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**Revising the E-Commerce Directive to Ensure
Freedom of Expression and Due Process of Law**
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European Digital Rights (EDRI), a European association of 29 digital civil rights organizations from 18 countries of which IRIS is a founding member, asks for the revision of the European regime of intermediaries liability, in view of better guaranteeing the respect for fundamental rights and the due process of law application on the Internet.

EDRI responded to the public consultation of the European Commission Directive on Electronic Commerce (Directive 2000/31/EC). This consultation, closed on 5 November 2010, aims at assessing the implementation of the Directive in Member States, and at identifying limitations with the current text.

EDRI focuses its answer on the technical intermediaries liability regime set by Articles 12 to 15 of the Directive. This scheme applies to intermediaries providing access to the Internet as well as content distribution and hosting. From the users perspective, this regime has a major impact on the level of freedom of expression, freedom of information, right to privacy and personal data protection on the Internet, as well as on the due process of law. From the technical intermediaries perspective, it must ensure the needed legal certainty to run their activities.

EDRI response stresses that the lack of clarity and precision of this regime does not currently allow adequate protection of human rights and the rule of law, nor does it ensure legal certainty for intermediaries. In support of this assertion, EDRI provides examples of concrete situations having occurred in different countries following the transposition of the Directive into national laws, including in France.

In order for the EU to respect its current obligations with regard to its own Charter of Fundamental Rights and its upcoming obligations under the European Convention on Human Rights, EDRI underlines the need to revise the current intermediaries liability regime as follows:

- Where an intermediary is not hosting the content (acting as a mere conduit, an access provider or a search engine), it should have no liability for this content, nor should it have any obligations with regards to the removal or filtering of this content;
- Where an intermediary acts as a hosting provider, its liability with respect to the content hosted should be restricted to its lack of compliance with a court order to take down this content;
- Intermediaries should have no obligation to monitor content;
- Services and activities currently not addressed by the Directive (search engines, web2.0 services, hypertext links) should also benefit from the same limited liability regime.

Details on all these issues are provided in EDRI response.

Since the adoption of the Directive and its transposition process, IRIS notes that its fears expressed during the adoption in France of the Confidence in Digital Economy Law were well founded, as regards the situation in France and in other countries. The association is pleased to see an increased amount of organizations convinced that the alternative advocated by IRIS for over ten years remains the only way to protect human rights and to uphold the due process of law in the digital environment. Beyond EDRI members, this alternative is now also advocated by other main promoters of freedom of expression and information, such as the International Association Article 19.

In France more specifically, IRIS reminds that the Constitutional Council had twice vetoed attempts to limit the fundamental freedoms on the Internet (in 1996, when the Telecom Regulation Law gave this power to an administrative authority, then in 2000 when the Freedom of Communication Law delegated this power to private companies). Despite its own jurisprudence, the French Constitutional Council has eventually approved, with the Confidence in Digital Economy Law transposing the E-Commerce Directive, this devolution to the private sector of a censorship power. The Constitutional Council had in fact forbidden itself to examine the constitutionality of provisions resulting from a literal transposition of a European Directive, thus undermining the principle of the hierarchy of norms.

For more details, see:

- EDRI response to the consultation on the E-Commerce Directive:
http://www.edri.org/files/EDRI_ecommerceresponse_101105.pdf
- European Commission public consultation on the E-Commerce Directive:
http://ec.europa.eu/internal_market/consultations/2010/e-commerce_en.htm
- IRIS dossier on the law for confidence in the digital economy:
<http://www.iris.sgdg.org/actions/len>
- Article 19 response to the consultation on the E-Commerce Directive:
<http://www.article19.org/pdfs/press/european-commission-freedom-of-expression-needs-better-protection-in-digital.pdf>
- French Constitutional Council decision on the Telecom Regulation Law (1996):
<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1996/96-378-dc/decision-n-96-378-dc-du-23-juillet-1996.10818.html>
- French Constitutional Council decision on the Freedom of Communication Law (2000):
<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2000/2000-433-dc/decision-n-2000-433-dc-du-27-juillet-2000.452.html>
- French Constitutional Council decision on the Confidence in Digital Economy Law (2004):
<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2004/2004-496-dc/decision-n-2004-496-dc-du-10-juin-2004.901.html>

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