

XXVIII FIDE Congress

Topic 1: Internal market and digital economy

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Themes

1. Internal Market and electronic commerce : Internet and e-commerce

Covers topics such as: E-commerce and consumer protection: liability of internet intermediaries, consumer rights: geo-blocking; internet purchase and contractual rights; consumer protection and dispute resolution; sharing economy

Relevant EU legal frameworks: E-Commerce Directive 2000/31/EC; Digital Consumer Rights proposals (on digital content and on digital contracts for goods)

2. Digital media

Covers two main subtopics:

- Distribution of audiovisual content over the Internet
- Convergence with social media (free speech, hate speech)
- IP (possibly narrow to copyright) in the digital single market,

Relevant EU legal frameworks:

- AVMS Directive (under review)
- Copyright framework (under review)

3. Digital infrastructures

Covers topics such as: high-speed networks, spectrum management, net neutrality, Citizens and the internet: connection for all, web accessibility

Relevant EU legal framework: electronic communications regulatory framework (under review), Web accessibility Directive

4. Data in the digital economy

Covers topics such as: 'data as an asset': free flow of data and the issue of data localisation. Emerging issues (arising mainly in the context of digitising industry and automation): open data, Machine-to-machine generated data (e.g. robots, automated cars): ownership, access and use; liability in case of harm

Citizen's fundamental rights (protection of personal data and privacy, especially in an increasingly digitised world (Internet of Things and Big Data; State security (surveillance)

Relevant EU legal frameworks: General Data Protection Regulation - will enter into force May 2018, ePrivacy Directive, PNR Directive and PNR international agreements; adequacy decisions

Topic 1: Internal market and digital economy

Introduction

It is common ground that one of the most significant founding stones of the EU, namely the internal market, is heavily touched upon by the unprecedented changes brought by technological developments.

At EU level, in several areas of law existing legal instruments have recently been reviewed and new ones have been (or will be) added. All of them are intended to address new challenges brought by rapid technological developments and globalisation.

The Commission adopted the Digital Single Market Strategy in May 2015, setting out the major challenges and key actions it considered would need to be addressed.

Part of those actions were put forward in successive 'packages' from December 2015 onwards and may be grouped according to the three pillars identified in the Digital Single Market Strategy namely:

- 1) ***Better access for consumers and businesses to online goods and services across Europe*** – this requires the rapid removal of key differences between the online and offline worlds to break down barriers to cross-border online activity.
- 2) ***Creating the right conditions for digital networks and services to flourish*** – this requires high-speed, secure and trustworthy infrastructures and content services, supported by the right regulatory conditions for innovation, investment, fair competition and a level playing field.
- 3) ***Maximising the growth potential of European Digital Economy*** – this requires investment in ICT infrastructures and technologies such as Cloud computing and Big Data, and research and innovation to boost industrial competitiveness as well as better public services, inclusiveness and skills.

The choice for the sub-topics of Topic 1 was guided not only by the fact that these are the ones on which courts are increasingly invited to decide on but also, and primarily, because those areas demonstrate the need to rethink legal concepts and to adapt the legal frameworks to new realities and challenges.

Questionnaire Topic 1

Internal market and digital economy

Introduction

This questionnaire is intended to provide the framework for national and institutional reports on the sub-topics listed below.

1. Internal Market and electronic commerce : Internet and e-commerce

Covers topics such as: E-commerce and consumer protection: liability of internet intermediaries, consumer rights: geo-blocking; internet purchase and contractual rights; consumer protection and dispute resolution; sharing economy

Relevant EU legal frameworks: E-Commerce Directive 2000/31/EC; Digital Consumer Rights proposals (on digital content and on digital contracts for goods)

Specific questions on:

1.1. Electronic Commerce, liability of Internet intermediaries

(Short introduction: The E-Commerce Directive has created a regime of liability exemption for providers qualifying as 'mere conduit' and 'cache', combined with a notice-and-take-down procedure. This regime is not limited to intellectual property but extends to all kinds of responsibility issues, including criminal law. Liability issues and court injunctions have led to a series of decisions of the ECJ¹. Thus, the 1st subtopic could raise the question of the

¹ C-360/10 SABAM v Netlog NV, C-70/10 Scarlet Extended v. SABAM, C-324/09 L'Oréal a.o. v. eBay International AG a.o., Joined Cases C-236/08, C-237/08 and C-238/08 Google France and Google Mc Fadden, Case C-484/14, 15.9.2016

C-160/15, Opinion of AG : §86. *Although Article 14 of Directive 2000/31 seeks to restrict or exempt cases where intermediary information society service providers may be liable under national law, the exemptions in question are subject to strict conditions. In this regard, the Court ruled in paragraph 119 of the judgment in L'Oréal and Others (C-324/09, EU:C:2011:474) that a provider of hosting services (55) may, in situations in which that provider has confined itself to a merely technical and automatic processing of data, only be exempt, under Article 14(1) of Directive 2000/31, from any liability for unlawful data that it has stored 'on condition that*

systematic relevance of the concept of *intermediary* and the *liability exemption* attached thereto under the E-Commerce Directive.)

Q1.1.1: Which difficulties (e.g. definition, delimitation) were/are your Member State and national courts confronted with when laying down rules or deciding cases where the concept of intermediary service providers is at stake?

Q1.1.2: Do you think in *L'Oréal v eBay*, C-324/09, the CJEU has put forward a reasonable test for liability?

Q1.1.3: Is the regime of notice-and-take down appropriate in all kinds of situations (e.g. in cases of infringement of others' rights, such as intellectual property right, by costumers of ISSs; hate speech)?

If not, what could be other appropriate solutions?

Q1.1.4: Which difficulties were/are your Member State and national courts confronted with when considering injunctions?

(*Scarlet v SABAM* C-70/10+ *SABAM v Netlog NV* C-360/10: copyright filtering injunction would create a clash with other legal principles. However, the ECJ created a checklist for specific blocking requests)

1.2. Consumer protection in relation to the internet and E-commerce, internet purchase and contractual rights; consumer protection and dispute resolution²

it has not had "actual knowledge of illegal activity or information" and, as regards claims for damages, has not been "aware of facts or circumstances from which the illegal activity or information is apparent" or that, having obtained such knowledge or awareness, it has acted expeditiously to remove, or disable access to, the information'.

² Extract from SWD(2016)163 Guidance on UCPD

The UCPD only applies in B2C situations, the first step in assessing whether this Directive is applicable to any given online platform provider should be to evaluate whether it qualifies as a "trader" under Article 2(b) UCPD.

According to a case-by-case assessment, a platform provider may be acting for purposes relating to its business whenever, for example, it charges a commission on the transactions between suppliers and users, provides additional paid services or draws revenues from targeted advertising.

Furthermore, under Article 5(2) UCPD, no platform provider qualifying as a "trader" should act contrary to the requirements of professional diligence in its commercial practices towards consumers. Under Article 2(h) UCPD, 'professional diligence' means the standard of special skill and care which a

Q1.2.1: Which difficulties were/are your Member State and national courts confronted with when considering remedies under the Consumer Sales and Guarantees Directive?

Q1.2.2: Does the proposed Directive on certain aspects concerning contracts for the supply of digital content (COM(2015)634) provide for appropriate rules enabling the achievement of a genuine digital single market?

Q1.2.3: Does the proposed Directive on certain aspects concerning contracts for the online and other distance sales of goods (COM(2015)635) and the envisaged full harmonisation of key contractual rights provide for appropriate rules enabling the achievement of a genuine digital single market?

Q1.2.4: How do you evaluate the effect of the harmonised above rules on the enforcement of EU consumer protection legislation? ³

trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity.

The professional diligence duties of these traders vis-à-vis consumers under the UCPD is different from, whilst complementary to, the regime on exemptions from liability established under Article 14 of the e-Commerce Directive for illegal information hosted by service providers at the request of third parties.

In particular, Article 14(1) is often invoked by some platforms, which argue that they merely act as intermediaries providing hosting services, as defined in that provision, and that they are thus not liable for the information stored.

Furthermore, Article 15(1) of the e-Commerce Directive prevents Member States from imposing on such "hosting service providers" a general obligation to monitor the stored information or to actively engage in fact-finding.

³ COM(2015)635, p. 7: *The full harmonisation approach has already proven successful in the area of EU consumer protection legislation, for instance through the rules of Directive 2011/83/EU, by ensuring a set of uniform consumer rights for all consumers within the European Union which are interpreted and enforced in a uniform way in all Member States. An initiative at EU level will secure the development of consumer rights in a coherent manner while ensuring that all consumers in the EU benefit from the same high level of consumer protection. It will create legal certainty for businesses which want to sell their goods in other Member States. Such a result can only be achieved by an action at the EU level.*

An initiative at EU level will secure the application of consumer rights in a coherent manner while ensuring that all consumers in the EU benefit from the same high level of consumer protection. It will create legal certainty for businesses which want to sell their goods in other Member States. Such an initiative will provide a consistent legal basis for coordinated enforcement actions as the proposed Directive will be included in the Annex of Regulation (EC) No 2006/2004 on cooperation of national authorities responsible for the enforcement of consumer protection

Q1.2.5: Do you consider that current EU consumer protection law (i.e. Unfair Commercial Practices Directive 2005/29/EC; Unfair Contract Terms Directive 1993/13/EC and Directive 2011/83/EC on Consumer Rights) appropriate for protecting consumers in their dealings with online platforms?

Q1.2.6: Has there been any action before your national courts on the basis of consumer law against online providers' terms and conditions?

Q1.2.7: Do you consider it necessary/useful to expand the scope of the rules on Business to Consumers (B2C) to Business to Consumers (B2B)?

1.3. Geo-blocking

[Short introduction: The Commission has presented a proposal on addressing unjustified geo-blocking (COM(2016). The proposal defines specific situations when there can be no justified reasons for geo-blocking or other discriminations based on nationality, residence or location:

- when a customer buys a good, such as electronics, clothes, sportswear or a book, which the trader does not deliver cross-border;
- when a customer buys an electronically delivered service, such as cloud services, data warehousing, website hosting;
- when a customer buys a service which is supplied in the premises of the trader or in a physical location where the trader operates, such as a hotel room or a rental car.

Furthermore, the proposal bans blocking of access to websites and the use of automatic re-routing if the customer has not given prior consent.

The proposal also provides for a non-discrimination rule in payments. While traders remain free to offer whatever payment means they want, the proposal includes a specific provision on non-discrimination within those payment means.

More information: <https://ec.europa.eu/digital-single-market/en/geo-blocking-digital-single-market>

Q1.3.1. The envisaged Regulation (COM(2016) aims at preventing unjustified discrimination on the basis of a consumer's domicile or nationality in cross-border situations. How do you

laws. Moreover, enforcement actions would be largely facilitated by the proposed uniform fully harmonised rules. Thus the enforcement of EU legislation will be strengthened for the benefit of EU consumers. Such a result can only be achieved by an action at the EU level.

see the interlink between this Regulation and Regulation 1215/2015 on the issue of a trader "directing activities to another Member State where the consumer has its domicile" for the purposes of determining jurisdiction?

1.4. Questions related to the collaborative economy (COM(2016)356)

Q1.4.1: What are the most contentious legal issues in your country raised by the collaborative economy businesses?

Q1.4.2: Competition issues: Does the fact that such businesses enter markets so far served by traditional service providers raise competition issues?

Q1.4.3: Market access requirements: What kind of service providers active in the collaborative economy required to obtain authorisations under national law in your country and under what conditions can such authorisations be obtained? Are the relevant administrative procedures and formalities clear and transparent?

Q1.4.4: Consumer protection⁴: Are consumer protection issues the subject of legal challenges in your country?

Q1.4.5: Under which conditions in a peer-to-peer provision of services the provider of the underlying service qualifies as a trader according to your national law?

Q1.4.6: How can legal rules contribute to remedying the lack of consumer confidence in peer-to-peer services? Do you think that trust-building mechanisms such as online rating and review systems and quality labels are appropriate tools to overcome the lack of information about individual service providers? What other tools would you consider appropriate?

2. Digital media

Covers three main subtopics:

- Distribution of audiovisual content over the Internet
- Convergence with social media (free speech, hate speech)
- IP (possibly narrow to copyright) in the digital single market,

⁴ "EU consumer law applies to any collaborative platform that qualifies as a 'trader' and engages in 'commercial practices' vis-à-vis consumers. Conversely, EU consumer and marketing legislation does not apply to consumer-to-consumer transactions."

Relevant EU legal frameworks:

- [AVMS Directive](#) (under review)
- [Copyright framework](#) (under review) -
- Portability of digital content

Introduction

The media sector is undergoing a major transformation as a result of digitisation, the rise of the Internet and convergence between print and audiovisual media(*), as well as between traditional and social media.

These days we can watch our favourite programmes from all over Europe not just on TV, but also via the internet or on our mobile devices. Like other goods and services, the audiovisual media are subject to the rules of the single European market. The EU's Audiovisual Media Services Directive governs EU-wide coordination of national legislation on all audiovisual media, both traditional TV broadcasts and on-demand services. The AVMSD directive is currently open for review. A new legislative proposal amending the AVMSD has been adopted by the European Commission on 25 May 2016.

() Publishers of online newspapers and magazines increasingly offer clips on their websites as an add-on to written articles. Frequently, these clips are compiled in separate spaces of the websites with particular navigation tools for users (such as most recent videos, most watched videos), and they may cover the entire range of subjects reported on. The distinction between press products and audiovisual media services is crucial as different legal requirements and regulatory regimes apply. Publishers of newspapers, in printed form or online, are subject to a much lighter set of rules than audiovisual media services which are regulated by the EU Audiovisual Media Services Directive (AVMSD). Due to the convergence of media, the formerly distinct boundary between the two genres has become blurred. The Court of Justice of the European Union (CJEU) recently had to shed some light into how the exercise of classification of services may be carried out (New Media Online GmbH v Bundeskommunikationssenat; case C-347/14).*

At the same time, and also in the context of its Digital Single Market Strategy, the Commission is rolling out an ambitious modernisation of the EU copyright framework. The objective is to make EU copyright rules fit for the digital age. The Commission published a Communication on a modern and more European copyright framework on 9 December 2015, together with a [draft Regulation](#) on ensuring the cross-border portability of online content services in the internal market. This legislative initiative aims at ensuring that consumers who buy or subscribe to films, sport broadcasts, music, e-books and games can access them when they travel in other EU countries.

A [second set of legislative proposals](#), adopted in September 2016, aims at modernising the copyright framework, focusing on allowing for wider online availability of content across the EU, adapting exceptions and limitations to the digital world, and achieving a well-functioning copyright market place. The package contains a draft Regulation which introduces the application of the country of origin to some online transmissions of broadcasting organisations, and the collective management of rights to retransmissions by means equivalent to cable (extending the specific regime for copyright licensing for TV and radio broadcasting by satellite and cable pursuant to [Directive 93/83/EEC](#) with a view to facilitating access to more television and radio programmes online from other EU countries).

More info: <https://ec.europa.eu/digital-single-market/en/copyright>

Specific questions

Q2.1: In its judgment of 21 October 2015 in *New Media Online GmbH v Bundeskommunikationssenat* (case C-347/14), the CJEU held that the concept of ‘programme’, within the meaning of Article 1(1)(b) of the AVMS Directive, must be interpreted as including, under the subdomain of a website of a newspaper, the provision of videos of short duration consisting of local news bulletins, sports and entertainment clips. It held that online newspapers are not per se excluded from the scope of the AVMSD. If publishers offer audio-visual material they may be covered by the Directive, provided that the principal purpose test is met.

Is your national practice in line with this judgment? If not, where does (or did) it deviate? Did the judgment of the CJEU lead to a different approach in your country?

Link to the judgment: <http://curia.europa.eu/juris/liste.jsf?num=C-347/14> and the press release:

<http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-10/cp150127en.pdf>

Informative case note by the EBU:
<https://www.ebu.ch/files/live/sites/ebu/files/News/2015/10/Case%20note%20New%20Media%20Online.pdf>

Q2.2: The legislative proposal to amend the AVMS directive brings video platforms (such as YouTube) under the scope of the AVMS rules. Do you consider this a step in the right direction? How far should the extension of the scope of application towards such platforms go: only for the rules on protection of minors and the combatting of hate speech, or also for the rules on commercial communications (product placement, sponsoring, advertising...)? Does your national legislation already provide for sector-specific rules for audio-visual platforms?

Q2.3: One of the major areas of debate in the context of the AVMS revision, concerns the country-of-origin principle and the criteria for jurisdiction. Have there been any disputes in your country concerning the application of the country-of-origin principle (whereby the media regulator attempted to impose certain rules on audio-visual media service providers established in other Member States)? Have there been any problems regarding providers established outside the EU and targeting your national audience?

Q2.4: The AVMS Directive today does not impose any independence or other requirements for media regulators – in stark contrast with what is the case in e.g. the telecommunications or energy sector, or for data protection authorities. Would you consider the introduction of such independence requirements for media regulators at EU level a step forward? Would it facilitate the creation of a single market for audio-visual media services? Are there any national legal obstacles to such independence requirements for media regulators? Have there been any problems of undue political or commercial pressure on media regulators in your country?

Q2.5: What have been the most contentious issues in your country in relation to the application of broadcasting laws? (e.g. rules on commercial communications such as product placement or sponsoring? Unsuitable content for minors on television? The dissemination of hate speech? The role of public service broadcasters? Growing media concentration?) Do you think that some areas need further harmonisation through the AVMS Directive?

Q2.6: Have there been any initiatives in your country towards the offering of targeted (or addressable) advertising on television or of personalised content? If so, how was this dealt with under broadcasting/data protection laws? Was there any cooperation between the media regulator and the data protection authority? Do you see a need for an EU-wide harmonised approach?

Q2.7: Is the specific regime for copyright licensing for TV and radio broadcasting by satellite and cable (pursuant to [Directive 93/83/EEC](#)) still relevant in your country? Have similar rules been applied to online transmissions of broadcasting organisations?

Q2.8: What are the main barriers in your country to cross-border portability of digital content? Do you consider that the country of residence of the consumer should be controlled by the service provider on a regular basis? If yes, how to conciliate such requirement with the data minimisation principle under the GDPR?

3. Digital infrastructures

Covers topics such as: high-speed networks, spectrum management, net neutrality, Citizens and the internet: connection for all, web accessibility

Relevant EU legal framework: electronic communications regulatory framework (under review), Web accessibility Directive

Introduction

Telecommunications networks and services are the backbone of our information society. In recent decades, the EU has adopted a harmonised regulatory framework for electronic communications to improve competition, drive innovation, and boost consumer rights within the European single market. In 2015, it adopted rules on [net neutrality \(open internet\)](#) which it labelled as a “major achievement for the Digital Single Market”. The rules in [Regulation \(EU\) 2015/2120](#) prescribe that, in principle, all traffic has to be treated equally, and that every European must be able to have access to the open internet and that all content and service providers must be able to provide their services via a high-quality open internet. Under these rules, blocking, throttling and discrimination of internet traffic by Internet Service Providers (ISPs) is not allowed in the EU, save for three exhaustive exceptions (compliance with legal obligations; integrity of the network; congestion management in exceptional and temporary situations) and users are free to use their favourite apps and services no matter the offer they subscribe to.

The EU also launched several initiatives to promote investment in broadband networks supporting high-speed Internet. In September 2016, in the light of its Digital Single Market strategy, the Commission adopted a set of measures - the so-called "[connectivity package](#)" - to place the EU at the forefront of internet connectivity and achieve a European "[Gigabit Society](#)", including a proposal for a new [European Electronic Communications Code](#). The Code further stimulates competition, and strengthens the internal market as well as consumer rights and wants more forward-looking and simplified rules that make it more attractive for all companies to invest in new top-quality infrastructures in the EU.

Specific questions

Q3.1: Did your country have rules on net neutrality in place before the adoption of [Regulation \(EU\) 2015/2120](#)? If so, were they more or less strict in comparison to the Regulation? What is the national approach towards practices of zero-rating (which are not explicitly prohibited by the Regulation)?

Q3.2: Should the EU go further in creating a single market for telecommunications networks or services (and introduce e.g. an EU-wide licensing scheme)? Did your national authorities

adopt any special broadband measures and were they the result of EU intervention or adopted at own initiative?

Q3.3: Are there legal issues on spectrum management in your country? If yes, how have them been solved?

Q3.4: Have questions linked with the independence of NRAs been raised in your country? If yes, did they lead to legal challenges? How have they been solved?

4. Data in the digital economy

Covers topics such as: 'data as an asset': free flow of data and the issue of data localisation. Emerging issues (arising mainly in the context of digitising industry and automation): open data, Machine-to-machine generated data (e.g. robots, automated cars): ownership, access and use; liability in case of harm

Citizen's fundamental rights (protection of personal data and privacy, especially in an increasingly digitised world (Internet of Things and Big Data; State security (surveillance)

Relevant EU legal frameworks: General Data Protection Regulation - will enter into force May 2018, ePrivacy Directive, PNR Directive and PNR international agreements; adequacy decisions.

Specific questions

Q4.1: How is your country preparing for the entry into force of the General Data Protection Regulation in May 2018? Are there any specific legislative proposals or executive measures in preparation?

Q4.2: How are businesses in your country adapting to the new requirements of the GDPR such as those related to consent, impact assessments, privacy by design and by default?

Q4.3: What are the most contentious issues in your country (from a legal viewpoint) in relation to IoT (Internet of Things) / smart cities / Machine-to-machine generated data / automated cars? (Ownership issues? Access and use? Liability in case of harm?) Are there any specific legislative measures or regulatory opinions/decisions in this area? What is the status of the policy debate?

Q4.4: Since the CJEU's controversial judgment in May 2014 in the [Google Spain \(or Costeja\) case](#), the so-called "right to be forgotten" (or to be delisted) has received a lot of attention in Europe and beyond. What is the legal status in your country? Are complaints being brought

before the data protection authority and/or courts? Has there been a growing body of case law in this regard? How is the balance struck between the individual's right to data protection and the other interests at stake (in particular the search engine's commercial freedom, the public's right to information and the author's right to free expression)?