Message 202

Communication from the Commission - TRIS/(2017) 01938
Directive (EU) 2015/1535
Translation of the message 201
Notification: 2017/0127/D

Forwarding of the response of the Member State notifying a draft (Germany) to comments (5.2)of Italy.
Forwarding of the response of the Member State notifying a draft (Germany) to comments (5.2)of Sweden.

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1. MSG 202 IND 2017 0127 D EN 28-06-2017 24-07-2017 D ANSWER 28-06-2017

2. Germany

3A. Bundesministerium für Wirtschaft und Energie, Referat E B 2, 11019 Berlin,
Tel.: 0049-30-2014-6353, Fax: 0049-30-2014-5379, E-Mail: infonorm@bmwi.bund.de

3B. Bundesministerium der Justiz und für Verbraucherschutz, Referat V B 2, 10115 Berlin,
Tel.: 0049-30-18580-9736, Fax: 0049-30-18580-9525, E-Mail: sayiner-me@bmjv.bund.de

4. 2017/0127/D - SERV60

5. -

6. The Federal Republic of Germany would like to thank Sweden and Italy for their comments regarding Notification 2017/0127/D and responds as follows.

It is pointed out that the notified draft Act improving law enforcement on social networks (Network Enforcement Act), which was submitted to Sweden for information purposes, was revised in consultation with the Commission in order to achieve the greatest degree of compatibility with EU law. In this reply, reference is therefore made to the version of the Network Enforcement Act in which said Act was adopted by the German Bundestag on 30 June 2017 and which will enter into force on 1 October 2017.

An English translation of the Network Enforcement Act is available at
http://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.html.

Response regarding: nature and scope of the Act
The scope of the Act has been clarified. The scope only covers platforms which are designed for users to share any content with other users or make it available to the public. The crucial factor is the fact that the content in question is user-generated content, i.e. the content is made available by the users and not the platform operators. In this regard, the form in which this happens (e.g. photo, video, audio or text) is irrelevant. Therefore, digital music services which only disseminate their own content and do not offer users any platform to disseminate their own content are not covered by the scope of the Network Enforcement Act.

The scope is restricted further by focusing on the intended use of the platform. Providers of platforms which are aimed at disseminating only specific content do not come under the provisions of the Network Enforcement Act. As a result, gaming platforms, professional networks, specialist portals or sales platforms, for instance, are not included in the scope.

In addition, the reporting obligation under § 2 of the Network Enforcement Act shall not apply to social network providers who, over the course of the calendar year, receive fewer than 100 complaints regarding unlawful content. This ensures that social networks where unlawful content as defined by § 1(3) of the Network Enforcement Act only plays a minor role are excluded. This restriction shall ensure the proportionality of the reporting obligations, which may be burdensome, primarily for smaller networks or start-ups.

As a result of the aforementioned clarifications, the scope of the Network Enforcement Act is limited to social networks which are of great relevance for social discourse.

Response regarding: national requirement for data storage
With respect to § 3(2)(4) of the Network Enforcement Act, it is pointed out that the final version of the Network Enforcement Act stipulates that content shall only be stored within the scope of Directives 2000/31/EC and 2010/13/EU. This should overcome Sweden's concerns with regard to a restriction on the freedom to provide

services.

Response regarding: relationship with the provisions of the Directive on electronic commerce

§ 3(2)(1) of the Network Enforcement Act introduces the obligation incumbent upon the networks to take immediate note of a complaint and to check whether the content reported in the complaint is unlawful. The social networks must only perform this check if the complaints covered by the Network Enforcement Act can be assigned to specific content. The complaint must be suitable as a basis for assessing the unlawfulness of the content. This means that knowledge within the meaning of Article 14(1) of the Directive on electronic commerce is not acquired upon receipt of the complaint, but rather can only be acquired from the test result.

The Directive on electronic commerce does not explicitly clarify – where knowledge is available – whether this is a legal concept that requires interpretation as well as one which is also open to interpretation. As to whether a complaint imparts knowledge within the meaning of Article 14(1) of the Directive on electronic commerce, this will be a question to be decided on a case-by-case basis and shall depend on the type of content or possible infringement involved, for example content that is clearly a punishable offence. In other instances, the imparting of knowledge within the meaning of Article 14(1) of the Directive on electronic commerce shall depend on other circumstances, such as the content of the complaint, other circumstances known to the social network and, as appropriate, further comments from the complainant or the user.

Blatantly unlawful content must be deleted or blocked with 24 hours pursuant to § 3(2)(2) of the Network Enforcement Act. As a result of the limitation to blatantly unlawful content, the time limit stipulation already includes a restriction at a de facto level. Pursuant to § 3(2)(3) of the Network Enforcement Act, other unlawful content must be removed, or access to it blocked, promptly (i.e. without undue delay), usually within seven days. By making the previously rigidly formulated deadline more flexible, account is taken of the idea that a final decision within seven days is not always feasible in complex situations.

Reference is also made to the fact that Article 14(3) of the Directive on electronic commerce does not affect the possibility of Member States establishing procedures governing the removal or blocking of access to information.

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European Commission

Contact point Directive (EU) 2015/1535
Fax: +32 229 98043
email: grow-dir2015-1535-central@ec.europa.eu