

# **Article 17 and the New EU Rules on Content-Sharing Platforms**

MIPLC Lecture Series, 17 June 2020 (Webinar)

**João Pedro Quintais (IViR, University of Amsterdam)  
@jpquintais**

# Outline

- How we got here
- Mechanics of Article 17
- Online content-sharing service providers?
- Authorization
- Preventive Measures vs User Rights or Freedoms

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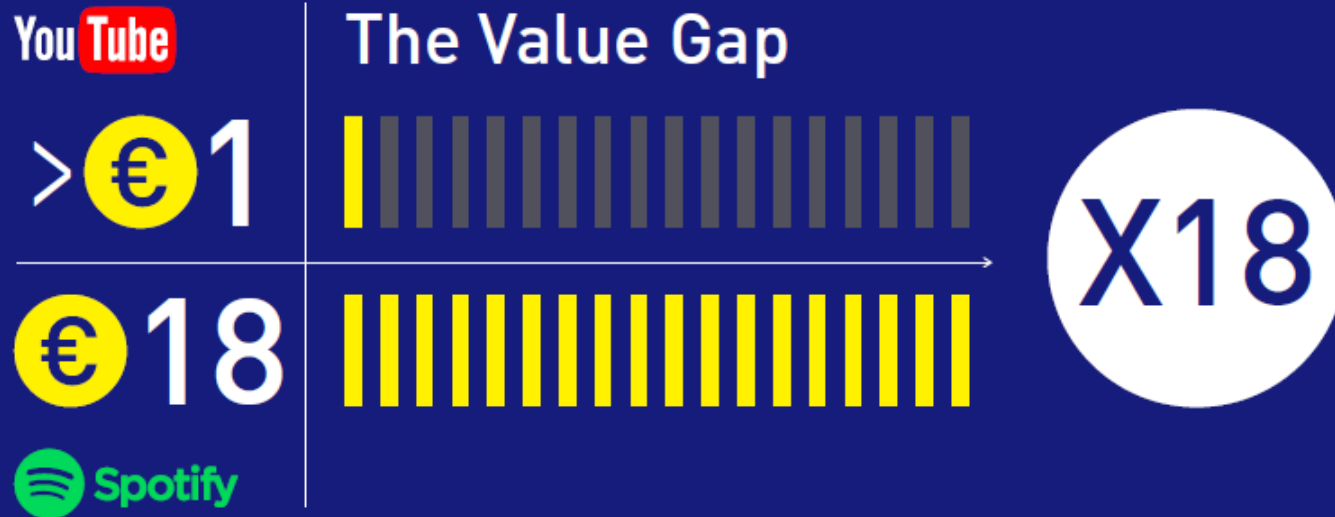
# **A Longer Story**

(the copyright law chapter)

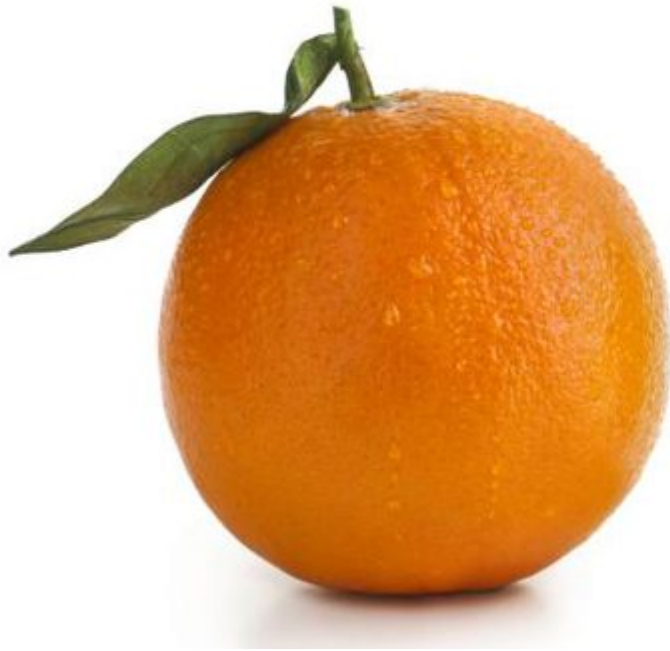
‘value gap’ > ‘upload filters’

These 'User Uploaded Content' (UUC) platforms have become the largest on-demand music services, but they avoid paying creators fairly by claiming they are not responsible for the content distributed on their platforms. This is also an unjust advantage over other digital services.

YouTube, for example, pays less than €1 per user per year; in contrast, Spotify pays 18 times that figure. This gulf between the value of music exploited and compensation to creators is known as the Value Gap.



?





Public



Online Music Provider

Arts 2 and 3 InfoSoc  
Repro & C2P

Primary Liability



© holders

MTL  
CRM Directive

Author's Rights

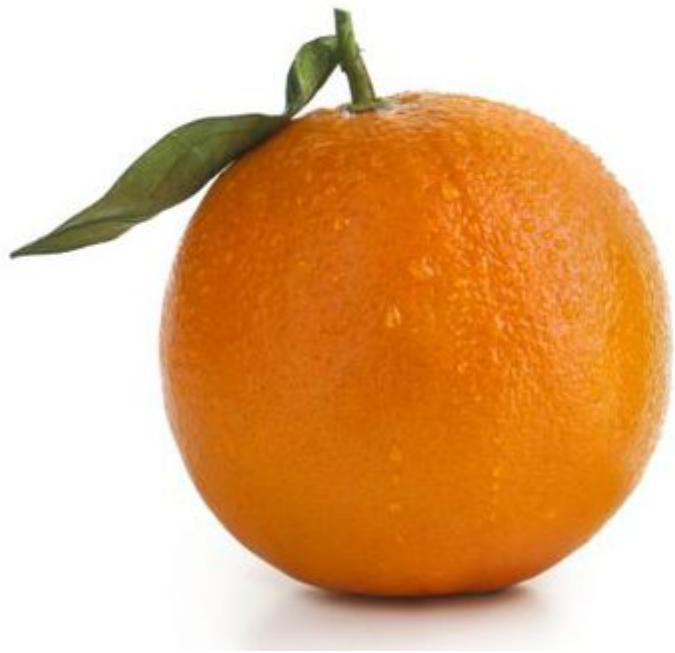
Authors' CMOs

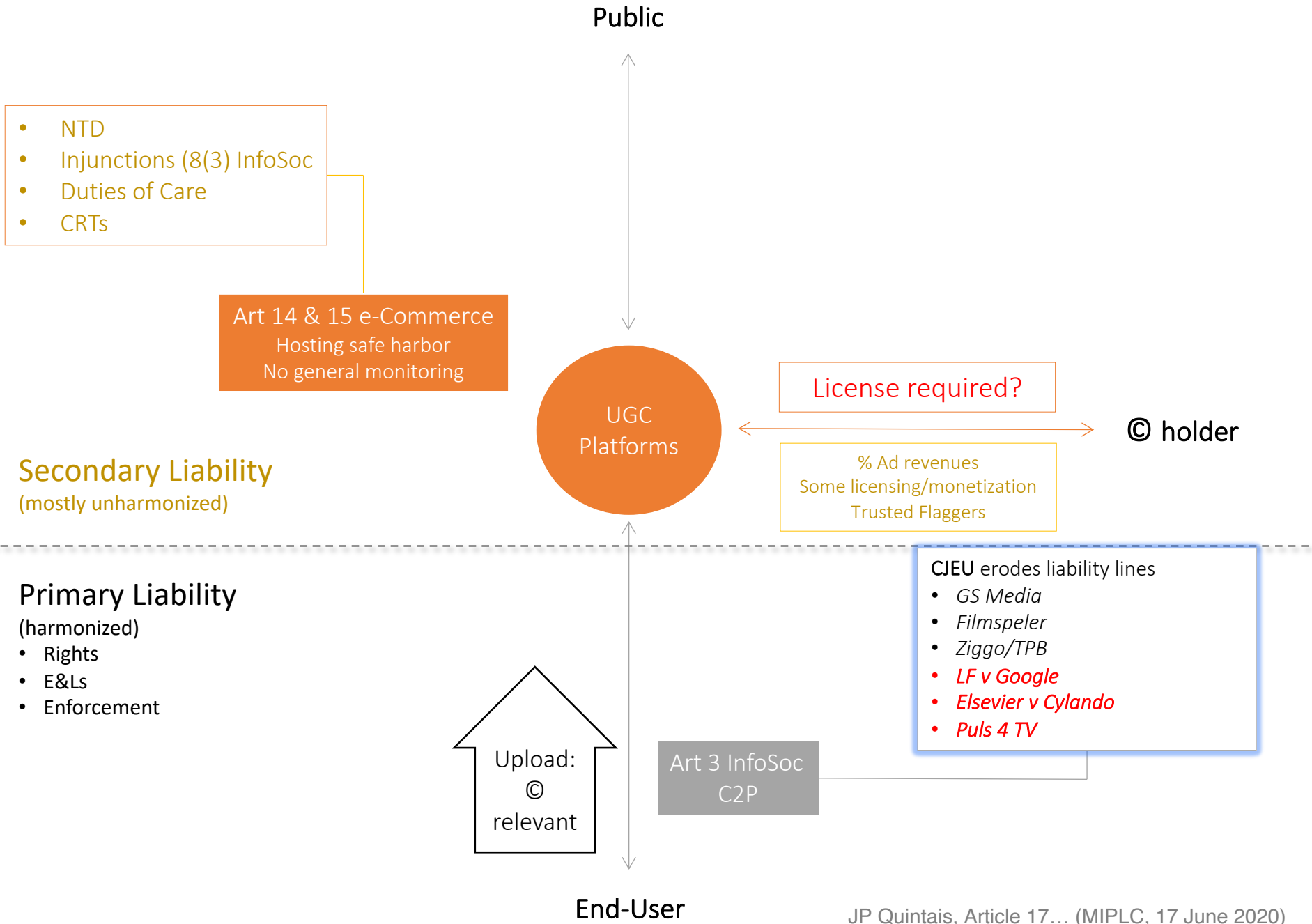
Record Producers' Rights

Performers' Rights

Record Producers







# Where we are today

## (in the copyright chapter)

- Stakeholder Dialogues: 17(10)
  - 6 so far, 7<sup>th</sup> postponed... useful info but mostly unsuccessful
  - Waiting EC Guidelines (**open for consultation soon**)
- National transpositions (by 7 June 2021)
  - Most countries in Public Consultation mode
  - Some draft implementation bills published or prepared (FR, NL, BG, DE)
- Academics
  - Recommendations European Academics: Safeguarding User Freedoms...
  - ECS Comments: Metzger & Senftleben on Art 17
  - Literature boom starting
- Numerous Stakeholder Statements
  - Civil Society / NGOs, CMOs, Tech Organisations, ALAI, etc.

Want to know more?



CREATE

<https://www.create.ac.uk/cdsm-implementation-resource-page/>



<https://www.communia-association.org/category/eu-policy/eu-copyright-reform/>



# The broader picture (the platform regulation story)

Illegal content: “any information which is not in compliance with Union law or the law of a Member State concerned”...

Focus: terrorist content, hate speech, child sexual abuse material, IPR infringements, consumer protection

Encourages “proactive measures” against illegal content, incl. via automated means (if appropriate, proportionate, and w/ safeguards), and trusted flaggers

EC COM(2017) 555 final, **Illegal Content Online**

EC Recommendation 2018/334, **Illegal Content Online**

EC Proposal Terrorist Content Regulation (**TerrReg**)

TerrReg 1st Reading Council of EU

**Digital Services Act [ECD rev]**, Public Consultation

September 2017

March 2018

September 2018

May 2019

June 2019



September 2016

CDSM Proposal EC

March 2019

CDSM approved EP

April 2019

CDSM approved Council

May 2019

**CDSM Directive**

C-401/19, Poland v Parliament and Council

June 2019

Start EC SHDs

Implementation by June 2021

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# Who does it apply to?



## Positive definition

- UGC platform
- Large amount of works
- Organise and promote
- Commercial / competitive effect



## Exclusions

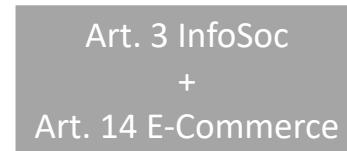
- Electronic comms services
- B2B Cloud Services + cloud services
- Online market places
- Non-profit online encyclopedias
- Non-profit educational and scientific repositories
- OS Sw developing & sharing platforms



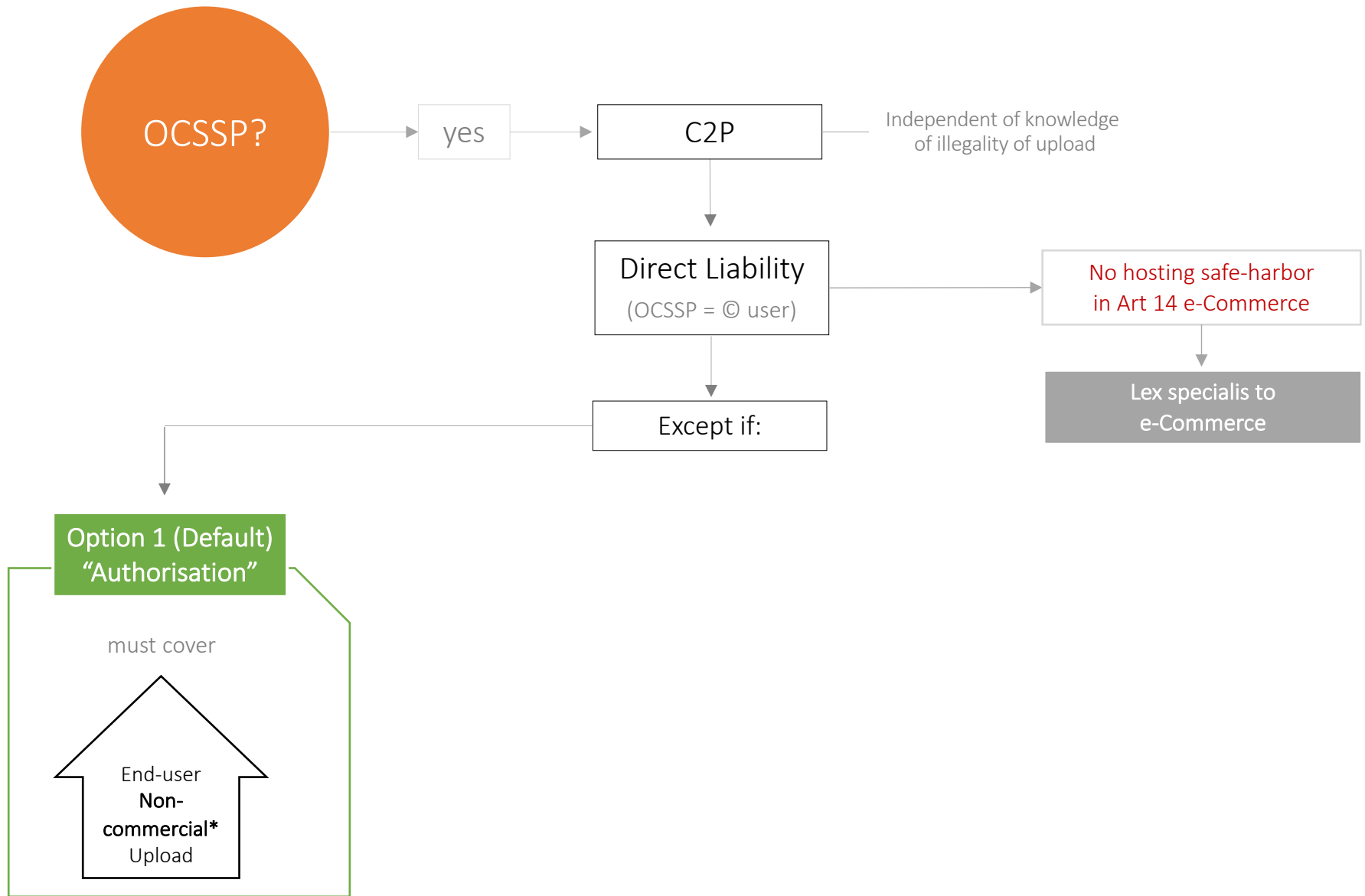
→ If not



outside CDSM Directive



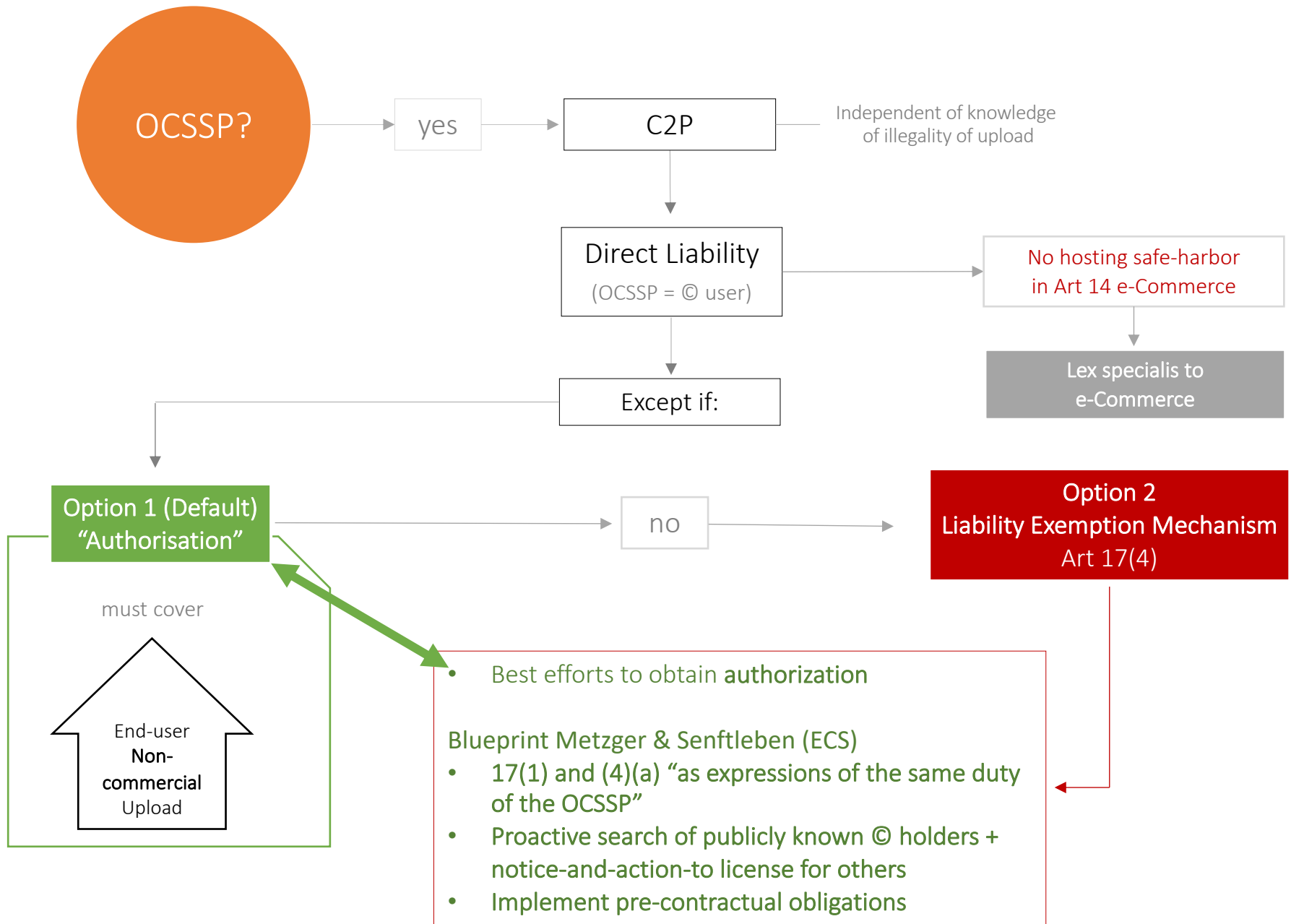
# What and how?



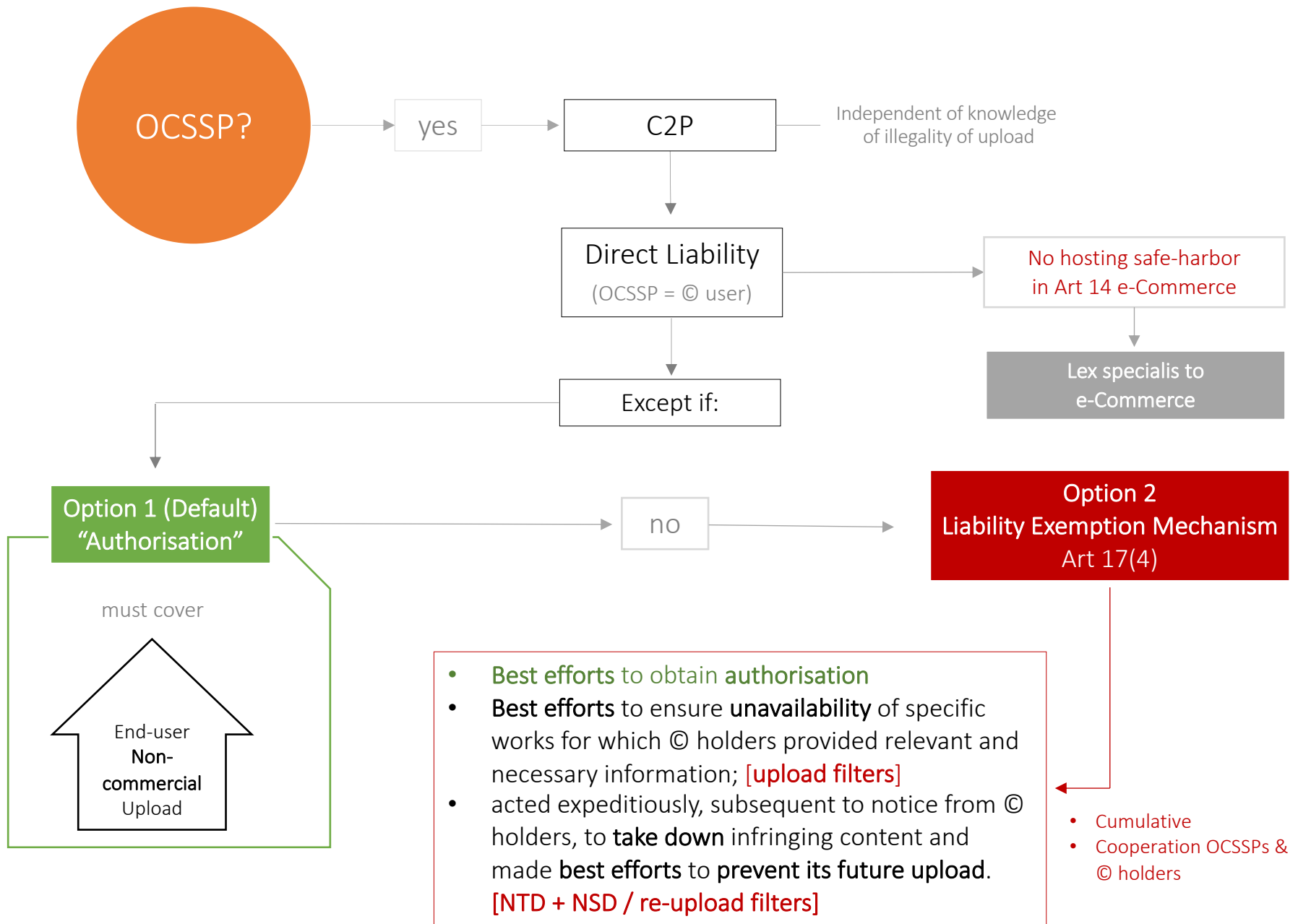
*\*or commercial but w/out generating "significant revenues" (priced into license)*

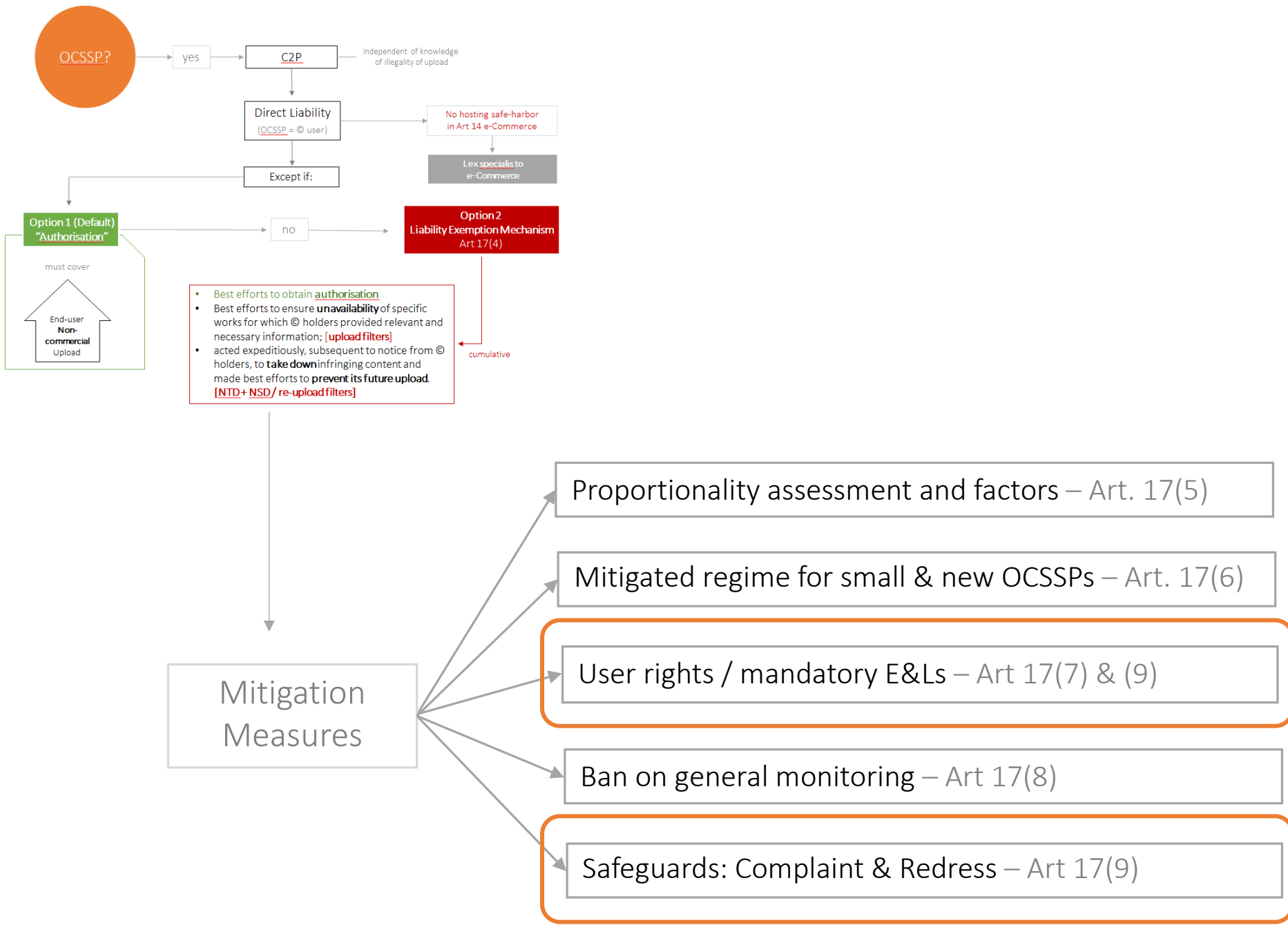


# What and how?



# What and how?



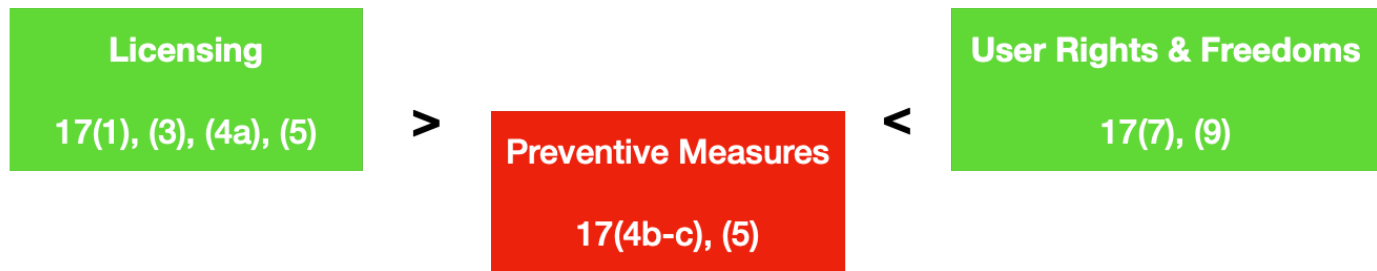


# In sum



# Article 17

## Normative hierarchy



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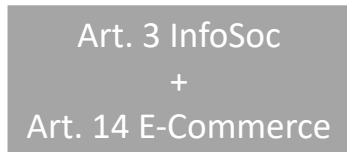
# Who does it apply to?



If not



outside CDSM Directive



## Exclusions

- Electronic comms services
- B2B Cloud Services + cloud services
- Online market places
- Non-profit online encyclopedias
- Non-profit educational and scientific repositories
- OS Sw developing & sharing platforms



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**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**

prepared by Axel Metzger\* and Martin Senftleben\*\*

Date: 27 April 2020

Member States implementing Article 2(6) and 17 DSMD should make clear in their legislation or in the official memorandum that online sharing services that do not organize and promote the materials uploaded by their users are not held liable for copyright infringement in accordance with Article 17(1), (4) DSMD. There are numerous simple sharing services which offer users the mere function of uploading materials for the download of specific other users, without any focus on pirated content, search function, structured streams of suitable contents etc. For those simple upload and sharing services, the DSM Directive does not require any of the proactive duties of care as now stated in Article 17 DSMD. Since the level of control and advantages taken from the uploaded contents are much less intensive for those services than for OCSSPs, Member States should continue to apply the general rules for secondary liability combined with a notice-and-take-down approach. In this regard, the safe harbour rules for hosting services as laid down in Article 14 E-Commerce Directive, the ban of general monitoring obligations in Article 15 E-Commerce Directive and the fundamental freedoms of OCSSPs must be respected without restrictions of any kind.<sup>5</sup> The CJEU will have an

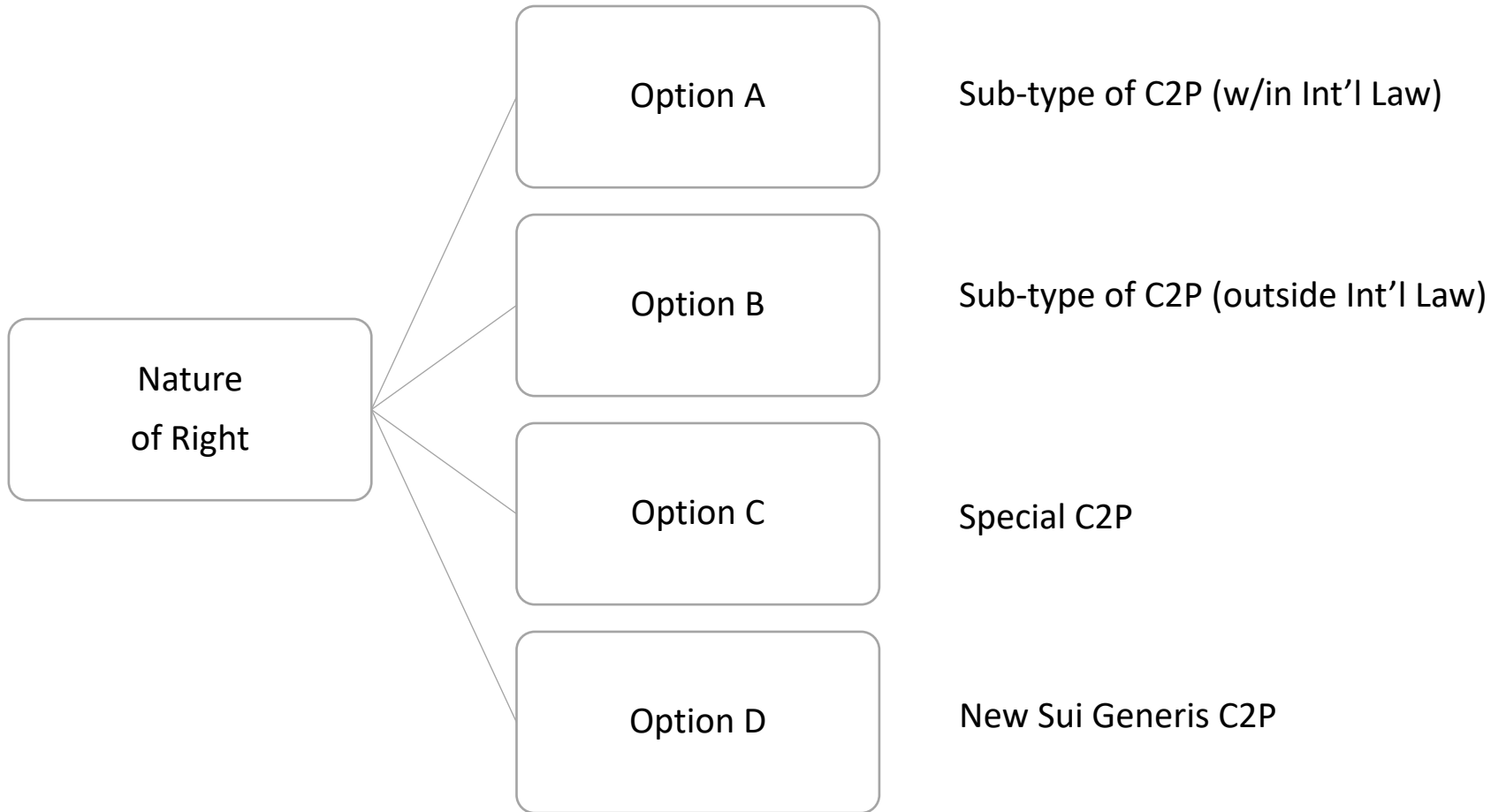


# Outline

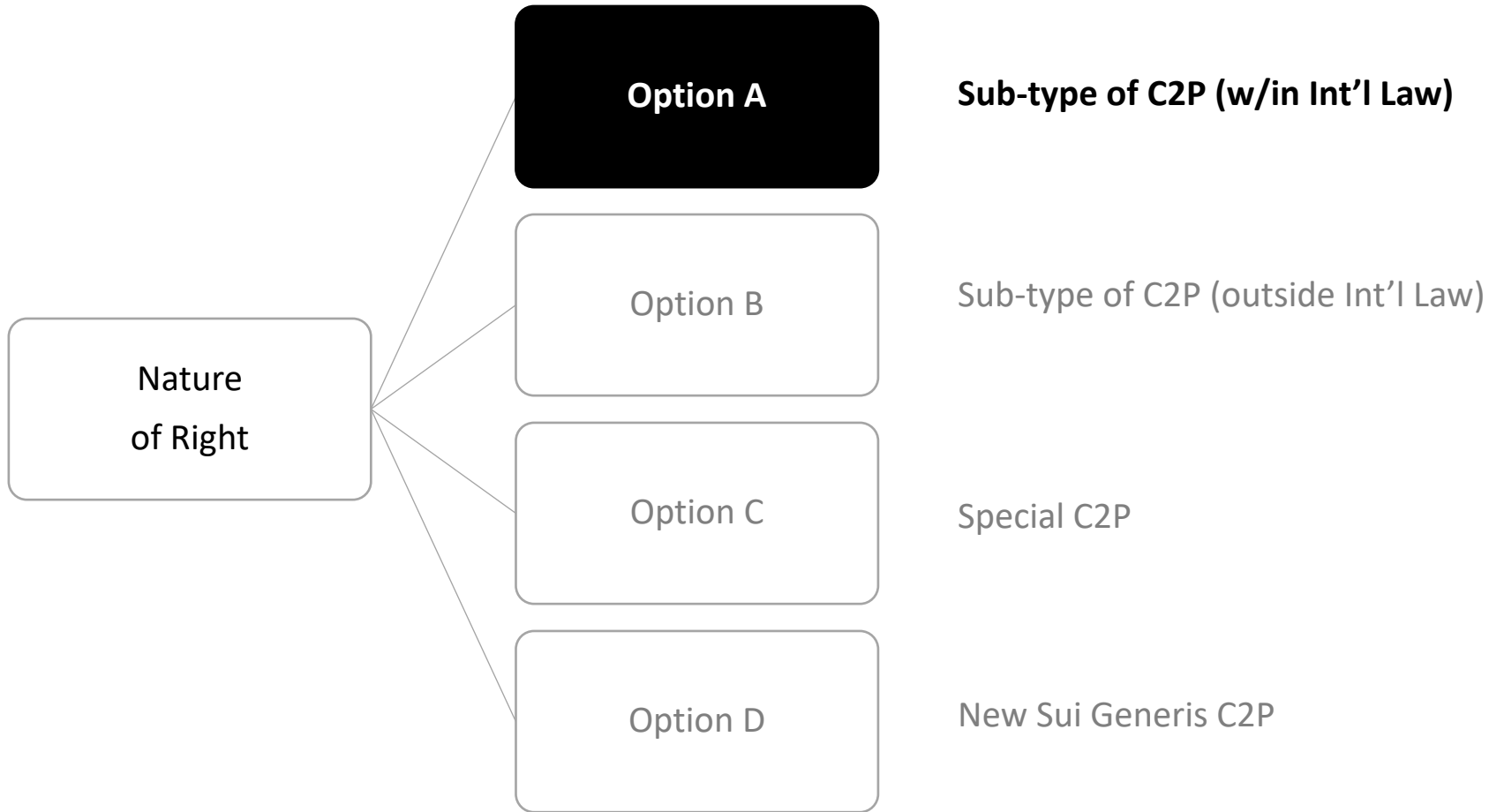
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**What is the nature of the right in Article 17?**

## Interpretation Options



Interpretation Options



# Option A

sub-type of C2P within International minimum standards



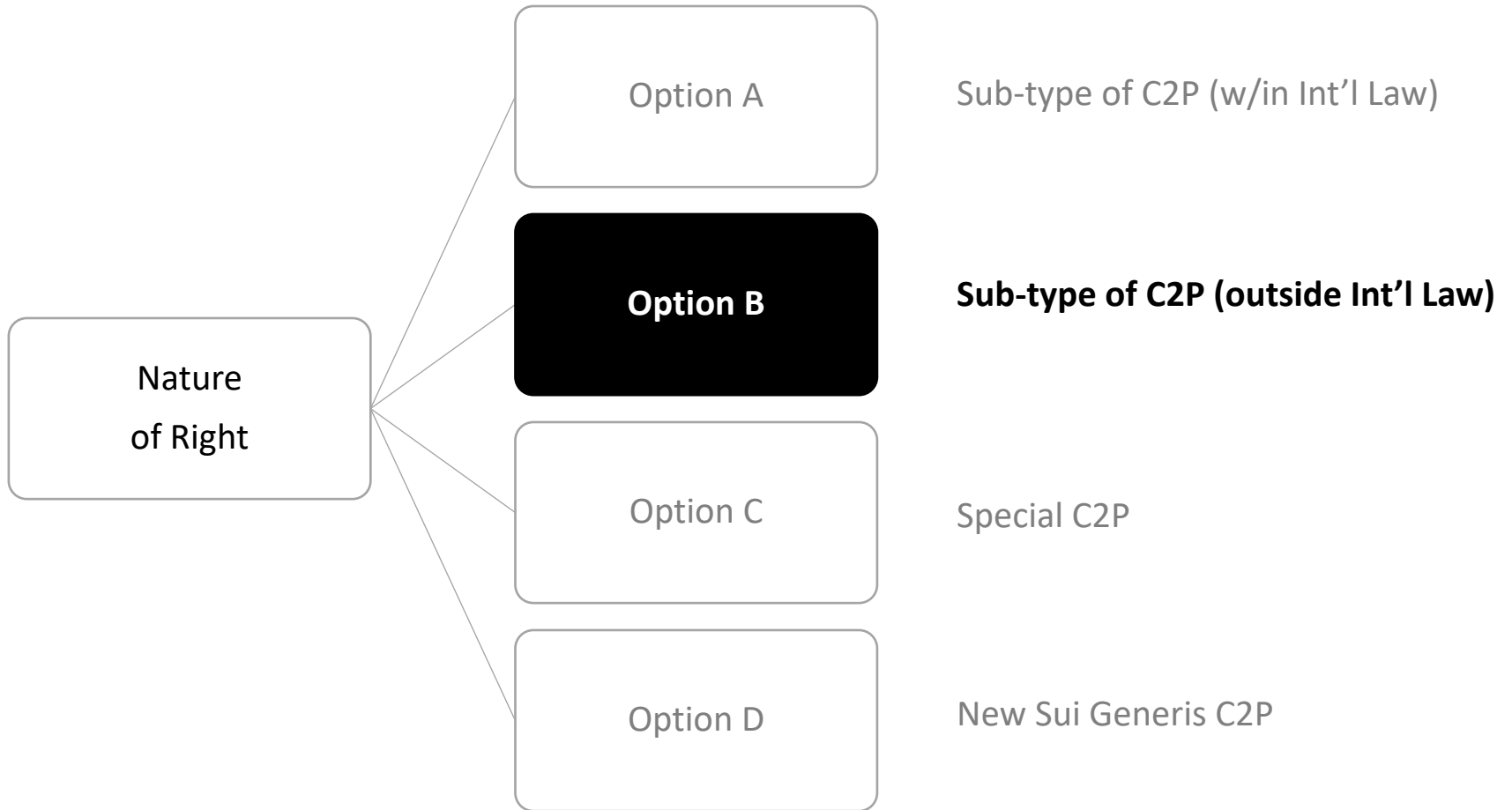
## Option A

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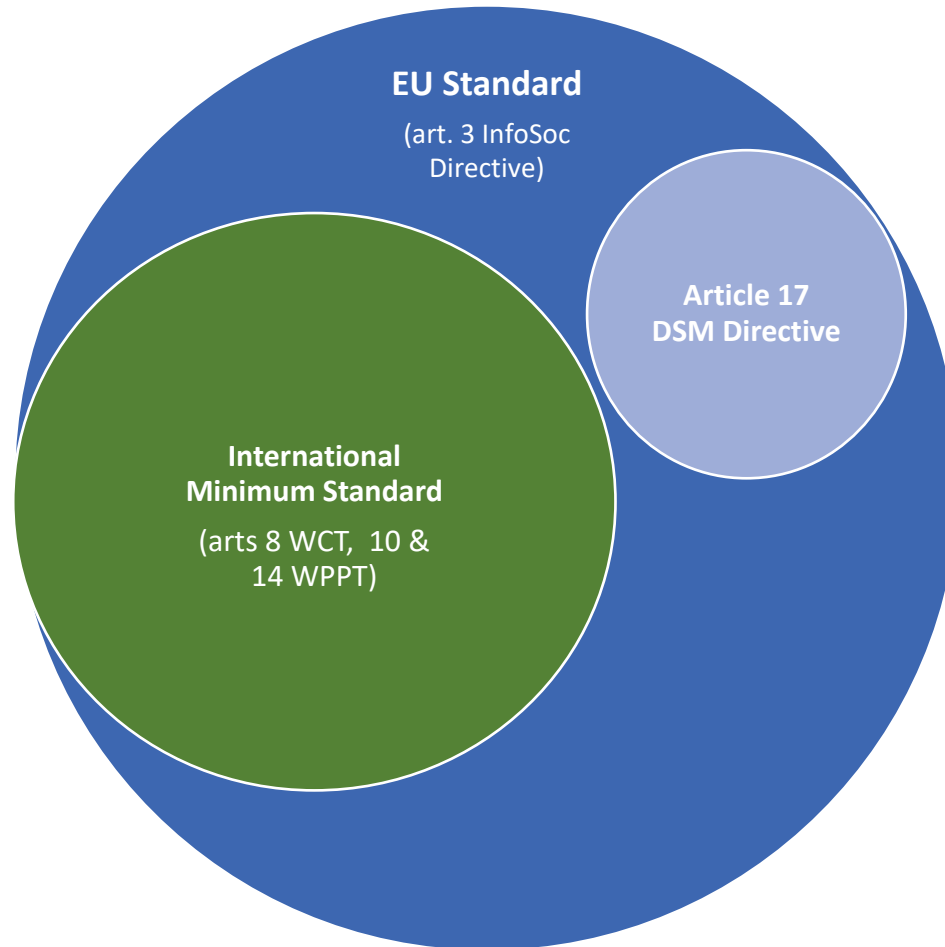


- But Int'l standard does not cover indirect access by intermediary UGC platforms
- If so, then no space for national secondary liability regimes...
- ... and all national laws should recognize this as exclusive right

## Interpretation Options



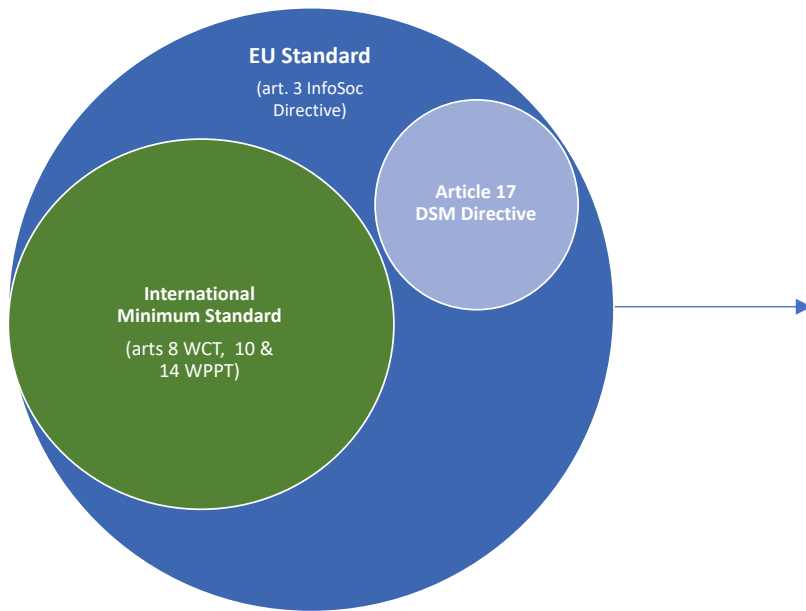
**Option B**  
sub-type of C2P *within* the EU concept  
but *outside* international minimum standards





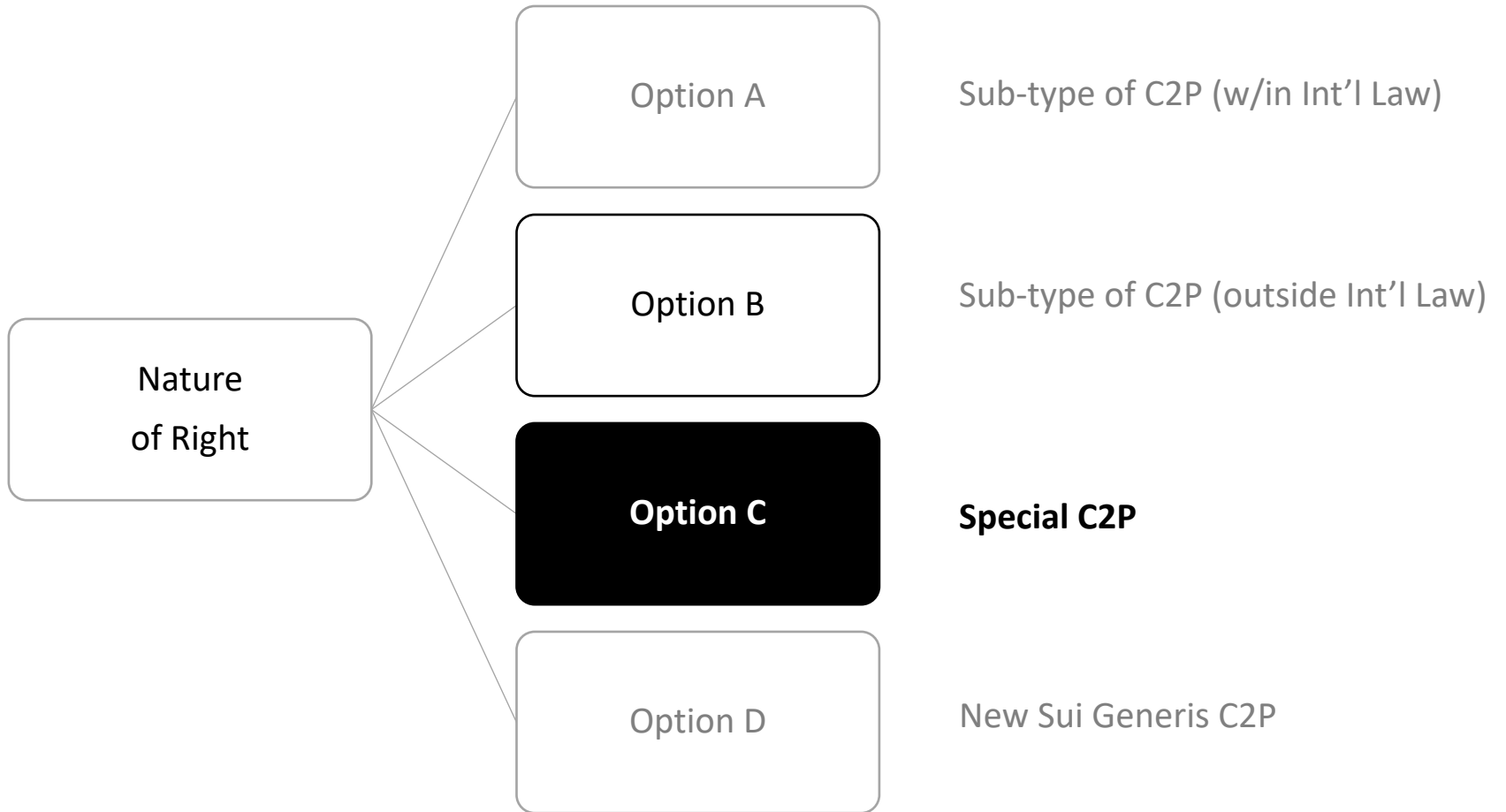
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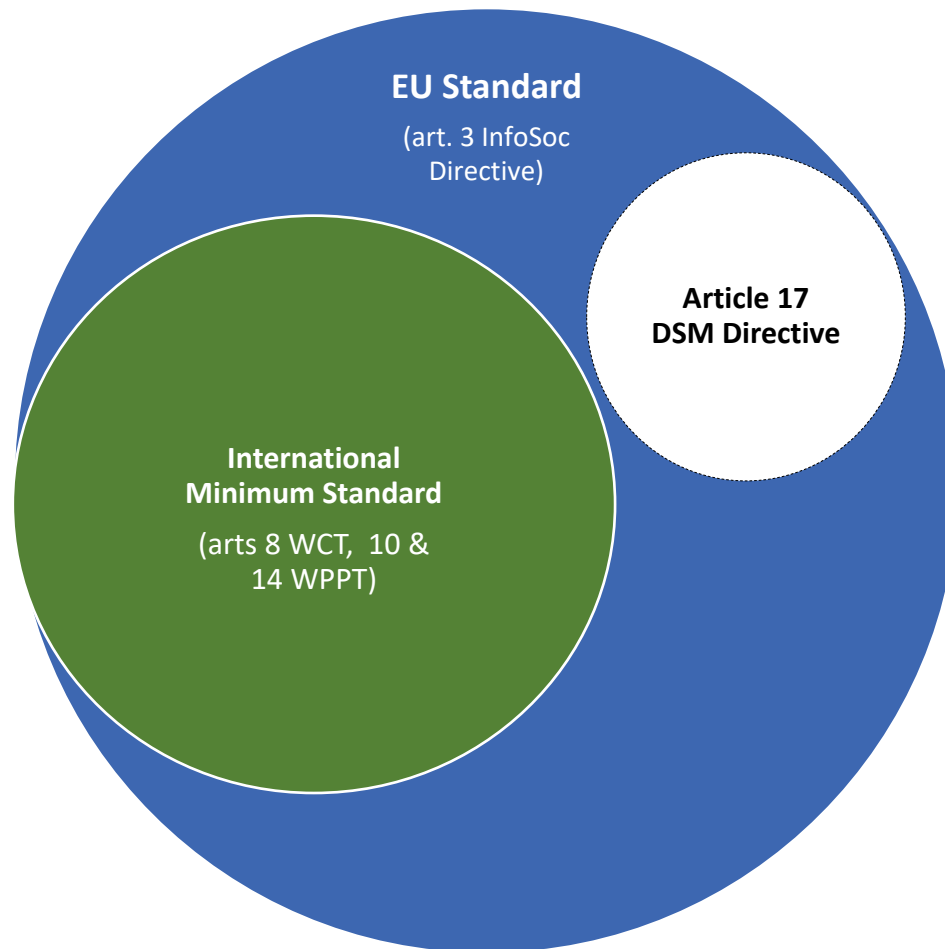
- Are these acts really covered by Article 3 InfoSoc? (See Options C & D)
- If 17 is a unitary right, then 17(4) is constitutive component
- Then 17(4)(b) and (c) ≠ 14 eCommerce
- 17(4)(b) and (c) = **E&L?** Limit on enforcement?
- If E&L, then 3ST in 5(5) InfoSoc applies in Option B... chaos ensues
- If limit on enforcement, then difficult to defend compatibility with art. 3 InfoSoc (previously subject to similar *external safe harbour*)

## Interpretation Options



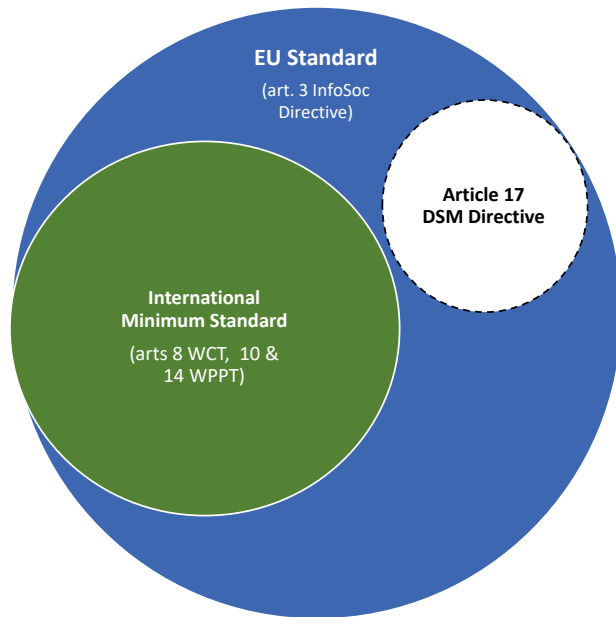
## Option C

sub-type of C2P *within* the EU concept but *qualified as lex specialis*



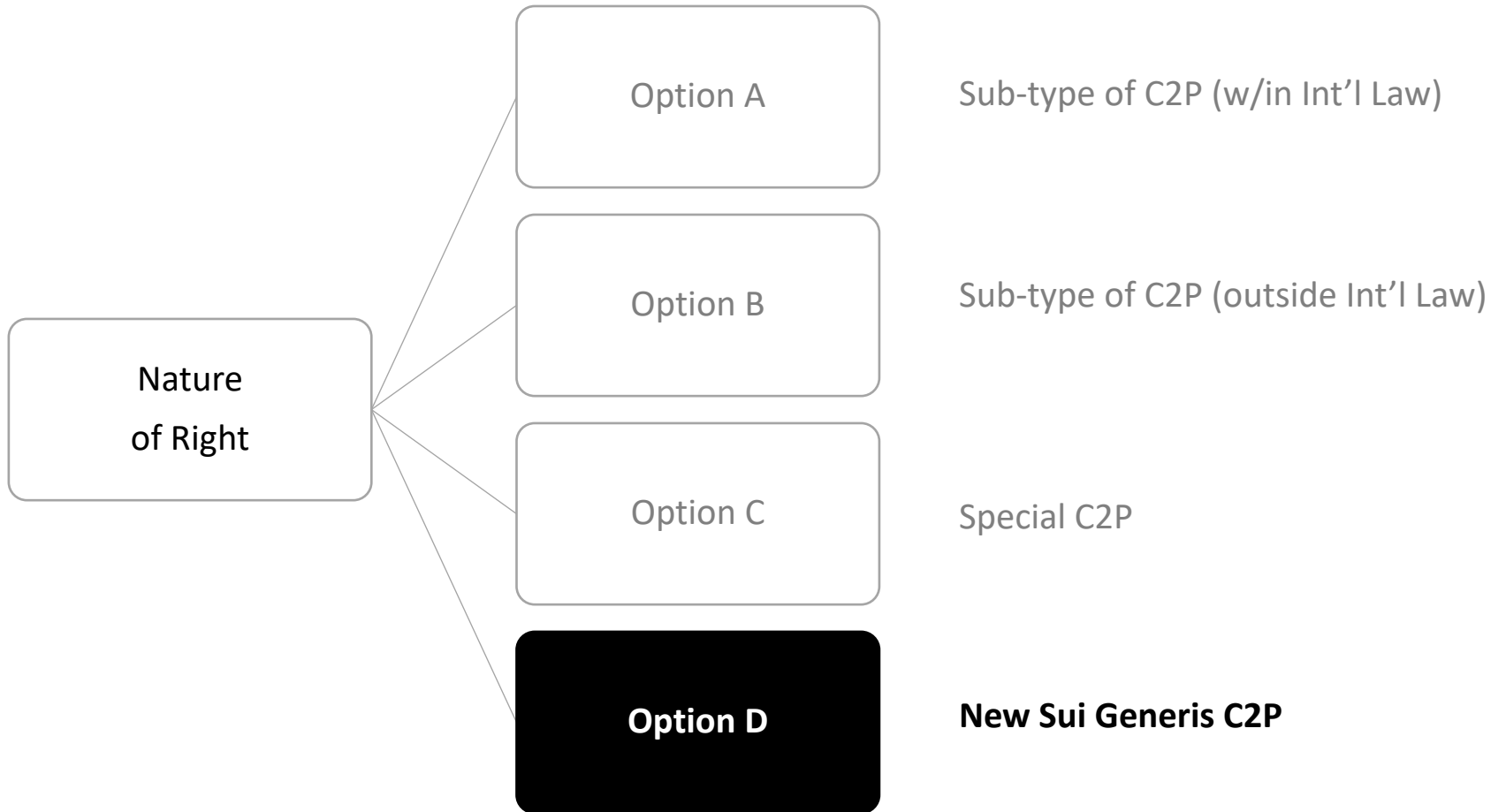
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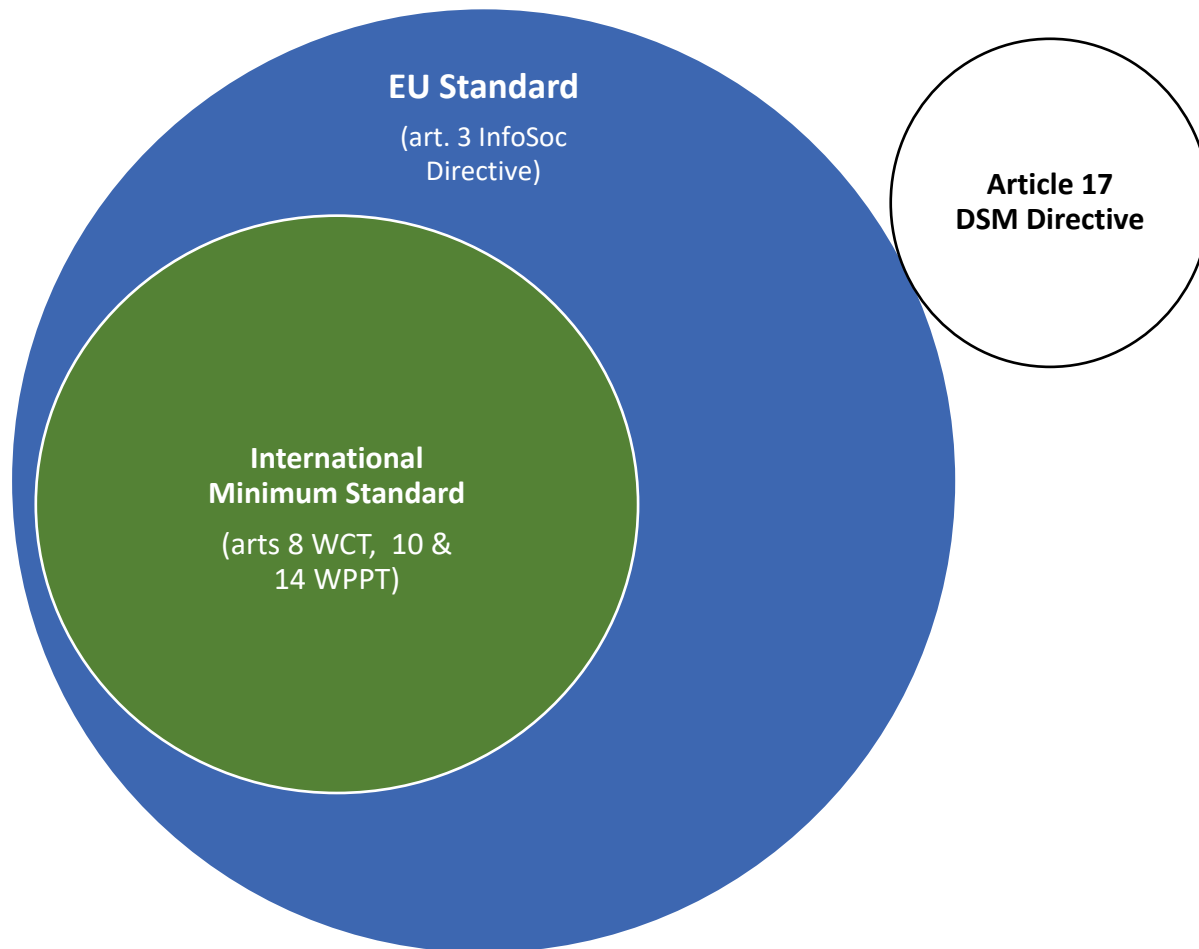


- Same as Option B but...
- ... not subject to InfoSoc Directive rules or case law (?) ...
- ...including on CRM & E&Ls
  - Think: Soulier, 3ST
- Why important?
- Authorisation mechanisms!
  - Wider margin of discretion

## Interpretation Options

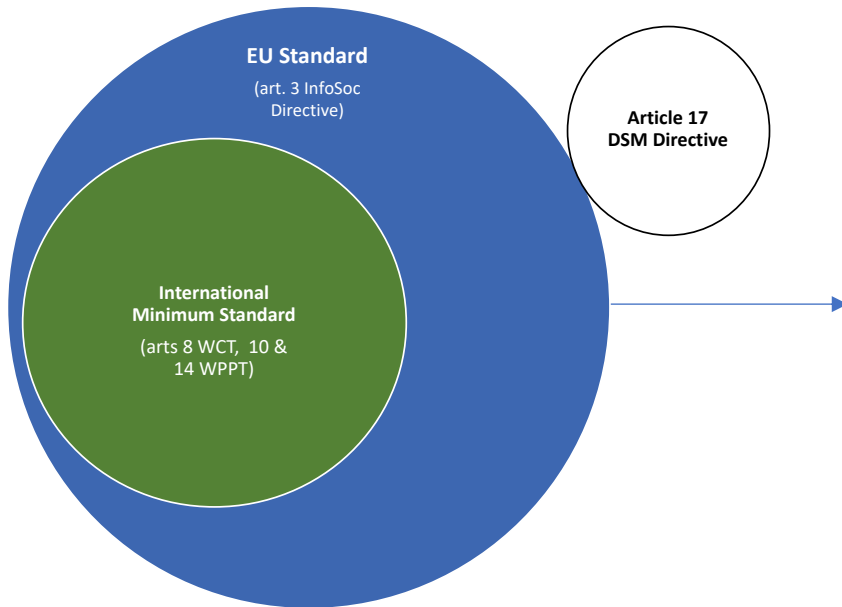


**Option D**  
new sui generis right of C2P *outside* the EU concept



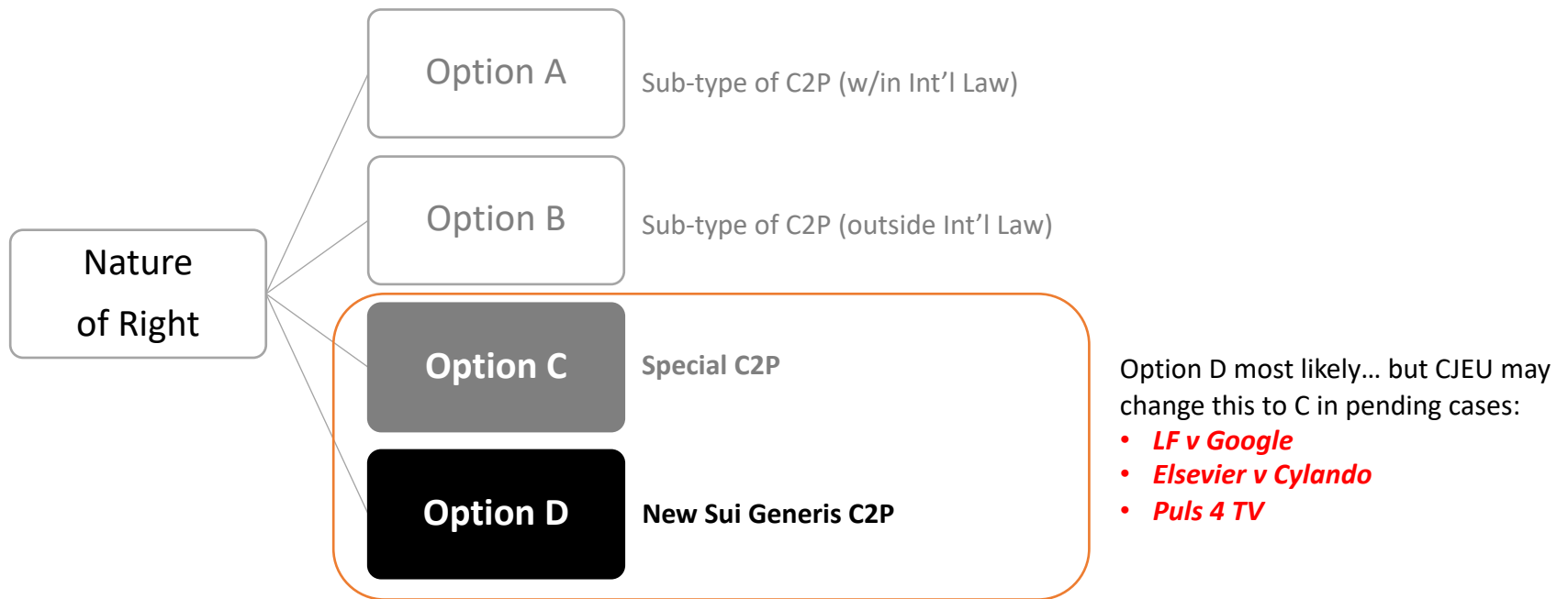
## Option D

new sui generis right of C2P *outside* the EU concept



- Activities covered wholly outside CJEU-extended scope of art. 3 InfoSoc
- Why? Focus is not on mental elements but on services' effects (rec. 62) + distinction from art. 3 InfoSoc scope (paras 1 & 2, rec. 64)
- Tentative consequences outlined for Option C) are clear here
- Freedom of MS to play around with authorisation mechanisms

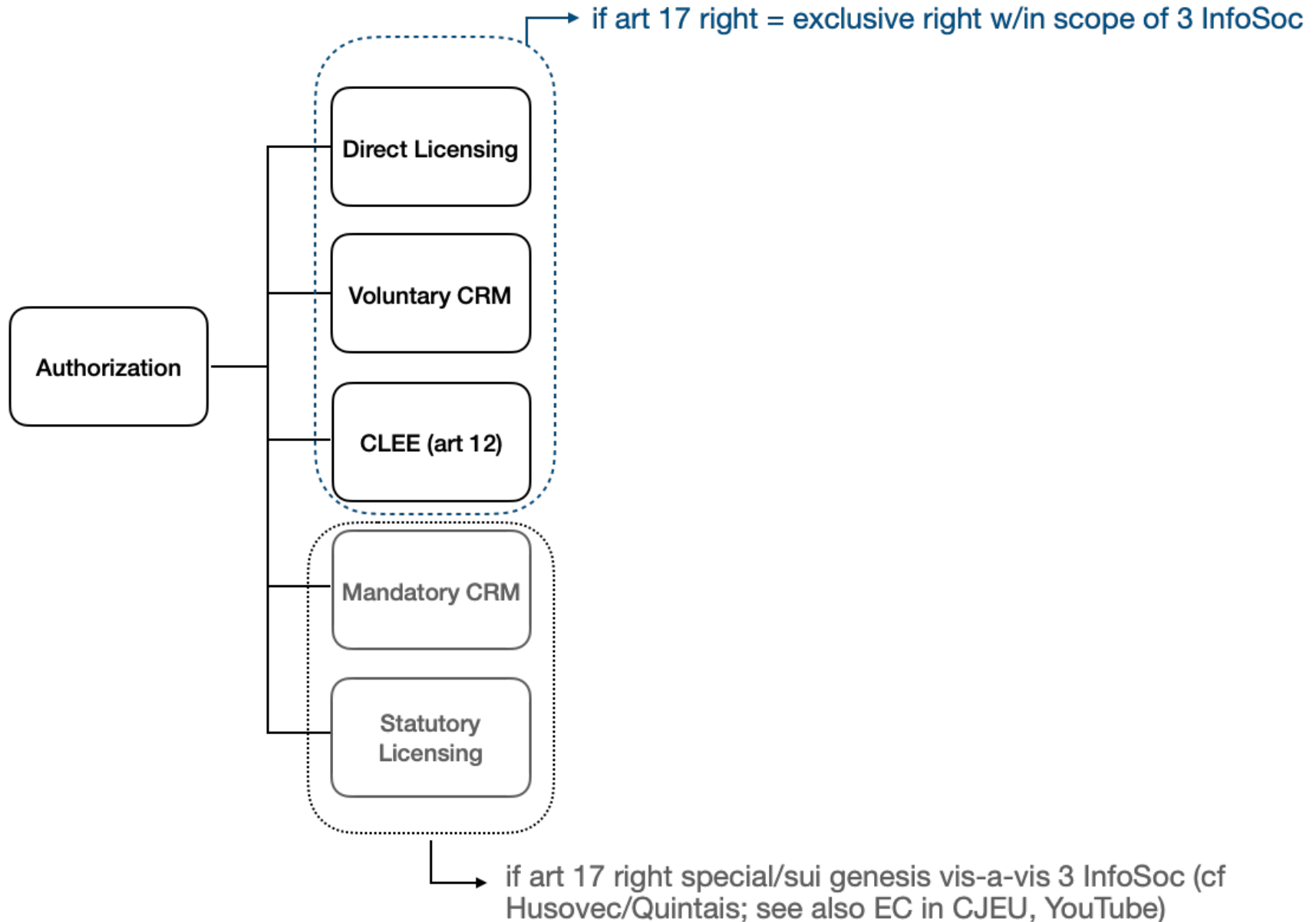
## My (our) view



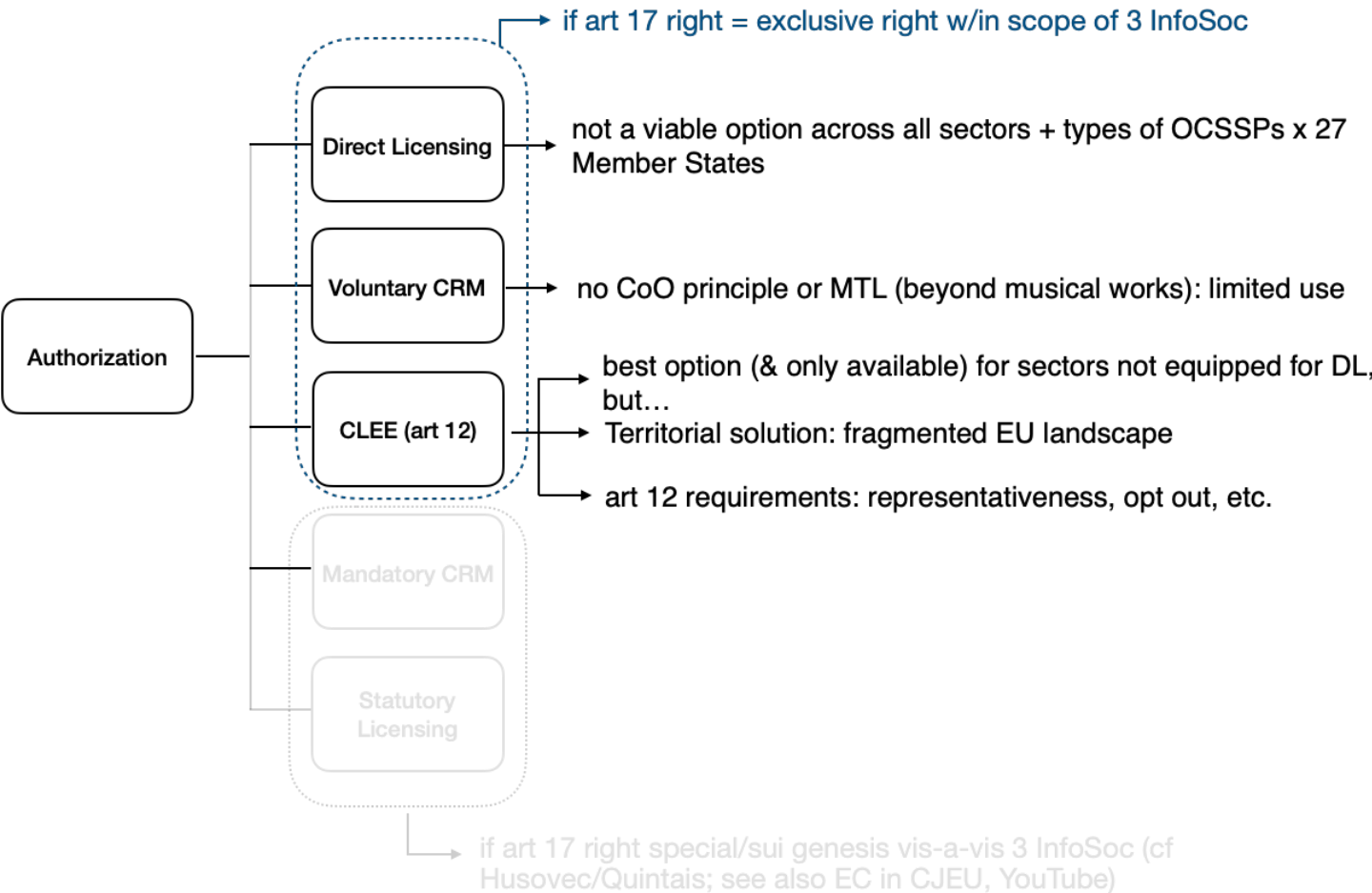


**Why does it matter?**

**1 size does not fit all + art 17 does not mandate it!**



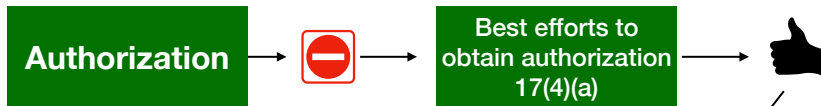
**1 size does not fit all + art 17 does not mandate it!**



- new / clarified mandates advised (Amend CRM Acts: 3 InfoSoc mandates extend to 17 CDSM)
- Low threshold below "systemic" OCSSPs, i.e. flexible interpretation of best efforts in 17(4)(a), in light of 17(5) proportionality & factors **(NL!)**
- e.g. non-obvious (c) holders → passive OCSSP OK (also valid for direct licensing)


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**Preventive Measures 17(4)(b-c)**


NTD?  
Others?




CRTs  
(Filters, NSD)

not suited for 17(7) uses

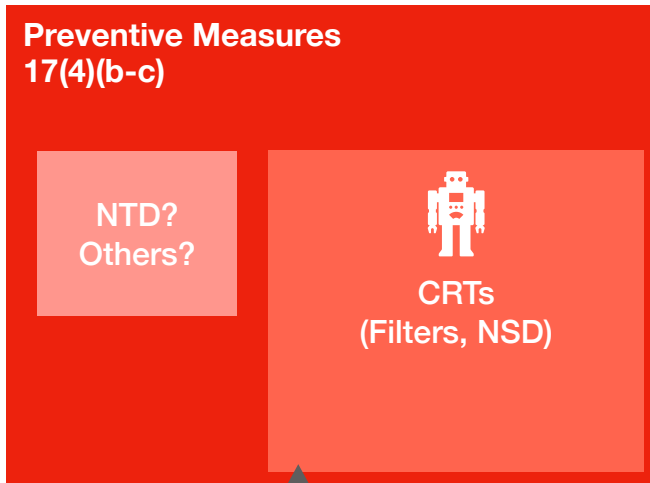
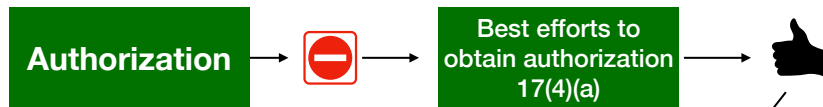
### How Filters fail (to meet the requirements of the DSM directive)



*Three common failure modes of upload filters*

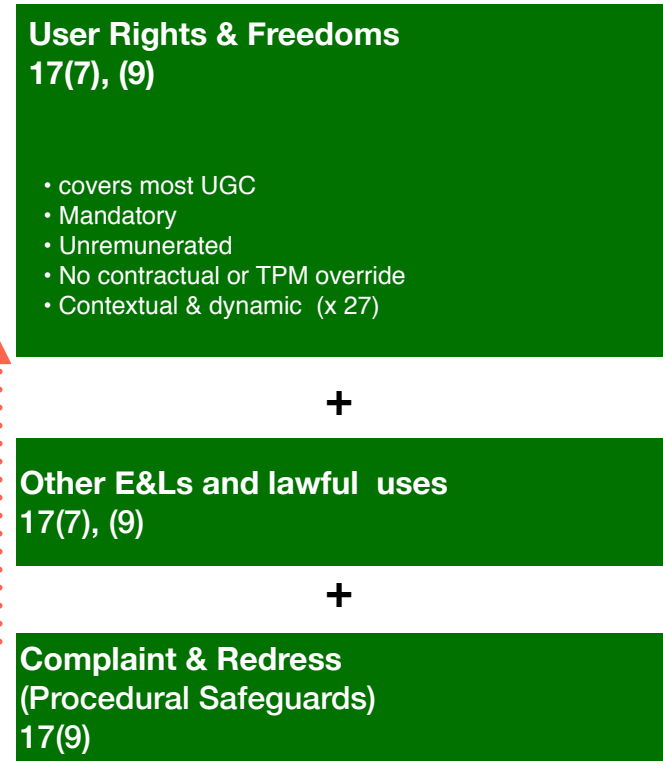
June 12, 2020 – [Paul Keller](#) Share this article:  

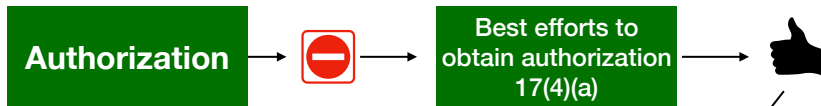
- Incorrect rights information (bad metadata)
  - Inability to recognise legitimate uses (context blind)
  - Inability to accurately identify works (false positives)
- JP Quintais, Article 17... (MIPLC, 17 June 2020)



not suited for  
17(7) uses


NL approach





**Preventive Measures 17(4)(b-c)**

NTD?  
Others?



**CRTs**  
(Filters, NSD)

not suited for 17(7) uses

- incompatible 17(7) and FoE
- Inconsistent w/ CRT capabilities & empirical evidence counter notices
- proportionality (alternatives exist)

**User Rights & Freedoms 17(7), (9)**

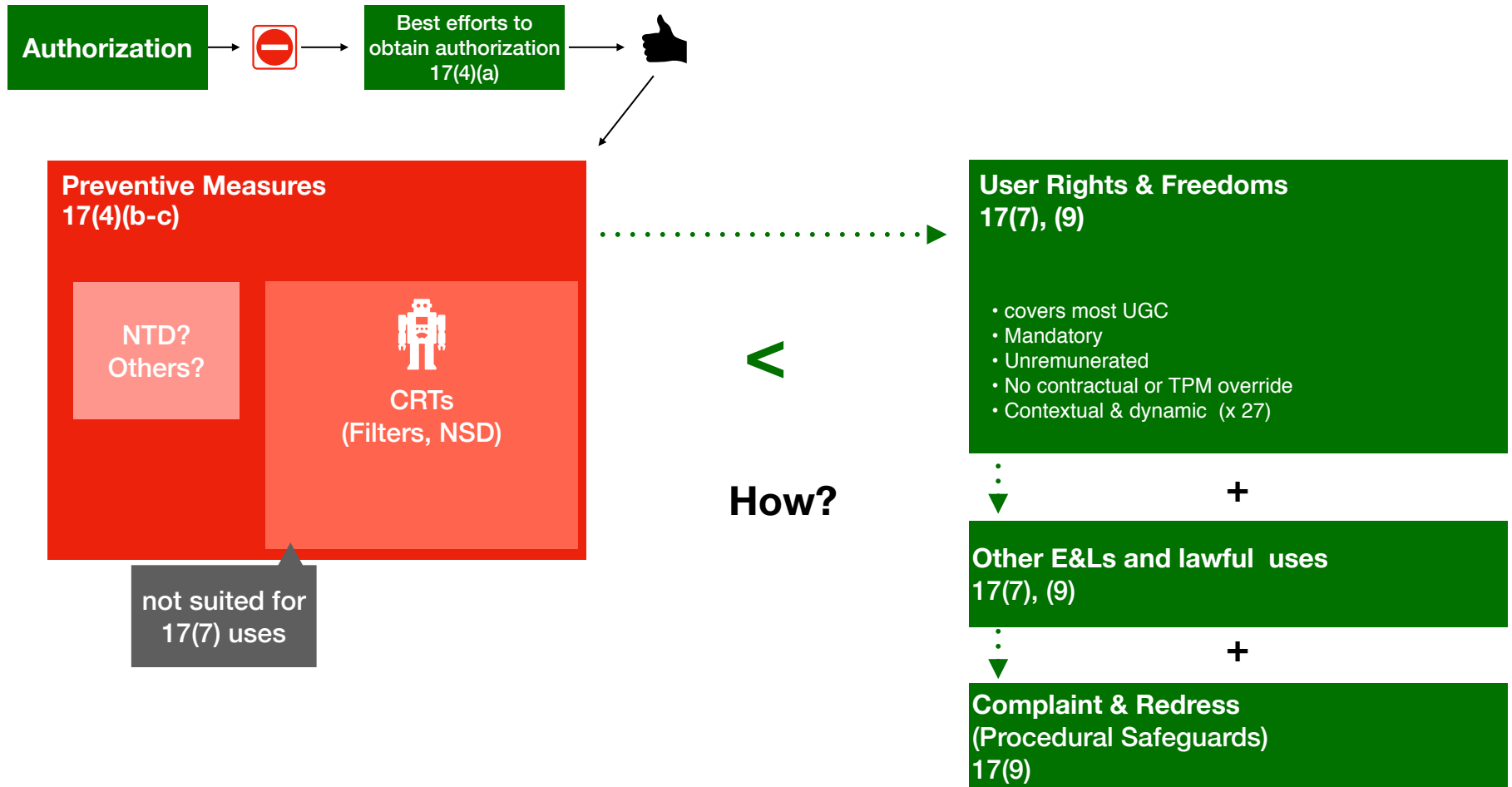
- covers most UGC
- Mandatory
- Unremunerated
- No contractual or TPM override
- Contextual & dynamic (x 27)

+

**Other E&Ls and lawful uses 17(7), (9)**

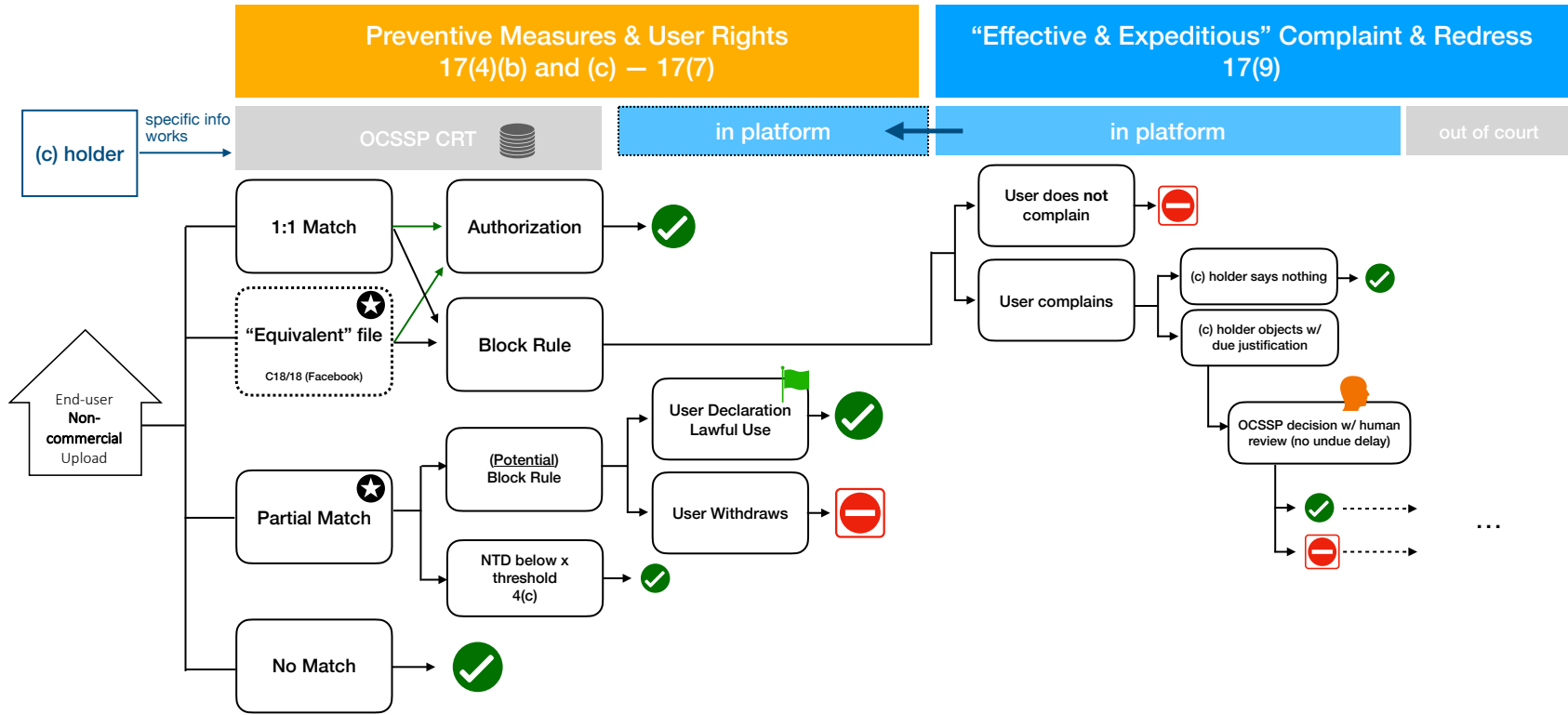
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**Complaint & Redress (Procedural Safeguards) 17(9)**





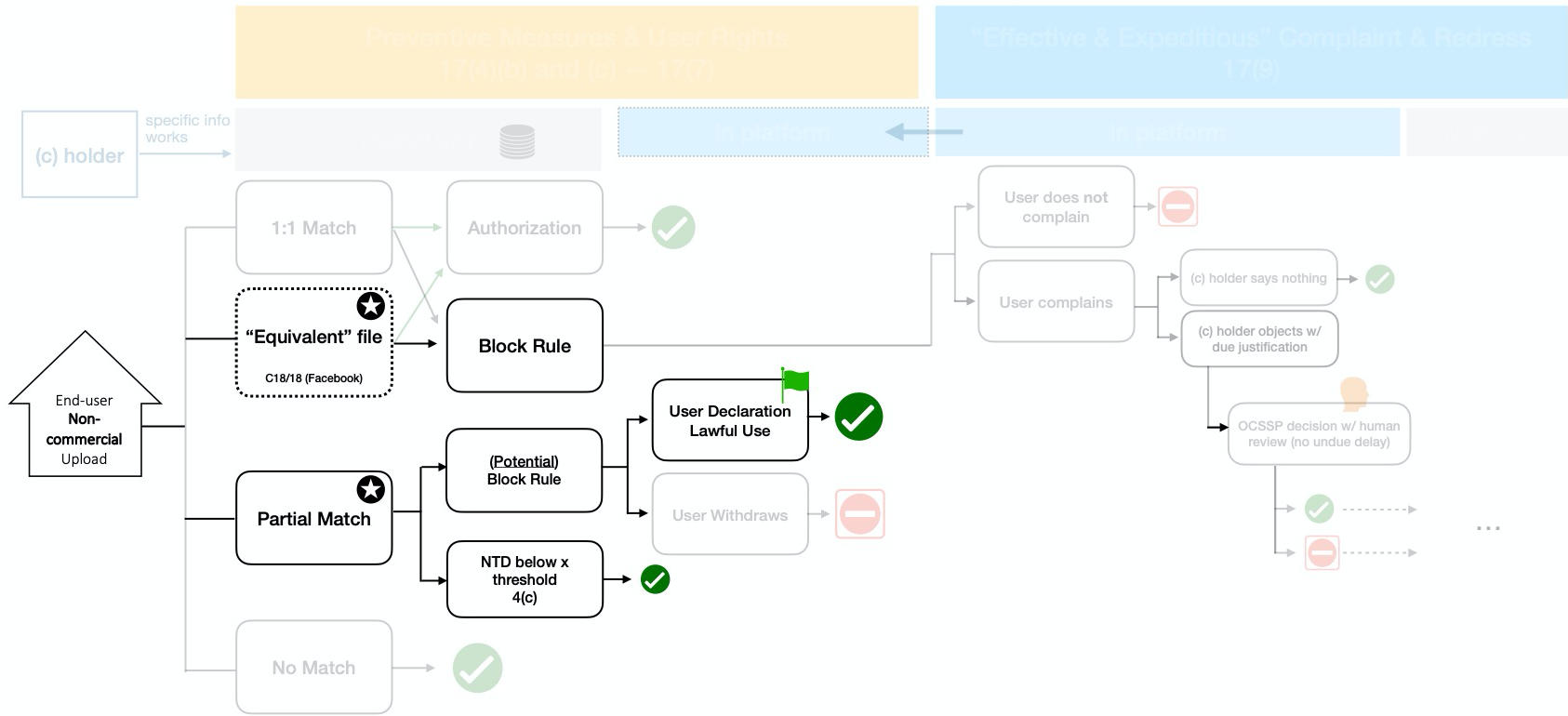
**1 size does not fit all OCSSPs + art 17 does not mandate it!**



-  Uploaded content available to public on platform
-  Uploaded content blocked - not available to public on platform

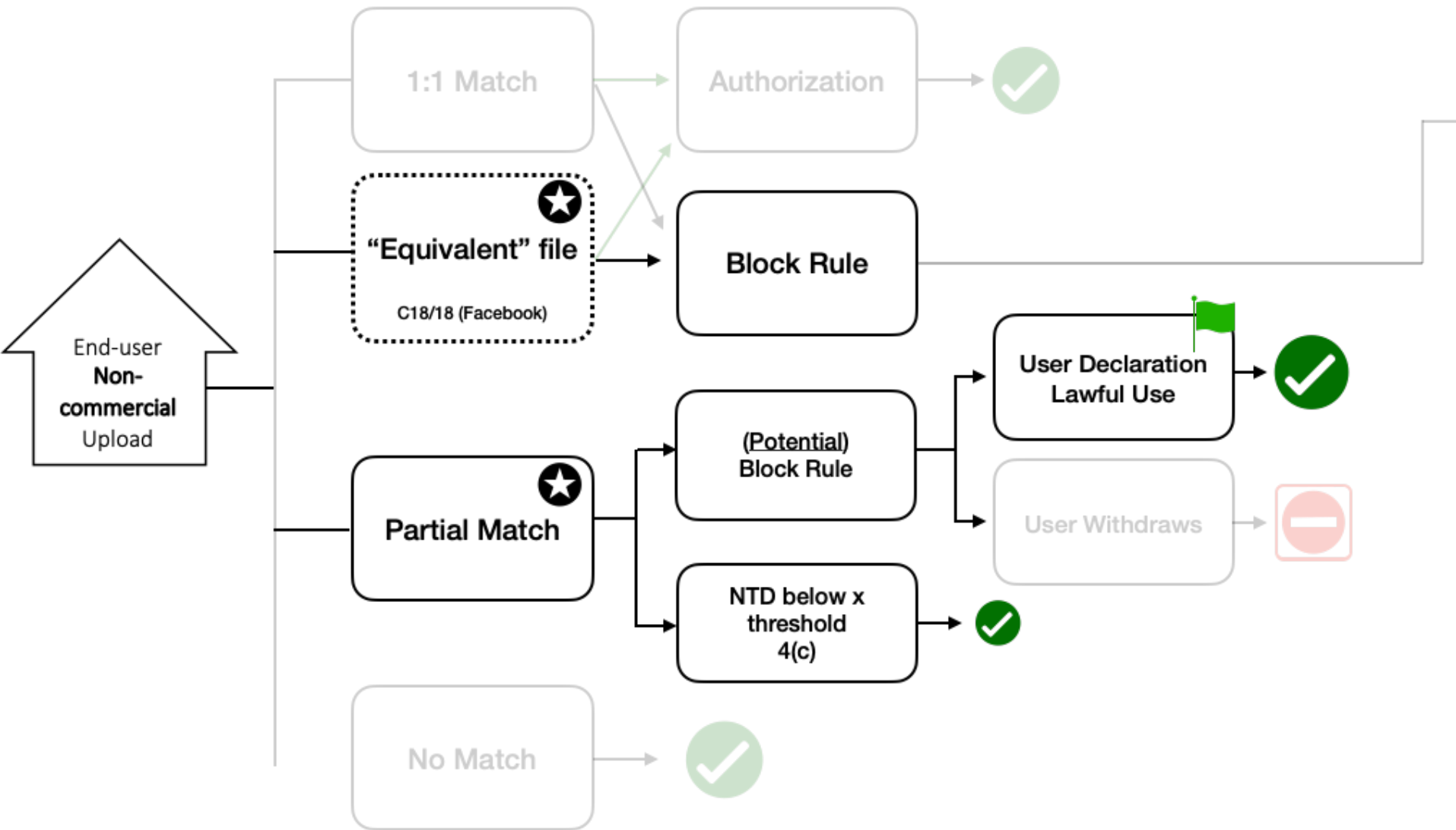
★ **Equivalent file:** narrow interpretation (e.g. high percentage similarity, limited to certain types of works CRTs are suitable for, attention to differences in national laws) // **Partial Match:** block rules in this scenario should arguably be “duly justified” (difficult to do ex ante for partial matches); is 17(4)(b)(c) sufficient legal basis for blocking most partial matches?

**1 size does not fit all OCSSPs + art 17 does not mandate it!**



- ✓ Uploaded content available to public on platform
- ✗ Uploaded content blocked - not available to public on platform

★ **Equivalent file:** narrow interpretation (e.g. high percentage similarity, limited to certain types of works CRTs are suitable for, attention to differences in national laws) // **Partial Match:** block rules in this scenario should arguably be "duly justified" (difficult to do ex ante for partial matches); is 17(4)(b)(c) sufficient legal basis for blocking most partial matches?



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## Some References

see also: <https://www.ivir.nl/employee/quintais/>

- João Pedro Quintais, Giancarlo Frosio, Stef van Gompel, P. Bernt Hugenholtz, Martin Husovec, Bernd Justin Jütte, Martin Senftleben, *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics*, 10 (2020) JIPITEC 277 para 1. <https://www.jipitec.eu/issues/jipitec-10-3-2019/5042>
- Husovec, Martin and Quintais, João, *How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms* (October 1, 2019). Available at SSRN: <https://ssrn.com/abstract=3463011> or <http://dx.doi.org/10.2139/ssrn.3463011>
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- Christina Angelopoulos, João Pedro Quintais, *Fixing Copyright Reform: A Better Solution to Online Infringement*, 10 (2019) JIPITEC 147 para 1. <https://www.jipitec.eu/issues/jipitec-10-2-2019/4913>
- Quintais, João, *Untangling the Hyperlinking Web: In Search of the Online Right of Communication to the Public*. *J World Intellect Prop.* 2018;1–36; Amsterdam Law School Research Paper No. 2018-16; Institute for Information Law Research Paper No. 2018-02. Available at SSRN: <https://ssrn.com/abstract=3199733> and <https://onlinelibrary.wiley.com/doi/abs/10.1111/jwip.12107>