Legal Risk Management in Cross-Border E-Commerce

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The Internet has made it easier to do business across borders. It may still involve considerable investment to do so, but the need for physical establishment in the targeted markets is reduced.

When businesses use the Internet for marketing or contracting purposes, are the activities by default available to all Internet users around the globe. There are no official standards for how a business can delimit its Internet activities in order to avoid economical loss deriving from infringement of the law of other states.

This paper focuses on possibilities in cross-border law enforcement and how businesses can manage legal risks deriving from states where its Internet activities are available. The article establishes a distinction between Traditional Law Enforcement and Alternative Law Enforcement.

This paper is elaborated in connection to a project presentation at Copenhagen Business School's international research conference on EU E-Commerce Law in November 2003. This paper is like the conference presentation meant as a project presentation, which means that it contains ideas and possible solutions without reaching final conclusions. The purpose of this article is to present and discuss the regulatory framework for mobile commerce in the European Union. The article focuses on the information requirements and similar requirements to electronic commerce carried out via mobile phones. The legal framework is not optimized for mobile commerce, but mobile commerce can in a number of situations be adapted to fulfil the requirements. This does however not mean that there is no need for focus and clarity on this subject - on the contrary!

1. Legal Risk Management

A Legal Risk can be defined as a potential economical loss deriving from the infringement of a legal norm. The loss can derive from a sanction or the deprival of possible advantages. Infringing behavioural norms may cause pecuniary penalties or tort claims, whereas infringement of norms regarding contracting may lead to unenforceable claims, damages or performance obligations. Infringement of legal norms may also lead to economical loss caused by damaged reputation.

Legal Risk Management is about how businesses should handle Legal Risks. Legal Risk Management concerns both economical based choices and practical implementation of strategies. This project deals only with the economical choices concerning legal risks deriving from the infringement of legal norms in

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states where the subject, a business, is not established. It is assumed that the business complies with the law of the state in which it is established.

The assessment of a Legal Risk entails a number of uncertainties, including the risk of detection and actual legal action, litigation costs, the magnitude of a possible judgement and reputation consequences. This project examines only the economical effect of the possibility of law enforcement across borders.

The expected loss due to the infringement of a legal norm can be calculated by multiplying the potential loss with the probability of the loss being suffered. If no sanctions can be carried out, the probability is zero and the expected loss is consequently zero. Even if the expected loss is not zero, may it be efficient for a business to breach the law. The somewhat controversial question of efficient breach is further elaborated on in the project presented in this article.

The purpose of the project is to present and discuss various ways of enforcing law in order for businesses to assess Legal Risks deriving from cross-border Internet activities. A second purpose is to evaluate certain risk mitigating techniques that can enable businesses to mitigate Legal Risks. These risk mitigation techniques are presented below under 4.

1.1. Cross-Border Law Enforcement

Cross-border law enforcement can be defined as imposing sanctions on a business in another state than the state in which the law enforcer is established.[2] It is assumed that the sanction is imposed due to the infringement of the law of the state in which the law enforcer is established and that that law is different from the law in the state where the business is established.

This article contains a division between Traditional Law Enforcement (direct law enforcement) and Alternative Law Enforcement (indirect law enforcement). Traditional law enforcement is sanctions imposed on the primary offender (the business) through the Judiciary, whereas Alternative Law Enforcement comprises other sanctions, such as imposing joint liability on intermediaries (secondary offenders), employ technical measures or using market forces.[3]

Under both traditional and alternative law enforcement are sanctions carried out on the initiative of an aggrieved party or a party who is authorized or obliged to take actions on behalf of collective interest. Law enforcers can be divided into private law enforcers and public law enforcers.

> The division between private and public law enforcers is neither sharp nor consistent in an international perspective. A division of common parties can be:
>
> Public law-enforcers: the Public Prosecutor and public organs such as health and consumer authorities, including ombudsmen.
>
> Private law-enforcers: Business partners, costumers, competitors and private

2 See Trzaskowski, Jan, Cross-Border Law Enforcement in the Information Society, Julebog 2003, Jurist- og Økonomforbundets forlag, 2003.

3 See in general also cross-border law enforcement; Mankowski, Peter, Behördliche Eingriff und grenzüberschreitende Online-Dienste, Die Bedeutung des Internationalen Privatrechts im Zeitalter der neuen Medien, Richard Doorberg Verlag, 2003, p. 51.

organisations pursuing collective interest (e.g. consumer and business organisations)

2. Traditional Law Enforcement

2.1. Private Law and Public Law

In the western world, states carry a distinction between private law and public law (criminal and administrative law). There are similarities in this distinction among states but the distinction is far from uniform. Public law and private law may also be defined as being penal and compensatory respectively.[4]

In this article public law is legislation that is normally enforced by public authorities exercising public powers. Private law is legislation normally enforced by private parties or governments acting as such.[5] A law can have both a private and a public nature.

There are different sanctions and procedural rules attached to private and public law respectively. Private law is normally sanctioned by damages, contractual obligations, specific performance etc., whereas public law enforcement normally implies sanctions such as custodial penalties (imprisonment), pecuniary penalties (fines) and disqualifications. Court orders such as injunctions and commands are found under both private and public law.

Some legislation can clearly be placed under either private or public law. Legislation may however fall within both private and public law. That is for example the case for a number of laws regulating businesses' market behaviour.

The distribution between public and private law sanction differs from state to state. Most states have legislation against misleading advertising. The types and magnitude of sanctions differs substantially. Legislation on misleading advertising may be sanctioned by e.g. fines, damages or contractual consequences. In some situations public law offences is also subject to private prosecution.

It is not the purpose of this article to establish an exact division of the content of the law. The purpose is to present and discuss procedural characteristics of the enforcement of private and public law respectively to provide guidelines for businesses' Legal Risk Management in international e-commerce.

4 Black, Donald, The Behaviour of Law, Academic Press, Inc., 1976, p. 5.

5 Civil law gives private parties rights to take legal actions, whereas public law gives public authorities acting on behalf of society as such right to take legal actions. See also the case, Verein für Konsumenteninformation vs. Karl Heinz Henkel, ECJ Case C-167/00 (1 October 2002) regarding the 1968 Brussels Convention.

2.2. Cross-Border Law Enforcement

The legal field of conflicts of law (private law) consist of three layers: Choice of law, jurisdiction (choice of forum) and recognition/enforcement of foreign judgements. The function of public law can be described by the same three elements, but with far less flexibility than in private law.

All three layers play an important role in cross-border law enforcement. Recognition and enforcement of foreign judgements is linked both to the jurisdiction applied and the subject matter of the judgement. Traditional cross-border law enforcement can be carried out in three ways:

1. The state where the business is established applies the law of the enforcer's state and grant the enforcer access to sue in its courts
2. The state where the sued business is established recognise or enforce foreign judgements from the state where the enforcer sues
3. The state where the business is established extradites the person(s) running the business to prosecution in the state of the enforcer.

A fourth situation exists where a court applies the law of the defendant and that law prescribe sanctions for actions carried out abroad. This situation is not dealt with in this article since it is assumed that the business complies with the law of the state in which it is established.

2.2.1. Applying Foreign Law

The first situation of cross-border law enforcement requires that the enforcer (plaintiff or prosecutor) brings proceedings in the business' homecourt. In order to do so the Judiciary of that state needs to recognise the enforcer by granting litigation capacity.

When a judgement is entered in the offender's state can actual enforcement be carried out by the legal system of that state since states normally enforce judgements entered within the state's own courts.

2.2.1.1. Litigation Capacity

Private persons will normally have litigation capacity in foreign courts. Public authorities and private organisations may however not be correspondingly recognised by foreign courts. Especially public law enforcers will most likely be reduced to ask local authorities to bring proceedings.

The 1998 EU Injunction Directive[6] provides within the Internal Market certain qualified bodies with litigation capacity to seek injunctions in the homecourt of the offender. The directive deals however only with infringement of some specific directives – i.e. a harmonised area.

6 Directive 98/27/EC on injunctions for the protection of consumers' interests (19 May 1998).

2.2.1.2. Private Law

Most states can apply foreign law in private law suits. The starting point of private international law is the contacts approach, which provides that the law with the closest connection to the matter should be applied. Most states also accept the contracting parties' freedom to choose the applicable law.

In Europe the main provisions for choice of law in contract are found in the 1980 Rome Convention.[7] Besides laying down the parties autonomy and the contacts approach as key principles, the convention contains special choice of law rules for inter alia certain consumer contracts and contracts on sale of goods and services.

2.2.1.2.1. Consumer Contracts

Consumers often benefit from legal protection. In the 1980 Rome Convention consumers are awarded with a mandatory rule, which designate the consumer's substantive law in certain consumer contracts.[8]

It is a prerequisite for designating the consumer's law under article 5 of the 1980 Rome Convention that the contract concerns the supply of goods or services to a person ('the consumer') for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object and:

- if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or
- if the other party or his agent received the consumer's order in that country, or
- if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.[9]

7 Convention on the Law Applicable to Contractual Obligations, consolidated version (98/C 27/02).

8 See e.g. Mankowski, Peter, E-Commerce und Internationales Verbracherschutzrecht, MultMedia und Recht-Beilage, vol. 7 (22), 2000, Foss, Morten and Bygrave, Lee A., International Consumer Purchases through the Internet: Jurisdictional Issues pursuant to European Law, International Journal of Law and Information Technology, Vol. 8, No. 2, 2000, Øren, Joakim ST., International Jurisdiction over Consumer Contracts in e-Europe, ICLQ vol 52, July 2003, p. 665 and Debusseré, Frederic, International Jurisdiction over E-Consumer Contracts in the European Union: Quid Novi Sub Sole?, International Journal of Law and Information Technology, Vol. 10 No. 3, 2002.

9 The requirements listed are identical to the coherent requirements in the Brussels convention. When the 1980 Rome Convention will be "converted" into a EU regulation, the text may be expected to be adjusted along the line of the above mentioned requirements in the 2000 Brussels Regulation.

It follows from the 1980 Rome Convention that while maintaining the parties freedom to choose the applicable law, the choice of law may not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the state in which the consumer resides, provided the requirements above are satisfied.[10]

It is possible to object to the choice of law by questioning the material validity of the contract[11] or if the choice is manifestly incompatible with the public policy ('ordre public') of the forum.[12]

2.2.1.2.2. Tort

The 1980 Rome Convention does not apply to tort cases. In multinational tort-cases, most states apply the concept of lex loci delicti in various manners. In the EU there is an ongoing work on the EU Rome II Regulation, which is to approximate the choice of law in tort.[13]

The principle of lex loci delicti means that sanctions under a foreign law can be imposed on a business if it is sued in its own homecourt. States may apply a liberal approach to weighing up different contacts and may also refuse to apply foreign law if it would be incompatible with the public policy of the forum.

The 2000 EU E-Commerce Directive introduced the country of origin principle, which provides that within the Internal Market, business should as a starting point only fulfil the legal requirements in the state of establishment. Consumer contracts are exempt from the scope of application, but the country of origin principle may conflict with the concept of lex loci delicti.

A business established in the Internal market can reasonably (and most likely with success) argue that applying (the stricter) tort law of another state than that, in which the business is established, is in contravention of the country of origin principle and the free movement of information Society Services as defined in the 2000 EU E-Commerce Directive.[14]

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10 The provision does not apply to contract of carriage and contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence, except for contracts which, for an inclusive price, provides for a combination of travel and accommodation.

11 Article 8. As a starting point the designated law shall determine the existence and validity of a contract. However may a party rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of the designated law. The law of the country in which the consumer has his habitual residence governs the formal validity of a consumer contract. Article 9 (5).

12 Article 16.

13 Proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II"), COM(2003)427 final, 22. July 2003.

14 Second part of recital 23 states, "provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in this Directive". See also Mankowski, Peter, Das Herkunftlandprinzip als Internationales Privatrecht der e-commerce-rechlinie, Zeitschrift für vergleichende Rechtswissenschaft, 2001, p. 137.

2.2.1.3. Public Law

Choice of law is normally not discussed within public law since state's courts only apply their own public law. The aggrieved party is therefore reduced to ask the public prosecutor of the state of establishment to initiate proceedings. Such a request is however not likely to be carried out if the underlying activity is not unlawful under the law of the state where the business is established.

The 1998 EU Injunction Directive ensures litigation capacity to certain parties, but the directive does not determine the applicable law.[15] It is unlikely that a state will apply foreign public law, whereas a state may do so in private law cases. There is no harmonisation of the rules on choice of law in this field.

The country of origin principle of the 2000 EU E-Commerce Directive comprises a principle of home country control, which obliges the EU member states to ensure that a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the directives coordinated field.

2.2.2. Recognition and Enforcement of Foreign Judgements

A judgement is recognised in the state in which the judgement has been rendered, but no state is by default obliged to recognise foreign judgments. Cooperation between regional states has led to agreements on recognition of certain foreign judgements. Recognition of foreign judgement is more accepted in private law than public law.

In order to be characterized as cross-border law enforcement, the judgement should be entered under a law other than the defendant's. This may in particular be of importance for considering the compatibility with the public order of the recognising state.

2.2.2.1. Private Law

The most important acts on recognition of foreign judgements in Europe are the 2000 EU Brussels Regulation[16] and 1988 Lugano Convention.[17] The acts regulate both jurisdiction (choice of forum) and mutual recognition of judgements. These acts provide 'free movement' of private judgements within EU and EFTA States respectively.

15 Article 2 (2) of the directive only that the directive is without prejudice to the rules of private international law, with respect to the applicable law, thus leading normally to the application of either the law of the Member State where the infringement originated or the law of the Member State where the infringement has its effects.

16 Council regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. This regulation replaces the EC Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters (1968 Brussels Convention) from 27 September 1968. Changing the convention into an EU regulation brings the principles into a part of the EU legislation whereas the Brussels convention was an independent multilateral agreement. Denmark is as the only EU states not bound by the 2000 Brussels regulation and therefore the 1968 Brussels convention still apply between Denmark and either of the other EU member states.

17 The EC and EFTA Lugano Convention on Jurisdiction and the Enforcement of Judgements Civil and Commercial Matters from 16 September 1988.

The European free movement of judgements is only applicable to judgements from courts within EU and EFTA. Enforcement of judgements can be refused only on procedural grounds or by invoking that recognition is incompatible with the public order of the recognising state.

Outside these obligations each state can decide whether to recognise a foreign judgement. The forthcoming of states varies from no recognition (as in Denmark) to recognition in respect of cooperation among sovereign nations.[18]

At a more global level is the 1958 UN New York Convention[19] of interest for European businesses. This convention provides a more globally adopted system for recognition of arbitral awards.[20] A similar convention for judgements seems to be emerging out of a previously more ambitious project under the Hague Convention.[21]

Like the 1958 UN New York Convention, the draft Hague Convention on Recognition of Civil or Commercial Judgements only deals with situations where the parties have chosen a forum.[22] The recognition of a judgement from another contracting state may only be refused on grounds similar to what is described above regarding the 2000 EU Brussels Regulation.

2.2.2.2. Public Law

Traditional judicial cooperation in criminal matters is based on a variety of international legal instruments, which are overwhelmingly characterised by a principle of request which implies that one sovereign state makes a request to another sovereign state, which then determines whether it will comply with the request.[23]

The Treaty of the European Union article 31 (a) deals with judicial cooperation between EU member states and a programme of measures to implement the principle of mutual recognition of decisions in criminal matters has been adopted.[24]

Since mutual recognition[25] of criminal decisions requires mutual trust in the concerned foreign states, harmonisation is required to ensure inter alia the rights of the indicted. Mutual recognition may however require extensive

18 European civil law states seem to be more reluctant to recognise foreign judgement than common law states. Most courts in the United States recognise foreign judgements as a matter of mutual respect and cooperation among sovereign nations ('Comity'), provided that that the recognising state find the rendering state to have proper jurisdiction and that fair procedures has been employed. See Kay, Herma Hill, Conflict of Laws, Harcourt Brace Legal and Professional Publications, Inc., 1998, p. 152.

19 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.

20 More than 120 states have adopted the convention, including the USA.

21 See http://www.hcch.net/e/workprog/jdgm.html.

22 ftp://ftp.hcch.net/doc/jdgm_pd22e.doc.

23 Communication from the Commission to the Council and the European Parliament on Mutual Recognition of Final Decisions in Criminal Matters, COM (2000) 495 final (26 July 2000), p. 2.

24 Official Journal of the European Communities C12/10 (15 January 2001).

25 Mutual recognition can appear in the form that the state just enforce the foreign decision or it may be required that the state converts the foreign decision to a national decision which is hereafter enforced.

harmonisation of several substantial and procedural areas.

In Europe the two most important conventions on mutual recognition in criminal matters is the 1970 Hague Convention on the International Validity of Criminal Judgement[26] and the 1991 Brussels Convention on the Enforcement of Foreign Criminal Sentences.[27] Both conventions are however poorly ratified in the EU.[28]

A basic principle of the two mentioned conventions and international cooperation on criminal law in general is the principle of dual criminality, which requires the act to be criminal under both the state of the prosecutor and the defendant. Furthermore are the conventions equipped with a number of exemptions including for situations where the recognition would contravene with the public order of the recognising state.

Freedom to establishment and provide goods and services are fundamental principles of the Internal Market, which may restricts the application of national law – including public law. See for example Piergiorgio Gambelli (case C-243/01) where the court established that:

> "National legislation which prohibits on pain of criminal penalties the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a licence or authorisation from the Member State concerned constitutes a restriction on the freedom of establishment and the freedom to provide services provided for in Articles 43 and 49 EC respectively."

Restrictions on the freedom to establishment and provide goods and services may however be justified by a public-interest objective, which take precedence over the requirements of the free movement. The European Court of justice established for example in the DocMorris[29] that a ban on mail order sale of medicinal product subject to prescription was justified – unlike for medicinal products not subject to prescription.

The country of origin principle in the 2000 EU E-Commerce Directive has supplemented these principles. The freedom to provide Information Society Services[30] in the 2000 EU E-Commerce is wider than for services in general under the EU Treaty. Unlike the EU Treaty, the 2000 EU E-Commerce Directive designates the law of establishment (country of origin principle), whereas the EU Treaty may only limit the application of legislation that may restrict the function of the Internal Market.

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26 Council of Europe, European Treaty Series No. 70 (28 May 1970).
27 Convention of 13 November 1991.
28 Communication from the Commission to the Council and the European Parliament on Mutual Recognition of Final Decisions in Criminal Matters, COM (2000) 495 final (26 July 2000), p. 6.
29 Case C-322/01.
30 "Any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service". See EU Directives 98/34 and 98/84.

2.2.3. Extradition

Extradition of an offender is also cross-border law enforcement. Extradition is based on either a case-to-case request structure or international agreements between states. Extradition is only used in more severe crimes involving custodial sanctions, i.e. public law. Businesses that are carried out by legal persons (companies) can for obvious reasons not be extradited, but extradition can be relevant for natural persons who carry out business or are responsible for a company's activities.

Like for other international cooperation in the field of criminal law is extradition based on dual criminal and respect of public order of the state, which is requested to extradite a person. The main convention in Europe on extradition is the 1957 Paris Convention.[31] This convention is also based on dual criminality, which means that a person will not be extradited for prosecution if the activities are not illegal in the requested state.

2.2.3.1. Alternatives to extradition

In American cases against two Russian hackers, Vasiliy Gorshkov and Alexey V. Ivanov, the FBI persuaded the two men to travel to the Unites States in order to participate in job interviews in a fictitious computer security company in Seattle created by the FBI.[32] During the meeting, the FBI recorded evidence against the hackers and obtained, through a demonstration by the hackers, access to search and copy evidence from the hackers' computers in Russia.

The mentioned approach led to conviction on a number of counts of conspiracy, various computer crimes and fraud. Since the two hackers conveniently enough were staying in the USA, the sentences could easily be enforced within U.S. territory. Though such undercover enforcement approaches may be effective, they are not allowed in a number of states.

A Legal Risk can also potentially restrict a businessman's freedom of movement if the businessman has ground to fear prosecution in certain states. Such a restriction in freedom to travel for either business or pleasure purposes may be significant for a person and thus should be considered when pursuing international e-commerce.

3. Alternative Law Enforcement

Alternative Law Enforcement is about imposing sanctions on secondary offenders (intermediaries) or on primary offenders by other sanctions than those carried out through the Judiciary. This article focuses only on joint liability and law enforcement through the market and by technical means. Alternative Law Enforcement does not require judicial cooperation between states and may therefore be more effective in cross-border situation than Traditional Law Enforcement.

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31 European Convention on Extradition of 13 December 1957.

32 U.S. Department of Justice, www.usdoj.gov/criminal/cybercrime. See also Bellia, Patricia L, Berman, Paul Schiff and Post, Davis G., Cyberlaw – Problems of Policy and Jurisprudence in the Information Age, Thomson West, 2003, p. 183.

3.1. Intermediaries and Joint Liability

In situations where it may be difficult to sue the primary offender in the enforcing state, a law enforcer may be successful in suing intermediaries. Suing intermediaries is often used when it is pointless to sue the primary offender or when the purpose of the lawsuit can be achieved easier that way, for example if the intermediary is established in the same state as the law enforcer.[33]

Joint liability can for example be imposed on users in for example gambling activities, on the executives of a company or business partners. Payment intermediaries such as credit card issuers may also play an important role in the law enforcement.

Joint liability is of significance from a Legal Risk Management perspective when sanctions on secondary offender can affect the business (the primary offender). That can be in situations where the intermediary may have recourse against the business or where the business is dependent on the intermediary's operation.

In a number of situations will the cooperation between the business and an intermediary be regulated by contract, which may contain distribution of liability. In these situations is it relatively easy to understand the Legal Risk. This can e.g. be the relationship between the business and a payment intermediary (bank or credit card issuer) or content intermediaries (for example banner-ad carriers).

3.2. Law Enforcement Through the Market

Market forces are a well-known effective regulator. Most businesses are to some extent vulnerable to unfavourable commenting, thus using the media can for some purposes be an alternative to enforcement through the Judiciary. In the wake of the Information Society the character and credibility of information and media has changed, but information can still be a powerful tool.

A party enforcing the law can take advantage of the possibility to influence the market through information. Information has the advantage that it can have an effect on foreign businesses without being dependent on recognition. To influence the market, the party enforcing the law may however need both credibility and access to a medium.

The market can be used to put pressure on businesses carrying out illegal activities by influencing the businesses' goodwill through for example warning potential costumers. It has however been seen that businesses have managed to turn such situations to their own advantage, which makes the consequences of unfavourable commenting less predictable.

The market can also be used positively by approving or evaluating certain businesses or activities in some form of trustmark scheme. As long as the information under the hallmark scheme has some significance in the market, business will have an incentive to comply with the scheme and thereby inter

33 The 2000 EU E-Commerce Directive prescribes some limitations to the possibility to apply joint responsibility on certain kinds of intermediaries. The directive however does not exclude such law enforcement.

alia observe the law of the state in question.

The market forces can be applied in order to deter infringement, but can also be applied to punish businesses to the extent the business is vulnerable to such enforcement. Enforcement through unfavourable commenting by for example a public authority may have a greater effect than traditional law enforcement. The credibility of information may however be diluted if the media is being used too intensively or in cases without wide support.

3.3. Technical Law Enforcement

The Internet requires electricity and connections in order to function. A sovereign state can choose not to connect the state to the Internet. Between this extreme and full access lie a number of possible solutions for effective law enforcement. No sovereign state is obliged to allow access to material, which is deemed unlawful in that state, unless otherwise agreed between states.

The Internet provides effective means of control.[34] If a sovereign state chooses to give access to the Internet, the state has possibilities to block out access to certain material or material from certain destinations.[35] Existing blocking techniques may not be 100% effective, but like for most other laws full compliance is not necessary in order to have effective law enforcement.

Blocking requires control over providers of Internet access. Since access providers are normally established within the state where access is provided, the access provider will also be within the state's control. Technical enforcement can be put into an automated system, which will not impose unreasonable burdens on the access providers.

Blocking will have the effect that users in the state in question cannot access the illegal material and will then mitigate the effect of the activity. Blocking causes however no further punishment than the hindrance of availability and can notably not be used to compensate injured parties.

Technical law Enforcement can also be carried out through the Domain Name System, which is an important point of control in the Internet environment. The Internet Corporation For Assigned Names and Numbers (ICANN) manage the Domain Name System[36] and its centralised nature makes it an obvious measure for technical law enforcement.[37] The Domain Name System already plays an important role in the enforcement of decisions concerning domain name disputes.[38]

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34 See Zittrain, Jonathan, Internet Points of control, Havard Law School Research paper No. 54, Boston College Law Review.

35 See Dornseif, Maximillian, Government mandated blocking of foreign Web content, md.hudora.de.

36 www.icann.org.

37 See in general Mueller, Milton L., Ruling the Root: Internet Governance and the Taming of Cyberspace, The MIT Press, 2002.

38 See http://ecommerce.wipo.int/domains/.

4. Mitigating Legal Risks

An important part of Legal Risk Management is to mitigate Legal Risks. Business can take a number of measures to mitigate Legal Risks in electronic commerce. This article present four approaches, viz. 1) geographical delimitation, 2) contractual regulation, 3) substantive adjustment and 4) controlling litigation initiative.

4.1. Geographical Delimitation

The most cost efficient approach to mitigate legal risks will normally be to geographically delimit the marketing material, including especially access to enter contracts. In absence of international standards for defining the targeted states, businesses may want to divide their websites into different regions from which the user has to choose.[39] Thereby business can at least to some extent control whereto which material is disseminated.[40]

Systems for technical delimitation are possible to elaborate in a way that users from non-targeted states will not obtain access to the business' marketing material or specific parts thereof. This can be done if for example a country code is connected to the user information sent in Internet communication.[41] Such delimitation will probably be more effective than the above-mentioned solution.

It should be noted that geographical delimitation within the Internal Market might become incompatible with EU law due to a proposed directive on services in the Internal Market.[42] The draft directive suggest in article 21 that member states shall ensure that the recipient is not subjected to discriminatory requirements based on his nationality or place of residence.

4.2. Contractual Regulation

The parties of a commercial interaction may as a starting point choose both forum and applicable law (parties autonomy) prior to an actual dispute. A business may benefit from requiring a contract, containing choice of law and forum clauses, with anybody who want to enter the business' website or purchase goods or services.

Most states recognise the parties' autonomy, but may require different standards for recognising such agreements. These requirements may concern how clear the terms have been presented and accepted. It should be noted that there are limitations on the parties' autonomy for certain consumer contracts as described above. Providing misleading information about choice of law or forum in such situations may in itself be unlawful.

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39 See e.g. www.sonyericsson.com, www.levis.com, www.mcdonalds.com

40 It will mainly be product information, offers and contracting ability that businesses should delimit, whereas general information about the business is less likely to give problems.

41 See e.g. www.infosplit.com.

42 Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market. See http://europa.eu.int/comm/internal_market/en/services/services/docs/2004-proposal_en.pdf.

In a situation where the user is buying goods or services, is it easy to insert relevant clauses in the purchase procedure – to the extent it is legal. The clearer the terms are presented and the clearer the consent is given, the more likely are such clauses to be recognised by foreign states.

As an alternative or supplement to make an agreement on choice of law and forum, the business may post a disclaimer on the website to for example limit the business liability. Disclaimers may not always be recognised, but can help mitigate legal risks.[43]

4.3. Substantive Adjustments

Business may choose to adjust its marketing material in accordance with the law of one or more targeted states and thus reducing the legal risks. Businesses may also choose to adjust the marketing material by observing guidelines of international nature or national guidelines in the targeted states.[44] Guidelines are normally available on the Internet free of charge and are often unlike laws designed for practical implementation.

Guidelines are often less precise than the law itself but can at a relatively low cost provide valuable information on how to mitigate legal risks. Getting precise information about the law is normally an expensive and cumbersome process, which may be preferable for businesses that are more vulnerable to e.g. unfavourable commenting.[45]

4.4. Controlling Litigation Initiative

Cross-border litigation is normally both expensive and cumbersome. This may deter an aggrieved party from suing another party even if the outcome of a case would clearly benefit the aggrieved party.[46] This is especially the case where the subject matter is of insignificant value like in most consumer purchases on the Internet.

In tort the litigation initiative will normally lie with the aggrieved party, whereas the initiative in contract will lie with the party whose contractual rights have not been fulfilled. By making sure that for example a customer pay for his services or goods in advance, the litigation initiative will lie with the purchaser unless the purchaser can seek redress through the payment instrument issuer by rules on charge back.

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43 For American case-law see e.g. Bellia, Patricia L, Berman, Paul Schiff and Post, Davis G., Cyberlaw – Problems of Policy and Jurisprudence in the Information Age, Thomson West, 2003, p. 623 ff.

44 See e.g. the 1999 OECD guidelines for Consumer Protection in the Context of Electronic Commerce, www.oecd.org and a number of guides for both consumers and businesses at www.ftc.gov/bcp/menu-internet.htm. See also the 2002 Position Statement of the Nordic Consumer Ombudsmen on E-Commerce and Marketing on the Internet, www.fs.dk/uk/acts/nord_gui.htm.

45 Since there are some similarities in the law of regions, it may be more efficient to only obtain detailed legal information in a limited number of states.

46 See e.g. Cooter, Robert and Ulen, Thomas, Law & Economics, 3rd edition, Addison-Wesley, 2000, p. 336.