

Message 304

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 Directive 98/34/EC
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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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2. Commission
3. DG ENTR/C/3 - BREY 08/94
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5. Article 8, paragraph 2, of Directive 98/34/EC
6. On 22 July 2008, the Commission received the aforementioned draft technical regulation. It establishes, on the one hand, discouragement and intervention measures as well as sanctions in respect of Internet users – held liable for an infringement of copyright or similar law caused by the content of a public online communication service – and, on the other hand, obligations for providers of Internet access, relating to the aforementioned measures. Such measures therefore refer to information society services.

Pursuant to Article 8, paragraph 2, of Directive 98/34/EC, examination of the notified draft has prompted the Commission to formulate the following observations:

1. Regulatory framework of electronic communications

Success in combating online piracy rests on effective cooperation between all parties involved, particularly but not only telecommunications operators and access providers. This point of view is reflected in the proposed reforms currently under discussion in the European Parliament and in the Council. In the case in point, this concerns the proposed Directive of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and services, and 2002/20/EC on the authorisation of electronic communications networks and services of 13 November 2007 [COM(2007)697] and the proposed Directive of the European Parliament and of the Council amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation on consumer protection [COM(2007)698].

In particular, and as incorporated in the aforementioned proposed Directives, for the sake of legal certainty, the users of electronic communications services should be clearly informed of their legal obligations as regards respecting copyright and of the legal consequences of their acts.

However, any measures which go beyond the provision of information, education and awareness, such as the filtering of the content of electronic communications or the suspension of access to the network for users whose Internet access is not secure, thus opening the way to copyright infringements, means finding the correct balance between the need to combat online piracy and other important objectives. The latter are, in particular, broadband distribution (the French Presidency of the EU supporting the concept of broadband as falling under universal service), universal access to electronic communications services, the rights and freedoms of users, the limits on the obligations incumbent upon operators (pursuant to Directive 2000/31/EC on electronic commerce mentioned

below). In particular, intervention measures on the content flows in computer networks should be treated with a great deal of precaution in order to obviate negative consequences on privacy and the freedom of information of Internet users in Europe.

2. Cross-border aspects – electronic commerce

On reading the notified draft, particularly Article 11 ("The provisions of this Act shall apply throughout the territory of the French Republic..."), it could be inferred that it is intended to apply solely, on the one hand, to Internet access providers established in France and, on the other hand, to Internet users who have agreed a contract of access to public online communication services with said operators established in France.

The French Authorities are requested to clarify this point for, if the notified draft was intended to apply equally to operators established and providing Internet access in other Member States or to subscribers who have agreed a contract of access to the Internet with such operators, it could raise a problem of compatibility with Article 3, paragraph 2, of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), which prohibits Member States from restricting the free circulation of information society services from another Member State.

In fact, the Commission would like to receive clarifications as to the fact of ascertaining whether and how the procedure laid down in the notified draft would apply to situations of violation of the obligations laid down in Article L. 336-3 of the Intellectual Property Code, which may be committed from Member States other than France by subscribers to an Internet access provider established in France or to violations, which may be committed from French territory by subscribers to an Internet access provider established in another Member State.

3. Notification to the subscriber - role and responsibility of the Internet access provider

In the terms of the notified draft (Article L. 331-24), the Rights Protection Committee may send the subscriber a message by electronic means, reminding him of the obligations laid down in Article L. 336-3 of the Intellectual Property Code.

Given that this communication is done via the subscriber's Internet access provider, the Commission wishes to ask the French Authorities whether such a notification, as laid down in Article L. 331-24 of the draft, would, under French law, constitute evidence which would make it possible to conclude that, under the terms of Article 14 of the Directive on electronic commerce, the aforementioned operator is actually aware of the illicit activity or information and that he could therefore be considered responsible for the information which he stores.

In other words, 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.

4. Security measures and obligations of Internet access providers

Article L. 331-30 of the notified draft lays down that "The High Authority establishes a list of security measures deemed effective for preventing breaches of the obligation referred to in Article L. 336-3". In the terms of Article L. 336-3, the holder of Internet access could not be held responsible for such breaches, particularly if he has implemented the security measures defined in implementation of Article L. 331-30 of the notified draft.

It is clear that it is only at the time subsequent to the definition of such

security measures by the High Authority that it will be possible accurately to assess the scope of the measures at issue and understand what other measures (other than those laid down in Article L. 336.3 of the notified draft) will make it possible to waive the responsibility of the access holder. However, 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, by a future Decree of the Council of State, according to Article 10, paragraph 1, of the notified draft.

Further clarification of these questions on the part of the French Authorities would therefore be opportune.

5. Proportionality of the suspension of access to online communication services

The notified draft lays down the possibility for the High Authority for the Distribution of Works and the Protection of Rights on the Internet (the administrative authority that the draft establishes) to impose the suspension of an Internet subscription, accompanied by the prohibition to resubscribe for a given period (three months to one year). In addition, it must be said that Article L. 331-28, second subparagraph, of the notified draft stipulates that "The suspension shall apply only to access to public online communication services. Where this access service is purchased as part of joint packages that include other types of services, such as telephone or television services, suspension decisions shall not apply to these services".

a) On this aspect, the notified draft raises several questions, particularly in light of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services ("Universal Service" Directive) currently undergoing revision [COM(2007)698 – see point 2 above].

This Directive guarantees a minimum range of services, including functional Internet access. Indeed, Article 4 lays down the obligation for Member States to meet the reasonable requests of users for connection at a fixed location to the public telephone network. This concerns not only telephone calls but also the communication of data at data rates sufficient to permit functional Internet access. According to the whereas clauses of this Directive, such access via a narrowband connection (the Directive refers to a typical data rate of 56 kbit/s) to the public telephone network must be capable of ensuring sufficient data rates to access online services, such as those offered on the public Internet (see whereas clause 8). This provision is transposed into French law by Article L 35-1 of the Postal and Electronic Communications Code.

Article 1(3) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ("Framework" Directive), currently undergoing revision [COM(2007)697 – see point 2 above], provides that the regulatory framework will not prejudice measures taken at Community or national level, in compliance with Community Law, to pursue general interest objectives, in particular relating to content regulation.

If, in this case, respect for copyright does indeed constitute a general interest objective, the fact remains that, to comply with Community Law, the national measures concerned must be necessary and proportional to the objective. In that it provides for the sanction of suspension of Internet access, the notified draft should be consistent with these Community provisions.

Indeed, it is necessary to guarantee that the measures envisaged in the notified draft meet the criterion of proportionality. This criterion must be assessed in light of the fact that the infringements at issue are currently already subject to criminal sanctions involving high fines and prison sentences.

- Though, as specified in the introductory explanation to the notified draft, the sanction of suspension laid down in the notified draft is intended to prevent it coming to criminal sanctions, the draft itself does not lay down any provisions preventing the representatives of eligible claimants from bringing the matter before either the High Authority or the criminal courts. Furthermore, nor does the notified draft lay down that, where the matter is brought before the High Authority, criminal proceedings should not be undertaken until after expiry of the administrative procedure, risking, therefore, the coexistence of two actions, one administrative and the other criminal. The combination of implementing measures could give rise to several different decisions for the same offence. The French Authorities are invited to provide further details on these points.

- In this context, the question also arises of ascertaining how the fact can be justified that an administrative body (the High Authority) and not a legal body has the power to decide whether or not copyright or a similar right has been violated. In addition, under Article L. 331-30 of the notified draft, how will the sworn officials be able to bring the matter before the Rights Protection Committee? Which cases will be pursued and on the basis of which criteria will decisions be taken (number of illegal downloads...)? The Commission invites the French Authorities to clarify all of these points.

b) More generally, it is necessary to take account of the reality of current Internet use, which considerably exceeds access to content: a growing and significant number of services are provided by Internet means, which are increasingly replacing traditional methods of communication. These are the public services offered by the Internet (obtaining administrative documents, tax return, etc.), but also banking services and ticketing services (reservations for flights, hotels, concert seats, etc.). A total suspension of Internet access would render all such services impossible.

As regards Internet access for underprivileged people, whereas clause 7 of the "Universal Service" Directive recalls the special attention that must be paid to the elderly, the disabled and people with special social needs. The Member States and the EU are currently developing initiatives within the framework of the i2010 strategy, such as online health services (eHealth) or the eInclusion initiative, in order to integrate these people and facilitate their access to the Internet. Severance of their Internet access could prejudice their ability to access services essential to them.

c) In fact, a significant number of Internet subscribers in France use combined offers (triple and quadruple play), which implies that, through one connection point, they have access to telephone, Internet and television services. Without sufficient specification, severance of Internet access could imply the suspension of access to telephone services, which are part of universal service. It will therefore be necessary to ensure that the provisions of the notified draft, which assert that suspension does not affect the telephone or television, are technically possible and actually applied. Details on this issue on the part of the French Authorities would be appreciated.

d) In addition, should it prove impossible to separate the various services, to what extent would the access provider be implicated in this action of separation of the various categories of service, without, however, there being question of a monitoring obligation (prohibited by Article 15 of Directive 2000/31/EC on electronic commerce)? Generally speaking, the question of ascertaining whether the filtering measures which have to be imposed by the Internet providers and the other actions to be taken will fall to the providers is not decided in the notified draft and should therefore be clarified.

e) Furthermore, the Commission, whilst sharing the intention expressed by the French Authorities to wish to limit the scope of the sanction imposed, invites them to provide clarification as to the fact of ascertaining whether it would be more in line with the requirements of proportionality to lay down a sanction

which, whilst concentrating only on access to online communication services without also affecting other services such as the telephone or television, would consist in only restricting access by a responsible subscriber to broadband Internet, without preventing narrowband access. This type of sanction may, indeed, be of a kind likely to achieve the objective specifically targeted of rendering the illegal downloading of protected works impossible or, in any case, extremely slow and virtually impracticable or harmless without removing the possibility of access to other activities (information, communication, administrative management, etc.) on the Internet.

Moreover, it would also be necessary to ensure that electronic mail services remain unaffected by the proposed measures in order that they be proportionate to and consistent with the behaviour of which the user is reproached.

6. Communication on creative content online in the single market

This draft falls under the perspective drawn by the Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market of 3 January 2008 [COM(2007) 836 final].

This document underlines the opportunity to encourage the setting up of cooperation procedures (good conduct codes) between access and service providers, right holders, and consumers in order to guarantee a diversified offer, user-friendly online services, adequate protection of works protected by copyright, awareness of the importance of copyright to ensure the availability of content and stronger cooperation in combating piracy and illegal file sharing.

The measures proposed by the notified draft are justified, according the French Authorities, in view of the protection of intellectual property and the protection of cultural diversity. The statement setting out the reasons for the notified draft underlines the difficulties that the current criminal sanctions system involves as well as a disproportion between the sanctions and the current situation of widespread piracy on the Internet.

However, in the opinion of Commission, which shares the objective of the draft, it would be useful that the notified draft, in addition to the clarifications requested and the following remarks, also stipulate that the proposed measures will be completed by other legislative provisions intended to support the development of online content, in particular in implementation of Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities.

7. Fundamental rights

From the point of view of fundamental rights as recognised by the European Convention on Human Rights and the European Charter of Fundamental Rights, the notified draft raises questions on the right to a fair trial (Article 6 ECHR, Articles 48 and 49 of the Charter) within the framework of the educational measures envisaged (statement of reasons, page 7 of the notified draft): "[...] In order to guarantee the educational effectiveness of the system, the rights protection committee shall use this option systematically, unless there are exceptional circumstances. Recommendations, which are simply reminders of the law, do not constitute grounds for appeal. They therefore cannot be subject to legal appeal and the merit may only be contested in support of an appeal against a sanction decision."

When the notified draft establishes an objective responsibility of the holder of Internet access regarding the breach of the security obligation of his access, which could result in an infringement of copyright, on pain of disconnection from the network, the fact that the recommendations systematically sent to subscribers are not subject to appeal could endanger the fundamental right to a fair trial.

The notified draft does not explain how the High Authority will be capable of preventing material errors in the management of the dispatch of recommendations, in particular, when the system used is a systematic dispatch system, nor whether the practical details of the "contradictory procedure" of the new Article L. 331-25 will give the subscriber the option of establishing a possible error. The subscriber who is the victim of a material error could face the imposition of a suspension without having the possibility of explaining his position as there is no course of appeal and contradictory procedure (not to mention the reversal of the burden of proof). It must be recalled here that decisions on merit should be based exclusively on elements of proof on which the parties have had the possibility to make themselves heard (see also Article 41(3) of the WTO "TRIPS" Agreement). In this context, the recommendations would not seem to be simple reminders of the law but acts by the administration which produce effects in the legal sphere of holders of access to the Internet.

In order to reinforce the legal certainty of the system, it is important that the notification to the subscriber, under the terms of Article L. 331-24 of the notified draft, also mention the subject of the alleged infringement (titles downloaded, date, etc.) and that the first message sent to the Internet user suspected of involvement in piracy may itself be subject to appeal, following the example of the second and third message. For example, the point of such an appeal on the part of the addressee against the first message may be the result of his desire to explain that the behaviour of which he stands accused is, in reality, imputable to a person who has fraudulently used the access to the public communication service (for example, in a network environment with no open wires), without this person being placed under the authority and surveillance of the access holder (on this subject, see Article L. 336-3, paragraph 2).

8. Acts subsequent to enforcement of this draft

The Commission would like to recall the necessity for the French Authorities to notify all draft Acts under Directive 98/34/EC, which in the future will be intended to enforce the provisions of the notified draft, provided that they fall within the scope of this Directive. Reference is made to this subject, for example, in the future "list of security measures" to be drafted by the High Authorities under Article L 331-30 of the notified draft, as well as in the future Decree of the Council of State, laid down in Article 10, paragraph 1.

The French Authorities are invited to consider the foregoing remarks and to provide the clarifications requested before adopting their notified draft.