Global Jurist Advances

Vol. 1, *Issue* 2 | 2001 | *Article* 3

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Abstract

This paper will point to some of the problems in implementing the E–Commerce Directive in national contract law, with a particular focus on Articles 9–11 related to formation of contracts by electronic means. Throughout the paper I will make comparisons with the US Uniform Electronic Transaction Act (UETA), The Principles of European Contract Law (PECL) and the UNCITRAL Model Law on Electronic Commerce.

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THE E-COMMERCE DIRECTIVE AND FORMATION OF CONTRACT IN A COMPARATIVE PERSPECTIVE

Christina Hultmark Ramberg[1]

Introduction

The E-Commerce Directive covers many topics related to electronic commerce.[2] This paper will point to some of the problems in implementing the E-Commerce Directive in national contract law, with a particular focus on Articles 9-11 related to formation of contracts by electronic means. Throughout the paper I will make comparisons with the US Uniform Electronic Transaction Act (UETA), The Principles of European Contract Law (PECL) and the UNCITRAL Model Law on Electronic Commerce.[3]

The purpose of the E-Commerce Directive

The overall aim of the E-Commerce Directive is to provide a legal infrastructure that facilitates the smooth functioning of the European Internal Market. Art. 1 of the E-Commerce Directive states:

> "This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between Member States."

Free movement is best achieved by providing a common and trustworthy legal infrastructure for businesses and consumers within the Internal Market. The focus on trustworthiness in the Directive can be seen in the articles regulating, among other things, the procedures for contracting online. This is thought necessary since actors have felt uncertainty as to whether contracting on-line can be made with legal effect.

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[2] Directive 2000/31/EC of the European parliament and Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

[3] A very helpful site is www.uetaonline.com. See also www.uncitral.org and O Lando & H Beale, Principles of European Contract Law, Part I and II, Kluwer 2000.

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Originally, the drafts of the E-Commerce Directive contained detailed private law regulation of how electronic contracts were to be formed.[4] As the original draft of the section on contract law was heavily criticised, one solution could have been to wholly abstain from regulating contractual issues. However, this was not the solution chosen. Instead, the articles remained but were changed substantially from being a regulation which belongs clearly to the realm of private law to one which is neither private law nor public law. Since no effects are provided for in case of non-compliance with the rules, it is impossible to know whether the regulation is intended to be sanctioned by public or private law. The result is three vague articles with an unclear rationale. The inevitable effect of such vagueness and ambiguity is that the Directive is difficult to implement into national law. The more complicated a Directive is to implement, the more likely it is that Member States will choose to implement it differently. Thus, instead of creating a harmonised legal environment for consumers and businesses acting within the Internal Market, we are at risk of achieving the opposite, namely many different legal environments for e-commerce.[5] This makes it difficult for businesses to streamline their procedures in order to easily and cost-effectively reach all consumers in the Internal Market and deprives European consumers of the benefit of having a large amount of supply of goods and services from which to choose, which in turn would have led to lower prices and a larger variety of products.

EU regulation and international regulations of e-commerce

It is worrying that the drafters of the E-Commerce Directive have not to a larger extent been influenced by work already carried out on a global scale.[6] There seems to have been an awareness of the importance of a global perspective, since the Directive's preamble (61) states:

> "If the market is actually to operate by electronic means in the context of globalisation, the European Union and the major non-European areas need to consult each other with a view to making laws and procedures compatible."

There are, however, few signs of any such international consultation having been carried out in the drafting of the contract provisions in the E-Commerce Directive. In particular, there appears to be no influences from The Vienna Convention of the International Sales of Goods

[4] (KOM(98)586) OJ 1999 C30/4. See also John Dickie, Internet and Electronic Commerce Law in the European Union.

[5] R Nielsen points to the increased ambition to create harmonised law in EU, Elektroniske kontrakter i europaeisk perspektiv, Festskrift til Bernhard Gomard, Thomson GADJURA 2001, p. 206.

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(CISG), the Principles of European Contract Law (PECL), the UNIDROIT Principles of International Commercial Contracts, the UNCITRAL Model Law on Electronic Commerce, or the US Uniform Electronic Transaction Act.[7]

One of the objections against the original draft of the section on contract law in the E-Commerce Directive was that all Member States (except the UK) have ratified CISG, in which formation of contract is regulated.[8] Naturally, it would be unfortunate if CISG were to be set aside within the EU, since it already contributes greatly to the harmonisation of European contract law. CISG is also well adopted to electronic contracts for the sale of moveables.[9] However, CISG does not cover all types of electronic contracts, since it is applicable only to sale of moveables and to business-to-business transactions.[10] This problem could have been solved by extending the applicability of CISG's rules on the formation of contracts.

While CISG is not applicable to consumer transactions, there are not many differences between the way contracts are formed in consumer transactions (B2C) compared to commercial transactions between two businesses (B2B). The main reason to protect consumers in relation to contracts is to allow a cooling off period (a right of withdrawal or cancellation) and to be certain that the conditions of sale are well-balanced and not too disadvantageous for the consumer. Considering that the EU already has an extensive and harmonised base for consumer contracting on the Internet in the form of directives generally providing consumer protection, throws into question the need for providing further explicit consumer protections for electronic contracting in the E-Commerce Directive.[11]

Other possible sources of inspiration for the contracting provisions of the E-Commerce Directive are the Principles of European Contract law (PECL) and UNIDROIT Principles of

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[6] C Kuner & A Miedbrodt, Written Signature Requirements and Electronic Authentication, The EDI Law Review 2/3, 1999 p. 143.
[7] These instruments can be found at www.uncitral.org, www.unidroit.org, www.uetaonline.com and in O Lando & H Beale, Principles of European Contract Law, Part I and II, Kluwer 2000.
[8] Denmark, Sweden and Finland have not ratified CISG Part II, which contains the rules on formation of contracts. Initiatives have been taken in these states to ratify CISG Part II.
[9] See report from the secretariat of the UNCITRAL Working Group on Electronic Commerce, Feb 2000 at www.uncitral.org.
[10] CISG is furthermore not applicable to auctions (which are likely to become a frequent way of concluding contracts on the Internet).
[11] For instance the Directive on distance contracts 97/7/EC and the Directive on unfair terms in consumer transactions 93/13/EEC. See also the recently-approved Brussels regulation which contains consumer protection provisions on jurisdiction and the Commission's recent Communication on E-Commerce and Financial Services.

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International Commercial Contracts.[12] The latter is not covering consumer contracts and is global in nature, and it may consequently be of less relevance here (although UNIDROIT Principles provide useful guidance for a legislature wishing to enable its citizens to act on a global scale). It is remarkable that the E-Commerce Directive did not use the PECL as a point of departure for the regulation of contracts. PECL has an extensive regulation for the formation of contracts that to a large extent is in harmony with the substantive contract law of most Member States, as well as with CISG. PECL is also applicable to consumer transactions and includes consideration of electronic contracting. PECL is based on extensive research and the drafters include some of the most prominent contract law experts in Europe. It is unfortunate that such expertise has been neglected in the process of drafting the E-Commerce Directive. Had the original draft of the Directive's section on contracts been of a higher quality, it might have been possible to accept a private law regulation with explicit sanctions for non-compliance that would have led to truly harmonised contract law in all EU Member States. PECL Chapter 2 shows that it is feasible to achieve harmonised private law within the EU without foregoing high standards of structure and content.

Another apparently-neglected source of inspiration in relation to the E-Commerce Directive's section on contract law is the UNCITRAL Model Law on Electronic Commerce.[13] The Model Law is based on the important principle of functional equivalency, which is an exceptionally helpful tool in analysing problems related to e-commerce.[14] It has been widely adopted in some form throughout the world.[15] The UNCITRAL Model Law Art. 5 states:

> "A data message shall not be denied legal effect, validity or enforceability solely on the ground that it is in electronic form."

Vague traces of this principle can be found in the EU's Directive on Electronic Signatures, Art. 5.[16] The E-Commerce Directive, however, shows nothing of it. The fact that the EU has

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[12] See www.unidroit.org.
[13] See www.uncitral.org
[14] For an explanation of functional equivalency see A Boss, The Uniform Electronic Transaction Act in a Global Environment, Idaho Law Review, Vol. 37, p.17; C Hultmark, European and U.S. Perspectives on Electronic Documents and Electronic Signatures, Tulane European and Civil Law Forum, Vol. 14, 1999, p 123 – 153.
[15] For instance by Argentina, Australia, Bermuda, Colombia, France, Hong Kong, Korea, India, Ireland, the Philippines, Singapore and Slovenia.
[16] Directive 1999/93/EC of 13 December 1999 Art. 5: "…2. Member States shall ensure that an electronic signature is not denied legal effectiveness and admissibility as evidence in legal proceedings solely on the grounds that it is:
- in electronic form, or
- not based upon a qualified certificate, or
- not based upon a qualified certificate issued by an accredited

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chosen not to refer to the UNCITRAL Model Law's concept of functional equivalency deserves an express explanation in the preamble.

What the EU wanted to achieve in the E-Commerce Directive was accomplished more efficiently in the USA by the Uniform Electronic Transaction Act (UETA), which is greatly influenced by the UNCITRAL Model Law on Electronic Commerce.[17] The principle of functional equivalency is expressly incorporated in UETA sec 7:

> "(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
> (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation."

UETA was introduced in August 1999 and has been a success. UETA can be implemented voluntarily by the US states (as opposed to the E-Commerce Directive, which the Member States of the EU are compelled to implement). As of January 2001, UETA has been adopted (wholly or in part) by 23 states.

In the process of drafting the E-Commerce Directive the EU Commission could have benefited from communicating with the drafters of UETA. The Directive shows no sign of any such communication having taken place, despite the fact that the drafting of UETA was made in an open environment in which all interested parties were invited to participate (for example, practitioners, academics, public servants, including Europeans).

The formal requirement of writing and signature in electronic contracts (Art. 9)

Some of the most hotly-discussed legal questions in relation to e-commerce are whether digital documents constitute "writing", and how they must be signed in order to fulfil legal signature and handwriting requirements.

"Writing" in UETA

UETA takes an non-formalistic stance in harmony with the UNCITRAL Model Law on Electronic Commerce Art. 5 and 6, according to which most digital messages constitute

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certification-service-provider, or
- not created by a secure signature-creation device."

[17] For an in depth analysis of the international influences on the UETA, see A Boss, The Uniform Electronic Transaction Act in a Global Environment, Idaho Law Review, Vol. 37, pp.1-77.

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writing.[18] UETA focuses on the possibility of retrieving and reading the "writing", and it clearly stipulates that e-mail and digital symbols constitute writing as long as they are retrievable in perceivable form.

> UETA Sec 7 (c): If a law requires a record to be in writing, an electronic record satisfies the laws.
> UETA Sec 2(7): "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.
> UETA Sec 2(13): "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

Writing in PECL

PECL has an explicit regulation of writing in the electronic context, which emphasises the readability of the document:

> *Article 1:301 (ex Art. 1.105): Meaning of Terms*
> In these Principles, except where the context otherwise requires:
> ...
> (6) 'Written' statements include communications made by telegram, telex, telefax and electronic mail and other means of communication capable of providing a readable record of the statement on both sides.

Signature in UETA

UETA is also non-formalistic with respect to electronic signatures and stipulates, that whenever the law requires a contract to be signed, the formal requirement can be satisfied by electronic means as long as the technique used for making a signature ensures that there is *an intention to sign.*[19]

> UETA Sec 7(d): If a law requires a signature, an electronic signature satisfies the law.
> UETA Sec 2(8): "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

Signature in the UNCITRAL Model Law on Electronic Commerce

The Model Law Art. 7 focuses on *identification* and *intention/approval*:

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[18] UNCITRAL Model Law on Electronic Commerce Art. 6 stipulates:
"(1) Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.
(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being in writing.
(3) The provisions of this article do not apply to the following:..".

[19] UETA only makes exceptions for wills, codiciles, testamentary trusts (sec 3 (b)(1).

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(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if:
(a) a method is used to identify that person and to indicate that person' s approval of the information contained in the data message; and
(b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement...

Signature in the EU Directive on Electronic Signatures

The EU Directive on Electronic Signatures does not refer to the intention to sign. The articles in the directive regulating advanced electronic signatures are based on the identification of the signer by stipulating requirements of technical nature that ascertain that the signer is the person he purports to be.[20]

The indirect approach in the E-Commerce Directive

The E-Commerce Directive Art. 9(1) does not explicitly refer to the terms "writing" and "signature":

> "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."

It follows indirectly from Art. 9 that the Member States are not allowed to require the use of pen-and-paper-writing or pen-and-paper-signatures for contracts to be validly formed (see below on the exceptions to this rule). It would have been preferable had the E-Commerce Directive addressed the question of writing and electronic signature in the electronic context expressly in order to avoid any uncertainty. It is not clear from the Directive what types of electronic signatures that are accepted.

What types of electronic signatures are accepted?

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[20] Art 2:
"..."electronic signature" means data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication;
2. "advanced electronic signature" means an electronic signature which meets the following requirements:
(a) it is uniquely linked to the signatory;
(b) it is capable of identifying the signatory;
(c) it is created using means that the signatory can maintain under his sole control; and
(d) it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable;..."

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It is a welcome approach that the E-Commerce Directive (indirectly) indicates that electronic signatures must be accepted in contract law, considering the uncertainties created by the Electronic Signatures Directive, which in effect only addresses the admissibility of electronic signatures in evidence and not as a form requirement for the validity of contracts. The meaning of the Electronic Signatures Directive is much disputed. Some Member States have interpreted it to only apply to evidence law, and others to also cover contractual aspects. Due to the E-Commerce Directive this debate has become less important.

However, a problem related to the E-Commerce Directive Art. 9 is that it does not prevent the Member States from imposing requirements of particular techniques to be used in order for a form requirement of a signature to be satisfied. Due to the Electronic Signatures Directive Art. 5, there is a considerable risk that some Member States may stipulate that form requirements in their legislation only can be satisfied by an advanced electronic signature which is based on a secure-signature-creation device (Art. 5(1) in the Electronic Signatures Directive). The Member States are almost encouraged to impose such requirements in the E-Commerce Directive preamble (34), (35) and (36). It is not unlikely that some Member States will choose to only accept electronic signatures of a certain type whereas other states will have a more open approach in line with UETA and the UNCITRAL Model Law on Electronic Commerce.[21] Consequently, different standards will have to be used in different States. This will potentially create disharmony in the legal frameworks for electronic signatures adopted by the Member States, which in turn will be harmful to electronic trade within the EU.

In my opinion, the E-Commerce Directive does not communicate clearly enough to the Member States that unnecessary bureaucracy and formalism should be avoided. It would have been preferable if the E-Commerce Directive had used the language in the UETA Secs. 7(d) and 2(8), cited above.

Protection of the signer's intention of commitment

[21] . "The UETA ... incorporates simple, rational risk allocation rules that can accommodate both the lack of a widely accepted standard today for strong authentication and the possible future development of such standards through the work of technical standard developing organization and private agreements and system rules. While legislation is poorly suited to either describing specific applications for electronic commerce technologies or promoting market adoption of specific technologies, it is well suited to providing rational incentives to the parties capable of shaping the architecture of electronic commerce in the future." J K Winn, Idaho Law Review Symposium: on Uniform Electronic Transaction Act The Emperor's New Clothes: The Shocking Truth About Digital Signatures and Internet Commerce at http://www.smu.edu/-jwiztn/shocking-truth.hlmt.

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It is important in relation to most legal requirements of a signature to ascertain that the signer really was willing to commit himself.[22] The definition of "advanced electronic signature" as set forth in the Directive on Electronic Signatures does not necessarily take the aspect of true intention of commitment into account and may, consequently, not be enough to satisfy a form requirement.

In practice, a signature often fulfils the function of establishing the identity of the signer (which for example may be achieved by using an advanced electronic signature, password techniques, or a simple e-mail), but this is often not the purpose of a legislative requirement of signature. For instance, where national law requires that a personal guarantee (surety) is made in writing and signed, the form requirement is imposed in order to ascertain that the guarantor thinks twice before undertaking such burdensome commitment. It is in the interest of the *party relying* on the signature to produce evidence as to the purported signer's identity. The relying party must take actions to secure adequate proof of identity and to determine what is an appropriate level of security in this respect. Legislation on signatures very rarely stipulates anything in relation to what a signature should look like. Even a single "X" might be enough. Instead, it is up to the relying party to accept or not accept signatures that are of poor evidentiary value.[23]

It has proven extremely difficult to analyse the underlying purposes of legal requirements of writing. We are blinded by traditional pen-and-paper behaviour and frightened by new phenomena. Thorough studies, however, have come to the conclusion that the relevant protection is that of the intention of the signer:

> "Several reasons may be advanced for the deviation of the UETA from the Model Law. First, under most domestic laws in the United States, signature requirements may be satisfied by a variety of means without any test of reliability. Thus, the Uniform Commercial Code defines a signature broadly to include typewriting and symbols – methods which often are not as reliable as handwritten signatures. To the extent that any symbols would suffice under legislation like the Code, the UETA is merely following suit by allowing electronic symbols to suffice without additional indicia of reliability. Second, the drafters of the UETA recognized that the reliability of signatures is

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[22] A Boss, The Uniform Electronic Transaction Act in a Global Environment, Idaho Law Review, Vol. 37, p. 37; C Hultmark, European and U.S. Perspectives on Electronic Documents and Electronic Signatures, Tulane European and Civil Law Forum, Vol. 14, 1999, p123 – 153.

[23] A Boss, The Uniform Electronic Transaction Act in a Global Environment, Idaho Law Review, Vol. 37, p. 37: "This evolution from the Model Law to the UETA can be viewed as an important improvement to the Model Law's provision. Indeed, the UETA is not the only piece of legislation to take that step; the Canadian UECA similarly requires that the electronic signature can be made or adopted "in order to sign a document" A Boss, The Uniform Electronic Transaction Act in a Global Environment, Idaho Law Review, Vol. 37, pp.1-77

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> frequently demonstrated by external indicia of reliability (e.g. requirement that the signature be affixed in the presence of witnesses or that the signature be notarized). The UETA does not displace those requirements, and thus these other reliability factors must still be present. Third, the UETA recognizes that the question is not simply whether a document was signed, but whether it was signed by the person from whom it purports to originate (i.e., whether it is attributable to that person) and whether it was appended worth the requisite intent to sign. Under the UETA, the burden is on the proponent of the message to prove attribution. In carrying that burden of proof, the proponent will at that stage need to show the reliability of he method of signing and the reliability of the association between the purported signature and the signed text in order to prove attribution. Where there is no question as to the identity of the signer (i.e., the purported signer takes responsibility for the message), there is no need to inquire into the relative "reliability" of the signature method used. Last, the UETA recognizes that there is a differences between what the law may require in the way of a signature before lending its enforcement powers to the transaction and what the parties may require as matter of good business practices. Thus, some companies may require signatures where the law requires none, and likewise may require signatures to be countersigned or notarized even though the law does not, simply reduce business risks."[24]

Neither the Electronic Signatures Directive, nor the E-Commerce Directive make any reference to the intention to sign. It would have been advantageous had the E-Commerce Directive clarified that form requirements usually do not need to be satisfied by special techniques as long as the *intention to sign* can be established, and if it had drawn attention to the importance of intention to sign in relation to electronic transactions. It would, furthermore, have been valuable had the E-Commerce Directive clarified that the burden of proof as to whether the purported signer actually is identical with the actual signer, is on the relying party and is of no relevance in interpreting the legal requirement of signatures (since it is outside the law of evidence).

UETA puts focus on the intention to sign. It is thus necessary for a party providing a possibility to conclude contracts at its webbsite to ascertain that the procedures at the webbsite are unambiguous and make it perfectly clear to the other party that by clicking a certain box or inserting a PIN-Code or applying a digital signature it commits itself and becomes bound. When there is a requirement in law that a transaction is signed, such a requirement is met if the procedures at the webbsite indicate that there was an intention to be bound and to sign. When there is no requirement in law, it is still advisable to design the

[24] A Boss, The Uniform Electronic Transaction Act in a Global Environment, Idaho Law Review, Vol. 37, pp. 38-39. See also C Hultmark, European and U.S. Perspectives on Electronic Documents and Electronic Signatures, Tulane European and Civil Law Forum, Vol. 14, 1999, p123 – 153; B Aalberts & S van der Hof, Digital Signature Blindness Analysis of Legislative Approaches to Electronic authentication, The EDI Law

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webbsite in the same way. Thereby it will be possible to prove that a contract has been formed since the party by following the procedures at the webbsite clearly indicates that he is willing to be bound.

Exemptions

At first sight, the E-Commerce Directive may appear far-reaching in requiring that Member States allow electronic writing and electronic signatures to satisfy form requirements in law. However, due to the wide possibility of making exemptions for every type of contract where signature requirements have traditionally applied, the E-Commerce Directive may in effect not enable electronic communication to any increased extent. Exempted from Art. 9 are transfer of rights in real estate, contracts requiring the involvement of courts, public authorities or notaries, contracts of personal surety, and contacts governed by family law. For many EU Member States these exemptions cover all (or more!) contracts where the law requires a signature. Thus, Art 9 in the E-Commerce Directive does not lead to the effect that electronic signatures will be recognised any more than they already are. However, if an EU member state wishes to make an exemption, it has to provide an explanation to the Commission as to why the exemption is made. This will compel the Member States to carefully consider why an electronic signature cannot be used in relation to for instance suretyship or real estate transactions. Many times, such an analysis will point out that the crucial factor in retaining a form requirement is whether or not the technique of signing electronically sufficiently allows intention to be committed to be ascertained. When intention to sign can be ensured also in electronic transactions, there is often no reason to allow an exemption that would invalidate electronic transactions.

UETA (Sec. 3) also has exemptions. It is not applicable to execution of wills, codicils or testamentary trusts.[25] The exemptions in UETA are less extensive than in the E-Commerce Directive.[26] The scope of application is wider in UETA as compared to the E-Commerce Directive, since it covers not only contracts but also any transaction (including governmental

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Review 2000 p. 1; C Kuner & A Miedbrodt, Written Signature Requirements and Electronic Authentication, The EDI Law Review 2/3, 1999 p. 143.

[25] Furthermore, UETA suggests that exemptions can be made in relation to UCC Secs. 1-107, Art. 2 and 2A.

[26] A Boss, The Uniform Electronic Transaction Act in a Global Environment, Idaho Law Review, Vol. 37, Pp. 25-27.

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transactions).[27] The reference to "intention to sign" enables UETA to have lesser exemptions than the E-Commerce Directive.

Information about the procedure of formation (Art. 10)

The E-Commerce Directive stipulates extensive requirements as to what information must be provided in connection with formation of electronic contracts. The service provider shall, among other things, inform about the technical steps to follow to conclude a contract, how to correct input errors, codes of conducts, contract terms and general conditions.[28] These requirements of information are problematic. According to national contract law, a contract is formed in a certain way. Most contracts may be formed without any particular exchange of information as to how the contract is supposed to be formed. The default rules in national contract law provide the answer as how a contract is formed when the parties have not reached a particular agreement relating to formation.

It is, of course, preferable that the parties have a common understanding of the procedure of formation of contracts before they start negotiating. In the traditional setting we often see that parties agree on a Letter of Intent stipulating the procedures of formation. Likewise, we often find on the Internet that the service provider has extensive provisions regulating how a contract is formed on its webbsite. For situations when the parties have not made such precontractual agreements, the default rules in law apply.

The problem in relation to the E-Commerce Directive Art. 10 lies in determining what the effects are when a service provider does not provide the stipulated information. It is awkward to require that the Member States take measures to ensure that service providers provide the relevant information. Is the E-Commerce Directive asking the Member States to have an "Internet-police" chasing non-informative service providers? And, if so, what weapon is this

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[27] As to the different scopes of applications in the Model Law referring to "activity" and UETA referring to "transaction", see A Boss, The Uniform Electronic Transaction Act in a Global Environment, Idaho Law Review, Vol. 37, p. 24.

[28] Article 10: "Information to be provided

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..."

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Internet-policeman to use? The threat of fines and/or jail? Should it be a criminal offence? Was it really the intention of the drafters to create such a far-reaching article? Or did they only intend to generally say that it is a good thing that businesses provide information about many things? It is possible that this provision was not intended to have any effects in law. It is, however, quite uncommon to find provisions in legislation that lack effects if not adhered to. Normally, such "norms" that stipulate recommended behaviour are instead elaborated in guidelines and recommendations.

Most Member States would according to their national general contract law be unwilling to accept incorporation of terms that are not referred to in the negotiations. This is particularly so when the available technology would have made it possible to easily refer to the terms.[29] Faced with a question as to whether a contract had been formed most Member States would, according to their general contract law, be unwilling to find that a binding contract is formed when the procedures at the webbsite were obscure and it was not clear to a consumer that he became bound by clicking in a certain box. Most national contract law have safeguards according to which an expression of intention shall be provided rather unambiguously. Thus, the rules in Art. 10 on information about technical steps to follow to conclude a contract and about terms and conditions do not provide any new protection from a contract law point of view.

If a consumer makes a mistake, he would not be helped much by having information on how to correct it as stipulated in Art. 10. What the consumer really needs are protective rules against input errors, see more below about Art. 11.

In my view, Art. 10 does not solve any practical problem. There are enough incentives in national general contract law for businesses to provide the information requested by the E-Commerce Directive. The implementation of Art. 10 will only create confusion in the national laws of the Member States and contribute to a disharmony in law within EU.

Confirmation (Art. 11)

The original draft of the E-Commerce Directive contained a novel method for formation of contracts. The idea was that a contract should not come into existence with the simple

[29] G.E. Maggs, Internet Solutions to Consumer Protection Problems, South Carolina Law Review, Vol. 49, 1998 no. 4.

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exchange of offer and acceptance, but needed to be once again confirmed. Instead of using a two-step-formation-procedure, the draft suggested the use of a three-step-procedure. The draft was fortunately changed.[30] However, the remainder of the original draft resulted in a vague stipulation in Art 11:

> "the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means".

The purpose of requiring confirmation

The rationale of the rule is unclear. The underlying purpose of requiring a confirmation appears to be to induce confirmation that a contract has been formed in order to avoid uncertainty. This is of course important for every type of contract and not only for electronic contracts. However, there is in law no general rule that a contract be confirmed. For centuries we have managed well without a legal requirement of confirmation, and e-commerce does not change this situation. Many times it is even less difficult to determine whether an electronic contract has been formed than the case of a "traditional" pen-on-paper contract.

Terminology

According to national contract law, a confirmation may be of legal importance if it in effect constitutes an acceptance. It is in practice often complicated to determine what messages that constitute offers or acceptances. Sometimes a document titled "confirmation" or "acknowledgement" constitutes an "acceptance" from a legal point of view, so that a contract is not formed until the acceptance/confirmation is communicated to the other party. Sometimes the document titled "confirmation" is merely a document repeating what the parties are already bound to perform. A contract may also be concluded by the mere exchange of offer and acceptance with no confirmation being given. When a contract is already at hand, the confirmation has no legal effect at all (apart from the fact that it may be of importance from an evidentiary point of view). Consequently, the *lack* of a confirmation that merely repeats an already existing contract has no effects in private law. Fitting documents titled "confirmation" or "order" into the legal concepts of offer and acceptance is a well-known and old problem in all legal systems. The practical problems of defining the legal status of

[30] "One of the foremost scholars of commercial law has observed that commercial law rules should be "accurate" (i.e. reflective of the way commercial transactions are actually conducted), not "original" (i.e. invented by a smart law professor perhaps out of his imagination)." P Samuelson, Five challenges for regulating the Global Information Society, in Regulating the Global Information Society (Edited C.T. Marsden, Routledge, 2000) pp. 316-330 with reference to Grant Gilmore (1951) "On the difficulties of codifying commercial law" Yale Law Journal 57:1341.

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confirmations becomes even more complicated due to the E-Commerce Directive referring to a wholly new legal concept of acknowledgement of an order. Neither "acknowledgement" nor "order" are concepts used in legislation on formation of contracts.

There is a strong tendency in contract law to lessen the legal technical structure of offer and acceptance in relation to formation of contract. Both PECL and the UNIDROIT Principles of International Commercial Contracts refer to "sufficient agreement" with the aim to release the judge from the inevitable fictitious legal technicalities that have followed from the concept of offer and acceptance. The terminology and structure of the E-Commerce Directive indicate that its drafters were not familiar with such basic contract law realities.

Effects

Apart from the problem in relation to terminology, the effects of the rule on confirmation must also be considered. What is the envisaged effect when such acknowledgement is not given? And what is the legal effect of an acknowledgement given in accordance with the E-Commerce Directive?

Since private law effects were rejected in the drafting of the article, we ought to be careful before providing private law effects in the implementation of the directive.[31] When the acknowledgement is not given any effects in private law, the Member States must presumably stipulate *other* sanctions against businesses not providing acknowledgements in Internet contracts. A consumer ombudsman could, for example, search for businesses not making acknowledgements and claim from them some kind of fee or penalty. Another alternative is to make lack of acknowledgement a criminal offence. Due to the different Member States having different infrastructures for protecting consumers outside the area of private law, it is highly probable that there will be different types of implementations in relation to Art. 10 on acknowledgement.

It is, however, not altogether clear that the Directive rejects the possibility of having private law effects in a case where acknowledgement is not given..The reference in Art. 10 to default rules indicates that it is intended to be a rule of private law, since it is impossible to implement this rule as a default rule if it is not to be a rule of private law. It is not

[31] T Vinje & D Paemen, The European Union's electronic commerce directive, World Intellectual Property Report, Vol. 14 No 7 p. 251.

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recommendable to introduce a wholly new kind of formation of contract according to which the time of formation is put at a later stage (at the time of confirmation instead of at the time of acceptance). To change the fundamentals of contract law is very delicate and requires a more important rationale than the one at hand in this particular case. An alternative could be to allow damages to the party who did not receive the acknowledgement. In practice, however, this is not likely to actually be of any importance since the loss in most individual cases will be very small, if any at all.

Conclusion

UETA and the UNCITRAL Model Law on Electronic Commerce do not address the issue of confirmation in relation to electronic commerce. In my view, EU does not need a rule on acknowledgement of orders of electronic contracts. It is likely that most businesses will chose to use confirmations voluntarily (as is often the case in paper-based transactions). This is in harmony with good practise and in most cases lowers the costs for businesses by reducing the risk of misunderstandings. The introduction of a legislative rule on acknowledgement of orders will only result in a bureaucratic and formalistic regulation and, even worse, different requirements in different Member States. Had the directive stipulated an effect for the lack of acknowledgement, it would have become apparent to its drafters that such a regulation is difficult to sanction in a sensible way.

The time of receipt, Art. 11 (1)

A frequently-discussed problem is when messages are considered "dispatched", "sent" and "received". These terms need to be specified for situations where it is uncertain whether a message has been sent, withdrawn or revoked in time. In the paper-world usages have been developed and we know rather well at what moment in time a message has been "dispatched" or "received" in the legal sense. For electronic communication such usages are yet not at hand.

In many national contract laws there are no explicit rules on when a message is received or sent. The rules have developed in usages and case law and only rarely follow from explicit legislation. Now the E-Commerce Directive Art.11 stipulates that Member States shall apply the principle that:

> "the order and acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them".

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PECL has a solution as to how the rules on notices can be harmonised. PECL also provides a description of when a message has reached the addressee:

> PECL Article 1:303: Notice
> (1) Any notice may be given by any means, whether in writing or otherwise, appropriate to the circumstances.
> (2) Subject to paragraphs (4) and (5), any notice becomes effective when it reaches the addressee.
> (3) A notice reaches the addressee when it is delivered to it or to its place of business or mailing address, or, if it does not have a place of business or mailing address, to its habitual residence.
> (4) If one party gives notice to the other because of the other's non-performance or because such non-performance is reasonably anticipated by the first party, and the notice is properly dispatched or given, a delay or inaccuracy in the transmission of the notice or its failure to arrive does not prevent it from having effect. The notice shall have effect from the time at which it would have arrived in normal circumstances.
> (5) A notice has no effect if a withdrawal of it reaches the addressee before or at the same time as the notice.
> (6) In this Article, 'notice' includes the communication of a promise, statement, offer, acceptance, demand, request or other declaration.

PECL is, however, not well-sutied for electronic messages. For instance, it is highly uncertain what "reaches" actually means in the electronic context and the references to "place of business", "mailing address" and "habitual residence" are also vague concepts in the electronic environment.

UETA and the UNCITRAL Model Law on Electronic Commerce regulate the time and place of sending and receipt of electronic messages.[32] UETA and the Model Law include all electronic records, whereas the E-Commerce Directive only covers orders and acknowledgements of receipt.

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[32] UNCITRAL Model Law on Electronic Commerce Art. 15: (1) Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator.
(2) Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:
(a) if the addressee has designated an information system for the purpose of receiving data messages. receipt occurs:
(i) at the time when the data message enters the designated information system; or
(ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;
(b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.
(3) Paragraph (2) applies notwithstanding that the place where the information system is located may be different from the place where the data message is deemed to be received under paragraph (4)...
For a comparison of UETA and The Model Law in this respect, see A Boss, The Uniform Electronic Transaction Act in a Global Environment, Idaho Law Review, Vol. 37, pp. 52 –61.

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The E-Commerce Directive focuses on *accessibility*. It is difficult to know when there is ability to access an electronic message. UETA has analysed in depth the general and vague concept "able to access" by referring to the crucial prerequisites that the message has *entered the recipient's processing system* and that it is in a *form capable of being processed* by that system:

UETA Sec 15 (a) – (b) (omitting (c) – (g)):

(a) Unless otherwise agreed between the sender and the recipient. an electronic record is sent when it:
(1) is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record;
(2) is in a form capable of being processed by that system; and
(3) enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient which is under the control of the recipient.

(b) Unless otherwise agreed between a sender and the recipient, an electronic record is received when:
(1) it enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and
(2) it is in a form capable of being processed by that system.

The question as to which of the parties bears the risk of a message not reaching the addressee or being delayed is important in relation to electronic commerce, in which transactions are becoming more speculative in nature and the importance of time is enhanced. The E-Commerce Directive only addresses a limited type of messages (order and acknowledgement of receipt), and it provides no effects in private law since it only refers to what shall be deemed to have happened. Furthermore, the rule provided in the E-Commerce Directive is ambiguous since the meaning of "able to access" is uncertain in the electronic environment.

UETA illustrates that it is possible to provide extensive guidance as to the exact moment and place where the risk shifts. A rule along the lines of UETA would have been more helpful for the European internal market than the regulation in the E-Commerce Directive with respect to time of receipt.

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Mistake in expression, Art. 11 (2)

Many users of electronic means of communication have experienced the speed with which Internet transactions are made. Maybe many have experienced also how easily it happens that something can go wrong. The "send-button" is clicked on too early, the "Yes, I accept-box" is clicked on by mistake and a kilogram of peppers is ordered instead of one piece of pepper. Worse things may also happen: One of my students working in a bank office once ordered 10 000 Ericsson shares at the Stock Exchange instead of ordering Ericsson shares for the value of 10,000 Swedish Crowns (approximately 1,000 Euros). The problem with mistake in expression is closely related to the situation when a party becomes bound by a contract without having the intention to be bound. As described above (p. x), it is crucial that the intention to be bound in electronic transactions is properly secured. It is likewise important to prevent mistakes in expressions.

Risk allocation for mistakes in traditional law

The problem of mistake has a long legal history. It has turned out to be difficult to strike the balance between, on the one hand, the interest of a mistaken party not to be bound by unintended expressions of promises and, on the other hand, the interest of a party relying on a promise to be able to act upon it. Traditionally, the risk for mistake has been placed upon the party making a mistake, the rationale being that such a rule creates an incentive to act carefully and avoid mistakes from being communicated. Another explanation for the rule is that the party to whom the mistake is communicated should be protected since it has no means to discover the mistake. At the outset it may seem unfair to hold someone to a mistake. However, a party relying on the mistake incurs a loss and should be entitled to compensation. This is particularly the case when there was no mistake, but merely a change of mind. In practice, it is often hard to know whether a party who claims that it has made a mistake really did so or only changed its mind.[33] In this regard, there are two major problems: First, how can it be established that it was a mistake and not merely a change of mind? Second, the suitability of allocating the risk for mistake to the relying party depends on the type of contract and on how soon the mistake is discovered and brought to the other party's attention.

For some types of contracts, it is in practice not critical if a party changes his mind and wishes to cancel a contract or withdraw an offer or bid. The basic principle of *pacta sunt servanda* is not crucial for all types of contracts, particularly not when notice of the mistake is provided at

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an early stage. In other words, when a party makes a mistake and soon after informs the other party about it, the other party does not necessarily incur any losses; this is for example the case with the sale of consumer products such as cars, bikes, kitchen appliances and the like. For such situations, it may seem unreasonably harsh to hold the promisor to his mistaken expression.

For other types of contracts it is absolutely vital that the parties be able to trust expressions of promises. This is the case, for example, at auctions and exchanges and with the sale of products exposed to rapid price variations, such as stocks, securities and commodities. If there were an opportunity to escape such contracts by referring to a mistake, parties would be tempted to refer to a mistake when they in reality had made a bad bargain (the buyer could claim that he made a mistake when the prices fall after the purchase). If such contracts were not upheld due to mistake, the party relying on the promise would make losses, which is not a proper risk allocation since he was not at fault and had no means of protecting himself from the mistake made by the other party.[34]

A third type of contract is for example those where an object that is not exposed to rapid price variations causes a party to bind himself to other contracts (with sub-contractors, or suppliers) or in other ways to take passive actions (such as not committing himself to another contract due to the first contract making him fully booked). It is difficult to uphold a strict borderline between contracts that are sensitive to mistakes and contracts that are not.

Mistake in the electronic environment

Two of the main features of electronic communication are speed and automation. Both these features increase the risks of making mistakes that cannot be easily corrected before they reach the addressee and before the addressee takes actions in reliance of the mistake. Discussions in the legal literature and recent initiatives by legislative bodies indicate that there may be reason in the case of electronic commerce to adjust the present distribution of liability in connection with mistake and to take the mistaken party's need of protection into account. This trend of imposing less liability on a party making mistakes in expression (input errors) can be found in the E-Commerce Directive Art. 11(2) according to which the

[33] E.A. Farnsworth, Changing your mind – the law of regretted decisions, Yale University Press 1988, passim.

[34] Furthermore, the whole market will be harmed if there is uncertainty as to the binding nature of offers and acceptances.

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"service provider shall make available effective and accessible technical means allowing the person communicating with the service provider to identify and correct input errors prior to the placing of the order."

This protection can be contracted out of in B2B transactions, but is mandatory for consumers.

UETA goes even further in protecting the mistaken party. Sec 10(2) Effect of Change or Error stipulates:

If a change or error in an electronic record occurs in a transmission between parties to a transaction, the following rules apply:

(1) If the parties have agreed to use a security procedure to detect changes or errors and one par conformed to the procedure, but the other party has not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party may avoid the effect of the changed or erroneous electronic record.

(2) In an automated transaction involving an individual, the individual may avoid the effect of an electronic record thus resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error and, at the time the individual learns of the error, the individual:

(A) promptly notifies the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person;

(B) takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record; and

(C) has not used or received any benefit or value from the consideration, if any, received from the other person.

(3) If neither paragraph (1) nor paragraph (2) applies, the change or error has the effect provided by other law, including the law of mistake, and the parties' contract, if any.

(4) Paragraphs (2) and (3) may not be varied by agreement.

UETA indeed turns the traditional rule of mistake in expression upside down. It used to be that a mistaken party was bound by his mistake. According to UETA the burden is now shifted to the party relying on the mistake. The purpose is to create a strong incentive on webbsite designers to introduce "are-you-sure-boxes?" in order to slow down the transaction and thereby reducing the risk of mistakes in Internet transactions. When such a security procedure is implemented on the webbsite, the party making the mistake has to bear the risk. It is important to note that this provision is mandatory and parties may not deviate from

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UETA Sec 10 (not even in B2B transactions) and that this rule is not applicable to transactions exposed to rapid price variations (UETA Sec. 10, Comment 6).[35]

The UNCITRAL Model Law on Electronic Commerce also addresses the problem of mistake, in Art. 13 dealing with the attribution of data messages.[36] This article is relevant to the problems discussed here but is difficult to interpret and understand. According to the Guide to Enactment, the intention of the article is not to interfere with the legal consequences determined by applicable rules of national law (pg. 48). But at the same time paragraph (5) stipulates that the addressee is entitled to act on the assumption that the data message corresponds to "what the originator intended to send". As far as I understand, this is a rule on mistake "interfering" with applicable rules of national law. Read together with paragraph (4), I come to the conclusion that the addressee may rely on an electronic message as long as he is acting in good faith and is unaware of any mistake. However, as soon as the addressee receives notice of the mistake, he is no longer entitled to rely on and act upon it. The effects of admitted action and reliance are not clear. It is uncertain whether an acceptance sent by the addressee during the period of time he is entitled to act on the assumption that the message (in this example, an offer) was correct results in a binding contract or only to compensation for

[35]A Boss, The Uniform Electronic Transaction Act in a Global Environment, Idaho Law Review, Vol. 37, pp. 68-70.

[36] (1) A data message is that of the originator if it was sent by the originator itself.
(2) As between the originator and the addressee, a data message is deemed to be that of the originator if it was sent:
(a) by a person who had the authority to act on behalf of the originator in respect of that data messages; or
(b) by an information system programmed by, or on behalf of, the originator to operate automatically.
(3) As between the originator and the addressee, n addressee is entitled to regard the data message as being that of the originator, and to act on that assumption, if
(a) in order to ascertain whether the data message was that of the originator, the addressee properly applied a procedure previously agreed to by the originator for that purpose; or
(b) the data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled tat person to gain access o a method used by the originator to identify data messages as its own.
(4) Paragraph (3) does not apply:
(a) as of the time when the addressee has both received notice from the originator that the data message is not that of the originator, and had reasonable time to at accordingly: or
(b) in a case within paragraph (3)(b), at any rime when the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure that the data message was not that of the originator.
(5) Where a data message is that of he originator r is deemed to be that of the originator, or the addressee is entitled to act on that assumption, then as between the originator and the addressee, the addressee is entitled to regard the data message as received as being what the originator intended to send, and to act no that assumption. The addressee is not so entitled when it knew or should have known, had it exercised reasonable care or used any agreed procedure, that the transmission resulted in any error in the data message as received.
(6) The addressee is entitled to regard each data message received s a separate data message and to act on that assumption, except to the extent that it duplicates another data message and the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was a duplicate. See www.uncitral.org.

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damage.[37] Despite the problems in interpreting Art. 13, it is worth noting that UNCITRAL addressed the problem of mistake in electronic communication as early as in the beginning of the 1990s. Art. 13 in the Model Law illustrates how difficult it may be to find a satisfactory solution to this problem.

PECL is more traditional in its approach to mistakes and stipulates that the mistaken party bears the risk for mistakes in expression.[38] The drafters of PECL had probably not identified the new trend as to mistakes in the electronic setting. PECL leaves only a very small opening making it possible to shift the risk of to the service provider (the webbsite holder), by the reference to "the mistake was caused by information given by the other party". It could be argued that the inappropriate design of the webbsite caused the mistake. However, it would be preferable if PECL more explicitly had addressed this question.

It would be valuable if the EU Member States carefully discussed the new trend in relation to mistake and elaborated a common solution in private law.

The effects of input errors

The rationale behind the E-Commerce Directive and UETA is similar in relation to mistakes. The means of achieving the underlying purpose are, however, different. While UETA clearly provides a rule in private law, allowing a mistaken party to claim a mistake against the service provider, the E-Commerce Directive does not provide any guidance as to the effects when the "security procedure" is not implemented at the webbsite. The only help offered to the Member States follows from Art. 20 that vaguely and generally states that the "sanctions they provide

[37] A Boss, The Uniform Electronic Transaction Act in a Global Environment, Idaho Law Review, Vol. 37, p. 49 – 50.

[38] Article 4:103 (ex art. 6.103): Mistake as to facts or law
(1) A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:
(a) (i) the mistake was caused by information given by the other party; or
(ii) the other party knew or ought to have known of the mistake and it was contrary to good faith and fair dealing to leave the mistaken party in error; or
(iii) the other party made the same mistake, and
(b) the other party knew or ought to have known that the mistaken party,
had it known the truth, would not have entered the contract or would have done so only on fundamentally different terms.
(2) However a party may not avoid the contract if:
(a) in the circumstances its mistake was inexcusable, or
(b) the risk of the mistake was assumed, or in the circumstances should be borne, by it.

Article 4:104 (ex art. 6.104): Inaccuracy in communication
An inaccuracy in the expression or transmission of a statement is to be treated as a mistake of the person who made or sent the statement and Article 4:103 applies.

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shall be effective, proportionate and dissuasive". Again, we encounter the problem as to whether the sanctions are to be imposed under private law or as some other kind of regulation, perhaps based on a consumer ombudsman combined with a fine to be paid to the state, or perhaps as a regulation in criminal law.

Conclusion

I am in favour of slightly changing the traditional rule on mistake in expression to a more dynamic rule. My main concern in relation to the E-Commerce Directive's rule on input errors is that it is highly likely that different Member States will chose different ways of implementing it. This, in turn, will create obstacles for businesses wishing to use the same interface irrespective of the Member State in which it operates.

Final Remarks

My main criticism of the E-Commerce Directive is that there is no need for articles 10 and 11 on information prior to the formation of contract and confirmation of orders. Instead, the EU would have benefited from

1. more specific clarifications as to the legal effects of electronic writing and signature,
2. a clarification of what constitutes "reached" or "able to access" in relation to electronic messages, and
3. explicit effects for mistakes in expression (input errors) in electronic contracting.

The UETA is a more useful instrument in these respects. [39]

Generally, the process of developing directives is not efficient compared to the process of developing model laws in the US. *First*, mandatory directives tend to create restrictions which are not present when instruments are to be implemented on a voluntary basis. It is more difficult to reach consensus and efficient harmonisation of law when the drafters know that the implementation is mandatory. Furthermore, there is not enough incentive for the drafters to come up with quality instruments when they need not find solutions attractive enough to invite voluntary implementation.

[39] In comparison with UCITA"... I predict UETA will be more successful over time. This is in part because it is predictable, minimalist, consistent, and simple, and in part because it does not endorse any particular technological approach." P Samuelson, Five challenges for regulating the Global Information Society, in Regulating the Global Information Society (Edited C.T. Marsden, Routledge, 2000) pp. 316-330

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Second, the tradition of not stipulating the sanctions and effects causes the directives to become implemented differently in the different Member States. Thus, the fundamental aim of the directive is lost. That is to say, the internal market will not function effectively when businesses must use different procedures in different Member States. The whole idea of harmonised law in this area is to realise the idea of the internal market where businesses and consumers do not have to bother about borders between Member States. As long as the legal, bureaucratic and formalistic rules are different, this goal is not achieved. The E-Commerce Directive, in preamble (5) states that:

> "The development of information society services within the Community is hampered by a number of legal obstacles to the proper functioning of the internal market which make less attractive the exercise of the freedom of establishment and the freedom to provide services; these obstacles arise from divergences in legislation ..."

The aim of creating harmonised legislation by the implementation of the E-Commerce Directive is, unfortunately, not likely to be achieved.

Now that the technique of doing business becomes more and more independent of geography and national borders, a golden opportunity exisits to realise the idea of the internal market in practice. EU's good intentions to facilitate this development by providing a common legal framework in the E-Commerce Directive will most probably have the opposite effect. It will create more disparate legislation in the Member States and make it even more complicated for businesses to access the entire internal market.[40] My hope is that the ongoing work on a European Civil Code will make an important contribution to making the internal market easily and cost-efficiently accessible to businesses and consumers, by providing a truly harmonised legal infrastructure for electronic and non-electronic commerce.

Despite my above expressed criticism, Arts. 9-11 of the E-Commerce Directive have some benefit by functioning as a checklist for designing efficient and trustworthy webbsites. Indeed, it is advisable for businesses to comply with the recommendations to provide information about the technical steps to follow to conclude a contract, the contract terms and general conditions. The indication to give confirmations and to allow for input errors to be corrected at an early stage is also worthy of compliance. These helpful recommendations would, however, have fit better in a voluntary Code of Conduct than in legislation. There are

[40] Maybe it would have been better if the original draft with the strange three-step-contracting procedure was kept. It is hard to know whether it is preferable to have a clear regulation in private law (although the regulation

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other means than legislation for politicians to make their visions of an improved society come about. Softer instruments, such as guide-lines or best practices by state authorities, are many times more efficient than legislation. This is particularly the case in the present time of transition.

From the perspective of contract law, the E-Commerce Directive is of no value and may even have contra-productive effects. It should, however, be emphasised that the E-Commerce Directive covers other aspects of electronic communication, which may promote the efficiency of the European internal market. These non-contractual aspects have not been analysed in this paper.

in itself is of poor quality) or to have the present hybrid of no law at all, which will only lead to disunification within the EU.

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