

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

Comparative National Implementation Report

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

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Executive Summary

On 17 April 2019, the EU's Directive on Copyright in the Digital Single Market (DCDSM)¹ was adopted. This included the highly controversial Articles 15 and 17 on the new related right for press publishers ("press publishers' right" or PPR) and the new liability scheme for copyright infringement on online platforms ("online content-sharing services providers" or OCSSPs) respectively. On 7 July 2021, the deadline passed for the transposition of the directive into the national law of the 27 EU Member States, with only four Member States (Denmark, Hungary, France and the Netherlands) having met it for both Article 15 and Article 17.² Over the next months, national implementations trickled in, although the implementation process is still ongoing in two Member States.³ 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 total⁴ harmonisation.⁵ The one obvious exception relates to exceptions and limitations, whose minimum harmonisation nature is pulled in from the Information Society Directive (ISD).⁶ Most of the terms used in the two provisions should therefore be understood as autonomous notions of EU law.⁷ 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.⁸ 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.⁹

¹ 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).

² See Article 29 DCDSM.

³ 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/>.

⁴ 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.

⁵ 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.

⁶ 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).

⁷ 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.

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

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

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

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

To this end, the following research question was identified:

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

To address this question, a comparative legal methodology was adopted. In particular, the so-called “European Legal Method” was employed. This involves comparative analysis with a harmonising objective that is adjusted to the current legal structures of the EU.¹⁰ 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.¹¹ 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

¹⁰ For more on the European Legal Method, see: K Riesenhuber, *European Legal Methodology* (2nd 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).

¹¹ 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. 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.

5. Exceptions and limitations
6. Licensing
7. Revenue sharing
8. Term of protection
9. Waiver
10. Entry into effect

5. Scope of protection
6. Right-holder cooperation
7. General monitoring
8. Exceptions and limitations
9. Licensing
10. Legitimate uses: ex ante safeguards
11. Legitimate uses: ex post safeguards
12. Sanctions
13. Information obligations
14. Waiver
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.¹² At the same time, a dialogue between these perspectives was sought. To this end, following their completion by the national legal experts, the questionnaires were subject to comments and questions by the author of the comparative report, embedding understanding and leading to potential refinement of the responses.

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

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

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

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

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

- AC 1 (subject matter);
- AC 2 (right-holders);
- AC 3 (exclusive rights);
- AC 4 (targeted providers);
- AC 5 (scope of protection);
- AC 7 (general monitoring);
- AC 8 (exceptions and limitations);
- AC 9 (licensing);
- 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.¹³ This follows from the fact that deviations from the wordings of Articles 15 and 17 DCDSM will amount to a deviation from the balance between fundamental rights deemed fair by the European legislator.¹⁴ Exceptions however can be identified: for example, the exclusion of “mere facts” from the reach of the PPR in Recital 57 DCDSM 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

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

¹⁴ The alternative would be to accept that Articles 15 and 17 DCDSM themselves offend the fair balance between fundamental rights. With regard to Article 17 this option has been rejected by the CJEU in *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.

misunderstandings on the part of the national legislator (as could be the case with, e.g., the Irish conflation of “sufficiently substantiated notices” and “relevant and necessary information” in Article 17 DCDSM (though note that a differentiated interpretation of “sufficiently substantiated notice” in practice could save this implementation) or the Estonian omission of protections for public domain content in Article 15 DCDSM).

Both additions and omissions may result in the expansion of the scope of the new rules (excessively maximalist transposition or gold-plating) or in their contraction (excessively minimalist transposition). For example, 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”¹⁵ (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).¹⁶

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’

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

¹⁶ H Koziol, “Comparative Conclusions” in H Koziol, *Basic Questions of Tort Law from a Comparative Perspective* (Jan Sramek Verlag 2015) 690.

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 DCDSM’s restriction to online uses – but is this covered by its limitation to ISSPs?

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)¹⁷ 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.¹⁸ Much depends on application in practice, meaning that continued vigilance is important. In the meantime, referrals to the CJEU are likely to start accumulating.¹⁹

This is disappointing, but not surprising.²⁰ 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.²¹ Inevitably, this effect is more pronounced when the new EU provisions are – as Articles 15 and 17 DCDSM have been widely accused of being – badly drafted.²² The intricate and obscure structures and contentious subject matter of these articles, as well as their heavy use of undefined terminology and occasional misalignment between the recitals and operative texts, do not facilitate either smooth national implementation or homogenous interpretation and application. As the European Commission has acknowledged,

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

¹⁷ 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>.

¹⁸ 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.

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

²⁰ 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.

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

²² 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.

²³ European Commission, “EU law: Better results through better application” (2017/C 18/02) OJ C 18/10. See also Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (2016) OJ L 123/1, according to which, the “three Institutions agree that Union legislation should be comprehensible and clear, allow citizens, administrations and businesses to easily understand their

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.

1. Introduction

On 17 April 2019, the EU's Directive on Copyright in the Digital Single Market (DCDSM)²⁴ 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 17.²⁵ Over the next months, national implementations trickled in, although the implementation process is still ongoing in two Member States.²⁶ 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.

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

1. the establishment and functioning of the internal market in line with Article 114 of the Treaty on the Functioning of the European Union (TFEU) that underpins the competence of the EU to act in the field of copyright and which underlies the DCDSM;²⁷ and
2. the Charter of Fundamental Rights of the EU,²⁸ 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?"

rights and obligations, include appropriate reporting, monitoring and evaluation requirements, avoid overregulation and administrative burdens, and be practical to implement."

²⁴ 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).

²⁵ See Article 29 DCDSM.

²⁶ 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/>.

²⁷ See second line of the Preamble and Recital 1 DCDSM. See also A Ramalho, *The Competence of the European Union in Copyright Lawmaking – A Normative Perspective of EU Powers for Copyright Harmonization* (Springer 2016) 117; A Ramalho, "The competence and rationale of EU copyright harmonization" in E Rosati, *The Routledge Handbook of EU Copyright Law* (Routledge 2021) 3 and A Ramalho, "'Conceptualising the European Union's Competence in Copyright: What Can the EU Do?'" (2014) 2 *International Review of Intellectual Property and Competition Law* 178.

²⁸ European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02 ("Charter").

Legal Methodology

To address this question, a comparative legal methodology was adopted. In particular, the so-called “European Legal Method” was employed. This involves comparative analysis with a harmonising objective that is adjusted to the current legal structures of the EU.²⁹ In the research at hand, the methodology involved comparing the national implementations with the texts of Articles 15 and 17 DCSDM, identifying deviations and considering the implications for the 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.³⁰ 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. A questionnaire on the national implementation of the DCSDM was compiled and shared with national experts in the 11 identified countries. The questionnaire was organised around identified assessment criteria (AC). Two sets of AC were compiled: one for Article 15 DCSDM and one for Article 17 DCSDM. As the sections below detail (see sections 2 and 3), the AC focuses on keywords identified within the provisions. These comprise core “building blocks” encountered across intellectual property rights (e.g., “subject matter”, “right-holders”, “exclusive rights”, “exceptions and limitations”), as well as particularities presented by Articles 15 and 17 DCSDM (e.g., “targeted users”, “revenue sharing”, “right-holder co-operation”, “general monitoring”).

Reporting by national experts was pursued 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.

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.³¹ 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. Unless indicated otherwise,³² independent research into the national implementations was not conducted by the author of the comparative report.

²⁹ For more on the European Legal Method, see: K Riesenhuber, *European Legal Methodology* (2nd 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).

³⁰ 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. 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.

³¹ G Samuel, *An Introduction to Comparative Law and Method* (Hart Publishing 2014) 60-63.

³² By means of a reference to sources other than the national report.

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

The questionnaire as circulated to the national experts can be found in Annex 1 and the final version of all national reports can be found in Annex 3. Annex 4 consists of a list and classification of the most significant incompatibilities of national implementations of Articles 15 and 17 DCDSM with EU law. A list of the national experts is provided in Annex 2 and short bios of the national experts are provided in Annex 5. Annex 6 contains the bibliography.

Implementing EU Copyright Harmonisation: the Basic Framework

In approaching the comparative report, it is important to understand Member States' obligations regarding the transposition of EU directives. The distinction between harmonisation and unification in EU law is central in this regard. While unification involves the complete replacement of national law with new rules adopted at the EU level, harmonisation aims at the creation of substantively identical or similar sets of rules across the Member States.³³ Unification is usually pursued by means of regulations, while harmonisation is generally achieved via directives.³⁴ According to Article 288 of the TFEU,³⁵ regulations are directly applicable in the Member States, but directives are binding only as to the result to be achieved.³⁶

To ensure that the objectives of the EU are realised, Article 4(3) of the Treaty of the European Union (TEU)³⁷ establishes the “principle of sincere co-operation”, according to which the Union and the Member States must, in full mutual respect, assist each other in carrying out tasks that flow from the Treaties. To this end, Member States must take any appropriate measure to ensure fulfilment of their obligations arising out of the Treaties. Article 291(1) TFEU is more targeted: “Member States shall adopt all measures of national law necessary to implement legally binding Union acts.”

In cases of a perceived failure by a Member State to fulfil an obligation, the Commission – under Articles 258 TFEU and in its role as “Guardian of the Treaties”³⁸ – may deliver a reasoned opinion on the matter. If the State does not comply with the opinion, the Commission may bring the matter before the CJEU. Under Article 260(1) TFEU, if the Court finds that the Member States has failed to fulfil an obligation under the Treaties, it will require that State to take measures to overcome this.³⁹ In relation to EU directives, “failure” can include a failure to provide notification of implementation, partial

³³ M Costa and S Peers, “Harmonisation” in M Costa and S Peers (eds), *Steiner & Woods EU Law* (14th ed., OUP), section 15.2.2.

³⁴ European Parliament, “The EU as a community of law – Overview of the role of law in the Union”, Briefing, March 2017, available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599364/EPRS_BRI\(2017\)599364_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599364/EPRS_BRI(2017)599364_EN.pdf).

³⁵ Treaty on the Functioning of the European Union (2012) OJ C 326/47.

³⁶ The CJEU has established that directives may have direct effect under certain circumstances, see M Costa and S Peers, “Principles of direct applicability and direct effects” in M Costa and S Peers (eds), *Steiner & Woods EU Law* (14th ed., OUP), section 5.2.5.

³⁷ Treaty on European Union (2012) OJ C 326/13.

³⁸ M Costa and S Peers, “Enforcement Actions” in M Costa and S Peers (eds), *Steiner & Woods EU Law* (14th ed., OUP), section 11.5.

³⁹ M Costa and S Peers, “Enforcement Actions” in M Costa and S Peers (eds), *Steiner & Woods EU Law* (14th ed., OUP), section 11.1.

implementation, faulty implementation or non-implementation.⁴⁰ As this study focuses only on those Member States that have implemented Articles 15 and 17 DCDSM, only partial and faulty implementation shall be relevant.

Depending on the degree of freedom left to the Member States, different types of harmonisation can be said to exist. There is no established classification of harmonisation and different commentators identify different categories, but one generally accepted distinction is that between “total” or “full” harmonisation” and “minimum” harmonisation.⁴¹ While total harmonisation leaves Member States with no scope for independent action in the harmonised field, with minimum harmonisation the EU legislator will establish a minimum standard with which Member States must comply, but beyond which they are free to establish their own rules.⁴² As a result, minimum harmonisation is of limited service in creating an internal market. Perhaps for this reason, in recent years, the EU legislator has shown a discernible preference for total harmonisation.⁴³ At the same time, it is important to remember that total harmonisation is distinct from unification and thus does not aim at homogenization.⁴⁴

The same harmonising directive may combine provisions that allow Member States different degrees of flexibility. Complicating matters further, the harmonisation technique employed (e.g., total or minimum harmonisation) will not usually be explicitly identified in the text of the directive.⁴⁵ Instead, according to the CJEU, the margin of discretion available to the Member States, while determined entirely by the directive itself, must be inferred from its wording, purpose and structure. For example, while an abstract wording might allow more flexibility to the Member States, a more precise wording may leave limited implementing freedom.⁴⁶

In line with the “room for manoeuvre” left for implementing Member States by harmonising directives, Article 288 TFEU allows national authorities to choose the form and methods through which they wish to achieve the result pursued by a directive.⁴⁷ “Form” in this context refers to the nature of national transposition instruments. “Method” refers to the technique used to transpose the contents of the directive into the chosen instrument: how is the “result” aimed at by the Directive “achieved” in a given Member State. For the purposes of this study, only the choice of “method” is relevant. The CJEU has acknowledged that transposition through general legal context may be sufficient, provided that it effectively ensures the full application of the directive in a sufficiently clear and precise manner.⁴⁸ In all cases, directives must be implemented,

⁴⁰ M Costa and S Peers, “Enforcement Actions” in M Costa and S Peers (eds), *Steiner & Woods EU Law* (14th ed., OUP), section 11.4.2.

⁴¹ M Costa and S Peers, “Harmonisation” in M Costa and S Peers (eds), *Steiner & Woods EU Law* (14th ed., OUP), section 15.3; A Ramalho, *The Competence of the European Union in Copyright Lawmaking – A Normative Perspective of EU Powers for Copyright Harmonization* (Springer 2016) 116-118; 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; M Dougan, “Minimum Harmonisation and the Internal Market” (2000) 37 *Common Market Law Review* 853 and J Hartmann, “Discretion in EU directives: enhancing political legitimacy within the EU’s multi - level legal system”, paper presented at the 6th Sixth Pan-European Conference on EU Politics, 13-15 September 2012, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2328673.

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

⁴³ M Costa and S Peers, “Harmonisation” in M Costa and S Peers (eds), *Steiner & Woods EU Law* (14th ed., OUP), section 15.3.3.

⁴⁴ A Ramalho, *The Competence of the European Union in Copyright Lawmaking – A Normative Perspective of EU Powers for Copyright Harmonization* (Springer 2016) 114 and L Guibault, “Why Cherry-Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright under Directive 2001/29/EC” (2010) 1 *JIPITEC* 55.

⁴⁵ A Ramalho, *The Competence of the European Union in Copyright Lawmaking – A Normative Perspective of EU Powers for Copyright Harmonization* (Springer 2016) 117.

⁴⁶ CJEU, C-52/00, *Commission v France*, 25 April 2002, ECLI:EU:C:2002:252, para. 16.

⁴⁷ See Article 288 point 3, Treaty on the Functioning of the European Union (TFEU).

⁴⁸ CJEU, C-281/11, *Commission v Poland*, 19 December 2013, EU:C:2013:855, para. 60.

“with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty, which requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights”.⁴⁹

Broadly speaking, implementing legislatures are faced with two main decisions:

- a) between literal transposition (“copy-out”) and “elaboration” on the rules set out in the directive;⁵⁰ and
- b) between minimalist and non-minimalist transposition.⁵¹ Minimalist transposition refers to transposition that does not exceed the minimum requirements of the directive. Non-minimalist transposition (sometimes called “gold-plating”) refers to the use of transposition measures that go beyond the requirements of the directive.

With regard to the first option, it is important to understand that, although – all things being equal – it is generally agreed that copy-out transpositions are preferable to elaboration, as they minimise the possibility of incorrect reformulation, not all directives are copiable. In order that the copy-out method be viable, the provisions of a directive must, among other requirements, be sufficiently precise, clear, internally consistent and unconditional. They must also be terminologically and conceptually compatible with existing national law in the area. Where further concretisation, clarification or supplementation is necessary and where directives are poorly drafted and in need of legislative repair, literal transposition must be rejected.⁵²

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

⁴⁹ CJEU, C-50/09, *Commission v Ireland*, 3 March 2011, ECLI:EU:C:2011:109, para. 46.

⁵⁰ See CJEU, C-281/11, *Commission v Poland*, 19 December 2013, EU:C:2013:855, para. 60, according to which “it must be recalled that it is settled law that transposing a directive into national law does not necessarily require its provisions to be reproduced verbatim in a specific, express law or regulation”.

⁵¹ R Král, “On the choice of methods of transposition of EU Directives” (2016) 41(2) E.L. Rev. 220.

⁵² R Král, “On the choice of methods of transposition of EU Directives” (2016) 41(2) E.L. Rev. 220.

⁵³ European Commission, “Commission Staff Working Document – Better Regulation Guidelines”, SWD(2021) 305 final, 3 November 2021, pp. 11 and 38; European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Identifying and addressing barriers to the Single Market”, COM (2020) 93 final, 10 March 2020, pp. 12–13; European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Long Term Action Plan for Better Implementation and Enforcement of Single Market Rules”, COM(2020) 94 final, 10 March 2020, pp. 3-5 and 8; European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Better Regulation: Delivering Better Results for a Stronger Union”, COM(2016) 615 final, 19 September 2016, p.10; European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Better Regulation for Better Results - An EU Agenda”, COM(2015) 215 final, 19 May 2015, pp. 8-9.

⁵⁴ European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Identifying and addressing barriers to the Single Market”, COM (2020) 93 final, 10 March 2020, pp. 12–13.

⁵⁵ A Ramalho, “The competence and rationale of EU copyright harmonization” in E Rosati, *The Routledge Handbook of EU Copyright Law* (Routledge 2021) 3.

have questioned the usefulness of the business-centric concept of gold-plating for the purposes of public policy-making and academic analysis,⁵⁶ emphasising instead the need for nuance: national legal “customisation” does not equal lack of compliance, while a compliant implementation may nevertheless be ineffective.⁵⁷ The provided level of discretion may be a deliberate choice of the EU legislator, necessary in order to achieve compromise during the complex process of EU decision-making.⁵⁸ Further, it is not always easy to determine whether a national implementation is more or less burdensome than a directive; often the effects may be different depending on the perspective taken. For example, a provision may be burdensome for a corporation, while facilitating transactions for individuals. Gold-plating directives with a deregulatory or liberalising impact may provide affected persons relief from regulatory burden.⁵⁹

In this context, it is important to remember that the Commission’s communications on gold-plating are soft law without binding force – gold-plating is not illegal under EU law.⁶⁰ Ultimately, compliance with Union law should therefore be determined by reference to the texts of directives: the question is not whether “gold-plating” has occurred, but whether EU law has been infringed.⁶¹ For this purpose, it is important to identify the “occupied field” of a directive – i.e., the aspects of the field which it aims to regulate. Areas outside this will be left to the realm of the Member States.⁶² With this in mind, while this study will use the term “gold-plating”, it will distinguish between permissible and impermissible instances of gold-plating. It will also examine critically both the DCDSM and its national implementations with a view to assessing the effectiveness of the adopted solutions.

It should be noted that Articles 15 and 17 DCDSM are, for the most part, total harmonisation instruments.⁶³ This significantly limits the ambit for national discretion. The one obvious exception relates to the rules on exceptions and limitations, whose minimum harmonisation nature is pulled in from the Information Society Directive (ISD).⁶⁴ Opportunities for gold-plating in implementing Articles 15 and 17 DCDSM will therefore not be abundant. However, even total harmonisation directives often permit national variations though, e.g., specific derogations or opt-out clauses. While no such flexibility-clauses have been incorporated into Articles 15 and 17 DCDSM, the warning above concerning the need for elaboration on insufficiently developed harmonising provisions is important.

⁵⁶ See L Squintani, “Gold-Plating: A Misleading Overarching Concept” in L Squintani, *Beyond Minimum Harmonisation Gold-Plating and Green-Plating of European Environmental Law* (Cambridge University Press 2019) 13-71. Exploring the advantages and disadvantages of minimum harmonisation, see S Weatherill, “The Fundamental Question of Minimum or Maximum Harmonisation” in S Garben and I Govaere (eds), *The Internal Market 2.0* (Hart 2020), available at: <https://ssrn.com/abstract=3660372>;

⁵⁷ E Thomann and A Zhelyazkova, “Moving beyond (non-)compliance: the customization of European Union policies in 27 countries” (2017) 24 (9) *Journal of European Public Policy* 1269 and E Versluis, “Even Rules, Uneven Practices: Opening the ‘Black Box’ of EU Law in Action” (2007) 30 *West European Politics* 50.

⁵⁸ R Zbiral, S Princen and H Smekal, “Mapping the Legal Scope for Flexible Implementation in EU Directives” (2022), Robert Schuman Centre for Advanced Studies Research Paper No. RSC_46, 2022, available at: <http://dx.doi.org/10.2139/ssrn.4148721> and N Dörrenbächer and E Mastenbroek, “Passing the buck? Analyzing the delegation of discretion after transposition of European Union law” (2019) 13 *Regulation and Governance* 70.

⁵⁹ R Král, “On the choice of methods of transposition of EU Directives” (2016) 41(2) *E.L. Rev.* 220.

⁶⁰ E Magrani, N Alija and F Andrade, “‘Gold-plating’ in the transposition of EU Law” (2021) 8(2) *E-Publica*, available at: <https://e-publica.pt/api/v1/articles/31477-gold-plating-in-the-transposition-of-eu-law.pdf>.

⁶¹ S Garben and I Govaere, “The Multi-faceted Nature of Better Regulation” in S Garben and I Govaere (eds.), *The EU Better Regulation Agenda: A Critical Assessment* (Hart Publishing 2018) 3.

⁶² M Costa and S Peers, “Harmonisation” in M Costa and S Peers (eds), *Steiner & Woods EU Law* (14th ed., OUP), section 15.3.1.

⁶³ 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.

⁶⁴ 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).

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

“the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union; that interpretation must take into account the context of the provision and the objective of the relevant legislation”.⁶⁵

The Court has identified the usual meaning of a word in everyday language as relevant in interpreting autonomous concepts of EU law. The wording of recitals may also be taken into account, as may the definitions established by other directives and the law of fundamental rights.⁶⁶ Unsurprisingly, anticipating the EU definition of autonomous concepts will not always be an easy task for the Member States, which – in the absence of other guidance – are more likely to follow their “homing tendencies” back to pre-existing national notions.⁶⁷ To assist in the process, the Commission has suggested that areas that may cause transposition and application risk be identified during legislative negotiations so that guidance may be issued.⁶⁸ In fact, Article 17 DCDSM has been the subject of precisely such guidance.⁶⁹ However, setting aside the issues of democratic legitimacy raised by this solution,⁷⁰ as the analysis below shall show, its success in establishing legal certainty has been very limited.

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

“the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question.”⁷¹

In assessing the compatibility of national implementations with the provisions of the DCDSM therefore, it will be the operative parts of the directive that shall serve as the primary reference point.⁷² At the same time, it is clear from the case law of the CJEU that recitals do have value as sources of interpretative guidance. Indeed, that is their purpose.⁷³ Therefore, while recitals do not have autonomous legal effect, so that any recitals drafted in normative terms are to be ignored, recitals can assist in illuminating the purpose of the operative parts of a directive. They can be helpful in interpreting ambiguous operative

⁶⁵ CJEU, C-467/08, *Padawan*, 21 October 2010, ECLI:EU:C:2010:620, para. 32.

⁶⁶ F Gotzen, “‘Autonomous concepts’ in the Case Law of the Court of Justice of the European Union on Copyright” (2020) 263(1) *RIDA* 75.

⁶⁷ M van Echoud et al, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Wolters Kluwer 2009), p. 301. Examining a different area of law, see V Mitsilegas, “Autonomous Concepts, Diversity Management and Mutual Trust in Europe’s Area of Criminal Justice” (2020) 57(1) *Common Market Law Review* 45.

⁶⁸ See also Article 291(2) TFEU, according to which, “Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.”

⁶⁹ European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Long Term Action Plan for Better Implementation and Enforcement of Single Market Rules”, COM(2020) 94 final, 10 March 2020, p. 5.

⁷⁰ A Ramalho, “The competence and rationale of EU copyright harmonization” in E Rosati, *The Routledge Handbook of EU Copyright Law* (Routledge 2021) 3.

⁷¹ CJEU, C-162/97, *Nilsson*, 19 November 1998, ECLI:EU:C:1998:554, para. 54. See also Case C-308/97, *Manfredi*, 13 July 2006, ECLI:EU:C:2006:461, para. 30.

⁷² R Barratta, “Complexity of EU law in the domestic implementing process” (2014) 2(3) *The Theory and Practice of Legislation* 293 and T Klimas and J Vaičiukaitė, “The Law of Recitals in European Community Legislation” (2008) 15(1) *ILSA Journal of Int’l & Comparative Law* 1.

⁷³ According to the Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation (Publications Office of the European Union 2015), p. 31, “the purpose of the recitals is to set out concise reasons for the chief provisions of the enacting terms, without reproducing or paraphrasing them. They shall not contain normative provisions or political exhortations.”

provisions, e.g., (as indicated above) in the context of the teleological and contextual analysis necessary for interpreting autonomous concepts of EU law. Obviously, in cases where recitals coincide with the requirements of an overriding rule of EU law (e.g., higher law, such as the Charter), they may prevail over the text of an article – though it is more accurate in such cases to say that it is the overriding rule that prevails.⁷⁴

2. National Implementations of Article 15 DCDSM

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

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

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

Assessment Criterion 1: Subject Matter

Definition

The definition of “press publications” provided by Article 2(4) DCDSM is complex.⁷⁵ It consists of:

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

The definition has been criticised as unclear and overly broad.⁷⁶

⁷⁴ D Beylveeld, “Why Recital 26 of the E.C. Directive on the legal protection of biotechnological inventions should be implemented in national law” 2000(1) IPQ 1.

⁷⁵ For an analysis see E Czarny-Drozdzejko, “The Subject-Matter of Press Publishers’ Related Rights Under Directive 2019/790 on Copyright and Related Rights in the Digital Single Market” (2020) 51 IIC 624.

⁷⁶ See e.g., L Bently, “Call for Views: Modernising the European Copyright Framework”, 5 December 2016, available at: <https://www.civil.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.civil.law.cam.ac.uk/documents/ipomodernising-ipprofresponsepresspublishers.pdf>; C Geiger, O Bulayenko and G Frosio, “Opinion of the CEIPI on the European Commission’s Copyright Reform Proposal with a Focus on the Introduction of Neighbouring Rights for Press Publishers in EU Law” (2017) 39(4) European Intellectual Property Review 202 and S Karapapa, “The Press Publication Right in the European Union: An Overreaching Proposal and the Future of News Online” in E Bonadio and N Lucchi (eds), *Non-Conventional Copyright: Do New and Non-Traditional Works Deserve Protection?* (Edward Elgar 2018), available at: <https://ssrn.com/abstract=3118457>.

Unsurprisingly, according to the national reports, most examined national legislators have shied away from serious tampering. At the same time, over half of implementations demonstrate failings. Belgium, the Czech Republic, Finland, Greece, Germany, Hungary, Ireland, Latvia, Luxembourg, Portugal, Romania, Slovakia and Sweden adopt the definition (almost) verbatim. Regarding the rest:

- Austria mysteriously omits qualifier (c).
- Estonia rewords Article 2(4)(c) to require “control by an editor’s office” (as opposed to “editorial responsibility”) and Croatia specifies the type of service provider (the newspaper or publication editor, newspaper publisher, media publisher, media service provider). This potentially narrows the reach of the provision.⁷⁷
- Cyprus, Malta and Spain pull into their definitions the exclusion of Recital 56 on “websites, such as blogs, that provide information as part of an activity that is not carried out under the initiative, editorial responsibility and control of a service provider, such as a news publisher.” This is likely of limited relevance as the exclusion is offered only as an example of qualifier (c) in Article 2(4) DCDSM.
- The Spanish wording implies that the inclusion of subject matter other than literary works of a journalistic nature is necessary. This could exclude protection for text-only press publications, unless an intentionalist interpretation is taken by the courts.
- France omits the reference to the “general public”, thus extending protection to specialist publications (although the words “special interest” in Recital 56 suggest the EU legislator viewed these as covered).
- Lithuania has produced a convoluted definition that matches that of the Directive in certain ways but strays away from it in others. Comparing it to the equally complex EU definition and assessing the consequences of any divergences is difficult.⁷⁸ At the very least, the Lithuanian restriction of the new right only to “electronic press publications” is consequential, given that the EU directive extends over both digital and paper publications.
- The Danish national expert reports that Denmark eschews any definition.⁷⁹ This raises the question whether a bad definition is better than no definition. To the extent that, e.g., the type of covered content, designated audience or carve-out are not indicated by the natural meaning of the word, the lack of a definition could prove problematic. On the other hand, in light of the *Marleasing* principle, the Danish courts should be seen as bound by the definition set out in the Directive.⁸⁰
- It is interesting that while the Lithuanian definition explicitly extends the carve-out to popular science publications,⁸¹ the Swedish preparatory works exclude these.

“Individual Words or Very Short Extracts”

According to Article 15(1) DCDSM *in fine*, the PPR does not apply to the use of “individual words or very short extracts of a press publication”. While “individual words” seems clear, “very short extracts” is more ambiguous. The issue is relevant to the freedom left to targeted platforms to provide information to their users and therefore has a clear fundamental rights dimension. Recital 58 justifies the exclusion by noting that such uses “may not undermine the investments made by publishers of press publications in the production of content”. The use of the words “may not” is curious and unhelpful – are they prescriptive or descriptive? The introduction of the exception for individual words and short extracts in the next sentence (“Therefore, it is appropriate to provide that the use of individual words or very short extracts of press publications should not fall within the scope of the rights provided for in this Directive”) suggests the latter. This implies that an absence of such undermining is not in fact required,⁸² only an

⁷⁷ Cf. answer to Q. 3 in the national report on the implementation of Article 15 in Croatia.

⁷⁸ See identified differences in answer to Q. 3 in the national report on the implementation of Article 15 in Lithuania.

⁷⁹ See answer to Q. 3 in the national report on the implementation of Article 15 in Denmark.

⁸⁰ See CJEU, C-29/84, *Commission v Germany*, 23 May 1985, ECLI:EU:C:1985:229, para. 23 and C-58/02, *Commission v Spain*, 7 January 2004, ECLI:EU:C:2004:9, para. 26. See also M Costa, “Enforcement Actions” in M Costa and S Peers (eds), *Steiner & Woods EU Law* (14th ed., OUP), section 11.7.5.

⁸¹ See Article 2(9) Republic of Lithuania Authors’ Rights and Related Rights Act.

⁸² Cf. “may” in sentence 3 of Recital 58 with “should not” in sentence 4.

interpretation of the exclusion “in such a way as not to affect the effectiveness” of the PPR, as per the last sentence of the recital.

When the effectiveness of the rights will be affected is unaddressed. While Recital 58 makes it clear that the Directive is geared towards the protection of the investments made by the publishers of press publications⁸³ – meaning that these might be linked to the assessment of effectiveness – the existence of such investments is not established as a condition for protection in Article 15 DCSDM. It is possible that investment is simply assumed.⁸⁴ This would mean that where no investment has been made, no protection is afforded – the key caveat being that the EU legislator appears not to have contemplated that this might also be the case where more than a “very short extract” is taken.

The conclusion would be that the effectiveness of the PPR will only be affected if “very short extracts” are taken that undermine the investments of publishers – this in turn meaning that any extracts that undermine the investments of publishers cannot benefit from the exclusion.⁸⁵ Such an interpretation would accept only non-informationally relevant content as “very short”, an outcome that would have detrimental effects for users’ freedom of expression.

To address this, it should be accepted that – regardless of the wording of the Preamble – an important role in interpreting the exclusion of “very short extracts” should be played by fundamental rights. To the extent that use of “very short extracts” is required by end-users’ freedom of expression, it should be permitted. The guidance of the recitals cannot be granted greater interpretative significance than that of the overarching norms of the Charter.⁸⁶

A large number of the examined Member States have taken a copy-out approach to the implementation of “individual works and very short extracts”. This is the case for Austria, Belgium, Cyprus, the Czech Republic, Estonia, Germany, Hungary, Ireland, Latvia, Luxembourg, Malta and Portugal, all of which thus delegate interpretation to their courts. The Danish and Dutch implementations switch “individual words” for “very few words” and “a few words” respectively. This implies that “very short extracts” may consist of more than a few words, thus raising the standard set slightly. Given the importance of fundamental rights in interpreting the term “very short extracts”, these changes should not be viewed as relevant. The Danish and Swedish legislators appear in the preparatory work to envision an interpretation that excludes extracts longer than 11 words. These conclusions are based on a flawed understanding of copyright law,⁸⁷ but are not binding on the courts.

Most Member States do not address the applicability of the exception to headlines. Those that do take conflicting approaches: while the Lithuanian implementation categorically excludes headlines from the reach of the press publishers’ right, the Finnish government’s bill notes that headlines are essential and commercially significant elements of press publications and may therefore be protected. As it is hard to see when restricting the ability to quote a headline would not be incompatible with freedom of

⁸³ See also Recitals 54 and 55 DCSDM.

⁸⁴ P B Hugenholtz, “Neighbouring Rights are Obsolete” (2019) 50(8) IIC 1006.

⁸⁵ E Rosati, *Copyright in the Digital Single Market* (OUP 2021), p. 275.

⁸⁶ T Rendas, “Taking freedom of information seriously: the ‘very short extracts’ limitation in Article 15 CDSM Directive and how not to implement it” Parts I and II, Kluwer Copyright Blog, March 2022, available at:

<http://copyrightblog.kluweriplaw.com/2022/03/30/taking-freedom-of-information-seriously-the-very-short-extracts-limitation-in-article-15-cdsm-directive-and-how-not-to-implement-it-part-1/> and

<http://copyrightblog.kluweriplaw.com/2022/03/31/taking-freedom-of-information-seriously-the-very-short-extracts-limitation-in-article-15-cdsm-directive-and-how-not-to-implement-it-part-2/>.

⁸⁷ The *Infopaq* decision of the CJEU found that 11 words may amount to an original work that is therefore protected by copyright, but this does not mean that they will always be. See CJEU, C-5/08, *Infopaq*, 16 July 2001, para. 51. The Danish report suggests that this was also the conclusion of the Danish Supreme Court when the *Infopaq* case was returned to it (see answer to Q. 4 in the national report on the implementation of Article 15 in Denmark). It is, moreover, not clear that a standard based on a concept that is not relevant to the PPR should affect its interpretation.

expression, the first approach is better in tune with EU fundamental rights, the second is saved by its ambiguity and non-binding nature.

The German Explanatory Memorandum clarifies that permitted extracts may include various types of content, including text, photographs, graphics, audio and video, as well as combinations thereof. This is also the case in Sweden. As the German national expert explains, this suggests a qualitative approach to interpreting “very short extracts”. Croatia dubiously excludes photos and video content from the exception.

Eight Member States have grappled with when a very small extract will affect the effectiveness of the PPR. The French implementation has incorporated the non-binding reference to the effectiveness of the right in the Directive’s Recital into the text of the law. As the French national expert explains, it then takes inspiration from competition law to interpret the requirement as indicating that the extract must not be capable of replacing the press publication itself or exempting the reader from referring to it. The Italian implementation likewise defines “very short extracts” as extracts that do not exempt users from the need to consult the entire article. Subsequent implementations in Croatia, Greece, Romania and Slovakia follow suit. The Belgian legislator toyed with this approach in its preparatory works but avoided incorporating it into the implementation itself. This is fortunate, as it has serious flaws: whether a replacement effect will occur will arguably differ from topic to topic and reader to reader, making the standard a difficult one to apply. A report of the French National Assembly put forward the idea that snippets or even titles may be covered by the PPR, on the reasoning that they may provide enough information to readers to satisfy their informational needs, thus discouraging them to click through to the full article.⁸⁸ This interpretation is hard to reconcile with the freedom of information-focused approach outlined above. As commentators have observed, its impact would be to encourage clickbait and deprive users of useful context that can help them navigate the immense amounts of information available on the internet.⁸⁹ The French national expert notes that the quotation exception may provide some relief – but this is accompanied by conditions and has been restrictively interpreted in France (see below, section on AC 8 on the implementation of Article 17 DCDSM).⁹⁰ Thus, these implementations run risks in terms of fundamental rights. As “very short extracts” should be seen as an autonomous notion of EU law, to the extent that they do not account for the context and objective of the provision, they are also questionable in light of the Directive’s internal market objective.

⁸⁸ V DUBY-MULLER and L GARCIA, “Rapport d’information N° 4902 déposé en application de l’article 145 du Règlement par la mission d’information sur l’application du droit voisin au bénéfice des agences, des éditeurs et professionnels du secteur de la presse”, 12 January 2022, available at: https://www.assemblee-nationale.fr/dyn/15/rapports/dv/115b4902_rapport-information.

⁸⁹ T RENDAS, “Taking freedom of information seriously: the ‘very short extracts’ limitation in Article 15 CDSM Directive and how not to implement it” Parts I and II, Kluwer Copyright Blog, March 2022, available at: <http://copyrightblog.kluweriplaw.com/2022/03/30/taking-freedom-of-information-seriously-the-very-short-extracts-limitation-in-article-15-cdsm-directive-and-how-not-to-implement-it-part-1/> and <http://copyrightblog.kluweriplaw.com/2022/03/31/taking-freedom-of-information-seriously-the-very-short-extracts-limitation-in-article-15-cdsm-directive-and-how-not-to-implement-it-part-2/>. More analytically, A PEUKERT, “An EU Related Right for Press Publishers Concerning Digital Uses. A Legal Analysis”, 16 December 2016, Research Paper of the Faculty of Law, Goethe University Frankfurt am Main No. 22/2016, available at: <https://ssrn.com/abstract=2888040> or <http://dx.doi.org/10.2139/ssrn.2888040>. See also U FERGAL, “Ancillary right for press publishers: an alternative answer to the linking conundrum?” (2018) 13(9) JIPLP 700, observing that “linking without snippets is useless”. In this context, it is important to recall the importance placed by the CJEU on hyperlinks for ensuring the “sound operation of the internet”, as well as “the exchange of opinions and information in that network characterised by the availability of immense amounts of information.” See CJEU, C-160/15, *GS Media*, 8 September 2016, ECLI:EU:C:2016:644, para. 45.

⁹⁰ It is, moreover, not mandatory in the realm of related rights, see L BENTLY, M KRETSCHMER, T DUDENBOSTEL, M DEL CARMEN CALATRAVA MORENO and A RADAUER, “Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive”, Study for the JURI Committee of the European Parliament, September 2017, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU%282017%29596810_EN.pdf.

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

Finally, two Member States incorporate quantitative elements. Lithuania defines “very short extracts” as consisting of “125 characters or fewer, excluding the headline of the text and spaces between characters” and Romania combines its qualitative approach described above, with a requirement that “very short extracts” not exceed 120 characters”.⁹¹ The compatibility of this approach with fundamental rights is questionable, as it leaves no room for consideration of, e.g., the content of the extract copied or the necessity of its use for end-users’ expression. While this may make algorithmic enforcement harder, the perceived advantages of such enforcement might be illusory, as the need to respect users’ rights risks undermining their validity and, therefore, legal certainty.

“Mere facts”

According to Recital 57, the rights of press publishers should not extend to “mere facts reported in press publications”. As this limitation is not included in the text of Article 15 DCDSM, it is unsurprising that it also does not appear in most national implementations.⁹² Yet it is of importance, particularly given the lack of any other discernible threshold for protection by the PPR.⁹³ Only Germany, Malta and Romania have explicitly adopted the exclusion. However, given that no threshold condition is set for protection in the Directive, the logical and troubling conclusion of the omission on the exclusion from the operative text of the Directive is that mere facts are caught by the PPR.⁹⁴ Assistance may be provided by general principles excluding mere facts from protection.⁹⁵ However, as a number of national experts worry, attention is needed: the PPR is a related right and its subject matter extends beyond “works” in the copyright sense. Rules that only protect mere facts from copyright protection may therefore be insufficient.⁹⁶ The Explanatory Memoranda of the Belgian, Dutch, Estonian, Finnish and Swedish implementations mitigate the problem somewhat by noting that the PPR should not be interpreted to

⁹¹ Similarly, the current Bulgarian draft defines “very short extracts” as “the title of the publication, together with up to the first 100 consecutive characters of the text, which may be accompanied by a small-format preview image with a resolution of up to 128 by 128 pixels and part of a sound file, or video up to three seconds long” (see section 70(1)(k) of the Bulgarian implementation, available at: <https://www.strategy.bg/PublicConsultations/View.aspx?lang=bg-BG&Id=6348>). Such solutions should be seen as incompatible with the single market objective of the Directive and EU law on fundamental rights.

⁹² See answers to Q.5 in the national reports on the implementation of Article 15 in the implementation of Article 15 in Austria, Belgium, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Portugal, Slovakia, Slovenia, Spain and the Netherlands, Sweden.

⁹³ M van Echoud, “A Publisher’s Intellectual Property Right – Implications for freedom of expression, authors and open content policies”, January 2017, available at: https://www.ivir.nl/publicaties/download/OFE_Implications_of_publishers_right.pdf.

⁹⁴ See answers to Q.5 on Article 15 in the national reports on the implementation of Article 15 in Estonia, France and Ireland.

⁹⁵ See I Stamatouidi and P Torremans, “The Digital Single Market Directive” in I Stamatouidi and P Torremans, *EU Copyright Law – A Commentary* (2nd ed., Edward Elgar 2021), para. 17.237. See also answer to Q. 5 in the national reports on the implementation of Article 15 in Austria, France, Hungary and Estonia.

⁹⁶ See answers to Q. 5 in the national reports on the implementation of Article 15 in Austria and Estonia. By contrast, note that the Greek and Cypriot Copyright Acts state more broadly that “the protection of this Law” does not extend to “mere facts” and “ideas, procedures, systems, methods, principles” respectively, thereby encompassing the PPR. These approaches are more promising – although it is worth noting that in correspondence the Greek national expert clarifies that historically the restriction is understood to apply exclusively to copyright. This can be explained by its lack of relevance for related rights prior to the introduction of the PPR.

create monopolies on “mere facts”, “factual information”, “news of the day”, etc. – but these statements are non-binding and, depending on the precise wording, may not provide complete coverage.

Given that “mere facts” are not mentioned in the Directive, it could be argued that – paradoxically – it is the Member States that exclude them which run the risk of incorrect implementation. Recital 57 could be said to salvage these transpositions – but it is hard to determine whether this supports or conflicts with the text of Article 15 DCDSM. As the operative part of the Directive does extend protection over mere facts – no threshold condition for such protection having been imposed – it is possible that the Recital is helpless to assist. At the same time, the disproportionate adverse effect this would entail for users’ freedom of expression cannot be ignored. The conclusion should therefore be that Article 15 DCDSM should be interpreted in line with the Charter in such a way as to allow a fair balance to be struck between the PPR and freedom of expression. National transpositions of the “mere facts” exclusion should accordingly be deemed acceptable in light of fundamental rights, if not with the express wording of the Directive. In Member States that do not explicitly implement the exclusion, it ought to be read into the national transposition teleologically to comply with fundamental rights. Application of exclusions from copyright protection by analogy can achieve this result.⁹⁷

In light of EU law’s contradictory instructions, all Member States other than Germany, Malta and Romania are indicated as “uncertain compatibility” with fundamental rights in the table below (unless another issue pulls them entirely out of compliance). Germany, Malta and Romania are marked as “uncertain compatibility” with the Directive.⁹⁸

Public domain content

A similar problem arises with regard to public domain content. According to Article 15(2) DCDSM *in fine*, the PPR cannot be invoked to control the use of works or other subject matter for which protection has expired. This restriction has made it into most implementations,⁹⁹ but is absent from the Czech, Croatian, Danish, Estonian, French and Hungarian ones. As the French national expert notes, given the absence of threshold conditions for protection, this amounts to an expansion of the reach of the right in the latter countries. The effects of this expansion may be dampened depending on whether the use of a single element from a “collection” that constitutes a press publication would amount to a “part” of the press publication.¹⁰⁰ Even if that is not the case, taking two expired works included in a press publication (e.g., two photos) would circumvent even a narrow interpretation and allow the appropriation of public domain content. The Czech national experts argue that the exclusion should be read into national law via the indirect effect of the Directive and an interpretation conformant to fundamental rights.¹⁰¹

The Estonian Explanatory Memorandum suggests that the fact that terms of protection are specified elsewhere in the law for copyright and related rights means that there is no need to make provision for public domain content in the national implementation.¹⁰² This statement is indicative of the lack of understanding regarding the effects of the PPR that has accompanied it since it was first proposed.

⁹⁷ See answers to Q. 5 in the national reports on the implementation of Article 15 in the Czech Republic and Slovakia.

⁹⁸ Note that this changes the scores compared to the first version of this report – although the substantive legal analysis remains unchanged.

⁹⁹ See answers to Q.6 in the national reports on the implementation of Article 15 in Austria, Belgium, Cyprus, Finland, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

¹⁰⁰ See answer to Q. 6 in the national report on the implementation of Article 15 in France.

¹⁰¹ See answer to Q.5 in the national report on the implementation of Article 15 in the implementation of Article 15 in the Czech Republic.

¹⁰² See answer to Q. 6 in the national report on the implementation of Article 15 in Estonia.

It is important to note that, as in the Directive, in those countries in which it appears, the exclusion is limited to subject matter for which copyright and related rights protection has expired. This means that it cannot provide cover to other elements of the public domain, such as information and news (see analysis on “mere facts” above).¹⁰³ Moreover, as the restriction refers to “subject matter for which protection has expired” and the PPR is a right that provides protection to subject matter, its wording is circular. The language in the Cypriot, Dutch, German and Slovak implementations, which specify that the PPR does not apply to subject matter *included in a press publication* for which protection has expired, is preferable.

Ultimately, the lack of implementation on expired rights brings the six affected countries out of line with the Directive. The risk this entails of an appropriation of public domain material has a corresponding impact on fundamental rights.

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

Art.15 AC 1	AT	BE	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR
DSM	-	+	+	-	0	-	-	-	+	-	-	-
FR	-	0	0	-	+	-	-	-	0	-	-	-

HU	IE	IT	LV	LT	LU	MT	NL	PT	RO	SK	SI	SE
-	+	-	+	-	+	0	+	+	-	-	+	+
-	0	-	0	-	0	+	0	0	-	-	0	0

Assessment Criterion 2: Right-holders

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

Based on the national reports, it appears that most Member States don’t delve deeper than the Directive. Austria, Lithuania, Portugal and Slovakia join the dots by clarifying that press publishers are the ones who provide the initiative, editorial responsibility and control mentioned in the definition of press publications.¹⁰⁴ Germany defines the publisher of a press publication as “any person who produces a press publication”. The German Explanatory Memorandum specifies that this covers those persons who provide the economic, organisational and technical services required for the publication. Belgium and Croatia introduce rebuttable presumptions in favour of the person indicated as publisher in the press publication or in other specified ways. These national legislative flourishes are likely harmless. More problematically, in line with its definition of press publications (see above under AC1), Croatia also limits press publishers to newspaper publishers, media publishers or media service providers, potentially restricting the reach of the provision.

¹⁰³ The Swedish correspondent notes the lack of protection for non-original creations, see answer to Q. 6 in the national report on the implementation of Article 15 in Sweden.

¹⁰⁴ Similarly see E Rosati, *Copyright in the Digital Single Market* (OUP 2021), p. 259.

Questions have arisen around news agencies. Debate has focused on whether news agencies are protected when they provide raw information and images as an intermediate product.¹⁰⁵ As the French national expert explains, the answer hangs on whether the beneficiary of the right must be the person who realises the publication. While the Lithuanian, Portuguese and Spanish implementations require that news agencies “publish” press publications to enjoy protection, in an interim decision, the French Competition Authority has concluded that press agencies, as producers of content that invest in its production, can benefit when the content is published by somebody else. The Dutch national expert notes that the issue is disputed in the Netherlands.¹⁰⁶

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

An interesting question concerns the geographical reach of the right. According to Article 15(1) DCDSM, protection only extends to publishers established in an EU Member State. Interestingly, according to the national reports, Ireland and Spain only provide protection to publishers established in their territories. This is a clear violation of the terms of the Directive. Other Member States (Denmark, Hungary, Latvia, Malta and Romania¹⁰⁷) mention no geographic limitations. The result in these cases will be under- and over-protection respectively. Both would affect the balance struck by the EU legislator between the protection of intellectual property and that of freedom of expression. The remaining Member States (Austria, Belgium, Cyprus, Croatia, the Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Lithuania, Luxembourg, the Netherlands, Portugal, Slovenia, Slovakia and Sweden) extend protection to publishers established anywhere in the EU, as the Directive requires.

A15 – Table 2: Assessment of national implementations under AC1. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.

Art.15 AC 2	AT	BE	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR
DSM	+	+	+	+	+	-	+	-	+	0	+	-
FR	+	+	+	+	+	-	+	-	+	0	+	-

HU	IE	IT	LV	LT	LU	MT	NL	PT	RO	SK	SI	SE
-	-	+	-	+	+	-	+	+	0	+	+	+
-	-	+	-	+	+	-	+	+	0	+	+	+

¹⁰⁵ See answers to Q. 8 in the national reports on the implementation of Article 15 in France and the Netherlands. See also M Ricolfi and R Xalabarder, “European Copyright Society – Opinion on the Proposed Press Publishers Right”, 25 April 2018, available at: <https://europeancopyrightsociety.org/>.

¹⁰⁶ See M van Eechoud, “Artikel 15 DSM-richtlijn: bescherming van perspublicaties met betrekking tot onlinegebruik (persuitgeversrecht)” (2019) 6 AMI 197, at 199.

¹⁰⁷ The Romanian situation is slightly unclear as the questionnaire suggests the issue is linked to broader Romanian, EU and international law, see answer to Q. 8 in the national report on the implementation of Article 15 in Romania.

Assessment Criterion 3: Restricted acts

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

CJEU interpretative case law has held that profit-seeking providers of hyperlinks to infringing content are rebuttably presumed to know that the content is infringing and therefore liable for making it available to the public.¹⁰⁸ To avoid extending press publishers' rights to the provision of hyperlinks (which would have had detrimental effects on freedom of expression online),¹⁰⁹ the EU legislator narrowed the scope of Article 15(1) DCDSM with an exception in favour of acts of hyperlinking.¹¹⁰ It should be understood that this is a different matter to the question of whether short extracts of text reproduced in the hyperlink are infringing. While that issue concerns the question of whether the part taken falls within the subject matter of the right and is therefore addressed via the exclusion in favour of very short extracts, here the question is whether the act of providing the hyperlink falls within the scope of the exclusive right.¹¹¹

Most national implementations have remained within the bounds set to restricted acts by Article 15(1) DCDSM. In particular, Austria, Belgium, Cyprus, Denmark, Estonia, Germany, Greece, Latvia, Luxembourg, Malta, the Netherlands, Romania, Slovakia and Spain all tick the crucial boxes of “reproduction”, “making available to the public” and “online use”.

The Italian implementation refers to “communication to the public” instead of “making available to the public”. As the Italian expert explains, the notion of a “communication to the public” in Italian copyright law is broader than “making available”, extending over e.g., broadcasting. This therefore represents an expansion. Portugal grants press publishers exclusive rights over the acts of online reproduction, communication to the public and making available to the public of their press publications, thus adding a right. The Portuguese expert explains that the definitions of reproduction and communication to the public correspond to those of the InfoSoc Directive. As communication to the public is broader than making available in EU copyright law, an expansion results here as well. Similarly, the Irish implementation covers “reproduction”, “adaptation” and “making available”, the latter being so broadly defined in Irish law as to include acts of distribution and broadcasting. In all three countries, this expansion is partially controlled through the condition of “online use”. Nevertheless, depending on national definitions, the result could be coverage of services that do not qualify as making available, in particular livestreaming and online radio.

Finland, Lithuania and Slovenia omit the reference to online use. Curiously, Finland replaces it with a condition of “a purpose of gain”.¹¹² It is possible that the Lithuanian legislator concluded that its restriction of protection to “electronic press publications” achieved the same effect as the Directive but this is not the case: restricting the subject matter of a right is not the same as restricting the scope of the

¹⁰⁸ CJEU, C-160/15, *GS Media*, 8 September 2016, ECLI:EU:C:2016:644, paras 49-51.

¹⁰⁹ See A Peukert, “An EU Related Right for Press Publishers Concerning Digital Uses. A Legal Analysis”, 16 December 2016, Research Paper of the Faculty of Law, Goethe University Frankfurt am Main No. 22/2016, available at: <https://ssrn.com/abstract=2888040> or <http://dx.doi.org/10.2139/ssrn.2888040>.

¹¹⁰ *Contra* see E Rosati, *Copyright in the Digital Single Market* (OUP 2021), p. 281-282.

¹¹¹ L Bently, M Kretschmer, T Dudenbostel, M del Carmen Calatrava Moreno and A Radauer, “Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive”, Study for the JURI Committee of the European Parliament, September 2017, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU%282017%29596810_EN.pdf; U Fergal, “The EU press publishers’ right: where do Member States stand?” 2021 16(8) *JIPLP* 887 and E Rosati, *Copyright in the Digital Single Market* (OUP 2021), p. 277.

¹¹² See answer to Q. 11 in the national report on the implementation of Article 15 in Finland.

right. That said, potentially the omission of “online use” is not significant given that under the terms of Article 15 DCSDM restricted acts will only be infringing if performed by an ISSPs – the question then being whether a provider retains that qualification in relation to acts of offline use.

The Czech Republic restricts the online use condition only to the reproduction right. This seems acceptable: making available by definition occurs online. Hungary replaces “online use” with a reference to electronic reproduction by an ISSP.¹¹³ Since, however, the Hungarian implementation considers electronic reproductions infringing only if done for the purpose of making available to the public – and therefore online – the Hungarian implementation passes muster.

Similar problems are encountered in France. France replaces “online uses” with uses “in digital format”, a broader term, and (unlike Hungary) introduces no qualification. As the French national expert explains,¹¹⁴ a further problem is that the French approach to the reproduction right is potentially broader than that of EU copyright law, covering acts of distribution and adaptation. The final result represents a significant departure from the DCDSM. The French approach is particularly questionable given France’s shaky transposition of the definition of ISSPs (see below AC 4). Curiously, France also incorporates the term “communication to the public” in its implementation of Article 15 DCDSM, although the term is foreign to French copyright law. As the national expert notes, the notion should, rightly, be interpreted to align with the reference to “making available to the public” in the Directive.

Particularly curious is the case of Croatia. Here, the legislator has expanded protection over offline, as well as online uses. In online situations, the Croatian implementation extends beyond reproduction and making available to communication to the public. It could therefore present similar problems to those identified above for Italy, Ireland and Portugal. In offline situations, it covers the rights of reproduction, distribution, renting and lending, communication to the public, including the making available, and adaptation. The result is clear gold-plating, whose compatibility with EU law is debatable: while the Croatian offline protections are clearly inspired by and connected to the harmonised PPR, there is an argument that they represent a national idiosyncratic related right of the kind that is common in EU Member States.

Croatia has also introduced a new moral right of attribution to the first source of “news of the day” and expanded the indicative list of authorial works to include works made by the press. The latter change does no more than clarify existing copyright law, as newspaper articles will normally qualify as literary works provided they display sufficient originality. The former is problematic from the perspective of freedom of expression and information. Nevertheless, it is only incidental to the implementation of Article 15 DCSDM and therefore will not be taken into account in Croatia’s compatibility assessment for the purposes of this report.

Hyperlinking is much better managed by the Member States. Almost all national implementations exclude the provision of hyperlinks from the scope of protection of the PPR. While none define hyperlinking, the well-developed case law of the CJEU is robust enough to set the pace. Issues do arise in two Member States. Cyprus only protects clickable hyperlinks (thus excluding, e.g., framing) that lead the user to the original or part of the original press publication on the press publisher’s website. As the EU hyperlinking exclusion sets no such limits, this unjustifiably expands the right.

According to what is described by the national expert, Sweden appears to misunderstand the hyperlinking exclusion as referring to the reproduction of protected content into a link – e.g., copying a headline into hypertext.¹¹⁵ This understanding would make the exclusion largely redundant given the separate exception for individual words and short extracts. Where longer extracts are used, it is not clear

¹¹³ See answer to Q. 9 in the national report on the implementation of Article 15 in Hungary.

¹¹⁴ See answer to Q. 9 in the national report on the implementation of Article 15 in France.

¹¹⁵ See answer to Q. 10 in the national report on the implementation of Article 15 in Sweden.

what the policy reason for protecting their use as links would be. The Swedish interpretation also does not accord with the Directive’s reference to “the act of hyperlinking” – language which clearly points to an exception to the restricted act, rather than the subject matter of the right. As, however, this understanding is not embedded in the implementation itself, that must be accepted as compatible with the Directive.

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

Art.15 AC 3	AT	BE	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR
DSM	+	+	-	+	+	+	+	+	-	-	+	0
FR	+	+	-	+	+	+	+	+	-	-	+	0

HU	IE	IT	LV	LT	LU	MT	NL	PT	RO	SK	SI	SE
+	0	0	+	0	+	+	+	0	+	+	0	+
+	0	0	+	0	+	+	+	0	+	+	0	+

Assessment Criterion 4: Targeted users

As opposed to what is generally the case for exclusive rights in copyright and related rights, Article 15 DCSDM does not apply *erga omnes*, but is targeted at uses by information society service providers (ISSPs).¹¹⁶ Recital 55 refers to Directive (EU) 2015/1535¹¹⁷ for a definition of ISSPs (“any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”). Article 15(1) DCSDM further stipulates that the PPR does not apply to private or non-commercial uses of press publications by individual users. In a final limitation, as the object of protection by the PPR may coincide with the subject matter of copyright and related rights incorporated in press publications, Article 15(2) para. 1 DCSDM states that the PPR leaves intact such rights, so that it may not be invoked against their owners or deprive them of the ability to exploit their rights independently. To this end, Article 15(2) para. 2 DCSDM clarifies that the holders of non-exclusive licenses issued by such right-holders shall likewise be insulated.¹¹⁸

A surprising number of issues of greater or lesser concern emerge across national implementations. Remarkably, Finland does not limit the PPR to ISSPs, although the Finnish Government’s Bill makes clear that that is the intention.

According to the national report, Estonia transposes the provisions on right-holders and their licensees in a “minimalist way”, stating that the new provisions “leave intact and do not in any way affect” copyright and related rights over content published in press publications. The Estonian Explanatory Memorandum suggests that other provisions in national copyright law achieve the same effect, but it is not clear that this is the case. Potentially, a right can be “left intact” and “not affected” even while its owner is blocked from exercising it due to a clash with another right. Similarly, although Finnish law

¹¹⁶ A Lazarova, “Re-use the news: between the EU press publishers’ right’s addressees and the informatory exceptions’ beneficiaries” (2021) 16(3) JIPLP 236.

¹¹⁷ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services [2015] OJ L241/1.

¹¹⁸ See also Recital 59 DCSDM.

states that the PPR not affect the rights of the author under this Act to the work included in a press publication”, it offers no transposition of Article 15(2) second sentence DCSDM on right-holders’ right to exploit their subject-matter. It is further not clear from the wording of the Finnish implementation as described in the national report whether related rights holders are covered.

A similar problem emerges in Belgium, Croatia, France and Hungary, which, according to the national experts, rely for the protection of other right-holders on the general provisions according to which related rights cannot influence the protection of copyright. This approach omits protection for the holders of related rights over subject matter incorporated in press publications. Croatia further undermines the protection provided by including a vague exception where a special derogation is adopted or where such derogation “derives from the legal nature of the press publishers’ right”. The Croatian national expert notes that it is unclear what this means.¹¹⁹ Romania allows the parties to agree not to apply the protection for authors and other right-holders, thereby giving – as the national expert observes – an advantage to press publishers.¹²⁰ The Czech Republic and Sweden do not include protection for the holders of rights in content incorporated in a press publication. The Swedish national expert explains that Sweden relies instead on the separate nature of the relevant rights. This glib disregard for potentially complex clashes is insufficient.

The French implementation targets “online public communication services”. The notion appears to be both broader and narrower than that of ISSPs in EU law, the relevant services being defined as covering the “transmission, on individual request, of digital data not having the character of private correspondence, by means of an electronic communication method allowing a reciprocal exchange of information between the provider and the recipient”.¹²¹ This omits the reference to services normally provided for remuneration, but adds a requirement of reciprocal information exchange.

France has also opted to omit the guarantee in favour of private or non-commercial uses by individuals, as it considers that the same effect is achieved through its private copying exception.¹²² Yet it is not clear that the conditions for the private copying exception coincide with those of the exclusion for individual users in Article 15(1) DCDSM.¹²³ Crucially, the private copying exception applies only to the reproduction right. It also requires fair compensation. Moreover, the relevant reproduction must be made “for private use and for ends that are neither directly nor indirectly commercial”. By contrast, the Article 15(1) DCDSM exclusion encompasses “private or non-commercial uses” by individual users. It has been argued that the word “or” should be ignored here,¹²⁴ but this is not convincing. There is no reason to restrictively reword the Directive. The result of the French approach is obvious gold-plating that is incompatible with the DCDSM.¹²⁵ This is, moreover, not without consequence, as it means that public uses by e.g., non-commercial bloggers¹²⁶ are left unprotected. This outcome is explicitly rejected by Recital 55 of the Directive, which states that users should remain allowed to “share” press publications online.

¹¹⁹ See answer to Q. 12 on the national implementation of Article 15 in Croatia.

¹²⁰ See answer to Q. 12 on the national implementation of Article 15 in Romania.

¹²¹ See answer to Q. 11 on the national implementation of Article 15 in France.

¹²² See Article 5(2)(b) ISD.

¹²³ E Rosati, *Copyright in the Digital Single Market* (OUP 2021), p. 273.

¹²⁴ E Rosati, *Copyright in the Digital Single Market* (OUP 2021), p. 273.

¹²⁵ See R Král, “On the choice of methods of transposition of EU Directives” (2016) 41(2) E.L. Rev. 220.

¹²⁶ Note that such a blogger could qualify as an ISSP under both the EU and French definitions – though the requirement of reciprocal exchange of information may be of assistance under the second (this, however, raising its own compatibility issues).

In addition, given that ISSPs include the OCSSPs (“online content-sharing service providers”) targeted by Article 17 DCDSM¹²⁷ and in light of the fact that (contrary to the Directive) the French implementation of Article 17 DCDSM appears to extend to the PPR (see below the discussion on AC 2 on Article 17 DCDSM), the French approach makes OCSSPs liable to the publishers of press publications for non-commercial public sharing of their press publications by their users on their platforms. Yet, as the recitals to the DCDSM make clear, Article 15 DCDSM was motivated by the need to address own use by providers such as news aggregators and media monitoring services.¹²⁸ The result is that the French implementation cannot be considered an appropriate reflection of Article 15 DCDSM.

France is not the only country to introduce complications to the guarantee for private users. The Czech Republic also omits the guarantee for individual users.¹²⁹ The Slovak implementation of the exception for private or non-commercial uses of press publications by individual users uses the word “and” instead of “or”, thus restricting its reach. Portugal adds novel conditions to the application of the guaranteed for individual users. To avoid the PPR, such users must: (i) be acting in the exercise of their right to be informed and (ii) have lawful access to the press publication. One wonders when a user may have reason to copy or make available a press publication in exercise of their own right to be informed rather than their right to inform others. The exception also appears to require both private and non-commercial use. How this protection interacts with the Portuguese private use exception – which might help plug some gaps – remains unclear.¹³⁰ Sweden protects use that does not take place for a commercial purpose, the national expert suggesting that Swedish law views private uses as by definition non-commercial. This approach, while curious, is acceptable.

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

Art.15 AC 4	AT	BE	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR
DSM	+	-	+	-	+	+	0	+	-	-	+	-
FR	+	-	+	-	+	+	0	+	-	-	+	-

HU	IE	IT	LV	LT	LU	MT	NL	PT	RO	SK	SI	SE
-	+	+	+	+	+	+	+	-	-	-	+	-
-	+	+	+	+	+	+	+	-	-	-	+	-

¹²⁷ See answers to Q. 11 in the national reports on the implementation of Article 15.
¹²⁸ U Fergal, “The EU press publishers’ right: where do Member States stand?” 2021 16(8) JIPLP 887.
¹²⁹ See answers to Qs 9 and 11 on the national implementation of Article 15 in the Czech Republic.
¹³⁰ See answer to Q. 13 on Article 15 in the national report on Portugal.

Assessment Criterion 5: Exceptions & limitations

Article 15(3) DCDSM establishes that the provisions on exceptions and limitations to copyright and related rights set out in the ISD, the Orphan Works Directive¹³¹ and the Directive implementing the Marrakesh Treaty in the EU¹³² apply *mutatis mutandis* to the PPR. The exceptions and limitations introduced through the DCDSM itself also apply to the PPR.¹³³ While more recent provisions on exceptions and limitations in EU copyright law have tended to be mandatory for Member States, this is the case for only one of the exceptions and limitations in the ISD.¹³⁴ Beyond that, the ISD sets out an exhaustive list of exceptions and limitations that national legislators may – but are not obliged to – introduce into their national legal order. As a result, a certain level of disharmonisation is baked into Article 15 DCDSM. The ISD legislator explained this approach by suggesting that full harmonisation of exceptions and limitations is not necessary for the smooth functioning of the internal market.¹³⁵ While all examined Member States appear to have incorporated Article 15(3) DCDSM into national law, the usual fragmented effects are liable to emerge¹³⁶ – it would be hard, however, to view any such effects as resulting from the national implementations of the DCDSM, as opposed to the minimum harmonisation nature of the ISD.

All Member States appear to extend their regular exceptions and limitations to the PPR. It is relevant to highlight Spain, which prior to the implementation of Article 15 DCDSM provided protection for press publishers in the form of an unwaivable and compulsively collectively managed exception that subjected providers of electronic aggregation services to the payment of equitable compensation.¹³⁷ Under this system, search engines were exempted from both authorisation and equitable compensation for any acts of making available to the public of press publications, provided such making available: (i) was carried out without a commercial purpose on its own; (ii) was limited to what is strictly needed to offer search results in response to search queries; and (iii) included a link to the origin web page.¹³⁸ This regime was maintained in Spain after the implementation of Article 15 DCDSM as a derogation from the rights it introduces. On its face, it represents a divergence from the system set up in the Directive. That said, any extracts “strictly needed to offer search results in response to search queries” are likely to qualify as “very short extracts” in the terms of Article 15. Therefore, as the Spanish national expert has observed elsewhere, any issues that may emerge in practice are likely to result from the excessively strict Spanish implementation of the “very short extracts” carve-out, rather than the exception itself.¹³⁹

¹³¹ Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works [2012] OJ L 299/5.

¹³² Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2017] OJ L 242/6.

¹³³ See Articles 3(1), 4(1), 5(1), 6(1) and 8(2) DCDSM.

¹³⁴ See Article 5(1) ISD on temporary copying.

¹³⁵ See Recital 31 ISD.

¹³⁶ For an analysis focusing on the “press review” and “reporting on current events” exceptions of Article 5(3)(c) ISD, see A Lazarova, “Re-use the news: between the EU press publishers’ right’s addressees and the inforamatory exceptions’ beneficiaries” (2021) 16(3) *JIPLP* 236.

¹³⁷ For further information see R Xalabarder, “Press Publisher Rights in the New Copyright in the Digital Single Market Draft Directive” CREATE Working Paper 2016/15 (December 2016), DOI:10.5281/zenodo.183788 and L Bently, M Kretschmer, T Dudenbostel, M del Carmen Calatrava Moreno and A Radauer, “Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive”, Study for the JURI Committee of the European Parliament, September 2017, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU%282017%29596810_EN.pdf.

¹³⁸ See answer to Q. 1 in the national report on the implementation of Article 15 in Spain.

¹³⁹ M Peguera, “Spanish transposition of Arts. 15 and 17 of the DSM Directive: overview of selected issues” (2022) 17(5) *JIPLP* 450.

A15 – Table 5: Assessment of national implementations under AC5. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.

Art.15 AC 5	AT	BE	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR
DSM	+	+	+	+	+	+	+	+	+	+	+	+
FR	+	+	+	+	+	+	+	+	+	+	+	+

HU	IE	IT	LV	LT	LU	MT	NL	PT	RO	SK	SI	SE
+	+	+	+	+	+	+	+	+	+	+	+	+
+	+	+	+	+	+	+	+	+	+	+	+	+

Assessment Criterion 6: Licensing

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

Collective licensing is explicitly made available in Estonia, Hungary, the Netherlands, Portugal and Spain. In Estonia, Denmark, Finland and Romania, collective licensing with extended effect is enabled.¹⁴⁰ It is interesting that Germany does not extend its provisions guaranteeing equitable remuneration to the publishers of press publications. In France, a new CMO representing press publishers has emerged.¹⁴¹ Moreover, a duty to negotiate a license has been imposed by the French Competition Authority on Google for abusing its dominant position by refusing to pay a fee to publishers for use of their press publications.¹⁴² It is difficult to assess this development. It is unclear whether resorting to competition law to force and control negotiations on the licensing of a related right falls within or without the “occupied field” of the DCDSM. A similar conundrum emerges in the Czech Republic, which imposes an “obligation to negotiate” on certain ISSPs, as well as what has been described as a “must-carry” obligation.¹⁴³

France, Italy, Portugal and Spain set out dedicated provisions on the licensing of press publications. The Spanish rules require that: (i) the editorial independence of press publishers and news agencies be respected; (ii) ISSPs provide detailed information on the parameters that determine the classification of content and their relative importance; and (iii) the agreement cannot be linked to other contracts or obligations. It is not clear what the result will be if these conditions are not met.¹⁴⁴ France sets out specific criteria to be taken into account in fixing the remuneration due to press publishers.¹⁴⁵ Portugal depends the remuneration for press publishers on the economic value of the online use of press publications by ISSPs and imposes information obligations on ISSPs. Interestingly, it also establishes a

¹⁴⁰ Sweden introduces extended collective licensing for ISSPs in relation to works included in press publications, see answer to Q. 14 in the national report on the implementation of Article 15 in Sweden.

¹⁴¹ See answer to Q. 14 in the national report on the implementation of Article 15 in France.

¹⁴² For discussion see answer to Q. 14 in the national report on the implementation of Article 15 in France and the following: A Lazarova, “Re-use the news: between the EU press publishers’ right’s addressees and the inforatory exceptions’ beneficiaries” (2021) 16(3) JIPLP 236; U Fergal, “The EU press publishers’ right: where do Member States stand?” 2021 16(8) JIPLP 887 and Scalzini, S, “The New Related Right for Press Publishers – What Way Forward?” in E Rosati, *The Routledge Handbook of EU Copyright Law* (Routledge 2021) 101.

¹⁴³ See answer to Q. 14 in the national report on the implementation of Article 15 in the Czech Republic.

¹⁴⁴ M Peguera, “Spanish transposition of Arts. 15 and 17 of the DSM Directive: overview of selected issues” (2022) 17(5) JIPLP 450.

¹⁴⁵ See answer to Q. 14 in the national report on the implementation of Article 15 in France.

transitional extended collective licensing scheme only on regional press publications. This is applicable until the end of 2028, after which the system will transition to a voluntary collective management regime.

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

Importantly, the European Commission has stated that Member States are not allowed to implement Article 15 through a mechanism of mandatory collective management, precisely because such a system would deprive publishers of the right to authorise or prohibit the use of their publications.¹⁴⁶ To support this interpretation, the Commission cited case law of the CJEU that has emphasised the preventive nature of the exclusive rights, meaning that the exploitation of protected content requires the prior consent of the right-holder. The Court has thus held that, while right-holders may provide such consent in an implicit manner, the conditions under which implicit consent may be accepted must be strictly defined so as not to deprive the principle of prior consent of proper effect.¹⁴⁷ Commentators have cast doubt on whether the Court would find the potential judicial imposition, under the Italian rules, of a duty to contract on press publishers compatible with this principle, particularly given the lack of an opt-out option or of the delineation of conditions governing the presumption of consent. The Italian approach also raises fundamental rights issues, as there is an argument that such a requirement would violate Article 17(2) of the Charter.¹⁴⁸

Italian-inspired systems have since been adopted elsewhere. In Belgium, provided that the press publisher is willing to authorise use of its publications, the press publisher and the information society service provider must conduct licensing negotiations in good faith. If no agreement can be reached within four months, dispute resolution proceedings may be commenced before the Belgian Institute for Postal Services and Telecommunications (BIPT), which may take a binding administrative decision on the amount of the remuneration. The fact that the law explicitly foresees the ability of the publishers to refuse authorisation may salvage the legality of this solution. A similar procedure in Greece does not, according to the national expert, imply a duty to engage in negotiations or to conclude a contract. The Czech Republic introduces factors to be taken into account in negotiations with certain “entrepreneur” ISSPs and grants the Ministry of Culture competence to determine remuneration where no agreement is reached. According to the national experts, the only guarantee offered to press publishers is the ability

¹⁴⁶ See question for written answer to the Commission, MEP Vondra, Rule 138, reference no: E-004603/2020 24 August 2020 and answer given by Mr Breton on behalf of the European Commission, reference no: E-004603/2020, 9 November 2020.

¹⁴⁷ See CJEU, C-301/15, *Soulier and Doke*, 16 November 2016, ECLI:EU:C:2016:878, paras 33-37 and CJEU, C-484/18, *Spedidam*, 14 November 2019, ECLI:EU:C:2019:970, paras 38-40.

¹⁴⁸ For a discussion see answer to Q. 14 in the national report on the implementation of Article 15 in Italy and C Sganga and M Contardi, “The new Italian press publishers’ right: creative, fairness-oriented... and invalid?” (2022) 17(5) JIPLP 421. See also U Fergal and G Priora, “Empowered to negotiate or obliged to contract? Lessons from the Italian implementation of the press publishers’ right”, Kluwer Copyright Blog, 14 April 2022, available at:

<http://copyrightblog.kluweriplaw.com/2022/04/14/empowered-to-negotiate-or-obliged-to-contract-lessons-from-the-italian-implementation-of-the-press-publishers-right/>.

to refuse to grant a license without this additional procedure. This solution is less convincing than the Belgian and Greek ones.

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

Art.15 AC 6	AT	BE	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR
DSM	+	0	+	-	+	+	+	+	+	0	0	+
FR	+	0	+	-	+	+	+	+	+	0	0	+
HU	IE	IT	LV	LT	LU	MT	NL	PT	RO	SK	SI	SE
+	+	-	+	+	+	+	+	+	+	+	+	+
+	+	-	+	+	+	+	+	+	+	+	+	+

Assessment Criterion 7: Revenue sharing

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

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

Other national innovations focus on the calculation of the “appropriate share”. Italy sets the share due to authors at between 2% and 5% of the “fair compensation” they receive. The precise amount is to be set by individual contracts in case of freelancers and collective agreements in cases of employees. Germany establishes that the minimum share for authors should be one third of the income generated. Derogations to the detriment of authors and related right owners must be based on a collective labour agreement or a joint remuneration agreement with authors’ associations. In Lithuania, absent agreement between press publishers and authors, revenue is divided equally. Greece has opted for 25% of the annual revenue from ISSPs of the press publishers that employ fewer than 60% of the authors/journalists under a contract of dependent labour and 15% where that number exceeds 60%. In Greece, the right is inalienable and contractual clauses to the contrary void. The right is also unwaivable in Slovenia.

France has adopted detailed provisions establishing the process for determining the appropriate share via negotiations or, failing that, a designated committee. Malta delegates the determination of the amount of remuneration to a designated Board. Previous legal practice in Hungary regarding employee works indicates that a case-by-case approach should be taken that accounts for all relevant circumstances (type of use, territorial scope, medium, proportion of the work used, etc.) to determine whether a share is appropriate. The Dutch Explanatory Memorandum relies on the transparency obligations of Article 19 DCDSM to conclude that press publishers are obliged to disclose the income that the PPR generates and the share to which authors are entitled. Portugal connects the issue to its implementation of Article 18 DCSDM, on appropriate and proportionate remuneration for authors who license or transfer their exclusive rights. The Finnish and Swedish legislators have intentionally left the question to freedom of contract, although in the later exclusive competence to collect belongs to a representative organisation.

Romanian law also explicitly refers to freedom of contact, as well as the need for a fair balance of parties’ rights and interests. It further stipulates that a lump sum payment may constitute appropriate remuneration (meaning that the appropriate remuneration can be designated as covered by a stated percentage of royalties in contracts between authors and publishers) and that the right does not apply where rights have been acquired by press publishers in the context of employment relationships or as a result of a license or assignment of rights. As the Romania national expert notes, this implementation will likely rob the rule of any practical effect.¹⁴⁹ It should be assumed that a good implementation would be one that does not foreseeably undermine the objective of the Directive.

A number of Member States mention collective management, though the details vary. Spain specifies that authors may resort to collective management organisations to exercise their rights. In Belgium, revenue sharing is subject to mandatory collective management, while the appropriate share is to be determined by a collective agreement between press publishers and authors. The parties must negotiate in good faith. If no agreement is reached on the appropriate share, the parties may bring the matter before a commission. Croatia too imposes mandatory collective licensing for works included in online press publications, but only for professional journalists or photographers covered by employment or commission agreements. Otherwise, press publishers are presumed to own all rights and may determine whether and in what amount authors have a remuneration right.

This disparate collection of provisions is not conducive to harmonisation. The divergences in percentage shares in those countries that venture to set them are striking, as is the fact that revenue sharing is designated an inalienable right in some countries, but dwindles into nothing in others. That said, while the notion of an “appropriate share” should be viewed as an autonomous notion of EU law,¹⁵⁰ absent further CJEU guidance it is hard to determine which national approach hits closer to the mark.

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

<u>Art.15 AC 7</u>	AT	BE	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR
DSM	+	+	+	+	0	+	+	+	+	+	+	+
FR	+	+	+	+	0	+	+	+	+	+	+	+
HU	IE	IT	LV	LT	LU	MT	NL	PT	RO	SK	SI	SE
+	+	+	+	+	+	+	+	+	-	0	+	+
+	+	+	+	+	+	+	+	+	-	0	+	+

Assessment Criterion 8: Term of protection

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

¹⁴⁹ See answer to Q. 15 in the national report on the implementation of Article 15 in Romania.
¹⁵⁰ Consider CJEU, Case C-467/08, *Padawan*, 21 October 2010, ECLI:EU:C:2010:620, paras 36-37.

commentators have noted that the question is unclear, it should be accepted that this approach is correct, otherwise the route to permanent protection would be obvious.¹⁵¹

It is worth noting that, while the term of protection for online uses has been correctly implemented in Croatia, for offline uses the term of protection is ten years from the date of the first lawful publication.

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

Art.15 AC 8	AT	BE	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR
DSM	+	+	+	+	+	+	+	+	+	+	+	+
FR	+	+	+	+	+	+	+	+	+	+	+	+
HU	IE	IT	LV	LT	LU	MT	NL	PT	RO	SK	SI	SE
+	+	+	+	+	+	+	+	+	+	+	+	+
+	+	+	+	+	+	+	+	+	+	+	+	+

Assessment Criterion 9: Waiver

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

Most of the examined Member States leave the issue unaddressed. In these cases, the national reports appear to conclude that there is nothing to exclude either option.¹⁵² The exceptions are Estonia and Hungary. In Estonia, related rights holders have an unwaivable right to renegotiate a relevant and fair remuneration where the remuneration received is disproportionate to the revenue derived from exploitation. In Hungary, right-holders may not waive their rights, although right-holders may refrain from requiring remuneration. In both countries, the ultimate result should be understood as allowing free uses by ISSPs with right-holder consent.

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

¹⁵¹ L Bently, “Sleepwalking towards a perpetual (news?) publishers’ right in online publications”, 22 May 2018, IP Kat, available at: <https://ipkitten.blogspot.com/2018/05/sleepwalking-towards-perpetual-news.html>. See also D Passinke, “An Analysis of Articles 15 and 17 of the EU Directive on Copyright in the Digital Single Market: a boost for the creative industries or the death of the internet?” (2020) Stanford – Vienna Transatlantic Technology Law Forum, European Union Law Working Papers No. 49.

¹⁵² See also E Rosati, *Copyright in the Digital Single Market* (OUP 2021), p. 287 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.

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

Art.15 AC 9	AT	BE	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR
DSM	+	+	+	+	+	+	+	+	+	+	+	+
FR	+	+	+	+	+	+	+	+	+	+	+	+
HU	IE	IT	LV	LT	LU	MT	NL	PT	RO	SK	SI	SE
+	+	+	+	+	+	+	+	+	+	+	+	+
+	+	+	+	+	+	+	+	+	+	+	+	+

Assessment Criterion 10: Entry into effect

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

Article 15(4) DCDSM restricts application of the new PPR to press publications first published from 6 June 2019. The selection of a date appears to be connected to the implementation deadline and the 2-year term of protection – although it does not seem to account for the 1 January rule for the calculation of the term of protection. Perhaps a coordinated starting point for protection across the EU would have been a more successful solution.

It is curious that most national implementations have transposed the 6 June 2019 rule despite missing the implementation deadline. Logically, in countries which implemented the Directive after 1 January 2022 the rule is redundant. Sweden is an exception: having adopted its implementation on 30 November 2023, it leaves out the 6 June 2019 rule. The preparatory works state that, given the 2-year protection period for press publications and the fact that the Swedish implementation applies from 1 January 2023, the Swedish PPR only extends to press publications first published in 2021. This calculation appears to be off by one year: the Swedish PPR only extends to press publications first published in 2020. However, this date still respects the 6 June 2019 rule.

The retroactive application effects that result for press publications published before the national implementation date but after 6 June 2019 are highlighted by the national experts in Finland and the Czech Republic. As they observe, this encroaches on the acquired freedoms of users who used affected press publications in good faith within the relevant window.¹⁵³ The Finnish legislator anticipated this problem by excluding from such retroactive effect acts done, rights acquired and agreements concluded before the date of entry into effect of the Finnish implementation (3 April 2023). Where this leaves Finland in terms of compatibility with the Directive is unclear. Moreover, as the Finnish expert notes, it is not certain what this means, for example, for ongoing communications of press publication to the public that begun before national implementation and continued after that date. This is a problem that

¹⁵³ See answers to Q. 18 in the national report on the implementation of Article 15 in the Czech Republic and Finland.

applies to the Directive as well. It would have been better if the Article 15 DCSDM had specified that the right does not apply to publications first published before the national implementation.

The Greek legislator has complicated matters further by establishing that the PPR applies from 7 June 2021, despite the national implementation having occurred on 24 November 2022. Although it also implements the 6 June 2019 rule and protects acts concluded and the rights acquired before 7 June 2021, retroactive application still results for the dates between 7 June 2021 and 24 November 2022.

It is worth noting that in Belgium, two actions for annulment of the national implementation of Article 15 DCSDM were filed with the Belgian Constitutional Court and are still pending at the time of writing. Information on the grounds for filing is not currently publicly available.

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

<u>Art.15</u> <u>AC 10</u>	AT	BE	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR
DSM	-	-	-	-	+	+	-	-	-	+	-	-
FR	-	-	-	-	+	+	-	-	-	+	-	-

HU	IE	IT	LV	LT	LU	MT	NL	PT	RO	SK	SI	SE
+	-	-	-	-	-	-	+	-	-	-	-	-
+	-	-	-	-	-	-	+	-	-	-	-	-

3. National Implementations of Article 17 DCSDM

Like Article 15 DCSDM, the final text of Article 17 DCSDM is the result of heated debate and delicate compromises. This is reflected in its length and intricacy. Evaluation of its implementation into the national laws of the Member States is further complicated by two developments that followed the adoption of the Directive: the publication of the Commission’s (non-binding) guidance on Article 17 DCSDM in June 2021¹⁵⁴ and the judgment of the CJEU in Poland’s action for annulment of Article 17(4) point (b) and (c) in April 2022.¹⁵⁵ As a result, assessing its implementation into the national laws of the Member States is – if anything – more complex than Article 15 DCSDM.

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

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

¹⁵⁴ European Commission, “Communication from the Commission to the European Parliament and the Council on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market”, 4 June 2021, COM(2021) 288 final, issued on the basis of Article 17(10) DCSDM.

¹⁵⁵ CJEU, C-401/19, *Poland v Parliament and Council*, 26 April 2022, ECLI:EU:C:2022:297.

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

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

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

As opposed to Article 15 DCDSM, Article 17 DCDSM does not introduce a new related right to EU copyright law. Instead, it expands or solidifies (depending on the preferred interpretation)¹⁵⁶ the protections already afforded under copyright and related rights to right-holders. Its subject matter is therefore clear: works of copyright and the subject matter of related rights.¹⁵⁷ Specifically, Article 17(1) para. 2 indicates that the beneficiaries are the owners of copyright and of the related rights listed in Article 3(2) ISD, i.e., performers, phonogram producers, the producers of the first fixations of films and broadcasting organisations.¹⁵⁸

Based on the national reports, only five Member States (Belgium, Latvia, Luxembourg, Malta and the Netherlands) appear to have restricted protection only to these four related rights. Although it is not always clear from the answers in the national reports – particularly those covered in the first stage of the study¹⁵⁹ – the remaining Member States appear either to explicitly extend protection to other rights or to refer in a general way to works and the subject matter of related rights and to authors and related rights owners, thus implicitly achieving the same effect. The result is distinctive disharmonisation: press publications are covered in Croatia, Cyprus, Estonia, Greece, Portugal, Romania, Slovenia and Slovakia; databases in the Czech Republic, Finland and Slovakia; non-original photographs in Cyprus, Denmark, Finland and Sweden and publications of previously unpublished works in Cyprus and Estonia. Estonia also protects publication of literary critical or scholarly editions of non-copyright works and Denmark of catalogues. These outcomes represent gold-plating, but whether they go against the total harmonisation nature of Article 17 DCDSM (and consequently have negative effects on freedom of expression) is unclear. There is a strong case that where the affected related rights fall outside of harmonised EU copyright law (e.g., with regard to non-original photographs, Sweden’s only transgression on this AC), the result is acceptable. However, where the PPR and database rights are pulled into the reach of the national transposition incompatibility ensues. It is unclear based on the national questionnaire what the relationship is between the Danish rights of catalogue producers and the EU’s rules on databases.¹⁶⁰

¹⁵⁶ Cf. e.g., High Council for Literary and Artistic Property of the French Ministry of Culture and Communication, “Mission to Link Directives 2000/31 and 2001/29 – Report and Proposals”, 3 November 2015, p. 2 and S Stalla-Bourdillon, E Rosati, K Turk, C Angelopoulos, A Kuczerawy, M Peguera, and M Husovec, “A Brief Exegesis of the Proposed Copyright Directive” (24 November 2016), available at: <https://ssrn.com/abstract=2875296> or <http://dx.doi.org/10.2139/ssrn.2875296>. See also M Husovec and J P Quintais, “How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms under the Copyright in the Digital Single Market Directive” (2021) 79(4) GRUR International, 325 and E Rosati, “Five Considerations for the Transposition and Application of Article 17 of the DSM Directive” (2021) 16(3) JIPLP 265.

¹⁵⁷ See Article 17(1) DCDSM.

¹⁵⁸ E Rosati, *Copyright in the Digital Single Market* (OUP 20cy21), p. 329-330.

¹⁵⁹ Austria, France, Germany, Hungary, Italy and Spain appear to refer in a general way to works and the subject matter of related rights and to authors and related rights owners, however the national reports do not confirm explicitly that rights beyond those indicated by the Directive are covered. For this reason they are marked as “unclear compatibility” in the table on AC 1-2.

¹⁶⁰ Note that for this reason the assessment of Denmark for AC 1-2 has changed in the second edition of this report.

Conversely, as the Irish national expert notes, it is not clear from the Irish implementation whether performers are granted protection in relation to their performances.¹⁶¹ If not, the result will also be faulty implementation. Lithuania excludes computer programs from protection, which also seems incorrect.

A17 – Table 1: Assessment of national implementations under AC1-2. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.

<u>Art.17</u> <u>AC 1-2</u>	AT	BE	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR
DSM	0	+	-	-	0	0	-	0	-	0	-	-
FR	0	+	-	-	0	0	-	0	-	0	-	-

HU	IE	IT	LV	LT	LU	MT	NL	PT	RO	SK	SI	SE
0	0	0	+	-	+	+	+	-	-	-	-	+
0	0	0	+	-	+	+	+	-	-	-	-	+

Assessment Criterion 3: Exclusive rights

Further complications present themselves in relation to the affected exclusive rights. Article 17(1) protects right-holders against publicly-accessible uploads of their content by end-users to the platforms of OCSSPs. Specifically, it holds that when OCSSPs give the public access to content uploaded by their users they are performing “an act of communication to the public or an act of making available”. The provision thus dispenses with the nuanced criteria developed by the CJEU to determine whether such platforms infringe under the ISD.¹⁶² The use of the conjunction “or” is presumably due to the misalignment in EU copyright law between copyright and related rights as concerns the communication and making available rights. While Article 3(1) ISD grants authors a broad right of communication to the public, which includes making available, Article 3(2) ISD reserves for related rights owners only the making available right.¹⁶³

Most national implementations adopt the wording of the Directive without modification. In some cases, there is no direct match between the language used in the Directive and that employed in national copyright law. According to the national reports, this is the case in France, Ireland and the Netherlands. The Dutch implementation employs the term “*openbaarmaking*” (“disclosure to the public”), which in Dutch copyright law covers both the right of communication to the public and the right of making

¹⁶¹ See answer to Q. 3 in the national report on the implementation of Article 17 in Ireland.

¹⁶² See CJEU, Case C-682/18, *YouTube and Cyando*, 22 June 2021, ECLI:EU:C:2021:503, paras. 66-70. See also the CJEU’s previous decision in Case C-610/15, *Stichting Brein*, 14 June 2017, ECLI:EU:C:2017:456, paras 18-48. Stamatoudi and Torremans describe the result as a “non-rebuttable presumption” of liability, see I Stamatoudi and P Torremans, “The Digital Single Market Directive” in I Stamatoudi and P Torremans, *EU Copyright Law – A Commentary* (2nd ed., Edward Elgar 2021), para. 17.250. Although see E Rosati, “Five Considerations for the Transposition and Application of Article 17 of the DSM Directive” (2021) 16(3) *JiPLP* 265, arguing that the term “communication to the public” has identical meanings in the ISD and the DCDSM.

¹⁶³ Rights of communications to the public are granted to performers, phonogram producers and broadcasting organisations by Article 8 of the Related Rights Directive (Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L 376/28) and Article 4 of the SatCab Directive (Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L 248/15), however these are limited in different ways compared to Article 3(1) ISD. The reference in para. 2 of Article 17(1) DCDSM to Articles 3(1) and (2) ISD makes clear that these rights are not contemplated in the context of Article 17. See also Opinion of AG Saugmandsgaard Øe in C-401/19, *Poland v Parliament and Council*, 16 July 2021, ECLI:EU:C:2020:586, FN 18.

available to the public. To the extent that the concept corresponds to the two rights mentioned in Article 17(1) DCDSM, this seems unproblematic.

The French implementation refers to French law's broadly conceived rights of "representation" and "reproduction" with regard to copyright and to the rights of communication and broadcasting with regard to related rights. The concept of "representation" is arguably adequately controlled by the descriptive approach taken in the directive (and transposed into French law) to the identified restricted act, which limits it to giving access to the public to content uploaded to the platforms of OCSSPs by users. The extension to the reproduction right is more troublesome in terms of alignment with the terms of the Directive (although arguably it follows from the logic inherent to Article 17 – it is hard to argue that OCSSPs are engaging in acts of communication to the public, but not acts of reproduction in relation to their users' uploads).¹⁶⁴

The same problem is presented by Ireland, which – while describing the restricted act accurately as acts of communication to the public or making available to the public – then appears to require that OCSSPs obtain authorisation for acts not only of communication or making available to the public, but also of reproduction. The wording of the relevant provision¹⁶⁵ is not entirely clear. It states that OCSSPs must obtain authorisations from "the rightholders referred to in sections 37 and 40 of the Act of 2000".¹⁶⁶ The first of these grants to the copyright owner the reproduction right, right of making available to the public and adaptation right and the second defines the right of making available. As the Irish national expert notes,¹⁶⁷ because the owners of these rights will not necessarily coincide, the Irish implementation appears to require that OCSSPs obtain consent for acts of reproduction and adaptation, as well as acts of making available to the public.¹⁶⁸ Of course, it may also be that only holders of rights relevant to the identified act of communication to the public or making available to the public¹⁶⁹ are considered relevant. The lack of a reference to s. 39 of the Act of 2000, which defines the reproduction right further supports this interpretation. But the wording is ambiguous and the fact that sections 37 and 40 of the Act of 2000 focus on restricted acts rather than right-holders is unhelpful. Further, the fact that, as noted above, OCSSPs inevitably copy the content they host makes it hard to explain why the reproduction right should not be included – which raises the possibility that the Irish legislator may have attempted to fix what it viewed as an obvious oversight.

In France, the application of the immunity of Article 17(4) to all "acts of unauthorised exploitation"¹⁷⁰ limits the damage. In Ireland, (if the national implementation is in fact to be understood to extend to the reproduction right) the problem is potentially worse, as the immunity is explicitly restricted to acts of communication to the public. While the wording of the Irish implementation is hard to decipher and different interpretations are possible, it could be that liability for reproduction is established for OCSSPs and then not retracted even where they abide by the conditions of the special liability regime. The result would be a clear conflict with the Directive.

¹⁶⁴ In this regard, note that the Commission's guidance suggests that, "the acts of communication to the public and making content available in Article 17(1) should be understood as also covering reproductions necessary to carry out these acts": European Commission, "Communication from the Commission to the European Parliament and the Council on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market", 4 June 2021, COM(2021) 288 final, p. 6.

¹⁶⁵ See ss. 19 and 20 of Ireland's European Union (Copyright and Related Rights in the Digital Single Market) Regulations 2021.

¹⁶⁶ Irish Copyright and Related Rights Act, 2000.

¹⁶⁷ See observation of the Irish national expert in the answer to Q. 4 in the national report on the implementation of Article 17 in Ireland.

¹⁶⁸ Consider M van Eechoud et al, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Wolters Kluwer 2009), pp. 88-89.

¹⁶⁹ Although note that "communication to the public" is not listed as an act restricted by copyright by s. 37 of the Irish Copyright Act.

¹⁷⁰ See answer to Q. 8 in the national report on the implementation of Article 17 in France.

Finland provides an interesting twist, by expanding the reach of the infringing act from “giving the public access” to protected content (as in the Directive) to “saving works to the service”. As a result, in Finland even when users upload to the platform in a private manner, the OCSSP liability is engaged.

With regard to the nature of the introduced right, according to the national reports, in the few countries that consider the issue, there appears to be agreement that Article 17 DCSDM is *lex specialis* vis-à-vis Article 3 ISD.¹⁷¹ This is in line with the Commission’s guidance on Article 17 and the Opinion of the AG in the *Poland* case.¹⁷² The issue is not straightforward and has proven controversial.¹⁷³ Among other things, it affects the permissibility of national implementations that introduce exceptions and limitations to Article 17 DCSDM not foreseen in that provision or in Article 5 ISD (see below section on AC 5).¹⁷⁴

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

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

Art.17 AC 3	AT	BE	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR
DSM	+	+	+	+	+	+	+	+	-	-	+	+
FR	+	+	+	+	+	+	+	+	-	-	+	+

HU	IE	IT	LV	LT	LU	MT	NL	PT	RO	SK	SI	SE
+	0	+	+	+	+	+	+	+	+	+	+	+
+	0	+	+	+	+	+	+	+	+	+	+	+

Assessment Criterion 4: Targeted providers

Like Article 15 DCSDM, Article 17 DCSDM is targeted at a specific set of ISSPs: “online content-sharing service providers” (OCSSPs). According to the definition of Article 2(6) DCSDM, this refers to ISSPs whose “main or one of the main purposes is to store and give the public access to a large amount

¹⁷¹ See answers to Q. 4 in the national reports on the implementation of Article 17 in the Czech Republic, Denmark, Estonia, Germany and Hungary. See also Recital 64 of the DCSDM, which (while stating that Article 17 “clarifies” that OCSSPs perform acts of communication to the public) stipulates that this “does not affect the concept of communication to the public or of making available to the public elsewhere under Union law, nor does it affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to other service providers using copyright-protected content.”

¹⁷² European Commission, “Communication from the Commission to the European Parliament and the Council on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market”, 4 June 2021, COM(2021) 288 final, p. 2. See also Opinion of AG Saugmandsgaard Øe in C-401/19, *Poland v Parliament and Council*, 16 July 2021, ECLI:EU:C:2020:586, FN 36.

¹⁷³ Cf. – writing very different perspectives – M Husovec and J P Quintais, “How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms under the Copyright in the Digital Single Market Directive” (2021) 79(4) GRUR International, 325 and IFPI, “IFPI and 21 Organisations from Europe’s Cultural and Creative Sectors Raise Concerns Regarding the European Commission’s Proposed Guidance on the Application of Article 17 of the DSM Directive”, 10 September 2020, available at: <https://www.ifpi.org/wp-content/uploads/2020/09/Rightholders-letter-on-Consultation-on-Article-17-Guidance-10-09-20.pdf>.

¹⁷⁴ See E Rosati, “Five Considerations for the Transposition and Application of Article 17 of the DSM Directive” (2021) 16(3) JIPLP 265, arguing that the term “communication to the public” has identical meaning in the ISD and the DCSDM and 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>.

of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.” An open list of carve-outs is included in the definition. This covers not-for-profit online encyclopaedias, not-for-profit educational and scientific repositories, open source software-developing and-sharing platforms, providers of electronic communications services as defined in Directive (EU) 2018/1972, online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use. The Commission’s guidance states that there is no scope for the Member States either to widen or to narrow the definition.¹⁷⁵

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

Notably, Denmark, Finland,¹⁷⁶ Hungary and Sweden don’t specify any carve-outs in their transpositions, thus potentially expanding the ambit of the provisions to include providers that were explicitly identified as inappropriate targets during the preparatory work on Article 17.¹⁷⁷ Estonia, France and Italy list the services specified in the carve-outs as excluded from the definition, but do not make clear whether this list is a closed or open one.¹⁷⁸ In Portugal, the list is a closed one. This also appears to be the case in Slovakia, which moreover makes no reference to providers of electronic communications services and includes cloud services that allow users to upload content for the needs of the state, as well as their own use.

Italy excludes from the carve-outs in favour of cloud service providers and online marketplaces OCSSPs that allow the sharing of protected works between multiple users. Presumably, the reasoning is that such providers are engaging in relevant behaviour regardless of their main qualification. How the Directive should be interpreted in this regard and whether therefore an incompatibility arises is unclear – does the qualification as a cloud service provider or online marketplace trump the provider’s actual activity or does the activity disqualify the provider? The second approach is more convincing, leaving Italy in the clear. Along similar lines, the Estonian Explanatory Memorandum notes that the fact that a service provider offers an excluded service does not preclude it from being caught by the provision if it also offers services that allow it to fall within the definition. Provided the “main purpose” proviso is respected, this seems sensible¹⁷⁹ and potentially provides guidance on how to determine whether a provider qualifies as e.g., an online encyclopaedia. It also agrees with Recital 62 of the Directive, according to which the carve-outs are intended to exclude “services that have a main purpose other than that of enabling users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit from that activity.”

According to the Croatian implementation, only online marketplaces whose main activity is retail and which do not provide access to copyright-protected work are included in the carve-out. Croatian law also offers cyberlockers as an example of cloud services that allow users to download content for their own use. The elements are taken from Recital 62 and follow logically from the Article 2(6) definition

¹⁷⁵ European Commission, “Communication from the Commission to the European Parliament and the Council on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market”, 4 June 2021, COM(2021) 288 final, p. 4. Consider also the words “such as” in Article 2(6) DCDSM and “for instance” in Recital 62 DCDSM.

¹⁷⁶ Confirmed in correspondence with the national expert.

¹⁷⁷ Both countries have incorporated the carve-outs into their Explanatory Memoranda, see answers to Q. 5 in the national report on the implementation of Article 17 in Denmark and Hungary.

¹⁷⁸ See also European Commission, “Communication from the Commission to the European Parliament and the Council on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market”, 4 June 2021, COM(2021) 288 final, p. 3, describing the list as “non-exhaustive”.

¹⁷⁹ See also European Commission, “Communication from the Commission to the European Parliament and the Council on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market”, 4 June 2021, COM(2021) 288 final, pp. 4-5.

and are therefore unproblematic. Greece adds “online application shops” to the carve-out. As the Directive’s list is an open one, this does not raise concerns.

With regard to the main definition, Austria, Germany and Sweden add an additional element of competition with other providers. Specifically, in Austria, a provider must play “an important role in the market for online content by competing with online content services such as audio and video streaming services for the same audiences” and in Germany it must “compete with online content services for the same target groups”. In Sweden, it must play “an important role on the content market by competing with other types of existing or potential online content services.” Why the type of online content services with which the provider is competing should be of a different type is unclear and the expansion to potential services offers disquieting ambiguity. These requirements are clearly inspired by Recital 62 DCDSM, according to which “this Directive should target only online services that play an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences.” However, as OCSSPs are online content services that presumably compete with each other, the condition is ill-formulated. To the extent that its application would result in a contraction of the scope of Article 17 DCDSM in a way that is incompatible with the operative part of the Directive, there is a strong argument that it should be ignored.¹⁸⁰ The Czech implementation more cautiously refers to a provider “which competes or may compete with other online services making works available to the same target audience”. This language is compatible with Article 17 DCSDM – but only because it adds or retracts nothing from its scope.

Croatia, Italy, France, Lithuania and Romania clarify that the profit-making purposes may be direct or indirect. Spain requires that online encyclopaedias and educational and scientific repositories have neither direct nor indirect intent to profit to benefit from the exclusion. These restrictions are likely inspired by the wording of Recital 62, which also specifies that OCSSPs’ profit may derive “directly or indirectly” from the sharing of protected content by users. They are arguably unproblematic, at least to the extent that the focus in the Commission’s guidance on the actual nature of the provider is followed.¹⁸¹ Romania includes the Recital 62 example of targeted promotion. Croatia dubiously replaces “profit” with “material or commercial benefit”, widening the net.

Greece renders the word “organises” as “optimises”. The national expert suggests that this raises the requisite threshold of OCSSP involvement with the uploaded material uploaded, potentially leaving certain OCSSPs, such as social media services, that provide organisational freedom to their users, outside the reach of Article 17. The Finnish legislator suggests that only private individuals can be classified as users, although this interpretation has not made it into the text of the law and ought to be ignored by the courts pursuant to *Marleasing*.

Slovenia slips into misalignment with the directive, as a result of its definition of an information society service as “economic activities conducted over the internet that are continuously accessible”.

¹⁸⁰ See *contra*, the Commission’s guidance, according to which “Member States are advised to transpose and apply the different elements of the definition in the light of Recitals 61, 62 and 63, which provide important clarifications on the types of service providers included or excluded. As explained in Recital 62, Article 17 is aimed at online service providers that play an important role on the online content market by competing with other online content service providers, such as online audio and video streaming service providers, for the same audiences” (European Commission, “Communication from the Commission to the European Parliament and the Council on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market”, 4 June 2021, COM(2021) 288 final, p. 4). However, like the Recitals, the Guidance is non-binding when contradictory to the operative part of the Directive.

¹⁸¹ See European Commission, “Communication from the Commission to the European Parliament and the Council on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market”, 4 June 2021, COM(2021) 288 final, p. 5.

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

Finally, in France and Greece the notion of “large amounts” is rendered as “significant quantities”. While the Greek legislator offers no further explanation, the French implementation further specifies that the relevant assessment should be done on a case-by-case basis, considering in particular, the number of infringing uploads, the type of uploaded works and the audience of the service. By decree of the Council of State, it is specified that a “significant quantity” is deemed to have been reached when the service’s audience and the number of content files uploaded by users of the service exceed set thresholds. By order of the Ministry of Culture, those thresholds are as follows: in terms of the audience, 400,000 unique visitors in France a month; in terms of the number of files uploaded by users, 100 for audiovisual works, radio works, written works including the press, video games / 5000 for musical works / 10,000 for visual art works / 10,000 for files including different types of works. The quantitative approach taken here sits uncomfortably alongside Recital 63 of the Directive, which calls for case-by-case assessments, although it does account for the factors the recital highlights. Whether this approach is acceptable will depend on the CJEU’s interpretation of this autonomous concept of EU law.

On the basis of the national reports, it seems that none of the national implementations engage with the elements of organisation and promotion in the definition, despite the fact that these play a decisive role in the definition of OCSSPs.¹⁸²

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

A17 – Table 3: Assessment of national implementations under AC4. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.¹⁸³

Art.17 AC 4	AT	BE	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR
DSM	0	+	+	+	0	-	0	-	-	0	-	-
FR	0	+	+	+	0	-	0	-	-	0	-	-

HU	IE	IT	LV	LT	LU	MT	NL	PT	RO	SK	SI	SE
-	+	0	+	+	+	+	+	-	+	-	-	-
-	+	0	+	+	+	+	+	-	+	-	-	-

¹⁸² 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 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.

¹⁸³ Note that the assessment of Malta has changed in this edition of the report compared to the first edition, as a result of moving the discussion of the piracy purpose to AC 5.

Assessment Criterion 5: Scope of protection

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

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

The relevant terminology can get complex. The prevention of uploads required by point (b) and point (c) *in fine* is often referred to as “blocking” or “upload filters”. Point (c) *in fine* specifically concerns what is known as “stay-down”, because (as opposed to what is the case for point (b)) the target is content which has been previously uploaded to the platform and subsequently removed. The disabling of access to and removal of content mentioned in the first sentence of point (c) is commonly termed “take-down”. In its entirety point (c) can be referred to as “take-down, stay-down”.

In this way, although Article 17(3) DCDSM pulls OCSSPs outside of the safe harbour of Article 14 ECD, Article 17(4) DCDSM replaces that with a different immunity – or “specific liability mechanism” to use the terminology of Recital 66 DCDSM. It is important to understand that, as the thrice-repeated term “best efforts” indicates, (except as concerns take-down) Article 17(4) DCDSM creates obligations not of result, but of means. It has thus been argued that OCSSPs are not required to trace every protected piece of content uploaded to their platforms for either authorisation or removal but need only limit themselves to due diligence endeavours.¹⁸⁴

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

As many commentators have observed, Article 17(4) points (b) and (c) *in fine* require or at least heavily incentivise OCSSPs to put in place automatic filtering tools in order to block and remove infringing content brought to their attention by right-holders.¹⁸⁵ This interpretation has now been confirmed by the

¹⁸⁴ See e.g., I Stamatoudi and P Torremans, “The Digital Single Market Directive” in I Stamatoudi and P Torremans, *EU Copyright Law – A Commentary* (2nd ed., Edward Elgar 2021), para. 17.259-17.261.

¹⁸⁵ See indicatively 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>; J Brieske and A Peukert, “Coming into Force, not Coming into Effect? The Impact of the German Implementation of Art. 17 CDSM Directive on Selected Online Platforms” (2022) CREATE Working Paper 2022/1; I Stamatoudi and P Torremans, “The Digital Single Market Directive” in I Stamatoudi and P Torremans, *EU Copyright Law – A Commentary* (2nd ed., Edward Elgar 2021), para. 17.260; C Geiger and B J Jütte, “Platform Liability under Art. 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match” (2021) 70(6) GRUR International 571; M Husovec and J P Quintais, “How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms under the Copyright in the Digital Single Market Directive” (2021) 79(4) GRUR International 325 and

CJEU.¹⁸⁶ At the same time, the Court has emphasised that OCSSPs cannot be obliged to undertake an independent legal assessment of the content on their platforms.¹⁸⁷ Moreover, as a matter of fact, modern filtering systems are unable to assess the legality of user uploads against the standards of EU copyright law. This presents a risk of false positives and thus of over-blocking.¹⁸⁸

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

This approach represents a significant limitation compared to the standard set by the Directive, unless the application of the principle of proportionality¹⁸⁹ or concessions to OCSSPs' right to conduct their business are to be understood as achieving or enabling the same effect. As the German national expert notes, while promoting the collective management of rights, it runs the risk of disadvantaging small right-holders. Arguably, to the extent that it does not include even a passive obligation to accept licenses offered by small and individual right-holders, it is excessive. This raises issues in light of both the DSM objective of the directive and right-holders' Article 17(2) Charter rights.¹⁹⁰

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

- 1) contains less than half of a work or several works by third parties;
- 2) combines the part or parts of a work with other content; and
- 3) uses the works of third parties only to a specified minor extent¹⁹¹ or is flagged as legal by the end-user.

F R Moreno, "Upload filters' and human rights: implementing Article 17 of the Directive on Copyright in the Digital Single Market" (2020) 34(2) *International Review of Law, Computers & Technology* 153. Taking a more nuanced position, see C Angelopoulos and M Senftleben, "An Endless Odyssey? Content Moderation without General Content Monitoring Obligations" (22 June 2021), available at: <https://ssrn.com/abstract=3871916> or <http://dx.doi.org/10.2139/ssrn.3871916>.

¹⁸⁶ CJEU, C-401/19, *Poland v Parliament and Council*, 26 April 2022, ECLI:EU:C:2022:297, paras 53-54.

¹⁸⁷ CJEU, C-401/19, *Poland v Parliament and Council*, 26 April 2022, ECLI:EU:C:2022:297, para. 90.

¹⁸⁸ J Brieske and A Peukert, "Coming into Force, not Coming into Effect? The Impact of the German Implementation of Art. 17 CDSM Directive on Selected Online Platforms" (2022) CREATE Working Paper 2022/1. See also E Engstrom and N Feamster, "The Limits of Filtering: A Look at the Functionality and Shortcomings of Content Detection Tools" (Engine, March 2017), available at: <https://www.engine.is/the-limits-of-filtering>.

¹⁸⁹ Though the elements listed as relevant to the principle of proportionality in Article 17(5) DCDSM do not fit well with the German approach.

¹⁹⁰ 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>. See also M Husovec and J P Quintais, "Too Small to Matter? On the Copyright Directive's bias in favour of big right-holders" in J Griffiths and T Mylly, *Global Intellectual Property Protection and New Constitutionalism. Hedging Exclusive Rights* (OUP 2021) and European Commission, "Communication from the Commission to the European Parliament and the Council on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market", 4 June 2021, COM(2021) 288 final, pp. 9-10.

¹⁹¹ The German implementation (*Gesetz über die urheberrechtliche Verantwortlichkeit von Diensteanbietern für das Teilen von Online-Inhalten (Urheberrechts-Diensteanbieter-Gesetz (UrhDaG)*, BGBl. I 2021 No. 27, S. 1204) deems the following to be minor, provided that they do not serve commercial purposes or only serve to generate insignificant income: 1. uses of up to 15 seconds in each case of a cinematographic work or moving picture, 2. uses of up to 15 seconds in each case of an audio track, 3. uses of up to 160 characters in each case of a text, and 4. uses of up to 125 kilobytes in each case of a photographic work, photograph or graphic. See s. 10 UrhDaG and answer to Q. 20 in the national report on the implementation of Article 17 in Germany.

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

A very similar system focused on pre-flagging by users and minor extracts operates in Austria.¹⁹² Here too, the OCSSP must make such content accessible and inform the right-holder. OCSSPs are obliged to provide forms to users to enable them to signal before or during the upload that the use is permitted, e.g., because an exception or limitation applies. Abusive submissions must not benefit. Automated filtering may not be used to remove or block minor uses¹⁹³ of works, unless the right-holder can sufficiently explain that irreparable harm would otherwise be caused.

The German and Austrian solutions have been labelled the “balanced” approach to implementation and are to be contrasted with the “traditional” model represented by the remaining implementing Member States, which instead opted for an *ad litteram* approach.¹⁹⁴

The obvious question that arises is whether this “balanced” approach is compatible with EU law. As opposed to the initial German draft, which relied on an exception in favour of *de minimis* uses and therefore (in light of Article 17’s *lex specialis* nature vis-à-vis Article 3 ISD) risked falling foul of the non-exhaustive list of exceptions and limitations in Article 5 ISD,¹⁹⁵ the current presumption-based approach should be viewed as acceptable. This is particularly so considering the principle of proportionality embedded in Article 17(5) DCDSM and the flexibility that this injects into the system, as well as Article 17 DCDSM’s rules on general monitoring and exceptions and limitations (see the analysis of AC 7, 8, 10 and 11 below).

The CJEU’s decision in the *Poland* case should not affect this assessment. Certainly, that decision confirmed the compatibility of Article 17 DCDSM with users’ fundamental rights. To the extent that the German approach provides greater guarantees for those rights, it should be deemed even less

¹⁹² See answer to Qs 15 and 16 in the national report on the implementation of Article 17 in Austria.

¹⁹³ In Austria, a minor use is defined as one that combines less than half of the work or protected subject matter of third parties with a user’s own content, where the use requires 15 seconds of a film or motion picture, 15 seconds of a sound track, 160 characters of a text, or a photograph or a graphic with a data volume of 250 kilobytes each. See answer to Q 15 in the national report on the implementation of Article 17 in Austria.

¹⁹⁴ 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>.

¹⁹⁵ 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>. See also M Husovec and J P Quintais, “Article 17 of the Copyright Directive: Why the German implementation proposal is compatible with EU law”, Parts I and II, Kluwer Copyright Blog, August 2020, available at: <http://copyrightblog.kluweriplaw.com/2020/08/26/article-17-of-the-copyright-directive-why-the-german-implementation-proposal-is-compatible-with-eu-law-part-1/> and <http://copyrightblog.kluweriplaw.com/2020/08/28/article-17-of-the-copyright-directive-why-the-german-implementation-proposal-is-compatible-with-eu-law-part-2/>. Cf. J B Nordemann and J Waiblinger, “Art. 17 DSMCD: a class of its own? How to implement Art. 17 into the existing national copyright acts, including a comment on the recent German Discussion Draft”, Parts I and II, Kluwer Copyright Blog, July 2020, available at: <http://copyrightblog.kluweriplaw.com/2020/07/16/art-17-dsmcd-a-class-of-its-own-how-to-implement-art-17-into-the-existing-national-copyright-acts-including-a-comment-on-the-recent-german-discussion-draft-part-1/> and <http://copyrightblog.kluweriplaw.com/2020/07/17/art-17-dsmcd-a-class-of-its-own-how-to-implement-art-17-into-the-existing-national-copyright-acts-including-a-comment-on-the-recent-german-discussion-draft-part-2/>.

problematic.¹⁹⁶ Could this mean, instead, that it upsets the “fair balance”¹⁹⁷ embedded in Article 17 DCDSM? It is notable that the German solution’s emphasis on *ex ante* safeguards accords with the approaches championed by the Commission and the AG in *Poland*.¹⁹⁸ More importantly, the Court’s decision, while accepting that Article 17 DCDSM is compatible with the Charter, emphasises the safeguards embedded within it.¹⁹⁹ If those safeguards are not to become an empty letter they have to be given concrete meaning.²⁰⁰ From this perspective, it could be argued that it is the “traditional” implementations that are at greater risk of incompatibility with EU law. It should be recalled that not all provisions of EU directives will be suitable for copy-out transposition (see the Introduction above). To the extent that Article 17 DCDSM requires elaboration to make clear how its various sub-paragraphs are intended to interact with each other and safeguard a fair balance between fundamental rights,²⁰¹ there is an argument that it is one such provision. That said, although there is no question that Article 17 is badly drafted, it is difficult to see how a text that has been deemed by the CJEU compatible with a fair balance at the EU level should be found incompatible with that balance when copied out into national law.

Instead, the preferable interpretation is that both the “traditional” and “balanced” approaches to the transposition of Article 17 should be considered acceptable. The key can be found in the final paragraph of the *Poland* decision. This emphasises both that Member States must transpose Article 17 in such a way as to allow a fair balance and that, when implementing the measures transposing Article 17 DCDSM, “the authorities and courts of the Member States” must interpret those measures so as to respect both Article 17 and fundamental rights.²⁰² In this way, the Court enables the compatibility with the Directive and the Charter of both the “balanced” and “traditional” implementation approaches: with the first the legislator takes on the task of identifying the appropriate “fair balance” itself, via the process of transposition. This makes the job of national courts subsequently called upon to apply the provision easier. The second – much like Article 17 DCDSM and the CJEU in *Poland* – delegates the details of finding the correct balance to judicial interpretation – while itself also remaining (according to *Poland*) compatible with freedom of expression.²⁰³ The first approach may be preferable from a policy perspective – but both are legal.

A final question on the German system is whether the presumption on which it relies undermines the preventive nature of relevant rights in the same way as the Italian rules on licensing Article 15 DCDSM discussed above (see section 2 on AC 6). The answer should be in the negative. The German presumption operates at the enforcement rather than the exploitation level (meaning that there is no issue

¹⁹⁶ Indeed, it has been suggested that, to the extent that filtering was widely applied in practice by OCSSPs prior to the adoption of the Directive, Article 17 DCDSM represents a welcome legislative injection of safeguards for user rights, see A Metzger and M Senftleben, “Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law – Comment of the European Copyright Society”, available at: <https://europeancopyrightsociety.org/>, published in (2020) 11 JIPITEC 115.

¹⁹⁷ CJEU, C-401/19, *Poland v Parliament and Council*, 26 April 2022, ECLI:EU:C:2022:297, paras 66, 75, 80, 86-87 and 98-99.

¹⁹⁸ European Commission, “Communication from the Commission to the European Parliament and the Council on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market”, 4 June 2021, COM(2021) 288 final, pp. 20-21 and Opinion of AG Saugmandsgaard Øe in C-401/19, *Poland v Parliament and Council*, 16 July 2021, ECLI:EU:C:2020:586, para. 170 *et seq.* See also J Brieske and A Peukert, “Coming into Force, not Coming into Effect? The Impact of the German Implementation of Art. 17 CDSM Directive on Selected Online Platforms” (2022) CREATE Working Paper 2022/1.

¹⁹⁹ CJEU, C-401/19, *Poland v Parliament and Council*, 26 April 2022, ECLI:EU:C:2022:297, paras 84-100.

²⁰⁰ CJEU, C-401/19, *Poland v Parliament and Council*, 26 April 2022, ECLI:EU:C:2022:297, paras 92, 85-86, 78, respectively.

²⁰¹ Which otherwise is not obvious, see C Angelopoulos and M Senftleben, “An Endless Odyssey? Content Moderation without General Content Monitoring Obligations” (22 June 2021), available at: <https://ssrn.com/abstract=3871916> or <http://dx.doi.org/10.2139/ssrn.3871916>.

²⁰² CJEU, C-401/19, *Poland v Parliament and Council*, 26 April 2022, ECLI:EU:C:2022:297, para. 99.

²⁰³ Although note that there is an argument that a literal transposition is not appropriate where a directive is of bad legislative quality, see R Král, “On the choice of methods of transposition of EU Directives” (2016) 41(2) E.L. Rev. 220.

of detriment to contractual freedom)²⁰⁴ and should be approached with the understanding that (as found by the CJEU) copyright is not absolute.²⁰⁵ It is also relevant that right-holders are offered appropriate remuneration for the communication to the public of uses presumably authorised by law.²⁰⁶

The above being accepted, there is no escaping the fact that the ultimate result will inevitably be one of considerable disharmonisation across the Digital Single Market, as uploads will be subjected to different Article 17-based regimes in different Member States. The effect could be widespread use of geo-blocking. Alternatively, there are indications that OCSSPs may find risking violation of certain national implementations more rewarding from a business perspective.²⁰⁷ Either way, this fragmentation cannot be attributed to faulty implementations at the Member State level, so much as the formulation, adoption and interpretation of a rule at the EU level that is badly suited to serve the Single Market.²⁰⁸ Certainly, it is clear that the notion of “best efforts” is an autonomous concept of EU law – but it is not defined in the Directive and the CJEU refrained from taking advantage of the opportunity provided by *Poland* to explain what such best efforts might look like in practice. This leaves Member States to devise their own interpretations.

Among those implementations that took a more “traditional” approach, it is worth noting two divergences from the EU text adopted in Spain. As the Spanish correspondent explains, in Spain OCSSPs must remove or disable access to transmissions of live events in real time. This resembles the German rule on time-sensitive content. More remarkable is the Spanish requirement that, even if an OCSSP undertakes “biggest [sic – see below] efforts” and, therefore, meets the conditions for the immunity,²⁰⁹ if unauthorized content that harms right-holders remains available, right-holders may still bring an action against it claiming compensation on a different basis, e.g., unjust enrichment. This digs a hole under the entire concept of immunity. The result is an encroachment on the “occupied field” of the Directive in a way that erodes its *effet utile*: the same claimant would be granted the same protection against the same defendant-OCSSP for the same behaviour.²¹⁰

That said, to the extent that the Spanish rule pulls in areas of law outside of copyright it could be that it is not incompatible with either the Directive or the Charter. Recital 66 DCDSM notes that the specific liability mechanism of Article 17 DCDSM should be without prejudice to remedies under national law for cases other than liability for copyright infringement. It is moreover true that overlaps between intellectual property rights, as well as between intellectual property rights and other areas of law, are not prohibited.²¹¹ Perhaps, therefore, there is nothing remarkable about the Spanish provision –

²⁰⁴ Consider in this regard Recital 61 DCDSM.

²⁰⁵ CJEU, C-401/19, *Poland v Parliament and Council*, 26 April 2022, ECLI:EU:C:2022:297, para. 92.

²⁰⁶ See answer to Q. 20 in the national report on the implementation of Article 17 in Germany. It is unclear under the Austrian report if compensation is similarly offered in Austria, although see here Leistner suggesting that that is not the case: M Leistner, “The Implementation of Art. 17 DSM-Directive in Germany – A Primer with Some Comparative Remarks”, 20 December 2021, forthcoming in GRUR Int. 2022, available at: <https://ssrn.com/abstract=3989726> or <http://dx.doi.org/10.2139/ssrn.3989726>.

²⁰⁷ See G Spindler, “The Liability system of Art. 17 DSM-Directive and national implementation – Contravening prohibition of general monitoring duties?” (2020) 10 JIPITEC 344; 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 and J Brieske and A Peukert, “Coming into Force, not Coming into Effect? The Impact of the German Implementation of Art. 17 DSM-Directive on Selected Online Platforms” (2022) CREATe Working Paper 2022/1.

²⁰⁸ 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>.

²⁰⁹ Although note the Spanish correspondent’s observations regarding the lack of correspondence between the terms of Article 17(4) DCDSM and those of this provision (FN 4 in the Spanish report).

²¹⁰ See M Peguera, “Spanish transposition of Arts. 15 and 17 of the DSM Directive: overview of selected issues” (2022) 17(5) JIPLP 450.

²¹¹ Consider, for example, CJEU, Case C-683/17, *Cofemel*, ECLI:EU:C:2019:721, 12 September 2019, paras 50-52, which confirm that “in certain situations” cumulative protection under copyright and design law is possible – although it “must not have the consequence that the respective objectives and effectiveness of those two forms of protection are undermined”.

particularly as it does not appear to guarantee alternative protection, but presumably depends on the details of the national rules governing the relevant area of law.²¹² Unquestionably, the Spanish rule fails to provide a fair balance with end-users' freedom of expression as identified by the CJEU in *Poland* – nor, one could add, with OCSSP's freedom to conduct a business. If, however, it is viewed as an application of purely home-grown law, as opposed to a national implementation of the DCDSM, EU law on fundamental rights would not apply.²¹³

Ultimately, the question concerns the harmonising power of Article 17 DCDSM: does that provision harmonise “fully” the liability of OCSSPs for copyright-infringing content uploaded by their users or does it harmonise “fully” the liability of OCSSPs only for communication to the public? The issue is key, given that pre-DCDSM in many Member States online platforms would not have been held directly liable for copyright infringement resulting from user-uploads, but may have been subject to other courses of action, e.g., accessory liability.²¹⁴ It is also relevant that – as the proposal for the provision²¹⁵ reveals – its core purpose is to ensure that Member States hold OCSSPs liable under certain circumstances. To that extent, it is very different to the ECD safe harbours, whose purpose was to ensure that providers that abided by certain conditions were *not* held liable.

Given its tendency to broad interpretations of the EU copyright directives, it is very likely that – faced with a preliminary question on the issue – the CJEU would classify the Spanish rule as faulty implementation. Either way, Article 14 ECD may provide an out for OCSSPs: under Article 17(3) DCDSM, that provision no longer applies “to the situations covered” by Article 17 DCDSM. However, the Spanish transposition uses more targeted wording: “regarding the liability arising from carrying out acts of communication or making available to the public”.²¹⁶ This could mean that the immunity continues to apply to other kinds of liability. If so, even if it is accepted that the Spanish provision is itself in conflict with the Directive, the safe harbour could pull Spanish law back into compatibility. Of course, given the temporary nature of the current Spanish transposition,²¹⁷ it may be that the issue will quickly disappear without resolution.²¹⁸ Even if that happens, the central question of the intersection between Article 17 DCDSM and pre-existing national rules on alternative courses of action will remain relevant across the EU.

A different matter concerns the interesting concept of “best efforts”. Research has found that the term has been inaccurately translated into most of the official language versions of the DCDSM.²¹⁹ Although remedied in some national implementations, this problem has occasionally filtered through to the

²¹² The example of unjust enrichment appears strange in this regard, as this is often subject to a rule of subsidiarity that holds that it should not apply where protection under an alternative specific course of action has been denied, see P del Olmo and X Basozabal, “Unjustified Enrichment in Spanish Law” (2017) 25 *Restitution L Rev* 104. It should also be considered how likely it will be that a different area of law can be used to provide relief to right-holders against OCSSPs that abide by the conditions of Article 17(4) DCDSM: it is likely that by meeting those conditions OCSSPs will fall outside of the reach of other legal tools.

²¹³ See Article 51(1) of the Charter.

²¹⁴ See C Angelopoulos, *European Intermediary Liability in Copyright – A Tort-Based Analysis* (Kluwer 2016) and summary at C Angelopoulos, “Harmonising Intermediary Copyright Liability in the EU: A Summary” in G. Frosio (ed.), *The Oxford Handbook of Online Intermediary Liability* (Oxford University Press, 2020), pp. 315-334.

²¹⁵ See Article 13 in European Commission, “Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market”, 14 September 2016, COM(2016) 593 final.

²¹⁶ See answer to Q. 7 in the national report on the implementation of Article 17 in Spain.

²¹⁷ As the Spanish national expert explains (see answer to Q. 2 in the national report on the implementation of Article 15 and Q. 1 in the national report on the implementation of Article 17 in Spain), the Spanish transposition happened via a Royal Decree-Law which is due to be replaced with an ordinary law.

²¹⁸ Note that the ECD safe harbours are due to be refined and re-homed into the Digital Services Act, currently in the process of being adopted into EU law, see European Commission, “Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC”, 15 December 2020, COM/2020/825 final.

²¹⁹ See A Larroyed, “When Translations Shape Legal Systems: How Misguided Translations Impact Users and Lead to Inaccurate Transposition – The Case of ‘Best Efforts’ Under Article 17 DCDSM” (30 November 2020), available at: <https://ssrn.com/abstract=3740066> or <http://dx.doi.org/10.2139/ssrn.3740066>.

national level. According to the national reports, in Austria, the concept is rendered as “every effort”,²²⁰ in Cyprus and Greece as “every possible effort”, in Italy as “greatest or maximum efforts”, in Latvia as “greatest efforts” and in Spain as “their [i.e., the OCSSPs] biggest efforts”. This suggests a tightening of the applicable standard: while the term “best efforts” suggests a contextual threshold that accounts for the options available in light of the cooperation of right-holders, the principle of proportionality and the need to avoid general monitoring and respect users’ rights (see below ACs 6, 7, 8 and 10),²²¹ these translations could be read to refer to what is possible disregarding all other considerations. This pulls them out of alignment with the need to respect competing fundamental rights²²² and results in fragmentation of the internal market – something particularly troublesome, given that the notion clearly represents an autonomous concept of EU law.²²³ Complicating this matter is the issue of coherence within established national legal terminology. The Latvian national experts state that the term “greatest efforts” is used in the Latvian implementation for purely linguistic reasons, but that it has the same meaning as “best efforts” in the Directive. The Romanian national expert criticises the literal translation adopted in Romania of “best efforts”, suggesting that the “every reasonable effort” would provide a better fit.²²⁴ While this does not likely create problems for the Digital Single Market or fundamental rights, it poses a risk, as unfamiliar terms can lead to erratic national interpretations.

Moving in the other direction, Hungary has dropped the adjective “high” from “high industry standards of professional diligence”, leading to a slight loosening of the standard. The Slovenian implementation talks of the “diligence of a good professional,” a phrase which the national expert assesses as potentially not as explicitly clear as “high industry standards”. Latvia omits mention of “high industry standards of professional diligence” entirely and requires that the disabling of access to or removal of content be “immediate” rather than “expeditious” – though again, the national experts suggest the issue is only linguistic. It also requires “greatest efforts” for the immunity’s take-down obligations, contrary to the Directive.

Particularly interesting is the Swedish approach. Sweden eschews the term “best efforts” and instead requires the OCSSPs take “such measures they can reasonably be required to take”. The Swedish expert explains that this represents an attempt to avoid the “incomprehensible regime” of Article 17 DCSDM that otherwise results in “contradictory statements”. Instead:

“The understanding is that such a standard better expresses the need to make an overall assessment, while accounting for the proportionality principle, and implying that the service providers’ obligations in this regard are not absolute”.²²⁵

No reference is made in the text of the Swedish implementation to “high industry standards of professional diligence”, although the preparatory works explain that these form the starting point for the assessment. The aim appears to be a flexible standard wherein:

²²⁰ While Austria, following the lead of the German version of the DCSDM, uses the term “*alle Anstrengungen*”, Germany has opted for the terms “*bestmögliche Anstrengungen*” and “*bestmöglich sicherzustellen*”. See answers to Q. 9 on Article 17 in the national reports on Austria and Germany.

²²¹ For a discussion of what should be necessary in practice see European Commission, “Communication from the Commission to the European Parliament and the Council on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market”, 4 June 2021, COM(2021) 288 final, p. 9-10 and A Metzger and M Senfleben, “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.

²²² M Peguera, “Spanish transposition of Arts. 15 and 17 of the DSM Directive: overview of selected issues” (2022) 17(5) JIPLP 450.

²²³ European Commission, “Communication from the Commission to the European Parliament and the Council on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market”, 4 June 2021, COM(2021) 288 final, p. 8.

²²⁴ See answer to Q. 9 in the national report on the implementation of Article 17 in Romania.

²²⁵ See answer to Q. 9 in the national report on the implementation of Article 17 in Sweden.

“Whilst industry practices and use of most effective measures to reach the aim of preventing access are given particular importance, an economically weaker actor is not expected to use the most costly or sophisticated solutions on the market, even if these constitute industry practice. The service provider is instead required to choose the best method out of those available that can reasonably be required from the perspective of the service provider’s situation.”

In line with the reasoning applied above to Austria and Germany, the Swedish solution should be understood to be compatible with both the Directive and fundamental rights.

With regard to the exceptional regime for start-ups, Germany relies on the principle of proportionality to rebuttably presume that service providers with an annual turnover of no more than 1 million euros (which German law labels “small service providers”) are not obliged to engage in stay-down. The principle of proportionality can be again employed to salvage this innovation.²²⁶ An interesting twist comes from Hungary, where the rules on start-ups are due to come into force 6 months after the rest of the regime, leaving SMEs temporarily facing stricter duties. Croatia and Portugal have included the clarification of Recital 67, according to which the special regime for start-ups should not apply to newly created services or to services provided under a new name which pursue the activity of an already existing OCSSP which ages out of that regime. This is unproblematic.

The Lithuanian expert suggests that the hosting safe harbour continues to apply in Lithuania to OCSSPs. This discrepancy can be resolved through the application of the principles of *lex posterior* or *lex specialis*. In Croatia the linking safe harbour continues to apply. As Article 17 DCDSM requires an upload to kick in this does not pose problems. Noteworthy are the Czech, Slovenian and Slovak implementations, which according to the national experts exclude the application of the hosting safe harbour to OCSSPs in general or to OCSSPs when communicating to the public. This may result in misfires, e.g., liability for the hosting of links.

Finally, the Finnish substitution of “upload” with “saving” (see above AC 2) tracks throughout the Finnish implementation, affecting the immunity conditions. Somewhat curiously, this has resulted in a correct implementation of point (b) on “unavailability”, but a divergence on point (c) *in fine*, under which Finland requires OCSSPs to prevent future “saving” of the content to the service. This not only broadens the liability regime, but creates a disconnect between the two immunity prongs.

Along similar lines, the Austrian, Croatian, Finnish, French, German, Greek, Maltese, Romanian and Slovak implementations all clarify that the Directive’s liability exception mechanism does not apply to providers whose (main) purpose is to engage in or to facilitate piracy.²²⁷ An equivalent restriction is included in Recital 62 of the Directive, but – as with the competition element – is not reflected in the text of Article 17 DCDSM. It is, moreover, unclear how to determine that the purpose of a service is piracy other than by reference to its abidance by the conditions of Article 17(4) DCDSM. Given that the criterion restricts the field of application of Article 17 DCDSM, it may be that – unless it is to be seen as an application of the principle of proportionality established in Article 17(5) DCDSM – national implementations would have done better to ignore it. Romania is particularly noteworthy, as it also

²²⁶ None of the other national implementations clarify what the principle of proportionality will mean for smaller providers that do not qualify for the special start-up regime. As commentators observe, this is unfortunate and risks placing them at a disadvantage, see A Metzger and M Senftleben, “Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law – Comment of the European Copyright Society”, available at: <https://europeancopyrightsociety.org/>, published in (2020) 11 JIPITEC 115 and T Spoerri, “On Upload-Filters and other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market” (2019) 10 JIPITEC 173.

²²⁷ See answers to Q. 5 in the national reports on the implementation of Article 17 in Austria, France, Germany, Greece and Malta and answers to Q. 7 in the national report on the implementation of Article 17 in Croatia and Romania.

excludes providers who practice or facilitate piracy from the protection of the hosting safe harbour of Article 14 ECD.²²⁸

In conclusion, most Member States appear to have opted with safe implementations that do not drift far from the Directive’s text. The translation of “best efforts” or “high industry standards of professional diligence” in Austria, Cyprus, Greece, Hungary, Italy, and Spain negatively impacting these countries. Latvia presents a similar problem, which the national experts however suggest is solved by interpretation – it nevertheless fails on “high industry standards” and take-down obligations. Germany is held back by its rules on licensing small and individual right-holders. The Spanish rule on alternative routes to compensation raises serious compatibility questions. Finland’s daring treatment of “uploads” dooms its approach, while the Czech Republic, Slovenia and Slovakia may have overcorrected with regard to the hosting safe harbour. The implementation of the piracy clause in Recital 62 raises questions for Austria, Croatia, Finland, France, Germany, Greece, Malta, Romania and Slovakia.

A17 – Table 4: Assessment of national implementations under AC5. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.²²⁹

<u>Art.17 AC 5</u>	AT	BE	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR
DSM	-	+	0	-	-	+	+	0	-	-	-	-
FR	-	+	0	-	-	+	+	0	-	-	-	-

HU	IE	IT	LV	LT	LU	MT	NL	PT	RO	SK	SI	SE
0	+	0	-	+	+	-	+	+	-	-	-	+
0	+	0	-	+	+	-	+	+	-	-	-	+

Assessment Criterion 6: Right-holder cooperation

As in Article 17(4) DCDSM, in all national implementations, take-down and stay-down obligations are only triggered by the actions of right-holders. This is in line with Article 17(4), points (b) and (c) *in fine* DCDSM, which depend the blocking obligations they impose on the provision of “relevant and necessary information” from right-holders and take-down obligations on the provision of “substantiated notices” from right-holders. As a result, OCSSPs are not required to block or remove content at their own initiative.

The Irish implementation fails to distinguish between a “sufficiently substantiated notice” and “relevant and necessary information”, with its rendition of Article 17(4)(c) requiring stay-down on the basis only of a “sufficiently substantiated notice”. The distinction between the two notions in the Directive ought not to be ignored. The Commission’s guidance places emphasis on the importance of differentiating between them.²³⁰ It moreover indicates one crucial difference: while stay-down need not require information on the location of the content, take-down would. Assuming Irish law interprets “sufficiently

²²⁸ See answer to Q. 7 in the national report on the implementation of Article 17 in Romania.

²²⁹ Note that the assessment of Malta and France has changed in this edition of the report compared to the first edition, as a result of moving the discussion of the piracy purpose to AC 5. The assessment of Spain was also changed from + to 0 to conform the similar assessments regarding the field of operation of the Directive with regard to newer national implementations examined in the second version of the report.

²³⁰ European Commission, “Communication from the Commission to the European Parliament and the Council on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market”, 4 June 2021, COM(2021) 288 final, p. 15-16.

substantiated notice” to include such “relevant and necessary information” in cases of stay-down requests, it can remain compliant.

Latvia displays some confusion by referring to a “justified notification” in relation to the stay-down obligations in prong (c) of the immunity. This is despite correctly using the term “relevant and necessary information in prong (b). As with the Irish implementation, if interpreted and applied correctly, this approach should be accepted.

The Lithuanian implementation elaborates on what a sufficient notice should include, namely, “the reasons for which the notice provider consider the content illegal; a clear location of the content; notice should contain such information that would allow the service provider to make a justified and well considered decision regarding the content, and especially whether the content is illegal and therefore should be removed or the access to it should be eliminated”.²³¹ A number of national legislators (Estonia, Finland, Slovakia and Sweden) also appear to have contemplated what a “sufficiently substantiated notice” and “relevant and necessary information” in preparatory works.

Although not mentioned in the Directive, the Commission guidance on Article 17 envisions a special “earmarking” process for content. According to the guidance, when providing “relevant and necessary information” to OCSSPs, right-holders may choose to “earmark” content the unauthorised online availability of which could cause them significant economic harm. Such earmarking can be taken into account when assessing whether OCSSPs have undertaken “best efforts” to ensure the unavailability of the content.²³²

The German national report identifies a possibility for trusted right-holders to “earmark” content for removal, albeit limited to the context of the complaints mechanism. According to the German rules, if (following a review by a natural person) a trustworthy right-holder declares that a “use presumably authorised by law” is nevertheless infringing and that its continued communication to the public would substantially impair the economic exploitation of the work, the OCSSP must immediately block the content until the conclusion of the complaints procedure. This means that right-holders with larger and/or premium repertoires, qualified personnel, a case history of justified notice and takedown requests etc., can force derogations from the general rule according to which presumably authorised uses must remain online until the conclusion of a complaints procedure (as the national expert explains, this is known as the “red-button procedure”). A similar option exists in Austria, where a right-holder can request the use of automated means for the detection of uses which the law views as minor and therefore by default permissible.²³³

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

While there is a strong argument that earmarking content as envisioned in the Commission’s guidance provides excessive power to right-holders to have content removed from platforms,²³⁴ within the context of these national implementations and by the measure of the standard applied by the CJEU in the *Poland* case (which accepts as compatible with fundamental rights the version of Article 17 DCDSM that does not include the safeguard of the German and Austrian presumption), the solutions these two countries introduce are arguably compatible with both the directive and fundamental rights. With regard to Germany, the “earmarking” only results in a reversion to a blocking or removal which will be automatic in other implementations. With regard to Spain, the rule on live take-downs, like the other take-down

²³¹ See answer to Q. 8 in the national report on the implementation of Article 17 in Lithuania.

²³² European Commission, “Communication from the Commission to the European Parliament and the Council on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market”, 4 June 2021, COM(2021) 288 final, p. 14.

²³³ See answer to Q. 15 in the national report on the implementation of Article 17 in Austria.

²³⁴ F Reda and P Keller, “European Commission back-tracks on user rights in Article 17 Guidance”, available at: <http://copyrightblog.kluweriplaw.com/2021/06/04/european-commission-back-tracks-on-user-rights-in-article-17-guidance/>.

and stay-down obligations imposed by the special liability mechanism, is best approached as an obligation of means, rather than result. If so, it can potentially be absorbed²³⁵ by the requirements of “best efforts” and proportionality.²³⁶

Finally, Slovenia appears to attempt an “earmarking” process in the form of a provision (separate to that on the conditional immunity) according to which an author may request that an online content-sharing service provider remove his notified copyrighted work or disable access to it if the work has been uploaded and communicated to the public without the author's permission. For this purpose, authors are required to “substantiate their requests “to the extent necessary” to enable the provider to make an informed decision. As this option is available to all right-holders and there does not appear to be anything that differentiates it from the notice-and-take-down system specified in implementation of Article 17(4) DCSDM, it should not be viewed as a real “earmarking” process.

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

Art.17 AC 6	AT	BE	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR
DSM	+	+	+	+	+	+	+	+	+	+	+	+
FR	+	+	+	+	+	+	+	+	+	+	+	+

HU	IE	IT	LV	LT	LU	MT	NL	PT	RO	SK	SI	SE
+	+	+	+	+	+	+	+	+	+	+	+	+
+	+	+	+	+	+	+	+	+	+	+	+	+

Assessment Criterion 7: General monitoring

According to Article 17(8) DCSDM, the liability rules introduced by Article 17 “shall not lead to any general monitoring obligation”. The meaning of general monitoring is highly contested. Broadly speaking, while one school of thought holds that monitoring is general if all or most of the content handled by a provider is monitored,²³⁷ another maintains that the generality of the monitoring is not determined by the generality of what is being monitored, but by the generality of the objective of the monitoring.²³⁸ While no clarity is provided by the Directive, the CJEU in its *Poland* decision appears to depart from earlier case law that had unambiguously embraced the first interpretation in the area of intellectual property rights, in favour of the second.²³⁹ That said, the Court has also held that OCSSPs,

“cannot be required to prevent the uploading and making available to the public of content which, in order to be found unlawful, would require an independent assessment of the

²³⁵ Note that Article 17(5) includes among the factors that determine where an OCSSP has complied with its obligations under Article 17(4) DCSDM the “type of works or other subject matter” uploaded by the users of the service.

²³⁶ M Peguera, “Spanish transposition of Arts. 15 and 17 of the DSM Directive: overview of selected issues” (2022) 17(5) JIPLP 450.

²³⁷ See e.g., C Angelopoulos and M Senftleben, “An Endless Odyssey? Content Moderation without General Content Monitoring Obligations” (22 June 2021), available at: <https://ssrn.com/abstract=3871916> or <http://dx.doi.org/10.2139/ssrn.3871916>.

²³⁸ See e.g., G Spindler, “The Liability system of Art. 17 DSMD and national implementation – Contravening prohibition of general monitoring duties?” (2020) 10 JIPITEC 344.

²³⁹ CJEU, C-401/19, *Poland v Parliament and Council*, 26 April 2022, ECLI:EU:C:2022:297, paras 85-86 and 90.

content by them in the light of the information provided by the rightholders and of any exceptions and limitations to copyright.”²⁴⁰

Filtering can therefore only be employed to take content down which – to use the language of the Commission’s guidance – is “manifestly” infringing.²⁴¹

According to the information provided by the national experts, while most examined Member States (with the notable exceptions of Denmark, Slovakia and Sweden)²⁴² transpose the prohibition on general monitoring, like the Directive, they do not engage with its meaning. According to the Swedish national expert, the Swedish legislator omitted the provision as it views it as directed to Member States.²⁴³ This logic is convincing, although a direct instruction to national courts would be ideal.

It is interesting that France, Portugal and Germany rely on their pre-existing national implementations of Article 15(1) ECD, which suggests that they view “general monitoring” in the DCDSM as having the same meaning as “general monitoring” in the ECD. As commentators have observed, this is not obvious.²⁴⁴

Most national implementations make no reference to the concept of “manifestly infringing” content as recommended by the European Commission²⁴⁵ – few, however, make much of the concept. Swedish law explicitly states that only content which “may be assumed, with a high degree of certainty, to infringe copyright” may be subject to automatic blocking. The Czech implementation similarly provides that “[w]here automatic content recognition tools are used, the prevention of uploading [and] re-uploading of a work [...] 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” – i.e., as likely to be infringing. The Czech implementation defines identical content as content without additional elements or added value, and equivalent content as 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.

As the German national expert observes, the German rules on “uses presumably authorised by law” also amount to rules on “manifestly non-infringing” uploads. The same can be said of the similar Austrian rules. Conversely, the German rules on trustworthy right-holders represent rules on “manifestly infringing” uploads. This is also true of the German and Spanish rules providing extra protection to time-sensitive content. To the extent, however, that (as noted above under AC 5) these rules form part of national attempts to reconcile the conflicting paragraphs of Article 17 DCDSM (and as long as they do not go beyond the establishment of obligations of means), they should be accepted as compatible with the Directive.

²⁴⁰ CJEU, C-401/19, *Poland v Parliament and Council*, 26 April 2022, ECLI:EU:C:2022:297, para. 90.

²⁴¹ European Commission, “Communication from the Commission to the European Parliament and the Council on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market”, 4 June 2021, COM(2021) 288 final, p. 20.

²⁴² While there is an argument that the general monitoring prohibition does not need to be transposed given that it provides an instruction to Member States, so that Member States are not in violation unless they impose a general monitoring obligation, the safer approach is for national legislators to incorporate it into national law and thus ensure that domestic courts can directly apply it. Of course, it can be said that comparable protections are offered via other legal mechanisms, e.g., the law of fundamental rights or the “Marleasing” principle (see CJEU, C-106/89, *Marleasing*, 13 November 1990, ECLI:EU:C:1990:395, para. 8). As a result, the Danish implementation is marked “unclear” in the table.

²⁴³ See answer to Q. 14 in the national report on the implementation of Article 17 in Sweden.

²⁴⁴ See C Angelopoulos and M Senftleben, “An Endless Odyssey? Content Moderation without General Content Monitoring Obligations” (22 June 2021), available at: <https://ssrn.com/abstract=3871916> or <http://dx.doi.org/10.2139/ssrn.3871916>.

²⁴⁵ European Commission, “Communication from the Commission to the European Parliament and the Council on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market”, 4 June 2021, COM(2021) 288 final, p. 20-24.

Further analysis can be found in certain national preparatory documents. For example, the Dutch national expert reports that, according to the Dutch Explanatory Memorandum, filtering user uploads in order to detect *specific* works for which right-holders have provided the OCSSP with the relevant and necessary information does not amount to general monitoring. Echoing *Poland*, it further suggests that, as preventive filtering of infringing content can be at odds with the freedom of information and expression, it should be limited to cases of “likely infringement” (see also below AC 10). The Estonian Explanatory Memorandum agrees that, while “high industry standards” may require the application of filtering technologies, the prohibition on general monitoring means that OCSSPs cannot be obliged to identify and remove content unless they have previously been provided with relevant information. The French national expert observes that the concept has a pre-existing history in France, where commentators have argued that copyright infringement can never be considered to be manifestly infringing given the complexity and nuance of the relevant rules.

The initial Finnish proposal regulated automated blocking mechanisms explicitly and noted that OCSSPs may use them only when it can be presumed with great likelihood that the situation concerns infringement of copyright and the communication to the public right. The Finnish Parliament’s Constitutional Law Committee considered this unconstitutional, leading to the removal of this wording. The Committee instead recommended that, provided the DCDSM permits this, filtering or other practices and procedures which do not sufficiently distinguish illegal from legitimate content should be explicitly prohibited – however, this wording has not been adopted in Finnish law.²⁴⁶ The explanatory memorandum on the Finnish implementation states that legitimate uses should be identified through metadata, although (as the national expert notes) it is currently unclear how that would work.

Although no mention is made of such systems in the law itself, the Hungarian Explanatory Memorandum refers to the use of pre-flagging systems as a potential solution. It also mentions “pre-filtering” (“upload filters”) technologies to identify the plausibility of the lawfulness of sources as an option – though it is unclear how filtering (which instead has been identified by commentators as the primary threat for over-blocking)²⁴⁷ can help protect end-users. A solution along the German lines was contemplated in Estonia, but ultimately rejected. According to the Estonian Explanatory Memorandum, this was because it was seen as out of line with the Commission’s proposal to safeguard freedom of expression, thereby risking fragmentation of the single market. As noted above (see discussion on AC 5), these concerns are valid.²⁴⁸ It was additionally not considered capable to accommodate more efficient solutions that might emerge in future.

All the above national approaches should be accepted as compatible with the Directive. Of course, the Commission’s guidance is not binding. There is also a strong argument that, to the extent that filtering – even if used only to identify “manifest” infringements – is not currently developed enough to detect exceptions and limitations to copyright, the inevitable result will be the take-down of lawful content.²⁴⁹ Paradoxically, such take-downs are explicitly rejected by the CJEU, which instead states that,

²⁴⁶ See answer to Q. 20 in the national report on the implementation of Article 17 in Finland.

²⁴⁷ See C Angelopoulos and M Senftleben, “An Endless Odyssey? Content Moderation Without General Content Monitoring Obligations” (22 June 2021), available at: <https://ssrn.com/abstract=3871916> or <http://dx.doi.org/10.2139/ssrn.3871916>.

²⁴⁸ See 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> and J Brieske and A Peukert, “Coming into Force, not Coming into Effect? The Impact of the German Implementation of Art. 17 CDSM Directive on Selected Online Platforms” (2022) CREATE Working Paper 2022/1.

²⁴⁹ See answer to Q 7 in the national report on the implementation of Article 17 in France. See also C Angelopoulos and M Senftleben, “An Endless Odyssey? Content Moderation without General Content Monitoring Obligations” (22 June 2021), available at: <https://ssrn.com/abstract=3871916> or <http://dx.doi.org/10.2139/ssrn.3871916>. See also C Angelopoulos, *European Intermediary Liability in Copyright – A Tort-Based Analysis* (Kluwer 2016), section 2.2.4.1.

“a filtering system which might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications, would be incompatible with the right to freedom of expression and information, guaranteed in Article 11 of the Charter, and would not respect the fair balance between that right and the right to intellectual property.”²⁵⁰

One can only assume that the word “adequately” carries this statement. Beyond this, within the logic of *Poland*, any filtering misfires are to be managed via *ex post* safeguards – the importance of which is heavily emphasised by the Court as appropriate “in cases where, notwithstanding the safeguards laid down in those latter provisions, the providers of those services nonetheless erroneously or unjustifiably block lawful content”.²⁵¹

Within this context, the outcome of the compatibility assessment for AC 10 is much as it is for AC 5. Those Member States – Austria, Germany and Sweden – that endeavour to put in place safeguards geared at enabling automatic filtering measures to avoid erroneous take- and stay-downs must be seen as compatible with both the Directive and the EU’s law of fundamental rights:²⁵² they have devised a solution that, to the extent possible, reconciles the CJEU’s conflicting instructions. On the other hand, those Member States that, as part of their “traditional” implementation, follow the CJEU in avoiding engaging with the practical implications of the general monitoring prohibition are likewise all also in the compatibility clear. Those that have tried to reflect *Poland* in their legislation can also not be faulted.

A17 – Table 6: Assessment of national implementations under AC 7. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.

Art.17 AC 7	AT	BE	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR
DSM	+	+	+	+	+	0	+	+	+	+	+	+
FR	+	+	+	+	+	0	+	+	+	+	+	+

HU	IE	IT	LV	LT	LU	MT	NL	PT	RO	SK	SI	SE
+	+	+	+	+	+	+	+	+	+	0	+	0
+	+	+	+	+	+	+	+	+	+	0	+	0

Assessment Criterion 8: Exceptions and limitations

According to Article 17(7) DCDSM, the liability framework set out in Article 17(4) “shall” not result in the prevention of the availability of non-infringing material. Importantly, as opposed to the “best efforts” mechanisms of Article 17(4), this is an obligation to achieve a specific result.²⁵³ In particular, according to Article 17(7) DCDSM, when uploading and making available content on OCSSPs, users must be able to enjoy the exceptions and limitations for the purposes of: (a) quotation, criticism, review; and (b) caricature, parody or pastiche. In relation to uploads onto OCSSPs, these exceptions and

²⁵⁰ CJEU, C-401/19, *Poland v Parliament and Council*, 26 April 2022, ECLI:EU:C:2022:297, para. 86.

²⁵¹ CJEU, C-401/19, *Poland v Parliament and Council*, 26 April 2022, ECLI:EU:C:2022:297, para. 93.

²⁵² Discussing this see J P Quintais, G Frosio, S van Gompel, P B Hugenholtz, M Husovec, B J Jütte and M Senftleben, “Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics” (2020) 10 JIPITEC 277.

²⁵³ CJEU, C-401/19, *Poland v Parliament and Council*, 26 April 2022, ECLI:EU:C:2022:297, para. 78. See also European Commission, “Communication from the Commission to the European Parliament and the Council on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market”, 4 June 2021, COM(2021) 288 final, p. 2.

limitations are thus mandatory for Member States. This is in contrast to their status in Article 5(2) and (3) ISD, where they are presented as optional.²⁵⁴

This also means that those exceptions and limitations that are listed in Article 5 ISD but not Article 17(7) DCDSM remain optional for the Member States, including exceptions and limitations of obvious relevance in the OCSSP context, such as incidental inclusion.²⁵⁵ As was the case with exceptions and limitations in the context of Article 15 DCDSM (see above section 2 on AC 5), this allows pre-existing disharmonisation to affect the treatment of content on OCSSPs across the EU. It is notable, that, for example, according to the Cypriot expert, in Cyprus, the general copyright exceptions and limitations are not applicable to uses on OCSSPs.

The national responses to the questionnaire reveal that, prior to the adoption of the Directive, Cyprus, Hungary, Ireland and Lithuania did not recognise a parody exception. The Czech Republic, Latvia, Slovenia and Spain did not, prior to implementation, include an exception in favour of pastiche.²⁵⁶ In Austria, Finland, Greece, Italy and (to some extent) Sweden, although no statutory provision covered parodies, protection was recognised by the courts. With the exceptions of Finland, in these countries, the new statutory parody exception extends only to uses on OCSSPs – this is nevertheless sufficient for compatibility purposes.

Croatia presents an interesting case, as the national legislator has added to the pre-existing exceptions new ones that apply only to uses on OCSSPs. As a result, different legal regimes are relevant for the creation of quotations and parodies and for their online upload and online dissemination. While this is a strange legislative choice, it is not obviously incompatible with the Directive. That said, the complexity of the resultant legal framework may pose difficulties from a human rights perspective. Also problematic is the fact that the Croatian parody exception extends only to parodic *works*, rather than *content*.²⁵⁷ This is incompatible with CJEU case law. Likewise, the Croatian OCSSP quotation exception requires a *literal* quotation, which does not appear to be a requirement under EU law.²⁵⁸

Denmark is noteworthy, as it temporarily recognised no exception for parodies. While Danish courts had previously recognised a non-statutory rule protecting parodies from copyright infringement, this interpretation was rejected in February 2022 by the *Østre Landsret* (Eastern High Court).²⁵⁹ The judgment brought Danish law clearly out of line with the DCDSM. Upon appeal, the Danish Supreme Court reinstated parody in Denmark. The parody exception is specifically implemented for uses on OCSSPs.²⁶⁰ Slovakia limits protection to parodies, caricatures and pastiches that do not give rise to a likelihood of confusion with the original work, contrary to CJEU case law.²⁶¹ Irish law subjects its quotation exception and new parody exception to the rules on fair dealing. Whether this will align with

²⁵⁴ Although note that the quotation exception is arguably obligatory under the Berne Convention, see L Bently and T Aplin, “Whatever Became of Global Mandatory Fair Use? A Case Study in Dysfunctional Pluralism” in S Frankel (ed.), *Is Intellectual Property Pluralism Functional?* (Edward Elgar 2019), pp. 8-36, available at: <https://ssrn.com/abstract=3119041>.

²⁵⁵ Article 5(3)(i) ISD. See J P Quintais, G Frosio, S van Gompel, P B Hugenholtz, M Husovec, B J Jütte and M Senftleben, “Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics” (2020) 10 JIPITEC 277 and 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.

²⁵⁶ On the importance of pastiche in this context, see A Metzger and M Senftleben, “Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law – Comment of the European Copyright Society”, available at: <https://europeancopyrightsociety.org/>, published in (2020) 11 JIPITEC 115 and M Senftleben, “Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market”, 4 April 2019, available at: <https://ssrn.com/abstract=3367219>.

²⁵⁷ Cf, CJEU, C-201/13, *Deckmyn*, 3 September 2014, ECLI:EU:C:2014:2132, [21].

²⁵⁸ See CJEU, C-145/10, *Eva-Maria Painer*, 1 December 2011, ECLI:EU:C:2011:798 and CJEU, C-476/17, *Pelham*, 29 July 2019, ECLI:EU:C:2019:624.

²⁵⁹ See the answer to Q. 16 in the national report on the implementation of Article 17 in Denmark.

²⁶⁰ See s. 52c(1) of the Danish Copyright Act (LBK no. 1093 of 20/08/2023).

²⁶¹ *Ibid.*

the EU requirements is unclear. This problem is compounded by the fact that it is also unclear whether the requirements under Article 17(7) DCDSM are the same as those under Article 5(3)(d) and (k) ISD.²⁶²

The questionnaires make clear that the quotation exception enjoyed broad recognition in national copyright laws even prior to the implementation of the Directive – however, it was often very narrowly construed, a problem that persists post-implementation. For example, France covers only “short quotations justified by the critical, polemical, educational, scientific or informative nature of the work in which they are incorporated”. As the French national expert explains, this means that, for example, the use of samples for music would not be covered, an outcome that is out of line with recent CJEU case law.²⁶³ To align with EU copyright rules, France will therefore have to adjust its approach, at least with regard to uses on OCSSPs. Similar issues are apparent from the national reports on Croatia, Cyprus, Greece, Portugal and Spain.

Finally, in Germany the parody right is subject to the payment of “appropriate remuneration”.²⁶⁴ It is striking that this is the case despite the newly introduced exception on caricatures, parodies and pastiches in s. 51a of the German Copyright Act²⁶⁵ not containing any statutory remuneration right outside of uses on OCSSPs. Recital 36 ISD accepts that Member States may provide for “fair compensation” for right-holders when applying the optional provisions on exceptions or limitations which do not require such compensation, but nothing to this effect is said in the DCDSM. The compatibility with the Directive of the German approach is therefore unclear.²⁶⁶ To the extent that Article 17 DCDSM is *lex specialis* in relation to the ISD, there is an argument that requiring adequate compensation is permissible.

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

Art.17 AC 8	AT	BE	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR
DSM	+	+	-	+	0	+	+	-	+	-	-	-
FR	+	+	-	+	0	+	+	-	+	-	-	-

HU	IE	IT	LV	LT	LU	MT	NL	PT	RO	SK	SI	SE
+	0	+	+	+	+	+	+	-	+	-	+	+
+	0	+	+	+	+	+	+	-	+	-	+	+

²⁶² While both Article 5(3)(k) ISD and Article 17(7) DCDSM talk simply of “use for the purpose of caricature, parody and pastiche” without further qualifications, Article 17(7) DCDSM refers to “quotation, criticism, review”, but Article 5(3)(d) ISD to “quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author’s name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose”. It is also unclear whether the CJEU’s case law on the quotation exception (CJEU, C-145/10, *Eva-Maria Painer*, 1 December 2011, ECLI:EU:C:2011:798; CJEU, C-476/17, *Pelham*, 29 July 2019, ECLI:EU:C:2019:624 and CJEU, C-516/17, *Spiegel Online*, 29 July 2019, ECLI:EU:C:2019:624) should apply with regard to Article 17(7) DCDSM.

²⁶³ See CJEU, C-145/10, *Eva-Maria Painer*, 1 December 2011, ECLI:EU:C:2011:798; CJEU, C-476/17, *Pelham*, 29 July 2019, ECLI:EU:C:2019:624 and CJEU, C-516/17, *Spiegel Online*, 29 July 2019, ECLI:EU:C:2019:624.

²⁶⁴ See section 5(2) German UrhDaG and the answer to Qs 16 and 30 in the national report on the implementation of Article 17 in Germany.

²⁶⁵ *Gesetz über Urheberrecht und verwandte Schutzrechte (UrhG)*, BGBl. I 1965 S. 1273.

²⁶⁶ Arguing that an adequate remuneration requirement for parodies is compatible with the DCDSM, see 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>.

Assessment Criterion 9: Licensing

According to Article 17(2) DCDSM, authorisations obtained by an OCSSP will be understood to cover corresponding infringements by their users, provided the latter are either not acting on a commercial basis or their activity does not generate significant revenues. Recital 69 clarifies that the reverse should also apply: where right-holders have explicitly authorised the use of content on an OCSSP by a user, the act of communication to the public of the OCSSP should be covered “within the scope of the authorisation granted by the rightholder”. At the same time, OCSSPs cannot rely on a presumption that their users have cleared all relevant rights. How OCSSPs can determine the existence and scope of any licenses obtained by their users is unclear. No further information on licensing uses by OCSSPs is given in the Directive, although the Commission’s guidance leaves open a wide range of different authorisation models.²⁶⁷

Some Member States appear to have erred in their implementation of the protection offered to users. While the Directive specifies that users’ actions will be covered by authorisations granted to OCSSPs “when they are not acting on a commercial basis or where their activity does not generate significant revenues”, the Slovak implementation instead states that the protection for users does not apply “to such actions [...] which the user performs in the course of his profession, business, or if such actions generate significant income.” This wording renders the conditions cumulative rather than alternate and thus sets a stricter standard. The same problem can be identified in the Czech, Dutch²⁶⁸ and Finnish implementations.

Whereas most Member States are silent on Recital 69 reciprocity and some (Austria and Germany) explicitly grant it, France appears to deny it: authorisations granted to users don’t eliminate the obligation of the OCSSP to obtain authorisation. While this is contrary to Recital 69, recitals are not binding. The question is therefore whether Recital 69 accords with the operative text of Article 17 DCDSM. As the French national expert observes,²⁶⁹ the issue is relevant to a key question in intermediary liability: is the OCSSP participating in a single act of infringement performed by the end-user or are there two independent acts of infringement, one performed by the user and the other by the intermediary? While logic suggests the first approach is the correct one (only one work is uploaded to the platform and the material act of uploaded is done by the user), the wording of Article 17(1) DCDSM (“performs an act of communication to the public”) points towards primary liability for the OCSSP and therefore the second solution.²⁷⁰ In that case, it follows that a separate license should be required for the OCSSP, unless specified otherwise by law. The unfortunate conclusion would be that not only that the French approach is correct, but that any Member States implementing Recital 69 are violating the terms of the Directive. That said, there is an argument that a teleological interpretation should prevail that acknowledges the essentially accessory nature of the OCSSP’s involvement. Moreover, OCSSP liability restricting users’ ability to upload works licensed to them would amount to an unjustified restriction of their freedom of expression.²⁷¹ On this reasoning, it will be here accepted that national implementations that incorporate Recital 69 are compatible with the DCDSM and that the French approach is questionable.

²⁶⁷ European Commission, “Communication from the Commission to the European Parliament and the Council on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market”, 4 June 2021, COM(2021) 288 final, pp. 5-6.

²⁶⁸ Note that this issue had not been identified in the first edition of this report.

²⁶⁹ See answer to Q. 19 in the national report on the implementation of Article 17 in France. See also the answer to the Estonian national expert to the same question.

²⁷⁰ At least to the extent that the end-user is not acting on a commercial basis or where their activity does not generate significant revenue (see Article 17(2) DCDSM), there is a “merging” of the treatment of the exploitation acts of users and OCSSPs. See M Husovec and J P Quintais, “How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms under the Copyright in the Digital Single Market Directive” (2021) 79(4) GRUR International, 325.

²⁷¹ See this point made in answer to Q. 19 in the national report on the implementation of Article 17 in Finland.

As follows from the analysis under AC5, in Germany, an unwaivable claim to adequate remuneration is imposed on OCSSPs where authors have granted third parties the right of communication to the public of a work, unless the third party is a collecting society or the author has engaged the third party as a digital distributor. Malta likewise establishes a principle of appropriate and proportionate remuneration for authors and performers. In the absence of an agreement, the amount of such remuneration is determined by a relevant Board.²⁷² Belgium introduces an unwaivable and collectively managed right to equitable remuneration for the exploitation of protected content by OCSSPs. The right is currently being challenged before the Belgian Constitutional Court. Croatia also introduces mandatory collective management for uses by OCSSPs. Interestingly, in relation to certain works this covers the adaptation and reproduction rights, i.e., rights not mentioned in Article 17 DCSDM. The stricter these regimes, the more they stray from the requirements of the Directive and the more their compatibility with it comes into question. The legal proceedings in Belgium in particular raise questions regarding similar systems elsewhere.

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

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

<u>Art.17 AC 9</u>	AT	BE	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR
DSM	+	0	+	-	+	+	+	+	-	0	+	0
FR	+	0	+	-	+	+	+	+	-	0	+	0

HU	IE	IT	LV	LT	LU	MT	NL	PT	RO	SK	SI	SE
+	+	+	+	+	+	0	-	+	+	-	+	+
+	+	+	+	+	+	0	-	+	+	-	+	+

Assessment Criterion 10: Legitimate uses: *ex ante* safeguards

As mentioned above, Article 17(7) DCSDM holds that the cooperation between OCSSPs and right-holders pursuant to Article 17(4) points (b) and (c) shall not result in the prevention of the availability of non-infringing uploads by users. The provision is repeated in many but not all examined national implementations. Moreover, like the Directive, most national implementations fail to incorporate *ex ante* safeguards for legitimate uses targeted at preventing the blocking of non-infringing uploads²⁷³ As the French national expert observes,²⁷⁴ the result will likely be weak protection for users in practice, particularly given the lack of strong sanctions for over-blocking and the natural power asymmetry between right-holders and users. The Estonian Explanatory Memorandum explicitly acknowledges this reality. As the Estonian national expert observes, OCSSPs are not required to identify and ensure the availability of each individual piece of legitimate content. Instead, they must simply take steps to

²⁷² A special voluntary negotiating mechanism is foreseen for the licensing of audiovisual works on video-on-demand services, see answer to Q. 18 in the national report on the implementation of Article 17 in Malta.

²⁷³ See e.g., the answer to Q. 17 in the national report on the implementation of Article 17 in Hungary.

²⁷⁴ See answer to Q. 17 in the French national report.

minimise the blocking of legitimately uploaded content, while ensuring that the solutions they adopt are not “highly inefficient” as against the market standard, as long as it would not be disproportionate to expect the OCSSP to comply with that standard. While this represents a low standard of protection for users, in *Poland*, the CJEU accepted it as compatible with the necessary “fair balance” between all implicated rights and interests.²⁷⁵

A few exceptions to this widespread national inertia can be identified. Notably, in Sweden contractual terms that limit user rights with regard to users on the platforms of OCSSPs are invalid.²⁷⁶ In Germany, Slovenia and Sweden, users must be informed if their content is removed or access to it disabled (see below AC 13).

A17 – Table 9: Assessment of national implementations under AC 10. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.

Art.17 AC 10	AT	BE	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR
DSM	+	+	+	+	+	+	+	+	+	+	+	+
FR	+	+	+	+	+	+	+	+	+	+	+	+
HU	IE	IT	LV	LT	LU	MT	NL	PT	RO	SK	SI	SE
+	+	+	+	+	+	+	+	+	+	+	+	+
+	+	+	+	+	+	+	+	+	+	+	+	+

Assessment Criterion 11: Legitimate uses: ex post safeguards

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

According to the national experts, all examined Member States have introduced complaint mechanisms for users. Most (Denmark, Estonia, Ireland, Hungary, Malta and the Netherlands) make no further specifications as to the relevant details. According to the Austrian implementation, the complaints procedure must be completed within two weeks. In Germany, it must be one week. Spain sets a deadline of 10 business days. The Italian Communications Authority (*Autorità per le garanzie nelle comunicazioni*) is due to adopt relevant guidelines. In the absence of more detailed guidance in the Directive, there is no reason why any of these rules should not be acceptable.

All Member States, with the exception of Cyprus, foresee the possibility of ADR mechanisms. Details differ from country to country. While e.g., Belgium, Croatia, the Czech Republic and Greece provide more detailed provisions, Sweden limits itself to a list of potential mediators. The Portuguese national expert notes that, at the time of writing, however, the relevant arbitration centre is still to be established and further regulated by the Government.

The Swedish and Finnish implementations are notable for establishing that if a right-holder’s request for removal or disabling of access to content is not duly justified, access to the content must be restored.

²⁷⁵ CJEU, C-401/19, *Poland v Parliament and Council*, 26 April 2022, ECLI:EU:C:2022:297, para. 98.

²⁷⁶ See answer to Q. 30 in the national report on the implementation of Article 17 in Sweden.

Moreover, in Slovenia and Sweden, service providers are required to expeditiously notify the user that access to content has been disabled. In Finland, users have the right to initiate court proceedings against the OCSSP to obligate it to enable the public to access to the materials saved by the in the service. Users and OCSSPs have the right to initiate court proceedings against the author for damages resulting from an unjustified request to disable access to or remove a protected work. In Cyprus too, users have the right to apply to a court to establish the legality of the use of exceptions and limitations. Thus, in these countries, as the Swedish national expert observes, legitimate uses are “treated as user rights proper”.²⁷⁷

In other countries, the situation regarding recourse to the courts is less obvious. The French national expert observes that, since the decision of the *Cour de cassation* in *Mulholland Drive*,²⁷⁸ exceptions and limitations to copyright are not approached in France as user rights, meaning that their violation does not substantiate a claim before the courts. The Czech national experts likewise note that, as Czech law views exceptions and limitations as defences, it is not clear what type of claim would be available to users, who the defendant would be or which court would have jurisdiction.²⁷⁹ Other national questionnaires (e.g., Greece or Luxembourg) are silent on the issue or tie the issue to arbitration (e.g., Portugal).

While it is true that an absence of judicial enforcement of user rights represents a striking limitation on the effectiveness of the safeguards in favour of end-users in the Directive, it would not be out of line with EU norms.²⁸⁰ To the extent that Article 17 DCDSM does not foresee any consequences for failing to respect “user rights” and the CJEU in *Poland* did not identify the issue as problematic *vis-à-vis* the necessary “fair balance”, it must be concluded that it does not give rise to compatibility issues in terms of fundamental rights. Accordingly, the only concrete incompatibility that emerges with regard to AC11 is the Cypriot lack of ADR provision.

A17 – Table 10: Assessment of national implementations under AC 11. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.

Art.17 AC 11	AT	BE	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR
DSM	+	+	-	+	+	+	+	+	+	+	+	+
FR	+	+	-	+	+	+	+	+	+	+	+	+

HU	IE	IT	LV	LT	LU	MT	NL	PT	RO	SK	SI	SE
+	+	+	+	+	+	+	+	+	+	+	+	+
+	+	+	+	+	+	+	+	+	+	+	+	+

²⁷⁷ See the answer to Q. 20 in the national report on the implementation of Article 17 in Sweden.
²⁷⁸ Cass. Civ. Iere, February 28, 2006.
²⁷⁹ See the answer to Q. 24 in the national report on the implementation of Article 17 in the Czech Republic.
²⁸⁰ T Rendas, “Are Copyright-Permitted Uses ‘Exceptions’, ‘Limitations’ or ‘User Rights’?” (2022) 17(1) JIPLP 54.

Assessment Criterion 12: Sanctions

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

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

According to the Czech implementation, if an OCSSP repeatedly and wrongfully prevents the upload of or removes works which do not infringe copyright, an organisation representing consumers or the platform's competitors may file an action before court demanding the prohibition of the service. The national experts note that it is yet unclear what this will mean in practice. As noted above (AC 11), Swedish law similarly enables users or organisations representing users to initiate proceedings against OCSSPs for failure to meet their obligations to protect legal communications to the public and obligation to inform users when content has been disabled and to operate an expeditious complaints mechanism, use manual review and restore access to content when rightholder has not duly justified request to disable access. Users are entitled to damages for intentional or negligent failure to meet the obligations to protect legal communications to the public and obligation to inform users when content has been disabled. Conversely, while the Finnish implementation states that the user and the OCSSP have the right to initiate court proceedings against the author for damages resulting from an unjustified request to disable access to or remove a protected work, the Finnish national expert explains that the corresponding substantial right to damages was removed from the bill in the late stages of the legislative process, indicating that the procedural provision was included by oversight. Whether the Finnish courts will nevertheless recognise a right or ignore the provision remains unclear. The Lithuanian implementation outsources the imposition of sanctions to right-holders who automatic content recognition technologies or submit frivolous or unfounded claims to OCSSPs, without determining what these may be.

Given the complete lack of information on sanctions in Article 17 CSDMD, compatibility assessments are difficult. Arguably, Member States are free to impose or refrain from imposing sanctions under the DCDSM. From a fundamental rights perspective, however, there is a strong argument that lack of sanctions for right-holders and OCSSPs can render any protections for user rights toothless.²⁸¹ Conversely, it could be argued that lack of sanctions for users that abuse the relevant procedures is detrimental to right-holders' rights under Article 17(2) of the Charter. Nevertheless, absent a point of

²⁸¹ S F Schwemer and J Schovsbo, "What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime" in P Torremans (ed.), *Intellectual Property Law and Human Rights* (4th ed., Wolters Kluwer, 2020), pp. 569-589, available at: <https://ssrn.com/abstract=3507542> or <http://dx.doi.org/10.2139/ssrn.3507542>.

reference making these assessments is difficult. Germany appears to be the only Member State with a well-rounded system of sanctions.

A17 – Table 11: Assessment of national implementations under AC12. Key: (+): no obvious compatibility problems, (-): detected compatibility problems; (0): unclear compatibility.

<u>Art.17 AC 12</u>	AT	BE	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR
DSM	+	+	+	+	+	+	+	+	+	+	+	+
FR	0	0	0	0	+	0	0	0	0	0	0	0

HU	IE	IT	LV	LT	LU	MT	NL	PT	RO	SK	SI	SE
+	+	+	+	+	+	+	+	+	+	+	+	+
0	0	0	0	0	0	0	0	0	0	0	0	0

Assessment Criterion 13: Information obligations

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

All national experts report implementation of these requirements, the only exception being Slovakia, which appears to have omitted any reference to OCSSP’s obligation to inform users of their right to use works under exceptions and limitations.²⁸² Three countries (France, Ireland and Romania) have implemented into law the exception related to business secrets included in Recital 68 DCDSM and note that more detailed obligations may need to be provided following contractual arrangements. While not mentioned in the text of the Directive itself, this can potentially be accommodated within the word “adequate” in Article 17(8) DCDSM. Spain specifies that the information for right-holders must be provided, at their request, every six months. In France, when the authorisation to the OCSSP is granted by a collective management organisation, the Minister of Culture may intervene to determine the format of the communication of the relevant information.

German law additionally requires that users be informed of any blocking of the content they have uploaded and be advised of their right to lodge a complaint. Conversely, in the case of “uses presumably authorised by law”, right-holders must be informed of the upload and advised on their right to have the presumption reviewed. These provisions follow from the German innovation of “uses presumably authorised by law” and, to the extent that that is deemed compatible with the DCDSM and fundamental rights, should also be viewed as unproblematic. In Germany, OCSSPs must also grant authorised persons data on the detection and blocking of content, in exchange for reasonable reimbursement, for the purposes of scientific research. There is no basis in the directive for this requirement. To the extent,

²⁸² Although it is not apparent from the national report, Slovenia appears to have implemented OCSSPs information obligations to end-users, see Article 163e of the Slovenian Copyright and Related Rights Act (Official Gazette of the Republic of Slovenia, No. 21/95 of April 14, 1995, as amended up to October 26, 2022), available at: <https://www.wipo.int/wipolex/en/text/587464>.

however, that it falls outside of the scope of the provision with only incidental relevance to the object of Article 17 DCDSM, is arguably acceptable.

Cyprus requires that OCSSPs not merely inform users that they can use protected subject matter under exceptions and limitations, but what the conditions for such use are. The Czech Republic also requires that OCSSPs inform users “about the possibilities to use the work in accordance with this law”, thus implying that more information than the mere fact that usage is possible may need to be provided. If these provisions amount to gold-plating, it is of an insignificant nature.

In Sweden, the OCSSPs’ obligation to provide information on the measures they have taken to qualify for the immunity must also be provided upon request to users. OCSSPs must also expeditiously inform users when access to content has been disabled. A similar obligation exists in Slovenia.²⁸³ Although not spelled out in the text of Article 17(9) DCSDM, this follows from its logic: if users are not informed that their content has been targeted, any complaint and redress mechanism cannot be said to have been “made available” to them.

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

Art.17 AC 13	AT	BE	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR
DSM	+	+	+	+	+	+	+	+	+	+	+	+
FR	+	+	+	+	+	+	+	+	+	+	+	+

HU	IE	IT	LV	LT	LU	MT	NL	PT	RO	SK	SI	SE
+	+	+	+	+	+	+	+	+	+	-	+	+
+	+	+	+	+	+	+	+	+	+	-	+	+

Assessment Criterion 14: Waiver

The DCDSM is silent on the possibility of waiver and royalty-free authorisation of the Article 17 right. According to the national reports, most national implementations also do not address these issues. While in some cases (the Czech Republic, Estonia, the Netherlands and Slovakia) the possibility of waiver is excluded or uncertain, no national expert identified an argument against royalty-free licensing. Some restrictions may result in Spain from the rules requiring that relevant negotiations be carried out under the principles of contractual bona fide, due diligence, transparency, and respect for free competition, excluding the exercise of a dominant position. As the Swedish and Croatian national expert notes, more practical limitations will result where licensing is managed by CMOs, particularly where the collective licensing is mandatory or appropriate remuneration is required. The same will be true of the Belgian equitable remuneration, should it survive its constitutional challenge. Importantly, in many countries (see, for example, the national report on France), moral rights cannot be waived. This indicates a discrepancy: while moral rights are not harmonised at the EU level, to the extent that there is alignment between the notion of communication to the public and making available to the public between economic and moral rights, national laws on moral rights may be affected. Regardless, all national implementations appear acceptable from a compatibility perspective.

²⁸³ See the answer to Q. 13 in the national report on the implementation of Article 17 in Slovenia.

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

Art.17 AC 14	AT	BE	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR
DSM	+	+	+	+	+	+	+	+	+	+	+	+
FR	+	+	+	+	+	+	+	+	+	+	+	+

HU	IE	IT	LV	LT	LU	MT	NL	PT	RO	SK	SI	SE
+	+	+	+	+	+	+	+	+	+	+	+	+
+	+	+	+	+	+	+	+	+	+	+	+	+

Assessment Criterion 15: Entry into effect

According to Article 29 DCDSM, the implementation deadline for the Directive was 7 June 2021. As the national experts' reports, most Member States were late to implement Article 17 DCDSM, with only Denmark, France, Hungary and the Netherlands completing the process in time.²⁸⁴ As above for AC 10 on Article 15 DCDSM, slow implementation could be said to delay the establishment of a single digital market and affect the protection of the fundamental right to intellectual property. Noteworthy is Greece, which despite implementing the DCSDM in November 2022 commences the protection granted under the national implementation of Article 17 on 7 June 2021. The result is retroactive application of the law.

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

Art.17 AC 15	AT	BE	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR
DSM	-	-	-	-	-	+	-	-	-	+	-	-
FR	-	-	-	-	-	+	-	-	-	+	-	-

HU	IE	IT	LV	LT	LU	MT	NL	PT	RO	SK	SI	SE
+	-	-	-	-	-	-	+	-	-	-	-	-
+	-	-	-	-	-	-	+	-	-	-	-	-

²⁸⁴ Note that the German transposition was adopted before the deadline on 31 May 2021, but only came into effect on 1 August 2021, see the answers to Qs 1 and 28 in the national report on the implementation of Article 17 in Germany.

4. Conclusion

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

- AC 1 (subject matter);
- AC 2 (right-holders);
- AC 3 (restricted acts);
- AC 4 (targeted users);
- AC 6 (licensing);
- 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);
- 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.²⁸⁵ 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.²⁸⁶ Exceptions however can be identified: for example, the exclusion of “mere facts” from the reach of the PPR in Recital 57 DCDSM 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

²⁸⁵ 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.

²⁸⁶ 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.

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).

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, 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"²⁸⁷ (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).²⁸⁸

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 DCDSM's restriction to online uses – but is this covered by its limitation to ISSPs?

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)²⁸⁹ 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.²⁹⁰ Much depends on application in practice, meaning that continued vigilance is important. In the meantime, referrals to the CJEU are likely to start accumulating.²⁹¹

²⁸⁷ M van Eechoud et al, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Wolters Kluwer 2009), p. 301.

²⁸⁸ H Koziol, "Comparative Conclusions" in H Koziol, *Basic Questions of Tort Law from a Comparative Perspective* (Jan Sramek Verlag 2015) 690.

²⁸⁹ 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>.

²⁹⁰ 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.

²⁹¹ 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".

This is disappointing, but not surprising.²⁹² 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.²⁹³ 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.²⁹⁴ 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.”²⁹⁵

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.

²⁹² 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.

²⁹³ M van Eechoud et al, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Wolters Kluwer 2009), p. 299.

²⁹⁴ 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.

²⁹⁵ 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.”