, Annex III, 247 (295); M Leistner, "European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?", *Zeitschrift für Geistiges Eigentum/Intellectual Property Journal* 2020, forthcoming, 16, available at: <https://papers.ssrn.com/abstract=3572040>; . However, these different views rest on an analysis that does not address the described central differences between defamation case law/injunction-based content moderation and intellectual property case law/notification-based content moderation.

<sup>114</sup> CJEU, C-324/09, *L'Oréal v eBay International*, ECLI:EU:C:2011:474, 12 July 2011, para. 141.

platforms.<sup>115</sup> In the discussion on Article 17 CDSMD, YouTube's Content ID system was often referenced as an example. As private parties, online intermediaries are not bound by the Charter.<sup>116</sup> However, as *Telekabel* indicates, when obligations are imposed on intermediaries to adopt copyright enforcement measures, in selecting the appropriate mechanism, they must ensure compliance with the fundamental rights of internet end users:

*'None the less, when the addressee [intermediary] of an injunction such as that at issue in the main proceedings chooses the measures to be adopted in order to comply with that injunction, he must ensure compliance with the fundamental right of internet users to freedom of information.'*<sup>117</sup>

Following the guidelines which the CJEU provided in *L'Oréal*, the question is thus the following: how can – in a scenario where automated filtering tools are employed – the specificity in respect of the infringed right (which Article 17(4)(b) already ensures by referring to 'specific' works or other subject matter and Article 17(4)(c) by relying on notifications of existing infringements) be supplemented with sufficient specificity in respect of the infringer, so that any adopted filtering measures affect postings only by such users?

The wording of Article 17(4)(b) and (c) offers two starting points. First, Article 17(4)(b) obliges rightholders to furnish 'the relevant and necessary information' for ensuring the unavailability of notified works. Similarly, Article 17(4)(c) requires a 'sufficiently substantiated notice' of an existing infringement. In the light of the need to safeguard fundamental rights and freedoms, it could be said that a rightholder notifying only specific works, but failing to notify specific infringers, has not provided all 'relevant and necessary information' or a 'sufficiently substantiated notice'. As a result, the notification is incomplete and incapable of imposing a valid filtering obligation on OCSSPs. Second, it can be argued that, considering the risk of encroachments upon fundamental rights and freedoms, the 'best efforts' required under Article 17(4)(b) and (c) only concern efforts based on notifications that specify both the work and the infringer. An OCSSP is thus free to reject and disregard a notification that does not offer the required degree of specificity in respect of both the copyrighted work and potential infringers.

This understanding of Article 17(4)(b) still leaves the question unanswered of which degree of specificity rightholder notifications must offer in respect of perpetrators. In this regard, it is important to take into account the division of tasks between Article 17(4)(b) and (c). While Article 17(4)(c) concerns 'stay-down' obligations that arise after an infringement has been brought to the attention of an OCSSP, Article 17(4)(b) concerns filtering obligations in a more abstract, preventive sense: even without any concrete incident of infringement on the content platform at issue, Article 17(4)(b) seeks to give rightholders the opportunity to establish a duty of preventing (future) uploads of infringing content on the platform. Obviously, the Article 17(4)(c) scenario – 'stay-down' after infringement has taken place – is close to the facts underlying the *L'Oréal* decision (section 2.1.1), whereas preventive notifications following from Article 17(4)(b) create a different scenario: different to such an extent that the *L'Oréal* formula – further infringements of that kind by the same person in respect of the same right<sup>118</sup> – can hardly be applied without modifications. In the absence of prior instances of infringement, a rightholder cannot be expected to specify in a notification who the infringing user is precisely.

With regard to this dilemma, the proportionality factors in Article 17(5) CDSMD provide guidance. Article 17(5)(a) requires an assessment of the efforts made by OCSSPs in the light of the 'the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service'. Hence it follows that the EU legislator does not expect OCSSPs to process any notification of specific works that is received under Article 17(4)(b). 'Best efforts' to ensure the unavailability of notified works can only be expected, if the notification is tailored to a concrete audience. As already concluded in section 2.1.2, the only truly 'specific' filtering measure that might be compatible with the general monitoring ban (in the sense of the 'basic' Option A interpretation) would be monitoring

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<sup>115</sup> Cf. M Senftleben, "Bermuda Triangle: Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market" 41(8) (2019) *European Intellectual Property Review*, 480 (482); G Frosio, "Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity" 51 (2020) *International Review of Intellectual Property and Competition Law*, 709 (723-724).

<sup>116</sup> Which, according to Article 51 of the Charter, are instead addressed to 'the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.'

<sup>117</sup> CJEU, case C-314/12, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH*, ECLI:EU:C:2014:192, 27 March 2014, para. 55.

<sup>118</sup> CJEU, C-324/09, *L'Oréal v eBay International*, ECLI:EU:C:2011:474, 12 July 2011, para. 141.

that is limited to content posted by a pre-identified sub-group from among all of an intermediary's users. This could consist, for example, of a group or association operating on the OCSSP's platform that is dedicated to the appreciation of a certain genre of works, and whose members might therefore (depending on the specifics and with due regard to the principle of proportionality) be said to pose a higher risk of infringing notified works falling within that genre.<sup>119</sup> This conclusion is in line with the double specificity requirement that emerged in *L'Oréal*. Considering these guidelines and the underlying fundamental rights and freedoms, the reference to 'the audience' and 'users of the service' in Article 17(5) must therefore be understood to require a concrete audience in the sense of an audience that can clearly be distinguished from the general audience of the content platform at issue.

In practice, these parameters can be understood to require notifications that explain convincingly why the notified specific works are relevant to a specific sub-group of the platform audience. OCSSPs should be in a position to reject notifications if a rightholder fails to specify a sub-group. Moreover, it follows from the need to protect personal data that OCSSPs should be in a position to reject notifications if the confinement of filtering to a specific sub-group would require data processing that falls foul of applicable data protection standards. Where all 'relevant and necessary information' under Article 17(4)(b) is provided and a notification is sufficiently substantiated under Article 17(4)(c), to the extent that filtering is required by those provisions it must only be allowed to extend to the monitoring of the uploads of the identified users, leaving all other content unaffected.

If a sub-group cannot be identified with sufficient specificity within the limits set by data protection law, the alternative measures outlined above in section 3.1 would provide the next recourse. In practice, the deployment of 'specific' monitoring obligations can also be expected to combine with such alternative measures. So, for example, where a rightholder provides, in accordance with Art. 17(4)(b) 'relevant and necessary information' consisting of a specific subject matter and an identified sub-group of end users, the OCSSP may be required to adopt specific monitoring measures targeting that group with the purpose of preventing infringement of that subject matter. In other cases, alternatives such as the issue of warnings may be found to be sufficient in light of Art. 17(5). If infringement nonetheless occurs, upon receiving a sufficiently substantiated notification in line with Art. 17(4)(c), the OCSSP would be obliged to remove or disable access to that infringement and to take action to prevent further infringement. That action may consist of further specific monitoring of the sub-group or (in line with the CJEU's *L'Oréal* approach) go as far as suspension of the infringing end user or the sub-group as a whole. In all cases, due regard to the principle of proportionality would be required.

Thus, with the reference to 'relevant and necessary information', 'sufficiently substantiated notice' and 'best efforts' in Article 17(4)(b) and (c), and the inclusion of 'the audience' and 'users of the service' in the proportionality factors in Article 17(5), the new copyright legislation offers starting points for an interpretation of content monitoring duties that is in line with *L'Oréal*: monitoring that is specific in respect of both the potential users to be screened and the protected works to be found.

#### **4. Conclusion: lessons to learn for the Digital Services Act**

For the time being, the DSA is a phantom. Its provisions have not taken concrete shape. Nonetheless, the foregoing analysis yields several insights that may inform the decision on the maintenance and potential further development of the general monitoring ban.

First, it is noteworthy that CJEU jurisprudence has shed light on several aspects of the prohibition of general monitoring obligations that can be traced back to primary EU law, in particular the right to the protection of personal data, the freedom of expression and information, the freedom to conduct a business (Articles 8, 11 and 16 of the Charter) and the free movement of goods and services in the internal market. Seeking to reconcile these fundamental rights and freedoms with countervailing values, such as the protection of intellectual property in line with Article 17(2) of the Charter, the principle of proportionality enters the picture as a compass for the required balancing exercise.

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<sup>119</sup> S Kulk & F Borgesius, "Filtering for Copyright Enforcement in Europe after the Sabam Cases" (2012) 34(11) European Intellectual Property Review 791. Identifying these users may pose challenges in light of data protection laws, but this is not an issue that falls under the purview of Article 15(1) ECD; C Angelopoulos, "Study on Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market" (February 2017), available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2947800](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800) (last accessed 20 August 2020).

Due to their higher rank in the norm hierarchy, these legal guarantees stemming from primary EU law constitute common ground for the application of the general monitoring ban in secondary EU legislation, namely Article 15(1) ECD and Article 17(8) CDSMD. Accordingly, Article 15(1) ECD and Article 17(8) CDSMD can be regarded as exponents of the aforementioned fundamental rights and freedoms and the accompanying principle of proportionality. With regard to the DSA, this result of the analysis implies that:

- any further manifestation of the general monitoring ban in the DSA would have to be construed and applied – in the light of applicable CJEU case law – as a safeguard against encroachments upon the aforementioned fundamental rights and freedoms. To the extent that filtering would fail to provide adequate protection to rights protected under Articles 8, 11 and 16 of the Charter, it cannot be imposed on intermediaries;
- even if new legislation were to set forth obligations to monitor platform content generally, any filtering this allowed would nevertheless be excluded by the need to strike a ‘fair balance’ between all protected fundamental rights;
- if the final text of the DSA does not contain a reiteration of the prohibition of general monitoring obligations known from Article 15(1) ECD and Article 17(8) CDSMD, the regulation of internet service provider liability, duties of care and injunctions would still have to avoid inroads into the aforementioned fundamental rights and freedoms and observe the principle of proportionality.

Second, as to the substance of the general monitoring ban, the foregoing analysis has shown that a misunderstanding of the difference between monitoring specific content and monitoring *for* specific content is a recurrent theme in the debate on intermediary liability and a central driver of the controversy surrounding it. Rightly understood, a prohibited general monitoring obligation arises whenever content – no matter how specific it is defined – must be identified among the totality of the content on a platform. The moment platform content must be screened in its entirety, the monitoring obligation has an excessive, general nature. Against this background, a content moderation duty can only be deemed permissible if it is specific in respect of both the protected subject matter and potential infringers (in line with the ‘double specificity requirement’ known from *L’Oréal*). The wording of relevant provisions leaves room for this requirement of double specificity. Article 17(4)(b) CDSMD, for instance, obliges rightholders to furnish ‘the relevant and necessary information’ for ensuring the unavailability of notified works. Similarly, Article 17(4)(c) requires a ‘sufficiently substantiated notice’ of an existing infringement. In the light of the need to safeguard fundamental rights and freedoms, a rightholder notifying only specific works, but failing to notify specific infringers, has not provided all ‘relevant and necessary information’ or a ‘sufficiently substantiated notice’. As a result, the notification is incomplete and incapable of imposing a valid filtering obligation on OCSSPs. It remains an open question whether and how the requisite degree of specificity with regard to both dimensions can be attained when automated content filtering systems are employed. Regardless, other options also exist, indicating that automated content recognition is not required by Article 17(4)(b) and (c). Until workable solutions have been found, a cautious approach is necessary to avoid violations of fundamental rights and freedoms, and the principle of proportionality. In particular, it is essential to prevent a snowstorm of notifications culminating in a filtering duty which *de facto* encompasses all kinds of protected subject matter, such as all kinds of currently exploited copyrighted works and which is accordingly incompatible with all proposed interpretations of the general monitoring obligation.

Third, the foregoing analysis has shown that, even if the prohibition of general monitoring obligations would be expressed in a uniform manner in the ECD, the CDSMD and the DSA, its concrete meaning and impact would still depend on the nature and scope of the legal position, in respect of which a rightholder requests the imposition of duties of care, including the introduction of content moderation duties. The examination of general monitoring rules with regard to copyright, trade mark and defamation cases already revealed substantial differences:

- the preventive content moderation duties arising from Article 17(4)(b) CDSMD must be reconciled with the general monitoring ban laid down in Article 17(8) CDSMD. While the initial version of Article 17 and, consequently, the debate surrounding it, focused on content recognition technologies, the subsequent evolution of the directive indicates that the legislator recognised the legal problems inherent to their deployment. In light of alternative ways of abiding by the requirements of Article 17(4)(b) and (c), such as infringer suspension, community

moderation and warning notices, it should be accepted that those provisions do not by definition require filtering. It should also now be accepted that rightholder notifications are required to be specific not only in respect of works and other protected subject matter, but also in respect of the circle of potential infringers belonging to the audience of the content platform at issue. To the extent that filtering is employed as a way of abiding by the requirements of Article 17(4)(b) and (c), it should therefore be limited to the uploads of such limited circles. In any case, a degree of specificity is required that prevents rightholders from notifying long lists of protected works without tailoring the notification to a specific sub-group of the platform audience. Otherwise, individual notifications may reach such a volume that, adding up the total number of notified specific works, a filtering duty arises which *de facto* amounts to a prohibited general monitoring obligation even under laxer interpretations that seek to offer more room for filtering measures (the aforementioned snowball effect);

- in a trade mark context, preventive content moderation duties based on notifications of specific protected subject matter, as envisaged in Article 17(4)(b) CDSMD with regard to copyright works, are most probably incompatible from the outset with freedom of competition and the principle of the free movement of goods and services in the internal market. In *L'Oréal v eBay*, the CJEU clarified that a monitoring obligation could not have as its object or effect a general and permanent prohibition on the selling, on that marketplace, of goods bearing a specific trade mark.<sup>120</sup> Otherwise, the filtering obligation would impede legitimate trading activities, such as advertising and offers for sale relating to parallel imports from other EU Member States after the exhaustion of trade mark rights. Hence, any automated content moderation system based on the notification of a specific trade mark runs the risk of encroaching upon freedom of competition and the guarantee of the free movement of goods and services in the internal market;
- finally, defamation cases are more context-specific than copyright or trade mark cases. They differ substantially from copyright and trade mark scenarios because of the absence of holders of large right portfolios who could trigger a snowball effect by notifying long lists of protected subject matter. Filtering requests in copyright cases concern content that is fixed after publication; in trade mark cases the distinctive elements of the protected sign are fixed after registration. In defamation cases, by contrast, the legitimacy of a filtering request depends on the specific – defamatory – nature of uploaded content. Considering these substantial differences, case law in the area of defamation, such as the CJEU decision in *Glawischnig*, fails to provide guidance for the assessment of content moderation measures relating to copyright works or trade marks.

If EU legislation intends to include a horizontal regulation of content moderation duties in the DSA, it is thus important to take differences between the scope of rights and the characteristics of infringement into account. Only measures that lead to appropriate results across all problem scenarios addressed in the DSA can serve as a basis for a global, horizontal rule.

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<sup>120</sup> CJEU, C-324/09, *L'Oréal v eBay International*, ECLI:EU:C:2011:474, 12 July 2011, para. 140.