



Fondazione  
Altagamma

European Commission – Register of interest representatives

Identification number 08713732301-19

## FONDAZIONE ALTAGAMMA SUBMISSION

To the European Commission Public Consultation on the future of electronic commerce in the  
internal market and the implementation of the Directive on Electronic commerce  
(2000/31/EC)



## **Framework and key points for Fondazione Altagamma response to EU E-commerce consultation**

### **I. Fondazione Altagamma**

#### *Profile*

Altagamma is the Foundation of Italian companies of international renown operating in the high end of the market; reflecting Italian style and culture in their company management and products, they stand out for their innovation, quality, service, design and prestige.

Altagamma is a non-profit Foundation.

Membership is granted exclusively by invitation through a three-step process:

- a proposal is made by two member companies
- the Board of Directors approves the motion by way of secret ballot
- final approval is made by the Assembly by way of secret ballot.

By joining Altagamma, members may:

- be a part of the most exclusive group of Italian companies
- contribute to defending and promoting, the world over, the cultural and economic heritage of the highest level of Italian lifestyle
- develop synergies with the other member companies with the aim of raising their degree of competitiveness
- receive information about markets and business opportunities that is reserved for the member companies
- be key players in high-profile, high-visibility communication initiatives and events.

#### *Mission*

Affirm the Excellence of Altagamma member companies and promote, together, the primacy of the Italian lifestyle and culture in the world.

Since its establishment in 1992, Altagamma has provided a unique opportunity to meet, to exchange ideas and experiences, and to discuss, both transversally and within specific sectors, the opportunities and methods of business development of its member companies.



### *Strategies*

- Uphold Altagamma's cultural and entrepreneurial values, and promote the awareness and renown of the association.
- Promote excellence in positioning and pursue economies of scale through the critical mass of its member companies.
- Encourage collaboration among its member companies through:
  - the exchange of opinions and experiences
  - the identification of development opportunities
  - the establishment of relations with partners and consumers
  - the creation of collective image and communication
  - an understanding of market trends
  - the development of knowledge among entrepreneurs and managers.

### *Areas of Activity*

Promotion and International Development

Communication

Altagamma System

Knowledge and Education

Economic Research

Institutional Relations

Protection of Intellectual Property



## II. Intro: Consumer trust and security key for the development of e-commerce in Europe

- The development of e-commerce in the EU is currently hindered by a lack of harmonization and clarity within the EU with respect to the responsibilities of online operators along the digital value chain.
- Like in the offline environment, opportunities and responsibilities must be shared among operators along the Digital value chain considering the economic and business realities of each operator's business model. This is crucial so that certainty and consumer trust can be increased in order for e-commerce to thrive in Europe.
- This is not the case today and the lack of certainty and clarity for both consumers and businesses operating online is the biggest obstacle to e-commerce growth.

## III. Structural barriers to E-Commerce

- The European Commission identified in 2009 that **cross border e-commerce** in the EU is the least developed due to barriers relating to “*language, demographics, individual preferences, technical specifications or standards, internet penetration or the efficiency of the postal or payment system*”, on top of the mechanisms that prevent consumers from placing orders in one country from another.<sup>1</sup>
- These obstacles have created a fragmented e-commerce internal market. Regulatory barriers result in significant compliance costs for businesses, which considerably diminish the appeal or feasibility of cross-border expansion. It is crucial to address these potential market barriers in order to ensure that future growth is not stymied and to unlock the potential of cross-border e-commerce. This includes:
  - *Improving payment systems across Europe to increase interoperability*
  - *Simplify the VAT reporting obligations and harmonise VAT rates*
  - *Eliminate the fragmentation of consumer protection rules*
  - *Increase choice of European delivery systems and reduce shipping costs*
  - *Strengthen law enforcement online and tackle cyber crime*
  - *Insist on a global approach of e-commerce, particularly with regards to China and the US.*

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<sup>1</sup> Report on cross-border e-commerce in the EU (SEC(2009) 283 final)



#### **IV. The “safe harbor” provisions of the ECD has been diverted from their original intent**

- The original intent of the E-Commerce Directive (“ECD”) was to create a “safe harbor” for basic internet intermediaries with the aim of promoting a swift and efficient development of the internet. This liability exemption was based on the common carrier principle (*e.g.*, telephone companies are not liable for content exchanged over their lines).
- However, significant technological developments in the internet have led to the emergence over the last ten years of a myriad of new online activities and services that are provided by online providers. While these often are useful and welcome by both consumers and businesses, it is undisputed that they are developed in addition to the “basic” services described in Articles 12-14 ECD.
- These additional services are generally commercial activities, supported by advertising, which go beyond the mere storage or transmission of data and are not any more passive, automatic and technical in nature.
- However, in many instances, online platforms carrying out commercial activities that go beyond basic storage of data claim that they must be considered as “hosting” providers within the meaning of Article 14 ECD because they also offer basic internet services. Based on this, these intermediaries further claim they should benefit from the “safe harbor” provisions of the ECD and thus to be exempted from any liability.
- The ECD original intent has therefore been co-opted in practice by those online providers claiming to act as “basic” internet intermediaries in order to elude responsibility along the Digital value chain.
- The result is that currently there is confusion and lack of clarity and a proliferation of court cases with different outcomes across Europe with regards to the interpretation of the liability exemption in the ECD. Such legal uncertainty keeps on growing: today, many cases referred by national courts are pending before the ECJ seeking for guidelines from European institutions, leading to slow decision-making that hinders legal certainty in the fast-moving online market.
- This lack of clarity is inconsistent with (i) the definition of what should be achieved via adoption of Directives at an EU level and (ii) the aim and spirit governing the European



- Single Market which needs equivalent rules across the Member States to function smoothly.
- The European Commission has already stated in the Digital Agenda that liability for intermediaries should be re-examined in the context of technological advances.<sup>2</sup> In addition, the EU 2020 strategy calls on EU and national legislation to be adapted to the digital era, including updating rules on liability.<sup>3</sup> The European Parliament supports this approach in its Report on the Development of E-Commerce in September 2010 in which it calls for the European Commission to update “*the rules on the limited liability of information society services so as to keep up with technological progress, in the context of the e-commerce directive*”.<sup>4</sup>
  - There is therefore **an opportunity for the Commission to clarify the question of who qualifies for the “safe harbor” provisions without a need to reopen the E-commerce Directive.**

#### **V. Need to clarify the definition of who qualifies for a safe harbor**

- The concept of “hosting” is effectively defined in Article 14 ECD as consisting in the activity of storage. This focus on storage is consistent with Recital 42 of the Directive, which refers to information which is “transmitted” (which is caught by the “mere conduit” exemption in Article 12) and “temporarily stored” (caught by the hosting and caching exemptions in Articles 13 and 14) “for the sole purpose of making this transmission more efficient”; as well as the *travaux préparatoires* relating to the Directive. It is clear that the policy intention was to limit liability exclusively for those storing and transmitting data.
- This was clearly confirmed in the 23 March 2010 European Court of Justice (“ECJ”) Google ruling, which held that the Article 14 ECD hosting defence applies to an internet referencing service provider “*in the case where that service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored*”.<sup>5</sup> The ECJ also stated that in order to establish whether the liability of an internet referencing provider may be limited under Article 14, it is necessary to examine

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<sup>2</sup> EC Digital Agenda p. 12, footnote 13: “In addition, it may be necessary to update provisions such as limited liability of information society services in line with technological progress.”

<sup>3</sup> p. 10, EU 2020 COM (2010)

<sup>4</sup> Report on completing the internal market for e-commerce (2010/2012(INI)), Rapporteur: Pablo Arias Echeverría, Article 59.

<sup>5</sup> ECJ joined cases 23 March 2010: Google France, Google, Inc. v Louis Vuitton Malletier (C-236/08), Viaticum SA, Luteciel SARL (C-237/08), CNRRH, Pierre-Alexis Thonet, Bruno Raboin, Tiger SARL (C-238/08)



whether the role played by the service provider is “*merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.*”

- Under Article 14 ECD, hosting providers only play the role of technical intermediaries in the storage of data; they operate their hosting services on an exclusive basis, *i.e.*, their services are “*limited*” (*cf.* Recital 42) to the technical process of data transmission; and they do not have knowledge of or control on the data transmitted or stored. If a hosting provider meets these criteria, they should legitimately benefit from the “safe harbor” provision.
- However the myriad of lawsuits in Europe exemplify that this definition is not entirely clear today. We suggest the Commission should clarify where to draw the line between the “basic” services limited to the storage and processing of data and the other activities that go **beyond** the storage and transmission of data within the meaning of Article 14 ECD.
- In the event online operators do not limit their activities to mere storage and transmission of data at the direction of a user but go beyond that, by using, presenting, organizing or modifying users’ materials for commercial purposes, they do not qualify as hosting providers within the meaning of the ECD.
- They fall outside the “safe harbor” and are under a duty to reasonably act as careful and prudent merchants (i) to detect and prevent online illicit practices, and (ii) to promptly remove or disable access to illicit act or content, upon obtaining knowledge or awareness of such illicit act or content.
  - i. ***Detection and prevention of online illicit practices.*** Online providers that cannot benefit from the “safe harbor” provisions should take any measures, technical or procedural, automated or non automated, aimed at the timely prevention and adequate response to attempts to perform or repeat illicit acts online as soon as technically and reasonably feasible.

This could include for instance for online platforms to proactively filter and block any posts or keywords that contain words which usually indicate that the products associated to them are not original goods (such as “fake”, “replica”, “knock-off”, “-70%”, etc.), used alone or in connection with a trademark or other distinctive sign.



Similarly, online platforms should proactively filter and block any posts or keywords relating to the promotion or sale of products that can only be legally sold within selective distribution networks by authorized retailers (such as trademarked perfumes and cosmetics) in the event the seller is unable to prove that it acts as an authorized retailer.

- ii. ***Removal of illicit act or content upon knowledge or awareness.*** The ECD currently lacks a **harmonized notice and take-down procedure** like the one set forth in the US DMCA for example. The preferred option at the time the ECD was enacted was to encourage the adoption of voluntary agreements and codes of conduct between business operators as demonstrated by Recital 40 of the ECD. However, this approach of favoring voluntary agreements between stakeholders has produced uneven results.

The Commission should consider recommending a harmonized NTD procedure, which would undoubtedly help to further legal certainty and, ultimately, consumer trust.<sup>6</sup> This would make notification procedures more efficient to all online providers (including those benefitting from the “safe harbor”).

- Finally, the Commission should also implement clear guidance as to **how information can be shared** between legitimate stakeholders in the spirit of cooperation in order to efficiently fight against online illicit practices, like the possibility for right owners to request for the disclosure of the identity and contact details of alleged infringers.
- The protection of intellectual property and the fight against counterfeiting should be a shared responsibility with regards to society in general, and to the consumer in particular. There is no reason why this burden should fall exclusively on the right owners. This burden should be shared between intermediaries and right owners. The first have control over their own tools and the second are experts in their rights.
- This approach would be consistent with the economic and business realities of these intermediaries’ business models and with what happens in the physical world where merchants have a duty of care in order to avoid that its activity or conduct generates illicit damages to third parties. This approach would be respectful of the online providers’ rights and would not require rewriting the ECD. This approach is finally the one which has been followed by several national courts to differentiate “genuine”

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<sup>6</sup> While not imposing a notice and take-down procedure was deemed to be the best approach at the initial stage, the ECD did expressly envision the possibility of a future amendment introducing a procedure of this kind in Article 21(2) ECD 2000/31/EC - L 178/15



hosting providers from all sorts of online service providers.<sup>7</sup> Last but not least, this approach would not prevent cooperation between all stakeholders to ensure an efficient protection of intellectual property rights online in order to increase consumer trust and further the growth of e-commerce in Europe.

- As example of what Fondazione Altagamma considers useful and in line with the proposed framework, we report below the proposal amendments to Art. 17 of Law Decree April 9, 2003 No. 70 of Italy.

#### **VI, Proposed Amendments to Italy's Law Decree April 9, 2003 No. 70 as implementation of E-Commerce Directive ("ECD")**

- i. *The exemption or dispensations in terms of responsibility foreseen by Law Decree do not apply to:*
  - *The provider who will wilfully cooperates with the recipient of its service with the aim of committing infringing acts;*
  - *The provider who offers to the recipient of its services object of the Decree or otherwise provides in its favour, also additional instruments or services, in particular of organizational or promotion nature, or adopts presentation schemes of the information which are unnecessary to render the services which are the object of the Decree, which are apt to promote or anyhow to facilitate the offer in commerce of products or services by the recipient of the service;*
  - *The provider who does not respect the duty of diligence which is reasonably asked to it and is foreseen by the right in order to find and prevent some kind of infringing activities. In particular, in order to prevent the infringement of intellectual property rights foreseen by law decree February 10, 2005 No. 30, this duty of diligence includes:*
    - *(i) the adoption of filters which do not enable the access to information directed to promote or otherwise facilitate the offer in commerce of products or services, as long as this information contains key words which, in the normal commercial uses, usually indicate that the products or services to which they are applied to are not original, used alone or in connection with a trademark or other distinctive sing for which*

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<sup>7</sup> e.g., eBay / Hermès, CA Reims, 20 July 2010 ; eBay / LV, CA Paris, 3 September 2010



*the recipient of the service did not demonstrate to be the owner or the licensee;*

- *(ii) the adoption of technically adequate filters which do not enable the access to information directed to promote or facilitate the offer in commerce of products or services, whose description corresponds to the description of the infringing products or services which the owners of the intellectual property rights related there to have previously communicated to the provider of the service;*
- *(iii) the exercise of these filters prior to the publishing on line of the information;*
- *(iv) the publication of the website of the provider of the service, in a clear and visible way, of this rule of exclusion. Furthermore, in order to prevent the violation of the rules on the sale of products or services which are subject to legal limitations as their sale or supply, this duty of diligence includes:*
  - *(i) the adoption of technically adequate filters which do not enable the access to information directed to promote or facilitate the offer in commerce of products or services, whose commercialization or supplying is reserved to particular channels of sale or require medical prescription;*
  - *(ii) the exercise of these filters prior to the publishing on line of the information;*
  - *(iii) the publication in the website of the provider of the service in a clear and visible way, of this rule of exclusion.*

- ii. *The exemptions or dispensations in terms of responsibility foreseen by the Decree do not modify the possibility to request injunctions of any kind, and specifically the injunctions foreseen by law decree February 10, 2005 No. 30 and law April 22, 1941 No. 633 which are intended to put and end to an infringement of industrial or intellectual property right or to prevent it, even with the removal of the illicit information or disabling the access to same.*



## **VII. Conclusion**

- Liability exemption needs to be clarified without reopening the ECD
- Cooperation among stakeholders key to find pragmatic solutions
- Think global to fight illicit materials online and strengthen e-commerce



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