

DSM Implementation Flash Survey Summary

In the first weeks of December 2020, CEATL* Authors' Rights Working Group conducted a flash-survey among its member associations to gather information about the implementation of the Digital Single Market directive that was voted in April 2019 by the European Parliament and has to be transposed into the national laws of Member States by June 2021.

Recognizing the weak position of authors (and among them literary translators) in the contractual relationship, the European Union set minimal standards so that authors get fairer conditions as to their remuneration and the exploitation of their works.

Title 4, chapter 3, of the Directive in particular provides for:

- **The principle of an appropriate and proportionate remuneration for the authors** (article 18)
- **Transparency obligations for the publishers** (article 19)
- **Contract adjustment mechanisms** (article 20)
- **Alternative dispute resolution procedures** (article 21)
- **A right of revocation for the authors** (article 22)

The goal of survey was therefore twofold:

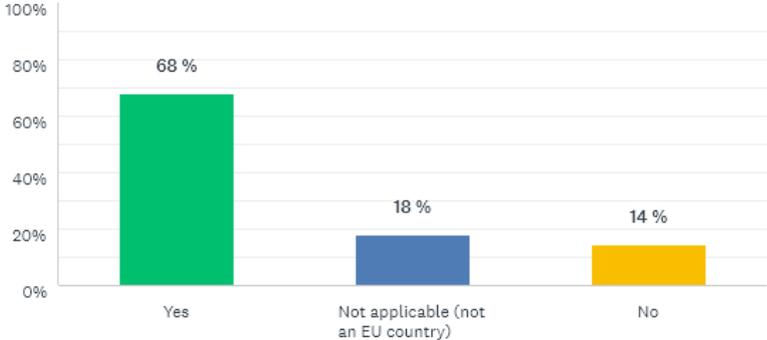
- **Taking stock of the progress of the legal transposition process at the end of a 2020 year that was heavily disrupted by the Covid crisis;**
- **Making sure the implementation of articles 18-22 is on top of everybody's agenda since they contain the seeds of a rebalancing of the contractual relationship and breakthroughs in favour of authors, including the notion of collective bargaining.**

This document is a summary of the results of the survey. Individual answers and comments for each question may be found in the Annex, as well as the list of responding associations.

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** CEATL is the European Council of Literary Translators' Associations. Officially founded in 1993 as an international non-profit organisation, it now has 34 member associations from 28 countries across Europe, and represents more than 10 000 individual literary translators.*

Question 3* . Has your association been following the implementation process of the DSM directive in your country?



| CHOIX DE RÉPONSES | RÉPONSES | |
|--------------------------------------|----------|-----------|
| ▼ Yes | 68 % | 19 |
| ▼ Not applicable (not an EU country) | 18 % | 5 |
| ▼ No | 14 % | 4 |
| TOTAL | | 28 |

The answers to question 3 show a **high level of engagement** from our member associations. All of the 28 countries represented within CEATL have participated in the survey, and two thirds of them have been able to monitor the ongoing implementation process one way or another (see question 4).

What’s is more, **among the associations that ticked the box « non applicable – not an EU country », some are actually following the process** because the directive is also relevant for the countries belonging to the European Economic Area (that is the case of Iceland and Norway) or because their country is committed to align its law with the European law with a view to join the Union (see Serbia’s answers). A spillover effect may be hoped for in all countries associated one way or another with the European Union.

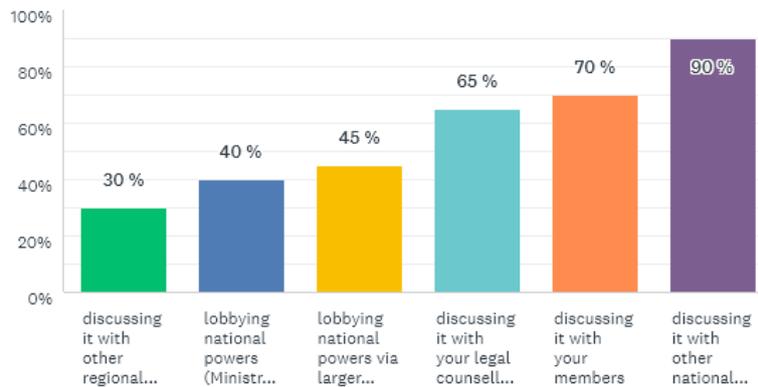
On the other hand, Brexit has unfortunately led the UK to drop the process entirely, since they were going to leave the EU before the end of the implementation period.

Highlight: Serbia

“The Association of Literary Translators of Serbia (UKPS) is very active in discussions about copyright law in our country [and] our Association is following the implementation of DSM. Even if we are not yet an EU country, Serbian legal system is in the process of integration with the EU and European Union copyright legislation.”

* Questions 1 and 2 were technical questions about the respondents. See the list in the Annex.

Question 4. If yes, how?



| CHOIX DE RÉPONSES | RÉPONSES |
|---|----------|
| discussing it with other regional authors/creators' organisations | 30 % 6 |
| lobbying national powers (Ministry of Culture and other executive powers, members of Parliament...) as a translators' association | 40 % 8 |
| lobbying national powers via larger authors' associations | 45 % 9 |
| discussing it with your legal counsellor(s) | 65 % 13 |
| discussing it with your members | 70 % 14 |
| discussing it with other national authors/creators' organisations | 90 % 18 |
| Nombre total de participants : 20 | |

Question 4 shows that our member associations have actively resorted to a wide range of tools to monitor the process and lobby in favour of authors in general and literary translators in particular – from informing and consulting rank-and-file membership (70 % of the respondents) to discussing with fellow creators' associations, nationally and internationally, and lobbying the authorities.

Discussing the DSM with other national authors' or creators' organisations gets a solid 90 % of ticking from the respondents (18 out of 20), which shows a **very high level of integration in and collaboration with the networks of national authors' organisations** (forums and federations of artists' associations, collaboration with the Collective Management Organisations, etc.)

Highlights: Finland, Czech Republic, Netherlands

"A forum of artists' organizations, of which SKTL is member, has been in talks with the department of culture." (Finland)

"Our association discussed the new EU Copyright Directive with the lawyers of DILIA (which is our collective management organisation for the book sector) and with the other authors' associations gathered within the KVAS (Coordinating Committee of Authors' Organisations)." (Czech Republic)

"The Dutch Writers Guild is a member of the authors/creators organisation Platform Makers (see www.platformmakers.nl, www.copyrightexplained.nl). Platform Makers is one of the three 'pillars' in the 'Federatie Auteursrechtbelangen' a federation of 1. creators 2. creative industry 3. collective societies." (Netherlands)

Two thirds of the respondents were also able to benefit from legal counsel on the subject of DSM.

However, items relating to actual « lobbying », whether as a self-standing translators' association or via larger organisations, get twice as little answers as the ones on « discussing » (40 % and 45 %).

One could read this as the result of a lack of access and perhaps of a culture of lobbying, but individual answers go to show that both the disruption caused by the Covid crisis and the lack of clarity of the process played a role in this state of affairs (see the example of Poland).

Highlight: Poland

"We have been following the process to the extent it has been possible. For a long time nothing happened (other than the Polish government suing the directive to the EU Court of Justice). When we enquired in the Ministry of Culture about the proceedings, we received an answer (after just 6 months!) with a link to a website where information was going to appear when legislation was going to be worked on. That didn't happen. Instead, we learned that July through September there were "pre-consultations" with stakeholders - which we hadn't heard of and neither have other authors' associations we've asked. Currently the legislation is reportedly being drafted to be presented for public consultation in December-January, and this we will follow closely."

"As stated above, there has been little opportunity for lobbying thus far. Now that we know work is underway, we are going to issue a letter to the Ministry of Culture soon, stating our position."

Question 5. Can you tell us about the current state of the implementation process in your country?

At the time of survey, the implementation process was still a work-in-progress in all EU countries. In the meantime, **the Netherlands became the first country to implement the directive in full**, after a vote of the House of Representatives and then the Senate in December.

Apart from a few countries where little or nothing seems to have happened in 2020 regarding the transposition (Spain, Ireland, Slovenia...), **in the large majority of countries the process is ongoing and the expectation seems to be that the legal transposition in the national Copyright laws will be effective on schedule**, in spite of delays and disruptions caused by the Covid crisis.

Most countries are just now moving from the consultation and stakeholders' dialogue stage to discussing actual bills drafted by different ministries (usually Culture or Justice, but also sometimes Economy or Trade and Commerce) and/or moving the text to the Parliamentary stage.

Both Italy and France have chosen to bypass the Parliament, though: Italy voted a delegation to the government (see below) and France authorized the government to issue ordonnances to implement articles 17 and following.

NB : For further information on the subject, it is worth mentioning that CREATE (the UK Copyright and Creative Economy Centre, based at the University of Glasgow) regularly updates a resource page on the [national consultations and transpositions by country](#).

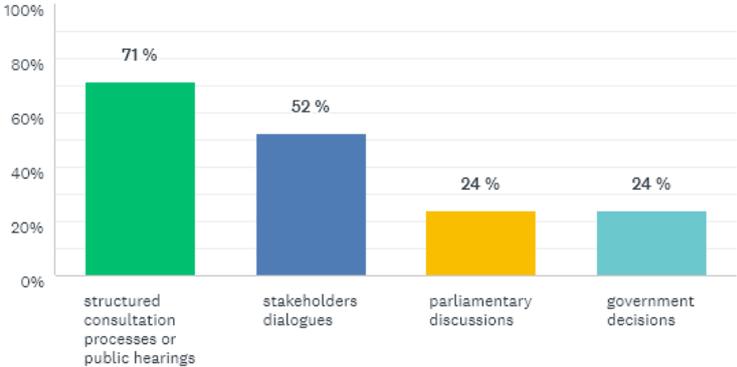
Highlights: Austria, Italy, Romania

"A preliminary bill was presented by the Dept. of Justice in the first week of December, inviting all stakeholders to comment – our side, i.e. an initiative of creators and performing artists, held a press conference to present our position to the public." (Austria)

"The Italian parliament has just approved a delegation law to the government for the implementation of the directive listing the points of the directive on which to concentrate and giving certain criteria for their implementation but we are just at the beginning of the process. Lobbying is intensive (with many contrasting interests, so it is particularly important that we follow the implementation process)." (Italy)

"The Romanian Office for Copyright (ORDA), government agency, confirmed the date of June 7th 2021 for updating the copyright act in Romania and informed us that the text – to be elaborated together with the Ministry of Culture, is still work in progress." (Romania)

Question 6. So far, your national implementation process has involved...?



| CHOIX DE RÉPONSES | RÉPONSES | |
|--|----------|----|
| structured consultation processes or public hearings | 71 % | 15 |
| stakeholders dialogues | 52 % | 11 |
| parliamentary discussions | 24 % | 5 |
| government decisions | 24 % | 5 |
| Nombre total de participants : 21 | | |

Question 6 shows that **very few countries have yet reached the stage of parliamentary discussions and government decisions**: Serbia and Iceland (non-EU countries), Portugal, France (but not for articles 18-22) and the Netherlands, who have completed the process since the survey.

However, **that the implementation process is ongoing is demonstrated by the large number of countries where public consultations (via questionnaires, public hearings...) and stakeholder dialogues have taken place (respectively three quarters and half of the respondents).**

That is in line with the spirit of the Directive, which called for stakeholders’ dialogues on a number of issues, starting with the implementation of the Directive itself (“Member States should take into account the specificities of different content sectors [...] and all relevant stakeholders should be involved when deciding on such sector-specific obligations.” recital 77).

In that context, one is struck by the fact that **the bigger countries fall short of the expectations in that respect**. Both France and Germany had no structured consultation processes or stakeholders’ dialogues and act behind closed doors (“Until now, all dialogues and discussions took part in shadow meetings” writes VdÜ in Germany). Italy had no consultation. Spain had no dialogue; they conducted a consultation in 2019, but the results and implementation plans have yet to be made public.

However, even in smaller countries, the picture is less rosy than it looks at first sight, because in some cases the consultations and dialogues were ill-advertised (Poland, Romania) or disrupted due to Covid (Slovenia, Slovakia...); there is also a lack of follow-up and publication of the results. This may go some way explaining our members’ difficulties in gathering information on the specific provisions actually in the pipelines (see next questions).

Highlights: Denmark, Bulgaria, Sweden

“The directive has been divided into segments and structured stakeholder consultations have been made. The Danish authors' association has been actively involved in two of four such consultations. We have also sent in written pre-hearing statements to the Ministry of Culture.” (Denmark)

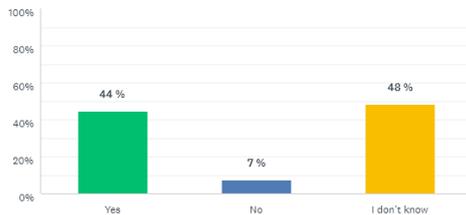
“The Ministry of Culture conducted a survey with stakeholders in four consultation documents on the introduction of the Directive on Copyright in the Digital Single Market (26 June 2020). The questions and the opinions of the organisations that took part in the survey are posted on the Ministry's official website. All proposals are expected to be examined in the relevant parliamentary committees of the Bulgarian National Assembly in early 2021.” (Bulgaria)

“The stakeholder dialogue in which we have participated, is now closed and we are waiting for the Dept. of Justice proposal for implementation. This will be sent out to all stakeholder organisations, and other relevant ones for commenting, prior for a proposal is put to the National Parliament for vote.” (Sweden)

Questions 7 to 11 on articles 18 to 22

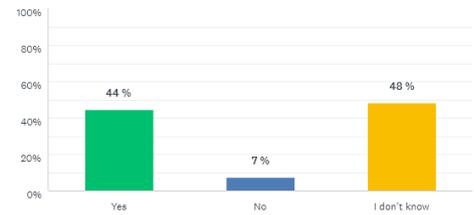
To your knowledge, are there plans to change the laws and regulations regarding the remuneration of authors, and if yes how?

Réponse(s) obtenue(s) : 27 Question(s) Ignorée(s) : 1



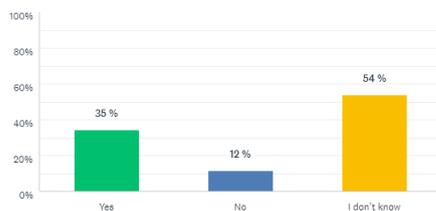
To your knowledge, are there plans to change the laws and regulations regarding the transparency obligation of publishers, and if yes how?

Réponse(s) obtenue(s) : 27 Question(s) Ignorée(s) : 1



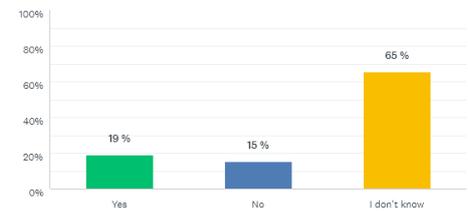
To your knowledge, will a contract adjustment mechanism be established (or, if already in existence, will it be reinforced)?

Réponse(s) obtenue(s) : 26 Question(s) Ignorée(s) : 2



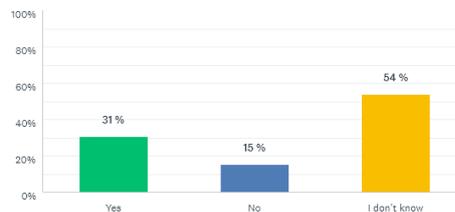
To your knowledge, will dispute resolution procedures be established or modified?

Réponse(s) obtenue(s) : 26 Question(s) Ignorée(s) : 2



To your knowledge, are there plans to establish a right of revocation in case of lack of exploitation (or, if already in existence, to reinforce it)?

Réponse(s) obtenue(s) : 26 Question(s) Ignorée(s) : 2



Questions 7 to 11 on articles 18 to 22 show a **higher level of confidence in and knowledge about the implementation of articles 18 and 19 on fair remuneration and transparency (44 %), as opposed to the implementation of article 22 on the revocation right (31 %, non mandatory article) and, more surprisingly, article 21 on dispute resolution procedures (19 % of “Yes” and 65 % who don’t know).**

Article 21 is mandatory and key in the architecture of provisions in favour of authors: “Member States shall provide that disputes concerning the transparency obligation under Article 19 and the contract adjustment mechanism under Article 20 may be submitted to a voluntary, alternative dispute resolution procedure. Member States shall ensure that representative organisations of authors and performers may initiate such procedures at the specific request of one or more authors or performers.”

This low-threshold dispute resolution policy is very interesting in that it makes it compulsory for all States to have a body or mechanism for that purpose, and gives the representatives of authors an important role. It would therefore be important to be attentive to the effectiveness of its implementation, as plans seem to be very unclear.

However, the main finding from these questions is that, **in half the cases, the associations don't know yet if legal changes will be made to accommodate the Directive and which ones.**

Given the high level of engagement of our members with the DSM and judging by their comments, the « I don't know » answers have to be understood either as: "the information is not available" or: "I am not sure yet what will come out of the drafts under discussion" - **which is consistent with the lack of clarity and openness already mentioned, as well as the fact that final debates are at an early stage.**

In that context, some associations (from France, Spain and elsewhere) have provided indications of the positions they stand for in the comments.

Highlights: Spain, France, Germany, Netherlands, Norway

REMUNERATION

"In October 2017, our association forwarded to its intermediary at the Ministry of Culture a series of proposals to reform the Intellectual Property Law. With regard to the remuneration of translators, the reform of article 46.2 on "flat-rate" payment was proposed, so that it could only be applied to established cases. The association also proposes: o Transparency and publicity in the fees' amount. o Recognition of asymmetry in the negotiation and flexible interpretation of competition rules in this regard, so that associations can address the issue within the law." (Spain)

"The CPE [France's writers' umbrella organization] is advocating for a guaranteed minimum remuneration; that minimum would remunerate the work of creation and would be non-refundable (even in the event of a termination of the contract through no fault of the author) and would not be considered as a mere "advance on royalties". The CPE is also advocating for a minimum percentage of royalties, to be perceived from the first copy. Guaranteed minimal fees and royalties would be negotiated by professional organizations of authors and publishers, and then made legally binding by decree of the Ministry." (France)

TRANSPARENCY

"The existing entitlement to information is going to be converted into a reporting duty for publishers. An injunctive relief for Authors' association violations of this duty has been proposed by the minister of justice." (Germany)

CONTRACT ADJUSTMENT MECHANISM

"The new Dutch Copyright Act (art 25d) states that this best-seller clause could be used not only to the first user – but also further on in the chain if the first publisher sub-licensed the work." (Netherlands)

ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

"It actually was discussed in the proposition to the new copyright law, but they decided against it. The DSM directive opens this possibility again and it will gain widespread support from all artists and authors' associations." (Norway)

Main findings

→ **Timeline:** In spite of the delays and disruptions caused by the Covid-crisis, there are reasons to believe that the great majority of Member States intend to transpose the DSM on schedule (by June 2021). At this point, however, the process isn't completed anywhere but in the Netherlands.

→ **Processes:** After the period of widespread consultations and stakeholder dialogues, the process seems to be slowly shifting to discussing actual drafts.

→ **What is in the pipelines?** Despite a high level of engagement, many of our associations still have a hard time finding out what the actual plans are for the transposition of articles 18-22, due to the delays in the process or to a lack of transparency. The implementation of article 21 on dispute resolution procedures seems particularly hazy at this stage in most countries.

→ **What is to be done?** The survey shows that the associations will have to use all the resources they have in terms of access and leverage to push for a less than minimal implementation in the limited time that remains.

→ **Assets:** On the plus side, however, the survey (questions 3 and 4) also shows that most of our association have the focus and networks to actively and publicly lobby, or at least share information and act in coordination with other authors' and creators' organizations.

By way of conclusion...

Articles 15 and 17 have been much in the spotlight before the vote of the Directive and since then, but articles 18-22 need to be put front and centre on the agendas, as they contain provisions that are essential to the European Union's purpose to rebalance the relationships in favour of authors.

Indeed, on top of the obligations regarding remuneration, transparency, contracts and disputes, **the Directive gives a central place to collective action to ensure that authors get fair conditions, and puts forward collective bargaining as one of the tools that States are free to implement to ensure fair remuneration.**

The transposition of the Directive is of course only the first step towards the concrete implementation of those principles, but the legal wording needs to be as strong as possible at this stage if the Directive is to make a difference in the short or medium term.

After the fierce debates around the Directive and in view of the breakthroughs in favour of authors it contains, the implementation is a historical opportunity not to be missed!