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#### **NOTE**

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| To:             | Permanent Representatives Committee  |
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| Subject:        | Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market<br>- Orientation debate on Articles 11 and 13 |

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#### **I INTRODUCTION**

The Commission presented the proposal for a Directive on copyright in the Digital Single Market to the Council on 14 September 2016. This proposal is one of the Commission's initiatives under the Digital Single Market Strategy and aims to further harmonise the Union law applicable to copyright and related rights in the framework of the internal market, taking into account in particular digital and cross-border uses of protected content.

The discussions that have taken place under the meetings of the Working Party on Intellectual Property (Copyright) chaired by the Maltese and Estonian Presidencies have led to significant progress. An attaché meeting took place on 18 December 2017 to take stock of the progress made, based on document 15651/17 prepared by the Estonian Presidency. This progress, reflected in the seventh and last compromise proposal issued by the Estonian Presidency, and the key outstanding issues, both outlined in that document and its Annex, remain valid and should be the basis for further work.

As mentioned in Section II.2 of doc. 15651/17, in order to continue discussions to finalise the work in Council with a view to reaching a political agreement, political guidance is considered necessary on two key outstanding issues: (i) the press publishers' rights (Article 11 of the proposal for a Directive); and (ii) user uploaded content platforms (the so-called value gap issue, Article 13 of the proposal for a Directive).

The key outstanding issues requiring political guidance that have been outlined by the Estonian Presidency in doc. 15651/17 remain the same. Additionally, in view of presenting further elements that could facilitate possible compromises for the press publishers' and value gap related provisions, the Bulgarian Presidency is proposing a few questions regarding the protection of press publishers and an additional question on value gap, which are presented in Section II of this document.

## **II. KEY OUTSTANDING ISSUES FOR POLITICAL GUIDANCE**

Taking into account the state of play of the two key outstanding issues of Art. 11 and Art. 13 as outlined in detail in Section II.2 of doc. 15651/17, the Presidency proposes that political guidance be sought on the basis of the following questions:

### **A. Protection of press publishers**

The divergent views expressed by the Delegations on the way to address the problems faced by publishers when exploiting and enforcing their rights in press publications in the digital environment make it difficult to reach a compromise. Attempts to do so are reflected in Options A and B of Annex II of doc. 15651/17, which represent the two main approaches considered by the delegations so far. Option A would grant exclusive rights to publishers of press publications, with some further amendments, notably to clarify the scope of the rights granted and their interaction with the rights of the authors and other rightholders of the content contained in a press publication, as well as to ensure that the protection granted to press publishers does not affect the public-domain status of the content contained in a press publication. Option B would provide publishers with a presumption of entitlement to license and enforce the rights in their press publications.

However, none of these options as they stand have got enough support so far.

In document 15651/17 by the Estonian Presidency, delegations were invited to take a position between Options A and B. In order to explore further elements of a possible compromise, the Presidency would also like to gather views from the delegations on whether amending further Option A could be an acceptable compromise for Member States. These amendments would notably concern the following three elements:

*(1) Extracts of press publications:* Option A currently provides protection to extracts of a press publication provided that the extracts are the expression of the intellectual creation of their authors. Therefore, the criterion for protection of extracts is its originality, similar to the criterion for the protection of works granted by copyright law.

*Should this approach be changed and rather the size of the extracts be used as a criterion for protection, i.e. carving out short extracts from the protection independently of their originality?*

*(2) Uses covered by the press publishers' related rights:* Option A currently applies to all uses of press publications, including those by individual users.

*Should uses by individual users be carved out from the protection, provided that the use of press publications is for non-commercial purposes?*

*(3) Term of protection of the press publishers' related rights:* Option A currently provides a 20-year term of protection for the new related rights.

*Should this term be shortened, in order to take into account elements such as the economic cycle of exploitation of press content?*

## **B. Value gap provisions**

Taking into account the different approaches by the delegations and the difficulties to reach an agreement on some fundamental elements of Article 13 and of the related recitals, the Presidency considers that political guidance should be sought on the most important questions in order to be able to progress with the discussions on Article 13. With this purpose, the Presidency would like to seek political guidance on the following questions :

- (1) *Should there be a clarification in Article 13 that service providers that store and give access to user uploaded content perform, under certain conditions, an act of communication to the public or should Article 13 be limited to self-standing measures, applying to user uploaded content platforms with a significant amount of uploaded content, without any clarification on communication to the public, as in the Commission proposal?*
- (2) *Should there also be an explicit provision in Article 13 clarifying that such services are not eligible for the limited liability regime under Article 14 of the E-Commerce Directive meaning that they would be taken out of Article 14 of E-Commerce Directive and be primarily liable for copyright infringements when their users upload content not authorised by rightholders?*
- (3) *If the user-uploaded content platforms should be liable, should they be liable in all cases or should there still be some targeted liability mitigation provided for to avoid potentially excessive impact on platforms storing and giving access to user uploaded content?*
- (4) *If there is a clarification of the communication to the public, should there also be an obligation to apply measures as an additional provision, and if so, should it apply to the same service providers as those concerned by the clarification on communication to the public or should the scope of this obligation be different, potentially wider?*

In addition to the above, within the context of questions concerning communication to the public and applicability of the limited liability regime as provided for under the E-commerce Directive, the Presidency would like to invite delegations to consider the following:

- *Would a possible solution be a text without any language regarding those issues in Article 13, but a recital that would recall the existing principles of EU law which are relevant to determine the conditions under which user uploaded content platforms engage, based on the existing case-law of the ECJ, into a copyright relevant act and are not covered by the limited liability in Article 14 of the E-commerce Directive?*

### **III. CONCLUSION**

The Permanent Representatives Committee is invited to provide guidance on the questions related to the two key outstanding issues as set out above.

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