

CLIENT ALERT

ISP-Liability & Media Law

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A French draft act, aimed at combating copyright infringements by obliging internet access providers to monitor their subscribers' behavior and to cut off repeat offenders, has met criticism from the European Commission.

Introduction

In a [previous contribution](#) we have already commented on the work of the French Olivennes Commission. Further to the activities of this Commission, the French Government has worked out a “Draft Act on the promotion of the distribution and protection of creativity on the internet”. In the framework of the Notification Directive 98/34, the European Commission has now issued some comments on the Draft Act.

The European Commission's position

The European Commission's position is interesting in at least two respects.

First, the fact that a government authority (the “rights Protection Committee”) would send a notice to subscribers who commit copyright infringements, has created some concern: *“the Commission is concerned about the fact of ascertaining whether the French Authorities consider that the fact that the message in question is sent by the Rights Protection Committee to “the subscriber, on its own behalf, by email and via the party whose activity is to provide access to public online communication services having concluded a contract with the subscriber” would have the effect that such operator would no longer enjoy the waiving of liability laid down in the Directive on electronic commerce”*.

Second, the Commission has expressed concern that the Draft Act could lead to imposing some kind of monitoring obligation upon French internet access providers: *“it should also be underlined that it is important that, in any state of events, the implementation of such measures, which would fall within the framework of relations between the subscriber and his Internet access provider, do not succeed in imposing on the part of the latter, in law or in fact, even indirectly, a general obligation to monitor Internet access. The Commission would here like to recall that, under Article 15, paragraph 1, of the Directive on electronic commerce, Member States must not impose upon intermediate service providers “a general obligation (...) to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity”. The requirement to obviate any general monitoring obligation also subsists as regards the procedures of implementation of the obligations to which Internet access providers are subject, given that these procedures will also be established at a later stage”*

Practical consequences

The European Commission's remarks are not binding, and the French Government may elect not to take these into account. However, since this attitude would open up the way to future actions for failure to comply with EC law and/or to defenses before the national courts that the French legislation is not in conformity with EC law, it is expected that the Commission's remarks will be taken into account at least to some degree. This is important, since it may put a stop to a tendency in France to impose general monitoring obligations upon internet service providers, contrary to the wording of Article 15 of the E-Commerce Directive.

References: [Observations of the European Commission](#)

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