

Message 202

Communication from the Commission - TRIS/(2015) 04025
Directive (EU) 2015/1535
Translation of the message 201
Notification: 2015/0305/D

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

ОГРАНИЧЕН - OMEZENÝ PŘÍSTUP - BEGRÆNSET - ZUGANGSBESCHRÄNKT - ΕΣΩΤΕΡΙΚΗ ΧΡΗΣΗ - LIMITED - LIMITADO - PIIRATUD - RAJOITETTU - LIMITÉ - KORLÁTOZOTT HOZZÁFÉRÉS - RISERVATO - RIBOTO NAUDOJIMO DOKUMENTAS - IEROBEŽOTAS PIEĒJAMĪBAS DOKUMENTS - RISTRETT - RESTRITO - LIMITAT - OBMEDZENÝ - OMEJENO - BEGRÄNSAT

Document handled in the framework of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical standards and regulations.

This document is only releasable to staff in the European Commission and the Member States with an established need-to-know in the framework of Directive (EU) 2015/1535.

When bearing the marking 'LIMITED', this document shall not be releasable for publication. When transmitting it via electronic means within the Commission, SECCEM (SECure EMail) should be used.

In case you are the holder of this document without having the established need-to-know, as indicated above, inform the author, originator or sender immediately and return it securely unread. Failure to do so shall be considered a breach of security, which may give rise to disciplinary or legal action.

(MSG: 201504025.EN)

1. MSG 202 IND 2015 0305 D EN 16-09-2015 22-12-2015 D ANSWER 16-09-2015

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 für Wirtschaft und Energie, Referat VIA3, 11019 Berlin,
Tel.: 0049-30-2014-6015, Fax: 0049-30-2014-7071, E-Mail: buero-VIA3@bmwi.bund.de

4. 2015/0305/D - SERV60

5. -

6. The Government of the Federal Republic of Germany thanks the Commission for its comments of 11 September 2015, and replies to these as follows:

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

II. Draft amendments to Article 10(2) TMG-GE

The Federal Government is of the opinion that Article 10(2) of the draft does not exceed the bounds of Article 14 ECD as interpreted by the European Court of Justice. Pursuant to Article 14 ECD, the provider of a hosting service is not responsible for stored information if he has no actual knowledge of the unlawful information, and - in relation to damage claims - if he himself is also not aware of any facts or circumstances that would expose the unlawfulness of the information. Article 10(2) TMG-GE is based on this in providing that the knowledge of facts or circumstances that would expose the unlawfulness of the information is presumed to be present if the service being offered is an especially risk-prone service. Subsequently, four examples of risk-prone services are given.

The Federal Government does not intend to exceed the limits of the ECD, but is rather of the opinion that the proposed changes are within the bounds of current law. Account should be taken here of the enormous technological advances, especially over the last few years, that have facilitated both the legal and illegal use of the internet, including in the form of copyright infringements. Business models have been created that are based on copyright infringements. The providers of these services typically operate anonymously from non-European countries, thereby evading any judicial action that might be taken against them. The Federal Court has therefore held, based on Recital 48, pursuant to which the ECD does not change the scope for duties of care to be imposed on hosting providers to detect and prevent specific types of unlawful activity, that if the service provided is especially risk-prone, there are more extensive obligations of due diligence. This should be presumed to be the case where the business model is designed from the start to facilitate rights infringements by users, or where an entrepreneur increases the risk of unlawful use through his/her own actions (see Federal Supreme Court, 2013 I ZR 80/12, par. 31 – File-Hosting-Dienst m.w.N.).

In light of the above, the Federal Government takes the following position on the request of the Commission to clarify Article 10(2) TMG-GE:

1. The word 'typically' [in der Regel] concretises the concept of a risk-prone service based on typical examples. Such examples are not restrictive or exhaustive, and allow deviations in specific or atypical circumstances. This serves to increase flexibility in the application of the law, and allows services arising in future that are currently unknown and therefore not listed under the four criteria to be dealt with as being especially risk-prone. Deviations are also allowed for atypical cases that were not foreseen at the time of legislation or were too small in scope to be addressed explicitly. The four criteria therefore provide a description of the typical use cases of risk-prone services, while leaving room for other use cases to which specific situations may give rise.

2. The concept of unlawful storage as defined in Article 10(2)(2)(1) TMG-GE is understood to be storage that violates applicable law. This relates in particular to storage of content undertaken in violation of copyright.

3. The phrase 'vast majority' [weit überwiegende Zahl] in Article 10(2)(2) TMG-GE on the one hand clarifies that it is not required that all content stored by a hosting provider be stored unlawfully for it to qualify as an especially risk-prone service. It is therefore not relevant for this criterion whether or not some storage might be undertaken without infringement if a large majority of the overall content provided by a hosting provider is characterised by unlawfully stored content.

On the other hand, the wording 'vast majority' [weit überwiegende Zahl], instead of simply a majority, also makes it clear that a service cannot be dealt with as especially risk-prone if just over half of the storage undertaken is unlawful. This concrete elaboration was added to avoid having to impose indirect control measures on hosting providers that would endanger the profitability of their business models or disproportionately complicate their operations and to ensure that hosting providers are not burdened with a general monitoring obligation.

4. 'There is no possibility to have unlawful content removed by the rights holder' in Article 10(2)(2)(4) TMG-GE relates to cases where a service provider may intentionally evade the Notice & Action procedure, for example by operating the service anonymously from a country where criminal prosecution by the German authorities is not possible (see above).

The possibility for rights holders to notify hosting providers of the presence of content infringing their copyright to prompt the latter to delete such content is not affected by this provision. The obligation of the service provider to

remove or block such content pursuant to Article 14(1)(b) ECD or Article 10(2) TMG continues to apply unchanged. Rather, the application of Article 10(2)(2)(4) TMG-GE becomes relevant only in situations where deletion cannot be enforced. This provision is subordinate to Article 10(2) TMG, as it should normally be examined first whether the latter serves to achieve the objective of having the unlawful content removed. If the rights holder has not endeavoured to have the unlawful content removed, then there is no case for application of Article 10(2)(2)(4)TMG - GE.

European Commission

Contact point Directive (EU) 2015/1535

Fax: +32 229 98043

email: grow-dir83-189-central@ec.europa.eu