



E-Commerce Directive (Directive 2000/31/EC)

Screening chapter 10 – INFORMATION SOCIETY AND MEDIA

Explanatory session of the acquis, Brussels 23rd May 2014



Objectives of the *acquis*

Remove obstacles to cross-border online services in the internal market

Provide legal certainty to business and citizens

Offer a flexible, technically neutral and balanced legal framework

Enhancing competitiveness of European service providers



Main characteristics/features of the ECD

horizontal application of the ECD – whenever provision of “*information society services*” (ISS)

identifies procedural rules:

- **notification mechanisms**
- **administrative cooperation between MS**

identifies substantive rules (examples):

- **internal market clause**
- **principle excluding prior authorisation for establishment**
- **general information requirements**
- **liability of internet intermediaries**



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

Internal market clause (Article 3)

*“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**:

- **measures necessary for public policy, protection of public health, public security, protection consumers**
- **taken against a given ISS which prejudices these objectives or presents a serious and grave risk of prejudice to these objectives**
- **proportionality test**
- **before acting, asking MS of establishment to take measure (two tier notification obligation)**



Notification obligation – Transparency Directive

Mechanism of transparency to prevent creation of fresh obstacles, reduce disputes to a minimum and avoid the risk of over-regulation

Notification to the Commission of

- **rules concerning information society services**
- **specifically aimed at these services**
- **at the draft stage**

Stand-still period (in principle 3 months); other MS may make observations; Commission examines compatibility the EU law



Notification obligation – Article 3(4) E-Commerce Directive

Notification of intention to take measures derogating from the internal market clause (see slide 5) 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"*

*Without prejudice to authorisations which are "**not specifically and exclusively targeted at ISS provider**"*

Derogation for electronic communication services

Information requirements (Article 5)

Service providers must render at least the following information easy, directly and permanently accessible:

- **geographic address, e-mail address**
- **registration number trade register**
- **particulars of the relevant supervisory authority**
- **Prices**
- **VAT details**

Regulated professions:

- **professional body where service provider registered;**
- **professional title and MS where it has been granted;**
- **reference to the applicable professional rules in the MS of establishment and the means to access them**



Commercial communications (Articles 6-8)

Commercial communication: any form of communication to promote the goods, services or corporate image

Commercial communication must be clearly identifiable

Specific rules on unsolicited commercial communication

Members of regulated professions:

- **are subject to their professional rules (independence, dignity, honour, fairness towards clients, etc.)**
- **codes of conduct at EU level should be encouraged**



Online contracts (Articles 9 – 11)

Legal systems MS should allow contracts to be concluded by electronic means with only limited number of exceptions (e.g. for real estate, family law, securities)

Minimal information requirements for service provider:

- **different technical steps to follow to conclude contract**
- **languages offered for conclusion of contract**

Contract terms must be made available to store and reproduce and service provider has to acknowledge the receipt without undue delay



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

Mere conduit (Article 12)

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 (Article 13)

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 (Article 14)

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? (C-236-238/08 - Google/LVMH)

Intermediary should not have knowledge or control over content - **mere technical automatic and passive nature** (see also recital 42 ECD)

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



What is a hosting activity? (C-324/09 L'Oreal/eBay)

Confirmation of application of recital 42 ECD

Passive v active: active role is providing assistance, in particular by optimising the presentation of the offers for sale in question or promoting those offers

"In some cases eBay also provides assistance intended to optimise or promote certain offers for sale"



What constitutes actual knowledge or awareness? (C-324/09 – L'Oreal/eBay)

Awareness: awareness of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question

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**



Administrative cooperation (Article 19 and beyond)

Contact Points in the MS for mutual cooperation between MS

MS shall provide assistance and information requested by other MS or by the Commission

ECD is included in Regulation (EC) No 2006/2004 on Consumer Protection Cooperation - cooperation in case of cross-border consumer problems

Pilot concerning the Internal Market Information system (IMI)



Thank you for your attention!

Any questions?