

**HOW MISGUIDED TRANSLATIONS IMPACT USERS  
AND LEAD TO INACCURATE TRANSPOSITION –  
THE CASE OF ‘BEST EFFORTS’ UNDER ARTICLE 17 DCDSM**

**WHEN TRANSLATIONS  
SHAPE LEGAL SYSTEMS**



# PRESENTATION OUTLINE



Broader context



Research scope



'Best efforts' concept



Methodology



Results

Article 17 DCDSM

'Best Efforts'

Meaning

Translations

Transposition

Harmonization

**COPYRIGHT  
& RELATED  
RIGHTS**

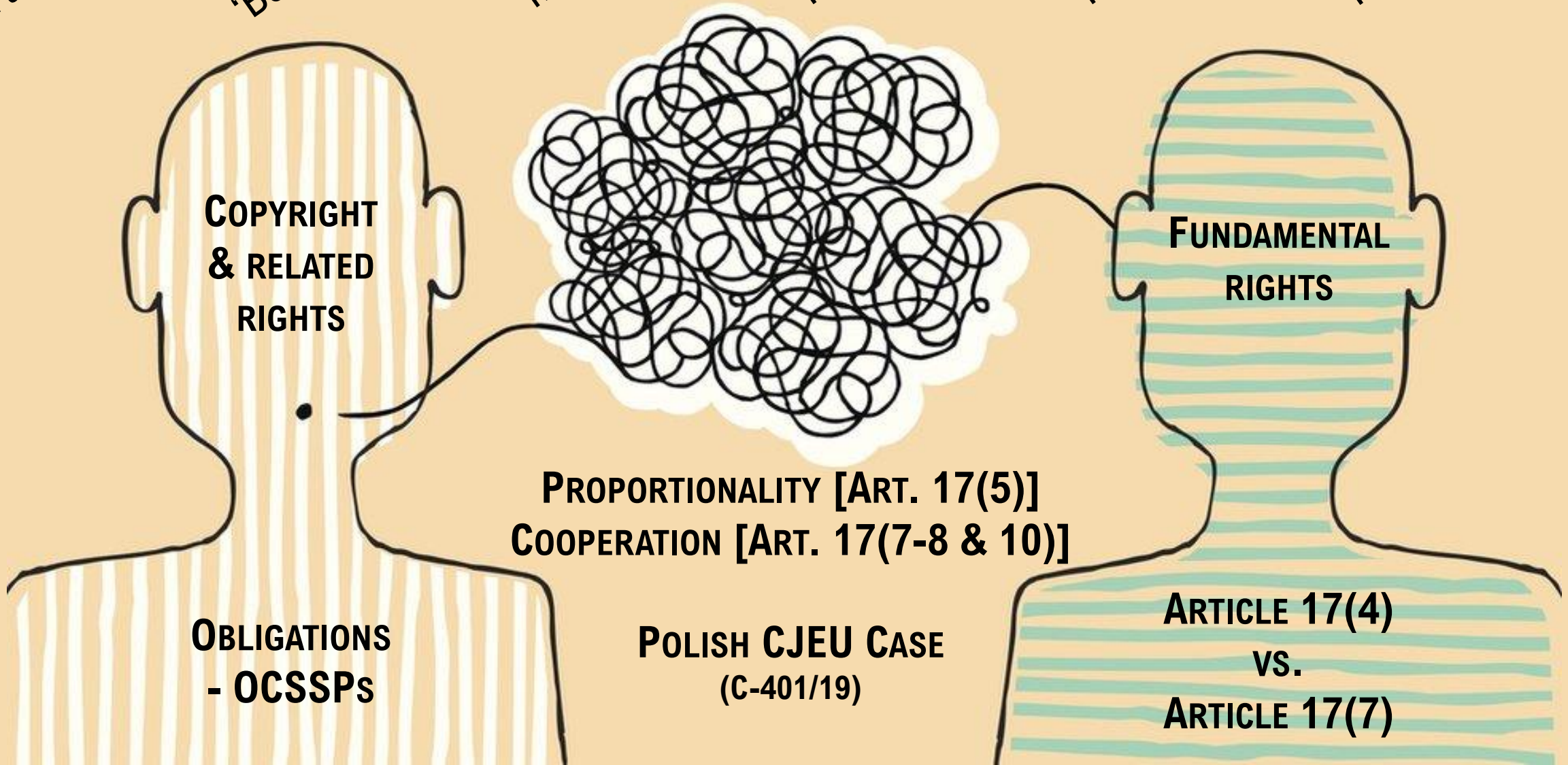
**FUNDAMENTAL  
RIGHTS**

**PROPORTIONALITY [ART. 17(5)]  
COOPERATION [ART. 17(7-8 & 10)]**

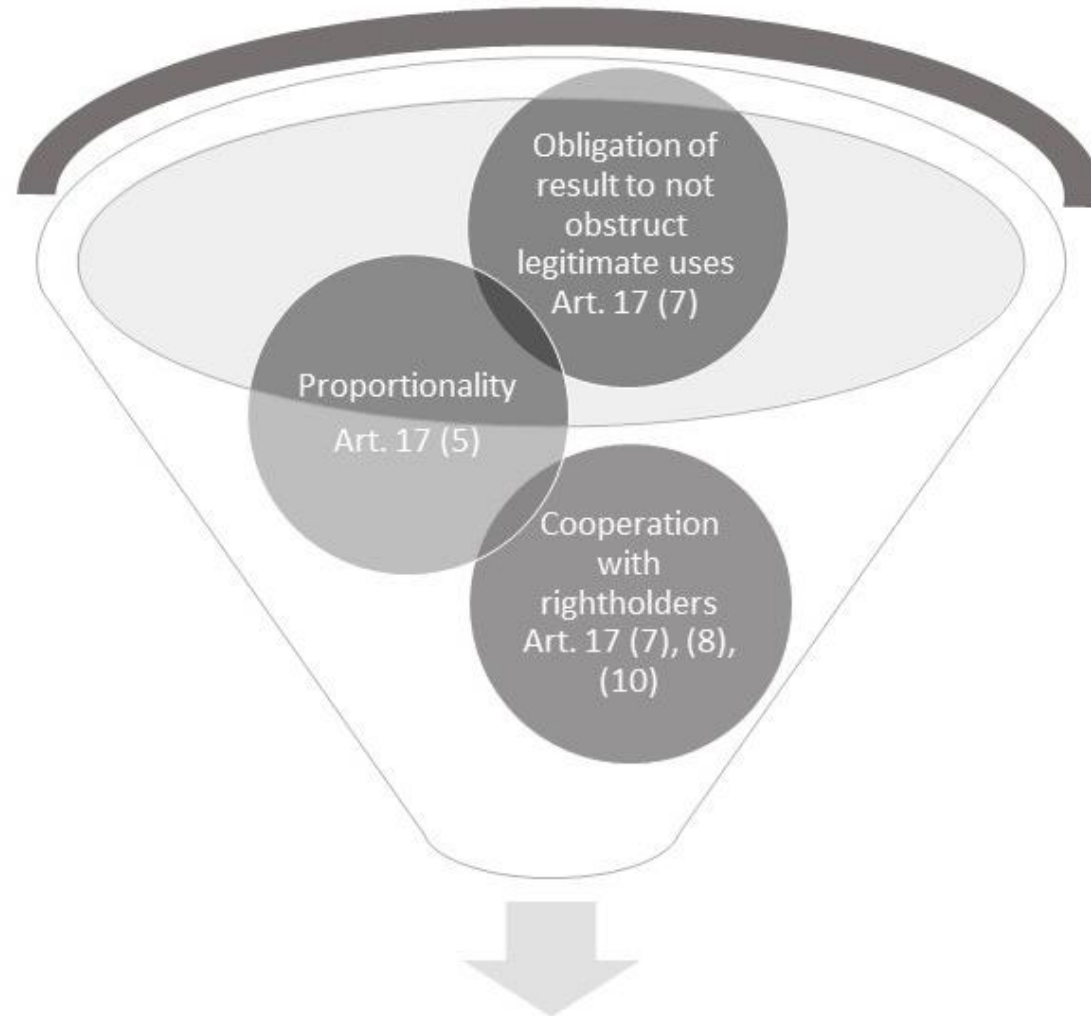
**OBLIGATIONS  
- OCSSPs**

**POLISH CJEU CASE  
(C-401/19)**

**ARTICLE 17(4)  
VS.  
ARTICLE 17(7)**



## Non obstruction of user limitations & exceptions Art. 17 (7) – Obligation of result



**Best efforts by OCSSPs**  
Art. 17 (4) – Obligation of means



**TRANSLATION  
INACCURACIES**

**LEGAL  
UNCERTAINTY**

**MISGUIDED  
INTERPRETATION**

**FRAGMENTATION**

**INCORRECT  
TRANSPOSITION**

**USERS,  
PLATFORMS,  
CREATORS**

Minimum = 99%

Quality = xx,xx

Types of Errors

Error classified by level of severity and multiplied by a weighting factor

**Minor**

**Major**

**Critical**

1 score = 10

1 score = 20

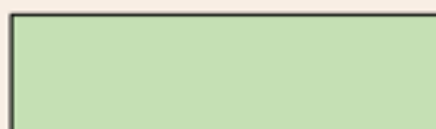
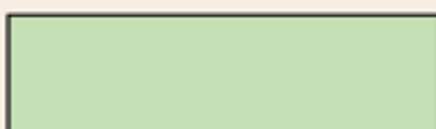
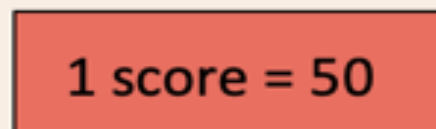
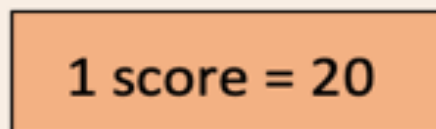
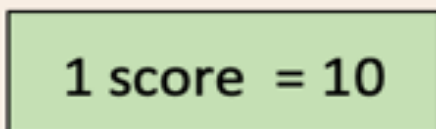
1 score = 50

Accuracy

Structure

Terminology

Outcome





**FOREIGNIZATION**



**DOMESTICATION**



**CLOSEST POSSIBLE  
MATCH**



# TRANSLATION APPROACHES: THE GOOD, THE BAD, THE UGLY



**Excessive threshold  
Incoherence and inconsistency**



**A step in the right direction but still inaccurate**



**The *ipssimis verbis*  
The 'reasonable' approach  
As close as possible transposition**



# ILLUSTRATIONS: **THE BAD**

## ITALY & PORTUGAL AND BULGARIA

### **Italy: Inaccurate transposition due to an excessive threshold**

The Italian translation is ‘i massimi sforzi’: this is a manifest translation error as the terminology implies ‘maximum efforts’ instead of ‘best efforts’. This should, at a minimum, be corrected in the national transposition process.



### **Portugal & Bulgaria: Inaccurate transposition due to excessive thresholds used in a non-coherent and inconsistent manner**

The Portuguese and Bulgarian translation do not follow the original text’s consistent approach of using ‘best efforts’ throughout Article 17(4), instead they mix various terminologies. (Portugal: ‘all efforts’ combined with ‘best efforts’; Bulgaria: ‘made all possible efforts’ mixed with ‘made maximum efforts’)

# ILLUSTRATIONS: THE UGLY


## GERMANY

**Germany: Risk of inaccurate transposition resulting from use of a wrong standard combined with accurate justification at first but rectified in the latest proposal**

Initially it kept the wording in the DCDSM's official German translation: inaccurately translating 'best efforts' into 'alle Anstrengungen'.



It highlighted the problem in the legislation's explanatory remarks to avoid it being interpreted as setting an obligation of 'all efforts' = still a risk of an inaccurate implementation or incorrect interpretations by stakeholders.

The German proposal switched very recently to 'bestmögliche Anstrengungen', an expression much closer to the original 'best efforts' standard.  National legislators can remedy inaccurate translation!

# ILLUSTRATIONS: THE GOOD

## GERMANY

**The Netherlands: As close as possible transposition when the ‘efforts’ standard cannot be transposed as such**



The initial proposal was to translate ‘best efforts’ into ‘have done everything possible’ (‘alles in het werk hebben gesteld’) based on an incorrect translation in EU Official Journal as starting point.

The text adopted by the Second Chamber switched to ‘best ability’ (‘beste vermogen’), a standard closer to the legal concept of ‘best efforts’, as used in the DCDSM.

**THE ULTIMATE IRONY:  
FRAGMENTATION RESULTING FROM A SINGLE MARKET DIRECTIVE**

Only in 10 out of the 24 official EU languages 'best efforts' was translated through an equivalent expression

LANGUAGE	TRANSLATION OF 'BEST EFFORTS' IN EU OFFICIAL JOURNAL	LITERAL OR APPROXIMATELY LITERAL TRANSLATION INTO ENGLISH	DOES THE TRANSLATION MEET THE COMMUNICATIVE PURPOSE IN THE TARGET LANGUAGE?
Bulgarian	Two different expressions are used within Article 17(4), namely: всички възможни усилия; and, максимални усилия	Two different expressions are used within Article 17(4), namely: all possible efforts, and, maximum efforts	No
Croatian	sve u svojoj moći	all that is possible (or 'all that is in one's power')	No
Czech	veškeré úsilí	every effort	No
Danish	bedste indsats	best efforts	Yes
Dutch	'alles in het werk hebben gesteld' Change made in draft legislation to 'beste vermogen'	'have done everything possible' Change made in draft legislation to 'best ability'	Yes
English	best efforts	best efforts	Yes
Estonian	suurimaid võimalikke pingutusi	the greatest possible efforts	No
Finish	toteuttaneet toimia parhaansa	(have taken their) best effort (or action)	Yes
French	leurs meilleurs efforts	best efforts	Yes
Gaelic	sárdhícheall	best efforts	Yes
German	alle Anstrengungen Changed recently to bestmögliche Anstrengungen	all efforts was initially proposed combined with a clarification in the explanatory remarks that the use of 'all' in the German version does not provide for a higher	Yes

LANGUAGE	TRANSLATION OF 'BEST EFFORTS' IN EU OFFICIAL JOURNAL	LITERAL OR APPROXIMATELY LITERAL TRANSLATION INTO ENGLISH	DOES THE TRANSLATION MEET THE COMMUNICATIVE PURPOSE IN THE TARGET LANGUAGE?
English	best efforts	best efforts	Yes
French	leurs meilleurs efforts	best efforts	Yes
Italian	i massimi sforzi	maximum efforts	No

# **THE WAY FORWARD – THREE ELEMENTARY STRATEGIES FOR ACCURATELY TRANSLATING ‘BEST EFFORTS’**

- (1) a literal translation (even when it implies foreignization);
- (2) translating it as ‘reasonable efforts’ (whenever it finds more resonance in legal language use); and,
- (3) (in the absence of the former strategies) employing another grammatical construct with an equivalent meaning.

**At any rate, expressions going beyond the original text’s scope, such as ‘all’ or ‘maximum’ like in the Italian translation, must be avoided.**

# **THE WAY FORWARD – ARTICLE 17 IS FRAMED BY ‘PROPORTIONALITY’ (§5) & COOPERATION (§§7-8 & §10)**

Article 17 refers to the following concepts to set the context and boundaries for the interpretative framework defining the scope and breadth of ‘best efforts’:

- 1) ‘proportionality’ (§5);
- 2) ‘cooperation’ (§§7-8 & §10).

**The EU institutions have further defined these boundaries by clarifying that the ‘best efforts’ required are part of an ‘obligation of means’, limited by the ‘obligation of result’ to not obstruct the limitations and exceptions of users (§7).**

# **THE WAY FORWARD – KEEP ‘BEST EFFORTS’ AT A LEVEL OF REASONABLENESS**

**Catch 22 dilemma for OCSSPs:** Excessive thresholds, like in the Italian translation, leaves OCSSPs no other option than to:

- block content under the ‘obligation of means’ set out under Article 17(4); and,
- breach Article 17(7)’s ‘obligation of result’ to not impede users exceptions and limitations.

 Impacting users’ fundamental rights & jeopardizing OCSSPs’ functioning, especially hurting smaller (EU) ones.

**Member States need to keep Article 17(4)’s ‘best efforts’ standard at a level of reasonableness to ensure that the national transpositions take due account of proportionality and the cooperation with rightholders.**

# **THE WAY FORWARD – FIX @ 2 LEVELS: EC & NATIONAL IMPLEMENTATION**

To fix the apparent translations errors identified and ensure that the contextual framework limiting Article 17's 'best efforts' concept is taken into account, the EC and the Member States need to:

**European Commission:** Issue corrigenda for incorrect language versions.

**Member States:** Implement 'best efforts' correctly, as translation errors are manifest.

**Italy should follow the examples of Germany and the Netherlands, showing that national legislators can remedy inaccurate EU Official Journal translations.**