

Von [REDACTED]

**Gesendet:** Freitag, 4. Oktober 2019 14:32

**Betreff:** Commercial broadcasters' message ahead of Experts Group Meeting on E-Commerce Directive

Dear Member States' Experts,

Ahead of the planned [meeting](#) of the E-Commerce Experts Group on 8 October, the Association of Commercial Television in Europe ([ACT](#)) would like to recall some important principles concerning the responsibilities of online intermediaries and hosting platforms:

#### Background on the liability privileges

- While it was not the only area covered by the [E-Commerce Directive](#) (ECD), the introduction of liability privileges (Articles 12 to 15 ECD) for certain types of intermediary has clearly been the most litigious area of the legislation.
- Originally meant to exempt the “plumbing level” (mere conduit, caching and hosting) of the Internet from liability, CJEU jurisprudence has over time usefully explored a **differentiation between active and passive providers, depending on their engagement with the content**.
- **We would caution against any idea of doing away with the distinction between “active” and “passive” providers**, particularly in the context of the liability privilege granted to hosting providers in Article 14 of the E-Commerce Directive.

#### Duty of care for passive service providers

- In any event, passive service providers are subject to a duty of care. **Recitals 40, 47 and 48 of the ECD** mention the **obligations** passive service providers should be subject to.
- The **Court of Justice of the European Union** (CJEU) has also recalled on many occasions that the prohibition of a general obligation to monitor for passive service providers in Article 15 of the E-Commerce Directive is not absolute, and that **a certain degree of monitoring can be applied even to passive service providers** (e.g. Case C-70/10 *SABAM v. Scarlet*, Case C-314/12 – *Telekabel*) and that a **duty of cooperation**, in order to avoid or prevent copyright infringements, is required from intermediary providers (e.g. Case C-610/15 – *Stichting Brein v. ZIGGO*).
- The European Commission’s **Communication on tackling illegal content online** ([Communication 555/2017](#)) states that online hosting and intermediary platforms have a “duty of care” and should “ensure a safe online environment for users, hostile to criminal and other illegal exploitation, and which deters as well as **prevents criminal and other infringing activities online**” (p.7). It also underlines that “online platforms should, in light of their central role and capabilities and their associated responsibilities, adopt **effective proactive measures to detect and remove illegal content online**, and not only to limit themselves to reacting to notices which they receive” (p. 10)<sup>[1]</sup>.

#### Clarification by CJEU case-law on the active role of certain online platform providers

- Several decisions of the CJEU highlight different (and non-cumulative) criteria which may indicate that an operator plays an active role (e.g. optimising, promoting, making available, managing, indexing, etc). From the moment an online service provider plays an active role, it cannot rely on the exemption from liability provided for by the ECD.
- See for instance Case C-324/09 - *L’Oréal and others*; C-610/15 - *Stichting Brein v. Ziggo*; C-527/15 - *Stichting Brein v. Fimspeler*; C-521/17 - *SNB-REACT U.A. v Deepak Mehta*.
- With this in mind, we would caution against a **widening the safe harbour** provisions as it could mean a **levelling down of the liability regime for active service providers**.

---

<sup>[1]</sup> Bonnier Broadcasting does not support the wording on “illegal content”. Bonnier Broadcasting considers the concept of “illegal content” at cross border EU level being too broad to function well in all territories.

Many thanks for your consideration of this email. We remain at your disposal for any further questions you may have.

██████████ | Senior EU Policy Officer  
Association of Commercial Television in Europe



T: ██████████ | M: ██████████  
[www.acte.be](http://www.acte.be) | [Twitter](#) | [LinkedIn](#)  
Rue des Deux Eglises, 26 | 1000 Brussels | Belgium

**Transparency Register Number – 18574111503-28**  
**European Economic Interest Grouping | Register of Legal Entities**  
**(Brussels) 0438.023.393**

This message and its attachments may contain legally privileged or confidential information. It is intended solely for the named addressee. If you are not the addressee indicated in this message (or responsible for delivery of the message to the addressee), you may not copy or deliver this message or its attachments to anyone. Rather, you should permanently delete this message and its attachments and kindly notify the sender by reply e-mail.

1. Bonnier Broadcasting does not support the wording on “illegal content”. Bonnier Broadcasting considers the concept of “illegal content” at cross border EU level being too broad to function well in all territories.