

Message 304

Communication from the Commission - TRIS/(2015) 02834
Directive 98/34/EC
Translation of the message 303
Notification: 2015/0305/D

Observations from the Commission (article 8, paragraph 2, of Directive 98/34/EC). These observations do not have the effect of extending the standstill period.

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1. MSG 304 IND 2015 0305 D EN 16-09-2015 11-09-2015 COM 8.2 16-09-2015

2. Commission

3. DG GROW/B/2 - N105 04/63

4. 2015/0305/D - SERV60

5. article 8, paragraph 2, of Directive 98/34/EC

6. Within the framework of the notification procedure laid down by Directive 98/34/EC, the German authorities notified to the Commission on 15 June 2015 the draft Second Act amending the Telemedia Act.

The draft act clarifies that WLAN operators are to be considered access providers for the purposes of establishing the liability regime for rights violations committed by users of their WLAN services and stipulates the conditions for liability privileges. The draft also stipulates the extent of liability privileges for host providers which offer a service involving particular risks.

Pursuant to Article 8(2) of Directive 98/34/EC, examination of the draft has prompted the Commission to deliver the following comments.

1. [REDACTED] *Section 1 of this document is out of scope.*

[REDACTED]

[REDACTED]

2. DRAFT AMENDMENTS TO ARTICLE 10 OF THE TELEMEDIA ACT

According to Article 10 (2) of the Telemedia Act, as introduced by the notified draft, for services involving particular risks, the service provider is assumed to have knowledge of facts or circumstances from which the unlawful act or information becomes apparent. Article 10 (2) specifies, in point 1-4, when a service involving particular risks is present.

Following the statements by the German authorities accompanying the notified draft, this new provision intends to clarify the liability of host providers, taking into account that it is becoming increasingly easy to infringe intellectual property rights to a greater extent on the Internet. It intends to make clear that actual knowledge in the sense of Article 14 of the Directive on electronic commerce is assumed where the business model is built largely in copyright infringements.

According to Article 14 of the Directive on electronic commerce, transposed in German Law by Article 10 of the Telemedia Act, the provider of a hosting service is not liable for the information stored on condition that it does not have actual knowledge of illegal activity or information. Moreover, upon obtaining such knowledge or awareness, it has to act expeditiously to remove or to disable access to the information in order to be exempted from liability. This Article has been interpreted by the European Court of Justice in different rulings, as C 324/09 (L'Oreal vs Ebay) or joined cases C-236/08 to C-238/08 (Google France vs LVMH). The Directive on electronic commerce, in its Recital 44, establishes that "a service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of "mere conduit" or "caching" and as a result cannot benefit from the liability exemptions established for these activities". In view of this, the provisions of Article 10(2) seem to go beyond the conditions in Article 14 of the Directive on electronic commerce as interpreted by the European Court of Justice.

As concerns the concepts introduced by Article 10(2), the Commission would like to invite the German authorities to clarify what is meant by "as a rule" (and if there are foreseen exceptions), "illegal storage and major proportion". Finally, the Commission notes that Article 10(1) point 4 refers to cases where "there is no possibility of having unlawful content removed by the authorised party". The Commission would like to invite the German authorities to clarify how this relates to the existing notice and action procedure according to Article 14 of the Directive on electronic commerce.

3. COMMISSION'S FORTHCOMING ASSESSMENT OF THE ROLE OF PLATFORMS AND OF ONLINE INTERMEDIARIES

The Commission takes this opportunity to remind the German authorities that the Commission is committed to launch before the end of 2015 a comprehensive assessment of the role of platforms and of online intermediaries, which will cover inter alia "how best to tackle illegal content on the Internet". To this end, the Commission intends

to launch a far-reaching public consultation which will cover questions related to the liability regime established in the Directive on electronic commerce and "whether to require intermediaries to exercise greater responsibility and due diligence in the way they manage their networks and systems – a duty of care". This comprehensive assessment may lead, if needed, to a legislative initiative on the liability of intermediaries.

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