

# The EU press publishers' right: where do Member States stand?

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## Introduction

The tension between news media and digital platforms has been growing for years. Platforms capture an overwhelming majority of the digital advertising revenue, causing the business models of legacy news organizations to become unsustainable. While strongly objecting to platforms using their content for free, news organizations depend on platforms as a key source of referral traffic and a forum for reaching their audiences.<sup>1</sup> The year 2021 has been an eventful year so far for those following the news media vs digital platforms saga. Australia has finally adopted its News Media Bargaining Code,<sup>2</sup> following a lot of controversy and a temporary news ban on Facebook.<sup>3</sup> The UK is considering following in the Australian footsteps and introducing its own code of conduct.<sup>4</sup> Google has signed a global licensing deal with one of its fiercest critics, Rupert Murdoch and his News Corp.<sup>5</sup> Microsoft has joined the discussion, declaring its support for regulation requiring platforms to pay for news in Australia,<sup>6</sup> the USA<sup>7</sup> and

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1 See Frances Cairncross, 'The Cairncross Review. A Sustainable Future for Journalism' (DCMS, February 2019); Australian Competition and Consumer Commission, 'Digital Platforms Enquiry Final Report' (ACCC, June 2019); Competition and Markets Authority, 'Online platforms and digital advertising. Market study final report' (CMA, July 2020).

2 Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021, No 21, 2021 (News Media Bargaining Code) <<https://www.legislation.gov.au/Details/C2021A00021>> accessed 21 April 2021.

3 Will Easton, 'Changes to Sharing and Viewing News on Facebook in Australia' (*About Facebook*, 17 February 2021) <<https://about.fb.com/news/2021/02/changes-to-sharing-and-viewing-news-on-facebook-in-australia/>> accessed 20 April 2021.

4 Alok Sharma and Oliver Dowden, 'New Competition Regime for Tech Giants to Give Consumers More Choice and Control over Their Data, and Ensure Businesses Are Fairly Treated' (*GOV.UK*, 27 November 2020) <<https://www.gov.uk/government/news/new-competition-regime-for-tech-giants-to-give-consumers-more-choice-and-control-over-their-data-and-ensure-businesses-are-fairly-treated>> accessed 27 November 2020.

5 'News Corp and Google Agree To Global Partnership On News' (*News Corp*, 17 February 2021) <<https://newscorp.com/2021/02/17/news-corp-and-google-agree-to-global-partnership-on-news/>> accessed 20 February 2021.

6 Brad Smith, 'Microsoft's Endorsement of Australia's Proposal on Technology and the News' (*Microsoft On the Issues*, 11 February 2021)

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## This article

- This article offers an opinion on the current state of the implementation of the press publishers' right, a related right introduced by Directive 2019/790 on Copyright in the Digital Single Market.
- It outlines the ongoing policy discussions and decisions taken by Member States with regard to selected aspects of the press publishers' right, including its scope, the appropriate share of revenues due to authors, and licensing mechanisms.
- It submits that the implementation of the press publishers' right is unlikely to bring the news media vs digital platforms saga to an end, as not all uncertainties concerning the new right's scope will be tackled; calls for further regulatory interventions are likely to follow.

Europe, where it has partnered with the press publishers' organizations.<sup>8</sup> Facebook has launched its News Tab in the UK,<sup>9</sup> and Google continues to sign licensing deals for its new product, Google News Showcase, with the latest

<<https://blogs.microsoft.com/on-the-issues/2021/02/11/endorsement-australia-proposal-technology-news/>> accessed 20 February 2021.

7 Brad Smith, 'Technology and the Free Press: The Need for Healthy Journalism in a Healthy Democracy' (*Microsoft On the Issues*, 12 March 2021) <<https://blogs.microsoft.com/on-the-issues/2021/03/12/technology-and-the-free-press-the-need-for-healthy-journalism-in-a-healthy-democracy/>> accessed 20 April 2021.

7 Brad Smith, 'Technology and the Free Press: The Need for Healthy Journalism in a Healthy Democracy' (*Microsoft On the Issues*, 12 March 2021) <<https://blogs.microsoft.com/on-the-issues/2021/03/12/technology-and-the-free-press-the-need-for-healthy-journalism-in-a-healthy-democracy/>> accessed 20 April 2021.

8 'Europe's Press Publishers & Microsoft Call for Australian-Style Arbitration Mechanism in Europe to Ensure Tech Gatekeepers Remunerate Press Publishers Fairly for Use of Content' (*EMMA*, 22 February 2021) <<http://www.magazinemedias.eu/pr/europe-s-press-publishers-microsoft-call-for-australian-style-arbitration-mechanism-in-europe-to-ens/>> accessed 1 April 2021.

9 Jesper Doub, 'A New Destination for News in the UK' (*Facebook*, 25 January 2021) <<https://about.fb.com/news/2021/01/new-destination-for-news-in-the-uk/>> accessed 20 April 2021.

agreements with Italian<sup>10</sup> and Czech<sup>11</sup> publishers also covering the press publishers' right, which is rather odd as these countries have not yet transposed this right into their national legal orders.

The press publishers' right provided in Article 15 of the Directive on Copyright in the Digital Single Market (CDSM)<sup>12</sup> has been the European Union's (EU) response to the news media vs digital platforms clash. It is a neighbouring right, applicable to online uses of press publications by information society service providers. The right was adopted following years of heated and highly polarized debate<sup>13</sup> and should become a part of Member States' laws by 7 June 2021.<sup>14</sup> Even though the deadline, at the time of writing, is less than two months away, the majority of the Member States still have a long way to go before the press publishers' right becomes national law.

This opinion sketches the current state of the implementation of the press publishers' right in Member States, outlining the ongoing policy discussions and decisions taken on the national level.

## Implementation: the basics

The core of the press publishers' right seems settled by Article 15 CDSM: publishers of press publications are provided with a right of reproduction and a right of making available covering online uses of their press publications by information society service providers. Even so, Member States still have some important decisions to make. They need to decide what exactly is excluded from the scope of the right ('very short extracts'); what exceptions and limitations apply to the right; what is 'an appropriate share of the revenues' due

to authors and how should it be paid; and whether to adopt a specific licensing mechanism.

To date<sup>15</sup>, only two Member States, France<sup>16</sup> and the Netherlands,<sup>17</sup> have implemented the press publishers' right, and only the French provision has entered into force. Additionally, ten Member States have tabled their implementation proposals, four of which are making their way through the national parliaments: Croatia,<sup>18</sup> Germany,<sup>19</sup> Hungary<sup>20</sup> and Denmark.<sup>21</sup>

While some of the Member States make a full use of their interpretative freedoms, others have put forward a simple copy-paste of Article 15 CDSM without further explanation on how this provision should work in practice. Such is the case with Cyprus,<sup>22</sup> Luxembourg<sup>23</sup> and Estonia.<sup>24</sup>

What remains largely unchanged in all implementation proposals, is the definition of a press publication,

10 Fabio Vaccarone, 'Google News Showcase Is Launching in Italy' (*Google*, 31 March 2021) <<https://blog.google/products/news/google-news-showcase-launching-italy/>> accessed 20 April 2021.

11 Tania le Moigne, 'Google News Showcase Is Launching in Czechia' (*Google*, 20 April 2021) <<https://blog.google/products/news/google-news-showcase-launch-czechia/>> accessed 20 April 2021.

12 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.

13 On controversies surrounding the CDSM see 'Copyright Directive: How Competing Big Business Lobbies Drowned out Critical Voices' (*Corporate Europe Observatory*, 10 December 2018) <<https://corporateeurope.org/power-lobbies/2018/12/copyright-directive-how-competing-big-business-lobbies-drowned-out-critical>> accessed 20 April 2021; and Ula Furgal, Martin Kretschmer and Amy Thomas, 'Memes and Parasites: A discourse analysis of the Copyright in the Digital Single Market Directive', CREATE Working Paper 2020/10 (October 2020) <<https://zenodo.org/record/4085050#.X4ILXe0o-cw>> accessed 20 April 2021. On arguments for and against press publishers' right see Thomas Höppner, Raquel Xalabarder and Martin Kretschmer, 'CREATE public lectures on the proposed EU right for press publishers' (2017) 39 EIPR 607.

14 For an overview of the national implementations see EU Copyright Reform: Evidence on the Implementation of the Copyright in Digital Single Market Directive (Directive (EU) 2019/790), CREATE Centre: University of Glasgow and reCreating Europe <<https://www.create.ac.uk/cdsm-implementation-resource-page/>> accessed 21 April 2021.

15 The article reflects the state of implementation as of 27 April 2021.

16 LOI n° 2019-775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse.

17 Wet van 16 december 2020 tot wijziging van de Auteurswet, de Wet op de naburige rechten, de Databankenwet en de Wet toezicht en geschillenbeslechting collectieve beheersorganisaties auteurs- en naburige rechten in verband met de implementatie van Richtlijn (EU) 2019/790 van het Europees parlement en de Raad van 17 april 2019 inzake auteursrechten en naburige rechten in de digitale eengemaakte markt en tot wijziging van de Richtlijnen 96/9/EG en 2001/29/EG (Implementatiewet richtlijn auteursrecht in de digitale eengemaakte markt) (Dutch Implementation Act).

18 Prijedlog zakona o autorskom pravu i srodnim pravima, 7 July 2020 (Croatian Implementation Draft) <[https://www.sabor.hr/sites/default/files/uploads/sabor/2020-11-12/170011/PZE\\_61.pdf](https://www.sabor.hr/sites/default/files/uploads/sabor/2020-11-12/170011/PZE_61.pdf)> accessed 21 April 2021.

19 Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes, 9 March 2021 (German Implementation Draft) <<https://dip21.bundestag.de/dip21/btd/19/274/1927426.pdf>> accessed 21 April 2021.

20 Törvény az egyes szerzői jogi törvények jogharmonizációs célú módosításáról, 31 March 2021 (Hungarian Implementation Draft) <<https://www.parlament.hu/irom41/15703/15703.pdf>> accessed 21 April 2021.

21 Forslag til Lov om ændring af lov om ophavsret (Implementering af dele af direktiv om ophavsret og beslægtede rettigheder på det digitale indre marked samt direktiv om regler for udøvelse af ophavsretten og beslægtede rettigheder, der gælder for visse af TV- og radioselskaberne, sonlinetransmissioner samt retransmissioner af TV- og radioprogrammer m.v.), 26 March 2021 (Danish Implementation Draft) <[https://www.ft.dk/ripdf/samling/20201/lovforslag/1205/20201\\_1205\\_som\\_fremsat.pdf](https://www.ft.dk/ripdf/samling/20201/lovforslag/1205/20201_1205_som_fremsat.pdf)> accessed 21 April 2021.

22 *Εναρμόνιση του περί του Δικαιώματος Πνευματικής Ιδιοκτησίας και Συγγενικών Δικαιωμάτων (Τροποποιητικός) Νόμος του 1976 (59/1976)*, 9 October 2020 (Cypriot Implementation Draft) <[https://www.intellectualproperty.gov.cy/assets/modules/wgp/articles/202010/1360/docs/proxedio\\_tropopois\\_nomou.pdf](https://www.intellectualproperty.gov.cy/assets/modules/wgp/articles/202010/1360/docs/proxedio_tropopois_nomou.pdf)> accessed 21 April 2021.

23 Avant-Projet de loi portant transposition de la directive 2019/790 du Parlement européen et du Conseil du 17 avril 2019 sur le droit d'auteur et les droits voisins dans le marché numérique et modifiant les directives 96/9/CE et 2001/29/CE, 10 February 2021 (Luxembourgish Implementation Draft) <<https://gouvernement.lu/content/dam/gouvernement/documents/actualites/2021/02-fevrier/12-consultation-publique/20210204-APL-transposition-directive-2019790-Version-finale.pdf>> accessed 21 April 2021.

24 Autoriõiguse seaduse muutmise seadus (autoriõiguse direktiivide ülevõtmine), 15 March 2021 (Estonian Implementation Draft) <[https://www.create.ac.uk/wp-content/uploads/2021/04/2021.03.19\\_Implementation-Bill-1.pdf#x37927](https://www.create.ac.uk/wp-content/uploads/2021/04/2021.03.19_Implementation-Bill-1.pdf#x37927)> accessed 21 April 2021.

the object of the new right. Member States simply copy the definition of a press publication provided in Article 2(4) CDSM, without further consideration of what 'initiative, editorial responsibility and control' and the requirement that protected collections are 'composed mainly' of literary works means in practice.<sup>25</sup> The group of beneficiaries of the new right simply described in Article 15 CDSM as 'publishers of press publications', have been slightly limited by France<sup>26</sup> and Croatia<sup>27</sup> to publishers and news agencies, as defined by national legislative acts governing media. While making a connection between the implementation of Article 15 CDSM and national press and media regulation is welcome, it should not lead to the modification of the right's scope. The group of the right's beneficiaries is a simple derivative of the right's object: a press publication.

The scope of the exclusive rights granted to the publishers of press publications causes no major controversies. The explanatory memo accompanying the German implementation proposal emphasizes that the right of reproduction vested in a publisher does not apply to the internal acts of reproduction required to ensure the functioning of search engines (eg copies of website in cache).<sup>28</sup> As the memo notes, only reproductions for online uses are covered by the press publishers' right, as only those copies impair the economic exploitation of press publications. When it comes to copyright exceptions, application of all existing exceptions to the new right causes no controversies.<sup>29</sup>

## Bargaining: a case for collective management

The press publishers' right provides a legal basis for the licensing of press publications, answering press publishers' calls for an equal treatment with other content producers who already enjoy their own legal standing. It does not, however, concern itself with how those licences are negotiated. This sets Australian and EU approaches to the news media vs digital platforms clash apart,<sup>30</sup> and has caused some of EU politicians<sup>31</sup> as well as European publishers' organizations<sup>32</sup> to advocate for

an 'Australian-style' negotiation mechanism to be introduced in the EU (possibly, as a part of the forthcoming Digital Markets Act).<sup>33</sup>

The negotiation mechanism provided for in the Australian News Media Bargaining Code, an Australian response to the news media vs digital platforms clash, involves two steps. First, a bargaining between designated platforms and media organizations over remuneration for making their news content available. This is not 'making available to the public' as understood by copyright law, but 'making content available', a concept created only for the Code's purposes.<sup>34</sup> Secondly, if the agreement between the parties is not reached within three months, an obligatory final price arbitration takes place, where an arbiter makes a choice between final offers put forward by the parties. It is the second step that makes the 'Australian-style' negotiation attractive to the European publishers, which they believe would help to establish a 'fair price' for their content.<sup>35</sup>

Do Member States provide guidance on licensing during implementation? Some do. To date, the French implementation is the only one that goes into detail on how the press publishers' remuneration should be calculated. The remuneration ought to be based on the platform's revenue from both direct and indirect use of press publications, and take account, among others, of investments made by publishers, and the importance of the use of press publications to the platform's service.<sup>36</sup> Due to the transparency obligation, platforms are obliged to provide press publishers with all the information necessary to estimate the remuneration due. The criteria listed in the French legislation are similar to factors which an arbiter needs to take under consideration when making her decision pursuant to the Australian Media Bargaining Code.<sup>37</sup> Additionally, in France publishers can negotiate individually or collectively: L'Alliance de la Presse d'Information Générale (APIG) has represented more than 300 French publishers in negotiations with Google.<sup>38</sup>

25 On the definition of a press publication see Elżbieta Czarny-Drożejko, '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.

26 Code de la propriété intellectuelle (French IP Code) art L.218-1.

27 Croatian Implementation Draft art 158(4).

28 German Implementation Draft, 113.

29 See, eg Danish Implementation Draft, 7.

30 For a detailed comparison of Australian and EU approaches see Ula Furgal, 'Making Google and Facebook Pay? Comparing the EU Press Publishers' Right and Australian Draft Media Bargaining Code' (CREATe, 15 September 2020) <<https://www.create.ac.uk/blog/2020/09/15/making-google-and-facebook-pay-comparing-the-eu-press-publisher>

ers-right-and-australian-draft-media-bargaining-code/> accessed 21 April 2021.

31 Javier Espinoza and Alex Barker, 'EU Ready to Follow Australia's Lead on Making Big Tech Pay for News' (8 February 2021) <<https://www.ft.com/content/4c40c890-afd3-40a3-9582-78a66c37a8af>> accessed 23 February 2021.

32 'Europe's Press Publishers' (n 8).

33 Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM/2020/842 final.

34 News Media Bargaining Code art 52B.

35 'Europe's Press Publishers' (n 8).

36 French IP Code art L.218-4.

37 News Media Bargaining Code art 52ZZ.

38 'Alliance de la Presse d'Information Générale' (Alliance Presse) <<http://www.alliancepresse.fr/>> accessed 21 April 2021.

The idea of collectivity has been taken further in other implementation proposals, which require that the press publishers' right is subject to collective rights management. If a collective management route is taken, an internet society service provider would not negotiate with publishers directly, but rather enter agreements with appropriate collective management organizations (CMOs) representing publishers. When answering the parliamentary questions of Vondra MEP,<sup>39</sup> the European Commission precluded implementation of Article 15 CDSM through a mechanism of *mandatory* collective management.<sup>40</sup> In the Commission's opinion, the press publishers' right cannot be reduced to a remuneration right, and publishers need to have a choice whether to authorize or prohibit the use of their publications. Thus, collective management is possible, but only when there is an opt-out mechanism available.

Both Danish<sup>41</sup> and Czech<sup>42</sup> implementation proposals envisage collective licensing with an extended effect, designed to cover not only press publishers registered with a competent CMO, but also those who have not done so.<sup>43</sup> In both countries, an opt-out mechanism has been provided and platforms would have an opportunity to contest CMOs' tariffs (Czechia), or 'unreasonable' licensing conditions (Denmark). Additionally, the explanatory memorandum accompanying the Hungarian implementation bill notes that collective management, also that with an extended effect, is allowed for the press publishers' right, as for other neighbouring rights.<sup>44</sup>

The Austrian implementation proposal provides for an obligatory collective management, but only for the remuneration claims against 'dominant service providers

for sharing online content and dominant service providers for searching online content'.<sup>45</sup> The explanatory memo explicitly notes that this obligation is motivated by the large platforms' reactions to the introduction of the press publishers' right in other Member States (ie France) and that it is designed to protect press publishers from the abuse of dominant market positions by these platforms. The language of the memorandum closely resembles that of the Australian Code, posed to tackle bargaining power imbalances between digital platforms and Australian news businesses, but it seems that such a mechanism, lacking an opt-out option, is unfeasible.

Google's reaction to the implementation of the press publishers' right in France, which the Austrian explanatory memo refers to, was not unexpected given Google's history with earlier regulatory interventions in Germany<sup>46</sup> and Spain,<sup>47</sup> and its widely-known opposition towards the press publishers' right. Following its initial refusal to negotiate with French press publishers,<sup>48</sup> Google was, however, mandated to do so by the French Competition Authority, following publishers' complaints of abuse of dominant position.<sup>49</sup> The collective management of rights, included in some implementation proposals, seems like the Member States' attempt to overcome Google's (and prospectively other platforms') refusal to negotiate, by taking the direct bargaining with press publishers off the table. Historically, however, the collective management approach was taken and failed in Germany, in the context of its national press publishers' right, as it did not stop Google from saying 'no' to payments.<sup>50</sup>

### 'Individual words or very short extracts'

Article 15 offers two important carve-outs from the press publishers' right's scope, covering 'acts of

39 Question for written answer E-004603/2020 to the Commission Rule 138 Alexandr Vondra (ECR) (*European Parliament*, 24 August 2020) <[https://www.europarl.europa.eu/doceo/document/E-9-2020-004603\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2020-004603_EN.html)> accessed 20 April 2021.

40 Answer given by Mr Breton on behalf of the European Commission, Question reference: E-004603/2020 (*European Parliament*, 9 November 2020) <[https://www.europarl.europa.eu/doceo/document/E-9-2020-004603-ASW\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2020-004603-ASW_EN.html)> accessed 20 April 2021.

41 Danish Implementation Draft s1(3).

42 Návrh zákona, kterým se mění zákon č. 121/2000 Sb., o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů (autorský zákon), ve znění pozdějších předpisů, a zákon č. 89/2012 Sb., občanský zákoník, ve znění pozdějších předpisů (Czech Implementation Draft), 6 November 2020, art. 31 and 44 <[https://apps.odok.cz/veklep-de-tail?p\\_p\\_id=material\\_WAR\\_odokkpl&p\\_p\\_lifecycle=0&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_col\\_id=column-1&p\\_p\\_col\\_count=3&material\\_WAR\\_odokkpl\\_pid=KORNBV4HKCRN&tab=detail](https://apps.odok.cz/veklep-de-tail?p_p_id=material_WAR_odokkpl&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=3&material_WAR_odokkpl_pid=KORNBV4HKCRN&tab=detail)> accessed 21 April 2021.

43 See Anette Alén-Savikko and Tone Knapstad, 'Extended Collective Licensing and Online Distribution - Prospects for Extending the Nordic Solution to the Digital Realm' in Taina Pihlajarinne, Juha Vesala and Olli Honkkila (eds), *Online Distribution of Content in the EU* (Edward Elgar 2019).

44 Hungarian Implementation Draft, General Explanation (*Általános indokolás*), 59–60.

45 Verwertungsgesellschaftengesetz 2016 geändert werden (Urheberrechts-Novelle 2021 - Urh-Nov 2021) (Austrian Implementation Draft), 4 December 2020, s76f(7) <<https://www.notion.so/Austria-a1190fc68d95469fbfed10e93e0359bc>> accessed 21 April 2021.

46 Philipp Justus, 'News zu News bei Google' (*Der offizielle Blog von Google Deutschland*, 1 October 2014) <<https://germany.googleblog.com/2014/10/news-zu-news-bei-google.html>> accessed 23 April 2021.

47 Richard Gingras, 'An Update on Google News in Spain' (*Google Europe Blog*, 11 December 2014) <<http://googlepolicyeurope.blogspot.com/2014/12/an-update-on-google-news-in-spain.html>> accessed 9 February 2016.

48 Richard Gingras, 'Nouvelles règles de droit d'auteur en France: notre mise en conformité avec la loi.' (*Le blog officiel de Google France*, 25 September 2019) <<https://france.googleblog.com/2019/09/comment-nous-respectons-le-droit-dauteur.html>> accessed 7 November 2019.

49 'Droits voisins: l'Autorité fait droit aux demandes de mesures conservatoires présentées par les éditeurs de presse et l'AFP' (*Autorité de la concurrence*, 9 April 2020) <<https://www.autoritedelaconcurrence.fr/fr/communiqués-de-presse/droits-voisins-lautorite-fait-droit-aux-demandes-de-mesures-conservatoires>> accessed 9 April 2020.

50 'Leistungsschutzrecht: VG Media Klagt Auf Zahlung Einer Angemessenen Vergütung' (*Institut für Urheberrecht und Medienrecht*, 10 June 2014) <<https://www.urheberrecht.org/news/5233/>> accessed 23 April 2021.

hyperlinking' and 'individual words or very short extracts'. With the hyperlink exception being quite straightforward, it is the latter that poses implementation and interpretative challenges for Member States. What constitutes a 'very short extract'? When is the licensing obligation triggered?

To date, no Member State has decided to offer a volume criterion, indicating a particular number of words or characters which could be freely used. Some explicitly refuse to do so (Denmark,<sup>51</sup> Estonia).<sup>52</sup> Where an explanatory memorandum accompanies the implementation proposal, it often refers to recital 58 of the CDSM Directive, requiring that the exempted extracts do not affect the effectiveness of the right, in the sense that they do not substitute a press publication or deter users from referring to it.<sup>53</sup> The Belgian implementation draft additionally echoes recital 55, mandating that exempted extracts do not have their own economic value<sup>54</sup>; and the Italian Delegation Law, outlining the principles for implementation of the CDSM Directive, requires that 'very short extracts' are defined in a way which does not jeopardize the free movement of information.<sup>55</sup> Thus, Member States provide general principles, and call for a case-by-case assessment. Only hints of what is allowed can be found in the Member States' proposals, eg Estonia names titles of press publications as exempt.<sup>56</sup>

Member States vary on permissibility of non-literary content as a part of an exempt extract. Some explicitly state that extracts can include non-literary forms of expression, such as photographs, graphics and videos (Estonia,<sup>57</sup> Germany),<sup>58</sup> whereas others allow only words to be included in an exempt snippet (Croatia).<sup>59</sup> The majority are silent on the issue. The reluctance to set volume criteria, and the lack of a unified approach on permissibility of non-literary content means that clarity over what 'very short extracts' are might be achieved only through the case law.

51 Danish Implementation Draft, 37.

52 Estonian Implementation Draft, explanatory memorandum (*eelnõu seletuskiri*), 94.

53 Czech Implementation Draft art 161(3); German Implementation Draft, 113; French IP Code art L 211-3-1.

54 Document de travail contenant l'exposé des motifs relatif à la transposition des articles 1 à 17 de la directive 2019/790 (Belgian Implementation Draft, 19 June 2020) 272 <<https://economie.fgov.be/sites/default/files/Files/Intellectual-property/Avis%20Conseils%20Propri%C3%A9t%C3%A9%20intellectuelle/Avis-CPI-19062020.pdf>> accessed 21 April 2021.

55 Delega al Governo per il recepimento delle direttive europee e l'attuazione di altri atti dell'Unione europea - Legge di delegazione europea 2019-2020, 20 April 2021, art 9(1)(i) <<http://www.senato.it/service/PDF/PDFServer/BGT/01217556.pdf>> accessed 22 April 2021.

56 Estonian Implementation Draft, explanatory memorandum (*eelnõu seletuskiri*), 94.

57 Ibid.

58 German Implementation Draft, 113.

59 Croatian Implementation Draft art 161(3)(3).

## Authors' share

Pursuant to Article 15(5) CDSM, authors of works and other subject-matter included in a press publication are entitled to an appropriate share of the revenues that press publishers receive from information society service providers. This guarantee was crucial for convincing initially hesitant journalists' organizations<sup>60</sup> to back the press publishers' right.<sup>61</sup> The first step towards making this guarantee more than an empty promise is for the implementation proposals to go beyond mere copying of the Article 15(5) CDSM principle (like in Denmark, Hungary and Luxembourg), and to provide more detail on both the amounts due and their modes of payment.

The German proposal guarantees that authors receive at least one-third of revenues,<sup>62</sup> and the Polish Ministry of Culture considers setting a guaranteed share at 50 per cent.<sup>63</sup> While France<sup>64</sup> and Croatia<sup>65</sup> do not prescribe a due percentage, they require that authors' appropriate share is considered separate from a salary. To date, Belgium is the only Member State to propose authors' share to be non-transferable.<sup>66</sup>

Member States which have decided to address the mode of collection and distribution of the authors' share, show a strong preference for the collective solutions. In Austria<sup>67</sup> and Germany,<sup>68</sup> the authors' share is to be subject to obligatory collective management. Collective management has been the preferred solution of the European Federation of Journalists, an umbrella organization bringing together national journalists' organizations in Europe, since tabling of the CDSM Directive in 2016.<sup>69</sup> In France, the share ought to be determined in a collective agreement,<sup>70</sup> and in Croatia journalists' rights needs to be exercised collectively.<sup>71</sup> In Belgium, the government reserved itself a competence to determine both the method of calculation and of

60 EFJ and IFJ, 'EFJ-IFJ Welcome Proposed EU Directive Strengthening Authors' Contractual Position' (*European Federation of Journalists*, 14 September 2016) <<https://europeanjournalists.org/blog/2016/09/14/efj-welcome-proposed-eu-directive-strengthening-authors-contractual-position/>> accessed 26 February 2019.

61 'Statement on Publishers' Right from Journalists and Publishers Ahead of the 12 September Plenary on the EU Directive on Copyright in the Digital Single Market'.

62 German Implementation Draft s87k.

63 'Konsultacje publiczne dotyczące wdrożenia najnowszych dyrektyw UE w zakresie prawa autorskiego (tzw. dyrektywy DSM i dyrektywy SatCab) Prawo autorskie' (*MKIDN*, 30 July 2020) <<http://www.prawoautorskie.gov.pl/pages/posts/konsultacje-publiczne-dotyczace-wdrozenia-najnowszych-dyrektyw-ue-w-zakresie-prawa-autorskiego-tzw-dyrektywy-dsm-i-dyrektywy-satcab-1025.php>> accessed 21 April 2021 question 10.

64 French IP Code L.218-5-I.

65 Croatian Implementation Draft art 162(2).

66 Belgian Implementation Draft art XI.216/2 s4.

67 Austrian Implementation Draft, explanatory notes (*Erläuterungen*), 3.

68 German Implementation Draft s87k (2).

69 EFJ and IFJ (n 59).

70 French IP Code art L.218-5-I.

71 Croatian Implementation Draft, explanatory notes (*obrazloženje*), 204.

collection of authors' remuneration, in the case that no agreement is reached between the stakeholders.<sup>72</sup>

To date, France is the only country that provides for a transparency obligation, guaranteeing that authors receive, at least once per year, complete information on the methods of calculating their appropriate share.<sup>73</sup> The lack of transparency obligation in other jurisdiction is somehow worrying, considering that the deals which are now being concluded between press publishers and Google are not public, potentially making it difficult for the authors to assess whether the amounts they receive are indeed an appropriate share.

### The curious case of Croatia

The Croatian implementation draft is an interesting read, as the Croatian government has proposed the introduction of not one, but two neighbouring rights to benefit press publishers. Whereas the first right implements Article 15 CDSM,<sup>74</sup> the second right is a full-blown neighbouring right, applicable to both analogue and digital uses of press publications by *all* users, not only information society service providers, and it lasts for ten years.<sup>75</sup> The explanatory memorandum accompanying the proposal does not explain why the government has decided to adopt an additional neighbouring right, or what is its relationship with the CDSM-mandated right, considerably narrower in its scope and lasting only for two years. In general, there is no obstacle for a Member State to adopt a new neighbouring right. However, the new-full blown right granted to press publishers should in no way restrict actions that are explicitly excluded from the scope of the CDSM-mandated right, undermining the implementation's efficiency.

### But wait. . . who should actually pay?

The press publishers' right is an odd creature, as it is applicable only to the online uses by information society service providers (not counting the above-mentioned Croatian full-blown related right). This limitation, not included in the original draft, was never discussed in detail. The CDSM does not offer its own definition of an information society service, but refers to the one provided in Directive 2015/1535,<sup>76</sup> which defines an information society service as any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.<sup>77</sup> Member States' implementation

proposals tend to simply refer to national acts which transpose provisions of Directive 2015/1535.

The explanatory notes and comments made by some of the stakeholders, however, reveal that there is some confusion as to which platforms are obliged to pay for the use of press publications, and especially weather social media (aka Facebook) need to start licensing news content. In Denmark, the explanatory memo uses search engines and social media platforms as examples of information society services.<sup>78</sup> In Austria, the mandatory collective management is to apply to such social media platforms as Facebook.<sup>79</sup>

Social media platforms were not a target of the EU legislation, as the press publishers' right was created with Google and its Google News service in mind. The CDSM Directive's recital 54 points at news aggregators and media monitoring services, as those whose business models centre on the reuse of press publishers' content. Over the years, however, the conflict between news media and digital platforms has evolved: it no longer centres on the reuse of content, but on the advertising revenue and news media dependency on the dominant platforms.<sup>80</sup> Thus, adding Facebook to the list of potential licensees of the press publications came naturally, especially when the Australian News Bargaining Code targets both Google and Facebook.

There is, however, an important difference between news aggregators and social media platforms. Whereas it is clear that it is news aggregators which make press publications available to the public, the same does not apply to social media, where news content is uploaded by users, including press publishers themselves. And only those information society service providers which make press publications available to the public are within the press publishers' right scope. It is not possible to draw a simple parallel between the EU and Australian regulation, as the News Media Bargaining Code does not belong to the realm of copyright, and relies on its own concept of 'making content available'. The question of whether user-uploaded content is made available by social media remains open under EU copyright. Some clarity should be provided in the forthcoming judgement of the Court of Justice of the EU in the *YouTube* case concerning liability of services such as YouTube for copyright-infringing content uploaded by

72 Belgian Implementation Draft art XI.216/2 s4.

73 French IP Code art L.218-5-IV.

74 Croatian Implementation Draft art 161.

75 *Ibid* art 160.

76 CDSM art 2(5).

77 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 (Text with EEA relevance) [2015] OJ L 241/1.

78 Danish Implementation Draft, 7.

79 Austrian Implementation Draft, explanatory notes, 3.

80 Mark Scott, 'Coronavirus Reignites Feud between Publishers and Platforms' (22 April 2020) <<https://pro.politico.eu/news/118062>> accessed 22 April 2020.

their users.<sup>81</sup> The Opinion by Advocate General Øe does not give press publishers and other rightsholders much hope, finding that YouTube does not carry out communication to the public.<sup>82</sup>

## Conclusion

A lot can happen in two months, but it is highly unlikely that all Member States will implement the press publishers' right before the 7 June 2021 deadline. It is more likely that the news media vs digital platforms saga in Europe continues, with the calls for the 'Australian-style' negotiation getting louder. The already-tabled implementation proposals show Member States erring on the side of caution, leaving such important issues as the understanding of 'very short extracts'

and authors' 'appropriate share' to stakeholder agreements and future court decisions. With the implementation deadline approaching fast, Member States should resist the temptation to simply copy the wording of Article 15 CDSM, without providing further clarifications. Numerous voices criticizing the press publishers' right as being unfit to address the media organizations vs digital platforms clash were ignored during the EU legislative process. The lack of clarity provided by the ongoing implementation, together with the expectation of further regulatory interventions and the ancillary role played by the press publishers' right in deals publishers are making with Google, does not prove those critics wrong.

81 Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 6 November 2018 - LF v Google LLC, YouTube Inc, YouTube LLC, Google Germany GmbH, C-682/18.

82 Opinion of Advocate General Saugmandsgaard Øe delivered on 16 July 2020 in joined cases C-682/18 and C-683/18, ECLI:EU:C:2020:586, para 76.