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DOT Europe Summary: Limited Liability and the Active-Passive Question

In the context of the ongoing debate on the revamp of Internal Market rules for digital services, DOT Europe wants to outline the evolution of the e-Commerce Directive over the past 20 years, how the different principles of the Directive are linked and how it current applies to modern online services. Many stakeholders are calling for the principles of the e-Commerce Directive to be maintained in the DSA, when in fact they are often speaking about different approaches.

Background on limited liability and general monitoring

- Articles 12-14 of the e-Commerce Directive set-out the conditions under which so called "information society service providers" (ISSPs) are exempt from liability for content provided by a third party. ISSPs are split into three different categories: "mere conduit" service providers, "caching" service providers and "hosting" service providers (HSPs).
- Focusing on hosting service providers, they are exempt from liability under Article 14 where they do not have "actual knowledge" or awareness of an illegality on their service. In exchange, they need to act expeditiously to remove illegal content or activity as soon as they are made aware of its existence. This limited liability framework protects citizens' freedom of expression, freedom of information and privacy rights, as it does not force service providers to look at every single piece of content uploaded before displaying it on their services.
- Another important piece of this puzzle is the so-called prohibition of a general monitoring obligation (Article 15 of the e-Commerce Directive). This provision ensures that Member State cannot oblige service providers to generally monitor users' individual interactions or posts on their service.

What is the problem?

- Over the years, confusion has arisen as to the instances in which service providers can qualify for limited liability. This issue stems from the CJEU's interpretation of Recital 42 of the e-Commerce Directive and how it relates to the rest of the limited liability regime - particularly Article 14.
- Recital 42 states that the exemptions from liability cover only cases where the activity of the ISSP is "of a mere technical, automatic and passive nature" which implies that the ISSP "has neither knowledge of nor control over the information which is transmitted or stored". This has led to the courts debating the "active" or "passive" nature of a service when debating whether or not limited liability applies to a particular service in a given case.
- In addition, it is becoming increasingly difficult to determine when a service provider can be seen to have knowledge of an illegality. For example, should a service provider be considered to be aware of every piece of content on its service if it organises it and optimises it for presentation? What if they make use of proactive tools to voluntarily reduce the possibility of illegal content appearing on their service?

Why does it matter?

- In the context of the DSA, changing the existing principles can be difficult and lead to many unintended consequences: the internet as we know it was built on the foundations described above. Many stakeholders have voiced their support for the limited liability regime and the prohibition of a general monitoring obligation. But some are also simultaneously calling for the DSA to "clarify" that both limited liability and the prohibition on general monitoring should only apply to "passive" service providers.
- But if we look in details at this argument, problems arise:

  - First, it is arguable that very few modern services would qualify as being "passive" nowadays. Even traditional online forums organise and optimise content in a certain way. Furthermore, a single provider can provide at the same time services that could be considered "active", and others that could be considered "passive".
  - Secondly, Articles 14 and 15 are intrinsically linked and dependent on one another. In practice, where a service provider which so much as organises content is considered "active" and falls outside of the limited liability regime, it would effectively be obliged to generally monitor its service and filter content and activity in search for illegalities. This would infringe on users' privacy and freedom of expression and information.
- If being "active" in this broad manner was the only requirement to fall outside the scope of Article 14, most of today's services would not be able to scale for fear of liability for every user interaction, and would have to monitor their services in a way that ultimately impacts on their users' fundamental rights. This would run counter to the aims of the e-Commerce Directive and indeed the Commission's hopes for the DSA.

What is needed going forward?

- DOT Europe believes that the "active"/"passive" distinction is irrelevant to the question of a hosting service provider's potential liability, knowledge is what matters. While the concepts of "active" and "passive" do appear in the CJEU's thinking, neither concept is applied in absolute terms – the Court uses them as tools in its assessments, but it also looks at whether a service provider actually knew of an illegality[1]. This mixture of references has given rise to legal uncertainty for service providers – how far can they go to proactively tackle illegalities without falling outside of the scope of Article 14?
- The DSA is an opportunity to clarify Article 14's conditional liability, based on expeditious action upon obtaining actual knowledge of an illegality. The DSA is also an opportunity to resolve this legal uncertainty for service providers which want to do more to proactively address the issues arising from illegalities on their services, while creating clear rules, oversight and procedures to address any issues arising from the systems service providers put in place to achieve this.
- For this purpose, two steps can be taken in the DSA:
  - The first would be to clarify that the standard for knowledge – and consequently liability - under Article 14 is actual knowledge of specific information on an illegality (for example as acquired through a valid notice), rather than "abstract knowledge" or "awareness" of illegalities on a service more generally.
  - The second would be to create a concrete legal safeguard, introducing a presumption that any proactive actions – technological or otherwise – taken by an online service provider to tackle illegal content on its services would not attribute to them actual knowledge of a specific illegality on their service, which would result in the loss of their limited liability protection.

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The DSA is an opportunity to get the legal framework right - to address concerns in the online space while ensuring innovative services can thrive and citizens feel protected. Going forward, we urge policymakers to keep the delicate balance and the overall purpose of the e-Commerce Directive in mind when considering what is really needed for the future.

[1] See for e.g. Joined Cases C-236/08 to C-238/08 *Google France*, paragraphs 112-120, Case C-324/09 *L'Oréal v eBay*, paragraphs 118-124, Joined Cases C-682/18 and C-683/18 *Petersen v Google and YouTube, Elsevier v Cyando* AG Saugmandsgaard Øe's opinion, paragraphs 169-196.