

Regulating the Information Society Services Sector
Consultation Document

September 2005

Table of Contents

Page	
	Table of Contents..... 2
	Foreword..... 3
	1 Objective and scope of Consultation..... 4
	2 What are information society services? 5
2.1	Categories of services considered to be information society services.....5
	3 Provisions related to the internal market 8
	4 Obligations incumbent upon Information Society Service Providers. 9
4.1	General Information9
4.2	Commercial Communications9
4.3	Electronic Contracts..... 10
4.4	Information Requirements Related to Electronic Contracts 10
4.5	Regulated professions..... 10
	5 General approach to supervision..... 11
5.1	Regulatory objectives and guiding principles 11
5.2	Regulatory options 11
5.3	Proposed Approach 12
5.4	Ensuring one-stop-shop where possible 12
5.5	Awareness raising 13
5.6	Co – Regulation..... 14
5.7	ex-Post intervention 14
	6 Submission of Comments 15
	Appendix A - Indicative list of services not falling under the definition of information society services..... 16

Foreword

The eCommerce Act (the Act) came into force on the 10th May 2002. The Act is primarily intended to facilitate the uptake of electronic commerce by establishing the legal validity of electronic records, transactions, contracts and signatures and by putting in place a legal framework for determining the time and place, when and where, an electronic communication is dispatched and received.

The Act also includes a number of provisions aimed at:

- o protecting consumers who enter into electronic contracts; and
- o establishing a framework within which services related to electronic signatures can be provided in Malta.

The Malta Communications Authority (MCA) was nominated as the competent authority to supervise the provisions related to electronic signatures on 10th May 2002. Its remit is being extended to cover the supervision of compliance with the regulatory obligations of information society service providers by virtue of an amendment to the eCommerce Act introduced in Act No XIII of 2005¹ and the subsequent designation that is expected to come into effect shortly.

The Act partially transposed 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 (Electronic Commerce Directive), and Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures (Electronic Signatures Directive).

These two directives create a framework for the establishment of the internal European Community market (the internal market) with respect to information society services and electronic signature services.

Following accession to the European Union, the Minister for Competitiveness and Communications (MCMP), after consultation with the MCA, has drawn up and published for consultation draft regulations intended to complete the transposition of these two directives. In particular these new regulations include provisions related to the establishment of the internal market for information society services.

This consultation paper sets out the MCA's proposed supervisory approach with respect to information society services in line with the provisions of the eCommerce Act and the draft Regulations.

It is intended to provide interested parties with a complete picture regarding the regulatory framework being proposed. For this purpose it is important that this consultation paper is read in conjunction with the draft regulations and explanatory memorandum published by the MCMP.

¹ Various Laws (amendment act) 2005 (Part XVIII)

1 Objective and scope of consultation

This consultation is intended to elicit response from the general public on the proposed approach to the supervision of information society service providers, in accordance with the eCommerce Act and the draft regulations that the MCMP is proposing to adopt under the Act.

The input received from this consultation together with that received by MCMP in response to its consultation on the draft regulations will serve to ensure that the final set of regulations, as well as the MCA's supervisory approach, are coherent and take into account the views of all interested parties.

2 What are information society services?

Information society services are, in essence, defined under the eCommerce Act as services provided, *whether for consideration or not*:

- at a distance,
- by electronic means,
- at the individual request of a recipient of the service.

This definition reflects the definition in European Union (EU) legislation, except that EU law (see Directive 98/34/EC²) differs by establishing that information society services are *normally provided for remuneration*.

The Authority is of the opinion that, for regulatory purposes, the local definition of Information society services should be interpreted in line with the EU definition. That is, regulation should apply to services “normally provided for remuneration” and “extend to services which are not remunerated by those who receive them ...”³.

Consequently the enforcement of the rules applicable to information society services, should focus on services that generate revenue. This is in line with the EU approach that defines these services as “economic activities”.⁴

The categories of services that fall within this definition are discussed in sub-section 2.1 below.

Question 1:

Do you agree that the information society services which should be regulated are those which constitute an “economic activity”? If not please explain which services you think should be regulated.

2.1 Categories of services considered to be information society services

The Electronic Commerce Directive identifies the following as falling within the definition:

- o selling of goods on-line;
- o services offering on-line information, or commercial communications, or tools allowing for search access and retrieval of data (even if the service is not remunerated by those who receive it);
- o services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service;
- o video-on-demand or the provision of commercial communications by electronic mail.

² Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations.

³ Recital 18 of the eCommerce Directive

⁴ Recital 18 of the eCommerce Directive states “Information society services span a wide range of economic activities which take place on-line;”

Furthermore, a report published by the Commission in 2003⁵ provides additional information as to the range of services falling within this definition, as follows:

“It (the Electronic Commerce Directive) covers a wide variety of services provided online ranging from online newspapers and specialised news services (such as business or financial information), online selling of various products (books, computer hardware and software, pharmaceuticals, etc.) to the online provision of financial services (online banking, online investment).”

The definition, in the MCA’s opinion, includes certain services currently available over mobile telephones such as:

- o internet access;
- o music / video and game downloads;
- o access to information based services; and
- o subscription-based information services, such as football score updates.

It also includes certain services that may be provided over interactive television.

Further information is provided in Annex V of Directive 98/34 that includes an indicative list of services **not** covered by the definition. Furthermore Recital 18 of the Electronic Commerce Directive, identifies an additional number of other services that do **not** fall under the definition of information society services. These services are listed in Annex A to this consultation paper.

In line with the discussion at the beginning of this Section, the Authority considers that, for the purpose of regulation, a web-site offering information about a commercial entity but which does not provide any revenue generating services should also not be considered to be an information society service.

The Authority concludes that the definition of information society services captures a vast number of services that are provided on-line. However, it recognises that there will be services which will not be easily categorised. In such instances, individual decisions would need to be taken as to whether such services are information society services or not.

⁵ COM (2003) 702(01) First Report on the application of 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)
http://europa.eu.int/eurlex/pri/en/dpi/rpt/doc/2003/com2003_0702en01.doc

Summarising, the definition of information society services includes:

- Selling of goods on-line;
- Services offering on-line information, or commercial communications, or tools allowing for search access and retrieval of data (even if the service is not remunerated by those who receive it);
- Services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service;
- Video-on-demand;
- Commercial communications by electronic mail;
- Online newspapers and specialised news services (such as business or financial information);
- Online provision of financial services (online banking, online investment);
- Certain services provided over mobile phones such as internet access, music/video and game downloads and access to information-based services.

Question 2:

Do you agree with the list of services that the Authority considers to be information society services? Are there any other types of information society services that do not fall within the broad categories identified above?

3 Provisions related to the internal market

The draft regulations establish measures intended to ensure the proper functioning of the internal market. In particular they adopt the 'country of origin' principle for certain rules applicable to information society services. This principle requires that those obligations laid down in **all** regulations applicable to information society services in respect of

- the *taking up* of the particular activity; or
- the *pursuit* of the activity;

apply to information society service providers established in Malta, whether the service itself is provided in Malta or not. Such obligations must consequently be enforced by the competent enforcement authority identified in the particular regulations, regardless of whether the service is provided in Malta or not.

In addition to the Malta Communications Authority, these provisions apply to a number of other enforcement bodies that are empowered to intervene in the event that a particular information society service contravenes the provisions of the legislative regime that these authorities enforce.

Regulatory bodies such as the Malta Financial Services Authority and the Malta Tourism Authority would, for example, fall under this category if they have powers to intervene with respect to the manner in which on-line financial or tourism services respectively are provided.

Other supervisory bodies such as the Commerce Division and the Consumer and Competition Division could also fall under this category to the extent that they are empowered to intervene in the event that an information society service breaches rules enforced by them.

The implications of these rules, with respect to the MCA's regulatory approach, are discussed in more detail in sub-section 5.2 below.

4 Obligations incumbent upon information society service providers

The following sections give an overview of the regulatory obligations established by the Act and the draft Regulations.

4.1 General Information

The regulations require that all information society service providers make the following information available to the recipients of their services:

- The name and address where the service provider is established;
- Contact details of the service provider including an electronic mail address allowing prompt contact;
- The registration number of any trade register with which the service provider may be registered;
- When the service is subject to an authorisation scheme, the name and contact details of the relevant supervisory body;
- VAT number; and
- Details of how users can consent to receiving unsolicited commercial communications.

In addition, if the service provider is a member of a regulated profession, additional details must be made available.

Furthermore, if the service provider makes reference to prices, then those prices must be shown clearly and unambiguously and clearly indicate whether they are inclusive of tax. Any delivery costs must also be clearly indicated.

4.2 Commercial Communications

In the event that a service provider makes use of commercial communications as part of the information society service or that the said communications in themselves constitute an information society service, then the following additional information must be provided:

- a statement to the effect that the communication is a commercial communication; and
- information about the service provider on whose behalf the commercial communication is made.

Moreover, if the service provider makes promotional offers or games, he must make the rules and conditions for such offers/games easily accessible and present such terms and conditions in clear and unambiguous terms.

4.3 Electronic Contracts

The Act requires information society service providers that allow customers to conclude electronic contracts (e.g. to place on-line orders) to:

- acknowledge receipt of the order without undue delay and by electronic means; and
- provide the on-line user with means to ensure that any errors made in the process of placing an on-line order may be identified and rectified.

An example of a common approach adopted by information society service providers in order to address this obligation is that of giving the consumer the opportunity to check the details of the order prior to the final confirmation.

It is important to note that these provisions do not apply to contracts concluded exclusively by electronic mail or by any other similar technological means.

4.4 Information requirements related to electronic contracts

Under Article 11 of the Act, information society service providers allowing the conclusion of contracts on-line, are required to provide the information set out in the First Schedule of the Act prior to the moment when the order is placed. These information requirements are the same as those discussed under sub-section 4.1, but in addition the service provider is required to provide the following information to the user prior to conclusion of the contract:

- the different steps to follow to conclude the contract;
- the technical means for identifying and correcting input errors prior to the placing of the order;
- the language or languages in which the contract may be concluded;
- a statement of whether the concluded contract will be filed by the originator;
- whether it will be accessible on-line.

4.5 Regulated professions

Information society services may be offered by members of regulated professions who may also make commercial communications forming part of an information society service.

The regulations establish the rules regarding conditions that may be imposed by bodies regulating such professions. As such these rules do not fall within the remit of the MCA and are therefore outside the scope of this consultation.

Question 3

Do you agree that the regulations related to regulated professions are outside of the remit of the MCA? If not, please give reasons.

5 General approach to supervision

5.1 Regulatory objectives and guiding principles

The Authority is proposing that its objectives in ensuring compliance with the provisions described in the previous section should be:

- To stimulate the development of the local market;
- To create a favourable climate in this area for businesses and consumers.

In developing its regulatory approach to information society services, the Authority has adopted the following as 'guiding principles':

- Facilitation of market entry and development by easing the setup of information society service providers in Malta;
- Stimulation of consumer activity/demand by enabling businesses and consumers to readily and easily take up the products and services on offer, particularly by building trust;
- Minimisation of onerous processes and procedures to ensure regulation does not become a cumbersome task with negative implications for the market;
- Regulatory measures should be proportionate to their intended objective and not cause undue burden on undertakings.

Question 4

Do you agree with the principles put forward as the basis for developing a regulatory regime? If not, please explain why and provide input as to which changes you would suggest.

5.2 Regulatory options

The Authority has taken into consideration the fact that information society services span all sectors of economic activity and therefore the regulatory regime must be one that is suitable for undertakings that may be offering complex on-line services, as well as those venturing into information society service provision.

The Authority has considered a range of options regarding its approach to regulatory supervision from relatively 'onerous' to 'light-touch' regimes as follows:

Option 1 – Ex-ante regulation

Under this option, all information society service providers would be required to notify their activities to the Authority and confirm compliance with obligations arising out of the Act and the Regulations as part of the notification. This would enable the Authority to carry out regular monitoring of the services provided in order to verify and ensure compliance.

Option 2 – Mix of ex-ante with ex-post regulation

Only specific categories of service providers, for example those which make available transaction-based services or allow on-line payment, would be required to notify their activities and confirm compliance with attendant rules – this would result in heavier regulatory burdens on selected categories of services.

Option 3 – Light-touch

Such a regime would focus mainly on awareness raising – ensuring that service providers are aware of their obligations at law and that consumers are aware of their rights and avenues for redress.

In this option, compliance would be ensured through ex-post intervention, i.e. the Authority would intervene when it is aware of breaches of the provisions or following a complaint or dispute.

5.3 Proposed Approach

The Authority is of the opinion that Option 3 is the most indicated. It is the model that places the least burden on service providers. Furthermore, it allows for the development of self-regulatory approaches as encouraged by the eCommerce Directive, such as codes of conduct⁶.

It also allows space for the introduction of the trust mark scheme currently being developed by the industry in conjunction with the Ministry for Industry, Investment and Information Technology.

The following sections provide additional detail regarding the proposed approach.

5.4 Ensuring one-stop-shop where possible

The Authority is of the opinion that, in line with the principles set out earlier both service providers and consumers should be provided with a one-stop-shop service when it comes to dealing with regulatory bodies.

⁶ eCommerce Directive (Article 16)

The Authority also considers that it may be possible that some of the requirements set out in the eCommerce Act are already imposed upon certain sectors by virtue of sector-specific regulations.

Particularly in such instances, it is critical that there are no inconsistencies between the supervisory approach to the enforcement of obligations under the eCommerce Act, and the supervision of sector-specific regulations.

With this objective in mind, the Authority is proposing to work with other sector-specific regulatory bodies in the supervision of the legal provisions in question.

Question 5

Do you agree with the general principle set out above? If not, please give reasons.

5.5 Awareness raising

The Authority is of the opinion that the obligations arising out the eCommerce Act will be complied with by the vast majority of service providers if there is sufficient awareness of these requirements.

It has in fact been the experience in other countries that when shortcomings with respect to compliance with the obligations were pointed out, service providers generally complied promptly.⁷

The Authority will therefore be conducting an awareness campaign aimed at ensuring that the business community is adequately informed of the obligations under the Act.

It aims to do this in consultation with:

- MCMP
- MIIIT
- Other regulatory bodies
- Constituted bodies such as the Federation of Industry, the Chamber of Commerce and the General Retailers and Traders Union.
- Consumer bodies

The Authority will in addition maintain on-going activity in this regard aimed at ensuring that the desired levels of awareness are maintained.

Question 6

Are there any other bodies that the Authority should be consulting with when it develops and implements its information campaign?

⁷ See point 4.2 of Commission report on the application of the eCommerce Directive http://europa.eu.int/eur-lex/pri/en/dpi/rpt/doc/2003/com2003_0702en01.doc

5.6 Co-regulation

The provision of information society services is still in its infancy in Malta. For this reason the Authority is of the view that a co-regulatory approach between the industry and the Authority is the most appropriate regulatory model.

As such, the Authority encourages the development of codes of conduct or trust marks to which service providers can voluntarily adhere. It commends MIIIT for its initiative in developing a trust mark for eBusinesses in collaboration with industry. Such a scheme would ensure that participants comply with legal obligations and would serve to create trust in information society services.

The Authority proposes that any codes of conduct or trust mark schemes that are developed should also include provisions for a first line of complaint-handling and dispute resolution. This will ensure that regulatory intervention is only required in the event that a dispute cannot be resolved between the parties involved.

A number of examples of self-regulatory schemes for information society service providers are available:

- Irish direct marketing association – eCommerce and Interactive Marketing Code of Practice: <http://www.selfregulation.info/cocon/coc-eea-01ecom-2001-fedma-cop02.pdf>
- WebTraderUK: <http://www.webtraderuk.org.uk/content/Default.asp>

5.7 ex-Post intervention

As discussed earlier, the Authority is of the opinion that at this stage of development of the market for information society services it will generally be sufficient for it to intervene in an ex-post manner, ie the Authority will not as a matter of course conduct market surveillance, however it will hear complaints/disputes lodged by recipients of information society services and take regulatory action in the event that it determines that the Act has been breached. It will be consulting separately on a dispute resolution procedure in line with the provisions of the proposed regulations.

The Authority will also intervene when breaches of the Act come to its attention.

The Authority furthermore envisages that it will, from time to time conduct spot checks or surveys to gauge the general level of compliance and it may decide to intervene in a more direct manner should it establish the need to do so.

Question 7

Do you agree with this proposed approach? If not, please give reasons.

6 Submission of comments

The consultation period will run up to the 31st October 2005. The MCA welcomes written comments on any of the issues raised in this paper. Having analysed and considered the comments received, the MCA will review the proposed approach. A report summarising the responses to the consultation and the MCA's final position will be published.

Receipt of comments will be acknowledged. Comments will be made publicly available by the MCA and on the MCA's website unless declared confidential. Respondents are therefore asked to separate out any confidential material into a clearly marked annex.

Respondents are also kindly requested to preferably refer their comments to the consultative questions. Respondents may also make comments on any aspect of the consultation by referring to the specific sections of this document when making their submissions.

All responses to this consultation should be clearly marked "Reference: Submission regarding Information Society Services Sector Regulation" and sent by post, facsimile or e-mail to the:

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Appendix A - Indicative list of services not falling under the definition of information society services

1. Services not provided "at a distance"

Services provided in the physical presence of the provider and the recipient, even if they involve the use of electronic devices:

- (a) medical examinations or treatment at a doctor's surgery using electronic equipment where the patient is physically present;
- (b) consultation of an electronic catalogue in a shop with the customer on site;
- (c) plane ticket reservation at a travel agency in the physical presence of the customer by means of a network of computers;
- (d) electronic games made available in a video-arcade where the customer is physically present.

2. Services not provided "by electronic means"

Services having material content even though provided via electronic devices:

- (a) automatic cash or ticket dispensing machines (banknotes, rail tickets);
- (b) access to road networks, car parks, etc., charging for use, even if there are electronic devices at the entrance/exit controlling access and/or ensuring correct payment is made.

Off-line services: distribution of CD roms or software on diskettes,

Services which are not provided via electronic processing/inventory systems:

- (a) voice telephony services;
- (b) telefax/telex services;
- (c) services provided via voice telephony or fax;
- (d) telephone/telefax consultation of a doctor;
- (e) telephone/telefax consultation of a lawyer;
- (f) telephone/telefax direct marketing.

3. Services not supplied "at the individual request of a recipient of services"

Services provided by transmitting data without individual demand for simultaneous reception by an unlimited number of individual receivers (point to multipoint transmission):

- (a) television broadcasting services (including near-video on-demand services), covered by point (a) of Article 1 of Directive 89/552/EEC;
- (b) radio broadcasting services;
- (c) (televised) teletext.

Services not considered to be information society services (Recital 18 of the Electronic Commerce Directive)

The use of electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an information society service;

The contractual relationship between an employee and his employer is not an information society service;

Activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not information society services.