



EU regulatory framework for e-commerce

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Outline

E-commerce Directive

E-commerce Action Plan – a coherent framework of actions to boost e-commerce and online services



E-commerce Directive

Objectives Directive on e-commerce 2000/31/EC of 8 June 2000 (ECD)

Remove obstacles to cross-border online services in the EU internal market (*free movement of services*)

Provide legal certainty to business and citizens

Offer a flexible, technically neutral and balanced legal framework

Enhancing competitiveness of European service providers

Main features of the ECD

horizontal application of the ECD – whenever provision of “*information society services*” (ISS) (e.g. online sellers of goods and services, ISPs, search engines, etc.)

ECD complements other EU legislation

identifies procedural rules

identifies substantive rules

Scope of application

- **notion of "information society services"**
 - any service normally provided for **remuneration**
 - at a **distance**
 - by **electronic means**
 - at **the individual request** of a recipient of services
- **ECD does not apply to**
 - the field taxation
 - data protection
 - gambling activities

Internal market clause (Article 3) – free movement of information society services

*“Member States **may not**, for reasons falling within the coordinated field, **restrict the freedom to provide information society services** from another Member State”*

Derogations possible under **strict conditions**, e.g:

- **measures necessary for public policy, protection of public health, public security, protection consumers**
- **proportionality test**

Article 3 does not apply to intellectual property rights, consumers contracts, freedom of parties to choose the applicable law

Notification obligation under E-Commerce Directive

Notification of intention to take measures derogating from the internal market clause (see previous slide) to

- **MS of establishment (1st and 2nd phase) and**
- **Commission (2nd phase)**

Commission examines the compatibility of the notified measures with the EU law

If incompatible: MS should refrain from action

Establishment – prohibition of prior authorization (Article 4)

*"Members States shall ensure that the taking up and pursuit of the activity of an information society service provider **may not be made subject to prior authorisation** or any other measure having equivalent effect"*

Liability of online intermediaries (general points)

ECD harmonises the conditions under which **information society service providers cannot be held liable** (liability limitations) for a third party illegal content

ECD does not harmonise “liability” but “limitations of liability”

The liability limitations apply to all forms of illegal activities (including copyright and trademark infringements, defamation, misleading advertising etc.)

The liability exemptions apply to both civil and criminal liability

Who are online intermediaries?

ECD does not provide for a legal definition of “*online intermediaries*”

The notion is defined through the activities described in Articles 12 to 14 of the ECD

- **Mere Conduit ,**
- **Caching and**
- **Hosting**

Only these activities can be exempted, which means that for some service provider could be held liable

Internet intermediaries (OECD classification)

Type of intermediary	Type of activity	Examples
Web hosting providers (including domain name registrars) and Data processing,	Transforming data prepare data for dissemination or store data or content on the internet for others	Navisite, Akamai, OVH, Easyspace, Rackspace, Regsiter.com, Leaseweb, Go daddy, GMO Internet INC.
Internet search engines and portals	Providing help navigating on the internet	Google, Yahoo!, Baidu, Never, MSN, Bing
E-commerce intermediaries,	Enabling online buying or selling, but don't owe the goods sold	Amazon, eBay, Allegro, Ali Baba, Priceline.com
Participative networking platforms, which do not create or own the content being published	Providing help in creating content and social networking	Facebook, LinkedIn; Youtube, Ohmynews
<i>Internet access and service providers (ISPs)</i>	<i>Providing access to the Internet to households, business and government</i>	<i>Verizon, Comcast, NTT, Internet Initiative Japan, BT, Free fr, Vodafone, Orange, T-mobile, MTN</i>
<i>Internet payment systems</i>	<i>Processing internet payments</i>	<i>Visa, Paypal, Mastercard</i>

Mere conduit

Service providers, whose role solely consists in the transmission of information originating from third parties and the provision of access through a communication network, cannot be held liable for third party illegal content if they:

- **Do not initiate the transmission**
- **Do not select the receiver of the transmission and**
- **Do not select or modify the information transmitted**

Automatic, intermediate and transient storage of information which takes place during the transmission of the information in order to carry out the transmission, are covered by the exemption of liability.

Caching

Service providers cannot be held liable for third party illegal content when providing caching facilities provided they:

- **do not modify the information**
- **comply with conditions on access to information and with rules on the updating of the information**
- **do not interfere with lawful use of technology to obtain data on the use of the information**
- **expeditiously act to remove the access to the information stored when informed that the information has been removed from the network, when access to it has been disabled or when a responsible authority has ordered the removal**

Hosting

Service providers who store information supplied by and at the request of a recipient of the service are not liable if:

- **They do not have actual knowledge of illegal activity or information and as regards claims for damages and are not aware of the facts or circumstances from which the illegal activity or information is apparent; or**
- **The provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or disable access to the information**

What is a hosting activity?

Court of Justice of the European Union (CJEU) (C-236-238/08 - *Google/LVMH* and C-324/09 *L'Oreal/eBay*):

*Intermediary should not have knowledge or control over content - **mere technical automatic and passive nature***

Passive v active: *the role played by the service provider in the drafting of the commercial message which accompanies the advertisement link or in the establishment or selection of keywords is relevant*

What constitutes actual knowledge or awareness?

Awareness: awareness of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question (CJEU in *C-324/09 – L'Oreal/eBay*)

How can it be obtained?

- **Through an investigation undertaken on an intermediary's own initiative**
- **Through a notification, if it is sufficiently precise and adequately substantiated**
- **Through an active role; optimising the presentation of the offers for sale or promoting them**

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Prohibition of a general monitoring obligation (Article 15)

"Member State shall not impose a monitoring 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."

Interpreted in two judgements of the CJEU

- **C-70/10 – Scarlet**
- **C-360/10 - Netlog**

Other ECD provisions

general information requirements and pre-contractual information requirements

commercial communications (including for regulated professions) have to be clearly identified

electronic contracting should be allowed



E-commerce Action Plan of 2012

Scope and ambition

Adopted on 11 January 2012 and provides "a vision" of the Commission on on-line services + strategy + action plan

Identification of five priority areas + creation of a coherent framework

Complements previously announced initiatives

No revision of the E-commerce Directive



European Commission



E-COMMERCE VALUE CHAIN



MAIN ACTIONS

Cloud Strategy	1) Strategy for Intellectual property rights; 2) Action plan online gambling; 3) "Notice and action" initiative; 4) Unfair business practices initiative	1) Boost business awareness; 2) Data protection review	1) Guidelines Article 20 Services Directive (abolish unjustified discriminations on grounds of residence/nationality customer)	1) Transposition of Consumer Rights Directive; 2) Common European Sales Law	1) Green Paper payments: cards; internet; mobile phones 2) VAT review	Green Paper parcel delivery	ADR/ODR;
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Classical "trust" issues (I)

➤ *Data protection*

- 72% of Internet users are worried about giving away too much personal data
- Erodes trust in online services and holds back the growth of the digital economy
- But also: fragmented legal environment with different regimes in 27 Member States, legal uncertainty for business
- Need to simplify and not to unnecessarily hinder new online business models

Action: Proposal for a General Data Protection Regulation (25 January 2012)

➤ *VAT*

- Complexity of the VAT system can dissuade businesses from selling online in another Member State
- Setting up a "one-stop-shop" would encourage and facilitate cross-border e-commerce
- Similar goods and products should be subject to the same VAT rate

Action: Action Plan on the future of VAT (December 2011); Proposals on the convergence between online and the physical environment (2013)

Classical "trust" issues (II)

➤ *Payments*

- 35% internet users do not buy online because of concerns on payment security
- Excessive costs of payment for traders and consumers; lack of transparency
- Risk of fraud, liability issue, privacy concerns

Action: Public consultation on card, internet and mobile payments (12 January 2012) + legislative proposals (revision Payment Services Directive; EU legislation on multi-lateral interchange fees for credit cards)

➤ *Postal delivery*

- 10% people do not buy online because of delivery concerns
- Lack of transparency on prices and of clarity on responsibility
- For SMEs/consumers: less attracted to engage in cross-border e-commerce fearing long delivery times and higher rates of lost items

Action: Green Paper on (cross-border) parcel delivery (Q4 2012) + Roadmap single market for parcel delivery (Autumn 2013)

Classical "trust" issues (III)

➤ *(Online) dispute resolution*

- 32% online shoppers does so only occasionally because of difficulty to solve problems
- About 60% of business and 64% of consumers would be willing to solve disputes through ODR
- (Cross-border) ODR schemes are poorly developed in the EU

Action: proposal for a Regulation on Consumer ODR (29 November 2011) - ADOPTED

Useful links

E-commerce Action Plan

http://ec.europa.eu/internal_market/e-commerce/communications/2012/index_en.htm

Digital Agenda for Europe

<http://ec.europa.eu/digital-agenda/>

Thank you for your attention!

Any questions?