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'I/A' ITEM NOTE

From: General Secretariat of the Council
To: Permanent Representatives Committee/Council

Subject: Draft DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC **(first reading)**

- Adoption of the legislative act
- Statements

Joint statement by the Netherlands, Luxembourg, Poland, Italy and Finland

The objectives of this Directive were to enhance the good functioning of the internal market and to stimulate innovation, creativity, investment and production of new content, also in the digital environment. The signatories support these objectives. Digital technologies have radically changed the way content is produced, distributed and accessed. The legislative framework needs to reflect and guide these changes.

However, in our view, the final text of the Directive fails to deliver adequately on the above-mentioned aims. We believe that the Directive in its current form is a step back for the Digital Single Market rather than a step forward.

Most notably we regret that the Directive does not strike the right balance between the protection of right holders and the interests of EU citizens and companies. It therefore risks to hinder innovation rather than promote it and to have a negative impact the competitiveness of the European Digital Single Market.

Furthermore, we feel that the Directive lacks legal clarity, will lead to legal uncertainty for many stakeholders concerned and may encroach upon EU citizens' rights.

We therefore cannot express our consent with the proposed text of the Directive.

Statement by Estonia

Estonia has always supported the objective of the Directive, namely better access to content online, the functioning of key exceptions in the digital and cross-border environment and the better and balanced functioning of the copyright marketplace.

However, Estonia considers that the final text of the Directive does not strike a sufficient balance between different interests in all aspects.

Furthermore, Estonia has recently had parliamentary elections and our new government and parliament have not been able to give their position on the final compromise text.

Statement by Germany

1. The German Federal Government agrees with the proposed Directive on copyright and related rights in the Digital Single Market (hereinafter: 'the Directive') in the version set out in the trilogue compromise of 13 February 2019, because the reform as a whole achieves urgently needed adjustments to the outdated European legal framework, such as the provisions on text and data mining, out-of-commerce works and contract law for performers.

2. At the same time, the German Federal Government regrets that it was not possible to agree on a concept for the copyright responsibility of upload platforms that could be broadly supported by all parties. There is widespread consensus that creatives should participate in the exploitation of their content through upload platforms. However, in particular the obligation provided for in Article 17 of the Directive to ensure the permanent ‘stay down’ of protected content and the algorithm-based solutions (‘upload filters’) likely to be used in this context have met with serious reservations and widespread criticism from the German public. The vote in the European Parliament on 26 March 2019 also revealed the huge gulf between supporters and critics.
3. The focus of our efforts is on performers, authors and ultimately all creatives who naturally make use of the new tools that digitisation and connectivity provide for creative work. The German Federal Government is of course not questioning the need to protect creative work on the internet, and to ensure creatives receive appropriate remuneration for such work.
4. Under Article 17(10), the European Commission is required to conduct a dialogue with all interest groups concerned in order to develop guidelines for the application of Article 17. The provision explicitly calls for a balance to be maintained between fundamental rights and the possibility of using protected content on upload platforms within the framework of legal authorisations. The German Federal Government therefore assumes that this dialogue is based on a spirit of guaranteeing appropriate remuneration for creatives, preventing ‘upload filters’ wherever possible, ensuring freedom of expression and safeguarding user rights. The German Federal Government assumes that uniform implementation throughout the Union will be agreed on in this dialogue, because fragmentary implementation with 27 national variants would not be compatible with the principles of a European Digital Single Market. On the basis of this declaration, the German Federal Government will participate in this dialogue.

5. Where technical solutions are used at all in that connection, the data protection requirements of the General Data Protection Regulation must be adhered to and the EU should encourage the development of open-source technologies with open interfaces (APIs). Open-source software guarantees transparency, while open interfaces ensure interoperability and standardisation. This can prevent market-dominant platforms from further consolidating their market power by means of their established filtering technology. At the same time, the EU must develop concepts that counteract a de facto copyright register in the hands of dominant platforms by means of public, transparent notification procedures.
6. First of all, the requirements laid down in Article 2(6) of the Directive must be addressed and clarified, since the rules are aimed solely at those market-dominant platforms which make large quantities of copyright-protected uploads accessible and which base their commercial business model on such a practice, i.e. services such as YouTube or Facebook. At the same time, we will make it clear that services such as Wikipedia, university repositories, blogs and forums, software platforms such as Github, special-interest offers without any connection to the creative industry, messenger services such as WhatsApp, sales portals or cloud services are not platforms within the meaning of Article 17. In addition, we will ensure an exemption for start-ups.
7. Furthermore, it is clear that upload platforms should continue to be available as free, uncensored communication channels for civil society in the future. Article 17 (7) and (8) stipulate in that connection that protective measures for upload platforms must not impede the permitted use of protected content. We are particularly committed to this because upload platforms are also a springboard for creatives, enabling them to reach a worldwide audience without a publisher or a label.

8. The aim must be to make the ‘uploadfilter’ instrument largely superfluous. Each permanent ‘stay down’ mechanism (‘uploadfilter’) must comply with the principle of proportionality. Procedural guarantees, in particular, could be considered, for example when users notify that they are lawfully uploading content from third parties. In these cases the deletion could not be performed automatically, but only after a check by a person. At the same time, the proprietorship of any content that has to be removed should be sufficiently proven, unless the information comes from a ‘trusted flagger’. In all events the platforms must guarantee easy access to a complaint mechanism for solving contentious cases effectively and as rapidly as possible.
9. In addition, the use of protected content on upload platforms for criticism or reviews, for caricatures, parodies or pastiches, or even in the context of the ‘quotation barrier’, is permitted and free of charge. In such cases the rightholder does not suffer any economic loss anyway. For all other uses platforms should acquire licences, if available relatively easily and for a fair tariff. We will examine how the fair participation of creatives in this licence revenue can be guaranteed through direct payment claims, including in those cases where the label, publisher or producer have the exclusive rights. It is also necessary to guarantee an appropriate remuneration for any new content created on upload platforms and used for commercial purposes. Above all, the proceeds from uses on upload platforms that are desired for political reasons must also reach the creatives themselves.

10. Article 17 aims to monetise the use of protected content on upload platforms and to ensure appropriate and fair remuneration for authors and performers. The German Federal Government shares this goal. In the European compromise, licensing is the method chosen to achieve this. Article 17(4) provides that, in order to fulfil their responsibilities, upload platforms must have ‘made best efforts’ to obtain licences. This will be crucial in the implementation of this provision. Workable solutions for obtaining licences must be found. Although requirements which are unreasonable in practice cannot be imposed on platforms, it is necessary to ensure that efforts to obtain licences are combined with fair offers of remuneration.
11. In order to resolve this issue – of how licences can, as far as possible, be concluded for all content on upload platforms – copyright law provides for many other mechanisms besides ‘traditional’ individual licensing (e.g. exceptions and limitations, possibly combined with remuneration rights; the option of converting exclusive rights into remuneration rights; the obligation to conclude contracts on reasonable terms; and the involvement of associations of creative artists such as collecting societies).
12. The Federal Government will examine all of these models. Should it appear that the implementation has led to a restriction of freedom of expression or should the guidelines set out above encounter obstacles in EU law, the Federal Government will work to ensure that the shortcomings identified in EU copyright law are corrected.
