

Decision

- Case ID: [REDACTED] -

In the out-of-court dispute settlement process between

[REDACTED]

- Complainant -

and

Instagram

- Online Platform -

because of

the removal of content based on Instagram's Policy on Adult Nudity and Sexual Activity

the certified out-of-court dispute settlement body User Rights decided through its independent reviewers on **21/08/25**:

User Rights finds that Instagram's decision to remove the content from the platform did not sufficiently take into account the fundamental rights of the complainant when applying the Policy on Adult Nudity and Sexual Activity. The content should not have been removed on this basis as it does not violate the platform's policy. Instagram should therefore reinstate the content.

I. Summary

User Rights finds that Instagram's decision to remove the complainant's content was unjustified. The image, featuring artistic tones, did not violate the Policy on Adult Nudity and Sexual Activity, as it lacked explicit sexual indicators as well as nudity. Moreover, Instagram failed to consider the complainant's rights to freedom of expression and artistic freedom, making the removal disproportionate and arbitrary. User Rights instructs Instagram to reinstate the content, as it aligns with artistic expression and does not breach platform policies.

II. Facts of the case

The complaint deals with content posted by the complainant. The image shows a close-up of a person's torso, with their skin exposed and wrapped in ropes in a style resembling Shibari, a form of Japanese rope bondage. The person is wearing underwear, and there is a tattoo visible on their skin. Over the person's breasts, there are two digital stickers.

On July █, 2025 Instagram removed the content from the platform.

On August █, 2025, the complainant appealed Instagram's decision to User Rights. When filing their complaint to User Rights, the complainant was asked to provide relevant context. The complainant pointed out that the image did not display any nipples or sexual activity. Furthermore, the complainant argued that the rule regarding "female nipples" constituted sex discrimination and should be considered illegal.

On August 5, 2025, User Rights informed Instagram about the complaint to User Rights and gave it the opportunity to provide a submission. User Rights invited Instagram to provide additional information justifying its contested content moderation decision. Instagram did not respond before the deadline expired.

III. Admissibility

The complaint is admissible.

User Rights is certified to resolve disputes between platforms and complainants regarding moderation of content posted on a social media platform in German or English. Instagram is a social media platform. The relevant content is in English, thus a language for which User Rights is certified. Instagram removed content that the complainant had shared on Instagram. The removal of content constitutes a measure which, in accordance with Art. 20 para. 1 a) and 21 para. 1 DSA, can be appealed to User Rights.

IV. Merits

The complaint is justified.

User Rights concludes that Instagram's decision to remove the content from the platform was unjustified regarding their own Policy on Adult Nudity and Sexual Activity. The online platform did not sufficiently take into account the fundamental rights of the complainant when applying the mentioned policy. The content should not have been removed on this basis. Instagram should therefore reinstate the content.

1. Scope of review

When moderating the content of a user, Instagram has an obligation to provide a statement of reason satisfying the requirements of Art. 17 DSA. This statement of reason must, among other information, reference the specific contractual ground relied on, Art. 17 (3) e) DSA. The subject of the complaint is thus primarily determined by which regulation the platform bases its action on.

Should Instagram later determine that the invoked policy was not violated but a different policy was, it needs to make a new content moderation decision, provide a statement of reason for that decision to the user, and the user has the right to appeal that decision, Art. 20 or 21 DSA.

2. Substantive Assessment

User Rights bases its decision on the most recent version of the platform's general terms and conditions.

The content shared by the complainant does not violate Instagram's Community Standards regarding Adult Nudity and Sexual Activity. The image depicts a person's torso wrapped in ropes in a Shibari style, but it does not show any explicit sexual activity or nudity that would contravene the platform's guidelines.

Instagram's Community Standards restrict the display of nudity or sexual activity, particularly when it involves visible genitalia, anuses, or explicit sexual activity. It also prohibits photorealistic imagery depicting fetish that involves BDSM (bondage and discipline, domination and submission, sadism and masochism) but only when sexual indicators are also present. However, the policy allows for artistic expression, provided it does not include the prohibited elements.

The image in question does not depict any visible genitalia, anuses, or female nipples, nor does it involve explicit sexual activity. The ropes are used in a decorative manner, and the presence of cartoon animals and text suggests an artistic or humorous context rather than a sexual one. While the image might suggest associations with BDSM aesthetics, it does not display any explicit sexual content or indicators.

The complainant's image can be considered an artistic representation of Shibari, which is a recognized form of rope art. The inclusion of cartoon stickers to cover the model's breasts further supports the notion that the image is not intended to be sexually suggestive. The complainant's argument that the image is artistic is supported by the lack of any elements that would typically be considered a violation under the Community Standards. Therefore, the platform's decision to remove the content was not justified, as the image does not meet the criteria for prohibited adult nudity or sexual activity.

Finally, an assessment of the platform's decision regarding its compatibility with the fundamental rights of the complainant (Article 14(4) DSA) seems necessary.

3. Fundamental Rights Assessment

Instagram's decision is also incompatible with the fundamental rights of the complainant.

a. Application of fundamental rights under the DSA

Art. 14 (4) DSA specifies that platforms, when enforcing restrictions, have an obligation to pay due regard to the fundamental rights and legitimate interests of users and other involved parties, and to act in a diligent, objective and proportionate manner.

The obligation to respect fundamental rights does not arise from the DSA but from the Charter of Fundamental Rights of the European Union (CFR). The fundamental rights enshrined in the Charter apply not only to disputes between citizens and the state. Rather, they are also applicable to purely private disputes that do not involve state authorities (cf. CJEU, judgment of January 29, 2008, C-275/06 *Promusicae*, ECLI:EU:C:2008:54). Art. 14(4) DSA merely specifies this in relation to disputes between users and providers of online platforms.

Against this background, User Rights will weigh the opposing fundamental rights positions of the complainant and the platform to determine whether the platform's decision is in accordance with Art. 14(4) DSA.

b. Fundamental rights to be considered

The complainant can invoke the fundamental right to freedom of expression (Art. 11 CFR). The publication of the content by the complainant is protected under Art. 11 CFR. To determine the scope of protection of Art. 11 CFR, the case law of the European Court of Human Rights (ECtHR) on Art. 10 of the European Convention on Human Rights (ECHR) may be used as a source of interpretation pursuant to Art. 52(3) CFR (Lock, "Art. 52 GRC" in Kellerbauer et al. (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, 2019, paras. 28f.).

Art. 11 CFR protects all forms and modes of expression. The dissemination of content via online platforms is also covered by Art. 11(1) CFR. Based on these standards, the publication of the content on the online platform falls within the scope of protection of freedom of expression under Art. 11 CFR.

In addition, the complainant can invoke the right to freedom of the arts under Art. 13 CFR. Artistic freedom is primarily derived from the right to freedom of expression

(CJEU, Judgment of 29 July 2019 – C 476/17, ECLI:EU:C:2019:624, para. 34). Accordingly, the scope of protection afforded by artistic freedom is equally broad. It encompasses all forms of artistic expression, including film, music, theatre, and the visual arts. Based on these standards, the publication of the content on the online platform also falls within the scope of protection of artistic freedom under Article 13 CFR (Sayers, Article 13 CFR, in: Peers, Hervey and Ward, The EU Charter of Fundamental Rights: A Commentary, 2021, para. 13.48).

Thus, the publication of the content on the online platform is protected under the right to freedom of the arts.

c. Fundamental rights requirements for moderation decisions of online platforms.

From the balancing of the fundamental rights positions of the complainant and the platform, it follows that content moderation measures must not be arbitrary, must be proportionate, and that online platform providers are obliged to implement moderation measures consistently (on these requirements, see: Wischmeyer/Meißner, Horizontalwirkung der Unionsgrundrechte – Folgen für den Digital Services Act, NJW 2023, 2678).

(1) Non-arbitrariness

The content moderation measure of the online platform is not arbitrary. Moderation measures are not arbitrary if they are based on an objective reason and serve a legitimate goal.

This is the case here. The measure serves to enforce platform policies, which aim to maintain an attractive communication environment and prevent negative impacts on the users of the online platform as well as third parties.

(2) Proportionality

The content moderation measure violates the fundamental rights of the complainant because it is disproportionate.

Under the proportionality requirement, platforms must impose sanctions in a graduated manner. For instance, depending on the severity of the breach of

policies, platforms can be required to delete individual posts prior to suspending an account.

In this case, less restrictive measures were available if Instagram deemed necessary to restrict the accessibility of the present content. These measures could have included the use of a content warning screen rather than outright removal. Applying age-restriction tools to limit access for minors could also have been an option.

Since these measures would have addressed any potential concerns while still preserving the complainant's freedom of expression and artistic freedom, removal was not necessary.

The principle of proportionality furthermore requires a balancing of the rights and interests of the complainant, the online platform, and, if applicable, third parties. These rights and interests should be given the highest possible level of effectiveness. In this balancing process, not only fundamental rights positions but also principles enshrined in European secondary law may be taken into account (ECJ, Judgment of April 17, 2018, Egenberger, C-414/16, ECLI:EU:C:2018:257, para. 81).

The principle of proportionality is also reflected in Art. 14(4) DSA, which stipulates that providers of online platforms must act proportionately. This includes the obligation to consider "the rights and legitimate interests of all parties involved as well as the fundamental rights of users."

The factors to be considered in the balancing include, among others, the focus of the platform, as well as the nature of the expression of opinion disseminated by the complainant.

While the protection of users from sexually explicit material constitutes a legitimate aim, the measure at issue was not suitable, as the image contained no explicit sexual indicators and therefore fell outside the scope of the harm the policy seeks to address. Nor was it necessary, since less restrictive means—such as the application of a content warning, contextual consideration of its artistic nature, or age-restriction—were readily available to achieve the same objective.

The removal of the content significantly curtailed the complainant's artistic freedom by preventing the dissemination of an artistic work that, while potentially suggestive in style, contained no explicit sexual indicators. In light of the minimal risk posed to the platform's legitimate interests, this interference placed an excessive and unjustified burden on the complainant's right to artistic expression, thereby rendering the measure disproportionate.

In consideration of these factors, User Rights finds that the content moderation measure is disproportionate.

V. Result

User Rights finds that Instagram's decision to remove the content from the platform is unjustified, as no violation of its Policy on Adult Nudity and Sexual Activity can be established. In addition, the moderation measure did not sufficiently take into account the fundamental rights of the complainant when applying the Policy on Adult Nudity and Sexual Activity. The content should not have been removed on this basis. Instagram should therefore reinstate the content.

Note: The decisions of out-of-court dispute settlement bodies are not binding for platforms according to Art. 21 para. 2, third sentence of the DSA. However, as part of their duty to cooperate in good faith pursuant to Art. 21 para 2, first sentence of the DSA, platforms must assess whether there are reasons against implementing the decision and must inform the dispute resolution bodies about the implementation of the decision.