

LEGISLATIVE PITFALLS: CASE STUDY OF ARTICLE 17 DSM DIRECTIVE RIA IN THE CZECH REPUBLIC*

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Abstract: *The submission shall discuss general principles of good lawmaking and the role of RIA in employing modern economic theory and methodology by providing general background and case study of Article 17 DSM Directive implementation. The goal of submission is twofold. First, it shall, on an example of a case study, demonstrate the inadequacy of the Czech RIA application and observe possible improvements. Second, it shall employ the relevant theory of economic analysis of law to explain observed inadequacy and formulate general observations that would apply to RIA processes across various EU member states.*

1. Introduction

Regulatory impact assessment (“*RIA*”) is a regular part of modern lawmakers’ toolset that aims to improve legislation coherency and generally promote efficient decisionmaking. RIA is a systemic approach that employs economic methodology to assess the costs and benefits of proposed legislation and its alternatives.¹ RIA’s goals are to improve economic welfare by assisting in the creation of quality regulation and it can be a valuable insight throughout the legislative process.²

RIA found its regular application in the majority of EU member states.³ Nonetheless, respective national systems employ RIA in vastly different ways. On the one hand, the use of RIA in the US conceptually flourished under Sunstein during the Obama administration by application of modern behavioral economy.⁴ On the other hand, the European Union member states reveal a fragmented national landscape with better and worse examples of RIA application.⁵ The Czech Republic shall be tackled by the submission and analyzed as outlined below.

RIA represents an attempt at a comprehensive approach and promotes lucidity, traceability, flexibility and consistency in lawmaking.⁶ RIA, furthermore, aids the complexity of legal decision-making by offering interdisciplinary methodology to lawmakers and applying the economic approach to law. Nonetheless, RIA is not a

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¹ ‘Regulatory Impact Analysis: A Tool for Policy Coherence – OECD’ <<https://www.oecd.org/gov/regulatorypolicy/ria-tool-for-policy-coherence.htm>> accessed 14 October 2022.

² Ibid.

³ ALAIN MARCIANO and GIOVANNI BATTISTA RAMELLO (eds), *Encyclopedia of Law and Economics* (Springer New York 2019) 1797 <<http://link.springer.com/10.1007/978-1-4614-7753-2>> accessed 13 October 2022.

⁴ ibid 1796.

⁵ OECD, *Better Regulation Practices across the European Union* (OECD 2019) <https://www.oecdilibrary.org/governance/better-regulation-practices-across-the-european-union_9789264311732-en> accessed 14 October 2022.

⁶ MARCIANO and RAMELLO (n 3) 1798.

tool associated exclusively with economic analysis of law that had been observed exclusively as an academic approach despite the common application of economic theory and methodology.⁷

This submission tackles RIA in the specific case of Article 17 DSM Directive implementation. For this purpose, the submission conceptualizes the RIA process in the Czech Republic and provides insight into the specific case study. Finally, the economy and law theory shall provide insights into the pitfalls of the RIA process in the Czech Republic.

The submission reveals a challenged legal landscape where the RIA process is rather formal, not material, process, due to, e.g., regulatory capture or improper order of legal drafting and RIA. Finally, RIA is vulnerable to observing technology as static which is highly problematic in the landscape of rapid technological advancements, such as the online copyright arena.

2. RIA in the Czech Republic

RIA was introduced into the Czech legal system in 2005 by the first methodology applied to selected drafts.⁸ Subsequently, RIA was applied widely after the pilot phase due to changes in Government Legislative Rules and the development of general methodology in 2007. The following years witnessed the Czech government tackling the process. In 2011 RIA relocated under the wings of the Office of the Government and its RIA department as a coordinating body. Moreover, Government Legislative Council saw an introduction of the Working Party on Regulatory Impact Assessment that independently evaluates RIA quality.

Subsequently, RIA is hardly a brand-new occurrence to the Czech legislature. Long application, however, does not amount to the good legislature and process quality. Nonetheless, even OECD repeatedly evaluated RIA in the Czech Republic positively.⁹

OECD, specifically, remarked that RIA is well-developed in the Czech Republic.¹⁰ However, OECD voiced concern over the ability to quantify impacts where it observed insufficiencies. This criticism shall be highlighted below as relevant to the economic analysis.

Finally, one must note the professional affiliation of officials conducting RIA. Interestingly, Broulík and Bartošek report that RIA in the Czech Republic is not an economic exercise but a legal one.¹¹ Professionally, RIA is conducted by lawyers that might lack the sufficient economic background to perform RIA on a higher level.¹²

3. DSM Directive implementation

The following part provides a case study on the example of DSM Directive implementation with a specific focus on Article 17 implementation¹³ and the RIA performed by Czech institutions. DSM Directive presents an example of complex legislation entailing copyright in the Single Digital Market that was finally implemented in the Czech Republic only in December 2022 despite the June 2021 deadline.¹⁴

⁷ *ibid* 1799–1801.

⁸ See official government information providing historical timeline and overview. ‘Ukotvení RIA v České republice | ria.vlada.cz’ <<https://ria.vlada.cz/ria/ukotveni/>> accessed 27 October 2022 Similarly, data provided below. Also see OECD (n 5) 136–137.

⁹ ‘OECD Regulatory Policy Outlook’ (*oecd-ilibrary.org*, 2015) 152 et seq. <https://read.oecdilibrary.org/governance/oecd-regulatory-policy-outlook-2015_9789264238770-en> accessed 27 October 2022; OECD, ‘Czech Republic’ (OECD 2019) <https://www.oecd-ilibrary.org/governance/better-regulation-practicesacross-the-european-union_9002ebf7-en> accessed 14 March 2022.

¹⁰ OECD (n 5) 136.

¹¹ JAN BROULÍK and JAN BARTOŠEK, *Ekonomický přístup k právu* (1st edn, C H Beck 2015) 141.

¹² *Ibid.*

¹³ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC 2019 [32019L0790].

¹⁴ ‘Parliamentary Print 31’ <<https://public.psp.cz/en/sqw/historie.sqw?t=31&o=9>> accessed 15 October 2022.

A closer examination of Article 17 reveals that the Czech approach does not entail innovative solutions as it closely follows black letter Article 17 provisions. Nonetheless, the examination of Article 17 RIA showcases fundamental problems as it exceeds the cost-benefit analysis function by providing legal interpretations beyond its scope and presenting a narrow set of solutions while simultaneously failing to quantify and truly evaluate the costs and benefits.¹⁵

The RIA observed three issues concerning Article 17 implementation, (i.) OCSSP definition; (ii.) liability regime under Article 17 (4); and (iii.) exercise of rights affected under Article 17.¹⁶ Provided examples of German implementation, however, one must recognize that Article 17 truly provides the legislative branch with much broader alternatives.¹⁷ Moreover, RIA recognizes only two possible solutions to each respective area, the minimalistic one that consists of literal transposition or extended where additional elements are introduced.¹⁸

The narrow scope of the RIA examination showcases the weakness of DSM Directive RIA. Specifically, it suggests that Czech legislators have very limited scope in implementing the DSM Directive. Nonetheless, numerous other issues could be considered, such as the de minimis uses or measures to mitigate overblocking.¹⁹

3.1. OCSSP Definition

Examining the specific issues, one must first observe how the Czech Republic tackled the OCSSP definition. Here RIA suggests that one must strictly follow original wording, i.e., literal (minimal) transposition.²⁰ Otherwise, one would have to include further definition of the following additional elements: “large amount of copyrightprotected works or other protected subject matter”²¹, “important role on the online content market”²² and “which it organizes and promotes”²³.

Interestingly, RIA provides readers with an interpretation of these elements and provides a list of services within the OCSSP category:

”so-called content sharing repositories (e.g. datator.cz, datoid.cz, eDisk.cz, fastshare.cz, file-share.top, hellshare.cz, hellspy.cz, prehrajo.cz, sdilej.cz, sledujteto.cz, streamuj.tv, ulož.to or webshare.cz)”²⁴

Nonetheless, the subsumption of services under the definition should be the task of the courts. Notably, enumerated platforms typically operate in the legal grey zone where they allow users to upload and download content. The application of safe harbour provisions has been previously controversial and even is currently subject to CJEU preliminary question under case number C 470-22.²⁵ In this particular case, the Czech

¹⁵ RIA accessible at ‘Bill Amending Act No. 121/2000 Coll., on Copyright, on Rights Related to Copyright and on Amendments to Certain Acts (Copyright Act), as Amended, and Other Related Acts’ <<https://odok.cz/portal/veklep/material/KORNC7DHSVAC/>> accessed 15 October 2022.

¹⁶ RIA at ibid 135.

¹⁷ Hayleigh Boshier, ‘De Minimis Uses and the German Implementation of Art. 17 DSM Directive’ (*The IPKat*, 24 May 2021) <<https://ipkitten.blogspot.com/2021/05/guest-post-de-minimis-uses-and-german.html>> accessed 27 October 2022; ‘DSM Directive Implementation Tracker – Germany’ (*Notion*) <<https://www.notion.so>> accessed 28 October 2022.

¹⁸ RIA at ‘Bill Amending Act No. 121/2000 Coll., on Copyright, on Rights Related to Copyright and on Amendments to Certain Acts (Copyright Act), as Amended, and Other Related Acts’ (n 15) 137.

¹⁹ Boshier (n 17).

²⁰ See RIA at ‘Bill Amending Act No. 121/2000 Coll., on Copyright, on Rights Related to Copyright and on Amendments to Certain Acts (Copyright Act), as Amended, and Other Related Acts’ (n 15) 138–139.

²¹ Art. 2(6) CDSM.

²² Rec 62 CDSM.

²³ Art. 2(6) CDSM.

²⁴ See RIA at ‘Parliamentary Print 31’ (n 14) 139.

²⁵ *Case C-470/22: Request for a preliminary ruling from the Vrchní soud v Praze (Czech Republic) lodged on 14 July 2022 – Česká národní skupina Mezinárodní federace hudebního průmyslu, z s v I&Q GROUP, spol s r.o., Hellspy SE (ECJ).*

Supreme court ruled that the E-Commerce provisions does not cover liability for unfair competition acts consisting of free riding on copyright infringement of users.²⁶ Specifically, the Supreme court found that:

“(t)he subject-matter of the proceedings is the protection against unfair competition based on the particular economic method (business model) of the defendants’ provision of the service in question, which arises from a different legal liability of the defendants than the liability for the content of the stored information.”²⁷

3.2. Liability Regime

Next, RIA tackles the liability regime under Article 17 (4). RIA, again, offers the minimal transposition option that does not go beyond the original black letter.²⁸ The extended option would, furthermore, include DSM Directive recitals providing further background.²⁹ Similarly to the academic and European discussions, the predominant RIA focus lies on preventive and removal obligations under Article 17 (4) (b) and (c).³⁰ Attention is, subsequently, paid to the choice of tools to comply with the obligations, where RIA, e.g., provides a list of market-available CRM technologies, such as ACR Cloud, Audible Magic, Pex or BMAT.³¹

3.3. Exercise of Rights

Finally, RIA considers the last defined issue of the exercise of rights under Article 17.³² Here, RIA considered how the implementation could mediate the authorization market between rightsholders and OCSSPs. The minimal option proposes no changes to existing law, thus leaving the rightsholders with doors open to individual or collective management. Extended option would implement the collective licensing with an extended effect.³³

3.4. RIA’s Position

RIA concludes the observed narrow issues by providing the following cost and benefit analysis (A = OCSSP definition; B = liability regime under Article 17 (4); C = exercise of rights affected under Article 17):³⁴

²⁶ ZDENĚK KUČERA and JIŘÍ MARŠÁL, ‘Piercing the Safe Harbor? Czech Supreme Court Issues Unique Judgment on Intermediary Liability for “Free Riding” on Copyrighted Content Shared by Users’ (*CEE Legal Matters*) <<https://celegalmatters.com/czech-republic/19880-piercing-the-safe-harbor-czech-supreme-court-issues-uniquejudgment-on-intermediary-liability-for-free-riding-on-copyrighted-content-shared-by-users>> accessed 3 December 2022.

²⁷ Para 118 ‘23 Cdo 2793/2020 Služba ukládání informací (hosting)’ (*Zákony pro lidi*) <<https://www.zakonyprolidi.cz/judikat/nscr/23-cdo-2793-2020>> accessed 3 December 2022.

²⁸ See RIA at ‘Bill Amending Act No. 121/2000 Coll., on Copyright, on Rights Related to Copyright and on Amendments to Certain Acts (Copyright Act), as Amended, and Other Related Acts’ (n 15) 141.

²⁹ *Ibid.* p. 141–142

³⁰ *Ibid.*

³¹ *Ibid.*, p. 143–148.

³² *Ibid.*, p. 149 et seq.

³³ *Ibid.*, p. 152.

³⁴ For the original table see *Ibid.*, p. 153–154.

Benefits, problems, costs and risks of the options considered				
option	benefits	problems/risks	costs	overall
A.1	(+) greater guarantee of uniform regulation across the EU	(-) less legal certainty for actors in the digital market segment (interpretation disputes)	Neutral	Neutral
A.2.	(+) greater legal certainty for actors in the digital market segment	(-) risk of lower level of harmonization within the EU (-) risk of noncompliance with possible future interpretation of the CJEU neutral prevail	neutral	(-) prevail
B.1.	(+) greater guarantee of uniformity of regulation within the EU (+) less risk of possible inconsistency with future CJEU case law	(-) possible interpretative doubts (will be, at least partially, removed by the EC Guidelines on Article 17)	(-) costs associated with the use of technology to identify and remove content and handle complaints (for a number of actors – already used under existing legislation)	neutral
B.2.	(+) partially increased legal certainty for the addressees of the legislation	(-) risk of eventual non-compliance with future CJEU case law (-) risk of a lower level of harmonization within the EU	(-) costs associated with the use of technology to identify and remove content and handle complaints (in the case of a number of entities – already used under existing legislation)	(-) prevail
C.1.	(+) Maintaining a greater degree of contractual freedom (+) simplification of obtaining a licence (+) greater legal certainty for users (both service providers and service users)	(-) less legal certainty for users	(-) greater administrative costs for service providers in obtaining permission from right holders	(+) prevail
C.2.	(+) simplification of obtaining a licence (+) preservation of contractual freedom (opt-out) (+) greater legal certainty for users (both service providers and service users)	(-) strong preference for maintaining freedom of contract (i.e. max. opt-out regime) in some areas (e.g. audiovisual) (-) large number of rights holders not yet represented by the CS	(-) higher administrative costs for collective managers	neutral

4. Economic analysis

One could, first, consider OECD conclusions that underline the lack of impact quantifications. The table above demonstrates exactly this shortcoming as it merely considers whether an outcome is positive or negative. This could be attributed, among other factors, to the lawyer professional affiliation of officials performing RIA. No attempt is made to provide any quantification and the final balancing act (see overall) proves to be nothing more than a crystal ball reading.

BROULÍK and BARTOŠEK previously put forward two observations that are tested and showcased by the case study above. Furthermore, their observation that lawyers, not economists, are involved in RIA further underline following points.³⁵ First, they argued that performing RIA after the initial legal draft leads to identifying only one possible solution and nonsensical alternatives.³⁶ One could observe the limited vision provided by RIA above as a perfect example of this.

In the presented situation, RIA has been drafted after the initial legislative draft. Moreover, the legislative text itself is based on DSM Directive. The legislative branch, thus, is prone to follow the original wording provided by the directive's framework. Subsequent RIA, thus, loses its value as it only serves as an ex-post explanation of the drafters' motives.

Second, the Czech application of RIA might be susceptible to regulatory capture³⁷ due to the limited choice of consulted parties.³⁸ As such, Article 17 RIA provides no specific insight into the consultation process and consulted parties since the consultations in the Czech Republic had not been public.³⁹ RIA, however, repeatedly mentions stakeholders that have been part of the process and that are listed in RIA Annex n. 1.⁴⁰ Unfortunately, without further insight, it is impossible to speak to stakeholders' roles or influence over the process. The limited information only allows guessing that user perspective has been underrepresented as stakeholders were predominantly rightsholders or OCSSPs.⁴¹ This observation might relate closely with the cognitive bias of availability explained below.

The public choice theory might serve to explain both of these observations as authorities performing RIA could be observed as economic actors that seek to maximize their benefit and minimize the costs of performing RIA.⁴² Naturally, such a conclusion would observe authorities as rational economic actors that minimize their work to submit acceptable results.⁴³ One, however, cannot rule out political role of involved actors that could pursue own agenda by submitting limited RIA reasoning for black letter transposition.⁴⁴

Authorities, however, are occasionally irrational actors prone to behavioral bias.⁴⁵ The above, thus, could be explained specifically by availability biases. The availability of arguments could play a significant role as active stakeholders primarily provided their perspectives and arguments.⁴⁶ More involvement of user associations, e.g., could offer significantly different outcomes.

³⁵ BROULÍK and BARTOŠEK (n 11) 141.

³⁶ *ibid* 141.

³⁷ See ERNESTO DAL BÓ, 'Regulatory Capture: A Review' (2006) 22 *Oxford Review of Economic Policy* 203.

³⁸ BROULÍK and BARTOŠEK (n 11) 145.

³⁹ 'CDSM Implementation Resource Page – CREATE' <<https://www.create.ac.uk/cdsm-implementation-resourcepage/>> accessed 15 October 2022.

⁴⁰ See RIA at 'Bill Amending Act No. 121/2000 Coll., on Copyright, on Rights Related to Copyright and on Amendments to Certain Acts (Copyright Act), as Amended, and Other Related Acts' (n 15) 188.

⁴¹ See Annex n. 1 at *Ibid.*, p. 188.

⁴² BROULÍK and BARTOŠEK (n 11) 143.

⁴³ RICHARD H THALER and CASS R SUNSTEIN, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Penguin Books 2009) 20.

⁴⁴ Under the moderate public choice view of legislation, actors seek to promote ideological beliefs while seeking to remain in power. NIVA ELKIN-KOREN and ELI SALZBERGER, *The Law and Economics of Intellectual Property in the Digital Age* (Taylor & Francis Ltd 2015) 236.

⁴⁵ *Homo sapiens, not homo economicus*. Thaler and Sunstein (n 43) 20 et seq.

⁴⁶ Accessibility of information may lead to overestimate of available experience. See *Ibid.*, p. 36 et seq.

Finally, one must observe that RIA is fixed in time and considers merely the existing status quo. Internet, however, provides a rapidly developing environment.⁴⁷ The failure of RIA to account for these possible changes could be demonstrated, i.e., on the analysis of available CRM technologies. As demonstrated previously by Elkin-Koren and Salzberger, failure to account for the interdependence of law and technology in the context of modern technology provides non-representative insights relevant to a fixed point in time.⁴⁸

5. Concluding remarks

In conclusion, the submission sets the theoretical framework for the analysis of RIA and analyzes the RIA framework in the Czech Republic. Subsequently, the submission performs a case study on the example of Article 17 DSM Directive implementation and demonstrates the inadequacy of the Czech RIA application and observes possible improvements. Finally, the submission employs the relevant theory of economic analysis of law to explain observed inadequacy and formulate general observations.

The economic analysis provides insight that RIA, in the case of Article 17 DSM Directive, provides a narrow vision and defines issues improperly. The failure can be explained by several factors, such as the psychological bias or cost-minimization of RIA performance. Furthermore, the RIA's failure to observe ever-developing technology significantly undermines any conclusions presented therein. Finally, the OECD's criticism of the lack of impact quantification is present in the observed case.

⁴⁷ NIVA ELKIN-KOREN and ELI SALZBERGER, *The Law and Economics of Intellectual Property in the Digital Age* (Taylor & Francis Ltd 2015), 33–35.

⁴⁸ *Ibid.*, p. 34, 69.

