

Message 303

Communication from the Commission - TRIS/(2013) 03174
 Directive 98/34/EC
 Notification: 2013/0496/I

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.

Observaciones - připomínky - Bemærkninger - Bemerkungen - Märkused - Παρατηρήσεις - Comments - Observations - Osservazioni - Piezīmes - Komentarai - Megjegyzések - Komentti - Opmerkingen - Uwagi - Observacoes - Komentáre-Pripombe - Huomautuksia - Synpunkter - Коментари - Comentarii.

Sin plazo de statu quo - Doba pozastavení prací se neaplikuje - Ingen status quo frist - Keine Stillhaltefrist - Ooteaeg ei ole kohaldatav - Δεν υπάρχει statu quo - Standstill period does not apply - Pas de délai de statu quo - Termine di status quo non previsto - Bezdarbības periods netiek piemērots - Atidējimo periodas netaikomas - A halasztási időszak nem alkalmazandó - Il-perijodu ta' waqfien ma japplikax - Geen status quo-periode - Okres odroczenia nie ma zastosowania - Prazo do statu quo não previsto - Períoda pozastavenia neplatí - Obdobje mirovanja ne velja - Ei status quon määraaika - Ingen tidfrist för status quo - Не се прилага период на прекъсване - Perioada de stagnare nu se aplică.

ОГРАНИЧЕН - OMEZENÝ PŘÍSTUP - BEGRÆNSET - ZUGANGSBESCHRÄNKT - ΕΣΩΤΕΡΙΚΗ ΧΡΗΣΗ - LIMITED - LIMITADO - PIIRATUD - RAJOITETTU - LIMITÉ - KORLÁTOZOTT HOZZÁFÉRÉS - RISERVATO - RIBOTO NAUDOJIMO DOKUMENTAS - IEROBEŽOTAS PIEEJAMĪBAS DOKUMENTS - RISTRETT - RESTRITO - LIMITAT - OBMEDZENÝ - OMEJENO - BEGRÄNSAT

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(MSG: 201303174.EN)

1. MSG 303 IND 2013 0496 I EN 03-12-2013 02-12-2013 COM 8.2 03-12-2013

2. Commission

3. DG ENTR/C/3 - BREY 08/94

4. 2013/0496/I - SERV60

5. article 8, paragraph 2, of Directive 98/34/EC

6. Within the framework of the notification procedure laid down by Directive 98/34/EC, the Italian authorities notified to the Commission on 2 September 2013 the draft Resolution no 452/13/Cons - Public Consultation on The Draft Regulation Concerning the Protection of Copyright On Electronic Communications Networks and Implementation Procedures In Accordance with Legislative Decree 70 of 9 April 2003.

The draft act regulates the activity of the Italian Communications Authority (AGCOM) in the field of copyright protection on electronic networks, in particular related to measures to encourage the development and protection of digital works, to the procedure for the protection of copyright on-line. The Commission welcomes that, in general, the initiative seems to be oriented towards the balance of different interests of parties involved in the notice and action procedure.

Pursuant to Article 8(2) of Directive 98/34/EC, examination of the draft has prompted the Commission to deliver the following comments.

I. In view of scope of the draft act, provisions of Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [OJ L 178, 17.7.2000, p.1] (E-commerce Directive) that address the liability of intermediary service providers are relevant for its assessment. In this respect, from the explanatory memorandum to the draft act it is apparent that this is based on Article 12 (3),

Article 13 (2) and Article 14 (3) of the E-commerce Directive, which leave Member States the possibility to require service providers, both through administrative or judicial procedure, to terminate or prevent an infringement, even if such service providers are not liable for the information transmitted or stored as part of mere conduit, caching or hosting services. The Commission would like to mention that these provisions clarify the fact that, where national law identifies competences for administrative and judicial authorities to require the service provider to terminate and prevent infringement, the provisions concerning safe harbour liability in Articles 12, 13 and 14 of the E-commerce Directive do not preclude that.

II. The Commission would further welcome clarifications from the Italian authorities on the issues below, raised in relation to the procedure for the protection of copyright on-line. The Commission understands that the draft act assumes a two tier procedure (pre-administrative and administrative) even though it deals primarily with the administrative procedure in front of the Italian Communications Authority (AGCOM).

a) Pre-administrative procedure

1. Could the Italian authorities clarify the scope of the draft act, in particular if it applies only to hosting service providers or if it lays down obligations for any intermediary service provider (e.g. mere conduit service providers)?
2. Could the Italian authorities explain the reasons for excluding from the scope of the draft act all applications and peer-to-peer programmes for the direct sharing of files by end users? Given that the draft act appears to exclude downloaders from the scope of its application, are end-users engaged in streaming content which infringes copyright included or excluded from the scope of the draft act?
3. Could the Italian authorities confirm that the notification by the entitled person to the website manager as per Article 6 of the draft act is a precondition for sending the notification to AGCOM in accordance with Article 7 of the draft act? In addition, could they confirm whether the draft act envisages the competence of AGCOM only in cases where the illegal copyright content is notified, with the exclusion of ex officio investigations?
4. Could the Italian authorities explain the notion of entitled person defined in Article 1(u) of the draft act? In particular, could they confirm if the notification to AGCOM in accordance with Article 7 of the draft act can only be submitted by the person that can prove the existence of the right related to the alleged infringing material and not by any person that may come across illegal content?
5. In relation to digital works, as defined in Article 1(p) of the draft act, could the Italian authorities clarify what is intended by the condition that these works are disseminated on electronic communications networks? In particular, does this definition cover only works that are sent and received in a digital form in intangible format and does not include digital works in tangible form (e.g. sale of DVD online)? Why have software and photos been excluded from the scope of the Regulation?
6. Could the Italian authorities explain the notion of uploader, defined in Article 1(aa) of the draft act? In particular, is the condition of making available to the public intended to mean that this definition covers, in addition to the person uploading the digital work, any online intermediary that provides the means by which the specific content is accessible to the general public, but not actively engaged in transmission of and provision of access to the digital works in question?
7. Could the Italian authorities clarify if Article 6(2) of the draft act is to be understood as obliging any website manager to have in place notice and action procedures? Could the Italian authorities further explain who is making public the self regulatory procedures developed by the website manager and what is meant by institutional website? Moreover, is the publicity of these procedures a pre-condition for a website manager to actually apply them in case of a received notification?
8. In relation to the definition of website manager in Article 1 (h) of the draft act, the Commission considers that the current wording might raise legal uncertainties. In particular, due to its broad coverage, the notion of website manager could potentially include both hosting providers in the sense of Article 14 of the E-commerce Directive, who can benefit from the safe harbour if conditions laid down in Article 14(1) thereof are respected, as well as other entities, who might not benefit from any liability exemptions under the aforementioned directive as the conditions for that would not be met. Given that a hosting service provider manages and organises its platform, which is normally available to the public through its website, it is not apparent why the Italian authorities propose to introduce the additional notion of website manager, which is not used by the E-commerce directive or, more generally, by relevant EU legislation. In this respect, could the Italian authorities explain the notion of website manager and, notably, how it differs from the notion of hosting service provider and why such differentiation is justified?
Moreover, could the Italian authorities clarify how they would prevent the legal uncertainty about the scope of the activity of the website managers and hosting service providers and how they would ensure that the procedure laid down in the draft act does not affect the rules governing the liability regime envisaged by the E-commerce Directive?

b) Administrative procedure

1. According to Article 7(1) of the draft act, the entitled person can request to AGCOM the removal of the alleged illegal digital work. The draft act provides for a timeline for this procedure which differentiates between situations where the website manager has its own notice and action procedure (requests can be sent to AGCOM after 7 days of contacting the website manager) or where such procedures are not in place (in which case, requests to AGCOM can be sent after 2 days of contacting the website manager). In this respect, could the Italian authorities explain the interplay between the timeline in Article 7(1) of the draft act and the notion of actual knowledge, as laid down in Article 16 (1) (b) of the Legislative Decree 70 of 9 April 2003 (hereinafter the Decree)? In particular, when is it or can be assumed that the actual knowledge is obtained: at the point of notification, after the expiry of the time defined in points (a) and (b) of Article 7 (1) of the draft act or after the request for action by AGCOM?

2. Could the Italian authorities explain the rationale of Article 7(4), which in the Commission's view is to be construed as precluding the possibility of the intervention of the administrative authorities in cases where there are on-going judicial procedures? In this regard, could the Italian authorities clarify the impact of this provision on the efficiency of the procedure, considering also the possibility of initiating court proceedings as a way to potentially delay action on the matter?

3. In relation to Article 8 (1) of the draft act, could the Italian authorities clarify what is intended by the notion of specifically identified service providers?

4. According to Article 8 (2) of the draft act, where a website manager cannot be traced, the service providers specifically identified can be required to enable the identification of the website manager in accordance with Article 17 (2) (b) of the Decree. Could the Italian authorities explain if this provision should be construed as encompassing possible requests for information about the website manager to the internet access providers? If affirmative, could they clarify why this would be justified and in compliance with Article 15(2) of the E-commerce Directive and Article 17(2) of the Decree, which allow for this type of information request only to the information society service providers with whom the third party has concluded a storage agreement?

5. Pursuant to article 8(1) of the draft act, AGCOM notifies the uploader and website manager about the launch of the proceedings, which are initiated within 10 days of the receipt of the request (Article 7 (8) of the draft act) or three days in case of abridged procedures (Article 10 (1) (a) of the draft act). At the same time, according to Articles 9(3) and 10(1) d) of the draft act, the final decision about the selective removal and the disabling of access are taken within 45 days from the receipt of application or 10 days in case of abridged proceedings. Could the Italian authorities clarify how they intend to ensure that, in case of structurally infringing websites containing predominantly copyright infringing content, the period between the notification and the final decision does not result in giving the uploader or website manager an opportunity to move to another location/domain name in order to continue its infringing activities after the envisaged measures have been applied? Furthermore, could the Italian authorities clarify whether selective action is envisaged only in relation to the removal of the alleged illegal content, and not also in case of disabling of access to it? Notably, would this imply that the addressee of the decision of AGCOM would need to disable access to the whole website, even if only part of that website is actually illegal within the meaning of the draft act?

6. Could the Italian authorities explain the notion of generic order, mentioned in Question 9.1. of the consultation as a potential alternative to the methods of intervention provided in the draft act, like selective removal or disabling content? In particular, how would this notion be interpreted in view of Article 15 of the E-commerce Directive, which prohibits any general monitoring obligations?

7. Could the Italian authorities confirm whether the administrative decision of AGCOM is subject to an effective remedy in front of a court, which is one of the fundamental rights ensured by the Charter of Fundamental Rights of the European Union?

III. In relation to the right of defence, Article 8(5) of the draft act stipulates a deadline of three days for submitting counterclaims by the uploader, website manager and service providers (with the possibility of an extension in cases falling under Article 8 (6)) and Article 10 (1) sets a deadline of one day for the abridged proceedings, while AGCOM initiates proceeding, in accordance with Article 7 (8) and 10 (1) (a) of the draft act, within 10 days, respectively 3 days from the request for removal. While considering the aim of effective action, as detailed in the question 5, the deadlines for counterclaims should be adequate to ensure an effective right of defence, taking into account also the deadlines applicable for the initiation of proceedings by AGCOM. In addition, should a judicial review of the administrative decision be in place (as mentioned in question 7), it would be opportune that AGCOM informs the parties about the possibility of such a remedy.

Moreover, in relation to Article 10 (1) of the draft act, which institutes abridged proceedings in relation to serious damages to the right of economic use of digital works, caused inter alia by the massive nature of the violation, it should be considered that, due to the nature of the Internet, each work may be copied very easily and, thus, in some cases it may be difficult to determine the scale of the infringement. Considering the consequences that the abridged proceedings have for the right of defence, the Commission would like to ask the Italian authorities to clarify how they would ensure the protection of fundamental rights in the application of the criteria in Article 10(2) of the draft act.

IV. Considering that the draft act has been submitted for public consultation, the Commission would like to remind

the Italian authorities of the obligation to communicate a draft again in accordance with Article 8 (1) paragraph 3 of Directive 98/34/EC, should the amendments to the initial notified draft have the effect of "significantly altering its scope, shortening the timetable envisaged for implementation, adding specifications or requirements, or making the latter more restrictive."

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