



Chapter XXIV

The Challenge of the Law to Electronic Commerce: The European Union Initiative

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INTRODUCTION

In the Communication on Electronic Commerce of 1997¹, the European Commission stressed that *“in order to allow electronic commerce operators to reap the full benefits of the Single Market, it is essential to avoid regulatory inconsistencies and to ensure a coherent legal and regulatory framework for electronic commerce.”*

The electronic marketplace has a crucial need to know *“the rules of the game”*² in order to carry out electronic commerce. Therefore, the regulatory framework has to be clear, stable and predictable, both to enable e-commerce operators to face all challenges raised by the development of new products and services and to ensure the trust and confidence of consumers in the new electronic supermarket. These are the main objectives of the legislative action of the European Commission³ which has, in recent years, laid the foundations for a consistent setting of the legal scene for electronic commerce in Europe. It is worth recalling that the action of the Commission has been and should be guided by the key principles of the EC Treaty, particularly by the concern for the Internal Market and the enhancement of the circulation of products and services. A clear consequence is that any regulatory intervention of the Commission should be directed to a further harmonization or clarification of the existing rules in order to lift the uncertainties and discrepancies in national policies which might impede the free circulation of electronic goods and services. Other key concerns of the European Commission are to refrain from over-regulating electronic markets and businesses and to remain open to a self-regulatory approach and alternative dispute resolution. This last guideline is particularly followed in the recent Draft Directive on electronic commerce⁴.

The European Commission couples its legislative efforts with an overwhelming number of R&D projects that are developing new tools, technologies and services for electronic commerce. Within this framework, the ECLIP (Electronic Commerce Legal Issues Platform) project seeks to set up a platform on the legal issues of electronic commerce

with the objective of providing legal support to EC-funded RTD projects on any issue of law linked to electronic commerce, thereby stimulating expertise and increasing general awareness of the existing or recommended legal framework of electronic commerce⁵.

Other objectives of ECLIP consist in analyzing the current European legal framework and the technology available to be taken into account when launching an electronic commerce initiative, and of ensuring the early integration of the legal requirements in technological tools. This enables the lawyers to develop a techno-legal thinking that integrates technological features in legal solutions and principles. The ECLIP project promotes general and specific awareness among developers of legal issues on electronic commerce through publications, workshops, conferences, and animation of Web sites.

One key aim of the project is to produce a global overview of the legal aspects of electronic commerce with a view to making recommendations to the EC. Such recommendations have already been addressed to the Commission in the field of user protection, privacy-enhancing technology, privacy-compliant browsers, alternative dispute resolution, labelling systems, electronic contracting and digital copyright protection.

ECLIP started in 1998 and is likely to go on until the end of 2002. Its main partners are five university research centers specialized in information technology law, i.e. the University of Namur (Belgium), the Queen Mary and Westfield College of London, the University of Münster (Germany), the University of the Balearic Islands (Spain) and the University of Oslo⁶.

The purpose of this chapter is to provide an outline of the regulatory framework⁷ that the European Union has started to set up for electronic commerce. Some issues that the European policymaker has to consider particularly are the key questions that any e-commerce developer has to cope with in the different steps of the development of his activity, from the establishment of his business, the advertising and promotion of his products, the selling of goods and services, to delivery and payment. These are the different sections we will address.

THE EUROPEAN REGULATORY FRAMEWORK AT A GLANCE

A key measure for preventing the Member States from adopting a fragmented approach in the field of regulation of information society is the Directive of June 29, 1998 laying down a procedure for provision of information in the field of technical standards and regulations⁸ (hereafter the 'Transparency Directive'). This text imposes Member States to notify the Commission and other Member States of any draft rules and regulation activity they undertake in the field of information society services. This transparency mechanism launches a process of making comments and giving opinions on aspects of the draft which may hinder trade, the free movement of service or the free establishment of service providers, which can lead to a postponing or modification of the proposed measure. This directive also lays down a definition of the information society services which will be used by subsequent relevant directives, i.e., "*any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*"⁹.

Other key legislative acts are the Directive on the protection of consumers with respect to distance contracts¹⁰ (hereafter the 'Distance Contracts Directive'), the Directive on the

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