

# **(Ir)Responsible Legislature?**

## **Speech Risks under the EU's Rules on Delegated Digital Enforcement**

- Dr. Martin Husovec

# A work-in-progress piece inspired by true events!



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## (Ir)Responsible Legislature? Speech Risks under the EU's Rules on Delegated Digital Enforcement

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# Some reflections on C-401/19

## Four Big Questions before the CJEU

1. How to conceptualise Art 17 CDSMD in light of Art 3 InfoSoc?
2. Is filtering constitutionally acceptable?
3. Should states take responsibility for failings of firms who are delegated some enforcement tasks by legislation?
4. How much should EU legislature itself do to safeguard against risks of abuse, and how much it can leave to MS?

## CJEU: Question 1 (Rights)

- Art 17 CDSMD is a special regime
- It grants “rights” beyond Art 3 InfoSoc
  - Call it sui generis, special or else, it is *lex specialis plus*
- Art 17 and even more so Art 13 of the EC Proposal was everything but “clarification” of existing law or case law
- Indirect CTP via Art 3 InfoSoc post-YouTube is clarified too
  - CTP can coat SHs when they are lost
  - Active/passive fight is not over (general know. & failure to credibly counter)

## CJEU: Question 2 (Filtering)

- Upload filtering can be introduced by the EU legislature
  - National MS are still limited by Art 15 ECD & Art 7 DSA;
  - Open: spill-over impact of the ruling on injunctions against intermediaries
- As such filtering constitutes a prior restraint, it has to be **precise and avoid making mistakes** (“adequately distinguish” between L and IL)
  - What it can do *autonomously* is what counts (not with help of humans)
  - Cannot force automation for areas where it is not ready (automatable vs non-automatable)
  - Thus, if the industry cannot show that Section 4 UhrDaG cases can be automated with high precision already, the German law is compatible with Art 17 CDSMD
- Machines cannot be trusted to do any delegated job if they are not are of high quality; reliance on ex-post only safeguards is unacceptable

## CJEU: Question 3 (State)

- The state is responsible for failing of firms when implementing the delegating enforcement schemes
- States cannot come up with enforcement goals and then look the other way when their operationalization fails
- They keep responsibility and have to step-up to police the firms by introducing additional safeguards
- Firms' failures are on state's balance sheet of HR violations!
- MS will have work to do if Art 17 implementations start failing people.

## CJEU: Question 4 (EU vs MS)

- EU legislature has some **central responsibility** to legislate safeguards for its own intrusions; but **not a complete one**;
  - Art 13 of the EC Proposal + later iterations would have been unconstitutional under C-401/19 standards
- MS must fix the EU legislature's shortcomings in their national implementations (partly understandable for competences but ..)
- Problem: for horizontal affairs under EU directives, national courts can do less for rights of individuals



## Bigger Problem for Europe: Terrible Incentives for Politics

- IF safeguards & scope are the **hardest to agree upon, then you leave them open**, and agree upon interferences only
- Result: Union legislature introduces interferences that the MS are expected to fix in their national parliaments
- Moreover: the central attack on EU legislation, the source, is limited; any scrutiny is decentralized on MS level
- CJEU puts in place some **central breaks** but Q as to how strict

Spirit

Verbatim



# Fragmentation

