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Subject:	Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - Presidency questions regarding Articles 3a, 11 and 13

Delegations will find attached a set of questions drawn up by the Presidency as the basis of discussions at the Intellectual Property attachés meeting on 16 April 2018.

I. State of play

The Proposal for a Directive on Copyright in the Digital Single Market was discussed by the Permanent Representatives Committee on 31 January 2018, on the basis of document 5284/18, which outlines out the substantive progress achieved and the key outstanding issues which were subject of the orientation debate.
Following the political guidance provided by the Permanent Representatives Committee, the Presidency has continued working with the Member States at working party level in February, March and April 2018.

Continuing its work further, towards finalisation of the discussions in the Council, the Presidency will aim to obtain a negotiation mandate in view of the inter-institutional negotiations with the Parliament. In order to obtain such mandate, a COREPER meeting is planned on 27 April 2018, which will be preceded by a preparatory Attaches meeting, scheduled for the 16 April 2018.

As a next step in view of the Attachés meeting, the Presidency prepared a revised compromise Presidency proposal (to be issued shortly) containing additional amendments which take into account the latest discussions with Member States notably during the WP that took place on 28 March and 11 April and during the bilateral meetings that were carried out.
In order to focus on the main objective of the Attaches meeting – to prepare the COREPER discussion, we would invite delegations to concentrate the discussion around the outstanding issues and questions laid down below in this document.

II. Outstanding issues

Building upon on the discussions up to date, we consider that in order to reach an agreement in COREPER, the remaining issues that need to be discussed are Articles 3a (optional TDM exception), 11 (publishers right) and 13 ("value gap").

During the upcoming Attaché meeting, the Delegations are invited to express their positions on these articles focusing on the questions below, without prejudice to their possibility to raise other key issues they might have in respect to these provisions. Based on the outcome of the discussion, the Presidency may further amend the consolidated compromise proposal in view of the COREPER meeting.

<u>Article 3a – Optional exception for text and data mining</u>

Most delegations seem to agree that the mandatory TDM exception for research purposes laid down in Article 3 should be complemented by an optional exception for text and data mining in other situations covering temporary reproductions and with safeguards for rightholders. However, some Member States have expressed concerns about the scope of the optional exception, that they consider too broad, and suggested to limit its application.

- *Should the scope of the optional exception for text and data mining provided for in Article 3a be limited and to what extent, for example to temporary copies of works and other subject matter which have been made freely available to the public online?*

Article 11 – Protection of press publications

The Presidency takes into account that most Delegations consider that the uses of press publications to be covered by Article 11 are online uses by information society services providers. As regards the criterion to grant protection, we acknowledge that a majority of Member States believe that the criterion to grant protection to parts of a press publication should be the originality, as it is today for the copyright of the works contained therein and that this seems to be a key element to reach an agreement. This approach has been reflected in the second sub-paragraph of Article 11(1) and in recital 34a. However, some delegations have stated that, in addition, the criterion of size could also be used.

- *Taking into account that non-original parts would not be protected anyway, do Member States consider that the size of the parts of press publications should be considered in combination with the originality criterion? If so, could the solution in the second subparagraph of 11(1) be to protect parts of press publications when they are original unless they are very short fragments?*

Regarding the term of protection, many Member States have expressed their wish to further reduce the 10-year term proposed in Article 11(4) of the text.

- *Do delegations consider that the term of protection should be reduced and if so how long should it be?*

Article 13 – *Value gap*

Presidency understands that most Member States agree to an approach which consists of a targeted definition of 'online content sharing service provider' in Article 2(5), a clarification under which conditions these services communicate to the public and a liability mitigation mechanism subject to specific conditions. However, three main issues still remain open:

- The definition of online content sharing service providers in Article 2(5) and in particular whether specific targeting of the services covered by Article 13 is needed, notably through the size of the service provider (for example, exclusion of SMEs).

- Whether the criterion of knowledge should be the key element for the acts of communication to the public by the services covered by this intervention. At the moment, Article 13(1) sets out that an online content sharing service provider performs an act of communication to the public when they have full knowledge of the consequences of its action to give the public access to works and other subject matter. Some Member States consider that this criterion should be removed from paragraph 1 and, as a consequence paragraph 2 should be deleted.

Do the Delegations wish to:

- *further target the services covered, for example by replacing the concept of "large amount" with a carve out of SMEs from article 2(5) according to the definition in the EU Recommendation 2003/361;*
- *keep the criterion of knowledge to determine whether an online content sharing service provider performs an act of communication to the public, or to delete it from Article 13.1 and as a consequence delete 13.2?*

As far as the mitigation of liability is concerned, the Presidency has further clarified the text of Article 13 in the compromise proposal (to be issued) presented to the Attachés, taking into account the discussions during the latest Council Working Party.

Delegations are invited to express their positions answering the questions related to the outstanding issues as set out above in view of preparing the discussions in COREPER and reaching a final agreement on the Council mandate.