Amendments to the Presidency compromise (8145/18) on the Directive of the European Parliament and of the Council on copyright in the Digital Single Market

Amendments proposed by ES, FR, IT, PT

Article 2.5: definition of "online content sharing provider"

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

Non-for-profit online encyclopaedias, non-for-profit educational and scientific repositories, non-for-profit open source software developing platforms, internet access service providers, online marketplaces and private cloud service providers shall not be considered online content sharing service providers within the meaning of this Directive ";

Recital 37a:

The definition of an online content sharing service provider under this Directive targets online services the main or one of the main ~~*purposes*~~ ***activity*** *of which is to provide access to [a large amount] of copyright-protected content uploaded by their users* ~~*with the purpose of obtaining profit therefrom*~~ *by organising it and promoting it. Organising and promoting content involves for example indexing the content, presenting it in a certain manner and categorising it, as well as using targeted promotion on it. The definition does not include services such as internet access providers, providers of cloud services which allow users to upload content for their private use, such as cyberlockers, or online marketplaces whose main activity is online retail and not giving access to copyright protected content. Nor does this definition cover* ~~*websites which store and provide access to content for non-for-profit purposes, such as*~~ *online encyclopaedias, scientific or educational repositories, or open source software developing platforms which do not store and give access to content for profit making purposes.*

Rationale:

- The "large amount" criterion (mentioned in the definition and explained in the recital 37b) creates legal uncertainty. The issue of "small" platforms is already dealt with through the provision that the measures of the directive have to take into account the size and audience of the services (article 13§5).
- The word "activity" is more precise and not subject to interpretation compared to the word "purposes".

Article 13:

§4

In the absence of the authorisation referred to in the second subparagraph of paragraph 1, Member States shall provide that an online content sharing service provider shall not be liable ***for criminal sanctions and for damages caused to rightholders*** *for acts of communication to the public or making available to the public within the meaning of this Article when:*

a) it demonstrates that it has made best efforts to prevent the availability of specific works or other subject matter by implementing effective and proportionate measures, ***agreed upon with rightholders*** *in accordance with paragraph 5, to prevent the availability on its services of the specific works or other subject matter identified by rightholders and for which the rightholders have provided the service with information for the application of these measures ; and*

b) upon notification by rightholders of works or other subject matter, it has acted expeditiously to remove or disable access to these works or other subject matter and it demonstrates that it has made its best efforts to prevent their future availability through the measures referred to in point (a).

The present paragraph is without prejudice to the possibility that the legal systems of the Member States provide for an action in relation to infringements of any protected work or other object.

Rationale: regarding the mitigation measures, we would like to improve the parameters, notably to avoid any unilateral definition of the measures by the platforms. The measures should be defined "in agreement" with the rightholders, as it was provided for in the proposal of the commission for the self-standing measures.

Instead of providing blanket exemption from copyright liability, the proposed wording precises that online content sharing service providers could benefit from exemption for "criminal sanctions and for damages caused to rightholders". "Without prejudice to the possibility that the legal systems of the Member States provide for an action in relation to infringements of any protected work or other object" enables rightholders to have recourse in appropriate cases.

Add in §5: « ***The implementation of paragraph 4 should also take into account the nature and size of the rightholders*** ».

Rationale: small rightholders should also be taken into account when asking them to provide information to the platforms.

Add in §8: « ***Member states are encouraged also to establish the necessary mecanisms to assess the appropriateness of the measures referred to in point (a) of paragraph 4 ».***

Rationale: given that the mitigation measures rely on technical measures, it is essential that Member States assess the efficiency of such measures.

Complete recital 38 in order to avoid that pirate websites benefit from article 13:

« ***This directive does not apply to services engaged in or facilitating copyright piracy. Any interpretation to the contrary would result in affecting the high level of protection of copyright enshrined in the EU acquis.*** »

Rationale: We suggest to make it clear that the provision of the directive should by no means benefit to pirate websites.