

The Belgian transposition of Article 15 of the DSM Directive

*National specificities regarding online uses of
press publications*





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Introduction



Basics

- Art. 5 DSM Directive provides for:
 - A new related right for press publishers in relation to the online use of press publications by information society service providers (ISSP)
 - A right, for authors of works incorporated in a press publication, to an appropriate share of the remuneration from press publishers
- Art. 2 (4) DSM Directive defines press publications:
 - collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter, and which:
 - a) constitutes an individual item within a periodical or regularly updated publication under a single title, such as a newspaper or a general or special interest magazine;
 - b) has the purpose of providing the general public with information related to news or other topics; and
 - c) is published in any media under the initiative, editorial responsibility and control of a service provider.
 - Not applicable to periodicals that are published for scientific or academic purposes, such as scientific journals
- Other requirements:
 - The press publisher must be established within the EU
 - It must have an economic activity that constitutes a provision of services

Exceptions

- Acts of hyperlinks
- Individual words or very short extracts
- Content in the public domain
- Private or non-commercial uses by individual users
- Other general exceptions to related rights that are applicable in Belgium (application *mutatis mutandis*) – art. XI.217 and XI.217/1 of the Belgian Code of Economic Law



The relation between press publishers and information society service providers



BE specificities – obligation of information

- Art. XI.216/2, § 3 of the Belgian Code of Economic Law provides for an obligation of information inspired by what is foreseen in Art. 17 DSM Directive regarding online content-sharing platforms
- The ISSPs must provide to press publishers:
 - up to date information
 - relevant information
 - complete information
 - in relation with the exploitation of the publisher's press publications by the ISSP
 - Ex.: number of consultations of the press publications, information on the revenues generated by their exploitation
- The aim is to facilitate negotiations between parties and to enable press publishers to better assess the value of their publications
- Procedure:
 - written request of the press publisher (e-mail allowed)
 - within one month after the notification of the information request
- Press publishers must ensure that the received information is kept confidential and not used for another purpose

BE specificities – negotiation and BIPT

- If an ISSP wishes to use press publications, it needs to obtain the press publisher's authorization (except if an exception applies). The contractual freedom is applicable, but the negotiation must be carried out with good faith (expressly indicated in Art. XI,216/2, § 2 of the Belgian Code of Economic Law).
- If an agreement cannot be reached, it is possible to go before the Belgian Institute for Postal Services and Telecommunications (BIPT).
 - Only after at least 4 months of unsuccessful negotiations.
 - The BIPT may take an administrative binding decision on the remuneration due for the exploitation of the press publications
 - Appeal possible before the Market Court
- Pending referral before the Constitutional Court of Belgium

BE specificities – press publisher's presumption

- Art. XI.216/2, § 5 of the Belgian Code of Economic Law provides for a (rebuttable) legal presumption: the person appearing as such on the press publication, on a reproduction of the press publication, or in connection with a communication of the latter to the public, by virtue of the mention of his name or an acronym enabling him to be identified is deemed to be the publisher.
- Similar to what is foreseen in favor of authors and other holders of related rights.

**The relation between press
publishers and authors of works
incorporated in a press publication**



BE specificities – The appropriate share of the revenues - Not transferable by agreement

- Art. XI.216/2, § 6 of the Belgian Code of Economic Law, inspired by what is foreseen in Art. 15 DSM Directive, provides for an obligation to share an appropriate part of the revenues received by press publishers from the information society service providers (ISSP) for the use of their press publications, with the authors of works incorporated into the press publications.
 - Authors of works incorporated into press publications: journalists, cartoonists, press photographers, ...
- The right to an appropriate share of the revenues **cannot be transferred by agreement.**
- The right to an appropriate share of the revenues owed to the authors of works included in press publications can **only be exercised** through **mandatory collective management**, in other words, solely through **collective management companies** and/or **collective management bodies** with a branch office in Belgium.

BE specificities – The Royal Decrees regarding the appropriate share of the revenues

- In accordance with Article XI.216/2, § 6 of the Belgian Code of Economic Law, the King (the government) may *appoint a management company/ body to collect and distribute the appropriate share of the revenues, under the conditions determined by Him (the government)*.
- In practice, this process will be conducted in **two phases**
- **In the first phase**: A Royal Decree will establish the conditions and modalities for the appointment of a management company/body
 - The designated management company/body must be **representative** of the management companies and collective management bodies in BE that manage the right to remuneration of the authors of works included in press publications
 - Any interested management company/body that meets the specified conditions can potentially apply.
 - The Royal Decree that is required for the first phase, is currently submitted for the **opinion of the Council of State**
 - Once the Royal Decree is published in the **Belgian Official Gazette**, management companies/bodies can apply

BE specificities – The Royal Decrees regarding the appropriate share of the revenues

- In the second phase:
 - Once the conditions (mentioned in the first Royal Decree) are met, the **appointment of the management company/body** for the management of the right to an appropriate share of the revenues can then proceed
 - This is will be done by a **second Royal Decree**

BE specificities – the appropriate share of the revenues - The Obligation of Information

- Article XI.216/2, § 7 of the Belgian Code of Economic Law, provides for an obligation to provide information on the part of the press publishers to the representative management company/body that will manage the right to an appropriate share of the revenues for the authors whose works are included in a press publication.
 - Press publishers are required to provide **current, relevant, and complete information** regarding the remuneration they receive from the ISSP, as authors are entitled to an appropriate share of the revenues.
 - The information must be provided within **one month from the day following the notification of the written request from the representative management company or collective management body**. In this regard, an email may be enough.
 - This information must be treated **confidentially** and can only be used for the evaluation of the appropriate share.

BE specificities – No agreement regarding the appropriate share of the revenues - The Commission

- Article XI.216/2, § 8 of the Belgian Code of Economic Law, stipulates that if no agreement is reached regarding the appropriate share (as referred to in article XI.216/2, § 6), the parties may resort to a Commission.
 - No agreement between press publishers and authors on the appropriate share of the revenues → Commission
 - It should be clarified that **before the parties can resort to this Commission**, they must demonstrate that they have at least attempted **mediation**. The mediator or mediators can support negotiations between the parties to reach an agreement. Mediation proceeds according the usual rules of the Judicial Code for Mediation.
 - The Commission will be **chaired by a representative of the minister** and will be **composed of representatives of the press publishers** on one hand and **representatives of the authors** on the other hand.
 - The primary role of this Commission is to facilitate an agreement between the parties. The Commission determines the appropriate share of the revenues.
 - For more details: The King (The government) will establish the further implementation modalities of this provision.

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