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THE LIABILITY OF ACCESS PROVIDERS

A PROPOSAL FOR REGULATION BASED ON THE RULES CONCERNING ACCESS PROVIDERS IN GERMANY

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A. From Netiquette to Regulation

The liability for content transmitted over the Internet is a pivotal issue in the context of Internet regulation. Germany has been eager to pass written rules on the subject matter[1]. However, as recent case law has shown, these rules are fraught with problems. Even taking the inadequacy of the judge's interpretation in the Somm-case[2] into account, the legal texts on which the judgement was based are also at least partly at fault. Considering the numerous plurilateral[3] and multilateral[4] activities in the context of the Internet, any law governing the Internet is subject to wide scrutiny. Furthermore, liability of Access Providers might become virulent in the context of European regulation[5].

Presumably, the idea of relying solely on the Netiquette to provide adequate standards for the Internet will not be regarded as sufficient regulation and written rules might be framed either imitating or improving on the German rules. Therefore, a reading of the present German legal text and proposals for reform might be of relevance for future regulatory concepts.

Therefore, the authors would like to explain the present legal text on Access Providers' liability in Germany, point out the difficulties involved and then suggest a formula which might also bear fruit for legislative projects of other countries.

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[1] cf. Koenig/ Röder, Converging Communications, Diverging Regulators - Germany`s Constitutional Duplication in Internet Governance

[2] Bavaria v. Felix Somm: The Pornography Conviction of the Former CompuServe manager by Dr. Gunnar Bender [Case Documents]

[3] cf. e.g. OECD focussing on e-commerce but also touching regulatory questions concerning content regulation, "there is a need to review content regulation" cf. also the Ottawa Conference

[4] cf. Director General of the WTO Ruggiero recently asked "should governments be able to regulate content?" ; furthermore the telecommunications agreement in the context of the GATS and further material of the WTO); The ITU is getting busy as well.

[5] Green Paper on the protection of minors and human dignity in audiovisual and informations services, KOM (96) 483, 16.10.97 and Communication on Illegal and Harmful Content on the Internet, KOM (96) 487,

B. Different Kinds of Providers Defined

First of all, the terms used to classify the different providers have to be defined[6] in order to avoid misunderstandings.

I. Network Providers

The most basic services are rendered by Network Providers. Network Providers are those providing infrastructure or data transmission capacity (bandwidth). Primarily, this can be offered in the form of traditional telephony, e.g. the Public Switched Telephone Network (PSTN). Furthermore, the infrastructure offered might be a specific network for data transfer, e.g. routers connected by dial-up lines or permanent lines. All this can be covered by the definition of telecommunications in the German Telecommunications Act[7]. In the following, only those providing specific data infrastructure shall be referred to as Network Providers.

In order for the German Internet regime (esp. the Tele Services Act) to be applicable on the operation of a network, further elements have to be present[8]. Otherwise, traditional PSTN-operators would be covered by rules concerning the Internet whenever a user dials up a computer, and by rules concerning conventional telecommunications, whenever voice phone calls are made, without in itself being able to influence one or the other. After all, using the last-mile of a phone line to dial-up a server temporarily integrates the last mile into the Internet.

II. Access Providers

The term Access Provider refers to those service providers who additionally provide special dial-up-points. In contrast to Network Providers, Access Providers do not only offer the

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16.10.97 asking for a common frameworkfor the liability of access providers and host service providers

[6] cf. for definitions e.g. Sieber, “Technisch möglich und zumutbar”: Geeignete Kriterien für die Praxis?; or on paper: ***Sieber***, Kontrollmöglichkeiten zur Verhinderung rechtswidriger Inhalte in Computernetzen, CR 1997, S. 581 (597 f.).

[7] The German Telecommunications Act defines telecommunications in § 3 Nr. 16 as "the technical process of sending, transmitting and receiving any kind of message in the form of signs, voice, images or sounds by means of telecommunications systems"

[8] For a model of delineation in between telecommunication and tele service, cf.

Helmke, Robin / Müller, Björn / Neumann, Andreas

Internet-Telephony between TKG, IuKDG and the states treaty covering media services

general means to transfer data, but a specific means for data transfer[9]. An Internet Access Provider, currently the most common form of these services, not merely offers the dial-up point, but also the protocols necessary to establish connections (in the case of the Internet e.g. IP-address, Name-Service, Routing) and frequently the billing of the service. Thus the service offered is not mere data transfer, but on top of that and more specifically the integration of the user's computer into the communications network.

III. Content Providers

Content Providers are those who offer their own content on the Internet. These are unproblematic as far as liability is concerned, as Content Providers are obviously liable for their own content.

IV. Service Providers, Online Service Providers

Internet Service Providers and Online Service Providers provide access plus further services, i.e. e.g. News or e-mail.

C. The German Law on Provider Liability

I. Different Sets of Rules

There are different regimes for the providers of Internet services[10] and those of telecommunications[11]. Traditionally, telecommunications providers are not liable for the content of the telecommunications, whereas some of the providers of Internet services can be held liable for content. Therefore, it is of high importance for a service provider to know which regime deals with the services offered.

II. Network Providers and the German law

The offer to transport data to any point of exit inside or outside one's own network is closer related to traditional telecommunications[12] than to a tele service as defined by the Tele Services Act.

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[9] It is arguable whether this can really be referred to as a service in the traditional services / networks dichotomy. So far, the most frequent use of the internet involves analogous data lines and modems so that the data stream, the service itself, only relies on the originary service "voice". Yet this is already different in the case of the use of digital transfer e.g. ISDN, if specific services like HDLC are used.

[10] The Tele Services Act and the MDStV

[11] The German Telecommunications Act

[12] The German Telecommunications Act defines telecommunications in § 3 Nr. 16 as "the technical process of

Like the PSTN providers offering capacity to transfer voice, the Network Provider offers bandwidth to transport data. The fact that the service offered by the network provider very often relies on services offered by third parties (e.g. permanent lines) cannot be used to contradict this classification. According to § 3 Nr. 18 Telecommunications Act, not only the operators of transmission networks themselves offer services of telecommunications, but also someone making use of somebody else's telecommunications network to provide services of telecommunications, e.g. as reseller of capacity. § 2 para. 4 Nr. 1 Tele Services Act states that the Tele Services Act is not applicable to "telecommunications services and the commercial provision of telecommunications services under § 3 of the Telecommunications". Summing up the above, this will have to be taken to mean that Network Providers are not covered by the Tele Services Act[13].

Neither can Network providers be classified as Access Providers in the meaning of § 3 Nr. 1 Tele Services Act referring to "providers" as "natural or legal persons or associations of persons who make available either their own or third-party tele services or who provide access to the use of tele services". The Internet is a network of networks[14]. If the mere provision of the network itself did constitute access provision, the term access provision in itself would be rendered meaningless in this context: there would be nothing to which said access provider would actually provide access to. Therefore, Network Providers are exclusively covered by the Telecommunications Act. Thus there is no obligation of Network Providers stemming directly from the rules on liability for content of tele services in § 5 Tele Services Act. The Telecommunications Act_is neutral towards content and consequently contains no rules on the liability of the provider for the content of telecommunications. This fact is hardly surprising as it can be explained by the background of the rules. The liability for the content of telecommunications has always been connected to the sender or the recipient, not to the provider of the transmission. However, the Telecommunications Act_contains extensive provisions (§§ 85 ff. TKG) on the powers of the state to reach out for the content of communications and for the circumstances of communications. Therefore, the liability of a provider of telecommunications services for illegal content of third parties[15] based on general statutes (e.g. the general powers of the local

sending, transmitting and receiving any kind of message in the form of signs, voice, images or sounds by means of telecommunications systems"

[13] Similarily *Koch*, Zivilrechtliche Anbieterhaftung für Inhalte in Kommunikationsnetzen, CR 1997, S. 193 (199); differing opinion *Pelz*, Die strafrechtliche Verantwortlichkeit von Internet-Providern, ZUM 1998, S. 530 (534).

[14] *Sieber*, Kontrollmöglichkeiten zur Verhinderung rechtswidriger Inhalte in Computernetzen, CR 1997, S. 581 (583), considering the Tele Services Act to be applicable on Network-Provider, does not consider this adequately.

[15] A counter argument to this deduction could be seen in the assumption that Network Providers do not provide individual communication to which this extenuation was to refer to. This would mean ignoring the fact that network providers merely connect individual computers and have no influence on the content transferred.

police authorities) is excluded[16]. The statutes passed by the legislator are exclusive and donot allow for the application of other statutes.

Therefore, Network Providers are not liable for illegal content transmitted.

This should not appear problematic. The liability of Network Providers is not necessary. If a service of communications is offered on the basis of the network services provided, the Network Provider provides additional services and can thus be covered by § 5 Tele Services Act as a provider of tele services.

III. Access Providers and the German law

As for Network Providers, there is no clear cut place in the Tele Services Act for Access Providers either. Next to a general definition of tele services as "all electronic information and communication services which are designed for the individual use of combinable data such as characters, images or sounds and (...) based on transmission by means of telecommunication" the Tele Services Act gives examples of what is to be regarded as tele services. Amongst these examples, it refers to " services providing access to the Internet or other networks" in § 2 para. 2 Nr. 3 Tele Services Act. Yet according to the legislator's intentions, this wording refers to services like browsers and search engines[17]. Thus, Access-Providers are not included in the examples given in the tele services act; there is no explicit tele service group "access provision " in the Tele Services Act. However, a systematic interpretation of the Act, especially of §§ 3 Nr. 1, 5 para. 3 Tele Services Act, shows that Access-Provider are covered by the Tele Services Act and especially by the provisions on liability in § 5 Tele Services Act. A comparison of the wording of the example "services providing access" (§ 2 para. 2 Nr. 3 Tele Services Act) and of the wording for the rule on the applicability of the Tele Services Act "provide access to the use" (§§ 3 Nr. 1, 5 para. 3 Tele Services Act support this result.

In the section of the Act dealing with the applicability of the Act (§ 3 Nr. 1 Tele Services Act "providers" covered by the act are defined as those who "provide access to the use ". The wording of § 3 Nr. 1 Tele Services Act indicates that the provision of access to tele services on its own does not constitute a tele service in the meaning of § 2 para. 1 Tele Services Act[18]. Yet

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[16] For providers of telecommunications similarily *Engel-Flechsig*, Das Informations- und Kommunikationsdienstegesetz des Bundes und der Mediendienstestaatsvertrag der Bundesländer, ZUM 1997, S. 231 (236); *Pelz*, Die strafrechtliche Verantwortlichkeit von Internet-Providern, ZUM 1998, S. 530 (533); furthermore BT-Drs. 13/7385 on zu § 5 Abs. 4, (Retrievable at http://dip.bundestag.de].

[17] *Engel-Flechsig/ Maennel/ Tettenborn*, Neue gesetzliche Rahmenbedingungen für Multimedia, Heidelberg 1997, S. 11.; BT-Drs. 13/7385 on § 2 Abs. 2 Nr. 3. (Retrievable at http://dip.bundestag.de]

[18] Applying the definition of tele services of § 2 Abs. 1 Tele Services Act [http://www.iid.de/iukdg/iukdge.html] access could only be included in a very wide understanding of the criterion " communication service" .

In this case, the differentiation of " based on transmission by means of telecommunication" would be rendered obsolete and a differentiation to the Telecommunications Act via § 2 Abs. 4 Nr. 1 Tele Services Act [http://www.iid.de/iukdg/iukdge.html] would be rendered impossible.

via the definition of "providers" in § 3 Nr. 1 Tele Services Act, Access Providers are covered by the Tele Services Act as well.

The liability of Access Providers for content according to German law is thus ruled by § 5 Tele Services Act. These rules state that

> (1) Providers shall be responsible in accordance with general laws for their own content, which they make available for use.
>
> (2) Providers shall not be responsible for any third-party content which they make available for use unless they have knowledge of such content and are technically able and can reasonably be expected to block the use of such content.
>
> (3) Providers shall not be responsible for any third-party content to which they only provide access. The automatic and temporary storage of third-party content due to user request shall be considered as providing access.
>
> (4) The obligations in accordance with general laws to block the use of illegal content shall remain unaffected if the provider obtains knowledge of such content while complying with telecommunications secrecy under § 85 of the Telecommunications Act and if blocking is technically feasible and can reasonably be expected.

Access Providers are thus not liable for third party content at all according to § 5 para. 3 Tele Services Act, if only access is provided.

According to § 5 para. 4 Tele Services Act, however, Access Providers can be liability for third party content as well if they obtain knowledge of illegal content. Then, the Access Provider can be obliged to block said content on the basis of the general rules of law as long as that is

(objectively[19]) technically feasible and can reasonably be expected. Thus, apparently the Access Provider could be made liable for third party content.

However, the wording of § 5 para. 4 Tele Services Act is ambiguous as far as Access Providers are concerned. As far as the law refers to "provider" in this context, Access Providers in the meaning of § 5 para. 3 Tele Services Act_ could be included, too[20]. Therefore, Access Provider would be covered as well. However, § 5 para. 4 Tele Services Act calls for the blocking of the *use*. Yet a proper wording for Access Providers would have to refer to the blocking of the *access*. § 5 para. 3 Tele Services Act on the other hand refers to the "access to the use", and thus supports the differentiation made above. Following this interpretation, § 5 para. 4 Tele Services Act would not apply to Access Providers[21]. The inclusive wording of § 5 Tele Services Act would thus indicate that a liability for Access Providers is excluded. The present - equivocal - wording of the law, however, allows for both interpretations.

In the context of liability of Access Providers, it has been argued that next to rules on liability of the Bund, the rules of the Media Services Treaty of the Lander (esp. § 18 para. 3 MDStV could be applicable[22] as well leading to a liability of Access Providers[23]. The MDStV covers media services[24]. § 18 para. 3 MDStV_ lays down an additional explicit - though subsidiary - obligation to block the use of content possibly including Access Providers of media services. The definition of "provider" in § 3 Nr. 1 MDStV includes those who "provide access to the use". In the case of the applicability of the Lander rule this could constitute an obligation to block the use of content for Access Providers only for media services. This obligation would thus depend on the content received by the user and therefore finally on the classification of the service accessed, e.g. a homepage, as a tele service or a media service. Yet it is hard to envisage the MDStV as being applicable to Access Provision at all. As a mere commercial act without relation to the content transmitted, the Access Provision is covered by the law of the Bund.

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[19] *Sieber*, Kontrollmöglichkeiten zur Verhinderung rechtswidriger Inhalte in Computernetzen, CR 1997, S. 581 (584); *Engel-Flechsig/ Maennel/ Tettenborn*, Neue gesetzliche Rahmenbedingungen für Multimedia, Heidelberg 1997, S. 18.

[20] So *Spindler*, Störerhaftung im Internet, KuR 1998, S. 177 (178).

[21] Apparently similarily *Engel-Flechsig*, Das Informations- und Kommunikationsdienstegesetz des Bundes und der Mediendienstestaatsvertrag der Bundesländer, ZUM 1997, S. 231 (239); for a differing view cf. *Engel-Flechsig / Maennel / Tettenborn*, Neue gesetzliche Rahmenbedingungen für Multimedia, Heidelberg 1997, S. 16.

[22] On the general system of two parallel regimes governing the internet in Germany and the problems resulting thereof, cf. Koenig/ Röder, Converging Communications, Diverging Regulators - Germany`s Constitutional Duplication in Internet Governance]

[23] *Engel-Flechsig*, Das Informations- und Kommunikationsdienstegesetz des Bundes und der Mediendienstestaatsvertrag der Bundesländer, ZUM 1997, S. 231 (239).

[24] for the differentiations cf. Koenig/ Röder, Converging Communications, Diverging Regulators - Germany`s Constitutional Duplication in Internet Governance with further sources.

§ 1 Tele Services Act especially states the aim of the law, "uniform economic conditions" for New Services: The commercial activities in the context of new services is covered by the Tele Services Act. The layers of transportation of the data which are indifferent to the content transmitted have to be covered by the Telecommunications Act or the Tele Services Act; there is no power of the Lander to legislate the matter. Thus, MDStV states also for retrieval services that the "mere transmission of Data" (§ 2 para. 2 Nr. 4 MDStV) is not covered by the Treaty. This rule has to be read as an exclusive reference to the examples of tele services as given in § 2 para. 2 Tele Services Act.

Access-Provision is not merely a retrieval service. However, the applicability of the MDStV to the lower layers of data transmission has to be excluded e fortiori if the applicability on the application layer is excluded. The rule of § 18 para. 3 MDStV is only applicable to Service-, Online- or Content-Providers as far as the content provided is to be classified as a media service. The criterion "provide access to the use" of § 3 Nr. 1 MDStV_therefore only refers to hyperlinks or Browsers or similar tools to use media services.

IV. A Proposal for Reform

Considering the present discussion concerning illegal content in the Internet, there appears to be a trend to apply the rules for liability extensively. The German law enforcement authorities apparently make far-reaching use of § 5 Tele Services Act [25]. The case of the former chairman of CompuServe as mentioned above[26] confirms impressively the second thoughts against the wording of § 5 Tele Services Act[27].

Rendering the wording of the legal text more precise appears to be inevitable on grounds of legal certainty. Prevailing reasons point towards a total exemption of Access Providers from any form of direct liability for content. If past experience is to be any kind of guide[28], incriminating content is frequently to be found on extraterritorial servers[29]. In this case the national authorities should not resort to primarily obliging domestic Access Providers.

Usually, it will not be the possible for the domestic Access Provider to recover costs incurred by the obligation to block content. An disproportionate amount of monetary losses might be the result for Access Providers. Furthermore, Access Providers would have to restruc-

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[25] Sieber, "Technisch möglich und zumutbar": Geeignete Kriterien für die Praxis?.

[26] Bavaria v. Felix Somm: The Pornography Conviction of the Former CompuServe manager by Dr. Gunnar Bender; Case Documents

[27] Vgl. Protokoll der Sachverständigenanhörung in BT-Drs. 13/7934 Teil A. 4., to be retrieved at http://dip.bundestag.de

[28] *Sieber*, "Technisch möglich und zumutbar": Geeignete Kriterien für die Praxis?, [http://www.iid.de/iukdg/fachtagung/sieber/html]; or on paper: *Sieber,* Kontrollmöglichkeiten zur Verhinderung rechtswidriger Inhalte in Computernetzen, CR 1997, S. 581 (597 f.).

[29] cf. e.g. article on right wing propaganda in the internet

ture their staff and hardware in a way allowing for the blocking of content. This demand can hardly be calculated financially by the providers due to the endless amount of information on the Internet and thus the possibility of endless obligations to block content.

Therefore, already during the process of legislation, the cancellation of § 5 para. 4 Tele Services Act had been proposed[30]. However, an explicit exclusion of Access Providers on its own from the rules of the Tele Services Act would not solve the problem. After all, Access-Providers could then still be obliged on the grounds of general rules of the local police authority as "interferers" (Störer).

Contrary to Network-Providers, Access Provision cannot be classified as constituting mere telecommunications due the definition included in § 3 Nr. 1 Tele Services Act. To this extent, § 5 para. 4 Tele Services Act_ has an extenuating consequence for Access Providers: they can only be obliged in the case of positive knowledge, and only to blocking the content, not to pay possible damages.

Yet an exemption to the system of liability in the Tele Services Act might help. Mere Access Providers could not be obliged to block content after an exemption to § 5 para. 4 Tele Services Act has been added reading

"This shall not apply to providers providing access to an indefinite number of third parties' services."

Thus, the application of § 5 para. 4 Tele Services Act_is restricted to deal with Service-, Online- and Content Providers and to obligations to block hyperlinks and similar forms of connections with third party content. The wording proposed “access to an indefinite number of third parties' services” will enable the provision to be applied to an obligation to block hyperlinks[31]. The blocking of an individuated hyperlink set by an access provider can thus be demanded in the case of knowledge, if blocking is technically feasible and can reasonably be expected.

The exemption of Access Providers from any kind of liability as proposed in this article also ensures that the providers of search engines could not be obliged to the technically challenging duty of blocking individual links, because search engines would not constitute access provision to a certain content, but only access provision to an discernible number of third parties' content.

[30] BT-Drs. 13/7934 zu Artikel 1 § 5., to be retrieved at http://dip.bundestag.de

[31] The Link Controversy Page (Stefan Bechtold) Comprehensive list of links to cases and articles about whether there is liability for links.

Finally, the regulation proposed does not entail a complete exclusion of public authority from covering Access Providers. It's merely exempted that access providers might not be held responsible on the grounds of disturbing the rule of law according to general rules of the local police authority dealing with "interferers" (Störer).

The rules of obliging non-interferers (Nichtstörer) are usually related to stricter criteria[32] and connected with the right to compensation.

As far as Internet-Service-Providers and Online-Service-Provider offering services on top of access provision, i.e. e.g. News or e-mail, one will have to differentiate in between the different services[33]. Insofar as access is provided, they will be exempted. Insofar as other services are offered, the usual rules (in Germany § 5 Tele Services Act) apply.

This solution concurs with current US case law on Access Provision[34]. The exclusion of Access Providers from liability is justified on the grounds that Access-Providers are by virtue of the character of their services closer to providers of telecommunications than to content providers. Like the providers of telecommunications, Access Providers offer a technical platform on which information can be exchanged, without influencing the contents transmitted. So it is appropriate to exempt Access Provider like providers of telecommunication services from liability for content.

Such an exclusion could appear to be politically imprudent due to the alleged masses of radical propaganda and child pornography on the Internet. However, it should be kept in mind that it is primarily the contents, not the transmissions, which are illegal. Thus, the exemption of access providers from the obligation to block access could in fact encourage the fight against illegal content at the source of said content.

V. A Case for Global Co-operation

There is general agreement that the new networks should be open networks, too. The aim of providing free access to these nets as demanded by legislators around the world would be rendered meaningless if an obligation to block content were to be accepted for mere Access Providers. Due to the fact that a single state's government on its own is helpless when facing law infringements outside its jurisdiction, the responsibility for illegal content would be loaded

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[32] *Prümm/Sigrist*, Allgemeines Sicherheits- und Ordnungsrecht, 1997, S. 104 ff.

[33] *Bock / Wöbke*, Selbstregulierung im Internet – Grundzüge eines Neuen Medienrechts, BB 1997, Supplement Kommunikation & Recht (Beilage zu Heft 18), S. 11 (12); *Engel-Flechsig*, Das Informations- und Kommunikationsdienstegesetz des Bundes und der Mediendienstestaatsvertrag der Bundesländer, ZUM 1997, S. 231 (234).

[34] In a similar US-case, no liability for third party content for AOL was found cf.

off just too easily onto the Access Provider[35]. The socially valuable task of providing a modern communications infrastructure[36] would be devalued by said liability for third parties' content. Therefore, if other countries in the world or even the EC-Commission were to follow suit in passing legislation on liability, an exemption of Access Providers from the rules of liability should be included in this legislation. The current Commission-proposal for an e-commerce Directive[37] points this way.

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35 E.g. via extended obligations to save data on connections, cf. *Schulzki-Haddouti*, Nicht den Anschluß verlieren – Das Bundesinnnenministerium zur Kontrolle des Internet, c't 1998, Heft 18, S. 84 f.

36 *Engel-Flechsig / Maennel / Tettenborn*, Neue gesetzliche Rahmenbedingungen für Multimedia, Heidelberg 1997, S. 16d.

37 cf. the text of the Directive Art. 12 „Mere Conduit" Article 12

Mere conduit

„1. Where an Information Society service is provided that consists of the transmission in a communication network of information provided by the recipient of the service, or the provision of access to a communication network, Member States shall provide in their legislation that the provider of such a service shall not be liable, otherwise than under a prohibitory injunction, for the information transmitted, on condition that the provider:

(a) does not initiate the transmission;

(b) does not select the receiver of the transmission; and

(c) does not select or modify the information contained in the transmission. (...)"

Article 13

Caching

Where an Information Society service is provided that consists in the transmission in a communication network of information provided by a recipient of the service, Member States shall provide in their legislation that the provider shall not be liable, otherwise than under a prohibitory injunction, for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

(a) the provider does not modify the information;

(b) the provider complies with conditions on access to the information;

(c) the provider complies with rules regarding the updating of the information, specified in a manner consistent with industrial standards;

(d) the provider does not interfere with the technology, consistent with industrial standards, used to obtain data on the use of the information; and

(e) the provider acts expeditiously to remove or to bar access to the information upon obtaining actual knowledge of one of the following:

- the information at the initial source of the transmission has been removed from the network;

- access to it has been barred;

The exemption of Access Providers from any kind of content liability clears the way for an adequate fight against illegal content at its root[38]. A more comprehensive control of content on a global network like the Internet will be too demanding for any single authority. Frequently, incriminating content offered makes use of material procured doing illegal acts (pirated software or child pornography e.g.). Here, the obligation of Access Providers would amount to a mere repression of the symptoms, not a cure.

On the contrary, global free access to the Internet would encourage stronger measures to avoid creating and offering such content. Thus, public authorities would be forced to deal with the cause, the content providers themselves, co-operating on repressing the crimes themselves, not the transmission of the results. For the EU, Europol could facilitate this co-operation.

- a competent authority has ordered such removal or barring.

Article 14

Hosting

1. Where an Information Society service is provided that consists in the storage of information provided by a recipient of the service, Member States shall provide in their legislation that the provider shall not be liable, otherwise than under a prohibitory injunction, for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge that the activity is illegal and, as regards claims for damages, is not aware of facts or circumstances from which illegal activity is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

Article 15

No obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Paragraph 1 shall not affect any targeted, temporary surveillance activities required by national judicial authorities in accordance with national legislation to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.

[38] Sieber, "Technisch möglich und zumutbar": Geeignete Kriterien für die Praxis?, []; or on paper: ***Sieber***, Kontrollmöglichkeiten zur Verhinderung rechtswidriger Inhalte in Computernetzen, CR 1997, S. 581 (597 f.). [38] cf. Koenig/ Röder, Converging Communications, Diverging Regulators - Germany`s Constitutional Duplication in Internet Governance