EXECUTIVE SUMMARY

This mapping Report addresses the following main research question: how can we map the impact on access to culture in the Digital Single Market (DSM) of content moderation of copyright-protected content on online platforms?

After an introduction, **Chapter 2** develops a conceptual framework and interdisciplinary methodological approach to examine copyright content moderation on online platforms and its potential impact on access to culture. The analysis clarifies our terminology, distinguishes between platform "governance" and "regulation", elucidates the concept of "online platform", and positions our research in the context of regulation "of", "by" and "on" platforms. Our legal analysis focuses on the regulation "of" platforms, predominantly through EU and national law. Our empirical analysis focuses on a subset of the regulation "by" platforms, namely (1) the rules they set to moderate copyright-protected content – their terms and conditions (T&Cs), and (2) the systems that platforms deploy to automatically moderate and enforce copyright through computational techniques, such as content recognition and filtering/blocking tools.

This chapter also advances a working definition of "copyright content moderation", which builds on the concept of "content moderation" in the Digital Services Act (DSA). In doing so, we highlight the fact that many content moderation activities are not explicitly regulated in EU copyright law. Hence, the regulation of such activities is mostly left to the complementary application of other instruments (e.g., the DSA), national legislators' margin of discretion, and – perhaps predominantly – private ordering by online platforms. Our research shows that EU copyright law mostly focuses on certain measures aimed at addressing the availability or accessibility of content, such ex ante filtering, blocking or removal of content. This results in regulatory gaps in the coverage of other copyright content moderation activities, in particular rules on measures: (1) affecting the visibility and monetization of content or (2) addressing a user's ability to provide information, e.g., relating to the termination or suspension of his account.

Finally, we briefly outline a possible approach to define access to culture for purposes of content moderation, highlighting the descriptive and normative dimensions of the concept. The *descriptive dimension* posits that the "quality" of copyright content moderation is correlated to access to culture, because access to culture is considered embedded in the existing copyright framework. Since this framework is assumed to strike the appropriate balance between exclusivity in copyright protection and access to culture, any variation in that balance – beyond the margin of interpretation allowed by law – will impact on access to culture. The focus of our approach is on the "downstream" issue of

mitigation of errors in content moderation (i.e., false positives and false negatives). This is particularly relevant in the context of EU copyright law, since the crux of the balance sought by the Advocate General (AG) and the Court of Justice of the EU (CJEU) in case C-401/19 – on the validity of art. 17 of Copyright in the Digital Single Market Directive (CDSMD) – is placed on whether ex ante filtering measures can be deployed while avoiding the risks of over-blocking (and false positives) to platform users' right to freedom of expression.

The *normative dimension*, on the other hand, rejects the notion that the existing copyright framework strikes the optimal balance between exclusivity in copyright protection and access to culture. The model suggests that substantive law relevant in the field of copyright can be amended in a way that changes the balance with the result that it further increases access to culture by providing more freedoms to third parties to use and disseminate protected works, without encroaching on the legitimate interest of copyright holders. The actual practices of content moderation by platforms are affected by the state-enacted law (including case law) that platforms are subject to, which determines their "autonomy space" in determining such practices. Under this framework, adjustments to state-enacted law can affect the content moderation practices of platforms either by narrowing down their autonomy space (e.g., by broadening the scope of liability for platforms) or by raising the costs of acting outside the autonomy space (e.g., introducing more severe sanctions and more effective remedies). Both the descriptive and normative approach are useful to frame and understand EU copyright law's approach to regulating content moderation by platforms. These approaches will be further developed in a subsequent evaluation report.

Chapter 3 carries out a mapping of copyright content moderation by online platforms at secondary EU law level. The chapter starts with an analysis of the baseline regime from which art. 17 CDSMD departs from, which we call the pre-existing acquis. EU law has been subject to a high level of harmonization stemming from many directives on copyright and related rights, the interpretation of which is determined by the case law of the CJEU. In particular, the legal status of copyright content moderation by online platforms under this regime is mostly set by the Court's interpretation of arts. 3 and 8(3) InfoSoc Directive – on direct liability for communication to the public and injunctions against intermediaries – and arts. 14 and 15 e-Commerce Directive – on the hosting liability exemption and the prohibition on general monitoring obligations. We explain this case law and its implications for platform liability and content moderation obligations up to the Court's Grand Chamber judgment in *YouTube and Cyando*, and how developments contributed to the proposal and approval of art. 17 CDSMD. Setting aside the political nature of legislative processes, from a systematic and historical perspective, art. 17 CDSMD and subsequently the DSA can be seen as the result of efforts in EU law

and its interpretation by the Court for the last 20 years to adapt to technological developments and the changing role and impact of platforms on society. The result has been an "enhanced" responsibility for platforms, characterized by additional liability and obligations regarding content they host, as well as an increased role of fundamental rights – especially of users – in the legal framework.

The heart of the analysis in this chapter is the complex legal regime of art. 17 CDSMD, which we examine in light of existing scholarship, the Commission's Guidance (COM/2021/288 final), and the AG Opinion and Court's Grand Chamber judgment in Case C-401/19. Our analysis sets out in detail the different components of this hybrid regime, including:

- The creation of the new legal category of "online content-sharing service providers" (OCSSPs), a sub-type of hosting service providers under the e-Commerce Directive, and "online platforms" under the DSA;
- The imposition of direct liability on OCSSPs for content they host and provide access to;
- The merged authorization regime for acts of OCSSPs and their uploading users, provided the user act does not generate significant revenue;
- The *lex specialis* nature of art. 17 in relation to art. 3 InfoSoc Directive and art. 14 e-Commerce Directive, which is endorsed explicitly by the Commission's Guidance and AG Opinion in C-401/19, and in our view also implicitly by the Court in the same judgment;
- The relationship between the prohibition on general monitoring obligations in art. 15 e-Commerce and art. 17(8) CDSMD, where we argue that the latter may be understood as being of merely declaratory nature;
- The complex liability exemption mechanism that comprises best efforts obligations on OCSSPs (to obtain an authorization and to impose preventive and reactive measures) in art. 17(4); and
- The substantive and procedural safeguards in the form of exceptions or limitations (E&Ls) or "user rights" and in-/out-of-platform (complaint and) redress mechanisms in art. 17(7) and (9).

Our analysis addresses multiple points of uncertainty in this regime, some of which will no doubt be subject to litigation at the national level and likely the CJEU. It is however worth highlighting the following aspects, as they also reflect possible points of improvement of this regime, from the perspective of copyright content moderation.

First, whether an online platform is subject to the pre-existing regime (as updated by the DSA) or the new regime in art. 17 CDSMD will depend on whether it qualifies as an OCSSP. Our research shows that there is significant legal uncertainty as regards this qualification, even despite the Commission's Guidance. To be sure, certain large-scale platforms, especially with video-sharing features (e.g. YouTube, Meta/Facebook, Instagram), clearly qualify as OCSSPs. Others will also clearly be excluded from the scope of art. 17 because they are covered by the carve-outs in art. 2(6) CDSMD. Still, there remains a significant grey area, which affects both larger platforms and (especially) medium-sized and small platforms. The main reason is that the definition includes a number of open-ended concepts ("main purpose", "large amount", "profit-making purpose") that ultimately require a case-by-case assessment of what providers qualify as an OCSSP. Furthermore, even where it can be established that

a platform falls within the scope of the legal definition, it might remain unclear to what extent (i.e., for which services) it does so. The outcome might well be that the same provider is subject to art. 17 CDSMD for certain services and the pre-existing regime for others, resulting in significant complexity in determining liability regimes and respective content moderation obligations.

Second, a crucial part of our analysis of platforms' liability and copyright content moderation obligations refers to the normative hierarchy of art. 17 CDSMD. We provide a critical analysis of how the Commission's Guidance has attempted to address this hierarchy and strike the balance between the competing rights and interests of rightsholders, platforms and users, drawing from the arguments in the AG Opinion and the Court's Grand Chamber judgment in case C-401/19. We identify the following important implications from the judgement.

- The Court recognizes that art. 17(7) includes an obligation of result. As such, Member States must ensure that these E&Ls are respected despite the preventive measures in paragraph (4), qualified as "best efforts" obligations. This point is reinforced by the Court's recognition that the mandatory E&Ls, coupled with the safeguards in paragraph (9), are "user rights", not just mere defences.
- The Court rejects the possibility of interpretations of art. 17 that rely solely on ex post complaint and redress mechanisms as a means to ensure the application of user rights. That was for instance the position defended by certain Member States during the hearing before the Court and in their national implementations. Instead, the judgment clarifies that Member States' laws must limit the possibility of deployment of ex ante filtering measures; assuming that occurs, the additional application of ex post safeguards is an adequate means to address remaining over-blocking issues.
- The Court states unequivocally that only filtering/blocking systems that can distinguish lawful from unlawful content without the need for its "independent assessment" by OCSSPs are admissible. Only then will these measures not lead to the imposition of a prohibited general monitoring obligation under art. 17(8) CDSMD. Furthermore, these filters must be able to ensure the exercise of user rights to upload content that consists of quotation, criticism, review, caricature, parody, or pastiche. Considering the Court's statements in light of the previous case law and current market and technological reality, we conclude that only content that is "obviously" or "manifestly" infringing – or equivalent content – may be subject to ex ante filtering measures. Beyond those cases, for instance as regards purely "earmarked content", the deployment of ex ante content filtering tools appears to be inconsistent with the judgment's requirements.
- It remains unclear whether this reasoning applies more broadly to other types of illegal content beyond copyright infringement. If it does, it might help to shape the scope of prohibited general monitoring obligations versus permissible "specific" monitoring, with relevance for future discussions on the DSA. In drawing these lines, caution should be taken in the application of the "equivalent" standard in *Glawischnig-Piesczek*, which likely requires a stricter interpretation for filtering of audio-visual content in OCSSPs.

Finally, we provide a brief analysis of the interplay between art. 17 CDSMD and the potentially applicable provisions of the DSA to OCSSPs.[1] Departing from the observation that a platform may qualify as an OCSSPs under the CDSMD and an "online platform" (and "very large online platform") under the DSA, we conclude that the DSA will apply to OCSSPs insofar as it contains rules that regulate matters not covered by art. 17 CDSMD, as well as specific rules on matters where art. 17 leaves a margin of discretion to Member States. This includes, to varying degrees, rules in the DSA relating to the liability of intermediary providers and to due diligence obligations for online platforms of different sizes. Importantly, we consider that such rules apply even where art. 17 CDSMD contains specific (but less precise) regulation on the matter. In our view, although there is legal uncertainty in this regard, such rules include both provisions in the DSA's liability framework and in its due diligence obligations (e.g., as regards the substance of notices, complaint and redress mechanisms, trusted flaggers, protection against misuse, risk assessment and mitigation, and data access and transparency).

In light of the above, one important conclusion from our analysis concerns the emergence of a bifurcated legal framework for online platforms engaging in copyright content moderation. On the one hand, OCSSPs are subject to the regime of art. 17 CDSMD as regards liability and content moderation. On the other hand, non-OCSSPs are subject to the pre-existing regime under the InfoSoc and e-Commerce Directives (and soon the DSA), as interpreted by the CJEU (most recently in *YouTube and Cyando*). Although the regimes have similarities – and can be approximated by the Court's interpretative activity – they are structurally different. This divergence may lead to further fragmentation, on top of the fragmentation that is to be expected by the national implementations of art. 17 CDSMD. To this we must add the application of the horizontal rules on content moderation liability and obligations arising from the DSA. In sum, the multi-level and multi-layered EU legal landscape on copyright content moderation that emerges from our mapping analysis is extremely complex.

Relatedly, as noted, certain copyright content moderation issues of relevance remain unregulated in the copyright *acquis*, namely rules on measures: affecting the visibility and monetization of content; and addressing a user's ability to provide information, e.g., relating to the termination or suspension of his account. From our perspective, the issue of monetization is the most glaring regulatory gap, since monetization actions play a central and financially consequential role in platforms' content moderation practices. We return to this point in our recommendations. Still as regards regulatory

[1] On this topic, we refer to our parallel research, which offers an in-depth analysis. See João Pedro Quintais and Sebastian Felix Schwemer, 'The Interplay between the Digital Services Act and Sector Regulation: How Special Is Copyright?' (2022) 13 European Journal of Risk Regulation 191.

gaps, it is important to underscore the complexity of the legal determinations and judgments required to assess human and algorithmic copyright content moderation practices. This strongly suggests a need for better transparency and access to data from platforms. Thus, serious consideration must be given to the potential application to OCSSPs and other copyright platforms of the DSA's transparency provisions, as well as to national solutions that impose transparency and data access obligations on OCSSPs and non-OCSSPs hosting protected content. In this regard, the German transposition law provides an promising blueprint in Section 19(3) UrhDaG (on rights to information).

Chapter 4 follows up on the EU level analysis with the comparative legal research at national level., based on legal questionnaires carried out in two phases with national experts in ten Member States. The key findings of the first phase questionnaire (pre-CDSMD implementation date) are as follows:

- Most Member States conceptualized service providers that store and give the public access to a large amount of protected content uploaded by their users; but the direct liability of such service providers was far from uniformly treated. E-Commerce, criminal and civil law concepts are alternatively or complementarily applied; and such liability is completely missing in some countries. The new regime in art. 17 CDSMD will therefore require the introduction of new mechanisms in most Member States studied.
- There appears to be a need for the transformation of the liability regime of OCSSPs in the Member States' laws. So far, injunctions, secondary liability, safe harbour and content moderation practices were mainly present in the analysed countries, unlike complaint-and-redress mechanisms, which were regulated only in a small number of Member States. Art. 17 CDSMD will require the implementation of all of these elements through amendments in the legal systems of Member States.
- End-users might in theory be directly liable for unauthorized uploading of protected subject matter to OCSSPs' systems, but such liability is rarely enforced in practice. Art. 17 CDSMD will also tend to push OCSSPs to authorize online users, and Member States' practices regarding end-user activities won't need to be amended significantly. On the other hand, several Member States will need to make more significant changes related to end-user flexibilities, user rights, and complaint-and-redress mechanisms.

The key findings of the second phase questionnaire (post the deadline for CDSMD implementation) are as follows.

- The implementation of art. 17 CDSMD (or the related legislative proposals) took place in nine of the Member States under analysis, with important differences as regards the implementation of the primary building blocks of art. 17: the economic rights affected; the new liability regime; or the balancing of fundamental rights of stakeholders. Such diversity suggests that the initial goal of the CDSMD to harmonize certain aspects of copyright in the digital single market might not be met, leading instead to a fragmented legal landscape.
- Nine of the Member States under analysis have implemented (or were in the process of implementing) art. 17. They can be grouped into three tiers: (1) the German and the Swedish models show above-the-average detail in the implementation of the new regime, with a special focus on the strengthened protection of user rights and detailed liability mechanisms; (2) the Estonian, French and the Dutch legislation applies a smaller number of individual solutions; (3) Denmark, Hungary, Ireland and Italy took a rather restrictive approach through an almost verbatim transplantation of art. 17 CDSMD. It is almost certain that all national

legislative institutions shall reconsider their domestic rules to make their laws fully compatible with the CJEU ruling in case C-401/19.

Our comparative research also flagged certain conflicting statements in the Commission's and the CJEU's view on the proper method of implementation and substance of the national laws that are consequential for national implementations, especially as regards compatibility with fundamental rights. The studied national solutions seem to be rather limited in terms of, e.g., the priority of user rights over content filtering. Despite that, it is important to note that there is still no consensus on the proper method of transposition of art. 17, namely as regards the question of whether it is preferable to follow a (near) verbatim or more sophisticated implementation of the provision. Still, considering the Commission's Guidance, the AG Opinion and the CJEU judgment in C-401/19, there are strong arguments that national implementations must go some way beyond quasi-verbatim transpositions. In light of the above, it is plausible that a number of preliminary references on different core aspects of art. 17 CDSMD will find their way to the CJEU in the short to medium term.

Chapter 5 mapped out the copyright content moderation structures adopted by 15 social media platforms over time, with a focus on their T&Cs (rules) and automated systems. The analysis suggests that two processes may explain these structures' development. The first is termed *complexification/opacification*. Our empirical work indicates that virtually all 15 platforms' T&Cs have become more intricate, in various ways and to different extents. Over time, more (kinds of) rules were introduced or made public, and these rules were communicated in increasingly more diverse sets of documents. These documents were changed and tweaked several times, producing sometimes a plethora of versions, often located in a dense web of URLs. We therefore conclude that the way platforms organize, articulate and present their T&Cs matters greatly. For one, under increasing public and policy pressure, platforms have felt the need to express and explain their practices and rules of operation, and they have done so with complex and greatly varying documentation. For observers, although this provides more information about platforms, it nevertheless makes understanding the trajectory of platforms and their T&Cs extremely challenging. For example, with YouTube as a major actor when it comes to copyright, our database of their highly fragmented T&Cs has not resulted robust enough to allow for a precise longitudinal examination of their rules. In that way, the very organization and presentations of T&Cs should be understood as one element of platforms' governance of content. Substantially, we demonstrated that complexification can be radically distinct, depending on which platforms one considers. Very large ones, such as Meta/Facebook, experienced an almost continuous and drastic transformation; smaller ones, such as Diaspora, have barely changed. Yet, when a change occurred, it made those sets of rules more difficult to comprehend.

Whilst our analysis did not take a longitudinal take on automated copyright content moderation systems, their emergence and eventual transformation into a central governance tool for various platforms is, in itself, an important element of broader complexification processes. These systems work at a scale that is hard to comprehend, through computational operations that are technically intricate, and under largely unjustified and seemingly arbitrary protocols on, e.g., how to appeal decisions. In other words, they are remarkably opaque, as are many of the T&Cs we studied. Our analysis points out that while in some cases some complexification might be impossible to avoid, opacification is by no means necessary or necessarily justifiable. From this perspective, then, the imposition by law of rules on platforms' internal content moderation procedures and their transparency is sensible and desirable.

The second process is *platformisation/concentration*. By categorizing rules into what we termed "normative types", we argue that various platforms in our sample altered their rules so as to give themselves more power over copyright content moderation, usually by increasing the number of their obligations and rights, which were, in turn, largely aligned with their own interests, logics and technologies. We suggested that this could be interpreted as a particular example of the broader phenomenon of "platformisation". But this transformation is not unidirectional. For platformisation enhances not only platforms' power but also their responsibilities over content moderation. It was curious to note, therefore, that while emboldening their normative legitimacy to control copyright, platforms did not necessarily alter their discursive focus on users-oriented rules. As with complexification, platformisation has been experienced differently by different platforms and deepened by the rise of automated copyright content moderation systems, which may severely impair ordinary users' ability to participate in and challenge removal decisions. Our research also suggests that this platformisation process might end up giving more power to large rightsholders, to the detriment of essentially smaller rightsholders and creators, as well as other users.

RECOMMENDATIONS FOR FUTURE POLICY ACTIONS

- Considering the potential for legal uncertainty and fragmentation of the digital single market as regards copyright content moderation, we recommend that the Commission reviews its Guidance on art. 17 CDSMD (COM/2021/288 final) in order to provide clearer guidelines on the definition of OCSSPs, especially for small and medium-sized online platforms.
- National legislators should review their national transpositions of art. 17 CDSMD to fully recognize the nature of the exceptions and limitations in paragraph (7) as "user rights", rather than mere defences.

- We further recommend that the Commission reviews its Guidance in order to provide guidelines from the perspective of EU law as to the concrete implications of a "user rights" implementation of paragraph (7) in national laws. This should include, to the extent possible, concrete guidance on what type of actions users and their representatives (e.g., consumer organisations) may take against OCSSPs to protect their rights.
- National legislators should review their national transpositions of art. 17 CDSMD to ensure that *ex post* complaint and redress mechanisms under paragraph (9) are not the only means to ensure the application of user rights, but rather a complementary means, in line with the Court's judgment in Case C-401/19.
- We further recommend that the Commission's Guidance is updated to fully reflect the Court's approach in case C-401/19, as regards the complementary role of complaint and redress mechanisms under paragraph (9).
- The Commission should review its Guidance to clearly align it with the Court's judgment in case C-401/19, namely by clarifying that: (1) OCSSPs can only deploy *ex ante* filtering/blocking measures if their content moderation systems that can distinguish lawful from unlawful content without the need for its "independent assessment" by the providers; (2) such measures can only be deployed for a clearly and strictly defined category of "manifestly infringing" content; and (3) such measures cannot be deployed for other categories of content, such as "earmarked content". Member States should further adjust their national implementations of art. 17 CDSMD to reflect these principles.
- In implementing these principles, the Commission and Member States could take into consideration the approach proposed by the AG Opinion on how to limit the application of filters to manifestly infringing or "equivalent" content, including the consequence that all other uploads should benefit from a "presumption of lawfulness" and be subject to the *ex ante* and *ex post* safeguards embedded in art. 17, notably judicial review. In particular, the AG emphasized the main aim of the legislature to avoid over-blocking by securing a low rate of "false positives". Considering the requirements of the judgment, in order to determine acceptable error rates for content filtering tools, this approach implies that the concept of "manifestly infringing" content should only be applied to uploaded content that is identical or nearly identical to the information provided by the rightsholder that meets the requirements of art. 17(4) (b) and (c) CDSMD.
- The Commission should review its Guidance to clarify which provisions in the DSA's liability framework and due diligence obligations Chapters apply to OCSSPs despite the *lex specialis* of art. 17 CDSMD, within the limits of the Commission's competence as outlined in art. 17(10) CDSMD.
- At EU level, EU institutions and in particular the Commission should explore to what extent copyright *acquis* already contains rules addressing content moderation actions relating to

monetization of copyright-protected content on online platforms (e.g., in arts. 18 to 23 CDSMD), and to what extent policy action is needed in this area. Further research is needed specifically on the imbalanced nature of the contractual relationship of online platforms and uploading users, as well as in the transparency and fairness of their remuneration.

- At EU level, EU institutions and in particular the Commission should explore the application of the DSA's provisions on transparency and access to data to OCSSPs and non-OCSSPs hosting copyright protected content, as well study and if adequate propose EU level action that imposes transparency and access to data obligations on online platforms regarding their copyright content moderation activities. Inspiration could be drawn by the design and implementation of the German national transposition law under Section 19(3) UrhDaG as regards rights to information. In that context, special care should be taken to assess the potential negative effects of requiring researchers to reimburse the platforms' costs related to complying with such requests. To the extent possible, the Commission should advance recommendations in this direction in its revised version of the Guidance on art. 17 CDSMD.