# EWC SURVEY RESULTS

THE IMPLEMENTATION OF THE DIRECTIVE (EU) 2019/790 ON COPYRIGHT IN THE DIGITAL SINGLE MARKET:

TITLE 4 CHAPTER 3

Articles 18 to 23 and 26-27,
Recitals 72 to 81

E W C European Writers' Council

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## THE IMPLEMENTATION OF THE DIRECTIVE (EU) 2019/790 ON COPYRIGHT IN THE DIGITAL SINGLE MARKET: TITLE 4 CHAPTER 3

*Articles 18 to 23 and 26-27, Recitals 72 to 81*

## Introduction

Articles 18 to 23 of the Directive on Copyright (EU) 2019/790 are not subject to full harmonisation, but leave the Member States a level of flexibility in implementation.

Article 18 leaves it up to the Member States to decide how to implement the principle of fair and proportionate remuneration.

Article 19 merely stipulates that an obligation to provide information must be granted, without prescribing a more specific form for this.

According to Article 20 in relation to Recital 78 of the Directive, it is left to the Member States to determine the rules on the appropriateness of sector-related remuneration. The Member States are also largely free to design the procedure for resolving disputes on the transparency obligation and the contract adjustment mechanism provided for in Article 21.

Likewise, for the revocation procedure provided in Article 22 (1), special provisions can be made in national law.

A mandatory characteristic is given in the implementation of Article 23 DSM-RL. It provides that (i) the obligation of transparency according to Article 19, (ii) the adjustment mechanism of Article 20 in case of remuneration that is too low in relation to the exploitation results and (iii) the possibility of a dispute resolution according to Article 21, may not be excluded by the parties by contract. In this respect, the Member States have no room for maneuver in implementing it.

The EWC survey helps to evaluate to what extent the flexibility granted is used positively, negatively, or neutrally. 12 EWC member organisations from 10 countries answered the survey. Duration of the survey: 22 November 2021 to 31 March 2022.

The data evaluation concerns the following six core areas:

- Involvement of authors' associations in the legislative process
- Remuneration
- Transparency
- Contract law and contract (re-)negotiation (incl. collective agreements)
- Rights revocation
- Right of associations to sue, mediation bodies

EXTRA: The challenges of the future for writers and translators

# Summary of the results

## I. Implementation status, and involvement of authors' associations in the legislative process

It is undisputed that there has been a massive delay in implementing the Directive or a postponed implementation in portions. On 26 June 2021, the European Commission had requested Austria, Belgium, Bulgaria, Cyprus, Czechia, Denmark, Estonia, Greece, Spain, Finland, France, Croatia, Ireland, Italy, Lithuania, Luxembourg, Latvia, Poland, Portugal, Romania, Sweden, Slovenia, and Slovakia to communicate information about how the rules included in the Directive on Copyright in the Digital Single Market (2019/790/EU) were being enacted into their national law. As the Member States above have not communicated national transposition measures to this date, the Commission decided last June (2021) to open infringement procedures by sending letters of formal notice. However, as of 1 August 2021, only eight of 27 EU member states had implemented the DSM Directive into their national law. As of today (April 2022), a majority of the investigated countries in this survey still has not implemented the Directive (46.15%) and the countries (June 2022: 15 EU Member Staes) which did so, had been delayed (38.46%). Only 7.69% of all observed ten countries have implemented it fully and on time.

There was not always an inclusion of authors' associations in the stakeholder dialogues (up to 23.08%). **Not even half have been frequently integrated (46.15%) and the other half, when consulted, was only partially involved (30.77%). This is a major loophole as domestic legislations should have completed the Directive's dispositions in order to ensure its efficiency. In addition, the lack of full involvement of the authors' representatives is contrary to Recitals 15, 42, 52 and 77 of the Directive, in which both sector-specific and cross-cultural stakeholder dialogues with all parties are strongly recommended.**

## II. Remuneration

Although the Directive (EU) 2019/790 states that authors should receive an appropriate and proportionate remuneration (a principle lacking in two thirds of national legislations examined), one third of the investigated countries in this survey does not know if this principle has been implemented, and one third confirms that it has been implemented but only partially or not at all. Only one third of the examined countries has implemented this principle in full.
One of the key concerns of the Directive is to secure the right to remuneration for a copyright work in order to stabilise the future of authorship. In fact, 66.67% of the organisations surveyed stated that the fair and proportionate remuneration principle was not present in the legislative framework; one third already had similar dispositions. Therefore, there is clear progress here. However, it is one that has been compromised by the lack of commitment on the part of national decision-makers: None of the countries have a definition of what an appropriate remuneration or a proportionate remuneration means – **90 and 100 per cent of the organisations surveyed stated that there is no agreement between writers and publishers on what "appropriate" and "proportional" mean in practice. On the one hand, this difference in perspective is unsurprising. On the other hand, it shows that the governments in power have little understanding of the ways in which authors live and work.**

Exceptions allowing the use of buy-out remunerations preventing the implementation from having a useful effect on the situation of authors and collective agreements cannot help in setting a common remuneration rule for authors (in 83.33%). Still, less than half of the participating countries can demand or sue for disproportion between payment and use. Accordingly, when the law is good but there is no practical enforcement, the law becomes ineffectual, unfortunately.

The effectiveness of the Directive is, all in all, suboptimal at best, to missed entirely, especially in combination with core findings on transparency:

## III. Transparency

More than half of the countries surveyed do not have the principle of transparency implemented in full, and when they have (36.36%), or when they already had legislations on transparency, the outcome does not provide a satisfying positive effect. **Too often the laws will install exceptions on transparency obligations, so that publishers and / or third parties do not have the mandatory duty to deliver all data, although this is especially needed in digital usage. This also means that the basis of appropriate and proportionate remuneration practice is not sufficiently given. Without transparency about each use, no appropriate remuneration or even renegotiation is possible.**

When there is a mandatory accounting for authors, only a minority (9.09%) gets two accounting reports per year, and still 18.18% don't receive any. Also, only a bit more than a third (36.36%) get third parties' data (for example on number of loaned titles in commercial flat rates, numbers of streamed audio books, or sales of translations). Only one third (36.36%) of authors can request accounting and figures directly from a third party (translation licensee, e-lending in libraries, other licences). Also, still 50% of respondents cannot request any sanctions in case of lack of reporting. These numerous national restrictions on the obligation to provide transparent information weaken the important effect that the directive was intended to create in the interests of authors.

**In general, the lack of transparency of platforms and distribution monopolies is criticised. Here, the transparency obligation must also apply to companies outside the EU legal area, and also on state institutions (libraries).**

Nevertheless, the respondents hope for an improvement of the information, especially with the increase of streaming of audio books, on the use of e-books in commercial lending and in e-lending in libraries, etc.

## IV. Contract law and contract (re-)negotiation (including collective agreements)

Adjustment of contracts are hindered until today, and often authors have no money to sue, or fear to be put on a blacklist.

Concerning contracts and recommendations, most of the responding organisations give recommendations confidentially or individually and without harming competition laws. Very few have a (binding) agreement with publishers, and if they have one, it is in fact, more a voluntary agreement. **On the one hand, this is also due to prevailing competition laws that prohibit any agreements between publishers' and authors' representatives. On the other hand, it is also due to the lack of interest on the part of the publishing counterpart in binding, fair rules. Here, the EU-wide modification of competition law on joint remuneration negotiations should close an important legal gap. After all, the Directive refers to the chances of common rules seven times.**

A vast majority of authors' associations (83.33%) provide individual remuneration recommendations. In very few of the countries surveyed there is a binding, jointly negotiated standard or norm contract whose terms are not undermined. There are model contracts here and there, but these are not legally binding and serve rather to guide the writers or translators

with the best possible clauses. In a few individual cases, there are agreements with individual publishing groups or institutions that represent a voluntary commitment rather than a legal minimum agreement.
However, a vast majority of respondents don't know and just hope that significantly more authors enter negotiations on retroactive contract adjustments. This is primarily to create and make the principle of "use it or lose it" enforceable.

## V. Rights Revocation

Very few countries surveyed have implemented this new right (27.27%), and half already had a similar law. These new possibilities might give authors in some countries much more freedom than before, where the recall of rights had played no role at all in official legislative texts.
**However, rights revocation will still remain also a question of individual contract negotiations.**
It remains unclear, both in purely practical and contractual terms, how, for example, legally guaranteed opt-outs by authors, such as in the text and data mining area, or in the area of out-of-commerce works, are to be realised.

**The respondents hope to reach, through negotiations, an easier recall of rights when a single transferred right is not exercised ("use it or lose it principle" - 63.64%),** an easier recall of rights when the work is not reprinted for a certain period (45.45%) and the conversion of an exclusively granted right of use into a simple, non-exclusive right of use (45%).

## VI. Right of associations to sue, mediation bodies

Authors continue to avoid disputes for fear of blacklisting and lack of financial capacity to sustain a lawsuit.

In most cases (90.91%), there is no mediation body in the book and publishing sector that could help authors. Most of the respondents believe that there will be no impact with this new legislation. Again, this is because a right of association to sue on behalf of an author only makes sense if applicable laws or common agreements have been violated. If laws are full of exceptions, or if agreements are not binding, a right of action by an association is accordingly a sword without sharpness.

**Overall verdict: the Member States have had every opportunity to decisively side with the authors and thus to ensure the sustainability of the resource for education, literature and knowledge. This "opportunity of the century" is being missed en masse.**

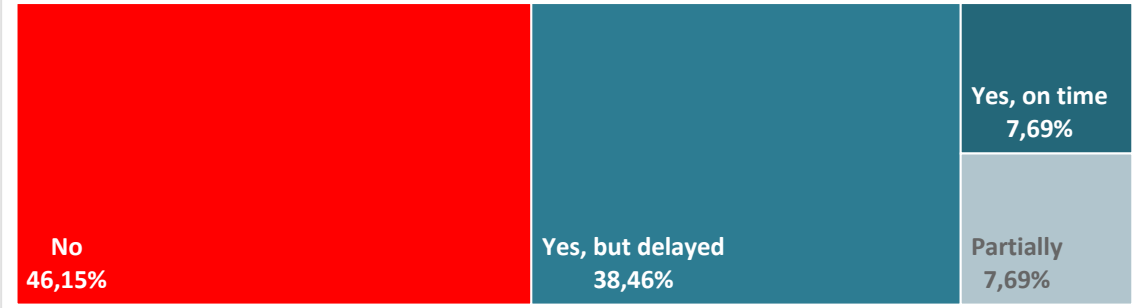
## EXTRA: Future challenges of writers and translators

The topics of non-transparency of the usage figures of audio book streaming and e-lending (commercially through platforms and in libraries) of the distribution monopolies, were raised again and again. The respondents also see the possibility of negotiating standard contracts or other binding agreements as an urgent matter, and the need to improve social security for authors, especially through the experience of the COVID crisis. The individual author needs to be much more protected – by appropriate legal frameworks, enforcement opportunities, by the backing of his or her organisations, and by state systems that protect him or her as a self-employed person, and value him or her as a source of the entire book economy.

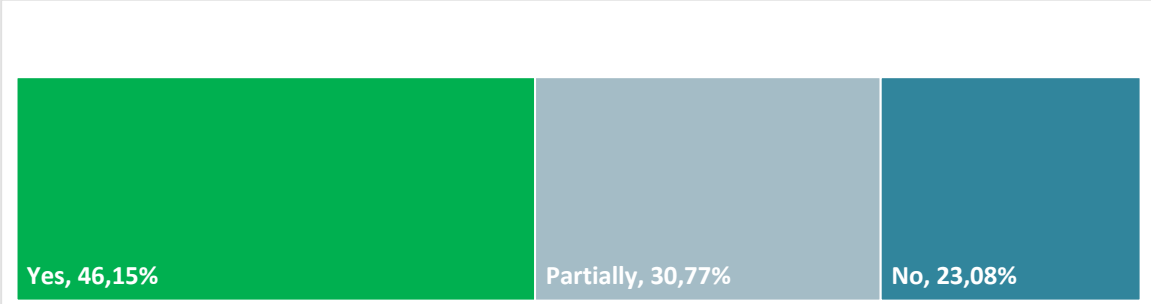
# Results in Details

## Entry into effect and required stakeholder consultation

**Is the implementation process in your country concluded / completed?**
*(Article 26: Application in time, 7/6/2021)*




**Were authors' associations actively integrated into the process by the legislature, e.g., with consultations, stakeholder meetings, hearings or other?**




*"It (our organisation) has only received information. There have been no consultations and no hearings."—SPAIN*

*"A limited written consultation process in October 2019."—IRELAND*

*"Only on other articles (articles on OOCW)" —FRANCE*

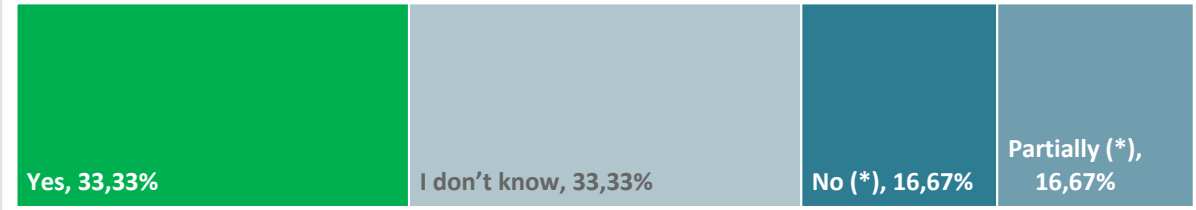
*"Public consultations, but also structured stakeholder dialogues on specific themes with specific questions from the Ministry of Culture."—DENMARK*

*"We have been included into a preliminary research conducted by an agency on behalf of the Ministry of Culture."—CZECH REPUBLIC*

# Article 18: Principle of appropriate and proportionate remuneration.

Article 18 provides that Member States shall grant authors and performers the right to appropriate and proportionate remuneration. Article 18 of the DSM Directive on Copyright does not contain any specific requirements as to how this right to remuneration is to be structured. The Member States are free to apply either existing or new procedures in the implementation (recital 73 of the DSM Directive).

## Is this principle applied in the implementation of the Directive in your country?




## Was there already a legal disposition related to an appropriate and/or proportionate remuneration in your country?


*"Was deleted from the laws many years ago. And competition authorities have even rigorously enforced a total ban on any recommendations."—DENMARK*

*"Finnish copyright law currently calls for the mediation of unreasonable clauses in copyright contracts, but there is no law specifically for appropriate remuneration."—FINLAND*

*"A principle of proportionate remuneration to all authors (the lump-sum being the exception)."—FRANCE*

*"There has been since 2001 a provision for a license override in Ireland for reprographic copying."—IRELAND*

*"There is a legal provision: Article 46 of the Law on Intellectual Property (LPI), which establishes as remuneration a proportional part of the operating revenues. However, several exceptions are recognized, including the possibility of a lump sum payment or, in other words, payment of a single amount for the transfer of rights. In any case, the most negative aspect is that the law does not define fair payment and does not even set a minimum."—SPAIN*

## What are the most significant differences now (positive and/or negative)?

*"No difference... unfortunately..."—FRANCE*

*"The motivation for collective agreements is possibly higher due to the transparency obligation for publishers." —GERMANY*

*"Very little significant change for Irish authors" —IRELAND*

*"The loss of an opportunity to update the law." —SPAIN*

*"It is positive that the principle of appropriate and proportionate remuneration, as the proposal from the government stipulate at this point, is mandatory for the parties."—SWEDEN*

## Are there exceptions in your national law allowing publishers to avoid a proportionate remuneration for authors?


*"In a way yes. Because there is a ban on freelancers collective bargaining and recommended fees."—DENMARK*

*"There is a lump sum in two articles of the French code of intellectual property :*
*- when the contribution of the author is secondary (i.e.: two drawings in a 150 pages book for a young adult: the author of the drawings only gets a ""forfait"" = lump sum. Another example: for the first edition in several cases such as translation or cheap albums for children (old article that should be reviewed)."—FRANCE*

*""Buy-out" is legal if in line with industry standards."—GERMANY*

*"The legislation does not provide mandatory proportionate remuneration for authors, but there is also no regulation that prevents it directly."—PORTUGAL*

*"Section 2 of the aforementioned Article 46 of the LPI admits, on numerous occasions, a lump sum as an exception to proportionate remuneration."—SPAIN*

## Do publishers and authors agree on what "proportionate" remuneration means?


## Do publishers and authors agree on what "appropriate" remuneration means?

## Is there a collective agreement or a common remuneration rule between authors and publishers in your country?


*"It is banned by competition law." —DENMARK*

*"We are pushing for 10% minimum, but it is a very complicated fight... integrating such a minimum in the law is opened to debate (legal counsels of the Ministry of Culture are saying it is not possible to have the law say as such)."—FRANCE*

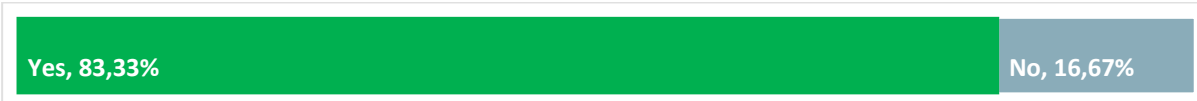
*"There is a non-binding collective agreement, but it does not deal with the question of remuneration either since this is prohibited by the Law on the Defence of Competition."*

*"It is up to individual authors and publishers."—IRELAND*

*"There is no legal provision for common remuneration between authors and publishers. Neither is there any collective agreement in this regard."—SPAIN*

*"There is no agreement between the publisher's association and us, but between us and some of the major publishers."—SWEDEN*

## Does your organisation provide remuneration recommendations?



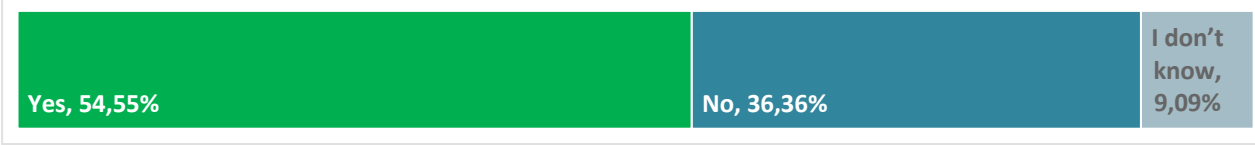

*"We do. Individually, which is allowed, and to a certain degree also collectively, but in an intelligent way that tries to push the envelope of what is legal. We contest the ban, so to speak."—DENMARK*

*"10% minimum for the print version, 20 to 25% for the digital version."—FRANCE*

*"Recommendation and guidance are provided through the Disputes Officer."—IRELAND*

*"As already stated, the Law on the Defence of Competition expressly forbids collective recommendations, and direct or indirect price fixing. Moreover, the National Competition Commission, which is responsible for observance of this law, is very militant in performing its task. In any case, there is a legislative change in this area which could allow authors to agree to fix a minimum payment in the agreements. And, since these agreements do not exist, associations representing freelance writers will be able to publish, for information purposes, lists of fees and non-binding material concerning average market prices."—SPAIN*

## Could authors demand or sue for appropriate remuneration from their publishers if there was a clear or massive disproportion between payment and use?



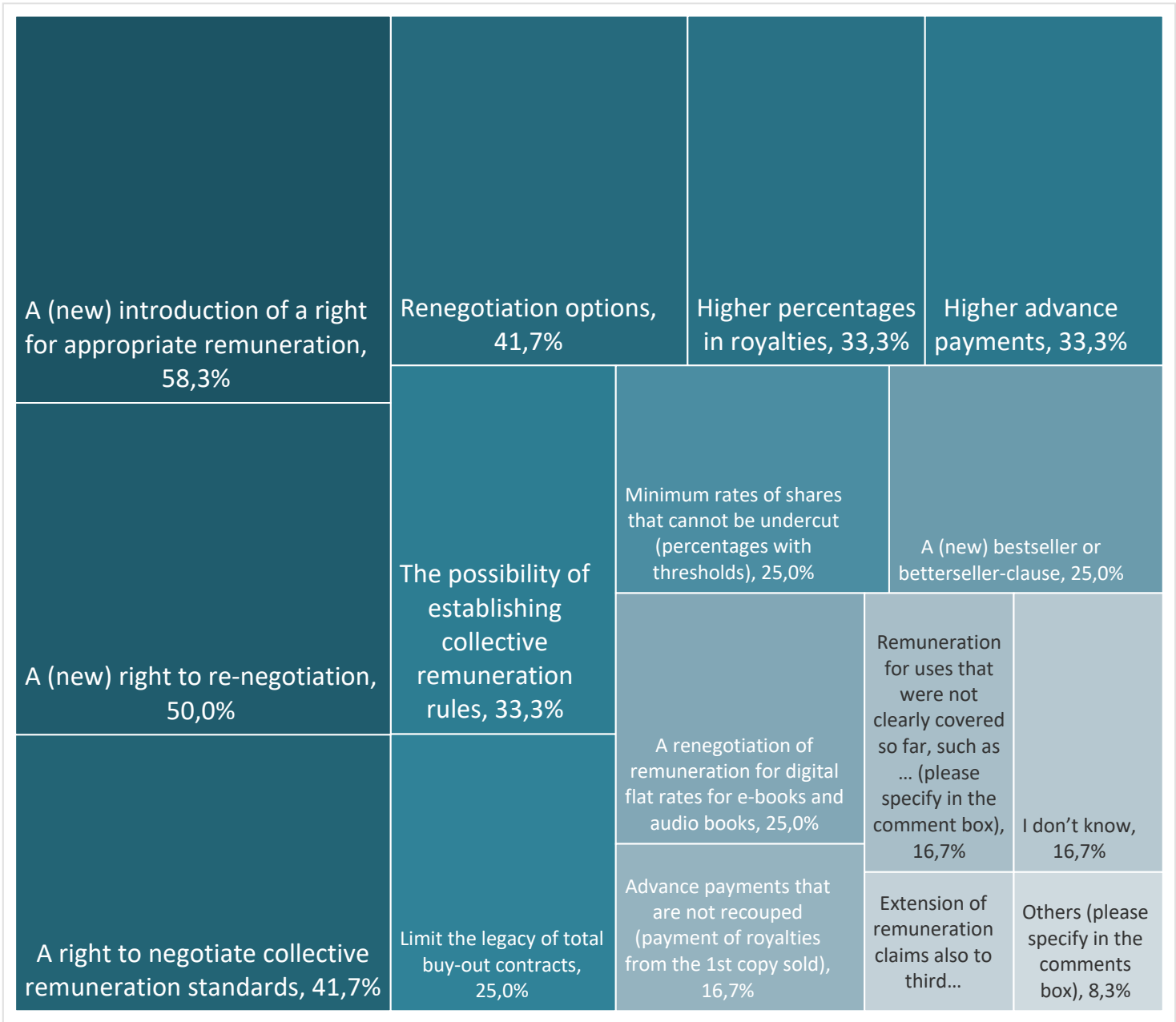
*"Both in terms of the law and in terms of legal case history, that is impossible."—DENMARK*

*"The law is not easy to trigger in front of a judge and, thus, it is never raised in a court room. We shall see how this evolves with the new disposition that came with the implementation." —FRANCE*

*"In theory."—IRELAND*

*"Article 47 of the LPI provides for the possibility of review action in case of unfair payment. Until now, this was limited to flat-rate payments. With the enactment of Directive 2019/790 (RDL 24/2021) it has been extended to all types of remuneration. The basic problem continues to be lack of definition of what is understood by "fair payment"."—SPAIN*

## In which areas do you expect substantial improvements?
(multiple answers possible)

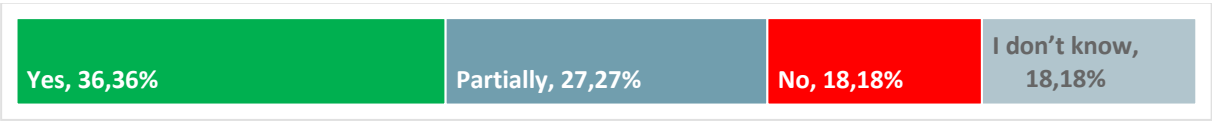



*"Audio books and e-books."—DENMARK*

# Article 19: Transparency obligation.

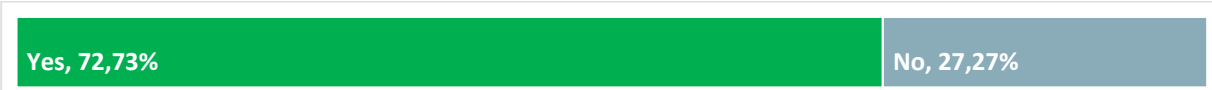
Article 19 DSM-RL requires the introduction of a general transparency regime in favor of authors and performers. It is up to the Member States to decide how this obligation on the part of the publisher as the first contractual counterpart and sub-licensees is to be structured and what restrictions can be applied.

## Is this principle applied in the implementation of the Directive in your country?




## Is there already a legal disposition related to transparency in your country?

If yes: please specify.




*"But very weak, basically only allowing for an accountant to come in and check the stock of printed copies and the veracity of the royalty calculation based on available data, but not guaranteeing any real insight in the turnover from the sales and not obliging publishers to keep tabs on anything. In short, the stipulation prohibits publishers from lying, but it does not require them to tell the whole truth. Big difference."—DENMARK*

*"Publishers are required to annually inform the writer on the number of books printed, as well as the number of books sold. Information on e-books and audio books is much less transparent."—FINLAND*

*"One accountings report to the author per year with some specific mentions in the report."—FRANCE*

*"We had a right to ask for information. Now, the publishers are obliged to report annually."––GERMANY*

*"Article 64.5 of the LPI defines as one of the publisher's obligations provisions of an annual account of the sales of the work, making available to the author a certificate giving details regarding the production, distribution, and stocks of copies. However, there are numerous cases of non-compliance with this obligation, either because certificates are not presented on time, or the records are incomplete."—SPAIN*

## What are the most significant differences (positive and/or negative)?

*"Insight in the digital revenue especially for streaming (subscription models and revenue sharing). Revenue sharing which is fast becoming the norm for subscription services is a machine that creates in-transparency in authors' royalties."—DENMARK*

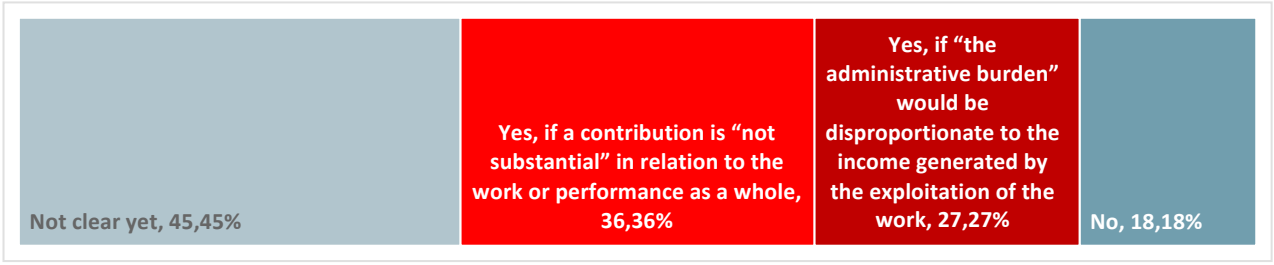
*"None for now - we are trying to obtain two accountings report per year instead of just one."––FRANCE*

*"The obligation is supported by a kind of a class action. The association's benefit of an injunctive relief if a publisher does not fulfil his obligation."—GERMANY*

*"Enshrines the right of transparency into legislation."—IRELAND*

*"Negative. Transparency measures that are considered in the Directive, such as those related to third parties, are not transposed into the law."—SPAIN*

## Will there be – under the transposition – exceptions in your national law allowing publishers to avoid concrete or systematic transparency and accounting reports to authors?



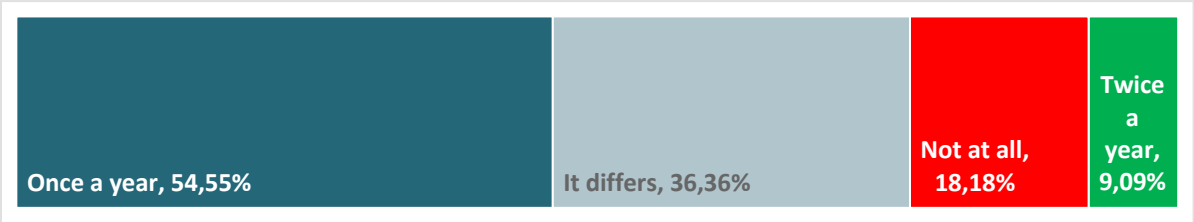

*"As I said, we have not got to that yet. But on transparency, we are in the final stages of concluding a standard agreement with the publisher's union. It will strengthen authors' transparency significantly, but yes, there will also be limitations to the obligations, which we consider fair."—DENMARK*

*"Only because authors might agree so in a collective bargaining. The implementation left the discussion opened to parties to a bargaining agreement between authors and publishers. It is being discussed right now."—FRANCE*

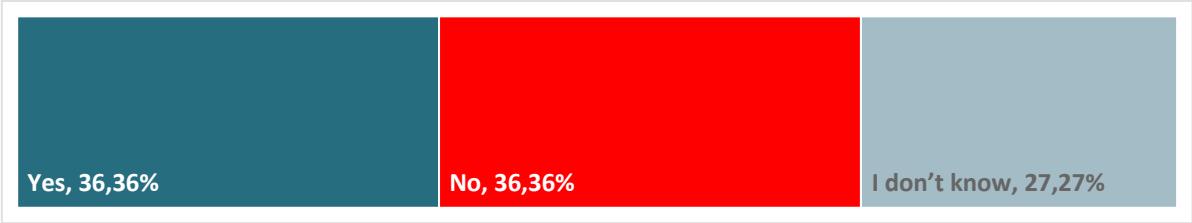
*"The administrative burden exception was not transposed in Ireland."—IRELAND*

## Does the implementation in your country define time specifications for the submission of the mandatory accounting report to the author, such as ...?

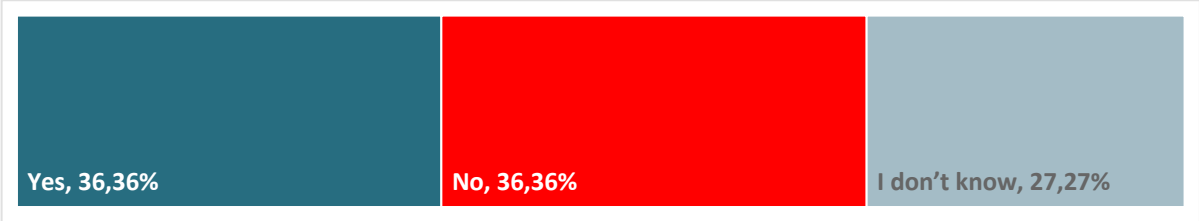
How often have authors received information about the exploitation of their work so far?




Does the existing or implemented transparency obligation include the duty of publishers to provide information covering all third parties and licensees?



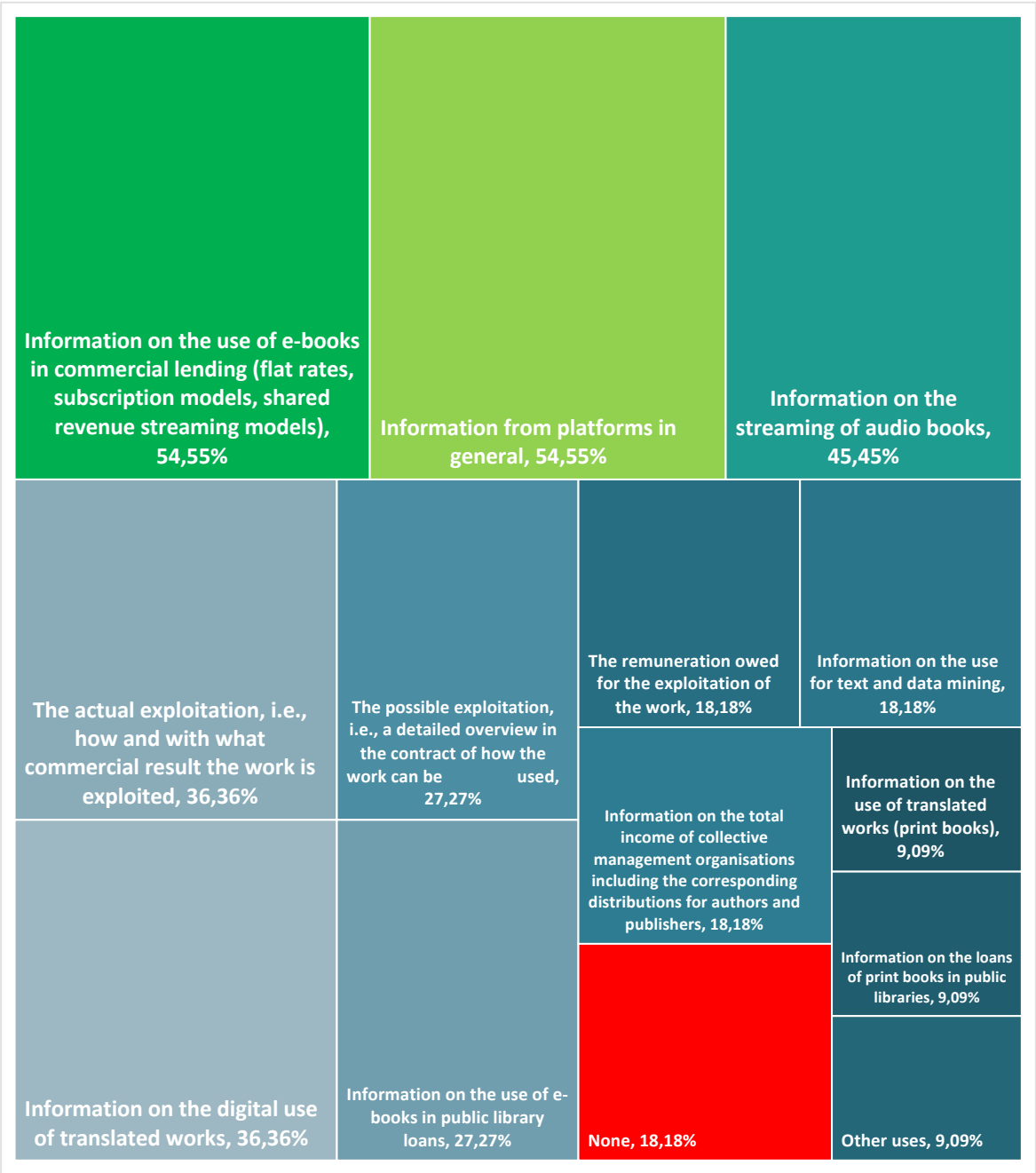

Does the implementation make it possible for authors to demand transparency and accounting details from third parties and licensees directly or under certain circumstances?




Does the implementation in your country set up sanctions against publishers when they, a third party and/or a licensee do not provide information, (e.g., right to require injunctive relief etc.)?

In which areas has the information for authors been rather poor or completely lacking so far? (multiple answers possible):

## Do you expect an improvement in terms of transparency in these areas?
(multiple answers possible)

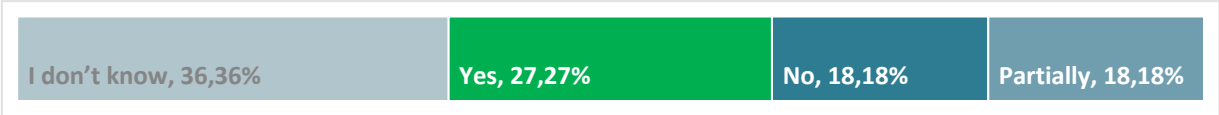



## Will your organisation negotiate adapted collective transparency rules with publishers' representatives?

# Article 20: Contract adjustment mechanism.

According to Article 20 in conjunction with Recital 78 of the DSM Directive, it is up to the Member States to define rules for negotiating the appropriateness of sector-related remuneration.

## Is this principle applied in the implementation of the Directive in your country?




*"Unfortunately, the government in Sweden relies on existing rules for negotiation."—SWEDEN*

## Was there already a legal disposition related to contract adjustment mechanisms in your country, for example, the re-negotiation of remuneration or right revocation?


*"Finnish copyright law already features a mechanism for mediating unreasonable contracts."—FINLAND*

*"Only for e-books."—FRANCE*

*"This was not the case until it was introduced with the implementation of Directive 180/2019 (RDL 24/2021 of November 2021), specifically in the new Article 48 bis of the LPI."—SPAIN*

## What is the most significant impact now (positive / negative / none)?

*"Application of re-negotiation for print books." —FRANCE*

*"In theory, it has become a better seller clause. It used to be applicable to bestsellers only." —GERMANY*

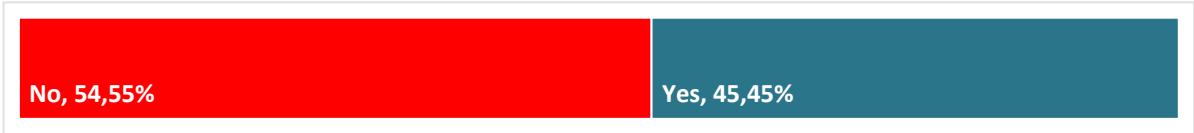
*"It will give clarity on revocation. Irish transposition of right of revocation refers to ""no exploitation"" rather than ""a lack of Exploitation"" as per the directive. Leading to difficulty defining the point at which a work is deemed no longer to be exploited." —IRELAND*

*"Significant impact by the establishment of the right of revocation. —SPAIN*

*"Negative: we have no sufficient contract adjustment mechanisms, and we will not get one."—SWEDEN*

## Is there a typical contract (i.e., defined by law) in your country?


## Is there a standard contract negotiated between authors' and publishers' organisations?




*"There is a standard contract negotiated between authors and publishers, but it is non-binding."—SPAIN*

*"Used to be, but it was cancelled as part of the liberalization of the book market in the early 1990's."–DENMARK*

## In your country, is there a model contract recommended by your association?


*"Yes, there are several model contracts for specific publishing houses both for writers and translators. Everything else would be illegal."—DENMARK*

*"The typical contract is a summary of the law and only a short part of it can be negotiated individually by each author. The first draft sent to authors is usually elaborated by publishers to their advantage.. Our model contract displayed by our association is written in the advantage of authors and goes beyond the typical contract negotiated between authors and publishers but it is rarely (not to say never) used by publishers."*
*—FRANCE*

*"There are some model contracts (publishing, translation, e-books) negotiated and signed by authors' and translators' associations. These serve as a reference, but they are not directly legally enforceable."—SPAIN*

*"We had one before but not today."—SWEDEN*

## Will your organisation negotiate adjusted contract rules with publishers' representatives in the context of the implementation of the Directive?

*"Not right away. But we hope that in the long run, a stronger authors' protection will make publishers more interested in standard contracts. Just as important, we hope that the legal right to fair remuneration will make it harder for competition authorities to uphold the ban on recommended fees and collective bargaining." —DENMARK*

*"The standard contract is a model contract." —GERMANY*

*"That may happen in time but not at this stage." —IRELAND*

*"We hope so."—SWEDEN*

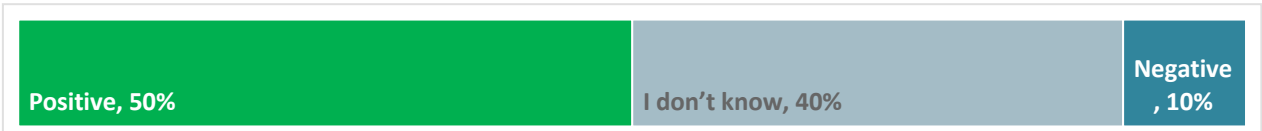
Will significantly more authors enter negotiations on retroactive contract adjustments, especially in the sense of subsequent remuneration or shortening of the transfer of rights of use, especially in the case of total buy-out contracts or lump-sum payments?


*"Hard to say. I dont' expect a lot of cases. More interested in the incentives it will give to publishers to negotiate collectively."—DENMARK*

*"We shall observe this."—FRANCE*

*"Yes, more and more. It is an orientation of the Association (AELC)."—SPAIN*

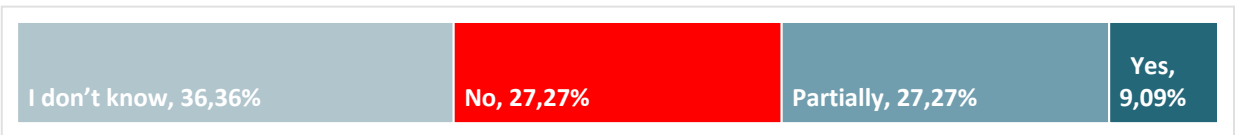
How do the (new) national transparency provisions affect the possibilities of getting information on the exploitation of the work to obtain a contractual adjustment for appropriate remuneration?




## Article 21: Alternative dispute resolution procedure.

Article 21 DSM-RL obliges Member States to establish a voluntary and alternative dispute resolution procedure to settle disputes concerning the transparency obligation of Article 19 and the contract adjustment mechanism of Article 20. The Member States are still relatively free in the specification of the procedure.

Is this principle applied in the implementation of the Directive in your country?



*"Only for adjustment of e-book remuneration (in case an author wants a higher remuneration, but the publisher says no): in theory (not yet in practice), an out-of-court commission should be set up and manage this issue (not yet set up)."—FRANCE*

*"No specific mechanism but a referral to existing mediation and/or arbitration legislation."—IRELAND*

*"It can improve if the Intellectual Property Commission exercises its new powers in this area."—SPAIN*

## Is there already a legal disposition related to (alternative and out of court) dispute resolutions in your country?


*"Only for adjustment of e-book remuneration (in case an author wants a higher remuneration, but the publisher says no): in theory (not yet in practice), an out-of-court commission should be set up and manage this issue (not yet set up)."—FRANCE*

*"Mediation Act 2017, Arbitration Act 2010."—IRELAND*

*"In Spanish intellectual property law, there is no legal provision that establishes specific mechanisms for alternative resolution of copyright disputes, except for those that are generally envisaged."—SPAIN*

## Is there already a mediation body in the book and publishing sector related to (alternative) dispute resolutions in your country?


## What is the most significant impact now with the implementation of Art 21 (positive / negative / none)?

*"A whole new tool and weapon to employ. Very strong addition to authors tools for recourse." —DENMARK*

*"None (regrettably): it could have been enhanced."—FRANCE*

*"None." —GERMANY*

*"Reduced costs in making a claim due to mediation/arbitration."—IRELAND*

*"Once again, the impact will depend on the performance of the Intellectual Property Commission."—SPAIN*

*"There will be no impact, Article 21 is not implemented in Sweden."—SWEDEN*

Does your organisation have, or will it have a legal representation for authors?


*"Yes, but currently not for class action lawsuits. We can only represent individual authors."—DENMARK*

*"The association currently assists authors in conflicts, but actual court cases or ADR (while rare) have traditionally been handled by the author's own representation."—FINLAND*

*"Courts in France agree that our organisation can be in a law suit next to an author (not instead of the author who needs to be part of it), whenever the author asks for help."—FRANCE*

*"Yes, but this has not been tested yet."—IRELAND*

*"Associations are recognised, but they do not have effective negotiating power ""erga omnes"" - of general effectiveness -, as is the case with labour agreements."—SPAIN*

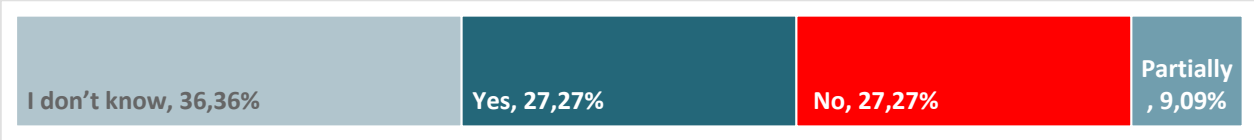
Why do you think authors have avoided disputes so far?


*"Authors avoid litigation for all the above reasons, and especially because the court proceedings are slow, burdensome, and they do not take due account of the author's weak position in contracts with publishers."—SPAIN*

# Article 22: Right of revocation.

If an author has granted an exclusive license for his or her rights in a work or has made an exclusive transfer of his or her rights in it, then this license or transfer may be revoked in whole or in part under Article 22(1) of the DSM Directive if there is no exploitation of the work. Instead of revocation, under Article 22(2) and 22(3) an author can choose to terminate the exclusivity of the contract instead of revoking the license or transfer of the rights).

## Is this principle applied in the implementation of the Directive in your country?




## Is there already a legal disposition related to right of revocation in your country, and if yes, describe it briefly.


*"A general «use it or lose it»-clause."—DENMARK*

*"Right of revocation, if a book has not been published two years after publisher received the manuscript. If all books have been sold, author has a right to request a reprint. Rights are revoked if the reprinting is not done within a year of the request. There is no right of revocation for audio books or e-books."—FINLAND*

*"If no exploitation: the author sends a notification letter to the publisher for the publisher to put the work back on the market within six months. Beyond the six months period, whenever the publisher did not put the work back on the market, the publishing agreement is automatically terminated."—FRANCE*

*"Since implementation, a new Article 48 bis has been introduced. This establishes, for the first time, the right of revocation, both total (termination of contract) and partial (ending exclusivity)."—SPAIN*

## What is the most significant impact now with the implementation of Art 22 (positive / negative / none), and where are the difficulties?

*"This clause is less interesting in Denmark."—DENMARK*

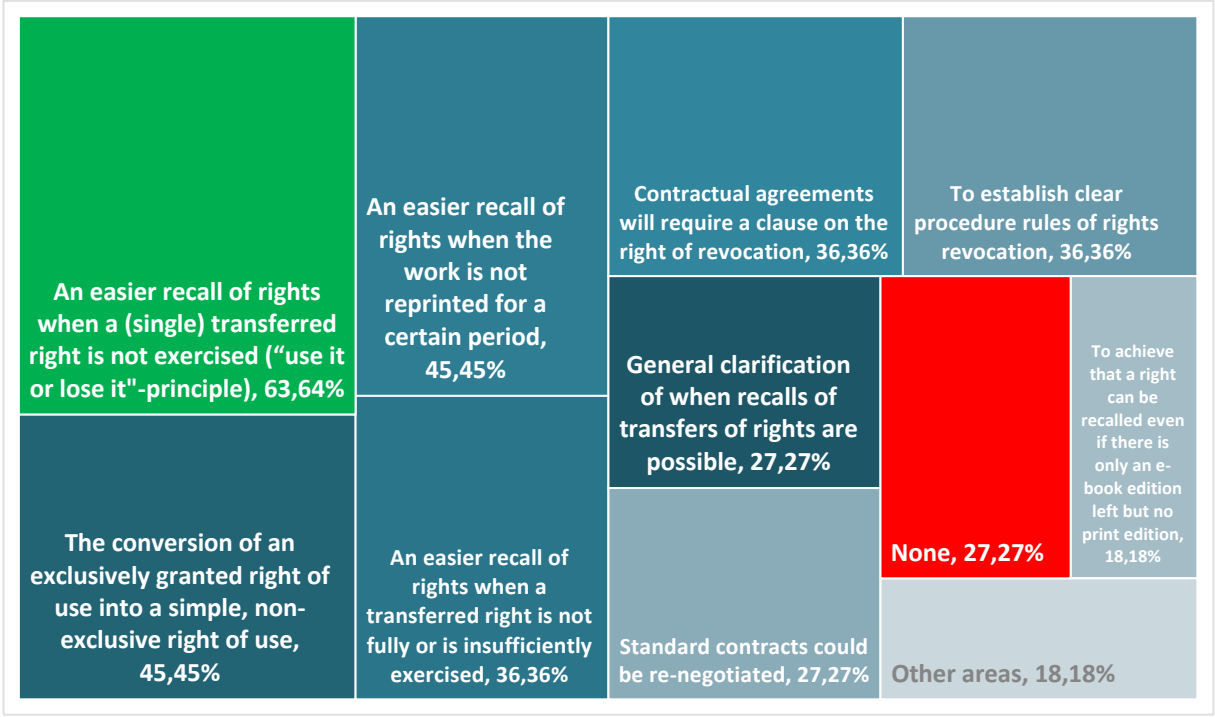
*"Termination of the exclusivity is interesting and not treated by our implementation." —FRANCE*

*"The right of revocation now exists in legislation, but the possibility of non-exclusivity is a missed opportunity."—IRELAND*

*"The most significant impact is the express recognition of the right of revocation."—SPAIN*

From which date is the right of revocation applicable?


Do you expect an improvement in these areas?
(multiple answers possible)




*"To establish a partial revocation of rights whenever the right is not exercised (but others are, and the contract can remain for these latter exercised rights)."—FRANCE*

## Article 23: Common provisions.

Member States shall ensure that any contractual provision that prevents compliance with Articles 19, 20 and 21 shall be unenforceable in relation to authors and performers.

What mechanisms will be used to guarantee this?

*"Not clear yet."—CZECH REPUBLIC*

*"In Denmark we have contractual freedom. But authors are protected as rightholders, so it is already illegal for a contract to ask an author to sign-away unwaivable rights. This is pretty*

*well established. Such contracts would not hold up in court, and publishers and platforms accept this in most cases."—DENMARK*

*"The nullity (voidness) of the clause that states otherwise (we say "ordre public" in French)."—FRANCE*

*"Contract adjustment mechanisms."—GERMANY*

*"Regulation 31 states that any contractual provision that prevents compliance shall be unenforceable in relation to authors and performers."—IRELAND*

*"We are waiting for the transposition of the Directive."—PORTUGAL*

*"Essentially collective bargaining with binding agreements."—SPAIN*

*"We don't know yet."—SWEDEN*

***

## Which issues (both in relation to contract law, and other developments (AI, streaming, platforms, self-publishing, post-Corona-consequences, social issues ...) do you consider as upcoming challenges for authors and especially for your members?

*"Revenue sharing in subscription models for streaming."—DENMARK*

*"The implementation process is at the stage where we are waiting for a second draft of the national legislation. So far we have not been impressed with what the legislature has presented us. The situation is unfortunately such that the new legislature would weaken the position of Authors and other artists. We are currently discussing with the politicians and the Ministry-personnel in what ways we hope that the second draft will improve."—FINLAND*

*"Transparency from bigger, international platforms."—FINLAND*

*"We have to find means to protect the individual author." —GERMANY*

*"While all of these are upcoming challenges the impact of Brexit for Irish authors will be considerable."—IRELAND*

*"The access (or non-access) to the welfare systems; the streaming companies' model for payment to the authors and publishers; the structure on the market with two big publishing houses owning the distribution of books and the streaming services."—SWEDEN*

*"Lower income both because of the shaken book market and also because of Covid restrictions on live performances."—CZECH REPUBLIC*

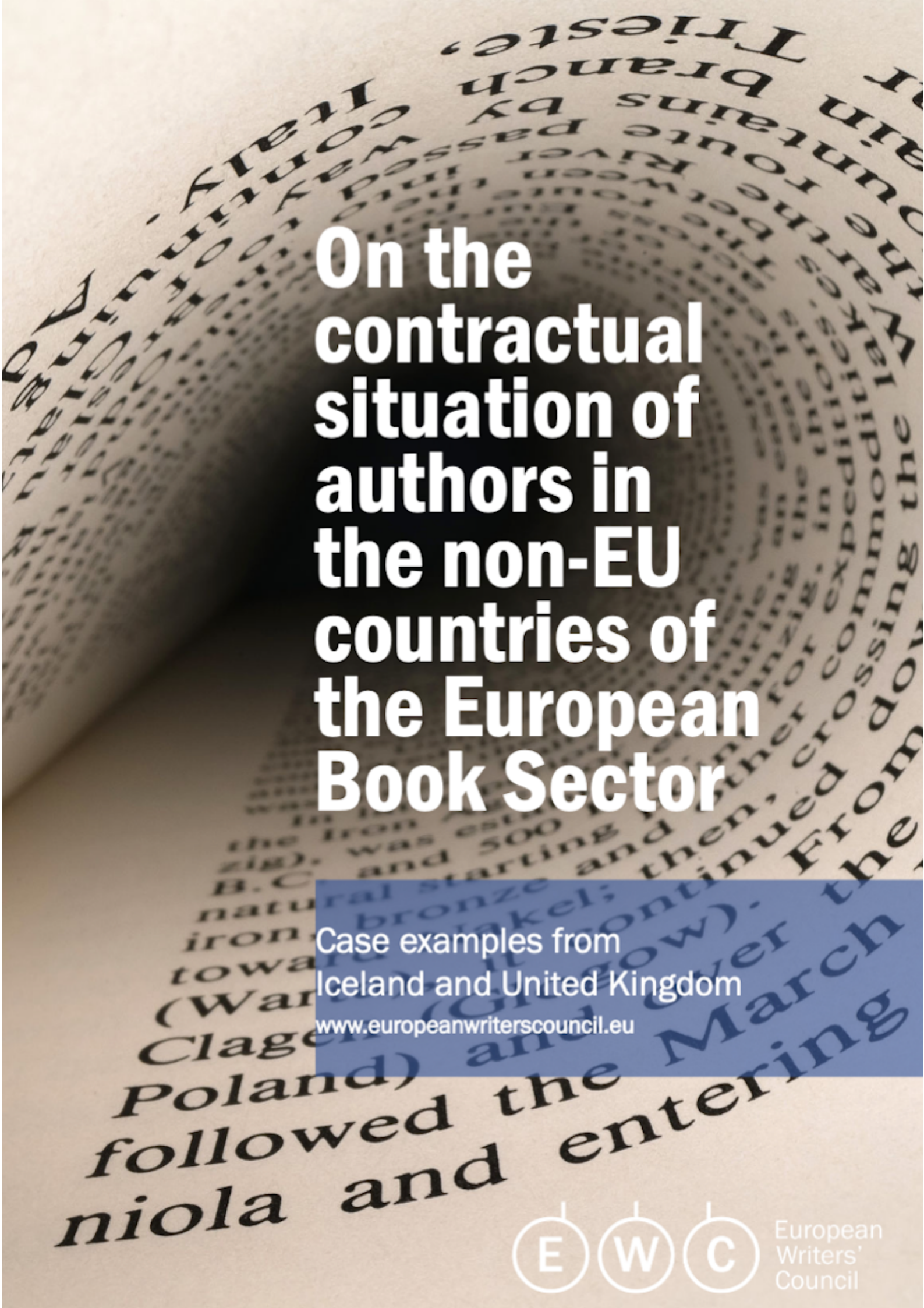
*"The main matters constituting challenges for the Association would be, inter alia:*

- *Establishment of collective bargaining mechanisms between authors and publishers, with full negotiating power for representative associations, and with binding agreements for the parties and their associates.*
- *Definition of what is understood by fair payment and inclusion of schedules of rights to minimum fees in collective agreements.*
- *Establishment of alternative mechanisms of dispute resolution (mediation and arbitration), as well as streamlining legal proceedings and reducing legal costs.*
- *Strengthening transparency concerning the use of works, reinforcing the means of information control, and including administrative intervention." —SPAIN*

# On the contractual situation of authors in the non-EU countries of the European Book Sector

Case examples from
Iceland and United Kingdom

www.europeanwriterscouncil.eu



European Writers' Council

# EWC SURVEY RESULTS

## ON THE CONTRACTUAL SITUATION OF AUTHORS IN THE EUROPEAN BOOK SECTOR OF THE NON-EU COUNTRIES

## Introduction

This survey and its results examine, as examples, two countries in the European book sector that are not or no longer part of the European Union: Iceland, and the United Kingdom.

Iceland and the European Union are closely linked through, among other aspects, Iceland's membership of the European Economic Area (EEA) and participation in the Schengen area. Iceland was a candidate for membership of the European Union from 2010 to 2015, but officially withdrew its application for membership.

Nevertheless, the Icelandic government decided to implement the Copyright Directive (EU) 2019/790 – unlike the government of Great Britain, for example. The latter, also to the dismay of authors, decided not to implement the directive in the course of its withdrawal from the Union, despite clear objections and justifications from the authors' representatives.

The structure of this case study survey follows the focal points of the Directive, and covers the topics of involvement of writers' organisations in legislative processes, on remuneration, the right to information and transparency, contractual law and contractual practices, including post-contractual adjustments, the right of revocation right, and the right of associations to sue. In this way, it is possible to make a comparative and complementary assessment of the situation for writers and translators in the European book sector. Especially since the Anglo-Saxon literary area is considered one of the most important in the world, both in terms of imports and exports of books and text works.

## Results in Detail

The comparison of the two countries presents some significant contrasts, particularly with regard to official remuneration rules, the existence of standard contracts, out-of-court arbitration bodies and competition law for negotiating agreements.
Similar, however, are the absence of statutory remuneration obligations as well as on recall; and subsequent contract corrections are again individually contractual and not legally secured.

### Are authors' associations actively integrated into all processes by your legislature, e.g., with consultations, stakeholder meetings, hearings or other?


UNITED KINGDOM: The Society of Authors takes an active role in legislative processes by responding to public consultations and calls for evidence on proposals for legislative reform.

# Appropriate and proportionate remuneration.

## Is there a legal disposition related to an appropriate and/or proportionate remuneration in your country?


ICELAND: The DSM directive will be implemented into Icelandic Copyright laws and hopefully articles 18 to 22 will be implemented in a way that we approve of.

UNITED KINGDOM: There are no provisions regarding authors' remuneration (whether fee-based or royalty-based) in the Copyright, Designs and Patents Act 1988 (CDPA). The only reference to 'equitable remuneration' found in the CDPA is limited to rental rights in cinematographic works or sounds recordings – S93B (S93B indicates "Where an author to whom this section applies has transferred his rental right concerning a sound recording or a film to the producer of the sound recording or film, he retains the right to equitable remuneration for the rental. The authors to whom this section applies are: (a)the author of a literary, dramatic, musical or artistic work, and (b)the principal director of a film.").
Having said that, the statutory recognition of equitable and proportionate remuneration is something that the SoA is advocating for with partners including the Creators Rights Alliance. See e.g. C.R.E.A.T.O.R | The Society of Authors (https://www2.societyofauthors.org/where-we-stand/c-r-e-a-t-o-r-campaign-for-fair-contracts/) and Fair Terms for Creators — creators' rights alliance (creatorsrightsalliance.org).

## Are there exceptions in your national law allowing publishers to avoid a proportionate remuneration for authors?


UNITED KINGDOM: Since there is no requirement for authors to receive equitable, fair, or proportionate remuneration, there is also no exception to proportionate remuneration for authors in the CDPA. Moreover, given the principle of sanctity of contract, the UK courts will not protect an author if they have signed a publishing contract which contains poor terms, including unfair remuneration terms. This applies even where an author has assigned their copyright in exchange for a flat fee, meaning that they have transferred copyright ownership to a third party (such as the publisher).

## Is there a collective agreement or a common remuneration rule between authors and publishers in your country?


ICELAND: The Writers' Union and the Publishers' Union have a collective agreement.

UNITED KINGDOM: There are good practice guides and industry standards but no collective agreement or common remuneration rule with book publishers.

## Does your organisation provide remuneration recommendations?


ICELAND: In many cases where we don´t have a standard contract the Union publishes remuneration recommendations.

UNITED KINGDOM: Competition law prevents us from providing remuneration recommendations as fees and rates are a matter for individual negotiation. However, we believe authors should be paid adequately and fairly for the work they do because paying authors shows proper recognition of their professional experience, skills, and status, and allows authors to maintain a career. We aim to empower authors so that they ask to be adequately and fairly paid, and we strongly believe that authors should not be put under pressure to work for free. We provide some observed rates and links to useful resources as a guideline. See generally: Advice | The Society of Authors.

## Could authors subsequently demand – or sue for – appropriate remuneration from their publishers if there was a clear or massive disproportion between payment and use?


ICELAND: The authors could demand/sue the publishers IF they were using the material in any other way than the contract says.

UNITED KINGDOM: There is no statutory provision in the CDPA allowing authors to demand (or take legal action for) appropriate remuneration if there was a clear or massive disproportion between payment and use. Authors may have cause for action in equity if they can prove duress, undue influence, or inequality of bargaining power, but this is rare, and again, the courts will not protect an author against bad contract terms that they have agreed to. The best recourse for authors is to negotiate for the introduction of a bestseller clause in their contract, as well as a clause for the reversion of rights (a 'use it or lose it' clause). The SoA always encourages authors to ask for such clauses to be added.

# On transparency.

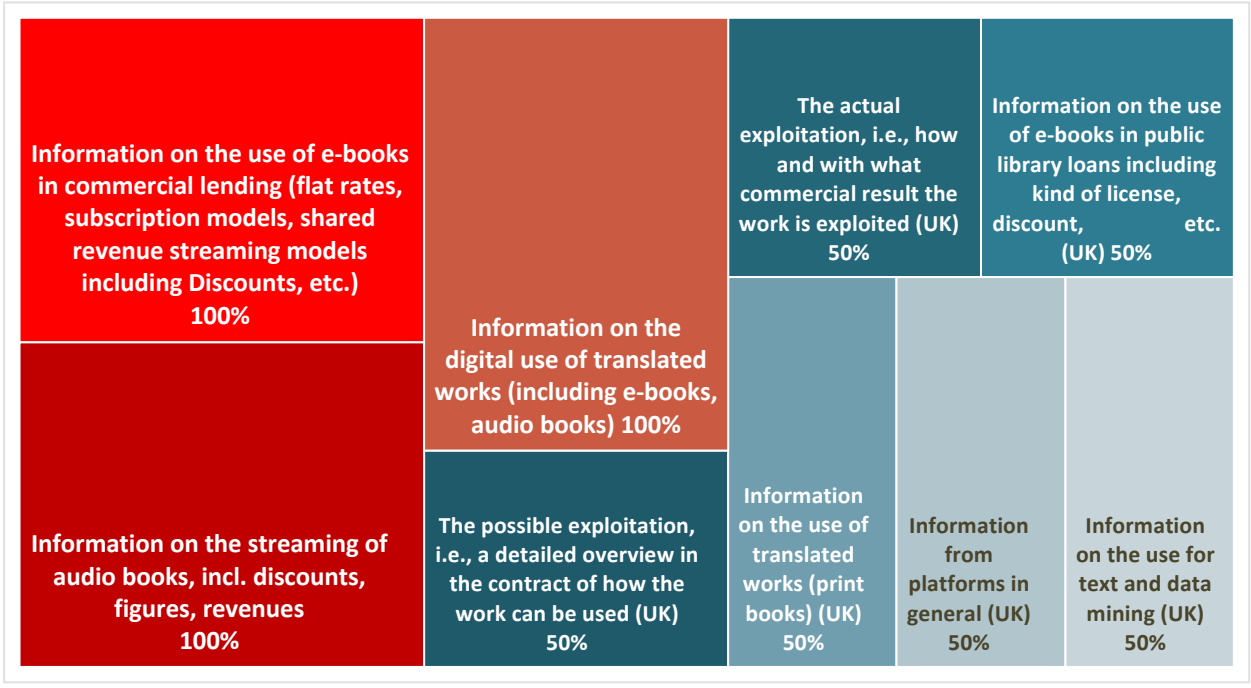
## Is there a legal disposition related to transparency in your country?


UNITED KINGDOM: There is no mandatory provision of law related to transparency incumbent upon publishers. The individual publishing contract will clarify the frequency of the statements of accounts as well as, in some cases, the information that ought to appear on it. Collecting societies, however, do have some obligations: the 2014 Collective Rights Management Directive, which contains provisions designed to improve the accountability and transparency of collecting societies, was implemented in UK law with the CRM Regulations 2016.

How often do authors receive information about the exploitation of their work? (multiple answers possible)


UNITED KINGDOM: In the absence of statutory provisions, the frequency of the statements of accounts depends on the publishing agreement and is subject to negotiation. Publishers usually send the statements twice a year and we continue to advocate for fairer and more detailed accounting clauses in contracts as per our CREATOR campaign (see C.R.E.A.T.O.R | The Society of Authors).

In which areas are the information for authors been rather poor or completely lacking? (multiple answers possible):




Will your organisation negotiate collective transparency rules with publishers' representatives in the future?


UNITED KINGDOM: Alongside our advice to individual members on their contracts, we are continually in discussions with various publishers and commissioning organisations to ensure the best terms for authors and establish minimum standards in their agreements, including regarding transparency clauses. See generally C.R.E.A.T.O.R | The Society of Authors. However, these negotiations are hampered because of Competition laws.

## Contract adjustment mechanism & contractual issues.

Is there a legal disposition related to contract adjustment mechanisms in your country, for example, the re-negotiation of remuneration or right revocation?

ICELAND: The right to re-negotiation of remuneration or right revocation has to be put into every contract.

UNITED KINGDOM: Bestseller and reversion of rights ('use it or lose it') clauses are not required by statute but we would like those clauses to become standard practice and highly encourage authors to ask their publishers to introduce such clauses in their contracts in line with our CREATOR campaign.

## Is there a typical contract (i.e., defined by law) in your country?


## Is there a standard contract negotiated between authors' and publishers' organisations?


UNITED KINGDOM: There are no standard contracts, but there are good practice guides and industry standards for commissioning and publishing contracts. Moreover, we are continually in discussions with various publishers and commissioning organisations to ensure the best terms for authors and establish minimum standards in their agreements. See generally C.R.E.A.T.O.R | The Society of Authors.

## In your country, is there a model contract recommended by your association?


UNITED KINGDOM: We do not have a model contract as each contract needs to be negotiated individually and tailored accordingly; instead, we offer our members free, confidential advice and contract vetting. We are also advocating for fair, minimum standards for contracts in line with our CREATOR campaign (C.R.E.A.T.O.R | The Society of Authors). We also provide guides to terms and particular publishing practices (see e.g. Guide to Publishing Contracts, Guide to Translator/Publisher contracts, etc.).

## Is your organisation entitled to negotiate contract rules with publishers' representatives?


# Alternative dispute resolution procedure.

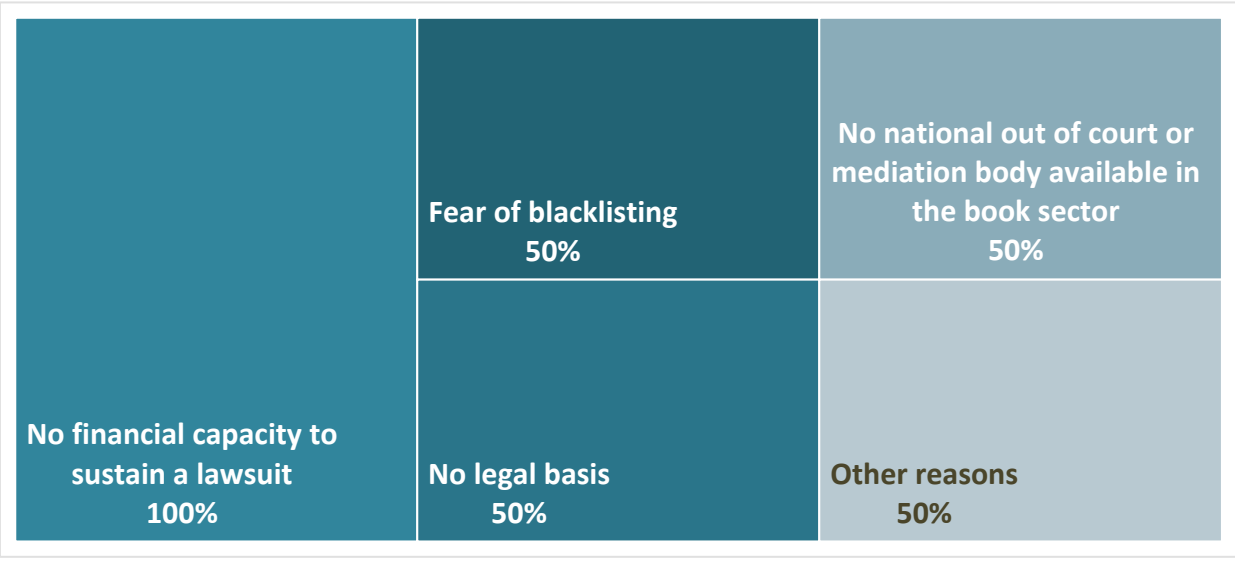
## Is there a legal disposition related to (alternative and out of court) dispute resolutions in your country?


ICELAND: There is a clause about this in Icelandic Copyright laws.

Is there a mediation body in the book and publishing sector related to (alternative) dispute resolutions in your country?


UNITED KINGDOM: The Intellectual Property Office runs a low-cost mediation service. The Civil Mediation Council has a search facility which lists registered mediators. Note also that the Small Claims Track operates its own mediation service once legal proceedings have started.

Why do you think authors avoid disputes so far? (Multiple answers possible)




## Right of revocation.

Is there a legal disposition related to right of revocation in your country?


Which issues (both in relation to contract law, and other developments (AI, streaming, platforms, self-publishing, post-Corona-consequences, social issues ...) do you consider as upcoming challenges for authors and especially for your members?

ICELAND: The DSM directive will be implemented into Icelandic Copyright laws and hopefully articles 18 - 22 will be implemented in a way that we approve of. The biggest challenge for Icelandic authors at the moment is the monopoly of a subscription streaming service, Storytel and a complete lack of transparency in the remuneration.

UNITED KINGDOM: CREATOR and Earning a living.

- CREATOR campaign: [fair contracts]
- Creative industries investment namely re post-covid recovery
- Equality, Diversity, and Inclusivity
- Freedom of expression and human rights
- Sustainability

# Annex

### Tool and analysis method

Monkey Survey (Extra) ©1999-2022, online query,
secured invitation link, full text analysis.

### Participants by country – implementation of the Directive (EU) 2019/790

Czech Republic
Denmark
Finland
France
Germany
Ireland
Portugal
Romania
Spain
Sweden

### Participants by name of association – implementation of the Directive (EU) 2019/790

Association of Catalan Language Writers
Czech Writers Association
Danish Authors' Association
German Writers' Union
Irish Writers Union
Société des Gens de Lettres (France)
Society of Swedish Authors in Finland
Sociedade Portuguesa de Autores SPA
Swedish Association of Educational Writers
The Association of Finnish Nonfiction Writers
The Swedish Writers' Union
Writers' Union of Romania

### Participants – On the situation of authors in the non-EU countries of the European Book Sector

Iceland – The Writers' Union of Iceland
United Kingdom – The Society of Authors

### EWC survey team

Maïa Bensimon (Vice President), Myriam Diocaretz (Secretary-General),
Nina George (President).



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