GRUR International, 72(7), 2023, 650–664

https://doi.org/10.1093/grurint/ikad025
Advance Access Publication Date: 3 March 2023
Article

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The Emperor Has No Clothes: How the Press Publishers' Right Implementation Exposes Its Shortcomings

This article discusses the implementation of the press publishers' right introduced by Art. 15 of the Directive on Copyright in the Digital Single Market (CDSM). It analyses Member States' transpositions through the lens of the legislative intent of the EU legislator, who aimed to strengthen the press publishers' bargaining position towards digital intermediates while preserving users' freedom to share information online. The article argues that the implementation process further exposes the shortcomings of the press publishers' right and its unfitness to deliver the goals set. The negotiation basis that the right provides is neither clear, nor capable of correcting bargaining imbalances, as it is unable to force relevant platforms to the negotiation table. The extension of the scope of the press publishers' right to social media is questionable, as it inherently influences users' freedoms. The article cautions against the implementation of the press publishers' right in a way that mimics the solutions endorsed in the competition law-based bargaining codes with the excess of implementation freedoms provided by the CDSM Directive.

I. Introduction

The press publishers' right provided for in Art. 15 of the Copyright in the Digital Single Market (CDSM) Directive[1] is the European Union's response to the press publishers and digital intermediaries conundrum. First proposed by the European Commission (the Commission) in 2016, and adopted in 2019, the right should have been implemented by all Member States by June 2021. Alas, this is not the case. Throughout the years the relationship between press and intermediaries has evolved, with an increasing amount of traffic coming to publishers from social media, and platforms consistently growing their share in digital advertising revenues. The global political climate has also altered, with an increasing number of governments considering or taking regulatory actions to address the press-and-intermediaries relationship, most notably Australia adopting the News Media Bargaining Code (the Code) in February 2021.[2] Those changing dynamics have left their mark on the press publishers' right transposition process, causing some Member States to go beyond the implementation freedoms left by the CDSM Directive.

This paper argues that the implementation of the press publishers' right further exposes the right's shortcomings, its unfitness to deliver on the goals set, and the lack of future-proofing. The right was intended to balance the bargaining position of press publishers and digital intermediaries by providing a clear legal basis for licensing negotiations, and ultimately contributing to the sustainability of the European press sector. The right is neither clear, nor capable of correcting negotiation imbalances, as it is unable to force relevant platforms to the negotiation table. Both copyright and neighbouring rights empower rightsholders to authorise (or not) uses of their content. They do not, however, give them the power to mandate third parties to use their content in exchange for remuneration. The extension of the scope of scope of the press publishers' right to social media is questionable, as it inherently influences users' freedoms which were to remain untouched by the regulatory intervention. Member States interventions on the scope of the press publishers' right and the negotiation mechanism, potentially well-intended, seems to have lost sight of what was intended by the EU legislator when the right was adopted as a part of a larger incursion into copyright law in 2019.

The paper tells a story of how the press publishers' right came to be and what its original goals were (Section II). It then draws a picture of the relationship between news media and digital intermediaries (Section III) and recounts the current move towards regulating this relationship (Section IV). After providing a brief overview of the implementation of the press publishers' right to date (Section V), the paper focuses on the two aspects of the right: the negotiation process (Section VI) and the personal scope (Section VII), arguing that the Member States' implementation decisions influenced by the current state of the press and digital intermediaries' relationship and its regulation

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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 L130.

2 Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020, Bills Digest No 48, 2020-21, 15 February 2021.

do not reflect the legislative intent behind the press publishers' right (Section VIII).

II. The EU press publishers' right

Following the adoption of similar rights in Spain[3] and Germany,[4] the European Union intervened into the relationship between media and digital intermediaries by providing publishers with a new neighbouring right on their press publications. When the possibility of introducing the right was first considered, the key concern was that of an uncertain scope of the right of communication to the public provided for in Art. 3 InfoSoc Directive and the functioning of a new type of an online service, i.e. news aggregators, particularly Google News.[5] The justification for the EU legislative intervention evolved over time. In 2019, when the CDSM Directive was adopted, news aggregators were still a concern, but it was the need to guarantee sustainability, freedom, and pluralism of the press sector which (at least formally) steered the actions of the EU legislator.[6] The press publishers' right was to guarantee that press publishers are remunerated for the uses of their content, and that the increased revenues lead to the 'availability of reliable information'.[7]

The new right was thought of as a way of strengthening the bargaining position of press publishers towards intermediaries, as their rights in press content could no longer be contested. At the same time, however, the EU guaranteed that the legislative intervention would have no impact on the users' ability to share and access information online. Thus, the right covers only online uses of press publications by information society service providers (ISSPs). Private and non-commercial uses of press publications by individual users are explicitly excluded from the right's scope, which means that users sharing press publications online should remain subject to already existing copyright rules.[8] This limitation of the right's scope, originally not a part of Art. 15 CDSM Directive, was to address concerns about the new right's impact on the users' right to receive and impart information, as well as internet freedoms.[9] While its introduction aligned the press publishers' right with its declared addresses,[10] it was not preceded by a focused discussion on which intermediaries the new right would apply to.

The CDSM Directive settles the core of the press publishers' right, defining what is a press publication and providing their publishers with a right of making available and the right of reproduction. The rights awarded to publishers are considerably narrower than those enjoyed by other rightsholders pursuant to the InfoSoc Directive. Not only do they concern solely online uses by ISSPs, but they do not apply to acts of hyperlinking and use of single words and very short extracts. What exactly a very short extract is remains to be seen, most likely in the future decisions of the Court of Justice of the European Union (CJEU). The right's term is considerably shorter than other neighbouring rights, lasting only two years. The exceptions and limitations found in the directives listed by the CDSM Directive should apply to the press publishers' right *mutatis mutandis* and authors of contributions included in a publication are entitled to an appropriate share of the revenues received by publishers based on the new right.

The introduction of the press publishers' right was not short of controversy. From the moment it was proposed, the new right attracted considerable and overwhelmingly justified criticism.[11] The majority of this criticism centred on the incapability of the new right to deliver the objectives set. Since both copyright and neighbouring rights apply to all qualifying works and subject matter equally, no matter their quality, giving rightsholders the control over their exploitation without the possibility to mandate their use, it was always questionable whether the press publishers' right is a meaningful tool. Regardless of the ongoing discussions on the effectiveness of the right, it was overwhelmingly supported by the legacy news publishers, who are most affected by the digital transition of the press sector. Publishers argued that by receiving the new right they would be treated equally with other content producers, such as phonogram producers and broadcasting organisations, in recognition of the technological advancement facilitating unauthorised exploitation of their content.[12] Born digital, small and innovative publishers were and still are less welcoming.[13] Their opposition was joined by

3 Ley N° 21/2014, de 4 de noviembre, por la que se modifica el texto refundido de la Ley de Propiedad Intelectual aprobado por Real Decreto Legislativo 1/1996, de 12 de abril, y la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil.

4 Achtes Gesetz zur Änderung des Urheberrechtsgesetzes vom 7 Mai 2013, Bundesgesetzblat 2013 Teil I Nr 23, 1161.

5 European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Towards a Modern, More European Copyright Framework' COM(2015) 626 final 9-10 (hereinafter: 'Communication from the Commission to the European Parliament').

6 CDSM Directive para 54.

7 ibid 55.

8 ibid.

9 Ula Furgał, Martin Kretschmer and Amy Thomas, 'Memes and Parasites: A discourse analysis of the Copyright in the Digital Single Market Directive' (2020) CREATe Working Paper 2020/10 <https://zenodo.org/record/4085050#.Y5r6433P2Uk> accessed 1 December 2022.

10 While the draft directive covered all digital uses of press publications, explanatory notes insisted that the new right is concerned to the 'online services'.

11 See Martin Kretschmer and others, 'Answer to the EC Consultation on the Role of Publishers in the Copyright Value Chain' (2016) 38 EIPR 591-95; Richard Danbury, 'Is an EU Publishers' Right a Good Idea?' (*CIPIL*, 15 June 2016) <https://www.cipil.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cipil.law.cam.ac.uk/documents/copyright_and_news/danbury_publishers_right_report.pdf> accessed 1 December 2022; Mireille van Eechoud, 'A Publisher's Intellectual Property Right. Implications for Freedom of Expression, Authors and Open Content Policies' (*OpenForum Europe*, January 2017) <https://www.openforumeurope.org/wp-content/uploads/2017/01/OFE-Academic-Paper-Implications-of-publishers-right_FINAL.pdf> accessed 1 December 2022; Alexander Peukert, 'An EU Related Right for Press Publishers Concerning Digital Uses. A Legal Analysis' (2016) Goethe University Research Paper No 22/2016 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888040> accessed 1 December 2022; Taina Pihlajarinne and Juha Vesala, 'Proposed Right of Press Publishers: A Workable Solution?' (2018) 13 Journal of Intellectual Property Law and Practice 220.

12 See European Publishers Council, 'Adequate Legal Protection Is Needed to Ensure the Diversity of the Press and the Future of Quality Journalism in Europe' (*EPC*, 10 January 2017) <https://www.epceurope.eu/post/adequate-legal-protection-is-needed-to-ensure-diversity-of-the-press-and-quality-journalism> accessed 1 December 2022.

13 European Innovative Media Publishers, 'RE: Open Letter to Members of the European Parliament and the Council of the European Union on the Introduction of a New Neighbouring Right under Art. 11 of the Copyright Directive' (*EIMP*, 25 September 2017) <https://mediapublishers.eu/2017/09/25/open-letter-to-members-of-the-european-parliament-and-the-council-of-the-european-union-on-the-introduction-of-a-new-neighboring-right-under-art-11-of-the-copyright-directive/> accessed 1 December 2022.

civil society, users organisations and users themselves, who feared the new right will restrict their online freedoms.[14] Together with Art. 17 CDSM Directive, which created a new intermediary liability regime for online content sharing service providers, the press publishers' right has been the most contentious and publicly debated provision, consistently delaying the CDSM Directive legislative process. All those controversies carried over into the implementation phase.

III. The frenemies

The proposal for the press publishers' right was not preceded by a focused enquiry into the relationship between press and digital intermediaries.[15] The impact assessment accompanying the proposal provided only a modest snapshot of this relationship, noting its complexity and focusing on the press publishers' declining revenues. As the document briefly explains, while the intermediaries bring publishers new audiences, the press content they provide often fulfils the information needs of users, causing them not to click through to the publishers' websites which erodes publishers' advertising revenues.[16] Communication scholars refer to those effects as market expansion and substitution effects, respectively.[17] While originally central to the discussion on press and intermediaries relationship, concerns about the click-through rates were pushed to the background by the concerns over platform dependency, and Google and Facebook's dominance on the digital advertising market.

The relationship between press and platforms is dynamic and symbiotic, and it has an undeniable impact on the current shape of the media landscape.[18] Digitalisation has restructured the linear model of news production and distribution, challenging not only traditional business models, but also legacy media's control over information communication channels. The legacy media are no longer the sole source of information. Audiences increasingly find their information through digital intermediaries such as news aggregators, search engines, social media and messaging apps (distributed discovery). At its core, platforms offer publishers an opportunity to reach new audiences by including press content on their services. The amount of content present on platforms differs, but it is usually a preview accompanied by a link to the full item. Such is the case for search results, news aggregators records and social media posts. Inclusion of complete news items is less common, however, some platforms offer an opportunity to directly publish on their services using dedicated formats, such as Google's Accelerated Mobile Pages (AMP) or Facebook's Instant Articles (distributed content).[19] While distributed discovery can lead to readers being exposed to a wider array of news sources,[20] it is prone to disrupt the direct relationship that news organisations have with their audiences. It goes against the legacy news organisations' practice of content bundling, offering users a single bundle of diverse content, promoting a disaggregated news experience.[21]

For years, the majority of news organisations have been arguing that digital intermediaries should pay for online uses of their press content, noting that those uses generate considerable revenues for platforms. First, directly via advertising displayed alongside the press content. Secondly, indirectly by enhancing platforms' attractiveness and the collection of users' data.[22] The latter gained importance with platforms' growing share of advertising revenues and the rise of programmatic advertising. In the UK, the Competition and Markets Authority 2020 study found that Google and Facebook dominate search and display advertising, attracting around 80% of the total annual spend.[23] The considerable reach of Google and Facebook is attractive not only to the advertisers, but also to the news organisations themselves, who were quick to establish their presence on social media and optimise their content for search results. Platforms became a crucial source of traffic, with the hope that in time this traffic will transform into loyal readers and paying subscribers. As shown by the Reuters Institute Digital News Media Report 2021, only 25% of users come across news directly via a website or an app of a news organisation, with the rest relaying on social media (26%), internet search (25%) and others.[24] While the level of engagement with platforms differs, it is quite uncommon for news organisations to demonstratively exit platforms, and such cases quickly catch public attention.[25]

14 'Message in Light of the Competitiveness Council' (*CopyBuzz*, 29 May 2017) <https://copybuzz.com/wp-content/uploads/2017/05/29May_OpenLetter_Council.pdf> accessed 1 December 2022.

15 The Commission asked the Joint Research Centre (JRC) to investigate the press and intermediaries' relationship at a later date. This report, however, was never officially published, and the public only found out about its existence thanks to a freedom of information request by MEP Reda.

16 European Commission, 'Commission Staff Working Document Impact Assessment on the Modernisation of EU Copyright Rules. Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council Laying down Rules on the Exercise of Copyright and Related Rights Applicable to Certain Online Transmissions of Broadcasting Organisations and Retransmissions of Television and Radio Programmes' (European Commission 2016) SWD(2016) 301 final 157 (hereinafter: 'Commission Staff Working Document Impact Assessment on the Modernisation of EU Copyright Rules').

17 Joan Calzada and Richard Gil, 'What Do News Aggregators Do? Evidence from Google News in Spain and Germany' (2018) 2 <https://ssrn.com/abstract=2837553> accessed 1 December 2022.

18 See 'Competition Issues Concerning News Media and Digital Platforms' (OECD 2021).

19 Recently, Facebook decided to cease support for Instant Articles, and Google stopped giving AMP articles preference in search results, effectively killing the format. See Sarah Fisher, 'Scoop: Meta ending support for Instant Articles' (*Axios*, 14 October 2022) <https://www.axios.com/2022/10/14/meta-facebook-ending-support-instant-articles> accessed 1 December 2022.

20 Richard Fletcher and Rasmus Kleis Nielsen, 'Are People Incidentally Exposed to News on Social Media? A Comparative Analysis' (2018) 20 New Media & Society 2450.

21 Frances Cairncross, 'The Cairncross Review. A Sustainable Future for Journalism' (2019) 31-32 <https://www.gov.uk/government/publications/the-cairncross-review-a-sustainable-future-for-journalism> accessed 1 December 2022.

22 'Digital Platforms Inquiry Final Report' (*ACCC*, 2019) 218 <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report> accessed 1 December 2022.

23 'Online Platforms and Digital Advertising. Market Study Final Report' (CMA 2020) 62.

24 Nic Newman and others, 'Reuters Institute Digital News Report 2021' (*Reuters Institute for the Study of Journalism*, 2021) 24 <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2021-06/Digital_News_Report_2021_FINAL.pdf> accessed 1 December 2022.

25 When New Zealand publisher Stuff quit Facebook in 2020 the news was reported by media outlets all around the world. See Jack Gramenz, 'News Giant Quits Facebook' (*NewsComAu*, 6 July 2020) <https://www.news.com.au/technology/online/social/new-zealand-news-site-stuff-quit-facebook-indefinitely/news-story/1bc25224e97a74a21aaf8789443cc5eb#.mass5> accessed 1 December 2022.

The news organisations' dependence on the intermediary traffic makes platforms their unavoidable trading partners.[26] This is not reciprocal, however. As noted by Nielsen and Ganter '[h]ow important news is for platforms is hotly disputed and hard to gauge'.[27] Back in 2018, Facebook indicated that less than 5% of content seen by users in their feeds is news content.[28] This statement was not backed by the relevant data. As neither Facebook nor Google are forthcoming with information on the extent and significance of news use in their services, publishers' valuations remain only an estimate.[29] While critical towards platforms, news organisations continue to engage with their new news products, News Tab (Facebook) and Google News Showcase (Google), as well as new platforms, such as TikTok, which is increasing its reach for news, especially among young social media users.[30] Ultimately, digital platforms are the news organisations' frenemies.

IV. A global move towards regulation

While Europe was the first to intervene into the relationship between press and digital intermediaries, it will certainly not be the last. When plans for the EU intervention were first made public in 2015, we were looking at this issue only through the copyright lens. This is no longer the case. Nowadays, the relationship between the news media and intermediaries is a part of a broader question on platform regulation and media policy. As noted by Bossio and others, what we are currently witnessing is a global trend towards proactive regulation of the digital media spaces.[31] Issues of sustainability, pluralism and quality of media are consistently linked to the effects digital intermediaries have on the press sector. News media is either the focus of, or a factor considered in numerous enquiries into the role and market power of digital intermediaries, which have been carried out at both national and supranational level.[32] Those enquiries aim to inform the policies and regulatory initiatives bundled together under the banner of 'regulating Big Tech'. Thus, the conversation about addressing the relationship between news media and intermediaries has left the copyright-familiar territory of control over content and is shifting to the market power and dominance, which are concepts more familiar to the field of competition law.

The most notable regulatory initiative following the EU press publishers' right is the News Media Bargaining Code, adopted in February 2021 in Australia, which has set the tone for the current discussion. The Code results from the Digital Platforms Inquiry (the Inquiry) conducted by the Australian Competition and Consumer Commission (ACCC) into the impact of platform services on the state of competition in media and advertising services markets, in particular in relation to the supply of news and journalistic content.[33] While the Inquiry's final report recommended that selected platforms develop voluntary codes of conduct to govern their commercial relationships with media organisations,[34] the Australian government eventually ordered the ACCC to draw up a single mandatory code which designated platforms would be obliged to observe.[35]

Unlike the press publishers' right, the Code does not belong to the realm of copyright and does not rely on a new or pre-existing right. Questions on the relevance of copyright were asked and answered in the negative during the Inquiry.[36] Thus, referring to the Code as a form of a press publishers' right is not accurate, and can be misleading. What the Code does, is establish a bargaining framework under the competition law umbrella for the news businesses and digital platforms to agree (amongst other things) on the remuneration for making news content available. The Code defines making available as all situations when news content or an extract of it is present or linked to on a service.[37] Thus, the Code's 'making available' is considerably broader than 'the right of making available' known to copyright. Pursuant to the Code, a platform is obliged to negotiate on remuneration whenever a news organisation expresses a desire to do so. If the agreement between parties is not reached within three months, they are subjected to an obligatory binding arbitration. The arbiter then makes a choice between final offers put forward by the parties (so-called final price or baseball arbitration) and their decision is final, but only binding for a period of one year.

The Code applies only to those news businesses which are registered with the Australian Communications and Media Authority (ACMA) and those digital platforms which were designated by the responsible minister. While the Code was created with Google and Facebook in mind, formally designated platforms should be those which benefit from a significant bargaining power imbalance towards Australian

26 'Digital Platforms Inquiry Final Report' (n 22) 100.

27 Rasmus Kleis Nielsen and Sarah Anne Ganter, *The Power of Platforms: Shaping Media and Society* (OUP 2022) 104.

28 Facebook, 'Response to the ACCC's Preliminary Report by Facebook Australia Pty Limited' 2 <https://about.fb.com/wp-content/uploads/2019/03/facebook-submission-in-response-to-accc-preliminary-report.pdf> accessed 1 December 2022.

29 'New Academic Paper Finds News Content Drives £1bn In Annual UK Revenues For Tech Platforms' (*News Media Association*, 13 May 2022) <https://newsmediauk.org/blog/2022/05/13/new-academic-paper-finds-news-content-drives-1bn-in-annual-uk-revenues-for-tech-platforms/> accessed 20 November 2022.

30 The 2022 Ofcom report on news consumption in the UK recorded a rise from 1% (2020) to 7% (2022) in TikTok's reach for news, with more than half (52%) of its news users aged between 16 and 24. 'News Consumption in the UK: 2022' (*Ofcom*, 21 July 2022) 8 <https://www.ofcom.org.uk/__data/assets/pdf_file/0027/241947/News-Consumption-in-the-UK-2022-report.pdf> accessed 1 December 2022.

31 Diana Bossio and others, 'Australia's News Media Bargaining Code and Global Turn towards Platform Regulation' (2022) 14 Policy & Internet 136.

32 See Cairncross (n 21); 'Breaking News? The Future of UK Journalism' (House of Lords 2020); 'Digital Platforms Inquiry Final Report' (n 22); 'Canada's Communications Future: Time to Act' (Broadcasting & Telecommunications Panel 2020); 'Competition Issues Concerning News Media and Digital Platforms' (n 18).

33 'Digital Platforms Inquiry' (*ACCC*, 28 November 2017) <https://www.accc.gov.au/focus-areas/inquiries-finalised/digital-platforms-inquiry-0> accessed 1 December 2022.

34 'Digital Platforms Inquiry Final Report' (n 22) recommendation 7.

35 Josh Frydenberg, 'ACCC Mandatory Code of Conduct to Govern the Commercial Relationship between Digital Platforms and Media Companies' (*Treasury*, 20 April 2020) <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/accc-mandatory-code-conduct-govern-commercial> accessed 1 December 2022.

36 'Digital Platforms Inquiry Final Report' (n 22) 260-61.

37 The Code s 52B.

news businesses. In practice, no platform has been designated within nearly two years of enacting the Code. This is because following Facebook's news ban in February 2021,[38] the government introduced a second factor to be considered during the designation: a significant contribution made by a digital platform to the sustainability of Australian news industry through remuneration agreements.[39] Consequently, as long as platforms keep paying news organisations willingly, they will not be designated and the Code will not apply. Still, most media organisations, the ACCC, and Rod Sims, the former ACCC chairmen and the Code's 'father', consider it a success.[40] While the exact numbers are not known, it is estimated that the deals made by Facebook and Google in Australia are worth USD 200 million a year, and have, to some extent, reversed the redundancy process in journalism.[41]

This success story narrative has prompted governments around the world, including those in Europe, to consider replicating the Australian approach. Most notably, in April 2022, Canada, a country with a long tradition of public support for the media industry, put forward a proposal for its own bargaining framework: the Online News Act (the Act).[42] While the Act copies the core of the Code, an obligation to bargain and binding arbitration, it deviates at some points. The Act is to apply to 'digital news intermediaries' whenever they enjoy 'significant bargaining power imbalance' without the need of designation. It also further broadens the definition of 'making content available' that news organisations need to be remunerated for, covering all situations when any portion of a particular piece of news content is reproduced, or access to it is facilitated by any means including indexing, aggregation and ranking. In common with the Code, the Act fails to provide a clear legal basis for the negotiation beyond an obligation to negotiate itself. The UK, another country considering the adoption of the Australian approach, could potentially differ on this point.

With the CDSM Directive deadline falling after the Brexit date, the UK decided not to implement the CDSM Directive.[43] The UK's choice of a code of conduct to regulate the relationship between news media and platforms was confirmed in the joint advice from Ofcom and Competitions and Markets Authority (CMA) issued in November 2021.[44] The advice addressed to the UK government recommends adoption of a code of conduct to govern the relationship between digital platforms with strategic market status (SMS) and content producers (not only publishers) as a part of the new pro-competition regime for digital markets. Under the code, content providers would be entitled to receive fair and reasonable compensation for the use of their content, but only when this content and its use is subject to copyright protection.[45] The Code approach is also being considered in the US. The Journalism Competition and Preservation Act (JCPA), originally tabled in 2019, in its current 2022 version proposes introduction of a temporary antitrust exemption allowing press publishers to negotiate collectively with digital platforms, and includes a must carry obligation and baseball style arbitration echoing the Code.[46]

While we are observing global moves towards regulation of the relationships between press and intermediaries, no jurisdiction outside of the EU has so far opted for an adoption of a new neighbouring right to benefit press publishers. While the US Copyright Office has carried an enquiry into the viability of adoption of the EU-style press publishers' right in the US, it has advised against it, considering it unnecessary and 'likely (…) ineffective so long as publishers depend on news aggregators for discoverability'.[47] Thus, it is the Australian competition law-based solution which has gained the biggest following. As we will see in the coming sections, some Member States try to adopt elements of the Code while transposing the press publishers' right into their national legal orders. On the EU level itself, a group of European press publishers advocated the introduction of an Australian-style obligation to negotiate in the Digital Markets Act, a new EU regulation addressing the market power of gatekeepers, large online platforms enjoying an entrenched position on the market and serving as a gateway for users and businesses.[48] The publishers' campaign was, however, unsuccessful.

V. Implementing the press publishers' right

While governments around the globe are deciding how to address the media and platform relationship, Member States are struggling with the implementation of the EU

38 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 November 2022.

39 Lisa Visentin, 'Facebook to Restore Australian News Content after Media Bargaining Code Amendments' *The Sydney Morning Herald* (Sydney, 23 February 2021) <https://amp.smh.com.au/politics/federal/government-agrees-to-last-minute-amendments-to-media-code-20210222-p574kc.html?utm_content=STORY&list_name=10093_smh_breakingnews&promote_channel=edmail&utm_campaign=breaking-news-smh&utm_medium=e-mail&utm_source=newsletter&utm_term=2021-02-23&mbnr=MjAyMzA0MDU&instance=2021-02-23-15-22-AEDT&jobid=29292245&__twitter_impression=true> accessed 1 December 2022.

40 'News Media and Digital Platforms Mandatory Bargaining Code. The Code's first year of operation' (ACCC, 2022).

41 Bill Grueskin, 'One year of the News Media Bargaining Code' (*Judith Neilson Institute for Journalism and Ideas*, 10 March 2022) <https://jninstitute.org/wp-content/uploads/2022/03/Bill-Grueskin-Report-web.pdf> accessed 1 December 2022.

42 Bill C-18 An Act respecting online communications platforms that make news content available to persons in Canada <https://www.parl.ca/LegisInfo/en/bill/44-1/C-18> accessed 10 November 2022.

43 'Copyright: EU Action. Question for Department for Business, Energy and Industrial Strategy' (*UK Parliament*, 21 January 2020) <https://questions-statements.parliament.uk/written-questions/detail/2020-01-16/4371> accessed 20 November 2022.

44 'Platforms and Content Providers, Including News Publishers. Advice to DCMS on the Application of a Code of Conduct' (Ofcom and CMA, 2021).

45 ibid 61-64.

46 S673 A bill 'To provide a temporary safe harbor for publishers of online content to collectively negotiate with dominant online platforms regarding the terms on which content may be distributed' <https://www.klobuchar.senate.gov/public/_cache/files/0/2/02edbc26-debb-41b4-8c19-da7090159e30/60AA7BF7A217968D95D8CE417B93C06C.sil22a02.pdf> accessed 20 November 2022.

47 'Copyright Protections for Press Publishers' (US Copyright Office, 2022) 2.

48 Luca Bertuzzi, 'Publishers' Last-Minute Attempt to Secure "Fair" Remuneration in the Digital Markets Act' (*Euractiv.com*, 24 March 2022) <https://www.euractiv.com/section/digital/news/publishers-last-minute-attempt-to-secure-fair-remuneration-in-the-digital-markets-act/> accessed 25 March 2022.

solution. Even though the deadline for transposition of the CDSM Directive passed on 7 June 2021, the implementation process is still ongoing. The failure to meet the deadline by all but three Member States has led the Commission to open infringement proceedings against delayed Member States as early as July 2021.[49] To date, the press publishers' right has made its way into 20 national legal orders.[50] While considerable work remains to be done, the analysis of the existing national transpositions, the draft transpositions made available to the public, and the policy discussion around the implementation process make it possible to make qualitative judgements of the ongoing process.[51]

While Art. 15 CDSM Directive settles the core of the press publishers' right by defining a subject matter of the right (a press publication) and specifying the exclusive rights enjoyed by its publishers, the provision leaves Member States a notable margin of discretion.[52] The depth of engagement with the implementation freedoms provided by the CDSM Directive varies. Some Member States simply replicate the text of Art. 15 CDSM Directive, without making substantial changes or additions to its wording. It is difficult, if not impossible, to consider such literal copying an appropriate approach. This is because during the implementation process Member States are required to both meet the goals set by the directives and make necessary adjustments to accommodate their national settings.[53] On the other side of the spectrum are those Member States which fully use, and possibly exceed, their implementation freedoms. While Member States do enjoy a notable margin of discretion, this discretion is ultimately limited by the general policy approach behind the CDSM Directive. Thus, a correct transposition is one where the policy objectives match the Member State's actions.[54]

As explained in the previous section, the goal set for the press publishers' right was that of strengthening the bargaining position of the press publishers towards intermediaries by providing them with a clear and primary right on their content. This objective should be considered alongside the EU legislator's intent to safeguard users' freedom to share information online, and publishers' freedom to decide whether or not to authorise uses of their content. Only implementations taking account of both of those issues fully reflect the policy objectives behind the press publishers' right. Nevertheless, being aware of the current global move towards regulating the news media and intermediaries' relationship, Member States struggling to ensure effectiveness of the new right tend to forget about the latter while shaping their implementations. This is particularly visible regarding two issues. First, regulation of the bargaining mechanism between press publishers and digital intermediaries. Secondly, the types of digital intermediaries within the right's scope.

VI. Bargaining over payments

By introducing the press publishers' right, the EU legislator focused on the provision of a legal basis for the licensing negotiations between press publishers and intermediaries. However, the procedural and substantive framework for such negotiations was not fleshed out, leaving it to the market and potentially to the Member States. This decision is nothing out of the ordinary. The harmonisation of copyright and neighbouring rights has rarely addressed the contractual dealings between the rightsholders and third parties.[55] The regulatory intervention into creator contracts by Chapter 3 of the CDSM Directive is a rare and notable exception to this rule, but no similar exception was made for the press publishers' right. This silence on the bargaining process visibly sets the EU press publishers' right apart from the Code and the regulatory interventions inspired by it.

The thought behind the press publishers' right was that publishers will no longer need to rely on copyright derived from authors of works included in a press publication, and the clarity of their entitlement will inevitably strengthen their negotiation position towards intermediaries.[56] While critics pointed at the failure of the national interventions in Spain and Germany to achieve this goal,[57] the press publishers' right advocates, and Commission officials argued that the weight and the authority of the European Union is sufficient for this situation not to repeat itself.[58] The EU was supposed to be too big a market for intermediaries to close their services as they had in Spain[59] or change their policies to opt in, as they did in Germany.[60] However, events in France clearly show that those hopes were unfounded.

France was the first Member State to transpose the press publishers' right into their national legal order, with the

49 'Copyright: Commission Calls on Member States to Comply with EU Rules on Copyright in the Digital Single Market' (*European Commission*, 26 July 2021) <https://ec.europa.eu/commission/presscorner/detail/en/MEX_21_3902> accessed 24 August 2021.

50 The paper reflects the status of the CDSM Directive implementation as of 1 December 2022.

51 For a complete overview of the implementation process see CREATe Implementation resource page <https://www.create.ac.uk/cdsm-implementation-resource-page/> accessed 1 December 2022.

52 To what extent the core of the right is actually settled by art 15 CDSM Directive is disputable, especially with regards to what types of publications should be considered 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.

53 Asya Zhelyazkova, 'Complying with EU Directives' Requirements: The Link between EU Decision-Making and the Correct Transposition of EU Provisions' (2013) 20 Journal of European Public Policy 702, 705.

54 Gerda Falkner and others, *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (CUP 2005).

55 See Séverine Dusollier and others, 'Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States' (*European Parliament*, 2014) <https://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/contractualarangements_/contractualarangements_en.pdf> accessed 1 December 2022.

56 European Commission, 'Commission Staff Working Document Impact Assessment on the Modernisation of EU Copyright Rules' (n 16) 172-73.

57 Communia Association, 'Position Paper: New Rights for Press Publishers' (2016) <https://www.communia-association.org/wp-content/uploads/2016/12/COMMUNIAPositionPaperonNewRightsforPressPublishers-final.pdf> accessed 1 December 2022.

58 Oettinger: An EU-Wide 'Google Tax' to Stabilize the Publishing Industry? (2015) <https://www.youtube.com/watch?v=jta92bxjMDw> accessed 6 October 2022.

59 Richard Gingras, 'An Update on Google News in Spain' (*Google Europe Blog*, 12 November 2014) <http://googlepolicyeurope.blogspot.com/2014/12/an-update-on-google-news-in-spain.html> accessed 1 December 2022.

60 Philipp Justus, 'News zu News bei Google' (*Der offizielle Blog von Google Deutschland*, 10 January 2014) <https://germany.googleblog.com/2014/10/news-zu-news-bei-google.html> accessed 23 November 2022.

Law No. 2019-775 entering into force already in October 2019.[61] As a pre-emptive action, Google changed its display policy, introducing an opt-in system in September 2019. This meant that search engine results would no longer include previews of European publishers' content unless a publisher had opted into such a display, without receiving remuneration.[62] In this way, Google wanted to move outside the scope of the right. The policy change was strongly criticised by French government officials, who saw it as contrary to both the text and the spirit of the CDSM Directive.[63] While opting in to display previews of their content in search results, an alliance representing French press publishers (APIG) and Agence France-Presse (AFP) launched complaints with the French Competition Authority (AdLC), asserting that Google has abused its dominant position by refusing to negotiate pursuant to the press publishers' right. The subsequent interim measures issues by AdLC in April 2020 obliged Google to negotiate with publishers in good faith, as in the AdLC's opinion it was likely that Google's refusal to negotiate was abusive because it may have imposed unfair trading conditions, implemented discriminatory practices and circumvented the law.[64]

The decision on interim measures did bring Google to the negotiation table, which in turn initiated a long period of appeals, measures' violations, high monetary penalties, deals and academic discussions on the validity of AdLC's approach, especially in the context of the contrary position taken earlier by the Federal Cartel Office in Germany.[65] More importantly, however, the French implementation has confirmed that the press publishers' right by itself is not capable of levelling the negotiation field. This led some Member States to introduce additional principles and mechanisms to guide the negotiation process, often drawing directly from the competition law toolbox, to force Google and the like to the negotiation table. The AdLC investigation into Google's dominant position itself has not seen the final decision on merits, as in June 2022 the AdLC approved a set of commitments from Google and closed the proceedings.[66]

1. Fair conditions …

In order to inject more balance into the negotiation process, beyond that supposedly stemming from a clear legal basis, Member States adopt additional measures to ensure an optimal bargaining position for publishers as a part of Art. 15 CDSM implementations. First, they explicitly require that negotiations between press publishers and digital intermediaries are conducted in good faith. This general requirement might be supplemented with additional principles. For example, Spain requires that negotiations follow principles of good faith, due diligence, transparency and respect the rules of free competition.[67] Italy notes that principle of good faith implies that an intermediary does not limit the visibility of the press publishers' right content during the negotiation process, which seems like a direct reaction to Google's change of display policy in Germany in 2015 and in France in 2019.[68] Interestingly, while the Czech implementation draft requires that a fair, equal and non-discriminatory approach to negotiation is adopted, this obligation is imposed only on digital intermediaries and not on publishers.[69]

Secondly, Member States introduce transparency requirements, obliging digital intermediaries to provide press publishers with information on the use of their press content and the revenues this use generates. The relationship between news media and platforms is opaque, with parties making contrary claims on both the benefits derived and the costs carried due to press content online use. The transparency obligations are to amend this situation and to further inform the bargaining process. As such, the information which parties are obliged to disclose generally mirrors factors which need to be taken under consideration while setting the amount of remuneration due to publishers. This approach not only emulates the Code's information requirements but mimics the transparency obligation introduced into the copyright contracting by Art. 19 CDSM.

The transparency obligations come in different forms and with varying scopes. Often they are one-sided and applicable only to the digital intermediary. This is the case in Belgium, where the intermediary is required to supply the publisher with all information needed to estimate the value of a press publication, including the number of consultations of a press publication and revenues derived from the press publications' use in particular.[70] This partiality goes further in the Italian transposition, as not only publishers can require information necessary to determine fair remuneration from the intermediaries, but all 'interested parties' (*parte interessata*), including collective management organisations and independent management companies.[71] Quite uniquely, the Authority for

61 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.

62 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.

63 'Réaction de Franck Riester, ministre de la Culture, suite aux déclarations de Google relatives à la rémunération des éditeurs de presse en ligne' (*Ministère de la Culture*, 25 September 2019) <https://www.culture.gouv.fr/Presse/Communiques-de-presse/Reaction-de-Franck-Riester-ministre-de-la-Culture-suite-aux-declarations-de-Google-relatives-a-la-remuneration-des-editeurs-de-presse-en-ligne> accessed 20 November 2022.

64 French Competition Authority, Décision n° 20-MC-01 du 9 avril 2020 relative à des demandes de mesures conservatoires présentées par le Syndicat des éditeurs de la presse magazine, l'Alliance de la presse d'information générale e.a. et l'Agence France-Presse.

65 See Vikas Kathuria and Jessica C Lai, 'The Case of Google "Snippets": An IP Wrong That Competition Law Cannot Fix' (2020) Max Planck Institute for Innovation and Competition Research Paper No 20-13 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3693781> accessed 1 December 2022; Giuseppe Colangelo, 'Enforcing Copyright through Antitrust? The Strange Case of News Publishers against Digital Platforms' (2022) 10 Journal of Antitrust Enforcement 133.

66 French Competition Authority, Décision 22-D-13 du 21 juin 2022 relative à des pratiques mises en œuvre par Google dans le secteur de la presse.

67 Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia (Spanish IP Law) art 129bis(3).

68 Legge 22 aprile 1941, n. 633 Protezione del diritto d'autore e di altri diritti connessi al suo esercizio (Italian Copyright Law) art 43bis(9).

69 Návrhu 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 další související zákony (Czech Implementation Draft) art 87b(9).

70 Code de droit économique (Belgian Economic Law Code) art XI.216/2 § 3.

71 Italian Copyright Law art 43bis(12).

Communications Guarantees (AGCOM), which supervises the fulfilment of the transparency obligation in Italy, can impose administrative pecuniary sanctions up to 1% of annual turnover.[72]

When a Member State lists factors which should to be taken into consideration when determining the remuneration due to press publishers, those factors tend to focus on the benefits derived by intermediaries and costs carried by publishers, not accounting that relationships between press and intermediaries are mutually beneficial. Accordingly, France requires that the remuneration paid to the publishers is based on revenues from publications' exploitation of any kind, both direct and indirect, and that, among other things, it takes into account human, material and financial investments made by publishers, the contribution of a press publication to political and general information and the importance of the use of press publications by the intermediaries.[73] The Portuguese draft offers a similar list, noticeably topping it up with the economic loss suffered directly or indirectly by press publishers due to use of their publications by intermediaries, including traffic and revenues.[74]

The majority of Member States' legislative activism concerns the format of negotiations, with a number of countries explicitly or implicitly allowing for collective management of the press publishers' right. Such is the case in France,[75] Spain,[76] Denmark,[77] Austria,[78] Hungary[79] as well as in the Polish[80] and Portuguese drafts.[81] In this scenario, collective management organisations (CMOs) negotiate and conclude agreements with the relevant intermediaries on behalf of their members who are beneficiaries of the press publishers' right, and then distribute the licensing fees received. The logic behind this solution is to allow publishers to band together and, by involving incumbent or purposely created CMOs, to secure more beneficial solutions for the whole press sector, including small and local publishers. Following this logic even further, a selection of Member States also allows CMOs to act on behalf of its non-members, through extended collective licensing. In such schemes, agreements concluded by the CMO representative of a considerable number of rightsholders in a particular field with regard to specific licenses are also effective towards rightsholders who have not authorised that CMO to act on their behalf.[82] The extended collective licensing is characteristic for the Nordic countries, and the most notable example of its application to the press publishers' right comes from Denmark, where negotiations with digital intermediaries can be carried by a representative CMO approved by the Ministry of Culture.[83]

The CDSM Directive is silent on the permissibility of the collective management of the press publishers' right. Generally, there seems to be no obstacle to involve such a scheme and it was already tested (and has failed) in Germany in the context of its national press publishers' right predating the CDSM Directive.[84] Not all the forms of collective management seem acceptable, however. The Commission had a chance to voice its opinion on mandatory collective management while answering a parliamentary question by MEP Vondra in 2020.[85] Ordinarily, when the right is subject to collective management, a rightsholder has an opportunity to opt out from the scheme. That is not the case when it is mandatory, as in this scenario rightsholders no longer hold the right to authorise or prohibit uses of their works. In his answer to the MEP's question, Commissioner Breton precluded the implementation of the new neighbouring right through mandatory collective management, precisely because it would deprive publishers of freedom to decide whether or not to authorise the use of their press content, transforming an exclusive right into a remuneration right.[86]

Mandatory collective management, due to its restrictive effect on the exclusive rights of the rightsholder, is envisaged as an option only in a handful of EU directives[87] and its permissibility beyond situations explicitly allowed in the *acquis* is debatable. According to Ficsor, the mere fact that the EU legislator found it necessary to explicitly allow mandatory collective management in the selected directives shows that such permission is indeed required.[88] Consequently, Member States are not free to adopt such restrictive schemes when the *acquis* (or an international treaty a Member State is a party to) does not allow (or mandate) obligatory collective management with respect to a particular exclusive right. As emphasised by the CJEU in *Soulier*[89] and *Spedidam*[90] protection provided to exclusive rightsholders is not limited

72 ibid.

73 Code de la propriété intellectuelle (French IP Code) art L218-4.

74 Proposta de Lei que transpõe a Diretiva (UE) 2019/790 do Parlamento Europeu e do Conselho, de 17 de abril de 2019, relativa aos direitos de autor e direitos conexos no mercado único digital e que altera as Diretivas 96/9/CE e 2001/29/CE (Portuguese Implementation Draft) art 188-B(2).

75 French IP Code art L218-3.

76 Spanish IP Law art 129bis(4).

77 Lov om ophavsret 1995 (Danish Copyright Law) s 29a.

78 Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte 1936 (Austrian Copyright Act) s 76f(7).

79 Általános indokolás 59-60 <https://www.parlament.hu/irom41/15703/15703.pdf> accessed 25 November 2022.

80 Uzasadnienie 47 <https://legislacja.rcl.gov.pl/docs//2/12360954/12887995/12887996/dokument561490.pdf> accessed 25 November 2022.

81 Portuguese Implementation Draft art 188-B(1).

82 See Thomas Riis and Jens Schovsbo, 'Extended Collective Licenses and the Nordic Experience – It's a Hybrid but Is It a VOLVO or a Lemon?' (2010) 33 Columbia Journal of Law & Arts 472-73.

83 Danish Copyright Law s 29a and s 50.

84 '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.

85 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> accessed 25 November 2022.

86 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> accessed 25 November 2022.

87 See Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art [2001] OJ L272/32 art 6(2); Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights [2006] OJ L372/12 art 9.

88 Mihály Ficsor, 'Collective Rights Management from the Viewpoint of International Treaties, with Special Attention to the EU "Acquis"' in Daniel Gervais, *Collective Management of Copyright and Related Rights* (3rd edn, Wolters Kluwer 2016) 56.

89 Case C-301/15 *Marc Soulier, Sara Doke v Premier ministre, Ministre de la Culture et de la Communication* ECLI:EU:C:2016:878, para 31.

90 Case C-484/18 *Spedidam, PG, GF v Institut national de l'audiovisuel* ECLI:EU:C:2019:970, para 37.

to the enjoyment of their rights but extends to the exercise of those rights as well. This means that each act covered by the exclusive rights needs to be authorised by a rightsholder, even if implicitly. Thus, mandatory collective management of exclusive rights depriving rightsholders of an opportunity to authorise, even implicitly, use of their works, cannot be freely adopted by a Member State.

However, this situation is different with respect to remuneration rights, as those are of a financial and not of a preventive nature.[91] As remuneration rights do not empower rightsholders to authorise or refuse authorisation for the use of their works, simply entitling them to receive remuneration for such uses, while subjecting such rights to mandatory collective management, does not deprive rightsholders of anything. As noted by Bulayenko, this difference in the rights' nature makes obligatory collective management 'more easily acceptable' as an implementation tool for the remuneration rights.[92] However, the press publishers' right is not a remuneration right. A proposal to add 'an inalienable right to obtain a fair and proportionate remuneration' to the right's text by MEP Voss was rejected by the European Parliament (EP) at the committee level in 2018.[93] Thus, using the mandatory collective management as an implementation tool for the press publishers' right comes with no 'enhanced acceptability'.

Austria considered, but eventually abandoned plans to introduce mandatory collective management for the press publishers' right. The draft implementation envisaged compulsory intermediation of CMOs against dominant service providers for sharing online content and dominant service providers for searching online content.[94] This selective mechanism was presented as a necessary restriction of publishers' freedom to protect them from abuse by large online platforms, following their reactions to the implementation in other Member States.[95] While the mechanism was not included in the final implementation act adopted in December 2021, the Austrian government notified the Commission of its intention to introduce the selective obligatory collective management at a later date.[96] The scheme has still not been adopted. However, the idea of tackling the press publishers' right licensing via mandatory schemes and the language of 'dominant' platforms, did not disappear. On the contrary, the Italian and Belgian implementations, as well as the Czech proposal, all look towards restricting publishers and digital intermediaries' freedom during the negotiation process.

2. … do not create obligations

Member States adopting varying additional measures to inject more balance into the negotiation process between publishers and intermediaries might lead to more fragmentation than harmonisation, defeating the broader purpose behind the CDSM Directive. However, with the exception of mandatory collective management, which was eventually abandoned, all measures outlined till now facilitate negotiations between stakeholders, with publishers exercising their preventive rights and intermediaries being under no obligation to remunerate publishers when their actions are no longer within the scope of Art. 15 CDSM Directive. The difficulty begins when the freedom of publishers and intermediaries is restricted. To date, two Member States – Italy and Belgium – have introduced such restrictions in their implementations, and Czechia is proceeding a proposal following suit.

Italy was the first Member State to implement the press publishers' right in a creative, albeit somewhat questionable way.[97] First, the Italian legislator explicitly provided that for the online uses of their content press publishers should receive 'fair compensation' (*un equo compenso*) from digital intermediaries. This provision is reminiscent of creators' right to fair compensation, which was a part of the Italian copyright act before its rephrasing into a right to appropriate and proportionate compensation to reflect Art. 18 CDSM wording.[98] The addition of an entitlement to 'fair compensation' to the press publishers' right provision brings the new related right into the territory of remuneration rights which, as already described, the press publishers' right does not inhabit. As noted by Sganga and Contardi, 'fair compensation' signposts a hybrid model adopted by the Italian legislator in implementing the press publishers' right, a model mixing elements of collective management, obligatory and collective licensing, as well as private levy schemes.[99] However, it might be more accurate to call this model an adaptation of the Code's bargaining mechanism.

The mechanism adopted in Italy awards AGCOM considerable power over the negotiations between press publishers and digital intermediaries. First, AGCOM is responsible for determining a set of criteria which should be used to establish what is a *fair* compensation. Secondly, following a request by either party when no agreement has been reached within 30 days, AGCOM determines the

91 Case C-135/10 *Società Consortile Fonografici (SCF) v Marco Del Corso* ECLI:EU:C:2012:140, para 89.

92 Oleksandr Bulayenko, 'MusicMatic – The French Supreme Court's Decision on Creative Commons Plus (CC+) Commercial Licensing and Mandatory Collective Management of the Right to Remuneration for Communication to the Public of Commercial Phonograms' (2020) 51 IIC 668, 678, <https://doi.org/10.1007/s40319-020-00948-5> accessed 1 December 2022.

93 'Draft compromise amendments on Article 11 and corresponding recitals' (28 March 2018) <https://felixreda.eu/wp-content/uploads/2018/03/voss11.pdf> accessed 25 November 2022.

94 Urheberrechts-Novelle 2021 Entwurf Bundesgesetz, mit dem das Urheberrechtsgesetz, das Verwertungsgesellschaftengesetz 2016 und das KommAustria-Gesetz geändert werden (Urheberrechts-Novelle 2021 – Urh-Nov 2021) § 76f(7) <https://www.bmj.gv.at/dam/jcr:65407c7f-fcf7-469a-ab99-0fc2cab472ca/Urh-Nov_2021_Text.pdf> accessed 1 December 2022.

95 Urheberrechts-Novelle 2021 Erläuterungen 37 <https://www.bmj.gv.at/dam/jcr:8c840b54-b8ae-453c-b2c3-b1b7dda266fd/Urh-Nov_2021_Erl%C3%A4uterungen.pdf> accessed 1 December 2022.

96 Notification No 2021/799/A, Federal Act amending the Copyright Act (Copyright Act Amendment 202x – UrhG-Nov 202x) <https://ec.europa.eu/growth/tools-databases/tris/index.cfm/en/search/?trisaction=search.detail&year=2021&num=799&mLang=EN> accessed 25 November 2022.

97 Italian Copyright Law art 43bis.

98 See Elisa Vittone and Sasha Ellisa Manzo, 'Notes on the Transposition in Italy of the Principle of "Appropriate and Proportionate Remuneration" with Reference to the Film and Audiovisual Sector' (2022) 17 JIPLP 568.

99 Caterina Sganga and Magali Contardi, 'When Harmonisation Leads to Fragmentation (and Potential Invalidity Claims): Snapshots from the Implementation of the New Press Publishers' Right' (2022) 44 European Intellectual Property Review 472, 478-79.

amount of fair compensation in a given case by making a choice between the parties' proposals based on the criteria it earlier established, and if none of the proposals reflects the criteria, sets the amount itself. Following the AGCOM's decision, the publisher and the intermediary should enter an agreement reflecting the fair remuneration set, and if they fail to do so, each party may refer the case to the court. No temporal limitation on the binding nature of the AGCOM's decision was made. Additionally, AGCOM is authorised to impose fines on the intermediary in the event of non-compliance with transparency obligations. As such, the role of AGCOM is comparable to that of ACCC under the Code and its involvement considerably limits the freedom of both publishers and intermediaries in the negotiation process. As both parties can request the intervention of AGCOM and appeal to the court where no agreement is reached, a publisher as a rightsholder no longer has a monopoly over the authorisation of its content's use and the conditions of such use. This restriction of the publishers' exclusive rights has the same effect as the introduction of mandatory collective management, and as argued convincingly by Sganga and Contardi should be subject to the same level of scrutiny.[100] Consequently, as the EU legislator does not explicitly allow press publishers' right to be subject to mandatory collective management, licensing schemes such as the one adopted in Italy could be considered invalid.

Similar doubts surround the Belgian implementation of the press publishers' right.[101] To some extent the Belgian legislator decided to limit the negotiation freedom of the parties in a more far-reaching way than the Italian. First, the parties are obliged to negotiate in good faith if a publisher 'is prepared to allow' (*est disposé à autoriser*) the use of her press content by an intermediary. The explanation provided in the memoranda accompanying the proposal implies it means not only that the parties are obliged to negotiate *in good faith*, but that the parties are obliged *to negotiate* in general if one of them requests to do so.[102] This is a rather far-reaching interpretation of the publishers' exclusive rights, effectively creating an obligation to negotiate for digital intermediaries reminiscent of an obligation to bargain which lies at the Code's core. The fact that Art. 15 CDSM Directive provides publishers with exclusive rights on press publications does not mean that the ISSPs are obliged to enter negotiations. Rights do not automatically create such broad obligations. It is the rightsholders who are the addresses of exclusive rights. They are given a monopoly over certain behaviours concerning their works or other subject matter. The exclusive right creates only obligations corresponding to the monopoly of the rightsholders. The press publishers' right is not a right effective *erga omnes*, but only towards ISSPs. This means that digital intermediaries are obliged not to behave in a way covered by the publishers' monopoly unless they acquire publishers' consent. That does not mean, however, that they must seek publishers' consent whenever a publisher requests them to do so.

Moreover, freedom to enter into a contract and freedom to select a contractual partner are crucial aspects of the principle of freedom of contract, which even though not harmonised, is universally respected by all Member States.[103] Contractual freedom is not an absolute, and it can be limited via already discussed mandatory collective licensing, for example. However, such limitations should not be interpreted from the rights of others, as if a result of an abstract balancing exercise, but need to be explicitly provided by a legislator. Therefore, if the EU legislator had intended to create an obligation to negotiate on the part of ISSPs, it would not have chosen a related right to regulate the relationship between press publishers and digital intermediaries. Contractual freedom of ISSPs in the context of the press publishers' right has been explicitly recognised by other Member States. For example, an explanatory memorandum accompanying the Estonian implementation notes that when an ISSP decides to no longer display press content, it no longer needs to conclude a licensing agreement with a publisher due to the principle of contractual freedom.[104]

The second notable feature of the Belgian implementation is that, similarly to Italy, it provides parties with an opportunity to ask an administrative body, in this case the Belgian Institute for Postal Services and Telecommunications (IBPT), to make a decision on the remuneration due to publishers in case they cannot reach a consensus. Unlike in Italy, the decision of IBPT is binding, so there is no need for a separate agreement between publisher and intermediary following the determination of remuneration, and the IBPT is authorised to monitor the decision's implementation. No temporal limitation on the binding nature of the IBPT's decision was set. The doubts as to the validity of the Italian implementation apply to this solution as well.

If adopted, the Czech implementation, currently proceeding through parliament, could be the most competition-infused transposition of the press publishers' right.[105] Similarly to Italy and Belgium, it grants press publishers a right to receive a reasonable remuneration and provides them with an opportunity to request an administrative body (here the Ministry of Culture) to determine the remuneration due in case the parties are unable to reach an agreement. Unlike in Italy and Belgium, a request to the Ministry can be made only by a publisher, not both parties, and only when the intermediary is a search engine or a social network (whether social media are covered by Art. 15 CDSM Directive is a separate issue discussed in the next section). A decision of the Minister remains binding for at least three years, after which either party can apply for it to be reconsidered. What is, however, the most innovative (and questionable) variation in the Czech implementation is a set of obligations imposed on search engines and social media, effectively creating two separate regimes for the press publishers' right.

100 ibid 482.

101 Belgian Economic Law Code art XI.216/2.

102 'Commentaire des Articles' 75 <https://www.lachambre.be/FLWB/PDF/55/2608/55K2608001.pdf> accessed 25 November 2022.

103 Jürgen Basedow, 'Freedom of Contract in the European Union' (2008) 16 European Review of Private Law 901, 905.

104 'Autoriõiguse seaduse muutmise seaduse eelnõu seletuskiri' 92 <https://www.riigikogu.ee/download/eea24ded-1acf-4036-8517-768f8214d4ca> accessed 25 November 2022.

105 Czech Implementation Draft art 87b.

The draft Czech law requires social media and search engines to refrain from acting in a way which circumvents the press publishers' right (*obcházel právo vydavatele k jeho tiskové publikaci*), listing three types of behaviour which are particularly restricted. First, they cannot refuse to negotiate in good faith, which effectively creates an obligation to negotiate. Secondly, an intermediary which occupies a dominant position on the market for a particular service cannot arbitrarily modify this service in a discriminatory manner, so that it no longer requires an authorisation to use content of a particular publisher, without a good reason. Thirdly, an intermediary cannot abuse its dominant market position to obtain authorisation to use a press publication in its service on conditions unreasonably unfavourable to a publisher. The last two situations are reminiscent of the must-carry obligation, which provides the dubious legal basis for bargaining pursuant to the Code. They introduce the competition law concepts of a dominant position (*dominantním postavením*) and an abuse of this dominant position (*zneužil svého dominantního tržního postavení*) into copyright and related rights law, which is quite unorthodox and systematically unsound, to say the least.

The press publishers' right already provides a unique solution, as unlike copyright and other related rights it does not apply *erga omnes* but is effective only with respect to ISSPs. The Czech draft takes this unprecedented approach even further, considerably restricting freedoms of selected intermediaries, including not only freedom to contract (setting the terms of an agreement), but also freedom to conduct their business, since they are no longer free to shape their services and select content included. It is not clear what can be considered an *arbitrary* modification of the service. For example, would it be arbitrary for an intermediary to exclude content of what they believe is a misinformation-spreading publisher? Or could such an action be considered discriminatory because what constitutes misinformation is contestable, meaning an intermediary would be obliged to carry such content and fairly remunerate the publisher? Those questions involve value judgements, which are alien to copyright and related rights, areas of law which equally protect all types of content meeting a definition of a copyrightable work or a subject matter of a related right. An implementation which provides for different levels of protections for publishers and different sets of obligations for intermediaries based on the criteria going beyond questions of whether something is a protected subject matter and whether a particular action is covered by a rightsholder's monopoly has no place in the copyright and related rights domain.

The Italian, Belgian and the expected Czech implementation stray too far from the legislative intent behind the press publishers' right. By introducing remuneration rights, obligations to negotiate and must-carry obligations, Member States are transforming exclusive rights provided to press publishers into a negotiation framework which has no backing either in the legislative history of the CDSM Directive or in the broader system of copyright and related rights protection. The press publishers' right comes with an in-built freedom to license. This is a freedom for publishers to both authorise or refuse the authorisation to use of their content, and freedom of ISSPs to use or not to use publishers' content.

VII. Uncertain addressees: the social media problem

Pursuant to its original wording, the press publishers' right was to apply to all digital uses of press publications. Such a broad scope did not correspond to the Commission's justification for proposing the legislative intervention, which from the outset aimed at regulating the functioning of digital intermediaries, not the actions of all users. What prompted the Commission to consider the intervention on the press publishers' rights were doubts about the fitness of the EU copyright framework to address the new forms of content distribution online, including content aggregation.[106] News aggregators were explicitly named as a service of concern in the Commission's 2015 Communication 'Towards a modern, more European copyright framework' outlining targeted actions and proposals for copyright in the Digital Single Market (DSM).[107] Neither at that time, nor at any point thereafter, did the Commission provide a definition of news aggregators. The impact assessment accompanying the 2016 proposal for the CDSM Directive uses the more general term 'online service providers' to identify the source of publishers' licensing difficulties, singling out news aggregators and social media as examples.[108] However, since the CDSM Directive 2016 proposal was to apply to all digital uses of press content, it did not reflect the impact assessment and did not name any digital intermediaries of concern, either in Art. 11 (later renumbered to Art. 15) or the respective recitals.

The original broad scope of the press publishers' right was subsequently narrowed down in both the Council's and EP's compromises to the digital (Council) or online (EP) uses by ISSPs. While the Council compromise recitals refer to 'powerful platforms' and mention search engines as relevant service providers,[109] the EP text refers to online services and points at news aggregators and media monitoring services.[110] Neither provides a definition of a service provider. Instead, they refer to the one included in the Directive 2015/1535,[111] a solution also adopted in the final text of the CDSM Directive. While narrowing the scope of the press publishers' right, the Council and EP tried to further emphasise that uses by individual users should not be affected by the new right. First, the EP added a provision stating that the new right shall not prevent legitimate private and non-commercial uses of press publications by individual users.[112] Secondly, the Council emphasised that that the current copyright rules applicable to uses of press publications by other

106 European Commission, 'Communication from the Commission to the European Parliament' (n 5) 10.

107 ibid.

108 European Commission, 'Commission Staff Working Document Impact Assessment on the Modernisation of EU Copyright Rules' (n 16) 157.

109 CDSM Directive recitals 31 and 32.

110 CDSM Directive recital 31.

111 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 L241/1.

112 European Parliament, 'Copyright in the Digital Single Market Amendments Adopted by the European Parliament on 12 September 2018 on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (2018) A8-0245/2018 art 11(1a).

users, including individual users, shall remain unaffected.[113] Those changes were intended to align the press publishers' right with the declared policy goals,[114] and both were incorporated in the final text of the CDSM Directive.

This short history of the press publishers' right shows that while the motivations behind the right have been linked to digital intermediaries, particularly news aggregators, from the outset, the actual limitation to the right's scope came quite late in the legislative process. Looking at the subsequent versions of the CDSM Directive considered both in the Council and the EP, one can see that this limitation was linked to the need to safeguard individuals' freedom to share information online.[115] Which digital intermediaries should be covered by the right was never discussed in much detail. If any intermediaries were named during the parliamentary discussions, it was often done generally, in connection to both Arts. 15 and 17 CDSM Directive, with MEPs calling for regulation of platforms, online giants or big tech.[116] This lack of thorough consideration and explanation resulted in the current ambiguity of the scope of press publishers' right and led the media[117] and some politicians[118] to imply that the EU press publishers' right has the same scope as the Code, providing legal basis for negotiation with both Google and Facebook. This, however, is not the case.

1. Information society service provider

First, to be covered by the press publishers' right, a digital intermediary needs to be an information society service provider. Directive 2015/1535, referred to in Art. 2(5) of the CDSM Directive, defines an information society service (ISS) as any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.[119] The provision at a distance means that the service provider and the recipient of its service are neither physically nor simultaneously present. Use of electronic means implies that all essential elements of the service are transmitted, communicated and received via an electronic network. The provision at an individual request assumes that the service is interactive, with the data being transmitted following an individual query. Provision for remuneration does not mean that the recipient of a service has to pay for it, as a service can be supported by ad-generated income.[120]

While Directive 2015/1535 does not belong to the EU copyright framework, the reference to its ISS definition is not surprising, as it can also be found in the eCommerce Directive,[121] a key text for the functioning of the DSM, and it is retained in the upcoming Digital Services Act.[122] The definition is broad, covering a variety of services from online marketplaces, databases and monitoring services, to mobile taxi apps and accommodation services such as AirBnB.[123] Recital 54 CDSM Directive names news aggregators and media monitoring services as examples of ISSPs relevant for the press publishers' right. While not mentioned explicitly in the CDSM Directive, search engines fall squarely within the definition of an ISSP. This was confirmed by the CJEU in its decision in *VG Media v Google*, which concerned the German predecessor of the EU press publishers' right.[124] Member States add extra examples of ISSPs relevant in the context of the press publishers' right in the explanatory memoranda accompanying their implementations. This comes in a form of either broad categories of services, such as online platforms[125] and publishers of newspapers or magazines,[126] or names of specific services.[127] The difficulty begins when a Member State and stakeholders point at social media generally, or Facebook in particular, as ISSPs covered by the press publishers' right.

The 2022 National Assembly's report on application of the press publishers' right in France calls both Google and Facebook 'the most directly concerned by the application of the neighbouring rights'.[128] An association of French publishers, APIG, follows this interpretation, having already

113 Council, 'Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market – Agreed Negotiating Mandate' (2018) 9134/18 para 32.

114 See Council, 'Note from Presidency to Delegations on Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market – Discussion Paper on Article 11 and Article 13' (2018) 5902/18 3.

115 The limitation introduced by the Council stems from a debate on the question 'Should uses by individual users be carved out from the protection, provided that the use of press publications is for non-commercial purposes?' posed by 16 January 2018 Council note to Perm Reps. The limitation introduced by the EP was first included in 'Draft compromise amendments on Article 11 and corresponding recitals' prepared by the JURI rapporteur Axel Voss (document dated 28 March 2018) where art 11 included para 1a 'The rights referred to in paragraph 1 shall not prevent legitimate private and non-commercial use of press publications by individual users'.

116 Plenary discussion on Copyright in the Digital Single Market (11 September 2018) <https://www.create.ac.uk/wp-content/uploads/2018/09/EP-Transcription-11-September_CREATe_Transcription.pdf> accessed 25 November 2022.

117 Pierre Petillault, 'News Publishers in France and Digital Platforms' (2022) <https://www.youtube.com/watch?v=y0A-myETvJg> accessed 25 September 2022.

118 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.

119 Directive 2015/1535 art 1(1)(b).

120 Case C-484/14 *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH* ECLI:EU:C:2016:689, para 43.

121 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

122 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance) [2022] OJ L277.

123 Case C-390/18 *AirBnB Ireland* ECLI:EU:C:2019:1112, para 49.

124 Case C-299/17 *VG Media v Google LLC* ECLI:EU:C:2019:716.

125 Urheberrechts-Novelle 2021 Erläuterungen (n 95).

126 Luonnos hallituksen esitykseksi eduskunnalle laeiksi tekijänoikeuslain ja sähköisen viestinnän palveluista annetu lain 184 §:n muuttamisesta, 50 § para 3, 99 <https://www.lausuntopalvelu.fi/FI/Proposal/DownloadProposalAttachment?proposalId=bf2bc712-ff6e-4a23-81de-91581bc2bf81&attachmentId=16538> accessed 25 November 2022.

127 Autoriõiguse seaduse muutmise seaduse eelnõu seletuskiri (n 104) 92. The explanatory memo names Drudge Report, Huffington Post, Fark, Zero Hedge, Newslookup, Newsvine, World News (WN) Network, and Google News as the relevant services.

128 Laurent Garcia, 'Rapport d'Information Sur l'application Du Droit Voisin Au Bénéfice Des Agences, Des Éditeurs et Professionnels Du Secteur de La Presse' (Assemblée Nationale 2022) 19-20.

concluded a licensing agreement with Facebook[129] and now setting their eyes on other social media, such as Twitter.[130] The explanatory memoranda accompanying Danish,[131] Czech[132] and, in its original version, Austrian implementations[133] also point at social media as an example of relevant ISSPs which were not explicitly mentioned by the CDSM Directive. As noted by the Danish Minister of Culture, his country's implementation of Art. 15 CDSM Directive provides the Danish media with 'the right to make collective agreements with tech giants, such as Facebook and Google'.[134] The news on Danish media banding together to negotiate with both Google and Facebook was widely reported.[135] Facebook's immediate reaction to Danish media pursuing payments on the basis of the press publishers' right was a change to its display policy limiting previews when press content was first shared by a private user and not a publisher.[136]

Are the Member States that are pointing at social media as ISSPs relevant for the press publishers' right simply amending the EU legislator's omission, or are they extending the intended scope of the new right, possibly inspired by the Code bargaining frameworks? The mere fact that social media are not mentioned in the CDSM Directive's recitals should not be overinterpreted, especially considering the non-binding nature of the recitals, but at the same time, this absence is difficult to ignore. Social media were certainly not the reason for the EU legislator's intervention into the relationship between the press and intermediaries. However, by simply looking at the ISSP definition one could conclude that social media is covered by the press publishers' right. This is exactly what the French National Assembly's report does.[137] This conclusion can be easily reinforced by the contemporary media narrative discussing the EU press publishers' right and the Australian Code side-by-side, and the growing share of Facebook in global advertising revenue which urges publishers to look its way.[138] However, the fact that social media falls within the ISSP definition is by itself not sufficient for them to fall within the remit of the press publishers' right. The reasons for that are twofold: a different mechanism of content collection, and the EU legislator's intention to safeguard the freedom of users to share information.

2. Mode of content collection matters

Contrary to what the French report on press publishers' right claims, the fact that Google and Facebook have different business models matters. What particularly matters in the context of the press publishers' right is how a service secures the content it uses. Unlike news aggregators and search engines crawling the internet in search of new content, social media's content comes from their users, including press publishers. This is an important difference from the press publishers' right's perspective, providing publishers with the right of reproduction and the right of making available but only with respect of online uses by ISSPs. This means that an ISSP is covered by the press publishers' right when it reproduces or makes available press publications. While it is clear that news aggregators and search engines make content available, the same does not apply to social media.

The question of whether intermediaries make user-uploaded content available has been occupying both copyright scholars and the CJEU for years. Even though CJEU judgments in *Pirate Bay*,[139] *Filmspeler*[140] and *YouTube*[141] envisage situations where a platform is liable for content uploaded by its users, those scenarios are far removed from users sharing press publications on Facebook, as those decisions focus on liability of intermediaries providing access to copyright-infringing content. It is safe to assume that press publications shared by social media users are not infringing when users link to the official websites of publishers who make them available in the first place. This certainly applies to content shared by the publishers themselves. Moreover, publishers often facilitate users sharing their content by provision of share buttons on their websites, a phenomenon which according to Höppner, the press publishers' right advocate, could even be interpreted as an implied license for users.[142] Potentially, some of the links shared by users could circumvent the technical restrictions put in place by press publishers such as paywalls, communicating press publications to a wider public than that originally authorised by a publisher.[143] However, this argument, never properly pursued by publishers, does not warrant a general presumption that all links to press publications shared by social media users are infringing. If a simple presumption that

129 'L'Alliance de la presse d'information générale et Facebook concluent un accord relatif au droit voisin' (*Alliance Presse*, 21 October 2021) <https://www.alliancepresse.fr/actualite/lalliance-de-la-presse-dinformation-generale-et-facebook-concluent-un-accord-relatif-au-droit-voisin/> accessed 25 September 2022.

130 Pierre Petillault, 'News Publishers in France and Digital Platforms' (n 117).

131 Bemærkninger til lovforslaget 7 <https://www.ft.dk/ripdf/samling/20201/lovforslag/l205/20201_l205_som_fremsat.pdf> accessed 25 November 2022.

132 Závěre na zpráva hodnocení dopadů regulace (RIA) 92 <https://www.psp.cz/sqw/text/orig2.sqw?idd=191952> accessed 25 November 2022.

133 Urheberrechts-Novelle 2021 37 <https://www.parlament.gv.at/dokument/XXVII/ME/143/fname_995659.pdf> accessed 1 December 2022.

134 'Ny Virkelighed for Tech-Giganter' (*Kultur Ministeriet*, 6 March 2021) <https://kum.dk/aktuelt/nyheder/ny-virkelighed-for-tech-giganter> accessed 1 December 2022.

135 Richard Milne and Alex Barker, 'Danish Media Club Together to Make US Tech Giants Pay for News' *Financial Times* (London, 28 June 2021) <https://www.ft.com/content/c83d6b7f-ed19-4a90-a719-3bf4aedccdff> accessed 28 November 2022.

136 Jesper Doub and Martin Ruby, 'Facebook: Rettighedshaverne har magten over indholdet' (*Kultur*, 6 June 2021) <https://www.altinget.dk/kultur/artikel/facebook-rettighedshaverne-har-magten-over-indholdet> accessed 1 December 2022.

137 Garcia (n 128) 34.

138 Courtney C Radsch, 'Making Big Tech Pay for the News They Use' (*CIMA*, 7 July 2022) <https://www.cima.ned.org/publication/making-big-tech-pay-for-the-news-they-use/> accessed 1 December 2022.

139 Case C-610/15 *Stichting Brein v Ziggo BV and XS4All Internet BV* ECLI:EU:C:2017:456.

140 Case C-527/15 *Stichting Brein v Jack Frederik Wullems* ECLI:EU:C:2017:300.

141 Joined Cases C-682/18 and C-683/18 *Frank Peterson v Google LLC and Others and Elsevier Inc.v Cyando AG* ECLI:EU:C:2021:503.

142 Thomas Höppner, 'EU Copyright Reform: The Case for Publisher's Right' (2018) 1 Intellectual Property Quarterly 1, 18.

143 Compare Case C-466/12 *Nils Svensson and others v Retriever Sverige AB* ECLI:EU:C:2014:76 27.

all content uploaded by users is made available by an intermediary was justified, and shared news content was infringing, we might not have needed Arts. 15 and 17 CDSM Directive in the first place.

It is important to note here that Art. 17 CDSM Directive significantly alters the liability regime of a subgroup of ISSPs, namely online content-sharing service providers (OCSSPs), providing that they make available user-uploaded works and other protected subject matter to the public. However, this provision cannot serve as a basis for bringing social media's actions within the remit of Art. 15 CDSM Directive. In theory, one could argue that since some of the ISSPs could be considered OCSSPs, and press publications are 'other protected subject matter', such ISSPs (including social media) should be subject to the new set of obligations imposed by Art. 17 CDSM Directive. Such an interpretation would leave no doubt that social media does make press publications available to the public, subjecting them to Art. 15 CDSM Directive. There are, however, two major issues with this reading. First, there is no consensus on whether social media are OCSSPs. As pointed out by Dusollier and Metzger and others, the requirements of organisation and promotion of content uploaded by users included in the OCSSP definition might not be met by the likes of Facebook and Instagram.[144] Secondly, and most importantly, Art. 17(1) CDSM Directive explicitly states that only rightsholders referred to in Art. 3(1) and (2) of the InfoSoc Directive benefit from the new provision. This does not include press publishers. This lack of rightsholder status under the InfoSoc Directive was confirmed by the CJEU in *Reprobel*,[145] a case which has significantly influenced the publishers advocating for introduction of a new related right. If one tried to argue that because press publishers are provided with the rights specified in the InfoSoc Directive they should benefit from Art. 17 CDSM Directive *per analogiam*, one would need to grapple with the second reason why a mere qualification as an ISSP is not enough to bring social media within the press publishers' right remit: the intention to safeguard users' freedom to share and impart information.

3. No impact on users sharing of news

The CDSM Directive explicitly excludes both acts of hyperlinking and private or non-commercial uses by individual users from Art. 15 CDSM Directive scope to further restrict the press publishers' right and confirm that only ISSPs' actions are covered. While the latter seems somehow obsolete, it highlights the reason for limiting the right's reach, namely the desire to safeguard users' freedom to share information online. The questions about the interference of the press publishers' right with the fundamental right of freedom of expression guaranteed by both Art. 11 of the European Charter of Fundamental Rights (the Charter) and Art. 10 of the European Convention on Human Rights (ECHR) were posed even before the right's proposal.[146] This is because, as noted by van Eechoud, 'the creation of exclusive new rights in information for publishers necessarily interferes with the freedom of expression of others'.[147] Thus the mere consideration of granting press publishers new rights was bound to cause concern over restricting users' freedom to share and access information online, earning it the nickname 'link tax'. Arguing against those accusations, press publishers were adamant that '[n]othing we [publishers] are asking for would affect the way that our readers access our content or share links on social media or via apps and email to friends and family'.[148]

While excluding private and non-commercial uses from the right's scope, recital 55 CDSM Directive notes that such uses remain subject to 'the existing rules in the Union law'. This means that when a user posts a link to and shares a preview of a press publication, this act should not be assessed pursuant to Art. 15 CDSM Directive, but the pre-CDSM legislation, mainly the InfoSoc Directive (or to be more precise, national instruments implementing it). Links and previews are not made available by users in a vacuum, one needs a forum to communicate, and those fora are provided by digital intermediaries. The role of digital intermediaries in providing a space for and setting the conditions of internet users' speech is undeniable and it is an important element of the ongoing discussion on Big Tech regulation. This is because by regulating digital intermediaries, we undoubtedly affect their users. Discussion of Art. 17 CDSM Directive and the new intermediary regime it introduces is a perfect example of this. Concern over users' freedom of expression and information is the reason why Art. 17 CDSM Directive generated such a controversy,[149] and why Poland (unsuccessfully) sought its annulment by the CJEU.[150] The need to safeguard users' freedom remains the main concern during the implementation process of this provision, with Member States searching for solutions to shield users' uploads covered by the copyright exceptions and limitations from filtering and blocking.[151]

While the impact a (copyright) regulation of digital intermediaries can have on users is not contested, it is somehow forgotten during the press publishers' right transposition. Member States compliantly copy exclusion of individuals' private and non-commercial uses from the right's scope, sometimes additionally explaining in

144 Séverine Dusollier, 'The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition' (2020) 57 Common Market Law Review 979, 1012; Axel Metzger and Martin 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' (*ecs*, 27 April 2020) 3 <https://europeancopyrightsocietydotorg.files.wordpress.com/2020/04/ecs-comment-article-17-cdsm.pdf>.

145 Case C-572/13 *Hewlett-Packard Belgium SPRL v Reprobel SCRL* ECLI:EU:C:2015:750.

146 Kretschmer and others (n 11).

147 van Eechoud (n 11) 19.

148 European Publishers Council (n12).

149 See Christophe Geiger and Bernd Justin Jütte, 'Platform Liability under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match' [2021] GRUR International 517.

150 Case C-401/19 *Republic of Poland v European Parliament and Council of the European Union* ECLI:EU:C:2022:297.

151 João Pedro Quintais and others, 'Safeguarding Use Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive' (2019) 10 JIPITEC 277.

accompanying memoranda that this limitation applies to posting on Twitter and Facebook.[152] The EU legislator's intention to safeguard users' freedom to share information is thus (formally) recognised. It is not, however, fully delivered when a Member States explicitly decides to include social media within the press publishers' right remit. Inclusion of the fora where users share press publications within the scope of the new right makes the built-in limitations of this right meaningless. If social media are required to remunerate press publishers for content shared by their users, including press publishers, this undoubtedly affects users' actions. And if the legislative intent was to preserve users' freedoms, a purposive interpretation of Art. 15 CDSM Directive requires that digital intermediaries which facilitate communication between users are not included within the scope of the press publishers' right. This is particularly so when the act of sharing a press publication is qualified as an act of making available by the users, but not the digital intermediary. To claim that users' ability to share and impart information remains unrestricted while requiring intermediaries facilitating sharing to seek publishers' consent for users' actions is simply illogical.

While digital intermediaries do not make content uploaded by users available to the public, their actions could potentially be covered by the second exclusive right provided to press publishers: the right to reproduction, as applied to the previews of press publications. With hyperlinks out of the scope, the right of reproduction plays the key role in determining the scope of the press publishers' right (hence the evolution from 'link tax' to 'snippet tax'). Whenever a part of a press publication going beyond a 'very short extract' is copied, the new right applies. This could be interpreted as the press publishers' right covering the previews of news content shared by social media users. However, such a reading would effectively make the press publishers' right's in-built limitations redundant. Since Art. 15 CDSM Directive provides publishers with exclusive rights with respect to *online uses by information society service providers*, it is justifiable to limit the application of the right of reproduction to those acts of copying which facilitate online uses. Internal copies required to ensure the functioning of ISSPs are thus out of scope, which has been explicitly confirmed in a selection of the national implementations.[153] Additionally, since the press publishers' right applies only to *uses by ISSPs* and *private and non-commercial uses by individual users* are excluded and remain subject to 'the existing copyright rules in Union law', the purposive reading of those provisions requires further limitation of the right of reproduction, so that it does not capture copies made by ISSPs in order to facilitate users' sharing of press publications. A different reading would mean that the limitation of the press publishers' right to the ISSPs' uses is without substance, straying far from the EU legislator's intention.

VIII. Conclusions

While assuring the sustainability, freedom and pluralism of the European press sector is a laudable goal, the press publishers' right seems unfit to achieve it. By providing press publishers with a neighbouring right on their publications, the EU legislator intended to strengthen their bargaining position towards digital intermediaries. However, the legal basis the right provides does not cause obligations to bargain and to remunerate to arise, as this would be contrary to the nature of the exclusive rights. What exclusive rights do, is to empower rightsholders to authorise (or not) uses of their content. In the case of the press publishers' right, a right not effective *erga omnes*, this authorisation comes into play only when a digital intermediary reproduces or makes press publications available to the public online.

As the press publishers' right sits quite uncomfortably within the copyright domain, its implementation should not further exacerbate this discomfort by creating dangerous precedents, challenging the character of copyright and neighbouring rights and the individual's right to receive and impart information, as well as introducing competition law concepts. Member States can and do introduce measures to facilitate favourable bargaining environments, such as the obligation to bargain in good faith or to provide information on the scale of the press publications' use, during the press publishers' right implementation. While potentially fragmentating the transposition picture, such measures are within the Member States' discretion when they try to adopt the new right to its national legal settings. The implementation freedoms, however, are restricted by the EU legislator's intention, which was not limited to strengthening the publishers' legal standing but also included safeguarding users' freedom to share information online.

With the effectiveness of the right questioned from the outset, the ongoing implementation process further emphasises the shortcomings of the press publishers' right. Member States look towards what they see as the successful regulatory intervention in Australia and shape the press publishers' right into something it was not designed to be. The Code's success story is quite illusory as it does not yet (and may never) apply in practice. Riding the wave of the big tech regulation Member States try to fix a right which has never been fit to achieve the laudable goals it was set to deliver.

ACKNOWLEDGEMENTS:
A sincere thanks to Amy Thomas and Bernd Justin Jütte for their valuable comments on a draft of this article.

152 See Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes, 9 March 2021, 112-13 <https://dip21.bundestag.de/dip21/btd/19/274/1927426.pdf> accessed 25 November 2022.

153 ibid 113.