Lex Electronica
Revue du Centre de recherche en droit public

The reform of electronic consumer contracts in Europe: towards an effective legal framework?

Christine RIEFA[1]

Lex Electronica, vol. 14 n°2 (Automne / Fall 2009)

[1] Christine Riefa is a lecturer in Consumer Law and Intellectual Property Law at Brunel University in the UK. She is an elected board member of the International Association of Consumer Law and an academic correspondent to the Euro-American Chair for the legal protection of consumers (University of Cantabria, Spain). In 2009-2010, Dr Riefa is a Fulbright EU Scholar-in-Residence at Cleveland-Marshall College of Law, Ohio USA. A first version of this article was presented at the Summer School in Consumer Law, organised by the GREDICC (Groupe de recherche en droit international et comparé de la consummation), UQAM, Montréal, 29th June – 4th July 2009.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

Droits d’auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022. licences@copibec.qc.ca

Introduction

One only has to mention the enormous success of eBay, Facebook, Google, Second Life or Amazon around the world to illustrate how consumers and businesses alike have embraced electronic commerce and the Internet in the last decade. Indeed, focusing on eBay alone, the site counts a staggering 86.9 million active users worldwide, 1 billion page views per day, and reports a net income in excess of $1.78 billion for 2008.[2] Unsurprisingly, in the EU, electronic commerce is the second most commonly used retail channel with 51% of retailers making sales via e-commerce in 2008. Only direct sales were more common according to the Eurobarometer figures from 2008.[3] Between 2004 and 2008, the amount of individuals using the Internet to order goods or services rose significantly from 22% to 34% and in 2008, 32% of individuals had ordered online in the last year. Despite these impressive figures, there are important variations across Member States and e-commerce markets can, according to the Commission, be categorised in three distinct groups:

- "*A mature market in Northern Europe, including the UK*[4]*, Germany and the Nordic countries where between 60% and 80% of Internet users are online purchasers.*
- *A growth market in France, Italy and Spain where the number of online purchasers is lower compared to the number of internet users, but where the number of new online purchasers is growing fast, signalling a strong potential for growth in the short and medium term.*
- *An emerging market in Eastern Europe (...)*".[5]

In the EU, the legal regime applicable to the different types of transactions in the electronic commerce environment is defined by a vast array of Directives and different national legal instruments, the enumeration of which would be too long and cumbersome to be fully listed here. However, two main Directives can be clearly identified as the backbone of B2C electronic contract regulation: Directive 97/7/EC of 20 May 1997, on the protection of consumers in respect of distance contracts – also known as the Distance Selling Directive (DSD thereafter)[6] and Directive 2000/31/EC of 8 June 2000, on certain legal aspects of information society

---

[2] Figures for the fourth quarter and full year results 2008, available online: http://files.shareholder.com/downloads/ebay/593094761x0x266606/581a206a-78df-4c3c-81c4-4a8b57e62440/eBay_FINALQ42008EarningsRelease.pdf

[3] Flash Eurobarometer 224, "Cross-border sales and consumer protection" (2008) as reported in Commission Staff Working Document, "Report on cross-border e-commerce in the EU", SEC (2009) 283 final, p. 6.

[4] Concerning the UK figures demonstrate continued growth in the online shopping market. The figures released by the Office for National Statistics in November 2008 showed that sales by UK businesses rose to £163 billion in 2007, an increase of over 30 percent on the previous year results. The figures also revealed that 70.3 percent of businesses had a website. See Office for National Statistics, News Release: Internet Sales rose by 30 per cent in 2007, 21 November 2008, available online: http://www.statistics.gov.uk/pdfdir/ecomnr1108.pdf, [26/03/2009].

[5] Commission Staff Working Document, "Report on cross-border e-commerce in the EU", SEC (2009) 283 final, p.5.

[6] 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, OJ 04.06.1997, L144/19.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022. licences@copibec.qc.ca

services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) – also known as the E-commerce Directive (ECD thereafter)[7].

The DSD is specifically targeted towards the protection of consumers in their interaction with businesses. It gives consumers buying at a distance, a number of rights including: the right to receive clear information about goods and services before they buy and confirmation in writing; a right to withdraw from the contract for a period of seven days; protection against credit card fraud. The ECD has a broader scope and covers both business to business and business to consumer transactions. It ensures that contracts can be concluded electronically and also carries provisions entitling customers to receive clear information about transactions.[8]

Yet, whilst much legislative progress has been made in the last ten years on policing electronic consumer contracts new ways to deceive consumers also seem to constantly emerge. This does much to erode consumer confidence in e-commerce, an embarrassing state of play since the DSD and ECD were adopted with the clear objectives to foster consumer confidence and achieve the internal market. The DSD and the ECD were implemented in the Member States and, in the UK, it is the Consumer Protection (Distance Selling) Regulations 2000 (DSReg 2000 thereafter)[9] as well as the Electronic Commerce (EC Directive) Regulations 2002 (ECReg 2002 thereafter)[10] which provide for much of the legal framework currently applicable to e-contracts. However, like in many other Member States, the application of those texts remains unsatisfactory in many ways.

First, this is due to the fact that the legislation in place is often not complied with. For example, a recent OFT web sweep[11] revealed that nearly one third of retail websites in the UK were breaking the aforementioned laws designed to protect shoppers.[12]

Second, it is because the legislation currently in place, does not deal adequately with a number of pre-existing issues. Indeed, much ambiguity still remains on some key points of law

[7] 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 (Directive on electronic commerce), OJ 17.07.2000, L178/1.
[8] In addition, the ECD carries provisions concerning the establishment of information society service providers (articles 4 and 5), commercial communications (articles 6 to 8) and the liability of intermediary service providers (articles 12 to 15).
[9] SI 2000, N°2334.
[10] SI 2002, N°2013.
[11] OFT, Web Sweep Analysis, March 2008, OFT982.
[12] Source Out-law.com, 'Third of online shops undermine consumer rights, says OFT', News 12/03/2008, available online http://www.out-law.com/page-8934, [11 March 2008].

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

such as the definition of electronic contracts, their formation (for reasons we will explore in more details below), the jurisdiction in which an e-contract was concluded, or the law applicable.[13]

Third, this is due to the fact that the legislation in place does not suitably address some emerging issues mostly related to the challenges of a fast changing digital world.[14] Technological developments are modifying the face of B2C transactions and many are not adequately covered by consumer legislation. For example, the sale of music downloads is excluded from the scope of Directive 1999/44/EC on the sale of consumer goods because this Directive only covers tangible moveable items and not intangibles. As a result, consumers have currently no redress should a piece of music downloaded from the Internet not play satisfactorily on an MP3 player, or if the file is corrupted.[15] Furthermore, the purchase of digital product is excluded from the right to withdraw from a distance contract, leaving consumers without recourse. In addition, the Commission noted many inadequacies in implementing legislation with regards to Directive 97/7/EC. One of the striking example is that of online auctions where consumers in different member states will not be protected in the same way.[16] The legal status of automated contracts (concluded by automated software), mobile contracts ("m-contracts") emanating from the conclusion of contracts using mobile phones interface, and "virtual contracts", contracts entered into in virtual environments such as Second Life, also remains problematic. Virtual contracts in particular are not yet met by legislation able to control their conclusion and execution.

Some changes in the regulation of electronic consumer contracts is however forthcoming at European level. The proposal for a Directive on Consumer Rights (pDCR thereafter)[17] published on the 8th October 2008 suggests some important reforms. The proposal is the product of the Review of the Consumer Acquis launched in 2004 by the Commission with a view to modernise the existing consumer directives and simplify as well as improve the regulatory environment for both professionals and consumers. The review encompassed eight Directives protecting consumers. In 2007, the Commission issued a Green Paper[18], identifying three main issues that needed to be addressed by new regulation: new market developments, fragmentation of rules and lack of confidence. The final proposal focuses on just four Directives: Directive

[13] For further discussions on the issues of conflicts of law and jurisdictions, see: Julia Hörnle, "The Jurisdictional Challenge of the Internet", in Lilian Edwards and Charlotte Wealde (eds.), *Law and the Internet*, 3rd edition, (Oxford: Hart Publishing 2009) 121-158; C. Wild, S. Weinstein and C. Riefa, "Council Regulation (EC) 44/2001 and Internet consumer contracts: Some thoughts on Article 15 and the futility of applying in the box conflict of law rules to the out of the box borderless world", (2005) 19(1) *International Review of Law, Computers & Technology* 13-21; C. Riefa, "Article 5 of the Rome Convention on the applicable law to contractual obligations of 19 June 1980 and consumer e-contracts: the need for reform", (2004) 13(1) *Information & Communications Technology Law* 59-73.

[14] Mike Butler and Aredhel Darnley, "Consumer Acquis: proposed reform of B2C regulation to promote cross-border trading", (2007) 13(4) Computer and Telecommunications Law Review 109-114.

[15] *Ibid*.

[16] We will address this issue in our developments on the right to withdraw further below.

[17] COM (2008) 614 final.

[18] COM (2006) 744 final.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

85/577/EEC of 20 December 1985 on contracts negotiated away from business premises, Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Directive 97/7/EC of 20 May 1997on the protection of consumers in respect of distance contracts, and Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. At the time of writing, the pDCR is only the first stage in the legislative process and it will no doubt be the object of fierce negotiations amongst Member States in the months and years to come. Regardless of what the result of negotiations may look like, it is already clear that because of its wide ranging scope (spanning across four Directives), the proposal for a Directive on Consumer Rights will have an important impact on electronic consumer contracts and may assist in plugging some of the identified gaps in consumer protection.

Unfortunately, whilst there is much activity to drag consumer protection legislation in the 21st Century, there does not seem to be much political acumen to lead to a revision of the e-commerce Directive, the key corollary instrument in the control of electronic contracts.[19] However, in the absence of changes to the e-commerce Directive, those proposed changes to the consumer protection regime via the pDCR may not prove sufficient to ensure that the regulation of electronic consumer contract can deliver effective changes in the regulatory and substantive legal frameworks for consumer electronic contracts.

In order to assess the impact of the proposal for a Directive on Consumer Rights on B2C electronic contracts, we will first turn our attention to the regulatory landscape already in place and the viability of the fragmented policy model adopted in the European Union. Indeed as we will show, the regulation of electronic contracts in the EU cannot be found in one single instrument. Instead the E-Commerce Directive chose to follow a piece-meal approach, focusing, as its full title indicates, only on certain legal aspects of information society services and in particular electronic commerce. We will argue that this approach only yields limited effectiveness. We will also show the difficulties linked with navigating and ultimately effectively applying such a fragmented regulatory framework (I). We will then concentrate on the substantive rules applicable to electronic consumer contracts and see how those may need to be improved in order to adequately meet the objectives of consumer confidence and growth of cross-border e-commerce set by the European legislator. We will have to regret that the current and forthcoming substantive electronic consumer contract rules only have, here again, relative effectiveness (II).

[19] Indeed legal activity in France discussing the reform of the law implementing the ECD on the liability of intermediaries was not well received in Brussels. The European Commission reacted to the project of reform by indicating that it did not consider it necessary to revise the e-commerce Directive and had no plans to do so. As reported in "Hébergeurs: Bruxelles s'inquiète d'une éventuelle réforme de la LCEN", *ZDNet.fr*, 19 September 2008, www.zdnet.fr/actualites/, [23 September 2008].

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

I – The limited effectiveness of the regulatory framework adopted to control electronic consumer contracts in Europe

Recitals 7 and 8 of the ECD state that the objective of the E-Commerce Directive is to create a legal framework in order to foster consumer confidence and legal certainty and ensure the free circulation of information society services within the common market. Yet, the European Commission opted for what can be described as a gap filling exercise rather than an all encompassing legal framework. Indeed, the Directive adopts the principle of "contract law neutrality"[20], that is, the adoption of an instrument (the ECD), which instead of controlling the full process of contract formation, only provides rules which do not interfere with existing national contract law systems. Unfortunately this approach was not based on sound policy decisions but rather on political strategy with, as we will see, important consequences.[21] Originally the text of the draft proposal was dealing with the formation of contracts, but this formulation was later abandoned as no agreement could be easily reached on the matter.[22]

Alongside the ECD, a number of Directives also form part of the electronic commerce regulatory landscape. This includes Directive 1999/93/EC on a Community framework for electronic signatures, (E-sigD thereafter)[23] and a number of Directives on consumer protection. Indeed, article 1(3) ECD states that the "*Directive complements law applicable to information society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts (...)*". Recital 11 ECD adds that "*amongst others Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and 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 form a vital element for protecting consumer in contractual matters; those directives also apply in their entirety to information society services*".[24]

As a result of this fragmented approach to regulation a number of issues merit attention. First of all, one has to acknowledge that article 9 ECD combined with the adoption of the electronic signature Directive and the "technology neutral" approach used in consumer

[20] Jane Kaufman Winn, Jens Haubold, "Electronic promises: contract law reform and e-commerce in a comparative perspective" (2002) 27(5) *E.L.Rev.*, 574.

[21] Winn and Haubold talk about *"a deliberate abstention of the drafters"* in the light of the difficulties of European contract law harmonisation still in the project phase. See *ibid* 20.

[22] Arno R. Lodder, "European Union E-Commerce Directive – Article by article comments", in *Guide to European Union Law on E-commerce*, (2007), Vol.4, Chapter 4, available online http://ssrn.com/abstract=1009945, [04/08/2009].

[23] Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999, on a Community framework for electronic signatures, OJ 19.01.2000, L13/12.

[24] Recital 11 ECD continues enumerating further consumer Directives fully applicable to information society services including misleading and comparative advertising, consumer credit, package travel and package holidays, indication of prices, general product safety directive, timeshare, injunction directive, liability for defective products, and so on and so forth.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

protection regulation provide a harmonised backdrop to the regulation of electronic consumer contracts that has proven efficient in stimulating the development of electronic commerce in the last 10 years or so. We believe that in this instance the piece-meal approach was justified and brought positive changes to the regulatory landscape for e-commerce (1). However, fragmentation also created a number of problems concerning, in particular, the scope of the relevant Directives. This includes the absence of a single definition of "consumer" and also crucially, "electronic contract" (2). Instead, definitions are tailored to the group that each regulatory instrument seeks to protect, making navigation of the regulatory landscape quite difficult at times. The new approach to European consumer legislation which consists in replacing minimum harmonisation Directives for full targeted harmonisation ones, without necessarily reforming the regulatory landscape applicable to e-contracts or many other consumer law instruments that have an impact on electronic contracts, creates new discrepancies in the system that need to be addressed (3). Those indeed very much limit the efficacy of the regulatory framework that will be applicable to B2C e-commerce in the future.

1. Validity of electronic contracts and electronic signatures as a motor for the development of B2C electronic commerce

We have already mentioned that the political choices made for the adoption of the e-commerce Directive led to proceeding with filling gaps rather than developing an e-commerce policy from scratch.[25] The imperative at the time was to go fast and ensure agreement amongst Member States to establish a framework within which e-commerce could develop rather than wait for long and protracted negotiations. To some extent this approach paid off and figures already mentioned in our introduction show the impressive progress B2C e-commerce has made and the important economic role it now plays.

One provision of the ECD that had a key impact in fostering the growth of electronic commerce over the last decade or so is article 9(1) of the E-Commerce Directive. This article states: "*Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither creates obstacles for the use of electronic contracts not result in such contract being deprived of legal effectiveness and validity on account of their having been made by electronic means*". Consequently, contracts which, in the past, required to be agreed in writing for obvious reasons of certainty and probativity, should now have the same legal standing if they are entered into electronically. In the UK, this ECD provision was not implemented as it was considered that the legal system already recognised the validity of electronic contracts. Indeed, Schedule 1 of the Interpretation Act 1978 states that "*writing includes typing, printing, lithography, photography and other modes of representing or*

[25] This is to be contrasted with the UNCITRAL Model Law on Electronic Commerce or the USA's Uniform Computer Information Transactions Act (UCITA) for example.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

reproducing words in a visible form, and expression referring to writing are construed accordingly". Bainbridge comments that "*this would appear to include computer storage. Words stored in a computer may be reproduced in screen or printed on paper. In any case, it is unlikely that a judge would take a restrictive view of this (…)*".[26] By contrast, article 1108-1 of the French Civil Code made full implementation of the provision.

Article 9 of the ECD is therefore a provision which can be credited with providing an important boost to e-commerce as it facilitates the recognition of electronic transactions as valid forms of contracts[27], although it is worthy to note that many consumer contracts may not have needed to be evidenced in writing[28], thus explaining why the ECD can be seen to have had limited effectiveness as far as consumer contracts are concerned.

To give electronic contracts the same validity as their paper counter-part, the main issue, in many cases, was to find a viable alternative to manuscript signatures which have, in more traditional forms of contracting, been used to authenticate transactions and provide evidence of such transaction. Whilst the use of technology can, not only match these requirements, but also exceeds them[29], electronic or digital signatures have proved superfluous in many e-contracts mainly because the more sophisticated forms of e-signatures based on Public/ Private key encryption (PKI) have a cost attached to their use, which far exceeds the benefits, especially in B2C or C2C transactions. In practice, uptake on e-signatures even in B2B commerce has been low.[30] In the UK, the legislation adopted (the Electronic Communications Act 2000) is "technology-neutral", prescribing no particular technology to generate the e-signature. As a result, digital signatures can range from "*a simple typed-in name or scanned-in signature to more complex biometric techniques, such as fingerprint scanning or signatures created by cryptographic means*".[31] In practice parties to electronic consumer contracts have leaned towards

---

[26] D. Bainbridge, *Introduction to Information Technology Law*, 6th ed, (Harlow: Pearson Longman 2008) 359.

[27] The provision is especially welcome since a large number of Member States, unlike the UK, did not have certainty on this point prior to the ECD.

[28] Some consumer laws require, or have required, elements of writing and/or signature to constitute an agreement or deed valid. For example, until recently in the UK, the Consumer Credit Act 1974 still required that the parties sign the contract (see formerly section 61). The Consumer Credit Act 1974 (Electronic Communications) Order 2004, has now removed such requirement. A signature is still required, but it can now take the form of an electronic signature.

[29] This is because digital signatures can perform the same tasks as a signature or writing on paper, both in relation to constitution and evidence. Unlike manuscript signatures however, digital signatures can do more. They not only replace the hand-written signature, they also encrypt the contents of the document. As such they are a far more effective guarantee against tampering with the document by the other party (or third parties in transit) than the traditional method of signing.

[30] For detailed discussion of the nature and regulation of encryption and digital signatures, see M. Hogg, "Secrecy and Signatures – Turning the legal spotlight on encryption and electronic signatures", in Edwards & Waelde (eds), *Law & the Internet, A framework for Electronic Commerce*, (Oxford, Hart Publishing 2000) 37-54; L.Brazell *Electronic Signatures Law and Regulation* (London, Sweet and Maxwell, 2004); Ian J. Lloyd, *Information Technology Law*, 5th ed, (Oxford: OUP 2008) 487-507.

[31] Mark O'Connor and Elizabeth Brownsdon, "Electronic signatures", 152 New Law Journal 348.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

even less advanced forms of electronic signatures, such as simply affixing one's name in electronic text in an email, or on an electronic document, or using a scanned version of a written signature.[32] We can note that the e-sigD and its implementation in many Member States like the Electronic Communications Act 2000 in the UK, which was adopted to "*provide a sound basis for electronic commerce and help to build consumer and business confidence in trading on the Internet*"[33], was not as effective in helping B2C electronic commerce to develop as first anticipated. The low uptake of electronic signatures is evidence enough of their little impact on most consumer transactions. If the parties to consumer transactions want to protect themselves against frauds, there are more efficient ways to do so without the need to use electronic signatures. Indeed, one provision which has had a better impact to foster consumer confidence is article 8 DSD which enables a consumer to request the cancellation of a payment where fraudulent use has been made of his payment card in connection with distance contracts covered by the Directive.[34] As a result of this provision there is an obligation on banks and credit card providers to protect consumers against the misuse of their credit card/ debit card details on the Internet.

2. A regulatory framework difficult to navigate: absence of a uniform definition of electronic consumer contracts

Whilst we have seen the merit of the regulatory approach in helping develop e-commerce, a gap filling policy on electronic commerce has also had some major flaws. The scope of the many Directives that needs to be combined to determine the legal framework applicable to particular types of transactions can be difficult to navigate indeed. This is due to the fact that the scope of the ECD and the DSD are different and in a lot of ways overlapping. It is also due to the fact that some contracts are excluded from the DSD altogether. But, mostly this is due to the absence of a definition of electronic contracts in the relevant instruments, and a number of definitions of what a "consumer" or a "professional" is in the different consumer protection Directives, suggesting that the scope of protection should vary. It is true that defining

[32] Under the Electronic Communications Act 2000, as we have noted, such forms are also admissible and according to Wegenek (Robert Wegenek (ed), *E-Commerce, A guide to the Law of Electronic Business*, 3rd edition, (London, Butterworths Lexis Nexis 2002) 30.), the case of *Goodman v J Eban Ltd [1954] 1 Q.B. 550* paved the way for the recognition of the role of such signatures in authenticating content. Further cases are of interest for the recognition of electronic signature. See, *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch) and *Harriet Caton v R.R. Caton and T.B. Caton* (1867) L.R.2 H.L. 127, and *Hall v. Cognos Ltd* (unreported).

[33] Patricia Hewitt, Minister for Small Businesses and E-Commerce, 340 HC Official Report (6th series), col. 4, 29 November 1999, second reading debate.

[34] When it is the case, the consumer needs to be re-credited with the sums paid. This is also a provision that has had a positive impact on trust in e-commerce, whilst the provision's effect is limited as it is not able to stop frauds or rogue traders from operating. It has in effect shifted liability towards the banks who are the primary target of the provision.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022. licences@copibec.qc.ca

e-contracts is an intricate task.[35] Perhaps a good place to start is to say that e-contracts are contracts concluded electronically. Yet this simplistic definition does not reflect the vast complexity of the methods employed to conclude e-contracts and the many different types of contracts that currently exist and are likely to develop in future.[36] As a result, the absence of a general legal regime in the ECD in particular may be mostly due to the complexity and diversity of e-contracts that a single legal instrument would not be able to fully and adequately apprehend.

a. Electronic contracts: distance contracts and/ or information society services?

Definitions are of course useful to define the scope of each instrument and decide if the DSD or the ECD will apply or both. Whilst both the ECD and the DSD concern electronic contracts none of those instruments directly defines e-contracts. Article 2(1) DSD provides a useful starting point however and defines a "distance contracts" as "*any contract concerning the goods or services concluded between a supplier and a consumer under an organised distance sales or service provision scheme run by a supplier who, for the purpose of the contract, makes exclusive use of one or more means of distance communication, up to and including the moment at which the contract is concluded"*.[37] Whilst a list of the means of distance communication inserted in the Annex, does not contain the Internet, and only electronic mail, the definition has always been considered to be wide enough to accommodate many electronic contracts concluded between businesses and consumers. This definition is set to change, as the proposal for a Directive on Consumer Rights, if adopted in its current state, provides a revised definition of distance contracts and defines means of distance communication is such broad way that there is no longer a possible doubt as to the inclusion of the Internet. Indeed, a distance contract is defined in article 2(6) pDCR as "*any sales or service contract where the trader, for the conclusion of the contract, makes exclusive use of one or more means of distance communication*". Means of distance communication are defined in article 2(7) pDCR as "*any means which, without the simultaneous physical presence of the trader and the consumer, may be used for the conclusion of a contract between those parties*". In addition, Recital 11 pDCR removes any potentially remaining ambiguity: "*the new definition of distance contract should cover all cases where sales and service contracts are concluded using exclusively one or more means of distance communication (such as mail order, Internet, telephone or fax)*". The fact that the new definition of a distance sale removes the requirement for an "organised scheme" should also improve legal certainty and create a level playing field for all traders.[38] As Howells and Schultze indicate, "*many traders may casually slip into a distance sale contract with the*

[35] Similar difficulties are raised by the definition of electronic commerce. On this subject, see Chris Reed and John Angel, *Computer Law*, 6th edition, (Oxford, OUP, 2007) 197.
[36] We have already hinted in our introduction to B2B, B2C and C2C contracts as well as automated, mobile and virtual contracts – for those already identified at today's date.
[37] Regulation 3(1).
[38] According to Recital 11 in fine.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

attendant obligations".[39] In this respect, the change may be seen as a positive move reinforcing online consumer protection. But this positive assessment needs to be tampered by the fact that some transactions are excluded all together from the scope of the Directive and others, while included, may not benefit from a right to withdraw or the same level of information.[40] As a result, whilst some contracts can be defined as distance contracts, they do not provide consumers entering into them with the same level of protection.

The ECD, article 2(a) does not define electronic contracts either but rather refers to information society services. Those are defined by references to the definition that already exists in Community law in article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC. Recital 17 of the ECD provides a useful reminder of this definition. An information society service provider is "*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*". The scope of the ECD is very wide indeed and many commentators agree that virtually any website operator is subject to it, especially because the ECD is not just concerned with B2C contracts, but also B2B interactions.[41] However, confusingly, different aspects of a same transaction may not necessarily all fall within the scope of the ECD. As Smith explains:

> "*the conclusion of an online contract for the sale of a book may be within the scope of the Regulations, but the fulfilment of the contract by delivery of a physical book would not be. If the book were to be downloaded in electronic form from the supplier's website, however, the whole transaction would fall within the scope of the Directive*".[42]

Neither the ECD nor the DSD provide much clarity as to whether new forms of electronic contracts are also caught by the regulatory framework. Indeed, contracts concluded by automatic agents, mobile contracts and virtual contracts are not specifically included in the scope of protection and is it is unclear if the current rules on B2C electronic consumer contracts should apply to those transactions as we are about to see.

---

[39] Geraint Howells and Reiner Schulze, "Overview of the proposed Consumer Rights Directive", in Howells and Schulze (eds.), *Modernising and Harmonising Consumer Contract Law*, (Munich: Sellier 2009) 6.

[40] See article 3 DSD. In particular, information requirements, right of withdrawal and performance obligations (under articles 4 to 7(1)) do not apply to contracts for the supply of foodstuffs, beverages or other goods intended for everyday consumption supplied to the home of the consumer, to his residence or his workplace by regular roundsmen, and to contracts for the provision of accommodation, transport, catering or leisure services, where the supplier undertakes, when the contract is concluded, to provide these services on a specific period (...). This leaves out car rental online because this comes under the transport exception (as confirmed by the ECJ in Case C-336/03, *easyCar (UK) Ltd v Office of Fair Trading* [2005] ECR I-1947) and the purchase of flight tickets for example.

[41] See for example, ibid Bainbridge (2008) 365, fn 26; I. J. Lloyd, *Information Technology* Law, 5th ed, (Oxford: OUP 2008) 478.

[42] Graham J.H. Smith (ed.), *Internet Law and Regulation*, 4th ed, (London: Sweet & Maxwell 2007) 792, point 10-047.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022. licences@copibec.qc.ca

b. Electronic contracts: automated, mobile and virtual contracts?

In many instances, in particular in B2B contracts, e-contracts may be concluded automatically between computers, without the intervention of a human being. Whilst it is clear that the human being has been involved in setting up the programming of the computer, e.g., instructing a computer to refuse a particular order or accept it under certain conditions, no natural person is directly involved in the contracting process. As Ian Kerr puts it, "*these technologies remove human beings from at least one side of the transaction*".[43] For B2C transactions indeed, consumers tend to control directly the mouse that will click on "accept" or "order", although it is worthy to note that this is not necessarily the case.[44] Problems arise when the computer, perhaps due to an error in the commanding software, orders something that should not have been ordered, or erroneously accepts an order. It is then necessary to clarify if such transaction can be caught by the ECD especially since the E-Commerce Directive makes no mention of them when in fact, as Lodder[45] comments, the explanatory notes of the draft ECD did mention electronic agents.[46]

Aside from the obvious question of scope of the ECD, many authors have questioned if the transactions concluded were to be classified as contracts or if a new legal classification needed to be uncovered, because human beings are no longer directly involved.[47] Advanced automation technologies can generate tailored "offers", based on the behavioural pattern (gathered using cookies for example) of the consumer using the site.[48] In such cases, the machine will effectively generate an "offer" whose exact content was never specified by a natural person and for which the machine can generate specific terms and conditions. More advanced technologies still include using autonomous agent software that is able to "learn" and thus depart from simple pre-programmed actions. At such a point it is difficult to simply see the autonomous agent as an assisting tool of the seller (or buyer) and the question of the validity of contracts formed is salient. Whilst in the UK there is no legislation confirming the validity of transactions conducted through electronic agents, many jurisdictions have enacted enabling provisions, Canada included.[49] This is not the case at EU level. Those jurisdictions which recognise

---

[43] Ian Kerr, "Bots, Babes and the Californication of Commerce", (2004) University of Ottawa Law & Technology Journal 290.

[44] For example, when biding on eBay a human being can also be removed from the bidding process because eBay offers an incremental bidding process, by which consumers enter the maximum amount they wish to bid and the software then keeps bidding up every time the consumer is outbid, until the upper limit it reached.

[45] *Ibid* Lodder, (2007), fn 22.

[46] COM (1998) 586 final, p. 25.

[47] See for example, *supra* note 43, fn 43 ; Margaret Jane Radin, "Humans, Computers and Binding Commitment", (2000) Indiana Law Journal 1125.; Tom Allem and Robin Widdison, "Can Computers Make Contracts?", (1996) 9 Harvard Journal of Law & Technology 26.

[48] For more on cookies and other data profiling techniques, see Lilian Edwards and Jordan Hatcher, "Consumer Privacy Laws 2: Data Collection, Profiling and Targeting", in Edwards and Wealde, *supra*, note 13 at 511-543

[49] See for example, Canada's Uniform Electronic Commerce Act, section 21which states: "*A contract may be formed by the interaction of an electronic agent and a natural person or by the interaction of electronic agents*". In the USA, the Uniform Electronic Transactions Act (UETA) also provides for the validity of contracts formed using electronic agents. Note that the proposal for a Directive on Consumer Rights does not make any such provisions.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

electronic agents tend to see them, however autonomous they may be, as legal intermediaries. As a result, the fact that a piece of software can "learn" and deviate from pre-programmed behaviour is only the result of human input and the human decision to trust the software to do the job it is asked to perform. It appears therefore that in the UK, the case of *Thornton v Shoe lane Parking Ltd*[50] can be seen as valid law even for more advanced forms of electronic agents and enable their use.[51]

If a revision of the ECD was forthcoming it seems that this would be an issue worth paying attention to, as contrary to the UK, not all EU Member States may have satisfactory legislation recognising the validity of automated contract. But as already mentioned such revision is unlikely in the near future. For the time being we will side with Lodder who states: "*Although neither in the recitals, nor in the Articles the electronic or intelligent agent returned, a systematic review of the legal system should in my opinion nonetheless lead to the acceptance of the conclusion of contracts by autonomous automated systems*".[52]

Another type of contract for which much doubt could have existed as to which legal framework was applicable is M-contact (contracts concluded with the use of a mobile phone). Contracts concluded using mobile phones are considered electronic contracts because most m-contracts refer to websites for terms and conditions and further details concerning an operator or a transaction and in addition, those contracts are effected electronically albeit using telecommunication networks. M-contracts are already considered to be controlled by the ECD and to sit comfortably within the remit of the DSD, despite being unable to fulfil some of the legislative requirements. M-contracts indeed face the difficulty that the medium of the Short Messaging System (SMS) only allows 160 characters including spaces. This does not allow room for, for example, full disclosure of the information legally required by consumer pre-contractual information rules. In practice this is usually circumvented by references to the website for full terms and conditions, but has always raised questions with regards to compliance with the law and if it was sufficient to inform the consumer on the spot so he or she can avoid making a

[50] [1971] 2 Q. B. 163. In this seminal case a machine, namely a car park ticket vending machine, dispensed a ticket and allowed the customer to pass the entrance barrier of a multi-storey car park. The question was whether the contract was concluded at the moment the driver reached out and took the ticket: if it was, then no further conditions could be imposed by the car park by a notice excluding liability which was only visible once the car had driven past the ticket machine. Lord Denning held that "*the offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money into the slot*". (Lord Denning at p.169) The machine in this case acts as an "agent" for the vendor. Thus the notice excluding liability was not incorporated into the contract. This famous analysis appears perfectly transportable to e-contracts; software and agent programmes which effect contractual relationships are thus the equivalent of the ticket machine and prima facie bind their master.

[51] This is a view shared by many scholars. See for example, Christopher C. Nicoll, "Can Computers make contracts?" J.B.L. 1998, Jan, 35-49; Simon Jones, "Forming electronic contracts n the United Kingdom", (2000) 11(9) I.C.C.L.R. 301-308.

[52] *Supra* note 22 at p. 82, n°4.5.1.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022. licences@copibec.qc.ca

prejudicial bargain. Only those with Internet-equipped smart-phones are indeed able to directly click through to the website terms while on the move. The proposal for a Directive on Consumer Rights in its current wording (article 11) would settle the debate and clearly place mobile contracts within the scope of the pDCR because it states that information requirements have to be delivered in a way which is appropriate to the means of distance communication used. Furthermore, article 11(3) makes a direct reference to a medium which allows limited space or time to display the information. In those cases, it would be acceptable to only provide a reduced set of information prior to the conclusion of the contract on that particular medium.[53]

Finally, one type of contract that did not get a mention at the preliminary stages of development of the ECD, nor is yet taken into account by the pDCR is that of virtual contracts. Virtual contracts are contracts concluded within the confine of a "virtual world" (VW), mainly online games such as Second Life, World of Warcraft or Entropia.[54] The particularity of such virtual worlds is that they not only are a source of entertainment, but they are also supporting entire virtual economies. Some research estimates that today's virtual economies build around such games and other virtual environments represent a gross domestic product of anywhere from $7 billion to $12 billion.[55] Like with any other information society services, players will conclude a contract with the operator of the service. This relationship is clearly subject to the ECD, although the validity of such agreement can be questioned.[56]

However, when in-game, players will be able to conclude other contracts with their fellow players. It is those contracts, the ones we call "virtual contracts" with fellow gamers that are particularly problematic.[57] The ECD and the DSD remain silent on this type of contracts. We

[53] However see our comments on this point further below within the information and transparency requirements section of this article.

[54] Often known as Massively Multiple Online Role Playing Games (MMORPGs).

[55] Julian Dibbell, "The life of the Chinese Gold Farmer", *The New York Times*, June 17, 2007. Available online: http://www.nytimes.com/2007/06/17/magazine/17lootfarmers-t.html?_r=2&oref=slogin&oref=slogin, [20/05/2008].

[56] See on this issue the case of *Bragg v Linden Labs* (unreported) concerned virtual land worth $8,000, which Bragg claimed he had been "evicted" from, without compensation, when Second Life terminated his account for allegedly cheating in-game. See also Joshua Fairfield, "Anti-social contracts: the contractual governance of virtual worlds", 53 McGill Law Journal 427. See in addition, the cases of *MDY Industries, LLC v. Blizzard Entertainment Inc. and Vivendi Games Inc* (United States Court for the District of Arizona, case CV 06-2555-PHX-DGC, 14 July 2008) and the article by Benjamin Tyson Duranske, *Virtual Law, Navigating the Legal Landscape of Virtual Worlds*, ABA 2008, p.133.

[57] This includes existence and validity of contracts concluded virtually. For example, because the contract is in fact concluded in the virtual world by an avatar, issues pertaining to machines concluding contracts and intention to create legal relations could occur. We do not feel these are true obstacles to the validity of virtual contracts. Human beings control avatars and it is those human beings who decide to purchase items in the game as we explained above. What is more problematic is to find out if such human beings are actually aware that they are entering into binding contractual relationships, since they use virtual money in particular. Again, with the caveat that some consumers may find this operation a little confusing, most players it seems will understand that the virtual money used to pay for an item is the consideration for the bargain being struck. Some other issues may occur with regards to the time of the conclusion of such virtual contract. Indeed, online games have to have downtime for maintenance

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

are unsure whether or not one could consider that virtual contracts are within the scope of the Directives. It is possible that one could interpret virtual contracts as gambling contracts. The money generated in the VW could be equated to virtual winnings in a game of skill or sometimes chance and as a result be heavily regulated but excluded from the scope of the ECD and DSD. At present, there is nothing substantial to back this interpretation and we believe that virtual contracts are to be caught under general law.[58] However, because of the possibility of virtual credit, i.e. bank loans and deposits between players and VWs (or third party banks allowed to operate in-game by the VW owner) as well as the possibility to exchange all virtual monies earned on the real world currency exchange[59] better regulation of VW may need to be put in place and virtual contracts may in the future need to be policed as thoroughly as current B2C e-contracts in order to protect consumers playing the game more efficiently against any unjustified losses.

Yet the recent proposal for a Directive on consumer rights does not make any endeavours to capture virtual contracts within its scope. This may be a missed opportunity, but it is not surprising since much of the issues pertaining to those types of contracts, relate to general contract law principles, and in effect the sale of software products since all purchases in the game concern "code". We have seen that these are areas that have been avoided by the European legislator both in the ECD and the DSD. However, interestingly the pDCR does pay some attention to contract concluded at auctions and draft the contours of a new legal regime which will have an impact on online auctions.[60] Many of these virtual games use a type of auctions to enable participants to sell and buy playing tools and "virtual goods" within the game. It is unclear however if that may mean that those virtual contracts would be caught by the pDCR, albeit indirectly or if the legislator did not envisage to include them within the scope of the proposed directive altogether.[61] One crucial point that would need to be answered concerns the legal classification of the parties to such virtual contracts (consumer-gamers and professional-gamers), since electronic consumer law traditionally tend to focus on B2C contracts only.

---

and that time is normally not counted in the game. As a result there is a discrepancy between "real-time" and "VW time", which may well have an impact on the formation of virtual contracts.

[58] This is the opinion of Lilian Edwards, which we share. We take this opportunity to acknowledge Lilian Edwards' useful contribution to our research and writing on virtual contracts for this article.

[59] See for example the virtual currency exchange at www.ige.com. Standing exchange rates exists for major real life currencies such as Euros and US dollars, and major VW currencies such as L$ and WoW Gold.

[60] Christine Riefa, "A dangerous erosion of consumer rights: the absence of a right to withdraw from online auctions", in Howells and Schulze (eds.), *supra* note 39 at 175-187

[61] To answer those questions, we have obtained funding by way of a Fulbright scholarship. We will be a Fulbright EU Scholar-in-Residence at Cleveland Marshall College of law in 2010 and spend time researching the area by comparing EU and US law. We hope to publish the full results of our enquiries later on in 2010.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022. licences@copibec.qc.ca

c. Notions of "Consumer" and "Business" in an Online Environment

In the same way that it was difficult to define electronic contracts, defining consumers and professionals is this is not a straight forward process either. This is mostly for two reasons: the notions of "consumer" and "business" are blurred in an online environment and parties do not meet in person and can in some instances transact anonymously or pseudonymously. We have already noted that there is no unified definition of consumers available in the EU and the same is true in English law. However, one can reliably understand a consumer to be a natural person acting for purposes, which are outside his or her business.[62] In order to harmonise the many divergent consumer definitions, article 2 of the proposal for a Directive on Consumer Rights, suggest defining a consumer uniformly as "*any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession*". However, online activity has blurred this essential binary distinction. Starting up an online web based business no longer requires major capital investment or sophisticated infrastructures. Many "web 2.0" businesses in fact have few assets other than their website and their clientele. Individuals who do not conceive of themselves as commercial entrants may also find themselves unexpectedly making money in the online world. Many eBay users, for example, end up using eBay as a source of second income, selling regularly on the site. It is also the case for the new virtual world entrepreneurs who are players in the game and earning a second income at the same time. The boundaries between play and earn, business and pleasure, have become entangled.

"Hybrid consumers"[63] are an emerging category of electronic commerce actors. They are individuals who have, often unknowingly or unwillingly, displayed the characteristics of a business. Whilst this category of actor is not new (there always was individuals making extra money "on the side"), the use of the Internet has clearly exacerbated the ease with which such individuals can attract revenues and mix play with work. One main reason for consumers not always being aware of their change in status is that defining the hybrid consumer is not an easy task. In the UK, there is no fixed definition of what "acting in the course of business" actually covers[64] and definitions vary with the legislation applicable. When legislation applies criminal sanctions, the definition of a business is typically narrow.[65] By contrast, in the Sale of Goods Act

---

[62] See article 2(e) ECD and article 2(2) DSD. For the UK, see Section 3, Consumer Protection (Distance Selling) Regulations 2000. A similar definition is found in Regulation 2 of the Electronic Commerce (EC Directive) Regulations 2002.

[63] They are called "hybrid sellers" in Martin Morgan-Taylor and Chris Willet, "The Quality Obligation and Online Market Places" (2005) 21 Journal of Contract Law 157.

[64] Oughton and Lowry, *Textbook on consumer law*, 2nd edition, (Oxford, Blackstone Press 2000) 4.

[65] This is so, for example, with the Business Advertisement (Disclosure) Order 1977, which makes it an offence for a party in the course of business to publish, or cause to be published, an advertisement offering goods for sale to consumers, unless it is made clear that it is a business sale. The same occurs in the Trade Description Act 1968. For example, in *Davies v Sumner* [1984] 1 WLR 405, the sale of a car used by a doctor for personal as well as business needs was considered not to have the necessary regularity to allow a criminal sanction to be imposed. Also, in

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

1979, the definition of a business is conceived widely in order to afford consumers better protection. As a result, in *Stevenson v Rogers*[66] a fisherman selling his only boat in order to replace it was considered "in the course of business".[67] Yet, as Howells and Weatherill, rightly point out, some grey areas still remains as to what counts as a business. For example, and of particular interest to eBay sellers and wannabe Second Life tycoons, it is still uncertain whether the provisions catch the "amateur entrepreneur".[68] It is clearly a matter to be determined on a case-by-case basis. There is a fine line between a consumer *stricto sensu* who simply uses the Internet to offer for sale a few unwanted items, and the individual who decides to empty the contents of lofts and garages, or the individual that decides to start actively buying goods with a view to reselling them. In the latter cases, the activity is likely to enter the business sphere. The same interpretation would apply in a virtual world, with a necessary distinction between players creating digital goods for their own use in the game who later sell them on, and players who create content on a larger scale with a view to sell it to fellow virtual users.

Distinguishing between consumers, hybrid consumers and businesses is crucial because the law typically applies a far greater standard of protection to consumers than businesses in transactions between them.[69] Businesses are assumed to contract *inter se* "at arm's length" – i.e. with equality of bargaining power – while this is not so in B2C interactions.[70] Indeed, consumers buying from businesses benefit from protective national legislation such as the DSReg 2000 in the UK, whilst if the parties are both classified as consumers, these will not apply.[71] Yet as already mentioned this may cause problems for some sales concluded on eBay for example. Power sellers are sellers on eBay who have realised an important number of sales and clearly act with a degree of regularity in the sales being conducted on the site. However for many of those power sellers, operating from their sheds or bedrooms, the classification as a business under the Sale of Goods Act 1979 or under the DSReg 2000 may be problematic, leaving open the question of the protection that can be granted to their buyers. It is our view that most power sellers will display enough of the characteristics of a business under English law to be considered as such for civil purposes. It is very uncertain if to apply criminal sanctions, the definition of "in

---

Blakemore v Bellamy [1983] RTR 303, a postal worker who often repaired and restored cars was not considered to be acting in the course of business as the work was carried out as a hobby.

[66] [1999] 2 WLR 1064

[67] In this case, the court of Appeal decided that for the application of the SGA 1979, there was no requirement for regularity of dealings and that is was sufficient that the sale was not made by a private individual.

[68] Howells and Weatherill, *Consumer protection* law, second edition, (Aldershot: Ashgate 2005) 167.

[69] There are of course many other consequences pertaining to issues such as fiscal regime and social security issues to name but a few.

[70] Interestingly, when consumers contract with consumers (C2C) neither, it seems, is assumed to need special protection.

[71] This remains the case under the proposal for a Directive on Consumer Rights, COM (2008) 614 final. Article 7, in its current wording, also states that an intermediary needs to disclose if he is acting for a consumer, in which case, the pDCR does not apply as the relationship would be formed between two consumers.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022. licences@copibec.qc.ca

the course of business" could stretch as far, but as already mentioned, this is really a matter that needs to be determined on a case-by-case basis.[72]

Despite forthcoming changes in the proposal for a Directive on Consumer Rights, this issue is unlikely to be settled. Whilst the proposal offers a single and uniform definition of consumers and traders[73], it does not create a definition for an intermediate function and we are doubtful there will be enough political acumen to drive a change during the negotiation phase. We broadly agree with such position however, as creating yet another category of actor would surely only add to the already existing confusion. However, a set of criteria enabling one to determine with more certainty the threshold at which a consumer becomes a business and falls within the remit of the DSD and ECD in particular would be most welcomed especially since those new definitions are likely to be interpreted in different ways across Europe.[74]

d. Anonymity, Pseudonyminity and Remote Contracting in an Online Environment

Another layer of difficulties associated with the parties to e-contracts is that such parties are contracting at a distance, and in many cases can remain anonymous or use a pseudonym. Issues relating to the identities of the parties involved in a transaction concluded at a distance are, of course, not novel.[75] However, such issues find a renewed significance when it comes to sales concluded electronically.[76] Anonymity creates specific problems in the application of

---

[72] Interestingly, such difficulties, not exclusive to English law, have pushed the French legislator to include in a "Bill on economic modernisation", considered in Parliament in the summer of 2008, the creation of a new legal classification destined to encompass power sellers on eBay and similar "self-entrepreneurs". No final decision has yet been made at the time we write this chapter, but if it went through without amendment, the French legislation would create a sui generis regime for those sellers, illustrating the different legal nature of those entrepreneurs. For more on the French position, see, ZDNet.fr, "Alexander von Schirmeister, eBay France: Nous souhaitons un statut d'auto-entrepreneur pour permettre le développement de l'activité de vendeur en ligne", available on line, http://www.zdnet.fr/actualites, 01/05/2008

[73] Article 2 states: (1) 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession; (2) 'trader' means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader;

[74] This is despite the Directive being a targeted full harmonisation Directive, which will not in our view stop diverging interpretations of the same notions across Member States. National legal orders all have diverging conceptions of what a business or a consumer is. For example, in France, investors can be considered consumers under certain circumstances and in the UK, for the application of the Communications Act 2003, consumers are including small businesses of up to 10 employees. For more on the concept of targeted full harmonisation and a critique of this approach, see Hans-W Micklitz, "The targeted full harmonisation approach: looking behind the curtain", in Howells and Shultze (eds.), *supra* note 39 at 47.

[75] We also need to note in that context privacy concerns. For a discussion of privacy online, we refer readers to the following: Lilian Edwards, "Privacy and Data Protection Online: The Laws Don't Work?" in Lilian Edwards and Charlotte Wealde (eds), *Law and the Internet*, 3rd edition, (Oxford: Hart Publishing 2009) 443-488.

[76] Indeed, the lack of clear identification of the parties creates many issues pertaining to the validity of transactions. For example, not every natural person is entitled to enter into legally binding contractual relationships. Minor

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022. licences@copibec.qc.ca

consumer legislation, where one key requirement is that the parties be a consumer and a trader. Under the DSD, for example, when it is the case, the consumer should be provided with pre-contractual information in order to make an informed decision. When the parties remain anonymous it is virtually impossible for consumers to know whom they are contracting with and they could miss out on some important protection they can legitimately expect such as a right to withdraw from the contract if they buy from a business. More worryingly, anonymity can also foster fraud and make detection more difficult. Whereas the solution is not to force parties to electronic contracts, to renounce anonymity and the use of pseudonyms, the pDCR may have been a perfect place to provide some practical solution. Regrettably, the proposal for a Directive on Consumer Rights does not make any specific provisions to cater for the anonymity of the parties which leaves this issue wide open. Instead, article 7 pDCR offers an incentive for businesses to disclose that they are acting for consumers as intermediaries. When they do so, the contract is not regarded as a contract between consumers and traders but rather a contract between two consumers falling outside the scope of the Directive. In case of non-disclosure the contract is considered concluded between the intermediary and a consumer and controlled by the pDCR. But this offers little assistance to consumers entering into legal relationships with professionals not acting as intermediaries and who do not have a legal obligation to identify themselves as such.[77] One practical solution, already adopted by eBay France, may be to rely on the parties being identified as consumer or trader on the site via a logo. This will however require further controls, and consequently costs, on the part of intermediaries which they may not be prepared to bear if it is not a statutory obligation, or can be demonstrated to bring a significant benefit to their business model.

The result of such fragmented scope is that the regulatory landscape is very difficult to navigate. One is never really sure of what protection he can expect to receive and may only find out once the contract is already concluded. Indeed, according to Lloyd, "*the major criticism that might be made of the EC's activity in the field of e-commerce, is that initiatives are dispersed across a range of measures.*" This, the author says is "*complicating the task of determining what the law is in a particular respect.*"[78] One of the main objectives of the ECD was to boost consumer confidence and encourage trust by clarifying the rights and obligations of businesses and consumers. Regrettably, this is not really the case and the proposed reform under the pDCR does not seem to make much improvement. It does no better if one considers the new legislative technique adopted which we are now going to consider.

---

children, for example, are usually restricted as to the type of contracts they can validly conclude, with exact rules varying from Member State to Member State.

[77] However note that in the UK for example, the Business Advertisement (Disclosure) Order 1977 makes it an offence for a party in the course of business to publish, or cause to be published, an advertisement offering goods for sale to consumers, unless it is made clear that it is a business sale. The ECD also requires that commercial communications be identified as such (article 6). This is also despite the fact that the ECD requires disclosure of professional identification numbers as we will see further on in this Chapter.

[78] *Supra* note 30 at 485.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

3. Deficiencies in the new regulatory approach to electronic consumer contracts

Despite a solid framework in place for the recognition of electronic contracts, and a vast array of Directives protecting consumers, there are still important deficiencies embedded in the system. We have already seen that the large amount of legislation applicable is clearly creating difficulties. Another problem perceived by the Commission comes from the use of minimal harmonisation clauses in the Directives.

In the past, Directives like the ECD and the DSD were adopted with a minimum harmonisation clause, enabling member states to do more for consumers in their implementing legislation. Such approach was beneficial at national level, but created many barriers in cross-border trade. Those discrepancies would be of no effect if they were not conflicting with the objectives of the harmonisation exercise in the first place. Indeed, as Brownsword indicates, evaluating the merits of a Directive is an exercise that is to be done relative to its regulatory purposes.[79] In the context of electronic commerce, this task is a thorny one as it is not one but an array of legal instruments that need to be reviewed, and it is not one single regulatory objective that is in play but a multitude of purposes justifying the adoption of a particular set of rules. We will only be brief and selective in this respect.

All Directives have as a primary objective the proper functioning of the internal market. The ECD for example was adopted "*to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between Member States*".[80] But the existence of discrepancies in implementation creates barriers to a properly functioning internal market because providers established in a country where requirements are higher than other Member States will face strong competition from suppliers established elsewhere. Fragmentation may also result in distorting markets as newcomers may wish to establish themselves in a Member State where the implementation may be most advantageous because the ECD broadly follows a "country of origin" principle.[81] Recital 22 ECD states: "*Information society services should in principle be subject to the law of the Member State in which the service provider is established*". As a result, it is the law of the Member State where the information society provider is established which applies. This is a rule however which is qualified for consumer contracts as it would encourage businesses to "forum shop" to escape

[79] Roger Brownsword, "Regulating Transactions: Good Faith and Fair Dealing", in Howells and Schulze (eds.), *supra* note 39 at 87-113

[80] Article 1 ECD.

[81] Covering what the Directive (art. 2 (h)) calls "the coordinated field", i.e. requirements laid down in Member States' legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them. This is quite broad and encompasses many things beyond the scope of the ECD's harmonised scope, including rules applicable to international law and jurisdiction or contract law rules. In addition, note that article 1(4) clearly states that the Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

more stringent national implementations and avoid the application of consumer law. For consumer contracts, an e-business should meet the laws of every Member States in which consumers can purchase its products.[82]

Meanwhile, the DSD sought it "*essential to the smooth operation of the internal market for consumers to be able to have dealings with a business outside their country, even if it has a subsidiary in the consumer country of residence*".[83] But here again, inconsistencies in implementation have led to market distortions and having to respect a large number of different laws protecting consumers has been identified as an obstacle to the furthering of the internal market and an unnecessary burden on businesses. Fragmentation also impacts legal certainty and consumer confidence, two other key regulatory purposes of the ECD[84] and the DSD[85]. Whilst the recognition of the validity of e-contracts in the ECD clearly increased legal certainty, it did not have the anticipated impact on consumer confidence in electronic commerce across the boundaries of Member States. Indeed, as the report on cross-border e-commerce in the EU from February 2009[86] reveals, "*while e-commerce is taking off at national level, it is still relatively uncommon for consumers to use the Internet to purchase goods and services in another Member State. The gap between domestic and cross-border e-commerce is widening as a result of cross-border barriers to online trade*".[87] The report confirms that these "*obstacles have created a fragmented e-commerce internal market*".[88]

[82] Note that article 3 ECD allows Member States to restrict freedom to provide information society services if they are for necessary reasons (as listed in article 3) and proportionate. The protection of consumers features as a necessary reason.
[83] Recital 3 DSD.
[84] Recital 7 ECD.
[85] The DSD sought to provide consumers with a level playing field, ensuring online contracting would not lead to a reduction in the protection received by consumers buying offline, see Recital 11 DSD.
[86] Commission Staff Working Document, Report on cross-border e-commerce in the EU, February 2009, SEC (2009) 283 final.
[87] *Supra* note 86, executive summary, p. 2. Some of the identified barriers to trade relate to:

- language, demographics, individual preferences, technical specifications or standards, internet penetration or the efficiency of the postal or payment system;
- the inability of consumers to access commercial offers in another member states because of mechanisms that prevent them placing orders;
- the lack of information on cross-border offers because it is difficult to make cross-border comparisons and because cross-border advertising is relatively uncommon;
- the regulatory obstacles faced by traders and the perceived difficulty to obtain effective redress when something goes wrong.

[88] *Supra* note 86, executive summary, p. 3.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

In a bid to alleviate the undesirable effects of minimal harmonisation recent Directives[89] have used maximum harmonisation, or full harmonisation as it is now called, whereby Member States cannot apply stricter rules than the ones in force at EC level. This guarantees, at least in theory, a fully harmonised playing field and facilitates cross-border trade, since the same rules will apply in all member states. This is the strategy adopted in the proposal for a Directive on Consumer Rights. The reasons behind this choice can be found in Recital 5 pDCR which notes that "*the cross-border potential of distance selling which should be one of the main tangible results of the internal market is not fully exploited by consumers*". This is directly linked to the disparities that exist between the laws applicable in the different Member States and the discrepancies already identified.[90] To remedy such fragmentation, full harmonisation of some key regulatory aspects is seen by the European legislator as a means to considerably increase legal certainty for both consumers and business, because they will both be:

> "*able to rely on a single regulatory framework based on clearly defined legal concepts regulating certain aspects of business-to-consumer contracts across the Community. The effect will be to eliminate the barriers stemming from the fragmentation of the rules and to complete the internal market in this area. These barriers can only be eliminated by establishing uniform rules at Community level. Furthermore consumers will enjoy a high common level of protection across the Community*".[91]

Interestingly, it is the same rhetoric that justified minimal harmonisation in the ECD and DSD that is being now used to call for full harmonisation. We are still talking about consumer confidence, functioning internal market, increased legal certainty. The objectives remain the same, but the legislative technique is changing. However full targeted harmonisation is vehemently criticised[92] and may be unlikely to fully address concerns. In particular this is so

---

[89] Directives 2005/29/EC on Unfair Commercial Practice and Directive 2008/48/EC on Consumer Credit are examples of such practice.

[90] Recital 6 pDCR: "*the laws of the member states on consumer contracts show marked differences which can generate appreciable distortions of competition and obstacles to the smooth functioning of the internal market*". Recital 7 adds: "*These disparities create significant internal market barriers affecting business and consumers. They increase compliance costs to business wishing to engage in cross border sale of goods or provision of services. Fragmentation also undermines consumer confidence in the internal market. The negative effect on consumer confidence is strengthened by an uneven level of consumer protection across the Community. This problem is particularly acute in the light of new market developments*".

[91] Recital 8 pDCR.

[92] See Geraint Howells and Reiner Schulze, "Overview of the proposed Consumer Rights Directive", in Howells and Schulze (eds.), *supra* note 39 at 6. The authors state: "*More fundamentally, it is hard to see how a maximal harmonisation approach per se can enhance this consumer confidence policy rather than a minimal harmonisation approach*" (p.8). Also see Hans-W Micklitz, "The targeted full harmonisation approach: looking behind the curtain", in Howells and Schulze (eds.), *supra* note 39 at 47. Notably this author warns that the legal certainty advocated in recitals 6 and 7 is an illusion (p.60). Further critiques can be found in Jan Smits, "Full harmonisation of consumer law? A critique of the draft Directive on Consumer Rights", *TICOM Working Paper* 2009/02 and Gilles Paisant, "Proposition de directive relative aux droits des consommateurs, avantages pour les consommateurs ou faveur pour les professionnels?", *JCP Ed G.* N°9, 25 février 2009, pp. 11-16.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

because it is doubtful that full targeted harmonisation will be able to effectively contribute to the realisation of the common market and reach a high level of consumer protection.

Indeed, Gilles Paisant notes, and we fully agree with him, that the reticence to buy cross-border can be found elsewhere than in legislative divergence.[93] Consumers do not abstain from buying across border because the law is not harmonised but because of other factors. These include technical limitations, as not all consumers have access to the Internet. They also include the fact that consumers prefer to contract with a professional that they know and is within relatively close distance rather than a business established abroad. To this we can add language barriers being of significant importance in the decision not to contract with a provider established abroad. It is not demonstrated by the Commission how the pDCR could effectively cater for the realisation of the common market. This is especially striking because even if we were to accept that full harmonisation could realise such goal, it could not in any event do so with any real degree of success, because what is subject to full harmonisation is only a small number of areas. Indeed, not all electronic contracts will be fully caught by the pDCR for example.[94] In addition, when it comes to electronic consumer contracts the rules contained in the pDCR would still have to be combined with the e-commerce Directive, which is not to be revised in the near future. The ECD is indeed a minimum harmonisation Directive and differences in implementation will subsist. As Mak indicates, maximum harmonisation is in fact a relative concept.[95] In addition, it is doubtful that the proposals made by the pDCR can provide consumers with a high level of protection. Whilst some proposals have some clear advantages many others will also lead to reduced rights than already granted for some European consumers. For example, the proposals concerning online auctions will lead to consumers being denied the right to withdraw as we will explain further below.

We cannot help but wonder if the energy expanded in moving towards a new legislative approach and full harmonisation would not have been better channelled towards making a consolidated instrument for e-commerce, albeit operating on a minimal harmonisation clause basis in order to stimulate cross-border electronic commerce? We will have to wait and see if being unsuccessful once in fully delivering on the promised objectives, the regulatory framework for electronic consumer contracts falls short yet again in future or if the proposed changes can deliver improved results. Much of course will depend, not only on the regulatory framework chosen, but also on the substantive rules it contains. It is those substantive rules that we will now review.

---

[93] *Ibid* p.15.

[94] At today's date, the proposal still excludes software from a right to withdraw and does not provide any further remedies if software is defective. Service contracts are also mostly excluded from the scope of the pDCR.

[95] Vanessa Mak, "Review of the Consumer Acquis: Towards Maximum Harmonization?", (2009) European Review of Private Law 59-60.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022. licences@copibec.qc.ca

II – The relative effectiveness of current and forthcoming substantive electronic consumer contract rules

Many scholars have over the last ten years or more discussed at length the problems raised by the formation and execution of e-contracts and the lack of clarity of the rules applicable in this area.[96] The proposal for a Directive on Consumer Rights[97] proposes to change a number of substantive rules applicable to electronic contracts. Indeed, the proposal suggests changes in matters concerning distance sales, unfair terms in consumer contracts and sale of consumer goods and associated guarantees.[98] However, whilst all three areas are relevant to consumers purchasing products and services online, the new proposed rules will not, in our opinion, all necessarily bring any improved effectiveness to the protection of consumers in the European Union. It is also unlikely in our view that the proposed Directive, partly for reasons explained above, will be able to deliver on its objective to improve cross-border trade.

Whilst some provisions of the proposal are controversial, some proposal will also be of real benefit. One thinks for example of the extension of the right to withdraw to 14 days, although we will see that our enthusiasm needs to be pondered as not all electronic consumer contracts will benefit from the right to withdraw. We can also think of unfair terms with the advent of some key features that should benefit consumers. According to Stuyck, the proposal for a Directive on Consumer Rights "*departs radically from the present Directive 93/13 in one important respect: the indicative list of unfair terms is replaced by two new lists: a black list of terms which are unfair in all circumstances and a grey list of terms presumed to be unfair*".[99] The introduction of a black and grey list is certainly an improvement and should come in handy to further protect consumers against unfair terms in particular in an online environment- in particular for fighting against arbitration and jurisdiction clauses as well as choice of law clauses which feature in the black list. The use of a black list should also prove rather uncontroversial as already a large amount of Member States use such device in their fight against unfair terms and we expect that this is one feature of the pDCR that should weather negotiations rather well.[100]

---

[96] See for example, Gringras , Smith G ed. *Internet Law* 4th edn. Chapter 10 Thomsons 2007, Reed and Sutter chapter 6th edn; Brownsword, R. and Howells, G. "When surfers start to shop: Internet commerce and contract law", (1999) 19 *Legal Studies* 287-315; Savirimuthu, J, "Online Contract Formation: Taking Technological Infrastructure Seriously", 2 *University of Ottawa Law and Technology Journal* 105 (2005), available online, http://www.uoltj.ca/articles/vol2.1/2005.2.1.uoltj.Savirimuthu.105-143.pdf, [15/05/2008].

[97] COM (2008) 614 final.

[98] Note that the proposal also includes reforms on the protection of consumers in respect of contracts negotiated away from business premises. Those are not relevant for e-commerce as they necessitate the parties meeting face-to-face.

[99] Jules Stuyck, "Unfair terms", in Geraint Howells and Reiner Schulze (eds.), *Modernising and Harmonising Consumer Contract Law*, (Munich: Sellier 2009) 144.

[100] But protection against unfair terms is only as good as its enforcement. The pDCR brings with it a reinforcement of the obligations of courts and administrative authorities to apply appropriate and effective means to prevent traders from continuing to use terms which have been found to be unfair. Currently, in the UK, it is primarily consumers who have to go to court to strike terms out of their contract, despite the OFT being mandated under the Enterprise

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

We will review a number of substantive rules that are being revised by the pDCR. These include information requirements (2) and the right to withdraw (3). We will also start our discussion with one crucial area that remains ignored by the proposal, but continues to be problematic: the formation of e-contracts (1).

1. Ghosts from the past: Formation of consumer e-contracts

We have already mentioned that the rules on contract formation are not clearly spelt out by either the DSD or the ECD and they will also vary depending on the means used to conclude the contract. Indeed, article 10 (4) and 11(3) ECD clearly exclude "contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications"[101], although under the DSD there is no such exclusion since both a website and email are means of distance communications.[102] The rules in articles 10 and 11 ECD, unhelpfully, are both confusing and partial for complicated political reasons. Due to the divergences between common law and civil law systems the European legislature felt unable to go so far as to harmonise the actual rules of formation for e-contracts across Europe as already mentioned. Instead they chose to focus on the ordering process and two common problem areas for B2C e-commerce: pricing errors by the merchant, and input errors by the purchaser, and, in essence, prescribe a good practice guide for how websites should set up their ordering process so as to minimise errors, and the consequences of errors, on both sides, but do not provide any answers to determining when a contract may be concluded.[103] Yet, determining when and how a contract is formed has an

---

Act 2002, Part 8. Clauses could in future get struck out in mass because the pDCR requires that representative action be opened to persons and organisations having a legitimate interest under national law. Such provision is already in place in France and fully operational. It has led in 2007 in the removal of a number of clauses from AOL's internet access contracts (See Cour de Cassation, 1ere civ, 8 novembre 2007, société AOL c/ associations UFC-Que choisir, AFA). This change would be an efficient way to target unfair terms in electronic contracts. Another efficient way, is to provide consumers with accurate information on the terms applicable to e-contracts, to enable them to make informed choices. For example, article 10(3) ECD provides consumers with more transparency by requiring that terms and conditions be made available to the consumer in a way that allows him or her to store or reproduce them. This requirement clearly entails that consideration be given to a number of factors, including the use of colour which may be suitable for online perusal of the site but render clauses illegible once printed on paper. For more on this point, see Mark E. Bundnitz, "Consumers surfing for sales in cyberspace: what constitutes acceptance and what legal terms and conditions bind the consumer?", (2000) 16 Georgia State University Law Review 773.

[101] Which may in our view also excludes SMS messages.

[102] SMS are also normally understood to be caught under the DSD. Under the pDCR we have seen that SMS would now clearly be caught by the Directive.

[103] This is, we have already seen, in contrast with the first draft of the Directive which ambition it was to define the legal contractual process.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022. licences@copibec.qc.ca

impact on the application of the DSD in particular, because a number of obligations have to be fulfilled "prior to the conclusion of any distance contract".[104]

As a result, the default rule is still to use contract law in place in the Member States. This creates some difficult problems nonetheless the pDCR does not address the issue. This is surprising because, Recital 8 pDCR states:

> "*Full harmonisation of some key regulatory aspects will considerably increase legal certainty for both consumers and business. Both consumers and business will be able to rely on a single regulatory framework based on clearly defined legal concepts regulating certain aspects of business-to-consumer contracts across the Community. The effect will be to eliminate the barriers stemming from the fragmentation of the rules and to complete the internal market in this area. These barriers can only be eliminated by establishing uniform rules at Community level*".

Yet we find it difficult to understand how one can remove all obstacles by only targeting key areas and not include in those key areas the actual legal formation of contracts. Without addressing this point, we do not see how rules can actually be harmonised. This is true even if we acknowledge that the pDCR does not deal with questions that are within the remit of the ECD. However, as we mentioned in our introduction, it is difficult to envisage any significant improvements in terms of consumer protection if the ECD is not also the object of reforms. Indeed, reforming substantive rules of the DSD without addressing contract formation still leaves major divergence issues. One simple example will be enough to be convinced. Currently, when a business may be bound by contract in France as soon as a consumer clicks "I accept", the contract is not even formed under UK law because of a difference in the legal classification of offers and acceptance.[105]

a. Offers and invitations to treat in electronic consumer contracts

Indeed, under UK law, Woodroffe and Lowe indicate, "*if the supplier were the offeror, then as soon as the consumer accepted the offer (e.g. by posting an order form), a contract would be made. This could pose difficult if not insuperable, problems for the supplier. A seller of goods would usually have limited stocks and be unable to meet an unexpected demand. Conversely, if it is the consumer who makes the offer when placing an order, the supplier will be in a position to choose whether to accept or reject it*".[106] An offer is defined in English law as "*a*

[104] See for example, article 4: Prior information needs to be given prior to the conclusion of the contract, so is a written confirmation. Similarly under article 6(1), the right to withdraw for services runs from the day of the conclusion of the contract. But this notion is not defined.

[105] Also see for the UK position, Christine Riefa and Julia Hörnle, "The Changing Face of Electronic Consumer Contracts in the Twenty-first Century: fit for purpose?" in Edwards and Wealde (eds) (2009), *supra* note 13 at 89-119.

[106] Woodroffe and Lowe's, *Consumer Law and Practice*, seventh edition, (London: Sweet & Maxwell 2007), 83, point 6:15.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

statement of willingness to contract on specified terms made with the intention that, if accepted, it shall become a binding contract".[107] An invitation to treat, by contrast, is a preliminary communication, an opening to negotiations. Under traditional English contract law, a display of goods in the window[108] or in the shop by the shopkeeper is deemed only an invitation to treat, not an offer. Indeed, in the leading case of *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd*[109] the Court of Appeal concluded obiter that the display of goods in the shop was an invitation to treat, and that the contract would only be concluded when the customer reached the cashier desk. Within the e-commerce context, a web site selling goods or services can easily be equated to a shop window display or the shelves of a self-service shop. Although this has not been tested in a UK court, there appears to be enough flexibility in the common law to warrant that this rule can adapt to new technologies and there has always have been strong doctrinal agreement on this point.[110] However, this interpretation needs to be contrasted with the approach in Continental Europe, where most legal regimes consider a website or a display of goods in a shop as an offer when it is made to consumers.[111]

b. Communication of acceptance in electronic consumer contracts

For the contract to be formed, an acceptance needs to meet the offer. Acceptance determines the moment and the place of formation of the contract. In the context of e-contracts, finding out when that moment is, or where this place may be is not straightforward and varies according to whether the contract is concluded by email, or by one of the web formation methods ("click-wrap", "browse-wrap" and "web-wrap"). [112] Here again divergence exists between the

[107] Robert Duxbury, *Contract Law*, (London: Sweet & Maxwell 2008)11.
[108] See *Fisher v Bell* [1961] 1 QB 394.
[109] [1952] 2 QB 795.
[110] See for example, ibid Woodroffe and Lowe's (2007), 83, point 6.15, fn 104; Andrew D. Murray, "Entering into Contracts Electronically: The Real W.W.W.", in Edwards & Waelde (eds), *Law & the Internet, A framework for Electronic Commerce* (Oxford: Hart Publishing 2000) 21. Also see amongst many others, John Adams and Roger Brownsword, *Understanding Contract Law*, 4th edition, (London, Sweet & Maxwell 2004) 59.
[111] There is also in the UK potential for an advert to be construed as an offer, although very little. In the interest of legal certainty and avoidance of dispute, a clear definition in terms and conditions that a display of goods is an invitation to treat and not an offer, may therefore be advisable, but cannot guarantee immunity as such term may be seen as unfair. In relation to advertisements, these are generally regarded as invitations to treat. However adverts can be regarded as offers capable of acceptance in particular circumstances. This was the case in *Carlill v Carbolic Smokeball Co* [1893] 1 QB 256. While similarly, most Internet e-commerce websites' display of goods would be interpreted as an invitation to treat, e-traders need to be aware of the potential danger of an advertising or promotional statement on a commercial website which could be interpreted as capable of being accepted leading to a unilateral contract. As Wegenek comments (in ibid Wegenek (ed) (2002) 13, fn 32), "*it may not (…) always be appropriate to consider a website as an invitation to treat. For example, if there is a link to a database which indicates the number of products available, it may be correct to view this as an offer*".
[112] For more on the different methods used to communicate acceptance and form contracts and the various methods used by website to bind visitors and users to their terms and condition, see ibid Riefa and Hörnle, in Edwards

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

different legal systems in place in the Member States that are regrettably not addressed by the pDCR.

In English common law, the general rule, as in most other European jurisdictions, is that acceptance is only effective when communicated to the offeror. However there is an important exception to this rule in relation to contracts concluded via mail, known as the "postal rule".[113] Such exceptions also exist in France, where one talks about "emission" theory rather than postal rule. We have already mentioned that the ECD introduced rules designed to harmonise the legal understanding across Europe of how and when an e-contract is formed. However these EC rules do not apply to "*contracts concluded exclusively by exchange of electronic mail*".[114] An important question however is to determine if a contract partly concluded via the use of email and partly via a website would be subject to the ECD. We believe so, as this is the only logical explanation we can find to the use of the word "exclusively".[115]Also as we will see, it is because the ECD requires orders to be acknowledged, which technically requires the use of emails in many instances. Therefore, when the contract is concluded via email only and not a mixture of web and email, the general rules on formation of contract, including potentially the postal rule, would apply undisturbed.

One crucial difference with contracts made via electronic mail, is that contracts formed over the web invariably are made on the standard terms and conditions of the merchant - whereas with emails, there is scope for negotiation on terms. Typically B2C contracts will be formed over the Web, with very few contracts being individually negotiated. Those are contracts often referred to as adhesion contracts.

---

andWaelde (eds), (2009)89-119, fn 104. See also, G.J.H. Smith (ed.), *Internet Law and Regulation*, fourth edition, (London: Sweet & Maxwell 2007) 821. The author gives a clear account of the notions of click-wrap, browse-wrap and web-wrap and their legal consequences.

[113] For more on this point, see Riefa and Hörnle, *supra* note 112. The authors explain that it is uncertain if this rule can be applied to electronic mail. However, note that in the UK, under Regulation 19(1) of the Consumer Protection (Distance Selling) Regulations 2000, the postal rule appeared to have triumphed. This Regulation states: "*Unless the parties have agreed otherwise, the supplier shall perform the contract within a maximum of thirty days beginning with the day after the day the consumer sent his order to the supplier*". But this would be limited to the scope of the application of the Regulations and will not extend to all contract types, only to B2C distance contracts. Unfortunately, one can question if such interpretation would remain valid in future, because the reference to the "day after sending an order" has disappeared from the text in the pDCR.

[114] Articles 10 (4) and 11(3) ECD. In the UK, this exception was implemented in Regulations 9(4) and 11(3) of the Electronic Commerce (EC Directive) Regulations 2002.In France, see article 1369-6 Code Civil.

[115] Also Recital 39 ECD states that the exceptions to the provisions concerning contract concluded exclusively by electronic mail or equivalent provided by this Directive, in relation to information to be provided and the placing not enable as a result, the by-passing of those provisions by providers of information society services. This seems to suggest, although it is not totally clear, that the ECD should apply if the exclusive use of email is only in order to having to avoid the provisions in articles 10 and 11 ECD.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

Article 10(1) ECD[116], provides that in e-contracts, the information society service should, prior to an order being placed, in a clear, comprehensible and unambiguous manner, provide its customer with information relating to:

> "*(a) The different technical steps to follow to conclude the contract;*
> *(b) Whether or not the concluded contract will be filed by the service provider and whether it will be accessible;*
> *(c) The technical means for identifying and correcting input errors prior to the placing of the order;*
> *(d) And the languages offered for the conclusion of the contract*".

This article is to be read in conjunction with article 11 ECD which deals more precisely with the placing of an order and the procedure to correct errors. This provision was heavily criticised at the time of the adoption of the Directive for not providing certainty in the formation of e-contracts[117], although as already noted, the reason for it was partly because of the problems of harmonising different underlying general national rules of contract.

If one needed further evidence of the necessity to intervene on the formation of contracts in order to truly harmonise European consumer law, the implementation of article 10(1) and 11 ECD provides an interesting example.

The legislation is hard to interpret in the English law context, because, as already mentioned, in a bid to meet the needs of both common and civilian Member States, the Directive refers on the whole to "orders" rather than contract law terminology. This terminology has also been adopted in the UK Regulations, the Electronic Commerce (EC Directive) Regulations 2002 (ECReg 2002). The intention is that in some, though not all, of the rules in the E-Commerce Directive, Member States were able to choose when implementing the legislation whether they defined "order" as equating to "offer" or merely as an invitation to treat. Thus Regulation 12 of the ECReg 2002 states under the heading "meaning of offer": "*Except in relation to regulation 9(1)(c) and regulation 11(1)(b), where "order" shall be the contractual offer, "order" may be but need not be the contractual offer for the purpose of regulation 9 and 11*". The Regulations thus identify two situations where an order is always to be considered an offer. Regulation 9(1)(c), the equivalent to article 10 ECD, concerns the information that should be made available to consumers prior to the conclusion of a contract regarding the technical means for identifying and correcting input errors prior to the placing of the *order*. Regulation 11(1)(c) (article 11 ECD) deals with the placing of the order and confirms that consumers should have available effective and accessible technical means to identify and correct input errors prior to the placing of their *order*. As a result, one can interpret that in situations dealt with in the aforementioned ECReg

[116] Implemented by Regulation 9 of the Electronic Commerce (EC Directive) Regulations 2002.
[117] See for example, Ramberg C, 'The e-commerce directive and formation of contract in a comparative perspective', (2001) 26(5) Entertainment Law Review 429-450.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

2002, the placing of the order is the contractual offer made to the business, thus confirming that websites can be interpreted as "invitation to treat". It is the consumer who, according to English law, makes an offer to the business. As a result, it appears that in cases where a website wrongly displays the price of an item on sale, there is no obligation to sell the said item. Many practical examples support this interpretation. For example we can usefully mention the case of Argos here, where the well-known high-street and online UK retailer had advertised television sets for £2.99 instead of £299. Dell experienced a similar problem, when its Chilean website started deducting money from the total bill for computer upgrades that should normally have been deducted. As a result, many consumers ordered a basic Dell Computer and upgraded to a Dual Core Processor for a total price of £77 instead of the £300 it should have normally cost. Having discovered the pricing error Dell refused to fulfil the orders.[118] It is interesting to note that had this case occurred on Dell's UK website, it appears that the manufacturer could have refused to fulfil the orders as no contract was concluded. Consumers placing the orders were only making an offer to Dell, which the manufacturer is free to accept or reject. This position is supported by Woodroffe and Lowe, who state:

> "*although there is no authority on this point, we consider that the offer is made by the consumer, e.g. by clicking on "submit" or "order", and acceptance occurs if – and only if – the supplier accepts by a further communication to the consumer, e.g. by sending an email acknowledgement or confirmation with a reference to the order or booking*".[119]

By contrast, article 1369-4 of the French Civil code refers to an offer being made by the professional. This professional is bound by his offer as long as the offer is accessible electronically of his own volition. The requirements of article 10(1) ECD regarding the different steps to conclude the contracts, the ways to rectify errors and the languages are all part of the necessary elements of an offer. As a result, it is clear that a pricing error for a product on a website in France would, in principle, bound the professional to fulfil the orders since the contract would be formed when the consumer orders the goods and communicates his acceptance.

c. Correction of input errors by consumers

According to article 11(2) ECD, "*effective and accessible technical means allowing the consumer to identify and correct input errors prior to placing the order need to be made available*".[120] Generally, websites provide a summary page where the details provided are shown to the consumer and where the consumer is asked to confirm this is correct before proceeding.[121]

---

[118] See Andrès Guadamuz, "Dell involved in massive pricing error", *TechnoLlama*, Thursday 10, July 2008, http://technollama.blogspot.com/2008/07/dell-involved-in-massive-pricing-error.html, last consulted [11/07/2008].
[119] *Supra* note 106 at 85
[120] Reg 11(1) (b) in the UK Regulations.
[121] Currently it is common to see tick boxes asking users to confirm that they will have read the terms and condition, or pop-up windows requiring users to scroll down through the terms and conditions (although this still does not guarantee actual reading thereof) before they can click an "I accept" button.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

This seems sufficient to comply with the ECD. The sanctions for the non-respect of article 11 and other ECD provisions were left at the discretion of Member States, providing that they are effective, proportionate and dissuasive.[122] In the UK, Regulation 15 ECReg 2002 states that "*in situations where the service provider has not made available means of allowing a person to identify and correct input errors in compliance with regulation 11(1)(b), the consumer shall be entitled to rescind the contract*".[123] The consequence for the consumer making an erroneous offer is therefore that he would not be bound by the professional accepting this offer if he did not have the opportunity to check the offer made. In France, the consequence is practically identical, as the contract is not validly formed if the consumer does not have the opportunity to check the acceptance he makes.[124] The French legislator does not talk about orders but offer and acceptance, one stark difference with the UK approach, since contract law terminology is clearly used in the French legislation, whilst in the UK, the term order is preferred.

One major flaw in this provision however, in both countries, is that without a corollary obligation to inform the consumer of such right, in practice the option of rescission will seldom be exercised and consumer in France may not have realised that they are in fact not bound by a contract that was never formed. This seems to therefore be a failure of the French and UK implementation in the sense that a sanction that is unknown to most consumers is unlikely to be exercised. Even if it is known, it is not, in our view, effective nor is it dissuasive and clearly contrary to article 20 ECD.[125] Luckily for many consumer contracts this lack of knowledge can be compensated by the possibility to withdraw from the contract under the DSD with the caveat that we will discuss further below.

Defining how and when offer and acceptance meet in an online environment is not an easy task as we have seen. The rules established by the ECD designed to protect consumers by providing them with information about the process and a possibility to check their order and know it is received, have not really helped. If anything they may have created more confusion, especially when one attempts to compare the practice in the UK and France. Regrettably, despite having looked into harmonising consumer contract law[126], which would provide for a uniform, or at least a more coherent, interpretation of key contractual notions such as offer and acceptance across the EU, the Commission has so far declined to deal with the differences amongst Member States on the general principles of contract law. The Commission is continuing to do so and the

[122] See article 20 ECD.
[123] Note however that the obligation to provide technical means to identify and correct errors is only imposed in B2C transactions. Businesses dealing with one another can choose to set this rule aside.
[124] Article 1369-5 French Civil Code, al. 1.
[125] The second flaw in UK law is that the service provider can ask a court having jurisdiction in relation to the contract to order otherwise even if the requirement was not fulfilled under Reg. 15.
[126] See Study Group on a European Civil Code/Research Group on EC Private Law (Acquis Group) (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, (Munich: Sellier 2009).

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

pDCR was published in advance of the Common Frame of Reference. In addition, Recital 25 pDCR maintains the objectionable rules developed in the ECD by stating that "*the rules on distance contract should be without prejudice to the provisions on the conclusion of e-contracts and the placing of orders as set by articles 9 and 11 of Directive 2000/31/EC*". Such position is clearly reiterated in article 3 on the scope of the Directive on Consumer Rights. If it is not changed during the negotiation round, most of the criticisms formulated above will unfortunately hold true for many years to come, especially since, at the time of writing, no reform of the ECD is planned. This is however a position which would benefit from being altered in the future if the Commission is truly committed to providing identical rules applicable across Europe in order to facilitate cross-border trade. At this stage we feel the Commission lacks focus and logic in how they approach the issue. One cannot advocate full targeted harmonisation and hope for improvements in cross-border trade if some of the most obvious obstacles are not actually dealt with. Note that it is not our view that such degree of harmonisation should be pursued, especially as we do not believe that this would improve cross-border trade in any significant ways. If the goal of increased cross-border trade and a high level of consumer protection is laudable it is not by full harmonisation of consumer protection rules that it can be magically attained. The full harmonisation method has been criticised for being pro-businesses rather that pro-consumers and we do share this feeling.[127] Indeed, one set of identical rules seems to benefit businesses that will no longer have to concern themselves with the laws applicable in the different Member States, rather than consumers who will have to lose some established rights in the process.[128]

2. Inflationary use of information and transparency requirements

Information and transparency requirements are imposed both under the ECD and the DSD, respectively in articles 5 ECD and article 4 and 5 DSD. As Winn and Haubold note, "*more concern could have been given to the information duties themselves of which the Electronic Commerce Directive and the Distance Selling Directive make an almost inflationary use. The lists of information duties in both Directives are long and not very well harmonised*".[129] This lack of harmonisation is indeed problematic but can be explained away by the fact that the Directives both have slightly different targets. The ECD protects all co-contractants (whether they are consumers or businesses), whereas the more demanding list of requirement in the DSD is here to protect specifically consumers. Interestingly, the pDCR brings some changes to the information requirements contained in the DSD with an inflationist trend as to the information required, but it does not provide more precision as to how this needs to be combined with the ECD. This over-inflation of information requirement is not as beneficial as one could first anticipate as we will see. It is therefore a real pity that the pDCR does not rationalise information

[127] *Supra* note 92 at 47 ; *supra* note 91.

[128] For example, consumers can currently choose what may be the most appropriate remedy if a product they purchased abroad is defective. This right will be taken away under the new proposal, clearly advantaging businesses. We will also see further below another example, with some consumers loosing a right to withdraw from online auctions.

[129] *Supra* note 20 at 577.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

needs at least for information that should be provided to consumers only. In addition, it may also be regrettable that the European Court of Justice is also of the opinion that information requirements under the ECD should be interpreted extensively rather than restrictively.

a. An extensive interpretation of Article 5 ECD by the European Court of Justice

Article 5 ECD requires the provision of information concerning the identity and geographical address of the provider, contact details, any professional identification and/ or authorisation (such as trade register number, supervisory authority, professional body, VAT registration as appropriate).

Recently, the ECJ in the case of *Bundesverband v Deutsche Internet Versicherung AG*[130] was given the opportunity to interpret article 5(1)(c) ECD which requires that consumers receive in addition to the name and geographical address of the provider, the "*details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner.*" In this case, the Bundesverband, the German Federation of Consumer Associations' brought an action against Deutsche Internet Versicherung AG seeking an order to cease the advertising of its insurance services on the Internet without allowing customers to communicate directly by phone. Deutsche Internet Versicherung AG (DIV), an automobile insurance company deals exclusively on the Internet and does not provide a telephone number on his web pages that consumers can use prior to the conclusion of a contract. Instead, an online enquiry form is provided enabling customers to ask their questions about the products and services.

Whilst many commentators had believed that the provision of an email address was sufficient to conduct business online and in compliance with the ECD, the court decided otherwise.[131] The ECJ interpreted this notion as meaning that a service provider had to supply the recipient of a service with other direct and effective means of information "in addition to" an electronic mail address. The ECJ defended its literal interpretation of the provision by explaining

[130] *Bundesverband der Vebraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband v Deutsche Internet Versicherung AG ECJ Case C-298-/07*, 16 October 2008.

[131] After detailed analysis, the ECJ concluded that "*article 5(1)(c) must be interpreted as meaning that a service provider is required to supply recipients of the service, before the conclusion of a contract with them, in addition to its electronic email address, other information which allows the service provider to be contacted rapidly and communicated with in a direct and effective manner. That information does not necessarily have to be a telephone number. That information may be in the form of an electronic enquiry template through which the recipient of the service can contact the service provider via the internet, to whom the service provider replies by electronic mail except in situations where a recipient of the service, who, after contacting the service provider electronically, finds himself without access to the electronic network, request the latter to provide access to another, non-electronic, means of communication*".

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022. licences@copibec.qc.ca

that it was clear from the wording that the Community legislature did not intend to limit the possibility of entering into contact and communicating with the service provider solely to electronic mail, as recipients of the service also needed to have access to a postal address. As a result an email address on its own could not satisfy the requirement of article 5(1)(c). Businesses need to supply an additional mean of information that enables direct and effective communication, but interestingly the ECJ stated that it did need not be a telephone number. But the court did not stop here and extended this literal interpretation further. Whilst accepting that a telephone number was not necessary to satisfy the requirements of article 5(1)(c), the court noted that in exceptional circumstances, a recipient of a service who has already made contact with a service provider via electronic means and who is unable to access the electronic network for various reasons, may require the service provider to supply access to non-electronic means of communication enabling him to maintain effective communication. The ECJ described the exceptional circumstances as the various reasons where an individual is deprived of access to the electronic network. It referred to a journey, a holiday or a business trip although we anticipate that this list is not exhaustive. In those circumstances, the provision of an electronic enquiry form is no longer a direct and effective means of communication and needs to be replaced by non-electronic means of communication. This may be a telephone or a fax number.

This extensive interpretation raises a number of problems.[132] Aside from being ambiguous on numerous points, the decision risks placing a heavy financial burden on businesses opting to conduct business online only. Answering the phones or a fax may require a different set-up from what is currently in operation and will clearly add to costs. Phone lines may need to be installed in sufficient numbers to ensure that customers get a direct and effective response to their enquiries and staff may need to be trained to handle those queries. In addition, it is astonishing that the ECJ would class a business trip, a holiday or a journey as exceptional circumstances. It is also intriguing that what was the virtue of the Internet, i.e. the ability to conclude contract at a distance regardless of geographic location, is now used against e-businesses. It is no longer acceptable to use the Internet only to conclude and administer a consumer electronic contract. Yet, it seems that heavier costs on businesses will be damaging to consumers. To satisfy a few, momentarily deprived from Internet access, the ECJ is risking disadvantaging many consumers for whom cost may rise. It is regrettable in our view that such an extensive interpretation of article 5 ECD was preferred by the ECJ when the literal interpretation of this provision was already providing consumers with sufficient protection. It is however interesting to note that under the ECD and this interpretation consumers are better protected by a piece of legislation which is not dedicated to their protection whereas under the pDCR they will in some instances end up being less protected as we will now see.

[132] For a full account, see Christine Riefa, Bundesverband der Vebraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband v Deutsche Internet Versicherung AG ECJ Case C-298-/07, 16 October 2008, *E-Commerce Law Reports* (2008), Vol. 08, issue 04, 6-7; also see Julia Hörnle, "Contact! The ECJ sets e-commerce obligations", *SCL* (2008-2009) Vol 19, issue 5.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

b. Lack of compliance with information requirements

Article 4 DSD requires that prior to the conclusion of the contract, the identity of the provider as well as its physical address be communicated to the consumer. One of the key issues here is that these requirements are often ignored on some e-commerce sites because anonymity precludes knowing if the seller is a business or consumer. On eBay and other online auction sites it is common for the parties to remain anonymous, in order to protect the site's revenue stream and stop the parties concluding sales outside of the site environment, thus avoiding the payment of the seller's commission. As a result, the identity of the parties is kept secret and only revealed after the close of the bidding process and the acceptance by the buyer of the highest bid as the winning bid. Businesses are required to provide details as to their identity so if fraud or breach of contract occurs the consumer knows who to complain to, or who to sue. Online, anonymity provides in many instances a shelter for fraudsters to use e-contracts to defraud users, creating complex questions of trust or lack thereof. The sale of fake goods and the growing numbers of scams on sites such as eBay are serious causes for concern. But for websites where anonymity is not being used, it is also regrettable to find that some of the most basic information essential to consumers is still missing. Indeed, an OFT web sweep revealed that still 14% of sites do not provide a physical address[133], whilst in their previous online shopping survey the OFT uncovered that one fifth of surveyed sites even failed to provide an e-mail address contrary to Regulation 6 of the Electronic Commerce (EC Directive) Regulation 2002 (article 5 ECD).[134]

Other requirements imposed by Regulation 7 of the DSReg 2000 relate to the goods or services object of the contract and the modalities of the contract. The obligation to disclose such information stems from the idea that it is information that the consumer will need to make an informed choice. This includes for example the price of the goods or service, including all taxes and delivery costs where appropriate, but also information about the arrangements for payment, delivery or performance, the length of time the offer remains valid, duration of contract, and the right to withdraw from the contract.[135] Here again compliance is an issue. For example, the OFT survey revealed that 40% of sites were not fully transparent about their pricing[136], adding extra charges at the check-out stage, when the consumer is already committed to the purchase and unlikely to back out of the purchase despite being unhappy about the additional hidden charges.

Before proceeding with changes to the information requirements already existent under the DSD and the ECD, we feel that better enforcement of the current requirement would be a

[133] Contrary to Reg 7 of the Consumer Protection (Distance Selling) Regulations 2000.
[134] OFT, Web Sweep Analysis, March 2008, OFT982. And yet as we have seen, an email only is no longer sufficient according to the ECJ.
[135] A for a more detailed exposé of the rules concerning pre-contractual information in distance sales, see Annette Nordhausen , "Distance marketing in the European Union", in Lilian Edwards (ed.), *The new legal framework for e-commerce in Europe*, (Oxford: OUP 2005) 239-276.
[136] OFT, Web Sweep Analysis, March 2008, OFT982.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022. licences@copibec.qc.ca

first step in the right direction. The Commission seems to assume that all information requirements have been well adhered to and conclude that they are not sufficient to provide consumers with a high level of protection, thus advocating some changes in the pDCR. However, without proper application of what is already in existence it is very difficult to assess if what is needed to stimulate cross-border shopping is a different set of information requirements or simply enabling consumers to be recipient of the information already in place, but not complied with. In addition, because many types of consumer electronic contracts are excluded from the DSD, we think of travel[137] for example, it is difficult to assess if the information requirement is in fact the culprit as until recently no such requirement was applicable to airlines. On this point, the European Commission's survey into airlines sites revealed that one of the main problems related to "*insufficient or unclear information about price, where the price is split into a series of diverse charges, and only becomes clear at the end of the booking process*".[138] Luckily for consumers, as a result of this survey, the EC has taken action, and included in article 23(1) of Regulation 1008/2008 on common rules for the operation air services in the Community[139] a provision which forces air services operators to disclose air fares and rates in a more transparent manner. Interestingly, because the DSD excludes air travel and package travel from the information requirement, the provision protecting consumers buying online are to be found in yet another EU instrument adding to the complexity of the regulations of electronic consumer contracts.

c. Impact of the pDCR on information requirements

Further action was taken in the pDCR which changes some of the information requirements in the DSD. If this proposal survives in its current wording, much of the already existing information obligations will remain. What is changed is the fact that the same set of general information contained in article 5 pDCR applies to all types of consumer contracts caught by the proposal. This includes distance contracts as well as contracts for sale concluded off-premises. Like in the past this information needs to be provided before the conclusion of the contract. This means that provision of the general information contained in article 5 can no

[137] Note that travel and holidays accommodation was ranked first in terms of the percentage of individuals shopping online according to the Commission Staff Working Document, "Report on cross-border e-commerce in the EU", SEC (2009) 283 final, p.5. It represented 42% of online purchases.

[138] Source Out-law.com, *"One in three airline sites breaks consumer law"*, News 13/05/2008, available online: http://www.out-law.com/default.aspx?page=9113

[139] OJ (2008) L293/3. This article states:

"Air fares and air rates available to the general public shall include the applicable conditions when offered or published in any form, including on the Internet, for air services from an airport located in the territory of a Member State to which the Treaty applies. The final price to be paid shall at all times be indicated and shall include the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication. In addition to the indication of the final price, at least the following shall be specified:

(a) air fare or air rate;
(b) taxes;
(c) airport charges; and
(d) other charges, surcharges or fees, such as those related to security or fuel;

where the items listed under (b), (c) and (d) have been added to the air fare or air rate. Optional price supplements shall be communicated in a clear, transparent and unambiguous way at the start of any booking process and their acceptance by the customer shall be on an 'opt-in' basis."

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022. licences@copibec.qc.ca

longer be con-commitment to acceptance. It is therefore likely to raise difficult issues in an e-contract context as this moment of acceptance may be occurring at different times depending on when the supplier is established (as we have already discussed above). This change is also creating problems for traders subject to the ECD. Indeed, under article 10(1) ECD, the information needs to be provided "prior to the order being placed", whereas under the pDCR the information only needs to be given before the actual conclusion of the contract. Remarkably, the ECD may appear here to be more protective of consumers, especially because it also requires that the information be provided "clearly, comprehensively and unambiguously", a requirement absent from the current wording of the pDCR.[140] As Nordhausen Scholes notes, electronic contracts do not get any less complicated for traders or consumers under the proposal. This is especially so because recital 25 pDCR declares the rules of the ECD to be unaffected. The result will be that traders will have to fulfil slightly different requirements arising from the ECD which follows the minimum harmonisation principle, as well as that of the pDCR with its targeted full harmonisation approach. We agree with this author that

> "*this causes some considerable doubt whether this is coherent with the aims of improving the functioning of the internal market and enhancing the likelihood of the consumer taking full advantage of the potential benefits of the internal market, given that a large proportion, especially of cross-border consumer contracts (and with further growth predicted) are electronic contracts.*"[141]

Nordhausen Scholes also notes that "*a chronological view shows that the information obligations in the consumer protection directives have become more and more detailed and more and more demanding as time has gone on*".[142] But this policy drive for consumer information is creating perverse effects transported into an online environment. Many website are suffering from an overdose of contractual term and information about the transaction which creates confusion and make consumers feel overwhelmed about the information they receive.[143] According to Gautrais, consumers are submerged by a multitude of contractual clauses, which creates incomprehension and lead to questioning the viability of the agreement entered into.[144]

---

[140] Although note that a similar requirement exists in the proposal in article 31(1) for contract terms.

[141] Annette Nordhausen Scholes, "Information requirements", in ibidHowells and Schulze (eds.) (2009) 222-223, fn 39.

[142] Nordhausen Scholes, *supra* note 141 at 213.

[143] See Pew Internet & American Life project, *Online Shopping: Internet users like the convenience but worry about the security of their financial information*, 13 February 2008, available online at www.pewinternet.org [11 March 2008], which indicates that 32% of shoppers have been confused by information they have found online during their shopping or research and that 30% have felt overwhelmed by the amount of information they have found online during shopping or research.

[144] See Vincent Gautrais, 'La formation des contrats en ligne', in Daniel Poulin et al (eds.), *Guide juridique du commerçant électronique*, (Montréal : Thémis, 2003) 143-164. One remarkable example is that of eBay, the online auction site. The terms and conditions are so precise, that many fully fledge lawyers feel overwhelmed by the task of reviewing the terms and conditions and their associated documents. Indeed, on eBay, users have access to much information which to be fully understood need to follow a link to the definition of particular terms or to policy

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022. licences@copibec.qc.ca

Winn and Haubold also comment that the information overflow may well result in the contrary effect that consumers do not read any of the information provided.[145] Whilst technology has allowed the communication of more information to the consumer enabling consumer to make theoretically better informed choices, it can also have a negative effect, and the legislator may be well inspired to review his inflationary information requirements to more manageable vital information. Interestingly for mobile contracts as we have seen, the legislator is happy to limit the information provided to the bare essentials, i.e the essential characteristics of the product and the total price.[146] Therefore this over-inflationary information drive seems to lack logic and coherence. It is questionable that more information will be required if the communication medium allows it. The medium alone should not motivate what information is provided or not to enable the consumer to make an informed choice.[147]

3. A limited right to withdraw from electronic consumer contracts

Article 6 DSD provides consumers with a right to cancel contracts concluded at a distance within seven days but there are some exceptions. The pDCR intends to set the cooling-off period at a flat 14 days to increase harmonisation across the Single Market, thus doubling the statutory limit in the UK. The key problem here for the e-commerce market is that the right to cancel does not currently apply to digital goods such as software, computer games, music, e-books or data and the pDCR does not change this.[148] Such products cannot be returned once

---

documents. The architecture of the site and the way links are organised impede a direct return to the original terms and conditions page, meaning that even the most versed lawyers end up literally lost.

[145] Ibid Winn and Haubold (2002), fn 20. This view is supported by Gillette, who explains that *"tendencies to disregard terms may also be exacerbated by cognitive errors, other forms of bounded rationality, or informational lapses that cause even reading buyers to misperceive the risks attending the goods they purchase or to apply improper discount rates to the risks they bear and thus to miscalculate the effect of unfavourable terms"*, in Clayton P. Gillette, "Pre-approved contracts for Internet commerce", 42 *Hous. L. Rev.* 975 2005-2006.

[146] The proposal for a Directive on Consumer Rights, article 11(3) states: *"If the contract is concluded through a medium which allows limited space or time to display the information, the trader shall provide at least the information regarding the main characteristics of the product and the total price referred to in Articles 5(1)(a) and (c) on that particular medium prior to the conclusion of such a contract. The other information referred to in Articles 5 and 7 shall be provided by the trader to the consumer in an appropriate way in accordance with paragraph 1."*

[147] This was in fact the position in Recital 11 of the DSD which states: "Whereas the use of means of distance communication must not lead to a reduction in the information provided to the consumer; whereas the information that is required to be sent to the consumer should therefore be determined, whatever the means of communication used." We see here another interesting u-turn on the part of the Commission! This has led some academic to reflect on what may be the most effective way of communicating with consumers. Some work is ongoing inspired by creative commons licences and their clear logos flagging the content of contracts also known as labelling systems. We also suggest Vincent Gautrais, "the colour of E-consent", (2003–2004) 1 *UOLTJ* 189.

[148] Bradgate commented: "The original draft and common position also excluded the right of withdrawal in the case of contracts for items which could be "immediately reproduced", intending this to refer to audio and video recordings and computer software. This was a little surprising since a consumer may be as disappointed with a compact disc or computer program bought by mail order as with any other item. The objective, of course, was to prevent consumers ordering such items, copying them (in breach of copyright) and then returning them. The final

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

downloaded clearly for fear that such items would merely be copied and then "returned" for refund.[149] Yet this is a portion of "goods" that is extremely popular with European consumers buying online according to the Commission's "Report on cross-border e-commerce in the EU" from 2009.[150] We fail to understand how the commission can feel that the pDCR will deliver a high level of consumer protection if some of the most popular purchases made online do not benefit from what is clearly the best protection, the ability to try a product that one did not have the opportunity to inspect and fully assess because of distance, nor see their product benefiting from provisions pertaining to their quality.[151] We also fail to comprehend how the Commission can feel that cross-border e-commerce can be improved if the products that are the most easily delivered cross-border because they are digital are not benefiting from at least similar protection. Nonetheless the market itself seems to have developed consumer-friendly norms e.g. offering partly functional free trial periods for software and some games, but this does not apply to all types of digital goods. Regrettably the pDCR does not bring any changes to the exceptions to the right to withdraw and software still remains non-returnable. More worrying, is the case of online auctions. The main difficulties arise here from the fact that the DSD exclude "auctions" from its scope but does not define what is to be understood by the term "auctions". Such lack of precision, has led some Member States to opt for different legal classifications of auctions and online auctions as conducted on eBay or similar sites in their implementing legislations. Such differences in interpretation have impacted widely on the protection that consumer buying cross-border may obtain. For example, a consumer buying on eBay in France will currently be protected by the Directive and be able to exercise freely his or her right of withdrawal, whilst a consumer in Estonia will also be protected but unable to withdraw. For a consumer in the UK there is much controversy as to whether or not he or she would be protected at all.[152] The pDCR,

---

version meets both objectives of protecting consumer and supplier by excluding the right of withdrawal in relation to contracts for the supply of audio and video recordings and computer software where the item supplied has been "unsealed" by the consumer. Suppliers can, therefore, protect themselves by supplying the goods in sealed packaging; the consumer can still withdraw if before unsealing the item (s)he realises that (s)he does not want it or that it is not what (s)he thought it was.", in Bradgate [1997] 4 Web JCLI, available online at: http://webjcli.ncl.ac.uk/1997/issue4/bradgat4.html#withdrawal. This interpretation is unsatisfactory in our view, since without unsealing software and trying it out on the computer it is impossible for a consumer to know if this will be the product he or she requires.

[149] Article 6(3) DSD. In the UK, see Regulation 13(d): "*Unless the parties have agreed otherwise, the consumer will not have the right to cancel the contract (…) in respect of contracts – (d) for the supply of audio or video recordings or computer software if they are unsealed by the consumer*."

[150] Commission Staff Working Document, "Report on cross-border e-commerce in the EU", SEC (2009) 283 final, p.5.

[151] See Christian Twigg-Flesner, "Fit for purpose? The proposals on sales", in Geraint Howells and Reiner Schulze (eds.), *Modernising and Harmonising Consumer Contract Law*, (Munich: Sellier 2009) 146-176. Also note as we remarked in our introduction that the sale of music downloads is excluded from the scope of Directive 1999/44/EC on the sale of consumer goods because this Directive only covers tangible moveable items and not intangibles. The pDCR does not change this.

[152] For more on this question see, Christine Riefa, "To be or not to be an auctioneer? Some thoughts on the legal nature of online "eBay" auctions and the protection of consumers", (2008) 31 *Journal of Consumer Policy* 167-194;

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022. licences@copibec.qc.ca

in its current wording, is striking out the right to withdraw from online auctions altogether and consumers, who so far were benefiting from it, would no longer be able to withdraw. In a previous article, we have described this as a dangerous and unjustified erosion of consumer rights, which is unlikely to foster confidence in cross-border e-commerce and should be amended.[153] Our view has not changed.

Another issue is the fact that the right to cancel, when it can be exercised, is unknown to many consumers[154] and is not, in any case, well complied with by businesses. In the UK, the OFT web sweep[155] found that 15% of sites were not complying with Regulation 7(1)(a)(vi) DSReg 2000. This Regulation requires that the retailer informs the consumer of his or her right to cancel prior to the conclusion of the contract in compliance with article 4 DSD. In addition, contrary to article 6 DSD (Regulation 14(1) DSReg 2000), which provides that on cancellation, consumers shall be reimbursed free of any charge, the survey found that a more worrying 31% of surveyed sites did not refund the full cost of the goods. Admittedly, under article 6 DSD and Regulation 14(5) DSReg 2000 a charge can be applied to the return of goods, but it cannot exceed the direct costs of recovering any goods supplied. But those provisions in general were devised to ensure a level playing field between consumers buying face-to-face and those who buy at a distance. If the return of unsuitable goods is too expensive, the cost of doing business at a distance is no longer advantageous and confidence in e-commerce will deteriorate. It is therefore regrettable that still a large proportion of surveyed sites do not adequately reimburse consumers returning goods. The rule is maintained in the pDCR. Yet this does not sit comfortably with ambitions of improving cross-border trade. One can only hope that e-businesses will be more forthcoming in future, or that perhaps more dissuasive sanctions can be put in place or better educated consumers can start applying the rights they have. Otherwise, we really fail to see how a right to withdraw in its current states can successfully encourage further cross-border electronic trade.

Conclusion

As we have seen, e-commerce is now one of the most important retail channels in Europe. The legal regime applicable to it has developed organically and is fragmented with a vast array of text applicable, the DSD and the ECD being the backbone of the legal regime in Europe. Recent changes introduced by the pDCR will impact this legal regime and offer a good opportunity to review and assess the legal landscape for electronic consumer contracts. We have reviewed two main areas: the regulatory framework and the substantive rules applicable to electronic consumer contracts.

---

from the same author, "A dangerous erosion of consumer rights: the absence of a right to withdraw from online auctions", in ibid Howells and Schulze (eds) (2009) 175-187, fn 39.

[153] *Ibid*, fn 152.

[154] Internet Shopping: an OFT market study, Annex H, OFT June 2007. This survey shows that 56% of Internet shoppers surveyed online did not know about their right to cancel.

[155] OFT, Web Sweep Analysis, March 2008, OFT982, pp. 20-28.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

The piece meal approach to electronic commerce paid off with the introduction of article 9 ECD as it boosted e-commerce without having to wait for the elaboration and negotiation of a fully dedicated instrument able to regulate the whole of e-commerce. The introduction of the ECD focusing on only a handful of legal aspects was efficient in reacting to the needs of the time and enabling e-commerce to flourish. The provisions pertaining to the validity of e-contracts have been largely successful in creating a framework in which electronic commerce could develop. Under this framework, e-contract evolved fast – 10 years from B2B contract via a slow email service to B2C and C2C virtual contracts, all in one clean sweep.

We are now entering in a different phase though – e-commerce no longer seeks to develop, but has attained a certain maturity in most European Member States.[156] It is therefore time to prepare a regulatory environment able to cope with consumer needs in the digital age. The patchwork of Directives has not, in our view, worked sufficiently well to foster strong consumer confidence in electronic commerce, nor has it achieved the full development of a single internal market. Indeed we also noted this regulatory approach to electronic consumer contracts in Europe created much confusion and renders the application of the current regulatory framework difficult at times. This is because electronic consumer contracts need to submit themselves to the application of many different pieces of legislation, all with different definitions of what an e-contract or who the consumer may be. The scope of the DSD and ECD are also unclear when it comes to new type of e-commerce contracts and in some situations, it is uncertain if a consumer could be protected by the DSD for example when entering into a contract via an auction on Second Life or even eBay. The use of anonymity for sales over the Internet has also compounded the difficulties linked with knowing if a piece of consumer friendly legislation may be applicable to a given electronic contract or not. Regrettably, none of those issues are finding viable responses in the pDCR.

In turn, because of the regulatory technique adopted in the past (minimal harmonisation), national implementations have been diverse, creating further disparities in the internal market. The Commission has reacted by changing tactics and using full targeted harmonisation in the pDCR as a tool to encourage better cross-border consumer electronic transactions. However, we doubt this can be truly efficient as a legislative technique. Instead we feel that the move to maximum harmonisation will lead towards a business friendly regulatory framework which may well cater for increased legal certainty but not towards a systematic increased protection of consumers. In any event, the reform in the pDCR will not alleviate many of the problems linked with the concomitant application of the DSD and ECD, since, the ECD, a minimal harmonisation Directive, is not up for reform in the foreseeable future.

[156] Although we have seen that the Eastern European block was still in a development phase.

Droits d’auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022. licences@copibec.qc.ca

But as we have seen, the success of the regulatory framework for B2C electronic commerce is not just dependant on the legislative technique adopted but very much on the substantive rules applicable.

The pDCR provides a useful backdrop for the elaboration of rules that can efficiently serve consumers in an electronic environment. But the changes proposed are likely to bring mixed results. We say mixed results, because it is clear that some proposals, such as those on unfair contract terms, should be mainly a positive change. But, some other proposals, like the absence of a right to withdraw for online auctions or the choice of remedy for defective products being pushed towards businesses, if maintained, will represent dangerous erosions of consumer rights in Europe. It is also astonishing that the pDCR does leave some critical areas completely untouched.

We regretted that the ECD does not go further to provide a blueprint for the formation of e-contracts nor does the pDCR. We commented at length on the difficulties this causes on the formation of electronic consumer contracts across Europe. Indeed, there are no harmonised rules to determine when a B2C e-contract may be concluded, which impacts on the application of the DSD, because a number of obligations have to be fulfilled "*prior to the conclusion of any distance contract*". This issue is ignored by the pDCR despite the clear will of the Commission to eliminate all barriers through the establishment of uniform rules at Community level. If we agree with the logic behind the adoption of the pDCR, i.e. effectively contributing to the realisation of the common market and reaching a high level of consumer protection, then intervention in this area seems essential and is cruelly lacking.

In addition, the pDCR leaves aside (and completely unresolved) issues pertaining to software downloaded from the Internet. This is perhaps for us the most unfortunate oversight, since software and in general digital goods are the portion of "goods" that is a) extremely popular with European consumers buying online and b) is the most easily delivered cross-border. Further we have seen, the pDCR completely ignores new forms of electronic contracts concluded in virtual environments contributing further to a weakening of consumer rights.

One area the pDCR does not ignore is that of information requirements. But, as we explained, we do not believe that the proposed changes will be as beneficial as one could first anticipate, primarily because the pDCR does not rationalise information requirements across the DSD and the ECD. It is also linked with the current trend for an inflationist use of information requirements, which does not have the desired effect on consumers. Finally, the pDCR makes some changes in the area of right of withdrawal for consumers. Whilst on the one hand the extension of a right to withdraw to 14 days is a positive move, the exclusion of a number of "products" from the right to withdraw will have a negative impact. In these two later areas we clearly expressed our disappointment to seeing a change in the rules whilst current good law is not properly enforced and was therefore not given a chance to prove its potential efficacy.

Droits d'auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022.
licences@copibec.qc.ca

Overall, we doubt the pDCR will be the panacea and can in its current version achieve the anticipated results. We can only hope that the negotiations that are now to take place on this instrument amongst Member States can lead to a more workable framework, truly stimulate cross-border e-commerce and protect European e-consumers effectively in the very near future.

Droits d’auteur et droits de reproduction. Toutes les demandes de reproduction doivent être acheminées à Copibec (reproduction papier) – (514) 288-1664 – 1(800) 717-2022. licences@copibec.qc.ca