When harmonization leads to fragmentation (and potential invalidity claims): snapshots from the implementation of the new press publishers' right

Caterina Sganga – Magali Contardi*

Surrounded by a polarised debate, Article 15 CDSM represented one of the most contested provisions of the new Directive. Halfway down the road of its transpositions, criticisms related to the structure and scope of the new press publishers' right are now coupled with challenges triggered by the fragmentation – and sometimes doubtful validity - of Member States' solutions. Building on the policy debate that surrounded the introduction of Article 15 CDSM and on an analysis of the room for manoeuvre left to national laws, this article offers a critical assessment of its national implementations, raising doubts on the effectiveness of the provision in achieving the Directive's goals. Then, it uses the Italian solution to demonstrate what effects an act of imperfect harmonization such as Article 15 CDSM may create, and tests its validity under EU law to draw the boundaries of Member States' discretion in shaping the new entitlement.

Introduction

In the path that led to the adoption of the Directive on Copyright in the Digital Single Market (CDSM),[1] one of the most heavily debated topics was the introduction of a new related right for press publishers. The arguments moved by the press industry and the evidence relied upon by EU policymakers were strongly challenged by several commentators and activists, who pointed their fingers at the failure of the German and Spanish experiments to highlight how the crisis of the sector, triggered by the Internet, could not be solved by simply adding another related right, but should have been tackled by other incentives and business models reforms.

After several rounds of amendments, the final version of Article 15 CDSM[2] remedied the most evident distortions, but still featured controversial elements, and it left the definition of key points,

* Caterina Sganga is Associate Professor of Comparative Private Law at Scuola Superiore Sant'Anna, Pisa. Email: caterina.sganga@santannapisa.it. Magali Contardi is Research Fellow in Comparative Private Law at Scuola Superiore Sant'Anna, Pisa, and PhD Candidate at the University of Alicante. Email: magalianabel.contardi@santannapisa.it. Caterina Sganga authored the Introduction, Parts 4, 5, and 6. Magali Contardi authored parts 1, 2 and 3. The paper reflects the shared views of the authors.

[1] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L-130/92 [CDSM Directive].

[2] Article 15 CDSM - Protection of press publications concerning online uses: "**(1)** Member States shall provide publishers of press publications established in a Member State with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the online use of their press publications by information society service providers. The rights provided for in the first subparagraph shall not apply to private or non-commercial uses of press publications by individual users.The protection granted under the first subparagraph shall not apply to acts of hyperlinking. The rights provided for in the first subparagraph shall not apply in respect of the use of individual words or very short extracts of a press publication. **(2)** The rights provided for in paragraph 1 shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject matter incorporated in a press publication. The rights provided for in paragraph 1 shall not be invoked against those authors and other rightholders and, in particular, shall not deprive them of their right to exploit their

such as the notion of short excerpts, the provision of licensing/collection schemes and the interplay with competition rules to the discretion of national legislators. Consequently, challenges related to the structure and scope of the new right are now coupled with criticisms related to the fragmentation of Member States' solutions, and to the risk of legal uncertainty caused by potentially diverging judicial interpretations. In addition, some national laws present doubtful features, which make them stand out as telling examples of the side effects that an act of imperfect harmonization such as Article 15 CDSM may engender. In this sense, Italy is a perfect case in point. From the definition of the amount to be paid as "fair compensation" to the pervasive intervention on the negotiations between publishers and providers, and the attribution of significant regulatory power to the national Communications Authority, Article 43*bis* of the Italian Copyright Act promises to cause several interpretative problems in the years to come, and has already raised questions of invalidity by local commentators.

Against this background, this article offers a critical assessment of the impact of Member States' discretion on the state of harmonization of the new press publishers' right, using the Italian solution as a paradigmatic example. Building on the policy debate that led to the approval of Article 15 CDSM (§1), it offers an analysis of the room for maneuver left to national laws (§2), and comments on the most relevant convergences and divergences in Member States' solutions that have ensued (§3), raising doubts on the effectiveness of the provision in achieving the Directive's goals. Then, it provides a critical assessment of the most salient features of the Italian version of the press publishers' rights (§4), and tests its validity under EU law (§6) on the basis of the indications provided so far by the European Commission and the CJEU (§5), so to draw the boundaries of Member States' discretion in shaping the new entitlement.

1. Why (and why not) a press publishers' right?

Eighteen years after the historical InfoSoc Directive, the CDSM Directive has embraced again a multi-target harmonization effort in the field of copyright. Undoubtedly, one of its most controversial provisions is Article 15 CDSM, which introduces a new related right in favour of press publishers, covering the online reproduction and making available of press publications by information society service providers.

works and other subject matter independently from the press publication in which they are incorporated. When a work or other subject matter is incorporated in a press publication on the basis of a non-exclusive licence, the rights provided for in paragraph 1 shall not be invoked to prohibit the use by other authorised users. The rights provided for in paragraph 1 shall not be invoked to prohibit the use of works or other subject matter for which protection has expired. **(3)** Articles 5 to 8 of Directive 2001/29/EC, Directive 2012/28/EU and Directive (EU) 2017/1564 of the European Parliament of the Council (19) shall apply mutatis mutandis in respect of the rights provided for in paragraph 1 of this Article. **(4)** The rights provided for in paragraph 1 shall expire two years after the press publication is published. That term shall be calculated from 1 January of the year following the date on which that press publication is published. Paragraph 1 shall not apply to press publications first published before 6 June 2019. **(5)** Member States shall provide that authors of works incorporated in a press publication receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers.

The aim of the new entitlement is to ensure remuneration for publishers when their publications are reused online, by improving their bargaining position *vis-à-vis* digital platforms, which in turn serve to support a 'free and pluralist press' in its function 'to ensure quality journalism and citizens' access to information', in line with the Directive's objective to achieve a well-functioning and fair marketplace for copyright.[3] For long press publishers have been complaining that by indexing, linking and displaying news and articles, usually for profit, news aggregation services unfairly free-rode on their news content, hindered their ability to recoup their investments, and refused any type of bargain, thus depriving of efficacy traditional licensing mechanisms.[4] Clashes experienced by Member States such as Germany[5] and Spain[6] prior to the enactment of the CDSM Directive are eloquent examples.

The alleged imbalance in the distribution of income between news authors, publishers and intermediaries was identified as one of the most urgent problems requiring the intervention of the EU legislator in the process of modernization of EU copyright rules[7]. However, the need and opportunity to introduce a new press publishers' right as the best solution to address the problems identified by the Commission were far from being universally accepted.[8]Aside from radical criticisms such as those that questioned the competence of the Union,[9] the main objections related to its underlying justifications. First, opponents objected that the press publisher right contradicted the institutional functions copyright and related rights are supposed to pursue, since it is not the

[3] CDSM Directive, Recitals 3, 54 and 55. For an assessment of the suitability of Article 15 CDSM to pursue the goal of fostering the availability of reliable information, see 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 CMLR 4.

[4] For a detailed analysis see Taina Pihlajarinne, Juha Vesala. 'Proposed right of press publishers: a workable solution?' (2018) 13(3) JIPLP 220.

[5] On the German press publisher's right and the case law that ensued, see Eleonora Rosati, 'Neighbouring rights for publishers: are national and (possible) EU initiatives lawful? [2016] 47(5) IIC 569, and Till Kreutzer, Das Leistungsschutzrecht für Presseverleger – Ein gescheiterter Ansatz! [2017] ZUM 127.

[6] See Raquel Xalabarder, 'The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government' (2014), IN3 Working Paper Series, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504596 (last accessed 18 February 2022).

[7] The proposal emerged for the first time in the Communication "Towards a modern, more European copyright framework", COM (2015) 626 final, and was supported by the conclusions reached in the Public Consultation on the Role of Publishers in the Copyright Value Chain and on the 'Panorama Exception', available at: https://ec.europa.eu/digital-singlemarket/en/news/public-consultation-role-publishers-copyright-value-chain-and-panorama-exception (last accessed 18 February 2022).

[8] See, e.g., IViR, 'Academics against Press Publishers' Right', available at https://www.ivir.nl/academics-against-press-publishers-right/; Statement by EPIP academics, available at https://www.create.ac.uk/wp-content/uploads/2018/09/Statement-by-EPIP-Academics.pdf; R.Hilty, V.Moscon (eds), Modernisation of EU Copyright Rules – Position Statement of the MPI for Innovation and Competition, available at https://pure.mpg.de/rest/items/item_2470998_12/component/file_2479390/content.; Lionel Bently et al. 'Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive' (2017). available at http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU%282017%29596810_EN.pdf (all webpages last accessed 18 February 2022). See also Rosati (n 5), and Giuseppe Colangelo, 'Enforcing copyright through antitrust? The strange case of news publishers against digital platforms' (2021) Journal of Antitrust Enforcement, online first at https://doi.org/10.1093/jaenfo/jnab009.

[9] Ana Ramalho, 'Beyond the Cover Story–An Enquiry into the EU Competence to Introduce a Right for Publishers' (2017) 48(1) IIC 71.

role of intellectual property to compensate market actors for changes brought by disruptive technologies, beyond what is necessary to adapt existing entitlements to new forms of exploitation. The provision was thus criticized for it was seen as a tool to rebalance the bargaining power of stakeholders threatened by technological innovation, and to reallocate value among them.[10] Second, scholars contested the opportunity to introduce yet another related right, in an era when digital technologies have ultimately frustrated the reason for their existence by drastically reducing the investments needed to produce and distribute content.[11]

The wording of Article 15 CDSM was also heavily challenged for its excessively wide scope and lack of threshold for protection. Although Recitals 55 and 58 CDSM partially limited it by offering non-exhaustive examples of what is not covered by the provision, the nature of the right remained overbroad, extremely similar to authors' rights, and not counterbalanced by dedicated flexibilities, but only by a reference to general copyright exceptions that national legislators are free to extend and adapt to the new entitlement. Not only did this regulatory choice fail to address the well-highlighted risk of adverse systematic effects on freedom of speech and the right to receive and impart information,[12] but it also left great margins for Member States to shape the balance between Article 15 CDSM and conflicting rights and interests. This will likely lead to substantial interpretative challenges for national legislators and courts, and is prone to trigger greater fragmentation instead of a consistent harmonization. The same can be said for other key concepts, definitions and mechanisms featuring the provision which, as we will see below, were left in haze and/or remitted to Member States' discretion, with no real guidance as to the boundaries to be followed in the implementation.

2. Article 15 CDSM: lights, shadows and margin of discretion left to Member States

Despite several rounds of amendments, the final wording of Article 15 CDSM did not address many of the criticisms raised during the parliamentary debate. To further complicate the

[10] See, e.g, Hilty-Moscon (n 7) at 17; Martin Kretschmer, Séverine Dusollier, Christophe Geiger, Bernt Hugenholtz, 'The European Commission's public consultation on the role of publishers in the copyright value chain: a response by the European Copyright Society' (2016) 38(10) EIPR 591; Giuseppe Colangelo, Valerio Torti, 'Copyright, online news publishing and aggregators: a law and economics analysis of the EU reform' (2019) 27(1) Int.J.L.Inf.Technol 75. Several impact studies confirm these findings. See Commission Staff Working Document: Impact Assessment on the Modernisation of EU Copyright Rules, SWD(2016) 301 final; NERA, 'Impact on Competition and on Free Market of the Google Tax or AEDE Fee', (2017), available at https://mediapublishers.eu/2017/04/26/impact-of-the-google-tax-or-aede-fee-in-the-spanish-market-2nd-nera-report-may-2017/ (last accessed 18 February 2022); Deloitte, 'The impact of web traffic on revenues of traditional newspaper publishers. A study for France, Germany, Spain, and the UK', (2016), available at https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/technology-media-telecommunications/deloitte-uk-impact-of-web-traffic-on-newspaper-revenues-2016.pdf (last accessed 18 February 2022).

[11] As in Bernt Hugenholtz, 'Neighbouring Rights are Obsolete' (2019) 50(8) IIC 1006. Along the same lines Caterina Sganga, 'The many metamorphoses of related rights in EU copyright law: unintended consequences or inevitable developments' (2021) 10 GRUR Int 821.

[12] See Colangelo-Torti (n 10), and more infra, section 3 and fn28.

framework, it strongly harmonized some elements of the new right, while offering no indications on other key aspects, which are thus theoretically left to Member States to regulate.

National legislators have little or no room for manoeuvre on the definition of the duration and content of the right. The term of protection, heavily contested in the drafting phase,[13] is set in two years, calculated from 1 January of the year following the date of publication of the protected work. As to the content, Article 15(1) CDSM requires Member States to provide publishers of press publications with the rights granted under Articles 2 (reproduction) and 3(2) (making available to the public) InfoSoc on the 'online use' of their press publications. This limitation makes the right cover only uses that take place at a distance, by electronic means, and at the individual request of a recipient of services, with no general coverage of works in digital format.[14] In addition, the right applies only against information society service providers, excluding implicitly other categories, and explicitly private or non-commercial uses of press publications by individual users, even if they share press publications online.[15] Another important and clear carve-out from the scope of the right is the exclusion of acts of hyperlinking, which for the purpose of Article 15 CDSM do not constitute communication to the public.

Some degree of flexibility for Member States starts appearing under Article 15(5) CDSM, which requires that "an appropriate share" of the revenues that press publishers receive for the use of their press publications shall be transferred to authors of works incorporated therein,[16] but is silent on what an "appropriate" share is, how to calculate it, and with which mechanism to distribute it. While some degree of national discretion and divergences in this area do not promise to cause significant inconveniences, greater challenges may come from other sensitive topics left to Member States, such as the identification of beneficiaries, the definition of important carve-outs like the notion of "very short extracts", the application of exceptions and limitations, the possibility to adopt specific licensing/distribution schemes and the related admissible degree of interference with parties' freedom of contract.

As for the beneficiaries, Article 15(1) CDSM generally refers to "publishers of press publications" established in an EU Member State.[17] The Directive does not expressly define this notion, although

[13] On the excessive duration see Christophe Geiger, Oleksandr Bulayenko, Giancarlo Frosio, 'Opinion of the CEIPI on the European Commission's Copyright Reform Proposal' (2017) 39(4) EIPR 202. *Contra* 'Articles 15 et 16: Droits sur le publications', in Nicolas Binctin, Xavier Près (eds) *Directives 2019/790 et 2019/789 sur le Droit d'Auteur dans le Marché Unique Numérique* (Bruylant 2021).

[14] See Eleonora Rosati, 'Article 15', in Id., *Copyright in the Digital Single Market: Article-by-Article Commentary to the Provisions of Directive 2019/790* (OUP 2021), at 262

[15] Blogs or social media postings incorporating news materials, are expressly excluded by Recital 56 CDSM. See Silvia Scalzini, 'The new related right for press publishers: what way forward?', in Eleonora Rosati (ed) *Handbook of European Copyright Law* (Routledge 2021), at 106.

[16] CDSM Directive, Recital 59.

[17] Criticising the (initial) lack of definition of publisherssee Lionel Bently, 'Sleepwalking towards a perpetual (news?) publishers' right in online publications', The IPKat, 22 May 2018, available at

Recitals 55-56 shed some light by suggesting that the right ought to be attributed to any entity that in a professional, entrepreneurial and/or commercial capacity issues press publications under their initiative, editorial responsibility and control. These conditions are to be satisfied cumulatively.[18] In this sense, beneficiaries would encompass news publishers or news agencies, whether natural or legal persons,[19] but not book publishers and scientific publishers.[20] Uncertainties remain, however, on the degree of discretion left to Member States to further restrict the definition,[21] while it is clear that national divergences in this respect would create further fragmentation and add another layer of complexity in the clearance of press publishers' rights, ,in ontrast with the goals of the Directive.

As to the subject matter, "press publication" essentially covers collections of literary works of a journalistic nature, as well as other subject matter (e.g., photographs and videos) that are published with the purpose of providing information related to news or other topics under editorial control (Article 2(4) CDSM). This excludes, for instance, websites like blogs, which provide information as part of an activity that is not carried out under the initiative and control of a service provider, such as a news publisher.[22]Also, the collection must constitute an individual item in a periodical or regularly updated publication published under a single title. However, this definition is far from clear,[23] as unclear is the result of the interplay between Recital 56, which excludes periodical publications that are published for scientific or academic purposes, and Article 2(4) CDSM which, by offering protection to press publications […] related to news or *other topics* (*emphasis added*), may well include scientific news or relevant information.[24] Again, Member States may decide to provide more articulated, clearer definitions, with the obvious risk of having national laws taking diverging directions.

Such a potential fragmentation is made even more worrisome by the lack of a threshold for protection. As made clear by its rationale and nature of related right, Article 15 CDSM is conceived to protect press publishers' investments. Yet, the provision does not require any minimum qualitative or quantitative standard of substantiality for the latter, as, for instance, the *sui generis*

https://ipkitten.blogspot.com/2018/05/sleepwalking-towards-perpetual-news.html (last accessed 18 February 2022), and similarly Dusollier (n 3) at 7.

[18] Similarly Rosati (n 14) at 261.

[19] Ibidem.

[20] Since books are not distributed via similar online platforms, while scientific publications do not generate revenue from advertisements. See Impact Assessment (n 10), at 158.

[21] Similarly Ula Furgal, 'The EU press publishers' right: where do Member States stand?' (2021) 16(8) JIPLP 887.

[22] CDSM Directive, Recital 56.

[23] See Dusollier (n 3), at 1006.

[24] Stavroula Karapapa, 'The press publishers' right in the European Union: an overreaching proposal and the future of news online' in Enrico Bonadio, Nicola Lucchi (eds) *Non-Conventional Copyright. Do New and Atypical Works Deserve Protection?* (EE 2018) at 318. See also Thomas Höppner, Martin Kretschmer, Raquel Xalabarder, 'CREATe public lectures on the proposed EU right for press publishers' (2017) 39(10) EIPR 607.

database right does.[25] The attribution of the right depends only on the purpose of the publication, that is providing information related to news or related topics, and its form, which should be online and under editorial control. This carries a risk of overprotection, since nothing prevents press publications that required little or no investment to still be subject to exclusivity.[26] At the same time, the features of the piece (including originality) play a limited or no threshold role, which implies that Article 15 CDSM may apply also on mere facts or information, that is, subject matters that are clearly not covered by copyright protection, with a propertization of the public domain having undeniable detrimental effects on the enjoyment of fundamental rights.[27] Against the silence of the Directive, Member States could theoretically take a position on the matter. However, it may be expected that, especially in light of the approach followed in other sectors, the CJEU will interpret the threshold of protection of Article 15 CDSM as an autonomous concept of EU law, thus moving towards its judicial harmonization.

One may nevertheless argue that a threshold exists, since the Directive excludes from the scope of the provision acts that are believed not to impinge upon its investment protection rationale, such as the reproduction of "very short extracts". Yet, the definition of "very short extracts" lies on Member States, which are also bound by the Directive not to adopt readings of the concept that may affect the effectiveness of the right. Two slippery consequences ensue. First, this carries the unavoidable risk of fragmentation, as some Member States might opt for a quantitative definition, while others may prefer a qualitative approach.[28] Second, nothing prevents Member States to adopt a reading that may end up nullifying the exclusion, with a consequent broadening of the scope of the right.

Parallel to this, the risk of overprotection has not been tackled by adequate balancing tools. The new press publishers' right is subject to the mandatory and optional exceptions under Article 5 InfoSoc, but the approach adopted under Article 15 CDSM is rather different than the one characterizing Article 17 CDSM, which mentions specific exceptions from the InfoSoc Directive to make them mandatory in favour of users uploading materials on online content-sharing platforms. The exceptions and limitations recalled by Article 15(3) CDSM, in fact, remain optional and overridable by contract, without distinction between cases where fundamental rights are or are not at stake. Not only does this circumstance create a hiatus between the two CDSM provision

[25] Article 7(1), Directive 96/9/EC on the legal protection of databases, OJ L-77/20 of 27.3.1996, on which see esp. case C-203/02, *The British Horseracing Board Ltd and Others v William Hill Organization Ltd* [2004], ECLI:EU:C:2004:695 §30; case C-444/02, *Fixtures Marketing Ltd Svenska Spel AB* [2004] ECLI:EU:C:2004:338, §38-39.

[26] See Hugenholtz (n 11) at 1009.

[27] On the impact on freedom of expression, see Bently et al (n 7), at 24; Alexander Peukert, 'An EU Related Right for Press Publishers Concerning Digital Uses. A Legal Analysis', Research Paper of the Faculty of Law, Goethe University Frankfurt am Main n.22/2016, available at https://publikationen.ub.uni-frankfurt.de/files/39370/16-22_RPS.pdf (last accessed 18 February 2022); Pihlajarinne-Vesala (n 4) at 227; Karapapa (n 24) at 20.

[28] Scalzini (n 15) at 110.

and their underlying philosophy *vis-à-vis* exceptions, but it may also lead to additional national fragmentation.[29]

Uncertainties also remain on the extent to which national laws may compress parties' freedom of contract in negotiating licenses under Article 15 CDSM. Interestingly, while one of the main reasons for introducing the new right was that press publishers were 'facing difficulties in licensing their publications online',[30] the Directive remains silent on the negotiation process it envisages, on the interplay between Article 15 CDSM and competition law (and particularly on the potential imposition of obligations to negotiate), as well as on available options for the determination, collection and distribution of the amounts due as remuneration.[31] These issues are of uttermost importance, as suggested by the hiccups in the negotiations between publishers and providers experienced in Member States that were early adopters of Article 15 CDSM.[32] Still, the Directive leaves ample room of manoeuvre for Member States, and this has already led, as illustrated below, to a diversification of national solutions, paving the way for additional fragmentation and related uncertainties, also with regard to the potential invalidity of specific regulatory choices.

3. When harmonization leads to fragmentation: some snapshots of Member States' implementations

With very few exceptions, the majority of Member States missed the CDSM implementation deadline (7 June 2022).[33] The first country to implement Article 15 CDSM was France,[34] followed

[29] On the relationship with the exception under Article 5(3)(c) c Infosoc, see Ana Lazarova, 'Re-use the news: between the EU press publishers' right's addressees and the informatory exceptions' beneficiaries', (2021) 16(3) JIPLP 236.

[30] European Commission, Explanatory Memorandum Proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, Brussels, COM(2016) 593 final, at 3.

[31] CDSM Directive, Recital 60, which clarifies that Member States should remain free to determine how publishers are to substantiate their claims for compensation or remuneration, and to lay down the conditions for the sharing between authors and publishers.

[32] A telling example comes from France where, following the implementation of Article 15 CDSM, Google refused to negotiate and was sued before the French Competition Authority for abuse of dominant position. The Authority, and later also the Paris Court of Appeal (Judgment 20/08071—N◦ Portalis 35L7-V-B7E-CB5z5 of 8 October 2020) clearly stated that the new ancillary right does not impose any obligation to negotiate, but still found for the illegality of Google's conduct under French and EU competition law, and ordered the provider to negotiate licences with press publishers. For a comment see Colangelo (n 8), and also Tone Knapstad, 'Fighting the tech giants—news edition: competition law's (un) suitability to safeguard the press publishers' right and the quest for a regulatory approach', (2021) 16(12) JIPLP 1319.

[33] See European Commission, National transposition measures communicated by the Member States concerning Copyright Directive EU 2019/790, available at https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32019L0790 (last accessed 18 February 2022).

[34] France has split the implementation across multiple legislative acts, with Article 15 CDSM transposed in late 2019 and the full act being implemented only in November 2021 (Ordonnance du 24 novembre 2021 complétant la transposition de la directive 2019/790, available at https://www.vie-publique.fr/loi/282569, last accessed 18 February 2022.

by the Netherlands.[35] To date also Austria,[36] Croatia,[37] Denmark,[38] Estonia,[39] Germany,[40] Hungary,[41] Ireland,[42] Italy,[43] Malta[44] and Spain[45] have adopted the press publishers' right, whereas Belgium,[46] Czechia,[47] Luxembourg,[48] Romania,[49] Slovakia[50] and Lithuania[51] have presented their draft proposals. Bulgaria,[52] Finland,[53] Sweden,[54] Portugal[55] and Slovenia[56] have recently closed their consultation periods, while Greece, Latvia, Poland and Cyprus are still lagging behind.[57] National approaches are the most various, with some countries like Italy and Spain making a full use of the discretion left by the CDSM Directive, and others such as, *inter alia*, Estonia following *verbatim* the wording of Article 15 CDSM, also in areas where the EU provision would have required or allowed national integrations.[58]

The definition of the subject matter is often taken slavishly from Article 2(4) CDSM. Belgium, for instance, specifies that collection of "press publications" may also include other works or

[35] §7b, Wet van 16 december 2020 - Implementatiewet richtlijn auteursrecht in de digitale eengemaakte markt.

[36] §76f, Urheberrechts-Novelle 2021 – Urh-Nov 2021, BGBl. I Nr. 244/2021.

[37] §163-171, Zakon o autorskom pravu i srodnim pravima, Narodne Novine (official gazette) n.111/2021.

[38] Denmark has so far adopted Articles 15 and 17 CDSM. See Lov om ændring af lov om ophavsret implementering af dele af direktiv om ophavsret og beslægtede rettigheder på det digitale indre marked, 6 June 2021.

[39] §73 – 75, Autoriõiguse seaduse muutmise seadus, *Elektrooniline Riigi Teataja* I,3,28 December 2021).

[40] § 87g - §87k, Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des Digitalen Binnenmarkts vom 31. Mai 2021, n. 27.

[41] § 82/A, 2021. évi XXXVII. törvény, 06 May 2021.

[42] Part 4, §13, Statutory Instrument n. 567 of 2021, European Union Regulations 2021, Iris Oifigiúl, 19 November 2021.

[43] Article 43bis, Attuazione della direttiva (UE) 2019/790 sul diritto d'autore e sui diritti connessi nel mercato unico digitale, GU n.283/2021.

[44] §15, Copyright and related rights in the Digital Single Market Regulations, n. 261/2021, Gazetta tal-Gvern ta, 18 June 2021.

[45] §129bis, Real Decreto-ley 24/2021 de 2 de noviembre, Boletin Oficial del Estado, 03 November 2021.

[46] Conseil des ministers du 4 Juin 2021, Droits d'auteur et droits voisins dans le marché unique numérique, § XI 216/1-2.

[47] ZÁKON ze dne 2021, kterým se mění zákon č. 121/2000 Sb., o právu autorském, 21 June 2021.

[48] Projet n. 7847 de loi portant transposition de la directive 2019/790, 26 June 2021.

[49]: PL-x nr. 565/202, Proiect de Lege pentru modificarea şi completarea Legii nr.8/1996 privind dreptul de autor şi drepturile conexe, §13;§94..

[50] Vladny navr zakon 2021, ktorým sa mení a dopĺňa zákon č. 185/2015 Z. z. Autorský zákon v znení neskorších predpisov, §129a-h.

[51] Autorių teisių ir gretutinių teisių įstatymo Nr. VIII-1185, VIII ir IX skyriais įstatymas, §57 (21 April 2021).

[52] Проект на Закон за изменение и допълнение на Закона за авторското право и сродните му права, §90 ff.

[53] Luonnos hallituksen esitykseksi eduskunnalle laeiksi tekijänoikeuslain ja sähköisen viestinnän palveluista annetun lain 184 §n muuttamiseta, §50.

[54] Promemorian Upphovsrätten på den digitala inre marknaden (Ds 2021:30), 6 October 2021.

[55] Proposta de Lei 114/XIV/3, Transpõe a Diretiva (UE) 2019/790, relativa aos direitos de autor e direitos conexos no mercado único digital, 28 September 2021.

[56] Predlog Predpisa Zakon O Spremembah In Dopolnitvah Zakona O Avtorski In Sorodnih Pravicah, §139.

[57] Εναρμόνιση του περί του Δικαιώματος Πνευματικής Ιδιοκτησίας και Συγγενικών Δικαιωμάτων (Τροποποιητικός) Νόμος του 1976 (59/1976), 9 October 2020. (implementation draft).

[58] Furgal (n21) at 891.

performances.[59] Similarly, the Dutch, Italian and Spanish acts clarify that press publications also cover 'other types of works or objects of related rights, including photographs and video content'. The Slovakian proposal follows a similar approach,[60] whereas Hungary slightly restricts the notion to cover only 'literary work consisting mainly of a journalistic nature', a wording that also features the Swedish implementation proposal (§48c). Needless to say, the fact that some national laws fail to specify or adopt different definitions of what 'composed mainly of literary works' means hinder the fulfilment of the harmonization goals of the right.[61]

Absent any guidance on the notion of press publisher, some Member States have made use of their freedom to better delineate the boundaries of the category. For instance, the French implementation links the notion to the definition offered by the *Réglementation des Agences de Presse*, while other Member States – e.g. Sweden – expressly refused to do so.[62] Most countries – for instance Finland (§50), Portugal (§176), Bulgaria (§90) and Czechia – do not restrict this notion, but simply require that the cumulative conditions set forth in the Directive are met. A particular approach features the Belgian proposal, which establishes a (rebuttable) presumption of belonging to the category of press publishers when the name or the acronym of the publisher appears as such on the press publication, its reproduction or communication to the public (§3a).

A key concept remitted to Member States' discretion is that of "very short excerpts". Despite its fundamental importance for the balance between Article 15 CDSM and conflicting rights and freedoms, and for the smooth functioning of licensing and enforcement processes, only a handful of Member States have devoted attention to its definition. In some instances – as in Czechia – legislators denied providing any guidance and suggested instead a case-by-case analysis as the most appropriate solution in light of the aims of the Directive.[63] In France the exclusion of excerpts from the scope of the right is prohibited when they 'replace the press publication itself or exempt the reader from referring to it' (L.211-3), with a solution both praised and criticised, since while it prevents readers from losing interest in the original source, it may extend the rightsholders' control to cover also the mere informative content of very short extracts. Romania (§94(2)(b)) envisages the same solution in its draft act, while the Slovakian proposal excludes 'the use of a title, individual words or a very short excerpt' as long as it is 'not capable of being a substitute for the whole work' (§129(4)(b)). The Spanish legislator also refers to the need to construe the exclusion so as not to not impair the protection of publishers' investments, expressly calling for a quantitative and qualitative case-by-case assessment (§129*bis*(6)(c)). Only the Lithuanian proposal introduces a quantitative criterion, that is 'individual words from the press publication or a very short excerpt

[59] Netherlands, §1; Italy,§43bis(2); Spain, §129*bis*(5).

[60] Slovakian Draft, §129a (1).

[61] Furgal (n 21) at 892.

[62] Swedish explanatory memorandum (n 54), at 6.

[63] Explanatory memorandum, Czechia; similarly in the memos for Germany, Denmark and Estonia. See Furgal (n 21) at 891.

thereof *consisting of 200 characters or less* are used, excluding the title of the text and the spaces between the characters'(§57(1)(3)). More generally, most countries are silent as to the adaptation of the concept of short excerpt to content that is not in literary form, except for Croatia, which expressly excludes 'very short clips, containing no more than a few words and containing no photographs or video content' (§166(1)(3)).

Again on the side of balancing tools, the majority of Member States mirror *mutatis mutandis* their copyright exceptions to the new press publishers' rights, without making any attempt to specify or adapt them to the different setting and needs raised by the new entitlement.[64]

Similarly, only a small number of Member States have used the freedom left by Article 15 CDSM to introduce specific management and licensing schemes. This is the case for Austria, which mandates a collective management for remuneration claims, but only applicable against 'dominant service providers' (§76f(7)). Also the Spanish (Art.129bis(4)), Dutch (§32) and French (L-218.3) laws and the Romanian proposal (§94(8)) introduce the possibility of collective management, leaving publishers free to engage in individual negotiations. Opt-out options from extended collective licensing (ECL) schemes are provided under Czech (§97e(4)(a)(O)) and Danish (§29a) drafts.[65] In addition, the Danish proposal (§29a (3)) attributes to the Danish Copyright License Board the competence to decide on the reasonableness of the conditions imposed by collective management organizations to enter into ECL agreements, and to eventually determine their terms, including the remuneration fee, while the Irish act offers the possibly to submit to a mediator any dispute related to the new right (§13(8)).

Some countries specify how the remuneration should be calculated and/or how negotiations should take place. The Czech proposal (§87b(9)) vaguely imposes on information society services duties of fair, equal and non-discriminatory access towards publishers, whereas the Spanish law attributes to both parties the duty to negotiate in accordance with the principles of good faith, due diligence, transparency and free competition (§73). Under French law, the remuneration shall be based on the income stemming from the platform's direct or indirect use of the news, and should take into account the investments made by the publisher, the contribution of the press publication to the public debate, and the importance of the utilization of the press publication for the service offered by the platform.[66] To this end, the law imposes on online service certain information and transparency duties in the negotiation with press publishers, necessary for a transparent assessment

[64] See, for instance, Italy, §43bis(16); Denmark, §69a(5); Germany, §87g; Austria, §76f(5); Bulgaria, §90w. In contrast, see Netherlands, §10.

[65] For a comment See Joao Quintais, 'The new copyright in the digital single market directive: A critical look' [2020] 42(1) EIPR 28-41.

[66] See Furgal (n 21), at 889, noting the connections with the Australian Media Bargaining Code.

of the remuneration level (L-218.4).[67] Similar criteria and corresponding duties are also envisaged under Spanish law (Art.129bis(3)(b)).

Amidst this puzzle of diverging national solutions, the Italian implementation of Article 15 CDSM deserves special attention, not only because it is a perfect case in point of the fragmenting effects an asymmetric harmonization may have, but also - and especially - because it adopts creative criteria and solutions that, albeit seemingly efficient and justified, may fail an invalidity check if challenged before the CJEU.

4. The Italian solution: creative, efficient…but invalid?

The Italian legislator transposed the CDSM Directive with the Legislative Decree (*Decreto Legislativo, D.Lgs.*) no.177/2021, issued on the basis of a parliamentary delegation, which amended the Italian *Legge sul diritto d'autore* (l.aut.).[68]

The new press publishers' right is regulated by Article 43*bis*. In line with the text of the Directive, the provision attributes to online publishers of journalistic content the exclusive rights of reproduction and communication to the public (Arts.13 and 16 l.aut.). The definition of journalistic content follows almost slavishly the language of Article 2(4) CDSM, and the same applies to the exclusion from the scope of the provision of private non-commercial uses, hyperlinks and uses of single words or very short excerpts.

The Italian legislator used the margin of appreciation left to Member States to better articulate the definition of "information society service providers", by including media monitoring and press review companies (Article 43*bis*(1)), and by stretching the notion of publisher so as to cover any entity that, in the context of a business activity, independently or in a consortium, even if established in another Member State, publishes journalistic content (Article 43*bis*(3)).[69] The Explanatory Memorandum highlights that the drafters purposefully declined the request, advanced by two Parliamentary Committees, to introduce additional specific requirements.[70] This was dictated by the wish to provide an all-encompassing definition that could cover also publishers established in other Member States, which might be subject to diverging rules and requirements.[71]

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[67] In particular, they shall provide details of all elements related to the utilization of press publications by their users, as well as all other elements.

[68] Decreto Legislativo 8 novembre 2021, n. 177, Attuazione della direttiva (UE) 2019/790 sul diritto d'autore e sui diritti connessi nel mercato unico digitale, GU n.283/2021, amending Law no.633/41.

[69] Giusella Finocchiaro, Oreste Pollicino, 'Il Recepimento della Direttiva Copyright. Il Caso Italiano in una Prospettiva Comparata ed Europea. Position Paper', 16 February 2022, available at https://www.medialaws.eu/il-recepimento-della-direttiva-copyright-il-caso-italiano-in-una-prospettiva-comparata-ed-europea/ (last accessed 18 February 2022).

[70] Relazione illustrativa (Explanatory Memorandum) al D.Lgs. n.177/2021, available at https://documenti.camera.it/leg18/dossier/testi/D21077.htm?_1626459605478 (last accessed 18 February 2022), at 4.

[71] Ibidem.

Similarly, as other national laws, Article 43*bis* elaborates on the notion of short excerpts, very broadly and generally defined as "any portion of a press publication that does not exempt readers from the need to consult the article in its integrity" (Article 43*bis*(7)). The Memorandum testifies for the long and heated debate that led to the final wording of the paragraph. During the preparatory phase, several stakeholders and some Parliamentary Committees emphasized the risk that a vague qualitative definition could weaken the protection offered to press publishers, increase uncertainties, and thus trigger litigation, and proposed instead the adoption of a quantitative definition based on the number of characters reproduced, which was potentially enforceable also by means of algorithms.[72] However, albeit practical and straightforward, this option was considered too straightjacketing, disproportionately compressing other rights, and also prejudicing press publishers, for they could have been denied protection in case of excerpts that did not reach the quantitative benchmark, but still satisfied readers enough to make it unnecessary for them to land on the publisher's website.[73] As a result, the general qualitative approach prevailed.

It remains to be seen how the criterion will be implemented, and what impact it will have on litigation rates and users' and providers' behaviors. In fact, it is highly probable that the negotiation between providers and publishers will lead to a more detailed definition of the concept of short excerpts. Yet, this might still be not enough to guide the behaviors of other parties, with outstanding risks of chilling effects.[74] Should this not be enough, the relevance the legislative definition implicitly gives to the value and preservation of the expressive/informative core of the work closely echoes the notion of originality and the qualitative definition of partial reproduction under Article 2 InfoSoc. This circumstance may trigger the risk of interpretative overlaps between journalists' (authors') rights and related (press publishers') rights, with all the consequences that such an improper cross-breeding has already proven to cause in other fields.[75]

Yet, the most innovative and original contribution of the Italian legislator, which stands out amidst all other national solutions so far, remains the negotiation and licensing scheme envisioned by Article 43*bis* l.aut.

Paragraph 7 already opts for a particular semantic choice, stating that "for the online use of press publications, information society providers recognize to [press publishers] a *fair* compensation". From a contextual and systemic perspective, the reference to "compensation" recalls a language that is generally used in the context of exceptions and mandatory licensing, when exclusive rights turn into remuneration rights.[76] In fact, the mechanism envisioned by the Italian decree presents

[72] Ibid at 5.

[73] Ibidem.

[74] Scalzini (n15) at 112.

[75] As also in Sganga (n 11) at 826.

[76] See, eg, Article 46bis l.aut. on the compensation due by broadcasting organizations to authors who assigned their exploitation rights to producers, or Article 68 l.aut. on the compensation due in case of exercise of the private copy exception

hybrid traits, where elements that are typical of forms of assisted or collective negotiations are coupled with features that characterize mandatory licensing, collective licensing or private levy schemes.

Within sixty days from the entry into force of the decree, the Italian Communications Authority (*Autorità Garante per le Comunicazioni*, AGCOM) was supposed to issue a decree indicating the criteria to determine the amount of fair compensation due to press publishers, taking into due account the number of online consultations of the work, the years of activity and market relevance of each publisher, the number of journalists employed, the investments both publisher and provider made for infrastructures and technologies, and the economic benefit derived by each party from the work, in terms both of visibility and of advertising revenues.

The relationship between these criteria and the independent negotiation parties must carry on is unclear. Article 43*bis*(9) l.aut. states that "the negotiation to conclude the contract regulating the exercise of the rights (…) is conducted by taking into account also the criteria set by the [AGCOM] Regulation". However, paragraph 10 specifies that, if within thirty days from the launch of the negotiations no agreement is reached on the compensation amount, each party may request AGCOM to determine it. The Authority has then thirty days to indicate which of the parties' proposal is more compatible with the criteria set in the Regulation. In case both fail to comply, AGCOM may determine *ex officio* the amount of the compensation. To facilitate the process and ensure its regularity, providers have the duty to disclose all data necessary to calculate the compensation due to press publishers, which, if violated, triggers an administrative sanction up to 1% of the provider's yearly gross profit (Article 43*bis*(12) l.aut.).

Very much along the lines of an arbitrage, after the final price is established, parties are still in charge of concluding the license agreement. This is what Article 43*bis*(11) l.aut. suggests by providing that "when, after AGCOM has determined the fair compensation, parties fail to stipulate the contract, each party may refer the case to the competent first instance court (…), **also** to introduce the proceedings under Article 9, law 18 June 1998, no.192", which regulates claims related to abuse of economic dependence. Two elements deserve to be highlighted here, which - unsurprisingly - have also been the most contested features of the new Italian press publishers' right.[77] First, the possibility to recur to courts in case of failed negotiations is offered not only to publishers but also to providers, with a decision that seems to equalize their positions in a manner that conflicts with the rationale and considerations grounding Article 15 CDSM. Second, the provision does not specify nor limit the types of judicial claims parties may introduce. This opens the door to the recourse to a plethora of interim and permanent remedies, including specific

[77] Giuseppe Colangelo, L'Italia stravolge la Direttiva Copyright, in Formiche, 31 July 2021, available at https://formiche.net/2021/07/italia-stravolge-direttiva-copyright-colangelo/ (last accessed 18 February 2022); Marco Scialdone, Il governo dà l'ok al decreto sulla Direttiva Copyright. Cosa non funziona', in Formiche, 5 August 2021, available at https://formiche.net/2021/08/cdm-direttiva-copyright-scialdone/ (last accessed 18 February 2022).

performance and duty to contract, both potentially issuable also against rightholders. Such a conclusion is reinforced by the explicit reference to Article 9, law no.192/98, which features among its key remedies the duty to contract, again potentially issuable against both parties.[78] This legislative choice may end up eliminating the press publishers' freedom of contract, and thus frustrate the principle of prior consent, which represents the distinguishing feature of preventive rights *vis-à-vis* remuneration rights. And while in the field of competition law the CJEU's *Magill* doctrine limits to "exceptional circumstances" the cases in which a copyright holder's refusal to license may constitute an abuse of dominant position and thus trigger remedies that may elide her freedom of contract,[79] this does not apply in case of abuses of economic dependence where, in addition, indications on what may constitute an abuse of IP rights are largely missing, and no harmonization exists across the EU.[80]

This blend of guided negotiation, integration of the content of the contract by a public authority, and compulsory contracting has been motivated by the admirable goal to ensure that all publishers, regardless of their size and importance, may enjoy equal standing *vis-à-vis* platforms.[81] Yet, the key features of the Italian provision mark a visible departure from the model adopted by Article 15 CDSM, moving closer to the Australian solution which, however, stands outside the realm of copyright law and proposes a *sui generis* approach that is tailored on the specific goal of rebalancing the bargaining power of all parties involved.[82]

In this sense, the Italian solution represents another strong evidence of how an incomplete harmonization may lead to national fragmentation also in the field of exclusive rights. Compared to other national implementations, however, Article 43*bis* l.aut. is also tainted by shadows of invalidity, which become particularly visible once the main characteristics of the Italian scheme are tested against the indications provided by the Commission during the implementation phase, and by landmark CJEU's decisions on the distinction between preventive and remuneration rights and the related limits to Member States' freedom to curtail the principle of rightholders' prior consent to the exercise of their rights.

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[78] See, eg, Vincenzo Meli, 'Diritto antitrust e libertà contrattuale: l'obbligo di contrarre e il problema dell'eterodeterminazione del prezzo', in Gustavo Olivieri-Andrea Zoppini (ed) *Diritto antitrust e libertà contrattuale* (Laterza 2008), 1000; Michele Bertani, *Proprietà intellettuale, antitrust e rifiuto di licenze (*Giuffrè 2004) 52 ff..

[79] Joined Cases C-241/91P and C-242/91P, *Radio Telefis Eirean (RTE) and Independent Television Publication Ltd (ITP) v Commission* [1995] ECR I-743, on which see, inter alia, Estelle Derclaye, 'Abuses of Dominant Position and Intellectual Property Rights: A Suggestion to Reconcile the Community Courts Case Law [2003] 26(4) World Competition 685.

[80] For a comparative overview, see Andrea Renda et al., 'The Impact of National Rules on Unilateral Conduct that Diverge from Article 102 TFEU', Study for the European Commission, DG COMP (2012).

[81] Relazione Illustrativa (n 70) at 6.

[82] News Media and Digital Platforms Mandatory Bargaining Code, Parliament of Australia, 17 February 2021, on which see Colangelo (n 8) at 22.

5. Which margin of discretion? Views from the EC and the CJEU

One of the areas Article 15 left to the discretion of Member States is the possibility to facilitate the collection and distribution of licensing fees through the intervention of collecting societies or other centralized mechanisms. Following the questions raised in this respect by several national policy-makers, MEP Vondra formally asked the Commission whether Member States could establish mandatory collective management schemes of press publishers' rights.[83] The Commission answered to the negative, stating that the mandatory nature of the scheme would illegitimately transform a right conceived to be exclusive/preventive into a remuneration right.[84] The response was not surprising, for it echoed and aligned with the arguments put forward by the CJEU in a then recent landmark case on performers' rights - *Spedidam v INA.*[85]

In *Spedidam* the heirs of a musician sued INA (*Institut national de l'audiovisuel*) for commercializing without their authorization phonograms and videos of the musician's performances, produced and broadcasted by the national television. INA did so by relying on Article 49 on the French law on freedom of communication, which allows the Institute to exercise performers' rights according to terms determined in agreements between INA and performers or their organizations. While the first and second instance courts sided with the heirs, the *Cour de Cassation* argued that the language of the law did not require INA to prove the acquisition of performers' consent. However, the *Cour* still decided to refer the case to the CJEU, asking whether the French solution was compatible with Articles 2, 3 and 5 InfoSoc.

The answer of the Court was straightforward, and recalled step-by-step the arguments advanced a few years before in *Soulier and Doke*,[86] a case very similar to *Spedidam*, but in the field of authors' rights.

Soulier and Doke originated from the request filed before the *Conseil d'État* by two French authors to annul Decree No 2013-182, which introduced an extended licensing scheme for out-of-commerce books.[87] The scheme attributed to the National Library the management of a database that every year enlisted new books published in France before 1 January 2001, which were no longer commercially distributed and not currently published in print or digital format.[88] Six months

[83] Question for written answer E-004603/2020 to the Commission, MEP Vondra, Rule 138, 24 August 2020.

[84] Answer given by Mr Breton on behalf of the European Commission, Question reference: E-004603/2020, 9 November 2020.

[85] Case C-484/18 *Société de perception et de distribution des droits des artistes-interprètes de la musique et de la danse (Spedidam) and Others v Institut national de l'audiovisuel* [2019] EU:C:2019:970.

[86] Case C-301/15 *Marc Soulier and Sara Doke v Premier ministre and Ministre de la Culture et de la Communication* [2016] EU:C:2016:878.

[87] JORF No 51, 1 March 2013, p.3835.

[88] As in Article L.134-2 CPI. See Jane Ginsburg, 'Fair Use for Free, or Permitted but-Paid' (2014) 29 Berkeley Tech LJ 1382, 1426 and Oleksandr Bulayenko, 'Permissibility of Non-Voluntary Collective Management of Copyright Under EU Law. The Case of the French Law on Out-of-Commerce Books' (2016) 1 JIPITEC 52, 54.

after the enlisting into the database, the rights to authorize the reproduction and communication to the public of the books in digital format was transferred to a collecting society appointed by the Ministry of Culture. The society had first to attempt licensing back the rights to the original publisher. In case of no response or rejection, the license could be put on the market. Rightholders had six months to claim back their titles after the enlisting, upon the obligation to commercialise them within two years, while authors could at any time withdraw their works by proving that their publications would have harmed their honor or reputation. Beyond this, authors could quit from the scheme only by proving that they were the sole holders of digital exploitation rights. The withdrawal was in any case prohibited after another publisher had licensed the title from the collecting society and started commercializing it.[89]

According to the plaintiffs, the scheme amounted to an unconstitutional violation of their property rights and was incompatible with the prohibition against formalities under Article 2(5) of the Berne Convention, and with Articles 2 to 5 InfoSoc. The *Conseil d'Etat* denied the claim of unconstitutionality and argued that the scheme was in line with the Berne Convention,[90] since its opt-out system interfered only with the exercise and not with the existence of the right,[91] but referred the question of admissibility of the decree vis-*à-vis* the InfoSoc Directive to the CJEU.

With implications the risk of which was dispelled only with the entry into force of Article 8 CDSM,[92] the Court declared the French scheme incompatible with Articles 2-5 InfoSoc, using landmark arguments that were later slavishly recalled in *Spedidam*.

In both decisions, the Court offered a broad interpretation to the scope of the rights of reproduction and communication to the public,[93] arguing that Articles 2 and 3 InfoSoc cover not only their enjoyment but also their exercise, with no distinction between copyright and related rights.[94] Since both provisions attribute rights that are preventive in nature, any act of reproduction or communication to the public requires the rightholder's prior consent or should be covered by an exception not to represent an infringement.[95]

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[89] On the criticisms raised against the scheme, see Sylvie Nerisson, 'La gestion collective des droits numériques des "livres indisponibles du XXe siècle" renvoyée à la CJEU, le Conseil d'Etat face aux fondamentaux du droit d'auteur' (2015) 24 Recueil Dalloz 1428.

[90] On this claim it also consulted the *Conseil Constitutionel*, which similarly rejected it. *Marc S and another*, Conseil Constitutionel, Decision no 2013-370, QPC, 28 February 2014.

[91] Conseil d'Etat, Decision No 368208, 6 May 2015, M.S., MMme D. The ECLI FR:CESSR:2015:368208.20150506.

[92] See, more extensively, Caterina Sganga, The eloquent silence of Soulier and Doke and its critical implications for EU copyright law (2017) 12(4) JIPLP 321.

[93] *Spedidam*, §36, as in *Soulier and Doke*, §30, and the case law cited therein.

[94] *Spedidam*, §37, as in *Soulier and Doke*, §31.

[95] *Spedidam*, §38, as in *Soulier and Doke*, §§33-34, later confirmed in case C-161/17 *Land Nordrhein-Westfalen v Dirk Renckhoff* [2018] EU:C.2018:634, §29.

The CJEU still admitted the legitimacy of an implied authorization, provided that conditions are clearly defined. However, while in *Soulier* the scheme was declared contrary to EU law, in *Spedidam* the Court ruled for the compatibility of the French solution with the InfoSoc Directive, stating that the performers' authorization to fix their works could be presumed, and this presumption was legitimate for it could be rebutted at any time, and touched upon a requirement - the performer's written consent – which is outside the scope of EU law and only requested by the French IP Code.[96]

With a meaningful final argument, in *Spedidam* the CJEU stated that the compatibility of the French scheme with EU law was also backed by the fact that it allowed a fair balance to be struck between conflicting fundamental rights. Two considerations supported this conclusion. First, without the legal presumption INA could have not fully exploited its collections, and this would have resulted in several rightholders perceiving less or no remuneration. Second, the presumption itself did not affect performers' right to obtain an appropriate remuneration.[97] Here lies, probably, the only but key difference between *Spedidam* and *Soulier*. In the former, the great emphasis put on remuneration justifies the lighter scrutiny on the features of the scheme and on whether the principle of prior consent is effectively preserved. In the latter, the central value to be protected is the author's right to control the use of the work, while the greater possibilities of remuneration offered by the French scheme for authors of out-of-commerce works are not given real relevance. This dichotomy ultimately differentiates the CJEU's approach to traditional author's rights from the reading offered in the field of "industrial" related rights, a nuance which, as we will see, may impact on the assessment of the validity of the Italian implementation.

There seems, instead, to be no difference between copyright and related rights, nor between preventive and remuneration rights with respect to the CJEU's application of Article 17(2) CFREU.

Dispelling the fear of overprotection that the cryptic text of the provision triggered in several commentators,[98] the Court has repeatedly confirmed that the Charter does not attribute to IPRs the status of absolute rights, and that they may be subject to limitations in the public interest, or when the balance with conflicting fundamental rights so requires.[99] This statement clearly refers to interventions limiting the exercise of exclusive rights that has already been granted, while it is less

[96] *Spedidam,* §40-43, as in *Soulier and Doke,* §35.

[97] Ibid §44.

[98] See, eg, Alexander Peukert, 'Intellectual Property as an End in Itself' (2011) 33(2) EIPR 67, 69; Christophe Geiger, 'Intellectual Property shall be protected!?' – Article 17(2) of the Charter of Fundamental Rights of the European Union: a mysterious provision with an unclear scope' (2009) 31(3) EIPR 113, 117.

[99] Case C-70/*10 Scarlet Extended SA v SABAM* [2011] ECR I-11959, §43; Case C-360/10 *SABAMv Netlog NV* [2012], EU:C:2012:85, §41; case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* [2014] EU:C:2014:192, and ultimately in the Grand Chamber's trio case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* [2019] EU:C:2019:623, §72; case C-476/17 *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] EU:C:2019:624, §33; case C-516/17 *Spiegel Online GmbH v Volker Beck* [2019] EU:C:2019:625, §56.

clear whether the same principle may be applied to interventions related to their existence, that is their creation and attribution.[100] It has been maintained by the majority of scholars, and implicitly by the Court alike, that Article 17(2) CFREU does not establish any obligation for the EU legislator to introduce IPRs.[101] Yet, the provision has been repeatedly used by the CJEU to reinforce and possibly broaden the scope of EU copyright harmonization, excluding any margin of discretion for national legislators when at stake there was an exclusive right introduced by EU law. This was the case, without distinction, in *Luksan*[102] with regard to preventive author's rights, and in *RAAP*,[103] with regard to related remuneration rights.

While it is straightforward that the attribution of an exclusive right to a specific rightholder (or categories thereof) by EU law cannot be disregarded by national legislators, the CJEU has never clarified whether Article 17(2) CFREU should be understood as having the effect to transform any intervention on IPRs by the EU into an act of maximum harmonization, or national legislators may intervene to the extent this does not touch the essence of the right granted, as provided by Article 52 CFREU.[104] *Soulier* and *Spedidam* indicate that a right that is framed as preventive by EU law cannot be transformed into a remuneration right by national legislators. Although this conclusion is not grounded on Article 17(2) CFREU, a contextual reading of the Court's case law may suggest that the rightholder's control over the use of its work represents part of the "essence" of preventive rights. This does not exclude that other policy considerations may tweak the outcome of the decision, as in *Spedidam*. Still, the validity of the general doctrine remains, and so do its potential implications on the evaluation of the Italian version of Article 15 CDSM.

6. Future outlook and its implications

It is yet to be seen whether Article43*bis* l.aut. will give rise to litigation. Should the latter be the case, it is highly likely that Italian courts, and ultimately the CJEU, will be invested by the question of the invalidity of the provision *vis-à-vis* EU law.[105]

Article 15 CDSM do not provide straightforward indications in the areas where the Italian legislator has exercised the greatest creativity. However, a contextual reading of the Court's case

[100] For a more detailed analysis of the matter, see Martin Husovec, 'The Fundamental Right to Property and the Protection of Investment: How Difficult Is It to Repeal New Intellectual Property Rights?', in Christophe Geiger (ed) *Research Handbook of Intellectual Property and Investment Law* (EE 2020) 385.

[101] Ibid at 391.

[102] Case C-277/10, *Martin Luksan v Petrus van der Let* [2012] EU:C:2012:65, §§68–70.

[103] Case C-265/19, *Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd* [2020] EU:C:2020:677.

[104] Broadly on this see Jonathan Griffiths, 'Constitutionalising or harmonizing? The Court of Justice, the right to property and European copyright law' [2013] 38 ELR 65, 75, and Martin Husovec, 'The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter' [2019] 20(6) German Law Journal 840, 853.

[105] Some scholars (Finocchiaro-Pollicino, n 69) have also hinted to the possibility that Article 43bis l.aut. constitutes an excess of delegated regulatory power by the Government, for its content would go beyond the guidelines provided by the Parliament in its delegation law.

law and the hints provided by the Commission, as applied to the main features of the Italian scheme, may help foreseeing the potential output of a referral of Article43*bis* l.aut. to the CJEU.

The Italian provision improperly defines the amount due to press publishers as "fair compensation" (*equo compenso*), rather than remuneration, as if the sums to be paid by providers would descend from the operation of an exception rather than from a voluntary license agreement. The reason of the semantic confusion may be traced back to the similarities between the calculation system envisioned by Article 43*bis* l.aut. and the structure of the private levy scheme under the private copy exception (Article 68 l.aut.). The only substantial difference between the two schemes is that while the decree under Article 68 l.aut. directly determines the amounts due as levies, the decree issued under Article 43*bis* l.aut. only indicates the criteria to be followed when negotiating or establishing licensing fees. It is clear that neither those similarities nor the improper use of the word "compensation" is enough to declassify the entitlement granted by Article 43*bis* l.aut. to the status of remuneration right, and thus to ground a judgment of invalidity of the provision for contrariety to EU law. One element should be considered, though. The criteria listed as guidelines for the AGCOM Regulation include factors that go well beyond the value of the news and the investments made by the publisher, including also, for instance, its size and years of activity. These elements, which may significantly impact on the final amount due, are foreign to the subject matter and rationale of the protection offered by the press publishers' right. This may expose them to be ruled out by the CJEU on grounds similar to those that led the Court to declare the illegitimacy of a number of private levy schemes or their calculation criteria, which were judged extraneous to the measurement of the prejudice suffered by rightholders or charged on the wrong subjects.[106]

However, the most problematic aspect of Article 43bis l.aut. lies in its negotiation scheme, and particularly in the pervasive intervention on the freedom left to publishers in negotiating the exploitation of their rights.

The fact that both parties – and not just the publisher – may trigger the intervention of AGCOM and the administrative determination of the remuneration significantly constraint the publisher's contractual freedom, and thus the exercise of its exploitation rights. Albeit formally different, the functional effects of such a mechanism are akin to those of a mandatory collective management scheme, which does not leave to rightholders the possibility to negotiate individually with users, should the conditions bargained for by the collecting society be unsatisfactory for them.

And while already this feature seems to run against the indications provided by the Commission during the implementation process, even more important profiles of invalidity are raised by Article 43*bis*(11) l.aut., which attributes again to both parties the right to sue in case no contract is

[106] Case C 467/08 Padawan SL v Sociedad General de Autores y Editores de España [2010] EU:C:2010:620; Case C-463/12 Copydan Båndkopi v Nokia Danmark A/S [2015] EU:C:2015:144; Case C-572/13 Hewlett-Packard Belgium SPRL v Reprobel SCRL (Reprobel) [2015] EU:C:2015:750.

stipulated after the determination of the price by AGCOM, with no limitations as to the remedies available. Particularly in case of abuse of economic dependence, but also under general civil procedure rules, this entails not only compensation in torts, but also the possibility to issue positive and negative injunctions, including an obligation to contract. Ultimately, such a curtailment of the publisher's freedom of contract cannot but have a substantial impact on the foundations of the principle of prior consent, potentially transforming the preventive right granted under Article 15 CDSM into a remuneration right. Absent any real possibility to opt out, nor any grounded presumption of publisher's consent, it is hard to see how Article 43bis l.aut. may stand the scrutiny crystallized in *Spedidam* and thus be declared compatible with EU law, and this even without running and "essence check" under Articles 17(2) and 52(1) CFREU.

Halfway down the road of Member States' implementation of Article 15 CDSM, the heavy criticisms that surrounded its introduction are now flanked by the fears triggered, on the one hand, by the fragmentation of national solutions, which promises to have a remarkable impact on the functioning of the internal market for journalistic contents and on the strategies of information society platforms in different countries, and on the other hand by the profiles of invalidity tainting some national solutions – the Italian one being a paradigmatic case in point. It is still early to make a grounded impact assessment of the new press publishers' right and its national implementation. Yet, in light of the flaws evidenced in the EU text and widely emerged in the implementation phase, it would come as no surprise if Article 15 CDSM would prove incapable of achieving the objectives set for it by the Directive, and rather cause more problems than the ones it was conceived to resolve.