

ETNO Reflection Document on the future of electronic commerce in the internal market and the implementation of the e-Commerce Directive



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Executive Summary

- ETNO welcomes the European Commission public consultation on the future of electronic commerce in the internal market and the implementation of the Directive on Electronic Commerce.
- Electronic commerce (e-commerce) is a fundamental driver of European growth and competitiveness.
- The current EU legal framework on e-commerce - in particular the provisions related to intermediaries' liability - strike the right balance amongst the interests of the different stakeholders. The framework has allowed the development of online commercial activities respecting fundamental principles and rights recognised at EU level, in particular the fundamental principles of freedom of speech, the freedom of access to the internet and the right of privacy.
- However, some stakeholders, in particular right-holders, are arguing for an increased liability for electronic communications operators concerning the content of communications transported over their networks. Any modification in this direction of the current liability regime for intermediaries as provided for by the e-Commerce Directive would be contrary to the basic principles of freedom of speech and privacy. Moreover, the extension of intermediary's liability would be inappropriate as it would go against the principle of proportionality and non-discrimination amongst actors of the value chain.
- ETNO believes that illegal file-sharing is an important concern for all stakeholders. At the same time, ETNO considers that the best way of reducing illegal downloading is by making legal offers that are affordable, within a sensible release window (i.e. not widely outside the expectations of end users) and easily accessible via different platforms. Developing efficient educational campaigns

addressing end users is equally important.

- ETNO acknowledges the limited takeoff of e-commerce and believes that the causes for this situation can be found in various factors, such as the lack of harmonised consumer protection rules, the insufficient availability of instruments for electronic payments, the lack of multi-territorial licenses for online content, insufficient consumer trust and knowledge, etc.
- Therefore, ETNO believes that the Commission should focus on the development of harmonised rules in the aforementioned fields and organise information campaigns addressed to users. The revision of the e-commerce directive, in particular the provisions related to intermediaries liability, is not the right instrument to remove the barriers to e-commerce and to encourage innovation and market development.

GENERAL REMARKS

In the consultation document - in particular in the paragraph "Issue 5: Interpretation of the provisions concerning intermediary liability in the Directive" - the Commission highlights that:

"The Electronic Commerce Directive ("ECD") was drawn up and negotiated in the late 1990s with the aim of developing a balanced liability framework for Internet operators that on the one hand protected rights and on the other encouraged the development of new information society services.

Section 4 of the ECD covers the responsibility of intermediary service providers. It defines the conditions for exemptions of liability of intermediary Internet service providers for certain activities: "mere conduit", "caching" and "hosting" (Articles 12 to 14). These mention the concepts of "actual knowledge" of an infringement and of an "expeditious" response. The Commission, and also national courts and administrations, have frequently been called on to interpret these concepts.

Article 14(1)(b) leaves open the possibility of notice and take down procedures to be agreed between parties if problematic information is detected. The Directive does not regulate the detail of such procedures.

Article 15 states that providers offering the services covered by the Articles above have no general obligation to monitor but that Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities.

The Commission has found, through its contacts with the various stakeholders, that the interpretation of the provisions concerning the liability of intermediaries is frequently considered necessary solving

problems. The study commissioned on this issue (see above) found differences in interpretation between national courts and even within Member States."

ETNO holds the following views in this respect.

ETNO members consider that the EU legal framework in force and in particular the regime established by the e-Commerce directive on intermediary liability strikes the right balance amongst the interests of the different stakeholders. The current regime - providing for exemptions to intermediary liability, the protection of the legitimate interests of right-holders as well as the protection of EU citizens rights - has in fact allowed the development of online commercial activities which are offered in respect of the fundamental principles and rights recognized at EU level, in particular the freedom of speech, the right of internet access and the right to privacy.

ETNO members are aware of the fact that the electronic commerce, as a driver for citizens' welfare and economic growth, should be fostered. However, ETNO believes that this goal may rather be achieved through intervention in other areas of legislation than the e-Commerce Directive, for instance by increasing harmonisation of the consumer protection rules, by guaranteeing effective and secure payments instruments for e-commerce transactions, and by defining new systems for managing copyright in the online world, for instance making multi-territorial licenses for online products available. Also, the development of educational campaigns addressed to users and the availability of legal, attractive and easily accessible content offers for consumers are fundamental to increase consumers' confidence in electronic commerce.

More in particular, access to creative content is the cornerstone to achieve the full potential of the digital single market and to contribute to the European competitiveness.

On the contrary, any intervention addressing the liability regime established by the e-Commerce Directive, as proposed by some stakeholders, in particular the right-holders, calling for an increased liability of intermediaries for the content transmitted over their networks, would be disproportionate and unbalanced. It would be imposed solely on one part of the industry, but its outcome would be extremely negative for Europe's competitiveness and welfare since it would jeopardize the development of innovative services by European ICT operators while not benefiting users.

This would also be contrary to the Digital Agenda, where on the role of ICT and internet for Europe, we read that *"The objective of this Agenda is to chart a course to maximise the social and economic potential of ICT, most notably the internet, a vital medium of economic and societal activity: for doing business, working, playing, communicating and expressing ourselves freely. Successful delivery of this Agenda will spur*

innovation, economic growth and improvements in daily life for both citizens and businesses. Wider deployment and more effective use of digital technologies will thus enable Europe to address its key challenges and will provide Europeans with a better quality of life through, for example, better health care, safer and more efficient transport solutions, cleaner environment, new media opportunities and easier access to public services and cultural content”.

Moreover, the Digital Agenda for Europe Communication identifies the barriers of a digital single market, but it does not include the intermediaries’ liability provisions. The extremely detailed Digital Agenda document should be considered as the functional boundary for any review of the e-Commerce Directive.

The proportionality requirement is even more fundamental, if we think of the electronic communication scenario from a global and forward-looking perspective: often the same operators which are called to develop and invest in innovative services, are the same companies that are subject to heavy obligations according to the provisions of the Digital Agenda and other EU measures in terms of deploying and investing in broadband and ultra-broadband networks while guaranteeing access to their networks at regulated conditions to other operators. In this perspective, ETNO considers that any stakeholder which is part of the digital value chain should share, in a proportionate and balanced manner, commitments and investments for the development of the single digital market.

RESPONSES TO SPECIFIC QUESTIONS

52. Overall, have you had any difficulties with the interpretation of the provisions on the liability of the intermediary service providers? If so, which? BUS (ISPs), PUB SERV, INFOSOC LAW PUBLIC SERVICE

The current regulatory framework has allowed for a continuous and often successful development of the market, not the least thanks to the balance struck between the interests of the different stake holders. However, recent developments, under the pressure of certain rights holders, could be leading to a regime where the systematic use of injunctions to terminate or prevent infringements – with the opening up of the possibility of liability for intermediaries in case the injunctions is not fully effective or cannot be implemented (e.g. the SABAM Tiscali case in Belgium) – introduce an unfavourable element of uncertainty by limiting the application of the principle of non liability of intermediaries: the exception (i.e. the liability) could become the norm, voiding the objective of the relevant articles of the directive.

Moreover, it would require intermediaries to disclose information about users to non authorised organisations and/or corporations therefore violating fundamental rights recognised by EU and national laws, such as the right to privacy.

53. Have you had any difficulties with the interpretation of the term "actual knowledge" in Articles 13(1)(e) and 14(1)(a) with respect to the removal of problematic information? Are you aware of any situations where this criterion has proved counter-productive for providers voluntarily making efforts to detect illegal activities? BUS (ISPs), PUB SERV, INFOSOC LAW PUBLIC SERVICE

Other cases (such as the eBay/LVMH case in France) have introduced doubts about the interpretation of "actual knowledge", by stating that any activity linked to the content being hosted, such as promoting specific e-commerce transactions in this case, automatically created a liability for the intermediary.

This certainly will have a chilling effect on many hosting sites, if this decision is maintained by the Cour de Cassation, as it essentially voids the limitation of liability provisions of the directive. Even "good citizen" gestures such as trying to preemptively identify pedo-pornographic material could be constructed as a general ability to have actual knowledge of all kinds of infringements.

This interpretation is to be considered not only non-proportional and too extensive, but it also raises concerns due to the lack of harmonisation throughout the EU.

54. Have you had any difficulties with the interpretation of the term "expeditious" in Articles 13(1)(e) and 14(1)(b) with respect to the removal of problematic information? BUS (ISPs), PUB SERV, INFOSOC LAW PUBLIC SERVICE

No.

55. Are you aware of any notice and take-down procedures, as mentioned in Article 14.1(b) of the Directive, being defined by national law? BUS (ISPs), PUB SERV, PRIV

ETNO is not aware of any general 'Notice and Take Down' procedures being defined by national law. In some member states measures are put in place in the framework of combating child sexual abuses.

56. What practical experience do you have regarding the procedures for notice and take-down? Have they worked correctly? If not, why not, in your view? BUS (ISPs), INFOSOC LAW PUBLIC SERVICE

See ETNO's response to question 55.

57. Do practices other than notice and take down appear to be more effective? ("notice and stay down", "notice and notice", etc) BUS (ISPs), INFOSOC LAW PUBLIC SERVICE

As explained in our response to question 55, in many cases notice and take down is actually notice and stay down, as once an infringement has been identified, the intermediary is usually required to actively fight the infringement and prevent that it is being repeated. Without making an evaluation if notice and stay down is more effective than notice and take down, ETNO wants to underline that such regime imposes a general monitoring obligation which is in conflict with Article 15 of the Directive. Notice and stay down must also be considered to go far beyond what is foreseen by the current liability regime.

58. Are you aware of cases where national authorities or legal bodies have imposed general monitoring or filtering obligations? BUS (ISPs), INFOSOC LAW PUBLIC SERVICE

No.

In the last decade, relatively few cases reached the level of gravity requiring ex post blocking obligations. In France for instance, in 2008 the Court of Cassation decision on the Aaargh! website confirmed the blocking obligation imposed to ISPs. Nevertheless, cases like this remain limited and should not push regulators to go further in this direction and impose an ex ante obligation to monitor or to readily identify users pursuing certain activities on the Internet.

Legal obligations based on courts' or other legal authorities' decisions to block ex post access to certain sites in Europe need to be in line with the principle of non-discriminatory access to information, meaning that they should be drafted in a way that don't affect consumers' right to access otherwise lawful content.

This is in line with what is stated in several EU provisions, e.g., Recital 30 and 31 of Directive 2009/136, where it is expressly set forth that *"providers are not required to monitor information transmitted over their networks"* and that *"it is a task for the Member States, not for providers of electronic communications networks or services, to decide, in accordance with due process, whether content, applications or services are lawful or harmful"*.

Ex post blocking access injunctions are and should remain a last resort measure aiming for instance at minimizing access to child abuse images. We also would like to mention that none of the filtering solutions that we have been working with are fully effective, as workarounds are easily put in place by those users aiming at reaching illegal content.

59. From a technical and technological point of view, are you aware of effective specific filtering methods? Do you think that it is possible to establish specific filtering? BUS (ISPs), INFOSOC LAW PUBLIC SERVICE

Filtering per se is neither specific (you must filter away a complete IP address, i.e. a full site), nor effective (the structure of Internet essentially allows any user with a minimum of technical savvy to overcome the filtering measures of its ISP). In our understanding filtering of blocking specific content coming from a specific site would not be very effective (circumvention means would be available) and would entail a general surveillance of the content seemingly originating from the designated site. Also from the technical point of view, filtering measures are ineffective since they cannot deal effectively with the technologies which are used today for downloading.

60. Do you think that the introduction of technical standards for filtering would make a useful contribution to combating counterfeiting and piracy, or could it, on the contrary make matters worse? BUS(ISPs), INFOSOC LAW PUBLIC SERVICE

General content filtering (which in any case cannot be legally imposed) would not benefit from a standardized technology as it would also "standardize" circumvention procedures. In any case, the introduction of content filtering would probably migrate the user towards more secure (encrypted) transfer mechanisms, which would render content invisible to any filtering system. There is also a high risk that "generalized filtering" which might be promoted by the existence of a standardized solution would hinder legal content from being shared.

61. Are you aware of cooperation systems between interested parties for the resolution of disputes on liability? BUS (ISPs), INFOSOC LAW PUB SERVICE

No.

65. Are you aware of specific fields in which obstacles to electronic commerce are particularly manifest? Do you think that apart from Articles 12 to 15, which clarify the position of intermediaries, the many different legal regimes governing liability make the application of complex business models uncertain? BUS (ISPs), INFOSOC LAW PUBLIC SERVICE

The internet is vital for the legal development of electronic commerce. At the same time, it has given counterfeiters and those involved in illegal file-sharing new ways of distributing their products, such as the illegal use of "peer to peer", electronic commerce sites, on-line auction sites and e-spamming. The digital environment is attractive to counterfeiters and pirates for several reasons, in particular anonymity, the possibility of creating sites anywhere in the world, removing or moving them if need to states where the legislation on intellectual property or its application are laxer, the huge size of the markets (number of electronic commerce sites and number of references), the relative ease of misleading consumers in the target market, etc.

It is ETNO's opinion that one of the most essential obstacles for successful electronic commerce, when it comes to online content, is the lack or insufficient availability of legal offers that are user-friendly and available at the same time as when illegal

content is “offered” (i.e. first release window). With the internet being a worldwide playing field, legal content available in one continent will instantly be available elsewhere. Therefore ETNO highlights that there is a need for cross-border licences and making legal content available to Europeans as soon as it has been distributed elsewhere. At the same time ETNO purports that right-holders, telecom operators and ISPs have to be able to benefit from new business models and be able to choose the models for their business.

The solution for copyright infringements is innovative services and new business models, which address the demands and expectations of consumers. That would seriously help in fighting illegal file-sharing and downloading, not the harmonization or extension of liability of intermediaries. ETNO does not believe that the different legal regimes governing liability throughout the EU make the application of new business models uncertain. We believe that this problem will be solved when new business models will be developed by right holders.

67. Do you think that the prohibition to impose a general obligation to monitor is challenged by the obligations placed by administrative or legal authorities to service providers, with the aim of preventing law infringements? If yes, why? BUS (ISPs), INFOSOC LAW PUBLIC SERVICE

This prohibition is being challenged (practically speaking, if not by the law itself) by judicial decisions about the obligation to prevent the reiteration of known infringements (as an example see the Sabam/Tiscali case in Belgium).

68. Do you think that the classification of technical activities in the information society, such as "hosting", "mere conduit" or "caching" is comprehensible, clear and consistent between Member States? Are you aware of cases where authorities or stakeholders would categorise differently the same technical activity of an information society service? BUS(ISPs), PUBLIC SERVICE INFOSOC LAW

The differences between those technical activities are often not well understood. In particular, national legislators or judges seem to be keen to impose actions for infringement reduction on certain intermediaries (e.g. control and prevention by “mere conduits”) - , actions that in fact could only be effectively implemented by another category of intermediaries (e.g. the “hosting” provider). A uniform understanding of the differences between the different types of intermediaries, and their effective possibility to execute certain actions would certainly avoid uncertainty in the European market. This would ensure the necessary level playing field for service providers throughout EU.

69. Do you think that a lack of investment in law enforcement with regard to the Internet is one reason for the counterfeiting and piracy problem? Please detail your answer. BUS (ISPs), INFOSOC LAW PUBLIC SERVICE

So far, there has been more attention paid to and investment made in law enforcement with regards to illegal file-sharing on the Internet, than in the adaptation by public authorities to the demands of the digital economy and the development of innovative services for their end users. ETNO members are firmly convinced that innovative services and new business models that address the demands and expectations of consumers are by far the most important tool in fighting illegal file-sharing and downloading. This is not to belittle the importance of educational campaigns, which should be run in parallel with the development of those new offers. We believe that right-holders, which would be the main beneficiaries of a reduction in illegal file-sharing, have been seriously lacking in their investments in those two areas.