

Information Requirements and Mobile Commerce in the European Union

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The purpose of this article is to present and discuss information and other similar requirements of electronic commerce carried out via mobile phones. The legal framework for electronic commerce and distance selling is not optimized for mobile commerce, and the information requirements may be difficult to fulfil especially in SMS-based mobile commerce. Viable solutions requires an improved platform for mobile commerce or a relaxed enforcement of the requirements. Limitations in the user-interface are the main reason for the current difficulties, which are likely to vanish concurrently with technological improvements. The industry must develop the necessary technical solutions and if required take up outstanding issues with the EU Commission. [This article is based on a presentation at the IFIP TC8 Working Conference on Mobile Information Systems (MOBIS), Oslo, Norway, September 2004]

1. Introduction

The common legislative framework in the European Union comprises a number of information and other similar requirements,² which may be difficult to comply with in mobile commerce. The purpose of this article is to identify these requirements and to discuss possible solutions. This article only deals with general requirements and not with specific product-related requirements such as those for medicinal products, financial services, insurance package travel and time-share. All legal documents referred to in this article can be obtained at 'europa.eu.int/eur-lex'.

In an EU Communication on Mobile Broadband Services³ a number of key policy issues are identified⁴ which the EU Commission will continue to work with in order for the European Union to exploit the evolution of mobile broadband services. The Communication, as well as the Commission's report on Digital Content for Global Mobile Services,⁵ is silent about challenges deriving from

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 - 2 See in general Geraint Howells and Annette Nordhausen, Information Obligations in EC E-Commerce Law, EU Electronic Commerce Law, Ruth Nielsen, Søren Sandfeld Jacobsen and Jan Trzaskowski (editors), DJØF Publishing, 2004.
 - 3 Communication on Mobile Broadband Services, COM(2004) 447 (30 June 2004).
 - 4 Research and development, Interoperability, Content (technical challenges), Spectrum, Trusted and secure environment, M-payments, Barriers to roll-out of networks and International co-operation.
 - 5 The European Commission (Directorate-General Information Society) Final Report on

information requirements. The Communication does however suggest a study on 'technical and other potential obstacles that may hinder the fast take-up of mobile services in Europe, and on consumer aspects'.⁶

1.1. Mobile Commerce

Mobile commerce is defined in this article as electronic commerce carried out via mobile phones. The high market penetration of mobile telephones makes mobile commerce especially interesting from a commercial perspective. Technological development in general and convergence in particular makes it still more difficult to distinguish between a mobile telephone and a computer in a traditional sense. An important attribute of a mobile telephone from a legal perspective is that it is, to a larger degree than traditional telephones and computers, personal and thus used only by the same person. This means that in most cases there exists a string of agreements between the service provider, the network operator and the user. The mobile phone combined with user agreements constitute a payments system which cannot only be used to purchase voice telephony.⁷ A mobile phone is of course mobile and the technology allows identification of the geographical location of the user which raises some privacy issues. Mobile phones and networks are, at the current technological stage, limited with respect to user-interface and bandwidth. The limitations of user-interface are the main reason why it may be difficult to fulfil information requirements prescribed by law.

Mobile commerce is a subset of electronic commerce and may be defined and subdivided in numerous ways. The dominant ways to communicate in traditional electronic commerce are the contract-based Electronic Data Interchange (EDI), the browser-based world wide web (WWW) and more individual forms of communications such as e-mail. Similar means of communication can be found in mobile commerce solutions. The exchange of SMS (the e-mail counterpart, which also comprise EMS and MMS) is currently the predominant way of communicating in mobile commerce, whereas the mobile WWW counterpart, WAP (Wireless Application Protocol) has, unlike for traditional e-commerce, only had little success so far. Browser-based mobile commerce will probably increase concurrently with the technological improvement of handsets and networks. The differences between traditional electronic commerce and mobile commerce will fade and to a large extent disappear when improved handsets allow for the use of the communication protocols we know from traditional electronic commerce. A number of handsets already provide for communication through the fundamental Internet protocols (TCP/IP) by including a browser and an e-mail client.

The inherent differences between browser-based and e-mail-based electronic

Digital Content for Global Mobile Services, February 2002. <http://www.content-village.org/articles.asp?id=32>.

6 See Communication on Mobile Broadband Services, COM(2004) 447 (30 June 2004), p. 6f.

7 It should be mentioned that when mobile phone pre-paid cards are used as a means of payment to purchase products and services, other than communication services, may this activity constitute the issuance of e-money, and mobile operators may thereby become e-money institutions, under the e-Money Directive (Directive 2000/46). See Communication on Mobile Broadband Services, COM(2004) 447 (30 June 2004), p. 8 (3.6).

commerce has caused a different legal treatment in the EU regulatory framework. The sending of e-mails has been regulated as a marketing method (spam) and some information requirements have been relaxed for e-mail based commerce. Electronic mail in mobile commerce (SMS etc.) must, under the current legal framework, be treated in the same manner as e-mails in traditional e-commerce. The Directive on Privacy and Electronic Communications⁸ defines 'electronic mail' as any text, voice, sound or image message sent over a public communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient. The E-Commerce Directive⁹ makes this amalgamation clear by making reference to electronic mail or 'equivalent individual communications'.

1.2. The European Internal Market

The European Union consists of 25 countries¹⁰ and 454 million people and may expand further in 2007, when Bulgaria and Romania are expected to join. European Union law is based on two founding treaties¹¹ comprising three pillars.¹² The primary pillar of interest for this article is the first concerning the European Community, which established the European Internal Market - a single market, which Norway, Iceland and Liechtenstein have joined¹³ without being full members of the Union. The Internal Market comprise a fundamental principle, which prohibits any discrimination on grounds of nationality. The treaties furthermore provide a right of establishment and a concept of free movement of goods and services. The free movement of goods and services is to be achieved through harmonisation of national law. States are allowed to apply national law in situations justified by mandatory requirements until sufficient harmonisation is provided.

The E-Commerce Directive¹⁴ is a cornerstone of the EU legislative framework for electronic commerce in the Internal Market. The purpose of the directive is to ensure the free movement of so-called Information Society Services by

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- 8 Directive 2002/58 (12 July 2002) concerning the processing of personal data and the protection of privacy in the electronic communications sector. See article 2(1)(h).
- 9 EU Directive 2000/31 (of 8 June 2000) on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce).
- 10 Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Germany, Greece, Finland, France, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, The Netherlands and United Kingdom.
- 11 Treaty on European Union - (consolidated text), Official Journal C 325 of 24 December 2002 and Treaty establishing the European Community - (consolidated text), Official Journal C 325 of 24 December 2002.
- 12 The European Community (EC Treaty) and two intergovernmental pillars (TEU) consisting of 1) Common foreign and security Policy and 2) Police and Judicial Co-Operation in Criminal Matters.
- 13 Agreement on the European Economic Area, May 1992 as amended by the Adjusting Protocol and subsequently by the EEA Enlargement Agreement (OJ L 130, 29 April 2004, p. 3 and EEA Supplement No 23, 29 April 2004, p. 1). The EEA Agreement entered into force on 1 January 1994.
- 14 EU Directive 2000/31 (of 8 June 2000) on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce). See also proposal for a European Parliament and Council directive on certain legal aspects of electronic commerce in the internal market, COM (1998) 586 final, 18 November 1998, 98/0325 (COD).

providing the necessary approximation of laws in order to introduce a country of origin principle. According to this principle, states must ensure that businesses established in the state comply with national provisions no matter where (in the Internal Market) business activity is directed. On the other hand, other states must refrain from restricting the freedom to provide Information Society Services. Information Society Services are commercial activities carried out at a distance by electronic means. Broadcasting and voice telephony is excluded from the definition. The definition comprises those activities which are carried out on-line, whereas, for example, the physical delivery of goods or services is not included - even though prior on-line marketing and conclusion of contracts is. This technologically-neutral definition obviously also comprises mobile commerce activities. In the above-mentioned Communication on Mobile Broadband Services, it is provided that mobile broadcasting services can be either Information Society Services or broadcasting services.¹⁵

For good measure, it should be mentioned that the Commission has presented a proposal for a directive on services in the Internal Market¹⁶ which, if adopted, will provide a legal framework with a country of origin principle for services in general. This proposed directive will also cover a number of situations, which have been exempted from the country of origin principle in the E-Commerce Directive.

2. Presentation of Information Requirements

2.1. Commercial Communication and Practices

Commercial Communication is mainly regulated in the Misleading Advertising Directive,¹⁷ and the E-Commerce Directive has introduced some general information requirements in connection with Information Society Services. The Distance Selling Directive also influences commercial communication to the extent that it relates to a distance contracts as described below under 2.3. There has been an attempt to harmonise commercial communication in the Proposed Regulation on Sales Promotions.¹⁸ The proposed regulation seeks to ensure the proper functioning of the internal market by stipulating that information¹⁹ must be provided in a clear and unambiguous manner when using sales promotions in commercial communication. Sales promotions are defined as the offer of a discount, a free gift, a premium or an opportunity to participate in a promotional contest or game.

The draft Directive on Unfair Commercial Practices²⁰ also proposes a

15 See Communication on Mobile Broadband Services, COM(2004) 447 (30 June 2004), p. 7.

16 Proposal for a directive of the European Parliament and of the Council on services in the internal market, COM(2004) 2 final (5 March 2004).

17 Directive 84/450 (10 September 1984) concerning misleading advertising as amended by directive 97/55 (6 October 1997) and the Unfair Commercial Practices Directive.

18 Amended proposal for a regulation concerning sales promotions in the Internal Market, COM(2002) 585 final (25 October 2002).

19 See article 4 with reference to the annex.

20 Proposal for a directive concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive), COM (2003) 356 final (18 June 2003).

harmonised regulation of commercial practices. The proposed directive regulates both misleading and aggressive commercial practices directed at consumers.²¹ By comprising misleading commercial practices will the directive take over the 'consumer part' of the Misleading Advertising Directive. In order for a commercial practice to be unfair (and thus illegal) must the practice 1) be contrary to the requirements of professional diligence and 2) materially distorts the behaviour of the average consumer targeted.²² Annex 1 of the directive contains a non-exhaustive list of unfair commercial practices.

2.1.1. General Information Requirements

Article 5 of the E-commerce Directive²³ prescribes that a business shall render information about name, geographical address, contact details and registrations numbers to the recipients of the service and competent authorities. This information shall be easily, directly and permanently accessible and shall be provided whether or not the business seeks to enter into a contract with the user. In the initial proposed directive, it was said in a commentary that 'the information in question must be easily accessible while the service is being provided. An icon or logo with a hypertext link to a page containing the information which is visible on all the site's pages would, for example, be sufficient to meet this requirement'.²⁴ It is obvious that these information requirements are elaborated with traditional electronic commerce (WWW) in mind where it is quite easy to provide access via, for example, a hyperlink.

2.1.2. Commercial Communication

Commercial Communication is regulated in the Misleading Advertising Directive to protect consumers, traders and the interests of the public in general against misleading advertising and the unfair consequences thereof. The directive and to lay down the conditions under which comparative advertising is permitted. Misleading advertising is advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or to whom it reaches. The advertising must, by reason of its deceptive nature, be likely to affect economic behaviour or injure a competitor. In determining whether advertising is misleading, account shall be taken of all its features.²⁵ The directive does not establish any specific information obligations, but since omissions may be misleading, the directive is indirectly imposing information requirements. When the proposed Directive on Unfair Commercial Practices is implemented the protection of consumers and the

21 By commercial practice is understood any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers.

22 Significantly impair the consumer's ability to make an informed decision and thereby causing the consumer to take a transactional decision that he would not have taken otherwise.

23 Directive 2000/31 (8 June 2000) on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)

24 Proposal for a directive on certain legal aspects of electronic commerce in the internal market, COM(1998) 586 final (18 November 1998), p. 22f.

25 See especially articles 2 and 3.

interests of the public in general will be moved to that directive.

According to article 6 of the E-Commerce Directive, commercial communications which are part of, or constitute, an Information Society Service must be clearly identifiable as such and the natural or legal person on whose behalf the commercial communication is made must be clearly identifiable. The directive also stipulates an obligation to clearly and unambiguously present conditions for promotional competitions or games and promotional offers, such as discounts, premiums and gifts. The directive thus introduces a requirement, which is not applicable in the physical world, where advertisers for example may use only a distinctive mark or other more ambiguous references to a product or the business in commercial communications.

Price information is regulated in the Price Indication Directive²⁶ with an aim to stipulate the indication of a selling price and the price per unit of measurement of products offered by traders to consumers. Article 4 requires that the final price including VAT and all other taxes, must be unambiguously indicated, easily identifiable and clearly legible. The E-Commerce Directive prescribe further that where Information Society Services refer to prices, must these prices be indicated clearly and unambiguously and must, in particular, indicate whether they are inclusive of tax and delivery costs.²⁷ This means that a price information shall be accompanied by a text indicating either that the tax and delivery costs are included or stating that it is not the case.

The Directive on the Sale of Consumer Goods²⁸ deals with guarantees which are legally binding on the offerer under the conditions laid down in the guarantee statement and the associated advertising. The guarantee must 1) state that the consumer has legal rights under applicable national legislation governing the sale of consumer goods, 2) make clear that those rights are not affected by the guarantee, and 3) set out in plain intelligible language the contents of the guarantee and the essential particulars necessary for making claims under the guarantee, notably the duration and territorial scope of the guarantee as well as the name and address of the guarantor.

Businesses shall according to the draft Regulation on Sales Promotions comply with a number of information requirements set in the annex of the draft regulation. The Information shall be provided in a clear and unambiguous manner. Some of the information shall however only be available on request at the time of the launch of the relevant sales promotion. Failure to provide this information or providing information which is false, unclear or ambiguous in fulfilment of the requirements will according to the annex of the proposed Directive on Unfair Commercial Practices be misleading.

According to the proposed Directive on Unfair Commercial Practices it is a misleading commercial practice to hide the promotion of a product in editorial content ('advertorial'), to state that a product can legally be sold when it cannot or by describe a product as "free" if the consumer in fact has to pay for the product. The draft directive also establishes that failing to provide the information stipulated in the Proposed (and notably not adopted) Regulation on

26 Directive 98/6 (16 February 1998) on consumer protection in the indication of the prices of products offered to consumers.

27 Article 5(2).

28 Directive 1999 (25 May 1999) on certain aspects of the sale of consumer goods and associated guarantees. See especially article 6.

Sales Promotion shall be deemed unfair. The proposed Directive on Unfair Commercial Practices does not provide a comprehensive list of information to be positively disclosed, though article 7(3) provides certain information requirements in commercial communication, which constitute an invitation to purchase as dealt with below under 2.3.

The directive also addresses information requirements in relation to advertising, commercial communication or marketing established by Community law.²⁹ Failure to fulfil such information requirements is a misleading commercial practice if, in its factual context, it deprives the consumer of information needed to make an informed decision about the transaction. Failure to fulfil such information requirement is thus not meant to be a misleading omission per se. This approach seeks to balance consumers' needs for information with recognition that an overload of information can be as much a problem to consumers as a lack of information.³⁰ The requirements in the respective directives however stands as an obligation for the governments to enforce.

2.1.3. Commercial Practices

Article 9 of the Distance Selling Directive prohibits the supply of goods or services to a consumer without their being ordered by the consumer beforehand ('inertia selling'). The consumer shall be exempt from the provision of any consideration in cases of unsolicited supply and the absence of a response can not constitute consent to solicitation. Such practices will be covered by the proposed Directive on Unfair Commercial Practices when adopted. According to that directive, it is an unfair practice to demand payment for products supplied which were not solicited by the consumer.

Unsolicited commercial communication is primarily regulated in the Directive on Privacy and Electronic Communications³¹ which bans the use of automatic calling machines, faxes and electronic mail for the purposes of direct marketing without the prior consent of subscribers.³² According to article 2(f) and recital 17 consent should have the same meaning as the data subject's consent as defined and further specified in the Data Protection Directive dealt with below under 2.2. In the Data Protection Directive article 2(h), consent is defined as any freely given specific and informed indication of the data subject's wishes by which he signifies his agreement to personal data related to him being

29 Annex II of the draft directive contains a non-exhaustive list of Community law provisions setting out information requirements in relation to commercial communication, advertising or marketing. See also article 7(4).

30 See the page 14 of the proposal, paragraph 65.

31 Directive 2002/58 (12 July 2002) concerning the processing of personal data and the protection of privacy in the electronic communications sector, article 13. See also Commission's Report on the Implementation of the EU Electronic Communications Regulatory Package, COM(2003) 715 (19 November 2003) and the Commission's Communication from the Commission to the European Parliament, the Council on unsolicited commercial communications or 'spam', COM(2004) 28 (22. January 2004).

32 As noted in COM(2004) 28 (22. January 2004), p. 3 is spam a problem for many reasons, including privacy, deception of consumers, protection of minors and human dignity, extra costs for businesses, lost productivity. More generally, it undermines consumer confidence, which is a prerequisite for the success of e-commerce, e-services and, indeed, for the Information Society. See also article 5 on 'system interference' in the European Convention on Cybercrime, European Treaty Series - No. 185 (Council of Europe).

processed.³³ Businesses which obtain the customer's electronic contact details in the context of the sale of a product or a service may use these electronic contact details for direct marketing of its own similar products or services provided that customers clearly and distinctly are given the opportunity to object, free of charge and in an easy manner, when the contact details are collected. The ban applies only to subscribers who are natural persons. But the Member States are obliged to ensure that the legitimate interests of subscribers other than natural persons are sufficiently protected with regard to unsolicited communications. The practice of sending electronic mail for purposes of direct marketing which disguise or conceal the identity of the sender on whose behalf the communication is made, or without a valid address to which the recipient may send a request that such communications cease is prohibited to protect all subscribers.

Unsolicited commercial communication, to the extent permitted, must according to article 7 of the E-Commerce Directive be identifiable clearly and unambiguously as such as soon as it is received by the recipient. EU Member States shall furthermore ensure that service providers undertaking unsolicited commercial communications by electronic mail consult regularly and respect available opt-out registers. The former requirement still applies to electronic mail which is legally sent under the above-mentioned exemption in the Directive on Privacy and Electronic Communications. The latter requirement seems obsolete after the full harmonisation of the sending of unsolicited electronic mails.³⁴

A commercial practice is according to the proposed Directive on Unfair Commercial Practices aggressive, and thus unlawful, if it, in its factual context, by harassment, coercion or undue influence is likely to cause him to take a transactional decision that he would not have taken otherwise. It is according to annex 1 of the draft directive an unfair, aggressive commercial practices to make persistent and unwanted solicitations by telephone, fax, e-mail or other remote media. This means that electronic mails which are sent to consumers in accordance with the above-mentioned Directive on Privacy and Electronic Communications, under certain circumstances, may be unlawful under the proposed Directive on Unfair Commercial Practices.

2.2. Processing Personal Data

It is almost impossible not to process personal data when carrying out mobile commerce. The processing of personal data is harmonised in a general Directive on the Processing of Personal Data³⁵ and in a more specific Directive on Privacy and Electronic Communications.³⁶ The general directive deals with

33 Article 2(h), see also further in The Article 29 Data Protection Working Party, opinion on unsolicited communications for marketing purposes under Article 13 of Directive 2002/58/EC, Opinion 5/2004 (27 February 2004).

34 The requirements in article 7 of the E-Commerce directive was introduced, when Member States in accordance with the Distance Selling Directive could choose between an opt in and an opt out regulation of unsolicited e-mails.

35 Directive 95/46 (24 October 1995) on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

36 Directive 2002/58 (12 July 2002) concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

processing of personal data, which concerns any operation³⁷ which is performed upon any information relating to an identifiable natural person (the data subject).³⁸ It should be noted that personal data also comprises, for example photos of identifiable persons taken with a mobile phone camera.

Personal data must be processed fairly and lawfully and must be collected for specified, explicit and legitimate purposes.³⁹ The data must not be processed in a way which is incompatible with those purposes. Data may be processed if the data subject has unambiguously given his consent. Personal data may also in a number of situations, be processed without such consent if the processing is necessary for the purposes of legitimate interests, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject. This can, for example, occur in situations where processing is necessary for the performance of a contract between the parties or is necessary for compliance with a legal obligation.⁴⁰ Processing of data involved strictly with a normal mobile commerce transaction can normally be carried out without the consent of the user. It is however advisable to get the data subject's consent as a matter of precaution and to avoid disappointing the user. Consent is defined as any freely given specific and informed indication of wishes by which the data subject signifies his agreement to personal data relating to him being processed.⁴¹

Article 10 of the Directive on the Processing of Personal Data provides that the data subject must be given information when data are being collected, about the identity of the controller and the purpose of the processing. There is no specification of the manner in which the information is to be provided and the information needs not to be given if the data subject already has the information.

2.2.1. Processing Location Data

The Directive on Privacy and Electronic Communications⁴² seeks to ensure security and confidentiality in electronic communication services. The directive complement the general privacy directive and provides for protection of the legitimate interests of subscribers who are legal persons, which are not dealt with in the general directive. The directive applies to the processing of personal data in connection with the provision of publicly available electronic communications services in public communications networks in the European Community.

37 Such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction.

38 An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.

39 Article 6.

40 Article 7.

41 See article 2(1)(h) and The Article 29 Data Protection Working Party's recommendation on certain minimum requirements for collecting personal data on-line in the European Union, Recommendation 2/2001 (17 May 2001).

42 Directive 2002/58 (12 July 2002) concerning the processing of personal data and the protection of privacy in the electronic communications sector.

The directive's provisions on location data⁴³ are of particular interest in connection with mobile commerce because those data are fundamental when providing location based services. Location data may only be processed when the data are made anonymous, or with consent and only to the extent necessary for the provision of a value added service. The service provider must, prior to obtaining consent, provide information on the type of location data which will be processed, of the purposes and duration of the processing and whether the data will be transmitted to a third party for the purpose of providing the value added service. Consent can be withdrawn at any time. If consent has been given, the user or subscriber must continue to have the opportunity of temporarily refusing the processing of such data for each connection to the network or for each transmission of a communication. The consent may be collected, and the user informed, by more suitable media than through the exchange of SMS messages.

2.3. Contracting

Contract law is not harmonised at community level, but the Commission has taken a series of initiatives aimed at increasing the overall coherence of European contract law.⁴⁴ The problems in contracting in the Internal market have so far been addressed by adopting measures relating to specific contracts or sectors. Article 9 of the E-Commerce Directive provides that Member States shall ensure that their legal system allows contracts to be concluded by electronic means. The states are thus obliged to 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.⁴⁵

Contracts, which are part of mobile commerce will normally be considered a distance selling contract within the meaning of the Distance Selling Directive.⁴⁶ A 'distance contract' is any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded.⁴⁷ The E-Commerce Directive also comprise a number of information requirements to be fulfilled in connection with contracting. The information requirements are presented below.

43 Article 9.

44 See however the Commission's action plan for a more coherent European Contract law, COM(2003) 68 final (12 February 2003) and the Commission's call for expression of interest with a view to setting up a network of stakeholder experts on the Common Frame of Reference in the area of European contract law (CFR-net), Official Journal OJ S 148 (31 July 2004).

45 The obligation to remove obstacles to the use of electronic contracts concerns only obstacles resulting from legal requirements and not practical obstacles resulting from the impossibility of using electronic means in certain cases. E-Commerce Directive recital 37.

46 Directive 97/7 (20 May 1997) on the protection of consumers in respect of distance contracts.

47 Article 2(1).

2.3.1. Information Prior to Contracting

Article 4 of the Distance Selling Directive provides that a business in good time prior to the conclusion of any distance contract shall provide the consumer with the following information:

- (a) the identity of the supplier and, in the case of contracts requiring payment in advance, his address;
- (b) the main characteristics of the goods or services;
- (c) the price of the goods or services including all taxes;
- (d) delivery costs, where appropriate;
- (e) the arrangements for payment, delivery or performance;
- (f) the existence of a right of withdrawal;
- (g) the cost of using the means of distance communication, where it is calculated other than at the basic rate;
- (h) the period for which the offer or the price remains valid; and
- (i) where appropriate, the minimum duration of the contract in the case of contracts for the supply of products or services to be performed permanently or recurrently.

The commercial purpose of the information must be made clear and the information shall be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used. It is apparent from recital 11 of the directive that the use of means of distance communication must not lead to a reduction in the information provided to the consumer.

Failure to provide some of the above-mentioned information⁴⁸ in commercial communication, which constitutes an invitation to purchase, will according to the proposed Directive on Unfair Commercial Practices Directive be a misleading omission if it, in its factual context, deprives the consumer of information needed to take an informed transactional decision and if the information is not already apparent from the context. Invitation to purchase is defined as a commercial communication which indicates the main characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase.

48 (a) the main characteristics of the product; (b) the trading name of the trader and, where applicable, the trading name of the trader on whose behalf he is acting; (c) the price inclusive of taxes, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that additional charges may be payable; (d) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence.

2.3.2. Information During Contracting

Despite an attempt in the initial proposal for the E-Commerce Directive to harmonise contract law, the adopted directive only provides an obligation to give certain information prior to the order being placed and in a comprehensible and unambiguous manner (article 10). The information does notably not affect the validity of the contract, which is still to be determined under national law. The information requirements do not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications and they may be departed from in B2B transactions if the parties agree. The information to be provided is (at least):

- (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; and
- (d) the languages offered for the conclusion of the contract.

Article 10(3) further mandates that contract terms and general conditions provided to the recipient must be made available in a way that allows the user to store and reproduce them. This obligation does not only apply to information given pursuant to the E-Commerce Directive, but also to other information that forms a part of the contract, including information given under the Distance Selling Directive.

The E-Commerce Directive also provides some requirements of a more procedural character,⁴⁹ such as providing means for input corrections and order acknowledgement. Unless otherwise agreed by parties who are not consumers, the business must make available appropriate, effective and accessible technical means allowing the customer to identify and correct input errors, prior to the placing of the order. In cases where the recipient of the service places his order through technological means, the business must acknowledge the receipt of the recipient's order without undue delay and by electronic means. This obligation does not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications and the parties to a B2B contract can agree to depart from the obligation.

2.3.3. Unfair Contract Terms

The Directive on Unfair Contract Terms⁵⁰ approximates legislation relating to unfair terms in consumer contracts. Contractual terms, which have not been individually negotiated are according to article 3(1) unfair if, contrary to the requirement of good faith, they cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. The annex contains an indicative and non-exhaustive list of the

49 See article 11.

50 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

terms which may be regarded as unfair and the Commission has developed a database of unfair contract terms (CLAB Database).⁵¹ Unfair terms are not binding on the consumer and the contract shall continue to bind the parties if it is capable of continuing in existence without the unfair terms.

The proposed Directive on Unfair Commercial Practices applies also to unfair commercial practices before and after a commercial transaction in relation to any product, but is notably like the information and procedural requirements in the E-Commerce Directive without prejudice to the rules on the validity, formation or effect of a contract. It is, however, not unlikely that under national law there may be some correlation between community information requirements and the validity of contracts and contract terms.

2.3.4. Written Confirmation of Information

When a distance contract has been entered the consumer must, according to article 5 of the Distance Selling Directive, receive a written confirmation or confirmation in another durable medium available and accessible to him of the 'prior information' mentioned above. The written confirmation shall also comprise further detailed information concerning the right of withdrawal, after-sales services, guarantees and where to address complaints. It is clear that the information also can be delivered in another durable medium if that medium is available and accessible to the consumer, such as through an e-mail. Since the information given under the Distance Selling Directive must be regarded as contract terms and general conditions the information must also be made available in a way that allows the consumer to store and reproduce it in accordance with the E-Commerce Directive, article 10(3).

The obligation of written confirmation does not apply to services which are performed through the use of a means of distance communication, where the services are supplied on only one occasion and are invoiced by the operator of the means of distance communication. This exemption applies to situations where the network operator is charging the customer. The exception does not exempt businesses or network operators from giving the 'prior information' mentioned above or the 'right of withdrawal' mentioned below.

2.3.5. Right of Withdrawal

A consumer shall for any distance contract have a period of at least seven working days in which to withdraw from the contract without penalty and without giving any reason.⁵² The right of withdrawal concerns both contracts on goods and services, but with a number of exceptions comprising, in particular, stocks, transportation, certain recreational services, gaming and lottery services. If the business fails to fulfil the obligations to provide the above-mentioned 'written confirmation of information', the period may be extended up to three months from the receipt by the consumer (goods) or from the day of conclusion of the contract (services). It is important to note that according to article 6(3) the consumer can not exercise the right of withdrawal for the provision of services if

51 <https://adns.cec.eu.int/CLAB/SilverStream/Pages/pgHomeCLAB.html>.

52 Article 6 of the Distance Selling Directive.

performance has begun, with the consumer's agreement, before the end of the seven working day period. Many mobile commerce services will be delivered in close connection to the ordering hereof and the business should make sure that costumers agree to the time of delivery and the lapse of the right of withdrawal.⁵³

3. Solutions?

There are a number of information requirements and similar requirements under the common legal framework in the Internal Market, that are not directly suitable for mobile commerce. At least not the kind of mobile commerce, which is currently predominant, that is, e-mail-based mobile commerce (SMS etc.).⁵⁴ If all the information was to be presented in SMS messages, the user would need to receive several messages, which would make such mobile commerce practically impossible. The introduction of MMS allows for more content in one message, but is still not suitable for providing a lot of information. The pricing structure of SMS and MMS makes it also less attractive to provide extensive information by these means.

The most burdensome requirements are found in the E-Commerce Directive and the Distance Selling Directive. The directives impose an obligation on states to ensure compliance with the requirement without leaving a possibility to relax the requirements on the basis of either the value of the product in question or the medium used. The draft Regulation on Sales Promotions does also comprise some extensive information requirements, which however easily can be avoided by not using sales promotions in mobile commerce.

3.1. Providing Information

The problem in e-mail-based mobile commerce is not a problem of providing the information, but rather a problem of structuring and presenting the information in the handset. A solution to manage information is to structure the information by applying metadata (information about information).⁵⁵ This approach is applied in browser-based communication by WML (Wireless Markup Language used in WAP) and HTML (Hypertext Markup Language used on WWW). Most e-mail clients can handle HTML encoded e-mails, which allows for more sophisticated e-mail designs and seamless connection between the content of e-mails and the world wide web. A similar connection between SMS and WAP, makes it easier to provide the obligatory information directly in the handset. Such solutions allow the service provider to provide, for example, business information and terms of condition under a hyperlink in a SMS message without compromising usability.

Many mobile services are marketed in alternative media such as newspapers,

53 This will add more information to the mobile commerce solution, but the directive presupposes some kind of agreement even when it is an obvious (implied) conditions that the service will be provided immediately.

54 Each SMS message can contain up to 160 characters, though some handsets can combine several SMS messages to one longer message.

55 See e.g. www.w3.org/XML for an introduction to Extended Markup Language.

television, teletext and the Internet. The service provider can utilize these media to provide at least some of the necessary information. The service provider can also make reference to information on a website, provide a service phone-number or send information by e-mails. The latter approach requires knowledge of the user's identity and coordinates. This is information the network operators usually have access to and a network operator can for example forward e-mails on behalf of the service provider. This solution would require an extension of the agreement between the network operator and the user. Data protection legislation must also be observed when processing such data.

3.2. Complying with Information Requirements

The 'general information' to be provided under the E-Commerce Directive shall be easily, directly and permanently accessible. Applying a strict construction, does it mean that the information must be obtainable from the mobile phone, which at the current technological level means SMS, WAP and voice telephony. The procedural requirement in the E-Commerce Directive concerning technical means to identify and correct input errors must be fulfilled in close connection with the contracting itself. The solution may be to make a two-step ordering procedure in which the customer confirms the order.

The written confirmation of information prescribed in the Distance Selling Directive shall be provided in a durable medium available and accessible to the consumer. This obligation can be fulfilled by sending a traditional letter or preferably an e-mail to the user. A SMS message or a similar message will only be sufficient if the consumer can in fact store the information. The presently limited memory in mobile phones may be a problem which can, for example, be solved by making it possible for the consumer to transfer the SMS to another durable medium.⁵⁶ The problems of the limited memory of mobile phones is however only a passing problem since the amount of available memory is increasing.

The remaining information requirements in the E-Commerce Directive and the Distance Selling Directive as well as other information requirements can be presented in other media by a hyperlink or in connection with the marketing of the service. It is however advisable to provide access to the information directly from the handset since customers may hear about the service and the order-procedure from sources other than the marketing material. It should furthermore be observed that contract terms and general conditions provided to the recipient must be made available in a way that allows the user to store and reproduce them.

3.3. Relaxing Requirements?

An alternative approach is to call upon the regulators to relax the information requirements for certain services or for services of a certain value. This would however require valid arguments for why the information found necessary in other, similar types of commerce, is not needed in mobile commerce. It should

⁵⁶ The users might for example be given the opportunity to receive automatically or by request a copy of all or specified SMS messages by e-mail or in print.

be noted that consumer protection provides a level playing field for the businesses and ensures consumer's confidence in the medium which is important for the industry. Common legal requirements mean that vendors in accordance with the country of origin principle in the E-Commerce Directive may provide Information Society Services in the entire Internal Market under one (national) legal framework. Information about the product, the offer and the vendor will create clarity and help avoid disappointments on the user's side.

It is likely that some information requirements, which are introduced with more information-rich media in mind, could be relaxed - both with regard to form and substance. Particularly in situations where the purchase is of a limited value, such as the purchase of a ringtone or a weather forecast, it could be reasonable to relax certain requirements. Since the national authorities have no possibility to relax the requirements, the Commission should be encouraged to include legal requirements as a key policy issue within the pursuit of exploiting the potential in mobile commerce in the European Union.

The challenges emerging from information requirements to mobile commerce calls for a co-ordinated effort from the industry and the lawmakers. Many if not all of the obstacles will be solved along with technological improvements of handsets and through improvement of mobile communication protocols. The magnitude of the problems can best be determined by the industry which may also be best able to elaborate and evaluate the possible technological solutions in the context of expectations for future technological development.

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