



EUROPEAN COMMISSION

Brussels, 11.1.2012  
SEC(2011) 1641 final

**COMMISSION STAFF WORKING DOCUMENT**

**Online services, including e-commerce, in the Single Market**

*Accompanying the document*

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN  
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL  
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**A coherent framework to boost confidence in the Digital Single Market of e-commerce  
and other online services**

{COM(2011) 942 final}  
{SEC(2011) 1640 final}

## TABLE OF CONTENTS

1	General Introduction .....	3
2	The market for online services: state of play .....	6
2.1	Description of e-commerce in the economy .....	6
2.2	The regulatory framework.....	8
2.2.1	The E-Commerce Directive .....	8
2.2.1.1	The Internal Market clause and establishment requirements (Articles 3-4 ECD) .....	8
2.2.1.2	Information requirements (Article 5 ECD) .....	12
2.2.1.3	Commercial communications and regulated professions (Articles 6-8 ECD) .	13
2.2.1.4	Electronic contracting (Articles 9-11 ECD).....	15
2.2.1.5	Liability of online intermediaries (Articles 12-15 ECD) .....	16
2.2.1.6	Implementation and application (Articles 16-20 ECD) .....	17
2.2.2	Other relevant EU rules.....	17
3	Issues and obstacles linked to the ECD.....	18
3.1	Need for further information on the application of the ECD .....	19
3.1.1	Lack of information on actual implementation in the Member States.....	19
3.1.2	Lack of statistics on e-commerce .....	19
3.2	Need for better co-operation in the application and implementation of the ECD ("governance").....	19
3.2.1	Transparency Directive 98/48/EC.....	19
3.2.2	Case-by-case derogations of Article 3 (4) ECD.....	20
3.2.3	Administrative cooperation under Article 19 ECD.....	22
3.3	Need for better enforcement of the ECD .....	23
3.4	Need for further clarification on the intermediaries regime of the ECD .....	24
3.4.1	Liability issues.....	24
3.4.2	The activities covered by Articles 12-15 ECD.....	26
3.4.2.1	National law .....	26
3.4.2.2	EU law.....	30
3.4.3	The conditions in Article 12 to 14 ECD.....	32
3.4.3.1	Absence of actual knowledge.....	32
3.4.3.2	Acting expeditiously .....	37
3.4.3.3	Other conditions .....	38
3.4.4	Notice-and-action procedures .....	39
3.4.4.1	The European legislative framework .....	39
3.4.4.2	The developments in the last ten years.....	40
3.4.4.3	Persisting issues.....	43
3.4.4.4	An EU initiative on procedures for notifying and acting on illegal online content .....	46
3.4.5	The prohibition in Article 15 ECD.....	47
3.4.5.1	EU law.....	47
3.4.5.2	National law .....	49
3.4.5.3	Filtering.....	50
4	Need for integration with other Digital Single Market policies.....	51
4.1	Trust .....	52
4.1.1	Trustmarks.....	52
4.1.2	Personal data protection .....	53
4.1.2.1	Personal data protection in the online environment.....	53

4.1.2.2	Spam and the ePrivacy Directive .....	55
4.1.2.3	Cookies and the ePrivacy Directive .....	56
4.1.2.4	Self-regulation in behavioural advertising .....	58
4.1.2.5	Data Protection Directive .....	59
4.1.3	Online gambling .....	60
4.1.4	Online pharmacies and other health issues .....	60
4.2	Information .....	63
4.2.1	Price comparison websites .....	63
4.2.2	Restrictions on advertising .....	64
4.2.3	Unfair commercial practices .....	65
4.2.4	Code of EU Online Rights .....	67
4.2.5	Business awareness .....	67
4.3	Access .....	67
4.3.1	Discrimination: Article 20 (2) of the Services Directive .....	67
4.3.2	Access to capital for SMEs .....	69
4.3.3	Domain names .....	69
4.3.4	Net neutrality .....	70
4.3.5	Intellectual property rights .....	71
4.3.6	Grey markets .....	74
4.3.7	Re-use of public information .....	75
4.3.8	Competition .....	76
4.3.8.1	General .....	76
4.3.8.2	Vertical distribution agreements .....	77
4.4	Contracting .....	79
4.4.1	Contract law .....	79
4.4.2	Unfair business practices .....	83
4.4.3	E-signatures, e-identification and e-authentication .....	84
4.5	Electronic payment and invoicing .....	86
4.5.1	Electronic payment .....	86
4.5.2	Electronic invoicing .....	88
4.6	Delivery .....	89
4.6.1	Delivery services in an e-commerce environment .....	89
4.6.2	Delivery problems .....	90
4.6.3	Parcel and express delivery services under the Postal Services Directive .....	91
4.6.4	Market trends and enhanced application of the EU postal legislation .....	94
4.7	Dispute resolution in an online environment .....	96
4.7.1	Alternative Dispute Resolution and Online Dispute Resolution .....	96
4.7.2	European Small Claims Procedure .....	100
4.7.3	Collective redress .....	101
4.7.4	International Private Law .....	101
4.8	Cross-cutting issues .....	103
4.8.1	VAT .....	103
4.8.2	Networks and infrastructure .....	105
4.8.3	Environmental dimension .....	106
4.8.4	International dimension .....	107

Annex I Transposition of Directive 2001/31/EC in the European Economic Area

Annex II National legislation on "notice-and-takedown" procedures

# 1 General Introduction

The "Single Market Act"<sup>1</sup> identifies information society services, including e-commerce, as one of the measures which can boost economic growth and drive forward the Internal Market of the 21<sup>st</sup> century. They also have a major role to play in achieving the objectives of smart, sustainable and inclusive growth in Europe by 2020.<sup>2</sup> The "Digital Agenda for Europe"<sup>3</sup> sets the objectives of developing electronic commerce across Europe and facilitating access to electronic commerce for SMEs engaged in sales and purchasing. The strategy includes quantitative targets: by 2015 33% of SMEs should be conducting online purchases/sales. By contrast, during 2008, 24% of enterprises were purchasing and 12% selling electronically volumes that equalled or exceeded 1% of their total purchases/turnover. Moreover, it is anticipated that 20% of the population will be buying goods online from cross-border providers by 2015.

Information society services (ISS) or online services can contribute to achieving crucial policy objectives in a number of ways:

- Information society services are key to growth. Over the past decade, these new activities have generated jobs and created enterprises, thus adding value and representing a major engine for European growth, even in a time of crisis.
- E-commerce is seen as the best way to transcend national borders and enable businesses and consumers to get the most out of the European Single Market, even if national markets still dominate today. For instance, only 9% of consumers in 2010 (against 8% in 2009) used e-commerce across borders.<sup>4</sup>
- E-commerce can help attain regional policy objectives: it can improve access to an increasingly large range of products and services for citizens and businesses located in isolated areas.
- E-commerce can enhance the quality of life of vulnerable populations: new technologies and new sales channels can often better meet the needs of at-risk social groups such as the elderly and allow them to have access to an extensive range of services and products not easily

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<sup>1</sup> Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Single Market Act, Twelve levers to boost growth and strengthen confidence, "Working together to create new growth"*, COM(2011) 206 final, 13.04.2011; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0206:FIN:EN:PDF>.

<sup>2</sup> Communication from the Commission, *Europe 2020, A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020 final, 03.03.2010; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF>.

<sup>3</sup> Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *A Digital Agenda for Europe*, COM(2010) 245 final/2, 26.08.2010; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0245:FIN:EN:PDF>.

<sup>4</sup> European Commission, DG Sanco, 5<sup>th</sup> Consumer Scoreboard, *Consumers at home in the Single Market*, March 2011, available at: [http://ec.europa.eu/consumers/consumer\\_research/editions/cms5\\_en.htm](http://ec.europa.eu/consumers/consumer_research/editions/cms5_en.htm)

available to them in the physical world, such as cultural events. Moreover, information society services and e-commerce can contribute to meeting the demographic challenge of an ageing European population.

- E-commerce can help protect the environment: e-commerce has a role to play in achieving the objectives of sustainable growth, since according to some studies<sup>5</sup>, it uses less CO<sub>2</sub> than traditional commerce.

Ten years after the adoption of the Directive on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)<sup>6</sup>, e-commerce is still limited to less than 4% of total European trade. As announced in the Communication "Towards a Single Market Act"<sup>7</sup>, the European Commission wants to explore the various reasons for the limited take-off of retail e-commerce outlined in the retail market monitoring report: "Towards more efficient and fairer retail services in the Internal Market for 2020."<sup>8</sup> In addition, the Commission is using this Staff Working Document to present its evaluation of the implementation of the E-Commerce Directive (hereafter: ECD) in conformity with Article 21 of the Directive, and as announced in the Communication "Towards a Single Market Act."<sup>9</sup>

The analysis presented below covers information society services, defined as those services provided at a distance, electronically and at the request of a recipient of services against remuneration<sup>10</sup>, and also the much wider domain of e-commerce transactions in goods and services.<sup>11</sup> Online retailing, online press, search engines, social networks, blogs, media streaming, online gambling and e-health are included in our analysis. The main focus,

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<sup>5</sup> E.g. Estia et Médiamétrie//NetRatings pour la FEVAD, *Etude de l'impact environnemental de l'achat sur internet et dans le commerce traditionnel*, Juin 2009; available at: [http://www.fevad.com/uploads/files/Prez/fevad\\_estia\\_110609.pdf](http://www.fevad.com/uploads/files/Prez/fevad_estia_110609.pdf)

<sup>6</sup> 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*, hereafter *ECD*), OJ L 178/1, 17.07.2000; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML>.

<sup>7</sup> Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Towards a Single Market Act, For a highly competitive social market economy, 50 proposals for improving our work, business and exchanges with one another*, (hereafter '*Towards a Single Market Act*') COM(2010) 608, 27.10.2010, available at: [http://ec.europa.eu/internal\\_market/smact/docs/single-market-act\\_en.pdf](http://ec.europa.eu/internal_market/smact/docs/single-market-act_en.pdf).

<sup>8</sup> Report from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Retail market monitoring report, "*Towards more efficient and fairer retail services in the internal market for 2020*", COM(2010) 355, OJ C 84/19, 17.03.2011; available at: [http://ec.europa.eu/internal\\_market/retail/docs/monitoring\\_report\\_en.pdf](http://ec.europa.eu/internal_market/retail/docs/monitoring_report_en.pdf).

<sup>9</sup> *Towards a Single Market Act*, COM(2010) 608, 27.10.2010.

<sup>10</sup> Article 1 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 *laying down a procedure for the provision of information in the field of technical standards and regulations*, OJ L 204/37, 21.07.1998; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:204:0037:0048:EN:PDF>.

<sup>11</sup> This is defined by Eurostat/OECD as purchases and sales orders made via websites or systems of electronic data interchange, excluding manually typed e-mails.

however, is on issues related to the E-Commerce Directive and the obstacles to its implementation that have been identified. The document does not attempt to cover all topics of interest to online services or cross-cutting issues such as social aspects or SME development.

The detailed analysis included in this Staff Working Document and the Communication is partly based on the results of an open public consultation carried out between August and November 2010. The consultation sought opinions on seven broad themes: (1) the level of development, both national and cross-border, of information society services; (2) issues concerning the application of Article 3 (4) by the Member States (administrative cooperation); (3) contractual restrictions on cross-border online sales; (4) cross-border online commercial communications, in particular from regulated professions; (5) the development of online press services; (6) the interpretation of the provisions concerning the liability of intermediary information society service providers; (7) the resolution of online disputes.

The consultation generated valuable input and almost 420 responses were received. The responses are published online and summarised in a separate report.<sup>12</sup> While 50% of the answers were from companies or business associations, a significant proportion - 31% - came from European citizens, with lesser proportions composed by consumer associations, lawyers, public authorities and regulated professions drawn from 13 Member States.<sup>13</sup> Besides the answers from European entities (federations etc.), responses from France, the Netherlands, the United Kingdom and Germany were particularly numerous. Only three Member States (Romania, Bulgaria, and Lithuania) failed to provide any response.

This Staff Working Document also draws on other sources of information available e.g. studies, participation in conferences, interviews with stakeholders and the deliberations of the expert group on e-commerce etc.

This document constitutes one of the two annexes to the Communication "A coherent framework to boost confidence in the Digital Single Market of e-commerce and other online services" and is divided into two main parts. The first part contains an in-depth analysis of the legal and economic state of play in the online services sector. It also evaluates the remaining obstacles to the full and proper application of the E-Commerce Directive. The second part covers regulatory barriers related to other EU policies, and the EU response to them. Annex I gives an overview of national legislation transposing the E-Commerce Directive. Annex II summarizes national legislation on so-called "notice-and-takedown" procedures.

The document, and in particular Chapters 2 and 3, serves as an application report within the meaning of Article 21 of the E-Commerce Directive. The Staff Working Document is not legally binding and does not constitute Commission guidelines.

The second annex to the Communication identifies the latest trends in business-to-consumer e-commerce in the EU and examines the potential benefits for consumers if current obstacles are overcome and the true potential of e-commerce in the Single Market is fulfilled (Commission Staff Working Paper, "Bringing e-commerce benefits to consumers").

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<sup>12</sup> See [http://ec.europa.eu/internal\\_market/e-commerce/directive\\_en.htm](http://ec.europa.eu/internal_market/e-commerce/directive_en.htm).

<sup>13</sup> Belgium, Czech Republic, Estonia, Finland, Luxemburg, Latvia, Malta, Poland, Portugal, Sweden, United Kingdom and Norway.

## 2 The market for online services: state of play

E-commerce and online services are some of the most significant innovations in the economy in recent decades and have precipitated an evolution in the legal framework for doing business online. This framework consists of the E-Commerce Directive and many other pieces of subsequent EU legislation.

### 2.1 Description of e-commerce in the economy

Online services play an increasingly important role in the everyday life of EU citizens. These services help to reduce the time spent on paperwork and increase activity online (reading newspapers, consulting bank accounts and making payments, sending mail, searching for information, communicating via social networks, etc.). Electronic commerce continues to grow substantially, even in the current economic crisis. It plays an important role in B2B exchanges as 27% of European enterprises purchase online and 13% sell online. Nevertheless, it is currently limited to 3.4% of retail sales in the 27 Member States. The highest level of online retail sales is 7.7%, in the United Kingdom.<sup>14</sup> The development of e-commerce is very uneven among Member States, with a clear North-South divide. The United Kingdom, France and Germany account for 70% of European e-commerce. The level of cross-border online retailing also appears to be modest. Indeed, only 9% of European consumers said they shopped online cross-border in 2010.<sup>15</sup>

E-commerce in Europe lags behind Korea, Japan and the United States. In the USA, 66% of internet users made purchases online, while 94% did in South Korea.<sup>16</sup> This compares with 57% in the EU.<sup>17</sup> However, the growth rate of electronic commerce is now higher in the EU than in the US.

Finally, m-commerce (electronic commerce conducted from a mobile phone, tablet etc.) in the EU plays a more modest part in the growth of electronic commerce than in the USA and Japan. According to a KPMG study<sup>18</sup>, the percentage of consumers who visited an online retailer site from their mobile phone increased from 10% in 2008 to 28% in 2010 against 41% in the Asia-Pacific region. However, the use of mobile phones for financial services is more widespread: 46% of consumers surveyed said they had used them. This was an increase on 19% in 2008 but contrasts with 61% for in Asia-Pacific.

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<sup>14</sup> Euromonitor International, 2010.

<sup>15</sup> Eurostat, Information Society Statistics, 2010.

<sup>16</sup> Forrester Research Inc, *The Global eCommerce Adoption Cycle*, 15.01.2010 (using 2009 data).

<sup>17</sup> Eurostat, *Data in Focus 50/2010: Internet Usage in 2010 – Households and Individuals*, 14.12.2010, available at: [http://epp.eurostat.ec.europa.eu/portal/page/portal/product\\_details/publication?p\\_product\\_code=KS-QA-10-050](http://epp.eurostat.ec.europa.eu/portal/page/portal/product_details/publication?p_product_code=KS-QA-10-050)

<sup>18</sup> KPMG, *Consumer and Convergence Survey IV*, April 2010, available at: <http://www.kpmg.co.il/e-vite/3b.pdf>

Some sectors have already been profoundly transformed by electronic commerce. These include travel agencies (39% of sales were online in 2008), sales of electronic and cultural goods (22%), financial services, gambling and sports betting. Clothing sales are growing (10%), while food sales are still relatively undeveloped (7%).<sup>19</sup> Online sales of cultural goods are hard to quantify accurately. There are high levels of consumption of music online, but it is still largely illegal, which has a very destabilizing effect on the sector. The development of an attractive, high quality and legal offer is crucial for the sale of cultural products. However, the responses to the public consultation (mentioned above) show that consumers have contrasting views depending on the types of content (digital books, music, movies, cultural and sporting events) and their Member State of residence. Overall, the market for online music is 4 times larger in the USA than in Europe, although it is now growing faster in Europe.<sup>20</sup>

The past decade has seen on the one hand the emergence of a number of (mainly US-based) large providers ("pure players") which only have a presence online and, on the other, a tendency for big retailers to deploy "multichannel" strategies. According to Experian Hitwise<sup>21</sup>, only 7 of the 10 largest UK online retailers have physical stores and the trend away from "bricks and mortar" is growing. In addition, half of consumers first get information online before buying. In comparison, the position of SMEs in e-commerce is still limited. They often choose platforms organized by large companies to grow online. Overall, the development of electronic commerce appears, however, to be creating new complementarities and business activity and there is little evidence that "cannibalization" of physical commerce by e-commerce is taking place. This is true even if there are problems between franchisee and franchisor, or other sector-specific problems (see above).

From a wider perspective, the internet economy has generated 21 % of the GDP growth of the last 5 years<sup>22</sup> and could represent as much as 20% of GDP growth in the period up to 2015 in the Netherlands and the UK. Internet consumption and expenditure already exceeds the share of GDP of agriculture or energy, and its GDP is bigger than the GDP of Canada or Spain.<sup>23</sup> It represents 7% of UK GDP, 3.7% in France, 2.2% in Spain, 2% in Italy, 2.7% in Poland, 3.6% in the Czech Republic, 4.3% in the Netherlands, 5.8% in Denmark, 6.6% in Sweden, 3.4% in Germany and 2.5% in Belgium.<sup>24</sup> According to IMRG, in March 2010, 600,000 jobs were linked to electronic commerce in the United Kingdom. The "Internet stream" (which is wider than ISS because it includes telecoms) has accounted for 25% of net job creation and growth

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<sup>19</sup> Forrester consulting, May 2009, Study on "A Single Market for Information Society".

<sup>20</sup> Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — A Digital Agenda for Europe, COM(2010) 245, OJ C 54/58, 19.02.2011, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:054:0058:0064:EN:PDF>.

<sup>21</sup> IMRG Experian Hitwise Hot Shops List, May 2011.

<sup>22</sup> McKinsey Global Institute, *Internet matters : The net's sweeping impact on growth, jobs, and prosperity*, May 2011, on the G8 countries, South Korea, Sweden, Brazil, China and India. Available at : [http://www1.mckinsey.com/mgi/publications/internet\\_matters/pdfs/MGI\\_internet\\_matters\\_full\\_report.pdf](http://www1.mckinsey.com/mgi/publications/internet_matters/pdfs/MGI_internet_matters_full_report.pdf)

<sup>23</sup> Boston Consulting Group, *Turning local: from Madrid to Moscow, the Internet is going native*, September 2011, available at: <http://www.bcg.com/documents/file84709.pdf>

<sup>24</sup> *How the Internet is transforming the economy*, a series of studies by the Boston Consulting Group commissioned by Google, 2010-2011; McKinsey & Company, *Impact d'Internet sur l'économie française*, March 2011, available at: <http://www.economie.gouv.fr/files/rapport-mckinsey-company.pdf>



in France since 2000.<sup>25</sup> Overall, the Internet economy creates 2.6 jobs for every job destroyed.<sup>26</sup> The value of the e-commerce market per se is between € 100 and 150 billion which is similar in the EU and the US.<sup>27</sup> This sector is expected to generate further growth especially as SMEs come increasingly to explore the potential of "digital conversion".

## 2.2 The regulatory framework

The E-Commerce Directive (ECD) is the main legislative tool dealing with information society services. Following its adoption in 2000, the Directive has been complemented by other EU legislation, covering various aspects such as data protection and consumer affairs.

### 2.2.1 The E-Commerce Directive

The ECD is designed to help remove obstacles to cross-border online services in the Internal Market and to provide legal certainty to administrations, businesses and customers. It was drafted in a technologically neutral manner in order to avoid amendments of the legal framework arising from the fast pace of innovation in the IT sector. On the one hand, the Directive contains principles which should encourage the functioning of the Internal Market such as the Internal Market clause, the cornerstone of the Directive. On the other hand, it regulates certain legal aspects of online services. The Directive harmonises for instance certain information requirements, commercial communications, electronic contracting and the liability regime for online intermediaries. The Directive does not apply to a number of areas including taxation, questions related to the Data Protection Directive and gambling activities<sup>28</sup>.

#### 2.2.1.1 The Internal Market clause and establishment requirements (Articles 3-4 ECD)

The Internal Market clause aims to ensure the free movement of information society services between the Member States. It has two complementary components:

- a. Each Member State must ensure that *information society services* provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the *coordinated field* (Article 3 (1) ECD);
- b. Member States may not, for reasons falling within the *coordinated field*, restrict the freedom to provide *information society services* from another Member State (Article 3 (2) ECD).

The terms "information society services" and "coordinated field" are crucial for a proper understanding of the Internal Market (or country of origin) clause.

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<sup>25</sup> Forrester Consulting, produced by DIW-econ.

<sup>26</sup> Boston Consulting Group, *Turning local: from Madrid to Moscow, the Internet is going native*, September 2011, available at: <http://www.bcg.com/documents/file84709.pdf>

<sup>27</sup> Forrester consulting produced by DIW-econ.

<sup>28</sup> See in particular Article 1 (5) and Recital 12 of the *ECD*.

The term "information society services" is not defined in the ECD but in the Transparency Directive 98/38/EC as amended by Directive 98/48.<sup>29</sup> The basic definition of "information society services" covers any service normally provided, for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.<sup>30</sup>

- The definition of a "service" and "normally provided for remuneration" derives from Article 57, first paragraph, of the TFEU<sup>31</sup>, as interpreted by the European Court of Justice (hereafter: ECJ). The ECJ has stipulated that the "*essential characteristic of remuneration [...] lies in the fact that it constitutes consideration for the service in question*". Such a characteristic is absent in the activities the State undertakes within the framework of its public tasks, particularly in social, cultural, educational and legal areas.
- The concept of "at a distance" implies that the service is provided without the parties (i.e. the service provider and the recipient) being simultaneously present. Medical advice requiring the physical examination of a patient does not fall, for instance, within the definition of an "information society service".<sup>32</sup> However, certain telemedicine services may be covered because they are by definition provided in situations where the healthcare professional and the patient (or two healthcare professionals) are not in the same location.<sup>33</sup>
- The expression "by electronic means" is taken to mean that a service is sent initially and received at its destination using electronic equipment for the processing (including digital compression) and storage of data, and that it is entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means. The service must be conveyed from its point of departure to its point of arrival by means of electronic (processing and storage) equipment and by telecommunications means.
- Finally, the service must be provided via the transmission of data "at an individual request". This constitutes the element of interactivity which characterises information society services and sets them apart from other services that are sent without a request from the recipient being necessary. For this reason, the Directive does not apply to radio or television broadcasting services.<sup>34</sup>

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<sup>29</sup> Directive 98/34/EC of the European Parliament and the Council of 22 June 1998 *laying down a procedure for the provision of information in the field of technical standards and regulations*, OJ L 204/37, 21.07.1998; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:204:0037:0048:EN:PDF>

<sup>30</sup> Article 1(2) of the Commission Directive 98/38/EC of 3 June 1998 *adapting to technical progress Council Directive 74/151/EEC on certain components and characteristics of wheeled agricultural or forestry tractors*, OJ L 170/13, 16.06.1998; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:170:0013:0014:EN:PDF>, as amended by Directive 98/48/EC, OJ L 204/37, 21.07.1998.

<sup>31</sup> *Treaty on the Functioning of the EU*, OJ C 155/47, 09.05.2008, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>.

<sup>32</sup> See Case C-108/09, *Ker-Optika bt v ANTSZ Dél-dunántúli Regionális Intézet*, judgment of 02.12.2010, (hereafter '*Ker-Optika*') par. 37-38, available at: <http://curia.europa.eu/juris/recherche.jsf?language=en>

<sup>33</sup> Commission Staff Working Paper, *Telemedicine for the benefit of patients, healthcare systems and society*, SEC(2009)943 final, June 2009; available at: [http://ec.europa.eu/information\\_society/activities/health/docs/policy/telemedicine/telemedecine-swp\\_sec-2009-943.pdf](http://ec.europa.eu/information_society/activities/health/docs/policy/telemedicine/telemedecine-swp_sec-2009-943.pdf).

<sup>34</sup> See for example Case C-89/04, *Mediakabel BV v Commissariaat voor de Media*, ECR [2005] I-04891, judgment of 05.06.2005, Par.38: "Pay-per-view" services to watch movies at the times indicated on the

This is a broad definition spanning a variety of online activities. More detailed examples are provided in a Vademecum to Directive 98/48/EC published by the Commission.<sup>35</sup>

For the majority of the aspects of electronic commerce, the Directive is not intended to achieve harmonisation of substantive rules, but defines a "coordinated field" in the context of which the mechanism in Article 3 must allow information society services to be, in principle, subject to the law of the Member State in which the service provider is established.<sup>36</sup> Article 2 (h) of the ECD defines the "coordinated field" of the Directive as those requirements laid down in Member States' legal systems which are applicable to information society service providers or information society services, regardless of whether the requirements are of a general nature or specifically targeted at this sector. At a more detailed level, the provision states that the coordinated field concerns the requirements with which the service provider has to comply with respect to:

- The *taking up* of the activity of an information society service, such as requirements concerning qualifications, authorisation or notification. Specific examples might be the requirement to demonstrate professional qualifications and good repute, to provide specific financial guarantees, or to obtain a licence and meet the conditions for that licence.
- The *pursuit* of the activity of an information society service, such as requirements concerning the behaviour of the service provider, the quality or content of the service linked to aspects such as advertising and contracts, or requirements concerning the liability of the service providers.

The coordinated field covers rules related to a wide range of activities such as online information, online advertising, online shopping and online contracting. Various national rules may also have consequences for to the taking up and pursuit of the activity of an information society service. The "coordinated field", however, does not cover requirements applicable to goods (e.g. safety standards, labelling and liability, classification for the purpose of protecting children<sup>37</sup>) or conditions for the delivery or the transport of goods sold via the Internet, generally to the customer's home.<sup>38</sup>

Recent case-law of the ECJ confirms the broad principles underlying the Internal Market mechanism. In the *Ker-Optika* judgment of 2 December 2010,<sup>39</sup> the Court recognised the

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screen or in a programme guide are not services provided "at the individual request" of a recipient because the selection of films is offered to all subscribers on the same terms, accessible at the broadcasting times determined by the provider, available at: <http://curia.europa.eu/juris/recherche.jsf?language=en>

<sup>35</sup> See: [http://ec.europa.eu/enterprise/policies/european-standards/files/standards\\_policy/vademecum/doc/98\\_34\\_ec\\_consolidated\\_version\\_en.pdf](http://ec.europa.eu/enterprise/policies/european-standards/files/standards_policy/vademecum/doc/98_34_ec_consolidated_version_en.pdf)

<sup>36</sup> See Recital 22 in the preamble of the ECD, and the judgment of the ECJ in Joined Cases C-509/09 and C-161/10, *eData Advertising a.o. v X a.o.*, judgment of 25.10.2011, (hereafter '*eData*') par. 57, available at <http://curia.europa.eu/juris/recherche.jsf?language=en>.

<sup>37</sup> Case C-244/06, *Dynamic Medien Vertriebs GbmH v Avides Media AG*, ECR [2008] I-00505, judgment of 14.02.2008, Par. 22; available at: <http://curia.europa.eu/juris/recherche.jsf?language=en>.

<sup>38</sup> Those conditions not covered by the E-Commerce Directive must therefore be assessed under primary law, in particular Articles 34-36 TFEU on the free movement of goods. See par.41 of the *Ker-Optika* judgment.

<sup>39</sup> See par. 40 of *Ker-Optika* judgment.

wide scope of the "coordinated field" and held that a national prohibition on selling contact lenses via the Internet falls, in principle, within the coordinated field of the ECD. In the *eData Advertising* judgment of 25 October 2011, the Court underlined that the mechanism provided for by the ECD prescribes, also in private law, respect for the substantive law requirements in force in the country in which the service provider is established. *In the absence of binding EU harmonisation, only the acknowledgment of the binding nature of national law to which the legislature has decided to make the service providers and their services subject can guarantee the full effect of the free provision of those services.* In this request for a preliminary ruling on the question as to whether the provisions of Articles 3 (1) and (2) of the ECD have the character of a conflict-of-laws rule, the Court held that Article 3 ECD must be interpreted as not requiring transposition in the form of a specific conflict-of-rules rule. Nevertheless, in relation to the coordinated field, Member States must ensure that, subject to the derogations of Article 3 (4) ECD, the provider of an electronic commerce service is not made subject to stricter requirements than those provided for by the substantive law applicable in the Member State in which that service provider is established.<sup>40</sup>

Article 3 (4) of the ECD provides a derogation from the Internal Market clause of Article 3 (2) ECD for a limited number of subjects. These are set out in the Annex of the Directive and include in particular intellectual property rights; the freedom of the parties to choose the law applicable to the contract; contractual obligations concerning consumer contracts and the permissibility of unsolicited commercial communications by e-mail. The conditions under which Member States may derogate from the Internal Market clause must be regarded as exhaustive.<sup>41</sup>

In the public consultation on e-commerce there were relatively few responses to the Annex as a whole. Some of the respondents (mostly business organisations and enterprises) had doubts about the added value of all or some of the derogations in the Annex. Some respondents pointed out that the lack of (full) harmonization in the area of consumer contracts makes the derogation still necessary.<sup>42</sup> Contradicting observations were made in relation to intellectual property rights derogations, mostly on copyright. Right holders tended to claim that the EU *acquis* has promoted the cross-border availability of copyright protected works. Many other stakeholders took the opposite view and identified the present copyright situation within the EU as a major barrier to the availability of content beyond the national borders and the establishment of a true Digital Internal Market.<sup>43</sup>

Article 4 (1) of the ECD prohibits Member States from making the taking up and pursuit of the activity of an information society service provider subject to prior authorisation or any other requirement having an equivalent effect. This provision ensures that establishing an information society service in a Member State is a relatively smooth process without administrative hurdles. No specific difficulties have been reported on the application of this provision.

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<sup>40</sup> *eData* judgment par. 59, 68.

<sup>41</sup> *eData* judgment, par. 59.

<sup>42</sup> Refer to Chapter 4.4.1 for further developments.

<sup>43</sup> For further information refer to Chapter 4.3.5.

### 2.2.1.2 Information requirements (Article 5 ECD)

Article 5 (1) of the ECD obliges the online trader to provide, as a minimum<sup>44</sup>, the following information: name, geographical address, e-mail address, registration number if registered in a trade or similar public register.

This information is important and may even be vital for customers claiming their rights. The country of origin of the web trader can have major consequences, for example, for their right of withdrawal. If the web trader is established in a non-EEA country, the provisions of the ECD do not apply<sup>45</sup> and the EU consumer cannot benefit from legal protection under the EU consumer acquis.

Moreover, Article 5 requires the online service provider to establish an effective direct communication channel with its customers. Article 5 (1) (c) imposes the obligation on the service provider to render "easily, directly and permanently accessible" to both recipients of services and the competent authorities "the details of the service provider, including its electronic e-mail address, which allow it to be contacted rapidly and communicated with in a direct and effective manner". The European Court of Justice has interpreted this provision as meaning "*that a service provider is required to supply to recipients of the service, before the conclusion of a contract with them, in addition to its electronic mail address, other information which allows the service provider to be contacted rapidly and communicated with in a direct and effective manner. That information does not necessarily have to be a telephone number. That information may be in the form of an electronic enquiry template through which the recipients of the service can contact the service provider via the internet, to whom the service provider replies by electronic mail except in situations where a recipient of the service, who, after contacting the service provider electronically, finds himself without access to the electronic network, requests the latter to provide access to another, non-electronic, means of communication*".<sup>46</sup> The judgment implies that service providers cannot limit themselves to offering an e-mail address accessible for their customers through the website. They must also provide for other forms of direct communication.<sup>47</sup>

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<sup>44</sup> The information requirements do not prevent Member States from imposing additional information requirements but these are nowadays often harmonised or unified at EU-level. See for example the new *Consumer Rights Directive*, which completes Article 5 of the *ECD* by fully harmonising the information requirements for B2C distance contracts.

<sup>45</sup> See Recital 58 of the *ECD*.

<sup>46</sup> Case C-298/07, *Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV v deutsche internet versicherung AG*, ECR [2008] I-07841, judgment of 16.10.2008; available at: <http://curia.europa.eu/juris/recherche.jsf?language=en>.

<sup>47</sup> See also Article 6 (1) (c) of the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 *on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council*, OJ L304/64, 22.11.2011 (Hereafter '*Consumer Rights Directive*') This obliges the trader to provide the consumer with the following information: the trader's geographical address, telephone number, fax number and e-mail address, where available, to enable the consumer to contact the trader quickly and communicate with him efficiently and, where applicable, the geographical address and identity of the trader on whose behalf he is acting. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:01:EN:HTML>

A recent Mystery Shopping study carried out by the ECC-Net reveals that:

- in 2% of purchases, the trader's *name* was not available at all;
- in 9% of purchases, consumers had to search for the *country of origin* of the trader and in 3% of purchases, the information was not even available;
- the *physical address* was not available in 3% of the purchases, and in 43% of the purchases, the company's *registration number* was not available;
- in 8% of purchases, the *phone number* and in 12% of purchases, the *e-mail address* could not be found.<sup>48</sup>

Article 5 (2) obliges web traders, where information society services refer to prices, to provide a clear and unambiguous indication of the prices, including taxes and delivery costs. This provision complements price transparency requirements laid down in other EU legislation (see Chapter 2.2.2). The "Mystery" survey above suggests that, in 34% of purchases, it was not clear whether the VAT was included in the price presented.

### 2.2.1.3 Commercial communications and regulated professions (Articles 6-8 ECD)

Article 6 of the ECD emphasises the need for transparency when advertisements are displayed on the Internet. It obliges the Member States to ensure that online commercial communications (including promotional offers, discounts, premiums, promotional competitions or games) meet certain transparency requirements. Both the commercial communication and the natural or legal person responsible for it must be clearly identifiable, and any conditions attached to the offers, discounts etc. must be easily accessible. For example, advertising originating from the operator of an online marketplace and displayed by a search operator must always disclose both the identity of the online marketplace operator and the fact that the trade-marked goods advertised are being sold through that online marketplace.<sup>49</sup>

Article 7 of the ECD preserves the possibility for Member States to either prohibit or allow the sending of unsolicited commercial communications ("spams") by e-mail. Those Member States permitting unsolicited commercial communication must ensure that such communication is clearly and unambiguously identifiable, and that service providers respect the opt-out registers to which natural persons not wishing to receive such commercial communications can sign up.

In practice it is not always easy to define notions such as "unsolicited" and "commercial". For example, not every unsolicited e-mail may be classified as "spam". The term "unsolicited" has posed particular problems in the context of "tell-a-friend" services. These popular services allow an internet user to enter the e-mail address of one or more "friends" who then receive a standard message e.g. inviting them to visit a particular website. Whether a message is "commercial" or not leaves room for divergent interpretations as well.

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<sup>48</sup> ECC-Net, *Online Cross-border Mystery Shopping: State of the e-Union*, September 2011, available at : [http://ec.europa.eu/consumers/ecc/docs/mystery\\_shopping\\_report\\_en.pdf](http://ec.europa.eu/consumers/ecc/docs/mystery_shopping_report_en.pdf). The research was conducted in all the EU Member States, Iceland and Norway, with purchases made for 10 different consumer product categories.

<sup>49</sup> Cf. Case C-324/09, *L'Oréal v eBay*, judgment of 12 July 2011, par. 95-96, available at: <http://curia.europa.eu/juris/recherche.jsf?language=en>.

Unsolicited commercial communication is also covered by other consumer rules such as the Unfair Commercial Practices Directive.<sup>50</sup> One of the practices which Annex I of the UCP qualifies as unfair under all circumstances is the "persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation". Member States must therefore provide effective, proportionate and dissuasive sanctions against spam-related activities of this kind.

These rules have been complemented by Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, most commonly known as the ePrivacy Directive<sup>51</sup>, which has become the central instrument against spam in the EU (see Chapter 4.1.2.2). Article 13 of the E-Privacy Directive deals with the use of email (including sms, mms), automatic calling machines and requires prior opt-in consent. It applies in principle only to subscribers who are natural persons. Member States may decide to extend the prior opt-in requirement to subscribers who are legal persons. The ECD rule requirement for the commercial communications to be "clearly and unambiguously identifiable" remains applicable.

Article 8 of the ECD obliges the Member States to ensure that members of regulated professions may use commercial communications online, subject to compliance with such professional rules governing the independence, honour and dignity of the profession. This provision has forced Member States to abolish restrictions on online commercial communications for such professions.

The Services Directive complements the rules on online commercial communications set out in the ECD. According to Article 24 (1) of Directive 2006/123<sup>52</sup>, Member States shall remove all total prohibitions on commercial communications by the regulated professions. The obligation to remove all "blanket" prohibitions also covers national legislation which only prohibits a particular form of commercial communication. In a judgment of 5 April 2011, the ECJ ruled that a ban on accountants' canvassing (direct marketing) must be regarded as a total prohibition of commercial communication, which is not allowed under Article 24 (1) of the Services Directive.<sup>53</sup>

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<sup>50</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 *concerning unfair business-to-consumer commercial practices in the internal market* and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (*'Unfair Commercial Practices Directive'*), OJ L 149/22, 11.06.2005, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF>

<sup>51</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201/37, 31.07.2002; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0058:EN:HTML>. As revised by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009.

<sup>52</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 *on services in the internal market*, OJ L 376/36, 27.12.2006; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0036:01:EN:HTML>

<sup>53</sup> Case C-119/09, *Société fiduciaire nationale d'expertise comptable v Ministre du Budget, des Comptes publics et de la Fonction publique*, judgment of 05.04.2011; available at: <http://curia.europa.eu/juris/recherche.jsf?language=en>.

Article 8 of the ECD encourages regulated professions to develop codes of conduct at EU level related to the use of commercial communications. Certain professions such as accountants, lawyers, doctors, pharmacists and real estate agents established EU codes of conduct almost a decade ago. These codes laid down professional rules in particular related to the independence, dignity and integrity of the profession. Technological progress in combination with the increasing use of the Internet by regulated professions may require that these codes be updated.

#### **2.2.1.4 Electronic contracting (Articles 9-11 ECD)**

Articles 9-11 of the ECD contain essential and mandatory contracting requirements for online transactions. These conditions apply in addition to other EU requirements on contracts, such as pre-contractual information rights or unfair contract terms for consumer contracts (see Chapter 4.4.1).

Pursuant to Article 9 (1) of the ECD, contracts concluded by electronic means should have the same validity as contracts concluded offline by "traditional" means (equivalence principle). This applies to all stages and acts of the contractual process, such as the contractual offer, the negotiation and the conclusion of the contract by electronic means. Legal provisions obliging hand-written contracts, for example, are no longer allowed. But the principle only covers legal requirements and not practical obstacles such as cases where the conclusion of a contract requires the physical presence of parties, e.g. must be signed before a notary.<sup>54</sup>

Article 9 (2) of the ECD leaves Member States the option of excluding certain categories of contracts used in the context of real estate transfer that require the involvement of courts and other public authorities, those related to family and succession law, as well as contracts dealing with certain securities. Article 9 (3) of the ECD obliges the Member States to regularly inform the Commission about the contracts for which the equivalence principle does not apply.

Article 9 of the ECD has been complemented by the Electronic Signatures Directive<sup>55</sup> which regulates the legal recognition of e-signatures (see Chapter 4.4.3).

According to Article 10 of the ECD, online traders must provide the consumer with specific information prior to the order being placed and, in particular:

- the steps to follow to conclude a contract,
- the filing of the contract by the service provider,
- the technical means for identifying and correcting input errors prior to the placing of the order, and
- the languages offered for the conclusion of the contract.

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<sup>54</sup> Cf. Recitals 34 and 37, *ECD*.

<sup>55</sup> Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 *on a Community framework for electronic signatures*, OJ L 013/12, 19.01.2000; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999L0093:en:HTML>



In addition, online service providers must make available any relevant codes of conduct, contract terms and general conditions.<sup>56</sup> Consumers should not only be able to store the contract terms and general conditions, but they must also be able to reproduce (print) them.

Article 11 of the ECD harmonises the placing of the order in B2C contracts. The online contract has to be concluded through an "order" placed by the consumer, followed by an electronic "acknowledgment" of the online trader without undue delay. The "order" and the "acknowledgement" are deemed to be received when the involved contracting parties are able to access them. In addition, the online trader has to provide the consumer with the technical means allowing him/her to identify and correct input errors prior to the placing of the order.<sup>57</sup>

A recent EU-wide survey carried out by the ECC-Net in 2011 suggests that the obligations under Articles 10 and 11 are often neglected. The survey shows that the online traders fulfilled the obligation to inform the consumer about the process of completing the purchase only in 68% of consumer purchases. The opportunity to review the details of the order before placing the order was not offered in 11% of purchases. In 6% of purchases it was not clear when the final stage was reached, i.e., when the order had been placed. In almost half the purchases (48%), the purchaser had to actively accept the terms and conditions. As to compliance with the rules in Article 11, 81% of purchasers received a confirmation order both on screen and by e-mail. In 10% of purchases, a confirmation of the order was received only by e-mail and in 8% only on screen. In 1% of purchases, no confirmation was received<sup>58</sup>.

Commission services do not have further reliable and detailed information on the practical application of the formation of contracts. It has never received reports from the Member States on the excluded categories of contracts referred to in Article 9 (2) of the ECD. It would welcome the opportunity to learn more about the experiences of both internet consumers and online businesses in respect to the process of placing orders. On the one hand, the ECC-Net survey shows that online traders too often do not respect national law transposing the provisions of the ECD. Awareness of these requirements should be increased in order to make sure that businesses adapt their websites. On the other hand, respondents to the e-commerce consultation expressed concerns that the contracting requirements of the ECD may have been legitimate and useful at the time when it was adopted, but they now believe that they could become obsolete or even a burden for devices operating with newer technologies.

#### **2.2.1.5 Liability of online intermediaries (Articles 12-15 ECD)**

The ECD introduced a specific liability regime for three categories of services: mere conduit operators, "caching" providers and hosting services. The details of the application of this regime are discussed in Chapter 3.4.

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<sup>56</sup> With the exception of the contract terms and conditions, these transparency requirements do not apply to contracts concluded exclusively by e-mail or by equivalent individual communications.

<sup>57</sup> The acknowledgement of receipt and the revision mechanism do not apply to contracts concluded exclusively by e-mail or by equivalent individual communications.

<sup>58</sup> ECC-Net, *Online Cross-border Mystery Shopping: State of the E-Union*, September 2011, available at: [http://ec.europa.eu/consumers/ecc/docs/mystery\\_shopping\\_report\\_en.pdf](http://ec.europa.eu/consumers/ecc/docs/mystery_shopping_report_en.pdf)

### 2.2.1.6 Implementation and application (Articles 16-20 ECD)

The horizontal nature of the Directive, meaning that it affects several fields of national law (administrative, civil, penal law) has led to delays in the transposition of the Directive into national law. Following accessions in 2004 and 2007, all 27 Member States have formally put into place implementing legislation and the Commission has currently no infringement cases pending. The EEA countries have also notified implementing legislation in accordance with the EEA Agreement. Annex II of the Staff Working Document contains a list of national measures transposing the Directive.

### 2.2.2 Other relevant EU rules

Since the adoption of the ECD more than a decade ago, EU law on e-commerce has developed considerably. New legislation has been adopted, and further initiatives have been proposed or are currently being considered. The following instruments are most directly linked to the provisions of the Directive:

- The need for Member States to notify derogations to the Internal Market clause has diminished due to the operation of the CPC-networks since 2007 (see Chapter 3.2.2)
- The information requirements laid down in Article 5 ECD have been complemented by specific rules e.g. in the Unfair Commercial Practices Directive<sup>59</sup> (2005), the Regulation on Passenger Rights<sup>60</sup> (2004), the Services Directive<sup>61</sup> (2006) and the new Consumer Rights Directive<sup>62</sup> (2011) (see Chapters 4.2.3 and 4.4.1).
- In the area of Intellectual Property Rights, the most relevant legislation concerns the Copyright Information Society Directive<sup>63</sup> (2001) and the IPR Enforcement Directive<sup>64</sup> (2004) (see Chapter 4.3.5)
- On electronic contracting, Article 9 of the ECD has been complemented by the Electronic Signatures Directive<sup>65</sup> which regulates the legal recognition of e-signatures and is currently under revision (see Chapter 4.4.3).

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<sup>59</sup> *Unfair Commercial Practices Directive*, OJ L 149/22, 11.06.2005.

<sup>60</sup> Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 *establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights*, and repealing Regulation (EEC) No 295/91, OJ L 046/1, 17.02.2004; available at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:046:0001:0007:EN:PDF>

<sup>61</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 *on services in the internal market*, OJ L 376/36, 27.12.2006; available at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0036:01:EN:HTML>

<sup>62</sup> *Consumer Rights Directive*, OJ L304/64, 22.11.2011

<sup>63</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 *on the harmonisation of certain aspects of copyright and related rights in the information society*, OJ L 167/10, 22.06.2001; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF>

<sup>64</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 *on the enforcement of intellectual property rights*, OJ L 157/16, 30.4.2004; available at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:157:0045:0086:EN:PDF>

- The E-Privacy Directive<sup>66</sup> (2002 and 2009) complements and particularises the Data Protection Directive<sup>67</sup> with regard to the processing of personal data in the electronic communication sector. The latter adds to the rules on "spam" in the ECD and regulates confidentiality of communications (See Chapter 4.1.2.2). The UCP Directive<sup>68</sup> (2005) is also relevant for the application of Articles 6 and 7 E-Commerce Directive (see Chapter 4.2.3).
- In addition, the prohibition of any commercial communications for regulated professions according to Article 24 Services Directive<sup>69</sup> has supplemented the provision of Article 8 of the ECD (see Chapter 4.2.2).

Even though they are beyond the direct scope of the ECD, the following initiatives can also be mentioned:

- The ban on discrimination in Article 20 Services Directive (see Chapter 4.3.1).
- Various new developments in the area of payment services (see Chapter 4.5.1).
- New rules on the application of VAT to digital services (see Chapter 4.8.1).
- New rules on vertical distribution agreements (see Chapter 4.3.8.2).
- Developments in private international law and dispute resolution (see Chapter 4.7).

### 3 Issues and obstacles linked to the ECD

E-commerce has certainly developed, but it has still not reached its full potential. Certain issues arising from both the E-Commerce Directive and other parts of the EU acquis can go some way towards explaining this.

The results of the public consultation and the analysis of the Commission services show that, despite praise for the positive role it has played in the development of online services, there is a need for further information on the application of the E-Commerce Directive. More administrative cooperation, improved enforcement and greater clarification in the liability regime of internet intermediaries are required to increase its impact.

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<sup>65</sup> Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 *on a Community framework for electronic signatures*, OJ L 013/12, 19.01.2000; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:013:0012:0020:EN:PDF>

<sup>66</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201/37, 31.07.2002; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:201:0037:0047:EN:PDF>. Directive 2002/58/EC repealed Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector.

<sup>67</sup> OJ L 281, 23.11.1995, p. 31.

<sup>68</sup> *Unfair Commercial Practices Directive*, OJ L 149/22, 11.06.2005

<sup>69</sup> Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on *services in the internal market*; OJ L 376/36, 27.12.2006; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0036:0068:EN:PDF>

## **3.1 Need for further information on the application of the ECD**

### **3.1.1 Lack of information on actual implementation in the Member States**

Rapid technological and market developments, in combination with the adoption of further EU legislation (see Chapter 2.2.2), have led to national laws on e-commerce being amended on several occasions. In recent years there has also been an increase in domestic case law, in particular linked to the liability regime of the ECD (see Chapter 3.4.2). In order to better monitor these and other related developments, the Commission services will increase their screening of the actual implementation and application of the ECD in the Member States (see Chapter 3.2.1). A conformity assessment will be carried out of the transposition in each of the 27 Member States, including an evaluation of national case-law and conformity with the most recent ECJ case-law (2012).

### **3.1.2 Lack of statistics on e-commerce**

Reliable statistics are a useful tool for measuring trends in the e-commerce sector. The OECD and Eurostat have contributed to the development of classifications of the ICT sector supply side, which includes information society services, using the new NACE Rev. 2 classification on economic activities. However, it is not possible to directly measure the share of employment, GDP, or the value added of electronic commerce activities.

The information society services financed by advertising but provided for free on the Internet are even more difficult to assess. Eurostat conducts surveys to measure the extent to which businesses and households use the Internet, applying such indicators as the percentage of users who bought online in a given period of time. Additional data are necessary to measure the progress of online services in the European economy. Some data are available in private research institutes, but they do not always cover the 27 Member States, and their comparability is not guaranteed. This lack of information calls for a new framework for measuring the value of the Internet including services provided via the Internet.

The Commission services will, together with the E-commerce Expert Group, explore means of improving (public) statistics on electronic commerce and of developing tools to collect more detailed statistics about internet sales volumes.

## **3.2 Need for better co-operation in the application and implementation of the ECD ("governance")**

Within the context of the ECD, three levels of administrative co-operation can be identified between Member States and the Commission services.

### **3.2.1 Transparency Directive 98/48/EC**

Directive 98/34/EC<sup>70</sup>, as amended by Directive 98/48/EC<sup>71</sup> (the "Transparency Directive"), lays down a procedure for the provision of information about rules on information society

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<sup>70</sup> Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 *laying down a procedure for the provision of information in the field of technical standards and regulations*, OJ L 204/37, 31.07.1998; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:204:0037:0048:EN:PDF>

services. The Directive is intended to help avoid the creation of new barriers to trade within the EU.

The Directive requires Member States to notify their rules on information society services in draft form, and generally observe a standstill period of at least three months before formal adoption, in order to allow other Member States and the Commission to raise concerns about potential barriers to trade. Where notified drafts are liable to create barriers to the free provision of information society services under primary or secondary EU law, the Commission and other Member States may submit a detailed opinion to the Member State that has notified the draft. Private stakeholders can submit comments, thereby assisting the Commission and national authorities in identifying possible trade barriers at an early stage.

Over the years, the active participation of Member States in assessing the notified draft has generated an effective dialogue between them and the Commission. In the period 2006-2008, over 100 notifications were submitted by the Member States, many of them on online gambling.<sup>72</sup> Recent notifications have dealt with issues such as notice-and-takedown procedures<sup>73</sup> and have highlighted the trend whereby proposed national rules can affect new business models, as shown in the case of e-books.<sup>74</sup>

However, Member States do not always respect the obligation to notify draft laws on information society services under the Transparency Directive. Commission services will remain vigilant to ensure that unlawful barriers to online services are detected at the earliest possible stage.

### 3.2.2 Case-by-case derogations of Article 3 (4) ECD

Article 3 (4) ECD contains a case-by-case limitation to the Internal Market clause. Member States may take measures to restrict the provision of a particular online service from another Member State. However limitations must meet certain requirements.

Firstly, there must be a need to protect certain interests, in particular public policy aims (protection of minors; actions against hatred on the grounds of race, sex, religion or nationality; human dignity), and interests on the grounds of public health, public security and

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<sup>71</sup> Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 *amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations*, OJ L 217/18, 05.08.1998; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:217:0018:0026:EN:PDF>

<sup>72</sup> See the Report from the Commission to the Council, the European Parliament and the ECOSOC, *The Operation of Directive 98/34/EC from 2006-2008*, COM(2009) 690 final, 21.12.2009; available at: [http://ec.europa.eu/enterprise/tris/reps\\_2008\\_2006/EN.pdf](http://ec.europa.eu/enterprise/tris/reps_2008_2006/EN.pdf)

<sup>73</sup> For example, the Commission received notifications from France on the "Loi Hadopi", from Spain on the so-called "Ley Sinde", and from the UK on the "Digital Economy Act", available at <http://ec.europa.eu/enterprise/tris/pisa/app/search/index.cfm?lang=EN>.

<sup>74</sup> France notified the original and amended version of the *Loi relative au prix du livre numérique*, see TRIS notification numbers 2010/616/F and 2010/710F, <http://ec.europa.eu/enterprise/tris/default.htm?CFID=70911363&CFTOKEN=31040420>.

consumers, including investors.<sup>75</sup> Article 3 (4) of the ECD contains an exhaustive list of general interests. With the exception of the protection of consumers, this provision does not cover the other public interests the European Court of Justice has recognised in its "mandatory requirement" case law, or the Treaty exceptions which justify cross-border trade restrictions. For instance, the national authorities cannot invoke the protection of culture, the fairness of trade or economic objectives to justify restrictions on online services from other Member States.

Secondly, the measures in question must be necessary and proportionate. They must be suitable for achieving the objective sought and they must not go beyond what is necessary to obtain that objective. Recently, the European Court of Justice has held that these principles must be interpreted in the same manner as those governing the Internal Market freedom provisions of the Treaty.<sup>76</sup>

Thirdly, these measures may only be taken if certain procedural requirements are fulfilled:

- the Member State taking the measure must have consulted with the Member State in which the provider is established;
- the former must not have taken any measures, or any measure taken must have been deemed inadequate in the view of the Member State of destination;
- the former must have notified the Commission and the Member State in which the provider is established of its intention to take such a measure. The notification procedure enables the Commission to exercise its competence to examine the compatibility of the notified measure with EU law.

Contrary to what might have been expected, the derogation appears to have been used very rarely. In the last decade, the Commission services have received only 30 notifications, mainly dealing with measures to protect consumers. It has never declared a measure incompatible with EU law.

The relatively small number of notifications can be explained because of the establishment of the Consumer Protection Co-operation Network (CPC-Network), which became operational in December 2006. The CPC Regulation<sup>77</sup> established a framework for cross-border cooperation between public authorities responsible for the enforcement of certain EU legislation protecting consumer's interests, including those arising from or affected by the E-Commerce Directive. The national authorities in the CPC Network have investigative and enforcement powers which they can exercise on their territory whenever there is a reasonable suspicion of intra-EU infringements. Article 8 of the CPC Regulation notably sets out an arrangement for cross-border cooperation. It enables an authority in one Member State to take the necessary enforcement measures to stop an infringement when requested to do so by the

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<sup>75</sup> See the Communication from the Commission to the Council, the European Parliament and the European Central Bank, *Application to Financial Services of Article 3 (4) to (6) to the Electronic Commerce Directive*, COM(2003) 259 final, 14.05.2003; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0259:FIN:EN:PDF>

<sup>76</sup> *Ker-Optika* judgment, par. 76

<sup>77</sup> Regulation (EC) No 2006/2004 of the European Parliament and the Council of 27 October 2004 *on cooperation between national authorities responsible for the enforcement of consumer protection laws* ('The Regulation on consumer protection cooperation'), OJ 364/1, 09.12.2004; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:364:0001:0011:EN:PDF>

relevant authority in another Member State. This could have the effect of making recourse to Article 3 (4)-(6) of the E-Commerce Directive unnecessary. For example, when an authority in Member State A considers that the website of an online trader established in Member State B does not fulfil the transparency requirements of Article 5 of the ECD, following for instance complaints lodged by consumers in Member State A, it may request the authority in Member State B to investigate the case and if necessary, take measures to stop the infringement. In that event, there would be no further need for cross-border administrative measures under Article 3 of the ECD.

The statistics show that in 2007 there were 15 requests and in 2008 48 requests for enforcement measures within the CPC-Net for alleged infringements of the E-Commerce Directive.<sup>78</sup> In 2009, the number of requests increased to 54 and, in 2010, dropped again to 40. These figures correspond with the considerable drop in notifications received by the Commission under the ECD after 2006, with almost no notifications in the last five years.

Referrals under the CPC mechanism are mostly about alleged infringements concerning Article 5 ECD. Many cases concern websites which give incomplete information such as failing to indicate all the taxes and costs included in a price. Other cases concern websites where the trader's identity, location and VAT-numbers were missing, or where terms and conditions were only available in English and not in the language of the targeted Member State.

The CPC-Network offers an effective tool in addressing cross-border infringements, thus making it unnecessary for Member States to take direct measures against ISS providers from other countries. However this is in itself not a sufficient explanation for why Member States have not notified more measures (sanctions, injunctions) adopted against ISS providers from other Member States in the last decade. A lack of awareness on the part of the administrative services of Member States may be a reason for the small number of measures adopted. Some Member States, in particular those with a more federal structure and decentralised enforcement systems, have experienced problems attaining sufficient internal coordination to ensure the functioning of the notification and cooperation procedures in the ECD. Language and translation issues have also been raised in relation to cross-border cooperation.

The Commission services will raise awareness about the obligation to notify draft measures. They will also explore with the Member States ways in which to strengthen administrative cooperation by integrating the notification systems under the ECD in the Internal Market Information (IMI) system.

### **3.2.3 Administrative cooperation under Article 19 ECD**

All Member States have set up national contact points for e-commerce. An updated list is available on the e-commerce website of DG MARKT.<sup>79</sup> National websites contain general

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<sup>78</sup> Report from the Commission to the European Parliament and of the Council *on the application of Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws ('The Regulation on consumer protection cooperation')*, COM(2009) 336 final, 02.07.2009; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0336:FIN:EN:PDF>

<sup>79</sup> See: [http://ec.europa.eu/internal\\_market/e-commerce/contact-points-central\\_en.htm](http://ec.europa.eu/internal_market/e-commerce/contact-points-central_en.htm)

information on e-commerce which is relevant for businesses and consumers. While national contact points are useful for citizens, there is nevertheless still room for improvement in cooperation between the Member States and cooperation with the Commission.

In 2005, the Commission established an expert group on electronic commerce.<sup>80</sup> The expert group is composed of representatives of the Member States, in principle the national points of contact. Chaired by the European Commission, it meets on a regular basis<sup>81</sup> to discuss any issues related to the E-Commerce Directive. Topics that have been dealt with include the application of the notification procedure under Article 3 (4) ECD; codes of conduct; liability of intermediaries and national "notice-and-action" procedures. The expert group also discusses studies, and the Commission services make presentations on both new and ongoing (legislative) initiatives relevant for the e-commerce sector.

Commission services consider the expert group a good forum for the exchange of views, experiences and best practices amongst the Member States and between them and the Commission.

However, the creation of national contact points and the e-commerce expert group has not led to a well-functioning system of notifications of national administrative and judicial decisions in the meaning of Article 19 (5) ECD. The Commission does not receive national administrative or judicial decisions despite the substantial amount of national practices and case-law that have been developed relating to, for instance, the liability regime of the Directive.

Commission services will, together with the Member States, closely monitor the system of notifications and invite the expert group to reconsider and improve the enforcement framework for national notifications. One improvement would be to make better use of electronic tools. Guidance documents such as guidelines and FAQ could be developed. The use of the Internal Market Information System (IMI) for Article 19 ECD could also be explored.

### **3.3 Need for better enforcement of the ECD**

Under the co-ordination of Commission services, the CPC-Network enforcement authorities both screen a sample of websites in a given sector for compliance with EU consumer legislation and take appropriate enforcement actions. This screening exercise is called a *sweep* and is carried out on an annual basis. Commission services will continue coordinating and monitoring the sweep activities carried out by the CPC-Network. Commission services are also supporting the online enforcement capacities of the CPC-Network through financing projects that aim to develop a common platform at EU-level of e-enforcers which will (1) enhance investigators' skills by training enforcers and developing common investigation standards, (2) develop the exchange of best practices through a common website and (3) develop tools and techniques to identify emerging online threats for consumers.

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<sup>80</sup> Commission Decision of 24 October 2005 *establishing an expert group on electronic commerce*, OJ L 282/20, 26.10.2005; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:282:0020:0021:EN:PDF>

<sup>81</sup> Since November 2005 ten meetings have been held.



It is important that the ECD is fully and consistently implemented in all the Member States, in particular in view of technological and market developments. As guardian of the EU Treaties, the Commission is determined to ensure that Member States respect the ECD. If there are new indications of incomplete or incorrect implementation or application of the ECD, it will take the necessary remedial steps and, when needed, take strong enforcement measures.

### **3.4 Need for further clarification on the intermediaries regime of the ECD**

#### **3.4.1 Liability issues**

The E-Commerce Directive provides for exemptions from liability for information society service providers when they host or transmit illegal content that has been provided by a third party. Information society service providers can under certain conditions benefit from these exemptions when they provide one of the so-called intermediary services set out in Articles 12 to 14 of the Directive. Moreover, Article 15 of the Directive prohibits Member States from imposing on providers of these services a general obligation to monitor content that they transmit or host. The Directive provides for a technologically neutral framework and the liability regime strikes a balance between the several interests at stake, in particular between the development of intermediary services, the societal interest that illegal information is taken down quickly, and the protection of fundamental rights<sup>82</sup>.

Stakeholders, by means of the public consultation on e-commerce, indicated that these provisions are essential for the provision of intermediary activities. They argue that, in their absence, intermediaries could be held liable under both national civil and criminal codes for information of which they were unaware. By way of example, a major video-sharing site reported that more than 24 hours of video are uploaded on its site every minute.<sup>83</sup> Checking all videos that are uploaded from possibly illegal sites would be too heavy a burden to continue providing the service and would still, not exclude the possibility that illegal information would "slip through the net". This stakeholder further stated that in the absence of liability exceptions, offering a video-sharing site would probably be too great a commercial risk. Other intermediaries also maintained that the liability exemptions of the E-Commerce Directive are essential for their trust in online activities.

Article 14 on hosting applies to *illegal activity or information*. The E-Commerce Directive does not define the notions of "illegal activity" or "illegal information". It could be understood

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<sup>82</sup> Recital 41 provides the following: "This Directive strikes a balance between the different interests at stake and establishes principles upon which industry agreements and standards can be based". Recital 46 provides: "In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information."

<sup>83</sup> Google contribution to the public consultation on the future of electronic commerce in the internal market and the implementation of the Directive on electronic commerce (2000/31/EC), available at: <https://circabc.europa.eu/d/d/workspace/SpacesStore/316395ec-5caf-4684-8538-fdfb207464de/EU%20GOOGLE%20ENTR%20%28th%201-2%264-5%29%20808590.pdf>

that the liability exemption of Article 14 applies to any content which is considered to be illegal according to EU or national legislation. This could include, for example, sites containing infringements of intellectual property rights (such as trademark or copyright infringements), but also sites containing child pornography, racist and xenophobic content, defamation, incitements to terrorism or violence in general, illegal gambling offers, illegal pharmaceutical offers, fake banking services (phishing), data protection infringements, illicit tobacco or alcohol advertisements, unfair commercial practices or breaches of the EU consumer rights acquis.

Although the Directive aimed at being technologically neutral, innovations and economic developments since the adoption of the Directive in 2000 have rendered the interpretation of above-mentioned provisions increasingly challenging. Diverging case law at the national level on the application of the Directive confirms this. Moreover, the responses to the public consultation on e-commerce indicated that a wide variety of stakeholders face a high degree of regulatory uncertainty about the application of the intermediary liability regime of the E-Commerce Directive.

The source of this uncertainty can be subdivided into four areas:

1. *The definition of intermediary activities in Articles 12 to 14.* The main question is to what extent new services that have not been explicitly mentioned in these articles (e.g. because they did not exist at the time of the adoption of the Directive) are intermediary activities in the sense of Articles 12 to 14 and can therefore benefit, in principle, from a liability exemption.

2. *The material conditions for benefiting from the "safe harbour" in Articles 12 to 14.* Information society service providers, even when they are covered by the scope of Article 12 to 14, can only benefit from liability exemptions when they fulfil certain conditions. It has not always been clear exactly when these conditions are met. The interpretation of the terms "actual knowledge" and "expeditious" is essential in this context.

3. *So-called "Notice-and-takedown" procedures.*<sup>84</sup> The E-Commerce Directive provides the basis for these procedures, according to which, following a notice of illegal information or activity, an intermediary takes down or prevents access to the information or activity (see Article 14 (2) of the ECD). In practice a multitude of often vary different procedures exist and it is not easy either for intermediary service providers or for victims of illegal content to determine which one applies and in what way.

4. *The prohibition in Article 15.* Article 15 prohibits Member States from imposing on intermediaries a general obligation to monitor. National courts have in recent years produced decisions imposing injunctions on intermediaries obliging them to *prevent* a

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<sup>84</sup> One of the conditions for an information society service provider to benefit from a liability exemption for illegal content provided by a third party is that, once it becomes aware of illegal content it is hosting, it immediately acts to "remove or disable access" to it. The ECJ *eBay vs. l'Oréal* judgment in case C-324/09 confirms that awareness in the sense of Article 14 can be obtained through a "notice" that is sent to an intermediary and that is sufficiently precise and substantiated. The E-commerce Directive therefore contains a basis for the takedown or blocking of illegal content by intermediaries, following receipt of a notice (hereafter "notice and takedown" or "NTD", or also "notice-and-takedown-and-blocking").

particular infringement, which implies a certain degree of monitoring. Yet what is a general monitoring obligation as opposed to a "specific" monitoring obligation, the second of which could be allowed in the meaning of recital 47 of the Directive? There remains uncertainty over what degree of monitoring is acceptable in the sense of Article 15.

These topics will be addressed below in more detail. Each review will describe the main obstacles that have been raised by stakeholders, the interpretation of the Directive by national judges and the state of EU law. It should, however, be recalled that this Staff Working Document is not legally binding, does not create any new legislative rules and does not constitute Commission guidelines. It should also be noted that, in any event, interpretation of Union law is ultimately the role of the ECJ.

### 3.4.2 The activities covered by Articles 12-15 ECD

It follows from the wording of Articles 12 to 14 ECD that the liability exemption regime applies to specific *activities* rather than to service providers in general. This has been confirmed in recent case law of the European Court of Justice.<sup>85</sup>

A service provider can conduct various activities of which some are intermediary (in the sense that the service provider transmits or hosts information from a third party) while others are not. The liability exemptions are limited to the first category. They do not extend to all other activities carried out by a service provider (cf. also recitals 42 to 46 of the Directive).

Since the E-Commerce Directive was adopted, several new services and activities have emerged that the legislators could not have foreseen, such as video-sharing sites, selling platforms, social networks and peer-2-peer services. This section provides an overview of the interpretations that have been given to the definition of activities listed in Articles 12 to 14 of the Directive, in particular as regards their applicability to services that are not explicitly mentioned in those provisions, but that could nevertheless be covered.

#### 3.4.2.1 National law

Member States have in general carried out a more or less literal **transposition** of the definition of activities in Articles 12 to 14. However, some Member States have provided for specific liability exemptions for information location services (search engine services) and hyperlinking services. Austria, Hungary, Spain and Portugal have adopted specific liability exemptions for search engines according to which a company can benefit if it meets the conditions that hosting service providers are required to meet in order to secure a liability exemption. Similarly, Austria, Spain and Portugal have adopted liability exemptions for hyperlinks applying the same conditions as the Directive's liability exemption for hosting activities.

Despite the frequent literal transposition of Articles 12-14 ECD, **divergent national case law** has emerged particularly in regard to the application of liability exemptions to "new services", location tool services and hyperlinking services. This has resulted in a degree of **regulatory**

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<sup>85</sup> Joined cases C-236/08 to C-238/08, *Google vs. LVMH*, judgment of 23.03.2010, for instance par. 113; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0236:EN:HTML>

**uncertainty.** Respondents to the e-commerce consultation called on the Commission to clarify the status of these new services in view of often contradictory national case law. Some respondents, in particular right holders, asked for the exclusion of several new online activities from the scope of Articles 12-14, whereas others, in particular selling platforms, video sharing sites, social networks and search engines, favoured the inclusion of those activities within the "safe harbour" regime.

Where specific exemptions from liability for **search engine services and hyperlinking services** have not been explicitly included in national legislation, these services have either been classified as mere conduit services, caching services or hosting services, or courts have excluded them from the scope of any exemption. For instance:

- in the UK case "TV Links" (*R v Rock and Overton*),<sup>86</sup> the court without further reasoning ruled that a hyperlinking website was a mere conduit activity that could benefit from the liability exemption of Article 12 ECD;
- the Belgian court in the "Copiepresse" case (*Copiepresse et al vs. Google Inc.*) stated that the Directive was not relevant for the liability of a news search service because that service would be actively editing content and could therefore not be considered an intermediary service provider;<sup>87</sup>
- in the German "Thumbnails" case the Bundesgerichtshof considered in an *obiter dictum* (the focus of the case being copyright) that an image search service could benefit from the liability exemption for hosting ex. Article 14 ECD.<sup>88</sup> The court did not specify why a search engine should be classed as a hosting provider.

Similarly, there is divergent national case law on **video-sharing sites**:

- French case law recently confirmed that video-sharing sites can benefit from the liability exemption for hosting activities, for instance in the *Magdane vs. Dailymotion* case.<sup>89</sup> The fact that DailyMotion received advertisement revenues was irrelevant in determining whether it was a hosting service provider or not. The fact that DailyMotion put in place a specific architecture allowing it to format and to encode certain content should not lead to the conclusion that it is not a hosting service provider. According to the court, these technical operations would, on the contrary, be part of the essence of the hosting activity and would not at all be equivalent to the selection of content;
- In Germany, however, the Hamburg Court held (in *Peterson v Google Inc and others*<sup>90</sup>) that a video sharing site for videos uploaded by third parties cannot benefit

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<sup>86</sup> Crown Court, Gloucester, 06.02.2010, ref. no. T20097013, available at: <http://merlin.obs.coe.int/iris/2010/4/article26.en.html>

<sup>87</sup> Brussels Court of First Instance, 15.02.2007, ref. no. 7964; available at: <http://www.copiepresse.be/13-02-07-jugement-en.pdf>.

<sup>88</sup> Deutscher Bundesgerichtshof (BGH), 29.04.2010, ref. no. I ZR 69/08; available at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2011&nr=51998&linked=urt&Blank=1&file=dokument.pdf>

<sup>89</sup> Paris Court of Appeal, 13.10.2010; available at: [http://legalis.net/spip.php?page=jurisprudence-decision&id\\_article=3001#](http://legalis.net/spip.php?page=jurisprudence-decision&id_article=3001#).

<sup>90</sup> Hamburg Regional Court, 03.09.2010, ref. no. 308 O 27/09; available at: [http://rechtsprechung.hamburg.de/jportal/portal/page/bshaprod.psml?doc.id=JURE100070104&st=ent&sho\\_wdoccase=1&paramfromHL=true#focuspoint](http://rechtsprechung.hamburg.de/jportal/portal/page/bshaprod.psml?doc.id=JURE100070104&st=ent&sho_wdoccase=1&paramfromHL=true#focuspoint).

from a liability exemption when it presents the uploaded content as its own content. The court ruled that YouTube could not benefit from a liability exemption for hosting providers as, for the following reasons, it would have adopted uploaded third party content as its own:

- YouTube provides a specific layout of the website and YouTube's logo is shown in rather big letters above the playing video;
  - YouTube provides links to related videos;
  - YouTube displays commercial video clips and not only content that expresses a personal opinion.
  - Because of the arrangement of the website the average user cannot tell at first sight that the videos were uploaded by the user and not by YouTube;
  - The homepage of YouTube suggests that YouTube exercises editorial control as it suggests certain videos;
  - YouTube actively connects advertisements to uploaded videos;
  - YouTube's Terms and Conditions indicate that YouTube can use the content uploaded on its site as its own content.
- In Italy the Civil Court of Rome (*RTI and others vs. YouTube and others*)<sup>91</sup> also considered that a video-sharing site could not benefit from a liability exemption. The court stated that YouTube was not to be regarded as a hosting provider but as a "digital broadcaster" and was consequently considered fully responsible for the published content. YouTube would play an active role and would not limit its activities to providing server space for users to independently upload and organise content.

The case law on **online selling platforms** is also fragmented:

- The Paris Commercial Court considered that eBay might not benefit from a liability exemption for its hosting activities.<sup>92</sup> The court considered that the sellers on eBay's website (recipients of eBay's services in terms of the E-commerce Directive) act under the authority or the control of eBay (the provider of an information society service in terms of the E-commerce Directive), in which case, in accordance with Article 14 (2) of the Directive, the liability exemption for hosting activities does not apply. The court came to this conclusion because eBay plays an active role in promoting sales with the objective of increasing profits by, for instance, appointing sales managers, creating online "boutiques" and offering the option of becoming a "power seller".
- In the *L'Oréal vs. eBay* case<sup>93</sup> the Paris Civil Court considered that eBay could offer its clients various services on the same site without losing the right to benefit from a liability exemption. However, only some of eBay's activities are covered by the definition of hosting of Article 14 of the E-Commerce Directive and eligible for the liability exemption (for instance eBay's selection of "daily deals" could not be covered)

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<sup>91</sup> Appeal Panel Decision of Civil Court of Rome, IP specialist section, 22.02.2010, and Court of Rome, 15.12.2009, Section IX, RG n.54218/08, available at: <http://www.scribd.com/doc/38060158/Ordinanza-Tribunale-di-Roma-16-dicembre-2009-RTI-vs-Youtube>

<sup>92</sup> Paris Commercial Court, 30.06.2008; available at: [http://www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=2354](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=2354)

<sup>93</sup> Paris Civil Court, 13.05.2009; available at: [http://www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=2639](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=2639)

- In the *eBay vs. Maceo* case<sup>94</sup>, the Paris Civil Court considered that eBay's activities are covered by the definition of hosting. That eBay receives revenues related to sales carried out on its website was considered irrelevant in this context. In this case, it was considered that eBay was not an editor as it could not be proven that eBay checks the messages that users post on the site. The fact that eBay has designed the architecture and structure of its site and that it has developed systems for organising and ranking the content on its site is not sufficient to conclude that it cannot benefit from the hosting liability exemption.
- The UK High Court in *L'Oreal vs. eBay*<sup>95</sup> considered, without any further reasoning, that eBay's activities could not be covered by Article 14 of the ECD because its activities would go far beyond the mere passive storage of information provided by third parties. eBay actively organises and participates in the processing and use of this information. The UK High Court has not yet decided on the hosting status of eBay as it requested guidance from the European Court of Justice (see the judgement referred to in Chapters 3.4.2.2 and 3.4.3.1).

Similarly fragmented case law exists in relation to **blogs, discussion fora and social networks**. For example:

- Usenet (a system in which users post messages to a newsgroup) was considered a caching provider by the German Regional Court of Munich<sup>96</sup> because information was mirrored and stored on its service for about 30 days.
- A UK court, however, considered that British Telecom operated a hoster in providing Usenet newsgroups (in the case *Bunt v Tilley*.)<sup>97</sup>
- The High Court of England and Wales (*Kaschke v. Gray Hilton*)<sup>98</sup> refused to apply the liability exemption for hosting to a blog owner, even for those parts posted by third parties. The defendant's involvement in the pages exceeded mere storage as he exercised some editorial control on parts of the website.
- The Paris Court of First Instance<sup>99</sup> refused to recognise a content aggregator displaying on its website links posted by third parties as a hosting provider because the owner had played an active role in how the links should be classified and presented, making him a publisher according to the court.
- The Tribunal de Grande Instance in France (*Lafesse vs. MySpace*)<sup>100</sup> held that the social network service MySpace was not offering a hosting activity and therefore

<sup>94</sup> Paris Tribunal de Grande Instance (TGI), 26.10.2010; available at: <http://www.legalis.net/spip.php?article3144>

<sup>95</sup> High Court of England and Wales, 22.05.2009, [2009] EWHC 1094 (Ch); available at: <http://www.bailii.org/ew/cases/EWHC/Ch/2009/1094.html>.

<sup>96</sup> Regional Court of Munich, 19.04.2007, ref. no. 7 O 3950/07; available at: [http://medien-internet-und-recht.de/pdf/vt\\_MIR\\_Dok\\_155-2007.pdf](http://medien-internet-und-recht.de/pdf/vt_MIR_Dok_155-2007.pdf).

<sup>97</sup> Queen's Bench Division, 10.03.2006, [2006] EWHC 407 (QB); available at: <http://www.bailii.org/ew/cases/EWHC/QB/2006/407.html>

<sup>98</sup> High Court of England and Wales, 29.03.2010, [2010] EWHC 690 (QB); available at: <http://www.bailii.org/ew/cases/EWHC/QB/2010/690.html>

<sup>99</sup> Paris Court of First Instance, 08.06.2009, ref. no. 08/11342; available at: <http://www.juriscom.net/documents/tgiparis20090608.pdf>

<sup>100</sup> TGI Paris, 22.06.2007; available at: [http://www.legalis.net/jurisprudence-decision.php3?id\\_article=1965](http://www.legalis.net/jurisprudence-decision.php3?id_article=1965)

could not benefit from a liability exemption. MySpace goes beyond offering technical hosting activities by offering an architecture based on frames and by receiving advertisement revenue linked to the content that is viewed.

- The Cour d'Appel de Paris<sup>101</sup> considered that an aggregator of news article links, provided by users, could benefit from a liability exemption for hosting. The fact that the site allowed the classification and structuring of certain information provided by users did not imply an editing activity. Moreover, the hosting provider status was seen to follow from the fact that the site did not offer a possibility to check the information on certain websites referred to in users' posts.

National jurisprudence on **file sharing services** also diverges. For instance:

- The Italian Court of Cassation<sup>102</sup> considered that PirateBay, a peer-2-peer file sharing service particularly known for sharing pirated works, was not a hosting service provider.
- The Stockholm District Court<sup>103</sup>, without providing details of its argumentation, considered that PirateBay should be considered a hosting service provider. However, PirateBay was not held to fulfil the requirements to benefit from a liability exemption for hosting activities since it had knowledge of the infringements committed through its service and did not act against it.

### 3.4.2.2 EU law

Not only are the relevant provisions of the Directive informative but also its recitals provide guidance for determining whether certain services can benefit from a liability exemption. First, recital 42 mentions that an activity should be "*of a mere technical, automatic and passive nature*". Second, recital 43 mentions that an intermediary should be "*in no way involved with the information transmitted*". Lastly, recital 44 states that an intermediary "*cannot deliberately collaborate with one of the recipients of its service in order to undertake illegal acts*".

Despite the clear divergence of interpretation at the national level, EU case law in this field is still limited. It is only in two recent preliminary rulings that the European Court of Justice has had the opportunity to provide more clarity on the scope of Article 14.

The first case concerned Google's paid referencing service, "Adwords", and its liability for infringements of trademarks held by the French luxury group LVMH,<sup>104</sup> "Adwords", enables an economic operator to display advertising links to its site accompanied by a commercial message that appears on the right hand side of the screen whenever one carries out "a search"

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<sup>101</sup> Cour d'Appel de Paris, 21.11.2008, ref. no. 08/09553; available at: [http://www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=2488](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=2488)

<sup>102</sup> Court of Cassation, Third Criminal Chamber, 29.09.2009, ref. no. 49437; available at: <http://www.ilsole24ore.com/fc?cmd=document&file=/art/SoleOnLine4/Norme%20e%20Tributi/2009/12/cassazione-sentenza-49437-2009.pdf?cmd=art>.

<sup>103</sup> Stockholm District Court, Division 5 Unit 52, 17.04.2009, ref. no. B 13301-06; available at: <http://www.ifpi.org/content/library/Pirate-Bay-verdict-English-translation.pdf>

<sup>104</sup> Joined cases C-236/08 to C-238/08, *Google vs. LVMH*, judgment of 23.03.2010; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0236:EN:HTML>

through Google's search engine. These advertisement links appear whenever a "keyword" that can be reserved by an economic operator corresponds to the word(s) entered as a request in the search engine.

In the national proceedings LVMH (the holder of the "Louis Vuitton" trademark) complained about the fact that both competitors and counterfeiters of the firm had reserved the keyword "Louis Vuitton" (meaning their advertisements would appear in response to a search for "Louis Vuitton") and that Google had not prevented them from doing so. The French Cour de Cassation asked the ECJ whether the reservation of keywords could be interpreted as a trademark infringement and, if this were the case, whether, the referencing service provider (Google) could be held liable for this.

The ECJ in this case refers to recital 42 in the preamble of the Directive to conclude that an intermediary service provider "*has neither knowledge of nor control over the information which is transmitted or stored*". Accordingly, in order to establish whether the liability of a referencing service provider may be limited under Article 14 of the ECD, the ECJ considers it necessary "*to examine whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores*" (paragraphs 113 and 114)

In analysing the Google "Adwords" service, the ECJ notes that "*with the help of software it has developed, Google processes the data entered by advertisers and the resulting display of the ads is made under conditions which Google controls. Thus, Google determines the order of display according to, inter alia, the remuneration paid by the advertisement*" (paragraph 116). However, the ECJ considers that to examine Google's activity in the light of recital 42, "*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*" (paragraph 118, underlining added).

The second ruling from the ECJ on the liability exemption regime concerns eBay and L'Oréal. In its ruling of 12 July 2011 in Case C-324/09 (see also Chapters 3.4.2.1 and 3.4.3.1) the ECJ had been asked, *inter alia*, whether the selling platform eBay could be held liable for trademark infringements committed (and possibly to be committed) through its site. In order to attract new customers to its website, eBay had bought keywords, including trademarks held by L'Oréal, from paid internet referencing services (such as Google's "Adwords"). In parallel to this, L'Oréal had identified several infringements of its trademarks through/by the selling platform eBay. The question posed to the ECJ was to what extent eBay could benefit from the exemption of liability on account of "hosting".

The ECJ first confirms that an online selling platform in principle offers an information society service and therefore is covered by the E-commerce Directive. The ECJ argues that, in order to define whether such a service is also an intermediary service in the sense of Article 14 of the Directive, one should not only look at the text of the Directive, but also at the intention of the legislator:

*"(Article 14 of the ECD) must, in fact, be interpreted in the light not only of its wording but also of the context in which it occurs and the objectives pursued by the rules of which it is part (see, by analogy, Case C-298/07 Bundesverband der Verbraucherzentralen und Verbraucherverbände [2008] ECR I-7841, paragraph 15 and the case law cited).*



*In that regard, the Court has already stated that, in order for an internet service provider to fall within the scope of Article 14 of Directive 2000/31, it is essential that the provider be an intermediary provider within the meaning intended by the legislature in the context of Section 4 of Chapter II of that directive (see Google France and Google, paragraph 112)".* (Paragraphs 110-112)

The ECJ then discusses when a service is *not* covered by the liability exemption of Article 14 ECD:

*"That is not the case where the service provider, instead of confining itself to providing that service neutrally by a merely technical and automatic processing of the data provided by its customers, plays an active role of such a kind as to give it knowledge of, or control over, those data (Google France and Google, paragraphs 114 and 120)".* (Paragraph 113)

*"(..) the mere fact that the operator of an online marketplace stores offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers cannot have the effect of denying it the exemptions from liability provided for by Directive 2000/31 (see, by analogy, Google France and Google, paragraph 116).*

*Where, by contrast, the operator has provided assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers, it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale. It cannot then rely, in the case of those data, on the exemption from liability referred to in Article 14(1) of Directive 2000/31".* (Paragraphs 115 and 116)

The ECJ suggested that Ebay would potentially in some instances not have such a neutral position:

*"In some cases, eBay also provides assistance intended to optimise or promote certain offers for sale" (paragraph 114).*

### **3.4.3 The conditions in Article 12 to 14 ECD**

Articles 12 to 14 of the ECD contain a number of specific material conditions to be met in order to benefit from a liability exemption. The responses to the public consultation confirm that the respondents perceive a lack of clarity on the interpretation of these conditions and in particular of the terms "actual knowledge" and "expeditious", both of which are part of the conditions for a liability exemption for hosting activities. National case law that has emerged on the interpretation of these conditions is often contradictory across borders or even within the same Member State. This section below will discuss the variations in defining conditions for exemptions including absence of actual knowledge, and acting expeditiously.

#### **3.4.3.1 Absence of actual knowledge**

Article 14 of the Directive specifies that a provider can benefit from a liability exemption regime for hosting activities if "the provider does not have *actual knowledge* of illegal activity

or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent".

Most Member States have literally transposed the condition of not having actual knowledge, but some Member States have deviated from the explicit text of the ECD. For example:

- Germany does not use the term "actual knowledge" in its transposition of Article 14 but refers merely to "knowledge";
- the Czech transposition requires the receipt of provable information about the illegal nature of the content in order for an intermediary to be judged to have obtained actual knowledge;
- Hungary and Malta restrict their liability exemptions for hosting to liability for damages and exclude criminal liability from the scope of the exemption;
- Spanish legislation mentions that actual knowledge *can* be obtained through a court order or notice by an administrative authority;
- Portuguese legislation refers to knowledge (instead of *actual* knowledge) of *manifestly* illegal information or activity;
- legislation in The Netherlands specifies that a hosting service provider cannot be held liable for damages if it "cannot reasonably be expected to know of the illegal nature of an activity or information".

Even when the term "actual knowledge" has been literally transposed, it has given rise to diverging interpretations. The responses to the public consultation demonstrated that, roughly speaking, there are *three interpretations that are given on how actual knowledge can be obtained*:

1. An intermediary can only obtain actual knowledge through a court order;
2. An intermediary can only obtain actual knowledge through a notice (ranging from an 'informal' notice from a user, such as a red flag under a video, to a court order)
3. An intermediary can obtain knowledge even in the absence of a notice if it, for instance, has a "general awareness" that its site hosts illegal information.

The first interpretation is commonly defended by civil organisations in defence of, in particular the freedom of speech, but also by some ISPs and other stakeholders. The underlying argument is twofold:

- On the one hand, it is argued that it would not be legitimate if private parties were to define what is legal and illegal and on that basis decide whether to take down or block the content. Taking down or blocking information is considered to be a restriction to the fundamental right of freedom of expression and information. Such a restriction can only be justified on the basis of democratic oversight and legal expertise. Such decisions should therefore only be taken on the basis of a court's assessment.
- On the other hand, it is argued that entrusting ISPs with the role of assessing what is legal and what is illegal would create an excessive economic burden for them. ISPs would not have the legal expertise in-house to assess the legality of the content and procuring this legal expertise would hamper their activities.

Recital 40 of the E-Commerce Directive states, in this regard, that the Directive "should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information" and that "such mechanisms could be developed on the basis of voluntary agreements between all parties concerned and should be encouraged by Member States".

The second interpretation is also defended by many ISPs and right holders. The main point of discussion among those sharing this interpretation is the required level of detail of the notice. This is discussed in more detail in Chapter 3.4.3 on notice-and-takedown procedures.

The third interpretation is mainly defended by right holders. They claim that intermediaries often have a general awareness of the possible existence of illegal information or activities on their sites and that this constitutes actual knowledge. ISPs that advertise the possibility of downloading music and videos of the consumer's choice would for instance have this form of actual knowledge.

Some ISPs argue that actual knowledge cannot be interpreted as general knowledge as this would in practice lead to a general monitoring obligation in order to avoid liability, which is prohibited under Article 15 of the Directive. In this context, respondents to the public consultation also argued that actual knowledge should be human knowledge and not "computer knowledge".

Stakeholders sometimes defend a differentiated approach on the basis that the means by which actual knowledge can be obtained depends on the kind of illegal activity or information. A key concept here is *the degree to which information or activity is manifestly illegal*. Some stakeholders who defend the first interpretation (actual knowledge can only be obtained through a court order) make an exception for child pornography or manifestly racist content. They consider that this content could be taken down immediately on the basis of a notice, although some of them argue that this decision should then still be validated by a court order. The court order would then be required *ex post* rather than *ex ante*.

National case law has further defined the concept of "manifestly illegal content":

- In Austria this concept has been interpreted as "obvious to any non-lawyer without further investigation". A domain name registration on the basis of the name of a political party by a third party was considered manifestly illegal because the website of the third party was almost identical to the website of the political party, but contained hyperlinks to racist content, meaning it could tarnish the reputation of the political party if internet users confused the two websites.<sup>105</sup> Also, defamation has been considered manifestly illegal in some instances.<sup>106</sup> By contrast, infringements relating to advertising and general terms and conditions<sup>107</sup> or trademark law<sup>108</sup> have not been considered manifestly illegal because a layman would not be able to easily identify the content as manifestly illegal without further research.

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<sup>105</sup> OGH, 13.09.2000, ref. no. 4 Ob 166/00s; available at:  
[http://www.internet4jurists.at/entscheidungen/ogh4\\_166\\_00s.htm](http://www.internet4jurists.at/entscheidungen/ogh4_166_00s.htm)

<sup>106</sup> OLG Innsbruck, 24.05.2005, ref. no. 2 R 114/05i; available at:  
[http://www.internet4jurists.at/entscheidungen/olgi\\_114\\_05i.htm](http://www.internet4jurists.at/entscheidungen/olgi_114_05i.htm)

<sup>107</sup> OGH, 06.07.2004, ref. no. 4 Ob 66/04s; available at:  
[http://www.internet4jurists.at/entscheidungen/ogh4\\_66\\_04s.htm](http://www.internet4jurists.at/entscheidungen/ogh4_66_04s.htm)

<sup>108</sup> OGH, 19.12.2005, ref. no. 4 Ob 194/05s; available at:  
[http://www.internet4jurists.at/entscheidungen/ogh4\\_194\\_05s.htm](http://www.internet4jurists.at/entscheidungen/ogh4_194_05s.htm)

- In Germany, however, the Federal Court<sup>109</sup> considered, in proceedings for injunctive relief and without any further reasoning, that the trademark infringements were clear as some of them had been ascertained in previous proceedings. The court also held that the liability limitation was not applicable in injunctive relief proceedings.
- In France the Paris Court of Appeal ruled that all racist<sup>110</sup>, anti-Semitic<sup>111</sup> or revisionist content<sup>112</sup> as well as texts which excuse war crimes, paedophilia or pornographic pictures<sup>113</sup> could be considered manifestly illegal. Moreover, the sale of copyrighted video<sup>114</sup> games well below counter price has been considered manifestly illegal in France. The Paris TGI, however, considered that privacy infringements were *not* manifestly illegal infringements.<sup>115</sup>
- In Belgium child pornography, revisionism or incontestable defamation have been considered manifestly illegal. The Belgian Supreme Court has even considered that *without notice* the existence of manifestly illegal content can lead to actual knowledge. A host of a website containing hyperlinks leading to child pornography was attributed knowledge of these illegal hyperlinks even if it did not insert them and had not received a notification about them (Belgian Supreme Court).<sup>116</sup>

Another issue that was raised in many responses to the public consultation is the impact that voluntary actions of an ISP can have on its "actual knowledge". A wide variety of stakeholders expressed concerns that ISPs would be reluctant to take voluntary measures to prevent illegality as this could make it more difficult to claim an absence of actual knowledge. This was confirmed by a judgment from the Hamburg regional court where an ISP that had voluntarily implemented a flagging system (that enables users to put red flags next to content they considered to be potentially illegal) was considered to have actual knowledge of illegal content because of this very flagging system it had voluntarily introduced (*Gisele Spiegel* vs.

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<sup>109</sup> BGH, 19.04.2007, ref. no. I ZR/04; available at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2007&Sort=3&anz=45&pos=0&nr=40136&linked=urt&Blank=1&file=dokument.pdf> and BGH, 11.03.2004, ref no. I ZR 304/01; available at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2004&Sort=3&anz=31&pos=0&nr=30359&linked=urt&Blank=1&file=dokument.pdf>.

<sup>110</sup> TGI Paris, 12.07.2001; available at: [http://www.legalis.net/spip.php?page=breves-article&id\\_article=213](http://www.legalis.net/spip.php?page=breves-article&id_article=213)

<sup>111</sup> TGI Nanterre, 24.05.2000; available at: <http://www.juriscom.net/txt/jurisfr/cti/tginanterre20000524.htm>

<sup>112</sup> TGI Paris, 13.06.2005; available at: <http://www.foruminternet.org/telechargement/documents/ca-par20061124.pdf>

<sup>113</sup> TGI Paris, 27.02.2006; available at: [http://www.legalis.net/breves-article.php3?id\\_article=1648](http://www.legalis.net/breves-article.php3?id_article=1648)

<sup>114</sup> Commercial Court of Paris, 17.10.2006; available at: <http://www.droit-technologie.org/jurisprudence/details.asp?id=224>

<sup>115</sup> TGI Paris, 19.10.2010, ref. no. 06/58312; available at: <http://www.juriscom.net/documents/tgiparis20061019.pdf>

<sup>116</sup> Cour de Cassation de Belgique, 03.02.2004, R.D.T.I., 2004, n° 19, P.03.1427.N; available at: [http://jure.juridat.just.fgov.be/pdfapp/download\\_blob?idpdf=F-20040203-3](http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20040203-3)

*YouTube LLC*).<sup>117</sup> Some stakeholders, in particular intermediaries, therefore suggested that the Commission should propose a so-called "Good Samaritan clause". Such a clause, which in the US has been introduced in the Communications Decency Act<sup>118</sup>, would ensure that taking voluntary actions would in principle not be punished.

In this regard, it can be noted that Recital 40 of the ECD states that "the provisions of this Directive relating to liability should not preclude the development and effective operation, by the different interested parties, of technical systems of protection and identification methods and of technical surveillance instruments made possible by digital technology within the limits of Directives 95/46/EC and 97/66/EC".

There is also national case law on a variety of other aspects related to the term "actual knowledge". For instance:

- The Regional Court of Hamburg<sup>119</sup> took a very wide interpretation of "knowledge" and considered that "there is thus a sliding obligation to exercise due care with a graded range of monitoring obligation: if it is almost certainly predictable that an infringement of the right of personality will happen, the operator's monitoring obligation can increase to a continuing monitoring obligation or an advance monitoring obligation". In another judgment the Higher Regional Court of Hamburg<sup>120</sup> held, however, that a complainant should sufficiently substantiate his/her complaint and that a simple hint should not be sufficient to obtain knowledge.
- In France the Constitutional Council, in its decision<sup>121</sup> on the French law that transposes the E-Commerce Directive, ruled that this law can only lead to liability of an intermediary that has not taken down allegedly illegal information following a notice, if the information is not manifestly illegal and if its takedown has not been ordered by a court.

In Case C-324/09, *L'Oréal vs. eBay* (see also Chapters 3.4.2.1 and 3.4.2.2) the referring court referred the question of what is actual knowledge and or awareness in the sense of Article 14 ECD to the European Court of Justice. In the judgment of 12 July 2011 the ECJ clarified that the relevant question relating to the conditions for benefiting from a liability exemption was

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<sup>117</sup> Regional Court of Hamburg, 05.03.2010, ref. no. 324 O 565/08; available at: <http://rechtsprechung.hamburg.de/jportal/portal/page/bshaprod.psml?showdoccase=1&doc.id=JURE100058567&st=ent>

<sup>118</sup> See Telecommunications Act of 1996: <http://transition.fcc.gov/telecom.html>

<sup>119</sup> Regional Court of Hamburg, 03.12.2007, ref. no. 324 O 794/07; available at: <http://www.landesrecht.hamburg.de/jportal/portal/page/bshaprod.psml?showdoccase=1&doc.id=JURE080002256&st=ent>; Regional Court of Hamburg, 05.03.2010, ref. no. 324 O 565/08; available at: <http://landesrecht.hamburg.de/jportal/portal/page/bshaprod.psml?showdoccase=1&doc.id=JURE100058567&st=ent>

<sup>120</sup> Higher Regional Court of Hamburg, 02.03.2010, ref. no. 7 U 70/09; available at: <http://www.telemedicus.info/urteile/Internetrecht/Haftung-von-Webhostern/1014-OLG-Hamburg-Az-7-U-7009-Blogspot.html>

<sup>121</sup> Constitutional Council of France, 10.06.2004, decision no. 2004-496 DC; available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000801165&dateTexte=>

whether eBay was aware of facts and circumstances from which the illegal activity was apparent.<sup>122</sup>

*"(...) it is sufficient, in order for the provider of an information society service to be denied entitlement to the exemption from liability provided for in Article 14 of Directive 2000/31, for it to have been aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question and acted in accordance with Article 14(1)(b) of Directive 2000/31. (Paragraph 120)*

The Court then clarifies how one can obtain this awareness: *The situations thus covered include, in particular, that in which the operator of an online marketplace uncovers, as the result of an investigation undertaken on its own initiative, an illegal activity or illegal information, as well as a situation in which the operator is notified of the existence of such an activity or such information. In the second case, although such a notification admittedly cannot automatically preclude the exemption from liability provided for in Article 14 of Directive 2000/31, given that notifications of allegedly illegal activities or information may turn out to be insufficiently precise or inadequately substantiated, the fact remains that such notification represents, as a general rule, a factor of which the national court must take account when determining, in the light of the information so transmitted to the operator, whether the latter was actually aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality.*

*In view of the foregoing, the answer to the ninth question is that Article 14(1) of Directive 2000/31 must be interpreted as applying to the operator of an online marketplace where that operator has not played an active role allowing it to have knowledge or control of the data stored. The operator plays such a role when it provides assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting them". (Paragraphs 121-123, underlining added)*

The ECJ concludes that it is up to the national court to decide whether eBay provides such assistance but it already indicated that "in some cases" (without further specification) eBay does play such an active role. The ECJ does not elaborate explicitly on how a hosting service provider can obtain "actual knowledge".

### **3.4.3.2 Acting expeditiously**

Article 14 of the Directive specifies that, for hosting activities, a provider can benefit from a liability exemption regime either if there is an absence of actual knowledge (as discussed above) or if "the provider, upon obtaining such knowledge or awareness, acts *expeditiously* to remove or to disable access to the information" (italics added). The Directive does not specify what removing or disabling expeditiously exactly means.

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<sup>122</sup> In his opinion of 9 December 2010 the Advocate General interprets Article 14 differently than the ECJ did in the *LVMH vs. Google* case. The AG claims to "have some difficulties" with the conclusion of the Court that recital 42 would contain conditions for all intermediary services for benefiting from a liability exemption and argues that recital 42 would only concern the activities of mere conduit and caching. He considers that "it is recital 46 which concerns hosting providers mentioned in Article 14 (...). Hence, the limitation of liability of a hosting provider should not be conditioned and limited by attaching it to recital 42".

Most Member States have transposed the condition of removing or disabling expeditiously literally, but **some Member States have chosen a slightly different wording than the text of the E-Commerce Directive.**

For instance:

- Lithuanian, Polish and Finnish law only requires that illegal information be disabled, but does not require that it be removed;
- Slovakia has, in contrast, implemented an obligation to remove information but not one to disable information;
- Sweden has introduced a general obligation "to prevent further dissemination" without specifying the means for doing this;
- Finnish law has provided for an exemption from liability for taking down legal content in good faith if the entity follows the legal notice-and-takedown procedure;
- Poland also explicitly exempts providers from contractual liability for blocking content if they have disabled information following an injunctive relief against the provider.

No Member State has, however, clarified the term "expeditious" in the transposition of the E-Commerce Directive. This was only done by certain Member States (Hungary, Finland and Lithuania) when adopting legislation on notice-and-takedown procedures for specific categories of illegal content at a later stage (see Annex 2 and Chapter 3.4.4.2). Moreover, national case law that interprets the term "expeditious" is very limited.

The term expeditious is discussed in more detail under the heading "timeframe" in Chapter 3.4.4.3 on notice-and-takedown procedures. In the consultation, generally, ISPs have defended a more flexible interpretation and right holders are in favour of a fixed and short time frame. Some stakeholders expressed fear that defining "expeditious" could increase pressure on ISPs to take down content on notice even before correctly assessing the alleged illegality of the information.

Some stakeholders (and national judgments) consider that the extent to which information or activity is *manifestly* illegal seems to be essential. It determines whether an intermediary can quickly and with certainty assess the legality and then proceed to either withdraw or disable access. When the illegality of information or activity is not manifest, assessing the legality may require considerably more time.

### **3.4.3.3 Other conditions**

The E-Commerce Directive also contains other conditions for intermediaries to benefit from a liability exemption. Article 12 of the Directive provides that for mere conduit activities, a provider can benefit from a liability exemption regime if "*the provider does not initiate the transmission, does not select the receiver of the transmission and does not select or modify the information contained in the transmission*". Moreover, Article 13 of the Directive provides that, for caching activities, a provider may for instance only benefit from an exemption from liability if it "*acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement*"

As is the case with conditions for a liability exemption for hosting activities, the Directive does not specify how exactly these conditions can be met. However, their interpretation appears to have led to fewer disputes than the interpretation of the conditions for hosting activities.

The transposition of these provisions has been almost literal across the EU, with a few exceptions:

- Lithuania provides that, where information held in cache memory has to be modified for technical reasons, the liability exemption still applies;
- Malta restricts its liability exemption for caching to liability for damages and excludes criminal liability from the scope of the exemption.

The **responses to the public consultation** indicated that some issues could be further clarified. In particular, according to the respondents, it is not always clear to what extent technical manipulations would preclude benefiting from the liability exemption for mere conduit activities. For instance, traffic management by internet providers (see Chapter 4.3.4 on net neutrality) could, according to some stakeholders, be interpreted as selecting or modifying. Recital 43 of the Directive provides in this regard that the requirement of not modifying information "does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission"

### 3.4.4 Notice-and-action procedures

#### 3.4.4.1 The European legislative framework

Article 14 of the E-Commerce Directive contains the basis for procedures for notifying and acting on online illegal content. It provides that hosting providers, in order to benefit from a liability exemption, should act expeditiously to remove (*take down*) or to disable access to (*block*) illegal activity or information of which they have obtained actual knowledge.<sup>123</sup>

Recital 40 states that: "*this Directive should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information; such mechanisms could be developed on the basis of voluntary agreements between all parties concerned and should be encouraged by Member States; it is in the interest of all parties involved in the provision of information society services to adopt and implement such procedures. (...)*".

An explicit reference to "notice-and-takedown" can be found in Article 21 (2) ECD, which provides that the application reports on the Directive "*shall in particular analyse (...) "notice-and-takedown" procedures and the attribution of liability following the taking down of content*".

The liability regime of the E-Commerce Directive applies to *all illegal activity or information* and it provides for *both removing and disabling access* (blocking). Blocking is of particular importance when takedown is not possible because the illegal activity or information is stored outside the European Union.

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<sup>123</sup> See in particular Chapter 3.4.3.1 on "actual knowledge" and the *eBay vs L'Oréal* case.



Apart from the E-Commerce Directive, there are other pieces of European legislation relevant for NTD procedures. For example, the Directive on the enforcement of intellectual property rights<sup>124</sup> (*Enforcement Directive*) provides in its Articles 9 and 11 that Member States shall ensure that right holders are in a position to apply for an injunction against intermediaries whose services are being used by a third party to infringe intellectual property rights. Moreover, its Article 17 provides that Member States shall encourage the development of self-regulatory codes of conduct contributing to the enforcement of intellectual property rights. The Commission will propose a revision of the Enforcement Directive (see also Chapter 4.3.5).<sup>125</sup>

Article 21 of the Proposal for a Directive on combating sexual abuse, sexual exploitation of children and child pornography<sup>126</sup> obliges Member States to take the necessary measures to obtain the blocking of access by internet users in their territory and the removal of internet pages containing or disseminating child pornography.

Furthermore, fundamental rights are relevant, as set out, *inter alia*, in the Charter of Fundamental Rights of the EU (see Article 6 TEU). Reference is made in particular to Article 11 of this Charter on the freedom of expression and information, as well as to its Article 16 on the freedom to conduct a business.

### 3.4.4.2 The developments in the last ten years

#### Self-regulatory developments

The Directive obliges Member States to encourage voluntary agreements for removing and disabling access to illegal information (cf recital 40). There are however only few examples of voluntary codes in Member States:

- In the United Kingdom a broad group of intermediaries (comprising providers of mere conduit and hosting activities) have set up a procedure in cooperation with a non-governmental organisation, specifically targeted at removing child abuse content.<sup>127</sup>

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<sup>124</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 *on the enforcement of intellectual property rights*, OJ L 157/16, 30.04.2004; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:157:0045:0086:EN:PDF>

<sup>125</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe*, COM(2011) 287 24.05.2011; available at [http://ec.europa.eu/internal\\_market/copyright/docs/ipr\\_strategy/COM\\_2011\\_287\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf). The Communication announces a review of the Enforcement Directive that should in particular find ways to combat “infringements of IPR via the internet more effectively” by “tackling the infringements at their source and, to that end, foster cooperation of intermediaries, such as internet service providers while respecting all fundamental rights recognised by the EU Charter of Fundamental Rights, in particular also the rights to private life, protection of personal data, freedom of expression and information and to an effective remedy”.

<sup>126</sup> Proposal for a Directive of European Parliament and the Council *on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA*, COM(2010) 94, 29.03.2010; available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010PC0094:EN:NOT>

<sup>127</sup> See: <http://www.iwf.org.uk/members/funding-council/code-of-practice>

- In the Netherlands, ISPs, national enforcement authorities and associations of right holders have subscribed to a notice-and-takedown code of conduct for all content that is punishable or unlawful;<sup>128</sup>
- In December 2009 several French internet platforms and right holders agreed on a charter for the fight against the sale of counterfeit goods on the Internet.<sup>129</sup> An extension of this charter is currently being discussed.<sup>130</sup>

Recently, a number of voluntary codes have been developed at EU level:

- In 2009 the Commission brokered an agreement on a code between a large group of social networks with the objective of ensuring the safety of minors online.<sup>131</sup>
- On 4 May 2011 a representative group of right holders and internet platforms signed, under the auspices of the Commission, a Memorandum of Understanding aimed at reducing the sale of counterfeits via e-commerce platforms. The MoU sets out a series of joint principles including effective and balanced measures to prevent offers of counterfeit goods from being listed on internet platforms.<sup>132</sup>
- A similar EU level dialogue on online piracy (copyright infringements) was launched in 2009 but did not result in a final agreement.

It should be noted, however, that most NTD procedures are not based on agreements between stakeholders, but result from the unilateral policy of individual companies.

In the **responses to the public consultation**, some stakeholders, in particular civil rights organisations, complained about a lack of transparency and democratic oversight with the policies of individual companies. Private companies are able to judge the legality and illegality of content without anyone looking over their shoulders. Some stakeholders are worried that intermediaries are in a position, for the sake of simplicity and to avoid liability claims, to simply take down any content about which they are notified without assessing the legality of the content and without informing or consulting the provider of the allegedly illegal content.<sup>133</sup>

As a result of a survey amongst the Member States for the preparation of a Commission Report on the implementation of the 1998 and 2006 Recommendations on Protection of Minors, it can be stated that ISPs are becoming increasingly involved in the protection of

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<sup>128</sup> See: [http://www.nederlandtegenerrorisme.nl/fileadmin/user\\_upload/Bedrijven/PDF\\_s/Gedragcode\\_Notice\\_and\\_Take\\_Down\\_tcm91-293746.pdf](http://www.nederlandtegenerrorisme.nl/fileadmin/user_upload/Bedrijven/PDF_s/Gedragcode_Notice_and_Take_Down_tcm91-293746.pdf)

<sup>129</sup> See *Charte de lutte contre la contrefaçon sur Internet*: <http://www.minefe.gouv.fr/actus/pdf/091216charteinternet.pdf>

<sup>130</sup> See recent developments on the web-page of the Ministère de l'Économie: [http://www.minefe.gouv.fr/actus/11/contref\\_internet.html](http://www.minefe.gouv.fr/actus/11/contref_internet.html)

<sup>131</sup> See: [http://ec.europa.eu/information\\_society/activities/social\\_networking/docs/sn\\_principles.pdf](http://ec.europa.eu/information_society/activities/social_networking/docs/sn_principles.pdf)

<sup>132</sup> See: [http://ec.europa.eu/internal\\_market/iprenforcement/docs/memorandum\\_04052011\\_en.pdf](http://ec.europa.eu/internal_market/iprenforcement/docs/memorandum_04052011_en.pdf)

<sup>133</sup> The website [www.chillingeffects.org](http://www.chillingeffects.org), an initiative from several US law faculties and some NGOs, reports on cases of blocked legal content.

minors, despite their limited liability and responsibility under the E-Commerce-Directive. This applies to their legal obligations regarding illegal content and particularly to joint voluntary commitments and adherence to codes of conduct. The large majority of Member States reported that notice-and-takedown procedures have been developed and are applied. However, there are considerable differences in the functioning of hotlines and particularly of notice-and-takedown procedures. This concerns the decision that certain content is illegal, the review of such decisions, the tracking of its source and identification of the web hosting provider and, in particular, the notification to the competent authorities. Moreover, in some Member States the response time is considered to be too long.

## **Legislative developments**

Some Member States have enacted notice-and-takedown and blocking procedures in national legislation. This has happened in at least Finland, France, Germany, Hungary, Lithuania, the United Kingdom, Spain and Sweden.

These procedures all apply to mere conduit providers. Except for the Swedish rules on online forums, they do not apply to providers of hosting activities in the meaning of Article 14 ECD. Article 13 of the Directive does not contain the requirement for providers of mere conduit activities to take down illegal information, even after having obtained actual knowledge of it, in order to qualify for an exemption of liability. It limits the obligation of the mere conduit provider in this regard to not initiating the transmission, to not selecting the receiver of the transmission and to not modifying or selecting the information contained in the transmission.

The Commission services have been made aware of the following national laws (see Annex II of this Staff Working Document for a more detailed description):

- The Finnish Act on provision of information society services (transposing the E-Commerce Directive) contains a detailed notice-and-takedown procedure for mere conduit and caching providers applying to infringements of copyright;
- The French HADOPI law provides for a so called "three strike" procedure for copyright infringements whereby, following a notice, an individual downloader may receive a warning that he or she is in breach of the law and may eventually, in case of repeated infringement, be cut off from internet access;
- The German Access Impediment Act obliges the Federal Office of Criminal Investigation to compile a black list containing child pornography websites, on the basis of which ISPs have to block access to those websites;
- The Hungarian Act on certain aspects of e-commerce and information society services (transposing the E-Commerce Directive) provides for a notice-and-takedown for mere conduit and caching providers as regards infringements of intellectual property rights;
- The Lithuanian law on information society services (transposing the E-Commerce Directive) also provides for a notice-and-takedown procedure for mere conduit and caching providers in cases of infringements of intellectual property rights;
- The UK Digital Economy Act follows a three-tier approach. First, ISPs must notify their subscribers of infringements which have been reported by copyright owners and they have to submit to the copyright owners a list of serious repeat infringers. Second, ISPs can be obliged to limit the internet access of subscribers and, thirdly, they can be forced to block access to copyright-infringing websites;
- The UK Terrorism Act provides a specific procedure for terrorism-related information;

- The Spanish "Ley Sinde" does not target the end user but the illegal service that can be taken down or, in the event that it is stored outside Spain, blocked;
- The Swedish Act on responsibility of Electronic Bulletin Boards (online forums or blogs) applies to several categories of illegal content;
- The Italian law on child pornography through the internet establishes a blocking mechanism for child abuse content;
- The French Law on the performance of internal security also puts in place a mechanism for blocking child pornography.

### 3.4.4.3 Persisting issues

According to a majority of stakeholders that responded to the public consultation, NTD procedures are heavily fragmented and this forms an important barrier to the Digital Single Market. In particular, it leads to legal uncertainty for intermediaries. Certain stakeholders also consider it socially undesirable that the takedown of manifestly illegal information (for instance child pornography) is sometimes less fast than the takedown of illegal information where there is a financial gain involved in the takedown (for instance phishing websites). A majority of the respondents to the consultation proposed a European notice-and-takedown procedure, either on a voluntary or on an obligatory basis. The views on what such a common standard for NTD procedures should look like are, however, divided.

This sub-section provides an overview of the main elements of the NTD procedures that cause the fragmentation.

#### *a) The requirements for notice*

The main question as regards the requirements for the notice is how a notice can lead to actual knowledge (see a more detailed discussion in Chapter 3.4.3.1) without placing an unreasonable burden on the notice provider.

Many right holders indicate that the required level of information for submitting a notice is often too detailed and amounts to a burdensome procedure. Some right holders for instance consider that the NTD procedure should not require specific information such as a URL reference or information about why specific content is illegal. Moreover, the procedure should be accessible by electronic means and easy to subscribe to. Many right holders also expressed a wish that NTD procedures become notice and *stay* down procedures, where a single notice would lead to actual knowledge of all potential future infringements that are similar to the notified infringement.

Intermediaries, on the other hand, stress the importance of a detailed notice and complain about the fact that notices are often not detailed enough to allow them to assess the alleged illegality of information. They argue that a notice should contain information which enables the intermediary to identify the complainant, locate the content (e.g. should include URLs) and assess the alleged illegality. Some intermediaries specified that certain complainants refuse to use the NTD procedure proposed by a particular site and provide information in a way that makes it difficult to identify the illegal information and its location (for instance by sending photocopies of URLs that have to be typed in manually by the intermediary).

### *b) The possibility of a defence for providers of information*

Takedown and blocking of certain content may have a negative impact on the exercise of the rights to freedom of expression and information. The E-Commerce Directive (in its recital 46) states that the removing or disabling of access "has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level". Many stakeholders consider it important that the provider of allegedly illegal information should be given the opportunity to submit a counter-notice and defend the legality of the information at issue.

Civil society organisations and the vast majority of intermediaries support the inclusion of a possibility of a counter-notice as a means to increase the legitimacy of takedowns and to minimise restrictions to the freedom of speech. Some national NTD procedures (in particular those in place in Finland, Hungary, Lithuania, Spain and UK) also recognise this by including an obligation for intermediaries to offer a possibility to submit a counter-notice.

Right holders and ISPs, however, consider that the possibility of counter-notice would make NTD procedures more burdensome, slower and less effective. Moreover, as indicated by stakeholders, offering the possibility of submitting a counter notice is perhaps not appropriate in the context of manifestly illegal information. For instance, it appears excessive to ask for the prior opinion of the provider of child pornographic content before it can be taken down. It has also been suggested that a requirement to offer the possibility of submitting a counter-notice could be in breach of data protection rules since it would require identifying the content provider.

### *c) The timeframe*

As discussed in Chapter 3.4.3.2, intermediaries have an obligation to take down or block illegal information expeditiously once they have obtained actual knowledge of it, so as to benefit from a liability exemption for hosting activities.

Most self-regulatory NTD procedures do not specify a timeframe for takedown<sup>134</sup>. Some legislative NTD procedures have established a specific timeframe for the takedown or blocking of information, while others have not. For instance:

- in Finland an intermediary has to act "immediately" for copyright infringements;
- in Hungary intermediaries have to act within 12 hours in the field of IPR;
- in Lithuania, intermediaries have to act within 1 day for copyright infringements;
- in Spain, ISPs have to act within 72 hours for copyright infringements;
- in the UK, intermediaries have to act within 2 days for terrorism-related illegal content.

According to the responses to the public consultation it is often unclear when time begins to run and, in particular, whether this happens from the moment of notice or from the moment that the notice has been assessed.

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<sup>134</sup> For example, the agreement on child pornography between UK intermediaries and a NGO according to which an intermediary has to act "expeditiously".

Intermediaries argue that the term "expeditious", found in Article 14 of the Directive, does not need to be clarified as it allows the intermediaries to take account of every individual case. The flexibility of the term is considered necessary by many ISPs because they would normally need to seek legal advice or translation and eventually make a judgment which could take some time.

Right holders, however, in general argue that "expeditious" should be specified and that this specification should correspond to a short time period. For instance, a takedown period of one hour would already be too long for live streaming. Moreover, a long time period would in regular circumstances be unnecessary for assessing the illegality of information. In some Member States, the time before takedown would "be long" because a specific authorisation would be required for this purpose.<sup>135</sup>

It has also been argued that a lack of a specification of the timeframe would also be detrimental to the fight against child pornography. A report conducted by Cambridge University<sup>136</sup> demonstrates that the average time before takedown of child pornography sites is much longer than the time before takedown of phishing sites.

#### *d) Liability for providing wrongful notices or for taking down or blocking legal content*

NTD procedures do not exclude a risk that wrongful notices are provided to intermediaries (in good faith or bad faith) and that intermediaries, acting on such notices, take down legal content.

Some respondents to the public consultation on e-commerce have raised the issue of *holding notice providers liable for submitting wrongful notices*. They consider that this could decrease the number of wrongful notices. But once a wrong notice has been submitted, the question is how the intermediary should deal with it. Some stakeholders consider that intermediaries should not be held liable for taking down "illegal" information if it turns out that the information was not illegal, provided they have respected a NTD procedure and that, on the basis of a notice submitted in the context of such a procedure, had good reason to consider that the information which was the subject of that notice was illegal. Some national legislative NTD procedures provide that, by following the procedure in good faith, intermediaries are exempted from liability, whereas others do not.

#### *e) Private operators assessing the legality of information*

Many respondents to the public consultation on e-commerce expressed concerns that private operators judging the legality of information on the Internet represented "private judges". They believed it would not be legitimate or feasible for intermediaries to assess the alleged illegality of certain information. Private operators would have a tendency to take down allegedly illegal information without even assessing the legality. Moreover, there would be no transparency and oversight on (the application of) NTD procedures of private companies.

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<sup>135</sup> According to several respondents this would be the case in Italy for instance.

<sup>136</sup> Moore/Clayton, *The Impact of Incentives on Notice and Takedown*, Seventh Workshop on the Economics of Information Security (WEIS 2008), June 25–28 2008; available at: <http://www.cl.cam.ac.uk/~rnc1/takedown.pdf>

Many stakeholders consider that the legitimacy of private operators deciding on the takedown of content without the intervention of a court depends on the extent to which the alleged illegal information is *manifestly* illegal (see Chapter 3.4.3.1). For instance, many stakeholders do not consider that the intervention of a court is required to takedown manifest child pornography.

It has been held that the term *manifestly* could be helpful in interpreting the E-Commerce Directive. Portugal has introduced the concept to its national legislation transposing the ECD.

*f) The need for NTD procedures to complement other policies*

Some respondents to the public consultation on e-commerce take the view that takedown or blocking would not be a solution to the existence of illegal information on the Internet. Certain right holders consider that the emphasis should be on prevention rather than enforcement and propose the use of filtering techniques. Other stakeholders, in particular intermediaries, also favour a focus on prevention, but in the form of offering attractive, accessible and legal services on the Internet. Moreover, some intermediaries, in particular video-sharing sites, argue that right holders should favour "monetisation" over takedown. "Monetisation" involves receiving a share of advertisement revenues that can be attributed to content to which they hold the rights.

#### **3.4.4.4 An EU initiative on procedures for notifying and acting on illegal online content**

The cross-border nature of the Internet, the existing fragmentation of NTD systems, the lack of development of regulatory codes at European level and conflicting jurisprudence within and across Member States justify an analysis of the need for EU action. In 2012 the Commission will publish an impact assessment on procedures for notifying and acting<sup>137</sup> on illegal online content which will determine the content of the initiative. Its main policy objectives are the following:

- Contribute to developing trust and therefore growth in (cross-border) online services, thus enhancing the functioning of the Digital Single Market.
- Contribute to combating illegality on the Internet.
- Ensure the transparency, effectiveness, proportionality and fundamental rights compliance of NTD procedures.
- Ensure a balanced and workable approach towards NTD procedures, with a focus on the impact on innovation and growth, while ensuring respect for fundamental rights.

The initiative will have a horizontal scope in the sense that it will cover all types of online services (including entertainment, adult, health, gambling etc.) representing many societal interests. Stakeholders to be consulted include Member States, internet intermediaries, right holders, child protection organisations, civil rights organisations and citizens in general.

The impact assessment will address a number of issues including the requirements for a notice; the time for an intermediary to act following a notice; the need to inform or consult the provider of the alleged illegal information; the need for further transparency on NTD

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<sup>137</sup> The term "acting" is broader than "takedown" of illegal content and includes also "blocking" of websites.

procedures; the consequences of submitting wrong notices; the instruments for removing or disabling access to illegal content, etc. Several options including no EU action, European soft law (such as already piloted in the Memorandum of Understanding on the sale of counterfeited goods) and legislative instruments will be assessed, in particular taking into account their respective proportionality.

In parallel the Commission will review the Directive on the enforcement of intellectual property rights. The objective is to fight illegal content whilst fully respecting internal market rules and fundamental freedoms, in particular by paying attention to procedural safeguards. The initiative on notice and action procedures is without prejudice to this initiative

### **3.4.5 The prohibition in Article 15 ECD**

#### **3.4.5.1 EU law**

Article 15 provides that "*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*".

Although such monitoring could constitute an infringement of other rules (e.g. certain fundamental rights), Article 15 itself does not prohibit monitoring by private companies as such, but prevents Member States from *imposing* such an obligation on companies. It aims to avoid placing a disproportionate burden on intermediaries that would seriously restrict them in providing their intermediary services.

Respondents to the public consultation on e-commerce raised three main issues related to the prohibition set out in Article 15 which they feel require further clarification.

First, recital 47 of the Directive states that "*Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation*". This raises the question as to what exactly a specific monitoring obligation could be as opposed to a general monitoring obligation.

Second, recital 48 of the Directive states that the E-Commerce Directive "*does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities*". Some respondents wondered what the exact duties of care are and where the border lies between an obligation to apply duties of care and a general obligation to monitor.

Third, some respondents raised doubts about the application of Article 15 to injunctions. The provision is silent about injunctions.



In the *L'Oréal vs. eBay* case<sup>138</sup> the European Court of Justice accepts, in principle, the compatibility of effective and proportionate injunctions against providers such as operators of online marketplaces. In the *Scarlet vs. SABAM* case<sup>139</sup>, the ECJ, however, considers that that under the circumstances of the case at hand a court injunction forcing an internet access provider to introduce filtering software for the prevention of copyright infringements is incompatible with Article 15 of the Directive, construed in the light of the requirements stemming from the protection of the applicable fundamental rights.

One of the preliminary questions referred by the Brussels Cour d'Appel to the ECJ was whether the applicable instruments of EU law, *"read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding an injunction imposed on an ISP to introduce a system for filtering*

- *all electronic communications passing via its services, in particular those involving the use of peer-to-peer software;*
- *which applies indiscriminately to all its customers;*
- *as a preventive measure;*
- *exclusively at its expense; and*
- *for an unlimited period,*

*which is capable of identifying on that provider's network the movement of electronic files containing a musical, cinematographic or audio-visual work in respect of which the applicant claims to hold intellectual property rights, with a view to blocking the transfer of files the sharing of which infringes copyright (...)"*.

The Court first considers the applicable instruments of secondary EU law. It clarifies that Directives 2001/29 (Copyright in the information society) and 2004/48 (Enforcement of intellectual property rights), which both contain a basis for injunctions against intermediaries, *"may not affect the provisions of Directive 2000/31 and, more specifically, Articles 12 to 15 thereof"*.

As regards the above-mentioned question it notes that *"it must be held that the injunction imposed on the ISP concerned requiring it to install the contested filtering system would oblige it to actively monitor all the data relating to each of its customers in order to prevent any future infringement of intellectual-property rights. It follows that that injunction would require the ISP to carry out general monitoring, something which is prohibited by Article 15(1) of Directive 2000/31"* (paragraph 40).

Secondly, the Court considers the applicable fundamental rights recognised under EU law. In this regard, the Court decides that the injunction:

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<sup>138</sup> Case C-324/09, *L'Oréal v eBay*, judgment of 12 July 2011, par. 141, available at <http://curia.europa.eu/juris/recherche.jsf?language=en>

<sup>139</sup> Case C-70/10, *Scarlet Extended v Société belge des auteurs compositeurs et éditeurs (SABAM)*, available at <http://curia.europa.eu/juris/recherche.jsf?language=en>.

- *"would result in a serious infringement of the freedom of the ISP concerned to conduct its business since it would require that ISP to install a complicated, costly, permanent computer system at its own expense"* (paragraph 48).
- *"is to be regarded as not respecting the requirement that a fair balance be struck between, on the one hand, the protection of the intellectual-property right enjoyed by copyright holders, and, on the other hand, that of the freedom to conduct business"* (paragraph 49).
- *"may also infringe the fundamental rights of that ISP's customers, namely their right to protection of their personal data and their freedom to receive or impart information, which are rights safeguarded by Articles 8 and 11 of the Charter respectively"* (paragraph 50).
- *"could potentially undermine freedom of information since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications"* (paragraph 52).

The Court concludes that *"Consequently, it must be held that, in adopting the injunction requiring the ISP to install the contested filtering system, the national court concerned would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other"* (paragraph 53).

A similar case, on the compatibility of such a filtering obligation for a social network, is currently pending before the ECJ.<sup>140</sup>

### **3.4.5.2 National law**

Article 15 has been transposed in different ways across the EU. Some Member States did not consider it necessary to introduce a prohibition of general monitoring in their legislative framework because their legislation did not have any such obligations at the time of transposing the Directive. Denmark, Finland, Spain, Ireland and the Netherlands have for instance not introduced an explicit prohibition. Most Member States have, however, opted for a more or less verbatim transposition of the Directive.

Independently from the mode of transposition, across the EU there have been questions about the interpretation of Article 15. This has become apparent in a number of cases where courts have imposed or have been asked to impose the use of filtering software to prevent illegal information and activity by means of injunctions on intermediaries. For instance:

- In a case concerning the Belgian collecting society SABAM and the internet service provider Tiscali<sup>141</sup> (now Scarlet) a judge on 29 June 2007 ordered Tiscali to use a specific filtering software ("Audible Magic") to prevent infringements of copyright

<sup>140</sup> Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM) v N.V. NETLOG*, available at <http://curia.europa.eu/juris/recherche.jsf?language=en>

<sup>141</sup> District Court of Brussels, 29.06.2007, ref. no. 04/8975/A; available at: <http://www.cardozoaelj.net/issues/08/case001.pdf>.

managed by SABAM. The court considered that this software had proven to be effective and considered that the average cost of implementing the measure did not appear excessive. Moreover, the Court argued that implementing a filtering technique should not be confused with monitoring as recital 40 of the Directive explicitly mentions that the Directive's provisions relating to liability should not preclude the development and use of technical surveillance instruments. Scarlet filed an appeal against the decision and on 28 January 2010 the Brussels Court of Appeal made a preliminary reference to the European Court of Justice (see above for the judgment).

- In a case concerning Rolex, Ricardo and eBay, two online selling platforms, the Bundesgerichtshof<sup>142</sup> (the German Federal Supreme Court) considered that an injunction against the two intermediaries forcing them to apply filtering software would not be infringing Article 15. The Court considered that the protection offered to intermediaries by the E-Commerce Directive would not apply to injunctive claims and that therefore such a measure could be ordered, although it was left to a lower court to assess whether it would be technically feasible.
- In France, in a ruling of 13 May 2009 in a case concerning eBay and L'Oreal,<sup>143</sup> the Court refused to oblige eBay to implement filtering software for its "health and beauty section" to prevent infringements of L'Oréal's trademark. The Court considered that filtering software was not necessary as eBay had made the required efforts to prevent trademark infringements, suggesting that to some extent there is an obligation of surveillance.
- In the UK, BT and TalkTalk, two internet service providers, had contested the validity of the Digital Economy Act (DEA, discussed above) under the European law and in particular Article 15 thereof<sup>144</sup>. The High Court, however, on 20 April 2011 took the position that the DEA does not involve any monitoring in the sense of Article 15. Under the DEA. The Court notes that copyright owners may well "monitor information (...), but they are not ISPs and they are under no duty by virtue of the DEA to carry out "monitoring."" BT and TalkTalk have been granted permission to appeal this decision.

### 3.4.5.3 Filtering

As discussed above, the main question concerning Article 15 is to what extent injunctions that impose filtering software are compatible with the prohibition of a general monitoring obligation. However, one can imagine that if filtering techniques had become flawless and costless, the need for a prohibition on imposing a general monitoring obligation would have become obsolete. For this reason, the public consultation on e-commerce consulted stakeholders on the effectiveness and efficiency of filtering techniques ten years after the

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<sup>142</sup> BGH, 19.04.2007, ref. no. I ZR/04; available at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2007&Sort=3&anz=45&pos=0&nr=40136&linked=urt&Blank=1&file=dokument.pdf> and BGH, 11.03.2004, ref no. I ZR 304/01; available at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2004&Sort=3&anz=31&pos=0&nr=30359&linked=urt&Blank=1&file=dokument.pdf>.

<sup>143</sup> TGI Paris, 13.05.2009; available at: [http://www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=2639](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=2639).

<sup>144</sup> High Court of Justice of England and Wales, Queen's Bench Division, 20.04.2011; available at <http://high-court-justice.vlex.co.uk/vid/-287515403>

adoption of the Directive. A wide variety of stakeholders mentioned several disadvantages of filtering techniques and confirmed that Article 15 is still relevant today.

First, respondents expressed *technical concerns about filtering*. Filtering techniques can range in effectiveness from not being in any way effective to being very promising, but filtering techniques may involve some degree of overblocking (blocking legal content) and underblocking (not blocking illegal content). An example of content that could not be filtered would be content in so-called 'flat pdf files' (that are similar to non-searchable images), such as scientific articles or books.

However, video is an example of a form of content to which filtering techniques can be usefully applied. Video hosting sites have, for instance, voluntarily and in cooperation with right holders, developed so-called fingerprinting techniques that identify the unique hash code of a file. Techniques such as these have also been shown to be effective in the fight against on-line child sex abuse images and videos. An important element is for the relevant file(s) to be "fingerprinted" (for example by Interpol). A similar technology has also been developed for audio files.

Any filtering approach brings the risk of a technological "arms race" between those imposing filters and pirates. For instance, in France, the HADOPI law (mentioned in Chapter 3.4.4.2) is said to have led to an increased use of encryption of traffic, the use of VPN (virtual private networks) and the use of proxies. These developments make it more difficult to identify seriously harmful content and to identify a user's real location and IP address.

A variety of stakeholders raised concerns about significant traffic speed reductions as a result of certain filtering techniques. In particular so-called deep packet filtering techniques (where one looks at what is inside trafficked "packages" rather than at the "packaging") would require large amounts of processing power and network reconfiguration. This would eventually lead to more limited broadband internet access and negatively affect consumers.

Second, stakeholders also expressed *concerns about the costs associated with filtering techniques*. ISPs tend to argue that implementing filtering techniques would be a significant financial burden. Some right holders would want to shift more of this burden on ISPs, in particular for the development of fingerprinting techniques. The fact that there is interoperability between these techniques for different video sharing sites would be a particular burden according to some right holders.

Third, a variety of stakeholders raised concerns about *tensions between the protection of fundamental rights and filtering techniques*. On the one hand, filtering can, depending on the technology used, risk restricting freedom of speech by blocking legal content by mistake. On the other hand, filtering techniques such as deep packet inspection could restrict the right of personal data protection. There are, however, legitimate concerns about the protection of minors and public decency as regards, in particular, child sex abuse images that circulate on the internet and as discussed above in the area of video and image content filtering.

## **4 Need for integration with other Digital Single Market policies**

Although the regulatory framework described in Chapter 3 is vast, better enforcement, enhanced administrative cooperation and providing clarifications are not in themselves

sufficient to tap the full potential of e-commerce and online services within the Single Market. Horizontal issues such the development of broadband and IT infrastructures or IT literacy across the Member States, social groups and generations are also key to the development of online services.<sup>145</sup>

This Staff Working Document does not cover infrastructure but deals with regulatory obstacles which still need to be addressed within the Single Market. This Chapter is based on the flow of a typical (retail) transaction, starting with the willingness to engage in e-commerce and following through the process of gathering of information on products and services on offer, the actual access to products and services, the issues surrounding the conclusion of a contract, the payment and delivery of the products and services bought/sold, ending with redress if things go wrong. Finally, certain cross-cutting issues are analysed which are relevant along this chain.

This analysis is based on an integrated approach to the development of online services, without attempting to cover all relevant issues.

## **4.1 Trust**

Trust is recognised as a prerequisite for the development of online services, without which potential buyers and sellers may not even consider going online. Trustmarks, personal data requirements, specific policies for online gambling and pharmacies and liability provisions for businesses all contribute to enhancing trust online.

### **4.1.1 Trustmarks**

Trustmarks are generally considered a useful instrument for traders to foster consumer confidence. Typical trustmark systems consist of an accreditation mechanism with an independent supervisor for an online trader to meet the trustmark's requirements (including creditworthiness, security mechanisms, price transparency, provision of information, customer service, data protection and dispute settlement). Well-known trustmarks within the EU include Thuiswinkel<sup>146</sup> (the Netherlands), Trusted Shops<sup>147</sup> (UK) and Confianza Online<sup>148</sup> (ES).

However, a major disadvantage of these trustmarks is that they operate mainly on a domestic level. They are characterised by different certification and business models and provide different guarantees of service.

To overcome such fragmentation, the Commission announced in the Digital Agenda for Europe (2010) its intention to create a stakeholder platform by 2012 for EU online trustmarks, especially for retail websites.

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<sup>145</sup> See in particular the Commission Communication "A Digital Agenda for Europe", COM (2010) 245 of 19.5.2010, available at: [http://ec.europa.eu/information\\_society/digital-agenda/documents/digital-agenda-communication-en.pdf](http://ec.europa.eu/information_society/digital-agenda/documents/digital-agenda-communication-en.pdf)

<sup>146</sup> See: <http://www.thuiswinkel.org/engelstalig/-new/home/homepage-thuiswinkel>

<sup>147</sup> See: <http://www.trustedshops.com>

<sup>148</sup> See: <http://www.confianzaonline.es>

The Working Group on E-Commerce, set up by the EP Committee on the Internal Market and Consumer Protection (IMCO), considered an EU Trustmark scheme a major instrument for completing the Internal Market for e-commerce. The Working Group concluded at its most recent meeting (June 2011) that further discussion was needed as well as the involvement of policy makers, stakeholders and experts to carefully analyse the implementation process for setting up the EU trustmark scheme.<sup>149</sup>

In order to lay the groundwork, the Commission services organised a workshop on "trust and confidence in the Internal Market" during the first Digital Agenda Assembly (June 2011). The key outcome of the discussion was a general agreement that there is a need for EU-level involvement in the co-regulation of trustmarks between the EU, national authorities, consumer organisations and trustmark suppliers. A study was launched to evaluate the most effective and proportionate means to reinforce consumer confidence in e-commerce and in particular assess the costs and benefits of (different models) for setting up an EU online trustmark stakeholder platform.

## **4.1.2 Personal data protection**

### **4.1.2.1 Personal data protection in the online environment**

It is widely acknowledged that trust is the currency of the digital economy. In today's digital context, buyers of goods and services provide – often without much thought - their bank or credit card details when paying for their purchase. Millions of citizens publish photos, blogs and text about families, friends and colleagues on social networks such as Netlog, LinkedIn and Facebook, often without being aware of privacy policies. The use and exchange of personal data have become essential factors in the online economy.<sup>150</sup> Professional players are aggregating massive amounts of data for professional use, in particular for behavioural advertising.<sup>151</sup> In situations where hosting services are requested to take down illegal material such as pirated or counterfeited works, information about both up- and downloaders needs to be shared between the right holders and intermediaries.

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<sup>149</sup> The IMCO Committee mandated Mr Pablo Arias Echeverria, Rapporteur for the own-initiative report "Completing the internal Market for E-Commerce", to set up this working group to provide a forum for an exchange of views between policy-makers and respective stakeholders and analyse the steps required to improve E-Commerce, enhance consumer confidence and develop a European Trustmark. The Working Group presented its conclusions to the Committee on 12 July 2011, available at: [http://www.europarl.europa.eu/document/activities/cont/201107/20110715ATT24204/20110715ATT24204\\_EN.pdf](http://www.europarl.europa.eu/document/activities/cont/201107/20110715ATT24204/20110715ATT24204_EN.pdf). The Working Group will organize a second cycle of workshops in the first half of 2012.

<sup>150</sup> McKinsey Global Institute, *Big data: The next frontier for innovation, competition and productivity*, May 2011; available at: [http://www.mckinsey.com/mgi/publications/big\\_data/index.asp](http://www.mckinsey.com/mgi/publications/big_data/index.asp).

<sup>151</sup> Behavioural targeting or behavioural advertising is a technique used by online publishers and advertisers to increase the effectiveness of their campaigns. Information is collected on an individual's web-browsing behavior, such as the pages they have visited or the searches they have made, to select which advertisements to display to that individual. Behavioural marketing can be used on its own or in conjunction with other forms of targeting based on factors like geography, demographics or the surrounding content. This helps marketers to deliver their online advertisements to the users who are most likely to be interested. For example, a user may often visit sport sites and thus be categorised in the "sports fan" segment. This user would then be shown advertisements that are relevant to the interests of a sports fan.

Articles 7 and 8 of the Charter of Fundamental Rights of the EU<sup>152</sup> recognize the respect for private and family life, and the right to the protection of personal data. Data protection rules organise and control the way personal data are processed. These rules take account of the importance of the freedom of expression and provide for specific regime applicable to the processing of personal data carried out solely for freedom of expression purposes.<sup>153</sup>

The ECD does not apply to questions relating to information society services covered by the EU legislation on the protection of personal data (Article 1 (5) (b) ECD). The Data Protection Directive<sup>154</sup> constitutes the fundamental legal framework for the processing of personal data in the EU. It was adopted to harmonise the legislation of the Member States with the twofold objective of protecting fundamental rights, namely the right to personal data protection, and ensuring the free flow of personal data between Member States within the context of the Internal Market. According to the Data Protection Directive, personal data must be processed fairly and lawfully, collected for specified, explicit and legitimate purposes (data minimisation principle) and not further processed in a way incompatible with those purposes (principle of finality). Personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected (purpose limitation principle). The Directive furthermore provides for the right of individuals to be given information on the purposes of the processing, how and by whom their data are processed and the rights to access, rectify and delete personal data. Monitoring of compliance with data protection laws implementing the Directive is entrusted to national public independent authorities endowed with investigative and enforcement powers. The data protection authorities also hear claims lodged by individuals regarding the processing of their personal data.

A major factor enabling individuals to know about the processing of their personal data and exercise the rights granted by the Data Protection Directive is the provision of information (principle of transparency).<sup>155</sup> Service providers that qualify as data controllers have to provide users with clear, easily understandable and affordable privacy notices in line with the requirements of the Data Protection Directive. This rule is, however, not always observed.

Since its adoption in 1995, other EU legislation has come into force which complements the Data Protection Directive. The most significant instrument for e-commerce and other online services is Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications),<sup>156</sup> as amended by Directive 2009/136/EC (Citizen's Rights

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<sup>152</sup> *Charter of Fundamental Rights of the EU*, OJ C 364/1, 18.12.200; available at: [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)

<sup>153</sup> See: ECJ, Case C-101/01, *Bodil Lindqvist*, 6.11.2003, and Case C-73/07, *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy, Satamedia Oy*, 16.12.2008; both available at <http://curia.europa.eu/juris/recherche.jsf?language=en>.

<sup>154</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 *on the protection of individuals with regard to the processing of personal data and on the free movement of such data*, OJ L 281/31, 23.11.1995 (hereafter '*Data Protection Directive*'); available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML>

<sup>155</sup> See: *Data Protection Directive*, Art. 10 and 11.

<sup>156</sup> *Directive on privacy and electronic communications*, OJ L 201/37, 31.07.2002

Directive),<sup>157</sup> hereafter the ePrivacy Directive.<sup>158</sup> The ePrivacy Directive intends *inter alia* to give citizens control over which information is stored on or retrieved from users' terminal equipment, including computers, smartphones or other devices connected to the internet. Users should be able to know and control who is using their information, and how the information is being used.

Many respondents to the public consultation on e-commerce commented on the data protection and privacy dimension of online services. The potential importance of personal data for the development of the Digital Single Market has been outlined, but also concerns about the use of data have been raised. The following sections focus on spam as well as cookies, and recall the upcoming revision of the data protection framework.

#### 4.1.2.2 Spam and the ePrivacy Directive

Recent studies suggest that unsolicited commercial communication or spam accounts for more than 90% of global e-mail traffic.<sup>159</sup> Spam is popular because costs for senders are low even with a wide range of unsolicited messages. Only a limited number of recipients need to respond in order for spam to be commercially viable. This is even truer for types of spam that intend to gain access to information such as credit card numbers or company secrets.

Spam can seriously harm the development of online services. Their costs do not only relate to the unnecessary use of broadband capacity or the purchase of expensive anti-virus software. Unsolicited messages infringe individual privacy rights, they can infect computers with viruses and the illegal offer of pharmaceuticals affects consumer confidence and threatens their health.<sup>160</sup>

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<sup>157</sup> Directive 2009/136/EC of the European Parliament and the Council of 25 November 2009 *amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws*, OJ L 337/11, 18.12.2009; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0011:0036:En:PDF>

<sup>158</sup> Reference can also be made to the *Data Retention Directive* (Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC), OJ L 105/54, 13.04.2006; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0024:EN:HTML>. The Directive harmonises national laws on the retention of data e.g. on internet access, telephony and e-mail to ensure the investigation, detection and prosecution of "serious crime". See the report from the Commission to the Council and the European Parliament *on the Data Retention Directive* (Directive 2006/24/EC), COM(2011) 225 final, 18.04.2011; available at: <http://www.statewatch.org/news/2011/apr/eu-com-data-retention-report-225-11.pdf>

<sup>159</sup> See : van Eecke & Truyens for DG INFSO, *EU Study on the Legal analysis of a Single Market for the Information Society: New rules for a new age?*, November 2009, Ch.10, p.2, available at [http://ec.europa.eu/information\\_society/newsroom/cf/itemdetail.cfm?item\\_id=7022](http://ec.europa.eu/information_society/newsroom/cf/itemdetail.cfm?item_id=7022).

<sup>160</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *on unsolicited commercial communications or "spam"*, COM (2004) 28 final, p. 4, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0028:FIN:EN:PDF>



Article 13 of the ePrivacy Directive complements the provisions of Articles 6 and 7 of the E-Commerce Directive. Article 13 contains an "opt-in" approach to unsolicited commercial communications. Users must give their prior consent before communications for the purposes of direct marketing may be addressed to them. This opt-in system applies to e-mail as well as text messages and other electronic messages received on any fixed or mobile terminal. Exceptions are foreseen in the context of already established customers for the direct marketing of its own similar products or services by the same provider. This opt-in system applies only to users who are natural persons.

The 2009 amendments of the ePrivacy Directive strengthen and clarify the legal framework to counter spam. The ePrivacy Directive, which now explicitly refers to the E-Commerce Directive, makes illegal under Article 13 (4) all commercial e-mails advertising websites without disclosing the identity of the sender on whose behalf the communication is made. It requires the disclosure of a valid address to exercise the right to request that such communications cease. Also, Article 13 (6) allows any legal person adversely affected by spam, such as internet service providers, to protect their business and their customers by taking legal action against spammers.

#### **4.1.2.3 Cookies and the ePrivacy Directive**

Cookies are hidden information exchanged between an internet user and a web server, and are stored in a file on the user's hard disc. They are designed to facilitate a browser-server interaction in order to collect data. Cookies allow the creation of profiles which can be beneficial for both users and online service providers. Based on a survey carried out in 2010 by ENISA, almost 80% of online service providers interviewed are collecting data from cookies.<sup>161</sup>

Business representatives indicated in the public consultation that today's internet economy and in particular the transformation of the Internet from web 1.0 to web 2.0 have been possible thanks to cookies. They argued that cookies do not store information such as IP addresses or personal information (names, addresses etc.).

But other respondents to the public consultation were not convinced and warned against the negative impact of cookies. Information collected through the use of cookies is processed to build up user profiles which is not only sold to third parties and applied for behavioural advertising but could also be used for other kinds of (commercial and non-commercial) applications, often without users being aware of it.

How the data are collected and used raises questions about the compatibility of this practice with the ePrivacy Directive. A significant number of respondents expressed concerns about the scope of the new rules on ePrivacy, and requested further guidance on their application in practice especially regarding the notion of "consent".

Commission services have issued a guidance document on the implementation of Article 5 (3) on cookies.<sup>162</sup>

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<sup>161</sup> See <http://www.enisa.europa.eu>

<sup>162</sup> DG INFSO/B2 Communications Committee Working Document, COCOM10-34, 20.10.2010, available at: [http://circa.europa.eu/Public/irc/infso/cocom1/library?l=/public\\_documents\\_2010/cocom10-](http://circa.europa.eu/Public/irc/infso/cocom1/library?l=/public_documents_2010/cocom10-)

Article 5 (3) states that *"the storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned **has given his or her consent**, having been provided with clear and comprehensive information, in accordance with Directive 95/46/EC, inter alia, about the purposes of the processing"* (bold added).

Article 2 of the ePrivacy Directive provides that the definitions of Directive 95/46/EC shall apply to the ePrivacy Directive. Accordingly, consent has the same meaning as the data subject's consent defined in Article 2 (h) of that Directive, i.e. "a freely given specific and informed indication of his wishes (...)". Recital 17 of the ePrivacy Directive emphasizes this interpretation of consent and explains that "consent may be given by any appropriate method enabling a freely given specific and informed indication of the user's wishes, including by ticking a box when visiting an internet website". The Commission services understand this in their guidance document as follows:

- The user concerned must be **informed**<sup>163</sup>, i.e. the user must have information about the purpose of the intended operation(s) when deciding on whether or not to consent to this operation. This condition is emphasized by the wording of the paragraph ("having been provided with clear and comprehensible information, in accordance with Directive 94/45/EC<sup>164</sup>") and underlined by recital 24 ("The use of such devices should be allowed for legitimate purposes, with the knowledge of the user concerned."). In order to fulfil the condition of specific consent, consent must relate to a defined set of operations about which the user has been informed at the time of giving consent. Any changes in the purpose for which consent was given that occur afterwards cannot be assumed to be covered by that consent, such as processing of data for incompatible secondary purposes. This would be unlawful.<sup>165</sup> However, where a sequence of operations of storing and accessing data on a user's terminal equipment are part of processing for the same purpose, it is not necessary to obtain consent for each individual operation involving gaining access to or storing of information on a user's terminal, if the initial information and consent covered such further use. This is clarified by recital 25 which explains that "Information and the right to refuse may be offered once for the use of various devices to be installed on the user's terminal equipment during the same connection and also covering any further use that may be made of these devices during subsequent connections."

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[34\\_guidance/EN\\_1.0\\_&a=d](#). See also Opinion 15/2011 of the Article 29 Working Party on the definition of "consent", available at [http://ec.europa.eu/justice/policies/privacy/workinggroup/wpdocs/2011\\_en.htm](http://ec.europa.eu/justice/policies/privacy/workinggroup/wpdocs/2011_en.htm)

<sup>163</sup> In accordance with Article 10 of *Data Protection Directive* (95/46/EC) information should cover at least the identity of the company, the purposes of the intended processing and any further information in so far as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the individual.

<sup>164</sup> Article 10 of the *Data Protection Directive* lays down the minimum information that has to be provided to a data subject.

<sup>165</sup> Further processing of personal data for historical, statistical or scientific purposes is not generally to be considered as incompatible with the purposes for which the data have previously been collected, provided suitable safeguards are in place (see recital 29 and Article 6 (1) (b) of the *Data Protection Directive*).

- Consent should be **freely given**, i.e. the user must have an actual choice. This also implies that a user, having freely given his or her consent, can also revoke it at any time. Recital 25 however clarifies that freely-given consent implies that a user may not be able to be provided with a specific service if he or she does not consent to the storing and/or accessing of information on his or her terminal equipment: "Access to specific website content may still be made conditional on the well-informed acceptance of cookies or similar device, if it is used for a legitimate purpose".

The second sentence of Article 5 (3) provides for a possible exception to the principle of information and consent where the use of cookies and similar devices could be allowed without the need for transparency and consent. Following the amendments introduced by Directive 2009/136/EC, the exception may apply in certain cases. Firstly, it may apply if the storage is technical and designed "for the sole purpose of carrying out the transmission of a communication over an electronic communications network", or secondly, if the processing is "strictly necessary in order for the provider of an information society service explicitly requested by the subscriber or user to provide the service". As it is an exception to the principle, it must be interpreted restrictively, as illustrated by recital 66: "Exceptions to the obligation to provide information and offer the right to refuse should be limited to those situations where the technical storage or access is strictly necessary for the legitimate purpose of enabling the use of a specific service explicitly requested by the subscriber or user". Nevertheless, recital 66 also points out that "(w)here it is technically possible and effective, in accordance with the relevant provisions of Directive 95/46/EC, the user's consent to processing may be expressed by using the appropriate settings of a browser or other application".

The transposition deadline for the amended ePrivacy Directive expired on 25 May 2011. By the summer of 2011, the Commission had only received a limited number of notified measures of Member States that had implemented the new rules. At the end November of 2011, a majority of Member States had not yet adopted and/or notified the Commission the measures ensuring the full transposition of the new rules.<sup>166</sup> Some of the proposed national laws have already been criticised for being unworkable in practice.<sup>167</sup> Commission services will closely monitor the process of transposition of the new ePrivacy Directive in those Member States that have not yet fulfilled their obligations, and if requested provide further guidance.

#### 4.1.2.4 Self-regulation in behavioural advertising

Many companies have developed guidelines for behavioural advertising. Companies and industry associations increasingly publish their internal guidance for online/behavioural marketing and the processing of data. These codes supplement already legally binding requirements and confirm commitments on principles such as informing consumers about control of their data; how they are used (selling to third parties, use re-targeting etc.), and respecting the particular needs and vulnerabilities of young users.<sup>168</sup>

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<sup>166</sup> Only AT, DK, EE, IE, FI, LT, LU, LV, MT, SE, SK and UK notified full transposition at that time.

<sup>167</sup> This is for instance the case in the Netherlands.

<sup>168</sup> Recently, for example, the advertising associations EASA and IAB Europe agreed on *Good Practice Principles for Online Behavioural Advertising*, available at <http://www.iabeurope.eu/public-affairs/top-stories/self-regulation-framework.aspx>. Their approach is based on an icon that is placed on each targeted

The Commission supports self-regulatory efforts in order to ensure compliance with the EU data protection legal requirements and to provide transparency to users, and it will present new initiatives in the area of behavioural advertising in the first quarter of 2012. The industry is well placed to design innovative technical solutions, including browser settings and other applications. A self-regulatory solution for compliance with Article 5(3) of the ePrivacy Directive would need to be based on the following elements:<sup>169</sup>

- effective transparency, i.e. users should be provided with a clear notice of any targeting activity that is taking place;
- consent, i.e. an appropriate form of affirmation on the part of the user that he or she accepts to be subject to targeting and for what purposes;
- a user-friendly solution, possibly based on browser (or another application) settings;
- effective enforcement, including clear and simple complaint handling, reliable third-party compliance auditing and effective sanctioning mechanisms.

The Council of Europe has adopted a recommendation on profiling and data protection setting out minimum privacy standards to be implemented through national legislation and self-regulation.<sup>170</sup>

#### 4.1.2.5 Data Protection Directive

The Commission is preparing a major reform of the data protection rules laid down in the Data Protection Directive<sup>171</sup> to make the data protection framework more coherent and provide more legal certainty (adoption foreseen in the first quarter of 2012). The objectives are to set forth a comprehensive and consistent personal data protection legal framework which addresses new challenges such as technological developments in the digital economy and more intense globalisation, while eliminating unnecessary costs for operators, reducing administrative burdens, and ensuring more coherence in the data protection acquis. The reform also aims at clarifying and simplifying rules for international transfers of personal data and strengthening and clarifying the powers of data protection authorities to ensure compliance with data protection rules.

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advertisement, coupled with a website providing the user with information about how to switch off behaviourally targeted display ads from the company that the user signed up to. The principles oblige the participating companies to provide clear and unambiguous notice to users that it collects data for the purposes of online behavioural advertising. They also contain commitments on user education and the creation of complaints mechanisms.

<sup>169</sup> See in particular <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/452>

<sup>170</sup> Recommendation CM/Rec(2010)13 of the Committee of Ministers to member states *on the protection of individuals with regard to automatic processing of personal data in the context of profiling*, 23.11.2010, available at: [https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM/Rec\(2010\)13&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM/Rec(2010)13&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383)

<sup>171</sup> See the Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *A comprehensive approach on data protection in the European Union*, COM(2010) 609, 04.11.2010; available at: [http://ec.europa.eu/justice/news/consulting\\_public/0006/com\\_2010\\_609\\_en.pdf](http://ec.europa.eu/justice/news/consulting_public/0006/com_2010_609_en.pdf)

Individuals sometimes find it difficult to exercise their rights as laid down in the Data Protection Directive. For example, in practice it is not always easy to request deletion of data, or to get access to personal data. This is particularly an issue in the digital environment. Several provisions of the Directive have given rise to divergent interpretations and have not been implemented and enforced in a uniform manner in the Member States, thereby creating legal uncertainty and unnecessary costs for business.

### **4.1.3 Online gambling**

The online gambling market is the fastest growing segment of the overall gambling market, with annual revenues in excess of € 8.5bn in 2010. Some markets have traditionally been open to licensed and regulated operators, while in others national monopolies have tended to be authorised to develop online activities. While certain Member States with monopoly regimes have gradually opted for opening their online gambling and betting market, others are banning online gambling.

The development of the Internet and the increased supply of online gambling services are posing challenges for the co-existence of differing regulatory models, illustrated by the number of preliminary rulings in this area as well as by the development of significant so-called "grey" markets (i.e. operators licensed in at least one but not all Member States) and illegal online markets across the Member States. The enforcement of national rules is rendered difficult by several factors, raising the possibility of the need for enhanced administrative co-operation between competent national authorities, or for other types of action. A number of objectives, common to all Member States, notably consumer protection, the fight against fraud and money laundering, ensuring the integrity of sports (mainly the fight against match fixing), and efficient enforcement, could also benefit from policy action at EU level.

On 24 March 2011, the Commission launched an extensive public consultation on all relevant public policy challenges and possible Internal Market issues resulting from the rapid development of both licit and unauthorised online gambling offers directed at citizens located in the EU.<sup>172</sup> With the consultation the Commission exhausted a number of questions related to the effects of, and the possible public policy responses to, this growth in online gambling activity. The Commission sought to gain a full picture of the existing situation, to facilitate the exchange of best practices between Member States and to determine if the differing national regulatory models for gambling can continue to coexist or whether specific action may be needed in the EU for that purpose.

On the basis of the conclusions drawn from the results of this consultation, the Commission will adopt an action plan in 2012, which should amongst other objectives contribute to enhancing (administrative) cooperation and protecting consumers and citizens more efficiently.

### **4.1.4 Online pharmacies and other health issues**

The situation in the EU with respect to online pharmacies is highly fragmented. Most Member States still prohibit the online (or mail-order) sale of prescription medicines and some

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<sup>172</sup> See the DG's website: [http://ec.europa.eu/internal\\_market/services/gambling\\_en.htm](http://ec.europa.eu/internal_market/services/gambling_en.htm)

Member States prohibit the online sale of "over-the-counter" (OTC) medicines or medical devices. The latter is noteworthy given that the European Court of Justice ruled already in 2003 in the so-called *DocMorris* judgment that the absolute prohibition for the online sale of OTC medicines is not compatible with the Treaty's provisions concerning the free movement of goods.<sup>173</sup> In those Member States permitting online sales of medicines, specific regulations on safety standards differ considerably and sometimes do not even exist. All this has led to diversity in practice with well established legal e-pharmacy markets in countries like Germany, the Netherlands and the UK, but an almost total absence of legal internet sales in some eastern European Member States.

The result of this highly fragmented market is that cross-border transactions between legal online pharmacies and patients residing in other Member States are rare. The lack of uniform safety standards creates uncertainties for consumers/patients, who encounter difficulties if they wish to verify the legality of an e-pharmacy. This does not always stop them from buying medicines online, with the result that they, often unconsciously, buy from illegal sites, with all the attendant health risks.

The public consultation on e-commerce triggered a limited number of responses to online pharmacies, stressing its advantages and disadvantages. There is an increasing demand for buying medicines online for a number of reasons. The greatest benefit for consumers is the convenience of buying online and the subsequent savings of time, travelling costs and effort. The Internet should not replace necessary face-to-face consultations with appropriate medical practitioners but internet services can provide quick and easy access to medicines in particular for chronically ill people, less mobile citizens, the elderly, working people or inhabitants of rural areas. Second, medicines sold online can also be cheaper. In the case of non-reimbursed OTC medicines it is obvious that patients benefit from such lower prices directly. Finally, the Internet guarantees anonymity to users, allowing people to access advice or medicines that they may otherwise be reluctant to approach their pharmacists for in front of other customers in a physical pharmacy environment.

In the absence of developed legal markets, the Internet has, however, become dominated by illegal offers to which consumers (including the most vulnerable seeking "cheaper" solutions) are drawn despite their unsafe or falsified character. Other disadvantages mentioned were the lack of physical contacts, possibly illegal advertising, language difficulties, and the delivery time.

In 2007, the Council of Europe adopted a resolution recommending a number of safety standards which governments should respect so that mail-order trade in medicines can take place safely.<sup>174</sup> The resolution considers an identifiable legal framework as the best protection for consumers. It covers (a) the virtual dimension with transparency obligations concerning names of responsible persons, addresses, licensing authorities etc, and (b) the physical side providing obligations such as delivering medicines safely and effectively to the person who has ordered them or printing pharmaceutical advice in the language of the country of destination, etc.

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<sup>173</sup> Case C-322/01, *Deutscher Apothekerverband* [2003] ECR I-14887. Recently confirmed in the decision in the *Ker-Optika* judgment, Case C-108/09.

<sup>174</sup> Council of Europe Parliamentary Assembly Recommendation 1794 (2007), *The quality of medicines in Europe*; available at: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/erec1794.htm#1>

In line with the *DocMorris* judgment of 2003, the recently adopted Falsified Medicines Directive<sup>175</sup> lays down a number of conditions under which the Member States are obliged to allow the sale of OTC medicines online. Without prejudice to the provisions of the E-Commerce Directive, the Directive provides, for example, for additional information requirements and the creation of an obligatory "trust mark" ("common logo") for websites legally offering medicinal products on the Internet. A "reciprocal link" between the common logo and a national register of legally-operating online sellers<sup>176</sup> will allow verification of authenticity. The Commission shall adopt an implementing act establishing, amongst other things, the design of the common logo. The new Directive also addresses information campaigns in order to raise consumer awareness of the functioning of the common logo.

However, the Falsified Medicines Directive does not harmonise the rules for the sale of the medicinal products at a distance to the public. Member States may therefore adopt further requirements under which medicines are sold over the Internet, within the limits of the EU Treaty.

Following the the adoption of the Falsified Medicines Directive, the Commission is prioritising the implementation act on a "common logo" for legally operating sellers. In addition, it will continue to analyse the risks related to the online sales of medicines in the context of the transposition and the application of the Falsified Medicines Directive in the Member States.

Other EU initiatives also contribute to the realization of a safe and legally secure Internal Market for online health services. For instance, the recently adopted Directive on the application of patients' rights in cross-border healthcare<sup>177</sup> establishes a Community framework for cross-border healthcare. Article 13 of the Directive provides for the mutual recognition of prescriptions issued in another Member State. Article 14 foresees the creation of an eHealth network which should address topics where structured cooperation between Member States is needed.

Furthermore, the Commission Communication on the benefits of telemedicine for patients, healthcare systems and society,<sup>178</sup> aims at enabling the wider deployment of telemedicine services through building confidence, bringing legal clarity, solving technical issues and facilitating market development. This Communication will be complemented by a Staff

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<sup>175</sup> Directive 2011/62/EU of the European Parliament and of the Council of 8 June 2011 *amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, as regards the prevention of the entry into the legal supply chain of falsified medicinal products*, OJ L 174, 1.7.2011, p. 74, available at: [http://ec.europa.eu/health/files/eudralex/vol-1/dir\\_2011\\_62/dir\\_2011\\_62\\_en.pdf](http://ec.europa.eu/health/files/eudralex/vol-1/dir_2011_62/dir_2011_62_en.pdf)

<sup>176</sup> Directive 2011/62/EU refers to a "natural or legal person authorised or entitled to supply medicinal products to the public also at a distance in accordance with the legislation of the Member State".

<sup>177</sup> Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 *on the application of patient's rights in cross-border healthcare*, OJ L 88/45, 04.04.2011; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:088:0045:0065:EN:PDF>

<sup>178</sup> Commission from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *on telemedicine for the benefit of patients, healthcare systems and society*, COM (2008)689 final, 4.11.2008, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0689:FIN:EN:PDF>

Working Paper on the applicability of the existing EU legal framework to telemedicine services in the first half of 2012. Finally, the Commission will adopt by the end of 2012 its second eHealth Action Plan (eHAP), which will consolidate the actions which have been addressed to date, take them a step further where possible and provide a longer-term vision for eHealth in Europe.

## 4.2 Information

Once trust is achieved, sellers and buyers willing to go online still need to be able to advertise their offers, and to be able to obtain information on the offer that is available. Where necessary in this context, price comparison websites, restrictions on advertising, and unfair commercial practices should be tackled.

### 4.2.1 Price comparison websites

As outlined in the Staff Working Document "Bringing e-commerce benefits to consumers" accompanying the Communication on e-commerce, consumers are missing out from the full benefits of e-commerce, that is lower prices and a wider choice, since many offers are not available across borders. In 2010, just 9% of consumers bought a good or a service from an online business based in another EU country.

Even in cases where it is possible to buy across borders, information on these offers is not readily available. In 2010, eight in ten online shoppers used a price comparison website to research their purchases, yet as was shown in a recent Mystery Shopping study of price comparison websites, only a low proportion of price comparison websites (17%) give customers the option of offers available from other Member States. In addition, just 14% of tested price comparison websites are available in more than one language<sup>179</sup>. As a result, consumers often do not find out about cross-border offers.

The performance of the tested price comparison websites was sub-standard in many aspects when it came to the provision of information. Only one in two price comparison websites provided the full details of their business address. The situation with online retailers was somewhat better, with 67% of tested retailers providing a full business address.

In 60% of tested price comparison websites, it was not clear whether retailers had to pay to have their products listed and most price comparison websites did not display the correct final price. Information provision on added costs was rather poor. Just 19% of price comparison websites showed prices including VAT and other taxes, and delivery charges. Another worrying finding was that in more than half of trials, the cheapest price was not the first price displayed.

It is also disappointing that many online sellers apparently do not even know where to turn to find out more information about selling cross-border: only 29% of retailers knew where to look for information or advice about consumer legislation in force in other EU countries. Moreover, 73% of distance sellers were unaware of the exact length of the "cooling-off"

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<sup>179</sup> Data from the mystery shopping exercise taken from Civic Consulting. *Consumer market study on the functioning of e-commerce, 2011*, available at: [http://ec.europa.eu/consumers/consumer\\_research/market\\_studies/e\\_commerce\\_study\\_en.htm](http://ec.europa.eu/consumers/consumer_research/market_studies/e_commerce_study_en.htm)



period for distance sales in their own country<sup>180</sup>. A Mystery Shopping exercise tested whether retailers provide information on the rights of consumers in case they receive a faulty product. Disturbingly, only 37% of cases provided information on the right of consumers to have a faulty good repaired or replaced or to obtain a refund within two years after purchasing the goods. A positive finding was that four out of five (82%) tested retailers provided information concerning the consumer right to return a good without giving a reason within a minimum of seven days after the purchase.<sup>181</sup>

Commission services will work closely with product testing and other organisations providing information on product quality comparisons/price/best value for money in order to make results available and comparable across the EU.

#### **4.2.2 Restrictions on advertising**

One of the main drivers of online services across Europe is advertising. Virtually all online businesses reach clients through advertising or other forms of commercial communications. Many small and emerging companies depend on online advertising to facilitate their market entry and build competitive and successful businesses. Effective online advertising helps to maintain low barriers to market entry, particularly in a cross-border context.

Different tools for approaching online customers exist. The classical way is for the traders or service providers to create their own website in the hope that clients will find their business and make a direct order online through their website. Second, online businesses such as newspapers, video sharing sites, and commercial blogs offer content and services to consumers for free, earning revenue by selling advertising space on their sites to businesses that intend to reach those customers. Third, online enterprises such as travel planning sites sell both advertising space and their (own) services directly to consumers.

In all those business models, the use of search engines has become widespread. Customers rely increasingly on search engines to find their preferred product or service. Search engines charge advertisers on a pay-per-click basis. The trend is towards direct-response type advertising instead of display advertising.

Publishers have focussed on the importance of advertising revenues which account for 50% of newspaper revenues in the printed environment and almost 100% in the digital area.

Restrictions on advertising may therefore have a negative effect on the development of online services. Certain restrictions on advertising, such as on tobacco products, alcohol, gambling or financial services, are based on the principle of the protection of a general interest. These restrictions are often based on EU legislation and apply both in offline and online

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<sup>180</sup> European Commission, Flash Eurobarometer 300: *Retailers' attitudes toward cross-border trade and consumer protection*. March 2011, available at: [http://ec.europa.eu/public\\_opinion/flash/fl\\_300\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_300_en.pdf). The "cooling-off" period is the period after the purchase during which a consumer has the legal right to return a product purchased on the internet, by phone or post without paying a penalty. This "cooling-off" period ranges from 7 to 15 calendar days depending on the country where the product is sold. The recently adopted *Consumer Rights Directive* fully harmonizes the "cooling-off" period to 14 days (see Chapter 4.4.1).

<sup>181</sup> ECC-Net, *Online Cross-border Mystery Shopping – State of the e-Union*, October 2011 [http://ec.europa.eu/consumers/ecc/docs/mystery\\_shopping\\_report\\_en.pdf](http://ec.europa.eu/consumers/ecc/docs/mystery_shopping_report_en.pdf)

situations.<sup>182</sup> But the public consultation and Commission research make clear that other advertising restrictions are more specific and may be more difficult to justify under the fundamental freedoms of the TFEU. Some Member States still ban the sale of certain products online<sup>183</sup> or apply different conditions for online and offline marketing. National rules restricting the periods of sales for "brick and mortar" shops may also be applied to online traders established in other Member States. Regulated professions still face restrictions when developing online commercial communications. In this context, Article 24 (1) of the Services Directive requires Member States to remove total bans in so far as such bans concern a particular form of advertising such as advertising over the Internet.<sup>184</sup> It has also been reported that contractual prohibitions (e.g. on data portability) complicate multi-platform advertising campaigns. Finally, the application of data and privacy protection rules on cookies and behavioural targeting has sometimes been perceived as excessive by internet companies.

The Commission services will continue to monitor and analyse the national regulatory and contractual developments in the Member States and the EU with a view to assessing their compatibility with the Internal Market freedoms and other EU acquis.

### 4.2.3 Unfair commercial practices

The Unfair Commercial Practices (UCD) Directive<sup>185</sup> lays down harmonised rules for the fight against unfair commercial practices and contributes to a high level of consumer protection. It ensures that consumers are not misled or exposed to aggressive marketing and that any claim made by traders in the EU is clear, accurate and substantiated, enabling consumers to make informed and meaningful choices. The Directive also aims to ensure, promote and protect fair competition in the area of commercial practices.

Based on full harmonisation, it has four key elements:

- *A general clause*: a far-reaching general clause defining practices which are unfair and therefore prohibited.
- *Misleading practices (actions and omissions) and aggressive practices*: the two main categories of unfair commercial practices – are defined in detail.

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<sup>182</sup> For example, Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 *on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services ('Audiovisual Media Services Directive')*, OJ L 15.4.2010, L 95/1, imposes advertising bans and restrictions for tobacco products, medicines on prescription, and alcohol advertising. The restrictions and bans are applicable to linear and on-demand services. All audiovisual commercial communications (TV and on-demand) must be readily recognizable; not use subliminal techniques; not use surreptitious techniques; respect human dignity; not include/promote discrimination (e.g. based on sex, nationality, religion); not encourage behavior harmful to health (see codes of conduct on fatty food), safety or the environment; and not promote tobacco or prescription medication. The Directive covers television, on-demand services and emerging advertising techniques. The question has been raised to what extent the commercial communications rules of the *Audiovisual Media Services Directive* also apply to new services such as the online social networks.

<sup>183</sup> See recently for example the *Ker-Optika* judgment, Case C-108/09.

<sup>184</sup> See Case C-119/09, *Société fiduciaire nationale d'expertise comptable v Ministre du Budget, des Comptes publics et de la Fonction publique*, judgments of 05.04.2011; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0119:EN:HTML>

<sup>185</sup> *Unfair Commercial Practices Directive*, OJ L 149/22, 11.06.2005.

- *Safeguards for vulnerable consumers*: the Directive contains provisions that aim at preventing exploitation of vulnerable consumers.
- *Black list*: an extensive black list of practices which are banned in all circumstances.

The UCP Directive applies to commercial practices both in offline and online situations. The Directive is thus a crucial instrument for guaranteeing that any commercial information available on websites is fair and that it does not confuse consumers. In order to ensure that both consumers and traders are subject to the same rules across the EU, it is necessary for national authorities and courts to contribute to the uniform implementation and consistent enforcement of the Directive. In recent years the Commission has undertaken certain initiatives to promote the knowledge of the UCP and to achieve a uniform transposition in the Member States:

- the web page [www.isitfair.eu](http://www.isitfair.eu) contains practical information for consumers on how to check if they have fallen victim to an unfair commercial practice, and how to get help;
- in 2009 the Commission published online the Digital Guide for Consumers which clarifies the application of the Directive on online practices;
- joint surveillance actions ("sweeps") have been carried out on the basis of UCP provisions (websites selling airlines tickets, online mobile phone services, websites selling consumer electronic goods);
- on 3 December 2009 the Commission published detailed guidelines aiming to provide guidance on those key concepts and provisions of the Directive which are perceived to be problematic. It includes practical examples showing how the Directive works. The guidelines must evolve in response to the input received from national enforcers, the emergence of new practices or additional questions and the development of European and national case law;
- to support the Member States in achieving a uniform application and common understanding of the Directive, the Commission has developed a legal database which will make it possible to compare decisions and national case law of the Member States. The database is a comprehensive and user-friendly tool which gathers and gives public access to national laws transposing the Directive, jurisprudence, administrative decisions, references to related legal literature and other relevant materials.

In spring 2012 the Commission will publish a report on the application of the Unfair Commercial Practices Directive. The report will identify areas for possible future revision of the Directive and provide an overview of its application in the fields of financial services and immovable property. Among the many issues which may be examined in the report are the rules on sales promotions, misleading environmental claims, price information and price comparisons.

Simultaneously, in the context of the fight against unfair commercial practices the Commission will also evaluate the application of the Directive on Misleading and Comparative Advertising which covers B2B relationships.<sup>186</sup> More details will be made

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<sup>186</sup> Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 *concerning misleading and comparative advertising*, OL 375/21, 27.12.2006, available at: [http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=EN&numdoc=32006L0114](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=EN&numdoc=32006L0114)

available in the Consumer Action Plan 2014-2020 which the Commission will make public in 2012.

#### **4.2.4 Code of EU Online Rights**

The Digital Agenda announced the issuing by the Commission of a Code of EU Online Rights which should summarize existing digital user rights in the EU in a clear and accessible way to inspire trust and confidence among users of e-communications and online services.

The Code will build on the prototype of the eYou Guide, the online information tool for internet users and consumers explaining the digital rights and obligations provided for by EU law in the form of frequently asked questions and answers.<sup>187</sup> The Code is expected to be completed in 2012.

#### **4.2.5 Business awareness**

There is also a serious lack of knowledge among traders concerning e-commerce and consumer rights, in particular in cross-border situations. For example, only 29% of retailers know where to look for information or advice about consumer legislation in force in other EU countries, and 72% of distant sellers do not even know the exact length of the "cooling-off" period for distance sales in their own country.<sup>188</sup> As a result, many businesses find it too daunting to begin selling online or to take the next step and start selling cross-border.

The Commission will contribute to a more proactive policy by using its existing networks such as the European Enterprise Network and/or the European Consumer Centres Network, to provide information to (potential) online traders about their obligations when selling cross-border and also to create more awareness about the opportunities offered by selling in other EU countries and taking advantage of the potential of the Internal Market.

### **4.3 Access**

Both consumers and businesses face legal and practical obstacles when they seek to operate online. These barriers include discrimination on the basis of country of residence; difficulties in obtaining capital; problems registering domain names or getting internet access; territorial restrictions on intellectual property rights; and grey markets.

#### **4.3.1 Discrimination: Article 20 (2) of the Services Directive**

There is a growing tendency for businesses to use the Internet to foster the sales of their goods and services by exploiting the global availability of their websites. However, most online traders still serve a very limited number of Member States. Online buyers are regularly confronted with refusals of online web shops to deliver if they are not residing in the same Member State, undermining the consumers' confidence in the digital Internal Market. The most frequent cases concern web shops that either refuse to sell items or services to residents

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<sup>187</sup> [http://ec.europa.eu/information\\_society/eyouguide/navigation/index\\_en.htm](http://ec.europa.eu/information_society/eyouguide/navigation/index_en.htm)

<sup>188</sup> European Commission, Flash Eurobarometer 300: *Retailers' attitudes toward cross-border trade and consumer protection*. March 2011, available at: [http://ec.europa.eu/public\\_opinion/flash/fl\\_300\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_300_en.pdf).

of certain Member States, or sell identical items or services at a (much) higher price due to the consumer's country of residence. It is not unusual that websites automatically route the consumer to another website which corresponds to their country of residence, enabling the web shop to maintain different price policies based on national borders. Consumer transactions may also fail at the stage of revealing credit card details due to the address of the owner. Complaints received by the Commission and the European Consumer Centres indicate that such practices exist for a wide range of services such as the sale of electronic goods, textiles, bikes, DIY goods, music downloads, rental cars, mobile phone contracts etc.

Article 20 (2) of the Services Directive<sup>189</sup> prohibits discrimination on grounds of nationality or residence in B2C and B2B relationships. It obliges Member States to ensure that general conditions of access to a service which is available to the public at large by a service provider do not contain discriminatory provisions based on nationality or the place of residence of recipients. This does not exclude that service providers offer different tariffs, prices and other conditions where those differences are directly justified by objective criteria.

In accordance with Article 20(2) of the Services Directive, Member States have an obligation to ensure that the above-mentioned non-discrimination principle is implemented in their national legal orders. Further to this implementation, it is for the competent national authorities to ensure that general conditions of access to a service made available to the public by online traders falling under the scope of the Services Directive comply with the national provisions implementing Article 20(2) of the Services Directive.

The application of these national provisions will require a case-by-case assessment of the possible "objective reasons" for the different treatment. Recital 95 of the Services Directive gives examples of such objective circumstances. Additional costs may be justified because of the distance involved or the technical characteristics of the provision of a service; different market conditions such as a higher or lower demand influenced by seasonal factors; pricing by different competitors, or extra risks linked to having to comply with rules different to those of the Member State of establishment. For example, delivery costs of physically heavy items such as television sets or differences in VAT could objectively justify higher prices. The provision of a service may also be refused because of the lack of a required intellectual property right in a particular territory. In addition, online service providers have invoked as objective justifications for different treatment the perceived insecurity of transactions and the higher risk of fraud and non-payments in cross-border transactions, and the difficulty of resolving cross-border disputes which is aggravated by the persistent complexity of cross-border legal arrangements.

Member States had to implement the Services Directive into their national legal orders by 28 December 2009. According to the information held by the Commission, a majority of Member States have implemented Article 20 (2) of the Services Directive through a provision in the horizontal law transposing the Services Directive.

The Commission has received numerous complaints and queries from citizens who have encountered problems when trying to buy services in other Member States. However, to the Commission's knowledge there have been very few cases of administrative application of the

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<sup>189</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 *on services in the internal market*, OJ L 376/36, 27.12.2006; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0036:0068:EN:PDF>

national provisions implementing Article 20 (2) of the Services Directive and as yet no instances of judicial application in any Member State<sup>190</sup>.

The Commission is currently assessing the completeness and correctness of the implementation of Article 20 (2) of the Services Directive. Based on the outcome of this research, it will establish guidelines to assist national authorities on the proper application of the national provisions implementing Article 20 (2) Services Directive (adoption in 2012).

#### **4.3.2 Access to capital for SMEs**

Small and Medium Sized Enterprises (SMEs) play an important role in fostering growth and innovation and this holds in particular for the online services market. Despite their importance, they encounter difficulties in raising finance for several reasons.

First of all, risk aversion tends to make investors and banks shy away from financing firms in their start-up and early expansion stages. Second, many SMEs lack awareness of the advantages and disadvantages of different forms of finance and knowledge of how best to present their investment projects. Third, SMEs tend to have a weak equity position, partially due to the late payment culture in Europe.

SMEs providing online services face an additional hurdle in accessing finance. As a rule, they have few tangible assets and therefore have difficulties in getting access to traditional bank finance. Innovative SMEs therefore often seek access to capital markets beyond bank financing, in particular through venture capital. Venture capital markets are, however, not sufficiently developed in Europe as they encounter significant difficulties in raising capital abroad and in operating across borders because of a multiplicity of national regulatory regimes and tax barriers.

On 7 December 2011, the Commission adopted an action plan on access to finance for SMEs.<sup>191</sup> The action plan includes measures to facilitate the cross-border provision of venture capital services in view of the existing multitude of national regulatory regimes and tax barriers.

#### **4.3.3 Domain names**

For many online services, obtaining a national top level domain name (TLD) is a major asset for reasons of trust and reputation. Globally operating internet companies therefore usually choose to have their country specific sites with a TLD of the country in question. Businesses that register under a local domain name will very often also be ranked higher when their customers are using search tools. However, the Commission services have received complaints from companies frustrated in their attempts to obtain TLDs because certain Member States require natural and legal persons to be established within their territory, and/or have a "real and substantive" connection with the country. While this may be an important element in building trust and reputation it may also create a barrier to the cross-border

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<sup>190</sup> Case nr. 10/04928, <http://www.forbrugerombudsmanden.dk/Sager-og-praksis/Lov-om-tjenesteydelser/Sager-efter-lov-om-tjenesteydelser/Lov-om-tjenesteydelser-i-det-indre-marked>

<sup>191</sup> See <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/879>

provision of online services, especially in cases where SMEs are trying to penetrate cross-border markets and expand their activities beyond national borders.

National domain names as such are not regulated at EU level. However, requiring a local presence for the registration of a TLD could be a restriction to the freedom to provide services (Art. 56 TFEU) and might also be in breach of the E-Commerce Directive (Article 3 (2), freedom to provide information society services). The Commission services will monitor the establishment requirements for obtaining TLDs and their compatibility with the Internal Market freedoms and other applicable EU *acquis*.

#### 4.3.4 Net neutrality

Net neutrality is the principle according to which the Internet should be neutral, open and easily accessible. This principle is not always compatible with the practice of "traffic management" generally used by internet providers. A recent Commission consultation on net neutrality and the open Internet<sup>192</sup>, shows a consensus of opinion on the necessity of having a certain degree of traffic management: on the one hand, techniques like packet differentiation and IP routing guarantee a minimum quality to end-users for services that require a differentiated network speed (such as videoconferencing), while, on the other hand, a certain degree of filtering is necessary to block harmful traffic such as cyber attacks and viruses.

Traffic management can, however, also be misused by internet providers to prevent access to information society services, in particular when they are competing with the services of the internet provider (such as telephony or television services). This can be done either by blocking certain services outright or by making it very unattractive to access them, usually by using a technique called "throttling" that degrades network quality.

The Commission Communication on the open Internet and net neutrality in Europe<sup>193</sup> reports several instances of blocking of legal services (in particular of Voice-over-Internet-Protocol services by mobile internet providers), but stresses that more exhaustive evidence is needed before policy conclusions can be drawn at the European level. The Communication furthermore recalls that the Commission reserves its right to assess under Articles 101 and 102 TFEU any behaviour related to traffic management that may restrict or distort competition. In the first half of 2012, the Commission will publish evidence from investigations by the Body of European Regulators for Electronic Communications (BEREC). On that basis it will decide whether, in addition to measures that should increase transparency and facilitate switching, specific guidance on net neutrality is necessary.<sup>194</sup> In the meantime, more stringent measures to ensure competition and access to certain online services are not excluded.

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<sup>192</sup> See: [http://ec.europa.eu/information\\_society/policy/ecommm/library/public\\_consult/net\\_neutrality/index\\_en.htm](http://ec.europa.eu/information_society/policy/ecommm/library/public_consult/net_neutrality/index_en.htm)

<sup>193</sup> Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of Regions, *The open internet and net neutrality in Europe*, COM(2011)222 final, 19.4.2011; available at: [http://ec.europa.eu/information\\_society/policy/ecommm/doc/library/communications\\_reports/netneutrality/comm-19042011.pdf](http://ec.europa.eu/information_society/policy/ecommm/doc/library/communications_reports/netneutrality/comm-19042011.pdf)

<sup>194</sup> In The Netherlands a draft law is discussed that should guarantee net neutrality, Kamerstuk, 32549/17, available at: <https://zoek.officielebekendmakingen.nl/dossier/32549/kst-32549-17>

The Commission will in 2012 publish the evidence that will come to light from BEREC's work on net neutrality. On that basis, the Commission will assess the need for more stringent measures to achieve competition and the choice consumers deserve.

#### **4.3.5 Intellectual property rights**

The development of the Internet has meant the birth of a trade in goods and services that have a distinct characteristic – independence from any physical medium. Music, films and books can be downloaded or viewed remotely without the need to visit shops or have them delivered to one's home. Equally, cultural and sporting events can be viewed on the Internet without having to go to a theatre or sports venue.

Historically, music was the first digital content available on the Internet. Thanks to further technological development including the growth of broadband networks, videos were able to "travel" on the network. Today, with the availability of adequate computer support for reading text, books have become services which can be downloaded on to digital readers. Businesses have developed new business models to promote transactions in online digital goods.

Although this new form of trade creates huge expectations on the part of consumers, the online content-related (legal) services are normally not available in all Member States and tend to concentrate in a limited number of Member States. These services also tend to target specific territories and limit the possibility for consumers to use them across borders. It is undisputed that Europe remains to a very great extent a patchwork of national online markets and that there are a number of regulatory and non-regulatory reasons for this.

The principle of territoriality that applies to copyright as well as related licensing practices that often necessitate obtaining obtain separate licences for all the countries covered are two of the main obstacles to cross-border trade. These two issues were identified by many respondents to the public consultation. Several respondents called for further harmonisation of intellectual property rules. Other than the difficulties linked to licences and legal uncertainty of the current intellectual property system, market players are also confronted with sometimes conflicting claims, from different claimants, over ownership of goods or rights for which they hold a licence. In addition, complaints have been made about the practical difficulties businesses face when they wish to provide cross-border digital content services which are copyright-protected, resulting in their needing to enter into licence agreements outside their home country. Copyright holders usually strongly defend the traditional territoriality system of rights and licences.

The fact that copyright protection is based on territoriality should not be seen as leading automatically to territorial licensing. It is nevertheless the case that right holders and, equally importantly, online service providers adapt works according to the linguistic and cultural tastes of each country in an attempt to maximise economic returns e.g. film distributors' staggered release windows.<sup>195</sup> In the absence of a European public domain, a common

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<sup>195</sup> Territorial licensing practices were also the subject of a recent case before the European Court of Justice. The Premier League case concerns the restriction of access by means of conditional access technology (decoder cards) to sports broadcasts which are transmitted via satellite in various Member States. Premier League brought actions against a number of UK pubs using non-UK pay-TV subscriptions to show live Premier League matches. The Court held that national legislation protecting sporting events is capable of justifying a restriction to the free movement of services (Article 56 *TFEU*). However, where a premium is



language, and common cultural preferences (humour, taste, decency, etc) the production and consumption of cultural products still remains overwhelmingly national.<sup>196</sup>

Intellectual property right holders also raised the issue of counterfeiting and piracy as an obstacle to e-commerce. Piracy deprives creators from a fair reward whereas counterfeiting distorts the Single Market because of the unfair competition between businesses. One of the crucial means of combating piracy is the development of legal offers by providers. In parallel, the development of cross-border trade should also help increase the income of authors by attracting potential customers from all Member States.

On 24 May 2011 the Commission published a Communication with the aim of boosting the Single Market for Intellectual Property Rights.<sup>197</sup> The new Intellectual Property Strategy announces a number of EU initiatives:

1. The Commission will present a legislative proposal to **simplify the collective management of copyright** in the EU. Collecting societies licence the rights of creators and collect and distribute their royalties. The Commission's focus will be two-fold. The first initiative will be the establishment of common rules for collecting societies in order to enhance the governance and transparency of all collectively-managed revenue streams. Clearer rules on the governance and transparency of collecting societies will create a level playing field amongst right holders, commercial users and collecting societies. Second, the creation of a clear and well-functioning legal framework for the multi-territorial licensing of musical works for online services will encourage the uptake of new business models that provide online services to European consumers.
2. In order to promote the dissemination of Europe's intellectual and cultural heritage, the Commission tabled on 24 May 2011 **a legislative proposal to facilitate the**

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paid by the television stations in order to ensure them absolute territorial exclusivity, this goes beyond what is necessary to ensure the right-holders appropriate remuneration, because such a practice may result in artificial price differences between the partitioned national markets. Such partitioning and such an artificial price difference are irreconcilable with the fundamental aim of the Treaty, which is completion of the Internal Market. Provisions on freedom to provide services impose obligations on the Member States but do not prohibit market players, such as FAPL, from imposing territorial restrictions in commercial agreements. The Court confirmed that the clauses of an exclusive licence agreement concluded between a holder of intellectual property rights and a broadcaster constitute a restriction on competition prohibited by Article 101 TFEU where they oblige the broadcaster not to supply decoding devices enabling access to that right-holder's protected subject-matter with a view to their use outside the territory covered by that licence agreement (See: Case C-430/08, *Football Association Premier League Ltd v QC Leisure* and C-429/08, *Karen Murphy v Media Protection Services Limited*, judgment of 4 October 2011, available at <http://curia.europa.eu/juris/recherche.jsf?language=en>).

<sup>196</sup> One of the reasons adduced to explain this shortage is the fact that certain (national) markets are far too narrow or even inexistent, meaning investments are not made. Cross-border access to cultural goods and services, however, helps European citizens to better know and understand each other's cultures, to appreciate the richness of cultural diversity and to see for themselves what they have in common.

<sup>197</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Single Market for Intellectual Property Rights. Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe*, COM(2011) 287 final, 24.05.2011, available at: [http://ec.europa.eu/internal\\_market/copyright/docs/ipr\\_strategy/COM\\_2011\\_287\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf)

**digitisation and making available of "orphan works".**<sup>198</sup> Orphan works are works such as books, newspapers or films that are still protected by copyright but whose copyright holders are not known or cannot be traced. Therefore, the right holders cannot be contacted to give their permission for libraries and archives to digitise their works and make them available online. The lack of a common EU framework on orphan works is a particular obstacle to the development of European large-scale digital libraries. As part of its efforts towards the creation of digital libraries, the Commission brokered a Memorandum of Understanding with Key Principles between authors, publishers, libraries and collecting societies to enable online **access to out-of-commerce books through licensing models**. The agreement was signed on 20 September 2011. Out-of-commerce books are books that are in-copyright but that are no longer in customary channels of commerce. They differ from orphan works in that their right holders (authors and publishers) are known.<sup>199</sup>

3. The proper functioning of the Internal Market requires the development of a durable approach to private copying levies. Remuneration for private copying of copyright-protected works is collected in the form of levies on recording media or recording equipment (photocopiers, printers, Mp3 players, CDs and DVDs etc.). However, different rules and tariffs apply across Member States. This impedes the smooth cross-border flow of goods that are subject to levies. The Commission has appointed a high-level mediator, M. Antonio VITORINO, tasked with resolving differences amongst relevant stakeholders and finding workable solutions to resolve outstanding issues that should lay the ground for comprehensive legislative action at EU level by 2012. The issues that will be looked at specifically are the methodology used to impose set tariffs, the equipment which should be subject to levies, and ways to improve the cross-border functioning of disparate national levy systems.<sup>200</sup>
4. In the audiovisual sector, the Commission launched a public consultation on the **online distribution of audiovisual works** on 13 July 2011 which was open until 18 November 2011.<sup>201</sup> On the basis of the results of the public consultation, the Commission will determine whether any follow-up action needs to be taken in order to overcome Digital Single Market barriers and stimulate the European audiovisual sector as regards issues such as video-on-demand (VoD) services and cross-border broadcast services (2012).

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<sup>198</sup> Proposal for a Directive of the European Parliament and of the Council *on certain permitted uses of orphan works*, COM(2011) 289 final, 24.05.2011, available at: [http://ec.europa.eu/internal\\_market/copyright/docs/orphan-works/proposal\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/orphan-works/proposal_en.pdf)

<sup>199</sup> See for more details European Commission, Memorandum of Understanding: *Key Principles on the Digitisation and Making Available of Out-of-Commerce Works*, 20.09.2011, available at: [http://ec.europa.eu/internal\\_market/copyright/copyright-info/copyright-info\\_en.htm#mou](http://ec.europa.eu/internal_market/copyright/copyright-info/copyright-info_en.htm#mou).

<sup>200</sup> On 23 November 2011, Mr. António Vitorino, former European Commissioner for Justice and Home Affairs, was appointed to take up the mission of mediator to lead the process of stakeholder dialogue on private copying levies. Mr. Vitorino's task will be to moderate stakeholder discussions with the objective of exploring possible approaches to harmonisation of both the methodology used to impose levies and the systems of administration of levies. It is planned that the discussions will commence in the beginning of 2012 and will be completed before the summer of 2012. See statement by Commissioner Barnier available at: [http://ec.europa.eu/commission\\_2010-2014/barnier/docs/speeches/20111123/statement\\_en.pdf](http://ec.europa.eu/commission_2010-2014/barnier/docs/speeches/20111123/statement_en.pdf).

<sup>201</sup> See [http://ec.europa.eu/internal\\_market/consultations/2011/audiovisual\\_en.htm](http://ec.europa.eu/internal_market/consultations/2011/audiovisual_en.htm).

5. As part of its long-term strategy on copyright, the Commission will assess the feasibility of creating a **European Copyright Code**. A future Code could envisage a comprehensive codification of the EU copyright Directives and provide an opportunity to examine the feasibility of an optional "unitary" copyright title to provide right holders with the flexibility to choose whether to license and enforce their copyrights nationally or on a multi-territory basis. Given its far-reaching implications, the creation of a European Copyright Code requires further study and analysis.<sup>202</sup>
6. Furthermore, the Commission will pursue its efforts exploring to what extent the sale of counterfeit goods over the Internet can be reduced through voluntary measures, involving the stakeholders most concerned by this phenomenon (right holders and internet platforms). In this context, a **Memorandum of Understanding** was signed by major internet platforms and right holders on 4 May 2011.<sup>203</sup> Over the coming twelve months, these stakeholders will review and measure progress under the auspices of the Commission services. The Commission is also working on a review of the IPR Enforcement Directive 2004/48/EC,<sup>204</sup> *inter alia* identifying ways to create a framework allowing more effective combating of IPR infringements via the Internet.
7. Journalists are authors and their work is crucial in Europe's pluralistic and democratic society. Protecting author's rights for journalists and ensuring that they maintain a say over how their works are exploited is central to maintaining independent, high-quality and professional journalism. Publishers play an important role in disseminating the work of writers, journalists, researchers, scientists, photographers and other creators. The Commission believes it important to safeguard the rights that journalists and publishers have over the use of their works on the Internet, in particular in view of the rise of **news aggregation services**. Commission services will continue to examine these issues in the light of new legal and technical developments.

#### 4.3.6 Grey markets

In its application report on the implementation of Directive 98/84/EC (on the protection of conditional access services)<sup>205</sup>, the Commission noted that European citizens are restricted in their cross-border access to audiovisual services whether this be on demand, Internet or satellite. The inadequacy of rules governing the provision of digital cultural goods, including across borders, an area of importance given increasing mobility of European citizens in the

<sup>202</sup> The Commission will examine these issues in a report on the application of Directive 2001/29/EC of 22 May 2001 *on the harmonization of certain aspects of copyright and related rights in the information society*, OJ L 167, 22.6.2001, p.10. The report will be published in 2012.

<sup>203</sup> See: [http://ec.europa.eu/internal\\_market/iprenforcement/stakeholders\\_dialogues\\_en.htm](http://ec.europa.eu/internal_market/iprenforcement/stakeholders_dialogues_en.htm)

<sup>204</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 *on the enforcement of intellectual property rights*, OJ L 157, 26.6.2004, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:195:0016:0025:en:PDF>

<sup>205</sup> Report from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of Regions, *Second report on the implementation of Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access*, COM(2008) 593 final, 30.09.2008; available at: [http://ec.europa.eu/dgs/internal\\_market/docs/evaluation/2008cad\\_eval\\_en.pdf](http://ec.europa.eu/dgs/internal_market/docs/evaluation/2008cad_eval_en.pdf)

EU, has contributed to the emergence of "grey markets". "Grey markets" develop when subscribers to pay-TV are prevented from viewing outside national territories due to a system of contracts with territorial limitations. Many citizens living abroad view their pay channels from their place of expatriation. These subscriptions are usually obtained through an address of convenience in the country of the service provider, often the country of origin of the expat. The grey market is well known but has never been quantified.

In its judgment Premier League<sup>206</sup> of 4 October 2011, the European Court of Justice ruled that the import, sale and use of pay-TV subscriptions from outside the national territory fall under the Internal Market freedoms. It held that the practice of holders of intellectual property rights to forbid broadcasters from supplying cross-border services in order to protect exclusive licence agreements are anticompetitive and unjustified within the EU.

In 2012, the Commission services will publish a study on the economic potential of cross-border pay-to-view audiovisual media services.

#### **4.3.7 Re-use of public information**

Public information can be defined as all the information that public bodies in EU produce, collect or pay for. Examples are geographical information, statistics, weather data, public transport data, data from publicly funded research projects, and digitised books from libraries. This information has an enormously – and currently untapped – potential for re-use in new products and services and for efficiency gains in administrations. Overall economic gains from opening up this resource could amount to € 40 billion a year in the EU.

Directive 2003/98/EC of the Parliament and of the Council on the re-use of public sector information (the PSI Directive)<sup>207</sup> was adopted on 17 November 2003. The PSI Directive harmonised the basic conditions of re-use across the EU and removed major barriers to re-use in the Internal Market.

Despite a minimum harmonisation in 2003 and although some progress has been achieved, significant differences in national rules (e.g. licensing and pricing conditions) and practices still exist. This results in fragmentation in the internal information market for PSI based products and services. Another key barrier is the lack of awareness of public organisations of the potential of open data. Moreover, there are practical and technical issues holding back the development of a true public data re-use market. In particular, lack of interoperability between the information resources from different organisations and countries, and the non-availability of the information in a machine-readable format make it impossible to reap maximum benefits from the new opportunities that the data offer. In addition, more support than available now is needed for R&D and innovation on data analysis and visualisation tools.

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<sup>206</sup> Joined Cases C-403/08 and C-429/08, *Football Association Premier League Ltd v QC Leisure and Karen Murphy v Media Protection Services Limited*, judgment of 4 October 2011, available at <http://curia.europa.eu/juris/recherche.jsf?language=en>

<sup>207</sup> Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 *on the re-use of public sector information*, OJ L 345/90, 31.12.2003, available at: [http://ec.europa.eu/information\\_society/policy/psi/docs/pdfs/directive/psi\\_directive\\_en.pdf](http://ec.europa.eu/information_society/policy/psi/docs/pdfs/directive/psi_directive_en.pdf)

These considerations have led the Commission to revise and strengthen its public data strategy by *inter alia* targeting both the legal framework for re-use and available support tools.

The Commission's revised strategy has three complementary strands:

- Adapting the framework in favour of data re-use, including legal, soft law and policy measures;
- Mobilising financing instruments by prioritising open data in R&D&I and infrastructure programmes;
- Facilitating coordination and experience-sharing between Member States.

On 12 December 2011, the Commission adopted the strategy in a Communication to the European Parliament and to the Council. The Communication is accompanied by a proposal for modifying the PSI Directive (the main element of the legal framework for re-use), notably its scope and principles on charging for access and use, and the revised Commission's decision on the re-use of information.<sup>208</sup>

### 4.3.8 Competition

#### 4.3.8.1 General

Competition is of key importance in ensuring a well-functioning digital Single Market. It is fostered by the application of general EU competition rules,<sup>209</sup> as well as by interoperability and efficient standards. Commission services closely monitor the information and internet sectors to ensure that market players comply with EU competition law.

For instance, in spring 2010 the Commission launched two investigations into business practices by Apple involving the iPhone. Apple had made warranty repair services available only in the country where the iPhone was bought, thereby potentially partitioning the Internal Market. Moreover Apple had restricted the terms and conditions of its licence agreement with independent developers of applications requiring the use of Apple's native programming tools and approved software languages to the detriment of third-party software. In September 2010, following a change of policy by Apple, the decision was taken to close both investigations.<sup>210</sup>

Similarly, on 20 November 2010 the Commission started investigations into Google following allegations of abuse of market dominance in the areas of online search, online advertising and online advertising intermediation.<sup>211</sup>

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<sup>208</sup> See for details [http://ec.europa.eu/information\\_society/policy/psi/index\\_en.htm](http://ec.europa.eu/information_society/policy/psi/index_en.htm)

<sup>209</sup> Mainly the prohibition of cartels (Article 101 *TFEU*), the prohibition of abuse of a dominant position (Article 102 *TFEU*) and the regulation of mergers and acquisitions (based on Regulation 139/2004)

<sup>210</sup> See Press Release, *Antitrust: Statement on Apple's iPhone policy changes*, IP/10/1175, 25.09.2010, available at : <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1175&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>211</sup> See Press Release, *Antitrust: Commission probes allegations of antitrust violations by Google*, IP/10/1624, 30.1.2010, available at:

On 6 December 2011 the Commission also announced that it had opened formal antitrust proceedings to investigate whether international publishers have, possibly with the help of Apple, engaged in anti-competitive practices affecting the sale of e-books in the European Economic Area, in breach of Article 101 TFEU.<sup>212</sup>

In the field of mergers and acquisitions, on 21 January 2010 the Commission agreed to the planned acquisition of Sun Microsystems by Oracle.<sup>213</sup> The acquisition raised the issue of the competitive effect of open source software products.

Interoperability of standards is also crucial for guaranteeing access to the Internal Market. Against this background, on 14 December 2010 the Commission adopted its guidelines on cooperation agreements.<sup>214</sup> These provide that the standard-setting process should be transparent and accessible to all interested market players. Moreover, IPR right holders are encouraged to commit to license on fair, reasonable and non-discriminatory terms (FRAND commitment) to ensure the accessibility of standards. This should considerably drive down the cost of innovation.

Stakeholders in the responses to the public consultation on the future of electronic commerce in the Internal Market and the implementation of the ECD also raised the issue of the provision of online press services being allegedly hampered by conditions set by certain "application platforms". For instance, a major application store would require from online press providers that their applications include an option to conclude commercial transactions *within* the application (instead of providing a link to a website where the commercial transaction is concluded), in which case the application platform would receive 30 % of the transaction value.

#### 4.3.8.2 Vertical distribution agreements

Competition rules on vertical restraints have been crucial in removing the unjustified restrictions on e-commerce contained in distribution agreements by prohibiting anticompetitive restrictions to cross-border internet marketing and sales.<sup>215</sup> However, certain

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<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1624&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>212</sup> See Press Release, *Antitrust: Commission opens formal proceedings to investigate sales of e-books*, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1509>

<sup>213</sup> See announcement of this decision on DG Competition's web-page: [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_5529](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_5529)

<sup>214</sup> European Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, OJ C11, 14.1.11, available at: [http://europa.eu/legislation\\_summaries/competition/firms/l26062\\_en.htm](http://europa.eu/legislation_summaries/competition/firms/l26062_en.htm)

<sup>215</sup> For instance, the Commission has on several occasions (*Yves Saint Laurent*, 2001; *B&W Loudspeakers*, 2002) approved selective distribution networks on the condition that the company removed clauses prohibiting authorised distributors from selling over the Internet. See also the recent judgement of the ECJ in a case on the question whether an absolute refusal of a cosmetic and personal care company to allow its French distributors to sell its products on the Internet is compatible with the (now) Article 101 TFEU and the Block Exemption Regulation of 1999: Case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la Concurrence and Ministère de l'Economie, de l'Industrie et de l'Emploi*. In its judgment of 13 October 2011 (available at: <http://curia.europa.eu/juris/recherche.jsf?language=en>), the ECJ

stakeholders responding to the public consultations expressed their concerns about manufacturers imposing "brick and mortar" requirements on their distributors when engaging in online sales. This, it is argued, hinders the development of a free digital Internal Market.

The new Commission Regulation on the application of Article 101 (3) TFEU to categories of vertical agreements and concerted practice,<sup>216</sup> and the accompanying new Commission Guidelines on Vertical Restraints<sup>217</sup> entered into force on 1 June 2010. The new Block Exemption Regulation sets out the principles for the assessment of vertical distribution agreements under Article 101 TFEU.

In general, distribution agreements are prohibited if they contain "hardcore restrictions", such as restraints on the buyer's ability to determine a sale price ("resale price maintenance") or certain types of re-sale restrictions, which may restrict competition and create barriers to the Internal Market to the detriment of consumers. Manufacturers can, however, implement certain types of distribution systems such as exclusive distribution or selective distribution. Within exclusive distribution systems, the manufacturer may protect an exclusive distributor against other distributors making active sales on its territory, but the manufacturer cannot restrict its distributors from responding to customer demand and selling its products throughout the Internal Market (passive sales): any such restriction would be a hardcore restriction. Within selective distribution systems manufacturers can choose their distributors on the basis of specified criteria and prohibit sales to unauthorised distributors. But distributors should then be free to actively sell to other authorised distributors throughout the Internal Market and to any end consumer. Any other restriction of their freedom regarding where and to whom they may sell in the area where the selective distribution system is applied would be a hardcore restriction.

The same rules apply to offline and online sales. For, in the online world, suppliers can also set up an exclusive distribution network which allows them to restrict active sales within exclusively defined territories or customer groups or to set up a selective distribution system and require quality standards for the use of an internet site to sell their products. Since the Internet allows distributors to reach different customers and different territories, certain restrictions on the use of the Internet by distributors are dealt with as hardcore restrictions. In principle, every distributor must be allowed to use the Internet to sell products. For example, any obligation on distributors to automatically reroute customers located outside their territory, or to terminate consumers' transactions over the Internet if their credit card data reveal an address that is not within the distributor's territory, are hardcore restrictions. Similarly, any obligation that dissuades distributors from using the Internet, such as a limit to the proportion of overall sales which a distributor can make over the Internet, or the requirement that a distributor pays a higher purchase price for units sold online than the same

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considered that such a restriction infringes Article 101(1) TFEU as it has an anti-competitive object, and cannot benefit from the Vertical Restraints Block Exemption Regulation.

<sup>216</sup> Commission Regulation (EU) No. 330/2010 of 20 April 2010 *on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices*, OJ L 102/1, 23.04.2010 (the "*Block Exemption Regulation*"); available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:102:0001:0007:EN:PDF>

<sup>217</sup> Information from European Union Institutions, Bodies, Offices and Agencies, *European Commission Guidelines on Vertical Restraints*, OJ C 130/1, 19.05.2010; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:130:0001:0046:EN:PDF>

distributor pays for units sold offline ("dual pricing"), is also considered to be a hardcore restriction.<sup>218</sup>

In addition, the new rules specify that qualitative and quantitative selective distribution agreements are not block exempted when the market share of supplier or buyer exceeds 30%.<sup>219</sup> It should also be recalled that, where an agreement contains one or more hardcore restrictions, the agreement is not only excluded from the benefit of the block exemption, it is also presumed unlikely that the agreement will meet the conditions set out in Article 101 (3) TFEU which would constitute compliance with competition rules.

The Commission services will closely monitor the e-commerce and other digital sectors to ensure that market players comply with EU competition law.

## 4.4 Contracting

### 4.4.1 Contract law

The E-Commerce Directive contains basic provisions on online contracting. It contains pre-contractual information requirements for business and consumer contracts and ensures through the "equivalence principle" that contracts concluded electronically are valid (see Chapter 2.2.1.2). Respondents to the e-commerce consultation, however, identified the lack of a unified substantive contract law, both in B2B as in B2C contractual relations, as a major obstacle for the creation of a digital Internal Market.

The European legal framework on contract law presents a highly diverse picture characterised by differences in substantive contract law rules. In order to improve legal certainty, the EU put in place uniform conflict-of-law rules under the Rome I Regulation<sup>220</sup>. The EU has partially reduced the differences in substantive rules by harmonising certain areas of contract law. However, these rules are often either limited to specific areas of contract law (e.g. pre-contractual information, right of withdrawal), or establish only minimum standards which Member States can build upon (e.g. unfair terms, sales guarantees).

The EU *acquis* on B2B contracts is limited to a few areas of contract law, addressed by the E-commerce and Late Payments Directives. A set of rules of a broader scope was introduced at international level by the 1980 Vienna Convention on the international sale of goods (CISG)<sup>221</sup> which contains rules for B2B contracts. However, it was not ratified by all Member States, it does not cover the full life cycle of a contract and there is no mechanism ensuring its uniform application.

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<sup>218</sup> See for more details par. 51 - 53 of the *Guidelines on Vertical Restraints*, 2010.

<sup>219</sup> See par. 176 of the *Guidelines on Vertical Restraints*, 2010.

<sup>220</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 *on the law applicable to contractual obligations* ('Rome I'), OJ L 177/6, 04.07.2008; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008R0593:EN:NOT>

<sup>221</sup> 1980 - *United Nations Convention on Contracts for the International Sale of Goods (CISG)*; available at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html)



The EU acquis for consumer contracts contains a number of directives establishing minimum consumer protection requirements, for instance for unfair contract terms and sales and guarantees. Over the years, Member States have made use of their competence to introduce more stringent rules to protect their consumers, making EU consumer contracts law a patchwork of 27 sets of differing rules. EU countries have for example developed a mix of different information obligations and rules on cooling-off periods for the rights of withdrawal. Similarly, they have different rights with respect to faulty products: while in some EU countries consumers can choose between the remedies of repair, replacement, reduction in price or termination of the contract, in others they can only first ask for repair and replacement and only if these remedies are not available ask for the termination of the contract. The e-commerce consultation confirmed that many online traders consider the fragmented national consumer laws as a source both of high compliance costs and of legal uncertainty.

One major piece of contract law legislation has been adopted in 2011, the new **Consumer Rights Directive (CRD)**.<sup>222</sup> The new Directive covers the scope of the current Doorstep Selling and Distance Sales Directives, which will be repealed after Member States have transposed the new Directive. Contrary to the original Commission proposal, which had a wider scope, the text agreed between the co-legislators leaves (essentially) unchanged the Directives on Unfair Contract Terms and Consumer Sales and Guarantees.

In contrast to the current Directives, which only impose a minimum level of harmonisation of consumer protection rules, the areas covered by the CRD provide for, with some limited exceptions, common rules and a convergent level of consumer protection across the 27 Member States. For distance and off-premises contracts, the information requirements for traders, the consumer's right of withdrawal from the contract and the obligations for traders and consumers in case of withdrawal will be fully harmonised. Both consumers and traders will benefit from standard forms for the rights of withdrawal. Additionally, the Directive entails new harmonised rules on the passing of risk in sales contracts and the default time-limit for the delivery of goods as well as a ban on hidden charges, on pre-ticked boxes which impose surcharges higher than the trader's actual costs for the use of a certain payment means (e.g. credit cards) and on charges for telephone hotlines higher than the standard telephone rate for calls. As to the scope, contracts on the provision of utilities (water, gas, electricity) and contracts concerning digital content will also be covered by the new rules, but certain areas such as healthcare services, passenger transport and gambling will be excluded.

The new rules of the Consumer Rights Directive will have to be transposed into national laws by 13 December 2013.

The new Directive, which has to a large extent retained its full harmonisation character, will increase legal certainty for consumers and business and hence contribute to the better functioning of online markets in the EU. The Directive will thus cut red tape that is holding back businesses from engaging in cross-border business.

However, the Directive will not remove all the contractual obstacles for cross-border e-commerce transactions. For example, the fragmentation of national laws on remedies (guarantees) and unfair contract terms will remain unchanged. The Directive also applies without prejudice to national laws on the validity, termination or enforceability of a contract;

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<sup>222</sup> *Consumer Rights Directive*, OJ L 304/64, 22.11.2011.

it does not affect the transfer of ownership of goods; nor is it applicable to gambling and healthcare services. Furthermore, it allows Member States to impose linguistic requirements on consumer contracts.

One special issue to note is the application of the Directive to digital content (data produced and supplied in digital form such as computer programmes, applications, games or music). Contracts for the supply of digital content are within the scope of the Directive, but the right of withdrawal is limited to situations where the performance of the contract has not yet begun or begun without the consumer's prior consent or, if the digital content is provided on a tangible medium such as a CD, where the consumer has not yet unsealed it.

The new Consumer Rights Directive improves and clarifies the information rights for consumers when purchasing digital content. In particular, traders will have to inform (consumer) buyers of digital content not only about its compatibility with hardware and software, but also about the application of any technical protection measures or digital rights management, for example about a limitation on the right of the consumers to make copies of the content.

The Commission services will closely monitor the transposition of the Consumer Rights Directive. They will also look into the most appropriate ways to ensure that businesses and consumers are made aware of the new consumer rights.

The European Commission will announce in 2012 a new European Consumer Agenda strategy. One of the cornerstones will be the impact of the digital revolution on consumer behaviour.<sup>223</sup>

Even with the adoption of the new Consumer Rights Directive, substantial differences between the national contract laws in the EU remain. This is particularly relevant for the contract law areas firstly where no harmonisation measures have been adopted at EU level at all (e.g. rules on the conclusion of a contract; defects in consent; obligations and remedies for service contracts; damages; restitution; prescription etc), and secondly for areas of minimum harmonisation that allow for significant discrepancies between the transposition measures of Member States (e.g. remedies in consumer sales contracts, unfair terms in consumer contracts).

Recent Eurobarometer surveys<sup>224</sup> and those carried out by the European Business Test Panel (EBTP)<sup>225</sup> and the Enterprise Europe Network<sup>226</sup> confirm that businesses with an interest in

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<sup>223</sup> On 16 November 2011 the Commission hosted a seminar to discuss consumer problems with digital products, such as e-mail, social networks, music, films, e-books or e-learning services. Problems include incomplete or incomprehensible information, interrupted access to content and faulty products. Two independent studies carried out at the request of the European Commission were officially presented at the conference. See for more details: [http://ec.europa.eu/justice/newsroom/consumer-marketing/events/digital\\_conf\\_en.htm](http://ec.europa.eu/justice/newsroom/consumer-marketing/events/digital_conf_en.htm)

<sup>224</sup> See Eurobarometer Flash 320, *European contract law in business-to-business transactions*, 2011, available at [http://ec.europa.eu/public\\_opinion/flash/fl\\_320\\_sum\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_320_sum_en.pdf) and Eurobarometer Flash 321, *European contract law in consumer transactions*, 2011, available at [http://ec.europa.eu/public\\_opinion/flash/fl\\_321\\_sum\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_321_sum_en.pdf)

<sup>225</sup> See: European Business Test Panel, *European Contract Law* survey, available at: [http://ec.europa.eu/yourvoice/ebtp/consultations/2010/european\\_contract\\_law/report\\_en.pdf](http://ec.europa.eu/yourvoice/ebtp/consultations/2010/european_contract_law/report_en.pdf)

selling their products cross-border rank barriers related to differences of contract law among the top barriers to cross-border trade. The contract law-related barriers are due to the legal complexity and transaction costs associated with adaptation to and compliance with the requirements of the different applicable national laws governing cross-border contracts. In addition, specific contract-law-related IT costs may be incurred by businesses selling online to consumers in other EU countries, as they have to adapt their website to the legal requirements of every Member State they direct their activity to.

For companies selling to consumers these costs grow proportionately to the number of countries they trade with and may be particularly dissuasive for SMEs and companies selling online. While an online shop may be willing to target consumers in neighbouring countries and beyond, it would first have to face transaction costs for ensuring compliance with multiple foreign laws. The transaction costs may be dissuasive, particularly for micro and small enterprises, as they constitute a greater share of their annual turnover. For instance, it could cost on average about € 10,000 for legal costs and € 3,000 for the related web-site adaptation for an e-commerce company to sell to consumers in one other Member State. It would cost about € 338,000 - more than a micro-retailer's annual turnover -<sup>227</sup> to trade across the whole of the EU.<sup>228</sup>

Differences in contract law therefore create obstacles to the digital Internal Market and hinder both businesses and consumers from engaging in cross-border online transactions.

Since 2001 the Commission has been working on the development of a European contract law. In July 2010, it adopted a "Green Paper on policy options on progress towards a European contract law for consumers and businesses". On 11 October 2011 the Commission proposed, as a follow-up to the Green Paper, an optional Common European Sales Law which would apply upon an agreement by the contracting parties.<sup>229</sup> The voluntary nature of this contract law would mean that Member States' contract laws will not be replaced and will continue to be used in domestic contracts and where parties do not choose the Common European Sales Law. This initiative would facilitate trade by offering traders the possibility to use a single set of contract terms for all their cross-border contracts in the 27 EU countries. If traders offer their products on the basis of the Common European Sales law, consumers would have the option of agreeing to be bound by a user-friendly Common European Sales law with a high level of protection. The Common European Sales Law would apply not only in business-to-consumer, but also in business-to-business contracts in which at least one party is an SME.

Article 6 of the **Rome I Regulation** establishes specific rules for a uniform EU conflict-of-laws regime which cover B2C contracts. These rules aim to protect consumers in situations where the business pursues its commercial activities in or directs its activity to the country of

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<sup>226</sup> The results of the SME panel survey on the *Impacts of European contract law* are available at: [http://ec.europa.eu/justice/contract/files/report\\_sme\\_panel\\_survey\\_en.pdf](http://ec.europa.eu/justice/contract/files/report_sme_panel_survey_en.pdf)

<sup>227</sup> See the *Impact Assessment* accompanying the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (hereafter '*CESL Proposal*'), COM(2011) 635 final, 11.10.2011, p.16.

<sup>228</sup> See *Impact Assessment of CESL Proposal*, pp.13-14

<sup>229</sup> See Press Pack, available at: [http://ec.europa.eu/justice/newsroom/news/20111011\\_en.htm](http://ec.europa.eu/justice/newsroom/news/20111011_en.htm).

habitual residence of the consumer. If the parties choose a law other than the law of the country of the habitual residence of the consumer, the contract cannot deprive the consumer of the protection afforded by the country of residence. Consumers are therefore always guaranteed the same level of consumer protection as in their home country. Article 6, however, does not apply to consumers who are not actively targeted by businesses and who approach sellers themselves in cross-border contexts.

The responses of businesses showed that this may lead to unclear legal situations in particular with e-commerce transactions. The recent *Pammer/Alpenhof*<sup>230</sup> case law of the ECJ on the interpretation of "directed activity" in the Brussels I Regulation<sup>231</sup> has provided a certain level of guidance on determining when a website contains activities directed to consumers in other Member States (see Chapter 4.7.4).

The Common European Sales Law would contribute to the solution for the problems posed by the diversity of cross-border situations. Parties would be able to choose the same set of rules in each national law and remove the need to adapt their contract to the rules in country of the consumer. However, given the very high level of consumer protection in the Common European Sales Law and the fact that the consumer must be informed of its applicability before the conclusion of the contract, the consumer would have nothing to lose when agreeing to be bound by this instrument.

#### 4.4.2 Unfair business practices

The retail market monitoring report "Towards more efficient and fairer retail services in the Internal Market for 2020"<sup>232</sup> underlined the existence of unfair commercial practices throughout the retail supply chain. The formal and informal consultations for the above-mentioned report and the preparation of this Staff Working Paper show that these business practices can affect electronic commerce as much as their "brick and mortar" competitors and indeed be more prevalent in that sector. Abuses of market power, especially at the expense of SMEs, are likely to exist in the online as in the offline sector. Other practices may be specific to electronic commerce. Operators may have to face practices from manufacturers such as the improper reclassification of the distribution of their products in selective distribution networks in order to avoid competition from pure e-commerce players.

As mentioned in the Single Market Act, the Commission will adopt (in 2012) a Communication on unfair B2B practices in the (retail) supply chain with the particular aim of pinpointing where there are problems. In addition, it will list the various existing national regulatory frameworks and evaluate their implementation, involving an examination of any

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<sup>230</sup> Joined cases C-585/08 and C-144/09, *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v Oliver Heller*, judgment of 07.12.2010; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0585:EN:NOT>

<sup>231</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, OJ L 12/1, 16.01.2001; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:EN:PDF>

<sup>232</sup> Report from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of Regions, Retail market monitoring report, *Towards more efficient and fairer retail services in the internal market for 2020*, COM(2010) 355 final, 05.07.2010; available at: [http://ec.europa.eu/internal\\_market/retail/docs/monitoring\\_report\\_en.pdf](http://ec.europa.eu/internal_market/retail/docs/monitoring_report_en.pdf)

Single Market problems posed by uncoordinated proliferation. It will also propose possible options to be submitted for consultation to interested parties.

In addition, certain anti-competitive or unfair practices may exist in the area of information society services beyond retailing, for example, in the way sites can be referenced by search engines or how technologies can be slowed down or blocked. The European Commission is carefully monitoring this issue, as outlined in the recent Communication on Internet network neutrality. In the first half of 2012, it will report on its analysis of the implementation of the Framework Directive "telecom" (2002/21/EC)<sup>233</sup>, as amended by Directive 2009/140/EC<sup>234</sup> to ensure that new rules guarantee an open Internet (see also Chapter 4.3.4).

#### **4.4.3 E-signatures, e-identification and e-authentication**

The legal recognition of electronic signatures and electronic authentication is crucial for facilitating and strengthening confidence in electronic transactions. The Directive on Electronic Signatures (Directive 1999/93/EC<sup>235</sup>) provides the European framework for e-signatures. EU-legislation on the mutual recognition and acceptance of e-identification and authentication across borders is still lacking.

The eSignature Directive has been evaluated a number of times since its adoption. The Commission's first implementation report of 15 March 2006<sup>236</sup> concluded that, although all Member States had implemented the Directive, the use of e-signatures had not increased. This was due to economic factors such as the insufficiently developed market and few incentives for service providers to develop e-signatures, which could be used throughout different sectors. Nevertheless, the Commission decided that there was no need for a revision of the Directive as it was expected that the use of e-signatures, in particular in e-government, could trigger future market growth. Moreover, the Commission announced in this report that it would analyse the need for complementary measures, continue to encourage the use of e-signatures and prepare a report on standards for e-signatures.

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<sup>233</sup> Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 *on a common regulatory framework for electronic communications networks and services*, OJ L 108/33, 24.04.2002; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:108:0033:0050:EN:PDF>

<sup>234</sup> Directive 2009/140/EC of the European Parliament and the Council of 25 November 2009 *amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services*, OJ L 337/37, 18.12.2009; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0037:0069:EN:PDF>

<sup>235</sup> Directive 1999/93/EC of the European Parliament and the Council of 13 December 1999 *on a Community framework for electronic signatures*, OJ L 013/12, 19.01.2000; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999L0093:en:HTML>

<sup>236</sup> Report from the Commission to the European Parliament, the Council, *Report on the operation of Directive 1999/93/EC on a Community framework for electronic signatures*, COM(2006) 120 final, 15.03.2006; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0120:FIN:EN:PDF>

On 2 December 2008, the Commission adopted an action plan<sup>237</sup> to enhance cross-border e-signatures and e-identification in the field of e-government in all areas of the Internal Market. Although the main focus of this action plan was on e-government, the Commission clarified that future policies would also yield benefits to business-to-business and business-to-consumer transactions. The goal of this action plan was to ease access by citizens and companies to cross-border electronic public services by redressing the lack of legal, organisational or technical interoperability of e-signatures and e-identification systems between different Member States.

Both the Digital Agenda and Single Market Act<sup>238</sup> announce that the Commission will propose a new legislative framework to ensure confidence in electronic transactions. This pan-European framework will propose a revision of the eSignatures Directive in order to clarify concepts, simplify the use of e-signatures and remove interoperability barriers. It will also cover the cross-border functioning of certain other trusted services and provide legislation for the mutual recognition of electronic identification and authentication services. The tools proposed in the framework should be general and open to all sectors, especially where electronic identification is concerned. The framework will be technologically neutral and open to all communication channels, including the Internet and mobile communications.

As a first step a public consultation on e-identification, e-authentication and e-signatures was held in the first half of 2011.<sup>239</sup> It confirmed that the existing framework on e-signatures could be strengthened, in particular by improving the mutual recognition, interoperability and security of these systems. A large majority of stakeholders confirmed the need for regulatory measures regarding the mutual recognition and acceptance of e-identification and authentication throughout the EU.

In 2012, the Commission will propose legislation ensuring the mutual recognition of electronic identification and authentication across the EU and a revision of the Directive on Electronic Signatures.

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<sup>237</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Action Plan on e-signatures and e-identification to facilitate the provision of cross-border public services in the Single Market*, COM(2008) 798 final, 28.11.2008; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0798:FIN:EN:PDF>

<sup>238</sup> Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Single Market Act, Twelve levers to boost growth and strengthen confidence, "Working together to create new growth"*, COM(2011) 206 final, 13.04.2011; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0206:FIN:EN:PDF>

<sup>239</sup> See Press Release, *Digital Agenda: Commission launches public consultation on eSignatures and eIdentification*, IP/11/198, 18.02.2011, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/198&format=HTML&aged=1&language=EN&guiLanguage=fr>

## 4.5 Electronic payment and invoicing

### 4.5.1 Electronic payment

With respect to the development of e-commerce, the responses to the consultation that this paper draws on show that there are four types of problems which relate to electronic retail payments: the restricted acceptance of different payment methods, both domestically and in cross-border situations; the level of payment related charges, both for merchants and consumers; a lack of payment security and data protection, and finally uncertainties relating to liability in case of unauthorised payments or unsatisfactory deliveries.

Even though a variety of payment means is available at the European level, their deployment and acceptance across Member States diverge. Credit cards play an important role in online payments today, but they are not available to all citizens. According to a study, in the EU-15 countries, two adults in ten do not have access to transaction banking facilities and four in ten do not have access to credit facilities. In the new Member States (EU-10), one third of citizens has difficulty accessing those financial services.<sup>240</sup> In particular, debit cards do not seem to be sufficiently accepted for online payments, according to consumers. But the issues relating to the deployment and acceptance of cards are insufficient explanation for the limited development of e-commerce across Europe which, according to data from one of the major credit cards players, has 50% more bank cards than the USA but 40% smaller volume of e-commerce.

The possibility for the consumer to use prepaid payment means, payment intermediaries, such as dedicated e-payment providers, or payment on delivery is important to the development of e-commerce in all parts of society. For micro-payments, mobile payments through billing by telecom operators seem to be the preferred solution today.

The excessive cost of payments has been noted by many merchants and associations. The criticism focuses on credit cards, but also on payment intermediaries, telecom operators for m-commerce, and payment on delivery. For micro-payments, the issue of cost seems to be a major obstacle to the development of low value information society services such as online newspapers, music, movies, video games, "premium rate service", directories, and low priced event tickets.

Consumers also complain about the high cost of payments. The possibility of charging additional fees for card payments (surcharging), which was left to the arbitration of Member States by the Payment Services Directive<sup>241</sup>, affects consumers who, for example, may be subject to several surcharges for every plane ticket they purchase even if only one payment transaction is made. The new Consumer Rights Directive addresses this problem by prohibiting merchants from charging consumers fees that exceed the costs borne by the merchant.

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<sup>240</sup> *Financial services provision and prevention of financial inclusion*, May 2008, a study carried out on behalf of the Commission by Réseau Financement Alternatif (Belgium), the University of Bristol (UK), the University of Milan (Italy) and the Warsaw School of Economics (Poland).

<sup>241</sup> Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 *on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC*, OJ L 319/1, 05.12.2007 (hereafter 'Payment Services Directive'), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:319:0001:0036:EN:PDF>

The cost of payments can be partly correlated to the risk of fraud, which seems to be very significant for both online and offline payments, and is apparently more relevant for cross-border payments than for domestic payments. This raises the question of the **security of payments**: a lack of trust is symptomatic, and both merchants and consumers experience failures in the security of payments. All relevant market actors seem willing to address this problem while realising that there is a trade-off between the level of security and convenience for the consumer. It is important that the perceived lack of security does not continue to hamper e-commerce, especially at a cross-border level. The issue of privacy and protection of payment information was recurrently mentioned by payment users in the consultation, again often in the context of potential fraud.<sup>242</sup>

Finally, issues of liability for any incident related to payment were raised in the public consultation. The Payment Services Directive<sup>243</sup> (PSD) in its Articles 60 *et sequ.* addresses the liability for payments, especially in cases of unauthorized payment transactions, and billing or processing errors. The PSD obliges the payment service provider to refund to the payer immediately the amount of an unauthorised payment transaction and stipulates that the cost is borne by the providers of payment services. By contrast, the payer shall bear the losses, up to a certain limit that Member States can reduce, that result from the misappropriation of a lost, stolen or unsafely kept payment instrument. However, the situation seems less clear for refunds in those cases where the consumer receives a product that was not ordered, arrives in a damaged condition or never arrives. In the light of responses to the consultation on the future of electronic commerce, it seems that this is still an area of future improvement for merchants, who carry the sole responsibility for refunds and returns.

The responses to the above-mentioned public consultation reflect to a large extent the problems addressed in the Green Paper "Towards an integrated European market for card, internet and mobile payments". The Green Paper aims to assess a number of specific factors which seem to be the root causes for many of the problems encountered by consumers and merchants in the field of e-commerce today. Notably, the scope of the Green Paper is wider than e-commerce, as for instance the majority of card payments today continue to be made offline.

The Paper is based on the premise that four drivers could significantly enhance the European payments market and therefore also improve the take-up of e-commerce throughout the EU:

- More competition
- More choice and transparency for consumers
- More innovation
- More payment security and customer trust

Each of these objectives would benefit from a more integrated European market for card, internet and mobile payments and the Green Paper provides the basis for a public consultation as to which measures could best contribute to improvements in the above-mentioned four areas.

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<sup>242</sup> A separate issue is the blocking of payments by financial institutions for example in situations of alleged intellectual property rights infringements or online gambling.

<sup>243</sup> *Payment Services Directive*, OJ L 319/1, 05.12.2007.



As regards the level of competition in the payments market, the Paper examines factors which could limit market access and market entry by alternative payment service providers, and thereby lead to market fragmentation. The pricing of payment services is analysed from two angles, namely the relationship between the consumer and the merchant and the relationship between the merchant and the payment service provider. Possible remedies mentioned in the Green Paper address the transparency of the cost of payments, as well as steering mechanisms which could ensure that the most efficient payment instrument, both from a consumer and a merchant point of view, is chosen in a given purchasing transaction. A third area considered in the Paper is technical standardisation which could significantly improve the acceptance of payment cards or e- and m-payment schemes across borders. Closely related to this, the issue of interoperability between payment service providers is addressed. Finally, the Paper deals with payment security and data privacy and the possibilities for improvements in this area.

The last part of the Green Paper touches on a crucial issue, which underpins all of the issues mentioned above, namely the establishment of proper governance structures that could facilitate the implementation of remedial measures in the aforementioned areas.

The consultation will lay the groundwork necessary for the definition in 2012 of a strategy to improve the efficiency of payments related to electronic commerce, including surcharges, the lack of competition, standardization, and micropayments.

On 11 January 2012, the Commission has adopted a Green Paper on card payments, internet and mobile payments.<sup>244</sup>

#### **4.5.2 Electronic invoicing**

Invoicing forms another part of the e-commerce process chain which could substantially benefit from dematerialisation or digitalisation. Due to the strong link between invoices and payments – generally every payment is preceded by an invoice – potential synergies between both processes are strong and can generate substantial economic savings. A study commissioned by the Commission estimates that replacing paper invoices by electronic invoices could lead to annual savings of EUR 40 billion over a six-year period.<sup>245</sup>

A large part of these savings relates to the invoice exchange between businesses, but consumers, especially in e-commerce, also benefit from the convenience that e-invoices can provide. In particular, if linked with an online banking or other e-payment solution, invoices can be paid electronically with a simple click and without the need for manual data input. Currently, however, e-invoicing in Europe is often complicated, especially across borders. Diverging approaches to e-invoicing have led to a certain degree of fragmentation, both in terms of the regulatory and technical environment.

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<sup>244</sup> See [http://ec.europa.eu/internal\\_market/payments/index\\_en.htm](http://ec.europa.eu/internal_market/payments/index_en.htm)

<sup>245</sup> Capgemini Consulting, *SEPA: potential benefits at stake*, available at: [http://ec.europa.eu/internal\\_market/payments/docs/sepa/sepa-capgemini\\_study-final\\_report\\_en.pdf](http://ec.europa.eu/internal_market/payments/docs/sepa/sepa-capgemini_study-final_report_en.pdf)

In its Communication "Reaping the benefits of electronic invoicing for Europe",<sup>246</sup> the European Commission identified the key hurdles which prevent the uptake of e-invoicing, defined priorities for their resolution and proposed a set of concrete future actions for all stakeholders involved. The proposed measures aim at making e-invoicing the predominant method of invoicing by 2020 and fall into four key priority areas:

1. Ensuring a consistent legal environment for e-invoicing
2. Achieving mass market adoption by getting SMEs onboard
3. Ensuring maximum use of e-invoicing
4. Promoting a common e-invoicing standard

Member States are best placed to advocate, develop and facilitate the use of e-invoicing at national level. The Commission therefore invited all Member States to set up national multi-stakeholder e-invoicing fora and to entrust them with the task to develop a national strategy for the promotion of e-invoicing. In turn, the Commission established a "European Multi-Stakeholder Forum on e-invoicing" to identify common hurdles and remedies for e-invoicing in Europe, to exchange best practices and to coordinate actions at Member State level. Particular attention should be given to facilitating cross-border transactions, especially for SMEs. The forum will gather representatives from the different national fora and from European associations representing e-invoicing users, including consumers. A first meeting took place in September 2011. Commission services will, together with the European multi-stakeholder forum, take action to encourage the maximum use of e-invoices exchange.

## 4.6 Delivery

Many surveys and studies including the e-commerce public consultation identify delivery as one of the main obstacles to the development of e-commerce, especially its cross-border dimension.<sup>247</sup>

### 4.6.1 Delivery services in an e-commerce environment

With the exponential growth and use of electronic means of communication, customers increasingly need to send or receive physical goods that they sell or buy online. The electronic-commerce value chain thus ends with the physical delivery of goods to consumers. This service is mostly still provided by national (public) postal operators and private alternative postal operators, including large integrated express operators and more locally focussed courier companies. As a response to emerging needs, new alternative ways of delivery are being developed such as parcel consolidators who arrange the direct transport of items from the online retailer to the postal operator of the country of destination.

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<sup>246</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Reaping the benefits of electronic invoicing for Europe*, COM(2010) 0509 final, 02.12.2010, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0712:EN:NOT>

<sup>247</sup> See for example: Eurostat Data in Focus 46/2009: *Internet usage in 2009 - Households and Individuals*, available at: [http://epp.eurostat.ec.europa.eu/portal/page/portal/product\\_details/publication?p\\_product\\_code=KS-QA-09-046](http://epp.eurostat.ec.europa.eu/portal/page/portal/product_details/publication?p_product_code=KS-QA-09-046)

Delivery links the two sides of the e-commerce chain. On the one side ("*sender aspect*"), there are the online retailers who seek reliable and trustworthy delivery partners for the final leg of the e-commerce service they provide to their end users. On the other side ("*addressee aspect*"), there are the end users purchasing items online who seek reliable retailers selling goods which suit their needs and can be delivered efficiently.

Enhancing the trust in delivery services to promote consumers' overall confidence in using the electronic-commerce services can contribute to its further growth.

While in the past the delivery of a letter or a parcel largely relied on the public postal delivery network, this practice has now undergone significant change. This is especially the case when talking about parcel delivery and express delivery services, which have traditionally been open to competition.<sup>248</sup> The European parcel and express market is today a highly consolidated market, after a decade of mergers and acquisitions. National postal operators, new entrants (alternative private operators) and express operators (mostly integrators)<sup>249</sup> have been actively participating in this market, which was estimated at € 42,4 billion in 2008, or 0.34% of EU27 GDP.<sup>250</sup> In 1998, 80% of this market was covered by five Member States: Germany (31%), France (23%), UK (16%), Italy (6%) and Spain (4%). This share decreased to 77% in 2008<sup>251</sup>. Contrary to the past, boundaries between parcel and express market segments have decreased and all these operators are today competing against each other to offer their customers an improved product portfolio.

Today, national postal operators hold 36%<sup>252</sup> of the total parcel market across the EU, showing that customers (senders) are increasingly using alternative delivery providers. The main reasons for this choice could be: (i) better prices, (ii) better range of services and (iii) better quality and/or reliability of delivery services provided by alternative operators.

#### 4.6.2 Delivery problems

Delivery emerges from the various consultations and studies as one of the the major obstacles to the development of electronic commerce<sup>253</sup>.

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<sup>248</sup> Green Paper on the development of the single market for postal services, COM(91) 476 final, 11.06.1992, available at [http://ec.europa.eu/internal\\_market/post/index\\_en.htm](http://ec.europa.eu/internal_market/post/index_en.htm)

<sup>249</sup> International express operators such as DHL, FedEX, TNT, UPS are commonly referred to "integrators" since they provide an end-to-end service, based on their integrated business model.

<sup>250</sup> ITA Consulting/WIK Consult, *The evolution of the European Postal market since 1997*, August 2009, available at: [http://ec.europa.eu/internal\\_market/post/doc/studies/2009-wik-evolution\\_en.pdf](http://ec.europa.eu/internal_market/post/doc/studies/2009-wik-evolution_en.pdf) (hereafter *ITA/WIK* 2009). The annual growth of the parcel and express market between 1998 and 2008 was 6.1%, growing faster than the GDP (3.5%) over the same time period.

<sup>251</sup> Western Europe is by far the most mature market and has the biggest market turnover in Europe. Southern Europe has showed a strong growth rate between 1998 and 2008, whilst Eastern Europe region, the smallest in turnover, has had the highest growth. See above: *The evolution of the European Postal market since 1997*

<sup>252</sup> Copenhagen Economics, *Main developments in the postal sector 2008-2010*, 29.11.2010, pp. 85-91; available at: [http://ec.europa.eu/internal\\_market/post/doc/studies/2010-main-developments\\_en.pdf](http://ec.europa.eu/internal_market/post/doc/studies/2010-main-developments_en.pdf)

<sup>253</sup> Eurostat Data in Focus 46/2009: *Internet usage in 2009 - Households and Individuals*, available at: [http://epp.eurostat.ec.europa.eu/portal/page/portal/product\\_details/publication?p\\_product\\_code=KS-QA-09-046](http://epp.eurostat.ec.europa.eu/portal/page/portal/product_details/publication?p_product_code=KS-QA-09-046).

In general, the e-commerce consultation highlighted several problems in postal services delivery in some Member States and raises questions about (i) the level of competition in the sector (particularly regarding the delivery of goods) and (ii) the status of the transposition and correct implementation of the postal *acquis*.

The responses to the consultation also indicated that the problems identified in delivery services are essentially (i) high costs, (mainly for cross-border trade), due to higher cross-border delivery prices in comparison to similar and/or equivalent domestic delivery services, (ii) the refusal to supply in specific geographical areas, (iii) the unreliability of the delivery service, which can be reflected either in lower quality of service, delays in the delivery of goods or indeed in the non-delivery of goods duly paid.

These delivery problems are exacerbated in remote areas where, apart from the problem of non-delivery, issues regarding higher shipping costs and longer delivery delays can be more problematic.

In addition, the delivery deadline for goods and the question of who bears the risk of loss or damages of shipped goods are two of the main difficulties encountered by consumers in online B2C-transactions and represent a source of dispute. The Directive on Consumer Rights<sup>254</sup> introduces new rules. Article 18 states that in principle, unless the parties have agreed otherwise, the trader shall deliver the goods by transferring physical possession or control of the goods to the consumer without undue delay, but not later than 30 days from the conclusion of the contract. Article 20 provides that the consumer will be protected against any risk of loss or damage of the goods occurring before he has acquired the physical possession of the dispatched goods.

The Consumer Rights Directive, however, does not harmonise the place and modalities of delivery which are essentially subject to the decision of the online buyer when purchasing online, although she/he is limited by the range of options that online retailer provides. The Directive also does not apply to delivery clauses where it is up to the consumer to take delivery of the goods or to ask a carrier to take delivery. The Commission Proposal on a Common European Sales Law<sup>255</sup> contains uniform rules on the modalities for delivery, such as the time, method and place of delivery, carriage of goods and the effects of delivery on the passing of risk. These rules in the Common European Sales Law also apply to B2B contracts.

#### **4.6.3 Parcel and express delivery services under the Postal Services Directive**

The Postal Services Directive<sup>256</sup> addresses certain of these delivery issues indirectly firstly through the requirement of universal service provision with regard to basic letter mail (up to 2 kg), recommended and insured items and basic parcels up to 10 kg (except where a Member State decides for a maximum weight of 20kg) and secondly through the requirement that all postal service providers set up an internal complaints system.

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<sup>254</sup> See Chapter 4.4.1

<sup>255</sup> Also see Chapter 4.4.1

<sup>256</sup> Directive 2008/6/EC of the European Parliament and the Council of 20 February 2008 *amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services*, OJ L 52/3, 27.2.2008, available at: [http://ec.europa.eu/internal\\_market/post/doc/legislation/2008-06\\_en.pdf](http://ec.europa.eu/internal_market/post/doc/legislation/2008-06_en.pdf)

Although parcel and express delivery services have been open to competition for some decades<sup>257</sup>, the Postal Services Directive provides for a number of regulatory measures to ensure a high quality of (basic) parcel service as well as a high level of postal users' protection. With regard to these regulatory measures, a distinction needs to be made between two types of services: (i) "basic" or "standard" parcel service which is part of the universal service obligation (USO), as defined in Article 3 (4) of the Postal Services Directive, and (ii) parcel delivery services with added value, which are not directly subject to USO, but are nonetheless subject to some other regulatory requirements (e.g. obligation to handle consumer complaints). The latter services are traditionally understood as comprising elements such as (i) the collection at the premises of the sender, (ii) the handling of bulk parcels (parcels sent in larger quantities), (iii) track and trace services and (iv) express (faster) delivery and/or guaranteed delivery times. The Postal Services Directive foresees a number of requirements concerning the basic parcel service as part of the USO.

### **Parcel delivery as part of the Universal Service Obligation (USO)**

Article 3 of the Postal Services Directive obliges Member States to ensure the provision of basic parcel services at affordable prices for all citizens on its territory at least five working days per week. All Member States ensure that basic parcel services, in most cases meaning over-the-counter parcel services,<sup>258</sup> are guaranteed as part of the universal service obligation.<sup>259</sup>

Article 3 (3) of the Postal Services Directive enables Member States to implement derogations from the minimum requirements for USO. This has to be granted by the independent national regulatory authority and only if the existing "*circumstances or geographical conditions deemed exceptional*" allow for it. Based on available data one can observe that - with the exception of Greece, where 7 % of the population does not have five times per week delivery frequency – Member States do not provide for extensive derogations.<sup>260</sup>

A basic high level parcel delivery of a specified quality standard at EU level is thus guaranteed on the basis of Article 3. Parcel services which are part of the USO do not, however, in most cases comprise the additional added value elements as defined above.<sup>261</sup> These added value services are not covered by the USO requirements of Article 3.

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<sup>257</sup> See for example Chapter 4.3.3., *ITA/WIK 2009*.

<sup>258</sup> It is known that basic parcel services usually indicate services where customers hand in the parcel at the post office counter.

<sup>259</sup> See Table 2.3., WIK Consult, *The Role of Regulators in a More Competitive Postal Market*, September 2009, available at: [http://ec.europa.eu/internal\\_market/post/doc/studies/2009-wik\\_regulators.pdf](http://ec.europa.eu/internal_market/post/doc/studies/2009-wik_regulators.pdf)

<sup>260</sup> See above reference: *The Role of Regulators in a More Competitive Postal Market*, p. 82

<sup>261</sup> Collection at the premises of the sender; bulk parcels (parcels sent in larger quantities); track and trace services and express (faster) delivery and/or time certain delivery. E.g. as regards the delivery to home premises in some Member States parcels may not be delivered frequently to the addressee's residence, but must be collected by the addressee from the nearest post office; additional services such as track and trace are often only provided by express and courier companies.

## Postal users' protection measures

Article 19 of the Postal Services Directive obliges Member States to ensure the existence of complaint procedures for all postal users, particularly in cases of loss, damage, theft or non-compliance with quality standards. It also determines that Member States shall encourage the development of independent out-of-court schemes for dispute resolution (Article 19 (1)). If postal service providers do not provide the service at the level agreed they have to adequately remedy the situation (e.g. provide payment of indemnity) based on the requirements laid down in the applicable national legislation.

Additionally, where users' complaints to businesses providing postal services within the scope of the universal service have not been satisfactorily resolved, postal users may bring these cases before the competent national authority (Article 19 (2)). While this provision is mandatory for the universal postal service and interchangeable services, many Member States go beyond this minimum and extend the complaint mechanism to services outside the USO.<sup>262</sup>

Although the Postal Services Directive entrusted to Member States the task of organizing transparent complaint procedures, it does not cover the issue of liability for late delivery or non-delivery as such. Nevertheless, there are many Member States that have introduced legislative solutions in their national legislation (e.g. right of indemnity in case of late delivery; right of indemnity in case of a lost item). Furthermore, the issues of accountability for delivery and transfer of risk are only resolved to a certain extent at EU level (see Chapter 4.4.1).

The complaint mechanism procedure is therefore not uniform or harmonized, which results in different practices being applied in different Member States, as well as variations in the possible level of protection. This can add ambiguity and difficulties in cross-border delivery firstly where a complaint triggers the need for cooperation between two service providers – a problem limited to delivery networks that are not integrated - and secondly where problems arise between two national regulatory authorities if a complaint is not satisfactorily resolved.<sup>263</sup>

Member States are therefore encouraged to ensure a high level of user protection, and to develop and facilitate the use of independent out-of-court schemes for the resolution of disputes between postal services providers and users while taking into account the cross-border dimension.<sup>264</sup>

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<sup>262</sup> See in this context Advocate General's Opinion, Case C-148/10, *Express Line NV v Belgisch Instituut voor Postdiensten en Telecommunicatie*, judgment of 26.05.2011; available at: <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Submit&numaff=C-148/10>

<sup>263</sup> Another example of possible difficulties in cross-border complaint cases is that the sender has the legal right to complain, except in the UK and Ireland where the responsibility for the item belongs to the recipient from the moment it is dropped in the postal pipeline. In continental Europe as long as the item is not delivered it is still a legal right of the sender. So, if the item is lost the sender and not the recipient must ask for indemnity. In the cases of delay and damaged goods, as soon as the items arrive to the recipient, he can ask for financial compensation.

<sup>264</sup> See on ADR also Chapter 4.7.1

#### 4.6.4 Market trends and enhanced application of the EU postal legislation

In order to achieve a fast and reliable delivery service in Europe it is essential that parcel delivery operators, express delivery operators and competent national and EU authorities take an active role.

The increased demand for more flexible and user-friendly delivery solutions has been impacting the delivery sector significantly. Postal delivery operators have been improving their service offers to become more flexible and customer-focused. Features such as increased distribution coverage, guaranteed delivery times, improved operational performance, end-to-end logistics services or track and trace services are increasingly offered as value-added delivery services. The tracking of an item is a key feature for retailers and customers using electronic-commerce.

Many operators are introducing flexible delivery systems, such as local stores or automatic parcel stations<sup>265</sup>, which allow users to collect their parcels even after the local post office has closed or outside working hours. Moreover, the market sees a higher convergence between express and parcel services, especially in terms of the products offered. Parcel operators have improved their transit times and can hence compete with the lower end of express operators' services, whilst express operators have introduced lower-cost products targeting customers less sensitive to delivery time.

Furthermore, new business solutions such as parcel consolidators<sup>266</sup> or online parcel brokers<sup>267</sup> are being developed, which facilitate the whole delivery process by providing customers with added value in the form of pre-delivery services (e.g. presentation of available delivery alternatives and finding the best options in a given situation) or in the form of passing on cost savings (e.g. consolidators' volume discounts), which are reflected in a lower final delivery price for customers.

In relation to innovations, new technologies have allowed operators to both improve efficiency and reduce costs. Technological solutions such as "*dynamic route planning*", with the help of GPS technology, and RFID significantly contribute to the optimization of the delivery chain processes (e.g. sorting; delivery), which can subsequently be reflected in improved services, both in terms of the quality of service as well as pricing.

With regard to the efficient application of existing regulatory tools, Commission services are working on a number of initiatives.

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<sup>265</sup> Service provided by some delivery service operators, where parcels can be collected and dispatched by consumers 24 hours a day. These automatic stations or boxes are self-service and based on a code received via SMS or e-mail. Germany, Austria, Latvia, Estonia and Poland are examples of Member States where this service is offered.

<sup>266</sup> Parcel consolidators provide for parcel preparation and collection services and later on insert the collected parcels in postal delivery networks.

<sup>267</sup> In contrast to parcel consolidators, online parcel brokers (e.g. parcelbroker.co.uk) are not at all involved in the logistic process, but only provide a sender with information on possible delivery options in a given situation.

The Commission services are conducting a sectoral study, with the help of an external consultant, regarding the cross-border provision of parcel delivery services, with a specific focus on the alleged price differences between cross-border and domestic parcel services. This will allow Commission services to better measure one of the issues mentioned in the consultation (high costs of delivery). Based on the results of this study, and together with other delivery issues identified above, Commission services will prepare the Green Paper on parcel delivery as the final leg of e-commerce services, with specific focus on its cross-border aspect. The Green Paper should provide for an informed overview of the issues identified, and possibly go further, and should include all stakeholders involved (e.g. delivery operators; e-retailers; customers; other stakeholders).

With regard to the complaints procedures in case of lost items, theft and delay, it becomes imperative that Article 19 of the Postal Services Directive and the user's possibility to complain to the postal service provider is implemented efficiently and that adequate protection is ensured at the national level.

In this regard, Commission services will, as envisaged by Article 22 of the Postal Services Directive, further promote cooperation among national regulatory authorities both within the context of the European Regulators Group for Postal services (ERGP) and in relation to possible individual cases.

Furthermore, as announced by Commissioner Barnier in his intervention at the European Parliament on 9 September 2010<sup>268</sup>, Commission services has organized the first Postal Users Forum for 12 December 2011.<sup>269</sup> The forum encouraged users to reflect on their experience with postal delivery services and identify possible shortcomings that would call for further initiatives.

In 2012, Commission services will prepare a report on the application of the USO derogations by Member States with a view to identifying their scope, with specific focus on basic parcel services, and their impact on the delivery of items that originated in e-commerce transactions.

Commission services will continue not only to monitor the developments on the quality of delivery services as well as consumer satisfaction, but will also encourage Member States to introduce further quality of service improvements, and promote best practices.

In summary, the Commission services will:<sup>270</sup>

- prepare a Green Paper on cross-border delivery, with specific focus on e-commerce-originated traffic (2012);
- continue to monitor the correct transposition and application of the Postal Services Directive;

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<sup>268</sup> See Minutes of the European Parliament, 09.09.2010, Response of Commissioner Barnier to Oral Question O-0114/2010, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+PV+20100909+ITEM-003+DOC+XML+V0//EN&language=EN>

<sup>269</sup> See [http://ec.europa.eu/internal\\_market/post/conference\\_en.htm#conference2011](http://ec.europa.eu/internal_market/post/conference_en.htm#conference2011)

<sup>270</sup> See in general for the EU developments in the postal area [http://ec.europa.eu/internal\\_market/post/index\\_en.htm](http://ec.europa.eu/internal_market/post/index_en.htm)



- promote cooperation among national regulatory authorities, in particular within the context of the European Regulators Group for Postal services (ERGP);
- organize annually a Postal Users Forum (first Forum took place on 12 December 2011);
- publish a sectoral study regarding the cross-border provision of parcel delivery services (January 2012);
- prepare a report on the application of the USO derogations by Member States (2012).

## 4.7 Dispute resolution in an online environment

While e-commerce offers a wide range of services, and many facilities, its development is still being severely hampered because the Internet continues to be perceived as a risk area, generating potential disputes which cannot be easily solved partly because of the nature of this virtual exchange zone. Responses to the consultation on the future of e-commerce testified to the fears felt by both consumers and businesses that something could go wrong. These fears are linked to the general lack of information on existing quick and effective remedies that e-commerce users could resort to if necessary. As a result of specific problems in electronic commerce and the absence of knowledge of relevant remedies, the parties may end up not exercising their rights. In this regard, the concern of consumers is even greater when it comes to cross-border e-commerce. Such fears, however, often tend to disappear after the first experience of using cross border e-commerce.<sup>271</sup>

Most disputes related to electronic commerce are characterized by their low monetary value. EU law already provides for special rules on consumer transactions with a relatively low value. This chapter deals both with out-of-court settlements and specific court procedures.

### 4.7.1 Alternative Dispute Resolution and Online Dispute Resolution

When disputes arise from cross-border transactions, consumers as well as enterprises want easy, fast and cheap solutions. **Alternative Dispute Resolution ("ADR ")**<sup>272</sup> is widely considered as an efficient, quick and low-cost alternative to classic court procedures both for online and offline disputes.

The public consultations both on the future of e-commerce and on ADR<sup>273</sup> revealed strong support for resolving disputes online. Consumer groups, business organisations and Member

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<sup>271</sup> See the Fifth Consumer Conditions Scoreboard, *Consumers At Home in the Single Market*, March 2011, IP/11/280, available at: [http://ec.europa.eu/consumers/consumer\\_research/editions/cms5\\_en.htm](http://ec.europa.eu/consumers/consumer_research/editions/cms5_en.htm)

<sup>272</sup> ADR can be defined as any scheme that leads to the resolution of a dispute, including compensation, through the intervention of an entity. Traditionally this definition includes *mediation* (the neutral third party intends to solve the dispute with a mutually agreed settlement) and *arbitration* (the neutral third party takes a binding and enforceable decision on the dispute).

<sup>273</sup> The Consultation Paper and other relevant documents are available at the Consumer Affairs Consultations web-page of DG SANCO, available at: [http://ec.europa.eu/dgs/health\\_consumer/dgs\\_consultations/ca/adr\\_consultation\\_18012011\\_en.htm](http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/adr_consultation_18012011_en.htm)

States favour the development of alternative dispute resolution mechanisms which can boost confidence in e-commerce.<sup>274</sup>

A recent study on the use of ADR in the EU<sup>275</sup> showed that ADR can offer inexpensive and fast resolution of disputes and that ADR has gained widespread acceptance amongst consumers and businesses in recent years. The vast majority of the more than 750 existing B-2-C ADR procedures in the EU are free of charge for consumers or are available at moderate costs (below € 50).<sup>276</sup> The majority of ADR cases are decided within a period of 90 days. The study also showed that ADR schemes are highly diverse in structure, operation and funding.<sup>277</sup>

**Online Dispute Resolution ("ODR")** can be defined as a type of ADR which is performed entirely or substantially online. Compared to traditional ADR, the inherently online nature of ODR provides further advantages such as time savings (no travelling), cost savings and convenience (the entire procedure can be performed online, at the convenience of the parties and the neutral third party). The potential for ODR at the global level was recognised in 2010 when UNCITRAL set up a working group on ODR for e-commerce transactions.<sup>278</sup>

Most of the existing ADR schemes do not make a distinction between online and offline purchases. Very few ADR schemes handle the entire process online where consumers, traders and ADR schemes communicate during the whole procedure through a web-based system in order to resolve disputes. Examples of where this is the case include ECODIR,<sup>279</sup> Risolvi-online,<sup>280</sup> and Belmed.<sup>281</sup> About half of the existing ADR schemes, however, provide for an online complaint form which can be submitted directly online or sent by post or e-mail.<sup>282</sup>

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<sup>274</sup> In addition, responses to the e-commerce consultation indicated the importance of private sector initiatives taken in order to settle disputes arising between their members and consumers (for example, call centres for telecommunications). Certain consumer protection associations have developed tools to assist consumers to quickly and effectively find solutions, outside the judicial system.

<sup>275</sup> Civic Consulting of the Consumer Policy Evaluation Consortium (CPEC), *Study on the use of Alternative Dispute Resolution in the European Union* (hereafter 'ADR study') 16 October 2009, available at: [http://www.cc.cec/home/dgserv/sg/evaluation/pages/eims\\_en.htm](http://www.cc.cec/home/dgserv/sg/evaluation/pages/eims_en.htm)

<sup>276</sup> *ADR study*, pp.8, 13.

<sup>277</sup> *ADR study*, Annex 1, pp. 164-324.

<sup>278</sup> <http://www.uncitral.org/>

<sup>279</sup> ECODIR stands for "Electronic Consumer Dispute Resolution" and is a pilot project concerned with disputes for transactions between businesses and consumers taking place over the Internet. Its partners, which include universities, are specialized in online dispute resolution. ECODIR is free of charge for consumers and involves a 3-step process of negotiation, mediation and recommendation. See for details <http://www.ecodir.org>.

<sup>280</sup> RisolviOnline is a service offered by the Milan Mediation Chamber that allows the resolution of commercial Disputes and can be used both by individual consumers/users and by enterprises. <http://www.risolvionline.com/>

<sup>281</sup> Belmed is an online dispute resolution scheme set up by Belgium to resolve disputes between consumers and traders: <http://economie.fgov.be/belmed.jsp>

<sup>282</sup> *ADR study* pp.100, 143.

Most consumers who have used ADR recall it as an uncomplicated and transparent process, where sufficient support and advice was provided<sup>283</sup>. The resultant simple and fast process was compared very favourably with the perceived long and slow process that proceedings before a court would entail. 54% of businesses would prefer to solve disputes through ADR rather than in court<sup>284</sup> and 82% who have already used ADR would do so again in the future.<sup>285</sup> This evidence is further reinforced by data on the satisfaction levels of businesses that had used ADR; 76% found that it provided a successful settlement of the dispute. Like ADR, ODR is perceived positively. About 60% of businesses<sup>286</sup> and 64% of consumers state that they would be willing to solve disputes with consumers through ODR.<sup>287</sup>

In this regard, the European Commission has already taken a number of initiatives to facilitate the resolution of disputes out-of-court. In particular, it has adopted two Recommendations to promote ADR – Recommendations 98/257/EC<sup>288</sup> and 2001/310/EC.<sup>289</sup> The two Recommendations establish a number of minimum guarantees, such as independence, transparency and effectiveness, which ADR schemes should respect. In addition, several EU Directives like Article 17 of the E-commerce Directive encourage Member States to establish ADR schemes. In some other sectors, such as telecoms, energy, and consumer credit, EU legislation obliges Member States to establish ADR schemes.

But there is still room for improvement. The potential of ODR, and in particular cross-border ODR, has not yet been fully exploited. Its limited success can partly be explained by the untapped potential of ADR in general. Despite the development of ADR and ODR in the EU over the last decade, there are still a number of shortcomings which hinder their effectiveness across Member States.

First, there are important gaps in ADR coverage. This means that the existing set of ADR schemes offering to resolve business-to-consumer disputes related to e-commerce transactions is still scattered and incomplete within the European Union. In addition, while half of the existing ADR schemes offer the possibility to submit complaints online, very few offer

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<sup>283</sup> TNS qual+, Eurobarometer Qualitative Study, *Consumer redress in the European Union: Consumer experiences, perceptions and choices*, August 2009, p.48, available at: [http://ec.europa.eu/consumers/redress\\_cons/docs/cons\\_redress\\_EU\\_qual\\_study\\_report\\_en.pdf](http://ec.europa.eu/consumers/redress_cons/docs/cons_redress_EU_qual_study_report_en.pdf)

<sup>284</sup> The Gallup Organization for DG Communication, Flash Eurobarometer 300, *Retailers' attitudes towards cross-border trade and consumer protection*, March 2011, p 79, available at: [http://ec.europa.eu/public\\_opinion/flash/fl\\_300\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_300_en.pdf)

<sup>285</sup> European Business Test Panel (EBTP) survey, *Alternative Dispute Resolution*, 2010-11, [http://ec.europa.eu/yourvoice/ebtp/consultations/2010/adr/report\\_en.pdf](http://ec.europa.eu/yourvoice/ebtp/consultations/2010/adr/report_en.pdf)

<sup>286</sup> EBTP statistics available at: [http://ec.europa.eu/yourvoice/ebtp/consultations/2010/adr/statistics\\_en.pdf](http://ec.europa.eu/yourvoice/ebtp/consultations/2010/adr/statistics_en.pdf)

<sup>287</sup> Preliminary results on a study on the development of e-commerce in the EU.

<sup>288</sup> Commission Recommendation 98/257/EC *on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes*, OJ L 115, 17.04.1998, p. 31, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:115:0031:0034:EN:PDF>

<sup>289</sup> Commission Recommendation 2001/310/EC *on the principles for out-of-court bodies involved in the consensual resolution of consumer ADR*, OJ L 109, 19.04.2001, p. 56, available at: [http://ec.europa.eu/consumers/redress/out\\_of\\_court/adr/acce\\_just12\\_en.pdf](http://ec.europa.eu/consumers/redress/out_of_court/adr/acce_just12_en.pdf)

consumers the possibility to conduct the entire procedure online. Handling the entire process online would allow savings in terms of time and ease of communication between the parties. In 2009, more than half of complaints (55.9%) received by the ECC-Net (see below) were linked to e-commerce transactions. Out of the 50,000 cross border complaints received by European Consumer Centres in 2009, 93% could not be referred to an ADR scheme in another Member State.

Second, many replies to both public consultations showed that ADR/ ODR systems are not well known. One of the most frequent observations was the lack of information and publicity surrounding ADR/ODR. Third, respondents indicated that the quality of existing ADR/ODR schemes can vary considerably.

On 29 November 2011 the Commission adopted proposals for two legislative measures to improve out-of-court dispute resolution for all consumer disputes and to improve the online dispute resolution of cross-border disputes related to online transactions.<sup>290</sup>

The Commission also set up the **European Consumer Centres Network (ECC-Net)**<sup>291</sup> which is an EU-wide network co-sponsored by the European Commission and the Member States. The aim of the network is to provide information to consumers on their rights and to assist them with cross-border disputes. The network is made up of 29 centres, one in each of the 27 EU Member States, Iceland and Norway. The network handles over 70,000 cross-border contacts per year. Internet purchases continue to be the main source of consumer cross-border complaints making up 56% of all complaints addressed to the ECC-Net in 2010 (44,232 complaints).

The Commission services will encourage the ECC-Net to take a more proactive and preventive approach towards key business sectors that have significant cross border exposure. A further alternative to traditional settlements of dispute in court is provided by the introduction of **compulsory mediation within the traditional litigation procedure**. The Mediation Directive<sup>292</sup> of 2008 applies to cross-border disputes in civil and commercial matters. The principal objective of this legal instrument is to encourage recourse to mediation services in the Member States. To do this, the Directive gives every judge the right to invite the parties to a dispute to try mediation first if she/he considers it appropriate given the circumstances of the case. It also provides that agreements resulting from mediation can be rendered enforceable if both parties so request. This can be achieved, for example, through court approval or certification by a public notary. The transposition period for the Member States to adopt national measures providing for the implementation of the Directive expired on 21 May 2011. The Commission services will carefully monitor the transposition of the Mediation Directive in the Member States and use the Commission's powers under the Treaties as regards those Member States which have not yet taken transposition measures

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<sup>290</sup> Proposed Directive on consumer ADR and Proposed Regulation on consumer ODR, available at: [http://ec.europa.eu/consumers/redress\\_cons/adr\\_policy\\_work\\_en.htm](http://ec.europa.eu/consumers/redress_cons/adr_policy_work_en.htm)

<sup>291</sup> For further information see the ECC-net web-page, available at: [http://ec.europa.eu/consumers/ecc/index\\_en.htm](http://ec.europa.eu/consumers/ecc/index_en.htm)

<sup>292</sup> Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 *on certain aspects of mediation in civil and commercial matters*, OJ L 136/3, 24.05.2008; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF>

## 4.7.2 European Small Claims Procedure

Due to the large backlog of cases and the time and cost that traditional means of resolving legal disputes entail, the use of courts and judicial tribunals to resolve online commercial transactions has not always offered a satisfactory solution for e-commerce users. Moreover, online legal services are underdeveloped and in many cases non-existent.

Simplified court procedures or "small claims procedures" exist in almost all Member States for national cases as a cost-efficient alternative to the traditional court procedures. In 2007, a Regulation was adopted setting up a European Small Claims Procedure<sup>293</sup> as an alternative to domestic claims procedures for cross-border cases. It is an optional procedure for claims under € 2,000 in value, covering both civil and commercial cases including all consumer transactions and applying equally to online disputes. The claimant must fill in a standard form (available online)<sup>294</sup> with the details of the claim and submit it to the competent court in another Member State. This court then drafts a standard answer and provides the defendant with the possibility to lodge a counterclaim. A judgment is given in thirty days and the court decision can be directly enforced, without the need to use the *exequatur* procedure. A further major advantage is that parties do not require compulsory legal assistance.

The success of this procedure essentially depends on the extent to which consumers, consumer advisors like ECC-Net and lawyers are aware of the procedure. This is not always considerable. A public opinion survey conducted in 2010 shows that only 8% of respondents had heard about the procedure.<sup>295</sup>

Its success also depends on the effective application of the procedure by national courts. A survey conducted by the ECC-Net in 2010<sup>296</sup> shows that 53% of courts and judges visited were already aware of the European Small Claims Procedure. There is however room for improvement. The relevant forms were not made available on the premises or the websites of 41% of the courts visited. Consumers found it difficult to fill in the forms on their own, while in 41% of cases, assistance to fill in the forms and start the procedure was not available to consumers. In 76% of examined cases, the European Small Claims Procedure was not free of charge for consumers. Consumers also faced language problems (no assistance is foreseen and certified translators are usually too expensive). Finally, consumers perceived difficulties with determining the competent court, as well as with the enforcement of judgments.

Commission services will conduct an assessment of the application of Regulation (EC) 861/2007 by 2013. This could lead to a future revision which could in particular include a

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<sup>293</sup> Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 *establishing a European Small Claims Procedure*, OJ L 199/1, 31.07.2007; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0001:0022:EN:PDF> (N.B. This Regulation does not apply to Denmark).

<sup>294</sup> The form is available from the European Judicial Atlas: [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/sc\\_filling\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/sc_filling_en.htm).

<sup>295</sup> TNS Opinion & Social at the request of DG JUST, Special Eurobarometer 351: *Civil justice*, October 2010, available at: [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_351\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_351_en.pdf)

<sup>296</sup> Draft ECC-Net *Joint Project on the European Small Claims Procedure*.

proposal for a possible increase of the threshold for its use. In addition, electronic processing related to the procedure should be further developed.

#### 4.7.3 Collective redress

Responses to the consultation indicated that e-commerce users have different views on collective redress. While some are in favour of collective redress for the resolution of disputes arising from electronic commerce, others are strongly opposed, fearing that this would give rise to a "claim culture".

Consideration of the need for a coherent approach to collective redress is underway at the EU level. In February 2011, the Commission launched a consultation to identify common legal principles on collective redress.<sup>297</sup> Currently, 15 Member States have judicial mechanisms whereby a group of consumers or an entity representing the consumer public interest can request compensation for harm caused by an illegal practice. These mechanisms are designed for mass claims and can be used if multiple consumers have been harmed by the illegal practice of a trader.

The Commission will explore in 2012 how to follow-up on the results of the public consultation<sup>298</sup>.

#### 4.7.4 International Private Law

Dispute resolution concerning online transactions is complex, particularly because online decisions and transactions take place without any direct human interface. Many online transactions have a relatively low value which implies that compliance costs are relatively high. But dispute resolution becomes even more complicated in a cross-border situation, when internet actors are resident in two different Member States or even outside the EU. Determining the competent court and the applicable law as well as the recognition and enforcement of judgments also for disputes in an online environment is regulated under international private law rules relating to cross-border dispute resolution.

The Brussels I Regulation<sup>299</sup> is the most important legal instrument for determining which court is competent to handle a dispute. The Rome I Regulation<sup>300</sup> (for contractual obligations)

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<sup>297</sup> Details of the consultation are available at: [http://ec.europa.eu/dgs/health\\_consumer/dgs\\_consultations/ca/collective\\_redress\\_consultation\\_en.htm](http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/collective_redress_consultation_en.htm)

<sup>298</sup> An initiative on an EU framework on collective redress, which would follow up on the full range of previous Commission work on collective redress at the EU level is scheduled in the Commission Work Programme for 2012 (Initiative 110 in the Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Commission work programme 2012. com(2011) 777 final vol. 2/2.-.

<sup>299</sup> Council Regulation (EC) No. 44/2001 of 22 December 2000 of the European Parliament and of the Council *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, OJ L 12/1, 16.01.2001; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:EN:PDF>

<sup>300</sup> Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (*Rome I*), OJ L 177/6, 04.07.2008; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008R0593:EN:NOT>

and the Rome II Regulation<sup>301</sup> (for non-contractual relations) regulate the applicable law (see further Chapter 3.2.4 on contracting).

The Brussels I Regulation provides that actions against a person domiciled in a Member State can, as a general rule, be brought in the courts of that State. It also provides that cases resulting from a contractual relationship may be decided by the courts of the place of performance of the contractual obligation. In the case of consumer contracts, however, rules protecting the consumer apply. The consumer may bring proceedings against the trader either in the courts of the Member States in which that party is domiciled, or in the courts of the place where the consumer is domiciled. Proceedings against the consumer may be brought only in the courts of the Member State where the consumer is domiciled. In order for those protective rules to apply, the Brussels I Regulation requires that the trader "directs its activities" to the Member State in which the consumer is domiciled (Article 15 (1) (c)). The protective rules are justified on the basis of the weaker negotiation power of individual consumers and the costs related to transnational litigation, which are difficult to bear for individual consumers.

The Brussels I Regulation, however, does not provide a definition of the notion "directed activity". At the time of the adoption of the Regulation, the Council and the Commission issued a declaration on the interpretation of the notion. Nevertheless, several respondents to the public consultation expressed their concerns about the lack of clarity surrounding the application of the Brussels I Regulation. In December 2010, however, the European Court of Justice issued certain guidance on the interpretation of Article 15 Brussels I with respect to services offered on the Internet.

In the cases of *Hotel Alpenhof* and *Peter Pammer*<sup>302</sup>, the basic question at issue was whether the fact that the website of a business, on the basis of which a consumer entered into a contract, can be viewed on the Internet is sufficient to justify the conclusion that an activity is being "directed" within the meaning of Article 15 (1) (c) of the Brussels I Regulation.

- In the *Hotel Alpenhof* case, the consumer, a German resident, reserved a number of rooms, for a period of a week, in Hotel Alpenhof, in Austria. The reservation was made by email, the address being provided on the hotel's website which the consumer had viewed. The consumer found fault with the hotel's services and left without paying his bill. The hotel then brought an action before the Austrian courts for payment of the bill.
- In the *Pammer* case, the consumer, a resident of Austria, wished to travel by freighter from Trieste (Italy) to the Far East. He booked a voyage with the German company Reederei Karl Schlüter through a German travel agency specialising in the internet sale of voyages by freighter. The consumer refused to embark on the grounds that the conditions on the vessel did not, in his view, correspond to the description which he

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<sup>301</sup> Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (*Rome II*), OJ L 199/40, 31.07.2007; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:0049:EN:PDF>

<sup>302</sup> Joined Cases C-585/08 and C-144/09, *Peter Pammer v Reederei Karl Schlüter GmbH & Co KG* (C-585/08), and *Hotel Alpenhof GesmbH v Oliver Heller* (C-144/09), judgment of 07.12.2010; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0585:EN:NOT>

had received from the agency and he sought reimbursement of the sum that he had paid for the voyage. As Reederei Karl Schlüter reimbursed only a part of that sum, the consumer brought proceedings before the Austrian courts, before which the German company raised a plea that the court lacked jurisdiction on the grounds that the company did not pursue any professional or commercial activity in Austria.

The European Court of Justice ruled that mere use of a website by a trader in order to engage in trade does not in itself mean that its activity is "directed to" other Member States, which would trigger application of the protective rules of jurisdiction in the regulation. The Court held that, in order for those rules to be applicable in relation to consumers from other Member States, the trader must have *manifested its intention* to establish commercial relations with such consumers.

In this context, the Court considers what evidence demonstrates that the trader was envisaging doing business with consumers domiciled in other Member States. Such evidence includes clear expressions of the trader's intention to solicit the custom of those consumers, for example when it offers its services or its goods in several Member States designated by name or when it pays a search engine operator for an internet referencing service in order to facilitate access to its site by consumers domiciled in those various Member States.

Nevertheless, other less obvious items of evidence, if combined with one another, are also capable of demonstrating the existence of an activity "directed to" the Member State of the consumer's domicile. These include: the international nature of the activity at issue, such as certain tourist activities; the inclusion of telephone numbers with an international code; use of a top-level domain name other than that of the Member State in which the trader is established, for example '.de', or use of neutral top-level domain names such as '.com.' or '.eu'; the description of itineraries from one or more other Member States to the place where the service is provided; and an indication of an international clientele composed of customers domiciled in various Member States, in particular by the presentation of accounts written by such customers. Likewise, if the website permits consumers to use a language or a currency other than that generally used in the trader's Member State, this can also constitute evidence demonstrating cross-border activity of the trader.

On the other hand, the mere mentioning on a website of the trader's email address or geographical address, or of its telephone number without an international code, does not constitute evidence of this kind because the information does not indicate whether the trader is directing its activity to one or more Member States.

The Court concluded that, in view of these considerations, the Austrian court must determine whether it is apparent from the traders' websites and overall activity that they were envisaging doing business with Austrian consumers (Case C-585/08) or German consumers (Case C-144/09) in the sense that they were minded to conclude contracts with them.

## **4.8 Cross-cutting issues**

### **4.8.1 VAT**

E-commerce is also hampered by tax obstacles in relation to value-added tax.

For goods, there is the problem of excessive administrative burdens: beyond a certain



threshold, set by each Member State at EUR 35 000 or EUR 100 000, the seller must register in the Member States where he sells. Knowledge of the thresholds and fulfilling the VAT obligations (registration for VAT, completing VAT returns and payment of the VAT due) in each Member State where sales exceed the threshold is clearly a deterrent to cross-border activities.

The introduction of a One Stop Shop mechanism as proposed by the European Commission<sup>303</sup> would help to alleviate administrative burdens for businesses.

For electronic services, there is currently a problem of distortion of competition within the EU. When these services are provided by an EU supplier to final consumers in the EU, their place of taxation is the Member State where that supplier is established. Consequently, businesses can take advantage of this situation by establishing in those Member States applying a lower VAT rate. The situation is different as regards electronic services provided by non-EU suppliers, given that the current rules already provide for VAT to be collected and paid in the Member State where the customer is established. For these non-EU suppliers, there is a single point of electronic contact for VAT identification and declaration – the mini One Stop Shop mechanism (MOSS).

Directive 2008/8/EC of 12 February 2008<sup>304</sup> sets new rules regarding electronic services. As from 2015, electronic services provided by an EU supplier to a non-taxable person (e.g final consumer) will also be taxable at the place where the customer is established. If the customer is established outside the EU, no VAT will be due in the EU. As a result, after 2015, any potential distortions of competition will disappear.

The supplier himself will be responsible for collecting the VAT paid in the Member State of the customer. In order to avoid new administrative burdens, all suppliers of electronic services will have the possibility to make use of the MOSS as from 2015.

The MOSS, which will be optional for businesses, should simplify administrative obligations for small e-commerce operators, as they will be able to fulfil all their obligations in their own Member State. This should facilitate the selling of electronic services throughout the EU.

There remains the question of VAT rates. First, VAT rates are subject to partial harmonization within the EU<sup>305</sup> and the Member States may set their rates within predetermined ranges. For example, the standard rate must be set at a minimum of 15% and currently varies between 15 and 25% of the value of goods or services, depending on the Member State of taxation.

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<sup>303</sup> Proposal for a Council Directive *amending Directive 77/388/EEC with a view to simplifying value added tax obligations* (COM(2004) 728 final, 29.10.2004. Bibliographic notice available at: <http://eur-lex.europa.eu/Notice.do?val=390797:cs&lang=en&list=390798:cs,390488:cs,390797:cs.&pos=3&page=1&nbl=3&pgs=10&hwords=>

<sup>304</sup> Council Directive 2008/8/EC of 12 February 2008 *amending Directive 2006/112/EC as regards the place of supply of services*, OJ L 44/11, 20.02.2008; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:044:0011:0022:EN:PDF>

<sup>305</sup> Council Directive 77/388/EC of 17 May 1977 *on the harmonisation of the laws of the Member States relating to turnover taxes*, OJ L 145/1, 13.06.1977, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31977L0388:EN:HTML>

Finally, VAT rates discriminate between physical and digital cultural goods. Whilst for certain cultural goods, Member States have the option to apply a reduced VAT rate (minimum 5%), the sales of digital assets are always subject to the standard rates (15 to 25%). This discrimination is a source of misunderstanding for the consumers, an additional administrative burden for companies, especially SMEs, and can constitute a barrier to market for digital goods. In its Green Paper on the future of VAT<sup>306</sup>, the Commission raised the question of the convergence between digital and physical environments, and notably of the impact on business and market development of the current divergences in the Single Market. It indicated that convergence can be achieved either by applying the standard rate to physical goods as well or by extending to the digital environment the reduced rates existing for goods on physical means of support.

On 6 December 2011, the Commission adopted a Communication drawing conclusions from this consultation on the future of VAT and identify appropriate priority areas for action at EU level.<sup>307</sup>

#### 4.8.2 Networks and infrastructure

Multiple networks are being developed at national and European level to manage the links between businesses, consumers and public authorities, as well as between public authorities of different Member States. Respondents to the e-commerce communication have stressed the importance of strengthening these networks in order to contribute to the Digital Single Market. Although this Staff Working Document does not cover networks and infrastructure, it is obvious that a clear relationship exists between these networks and the online trade in goods and services. For example:

- There is an increasing demand for access to information on companies in a cross-border context, either for commercial purposes or to facilitate access to justice, which requires cross-border cooperation amongst business registers. The Commission proposed to amend Directives 89/666/EEC, 2005/56/EC and 2009/101/EC as regards the interconnection of central, commercial and companies' registers. An initiative is also underway to interconnect insolvency registers via the European e-Justice Portal by mid 2012.
- More generally, the e-Justice Portal was launched on 16 July 2010. The Portal intends to promote access to information in the field of justice (both to EU and national legislation and case law); to dematerialise cross-border judicial and extra-judicial proceedings (for example, e-mediation) and to enhance the communication between judicial authorities.<sup>308</sup>

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<sup>306</sup> Commission Staff Working Document, Accompanying document to the Green Paper on the future of VAT, *Towards a simpler, more robust and efficient VAT system*, COM(2010) 695 final, 01.12.2010; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2010:1455:FIN:EN:PDF>

<sup>307</sup> Commission Communication on the future of VAT, *Towards a simpler, more robust and efficient VAT system tailored to the single market*, COM(2011) 851 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/vat/key\\_documents/communications/com\\_2011\\_851\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/key_documents/communications/com_2011_851_en.pdf)

<sup>308</sup> See the Council's *Multi-Annual European e-Justice Action Plan 2009-2013*, 2009/C 75/01, 31.3.2009, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:075:0001:0012:en:PDF>.

- The new fund for the "Connecting Europe Facility" proposed by the European Commission for the 2014-2020 multi-annual budget reserves € 9.2 billion for digital infrastructures.<sup>309</sup>
- The Commission is moving to support take-up of e-procurement.<sup>310</sup>

### 4.8.3 Environmental dimension

The development of e-commerce and other online services can contribute to a more sustainable economy. Though research is still rather in its infancy, available empirical evidence shows that the digital economy has positive effects on the environment.

For example, compared to a traditional CD purchase in a "brick and mortar" shop, the purchase of online music and online movie rental is much more environmentally friendly. A recent study concludes that energy use and carbon emission can be reduced by between 40% and 80%, depending on whether the customer burns the file to a CD or not.<sup>311</sup> Research in the field of online and offline movie rental came to the same conclusions despite the fact that in the online movie rental business the DVDs were still delivered.<sup>312</sup>

E-Commerce and other modern technologies can also help to communicate to consumers the environmental performance of the products they buy more clearly, efficiently and effectively. This can be done not just at the point of purchase but also while the consumer is doing (online) research about the products he intends to buy. E-Commerce and other online services can for example allow consumers easy access to a summary of environmental information of the products they are considering buying using electronic tagging, or enable them to benchmark the products they intend to buy against the best in class on the market.

The European Commission supports the proposal, made at the Retail Forum established in 2009, to reduce the retail environmental footprint and spread good environmental practices throughout the supply chain. E-commerce is seen as a way to reduce the environmental costs

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And for more concrete examples see the revised roadmap of the Council Working Party on e-Law (e-Justice), doc 1033/11 of 20 May 2011.

<sup>309</sup> Communication from the Commission to the European Parliament, the Council, the European Court of Justice, the Court of Auditors, the European Investment Bank, the European Economic and Social Committee and to the Committee of the Regions, *A growth package for integrated European infrastructures*, COM(2011) 676, 19.10.2011, available at: [http://ec.europa.eu/commission\\_2010-2014/president/news/speeches-statements/pdf/20111019\\_1\\_en.pdf](http://ec.europa.eu/commission_2010-2014/president/news/speeches-statements/pdf/20111019_1_en.pdf)

<sup>310</sup> See for details the Public Procurement web-page of DG MARKT: [http://ec.europa.eu/internal\\_market/publicprocurement/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/index_en.htm).

<sup>311</sup> Weber/ Koomey/ Matthews, *The energy and climate change impacts of different music delivery methods*, Final Report to Microsoft Corporation and Intel Corporation, 2009, p. i, available at: <http://download.intel.com/pressroom/pdf/cdsvsdownloadsrelease.pdf>

<sup>312</sup> Marcelo Velásquez, *A comparative study of the environmental impact of the online and offline movie rental business*, 2009, available at: <http://dalspace.library.dal.ca:8080/bitstream/handle/10222/12737/MEC%20THESIS%20MARCELO%20V%20ELASQUEZ.pdf?sequence=1>

of transporting products to consumers. A study commissioned by FEVAD<sup>313</sup>, in France, showed that, in terms of journeys made by customers, the e-commerce model results in a total distance of 10.09 km saved per delivery. For standard-sized parcels, the e-commerce model makes it possible to divide the emissions of greenhouse gases by a factor of almost 4. In absolute terms, the average saving made on CO<sub>2</sub> emissions amounts to 2.670 kg eq. CO<sub>2</sub> per delivery. The e-commerce model makes it possible to reduce the use of non-renewable resources used in deliveries by a factor of 4.5, and reduce by a factor of 2.81 the impact on human health. Moreover, a US study<sup>314</sup> found that e-commerce electronic products consumed 30% less energy than those originating in traditional commerce.

The current lack of harmonisation in national implementation of the rules on waste of electrical and electronic equipment (WEEE Directive) results in various levels of fees and thresholds for the registration and reporting of electrical and electronic equipment by online retailers, which can be prohibitive for cross-border traders. In its proposal to recast the Directive of 2009,<sup>315</sup> the Commission took major steps to harmonise implementation, clarifying certain provisions of the Directive, including its scope. Article 16 proposes to harmonise registration and reporting by producers in the EU by making the national registers for producers interoperable. This would allow producers to register in one Member State and conduct their activities in the whole EU instead of registering in each Member State separately. The Commission's proposal would significantly contribute to alleviating the practical problems identified under the current scheme. In the co-decision discussion on the WEEE Directive during its first reading, the Parliament has supported the approach proposed by the Commission, while the Council expressed a preference for a national approach. The Commission invites the Council to reconsider this approach, especially as regards cross-border distance sales.

#### 4.8.4 International dimension<sup>316</sup>

E-commerce and the Internet have an inherently global dimension, but rules on e-commerce are still very much fragmented both across Europe and worldwide. This may be problematic when European companies operate outside Europe or when non-EU companies operate in Europe. For instance, some non-European countries impose general monitoring obligations on companies or require companies to block certain content in a way that would not be considered proportionate in Europe. On the other hand, companies that are not established in Europe are in principle not covered by the E-Commerce Directive.<sup>317</sup> Particular problems can

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<sup>313</sup> Estia et Médiamétrie//NetRatings pour la FEVAD, *Etude de l'impact environnemental de l'achat sur internet et dans le commerce traditionnel*, June 2009; available at: [http://www.fevad.com/uploads/files/Prez/fevad\\_estia\\_110609.pdf](http://www.fevad.com/uploads/files/Prez/fevad_estia_110609.pdf)

<sup>314</sup> Weber et. al., *Life Cycle Comparison of Traditional Retail and E-commerce Logistics for Electronic Products: A case study of buy.com*, Green Design Institute at Carnegie Mellon University, December 2008, available at: [http://www.ce.cmu.edu/~greendesign/research/Buy\\_com\\_report\\_final\\_030209.pdf](http://www.ce.cmu.edu/~greendesign/research/Buy_com_report_final_030209.pdf)

<sup>315</sup> [http://ec.europa.eu/environment/waste/weee/index\\_en.htm](http://ec.europa.eu/environment/waste/weee/index_en.htm)

<sup>316</sup> The present chapter complements the international aspects of the Digital Agenda as set out in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Agenda for Europe*, COM (2010) 245 of 19.5.2010, available at: [http://ec.europa.eu/information\\_society/digital-agenda/documents/digital-agenda-communication-en.pdf](http://ec.europa.eu/information_society/digital-agenda/documents/digital-agenda-communication-en.pdf)

<sup>317</sup> See Recital 58, *ECD*.

also arise in the context of notice-and-takedown procedures. When illegal information is accessible in Europe, but is hosted outside the EU, a court in a Member State cannot order the takedown of this information. Intermediaries in Europe can then block this content, but many consider this to be a sub-optimal solution which could hamper the freedom of expression.

The Commission has been addressing international aspects of e-commerce both in bilateral<sup>318</sup> and multilateral<sup>319</sup> contacts with its partners. Bilaterally, the Commission has been negotiating the inclusion of certain instruments of the e-commerce *acquis*, such as the liability exemptions regime of the ECD in Free Trade Agreements. Although the initial focus was on the inclusion of the liability exemptions in the specific area of IPR enforcement, the Commission now aims to include liability exemptions that apply horizontally to all illegal information and activities. Similarly the Commission is seeking to include horizontal prohibitions on general monitoring obligations in its FTA negotiations. This reflects the importance that European online companies attach to the horizontal application of the liability regime, as expressed in the responses to the public consultation on e-commerce.

The Commission has also been discussing the E-Commerce Directive in a bilateral context:

- by negotiating cooperation provisions on issues such as the prohibition of prior authorisation, the conclusion of contract by electronic means, unsolicited commercial communications and other provisions of the E-Commerce Directive;
- by requiring the full transposition of the E-Commerce Directive in Association Agreements concluded in the context of the European Neighbourhood Policy;
- by negotiating the full transposition of the E-Commerce Directive with (potential) candidate countries.

The Commission has taken into account the international dimension of trade also in respect of other policy instruments. For instance, the Proposal for a Common European Sales Law provides that companies from third countries could also choose this instrument for contracts with parties located in the EU. This would be an incentive from companies from third countries to expand their e-commerce in the EU, as they would be able to trade within the Single Market based on the same rules.

At a multilateral level, the Commission has been active in several bodies, notably in the G8 and the OECD. The Commission has for instance taken an active role in the OECD Working Group on the role of intermediaries in advancing public interest objectives. The Commission has also contributed significantly to the discussions within the context of the WTO programme on e-commerce. One of the achievements of this work programme is notably the so-called "e-commerce moratorium" (WTO members will not charge import duties on electronic transmissions), therefore the development of electronic transactions. The work programme has been ongoing since 1998 and covers all trade related aspects of e-commerce, such as the classification of e-commerce services or the development dimension of e-commerce. The Commission has also been involved in the discussions within the Internet Governance Forum (IGF) on issues such as the sustainability and security of the Internet.

Despite the usefulness of several multilateral dialogues on e-commerce, the Commission believes that e-commerce could benefit from intensifying multilateral dialogues.

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<sup>318</sup> For example: Free Trade Agreements; Stabilization and Association Agreements.

<sup>319</sup> For example: WTO/GATS; European Neighbourhood Policy.

Commission services will further intensify the bilateral and multilateral discussions on e-commerce and other online services through global cooperation in particular in the context of the WTO/GATS, OECD and the Internet Governance Forum.

**ANNEX I: TRANSPOSITION OF DIRECTIVE 2000/31/EC IN THE EUROPEAN ECONOMIC AREA**

Member States

Transpositions Laws

Belgium

**Transposition deadline: 17/01/2002**

1. **Loi du 11 mars 2003 sur certains aspects juridiques des services de la société de l'information visés à l'article 77 de la Constitution. MB Ed. 2 du 17/03/2003 p. 12960 (C - 2003/11126)**

**Legal act: Mesures administratives; Official Journal: Moniteur Belge, Publication date: 17/03/2003, Entry into force: 11/03/2003; Reference: (SG(2003)A/02989)**

**[http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=fr&la=F&cn=2003031131&table\\_name=loi](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2003031131&table_name=loi)**

2. **Loi sur certains aspects juridiques des services de la société de l'information – 11 mars 2003; Moniteur belge du 17.3.2003 p. 12960 et 12963**

**[http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=fr&la=F&cn=2003031132&table\\_name=loi](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2003031132&table_name=loi)**

Bulgaria

**Transposition deadline: 01/01/2007**

1. **Закон за задълженията и договорите**

**Legal act: Закон; Official Journal: Държавен вестник, number: 36, Publication date: 02/05/2006, Entry into force: 01/07/2006; Reference: (MNE(2006)58154)**

2. **Закон за международния търговски арбитраж**

**Legal act: Закон; Official Journal: Държавен вестник, number: 46, Publication date: 07/05/2002, Entry into force: 11/05/2002; Reference: (MNE(2006)58156)**

3. **Закон за медиацията**

**Legal act: Закон; Official Journal: Държавен вестник, number: 86, Publication date: 24/10/2006, Entry into force: 28/10/2006; Reference: (MNE(2006)58152)**

4. Закон за електронния документ и електронния подпис

Legal act: Закон; Official Journal: Държавен вестник, number: 80, Publication date: 03/10/2006, Entry into force: 03/10/2006; Reference: (MNE(2006)58150)

5. Граждански процесуален кодекс

Legal act: Кодекс; Official Journal: Държавен вестник, number: 64, Publication date: 08/08/2006, Entry into force: 09/11/2006; Reference: (MNE(2006)58151)

6. Закон за електронната търговия

Legal act: Закон; Official Journal: Държавен вестник, number: 51, Publication date: 23/06/2006, Entry into force: 24/12/2006; Reference: (MNE(2006)58149)

Czech  
Republic

Transposition deadline: 01/05/2004

1. Закон č. 88/2003 Sb., kterým se mění zákon č. 513/1991 Sb., obchodní zákoník, ve znění pozdějších předpisů, zákon č. 40/1964 Sb., občanský zákoník, ve znění pozdějších předpisů, zákon č. 99/1963 Sb., občanský soudní řád, ve znění pozdějších předpisů, zákon č. 591/1992 Sb., o cenných papírech, ve znění pozdějších předpisů, zákon č. 358/1992 Sb., o notářích a jejich činnosti (notářský řád), ve znění pozdějších předpisů, zákon č. 370/2000 Sb., kterým se mění zákon č. 513/1991 Sb., obchodní zákoník, ve znění pozdějších předpisů, zákon č. 358/1992 Sb., o notářích a jejich činnosti (notářský řád), ve znění pozdějších předpisů, zákon č. 15/1998 Sb., o Komisi pro cenné papíry a o změně a doplnění dalších zákonů, ve znění zákona č. 30/2000 Sb., zákon č. 200/1990 Sb., o přestupcích, ve znění pozdějších předpisů, zákon č. 99/1963 Sb., občanský soudní řád, ve znění pozdějších předpisů, a zákon č. 328/1991 Sb., o konkursu a vyrovnání, ve znění pozdějších předpisů, ve znění zákona č. 501/2001 Sb. a nálezu Ústavního soudu vyhlášeného pod č. 476/2002 Sb., zákon č. 219/2000 Sb., o majetku České republiky a jejím vystupování v právních vztazích, ve znění pozdějších předpisů, a zákon č. 455/1991 Sb., o živnostenském podnikání (živnostenský zákon), ve znění pozdějších předpisů

Legal act: Zákon, number: 88/2003; Official Journal: Sbirka Zakonu CR, Publication date: 01/04/2003; Reference: (MNE(2003)56385)

<http://aplikace.mvcr.cz/archiv2008/sbirka/2003/sb037-03.pdf>

2. Закон č. 151/2002 Sb., kterým se mění některé zákony v souvislosti s přijetím



soudního řádu správního

Legal act: Zákon, number: 151/2002; Official Journal: Sbirka Zakonu CR, Publication date: 17/04/2002; Reference: (MNE(2003)56295)

<http://aplikace.mvcr.cz/archiv2008/sbirka/2002/sb061-02.pdf>

3. Zákon č. 138/2002 Sb., kterým se mění zákon č. 40/1995 Sb., o regulaci reklamy a o změně a doplnění zákona č. 468/1991 Sb., o provozování rozhlasového a televizního vysílání, ve znění pozdějších předpisů, a zákon č. 79/1997 Sb., o léčivech a o změnách a doplnění některých souvisejících zákonů, ve znění pozdějších předpisů

Legal act: Zákon, number: 138/2002; Official Journal: Sbirka Zakonu CR, Publication date: 15/04/2002; Reference: (MNE(2003)56308)

<http://aplikace.mvcr.cz/archiv2008/sbirka/2002/sb057-02.pdf>

4. Zákon č. 135/2002 Sb., kterým se mění zákon č. 40/1964 Sb., občanský zákoník, ve znění pozdějších předpisů

Legal act: Zákon, number: 135/2002; Official Journal: Sbirka Zakonu CR, Publication date: 15/04/2002; Reference: (MNE(2003)56792)

<http://aplikace.mvcr.cz/archiv2008/sbirka/2002/sb057-02.pdf>

5. Zákon č. 317/2001 Sb., kterým se mění zákon č. 40/1964 Sb., občanský zákoník, ve znění pozdějších předpisů, a o změně dalších zákonů

Legal act: Zákon, number: 317/2001; Official Journal: Sbirka Zakonu CR, Publication date: 07/09/2001; Reference: (MNE(2004)53429)

<http://aplikace.mvcr.cz/archiv2008/sbirka/2001/sb122-01.pdf>

6. Zákon č. 370/2000 Sb., kterým se mění zákon č. 513/1991 Sb., obchodní zákoník, ve znění pozdějších předpisů, zákon č. 358/1992 Sb., o notářích a jejich činnosti (notářský řád), ve znění pozdějších předpisů, zákon č. 15/1998 Sb., o Komisi pro cenné papíry a o změně a doplnění dalších zákonů, ve znění zákona č. 30/2000 Sb., zákon č. 200/1990 Sb., o přestupcích, ve znění pozdějších předpisů, zákon č. 99/1963 Sb., občanský soudní řád, ve znění pozdějších předpisů, a zákon č. 328/1991 Sb., o konkursu a vyrovnání, ve znění pozdějších předpisů

Legal act: Zákon, number: 370/2000; Official Journal: Sbirka Zakonu CR, Publication date: 25/10/2000; Reference: (MNE(2003)56337)

<http://aplikace.mvcr.cz/archiv2008/sbirka/2000/sb100-00.pdf>

7. Zákon č. 367/2000 Sb., kterým se mění zákon č. 40/1964 Sb., občanský zákoník, ve znění pozdějších předpisů, a některé další zákony

Legal act: Zákon, number: 367/2000; Official Journal: Sbirka Zakonu CR, Publication date: 23/10/2000; Reference: (MNE(2003)56434)

<http://aplikace.mvcr.cz/archiv2008/sbirka/2000/sb099-00.pdf>

8. Zákon č. 227/2000 Sb., o elektronickém podpisu a o změně některých dalších zákonů

Legal act: Zákon, number: 227/2000; Official Journal: Sbirka Zakonu CR, Publication date: 26/07/2000; Reference: (MNE(2003)56642)

<http://aplikace.mvcr.cz/archiv2008/sbirka/2000/sb068-00.pdf>

9. Zákon č. 356/1999 Sb., kterým se mění zákon č. 455/1991 Sb., o živnostenském podnikání (živnostenský zákon), ve znění pozdějších předpisů, a některé další zákony

Legal act: Zákon, number: 356/1999; Official Journal: Sbirka Zakonu CR, Publication date: 30/12/1999; Reference: (MNE(2003)56853)

<http://aplikace.mvcr.cz/archiv2008/sbirka/1999/sb111-99.pdf>

10. Zákon č. 63/1999 Sb., kterým se mění zákon č. 202/1990 Sb., o loteriích a jiných podobných hrách, ve znění pozdějších předpisů, a o změně dalších zákonů

Legal act: Zákon, number: 63/1999; Official Journal: Sbirka Zakonu CR, Publication date: 09/04/1999; Reference: (MNE(2004)53428)

<http://aplikace.mvcr.cz/archiv2008/sbirka/1999/sb026-99.pdf>

11. Zákon č. 286/1995 Sb., kterým se mění a doplňuje zákon č. 455/1991 Sb., o živnostenském podnikání (živnostenský zákon), ve znění pozdějších předpisů, a zákon České národní rady č. 570/1991 Sb., o živnostenských úřadech

Legal act: Zákon, number: 286/1995; Official Journal: Sbirka Zakonu CR,

Publication date: 08/12/1995; Reference: (MNE(2003)56856)

<http://aplikace.mvcr.cz/archiv2008/sbirka/1995/sb74-95.pdf>

12. Zákon č. 40/1995 Sb., o regulaci reklamy a o změně a doplnění zákona č. 468/1991 Sb., o provozování rozhlasového a televizního vysílání, ve znění pozdějších předpisů

Legal act: Zákon, number: 40/1995; Official Journal: Sbirka Zakonu CR, Publication date: 14/03/1995; Reference: (MNE(2003)56307)

<http://aplikace.mvcr.cz/archiv2008/sbirka/1995/sb08-95.pdf>

13. Zákon č. 216/1994 Sb., o rozhodčím řízení a o výkonu rozhodčích nálezů, ve znění pozdějších předpisů

Legal act: Zákon, number: 216/1994; Official Journal: Sbirka Zakonu CR, Publication date: 30/11/1994; Reference: (MNE(2003)56857)

<http://aplikace.mvcr.cz/archiv2008/sbirka/1994/sb67-94.pdf>

14. Zákon č. 264/1992 Sb., kterým se mění a doplňuje občanský zákoník, zrušuje zákon o státním notářství a o řízení před státním notářstvím (notářský řád) a mění a doplňují některé další zákony

Legal act: Zákon, number: 264/1992; Official Journal: Sbirka Zakonu CR, Publication date: 10/06/1992; Reference: (MNE(2004)53427)

<http://aplikace.mvcr.cz/archiv2008/sbirka/1992/sb056-92.pdf>

15. Zákon č. 513/1991 Sb., obchodní zákoník, ve znění zákona č. 370/2000 Sb., zák. č. 501/2001 Sb. a zák. č. 88/2003 Sb., ve znění pozdějších předpisů

Legal act: Zákon, number: 513/1991; Official Journal: Sbirka Zakonu CR, Publication date: 18/12/1991; Reference: (MNE(2003)56306)

<http://aplikace.mvcr.cz/archiv2008/sbirka/1991/sb098-91.pdf>

16. Zákon č. 509/1991 Sb., kterým se mění, doplňuje a upravuje občanský zákoník

Legal act: Zákon, number: 509/1991; Official Journal: Sbirka Zakonu CR,

**Publication date: 18/12/1991; Reference: (MNE(2003)56311)**

**<http://aplikace.mvcr.cz/archiv2008/sbirka/1991/sb097-91.pdf>**

17. **Zákon č. 455/1991 Sb., o živnostenském podnikání (živnostenský zákon), ve znění pozdějších předpisů**

**Legal act: Zákon, number: 455/1991; Official Journal: Sbirka Zakonu CR, Publication date: 15/11/1991; Reference: (MNE(2003)56510)**

**<http://aplikace.mvcr.cz/archiv2008/sbirka/1991/sb087-91.pdf>**

18. **Zákon č. 202/1990 Sb., o loteriích a jiných obdobných hrách, ve znění pozdějších předpisů**

**Legal act: Zákon, number: 202/1990; Official Journal: Sbirka Zakonu CR, Publication date: 18/05/1990; Reference: (MNE(2003)56673)**

**<http://aplikace.mvcr.cz/archiv2008/sbirka/1990/sb035-90.pdf>**

19. **Zákon č. 40/1964 Sb., občanský zákoník, ve znění pozdějších předpisů**

**Legal act: Zákon, number: 40/1964; Official Journal: Sbirka Zakonu CR, Publication date: 05/03/1964; Reference: (MNE(2003)56425)**

**<http://aplikace.mvcr.cz/archiv2008/sbirka/1964/sb19-64.pdf>**

20. **Zákon č. 99/1963 Sb., občanský soudní řád**

**Legal act: Zákon, number: 99/1963; Official Journal: Sbirka Zakonu CR, Publication date: 04/12/1963; Reference: (MNE(2003)56292)**

**<http://aplikace.mvcr.cz/archiv2008/sbirka/1963/sb56-63.pdf>**

21. **Zákon č. 500/2004 Sb., správní řád, ve znění pozdějších předpisů**

**Legal act: Zákon, number: 500/2004; Official Journal: Sbirka Zakonu CR, Publication date: 24/09/2004; Reference: (MNE(2004)53430)**

**<http://aplikace.mvcr.cz/archiv2008/sbirka/2004/sb174-04.pdf>**

22. Zákon č. 480/2004 Sb., o některých službách informační společnosti a o změně některých zákonů (zákon o některých službách informační společnosti), ve znění pozdějších předpisů
- Legal act: Zákon, number: 480/2004; Official Journal: Sbirka Zakonu CR, Publication date: 07/09/2004; Reference: (MNE(2004)53161)
- <http://aplikace.mvcr.cz/archiv2008/sbirka/2004/sb166-04.pdf>
23. Zákon č. 235/2004 Sb., o dani z přidané hodnoty, ve znění pozdějších předpisů
- Legal act: Zákon, number: 235/2004; Official Journal: Sbirka Zakonu CR, Publication date: 23/04/2004, Entry into force: 01/05/2004; Reference: (MNE(2004)58467)
- <http://aplikace.mvcr.cz/archiv2008/sbirka/2004/sb078-04.pdf>
24. Zákon č. 167/2004 Sb., kterým se mění zákon č. 455/1991 Sb., o živnostenském podnikání (živnostenský zákon), ve znění pozdějších předpisů, a některé související zákony
- Legal act: Zákon, number: 167/2004; Official Journal: Sbirka Zakonu CR, Publication date: 16/04/2004, Entry into force: 01/05/2004; Reference: (MNE(2004)59068)
- <http://aplikace.mvcr.cz/archiv2008/sbirka/2004/sb057-04.pdf>
25. Zákon č. 18/2004 Sb., o uznávání odborné kvalifikace a jiné způsobilosti státních příslušníků členských států Evropské unie a o změně některých zákonů (zákon o uznávání odborné kvalifikace), ve znění pozdějších předpisů
- Legal act: Zákon, number: 18/2004 ; Official Journal: Sbirka Zakonu CR, Publication date: 23/01/2004; Reference: (MNE(2003)56823)
- <http://aplikace.mvcr.cz/archiv2008/sbirka/2004/sb007-04.pdf>
26. Zákon č. 127/2005 Sb., o elektronických komunikacích a o změně některých souvisejících zákonů (zákon o elektronických komunikacích), ve znění pozdějších předpisů,

*Legal act: Zákon, number 127/2005; Official Journal: Sbirka Zakonu CR,  
Publication date: 31/03/2005;*

27. *Zákon č. 130/2008 Sb., kterým se mění zákon č. 455/1991 Sb., o živnostenském podnikání (živnostenský zákon), ve znění pozdějších předpisů, a další související zákony*

*Legal act: Zákon, number 130/2008; Official Journal: Sbirka Zakonu CR,  
Publication date: 17/04/2008;*

28. *Zákon č. 155/2010 Sb., kterým se mění některé zákony ke zkvalitnění jejich aplikace a ke snížení administrativní zátěže podnikatelů;*

*Legal act: Zákon, number 155/2010; Official Journal: Sbirka Zakonu CR,  
Publication date: 21/05/2010;*

29. *Zákon č. 189/2008 Sb., kterým se mění zákon č. 18/2004., o uznávání odborné kvalifikace a jiné způsobilosti státních příslušníků členských států Evropské unie a o změně některých zákonů (zákon o uznávání odborné kvalifikace), ve znění pozdějších předpisů, a další související zákony*

*Legal act: Zákon, number 189/2008; Official Journal: Sbirka Zakonu CR,  
Publication date: 02/06/2008;*

30. *Zákon č. 214/2006 Sb., kterým se mění zákon č. 455/1991 Sb., o živnostenském podnikání (živnostenský zákon), ve znění pozdějších předpisů, a některé další zákony*

*Legal act: Zákon, number 214/2006; Official Journal: Sbirka Zakonu CR,  
Publication date: 19/05/2006;*

31. *Zákon č. 261/2007 Sb., o stabilizaci veřejných rozpočtů*

*Legal act: Zákon, number 261/2007; Official Journal: Sbirka Zakonu CR,  
Publication date: 16/10/2007;*

32. *Zákon č. 281/2009 Sb., kterým se mění některé zákony v souvislosti s přijetím daňového řádu*

*Legal act: Zákon, number 281/2009; Official Journal: Sbirka Zakonu CR,  
Publication date: 03/09/2009;*

33. *Zákon č. 302/2008 Sb., kterým se mění zákon č. 235/2004 Sb., o dani z přidané hodnoty, ve znění pozdějších předpisů*

*Legal act: Zákon, number 302/2008; Official Journal: Sbirka Zakonu CR,  
Publication date:19/08/2008;*

34. *Zákon č. 427/2010 Sb., kterým se mění zákon č. 326/1999 Sb., o pobytu cizinců na území České republiky a o změně některých zákonů, ve znění pozdějších předpisů, zákon č. 325/1999 Sb., o azylu a o změně zákona č. 283/1991 Sb., o Policii České republiky, ve znění pozdějších předpisů, (zákon o azylu), ve znění pozdějších předpisů, a další související zákony*

*Legal act: Zákon, number 427/2010; Official Journal: Sbirka Zakonu CR,  
Publication date: 13/12/2010;*

35. *Zákon č. 47/2011 Sb., kterým se mění zákon č. 235/2004 Sb., o dani z přidané hodnoty, ve znění pozdějších předpisů*

*Legal act: Zákon, number 47/2011; Official Journal: Sbirka Zakonu CR,  
Publication date: 08/03/2011;*

36. *Zákon č. 489/2009 Sb., kterým se mění zákon č. 235/2004 Sb., o dani z přidané hodnoty, ve znění pozdějších předpisů*

*Legal act: Zákon, number 489/2009; Official Journal: Sbirka Zakonu CR, Publication date: 13/12/2009;*

37. *Zákon č. 545/2005 Sb., kterým se mění zákon č. 586/1992 Sb., o daních z příjmů, ve znění pozdějších předpisů, a některé související zákony*

*Legal act: Zákon, number 545/2005; Official Journal: Sbirka Zakonu CR, Publication date: 30/12/2005;*

38. *Zákon č. 56/2006 Sb., kterým se mění zákon č. 256/2004 Sb., o podnikání na kapitálovém trhu, ve znění pozdějších předpisů, a další související zákony*

*Legal act: Zákon, number 56/2006; Official Journal: Sbirka Zakonu CR, Publication date: 08/03/2006;*

39. *Zákon č. 635/2004 Sb., kterým se mění některé zákony v souvislosti s přijetím zákona o správních poplatcích*

*Legal act: Zákon, number 635/2004; Official Journal: Sbirka Zakonu CR, Publication date: 17/12/2004;*

40. *Zákon č. 444/2005 Sb., kterým se mění zákon č. 531/1990 Sb., o územních finančních orgánech, ve znění pozdějších předpisů, a některé další zákony*

*Legal act: Zákon, number 444/2005; Official Journal: Sbirka Zakonu CR, Publication date: 11/11/2005;*

41. *Zákon č. 296/2007 Sb., kterým se mění zákon č. 182/2006 Sb., o úpadku a způsobech jeho řešení (insolvenční zákon), ve znění pozdějších předpisů, a některé zákony v souvislosti s jeho přijetím*

*Legal act: Zákon, number 296/2007; Official Journal: Sbirka Zakonu CR,*



Publication date: 29/11/2007;

42. Zákon č. 104/2008 Sb., o nabídkách převzetí a o změně některých dalších zákonů

Legal act: Zákon, number 104/2008; Official Journal: Sbirka Zakonu CR,  
Publication date: 01/04/2008;

Denmark

Transposition deadline: 17/01/2002

1. Lov om tjenester i informationssamfundet, herunder visse aspekter af elektronisk handel ref: Lov nr 227 af 22/04/2002

Legal act: Lov, number: 227; Official Journal: Administrative measures, Entry into force: 22/04/2002; Reference: (SG(2002)A/06093)

<http://www.retsinfo.dk/GETDOC/ACCN/A20020022730-REGL>

Germany

Transposition deadline: 17/01/2002

1. "Umsetzung der Artikel 10 und 11 der RL: § 312 e Bürgerliches Gesetzbuch Umsetzung von Artikel 18 der RL: §§ 2 und 3 Unterlassungsklagengesetz"

Legal act: Gesetz; Official Journal: Bundesgesetzblatt Teil 1 (BGB 1), Publication date: 29/11/2001, Page: 03138-03188; Reference: (MNE(2006)56697)

[http://www.bgbl.de/Xaver/text.xav?bk=Bundesanzeiger\\_BGBI&start=%2F%2F\\*%5B%40attr\\_id%3D'bgbl101s3137.pdf'%5D&wc=1&skin=WC](http://www.bgbl.de/Xaver/text.xav?bk=Bundesanzeiger_BGBI&start=%2F%2F*%5B%40attr_id%3D'bgbl101s3137.pdf'%5D&wc=1&skin=WC)

2. Teledienstegesetz

Legal act: Gesetz; Official Journal: Bundesgesetzblatt Teil 1 (BGB 1), Publication date: 28/02/2007; Reference: (MNE(2007)55072)

[http://www.bgbl.de/Xaver/text.xav?bk=Bundesanzeiger\\_BGBI&start=%2F%2F\\*%5B%40attr\\_id%3D'bgbl101s3137.pdf'%5D&wc=1&skin=WC](http://www.bgbl.de/Xaver/text.xav?bk=Bundesanzeiger_BGBI&start=%2F%2F*%5B%40attr_id%3D'bgbl101s3137.pdf'%5D&wc=1&skin=WC)

3. Concordance table

Legal act: Concordance table; Reference: (MNE(2007)55071)

4. Umsetzung von Art. 20 der Richtlinie: §§ 8 - 10, 16 Gesetz gegen den unlauteren Wettbewerb vom 3. Juli 2004 (BGBl. I S. 1414), geändert durch Artikel 165 des Gesetzes vom 19. April 2006 (BGBl. I S. 866)

Legal act: Gesetz; Official Journal: Bundesgesetzblatt Teil 1 (BGB 1), Publication date: 07/06/2004; Reference: (MNE(2006)55202)

[http://www.bgbl.de/Xaver/text.xav?bk=Bundesanzeiger\\_BGBl&start=%2F%2F\\*%5B%40attr\\_id%3D'bgbl101s3137.pdf'%5D&wc=1&skin=WC](http://www.bgbl.de/Xaver/text.xav?bk=Bundesanzeiger_BGBl&start=%2F%2F*%5B%40attr_id%3D'bgbl101s3137.pdf'%5D&wc=1&skin=WC)

5. Gesetz über rechtliche Rahmenbedingungen für den Elektronischen Geschäftsverkehr (Elektronischer Geschäftsverkehr-Gesetz (EGG)) Bundesgesetzblatt, Jahrgang 2001, Teil I Nr. 70 vom 20/12/2001, Seite 3721

Legal act: Gesetz; Official Journal: Bundesgesetzblatt Teil 1 (BGB 1), number: Teil I nr 70, Publication date: 20/12/2001, Page: 3721; Reference: (SG(2002)A/04406)

[http://www.bgbl.de/Xaver/text.xav?bk=Bundesanzeiger\\_BGBl&start=%2F%2F\\*%5B%40attr\\_id%3D'bgbl101s3137.pdf'%5D&wc=1&skin=WC](http://www.bgbl.de/Xaver/text.xav?bk=Bundesanzeiger_BGBl&start=%2F%2F*%5B%40attr_id%3D'bgbl101s3137.pdf'%5D&wc=1&skin=WC)

6. Umsetzung von Art. 10 und 11 der RL: § 3 der BGB- Informationspflichten-Verordnung

Legal act: Verordnung; Official Journal: Bundesgesetzblatt Teil 1 (BGB 1), Publication date: 08/08/2002; Reference: (MNE(2006)55241)

[http://www.bgbl.de/Xaver/text.xav?bk=Bundesanzeiger\\_BGBl&start=%2F%2F\\*%5B%40attr\\_id%3D'bgbl101s3137.pdf'%5D&wc=1&skin=WC](http://www.bgbl.de/Xaver/text.xav?bk=Bundesanzeiger_BGBl&start=%2F%2F*%5B%40attr_id%3D'bgbl101s3137.pdf'%5D&wc=1&skin=WC)

7. Umsetzung von Art. 20 der Richtlinie: §§ 8 - 10, 16 Gesetz gegen den unlauteren Wettbewerb vom 3. Juli 2004 (BGBl. I S. 1414), geändert durch Artikel 165 des Gesetzes vom 19. April 2006 (BGBl. I S. 866)

Legal act: Gesetz; Official Journal: Bundesgesetzblatt Teil 1 (BGB 1), Publication date: 07/06/2004; Reference: (MNE(2006)55203)

8. Landesgesetz zu dem Sechsten Rundfunkänderungsstaatsvertrag und zur Änderung des Landesrundfunkgesetzes vom 4/07/2002 GVBl. Rheinland-Pfalz n° 10 du 12/06/2002 p. 255

Legal act: Gesetz; Official Journal: Verwaltungsmassnahmen

1. KÄIBEMAKSUSEADUS

Legal act: seadus, number: RT I 2004, 89, 603; Official Journal: Elektrooniline Riigi Teataja, number: RT I 2004, 89, 603, Entry into force: 01/01/2005; Reference: (MNE(2005)54902)

<https://www.riigiteataja.ee/akt/976969>

2. ÄRISEADUSTIK

Legal act: seadus, number: RT I 1995, 26-28, 355; Official Journal: Elektrooniline Riigi Teataja, number: RT I 1995, 26-28, 355, Entry into force: 01/09/1995; Reference: (MNE(2003)54262)

<https://www.riigiteataja.ee/akt/834159>

3. TSIVILSEADUSTIKU ÜLDOSA SEADUS

Legal act: seadus, number: RT I 2005, 39, 308; Official Journal: Elektrooniline Riigi Teataja, number: RT I 2005, 39, 308, Entry into force: 01/01/2006; Reference: (MNE(2005)55585)

<https://www.riigiteataja.ee/akt/687028>

4. VÕLAÕIGUSSEADUS1

Legal act: seadus, number: RT I 2005, 39, 308; Official Journal: Elektrooniline Riigi Teataja, number: RT I 2005, 39, 308, Entry into force: 01/01/2006; Reference: (MNE(2005)55584)

<https://www.riigiteataja.ee/akt/12876121>

5. TSIVILSEADUSTIKU ÜLDOSA SEADUS

Legal act: seadus, number: RT I 2002, 35, 216 ; Official Journal: Elektrooniline Riigi Teataja, number: RT I 2002, 35, 216 , Entry into force: 27/12/2003; Reference: (MNE(2005)54518)

<https://www.riigiteataja.ee/akt/95221>

6. **Infoühiskonna teenuse seadus**

**Legal act: seadus, number: RTI 2004, 29, 191; Official Journal: Elektrooniline Riigi Teataja, number: RTI 2004, 29, 191, Entry into force: 01/05/2004; Reference: (MNE(2004)57749)**

<https://www.riigiteataja.ee/akt/780289>

7. **Tarbijakaitseseadus**

**Legal act: seadus, number: RTI, 15.03.2004, 13, 86; Official Journal: Elektrooniline Riigi Teataja, number: RTI, 15.03.2004, 13, 86, Entry into force: 15/04/2004; Reference: (MNE(2003)55290)**

<https://www.riigiteataja.ee/akt/757827>

8. **VÄLISRIIGIS OMANDATUD KUTSEKVALIFIKATSIOONI TUNNUSTAMISE SEADUS**

**Legal act: seadus, number: RTI, 15.03.2000, 29, 168 ; Official Journal: Elektrooniline Riigi Teataja, number: RTI, 15.03.2000, 29, 168, Entry into force: 13/03/2003; Reference: (MNE(2003)54572)**

<https://www.riigiteataja.ee/akt/26294>

9. **Võlaõigusseadus**

**Legal act: seadus, number: RT I 2004, 37, 255; Official Journal: Elektrooniline Riigi Teataja, number: RT I 2004, 37, 255, Entry into force: 01/05/2004; Reference: (MNE(2003)55345)**

<https://www.riigiteataja.ee/akt/745265>

Ireland

**Transposition deadline: 17/01/2002**

1. **European Communities (Directive 2000/31/EC) Regulations 2003. SI n° 68/2003 of 24/02/2003**

**Reference: (SG(2003)A/02960)**

<http://www.irishstatutebook.ie/2003/en/si/0068.html>

Greece

Transposition deadline: 17/01/2002

1. Acte législatif 131 FEK A n° 116 du 16/05/2003 p. 1747

Legal act: Administrative measures; Official Journal: Εφημερίς της Κυβερνήσεως (ΦΕΚ) (Τεύχος Α), Publication date: 16/05/2003, Page: 1747; Reference: (SG(2003)A/05684)

[http://www.et.gr/index.php?option=com\\_wrapper&view=wrapper&Itemid=104&lang=en](http://www.et.gr/index.php?option=com_wrapper&view=wrapper&Itemid=104&lang=en)

Spain

Transposition deadline: 17/01/2002

1. Ley 34/2002 de 11 de julio, de servicios de la sociedad de la información y de comercio electrónico BOE n° 166 du 12/07/2002 p. 25388

Legal act: Ley, number: 34/2002; Official Journal: Boletín Oficial del Estado (B.O.E), number: 166, Publication date: 12/07/2002, Entry into force: 11/07/2002; Reference: (SG(2002)A/07568)

[http://noticias.juridicas.com/base\\_datos/Admin/l34-2002.html](http://noticias.juridicas.com/base_datos/Admin/l34-2002.html)

France

Transposition deadline: 17/01/2002

1. Loi n° 575 du 21/6/2004 pour la confiance dans l'économie numérique.

Legal act: Loi, number: 575; Official Journal: Journal Officiel de la République Française (JORF), Publication date: 22/06/2004, Page: 00001-00022; Reference: (MNE(2004)50105)

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000801164&dateTexte=>

2. Ordonnance n° 2005-674 du 16/6/2005 relative à l'accomplissement de certaines formalités contractuelles par voie électronique.

Legal act: Ordonnance, number: 2005/674; Official Journal: Journal Officiel de la République Française (JORF), Publication date: 17/06/2005, Page: 00001-00002; Reference: (MNE(2005)52425)

<http://admi.net/jo/20050617/JUSX0500112R.html>

3. Décret n° 2005-137 du 16/2/2005 pris pour l'application de l'article L. 134-2 du code de la consommation.

Legal act: Décret, number: 2005/137; Official Journal: Journal Officiel de la République Française (JORF), Publication date: 18/02/2005, Page: 00001-00001; Reference: (MNE(2005)50744)

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000448451&dateTexte=>

Italy

Transposition deadline: 17/01/2002

1. Decreto legislativo 09/04/2003 n. 70 - Attuazione delle direttiva 2000/31/CE relativa a taluni aspetti giuridici dei servizi della società dell'informazione nel mercato interno, con particolare riferimento al commercio elettronico GURI Serie generale n° 87 du 14/04/2003

Legal act: Administrative measures; Official Journal: Gazzetta Ufficiale della Repubblica Italiana, Publication date: 14/04/2003; Reference: (SG(2003)A/03980)

<http://www.senato.it/parlam/leggi/deleghe/03070dl.htm>

Cyprus

Transposition deadline: 01/05/2004

1. Ο Περί Ορισμένων Πτυχών των Υπηρεσιών της Κοινωνίας της Πληροφορίας και Ειδικά του Ηλεκτρονικού Εμπορίου καθώς και για Συναφή Θέματα (Τροποποιητικός) Νόμος του 2007.

Legal act: Νόμος, number: N. 97(I)/2007; Official Journal: Cyprus Gazette, number: 4135, Publication date: 18/07/2007, Page: 00851-00852, Entry into force: 18/07/2007; Reference: (MNE(2007)55799)

[http://www.mof.gov.cy/mof/gpo/gpo.nsf/All/257AE9F14E771126C225731E001D768A/\\$file/4135%2018.7.2007%20Parartima%201o%20Meros%20I.pdf](http://www.mof.gov.cy/mof/gpo/gpo.nsf/All/257AE9F14E771126C225731E001D768A/$file/4135%2018.7.2007%20Parartima%201o%20Meros%20I.pdf)

2. Ο Περί Ορισμένων Πτυχών των Υπηρεσιών της Κοινωνίας της Πληροφορίας και Ειδικά του Ηλεκτρονικού Εμπορίου καθώς και για Συναφή Θέματα Νόμος του 2004

Legal act: Νόμος; Official Journal: Cyprus Gazette, Publication date: 30/04/2004; Reference: (MNE(2004)59504)

Latvia

Transposition deadline: 01/05/2004

1. **Par Vispārējās atļaujas noteikumiem**

**Legal act: SPRK padomes lēmums, number: 118; Official Journal: Latvijas Vēstnesis, number: 90, Publication date: 08/06/2005, Entry into force: 25/05/2005; Reference: (MNE(2006)51147)**

**<http://www.likumi.lv/doc.php?id=109879&from=off>**

2. **Patērētāju tiesību aizsardzības likums**

**Legal act: Likums; Official Journal: Latvijas Vēstnesis, number: 104/105, Publication date: 01/04/1999; Reference: (MNE(2003)50062)**

**<http://www.likumi.lv/doc.php?id=23309>**

3. **Par reglamentētajām profesijām un profesionālās kvalifikācijas atzišanu**

**Legal act: Likums; Official Journal: Latvijas Vēstnesis, number: 105, Publication date: 06/07/2001, Entry into force: 20/07/2001; Reference: (MNE(2004)50177)**

**<http://www.likumi.lv/doc.php?id=26021>**

4. **Latvijas Republikas Civillikums**

**Legal act: Likums; Official Journal: LR Saeimas un Ministru Kabineta Zinotājs, number: 4, Publication date: 30/01/1992; Reference: (MNE(2003)50827)**

**<http://www.vvc.gov.lv/export/sites/default/LV/publikacijas/civillikums.pdf>**

5. **Informācijas sabiedrības pakalpojumu likums**

**Legal act: Likums; Official Journal: Latvijas Vēstnesis, number: 183, Publication date: 17/11/2004, Entry into force: 01/12/2004; Reference: (MNE(2004)53163)**

**<http://www.likumi.lv/doc.php?id=96619>**

6. **Grozījumi Patērētāju tiesību aizsardzības likumā**

**Legal act: Likums; Official Journal: Latvijas Vēstnesis, number: 74, Publication date: 12/05/2004, Entry into force: 26/05/2004; Reference: (MNE(2004)51138)**

**<http://www.likumi.lv/doc.php?id=221390>**

1. Lietuvos Respublikos informacinės visuomenės paslaugu įstatymas Nr. X-614

Legal act: Įstatymas, number: X-614/2006; Official Journal: Valstybės žinios, number: 65, Publication date: 10/06/2006, Entry into force: 01/07/2006; Reference: (MNE(2006)54979)

[http://www.regitra.lt/uploads/documents/dokumentai/istat\\_lr\\_info\\_pasl.pdf](http://www.regitra.lt/uploads/documents/dokumentai/istat_lr_info_pasl.pdf)

2. Lietuvos Respublikos informacinės visuomenės paslaugu įstatymo 4, 18, 19 straipsnių pakeitimo ir papildymo įstatymas Legal act: Įstatymas, number: XI-800; Official Journal: Valstybės žinios, number: 60, Publication date: 25/05/2010, Entry into force: 25/05/2010;

<http://tar.tic.lt/Default.aspx?id=2&item=results&aktoid=ACB1D81A-6BCF-406E-9EB0-421FFF219A69>

3. Administracinių teisės pažeidimų kodekso 15, 44(1), 189(7), 224, 247(10), 259(1), 320 straipsnių pakeitimo ir Kodekso papildymo 44(3), 44(4), 44(5), 214(25), 214(26) straipsniais įstatymas Legal act: Įstatymas, number: X-1019; Official Journal: Valstybės žinios, number: 12, Publication date: 30/01/2007, Entry into force: 30/01/2007;

<http://tar.tic.lt/Default.aspx?id=2&item=results&aktoid=9303239B-69D5-49E7-A5B9-D1E5F5AF0A4A>

4. Lietuvos Respublikos Vyriausybės 2007 m. rugpjūčio 2 d. nutarimas Nr. 881 “Dėl galimybės pasiekti neteisėtu būdu įgytą, sukurtą, pakeistą ar naudojamą informaciją panaikinimo tvarkos aprašo patvirtinimo” Legal act: Governmental decree, number: 881; Official Journal: Valstybės žinios, number: 94, Publication date: 01/09/2007, Entry into force: 02/09/2007;

<http://tar.tic.lt/Default.aspx?id=2&item=results&aktoid=014FC9F3-DB65-42E3-A0B6-6D6FE55A9CE3>



Luxembourg: Transposition deadline: 17/01/2002

5. Loi du 14 août 2000 relative au commerce électronique modifiant le code civil, le nouveau code de procédure civile, le code de commerce, le code pénal et transposant la directive 1999/93 relative à un cadre communautaire pour les signatures électroniques, la directive relative à certains aspects juridiques des services de la société de l'information, certaines dispositions de la directive 97/7/CEE concernant la vente à distance des biens et des services autres que les services financiers

Reference: (SG(2000)A/11994)

<http://www.legilux.public.lu/leg/a/archives/2000/0096/a096.pdf>

Hungary Transposition deadline: 01/05/2004

1. 2008. évi XLVII. törvény a fogyasztókkal szembeni tisztességtelen kereskedelmigyakorlat tilalmáról

Legal act: Törvény, number: 2008/XLVII.; Official Journal: Magyar Közlöny, number: 2008/95., Page: 05782-05813; Reference: (MNE(2008)54528)

<http://www.parlament.hu/irom38/05448/05448.pdf>

2. 2003. évi C. törvény az elektronikus hírközlésről

Legal act: Törvény, number: 2003/C; Official Journal: Magyar Közlöny, number: 2003/136, Publication date: 27/11/2003, Page: 10420-10483, Entry into force: 01/01/2004; Reference: (MNE(2003)54694)

<http://www.parlament.hu/irom37/5680/5680.htm>

3. 2001. évi XXXV. törvény az elektronikus aláírásról

Legal act: Törvény, number: XXXV/2001; Official Journal: Magyar Közlöny, number: 2001/65, Publication date: 12/06/2001, Page: 04137-04149; Reference: (MNE(2003)54716)

<http://www.mkogy.hu/irom36/3847/3847.htm>

4. 2001. évi CVIII. törvény az elektronikus kereskedelmi szolgáltatások, valamint az információs társadalommal összefüggő szolgáltatások egyes kérdéseiről

**Legal act: Törvény; Official Journal: Magyar Közlöny, number: 153, Publication date: 24/12/2001, Page: 11450; Reference: (MNE(2003)54725)**

**<http://www.navar-honlap.hu/alapveto-jogszabalyok/az-elektronikus-kereskedelmi-szolgaltatasok-valamint-az-informacios-tarsadalommal-osszefuggo.html>**

Malta: **Transposition deadline: 01/05/2004**

**1. Electronic Commerce Act 2001 (Chapter 426 of 2001)**

**Legal act: Act; Official Journal: The Malta government gazette, number: 17,037, Publication date: 16/01/2001; Reference: (MNE(2003)57439)**

**<https://secure.gov.mt/e-procurement/pdfs/chapt426.pdf>**

**2. LE{ISLAZZJONI SUSSIDJARJA 426.02REGOLAMENTI DWAR IL-KOMUNIKAZZJONIJIETU TRANSAZZJONIJIET ELETTRONI-I**

**Legal act: Regolament, number: LS42602; Official Journal: The Malta government gazette, Publication date: 24/10/2006, Page: 00001-00016; Reference: (MNE(2011)51813)**

Netherlands: **Transposition deadline: 17/01/2002**

**1. Wet van 13 mei 2004 tot aanpassing van het Burgerlijk Wetboek, het Wetboek van Burgerlijke Rechtsvordering, het Wetboek van Strafrecht en de Wet op de economische delicten ter uitvoering van richtlijn nr. 2000/31/EG van het Europees Parlement en de Raad van de Europese Unie van 8 juni 2000 betreffende bepaalde juridische aspecten van de diensten van de informatiemaatschappij, met name de elektronische handel, in de interne markt (PbEG L 178) (Aanpassingswet richtlijn inzake elektronische handel)**

**Legal act: Wet; Official Journal: Staatsblad (Bulletin des Lois et des Décrets royaux), number: 2004/210, Publication date: 25/05/2004, Page: 00001-00008; Reference: (MNE(2004)51461)**

**<http://cdn.ikregeer.nl/pdf/stb-2004-210.pdf>**

**2. Besluit van 18 juni 2004, houdende vaststelling tijdstip van inwerkingtreding van de wet van 13 mei 2004 tot aanpassing van het Burgerlijk Wetboek, het Wetboek van Burgerlijke Rechtsvordering, het Wetboek van Strafrecht en de Wet op de economische delicten ter uitvoering van richtlijn nr. 2000/31/EG van het Europees Parlement en de Raad van de Europese Unie van 8 juni 2000 betreffende bepaalde**

**juridische aspecten van de diensten van de informatiemaatschappij, met name de elektronische handel, in de interne markt (PbEG L 178) (Aanpassingswet richtlijn inzake elektronische handel) (Stb. 210)**

**Legal act: Ministerieel besluit; Official Journal: Staatsblad (Bulletin des Lois et des Décrets royaux), number: 2004/285, Publication date: 29/06/2004, Page: 00001-00002; Reference: (MNE(2004)51463)**

**<http://cdn.ikregeer.nl/pdf/stb-2004-285.pdf>**

Austria

**Transposition deadline: 17/01/2002**

1. **Regelung bestimmter rechtlicher Aspekte des elektronischen Geschäfts- und Rechtsverkehrs und Änderung des Signaturgesetzes sowie der Zivilprozessordnung Bundesgesetzblatt n° 152, Jahrgang 2001, Teil I vom 21/12/2001, Seite 1977**

**Legal act: Bundesgesetz; Official Journal: Bundesgesetzblatt für die Republik Österreich (BGBl.), number: teil I nr, Publication date: 21/12/2001, Page: 1977; Reference: (SG(2002)A/02947)**

**<http://www.ris.bka.gv.at/Ergebnis.wxe?Abfrage=BgblPdf&Titel=&Bgbnummer=152%2f2001&SucheNachGesetzen=False&SucheNachKundmachungen=False&SucheNachVerordnungen=False&SucheNachSonstiges=False&SucheNachTeil1=True&SucheNachTeil2=False&SucheNachTeil3=False&SucheNachTeilAlt=False&VonDatum=01.05.1945&BisDatum=31.12.2003&ImRisSeit=Undefined&ResultPageSize=50&Suchworte=&ReturnUrl=%2fSuchen.wxe%3fQueryID%3dBgblPdf>**

Poland

**Transposition deadline: 01/05/2004**

1. **Ustawa z dnia 18 lipca 2002 r. o świadczeniu usług drogą elektroniczną**

**Legal act: Ustawa; Official Journal: Dziennik Ustaw, number: 2002/144/1204, Publication date: 09/09/2002; Reference: (MNE(2003)53899)**

**<http://mediarun.pl/files/attach/2007/05/1178548615.pdf>**

2. **Ustawa z 23 kwietnia 1964 Kodeks Cywilny**

**Legal act: Ustawa; Official Journal: Dziennik Ustaw, number: 1964/16/93, Publication date: 18/05/1964; Reference: (MNE(2003)51767)**

<http://isap.sejm.gov.pl/DetailsServlet?id=WDU19640160093>

Portugal

Transposition deadline: 17/01/2002

1. Ministério da Economia e da Inovação Procede à primeira alteração ao Decreto-Lei n.º 7/2004, de 7 de Janeiro, que transpõe para a ordem jurídica nacional a Directiva n.º 2000/31/CE, do Parlamento Europeu e do Conselho, de 8 de Junho, relativa a certos aspectos legais dos serviços da sociedade de informação, em especial do comércio electrónico, no mercado interno

Legal act: Decreto-Lei, number: 62/2009; Official Journal: Diaro da Republica I, number: 48, Publication date: 10/03/2009, Page: 01602-01602; Reference: (MNE(2009)51108)

<http://www.cnpd.pt/bin/legis/nacional/DL62-2009-SPAM.pdf>

2. Decreto-Lei n.º 7/2004 de 7/1 Diário da republica I-A n.º 5 de 7/1/2004 p. 70

Legal act: Decreto-Lei, number: 7/2004; Official Journal: Diaro da Republica I, number: serie A nr 5, Publication date: 07/01/2004; Reference: (SG(2004)A/00736)

<http://www.cnpd.pt/bin/legis/nacional/DL7.2004.pdf>

Romania

Transposition deadline: 01/01/2007

1. Lege pentru modificarea și completarea Legii nr. 365/2002 privind comerțul electronic

Legal act: Lege, number: 121; Official Journal: Monitorul Oficial al României, number: 403, Publication date: 10/05/2006, Page: 00005-00006, Entry into force: 13/05/2006; Reference: (MNE(2006)58519)

<http://www.legi-internet.ro/legislatie-itc/comert-electronic/legea-comertului-electronic/legea-nr-121-din-4-mai-2006-pentru-modificarea-i-completarea-legii-nr-3652002-privind-comerul-electronic.html>

2. Lege privind comerțul electronic

Legal act: Lege, number: 365; Official Journal: Monitorul Oficial al României, number: 483, Publication date: 05/07/2002, Page: 00001-00008, Entry into force: 05/07/2002; Reference: (MNE(2006)58517)

<http://www.legi-internet.ro/index.php?id=22>

3. **Lege privind unele măsuri pentru asigurarea transparenței în exercitarea demnităților publice, a funcțiilor publice și în mediul de afaceri, prevenirea și sancționarea corupției**

**Legal act: Lege, number: 161; Official Journal: Monitorul Oficial al României, number: 279, Publication date: 21/04/2003, Page: 00002-00060, Entry into force: 21/04/2003; Reference: (MNE(2006)58518)**

**[http://legislatie.resurse-pentru-democratie.org/161\\_2003.php](http://legislatie.resurse-pentru-democratie.org/161_2003.php)**

Slovenia

**Transposition deadline: 01/05/2004**

1. **Zakon o spremembah in dopolnitvah Zakona o varstvu potrošnikov (ZVPot-C)**

**Legal act: Zakon; Official Journal: Uradni list RS, number: 126/2007, Publication date: 31/12/2007, Page: 18733-18738, Entry into force: 15/01/2008; Reference: (MNE(2009)54585)**

**[http://zakonodaja.gov.si/rpsi/r05/predpis\\_ZAKO5065.html](http://zakonodaja.gov.si/rpsi/r05/predpis_ZAKO5065.html)**

2. **Zakon o elektronskem poslovanju na trgu (ZEPT)**

**Legal act: Zakon; Official Journal: Uradni list RS, number: 61/2006, Publication date: 13/06/2006, Page: 06601-06605, Entry into force: 28/06/2006; Reference: (MNE(2010)52769)**

**[http://zakonodaja.gov.si/rpsi/r00/predpis\\_ZAKO4600.html](http://zakonodaja.gov.si/rpsi/r00/predpis_ZAKO4600.html)**

3. **Zakon o varstvu potrošnikov - uradno prečiščeno besedilo**

**Legal act: Zakon; Official Journal: Uradni list RS, number: 98/2004, Publication date: 09/09/2004, Page: 11845-11861, Entry into force: 08/05/2004; Reference: (MNE(2004)53658)**

**<http://www.uradni-list.si/1/objava.jsp?urlid=200498&stevilka=4288>**

4. **Zakon o elektronskem poslovanju in elektronskem podpisu - uradno prečiščeno besedilo**

**Legal act: Zakon; Official Journal: Uradni list RS, number: 98/2004, Publication date: 09/09/2004, Page: 11809-11817, Entry into force: 03/04/2004; Reference: (MNE(2005)54528)**

<http://www.uradni-list.si/1/objava.jsp?urlid=200498&stevilka=4284>

5. **Zakon o spremembah in dopolnitvah Zakona o elektronskem poslovanju na trgu (ZEPT-A)**

**Legal act: Zakon; Official Journal: Uradni list RS, number: 79/2009, Publication date: 09/10/2009, Page: 10622-10623, Entry into force: 24/10/2009; Reference: (MNE(2010)52770)**

<http://www.uradni-list.si/1/objava.jsp?urlid=200979&stevilka=3438>

6. **Zakon o spremembah in dopolnitvah zakona o varstvu potrošnikov**

**Legal act: Zakon; Official Journal: Uradni list RS, number: 110/2002, Publication date: 18/12/2002, Page: 13152-13164; Reference: (MNE(2003)53651)**

<http://www.uradni-list.si/1/objava.jsp?urlid=2002110&stevilka=5391>

7. **Zakon o varstvu potrošnikov - uradno prečiščeno besedilo**

**Legal act: Zakon; Official Journal: Uradni list RS, number: 14/2003, Publication date: 13/02/2003, Page: 1956-1971; Reference: (MNE(2003)53701)**

<http://www.uradni-list.si/1/objava.jsp?urlid=200314&stevilka=566>

8. **Zakon o spremembah in dopolnitvah zakona o elektronskem poslovanju in elektronskem podpisu**

**Legal act: Zakon; Official Journal: Uradni list RS, number: 25/2004, Publication date: 19/03/2004, Page: 2839-2842; Reference: (MNE(2003)53091)**

<http://www.uradni-list.si/1/objava.jsp?urlid=200425&stevilka=1066>

9. **Zakon o varstvu potrošnikov**

**Legal act: Zakon; Official Journal: Uradni list RS, number: 20/1998, Publication date: 13/03/1998, Page: 01293-01301; Reference: (MNE(2003)53422)**

<http://www.uradni-list.si/1/objava.jsp?urlid=199820&stevilka=815>

10. Zakon o elektronskem poslovanju in elektronskem podpisu

Legal act: Zakon; Official Journal: Uradni list RS, number: 57/2000, Publication date: 23/06/2000, Page: 7465-7472; Reference: (MNE(2003)53383)

<http://www.uradni-list.si/1/objava.jsp?urlid=200057&stevilka=2615>

Slovakia

Transposition deadline: 01/05/2004

1. Zákon č. 160/2005 Z. z., ktorým sa mení a dopĺňa zákon č. 22/2004 Z. z. o elektronicom obchode a o zmene a doplnení zákona č. 128/2002 Z. z. o štátnej kontrole vnútorného trhu vo veciach ochrany spotrebiteľa a o zmene a doplnení niektorých zákonov v znení zákona č. 284/2002 Z. z.

Legal act: zákon, number: 160/2005; Official Journal: Zbierka zákonov SR, number: 68, Publication date: 26/04/2005, Entry into force: 01/05/2005; Reference: (MNE(2005)55614)

<http://www.zbierka.sk/zz/predpisy/default.aspx?PredpisID=18606&FileName=05-z160&Rocnik=2005>

2. Zákon č. 22/2004 Z. z. o elektronicom obchode a o zmene a doplnení zákona č. 128/2002 Z. z. o štátnej kontrole vnútorného trhu vo veciach ochrany spotrebiteľa a o zmene a doplnení niektorých zákonov v znení zákona č. 284/2002 Z. z.

Legal act: zákon, number: 22/2004; Official Journal: Zbierka zákonov SR, number: 131, Publication date: 15/01/2004, Entry into force: 01/02/2004; Reference: (MNE(2004)58245)

<http://www.zbierka.sk/zz/predpisy/default.aspx?PredpisID=17650&FileName=04-z022&Rocnik=2004>

Finland

Transposition deadline: 17/01/2002

1. Laki sopimattomasta menettelystä elinkeinotoiminnassa annetun lain muuttamisesta Suomen Säädöskokoelma n° 461 du 11/06/2002 p. 3049

Legal act: Laki

<http://www.finlex.fi/pdf/sk/02/vihko072.pdf>

2. Laki yksityisyyden suojasta televiestinnässä ja teletoiminnan tietoturvasta annetun lain muuttamisesta Suomen Säädöskokoelma n°459 du 11/06/2002 p. 3047

**Legal act: Laki**

<http://www.finlex.fi/pdf/sk/02/vihko072.pdf>

This has been replaced by "Sähköisen viestinnän tietosuojalaki (516/2004)"

<http://www.finlex.fi/fi/laki/alkup/2004/20040516>

3. **Laki kuluttajansuojalain 2 luvun muuttamisesta Suomen Säädoskokoelma n° 460 du 11/06/2002 p. 3048**

**Legal act: Laki**

<http://www.finlex.fi/pdf/sk/02/vihko072.pdf>

This has been replaced by "Laki kuluttajansuojalain 2 luvun muuttamisesta" (561/2008)

<http://www.finlex.fi/fi/laki/alkup/2008/20080561>

4. **Laki tietoyhteiskunnan palvelujen tarjoamisesta Suomen Säädoskokoelma n° 458 du 11/06/2002 p. 3039**

**Legal act: Laki; Reference: (SG(2002)A/06090)**

<http://www.finlex.fi/pdf/sk/02/vihko072.pdf>

Sweden

**Transposition deadline: 17/01/2002**

1. **Lag om elektronisk handel och andra informationssamhällets tjänster SFS 2002:562 du 14/06/2002 - SG(2002) A/6456 du 26/06/2002**

**Legal act: Administrative measures; Official Journal: Svensk författningssamling (SFS), number: 562, Publication date: 14/06/2002; Reference: (SG(2002)A/06456)**

<http://www.notisum.se/rnp/sls/sfs/20020562.PDF>

United Kingdom

**Transposition deadline: 17/01/2002**



1. **The Electronic Commerce (EC Directive) Regulations 2002 SI n° 2013 of 21/08/2002**

**Legal act: Administrative measures; Official Journal: Her Majesty's Stationery Office (HMSO), Publication date: 21/08/2002; Reference: (SG(2002)A/08323)**

<http://www.legislation.hmso.gov.uk/si/si2002/20022013.htm>

2. **For separate implementation in financial services sector:**

[http://www.hm-treasury.gov.uk/Documents/Financial\\_Services/Regulating\\_Financial\\_Services/fin\\_rsf\\_edirec.cfm](http://www.hm-treasury.gov.uk/Documents/Financial_Services/Regulating_Financial_Services/fin_rsf_edirec.cfm)

**Other countries belonging to the European Economic Area:**

<b>Island</b>	1. Lög um rafræn viðskipti og aðra rafræna þjónustu 2002 nr. 30 16. apríl. Lagasafn. Uppfært til október 2002. Útgáfa 127B. Prenta í tveimur dálkum. (Act No 30/2002 on Electronic Commerce and other Electronic Service) <a href="http://www.althingi.is/lagas/127b/2002030.html">http://www.althingi.is/lagas/127b/2002030.html</a>
<b>Liechtenstein</b>	1. Gesetz vom 16. April 2003 über den elektronischen Geschäftsverkehr (E-Commerce-Gesetz; ECG) Liechtensteinisches Landesgesetzblatt 2003, Nr. 133 am 12. Juni 2003 <a href="http://www.gesetze.li/Seite1.jsp?LGBl=2003133.xml&amp;Searchstring=Gesetz+vom+16.+April+2003+%FCber+den+elektronischen+&amp;showLGBl=true">http://www.gesetze.li/Seite1.jsp?LGBl=2003133.xml&amp;Searchstring=Gesetz+vom+16.+April+2003+%FCber+den+elektronischen+&amp;showLGBl=true</a>
<b>Norway</b>	1. Lov 2003-05-23 nr 35: Lov om visse sider av elektronisk handel og andre informasjonssamfunnstjenester (ehandelsloven) Publisert: I 2003 hefte 7. <a href="http://www.lovdato.no/all/hl-20030523-035.html">http://www.lovdato.no/all/hl-20030523-035.html</a>

## **ANNEX II: NATIONAL LEGISLATION ON "NOTICE AND ACTION" PROCEDURES**

*NB: This table does not pretend to be exhaustive and provides examples of notice and action procedures of which the Commission services have become aware.*

<b>Characteristics</b>	<b>M S</b>	<b>Finland</b>	<b>France*</b>	<b>Germany</b>	<b>Hungary</b>	<b>Lithuania</b>	<b>UK</b>	<b>Portugal</b>	<b>Spain</b>	<b>Sweden</b>
<b>1. Law</b>		Act on provision of information of information society services	HADOPI Act	Access Impediment Act (repealed)	ACT CVIII of 2001 on certain aspects of e-commerce services	Law on information society services	Terrorism Act 2006 /  Digital Economy Act 2010	Articles 14-18 Decree-Law 7/2004	Royal Decree on the functioning and operating of the IPR Commission	Act on Responsibility of Electronic Bulletin Boards
<b>2. Scope infringements</b>		Copyright	Copyright	Child pornography	Intellectual property rights	Copyright or "information which may not be published or distributed"	Terrorism related ./  Copyright	Horizontal	Copyright	Horizontal
<b>3. Notice provider = who initiates the notice procedure?</b>		copy right owner (CO)	Right holders, officials of professional defence bodies, royalty collection and distribution organisations	Federal Office of Criminal Investigation	Intellectual property rights owner	Anybody	Constable /  Copyright owner (CO)	Anybody (interested party)	Copyright owner (CO)	Anybody
<b>4. Addressee notice = which service provider receives the notice from whom?</b>		Hosting service providers	Mere conduit providers	Mere conduit providers	All intermediaries	Hosting service provider	All intermediaries /  Mere conduit provider	Hosting service provider or content aggregator	All intermediaries	Hosting service provider

Characteristics	M S	Finland	France*	Germany	Hungary	Lithuania	UK	Portugal	Spain	Sweden
<b>5. Obligation to notify content provider</b>		Yes	Yes	No	Yes	Yes (if service provider has information to identify content provider)	No / Yes		Yes	No
<b>6. Requirements notice</b>		<ul style="list-style-type: none"> <li>- Details of the notifying party</li> <li>- material in itemised form</li> <li>- location of material,</li> <li>- confirmation that material is illegally accessible</li> <li>- information that notifying party has in vain contacted content provider</li> <li>- confirmation that notifying party is copyright holder</li> </ul>		Black list must provide: domain names, internet protocol addresses and destination addresses of the website	<ul style="list-style-type: none"> <li>- subject-matter of injury and description of facts substantiating infringement</li> <li>- data necessary for identification of infringement</li> <li>- name, address or head office, telephone number and electronic mail address of rights holder</li> </ul>	<ul style="list-style-type: none"> <li>Information on:</li> <li>- noticeprovider</li> <li>- protected work</li> <li>- IPR holder</li> <li>- nature infringement</li> <li>- location infringing material</li> </ul>	<ul style="list-style-type: none"> <li>- declaration that content is terrorism-related</li> <li>- order to secure that content is not available to the public or is modified</li> <li>- warning that failure to comply with notice within 2 working days will result in content being regarded as having endorsed</li> <li>- explanation on liability</li> </ul> <p style="text-align: center;">/</p> <ul style="list-style-type: none"> <li>- name &amp; address of the CO</li> <li>- identification of relevant work</li> <li>- infringement statement</li> <li>- description of infringement, including file name</li> <li>- copyright statement</li> <li>-date and time</li> <li>- IP address, port number , website, protocol, or Unique infringement</li> </ul>		The ISP must be notified of the decision of the Section and in case of non-compliance of the judicial order which authorizes the decision	No

Characteristics	MS	Finland	France*	Germany	Hungary	Lithuania	UK	Portugal	Spain	Sweden
							identifier (UII)			
a) Should the notice contain a fully qualified URL?		No	No	Yes	No	No	No		No	No
b) Should the notice exclusively be submitted through electronic means?		No	No	No	No	No	No / Yes		No	
6. Delay for reacting to notice / definition of "expeditiously"		No	No	6 hours	12 hours	24 hours	48 hours / 10 days		48 hours	
7. Possibility counter notice?		Yes	No	No	Yes	Yes	No / Yes	Possibility dispute settlement procedure.	Yes	No
a) obligatory counter notice before 'take-down'?		No	No	No	No	No	No		Yes	No
b) Delay for giving counter notice		14 days	No	No	8 days	3 days	No / Shall be set by the Appeal Body		5 days to comment	No
c) Delay for reacting to counter notice						3 day	No / Will be specified by the Appeal Body		5 days	

Characteristics	M S	Finland	France*	Germany	Hungary	Lithuania	UK	Portugal	Spain	Sweden
<b>8. Liability exemption for taking down legal content if procedure was followed?</b>			No	No	Yes	Yes		Yes; for content that is <i>not</i> manifestly illegal or for manifestly illegal content taken down expeditiously	No	

\*The French Hadopi law is an example of a law that was specifically designed for the purpose of regulating notice and action. However, a general legal basis for notice and action procedures in France can be found in Article 6.5 of the law of 21 June 2004. Moreover, other laws contain provisions that are relevant for notice and action procedures in specific fields:

- the law of 12 May 2010 contains in its Article 61 a basis for filtering of illegal gambling sites;
- the law of 14 March 2011 contains in its Article 4 a basis for the filtering of child abuse content;
- the decree of 20 June 2009 lays down the basis for a public website for reporting cybercrime (notably child abuse content, financial crime and racist content).