

# SAA contribution to the EC consultation on the Digital Services Act package

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## About the SAA

The [Society of Audiovisual Authors \(SAA\)](#) is the association of European collective management organisations representing audiovisual authors. Its 33 members in 25 countries manage rights for over 140,000 film, television and multimedia European screenwriters and directors. The organisation's objectives are: 1) to defend and strengthen the economic and moral rights of audiovisual authors; 2) to secure fair remuneration for audiovisual authors for every use of their works; 3) to develop, promote and facilitate the management of rights by member societies.

## Introduction

A revision of the E-Commerce Directive as the horizontal instrument that regulates digital services is necessary to reflect the rapid transformation and expansion of e-commerce in all its forms and address the current challenges. The E-Commerce Directive is indeed outdated. It does not address today's market realities: a much wider diversity of services than in 2000 and the massive turnover generated by and around these digital services.

This outdated legal framework has generated adverse effects. The hosting services' liability exemption has been invoked by some online services whose activity was not limited to storing information but rather, expanded to communicating it to the public. This has created confusion in courts and a sense of immunity by these services for 20 years, leading to a situation of legal uncertainty.

The new services which have emerged play a significant role in the information and media environment. In particular, as highlighted by the European Parliament, social media services may determine what content is provided to their users, thereby profoundly influencing the way we obtain and communicate information, to the point that they have de facto become public spaces in the digital sphere. This should come with corresponding responsibility.

For audiovisual authors and their collective management organisations (CMOs), digital services have become big players in the exploitation of their works, to the detriment of traditional players like cinemas, broadcasters and DVDs publishers. The COVID-19 crisis has accelerated the transition of viewers' habits to digital platforms.

Thanks to the recent adoption of the 2018/1808 Audiovisual Media Services Directive (AVMS Directive) and the 2019/790 Directive on Copyright in the Digital Single Market (Copyright Directive), new rules are applicable to digital services which better fit their role and importance in the media and copyright markets. The Copyright Directives provide authors with a right to appropriate and proportionate remuneration (Art 18) and a right to receive information on the exploitation of their works, including online (Art 19), and reaffirms that online content sharing service providers perform an act of communication to the public when they give to the public access to copyright-protected works uploaded by their users (Art 17). The AVMSD Directive promotes the presence of European

audiovisual works on video-on-demand platforms and encourages the investment of these platforms in the production of these works (Art 13).

In order to ensure legal certainty to authors, the new rules governing the liability of online platforms should apply without prejudice to the provisions of the Copyright Directive and the AVMS Directive.

## **Definitions**

The E-Commerce Directive definitions are outdated, mainly because it dates back to 2000 when most of the current dominant services did not exist and technology was not as developed as it is today.

Among the Information Society Services, the E-Commerce Directive only addresses mere conduit, caching and hosting activities. Content sharing platforms have appeared since then and are now partially addressed by the AVMS and Copyright Directives for different purposes.

However, there are still loopholes, in particular for social media services. Whereas this might be resolved by the implementation of Art 17 of the Copyright Directive for copyright purposes, clearer definitions and scopes of application are highly recommended.

Further, in order to avoid new loopholes in the future because of the emergence of new services, the Digital Services Act should at least include a clear and comprehensive definition of digital services/online platforms which would encompass the specific definitions of a 'video-sharing platform service' of the AVMSD and an 'online content-sharing service provider' of the Copyright Directive and their activities.

## **Obligations/liability**

The E-Commerce Directive should be completely overhauled and focus on new rules defining the liability regime of online services, instead of their liability exemption.

The European Parliament adopted the mantra 'what is illegal offline should be illegal online' and this should be the key driver of the Digital Services Act.

The prohibition to monitor the information is one pillar of the E-Commerce Directive which reveals how much outdated the directive is. Online services should be liable for the illegal activities conducted by their users such, as piracy, and take all proactive measures to limit these illegal activities and stop them.

## **Respect of copyright/Fight against piracy**

Digital services of all kinds should have a clear obligation to respect copyright and the authors' rights of the content these services use. Respecting intellectual property rights should be recalled as a general principle at the same level as the protection of other fundamental rights such as freedom of expression.

The specific regime of 'online content-sharing service providers' as defined in Art 2(6) and 17 of the Copyright Directive should not be revisited and continue to apply.

Digital services should cooperate with rightsholders and regulatory authorities in the fight against piracy.

## **Remuneration of authors**

The remuneration of the authors of the copyright-protected content must be legally ensured for any type of exploitation, whatever the licensing option the digital services choose or is offered to them. For cases where obtaining an adequate remuneration could be difficult or burdensome for authors on an individual basis, an unwaivable and untransferable right to remuneration collectively managed

as provided by Article 7 of the [German government's proposal](#) published on 12 June 2020 on the implementation of Art 17 of the Copyright Directive is a good example to follow.

## Transparency

The current transparency and information requirements set out in the E-Commerce Directive on information society service providers and their business customers, and the minimum information requirements on commercial communications, should also be substantially strengthened.

As highlighted by the European Parliament's CULT opinion for IMCO on the DSA, improving the functioning of the Single Market calls for media service providers to be given access to the data generated by the services they provide or the content they produce, or which is directly associated therewith, if the services and content are offered on global digital platforms.

Services that are acting as gatekeepers or who have a dominant position in the digital and entertainment markets must comply with enhanced transparency rules. There is currently a striking imbalance of transparency requirements with collective management organisations (CMOs) who have to comply with strict rules derived from the 2014 Collective Rights Management Directive. A similar level of obligations should be imposed on service providers by the DSA.

The market power of service providers makes it difficult for CMOs to enter in contractual negotiations. When those services are offering audiovisual content in a bundled offer, it is impossible for their contract partners or potential contract partners to know how many users are using the service, what the price of a subscription is, what the price for the service by subscription is, etc. This lack of transparency should be tackled by strict transparency requirements to publish an annual report on key data and controlled by the relevant regulatory authorities.

In addition, to ensure the functioning of the contracts signed with CMOs, contract provisions such as mandatory effective audits allowing rightsholders to access all relevant data regarding the income generated in relation to the content provided by service providers should be included.

## Governance and enforcement

While some in the European Parliament advocate for the establishment of a central regulatory authority, the French and German authorities for audiovisual media services are in favour of cooperation between national authorities.

The national regulatory authorities are responsible for monitoring the effective application of the AVMS Directive according to the national law and the respect of copyright. In most EU Member States, they are trustworthy partners of CMOs and authors by ensuring the rights of the latter are respected while their works are broadcasted. Extending those duties to the digital area would be relevant.

ERGA, which coordinates at EU level independent media regulators, is a good model of cooperation which respects Member States' specificities. However, to cope with today's market realities and challenges, media regulators need clearer powers to access platforms' data and intervene in a proportionate manner to ensure that platforms fully abide by their cooperation and transparency obligations. The efficiency and quality of the mutual cooperation of media regulators rely on those increased powers.

## Services established in third countries

The Digital Services Act should apply to services offered in any Member State, independently from their country of establishment. Thus, compliance with the DSA will be mandatory when offering services and targeting European citizens.

As in the GDPR regulation (art 27), those services should designate in writing a legal representative in the EU.

This provision would be of most relevance since the UK is not a member of the EU anymore and many audiovisual/digital services established in the UK are targeting solely the EU internal market.