

# STUDY ON DYNAMIC BLOCKING INJUNCTIONS IN THE EUROPEAN UNION

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IPR ENFORCEMENT  
CASE-LAW COLLECTION



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## EXECUTIVE SUMMARY

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This study and case-law collection offers an overview of static and dynamic blocking injunctions in the EU and the Studied Member States (SMS). The overview is based on questionnaires and a comparative review of the case-law and the legal framework of the SMS.

Blocking injunctions find their **legal basis** in Article 18(1) of the e-commerce Directive, Article 8(3) of the InfoSoc Directive and Article 11 of the IPRED. The compatibility of blocking injunctions with EU law has been confirmed by a number of Court of Justice of the European Union (CJEU) judgments, which also support the availability of dynamic blocking injunctions. However, while static blocking injunctions are available in all the SMS, dynamic blocking injunctions are not or, at least, their availability has not yet been tested in the courts in some of the SMS.

The availability of static and dynamic blocking injunctions largely depends on the proper **balancing of rights and interests** of persons concerned by the measures. This balancing is undertaken through the consideration of different fundamental rights and of the overall proportionality of the injunctions. Overall, static and dynamic blocking injunctions should be available, according to the doctrine of 'fair balance' among fundamental rights, only if they are strictly targeted to bring the infringement to an end and if they do not disproportionately impinge on fundamental rights, do not impose 'excessive obligations' on intermediaries and address the risk of over- and under-blocking.

**Requirements** for obtaining a **blocking injunction** differ in the SMS. However, there are still some common general requirements and procedural rules that apply in most SMS, including the need to demonstrate the rights holder's status and ownership of rights, evidence of alleged infringement, proportionality, appropriateness and/or reasonableness of the requested measure.

**Dynamic blocking injunctions** have been granted in most of the SMS, including Denmark, France, Ireland, Italy, the Netherlands, Spain, Sweden and the UK. However, so far, the number of dynamic blocking injunctions issued in the SMS has been limited. In most SMS, there is no explicit statutory notion of dynamic blocking injunctions. Therefore, courts have been granting dynamic blocking injunctions – and defining their requirements – on the basis of an expansive interpretation of pre-existing norms. As a subspecies of dynamic blocking injunctions, some SMS (Ireland, Spain and the UK) have made available **live blocking injunctions** with the principal goal of limiting infringement of rights to live (sports) events. In other SMS, live blocking injunctions are not available or, at least, their availability has not been tested in court yet.

With regard to the **scope of dynamic blocking injunctions**, the subject matter, targeted intermediaries, targeted websites, temporal and territorial scope vary to different extents in the SMS. Copyright infringement is the main target of these measures in the SMS, but there does not seem to be any specific limitation to the subject matter that can be covered by a dynamic injunction. Similarly, although dynamic blocking injunctions have been customarily granted against internet access service providers in most SMS, these measures can be used against any party deemed an intermediary under Article 8(3) of the InfoSoc Directive and Article 11 of the IPRED. In most SMS, there are no limitations on the number of websites that can be blocked. The law does not regulate dynamic blocking

injunctions nor their duration in most SMS, but these measures might be limited in time by judicial decisions. In general, injunctions can order the blocking of content regardless of the location where the infringement took place or the location of the users accessing the infringing content, as long as the activities target the consumers and internet users of Member States (MS).

There are no specific procedural rules on the requirements for and the admissibility of **evidence** for static and dynamic blocking injunctions in the SMS.

The **implementation of blocking injunctions** mainly focuses on technical solutions and the implementation costs. In most SMS, the injunction usually specifies the technical solution to be applied. If that is not the case, such as in Denmark, France, Italy, Spain and Sweden, courts might, however, suggest technical solutions to meet the scope of the injunction. Both Internet Protocol (IP) address and domain name system (DNS) blocking are the most common technical solutions applied by blocking injunctions in the SMS. The SMS have treated the allocation of the costs of implementing blocking measures rather inconsistently. The intermediaries bear the costs of implementing a blocking injunction in the large majority of the SMS. In fewer SMS, costs might be shared between the intermediary and rights holders, or assigned to intermediaries only.

**Follow-up actions to dynamic blocking injunctions** play an important role in the measures' effectiveness and the overall balance of interests. In some SMS, specific procedures are available for renewing, updating or extending static and dynamic blocking injunctions, while they are not available in others. In this context, there does not seem to be any specific distinctions between procedural rules for renewal and update of static and dynamic injunctions among the SMS. In addition, the SMS do not have any specific procedure available to convert a static blocking injunction into a dynamic one. Instead, a new procedure on the merits has to be started. In addition, most SMS provide for the enforcement of the order, fines, and recurring penalties. Finally, there are remedies available to challenge blocking injunctions in all the SMS under traditional civil procedure rules. The remedies are generally available to the intermediaries and the alleged infringers concerned by the injunction. In a few SMS, these remedies are also available to affected individual internet users, or in some SMS via collective actions.

Discussing the **extraterritorial scope of injunctions** against online intermediaries, recent CJEU jurisprudence concluded that EU law does not impose or preclude worldwide measures. Instead, it is up to national courts to decide whether extraterritorial injunctions could be imposed according to their own balancing of fundamental rights and application of international norms. In this context, blocking injunctions must be targeted and specific with a territorial scope not broader than what is necessary to achieve its objective, according to fundamental right balancing and international law, including the doctrine of comity.

Static and dynamic blocking case-law shows multiple instances of **legal entanglement** among national courts of different SMS. Legal entanglements can be considered a form of informal cross-border cooperation and occur when national courts refer to judgments in other jurisdictions.

An additional important factor to evaluate availability, scope and proportionality of blocking injunction is their **effectiveness** in reducing infringement. The effectiveness of blocking injunctions is usually not explicitly assessed in most SMS. Effectiveness might not require 100 % success as long as the remedy is seriously discouraging internet users from accessing the infringing content. Effectiveness is considered in certain jurisdictions an additional requirement to justify targeted and specific blocking injunctions that fairly balance fundamental rights and impose proportionate, not excessive obligations on access providers and other intermediaries.

The overview of static and dynamic blocking injunctions in the EU and the SMS shows a complex web of a variety of approaches in EU MS that is sometimes hard to untangle. Against this backdrop, this study provides a set of key findings that might serve as a reference for the further development of policies and practices in the field.