ELECTRONIC COMMERCE AND LEGAL PROTECTION FOR CONSUMERS IN SPAIN

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INTRODUCTION

Electronic commerce is becoming increasingly common at international level. It is defined as “doing business electronically across the extended enterprise”, which includes all forms of business, administrative transactions and information exchanges in which any type of information or communication technology is used. It has also been defined as “the form of commerce that by using the services and links provided in electronic documents in the Internet, allows the customer to query, select and purchase a distributor's offer using a device that is connected to the Internet, in real time and at any time or place”. In Spain, the Information Society Services and Electronic commerce Act defines in its appendix, among others, the concept of “information society service”, but it does not at any stage, in the appendix or elsewhere in the Act, define the concept of “electronic commerce”. Nonetheless, the first item included in the list of “information society service” categories, “the hiring of goods and services by electronic means”, despite not mentioning the defined concept, appears to be an acceptable definition of what may be understood by electronic commerce.

It is precisely the appearance of electronic commerce that is bringing about relevant changes in consumers' shopping habits in recent years, with repercussions and complete alterations of their relationship with conventional commercial establishments.

The massive growth of electronic commerce in recent years indicates the special potential of this new sales channel. In fact, on the basis of the various sources and data published on a regular basis on the evolution of supply and demand in this field, we should point out from the perspective of the supply that at international level, the main reasons why companies create web pages are as follows: to provide information to Internet users, to offer services and support, for marketing, branding and promotion initiatives, as a sales channel and to a lesser extent, for cost-saving. From the perspective of the demand, the number of Internet users has registered exponential growth in the last five years. From the perspective of the supply, it is important to highlight that the increase in the use of the new technologies is a clearly rising curve.

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This growth is due to the advantages obtained by the company in using the Internet, which according to the literature related to this field of research, are mainly the increasing number of Internet users; the possibility of global access offered by this medium due to the partial disappearance of logistic and geographical barriers; the possibility of establishing ongoing interactive contacts with customers, thus promoting long-term relations; saving on costs (distribution, office materials, human errors in inventories, in marketing functions...); the possibility of carrying out customised marketing strategies in real time; the leveraging of good technological opportunities and access to information on an immediate basis, with no time or spatial barriers.

Therefore, to what is the lack of interest in electronic commerce in Spain due to and consequently, what factors determine the adoption of the Internet as a sales channel? On the one hand, we may highlight a series of internal factors that may be controlled by the company and which are relatively easy to influence: top management, the strategic plan for implementing the Internet and electronic commerce in the company and the availability of resources (technological, human and financial). On the other hand, there are a series of external or environmental factors that will also determine the possibilities of the Internet being adopted as a sales channel. To be specific, logistic problems, a certain degree of insecurity regarding the legal framework for Internet sales, security problems related to payments, the shopping habits of consumers that are not yet familiar with this type of environments as a shopping channel and the most important obstacle, the non-suitability of products for sale over the Internet.

I. THE NEW CONTRACTUAL FORMS ARISING FROM THE “INFORMATION SOCIETY” AND THE LEGAL ISSUES ASSOCIATED TO THE LATTER

The so-called “information society” described in EC Directive 2000/31 has brought about an extraordinary expansion in telecommunications networks and in the Internet in particular, as a vehicle for transmitting and exchanging all kinds of information. Some of its unquestionable advantages are the improved business efficiency, the increase in the possibilities of choice for users and the appearance of new sources of employment. However, the legal uncertainty attached to the use of the new technologies has led to the need, in all EU countries, to establish an adequate legal framework to generate in the factors operating there the necessary trust in using this new means of exchanging not just information, but also goods and services. In Spain, Act 34/2002, of 11th July, on Information Society Services and Electronic Commerce (hereinafter referred to as the LSSI) filled the legal vacuum that had existed until its publication.

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6 Before this, the legal vacuum was covered by the regulations of the Civil Code (article 1262) and the Commercial Code (article 54), which deal with the issues of contract perfection in the case of what was traditionally referred to as the “contract between absent parties”. Act 7/1996, of 15th January, on the Organisation of Retail Commerce (articles 38 to 47) represented a major advance in dealing with the issues arising from the new contract forms, by broadly regulating for the first time the issues derived from distance contracts. Relevant technical issues are dealt with in the General Telecommunications Act 32/2003, of 3rd November. In turn, Act 59/2003, of 19th December, regulates an imperious need arising from the generalisation of electronic commerce: the electronic signature.
In the context of this study, we are interested in the problems generated by electronic contracts, especially from the perspective of protecting the weakest link: consumers and users.

In general terms, “electronic commerce” may be defined as any mode of transaction or exchange of information with commercial content, in which the parties communicate using “information and communication technologies (ICTs) instead of doing so by direct exchange or physical contact.

Articles 23 to 29 of the LSSI deal with electronic contracts. According to article 23, contracts signed by electronic means will produce all of the effects foreseen by the legal system, as long as they meet the requirements that are necessary in order for them to be valid (article 23 LSSI). This Act declares applicable to such contracts, as well as the aforementioned provisions, those contained in the Civil Code and the Code of Commerce and in other civil or mercantile regulations on contracts, particularly the regulations for protecting consumers and users and organising commercial activity.

In order that the signing of contracts by electronic means may be valid, there shall be no need for a prior agreement between the parties regarding the use of electronic means. Wherever the Act requires that the contract or any information related to the latter be provided in writing, this requirement shall be understood to have been met if the contract or any information contained in same is contained in electronic format. In the case of contracts, business or any legal act in which the law determines the public document form in order that they may be valid or produce effects, or which require the intervention of jurisdictional bodies, notaries, registrars or other public authorities, the specific legislation on these issues shall apply.

As a prior step, it is of interest to highlight that of the three possible modalities of electronic commerce: business to business, consumer to consumer and business to consumer, the latter is of special interest. In this case, the consumer is the weakest party in legal and economic terms. The reasons for this weakness are due to a series of important factors:

- the frequent use in this modality of adhesion contracts or contracts that are signed on the basis of general contract conditions.
- the frequent use of abusive clauses.
- fraud and deception in offers.
- information deficit (the object of the contract is known via photographs).
- impulsive statements of will (the contract is perfected by pressing a button on the keyboard).
- legal insecurity (lack of knowledge of applicable law, place where lawsuit should be filed….).

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7 Royal Legislative Degree of 18th November 2007, which approves the Reworded Text of the General Consumer and User Protection Act and other complementary laws (hereinafter referred to as TRLGDCU), dedicates Title III of Book II (articles 92-106) to distance contracts. Paragraph 2 of article 92 enumerates the following among the techniques for distance communication: video text with touch screen, either via computer or television screen, e-mail, fax and television. Article 94, on commercial communications by e-mail and electronic contracts, declares that the provisions of the LSSI prevail over those of the TRLGDCU in the event of discrepancy between same.
All of these clauses often generate mistrust towards electronic commerce in the consumer. Therefore, special protection for users of this modality is required, as well as, in general, for those to whom commercial communications are sent by electronic means.

II. SPANISH LEGAL SYSTEM FOR PROTECTING THE CONSUMER IN ELECTRONIC CONTRACTS

Spanish legislation provides legal mechanisms for protecting the consumer via the Internet, for the three stages of life of the contract: pre-contract, perfection and post-contract.

✓ Pre-contract stage.

The objective in this stage is to provide the consumer with the maximum possible information in order that they can make a grounded decision and that the provider of the goods or services may identify themselves adequately. Hence the fact that article 10 of the LSSI requires that the following information be accessed by electronic means, on a user-friendly, direct basis and free of charge: name or corporate denomination, residence and domicile; address of a permanent establishment in Spain; e-mail and any other data that enables direct, effective communication with the provider; details of registration in the Companies Register or any other Public Register. If the provider exercises a regulated profession, the following information must be indicated: the details of the professional association to which they belong and their collegiate member's number; NIF (Fiscal Identification Number); clear information on the price of the product or service, delivery charges, if taxes are included…; codes of conduct and how to consult them by electronic means.

As well as adequate, complete information, it is also of the utmost importance to control electronic commercial communications. This is a matter of special interest, which we shall deal with in greater detail in the next section.

✓ Contract perfection stage.

In this stage, it is important to distinguish between the obligations that refer to the moment the contract is formed and to its content.

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8 Given that contracts entered into by electronic means are distance contracts, the provisions of the LSSI must be completed by the provisions contained in the TRLGDCU on the matter of distance contracts. To be specific, article 97 of the latter stresses the importance of pre-contract information. It refers to article 60, contained in the section on contracts with consumers, which details the information that must be provided free of charge to the consumer before the contract is entered into (name, corporate denomination and address; full price, including taxes; date of delivery and execution; procedure for terminating the contract and guarantees offered; the language in which the contract is formalised and the right to desist from same). As well as the reference to article 60, article 97 of the TRLGDCU requires that consumers be informed in advance of aspects of the following importance: the cost of using the distance communication technique when it is calculated on a basis other than the basic fee; the essential characteristics of the good or service; the delivery and transport expenses, where applicable; the period of validity of the offer and the price; the minimum contract duration; the payment method and the modalities for delivery or execution and the indication that the businessperson remains subject to some extrajudicial procedure for resolving conflicts.
Moment of formation. In this stage, the information society services provider has the obligation of placing at users’ disposal, on a permanent, user-friendly basis and free of charge, information that is clear and comprehensible on the following aspects: various proceedings to be followed in order that the contract may be signed; if the provider is going to file the electronic document on which the contract is formalised and if this document will be accessible; technical means for identifying and correcting mistakes when introducing data; the language(s) in which the contract will be formalised (cf, article 27 LSSI, written according to Act 56/2007, of 28th December, on Measures to Promote the Information Society).

The obligation to place this information at users’ disposal shall be understood to have been complied with if the provider includes it on their Internet page or site under the indicated conditions.

The provider shall not be obliged to provide the information mentioned above when both contracting parties so agree and neither of them has the status of consumer, or when the contract has been signed exclusively via the exchange of e-mail or other type of equivalent electronic communication.

Contract content. The most important obligations of the service provider as regards the content of the contract include: to place at the disposal of the consumer and user the clauses or general conditions in the contract, sufficiently in advance in order that it may be perfected. Illegible or ambiguous clauses shall not be included.

Of special importance is the issue regarding control over abusive clauses, which is regulated by articles 82 to 91 of the TRLGDCU. Stipulations that have not been negotiated on an individual basis and which contrary to the standards of good faith cause a major imbalance in the rights and obligations derived from the contract to the detriment of the consumer and user shall be considered to be abusive. The businessperson shall have the onus of proving that a particular clause has been negotiated on an individual basis.

The abusive nature of a clause shall be appreciated depending on the nature of the goods or services that are the object of the contract and considering all of the circumstances present at the time at which it was entered into, as well as all of the other clauses in the contract or another on which it depends.

In accordance with article 82.4 TRLGDCU, the following clauses shall be considered to be abusive in all cases:

- those that bind the contract to the businessperson’s will.
- those that limit the rights of consumers and users.
- those that determine a lack of reciprocity in the contract.
- those that impose on the consumer and user guarantees that are disproportionate or that allocate the burden of evidence incorrectly.
- those that are disproportionate in relation to the perfection or enforcement of the contract.
- those that infringe the regulations on competition and applicable law.

The consequence of a clause being declared to be abusive shall be the nullity of such clause and the consideration that it has not been included. When the contract subsists, it shall be the responsibility of the Judge that declares the nullity of a clause to moderate regarding the rights and obligations of the parties and regarding the consequences of its unenforceability in the event of an appreciable loss for the consumer and user. Only when the subsisting clauses determine an unfair positioning of
the parties that cannot be resolved may the Judge declare the contract to be unenforceable.

Notaries and Property and Companies’ Registrars shall not authorise or register contracts or legal business in which there is the intent to include clauses that have been declared to be null due to their abusive nature in a sentence registered in the Registry of General Contract Conditions (article 84 TRLGDCU).

✓ Protection in the post-contract stage.

In this stage, the imperative and inalienable rights of the consumer are as follows:

- The right to receive confirmation from the offerer regarding receipt of acceptance in the following twenty-four hours. This confirmation shall not be necessary when the contracting parties so agree and when neither has the status of consumer. Neither shall it be necessary when the contract has been entered into exclusively by e-mail or other equivalent electronic communication (article 28.3 LSSI).

- The right to desist from the contract within the period of seven working days after the delivery of the product or the moment that the service starts to be provided (in accordance with articles 101-102 TRLGDCU). This right does not apply when the nature of the product means that it is impossible for this to be done (for example, in the case of computer programmes). In general, all products that may be copied have been excluded from the exercise of this right.

- The right to have the order materialise within, at the latest, a period of thirty days of the day after the consumer or user has granted their consent to enter the contract. If the order does not materialise due to the lack of availability of the good or service under contract, the consumer shall be informed of this circumstance, with entitlement to receive a refund of the amounts paid within a maximum timeframe of thirty days. If the refund is not made within this timeframe, the consumer shall be entitled to receive double the amount, without detriment to their right to receive compensation. They are also entitled to replace the good or service under contract if they have been expressly informed of this possibility. This right is exempt of any price (articles 104-105 TRLGCDU).

- In the case of movable tangible consumer assets: a two-year guarantee counting from the date on which the contract is signed, if the asset does not comply with the contract. This lack of conformity shall occur in the following cases: if the asset does not match what was advertised; if it does not have the characteristics listed in the contract or if it does not comply with the function that would be expected in accordance with its characteristics. In such cases, the consumer may opt to request a repair, replacement, discount or a monetary refund (articles 125-127 TRLGDCU).

The legal protection system is completed with important measures against an ever increasing phenomenon: the receipt of unsolicited commercial communications, which we shall describe in the next section.
III. PROTECTION FOR CONSUMERS AND USERS AGAINST SPAMMING

Spam is a technique employed by advertising companies, who make an abusive use of the e-mails of users. In the light of the generalisation of this practice, the European Commission has provided a series of technical and regulatory measures with a view to avoiding spam. EC Directive 2002/58 establishes the need to obtain express consent from the receivers of communications issued before they are actually sent (article 13). Notwithstanding the foregoing, because they are customers of the advertising entity, this requirement shall not be necessary when two requirements are met: that they have been informed regarding the possible promotional message and that they have not refused same (therefore, logically, it is necessary for their personal data to have been obtained in a legitimate manner). However, we must bear in mind that these are the minimum guidelines for conduct, on the basis of which the legislators in the EU member countries shall determine the content of their own regulations. Each EU country shall on an internal basis establish the resources that it deems to be opportune in order that those affected by spam may denounce this practice and file complaints for the losses suffered, with the imposition of the relevant sanctions. In this regard, it should be borne in mind that in accordance with the advertising principles of “source control” and “mutual recognition”, it shall be necessary to comply with the regulations of the country from where the unsolicited advertising message is being sent. This leads to the proliferation of this practice in countries whose system of sanctions is less severe. The problem is further aggravated because most unsolicited commercial communications come from non-EU countries.9

In the Spanish legal system, these issues are regulated by article 20 of the LSSI, written according to the Act of 28th December 2007 on Measures to Promote the Information Society. It details the information to be contained in electronic commercial communications. Such communications must be clearly identifiable as such. If they are made by e-mail, they shall include in the heading of the message the word “publicidad” (“advertising” in Spanish) or the abbreviation “publi” (advert). If promotional offers are made with discounts, prizes or gifts, as well as the previous requirement, the conditions for access or participation must be easily accessible and be expressed in a clear, unequivocal manner.10

Article 21 of the LSSI prohibits all commercial communications that have not been solicited or expressly authorised by the addressees. If the receiver of services is required to provide their e-mail address during the process of hiring or subscribing to a service and the provider intends to use this address later on for sending commercial communications, the customer must be informed of this intention and the latter's consent to receiving such communications must be obtained, before finalising the hiring process. The receiver is free to revoke the consent provided at any time.

These provisions apply both to information society service providers that are established in Spain and those that are established in an EU state, when the receiver of said service is located in our country. Moreover, in accordance with the provisions of article 39. 3 of the LSSI, even when the ISSP is established in non EU-member States,

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10 The precept is without detriment to the provisions that may be dictated on this matter by the Autonomous Communities.
the body with authority for sanctioning may order the providers of intermediation services to prevent access from Spain to services offered by same for a maximum period of two years in the case of very serious infringements, one year in the case of serious infringements and six months in that of minor infringements.

Article 38.3.b) considers “serious infringement”\(^{11}\) to mean the mass-scale sending of commercial communications by e-mail or other equivalent means of electronic communication to addressees that have not authorised or expressly requested the sending of same or the sending, in a one-year period, of more than three commercial communications by the aforementioned means to a single addressee that has not requested or authorised such sending.

Articles 30 and 31 of the LSSI regulate the legal action for cessation to be taken against conduct that is detrimental to the collective interests of consumers and users. The objective of such action is to obtain a sentence ordering the defendant to cease this conduct that is contrary to the Law and to prohibit the reiteration of such conduct in future. It may also be aimed at prohibiting a conduct when it has ceased at the time of the action being taken, if there are indications that it may be reiterated on an imminent basis. The exercise of such action must comply with the provisions of the Law on Civil Procedure (article 30)\(^{12}\).

The protection of consumers and users against spam and in general, against all non-legitimate commercial communication by electronic means is completed by the provisions of the General Advertising Act (Spanish acronym LGP), 34/2008, of 11th November. Articles 3 and subsequent numbers in same regulate non-legitimate advertising, which consists of the following categories: advertising that is an affront to dignity or to the rights enshrined in the Spanish Constitution; deceptive advertising, which is misleading to the target audience or which omits information on the goods, activities or services; and unfair advertising, which is understood to mean advertising that is denigrating or disparaging to a person or company, that leads to confusion with competitors’ companies, brands or distinctive signs and in general, any advertising that is contrary to good faith and commercial customs. The LGP regulates the advertising action (action for cessation and rectification) in Articles 25 to 31. The exercise of such action is compatible with that of civil\(^{13}\), penal\(^{14}\) and administrative\(^{15}\) action or of any other kind and which may apply, as well as with the persecution and sanction as fraudulent of misleading advertising by the administrative bodies that have competences in the area of consumer and user protection.

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\(^{11}\) The sanction is a fine amounting to between 30,001 and 150,000 euros -article 39 b)-.

\(^{12}\) Article 31 lists the persons that may exercise the action for cessation. In accordance with the terms of the latter, the following are entitled to do so: a) natural or legal persons in possession of legitimate interest; b) groups of affected consumers or users, in the cases and conditions provided in the Law on Civil Procedure; c) associations of consumers and users that meet the requirements provided in the law; d) the Office of the Public Prosecutor e) the National Consumers Institute and the relevant bodies in the Autonomous Communities; f) the bodies in other European Union member States that have been formed in order to protect the collective or diffuse interests of consumers, which are authorised by the European Commission by means of their inclusion in the list published in this regard by the Official Journal of the European Communities. The Judges and Courts shall accept this list as proof of the capacity of the body that has been authorised to be a party, without detriment to examining if its purpose and the affected interests justify the exercise of the action.

\(^{13}\) These include the action of termination due to non-compliance, or to require contractual compliance ex article 1124 of the Civil Code.

\(^{14}\) When the advertising is an obvious affront to dignity or to rights enshrined in the Spanish Constitution.

\(^{15}\) Which require the inception of the relevant administrative dossier.
In any case, the protection of consumers against non-legitimate advertising in general and against spam in particular, requires international cooperation. There is an international group whose purpose is the exchange of legal and technical information on limiting the sending of unsolicited electronic messages, the *Stop Spam Alliance*. This institution provides the content of the rules that have been approved on this matter and a calendar indicating the most relevant events in the area of unsolicited commercial communications. Initiatives of this kind are highly commendable. However, there is no straightforward solution for the problem at hand. Cooperation between States, the establishment of common international regulations and heightening the awareness of advertising companies and consumers or users, all constitute indispensable elements if a solution is to be found.\(^{16}\)

**IV. CONCLUSIONS**

The incidence of the new information and communication technologies is unquestionable in our day and one of the elements that they have clearly promoted is electronic commerce: its exponential growth in recent years has led to a firm interest in controlling all aspects regarding the security of transactions carried out in this area.

This project approaches some of the new contractual forms that have arisen from the “information society” and the legal issues associated to same in Spain: the Information Society Services Act has represented a catalyst in the Spanish legal system as regards the improvement of security and consumer protection conditions. To be precise, there is a need for intervention in order to guarantee consumer security in terms of the frequent use of abusive clauses, fraud and tricks in offers, deficit of information on the products being purchased by consumers, impulsive statements of will and even legal insecurity.

Moreover, the Spanish legal system for protecting consumers in contracts by electronic means highlights the legal mechanisms provided by the Spanish legal system in terms of protecting the consumer via the Internet. In this regard, three stages in the process of an “electronic” consumer’s decision to purchase have been regulated: pre-contract, contract perfection and finally, protection in the post-contract stage.

Finally, despite the fact that the legal system establishes a series of measures to foster the protection of consumers and users against spamming, it is necessary to address the regulation of spam, which is a technique employed by some advertising companies, which make an abusive use of users’ e-mails in order to send them unsolicited messages.

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\(^{16}\) See VAZQUEZ RUANO, quotation from pages 364-365.