

Justice Committee

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

Written submission from the Internet Services Providers' Association

About ISPA

The Internet Services Providers' Association (ISPA) UK is the trade association for companies involved in the provision of Internet Services in the UK. ISPA was founded in 1995, and seeks to actively represent and promote the interests of businesses involved in all aspects of the UK Internet industry.

ISPA's membership includes small, medium and large Internet Service Providers (ISPs), cable companies, content providers, web design and hosting companies and a variety of other organisations. ISPA currently has over 200 members, representing more than 95% of the UK Internet access market by volume. ISPA was a founding member of EuroISPA, the European Internet Service Providers Association based in Brussels, which is the largest umbrella organisation of ISPs globally.

About ISPs

ISPs perform a number of services each of which may have varying degrees of liability. Traditional ISPs or access providers provide Internet connectivity to their customers and are generally regarded as mere conduits that cannot be held liable for the information they transmit on behalf of their customers.¹ Hosting provider ISPs store others' content online – from the website of large corporations to an individual's personal website or user generated content posted on a website. Under the e-Commerce Regulation 19 hosting providers are not liable for the content they host as long as the service provider does not have actual knowledge of unlawful activity or information. However, upon obtaining such knowledge, hosting providers become liable if they do not act expeditiously to remove or to disable access to the information.²

Introduction

ISPA welcomes the opportunity to submit written evidence and hope that its response will be useful in helping the Justice Committee to formulate a bill that is effective in addressing the problems that have been identified by the Scottish Government and the Football Summit held on 8 March 2011. However, as the body representing ISPs in the UK, ISPA wants to ensure that the Bill fully takes into account potential implications for Internet Services Providers and Internet users. Our response will focus exclusively on Sections 5 to 7 of the proposed Bill, which are most relevant to ISPA's members, and we hope our views are of value to the Committee.

Summary

¹ As mere conduits access providers "shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as result of that transmission." (e-Commerce Regulation 17).

² It is important to note that under the e-Commerce Directive, ISPs are not obliged to monitor the information which they transmit or store and that member states are indeed barred from imposing general monitoring obligations on ISPs.

- ISPA understands the reasoning for creating a new provision on religious hate crime but argues that the new provision should resemble as closely as possible the legislative framework that already exists in the rest of the UK.
- While not fundamentally opposed to Section 5 (2) Condition A, ISPA would welcome further evidence as to why already existing offences are deemed to be inadequate in relation to addressing threatening communications.
- ISPA would welcome clarification on how the new rules are to be enforced outside of Scotland and calls for the provision of guidance for ISPs and law enforcement authorities.
- ISPA would welcome a commitment that the final Bill does not negatively affect the limited liability provisions for ISPs under the e-Commerce Regulations.
- Any new provisions must be carefully drafted and fully justified to ensure that it strikes the right balance between freedom of speech and the protection of users.

Response

Scotland faces a unique set of problems related to offensive and threatening behaviour in the context of football matches that are often sectarian in nature and we believe that the Bill was primarily introduced to prevent these kinds of incidents from happening again in the future. Scotland, unlike as the rest of the UK, has so far not introduced any specific offences relating to inciting religious hatred, and given the aforementioned incidents, we can understand and support the Scottish Parliament in seeking to introduce these specific offences.

When considering this new offence, the Scottish Parliament should try to replicate already existing provisions in other parts of the UK as much as possible, especially as the new offence of religious hatred is intended to apply to anything done outside Scotland. Doing so would provide clarity to the average citizen in the UK but also to hosting providers who, under e-Commerce Regulation 19, need to expeditiously remove or to disable access to illegal content as soon as they are made aware of it in order to be not held liable for that content. This legal certainty, based on practical, well-established definitions, would enable sectarian content to be tackled online and give our members the confidence they need in this fast-moving sector. Online providers have developed and grown their businesses (and continue to do so) on the assumption that the liability regime will apply across the board and to all types of content.

While ISPA understands the introduction of a religious hatred offence, we are less certain about introduction of Section 5 (2) Condition A, i.e. the new offence of generally threatening communication. This offence is neither related to football nor religion and we feel that it was added to the bill as an afterthought and has not been given the same amount of consideration as the other aspects of the bill. While not fundamentally opposed to the new offence, we would welcome further evidence as to why the Scottish Government believe that already existing offences (see p.7f of the policy memorandum that accompanies the bill) that deal with threatening communications (such as the Communications Act) are inadequate. Therefore the new offence needs to be fully justified to ensure that the balance between freedom of expression and protection of users is found.

ISPA would welcome clarification from the Scottish Parliament on how it intends to enforce the new provisions outside of Scotland, e.g. if somebody from inside Scotland or indeed outside Scotland uses an ISP that is not based in Scotland. There is also the additional difficulty of removing content hosted outside of the UK. However, ISPs are generally cooperative when they are approached by law enforcement about the removal of clearly illegal content hosted in the UK, particularly as their terms and conditions often allow them to remove offensive material. However, this process would be facilitated by the provision of clear guidance for both ISPs and law enforcement on how the new rules are to be enforced and the types of cases the new rules are supposed to cover. As with the religious hatred offence, a legal framework that is as uniform as possible within the UK would facilitate better implementation of the new rules.

In this context, we would also urge to Scottish Government to confirm that the final Bill will fully respect the limited liability provisions that are provided to ISPs under the e-Commerce Directive. The Directive is implemented in the UK through the e-Commerce Regulations but the UK Government failed to give prospective effect to the Regulations (i.e. they are not automatically applied to new relevant legislation). While the Bill, in its present state, does not directly confer any new responsibilities on ISPs, we would welcome that any further development of the Bill or implementation guidelines do not reduce the limited liability provisions under the e-Commerce Directive.

Internet Services Providers' Association
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