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

Comparative National Implementation Report

Author: Dr Christina Angelopoulos (Associate Professor, University of Cambridge)

This comparative report is based on 11 national questionnaires prepared by the following national legal experts:

**Austria**  
Manfred Büchele, Matthias Kettemann, Felicitas Rachinger and Meryem Vural

**Denmark**  
Sebastian Felix Schwemer

**Estonia**  
Karmen Turk

**France**  
Valérie-Laure Benabou

**Germany**  
Matthias Leistner

**Hungary**  
Péter Mezei and Adrienn Timár

**Ireland**  
Giuseppe Mazziotti

**Italy**  
Caterina Sganga,

**Malta**  
Tiziana Filletti

**Netherlands**  
Stef Van Gompel

**Spain**  
Miquel Peguera

The research project was funded by the Coalition for Creativity (C4C) (for more information see: https://coalition4creativity.org). Pursuant to the principles of academic freedom, the research was conducted in complete independence from third parties, including the commissioning party.

The full study is available for download at: https://informationlabs.org/copyright
Table of Contents

Executive Summary ........................................................................................................ i

1. Introduction .................................................................................................................. 1

2. National Implementations of Article 15 DCDSM ...................................................... 8
   Assessment Criterion 1: Subject Matter ........................................................................ 8
   Assessment Criterion 2: Right-holders ......................................................................... 13
   Assessment Criterion 3: Restricted acts ....................................................................... 14
   Assessment Criterion 4: Targeted users ...................................................................... 16
   Assessment Criterion 5: Exceptions & limitations ....................................................... 18
   Assessment Criterion 6: Licensing ............................................................................. 19
   Assessment Criterion 7: Revenue sharing ................................................................... 20
   Assessment Criterion 8: Term of protection .................................................................. 21
   Assessment Criterion 9: Waiver ................................................................................. 21
   Assessment Criterion 10: Entry into effect ................................................................. 22

3. National Implementations of Article 17 DCDSM ...................................................... 22
   Assessment Criteria 1 and 2: Subject matter and right-holders .................................. 23
   Assessment Criterion 3: Exclusive rights .................................................................. 24
   Assessment Criterion 4: Targeted providers ............................................................... 26
   Assessment Criterion 5: Scope of protection .............................................................. 29
   Assessment Criterion 6: Right-holder cooperation ...................................................... 36
   Assessment Criterion 7: General monitoring .............................................................. 37
   Assessment Criterion 8: Exceptions and limitations .................................................... 39
   Assessment Criterion 9: Licensing ............................................................................ 41
   Assessment Criterion 10: Legitimate uses: ex ante safeguards .................................. 42
   Assessment Criterion 11: Legitimate uses: ex post safeguards .................................. 44
   Assessment Criterion 12: Sanctions ......................................................................... 44
   Assessment Criterion 13: Information obligations ....................................................... 45
   Assessment Criterion 14: Waiver ............................................................................. 46
   Assessment Criterion 15: Entry into force .................................................................. 46

4. Conclusion .................................................................................................................... 47

Annex 1 – DCDSM Questionnaire on National Implementation ..................................... 51
Annex 2 – National Experts and Affiliations .................................................................. 61
Annex 3 – National Questionnaires ............................................................................... 62
Annex 4 – List of Incompatibilities .................................................................................. 63
   Article 15 - List and classification of most significant identified incompatibilities of national implementations with EU law ................................................................................. 63
   Article 17 - List and classification of most significant identified incompatibilities of national implementations with EU law .......................................................... 65
Annex 5 – Biographical Notes on National Experts .......................................................... 67
Annex 6 – Bibliography ................................................................................................... 71
Executive Summary

On 17 April 2021, the EU’s Directive on Copyright in the Digital Single Market (DCDSM)1 was adopted. This included the highly controversial Articles 15 and 17 on the new related right for press publishers (“press publishers’ right” or PPR) and the new liability scheme for copyright infringement on online platforms (“online content-sharing services providers” or OCSSPs) respectively. On 7 July 2021, the deadline passed for the transposition of the directive into the national law of the 27 EU Member States.2 Nevertheless, the implementation process is still ongoing in over half of the Member States.3 This legal report examines the national implementation of the DCDSM in 11 Member States: Austria, Denmark, Estonia, France, Germany, Hungary, Ireland, Italy, Malta, the Netherlands and Spain. These countries represent those that had completed their implementations of Articles 15 and 17 DCDSM when this legal research project started in February 2022.4

For the most part, Articles 15 and 17 DCDSM are instruments of total5 harmonisation.6 The one obvious exception relates to exceptions and limitations, whose minimum harmonisation nature is pulled in from the Information Society Directive (ISD).7 Most of the terms used in the two provisions should therefore be understood as autonomous notions of EU law.8 That being said, as the objective of the Directive is harmonisation rather than unification, some “room for manoeuvre” is left for implementing Member States, as long as the “result to be achieved” is met.9 In particular, national authorities enjoy freedom as to the choice of implementing methods, i.e., the techniques used to transpose the content of the directive into the chosen instrument: how the “result” aimed at by the Directive “achieved” in a given Member State. Broadly speaking, implementing legislatures are faced with two main choices in this regard: between literal transposition and elaboration on the rules set out in the directive and between minimalist and non-minimalist transposition.10

---

2 See Article 29 DCDSM.
4 Croatia also implemented the DCSDM by this deadline, however, while a national expert for Croatia was engaged for this study, they were unable to complete the questionnaire on the Croatian national implementation. Three further Member States, Lithuania, Luxembourg and Romania, have since implemented the Directive – see CREATE, “Copyright in the Digital Single Market Directive Implementation – An EU Copyright Reform Resource”, available at: https://www.create.ac.uk/cdsd-implementation-resource-page/ and Communia, “Eurovision DSM Contest”, available at: https://eurovision.communia-association.org/. As these transpositions occurred after the start of the work on this research project, it was not possible to consider them in this study.
9 See Article 288 point 3, Treaty on the Functioning of the European Union (TFEU).
In this context, this study assesses the compliance with the EU legal framework of the national implementations in the selected countries of Articles 15 and 17 DCDSM. In particular, it looks at how convergence or divergence with the wording of Articles 15 and 17 of the Directive impact two key aspects:

1. the establishment and functioning of the internal market in line with Article 114 Treaty on the Functioning of the European Union (TFEU) that founds the competence of the EU to act in the field of copyright and which underlies the DCDSM; and
2. the Charter of Fundamental Rights of the EU, as interpreted by the Court of Justice of the EU (CJEU).

To this end, the following research question was identified:

“How compatible are the existing national implementations of Articles 15 and 17 CSDMD with the Digital Single Market objective of the Directive and with the EU law of fundamental rights?”

To address this question, a comparative legal methodology was adopted. In particular, the so-called “European Legal Method” was employed. This involves comparative analysis with a harmonising objective that is adjusted to the current legal structures of the EU. In the research at hand, the methodology involved comparing the national implementations with the texts of Articles 15 and 17 CSDMD, identifying deviations and considering the implications of these in terms of the need to build an internal market and the law of fundamental rights.

The comparative analysis was based on desk research in the form of the analysis of a questionnaire shared with national experts in the 11 identified countries. The purpose of the questionnaires was to gather legal information for each implementing Member State. To this end, the questionnaire was organised around identified assessment criteria (AC). Two sets of AC were compiled: one for Article 15 DCDSM and one for Article 17 DCDSM. The AC focus on key words identified within the provisions. Specifically, the following AC were identified:

<table>
<thead>
<tr>
<th>Article 15 DCDSM</th>
<th>Article 17 DCDSM</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Subject matter</td>
<td>1. Subject matter</td>
</tr>
<tr>
<td>2. Right-holders</td>
<td>2. Right-holders</td>
</tr>
<tr>
<td>3. Restricted acts</td>
<td>3. Exclusive rights</td>
</tr>
<tr>
<td>4. Targeted users</td>
<td>4. Targeted providers</td>
</tr>
<tr>
<td>5. Exceptions and limitations</td>
<td>5. Scope of protection</td>
</tr>
<tr>
<td>6. Licensing</td>
<td>6. Right-holder cooperation</td>
</tr>
<tr>
<td>7. Revenue sharing</td>
<td>7. General monitoring</td>
</tr>
<tr>
<td>8. Term of protection</td>
<td>8. Exceptions and limitations</td>
</tr>
<tr>
<td>10. Entry into force</td>
<td>10. Legitimate uses: ex ante safeguards</td>
</tr>
<tr>
<td></td>
<td>11. Legitimate uses: ex post safeguards</td>
</tr>
<tr>
<td></td>
<td>12. Sanctions</td>
</tr>
<tr>
<td></td>
<td>13. Information obligations</td>
</tr>
<tr>
<td></td>
<td>14. Waiver</td>
</tr>
<tr>
<td></td>
<td>15. Entry into force</td>
</tr>
</tbody>
</table>

These AC comprise core “building blocks” encountered across intellectual property rights (e.g., “subject matter”, “right-holders”, “exclusive rights”, “exceptions and limitations”), as well as particularities presented by Articles 15 and 17 DCDSM (e.g. “targeted users”, “revenue sharing”, “right-holder cooperation”, “general monitoring”).

Reporting by national experts was pursued in order to:

a) address inevitable linguistic limitations faced by the author of the comparative report in assessing national laws drafted in 10 different languages; and
b) ensure appropriate immersion in local legal mentalité and traditions, which may differ from country to country.

To that extent, the author of the comparative report represents the “external” perspective in assessing the national implementations, the “internal” perspective having been provided by the national experts.\(^\text{12}\)

At the same time, a dialogue between these perspectives was sought. To this end, following their completion by the national legal experts, the questionnaires were subject to comments and questions by the author of the comparative report, embedding understanding and leading to potential refinement of the responses.

**It should be emphasised that the comparative report is based on the information provided in the national reports. Independent research into the national implementations was not conducted by the author of the comparative report.**

As analysis showed, the adoption of the Directive has not led to resolution in the difficult areas of press publishers rights and platform liability. Among the examined implementing Member States, multiple instances of problematic implementation – i.e., implementation that is (potentially) incompatible with either the Directive itself or with fundamental rights – can be identified. In particular, in relation to Article 15 DCDSM, issues emerge in relation to the following Assessment Criteria:

- AC 1 (subject matter);
- AC 2 (right-holders);
- AC 3 (restricted acts);
- AC 4 (targeted users);
- AC 6 (licensing) and;
- AC 7 (revenue sharing).

In relation to Article 17 DCDSM, potential issues emerge with regard to:

- AC 1 (subject matter);
- AC 2 (right-holders);
- AC 3 (exclusive rights);
- AC 4 (targeted providers);
- AC 5 (scope of protection);
- AC 7 (general monitoring);
- AC 8 (exceptions and limitations);
- AC 9 (licensing) and;
- AC 12 (sanctions).

In addition, a majority of Member States failed to meet the transposition deadline in relation to both Articles. From among the 11 examined Member States, the only to emerge with no implementation irregularities is the Netherlands. It is unsurprising that, as a general rule, where implementations presented problems in terms of the internal market, they also presented problems in terms of fundamental rights.\textsuperscript{13} This follows from the fact that deviations from the wordings of Articles 15 and 17 DCDSM will amount to a deviation from the balance between fundamental rights deemed fair by the European legislator.\textsuperscript{14}

Close examination of the emergent compatibility issues reveals that they come in a variety of forms. Almost all Member States have engaged in some level of elaboration – even if just to adjust the terms used by the Directive to the local legal regime (e.g., when the Netherlands adjusts the language of communication to the public and making available to the public to the local concept of "openbaarmaking").

In some instances, the national implementation adds elements that do not exist in the text of the Directive (excessively maximalist transposition). For example, the Spanish definition of the “online content-sharing service providers” (OCSSPs) targeted by Article 17 DCDSM requires that OCSSPs store and give access to protected content \textit{either} in large amounts \textit{or} that they have a large audience in Spain – as opposed to the DCDSM, which requires only that OCSSPs store and give access to “a large amount” of protected subject matter. Occasionally, such additions are based on the recitals of the Directive – which, however, do not have self-standing normative power, so that, where they contradict the operative text of the Directive or other relevant rules of EU law, their implementation is counterindicated. For example, Austria, France, Germany and Malta all transpose into national law Recital 62 DCDSM to hold that the immunity Article 17(4) DCDSM does not apply to providers whose (main) purpose is to engage in or to facilitate piracy.

In other cases, national implementations omit elements that are included in the text of the Directive (excessively minimalist transposition). For example, France fails to exclude “private or non-commercial uses of press publications by individual users” from the reach of the national implementation of Article 15 DCDSM. Denmark and Hungary do not implement the carve-outs in the definition of OCSSPs and Denmark does not transpose the prohibition on general monitoring obligations of Article 17(8) DCDSM. This can also result from misunderstandings on the part of the national legislator – as appears to be the case with e.g., the Irish conflation of the “sufficiently substantiated notices” and “relevant and necessary information” mentioned in Article 17(4) DCDSM (though note that a differentiated interpretation of “sufficiently substantiated notice” in practice could save this implementation) or the Estonian omission of protections for public domain content in Article 15 DCDSM).

Both additions and omissions may result in the expansion of the scope of the new rules (excessively maximalist transposition or gold-plating) or in their contraction (excessively minimalist transposition). For example, Denmark and Hungary’s omission of the carve-out from the definition of OCSSPs results in an expansion of the scope of the new liability scheme of Article 17 DCDSM, as does Spain’s addition of a condition of a large audience in Spain. Conversely, Austria and Germany’s addition of a condition of competition with other providers to the definition of OCSSPs restricts the reach of the Article 17 DCDSM regime, while Denmark’s omission of a parody exception restricts the guarantees offered to users.

\textsuperscript{13} The exception is AC 12 on Article 17 DCDSM. As noted above, while Member States appear free under Article 17 to make decisions on sanctions (this clearly having been decided by the EU legislator to be unproblematic in terms of the single market), significant fundamental rights effects are foreseeable.

\textsuperscript{14} The alternative would be to accept that Articles 15 and 17 DCDSM themselves offend the fair balance between fundamental rights. With regard to Article 17 this option has been rejected by the CJEU in \textit{Poland}. With regard to Article 15, this study also assumes that the EU legislator has struck the right balance. To hold otherwise would be inappropriate for a study intended to assess national implementations, rather than the EU provision.
In some cases, national law interprets autonomous notions of EU law incorrectly. This can be the result of legacy interpretations (this is the case, for instance, with the narrow French and Spanish interpretations of the quotation exception) or of new constructs (as has occurred with the French and Italian interpretation of “very short extracts” in Article 15 DCDSM as extracts that are not capable of replacing the press publication). Occasionally, variations in terminology across different language versions also emerge (see e.g., the Austrian, Italian and Spanish renditions of “best efforts” in Article 17(4) DCDSM as “every effort”, “greatest efforts” and “biggest efforts” respectively).

Sometimes, seemingly small changes can have significant effects. This is the case with the French replacement of “online uses” of press publications in Article 15 DCDSM with uses “in digital format” and the German extension of the revenue-sharing introduced by Article 15 DCDSM beyond authors to other right-holders. In other cases, the change is obvious and was subject to intense debate in the relevant Member State. This is the case for the Italian rules on the licensing of Article 15 DCDSM, which are potentially incompatible with the preventive nature of exclusive rights.

Particularly interesting are those cases of non-compliant implementation that result from national attempts to fit the provisions of the Directive into the logic of national law. This, for example, leads Estonia to fail to account properly for the interaction between existing national law and the provisions implementing Article 15’s protections for right-holders of content included in press publications. A number of Member States (Austria, Estonia, France, Germany, Hungary, Italy and Spain) extend their implementations of Article 17 to all related rights. Such “homing tendencies” (and mistakes in pursuing them) by Member States are to be expected, however the result is detrimental to the internal consistency of both national and EU law (a “double shattering” of the law, as it has been termed).

Occasionally, the intersection between the DCDSM and national law will not be clear. Uncertainty can flow from both national law and the DCDSM. An example of both is provided by the Spanish provision stating that the national implementation of Article 17 DCDSM does not exclude alternative courses of action against OCSSPs. Whether this will conflict with the Directive or not will depend on the details of Spanish law and on whether the Directive harmonises all liability of OCSSPs for their users’ infringing uploads or only their liability for communication to the public resulting from their users’ infringing uploads. Similarly, Ireland appears to include of the reproduction right in the exclusive rights covered by Article 17 DCDSM – this is contrary to a teleological interpretation of the Directive, despite not being clearly excluded by its wording.

Issues may also arise in relation to compliant implementations. The most prominent are those that concern the implementation of the special liability regime of Article 17(4) DCDSM. As the report details, a distinction can be drawn here between the literal and elaborative (“traditional” and “balanced”, as they have been termed respectively) approaches to implementation. While both of these emerge as compliant – both copying and elaboration are, after all, acceptable transposition techniques – the divergence they introduce undercuts the Directive’s ostensible objective of creating a Digital Single Market and the “full harmonisation” approach it takes to this end. It also results in uneven protection for fundamental rights across the EU. The same observation can be made with regard to compliant implementations of multiple other elements of both Article 15 and 17 DCDSM: a compliant national implementation of vague and novel terminology, such as “very short extracts” or “large amounts”, does

---

16 H Koziol, “Comparative Conclusions” in H Koziol, Basic Questions of Tort Law from a Comparative Perspective (Jan Sramek Verlag 2015) 690.
not mean that the risk of fragmentation has been eliminated.\textsuperscript{18} Much depends on application in practice, meaning that continued vigilance is important. In the meantime, referrals to the CJEU are likely to start accumulating.\textsuperscript{19}

This is disappointing, but not surprising.\textsuperscript{20} Commentators have long observed that the addition of new territorial rights to the European \textit{acquis} can undermine rather than support the establishment of an Internal Market.\textsuperscript{21} Inevitably, this effect is more pronounced when the new EU provisions are – as Articles 15 and 17 DCDSM have been widely accused of being – badly drafted.\textsuperscript{22} The intricate and obscure structures and contentious subject matter of these articles, as well as their heavy use of undefined terminology and occasional misalignment between the recitals and operative texts, do not facilitate either smooth national implementation or homogenous interpretation and application. As the European Commission has acknowledged,

“[b]etter law-making helps better application and implementation […] If legislation is clear and accessible, it can be implemented effectively, citizens and economic actors can more easily understand their rights and obligations and the judiciary can enforce them.”\textsuperscript{23}

In pursuit of compromise, this principle was set aside during the intense discussions on Articles 15 and 17 in the run-up to the adoption of the DCDSM. The disharmonising results cannot be laid solely at the door of implementing national legislatures. They are equally the product of the EU legislator: an excellent national transposition of bad EU law will result in bad national law. To rectify them, the CJEU will no doubt have much DCDSM-focused work ahead of it. Inauspiciously, in \textit{Poland}, that institution also shied away from a close engagement with the real issues. Hopefully, future judgments will dare to provide clarity.


\textsuperscript{19} See R Barratta, “Complexity of EU law in the domestic implementing process” (2014) 2(3) The Theory and Practice of Legislation 293, noting that “if a normative text fails to fulfil the principle according to which \textit{leges ab omnibus intelligi debent}, it is destined, in due course, to become a source of virtually endless references for preliminary rulings”.


\textsuperscript{23} European Commission, “EU law: Better results through better application” (2017/C 18/02) OJ C 18/10. See also Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (2016) OJ L 123/1, according to which, the “three Institutions agree that Union legislation should be comprehensible and clear, allow citizens, administrations and businesses to easily understand their rights and obligations, include appropriate reporting, monitoring and evaluation requirements, avoid overregulation and administrative burdens, and be practical to implement.”
1. Introduction

On 17 April 2021, the EU’s Directive on Copyright in the Digital Single Market (DCDSM) was adopted. This included the highly controversial Articles 15 and 17 on the new related right for press publishers (“press publishers’ right” or PPR) and the new liability scheme for copyright infringement on online platforms (“online content-sharing services providers” or OCSSPs) respectively. On 7 July 2021, the deadline passed for the transposition of the directive into the national law of the 27 EU Member States. Nevertheless, the implementation process is still ongoing in over half of the Member States. This legal report examines the national implementation of the DCDSM in 11 Member States: Austria, Denmark, Estonia, France, Germany, Hungary, Ireland, Italy, Malta, the Netherlands and Spain. These countries represent those that had completed their implementations of Articles 15 and 17 DCDSM when this legal research project started in February 2022.

The project aims to assess the compliance with the EU legal framework of the national implementations of Articles 15 and 17 DCDSM in the selected countries. In particular, the project looks at how convergence or divergence with the wording of Articles 15 and 17 of the Directive impacts two key aspects:

1. the establishment and functioning of the internal market in line with Article 114 of the Treaty on the Functioning of the European Union (TFEU) that underpins the competence of the EU to act in the field of copyright and which underlies the DCDSM; and
2. the Charter of Fundamental Rights of the EU, as interpreted by the Court of Justice of the EU (CJEU).

To this end, the following research question was identified:

“How compatible are the existing national implementations of Articles 15 and 17 CSDMD with the Digital Single Market objective of the Directive and with the EU law of fundamental rights?”

---

25 See Article 29 DCDSM.
27 Croatia also implemented the DCSDM by this deadline, however, while a national expert for Croatia was engaged for this study, they were unable to complete the questionnaire on the Croatian national implementation. Three further Member States, Lithuania, Luxembourg and Romania, have since implemented the Directive – see CREATe, “Copyright in the Digital Single Market Directive Implementation – An EU Copyright Reform Resource”, available at: https://www.create.ac.uk/cdsm-implementation-resource-page/ and Communia, “Eurovision DSM Contest”, available at: https://eurovision.communia-association.org/. As these transpositions occurred after the start of the work on this research project, it was not possible to consider them in this study.
Legal Methodology

To address this question, a comparative legal methodology was adopted. In particular, the so-called “European Legal Method” was employed. This involves comparative analysis with a harmonising objective that is adjusted to the current legal structures of the EU. In the research at hand, the methodology involved comparing the national implementations with the texts of Articles 15 and 17 CSDMD, identifying deviations and considering the implications with regard to the internal market and the law of fundamental rights.

The comparative analysis was based on desk research. A questionnaire on the national implementation of the DCDSM was compiled and shared with national experts in the 11 identified countries. The questionnaire was organised around identified assessment criteria (AC). Two sets of AC were compiled: one for Article 15 DCDSM and one for Article 17 DCDSM. As the sections below detail (see sections 2 and 3), the AC focus on key words identified within the provisions. These comprise core “building blocks” encountered across intellectual property rights (e.g., “subject matter”, “right-holders”, “exclusive rights”, “exceptions and limitations”), as well as particularities presented by Articles 15 and 17 DCDSM (e.g. “targeted users”, “revenue sharing”, “right-holder co-operation”, “general monitoring”).

Reporting by national experts was pursued in order to:

a) address inevitable linguistic limitations faced by the author of the comparative report in assessing national laws drafted in 10 different languages; and

b) ensure appropriate immersion in local legal mentalité and traditions, which may differ from country to country.

To that extent, the author of the comparative report represents the “external” perspective in assessing the national implementations, the “internal” perspective having been provided by the national experts. At the same time, a dialogue between these perspectives was sought. To this end, following their completion by the national legal experts, the questionnaires were subject to comments and questions by the author of the comparative report, embedding understanding and leading to potential refinement of the responses.

It should be emphasised that the comparative report is based on the information provided in the national reports. Independent research into the national implementations was not conducted by the author of the comparative report.

The comparative report proceeds as follows. After this introduction, section 2 undertakes an AC-by-AC overview of the national implementations of Article 15 DCDSM. Section 3 repeats this exercise for Article 17 DCDSM. Sections 2 and 3 focus on the main similarities and differences from the text of Articles 15 and 17 of the Directive that emerge from reviewing the national reports. Divergences are assessed in order to determine whether they are compatible with the wording of the Directive (and, accordingly, the need to service the internal market), as well as with the law of fundamental rights. Summarising score cards appear at the end of each section assessing the national implementation of the AC. These are intended to visualise the comparative findings in relation to each AC. Finally, an overview and conclusion are provided in Section 3.


31 G Samuel, An Introduction to Comparative Law and Method (Hart Publishing 2014) 60-63.
The questionnaire as circulated to the national experts can be found in Annex 1 and the final version of all national reports can be found in Annex 3. Annex 4 consists of a list and classification of the most significant incompatibilities of national implementations of Articles 15 and 17 DCDSM with EU law. A list of the national experts is provided in Annex 2 and short bios of the national experts are provided in Annex 5. Annex 6 contains the bibliography.

*Implementing EU Copyright Harmonisation: the Basic Framework*

In approaching the comparative report, it is important to understand Member States’ obligations with regard to the transposition of EU directives. The distinction between harmonisation and unification in EU law is central in this regard. While unification involves the complete replacement of national law with new rules adopted at the EU level, harmonisation aims at the creation of substantively identical or similar sets of rules across the Member States. Unification is usually pursued by means of regulations, while harmonisation is generally achieved via directives. According to Article 288 of the TFEU, regulations are directly applicable in the Member States, but directives are binding only as to the result to be achieved.

To ensure that the objectives of the EU are realised, Article 4(3) of the Treaty the European Union (TEU) establishes the “principle of sincere co-operation”, according to which the Union and the Member States must, in full mutual respect, assist each other in carrying out tasks that flow from the Treaties. To this end, Member States must take any appropriate measure to ensure fulfilment of their obligations arising out of the Treaties. Article 291(1) TFEU is more targeted: “Member States shall adopt all measures of national law necessary to implement legally binding Union acts.”

In cases of a perceived failure by a Member State to fulfil an obligation, the Commission – under Articles 258 TFEU and in its role as “Guardian of the Treaties” – may deliver a reasoned opinion on the matter. If the State does not comply with the opinion, the Commission may bring the matter before the CJEU. Under Article 260(1) TFEU, if the Court finds that the Member States has failed to fulfil an obligation under the Treaties, it will require that State to take measures to overcome this. In relation to EU directives, “failure” can include a failure to provide notification of implementation, partial implementation, faulty implementation or non-implementation. As this study focuses only on those Member States that have implemented Articles 15 and 17 DCDSM, only partial and faulty implementation shall be relevant.

35 The CJEU has established that directives may have direct effect under certain circumstances, see M Costa and S Peers, “Principles of direct applicability and direct effects” in M Costa and S Peers (eds), *Steiner & Woods EU Law* (14th ed., OUP), section 5.2.5.
Depending on the degree of freedom left to the Member States, different types of harmonisation can be said to exist. There is no established classification of harmonisation and different commentators identify different categories, but one generally accepted distinction is that between “total” or “full” harmonisation and “minimum” harmonisation. While total harmonisation leaves Member States with no scope for independent action in the harmonised field, with minimum harmonisation the EU legislator will establish a minimum standard with which Member States must comply, but beyond which they are free to establish their own rules. As a result, minimum harmonisation is of limited service in creating an internal market. Perhaps for this reason, in recent years, the EU legislator has shown a discernible preference for total harmonisation. At the same time, it is important to remember that total harmonisation is distinct from unification and thus does not aim at homogenization.

The same harmonising directive may combine provisions that allow Member States different degrees of flexibility. Complicating matters further, the harmonisation technique employed (e.g., total or minimum harmonisation) will not usually be explicitly identified in the text of the directive. Instead, according to the CJEU, the margin of discretion available to the Member States, while determined entirely by the directive itself, must be inferred from its wording, purpose and structure. For example, while an abstract wording might allow more flexibility to the Member States, a more precise wording may leave limited implementing freedom.

In line with the “room for manoeuvre” left for implementing Member States by harmonising directives, Article 288 TFEU allows national authorities to choose the form and methods through which they wish to achieve the result pursued by a directive. “Form” in this context refers to the nature of national transposition instruments. “Method” refers to the technique used to transpose the contents of the directive into the chosen instrument: how is the “result” aimed at by the Directive “achieved” in a given Member State. For the purposes of this study, only the choice of “method” is relevant. The CJEU has acknowledged that transposition through general legal context may be sufficient, provided that it effectively ensures the full application of the directive in a sufficiently clear and precise manner. In all cases, directives must be implemented,

“with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty, which requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights”.


41 M Costa and S Peers, “Harmonisation” in M Costa and S Peers (eds), Steiner & Woods EU Law (14th ed., OUP), section 15.3.3.

42 M Costa and S Peers, “Harmonisation” in M Costa and S Peers (eds), Steiner & Woods EU Law (14th ed., OUP), section 15.3.3.


46 See Article 288 point 3, Treaty on the Functioning of the European Union (TFEU).

47 CJEU, C-281/11, Commission v Poland, 19 December 2013, EUC:2013:855, para. 60.

48 CJEU, C-50/09, Commission v Ireland, 3 March 2011, ECLI:EU:C:2011:109, para. 46.
Broadly speaking, implementing legislatures are faced with two principle decisions:

   a) between literal transposition (“copy-out”) and “elaboration” on the rules set out in the directive;\(^49\)

   and

   b) between minimalist and non-minimalist transposition.\(^50\) Minimalist transposition refers to
   transposition that does not exceed the minimum requirements of the directive. Non-minimalist
   transposition (sometimes called “gold-plating”) refers to the use of transposition measures that
   go beyond the requirements of the directive.

With regard to the first option, it is important to understand that, although – all things being equal – it
is generally agreed that copy-out transpositions are preferable to elaboration, as they minimise the
possibility of incorrect reformulation, not all directives are copiable. In order that the copy-out method
be viable, the provisions of a directive must, among other requirements, be sufficiently precise, clear,
internally consistent and unconditional. They must also be terminologically and conceptually
compatible with existing national law in the area. Where further concretisation, clarification or
supplementation is necessary and where directives are poorly drafted and in need of legislative repair,
literal transposition must be rejected.\(^51\)

With regard to the second option, it is relevant to note that in recent years the European Commission
has urged Member States to avoid gold-plating in implementing EU directives.\(^52\) The Commission warns
that, while this may help achieve the legislation's objectives in the local context or even enhance the
benefits at national level, it can also add unnecessary costs for businesses and public authorities. That
any resultant red tape and regulatory burden are often mistakenly attributed to EU legislation is an
additional concern. The Commission has thus stated that any added requirements must be kept to a
minimum and “justified by an overriding reason of public interest, be non-discriminatory, proportionate,
easy to understand and compliant with the harmonized minimum rules.”\(^53\) It is not clear when an
overriding reason might exist – potentially, the protection of intellectual property rights or other rights
recognised by the Charter of Fundamental Rights of the EU might suffice.\(^54\) More generally, many
commentators have questioned the usefulness of the business-centric concept of gold-plating for the
purposes of public policy-making and academic analysis,\(^55\) emphasising instead the need for nuance:

\(^{49}\) See CJEU, C-281/11, \textit{Commission v Poland} \textnormal{19 December 2013, EU:C:2013:855, para. 60, according to which “it must be
recalled that it is settled law that transposing a directive into national law does not necessarily require its provisions to be
reproduced verbatim in a specific, express law or regulation”}.


November 2021, pp. 11 and 38; European Commission, “Communication from the Commission to the European Parliament,
the Council, the European Economic and Social Committee and the Committee of the Regions – Identifying and addressing
from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the
COM(2020) 94 final, 10 March 2020, pp. 3-5 and 8; European Commission, “Communication from the Commission to the
European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Better
Regulation: Delivering Better Results for a Stronger Union”, COM(2016) 615 final, 19 September 2016, p.10; European
Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and
Social Committee and the Committee of the Regions – Better Regulation for Better Results - An EU Agenda”, COM(2015)

\(^{53}\) European Commission, “Communication from the Commission to the European Parliament, the Council, the European
Economic and Social Committee and the Committee of the Regions – Identifying and addressing barriers to the Single

\(^{54}\) A Ramalho, “The competence and rationale of EU copyright harmonization” in E Rosati, \textit{The Routledge Handbook of EU
Copyright Law} (Routledge 2021) 3.

\(^{55}\) See L Squintani, “Gold-Plating: A Misleading Overarching Concept” in L Squintani, \textit{Beyond Minimum Harmonisation
Gold-Plating and Green-Plating of European Environmental Law} (Cambridge University Press 2019) 13-71. Exploring the
advantages and disadvantages of minimum harmonisation, see S Weatherill, “The Fundamental Question of Minimum or
Maximum Harmonisation” in S Garben and I Govaere (eds), \textit{The Internal Market 2.0} (Hart 2020), available at:
national legal “customisation” does not equal lack of compliance, while a compliant implementation may nevertheless be ineffective. The provided level of discretion may be a deliberate choice of the EU legislator, necessary in order to achieve compromise during the complex process of EU decision-making. Further, it is not always easy to determine whether a national implementation is more or less burdensome than a directive; often the effects may be different depending on the perspective taken. For example, a provision may be burdensome for a corporation, while facilitating transactions for individuals. Gold-plating directives with a deregulatory or liberalising impact may provide affected persons relief from regulatory burden.

In this context, it is important to remember that the Commission’s communications on gold-plating are soft law without binding force – gold-plating is not illegal under EU law. Ultimately, compliance with Union law should therefore be determined by reference to the texts of directives: the question is not whether “gold-plating” has occurred, but whether EU law has been infringed. For this purpose, it is important to identify the “occupied field” of a directive – i.e., the aspects of the field which it aims to regulate. Areas outside this will be left to the realm of the Member States. With this in mind, while this study will use the term “gold-plating”, it will distinguish between permissible and impermissible instances of gold-plating. It will also examine critically both the DCDSM and its national implementations with a view to assessing the effectiveness of the adopted solutions.

In this regard, it should be noted that Articles 15 and 17 DCDSM are, for the most part, total harmonisation instruments. This significantly limits the ambit for national discretion. The one obvious exception relates to the rules on exceptions and limitations, whose minimum harmonisation nature is pulled in from the Information Society Directive (ISD). To this extent, opportunities for gold-plating in implementing Articles 15 and 17 DCDSM will not be abundant. Nevertheless, even total harmonisation directives often permit national variations though, e.g., specific derogations or opt-out clauses. While no such flexibility-clauses have been incorporated into Articles 15 and 17 DCDSM, the warning above concerning the need for elaboration on insufficiently developed harmonising provisions should be heeded.

A relevant issue concerns the use of vague legal terms left undefined in the EU directive – of which there is an abundance in Articles 15 and 17 DCDSM. The CJEU often labels such terms “autonomous concepts of EU law” and reserves for itself powers of interpretation. According to settled case law,

“the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union; that interpretation must take into account the context of the provision and the objective of the relevant legislation”.64

The Court has identified the usual meaning of a word in everyday language as relevant in interpreting autonomous concepts of EU law. The wording of recitals may also be taken into account, as may the definitions established by other directives and the law of fundamental rights.65 Unsurprisingly, anticipating the EU definition of autonomous concepts will not always be an easy task for the Member States, which – in the absence of other guidance – are more likely to follow their “homing tendencies” back to pre-existing national notions.66 To assist in the process, the Commission has suggested that areas that may cause transposition and application risk be identified during legislative negotiations so that guidance may be issued.67 In fact, Article 17 DCDSM has been the subject of precisely such guidance.68 However, setting aside the issues of democratic legitimacy raised by this solution,69 as the analysis below shall show, its success in establishing legal certainty has been very limited.

A final word should be said on the role of recitals in the implementation of a directive. This requires delicate handling. The CJEU has held that,

“the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question.”70

In assessing the compatibility of national implementations with the provisions of the DCDSM therefore, it will be the operative parts of the directive that shall serve as the primary reference point.71 At the same time, it is clear from the case law of the CJEU that recitals do have value as sources of interpretative guidance. Indeed, that is their purpose.72 Therefore, while recitals do not have autonomous legal effect, so that any recitals drafted in normative terms are to be ignored, recitals can assist in illuminating the purpose of the operative parts of a directive. They can be helpful in interpreting ambiguous operative

---

64 CJEU, C-467/08, Padawan, 21 October 2010, ECLI:EU:C:2010:620, para. 32.
65 F Gotzen, “‘Autonomous concepts’ in the Case Law of the Court of Justice of the European Union on Copyright” (2020) 263(1) RIDA 75.
67 See also Article 291(2) TFEU, according to which, “Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.”
72 According to the Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation (Publications Office of the European Union 2015), p. 31, “the purpose of the recitals is to set out concise reasons for the chief provisions of the enacting terms, without reproducing or paraphrasing them. They shall not contain normative provisions or political exhortations.”
provisions, e.g., (as indicated above) in the context of the teleological and contextual analysis necessary for interpreting autonomous concepts of EU law. Obviously, in cases where recitals coincide with the requirements of an overriding rule of EU law (e.g., higher law, such as the Charter), they may prevail over the text of an article – though it is more accurate in such cases to say that it is the overriding rule that prevails.73

2. National Implementations of Article 15 DCDSM

Article 15 DCDSM is a notably complex legal provision. Assessing its implementation into the national laws of the Member States is correspondingly challenging. In order to assess the national implementations of Article 15 DCDSM, this study broke the provision down into 10 Assessment Criteria (AC):

1. subject matter;
2. right-holders;
3. restricted acts;
4. targeted users;
5. exceptions and limitations;
6. licensing;
7. revenue sharing;
8. term of protection;
9. waiver and
10. entry into force.

Of these, AC 1, 2, 3, 5, 6, 8, 9 and 10 consist of standard building blocks of intellectual property rights, while AC 4 and 7 represent peculiarities of the regime set out in Article 15 DCDSM. Below, the AC shall be examined in turn with a view to assessing compliance with: a) the wording of Article 15 DCDSM itself and therefore the Digital Single Market objective of the Directive; and b) the EU’s law of fundamental rights.

Assessment Criterion 1: Subject Matter

Definition

The definition of “press publications” provided by Article 2(4) DCDSM is complex.74 It consists of:

- an initial description (“a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter”);
- supplemented by three qualifiers (“which:
  (a) constitutes an individual item within a periodical or regularly updated publication under a single title, such as a newspaper or a general or special interest magazine;
  (b) has the purpose of providing the general public with information related to news or other topics; and
  (c) is published in any media under the initiative, editorial responsibility and control of a service provider”);
and
- a carve-out (“Periodicals that are published for scientific or academic purposes, such as scientific journals, are not press publications for the purposes of this Directive”). It has been criticised as unclear and overly broad.75

\[\text{References:}\]

Unsurprisingly, according to the national reports, the majority of national legislators have shied away from serious tampering. At the same time, over half of implementations demonstrate faults. Germany, Hungary and Ireland adopt the definition verbatim. Austria mysteriously omits qualifier (c). Estonia rewords Article 2(4)(c) to require “control by an editor’s office” (as opposed to “editorial responsibility”). Malta and Spain pull into their definitions the exclusion of Recital 56 on “websites, such as blogs, that provide information as part of an activity that is not carried out under the initiative, editorial responsibility and control of a service provider, such as a news publisher.” This is likely of limited relevance as the exclusion is offered only as an example of qualifier (c) in Article 2(4) DCDSM. The Spanish wording also implies that the inclusion of subject matter other than literary works of a journalistic nature is necessary. This could exclude protection for text-only press publications, unless an intentionalist interpretation is taken by the courts. France omits the reference to the “general public”, thus extending protection to specialist publications (although the words “special interest” in Recital 56 suggest the EU legislator viewed these as covered). The Danish national expert reports that Denmark eschews any definition. This raises the question: is a bad definition better than no definition? To the extent that e.g., the type of covered content, designated audience or carve-out are not indicated by the natural meaning of the word, the lack of a definition could prove problematic. On the other hand, in light of the *Marleasing* principle, the Danish courts should be seen as bound by the definition set out in the Directive.

“Individual Words or Very Short Extracts”

According to Article 15(1) DCDSM *in fine*, the PPR does not apply to the use of “individual words or very short extracts of a press publication”. While “individual words” seems clear, “very short extracts” is more ambiguous. The issue is relevant to the freedom left to targeted platforms to provide information to their users and therefore has a clear fundamental rights dimension. Recital 58 justifies the exclusion by noting that such uses “may not undermine the investments made by publishers of press publications in the production of content”. Making sense of the Recital is not easy. The use of the word “may” is curious and unhelpful. At the same time, the Recital does not appear to in fact require an absence of such undermining, only that the exclusion “be interpreted in such a way as not to affect the effectiveness” of the PPR. When this will be the case is unaddressed. While it is clear that the Directive is geared towards the protection of the investments made by the publishers of press publications – meaning that these might be linked these to the assessment of effectiveness – the existence of such investments does not seem to be a condition for protection. It is possible that the existence of investments is simply assumed. This could mean that where no investments exist, no protection is afforded – the key caveat being that the EU legislator appears not to have contemplated that this might also be the case where more than a “very short extract” is taken.

The conclusion would be that the effectiveness of the PPR will only be affected if “very short extracts” are taken that undermine the investments of publishers – this in turn meaning that any extracts that undermine the investments of publishers cannot qualify as “very short”. Such an interpretation would accept only non-informationally relevant content as “very short”, an outcome that would have detrimental effects for users’ freedom of expression.

---


76 See answer to Q. 3 in the national report on the implementation of Article 15 in Denmark.


78 Cf. “may” in sentence 3 of Recital 58 with “should not” in sentence 4.

79 See Recitals 54, 55 and 58 DCDSM.

80 P B Hugenholtz, “Neighbouring Rights are Obsolete” (2019) 50(8) IIC 1006.

To address this, it should be accepted that – regardless of the wording of the Preamble – an important role in interpreting the exclusion of “very short extracts” should be played by fundamental rights. To the extent that use of “very short extracts” is required by end-users’ freedom of expression, it should be permitted. The guidance of the recitals cannot be granted greater interpretative significance than that of the overarching norms of the Charter.\(^82\)

The majority of the examined Member States have taken a copy-out approach to the implementation of “individual works and very short extracts”. This is the case for Austria, Estonia, Germany, Hungary, Ireland and Malta, all of which thus delegate interpretation to their courts. The Danish and Dutch implementations switch “individual words” for “very few words” and “a few words” respectively. This implies that “very short extracts” may consist of more than a few words, thus raising the standard set slightly. The Danish Ministry of Culture appears to envision an interpretation that excludes extracts longer than 11 words – however, this conclusion is based on a flawed understanding of copyright law\(^83\) and is not binding on the courts. Regardless, in light of the importance of fundamental rights in interpreting the term “very short extracts”, the change in wording in the Danish and Dutch versions should not be viewed as significant.

The German Explanatory Memorandum clarifies that permitted extracts may include various types of content, including text, photographs, graphics, audio and video, as well as combinations thereof. As the German national expert explains, this suggests a qualitative approach to interpreting “very short extracts”.

A qualitative approach was also adopted by the three Member States that opted for elaboration. The French implementation has incorporated the non-binding reference to the effectiveness of the right in the Directive’s Recital into the text of the law. As the French national expert explains, it then takes inspiration from competition law to interpret the requirement as indicating that the extract must not be capable of replacing the press publication itself or exempting the reader from referring to it. The Italian implementation likewise defines “very short extracts” as extracts that do not exempt users from the need to consult the entire article. Whether such a need will arise, however, will arguably differ from topic to topic and reader to reader, making the standard a difficult one to apply. A report of the French National Assembly put forward the idea that snippets or even titles may be covered by the PPR, as they may provide enough information to readers to satisfy their informational needs, thus discouraging them to click through to the full article.\(^84\) This interpretation is hard to reconcile with the freedom of information-focused approach outlined above. As commentators have observed, its impact would be to encourage clickbait and deprive users of useful context that can help them navigate the immense amounts of information available on the internet.\(^85\) The French national expert notes that the quotation exception


\(^{83}\) The Infopaq decision of the CJEU found that 11 words may amount to an original work that is therefore protected by copyright, but this does not mean that they will always be. See CJEU, C-5/08, Infopaq, 16 July 2001, para. 51. The Danish report suggests that this was also the conclusion of the Danish Supreme Court when the Infopaq case was returned to it (see answer to Q. 4 in the national report on the implementation of Article 15 in Denmark). It is, moreover, not clear that a standard based on a concept that is not relevant to the PPR should affect its interpretation.


may provide some relief – but this is accompanied by conditions and has been restrictively interpreted in France (see below, section on AC 8 on the implementation of Article 17 DCDSM).66 Thus, the French and Italian implementations run risks in terms of fundamental rights. As “very short extracts” should be seen as an autonomous notion of EU law, to the extent that these two implementations do not account for the context and objective of the provision, they are also questionable in light of the Directive’s internal market objective.

The Spanish implementation requires that excerpts be either very short or of little significance qualitatively and quantitatively. At first sight, this appears to loosen the standard by adding an additional element. Yet, to the extent that the quality of what is taken remains relevant, the standard will not be affected. The Spanish text also demands both that the extract does not harm right-holder investments and that it does not affect the effectiveness of the PPR. Given that, as argued above, it does seem as though the two conditions tend towards the same result, this elaboration likely has no effect. That said, in embedding the two elements into the text of the law (as opposed to the interpretative guidance of a Preamble or Explanatory Memorandum), Spain excludes the possibility that very short extracts that do not meet these conditions may be nevertheless permissible, something left open in the Directive and other national implementations.

According to the national reports, no examined Member State has opted for a purely quantitative definition based on the number of, e.g., characters or words taken.67 This should be accepted as the correct approach, in light of the fundamental rights concerns described above – which mean that the content of the extract copied and the necessity of its use for end-users’ expression should be taken into account. While this may make algorithmic enforcement harder, the perceived advantages of such enforcement might be illusory, as the need to respect users’ rights risks undermining their validity and, therefore, legal certainty.


66 It should be noted that other Member States have adopted or are contemplating a quantitative approach. For example, the Lithuanian implementation, adopted after the research for this study commenced, defines “very short extracts” as consisting of “125 digits or less, excluding the headers and spaces between text” (see Article 571(2)(3) of the Lithuanian implementation, available here: https://www.e.tar.lt/portal/en/legalAct/5b445220b02711ec8d9390588bf2dc65 and E Rosati, “Lithuania transposes the DSM Directive”, 11 April 2022, IP Kat, available here: https://jpikitten.blogspot.com/2022/04/guest-post-lithuania-transposes-dsm.html). Similarly, the current Bulgarian draft defines “very short extracts” as “the title of the publication, together with up to the first 100 consecutive characters of the text, which may be accompanied by a small-format preview image with a resolution of up to 128 by 128 pixels and part of a sound file, or video up to three seconds long” (see section 70(1)(k) of the Bulgarian implementation, available at: https://www.strategy.bg/PublicConsultations/View.aspx?lang=bg-BG&Id=6348). Such solutions should be seen as incompatible with the single market objective of the Directive and EU law on fundamental rights.
“Mere facts”

According to Recital 57, the rights of press publishers should not extend to “mere facts reported in press publications”. As this limitation is not included in the text of Article 15 DCDSM, it is unsurprising that it also does not appear in most national implementations. Yet it is of importance, particularly given the lack of any other discernible threshold for protection by the PPR. Only Germany and Malta have explicitly adopted the exclusion. However, as a number of national experts observe, given that no threshold condition is set for protection in the Directive, the logical and troubling conclusion of the omission on the exclusion from the operative text of the Directive is that mere facts are caught by the PPR. Assistance may be provided by general principles excluding mere facts from protection. However, as the Estonian national expert notes, attention is needed: the PPR is a related right and its subject matter extends beyond “works” in the copyright sense. Rules that only protect mere facts from copyright protection are therefore insufficient. The Explanatory Memoranda of the Dutch and the Estonian implementations mitigate the problem somewhat by noting that the PPR should not be interpreted so as to create monopolies on “factual information” and “news of the day”, respectively – but these statements are non-binding and limited in their reach.

To the extent that “mere facts” are not mentioned in the Directive, it could be argued that – counterintuitively – it is those Member States that exclude them that run the risk of incorrect implementation. Recital 57 could be said to salvage these transpositions – but it is hard to determine whether this supports or conflicts with the text of Article 15 DCDSM itself. To the extent that the wording of the operative part of the Directive does extend protection over mere facts – no threshold condition for such protection having been imposed – it is possible that the Recital is helpless to assist. At the same time, the disproportionate adverse effect this would entail for users’ freedom of expression cannot be ignored. The conclusion should therefore be that Article 15 DCDSM should be interpreted in light of the Charter in such a way as to allow a fair balance to be struck between the PPR and freedom of expression. National transpositions of the “mere facts” exclusion should accordingly be deemed acceptable. In Member States that do not explicitly implement the exclusion, it ought to be read into the national transposition teleologically and in light of the requirements of fundamental rights.

Public domain content

A similar problem arises with regard to public domain content. According to Article 15(2) DCDSM in fine, the PPR cannot be invoked to control the use of works or other subject matter for which protection has expired. This restriction has made it into the Austrian, Dutch, German, Irish, Italian and Spanish implementations, but is absent from the Danish, Estonian, French and Hungarian ones. As the French national expert notes, given the absence of threshold conditions for protection, this amounts to an expansion of the reach of the right in the latter countries. The effects of this expansion may be dampened depending on whether the use of a single element from a “collection” that constitutes a press publication would amount to a “part” of the press publication. Even if that is not the case, however, taking two
expired works included in a press publication (e.g., two photos for which protection has expired) would circumvent even a narrow interpretation and allow the appropriation of public domain content.

The Estonian Explanatory Memorandum suggests that the fact that terms of protection are specified elsewhere in the law for copyright and related rights means that there is no need to make provision for public domain content in the national implementation. This statement is indicative of the lack of understanding regarding the effects of the PPR that has accompanied it since it was first proposed.

It is also important to note that, as in the Directive, in those countries in which it appears, the exclusion is limited to subject matter for which copyright and related rights protection has expired. This means that it cannot provide cover to other elements of the public domain, such as information and news (see analysis on “mere facts” above). Moreover, to the extent that the restriction makes reference to “subject matter for which protection has expired” and the PPR is a right that provides protection to subject matter, its wording is circular and accordingly unclear. It may be that the slightly more detailed language in the Dutch and German implementations, which makes reference to the inclusion in a press publication of content for which protection has expired, may provide greater clarity. Ideally, the law should have specified that the reference is to protection by other rights.

Ultimately, the lack of implementation on expired rights in Denmark, Estonia, France and Hungary brings these countries out of line with the Directive. The risk this entails of an appropriation of public domain material has a corresponding impact on fundamental rights.

**A15 – Table 1: Assessment of national implementations under AC1. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.**

<table>
<thead>
<tr>
<th>Art. 15 AC 1</th>
<th>AT</th>
<th>DK</th>
<th>EE</th>
<th>FR</th>
<th>DE</th>
<th>HU</th>
<th>IE</th>
<th>IT</th>
<th>MT</th>
<th>NL</th>
<th>ES</th>
</tr>
</thead>
<tbody>
<tr>
<td>DSM</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>-</td>
</tr>
<tr>
<td>FR</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

**Assessment Criterion 2: Right-holders**

Article 15 DCDSM affords protection to publishers of press publications without defining them. Recital 55 in fine states that “[t]he concept of publisher of press publications should be understood as covering service providers, such as news publishers or news agencies, when they publish press publications within the meaning of this Directive.”

Based on the national reports, it appears that most Member States have taken a light touch approach to implementation that doesn’t delve deeper than the Directive. Austria joins the dots by clarifying that press publishers are the ones who provide the initiative, editorial responsibility and control mentioned in the definition of press publications. Germany defines the publisher of a press publication as “any person who produces a press publication”. The Explanatory Memorandum specifies that this covers those persons who provide the economic, organisational and technical services required for the publication.

95 See answer to Q. 6 in the national report on the implementation of Article 15 in Estonia.
96 Similarly see E Rosati, Copyright in the Digital Single Market (OUP 2021), p. 259.
Some question marks have arisen around news agencies. These are explicitly covered in the French and Spanish implementations. Debate has focused on whether news agencies are protected when they provide raw information and images as an intermediate product. As the French national expert explains, the answer hangs on whether the beneficiary of the right must be the person who realises the publication. While the Spanish implementation requires that news agencies “publish” press publications to enjoy protection, in an interim decision, the French Competition Authority has concluded that press agencies, as producers of content that invest in its production, can benefit when the content is published by somebody else. The formulation of the Austrian and German definitions might suggest that those Member States would tend to move in the opposite direction. The Dutch national expert notes that the issue is disputed in the Netherlands.

The notion of a press publisher should be viewed as an autonomous concept of EU law. The wording of Recital 55 could be read as suggesting that involvement in the act of publication is necessary. That said, one would expect a publisher of press publications to publish them. The question, therefore, is what qualifies as publishing. CJEU guidance will accordingly be necessary for a homogenous application.

An interesting question concerns the geographical reach of the right. According to Article 15(1) DCDSM, protection only extends to publishers established in an EU Member State. Interestingly, according to the national reports, Ireland and Spain only provide protection to publishers established in their territories. This is a clear violation of the terms of the Directive. Other Member States (Denmark, Hungary and Malta) mention no geographic limitations. The result in these cases will be under- and over-protection respectively. Both would affect the balance struck by the EU legislator between the protection of intellectual property and that of freedom of expression. The remaining Member States (Austria, Estonia, France, Germany, Italy and the Netherlands) extend protection to publishers established anywhere in the EU, as the Directive requires.

Art. 15 – Table 2: Assessment of national implementations under AC1. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.

<table>
<thead>
<tr>
<th>Art. 15 AC 2</th>
<th>AT</th>
<th>DK</th>
<th>EE</th>
<th>FR</th>
<th>DE</th>
<th>HU</th>
<th>IE</th>
<th>IT</th>
<th>MT</th>
<th>NL</th>
<th>ES</th>
</tr>
</thead>
<tbody>
<tr>
<td>DSM</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>0</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>-</td>
</tr>
<tr>
<td>FR</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>0</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>-</td>
</tr>
</tbody>
</table>

Assessment Criterion 3: Restricted acts

According to Article 15(1) DCDSM, publishers of press publications should be granted the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the online use of their press publications. These provisions cover the reproduction right and the making available right (i.e., the right to control the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them) for related rights owners.

---

CJEU interpretative case law has held that profit-seeking providers of hyperlinks to infringing content are rebuttably presumed to know that the content is infringing and therefore liable for making it available to the public.\(^9\) To avoid extending press publishers’ rights to the provision of hyperlinks (which would have had detrimental effects on freedom of expression online),\(^10\) the EU legislator narrowed the scope of Article 15(1) DCDSM with an exception in favour of acts of hyperlinking.\(^11\) It should be understood that this is a different matter to the question of whether short extracts of text reproduced in the hyperlink are infringing. While that issue concerns the question of whether the part taken falls within the subject matter of the right and is therefore addressed via the exclusion in favour of very short extracts, here the question is whether the act of providing the hyperlink falls within the scope of the exclusive right.\(^12\)

Most national implementations have remained within the bounds set by Article 15(1) DCDSM. In particular, Austria, Denmark, Estonia, Germany, Malta, the Netherlands and Spain all tick the crucial boxes of “reproduction”, “making available to the public” and “online use”. Hungary replaces “online use” with a reference to electronic reproduction by an ISSP.\(^13\) Since, however, electronic reproductions are only considered infringing if done for the purpose of making available to the public, the Hungarian implementation passes muster. The Italian implementation refers to “communication to the public” instead of “making available to the public”. As the Italian expert explains, the notion of a “communication to the public” in Italian copyright law is broader than “making available”, extending over e.g., broadcasting. This therefore represents an expansion. Similarly, the Irish implementation covers “reproduction”, “adaptation” and “making available”, the latter being so broadly defined in Irish law as to include acts of distribution and broadcasting. In Italy and Ireland, this expansion is partially controlled through the condition of “online use”. Nevertheless, depending on national definitions, the result could be coverage of e.g., streaming services and online radio.

Similar problems are encountered in France. France replaces “online uses” with uses “in digital format”, a broader term, and (unlike Hungary) introduces no qualification. As the French national expert explains,\(^14\) a further problem is that the French approach to the reproduction right is potentially broader than that of EU copyright law, covering acts of distribution and adaptation. The final result represents a significant departure from the DCDSM. Curiously, France also incorporates the term “communication to the public” in its implementation of Article 15 DCDSM, although the term is foreign to French copyright law. As the national expert notes, the notion should, rightly, be interpreted to align with the reference to “making available to the public” in the Directive.

---

\(^13\) See answer to Q. 9 in the national report on the implementation of Article 15 in Hungary.
\(^14\) See answer to Q. 9 in the national report on the implementation of Article 15 in France.
Hyperlinking is much better managed by the Member States. All national implementations exclude the provision of hyperlinks from the scope of protection of the PPR. While none define hyperlinking, the well-developed case law of the CJEU is robust enough to set the pace. In this regard, it is worth noting that the Danish explanatory memorandum refers only to “clickable” links. As the Danish national expert observes, this is likely incompatible with the case law of the CJEU, which has instead taken a largely aligned approach to “clickable” and “non-clickable” links, such as framing/embedding. If applied in practice, the Danish restriction could also negatively affect users’ freedom of expression. Since the explanatory memorandum is non-binding, it is not clear that a problem will emerge.

**A15 – Table 3: Assessment of national implementations under AC3. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.**

<table>
<thead>
<tr>
<th>Art. 15 AC 3</th>
<th>AT</th>
<th>DK</th>
<th>EE</th>
<th>FR</th>
<th>DE</th>
<th>HU</th>
<th>IE</th>
<th>IT</th>
<th>MT</th>
<th>NL</th>
<th>ES</th>
</tr>
</thead>
<tbody>
<tr>
<td>DSM</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>0</td>
<td>0</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>FR</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>0</td>
<td>0</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
</tbody>
</table>

**Assessment Criterion 4: Targeted users**

As opposed to what is generally the case for exclusive rights in copyright and related rights, Article 15 DCSMD does not apply *erga omnes*, but is targeted at uses by information society service providers (ISSPs). Recital 55 refers to Directive (EU) 2015/1535 for a definition of ISSPs (“any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”). Article 15(1) DCDSDM further stipulates that the PPR does not apply to private or non-commercial uses of press publications by individual users. In a final limitation, as the object of protection by the PPR may coincide with the subject matter of copyright and related rights incorporated in press publications, Article 15(2) para. 1 DCDSDM states that the PPR leaves intact such rights, so that it may not be invoked against their owners or deprive them of the ability to exploit their rights independently. To this end, Article 15(2) para. 2 DCDSDM clarifies that the holders of non-exclusive licenses issued by such right-holders shall likewise be insulated.

For the most part, the implementing Member States appear to have transposed these provisions successfully. A few small hiccoughs can be observed. According to the national report, Estonia transposes the provisions on right-holders and their licensees in a “minimalist way”, stating that the new provisions “leave intact and do not in any way affect” copyright and related rights over content published in press publications. The Estonian Explanatory Memorandum suggests that other provisions in national copyright law achieve the same effect, but it is not clear that this is the case. Potentially, a right can be “left intact” and “not affected” even while its owner is blocked from exercising it in a specific situation due to a clash with another right. The same problem emerges in Hungary, which, according to the national experts, relies for the protection of other right-holders on the general provisions on related rights, according to which related rights cannot influence the protection of copyright. The Hungarian approach also seems to omit protection for the holders of related rights over subject matter incorporated in press publications.

---


106 A Lazarova, “Re-use the news: between the EU press publishers’ right’s addressees and the informatory exceptions’ beneficiaries” (2021) 16(3) JIPLP 236.


108 See also Recital 59 DCDSDM.
The French implementation targets “online public communication services”. The notion appears to be both broader and narrower than that of ISSPs in EU law, the relevant services being defined as covering the “transmission, on individual request, of digital data not having the character of private correspondence, by means of an electronic communication method allowing a reciprocal exchange of information between the provider and the recipient”.109 This omits the reference to services normally provided for remuneration, but adds a requirement of reciprocal information exchange.

France has also opted to omit the guarantee in favour of private or non-commercial uses by individuals, as it considers that the same effect is achieved through its private copying exception.110 Yet is not clear that the conditions for the private copying exception coincide with those of the exclusion for individual users in Article 15(1) DCDSM.111 Crucially, the private copying exception applies only to the reproduction right. It also requires fair compensation. Moreover, the relevant reproduction must be made “for private use and for ends that are neither directly nor indirectly commercial”. By contrast, the Article 15(1) DCDSM exclusion encompasses “private or non-commercial uses” by individual users. It has been argued that the word “or” should be ignored here,112 but this is not convincing. There is no reason to restrictively reword the Directive. The result of the French approach is obvious gold-plating that is incompatible with the DCDSM.113 This is, moreover, not without consequence, as it means that public uses by e.g., non-commercial bloggers114 are left unprotected. This outcome is explicitly rejected by Recital 55 of the Directive, which states that users should remain allowed to “share” press publications online.

In addition, given that ISSPs include the OCSSPs (“online content-sharing service providers”) targeted by Article 17 DCDSM115 and in light of the fact that (contrary to the Directive) the French implementation of Article 17 DCDSM appears to extend to the PPR (see below the discussion on AC 2 on Article 17 DCDSM), the French approach makes OCSSPs liable to the publishers of press publications for non-commercial public sharing of their press publications by their users on their platforms. Yet, as the recitals to the DCDSM make clear, Article 15 DCDSM was motivated by the need to address own use by providers such as news aggregators and media monitoring services.116 The result is that the French implementation cannot be considered an appropriate reflection of Article 15 DCDSM.

France also appears to have omitted the guarantee in favour of right-holders and licensees of integrated content. The effects of this omission are limited only to the holders of related rights, owners of copyright being protected by the general rule that holds that neighbouring rights cannot affect the rights of authors.117

<table>
<thead>
<tr>
<th>Art. 15 DSM</th>
<th>AT</th>
<th>DK</th>
<th>EE</th>
<th>FR</th>
<th>DE</th>
<th>HU</th>
<th>IE</th>
<th>IT</th>
<th>MT</th>
<th>NL</th>
<th>ES</th>
</tr>
</thead>
<tbody>
<tr>
<td>FR</td>
<td>+</td>
<td>+</td>
<td>0</td>
<td>-</td>
<td>+</td>
<td>0</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
</tbody>
</table>

A15 – Table 4: Assessment of national implementations under AC4. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.

109 See answer to Q. 11 on the national implementation of Article 15 in France.
110 See Article 5(2)(b) ISD.
114 Note that such a blogger could qualify as an ISSP under both the EU and French definitions – though the requirement of reciprocal exchange of information may be of assistance under the second (this, however, raising its own compatibility issues).
115 See answers to Q. 11 in the national reports on the implementation of Article 15.
117 See answer to Q. 12 on Article 15 in the national report on France.
Assessment Criterion 5: Exceptions & limitations

Article 15(3) DCDSM establishes that the provisions on exceptions and limitations to copyright and related rights set out in the ISD, the Orphan Works Directive\(^{118}\) and the Directive implementing the Marrakesh Treaty in the EU\(^{119}\) apply \textit{mutatis mutandis} to the PPR. The exceptions and limitations introduced through the DCDSM itself also apply to the PPR.\(^{120}\) While more recent provisions on exceptions and limitations in EU copyright law have tended to be mandatory for Member States, this is the case for only one of the exceptions and limitations in the ISD.\(^{121}\) Beyond that, the ISD sets out an exhaustive list of exceptions and limitations that national legislators may – but are not obliged to – introduce into their national legal order. As a result, a certain level of disharmonisation is baked into Article 15 DCDSM. The ISD legislator explained this approach by suggesting that full harmonisation of exceptions and limitations is not necessary for the smooth functioning of the internal market.\(^{122}\) While all examined Member States appear to have incorporated Article 15(3) DCDSM into national law, the usual fragmented effects are liable to emerge\(^{123}\) – it would be hard, however, to view any such effects as resulting from the national implementations of the DCDSM, as opposed to the minimum harmonisation nature of the ISD.

All Member States appear to extend their regular exceptions and limitations to the PPR. It is relevant to highlight Spain, which prior to the implementation of Article 15 DCDSM provided protection for press publishers in the form of an unwaivable and compulsively collectively managed exception that subjected providers of electronic aggregation services to the payment of equitable compensation.\(^{124}\) Under this system, search engines were exempted from both authorisation and equitable compensation for any acts of making available to the public of press publications, provided such making available: (i) was carried out without a commercial purpose on its own; (ii) was limited to what is strictly needed to offer search results in response to search queries; and (iii) included a link to the origin web page.\(^{125}\) This regime was maintained in Spain after the implementation of Article 15 DCDSM as a derogation from the rights it introduces. On its face, it represents a divergence from the system set up in the Directive. That said, any extracts “strictly needed to offer search results in response to search queries” are likely to qualify as “very short extracts” in the terms of Article 15. Therefore, as the Spanish national expert has observed elsewhere, any issues that may emerge in practice are likely to result from the excessively strict Spanish implementation of the “very short extracts” carve-out, rather than the exception itself.\(^{126}\)


\(^{120}\) See Articles 3(1), 4(1), 5(1), 6(1) and 8(2) DCDSM.

\(^{121}\) See Article 5(1) ISD on temporary copying.

\(^{122}\) See Recital 31 ISD.

\(^{123}\) For an analysis focusing on the “press review” and “reporting on current events” exceptions of Article 5(3)(c) ISD, see A Lazarova, “Re-use the news: between the EU press publishers’ right’s addressees and the informative exceptions’ beneficiaries” (2021) 16(3) JIPLP 236.


\(^{125}\) See answer to Q. 1 in the national report on the implementation of Article 15 in Spain.

\(^{126}\) M Peguera, “Spanish transposition of Arts. 15 and 17 of the DSM Directive: overview of selected issues” (2022) 17(5) JIPLP 450.
### A15 – Table 5: Assessment of national implementations under AC5. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.

<table>
<thead>
<tr>
<th>Art. 15 AC 5</th>
<th>AT</th>
<th>DK</th>
<th>EE</th>
<th>FR</th>
<th>DE</th>
<th>HU</th>
<th>IE</th>
<th>IT</th>
<th>MT</th>
<th>NL</th>
<th>ES</th>
</tr>
</thead>
<tbody>
<tr>
<td>DSM</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>FR</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
</tbody>
</table>

### Assessment Criterion 6: Licensing

The Directive does not include any provisions specific to the licensing of PPRs. The majority of Member States are likewise silent on the issue. In such cases, unless stated otherwise, the general provisions apply.

Collective licensing is explicitly made available in Estonia, Hungary, the Netherlands and Spain. In Estonia and Denmark, collective licensing with extended effect is allowed. It is interesting that Germany does not extend its provisions guaranteeing equitable remuneration to the publishers of press publications. In France, a new CMO representing press publishers has recently emerged. Moreover, a duty to negotiate a license has been imposed by the French Competition Authority on Google for abusing its dominant position by refusing to pay a fee to publishers for use of their press publications. It is difficult to assess this development. Arguably, it falls outside the field occupied by the directive. Does resorting to competition law to force and control negotiations on the licensing of a related right fall within or without the “occupied field” of the DCDSM?

France, Italy and Spain set out dedicated provisions on the licensing of press publications. The Spanish rules require that: (i) the editorial independence of press publishers and news agencies be respected; (ii) ISSPs provide detailed information on the parameters that determine the classification of content and their relative importance; and (iii) the agreement cannot be linked to other contracts or obligations. It is not clear what the result will be if these conditions are not met. France sets out specific criteria to be taken into account in fixing the remuneration due to press publishers.

The Italian provisions require that the payment of fair compensation be decided by negotiation and taking into account criteria to be decided by the Italian Communications Authority (Autorità Garante per le Comunicazioni, (AGCOM)). During negotiations, ISSPs must not limit the visibility of the press publications and must disclose the necessary data to calculate compensation. Publishers must respect confidential information. If negotiations are unsuccessful, the parties may request intervention by AGCOM. If, after the determination of fair compensation by AGCOM, no agreement is reached, both parties can refer the case to the courts. The result could be a court mandated duty to contract. As the Italian national expert observes, a potential incompatibility arises here with EU law, to the extent that the Italian implementation effectively transforms what are intended to be exclusive rights into remuneration rights.

---

127 See answer to Q. 14 in the national report on the implementation of Article 15 in France.
130 See answer to Q. 14 in the national report on the implementation of Article 15 in France.
Importantly, the European Commission has stated that Member States are not allowed to implement Article 15 through a mechanism of mandatory collective management, precisely because such a system would deprive publishers of the right to authorise or prohibit the use of their publications. To support this interpretation, the Commission cited case law of the CJEU that has emphasised the preventive nature of the exclusive rights, meaning that the exploitation of protected content requires the prior consent of the right-holder. The Court has thus held that, while right-holders may provide such consent in an implicit manner, the conditions under which implicit consent may be accepted must be strictly defined so as not to deprive the principle of prior consent of proper effect. Commentators have cast doubt on whether the Court would find the potential judicial imposition, under the Italian rules, of a duty to contract on press publishers compatible with this principle, particularly given the lack of an opt-out option or of the delineation of conditions governing the presumption of consent. The Italian approach also raises fundamental rights issues, as there is an argument that such a requirement would violate Article 17(2) of the Charter.

A15 – Table 6: Assessment of national implementations under AC6. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.

<table>
<thead>
<tr>
<th>Art. 15</th>
<th>AC 6</th>
<th>AT</th>
<th>DK</th>
<th>EE</th>
<th>FR</th>
<th>DE</th>
<th>HU</th>
<th>IE</th>
<th>IT</th>
<th>MT</th>
<th>NL</th>
<th>ES</th>
</tr>
</thead>
<tbody>
<tr>
<td>DSM</td>
<td></td>
<td>+</td>
<td></td>
<td></td>
<td>0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FR</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>0</td>
<td>+</td>
<td>+</td>
<td></td>
<td></td>
<td></td>
<td>-</td>
<td>+</td>
<td>+</td>
</tr>
</tbody>
</table>

Assessment Criterion 7: Revenue sharing

Article 15(5) DCDSM establishes that authors of works incorporated in press publications must receive an “appropriate share” of the revenues that press publishers receive for the use of their press publications by ISSPs. While six of the examined Member States (Austria, Denmark, Estonia, France, Ireland and Malta) have transposed these provisions without elaboration, others take a more engaged approach.

Notably, Germany extends the entitlement to the holders of related rights in content included in a press publication. This represents gold-plating, but its acceptability is unclear – EU law does not purport to list exhaustively the rights of related right-holders.

Other national innovations focus on the calculation of the “appropriate share”. Italy sets the share due to authors at between 2% and 5% of the “fair compensation” they receive. The precise amount is to be set by individual contracts in case of freelancers and collective agreements in cases of employees. Germany establishes that the minimum share for authors should be one third of the income generated. Derogations to the detriment of authors and related right owners must be based on a collective labour agreement or a joint remuneration agreement with authors’ associations. France has adopted detailed provisions establishing the process for determining the appropriate share via negotiations or, failing that, a designated committee. Malta delegates the determination of the amount of remuneration to a designated Board. Previous legal practice in Hungary regarding employee works indicates that a case-by-case approach should be taken that accounts for all relevant circumstances (type of use, territorial...

scope, medium, proportion of the work used, etc.) to determine whether a share is appropriate. The Dutch Explanatory Memorandum relies on the transparency obligations of Article 19 DCDSM to conclude that press publishers are obliged to disclose the income that the PPR generates and the share to which authors are entitled. Spain specifies that authors may resort to collective management organisations to exercise their rights.

This disparate collection of provisions is not conducive to harmonisation. The discrepancy between the shares set in Italian and German law is striking. That said, while notion of an “appropriate share” should be viewed as an autonomous notion of EU law, absent further CJEU guidance it is hard to determine which national approach hits closer to the mark.

A15 – Table 7: Assessment of national implementations under AC7. Key: (+): no obvious compatibility problems; (-): detected compatibility problems; (0): unclear compatibility.

<table>
<thead>
<tr>
<th>Art. 15</th>
<th>AT</th>
<th>DK</th>
<th>EE</th>
<th>FR</th>
<th>DE</th>
<th>HU</th>
<th>IE</th>
<th>IT</th>
<th>MT</th>
<th>NL</th>
<th>ES</th>
</tr>
</thead>
<tbody>
<tr>
<td>DSM</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>0</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>FR</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>0</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
</tbody>
</table>

Assessment Criterion 8: Term of protection

The term of the PPR is set by Article 15(4) DCDSM at two years after the press publication is published. This is calculated from 1 January of the year following the date on which the press publication is published. All Member States appear to have implemented this duration faithfully. Notably, in France it has been accepted that only the first publication is relevant. This means that, if a piece of content included in a press publication is re-published, the term of protection is not extended. Although commentators have noted that the question is unclear, it should be accepted that this approach is correct, otherwise the route to permanent protection would be obvious.

According to Article 15(4) DCDSM, the new PPR does not apply to press publications first published before 6 June 2019. According to the national reports, all Member States implemented this time frame.

A15 – Table 8: Assessment of national implementations under AC8. Key: (+): no obvious compatibility problems; (-): detected compatibility problems; (0): unclear compatibility.

<table>
<thead>
<tr>
<th>Art. 15</th>
<th>AT</th>
<th>DK</th>
<th>EE</th>
<th>FR</th>
<th>DE</th>
<th>HU</th>
<th>IE</th>
<th>IT</th>
<th>MT</th>
<th>NL</th>
<th>ES</th>
</tr>
</thead>
<tbody>
<tr>
<td>DSM</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>FR</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
</tbody>
</table>

Assessment Criterion 9: Waiver

The operative part of the DCDSM is silent on whether the PPR can be waived or whether authorisation can be provided for free by press publishers. Recital 82 clarifies that “[n]othing in [the] Directive should be interpreted as preventing holders of exclusive rights under Union copyright law from authorising the use of their works or other subject matter for free, including through non-exclusive free licences for the benefit of any users.”

---

134 Consider CJEU, Case C-467/08, Padawan, 21 October 2010, ECLI:EU:C:2010:620, paras 36-37.
Most of the examined Member States leave the issue unaddressed. In these cases, the national reports appear to conclude that there is nothing to exclude either option. The exceptions are Estonia and Hungary. In Estonia, related rights holders have an unwaivable right to renegotiate a relevant and fair remuneration where the remuneration received is disproportionate to the revenue derived from exploitation. In Hungary, right-holders may not waive their rights, although right-holders may refrain from requiring remuneration. In both countries, the ultimate result should be understood as allowing free uses by ISSPs with right-holder consent.

As mentioned above, Spain and Italy institute rules on the licensing of uses of press publications. However, there appears to be nothing in those provisions to prohibit either waiver or a royalty-free grant.

**A15 – Table 9: Assessment of national implementations under AC9. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.**

<table>
<thead>
<tr>
<th>Art. 15 AC 9</th>
<th>AT</th>
<th>DK</th>
<th>EE</th>
<th>FR</th>
<th>DE</th>
<th>HU</th>
<th>IE</th>
<th>IT</th>
<th>MT</th>
<th>NL</th>
<th>ES</th>
</tr>
</thead>
<tbody>
<tr>
<td>DSM</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td></td>
</tr>
<tr>
<td>FR</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td></td>
</tr>
</tbody>
</table>

**Assessment Criterion 10: Entry into effect**

According to Article 29 DCDSM, the implementation deadline for the directive was 7 June 2021. According to the national reports, with regard to Article 15, this was met only by Denmark, France, Germany, Hungary and the Netherlands. This obviously has effects for the internal market. To the extent that the PPR is protected by Article 17(2) of the Charter, it also results in incompatibility with fundamental rights.

**A15 – Table 10: Assessment of national implementations under AC10. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.**

<table>
<thead>
<tr>
<th>Art. 15 AC 10</th>
<th>AT</th>
<th>DK</th>
<th>EE</th>
<th>FR</th>
<th>DE</th>
<th>HU</th>
<th>IE</th>
<th>IT</th>
<th>MT</th>
<th>NL</th>
<th>ES</th>
</tr>
</thead>
<tbody>
<tr>
<td>DSM</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>-</td>
</tr>
<tr>
<td>FR</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>-</td>
</tr>
</tbody>
</table>

### 3. National Implementations of Article 17 DCDSM

Like Article 15 DCDSM, the final text of Article 17 DCDSM is the result of heated debate and delicate compromises. This is reflected in its length and intricacy. Evaluation of its implementation into the national laws of the Member States is further complicated by two developments that followed the adoption of the Directive: the publication of the Commission’s (non-binding) guidance on Article 17 DCDSM in June 2021 and the judgment of the CJEU in Poland’s action for annulment of Article 17(4) point (b) and (c) in April 2022. As a result, assessing its implementation into the national laws of the Member States is – if anything – more complex than Article 15 DCDSM.

---


As it did with Article 15, this study broke the provision down into 15 Assessment Criteria (AC):

1. subject matter;
2. right-holders;
3. exclusive rights;
4. targeted providers;
5. scope of protection;
6. right-holder cooperation;
7. general monitoring;
8. exceptions and limitations;
9. licensing;
10. legitimate uses: *ex ante* safeguards;
11. legitimate uses: *ex post* safeguards;
12. sanctions;
13. information obligations;
14. waiver and
15. entry into force.

AC 1, 2, 3, 5, 8, 9, 14 and 15 consist of standard building blocks of intellectual property rights and AC 4, 6, 7, 10, 11, 12 and 13 represent peculiarities of the regime set out in Article 17 DCDSM. Most of the questions chosen to explore the AC are based on the wording of Article 17 DCDSM. Others (e.g., in relation to “manifestly infringing content” or “earmarking”) are motivated by the Commission’s guidance.

As was done above for Article 15 DCDSM, below the AC are examined in turn with a view to assessing compliance with: a) the wording of Article 17 DCDSM itself and therefore the Digital Single Market objective of the Directive; and b) the EU’s law of fundamental rights.

### Assessment Criteria 1 and 2: Subject matter and right-holders

As opposed to Article 15 DCDSM, Article 17 DCDSM does not introduce a new related right to EU copyright law. Instead, it expands or solidifies (depending on the preferred interpretation) the protections already afforded under copyright and related rights to right-holders. Its subject matter is therefore clear: works of copyright and the subject matter of related rights.

Specifically, Article 17(1) para. 2 indicates that the beneficiaries are the owners of copyright and of the related rights listed in Article 3(2) ISD, i.e., performers, phonogram producers, the producers of the first fixations of films and broadcasting organisations.

Based on the national reports, only two Member States (Malta and the Netherlands) appear to have restricted protection only to these four related rights. Although it is not always clear from the answers in the national reports, most other Member States (Austria, Estonia, France, Germany, Hungary, Italy and Spain) appear to refer in a general way to works and the subject matter of related rights and to authors and related rights owners. This may mean that protection is extended to, e.g., (depending on national law) press publishers. The Estonian national expert suggests that this is in fact the case in Estonia. Denmark explicitly extends protection to producers of photographic pictures and producers of catalogues. These outcomes represent gold-plating, but whether they go against the total harmonisation nature of Article 17 DCDSM (and consequently have negative effects on freedom of expression) is unclear. It may be argued that where (as in Denmark’s case) the affected related rights fall outside of harmonised EU copyright law, the result is acceptable. However, where the PPR is pulled into the reach of the national transposition incompatibility ensues. Conversely, as the Irish national

---


140 See Article 17(1) DCDSM.


142 See answer to Q. 3 in the national report on the implementation of Article 17 in Estonia.
expert notes, it is not clear from the Irish implementation whether performers are granted protection in relation to their performances.\(^{143}\) If not, the result will also be faulty implementation.

**Art. 17 – Table 1: Assessment of national implementations under AC1-2. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.**

<table>
<thead>
<tr>
<th>Art. 17 AC 1-2</th>
<th>AT</th>
<th>DK</th>
<th>EE</th>
<th>FR</th>
<th>DE</th>
<th>HU</th>
<th>IE</th>
<th>IT</th>
<th>MT</th>
<th>NL</th>
<th>ES</th>
</tr>
</thead>
<tbody>
<tr>
<td>DSM</td>
<td>0</td>
<td>+</td>
<td>-</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>+</td>
<td>+</td>
<td>0</td>
</tr>
<tr>
<td>FR</td>
<td>0</td>
<td>+</td>
<td>-</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>+</td>
<td>+</td>
<td>0</td>
</tr>
</tbody>
</table>

**Assessment Criterion 3: Exclusive rights**

Further complications present themselves in relation to the affected exclusive rights. Article 17(1) protects right-holders against uploads of their content by end-users to the platforms of OCSSPs (see below). Specifically, it holds that when OCSSPs give the public access to content uploaded by their users they are performing “an act of communication to the public or an act of making available”. The provision thus dispenses with the nuanced criteria developed by the CJEU to determine whether such platforms infringe under the ISD.\(^{144}\) The use of the conjunction “or” is presumably due to the misalignment in EU copyright law between copyright and related rights as concerns the communication and making available rights. While Article 3(1) ISD grants authors a broad right of communication to the public, which includes making available, Article 3(2) ISD reserves for related rights owners only the making available right.\(^{145}\)

Most national implementations adopt the wording of the Directive without modification. In some cases, there is no direct match between the language used in the Directive and that employed in national copyright law. According to the national reports, this is the case in France, Ireland and the Netherlands. The Dutch implementation employs the term “openbaarmaking” (“disclosure to the public”), which in Dutch copyright law covers both the right of communication to the public and the right of making available to the public. To the extent that the concept corresponds to the two rights mentioned in Article 17(1) DCDSM, this seems unproblematic.

The French implementation refers to French law’s broadly conceived rights of “representation” and “reproduction” with regard to copyright and to the rights of communication and broadcasting with regard to related rights. The concept of “representation” is arguably adequately controlled by the descriptive approach taken in the directive (and transposed into French law) to the identified restricted act, which limits it to giving access to the public to content uploaded to the platforms of OCSSPs by users. The extension to the reproduction right is more troublesome in terms of alignment with the terms of the Directive (although arguably it follows from the logic inherent to Article 17 – it is hard to argue that

---

\(^{143}\) See answer to Q. 3 in the national report on the implementation of Article 17 in Ireland.

\(^{144}\) See CJEU, Case C-682/18, YouTube and Cyando, 22 June 2021, ECLI:EU:C:2021:503, paras. 66-70. See also the CJEU’s previous decision in Case C-610/15, Stichting Brein, 14 June 2017, ECLI:EU:C:2017:456, paras 18-48. Stamatooudi and Torremans describe the result as a “non-rebuttable presumption” of liability, see I Stamatooudi and P Torremans, “The Digital Single Market Directive” in I Stamatooudi and P Torremans, *EU Copyright Law – A Commentary* (2nd ed., Edward Elgar 2021), para. 17.250. Although see E Rosati, “Five Considerations for the Transposition and Application of Article 17 of the DSM Directive” (2021) 16(3) JIPLP 265, arguing that the term “communication to the public” has identical meanings in the ISD and the DCDSM.

\(^{145}\) Rights of communications to the public are granted to performers, phonogram producers and broadcasting organisations by Article 8 of the Related Rights Directive (Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L 376/28) and Article 4 of the SaCab Directive (Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L 248/15), however these are limited in different ways compared to Article 3(1) ISD. The reference in para. 2 of Article 17(1) DCDSM to Articles 3(1) and (2) ISD makes clear that these rights are not contemplated in the context of Article 17. See also Opinion of AG Saugmandsgaard Øe in C-401/19, Poland v Parliament and Council, 16 July 2021, ECLI:EU:C:2020:586, FN 18.
OCSSPs are engaging in acts of communication to the public, but not acts of reproduction in relation to their users’ uploads.\(^{146}\)

The same problem is presented by Ireland, which — while describing the restricted act accurately as acts of communication to the public or making available to the public — then appears to require that OCSSPs obtain authorisation for acts not only of communication or making available to the public, but also of reproduction. The wording of the relevant provision\(^{147}\) is not entirely clear. It states that OCSSPs must obtain authorisations from “the rightholders referred to in sections 37 and 40 of the Act of 2000”.\(^{148}\) The first of these grants to the copyright owner the reproduction right, right of making available to the public and adaptation right and the second defines the right of making available. As the Irish national expert notes,\(^{149}\) because the owners of these rights will not necessarily coincide, it appears that the Irish implementation requires OCSSPs to obtain consent for acts of reproduction and adaptation, as well as acts of making available to the public.\(^{150}\) Of course, it may also be that only holders of rights relevant to the identified act of communication to the public or making available to the public\(^{151}\) are considered relevant. The lack of a reference to s. 39 of the Act of 2000, which defines the reproduction right further supports this interpretation. But the wording is ambiguous and the fact that sections 37 and 40 of the Act of 2000 focus on restricted acts rather than right-holders is unhelpful. Further, the fact that, as noted above, OCSSPs inevitably copy the content they host makes it hard to explain why the reproduction right should not be included — which raises the possibility that the Irish legislator may have attempted to fix what it viewed as an obvious oversight.

In France, the application of the immunity of Article 17(4) to all “acts of unauthorised exploitation”\(^{152}\) limits the damage. In Ireland, (if the national implementation is in fact to be understood to extend to the reproduction right) the problem is potentially graver, as the immunity is explicitly restricted to acts of communication to the public. While the wording of the Irish implementation is hard to decipher and different interpretations are possible, it could be that liability for reproduction is established for OCSSPs and then not retracted even where they abide by the conditions of the special liability regime. The result would be a clear conflict with the Directive.

---

\(^{146}\) In this regard, note that the Commission’s guidance suggests that, “the acts of communication to the public and making content available in Article 17(1) should be understood as also covering reproductions necessary to carry out these acts”: European Commission, “Communication from the Commission to the European Parliament and the Council on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market”, 4 June 2021, COM(2021) 288 final, p. 6.

\(^{147}\) See ss. 19 and 20 of Ireland’s European Union (Copyright and Related Rights in the Digital Single Market) Regulations 2021.

\(^{148}\) See ss. 19 and 20 of Ireland’s European Union (Copyright and Related Rights in the Digital Single Market) Regulations 2021.

\(^{149}\) See observation of the Irish national expert in the answer to Q. 4 in the national report on the implementation of Article 17 in Ireland.


\(^{151}\) Although note that “communication to the public” is not listed as an act restricted by copyright by s. 37 of the Irish Copyright Act.

\(^{152}\) See answer to Q. 8 in the national report on the implementation of Article 17 in France.
With regard to the nature of the introduced right, according to the national reports, in those countries that consider the issue, there appears to be agreement – in line with the Commission’s guidance on Article 17 and the Opinion of the AG in the Poland case153 – on the lex specialis nature of the provision vis-à-vis Article 3 ISD.154 The issue is not straightforward and has proven controversial.155 Among other things, it affects the permissibility of national implementations that introduce exceptions and limitations to Article 17 DCDSM not foreseen in that provision or in Article 5 ISD (see below section on AC 5).156

Ultimately, based on the national reports, all examined Member States, with the exceptions of Ireland and France, appear to have implemented AC 1-3 in an unproblematic manner with regard to both the DSM objective and the law of fundamental rights.

A17 – Table 2: Assessment of national implementations under AC3. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.

<table>
<thead>
<tr>
<th>Art. 17 DSM</th>
<th>AT</th>
<th>DK</th>
<th>EE</th>
<th>FR</th>
<th>DE</th>
<th>HU</th>
<th>IE</th>
<th>IT</th>
<th>MT</th>
<th>NL</th>
<th>ES</th>
</tr>
</thead>
<tbody>
<tr>
<td>DSM</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>0</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>FR</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>0</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
</tbody>
</table>

Assessment Criterion 4: Targeted providers

Like Article 15 DCDSM, Article 17 DCSMD is targeted at a specific set of ISSPs: “online content-sharing service providers” (OCSSPs). According to the definition of Article 2(6) DCDSM, this refers to ISSPs whose “main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.” An open list of carve-outs is included in the definition. This covers not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and-sharing platforms, providers of electronic communications services as defined in Directive (EU) 2018/1972, online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use. The Commission’s guidance states that there is no scope for the Member States either to widen or to narrow the definition.157

---


154 See answers to Q. 4 in the national reports on the implementation of Article 17 in Denmark, Estonia, Germany and Hungary. See also Recital 64 of the DCDSM, which (while stating that Article 17 “clarifies” that OCSSPs perform acts of communication to the public) stipulates that this “does not affect the concept of communication to the public or of making available to the public elsewhere under Union law, nor does it affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to other service providers using copyright-protected content.”


According to the national reports, two examined Member States (Ireland and the Netherlands) adopt the EU definition verbatim. For the rest, the modifications are mostly minor, although some are potentially significant.

Notably, Denmark and Hungary don’t specify any carve-outs in their transpositions, thus potentially expanding the ambit of the provisions to include providers that were explicitly identified as inappropriate targets during the preparatory work on Article 17. Estonia, France and Italy list the services specified in the carve-outs as excluded from the definition, but do not make clear whether this list is a closed or open one.

Italy excludes from the carve-outs in favour of cloud service providers and online marketplaces OCSSPs that allow the sharing of protected works between multiple users. Presumably, the reasoning is that such providers are engaging in relevant behaviour regardless of their main qualification. How the Directive should be interpreted in this regard and whether therefore an incompatibility arises is unclear – does the qualification as a cloud service provider or online marketplace trump the provider’s actual activity or does the activity disqualify the provider? The second approach is more convincing, leaving Italy in the clear. Along similar lines, the Estonian Explanatory Memorandum notes that the fact that a service provider offers an excluded service does not preclude it from being caught by the provision if it also offers services that allow it to fall within the definition. As long as the “main purpose” proviso is respected, this seems sensible and potentially provides guidance on how to determine whether a provider qualifies as e.g., an online encyclopedia. It also agrees with Recital 62 of the Directive, according to which the carve-outs are intended to exclude “services that have a main purpose other than that of enabling users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit from that activity.”

With regard to the main definition, Austria and Germany add an additional element of competition with other providers. Specifically, in Austria, a provider must play “an important role in the market for online content by competing with online content services such as audio and video streaming services for the same audiences” and in Germany it must “compete with online content services for the same target groups.” These requirements are clearly inspired by Recital 62 DCDSM, according to which “this Directive should target only online services that play an important role on the online content market by competing with other online content service providers, such as online audio and video streaming service providers, for the same audiences.” However, as OCSSPs are online content services that presumably compete with each other, the condition is ill-formulated. Moreover, to the extent that its application would result in a contraction of the scope of Article 17 DCDSM, there is a strong argument that it should be ignored.

---

158 Both countries have incorporated the carve-outs into their Explanatory Memoranda, see answers to Q. 5 in the national report on the implementation of Article 17 in Denmark and Hungary.


161 See contra, the Commission’s guidance, according to which “Member States are advised to transpose and apply the different elements of the definition in the light of Recitals 61, 62 and 63, which provide important clarifications on the types of service providers included or excluded. As explained in Recital 62, Article 17 is aimed at online service providers that play an important role on the online content market by competing with other online content service providers, such as online audio and video streaming service providers, for the same audiences” (European Commission, “Communication from the Commission to the European Parliament and the Council on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market”, 4 June 2021, COM(2021) 288 final, p. 4). However, like the Recitals, the Guidance is non-binding when contradictory to the operative part of the Directive.
Along similar lines, the Austrian, French, German and Maltese implementations all clarify that the OCSSP immunity does not apply to providers whose (main) purpose is to engage in or to facilitate piracy.\(^{162}\) While an equivalent restriction is included in Recital 62 of the Directive, it is also not reflected in the text of Article 17 DCDSM. It is, moreover, unclear how to determine that the purpose of a service is piracy other than by reference to its respect for the conditions of Article 17(4) DCDSM. Again, given that it restricts the application of Article 17 DCDSM, it may be that – unless it is to be seen as an application of the principle of proportionality established in Article 17(5) DCDSM – the rule should not have been implemented into national law.

Italy and France both clarify that the profit-making purposes may be direct or indirect. Spain requires specifically that online encyclopaedias and educational and scientific repositories have neither direct nor indirect intent to profit. These restrictions are likely inspired by the wording of Recital 62, which also specifies that OCSSPs’ profit may derive “directly or indirectly” from the sharing of protected content by users. It is arguably unproblematic, at least to the extent that the focus in the Commission’s guidance on the actual nature of the provider is followed.\(^{163}\)

While the DCDSM requires that OCSSPs store and give access to “a large amount” of protected subject matter, Spain requires that they store and give access to protected content either in large amounts or that they have a large audience in Spain. The result is a clear broadening of scope.

Finally, in France the notion of “large amounts” is rendered as “significant quantities”. The French implementation further specifies that the relevant assessment should be done on a case-by-case basis, taking into account in particular, the type of infringing uploads, the type of uploaded works and the audience of the service. By decree of the Council of State, it is specified that a “significant quantity” is deemed to have been reached when the service’s audience and the number of content files uploaded by users of the service exceed set thresholds. By order of the Ministry of Culture, those thresholds are as follows: in terms of the audience, 400,000 unique visitors in France a month; in terms of the number of files uploaded by users, 100 for audiovisual works, radio works, written works including the press, video games / 5000 for musical works / 10,000 for visual art works / 10,000 for files including different types of works. The quantitative approach taken here sits uncomfortably alongside Recital 63 of the Directive, which calls for case-by-case assessments, although it does account for the factors the recital highlights. Whether this approach is acceptable will depend on the CJEU’s interpretation of this autonomous concept of EU law.

On the basis of the national reports, it seems that none of the national implementations engage with the elements of organisation and promotion in the definition, despite the fact that these play a decisive role in the definition of OCSSPs.\(^{164}\)

With regard to the law of fundamental rights, to the extent that the regime imposed on OCSSPs is a finely-tuned one that has the potential to negatively impact the freedom of expression of end-users, expansions of its reach should be negatively assessed. Certainly, they impact adversely on the freedom of expression of affected providers under Article 16 of the Charter. Conversely, retractions could be said to have a negative effect on the rights of right-holders under Article 17(2) of the Charter.

\(^{162}\) See answers to Q. 5 in the national reports on the implementation of Article 17 in France, Germany and Malta.


Assessment Criterion 5: Scope of protection

What Article 17 DCDSM gives with the one hand (para. 1), it takes away with the other (para. 4) – subject to certain conditions. In particular, although, as mentioned above, Article 17(1) DCDSM holds that OCSSPs that provide access to the public to copyright-protected works or other protected subject matter uploaded by their users are performing acts of communication to the public or making available to the public, Article 17(4) DCDSM protects OCSSPs from liability for these acts provided they have:

(a) made best efforts to obtain an authorisation, and
(b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the right-holders have provided the service providers with the relevant and necessary information; and in any event
(c) acted expeditiously, upon receiving a sufficiently substantiated notice from the right-holders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).

The prevention of uploads required by point (b) and point (c) in fine is often referred to as “stay-down” or “upload filters”, while the disabling of access to and removal of content mentioned in point (c) is commonly termed “take-down”.

In this way, although Article 17(3) DCDSM pulls OCSSPs outside of the safe harbour of Article 14 ECD, Article 17(4) DCDSM replaces that with a different immunity – or “specific liability mechanism” to use the terminology of Recital 66 DCDSM. It is important to understand that, as the thrice-repeated term “best efforts” indicates, (except as concerns take-down) Article 17(4) DCDSM creates obligations not of result, but of means. It has thus been argued that OCSSPs are not required to trace every protected piece of content uploaded to their platforms for either authorisation or removal, but need only limit themselves to due diligence endeavours.165

Article 17(5) DCDSM encourages this interpretation by clarifying that the principle of proportionality should determine when these conditions are met. To this end, it indicates that the type, audience and size of the service, the type of works or other subject matter uploaded by the users of the service and the availability and cost of suitable and effective means should be taken into account. Article 17(6) introduces a more lenient regime for new OCSSPs.

---

As many commentators have observed, Article 17(4) points (b) and (c) require or at least heavily incentivise OCSSPs to put in place automatic filtering tools in order to block and remove infringing content brought to their attention by right-holders.\(^{166}\) This interpretation has now been confirmed by the CJEU.\(^ {167}\) At the same time, as modern filtering systems are currently unable to assess the legality of user uploads against the standards of EU copyright law, there is a real risk of false positives and thus of over-blocking.\(^ {168}\)

Among the national implementations, the German approach to the OCSSP immunity stands out for its elaborate and diligent attempt to provide sufficient safeguards to user freedoms. With regard to the obligation of best efforts to acquire licenses under point (a), the German implementation specifies that OCSSPs need only take licenses where these are offered to them and are available through representative right-holders that are known to them or can be acquired through collecting societies or dependent rights management entities established in Germany. Moreover, the content, by its nature, must have been manifestly communicated to the public in more than minor quantities and the licence must cover a considerable repertoire of works and right-holders and offer reasonable terms and conditions.

This approach represents a significant limitation compared to the standard set by the Directive, unless the application of the principle of proportionality\(^ {169}\) or concessions to OCSSPs’ right to conduct their business are to be understood as achieving or enabling the same effect. As the German national expert notes, while promoting the collective management of rights, it runs the risk of disadvantaging small right-holders. Arguably, to the extent that it does not include even a passive obligation to accept licenses offered by small and individual right-holders, it is excessive. This raises issues in light of both the DSM objective of the directive and right-holders’ Article 17(2) Charter rights.\(^ {170}\)

---


167 CJEU, C-401/19, Poland v Parliament and Council, 26 April 2022, ECLI:EU:C:2022:297, paras 53-54.


169 Though the elements listed as relevant to the principle of proportionality in Article 17(5) DCDSM do not fit well with the German approach.

As concerns, points (b) and (c) of Article 17(4), the German implementation introduces the innovative concept of “uses presumably authorised by law”. According to the German implementation, this refers to content that:

1) contains less than half of a work or several works by third parties;  
2) combines the part or parts of a work with other content; and  
3) uses the works of third parties only to a specified minor extent or is flagged as legal by the end-user.

When automated procedures are used to locate “uses presumably authorised by law”, the OCSSP must inform the relevant right-holder of the posted content and that they have the right to lodge a complaint, but refrain from take-down until a complaints procedure is completed and the use is confirmed as illegal. Likewise, if user-generated content is only automatically identified for blocking after it has already been uploaded, it is deemed to be a use presumably authorised by law for 48 hours regardless of whether the user has flagged it as such and the user is informed of the blocking request. In all cases, right-holders retain the right to request take- and stay-down if they provide a duly substantiated notice. Exceptionally, the rules on “uses presumably authorised by law” do not apply to certain time-sensitive content (e.g., live sports events or unreleased films), in which case immediate blocking is permitted.

A very similar system focused on pre-flagging by users and minor extracts operates in Austria. Here too, the OCSSP must make such content accessible and inform the right-holder. OCSSPs are obliged to provide forms to users to enable them to signal before or during the upload that the use is permitted, e.g., because an exception or limitation applies. Abusive submissions must not benefit. Automated filtering may not be used to remove or block minor uses of works, unless the right-holder can sufficiently explain that irreparable harm would otherwise be caused.

The German and Austrian solutions have been labelled the “balanced” approach to implementation and are to be contrasted with the “traditional” model represented by the remaining implementing Member States, which instead opted for an ad litteram approach.

The obvious question that arises is whether this “balanced” approach is compatible with EU law. As opposed to the initial German draft, which relied on an exception in favour of de minimis uses and therefore (in light of Article 17’s lex specialis nature vis-à-vis Article 3 ISD) risked falling foul of the non-exhaustive list of exceptions and limitations in Article 5 ISD, the current presumption-based

---

171 The German implementation (Gesetz über die urheberrechtliche Verantwortlichkeit von Diensteanbietern für das Teilen von Online-Inhalten (Urheberrechts-Diensteanbieter-Gesetz (UrDaG)), BGBl. I 2021 No. 27, S. 1204) deems the following to be minor, provided that they do not serve commercial purposes or only serve to generate insignificant income: 1. uses of up to 15 seconds in each case of a cinematographic work or moving picture, 2. uses of up to 15 seconds in each case of an audio track, 3. uses of up to 160 characters in each case of a text, and 4. uses of up to 125 kilobytes in each case of a photographic work, photograph or graphic. See s. 10 UrDaG and answer to Q. 20 in the national report on the implementation of Article 17 in Germany.

172 See answer to Qs 15 and 16 in the national report on the implementation of Article 17 in Austria.

173 In Austria, 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 graphic with a data volume of 250 kilobytes each. See answer to Q 15 in the national report on the implementation of Article 17 in Austria.


approach should be viewed as acceptable. This is particularly so considering the principle of proportionality embedded in Article 17(5) DCDSM and the flexibility that this injects into the system, as well as Article 17 DCDSM’s rules on general monitoring and exceptions and limitations (see the analysis of AC 7, 8, 10 and 11 below).

The CJEU’s decision in the *Poland* case should not affect this assessment. Certainly, that decision confirmed the compatibility of Article 17 DCDSM with users’ fundamental rights. To the extent that the German approach provides greater guarantees for those rights, it should be deemed even less problematic. Could this mean, instead, that it upsets the “fair balance” embedded in Article 17 DCDSM? It is notable that the German solution’s emphasis on *ex ante* safeguards accords with the approaches championed by the Commission and the AG in *Poland*. More importantly, the Court’s decision, while accepting that Article 17 DCDSM is compatible with the Charter, emphasises the safeguards embedded within it. If those safeguards are not to become empty letter they have to be given concrete meaning. From this perspective, it could be argued that it is the “traditional” implementations that are at greater risk of incompatibility with EU law. It should be recalled that not all provisions of EU directives will be suitable for copy-out transposition (see the Introduction above). To the extent that Article 17 DCDSM requires elaboration in order to make clear how its various sub-paragraphs are intended to interact with each other and safeguard a fair balance between fundamental rights, there is an argument that it is one such provision. However, while there is no question that Article 17 is badly drafted, it is difficult to see how a text that has been deemed by the CJEU compatible with a fair balance at the EU level should be found incompatible with that balance when copied out into national law.

Instead, the preferable interpretation is that both the “traditional” and “balanced” approaches to the transposition of Article 17 should be considered acceptable. The clue can be found in the final paragraph of the *Poland* decision. This emphasises both that Member States must transpose Article 17 in such a way as to allow a fair balance and that, when implementing the measures transposing Article 17 DCDSM, “the authorities and courts of the Member States” must interpret those measures so as to respect both Article 17 and fundamental rights. In this way, the Court enables the compatibility with the Directive and the Charter of both the “balanced” and “traditional” implementation approaches: with the first the legislator takes on the task of identifying the appropriate “fair balance” itself, via the process of transposition. This makes the job of national courts subsequently called upon to apply the provision

---


216 Indeed, it has been suggested that, to the extent that filtering was widely applied in practice by OCSSPs prior to the adoption of the Directive, Article 17 DCDSM represents a welcome legislative injection of safeguards for user rights, see A Metzger and M Senftleben, “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”, available at: [https://europeancopyrightsociety.org/](https://europeancopyrightsociety.org/), published in (2020) 11 JIPITEC 115.


218 *CJEU, C-401/19, Poland v Parliament and Council*, 26 April 2022, ECLI:EU:C:2022:297, paras 84-100.

219 *CJEU, C-401/19, Poland v Parliament and Council*, 26 April 2022, ECLI:EU:C:2022:297, paras 92, 85-86, 78, respectively.


easier. The second — much like Article 17 DCDSM and the CJEU in Poland — delegates the details of finding the correct balance to judicial interpretation — while itself also remaining (according to Poland) compatible with freedom of expression.\textsuperscript{183} The first approach may be preferable from a policy perspective — but both are legal.

A final question on the German system is whether the presumption on which it relies undermines the preventive nature of relevant rights in the same way as the Italian rules on licensing Article 15 DCDSM discussed above (see section 2 on AC 6). The answer should be in the negative. The German presumption operates at the enforcement rather than the exploitation level (meaning that there is no issue of detriment to contractual freedom)\textsuperscript{184} and should be approached in light of the CJEU’s finding that the protection afforded to copyright is not absolute.\textsuperscript{185} It is also relevant that right-holders are offered appropriate remuneration for the communication to the public of uses presumably authorised by law.\textsuperscript{186}

The above being accepted, there is no escaping the fact that the ultimate result will inevitably be one of considerable disharmonisation across the Digital Single Market, as uploads will be subjected to different Article 17-based regimes in different Member States. The effect could be widespread use of geo-blocking. Alternatively, there are indications that OCSSPs may find risking violation of certain national implementations more rewarding from a business perspective.\textsuperscript{187} Either way, this fragmentation cannot be attributed to faulty implementations at the Member State level, so much as the formulation, adoption and interpretation of a rule at the EU level that is badly suited to serve the Single Market.\textsuperscript{188} Certainly, it is clear that the notion of “best efforts” is an autonomous concept of EU law — but it is not defined in the Directive and the CJEU refrained from taking advantage of the opportunity provided by Poland to explain what such best efforts might look like in practice. This leaves Member States to devise their own interpretations.

With regard to those implementations that took a more “traditional” approach, it is worth noting two divergences from the EU text adopted in Spain. As the Spanish correspondent explains, in Spain OCSSPs must remove or disable access to transmissions of live events in real time. This resembles the German rule on time-sensitive content. More remarkable is the Spanish requirement that, even if an OCSSP undertakes “biggest [sic] efforts” and, therefore, meets the conditions for the immunity,\textsuperscript{189} if unauthorized content that harms right-holders remains available, right-holders may still bring an action against it claiming compensation on a different basis, e.g., unjust enrichment. This digs a hole under the entire concept of immunity. The result is an encroachment on the “occupied field” of the Directive in a

\textsuperscript{183} Although note that there is an argument that a literal transposition is not appropriate where a directive is of bad legislative quality, see R Král, “On the choice of methods of transposition of EU Directives” (2016) 41(2) E.L. Rev. 220.

\textsuperscript{184} Consider this in regard Recital 61 DCDSM.

\textsuperscript{185} CJEU, C-401/19, Poland v Parliament and Council, 26 April 2022, ECLI:EU:C:2022:297, para. 92.

\textsuperscript{186} See answer to Q. 20 in the national report on the implementation of Article 17 in Germany. It is unclear under the Austrian report if compensation is similarly offered in Austria, although see here Leistner suggesting that that is not the case: M Leistner, “The Implementation of Art. 17 DSM-Directive in Germany – A Primer with Some Comparative Remarks”, 20 December 2021, forthcoming in GRUR Int. 2022, available at: https://ssrn.com/abstract=3989726 or http://dx.doi.org/10.2139/ssrn.3989726.


\textsuperscript{189} Although note the Spanish correspondent’s observations regarding the lack of correspondence between the terms of Article 17(4) DCDSM and those of this provision (FN 4 in the Spanish report).
way that erodes its _effet utile_: the same claimant would be granted the same protection against the same defendant-OCSSP for the same behaviour.\(^{190}\)

That said, to the extent that the Spanish rule pulls in areas of law outside of copyright it could be that it is not incompatible with either the Directive or the Charter. Recital 66 DCDSM notes that the specific liability mechanism of Article 17 DCDSM should be without prejudice to remedies under national law for cases other than liability for copyright infringement. It is moreover true that overlaps between intellectual property rights, as well as between intellectual property rights and other areas of law, are not prohibited.\(^{191}\) Perhaps, therefore, there is nothing remarkable about the Spanish provision – particularly as it does not appear to guarantee alternative protection, but presumably depends on the details of the national rules governing the relevant area of law.\(^{192}\) Unquestionably, the Spanish rule fails to provide a fair balance with end-users’ freedom of expression as identified by the CJEU in _Poland_ – nor, one could add, with OCSSP’s freedom to conduct a business. If, however, it is viewed as an application of purely home-grown law, as opposed to a national implementation of the DCDSM, EU law on fundamental rights would not apply.\(^{193}\)

Ultimately, the question concerns the harmonising power of Article 17 DCDSM: does that provision harmonise “fully” the liability of OCSSPs for copyright-infringing content uploaded by their users or does it harmonise “fully” the liability of OCSSPs only for communication to the public? The issue is key, given that pre-DCDSM in many Member States online platforms would not have been held directly liable for copyright infringement resulting from user-uploads, but may have been subject to other courses of action, e.g., accessory liability.\(^{194}\) It is also relevant that – as the proposal for the provision\(^{195}\) reveals – its core purpose is to ensure that Member States hold OCSSPs liable under certain circumstances. To that extent, it is very different to the ECD safe harbours, whose purpose was to ensure that providers that abided by certain conditions were _not_ held liable.

Given its tendency to broad interpretations of the EU copyright directives, it is very likely that – faced with a preliminary question on the issue – the CJEU would classify the Spanish rule as faulty implementation. Either way, Article 14 ECD may provide an out for OCSSPs: under Article 17(3) DCDSM, that provision no longer applies “to the situations covered” by Article 17 DCDSM. However, the Spanish transposition uses more targeted wording: “regarding the liability arising from carrying out acts of communication or making available to the public”.\(^{196}\) This could mean that the immunity continues to apply to other kinds of liability. If so, even if it is accepted that the Spanish provision is itself in conflict with the Directive, the safe harbour could pull Spanish law back into compatibility. Of course, given the temporary nature of the current Spanish transposition,\(^{197}\) it may be that the issue will

---

\(^{190}\) See M Peguera, “Spanish transposition of Arts. 15 and 17 of the DSM Directive: overview of selected issues” (2022) 17(5) JIPLP 450.

\(^{191}\) Consider, for example, CJEU, Case C-683/17, _Cofemel_, ECLI:EU:C:2019:721, 12 September 2019, paras 50-52, which confirm that “in certain situations” cumulative protection under copyright and design law is possible – although it “must not have the consequence that the respective objectives and effectiveness of those two forms of protection are undermined”.

\(^{192}\) The example of unjust enrichment appears strange in this regard, as this is often subject to a rule of subsidiarity that holds that it should not apply where protection under an alternative specific course of action has been denied, see P del Olmo and X Basozabal, “Unjustified Enrichment in Spanish Law” (2017) 25 Restitution L Rev 104. It should also be considered how likely it will be that a different area of law can be used to provide relief to right-holders against OCSSPs that abide by the conditions of Article 17(4) DCDSM; it is likely that by meeting those conditions OCSSPs will fall outside of the reach of other legal tools.

\(^{193}\) See Article 51(1) of the Charter.


\(^{196}\) See answer to Q. 7 in the national report on the implementation of Article 15 and Q. 1 in the national report on the implementation of Article 17 in Spain.

\(^{197}\) As the Spanish national expert explains (see answer to Q. 2 in the national report on the implementation of Article 15 and Q. 1 in the national report on the implementation of Article 17 in Spain), the Spanish transposition happened via a Royal Decree-Law which is due to be replaced with an ordinary law.
quickly disappear without resolution. Even if that happens, the central question of the intersection between Article 17 DCDSM and pre-existing national rules on alternative courses of action will remain relevant across the EU.

A different matter concerns the interesting concept of “best efforts”. Research has found that the term has been inaccurately translated into most of the official language versions of the DCDSM. This problem appears to persist at the national level. According to the national reports, in Austria, the concept is rendered as “every effort”, in Italy as “greatest or maximum efforts” and in Spain as “their [i.e., the OCSSPs] biggest efforts”. All three instances arguably represent a tightening of the applicable standard: while the term “best efforts” suggests a contextual threshold that accounts for the options available in light of the cooperation of right-holders, the principle of proportionality and the need to avoid general monitoring and respect users’ rights (see below ACs 6, 7, 8 and 10), these translations could be read to refer to what is possible disregarding all other considerations. This pulls them out of line the need to respect competing fundamental rights as well as resulting in inconsistency across the internal market.

It is particularly troublesome, given that the notion clearly represents as an autonomous concept of EU law. Moving in the other direction, in Hungary, the adjective “high” is dropped from “high industry standards of professional diligence”, resulting in a slight loosening of the standard. The Estonian Explanatory Memorandum elaborates on its conception of “best efforts” in a non-binding manner.

With regard to the exceptional regime for start-ups, Germany relies on the principle of proportionality to rebuttably presume that service providers with an annual turnover of no more than 1 million euros (which German law labels “small service providers”) are not obliged to engage in stay-down. The principle of proportionality can be again employed to salvage this innovation. An interesting twist comes from Hungary, where the rules on start-ups are due to come into force 6 months after the rest of the regime, leaving SMEs temporarily facing stricter duties.

In the final analysis, most Member States pass the compatibility test, with the translation of “best efforts” in Austria, Hungary, Italy and Spain negatively impacting these countries. Germany is held back by its rules on licensing small and individual right-holders. The Spanish rule on alternative routes to compensation raises serious compatibility questions.

---

198 Note that the ECD safe harbours are due to be refined and re-homed into the Digital Services Act, currently in the process of being adopted into EU law, see European Commission, “Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC”, 15 December 2020, COM(2020)825 final.


200 While Austria, following the lead of the German version of the DCDSM, uses the term “alle Anstrengungen”, Germany has opted for the terms “bestmögliche Anstrengungen” and “bestmöglich sicherzustellen”. See answers to Q. 9 on Article 17 in the national reports on Austria and Germany.


204 See answer to Q. 9 in the national report on the implementation of Article 17 in Estonia.

A17 – Table 4: Assessment of national implementations under AC5. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.

<table>
<thead>
<tr>
<th>Art. 17 AC 5</th>
<th>AT</th>
<th>DK</th>
<th>EE</th>
<th>FR</th>
<th>DE</th>
<th>HU</th>
<th>IE</th>
<th>IT</th>
<th>MT</th>
<th>NL</th>
<th>ES</th>
</tr>
</thead>
<tbody>
<tr>
<td>DSM</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>0</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>-</td>
</tr>
<tr>
<td>FR</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>0</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>-</td>
</tr>
</tbody>
</table>

Assessment Criterion 6: Right-holder cooperation

As in Article 17(4) DCDSM, in all national implementations take-down and stay-down obligations are only triggered by the actions of right-holders. This is in line with Article 17(4), points (b) and (c) DCDSM, which depend the stay-down obligations they impose on the provision of “relevant and necessary information” from right-holders and take-down obligations on the provision of “substantiated notices” from right-holders. As a result, OCSSPs are not required to block or remove content at their own initiative. The Estonian Explanatory Memorandum notes that notifications must be reasoned and sufficiently detailed to enable the platform provider “to conclude that the right-holder’s rights have been infringed by the uploading.”

The Irish implementation fails to distinguish between a “sufficiently substantiated notice” and “relevant and necessary information”, with its rendition of Article 17(4)(c) requiring stay-down on the basis only of a “sufficiently substantiated notice”. The distinction between the two notions in the Directive ought not to be ignored. The Commission’s guidance places emphasis on the importance of differentiating between them.206 It moreover indicates one crucial difference: while stay-down need not require information on the location of the content, take-down would. Assuming Irish law interprets “sufficiently substantiated notice” to include such “relevant and necessary information” in cases of stay-down requests, it can remain compliant.

Although not mentioned in the Directive, the Commission guidance on Article 17 envisions a special “earmarking” process for content. According to the guidance, when providing “relevant and necessary information” to OCSSPs, right-holders may choose to “earmark” content the unauthorised online availability of which could cause them significant economic harm. Such earmarking can be taken into account when assessing whether OCSSPs have undertaken “best efforts” to ensure the unavailability of the content.207

Among the national reports, the German one identifies a possibility for trusted right-holders to “earmark” content for removal, albeit limited to the context of the complaints mechanism. According to the German rules, if (following a review by a natural person) a trustworthy right-holder declares that a “use presumably authorised by law” is nevertheless infringing and that its continued communication to the public would substantially impair the economic exploitation of the work, the OCSSP must immediately block the content until the conclusion of the complaints procedure. This means that right-holders with larger and/or premium repertories, qualified personnel, a case history of justified notice and takedown requests etc., can force derogations from the general rule according to which presumably authorised uses must remain online until the conclusion of a complaints procedure (as the national expert explains, this is known as the “red-button procedure”). A similar option exists in Austria, where a right-

---


holder can request the use of automated means for the detection of uses which the law views as minor and therefore by default permissible. 208

The exceptional German and Spanish rules on live take-downs (see above section on AC 5) can also be viewed as a kind of “earmarking” process.

While there is a strong argument that earmarking content as envisioned in the Commission’s guidance provides excessive power to right-holders to have content removed from platforms, 209 within the context of the German and Austrian implementations and by the measure of the standard applied by the CJEU in the Poland case (which accepts as compatible with fundamental rights the version of Article 17 DCDSM that does not include the safeguard of the German and Austrian presumption), the solutions these two countries introduce are arguably compatible with both the directive and fundamental rights. With regard to Germany, the “earmarking” only results in a reversion to a blocking or removal which will be automatic in other implementations. With regard to Spain, the rule on live take-downs, like the other take-down and stay-down obligations imposed by the special liability mechanism, is best approached as an obligation of means, rather than result. If so, it can potentially be absorbed 210 by the requirements of “best efforts” and proportionality. 211

A17 – Table 5: Assessment of national implementations under AC6. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.

<table>
<thead>
<tr>
<th>Art. 17 AC 6</th>
<th>AT</th>
<th>DK</th>
<th>EE</th>
<th>FR</th>
<th>DE</th>
<th>HU</th>
<th>IE</th>
<th>IT</th>
<th>MT</th>
<th>NL</th>
<th>ES</th>
</tr>
</thead>
<tbody>
<tr>
<td>DSM</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>FR</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
</tbody>
</table>

Assessment Criterion 7: General monitoring

According to Article 17(8) DCDSM, the liability rules introduced by Article 17 “shall not lead to any general monitoring obligation”. The meaning of general monitoring is highly contested. Broadly speaking, while one school of thought holds that monitoring is general if all or most of the content handled by a provider is monitored, 212 another maintains that the generality of the monitoring is not determined by the generality of what is being monitored, but by the generality of the objective of the monitoring. 213 While no clarity is provided by the Directive, the CJEU in its Poland decision appears to depart from earlier case law that had unambiguously embraced in the area of intellectual property rights the first interpretation, in favour of the second. 214 That said, the Court has also held that OCSSPs,

“cannot be required to prevent the uploading and making available to the public of content which, in order to be found unlawful, would require an independent assessment of the content by them in the light of the information provided by the rightholders and of any exceptions and limitations to copyright.” 215

---

208 See answer to Q. 15 in the national report on the implementation of Article 17 in Austria.
210 Note that Article 17(5) includes among the factors that determine where an OCSSP has complied with its obligations under Article 17(4) DCDSM the “type of works or other subject matter” uploaded by the users of the service.
213 See e.g., G Spindler, “The Liability system of Art. 17 DSMD and national implementation – Contravening prohibition of general monitoring duties?” (2020) 10 JIPITEC 344.
214 CJEU, C-401/19, Poland v Parliament and Council, 26 April 2022, ECLI:EU:C:2022:297, paras 85-86 and 90.
215 CJEU, C-401/19, Poland v Parliament and Council, 26 April 2022, ECLI:EU:C:2022:297, para. 90.
Filtering can therefore only be employed to take content down which – to use the language of the Commission’s guidance – is “manifestly” infringing.\(^\text{216}\)

According to the information provided by the national experts, while all examined Member States (with the notable and problematic exception of Denmark)\(^\text{217}\) transpose the prohibition on general monitoring, like the Directive, the national implementations do not engage with its meaning. It is interesting that France and Germany both rely on their pre-existing national implementations of Article 15(1) ECD, which suggests that they view “general monitoring” in the DCDSM as having the same meaning to “general monitoring” in the ECD. As commentators have observed, this is not obvious.\(^\text{218}\)

Further analysis can be found in certain national Explanatory Memoranda. For example, the Dutch national expert reports that, according to the Dutch Explanatory Memorandum, filtering user uploads in order to detect specific works for which right-holders have provided the OCSSP with the relevant and necessary information does not amount to general monitoring. The Explanatory Memorandum further suggests that, as preventive filtering of infringing content can be at odds with the freedom of information and expression, it should be limited to cases of “likely infringement”. The Estonian Explanatory Memorandum agrees that, while “high industry standards” may require the application of filtering technologies, the prohibition on general monitoring means that OCSSPs cannot be obliged to identify and remove content unless they have previously been provided with relevant information.

These analyses accord with that of Poland. There is a strong argument that, to the extent that filtering – even if used only to identify “manifest” infringements – is not currently developed enough to detect exceptions and limitations to copyright, the inevitable result will be the take-down of lawful content.\(^\text{219}\)

Paradoxically, such take-downs are explicitly rejected by the CJEU, which instead states that,

\begin{quote}
“a filtering system which might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications, would be incompatible with the right to freedom of expression and information, guaranteed in Article 11 of the Charter, and would not respect the fair balance between that right and the right to intellectual property.”\(^\text{220}\)
\end{quote}

One can only assume that the word “adequately” carries this provision. Beyond this, within the logic of Poland, any filtering misfires are to be managed via ex post safeguards – the importance of which is heavily emphasised by the Court as appropriate “in cases where, notwithstanding the safeguards laid down in those latter provisions, the providers of those services nonetheless erroneously or unjustifiably block lawful content”.\(^\text{221}\)

\begin{footnotesize}
\begin{itemize}
\item \(^\text{217}\) While there is an argument that the general monitoring prohibition does not need to be transposed given that it provides an instruction to Member States, so that Member States are not in violation unless they impose a general monitoring obligation, the safer approach is for national legislators to incorporate it into national law and thus ensure that domestic courts can directly apply it. Of course, it can be said that comparable protections are offered via other legal mechanisms, e.g., the law of fundamental rights or the “Marleasing” principle (see CJEU, C-106/89, Marleasing, 13 November 1990, ECLI:EU:C:1990:395, para. 8). As a result, the Danish implementation is marked “unclear” in the table.
\item \(^\text{219}\) See answer to Q 7 in the national report on the implementation of Article 17 in France. See also C Angelopoulos and M Sentfleben, “An Endless Odyssey? Content Moderation without General Content Monitoring Obligations” (22 June 2021), available at: https://ssrn.com/abstract=3871916 or http://dx.doi.org/10.2139/ssrn.3871916. See also C Angelopoulos, European Intermediary Liability in Copyright – A Tort-Based Analysis (Kluwer 2016), section 2.2.4.1.
\item \(^\text{220}\) CJEU, C-401/19, Poland v Parliament and Council, 26 April 2022, ECLI:EU:C:2022:297, para. 86.
\item \(^\text{221}\) CJEU, C-401/19, Poland v Parliament and Council, 26 April 2022, ECLI:EU:C:2022:297, para. 93.
\end{itemize}
\end{footnotesize}
Within this context, the outcome of the compatibility assessment for AC 7 is much as it is for AC 5. Those Member States – Austria and Germany – that endeavoured to put in place safeguards geared at enabling automatic filtering measures to avoid erroneous take- and stay-downs must be seen as compatible with both the Directive and the EU’s law of fundamental rights; they have concocted a solution that, to the extent possible, reconciles the CJEU’s conflicting instructions. On the other hand, those Member States that, as part of their “traditional” implementation, follow the CJEU in avoiding engaging with the practical implications of the general monitoring prohibition are likewise all also in the compatibility clear.

AI7 – Table 6: Assessment of national implementations under AC 7. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.

<table>
<thead>
<tr>
<th>Art. 17 AC 7</th>
<th>AT</th>
<th>DK</th>
<th>EE</th>
<th>FR</th>
<th>DE</th>
<th>HU</th>
<th>IE</th>
<th>IT</th>
<th>MT</th>
<th>NL</th>
<th>ES</th>
</tr>
</thead>
<tbody>
<tr>
<td>DSM</td>
<td>+</td>
<td>0</td>
<td>+</td>
<td></td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>FR</td>
<td>+</td>
<td>0</td>
<td>+</td>
<td></td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
</tbody>
</table>

Assessment Criterion 8: Exceptions and limitations

According to Article 17(7) DCDSM, the liability framework set out in Article 17(4) “shall” not result in the prevention of the availability of non-infringing material. Importantly, as opposed to the “best efforts” mechanisms of Article 17(4), this is an obligation to achieve a specific result. In particular, according to Article 17(7) DCDSM, when uploading and making available content on OCSSPs, users must be able to enjoy the exceptions and limitations for the purposes of: (a) quotation, criticism, review; and (b) caricature, parody or pastiche. In relation to uploads onto OCSSPs, these exceptions and limitations are thus mandatory for Member States. This is in contrast to their status in Article 5(2) and (3) ISD, where they are presented as optional. This also means that those exceptions and limitations that are listed in Article 5 ISD but not Article 17(7) DCDSM remain optional for the Member States, including exceptions and limitations of obvious relevance in the OCSSP context, such as incidental inclusion. As was the case with exceptions and limitations in the context of Article 15 DCDSM (see above section 2 on AC 5), this allows disharmonisation to affect the treatment of content on OCSSPs across the EU.

---


The national responses to the questionnaire reveal that, whereas the quotation exception enjoys broad recognition in national copyright laws, prior to the adoption of the Directive, Hungary and Ireland did not recognise a parody exception. Spain did not include an exception in favour of pastiche.226 In Austria and Italy, although no statutory provision covered parodies, protection was recognised by the courts. In both these countries, the new statutory parody exception extends only to uses on OCSSPs – this is nevertheless sufficient for compatibility purposes. Denmark is noteworthy, as it recognises no exception in favour of parodies. While Danish courts had previously recognised a non-statutory rule protecting parodies from copyright infringement, this interpretation was rejected in February 2022 by the Østre Landsret (Eastern High Court). The judgment brings Danish law clearly out of line with the DCDSM and has been appealed to the Danish Supreme Court.

Irish law subjects its quotation exception and new parody exception to the rules on fair dealing. Whether this will align with the EU requirements is unclear – this is particularly so, as it is also unclear whether the requirements under Article 17(7) DCDSM are the same as those under Article 5(3)(d) and (k) ISD.227 Similarly, while France enjoyed a quotation exception prior to the implementation of the Directive, this was very strictly interpreted to apply only to “short quotations justified by the critical, polemical, educational, scientific or informative nature of the work in which they are incorporated.” As the national expert explains, this means that, for example, the use of samples for music would not be covered. This interpretation is out of line with recent CJEU case law on the exception.228 To align with EU copyright law, France will therefore have to adjust its approach, at least with regard to uses on OCSSPs. The same applies to Spain, which recognises a quotation exception only in the areas of education and research.

Finally, as the German national expert explains, in Germany the parody right is subject to the payment of “appropriate remuneration”.229 It is striking that this is the case despite the fact that the newly introduced exception on caricatures, parodies and pastiches in s. 51a of the German Copyright Act230 does not contain any statutory remuneration right outside of uses on OCSSPs. Conversely, Recital 36 ISD accepts that Member States may provide for “fair compensation” for right-holders when applying the optional provisions on exceptions or limitations which do not require such compensation, but nothing to this effect is said in the DCDSM. The compatibility with the Directive of the German approach is therefore unclear.231 To the extent that Article 17 DCDSM is lex specialis in relation to the ISD, there is an argument that requiring adequate compensation is permissible.

---

227 While both Article 5(3)(k) ISD and Article17(7) DCDSM talk simply of “use for the purpose of caricature, parody and pastiche” without further qualifications, Article17(7) DCDSM refers to “quotation, criticism, review”, but Article 5(3)(d) ISD to “quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose”. It is also unclear whether the CJEU’s case law on the quotation exception (CJEU, C-145/10, Eva-Maria Painer, 1 December 2011, ECLI:EU:C:2011:798; CJEU, C-476/17, Pelham, 29 July 2019, ECLI:EU:C:2019:624 and CJEU, C-516/17, Spiegel Online, 29 July 2019, ECLI:EU:C:2019:624) should apply with regard to Article 17(7) DCDSM.
229 See section 5(2) German UrhDaG and the answer to Qs 16 and 30 in the national report on the implementation of Article 17 in Germany.
230 Gesetz über Urheberrecht und verwandte Schutzrechte (UrhG), BGBl. I 1965 S. 1273.
In the context of limitations and exceptions, the assessment of fundamental rights compatibility of the national implementations should mirror that of the assessment of DSM compatibility.

**A17 – Table 7: Assessment of national implementations under AC 8. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.**

<table>
<thead>
<tr>
<th>Art. 17 AC 8</th>
<th>AT</th>
<th>DK</th>
<th>EE</th>
<th>FR</th>
<th>DE</th>
<th>HU</th>
<th>IE</th>
<th>IT</th>
<th>MT</th>
<th>NL</th>
<th>ES</th>
</tr>
</thead>
<tbody>
<tr>
<td>DSM</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>0</td>
<td>+</td>
<td>0</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>-</td>
</tr>
<tr>
<td>FR</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>0</td>
<td>+</td>
<td>0</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>-</td>
</tr>
</tbody>
</table>

**Assessment Criterion 9: Licensing**

According to Article 17(2) DCDSM, authorisations obtained by an OCSSP will be understood to cover corresponding infringements by their users, provided the latter are either not acting on a commercial basis or their activity does not generate significant revenues. Recital 69 clarifies that the reverse should also apply: where right-holders have explicitly authorised the use of content on an OCSSP by a user, the act of communication to the public of the OCSSP should be covered “within the scope of the authorisation granted by the rightholder”. At the same time, OCSSPs cannot rely on a presumption that their users have cleared all relevant rights. How OCSSPs can determine the existence and scope of any licenses obtained by their users is unclear. No further information on licensing uses by OCSSPs is given in the Directive, although the Commission’s guidance leaves open a wide range of different authorisation models.\(^\text{232}\)

Spain specifies that OCSSP authorisations will extend to users only “within the scope of the authorisation granted and under the same conditions”. This condition is unproblematic and is implied in the Directive. In France, there is no reciprocity: authorisations granted to users don’t eliminate the obligation of the OCSSP to obtain authorisation. While this is contrary to Recital 69, recitals are not binding. The question is therefore whether Recital 69 accords with the operative text of Article 17 DCDSM. As the French national expert observes,\(^\text{233}\) the issue is relevant to a key question in intermediary liability: is the OCSSP participating in a single act of infringement performed by the end-user or are there two independent acts of infringement, one performed by the user and the other by the intermediary? While logic suggests the first approach is the correct one (only one work is uploaded to the platform and the material act of uploaded is done by the user), the wording of Article 17(1) DCDSM (“performs an act of communication to the public”) points towards primary liability for the OCSSP and therefore the second solution.\(^\text{234}\) In that case, it follows that a separate license should be required for the OCSSP, unless specified otherwise by law. The unfortunate conclusion would be that not only that the French approach is correct, but that any Member States implementing Recital 69 are violating the terms of the Directive. That said, there is an argument that a teleological interpretation should prevail that acknowledges the essentially accessory nature of the OCSSP’s involvement. On this reasoning, it will be here accepted that national implementations that incorporate Recital 69 are compatible with the DCDSM.

---


\(^{233}\) See answer to Q. 19 in the national report on the implementation of Article 17 in France. See also the answer to the Estonian national expert to the same question.

\(^{234}\) At least to the extent that the end-user is not acting on a commercial basis or where their activity does not generate significant revenue (see Article 17(2) DCDSM), there is a “merging” of the treatment of the exploitation acts of users and OCSSPs. See M Husovec and J P Quintais, “How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms under the Copyright in the Digital Single Market Directive” (2021) 79(4) GRUR International, 325.
It is worth noting that the Estonian Explanatory Memorandum attempts to avoid the problem through the concept of an “extended license” that provides protection for OCSSPs where users are acting lawfully, including because they have obtained the right-holders’ permission for their uploads.\textsuperscript{235} In Germany, an unwaivable claim to adequate remuneration is imposed on OCSSPs where authors have granted third parties the right of communication to the public of a work, unless the third party is a collecting society or the author has engaged the third party as a digital distributor.

Few Member States grapple with the modalities of the licensing of uses by OCSSPs. Germany is one of these. The relevant parameters are set out above under AC 5. As noted there, collective management emerges as the preferred solution in Germany.

Along somewhat similar lines, Malta establishes a principle of appropriate and proportionate remuneration for authors and performers. In the absence of an agreement, the amount of such remuneration is determined by a relevant Board.\textsuperscript{236} The Italian implementation states the OCSSPs may obtain authorisation via licensing through collecting societies and independent management entities. The Dutch Explanatory Memorandum also mentions the possibility of licensing via collective rights management organisations, including those that operate with extended effect. However, this is not required by the Dutch implementation and the Explanatory Memorandum underscores the preventive nature of the exclusive rights granted by copyright and related rights\textsuperscript{237} and the importance of contractual freedom. It therefore accepts the possibility that the parties will not be able to reach agreement even if best efforts are undertaken. The same conclusion is reached by the Estonian national implementation.

Other countries only set out basic principles to be respected in negotiations. For example, the Spanish implementation notes that negotiations for authorisation should be carried out under the principles of contractual bona fide, due diligence, transparency, and respect for free competition, excluding the exercise of a dominant position.

\textit{A17 – Table 8: Assessment of national implementations under AC 9. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.}

<table>
<thead>
<tr>
<th>Art. 17 AC 9</th>
<th>AT</th>
<th>DK</th>
<th>EE</th>
<th>FR</th>
<th>DE</th>
<th>HU</th>
<th>IE</th>
<th>IT</th>
<th>MT</th>
<th>NL</th>
<th>ES</th>
</tr>
</thead>
<tbody>
<tr>
<td>DSM</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>0</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>FR</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>0</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
</tbody>
</table>

\textbf{Assessment Criterion 10: Legitimate uses: ex ante safeguards}

As mentioned above, Article 17(7) DCDSM holds that the cooperation between OCSSPs and right-holders pursuant to Article 17(4) points (b) and (c) shall not result in the prevention of the availability of non-infringing uploads by users. The provision is repeated in the majority of examined national implementations (Austria, Estonia, France, Hungary, Ireland, Italy, Malta, the Netherlands and Spain). Nevertheless, like the Directive, most national implementations fail to incorporate \textit{ex ante} safeguards for legitimate uses targeted at preventing the blocking of non-infringing uploads.\textsuperscript{238} As the French national expert observes,\textsuperscript{239} the result will likely be weak protection for users in practice, particularly given the lack of strong sanctions for over-blocking and the natural power asymmetry between right-holders and users. The Estonian Explanatory Memorandum explicitly acknowledges this reality. As the Estonian national expert observes, OCSSPs are not required to identify and ensure the availability of

\textsuperscript{235} For further detail, see answer to Q. 19 in the national report on the implementation of Article 17 in Estonia.
\textsuperscript{236} A special voluntary negotiating mechanism is foreseen for the licensing of audiovisual works on video-on-demand services, see answer to Q. 18 in the national report on the implementation of Article 17 in Malta.
\textsuperscript{237} See also CJEU, C-161/17, Renckhoff, 7 August 2018, ECLI:EU:C:2018:634, para. 29.
\textsuperscript{238} See e.g., the answer to Q. 17 in the national report on the implementation of Article 17 in Hungary.
\textsuperscript{239} See answer to Q. 17 in the French national report.
each individual piece of legitimate content. Instead, they must simply take steps to minimise the blocking of legitimately uploaded content, while ensuring that the solutions they adopt are not “highly inefficient” as against the market standard, as long as it would not be disproportionate to expect the OCSSP to comply with that standard. While this represents a low standard of protection for users, in Poland, the CJEU accepted it as compatible with the necessary “fair balance” between all implicated rights and interests.240

Austria and Germany represent exceptions. As noted above (see section on AC 5), in Germany, “uses presumably authorised by law”, including content flagged by a user as legal, must be preserved on OCSSPs’ platforms until the completion of a complaints procedure. A similar system applies in Austria. Although no mention is made of such systems in the law itself, the Hungarian Explanatory Memorandum refers to the use of pre-flagging systems as a potential solution. It also mentions “pre-filtering” (“upload filters”) technologies to identify the plausibility of the lawfulness of sources as an option – though it is unclear how filtering (which instead has been identified by commentators as the primary threat for over-blocking)241 can help protect end-users. A solution along the German lines was contemplated in Estonia, but ultimately rejected. According to the Estonian Explanatory Memorandum, this was because it was seen as out of line with the Commission’s proposal to safeguard freedom of expression, thereby risking fragmentation of the single market. As noted above (see discussion on AC 5), these concerns are valid.242 It was additionally not considered capable to accommodate more efficient solutions that might emerge in future.

The majority of national implementations make no reference to the concept of “manifestly infringing” content as recommended by the European Commission.243 This is appropriate, as the guidance is not binding and the lack of technological tools capable of reliably distinguishing between infringing and non-infringing content (see discussion on AC 7) renders it highly problematic. As noted above (see section on AC 7), the Dutch Explanatory Memorandum does note that automatic filtering should be limited to cases of “likely infringement”. The French national expert observes that the concept has a pre-existing history in France, where commentators have argued that copyright infringement can never be considered to be manifestly infringing given the complexity and nuance of the relevant rules. Although not using the term, as the German national expert observes, the German rules on “uses presumably authorised by law” amount to a rule on “manifestly non-infringing” uploads. Conversely, the German rules on trustworthy right-holders represent rules on “manifestly infringing” uploads. The same can be said of the German and Spanish rules providing extra protection to time-sensitive content. To the extent, however, that (as noted above under AC 5) these rules form part of national attempts to reconcile the conflicting paragraphs of Article 17 DCDSM (and as long as they do not go beyond the establishment of obligations of means), they should be accepted as compatible with the Directive.

240 CJEU, C-401/19, Poland v Parliament and Council, 26 April 2022, ECLI:EU:C:2022:297, para. 98.
Assessment Criterion 11: Legitimate uses: ex post safeguards

Article 17(9) DCDSM requires that OCSSPs put in place effective and expeditious complaint and redress mechanisms to handle disputes over the disabling of access to or the removal of uploads. Complaints must be processed without undue delay and entail human review. Both out-of-court redress mechanisms and judicial remedies should be available to users.

According to the national experts, all examined Member States have introduced complaint mechanisms for users. Most (Denmark, Estonia, Ireland, Hungary, Malta and the Netherlands) make no further specifications as to the relevant details. According to the Austrian implementation, the complaints procedure must be completed within two weeks. In Germany, it must be one week. Spain sets a deadline of 10 business days. The Italian Communications Authority (Autorità per le garanzie nelle comunicazioni) is due to adopt relevant guidelines. In the absence of more detailed guidance in the Directive, there is no reason why any of these rules should not be acceptable. All Member States foresee the possibility of ADR mechanisms and either explicitly or implicitly allow for recourse to the courts. The French national expert observes that, since the decision of the Cour de cassation in Mulholland Drive, 244 exceptions and limitations to copyright are not approached in France as user rights, meaning that their violation does not substantiate a claim before the courts. While it is true that this represents a striking limitation on the effectiveness of the safeguards in favour of end-users in the Directive, this is not out of line with EU norms. 245 To the extent that Article 17 DCDSM does not foresee any consequences for failing to respect “user rights” and the CJEU in Poland did not identify the issue as problematic vis-à-vis the necessary “fair balance”, it must be concluded that it does not give rise to compatibility issues in terms of fundamental rights.

Assessment Criterion 12: Sanctions

The DCDSM does not provide any information on sanctions in cases of abuses of the procedures it introduces by right-holders, users or platforms. Based on the information provided by the national experts, most Member States likewise ignore the issue. A few exceptions emerge. For example, in Austria, OCSSPs may incur a fine of up to one million euros if they apply measures that cause the unavailability, systematically and to a significant extent, of non-infringing user-uploads or do not set up effective and expeditious complaints procedures. In Estonia, where OCSSPs do not perform certain specified obligations (including, to establish a complaints mechanism and ensure its proper

---

245 T Rendas, “Are Copyright-Permitted Uses ‘Exceptions’, ‘Limitations’ or ‘User Rights’?” (2022) 17(1) JIPLP 54.
performance, as well as obligations to provide specified information to right-holders and users) they may be subject to a compliance notice and non-compliance levy.

Two national experts report sanctions for right-holders and/or users. In Germany, if an OCSSP service provider repeatedly and wrongly blocks authorised uses, injunctive relief may be claimed by a user association. Right-holders and users that repeatedly misuse the notice-and-takedown, notice-and-stay-down and earmarking mechanism or the flagging mechanism respectively, are excluded from these mechanisms for an appropriate amount of time. If right-holders do so intentionally or negligently, they are obliged to compensate the OCSSP and user for resulting damage. Much less drastically, French law notes that ARCOM, the independent Regulatory Authority for Audiovisual and Digital Communication, is not obliged to follow up on referrals that are abusive, particularly in terms of their number, repetitive or systematic nature.

In light of the complete lack of information on sanctions in Article 17 CSDMD compatibility assessments are difficult. Arguably, Member States are free to impose or refrain from imposing sanctions under the DCDSM. From a fundamental rights perspective, however, there is a strong argument that lack of sanctions for right-holders and OCSSPs can render any protections for user rights toothless. Conversely, it could be argued that lack of sanctions for users that abuse the relevant procedures is detrimental to right-holders’ rights under Article 17(2) of the Charter. Absent a point of reference however, making these assessments is difficult. Germany appears to be the only Member State with a well-rounded system of sanctions.

**Table 11: Assessment of national implementations under AC12. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.**

<table>
<thead>
<tr>
<th>Art. 17 AC 12</th>
<th>AT</th>
<th>DK</th>
<th>EE</th>
<th>FR</th>
<th>DE</th>
<th>HU</th>
<th>IE</th>
<th>IT</th>
<th>MT</th>
<th>NL</th>
<th>ES</th>
</tr>
</thead>
<tbody>
<tr>
<td>DSM</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>FR</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>+</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

**Assessment Criterion 13: Information obligations**

According to Article 17(8) DCDSM, OCSSPs must provide right-holders, at their request, with adequate information on the functioning of the measures they have taken to qualify for the immunity of Article 17(4) DCDSM and, in the case of licensing agreements, information on the use of covered content. According to Article 17(9) DCDSM, OCSSPs must also inform users in their terms and conditions that they can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law.

All national experts report implementation of these requirements. Two countries (France and Ireland) have implemented into law the exception related to business secrets included in Recital 68 DCDSM and note that more detailed obligations may need to be provided following contractual arrangements. While not mentioned in the text of the Directive itself, this can potentially be accommodated within the word “adequate” in Article 17(8) DCDSM. Spain specifies that the information for right-holders must be provided, at their request, every six months. In France, when the authorisation to the OCSSP is granted by a collective management organisation, the Minister of Culture may intervene to determine the format of the communication of the relevant information. German law additionally requires that users be informed of any blocking of the content they have uploaded and be advised of their right to lodge a complaint. Conversely, in the case of “uses presumably authorised by law”, right-holders must be informed of the upload and advised on their right to have the presumption reviewed. These provisions

---

follow from the German innovation of “uses presumably authorised by law” and, to the extent that that is deemed compatible with the DCDSM and fundamental rights, should also be viewed as unproblematic. In Germany, OCSSPs must also grant authorised persons data on the detection and blocking of content, in exchange for reasonable reimbursement, for the purposes of scientific research. There is no basis in the directive for this requirement. To the extent, however, that it falls outside of the scope of the provision with only incidental relevance to the object of Article 17 DCDSM, is arguably acceptable.

A17 – Table 12: Assessment of national implementations under AC13. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.

<table>
<thead>
<tr>
<th>Art. 17 AC 13</th>
<th>AT</th>
<th>DK</th>
<th>EE</th>
<th>FR</th>
<th>DE</th>
<th>HU</th>
<th>IE</th>
<th>IT</th>
<th>MT</th>
<th>NL</th>
<th>ES</th>
</tr>
</thead>
<tbody>
<tr>
<td>DSM</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>FR</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
</tbody>
</table>

Assessment Criterion 14: Waiver

The DCDSM is silent on the possibility of waiver and royalty-free authorisation of the Article 17 right. According to the national reports, most national implementations also do not address these issues. While in some cases (Estonia and the Netherlands) there appears to be some uncertainty about the possibility of waiver, no national expert identified an argument against royalty-free licensing. Some restrictions may result in Spain from the rules requiring that relevant negotiations be carried out under the principles of contractual bona fide, due diligence, transparency, and respect for free competition, excluding the exercise of a dominant position. Importantly, in many countries (see, for example, the national report on France), moral rights cannot be waived. This indicates a discrepancy: while moral rights are not harmonised at the EU level, to the extent that there is alignment between the notion of communication to the public and making available to the public with regard to economic and moral rights, national laws on moral rights may be affected. Regardless, all national implementations appear acceptable from a compatibility perspective.

A17 – Table 13: Assessment of national implementations under AC14. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.

<table>
<thead>
<tr>
<th>Art. 17 AC 14</th>
<th>AT</th>
<th>DK</th>
<th>EE</th>
<th>FR</th>
<th>DE</th>
<th>HU</th>
<th>IE</th>
<th>IT</th>
<th>MT</th>
<th>NL</th>
<th>ES</th>
</tr>
</thead>
<tbody>
<tr>
<td>DSM</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>FR</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
</tbody>
</table>

Assessment Criterion 15: Entry into force

According to Article 29 DCDSM, the implementation deadline for the Directive was 7 June 2021. As the national experts report, most Member States were late to implement Article 17 DCDSM, with only Denmark, France, Hungary and the Netherlands completing the process in time. As above for AC 10 on Article 15 DCDSM, slow implementation could be said to delay the establishment of a single digital market and affect the protection of the fundamental right to intellectual property.

A17 – Table 14: Assessment of national implementations under AC15. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.

<table>
<thead>
<tr>
<th>Art. 17 AC 15</th>
<th>AT</th>
<th>DK</th>
<th>EE</th>
<th>FR</th>
<th>DE</th>
<th>HU</th>
<th>IE</th>
<th>IT</th>
<th>MT</th>
<th>NL</th>
<th>ES</th>
</tr>
</thead>
<tbody>
<tr>
<td>DSM</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>-</td>
</tr>
<tr>
<td>FR</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>-</td>
</tr>
</tbody>
</table>
4. Conclusion

Articles 15 and 17 DCDSM are the gifts that keep on giving. As the above comparative analysis shows, after years of heated debates, the adoption of the Directive has not led to resolution. A year after the implementation deadline, under half of the Member States have transposed Articles 15 and 17 DCDSM. Among these, multiple instances of problematic implementation – i.e., of implementation that is (potentially) incompatible with either the Directive itself or with fundamental rights – can be identified. In particular, in relation to Article 15 DCDSM, potential issues emerge in relation to the following Assessment Criteria:

- AC 1 (subject matter);
- AC 2 (right-holders);
- AC 3 (restricted acts);
- AC 4 (targeted users);
- AC 6 (licensing) and;
- AC 7 (revenue sharing).

In relation to Article 17 DCDSM, potential issues emerge with regard to:

- AC 1 (subject matter);
- AC 2 (right-holders);
- AC 3 (exclusive rights);
- AC 4 (targeted providers);
- AC 5 (scope of protection);
- AC 7 (general monitoring);
- AC 8 (exceptions and limitations);
- AC 9 (licensing) and;
- AC 12 (sanctions).

In addition, a majority of Member States failed to meet the transposition deadline in relation to both Articles. From among the 11 examined Member States, the only to emerge with no implementation irregularities is the Netherlands. It is unsurprising that, as a general rule, where implementations presented problems in terms of the internal market, they also presented problems in terms of fundamental rights. This follows from the fact that deviations from the wordings of Articles 15 and 17 DCDSM will amount to a deviation from the balance between fundamental rights deemed fair by the European legislator.

Close examination of the emergent compatibility issues reveals that they come in a variety of forms. Almost all Member States have engaged in some level of elaboration – even if just to adjust the terms used by the Directive to the local legal regime (e.g., when the Netherlands adjusts the language of communication to the public and making available to the public to the local concept of “openbaarmaking”).

---

247 The exception is AC 12 on Article 17 DCDSM. As noted above, while Member States appear free under Article 17 to make decisions on sanctions (this clearly having been decided by the EU legislator to be unproblematic in terms of the single market), significant fundamental rights effects are foreseeable.

248 The alternative would be to accept that Articles 15 and 17 DCDSM themselves offend the fair balance between fundamental rights. With regard to Article 17 this option has been rejected by the CJEU in Poland. With regard to Article 15, this study also assumes that the EU legislator has struck the right balance. To hold otherwise would be inappropriate for a study intended to assess national implementations, rather than the EU provision.
In some instances, the national implementation adds elements that do not exist in the text of the Directive—consider, for example, the Spanish implementation of “large amounts” in Article 17 DCDSM. Occasionally, such additions are based on the recitals of the Directive—which, however, do not have self-standing normative power, so that, where they contradict the operative text of the Directive or other relevant rules of EU law, their implementation is counterindicated (see e.g., the Austrian, French, German and Maltese exclusion of OCSSPs whose (main) purpose is to engage in or to facilitate piracy from the special liability mechanism of Article 17 DCDSM—modelled on Recital 62 DCDSM).

In other cases, national implementations omit elements that are included in the text of the Directive—see, for example, the absence of the provision on “private or non-commercial uses of press publications by individual users” in the French implementation of Article 15 DCDSM, of the carve-outs in the definition of OCSSPs in the Danish and Hungarian implementations of Article 17 DCDSM and of the prohibition on general monitoring obligations in the Danish implementation of Article 17 DCDSM. This can also result from misunderstandings on the part of the national legislator (as could be the case with, e.g., the Irish conflation of “sufficiently substantiated notices” and “relevant and necessary information” in Article 17 DCDSM (though note that a differentiated interpretation of “sufficiently substantiated notice” in practice could save this implementation) or the Estonian omission of protections for public domain content in Article 15 DCDSM).

Both additions and omissions may result in the expansion of the scope of the new rules (excessively maximalist transposition or gold-plating) or in their contraction (excessively minimalist transposition). For example, Denmark and Hungary’s omission of the carve-out from the definition of OCSSPs results in an expansion of the scope of the new liability scheme of Article 17 DCDSM, as does Spain’s addition of a condition of a large audience in Spain. Conversely, Austria and Germany’s addition of a condition of competition with other providers to the definition of OCSSPs restricts the reach of the Article 17 DCDSM regime, while Denmark’s omission of a parody exception restricts the guarantees offered to users.

In some cases, national law interprets autonomous notions of EU law incorrectly. This can be the result of legacy interpretations (see, e.g., the French and Spanish interpretations of the quotation exception) or of new constructs (e.g., the French and Italian approaches to “very short extracts” in Article 15 DCDSM). Occasionally, variations in terminology across different language versions also emerge (see e.g., the Austrian, Italian and Spanish renditions of “best efforts” in Article 17(4) DCDSM as “every effort”, “greatest efforts” and “biggest efforts” respectively).

Sometimes, seemingly small changes can have significant effects (e.g., the French replacement of “online uses” of press publications in Article 15 DCDSM with uses “in digital format” and the German extension of the revenue-sharing introduced by Article 15 DCDSM beyond authors to other right-holders). In other cases, the change is obvious and was subject to intense debate in the relevant Member State (as is the case with the Italian rules on the licensing of Article 15 DCDSM).

Particularly interesting are those cases of non-compliant implementation that result from national attempts to fit the provisions of the Directive into the logic of national law. Examples are offered by the Estonian failure to account properly for the interaction between existing national law and the provisions implementing Article 15’s protections for right-holders of content included in press publications or the Member States (Austria, Estonia, France, Germany, Hungary, Italy and Spain) which extend their implementations of Article 17 to all related rights, potentially including the PPR. Such “homing tendencies” and mistakes in pursuing them) by Member States are to be expected, however the result

is detrimental to the internal consistency of both national and EU law (a “double shattering” of the law, as it has been termed).²⁵⁰

Occasionally, the intersection between the DCDSM and national law will not be clear. Uncertainty can flow from both national law and the DCDSM. An example of both is provided by the Spanish provision stating that the national implementation of Article 17 DCDSM does not exclude alternative courses of action against OCSSPs. Whether this will conflict with the Directive or not will depend on the details of Spanish law and on whether the Directive harmonises all liability of OCSSPs for their users’ infringing uploads or only their liability for communication to the public resulting from their users’ infringing uploads. Similarly, Ireland appears to include of the reproduction right in the exclusive rights covered by Article 17 DCDSM – this is contrary to a teleological interpretation of the Directive, despite not being clearly excluded by its wording.

Issues may also arise in relation to compliant implementations. The most prominent are those that concern the implementation of the special liability regime of Article 17(4) DCDSM. As the report details, a distinction can be drawn here between the literal and elaborative (“traditional” and “balanced”, as they have been termed respectively)²⁵¹ approaches to implementation. While both of these emerge as compliant – both copying and elaboration are, after all, acceptable transposition techniques – the divergence they introduce undercuts the Directive’s ostensible objective to create a Digital Single Market and the “full harmonisation” approach it takes to this end. It also results in uneven protection for fundamental rights across the EU. The same observation can be made with regard to compliant implementations of multiple other elements of both Article 15 and 17 DCDSM: a compliant national implementation of vague and novel terminology, such as “very short extracts” or “large amounts”, does not mean that the risk of fragmentation has been eliminated.²⁵² Much depends on application in practice, meaning that continued vigilance is important. In the meantime, referrals to the CJEU are likely to start accumulating.²⁵³

This is disappointing, but not surprising.²⁵⁴ Commentators have long observed that the addition of new territorial rights to the European acquis can undermine rather than support the establishment of an Internal Market.²⁵⁵ Inevitably, this effect is more pronounced when the new EU provisions are – as Articles 15 and 17 DCDSM have been widely accused of being – badly drafted.²⁵⁶ The intricate and obscure structures and contentious subject matter of these articles, as well as their heavy use of undefined terminology and occasional misalignment between the recitals and operative texts, do not

²⁵⁰ H Koziol, “Comparative Conclusions” in H Koziol, Basic Questions of Tort Law from a Comparative Perspective (Jan Sramek Verlag 2015) 690.
²⁵³ H Koziol, “Comparative Conclusions” in H Koziol, Basic Questions of Tort Law from a Comparative Perspective (Jan Sramek Verlag 2015) 690.
²⁵⁴ See R Barratta, “Complexity of EU law in the domestic implementing process” (2014) 2(3) The Theory and Practice of Legislation 293, noting that “if a normative text fails to fulfil the principle according to which leges ab omnibus intelligi debet, it is destined, in due course, to become a source of virtually endless references for preliminary rulings”.
facilitate either smooth national implementation or homogenous interpretation and application. As the European Commission has acknowledged,

“[b]etter law-making helps better application and implementation […] If legislation is clear and accessible, it can be implemented effectively, citizens and economic actors can more easily understand their rights and obligations and the judiciary can enforce them.”

In pursuit of compromise, this principle was set aside during the intense discussions on Articles 15 and 17 in the run-up to the adoption of the DCDSM. The disharmonising results cannot be laid solely at the door of implementing national legislatures. They are equally the product of the EU legislator: an excellent national transposition of bad EU law will result in bad national law. To rectify them, the CJEU will no doubt have much DCDSM-focused work ahead of it. Inauspiciously, in Poland, that institution also shied away from a close engagement with the real issues. Hopefully, future judgments will dare to provide clarity.

---

257 European Commission, “EU law: Better results through better application” (2017/C 18/02) OJ C 18/10. See also Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (2016) OJ L 123/1, according to which, the “three Institutions agree that Union legislation should be comprehensible and clear, allow citizens, administrations and businesses to easily understand their rights and obligations, include appropriate reporting, monitoring and evaluation requirements, avoid overregulation and administrative burdens, and be practical to implement.”
Annex 1 – DCDSM Questionnaire on National Implementation


Questionnaire on national implementation

Country:

National Expert:

Instructions – please read these carefully before beginning the questionnaire.

Thank you for agreeing to participate in this survey of national implementations of Articles 15 and 17 of the Directive on Copyright in the Digital Single Market (CDSMD).

The objective of the study is to assess the compliance of EU Member States’ implementations of the CDSMD with its original provisions. Focus is intended to lie on whether any convergence or divergence from those provisions impact two key aspects: i) the Directive’s single-market objective; and, ii) Fundamental Rights. For this purpose, a set of assessment criteria (ACs) have been identified. The questions in the questionnaire are organised around these assessment criteria.

Please note that the questions are high in number and specificity. This is to allow the identification of divergences from the original provisions of the Directive in the various and potentially varied national implementations. The length of answers should depend on the national situation. In certain cases, very short answers may be appropriate, whereas in others more detailed elaborations may be necessary. Please provide any background information on national law that you think is necessary for persons not specialised in your jurisdiction to follow your response. Within these parameters, please keep answers as short as possible.

Part I focuses on Article 15 CDSMD and Part II on Article 17 CDSMD.

In order to facilitate the processing of the reports, it would be helpful if you could adopt the following practices when drafting your response:

- **Language:** please fill out the questionnaire in UK English.
- **References and citation style:** if possible, please use the OSCOLA for any citation of legal authority or scholarship. The OSCOLA Quick Reference Guide can be found at: [https://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012quickreferenceguide.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012quickreferenceguide.pdf)
- **Abbreviations:** if you use abbreviations in your report, please identify them clearly on first use. To enable style coordination, the Annex includes a list of abbreviations that may be of use to you for filling out the questionnaire.

If you have any requests for clarification, please send these to cja58@cam.ac.uk (subject line: “CDSMD Implementation Questionnaire”).

**Note:** This research project has been commissioned by Coalition for Creativity (C4C). Pursuant to the principles of academic freedom, both the national experts responding to the questionnaire and the main author will conduct the research in complete independence from third parties, including the commissioning party.
PART I: Article 15 CDSMD

Prior to answering this questionnaire, please consult Directive (EU) 2019/790 (CDSMD), with particular attention to Articles 2(4) and 15. For your convenience, these are reproduced below in English.

Article 2
Definitions
(4) ‘press publication’ means a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter, and which:
(a) constitutes an individual item within a periodical or regularly updated publication under a single title, such as a newspaper or a general or special interest magazine;
(b) has the purpose of providing the general public with information related to news or other topics; and
(c) is published in any media under the initiative, editorial responsibility and control of a service provider.
Periodicals that are published for scientific or academic purposes, such as scientific journals, are not press publications for the purposes of this Directive;

Article 15
Protection of press publications concerning online uses
1. Member States shall provide publishers of press publications established in a Member State with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the online use of their press publications by information society service providers.
The rights provided for in the first subparagraph shall not apply to private or non-commercial uses of press publications by individual users.
The protection granted under the first subparagraph shall not apply to acts of hyperlinking.
The rights provided for in the first subparagraph shall not apply in respect of the use of individual words or very short extracts of a press publication.
2. The rights provided for in paragraph 1 shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject matter incorporated in a press publication. The rights provided for in paragraph 1 shall not be invoked against those authors and other rightholders and, in particular, shall not deprive them of their right to exploit their works and other subject matter independently from the press publication in which they are incorporated.
When a work or other subject matter is incorporated in a press publication on the basis of a non-exclusive licence, the rights provided for in paragraph 1 shall not be invoked to prohibit the use by other authorised users. The rights provided for in paragraph 1 shall not be invoked to prohibit the use of works or other subject matter for which protection has expired.
4. The rights provided for in paragraph 1 shall expire two years after the press publication is published. That term shall be calculated from 1 January of the year following the date on which that press publication is published.
Paragraph 1 shall not apply to press publications first published before 6 June 2019.
5. Member States shall provide that authors of works incorporated in a press publication receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers.
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.

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).

   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.

   Note: if there is no national implementation of Article 15 CDSMD, please process 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.

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-literal content. Please note whether there are specific provisions on headlines.

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

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

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

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.

AC 3: Restricted acts

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

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

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.

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.
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.

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.

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.

AC 8: Term of protection
16. What is the term of the protection afforded to press publications by the LNI?

AC 9: Waiver
17. Can right-holders waive their rights under the LNI? Can authorisation be given for free?

AC 10: Entry into effect
18. From what date did the protection provided by the LNI come into effect in your jurisdiction?

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.
PART II: Article 17 CDSMD

Prior to answering this questionnaire, please consult Directive (EU) 2019/790 (CDSMD), with particular attention to Articles 2(6) and 17. For your convenience, these are reproduced below in English.

**Article 2**
Definitions

(6) ‘online content-sharing service provider’ means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.

Providers of services, such as not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and-sharing platforms, providers of electronic communications services as defined in Directive (EU) 2018/1972, online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use, are not ‘online content-sharing service providers’ within the meaning of this Directive.

**Article 17**
Use of protected content by online content-sharing service providers

1. Member States shall provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.

An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter.

2. Member States shall provide that, where an online content-sharing service provider obtains an authorisation, for instance by concluding a licensing agreement, that authorisation shall also cover acts carried out by users of the services falling within the scope of Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or where their activity does not generate significant revenues.

3. When an online content-sharing service provider performs an act of communication to the public or an act of making available to the public under the conditions laid down in this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply to the situations covered by this Article.

The first subparagraph of this paragraph shall not affect the possible application of Article 14(1) of Directive 2000/31/EC to those service providers for purposes falling outside the scope of this Directive.

4. If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless the service providers demonstrate that they have:

   (a) made best efforts to obtain an authorisation, and

   (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information; and in any event

   (c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).

5. In determining whether the service provider has complied with its obligations under paragraph 4, and in light of the principle of proportionality, the following elements, among others, shall be taken into account:

   (a) the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service; and

   (b) the availability of suitable and effective means and their cost for service providers.
6. Member States shall provide that, in respect of new online content-sharing service providers the services of which have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million, calculated in accordance with Commission Recommendation 2003/361/EC (20), the conditions under the liability regime set out in paragraph 4 are limited to compliance with point (a) of paragraph 4 and to acting expeditiously, upon receiving a sufficiently substantiated notice, to disable access to the notified works or other subject matter or to remove those works or other subject matter from their websites.

Where the average number of monthly unique visitors of such service providers exceeds 5 million, calculated on the basis of the previous calendar year, they shall also demonstrate that they have made best efforts to prevent further uploads of the notified works and other subject matter for which the rightholders have provided relevant and necessary information.

7. The cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation.

Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services:

(a) quotation, criticism, review;
(b) use for the purpose of caricature, parody or pastiche.

8. The application of this Article shall not lead to any general monitoring obligation.

Member States shall provide that online content-sharing service providers provide rightholders, at their request, with adequate information on the functioning of their practices with regard to the cooperation referred to in paragraph 4 and, where licensing agreements are concluded between service providers and rightholders, information on the use of content covered by the agreements.

9. Member States shall provide that online content-sharing service providers put in place an effective and expeditious complaint and redress mechanism that is available to users of their services in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them.

Where rightholders request to have access to their specific works or other subject matter disabled or to have those works or other subject matter removed, they shall duly justify the reasons for their requests. Complaints submitted under the mechanism provided for in the first subparagraph shall be processed without undue delay, and decisions to disable access to or remove uploaded content shall be subject to human review. Member States shall also ensure that out-of-court redress mechanisms are available for the settlement of disputes. Such mechanisms shall enable disputes to be settled impartially and shall not deprive the user of the legal protection afforded by national law, without prejudice to the rights of users to have recourse to efficient judicial remedies. In particular, Member States shall ensure that users have access to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright and related rights.

This Directive shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law, and shall not lead to any identification of individual users nor to the processing of personal data, except in accordance with Directive 2002/58/EC and Regulation (EU) 2016/679.

Online content-sharing service providers shall inform their users in their terms and conditions that they can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law.

10. As of 6 June 2019 the Commission, in cooperation with the Member States, shall organise stakeholder dialogues to discuss best practices for cooperation between online content-sharing service providers and rightholders. The Commission shall, in consultation with online content-sharing service providers, rightholders, users’ organisations and other relevant stakeholders, and taking into account the results of the stakeholder dialogues, issue guidance on the application of this Article, in particular regarding the cooperation referred to in paragraph 4. When discussing best practices, special account shall be taken, among other things, of the need to balance fundamental rights and of the use of exceptions and limitations. For the purpose of the stakeholder dialogues, users’ organisations shall have access to adequate information from online content-sharing service providers on the functioning of their practices with regard to paragraph 4.
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).

   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.

   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?

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.

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”)?

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”).

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.

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?

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.

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.

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

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.

AC 6: Right-holder cooperation
12. Does the LNI depend on the conditions of the immunity on right-holder cooperation? If so, please describe what cooperation is expected of right-holders.

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.

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.

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.

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 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.

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

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.

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.

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?

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?

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.

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. If applicable, please include information on time limits, decision-makers, procedural steps and whether any review is performed by humans.

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.

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.

AC 13: Information obligations

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

AC 14: Waiver

27. Can right-holders waive the rights provided by LNI? Can authorisation be given for free?
AC 15: Entry into effect

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

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)?

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.
**ANNEX**

Suggested abbreviations:

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art.</td>
<td>Article</td>
</tr>
<tr>
<td>AG</td>
<td>Advocate General</td>
</tr>
<tr>
<td>BC</td>
<td>Berne Convention for the Protection of Artistic and Literary Works</td>
</tr>
<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>EUR</td>
<td>Euro (currency) (please use before any number, e.g., EUR 10)</td>
</tr>
<tr>
<td>ISSP(s)</td>
<td>Information Society Service Provider(s)</td>
</tr>
<tr>
<td>OCSSP(s)</td>
<td>Online Content Service Provider(s)</td>
</tr>
<tr>
<td>para. or paras</td>
<td>paragraph or paragraphs</td>
</tr>
<tr>
<td>WCT</td>
<td>WIPO Copyright Treaty</td>
</tr>
<tr>
<td>WIPO</td>
<td>World Intellectual Property Organization</td>
</tr>
<tr>
<td>WIPO Treaties</td>
<td>The WCT and WPPT</td>
</tr>
<tr>
<td>WPPT</td>
<td>WIPO Performances and Phonograms Treaty</td>
</tr>
<tr>
<td>WCT</td>
<td>WIPO Copyright Treaty</td>
</tr>
</tbody>
</table>
## Annex 2 – National Experts and Affiliations

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>NATIONAL EXPERT AND AFFILIATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>MANFRED BÜCHELE, University of Innsbruck</td>
</tr>
<tr>
<td></td>
<td>MATTHIAS KETTELMANN, UNIVERSITY OF INNSBRUCK</td>
</tr>
<tr>
<td></td>
<td>FELICITAS RACHINGER, UNIVERSITY OF INNSBRUCK</td>
</tr>
<tr>
<td></td>
<td>MERYEM VURAL, UNIVERSITY OF INNSBRUCK</td>
</tr>
<tr>
<td>Denmark</td>
<td>SEBASTIAN FELIX SCHWEMER, CIIR, University of Copenhagen / NRCCL, University of Oslo</td>
</tr>
<tr>
<td>Estonia</td>
<td>KARMEN TURK, Trinity Law Firm</td>
</tr>
<tr>
<td>France</td>
<td>VALÉRIE-LAURE BENABOU, Université Paris Saclay/UVSQ</td>
</tr>
<tr>
<td>Germany</td>
<td>MATTHIAS LEISTNER, Ludwig-Maximilians-Universität München (LMU)</td>
</tr>
<tr>
<td>Hungary</td>
<td>PÉTER MEZEI, University of Szeged</td>
</tr>
<tr>
<td></td>
<td>ADRIENN TIMÁR, Budapest University of Technology and Economics</td>
</tr>
<tr>
<td>Ireland</td>
<td>GIUSEPPE MAZZIOTTI, Trinity College Dublin</td>
</tr>
<tr>
<td>Italy</td>
<td>CATERINA SGANGA, Sant'Anna School of Advanced Studies</td>
</tr>
<tr>
<td>Malta</td>
<td>TIZIANA FILLETTI, L-Università ta' Malta</td>
</tr>
<tr>
<td>Netherlands</td>
<td>STEF VAN GOMPEL, Vrije Universiteit (VU) Amsterdam</td>
</tr>
<tr>
<td>Spain</td>
<td>MIQUEL PEGUERA, Universitat Oberta de Catalunya</td>
</tr>
</tbody>
</table>
Annex 3 – National Questionnaires

The national questionnaires are available for download here:

Austria
Denmark
Estonia
France
Germany
Hungary
Ireland
Italy
Malta
Netherlands
Spain
Annex 4 – List of Incompatibilities

Article 15 - List and classification of most significant identified incompatibilities of national implementations with EU law

**Note:** Incompatibilities may be listed more than once, where different classifications apply. Classifications amount only to suggestions – alternative descriptions may apply. List includes cases of uncertain incompatibility.

### ARTICLE 15 INCOMPATIBILITIES

| **ADDITIONS** | **DE** – extension of revenue sharing to the holders of related rights in content included in a press publication  
**ES** – definition of “very short extracts” |
| **OMISSIONS** | **AT** – omission of qualifier (c) in definition of press publications  
**DK** – omission of definition of press publications; no protection for public domain content  
**EE** – no protection for public domain content; minimalist protection for other right-holders and licensees  
**FR** – no protection for public domain content; omission of guarantee in favour of private or non-commercial uses by individuals  
**HU** – no protection for public domain content; minimalist/ no protection for other right-holders and licensees |
| **INCOMPATIBLE GOLD PLATING (EXCESSIVELY MAXIMALIST TRANSPOSITION)** | **AT** – omission of qualifier (c) in definition of press publications  
**DE** – extension of revenue sharing to the holders of related rights in content included in a press publication  
**DK** – no geographic limitation  
**EE** – no protection for public domain content; minimalist protection for other right-holders and licensees  
**FR** – definition of “very short extracts”; replacement of “online uses” with uses “in digital format”; definition of reproduction right; omission of guarantee in favour of private or non-commercial uses by individuals  
**HU** – no geographic limitation; minimalist/ no protection for other right-holders and licensees  
**IE** – broad exclusive rights  
**IT** – definition of “very short extracts”; broad definition of CTTP  
**MT** – no geographic limitation  
**ES** – definition of “very short extracts” |
| **EXCESSIVELY MINIMALIST TRANSPOSITION** | **IE** – protection only for publishers established in territory  
**ES** – requirement that press publications include subject matter other than literary works; protection only for publishers established in territory |
<table>
<thead>
<tr>
<th>ARTICLE 15 INCOMPATIBILITIES (continued)</th>
</tr>
</thead>
<tbody>
<tr>
<td>INCORRECT INTERPRETATION OF AUTONOMOUS CONCEPTS OF EU LAW</td>
</tr>
<tr>
<td>AT – omission of qualifier (c) in definition of press publications</td>
</tr>
<tr>
<td>FR – definition of “very short extracts”; protection for news agencies (unclear compatibility)</td>
</tr>
<tr>
<td>IT – definition of “very short extracts”</td>
</tr>
<tr>
<td>ES – definition of “very short extracts”; requirement that press publications include subject matter other than literary works; protection for news agencies (unclear compatibility)</td>
</tr>
<tr>
<td>VARIATIONS IN TERMINOLOGY</td>
</tr>
<tr>
<td>FR – replacement of “online uses” with uses “in digital format”; replacement of ISSP with “online public communication services”</td>
</tr>
<tr>
<td>HOMING TENDENCIES</td>
</tr>
<tr>
<td>EE – no protection for public domain content; minimalist protection for other right-holders and licensees</td>
</tr>
<tr>
<td>FR – definition of reproduction right</td>
</tr>
<tr>
<td>HU – minimalist/ no protection for other right-holders and licensees)</td>
</tr>
<tr>
<td>IE – broad exclusive rights</td>
</tr>
<tr>
<td>IT – broad definition of CTTP</td>
</tr>
</tbody>
</table>
**Article 17 - List and classification of most significant identified incompatibilities of national implementations with EU law**

**Note:** Incompatibilities may be listed more than once, where different classifications apply. Classifications amount only to suggestions – alternative descriptions may apply. List includes cases of uncertain incompatibility.

<table>
<thead>
<tr>
<th>ARTICLE 17 INCOMPATIBILITIES</th>
</tr>
</thead>
</table>
| **ADDITIONS** | AT – addition of condition of competition with other providers to OCSSP definition; no immunity for piracy providers  
DE – interpretation of “best efforts” to obtain authorisation; addition of condition of competition with other providers to OCSSP definition; no immunity for piracy providers  
FR – extension to reproduction right; no immunity for piracy providers  
IE – potential extension to reproduction right  
MT – no immunity for piracy providers  
ES – OCSSPs must store and give access to protected content in large amounts or have a large audience in Spain; rule on additional courses of action, e.g., unjust enrichment |
| **OMISSIONS** | DK – no carve-outs from OCSSPs definition; no prohibition on general monitoring obligations; no parody exception  
FR – authorisations for users don’t protect OCSSPs  
HU – no carve-outs from OCSSPs definition |
| **INCOMPATIBLE GOLD PLATING (EXCESSIVELY MAXIMALIST TRANSPOSITION)** | AT – potential expansion to other rights, incl. PPR; no immunity for piracy providers  
DE – potential expansion to other rights, incl. PPR; no immunity for piracy providers  
DK – no carve-outs from OCSSPs definition  
EE – expansion to other rights, incl. PPR  
FR – potential expansion to other rights, incl. PPR; extension to reproduction right; no immunity for piracy providers  
HU – potential expansion to other rights, incl. PPR; no carve-outs from OCSSPs definition  
IE – potential extension to reproduction right  
IT – potential expansion to other rights, incl. PPR  
MT – no immunity for piracy providers  
ES – potential expansion to other rights, incl. PPR; OCSSPs must store and give access to protected content in large amounts or have a large audience in Spain; rule on additional courses of action, e.g., unjust enrichment |
### ARTICLE 17 INCOMPATIBILITIES (continued)

#### EXCESSIVELY MINIMALIST TRANSPPOSITION

<table>
<thead>
<tr>
<th>Country</th>
<th>Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>AT</td>
<td>addition of condition of competition with other providers to OCSSP definition</td>
</tr>
<tr>
<td>DE</td>
<td>addition of condition of competition with other providers to OCSSP definition; interpretation of “best efforts” to obtain authorisation; payment of appropriate remuneration for parodies (unclear compatibility)</td>
</tr>
<tr>
<td>DK</td>
<td>no parody exception</td>
</tr>
<tr>
<td>FR</td>
<td>narrow quotation exception; authorisations for users don’t protect OCSSPs</td>
</tr>
<tr>
<td>IE</td>
<td>not clear that performers are protected; “fair dealing” conditions for E&amp;Ls (unclear compatibility)</td>
</tr>
<tr>
<td>ES</td>
<td>narrow quotation exception</td>
</tr>
</tbody>
</table>

#### INCORRECT INTERPRETATION OF AUTONOMOUS CONCEPTS OF EU LAW

<table>
<thead>
<tr>
<th>Country</th>
<th>Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>DK</td>
<td>no carve-outs from OCSSPs definition</td>
</tr>
<tr>
<td>DE</td>
<td>interpretation of “best efforts” to obtain authorisation</td>
</tr>
<tr>
<td>HU</td>
<td>no carve-outs from OCSSPs definition</td>
</tr>
<tr>
<td>FR</td>
<td>definition of “large amounts” may be incompatible depending on CJEU definition; narrow quotation exception</td>
</tr>
<tr>
<td>ES</td>
<td>OCSSPs must store and give access to protected content in large amounts or have a large audience in Spain; narrow quotation exception</td>
</tr>
</tbody>
</table>

#### VARIATIONS IN TERMINOLOGY

<table>
<thead>
<tr>
<th>Country</th>
<th>Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>AT</td>
<td>change of “best efforts” to “every effort”</td>
</tr>
<tr>
<td>HU</td>
<td>change of “high industry standards of professional diligence” to “industry standards of professional diligence”</td>
</tr>
<tr>
<td>IT</td>
<td>change of “best efforts” to “greatest efforts”</td>
</tr>
<tr>
<td>ES</td>
<td>change of “best efforts” to “biggest efforts”</td>
</tr>
</tbody>
</table>

#### HOMING TENDENCIES

<table>
<thead>
<tr>
<th>Country</th>
<th>Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>AT</td>
<td>potential expansion to other rights, incl. PPR</td>
</tr>
<tr>
<td>DE</td>
<td>potential expansion to other rights, incl. PPR</td>
</tr>
<tr>
<td>EE</td>
<td>expansion to other rights, incl. PPR</td>
</tr>
<tr>
<td>FR</td>
<td>potential expansion to other rights, incl. PPR; extension to reproduction right; narrow quotation exception</td>
</tr>
<tr>
<td>HU</td>
<td>potential expansion to other rights, incl. PPR</td>
</tr>
<tr>
<td>IE</td>
<td>potential extension to reproduction right; “fair dealing” conditions for E&amp;Ls (unclear compatibility)</td>
</tr>
<tr>
<td>IT</td>
<td>potential expansion to other rights, incl. PPR</td>
</tr>
<tr>
<td>ES</td>
<td>potential expansion to other rights, incl. PPR; narrow quotation exception</td>
</tr>
</tbody>
</table>
Annex 5 – Biographical Notes on National Experts

Valérie-Laure Benabou is a full professor of private law at the Université de Versailles Saint-Quentin-en-Yvelines (Paris Saclay), specialising in intellectual property law.

Manfred Büchele is Associated Professor of Company and Capital Market Law at the Department of Commercial and Taxation Law at the University of Innsbruck, Austria. He specializes in Industrial Property and Intellectual Property Law. As a member of the Association Littéraire et Artistique Internationale (ALAI) and the German Association for the Protection of Intellectual Property (GRUR) he cooperates with the European Observatory on Infringements of IP Rights at the EUIPO, Universidad de Alcalá (both Spain) and Tunghai University (Taiwan).

Tiziana Filletti (B.A., LL.M (IMO-IMLI), M.Jur. (Oxon.), LL.D. (Melit.), Ph.D. (Melit.)) is the Head of Department of Commercial Law and a resident lecturer in Company Law and Corporate Insolvency Law at the Faculty of Laws, University of Malta. She obtained a Doctor of Philosophy (Ph.D.) degree in Corporate Insolvency Law. She also graduated with a Bachelor of Laws degree summa cum laude, Diploma of Notary Public and Doctor of Laws from the University of Malta. She furthered her studies at the International Maritime Law Institute where she was awarded a Master of Law degree with distinction. As a Chevening Scholar she read law at the University of Oxford where she was awarded a Magister Juris degree in Company Law and Corporate Insolvency Law.

Stef van Gompel is Full Professor of Intellectual Property at the Vrije Universiteit Amsterdam and Associate Professor at the Institute for Information Law (IViR) of the University of Amsterdam. On March 16, 2011, he received his doctorate from the University of Amsterdam for his thesis entitled Formalities in Copyright Law: An Analysis of their History, Rationales and Possible Future (Kluwer Law International, 2011). He studied law at the University of Amsterdam (2005, cum laude) and Music Management at the Fontys Business College of Higher Education in Tilburg, the Netherlands (1999). He is specialized in intellectual property law and in national and international copyright law, in particular. He is also the president of the Dutch national group of AIPPI, member of the executive committee of AIPPI international, chairperson of the editorial board of the Dutch copyright journal Auteursrecht, deputy chairperson of the Standing Committee on Plagiarism of Buma/Stemra, and member of the general board of the Dutch reprographic reproduction rights foundation Reprorecht (representing authors of professional and scientific publications).

Matthias C. Kettemann is Professor of Innovation, Theory and Philosophy of Law and head of the Department of Legal Theory and Future of Law at the University of Innsbruck, Austria. He is head of the research program on private communication orders at the Leibniz Institute for Media Research | Hans-Bredow-Institute, Hamburg, and leader of the Research Group Global Constitutionalism and the Internet at the Humboldt Institute for Internet and Society, Berlin, and of the Research Group Platform and Content Governance at the Sustainable Computing Lab at the Vienna University of Economics and Business.

Matthias Leistner was Head of the Commonwealth Unit at the Max-Planck-Institute for Intellectual Property and Competition Law, Munich. From 2007-2016 he was Professor of Civil Law, Intellectual Property Law and Competition Law and Director of the Institute for Commercial and Economic Law at the University of Bonn. Apart from his Chair at LMU Munich, at present, he is a Member of the Faculty of the Munich Intellectual Property Law Center (MIPLC), and was a guest professor for European Intellectual Property Law at the University of Xiamen, China, and at the Tongji University, Shanghai. He was a Short Term International Visiting Professor at Columbia Law School, New York, in the Spring Term 2020.

His specialties are intellectual property law (in particular copyright and patents), unfair competition law and internet law. He has published seven books and numerous articles in these fields and has been consulted on IP matters by various government departments and non-governmental organisations as well as international institutions. He is editor of the leading German IP journal Gewerblicher Rechtsschutz und Urheberrecht (GRUR), co-editor of a commentary on German unfair competition law (Grosskommentar UWG, Berlin 2013), and the standard commentary on German copyright law (Schricker/Loewenheim/Leistner/Ohly, Urheberrecht, 6th edition 2020).

His most recent publications are available at: https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=2742264

Miquel Peguera is Associate Professor of Law at Universitat Oberta de Catalunya (UOC) (Barcelona, Spain). He holds a PhD in Law from the University of Barcelona (2006), with a doctoral dissertation on the liability of internet intermediary service providers. Deputy dean of research at the School of Law and Political Science (UOC). Affiliate Scholar at Stanford Center for Internet & Society since 2014. Co-editor of the Journal of Intellectual Property, Information Technology and E-Commerce Law (jipitec.eu) since 2011. He was Visiting Scholar at Columbia University School of Law (2007-08). His research focuses on the legal aspects of the internet, particularly regarding copyright, trademarks, privacy, and intermediary liability, as well as artificial intelligence. He has published extensively on those fields from both an EU and US perspective. He is a consultant with the Spanish law firm Cuatrecasas.

Giuseppe Mazziotti is an Italian academic and legal counsel specializing in intellectual property, EU law, information technology, media, cultural policies and Internet law. Since October 2014 he has been a Professor at Trinity College Dublin, where he was elected Fellow in April 2020. Giuseppe has gained broad international experience as a teacher and scholar. He was a Visiting Professor at the Academy of European Law (Trier) and at universities such as Nanterre, Versailles and Roma Tre. He was a 2018/2019 Emile Nöel Global Fellow and EU Fulbright Schuman Scholar at New York University School of Law. As a Visiting Scholar, he was invited to conduct and disseminate his research at Pompeu Fabra University, ESADE Business School, Instituto de Tecnologia & Sociedade do Rio de Janeiro, Harvard, Columbia University, and the University of California at Berkeley. His work has focused on the intersection of law, media, and technology, critically examining and analyzing fast-growing areas such as international and EU intellectual property, Europe’s Digital Single Market policies, and media law. As a consultant, he advised governments, public sector institutions, companies and industry organizations on regulation and policy as well as creators, content producers and tech companies on contentious and licensing issues.
Péter Mezei is a full-time faculty member of the Szeged Law School. He was awarded an honorary adjunct professorship (dosentti) at the Faculty of Law, University of Turku (Finland) in December 2014. He is a visiting professor of the Université Jean Moulin Lyon III (France). His focus in both education and research is on comparative law, comparative, digital, International and European copyright law.

Sebastian Felix Schwemer is Associate Professor at the Centre for Information and Innovation Law (CIIR) at the University of Copenhagen and Adjunct Associate Professor at the University of Oslo’s Norwegian Research Center for Computers and Law (NRCCL). Sebastian is interested in the regulation of & by technology and is inter alia looking at Article 17 and algorithmic content moderation issues in the context of the H2020 project “ReCreating Europe”.

Adrienn Timár is an intellectual property practitioner and a lecturer. She graduated from the JD program of ELTE (HU) and received an LLM from the UCLA (USA) with specialization in Media, Entertainment and Technology Law and Policy. She participated in WIPO’s program specializing in designs at the Tongji University (PRC) to get acquainted with the law in the South-East Asian region. She interned at various law firms before starting to work at the Hungarian Intellectual Property Office where she was deeply involved in the copyright reform, taking part in the negotiations and in the transposition of the new directives. Currently, she works as the chief IP advisor of Budapest University of Technology (BME) leading the technology transfer unit which requires to be an intermediary between researchers and market players and to give advice in various intellectual property matters emerging in the academic field. Parallel, she teaches at BME various intellectual property classes. Keep in touch with Adrienn via LinkedIn.

Karmen Turk is a litigation attorney and partner with an expertise in artificial intelligence regulations, human rights (mainly freedom of expression and privacy), intellectual property and media law in Estonia and beyond. During her practice, altogether Karmen has represented clients in human rights, technology and media related cases in more than 300 disputes, including in European Court of Human Rights as well European Court of Justice. For a case heard by European Court of Justice, a highest reward in intellectual property field IP STAR was granted for the team for most important case of the year. Karmen is also a visiting lecturer in IT Law at the University of Tartu for subjects of IP as well as human rights in information society. She is also doing her PhD and researching issues regarding new technologies and liabilities of the stakeholders. She is an expert in the Council of Europe for several sub-committees (e.g. Chair for anti-SLAPP committee, Co-Chair and expert for Intermediary Liability Committee attached to the Council of Europe). Within the framework of UN Internet Governance Forum, she is coordinating the Dynamic Coalition of Freedom of Expression and Media on the Internet. In recent years, her passion has been towards researching legal approach to autonomous and intelligent systems (AI/S, Artificial Intelligence). She was an external member for European Commission’s High-Level Group on Artificial Intelligence (HLEG-AI). As an expert, she in involved in European Commission and Council of Europe joint projects in strengthening information society in countries such as Ukraine and Moldova, specifically in training judiciary – for example she was a trainer for human rights and media law for joint program of European Union and Council of Europe in Ukraine for development of human rights law course for the National Academy of Judges (with prof. J. Kulezsa and A. Pazniuk).

Felicitas Rachinger is a research and teaching assistant at the Department of Legal Theory and Future of Law at the University of Innsbruck, Austria. In her research, she focuses on anti-discrimination law and digital rights.
**Caterina Sganga** joined Sant’Anna as an Associate Professor of Comparative Private Law in October 2018. Prior to her appointment at SSSA, she was Assistant and later Associate Professor of Law at the Department of Legal Studies and Department of Economics and Business of Central European University (CEU, 2012-2018). She holds a Ph.D. in Comparative Private Law from Sant’Anna, an LL.M. from Yale Law School, and an LL.B. and J.D. from University of Pisa.

She is a member elected of the European Copyright Society (ECS), one of the most prestigious independent academic associations in the field of copyright, a fellow of the European Law Institute (ELI), and a member of several international IP and property law associations (EPIP, ATRIP, ALPS).

From January 2020, she is the coordinator of the H2020 project reCreating Europe (“Rethinking digital copyright law for a culturally diverse, accessible, creative Europe”), which studies the impact of EU digital copyright law on creativity, cultural diversity and access to knowledge through a multidisciplinary approach and a focus on five groups of stakeholders (authors and performers, creative industries, cultural heritage institutions, intermediaries, users). ReCreating Europe aims at offering innovative contributions to assess the impact of current laws, develop reform proposals, and prepare and test guidelines which may inspire the self-regulatory efforts of different interest groups.

In the past years she held visiting teaching appointments at Maynooth University (Ireland), CEU, the Europa-Kolleg of the University of Hamburg and the University of Pisa, was a fellow at the Information Society Project at Yale Law School, and a visiting researcher at the Center for Intellectual Property Policy at McGill University (Montreal).

Caterina’s book “Propertizing European Copyright. History, Challenges and Opportunities” has been published by Edward Elgar in 2018 (electronic version with Introduction and Chapter One in open access available here). She authored the volume “I beni in generale” (On goods - general theory) in the Italian Commentario al Codice Civile P.Schlesinger (Giuffré Editore) in 2015, and several contributions published in edited books, international journals such as the International Review of Intellectual Property and Competition Law (IIC), the Cambridge Journal of International and Comparative Law, the European Intellectual Property Review (EIPR), the Journal of Intellectual Property, Information Technology and E-Commerce Law (JIPITEC), the Journal of Intellectual Property Law and Practice, GRUR Int., ERA Forum, and a number of Italian law reviews.

You can find most of her publications in open access on SSRN and ResearchGate, and sporadic tweets here. Caterina is also avvocato at the Italian State Bar and attorney-at-law at the New York State Bar.

**Meryem Vural** is a research and teaching fellow at the Department of Theory and Future of Law at the University of Innsbruck, Austria. She specializes in Human Rights Law, Data Protection Law and Internet Law.
Annex 6 – Bibliography


Angelopoulos, C, European Intermediary Liability in Copyright – A Tort-Based Analysis (Kluwer 2016)


Beyleveld, D, “Why Recital 26 of the E.C. Directive on the legal protection of biotechnological inventions should be implemented in national law” 2000(1) IPQ 1


Costa, M and Peers, S (eds), Steiner & Woods EU Law (14th ed., OUP)


Dörrenbächer, N and Mastenbroek, E, “Passing the buck? Analyzing the delegation of discretion after transposition of European Union law” (2019) 13 Regulation and Governance 70


Eechoud (van), M, “Artikel 15 DSM-richtlijn: bescherming van perspublicaties met betrekking tot onlinegebruik (persuitgeversrecht)” (2019) 6 AMI 197


European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Identifying and addressing barriers to the Single Market”, COM (2020) 93 final, 10 March 2020

European Commission, “Communication from the Commission — EU law: Better Results through Better Application” (2017/C 18/02) OJ C 18/10


European Copyright Society, “Answer to the EC Consultation on the role of publishers in the copyright value chain”, 15 June 2016, available at: https://europeancopyrightsociety.org/


Fergal, U, “The EU press publishers’ right: where do Member States stand?” 2021 16(8) JIPLP 887


Gotzen, F, “‘Autonomous concepts’ in the Case Law of the Court of Justice of the European Union on Copyright” (2020) 263(1) RIDA 75


Hugenholtz, P B, “Neighbouring Rights are Obsolete” (2019) 50(8) IIC 1006


Klamert, M, “What We Talk About When We Talk About Harmonisation” (2015) 17 Cambridge Yearbook of European Legal Studies 360


Koziol, H, “Comparative Conclusions” in H Koziol, Basic Questions of Tort Law from a Comparative Perspective (Jan Sramek Verlag 2015) 690


Lazarova, A, “Reuse the news: between the EU press publishers’ right’s addressees and the informatory exceptions’ beneficiaries” (2021) 16(3) JIPLP 236

Leistner, M, “Copyright law on the internet in need of reform: hyperlinks, online platforms and aggregators” (2017) 12(2) JIPLP 136


Neergaard, U and Nielsen, R, European Legal Method: In a Multi-level EU Legal Order (Djøf Publishing 2012)


Ohly, A and Pila, J (eds), The Europeanization of Intellectual Property Law: Towards a European Legal Methodology (Oxford University Press 2013)


Peguera, M, “Spanish transposition of Arts. 15 and 17 of the DSM Directive: overview of selected issues” (2022) 17(5) JIPLP 450


Ramalho, A, The Competence of the European Union in Copyright Lawmaking – A Normative Perspective of EU Powers for Copyright Harmonization (Springer 2016)


Rendas, T, “Are Copyright-Permitted Uses ‘Exceptions’, ‘Limitations’ or ‘User Rights’?” (2022) 17(1) JIPLP 54


Riesenhuber, K, European Legal Methodology (2nd ed., Intersentia 2021)


Rosati, E, “Five Considerations for the Transposition and Application of Article 17 of the DSM Directive” (2021) 16(3) JIPLP 265

Rosati, E, Copyright in the Digital Single Market (OUP 2021)

Samuel, G, An Introduction to Comparative Law and Method (Hart Publishing 2014)


Spindler, G, “The Liability system of Art. 17 DSMD and national implementation – Contravening prohibition of general monitoring duties?” (2020) 10 JIPITEC 344


Thomann, E and Zhelyazkova, A, “Moving beyond (non-)compliance: the customization of European Union policies in 27 countries” (2017) 24 (9) Journal of European Public Policy 1269


Weatherill, S, “The Fundamental Question of Minimum or Maximum Harmonisation” in S Garben and I Govaere (eds), The Internal Market 2.0 (Hart 2020), available at: https://ssrn.com/abstract=3660372


National and international case law

Cour de Cassation, Chambre civile 1, Mulholland Drive, 28 February 2006, 05-15.824 (France)

CJEU case law

CJEU, C-29/84, Commission v Germany, 23 May 1985, ECLI:EU:C:1985:229
CJEU, C-106/89, Marleasing, 13 November 1990, ECLI:EU:C:1990:395
CJEU, C-58/02, Commission v Spain, 7 January 2004, ECLI:EU:C:2004:9
CJEU, C-52/00, Commission v France, 25 April 2002, ECLI:EU:C:2002:252
CJEU, C-308/97, Manfredi, 13 July 2006, ECLI:EU:C:2006:461
CJEU, C-275/06, Promusicae, 29 January 2008, ECLI:EU:C:2008:54
CJEU, C-467/08, Padawan, 21 October 2010, ECLI:EU:C:2010:620
CJEU, C-50/09, Commission v Ireland, 3 March 2011, ECLI:EU:C:2011:109
CJEU, C-145/10, Eva-Maria Painer, 1 December 2011, ECLI:EU:C:2011:798
CJEU, C-281/11, Commission v Poland, 19 December 2013, EU:C:2013:855
CJEU, C-160/15, GS Media, 8 September 2016, ECLI:EU:C:2016:644
CJEU, C-301/15, Soulier and Doke, 16 November 2016, ECLI:EU:C:2016:878
CJEU, C-161/17, Renckhoff, 7 August 2018, ECLI:EU:C:2018:634
CJEU, C-476/17, Pelham, 29 July 2019, ECLI:EU:C:2019:624
CJEU, C-516/17, Spiegel Online, 29 July 2019, ECLI:EU:C:2019:624
CJEU, C-683/17, Cofemel, ECLI:EU:C:2019:721, 12 September 2019
CJEU, C-484/18, Spedidam, 14 November 2019, ECLI:EU:C:2019:970
CJEU, C-401/19, Poland v Parliament and Council, 26 April 2022, ECLI:EU:C:2022:297

Opinion of AG Saugmandsgaard Øe in Case C-401/19, Poland v Parliament and Council, 16 July 2021, ECLI:EU:C:2020:586