Assessment of the Belgian additional remuneration rights for authors and performers (Articles 54 and 62 of the Law of 19 June 2022) in light of EU law

Eleonora Rosati

Abstract

- This contribution focuses on the Belgian transposition of Directive 2019/790 ("CDSMD"). Specifically, it is concerned with assessing the compatibility of Articles 54 and 62 of Law of 19 June 2022 ("Belgian Law") with Articles 17 and 18 CDSMD.
- Both Articles 54 and 62 of the Belgian Law have introduced an additional remuneration right ("ARR") in favour of authors and performers who have transferred their rights to third parties for the communication/making available to the public of their works and performances. The former relates to uses of works and performances by online content-sharing services providers ("OCSSPs"), while the latter concerns uses by streaming services. In turn, Article 17 CDSMD governs the use of protected content by OCSSPs (as defined in Article 2, No 6 therein). Article 18 CDSMD sets forth a principle of appropriate and proportionate remuneration of authors and performers in certain cases.
- This opinion explains why the ARRs introduced by the Belgian legislature through Articles 54 and 62 of the Belgian Law are incompatible with inter alia the EU law provisions referred to above and, therefore, the obligations of the Belgian State as arising from its EU membership.

Keywords

Copyright, CDSMD, additional remuneration right, Belgium, Article 17 CDSMD, Article 18 CDSMD

Introduction

This contribution considers the compatibility of Articles 54 and 62 of Law of 19 June 2022 (also, the "Belgian Law") with relevant provisions of Directive 2019/790¹ ("CDSMD"), specifically Articles 17 and 18 therein. Both Articles 54 and 62 of the Belgian Law have introduced an additional remuneration right ("ARR") in favour of authors and performers who have transferred their rights to third parties for the communication/making available to the public of their works and performances. The former relates to uses of works and performances by online content-sharing services providers ("OCSSPs"), while the latter concerns uses by streaming services. In turn, Article 17 CDSMD governs the use of protected content by OCSSPs (as defined in Article 2, No 6 therein). Article 18 CDSMD sets forth a principle of appropriate and proportionate remuneration of authors and performers in certain cases.

performances by online content-sharing services providers ("OCSSPs"), while the latter concerns uses by streaming services. In turn, Article 17 CDSMD governs the use of protected content by OCSSPs (as defined in Article 2, No 6 therein). Article 18 CDSMD sets forth a principle of appropriate and proportionate remuneration of authors and performers in certain cases.

In what follows, it is explained why the ARRs introduced by the Belgian legislature through Articles 54 and 62 of the Belgian Law are incompatible with *inter alia* the EU law provisions referred to above and, therefore, the obligations of the Belgian State as arising from its EU membership. The analysis is limited to assessing the compatibility of Articles 54 and 62 of the Belgian Law with Articles 17 and 18 CDSMD, though reference to other relevant EU law provisions – including those of the CDSMD, the Treaty on the Functioning of the European Union\(^2\) ("TFEU") and the Charter of Fundamental Rights of the European Union\(^3\) ("EU Charter") – is made as appropriate.

In the first part ("Relevant EU framework"), a brief overview of the rationale, legislative history and resulting wording of both Articles 17(1) and 18 CDSMD (§§1 and 2) is provided, as well as the relationship between these provisions (§3). After that, the second part ("The Belgian Law in light of EU law") articulates further with specific reference to some of the additional arguments advanced – in particular but not only – by the Belgian State in relation to, respectively, Articles 54 and 62 of the Belgian Law (§§4 to 6). In the final part ("Summary and conclusion"), the main points of the analysis are summarized.

I. Relevant EU framework

1. Article 17(1) CDSMD as a measure of full harmonization

Moving from the consideration that an OCSSP directly performs copyright-restricted acts when it gives the public access to copyright works or other protected subject-matter uploaded by its users, Article 17(1) CDSMD requires it to “obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter.”

a) History and context

As the European Commission also clarified in its Guidance to Article 17 CDSMD ("Article 17 Guidance"), this provision “fully and specifically regulates the act of ‘communication to the public’ in the limited circumstances covered by this provision ‘for the purposes of this Directive’.”\(^4\) It does so by settling *ex lege* any uncertainty regarding the treatment of OCSSPs and thus achieving the objective of well-functioning and fair marketplace for copyright and related rights by fostering the development of the licensing market between rightholders and OCSSPs. As further explained by Advocate General ("AG") Saumandsgaard Øe in his Opinion in *Poland*, C-401/19:

---


The aim is to strengthen the position of those rightholders during the negotiation (or renegotiation) of licensing agreements with those providers, in order to ensure that those agreements are ‘fair’ and keep a ‘reasonable balance between both parties’ — and, in so doing, to remedy the ‘Value Gap’.\(^5\)

It is appropriate to recall that the position above, ie that Article 17(1) CDSMD is a measure of full harmonization, has been also reiterated by the European Commission staff in response to specific queries raised by the Belgian Government during the process leading up to the transposition of the CDSMD into Belgian law. Writing on behalf of Commissioner Breton, in 2021, Mr Abbamonte stated that “Article 17 of the DSM directive does not permit Member States to introduce a remuneration right of the kind currently discussed in Belgium.”\(^6\) Along the same lines, also writing on behalf of Commissioner Breton, later that year, Mr Viola considered that the then proposed ARR under Belgian law “would not be compatible with the Directive.”\(^7\)

Furthermore, it is well-known that when an EU law provision makes no reference to Member States’ laws — as it is indeed the case of Article 17(1) CDSMD — then relevant concepts therein are not to be defined at the national level but are rather to be intended as autonomous concepts of EU law. As such, they are to be given a uniform application throughout the EU, with the result that Member States are not allowed to determine the limits thereof in an inconsistent and unharmonized manner. As the Court of Justice of the European Union (“CJEU”) clarified early on in *Ekro*, C-327/82:

> The need for a uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the relevant regulations.\(^8\)

All this is expression of the principle of autonomy and is regarded by the CJEU itself as “settled case-law.”\(^9\)

### b) Supremacy and preemption of EU law as applied to Article 17(1) CDSMD

It follows from the above that Article 17(1) CDSMD preempts Member States from altering the normative content thereof and/or introducing conditions and modalities beyond the EU text. This is also necessary and required under the principles of EU supremacy and preemption.

In this sense, it may be worth recalling that the current President of the CJEU, Mr Koen Lenaerts, has also authoritatively acknowledged (writing extra-judicially) that the principle of EU preemption is codified in Article 2(1)—(2) TFEU.\(^10\) This principle is related to yet distinct

---


\(^8\) *Ekro*, C-327/82, EU:C:1984:11, para 11.


from that of EU supremacy. The latter denotes the superior hierarchical status of the Union legal order over the national legal orders and thus gives EU law the capacity to preempt national law. The doctrine of preemption denotes instead the actual degree to which national law will be set aside by EU law.\footnote{R Schütze \\*European Constitutional Law (Cambridge University Press, 2012), p. 364. See also R Schütze, \\*European Union Law (CUP:2018), 2\textsuperscript{nd} edn, p. 138, and A Arena, 'Exercise of EU competences and pre-emption of Member States' powers in the internal and the external sphere: Towards 'grand unification'?' (2016) 35(1) Yearbook of European Law 28, pp. 28-29.}

Like all intellectual property rights, copyright is an area of shared competence between the EU and its Member States. This means that, once the EU has exercised its competence in a certain field and adopted rules on a particular matter, EU Member States are preempted from legislating in relation to the elements of the EU action in question outside of the requirements and constraints of EU law.

With specific regard to copyright, case law of the CJEU also \textit{clearly} and \textit{correctly} indicates that the EU copyright system is such that a uniform approach is required and that Member States’ freedom to legislate is significantly limited.

As it is discussed in greater detail elsewhere\footnote{E Rosati, \*Copyright and the Court of Justice of the European Union (Oxford University Press, 2023), 2\textsuperscript{nd} edn, Chapter 3.}, when it comes to the EU copyright directives and the degree of freedom enjoyed by Member States in the subsequent transposition (and application) process, it is possible to identify three groups of provisions. There is a first group that allows Member States the very option to introduce certain mechanisms into national law or not. Then there is a second group of provisions that require Member States to undertake certain initiatives, while also granting them some substantial discretion in this regard. Finally, there are provisions that are prescriptive in content and scope. In turn, the freedom of Member States, insofar as their transposition and application are concerned, is extremely limited.

It is submitted that Article 17 CDSMD, including Article 17(1), is a provision that belongs to the third group above.

As stated, this conclusion is consistent with the very wording of the provision (see also further below) and Article 17 Guidance, as well as the recent CJEU judgment in \textit{Poland}, C-401/19. There, the Grand Chamber imposed on Member States not to alter the normative content of the provision \textit{as a whole} (not just Article 17(4)) by complying with six key safeguards identified and detailed in the judgment itself.\footnote{Poland, C-401/19, EU:C:2022:297, paras 58 and 85-100.} In addition, such a conclusion is consistent with the Opinion of AG Saumandsgaard Øe in the same case, including the part in which he expressed his concerns relating to diverging national transpositions of Article 17 CDSMD.\footnote{Opinion of Advocate General Saugmansdgaard Øe in \textit{Poland}, C-401/19, EU:C:2021:613, para 152.}

c) The “rightholders” that benefit from Article 17(1) CDSMD protection

As stated, it stems from the very wording of Article 17(1) CDSMD that Member States cannot alter the normative content thereof. This is also true insofar as the beneficiaries of the provision are concerned, that is the “rightholders” whom the second sentence in Article 17(1) CDSMD refers to:
An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter. (emphasis added)

Furthermore, as AG Saumandsgaard Øe also made clear in the passage from his Opinion in Poland, C-401/19 referred to above sub a), rightholders are not only those entitled to grant an authorization to OCSSPs to store and display their content, but they are also those who negotiate the relevant terms thereof with them.

Article 17(1) CDSMD foresees that the obligation imposed on OCSSPs is to obtain the necessary authorization from the holders of the exclusive rights (for instance, authors or their copyright assignees) referred to in Article 3 of Directive 2001/2915 (“InfoSoc Directive”). In turn, Article 17(1) CDSMD prevents Member States from imposing additional obligations or burdens on OCSSPs.16

In sum: contrary to what some other academic commentators have submitted17, Article 17(1) CDSMD mandates a minimalistic transposition approach. No freedom is afforded to national legislatures to add any additional groups or stakeholders that are entitled to claim remuneration from OCSSPs.

2. Scope of application of Article 18 CDSMD

Article 18 CDSMD requires Member States to “ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration.” The provision only applies in the context of contracts relating to a licence or transfer of authors and performers’ rights for the exploitation of their works or other subject-matter. In addition, as it is made clear by recital 72, the rights at issue must be both exclusive and harmonized at the EU level (thus excluding, for example, moral rights).

a) History and context

Insofar as the history of Article 18 CDSMD is concerned, the European Commission’s Proposal18 (the “Proposal”) for what would be eventually adopted as the CDSMD did not include any provision envisaging a principle of appropriate and proportionate remuneration of authors and performers. The Proposal specifically included measures that would allow a better balance in the contractual relationships between, on the one hand, authors and performers and, on the other, those to whom they license or assign their rights. Such

---


measures would consist of a transparency obligation, a contract adjustment mechanism and the establishment of a dispute resolution mechanism (Articles 14 to 16 of the Proposal).

The introduction of a principle on the remuneration of authors and performers in the context of their contracts was initially upon input from the European Parliament\textsuperscript{19} ("Parliament text"), which entered the trilogue negotiations with a mandate for the inclusion of a principle of "fair and appropriate remuneration"; the achievement of which could be possible through a combination of agreements, including collective bargaining agreements, and statutory remuneration mechanisms. In the context of the trilogue negotiations, the principle of appropriate remuneration was accepted for inclusion in the final text of the CDSMD and complemented by a requirement that the remuneration be also proportionate. It is relevant to note that, unlike the Parliament text, the CDSMD does not contain any mention of statutory remuneration rights.

All the above said, and despite what some commentators have suggested\textsuperscript{20}, the history, wording, and context of Article 18 CDSMD indicate that it does not confer a blanket mandate or impose \textit{ex ante} obligations. Instead, it serves as an umbrella provision that ties together the subsequent Articles 19 to 23 CDSMD: the transparency obligation (Article 19), the contract adjustment mechanism (Article 20), and the right of revocation (Article 22) are how the overarching principle expressed in Article 18 may find externalization and, thus, realization.

b) Freedom and obligations of Member States

While Article 18 CDSMD is not a measure of full harmonization, the mechanisms chosen by Member States must comply with EU law. All this is clear from the wording of both recital 73 and Article 18(2) CDSMD.

Article 18(2) mandates upon Member States to take into account the principle of contractual freedom and a fair balance of rights and interests. As discussed in greater detail elsewhere, albeit that the English formulation of Article 18(2) might suggest that Member States are entitled to decide whether to take into account the principle of contractual freedom and a fair balance of rights and interests, such an interpretation – besides being odd – would be obviously incorrect. The other language versions of the CDSMD confirm that the respect of the principle of contractual freedom and ensuring a fair balance of rights and interests are obligations imposed upon Member States.\textsuperscript{21}

The fair balance mandate is also inherent to the system of rights and freedoms acknowledged under the EU Charter, including protection of intellectual property (Article 17(2) of the EU Charter) and freedom to conduct a business (Article 16 of the EU Charter). Article 52 of the EU Charter further states that any limitation on the exercise of the rights and freedoms recognized by that instrument must be provided for by law and respect the


essence or, to borrow from the language employed in the Opinion of AG Saumandsgaard Øe in Poland, C-401/19, the “untouchable core” of those rights and freedoms.\textsuperscript{22}

All this means that the principle of appropriate and proportionate remuneration needs to be fairly balanced against freedom of contract and third-party rights and interests, in line with the ‘fair balance’ mandate under the EU Charter and settled CJEU case, including in the field of copyright.\textsuperscript{23}

3. Absence of any relationship between Articles 17(1) and 18 CDSMD and resulting inadmissibility of national ARRs

In light of all that precedes, because of the application of \textit{inter alia} the principles of EU supremacy, preemption and subsidiarity, Article 18 CDSMD does not find application in areas that are fully harmonized at the EU level, including situations covered by Article 17(1) CDSMD.

In turn, in such cases, the duty of loyal cooperation also prevents Member States from (re-)introducing fragmentation in the internal market by adopting measures, including national ARRs, that raise barriers to the free movement of protected content and related services.\textsuperscript{24} It is submitted that that is even more so considering national ARRs that apply in online exploitation contexts – as it is certainly the case of OCSSPs – which, by definition, are technically borderless.\textsuperscript{25}

Furthermore, as stated, if one considers the other provisions in Chapter 3 of Title IV, it is apparent that the principle of appropriate and proportionate remuneration finds externalization and may be ultimately realized through the transparency obligation in Article 19 which, in turn, allows authors and performers to decide whether to request that their contracts be adjusted in accordance with Article 20 or the rights conferred through such contracts be revoked at the conditions set in Article 22. As such, Article 18 does not come into consideration when the contractual counterparts of authors and performers negotiate their own contracts with OCSSPs or streaming services.

To this it should be added that, where the CDSMD wishes specifically to cater for authors in relation to rights held by others, it expressly does so. In this sense, Article 15 CDSMD is telling: while introducing a related right in favour of press publishers over their press publications, Article 15(5) CDSMD also requires Member States to “provide that authors of works incorporated in a press publication receive an appropriate share of the revenues that

\textsuperscript{22} Opinion of Advocate General Saugmandsgaard Øe in Poland, C-401/19, EU:C:2021:613, para 99, as also more recently referred to in Opinion of Advocate General Emiliiu in \textit{Agen\c{t}ia Na\c{t}ional\a\c{s} de Integritate}, C-40/21, EU:C:2022:873, para 93.

\textsuperscript{23} \textit{Ex multis}, see GS Media, C-160/15, EU:C:2016:644, para 31; Renckhoff, C-161/17, EU:C:2018:634, para 41; Pelham, C-476/17, EU:C:2019:624, para 32; Funke Medienn, C-469/17, EU:C:2019:623, para 57; Spiegel Online, C-516/17, EU:C:2019:625, para 42; BY, C-637/19, EU:C:2020:863, para 31; VG Bild-Kunst, C-392/19, EU:C:2021:181, para 54; Mircom, C-597/19, EU:C:2021:492, para 58; YouTube, C-682/18 and C-683/18, EU:C:2021:503, paras 64-65.

\textsuperscript{24} Also noting the application of subsidiarity and the prohibition to interfere with the functioning of the internal market, see R Xalabarder Plantada, ‘The Principle of Appropriate and Proportionate Remuneration for Authors and Performers in Art. 18 Copyright in the Digital Single Market Directive. Statutory residual remuneration rights for its effective national implementation’ (2020) 4 InDret 1, p. 38.

\textsuperscript{25} The borderless nature of the internet contrasted to the territorial character of intellectual property rights – and the resulting “fundamental contradiction” – was also recently stressed in Opinion of Advocate General Szpunar, \textit{Grand Production}, C-423/21, EU:C:2022:818, paras 1-2.
press publishers receive for the use of their press publications by information society service providers." If Article 18 CDSMD was applicable beyond the specific context of Chapter 3 of Title IV, then Article 15(5) would be pleonastic and (even more) confusing given the different wording used when referring to the remuneration that authors are to receive thereunder ("appropriate") and the one referred to in Article 18 ("appropriate and proportionate").

It follows that neither Article 17(1) nor Article 18 CDSMD allow Member States to introduce their own ARRs.

In the event that any such ARR was however deemed compatible with EU law – at least in principle – it is further submitted that the mandate of Article 18(2) CDSMD would need in any event to be complied with. In this sense, a mechanism in national law by which such an ARR is unwaivable and subjected to mandatory collective rights management is highly problematic (see further below at §6) and likely also incompatible with the TFEU and its Article 56. Nevertheless, as stated, the latter is outside the scope of the present opinion; accordingly, the analysis shall not be developed further.

Furthermore, it is clear from the context of which Article 18 CDSMD is part and the language of relevant recitals accompanying Chapter 3 of Title IV that account should be taken of the specific circumstances of different content sectors, including relevant remuneration practices. In turn, national ARRs that apply indiscriminately without regard to the specificities of relevant sectors and contractual practices therein are likely to breach a Member State’s own obligations under EU law.

II. The Belgian Law in light of EU law

As detailed, Articles 54 and 62 of the Law of 19 June 2022 grant authors and performers who have transferred their right of communication to the public an ARR for the communication to the public of their works or performances by, respectively, OCSSPs and streaming services. The ARRs provided for under these provisions are neither transferrable nor waivable and are subjected to mandatory collective rights management. The rules under Article 62 apply to the extent that there are no collective agreements in place concerning the remuneration of authors/performers (these, at the time of writing, are unavailable).

Both provisions are incompatible with EU law for the reasons explained above at §§1 to 3, which shall not be repeated here. It however worth also making the following specific observations regarding the Belgian provisions.

4. Scope of the EU right of communication to the public

As a preliminary observation – in line with settled CJEU case law stating that identical concepts in different directives should be attributed the same meaning – it is worth recalling that the right of communication/making available to the public is the same under the various instruments that compose the EU copyright system. It follows that the right referred to in Article 17(1) CDSMD is the same right as referred under Article 3 of the InfoSoc

---

26 See also recitals 77 and 78 in the preamble to the CDSMD.

27 For examples specifically in the copyright field, see the CJEU decisions in: Luksan, C-277/10, EU:C:2012:65, para 85; Football Association Premier League Ltd, C-403/08 and C-429/08, EU:C:2011:631, paras 187-188; UsedSoft, C-128/11, EU:C:2012:407, para 60; Mc Fadden, C-484/14, EU:C:2016:689, para 36.
Directive. Such a conclusion is also reinforced by the already mentioned Grand Chamber’s judgment in Poland, C-401/19. There, the Grand Chamber held that Article 17(4) CDSMD introduces a “specific liability mechanism” for situations previously entirely governed by Article 3 of the InfoSoc Directive “in order to foster the development of the fair licensing market between rightholders and OCSSPs.”

Nowhere does that judgment suggest that the right of communication to the public as found in Article 17(1) CDSMD differs from that referred to in the rest of the acquis.

As explained above at §1, Article 17(1) CDSMD only allows the rightholders specifically referred to in Article 3 of the InfoSoc Directive to authorize the use, by OCSSPs, of their works and protected subject-matter, not other subjects. As such, an ARR like the one provided for under Article 54 of the Belgian Law does alter the scope of the right of communication to the public under both Articles 17(1) CDSMD and 3 of the InfoSoc Directive. While it is true that it does not result in the right covering more or fewer acts than what is the case at the EU level (thus differing from the scenarios considered by the CJEU so far), it does alter the structure of the right precisely because it does exceed the closed catalogue of beneficiaries who are entitled to claim protection thereunder. This is because the rightholders who can invoke the protection of Article 17(1) CDSMD are only the holders of the rights of communication/making available to the public. Thus, when authors or performers are no longer holders of the right of communication/making available to the public, they are not entitled to invoke protection under Article 17(1) CDSMD, including by means of national ARRs.

Furthermore, in the specific context of Article 17(1) CDSMD, it follows from the wording of the provision – as well as the Article 17 Guidance – that the ‘authorization’ which OCSSPs are required to seek from concerned rightholders may take different forms – e.g., individual licences, collective licences, extended collective licences, etc – but it is not possible for Member States to impose a particular licensing modality. In this context, it may be helpful to recall that, in the past, a specific question was posed to Commissioner Breton regarding licensing modalities under Article 15 CDSMD. On behalf of the European Commission, Mr Breton noted that the text of the CDSMD is silent regarding how licensing under that provision is to be done. Under corresponding national laws, press publishers should thus have the possibility of licensing the use of their press publications both individually and collectively. Vice versa, the sole provision of mandatory collective management under national law would be unduly restrictive and contrary to the wording of that provision.

5. Member States’ freedom regarding contractual arrangements

In areas harmonized at the EU level – as it is certainly the case of the main exclusive rights, including the right of communication to the public which is at issue here – contractual arrangements under national law are not a ‘no man’s land’. In its case law, the CJEU has held that not only the existence but also the exercise of the rights harmonized at the EU level – including relevant contractual arrangements – must comply with EU law.

---

29 Poland, C-401/19, EU:C:2022:297, para 29.
30 E.g., Svensson, C-466/12, EU:C:2014:76, paras 33-41.
32 See, e.g., Soulier and Doke, C-301/15, EU:C:2016:878; Renckhoff, C-161/17, EU:C:2018:634; Spedidam, C-484/18, EU:C:2019:970.
As recalled above at §1, it is important to stress once again that copyright is an area of shared competence between the EU and its Member States. In turn, this means that Member States are free to legislate until and insofar as the EU legislature has exercised its competence. Once the EU legislature has intervened in a certain area, not only do Member States lose their competence to legislate outside of EU constraints but they are also prevented from impairing the activity and effectiveness of EU legislative action.

In this sense, without addressing here the compatibility or not of specific, pre-existing national ARRs (as it is, for example, the case of Spain) with EU law, following the adoption of the CDSMD, Member States have clearly lost their competence (if any at all, considering the pre-existing EU legislative framework and CJEU case law referred to above) to introduce their own rights or contractual arrangements outside of and contrary to the framework laid out at the EU level.

As it has been explained, Article 17(1) CDSMD is a measure of full harmonization and Article 18 CDSMD does not find application in situations covered by that paragraph of the provision. It follows that the adoption of national ARRs that could be invoked against subjects covered by Article 17 is incompatible with EU law and is also likely to amount to a breach of the duty of loyal collaboration between the EU and its Member States, because it negatively affects the functioning of the internal market. It does so by re-creating a fragmentation that the entire EU harmonization project in the copyright field – including the CDSMD – has sought to remove for the past 30+ years, also by using – as legislative basis – what are now Articles 26 and 114 TFEU. All this, as stated, is even more acute in relation to services – those of OCSSPs – where the content at issue is disseminated through technically borderless means (the internet).

6. Mandatory collective rights management mechanisms

Even in the event that the introduction of national ARRs was deemed compatible in principle with EU law, the specific ARRs under Articles 54 and 62 of the Belgian Law are problematic. In this sense, reference may be made of the modality through which the ARRs are managed, that is mandatory collective rights management.

Some academic commentators refer to the CJEU judgment in OSA, C-351/12 as indicating that the CJEU has found that EU law allows mandatory collective rights management systems. In that case, however, the Court did not address this point: instead, it tackled specifically issues relating to the lawfulness of (legal, as opposed to de facto) monopolies of collecting societies and questions of tariffs from the perspective of EU competition rules. Hence, no guidance may be inferred from OSA, C-351/12 or other CJEU case law regarding the compatibility with EU law of national systems of mandatory collective rights management.

Commissioner Breton himself, with specific reference to Article 18 CDSMD, stated unequivocally that:

   Member States may introduce compulsory collective management schemes only insofar as such schemes do not contradict the exclusive nature of the rights granted


34 Recently, see Opinion of Advocate General Szpunar in LEA, C-10/22, EU:C:2023:437, paras 4-7, also noting that existing CJEU decisions “have not made it possible to dispel all doubts as to the compatibility of the monopoly position of collective management organisations with EU law.”
to copyright holders under EC law, which is the right to authorise or prohibit the use of their work or protected subject matter; or when such schemes are explicitly laid down in specific EU copyright legal instruments.\(^{35}\)

Given both the features of the ARRs under the Belgian Law and the lack of any specific EU copyright legal instruments which legitimize them, it appears that neither Article 54 nor 62 of the Belgian Law fall under either category outlined by Mr Breton above. In sum: Even admitting the compatibility in principle of national ARRs adopted pursuant to Article 18 CDSMD with EU law, a system by which national law provides for a system of mandatory collective rights management – as it is the case of the Belgian Law – appears to amount to a breach of EU membership obligations.

III. Summary and conclusion

Through the analysis conducted above, the following points have been established:

**Relevant EU framework**

- Article 17(1) CDSMD is a measure of full harmonization because of its wording, history and rationale alike. In addition, the rightholders who can invoke its protection are only the holders of the rights of communication/making available to the public under Article 3 of the InfoSoc Directive. Where the CDSMD wishes to provide for a remuneration right of authors who are not the owners of relevant rights, it expressly does that. This is not the case of Article 17(1) CDSMD. It follows that authors and performers who are not or no longer holders of the right of communication/making available to the public are not entitled to invoke protection under Article 17(1) CDSMD, including by means of national ARRs.

- Article 18 CDSMD is an umbrella provision that serves to create a functional link between Articles 19 to 23 CDSMD. It is not, nor can it be, a provision that in itself entitles Member States to introduce new rights – whether exclusive or remuneration rights – in favour of authors and performers and having, as addressees, their contractual counterparts or their successors in title, at least in relation to areas – like Article 17(1) CDSMD – that are fully harmonized at the EU level. Holding otherwise would be contrary to the history, wording, and context of Article 18, as well as the rationale of both that provision and the CDSMD more generally, including to reduce fragmentation in the single market for copyright or other protected content.

- Turning to the relationship between Articles 17(1) and 18 CDSMD, even admitting that the latter would allow in principle Member States to introduce their own ARRs, such a possibility would be nevertheless precluded in relation to areas covered by the former, given that Article 17(1) is a measure of full harmonization. In any event, the mandate of Article 18(2) CDSMD would need to be complied with. In this sense, a mechanism in national law by which an ARR is unwaivable and subjected to mandatory collective rights management appears highly problematic.

---

The Belgian Law in light of EU Law

– Like all exclusive rights, the right of communication to the public under EU law is not just altered when Member States include within its scope more or fewer acts than what is allowed at the EU level, but also when the catalogue of its beneficiaries is unduly broadened (or narrowed) at the national level.

– Member States do not enjoy freedom to legislate in areas other than those covered by Articles 18 to 22 DSM Directive and introduce their own contractual arrangements on copyright and ARRs without also complying with the requirements and constraints under EU law.

– Outside of cases expressly provided for in EU law, it is uncertain that mandatory collective rights management mechanisms are generally allowed.

In light of everything that precedes, it is submitted that provisions like those contained in Articles 54 and 62 of Law of 19 June 2022 are incompatible with EU law.