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GESAC's views on the proposal of the European Commission on Digital Services Act

GESAC (European Grouping of Societies of Authors and Composers) represents more than one million creators from all artistic fields through its 32 authors' society members (collective management organisations). Please see www.authorsocieties.eu for more information about GESAC.

GESAC welcomes the opportunity to provide its views on the proposals of the European Commission (EC) for a Regulation titled as Digital Services Act (draft DSA).

GESAC also welcomes the initiative of a Digital Services Act to ensure a safe and accountable online environment. Over the last 5 to 10 years both citizens and policy makers have developed a stronger and clearer understanding on the necessity of certain responsibilities and, where necessary, liabilities for the so-called internet intermediaries, and in particular for platform-based online services. This is mainly due to the growing importance of such services in daily lives of citizens, as the latter use them more and more to shop, to book holidays or to access information, media, etc, among many other daily needs. Previous EU legislature has taken significant steps to address some of the most chronic and damaging practices of such platforms in the field of copyright/authors' rights and audio-visual media services. Creators community very much welcomes those clear and ambitious steps taken by the EU legislators in that respect, especially in the Directive on the Copyright in the Digital Single Market (CDSM) and Audio-visual Media Services Directive (AVMSD).

GESAC's views on the draft DSA will focus on the following priorities at this stage and we would like to keep the possibility for further elaboration with the Commission when needed during the legislative process:

1. Necessity to keep Art. 17 of CDSM intact and to apply final DSA without prejudice to Art 17 CDSM
2. Effectively tackling the use of online market places by the traders that intend to circumvent their obligations to pay private copy compensation under EU and national copyright laws.
3. A more solid and functional notice and action (NA) regime against illegal and piracy platforms
4. An urgent need to develop a policy perspective, in or beyond DSA, to address the growing problems regarding algorithmic transparency, cultural diversity and fair treatment of creators on e-commerce platforms that are not providing a "hosting" or intermediary" services.

1. Necessity to keep Art. 17 CDSM intact and to apply final DSA without prejudice thereto

We welcome that the necessity that final DSA should apply without prejudice to the EU copyright/authors' rights rules is reflected clearly in the draft DSA. This certainly reflects the policy perspectives agreed at the Commission and European Parliament level and should be kept as a clear, consistent and not challenged point elsewhere in the DSA or its supporting documents throughout the process and in the final document.

Indeed Art 17 CDSM provides a specific regime for online content sharing service providers (OCSSPs), as defined by Art 2.6 of the same directive. It is a sector specific regulation (*lex specialis*) providing for the liability of the concerned platforms for their copyright relevant acts and therefore the DSA and its possible revision of E-Commerce Directive should apply without prejudice to this newly adopted CDSM and should not have any negative impact thereon.

2. Effectively tackling the use of online market places by the traders that intend to circumvent their obligations to pay private copy compensation under EU and national copyright laws

As we noted in our answers to public consultation for the preparation of the draft DSA, creators community and authors' societies are very concerned about the difficulties and inefficiencies they face with for the enforcement of the payment of private copy remunerations (PCR) due on the devices that are sold by traders using online market places.

According to Article 5.2(b) of the Copyright in the Information Society Directive (EC/2001/29), Member States of the EU can introduce an exception for the reproduction of the copyright protected works for personal and non-commercial uses by private individuals. Member States that choose to implement this exception must provide an accompanying compensation scheme for the harm caused by such private copies to creators and rightholders. This PCR regime exists in most of the Member States and has been approved several times by the Court of Justice of the European Union (CJEU). It is typically applied in form of a levy added on the price of electronic devices, recording media or services that provide the capacity to copy (such as mobile phones, tablets, USBs, memory cards, computers, etc.) and collected by collective management organisations (CMOs) on behalf of all relevant rightholders. However, several devices or recording media manufacturers use the online marketplaces to avoid, among other EU laws, payment of PCR. Although this specific issue of avoiding the payment of PCR by using online market-places is typically undertaken by third country manufacturers and sellers, it is also notably used for sales originating from Luxembourg and Ireland, where no effective compensation system for private copying is in place.

We have submitted to your services evidence and details of such challenges experienced by our members across Europe.

GESAC welcomes the intention of the Commission to tackle the illegal activities on platform services and in particular online market places. Indeed, the harm the illegal products cause for the consumers and rightholders in Europe are substantial. As stated by Commissioner Breton in his speeches *'Non-compliant products are dangerous for consumers but also undermine the level playing field for businesses by providing competitive advantages to companies which do not follow the rules.'* Collective management organisations responsible for collecting and distributing the relevant PCR do

not only face the frustration of not being able to stop such players or effectively collect the amounts from those traders, but also see a similar frustration of legitimate businesses that complain about the competitive disadvantage they face vis-à-vis such rogue traders.

While acknowledging that the draft DSA provides several tools to discourage and in the long term to disincentivise such practices, we also believe that more concrete measures to stop such practices and even a layer of liability on the platforms in case of continuous non-compliance can be introduced to persuade the concerned platform services that have so far never shown the willingness to cooperate or stop such illegal practices in absence of liability or strong obligations.

The principle of “what is illegal offline is also illegal online”, as mentioned by the Executive Vice President Vestager and Commissioner Breton is a useful guiding principle here, and indeed as any importers, who would bear the responsibility of paying the relevant PCR or at least ensuring that the relevant PCR is paid for the devices they import in offline era, online market places should also have clearer responsibilities when they are used as the way of importing the relevant devices in Europe by third party sellers in the online environment.

Apart from that, it is also seen that counterfeit products such as DVD, CD or vinyl infringing copyright law, as well as “smart cards” for access to pay-TV channels, “cloned” decoders and devices allowing the circumvention of technological protection measures are widely available through such platforms infringing other laws, harming creative sector in other ways and risking consumer safety in Europe.

There are three main issues, for which DSA can usefully provide solution to stop such illegal activities that are easily taking place online, although they are clearly illegal offline:

- Online market places do not provide any relevant information on the third party traders using their platforms and do not cooperate to stop such activities by claiming non-liability as an intermediary service
- Online market places whose platforms are used to circumvent EU law are not based in the EU and the Courts and/or administrative authorities have significant difficulty to find a legal representative for a possible information request or enforcement of their decisions
- Even when the third party sellers are traced, or in very limited cases pursued at the courts, they are usually based outside the EU, mainly in China, and therefore criminal or civil law proceedings against them can in most, if not all, cases cannot be followed up properly or enforced. Moreover, those services disappear and re-appear with other names and accounts, when any proceeding can be commenced in limited cases and authors’ societies are faced with the same non-cooperation of platforms that are financially benefitting from these activities.

GESAC believes **that the following provisions of the draft DSA, if improved properly and in a targeted manner, can tackle these illegal activities**, while also respecting the main principles of the DSA and e-commerce framework:

a) GESAC welcomes that **Art 9 on orders for information is provided under the section regarding “liability”** of all intermediary services. Especially combined with the obligation to have an establishment or legal representative within the EU, as provided in Art 10 and 11, DSA should aim at

receiving the necessary information from the intermediary services during the court proceedings or investigations by competent authorities as a “liability” issue and count on the effective cooperation of such services. This would at least decrease the number of problems relating to not being able to find any legal representative of the platform to ask info and cooperation. Having the possibility of a legal representative, DSA can also set the consequences and possible sanctions for individual acts of non-compliance of intermediary services more clearly for efficient enforcement of its provisions.

b) GESAC welcomes the so-called “**know your business customer (KYBC)**” principle introduced by **Art 22 of the draft DSA** to more effectively deal with the traders that use the online platforms to circumvent their obligations under EU and national laws. Online market places (OMP) have become one of the primary place where consumers and traders that are commercial entities come together.

While the OMPs allowed many legitimate traders to continue their businesses during the pandemic and confinement periods, they have also exponentially increased their role in the market. The growing dependency of the online trade to OMPs therefore provides a stronger basis to introduce responsibilities and certain liabilities on OMPs to properly and safely exercise their function for European consumers and businesses, and this should in no ways be considered as a ‘punishment’ or ‘burden’ on such platforms.

Art 22.1 of the draft DSA requires from OMPs to collect certain information on the identity and traceability of the trader using their platforms. GESAC believes that the Art 22.1(f) that requires the traders to provide *“a self-certification by the trader committing to only offer products or services that comply with the applicable rules of Union law”* to the platform prior to their use of such platform can be an opportunity, if it can be usefully linked and concretely connected to other provisions of the same article for a tangible result. In particular, Art 22.3 provides that *“Where the online platform obtains indications that any item of information referred to in paragraph 1 obtained from the trader concerned is inaccurate or incomplete, that platform shall request the trader to correct the information ...”* and then states that *“Where the trader fails to correct or complete that information, the online platform shall suspend the provision of its service to the trader until the request is complied with.”*

This can be a good basis to ensure the compliance of traders with EU and national laws, in our case with the payment of PCR. When the traders that operate without payment of such amounts can be indicated by rightholders to the OMPs, OMPs shall be expected to check with their traders to give evidence of and substantiate their *“self-certification of committing to only offer products or services that comply with the applicable rules of Union law”* in respect of the ‘indications’ they received from rightholders on the non-compliance of such traders with EU law as regards payment of PCR (or sale of counterfeit products). The traders that have been indicated and/or identified as non-compliant shall clearly see the consequences that the provision of such services is suspended. Moreover, if this is not ensured by the platform, despite the indication provided by rightholders and no provision by the trader to substantiate its self-declaration on its compliance with law, platforms shall no longer benefit from non-liability regime.

Without such a concrete link to liability and connection between Art 22.1(f) and 22.3, Art 22.1(f) would be as meaningless as any online platform provider’s ‘terms and conditions’ of today requiring their users to respect the law, which is in practice unfortunately worth absolutely nothing, in the absence of any liability of the platform on following up on this information.

c) Status of **trusted flaggers, as provided in Art 19** can indeed be a useful instrument to deal with such undesired illegal activities more quickly and efficiently. In this respect the process can be made much more efficient, if the possibility of asking removal of content/offers for sales within 24 or 48 hours and a consequent stay-down obligation when such removal requests come from trusted flaggers. The mere possibility that the notices sent by trusted flaggers are only “processed and decided upon with priority and without delay” would be a missed opportunity, if not matched with a robust and concrete regime to avoid re-appearance of the same content/offer in the future. Details of this can be elaborated within the Art 19 or Art 14.

d) Clarification that the **risk assessment requirement of very large online platforms in Art 26.1(a)** include also all IP related infringements (including the sale of devices without paying PCR and sale of counterfeit products such as DVDs, CDs, vinyl). Moreover, verification of risk assessment reports and possible loss of non-liability status of platforms can be included in the regulation in addition to sanctions, in case the illegal activities continue to take place and/or the possible risks for such non-compliance is not properly dealt with. The consequences and possible sanctions for individual acts of non-compliance of intermediary services can be set more clearly for efficient and predictable enforcement of these provisions.

3. A more solid and functional notice and action (NA) regime

GESAC notes that an effort to streamline and harmonise the notice and action (NA) system across the EU would be a useful exercise. Considering that the notice and take-down systems that have so far been in place in a number of Member States did not deliver a satisfactory result for anyone involved, having an objective to fix this problem at EU level is certainly a step in the right direction. While keeping the possibility to comment further on possible details and specific steps of such procedure in the future, GESAC would like to make the following general comments at this stage:

- i. The DSA should ensure that the positive developments in several Member States that allow stay-down of the content as decided by the courts or removal of similar content and dynamic removal or blocking orders that are not dependent on a specific URL are embraced by the new NA regime introduced therein and NA regime is not made entirely dependent on providing a specific URL each and every time for the same infringing content.
- ii. The new NA system can usefully include a layer of stay-down obligation in itself, with the possible necessary conditions around it. This would particularly be useful for the notices provided by trusted flaggers.
- iii. It would be important to clarify the results and legal consequences of a notice, and at what stage it creates and leads to liability of the platform. For instance, how to ensure the effectiveness of the system and at what stage ineffective implementation of the regime can lead to liability of the platforms can be clarified.

In this respect, it is important to note that the online services that develop knowledge on the content through notices or through their own investigations are not covered by the conditional non-liability regime. GESAC believes that **the proposal in Art 6 that sounds like the Good Samaritan provision in the US law would not be acceptable, if it creates a wider or safer harbour for intermediary services,** against the very purpose of this legislation. Rec 22 notes that actual knowledge or awareness can be

developed through, in particular, online intermediary's own-initiative investigations, in addition to or without any notifications. Therefore, in the cases, where an intermediary services' own actions under Art 6 can be considered as leading to a certain knowledge and/or awareness on illegality of content, their non-liability shall be conditional to stopping the illegal activity effectively.

Additionally, Rec 20 of the draft DSA unexpectedly provides that *"A provider of intermediary services that deliberately collaborates with a recipient of the services in order to undertake illegal activities does not provide its service neutrally and should therefore not be able to benefit from the exemptions from liability provided for in this Regulation"*. This would mean that a platform would lose its liability exemption only if its deliberate collaboration is in order to undertake an illegal activity, which seems to be expanding the current safe harbour regime substantially by conditioning the loss of the non-liability status not only to the platform's active role, but also its 'specific intention' to undertake an illegal activity in such active role.

As the necessary measures to discourage, minimise and eventually eliminate illegal activities shall be expected from all intermediaries (if what is illegal offline is also illegal online), further-going, immediate and positive actions taken by certain intermediary services on a voluntary basis to stop illegal activities can then be considered as not causing to lose their 'safe harbour', only if such action is in good faith and really and effectively stops the illegal activity. Non-liability can certainly not be sustained, if the illegal content is still available, despite the certain knowledge that platform develops through its own acts.

4. An urgent need to develop a policy perspective, in or beyond DSA, to address the growing problems regarding algorithmic transparency, cultural diversity and fair treatment of creators on all e-commerce platforms

GESAC elaborated on this issue broadly in its [answer to public consultation](#) prior to the proposal of the draft DSA. We carefully note that the scope of the draft DSA is limited to "intermediary services", however the e-commerce framework requires further modernisation beyond those services.

The online market, on the one hand, gradually replaces traditional media (TV, radio, print), and on the other hand converges rapidly including AV, music, print, streams, podcasts, etc. within the same services. Moreover, algorithmic transparency has become one of the main concerns for ensuring diversity and pluralism in the media. Algorithms are indeed essential for the proper functioning and user-friendliness of online services, but cannot be totally left in the hands of their commercial choices and decisions that are now determining what people see, hear, listen to and read online. In this respect currently online music streaming services operate in a legal vacuum with no responsibility and every day with growing concerns and practices of stream manipulations that do not only impact the earnings of European creators but also pose serious risks for cultural diversity in Europe.

This issue was raised by the different Opinions and Reports on DSA and artificial intelligence adopted by the European Parliament, however, so far the Commission has not addressed the problem in any of its legislative proposals or action plans.

GESAC asks for urgent attention of the Commission and EU decision-makers to this issue, within or beyond the DSA, as not addressing it would harm the future of the market irreversibly.