



**Platform Responsibility in the EU:  
From Article 17 of the DSM © Directive to the  
forthcoming Digital Service Act**

**18<sup>th</sup> Annual US-EU-DE © Summit/Online:  
Ted Shapiro, Wiggin LLP (Brussels)  
15 October 2020**



**WIGGIN**



# DSM Copyright Directive/Article 17 Value Gap or Trap?



- © A controversial, hotly contested Directive – 6 MSs voted against
- © Transposition deadline: 7 June 2021
- © Article 17: OCSSPs CttP and do not get the hosting privilege (Article 14 ECD)
  - © So authorisation/prohibition apply but if no license...
  - © ...Best efforts to license, filtering and staydown → new safe harbour
  - © Built in proportionality mechanism and liability holidays for start-ups
  - © RH-OSSCP coop ‘shall’ not prevent non-infringing uses
  - © Complaint and Redress – to right wrongs not wrong rights
  - © Neither *Lex Specialis* nor *Sui Generis*
  - © AG Opinion in *YouTube/Uploaded*
  - © European Commission to issue misguidance
- © Implementation slow but chugging along (1/3 MSs have draft laws)
- © Issues: Legal nature, Best efforts, AP, contractual freedom (ECLs), and exceptions

# Digital Services Act (DSA) – cue the new safe harbours!?

- ⦿ Update the horizontal regulatory framework for digital services/platforms in the EU
- ⦿ 2 Legislative Proposals – Liability and Ex Ante Regulation of Gatekeepers
- ⦿ For Liability -- clarify the E-Commerce Directive regime:
  - ⦿ New safe harbour(s) – jettison ‘outdated’ active/passive doctrine?
    - ⦿ Infrastructure (traditional hosts but maybe others) stay in Article 14 while
    - ⦿ Online platforms and others (search engines?) move into new refuges
    - ⦿ Question of control becomes key determining factor
  - ⦿ New due diligence obligations (duties of care?)
    - ⦿ Notice and Action (Staydown?)
    - ⦿ Transparency
    - ⦿ KYBC (online marketplaces and more?)
  - ⦿ Good (EU) Samaritan: remove disincentives to do what they can already do
- ⦿ Protecting users’ fundamental rights against overzealous private enforcement
- ⦿ Relationship to Article 17/what impact on copyright and Article 8(3) 2001 CD





**PEACE LOVE AND COPYRIGHT**

# Thank you



[Ted Shapiro](#)

**Partner**

T: +32 (0) 2 892 1104

E: [ted.shapiro@wigginc.co.uk](mailto:ted.shapiro@wigginc.co.uk)

The WIGGIN logo is located in the bottom right corner of the slide. It consists of the word "WIGGIN" in a bold, white, sans-serif font, set against a large, stylized graphic of overlapping purple and grey geometric shapes.

**WIGGIN**