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**TACKLING ILLEGAL CONTENT ONLINE AND THE LIABILITY OF ONLINE
INTERMEDIARIES**

ADDITIONAL COMMENTS TO THE FOLLOWING QUESTIONS:

Have you encountered situations suggesting that the liability regime introduced in Section IV of the E-commerce Directive (art. 12-15) has proven not fit for purpose or has negatively affected market level playing field?

The liability regime as interpreted by the Court of Justice of the European Union (CJEU) is fit for purpose but not always applied in the correct manner at the national level. Changing or reopening the E-Commerce Directive is not required to address this situation, but the Commission could more strongly encourage voluntary agreements between right holders and legitimate platforms and could codify current case law via recommendations and/or interpretative communications. Illegitimate sites could be addressed in the context of possible future review of the EU's legal framework for enforcement of IPRs.

The CJEU has clearly delineated the extent to which online intermediaries may rely on the liability privileges by holding that activities carried out by online intermediaries must be of a mere technical, automatic and passive nature and that the intermediary must be neutral with regard to the content, i.e. having neither knowledge of nor control over the content transmitted or stored (see C-236/08, *Google* and C-324/09, *L'Oreal*). It is therefore already the case under existing legislation, as interpreted by the CJEU, that many online platforms cannot be considered intermediaries – they are more appropriately content distributors.

As infringing sites are increasingly established offshore or concealing their identities following clarifications by the courts that they do not benefit from the liability privileges, the role of intermediaries has emerged as the most important factor in successful enforcement online. This was foreseen in existing EU legislation by setting up a framework that limits liability but also imposes responsibility on platforms and is based on the expectation that robust anti-infringement procedures will be implemented.

Scope of measures: Some online intermediaries refuse to cooperate with right holders by wrongly referring to the liability privileges in Articles 12-14, which they incorrectly think they may benefit from. This goes against the reasoning of the CJEU's ruling in *L'Oreal* that

online intermediaries must act as diligent economic operators, which entails taking proactive measures against illegal activity including copyright infringement.

Conclusion: The E-Commerce Directive's liability privileges were intended to foster cooperation, not make it obsolete. A solution to the current lack of cooperation lies in Recital 40 and Art 16 of the E-Commerce Directive, which provide for the development of "rapid and reliable procedures for removing and disabling access to illegal information" based on voluntary agreements. Member States should step up efforts to encourage voluntary agreements complemented by the development and use of effective technological tools. Several Member States have already developed such voluntary agreements, and we encourage the Commission to build on this experience and relevant case law at the Member State level to promote model agreements (include in the follow the money strategy).

Do you think that the concept of a "mere technical, automatic and passive nature" of information transmission by information society service providers provided under recital 42 of the ECD is sufficiently clear to be interpreted and applied in a homogeneous way, having in mind the growing involvement in content distribution by some online intermediaries, e.g.: video sharing websites?

The CJEU has provided sufficient guidance on this concept (L'Oreal, Sabam) but there is a general unwillingness on the part of platforms to accept the application of the concept on a national level in specific cases. There is no need to make changes to the E-Commerce Directive, and we believe that the Copyright Directive, as interpreted by the CJEU, already embodies the relevant principles. The Commission may wish to explore alternative means to clarify (via a recommendation, communication or separate legislative instrument) that sites, which are actively involved in content distribution, cannot avail themselves of the liability privileges.

Mere conduit/caching/hosting describe the activities that are undertaken by a service provider. However, new business models and services have appeared since the adopting of the E-commerce Directive. For instance, some cloud service providers might also be covered under hosting services e.g. pure data storage. Other cloud-based services, as processing, might fall under a different category or not fit correctly into any of the existing ones. The same can apply to linking services and search engines, where there has been some diverging case-law at national level. Do you think that further categories of intermediary services should be established, besides mere conduit/caching/hosting and/or should the existing categories be clarified?

Please see our response above concerning intermediaries that are more active than "mere conduits" but stop short of having full editorial control. We do not believe that further clarification in the E-Commerce Directive is warranted, but support exploring the possibility to codify current CJEU case law (to the effect that safe harbours are not available to intermediaries, whether they host, cache, conduit or variants thereof in case they take an active role) by way of a clarification via a recommendation, interpretative communication or via a separate legal instrument.

Do you consider that different categories of illegal content require different policy approaches as regards notice-and-action procedures, and in particular different requirements as regards the content of the notice?

Illegal content requires robust enforcement procedures, including effective takedown & stay down options and respect for Art 5 of the E-Commerce Directive. These solutions do not require amendments to the E-Commerce Directive.

Notice and takedown can be effective to address isolated infringements associated with websites, hosting providers and other online intermediaries which operate legitimately. It does not work for structurally infringing websites and rogue hosting providers, which directly infringe copyright, by building their business models on illegal provision of copyright content.

Online intermediaries are required to enact procedures to validate the identity of their counterparties (Art 5 E-Commerce Directive). This is, however, widely ignored, rendering the sending of any notices to website operators and exercising the right of information, as foreseen in Art 8 of the Enforcement Directive, ineffective. The Commission should pursue better enforcement of existing legislation and explore how to make this requirement more meaningful.

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