

2 February 2022



### Joint Position on the proposed EU Digital Services Act – Trilogue Negotiation Priorities

The undersigned organisations represent key stakeholders in the film and audiovisual value chain. We urge the EU co-legislators to show ambition and to ensure that the final Digital Services Act does not represent a step backwards neither in terms of the fight against illegal content online, nor by granting additional, unwarranted liability exemptions to online intermediaries.

**There is still an opportunity for the DSA to achieve the stated goal of making internet intermediaries more accountable, creating a safer, better-functioning online environment for everyone, and to deliver on the political ambition of ensuring that what is illegal offline is illegal online. To achieve this, the following issues must be addressed in trilogue:**

#### No new liability privileges for online search engines

Despite the European Commission's claimed legislative aim of preserving the existing regime of liability privileges set out in the E-Commerce Directive as interpreted by the Court of Justice, the Council has made changes to the proposed Article 4, placing online search engines under the same liability regime as caching providers. This new safe harbour **removes the obligation on search engines to act upon notices** and therefore eradicates all incentives on them to contribute to the fight against illegal content online. This would represent a huge step backwards from status quo. Such a result is clearly contrary to the expressed goals of the DSA – and the EU co-legislators.

The goal of increasing accountability in the online environment can only be achieved through the introduction of effective due diligence obligations, not by making search engines beneficiaries of a broad and unjustified “safe harbour”, which would reduce their potential liability and their incentive to act responsibly.

**We therefore urge the trilogue to develop a solution which does not weaken the existing liability regime.**

### **Know Your Business Customer (KYBC)**

Limiting the scope of the “Traceability of Traders” provision to online marketplaces would only address a very small fraction of illegal activity online and would fail to address scam websites and rogue intermediaries widespread activities on the Internet. KYBC provisions should apply to all business infrastructure services, and at least to all hosting providers, in order to ensure trust and safety online, to the benefit of consumers and business alike.

There is sufficient political will in all institutions to broaden the scope of the provision:

- On the Parliament side, a majority of MEPs supported Recital 39b (linked to a new Article 13a (AM 512)) introducing broad KYBC obligations.
- On the Council side, Italy and Spain issued a joint statement at the adoption of the Council General Approach, requesting that broad scope of the KYBC provision to be considered “in the course of future negotiations”. This position repeatedly received verbal support by Austria, Denmark, the Netherlands, and Portugal.

**We therefore urge the co-legislators to develop language extending the scope of the KYBC provision to all intermediary service providers in line with the political intention of the Parliament and the views of many Member States.**

### **Notice and Action – Expeditious removal of illegal content**

The Commission’s proposal to harmonise notice and action processes in Article 14 fails to establish a mechanism that will secure a safe and trustworthy online environment. This will allow some services to continue to evade the rules.

The provisions of Article 14 must not undermine the conditions of Article 5 to expeditiously remove content upon obtaining knowledge or awareness of its illegal nature.

The Parliament’s proposed Article 14.3.a (new) undermines the conditions of Article 5 by suggesting that content should remain accessible while the assessment of its legality is ongoing, without any implications for the liability exemption of Article 5. In order to avoid compromising a safe and trustworthy online environment, “actual knowledge” and “acting expeditiously” should remain the only criteria for assessment of liability under Article 5.

**We therefore urge the trilogue to reject the Parliament’s proposed Article 14.3.a (new).**

### **Trusted flaggers**

It is crucial that trusted flagger status is awarded to notice senders that have demonstrated expertise and a high rate of accuracy when flagging illegal content independently of whether they represent collective interests.

**We therefore urge the trilogue to remove the collective interest criterion in Article 19.2.b as per the Council General Approach.**

### **No general monitoring obligation**

In line with the European Commission's intention not to diverge from the E-commerce Directive's liability regime, Article 7 and Recital 28 of the Commission proposal also maintained the principle that general monitoring obligations should not be imposed upon intermediary service providers.

The Council has preserved this principle and has limited its General Approach to codifying CJEU caselaw in Recital 28 to outline the conditions under which providers can be required to conduct specific monitoring. However, the European Parliament's proposed amendments to Recital 28 go further, departing from existing case law by introducing new and unclear concepts of "de facto" and "de jure" monitoring obligations of a general nature and prohibiting the use of automated tools for content moderation.

**We therefore urge the trilogue not to deviate from the current regime on the prohibition of general monitoring obligations and to support the Council's proposed codification of CJEU caselaw.**

### **The right to compensation for damages**

The European Parliament introduces a right for recipients of a service to seek compensation from providers of intermediary services against any direct damage or loss suffered due to an infringement, by providers of intermediary services, of their DSA obligations (see Article 43a and Recital 83a). This is an important addition. Not only will it provide an opportunity for recipients of a service to seek compensation, but it will also bring coherence to the DSA and establish an important incentive for ensuring compliance with the due diligence obligations. Experience shows that too many intermediaries make little or no effort to comply with their regulatory obligations, including in the fields of consumer and data protection, when the risk of non-compliance is limited to regulatory fines. It seems they simply factor in the risk of fines as a cost of doing business.

In addition, for this provision and the right to lodge a complaint of Article 43 to function more effectively, we support the Council's proposed changes to the definition of "recipient of the service" in Article 2b and references in Article 17 and 18 that state that recipients of the service include individuals or entities that have submitted a notice.

Finally, the Council's proposed Recital 35 amendments stating that complying with due diligence obligations is independent from the liability of intermediaries should be rejected as contrary to the express goals of the DSA. Diligent behaviour is a criterion which courts use to assess the application of liability exemptions, as confirmed in relevant case-law.

**We therefore urge negotiators to maintain the Parliament's proposed Article 43a and Recital 83a, while applying the Council's proposed amendments to Article 2b and references in Articles 17 and 18 regarding the definition of "recipient of the service", and at the same time, reject the Council's proposed amendments to Recital 35.**

### **Intermediaries "best placed" to end infringement**

The Commission's proposed language in Recital 26 states that aggrieved parties should take legal action to hold individual end-users/direct infringers "liable" instead of asking for intermediary intervention. In many cases, however, providers of intermediary services are best placed to address illegal content in an effective manner thereby obviating the need for complex, costly and invasive legal actions against individual end-users. This is particularly the case where the illegal content is being made available via structurally infringing services.

An example from Directive 2001/29/EC is instructive. Recital 59 explains that the rationale for intermediary intervention is the very fact that intermediaries are often best placed to bring infringing activities to an end. Indeed, the Court of Justice (see Case C-314/12, UPC Telekabel Wien, para 27) has recognised that because intermediaries' services are increasingly used to infringe, "such intermediaries are, in many cases, best placed to bring such infringing activities to an end". Other criteria (such as "technical and operational ability" or "closest relationship to the recipient of the service" as suggested in Parliament's Article 14.6, Article 8,2(cb), and Recital 40a) ignore the need for efficient intervention and should be rejected.

### **Commission Guidelines**

The Parliament's proposed Article 1a calls for the development of guidelines by the European Commission to clarify potential conflicts between the DSA and other EU legislation (Directives and Regulations). This approach aiming at addressing the *lex specialis* status of such other EU legislation in relation to the DSA's *lex generalis* problems will only create legal uncertainty. A large amount of interpretation will be necessary, and it is the role of the Court of Justice of the European Union to interpret EU law as well as potential conflicts – it is not the role of the European Commission to undertake such interpretation.

**We therefore urge the trilogue to reject the suggested guidelines in the Parliament amendments to Recital 9 and in Article 1a, as per the Council General Approach.**

## Signatories

**ACT** - Association of Commercial Television and VoD Services in Europe

**ANICA** - Associazione Nazionale Industrie Cinematografiche Audiovisive e Digitali

**CICAE** - International Confederation of Art Cinemas

**CEPI** - European Audiovisual Production Association

**Eurocinema** - Association de producteurs de cinéma et de télévision

**European VOD Coalition**

**Fedicine** - Federación de Distribuidores Cinematográficos

**FIAD** - International Federation of Film Distributors' and Publishers' Associations

**FIAPF** - International Federation of Film Producers Associations

**IFTA** – Independent Film & Television Alliance

**IVF** – International Video Federation

**Mediapro**

**MPA** – Motion Picture Association

**SPIO** – Spitzenorganisation der Filmwirtschaft e.V.

**SROC** - Sports Rights Owners Coalition

**UNIC** - International Union of Cinemas

**VAUNET** – Verband Privater Medien e.V.

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