

# Chapter 7

## Negotiating and entering into e-contracts

### Introduction

#### E-commerce is booming

The advent of the Internet has presented enormous opportunities for businesses and consumers around the globe. E-commerce enables trading at low cost across regions and national frontiers. To reap its full benefit, efficient logistics services need to be developed so that speed of delivery can be compatible with speed of placing orders.

The lion's share of Internet generated revenue is taken by business to business transactions. The business to consumer turnover on the Internet remains paltry by comparison.

Trading on the Internet is in essence no different to trading using the more conventional means of face-to-face meetings, telephones, letters and faxes. The general rule is that a business person should conduct themselves in cyberspace as they would in any other medium. Difficulties and uncertainties arise largely because in view of the relatively recent accessibility of the Internet, the legislators have not been able to keep apace of developments and promulgate specific laws. It will be of some comfort to those planning to trade on the Internet that the common law (found for example in England, the US and former British Commonwealth countries), with its flexible approach, can largely be interpreted to give a solution to almost any issue raised by e-commerce. Civil law systems (such as are found, for example, in most of Continental Europe and South America), are less flexible. This leads to a lacuna in these civil laws in respect of e-commerce, and greater uncertainty as to how a cyberspace situation might be viewed.

## Global developments in e-commerce policy and law

There has been a general move around the world in the last decade to legislate for the electronic commerce sector. The UN General Assembly adopted on 16 December 1996 a UNCITRAL model law on electronic commerce. Since then, several of the major trading states of the world have adopted e-commerce legislation.<sup>29</sup> The European Commission has also taken several initiatives. The most important pieces of legislation from the European perspective are:

- The E-Commerce Directive 2000/31/EC of 8 June 2000;
- The E-Signatures Directive 1999/93/EC of 13 December 1999;
- The Distance Selling Directive 97/7 of 20 May 1997 (applicable only to business to consumer transactions); and
- The Data Protection Directive 95/46 of 24 October 1995.

The adoption of these Directives signifies a major step in the creation of e-commerce legislation. However, it is by no means the final solution for two reasons. First, the Directives by their very nature are limited to the European Union in their scope and application. Although as a general rule they are broadly in harmony with legislation emanating from other major trading nations, they do not replicate it. Second, the Directives had to be implemented into national laws by domestic legislation. The Directives themselves frequently give national governments discretion as to the terms of such domestic legislation. This means that divergencies are preserved and created between national laws within European Member States.

It is noteworthy that the E-Commerce Directive only applies to the activities of service providers established within the European Union. The place of establishment of a company providing services by an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity. The Directive does not apply to information society services supplied by service providers established outside the European Union. However, the E-Commerce Directive specifies that in view of the global dimension of electronic commerce, it is appropriate to ensure that the Community rules are consistent with international rules. The E-Commerce Directive is therefore without prejudice to the result of discussions within international organisations (amongst others, WTO, OECD and UNCITRAL).

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<sup>29</sup> Most notably, the Uniform Electronic Transactions Act in the United States

Difficulties are caused by the fact that almost no e-commerce is purely domestic and that there is no European, let alone global harmonisation of e-commerce legislation. By definition, the use of the Internet raises the question of the application of overseas laws and the even harder question of how any conflicts between these various national laws will be resolved. Each country has its own set of 'private international laws' which seek to resolve such conflicts (see chapter 3). These private international laws are largely unharmonised from a global perspective and therefore leave many questions unanswered. There is as yet no 'law of cyberspace' and there is unlikely to be any for the foreseeable future. There is however a body of common practice developing and which it is expected will be refined as trading on the Internet increases. For example, the introduction of the ICANN Arbitration System has greatly simplified disputes in respect of certain domain names.

This chapter seeks to deal with the principal issues facing those wishing to contract on the Internet, namely:

- Pre-contract considerations.
- Who the parties are.
- Forming valid e-contracts.
- Using standard terms.
- Website design and hosting agreements.
- The Distance Selling Directive.
- The Database Directive.

## Pre-contract considerations

Several points need to be borne in mind before a contract is entered into, as follows:

### Pre-contractual liability

Many civil law countries have a relatively developed doctrine of 'pre-contractual liability', which imposes a legal obligation on both parties to negotiate in good faith. Under English law, either party may generally withdraw without liability from negotiations at any stage before the contract is signed (see chapter 2).

Trading internationally on the Internet highlights the different approaches taken on this point across the globe. An English business person, unaware of the

existence of this doctrine overseas, could easily be caught out if they engage in a series of e-mails and then decide not to go ahead. Equally a continental European could be surprised to find they have no recourse against an English counterpart if discussions subject to English law terminate. To some extent, pre-contractual liability can be prevented from accruing by applying a common law, such as English, to all negotiations. This method is not entirely watertight, since the private international laws of the civil law country may apply the domestic law irrespective of the chosen English law.

### **Advertising and marketing**

There is currently no international unanimity as to which law governs advertising and marketing on the Internet. In some countries, it is believed that the law of the country where the advertising originates will apply; in others, it would appear that the country where the advertising and marketing is accessed by users apply.

The safest, but expensive course to follow when setting up a website is to ensure the advertising used complies with the rules applying in the relevant jurisdictions.

The E-Commerce Directive has to some extent relieved businesses of the burden of ensuring that they comply with individual Member States' advertising rules. Article 3 (1) requires that information society services provided by a service provider established on a given territory shall comply with the national provisions applicable in that Member State. In other words, the principle of 'host rule' will apply. However, it is likely that conflicts will arise between national legislation implementing the E-Commerce Directive and pre-existing advertising laws of other Member States. Some such national advertising laws, particularly when they have been promulgated to protect consumers and children, are likely to be 'mandatory' and applied by their national courts to any advertising that may be accessed by nationals, irrespective of the E-Commerce Directive. This means that businesses will still, to be on the safe side, need to check the advertising laws of other countries, albeit they could limit their search to mandatory advertising laws.

Further, it should be checked that the advertisement does not constitute a unilateral contract or standing offer that can bind the seller without any further action on the seller's part (see below).

The website should be prepared carefully so as not to make any misrepresentations (untrue statements which induce a purchaser to enter in to a contract) in relation to the goods or services being offered.

## Global self-regulation

The International Chamber of Commerce issued revised guidelines on advertising and marketing on the Internet in April 1998. These guidelines are not binding and are always subordinate to existing national law. However, ICC Codes and Guidelines are frequently used, particularly in the Member States of the EU, as providing the core of domestic codes, or as offering guidance on the interpretation of the laws dealing with unfair trade practices.

The ICC Guidelines cover all advertising and marketing on the Internet, including text, pictures, animation, video and audio, and they also include software. Its principal provisions are as follows:

- All advertising and marketing should be legal, decent, honest and truthful. 'Legal' is presumed to mean legal in the country of origin of advertising and marketing messages.
- Advertisers and marketers of goods and services should always disclose their own identity.
- Advertisers and marketers should clearly inform users of the cost of accessing a message or a service where the cost is higher than the basic telecommunications rate.
- Advertisers and marketers should respect the role of particular electronic newsgroups, forums or bulletin boards as public meeting places which may have rules and standards as to acceptable commercial behaviour.
- Users' rights should be protected, in particular there are provisions governing the collection, use, disclosure, correction and blocking of data and also ensuring data privacy. Unsolicited commercial messages must not be sent on-line to users who have indicated that they do not wish to receive such messages.
- Measures safeguarding the interests of children to ensure that they are not exploited or harmed are included.

The ICC has also issued draft guidelines for presenting advertising online that await finalisation.

### **Invitation to treat/offer**

It is vital that websites are prepared so that no unintentional offers are made by an unwitting seller, to which they may be bound in the event of an on-line consumer accepting them. The law already provides that when a shopkeeper displays goods for sale, he is merely making an invitation to treat, which is the stage before making an offer. It is the prospective purchaser who makes the offer to purchase by taking the goods to the counter. The shopkeeper may then accept to sell the goods. The important distinction between invitations to treat and offers is that a party can be bound by an offer but not by an invitation to treat. It is generally preferable for statements on websites to be invitations to treat so that stock supplied and identities of purchasers can be controlled. It is unclear whether the laws of different jurisdictions will generally treat websites as invitations to treat or offers. To be on the safe side, it is best to state specifically that statements on websites are invitations to treat and not offers and the seller will not be bound by orders placed by customers until they are accepted.

### **Information**

The E-Commerce Directive provides that a service provider shall render at least the following information to recipients of the service:

- The name of the service provider;
- The geographic address at which the service provider is established;
- The details of the service provider, including their electronic mail address;
- Where applicable, the trade register in which the service provider is entered and its registration number;
- Particulars of any relevant supervisory authority;
- Any professional body with which the service provider is registered, the professional title of the service provider and the Member State where it has been granted, and a reference to the applicable professional rules in the Member State where the service provider is established and the means to access them;
- The VAT number.

Further, the E-Commerce Directive stipulates that prices must be indicated clearly and unambiguously and must state whether they are inclusive of tax and delivery costs.

## Unsolicited e-mails

The E-Commerce Directive partially legislates for unsolicited e-mails. It provides in Article 7 (1) that Member States which permit unsolicited commercial communication by electronic mail, shall ensure that such communication by a service provider established in their territory, shall be identifiable clearly and unambiguously as soon as it is received. Article 7 (2) further provides that Member States shall take measures to ensure that service providers undertaking unsolicited commercial communications by e-mail, consult regularly and respect the opt-out registers in which natural persons not wishing to receive such e-mails can register themselves.

The E-Commerce Directive therefore only deals with the matter insofar as Member States have already set up opt-out registers. It does not require Member States to set up opt-out registers and those that had not were under no obligation to provide protection against unsolicited e-mails.

## The Data Protection in Electronic Communications Directive 2002

The Data Protection in Electronic Communications Directive (The Electronic Data Protection Directive) introduced further rules in relation to unsolicited e-mails, and also addressed the use of 'cookies'.

Member States have until October 2003 to implement the provisions of the new Directive in their domestic laws.

The Electronic Data Protection Directive provides that a consumer must have indicated that he or she is willing to receive unsolicited commercial e-mail, text messages, faxes or telephone calls from automated calling systems before these communications can be legally sent. In other words, the 'opt-in' approach has been adopted. This will change the current position in the UK when it is implemented into UK law, although it reflects the current position in some other Member States.

Where a business obtains from its existing customers their e-mail addresses in the context of sales or services, that business can use the address for direct marketing of its own similar products or services, provided the customer is given the opportunity to opt-out.

The use of mobile phone location data must be subject to the explicit consent of the individual phone user and users should have the possibility temporarily to block the processing of location data at any time.

Cookies are small text files that can be sent to an Internet user's computer to store certain information about that user for later use by the website. The Electronic Data Protection Directive limits storing information on an Internet user's computer or accessing such information by stating it is only allowed:

“...on condition that the subscriber or user is provided with clear and comprehensive information in accordance with [the Electronic Data Protection Directive about] the purposes of the processing and is offered the right to refuse such processing.”

## Who are the parties?

### Buyer

Businesses may not wish to sell goods and services to everyone on the Internet. For example, there may be trade embargoes blocking sales to certain countries. Local laws may prohibit the sale of certain substances, such as tobacco, to minors. Companies do not wish to sell to a child who is unable to pay for the goods. There may be strong consumer protection laws in force in certain countries which could lead a company to be on the receiving end of a writ which will be hard to defend.

Electronic signatures and smart cards may be used to ascertain or control with whom a contract is made on the Internet. The following methods may also be used by businesses to control to some extent with whom they are about to contract. Although they are not water-tight, their operation would be taken into account by a court when determining whether digitised services were intended to be sold in a particular jurisdiction:

- If a company is to deliver goods or services, request the delivery address at an early stage and reject the customer if the address is within a vetoed country.
- Carry out a web server check to ascertain the purchaser's country of registration of their domain name if it is a national one (this will not necessarily be the same as the place of incorporation or trading activity but will at least give some indication).
- Utilise a 'cookie' to obtain a general geographical location by detecting the time zone offset used by the customer and reject customers outside the time zone in which it is intended to trade.
- Consider including a disclaimer on the website whereby the website is stated as intended only for certain nationals or groups of people.

## **Seller**

It is important to ascertain who is the seller in any given e-commerce transaction. The position is clear in the case of a wholly owned, designated, website. However, the flexible nature of trading on the Internet has led to a number of emerging Internet business models whereby one business is affiliated to another and the two share a common website. In such instances, it is vital that the parties agree between themselves whether they are to be joint sellers (and potentially jointly liable) and for the website to make it clear if this is the case. Similar issues may arise when parties agree to revenue sharing advertising which links through from one interactive site to another where transactions for products are entered into on both. It is important to ascertain whether the original site, or the linking site is a 'retailer' for implied warranty and product liability purposes.

## **Contracting is easy on the Internet**

Having set up a website and placed advertising material on it, the next step is hopefully to receive orders for goods. One of the advantages for sellers, and disadvantages for purchasers, is it is easy to enter into a legally binding contract. Few formalities are required under the laws of most EU Member States. There are exceptions (for example, sales of land and agency contracts, if requested by one of the parties, must be made in writing) but most everyday contracts will be enforceable provided there has been an offer, acceptance and an intention to create legal relations. Some countries' laws require consideration (i.e. value) to pass between the parties. It follows that contracts can in principle be validly made either by e-mail or the World Wide Web.

Even outside the remit of the Internet, businesses often form contracts without realising they have done so. Commencing work on the basis of oral negotiations or a draft contract will rarely mean there is no contract, only that its details will be less certain than if standard terms were used or a signed agreement was in place.

The ease and speed with which communications can be made by e-mail creates its own set of problems. This, coupled with its informality, means that users are more likely to contract on the basis of communications which are less precise or considered than might be the case with a carefully drafted letter or fax.

### Usual sales laws apply

The general legal rules governing the type of contract to be entered into will apply to online contracts as well as offline contracts. In order to ascertain which laws apply, it is necessary first to decide which law governs the contract (see chapter 2.1). Then, the transaction must be categorised as to whether it is a sale of goods or services, and whether the sale is to a business or consumer, in order to ascertain which category of domestic laws will apply. The supply of products in digital form over the Internet rather than in hard copy form, has given rise to uncertainty as to whether this constitutes goods or services. The position is still unclear, but it would appear to be regarded as goods by the laws of most countries and therefore subject to Sale of Goods legislation.

### Which law governs contracts made on the Internet?

In view of the international nature of most e-contracts, it is vital that a governing law clause is included.

#### **THE LAW WITH WHICH THE CONTRACT IS MOST CLOSELY CONNECTED**

If a governing clause is not stated, in the EU, the Rome Convention provides that the law with which the contract is most closely connected shall apply. There is a rebuttable presumption that the law shall be the law of the 'characteristic performance', being the law of the place where the party who has to effect the characteristic performance has his seat of business.

The application of this rule to contracts made on the Internet may on occasions unfortunately apply a law which has little connection with the reality of the contract, particularly where, for example, the seller may have set up business in one country with a favourable tax regime and the goods never physically pass through that country. In such a case, the law of the country where the seller has set up business would nevertheless apply.

The Rome Convention provides special rules relating to consumer contracts and individual employment contracts. Whichever law is applicable by choice of the parties or otherwise, consumers and employees will remain protected by the mandatory rules of their country of habitual residence. In the case of consumers, this will apply if the purchases are made in their home country (the most obvious example being via the Internet), or on the strength of local advertisement or a direct offer. This provision opens the floodgate to overseas consumer protection laws applying to Internet transactions. This important consumer protective provision is unaffected by the E-Commerce Directive.

## Forming valid e-contracts

### Which law governs the execution of a contract made on the Internet?

In international contracts, it is vital to check that the parties purporting to sign the contract are duly authorised to do so. The law governing this question will be the law of the place of registration of the Company or the domicile of the individual. Indeed, the wording of the signatory clause will also be governed by that law. Technology has now developed so that computers can 'talk' to each other without human intervention. This raises the question of whether computers can validly contract, without human intervention. It is submitted that the question will in each case fall to be determined most probably by the law of the country where the computer resides at the time of entering into the contract. Most countries require an intention to create legal relations as a pre-requisite to entering into a valid contract. It would seem that if a computer has been programmed by a duly authorised individual with the intention of such programme enabling a computer to enter into a contract, such 'duly authorised computer' can enter into a legally binding contract.

### The E-Signatures Directive 1999/93

The E-Signatures Directive has now been implemented throughout the EU. It follows the US and UNCITRAL lead by adopting a hybrid approach to e-signatures. It provides that all electronic signatures will have legal effect and be enforceable. It further allows for a hierarchy of electronic signatures by stating that those which are based on a qualified certificate issued by a certification service provider which meets certain criteria will be recognised as satisfying the requirement of a handwritten signature and be admissible in evidence in legal proceedings as if they were handwritten.

It further provides that those who provide certification services need not be authorised, but that national voluntary accreditation schemes may be implemented. It follows that businesses will have a free choice as to whom they choose to certify their signatures. However, if they wish to rely in law on the certificate, they should choose a service provider who meets the specified criteria.

The extent to which uncertified electronic signatures may be admissible as evidence in courts is unclear. In practice the courts usually accept computerised evidence and have continued to do so following the implementation of the E-Signatures Directive. However, uncertified e-signatures carry less evidential weight.

The UK has implemented the E-Signatures Directive by way of the Electronic Communications Act 2000 and the Electronic Signatures Regulations 2002.

### **The E-Commerce Directive**

The law relating to contracting on-line has to some extent been harmonised within the EU by the E-Commerce Directive. Although Member States were given until 17 January 2002 to enact implementing legislation, many have not yet done so. The UK has carried out a public consultation on implementation of the Directive. As a result of the consultation, a draft Statutory Instrument was promulgated, namely the draft Electronic Commerce (EC Directive) Regulation 2002. This is being debated by the UK Parliament.

It is not within the scope of this paper to deal with all aspects of the Directive; the commentary below is confined to its provisions relating to e-contracts.

#### **SCOPE OF THE DIRECTIVE**

The E-Commerce Directive covers 'information society services', i.e. most e-commerce activities.

#### **ELECTRONIC CONTRACTS**

Article 9 makes it clear that it must be possible to contract electronically. The laws of Member States must not deprive such contracts of legal effect and validity simply because they have been made electronically. This does not apply to contracts requiring a notary, to be registered with a public authority, or those governed by family law or the law of succession.

Article 10 provides that a service provider must explain clearly and unequivocally how a contract shall be formed by electronic means, prior to the conclusion of a contract. The exception to this requirement is when B2B contractors agree otherwise. In particular, information must be given as to:

- the different stages to follow to conclude the contract;
- whether or not the concluded contract will be filed by the service provider and whether it will be accessible;
- how input errors will be identified and corrected. (The Directive is silent on what is understood to be such an error);
- the languages offered for the conclusion of the contract; and
- relevant codes of conduct to which the service provider subscribes.

The requirement to give this information does not apply when contracts are concluded by exchange of e-mail or equivalent individual communications.

Contract terms and conditions provided to the recipient must be made available in a way that allows him to store and to reproduce them.

This Article intends to ensure that parties will give their full and informed consent to electronic contracts.

### Placing orders

The E-Commerce Directive gives parties in a B2B situation freedom to contract. However, if the businesses do not agree how contracts are to be entered into, the provisions of Article 11 that apply to sales to consumers will also apply. Article 11 establishes that when a purchaser places an order through technological means, the service provider must acknowledge receipt of the order without undue delay and by technological means. This provision is qualified by Recital 34 that provides that the acknowledgement of receipt by a service provider may take the form of the on-line provision of the service paid for.

Further, the electronic order and acknowledgement are taken to be received when the party to whom they are addressed is 'able to access it'. This provision marks an unusual departure from the general rule as to the time when a contract is formed. Generally, a contract is formed when the acceptance of the offer is effective. The laws of the countries in the EU generally apply either the 'postal rule' or the 'receipt rule' to determine when the acceptance is effective.

According to the 'postal rule', a contract is made when the communication is sent. The theory is based upon the premise that acceptance of the offer takes place when the offeree loses control over the risk of mis-communication or non-delivery. In the Internet environment, the equivalent moment would be when the offeree clicks the send button in order to send an e-mail. Control over the message is lost but the message has not yet been received by the offeror.

The application of the 'postal rule' to e-contracts has not yet been decided by any court. It would have seemed appropriate that the 'postal rule' should apply equally to e-mails as to letters and faxes, since the methods of communication are inherently similar. However, the provision of Article 11 of the E-Commerce Directive, which opts for the 'receipt rule' in consumer transactions and business transactions where the parties do not otherwise agree, will prevail.

It is important that parties to a B2B transaction agree at the outset whether the 'postal rule' or 'receipt rule' is to apply.

## Using standard terms

Parties using e-mail to sell goods or services should take care to ensure all the terms of the contract are as clearly agreed as in off-line circumstances. Electronic standard terms and conditions, whether in digital form or otherwise, are subject to the usual rules and must be incorporated into individual contracts. On the Internet this is often done by making readers scroll through them before acknowledging they have been read and accepted by means of a hypertext link (known as 'click wrap'). Since the website will usually comprise a mere invitation to treat, it is important that not only does it list the terms and conditions in such a way that the purchaser has to read them before moving through the site, but also that the document constituting the offer by the purchaser refers to the terms and conditions and accepts them.

The purchaser should have no means of altering the terms of the invitation to treat when they come to making an offer. The most obvious example of this is the price: the customer should be presented with fixed prices, no blank boxes, and only the possibility to confirm the offer by clicking a button.

It is generally not possible to assume acceptance from silence. It is therefore advisable for the seller to state at the outset in the terms and conditions how acceptance can take place.

## Website design and hosting agreements

Businesses are increasingly realising that a website is a vital element of their marketing strategy. It is, after all, a virtual shop window that can be seen by interested parties all around the globe. That, coupled with the desire to protect the goodwill built up in the company name and/or trademark or service mark by registration of a domain name, has prompted a proliferation of websites to be set up over the past few years. Businesses have naturally grown on the back of this development, principally web designers and web hosters. Although the two services may be provided by the same party, they are more usually provided separately.

## Web Designer Agreements

The following points should be agreed and confirmed in the written agreement:

### **WHO OWNS THE INTELLECTUAL PROPERTY IN THE DESIGN OF THE SITE?**

If the contract is silent, a consultant web designer will own the intellectual property in the designs they create on behalf of the company. It is therefore desirable to obtain:

- an assignment of intellectual property rights from the consultant to the business;
- a warranty from the web designer that the website will not constitute an infringement of any other party's intellectual property rights; and
- consents of any third parties in respect of the use of any intellectual property rights owned by any such third party.

### **EXCLUSIVITY**

The business may seek to impose upon the web designer an agreement that they will not design a website for any competitor and that they will work exclusively for the particular business in relation to their particular sector of activity. This will be difficult commercially to obtain, and in any event may be anti-competitive.

### **CONFIDENTIALITY UNDERTAKING**

The web designer will need to be privy to certain confidential information relating to the strategic plans of the business. It is desirable that such plans are protected by way of a confidentiality undertaking.

### **WEB TERMS**

Place the onus on the web designer to ensure that the on-line and off-line business of the company are in harmony, from both a marketing and legal perspective. It may be that the standard terms and conditions of the company are amended for use on-line. This should only be done with extreme caution since otherwise questions of evidence may arise in the event of a dispute, as to which set of terms apply to any given contract.

### **SUB-CONTRACTS**

The web designer should agree that they will enter into sub-contracts upon similar terms to the main contract if they sub-contract any part of the design or the graphics.

## Web Hosting Agreements

It is important that the 'shop window' is kept on permanent display insofar as possible. Accordingly, the following clauses should be included in a web hosting agreement:

### **THE LOCATION OF THE HOST**

This will have an impact on liability and also regulatory issues.

### **DETAILS OF UPTIME AND DOWNTIME**

These should be calculated and specified in detail. In particular, the business should seek to ensure that the website will be available during the normal trading hours of its principal trading partners.

### **DISASTER RECOVERY**

Provisions for the website to be transferred to another site should the web host fail completely. In order to do so, it is vital that the business be given the object and source code of the website.

Liability of the web host for content and for damages for lost business due to the website not being available.

### **INSURANCE**

Who shall take out and pay for insurance to cover the site being down for more than a specified period?

## Liability of ISPs

This is a very sensitive area as intellectual property rights holders wish to ensure that their property rights, such as logos and brand names, are not undermined by imitators on the Internet. The area is regulated by the E-Commerce Directive, that seeks to create a balance between the interests of rights holders and Internet service providers. Rights holders want to ensure that if an infringement is brought to their attention, it can be swiftly rectified with the offending material removed. On the other hand, service providers are adamant that it is impossible to monitor the Internet for content.

Liability for intermediary service providers is contained in Articles 12 to 15. This exonerates the service provider from liability for mere conduit (Article 12) or caching (Article 13) provided that the service provider does not initiate the transmission, select the receiver of the transmission and does not select or modify the information. Article 14 exonerates the service provider from liability for

hosting provided the provider has no actual knowledge of illegal activity and is not aware of facts or circumstances from which an illegal activity is apparent, or upon gaining actual knowledge acts expeditiously to remove or disable such information.

Article 15 makes it clear that there is no general obligation actively to seek facts or circumstances indicating illegal activity. However, Member States may impose obligations on intermediary service providers to inform competent authorities of alleged illegal activities.

## The Distance Selling Directive 1997/EC

### Principle provisions

The Distance Selling Directive, which has been implemented by all Member States, has made an important impact on Internet sales to consumers. The object of the Directive is to harmonise Member States' laws on contracts between suppliers and consumers for goods and services concluded at a distance as part of a sales or service provision scheme. It applies to most contracts entered into as a consequence of an organised distance sales or service provision scheme – i.e. Internet as well as mail order, telephone selling, and selling through radio or television. It will not apply to classified advertising in newspapers and periodicals.

#### THE MAIN PROVISIONS OF THE DIRECTIVE ARE:

- **Prior information:** Detailed specified information must be given to a consumer before a distance contract is concluded. The information should include the identity of the supplier, the main characteristics of the goods or services, delivery costs where appropriate, the price of the goods or services including taxes, the existence of a right of withdrawal (where appropriate), and the arrangement for payment, delivery, or performance of the contract. If the consumer does not receive the information in writing (or in some other durable medium) at the time of solicitation, it must be confirmed in writing at a later stage. In the case of goods this is no later than delivery, except when the goods are ordered for delivery to third parties, in which case the supplier may send confirmation to the consumer at a later stage.
- **Cooling off period:** The consumer is given a general right – subject to certain exclusions – to a 7 day cooling-off period during which he may withdraw from a distance selling contract without giving reasons

and without penalty. The introduction of this significant right is viewed by many as a major obstacle to selling consumer goods on the Internet. If the price of the goods or service is fully or partly covered by credit granted by the supplier (or granted to the supplier by a third party) the credit agreement is cancellable, without penalty, if the consumer exercises his right of withdrawal.

- **Delivery:** The supplier must deliver the order within a maximum of 30 days from the day following that on which the consumer forwarded his order to the supplier, unless the parties have agreed otherwise.
- **Fraudulent use of credit card:** Member States must ensure that measures exist to allow the consumer to request cancellation of a payment where fraudulent use has been made of his payment and to be recredited with the sum paid or have them returned.
- **Use of distance communication:** The prior consent of the consumer is needed when a fax or 'automated calling system without human intervention' (automatic calling machine) is used.
- **Governing law:** Member States must ensure that the consumer does not lose the protection granted by the Directive by virtue of a choice of law of a non-EU Member State if the consumer has a 'close connection' with one or more Member States.

## The Database Directive

### Introduction

The European Parliament and Council have recognised that making databases requires the investment of considerable human, technical and financial resources while such databases can be copied or accessed at a fraction of the cost needed to design them independently. In order to redress this imbalance, they have issued a Directive<sup>30</sup> (the Directive) which is now law throughout most of the E.U. This law is a very welcome addition to the welter of laws that emanate from Brussels, since it provides greatly enhanced protection to information, such as market research data which is held in databases. It also ensures that the maker of a database is properly paid if it is used by someone else.

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<sup>30</sup> Directive 96/9/EC of the European Parliament and of the Council

**GENERAL RIGHTS IN MARKET RESEARCH DATA**

Before the Directive was issued, data may have been protected by copyright, and also by the law of confidentiality. The computer programs used in the making or operation of a database are protected by an entirely separate directive<sup>31</sup>. There is also a directive dealing with renting and lending databases<sup>32</sup>. These measures remain unaffected by the new Directive.

**The new rights under the Directive****SUI GENERIS RIGHT FOR DATABASES**

The most important right created by the Directive is the so-called 'sui generis' right, which allows the maker of a database who can show that there has been qualitatively and/or quantitatively a substantial investment in producing the contents (substantial investment) to prevent others from transferring the contents elsewhere or making them available to the public. The really significant aspects of this right are that it applies *irrespective* of whether the database would otherwise be protected by copyright or any other legal principle, and it is obtained automatically, without the need for any further steps, such as registration, to be taken. Further, the right can be transferred by way of a licence.

**HOW LONG DOES IT LAST?**

The sui generis right begins to run when the database is completed, and expires 15 years from the 1st January of the year following completion. If the database is made available to the public during this time, the period of protection is extended to 15 years from the 1st January when the database is made available to the public. The law also recognises that databases are frequently updated and amended and provides that if the alterations result in the database being considered to be a substantial new investment, a new period of protection shall start to run. It follows that data which continues to be substantially updated will probably enjoy protection of the most recent version for approximately 15 years.

**WHAT ABOUT DATABASES CREATED BEFORE 1ST JANUARY 1998?**

The Directive is retrospective, and provides that any databases completed on or after 1st January 1983 which fulfil the 'substantial investment' test on 1st January 1998 shall be protected until 15 years from the date of completion.

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31 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs

32 Council Directive 92/100/EEC of 19 November 1992 on rental and lending right

### **COPYRIGHT IN DATABASES**

The Directive also attempts to harmonise national EU copyright laws in so far as they relate to the selection and arrangement of databases. It provides that if an author makes an 'intellectual creation' by selecting or arranging the contents of a database (the 'expression' of a database), it will be protected by copyright. This copyright will attach solely to the selection or arrangement of the research data, and will not attach to the contents themselves. This is an important development of copyright, since previously copyright only attached to the contents of a database, rather than the methodology by which they were put together. This is often the hardest, most skilful, and time-consuming part. As stated earlier, this part of the law has no effect on the existing national and Community laws relating to copyright in the *contents* of databases.

The owner of the copyright in the 'expression' of the database will have the *exclusive* right to reproduce, translate, adapt, and distribute it, among other acts. They will also be the only person able to authorise others to do so.

### **HOW LONG DOES THE COPYRIGHT PROTECTION LAST?**

The copyright in the 'expression' of the database lasts for the usual period of copyright, namely for 70 years from the date of death of the author of the work. The Directive again makes these rights retrospective by providing that if a database was created before 1st January 1998, and fulfils the 'expression' requirement on that date, copyright shall accrue. It does not specify the date from when the copyright should be deemed to run, but it is assumed to be the date of creation rather than 1st January 1998.

### **INTERNATIONAL EXHAUSTION**

An interesting point raised by the drafting of the Directive is whether the owner of *sui generis* rights or copyright in a database will lose those rights by selling the database, or permitting it to be sold, outside the Community (the so-called 'international exhaustion of rights' principle). In a landmark case, the European Court has held that in the field of trademarks, a similarly worded law does not create international exhaustion, thereby allowing, for example, manufacturers of branded clothes to sell their goods to distributors in the USA and then prevent these goods from re-entering the Community for sale on the 'grey market' at greatly reduced prices. By analogy, it would seem likely that the same interpretation would apply to the Directive.

The effect of this is that an owner of sui generis rights or copyright in a database, who sells or allows another to sell their database in the Community will lose the right to control any resales of the database. If an owner sells or permits a sale outside the Community, they can probably legitimately restrict a purchaser from reselling the database in the Community.

### Practical steps

The effect of the Directive is that new rights are accorded to creators of databases. These rights are not registrable, and accrue without any action being taken. The most important steps to be taken to ensure that the rights are preserved, and can be used effectively against others, are to:

- keep records of when, how, and by whom databases are created and amended;
- agree with the individual creating or amending the database in whom the rights will vest (if an employee, they will be deemed to vest in the employer);
- contractually bind employees (and, where appropriate any third parties) to keep databases and their contents confidential;
- protect computer software by passwords, encryption of material or other means; and
- enter into carefully drafted agreements if others are permitted to see, use or alter the database or any part of it.

### Conclusion

Electronic Commerce is already revolutionising the way business is done. It is changing the way businesses, of all sizes, work internally and interact with their customers and suppliers. The opportunities to trade using the Internet are immense, whether business to business or business to consumer.

Many national laws are applicable to trading on the Internet and they should be borne in mind by those engaged in e-commerce. Although there are a number of grey areas where it is unclear whether such laws will apply to e-commerce, it is safer to assume, insofar as practicable and commercially viable, that they will do.

There are a number of initiatives at EU level which are in the course of being implemented into national laws, most notably the E-Commerce Directive. Those embarking upon e-commerce trade for the first time would be well advised to set up their practices and procedures to accord with this legislation, to avoid incurring adaptation costs when they are implemented.

In fields such as advertising and marketing where there are currently no specific laws relating to the Internet, it is good practice to follow the international codes or guidelines that are available. Sellers may also wish to avail themselves of certain computer techniques to limit the categories of people with whom they may contract.

The bottom line is that cyberspace is no paradise where no laws apply; businesses who contract on the Internet as they would when using any other means of communication are unlikely to go far wrong. This includes considering carefully the relevant laws that apply to their proposed contracts, and entering into detailed contracts which comply with those laws.

Further information on European electronic commerce directives and policies can be found at: [http://europa.eu.int/comm/internal\\_market](http://europa.eu.int/comm/internal_market)