

## Louisiana Law Review

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Volume 62 | Number 4

*Essays in Honor of William D. Hawkland - Unifying  
Commercial Law in the 20th Century: Understanding  
the Impulse and Assessing the Effort - Symposium  
Summer 2002*

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### Repository Citation

Saul Litvinoff, *The European Union and Electronic Commerce*, 62 La. L. Rev. (2002)  
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# The European Union and Electronic Commerce

Saul Litvinoff<sup>1</sup>

## PRELIMINARY REMARKS

The European Union is extremely sensitive to the advantages and problems that derive from the digital age. Although the European Community recognizes legal problems arising from the information based economy, it is also aware of the opportunities that electronic commerce creates for economic growth. This growth is prompted by the advent of new goods and services and results in greater competitiveness, as well as additional new jobs. However, this information based economy seems to ignore national borders and presents a challenge to the legal systems of the member states thereby bringing to the fore the need for harmonization of rules across the community.<sup>1</sup>

### I. THE DIRECTIVE ON ELECTRONIC COMMERCE

In pursuit of elusive harmonization, in the year 2000, the European Parliament and the Council of the European Union issued the Electronic Commerce Directive (the "Directive"). The Directive is like an order addressed to the member states with binding effects and establishes the parameters within which the members states are to adjust their domestic legislation to obtain a desired harmonization, if not uniformity.<sup>2</sup> The Directive is regarded as a landmark and is aimed at promoting the enactment of rules that will allow easy prediction of the outcome of possible disputes and will inspire confidence in businesses and consumers. These results are achieved by making the perpetration of fraud more difficult, and by creating instrumentalities for the widest possible divulgation of information on the rights and obligations of parties who trade in electronic commerce.<sup>3</sup>

The Directive is a comprehensive document that contemplates many matters. Only a few of the provisions will be highlighted.

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1. See Graham Pearce & Nicholas Platten, *Promoting the Information Society: The EU Directive on Electronic Commerce*, 6 Eur. L.J., Vol. 363, 363-65 (2000). See also Iteanu, Olivier, *Internet et le droit* 30-34 (1996).

2. Council Directive 00/31/EEC, 2000 O.J. (L. 178) 1.

3. See David Goldstone & Betty-Ellen Shave, *Essay: International Dimensions of Crimes in Cyberspace*, 22 Fordham Int. L.J. 1924 (1999).

These provisions were selected based upon their connection with the endeavor of finding alternative means to reach the objectives that traditional law finds increasingly difficult to attain in the dazzling, but also puzzling, sphere of cyberspace.

## II. PREVENTING DISCRIMINATION

The European Court has emphasized several times the free movement of services may easily fall prey to restrictions contained in domestic regimes governing sales. Therefore, one clear goal of the Directive is to prevent the member states from discriminating in their own domestic law against service providers of other states. Examples of restrictions the drafters of the Directive likely had in mind include the French requirement that electronic contracts entered into by French consumers be drafted in the French language, as well as provisions of the German consumer law that restrict the use of certain special offers, such as "we will give you two for the price of one," as promotional devices.<sup>4</sup> Restrictions of the latter kind recently prompted complaints to the Commission by Land's End, the well known American mail order retailer, American Express, the financial services provider, and also by the Dutch music company Polygram. The complaints were based on the clear grounds that such restrictions are an obstacle to the sale of services across borders within the internal market of the European Community. To alleviate the problem one section of the Directive provides member states will not be allowed to impose requirements of their own on services providers from other member states when the requirements exceed those of the Community law. Accordingly, the German prohibition of "two for one" offers will not be applicable to web-sites based, for example, in Belgium.<sup>5</sup>

Concerning the law that should govern business organizations that operate across borders, the Commission contemplated the alternative that such enterprises be required to comply with the requirements of the systems of the different states in which they operate. The Commission regarded that alternative as unworkable. Instead, the Directive provides that it suffices for those enterprises to comply with the requirements of the law of the state where they are established. The Directive further defines the place of establishment as the one where a company, for example, is engaged in business activities from a fixed site, regardless of the situation of the pertinent web-site or service.<sup>6</sup> For companies or providers registered in several states, the

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4. Pearce & Platten, *supra* note 1, at 369.

5. Council Directive 00/31/EEC, 2000 O.J. (L. 178) 1, art. 3.

6. Council Directive 00/31/EEC, 2000 O.J. (L. 178) 1, preamble 19.

place of establishment is the one where the Company's activities for a particular service are centered. Thus, providers whose services are offered in more than one member state only subject themselves to the legal requirements of one country.<sup>7</sup>

Provisions regarding location also have an important impact upon conflict of laws questions. In particular, the Directive does not extend its scope over enterprises not physically located in any member state, nor does it impose on member states any obligations concerning the way in which the state regulates the furnishing of on-line services by entities located in third countries. Nevertheless, one of the many purposes expressed as a preamble states that the Directive should be consistent with legal protocols being considered by international organizations such as the World Trade Organization, the European Organization for Co-operation and Development and UNCITRAL.<sup>8</sup>

### III. SOME GENERAL PROVISIONS ON CONTRACTS

The Electronic Commerce Directive is not the first effort by the organs of the European Community to promote better trust and confidence in electronic buying and selling. An earlier attempt, known as the Distance Selling Directive, imposes upon on-line providers the duty to furnish information about their address, the character and features of the goods and services offered, the terms on which they are willing to trade, the price of whatever they offer, and their policy concerning the return of goods. The Distance Selling Directive also imposes a duty to clearly impart information on how to make and confirm a purchase, the means of protecting the information received from trading partners, and the ways in which customers may obtain redress in case of complaints or dissatisfaction. All of this information is to be made available to prospective purchasers prior to the conclusion of any contract.<sup>9</sup> That Distance Selling Directive is not superceded by, but should to work together with, the Electronic Commerce Directive. The latter, however, additionally requires that member states impose upon providers the duty to supply potential clients with information about the identity and geographic location of the provider, the provider's electronic address, the professional or trade register where the provider is listed or entered and, where applicable, the provider's value added tax (VAT) number. Furthermore, another section the Electronic Commerce Directive addresses providers who make promotional

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7. *Id.*

8. Pearce & Platten, *supra* note 1, at 370.

9. *Id.* at 371.

offers, such as discounts, gifts, competitions, and games. The Electronic Commerce Directive requires these providers present their conditions clearly and unambiguously, and that they identify the member state in which they are located. This final requirement is included to assist in determining the domestic law that would be applicable if a dispute arises in the future.<sup>10</sup>

Concerning contract formation, the Commission originally proposed that a contract be regarded as concluded when the provider acknowledged the client's or recipient's acceptance, but that proposal was not received in the final version of the Directive. Rather, one article provides, except when otherwise agreed by non-consumer parties, member states shall ensure that in cases where the recipient of the service places his order through technological means the following two principles are observed: first, the service provider must acknowledge receipt of the order without undue delay and by electronic means; second, the order and the acknowledgment of receipt are deemed to be received when the parties to whom they are addressed are able to access them. The first principle will not apply, however, to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communication.<sup>11</sup>

Taking into account the agility or instantaneity of electronic communications, the question arises whether a provider's acknowledgment of a recipient's order can be regarded as other than an acceptance in the absence of very specific language to the contrary. The principle that identifies reception and accessibility is consistent with continental law where reception has always prevailed over transmission to determine the moment at which an acceptance is effective. This brings to mind the tongue-in-cheek comments of an American federal judge about the whimsical behavior of electrons in cyberspace, comments that seem geared at persuading the reader that the good old mailbox rule of *Adam v. Lindsell*<sup>12</sup> makes perhaps more sense for electronics than for conventional mail.<sup>13</sup>

#### IV. REDRESS AND REPUTATION

The Directive reflects awareness of the skepticism of consumers and small businesses about the reliability and security of e-commerce and attempts to contribute to dispelling this mistrust. For instance, the Directive appears to admit that the reputation of providers and the accessibility to consumers of sources of information about that

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10. Council Directive 00/31/EEC, 2000 O.J. (L. 178) 1, arts. 5, 6, and 7.

11. Council Directive 00/31/EEC, 2000 O.J. (L. 178) 1, art. 11.

12. 106 Eng. Rep. 250 (K.B. 1818).

13. *In re Marin Motor Oil, Inc.*, 740 F.2d 220, 228 (3d Cir. 1984).

reputation are means of strengthening consumers' confidence in e-commerce. To that end, member states are required to establish information service contact points that shall be electronically accessible and inform consumers about organizations from which information can be obtained and where complaints may be filed if disputes arise. Additionally, the Directive provides that member states and the Commission shall encourage the drafting of codes of conduct by consumer, trade, and professional associations or organizations at the community level. These codes of conduct shall be designed to contribute to the proper implementation of the provisions in the Directive and shall be accessible in the different community languages by electronic means.<sup>14</sup>

In spite of that, with unmistakable realism, the Directive contains numerous provisions on litigation of disputes thereby reflecting the belief that, for the time being, redress must still be dispensed by courts.<sup>15</sup> The litigation provisions offer less interest against the background of the subject here discussed and may face serious problems of jurisdiction. Accordingly, their effectiveness may be dependent on some doctoring of the basic and organic Treaty of Rome.<sup>16</sup>

Nevertheless, through its Joint Research Centre the Commission has ordered exploratory research on the implementation of on-line out-of-court dispute settlement systems for e-commerce.<sup>17</sup> Likewise, the Consumer Protection Commissioner has put pressure on member states, "[t]o establish fast-track national gateways which would link consumers with out-of-court 'alternative dispute resolution' bodies, based in the same country as the provider from whom goods and services were purchased."<sup>18</sup>

#### CONCLUSIONS

The implementation of on-line out-of-court dispute settlement systems seems to entreat the imagination to run loose, or perhaps wild and, with slight abuse of language, to start pondering whether there would be electronic courts. This sounds feasible. One also wonders whether means will be found for the electronic enforcement of the decisions of such courts through, for instance, the electronic attachment of funds in accounts and the electronic placing of liens on property, if found. Taking this one step further, it is possible that the

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14. Council Directive 00/31/EEC, 2000 O.J. (L. 178) 1, arts. 16, 20.

15. Council Directive 00/31/EEC, 2000 O.J. (L. 178) 1, art. 18, preamble (52).

16. See Pearce & Platten, *supra* note 1, at 375.

17. Commission Report on an exploratory study of out of court dispute settlement systems for e-commerce, 1999 O.J. (C 198) 56.

18. Pearce & Platten, *supra* note 1, at 377.

enforcement mechanisms could be carried out by national or even international cybersheriffs whose advent might very well have already been augured by the appearance of the cybernotary who certifies electronic signatures.<sup>19</sup>

A good question seems to be what to do in the meantime, that is, in the time it takes science-fiction to become reality. One initiative could be to take advantage of traditional instruments and apply them to the new reality with the required modifications. Thus, continental codes of commerce start by addressing the person of the merchant in the first place, starting with a definition, and then requiring the inscription of merchants in special registries in order for those persons to enjoy the protection and advantages that the law provides to their professional activity. One such example is the privilege of merchants using entries in their own books as proof of the existence of a disputed transaction, or a credit in their favor.<sup>20</sup> The inscription in the pertinent registry requires, in varying degrees by different jurisdictions, the furnishing of evidence of solvency and good character. Logically, obtaining the pertinent inscription and the licence that follows is already at least an indicium of, or a first step towards, the establishment of reputation. The organization of a similar on-line registry for those whose livelihood entails selling goods or providing services through the internet should not present great technical difficulties and the cost could be quite reasonable.

Payment for goods and services on-line poses additional problems. One special concern is payment with the practical, but vulnerable and archperilous, credit card. Rather than transmitting directly the pertinent number to an on-line seller, of whom not very much is known, the information could be given to a sort of on-line escrow agency. This agency would credit the payment to the seller once the buyer communicates on-line that satisfactory goods have been received. This instrumentality may very well exist since the underlying idea is such a simple one.

Besides creating or disseminating information about reputation using the Good Housekeeping or eBay approach, a sort of on-line Consumer Report could be implemented. This report could deal not only with the quality of goods but also with the reliability of sellers. This option does not appear to present unsurmountable technical, or even financial, problems.

When the aid of the law, though theoretically available, is practically out of reach, reputation may very well be an alternative for

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19. See 5 Litvinoff, *Louisiana Civil Law Treatise: The Law of Obligations* 317-18 (2d. ed. 2001).

20. See for example, Articles 1-17 of the *French Code de commerce* (1807), and Decree No.58-1355 of Dec. 27, 1958.

the creation of confidence in transactions that stabilizes and enlarges markets. However, before the cybersheriffs arrive the defense of reputation against unfair discredit will have a cost. On the other hand, the hazzards of risk are very deeply imbedded in social, political, and economic human interaction. It is not the task of the law to protect persons against all risks, especially the risk of making a poor decision that leads to a failed transaction. However, since first systematized by the Romans, western law never promised that its enforcement would entail no cost.

