

The e-Commerce Directive

In January 2020, EDiMA called on the European Commission to introduce an Online Responsibility Framework. This framework aims to help internet companies respond to growing demands to do more to tackle illegal content online.

When the e-Commerce Directive came into force twenty years ago, the internet looked very different, as did the challenges associated with it. While today's rules need to be updated to better respond to those challenges, some of the principles set out in the e-Commerce Directive put in place the rules that govern the internet we have all grown to know and value. These principles remain as relevant today as they did twenty years ago.

In updating our rules for the future internet, three key principles of the e-Commerce Directive should be maintained:

- 1. The Country of Origin Principle**
- 2. The Limited Liability regime**
- 3. The Prohibition of a General Monitoring Obligation**

These three core principles are essential to maintaining a balance between enabling the growth of businesses in the single market and ensuring the protection of citizens' freedom of expression and their right to privacy.

What is the Country of Origin Principle?

The country of origin principle of the e-Commerce Directive establishes that internet companies are required to comply with the laws of the Member State they are legally established in when operating across the EU.

This provision simplifies legal compliance for companies so they can access the entire EU single market while complying with the laws of the country in which they are based. It ensures that they do not have to comply with every different national law in each country in which they wish to operate.

The Country of Origin Principle significantly reduces administrative burden for companies. It allows them to quickly scale-up and expand to new EU markets beyond their national one, and offer their products and services to EU citizens outside of their country of establishment. Without this principle, a company operating in the 27 EU Member States would have to apply at least 27 different legal regimes. It would de facto make it very difficult for SMEs to fully grasp the benefits of the EU Single Market.

Simply put, without the Country of Origin Principle, the EU Single Market does not exist for information society service providers.

What is the Limited Liability Regime?

The limited liability regime of the e-Commerce Directive establishes that internet companies must remove illegal content or activity from their services when they have been informed of its presence on their service. It also establishes that they cannot be held liable for illegal content or activity on their services unless they have 'actual knowledge' of the illegal content or activity. In doing so, it limits the liability of service providers to instances where they have been properly informed of the presence of illegal content/activity and have not acted expeditiously to remove it.

The limited liability regime is for internet companies and users, as well as for the internet ecosystem as a whole. Without this regime, internet companies would be forced to monitor their services and check every piece of content or activity before it would be visible to ensure that there would be no illegality. In an instance where the service provider suspected that content or activity may be illegal, they would be likely to prevent its upload in an effort to reduce any legal risk for themselves. Users' freedom of expression and privacy rights would consequently be seriously impaired. Such monitoring would also require massive investments for internet companies, raising significant barriers to entry which would be detrimental to a healthy competitive environment.

What does the Prohibition of a General Monitoring Obligation mean?

The prohibition of a general monitoring obligation means that companies cannot be obliged to introduce measures that will result in blanket monitoring of the activity of users of their service, nor obliged to seek out illegal activity. This provision protects users' fundamental rights by ensuring that service providers cannot generally monitor and interfere with users' individual interactions or posts on their service. It also offers service providers additional legal certainty, complementary to the limited liability regime, which means that they cannot be obliged to monitor user activity in a way that could cause them to gain 'actual knowledge' of illegal content or activity, and therefore be held liable for this content or activity.

Challenges have arisen in recent years as new rules increasingly require service providers to prevent the appearance of illegal content with the use of content recognition technologies, such as the EU Copyright Directive for example. These obligations have caused concern for some service providers as they can be interpreted as an obligation to monitor users. Court rulings from the European Court of Justice¹ have created further concern by failing to clarify whether the obligation to use content recognition technologies constitutes a general monitoring obligation, or not.

What is needed now?

While the rules governing the internet need to be updated to reflect the challenges of today, the principles that underpin it remain valid. In order to build a legislative framework that will better tackle illegal content and activity online, the core principles of the e-Commerce Directive (Country of Origin Principle, Limited Liability Regime, Prohibition of a General Monitoring Obligation) must be maintained, re-affirmed and clarified.

The Digital Services Act should retain these core principles and bring clarity to concerns about general monitoring obligations in order to best equip service providers to reduce and prevent illegal content and activity online.

1: For example, see the evolution of the CJEU's thinking in [L'Oréal v eBay](#), [Scarlet v SABAM](#), [SABAM v Netlog](#), and the recent General Court ruling on [Eva Glawischnig-Piesczek v Facebook Ireland](#).

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- EDiMA is the voice of the leading internet companies and the most popular internet products in Europe. EDiMA stands for an internet which enables companies to grow and allows customers to make the most of the opportunities it offers. More information is available here: <https://edima-eu.org/>
 - EDiMA's members are modern internet companies that make the most popular internet products in Europe. EDiMA represents the leading online market-places, browsers, entertainment platforms, review sites and social networks that offer consumers some of the most popular internet products every single day. More information is available here: <https://edima-eu.org/members/>
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- *In January, EDiMA launched a new position paper calling for a new Framework for Responsibility Online in the context of the Digital Services Act. The paper is available here: <https://edima-eu.org/wp-content/uploads/2020/01/Responsibility-Online.pdf>*
 - *EDiMA's feedback on the Digital Services Act Roadmap Consultation can be found here: <https://edima-eu.org/wp-content/uploads/2020/06/EDiMA-response-DSA-IIA-Roadmap-consultation-e-Commerce-Aspects.pdf>*