

## The Emerging European Regime on ISP Liability Member States Make Progress Implementing E-Commerce Directive

European Union Member States are moving forward towards implementing the Directive on electronic commerce<sup>1</sup> (hereafter “E-commerce Directive” or simply “Directive”) in their national legislation, in an effort to meet the implementation deadline of 17 January 2002. So far, only Luxembourg has actually implemented the E-commerce Directive. However, Austria, Belgium, Denmark, France, Germany, Greece, Spain, Sweden and Finland are among the countries that have issued drafts that aim to implement the Directive.<sup>2</sup>

This article describes the draft implementation legislation in certain selected countries, namely Belgium, Finland, France, Luxembourg, Spain, Sweden and Norway (which will implement the Directive as part of its obligations as a member of the EEA).<sup>3</sup> Although implementation of the Directive has raised interesting issues in several areas, including in particular with respect to the manner of implementation of the Internal Market (“country of origin”) principle found in Article 3 of the Directive, this article will focus solely on implementation of the provisions of the Directive that provide limitations of liability for information society service providers (“ISSPs”) engaging in transmission, access provision, caching and hosting (Articles 12-14 of the Directive).

### Belgium

#### 1. General

The Belgian Ministry of Justice commissioned the “Centre de Recherches Informatique et Droit” (CRID), a research center at the University of Namur, to draft a proposal for a bill implementing the E-commerce Directive. Once satisfied with the CRID’s draft, the Ministry will formally introduce it as a proposal in Parliament. The timing for adoption of the Belgian legislation is unclear.

The CRID’s “pre-draft” in substance generally remains faithful to the E-commerce Directive’s provisions.

#### 2. Liability provisions for intermediary service providers

The pre-draft transposes the liability limitations concerning on-line intermediary activities in Articles 19 to 23. In contrast to the E-commerce Directive, injunctions are dealt with separately in Article 23 rather than in the individual articles on mere conduit, caching, and hosting, although in substance the approach taken is the same.

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<sup>1</sup> Directive 2000/31/EC of the European Parliament and 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), OJ L 178, July 17, 2000.

<sup>2</sup> The author would like to thank the following colleagues from the Brussels office of Morrison & Foerster for their contributions to this article: Karin Retzer (Germany); Dieter Paemen (Belgium and France); Ann-Charlotte Högberg (Norway and Sweden); Sakari Aalto (Finland); and Rosa Barcelo (Spain).

<sup>3</sup> The draft Austrian and Danish legislation, which are not discussed below, are available at <http://www.bmj.gv.at/gesetzes/download/ecommerce.pdf> (Austria) and <http://www.em.dk> (Denmark).

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Article 19 of the pre-draft implements the liability limitation for transmission and access provision. It does not differ in substance from the equivalent provision in the Directive. The same is true for Article 20 on the limitation of liability for caching.

Article 21 §1 and §2 of the pre-draft closely track the criteria provided in Article 14 of the Directive for the limitation of liability for host service provision. However, Article 21 §3 provides that the Government will propose a Royal Decree introducing a notice and take-down regime, after consultation with industry. The notice and take-down regime is “without prejudice to existing legal avenues.”

The drafters explicitly state in the pre-draft that their preference is not to deal with hyperlinking liability “so as not to interfere with plans the European Community may have regarding this issue for the future.”

Finally, Article 22 governs the extent of the duties of service providers to comply with monitoring obligations, and again generally is faithful to Article 15 of the Directive.

### **Finland**

#### 1. General

On March 8, 2001, the Finnish Ministry of Justice published a consultation paper on the implementation of the E-commerce Directive (2000/31/EC) into Finnish law. The consultation paper proposes adoption of a new act on the offering of information society services, together with some amendments to existing acts on consumer protection, telecommunications privacy and unfair business practices. Finland is moving forward quickly towards adoption of the legislation, and it should be in force by the implementation deadline.

The legislation proposed by the consultation paper closely follows the E-commerce Directive both in terms of structure and content, with few significant differences. Structural changes are made to take into account the existing Finnish legislation. With regard to content, there are some significant differences from the text of the Directive. The liability standards for hosting have been somewhat modified and statutory take-down procedures are introduced.

#### 2. Liability provisions for intermediary service providers

Sections 10 to 21 of the draft act set forth the liability limitations for intermediary service providers and applicable take-down and put-back regimes for illegal material distributed through their facilities. A general overview of the most significant points where the liability rules differ from the provisions of the Directive for each category of intermediary is given below.

The draft act covers the same three categories of on-line intermediary functions as the E-commerce Directive: (a) “mere conduit” activity, which includes both transmitting information and providing access to the Internet; (b) proxy caching; and (c) the provision of space on servers. With respect to the liability exemptions for mere conduit and proxy caching, the rules in Sections 10 and 11 of the draft act essentially are copies of the equivalent provisions contained in the Directive.

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On hosting service provider liability, the draft provision differs significantly in its formulation from Article 14 of the Directive, although it might be deemed consistent in substance. In particular, hosting service provider liability has been modified to be in line with the notice and take-down regime introduced by the draft act. Generally, the draft provision exempts hosting service providers from liability for third party content unless they fail to comply with a court order to prevent access to the content in question. The draft act sets forth two exceptions to this rule. First, with respect to copyright infringing material, a hosting service provider must prevent access based on a notice from the rightholder in accordance with the take-down regime provided by the draft act (*see* below). Second, a hosting service provider must expeditiously prevent access to content which contains illegal pornographic material (mainly child pornography) or hate speech upon obtaining knowledge of such illegal content. Illegal pornographic material and hate speech have been defined by reference to the Finnish Criminal Code, and defining the content of these provisions is beyond the scope of this article.

The knowledge standard introduced for take-down of material containing (child) pornography and hate speech is new in Finnish legislation. A direct translation of the standard carries the meaning that the service provider is actually aware of the illegality of the content. Because similar wording does not seem to have been used in any other statutes, it is not possible to define the exact content of this standard in practice. The Finnish wording is open to a broad range of interpretations, from actual knowledge to loosely defined constructive knowledge. The notes that were published together with the draft act would seem to indicate a standard close to actual knowledge, but the question is far from clear.

The Finnish telecommunications and service provider industries have welcomed the liability provisions in general, but have heavily criticized the special regime for take-down of copyright-protected material. They argue that there is insufficient reason to treat copyright content any differently from other content, and that introducing such a system would place an undue burden on industry.

*Take-down regimes.* The draft act sets forth a special court proceeding for issuing injunctions to take down illegal or infringing content. This procedure can be initiated in the City Court of Helsinki or at the local court at the domicile of the hosting service provider, and the courts will have to decide on the injunction in accordance with an expedited procedure. The injunction expires if a case on the substance is not taken forward by the prosecutor or the plaintiff within four months of the injunction being issued. The procedure is based on the general procedural rules of Finnish courts, and therefore an injunction is likely to be granted or rejected within a few days, or at the most a few weeks. Also, based on the general rules, a party seeking an injunction will have to provide for collateral, and is liable for all damages that may be caused by an enforcement of an injunction that is later found to be unjustified.

In addition to the general take-down procedure, copyright holders would have, according to the act, the possibility of giving direct notices to hosting service providers. The optional take-down procedure set forth for content that allegedly infringes a copyright copies, in essence, the equivalent procedure in the Digital Millennium Copyright Act (“DMCA”). A service provider must take down material upon notice from the rightholder in the form defined by law. A major difference from the DMCA is that the copyright holder must serve the take-down request, or at least try to serve it on the person responsible for the content on the server, before he can serve a take-down notice on the service provider.

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The draft act contains a put-back regime similar to that in the DMCA, where the person whose content is alleged to be an infringement may have the allegedly infringing content put back by providing a notice in the form described in the draft act. The difference from the DMCA is that the person has a seven-day limit, counted from the date he obtained knowledge of the take-down request, to provide his put-back request. The person must provide his put-back request to the alleged copyright holder with a copy to the service provider, and not to the service provider as in the put-back procedure of the DMCA. The differences between the put-back regimes under the DMCA and the draft act seem to be of lesser importance.

The person issuing either a take-down or put-back request would be liable for the damages that might be caused by a misrepresentation in the request, according to the draft act. The liability standard seems to be slightly stricter under the draft act than under the provisions of the DMCA, as the person is liable unless he can prove that he had a good faith belief that his representations were correct. According to the DMCA, the person is liable for knowingly materially misrepresenting facts in the requests, *i.e.*, a service or content provider claiming damages from the person would have to prove the knowledge and the misrepresentation. Without having undertaken detailed research into how the liability rules are interpreted by courts in practice, it is not possible to determine the exact significance of this difference.

The draft act does not have a provision exempting the hosting service provider from liability towards the content provider for a take-down that ultimately turns out to be unjustified. Such an exemption would be useful, but under the Finnish contract or tort law it would be difficult to imagine a case where the service provider would be liable in contract or tort for complying with the law.

A service provider would be required to have the contact details of a person receiving take-down and put-back requests readily available. However, the draft act does not contain a registration requirement for such contact persons as does the DMCA.

*Monitoring obligations.* The notes to the draft act state that Finnish law does not contain any general monitoring obligations on service providers and therefore there is no need to implement Article 15 of the Directive.

### France

#### 1. General

France made available an official version of its draft implementation legislation -- the "Projet de Loi sur la Société d'Information" (LSI) or the "Draft of the Law on the Information Society" -- on-line on June 13, 2001.<sup>4</sup>

The LSI is not limited to the subject matter dealt with in the E-commerce Directive. For example, it also proposes a right of reply in electronic communications and regulates domain name registrations in France. Further, in a number of areas where France has already adopted legislation, the LSI would introduce technical amendments to the existing law rather than introduce new coordinated legislation; this is, for example, the case with regard to the

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<sup>4</sup> It replaces an earlier pre-draft circulated unofficially months earlier, which differs significantly from the current version of the legislation. See <http://www.lsi.industrie.gouv.fr>.

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liability provisions imposed by the E-commerce Directive. The result is that the impact of the implementing legislation is difficult to grasp without reference to the numerous individual pieces of existing legislation that it amends.

The provisions of the LSI implementing the E-commerce Directive are contained in Title III (Articles 17-25, relating to the Internal Market principle, on-line advertising, and on-line contracting) and Title II Chapter II (Articles 11-13, concerning on-line intermediary liability).

### 2. Liability provisions for intermediary service providers

France adopted on August 22, 2000 a law that amended the 1986 Freedom of Communications Act to limit the liability of host service providers. Articles 11 to 13 of the LSI would further amend this law to bring it into compliance with the E-Commerce Directive. However, the language used in the LSI does not precisely track the wording of the Directive, although it might be deemed in substance to comply with the Directive. Host service providers will be held liable if they do not act expeditiously to remove or disable access to the information when they “effectively have knowledge of the manifestly unlawful character of the information” hosted or fail to act upon a court order.

The 1986 Freedom of Communications Act already contains a limitation of liability for access provision, which the LSI amends to ensure compliance with the Directive. The LSI’s proposed liability limitation for caching corresponds in substance to the Directive’s provision and would be inserted in the Code of Postal and Telecommunications Law. Technical amendments to the Intellectual Property Code also are proposed.

In accordance with the Directive, the LSI states that ISSPs are not subject to a general obligation to monitor. The LSI also clarifies that ISSPs are not to be treated as publishers subject to press liability.

It should be noted that the Freedom of Communications Act of 1986 as amended by the law of August 22, 2000 includes other obligations for on-line service providers that are not affected by the implementing legislation. For example, the Act requires Internet access providers to inform their customers of the availability of technical means to block access to certain sites and to offer them at least one such means. Further, ISSPs must keep records of the actual identity of their customers to allow their identification.

The LSI does not propose to introduce a system of notice and take-down, nor does it provide for a limitation of liability resulting from the establishment of hyperlinks.

## Germany

### 1. General

On December 1, 2000, the Ministry of Economics published a first “working draft” of the legislation intended to implement most of the provisions of the E-commerce Directive: the “*Entwurf eines Gesetzes über rechtliche Rahmenbedingungen für den elektronischen*

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*Geschäftsverkehr*” or “EGG”.<sup>5</sup> The EGG would amend the existing Information and Communication Services Act, the “IuKDG” which entered into force August 1, 1997.<sup>6</sup>

On April 30, 2001 the Bundesrat, the federal legislative chamber representing the German federal states (“Länder”), delivered its opinion on the draft, proposing several amendments to the text. The slightly amended draft of the EGG was published in the Official Gazette on May 17, 2001. This text was the subject of further discussions in the Bundestag (the German Parliament) on June 22, 2001. However, due to fierce criticism of the draft, it was referred to the parliamentary working group for economic affairs and the second full plenary hearing is not expected to take place until October 2001.

The criticisms concerning the EGG mainly focused on the manner in which it proposed to implement the internal market principle (Article 4 EGG). European Commission officials and numerous industry groups feel that the current text of Article 4 EGG would transpose the internal market principle in an incorrect and complicated way. Commissioners Liikanen (DG Enterprise & Information Society) and Bolkenstein (Internal Market) expressed their concern in a letter sent to the German Justice Minister, Ms. Däubler-Gmelin, in order to raise her awareness on this issue.

As does the original IuKDG, the EGG confines itself to so-called “*teleservices*” and does not deal with “*media services*.” “Teleservices” are those Information Society services that are “designed for the individual use of data such as characters, images and sounds, and are based on transmission by means of telecommunication” (for example, on-demand services, internet access services, telebanking) whereas “media services” are Information Society services directed to the general public (for example, the provision of an on-line newspaper or on-line stock quotes).<sup>7</sup> Media services will be legislated by the German Länder rather than the Federal government, in accordance with the political compromise reached in 1996 in connection with the adoption of the IuKDG. During the legislative debate about the (Federal) IuKDG the question of whether the federal legislature or the German federal states had legislative competence over the new media services was subject to heated discussions. The compromise achieved in July 1996 left it to the federal legislature to regulate teleservices, while the Länder were given authority over media services, which led to the adoption of the “*Mediendienste-Staatsvertrag*” (MDStV), the equivalent of the IuKDG applicable to media services.

As the Länder lack competence for copyright,<sup>8</sup> the current Article 5 MDStV, which limits ISSPs’ liability (and mirrors the liability limitations provided in Article 1.5 IuKDG<sup>9</sup>), is commonly held not to apply to copyright infringement. It was suggested that Article 1.5

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<sup>5</sup> The “Draft law on the legal conditions for electronic commerce” is available at <http://www.iid.de/iukdg/eval/EGG-Fassung-Kabinett.pdf> (in German).

<sup>6</sup> On May 9, 2001, the German Ministry of Justice published a draft law implementing the information requirements imposed on ISSPs by Articles 10 and 11 of the Directive, the so-called “*Regierungsentwurf für ein Gesetz zur Schuldrechtsmodernisierung*.” This law is subject to fierce debate.

<sup>7</sup> In practice, the distinction between teleservices and media services is rather artificial and can be difficult to apply.

<sup>8</sup> See Article 73 (9) of the German Constitution.

<sup>9</sup> Section 1 of the IuKDG is also referred to as the “*Teledienstengesetz*” (TDG) or teleservices act, and Article 1.5 of the IuKDG is also referred to as Section 5 of the TDG.

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IuKDG would apply by analogy to liability for copyright in relation to media services. However, such an interpretation is likely to contravene German constitutional law. Moreover, at least one case has called into question the applicability of the IuKDG to copyright liability. It remains to be seen whether and how the Länder will approach this uncertainty in the MDStV in their implementation of the E-commerce Directive with regard to media services; so far, no draft of this legislation has been released.

### 2. Liability provisions for intermediary service providers

The EGG faithfully implements the liability limitations of the Directive for transmission, access provision, caching and hosting activities. In accordance with the Directive, the liability limitations of the EGG cover civil as well as criminal liability.

The new liability regime provided for in the EGG could clarify certain civil liability questions existing under the old regime (Article 1.5 IuKDG). For example, whereas at least one court found (against the commonly held view among legal scholars) that Article 1.5(2) IuKDG (which shields hosting service providers from liability) does not apply to copyright liability,<sup>10</sup> the EGG provides additional arguments to suggest that its liability limitation for hosting *does* apply to copyright liability.

Also, the EGG clarifies that the liability-triggering knowledge standard of the hosting liability limitation is “actual knowledge” *or* with regard to claims for damages a form of constructive knowledge (“awareness of facts or circumstances”), and that the required knowledge relates to the information or the illegal activity -- issues that were not clearly addressed in Article 1.5 of the IuKDG.

The EGG does not provide for rules on the limitation of liability arising out of the provision of hyperlinks (even though the significant number of German cases on the topic are inconsistent in their rationale, and a statutory clarification of hyperlinking liability along the one found in the U.S. DMCA would be appropriate and useful), nor does it lay out any rules governing “notice and take-down.”

## **Luxembourg**

### 1. General

Luxembourg implemented the E-commerce Directive as early as August 14, 2000 together with the Electronic Signature and Distance Selling Directives (hereafter “E-commerce Law”).<sup>11</sup> This law contains 72 articles, and modifies parts of the Civil, Commercial, Procedural and Criminal Codes.

### 2. Liability provisions for intermediary service providers

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<sup>10</sup> See OLG Hamburg, *AOL v. Hitbox*, decision of March 8, 2001.

<sup>11</sup> Loi du 14 aout 2000 relative au commerce électronique modifiant le code civil, le nouveau code de procédure civile, le code de commerce, le code pénal et transposant la directive 1999/93 relative à un cadre communautaire pour les signatures électroniques, la directive relative à certains aspects juridiques des services de la société de l’information, certaines dispositions de la directive 97/7/CEE concernant la vente a distance des biens et des services autres que les services financiers, Journal Officiel du Grand-Duché de Luxembourg, A- No. 96.

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Articles 60 to 63 of the E-commerce Law implement very closely the liability provisions of the E-commerce Directive. Therefore, these articles contain a liability exclusion for mere conduit activities and a liability limitation for hosting and caching provided that the same requirements set forth by the Directive are met.

The law also foresees the possibility for courts to require the monitoring of specific sites or general surveillance for long periods of time whenever this proves necessary for the public order, or for prevention and investigation of crime, public health and public safety or safety of consumers.

## Norway

### 1. General

As an EEA Member State, Norway is obliged to implement the Directive as if it were a member of the European Union.<sup>12</sup> The Norwegian Government's consultation paper proposes to implement the Directive through the adoption of an entirely new law, which follows closely the Directive in structure, content and wording.

### 2. Liability provisions for intermediary service providers

The Directive's provisions on limited liability for intermediary service providers have been implemented in three separate provisions covering "mere conduit," caching, and hosting.

The "mere conduit" provision sets forth, as does the Directive, that intermediaries are not liable for content transmitted through their services, provided they do not initiate the transmission, choose the recipient, or choose or tamper with the content that is being transmitted.

The caching provision has also been implemented almost word for word from the Directive. Liability may attach to an intermediary only if it does not expeditiously remove cache copies when it is made aware that a court or public authority has prohibited the making available of the content, or when it has been notified that the content has been removed from, or that access has been blocked at, the originating source, in accordance with a notice and take-down regime, which is further described below. Hence, the Directive's requirement for "actual knowledge" before liability will attach to the intermediary has been interpreted to require notification in accordance with the special notice and take-down procedure, or an order by a court or authority.

Concerning limited liability for hosting, the consultation paper sets forth two alternative proposals. The first proposal limits liability for hosting services ("the storage of data at the request of a recipient of the service"), *i.e.*, the intermediary is not liable provided that he expeditiously removes or blocks access to the content if he (1) is made aware that a court or public authority has prohibited the making available of the content; (2) has been notified in accordance with the notice and take-down regime; or (3) has actual knowledge that the content is illegal "under [intellectual property, child pornography, or racism laws]."

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<sup>12</sup> The Norwegian consultation paper, including a draft law implementing the E-commerce Directive, is available (in Norwegian) on the web site of the Ministry of Industry and Commerce, at [http://odin.dep.no/nhd/norsk/aktuelt/hoeringssaker/paa\\_hoering/024081-080013/index-dok000-b-n-a.html](http://odin.dep.no/nhd/norsk/aktuelt/hoeringssaker/paa_hoering/024081-080013/index-dok000-b-n-a.html).



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The intended meaning of “actual knowledge” is not only that the intermediary must have knowledge of the existence of the content before liability may attach, but also that the intermediary must have realized that the content is illegal. However, the consultation paper states that there may be areas where such a requirement may be inappropriate, such as, *e.g.*, defamation, where difficult legal evaluations must be carried out. Therefore, the reference to “intellectual property law, child pornography or racism” has been put within brackets, because the specific laws under which the intermediary can be expected to carry out such evaluations are still under discussion.

Subject to the same considerations, in the second alternative, the requirement of “actual knowledge” has been completely excluded. Under the second proposal, liability will attach only where the intermediary does not act to take down or block access to content when he (1) is made aware that a court or public authority (presumably in Norway, although the text is not explicit on this point) has prohibited the making available of the content, or (2) has been notified in accordance with the notice and take-down regime.

It is emphasized in the consultation paper that liability will not attach only because the intermediary does not meet the requirements to benefit from limited liability. In addition, there must be a provision in Norwegian law under which he would be held liable.

Also, the Directive’s provision that a general monitoring obligation may not be imposed on intermediaries has been imported into the draft law. Section 13 of the draft law thus states that the provision which limits liability for hosting does not impose on the intermediary any general obligation to control or monitor the content which is stored or transmitted upon the request of a service recipient; neither is there a general obligation to investigate indications of illegal acts.

*Notice and take-down regime.* As indicated above, the consultation paper also proposes implementation of a notice and take-down regime modeled on the provisions of the Digital Millennium Copyright Act. Section 14 of the draft law thus sets forth that a service provider who has received a notice (subject to the requirements in Section 15) that data which is stored upon the request of a service recipient is illegal pursuant to provisions in laws on intellectual property, child pornography, and racism, is obliged immediately to remove or block access to those data. He shall inform the service recipient that the data has been removed or that access to it has been blocked, and that the service recipient can ask for the content to be put back. If the service provider receives such a request, he must inform the person who asked for the take-down that the data will be made available again, at the earliest within ten days and at the latest within fourteen days after the service provider sent such notice. Section 15 sets forth formal requirements applicable to a request for take-down, such as identification of the person making the request, and the content that is requested to be taken down. The service provider can ask for additional information before taking down or blocking access to the content, if the requirements of Section 15 are not met.

### **Spain**

#### **1. General**

*Legislative process.* On April 30, 2001, the Ministry of Science and Technology (hereafter “MST”) adopted its fourth draft bill on information society services and electronic commerce (hereafter “draft bill”) for the purpose of implementing the E-commerce Directive

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into Spanish law. The draft bill, which is publicly available on the MST web site at <http://www.setsi.mcyt.es>, has taken into account many comments made by interested parties during the public consultation periods of the previous draft bills.

A note accompanying the bill says that the bill might still be subject to further amendments before it is put before the Council of Ministers for final adoption as a formal bill. In fact, the Ministry has publicly announced that amendments will be made, as a result of strong campaigning by Internet and libertarian associations against various aspects of the bill which, in their view, stifle freedom of speech.

Representatives of the Ministry have said that once the suggested amendments addressing some of the expressed concerns have been incorporated into the bill, the MST will call a halt to the drafting, and the bill will be submitted to the Council of Ministers for adoption as a formal bill. The bill will then be submitted to Parliament, first to Committee and then to Plenary, for discussion and final adoption.

While the MST has always expressed its desire to see the bill formally adopted before the end of the year 2001, the opposition seen to the early drafts may be repeated in the Parliament, thus causing the bill to be further amended as a result of Parliamentary discussions, and therefore delaying the MST's original plans.

*General background.* The draft bill deals with the same main areas as the Directive, although it includes a section on sanctions and some amendments to existing acts such as the Civil Code, Law of the Mercantile Registry and the Arbitration Law.

### 2. Liability provisions for intermediary service providers

Articles 12 to 17 of the Spanish draft bill set forth the liability provisions for intermediary service providers for illegal or unlawful material that circulates through their facilities.

*General Overview.* The draft bill covers the same three categories of on-line intermediary functions as the E-commerce Directive, *i.e.*, "mere conduit," proxy caching, and the provision of space on servers. However, in addition to these three categories, the draft bill has added a new on-line intermediary function, namely the provision of hyperlinks.

The liability limitations in the draft bill resemble very closely the ones in the Directive. They refer to both civil and criminal liability and they apply to all kinds of illegal or infringing material as long as it is provided by third parties and not by the intermediaries themselves. Finally, the limitations apply only to damages liability; thus, injunctions (court and administrative) remain available.

*Individual liability rules.* The contents of the liability provisions of the draft bill are very similar to the provisions contained in the E-commerce Directive. The same as the Directive, the Spanish draft bill foresees no liability for the provision of network facilities and access to the Internet. The liability standard for caching follows very closely the one contained in the Directive. The main difference between the draft bill and the E-commerce Directive regarding this is that according to the draft bill, providers of caching services are required to remove the information or disable access to exclude liability, but the draft bill does not require this to be done "expeditiously," as does the Directive.

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According to Article 16 of the draft bill, host service providers are not liable if they have no *knowledge* of the illegal nature of the activity or information. Host service providers will still be able to limit their liability if upon gaining such knowledge they act *diligently* to remove or disable access to the information. The bill contains a presumption by virtue of which host service providers will be deemed to have such knowledge if an “authority” has established the illegal nature of the information and its removal.

The law does not specify that such a decision must be issued against the particular service provider who is deemed to have such knowledge. This might mean that a host service provider established in Spain could be deemed to have knowledge of the illegal nature of content it hosts if *any* court established in *any* country in the world establishes the illegal nature of the given information, and even if any such decision is directed to an entirely different party. Finally, the law adds that this presumption would apply without prejudice to notice and take-down regimes adopted on a voluntary basis by host service providers.

This last presumption added to the fourth draft bill seems to be quite unfavorable to host service providers, because according to the actual wording, a host service provider established in Spain could be deemed to have actual knowledge that certain information it hosts is illegal if such information has been declared illegal and ordered to be removed from another host service provider established, for example, in China.

Finally, unlike the E-commerce Directive (but like the U.S. DMCA), Article 17 of the draft bill deals with linking. It says that ISSPs that provide links to content hosted elsewhere on the Internet or included on web sites, in directories or search engines will not be liable for directing end users of the services to illegal content provided that: a) they have no actual knowledge that the information or activity which they link to or recommend is unlawful or can damage third party rights, or b) if they have such knowledge, they delete or block access to the link. In light of the importance of search engines and hyperlinking more generally to the Internet and electronic commerce, and the existing uncertainty surrounding possible liability for hyperlinking, the introduction of a sensible provision on this point by Spain is a welcome step forward.

The draft bill does not establish a general obligation to monitor. However, Article 11 of the draft bill establishes that upon gaining knowledge of the existence of illegal activity, ISSPs must inform the authorities (including administrative and judicial) accordingly. Failure to communicate the existence of the material can be punished. The same article contains one of the most contested rules, which empowers administrative bodies (in addition to courts) to issue interlocutory injunctions against on-line intermediaries. As a result of the strong opposition to such new administrative competence, it appears that the Ministry will limit the ability to issue injunctions uniquely to courts.

Also, if requested to do so by the court, ISSPs must monitor a given (specified) recipient of the service and keep the information regarding the activities of that recipient. Courts can only impose this obligation for a maximum period of six months. The draft bill provides that the monitoring can be done in a way that is less cumbersome for the ISSP if such a method proves to be effective. Finally, at the request of the court or administrative body, ISSPs must provide information enabling the identification of the recipients of their service.

## Sweden

### 1. General

*Legislative process.* The first draft of the Swedish law implementing the E-commerce Directive is available (in Swedish) on the web site of the Ministry of Industry, Employment and Communications, at <http://naring.regeringen.se>. The draft is in public consultation, which ended on June 15. A formal proposal to the Parliament will be made sometime during the second half of 2001, and the Parliament would then be expected to pass the bill without amendments in late 2001 or early 2002. The government officials in charge of the implementation do not rule out the possibility of Sweden not being able to implement the Directive on time.

The draft has been controversial internally, because the Ministry of Industry, Employment and Communications is mainly responsible for implementing the Directive, but the Ministry of Justice has taken a great interest, and apparently engineered some of the odd interpretations of the Directive that are put forward in the draft.

*General background.* The draft follows closely the Directive in structure, content and wording. Yet, there are some problems, especially relating to the country of origin principle and to the provisions limiting liability for intermediaries.

### 2. Liability provisions for intermediary service providers

The Directive's provisions on limited liability for intermediary service providers have been implemented in three separate provisions covering "mere conduit," caching, and hosting.

The "mere conduit" provision does not explicitly include the copies made during packet switched transmission, although this would seem to be the intention. The reason for not explicitly implementing the language of Article 12(2) is probably that such a temporary copy, which "lacks independence," currently is considered as irrelevant under Swedish copyright law, and the omission would therefore seem irrelevant.<sup>13</sup>

None of the liability limitations extend to criminal liability, but only to damages and sanctions. The argument behind this is that Swedish criminal law is already consistent with the Directive's liability limitations and contains the safeguards necessary to ensure consistency with the Directive.

The main reason for this implementation is probably the existence of the Swedish Act on liability for electronic bulletin boards ("the Act"). Pursuant to the Act, an owner of a "bulletin board," widely defined to cover a broad range of Internet services, is obliged to monitor, to a certain extent, the service for defined illegal content, e.g., hate speech, defamatory or copyright infringing material, and to take down or block access to such content. The owner is criminally liable for intentionally or grossly negligently not taking down certain material. In the absence of case law, it is very unclear how far-reaching the monitoring obligation actually is and what kind of behavior would be considered as grossly negligent. It

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<sup>13</sup> It would be very surprising if the copies made during transmission were given any weight outside the copyright context, and in any event, it would seem likely that the same conclusion would be reached also with respect to other liability.

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has been held, however, that the requirements of the law can be met through an “abuse” department which users can notify of the existence of content that must be taken down. However, even though the Act has been interpreted as a notice and take-down regime (albeit without the legal certainty of the notice and take-down regime of the Digital Millennium Copyright Act), in the absence of case law, it would be preferable for the liability limitations included in the Swedish law implementing the E-Commerce Directive to cover criminal as well as civil liability.

The decision not to implement explicit provisions limiting criminal liability, as well as the decision to keep intact the monitoring obligation of the Act, both seem contrary to the Directive’s requirements. In particular, the Act appears to stipulate that the service provider may be held liable, not only when it intentionally refrains from taking down illegal content of which it has actual knowledge, as provided for by the Directive, but also when it lacks such knowledge because of gross negligence. It is not clear whether a service provider that thought itself able to fulfil the monitoring obligation through an “abuse department” might be held liable because it neglected to monitor the service.

Sweden has chosen not to implement a notice and take-down regime, arguing that the current situation seems to be working well in practice. A more important reason is probably the explicit concern that a notice and take-down regime would limit the ways in which an intermediary can become aware of illegal material and take it down, and that a notice and take-down regime might be difficult to combine with the Act.

It looks, therefore, as if Norway and Finland will end up with notice and take-down (and put-back) regimes, whereas Sweden will not. This will depart from the traditional harmony found among Nordic laws. Usually, directives are implemented very similarly in all Nordic countries.

### **Conclusion**

On the whole, the E-Commerce Directive provided a workable and balanced approach to on-line intermediary liability, although it left several important gaps. In general, Member States are remaining true to the letter and spirit of the Directive, and some countries are taking steps to fill in its gaps. For example, Spain has taken the lead in proposing a reasonable liability exemption for hyperlinking providers, and Finland and Norway have made progress in implementing notice-and-take-down regimes that should facilitate efficient and effective removal of illegal material from the Internet while ensuring respect in particular for freedom of expression.

Once the Directive has been implemented, Member States will have reasonably consistent on-line liability regimes, but considerable differences may remain. For example, Member State courts may not consistently apply the constructive knowledge standard applicable to the hosting liability limitation. In short, while a satisfactory liability framework has been achieved, plenty of work will likely remain for the European Commission, and perhaps the European Courts, to ensure the existence of a reasonable and consistent on-line liability regime for Europe.