

Member States make slow progress on DSM Directive as deadline looms

With the EU Directive on Copyright in the Digital Single Market (“DSM Directive”) set for 7 June next week, transposition of this new legislative framework into national law appears to be far from complete.

At present, only two Member States, Hungary and the Netherlands, have fully completed the implementation process with the adoption of two implementation bills adopted on April 2021 and December 2020, respectively. The Hungarian Copyright Act entered into force on 1 June 2021, whilst the Dutch Implementation Bill will enter into force precisely on time. The Article 16 measures have already been applicable in The Netherlands since 1 January 2021, and Article 19 is due to be applicable as of 7 June 2022.

Some Member States have decided to split the implementation of the DSM Directive into different delegation laws. Notably, this is the case for France which had been leading the implementation process, but it is now failing to complete the process within the set deadline. Article 15 of the DSM Directive has already been applicable in France since 24 October 2019. Meanwhile, Articles 17 to 23 were due to be implemented within a six-month period starting from the promulgation of the Law of 18 November 2020, which authorised the French Government to transpose the Directive. The remaining articles of the DSM Directive were supposed to be implemented in a 12-month period running from the same date. However, the French government’s implementation process for both blocks of articles is still pending.

In Denmark, the implementation of the DSM Directive has been divided into two parts. The legislative proposal on the first part, including Articles 15 and 17, was introduced on 26 March 2021. According to an updated implementation plan issued by the Danish Ministry of Culture, the first and second readings of the text should both take place during the first week of June.

In Italy, the implementation is being carried out by means of delegation laws. The Italian legislation implementing the EU Directives that need to be transposed into national law (“Legge di Delegazione Europea”) was approved on 21 April 2021 by the Italian Upper Chamber (“Senato”). The Italian Government will now work towards issuing a Legislative Decree implementing the DSM Directive. The draft

text of the Decree is currently under discussion by the Italian Permanent Advisory Committee on Copyright. The final text of the Decree requires the approval of the Council of Ministers, before being published in the Italian Official Journal.

In Germany, the Government Draft Bill, as amended on 3 February 2021, is still under discussion in the Parliament. However, on 20 May 2021, German legislators adopted the Directive's Article 17, which requires online content-sharing service providers (OCSSPs) to either obtain use licenses from rightsholders or enforce copyright *ex ante* by preventing certain uploads. Article 17 will be applicable as of 7 June 2021. According to the new German provisions, platforms will then have until 1 August 2021 to comply with the new measures. In the Czech Republic, a draft of the bill that will implement the DSM Directive, by way of amending the Czech Copyright Act, was published on 22 April 2021. At the time of writing, the text had not been officially adopted by the Parliament. Given the current political situation, it is likely that the legislative procedure will not be completed until elections are held in Autumn 2021.

According to both National Government representatives and private stakeholders, one of the reasons for Member State delays in implementing the Directive can be traced to lack of guidance from the European Commission. Commission delays in publishing the much-anticipated guidance on Article 17 (which was due to be presented by the second half of 2020) has increased legal uncertainty around the most controversial provision of the DSM Directive. This delay may, in turn, be linked to Poland's ongoing challenge to Article 17 in front of the Court of Justice of the European Union, on the basis that the new law would conflict with EU fundamental rights.

Next Steps

Few Members States will meet the 7 June deadline for implementation of the DSM Directive. Meanwhile, the Advocate General's Opinion in the Polish challenge to Article 17 in front of the Court of Justice of the European Union is expected on 15 July, with the final judgment expected later this year.