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The Information Society Services and Electronic Commerce Spanish Act

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I. Introductory remarks

On the 11th of July 2002 the Spanish parliament passed the Electronic Commerce Act, num. 34/2002, coming into force on October the 12th[1]. The final wording is the result of a six months public consultation period, being the draft accessible on the Internet so individuals and groups could send their opinions and concerns, more than one hundred amendments and four different versions the text. The process has certainly become a landmark in lawmaking process in Spain.

Not only these precedents have been truthful to the nature of the object of its regulation: the Information Society, its actors and their activities and the very interactive nature of this means of communication; but this still remains one of its very aims. As an own mandate of the Act on its article 33, the Science and Technology Department has its very own site[2] in which information abut the Act and any further developments in the field of information society services are posted there for general access as well as a means of direct dialogue with the Department.

The Electronic Commerce Act (EAC) is the result of the aim of the Spanish legislator in achieving a comprehensive regulatory instrument which would become the head of the regulation of the whole information society in Spain. In that sense not only throughout the preamble of the Act but also on its article 1(1) specifically provides that the object of the present Act is the regulation of information society services and the regime of contracts concluded by electronic means in so far as it relates to:

- information service providers obligations, intermediaries included
- electronic commercial communications
- essential information to be given in relation with the celebration of contracts
- validity of contracts concluded by electronic means
- sanctions and penalties regime.

Of course, as we shall see, although not mentioned in this article 1(1), the Act establishes the applicable liability regime (articles 13 to 17) and also defines through Annex what its personal scope of application will be.

II. Scope of application

First of all we need to establish how the ECA has defined the term of information society services. The Act has, as many other texts around Europe have, embraced the definition that the E-Commerce Directive offers on its article 2 (a) by reference to the Directive 98/34/EC as amended by Directive 98/48/EC[3]. However, a slightly different and more clarifying version of the definition has been used by the Act[4]: on the one hand it generally refers to services normally provided for remuneration, at a distance, by electronic means, and at the individual request of the recipient. On the other hand, the Spanish legislator has decided to refer all the questions relating to activities of transmission, processing and storage of data by any electronic means to what it has been named as Intermediary Services: Internet access services, transmission of digital data, caching, hosting, search tools services.

With this position there will be no doubts now that the ECA applies to any activity that makes use of electronic communications means, avoiding this way the more general reference to Information Society Services that could eventually lead to the wrong conclusion that only those services more closely and strictly linked to the use of electronic equipment and the processing of data would be targeted by the regulations.

Once the personal scope of application has been clarified, we must now focus on another very important requisite for the regime to apply: the fact of the service being normally provided for remuneration. The test would seem to be whether the service represents an economic activity, and at this point much criticism arose, once again, for the extensive perception of what an economy activity represents. To present the issue by way of contrast, the UK Department of Trade and Industry , on its "Guide for business to the Electronic Commerce (EC Directive) Regulations 2002", exposes and understands that this specific requirement will include "services (insofar as they represent an economic activity) that are not directly remunerated by those who receive them, such as those offering information or commercial communications (e.g. adverts) or providing tools allowing for search, access and retrieval of data"[5]. In other words "the test, it would seem, is whether the service represents an economic activity *and apart from advertising* can include the provision of information, search, access and retrieval of data"[6]. However, on the Spanish side we shall find a different and more comprehensive approach as mentioned before. The FAQs web-page of the ECA [7] (hosted by the Science and Technology Department), answering the question on when is to be understood that a web-page represents an economic activity for the owner, states that it will be considered as such economic activity whenever any sort of direct or indirect retribution comes out from the mere existence of the web-page, including remuneration from advertising, and that will apply also to personal web-pages[8].

There is a clear difference as to what has been considered as economic activity and, whereas positions like the one adopted by the UK legislator are more faithful to the meaning of economic activity, the Spanish counterpart has opted for a broader concept that reflects the true spirit of the Act: the EAC as staple for the information society regime in Spain, trying to reach as many situations as possible. However, this understanding even truthful to the aims of the Spanish legislator has not been so much in relation with the spirit of the Directive.

III. Obligations on Providers of Services

In this field, the Spanish Act has also introduced some new requisites for service providers to be regarded: first of all, the supply of at least one of the services provider's domain names to the Commercial Registry or that other Registry which first inscription is necessary for the body in order to acquire personality or just for publicity purposes; secondly, a general obligation of collaboration with the Authorities and, thirdly, the obligation of storage of certain electronic communications data.

The obligation to register at least one domain name, despite the criticisms that has produced[9], has been implemented having a higher aim behind. As the explanatory memory of the Act shows, the

intention of this rule was double: as well as bringing domain names at the same level of importance as trade names have, the legislator had in mind the creation of a powerful instrument to fight back domain names piracy. In this sense, the fact of registering domain names will give the benefit of publicity (the Registry's contents are public and open to anybody) and opposability of the domain name against third parties. This will represent a very strong evidence against what is been called Cyber-squatting, although we mustn't forget the fact that within a global phenomenon like the Internet, this kind of measures are of a limited nature and effect even more considering the fact that this requisite will only apply to service providers established[10] in Spain.

In respect now of the obligation of collaboration with the authorities, two different articles refer to this duty: articles 11 and 36. The final question that the author has in mind is the real necessity or operability of those two mandates as, first sight, they would be already covered by the general obligation upon individuals and corporate bodies to collaborate with the competent authorities when it comes to administrative or judicial proceedings. However the fact of expressly mentioning those obligations will simply open the way for the relevant sanctions to apply.

Article 36 refers to the obligation of any information society service provider to collaborate with the agents of the Science and Technology Department or otherwise the competent agent in the course of their investigations and supervisions. In particular, it refers to facilitating access to the premises as well as to any required documentation without prejudice of the relevant court order whenever necessary.

On the other hand, article 11 will only target providers of intermediary services in terms of obtaining their collaboration whenever access or transmission of services from third party providers established in Spain need to be interrupted following an order from the competent authority. The same collaboration is expected in relation with the removal of infringing contents. This article give us a hint on how the liability regime for intermediary services has been conceived as well as how the notice and take down procedure is understood under the Spanish law: notice and take-down orders will always come from public authorities as a result of a due process which will be respectful and protective with the rights of privacy, protection of personal data and freedom of expression[11].

The express provision of these two rules has not only an emphatic purpose. Failure to comply with these obligations will risk the imposition of a second degree sanction (up to €150,000) in the first case and the maximum penalty fare for breach of the second one: up to €600,000.

Finally, and still related with the obligation of providing information to the relevant authorities, this time, in case of prosecution of a criminal offence or the safeguarding of national security and defence, there is a last duty or, better said, burden placed on certain intermediary service providers. Network operators and access providers will need to retain, for a maximum period of 12 months, connection and traffic details of every single transaction in order to allow identification of the final user terminal. On the other hand, providers of hosting services will need to keep information enough to allow the identification of the origin and time of the transmission of the related data.

This information cannot be used for any other purposes but the above mentioned. In addition, a specific duty of care is equally imposed since any necessary means of protection of the stored data will be required from the service provider to apply.

Failure to comply with this obligation will equally amount to a maximum penalty fare of €600,000.

IV. Commercial Communications Regime

The Spanish regime has opted for the solution of permitting only those direct and individual commercial communications that have previously been either solicited or expressly authorised. Therefore, an opt-in approach has been followed.

This decision has been reached not without problems: it has been strongly criticised since it does, in fact, put business working in the direct e-marketing field in a more disadvantageous position compare to their colleagues working in the off-line sphere. Having gone for an opt-out solution caring always for proper safeguard measures in respect of privacy and data protection would have promoted this economic sector which seems to have excellent rates in relation to costs and efficiency of the advertised message. It is certainly clear that the Spanish legislator has not relayed as much as the English one has on industry self-regulation and codes of conduct as an alternative to be considered together with an opt-out approach.

However, there has been left still one door open. The ECA FAQs site[12] admits as valid ways of obtaining the required authorisation:

a) by expressly requesting the e-mail address in the case where further information about products and services was required by the recipient,
b) by including such an option in the course of a contractual process for any given service, provided this main process was carried on-line,
c) again within the course of a contractual process, by inserting in the general terms and conditions applicable to the contract one such clause that states that the recipient will agree on the reception of future commercial communications, requesting his authorisation together with the acceptance of the final contract.

It is this last possibility the one that is has been mainly used to require authorisation for direct mailing in the off-line world, so its recognition brings some balance and softens the pure opt-in position.

It has also been recognised the possibility of extracting and using personal information kept in public sources of information like telephone directories, media, official publications, lists of member of professional bodies. Nonetheless every communication will need to inform the recipient about the original source of the information and the possibility of disapproving the reception of further communications.

In any case there will also be an obligation on service providers to facilitate by all necessary means and free of cost the possibility of withdrawal of the recipient's authorisation.

V. Liability regime of Intermediary Services Providers

Articles 13 to 17 determine the liability regime applicable to information society service providers. Opening the Section, article 13 reminds that in any case general liability rules of civil, administrative and criminal law will apply. However, in the case of intermediary services, the following articles will establish those situations in which they will not be held liable for their operations.

In this context of intermediary service providers, the Spanish Act introduces two further developments compare to the text of the Directive. First, the introduction of a fourth safe-harbour case relating to providers of hyperlinks[13] and location tools services. The legislator has found positive in terms of legal certainty[14] the fact of providing this specific category and has opted for the solution already given by the Digital Millennium Copyright Act.

Secondly and in relation with the liability regime of providers of hosting services and providers of hyperlinks and location tools, it clarifies what is to be understood by the requisite of actual knowledge. Such a knowledge will be acquired by service providers from the moment they are notified the resolution from the relevant authority by which the contents at stake have been declared illegal and subsequently it has been ordered its removal or access been disabled. This will apply without prejudice to other self-regulation procedures and codes of conduct that the service provider might subscribe and other means of actual knowledge that could be equally applicable.

It would be worth noticing the fact that apart from the regulation of the so called “stop now orders” as a relieve with the immediate effects that this sort of procedure requires, we find no other adequate administrative or judicial procedure. The option of a notice and take down procedure lead by a public authority seems a very right choice in terms of safeguarding both parties rights and interest, however until now no appropriate proceedings that take account of the necessity of rapid action needed in this context have been set up. Referring to the ordinary procedures is just not good enough when we are talking about the on-line environment where its very essence lies on the volatility of its contents.

VI. Electronic contracts regime

We now proceed with Title IV of the Act: Contracts concluded by electronic means. This title will try to deal with the whole applicable regime to electronic contracts but such an ambitious task, to the author of these lines, has not been tackled with the finest legislative technique possible. Lack of internal coherency and the ever confusing terminology has driven authors to a state of perplexity first and madness afterwards trying to build up a reasonable interpretation for these provisions. This has probably been the field where fewer critics and proposals came from the part of the Industry, still trying to figure out the not so apparent but simple in the end regime that lays behind[15].

To begin with, the Spanish legislator believed convenient the fact of recognising full validity to those contracts where offer and acceptance where exchanged by electronic means without need for the parties to previously agree on that specific format. Also admits that whenever a written form is required by law, digital format will fulfil this obligation. In respect of the exclusions for electronic format, this cannot be used in contracts related to family law and successions apart from those contracts that require for their validity public document.

To the same extend, contracts in digital formal are given the value of documentary evidence however, proof of its integrity and authenticity will be examined according to the general rules of evidence and, in particular on the base of the electronic signature regime. The ECA has also introduced the possibility for a third party to archive the electronic contract. Although this third party will not give faith of the contents of those communications, it will be trusted as far as date and time factors are concerned.

The following articles refer to those obligations applicable to the provider of services at the time when orders are placed by recipients of services. In these sense, the language used by the EAC is far more precise than that we find in the Directive: the obligations have been expressly specified as pre-contractual and post-contractual obligations instead of the rather vague terminology of obligations “prior to the order been placed” or “placing the order”[16]. As far as pre-contractual obligations are concerned, the Act has pretty much repeated what the Directive already established, no new obligations had been added. We should also remark the fact that although terminology has changed for the best, the Act does not assume that providers of services through electronic means are directly placing themselves as offerors in an eventual contractual relation ship. Whether the nature of the disclaimer is an offer or a simple invitation to treat will be determined by the presence of the basic elements to conclude a contract[17].

We shall move now into the final provisions of the Act and concentrate on Additional Disposition fourth which has been the centre of the whole storm relating to electronic contracts formation.

The ECA has reached a final decision, after over a century, on the disagreement on the formation of contracts concluded at distance. Two were the existing approaches: either the emission of the acceptance rule, followed by the Commercial Code (art. 54) and so only applicable to business to business transactions; or the reception of the acceptance by the offeror rule followed by our Civil Code (art.1262) hence applicable for the rest of the cases. The justification for this difference was

based on the ease of trade requirements and at this point we could think of, for example, the possibility of withdrawal of both offer and acceptance: if we are to follow the emission rule, chances for withdrawal of either offer or acceptance would be significantly reduced and contracts would have been concluded as soon as the acceptance was sent. It seems that the legislator has now decide that this issue is no longer of such an importance and that traffic requirements will still be at their ease following the reception rule in the case of distance and non-simultaneous communications.

Nevertheless, we don't seem to get to the same conclusion when it comes to electronic communications[18]. Probably having in mind the still immaturity of this market sector, the Spanish law has stuck to the emission rule as far as electronic contracts are concerned, trying to minimise any possible risks. This way, whenever the offeree is also the recipient of the service this rule will work fantastically: the risks are translated to the offeror- provider of the service as soon as the acceptance has been sent. However this seems not to work so well in favour of the recipient of the service whenever he or she has taken the roll of actively putting forward an offer replying to a simple invitation to treat posted on a web-page. At this point we must remember that some other resorts will assist consumers, like the seven days peace of mind period in which withdrawal will still be possible [19].

The following step to go through will be that of acknowledgement of receipt of the acceptance, which according to the Spanish Act shall be done within the following 24 hours of its receipt either by electronic mail or using analogue means to the ones used during the transaction, providing the possibility of storage by the recipient. In respect of this requirement, once again, some authors have criticised the lack of clarity of the text. The wording of article 28 (2) estates that it will be understood that acceptance and its confirmation have been received whenever the parties to whom they are addressed could have knowledge of them, and paragraph two continues adding that parties are deemed to be able to acknowledge the mentioned communications as soon as they reach the server.

For some authors, this situation seems to be in conflict with the system previously set in relation with the process of formation of electronic contracts, retarding the moment of conclusion of the contract when the acceptance is received by the offeror[20]. We must however deny this possibility not without regretting this careless technique once again, and interpret as the true aim of this article the fact of fixing a time limit for the compliance with the obligation of acknowledgement of receipt. According to this interpretation, failure to comply with the mentioned obligation will lead only into breach of statutory duty (resulting in a possible maximum fine of up to €30,000) but in no case will originate breach of contract. It seems imperative to understand the whole of the system in this way and interpret the requirement of acknowledgement as a formal duty to comply mainly by providers of services[21] in order to avoid any sort of uncertainties and bring confidence in the use of electronic commerce.

Going still further down the road, the Act has determined where contracts have been concluded: place of habitual residence of the consumer and, as default rule in cases of business to business transactions, place where the service provider is established. We shall understand that this rule do not intend to became a conflict of laws rule, but one can imagine some situations in which a national judge would be happy to apply the above mentioned rules in order to justify by jurisdiction and applicable law.

VII. Sanctions regime

Just a brief note on this respect and following the mandate of article 20 of the E-Commerce Directive, the Spanish Act has introduced its own range of sanctions and consequent penalty fares applicable to the different infringements. The result has certainly been dissuasive if we look at the amount of the possible fines that a provider of services could be faced with, but the effectiveness and proportionality aspects have been possibly neglected.

The range of sanctions goes from up to €30,000; €30,001 to €150,000 and €150,001 to €600,000. Their proportionality is still to be determined as situations like no compliance with the obligation on intermediary service providers to retain certain data relating to electronic communications[22] could amount to the maximum fare of €600,000. Not only breach of this duty has been treated at the same level of breach of those measures allowed by the Directive to restrict freedom to provide information society services within the EU based on the reasons set on article 3 (4) (a), but the burden remains even though the Spanish Government has not approved yet the needed regulation that will set the standards and period of time according to which the relevant data should be stored.

Another aspect that has gained critics is the absolute lack of clarity in respect of the competent authority. Many of the articles of the Act refer to the competent authority as such, without pointing at the one that has got the actual statutory power to act[23]. Furthermore, confusion is even greater whenever general references are done to the judicial or administrative authority. Trying to quick fix this problem, article 43 gives general competence to the Minister of Science and Technology for the most serious offences (those fined with penalties from €150,000 to €600,000) and for the rest, competence is given to the Secretary of State for Telecommunications. In any case, this brings no more than problems since some of the conducts that the ECA tries to regulate would have already been included in another piece of legislation which could lead to an infringement of the very important principle of "ne bis in idem" (no double sanction based on the same facts) which informs any punitive action taken by any considered authority.

This whole regime might well be challenged for a possible unconstitutionality as the Act has failed to be either proportional or predictable in the sense of prefixing both the wrongful action, the exact competent authority and the proceedings that are to be followed. A general remission to the rest of the existing applicable law is just not enough within the rule of law. Further developments on this respect will be necessary.

VIII. Conclusions

After this small introduction to what Spain has as its main staple for the regulation of the information society services, the impression is still that one of immaturity of the final result. The Electronic Commerce Act has been the first attempt to seriously and globally approach this still new phenomenon, and as a baby that is learning how to walk the Act is trying to break through its first steps in the regulation of information society which is a major subject all around the world. Amendments might be expected for the sake of clarity, simplicity and certainty although not in the sort term.

Maybe the idea of a single reference for the whole regulation of information society services is the main failure of the project. Maybe a more lowprofile regulation as the one adopted in the UK would also be a right answer. Maybe not a single frame but multiple approaches depending on the subject matter would be the most sensible way to act. In any case, only time and experience will make us wise enough to opt for the right choice and this is not the Spanish case just yet.

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[1] The same day that Columbus reached the American Coasts in 1492, marking the "beginning of a new era".

[2] www.lssi.es
[3] “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”. Recital 17 of the Directive 2000/31/EC on certain aspects of information society services, in particular, electronic commerce, in the Internal Market (Directive on Electronic Commerce).
[4] Letters (a) and (b) of the Annex.
[5] Paragraph 2.16
[6] Raffi Azim-Khan and Rico Calleja, “E-Commerce Regulations under the microscope”. Electronic Business Commerce, November 2002, pages 7-9.
[7]http://www.lssi.es/HTML/ServerPages/home.php
[8] To this extend and for this kind of sites, the main obligations under the Spanish Act would be those referring to identification of the owner, as the answer to the correlative FAQ states.
[9] See ICC, Press room, 22/11/01: “New Spanish Internet law will stymie e-commerce”
[10] Establishment always in the sense of the E-Commerce Directive as well as Providers established in other Member Estates but with permanent establishment in Spain.
[11] Art. 11(2) ECA
[12] See num. 4
[13] Note that hyperlink services are conceived in relation with the provision of search services as to the presentation any given search results and the facility of a direct link to the site. Not to forget either that this regime only applies to Intermediary service providers so cases of linking and deeplinking from a given webpage to another that could amount for example, to situations of unfair competition, are not covered by this exemption.
[14] As opposed to the approach taken by the UK implementation. See guide num 6.14 from the Department of Trade and Industry (DTI), “Guide for Business to the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013)”.
[15] On this respect we can check against those amendments proposed throughout the drafting period by two of the biggest and strongest industry associations: National Internet Businesses Association (ANEI, Asociacion National de Empresas de Internet) and the Spanish Association of Internet Service Providers (AEPSI, Asociacion Espanola de Proveedores de Servicios de Internet). No mention at all in relation with the proposed contractual regimen was put forward.
[16] Article 10 (1) paragraph 1 and heading of article 11 respectively.
[17] Helping this interpretation we shall refer to art. 27 (3) by which without prejudice to what is determined by specific legislation, offers and invitations to treat made by electronic means will be valid for as long as the offerors claims or, failing to do so, as long as it is accessible to recipients of services.
[18] At this point is when the legislative technique has completely failed since, suddenly and coming out of the blue, the Act in its Additional Disposition fourth, last paragraph, refers to “contracts celebrated by *automated* means” without any further explanations. It is certainly regrettable the use of this wording which adds nothing else but confusion to the debate.
[19] as disposed by the Distance Selling Directive.
[20] In this sense Carlos Rodriguez Sau and Raul Rubio Velazquez, “Todo sobre la LSSI y de Comercio Electronico”, Chapter X, page 95 last paragraph. Barcelona, September 2002.
[21] In favour of this view we find that art.28 (1) second paragraph of the Act is urging service providers to facilitate by all means the compliance with this requisite whenever it is down to the recipient of the service to provide such an acknowledgement of receipt on first instance. The Act wants to secure also those situations where recipients of services are the ones that initiate the contractual process by putting forward an offer.
[22] Article 12 EAC
[23] Which is in open collision with the principle of legality that informs penal law, requiring the predetermination of the competent authority that is to exercise its sanctioning power.