

Commissioner Michel Barnier
European Commission
B-1049 Brussels

17 March 2010

Dear Commissioner Barnier,

On behalf of the European NGO Alliance for Child Safety Online (eNACSO), I am writing to congratulate you on your recent appointment as the EU's Commissioner for Internal Market and Services. I wanted to take this opportunity to introduce you to eNACSO's work and highlight what we, as a key voice of European civil society, think should be prioritised within your portfolio to help protect the ninety four million children who reside in and are citizens of the EU.

eNACSO was launched in September 2008 with funding from the EU's Safer Internet Programme. The network consists of leading NGOs from, at present, eighteen EU member states. We are the EU's first NGO network dedicated solely to advocating European and international action on online child safety.

The internet has become an enormously important technology in the modern world and children and young people are a major constituency of internet users. eNACSO believes the internet's ability to provide a platform for learning, creativity, connectivity and games is at the heart both of its value and its attraction to the hundreds of millions of children and young people worldwide who use it daily. However, it is important to recognise that the internet can also be a source of risk or harm to children, for example by exposing them to illegal or age-inappropriate material or services.

I am writing to you specifically to highlight eNACSO's concerns regarding the impact of the Electronic Commerce Directive 2000 (the Directive) and its associated regulations on protecting children online. eNACSO wishes to draw your attention to the fact that Article 12¹ of the Directive is cited by Internet

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- ¹ 1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

Service Providers (ISPs) and other online service providers or hosting companies to justify not monitoring the content of their web sites for material which is in breach of their own terms and conditions or proactively taking steps to remove any such material. This has important implications for child protection.

Article 12 establishes the concept of “mere conduit” status. This means ISPs and other online service providers are not liable for any activity on their sites as long as they do not have any knowledge of it. This is because the web sites are effectively an intermediary i.e. they carry traffic across their network, but they do not initiate or create the content of that traffic, they do not select the recipient and they carry it without selection or modification. As long as the terms of the Article are adhered to companies may claim mere conduit status and therefore they cannot be held liable for anything contained within the content e.g. child abuse images.

However, decisions in the courts of some EU Member States have adopted a very narrow and literal interpretation of Article 12 of the Directive. Proactive engagement of any kind now seems to mean the web site can be deemed to become the legal publisher of everything on the site. This is because such courts have held that this type of activity amounts to a form of selection or modification of the content and therefore fails the test set in clause 1(c) of Article 12. Therefore, even if a company were to miss something accidentally, they could still become liable for it because they have forfeited their mere conduit status. As a result, many different kinds of online companies are choosing to take no action to root out inappropriate content for fear of the potential legal consequences. Action to remove any content is only taken by them when web sites have specifically been made aware of potential illegal or other content (typically by a user) which is in breach of the site’s terms of usage.

This can result in illegal or other inappropriate content remaining visible on a site for protracted periods. For example, a recent case involved YouTube in Italy where a video of a Downs Syndrome child being bullied in his school playground was on the site for over two months. YouTube quoted Article 12 of the E-Commerce Directive to justify not taking an active approach to monitoring their website. Had they done so they might have found this distressing video and removed it much earlier.

When the E Commerce Directive was originally drafted, the current situation could not have been foreseen. eNACSO therefore calls on the Commission to bring forward a revised proposal which removes the current perceived legal barrier thus ensuring better protection for children online. The new revised

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- (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.

proposal should state that for any kind of civil or criminal liability to exist, it should always be necessary to show that the hosting company had actual knowledge of the content and then either deliberately took no action to remove it or failed to act to remove it within a reasonable time. We acknowledge that this puts a premium on having an agreed way of determining how one knows whether or not a company has been put on notice, and what constitutes a “reasonable time”, but this arises constantly in many areas and is capable of being solved.

eNACSO is not calling for legislation to make it mandatory for companies to have to actively monitor their sites but we are keen that the incentive or legal reason not to do so should be unequivocally dismantled.

I would be happy to provide you with a full briefing on this issue and to discuss it further with you or members of your team. I am available on 00 44 (0) 207 825 2758 or naureen.khan@nspcc.org.uk. eNACSO very much looks forward to working with you over the next five years to ensure that protecting children online remains a priority for the EU.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'AK' with a stylized flourish at the end.

Naureen Khan
Acting Chair, eNACSO