

Articles 15 & 17 of the Directive on
Copyright in the Digital Single Market
Questionnaire – Annex to the Comparative
National Implementation Report
CZECH REPUBLIC

Last Updated: 1 September 2023

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

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PART I: Article 15 CDSMD

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

Background information

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

Before the transposition of the Article 15 CDSMD, the national regulation regarding publisher’s rights, as detailed in sec. 87 CA (effective then), acknowledged only the publisher’s entitlement to compensation for reproductions and lending of the works published by that publisher.

The right of the publisher to compensation in connection with the reproduction of these published works is indeed listed among the rights related to copyright (sec. 1 let. b) CA). However, we do not consider it as a right of intellectual property in *stricto sensu*, as it possesses only a relative nature and does not establish any absolute rights but rather the right to monetary compensation (i.e., it is a remuneration right).

This right is preserved for the publisher even after the CDSMD transposition of the right of press publishers to the use of their publications online.

In accordance with national regulation, a publisher in the Czech jurisdiction is entitled to receive compensation for reproducing works published by that publisher for personal use or for the internal needs of legal entities or entrepreneurial individuals. This compensation serves as a recognition of the publisher’s contribution and ensures fair remuneration for the efforts in disseminating knowledge and creative works to the public. Additionally, sec. 87 CA stipulates that the publisher has the right to compensation when the published work is lent to individuals as specified in sec. 37 para. 1 of the CA (notably where lending occurs in institutions such as school libraries, libraries of higher education institutions, and libraries of museums, galleries, and archives).

These relative publisher’s rights have a duration of 50 years starting from the publication of the work and are transferable. This means that the publisher can assign or transfer these rights to another party.

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).**

Art. 15 CDSMD was transposed into Czech law by Act no. 429/2022 Sb. from 8 December 2022. The act entered into effect on 5 January 2023. The official name of the act is Act amending Act No. 121/2000 Sb., on Copyright, Rights Related to Copyright and on Amendments to Certain Acts (Copyright Act), as amended, and other related acts (in Czech „zákon, kterým se mění zákon č. 121/2000 Sb., o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů (autorský zákon), ve znění pozdějších předpisů, a další související zákony“).

The approach can be perceived as very intentionalist, while maintaining a substantial part of the original wording where possible (e.g., definition of press publication subject to Art. 2 para. 4 CDSMD). As will be explained later, the national legislator diverged heavily from the CDMSD regarding the negotiating and price-setting mechanisms and related obligations of the respective subjects by introducing competition law concepts.

At this point, it must be noted that the Czech implementation of the Article 15 CDSMD took place after the transposition deadline, and therefore, the resulting LNI is only a few months old. As such, academia and professional networks in the Czech Republic have yet to respond with extensive scholarship explaining the nature of the LNI. Also, the LNI still needs to be appropriately tested before the courts.

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.

Act no. 429/2022 Sb. is available here: https://aplikace.mvcr.cz/sbirka-zakonu/SearchResult.aspx?q=429/2022&typeLaw=zakon&what=Cislo_zakona_smlouvy. No English translation is available. As there is no translation available, we are offering our own translation below:¹

Sec. 25b

Author’s right to a proportionate share of the income of the publisher of a press publication

The author of a work which forms part of a printed publication shall be entitled to a proportionate share of the income of the publisher of the printed publication accruing to that publisher from the exercise of the right referred to in sec. 87b.

Right of the publisher of a press publication

Sec. 87b

(1) For the purposes of this Act, a press publication means a collection consisting mainly of literary works of a journalistic nature, which may also contain other works and other objects of protection, and which

(a) constitutes a single item within a periodically published or regularly updated publication under the same title as a newspaper or magazine,

(b) contains information in the field of news or other areas; and

¹ Translation initially made by DeepL and checked by the authors of the national report.

(c) has been published by, under the editorial responsibility and control of the publisher.

(2) A press publication referred to in para. 1 is not a press publication which has been published for scientific or academic purposes.

(3) The publisher of a press publication established in a Member State of the European Union or in a State forming the European Economic Area shall have the exclusive proprietary right to use its press publication and to grant to the information society service provider an authorisation to exercise this right; without granting such authorisation, the press publication may be used only in the cases provided for by this Act.

(4) The right to use a press publication is the right to

(a) reproduction of a press publication for the purpose of its use online,

(b) making the press publication available to the public in the manner provided for in sec. 18 para. 2.

(5) The right of the publisher of a press publication is transferable.

(6) The right of the publisher of a press publication shall last for 2 years from the publication of the press publication.

(7) Sec. 2 para. 3, 4, 6, 7 and 9, sec. 12 para. 2 and 3, sec. 13 and 14, sec. 18 para. 2, sec. 27 para. 8, sec. 27a - 29, sec. 31 para. 1 let. (b) and para. 2, sec. 31a, sec. 34 let. (a) – (c), sec. 37 para. 1 let. (a) and (b), 37a and sec. 37b, sec.38a para. 1, sec. 39 - 41, sec. 43 and 44 and sec. 53 - 57 shall apply mutatis mutandis to the right of the publisher of a printed publication.

(8) The right to use a press publication under para. 3 and 4 shall not apply to the use of single words or very short extracts from a press publication and to the insertion of hyperlinks.

(9) When negotiating the granting of the right to use a press publication pursuant to para. 3, the provider of an information society service shall be obliged to maintain a fair, equal and non-discriminatory approach towards the publisher of the press publication and to pay the publisher appropriate remuneration for the granting of the right to use the press publication.

(10) In negotiating the remuneration for the granting of the authorisation to exercise the right to use a press publication pursuant to para. 3, account shall be taken in particular of the extent of the use of the press publication in the exercise of the right referred to in para. 4, the territorial scope of the use, the impact of the press publication in relation to the public, the effort expended by the publisher in acquiring the content of the press publication and the economic benefit accruing to the information society service provider from the use of the press publication, including advertising revenue.

(11) If no agreement on the amount of remuneration is reached between the provider of an information society service and the publisher of a press publication within 60 days from the date of commencement of negotiations for the granting of the authorisation to exercise the right to use a press publication pursuant to para. 3, either of the negotiating parties shall be entitled to apply to the Ministry for the determination of the amount of remuneration pursuant to para. 10. The Ministry shall invite the other party to comment on the request within a period of not less than 14 days. The information society service provider and the publisher of the press publication shall be obliged to provide the Ministry, free of charge, on request, with all the information necessary to determine the amount of the fee or the method of determining it, within a maximum period of 30 days from the date of receipt of the request.

(12) The Ministry shall, within 60 days of receipt of the request, the statement of the request or the data necessary for determining the amount of the remuneration, whichever is later, determine the amount of the remuneration in accordance with para. 10.

(13) An application for the determination of the amount of the fee pursuant to para. 11 and 12 may be made by either party no earlier than three years after the decision pursuant to para. 12 has become final.

(14) The provider of an information society service shall refrain from acting in a way that circumvents the publisher's right to its print publication, in particular by:

(a) refusing to act in good faith to authorize the exercise of the right to use the press publication, including the payment of appropriate remuneration for such use,

(b) arbitrarily restricting or modifying an information society service in a discriminatory manner so as to exclude the necessity of obtaining the authorisation to exercise the right to use a press publication from a particular publisher, without having a fair reason for such restriction or modification; this provision shall apply only where the information society service provider is a dominant player on the market for the service which it has restricted or modified pursuant to the preceding sentence,

(c) has abused its dominant market position in order to obtain authorisation to exercise the right to use a print publication on terms which are disproportionately unfavourable to the publisher.

(15) The provisions of para. 10 to 14 shall apply only if the information society service provider is an entrepreneur² and only in relation to the granting of an authorisation to exercise the right to use a press publication for the reproduction and making available to the public of a press publication by an information society service provider in the manner referred to in sec. 18 para. 2 for the purpose of making search results available through an internet search engine or making them available through a social network. Para. 11 shall not apply if the publisher expressly refuses to grant authorisation to exercise the right to use the press publication.

(16) The provisions of para. (10) to (13) shall not apply where the contract is concluded by a collective administrator.

Sec. 105b

Offences by legal entities and natural persons engaged in business

(1) A legal or natural person commits an offence by

a) unauthorised use of a work of authorship, artistic performance, sound or sound-visual recording, radio or television broadcast, press publication or database,

(b) unlawful interference with copyright in the manner referred to in sec. 43 para. 1 or 2 or sec. 44 para. 1,

(c) failing to comply with the notification obligation under sec. 24 para. 6 as a dealer involved in the sale of an original work of art,

(d) carrying out collective management without having been granted an authorisation pursuant to sec. 96a,

² According to sec. 420 para. 1 of act. no. 89/2012 Sb. (Civil Code), a person who, on their own account and responsibility, independently carries out a gainful activity in the form of a trade or in a similar manner with the intention to do so consistently for profit is considered, with regard to this activity, to be an entrepreneur.

(e) failing to notify the Ministry of the facts referred to in sec. 56 para. 3,

(f) failing to register as a person intending to exercise or exercising the activity of an independent rights manager in accordance with sec. 104b para. 2,

(g) as a provider of an information society service failing to apply for authorisation to exercise the right to use a press publication in accordance with sec. 87b para. 9 or breaches the obligation set out in sec. 87b para. 14; or

(h) as a provider of an information society service or as a publisher of a press publication, failing to provide the information referred to in sec. 87b para. 11.

(2) A fine of up to CZK 500,000 or up to 1% of the total annual worldwide turnover of the person who committed the offence for the previous financial year, whichever is higher, may be imposed for an offence under para. 1 (g) or (h). (d) a fine of up to CZK 500,000 may be imposed, for an offence under para. 1 let. (a) or (f) a fine of up to CZK 150,000, for an offence under para. 1 let. (b) or (c) a fine of up to CZK 100,000 and for an offence under para. 1(e) a fine of up to CZK 50,000.

Sec. 105c

Common provisions on offences

(1) Offences under this Act shall be heard by

(a) under delegated competence, the municipal authority of the municipality with extended competence in whose territorial district the offence was committed, if the offence is an offence under sec. 105a para. 1 and sec. 105b para. 1 let. (a) to (c) or (g),

(b) the Ministry, in the case of offences under sec. 105b para. 1 let. (d) to (f), Sec. 105ba(1) and sec. 105b para. 1.

(2) Fines shall be collected and enforced by the authority which imposed them. Fines imposed by the Ministry shall be the revenue of the State Fund of Culture of the Czech Republic.

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.

The object of protection according to Act no. 121/2000 Sb., Copyright Act, as amended by Act no. 429/2022 Sb. (the “CA”) is the protection of a press publication (Sec. 87b CA).

There are no differences in LNI as to the concept of press publication other than stylistic changes (e.g., different synonym used for “collection” than the official translation; the term in LNI could also be translated as proceedings; instead of “has the purpose of” in b) using “obsahuje” that can be translated as “contains”.

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

Yes, LNI excludes uses of individual words or very short extracts from protection – see sec. 87b para. 8 CA. The LNI took qualitative approach (individual words or short extracts in line with Art. 15 para. 1 CDSMD). LNI does not specify anything regarding non-literary content and headlines.

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

The legal regulation regarding the extension of publishers' rights to press publications does not explicitly address the protection of facts, such as daily events, etc. Unfortunately, the enumerative provision of sec. 87b para. 7 of the CA does not refer to sec. 2 para. 6, which excludes elements like “*the subject matter of the work itself, daily news, or other data in itself, an idea, process, principle, method, discovery, scientific theory, mathematical or similar formula, statistical graph, or a similar subject matter in itself*” from copyright protection. Therefore, theoretically, the new protection of press publications could potentially apply to daily facts and information since it cannot be directly inferred from the absence of copyright protection that the rights of press publications cannot extend to the facts themselves. Nevertheless, considering the constitutional protection of the public domain, which encompasses the right to freely use daily news and facts by all members of society, it can be inferred by analogy that press publications do not extend to the facts, data, and information themselves.

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

The Art. 15 para. 2 of the CDSMD has not been transposed fully and explicitly, i.e., there is no specific provision in LNI on this issue.³ As a public domain content can be incorporated as part of press publication, subject to its definition in sec. 87b CA, the general press publishers' right seemingly might extend also to such public domain content (e.g., a photo used in an article). This however would be an unjustified and unsubstantiated extension of these exclusive rights. An interpretation conformant with the EU acquis that seeks to achieve the intended result and plug this loophole via the indirect effect of the Directive is suggested,⁴ so that these rights shall “not be invoked to prohibit the use of works or other subject matter for which protection has expired” as in Art. 15 para. 2 of the CDSMD. Furthermore, constitutional requirements for the protection of the public domain as part of general freedom of action and the right to information (Art. 2 para. 3 and Art. 17 of the Charter of Fundamental Rights and Freedoms⁵) exclude the artificially subsequent protection of elements and works that have already entered the public domain by including them in a press publication.

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

LNI does not contain any additional threshold for protection (see translation above that follows the original wording of Art. 2 para. 4 CDSMD).

³ While sec. 87b para. 7 CA does have reference to sec. 28 CA, which establishes that “a work for which the duration of property rights has expired may be freely used by anyone without further restrictions,” this provision itself does not imply anything specific regarding derivative subjects of protection such as printed publications or sound recordings. Article 15 (2) CDSMD is clearly transposed, for example, in sec. 87h para. 2 of the German Urheberrechtsgesetz, which adopts the literal wording of the directive. The Czech Copyright Act lacks a similar provision.

⁴ Relying on the CJEU judgment in case C-14/83, *Von Colson*, 10 April 1984, ECLI:EU:C:1984:153, para. 28; relying also on joined cases C-397/01 to C-403/01, *Bernhard Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshut eVSDEU*, 5 October 2004, ECLI:EU:C:2004:584 regarding the allowed methods of interpretation.

⁵ Available in official English translation here: <https://www.psp.cz/en/docs/laws/listina.html>.

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.

(See sec. 87b para. 3 CA)

Publishers of press publications established in Member States or in states forming the EEA are beneficiaries of the protection for press publications in line with Art. 15 para. 1 CDSMD. No lists of press publications or beneficiaries is employed.

AC 3: Restricted acts

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

(See sec. 87b para. 4 CA)

The LNI grants press publishers the rights of reproduction for online use and making press publications available. Making available is further defined in sec. 18 para. 2 CA as follows:

“Communication to the public

Sec. 18

(1) Communication of a work to the public means making the work available to the public in intangible form, live or recorded, by wire or wirelessly.

(2) Communication of a work to the public as referred to in para. 1 includes making the work available to the public in such a way that anyone may have access to it at a place and time of their choice, in particular by means of a computer or similar network. This communication of a work to the public shall also include the making available of the work to the public by a provider of an online content sharing service under sec. 46 para 1 where the work has been uploaded by a user of such a service.” [The sec. 46 CA contains the transposition of the Article 17 CDSMD and is thus an expansion of press publishers’ rights as will be discussed later].

The LNI (sec. 87b (3) CA) protects against unauthorised exploitation of press publications in the form of reproduction for the purposes of use online and making available by information society service providers that are defined in Act No. 480/2004 Sb., on Certain Information Society Services and on Amendments to Certain Acts (Act on Certain Information Society Services), as amended (“ACISS”), according to the ECD.

It must be highlighted that sec. 18 para. 2 CA also extends communication to the public to situations where users upload the works in question. Implementing Article 17 (1) CDMSD in such a way thus also expands press publisher’s rights. The scope of press publisher’s rights is, thus, extended to UGC in cases of ISSPs that fall under the definition of ISSP and OCSSP simultaneously. In other words, this narrower category of ISSPs can infringe press publishers’ rights without use on their part simply by enabling users to upload press publications.

Article 15 para. 1 CDSMD excludes *“private or non-commercial uses of press publications by individual users”* from protection. LNI does not contain this rule explicitly – however this effect should be achieved by the euroconform interpretation of CA.

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

The LNI (Sec. 87b para. 8 CA) stipulates that these rights do not cover hyperlinking, in line with art. 15 para. 1 CDSMD. Hyperlinking, however, is not defined any further. There is nothing in the CA specifying which kinds of hyperlinks are permissible.

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.

Sec. 87b CA relates only to the uses by information society service providers. However, it does not specify which categories of ISSPs can be users of press publications. Sec. 87b CA only references the ACISS. Later in the sec. 87b para. 15 a sub-group of ISSPs, namely the search engines and social media networks are subjected to specific obligations regarding the negotiation and further actions regarding the right itself.

As pointed out in question 9, the scope of protection extends communication to the public to situations where users upload the protected subject-matter in question. The scope of press publishers' rights, thus, covers UGC in cases of ISSPs that fall under the definition of ISSP and OCSSP simultaneously even for the acts of users. In this case the press publisher may invoke the right against the OCSSP. The OCSSP's act of communication to the public is however not subjected to the "Art. 17 CDSMD liability exclusion regime", i.e., there are no licensing and filtering obligations as such, and "normal ECD liability exclusion regime" (in Czech Republic implemented by ACISS) does apply (albeit modified by the CJEU's case law such as *Frank Peterson v. Google LLC et others and Elsevier Inc. v. Cyando AG* (C-682/18)).

The rule, stated in the second subparagraph of Art. 15 para. 1 CDSMD, i.e., that these rights "*shall not apply to private or non-commercial uses of press publications by individual users*" is not explicitly contained in the LNI. Again, this exclusion of the subjects must be achieved only with the help teleological reduction.

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.

There are no applicable rules in the LNI as Art. 15 para. 2 CDSMD has not been transposed into the Czech CA. An interpretation conformant with the EU acquis that seeks to achieve the intended result and plug this loophole via the indirect effect of the Directive is suggested.⁶

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.

(See sec. 87b para. 7 CA)

LNI recognises exceptions and limitations through sec. 87b para. 7 CA. It, as such, provides the following list of exceptions and limitations that are set out in part of CA related to works of copyright and that are applied mutatis mutandis to the part of CA regulating press publications:

⁶ See footnote 4.

- Sec. 31 para. 1 let. b) and para. 2 – Quotation for the purposes of criticism or review
- Sec. 31a – Licence for digital teaching
- Sec. 34 a) – Official and news licence for the purposes of public security, for judicial or administrative proceedings or for any other official purpose or for parliamentary proceedings and the taking of a record thereof
- Sec. 34 let. b) – Official and news licence in connection with news coverage of current events
- Sec. 34 let. c) – Official and news licence in the periodical press, television or radio broadcast or other mass media making available coverage of current political, economic or religious affairs
- Sec. 37 let. a) – Library licence for archival and preservation needs
- Sec. 37 let. b) – Library licence for lending of reproduction of damaged or lost works
- Sec. 37a – Licence for certain uses of an orphan work
- Sec. 37b – Licence for the use of out-of-commerce works
- Sec. 38a para. 1 – Licence for temporary reproductions
- Sec. 39 – Licence for persons with disabilities
- Sec. 39a – Licence for certain uses of a work for the benefit of persons with visual impairments or other reading disabilities
- Sec. 39b – Obligations of the authorised provider
- Sec. 39c – Licence to reproduce the work for the purpose of automated text or data analysis
- Sec. 39d – Licence to reproduce a work for the purposes of automated text or data analysis for scientific research

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.**

(See Sec. 87b para. 9-16 CA)

Aiming to prevent the “French scenario” and inspired by the Italian transposition,⁷ these provisions represent the most intensive substantive departure from the nature and purpose of the Art. 15 CDSMD.⁸

Appropriate remuneration

The LNI sets out that press publishers are entitled to appropriate remuneration (sec. 87b para. 9 CA). Sec. 87b para. 9 CA furthermore obliges ISSPs (however, not the publisher) to maintain a fair, equitable and non-discriminatory approach and to pay an appropriate remuneration.

In cases of uses of the press publication by an ISSP that qualifies as an entrepreneur⁹ and is a search engine or a social network and only in cases of direct negotiation between an ISSP and the press publisher (i.e., it is excluded

⁷ A Faladová, “Velká novela autorského zákona 2022“ (2023) 1(1) Duševní vlastnictví, available at:<https://upv.gov.cz/files/uploads/PDF_Dokumenty/dusevni_vlastnictvi/elektronicka_verze_2023/casopis2023-02.pdf>, accessed 18 July 2023 8

⁸ See in general U Furgał, “The Emperor Has No Clothes: How the Press Publishers’ Right Implementation Exposes Its Shortcomings” (2023) 72 GRUR International 650–664.

⁹ For the definition of entrepreneur, see footnote 1.

when the contract is negotiated by the collective management society¹⁰) the following factors should be taken into account when setting the remuneration (sec. 87b para. 10 CA):

- *“the extent of the use of the press publication in the exercise of the right*
- *the territorial scope of the use,*
- *the impact of the press publication in relation to the public,*
- *the effort expended by the publisher in acquiring the content of the press publication and*
- *the economic benefit accruing to the information society service provider from the use of the press publication, including advertising revenue.”*

At this point, it is necessary to highlight the competition level of remuneration determination that shall be addressed further below (see sanctions). To determine the ISSP's compliance, weighting market power and share in relevant markets is necessary.

The specific administrative proceedings as regards to negotiation is excluded when the contract is negotiated by the collective management society.

Administrative proceedings

Should no agreement be made within 60 days upon commencement of negotiations, any party to the negotiations is entitled to reach out to the Ministry of Culture of the Czech Republic (further “Ministry”) with a request to determine the remuneration (sec. 87b para. 11 CA). Press publishers can refuse to grant licenses without this additional procedure (sec. 87b para. 15 CA). The Ministry decides within another 60 days after receipt of the request (sec. 87b para. 12 CA). Another request can be made three years after the previous Ministry decision (sec. 87b para. 13 CA).

Problematic aspects of this decision process are the time limit provided to the Ministry and its competences. Under sec. 87b para. 11 CA, the Ministry can request additional information to determine the license rate to which parties to the dispute must respond within maximum period of 30 days from the date of receipt of the request. However, it is yet to be seen if the Ministry can safely obtain the necessary information and decide within the set 60 days. To ensure compliance, Sec. 105b para. 1 let. h) CA (see translation and sanctions below) introduces a sanction mechanism with information requests. The CA, however, fails to determine which public body enforces this provision. Relying on the Act on Liability for Offences and Proceedings, the enforcing body would be a municipality with extended competence. The enforcing and decision bodies are then different. Thus, the Ministry might face problems in enforcing this compliance, without which it would be challenging to determine the license rate.

ISSPs' additional obligations

The entrepreneurial ISSP that is a search engine or a social network *“shall refrain from acting in a way that circumvents the publisher's right to its print publication”*.

This behaviour may consist of not negotiating in good faith (incl. payment of remuneration) – this basically means that there is an “obligation to negotiate”.¹¹ The most puzzling provision is the one forbidding *“arbitrarily restricting or modifying an information society service in a discriminatory manner so as to exclude the necessity of obtaining the authorisation to exercise the right to use a press publication from a particular publisher, without having a fair reason for such restriction or modification”* (sec. 87b para. 10 CA). This however only applies if the provider is a dominant one as regards to the service. It is truly hard to imagine what could be considered as arbitrary and what, for example, is a necessary technical choice. The provision has also been qualified as a “must-

¹⁰ In this case of voluntary collective licensing, the criteria to be taken into account are enumerated in sec. 98e CA that should be applied *mutatis mutandis*.

¹¹ Furgał, (8), p. 660.

carry” obligation.¹² The last of these obligations also shows a heavy competition law character, as it is a ban on abusing of the dominant position (sic!) to obtain preferable terms for the authorisation to exercise the rights.

Sanctions

Finally, we must point out the sanction mechanisms established in the CA. Specifically, sec. 105a et seq. CA establishes unauthorised use of press publication as an administrative offence. Physical persons or legal and physical persons engaged in business may commit such an offence with fines up to CZK 150,000.

Sec. 105b para. 1 let. (g) CA establishes sanction mechanisms for ISSPs, where municipalities are competent bodies (sic!). ISSPs can commit the offence under sec. 105 para. 1 let. (g) CA by:

- not acting to obtain the authorisation under sec. 87b para. 9 CA or by
- failing to perform its obligation under sec. 87b para. 14, i.e., acting in such a way to circumvent publisher rights.

Again, the specificity of this regulation must be underscored. The sec. 87b para. 14 CA namely foresees inter alia the assessment of market dominance. Traditionally, the competent bodies to evaluate and decide upon competition aspects in general (or even in particular, in the case of this non-compliance) would be either the European Commission or the Czech Office for the Protection of Competition. This enforcement mechanism, thus, proves problematic, as municipalities lack the necessary information to impose the sanction. Moreover, sanctioning ISSPs might itself prove distorting to competition and municipalities might be sanctioned by the Czech Office for the Protection of Competition themselves.

Sec. 105b para. 1 let. (h) CA then establishes a sanction mechanism for ISSP and press publishers. They can commit the offence by failing to provide information under sec. 87b para. 11 CA, i.e., failing to comply with information requests to provide the Ministry, upon request, free of charge, with all data necessary for determining the amount of the remuneration or the manner of its determination. As pointed out above, the competencies are problematic, as municipalities enforce the sanction, while the Ministry leads the proceedings.

The fines for these offences (sec. 105b para. 1 let. (g) and (h) CA) are up to either CZK 500,000 or 1 % of the total annual worldwide turnover in the preceding year, whichever is higher (see sec. 105b para. 2 CA). The administrative body dealing with these administrative offences is the Ministry.

Collective licensing

LNI does not provide for either mandatory collective licensing of press publisher rights or extended collective licensing. Sec. 97e para. 4 CA regulating extended collective licensing does not list the right of the publisher among its enumeration of rights that might be managed in such manner.

Theoretically, voluntary collective licensing might be possible; if all of the needed legal requirements are fulfilled and the Ministry issues the corresponding authorisation to the applicant (sec. 96 and 96a CA).

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.

Sec. 25b CA provides that such authors are entitled to an appropriate share of the publisher's income. The LNI does not provide for any further details.

¹² Ibid., p. 660.

AC 8: Term of protection

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

The term of protection lasts for two years from the publication (sec. 87b para. 6 CA) – this term is then calculated analogously as in the case of standard works of authorship, as the sec. 27 para. CA is mentioned in the enumerative provision (sec. 87b para. 7 CA) of further applicable sections of the CA.

AC 9: Waiver

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

The LNI does not provide for any provisions enabling rightsholders to waive their rights. As these rights are of purely economic nature without any moral rights substance and waiver is not forbidden, it must be concluded that these rights can be waived, akin to for example the sui generis rights of the database maker. A waiver of sui generis database rights is explicitly regulated in sec. 14c of the Freedom of Information Act (Act 106/1999 Sb., Freedom of Information Act [Zákon o svobodném přístupu k informacím]), that provides that if information is to be provided which is the subject of a sui generis database right, and the property rights to this right are exercised by the obliged entity, this obliged entity shall waive these rights when providing the information or provide an adequate license allowing re-use.

The LNI does not forbid giving authorisation for free. As such, rightsholders can opt to license their press publications gratuitously. The only potential problem might be ISSPs' obligations (sec. 87b para. 9 CA) that oblige them to maintain a fair, equitable and non-discriminatory approach and to pay an appropriate remuneration. ISSPs might thus be found to violate these obligations by accepting licenses for free contradictory to their obligations to pay appropriate remuneration

AC 10: Entry into effect

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

Art. 15 CDSMD was transposed into Czech law by Act no. 429/2022 Sb. from 8 December 2022. The act entered into effect on 5 January 2023.

The retroactive effect of the new law on publications that were published before 5 January 2023 and after 6 June 2019 can be considered highly problematic. The troublesome transitional provisions of the amendment to the CA No. 429/2022 Sb. state: "The right under sec. 87b of Act No. 121/2000 Sb., in the version effective from the date of effectiveness of this Act, does not apply to a press publication first published before 6 June 2019." Considering the constitutional limits on the retroactive effect of the law, it can be inferred that this provision, in relation to press publications that were published before the effectiveness of the amendment (i.e., before 5 January 2023), establishes an unconstitutional disproportionate false retroactive effect that encroaches upon the acquired freedoms of users who, in good faith, utilised press publications before the effectiveness of the amendment when no exclusive rights existed.

In a situation where the transitional provisions do not provide any possibility for users to freely use, for example, press publications published before the effectiveness of the amendment for a period of one year, the establishment of new exclusive rights immediately upon effectiveness of the new law contradicts the constitutional requirement of legal certainty.

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.

Noteworthy is especially the unique set of “anti-circumvention” obligations imposed on specific ISSPs vis-à-vis the publisher’s rights in publication as elaborated above. These might be evaluated as borderline infringing the right to conduct business of the ISSPs.¹³

Apart from that, we tried to address all noteworthy divergences above. *Cum grano salis* it could be only anecdotally noted that newly adopted legislation seems to have the completely opposite effect than desired.¹⁴ Namely, as a reaction thereto, Google stopped showing “snippets” (i.e., extended previews) of found news content.¹⁵

¹³ See Furgal (8), p. 660.

¹⁴ See Faladová (7), p. 8.

¹⁵ E.g., <https://czechrepublic.googleblog.com/2022/09/konstruktivni-cesta-ke-spolupraci-s.html> stating: “*Due to the risks described above, we have no other option than to remove previews of news content from publishers from the European Union in the Czech Republic from Search, News and the Discover service. This is content that can be protected by an amendment to the Copyright Act, i.e., article excerpts and image and video previews. The display of titles and links will not change in any way. We also had to make the difficult decision to end our Google News Showcase license program in the Czech Republic, which until now had allowed us to pay publishers to select content for Google News and the Discover service. Unfortunately, the amendment to the copyright law represents too fundamental a limitation for our products, and the financial and operational risks that result from it are not sustainable for us in the long term.*” [translated by Google Translate].

PART II: Article 17 CDSMD

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

Background information

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

Article 17 CDSMD was transposed into Czech law by Act no. 429/2022 Sb. of 8. 12. 2022. The act entered into effect on 5 January 2023. The official name of the act is Act amending Act No. 121/2000 Sb., on Copyright, Rights Related to Copyright and on Amendments to Certain Acts (Copyright Act), as amended, and other related acts (in Czech „zákon, kterým se mění zákon č. 121/2000 Sb., o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů (autorský zákon), ve znění pozdějších předpisů, a další související zákony“).

Originally, the draft act adopted a textual approach. However, in the course of the legislative procedure, several deviant amendments have made it into the text, notably Sec. 47 para. 3 CA, that limits the deployment of automated content recognition technology to situations when the uploaded content is assessed by the OCSSP as identical or equivalent to the rightsholder’s work, and Sec. 51a CA, which contains a possibility of an organisation representing consumers or the platform’s competitors to file an action before court demanding the prohibition of the service, if the OCSSP systematically removes or prevents the upload of legitimate content.¹⁶ Therefore, the final result could be described as textual with intentionalist elements.

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.

Act no. 429/2022 Sb. is available at: https://aplikace.mvcr.cz/sbirka-zakonu/SearchResult.aspx?q=429/2022&typeLaw=zakon&what=Cislo_zakona_smlouvy. No official English translation is available. Therefore, we include our own translation.¹⁷ The resulting regulation in CA is as follows:

Chapter 6

Use of the work by provider of an online content sharing service

Sec. 46

- (1) For the purposes of this Act, provider of an online content sharing service means a provider of an information society service whose main purpose or one of its main purposes is to store and communicate to the public a large number of works uploaded by a user of such service and which competes or may compete with other online services making works available to the same target audience, where the provider of such service arranges and promotes such works for profit.*

¹⁶ For details on sec. 47 para. 3 CA, see answer to question 15. For details on sec. 51a CA, see answer to question 25.

¹⁷ Translations initially made by DeepL and checked by the authors of the national report.

- (2) *A provider of an information society service, which is a non-profit online encyclopaedia, a non-profit educational and scientific repository, an open-source software development and sharing platform, an electronic communications service, online marketplace and an inter-company cloud service and a cloud service that allows users to upload content for their own use, shall not be deemed to be a provider of an online content sharing service.*

Sec. 47

- (1) *The online content sharing service provider shall not be liable for the unauthorised communication of a work to the public pursuant to sec. 18 para. 2 if*
- a) it made its best efforts to obtain authorisation to exercise this right,*
 - b) in accordance with high industry standards of professional care, it made its best efforts to prevent the uploading of a work about which the author has provided it with relevant and necessary information; and*
 - c) immediately after receiving a sufficiently substantiated notification from the author, it disabled access to the work or removed it from its website and made its best efforts to prevent its re-uploading in accordance with let. b).*
- (2) *In determining whether an online content sharing service provider has complied with its obligations under para. 1, account shall be taken, having regard to the principle of proportionality, inter alia, of*
- a) the type and scope of the service, its target audience and the type of work uploaded by the service user; and*
 - b) the availability of appropriate and effective means to fulfil the obligations under para. 1 and their cost to the service provider.*
- (3) *Where automatic content recognition tools are used, the prevention of uploading of a work under para. 1)(b) and the prevention of re-uploading of a work under para. 1 c) may only occur where the online content sharing service provider assesses the uploaded content as identical or equivalent to the work identified by the author under para. 1 b) or c). Identical content means identical content without additional elements or added value. Equivalent content means content which differs from the work identified by the author only by such modifications as may be considered immaterial without the need for additional information to be provided by the author and without an independent assessment of the legitimacy of the use of the work with modifications under this Act.*
- (4) *A provider of online content sharing services does not have a general obligation to supervise the content stored by users of its service.*
- (5) *The provider of an online content sharing service cannot invoke the limitation of liability for storing the content of information provided by the user under the Act on Certain Information Society Services.*

Sec. 48

A provider of an online content sharing service whose service has been on the market in the territory of the Czech Republic or of a Member State of the European Union or of the States forming the European Economic Area for less than 3 years and whose annual turnover calculated in accordance with the Commission Recommendation on the definition of micro, small and medium-sized enterprises is less than EUR 10 000 000 shall not be liable for the unauthorised communication of a work to the public pursuant to sec. 18 para. 2 if it

- a) *made the best efforts to obtain authorisation to exercise that right; the provisions of sec. 47 para. 2 shall apply mutatis mutandis; and*
 - b) *immediately after receiving a sufficiently substantiated notification from the author, disabled access to the work or removed it from its website.*
- (1) *A provider of an online content sharing service to which para. 1 applies, whose average monthly number of unique visitors to the service calculated on the basis of the preceding calendar year exceeds 5 000 000, shall not be liable for unauthorised communication of the work to the public pursuant to sec. 18 para. 2 if it has also made the best efforts to prevent the re-uploading of the work about which the author has provided it with relevant and necessary information. Sec. 47 para. 2 shall apply mutatis mutandis.*
- (2) *Sec. 47 para. 3 shall apply mutatis mutandis to the provider of an online content sharing service pursuant to para. 1 and 2.*

Sec. 49

In fulfilling the obligations under sec. 47 para. 1 and 48 para. 1 and 2, cooperation between online content sharing service providers and right-holders shall not lead to limiting the availability of a work made available in accordance with this Act by a user when using the service of a provider of online content sharing service.

Sec. 50

- (1) *The online content sharing service provider is obliged to*
- a) *provide the author, at his request, with reasonable information about the procedures under sec. 47 and 48 and, where such a service provider has been authorised to exercise the right of communication of the work to the public under sec. 18 para. 2, it shall provide the author, at his request, with information about the uses of the work to which that authorisation relates,*
 - b) *inform the users of its service through its terms and conditions about the possibilities to use the work in accordance with this law.*
- (2) *The information referred to in para. 1 (a) shall be provided by the online content sharing service provider instead of the author to the person who has contractually acquired the exclusive right to exercise the right to use the work or to whom the exercise of that right is conferred by law.*

Sec. 51

- (1) *The provider of online content sharing service is obliged to establish an effective and prompt complaint and redress mechanism that can be used by the user of its service in the event of disputes relating to the restriction of access or removal of a work uploaded by the user. The lodging and handling of complaints must be free of charge to the user.*
- (2) *If the author insists on preventing access to or removing his work in the context of a complaint under para. 1, he shall justify it.*
- (3) *A complaint under para. 1 shall be dealt with without undue delay. The assessment of a complaint relating to the restriction of access to an uploaded work or the removal of an uploaded work shall not be exclusively automated.*

Sec. 51a

Where an online content sharing service provider repeatedly and unlawfully prevents the uploading of a work, restricts access to a work or removes a work within the meaning of sec. 47 para. 1 b) and c) in breach of sec. 49, a legal person entitled to defend the interests of competitors or customers may seek the prohibition of providing the service against the provider. The provisions of sec. 83 para. 2 and 159a para. 2 of the Code of Civil Procedure shall apply to the proceedings about the action under the first sentence.

Sec. 52

Where an author grants an online content sharing service provider an authorisation to exercise a right pursuant to sec. 18 para. 1 or 2, that authorisation shall also apply to the acts referred to in sec. 18 para. 1 and 2 performed by a user of that service, unless that user performs those acts in the course of his business or in the independent exercise of his profession or unless those acts generate significant revenue.

Chapter 7

Dispute resolution procedures

Sec. 53

Mediation and use of an intermediary

For the purposes of this Act, mediation shall mean the practice of an intermediary of providing assistance in negotiations, making proposals, finding solutions to disputes and other related activities carried out to facilitate the negotiation of licences for the use of an audiovisual work in the manner referred to in sec. 18 para. 2, the resolution of disputes arising under sec. 47 para. 2, 3, sec. 48 para. 1 b) and c) and sec. 49, the resolution of disputes arising from the author's right to claim reasonable and fair additional remuneration for the grant of a licence, the resolution of disputes arising from the fulfilment of the licensee's or sub-licensee's obligation to provide the author with regularly updated, relevant and complete information on the use of the work and in the cases referred to in sec. 101. Mediation may be used by right-holders, users pursuant to sec. 95 para. 4 or their associations or collective administrators pursuant to sec. 95a para. 1. Those interested in mediation may use one or more intermediaries from the list of intermediaries maintained by the Ministry.

Sec. 54

List of intermediaries

- (1) The Ministry shall maintain a list of intermediaries, which shall include the names of intermediaries and contact details in accordance with Sec. 56 para. 1. The list of intermediaries is a public administration information system and is published on the Ministry's website.*
- (2) The authorisation to act as a mediator shall be granted by the Ministry to a natural person who
 - a) has full legal capacity,*
 - b) is of good character and*
 - c) is professionally qualified.**

Sec. 54a

Integrity

- (1) *A person shall not be deemed to be of good character under sec. 54 para. 2 b) if he has been convicted of an intentional criminal offence, unless he is treated as if he had not been convicted.*
- (2) *Sec. 96b shall apply mutatis mutandis to proof of good character.*

Sec. 54b

Professional competence

- (1) *A person shall be qualified under sec. 54 para. 2 c) if she*
 - a) *has obtained a university degree in a master's degree programme, and*
 - b) *has successfully passed the examination for an intermediary.*
- (2) *The examination for an intermediary includes a test of the knowledge of copyright law necessary to act as an intermediary and the basic knowledge and skills of out-of-court dispute resolution. The test shall be oral and shall not last more than 2 hours. The examination shall be taken by the applicant before a committee appointed by the Minister for Culture. The committee shall consist of at least three members and shall be chaired by a civil servant assigned to the Ministry. The Commission shall have a quorum with all its members present and shall decide by the majority of its members. The examination shall be marked 'pass' or 'fail'. The Board shall draw up a report on the result of the examination. An applicant who has failed the examination may reapply for the examination no earlier than one year from the date of the examination in which he failed.*

Sec. 55

Visiting intermediary

- (1) *A national of another Member State of the European Union or of one of the States forming the European Economic Area, who is entered by the Ministry in the list of intermediaries as a visiting intermediary on the basis of his/her application, may also perform the activity of an intermediary in the Czech Republic temporarily or occasionally as a visiting intermediary. Sec. 56 para.1 shall apply mutatis mutandis to the submission of such an application. The applicant shall enclose with the application a copy of a document confirming that he is authorised to carry out an activity comparable to that of an intermediary in accordance with the legislation of another Member State of the European Union or one of the States forming the European Economic Area. The Ministry shall, without undue delay, enter the applicant on the list of intermediaries once the above conditions have been fulfilled; however, a person who does not have full legal capacity or is not of good character may not be entered on the list of intermediaries.*
- (2) *The activities of the visiting intermediary in the Czech Republic are governed by the law of the Czech Republic. A visiting intermediary shall be entitled to carry out the activities of an intermediary in the territory of the Czech Republic pursuant to this Act from the date on which he is entered in the list of intermediaries.*

Sec. 56

Entry in the list of intermediaries, changes to the data entered and removal from the list of intermediaries

- (1) In the application for authorisation to act as an intermediary, the applicant shall indicate, in addition to the general requirements for submission set out in the Administrative Procedure Code, the identifier of his/her data box or address for the delivery of documents in the Czech Republic, or an electronic address.*
- (2) The Ministry shall enter on the list of intermediaries the person to whom it has granted authorisation pursuant to sec. 54 para. 2. The entry in the list of intermediaries shall be made by the Ministry on the date of entry into force of the decision granting the authorisation.*
- (3) The intermediary shall notify the Ministry without undue delay of changes to the data referred to in para. 1. The Ministry shall enter the notified changes in the list of intermediaries.*
- (4) The Ministry shall remove from the list of intermediaries an intermediary who has died or been declared dead or missing.*
- (5) The Ministry shall revoke the authorisation to act as an intermediary and remove the intermediary from the list of intermediaries or remove the guest intermediary from the list if the intermediary or guest intermediary
 - a) has been deprived of his legal capacity*
 - b) no longer meets the requirement of good character,*
 - c) requested the withdrawal of the authorisation to act as a mediator or, in the case of a guest mediator, the cancellation of the registration on the list of mediators; or*
 - d) has violated the duty of a mediator established by this Act in a serious manner, or has violated it repeatedly during the last 2 years, despite a written warning from the Ministry.**
- (6) The Ministry shall remove a visiting intermediary from the list of intermediaries if his/her authorisation to carry out an activity comparable to the activity of an intermediary which he/she was authorised to carry out in accordance with the legislation of another Member State of the European Union or one of the States forming the European Economic Area is no longer valid.*
- (7) The intermediary or visiting intermediary shall notify the Ministry in writing of the facts which are grounds for withdrawal of the authorisation to act as an intermediary or for removal from the list of intermediaries, no later than 15 days from the date on which he became aware of them.*

Sec. 57

Procedure for using an intermediary

- (1) A request for mediation pursuant to sec. 53 shall be made in writing to the intermediary or to the visiting intermediary by any of the persons interested in the mediation. In the request, the person shall include the state of the negotiations to date, attach his proposal and state the views of the other persons interested in mediation. The intermediary or guest intermediary shall be obliged to refuse mediation if, having regard to his relationship to the case, to the person interested in mediation or to their representative, their impartiality may be doubted.*

- (2) *If the persons interested in mediation do not agree on the person of the intermediary or guest intermediary, the Ministry shall appoint the intermediary or guest intermediary at the request of the person interested in mediation.*
- (3) *If none of the persons interested in mediation expresses any objections to the draft agreement prepared by the intermediary or the visiting intermediary within 3 months of the submission of the draft agreement, they shall be deemed to have accepted it.*
- (4) *If the persons interested in mediation do not agree with the intermediary or guest intermediary on the amount of their remuneration, the intermediary or guest intermediary shall be entitled to remuneration equal to the average wage in the national economy for the first to third quarters of the calendar year preceding the calendar year in which the mediation was provided, as announced under the act regulating employment.*
- (5) *Sec. 4 para. 2, 5 para. 2, 6 to 9, 10 para. 1, 2 and 4 and 12 of the Mediation Act shall apply mutatis mutandis to mediation.*

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

AC 1: Subject matter

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

The object of protection according to the CA is authorial works (sec. 2 CA),¹⁸ artistic performances (sec. 67 CA), phonograms (sec. 75 CA), audiovisual fixations (sec. 79 CA), broadcasts (sec. 83 CA) and databases (sec. 88 CA).

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.

The beneficiaries of protection are authors (sec. 5 CA), performers (sec. 67 in connection with the referring sec. 74 CA), phonogram producers (sec. 75 in connection with the referring sec. 78 CA), audiovisual fixation producers (sec. 79 in connection with the referring sec. 82 CA), broadcasters (sec. 83 in connection with the referring sec. 86 CA) and makers of the database (sec. 89 in connection with the referring sec. 94 CA).

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”)?

Rightsholders are protected against unauthorised communication of their works or other protected subject matter to the public. According to sec. 18 para. 2 CA, “*the communication of a work to the public also includes the making available to the public of a work by a provider of an online content sharing service pursuant to sec. 46 para. 1 where the work has been uploaded by a user of such a service.*”

¹⁸ Which includes computer programs, photographs and databases which, by way of selection or arrangement of content are their author's own intellectual creation.

AC 4: Targeted providers

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

The CA borrows the definition of OCSSP contained in Art. 2 para. 6 CDSMD. According to sec. 46 para. 1 CA, *“provider of an online content-sharing service means a provider of an information society service whose main purpose or one of its main purposes is to store and communicate to the public a large number of works uploaded by a user of such service and which competes or may compete with other online services making works available to the same target audience, where the provider of such service arranges and promotes such works for profit.”*

The underlined part of definition takes inspiration from recital 62 CDSMD, which states that the definition of an online content-sharing service provider laid down in this Directive should target only online services that play an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences. However, the LNI (CA definition) does not refer to important role of the provider.

Sec. 46 para. 2 CA enumerates carveouts from the definition of OCSSP: *“A provider of an information society service, which is a non-profit online encyclopaedia, a non-profit educational and scientific repository, an open-source software development and sharing platform, an electronic communications service, online marketplace and an inter-company cloud service and a cloud service that allows users to upload content for their own use, shall not be deemed to be a provider of an online content sharing service.”* These carveouts are identical to those listed in Art. 2 para. 6 CDSMD.

- 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.**

The targeted service providers were subject to general rules on liability, provided they did not qualify for hosting safe harbour protection provided by sec. 5 para. 1 ACISS. In contrast to other legal systems, Czech private law does not operate with secondary liability or any other concept that would differentiate levels of liability.¹⁹

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?**

Previously, the targeted service providers benefitted from liability exemption for providers of hosting services under sec. 5 of the ACISS. Sec. 47 para. 5 of CA deprives them of this protection with regard to upload by users: *“The provider of an online content sharing service cannot invoke the limitation of liability for storing the content of information provided by the user under the Act on Certain Information Society Services.”*²⁰ However, hosting service providers which do not fit the OCSSP definition continue to benefit from this hosting safe harbour.

¹⁹ R Polčák, “Information Society Between Orwell and Zapata: A Czech Perspective on Safe Harbours” in G Dinwoodie, *Secondary Liability of Internet Service Providers* (Springer International Publishing 2017), p. 257.

²⁰ This is an act that transposes the ECD into Czech law.

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

Yes, the CA does provide an immunity for targeted service providers. According to sec. 47 para. 1 CA, an OCSSP shall not be liable for the unauthorised communication of a work to the public pursuant to sec. 18 para. 2 CA if:

- a) it has made best efforts to obtain authorisation to exercise that right,
- b) it has made best efforts, in accordance with high industry standards of professional care, to prevent the uploading of a work about which the author has provided it with relevant and necessary information; and
- c) promptly after receiving a sufficiently substantiated notification from the author, it disabled access to the work or removed it from its website and made best efforts to prevent its re-upload in accordance with point (b).

Let. b) refers to obligation to take action against future content based on information provided by the right-holder. Let. c) refers to taking action towards content in the present and preventing its future reappearance.

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.

CA uses the term “*nejlepší úsilí*”, which represents a literal translation of best efforts. The term is different from the expression used in the Czech translation of CDSMD, “*veškeré úsilí*”, which loosely translates to “*all efforts*”. The expression “*high industry standards of professional diligence*” is also translated literally as “*vysoké odpovědnostní standardy odborné péče*”.

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

Yes, the principle of proportionality is explicitly mentioned in sec. 47 para. 2 CA. According to this provision, “*in determining whether an online content sharing service provider has complied with its obligations under para. 1, account shall be taken, having regard to the principle of proportionality, inter alia, of:*

- a) *the type and scope of the service, its target audience and the type of work uploaded by the user of the service; and*
- b) *the availability of appropriate and effective means to fulfil the obligations under para. 1 and their cost to the service provider.”*

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.

Yes, it does. Sec. 48 para. 1 CA absolves the OCSSP, whose service has been on the market in the territory of the Czech Republic or of a Member State of the European Union or of the States forming the European Economic Area for less than 3 years and whose annual turnover calculated in accordance with the Commission Recommendation on the definition of micro, small and medium-sized enterprises is less than EUR 10 million, from the liability exemption condition to remove future content. Such provider is subject only to two conditions to be exempted from liability. It has to make best efforts to obtain authorisation and to take down content upon notice:

- (1) *A provider of an online content sharing service whose service has been on the market in the territory of the Czech Republic or of a Member State of the European Union or of the States forming the European Economic Area for less than 3 years and whose annual turnover calculated in accordance with the Commission Recommendation on the definition of micro, small and medium-sized enterprises is less*

than EUR 10 000 000 shall not be liable for the unauthorised communication of a work to the public pursuant to sec. 18 para. 2 if it

- a) made the best efforts to obtain authorisation to exercise that right; the provisions of sec. 47 para. 2 shall apply mutatis mutandis; and*
- b) immediately after receiving a sufficiently substantiated notification from the author, disabled access to the work or removed it from its website.*

However, according to sec. 48 para. 2 CA, once the provider who meets the above criteria reaches the average monthly number of unique visitors to the service calculated on the basis of the preceding calendar year higher than 5 million, it also has to make best efforts to ensure unavailability of works uploaded in the future, based on relevant and necessary information from right-holders. The only condition that such provider does not have to meet in comparison to a regular OCSSP is that it does not have to ensure future stay-down of content that was taken down upon receiving a notice:

The provider of an online content sharing service to which para. 1 applies, whose the average monthly number of unique visitors to the service calculated on the basis of the preceding calendar year exceeds 5 000 000, shall not be liable for unauthorised communication of the work to the public pursuant to sec. 18 para. 2 if it has also made the best efforts to prevent the re-uploading of the work about which the author has provided it with relevant and necessary information. Sec. 47 para. 2 [proportionality] shall apply mutatis mutandis.

AC 6: Right-holder cooperation

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

Yes, according to sec. 47 para. 1 let. b) CA, the rightholder is under obligation to provide “relevant and necessary information” if they desire the OCSSP to make best efforts to prevent the uploading of the work. Alternatively, the rightholder may submit a “sufficiently substantiated notification”, in response to which the OCSSP is supposed to make best efforts to disable access to the work or remove it from its website and to prevent its re-uploading. The wording of these provisions exhibits little variance from article 17 para. 4 let. b) and c) CDSMD.

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.

No.

AC 7: General monitoring

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

No. Sec. 47 para. 4 CA explicitly states that OCSSP has no general obligation to supervise the content stored by users of its service.

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.

No, but the LNI specifies the conditions for its use. Sec. 47 para. 3 CA limits the deployment of automated content recognition technology to situations when the uploaded content is assessed by the OCSSP as identical or equivalent to the rightsholder's work. This provision is inspired by the AG Oe's Opinion in the Polish case and the Commission's guidance for the implementation of Article 17 CDSM.²¹ The Opinion suggests that lessons could be drawn from the Glawischnig-Piesczek judgment²² enabling imposition of an injunction that extends to equivalent information, "since the operator is not obliged to carry out an 'independent assessment' of its lawfulness and may, by contrast, have 'recourse to automated search tools and technologies.'"²³

It is unclear what will be the sanction if OCSSP does not comply with sec. 47 para. 3 CA.

Text of the provision:

Where automatic content recognition tools are used, the prevention of uploading of a work under paragraph 1 let. b) and the prevention of re-uploading of a work under paragraph 1 let. c) may only occur where the online content sharing service provider assesses the uploaded content as identical or equivalent to the work identified by the author under paragraph 1 let. b) or let. c). Identical content means identical content without additional elements or added value. Equivalent content means content which differs from the work identified by the author only by such modifications as may be considered immaterial without the need for additional information to be provided by the author and without an independent assessment of the legitimacy of the use of the work with modifications under this Act.

AC 8: Exceptions and limitations

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

The exception for the purpose of quotation, criticism and review was available prior to the adoption of LNI in sec. 31 CA, which was in place already in the original version of CA. Act no 216/2006 Sb. amended the provision to align it with the wording of article 5 para. 3 let. d) of ISD. See the wording of the provision:

"Copyright is not infringed by anyone who

*a) uses, to a reasonable extent, extracts from the published works of other authors in his or her own work,
b) uses extracts from a work or whole short works for the purposes of criticism or review relating to such work, or for scientific or scholarly works, and such use is in accordance with fair usage and to the extent required by the particular purpose,
c) uses the work in teaching for illustrative purposes or in scientific research not intended to achieve direct or indirect economic or commercial benefit and not exceeding an extent appropriate to the purpose pursued; however, the name of the author, unless the work is anonymous, or the name of the person under whose name the work is made public, as well as the title of the work and the source, shall always be indicated, if possible.*

²¹ K Kocmanová, "Amendment Proposal by MEP Klára Kocmanová to the Government Bill Amending Act No 121/2000 Sb., on Copyright, on Rights Related to Copyright and on Amendments to Certain Acts (Copyright Act), as Amended, and Other Related Acts" (Chamber of Deputies 2022).

²² Case C-18/18, *Eva Glawischnig-Piesczek v. Facebook Ireland Limited*, 3 October 2019, ECLI:EU:C:2019:821.

²³ Opinion of AG Saugsmansgaard Oe, Case C-401/19, *Republic of Poland v European Parliament, Council of the European Union*, 15 July 2019, ECLI:EU:C:2021:613, para 196 et seq.

(2) Nor shall the copyright be infringed by anyone who further uses extracts from the work or small whole works cited pursuant to para. 1 let. a) or b); the provisions of para. of the part of the sentence following the semicolon shall apply mutatis mutandis.”

The exception for purposes of caricature and parody was also available prior to the adoption of LNI. Sec. 38g CA, which states that “copyright is not infringed by anyone who uses a work for the purposes of caricature or parody” was added to CA by the amendment in 2017 (Act no. 102/2017 Sb.) with effect from 20 April 2017, transposing voluntary exception for parody in Article 5 para. 3 let. k) of ISD. However, the exception for pastiche was only added by LNI (Act no. 429/2022 Sb.).

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

Other exceptions and limitations which exist in CA may be relevant in the context of LNI:

Exception	Description
Journalism exception (sec. 34 CA)	<ul style="list-style-type: none"> - use a copyright-protected work in connection with a news item relating to current events, to the extent appropriate to the informational purpose; - use a work that has a purpose of informing about news of current political, economic or religious affairs and which has already been published in the periodical press, television or radio broadcast or other mass media; - use a political speech or extracts from a public lecture or similar works to the extent appropriate to their informative purpose; - condition: indicate the name of the author, unless the work is anonymous, or the name of the person under whose name the work is made public, title of the work and the source.
Non-commercial use of the own photographic portrait (sec. 38 CA)	- a person who commissioned their portrait for remuneration may use it for non-commercial purposes, unless such use is prohibited.
Non-essential incidental uses of the work (sec. 38c CA)	- copyright is not infringed by a person who makes incidental use of a work in connection with the intended principal use of another work or element.

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.

The LNI does not contain a specific provision on the licensing of relevant uses. General provisions on licensing contained in Act no. 89/2012 Sb. (Civil Code) apply. There is no mandatory or extended collective management foreseen. Theoretically, voluntary collective licensing might be possible, if all of the needed legal requirements therefore would be fulfilled and the Ministry will issue the corresponding authorization to the applicant (sec. 96 and 96a CA). In such case, the standard rules on setting of remuneration would be applicable (sec. 98e CA).

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

Yes. Per sec. 52 CA, "*where an author grants an OCSSP an authorisation to exercise a right pursuant to sec. 18 para. 1 or 2, that authorisation shall also apply to the acts referred to in sec. 18 para. 1 and 2 performed by a user of that service, unless that user performs those acts in the course of his business or in the independent exercise of his profession or unless those acts generate significant revenue.*" The provision does not address the question whether authorisation obtained by the user extends to the provider or not.

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?

No.

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?

No.

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.

Sec. 49 CA, which is a verbatim copy of Art. 17 para. 7 CDSMD, states that "*in fulfilling the obligations under sec. 47 para. 1 and sec. 48 para. 1 and para. 2, cooperation between online content sharing service providers and right-holders shall not lead to limiting the availability of a work made available in accordance with this Act by a user when using the service of a provider of online content sharing service.*"

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.

Sec. 51 CA requires OCSSP to establish “*an effective and prompt complaint and redress mechanism that can be used by the user of its service in the event of disputes relating to the restriction of access to or removal of a work uploaded by the user*”. A complaint shall be dealt with “without undue delay”. If, in the context of the redress mechanism, the author insists on preventing access to or removal of his work, he shall justify it.

The CA goes beyond the text of CDSMD in firstly, demanding that the lodging and handling of complaints must be free of charge to the user, and secondly, requiring that the assessment of a complaint concerning the prevention of access to or removal of the uploaded work shall not be exclusively automated.

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.

An out-of-court dispute settlement mechanism is laid down in sec. 53-57 CA. Sec. 53 CA defines the specific kind of mediation as “*the practice of an intermediary of providing assistance in negotiations, submitting proposals, finding solutions to disputed issues and other related activities*.” Sec. 53 CA applies to disputes arising from the takedown or stay-down of content (Article 17 para. 4 let. b) and c) of the CDSMD) and disputes caused by the breach of obligation to prevent such cooperation between content-sharing service providers and right-holders that could result in unavailability of legitimate uses. The mechanism is designed to serve in relation to other disputes as well.²⁴

Per sec. 54 para. 2 CA, the copyright mediator is a physical person who fulfils the conditions laid down by the law and is on the list of copyright mediators maintained by the Ministry.²⁵ The copyright mediator should be legally competent, with a clean criminal record, hold a master’s degree and be authorised by the Ministry (sec. 54a and 54b CA). The authorisation is conditioned by a professional examination where the candidate has to demonstrate knowledge of copyright law necessary for the exercise of the function and basic knowledge and skills in out-of-court dispute resolution.

According to sec. 57 CA, the copyright mediator may be engaged by persons interested in mediation by means of a written request. In the request, the party shall indicate the state of the negotiations to date and attach its own proposal and the opinions of the other party. It seems that the parties still have to enter into contract to conduct mediation.²⁶ The participation in the scheme seems to be entirely voluntary for both parties.

If the parties reach an agreement, there is a presumption that the concluded mediation is binding. Sec. 57 para. 3 of the CA states that if none of the parties expresses any objection to the draft agreement prepared by the copyright mediator within three months of it being presented to the parties, they shall be deemed to have accepted it. However, the resulting mediation agreement isn’t directly enforceable – it has to be approved by the court as a settlement. This follows from the commentary to sec. 7 of the Act no. 202/2012 Sb. (Mediation Act), that applies to copyright mediation according to sec. 57 para. 5 CA. Sec. 7 sets out the essentials of mediation agreement concluded by the parties, that constitutes the outcome of mediation. Commentary states that “*the obligations*

²⁴ Sec. 53 CA is also designed for resolution of disputes arising from the author's right to demand reasonable and fair additional remuneration for the granting of a licence (i.e., disputes under Article 20 of the CDSMD) or from the licensee's or sub-licensee's obligation to provide the author with regular, up-to-date, relevant and complete information about the use of the work (Article 19 of the CDSMD). Finally, the scope of the provision includes collective management disputes. In addition, the services of the copyright mediator under sec. 53 may be used in negotiating licenses for the use of audiovisual work, which transposes Article 13 of the CDSMD.

²⁵ Currently, there are five persons on the list. ‘Seznam prostředníků | mkcr.cz’, see <https://www.mkcr.cz/seznam-prostredniku-cs-693>, accessed 11 May 2023.

²⁶ Sec. 57 para. 5 of CA states that sec. 4 para. 2 of the Mediation Act, which sets out the essentials of the contract to conduct mediation, shall apply.

agreed in it cannot be directly enforced. The enforceability of a mediation agreement can be achieved through its approval by the court [...]”²⁷

Besides, the LNI does not prevent the parties from recourse to traditional mediation governed by the Mediation Act.

The LNI also does not prevent the parties from submitting their case to arbitration, which results in binding arbitral awards. There is also an important caveat concerning prospective parties to the arbitration – according to sec. 2 para. 1 of the Act no. 216/1994 Sb. (Arbitration Act), disputes arising from contracts concluded between consumers and entrepreneurs are excluded from its scope. Seeing as the platform users will often be consumers, for the platform user the choice of other party is limited to right-holders. Besides, sec. 2 of Arbitration Act demands that the dispute arises from a property right in order to be arbitrable. If we consider this requirement from the right-holder’s point of view, the arbitrability requirement is fulfilled, as the subject-matter of the dispute is the violation of their exclusive right to make the work available to the public. On the other hand, from the user’s perspective, the legal grounds for challenging the content removal decision are exceptions from copyright, not an exclusive right.

Although LNI does not explicitly state this, according to the explanatory memorandum, the user may also seek judicial redress.²⁸ However, given that the Czech law still operates under the notion that exceptions to copyright may only be used as a defence against the right-holder’s claim, it isn’t clear which type of claim is available to the user, who should be the defendant or which court has jurisdiction.

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.

Yes. According to sec. 51a CA, if an OCSSP repeatedly and wrongfully prevents the upload of a work or removes it in breach of sec. 49 CA (i.e., that the cooperation between online content-sharing service providers and right-holders shall not result in the prevention of the availability of works uploaded by users in compliance with CA), an organisation representing consumers or the platform’s competitors may file an action before court demanding the prohibition of the service. The practical repercussions have not been tested yet before courts.

AC 13: Information obligations

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

Yes. Per sec. 50 para. 1 CA, the OCSSP shall provide the author, on his request, with reasonable information about the procedures under sec. 47 and 48 (i.e., fulfilment of best efforts obligations) and, where such a service provider has been authorised to exercise the right of communication to the public under sec. 18 para. 2 CA, shall provide the author, on his request, with information about the uses of the work to which that authorisation relates. The OCSSP should also provide this information to a person who has contractually acquired the exclusive right to exercise the right to use the work, or to whom the exercise of that right is conferred by law, instead of the author.

²⁷ M Doležalová and others, *Zákon o mediaci. Komentář* (1st ed, C H Beck 2013). p. 37.

²⁸ Explanatory Memorandum to Government Bill amending Act No. 121/2000 Sb., on Copyright, on Rights Related to Copyright and on Amendments to Certain Acts (Copyright Act), as amended] [online]. Chamber of Deputies Parliament of the Czech Republic, 9. Electoral term, 2021–, Parliamentary Press 31/0, 11. 11. 2021, to point 30 to sec. 51, p. 57.

The second information obligation transposes Art. 17(9) *in fine* CDSMD, which requires OCSSPs to 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. Sec. 50 para. 2 CA imposes an obligation on OCSSPs to inform the users of their services, through their terms and conditions, of the possibilities of using works in accordance with CA.

AC 14: Waiver

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

As this right is treated as an “author’s right”, i.e., not a related right, its waiver under Czech law is forbidden. On the other hand, nothing prevents the right-holder from providing a free authorisation.

AC 15: Entry into effect

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

From 5 January 2023.

Additional information

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

No.

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

No.