

Answers to some questions for 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)**

Joint contribution by:

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Luca Bolognini (President IIP):

Articles 5 (letter b) and 7 of the Directive, making the rules on unsolicited communication (opt-out with Robinson list) not applicable to data protection directive (95/46/EC) and to e-privacy directive, caused several problems to e-commerce players in some Member States . This is because Member States - like Italy - do not allow, in the national privacy regulations (e.g. art. 130 of italian privacy code), the e-mailing for marketing purposes directed to legal persons or to professionals without their prior consent (opt-in). New articles 5 and 7 should be modified so as to be clear, mandatory for States and guaranteeing the sure application of opt-out system for direct e-marketing between professionals and legal persons. Otherwise, what is not forbidden in the data protection and e-privacy directives and is even allowed by E-commerce directive at the european level, is still not allowed at the national level in the name of privacy. The european e-market is greatly undermined by these incorrect interpretations and application of rules.

Nicola Fabiano (Scientific Committee EPA):

I would like to underline one of the most important problems concerning article 11, regarding the perfecting of the contracts and their relative effects (often it is observed the non reception or the delay of the confirmation e-mail) . I believe the rules about the conclusion of contracts have to be organized in a manner which is more efficient and with more guarantees in terms of validity of the contract, in favour of both parties. I can think of the hypothesis of identity stealing, in contracts regarding goods and services between two parties, in the case of using the data of one of the parties without their consent. Besides the penal initiatives used (if it is the case), it is necessary to take into account the civil perspective and that one of the parties will, at the same time, undertake the initiative for the recovery of the credit.

Marco R. Provierdera (Scientific Committee EPA):

Question #36: While IP rights protection is still, by far, "jurisdiction sensitive", better coordination, at least at enforcement level, is advisable, particularly in light of intervention, since the ECD of the "Copyright Directive" (2001/29/EC) and the "Enforcement Directive" (2004/48/EC), not to mention major case law - *Google v. Louis Vuitton* and *E-Bay* - and the new EU Trademark and EU Patent.

Questions #52-59 and 66-68: Clearly, the major issue of ISPs' liability is still very contentious and a

source of serious legal uncertainty, which translates into one of more relevant obstacles to the growth of e-commerce, and of the services of information society in general. Here, some of the perceived insufficiencies of the ECD's provisions on point: the "hosting", "caching", "mere conduit" concepts seem to be either altogether obsolete or in any event inadequate in light of the last years' boom of posting activity and UGC (User Generated Content) sites, not to mention social network sites. A serious re-visitation of the principles on-point embedded, or lacking, in the ECD, together with coordination with global state-of-the-art reflections, case law and legislation (Hadopi, DMCA, YouTube decision, etc.) is long overdue. Another major problem seems to spring from the exclusion of privacy from the ECD's "coordinated field". This seriously contributes to the kind of misunderstanding, misapplication and uncertainty of law that brought, for example, the (in)famous "Italian Google" decision, or the previous "Tiscali".

As per Question #53: "actual knowledge" has proven to raise interpretation issues; clarification should be provided that the term legally refers to something more than "mere knowledge" of the indefinitely foreseeable set of possible events: this *quid* is solely what may trigger ISP's legal duty to act to prevent damages (via removal, take-down, report to authorities, etc.);

#54: the adverb "expeditiously" should be interpreted the way it is in common law: an action taken perhaps not *immediately*, but certainly *with no undue delay*; this would harmonize with accepted interpretation of the same term in the US Digital Millennium Copyright Act's "safe harbor provision", creating consistency in cross-border implementation and certainty of law;

Question #74-76: While various ADR systems are certainly to be promoted as a quick, less-expensive means to access justice and to seek relief, it is my opinion that some current trends towards making ADR mandatory - see Italian Dlgs 28/2010 - are overall less desirable, in that the ADR option must always be up to the parties' choice, thus contractual in nature, as opposed to legislatively mandated; in fact, in this latter case, it may amount to an unconstitutional limit to the right of legal action.