

One year on – The DSM Copyright Directive in Action

A comparative overview of the implementation of Art. 17 and Artt. 18–23 of the DSM Copyright Directive in Germany, Spain, France, Italy and the Netherlands



FAQ: How the DSM Directive's provisions were implemented in Germany, Spain, France, Italy and the Netherlands

One of the most intensely discussed EU legislative acts concerning copyright, Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (Digital Single Market Copyright Directive – “DSM Directive”)¹ was enacted on 17 April 2019 and was due for implementation by 7 June 2021. While the deadline was not met by all member states, the DSM Directive has now been transposed into national law by the majority of EU member states.

The DSM Directive harmonises further areas of Copyright law, but still leaves some discretion to member states. Art. 17 of the Directive (often referred to as “upload filtering”) and Artt. 18 through 23 on “fair remuneration” were some of the most discussed and arguably among the most relevant changes brought about by the Directive. The following overview gives a summary of how these provisions were implemented into national law in Germany, Spain, France, Italy and the Netherlands, focussing amongst others on key features, relevant deviations from the DSM Directive, and their extraterritorial effect.

The text is based on a [seminar](#) held on 8 June, 2022 at Taylor Wessing London with the participation of [Gregor Schmid](#) (Taylor Wessing Germany), [Marc Schuler](#) and [Ines Tribouillet](#) (Taylor Wessing France), [Margot van Gerwen](#) (Taylor Wessing Netherlands), [Carolina Pina](#) (Garrigues, Spain) and [Fabrizio Sanna](#) (Orsingher Ortu, Italy), moderated by [Xuyang Zhu](#) (Taylor Wessing UK). A recording of the discussion can be accessed [here](#). They are also authors of respective country contributions. For questions and comments, please feel free to reach out to the contributors under the links provided.

¹Directive (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.

Differences in national implementation

Do national implementing laws faithfully follow the DSM Directive or are there material substantive differences? Are there any contextual factors in the respective jurisdiction that impact the way these laws will be interpreted or enforced?

Germany

Article 17

Germany implemented the DSM Directive only partly in a verbatim way of the DSM Directive's text, such as with regard to limitations/exceptions, extended collective licensing (Art. 12), and press publications (Art 15).

Article 17 of the DSM Directive was not implemented "1:1" but in the form of a **separate act** to the German Copyright Act [Urheberrechtsgesetz (UrhG)], called the "Act on Copyright and Online Content Sharing Service Providers" [Urheberrechts-Diensteanbieter-Gesetz (UrhDaG)].

The new law has some **noteworthy specifics**, such as a provision on "presumedly permitted uses", de minimis provision on the use of films, sound, text and images (secs. 9, 10 UrhDaG), and the so-called "red button" (sec. 14 para. 4 UrhDaG), which enables trusted right owners to override the aforementioned de minimis presumption rule and thus achieve immediate blocking of content for the duration of the complaint procedure. In more detail:

- Communication to the public of UGC is deemed a communication to the public by the OCSSP.
- Liability is however excluded, if certain obligations are followed: best efforts to license underlying protected content; "qualified" blocking following respective information by the rights holder; take down and stay down.
- No blocking / take down and stay down however in the event of "presumedly lawful" uses;
- No blocking until dispute resolution mechanism is done.

² Article 2(6) states: "online content-sharing service provider" means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes".

- This exception can be overridden by notification of a “trusted rights owner” (“red button”)
- Take down and stay down following notification (blocking of content, “simple blocking”), sec. 8 UrhDaG.

The new law also provides the exception/limitation of caricature, criticism and pastiche (Sec. 51a UrhG)

Multi jurisdiction cases remain a challenge due to the principle of Lex loci protectionis in copyright and deviating implementation. OCSSPs may thus consider to apply geo-blocking to the respective content.

Articles 18–23

Art. 18–23 DSM Directive were in most parts already existing in German Copyright law.

Articles 18–23 of the DSM Directive have been transposed into German law by **amending** existing secs. 32 et seq. of the German Copyright Act.

Changes were limited, as German law already included

- provisions on fair remuneration and additional participation of creators since 2002 (Secs. 32, 32a, 32b of the German Copyright Act) as well as
- transparency provisions since 2017 (Secs. 32d, 32e of the German Copyright Act) and even earlier based on “good faith/equity”.
New: Information is to be provided **automatically each year** (and not merely upon request). There are no sector or work specific exceptions, but the transparency obligations shall not apply where the contribution was of a “subordinate” character, or where the effort to provide the information would be unreasonable, e.g. in the event of very low revenues.
- a general right of revocation of exclusive licenses due to a lack of exploitation / non-use. The creator may choose to revoke the license, or merely the exclusivity (Sec. 41 UrhG). There are no sector specific or work specific exceptions.

Note that there is also a right of revocation due to a change of conviction.

Another specific is the general possibility of **collective bargaining agreements** on the remuneration and transparency provisions (e.g. joint remuneration agreements), and a possibility of an enforcement action by associations of creators in the event of widespread violation of the transparency rules.

Generally, the rules of the Directive have been fully implemented, with some good amount of gold-plating.

Spain

Article 17

DSM Directive has been transposed in Spain by virtue of Royal Decree Law no. 24/2021 ("**RDL 24/2021**"), which partially amends the Spanish Copyright Act ("**SCA**").

The Spanish implementation is generally aligned with Article 17 of the DSM Directive. The main divergences are as follows:

(1) Article 74(3) in fine RDL 24/2021 ("live content" provision).

"In relation to live content, providers of online content-sharing services must disable access to or remove such content from their website during the broadcast of the live event in question".

(2) Article 74(3) in fine RDL 24/2021 ("unjust enrichment" provision).

"Without prejudice to the above, right holders may exercise legal actions aimed at restoring pecuniary damage, such as unjust enrichment actions, in the event that, although service providers have made their best efforts to delete the unauthorized content, it continues to be exploited by them, causing significant harm to right holders".

(3) Article 74(10) RDL 24/2021 (“redress mechanism”).

“Works and other subject-matter of the complaint and redress procedure shall not remain accessible on the provider’s service pending the outcome of the complaint and redress procedure”.

(4) Article 74(11) RDL 24/2021 (term for the complaint and redress mechanism).

“Where rightholders request to have access to their specific works or other subject matter disabled or to have those works or other subject matter removed, they shall duly justify the reasons for their request. Complaints submitted under the mechanism set out in paragraph 10 shall be dealt with within a period not exceeding 10 working days and decisions to disable access to or remove uploaded content shall be subject to human review, i.e. without automated intervention by robots or other (4) Article 74(11) RDL 24/2021 (term for the complaint and redress mechanism). “Where rightholders request to have access to their specific works or other subject matter disabled or to have those works or other subject matter removed, they shall duly justify the reasons for their request. Complaints submitted under the mechanism set out in paragraph 10 shall be dealt with within a period not exceeding 10 working days and decisions to disable access to or remove uploaded content shall be subject to human review, i.e. without automated intervention by robots or other similar means”.

Articles 18-23

(1) Article 18 DSM Directive (appropriate and proportionate remuneration) is equivalent to new Article 74 RDL 24/2021. Spanish law has added that

“The negotiation of the corresponding authorizations or assignments shall be carried out in accordance with the principles of contractual good faith, due diligence, transparency and respect for free competition, which excludes the exercise of a dominant position”.

(2) Article 19 DSM Directive (transparency obligation) is equivalent to new Article 75 RDL 24/2021. The Royal Decree Law sets out that transparency obligations shall also be applicable vis-à-vis collecting societies. Information should be provided by electronic means (this was not included in the EUCD).

(3) Article 20 DSM Directive (contract adjustment mechanism) is equivalent to new Article 47 SCA. ES law sets out a term of 10 years which was already included in the Spanish Copyright Act.

(4) Article 21 DSM Directive (ADR procedure) is equivalent to new Article 194(5) SCA. Section One of the Copyright Commission (Spanish Ministry of Culture) can settle disputes relating to the provisions included in this table via mediation or arbitration on a voluntary basis.

(5) Article 22 DSM Directive (revocation right) is equivalent to new Article 48bis SCA. The Royal Decree Law sets out a term of 5 years.

France

Article 17

France has implemented the Directive in a very faithful manner. The French provisions entered into force on 7 June 2021.

The following nuances can be noted:

1) While Article 2.6 of the DSM Directive refers to “profit-making purposes” to define Content-sharing service provider, Article L.137-1 of the French Intellectual Property Code (“IPC”) refers to an activity carried out **“for direct or indirect profit”**. Article 2(6) states: “‘online content-sharing service provider’ means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes”. The difference is subtle, but the French regulator decides to take a “maximalist” approach to encompass any advantage the service can make out of its activities. The same provision is applicable to performers (Article L. 219-1 of the IPC refers to Article L. 137-1 of the IPC).

2) Another category not specified in the DSM Directive is excluded from the scope of Article 17: “online public communication services whose purpose is to infringe copyright and related rights” (Article L. 137-1 of the IPC).

This exclusion seemed to be obvious, but the intention is to give judges solid legal provisions to exclude these service providers from this regime. The same provision is applicable to performers (Article L. 219-1 of the IPC).

The assessment of what is deemed to constitute a “large amount of copyright protected works” takes into account, the audience for the service and the number of files of protected content per type of work uploaded by users of the service. This definition is deemed to be fulfilled when the audience is above 400.000 unique visit per month in France during the previous civil year and the number of files reaches a threshold fixed per type of copyrighted work. Typically, 10.000 files for visual works and 5.000 for musical works.

Contextual factors: France has been for years a battle ground against the safe harbour provision / hosting defence. French judges have always been reluctant to apply it and tried overtime to limit it, inter alia by submitting it to a take down stay down procedure. However, the Cour de Cassation (i.e., the French Supreme Court) decided that a “stay down” would result in a general monitoring obligation and has therefore ruled against such an obligation. Since then, the content-sharing service providers have been seen from enjoying an ill-grounded impunity.

Articles 18-23

French implementing laws are quite faithful to the DSM Directive. There are some nuances highlighted below but the consequences are limited.

Article 18 (appropriate and proportionate remuneration)”. Such a provision **is not** applicable to ongoing contracts.

The article of the DSM Directive states that “Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration”. Such a provision is **not applicable** to ongoing contracts.

Article L. 131-4 of the IPC refers to the term “proportionnelle” (i.e., “proportional”) rather than “proportionate”. This is due to the fact that the proportional remuneration is a key principle of French copyright law (the author’s remuneration should be proportional to the revenues resulting from the exploitation of the work).

It complies with the rationale of the DSM Directive as a proportional remuneration should be deemed to be proportionate within the meaning of recital 73, namely proportionate to the actual or potential economic value of the licensed or transferred rights.

The same provision is applicable to performers (Article L. 212-3 of the IPC). Such a provision is not applicable to ongoing contracts.

Regarding the determination of such remuneration, the French legislator referred to collective bargaining agreements or a decree of the Conseil d'Etat if such agreements have not been concluded within 12 months from the publication of the implementation text of 12 May 2021 (Article L. 132-25-2 of the IPC). To our knowledge, such collective bargaining agreements or decree have not been concluded / adopted yet.

Article 19 (transparency obligation) (Entry into force: 7 June 2021)

The DSM Directive provides that Member States may decide that the transparency obligation does not apply when the contribution of the author or performer is not significant. Article L. 131-5-1 of the IPC did not implement this exception. Such a provision is applicable as of 7 June 2022 to ongoing contracts.

Article 19(2) provides for the possibility to request information to sub-licensees regarding the exploitation of the works. The IPC replaces “sub-licensees” by “sub-assignees”, which should not have an impact according to Scholars.

The same provision is applicable to performers (Article 212-3-1 of the IPC). Such a provision is applicable to ongoing contracts.

Article 20 (contract adjustment mechanism) (Entry into force: 14 May 2021)

Article 20 of the DSM Directive states that: “Member States shall ensure that, **in the absence of an applicable collective bargaining agreement providing for a mechanism comparable** to that set out in this Article, authors and performers or their representatives are entitled to claim additional, appropriate and fair remuneration”. The DSM Directive encourages Member States to adopt renegotiation mechanisms based on collective agreements.

Article L. 131-5 of the IPC which now applies the contract adjustment mechanism not only to lump sums but also to proportional remuneration, states that this mechanism is applicable in “the absence of a specific provision providing for a comparable mechanism **in the exploitation agreement** or in a professional agreement applicable in the sector of activity [concerned]”. It is thus possible to set aside the contract adjustment mechanism via contractual provisions but a “comparable” mechanism should be specified, which could be interpreted as meaning that more favourable mechanism should be stated. Such a provision **is not** applicable to ongoing contracts.

For remuneration based on lump-sums, the French provision states that the contract adjustment mechanism is triggered by a 7/12th rule (i.e., the author has suffered a prejudice which is more than 7/12th resulting from a contract which became burdensome or from an insufficient forecast of the work revenues). Certain scholars consider that it does not comply with Recital 78 of the DSM Directive specifying factors to determine the revision of the remuneration.

Certain contracts for the exploitation of rights harmonised at Union level are of long duration, offering few opportunities for authors and performers to renegotiate them with their contractual counterparts or their successors in title in the event that the economic value of the rights turns out to be significantly higher than initially estimated. Accordingly, without prejudice to the law applicable to contracts in Member States, a remuneration adjustment mechanism should be provided for as regards cases **where the remuneration originally agreed under a licence or a transfer of rights clearly becomes disproportionately low compared to the relevant revenues derived from the subsequent exploitation of the work or fixation of the performance by the contractual counterpart of the author or performer**. All revenues relevant to the case in question, including, where applicable, merchandising revenues, should be taken into account for the assessment of whether the remuneration is disproportionately low. The assessment of the situation should take account of **the specific circumstances of each case, including the contribution of the author or performer, as well as of the specificities and remuneration practices in the different content sectors, and whether the contract is based on a collective bargaining agreement**. Representatives of authors and performers duly mandated in accordance with national law in compliance with Union law, should be able to provide assistance to one or more authors or performers in relation to requests for the adjustment of the contracts, also taking into account the interests of other authors or performers where relevant.

The same provision is applicable to performers (Article L. 212-3-2 of the IPC). Such a provision **is not** applicable to ongoing contracts.

Article 21 (alternative dispute resolution procedure) (No new provisions)

No implementation needed as French law already provides for these types of provisions.

Article 22 (right of revocation for lack of exploitation) (Entry into force: 14 May 2021)

Article L. 132-5-2 of the IPC faithfully implements this provision. Such a provision **is not** applicable to ongoing contracts.

The same provision is applicable to performers (Article L. 212-3-3 of the IPC). Such a provision **is not** applicable to ongoing contracts.

Article 23 (imperative nature of certain provisions)

Article L. 132-5-3 of the IPC faithfully implements this provision.

The Netherlands

Article 17

The Netherlands is characterised by being one of the first EU member states which implemented the DSM Directive in already existing Dutch legislation (including its Copyright Act (Auteurswet) and Neighbouring Rights Act (Wet op de naburige rechten). During the consultation phase point of criticism was that the Dutch legislator unduly deviated from the text of the DSM Directive. Therefore, the Dutch legislator changed its approach and chose a very faithful and neutral implementation that is closely similar to the text of the DSM Directive itself.

Unfortunately, the Dutch legislator thus also did not provide much guidance or clarity on vague definitions and terms included in the DSM Directive, but only strictly followed the wording of the English version of the DSM Directive.

More specifically, the implementation and definitions of the terms “OCSSPs” and “best efforts” received an amount of criticism in the consultation phase. The English version of the DSM Directive includes the “best efforts” obligation, while the official Dutch translation of the DSM Directive included an “every effort” obligation. The Dutch government in the end chose to deviate from the Dutch version of the DSM Directive, and eventually included the best efforts clause into national legislation to avoid that the OCSSPs should do anything within their power.

“OCSSP” was first converted to a more general “platform provider” in the first legislative proposal, which was also altered at a later stage and now only refers to the definition of an online content-sharing service providers as already given in the DSM Directive.

The Dutch Government has eventually explicitly chosen to align as closely as possible with already existing Dutch copyright legislation (including the Copyright Act) and with the text of the DSM Directive, also to avoid differences with other EU member states.

Articles 18-23

The Dutch Copyright Act was already altered in 2015 to improve the position of authors and performers in the context of exploitation agreements. The equitable remuneration, non usus right and the ‘bestseller provision’, which includes the possibility to claim additional remuneration in case of serious inequality between the remuneration received by the author and the profit made from the exploitation, were included in the Dutch Copyright Act already. Dutch legislation thus already included highly similar provisions as included in articles 18-23 of the DSM Directive, but the scope of these creator’s rights is now expended also outside the field of exploitation agreements. Mainly the transparency obligation was missing in Dutch law before the implementation of the DSM Directive, which obligation entered into force on June 8, 2022.

Italy

Article 17

The implementation of Article 17 of the DSM Directive in Italy has been faithful, however there are some nuances to be noted:

- (a) upon receiving a sufficiently substantiated notice from the rightsholders
 - (i) contents are removed expeditiously;
 - (ii) a notice to the user on the removal is sent;
 - (iii) pending the decision on the complaint the contested contents remain disabled;
- (b) no provision that the implementing law “in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law”;
- (c) specific exclusion for “non-profit online encyclopaedias, non-profit educational or scientific repositories, open source software development and sharing platforms, providers of electronic communication services, providers of online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for personal use, unless the online marketplace or cloud service allows copyrighted works to be shared among multiple users”;
- (d) media regulator to hear complains again take down decisions.

Articles 18–23

In implementing Article 18 of the DSM Directive, it has been provided that when licensing or transferring their exclusive rights for the exploitation of their works, authors/performers are entitled to receive appropriate remuneration, “which must be proportionate to the value of the rights licensed or transferred, as well as

commensurate with the revenues deriving from such exploitation" and "a lump-sum remuneration for the authors, artists and performers should be provided [only] when their relevant contribution to the work or performance is merely incidental and the costs [of calculating the author's fee] are disproportionate in respect to the scope of the contract".

This remuneration

- (a) may be collected directly or through the collecting organisations; and
- (b) may be determined as a result of collective bargaining agreements.

The "fair compensation" of authors and performers already provided for by Italian laws for certain exploitations (mainly public performance) (Articles 46bis and 84 ICL) has been confirmed.

In implementing Article 19 of the DSM Directive, it has been provided that Information to be disclosed to authors/performers include

- "(a) the identity of the parties involved in the transfers or licences (including secondary users of works and performances who have entered into agreements with authors' and performers' direct contractors),
- (b) the manner of exploitation of the works and performances,
- (c) the revenues generated from such exploitation (including advertising and merchandising revenues and remuneration due), and
- (d) with specific reference to providers of non-linear audio-visual media service providers the numbers of purchases, views and subscribers".

The failure to provide information constitutes a legal presumption of "inadequate remuneration" in favour of authors/performers and the media regulator can apply a fine up to one per cent of the turnover in the last financial year ending before notification of the challenge if information not provided.

Practical impact of the Directive

What has the practical impact of the Directive been, e.g. in the way rightsholders and OCSSPs (online content sharing service providers) engage, or the terms or negotiation process for creator contracts?

Germany

Article 17

OCSSPs are in the process of adapting their services / processes to the new regulations or have already done so. This concerns for example complaint and redress mechanism, licensing efforts and the “red button” mechanism.

Articles 18-23

Since German law has long contained fairness rules for the remuneration of copyright holders and there have been some high-profile **cases**, German rights exploiters are probably already **largely prepared for the issue**. A notable change is that the transparency obligations were only to be fulfilled upon request, and **now have to be** satisfied annually **without** a request.

In German practice, there were/are some **joint remuneration agreements** e.g. for **fictional writers, journalists, script writers**, film and TV **directors, cameramen, actors**, and more recently for certain Netflix creators.

The joint remuneration agreements have a strong impact – even if they are not directly “applicable” to a given contract, they can be seen by the courts as

indicating “**appropriateness**” of the remuneration agreed upon.

Generally, contractual practice (e.g. standard terms in production or licensing agreements) has not changed dramatically, but is expected to change rather gradually.

Notably, there is already a fair amount of **case law**. This includes court decisions on “**appropriate remuneration**” regarding translators (“Talking to Addison”) and photo journalists, as well as decisions on “**additional remuneration**” regarding cameramen (“Das Boot”), dub voice actors (“Pirates of the Caribbean”) and car designers (regarding the Porsche 911 and VW Beetle design).

One of the most relevant to-dos arguably is the need to collect information regarding the **transparency** obligations. The provisions **have retroactive effect**, i.e. they also cover agreements that date back before the implementation date. There are **however limits if such effort would be disproportionate**.

Spain

Article 17

Although RDL 24/2021 is in force, it is currently being discussed by the Parliament (i.e. amendments can be proposed by political parties). Rightsholders and OCSSPs are currently adapting to the new regulation and only preliminary contacts between them have taken place.

Articles 18–23

Most of these provisions were already included in Spanish law. We have not observed any conflicts relating to them, although we are aware that audio-visual and music rightsholders are adapting their agreements in order to comply with such provisions.

France

Article 17

An agreement has been reached on 24th May 2022 between Meta and the SCAM, a collective management organization composed of thousands of authors of audiovisual works. A license has been granted to Meta over the Scam's repertoire so that it can be used on its platforms (Facebook, Instagram, etc.). The terms have been made strictly confidential. No doubt some information will be made available sooner or later but not yet.

Articles 18-23

Article L. 212-3 of the IPC which provides for an appropriate and proportional remuneration for performers states that the remuneration conditions can be specified via collective bargaining agreements.

Article L. 212-14 of the IPC regarding **online streaming** provides for a minimum compensation principle which should be determined via collective bargaining agreements. This article does not implement Article 18 of the DSM Directive per se, but it is **a consequence of the appropriate and proportional remuneration principle for performers.**

In application of Article L. 212-14 of the IPC, a collective bargaining agreement has been reached between performers and phonogram producers. This agreement provides for a **minimum rate of royalties to be paid to the main performers**, for the streaming broadcast of their works. Performers will receive between 10 to 11% of the amount paid by the platforms to the producers. **This agreement will enter into force on the 1st of July** and will benefit to recordings marketed from this date as well as to phonograms marketed from this date which benefit to performers under exclusive recording contracts if such contracts have been concluded between 6 July 2017 and 1 July 2022.

The Netherlands

Article 17

There is no published case law yet nor any pending lawsuits known in the Netherlands with respect to the practical impact or its explanations or interpretation.

The Dutch Collective Management Organisations do however seem to feel more strengthened in their negotiation position, since it gives leverage in providing licenses with respect to the portfolios, because the current law is providing more clarity on the position of OCSSPs which tend to seek prior approval for use of content included in the portfolio. Practice seems to indicate that only the well-known big players/OCSSPs act proactively, the others, and more smaller ones, do less tend to act proactively with obtaining licenses.

Articles 18-23

In 2020 the former strengthened legal position of authors was evaluated in the Netherlands, 5 years after its entry into force, by researchers of the Institution of Information Law and Leiden University. This evaluation/study(based on interviews with authors, exploiters, experts and stake holders et cetera) shows that the effects are minor so far.

From a Dutch perspective it is therefore likely that the provisions are not firm enough to improve the negotiation position of creators. For instance, the evaluation study shows that the right to fair remuneration is barely exercised in practice. Since most authors, out of fear of loss of contracts or blacklisting, do not dare to invoke or enforce their rights to fair remuneration against exploiters, also very little case law is available. The 'bestseller provision' of article 25d of the Copyright Act, is also rarely being invoked in practice. According to the researchers the fear of blacklisting seems to play a major role also in this respect.

The evaluation study also indicates that many sectors are bothered by the lack of transparency of the exploitation incomes received, since it complicates authors to substantiate a bestseller claim (in and out of court). The transparency obligation included in the DSM Directive, now implemented in Dutch law, will

probably lighten this burden. So, based on the Dutch evaluation conducted by well-known researchers of the Institute for Information Law and Leiden University there are reasons not to be too optimistic about these provisions effectually improving the negotiation position of creators and closing the “value gap”.

Italy

Article 17

OCSSPs are in a “wait-and-see” attitude (they are waiting to understand regulator and market moves).

Articles 18-23

The implementation of the DSM Directive is going to change the contractual practice in Italy that has so far seen authors and performers paid on a lump-sum basis (in almost all cases), as it seems to require that the main authors and performers instead receive a remuneration that also takes into account the “revenues” generated by the exploitation of their works.

No signals have yet come from the market (and in particular from the most directly interested parties) to predict how contractual practice will adapt to this new legislation. In particular, players are in a “wait-and-see” position (they are waiting to understand how the regulator, the market and the trade associations will orient themselves, in order to avoid concessions that will turn out to be excessive). “Bridge provisions” are inserted in the agreement.

Extra-territorial effect outside the EU

To what extent do author/performer remuneration provisions have extra-territorial effect outside the EU, e.g. for non-EU law-governed agreements, non-EU creators or non-EU counterparties?

Germany

Articles 18-23

Most of the fair remuneration provisions included in Secs. 32 et seq. of the German Copyright Act are **mandatory** in German contractual relations.

According to Sec. 32b German Copyright Act the key remuneration provisions are mandatory in international legal relations as well, if,

- besides a contractual choice of law, German law would actually be applicable (under Rome I) or
- if the work is exploited in Germany.

Although there is little case law on the issue, the prevailing view in Germany is that the key fair remuneration rules have “**extraterritorial**” effect under private international law by way of their mandatory nature.

Spain

Articles 18-23

Such provisions would be applicable to agreements subject to Spanish law.

In general terms, rights granted by Spanish law are applicable to non-EU authors if they have their residence in Spain or if their works are published for the first time in Spain. Otherwise, recognition of such rights is subject to the principle of reciprocity.

For the case of artists, rights would be enjoyed by non-EU artists if: (a) they have their residence in Spain; (b) their performance was made in Spain; (c) their performance is recorded in a phonogram or audiovisual support protected by Spanish law; or (d) their performance is incorporated into a broadcast signal protected by Spanish law. Otherwise, recognition of such rights is subject to the principle of reciprocity.

It is dubious that Articles 18 – 23 DSM Directive would be considered a matter of ordre publique which authors and performers will enjoy in Spain in any event, given that they are not moral rights.

France

Articles 18-23

Certain provisions of the IPC in the context of the implementation of the DSM Directive specifically indicate that the provisions apply regardless of the law chosen by the parties and regardless of the jurisdiction clause.

Article L. 132-24 of the IPC states that the contract by which the author of the musical composition with or without lyrics of an audiovisual work transfers all or part of his exploitation rights to the producer of the latter cannot have the effect, notwithstanding the law chosen by the parties, of depriving the author, for the exploitation of his work on French territory, of the protective provisions provided by the IPC.

This Article further states that “The author may bring before French courts any dispute relating to the application of the preceding paragraph, **regardless of the place where he or his assignee is established and notwithstanding any clause conferring jurisdiction to the contrary**”.

The legislator seems to have qualified this provision as international public order despite the DSM Directive being silent on this point.

However, the other provisions on remuneration do not make such specifications so that we could consider that they should not have extra-territorial effect outside the EU.

In addition, despite the fact that certain provisions are imperative according to the DSM Directive and the IPC, they fall within the “European” public order rather than the international public order.

The Netherlands

Articles 18-23

Article 25h of the Dutch Copyright Act includes mandatory law for exploitation agreements. It includes that the provisions on the right to fair remuneration, disproportionality (the “bestseller provision”), non-usus and unfair contract terms are mandatory irrespective of the choice of law, if the exploitation agreement would be subject to Dutch law based on the known rules. So for instance in case the author is Dutch, the work is made available to the public for the first time in the Netherlands, or the distribution/exploitation is taking place wholly or predominantly in the Netherlands, these clauses are binding irrespective of choice of law, and also outside the EU. In these specific cases the (Dutch) author cannot waive the rights granted under these provisions.

Italy

Articles 18-23

The matter is not dealt with by the law implementing the DSM Directive. Below our preliminary view on this topic.

The provisions implementing the rules on author/ performer remuneration of the DSM Directive do not appear to be of “public order” in Italy, and therefore (assuming this matter is not subject to the national treatment principle) it could be argued that they are not applicable to non-EU law-governed agreements, if authors/performers not resident in Italy or not Italian works are involved (even if the works are exploited in Italy).

If the parties agree to have the agreement on the assignment of exclusive rights governed by a non-EU law which does not provide for an “appropriate and proportionate remuneration”, the choice of the foreign law would not prevent the provisions of the Italian law on “appropriate and proportionate remuneration” to apply. If authors/performers have their residence in Italy and/or if their works are published for the first time in Italy.

Announcements, documents and guidances

Have there been any government, regulator, or industry organisation announcements, documents or guidance about how the laws work (akin to the [EU Commission's guidance on Article 17](#))?

Germany

Article 17

The German legislator has explained its transposition of the DSM Directive in an explanatory memorandum to the actual bill. As is common practice, the memo summarises the main considerations underlying the new law, and thus serves as an important aspect in interpreting the new provisions.

The Federal Ministry of Justice has also published [FAQs on its website](#), which among other things cover the OCSSP's duty to make best possible but also reasonable efforts to acquire licences, the complaints procedure to be established by OCSSPs and collective actions in the event that a creators counterparty fails to provide information on his exploitation of works.

Articles 18-23

No such documents or guidance exists for the implementation of Art. 18-23 DSM Directive. Existing case law and existing joint remuneration agreements can however give important indications.

Spain

Article 17

N/A. The Government is planning to create an AI Agency supervising algorithms used, inter alia, by OCSSPs.

In addition, the Government is planning to create an independent Copyright and Related Rights Office which will be in charge of the copyright regulation. Such new entity may issue guidance about the practical effects of Article 17.

Articles 18-23

N/A. Collecting societies are likely to issue particular guidance available to their associates.

France

Article 17

Guidance in relation to the balance between rightsholders and platform users.

The report given to the French President for the presentation of the implementing ordinance.

Proposals made by the CSPLA before the implementation of the Directive: the CSPLA is an independent advisory body advising the Minister of Culture and Communication in the field of literary and artistic property.

In its reports dated 2020 and 2021, the CSPLA promotes a faithful and strict implementation of the DSM Directive.

The CSPLA further recommended:

An explicit reference in the French provisions to all the exceptions provided under the IPC but give more comfort to platform users to be a position to ground their user towards rightsholders and to promote the same;

A close collaboration between platforms and rightsholders even before any content is uploaded on the platform or identified contents;

The transparency of algorithms and developing as well as improving the technical solutions implemented by platforms overtime;

The emergence of “smart processing” techniques for complaints and a speedy and efficient complaint process via the ARCOM, i.e. an administrative authority, which is seen as stated by the CSPLA as “less restrictive than the judge”.

At the same time, the CSPLA favours ex post complaint and redress mechanism as a mean to ensure the enforcement of user rights.

This position illustrates the French tradition to consider that an exception to copyright is to be treated as a defence mechanism and not a right as such. Limiting the deployment of ex ante filtering measures to “manifestly infringing” or “earmarked” content is not commonly seen as the right way to approach the protection of rightsholders under the new regime.

This vision has however not been implemented in the French provisions and this leaves the assessment of this balance of rights to the judges. No doubt... interesting debates to come.

The Netherlands

Article 17

The Dutch explanatory memorandum is available on the implementation of the DSM Directive, but no real guidance is given, or surprising statements are made with respect to its interpretation.

With respect to the definition of an OCSSP the explanatory memorandum refers to recital 62, including the statement that the definition is directed at online services which play an important role on the market for online content by competing with other online services, it explicitly includes YouTube as an example. It also multiple times refers to the possibility to reach out to CMOs to seek prior authorization, with respect to complying with the “best efforts” clause it thus multiple times suggest a link between collective licensing and complying.

The Dutch government also included the possibility that it could implement the Guidance of the European Commission by governmental decree, so without following the regular legislative process and route.

Articles 18–23

No real guidance, which also seems the reason that the remuneration provisions in the Dutch Copyright Act only have little practical impact so far.

Italy

Article 17

The media regulator has issued a draft regulation on “complaints” currently subject to public consultation (ending on 28 September) which sets guidelines on “diligence standard” in the sector.

Articles 18-23

The media regulator must issue in forthcoming weeks a regulation on obligation of information which is expected to set guidelines also on “proportional” remuneration.

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