

## EDiMA comments on BG Presidency draft compromise text on the Directive on copyright in the Digital Single Market, dated 17/05/2018

The Presidency's [latest proposal](#) (dated 17 May 2018) for a compromise on the Directive on copyright in the Digital Single Market has confirmed its intentions to remove user uploaded content from the scope of the e-Commerce Directive for copyright and to move ahead with a publishers' right.

We regret that the overwhelming opposition to such proposals is not given more consideration (see Annex for the most recent developments in the run up to the COREPER of 26<sup>th</sup> April). EDiMA maintains strong reservations against such proposals which will inflict long lasting damage to Europe's competitiveness and innovation.

Here we highlight the most pressing concerns that require the most immediate attention.

### **Article 13**

- Scope:

Certain service providers which are not the intended target of this Directive ought to be explicitly excluded in Article 2.5. While we understand that efforts have been made in Recital 37a to clarify the scope of application, much of the new language is confusing and will not limit the scope in practice without further amendments to the Article itself:

- Electronic communications service providers - such as ISPS, instant messaging services, email services should be clearly excluded from the scope in the text of Article 2.5. In addition, it should be made clear that cloud service providers are fully excluded - for instance it is unclear whether B2B or enterprise cloud services are still in scope as only cloud services for one's "own" use are excluded.
- Although we understand the spirit behind the exclusion of SMEs from certain obligations under Article 13, we disagree with this course of action. An exclusion for smaller service providers will only create a glass ceiling for those companies which are trying to grow a business in the EU. It must also be noted that this exclusion will achieve little in practice, as an obligation on a service provider – of any size – to remove content based solely on a notification "of a work", without any reference to the infringing use of that work, is not feasible (see below).
- We understand some delegations have called for the limitation of the scope of Article 13 to certain categories of works or other subject matter, such as a music or audiovisual works. This intention appears to be reflected in the language of Recital 37a, however (and as noted above) the language therein falls short of providing any legal certainty for the service providers concerned. To address this, we recommend that the scope of the targeted works in Article 2.5 is clarified to target phonograms only.
- **In relation to scope we also urge Member States to consider the interaction between Articles 11 and 13 and in particular to clarify that there should be no filtering measures for "snippets" or other subject matter protected by Article 11.**

- Liability:

Article 13.3 removes most open platforms from the limited liability regime of the e-Commerce Directive, creating a parallel "unlimited liability" regime – all without the backing of a proper impact assessment or prior stakeholder consultation. Outside of our well-established concerns with any back-

door interference with the e-Commerce Directive and with the functionality of the text in mind, we recommend:

- That Article 13.3 is deleted. This would ensure that the notice and action regime described within the e-Commerce would provide a workable and well-established framework for the execution of the mitigation measures described in Article 13.4 (below).

- “Mitigation measures”:

As the “unlimited liability” regime would make it all but impossible for digital intermediaries to allow users to share content, Article 13.4 introduces so-called mitigation measures. We recognise that some improvement has been made to the text of Article 13.4(a) to clarify the requisite information to be provided for the implementation of the measures described therein, but some amendments to Article 13.4(b) are still required:

- The reference to “notification of works” to be provided by the rightholder for the implementation of Article 13.4(b) is unworkable. Article 13.4(b) essentially describes a notice and action system under which the service provider must act expeditiously to remove the content. In order to do so, the service provider needs “information of the infringing use” of the work, which would require that the rightholder provide a URL to the infringing use of the work by a user. Without this URL, the service provider is permanently liable for an infringing use of a rightholder’s work by a user somewhere on its service, without knowing where to find it and how take action.

## **Article 11**

While we recognise that the removal of the retroactivity criterion and the reduction in the term of protection are positive steps in the latest proposal, we continue to urge Member States take account of precedents from Spain and Germany (not to mention overwhelming stakeholder and academic consensus) and opt for a presumption of transfer rather than a new publishers’ right. However, should a new publishers’ right continue to be the focus of Council’s negotiations, we recommend that:

- The publishers’ right is based on the originality criteria only. The Presidency’s new proposal is ambiguous as it introduces a new criterion based on “economic significance” in order to protect even the smallest extracts of news, while also retaining the originality criterion. This is an untested criterion which does not take account of the freedom of information and risks establishing a copyright protection for facts – e.g. a match result or a weather report could be protected should it meet the requisite snippet length.
- Article 11(1) is brought into line with Recital 34a. The current text appears to be contradictory in that the Recital allows for Member States to choose between the preferred criteria when implementing the publishers’ right, while Article 11(1) does not allow for this.

## **Annex**

[Over 200 academics criticized article 11](#) (publisher rights) which would impede “the free flow of information that is of vital importance to democracy” and “would be likely to harm journalists”. Leading European centers researching intellectual property, information and innovation law published an open letter, “[The Copyright Directive is failing](#)”, noting that the proposals for Art. 13 “threaten the user participation benefits of the eCommerce Directive (2000/31/EC) which shared the responsibility for enforcement between rightholders and service provider”.

Over 145 organisations including startups, digital rights groups, human rights advocates, universities, research institutions, libraries, digital industry representatives from all over Europe, joined together to highlight that “the text represents a major threat to the freedoms of European citizens and businesses and promises to severely harm Europe’s openness, competitiveness, innovation, science, research and education” ([here](#)).

Wikimedia Germany [displayed a take action banner](#) calling the government to act against article 13 and censorship filters. GitHub stated that “upload filters raise a number of efficacy, speech, and privacy concerns for software developers and the public” and “neither the Council nor Parliament has yet to effectively protect open source software development” ([here](#)).

The Organized Crime and Corruption Reporting Project (OCCRP), an organisation of reporters, editors, researchers, fact-checkers, [highlighted that Article 11](#) would severely limit accurate and fair reporting, deal a serious blow for investigative journalism and present a giant step backward in the fight against fake news.

The former EP rapporteur Comodini Cachia called for policy makers to put “put the general public and the citizens as a priority together with the creators” and insisted “there should be no European legislation on particular national interests especially in the digital single market” ([Politico, paywall](#)). MEPs Tiemo Wölken, Julia Reda, Jan Philipp Albrecht, Nadja Hirsch and Martina Michels posted a YouTube video against article 13 ([here](#), in German). German consumer association VZBV issued a strong statement against Article 13 (“[No upload filters through the back door!](#)”).