EDiMA's Comments on the Revision of the European Commission's Guidelines on the Implementation of the Unfair Commercial Practices Directive

I. Introduction

EDiMA welcomes the opportunity to comment on the Commission's planned revision of the Guidelines on the Implementation of the Unfair Commercial Practices Directive[1]. In this paper, we seek to address selected important areas outlined by the Commission in the UCPD Stakeholder Workshop of 9 September 2015[2].

As a representative of online platforms, many of our members connect buyers and sellers throughout Europe. In this context, we have noted significant differences in the national implementation and enforcement of the UCPD. As such, the Commission's decision to clarify the guidance is very welcome, as it will provide greater legal certainty and reduce friction in cross-border trade.

However, we are seriously concerned about the Commission's intention to fundamentally challenge the current interpretation of the legal framework applicable to online intermediaries in the context of the UCPD guidelines. Furthermore, in addition to the liability framework for intermediaries, many other areas covered by the Commission's draft Guidelines (as presented during Workshop) suggest new policy settings without the appropriate policy process. The Commission has announced and conducted comprehensive reviews and consultations on issues such as intermediary liability, search neutrality, geo-blocking, consumer reviews, online contracts, and data protection in the past months. We believe it would therefore be inappropriate to pre-empt further studies and political discussions on these issues by adopting a detailed guidance on how certain broad concepts included in the UCPD should be reinterpreted before an in-depth policy discussion and the appropriate policy making processes are carried out.

In the following sections, we will outline our thoughts on some of the key areas.

II. UCPD and Online Platforms

Online intermediaries play a crucial role and an important enabling function in Europe's economy, in both online and offline industries. As the role of online intermediaries continues to integrate with Europe's economy, there is a vital need to rely on a measured liability regime in order to provide online services in an efficient and coherent manner. Preserving and improving the regulatory framework governing online intermediaries in the EU will underpin the economic growth generated by online intermediaries. Conversely, any adverse changes to the current liability regime – including increased legal obligations on intermediaries – could have adverse impacts on innovation, creativity and the economic activity of online intermediaries, putting their added economic value at risk.

Today, the current liability regime is enshrined in Articles 12-15 of the e-Commerce Directive. The e-Commerce Directive provides a sensible legislative framework for online intermediaries in Europe, which includes diverse platforms such as search providers, e-commerce platforms, social networks and cloud computing providers. The current legislative landscape recognizes that, by ensuring a well-functioning and future-proof legislative environment, online innovation and new-business models are able to prosper and flourish within Europe. This is achieved through ensuring a balanced approach that both protects online intermediaries from liability for the misuse of their services by users and third parties, and requires the intermediary to act expeditiously to remove or disable access to illegal information only when they have actual knowledge of such illegality. Without this regime, the costs associated with general monitoring would hinder the generation of new online entrepreneurs and start-ups, and stifle competition and future growth in the European online sector.

The limited liability regime is not only necessary for the functioning and growth of online intermediaries, but it is also beneficial to the European economy as a whole. In terms of figures, the total value of goods and services

[1] Hereinafter, UCPD.
[2] Hereinafter, the Workshop.

purchased through online intermediaries by private households and the public sector came in at approximately €270bn in 2014 – with 60% of the private sector's entire consumption of goods and services occurring through online intermediaries[3]. Furthermore, since 2013 online intermediaries have resulted in a 10% growth rate per year[4]. The intermediaries' contribution to the economy would not be possible at the current level without the liability regime as it is currently designed.

Against this background, we are concerned about the Commission's intention to fundamentally challenge the current interpretation of the legal framework applicable to online intermediaries in the context of the UCPD guidelines:

1) In the Commission's presentation on the draft Guidelines on the UCPD, the Commission notes that the e-Commerce Directive applies "*without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts*". It is unclear how the Commission understands that provision and whether it believes the principles enshrined in the e-Commerce Directive should not be taken into account when applying consumer law. Such an interpretation could lead to unlimited monitoring obligations and liability for intermediaries, as a result of third party infringements.

2) The Commission aims to limit the application of the hosting liability framework significantly by considering that **platforms, which "actively shape the presentation of the information provided by third parties, process payments and product deliveries, charge commissions on transaction" should not benefit from the hosting liability framework**. Such broad understanding of "active role" would make most online intermediaries liable for the infringements of their users - many of whose business models depend upon their users being able to upload their content at leisure. This would affect not only online market places like eBay, but collaborative economy platforms like Airbnb and Bla-bla car, search tools and user-generated content platforms like TripAdvisor and Yelp, video sharing platforms like YouTube, and social networks like Twitter and Facebook.

3) The Commission argues that online intermediaries, which play such an "active role" have to act in accordance with the requirements of professional diligence (UCPD Art. 5(2)) in relation to unfair commercial practices engaged by other traders on the platform. **The Commission's envisaged obligations for intermediaries whose role is considered to be active, include "proactively identifying and removing infringing information by third party traders"** would significantly impact intermediaries' ability to innovate and enable European business and consumers. Such interpretation of the concept of an "active" intermediary would mean that online marketplaces, collaborative economy platforms, social networks, video hosting platforms, specialised search tools etc., would all be fully liable for all of the infringements of their users. In effect, this would require online intermediaries to advance significant funds in order to consistently monitor the content of their users. An increased monitoring requirement can also result in adverse implications for the privacy of the user, as well as contributing to a situation of uncertainty for creators, that can impact on innovation and creativity online. It will also harm the consumers, as it will considerably decrease the content of the platforms, which is found useful and attractive by the consumers. As such, removing the hosting defence for nearly all online platforms would surely be an unintended consequence of the UCPD guidelines.

   It also neglects the fact that certain transaction-related activity such as processing payments and facilitating shipment is not related to liability stemming from hosted content and does not fall into the realm of what the CJEU described as giving rise to an active role with regards to such content. The concept of an active role "of such a kind as to give it knowledge of, or control over" data is based in the notion that those who are concerned with third party content in a way that they are bound to note the infringing nature and can do something about it need to act accordingly as clearly spelled out in Art. 14 of the e-Commerce Directive

[3] EDiMA and Copenhagen Economics study: Online Intermediaries, Impact on EU economy, 2015 <http://www.europeandigitalmediaassociation.org/pdfs/EDiMA%20-%20Online%20intermediaries%20-%20EU%20Growth%20Engines.pdf>

[4] *Ibid*.

itself. The Court took this out of the recitals explaining the concept behind Art. 14. To avoid such unintended far-reaching consequences, the concept of "active role" as defined by CJEU case law must be assessed against **two criteria**[5]:

- Whether the intermediary had involvements with the actual infringing content (the active role needs to be specific to the infringement).
- Whether the intermediary treats all different seller-potential-buyer relations equally (neutrality implies passive role).

4) The Commission rightly notes that platforms must be considered as **"traders" for their own commercial practices** towards consumers and are therefore subject to general information requirements about the service the platform provides to its users[6]. Note that these general information obligations apply to search engines with regard to how results are displayed/promoted content, price comparison websites, app stores, sharing economy websites. In order to ensure sufficient flexibility and business model neutrality, such information requirements should not be imposed in a rigid and prescriptive way, leaving it up to the platform operator to determine the best way of informing the consumer about the main characteristics of its service.

   In addition, the Commission should avoid stretching the seller's obligations/liability to the platform provider. During the Workshop, the Commission stated that if a marketplace platform violates its information and professional obligations under UCPD (e.g. omits the name of the seller and the consumer is rather given the impression that s/he is buying directly from the intermediary), the platform may be held "on a case-by-case" basis liable for the performance of the transaction - i.e. in the case of non-delivery or non-conformity under the Sales and Guarantees Directive 1999/44/EC, in conjunction with the UCPD. The potential consequence of this position would be that if the enforcer believes that the information on the platform does not meet the alleged standard of diligence, the platform provider would not only be potentially sanctioned for UCP but also charged with obligations lying solely with the seller under existing law, e.g. obliged to refund customers if the relevant third party seller did not replace or refund a defective product.

   Liability under UCPD (for informational diligence) is distinct and autonomous from contractual liability and from liability under consumer guarantee rules (i.e. under 1999/44/EC). Directive 1999/44/EC is clear in that only the "seller" (which is defined clearly in the directive) is liable to provide consumers with the remedies for non-conformity of the good supplied under the sale transaction (replacement, repair, refund).

   For further background, the ECJ case quoted on this point in the Commission's Workshop slides has not been decided and is very fact specific in a sense that the seller is a non-professional seller which is excluded from the scope of directive 1999/44/EC.

III. Invitation to purchase, lex specialis, and main characteristics

The broad concept of "invitation to purchase" and in particular the interpretation given to the concept by the CJEU in the *Ving Sverige* case (as outlined in the Commission's presentation) is problematic in the context of online commerce[7]. By stating that the "possibility to make a purchase" is not a precondition for an "invitation to purchase", the Court in essence considers any display of a product with a price an "invitation to purchase". The interpretation is very broad and blurs the line between "invitation to purchase" and "advertising", also in other areas of law.

In general, legislation relating to information requirements differentiates between what needs to be shown in an "offer" and in "advertising". Generally, less information needs to be shown in advertising than in the offer. This

[5] Please see Annex I for national case law post the CJEU's L'Oréal case

[6] However, as explained below, platforms should not be considered "traders" for the commercial practices of their users.

[7] A differentiation between online and offline transactions is indeed warranted; in the offline world the consumer needs all relevant information before he decides to enter a shop (higher transactional costs), but this is different in case of an online transaction

makes sense. Not every piece of information that the buyer needs to see before making a purchase decision (which usually happens on the offer page where he can actually buy) must be shown in all advertising preceding this final step.

However, Courts increasingly interpret the concept of "offer" to be equivalent to the concept of "invitation to purchase", within the meaning of the UCPD and in particular with the wide interpretation given to it in CJEU's ruling in the *Ving Sverige case* ("offer" = "Invitation to purchase" = most advertising —> "offer" = "advertising"). This leads to a situation where eventually the legislator's reasonable differentiation between information given in "advertising" and in the "offer" becomes obsolete.

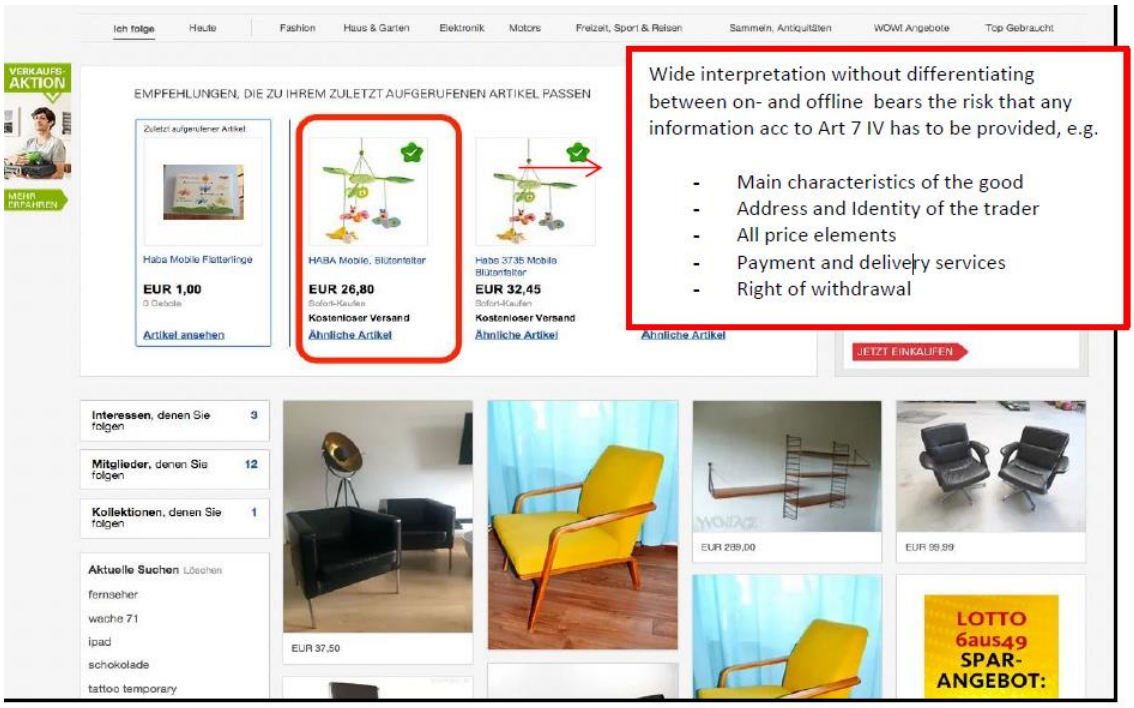
Examples of legislation differentiating between "offer" and "advertising" include:

- Price indication: According to the German law on price indications (Preisangabenverordnung), some information needs to be given in "offer and advertising", others only in the offer. This differentiation does not make sense if an "offer" is considered to bear the same information requirements as "advertising".
- Energy labelling: Delegated Acts differentiate between offer (Art 4 (b)) and advertising (Art 4 (c)). 518/2014 regulates specifically how the energy label must be shown in the offer (referenced in Art 4 (b)). It does not require the same display for Art 4 (c) which deals with advertising.

However, there is a risk that courts will use Art 7 (4) of the UCPD to justify more far-reaching information requirements than intended by the legislator. Therefore, the clarification that specific EU regulation must prevail is very important, in particular with regards to Art 7 (4). Whenever there is specific regulation on information requirements which states what information needs to be given at which point of time within the purchase process, this must be considered an exhaustive regulation, leaving no room for Art 7 (4) as a back-up clause. And whenever the law differentiates "offer" and "advertising", there cannot be room for interpreting "offer" as "invitation to purchase".

Also, it is important to differentiate between on- an offline as the ECJ indicated in para. 54 and 56 in the *Ving Sverige* decision and as laid down in Art. 7 III of the UCPD. Whereas in fact in the offline world the decision to enter a shop could be qualified as a "transactional decision" this is different when searching online as (1) the consumer does receive the relevant information shortly after he clicks on the advertisement and he does not expect to see all information in all instances at first glance and, (2) in the case of online the medium does have limitations of space which have to be taken into account. Also, whereas in the offline world it is important to provide consumers with the relevant information at an earlier stage (example: the consumer might have to drive to the brick and mortar store), this is different when looking online where the relevant information can be found when clicking on the placement.

The highlighted placement in the screenshot below has been considered an "invitation to purchase" in German court proceedings. Should the list of information requirements included in Art 7 (4) UCPD be understood to cover such placement, it would be impossible to provide the required information to the buyer in this placement. An effort to comply with such obligation would overwhelm the potential buyer with information and effectively lead to the opposite effect: a confused consumer who will blind out the provided information because the information is not relevant to the consumer at this point of the purchasing process. The consumer will only want to see the full information when making a decision to purchase. Such information "overkill" would be even more detrimental in the mobile commerce environment, where the available screen space is more limited. In line with the Commission's "digital fitness" check of consumer law, such considerations must be a priority.



Therefore, it should be required but also sufficient if the information is given to the buyer before a purchase decision is made.

With regard to the list of information which the Commission considers to be "main characteristics" within the meaning of Art 7 (1)-(2) for a platform provider's services, most of the listed information is relevant and is provided to the consumer at an appropriate point. However, by no means should all the information be provided in "invitation to purchase" as the concept is currently defined by the CJEU and national courts. As the Commission makes reference only to Art 7 (1)-(2) (and not to Art 7 (4)), this seems not to be the Commission's intention. However, this must be clarified.

IV. Commission Principles for Comparison Tools and French draft decree

We would also like to take this opportunity to comment on the Commission's work on Principles on Comparison Tools, which we understand links to the Commission's UCPD guidance and is closely related to the French draft decree "On information requirements of online comparison sites" that has been notified to the Commission on 24 August as part of the 98/34 notification procedure.

We understand that the French draft law includes "e-commerce platforms", "remote sales sites", or "[marketplaces]" in the definition of a comparison tool or website, either explicitly or as a consequence of broad language employed in the texts. This is similar to the thinking outlined in the Commission's principles on Comparison Tools as presented at the workshop. According to the Commission, "to the extent that operators of search engines, travel or tickets booking sites, e-commerce platforms acting as a market place for several traders develop functions or applications dedicated to the comparison of products and services, these functions or applications are also covered by the term "comparison tools".

One could argue that this is too broad a definition, as often a user has to navigate between several websites via a search engine, or several travel/ticket booking websites in order to effectively "compare" purchase prices. While these intermediaries may facilitate the access that leads to the comparison, many do not compare prices on their own domains.

Furthermore, as the UCPD also covers issues related to comparison tools, the Commission should further discourage national initiatives being developed in parallel. Developing national solutions and EU-level solutions in parallel may lead to conflicting requirements and legal uncertainty.

Annex I. 'Active Role' – German vs Dutch case law

The EU's e-Commerce Directive (2000/31/EC) stipulates that an online selling platform can only benefit from the exemption of liability for infringements on that platform if it does not have actual knowledge of the infringement. In order to have a workable system for receiving and acting upon information which imparts this 'actual knowledge', intermediaries must necessarily establish notification mechanisms. In this sense, such mechanisms are a necessity throughout the EU, even if they are not explicitly mandatory. eBay's VeRO system is an example of an effective system which allows rights owners to protect their IPRs, while enabling eBay to efficiently obtain and act on actual knowledge of infringements.

This note compares the case law of the Dutch Appeal Court in the Stokke vs. Marktplaats case and the German Federal Supreme Court in the Stokke vs. eBay case (I ZR 216/11)

1. **Dutch Court of Appeal in Leeuwarden Stokke vs. Marktplaats dated 22 May 2012**

In this case between Stokke, the producer of the Tripp Trapp highchair, and Marktplaats, the most popular Dutch online market platform (a classifieds site), the Dutch Court of Appeal in Leeuwarden has ruled in favour of Marktplaats with regards to its liability for intellectual property infringements and the burden of policing for the unlawful use of its platform.

Using recent judgments about intermediary liability of the ECJ, the Court rejects a long variety of arguments why the intermediary should not be considered passive enough to be considered a hosting provider (Article 14 e-Commerce Directive) as well as why the Court should impose injunctions to pro-actively police the platform, notice and stay down, or register identifying data of its users. In addition, the Court concludes that the intermediary in question is not a direct infringer of copyright or trademark law.

a. **Hosting or not?**
   The core question the Court was asked to answer was whether Marktplaats should pro-actively remove infringing advertisements from its platform. Stokke was of the opinion that Marktplaats could not be considered a hosting provider on the basis of a range of arguments that were crafted in view of the ECJ's widely debated ruling between eBay and L'Oréal.

   More specifically, the ECJ had ruled that the intermediary would not be able to invoke the hosting safe harbour if it:

   > *113. […], 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 […].*
   >
   > *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.*

The Leeuwarden Court of Appeal interprets the criterion of an active role as meaning that Marktplaats can invoke the hosting safe harbour if it has taken a neutral position between the user-seller and the potential buyers and that it cannot if it has played an 'active role' which it interprets as meaning an active role between the user-seller and the potential buyers.

b. **Hosting and optimization activity: equal treatment implies neutrality**

When dealing with the question whether Marktplaats loses its neutrality due to the various ways of shaping and optimizing the interaction between advertisers and buyers on its platform, the Court looks at **two criteria**:

i. First, whether Marktplaats had **involvements with the actual contents of infringing advertisements**.
ii. And second, **whether Marktplaats had treated the different seller-potential-buyer relations equally**. In consideration 5.7 for instance, the Court states:
"*Since all its user-sellers profit equally from these efforts of Marktplaats, its neutral position with regard to particular offers remains unaffected"*

Concluding that this remained the case for all the different ways in which Marktplaats had played an active role, in the view of Stokke, the Court concludes that Marktplaats can invoke the hosting safe harbour for the infringements on its service.

2. German Federal Supreme Court judgment Stokke vs eBay – I ZR 216/11

In contrast to the final and legally binding Dutch decision (which the German Supreme Court was aware of when it decided upon this case), the German Supreme Court decided to apply different criteria when having to decide whether eBay has had an active role or not in this case. Without dealing with the question of what the concept of the active role means in the context of the ECJ L'Oréal vs. eBay decision, the German Supreme Court simply declares that "*if the platform operator assumes an active role by placing ads that lead directly to proprietary rights- infringing listings, it generally bears further-reaching review obligations*" (see para 48 of the judgment). The German Supreme Court was fully aware of the following facts:

a. eBay had no involvement whatsoever with the actual content of the infringing listings
b. eBay did not treat its sellers differently when placing the ads but all sellers potentially profited from the enhanced visibility of their listings through promotion of Google Ads.

In particular, the German Supreme Court was aware of the fact that the Google Ad did not link to one specific (infringing) listing, but to a search result list containing all listings that at the time when the user clicked on the ad were uploaded on eBay by the eBay users (without prior knowledge from eBay) and contained the relevant keyword. In this context the German Supreme Court ruled that "*it does not matter whether the search result lists are static or dynamic, i.e. whether the same hit list is generated upon entry of a specific search term via a concrete AdWords ad or whether it changes due to the constantly changing listings on the Defendant's internet platform. It is also irrelevant that the Defendant generates the result lists automatically*." (See para 52).

3. Summary

It is therefore apparent that the German Federal Supreme Court would have come to a different result when deciding whether eBay has had an active role when placing the Google Ad if it had applied the criteria laid out by the Dutch Appeal Court. Instead of doing that it decided to simply interpret the "active role" concept on its own and in a non-consistent way with another final ruling in another member state. Knowing about the inconsistency of the interpretation of the active role concept the German Supreme Court would have been obliged to refer the question to the ECJ instead. By not doing so, the German Federal Supreme Court violated its obligation to exercise the reference for a preliminary ruling to the ECJ.