

Policy Paper

**THE IMPLEMENTATION OF THE COPYRIGHT DIRECTIVE IN ITALY
AND THE PROPER UNDERSTANDING OF THE ‘BEST EFFORTS’ CLAUSE**

Marco Bassini – Giovanni De Gregorio

Executive Summary

The adoption of Directive (EU) 790/2019 (‘Copyright Directive’) has introduced a new system of liability for online intermediaries, while also raising questions about the implementation of its provisions at the national level. The transposition of the new system of online platforms’ liability, as provided by Article 17, has captured the attention of policy makers around Member States. Among the challenges in implementing this new legal framework, the notion of best efforts is one of the primary points of the debate.

Within this framework, Italy has shown its intention to transpose the notion of best efforts (*migliori sforzi*) as maximum efforts (*massimi sforzi*). This linguistic approach is not a detail since it could impact on the application of the liability regime of online platforms for hosting unauthorised copyright content. While ‘best efforts’ refers to the notion of reasonableness, maximum effort could be read and interpreted as requiring a disproportionate effort for these providers. Member States around Europe are also debating about the implementation of this notion even if most of the implementing bills adopted or proposed so far have oriented towards the notion of best efforts.

This policy paper focuses on the implementation of Article 17 of the Copyright Directive. In particular, this work has the purpose of shedding light on the new content-sharing platforms liability regime, with a specific focus on the notion of best efforts. The goal is to dig into the notion of best efforts and look at the implementation of the Copyright Directive in Europe. It seems appropriate to look at the other implementation strategies of the Copyright Directive in a comparative perspective to assess the Italian approach to the notion of best effort. This is why this work also maps the implementation of the Copyright Directive by other Member States. This comparative analysis would contribute to underlining how to transpose the liability regime established by Article 17 in the Italian legal framework.

The first part of the report analyses the legal framework of liability introduced by Article 17. This part underlines opportunities and challenges of this system also in relation to the system of intermediary liability in Europe. The second part focuses on the notion of ‘best effort’ and the potential implementation in the Italian legal framework. The third part provides a comparative analysis underlining how Member States have implemented Article 17 and, in particular, the notion of ‘best effort’. The last part will provide guidelines on the implementation of Article 17 in the Italian legal framework.

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I. Introduction

The reality of digital services has undergone a huge transformation, expanding and becoming accessible to citizens, businesses and governments across Europe. The spread of online platforms has contributed to bringing advantages on both the demand and supply side, it has made the internal market more efficient, favoured innovation and facilitated trade and access to new markets. At the same time, however, this high potential and the continuous development of digital services has triggered a series of challenges and associated risks, related to the protection of users, the responsibility of intermediaries, and access to the market.

In order to answer these challenges, in the last twenty years, the European policy has moved from a merely liberal economic approach to the Digital Single Market strategy, oriented not only to innovation but also to the protection of fundamental rights and democratic values (De Gregorio, 2021). In the framework of the Digital Single Market strategy (COM(2015) 192 final), the Commission underlined the need to ensure that online platforms (*rectius* platforms) ‘protect core values’ and increase ‘transparency and fairness for maintaining user trust and safeguarding innovation’ (COM(2016) 288 final). This is because of the role of online platforms in giving access to information and contents to society and, as a result, their impact on users’ fundamental rights. As the Commission stressed, this role implies ‘wider responsibility’ (COM(2016) 288 final).

Within this framework, the Commission has been trying to increase the level of transparency and accountability of online platforms. The first trend is to provide general rules about the tackling of illicit

online contents, while the second regards sectorial recommendations on specific content such as fake news and hate speech. Indeed, the Commission has recently issued a Communication on tackling illegal content online (COM(2016) 555 final), then implemented in the Recommendation on measures to effectively tackle illegal content online (C(2018) 1177 final). Both the Communication and the Recommendation can be considered a first attempt to provide a form of administrativisation of the activities of online platforms. From a different perspective, this choice could be interpreted as an acknowledgement of, on the one hand, the role of online platforms as proxies of public actors in the online environment and, on the other hand, of the need to ensure that, by virtue of their role, such private actors should act responsibly. The recent adoption of the Digital Services Act exactly fits within this strategy of the Union to increase transparency and accountability of online platforms (COM(2020) 825 final).

Within this framework, in April 2019, the Copyright Directive entered into force. This is only a step in the process of copyright modernisation in the EU framework since the adoption of the Directive 2001/29/EC (InfoSoc Directive) in 2001. In 2010, the Digital Agenda for Europe prioritised future actions in the field of EU copyright law (COM(2010) 245 final) which, as the Commission recognised, plays a crucial role in the Digital Single Market (COM(2011) 287 final). The goal is to set a long-term strategy to adapt copyright rules to the new digital economy in order to grant the competitiveness of the EU cultural sector and ensure the growth of research and education (COM(2015) 626 final). Together with the general goal to increase transparency and accountability of online platforms, one of the primary aims is to find a solution to solve the 'value gap' (COM(2016) 592 final), precisely between the lack of remuneration for the exploitation of rightholders' works online and the profits made by platforms resulting from the online availability of such works.

Article 17 of the Copyright Directive aims to cope with this situation by expressly recognising that online content-sharing service providers ('OCSSP') perform an act of communication to the public when they host third-party content. This new approach which should be read together with the general principles of the e-Commerce Directive (and the future Digital Services Act) and, even more importantly, under the light of European constitutional law, has been the first attempt of the Union to change the system of exemption of liability in Europe. Nonetheless, this change of paradigm also depends on the political choices of Member States. According to Article 26 of the Copyright Directive, Member States have to implement the new legal framework within the 7 June 2021. The Copyright Directive leaves Member States margins of discretion in implementing Article 17 with the result that online platforms falling within the scope of the Copyright Directive would potentially face different systems of liability for unauthorised copyright content uploaded by third parties. In particular, the notion of 'best efforts', which comes into play when no authorisation is granted, is vague and subject to domestic translation potentially introducing different layers of compliance (Husovec and Quintais, 2020), thus, also impacting on fundamental rights (Quintais and others, 2019).

This policy paper focuses on the implementation of Article 17 of the Copyright Directive. In particular, this work has the purpose of shedding light on the new content-sharing platforms liability regime, with a specific focus on the notion of best efforts. The goal is to dig into the notion of best efforts while looking at the implementation of the Copyright Directive in Europe to understand how Italy should implement Article 17 at the domestic level. It seems appropriate to look at the other implementation strategies of the Copyright Directive in a comparative perspective to assess the Italian approach to the notion of best

effort. This comparative analysis would contribute to underlining how to transpose the liability regime established by Article 17 in the Italian legal framework.

The first part of the report analyses the legal framework of liability introduced by Article 17. This part provides the basic opportunities and challenges of this system also in relation to the system of intermediary liability in Europe. The second part focuses on the notion of 'best effort' and the potential implementation in the Italian legal framework, also with a view to stressing the negative consequences of a too restrictive approach. The third part provides a comparative analysis underlining how Member States have implemented Article 17 and, in particular, the notion of 'best effort' so far. The last part will provide recommendations on the implementation of Article 17 in the Italian legal framework.

II. The Legal Framework of Article 17

The entry into force of the Copyright Directive has marked a paradigmatic turning point in the European policy on the responsibilities of online intermediaries. In the last twenty years, the system has been based on a secondary liability framework as defined by Directive 2000/31/EC (e-Commerce Directive). The new system of liability introduced by the Copyright Directive aims to deal with the challenges raised by business models based on the sharing and moderation of users' content which contributes to attracting profits from advertising revenues.

Within this framework, the Copyright Directive introduces a new definition of online intermediary, precisely that of online content-sharing service provider. As defined by Article 2(6) of the Copyright Directive, an online content-sharing service provider is 'a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes'. This definition does not clarify the notion of large amount of work, thus, with the result that online content-sharing service providers are always defined on a case-by-case assessment as also stated in Recital 63. It is possible to exclude from this definition those services whose primary purpose is not the hosting of third-party content and share a large amount of copyright-protected content for profit. As defined by Recital 62, this includes electronic communication services within the meaning of Directive (EU) 2018/1972 as well as providers of business-to-business cloud services and cloud services, which allow users to upload content for their own use or online marketplaces the main activity of which is online retail, and not giving access to copyright-protected content. Likewise, providers of services, such as not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open-source software-developing and-sharing platforms are not online content-sharing service providers.

Article 17 establishes that online content-sharing service providers perform an act of communication to the public when hosting third-party online content. The ECJ has underlined that making available and managing an online platform for sharing copyright-protected works may constitute an infringement of copyright in *Stichting Brein* (Case C-610/15). Therefore, according to the InfoSoc Directive, in order to communicate to the public or make available to the public works or other subject matter, online content-sharing service providers are required to obtain an authorisation from the rightholders, for instance by concluding a licensing agreement. Where there is no agreement between online content-sharing service

providers and rightholders, the system of exemption of liability applies if the provider has a) made best efforts to obtain an authorisation, and (b) made, 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; and in any event (c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).

The Copyright Directive clarifies that an online content-sharing service provider performing an act of communication to the public or an act of making available to the public cannot rely on the limitation of liability established in Article 14(1) of the e-Commerce Directive. As a general rule, firstly the cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation. Secondly, the application of Article 17 should not overcome the ban on general monitoring imposed by Article 15 of the e-Commerce Directive. Thirdly, Member States are required to impose to online content-sharing service providers obligations to provide rightholders, at their request, adequate information. Precisely, online content-sharing service providers should inform rightholders about their practises of cooperation and, in case of licensing agreements, provide information about the use of content covered by the agreement.

In determining whether the service provider has complied with its obligations, the Copyright Directive underlines the role of the principle of proportionality. Precisely, it expressly refers to an open catalogue of elements such as (a) 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; and (b) the availability of suitable and effective means and their cost for service providers. Likewise, the principle of proportionality is also relevant even when focusing on the limited application of the aforementioned system of liability applying to new online content-sharing service providers the services of which have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million, calculated in accordance with Commission Recommendation 2003/361/EC.

Besides, Article 17 also introduces safeguards for users and rightholders by requiring Member States to impose online content-sharing service providers to put in place an effective and expeditious complaint and redress mechanism that is available to users of their services in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them.

This complex legal framework has been subject to the monitoring by the Commission which closed a public consultation on the implementation guidance in September 2020 and will publish the guidance in 2021 before the implementation deadline. The challenges at national level are clear when looking at the preliminary reference raised by Poland to the European Court of Justice to annul key parts of Article 17, precisely Articles 17(4)(b) and 17(4)(c) (Case C-401/19). The primary point indeed concerns the violation of the right to freedom of expression and information guaranteed by Article 11 of the Charter of Fundamental Rights of the European Union. According to the Polish government, Article 17 would lead online content-sharing service providers to carry out prior automatic verification (filtering) of third-party

content and, as a result, these preventive control mechanisms would interfere with the right to freedom of expression and information.

III. The System of Liability and Best Efforts

A truly key point for understanding the practical consequences of the implementation of Article 17 lies with the interpretation of the concept of 'best efforts' inherent to the provisions governing the new mechanisms of liability of Internet service providers for copyright infringements. As noted by some scholars (Scialdone, 2020) the significance of this clause has to be properly contextualised in light of the new paradigm enshrined in the Copyright Directive, where online content-sharing service providers perform an act of communication to the public when they give the public access to copyrighted works. This is no longer a merely judicial-made achievement, through the case law of the Court of Justice, but rather constitutes the content of a legal provision which aims to safeguard and promote the circulation of content in view of the peculiarities of the digital environment.

Generally speaking, the wording 'best efforts' refers to a terminology which has its origin and is widely used in common law to describe a standard of conduct that a party, e.g., the party of a contract, is expected and bound to meet. It is nevertheless a frequent source of contention to the extent it is used in a variety of contexts, implying different possible legal expectations. Empirical researches (Adams, 2004) have proven that, despite the assumption that 'best efforts' clauses set a higher standard than 'reasonable efforts' one, more and more courts tend to interpret and enforce the former notion as equivalent to the latter one, requiring the relevant party to act 'in good faith' and with the due level of diligence. This conclusion seems to be confirmed by the commentary to Art. 5.1.4. of the UNIDROIT principles, which draws a connection between the 'best efforts' standard and the nature of the obligation at stake, stating that: 'Sometimes a party is bound *only by* a duty of best efforts. That party must then exert the efforts that *a reasonable person of the same kind* would exert in the same circumstances, but does not guarantee the achievement of a specific result' (emphasis added) (Philippe, 2018; Larroyed, 2020). Commentators have largely stressed the need to attach relevance also to the context, most notably when this wording is used in civil law systems, thus far from the original common law domain.

The use of such wording is of a particularly sensitive nature and may give rise to important and unintended consequences with respect to the liability of online content-sharing service providers for the purpose of Article 17 of the Copyright Directive. Indeed, given the remarkable implications for freedom of speech of the role of service providers, the wording 'best efforts' should not per se impose a specific and inelastic standard of liability; actually that standard comes into play when it comes to assessing the existence of 'affirmative defences' preventing online content-sharing service providers from being charged with copyright infringement in case no authorisation is granted. The more such notion is interpreted according to an extensive understanding (as a standard of strict liability), the more it may ultimately trigger chilling effects for freedom of expression.

It is worth noting that the provision in question, namely Article 17(4), specifically regulates the scenario where online content-sharing service providers have not obtained any authorisation (including, but not limited to, by concluding a licensing agreement) for copyright-protected works or other protected subject matter uploaded by their users. In that scenario, the said provision establishes the conditions which

exempt the relevant service providers from liability for possible copyright infringements deriving from the uploading of third-party content. However, it seems that, while requiring service providers to make ‘best efforts’, Article 17(4) does not define any specific rule of conduct as such; rather, it articulates the circumstances under which service providers are presumed to act in good faith. The purpose of the ‘best efforts’ requirement is to encourage online content-sharing service providers to cooperate with rightholders with a view to facilitating the acquisition of authorisations when an act of communication to the public or an act of making available to the public occurs.

Also, it is worth noting that the same rationale of Article 17(4) should lead to exclude that the notion of ‘best efforts’ implies a specific and well-established standard of strict liability. Indeed, the provision at hand points out three requirements based on the aforesaid ‘best efforts’ clause which allow online-content-sharing providers to escape liability for copyright infringements. However, Article 17(6) makes it clear that, as far as the so called ‘newcomers’ (service providers the services of which have been available to the public in the Union for less than three years and which have an annual turnover below 10 million Euro) are concerned, only the requirement under Article 17(4)(a) (i.e., making best efforts to obtain an authorisation) applies. The goal of this exemption is to avoid that small players are excessively overburdened (compared to larger entities with a well-established business) and thus discouraged from entering into the market. Such rationale would be most likely overturned if the ‘best efforts’ requirement were interpreted in the same manner, as applicable as such to every category of provider.

As noted above, Poland has asked the Court of Justice to invalidate some parts of the wording of Article 17(4)(b)(c), to the extent the latter provisions refer to the concept of best efforts. In the context of the proceedings, the European Commission’s legal service pointed out that according to the official interpretation, Article 17(7) should refer to an obligation of results, whereas Article 17(4) should be construed as containing an obligation of best efforts (i.e., an obligation other than of results). In this view, Article 17(7) would establish a higher duty on providers to make sure that the efforts they put in place do not result in preventing the availability of pieces of content which do not amount to copyright infringements (Larroyed, 2020); in other terms, following the interpretation provided by the Commission’s legal service, online content-sharing service providers should be more concerned about avoiding detrimental effects for freedom of expression rather than meeting the requirement of best efforts required under Article 17(2).

This provision seems to imply that the requirement that online content-sharing service providers put in place their best efforts, however framed, shall never lead to detrimental effects (chilling effects) for freedom of expression, in particular by affecting those users uploading content which does not constitute copyright infringements. It means that the liability of online content-sharing service providers shall not be construed in a way which may facilitate private and collateral censorship, and disproportionately restrict freedom of expression. Therefore, by adhering to an extensive construction of the ‘best efforts’ requirement as a strict liability standard, lawmakers would likely increase the risk of chilling effects for freedom of expression. This increase in the level of risks depends on at least two factors.

The fact that the notion of best efforts is not crystal-clear and comes into play as an open-ended clause which requires evaluating conditions which are likewise framed in an ‘open’ and not exhaustive way: namely, among others, a) 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; and b) the availability of suitable and effective means and their cost for service providers. The fact that the provision at hand shapes these conditions as an open catalogue may create a variety of possible interpretations of such ‘good faith’ standard; this means, therefore, that other conditions can be taken into account to evaluate if the online content-sharing service provider at hand did actually meet the ‘best efforts’ requirement, depending on the specific implementation of this provision by each Member State as well as on the interpretation given by courts in the respective legal orders.

In a way, this provision recalls the ‘adequacy’ (of the level of protection) requirement established by Article 25 of Directive 95/46/CE (Data Protection Directive, now replaced by Regulation 679/2016, also known as the GDPR) for the legitimate transfer of personal data to third non-EU countries. Such clause was drafted in a very open-ended manner, by referring in paragraph 2 to a variety of factors that could be taken into account when ascertaining the adequacy of the level of protection afforded to personal data in a given jurisdiction. For this reason, when invalidating the Safe Harbour in 2015 in the *Schrems* case (C-362/14), the Court of Justice had to manipulate the wording of such provision and enforce a more fine-tuned (but deprived of specific legal grounds) standard, that of ‘essential equivalence’ of the level of protection (Pollicino and Bassini, 2017). Only by this move the Court of Justice managed to shape the relevant standard in a way that allowed it to overcome the flexibility and ambiguity of Article 25(2) and to draw the necessary consequence (i.e., invalidating the Commission adequacy decision). This is something that should be avoided in the context of the implementation of the Copyright Directive and, most notably, of Article 17, with particular regard to the ‘best efforts’ clause. If interpreted as a strictly binding legal requirement, in fact, it could trigger fragmentation and thus cause legal uncertainty.

On the other hand, preventing chilling effects may prove all the more difficult to the extent the relevant decisions are left to online content-sharing service providers, which may consider the ‘threat’ to be charged with copyright infringements caused by third-party users as an incentive to remove pieces of content or information in a disproportionate way, according to the so-called ‘collateral censorship’ mechanism (Balkin, 1999). Construing the ‘best efforts’ as a strict legal requirement describing the standard of conduct would likely trigger the same problems discussed by commentators with respect to the so-called active hosting providers (Bassini, 2019; Apa and Pollicino, 2013). Relying on the case law of the Court of Justice, many courts of Member States, including the Italian ones, have interpreted the liability exemptions enshrined in the e-Commerce Directive according to a restrictive understanding.

Pursuant to this interpretation, those hosting providers which qualify as active providers (i.e., providers that operate a service which is no longer of a purely technical, automatic and passive nature (as required by Recital 42 of the e-Commerce Directive), should not benefit from the liability exemption at the same conditions applicable to merely passive providers. The ‘active provider’ saga has given rise to some uncertainty as to the actual status of hosting providers: they do not act as publishers, and do not exert any editorial control over third-party content; but they are presumed to have ‘actual knowledge’ of illegal pieces of content or information even in the absence of court orders. As a result of this, hosting providers may turn out to be more inclined to remove content to not incur the risk of facing damages at a later stage for having failed to promptly take down certain information. The active provider saga explains that when uncertainty bears on intermediaries, a more severe content curation and policing may follow, with

chilling effects for freedom of expression. The all but crystal-clear notion of 'best efforts' in this domain may stimulate similar reactions by online content-sharing service providers.

Also, it is worth noting that given the open-ended nature and the inherent vagueness and ambiguity of the notion of 'best efforts', framing this requirement as a standard of strict liability may severely hamper freedom to conduct business of online-sharing service providers. In the view of escaping negative consequences (penalties and charges of copyright infringements), they may implement burdensome measures which do not only constitute a threat for freedom of expression to the extent specified above, but also may undermine freedom to conduct business. The more the notion of 'best efforts' is considered strictly legally binding, the more it may lead Member States and ultimately service providers to implement measures which significantly impacts freedom to conduct business.

In addition to the above, another reason why the requirement of 'best efforts' should not be interpreted as a specific and legally binding rule of conduct lies with the relevance attached to the principle of proportionality, which is expressly mentioned by Article 17(5) while setting the conditions on the basis of which to determine if the relevant online content-sharing service provider complied with the requirements under Article 17(4).

The principle of proportionality, as it is well-known, constitutes an essential pillar in the case law of the Court of Justice of the European Union and of the European Court of Human Rights concerning the relationship between copyright enforcement and other fundamental rights, including freedom of expression. The Court of Justice, in particular, had the chance to deliver a number of rulings where the principle of proportionality played a key role to strike a balance between the different interests at stake. It is worth recalling, for instance, the *UPC Telekabel Wien* case (C-314/12), where the Court stressed:

EU law does not prevent a court injunction prohibiting an internet service provider from allowing its customers access to a website placing protected subject-matter online without the agreement of the rightholders when that injunction does not specify the measures which that access provider must take and when that access provider can avoid incurring coercive penalties for breach of that injunction by showing that it has taken all reasonable measures, provided that (i) the measures taken do not unnecessarily deprive internet users of the possibility of lawfully accessing the information available and (ii) that those measures 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.

The Court of Justice relied on the very same principle also in the *Promusicae* case, which concerned the balance between copyright enforcement and protection of personal data (C-275/06). Also, it stressed the pivotal role of the principle of proportionality in its landmark *Scarlet* (C-70/10) and *Netlog* (C-360/10) cases concerning notably the enforcement of copyright on the Internet and the relationship between this goal and the protection of other fundamental rights such as freedom of information, protection of

personal data and freedom to conduct business, and thus the risk that copyright enforcement measures result in disproportionate externalities for other fundamental rights and freedoms.

Proportionality does therefore work as a guiding principle setting the boundaries and limits to measures which may turn out to interfere with some fundamental rights to an excessive degree. It is also worth noting that, while shaping the content of this principle, the same Article 52 of the Charter of Fundamental Rights of the European Union specifies that any limitation on the exercise of the rights and freedoms provided by this Charter must respect the essence of those rights and freedoms.

Accordingly, when interpreting the 'best efforts' clause enshrined in Article 17(2) in the implementation of this provision in the national legal systems, lawmakers should carefully consider the fundamental rights implications inherent to the role of online content-sharing service providers. They should likewise be aware that, in the view expressed by the Commissions' legal service in the proceedings raised by the Polish government, the obligation of results to avoid chilling effects for freedom of expression pursuant to Article 17(7) qualifies as 'higher' than that of carrying out 'best efforts' applicable to service providers according to Article 17(2). 'Best efforts' should not therefore mean that online content-sharing service providers must achieve a certain result to avail themselves of the affirmative defence enshrined in Article 17(2).

As suggested in the scholarly debate (Scialdone, 2020), 'every reasonable effort' (in Italian, *ogni ragionevole sforzo*) is probably the wording that better reflects the purpose of the Copyright Directive and the essence of the principle of proportionality. If, on one hand, there is in fact no limit to the efforts that online content-sharing service providers can put in place, on the other one, efforts are nonetheless meant to be reasonable, in order not to create legal expectations that are beyond a certain threshold. This way, the efforts legally due would be 'proportionate' in light of the variety of the factors that come into play.

If the wording 'best efforts' were, on the contrary, interpreted according to a different understanding, i.e., as implying an obligation to make the maximum efforts, this would result in severe consequences for the other fundamental rights involved and, ultimately, give rise to a significant risk of over-blocking. Over-blocking, as it is well-known, refers to the effect of too much restrictive measures affecting actors with the status of gatekeepers, such as hosting providers. Over-blocking often derives from the existence of regulatory pressure consisting in the threat of severe penalties which may affect the relevant actors: the threat of incurring such penalties for hosting providers may trigger as reaction the implementation of a more restrictive approach in content moderation, ultimately resulting in the removal also of pieces of content or information which are not manifestly illegal. The German Network Enforcement Act (*Netzwerkdurchsetzungsgesetz*, also known as NetzDG) passed in June 2017 provides an interesting example of this problem: the law does not per se make any new conduct illegal as such; nonetheless, it indirectly creates incentives for the removal of certain contents, to the extent it imposes to providers serious penalties in case they fail to act promptly and combines such threat with the provision of a very strict timeframe for conducting every assessment.

Were the wording 'best efforts' be translated as implying the need to make maximum efforts rather than reasonable efforts, this would likely create similar incentives in terms of over-blocking, most notably in light of the inherent diversity of the categories of providers (and the relevant business) to which such requirement applies. This would frustrate the principle of proportionality, and *de facto* make the

obligation of means provided by Article 17(4) very similar to an obligation of results. It would become all the more difficult to reconcile the requirement shaped as an obligation of means with the principle of proportionality and also with the goal of legal certainty: in the absence of a crystal-clear understanding of what actually constitutes the ‘best efforts’, providers would more likely implement severe policing and moderation over third-party content.

IV. The Comparative Analysis

These considerations explain why Member States are still discussing how to implement this new system of liability and, in particular, the notion of best efforts. So far, only a few Member States, like France and the Netherlands, have implemented the Copyright Directive in their national legal system. Some Member States have not adopted bills or proposals yet like Greece and Ireland. This situation is also because the European Commission is still working on the implementation guidance for Article 17. Besides, as already mentioned, the Polish government’s preliminary reference to the ECJ to annul parts of Article 17 has discouraged national implementation. Both these elements would explain why most Member States will wait for implementing the Copyright Directive in the next months.

Italy is among the countries that have not already implemented the Copyright Directive. Nonetheless, in January 2020, the Italian Parliament adopted the ‘*Schema di disegno di legge recante delega al Governo per il recepimento delle direttive europee e l’attuazione di altri atti dell’Unione europea – Legge di delegazione europea 2019*’, thus, delegating the government to implement the Copyright Directive. In particular, concerning the implementation of Article 17, the delegation establishes that the degree of diligence of online content-sharing service providers would follow the criterion of the maximum efforts (*massimi sforzi*) rather than best efforts.

The Italian path to implement Article 17 and, in particular, the notion of best efforts, diverge from the general approaches of those countries which have already implemented or proposed bills to implement Article 17. As already underlined, this is not a trivial difference. Implementing the notion of best efforts as maximum efforts could be read as making platforms objectively liable for their failure to reach an agreement with rightholders or 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. On the opposite, the notion of best efforts would look at platform liability considering the context in which the platform operates as well as the available options.

Looking at Member States, the Netherlands is the only country that has implemented the Copyright Directive in full. In December 2020, the Copyright Directive Implementation Act was published in the official journal. It is interesting to observe that the Dutch translation of the Directive by the EU Commission’s translators referred to ‘all’ rather than ‘best’ efforts. Nonetheless, the Dutch government corrected this mistranslation, thus, adopting the notion of best efforts. Precisely, Article 29c implements Article 17 of the Copyright Directive. Paragraph 2 states:

De aanbieder van een onlinedienst voor het delen van inhoud die geen toestemming heeft verkregen, is aansprakelijk voor de inbreuk op het openbaarmakingsrecht, tenzij hij aantoon

*dat: 1°. Hij zich **naar beste vermogen [best effort, migliori sforzi]** heeft ingespannen om toestemming te verkrijgen; en 2°. hij zich naar beste vermogen heeft ingespannen om, in overeenstemming met de hoge industriële normen van professionele toewijding, ervoor te zorgen dat bepaalde werken ten aanzien waarvan de makers of hun rechtverkrijgenden hem relevante en noodzakelijke informatie hebben verstrekt, niet beschikbaar zijn; en in ieder geval 3°. hij, na ontvangst van een voldoende onderbouwde kennisgeving van makers of hun rechtverkrijgenden, de gemelde werken snel van zijn website heeft verwijderd of de toegang daartoe onmogelijk heeft gemaakt, en hij in overeenstemming met het onder 2°. bepaalde zich naar beste vermogen heeft ingespannen om te voorkomen dat de gemelde werken in de toekomst weer worden aangeboden.*

France has been at the forefront when looking at the implementation of the Copyright Directive. Firstly, in July 2019, France adopted the Loi no 2019-775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse to implement Article 15 of the Copyright Directive. In December 2019, France proposed a Projet de Loi relatif à la communication audiovisuelle et à la souveraineté culturelle à l'ère numérique to implement Article 17-22. The draft was adopted on 18 November 2020. This bill states:

*En l'absence d'autorisation des titulaires de droits, le fournisseur d'un service de partage de contenus en ligne est responsable des actes d'exploitation non autorisés d'œuvres protégées par le droit d'auteur, à moins qu'il ne démontre qu'il a rempli l'ensemble des conditions suivantes: «a) Il a fourni ses **meilleurs efforts [best effort, migliori sforzi]** pour obtenir une autorisation auprès des titulaires de droits; «b) Il a fourni ses meilleurs efforts, conformément aux exigences élevées du secteur en matière de diligence professionnelle, pour garantir l'indisponibilité d'œuvres spécifiques pour lesquelles les titulaires de droits lui ont fourni, de façon directe ou indirecte, les informations pertinentes et nécessaires; [...].*

In February 2021, the German Government adopted a draft to implement the Copyright Directive and Directive (EU) 2019/789. Like in the Dutch case, the German version of the Copyright Directive refers to maximum efforts. Nonetheless, even in this case, the Government adopted the notion of best effort. In particular, Article 3, Part II, Section 4 states:

*Ein Diensteanbieter ist verpflichtet, **bestmögliche Anstrengungen [best efforts, migliori sforzi]** zu unternehmen, um die vertraglichen Nutzungsrechte für die öffentliche Wiedergabe urheberrechtlich geschützter Werke zu erwerben. Der Diensteanbieter erfüllt diese Pflicht, sofern er Nutzungsrechte erwirbt, die 1. ihm angeboten werden, 2. über repräsentative Rechtsinhaber verfügbar sind, die der Diensteanbieter kennt, oder [...].*

Likewise, the same correction happened in Croatia. In April 2020, Croatia adopted a draft bill on Copyright and Related Rights implementing provisions of the Copyright Directive. The bill states:

Ako davatelj usluge dijeljenja sadržaja putem interneta ne pribavi odobrenje autora za obavljanje radnji davanja pristupa javnosti djelima koje su učitali korisnici na platformama za dijeljenje sadržaja putem interneta, odgovoran je za neovlašteno priopćavanje javnosti iz

članka 29. ovoga Zakona, uključujući činjenje dostupnim javnosti autorskih djela iz članka 40. ovoga Zakona, osim ako dokaže da je: a) uložio **najbolje napore [best efforts, migliori sforzi]** da ishodi takvo odobrenje i b) uložio, u skladu s visokim profesionalnim standardima u području odgovarajuće industrije te s profesionalnom pažnjom, najbolje napore da osigura nedostupnost djela za koje su mu njihovi autori dali relevantne i potrebne podatke te, u svakom slučaju [...].

Hungary adopted a bill for implementing the Copyright Directive and Directive (EU) 2019/789. Nonetheless, it has only implemented the exception for use of works in digital and cross-border teaching activities (Article 5). Concerning Article 17 of the Copyright Directive, the bill establishes:

*Az online tartalomgyőszto szolgálató felelős az általa működtetett, nyilvánosság számára elérhető online felületen az azt igénybe vevő személyek által jogosultság nélkül elhelyezett művek vagy teljesítmények nyilvánossághoz közvetítéséért. Az online tartalomgyőszto szolgálató mentesül a felelősség alól, ha bizonyítja, hogy a) az adott **helyzetben általában elvárható [best efforts, migliori sforzi]** mértékben mindent megtett a felhasználási jog megszerzése érdekében; b) a szakmai előírásokra és szokásokra tekintettel az adott helyzetben általában elvárható gondossággal eljárva – mindent megtett annak biztosítására, hogy az általa működtetett online felületen ne jelenhessenek meg olyan művek, amelyeket a rájuk vonatkozó lényeges információknak az online tartalomgyőszto szolgálató részére való megküldésével a jogosultak megjelöltek; valamint [...].*

Looking at Belgium, in June 2020, the Council for Intellectual Property has adopted an opinion including a draft bill to implement the Copyright Directive. Precisely, the draft bill states:

*Si aucune autorisation n'est accordée, le prestataire de services de partage de contenus en ligne est responsable des actes non autorisés de communication au public, y compris la mise à la disposition du public, d'œuvres et de prestations, à moins qu'il ne démontre que: 1° il a fourni ses meilleurs efforts **[best effort, migliori sforzi]** pour obtenir une autorisation; et 2° il a fourni ses meilleurs efforts, conformément aux normes élevées du secteur en matière de diligence professionnelle, pour garantir l'indisponibilité d'œuvres et prestations spécifiques pour lesquelles les ayants droit lui ont fourni les informations pertinentes et nécessaires [...].*

In Denmark, a Draft Law introducing Chapter 2b (Informationssamfundstjenester m.v.) aims to implement Article 17 in the national legal system. In particular, Paragraph 52(e) states:

*Hvis der ikke er givet tilladelse efter stk. 2, er udbydere af onlineindholdsdelingstjenester ansvarlige for uautoriseret overføring til almenheden, herunder tilrådgivningsstillelse, af ophavsretligt beskyttede værker og andre frembringelser, medmindre udbyderen påviser, at den har opfyldt alle følgende betingelser: a) gjort sin **bedste indsats [best effort, migliori sforzi]** for at opnå en tilladelse fra rettighedshaverne, b) i overensstemmelse med høje branchestandarder for erhvervsmæssig diligenspligt gjort sit bedste for at sikre, at specifikke*

værker og andre frembringelser, for hvilke rettighedshaverne har givet tjenesteudbyderne de relevante og nødvendige oplysninger, ikke er tilgængelige, og under alle [...].

Unlike these cases, in Czech Republic, the Ministry of Culture adopted a draft bill implementing the Copyright Directive and Directive (EU) 2019/789. The Ministry has also published an explanatory memorandum. In particular, Article 47 states:

*Poskytovatel služby pro sdílení obsahu online odpovídá za neoprávněné sdělování díla veřejnosti podle § 18 odst. 3, pokud neprokáže, že a) **vynaložil veškeré úsilí [maximum efforts, massimi sforzi]**, které na něm bylo možno spravedlivě požadovat, k získání oprávnění k výkonu tohoto práva, b) v souladu s vysokými odvětvovými standardy odborné péče vynaložil veškeré úsilí, které na něm bylo možno spravedlivě požadovat, k zajištění nedostupnosti díla, o kterém mu autor poskytl relevantní a nezbytné informace, a [...].*

In these cases, the notion of best efforts has been interpreted as implying reasonable rather than maximum efforts. Apart from some few cases like Czech Republic, the ratio behind Article 17 of the Copyright Directive appears to be clear to the majority of Member States, that, despite the mistranslation, correctly implemented the notion of ‘best efforts’ in their bills. As also the Director of Media Policy at DG Connect, Abbamonte, underlined, in Italy the notion of ‘best efforts’ should be preferred to ‘maximum efforts’. Therefore, this approach leads platforms not to be objectively responsible but it introduces a case-by-case assessment of the context and other elements to measure best efforts. In other words, online platforms are not required to do the best but the best as they can.

V. Recommendations and Conclusions

In light of these remarks, it is apparent that the proper implementation of Article 17 of the Copyright Directive represents a key point for the actual fulfilment of the purposes behind the Digital Single Market strategy. A simple matter of wording can significantly influence the decisions made by national lawmakers in the implementation of this provision. It goes without saying that the more differences exist in the provisions at hand, the more the goals pursued by the European Union in this respect are far from being met. The very same need for a directive in this field would be called into question and legal certainty will be seriously undermined.

Governing this transition is a difficult task, however clear guidelines are needed in order to reduce any risk of regulatory arbitrage. If the option to set a strict liability regime for service providers may prima facie appear as a sound avenue for strengthening rightholders and reducing the value gap, it leads to unintended consequences and chilling effects. Indeed, online content-sharing service providers, like other Internet service providers, play a pivotal role in fostering the exercise of freedom of expression; subjecting them to a strict liability regime for the sake of copyright enforcement, as case law shows, does not bring any benefit for other competing fundamental rights and interests, including freedom of expression and freedom to conduct business. This is one of the results that would derive from the adoption of a strict and extensive approach in the implementation of the notion of ‘best efforts’ under Article 17(4) of the Copyright Directive.

A flexible and open-ended notion, then, has to be preferred, in light of the broad room that it will vest in national authorities to determine whether, in light of the specific circumstances of each case, an online content-sharing service provider has actually made any reasonable effort. Requiring, instead, that a provider has made the maximum efforts could be read as triggering disproportionate effects, with a shift from a qualitative requirement ('the best efforts') toward a quantitative one and the risk of frustration of the actual purposes of the European Union institutions while shaping the Digital Single Market strategy.

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