

# "REGULATION OF ELECTRONIC CONTRACTS IN THE EUROPEAN COMMUNITY: NEW CHALLENGES"

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## **Abstract**

*This paper explains the lack of uniform rules governing electronic contract formation directly affects the lack of use of this type of contract. In particular is exposed as Community law does not address the issue of execution of the contract, in a precise way. Which implies that the internal rules of transposition gives different solutions. This study is part of the investigation project AGR-5961: “Fortalezas y debilidades en la internacionalización de las empresas españolas del sector del aceite de oliva” (Strengths and Weaknesses in the Internationalisation of Spanish Businesses in the Olive Oil Sector) conceded and financed by the Ministry of Economy, Innovation and Science of the Government of Andalusia.*

**Keywords:** Website, e-commerce, contract formation, international commerce, transposition.

## **1. Introduction**

The use of electronic tools for the commercialisation of products and services has called for a revision and an adaptation of the existing regulatory framework to eliminate the legal insecurity which previously surrounded these transactions. The general rules regarding contraction have been modified using a common European instrument, guaranteeing a high level of harmonization in the orders of the Member States.

It is a regulation that seeks neutrality and generality to avoid divergences in the application of the rule in the Member States. Alongside the difficulties related to the logistics of this kind of operation, or to means of payment, the main difficulties are still those related to uncertainties surrounding the set-up of an international electronic contract, not only on an international scale, but also within the European Community, as will be examined in detail below.

Therefore, given that the issue is not resolved, conclusion of the contract would require regulation to give a more concrete solution, to avoid the legal uncertainty that currently exists if there is a dispute concerning the time in which an electronic contract is to be considered valid.

## **2. Regulation over the completion of the electronic contract in the EU**

Directive 31/2000 requires States to give legal effects to contracts made electronically and establishes a harmonized regulation over some aspects of the business (Tang, 2009), despite the impact that international trade has on contracts concluded on-line (Flores, 2002). For this reason the question surrounding the formation of a contract has not been resolved, as seen below.

Although article 11 does not specify the time and place of completion of an electronic contract, it obliges the service provider to acknowledge the receipt of the recipient's order without undue delay. The European directive does not establish the moment from which a contract is formalized, although one assumes that a contract is not valid if the final confirmation called for in article 11.1 a) does not exist. In the same way, 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 (Gilliet, 2008).

In any case, it is difficult to determine the moment a contract is concluded, given the precaution laid out in article 11.1 b), stating that this occurs when the parties to whom they are addressed are able to access the acknowledgement of receipt, with no clear indication of when it is understood that the recipient has access to the information. The party on the receiving end of the confirmation will only be aware that they have access to said confirmation on receipt, which may take place hours or days after this first becomes available. (Barriuso, 2006). The lack of regulation in the Directive on Electronic Commerce about the moment a contract is formulated may result from, among other questions, the difficulty that this ascertainment implies, given the diversity of solutions present in the Member States (Gómez, 2012).

Furthermore, there may be differences present even within the same State, depending on whether the contract is of a civil or mercantile nature (García, 2009). Therefore, the Community legislature has not established a comprehensive solution which establishes the precise moment from which an electronic contract is valid, thus creating a legal loophole that may be classified as intentional.

In this way the rule is in place merely to regulate test mechanisms by demanding an acknowledgment of receipt although this is not explicitly linked to the formation of the contract (issue not addressed), making this a functional acknowledgment, for purely evidentiary purposes (Gómez, 2011). Furthermore, Article 11 of Directive 31/2000 highlights numerous inconveniences: firstly, a vague temporal aspect and indeterminate legal concept are introduced when obliging the service provider to acknowledge the receipt of the recipient's order "*without undue delay*". This demand has been specified in, for example, the Law 34/2002 of Services of the Information Society (SISL) (Ley 34/2002 de Servicios de la Sociedad de la Información-LSSI<sup>1</sup>), the transposition to Spanish Law of the Directive 21/2000.

The normative states that if confirmation of receipt of acceptance is done by sending acknowledgment by email or equivalent means, such submission must be implemented "*within twenty four hours of receipt of acceptance*" (Pendón 2003). Secondly, declaring that information has been received (an order or an acknowledgment) when the parties "*can access*" it is seen as a delicate matter, due to the ambiguity of the moment when a person can gain access to the same.

It could be concluded that the mere fact of the document being deposited in the recipient's email in-box signifies receipt. Community legislation does consider the arrival of messages in the email in-box as this is the simplest solution, although it may not be the most favourable for the recipient of the message (Coronil and Pampillon, 2002).

In this way the Directive on Electronic Commerce allows the design of a model electronic contract in three phases: the first is that of an entrepreneur, offering, through electronic means (e.g. a Virtual Store), the sale of goods or offer of services (contractual offer). The second is that of a consumer (or other entrepreneur) who places an order through electronic means (acceptance of offer). The third phase is that where the first entrepreneur must send acknowledgement of receipt of the acceptance sent by the consumer (or second entrepreneur) (Illescas, 2002).

Although this possibility is contemplated in the Directive, there is no obligation to include these three phases in electronic contracts between Member States (Ruíz, 2000). In fact, when dealing with contracts which are not celebrated between consumers, and if all parties are in express agreement, the acknowledgement of receipt can be omitted. The steps are not classified as such either, probably due to the fact that, depending on each country's legislation, that which here is classified as an offer may just be an "invitatio ad offerendum" and acceptance merely previous consent (Mateu de Ros, 2000).

Hence the final version of the Directive, with pretence of neutrality, just talks of "placing an order" without legal classification of the actions and statements made by the parties, leading to the regulatory vagueness over the moment when electronic contracts are considered to be completed (Juliá 2000).

### **3. Transposition of the EC directive to European legal systems**

The transposition of the Directive on electronic commerce has taken place through different regulations stated below:<sup>ii</sup>

In Austria (Law 152/2001 21st December 2001), Belgium (Laws of 11<sup>th</sup> March 2003), Denmark (Law 227/2002 22<sup>nd</sup> April 2002), Finland (Law 458/2002 5<sup>th</sup> June 2002), France (Law 719/2000 1<sup>st</sup> August 2000 and Law 575/2004 21<sup>st</sup> June 2004), Greece (Decree 131/2003 16<sup>th</sup> May 2003), Iceland (Law 30/2002 16<sup>th</sup> April 2002), Ireland (By-law 68/2003 24<sup>th</sup> February 2003), Italy (Decree 70/2003 9<sup>th</sup> April 2003), Luxemburg (Law of 14<sup>th</sup> August 2000), Norway (Law of 23<sup>rd</sup> May 2003 and 20<sup>th</sup> February 2004), Portugal (Decree 7/2004 7<sup>th</sup> January 2004), Spain (Law 24/2002 11<sup>th</sup> July 2002, LSSICE), Sweden (Law of 6<sup>th</sup> June 2002), United Kingdom (By-law 2013/2002 21<sup>st</sup> August 2002) and Holland (Law of May 2004, implemented by the DCE, through specific modifications of different laws and regulations)<sup>iii</sup>.

According to the findings of the preliminary evaluation carried out by the Commission, the transposition of the Directive is, in general, satisfactory (Ramos, 2001). There are however various points which either are not satisfactorily resolved through the internal legislation of the Member States which transposed the Directive, or whose resolution is different depending on the Member State involved. This is the case for the execution of electronic contracts, a point which is not given a uniform solution under European legislation. The treatment given to the formation of electronic contracts by the different EC legislations in the normatives which transpose the Directive will be examined in detail below. It will become clear that the moment of completion of a contract differs between the Member States and is reliant on various factors.

The transposition of the Directive to Spanish Law occurs through Services of the Information Society Law (SISL). This Law states that: Contracts concluded electronically will produce all the effects provided by law, when consent has been granted along with any other conditions necessary for its validity (Jiménez de Parga, 2000). In the Spanish legal system, a contract is governed by the principle of autonomy. This is unchanged when dealing with technological advances; however the forms of manifestation of offer and

acceptance are modified, so a contract is concluded when one party makes an offer and another accepts. In dealing with electronic contracts this matter is more complex not least because of the difficulty of determination and the different methods of both making and accepting an offer (Martínez and Ruíz, 2002).

Article 28.2 SISL goes some way to offering a solution to the matter stating that: *“The acceptance and its confirmation will be deemed to have been received when all parties are aware of this fact. In cases where reception of the acceptance is done through an acknowledgment of receipt, from the moment in which this document is stored in the server where the receiver holds an email account or in the device where communications are usually received, the document is said to have been received”*

In this case the SISL concludes that, for the simple fact that a document has arrived in a person’s email inbox, that person has received said document, without taking into account the subjective conditions of the recipient. The legislation opts for a simple solution, although it may not be the most favourable for the recipient of a message, given that it is questionable to consider the deposit of information in email inboxes as sufficient to claim a person has received and is aware of the contents of a message (Montaguado, 2000).

Moreover, continuing the analysis of the transposition of the Directive and the determination of when electronic contracts are formed, in the UK the Regulation 2013/2002 on Electronic Commerce, which came into force on August 21st, 2002<sup>iv</sup> transposes the Directive. On the matter of contract validity, the Regulation obliges the party selling the goods or offering the service to acknowledge receipt of the order to the recipient of the service without undue delay and by electronic means (Martínez, 2002). The regulation also states that the acknowledgement of receipt may take the form of the provision of the service paid for, that is to say from the moment payment is received, the contract is recognized as formalized and therefore valid. (Hedley, 2006).

In this way a contract is considered valid as of the moment a payment is made for the goods or services purchased on-line. Here lies the difference with the Spanish SISL, where an on-line contract is formulated as of the moment when the information on the acceptance appears in the recipient’s e-mail inbox, independently of whether or not payment has been made.

Regarding the Italian legal system, the Directive was transposed through Legislative Decree 70<sup>th</sup> April 2003<sup>v</sup> relating to some judicial aspects of information society services, in particular, electronic commerce, on the domestic market. Article 12 of the Decree is relevant to this study as it establishes the necessary conditions for closure of a contract. Here, a document is considered sent and received by the recipient if it is transmitted to the email address previously given. It must be considered that the date and time of formation, transmission or receipt of an electronic document drawn up in accordance with the provisions of the standard will be effective against third parties.

It also states in this precept that the transmission of a computed document electronically, if future receipt is ensured, is equivalent to notification via email as permitted by law. This standard proves to be even less specific than the previous two, given that the validity of the contract comes down to a very generic issue such as: *“that the message be remitted to the address given by the recipient”*.

In the case of French law it is the Law on Confidence in the Digital Economy, n° 2004-575 21<sup>st</sup> June 2004<sup>vi</sup> which transposes the European Directive on electronic commerce. This standard does not introduce significant developments relating to the improvement of electronic contract. The modifications made to the French Civil Code in order to adapt to the European standard shed some light on the matter. These reforms, however, are still generic, given that there is no specification made to the moment when it is understood that the parties to whom the confirmation of acceptance of an offer and the acknowledgement of receipt are addressed can access them (Schultz, 2005). This moment could be understood as, for example, when the message of acceptance is deposited in the email inbox of the recipient, when confirmation is sent that the document has been read etc.

#### 4. CONCLUSIONS

Each domestic regulation transposing the Directive 31/2000 offers a different solution to the problem of determining the precise moment when an electronic contract is considered to be executed. Therefore there is no clear, uniform indication of the moment a contract is executed, impeding the knowledge of when the parties become tied by said contract, on the one hand, and preventing, on the other, the making of a prevision over the legal competence or law applicable to the international contract drawn up by electronic means.

The Community legislator must offer clear rules about the key negotiable issues facing this type or method of international contracting. This would have positive repercussions on the use of Virtual Stores in the EC, heightening their scope, whilst reducing exportation costs and improving the internationalization of olive oil companies.

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<sup>i</sup> BOE no. 166 12<sup>th</sup> July 2002.

<sup>ii</sup> Please see [http://www.europa.eu.int/comm/internal\\_market/en/ecommerce/index.htm](http://www.europa.eu.int/comm/internal_market/en/ecommerce/index.htm).

<sup>iii</sup> For a more detailed look at the publication of these standards, please refer to [www.ec.europa.eu](http://www.ec.europa.eu)

<sup>iv</sup> *Statutory Instruments* 2002, no. 2013, ([www.legislation.gov.uk](http://www.legislation.gov.uk)).

<sup>v</sup> *Gazzetta Ufficiale* n. 87 , 14th April 2003 - Supplemento Ordinario n. 61, ([www.camera.it](http://www.camera.it)).

<sup>vi</sup> *Journal Officiel* n° 143 22<sup>nd</sup> June 2004, ([www.legifrance.gouv.fr](http://www.legifrance.gouv.fr)).

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