



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

## Comparative National Implementation Report

### EXECUTIVE SUMMARY

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

## Executive Summary

On 17 April 2019, the EU's Directive on Copyright in the Digital Single Market (DCDSM)<sup>1</sup> was adopted. This included the highly controversial Articles 15 and 17 on the new related right for press publishers ("press publishers' right" or PPR) and the new liability scheme for copyright infringement on online platforms ("online content-sharing services providers" or OCSSPs) respectively. On 7 July 2021, the deadline passed for the transposition of the directive into the national law of the 27 EU Member States, with only four Member States (Denmark, Hungary, France and the Netherlands) having met it for both Article 15 and Article 17.<sup>2</sup> Over the next months, national implementations trickled in, although the implementation process is still ongoing in two Member States.<sup>3</sup> This legal report examines the national implementation of the DCDSM in the other 25 Member States: Austria, Belgium, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

For the most part, Articles 15 and 17 DCDSM are instruments of total<sup>4</sup> harmonisation.<sup>5</sup> The one obvious exception relates to exceptions and limitations, whose minimum harmonisation nature is pulled in from the Information Society Directive (ISD).<sup>6</sup> Most of the terms used in the two provisions should therefore be understood as autonomous notions of EU law.<sup>7</sup> That being said, as the objective of the Directive is harmonisation rather than unification, some "room for manoeuvre" is left for implementing Member States, as long as the "result to be achieved" is met.<sup>8</sup> In particular, national authorities enjoy freedom as to the choice of implementing methods, i.e., the techniques used to transpose the content of the directive into the chosen instrument: how the "result" aimed at by the Directive "achieved" in a given Member State. Broadly speaking, implementing legislatures are faced with two main choices in this regard: between literal transposition and elaboration on the rules set out in the directive and between minimalist and non-minimalist transposition.<sup>9</sup>

In this context, this study assesses the compliance with the EU legal framework of the national implementations in the selected countries of Articles 15 and 17 DCDSM. In particular, it looks at how convergence or divergence with the wording of Articles 15 and 17 of the Directive impact two key aspects:

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<sup>1</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (2019) OJ L 130/92 (DCDSM).

<sup>2</sup> See Article 29 DCDSM.

<sup>3</sup> Bulgaria and Poland, see COMMUNIA, "DSM Directive Implementation Tracker", available at: <https://www.notion.so/DSM-Directive-Implementation-Tracker-361cfae48e814440b353b32692bba879> and see CREATE, "Copyright in the Digital Single Market Directive Implementation – An EU Copyright Reform Resource", available at: <https://www.create.ac.uk/cdsm-implementation-resource-page/>.

<sup>4</sup> See A Ramalho, "The competence and rationale of EU copyright harmonization" in E Rosati, *The Routledge Handbook of EU Copyright Law* (Routledge 2021) 3; R Král, "On the choice of methods of transposition of EU Directives" (2016) 41(2) E.L. Rev. 220; S Weatherill, "The Fundamental Question of Minimum or Maximum Harmonisation" in S Garben and I Govaere (eds), *The Internal Market 2.0* (Hart 2020), available at: <https://ssrn.com/abstract=3660372> and M Klamert, "What We Talk About When We Talk About Harmonisation" (2015) 17 Cambridge Yearbook of European Legal Studies 360.

<sup>5</sup> A Metzger and M Senftleben, "Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law – Comment of the European Copyright Society", available at: <https://europeancopyrightsociety.org/>, published in (2020) 11 JIPITEC 115.

<sup>6</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (ISD).

<sup>7</sup> A Metzger and M Senftleben, "Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law – Comment of the European Copyright Society", available at: <https://europeancopyrightsociety.org/>, published in (2020) 11 JIPITEC 115.

<sup>8</sup> See Article 288 point 3, Treaty on the Functioning of the European Union (TFEU).

<sup>9</sup> R Král, "On the choice of methods of transposition of EU Directives" (2016) 41(2) E.L. Rev. 220.

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

To this end, the following research question was identified:

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

To address this question, a comparative legal methodology was adopted. In particular, the so-called “European Legal Method” was employed. This involves comparative analysis with a harmonising objective that is adjusted to the current legal structures of the EU.<sup>10</sup> In the research at hand, the methodology involved comparing the national implementations with the texts of Articles 15 and 17 CSDMD, identifying deviations and considering the implications of these in terms of the need to build an internal market and the law of fundamental rights.

The process was two staged. The first stage began in February 2022 and was limited to the 11 Member States which had completed their implementation process at that point: Austria, Denmark, Estonia, France, Germany, Hungary, Ireland, Italy, Malta, the Netherlands and Spain.<sup>11</sup> In April 2023, the study expanded to cover the subsequent 14 national implementations: Belgium, Croatia, Cyprus, the Czech Republic, Finland, Greece, Latvia, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia, and Sweden.

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

Specifically, the following AC were identified:

<u>Article 15 DCDSM</u>	<u>Article 17 DCDSM</u>
1. Subject matter	1. Subject matter
2. Right-holders	2. Right-holders
3. Restricted acts	3. Exclusive rights
4. Targeted users	4. Targeted providers
5. Exceptions and limitations	5. Scope of protection
6. Licensing	6. Right-holder cooperation
7. Revenue sharing	7. General monitoring
8. Term of protection	8. Exceptions and limitations
9. Waiver	9. Licensing
10. Entry into effect	10. Legitimate uses: ex ante safeguards

<sup>10</sup> For more on the European Legal Method, see: K Riesenhuber, *European Legal Methodology* (2<sup>nd</sup> ed., Intersentia 2021); U Neergaard and R Nielsen, *European Legal Method: In a Multi-level EU Legal Order* (Djøf Publishing 2012); M W Hesselink, “A European Legal Method? On European Private Law and Scientific Method” (2008) 15(1) *European Law Journal* 20 and A Ohly and J Pila (eds), *The Europeanization of Intellectual Property Law: Towards a European Legal Methodology* (Oxford University Press 2013). For more on comparative legal research, see: G Samuel, *An Introduction to Comparative Law and Method* (Hart Publishing 2014).

<sup>11</sup> See European Commission, “Copyright: Commission urges Member States to fully transpose EU copyright rules into national law”, available at: [https://ec.europa.eu/commission/presscorner/detail/EN/IP\\_22\\_2692](https://ec.europa.eu/commission/presscorner/detail/EN/IP_22_2692). Croatia also implemented the DCSDM by this deadline, however, while a national expert for Croatia was engaged for this study, they were unable to complete the questionnaire on the Croatian national implementation.

11. Legitimate uses: ex post safeguards
12. Sanctions
13. Information obligations
14. Waiver
15. Entry into effect

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

Reporting by national experts was pursued in order to:

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

To that extent, the author of the comparative report represents the “external” perspective in assessing the national implementations, the “internal” perspective having been provided by the national experts.<sup>12</sup> At the same time, a dialogue between these perspectives was sought. To this end, following their completion by the national legal experts, the questionnaires were subject to comments and questions by the author of the comparative report, embedding understanding and leading to potential refinement of the responses.

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

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

- AC 1 (subject matter);
- AC 2 (right-holders);
- AC 3 (restricted acts);
- AC 4 (targeted users);
- AC 6 (licensing);
- AC 7 (revenue sharing) and;
- AC 10 (entry into effect).

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

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

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<sup>12</sup> G Samuel, *An Introduction to Comparative Law and Method* (Hart Publishing 2014) 60-63.

- AC 9 (licensing);
- AC 12 (sanctions) and;
- AC 10 (entry into effect).

Remarkably, none of the 25 examined Member States emerges with no implementation irregularities. It is unsurprising that, as a general rule, where implementations presented problems in terms of the internal market, they also presented problems in terms of fundamental rights.<sup>13</sup> This follows from the fact that deviations from the wordings of Articles 15 and 17 DCDSM will amount to a deviation from the balance between fundamental rights deemed fair by the European legislator.<sup>14</sup> Exceptions however can be identified: for example, the exclusion of “mere facts” from the reach of the PPR in Recital 57 CDSMD but not in the operative part of Article 15 doomed Member States to incompatibility: either Member States conformed with the wording of Article 15 DCDSM thus threatening freedom of expression or they prioritised freedom of expression thus deviating from the express wording of the Directive.

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

In some instances, the national implementation adds elements that do not exist in the text of the Directive – consider, for example, the Croatian creative flourish on offline uses of press publications. Occasionally, such additions are based on the recitals of the Directive – which, however, do not have self-standing normative power, so that, where they contradict the operative text of the Directive or other relevant rules of EU law, their implementation is counter-indicated (see e.g., the Austrian, Croatian, Finnish, French, German, Greek, Maltese, Romanian and Slovak exclusion of OCSSPs whose (main) purpose is to engage in or to facilitate piracy from the special liability mechanism of Article 17 DCDSM. This is modelled on Recital 62 DCDSM).

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

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

<sup>14</sup> The alternative would be to accept that Articles 15 and 17 DCDSM themselves offend the fair balance between fundamental rights. With regard to Article 17 this option has been rejected by the CJEU in *Poland*. With regard to Article 15, this study also assumes that the EU legislator has struck the right balance. To hold otherwise would be inappropriate for a study intended to assess national implementations, rather than the EU provision.

Both additions and omissions may result in the expansion of the scope of the new rules (excessively maximalist transposition or gold-plating) or in their contraction (excessively minimalist transposition). For example, Danish, Finnish, Hungarian and Swedish omission of the carve-out from the definition of OCSSPs results in an expansion of the scope of the new liability scheme of Article 17 DCDSM, as does Spain's addition of a condition of a large audience in Spain. Conversely, Austria, the Czech Republic, Germany and Sweden's addition of a condition of competition with other providers to the definition of OCSSPs restricts the reach of the Article 17 DCDSM regime.

In some cases, national law interprets autonomous notions of EU law incorrectly. This can be the result of legacy interpretations (see, e.g., the Croatia, Cypriot, French, Greek, Portuguese and Spanish interpretations of the quotation exception) or of new constructs (e.g., the Croatian, French, Greek, Italian, Romanian and Slovak approaches to "very short extracts" in Article 15 DCDSM). Occasionally, variations in terminology across different language versions also emerge (see e.g., the Austrian, Cypriot, Greek, Italian, Latvian and Spanish tweaks of "best efforts" in Article 17(4) DCDSM).

Sometimes, seemingly small changes can have significant effects (e.g., the French replacement of "online uses" of press publications in Article 15 DCDSM with uses "in digital format" and the German extension of the revenue-sharing introduced by Article 15 DCDSM beyond authors to other right-holders). The Slovak, Czech, Dutch and Finnish implementations slight reword Article 17's rule on users not acting on a commercial basis or whose activity does not generate significant revenues and completely change its meaning – potentially unintentionally. In other cases, the change is obvious and was subject to intense debate in the relevant Member State (as is the case with the Italian rules on the licensing of Article 15 DCDSM).

Particularly interesting are those cases of non-compliant implementation that result from national attempts to fit the provisions of the Directive into the logic of national law. Examples are offered by the Belgian, Croatian, Czech, Estonian, French, Hungarian and Swedish failure to account properly for the interaction between existing national law and the provisions implementing Article 15's protections for right-holders of content included in press publications or the Member States (Austria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany Greece, Hungary, Italy, Portugal, Romania, Slovenia, Slovakia and Spain) which extend their implementations of Article 17 to all related rights, potentially including the PPR and the sui generis database right. Such "homing tendencies"<sup>15</sup> (and mistakes in pursuing them) by Member States are to be expected, however the result is detrimental to the internal consistency of both national and EU law (a "double shattering" of the law, as it has been termed).<sup>16</sup>

Occasionally, the intersection between the DCDSM and national law will not be clear. Uncertainty can flow from both national law and the DCDSM. An example of both is provided by the Spanish provision stating that the national implementation of Article 17 DCDSM does not exclude alternative courses of action against OCSSPs. Whether this will conflict with the Directive or not will depend on the details of Spanish law and on whether the Directive harmonises all liability of OCSSPs for their users' infringing uploads or only their liability for communication to the public resulting from their users' infringing uploads. Similarly, Ireland appears to include the reproduction right in the exclusive rights covered by Article 17 DCDSM – this is contrary to a teleological interpretation of the Directive, despite not being clearly excluded by its wording. Finland, Lithuania and Slovenia omit Article 15 DCSDM's restriction to online uses – but is this covered by its limitation to ISSPs?

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<sup>15</sup> M van Eechoud et al, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Wolters Kluwer 2009), p. 301.

<sup>16</sup> H Koziol, "Comparative Conclusions" in H Koziol, *Basic Questions of Tort Law from a Comparative Perspective* (Jan Sramek Verlag 2015) 690.

Issues may also arise even where an implementation is compliant. The most prominent are those that concern the implementation of the special liability regime of Article 17(4) DCDSM. As the report details, a distinction can be drawn here between the literal and elaborative (“traditional” and “balanced”, as they have been termed respectively)<sup>17</sup> approaches to implementation. While both of these emerge as compatible with Article 17 DCDSM – both copying and elaboration are, after all, acceptable transposition techniques – the divergence they introduce undercuts the Directive’s ostensible objective to create a Digital Single Market and the “full harmonisation” approach it takes to this end. It also results in uneven protection for fundamental rights across the EU. The same observation can be made with regard to compliant implementations of multiple other elements of both Article 15 and 17 DCDSM: a compliant national implementation of vague and novel terminology, such as “very short extracts” or “large amounts”, does not mean that the risk of fragmentation has been eliminated.<sup>18</sup> Much depends on application in practice, meaning that continued vigilance is important. In the meantime, referrals to the CJEU are likely to start accumulating.<sup>19</sup>

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

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

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<sup>17</sup> M Leistner, “The Implementation of Art. 17 DSM-Directive in Germany – A Primer with Some Comparative Remarks”, 20 December 2021, forthcoming in GRUR Int. 2022, available at: <https://ssrn.com/abstract=3989726> or <http://dx.doi.org/10.2139/ssrn.3989726>.

<sup>18</sup> Novel terminology always presents a risk of short-term disharmonisation and legal uncertainty, see M van Eechoud et al, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Wolters Kluwer 2009), p. 299.

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

<sup>20</sup> M Leistner, “The Implementation of Art. 17 DSM-Directive in Germany – A Primer with Some Comparative Remarks”, 20 December 2021, forthcoming in GRUR Int. 2022, available at: <https://ssrn.com/abstract=3989726> or <http://dx.doi.org/10.2139/ssrn.3989726>;

S Dusollier, “The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition” (2020) 57(4) *Common Market Law Review*, 979 and S Scalzini, “The New Related Right for Press Publishers – What Way Forward?” in E Rosati, *The Routledge Handbook of EU Copyright Law* (Routledge 2021) 101.

<sup>21</sup> M van Eechoud et al, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Wolters Kluwer 2009), p. 299.

<sup>22</sup> In discussing the quality of the EU copyright harmonisation project, van Eechoud et al quote Cornish et al.: “Haste and political pressure from interest groups do not make for good counsel when it comes to regulating complex and sensitive fields like that of sanctions and procedural measures for IP protection.” See W Cornish et al., “Procedures and Remedies for Enforcing IPRs: The European Commission’s Proposed Directive” (2003) 25 *EIPR* 447 in M van Eechoud et al, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Wolters Kluwer 2009), p. 28.

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



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