

**Comments of**

**TechFreedom**

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**In the Matter of**

*Trade Regulation Rule on Impersonation of Government and Businesses*

Impersonation SNPRM, R207000

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## INTRODUCTION

TechFreedom<sup>1</sup> is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible and thus unleashes the ultimate resource: human ingenuity.

On March 1, 2024, the Commission released a supplemental notice of proposed rulemaking (SNPRM) seeking comment on proposed amendments to its Trade Regulation Rule on Impersonation of Government and Businesses.<sup>2</sup> The Commission proposes greatly expanding the scope of the rule. The proposed rule would prohibit impersonation not only of businesses and government officials, but also private citizens. The new rule would also extend liability “to parties who provide goods and services with . . . reason to know that those goods or services will be used in” unlawful impersonations. The SNPRM does not define such “means and instrumentalities” of impersonation, saying only: “One who places in the hands of another a means or instrumentalities to be used by another to deceive the public in violation of the FTC Act is directly liable for violating the Act.”<sup>3</sup> These broad terms would cover services like Photoshop as well as generative AI tools. Although the SNPRM only mentions artificial intelligence once, deep in a footnote,<sup>4</sup> liability under the rule would clearly extend to the providers of AI services used by third parties to generate impersonations.<sup>5</sup>

The proposed rule could be inconsistent with, and therefore preempted by, 47 U.S.C. § 230(c)(1) in two ways. First, Section 230(c)(1) immunizes Internet services from civil liability for content they are not responsible for developing. Lawmakers and public policy experts are currently debating to what extent Section 230(c)(1) immunizes generative AI providers from liability for their tools’ outputs.<sup>6</sup> The answer may depend on the precise

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<sup>1</sup> TECHFREEDOM, <https://techfreedom.org/> (last visited Apr. 30, 2024).

<sup>2</sup> Trade Regulation Rule on Impersonation of Government and Businesses, Supplemental notice of proposed rulemaking, 89 Fed. Reg. 15072 (proposed Mar. 1, 2024) (to be codified at 16 C.F.R. § 461), <https://www.federalregister.gov/documents/2024/03/01/2024-03793/trade-regulation-rule-on-impersonation-of-government-and-businesses>.

<sup>3</sup> *Id.* at 15082 n.94 (quoting *Fed. Trade Comm’n v. Magui Publishers, Inc.*, No. Civ. 89–3818RSWL(GX), 1991 WL 90895, at \*14 (C.D. Cal. Mar. 28, 1991), *aff’d*, 9 F.3d 1551 (9th Cir. 1993)).

<sup>4</sup> *Id.* at 15082 n.98.

<sup>5</sup> *Id.* at 15077 (“The proposed prohibition in § 461.4 would cover unlawful conduct by persons who misrepresent that they are or are affiliated with an individual, as defined in § 461.1, including but not limited to . . . using an individual’s identifying information, including likeness or insignia, on a letterhead, website, email, or other physical or digital place.”).

<sup>6</sup> Section 230 provides two other immunities against liability for limiting access to third-party content and for providing tools that allow others do so. 47 U.S.C. § 230(c)(2). These two immunities protect providers of interactive computer service regardless of whether they are partially responsible for developing content. These

details of how generative AI works in particular contexts. The courts have not yet ruled on these questions, but at least some applications of generative AI could be protected by Section 230(c)(1). To that extent, holding providers of generative AI liable for content compiled by their tools, but created by others, would be barred by law.

Second, the proposed rule would hold providers of generative AI tools responsible if they provide their services “with knowledge or reason to know that those . . . services will be used to” produce impersonations barred by the rule. Creating liability for such constructive knowledge would be inconsistent with existing case law: Clearly, providers of interactive computer services may lose the protection of Section 230(c)(1) if they have *actual* knowledge that they are materially contributing to the creation of unlawful material, but we are unaware of any case in which *constructive* knowledge has sufficed under this test. At a minimum, the Commission should consider setting a higher bar for what kind of constructive knowledge would suffice. For example, the FTC’s Telemarketing Sales Rule makes it “an unfair or deceptive act or practice for a person to provide goods or services to a party when that person knows or *consciously avoids knowing* that the particular party will use those goods or services . . . .”<sup>7</sup>

The Commission failed to seek comment on Section 230 in either the NPRM or SNPRM. While some commenters might, despite this glaring omission, nonetheless address the topic, the Commission can develop a complete record only by seeking public comment specifically on this issue. Whether Section 230(c)(1) applies to artificial intelligence likely depends on how the AI tool in question generates a given output. In other words, whether an AI is responsible, in whole or part, for creating or developing a generated output is a factual question—one that is highly material to this rulemaking, given its significant legal consequences.

The Magnuson-Moss Act requires the agency to hold a hearing to resolve disputed issues of material fact before it can proceed to issuing a rule. Clearly, whether the rule would apply to AI tools covered by Section 230 is such an issue and therefore requires a hearing. In accordance with 16 C.F.R. § 1.11(e)(1)-(3), TechFreedom requests to make an oral submission at such a hearing. TechFreedom’s interest in the proceeding is threefold: We work to protect Internet freedom, promote technological progress, and ensure the Federal

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two provisions lack the distinction inherent in Section 230(c)(1): “no provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” See *Barnes v. Yahoo!, Inc.*, 565 F.3d 560 (9th Cir. 2009).

<sup>7</sup> 16 C.F.R. § 310.3(b) (emphasis added).

Trade Commission operates according to procedures mandated by Congress and the Constitution.<sup>8</sup> TechFreedom has a longstanding interest in Section 230.<sup>9</sup>

### **I. The Proposed Rule Would Short Circuit the Ongoing Debate over the Extent to which Section 230(c)(1) Protects AI Platforms.**

There is an ongoing debate among legal scholars over the extent to which Section 230(c)(1) applies to AI. The current debate focuses on text-based generative AI chatbots like ChatGPT. AI technology, however, has already advanced far beyond chatbots and is outpacing any legal consensus on the topic. Law review articles simply cannot keep up with robots.

The Commission proposes to terminate this critical debate before it has even really begun. The broadly worded proposed rule would cover audio and visual impersonations, prohibiting AI-generated text, voice, and video imitations of government, business, *and* private individuals—while *also* extending liability to the platforms used to generate the infringing content. The scope is massive, especially compared to the original Impersonation Rule, which covered only government officials and businesses. Despite the sweep and complexity of the rulemaking, the Commission did not seek comment on the Section 230 issue.

How Section 230(c)(1) applies to AI should be decided by the courts or by Congress, not by the Commission. Here, the Magnuson-Moss Act makes the Commission’s role clear: the Commission must “provide an opportunity for an informal hearing” to resolve disputed issues of material fact.<sup>10</sup> Section 230’s application to AI and the applicability of a constructive knowledge standard are issues of disputed material fact. To proceed with the rulemaking, the Commission must hold an informal hearing to seek further public comment on these crucial questions of law and policy.

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<sup>8</sup> The Commission recently acknowledged TechFreedom’s interest in Internet freedom and technological progress. Negative Option Rule, Initial notice of informal hearing, 16 C.F.R. pt. 425 n.7 (Dec. 4, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p064202\\_negative\\_option\\_-\\_informal\\_hearing.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p064202_negative_option_-_informal_hearing.pdf).

<sup>9</sup> *TechFreedom Comments at FTC Open Commission Meeting* (Mar. 21, 2024), <https://techfreedom.org/wp-content/uploads/2024/03/FTC-Open-Meeting-March-21-2024.pdf> (Comments of Andy Jung); Letter from TechFreedom to Senators Schumer & McConnell on S. 1993, “No Section 230 Immunity for AI Act” (Dec. 11, 2023), <https://techfreedom.org/wp-content/uploads/2023/12/S.-1993-Coalition-Letter-December-11-2023.pdf>; Brief for TechFreedom as Amicus Curiae, *Gonzalez v. Google LLC*, 598 U.S. 617 (2023), [https://www.supremecourt.gov/DocketPDF/21/21-1333/252397/20230118032344252\\_bsac%20Tech-Freedom%20No.%2021-1333.pdf](https://www.supremecourt.gov/DocketPDF/21/21-1333/252397/20230118032344252_bsac%20Tech-Freedom%20No.%2021-1333.pdf); *NTIA’s FCC Petition to Reinterpret Section 230 Is a Constitutional Non-Starter*, TECHFREEDOM (July 27, 2020), <https://techfreedom.org/ntias-fcc-petition-to-reinterpret-section-230-is-a-constitutional-non-starter/>.

<sup>10</sup> 15 U.S.C. § 57a(b)(1)(C).

## A. The Broad View of Section 230(c)(1)'s Application to Generative AI

In one view, outputs from platforms such as ChatGPT are analogous to search engine outputs and thus should receive Section 230(c)(1) immunity. ChatGPT is “entirely driven by third-party input” and does “not invent, create, or develop outputs absent any prompting from an information content provider.”<sup>11</sup> Instead, users write prompts, and ChatGPT uses predictive algorithms to produce a coherent response by piecing together text from the Internet. As renowned mathematician and computer scientist Stephen Wolfram explains:

OK, so what does ChatGPT (or, rather, the GPT-3 network on which it's based) actually do? Recall that its overall goal is to continue text in a “reasonable” way, based on what it's seen from the training it's had (which consists in looking at billions of pages of text from the web, etc.) So at any given point, it's got a certain amount of text—and its goal is to come up with an appropriate choice for the next token to add.<sup>12</sup>

Generative AI products operate on a “spectrum between a retrieval search engine (more likely to be covered by Section 230) and a creative engine (less likely to be covered).”<sup>13</sup> If part of a chatbot's output is partly or completely dependent on the user's initial query, Professors Bambauer and Surdeanu argue, courts are unlikely to treat the AI as a “creator or developer” of the content.<sup>14</sup>

Current case law suggests that courts determining whether to apply Section 230 to Generative AI must examine how the specific product at issue generates an output and what aspect of the output the plaintiff alleges to be illegal. For example, courts have extended Section 230(c)(1)'s (partial) immunity to search engines and autocomplete features.<sup>15</sup>

In *Roommates.com*, the Ninth Circuit established the “material contribution test”: a provider of an interactive computer service remains protected in providing users tools to post content as long as they do not materially *contribute* to the illegal activity.<sup>16</sup> Essentially, a website operator is immune if it does not encourage illegal content or design its website to require users to input illegal content.<sup>17</sup> *Roommates* allowed users to provide “additional comments”

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<sup>11</sup> Jess Miers, *Yes, Section 230 Should Protect ChatGPT And Other Generative AI Tools*, TECHDIRT (Mar. 17, 2023), <https://www.techdirt.com/2023/03/17/yes-section-230-should-protect-chatgpt-and-others-generative-ai-tools/Miers>.

<sup>12</sup> Stephen Wolfram, *What Is ChatGPT Doing . . . and Why Does It Work?*, WRITINGS (Feb. 14, 2023), <https://writings.stephenwolfram.com/2023/02/what-is-chatgpt-doing-and-why-does-it-work/>.

<sup>13</sup> See Henderson et al., *Where's the Liability in Harmful AI Speech?*, 3 J. OF FREE SPEECH L. 589, 622 (2023).

<sup>14</sup> See Derek Bambauer & Mihai Surdeanu, *Authorbots*, 3 J. OF FREE SPEECH L. 375, 384 (2023).

<sup>15</sup> See, e.g., *Obado v. Magedson*, 2014 WL 3778261 (D. N.J. July 31, 2014).

<sup>16</sup> *Fair Housing Council v. Roommates.com, LLC*, 521 F.3d 1157, 1169 (9th Cir. 2008).

<sup>17</sup> *Id.* at 1175.

through a form. The appeals court held that Section 230 protected Roommates from liability for such comments: the platform did not “develop” this information, even “in part,” because it did not “encourage or enhance any discriminatory content created by users.”<sup>18</sup> Under the material contribution test, a court would need to find that a provider “directly participated in developing the alleged illegality.”<sup>19</sup>

Broadly speaking, ChatGPT functions like the “additional comments” form in *Roommates.com*.<sup>20</sup> The output generated by ChatGPT is composed entirely of third-party information scraped from the web. That output is an algorithmic augmentation of third-party content.<sup>21</sup> Making algorithmic compilations or augmentations of third-party content does not make an ICS provider responsible for developing that content as an ICP.<sup>22</sup>

### **B. The Narrow View of Section 230(c)(1)’s Application to Generative AI**

Other commentators argue that generative AI is, by definition, unprotected by Section 230(c)(1): what makes certain AI systems “generative” is precisely that they “develop” content, at least in part.<sup>23</sup> Some AI models create brand-new “text on a topic” that no other party has ever written.<sup>24</sup> “If generated content contains claims or assertions that do not appear in its training data, the claims or assertions could be seen as entirely new information created by the providers rather than by another person.”<sup>25</sup> If an AI program assembles facts or claims from training data into new material that does not appear elsewhere on the Internet, courts might deem the website operator “responsible for the development of the specific content that was the source of the alleged liability” and thus unprotected by Section 230(c)(1).<sup>26</sup>

Section 230(c)(1) protects an ICS provider from liability as a publisher only for “information provided by another information content provider”—not for information that it is responsible for developing, even “in part.”<sup>27</sup> In *Accusearch*, the Tenth Circuit held that a provider of an interactive computer service (ICS) becomes an information content provider (ICP) responsible for the development of content when it knowingly transforms virtually

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<sup>18</sup> *Id.* at 1174. The Ninth Circuit, however, found Roommates liable for its specification of protected classes. *Id.*

<sup>19</sup> *Id.* at 1167-68.

<sup>20</sup> See Miers, *supra* note 11.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> See Matt Perault, *Section 230 Won’t Protect ChatGPT*, 3 J. OF FREE SPEECH L. 365, 365 (2023).

<sup>24</sup> *Id.*

<sup>25</sup> CONGRESSIONAL RESEARCH SERVICE, SECTION 230 IMMUNITY AND GENERATIVE ARTIFICIAL INTELLIGENCE 4 (2023), <https://crsreports.congress.gov/product/pdf/LSB/LSB11097>.

<sup>26</sup> *Id.*

<sup>27</sup> See Fed. Trade Comm’n v. Accusearch Inc., 570 F.3d 1187, 1197 (10th Cir. 2009).

unknown information into a publicly available commodity.<sup>28</sup> Accusearch had solicited requests for confidential information protected by law, paid researchers to find it, and later sold it to customers.<sup>29</sup>

Kristin Rheins suggests that, when considering whether to apply Section 230(c)(1) protections to generative AI platforms, courts must determine the extent to which the user, rather than the AI tool, is responsible for the output.<sup>30</sup> The behind-the-scenes organization and editing of the third-party data used to generate AI content might transform an AI platform into a material contributor if courts determine that AI creates content rather than “hosts content like a Reddit message board or a Twitter timeline,” thereby exercising “editorial agency over what is created.”<sup>31</sup>

### C. Whether or Not Section 230(c)(1) Applies to Generative AI Depends on the Tool and Output in Question.

Ultimately, whether courts extend Section 230(c)(1) immunity to generative AI will likely depend on how the specific product or tool at issue works. For large language models (LLMs) like ChatGPT, if a court determines that the output is an algorithmic augmentation of third-party information, it will likely apply 230 protections. On the other hand, a court will likely not apply Section 230(c)(1) when LLMs are responsible, in whole or part, for creating or developing the generated output. Deepfakes, however, are not merely reconfigured third-party information, at least not in the same sense as AI chatbot text responses. Audio and visual deepfake content, therefore, may ultimately fall outside the scope of Section 230(c)(1) in some cases.

By proposing broad liability for AI developers, the proposed rule presumes that Section 230(c)(1) does *not* apply to generative AI—a presumption about a highly material fact that can have no basis in the record, since the Commission has not even asked about Section 230. The Commission should instead start from the premise that Section 230(c)(1) may apply to at least *some* applications of generative AI—and it will be up to the courts to draw that line. At a minimum, that means taking public comment on how to craft a rule that is not

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<sup>28</sup> *Id.* at 1199 (“Accusearch was responsible for the development of that content—for the conversion of the legally protected records from confidential material to publicly exposed information. Accusearch solicited requests for such confidential information and then paid researchers to obtain it. It knowingly sought to transform virtually unknown information into a publicly available commodity.”).

<sup>29</sup> *Id.* at 1201.

<sup>30</sup> See Kristin Rheins, *The Debate Over Liability for AI-Generated Content*, THE PROGRESSIVE POLICY INSTITUTE (Aug. 8, 2023), <https://www.progressivepolicy.org/blogs/the-debate-over-liability-for-ai-generated-content/>.

<sup>31</sup> *Id.*



preempted by Section 230. In particular, it means ensuring that the knowledge requirement for the rule is consistent with how the courts have applied Section 230.

## **II. Any Final Rule Should Codify the Knowledge Requirement for Intermediary Liability.**

Setting the right knowledge standard for the rule is crucial. The failure to specify a standard was another glaring omission from the NPRM.<sup>32</sup> No developer should face liability merely for offering AI services that, as one commenter put it, “by no fault of their own and by nature of the services they offer, were unintentional conduits for impersonation fraud.”<sup>33</sup> Such liability would be impossible for all but the largest, best-financed companies to bear—and crushing to all other developers.<sup>34</sup> Indeed, it could drive the development of AI technologies out of the United States entirely.

The SNPRM moves in the right direction by proposing a knowledge requirement.<sup>35</sup> Unfortunately, “reason to know” is the wrong standard; it would impose exactly the kind of crushing liability the Commission should avoid. Impersonation scams perpetrated by criminals using generative AI are increasingly common and highly publicized.<sup>36</sup> These days, arguably, all developers have “reason to know” that generative AI products can be used for illegal impersonations. A constructive knowledge standard, therefore, would extend liability to all developers and distributors that offer generative AI services to the public. In effect, AI developers would be subject to the kind of “Know Your Customer” obligations borne by financial institutions.<sup>37</sup> The rule must require a higher standard of knowledge.

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<sup>32</sup> The proposed rule would make it unlawful to provide goods or services with knowledge or reason to know that those goods or services will be used in impersonations of the kind that are themselves unlawful under the Rule. The NPRM proposed a similar provision, which referred to “means and instrumentalities,” but lacked a requirement to prove “knowledge or reason to know.” Trade Regulation Rule on Impersonation of Government and Businesses, Notice of proposed rulemaking, 87 Fed. Reg. 62741 (proposed Oct. 17, 2022), <https://www.federalregister.gov/documents/2022/10/17/2022-21289/trade-regulation-rule-on-impersonation-of-government-and-businesses>.

<sup>33</sup> USTelecom Comments on Impersonation NPRM at 2 (Dec. 16, 2022), <https://www.regulations.gov/comment/FTC-2022-0064-0059>.

<sup>34</sup> See a16z Comments on Impersonation SNPRM, R207000 (Apr. 30, 2024).

<sup>35</sup> Supplemental notice of proposed rulemaking, *supra* note 2, at 15077 (“the Commission proposes, in § 461.5, expressly to impose liability on those who provide goods or services with knowledge or reason to know that those goods or services will be used in impersonations of the kind that are themselves unlawful under the Rule.”).

<sup>36</sup> See, e.g., Eric Revell, *AI voice cloning scams on the rise, expert warns*, FOX BUSINESS (Sept. 23, 2023), <https://www.foxbusiness.com/technology/ai-voice-cloning-scams-on-rise-expert-warns>; Charles Bethea, *The Terrifying A.I. Scam That Uses Your Loved One’s Voice*, THE NEW YORKER (Mar 7, 2024), <https://www.newyorker.com/science/annals-of-artificial-intelligence/the-terrifying-ai-scam-that-uses-your-loved-ones-voice>.

<sup>37</sup> See a16z Comments on Impersonation SNPRM, R207000 (Apr. 30, 2024).

The knowledge standard must also be consistent with how courts have interpreted Section 230(c)(1). In *Accusearch*, a company made a “material contribution” to the development of unlawful content because it “*knowingly* sought to transform virtually unknown information into a publicly available commodity.”<sup>38</sup> We could find no example of a court holding that a company had lost its Section 230(c)(1) protection under some lower knowledge standard.

The rule should be modeled on the standard in the Telemarketing Sales Rule: a developer must either know, or consciously avoid knowing, not merely that *someone* might misuse its tool, but that the particular party to which it provides an AI tool will use those goods or services to violate the rule.<sup>39</sup> This “conscious avoidance” standard is also referred to as willful blindness.<sup>40</sup> As one treatise explains:

A court can properly find willful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is willful blindness.<sup>41</sup>

This is the right standard; it appropriately distinguishes between bad actors and those developers whose general-purpose AI tools might be misused by a small number of users. But such standards of scienter are exceptionally difficult to parse, even for lawyers. The Commission cannot expect that smaller AI developers, operating with limited legal advice or no legal counsel at all, will understand this standard correctly. Both the development of, and investment in, AI technologies would be chilled dramatically.

To provide clarity, the Commission should clearly state the practical bottom line of this standard by adding an additional proviso to the rule, as a16z proposes: “Nothing in this section shall be interpreted to require a provider of goods or services to conduct prior due diligence on any or all parties that may use the goods or services.” Such disclaimers against

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<sup>38</sup> Fed. Trade Comm’n v. *Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009).

<sup>39</sup> Compare 16 C.F.R. § 310.3(b) (“It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a), (c) or (d), or § 310.4 of this Rule.”). See generally a16z Comments on Impersonation SNPRM, R207000 (Apr. 30, 2024).

<sup>40</sup> Frans J. von Kaenel, *Willful Blindness: A Permissible Substitute for Actual Knowledge Under the Money Laundering Control Act?*, 71 WASH. U. L. Q. 1189, 1191 n.15 (1993), <https://journals.library.wustl.edu/lawreview/article/2264/galley/19097/view/#:~:text=The%20doctrine%20of%20%22willful%20blindness,required%20mens%20rea%20of%20knowledge>.

<sup>41</sup> *Id.* at 1199 n.60 (quoting Glanville Williams, CRIMINAL LAW: THE GENERAL PART 159 (1961)).

general monitoring obligations are commonly used in intermediary liability to ensure that the law does not cast too long a shadow over legitimate operators.<sup>42</sup>

### CONCLUSION

The Commission should seek further comment on the application of Section 230(c)(1) to the proposed rule, especially the knowledge standard. If the Commission moves forward with the proposed rule, it should replace the “reason to know” standard with one of “conscious avoidance,” and include a proviso disclaiming any general obligation to monitor how AI systems are used. If the Commission does not do both, it must hold hearings on these issues before issuing a final rule. Given that the Commission did not seek public comment on Section 230, it should give affected parties another opportunity to request to make oral presentations at such a hearing—or at least, it should extend the opportunity to those parties that filed comments in this docket, even if they did not request to make such a presentation.

Respectfully submitted,

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<sup>42</sup> *See, e.g.*, 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”), Article 15.1 (“Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.”).