Section 3. Contracts concluded by electronic means

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[Treatment of contracts]

Article 9

(1) 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 create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.

(2) Member States may lay down that paragraph 1 shall not apply to all or certain contracts falling into one of the following categories:

- **(a) contracts that create or transfer rights in real estate, except for rental rights;**
- **(b) contracts requiring by law the involvement of courts, public authorities or professions exercising public authority;**
- **(c) contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession;**
- **(d) contracts governed by family law or by the law of succession.**

(3) Member States shall indicate to the Commission the categories referred to in paragraph 2 to which they do not apply Article 9 paragraph 1. Member States shall submit to the Commission every five years a report on the application of paragraph 2 explaining the reasons why they consider it necessary to maintain the category referred to in paragraph 2(b) to which they do not apply paragraph 1.

1. General rule (para. 1). Since the Directive aims at spurring the development of e-commerce, it quite obviously needs to make sure legal systems do not hinder the conclusion of online contracts with formal requirements that electronic means cannot fulfil. This does not mean that formal requirements of all kinds have to be suppressed. Rather, it means that the legal systems need some refined tweaking to allow electronic means to fit those requirements. For instance, if a legal system requires a 'written document' to be used in a specific kind of contract, it is not necessary to delete that condition from the legal system. Instead, the interpretation of the notion of a 'written document' should be modified so as to include electronic documents, or the legal source of the requirement should specify that the contract in question requires a 'written document' or an 'electronic document'. The Directive does not state the method that the Member States need to follow in order to modify their legal systems, but emphasises that mere suppression of the legal requirements is not necessarily the only possible method (see recital 36). It should be stressed that the result of the legal tweaking has to be perfect equivalence between electronic and normal contracts. This has two

consequences. Firstly, the legal effect of an electronically concluded contract must be absolutely identical to that of a normal contract. If that were not the case, there would be legal deterrents to the use of electronic contracts, and that would of course be unacceptable. Secondly, all the necessary stages and acts of the contractual process must be examined by Member States, so that differences in legal regimes do not appear in the pre- or post-contractual stages. It would not be acceptable to have perfect equivalence in the conclusion phase of the contract, and yet have substantial legal differences in the pre-contractual or execution phase of the contract. Quite obviously, it is not required that the practical obstacles to online conclusion or execution of contracts be suppressed. Member States do not have to make sure everyone has internet access, or that each type of product can be delivered via the network. Only legal obstacles need to be addressed.

2. Possible exceptions (para. 2). (a) The principle. Member States have the opportunity to exclude four broad categories of contracts from the scope of para. 1. In doing so, they shall maintain a distinction between electronic and ordinary means as regards the legal regime of those categories of contracts. This is a right of the Member States, not an obligation imposed upon them. **(b) The categories.** The four categories of contracts the Member States may exclude from the scope of para. 1 all concern contracts that are of particular importance to the contractors, and that are usually submitted to a series of legal requirements protective of the parties that cannot easily be transposed to an electronic context. It is thus quite legitimate to offer the Member States the possibility of excluding these contracts from the scope of para. 1 as long as electronic equivalents to these requirements have not been devised. It would of course be desirable for such exceptions to disappear in time.

3. Justifying the exceptions (para. 3). It is up to the Member States to choose which categories of contracts laid down in para. 2 they exclude from the scope of para. 1. Nevertheless, they are required to inform the Commission of the categories they do effectively exclude. No justification is required at first, but it will have to be communicated to the Commission five years after the transposition of the Directive regarding the exception concerning contracts in which national law requires the involvement of courts, public authorities or professions exercising public authority. If this exception continues to be maintained, the Member State shall have to justify its position every five years.

[Information to be provided]

Article 10

(1) In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service:

(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) the languages offered for the conclusion of the contract.

(2) Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider indicates any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically.

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

(4) Paragraphs 1 and 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

1. Transparency of the contractual process (para. 1). (a) Principle. Art. 10 requires that a service provider using electronic means to conclude a distance contract must provide his client with an array of information pertaining to the contractual process, in addition to the general information required by art. 5 and the prior information required by art. 4 of the Directive on distance contracts. The obligation imposed upon the service provider by art. 10 is quite innovative: The information due does not relate to the product or service offered by the service provider, but to the specificities of the conclusion of the contract by electronic means. Hence, the goal of the measure is greater transparency of the ordering process per se. The communication of information pertaining to the contractual process is compulsory when the client is a consumer. However, when the client does not fall in that category, they may consent to the omission of such information. Thus, if a website dedicated to electronic commerce purports to deal only with non-consumer clients, it is not required to inform the client of the whole contractual process when the client has accepted the absence of such information. Let it be stressed that the acceptance of the client is necessary for the omission to be legally valid. The information required by art. 10 must be expressed 'clearly, comprehensibly and unambiguously'. As such, the nature of the information must be apparent, and this implies that it should be presented under a sufficiently noticeable header, that the given explanations should be easily understandable, that they should not be unnecessarily mixed with irrelevant commercial information, and that they should not be accessible only through an inconspicuous hyperlink. Art. 10(1) also states that the information should be communicated 'prior to the order being placed by the recipient of the service'. The reference to the 'placing of the order' was deliberately used in order to avoid the use

of conclusion of the contract. This was a crucial move, because Member States do not agree on the moment at which the conclusion of a contract occurs, and reference to the 'conclusion of the contract' would have entailed different interpretations of the article in different Member States. Quite to the contrary, the 'placing of the order' is understood similarly across Europe. Hence, the wording of the article ensures that it shall be construed as meaning that the communication of the information required by art. 10 should occur before the client starts selecting the goods and services in which they are interested. It should be noted that fulfilling the obligations imposed by art. 10(1) does not exempt the service provider from giving the customer any other information required by national law. **(b) Information to be given.** Art. 10 states that information should be given on the different technical steps to follow to conclude the contract. The aim of this requirement is to ensure three things. First, It would prevent any contract from being concluded by mistake. Second, it would ensure that the recipient of the service is fully aware that they are in fact concluding a contract. And lastly, it would safeguard that the recipient clearly understands the steps that will be required to conclude the contract. This last aim is largely inspired by a practice that has become quite common among many websites: The whole ordering process is interspersed with halts and warnings requiring active assent from the recipient – usually by way of clicking an appropriate icon or button – thus allowing for careful reflection on their part. Such a procedure is obviously a good way of clarifying the contractual process. *The archiving of the contract.* Service providers frequently file the contract in order to be able to trace back the transaction. In such cases, the recipient of the service must be told that such a filing process exists, and whether they will have the opportunity to have access to their file. It is noteworthy that there is no obligation either to archive the contract, or to grant access to the archived contract; the only obligation imposed on the service provider is the obligation to inform the recipient of the process and of his rights. *The technical means for identifying and correcting input errors prior to the placement of the order.* The service provider has to grant the recipient the technical means of identifying and correcting any input mistakes they might have made. Such identification and correction must be possible before the placing of the order (see art. 11(2)). Subsequently, the service provider must inform the recipient that such means exist. *The languages offered for the conclusion of the contract.* The service provider is free to target any specific market by using one or more languages of his choice. However, if a particular language appears on the first pages of the website and is consistently used throughout the whole contractual process, including the completion of the order, then the information required by law must be present in that same language. The service provider may not use one language to attract customers, while using another language to provide legal information, help services, or general terms and conditions. Consistency must be sought.

2. Codes of conduct (para. 2). Adhering to a code of conduct is not mandatory. However, it provides a sense of reliability, and as such, is a potent

commercial argument. When a service provider does adhere to a code of conduct, he must inform the service recipient about it, and give directions as to where and how the code may be accessed by electronic means. In this way, the user can examine the requirements of the code and check that they are met by the service provider. If the service provider does not meet the requirements of the code, the user should be able to invoke the misleading advertising regulations. Moreover, reference to a code of conduct can be interpreted as an inclusion of the code in the contract, thus implying that the recipient of the service might be able to refer to some of the code's rules as if they were part of the contract terms. The obligation to inform the recipient of the service about the applicable codes of conduct is only compulsory when the recipient of the service is a consumer. When he is not, the recipient of the service may waive his right to be informed about such codes.

3. Presentation of the contract terms (para. 3). The Directive does not require that the recipient of the service be informed of the terms and conditions of the contract. The mandatory or optional nature of such information is still to be determined by Member States. But if the service provider does communicate the terms and conditions of the contract to the recipient, the Directive requires that they should be made available in such a manner that allows the recipient to store and reproduce them. Basically, this means the service provider must configure his website so that it is easy for the recipient of the service to print the contract or to save it to their computer's hard disk. This obligation is compulsory, regardless of whether the recipient is a consumer or not.

4. Exceptions to paras. 1 and 2 (para. 4). The service provider does not have to comply with the obligation to inform the recipient about applicable codes of conduct or about the contractual process when the contract is concluded exclusively via e-mail exchange or any other similar means of individual communication. Conversely, one may assume from its exclusion of para. 4, that art. 10(3) remains applicable even when the contract is concluded via e-mail exchange or some similar means of individual communication.

[Placing of the order]

Article 11

(1) Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the following principles apply:

- **the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means,**
- **the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.**

(2) Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order.

(3) Paragraph 1, first indent, and paragraph 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

1. The obligation to acknowledge receipt of the order (para. 1). (a) General. As distance contracts steadily rise in numbers, and electronic commerce spreads, lawmakers are ever more concerned with the protection of distance contractors, and constantly increase the quantity of information that must be furnished not only before, but also after the conclusion of the contract. Hence, the service provider has to acknowledge receipt of the order without undue delay and by electronic means. This acknowledgement can be made either by an e-mail sent to the recipient of the service, or by displaying a webpage just after the recipient of the service validates their order. Usually, the service providers use both formulas, just to be on the safe side. That way, the recipient of the service is sure that their order has been received and taken into account. The Directive does not specify which information should be mentioned in the acknowledgement, nor whether it should recap the order. However, it does specify 'the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them'. It should be stressed that this paragraph is only compulsory when the recipient of the service is a consumer; non-consumers can agree to forgo acknowledging receipt of the order. Such could be the case on websites purporting to do business-to-business e-commerce. **(b) Consequences of the phrase 'placing of an order'.** The rather vague word 'order' was chosen deliberately to avoid any reference to the notions of 'offer' and 'acceptance', which are interpreted quite differently in the various Member States. Contrary to what was envisioned by the European Commission's initial proposal, the text of the Directive does not try to harmonise the notions of offer and acceptance, nor does it try to determine a unique moment for the conclusion of the contract. Those questions are still to be decided on a national basis. In those Member States where sending the order is considered to be a way of accepting an offer, it seems obvious that the acknowledgement, insofar as it is sent out after the acceptance, has no influence whatsoever on the formation of the contract. However, it assures the recipient of the service that their order has been correctly received by the service provider and that the contract has been effectively concluded; it can also be used to bear evidence of the existence of the contract, should the contract be contested. Nonetheless, it frequently occurs that the 'offer' is actually a simple invitation to treat (invitatio ad offerendum), especially when the service provider displays a notice specifying that 'orders are submitted to our own acceptance'. In those

cases, the order is the actual offer, and the contract will only be concluded when the service provider accepts the recipient's order. Does this mean that the acknowledgement sent by the provider to his customer should be equated with an acceptance of the offer? It seems that the risks of confusion are high in that regard. The importance of the wording of the receipt cannot be understated, since a service provider might acknowledge receipt of the order and state that they retains the right to refuse or accept the offer, within a reasonable time limit. Such a statement would have to be clear and visible. If such were the case, the acknowledgement would only inform the customer that his offer has been received, without having an impact on the conclusion of the contract per se. If the acknowledgement is ambiguous as to whether the service provider retains the right to accept or refuse the offer, the recipient of the order might be led to believe that his offer has been accepted, and this belief could be sanctioned as legitimate by the courts. However, it seems likely that in most cases the service provider will state his acceptance of the offer within the acknowledgement. Nevertheless, whatever the case, it can be said that acknowledgement of the receipt of the order does not, per se, entail conclusion of the contract. It is only when such an acknowledgement contains, explicitly or tacitly, an acceptance of the offer, that it shall imply conclusion of the contract. Let it be noted that the service provider might be in an awkward situation regarding evidence of the contract, insofar as the Directive does not require that the recipient of the order acknowledge receipt of the provider's acceptance; hence the service provider might be unable to prove that his acceptance actually reached the client and, thus, that a contract was concluded.

2. Availability of technical means allowing the correction of input errors (para. 2). The use of the electronic means (web, e-mail, etc.) for the conclusion of contracts enhances the risk of mistakes originating in a lack of familiarity with the technology, or in pure clumsiness. It is easy to imagine examples of such situations. The customer clicks on an icon or button and concludes a contract without really wanting to do so. Network traffic problems might lead them wrongly to believe that their order was not taken into account, and thus lead them to make a second order. They might make various input mistakes such as selecting the wrong article, selecting the wrong quantity, giving a wrong credit card number or postal address, and so forth. To avoid such situations, the service provider is required to furnish the recipient of the service with technical means that would allow for the correction of mistakes. From a technical point of view, this implies the use of software tools that automatically identify patently erroneous orders (exorbitant quantities, data inconsistent with the nature of field into which they are inserted, invalid credit card numbers, etc.) or blank fields. When such mistakes are identified, a message appears, and prompts the customer to make the relevant corrections. Furthermore, various buttons allowing for correction, cancellation or validation can appear all along the contractual process. Such buttons can go a long way toward helping one avoid mistakes when ordering. This

obligation is compulsory when the recipient of the service is a consumer. Non-consumer parties can agree to bypass this obligation.

3. Exceptions to paras. 1 and 2 (para. 3). The obligation to acknowledge receipt of the order (para. 1) and the obligation to make available technical means allowing for correction of input mistakes (para. 2) are not applicable when the contract is concluded by e-mail exchange, or some similar form of individual communication.

[Mere Conduit]

Article 12

(1) Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

(a) does not initiate the transmission;

(b) does not select the receiver of the transmission; and

(c) does not select or modify the information contained in the transmission.

(2) The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

(3) This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

1. General. The regulation of electronic commerce under the e-Commerce Directive is designed both to restrain certain types of behaviour as well as to facilitate others. These objectives may obviously be mutually supportive, to the extent that restraints on one category of actor or activity may facilitate the development of other actors or activities. Arts. 12 to 15 are concerned primarily with regulation as facilitation (First Report on the application of Directive on electronic commerce, p. 12). They are designed to encourage the provision of 'Information Society Services' (ISS), by protecting the provider of such services from liability, whether civil or criminal, for the communication of unlawful or illegal content by third parties utilising the service (recital 40). The policy concern that arose in the early years of the Internet was that if communications intermediaries were held liable for the content supplied by others, on grounds such as being the 'publisher' or 'distributor' of such content or on a strict liability basis, then they would either not enter the market, due

to the excessive legal risks, or would provide services under such restrictive conditions that would discourage use and undermine the rights of users, such as the right to privacy. These provisions therefore reflect international best practice in the regulation of electronic commerce by offering communication intermediaries a safe harbour from liability, under specified circumstances, and try to balance the interests of the various parties, rights holders, users and service providers (recital 41). To date, six Member States (Spain, Portugal, Hungary, Austria, Bulgaria and Romania) have extended the protections to activities other than those provided for in arts. 12 to 14, specifically the provision of hyperlinks and search engines (e.g. Austrian e-Commerce Act, arts. 14 and 17), and the Commission has, under art. 21(2), an ongoing obligation to monitor whether such protections should be extended (First Report on the application of Directive on electronic commerce, p. 13). The scope of these provisions and the protection they offer from liability has been controversial and the subject of a number of preliminary references from national courts to the Court of Justice; although to date the Court has yet to issue any judgment.

2. The protected acts (para. 1). Two distinct activities of the ISS provider are addressed in this article: the provision of transmission and access. Transmission and access enable the process of communication and in providing such services, the ISS provider is acting as a provider of 'electronic communication services', an activity subject to a separate although overlapping regulatory framework, under Directive on electronic communications networks and services. The distinction made between the two services is on the basis of whether the service comprises 'wholly or mainly in the conveyance of signals on electronic communications networks' (Directive on electronic communications networks and services, recital 10 and art. 2(c)). An internet service provider, for example, will generally offer services above and beyond simple conveyance, which renders it subject to both regulatory regimes. Other providers of ISS, such as a web-based transaction site like eBay, will not be offering conveyance as part of their service. The provision does not specify any particular category of liability, which would appear to mean it extends to all forms of civil, administrative and criminal liability. In the UK, for example, it states that the provider 'shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction' (the Electronic Commerce Regulations Act, recital 17(1)). However, in a number of Member State transposition measures, the scope of the liability protection is not expressly stated and may therefore be interpreted by national courts more narrowly (e.g. Italian Decree on e-commerce). The protection from liability is only available on satisfaction of three conditions in respect of the illegal or unlawful content. First, that the ISS provider does not initiate the transmission (para. 1(a)), i.e. that the decision to transmit or access the content has not be taken by the ISS provider or his agent. However, the actual moment at which a transmission is sent or access obtained may be determined in part by the operational parameters of the particular ISS. So, for example, when a user sends an email message may not immediately coincide