

Intermediary services should “earn their liability exemptions”

In order for the Digital Services Act (DSA) to achieve a safe and more trustworthy online environment, companies that do not comply with the DSA’s due diligence obligations should not be entitled to the DSA’s liability exemptions.

The proposed DSA aims to establish rules that would create a “a safe and more open” digital environment and ensure less exposure to illegal content. To achieve this, the Commission has proposed introducing graduated due diligence obligations that apply to different categories of intermediary services (see Chapter III of the proposal).

These due diligence obligations unfortunately often fall short of what is needed in order to ensure consumer safety and the protection of legitimate companies.

The Commission maintained the E-Commerce Directive’s liability privileges for intermediary services that qualify as “mere conduit”, “caching” or “hosting services”, but failed to link these liability exemptions with companies’ compliance with the baseline due diligence obligations set out in the DSA.

This is a grave shortcoming. Experience shows that too many intermediaries make little or no effort to comply with regulatory obligations, including in the fields of consumer and data protection, when the risk of noncompliance is limited to regulatory fines, apparently factoring the risk of fines in as a cost of doing business. Making compliance with the DSA’s due diligence obligations a pre-condition of liability privilege eligibility would create a real, impactful incentive for compliance and have a dissuasive effect on such intermediaries.

It would also ensure that only diligent, trustworthy and reliable intermediaries benefit from the DSA liability privileges, thus contributing to a higher level of safety and trust in the online environment to the benefit of all stakeholders.

The idea of making the exemption from liability conditional on compliance with due diligence obligations was briefly considered by the Commission, but dismissed. The arguments invoked by the Commission are, however, unconvincing (see impact assessment Part 2, Section 3.4, pages 165-166):

1. The Commission argues this would only “incentivise” but not “require” compliance with the due diligence rules. This is incorrect, as compliance with the due diligence obligations can be mandatory *in addition* to being a condition of eligibility for the liability exemptions. There is no need to choose between the two approaches, in fact they are complementary.
2. The Commission argues it would require a more systematic and therefore burdensome supervision of compliance with due diligence rules. That is also incorrect as eligibility for the liability exemption does not need to be assessed by the DSCs. As the Commission argues elsewhere, the liability exemption is not a static status an intermediary acquires, but rather something that needs to be assessed on an ad hoc, case-by-case basis when liability is invoked, i.e. by the courts rather than by the DSCs.

We believe that the DSA offers a unique opportunity to achieve the goals of creating a safe, trustworthy and diverse online environment and to ensure that what is illegal offline, is illegal online. Making compliance with the due diligence obligations a pre-condition for eligibility to benefit from the liability exemptions would bring a coherence to the DSA that is currently lacking. It would positively impact compliance with the DSA and guarantee that only responsible and trustworthy intermediaries are able to benefit from its liability exemptions.

To this end we have proposed the following two amendments.

We thank you for your attention and would welcome the opportunity to discuss this issue with you further.

Kind regards,

Suggested amendments

Recital 18a (new)

Commission proposal	Suggested amendment
	<p><i>(18a) Those exemptions from liability should also not be available to providers of intermediary services that do not comply with the due diligence obligations in this Regulation. The conditionality should further ensure that the standards to qualify for those exemptions contribute to a high level of safety and trust in the online environment in a manner that promotes a fair balance of the rights of all stakeholders.</i></p>

Article 2 a (new)

Commission proposal	Suggested amendment
	<p><i>Article 2a</i></p> <p><i>Conditionality to the compliance with due diligence obligations</i></p> <p><i>Providers of intermediary services shall be deemed ineligible for the exemptions from liability referred to in Articles 3, 4 and 5 when they do not comply with the due diligence obligations set out in this Regulation.</i></p>

Signatories:

ACCION

Aktionskreis gegen Produkt- und Markenpiraterie e. V. (APM)

Alliance for Safe Online Pharmacy (ASOP EU)

ANDEMA

Anti-Counterfeiting Group (ACG)

Association de Producteurs de Cinéma et de Télévision (Eurocinema)

Association of Commercial Television in Europe (ACT)

Associazione Nazionale Industrie Cinematografiche Audiovisive Multimediali (ANICA)

BREIN

British Association for Screen Entertainment (BASE)

BBC Studios

Comité Colbert

Copyright Information and Anti-Piracy Centre (TTVK)

Digital Entertainment Group (DEGI)

EUROCOPYA

European Audiovisual Production (CEPI)

European and International Booksellers Federation (EIBF)

European Brands Association (AIM)

European VOD Coalition

Face-value European Alliance for Ticketing (FEAT)

FDV -Danish Video Association (FDV)

Federation of Screenwriters in Europe (FSE)

Federation of the European Sporting Goods Industry (FESI)

Federazione per la Tutela dei Contenuti Audiovisivi e Multimediali (FAPAV)

Fédération Internationale des Associations de Producteurs de Films (FIAPF)

Federación de Distribuidores Cinematograficos (FEDICINE)

Federation of European Screen Directors (FERA)

Film and Music Austria (FAMA)

Filmdistributeurs Nederland (FDN)

Independent Film & Television Alliance (IFTA)

Independent Music Companies Association (IMPALA)

INDICAM

International Confederation of Music Publishers (ICMP)

International Federation of Actors (FIA)

International Federation of Film Distributors' Associations (FIAD)

International Federation of the Phonographic Industry (IFPI)

International Video Federation (IVF)

International Union of Cinemas (UNIC)

Lionsgate

Motion Picture Association (MPA)

Produzenten Allianz (Germany)

Rattighetsalliansen (Sweden)

RettighedsAlliancen

SF Studios

Sky

Slovak Audiovisual Producers' Association (SAPA)

Spitzenorganisation der Filmwirtschaft e.V. (SPIO)

Sports Rights Owners Coalition (SROC)

Swedish Anti-Counterfeiting Group (SACG)

Together Against Counterfeiting Alliance (TAC)

Toy Industries of Europe (TIE)

UNI Global Union – media, entertainment & arts (UNI MEI)

Union des Fabricants (UNIFAB)

Unione Italiana Editoria Audiovisiva Media Digitali e Online (Univideo)

VAUNET Verband Privater Medien e.V. (VAUNET)

Verein für Anti-Piraterie der Film- und Videobranche (VAP)

ACCIÓN! Asociación de Directores

APM AKTIONSKREIS GEGEN PRODUKT- UND MARKENPIRATERIE E.V.

ASOP EU Alliance for Safe Online Pharmacy

ACCG THE ANTI-COUNTERFEITING GROUP

An de ma Asociación para la defensa de la Marca

EUROKINEMA Association de producteurs de cinéma et de télévision

ACT Association of Commercial Television in Europe

ANICA Associazione Nazionale Industrie Cinematografiche Audiovisive e Multimediali

BREIN The Art of Protecting The Creative



BASE ASSOCIATION for SCREEN ENTERTAINMENT CHAMPIONING THE GROWTH OF SCREEN ENTERTAINMENT ACROSS DISC AND DIGITAL

BBC STUDIOS

COMITÉ COLBERT Depuis 1954

TTVK

DEG INTERNATIONAL THE DIGITAL ENTERTAINMENT GROUP

EUROCOPYA European Federation of Joint Management Societies of Producers for Private Audiovisual Copying

CEPI EUROPEAN AUDIOVISUAL PRODUCTION



eibf European and International Booksellers Federation

AIM EUROPEAN BRANDS ASSOCIATION

The European VOD Coalition

FEAT



DANISH VIDEO ASSOCIATION

fse

FESI Federation of the European Sporting Goods Industry

FAPAV FEDERAZIONE PER LA TUTELA DEI CONTENUTI AUDIOVISIVI E MULTIMEDIALI

FIAPF

fedicine Federación de distribuidores cinematográficos



Federation of European Screen Directors Fédération Européenne des Réalisateurs de l'Audiovisuel

F & M A Fachverband der Film- und Musikindustrie Film and Music Austria

FON FILMDISTRIBUTEURS NEDERLAND

Independent Film & Television Alliance

IMPALA INDEPENDENT MUSIC COMPANIES ASSOCIATION

INDICAM Istituto di Cinematografia per la lotta alla contraffazione

MP THE GLOBAL VOICE OF MUSIC PUBLISHING

FIA INTERNATIONAL FEDERATION OF ACTORS FEDERATION INTERNATIONALE DES ACTEURS

FIAD INTERNATIONAL FEDERATION OF FILM DISTRIBUTORS' ASSOCIATION

Jifpi representing the recording industry worldwide

IVF INTERNATIONAL VIDEO FEDERATION Publishers of Audiovisual Content on Digital Media and Online

UNIC UNION INTERNATIONALE DES CINEMAS INTERNATIONAL UNION OF CINEMAS

LIONSGATE

MPA EMEA

LPA PRODUZENTENALLIANZ FILM + FERNSEHEN



RETTIGHEDS ALLIANCEN

STUDIOS

sky soppa SLOVAK AUDIOVISUAL PRODUCERS' ASSOCIATION

SPIO Spitzenorganisation der Filmwirtschaft e.V.

SROC SPORTS RIGHTS OWNERS COALITION



TA TOGETHER AGAINST COUNTERFEITING

TOE UNi global union media, entertainment & arts Toy Industries of Europe

union des fabricants unifab POUR LA PROTECTION INTERNATIONALE DE LA PROPRIÉTÉ INTELLECTUELLE

UNIVIDEO

VANET German Media Association

VAP VEREIN ANTI PIRATERIE