

15 JANUARY 2019

CREATIVE SECTORS CALL FOR A SUSPENSION OF NEGOTIATIONS ON
ARTICLE 13



TO:

Dear President Tusk,
Dear President Juncker,
Dear President Tajani.
Dear Prime Minister Dăncilă,
Dear Minister Ciamba,

CC:

Permanent and Deputy Permanent Representatives of the Member States to the European Union
Chair of the Committee on Legal Affairs in the European Parliament
Shadow Rapporteurs and members of the European Parliament negotiating team
European Commission, Roberto Viola, Mariya Gabriel

Creative Sectors Call for a suspension of negotiations on Article 13¹

As representatives of the audiovisual and publishing sectors active across the European markets, we are extremely and increasingly concerned about the direction of the ongoing trilogue discussions on **Article 13 (the Value Gap provision)** of the proposed Directive on Copyright in the Digital Single Market, as the solutions that are under discussion are worse than the current legal framework.

One of the main justifications² for Article 13 articulated in the Commission's original impact assessment back in 2016 was the absence of a CJEU referral that could bring clarity to the question of whether an uploaded content service is responsible for acts of communication to the public and/or can benefit from the hosting provider status under the E-Commerce Directive. Since that assessment the situation has now fundamentally changed. In the meantime, such a referral has been launched by a recent decision of 13 September 2018. The German Federal Court of Justice (Bundesgerichtshof) referred a case to the CJEU involving YouTube/Google and certain rightholders, for clarification of this very issue (case C-682/18 Google e.a.).

We understand the eagerness to bring the negotiations to a close within the current mandate. However, rather than rushing the highly controversial Art. 13 and seeking conclusion of this provision, no matter the jeopardy to the European copyright framework and no matter the prejudice and damage to the creative sectors before the end of this legislative period, **we urge EU co-legislators to suspend negotiations with respect to this article**. The Commission should continue to monitor the developments on CJEU level, in particular in case C-682/18, and decide, following this judgement, whether legislative intervention might be necessary in the future. In this regard, we'd also like to recall the principles of proportionality and subsidiarity³ as well as the commitments made under the Inter-Institutional Agreement on better law making⁴.

¹ This letter does not pre-empt the position of the signatories on the rest of the Directive

² Page 143 Impact Assessment: *"The CJEU has not addressed the specific case of online services giving access to content uploaded by their users" and "whether they can benefit from the hosting service provider status in the E-Commerce Directive"* and page 144: *"Whereas it is possible that the CJEU will bring clarity to the question of whether an uploaded content service is responsible for acts of communication to the public and/or can benefit from the hosting provider status under the E-Commerce Directive, this cannot be predicted as it is entirely dependent on referrals by national courts."*

³ Article 5(3) Lisbon Treaty, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012M/TXT&from=EN>

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2016:123:FULL&from=EN>

Signatories

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