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Subject:	Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market - Update of negotiating mandate

I. INTRODUCTION

On 25 May 2018, COREPER granted the Bulgarian Presidency a mandate (9134/18) to start negotiations with the European Parliament (EP) on the above-mentioned proposal with a view to reaching a first reading agreement. The EP adopted its negotiating mandate on 12 September 2018 (11520/18).

Trilogue negotiations started on 2 October 2018. During the Austrian Presidency, four more trilogues (on 25 October, 26 November, 3 and 13 December 2018), as well was a number of technical meetings were held.

The 6th political trilogue scheduled for 21 January 2019, intended to be the final one, was cancelled in the absence of an overall compromise at the COREPER meeting on 18 January 2019. The positions of delegations indicated that further work was needed to find a compromise between divergent views on the main outstanding issues.

In a second and last attempt, the Presidency prepared a new compromise package, set out in part II of this note, building upon the elements that seemed to be agreed during the last COREPER meeting and taking into account the comments made by delegations. The Presidency has in mind the overall balance of the text, as well as the need to ensure agreements both in Council and with the European Parliament.

The Presidency will therefore invite the delegations to agree at the meeting of COREPER on 8 February 2019 on an updated negotiating mandate as outlined in part II below.

II. POSSIBLE COMPROMISES

A) Article 13 and Article 2(5)

1) Definition of an online content sharing service provider in Article 2(5)

To address the concerns expressed by several delegations, the Presidency proposes to use the term "access" - the definition of *online content sharing service providers* in Article 2(5), thereby reverting back to the wording of the Council mandate on this specific point as adopted by COREPER in May 2018.

Article 2(5)

(5) 'online content sharing service provider' means a provider of an information society service whose main or one of the main purposes is to store ~~and enable user to~~ ~~upload~~ and ***give the public access to*** *a large amount of ~~copyright protected~~ works or other ~~protected~~ subject-matter* ***uploaded by its users*** *which ~~the service~~ **it** organises and promotes for profit-making purposes.*

2) Micro and small sized enterprises

In order to find a balance between the divergent positions of delegations, the Presidency suggests as a compromise solution that micro and small sized enterprises with a turnover under 10 million Euro, whose services have been available to the public in the Union for less than three years, should benefit from a softer liability regime. An additional parameter – the audience - was added for determining micro and small sized enterprises that benefit from this lighter regime. Thus, in the situation where no license is granted, online content sharing service providers in the first three years of their business activity would be subject only to a notice and take down obligation as a rule, but they would also be subject to additional obligation as soon as they reach a significant number of visitors.

A new paragraph 4aa, added in Article 13, would read as follows:

Article 13(4aa)

Member States shall provide that when new online content sharing service providers whose services have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million within the meaning of the Commission recommendation 2003/361/EC, the conditions applicable to them under the liability regime set out in paragraph 4 are limited to the compliance with the letter a above and to acting expeditiously, upon receiving a sufficiently substantiated notice, to remove the notified works and subject matters from its website or to disable access to them.

Where the average number of monthly unique visitors of these service providers exceeds 5 million, calculated on the basis of the last calendar year, they shall also demonstrate that they have made best efforts to prevent further uploads of the notified works and other subject matter for which the rightholders have provided relevant and necessary information.

It is suggested that the relating recital would highlight the similarities with Article 16(2) of Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, as well as the conditions of application in order to avoid possible abuses.

(Clarifications along the following lines to be added in recital (38b), row 83:

Paragraph 4aa applies to new online services. A similar provision is foreseen in Article 16(2) of Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market. This regulation is intended to take into account the specific case of start-up companies working with user uploads to develop new business models.

The modified regime applicable to new service providers with a small turnover and audience should benefit genuine new enterprises and should therefore cease to apply three years after they became first available online in the Union. It should not be abused by arrangements aiming at extending the benefit of this modified regime beyond the first three years. In particular, it should not apply to services newly created or to services provided under a new name but which are pursuing the activity of an already existing online content sharing service provider which could not or does not longer benefit from this regime.

In order to take also on board the suggestion of those delegations that asked for a review clause, a new paragraph 1a would be added in Article 22 as follows:

The Commission shall, by [three years after the end of transposition deadline set out in Article 21(1)], assess the impact of the specific liability regime applicable to online content sharing service providers which have an annual turnover of less than EUR 10 million under Article (4aa) and, if appropriate, take action in accordance with the conclusions of its assessment.

3) Relationship with the E-commerce Directive (Article 13(3) and (7))

The Presidency made a minor change in Article 13(3), aligning the wording of this provision to the text of the Council mandate adopted by COREPER in May 2018 (adding the word "possible"). A change is also made to Article 13(7), to take into account the concerns of some delegations as regards the reference to Article 15 of the E-commerce Directive.

Article 13(3)

When an online content sharing service provider performs an act of communication to the public or an act of making available to the public, under the conditions established under this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply to the situations covered by this Article. This shall not affect the ***possible*** *application of Article 14(1) of Directive 2000/31/EC to these service providers for purposes falling outside the scope of this Directive.*

Article 13(7)

The application of the provisions in this article shall not lead to any general monitoring obligation ~~as defined in Article 15 of Directive 2000/31/EC~~.

4) Mitigation of liability (Article 13(4) and related recital (38b))

In Article 13(4), the Presidency suggests removing the reference to "*relevant and necessary information"* from the *chapeau* of the provision, as announced in COREPER on 18 January 2019, responding to the concerns of several delegations asking for more precision with regard to the mitigation of liability.

Point (a) in paragraph 4 is kept in the text, with a relating recital on contractual freedom clarifying that rightholders are not obliged to grant licences.

The wording in paragraph 4 also makes it explicit that the conditions for the mitigation of liability are cumulative.

Article 13(4)

If no authorisation is granted, online content sharing service providers shall be liable for unauthorised acts of communication to the public of ***copyright protected works*** *and other subject matter ~~for which the rightholders have provided the service providers with the relevant and necessary information or submitted a notice~~, unless the service providers demonstrate that they have:*

(a) made best efforts to obtain an authorization ***and***

(b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information, ***and in any event***

(c) acted expeditiously, upon receiving a sufficiently substantiated notice by the rightholders, to remove from their websites or to disable access to the notified works and subject matters, and made best efforts to prevent their future uploads in accordance with paragraph (b).

Article 13(4a)

*In determining whether the service has complied with its obligations under paragraph 4**,** in the light of the principle of proportionality, the following factors should, among others, be taken into account:*

(a) the type, the audience and the size of the service ~~[including whether they are provided by a microenterprise or a small-sized enterprise within the meaning of Title I of the Annex to Commission Recommendation 2003/361/EC (Role of SMEs to be discussed in relation to the scope - discussion is still open on this point - see Article 2(5), row 125)];~~

(b) the number and type of works or other subject matter uploaded by the users of the service;

(c) the availability of suitable and effective means and their cost for service providers.

The related recital (38b) is also further aligned to the changes made in Article 13 above. And an explanation is added with regard to "best efforts" as requested by some delegations.

Recital 38b – Row 83

(38b) Taking into account the fact that online content sharing service providers give access to content which is not uploaded by them but by their users, it is appropriate to provide for a specific liability mechanism for the purposes of this Directive for cases where no authorisation has been granted. This should be without prejudice to remedies under national law for cases other than liability for copyright infringements and to the possibility for national courts or administrative authorities of issuing injunctions in compliance with Union law.

Where no authorisation has been granted to the services providers, they should make their best efforts ***~~in cooperation with rightholders and~~*** *in accordance with high industry standards of professional diligence to avoid the availability on their services of unauthorised works and other subject matter, as identified by the relevant rightholders. For that purpose rightholders should provide the service providers with necessary and relevant* ***information*** ***~~data~~*** *taking into account, among other factors, the size of rightholders and the type of their works and other subject matter. The steps taken by the online content sharing service providers in cooperation with right holders should not lead to the prevention of the availability of non-infringing content, including the use of works or other protected subject matter covered by a licencing agreement, exception or limitation to copyright. Thereby it should not affect users who are using the online content sharing providers' services in order to lawfully upload and access information on these services.*

The obligations established in Article 13 should also not lead to Member States imposing a general monitoring obligation.

When assessing whether an online content sharing service provider has made its best efforts according to the high industry standards of professional diligence, account should be taken of ***whether the service provider has taken all the steps that would be taken by a diligent operator to achieve the result of preventing the availability of unauthorised works or other subject matter on its website, taking into account best industry practices and the effectiveness of the steps taken in light of all relevant factors and developments, as well as the principle of proportionality****. For the purposes of this assessment, a number of elements should be considered, such as the size of the service, the* ***evolving*** *state of the art of existing means****, including future developments,*** *for avoiding the availability of different types of content and their cost for the services. Different means to avoid*

the availability of unauthorised copyright protected content may be appropriate and proportionate per type of content and it is therefore not excluded that in some cases unauthorised content may only be avoided upon notification of rightholders.

Any steps taken by the service providers should be effective with regard to the objectives sought but should not go beyond what is necessary to achieve the objective of avoiding and discontinuing the availability of unauthorised works and other subject matter.

If unauthorised works and other subject matter become available despite the best efforts made in cooperation with rightholders as required by this Directive, the online content sharing service providers should be liable in relation to the specific works and other subject matter for which they have received the relevant and necessary information from rightholders, unless they demonstrate that they have made their best efforts pursuant to high industry standards of professional diligence.

In addition, where specific unauthorised works or other subject matter have become available on the services, including ***irrespective of whether*** ~~*despite*~~ *the best efforts* ***were*** *made* ***and regardless of whether right holders have made available the necessary information in advance,*** *the online content sharing service providers should be liable for unauthorised acts of communication to the public of* works and other subject *matter, when upon receiving a sufficiently substantiated notice, they fail to act expeditiously to remove from their websites or disable access to the notified works and subject matter. These service providers should also be liable if upon receiving a notice they fail to demonstrate that they have made their best efforts to prevent the future uploads* ***of notified works, based on relevant and necessary information provided by rightholders****.*

When rightholders do not provide the service providers, with the necessary and relevant ***information*** ~~*data*~~ *on their specific works and other subject matter or when no notification concerning the removal or disabling access to specific unauthorised works or other subject matter has been provided by rightholders and, as a result, online content sharing service providers cannot make their best efforts to avoid on their services the availability of unauthorised content in accordance with the high standard of professional diligence the service providers should not be liable for unauthorised acts of communication to the public or of making available to the public of these unidentified works and other subject matter.*

5) User generated content (UGC) provision (Article 13(5), second sentence)

To address the views expressed on the UGC exception, the Presidency deleted the *illustration* exception. Moreover, it was clarified that users are allowed to upload and make available content generated by themselves or by other users.

Users ***shall be*** *allowed to upload and make available content generated by themselves* ***or by other users*** *and which includes parts of existing protected works and subject matter for the purposes of ~~illustration,~~ quotation, criticism, review, caricature, parody or pastiche****.***

6) Other changes

Comments were made at the last COREPER meeting on the second paragraph of recital (38d). The views of delegations diverged with regard to this paragraph, with some Member States asking for its deletion. Taking into account the views expressed the Presidency proposes as a compromise to modify the text of this paragraph.

Recital 38d – Row 85

(38d) Where online content sharing service providers obtain authorisations, including via licensing agreements, for the use on the service of content uploaded by the users of the service, these should also cover the copyright relevant acts in respect of uploads by the users within the scope of the authorisation granted to the service providers, but only in cases where the users act for non-commercial purposes, such as sharing their content without any profit making purpose, or when the revenue generated by their uploads are not significant in relation to the copyright relevant act of the users for which they are covered. [First sentence of recital (38d) unchanged as in doc. 5138/19]

[Remaining part of recital (38 d) suggested to be replaced by the following]

When rightholders have explicitly authorised users to upload and make available works or other subject-matter on an online content sharing service, the act of communication to the public of the service should be authorised within the scope of the authorisation granted by the rightholder ~~and therefore the online content sharing service provider should not be liable for this authorised act of communication to the public~~.

The Presidency proposes to leave all other parts of Article 13 and the related recitals unchanged as compared to the four column table set out in the Annex to doc. 5138/19 of 17 January 2019.

B) Press publisher's right - Article 11- Remuneration of journalists

As announced at the COREPER meeting of 18 January, the Presidency proposes to add some text to recital (35), reflecting the concerns of some delegations related to employment contracts. The Presidency proposes to leave the text of Article 11 as well as the other recitals related to this article unchanged as compared to the four column table set out in the Annex to doc. 5138/19 of 17 January 2019.

Recital 35 – Row 73

(35) The protection granted to publishers of press publications under this Directive should not affect the rights of the authors and other rightholders in the works and other subject-matter incorporated therein, including as regards the extent to which authors and other rightholders can exploit their works or other subject-matter independently from the press publication in which they are incorporated. Therefore, publishers of press publications should not be able to invoke the protection granted to them against authors and other rightholders or against other authorised users of the same works and other subject-matter. This is without prejudice to contractual arrangements concluded between the publishers of press publications, on the one side, and authors and other rightholders, on the other side. Authors whose works are incorporated in a press publication should be entitled to an appropriate share of the revenues press publishers receive for the uses of their press publications by information society service providers. ***This is without prejudice to Member States' laws on ownership of rights in the context of employment contracts, provided that they are compliant with Union law.***

C) Principle of fair remuneration (Article minus 14)

In order to accommodate the views expressed on this Article, the Presidency proposes some changes in the related recital (39y), in order to leave more flexibility for the Member States with regard to the situations where lump sums could be applied. The text of Article -14 itself as well as the other recitals related to this article remain unchanged as compared to the four column table set out in the Annex to doc. 5138/19 of 17 January 2019.

Recital 39y – Row 90

(39y) *The remuneration of authors and performers should be* ***appropriate and*** *proportionate to the actual or potential economic value of the licensed or transferred rights, taking into account the author's or performer's contribution to the overall work or other subject-matter~~, the actual exploitation of the work~~ and all other circumstances of the case, ~~including~~* ***such as*** *market practices* ***or the actual exploitation of the work****.* *A lump sum payment can constitute proportionate remuneration.* ***Member States should have the possibility, taking into account the specificities of each sector, to define specific cases for the application of lump sums. such as cases*** *~~when proportionate remuneration can be reasonably determined already at the conclusion of the contract~~* ***determining the basis of a proportional remuneration is impossible in practice, or when the contribution of the author or performer is not significant having regard to the overall work or performance*** *~~taking into account the potential economic value of the rights~~.* *Members States should be free to implement the principle of appropriate and proportionate remuneration through different mechanisms, including collective bargaining and statutory mechanisms, provided that such mechanisms are in conformity with Union law.*

D) Revocation right (Article 16a)

For being able to go into the direction of the EP on this point in the context of an overall final compromise, the Presidency kept the text as it was presented at the COREPER meeting on 18 January 2019.

It is clear that Article 16a as well as the Article -14, which are important for the EP, can be given to the EP only as major concessions, which would require, in return, concessions of equal importance made by the EP, in particular on Articles 11 and 13.

E) Optional exception or limitation for text and data mining (Article 3a)

Given that no strong majorities emerged in previous discussions, the Presidency will not pro-actively support the change to a mandatory exception during the negotiations with the European Parliament, but asks COREPER for the flexibility to accept such change, should this become necessary to achieve an overall compromise.

III. CONCLUSION

In the light of the above, the Presidency invites COREPER

- to update the negotiating mandate as suggested in point II of this note as the negotiating basis for the Presidency at the next trilogue tentatively scheduled for 11 or 12 February 2019, which is intended to be the final trillogue on the proposed Directive,

  and

- to grant the Presidency with the necessary flexibility where minor concessions turn out to be necessary for achieving the overall final outcome in the negotiations.