

KLUWER LAW INTERNATIONAL

# E-Business Law of the European Union

Second Edition

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## Preface

It was once popular belief that the normal laws do not apply to the Internet. Instead doing business on the Internet, or e-commerce, seemed to be governed primarily by entirely different laws, such as Moore's law (computing power will double every eighteen months) and the law of Metcalfe (the usefulness of a network will increase exponentially with the number of users).

The first (if not the second) part of this set of beliefs has been proved wrong. Since the emergence of the Internet, we have seen courts and regulators applying existing laws to deal with the legal issues that arise on the Internet, and also new Internet-specific rules being issued by legislators where existing rules were deemed unclear or otherwise unsatisfactory for dealing with Internet-related issues.

It is of course comforting for business lawyers to find that 'their' laws are as relevant on the Internet as they are in other walks of commercial life. E-business cannot do without their skills and expertise. However, the juridification of the Internet also has its drawbacks. Some have gone so far as to argue that it will stifle innovation and hamper the further growth of the Internet itself. A less drastic drawback is that this steady stream of diverse e-business rules and regulations has made it harder and harder for lawyers to keep abreast of all relevant legal developments.

This book aims to offer assistance in this respect. It contains those EU legislation texts that are particularly relevant to e-business, covering a broad spectrum of legal issues such as data protection, distance selling, electronic signatures, liability of online intermediaries, electronic money, applicable law and jurisdiction in international disputes. Many of these texts have been amended since the first edition of this book was published. There are also new additions, one example (which is perhaps indicative of the speed at which the Internet is continuing to develop) being the new rules on audiovisual media services on the internet. The

## *Preface*

source materials selected for this publication are included in chronological order going back in time (based on the year of the original legislative text). The official texts can be found in the Official Journal of the European Communities (OJ). The texts of the source materials are preceded by a short introduction to the European directives and regulations for those readers not already familiar with the subject matter.

Like its subject matter, e-business law is still developing and likely to change. Readers are therefore well advised to keep track of new developments on the websites of EU institutions (see Selected Websites).

For and on behalf of the Allen & Overy Communications, Media and Technology Group

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## Selected Websites

### **European Union**

<http://europa.eu>

The official website of the European Union, links to all its institutions, official documents, news.

### **European Union law**

<http://eur-lex.europa.eu/>

Official Journal, Treaties, Regulations, Case Law.

### **Directorate-General Information Society of the European Commission**

[http://ec.europa.eu/information\\_society/](http://ec.europa.eu/information_society/)

Information on e-Europe and e-business.

### **Directorate-General Internal Market and Services of the European Commission**

[http://ec.europa.eu/internal\\_market/](http://ec.europa.eu/internal_market/)

Information on financial services, e-commerce, company law, contract law, intellectual property.

### **Directorate-General for Health and Consumers of the European Commission**

[http://ec.europa.eu/dgs/health\\_consumer/](http://ec.europa.eu/dgs/health_consumer/)

Information on e-commerce, distance selling.

### **Directorate-General Taxation and Customs Union of the European Commission**

[http://ec.europa.eu/taxation\\_customs/](http://ec.europa.eu/taxation_customs/)

Information on VAT rules.

**Directorate-General for Justice, Freedom and Security of the European Commission**

[http://ec.europa.eu/justice\\_home/](http://ec.europa.eu/justice_home/)

Information on data protection (including the Article 29 Working Party) and international private law.

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## Part I

# Introduction

### 1. ELECTRONIC COMMERCE

#### 1.1 GENERAL

Doing business over the Internet raises a variety of legal issues. Some of these are relatively new and have particular bearing on e-commerce. Others are not and can be dealt with by applying the existing, general rules and principles of law. A wide range of EU legislative measures can be of importance to e-business. This publication contains the texts of EU legislation which have in practice proved to be particularly relevant. Some of these pre-date the massive growth in the use of the Internet and were not written with the Internet specifically in mind. However, a number of Internet- and even e-commerce-specific measures have been issued since use of the Internet became widespread. Probably the most pertinent and ambitious example to date is '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 (the Directive on electronic commerce)' (see Source Materials 13).

The Directive on e-commerce was adopted on 8 June 2000, only a little over one-and-a-half years after the Commission had adopted the original proposal. It is not meant to provide a complete legal framework for doing business in an online environment. The Directive merely aims to ensure legal certainty and improve consumer confidence by dealing with certain specific matters and legal concepts which gave rise to problems for the internal market. Many other areas of law which are of particular importance to e-commerce remain outside the scope of this effort at harmonisation. This is explicitly acknowledged in the Directive, both in the considerations, in the general provisions of Chapter 1, and in the Annex to the Directive.

Some of these areas of law have not been coordinated within the EU. Consequently, national legal rules on these issues may continue to vary greatly. A notable example is gambling (which is identified as being outside the scope of Directive in Article 1, 5 sub (d)).

Other areas of law outside the scope of the Directive on electronic commerce are the subject of other (proposed) European legislative measures, a number of which are also discussed in this publication. The Directive on electronic commerce specifically identifies various areas as not falling within the coordinated field and/or as being already covered by other legislation, such as:

- (a) measures for the protection of public health and consumer interests, for example, those addressing unfair terms in consumer contracts, or distance selling (see consideration (11));
- (b) copyright, database rights and similar rights (see consideration (50) and the Annex);
- (c) measures on the protection of individuals with regard to the processing of personal data (see consideration (14));
- (d) rules on private international law and jurisdiction of the courts generally (see consideration (23) and Articles (1) and (4)) and, specifically, on law applicable to consumer contracts (see consideration (55));
- (e) taxation (see consideration (13) and Article (1)(5)(a));
- (f) emission of electronic money (see the Annex);
- (g) electronic signatures (see consideration (34));
- (h) television broadcasting (see consideration (18)).

These areas, which are the subject of other legislative initiatives also included in this publication, are briefly introduced below (see *infra* Chapters 2–9). First however, a more extensive summary of some of the most significant provisions of the Directive on electronic commerce is given (see *infra* Chapter 1.2).

## 1.2 THE DIRECTIVE ON ELECTRONIC COMMERCE

### 1.2.1 General

The Directive on electronic commerce is meant to eliminate legal obstacles hampering the development of information society services within the European Community. These arise mainly from inconsistencies between national legislation and from the legal uncertainty as to which national rules apply to such services. The Directive therefore aims to coordinate certain national laws and to clarify relevant legal concepts. The specific legal issues addressed in the Directive on electronic commerce include:

- (a) the internal market (Article 3 in Chapter I);
- (b) establishment and information requirements for service providers (Chapter II, Section 1);

- (c) commercial communications (Chapter II, Section 2);
- (d) contracts concluded by electronic means (Chapter II, Section 3);
- (e) liability of intermediary service providers (Chapter II, Section 4);
- (f) codes of conduct (Article 16 in Chapter III);
- (g) out-of-court dispute settlements and court actions (Articles 17 and 18 in Chapter III);
- (h) cooperation between Member States (Article 19 in Chapter III).

The provisions on the most practically relevant of these issues are described in more detail below.

The Directive applies to information society services as defined in 'Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations' (see Source Materials 15) as:

any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service.

As pointed out in consideration (18) of the Directive on electronic commerce, this definition contains important clues about the scope of the legislation. For instance, it makes clear that the Directive does not apply to off-line activities, even if these take place as the result of an online transaction. Thus delivery of goods or the provision of services off-line are not covered. Traditional broadcasting activities are also outside of the scope of the Directive as these are not provided at individual request. An interesting question is whether this also excludes web-casting (in real time) from the scope of the Directive. The definition's requirement that the service is normally provided for remuneration does not mean that those receiving the services must be paying for it. What matters is that the services represent an economic activity. Thus, a service which is paid for by advertisements falls within the scope of the Directive.

### **1.2.2 Internal Market**

The Directive on electronic commerce establishes the country-of-origin principle for information society services by requiring each Member State to ensure that service providers established on its own territory comply with applicable national provisions, while at the same time banning those States from restricting the freedom of providers in other Member States to provide information services into their territory. However, Member States may take measures which limit this country-of-origin principle, provided certain conditions are met (e.g., the measure must be necessary for public policy reasons or for the protection of public health). The scope of the country-of-origin rule is also restricted because it only applies to measures falling within the coordinated fields. Given that the Directive only coordinates certain specific matters, and does not cover requirements such as those applicable to goods or their delivery, this leaves Member States considerable

freedom to take restrictive national measures in other areas. For instance, Member States appear to be free to set or maintain requirements that a website must be offered in a particular language, that it may not offer certain goods or services to minors or that certain goods (e.g., medicine) may not be offered for sale at all, or unless local requirements for these goods are met (e.g., the requirement that certain medication may only be sold on a doctor's prescription).

### **1.2.3 Establishment and Information Requirements**

On the issue of establishment requirements, the Directive on electronic commerce prescribes that the activities of information society service providers may not be made subject to prior authorisations or any similar requirements. As to information requirements (also known as transparency requirements), Member States must see to it that service providers supply their customers with certain information about themselves, such as name, geographical and electronic address, registration number (with the relevant trade register) and VAT number. 'Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers with respect to distance contracts' (see Source Materials 16) also contains transparency requirements. These do not so much relate to the identity of the service provider but are aimed more at ensuring that the consumer is given sufficient information about the goods or services offered and the conditions for the sale thereof (see *infra* Chapter 2.2). For providers of financial services, similar requirements are imposed by the 'Directive of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC' (see Source Materials 8). 'Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on the coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent' (see Source Materials 3) also contains an information requirement specifically for companies. Whereas these were already required to list their legal form, location of registered office, and the particulars of their registration with the trade register in their paper stationary and order forms, under the new directive companies are also obliged to include this information when using other media for letters and order forms (e.g. email) and on their company websites.

### **1.2.4 Contracts Concluded by Electronic Means**

To be able take full advantage of conducting business online, a service provider must be able to enter into a contract electronically. Requirements as to form (such as 'in writing' requirements) can create obstacles to this. For this reason, the Directive on electronic commerce requires that Member States ensure that their legal systems allow contracts to be concluded by electronic means. Certain exceptions to this requirement continue to be permitted however, for example, contracts

which create or transfer rights in real estate. A common formal requirement is that a contract must be signed. Electronic signatures are the subject of a separate directive of 13 December 1999 (see *infra* Chapter 8). This directive eliminated one important obstacle to electronic contracting by stipulating that electronic signatures which meet certain criteria shall satisfy the same legal requirements for electronic data as hand-written signatures do for paper documents. The section in the Directive on electronic commerce on contracts concluded by electronic contracts also contains information requirements, which may be departed from by parties who are not consumers. The recipient of a service must be informed of the technical steps to be followed to enable conclusion of the contract as well as the means for correcting input errors (which consumers must be able to do). Also, contract terms and general conditions must be made available in a way that allows the recipient (whether a consumer or not) to store and reproduce them. Finally, on the issue of electronic contracts, the directive stipulates that a service provider must acknowledge receipt of an order without undue delay when dealing with consumers. Contrary to the approach in earlier proposed versions of the directive, this is not considered a requirement which will determine the validity of the online contract.

### **1.2.5 Liability of Intermediary Service Providers**

The growth in the use of the Internet has prompted questions about whether companies which provide access to the Internet may be held liable for the actions of their subscribers. Courts and legislators throughout the EU (and elsewhere) have dealt with this issue in different ways, preventing the smooth functioning of the internal market. For this reason, the Directive on electronic commerce contains detailed rules on the liability of certain so-called 'intermediary service providers', which state the conditions in which these providers are exempt from liability: that is, when they act as a 'mere conduit', or engage in hosting or caching. These acts, which are defined in detail in the relevant provisions, have in common the fact that they are merely of a technical, automatic and passive nature, which implies that the provider has neither knowledge nor control over the information transmitted or stored. In the case of caching and hosting, the provider must remove or disable access to the information upon becoming aware of any illegal activity or information. However, Member States cannot impose a general obligation on providers of these information services to monitor the information transmitted or stored by them. These exemptions from liability are not meant to affect the possibility of injunctions which require the service provider to terminate or prevent an infringement. 'Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society' (see *infra* Chapter 3.3 and Source Materials 11) goes one step further by requiring Member States to ensure that holders of copyrights or related rights are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe their rights.

## 2. CONSUMER PROTECTION; DISTANCE SELLING

### 2.1 GENERAL

The Directive on electronic commerce is without prejudice to the level of protection for consumer interests as established by Community acts, a number of which are listed in consideration (11) of that Directive. An important difference between these directives and the Directive on electronic commerce is that the former only apply to online transactions involving consumers (i.e., any natural person acting for purposes outside his trade, business or profession). Also, they tend to provide minimum rules which allow Member States to introduce or maintain stricter rules, and consequently do not necessarily result in the same degree of harmonisation.

### 2.2 DISTANCE CONTRACTS

Of the directives mentioned in consideration (11), 'Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts' (see Source Materials 16) is probably the one most relevant to e-businesses (at least those operating on the business-to-consumer, or B2C market), as the Internet by nature introduces a distance component in any online transaction. Although it was not drafted primarily to deal with e-commerce, Directive 97/7/EC does apply to contracts concerning goods or services concluded between a consumer and a supplier, making use of a website as part of an organised distance-sales or service-provision scheme.

One of the most significant provisions of Directive 97/7/EC is that it provides consumers with a right of withdrawal for any distance contracts, meaning that consumers may withdraw from the contract without penalty and without giving any reason within a specified period of time (also known as the 'cooling off' period). The right of withdrawal is not obligatory for certain distance contracts, for example, those for goods made to the consumer's specifications, or which by reason of their nature cannot be returned. Like the Directive on electronic commerce, Directive 97/7/EC also contains transparency requirements. Information to be provided to consumers before the conclusion of any distance contract includes the main characteristics of the goods or services, all taxes and delivery costs, arrangements for payment, delivery or performance and the existence of the right of withdrawal. The consumer must receive confirmation of this information in written form, or in another durable medium, available and accessible to him or her. Confirmation must be received in good time during the performance of the contract and at the latest at the time of delivery. If the supplier complies with these requirements, the cooling off period lasts seven working days, starting from the day of receipt of the goods or, for services, from the day the contract was concluded, or the required information was confirmed.

If the supplier fails to fulfil its obligation to provide this written confirmation, the cooling off period is extended to three months. The supplier can shorten this period by providing the written confirmation within these three months, in which case the cooling off period will end seven working days after the confirmation has been provided. Upon exercise of the right of withdrawal, the supplier must reimburse the sums paid within thirty days. Only the direct costs of returning the goods may be charged to the consumer.

Directive 97/7/EC also contains rules on the performance of the contract. Unless agreed otherwise, an order must be executed within 30 days of its being placed. Other issues addressed in Directive 97/7/EC include fraudulent use of payment cards, unsolicited supply of goods or services (inertia selling), and use of certain (intrusive) means of distance communications. The issue of intrusive distance communications is also addressed by 'Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector' (see *infra* Chapter 4.2 and Source Materials 9). Member States are furthermore placed under an obligation to ensure adequate and effective means for compliance with the requirements of Directive 97/7/EC. They may provide for voluntary supervision by self-regulatory bodies, and for recourse to such bodies for the settlement of disputes. The issue of voluntary supervision has also been addressed by the Directive on electronic commerce, which requires Member States to encourage out-of-court dispute settlement schemes (including through appropriate electronic channels) and to remove obstacles in their legislation which may hamper these.

## 2.3

### DISTANCE MARKETING OF CONSUMER FINANCIAL SERVICES

Directive 97/7/EC does not apply to consumer financial services. These are covered by 'Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC' (see Source Materials 8). Directive 2002/65/EC applies rules similar to those from Directive 97/7/EC to banking, insurance, investment and payment services. It introduces a right of withdrawal from 14 to 30 days (with exceptions for certain financial services with fluctuating prices), and contains transparency requirements as well as provisions on unsolicited selling, use of intrusive means of communications and dispute resolution. On the issue of alternative dispute resolution, the European Commission has stimulated the foundation of FIN-NET, a network of organisations across Member States which offers assistance to consumers when using cross-border services. Unlike Directive 97/7/EC, Directive 2002/65/EC does not contain a 'minimal clause', which suggests that Member States are not free to introduce or maintain more stringent provisions.

### 3. COPYRIGHTS, DATABASE RIGHTS AND SIMILAR RIGHTS

#### 3.1 GENERAL

Although all EU Member States are party to the Berne Convention for the Protection of Literary and Artistic Works, copyright protection still varies within the EU. To harmonise the legal framework on copyright and related rights, various directives have been adopted since the early nineties of the previous century relating to issues like the legal protection of computer programs (see Source Materials 19), rental and lending rights, the term of protection of copyright, and copyright and related rights applicable to broadcasting of programmes by satellite and cable retransmission. Also, two directives have been adopted which are of particular relevance to Internet websites. These are 'Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases' and 'Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society' (see Source Materials 17 and 11).

#### 3.2 DATABASE RIGHTS

Directive 96/9/EC affords legal protection to databases which are defined as collections of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means. The legal protection consists of two separate tiers. First, copyright protection is afforded to databases which by reason of the selection or arrangement of their content constitute the author's own intellectual creation. Secondly, databases for which – qualitatively and/or quantitatively – a substantial investment has been made in obtaining, verifying or presenting the content are (also) protected by a *sui generis* right. This allows the maker of the database (which refers to the person who takes the initiative as well as the risk of investing) to prevent extraction and/or re-utilisation of the whole (or of a substantial part) of the database, to be evaluated qualitatively and/or quantitatively. The term for the *sui generis* right is 15 years, whereas the term for copyright protection is set at 70 years by 'Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights'. The legal protection for databases must be viewed separately from the legal protection of their contents, which may themselves be the subject of intellectual property rights like copyright. The exclusive distribution right of the copyright-owner and the *sui generis* right to prevent re-utilisation are not exhausted by making the database available online. This means that even if the database is made available online with consent of the right-holder, he may still continue to invoke his exclusive rights to prevent further use of this online database.



Electronic databases incorporated in websites (and indeed most websites themselves) are likely to qualify as databases within the meaning of the directive. Consequently, the protection afforded by the database directive may help website owners stop unwanted forms of re-utilisation of their websites. Case law from various Member States shows that rights owners have – sometimes successfully – invoked their database rights to stop practices like deep linking (where another website provides hyperlinks to a page other than the top level homepage of the website) and systematic searching of a database by other websites or by special software.

### 3.3

#### COPYRIGHT IN THE INFORMATION SOCIETY

Although Directive 2001/29/EC only intends to adapt and supplement the current law on copyright in view of technological developments without introducing new concepts for the protection of intellectual property, it has proved to be quite controversial. When it was adopted on 22 May 2001, well over four years had passed since the Commission had submitted its first draft for the directive to the Parliament and the Council. Directive 2001/29/EC (see Source Materials 11) requires Member States to provide copyright-owners with certain exclusive rights, while allowing particular limitations to those rights. It also introduces a requirement for Member States to provide for adequate legal protection of rights management information and technological measures aimed at copyright protection.

The exclusive rights which Member States must provide for, relate to online reproduction, communication to the public, and distribution. They are specified in Chapter II of the directive and include: (i) the right to authorise or prohibit indirect, temporary reproductions (e.g., temporary copies which are made in the memory of a computer); and (ii) making works available to the public in such a way that members of the public may access them from a place and at a time chosen by them (as is most often the case on the Internet). As to the right of distribution, Directive 2001/29/EC specifies that this is not exhausted within the EU unless the object is sold within the Community by (or with consent of) the right holder. Consequently, if the right holder allows an object to be sold outside the Community, this does not exhaust his exclusive distribution rights in the Community; he may still rely on these to ban the object from being imported into the Community. However, if an object is distributed in an EU Member State with consent of the right holder, he cannot ban further distribution of those objects to other EU Member States, as his rights have been exhausted. This so-called exhaustion rule applies only to distribution of a work incorporated in a tangible article and not to online services, nor to a material copy made by a user of such online services.

The exclusive rights which Member States must provide for, are (or may be) restricted by the exceptions listed in Directive 2001/29/EC. Some of these exceptions are mandatory, such as the exemption for temporary acts of reproduction which are an integral and essential part of a technological process (e.g., the