

The role of Internet intermediaries in advancing public policy objectives

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The role of internet intermediaries has, in certain circles, been hotly debated in recent years. Definitions vary and in particular there are divergences of views as to what they can and should do.

More often than not these discussions seek to fit these economic actors into the context of comparable off-line economic functions. For example, they are seen as portals to information in the same manner that a newspaper or a TV channel serves that function. The European Commission was faced with this question back at the end of the nineties when it was working on the e-commerce directive (ECD) with a view to designing a harmonised set of rules that would allow for the development of new cross-border information society services.

The proposal of the Commission which was enshrined by the European legislator in 2000 purposefully avoided the trap of trying to define the role of these intermediaries that can and should be multi-faceted. Instead, we find a clear definition in EU law of the term information society service (in the so-called transparency directive 98/34 as modified by 98/48/EC that is recalled in recital 18 of the ECD (2000/31/EC)) and a definition of a provider of information society services in Article 2 (b) ECD. In Community law therefore internet intermediaries are providers of information society service providers.

In the ECD the European legislator focussed on what specific functionalities of the internet could impact on public interest objectives and were not already sufficiently regulated by exiting legislation in terms of protecting recognised general interest objectives. Thus, for example, the directive ensured that services that were not subject to a license on the off-line world should not need one for the on-line world. In contrast, it harmonised a long list of information requirements because it was felt that, in the absence of a physical presence, increased information requirements were essential to allow for similar levels of trust and enforcement efficiency to be achieved in the on-line world compared to the off-line world.

When it came to the issue of liability, the European legislator decided that any information society service provider would fall under what might broadly be referred to as off-line general and specific liability obligations associated with information provision. However, it considered that three very specific services relating to the access and transmission of information over a communication network, if undertaken in a very precisely defined manner, should be subject to a conditional liability regime otherwise the communication network would simply not function.

Those services of mere conduit, caching and hosting and how they should be executed to benefit from this limited liability regime are defined in Article 12 to 14 of the text. These liability provisions of the EC are unfortunately, sometimes intentionally, misinterpreted. For example, it is false to suggest that the ECD exempts internet intermediaries from all liability. Likewise, it is false to suggest that the imposition of full liability for the services exempted is feasible and would have no

effect on the operation of the internet.

Internet intermediaries, depending on their business models, clearly offer a bundle of services of which these three specific types, offered in the passive manner explained in the ECD, may or may not form a substantial part. A case by case evaluation is therefore necessary, it is not a simple question of whether or not the information society service provider is acting as an intermediary. Many commentators suggest that internet intermediaries have changed or developed their services over time and therefore provisions adopted by the EU legislator in 2000 need to be altered. These fail to see that these new information society services, in so far as they do not include the three specified above, are simply not covered by the liability exemptions but are regulated as information society services within the text.

The ECJ has made clear in its recent case-law that the key point, as specified in the directive, is whether these three services are supplied in an automatic and/or passive manner. More specifically it ruled in the *Google v LVMH* case (C-236/08) that concerned a paid referencing service that: "... In that regard, it follows from recital 42 in the preamble to Directive 2000/31 that the exemptions from liability established in that directive cover only cases in which the activity of the information society service provider is 'of a mere technical, automatic and passive nature', which implies that that service provider 'has neither knowledge of nor control over the information which is transmitted or stored'." (para 113 of the judgement)

It added:

"It must be pointed out that the mere facts that the referencing service is subject to payment, that Google sets the payment terms or that it provides general information to its clients cannot have the effect of depriving Google of the exemptions from liability provided for in Directive 2000/31." (para 116 of the judgement)

The ECD and ECJ jurisprudence are therefore clear as to where the conditional liability exemptions for information transmission over the internet apply. The Directive is also clear that for these three types of services Member States cannot impose general monitoring obligations to seek facts or circumstances indicating illegal activity.

In contrast, Member States may establish obligations on information society service providers to inform the competent authorities of alleged illegal activities or obligations on such service providers following specific requests to provide information to help identify recipients with whom they have storage agreements. Likewise, injunctions are also allowed as specified in articles 12 to 14.

It is the implementation of these injunctions and specific monitoring obligations that appear to have been subject to differing interpretations in different Courts. In cases of dispute, in order to determine whether the information society service provider acted in accordance with the ECD requirements to assist it was necessary to estimate whether the internet intermediary had "actual knowledge" or awareness of the relevant illegal acts or not. This trigger of liability appears to be subject to different interpretations. The same is true with the obligation of the provider to then "disable" the access to the relevant information. The question being, how can

permanent disablement not imply permanent monitoring that is forbidden? These issues are the ones that the future report on the evaluation of the ECD foreseen for the end of this year will need to clarify.

The ECD left the issue of notice and takedown to the market to develop. This unfortunately does not appear to have happened. However, any discussion or further refinement of ‘actual knowledge’ or “disabling” possibilities must not be solely framed by what is technically and economically feasible. If the legislator decides to refine further how these conditional liability provisions must be enforced by the Courts he cannot simply consider the issues of dispute between internet intermediaries and rights-holders that currently tend to dominate these debates. He must also, given the breadth of information transmitted over the internet, also fully account for the potential impacts on two other general interest objectives, viz. those of the fundamental right to the freedom of expression and the right to protect personal data.