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STATEMENT

on the discussion draft of the German Federal Ministry of Justice and Consumer Protection on a Second Act on the Adaptation of Copyright Law to the Requirements of the Digital Single Market

Berlin/Brussels, 31 July 2020

Introductory remark

After several years of negotiations, on 17 April 2019, the European Union adopted the Directive on Copyright in the Digital Single Market (DSM Directive) on the basis of a Commission draft from 2016.

The DSM Directive was subject to strong criticism from industry, academia and civil society, both for its introduction of a press publisher ancillary copyright and for the regulations on the so-called “value gap” and upload filtering.

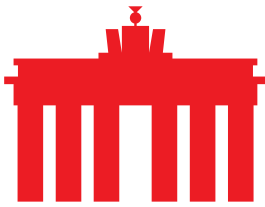
eco reiterates the criticism which it had already repeatedly voiced throughout the time of the Directive’s development: namely, that upload filters are not in line with the E-Commerce Directive and the Charter of Fundamental Rights.

In the course of the EU Council’s decision-making, Germany submitted a corresponding protocol declaration calling for implementation with the avoidance of upload filters. However, in spite of the statements of the German legislator, eco does not see this as having been incorporated into the present draft German Copyright Service Provider Act (CSPA), and the association has fundamental doubts that the DSM Directive will be implemented with the avoidance or without the use of upload filters.

It is in the nature of EU Directives that they allow a certain leeway in their transposition. On the one hand, this opens up the possibility to react to national specificities. On the other hand, for the same reason, the DSM Directive also runs the risk of lastingly damaging the European (Digital) Single Market through inconsistent regulations across the EU

eco welcomes the new opportunity to participate in the discussion on the national transposition of the DSM Directive in Germany, but limits itself to the central aspects of particular importance for the Internet industry in the subject of Art. 17 of the DSM Directive and the Online SatCab Directive.

eco will comment on further points in the discussion of the DSM Directive and its future implementation in the further course of the legislative procedure.



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I. General remarks

A. Not a robust draft

The present draft presented by the German Federal Ministry of Justice and Consumer Protection (BMJV) on 24 June is once again a “discussion draft”, as was already the case with the First Act on the Adaptation of Copyright Law to the Requirements of the Digital Single Market. Accordingly, even the BMJV itself assumes that even greater changes will be made in the further course of the legislative procedure. In addition, coordination with the other ministries involved in the departmental coordination process has not yet taken place.

Given the combined backdrop of the consultation procedure already carried out last year by the BMJV on the transposition of the DSM Directive, the consultation on the discussion draft on the transposition of the press publishers’ ancillary copyright law, and the even longer transposition period for the Member States until 7 June 2021, it would have been desirable to have had a draft presented which was more robust.

B. Partial transposition of the DSM Directive

The DSM Directive is to be transposed into national law by the Member States by 7 June 2021 – as is the Online SatCab Directive. However, the discussion draft presented by the BMJV does not comprise a complete transposition of the EU Directive.

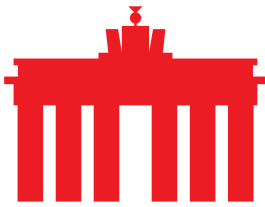
As already noted in the course of the First Act on the transposition of the DSM Directive, eco finds the fact that the BMJV decided on a variant involving a split transposition of the Directive difficult to understand. In particular, eco has already critically questioned the overly hasty, early transposition and new regulation of the ancillary copyright law for press publishers.

Furthermore, in light of the lawsuit filed by Poland with the European Court of Justice (ECJ) regarding Art. 17 of the DSM Directive and the still ongoing stakeholder dialogue of the European Commission on guidelines for the transposition of Art. 17 of the DSM Directive, eco also does not comprehend the need for a particularly urgent transposition of the DSM Directive.

In addition, the uncoordinated transposition among the EU Member States in stages of varying duration will contribute to an imbalance in Europe and will lead to the disruption of the DSM Directive, which from the European legislator’s perspective should represent a coherent and interlocking set of rules. This will further increase the implementation complexities for companies.

II. On the regulations

With the provisions on the liability of upload platforms and the regulations on collective licences with extended effect, the present discussion draft is intended to introduce two new legal instruments into German copyright law. For this purpose, a German Copyright Service Provider Act (CSPA) is to be created. In addition, the



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draft is intended to modify the German Copyright Act (CA) and the German Collecting Societies Act (CSA) in a number of places.

A. On § 20c draft CA (European ancillary online service)

In § 20c (1) of the draft CA, the definition of “ancillary online service” is intended to be transposed from the SatCab Directive. The BMJV hereby uses a free formulation which deviates from the Directive. While the ancillary material in Art. 2 (1) SatCab Directive is still generally understood as belonging to the ancillary online service, according to the draft CA, to eco’s interpretation, this only applies to Video on Demand (VoD) and to simultaneous services anymore.

B. On § 2 draft CSPA (Service Providers)

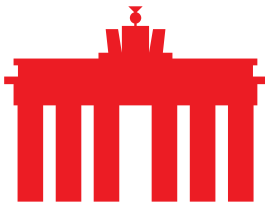
The definition of service providers – those who will be subject to the new obligations pursuant to the discussion draft – appears at first glance to be well thought-through and to contain sufficient precision. However, a lack of clarity does arise from a choice of words which deviates from those of Art. 2 No. 6 of the DSM Directive (“of which the main or one of the main purposes is”), with the alternative chosen wording being “exclusively or at the least partly pursue it as their main purpose”. The latter introduces the inclusion of secondary purposes, which is obviously not intended by the DSM Directive.

In addition to adopting the definition from the DSM Directive in § 2 (1) No. 1 of the draft CSPA, a clarification regarding the purpose of making a profit according to No. 3 and an exemption for operators to refinance their own costs would also be desirable. In any case, not all income should immediately lead to a qualification according to § 2 (1) of the draft CSPA.

C. On § 4 draft CSPA (Contractual rights of use)

§ 4 (1) Sentence 2 of the draft CSPA concretizes the expectations placed on the service providers for obtaining rights of use. The draft act stipulates a unilateral obligation to contract at the expense of the service providers. This serves the interest of the rightholders in generating income. However, the protection of the entrepreneurial freedom of service providers who, for example, want to work exclusively with content uploaded by licensees or rightholders is not addressed. Unfortunately for such service providers, there is no provision for a desirable opt-out regulation, a provision which would also reflect the principle of proportionality. The regulation is therefore set to encroach massively on the shaping of providers’ services and business models.

Furthermore, a translation error in the German version of the DSM Directive ought not to be adopted in the transposition. Whereas the English original speaks of “best efforts”, the translation of this into German as “every effort” is incorrect and goes a step too far.



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D. On § 5 draft CSPA (Mechanically non-verifiable uses authorized by law)

According to § 5 of the draft CSPA, in the definition of content for public reproduction not subject to licensing, the draft adopts parts of Art. 17 (7), Sub-paragraph 2 of the DSM Directive. As such, quotations, caricatures, parodies and pastiches are explicitly mentioned. On the other hand, criticism and reviews are missing from the draft. It can be assumed that these also fall under § 51 of the German CA. A relevant clarification would nevertheless be desirable.

In addition, the authorized use should also cover other cases authorized by law pursuant to Part 1 (6) of the German CA (which covers §§ 44a to 63a and thus also §§ 51 of the CA and 51a of the draft CA).

In summary, at first glance this is an incomplete transposition of the provisions of the Directive, while at second glance, it is not very lucid. An adaptation and a closer alignment would be welcome. Nonetheless, the scope of the exemptions is to be viewed positively in principle.

E. On § 6 draft CSPA (Mechanically verifiable uses authorized by law)

First of all, it should be noted that the title (“mechanically verifiable”) allows only one conclusion to be drawn: namely, that it refers to automated content detection systems, i.e. upload filters. As already stated, the automated detection of content – also because it is prone to errors – is not a desirable solution. Rather, it poses a risk of over-blocking – that is, a too-extensive removal of content – as well as contravening the prohibition of general surveillance as defined in the E-Commerce Directive.

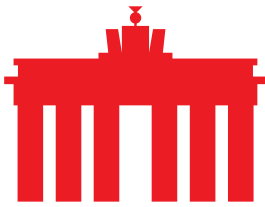
§ 6 is one of the core elements of the draft CSPA. Here, Paragraph 1 defines content which – according to the concepts of the German legislator – may be publicly reproduced for non-commercial purposes.

As such, content with up to 20 seconds of video and/or sound, up to 1,000 characters of text, and images with file sizes of up to 250 KB are definitively listed.

In accordance with the recitals to § 6 (2) of the draft CSPA, this listing is intended to represent the catch-all character of the provision, according to which Paragraph 1 is only to be applied if no corresponding contractual right of use has been acquired in accordance with § 4 or § 9 (2) of the draft CSPA and it is also not a legally authorized use in accordance with § 5 of the draft.

For eco, this implies that the legislator is addressing this as a motivation for the rightholders to conclude contracts to the defined extent and not to lose the license costs.

The legislator’s approach of defining a limit on the reproduction of copyright-protected works (in part or in whole) for non-commercial purposes in the form of minimum criteria, according to which a right of use and publication exists in any case, is generally to be welcomed. This would also enable smaller and new service providers who do not have a corresponding negotiating position and would



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sometimes be at a disadvantage when concluding licence agreements to allow such content on their platforms.

The recitals explain: “The scheme takes into account, inter alia, that it is now standard business practice to make excerpts of works available free of charge for advertising purposes on the Internet: For example, film rightholders make multi-minute trailers of films available in order to attract cinema audiences. On many platforms it is possible to listen to songs for up to 30 seconds to encourage customers to conclude a user contract. Publishers often make the introductory chapter of a new book available as a PDF document for free download or readable online to encourage the purchase of the publication.”

The recitals also go on to state: “It is clear that this partial free availability of protected content does not harm sales on the primary markets, but on the contrary serves the sale of works. Against this background, it seems appropriate to legally permit non-commercial use lower than this scale in accordance with the provisions of Paragraph 1, and at the same time to require remuneration for it.”

In accordance with these statements, the logic behind why even the briefest of content should give rise to a corresponding payment obligation for service providers is not comprehensible.

Rather, this situation, which is advantageous both for rightholders and for service providers, should be sufficiently valued, even without financial remuneration within the already limited framework of § 6 of the cited draft Act.

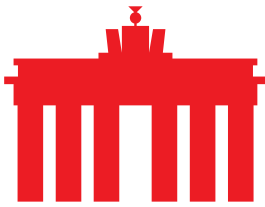
Moreover, it is not clear to what extent service providers must now acquire the rights of use: To the limited extent outlined in § 6 of the draft CSPA, or in its entirety.

F. On § 8 draft CSPA (Pre-Flagging of authorized uses)

At several points, the present discussion draft of the BMJV shows that the legislator is well aware of its difficult task in transposing the DSM Directive. For example, in § 8 of the draft CSPA, with its obligation for service providers to install a content flagging system for users, we find a potential building block for a more efficient handling of content. By means of so-called “pre-flagging”, content is to be categorised when uploaded by the user in order to enable an automated activation of content with a simultaneous limitation of liability of the service provider.

With this pre-flagging, the responsibility for public communication is, in connection with § 16 of the cited draft Act, transferred from the service provider to the user. The limitation of liability is a necessary condition for the functioning of the system.

However, the pre-flagging of content has an explicit weakness: the dependence on the users’ willingness and ability to pre-flag. The possibility of categorising content during uploading is an additional task that can only be optional for users. It is to be expected that this information would often not be provided, or not supplied correctly. On the one hand, this would be due to an additional step that would have to be carried out, but on the other hand it would also stem from the fact that users



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often lack the necessary legal knowledge concerning the assessment and qualification of the content. Since an incorrect pre-flagging has related consequences for providers and users, the easiest solution seems to be to free the user from this task and to transfer it to the service provider. Thus, the intention to enable the use of content that is actually authorized would be reversed and counteracted by the envisaged procedure of “pre-flagging”.

According to the recitals, the pre-flagging also covers use based on Creative Commons licences. Again, this is an essential point that warrants inclusion in the legal text. It should also be possible to pre-flag public domain content that either does not have or no longer has copyright protection as such.

On the other hand, what raises problems is the reference in Paragraph 2 to § 12 of the draft CSPA to “obviously incorrect” pre-flagging of content by users. More on the problem of § 12 of the cited draft Act can be found below.

G. On § 9 draft CSPA (Extension of authorizations)

The extension of authorizations according to § 9 of the draft CSPA is intended to clarify that the permission for public communication of the service provider also extends to the user and vice versa. In view of the way platforms function, this clarification makes sense and is to be welcomed in principle.

On the other hand, what does not make sense is that the recitals to § 9 (2) of the cited draft Act state: “An extension is out of the question, for example, if the licence granted to the user only permits non-commercial use. This is because the service provider always acts commercially pursuant to the definition in § 2 (1) No. 3 of the draft CSPA”.

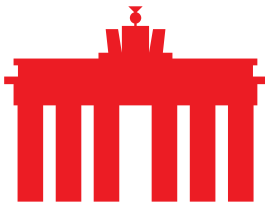
In eco’s view, this restriction on the extension is not justifiable. Essentially, publishing content on platforms is an action of a user, which stems from their own motivation and intention and which is therefore not intended to serve any commercial purposes of the service provider. If the user acts for him or herself in a private non-commercial context, it does not make sense that the legislator suddenly tries to create a commercial use out of it, provided that no use remote from the original use takes place – i.e. detached from the likes of a contribution under the user account, name or pseudonym of the user.

H. On § 10 draft CSPA (Blocking of non-authorized uses)

1. On Paragraph 1

As already discussed above, § 4 of the draft CSPA provides for an obligation to contract at the expense of the service providers. However, the rightholders are still free to decide whether they wish to contractually agree to the use of content – beyond the limits defined in § 6 of the draft CSPA – and under what conditions this should take place, if applicable.

“In the event that a rightholder does not wish to have the use of their works licensed by the service provider, § 10 of the draft CSPA grants them the possibility



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to oblige the service provider to block their works” (cf. recitals). In accordance with the legislator’s approach, the rightholder only has to provide the information on the work to be blocked which is necessary for the blocking.

In order to prevent undesired use of content on the part of the rightholders, this content must be checked by using automated upload filters. As a consequence, all content – possibly with the exception of that covered by § 5 of the draft CSPA – must be checked by the system of the service provider and compared with a database and filtered out. The problems surrounding upload filters, also in terms of the contravention of proportionality, have already been gone into several times.

In addition, § 10 (1) of the cited draft Act refers to the provision of the “information required” by the rightholder. However, the information required is not specified in any concrete way. Here, what would certainly be desirable is to have a clarification concerning which information is deemed to trigger a blocking obligation, as well as to ensure permission for both a clear identification of the work on the service provider’s platform and the verification of the undisputed ownership of the rights and the absence of an exemption for authorized use.

2. On Paragraph 2

The provision in § 10 (2) transposes Article 17 (6) of the DSM Directive. According to this provision, start-up service providers are not obliged to block works on their platforms during the first three years of their business activity as long as the average number of monthly unique visitors does not exceed five million.

The German proposal for transposition is based on the text of the Directive and partially adopts it. A more precise definition of “unique visitors” would have made sense and offered clarity. In the absence of such a definition, the rebuttable presumption is that offers do not exceed this threshold unless they are ruled out by clearly deviating figures – usually based on active user accounts. Furthermore, there is no geographical limitation (for visitors from the European Union).

3. On Paragraph 3

With § 10 (3) of the draft CSPA, the legislator exempts small service providers in the sense of § 2 (3) of the draft CSPA from the obligation to block the re-upload of illegal content. Thus, the proportionality requirement from Art. 17 (5) of the DSM Directive is intended to be transposed.

“As a rule, it will not be required for service providers in this category to use automated filter technologies. Nevertheless, according to § 11 of the draft CSPA, they are obliged to remove unlicensed content after having been informed to that effect”, is stated in the recitals.

On what premise the BMJV bases its assessment that automated filter technologies are “as a rule” not required in such cases is entirely elusive. Purely because content would not have to be blocked according to § 10 (1), the other regulations of the draft CSPA, which also cannot be fully implemented without filtering measures, continue to apply to small service providers.



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I. On § 11 draft CSPA (Removal of non-authorized uses)

The blocking according to § 10 of the draft CSPA can also be a consequence of the removal of unauthorized uses according to § 11 of the cited draft Act. In accordance with the latter, content uploaded by users and not categorised as allowed on a contractual basis or a legal exemption must be removed and blocked for future use if the rightholder requests removal from the service provider.

Both §§ 10 and 11 of the draft CSPA will only be applied in those cases in which the content has not been pre-flagged by the user as authorized use and where this is not obviously incorrect. In the case of pre-flagging, the service provider would be instructed to inform the rightholder about the upload and the corresponding pre-flagging as authorized content. The rightholder would then have the possibility to use the internal complaint procedure according to § 14 of the draft CSPA. In the present draft, the legislator does not seem to have considered how the notification to the rightholder should be made without automated content detection or upload filters or the fact that this is not technically possible in any other way.

In addition, as in the case of § 10 (1) of the cited draft Act, the wish prevails to gain clarification as to which information is capable of triggering an obligation to remove, as well as to ensure permission for both a clear identification of the work on the service provider's platform and the verification of the undisputed ownership of the rights and the absence of an exemption for authorized use.¹

At all events, it must be ensured that the requirements are in line with the current ECJ rulings on the McFadden and Glawischnig-Piesczek cases.

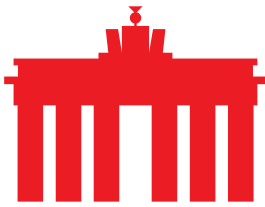
J. On § 12 draft CSPA (Blocking and removal of uses pre-flagged as authorized)

The provision of § 12 of the draft CSPA provides an exception to the principle in § 8 (2) of the cited draft Act that content which is pre-flagged as authorized uses may neither be blocked nor removed.

It is the obligation of the service provider to check whether the user's claim that he/she has rights of use or that he/she is invoking legal permissions in accordance with §§ 5 and 6 of the draft CSPA is obviously incorrect. If necessary, the blocking or removal request of the rightholder would have to be followed despite the pre-flagging.

The question as to when a categorization of uploaded user content is "obviously incorrect" is left completely undefined by the Act. Only one highly questionable example of a 90 percent presumption is mentioned (see below), which is probably not applicable in most cases. How the service provider is supposed to recognise the existing copyright protection of content without having every single uploaded piece checked (by an upload filter) against a database is also questionable.

¹ cf. Commission Recommendation on measures to effectively tackle illegal content online (C(2018) 1177 final), <https://ec.europa.eu/digital-single-market/en/news/commission-recommendation-measures-effectively-tackle-illegal-content-online>



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The recitals state: “According to the second sentence of the provision, an obviously incorrect pre-flagging is to be assumed if the content uploaded by the user corresponds to at least 90 percent of the information provided by the rightholder. With this high level of correspondence, it must be assumed that the use of the restriction is generally unlikely.” And further: “When pre-flagging a use as contractually authorized, the obvious inadmissibility of the pre-flagging can nevertheless result from other circumstances, in particular from the nature of the user and the type of content: Thus, it should be ruled out that (private) users of service providers have corresponding rights to complete feature films.”

The lack of a legal definition and the use of other vague terms such as “in particular” and “generally unlikely” do not contribute to the badly needed clarification and legal certainty. On the contrary. Due to the lack of clarity and precision in the standards, the service providers will be left to their own devices when it comes to making decisions and weighing up the merits when it comes to accepting responsibility and engaging in judicial clarification – including the risk of litigation and liability, not least with regard to § 19 (4) of the draft CSPA. This is extremely problematic – in particular, because the 90 percent correspondence is practically impossible to calculate and is also frequently not applicable to authorized cases pursuant to §§ 5 and 6 of the cited draft Act. As a consequence, service providers will, in order to reduce the legal risk, increasingly carry out blocking, leading in turn to over-blocking.

According to the legislator’s intentions, the service provider should also have the task of checking the plausibility of the user’s identification of the content. Here, on the one hand, the question arises as to why a special regulation should be devised, the subject matter of which is already covered by the E-Commerce Directive. And on the other hand, what comes first: the activation and subsequent manual check, or the blocking and possible subsequent activation?

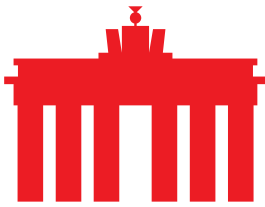
K. On § 13 draft CSPA (Remedies, access to the courts)

Neither users nor rightholders are obliged to participate in the complaint procedure by service providers. In this respect, it would be good to have it clarified that the service provider is able to make a decision even in the absence of participation by the other party and that the non-participation of the rightholder leads to the fact that the claims prerequisites of § 97 (2) of the German CA are not fulfilled.

L. On § 16 draft CSPA (Liability in case of users pre-flagged as authorized)

In the case of pre-flagged content, the service provider is generally exempted from liability for public reproduction of uploaded content in accordance with § 16 of the draft CSPA. Exceptions to this rule are the cases of “obviously incorrect” pre-flagging already mentioned and critiqued above.

This exemption is consequently a situation which is welcome for the user, given that the rightholder must first contact the service provider by way of complaint if they do not agree to the content being made accessible.



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However, the one-week deadline for a decision and the automatic sanctioning of a decision taken at a later date seem questionable. If, for whatever reason, cases could not be dealt with in time, service providers would have no choice but to block content automatically in order to avoid possible liability. This cannot be in the interests of the legislator.

Accordingly, a more flexible provision should be made here, which does not automatically entail liability after one week.

M. On § 19 draft CSPA (Measures against abuse)

In § 19 of the draft CSPA, the legislator provides for measures against abuse in the pre-flagging and removal of content. This is generally to be welcomed.

For example, it is clarified that the unauthorized request for blocking or removal of third-party works as own works by self-proclaimed rightholders can lead both to temporary exclusion from the deletion and blocking procedure and to consequences under liability law in accordance with the principles of unjustified warning notices of intellectual property rights.

However, just how effective this measure against abuse can actually be is rather questionable. Hardly any user or service provider will be prepared to bear the expense or even the risk of legal proceedings to clarify liability according to the principles of unjustified warning notices of intellectual property rights.

Paragraph 4 of the cited draft Act provides for a right of action for associations to seek an injunction from the service provider for repeated wrongdoing. This would provide an opportunity to grant associations a right in the cases of Paragraph 2 in order to hold rightholders liable in court in the event of frequent infringements.

Overall, the measures against abuse represent a fundamentally welcome addition. However, the ultimate responsibility nevertheless often seems to lie with the service provider. This is especially true when one considers that most of the service providers in question offer their services free of charge to the user. A greater balance would be desirable here.

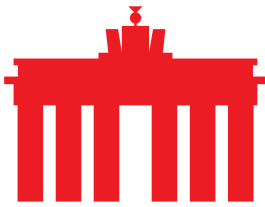
N. On § 21 draft CSPA (Person authorized to receive service in the Federal Republic of Germany)

Pursuant to the Network Enforcement Act, § 21 of the draft CSPA provides for the obligation of the service provider to name a person authorized to receive service in the Federal Republic of Germany. The extent to which it is really necessary to appoint 27 authorized representatives for international service providers within the EU must be critically examined and is not in the interest of an EU Internal Market.

III. Closing remarks

A. Need for greater clarity

When it comes to the present discussion draft, eco sees a need for further clarification and a greater level of precision.



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While there is no denying the efforts that the BMJV have gone to in compiling the present discussion draft, the promised transposition with the avoidance of upload filters can in particular be described as having failed.

It is to be hoped that the discussion draft will be revised accordingly and submitted for discussion again as a draft agreed upon by the ministries.

The definition of service provider in § 2 (1) of the draft CSPA should adopt the wording of the DSM Directive in No. 1 and should also be subject to a clarification of profit-making in No. 3.

For service providers, an opt-out option for licensing would certainly be desirable, as would the possibility of generating revenues without immediately falling under the qualification as service provider pursuant to § 2 of the draft CSPA.

§ 5 of the draft CSPA should be further clarified.

In the opinion of eco, the point of mutual profit should be subject to a general licence exemption for mechanically verifiable uses authorized by law pursuant to § 6 of the cited draft Act.

The pre-flagging of authorized uses according to § 8 of the draft CSPA leads in Paragraph 2 (in connection with § 12 of the cited draft Act) to a practical infeasibility of the pre-flaggings and the resulting exemptions from removal. In general, the wording of § 12 of the draft CSPA and the terms used therein do not meet the high standards required from the Act.

The extension of authorizations must focus on the nature of use by the users and must not be based on the commerciality of the service provider.

In § 10 of the cited draft Act, the concept of “unique visitors” should be accorded a legal definition and it should be explained which information must be provided as “required”.

With regard to the responsibility for pre-flagging authorized content and the measures against abuse, service providers should be given some more leeway for reactions and actions when it comes to time limits or liability.

The requirement for up to 27 authorized representatives within the EU should be critically questioned in view of the concept of the Internal Market.

About eco

With more than 1,100 member companies, eco is the largest Internet industry association in Europe. Since 1995 eco has been highly instrumental in shaping the Internet, fostering new technologies, forming framework conditions, and representing the interests of members in politics and international committees. The focal points of the association are the reliability and strengthening of digital infrastructure, IT security, trust and ethically-oriented digitalisation. That is why eco advocates for a free, technology-neutral and high-performance Internet.