

LEGAL ASPECTS OF CROSS-BORDER ONLINE SERVICES IN THE EU (THE FINNISH EXPERIENCE)

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ABSTRACT

Modern European consumers increasingly want to access online services not only in their home countries but also when they travel or temporarily stay in another Member State. Enhancing cross-border access to online content has therefore become central issue to fostering a favorable law environment for e-commerce in the EU. Moreover, those services form the part of EU online internal market noted by many scientists¹. The paper is focused on the brief overview of the current EU legal framework in that area (cross-border online services) and its implementation in the EU Member State on the example of Finland.

1. INTRODUCTION

Cross-border Online Services form the essential part of a brand-new Digital Single Market concept, which definition was reflected in para 1 of Communication from the Commission “A Digital Single Market Strategy for Europe” of May 6, 2015². According to it, a Digital Single Market³ is one in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence.

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¹ Biryukov, P., Horak, H., Galushko, D., European Market Law, Voronezh, Zagreb, 2014, p. 32.

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 6 May 2015 “A Digital Single Market Strategy for Europe” COM(2015) 192 final

³ <http://ec.europa.eu/priorities/digital-single-market_en>, last accessed on 11/05/2016

The “Single Market Act II”⁴ identified information society services (ISS) or on-line services, including e-commerce, as one of the measures which can boost economic growth and drive forward the Internal Market of the 21st century. They also have to play a major role in achieving the objectives of smart, sustainable and inclusive growth in Europe by 2020. The “Digital Agenda for Europe”⁵ sets the objectives of developing electronic commerce across Europe and facilitating access to electronic commerce for SMEs engaged in sales and purchasing.

In accordance with the Article 1(b) of the Directive (EU) 2015/1535 of September 9, 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services⁶, the term “Information society services (ISS)” or “online services” defined as those services provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. It covers not only e-commerce in goods (including cultural goods and pharmaceutical products) and services (including online gambling) but also social networks, vocational training by distance learning, online services provided by public administrative bodies, etc., that was stipulated in the Commission Communication “A coherent framework for building trust in the Digital Single Market for e-commerce and online services” of January 11, 2012⁷.

2. CURRENT EU LEGAL FRAMEWORK

Online services and e-commerce are some of the most significant innovations in the economy in recent decades and have prompted 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.

⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 3 October 2012 «Single Market Act II Together for new growth» COM(2012) 573 final

⁵ Communication from the Commission of 19 May 2010 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 final

⁶ Directive (EU) 2015/1535 of The European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services

⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 11 January 2012 “A coherent framework for building trust in the Digital Single Market for e-commerce and online services” COM(2011) 942, final

Directive 2000/31/EC or “The E-Commerce Directive”⁸ (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.

The ECD was designed to help remove obstacles to cross-border online services in the Internal Market and to provide legal certainty to administrations, businesses and customers. The Directive has two vectors of action: a) it contains principles which should encourage the functioning of the Internal Market such as the Internal Market clause; b) it regulates certain legal aspects of online services.

The E-Commerce Directive regulates such important legal aspects of online services as the Internal Market clause (Articles 3-4 of ECD), information requirements (Article 5), commercial communications and regulated professions (Articles 6-8), electronic contracting (Articles 9-11), liability of online intermediaries (Articles 12-15), implementation and application (Articles 16-20).

3. EU LEGAL FRAMEWORK BEYOND THE ECD

The ECD is complemented by a massive of the EU instruments. The need for Member States to notify derogations to the Internal Market clause has diminished due to the operation of the CPC-networks since 2007⁹. The information requirements laid down in Article 5 ECD have been complemented by specific rules e.g. in the Unfair Commercial Practices Directive (2005)¹⁰, the Regulation on Passenger Rights (2004)¹¹, the Services Directive (2006)¹² and the new Consumer Rights Directive (2011)¹³.

⁸ 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)

⁹ Poncibò, C., Networks to Enforce European Law: The Case of the Consumer Protection Cooperation Network, *Journal of Consumer Policy*, Vol. 35 (2) 2012, p. 175.

¹⁰ 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 (‘Unfair Commercial Practices Directive’)

¹¹ 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

¹² Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market

¹³ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights

In the area of Intellectual Property Rights, the most relevant legislation concerns the Copyright Information Society Directive (2001)¹⁴ and the IPR Enforcement Directive (2004)¹⁵. On electronic contracting, Article 9 of the ECD had been complemented by the Electronic Signatures Directive (1993)¹⁶ which regulates the legal recognition of e-signatures. Worth noting that the new regulatory framework (910/2014/EU)¹⁷ was published in the Official Journal of the EU on 28 August 2014 under the name “Regulation on electronic identification and trust services for electronic transactions in the internal market” (“E-IDAS” Regulation). It will be applied since July 1, 2016 replacing the Directive on Electronic Signatures. The E-Privacy Directive (2009)¹⁸ complements and particularizes the Data Protection Directive with regard to the processing of personal data in the electronic communication sector.

Moreover, the following initiatives can also be mentioned: a) the ban on discrimination in Article 20 Services Directive; b) various new developments in the area of payment services; c) new rules on the application of VAT to digital services; d) developments in private international law and dispute resolution; e) enhancing data transparency¹⁹.

4. FINNISH EXPERIENCE

Finland ranks 4th out of the 28 EU Member States in the Digital Economy and Society Index 2016 (DESI)²⁰, that’s an excellent result for such a small

¹⁴ 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

¹⁵ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights

¹⁶ Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures

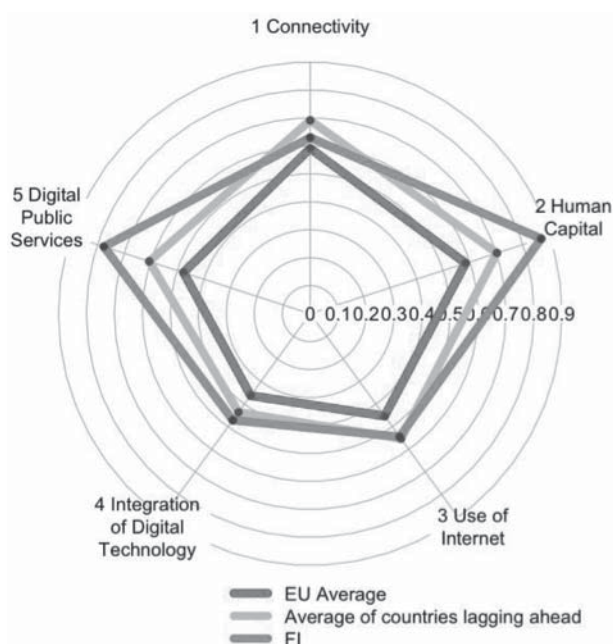
¹⁷ Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC

¹⁸ Directive 2009/136/EC of the European Parliament and of 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

¹⁹ Horak, H., Dumančić, K., Poljanec, K., Modernisation and harmonisation of company law in the Republic of Croatia with *acquis communautaire* and principle of data transparency, Centar za društvena istraživanja Internacionalnog Burč univerziteta, 2014, p. 575.

²⁰ <<https://ec.europa.eu/digital-single-market/en/desi>>, last accessed on 11/05/2016

EU-country. Whilst Finland is generally among the more advanced countries, it is outstanding as far as “human capital” is concerned: 91% of the population are regular internet users and the Finnish workforce has by far the highest proportion of ICT specialists in the EU (6.7%). Finland is also very good at using digital technologies for online public services. However, even in Finland only 15% of SMEs sell online, that is below EU average, despite their citizens’ propensity for e-commerce.



Act on the Provision of Information Society Services²¹ harmonizes Finnish law with the EU E-Commerce Directive (2000/31/EC). The Act was adopted by Parliament on June 5, 2002 and came into force on July 1, 2002. The act aimed at promoting e-commerce by ensuring the free provision of information society services. It was also designed to reduce the uncertainties relating to electronic contracting and to build up trust towards e-commerce among consumers. The transposition of the directive affected existing legislation: new provisions relating to marketing were added to the Consumer Protection Act, the Telecommunications Privacy Act and the Unfair Business Practices Act. These provisions required that the commercial purpose of marketing and the identity of the trader were clearly recognizable.

²¹ Act on the Provision of Information Society Services (458/2002)

The act applies to services offered through networks and also covers the offer of goods by electronic means. Consequently, the act covers, for example, the electronic marketing of services or goods. However, the physical provision of services or delivery of goods fall outside its scope.

As the freedom of contract and free evaluation of evidence are well-established principles in Finnish legal theory, the new act does not introduce significant changes to Finnish contract law. Electronic contracts have, as a general rule, already been recognized as valid and binding agreements under the existing legislation.

The new rules clarified the legal state by expressly addressing the form requirements for contracts. Therefore, a requirement for a written contract is fulfilled only if a contract's contents may not be unilaterally amended and providing that the contract remains accessible to the parties. However, certain categories of contracts (e.g., sales of real estate) will remain subject to specific form requirements and cannot be concluded online.

A reform of the Finnish regulation on information society - the Information Society Code ("the Code") - was passed on Friday, November 7, 2014 and took effect on January 1, 2015.

According to the Section 1 of the Code, the objective of the Act is to foster the supply and use of electronic communications services and to ensure that everyone across Finland has access to communications networks and services at reasonable conditions. A further objective of the Act is to secure the efficient and interference-free use of radio frequencies, to foster competition, and to ensure that communications networks and services are technologically advanced, of high quality, reliable, safe, and inexpensive. This Act also aims to ensure the confidentiality of electronic communication and the protection of privacy.

The Code significantly updates current regulations on areas such as e-privacy, consumer protection, communications networks and data security and collects the following laws under one umbrella:

- Communications Market Act
- Act on the Protection of Privacy in Electronic Communications;
- Domain Name Act;
- Act on Radio Frequencies and Telecommunications Equipment;
- Act on the Measures to Prevent Distribution of Child Pornography;
- Act on Television and Radio Operations;
- Act on the Prohibition of Certain Measures;

- Act on the Prohibition of Certain Illicit Devices for Accessing Protected Services; and
- Act on Auctioning Certain Radio Frequencies

The Information Society Code promotes electronic commerce in the EEA by ensuring the freedom to provide information society services, by clarifying the rights and obligations of the parties. The Act implements the Electronic Commerce Directive of the European Parliament and of the Council, concerning information society services, in particular electronic commerce, in the internal market.

According to the Section 3 (29) of the Code, by “information society services” means services that are provided: at a distance (provision of commodities to be ordered on the internet and delivered to the recipient so that the parties do not physically meet each other); electronically; at the recipient’s request; against a payment.

The most important issue is that the new Code clarifies the applicability of Finnish law in cross-border cases because it’s applied to both national and foreign operators that convey communication, if the operator has its seat in Finland or within Finnish jurisdiction. Even when the operator is outside of a Member State of the European Union, he is obliged to adhere to the regulation on the protection of privacy, if the operator’s key equipment is located in Finland or is maintained from Finland. The situation is similar when the operator has no seat in the territory of the Member States of the European Union, but the user of the service is in Finland and it is evident, based on the content of the service or the way it is marketed that the service is targeted at Finland.

The aim of the Code is to increase the awareness of foreign companies about privacy and data security requirements that are set when a company either becomes established in Finland or offers its services there. The objective is equality between Finnish and international companies. In future, the operation of more and more operators conveying communication must take into account various obligations related to the confidentiality in the electronic communication and to the protection of privacy.

With regard to consumer protection, the act will provide that when a consumer orders and pays for a product or service via mobile, the consumer’s telecom operator and the company selling the product or service will share accountability. The act also expands the coverage of privacy protection and information security. In the future, data protection and information security provisions will apply to all communication distributors including social media service providers.

Additionally, the Information Society Code will improve access to the internet’s universal service connection. The law obligates telecom operators to tell

their clients about and offer them universal service products more actively than before. In order to promote competition, price monitoring of operators with significant market power are made more efficient. The Finnish Communications Regulatory Authority (FICORA) will also be entitled to intervene in pricing if there is need to eliminate barriers to the competition or to promote the competition.

5. CONCLUSION

A Digital Single Market Strategy posed a powerful impetus to the EU legislation in the field of cross-border online services. A variety of measures are already taken for the development and approximation of the law systems of the Member States. The example of Finland shows how best to implement European law, among other things, by improving and codifying national legislation. Basing on the latest EU Regulations and Directives, the Information Society Code provided the better regulation of usage of electronic services both inside and outside of Finland.

LITERATURE:

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