

**COMMENTS OF THE NATIONAL COUNCIL OF TV AND RADIO BROADCASTING
OF UKRAINE ON UPDATING THE SECTION ON UKRAINE TO THE
COMPARATIVE STUDY ON “BLOCKING, FILTERING AND TAKEDOWN OF
ILLEGAL INTERNET CONTENT”**

Since information in the study reflects the situation as of June 2020 the following should be taken into account:

The section “2.1.1. General legal framework” mentions draft acts on blocking content and sites that have not been approved. As of June 2020, the draft Law “On State Regulation of Activities Concerning the Organization and Conduct of Gambling” passed the first reading. Its provisions provide for restrictions on access to gambling sites without a proper license, at the request of the Commission for the Regulation of Gambling and Lotteries.

Also in June 2020, in the first reading, the Verkhovna Rada of Ukraine voted in favour of the draft Law on Electronic Communications, which was to replace the Law of Ukraine “On Telecommunications”. However, the draft law adopted in the first reading did not contain the provisions of the Law of Ukraine “On Telecommunications”, which provided for the obligation of providers to block access to sites that share child pornography.

In the section “2.1.2. Protection of National Security, Territorial Integrity or Public Safety” the author mentions two Decrees of the President of Ukraine on the application of sanctions in the form of blocking sites on the network. Agreeing with the substantive analysis of their illegality, we consider it necessary to emphasize that during the reporting period the President of Ukraine issued two more decrees – No. 92/2019 of March 19, 2019 and No. 184/202 of May 14, 2020, which blocked more than two hundred sites.

Section “2.1.3. Protection of Copyright and Related Rights” thoroughly describes the innovations in the area of copyright protection on the Internet that took place in 2017. However, the provisions of the Law of Ukraine “On Copyright and Related Rights” mainly concern the takedown of illegal content, rather than blocking it, which is allowed only if it is impossible to restrict access to content that infringes copyright. We believe that the relevant part of the analysis of the notice-and-takedown mechanism introduced into Ukrainian legislation should be structurally transferred to section “2.2. Takedown/Removal of Illegal Internet Content”.

The same section describes the practice of blocking websites by courts by “arrest of Internet users intellectual property rights deriving from the use of web-resources” which is certainly contrary to human rights. For a full analysis, it should be noted that in March 2020, the Unified State Register of Judgments issued decisions of the appellate courts, which stated that such a

measure is not provided by the Criminal Procedure Code of Ukraine. However, the practice of appealing these decisions in appellate courts is inconsistent and needs to be unified.

The section “2.2.1. The General Legal Framework” does not mention the Law of Ukraine “On E-Commerce” which entered into force in September 2015. The changes made to it in 2017 provided for limited immunity of Internet intermediaries from liability for the content of transmitted or received information. If such an intermediary does not have information about the illegality of the transmitted information or has responded quickly enough to notifications and restricted access to an illegal content, it will not be responsible for its dissemination. This rule is broadly in line with Article 15 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) on standards for the takedown/removal of illegal content.

The current regulations on blocking, filtering and restricting access to illegal content have not been changed significantly compared to the reporting period, taking into account the comments provided here. Thus, the Law of Ukraine “On State Regulation of Activities Concerning the Organization and Conduct of Gambling” and the Law of Ukraine “On E-Commerce” came into force. In accordance with the provisions of the first of them, the Commission for the Regulation of Gambling and Lotteries in August 2021 approved the Procedure for sending and complying with the requirements for restricting access to (from) the territory of Ukraine to the website or part thereof. The Law of Ukraine “On E-Commerce” before its adoption in general, was supplemented by the previous law on the obligation of Internet access providers based on a court decision to restrict access of their subscribers to resources through which child pornography is distributed.

At the end of 2021, the Information Security Doctrine was replaced by the Information Security Strategy approved by the Decree of the President of Ukraine. Unlike the previous document, the latter does not specify the category of illegal content that is proposed to be blocked and takedown. At the same time, one of its focuses remains “the introduction of effective mechanisms for detecting, recording, restricting access and/or removing from the Ukrainian segment of the Internet information, the placement of which is restricted or prohibited by law”. Such mechanisms should be aimed primarily at restricting access to malicious content, not resources. If it is necessary to restrict access to the resource, a proper analysis of the regularity of its distribution of illegal content should be conducted as well as the impossibility of applying other less restrictive measures. In any case, restrictions on access to content and resources must comply with international standards, including the three-part human rights test, and the case-law of the European Court of Human Rights.

Unfortunately, the problematic practices of blocking access to sites described in the study have intensified. In 2021, the President of Ukraine issued 10 decrees (No.109/2021 of March 23,

203/2021 of May 21, 265/2021 and 266/2021 of June 24, 304/2021 of July 14, 375/2021, 376/2021, 378/2021, 379/2021 of August 20 and 556/2021 of October 30) on the application of sanctions in the form of blocking sites. In total, Presidential decrees in 2021 restricted access to 612 sites (some of which have already been sanctioned). These blockades included blocking of channels in messengers, references and e-mail addresses. Any further use of sanctions to block websites requires appropriate legislation, taking into account the principle of proportionality and international standards in the field of protection of freedom of expression.

**COMMENTS OF THE MINISTRY OF DIGITAL TRANSFORMATION TO THE
COMPARATIVE STUDY ON “BLOCKING, FILTERING AND TAKEDOWN OF
ILLEGAL INTERNET CONTENT”**

"In spite of rather a deep and comprehensive analysis of the Ukrainian part, some significant changes that had been made to the national legislation have not been indicated in the document. In 2017 amendments were made to the Law of Ukraine on E-commerce. The amendments to Article 9 provide for a de facto obligation for ISPs providing hosting services to disable access or to stop providing access to illegal content once the provider becomes aware. Article 17 (4) clearly states that the provider bears responsibility for the damage caused unless there are circumstances exempting the provider from liability in accordance with Article 9.

It should be also mentioned that taking into account the technical nature of hosting as a service, the obligation 'to disable access or to stop providing access' means in practice undertaking of measures similar to removal/take down of illegal content."