

Exam guidance d3

Exam as a whole

The topics of this exam are consumer rights, intermediary liability and trust services. These are three of the more in-depth topics that were dealt with in class this year and all relevant EU legislation is in their materials. Consequently, students should have a good grasp on all of these topics.

It should be noted that the facts in Q1(a) and Q1(b) are fairly lengthy. However, many of the facts are either irrelevant or simply 'set the scene'. Students who have a strong understanding of the law will have no problem in picking out the relevant facts.

Nonetheless, this exam probably requires more writing than previous years' exams. Markers can therefore, at their discretion, bear this in mind when evaluating students' responses, particularly for Q2.

Please note the weighting of each question and assign grades accordingly.

Q1(a) - 40%

As the last paragraph of the question points to, this is a right to withdrawal question under the Consumer Rights Directive (CRD). An adequate answer cannot be achieved without addressing the CRD.

There are a few issues that a student would need to address to be considered an excellent answer, including:

- whether Adam is a consumer;
- whether the contract is a 'distance contract' and/or 'off premises' contract;
- whether the information requirements have been met (no facts are given as to whether these are given met - mere mention of these requirements or speculation is sufficient);
- whether an exception under Article 16 CRD is met (in this case, 16(c) regarding custom made goods).

A good to very good answer may either miss one or two of these, or identify all of them but deliver a less comprehensive or satisfactory answer.

On the first point, Adam is likely a consumer for the purposes of the CRD, given the 'predominant purpose' (Rec 17 CRD) seems to be for his own personal use. Some of the facts, however, complicate this. For instance, Adam is a chef by profession, receives income from his YouTube channel, and has aspirations to make his YouTube channel his main source of income. Therefore, a good answer will analyse whether Adam could be considered a hybrid consumer / the contract considered a dual purpose contract. The correct test for whether a person is still a consumer under the CRD is the 'predominant purpose' test. Students may mention the *Gruber* case, but should distinguish the test that the CJEU applied in this case from the test under the CRD.

It is anticipated that the biggest difficulty students will face is with the second aspect - whether the contract is a 'distance contract' and/or an 'off-premises' contract under Art 2(7) and 2(8) CRD. A good answer will address both the 'distance contract' aspect and the 'off-premises' aspect.

For the 'distance contract' aspect, students may remark that the transaction appears to be completed online - except there is the 'physical presence' of the trader. For the 'off-premises' aspect, students may discuss whether the booth/street is the "business premises of the trader". A range of different approaches can be expected - marks should be awarded not for the final conclusion but for the way the student arrives at their conclusion. A very good answer may make reference to recitals 20 and 21, which colour the interpretation of Articles 2(7) and 2(8).

For the third point, as indicated above, no facts are given as to whether information requirements have been met. Students may either not arrive at a conclusion, or make a reasonable assumption that they have or have not been complied with. An excellent answer may also mention the different information requirements for each type of contract under Articles 7/8 (distance versus off-premises contract). A very good answer will discuss the practical effect that non-compliance with information requirements has on the contract and the consumer's rights, such as extension of the right of withdrawal under Article 10 / Recital 43.

For the final point, under Article 16, certain contracts do not grant the consumer a right to withdraw. This aspect of the question should prompt students should examine whether Adam's knife configuration is "made to the consumer's specifications or clearly personalised", an exception to the right of withdrawal under Article 16(c). As above, marks should be awarded not for the final conclusion that is arrived at, but the strength of argument in coming to that conclusion. A very good to excellent answer may make reference to recital 49, which gives 'tailor-made curtains' as an example. An excellent answer may also refer to Article 6(1)(k), which states that a trader seeking to rely on an Article 16 exception must inform the consumer of that fact 'before the consumer is bound' (Art 6(1)) by the contract.

Q1(b) - 20%

This question expressly directs students towards the intermediary liability scheme in the Electronic Commerce Directive (**ECD**).

A good answer would start by addressing whether onlinemarketplacereview.com is an 'information society service'. This is a little bit difficult, since the definition in the ECD at Art 2(a) points to another Directive that is not in their materials. Students cannot be expected to perfectly recall a relatively lengthy definition that is not freely available. However, Rec 18 ECD gives guidance - the definition encompasses a 'wide range of economic activities which take place online'. A good answer will conclude that it is uncontroversial that the website is an information society service.

Second, students should consider what kind of service the website is - mere conduit, caching or hosting (Arts 12-14 ECD). A good answer will identify that the website is most likely a hosting service.

Under Article 14 ECD, a hosting service is immune from liability if they do not have actual knowledge **OR** an expeditious take-down procedure. A good answer will note that Adam has given them notice of the (allegedly) illegal content, so the website likely cannot argue that they do not have actual knowledge and therefore cannot rely on Article 14(1)(a). Therefore the question is whether the takedown procedure is 'expeditious' under Art 14(1)(b). A good to very good answer would discuss whether 3 days that Adam has waited is sufficiently expeditious.

A good answer would also discuss whether the website is "mere[ly] technical" or in "no way involved in the information transmitted" under Recitals 42/43 (reference to either or both recitals is fine). On the facts, given that the unlawful content is posted by persons other than the website owners (cf. *Papasavvas* case), this requirement is likely met (though more facts may be needed).

A very good answer may mention the addition of a 'neutrality' criterion seemingly established (or perhaps construed through Rec 43) by the CJEU in *Google France* and *L'Oreal v eBay*. An excellent answer may make reference to *Google France* and *L'Oreal v eBay*, and compare the facts in those cases to the present case. An excellent answer may speculate as to what kinds of functions a website may have for it to forfeit its 'neutrality' or 'mere technicality', using their knowledge of *L'Oreal v eBay* and *Google France*.

Finally, a paper in the excellent range may examine the relevance of *Delfi v Estonia* to the scenario posed in the question. The facts of the present case - involving the 'trolls' that frequent the site - are meant to nudge the student towards a discussion of this case. A very good answer may remark that *Delfi v Estonia* seems to suggest that websites may be liable for the 'hate speech' of its users if it has established a reputation as a website where hate speech is frequent - in spite of both Article 14(1)(b), which immunises hosting services that take down unlawful content expeditiously, and Article 15 ECD, which establishes that intermediaries cannot be imposed with a general obligation to monitor content. However, an excellent answer would distinguish *Delfi v Estonia* on the basis that it dealt with intermediary liability in a human rights (freedom of expression under the ECHR) context rather than under the ECD so it does not directly affect the operation of Arts 12-15 ECD.

Q2 - 40%

Discuss the focus on "trust services" in Regulation (EU) No 910/2014 (eIDAS Regulation). Why does this Regulation focus on "trust services", rather than only on electronic signatures, and what is the practical impact of this focus?

This question can really be confined into two shorter questions:

- (1) Why does eIDAS focus on 'trust services' rather than only electronic signatures; and
- (2) What is the practical impact of the focus on trust services.

The first aspect of the question can be largely answered by reference to the recitals. Recital 3 notes that eIDAS' predecessor, which focused on e-Signatures, "dealt with electronic signatures without delivering a comprehensive cross-border and cross-sector framework for secure, trustworthy and easy-to-use electronic transactions." Recital 5 notes that the "European Council invited the Commission to create a digital single market by

2015, to make rapid progress in key areas of the digital economy and to promote a fully integrated digital single market by facilitating the cross-border use of online services, with particular attention to facilitating secure electronic identification and authentication.”

Students should also be able to give a good definition of ‘trust services’ (noting that e-Signatures are considered a trust service per Art 3(16)) by looking at the operative provisions of eIDAS.

The second part of the question can be answered in many different ways. Students should be rewarded by the understanding they show of the eIDAS Regulation, the extent to which they answer the question, and the comprehensiveness of their response.

One commendable approach is a direct and literal take on the question. The eIDAS Regulation permits a much broader variety of electronic verification/validation techniques. A student may, for instance, note that the eIDAS Regulation covers the use of company seals to verify a cross-border transaction, whereas its predecessor was restricted to e-Signatures by natural persons. A student who points to several examples such as this will be well on their way to an answer in the excellent range.

A student may also take a broader interpretation of the second aspect of the question, by discussing the broader practical impact of the eIDAS Regulation as a whole versus the previous Directive. Discussion points may include:

- the increased prominence of eIDAS as a Regulation instead of a Directive;
- the liability and insurance scheme;
- differing assurance levels;
- the concept of trust service providers; and/or
- the critical importance of authentication, confidentiality etc. in electronic commerce.

A student can still achieve an excellent grade through answering this way, though must be careful to link back their response to the *practical impact of the focus on trust services* rather than simply narrating the eIDAS Regulation.

Some of the more insightful answers that take this broader approach may be critical of the actual effect of the eIDAS Regulation. Both of the assigned readings for this topic were skeptical (and one relatively critical) of the practical impact that eIDAS has or will have. Students may question the extent to which eIDAS has, for instance, contributed to EU consumer confidence in conducting electronic commerce, or the broader international trust services landscape (e.g. the prominence (or lack thereof) of the EU ‘Trust Mark’).