

Articles 15 & 17 of the Directive on Copyright in the Digital Single Market

Questionnaire – Annex to the Comparative National Implementation Report

AUSTRIA

Last Updated: 3 August 2022

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This comparative report is based on 11 national questionnaires prepared by national legal experts.

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The full study is available for download at: <https://informationlabs.org/copyright>

Country: AUSTRIA

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PART I: Article 15 CDSMD

Note: The questions below concern the national implementation of Article 15 CDSMD in your country. They refer to this as the “local national implementation” or LNI. It is recommended that you read all the questions before beginning to compose answers. In all responses, please cite the relevant provisions of national law in your country.

Background information

1. Did your national jurisdiction provide protection (whether via copyright or a relevant targeted related right) for press publications prior to the adoption of the CDSMD? If so, please briefly describe this, indicating any differences from the protection provided by Article 15 CDSMD.

No. However, section 79 Austrian Copyright Act provides for the protection of press articles that are not subject to copyright. This protection is designed as a safeguard under competition law.

2. Has Article 15 CDSMD been transposed into national law in your country? If so, please cite the legal act with which and the date on which this was done. Please also briefly indicate whether you consider that the transposition takes a textual (“*ad litteram*”) or intentionalist approach (e.g., one that is adaptive to national circumstances).

Section 76f Austrian Copyright Act, Federal Law Gazette BGBl I Nr 244/2021 of 31 December 2021 (textual approach).

If available, please provide a link to the legal provision in the official language(s) of your jurisdiction. If you are aware of a good (official or unofficial) English language translation, please include that as well.

<https://www.ris.bka.gv.at/eli/bgbl/1936/111/P76f/NOR40241426>

Note: if there is no national implementation of Article 15 CDSMD, please proceed to Part II of the questionnaire.

AC 1: Subject matter

- 3. What is the subject matter (object) of protection by the LNI and how is this defined? Please focus on any differences (including additions) from the concept of “press publications” as defined by Art. 2(4) CDSMD.**

Section 76f (2) Austrian Copyright Act. The subject matter of protection is based on the wording of the definition of a “press publication” in Art. 2 (4) CDSMD – except for the terms in Art. 2 (4) (c) CDSMD. Section 76f (2) clause 2 Austrian Copyright Act indicates that the protection does not cover periodicals published for scientific, artistic or academic purposes, such as scientific journals or literary magazines, as they are not press publications (see Art. 2 (4) clause 2 CDSMD).

- 4. Does the LNI protect against uses of individual words or very short extracts? If these are excluded from protection, how are they defined? Please note whether a qualitative or quantitative approach is taken and whether such short extracts may include non-literary content. Please note whether there are specific provisions on headlines.**

See Art. 15 (1) clause 4 CDSMD and recital 58 CDSMD: hence, section 76f (5) Austrian Copyright Act excludes “individual words and very short extracts” from protection, even if they are part of a hyperlink (see question 10). The interpretation of “individual words and very short extracts” is left to case law.

- 5. Does the LNI extend to mere facts reported in its subject matter? If these are excluded from protection, how are they defined?**

There is no explicit/direct implementation of recital 57 CDSMD in the Austrian Copyright Act. Notwithstanding, section 76f Austrian Copyright Act does not provide for the protection of “mere facts” because they are not classified as “works” entitled to copyright protection.

- 6. Does the LNI extend to public domain content incorporated in its subject matter? If these are excluded from protection, how are they defined?**

See section 76f (4) clause 4 Austrian Copyright Act and Art. 15 (2) clause 2 CDSMD. Hence, works and other subject matter for which protection has expired are excluded from protection.

- 7. Does the LNI include any other threshold conditions for protection?**

No.

AC 2: Right-holders

- 8. Who are the beneficiaries of the protection for press publications in the LNI? Please indicate any exclusions, (e.g., territorial). Please indicate if the LNI employs lists of press publications or beneficiaries that would be covered.**

Section 76f (1) Austrian Copyright Act refers to Art. 2 (4) (c) CDSMD. Therefore, the beneficiaries are service providers (see Art. 2 (5) CDSMD) who publish press publications in analogue or digital form under their initiative, editorial responsibility and control. The protection for press publications benefits publishers that have their registered office in Austria or that are established in a Member State of the EU/EEA and have their registered office, central administration or principal place of business in a Member State of the EU/EEA (see section 99d in conjunction with section 98 (2) Austrian Copyright Act).

AC 3: Restricted acts

9. Against what kind of acts does the LNI protect? Please provide any relevant definitions.

Section 76f (1) Austrian Copyright Act. The scope of protection is limited to the rights of reproduction (see section 15 Austrian Copyright Act) and making available to the public (see section 18a Austrian Copyright Act), with both types of use only being relevant for online use. See also Art. 15 (1) clause 1 CDSMD as well as recitals 55 and 57 CDSMD.

10. Does the LNI cover hyperlinking to the protected subject matter? If not, how is hyperlinking defined?

No, section 76f (5) Austrian Copyright Act excludes hyperlinking from protection. “Hyperlinking” refers to the act of communicating to the public according to the case law of the ECJ, but not to the communication of small parts (snippets) of the content of the linked website in the hyperlink. Though individual words and very short extracts are excluded from protection in any case – even if they are part of a hyperlink (see question 4).

AC 4: Targeted users

11. Does the LNI target use by a specific kind of user (provider)? Please provide any relevant definitions. Specifically, please indicate whether private or non-commercial uses by individual users are covered. Please also indicate whether online platforms (OCSSPs) are covered.

Section 76f (1) Austrian Copyright Act covers the online use of press publications by information society service providers. The latter are defined in Art. 1 (1) (b) Directive (EU) 2015/1535 which was implemented in section 1 (1) item 2 Notifikationsgesetz (see Art. 2 (5) CDSMD). Additionally, section 76f (5) Austrian Copyright Act excludes private or non-commercial uses of press publications by individual users (see Art. 15 (1) clause 2 CDSMD). With a view to section 18c Austrian Copyright Act and the ruling of the CJEU in joined cases C-682/18 (*YouTube*) and C-683/18 (*Cyando*), OCSSPs are covered.

12. Does the LNI allow for the rights it provides to be invoked against:

- a) **right owners whose content is incorporated in the protected subject matter?**
- b) **holders of licenses to exercise rights in content that is incorporated in the protected subject matter?**

Please describe the applicable rules.

According to sub-paragraph a) Section 76f (4) clause 1 Austrian Copyright Act stipulates that the protection of press publications cannot be invoked against authors and other right-holders in respect of the works and other subject matter incorporated in press publications. According to section 76f (4) clause 2 Austrian Copyright Act, the protection of press publications shall not affect the right of authors and other right-holders to exploit their works and other subject matter independently from the press publication in which they are incorporated.

According to sub-paragraph b) When a work or other subject matter is incorporated in a press publication on the basis of a non-exclusive licence, the protection of press publications shall not be invoked to prohibit the use by other authorised users (see section 76f (4) clause 3 Austrian Copyright Act and Art. 15 (2) clause 2 CDSMD).

AC 5: Exceptions and limitations

13. Does the LNI recognise exceptions or limitations to the protection it provides? If so, please indicate what these are.

- Works or other subject matter for which protection has expired are excluded from protection (see section 76f (4) clause 4 Austrian Copyright Act and Art. 15 (2) clause 2 CDSMD).
- According to section 76f (5) clause 3 Austrian Copyright Act, all available limitations/exceptions to the rights of reproduction and making available to the public shall apply mutatis mutandis.

AC 6: Licensing

14. Does the LNI include provisions on the licensing (incl. systems of extended collective licensing) of uses of press publications? If so, please briefly describe any relevant details. For example, these could involve the following:

- **criteria for determining the height of compensation;**
- **the process for negotiating compensation;**
- **transparency duties (incl. data sharing obligations);**
- **duties to engage in negotiations;**
- **oversight by a government authority;**
- **(mandatory) collective rights management.**

No. As far as the licensing of the protection of press publications itself is concerned, no particularities are to be observed (see section 76f (5) clause 3 in conjunction with sections 24, 26, 27 (1), (3), (4) and (5) and section 31 (1) Austrian Copyright Act).

AC 7: Revenue sharing

15. Does the LNI require that any revenue it provides be shared with authors of works incorporated in its subject matter? If so, does it provide details on e.g., the size of the share or modes of collection and distribution or transparency obligations on press publishers? Please describe the applicable rules.

According to section 76f (6) Austrian Copyright Act, authors of works incorporated in a press publication shall receive an appropriate share of the revenues. The Austrian Copyright Act does not provide further details.

AC 8: Term of protection

16. What is the term of the protection afforded to press publications by the LNI?

The protection of press publications expires two years after the press publication is published. That term is calculated from 1 January of the year following the date on which the press publication is published (see section 76f (3) Austrian Copyright Act and Art. 15 (4) CDSMD).

AC 9: Waiver

17. Can right-holders waive their rights under the LNI? Can authorisation be given for free?

In principle, right-holders can waive their rights and give authorisation for free. However, the Austrian Copyright Act does not provide further details on that – apart from the provision in section 76f (5) clause 3 in conjunction with section 74 (2) Austrian Copyright Act.

AC 10: Entry into effect

18. From what date did the protection provided by the LNI come into effect in your jurisdiction?

The protection of press publications came into force on 1 January 2022.

However, the protection does not apply to press publications first published before 6 June 2019 (see section 116 (18) Austrian Copyright Act and Art. 15 (4) CDSMD).

Additional information

19. Can you think of any noteworthy divergence in the LNI from the standards set out in Article 15 of the CDSMD that you have not already addressed above? If so, please elaborate.

Art. 15 (1) CDSMD and recital 55 CDSMD provide for the protection of publishers of press publications that are established in a Member State (and have their registered office, central administration or principal place of business within the Union). The Austrian Copyright Act does not refer to this territorial restriction.

PART II: Article 17 CDSMD

Note: The questions below concern the national implementation of Article 17 CDSMD in your country. They refer to this as the “local national implementation” or LNI. It is recommended that you read all the questions before beginning to compose answers. In all responses, please cite the relevant provisions of national law in your country.

Background information

1. **Has Article 17 CDSMD been transposed into national law in your country? If so, please cite the legal act with which and the date on which this was done. Please also briefly indicate whether you consider that the transposition takes a textual (“*ad litteram*”) or intentionalist approach (e.g., one that is adaptive to national circumstances).**

Article 17 CDSMD has been transposed into national law by the Copyright Amendment 2021 – (Urheberrechtsnovelle 2021). Several new provisions were included in national acts, such as §§ 18c, 42f, 87b (5), 89a, 89b UrhG (Copyright Act). The implementation follows an intentionalist approach.

If available, please provide a link to the legal provision in the official language(s) of your jurisdiction. If you are aware of a good (official or unofficial) English language translation, please include that as well.

Source: https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2021_I_244/BGBLA_2021_I_244.html

Note: if there is no national implementation of Article 17 CDSMD you can end the questionnaire at this point.

AC 1: Subject matter

2. **What is the subject matter (object) of protection by the LNI?**

The subject matter of the protection by the LNI are works of copyright, such as literary and artistic works, works of the fine arts, works of sound and cinematography, as well as edits or collections of such works.

AC 2: Right-holders

3. **Who are the beneficiaries of the protection provided by LNI? Please note whether there are any deviations from the directive.**

Authors and their works and the holders of related rights are protected from the new Copyright Amendment, and includes particular protection from infringements on platforms.

AC 3: Exclusive rights

4. **Against what kind of act does the LNI protect right-holders? Is a legal qualification given to those acts (e.g., “communication to the public”)?**

The new provisions intend to protect right-holders from copyright infringements.

AC 4: Targeted providers

- 5. Does the LNI target a specific kind of service provider? Please provide any relevant definitions, including any exclusions (“carve-outs”). Please focus on any differences from the concept of “online content sharing providers” (OCSSPs) as defined by Article 2(6) CDSMD and any elements taken from the recitals (e.g., facilitating piracy, definitions of “large amounts”).**

The LNI specifically targets providers of large online platforms, which is defined in § 18c UrhG as a provider of a service of information society, if it plays an important role in the market for online content by offering online content services such as audio and video streaming services and using these services to compete for the same target groups, and one of the main purposes of the service is to store a large number of works uploaded by its users and to provide the public with access to them, and that the service organizes and promotes this content in order to make a profit from it. There are several exceptions (i.e. non-profit online encyclopaedias), which follow Article 2(6) CDSMD. The definition differs from the definition in Art 2(6) CDSMD as it includes a need of competition with other service providers. In this regard, the LNI follows the Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market (COM(2021) 288 final, page 4). § 87a(5) UrhG states that the liability of service providers whose main purpose is to participate in or facilitate copyright infringement remains unaffected by the special regime introduced by the LNI.

- 6. Were the targeted service providers considered to infringe the relevant exclusive rights in your country prior to the adoption of the LNI? Please indicate whether any liability was primary or secondary.**

Yes, according to § 81 (1a) of the copyright act. See cases C-682/18 and C-683/18.

AC 5: Scope of protection

- 7. In your national jurisdiction prior to the transposition of the CDSMD did the service providers targeted by the LNI benefit from the protection of an immunity (e.g., the national implementation of the hosting safe harbour provided by Article 14 of the ECD (Directive 2000/31/EC))? If so, does this provision continue to apply?**

Article 16 of the E-Commerce-Act of Austria provides an exemption from the liability privilege for hosting providers. This provision is still valid, although § 89a (4) of the Copyright Act declares that it does not apply to uses by the Austrian implementation of Article 17 CDSMD. Beyond this, Article 16 of the E-Commerce-Act remains unaffected in its application on services providers as defined in § 18 c UrhG.

- 8. Does the LNI provide an immunity for targeted service providers against the protection it introduces? If so, please describe the conditions for this immunity. To the extent that such conditions relate to obligations to take action against infringing content, please distinguish between obligations to take action against current infringing content and obligations to take action against future infringing content.**

Yes. According to § 89a UrhG of the Copyright there are three requirements to be fulfilled: First of all, the platform has to make every effort to obtain permission and has to make every effort in accordance with high industry standards of professional diligence to ensure that certain works and other subject matters are not available. Furthermore, the provider has to disable access to works or other subjects or remove them from the website after being notified about the existence of such content and has to undertake all measures possible to prevent such works, etc. from being uploaded again, once becoming aware of the unauthorised use of this works or subjects by the right-holder.

- 9. Does the LNI identify a standard of care to which targeted service provider should adhere in relation to the conditions of the immunity? For example, the Directive makes reference to “best efforts” and to “high industry standards of professional diligence”. Please also discuss whether you consider any such terms used in the LNI to represent accurate translations of the corresponding terms in the EU provision, preferably taking into account both the English language and the national language versions.**

Yes. § 89a UrhG refers to a quite accurate translation of the terms in the EU provision, referring to “high industry standards of professional diligence” or in German: “nach Maßgabe hoher branchenüblicher Standards für die berufliche Sorgfalt”, which is the same wording as in the German version of the CDSMD. “Best efforts” is translated with “alle Anstrengungen” in the German translation of the Directive and is implemented in the LNI with the same wording.

- 10. Are the conditions for the immunity in the LNI subject to the principle of proportionality? If so, please describe any specified implications.**

Yes, § 89 a (2) states that in accordance to the principle of proportionality the nature, audience and scope of the services and the nature of the works uploaded by the users should be considered, as well as the availability of appropriate and effective means and the costs for these services. Furthermore, the restrictions of § 89 b in favour of the users must be taken into account.

- 11. Do the conditions of the immunity differ depending on the characteristics of the specific service provider (e.g., size or age)? If so, please describe those differences, providing any relevant definitions.**

In § 89a (3) of the Copyright Act there is an exemption included for smaller companies which have less than 10 million Euro annual turnover. Within the first three years after the company was formed these companies are only obliged to make every effort to obtain permission and in case they do not obtain permission, only remove illegal content if they are notified of it. Therefore, the requirements for immunity are lower than for other companies. However, if they have more than 5 Million users/month, they also have to provide proof that they have made best efforts to hinder the upload of the reported works in the future.

AC 6: Right-holder cooperation

- 12. Does the LNI depend the conditions of the immunity on right-holder cooperation? If so, please describe what cooperation is expected of right-holders.**

The liability of the provider depends on whether the right-holder has notified the platform of the infringement (notice-and-take-down according to § 89a (1) 3). Right-holders’ notice to platforms has to be “duly substantiated” (hinreichend begründet). Right-holders are also obliged to provide relevant and necessary information in order to trigger the provider’s obligation to ensure that works and other subject matter are unavailable.

- 13. Does the LNI allow right-holders to “earmark” content the unauthorised online availability of which could cause them significant economic harm? If so, please provide any definitions and conditions that govern such earmarking and describe any special regime set in place for earmarked content.**

We have no specific finding on this.

AC 7: General monitoring

- 14. Does the LNI permit the conditions of the immunity to result in general monitoring? If not, please explain how “general monitoring” is defined.**

No; § 89b UrhG explicitly states that there is no obligation for general monitoring. There is no legal definition of “general monitoring”.

15. Does the LNI recommend or dissuade from using any specific kind of technology in order to adhere to the conditions for immunity? If so, please describe.

The LNI introduces a rule against using automated filter systems (§ 89b UrhG) when assessing minor uses of works. Automatic filtering systems cannot recognise whether a particular act of use fulfils the conditions of free use of the work. However, § 89b (3) UrhG allows platforms to use automated means to block minor uses, if the right-holder can sufficiently explain that irreparable harm would be caused otherwise.

A minor use is defined as one that combines less than half of the work or protected subject matter of third parties with a user's own content, where the use requires 15 seconds of a film or motion picture, 15 seconds of a sound track, 160 characters of a text, or a photograph or a graphic with a data volume of 250 kilobytes each.

AC 8: Exceptions and limitations

16. Prior to the adoption of the LNI, did national law provide for an exception or limitation to copyright for uses for the purpose of a) quotation, criticism and review; and b) caricature, parody or pastiche? If not, has it now introduced such exceptions or limitations? Please describe the conditions under which such exceptions or limitations apply.

An exception for quotations was already included (§ 42f UrhG). There was no explicit provision covering parodies. However, when assessing the legitimacy of parodies under copyright law, Courts have considered their significance for freedom of speech and referred to Article 10 ECHR (which is part of the Austrian constitution).

The implementation of Article 17 CDSMD extends the already existing § 42f UrhG and now not only covers quotation, but also caricature, parody and pastiche. For quotations, § 42f UrhG allows for published works to be reproduced, distributed, broadcast, made available to the public, and used for public lectures, performances, and presentations, provided that the extent of such use is justified by the particular purpose for which it is intended. With regard to caricature, parody or pastiche, published works are allowed to be transmitted via large online platforms, made available to the public or be reproduced for these purposes.

In addition, § 89b (4) refers to quotations, criticism, review, parody, caricature and pastiche and states that when users claim to upload works for these or other permitted purposes, the content has to be uploaded by the platform and right-holders have to be informed about the use. Platforms have to provide a form for users to enable them to inform the platform that they are uploading such content. This does not apply in cases of obvious misuse of this right.

17. Do other exceptions or limitations apply to the protection provided by the LNI? If so, please describe.

Service providers are not generally excluded from the scope of general exceptions and they may therefore also be applicable to them. Those exceptions are further discussed in the questionnaire to Article 15 CDSMD.

AC 9: Licensing

18. Does the LNI include provisions on the licensing (incl. systems of extended collective licensing) of relevant uses? If so, please briefly describe any relevant details. For example, these could involve the following:

- **criteria for determining the height of compensation;**
- **the process for negotiating compensation;**
- **transparency duties (incl. data sharing obligations);**
- **duties to engage in negotiations;**
- **oversight by a government authority;**
- **(mandatory) collective rights management.**

Not with regard to Article 17, however with regard to Article 15 (see above).

19. Under the LNI, do licenses obtained by a platform cover the platform’s users and/or the other way around? If so, please explain.

Yes, both ways (§ 24a UrhG). Licenses obtained by a platform cover users unless they are acting on a commercial basis or where their activity does not generate significant revenues. Licenses obtained by users cover platforms.

AC 10: Legitimate uses: *ex ante* safeguards

20. Does the LNI include a concept of “legitimate uses”? If so, how are these defined? How are legitimate uses treated?

The LNI does not explicitly refer to “legitimate uses”. The legislative materials refer to the principle of “legitimate uses” in Article 17 without giving further information. The relevant provision, § 89b UrhG states that measures to ensure that certain works are not available shall not result in the prevention of the availability of works uploaded by users that do not infringe copyright or related rights.

21. Does the LNI include a concept of “manifestly infringing uploads”? If so, how is this defined? How are “manifestly infringing” and “non-manifestly infringing” uploads treated?

Yes, in § 89b (3) UrhG. Platforms can make use of automation-supported measures against the availability of smaller sections if, in the absence of such measures, there would be a risk that minor uses could significantly impair the economic exploitation of the work, and other precautions are taken to ensure that permitted uses are not prevented.

22. Does the LNI include other *ex ante* mechanisms for the avoidance of action against legitimate content? If so, please describe these citing the relevant provisions of national law.

The Austrian implementation does not include such a concept.

AC 11: Legitimate uses: *ex post* safeguards

23. Does the LNI provide for effective and expeditious complaint and redress mechanisms in the event of disputes? If so, please describe these. Please include information on the applicable time limits and decision-makers.

Yes: § 89b (5) UrhG sets up a complaint mechanism which allows users to take effective and expeditious action against unauthorized blocking of access to or unauthorized removal of the works or other subject matter they have uploaded. These mechanisms have to be easy to be found. Complaints have to be processed immediately; statements by the other party have to be obtained immediately. Furthermore, decisions with regard to such complaints have to be reviewed by a human person and users have to be informed about the result of such decisions. In total, the process must be completed within two weeks.

24. Does the LNI foresee for any other ways of settling disputes over content posted on their platforms (e.g., out-of-court mechanisms or recourse to the courts, incl. collective redress)? If so, please list these.

Platforms have to introduce a complaint mechanism for users to complain about the unjustified blocking of content they uploaded (§ 89b (5) UrhG). If users find a platform does not comply with their obligations to set up such a mechanism (e.g., absence of information, inadequacy of the online-forms or the complaint mechanism), they can bring up the issue to a “Beschwerdestelle” (complaints department). According to § 89c (1) UrhG, the RTR-GmbH is the central Beschwerdestelle to which all users can turn. The complaints department can also be addressed in cases of disputes between right-holders, platforms, and users, if no satisfactory decision can be found via the complaint mechanism (see above). If a platform does not comply with these provisions, this can lead to sanctions as described in Q. 25.

AC 12: Sanctions

- 25. Does the LNI foresee sanctions in cases of abuses of the procedures it introduces by right-holders, users and/or platforms? If so, please describe these. If applicable, please include information on time limits, decision-makers, procedural steps and whether any review is performed by humans.**

Yes, in § 89c UrhG. Sanctions can be imposed against service providers if they use means which lead to the blocking of legally uploaded works or related subject matter, if they do not set up complaint mechanisms (§89b (2) UrhG) and if they infringe information obligations or do not set up the forms required under §89 (3). The proceedings are led by the KommAustria as the supervisory body. There can be sanctions of up to 1 million Euro, depending on: the financial strength of the platform (which can be, for example, measured by its total revenue); the number of registered users of the platform; previous violations; the extent and duration of the negligence of the platform when complying with imposed obligations; the contribution to the investigation; the extent of the precautions taken to prevent a violation or the guidance of employees to law-abiding behaviour. Appeals can be brought before the administrative courts.

AC 13: Information obligations

- 26. Does the LNI impose information obligations on platforms? If so, please describe these.**

The newly introduced § 87(5) obliges platforms to provide right-holder, upon their request, with adequate information about contractually permitted uses and the functioning of the measures they have taken to prevent unauthorized uses. They are also obliged to inform users in their terms and conditions that users are allowed to use works under the exceptions and limitations to copyright set out in the law of the European Union.

AC 14: Waiver

- 27. Can right-holders waive the rights provided by LNI? Can authorisation be given for free?**

We have no specific finding on this.

AC 15: Entry into effect

- 28. From what date did the protection provided by the LNI come into effect in your jurisdiction?**

1 January 2022

Additional information

- 29. Does the LNI explicitly address the relationship between the protection it provides as against OCSSPs and fundamental or human rights (whether of OCSSPs or third parties)?**

No.

- 30. Can you think of any noteworthy divergence in the LNI from the standards set out in Article 17 of the CDSMD that you have not already addressed above? If so, please elaborate.**

We have no specific finding on this.