

## Tilburg University

### Editorial

van der Hof, S.

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## Editorial

This issue is essentially devoted to the somewhat trendy topic of electronic commerce (e-commerce), which means as much as doing business electronically but is nowadays generally used synonymously with Internet commerce (i-commerce). High expectations for the realization of the on-line business potential has kindled many a business, government and even some lawyers with great interest in the network of networks. From a lawyers' perspective, the challenge of i-commerce lies primarily in removing legal barriers and optimizing relevant legislation. Thus, shaping a productive legal environment for i-commerce to blossom. For this end precisely, the European Commission has in November 1998 issued a Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market (COM (1998) 586 final).<sup>i</sup> The draft directive is a direct consequence of the 1997 Commission Communication "European Initiative in Electronic Commerce" (COM(97) 157 final), which sets a policy framework for electronic commerce at a European level, and must be regarded in connection with other EU (draft) directives aimed at electronic services (e.g. Data Protection, Regulatory Transparency Mechanism, Distance Selling, Conditional Access, Electronic Signatures, Copyright and Electronic Money). The common denominator in all of these regulatory initiatives is to abolish as well as to forestall any disturbing differences in Member State legislation and, accordingly, to remove the significant lack of legal certainty, which presently exists. It is approvable that the European Commission thus strives to stay ahead of the various regulatory initiatives by the Member States, which intend to remove impediments to i-commerce, yet, do quite the opposite owing to their mutual diversity.

What strikes the eye first of all are the comments on the individual articles provided along with the draft. This is not common practice with respect to EU legislation and certainly an appreciable step in the right direction.

The draft E-Commerce Directive focusses on some of the most pressing issues with respect to i-commerce, such as the validity of electronic contracts, (unsolicited) commercial communications, the liability of intermediaries and alternative dispute resolution. Unfortunately, due to a distribution of powers over various Directorates General of the European Commission the directive seems unable to regulate matters in an advisably more coherent way. The subject of legal requirements of form (writings, signatures), for instance, is divided over two separate directives. The draft Electronic Signatures Directive provides legal validity of electronic, or rather digital signatures, whereas other formal requirements are left to be dealt with in the draft E-Commerce Directive. Apart from the fact that the regulatory approach to electronic signatures is different, i.e. more or less technology-dependent<sup>ii</sup> as opposed to the perhaps more favourable technology-neutral approach in the draft E-commerce Directive, it seems rather arbitrary and artificial to diffuse the issue. Another example of unfortunate tuning is the obligation to provide information for on-line service providers, which is included in both the Distance Selling Directive and the draft E-Commerce Directive, however, with a significant distinction. Whereas the Distance Selling Directive embodies the burdensome and Internet-unfriendly obligation to provide the information in "writing" or on a "durable medium", the draft E-commerce Directive regards "easy accessibility" of information as sufficient to fulfill the requirement. "Easy accessible" means e.g. an "icon or logo with a hypertext link to a page containing the information which is visible on all site's". It is very doubtful whether this interpretation will satisfy the "durable medium" requirement. The differences are not due to a difference in *ratio*, since both directives are concerned with consumer protection in this respect.<sup>iii</sup> The draft E-commerce Directive mentions on several occasions that it supplements the Distance Selling Directive "which is specifically concerned with *contractual relationships*". However, it does not give a decisive enough answer with respect to the actual relationship between both directives to prevent a lack of legal certainty.

The draft E-Commerce Directive is a commendable initiative of the European Commission in that it addresses some of the most persistent issues with respect to i-commerce and, at the same time, takes into account the limits to regulation by embracing a flexible and simple approach. The Directive, thus, leaves the necessary elbow-room for self-regulation as well as international negotiations, which may even lead to other and more productive approaches as regards global i-commerce. However, in order to achieve a coherent and feasible i-commerce regulatory framework, gearing the different directives to one another is a prerequisite. The aforementioned examples show that there is still work to be done in that area.

*Simone van der Hof\**

## Notes

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- i. Many of the documents mentioned here, including the draft E-commerce Directive, are available on-line at WWW [<http://www.ispo.cec.be/ecommerce/legal.htm#legal>].
  - ii. The draft Directive on Electronic Signatures appears to be technology-neutral by using the term 'electronic signatures', however, the contents of the directive seem essentially directed towards the digital signature method.
  - iii. A discussion of the position of consumers under the E-commerce Directive is outside the scope of this editorial, but it is an interesting question whether the "easy accessibility" test will protect the consumer to a sufficient extent.

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\*Research Fellow at the Center for Law, Public Administration and Informatization, Tilburg University, The Netherlands.