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## **The E-Commerce Directive: first evaluations**

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**Introduction**

The use of the Internet in commercial transactions offers new possibilities for development of individual companies and economic systems. The introduction of the new technology has dramatically reduced transaction costs thanks to shorter distances and faster communication. Business is facing new challenges and discovering a new frontier. As correctly put by Sabel<sup>1</sup>, the economic space is becoming virtual and, as a consequence, it changes the corporate map, drawing different relations among economy, society and territory.

These innovations, at macroeconomic level, produce the so-called globalization, i.e. a tight interconnection between States that blurs national borders in a global village. National markets become parts of a huge international market. This transformation has important effects on the strategic choices not only of individuals, but also of governments. The passage from the old to the new economy creates a framework where public authorities should try to strike a balance between the promotion of the new technology and the need to protect goods of general interest.

Thus, the creation of a regulatory framework is not a duty, but a need in order to have a steady and orderly growth. The presence of reliable legal outlines allows the different actors – public authorities, private companies, consumers – to have clear references on

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<sup>1</sup> C.F. Sabel, *Flexible Production Systems and Regional Development: the Rise of New Industrial Spaces in North America and Western Europe*, in *International Journal of Urban and Regional Research*, vol. 12, n. 2, p. 171-186.

which to elaborate their policies. At the same time, a balanced regulation can guarantee the effective protection of interests deemed relevant for the general good.

Against this background, it is easy to understand why the EU has heavily invested on having a set of rules on the Internet. The directive 2000/31/EC on the electronic commerce<sup>2</sup> is only the final result of a wide strategy put in place to provide Europe with tools to compete in the ever faster and complicate present world. There is growing awareness of the economic potential behind the new information technologies. The digitalisation of the European society is a strategic objectives of the next decade<sup>3</sup>, and the European Commission is multiplying the efforts to keep the pace with innovation. The action plan “E-Europe”<sup>4</sup> is one example.

This strategy requires also legal measures. The e-commerce directive goes hand in hand with other initiatives like the directive on the electronic signature<sup>5</sup>, the directive on e-money<sup>6</sup>, the proposal for a directive on the distance selling of financial services<sup>7</sup>. The aim is to create a coherent and complete framework for electronic services.

The e-commerce directive is a very articulated Act which tries to give the widest coverage to commercial transactions concluded on the Internet. The task is not an easy one, considering the extent and the rapid evolution of the phenomenon.

The present work will try to draw a picture of this Directive, examining in the first place its history and structure; then, it will evaluate the consequences of its entry into force and transposition for the EC and the Member States.

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<sup>2</sup> 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, in OJEC n. L178 of 17 July 2000.

<sup>3</sup> European Commission, *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Strategic Objectives 2000-2005, Shaping the New Europe*, COM(2000) 154, 9 February 2000.

<sup>4</sup> European Commission, *eEurope, An Information Society for All*, Bruxelles, 2000.

<sup>5</sup> Directive 1999/93/CE of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signature, in OJEC L13/12 of 19 January 2000.

<sup>6</sup> Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions, in OJEC L275 of 27 October 2000.

## **1. The Directive on Electronic Commerce**

### **1.1 Origin and Guiding Principles**

The origin of the Directive on electronic commerce can be easily retraced to the Communication of the European Commission “An European Initiative for Electronic Commerce”<sup>8</sup> of 1997. According to the Communication, it was important to have a legal framework that, on the one hand, could increase users’ confidence in the new tool, and, on the other, could guarantee to providers an easy access to the Single Market. The challenge was to create a flexible instrument, suitable to the objectives of the European integration, while assuring the safeguard of general interests.

In 1998, the European Commission presented a formal proposal for a directive to the European Parliament and to the Council<sup>9</sup>. Bearing in mind the conclusions of the 1997 Communication, the Commission recognised the lack of a legal framework for the Internet and expressed its fears for European competitiveness. In fact, the comparison with the US, where the Net has had a major role in boosting the astonishing growth of the last years, showed a dim picture.

The approach followed by the Commission is a nimble and flexible one. The explanation is twofold: in the first place, considering the early stage of development, it would have been unwise to burden the Internet with cumbersome legislation. Secondly, it was important to regulate only what was really necessary in the interest of the Single Market, respecting the sovereignty of Member States.

Moreover, the proposal should be seen against the need for protection of the consumer. The EC has always attached a particular importance to the protection of individuals

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<sup>7</sup> Amended Proposal for a Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services and amending Directives 97/7/EC and 98/27/EC, COM(99) 385, 30 July 1999.

<sup>8</sup> European Commission, *An European Initiative for Electronic Commerce*, COM(1997) 157, 16 April 1997.

considered the weak party of a contractual relationship. This is especially true for contracts where the parties do not have physical contacts.

The proposal, after two years of negotiations, has been approved in June 2000. The deadline for transposition is set by January 2002.

## **1.2 The Structure of the Directive**

The aim of the Directive is to create a general framework with minimum harmonization, able to fit the legal systems of all Member States. This contributes to the creation of the Single Market, along the lines drawn by the Single Act and article 95 (ex 100A) of the Treaty. In fact, article 1 of the Directive underlines the objective to contribute to the proper functioning of the Internal Market, harmonising to the extent necessary for that purpose.

The same article 1 defines the scope, excluding matters like taxation, privacy, agreements or practices governed by cartel law, the activities of notaries, the representation before courts, gambling activities.

Article 3, according to the objective of article 1 and to the modalities set out in article 95 of the Treaty, introduces the Internal Market principle<sup>10</sup>.

The Directive contains the following rules:

- a) general information to be provided (article 5): in addition to other information requirements established by sectoral Community law, providers should give basic information (name, geographical and electronic address, registration number if present, etc.);
- b) commercial communications (articles 6-8): the commercial communication and the sender shall be clearly identifiable as such; the same applies for promotional

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<sup>9</sup> Proposal for a Directive of the European Parliament and of the Council on certain legal aspects of electronic commerce in the Internal Market, COM(1998) 586, 18 November 1998.

<sup>10</sup> See further par. 1.3.

competitions and games. For unsolicited commercial communication, apart from the necessary identification, Member States shall take measures to ensure the respect of the will of clients who do not wish to receive such commercial communication. Member of regulated professions shall respect professional rules;

- c) contracts concluded by electronic means (articles 9-11): Member States shall allow the conclusion of contracts by electronic means, adapting, if necessary, their legislation. Waivers are possible for specific types of contract (i.e., contracts that create or transfer rights in real estate). The provider shall give all the relevant information prior to the conclusion of the contract. The placing of orders shall take place without undue delay and giving acknowledgement of receipt to the counterpart. The order is deemed to be received when the addressee is able to access it<sup>11</sup>;
- d) liability of intermediary service providers (articles 12-15): there is no liability for the provider when the service is a mere transmission or access to a communication network, to the extent that he cannot select or modify the content of the transmission, or select the receiver of the transmission. There is no liability for the provider when the service is an automatic, intermediate and temporary storage of data (caching) to the extent that the providers does not modify the information, complies with conditions on access, and acts promptly to remove or disable access to the information, should the need arises. There is no liability for the provider when the service consists in the storage of information, provided that he does not have knowledge of illegal activities or information, or, obtaining such awareness, acts promptly to remove or disable access to the information;
- e) codes of conduct (article 16): Member States and the Commission shall encourage the drawing up of codes of conduct by professional and consumers associations;
- f) out-of-court dispute settlement (article 17): Member States shall encourage the creation of out-of-court dispute settlement schemes;
- g) court actions (article 18): Member States shall make available under national law court actions which allow the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.

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<sup>11</sup> See Directive 1999/93/EC on electronic signature.

### **1.3 Article 3 and the Principle of the Internal Market**

The principle of the Internal Market, introduced by article 3, is the most distinguishing feature of the Directive. Following this principle, a provider, regularly established in a Member State, may provide its services on the territory of another Member State without any other formality or authorization. In other words, a Member State cannot prevent a free provision of cross-border services by a subject who abides by the laws of another Member State, even if there are differences in the national regulations.

This legal scheme is a direct development of the principles of minimum harmonization and mutual recognition. These concepts were first introduced by the European Communities Court of Justice with the judgement on the *Cassis de Dijon*<sup>12</sup>. In this case, the Court stated that it was not necessary to have a uniform sectoral community legislation to recognise the right to free movement. But a minimum harmonization on the general principles was enough to trigger mutual recognition among Member States.

However, the two concepts, minimum harmonization and mutual recognition, do not prevent Member States to derogate the principle of the Internal Market under specific circumstances. In fact, Directive 2000/31/EC, following the case law of the Court of Justice, allows host Member States to limit or prevent the provision of services for reasons of general good (public health, public policy, etc.) (article 3.4). It goes without saying that these derogations shall be necessary, proportionate and not based on discrimination. Moreover, the Directive empowers the Commission to review the respect of these conditions.

The principle of the Internal Market can also be derogated on other occasions. The Court of Justice has consistently held that a Member State retains the right to take measures against a service provider that is established in another Member State but directs all or most of his activity to the territory of the first Member State. This is possible if the choice of establishment was made with a view to evading the legislation that would have

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<sup>12</sup> Case Rewe-Zentral, C-120/78, [1979] ECR 649.

applied to the provider had he been established on the territory of the first Member State<sup>13</sup>.

Moreover, article 3.3 excludes from the scope of the principle certain matters like copyright, e-money, article 44 of Directive 85/611/EEC<sup>14</sup> on UCITS, insurance, the freedom of the parties to choose the law applicable to their contract, contractual obligations concerning consumer contracts, the formal validity of contracts concerning the rights in real estate, the permissibility of unsolicited commercial communication by electronic mail. The justification for these derogations is to be found in the specific features of the sectoral legislation.

Finally, it is worth mentioning that there is a direct link between article 3 and article 4. The latter forbids the existence of prior authorization for the taking up and pursuit of the activity of Internet provider. This rule aims at facilitating the free availability of the service, while avoiding, thanks to the authorization, illicit circumvention of the articles on the free provision of services. Article 4 does not prejudice authorisation schemes which are not specifically and exclusively targeted at Internet services providers. As a consequence, authorisations – and notification procedures – like banking or insurance licences do not fall under this prohibition<sup>15</sup>.

## **2. Open Issues on the E-Commerce Directive**

The e-commerce Directive has the ambition to become a landmark in the Community legislation landscape. Its importance resides in the fact that the law for Internet is a territory yet to be explored. The task of the Directive is then to shed light on the major issues concerning commercial activity on the Net.

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<sup>13</sup> See case Van Binsbergen, C-33/74 [1974] ECR 1299, and confirmed by case Veronica, C-148/91 [1993] ECR I-487, and case TV10, C-23/93 [1994] ECR I-3803.

<sup>14</sup> Council Directive of 20 November 1985 on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), in JOEC375 of 31 December 1985.

<sup>15</sup> See, i.e., Directive 2000/12/EC relating to the taking up and pursuit of the business of credit institutions (Codified Directive), in OJEC L126, 26 May 2000.



However, the Directive introduces some innovations that raise questions on specific topics as well as on the more general role of the Directive in the Community legal system.

In this section, some of these questions are analysed. For each one, the exam will offer a solution for the problems that may arise.

## **2.1 The E-Commerce Directive and the Free Provision of Services**

The qualification of the economic activity on the Internet has often been an occasion for wide debate. In particular, commentators have argued about the possible inclusion of the provision of services on the Internet in the general taxonomy of free provision of services (FPS).

According to article 50 (ex 60) of the Treaty, FPS has specific and distinguishing features: the provision of services should be temporary, made by a subject resident in a Member State in favour of a resident in another Member State. The activity in question should not fall under the scope of the free movement of goods, of capitals or of persons. The Court of Justice has had the occasion to explain and interpret the aspects of every single element (economic activity, temporary character, cross-border nature, etc.)<sup>16</sup>.

The European Commission, with the Communication on FPS under Second Banking Coordination Directive<sup>17</sup>, denied the nature of FPS to cross-border banking services provided via Internet because "...the supplier cannot be deemed to be pursuing its activities in customer's territory".

On the contrary, in the Communication on FPS in the insurance sector<sup>18</sup>, the Commission considers that the use of the Internet for the undertaking of contracts whose risk is located

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<sup>16</sup> The European Commission followed the position of the Court of Justice with the Interpretative Communication on Free Provision of Cross-border Services, in OJEC C334, 9 December 1993.

<sup>17</sup> European Commission, *Interpretative Communication on the Freedom to Provide Services and the Interest of the General Good in the Second Banking Directive*, in OJEC C209, 10 July 1997.

<sup>18</sup> European Commission, *Interpretative Communication on the Freedom to Provide Services and the Interest of the General Good in the Insurance Sector*, in OJEC C43, 16 February 2000.

in a Member State other than the one where the insurer resides, may be included in the FPS.

Directive 2000/31/EC, besides a direct reference to article 55 of the Treaty as legal basis, in article 3.2 provides the following:

*“Member States may not, for reasons falling within the co-ordinated field, restrict the freedom to provide information society services from another Member State”*

According to this wording, then, the Directive presumes the existence of information society services that can be provided across Member State and whose circulation within the Union cannot be restricted when exercised in the framework of harmonised legislation.

In other words, the Directive contains harmonised rules on the free provision of services which Member States must respect and can restrict only following the modalities prescribed (article 3.4).

Thus, article 3 is very clear in qualifying e-commerce as a service falling under the free provision allowed by the Treaty. As a consequence, it is logical to apply to transactions concluded on the Internet the conditions specific to the FPS.

The qualification of e-commerce as an expression of the FPS is also important in order to have a clear taxonomy of Community law. Being a general act, the Directive becomes a direct application of article 49 of the Treaty for what relates to the Internet. Not only the Directive is a vehicle of the FPS, but organises its exercise with limits and specific modalities.

The qualification is very helpful for a better comprehension of the Directive. For example, thanks to the FSP, the meaning of article 1.3 becomes clearer. The article tries to safeguard a high level of protection for public health and consumers as established by Community acts and national legislation implementing them “...in so far as this does not restrict the freedom to provide information society services”. In the light of the FPS and

of the case law of the Court of Justice<sup>19</sup>, it is possible to interpret the sentence as a reference to the criteria used to determine the viability of derogations to the FPS. Therefore, measures for protection of public health and consumers may be admitted provided that they are necessary, proportionate and do not cause discrimination.

## **2.2 The E-Commerce Directive and the Protection of Consumers**

The increasing diffusion of electronic commerce raises the issue of the protection of consumers. The conclusion of contracts via the Internet casts doubts on the applicability of common law schemes to the extent that the relationship is less formal and more elusive.

Theoretically, a laptop and a modem are all that is needed to be able to enter agreements all over the world. Consumers do not see who is their counterpart behind the screen and their knowledge is built only on the information received from the provider.

The Community lawmaker is well aware of possible abuses against the consumer and, thus, a high level of protection is an objective of the Directive. The text contains specific provisions on the matter as well as particular derogations designed to enhance the protection.

Ideally, the provisions may be evaluated making a distinction between the pre-contractual phase and the contractual phase. This grouping is determined by article 3 which excludes from the scope of the principle of the Internal Market contractual obligations concerning consumer contracts. Then, *a contrario*, this principle may be deemed to be applicable only to the pre-contractual phase.

Before the conclusion of the contract, the Directive tries to supply the consumer with sufficient and correct information as concerns the identification of the provider and of the commercial communication, including the unsolicited one.

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<sup>19</sup> See, for all, case SECO, C-62 and 63/81 [1982] ECR 223.

In this phase, the principle of the Internal Market allows the provider to apply the rules of its own country of origin. However, the consumer has the guarantee that national rules are the transposition of the provisions of the Directive and, thus, at least in theory, they should be harmonised.

In this last regard, it is important to stress that harmonization does not produce uniform provisions. In fact, the e-commerce Directive does not prejudice the application of other information requirements set by Community law. In other words, information requirements of the e-commerce Directive sums up to information requirements provided by sectoral Community legislation.

Thus, possible differences in the transposition of sectoral information obligations may influence e-commerce communication. For example, Directive 85/611/EEC on UCITS provides that a prospectus should be published and supplied to authorities and investors (article 27). The UCITS Directive gives general guidelines on the content of the prospectus and the modalities for its delivery. However, some Member States issued additional rules: in Portugal, a simplified version of the prospectus is allowed; in Ireland, remuneration, costs and fees must be inserted in the same section of the prospectus; in Spain, it is always necessary to indicate the number of units of the undertaking.

In any case, in order to avoid abuses against the consumer, Member States may use the procedure of article 3.4. Thus, they can at least take interim measures.

After the conclusion of a contract, the protection of the consumer is assured in a different way. Considering that the principle of the Internal Market cannot be applied, consumers are protected recurring to the remedies of common Community law, i.e. the sectoral rules and general legislative acts that may apply.

In this last regard, an important role is played by the 1980 Rome Convention on the law applicable to contractual obligations<sup>20</sup>. Article 5 of the Convention contains a general principle for the protection of consumers, according to which, notwithstanding the law chosen by the parties to regulate their contract, the consumer cannot be deprived of the

protection offered by the law of the country where he resides. The same philosophy inspired article 13 of the 1968 Brussels Convention on jurisdiction and execution of civil and commercial judgements<sup>21</sup>.

The approach adopted by the Rome Convention has direct effects on on-line cross-border contracts, to the extent that a provider would have to offer a protection at least equivalent to the one supplied in the consumer's country of residence. As a consequence, the philosophy that privileged the country of origin is diminished. It is clear, in fact, that parties may designate, as law applicable to the contract, the law of the country from which the provider comes, but this law shall guarantee to the consumer the same degree of protection as the law of the consumer's residence. Otherwise, the latter shall apply if more protective.

### **2.3 E-Commerce Directive and Sectoral Directives**

The e-commerce Directive is an act that falls within the general legal framework of the European Community and, because of this, it interacts with the rest of the EC legislation. Thus, the question is to know how the general picture works when Directive 2000/31/EC meets sectoral legislation.

This exam should start with the exact determination of the legal significance of the Directive. The preamble chooses articles 47.2, 55 and 95 of the Treaty as a legal basis: the first two are articles related to the FPS (55) and to the legislative implementation of the FPS (47.2); the latter aims at harmonization through the usual schemes organised according to minimum harmonization and mutual recognition.

As such, the e-commerce Directive possesses all the necessary conditions to be considered a general legislative act that becomes the primary legal source for a sector

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<sup>20</sup> Convention on the Law Applicable to Contractual Obligations, Rome, 19 June 1980, in JOEC L266, 9 October 1980.

<sup>21</sup> Convention Relating to the Jurisdictional Competence and the Execution of Civil and Commercial Judgements, Brussels, 27 September 1968, in JOEC C189, 28 July 1990.

until then devoid of regulation. The Directive will apply every time a transaction is concluded on-line, notwithstanding its content.

To explain the relations with sectoral legislation, reference can be made to the directives of the financial sector. As a general act, Directive 2000/31/EC would not affect the normal functioning of these directives, at least for their particular and specific aspects. In practise, the relationship would work along the lines of the old saying: *lex specialis derogat lege generalis*. Every time financial directives provide for specific regulation, this derogates to the rules set out by the e-commerce Directive. *A contrario*, lacking this specific regulation, the rules of the e-commerce Directive will apply.

As a consequence of this interpretation, an exam of the single aspects becomes important. In fact, it is possible to make a distinction based on the content of the rules. If article 3 (the principle of the Internal Market) is nothing else than the transposition to the electronic context of a general principle accepted as *acquis communautaire*, the presence of directives with special rules that apply the general principle to the banking and financial sector implies that the special status of sectoral rules prevails.

To support such an interpretation, it is possible to refer to recital 27 of the Directive. The recital states that the e-commerce Directive contributes to the creation of a legal framework for the on-line provision of financial services and does not pre-empt future initiatives in the same area. The fact that the Directive dedicates specific attention to this sector is a clear sign of its special status.

Nobody doubts that the rules for the taking up and pursuit of banking and financial activities, as regulated by Directive 2000/12/EC<sup>22</sup> and 1993/22/EEC<sup>23</sup>, are the *ad hoc* transposition of the scheme “minimum harmonization-mutual recognition”. The two Directives offer minimum harmonized rules applicable in every Member State, building the base that allows supervisory authorities to grant the so called “European passport”.

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<sup>22</sup> Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (Codified Directive), in OJEC L126, 26 May 2000.

The consequence is that the principle of the Internal Market for on-line banking and financial services will follow the rules set by Directive 2000/12/EC and 1993/22/EEC, i.e. with the guarantees offered by the presence of supervisory authorities which verifies that the Internet provider abides by the same regulation as traditional operators.

For banks and financial intermediaries that work on the Internet, the provisions on the FPS of the relevant directives will apply. Thus, the provider shall make a prior notification to supervisory authorities and his request will undergo the usual review to check the viability of the project.

On the contrary, for specific aspects like commercial communications, the conclusion of contract, the liability of the provider, etc., the rules of the e-commerce Directive will apply. In fact, these aspects have specific features relating to the use of the Internet.

For the financial sector, then, the result of this interpretative operation is a sort of *depeçage*, where the provider is authorised and supervised by competent banking or financial authorities, while the practical modalities of its activities on the Internet are regulated by the e-commerce Directive. The problem of possible overlapping with community or national legislation should be solved seeking ways for a simultaneous application. This means an effort of coherence to avoid uncertainty and useless conflict. Besides, it is important to bear in mind that article 9 of the Directive requires Member States to adapt their legal systems to facilitate its transposition.

## **Conclusions**

The necessity to organise the legal framework for the Internet was unavoidable. In this sense, the Directive 2000/31/EC gives a first answer.

The provisions issued form a structure that tries to achieve different objectives: the free economic initiative, using the opportunities offered by the new tool; the protection of consumers; the protection of privacy; the search for new contractual models; etc.

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<sup>23</sup> Council Directive 1993/22/EEC of 10 May 1993 on investment services in the securities field,

The result is a compromise with lights and shades. The objective of facilitating the use of the Internet and the adoption of the Internal Market principle have to reckon with, on the one hand, the protection of general interests and, on the other, the presence of pre-existing national and Community rules.

In many respects, the integration of these two aspects is uneasy and there are many open issues. In the next years, practitioners will play a major role in finding solutions to interpretative questions.

Internet is a new phenomenon for present legal systems and it is important to find correct ways to acquire better knowledge of its many aspects. However, this analysis should not produce distortions of existing discipline. Sudden and unjustified changes risk to create confusion and harm the coherence of Community law.

On the contrary, the final end should be a real equilibrium among the different interests using a forward-looking interpretation of the *acquis communautaire*.