

Proposal for a REGULATION on a Single Market For Digital Services and amending Directive 2000/31/EC

## DIGITAL SERVICES ACT

COM(2020) 825 final – 15.12.2020

### EUROKINEMA Position

EUROKINEMA represents audiovisual producers at the European level.

The DSA represents an important step toward a more regulated and safer online environment.

Notwithstanding the foregoing, we trust some modifications to the text are necessary:

- to improve a better articulation between the existing EU and Member States' national laws as regards to copyright and related right law, and
- to strengthen the responsibility of intermediaries when moderating illegal contents and therefore notably improving the fight against piracy of audiovisual works for intermediaries not yet covered by article 17 of the 2001 and/or 2019 Copyright Directives.

We remain available to the Commission, the Parliament and the Council to enhance this legislative proposal.

#### A. *Lex specialis*:

- a. Copyright law and related rights are composed of a set of rules and national, European and international treaties and laws that together form a "*lex specialis*".
- b. The 2019 Copyright Directive<sup>1</sup> notably provides in its article 17 for a set of obligations for so-called Online Creative Content Sharing Platforms<sup>2</sup>(OCCSPs). Although OCCSPs do not cover all types of platforms that can give access to copyright protected content (marketplaces for instance are regrettably explicitly excluded from the scope of Article 17), this article contains provisions that are **key to our sector** as they clearly clarify the fact that uploading of an audiovisual content is an act of Communication to the public, and provide for a clear responsibility for OCCSPs to obtain the authorization (notably through license agreements) from right-holders for any copyright-protected content uploaded by a user. In addition, in case of unauthorized uploads, OCCSPs are obliged to do their best efforts to implement measures in order to **take down** and **prevent** access to fraudulent content notified by rightholders.
- c. Article 8.3 of the 2001 Copyright Directive<sup>3</sup> is another example of *lex specialis* that grants to the rights holders the possibility to apply for an **injunction against intermediaries** "*whose*

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<sup>1</sup> [Directive \(EU\) 2019/790](#) of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

<sup>2</sup> See article 2.6 of the Copyright Directive 2019/790

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

*Providers of services, such as not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and-sharing platforms, providers of electronic communications services as defined in Directive (EU) 2018/1972, online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use, are not 'online content-sharing service providers' within the meaning of this Directive."*

<sup>3</sup> [Directive 2001/29/EC](#) of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

*services are used by a third party to infringe a copyright or related right*". This article is key today in most cases of copyright infringements where non-EU Internet platforms or intermediaries are involved. The implementation of this article by Member states varies from one state to another and has sometimes gone further than the very terms of the 2001 Directive, in line with the goals pursued by the Directive, notably "providing for a high level of protection of intellectual property"<sup>4</sup>.

Therefore, it is crucial to us that these major achievements remain unaffected by the DSA.

However, despite Recital 11 and article 1.5.c ruling out copyright and related rights law, spill over effects might loom. The DSA is aimed to "complement" (recital 9)<sup>5</sup> the *lex specialis*. There is therefore a risk that the existing Copyright and related EU law along with national law and the jurisprudence be put in stake by the DSA provisions.

### Why is the DSA Regulation a concern?

#### Some examples:

- Article 5.4 of the DSA only concerns hosting services (and not the other intermediaries).
- Article 8.1 of the DSA stipulates that the orders should provide "specific items" narrowing the possibility to tackle either equivalent items or piracy platforms as a whole. The same goes for Article 14.2.b of the DSA which refers to "clear indication of the URL", a concept unsuitable and outdated for some platforms (such as Apps for instance).
- Finally, article 43 (and Recital 81) of the DSA gives to the "Digital services coordinator where the recipient resides or is established" the **exclusive right to receive a complaint from a recipient whereas article 8.3 of the Copyright directive does not foresee such a restriction**. This exclusivity could impair the rightsholder's capacity to directly lodge complaints against intermediaries in front of national courts.

Therefore, the DSA Regulation should make clear that **no provisions of the DSA shall lead to less favourable solutions to fight against copyright infringement online than those prevailing before or after its entry into force in the Union's and its Member states' positive law relating to the protection of literary and artistic property** (see amendments in annex).

## B. Liability and Notice and action:

### a. Article 14 – Notice and Action:

- i. Article 14.1 of the E-commerce directive<sup>6</sup> provides for a positive obligation of intermediaries to "remove and disable access" to illegal activity or information when

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<sup>4</sup> See Recital 4 of the 2001/29/CE Copyright Directive.

<sup>5</sup> (9) This Regulation should complement, yet not affect the application of rules resulting from other acts of Union law regulating certain aspects of the provision of intermediary services, in particular Directive 2000/31/EC, with the exception of those changes introduced by this Regulation, Directive 2010/13/EU of the European Parliament and of the Council as amended,<sup>28</sup> and Regulation (EU) .../.. of the European Parliament and of the Council<sup>29</sup> – proposed Terrorist Content Online Regulation. Therefore, this Regulation leaves those other acts, which are to be considered *lex specialis* in relation to the generally applicable framework set out in this Regulation, unaffected. However, the rules of this Regulation apply in respect of issues that are not or not fully addressed by those other acts as well as issues on which those other acts leave Member States the possibility of adopting certain measures at national level.

<sup>6</sup> [Directive 2000/31/EC of 8 June 2000](#) on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')

- notified<sup>7</sup>. Unfortunately, article 14.5 of the DSA<sup>8</sup> (that supersedes article 14 of the E-commerce directive<sup>9</sup>) leaves the possibility for the intermediary to decide **or not** to remove the notified illegal content. On this peculiar topic, the **DSA is a step back from the previous situation**. This new provision is problematic since it will affect contents or services protected by copyright law in platforms other than video sharing platforms (covered by article 17 of the Directive 2019/790 on Copyright) like marketplaces.
- ii. Exact URL: as explained above, article 14.2.b requests “*a clear indication of the electronic location of that information, in particular the exact URL or URLs ...*”. However, this peculiar specification widely differs from the reality and is rather outdated in some cases. Indeed, the notice and take down notification that rights holders communicate to the intermediaries are not always composed of exact URLs of the contents but of digital fingerprints and/or identifiers (such as ISAN for instance) **so that any reappearance** of the same content (with different URL address) be taken down. In addition, no URL is used for Apps.
  - iii. For the reasons expressed above, **we trust that it is essential, particularly for marketplaces, that a take down and stay down obligation be introduced in article 14 making sure that illegal contents are removed and identical or equivalent illegal contents do not reappear**. This take down and stay down obligation should beside be extended to caching services.

### C. Scope of the liability regime in the DSA: exclusion of the active intermediaries (Recital 18) and/or those facilitating illicit acts (Recital 20)

The DSA regulation takes over the limited liability regime of the E-Commerce directive 2000/31/CE in favour of mere conduits, caching and hosting intermediaries. However, it is key that the intermediaries that have in the meantime been qualified as active by the CJUE (see Recital 18 which is taking over Google AdWords Decision<sup>10</sup>) would not benefit from this new DSA liability exemption regime. Same for those intermediaries mainly aiming at facilitating piracy (see Recital 20).

Therefore, we trust that the following additional precisions be added:

- Recital 18: "... control over, that information. **A provider of intermediary services plays an active role when assistance is given to the recipient of the service, notably for the**

<sup>7</sup> Article 14 | Hosting (e-commerce directive)

"1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or  
(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information."

<sup>8</sup> Article 14.5 of the DSA proposal

" 5. The provider shall also, without undue delay, notify that individual or entity of its decision in respect of the information to which the notice relates, providing information on the redress possibilities in respect of that decision."

<sup>9</sup> As per article 71 of the DSA

<sup>10</sup> Google Adwords c/LVMH and others (C-236/08 à C-238/08)

**optimizing and the promotion of the content offered.**" [added provisions here refer to EUCJ case law in its "eBay" ruling of July 12<sup>th</sup>, 2011 (C-324/09)]

- Recital 20: "Piracy professionals should not benefit from the DSA liability exemptions. **It should therefore be specified that if the main purpose of the service provider is illegal activities, or their facilitation, the exemption of liability could not apply.**" [see similar provisions in recital 62 of the 2019/790 EU Copyright Directive]

#### D. Recital 26: a potential step backwards

Recital 26 notably provides the following: « *Where possible, third parties affected by illegal content transmitted or stored online should attempt to resolve conflicts relating to such content without involving the providers of intermediary services in question* ».

It therefore seems to suggest a **subsidiarity principle when lodging complaints against intermediary providers** (providers of intermediary services should only be involved if really needed). **This would be a huge step backward** considering the E-commerce Directive and Copyright directive provisions.

#### E. No General monitoring (recital 28 and article 7) :

It should be clarified in Recital 28 that Article 7 of the DSA proposal providing for a no general monitoring obligation **shall not hinder the Intermediary Service Provider to have a stay down obligation including with automated recognition tools** as ruled by the EUCJ in the « Facebook » case<sup>11</sup> on October 3<sup>rd</sup>, 2019 (C-18/18).

#### F. Injunction Proceedings (articles 8 and 9 et recital 29):

As previously stated, the harmonization of injunction proceedings (notably article 8 that only concerns some intermediaries and the notification of specific identified illegal contents) could put at stake the national injunction regimes even when they proved already to be effective.

We therefore suggest that, beyond the clarifications requested in paragraph A) above, article 8 and 9 only apply to **cross-border injunctions**. This solution would resolve possible procedural differences between Member States.

Besides, the injunction proceedings as per article 8 appear to be too narrow or unsuited, in the same manner as explained earlier regarding article 14 (see paragraph B) a) ii above).

The orders to provide information regulated by this Regulation concern the production of specific information about individual recipients of the intermediary service concerned who are identified in

<sup>11</sup> CJEU - Case C-18/18 (*Eva Glawischnig-Piesczek c/ Facebook Ireland Limited*). By its judgment, the Court of Justice considers that (see [press release](#)) "*the Directive on electronic commerce, which seeks to strike a balance between the different interests at stake, does not preclude a court of a Member State from ordering a host provider:*

- *to remove information which it stores, the content of which is identical to the content of information which was previously declared to be unlawful, or to block access to that information, irrespective of who requested the storage of that information;*
- *to remove information which it stores, the content of which is equivalent to the content of information which was previously declared to be unlawful, or to block access to that information, provided that the monitoring of and search for the information concerned by such an injunction are limited to information conveying a message the content of which remains essentially unchanged compared with the content which gave rise to the finding of illegality and containing the elements specified in the injunction, and provided that the differences in the wording of that equivalent content, compared with the wording characterising the information which was previously declared to be illegal, are not such as to require the host provider to carry out an independent assessment of that content (thus, the host provider may have recourse to automated search tools and technologies);"*

those orders for the purposes of determining compliance by the recipients of the services with applicable Union or national rules. Therefore, orders about information **on a group of recipients of the service who are not specifically identified, including orders to provide aggregate information required for statistical purposes or evidence-based policy-making**, should remain unaffected by the rules of this Regulation on the provision of information.

Finally, more specifically concerning article 9 (and recital 32), in case of personal injunctions it should be specified that the data to communicate to the intermediary service provider is wider than the postal address. Indeed, the CJUE July 2020 which provides for such a limit is often used by bad faith defendants<sup>12</sup>.

### G. Trusted flaggers (article 19):

For online platforms<sup>13</sup> which are not SMEs, Article 19 of the DSA proposal provides that notifications issued under the provisions of the above-mentioned Article 14 by a trusted flagger shall be processed as a matter of priority. Article 19.2 provides that the status of trusted flagger is granted by the Coordinator designated by the Member State (cf. Art. 38 et seq. of the DSA).

First of all, it seems essential that the procedure for awarding trusted flaggers status should provide for the **possibility for the government authorities of Member States to propose candidate entities for this status, or to give opinions on these applications**, and also to provide for the possibility of appealing against the Coordinator's decision in the event of a candidate entity being refused this status.

Secondly, there is no reason **not to extend this regime of trusted flaggers to intermediaries other than online platforms**, in particular cyberlockers or other types of hosting platforms. Similarly, the relevance of the provisions of Article 16 of the DSA, which exclude SMEs from this regime, particularly after a certain period of time elapsed since the creation of the company and after a certain audience has been reached, may be questioned.

### H. Repeated infringements (Article 20 and Recital 47):

As in the case of "trusted flaggers", there is no reason not to extend the sanction regime for misuse of the service (Article 20.1) or the notification system (Article 20.2) to hosting services other than online platforms, in particular cyberlockers or other kind of hosting service. Similarly, the relevance of the provisions of Article 16 of the DSA, which exclude SMEs **from this regime, particularly after a certain period of time elapsed since the creation of the company and after a certain audience for the service has been reached, may be questionable**.

### I. Traceability of traders (« KYBC ») (article 22) :

Currently, Article 5 of the E-Commerce Directive requires traders to identify themselves on their website, but this provision often remains unanswered, due to the lack of sanctions. The "Know Your Business Customer" (KYBC) obligation imposed by Article 22 on online platforms which

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<sup>12</sup> Cf. [Arrêt CJUE du 9 juillet 2020](#) dans l'affaire C-264/19 (*Constantin Film Verleih GmbH c/Google et YouTube*)

<sup>13</sup> See article 2 (h) of the DSA proposal.

"2(h) 'online platform' means a provider of a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information, unless that activity is a minor and purely ancillary feature of another service and, for objective and technical reasons cannot be used without that other service, and the integration of the feature into the other service is not a means to circumvent the applicability of this Regulation."

enable consumers to conclude distance contracts with traders is therefore welcome, but not sufficient, since it is limited to marketplaces.

This obligation to obtain and reasonably verify the identifying information of the traders with whom they contract should be extended to **all intermediary service providers** (e.g. by transferring the provisions of Article 22 to Chapter III Section 1 of the DSA applicable to all intermediaries).

#### J. Lodging complaint for the implementation of the DSA (Article 43 et Recital 81) :

As it stands, Article 43 and Recital 81 provide that beneficiaries of the service ("individuals or representative organisations") have the right to lodge a complaint against an intermediary alleging a breach of the provisions of the DSA with the Digital Services Coordinator in their Member State of residence. The right to **act should be extended to any interested party, or at least to "trusted flaggers" and the competent public authorities of the Member State.**

#### K. Illegal contents:

While the definition of an illegal content provided into article 2 g)<sup>14</sup> is general, leaving each Member States the possibility to define what is illegal according to its own national law, it still covers an activity including "sales of products and provision of services". For the sake of clarity, it should be specified that it includes "sales of products **and contents**".

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<sup>14</sup> Article 2 g) : « *illegal content' means any information, which, in itself or by its reference to an activity, including the **sale of products or provision of services** is not in compliance with Union law or the law of a Member State, irrespective of the precise subject matter or nature of that law; »*

**ANNEX****1. SECURING MEMBER STATES' COMPETENCE, COPYRIGHT AND RELATED RIGHT LAW MATTERS AND THE PREVALENCE OF SECTOR-SPECIFIC EU LAW**

Commission proposal	Eurocinema amendments proposal
Art. 1(5) – Subject matter and scope	Art. 1(5)
<p>5. This Regulation is without prejudice to the rules laid down by the following:</p> <p>(a) Directive 2000/31/EC;</p> <p>(b) Directive 2010/13/EC;</p> <p>(c) Union law on copyright and related rights;</p>	<p>5. This Regulation <del>is without prejudice to</del> <b>shall not affect</b> the rules laid down by the following:</p> <p>(a) Directive 2000/31/EC;</p> <p>(b) Directive 2010/13/EC;</p> <p>(c) Union law on copyright and related rights <b>as implemented in national laws so as to insure the highest level of protection of these rights.</b></p>
Recital 9	Recital 9
<p>This Regulation should complement, yet not affect the application of rules resulting from other acts of Union law regulating certain aspects of the provision of intermediary services, in particular Directive 2000/31/EC, with the exception of those changes introduced by this Regulation, Directive 2010/13/EU of the European Parliament and of the Council as amended, and Regulation (EU) .../.. of the European Parliament and of the Council – proposed Terrorist Content Online Regulation.</p> <p>Therefore, this Regulation leaves those other acts, which are to be considered <i>lex specialis</i> in relation to the generally applicable framework set out in this Regulation, unaffected.</p>	<p>This Regulation should <b>complement, yet</b> not affect the application of rules resulting from other acts of Union law regulating certain aspects of the provision of intermediary services, in particular, Directive 2000/31/EC, with the exception of those changes introduced by this Regulation, Directive 2010/13/EU of the European Parliament and of the Council as amended, and Regulation (EU) .../.. of the European Parliament and of the Council – proposed Terrorist Content Online Regulation.</p> <p>Therefore, this Regulation leaves those other acts, which are to be considered <i>lex specialis</i> in relation to the generally applicable framework set out in this Regulation, unaffected.</p> <p><b><i>This Regulation should not affect Member States' freedom to regulate issues on which those other acts</i></b></p>

<p>However, the rules of this Regulation apply in respect of issues that are not or not fully addressed by those other acts as well as issues on which those other acts leave Member States the possibility of adopting certain measures at national level.</p>	<p><b>leave Member States the possibility of adopting certain measures at national level.</b></p> <p><b>In the event of a conflict between <i>lex specialis</i> Directives and their implementing national measures and the present Regulation, the <i>lex specialis</i> provisions shall prevail.</b></p> <p><b><del>However, the rules of this Regulation apply in respect of issues that are not or not fully addressed by those other acts as well as issues on which those other acts leave Member States the possibility of adopting certain measures at national level</del></b></p>
<p>Recital 11</p>	
<p>It should be clarified that this Regulation is without prejudice to the rules of Union law on copyright and related rights, which establish specific rules and procedures that should remain unaffected</p>	<p>It should be clarified that this Regulation is without prejudice to the rules of Union law on copyright and related rights <b>as implemented in national laws so as to insure the highest level of protection of these rights</b>, which establish specific rules and procedures that should remain unaffected. <b>No provisions of this Regulation shall lead to less favourable solutions to fight against infringement of online copyright and related rights that the one prevailing before its entry into force or after in the Union's and its Member states' positive law relating to the protection of literary and artistic property.</b></p>
<p>Article 43 – Right to lodge a complaint</p>	
<p>Recipients of the service shall have the right to lodge a complaint against providers of intermediary services alleging an infringement of this Regulation with the Digital Services Coordinator of the Member State where the recipient resides or is established. The Digital Services Coordinator shall assess the complaint and, where appropriate, transmit it to the Digital Services Coordinator of establishment. Where the complaint falls under the responsibility of another competent authority in its Member State, the Digital</p>	<p>Recipients of the service shall have the right to lodge a complaint against providers of intermediary services alleging an infringement of this Regulation with the Digital Services Coordinator of the Member State where the recipient resides or is established <b>or with any interested person or legal entity having an interest in acting such as a trusted flagger.</b> The Digital Services Coordinator shall assess the complaint and, where appropriate, transmit it to the Digital Services Coordinator of establishment.</p>

Service Coordinator receiving the complaint shall transmit it to that authority.	Where the complaint falls under the responsibility of another competent authority in its Member State, the Digital Service Coordinator receiving the complaint shall transmit it to that authority.
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## 2. STRENGTHENING THE EFFECTIVENESS OF THE NOTICE AND ACTION PROCEDURE

Commission proposal	Eurocinema amendments proposal
Art. 14 – <i>Notice and action mechanisms</i>	
<p>1.Providers of hosting services shall put mechanisms in place to allow any individual or entity to notify them of the presence on their service of specific items of information that the individual or entity considers to be illegal content. Those mechanisms shall be easy to access, user-friendly, and allow for the submission of notices exclusively by electronic means.</p> <p>2.The mechanisms referred to in paragraph 1 shall be such as to facilitate the submission of sufficiently precise and adequately substantiated notices, on the basis of which a diligent economic operator can identify the illegality of the content in question. To that end, the providers shall take the necessary measures to enable and facilitate the submission of notices containing all of the following elements:</p> <p>(a)an explanation of the reasons why the individual or entity considers the information in question to be illegal content;</p> <p>(b)a clear indication of the electronic location of that information, in particular the exact URL or URLs, and, where necessary, additional information enabling the identification of the illegal content;</p> <p>(c)the name and an electronic mail address of the individual or entity</p>	<p>same</p> <p>(b)a clear indication of the electronic location of that information, <del>in particular the exact URL or URLs,</del> and, where necessary, additional information enabling the identification of the illegal content;</p> <p>c) same</p>

submitting the notice, except in the case of information considered to involve one of the offences referred to in Articles 3 to 7 of Directive 2011/93/EU;

(d) a statement confirming the good faith belief of the individual or entity submitting the notice that the information and allegations contained therein are accurate and complete.

3. Notices that include the elements referred to in paragraph 2 shall be considered to give rise to actual knowledge or awareness for the purposes of Article 5 in respect of the specific item of information concerned.

4. Where the notice contains the name and an electronic mail address of the individual or entity that submitted it, the provider of hosting services shall promptly send a confirmation of receipt of the notice to that individual or entity.

5. The provider shall also, without undue delay, notify that individual or entity of its decision in respect of the information to which the notice relates, providing information on the redress possibilities in respect of that decision.

6. Providers of hosting services shall process any notices that they receive under the mechanisms referred to in paragraph 1, and take their decisions in respect of the information to which the notices relate, in a timely, diligent and objective manner. Where they use automated means for that processing or decision-making, they shall include information on such use in the notification referred to in paragraph 4.

6. Providers of hosting services shall process any notices that they receive under the mechanisms referred to in paragraph 1, and ~~take their decisions in respect of~~ **remove or disable access to** the information to which the notices relate, in a timely, diligent and objective manner **and made best efforts to prevent their future uploads.**

. Where they use automated means for that processing or decision-making, they shall include information on such use in the notification referred to in paragraph 4.