

Brussels, 19 April 2021

Dear President von der Leyen,  
Dear Executive Vice President Vestager,  
Dear Commissioner Breton,

We, the undersigned users' organisations represented in the Commission's stakeholder dialogue on the implementation of Article 17 of the Copyright in the Digital Single Market Directive, are writing to you to express our concern about the Commission's handling of the final phase of this process.

We are concerned that the Commission has not managed to publish its guidance on the application of the Article yet. Last week the Advocate General in the CJEU case challenging the fundamental rights compliance of Article 17 CDSM (C-401/19 Republic of Poland vs Council and Parliament) postponed his opinion by almost three months to the 15th of July 2021. The fact that the Commission's guidance, which played an important role in the Commission's argumentation before the Court, is still not available to the Advocate General may have contributed to this postponement.

As a result, Member States, many of which have been waiting for both the Commission's guidance and the initial legal assessment by the CJEU, will not be able to take the Court's initial legal assessment into account should they wish to implement the directive in time.

This situation is even more concerning as there have been indications that the Commission is considering weakening the very fundamental rights safeguards that have been central for its argument in favour of the directive's fundamental rights compliance before the court. As a consequence of Article 17 (7) CDSM, which constitutes an obligation of result and trumps the best effort obligation on platforms to block infringing uploads on the request of rightsholders, Member States are required to implement ex-ante fundamental rights safeguards that prevent the blocking of legal content. Implementations of Article 17 that fail to ensure that blocking obligations are limited to manifestly infringing content would further violate the ban on general monitoring enshrined in Article 17 (8) CDSM and the Charter.

From our perspective it would be unacceptable for the guidance to fall back below the position that the Commission's legal services have argued before the CJEU. In this context we are particularly concerned that the final version of the guidance might contain **open ended** exception clauses for particular types of repertoires that would effectively exempt them from ex-ante protections against fully automated blocking.

Indications that such measures have found their way into the final version of the guidance are even more concerning since they have started to surface right after the Commission's "secret" meeting with Members of the European Parliament and Member States critical of the meaningful fundamental right safeguards<sup>1</sup> and a meeting on - *inter alia* - the Copyright Directive between a Member of the Cabinet of Executive Vice-President Vestager and organisations representing rightsholders who would directly benefit from such exceptions on the 15th of February.<sup>2</sup> In this context we are not aware of comparable meetings with other groups of stakeholders represented in the stakeholder dialogue during the final stage of this process.

In the light of the above we urge the Commission not to weaken its guidance through **open ended** exception clauses that seem to benefit particular rightsholders at the expense of users' fundamental rights and that would significantly undermine the position taken by the Commission on these matters before the CJEU. As argued by the Commission, strong ex-ante fundamental rights protections are necessary to meet the obligation of result to protect users' fundamental rights. Issuing guidance that substantially diverges from the position taken before the Court would also indicate that while the Commission has clearly recognised the need for such protections in order to meet its fundamental rights obligations under the Charter, it is lacking the political will to ensure that such protections will be included in national implementations of the directive.

With best regards,

Paul Keller

On behalf of the following organisations:

COMMUNIA Association for the Public Domain	ApTI (EDRi Member)
Electronic Frontier Foundation (EFF)	Citizen D / Državljan D (EDRi Member)
Young Pirates of Europe (YPE)	Electronic Frontier Finland (EDRi Member)
Civil Liberties Union for Europe (Liberties)	Fitug e.V. (EDRi Member)
Wikimedia (FKAGEU)	Homo Digitalis (EDRi Member)
Verbraucherzentrale Bundesverband e.V. (vzbv)	ISOC Bulgaria (EDRi Member)
SaveTheInternet (STI)	Vrijdschrift (EDRi Member)
epicenter.works	XNet (EDRi member)
International Federation of Library Associations and Institutions (IFLA)	IT-Pol Denmark (EDRi member)
European Digital Rights (EDRi)	Digitale Gesellschaft e.V. (EDRi Member)
	Defesa dos Direitos Digitais (EDRi Member)

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<sup>1</sup> See Euractiv, 12 February 2021: [Commission and Parliament in 'secret talks' on EU copyright directive](#).

<sup>2</sup> See the [meeting register for cabinet members of Executive Vice-President Margrethe Vestager](#), entry from 15 February 2021.