

COMMUNICATION FROM THE EUROPEAN UNION

AN ENABLING ENVIRONMENT TO FACILITATE ONLINE TRANSACTIONS

How Common Principles on Consumer Protection, Unsolicited Messages, Authentication and Trust Services and Electronic Contracts Would Contribute to a Better Integration, Especially of SMEs, in the World Economy and Enhance Trust and Confidence of Consumers Online

The following communication, dated 23 May 2017, is being circulated to the Members of the Council for Trade in Services – Special Session, at the request of the delegation of the European Union.

1 THE ISSUE

1.1. Devising the right enabling environment is critical to the harmonious development of trade by electronic means. Ensuring that every step of online transactions is underpinned by a strong regulatory framework enhances consumers' confidence and trust, and contributes to legal certainty online while facilitating trade in services. Addressing all aspects of those services trade related transactions – i.e. the conclusion of a contract online, its signature and the related payments – and ensuring that they are subject to clear rules would increase the uptake of operations online.

2 ELEMENTS OF AN ENABLING ENVIRONMENT

2.1 Consumer protection

2.1. Electronic commerce has been changing dramatically in recent years, both in terms of its expanding market size and the variety of new forms it has been taking. Nowadays, one can find almost any good or service online, ranging from automobiles to daily commodities, to professional services. Since in electronic transactions people cannot directly see the other party, problems are potentially more likely to occur than with traditional transactions. Also, the scale of problems caused by online frauds and scams and the number of affected consumers in different countries risks being much larger than in traditional forms of commerce. In order to create an environment where consumers can participate in online trade in services with confidence, it is essential to ensure that they enjoy concrete rights, and that there are ways to quickly address problems if they do arise, to protect them from unfair commercial practices, to ensure transparency, and to provide for effective redress and other trust-enhancing measures. To this end, effective international cooperation between consumer protection agencies or other relevant bodies is paramount.

2.2 Unsolicited commercial electronic messages

2.2. Unsolicited commercial communications or messages –"spam" – are unwanted messages sent via e-mail, messenger services, social networks, SMSes, etc. Receiving such messages is an issue for many reasons: privacy, deception of consumers, protection of minors, extra costs for businesses, lost productivity, etc. More generally from the consumer perspective, it undermines consumer trust and confidence, which is a prerequisite for the success of e-commerce. So, rules ensuring that consumers can be protected against unsolicited communications and at any time opt

out of such messages and/or have the option of opting-in could contribute to a more consumer and business friendly digital trade environment.

2.3 Electronic authentication and trust services, including electronic signature

2.3. Electronic authentication and trust services, which include electronic signatures, electronic seals, electronic time stamps, electronic delivery service and website authentication play a crucial role in the functioning of the Internet, including but not exclusively in the context of electronic contracts. In many Internet transactions, verifying the identity of a website's owner is needed to ensure that the website belongs and is effectively managed by the legal person who claims to be behind it. Similarly, the electronic signature of a final agreement may also require identifying the different signatories to ensure that they have expressed their consent to a content that will maintain its integrity. Examples of electronic signatures include clicking an 'accept' button online, signing on a touch pad to approve a credit card purchase or typing one's name on a signature line. Stamping the document provides it with a specific date and time. Finally, in some cases it is important that documents are transmitted to the other party through a secure channel that ensures the date of sending and receiving the document.

2.4. Trust services are therefore crucial in facilitating both domestic and cross-border e-commerce as they help to ensure the authenticity, integrity and privacy of online transactions. For service providers or consumers in any country to engage in e-commerce (both domestic and cross-border) using electronic authentication and trust services, the national legal framework must be in place to provide for their legal significance, validity and equivalence with traditional paper-based services. Most countries that have legislation covering electronic signatures and/or the other trust services do not impose limitations on the technology used when using such services.

2.4 Electronic contracts

2.5. All electronic commerce transactions are based on electronic contracts. Electronic commerce can therefore not take place without the recognition of such e-contracts. The UNCITRAL Model Law on electronic commerce already recognised this by providing that "*a contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose*". The explanatory notes to the UNCITRAL Model law recognises that, while in certain countries, the rule might be regarded as merely stating the obvious; it also states that the provision is needed "*in view of the remaining uncertainties in a considerable number of countries as to whether contracts can validly be concluded by electronic means*".

3 COVERAGE BY EXISTING WTO AGREEMENTS

3.1. There are no specific WTO disciplines on electronic signatures and trust services, electronic contracts, and spam. However, the transparency and MFN principles found in GATS may apply in instances related to trade in services. Disciplines on domestic regulation, market access and national treatment may also apply in instances/sectors where specific commitments have been made. The GATS general exceptions also play a role, notably in relation to consumer protection.

4 THE CASE FOR A WTO OUTCOME

4.1. Digitalisation offers great opportunities for all countries to cooperate in a manner which potentially brings great global benefits. To promote e-commerce, regulatory frameworks should facilitate an open and competitive environment. The WTO has a role to play here. A WTO outcome on consumer protection and unsolicited messages, electronic authentication and trust services including signatures and electronic contracts would be beneficial in the following ways:

4.2. *First*, recognizing the importance of maintaining and adopting transparent and effective measures to protect consumers engaging in electronic commerce from fraudulent and deceptive commercial practices, it would reassure consumers and facilitate the uptake of online transactions, resulting in increased flows of trade in services. Cross-border cooperation between authorities to combat illegal commercial practices would be facilitated if national measures were based on common principles.

4.3. *Second*, a WTO outcome on unsolicited messages would also increase consumer trust as consumers would be protected against unsolicited communications.

4.4. *Third*, it would encourage more Members to adopt domestic measures and legislation to facilitate the use of authentication and trust services and recognize electronic contracts, thus enabling electronic payments. This would bring legal certainty to both service providers and also consumers to engage in e-commerce, and would also facilitate the growth of online payment systems. It would unlock the potential of e-commerce for growth, especially in developing countries and LDCs.

4.5. *Fourth*, it would reassure companies, especially SMEs, that electronic contracts will be recognised and hence encourage them to invest in online solutions.

5 POSSIBLE WAY FORWARD

5.1. Recognizing the potential benefits of a multilateral outcome on a set of items covering every step of online transactions, and pursuant to GATS Article XVIII, Members could agree upon a series of legally binding principles that would form the basis for regulatory frameworks on those issues.

5.2. While the elements proposed in this paper constitute a coherent and complementary set of components, more could be added, taking account views from Members.

5.3. Moving forward, Members will also need to consider any necessary development dimension of the proposed outcome, as indicated in paragraph 11 of the text proposal below.

6 TEXT PROPOSAL FOR "AN ENABLING ENVIRONMENT TO FACILITATE ONLINE TRANSACTIONS"

AN ENABLING ENVIRONMENT TO FACILITATE ONLINE TRANSACTIONS

Members,

recognising the importance of adopting and maintaining transparent and effective measures to enhance trade in services and protect consumers from fraudulent and deceptive commercial practices when they engage in electronic commerce;

recognising that the prevalence of unsolicited commercial electronic messages can discourage the use of electronic means to carry out a commercial activity;

recognising that ensuring the legal validity of electronic signatures and other trust services, electronic authentication as well as contracts contribute to creating an enabling, secure and seamless online environment for trade in services;

have agreed as follows:

DEFINITIONS

Unsolicited commercial electronic message means an electronic message which is sent for commercial purposes without the consent of the recipient or against the explicit rejection of the recipient, using an Internet access service supplier and, to the extent provided for under the domestic laws and regulations of each Member, other telecommunications service.

Electronic authentication means the process or act of verifying the identity of a party to an electronic communication or transaction or ensuring the integrity of an electronic communication.

Electronic trust services means an electronic service consisting of the creation, verification, validation of electronic signatures, electronic seals, electronic time stamps, electronic registered delivery services, website authentication and certificates related to those services.

CONSUMER PROTECTION

1. Members shall adopt or maintain measures that contribute to consumer trust, including but not limited to measures that protect consumers from fraudulent and deceptive commercial practices when they engage in electronic commerce.
2. Members recognise the importance of cooperation between their respective national consumer protection agencies or other relevant bodies on activities related to electronic commerce in order to protect consumers and enhance consumer trust.

UNSOLICITED COMMERCIAL ELECTRONIC MESSAGES

3. Members shall adopt and maintain measures that protect consumers against unsolicited commercial electronic messages.
4. Members shall adopt or maintain measures regarding unsolicited commercial electronic messages sent to an electronic mail address that:
 - (a) require the consent, as specified according to the laws and regulations of each Member, of recipients to receive commercial electronic messages; or
 - (b) require suppliers of unsolicited commercial electronic messages to facilitate the ability of recipients to prevent ongoing reception of such messages.
5. Members shall provide recourse against suppliers of unsolicited commercial electronic messages who do not comply with its measures implemented pursuant to paragraph 4.
6. Members shall ensure that unsolicited commercial electronic messages are clearly identifiable as such and clearly disclose on whose behalf they are made.

ELECTRONIC AUTHENTICATION AND TRUST SERVICES, INCLUDING ELECTRONIC SIGNATURES

7. Members shall not deny the legal effect and admissibility as evidence in legal proceedings of electronic authentication and trust services solely on the basis that they are in electronic form.
8. Members shall not adopt or maintain measures for electronic authentication and trust services that would:
 - (a) prohibit parties to an electronic transaction from mutually determining the appropriate electronic methods for that transaction; or
 - (b) prevent parties from having the opportunity to prove to judicial or administrative authorities that their electronic transaction complies with any legal requirements with respect to electronic authentication and trust services.
9. Notwithstanding paragraph 8, a Member may require that, for a particular category of transactions, the method of electronic authentication or the trust service meet certain performance standards or be certified by an authority accredited in accordance with the Member's law.

ELECTRONIC CONTRACTS

10. Members shall ensure that their legal systems allow contracts to be concluded by electronic means and that the legal requirements for contractual processes neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on the ground of having been made by electronic means.¹

PARTICIPATION OF DEVELOPING COUNTRIES

11. [Language to facilitate the participation of developing countries to be considered.]
-

¹ This provision shall not apply to contracts that create or transfer rights in real estate; contracts requiring by law the involvement of courts, public authorities or professions exercising public authority; contracts of suretyship granted and or collateral securities furnished by persons acting for purposes outside their trade, business or profession; and contracts governed by family law or by the law of succession.