

INTERNATIONAL ELECTRONIC CONTRACTING: OFFER AND ACCEPTANCE

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Abstract

Internet offers us not only a new means of communicating or of diffusing information, but also a new electronic marketplace. The basic characteristics of this new market are that commercial transactions no longer take place using traditional methods, rather they are made electronically. Due to its transnational nature, Internet reaches an international audience, as neither distance nor geopolitical borders offer any obstacles to commercial relations over the Web. A contract can even be concluded by electronic means, as the parties can transmit their declarations of intention through the exchange of emails or by filling out a request form, depending on whether the website they are dealing with is interactive or not.

Keywords: Website, e-commerce, contract formation, international commerce, dynamic (active) websites, and static (passive) websites

Introduction

The term e-commerce covers a very wide concept, which includes any commercial transaction made by electronic means, as well as those made by fax, over the telephone, through electronic data interchange (EDI) or on the Internet. In the interests of our study, we have limited the reaches of the term e-commerce to include only those commercial transactions which take place over the Internet. This does not mean however that we are merely talking about the buying and selling of goods, services or information on the Web.

We will also be examining the use of the Web for other, related activities such as advertising, searching for information, customer support services, etc. As is widely understood, the opening of the Internet to commercial use and, in particular, the development

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of the World Wide Web, have been fundamental in enabling e-commerce to reach the consumer, following an important surge in transactions carried out over the Web³⁸.

This kind of commerce has strong economic incentives, such as the reduction of administrative costs and taxes, the elimination of distribution and intermediary processes, the possibility to work 24 hours a day, the elimination of national borders, the speed of transactions, etc. For these reasons, this virtual – rather than material – field has opened up a new sector in trading activities, in which there exists a new, previously unheard-of, meeting place for offers and acceptance of negotiations.

The aspect which brings added value to the commercialization of goods and services on-line is the fact that the completion of the obligations which may arise from a contract between parties can be completed by electronic means. Furthermore, different types of websites can be created, depending on whether they only offer information or whether the user can interact somehow and modify the contents³⁹.

Depending on the websites, the formalization of the contract shall be made at one time or another. This issue is related to the time occurrence supply and acceptance. This question is not peaceful, considering that in most cases we are facing international electronic contracting. Thus the regulation comes into play private international law, because the moment occurs offer and acceptance will be different depending on the state.

Concept And Classification Of Websites

Active and passive websites

The objective of this section is to offer a brief approximation of the main types of websites that exist today as at present there is no clearly established standard to decide what kind of web pages enter into each category. This has meant that a classification of the types of web pages has been made according to two order parameters and the type of technology and methods which are built⁴⁰. Thus, one can speak on one side of static web pages. They are made in HTML to display information. Although these websites are called "static", this does not mean they can only contain text and photos. They may also have videos, flash animations (like banners) or moving images such as "Gif". Usually, web designers and developers are

³⁸See, AAVV, Cutsem Jean-Pierre, V. (2008), *E-commerce in the world, Aspect of Comparative Law*, Bruylant, Bruselas, pp. 15-39

³⁹See, Grassi, R. (2010), *Elementi di informatica in diagnostic per immagini*, Springer-Verlag, Milan, pp. 101-112.

⁴⁰See, Valdés-Miranda Cros, C. (2010), *Creación y diseño web*, Anaya Multimedia, Madrid, pp. 32-41.

employed to edit these pages. This page type is difficult for the customers to handle due to the knowledge and programs required⁴¹.

Most people who employ these pages for their business or company usually modify the content sporadically seeing as each modification requires the services of web development personnel or other entities engaged in providing these services, implying a cost per change. On the other hand one can speak of dynamic websites like forums, blogs, portals, online stores, etc. Unlike those mentioned above which consist of a simple HTML document that visitors open, in this case the document is generated automatically every time a visitor enters, resulting in a website which interacts with the user, for example, when a message is written in a forum and it appears once or a product bought in a virtual store.

Dynamic websites also offer the following features⁴²: - a large number of possibilities in design and development. -The visitor can alter the design, content or layout of the page as they wish. -Performance using various programming languages and techniques. - The update process is very simple; there is no need to enter the server. -Allows a number of features such as databases, forums, dynamic content, etc. - Can be done entirely with free software. - There is a large community of developers offering selfless support. – And, there are a large number of freely available solutions.

In short, the concept of the dynamic Web page has been imposed in the design world and in online businesses. Sites such as Yahoo, Google or Amazon are excellent examples of dynamic Web pages that allow interaction with visitors and offer many possibilities: shopping carts, inclusion of customers' own book or record reviews based on certain search criteria, participation in discussions, among others.

Electronic dynamic web pages are most relevant because, as stated, in these sites, the user can interact and may specifically execute contracts. Therefore, this study focuses on determining goals, through the study of the way in which an offer is made on these websites, as an offer can be understood on acceptance. Here lies the core issue for an electronic contract to be formalized and therefore valid, and for the time of execution of the contract to be determined. This will be fundamental in knowing the precise moment from which the parties are bound by the contractual relationship.

This issue is even more complex, as in the field of electronic commerce the parts may be located in different geographical locations and different countries. Here lies the

⁴¹See, Ramajuan, R. (2012), "Distributed Computing and Internet Technology": *8 th International Conference Berlin*, pp. 41 and f.

⁴²See, Menchen Peñuela, A. (2010), *Informática para la gestión y la administración*, Startbook, Madrid, pp. 32-39.

international element, and therefore the discipline that regulates such private legal relationships, namely private international law. The field of the European law Directive on electronic commerce thus far has not resolved the issue of contract completion time of international mail. Neither have the domestic laws which transpose the directive, such as the Law of Services of the Information Society in the case of Spain.

Active websites and electronic contracts

One of the most important features of active or dynamic websites is that they offer users the possibility to purchase goods and services using electronic contracts. Within the generic term electronic contract we find different classifications of contract. For example, based on the way the operation is executed we can talk about direct or indirect electronic contracting. The first term refers to those contracts which allow for the delivery of immaterial goods or the provision of services, the second does not require the physical presence of the parties⁴³.

The delivery or provision of goods and/or services can be immediate or deferred. Immediate provision is that which does not necessitate a physical delivery of material goods and/or that in which the service does not need to be provided in person. Examples of this could be the purchase of licenses for the use of computer programs or the rights to a song. In contrast indirect electronic contracting does require the delivery of material goods or services offered in person which is, by its nature, deferred. This type of contract can be, for example, for the purchase of ink for a printer, the contracting of the services of a lawyer, etc⁴⁴.

Depending on the way in which the contracting parties carry out their declaration of intent, we may be talking about a pure or a mixed electronic contract. In the case of a pure electronic contract, the declarations of intent are made exclusively through electronic means, such as by email or through interactive websites. Here we must also distinguish reactive contracts, which are those which require the parties to employ additional communicative tools to complete the contract. Within the term reactive contracts we find the so-called “click contracts.” Here, to formalize the contract, the receiver must show acceptance by clicking on a button made especially to this effect, usually containing the word “accept.” For example: the acceptance, by clicking on a button, of the terms of use of a social networking site.

Within the term interactive electronic contracts we find the so-called “browse contracts.” Here the contract is formalized through accessing a webpage or website, without

⁴³See, Makesinis B., Underath H., Johnston A. (2006), *The German Law of Contract, a comparative treatise*, Oxford and Portland, Oregon, pp. 95-104.

⁴⁴See, López Tarruela, A. (2006), *Contratos internacionales de software*. Tirant lo Blanch, Valencia, pp. 43-69.

the receiver actually expressing acceptance. For example: the tacit acceptance of the terms of use of a web page or its disclaimer. Also under this heading of electronic contracts which depend on the way in which contracting parties carry out their declaration of intent we find the mixed electronic contract in which various electronic systems of expressing intent are combined with other, more traditional methods, such as downloading a purchase order form to be returned by fax or post.

A further two classifications can be made depending on the subjects who employ the use of an electronic contract. Here we distinguish between the electronic contract for consumption and the commercial electronic contract. The first is an online contract in which at least one user or consumer participates, for example: the purchase of airline tickets over a webpage. The commercial electronic contract is that in which all contracting parties are businesspeople or professionals. For example: trading wood for the fabrication of chairs.

The final classification of electronic contracts which we must make depends on the payment method agreed on by the interested parties. We distinguish here between contracts using electronic payments and those using traditional payment methods. In the first case the payment method chosen by both parties is electronic cash. For example: credit cards, bank transfers, PayPal. However, payments made with private money are becoming more and more popular on electronic trading websites, in auctions and MMORPGS; for example, on the webpage Second Life, payments are made using Linden Dollars (L\$), some websites use tokens as payments, and in WOW users pay with gold coins. In other cases where the contract requests traditional payment methods, payments are made in cash or by cheque, which can be sent by post or settled on delivery.

Regulation Of The Electronic Contract In The European Union
Treatment of the execution of the international electronic contract in the Directive 2000/31/EC of 8th June 2000 on Electronic Commerce

The use of electronic tools for the commercialization of products and services has called for a revision and an adaptation of the existing regulatory framework to eliminate the legal insecurity which previously surrounded these transactions. The general rules regarding contraction have been modified using a common European instrument, guaranteeing a high level of harmonization in the orders of the Member States. We are talking about Directive 2000/31/EC of the European Parliament and of the Council of 8th June 2000 on electronic commerce, which was incorporated into Spanish law with the Law 34/2002 of 11th July, the Service Law of the Information Society (SLIS). This Law becomes applicable to e-commerce transactions from the moment in which such transactions can be defined as a service to the Information Society.

Directive 2000/31/EC obliges the Member States to ensure that their legal system allows contracts to be executed by electronic means, (article 9), whilst ensuring harmony in the regularization of certain questions which may arise from this type of contract. Along the same lines, Article 5 states that it is the obligation of the service providers to render accessible to the recipients of a service and to the competent authorities enough information for them to be quickly and easily identified and contacted if necessary. Articles 6 and 7 offer a series of conditions, related to offers and publicity regarding products, which service providers have the obligation to follow if they are to commercialistgoods or services over the Internet.

Article 10 of the Directive obliges Member States to ensure that service providers provide information on the different technical steps to follow when concluding an electronic contract and make available to the recipients the general conditions of the contract, prior to the order being placed. This aspect is particularly relevant due to the habitual use of adhesion contracts. In the case of Article 11, although it does not specify exactly the time and the place of execution of an electronic contract, it obliges the service provider to acknowledge the receipt of the recipient's order without undue delay and by electronic means. The acknowledgement of receipt is deemed to be received when the parties to whom they are addressed are able to access them.

Concretely, Article 11, "Placing of the order", states:

"1. Member States shall ensure, except when otherwise agreed by the interested parties and in cases when dealing with professionals, the recipient of a service must state his consent using technological means, and the following principles are applicable: A) The contract is completed when the recipient of a service:- has confirmed receipt of the acknowledgement of receipt; B) The order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them; C) The acknowledgement of receipt of the service provider and the confirmation of the recipient must be sent without undue delay".

Regarding the regulations on the completion of international electronic contracts and the adaptation of such to the national laws of each Member State, Directive 2000/31/EC does not clarify the consequences if a failure to comply with the rules stipulated in Article 11 arises. The validity of a contract may come into question if the acknowledgement of receipt, deemed necessary in Article 11.1 a), is not available.

Furthermore, it may be difficult to determine the moment in which a contract is completed, according to article 11.1º, b), which states that the completion of a contract occurs

when the receiving party can access the confirmation. Here the ambiguity lies in the fact that the receiving party will only know whether they can access the acknowledgement of receipt on receipt of the same. This may occur hours or even days after the original was sent. If, in general, communications over long distances create uncertainty regarding receipt of messages by the interested parties, the Directive attempts to avoid this uncertainty in the case of electronic contracts by lengthening the process.

This method raises the question of whether the “neutrality principle” can be maintained between traditional trading methods and electronic ones. The complex nature of the solution offered by Article 11 of the text presented by the EC caused the inclusion of amendment 42 included in the Report on the proposal of the Directive of the European Parliament and the Committee relating to certain legal aspects of e-commerce in domestic markets elaborated by the Committee on Legal Affairs and Citizens' Rights of the European Parliament.

In the final version, to gain the approval of all Member States, the proposal is reduced to a minimum. For this reason, the first section of Article 11 (“Placing of the Order”) states that: *“1. Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the following principles apply: a) the service provider has to acknowledge the receipt of the recipient’s order without undue delay and by electronic means, b) the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them”*.

In any case, and regardless of the modifications mentioned above, the Directive does not regulate the moment in which the contract is deemed to have been executed. This is – surely - due to the difficulty of said regulation, given the diversity of solutions offered by Member States, solutions which can differentiate even within each particular State. This ambiguity depends on whether a contract has a civil or a mercantile nature, as occurred in the Spanish law. Although not expressly established, the trial mechanisms are regulated through the demand of only one acknowledgement of receipt (as opposed to the chain of acknowledgements of receipt which are not directly relative to the formation of a contract (a point which the Directive does not deal with), so – in principle – we are dealing here with a functional acceptance of receipt, for purely substantiating ends.)

Secondly, the Article introduces an imprecise temporary aspect and an undetermined legal aspect on obliging the sender to send the acceptance of receipt “without undue delay.” This demand has been set, for example in the Spanish law, which stipulates that if the

confirmation of receipt of the acceptance is done through the sending of an acceptance of receipt by email or equivalent, it must be sent “within 24 hours of receipt of the acceptance.” Article 28.1 a) of the SLIS stipulates how proof is shown, while if a method is used which is equivalent to that used in the contractual procedure, (e.g. through a web page), it must occur “as soon as the recipient has completed said process.”

Thirdly, the Directive considers the interested party to have received information (either the order or the proof of receipt) when each party “is able to access them”. This is a delicate, if not dangerous, statement as the moment from which a person can gain access to something is inevitably disputable. One may conclude, for the simple fact that a document has arrived in a person’s inbox, that that person has received said document, without taking into account the subjective conditions of the receiver. The EC legislation considers the deposit of messages in electronic inboxes, as this is the simplest solution, even though it may not be the better solution for the receiver of a message.

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

Finally, the Directive allows design of a model of electronic contracting in three phases: Firstly, that of a business offering, through electronic means, the sale of goods or offer of services (contractual offer). Secondly, that of a consumer (or another business) who places an order through electronic means (namely, a declaration of acceptance of the previous offer). The third step is the business must send acknowledgment of receipt of the order which the consumer (or second business) sent.

Although the three phases mentioned above are present in the legislation, it is not obligatory to follow them in electronic contracting between Member States. In fact, when dealing with contracts which have not been executed by consumers, or have been executed via email, the third phase, the sending of acknowledgment of receipt, can be avoided completely. The phases are not set out as such either, probably because, depending on the order, that which here we classify as offer could be an *invitatio ad offerendum*, and acceptance could merely be previous consent. For this reason, in the final version of the Directive, in an attempt at neutrality, they speak about “execution of an order” with no legal classification of the actions and declarations of the parties.

Other EC rules relating to electronic communications and their associated services could be relevant here, and also have an effect – albeit indirectly - on the completion of an international electronic contract. Here we are referring to the new regulatory regime, based on the necessity to reduce administrative obstacles, to better legal security; on offering services; on authorising communication services which use Internet in the same way as other communication services, etc. This regime is basically based on five Directives, one general, framework Directive, and four specific Directives dealing with authorization; access; universal service; and privacy, which are listed below due to their importance and repercussion in the fields of Information Technologies and International Communication:

-Framework Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002.

-Authorisation Directive 2002/20/EC of the European Parliament and Council on the authorization of networks and electronic communications services.

- Access Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to electronic communications networks.

-Universal Service Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on universal service and users' rights relating to networks and electronic communications services.

-Directive on Privacy and Electronic Communications 2002/58/EC of the European Parliament and the Council of 12 July 2002 on the protection of personal data and privacy in the electronic communications sector.

Alongside these Directives we can also name other, complementary, regulations which work toward better protection for the users of Internet and, especially, the Directive 2002/77/EC of 16 September 2002, on Competition in the Markets for Electronic Communications Networks and Services. (Text with EEA relevance).

Having analyzed the regulation of Directive 2000/31/EC, regarding the offer and acceptance in electronic contracts, it must be stated that the solution offered by this standard to the question is not clear. It is a regulation that seeks neutrality and generality to avoid divergences in the application of the rule in the Member States. Therefore, given that the issue is not resolved, conclusion of the contract would require regulation to give a more concrete solution, to avoid the legal uncertainty that currently exists if there is a dispute concerning the time in which an electronic contract is to be considered valid.

Transposition of Directive 2000/30/EC to Spanish law

The SLIS transposes the EC Directive to the Spanish legal system, so important similarities exist between the Spanish and the European regulations. The obligations of the interested parties prior to and after completion of an electronic contract are the same for both regulations. Obligations prior to drawing up a contract are regulated in Article 27.4 of the SLIS and are as follows: Make available to the receiver the general conditions he or she must adhere to according to the contract, in such a way as they may be stored and reproduced by the same.

There are also prior obligations related to the information necessary to execute an electronic contract: whether or not the service provider is going to file the document and whether this will be accessible, the technical means of identification and error correction, and the language or languages used to formalize the contract. The obligations mentioned above become void if the contract is executed solely through the exchange of emails, or if both parties agree to omit these terms and neither are considered to be consumers⁴⁵.

With regard to obligations posterior to the completion of a contract, the benefactor must confirm receipt of the acceptance made by them through any of the means mentioned in Article 28 of the SLIS. Confirmation through acknowledgement of receipt sent via email within 24 hours of receipt is also valid according to this regulation. This confirmation is to be carried out as from the moment that acceptance is received, or with the confirmation of the acceptance received, as soon as the receiver has completed the contract procedure and only when the confirmation can be accessed and filed by the addressee. The acceptance and its confirmation will be viewed as having been received when the interested parties are aware of the fact, or in cases where receipt of acceptance is confirmed using an acknowledgement of receipt⁴⁶.

The objective of the SLIS is to regulate services offered by the Information Society and contracting through electronic means. This law regulates all aspects of: service providers' obligations, including those who act as intermediaries in the transmission of content over telecommunication networks; any commercial communication made through electronic means; previous and posterior information relating to the conclusion of electronic contracts; conditions relating to validity and efficiency of contracts; and the relevant disciplinary regulations applicable to service providers in the Information Society.

⁴⁵See, Cotino Hueso, L. (2008): *Consumidores y usuarios ante las nuevas tecnologías*, Tirant lo Blanch, Valencia, 24 and f.

⁴⁶See, Mcintire, P. (2009), *Técnicas innovadoras en diseño web*, Anaya Multimedia, Madrid, pp. 31 and f.

Questions Raised By The Execution Of The Electronic Contract

Demonstration of consent in the electronic contract: execution of the offer made over websites.

As we have already mentioned, the possibility of using interactive websites in the execution of electronic contracts is a very interesting tool both for the companies who make direct use of online marketing and for the consumers⁴⁷. This tool enables the companies to select not only the form of executing a contract with a customer but also the method of payment most convenient for both parties. It goes without saying that each transaction made over the internet, as a commercial transaction, is regulated both by national and international law.

It is necessary –however- to determine when an electronic contract actually exists. The main question raised here is how to gain proof of contract, relating to the intervention of the interested parties and the giving of consent. Furthermore, determining when a contract is born carries great importance as it allows us to respond to various questions, for example:

The first question we need to deal with is related to the moment when a contract takes effect. In other words from what point does a contractual relationship exist, and as a consequence what are the legal rights and obligations of the parties involved. Secondly, we must know the precise moment when a contract takes effect to be able to determine the law and the regulations applicable to the case, supposing that legislative modifications took place during the contract formation stage. The third question is how to determine the deadlines of the statute of limitation and the limits of retroactivity in the cases where the contract is subject to conditions.

Finally, clarifying the moment when a contract takes effect is relevant in determining the transfer of risks of the goods covered by said contract, the market price or the termination of contracts made in fraud of the creditors, among other questions. Some of these aspects are relevant when dealing with electronic contracting, for example the determination of risks, whereas others seem impossible, such as legislative modifications made during the processing of a contract, due to the speed at which electronic contracts are processed⁴⁸.

For the reasons stated above, in this study we will analyse the questions raised by the execution of electronic contracts. To this end it is necessary to study the moment when the expressions of will of the interested parties coincide. These expressions of will are what are also known as offer and acceptance.

In our legal system, a contract is governed by the principle of autonomy. This continues to be the base of any agreement; advances in technology modify only the manifestations of offer and acceptance. The level of security these resources hold and the legal acceptance of such before a possible breach of contract are where problems arise. For

⁴⁷See, Jiménez Arroyo, M. (2011), *La gestión informática de la empresa, nuevos modelos de negocio*, Thomson-Aranzadi Madrid, pp. 61-84.

⁴⁸See, López Tarruela, A. (2006), *Contratos internacionales de software*, Tirant lo Blanch, Valencia, pp. 26-35.

this reason in Spain the willingness and the consent of the parties to enter into a contract is freely expressed, without vices of will, through email or accession to a web page. The contract will take effect – given the consensual principle of our contract laws – provided no special formalities established by law are required. Following these lines then, a contract takes effect when one party makes an offer and the other party accepts the offer, although the case of electronic contracts is somewhat more complicated.

An offer made over the Internet implies – unavoidably - a unilateral declaration of will; the party who makes the declaration proposes the drawing up of a contract between themselves and one or more parties, or the public in general. The legal effects of the offer come into play immediately, regardless of whether or not the offer is accepted, even if the proposal, without the essential and precise determination of the elements of the future contract, will have no legal relevance. Acceptance refers to the act of admission of an offer, and is essential for a compromise between two parties to exist. In this way, and as stated in Article 1258 of the Civil Code: “Contracts come into play by mere consent, and from this moment undertake not only to comply with that which has been expressly agreed, but also with all the consequences which, according to their nature, are consistent with good faith, use, and the law”.

In any case, offers must not be confused with generic proposals or invitations (*invitatio ad offerendum*), that is, invitations or proposals which lack those elements which characterize an offer⁴⁹. Along these lines, the Spanish legal system establishes a series of requirements which any contractual offer must reach. In general, an offer must constitute a real manifestation of will and be complete so that the mere acceptance of the contract is considered to be perfect. Specifically, in the field of electronic contracts, the contract must comply with other requirements, derived from the application of specific laws, which have been drawn up for the purposes of this type of contract.

Among these specific laws we list: Law 26/1984 of 19 July, General Law for the Protection of Consumers and Users; Law 7/1996 of 15 January of Retail Trade; Law 7/1998 of 13 April of General Terms and Conditions of Contracts; Law 15/1999 of 13 December on Protection of Personal Data; and Directive 97/7/EC on the Protection of Consumers in the Respect of Distance Contracts.

In the field of electronic contracts, when in the presence of an offer (for example a catalogue displayed on a web page), by merely clicking on the accept button, we bring a

⁴⁹See, De Miguel Asensio, P. A. (2011), *Derecho privado de Internet*, Civitas, 4^a ed. Madrid, 32 and f.

contract into play. However, this type of contract is more complex than the traditional contract, given that they are often drawn up between parties from different countries, calling for the need to examine the type of contract and the law relevant to each separate case. Here we must also point out that the person to whom an offer is made cannot be bound by their silence, so that, if an email is received stating that they did not respond to an offer within the specified time period, they are not obliged to respond. On the other hand, in principle, acceptance of an offer can be implicit.

This is possible in those cases where a regular flow of business transactions has already been set up between the parties, parties who make regular use of the Internet as a means of communication, and who have established a permanent commercial relationship, based on a previously celebrated contract, in which the use of virtual means to carry out conventions was agreed⁵⁰.

Execution of electronic contracts: the moment of acceptance

As a general rule, the externalization of will over Internet, in other words the acceptance of an offer, occurs as electromagnetic signals represented by a string of codings and conversions in readable language, being of fundamental importance the timing of the expression of said will. In this way, a contract can come into play as from the moment these electromagnetic signals are received or, on the contrary, when the recipient has sensory perception of the statement⁵¹.

The exact instance of execution of a contract depends on the communicative tool used by the parties on the Internet, given that the service or product provider can include expressions such as “Without compromise” or “Subject to confirmation,” and on whether the contract is entered into before witnesses or in absentia, given that Article 1155 of the Civil Code states that acceptances made in absentia can be retracted before they reach the benefactor. This situation is hardly relevant to the electronic contract, given the speed at which they are carried out.

In any case, regarding the moment of execution of the electronic contract, most of the European legal systems consider that a mercantile offer made over the Internet and its acceptance by a buyer constitute a meeting of the minds (contract) which leads to the responsibilities accepted by the parties. However in some Orders such as that of the USA or

⁵⁰See, Serrano Fernandez, M. (2005), *Estudio Comparado sobre la interpretación de los contratos*, Tirant Monografías, Valencia, pp. 65-74.

⁵¹See, Miguel Ibañez, C. (2010), *Derecho de los contratos, parte general*, Editorial Ábaco de Rodolfo de Palma, Buenos Aires, 15-24.

Great Britain, a contract is executed when all parties show a mutual will and intention to become bound through a set of terms, therefore the moment a contract takes effect is affected by its international character, which is the detriment of contractual relations carried out over the Internet on a multitude of occasions⁵².

The SLIS, as already mentioned, has had an effect on the execution of contracts and, specifically, contracts carried out over distance and using automatic devices. This regulation modifies Article 1262 of the Civil Code in the fourth Additional Disposition in such a way that the new redaction of this precept becomes: “(...) *consent is manifested by the concurrence of the offer and acceptance of the thing and causes which the contract is to serve. The fact that the party making the offer and that which receives the offer are in different places means consent is valid as of the moment when the person making the offer is aware of the acceptance of such, or from when, having sent the acceptance, to ignore it would be a violation of good faith. The contract is assumed to be closed in this case in the place from which the offer was made. For contracts celebrated through automatic devices, consent is manifest as of the moment of acceptance of the offer.*”

The main question which arises when dealing with electronic contracts is deciding when acceptance is formulated. If consent is stated through email or an attached document, there is no difficulty seeing that the contractual relationship exists, and from when. What happens, however, when we use other means? Here we are referring to active websites, in which the user must click on a certain icon or accept certain conditions which appear on the page. There is another drawback which presents itself at the moment of deciding whether or not a contract exists. Given that the Internet is an international system, we must determine which law is applicable to each contract carried out between parties, as the contract will be considered to be in force at different times depending on the different legislation to be applied.

As a consequence, in Spain the SLIS has decided on the solution of understanding a contract to be executed from the moment in which the recipient or consumer of an accessible online offer manifests or expresses (online if they wish) their conformity. This is the moment that must be taken into account when deciding from when a contract takes effect. This solution is not common to all Member States, given that the Directive leaves some room so that, in the moment of transposition, each Member State decides when a contract can be seen

⁵²See, Furmston, M. (2007), *Law of contract*, Oxford University Press, Oxford, pp. 25-43.

to have been executed. This means that in the EU there is no conformity on the exact moment in which a contractual relationship is realized if electronic means are used⁵³.

Conclusion

The Directive has not succeeded in avoiding insecurities present at the moment of carrying out a contract by electronic means, through active websites, depending on the significance of the acts of all interested parties. As pointed out in the presentation of the Draft Directive: the action of clicking on the icon “accept” can have different legal significance according to the legislation of each Member State.

These differences between national legislations exist, even after adopting the Directive, because the EC opted not to enter in the regulations relating to the drawing up of contracts, and the only requisite is an acknowledgement of receipt, which can be considered merely functional or absolutely essential depending on the different orders in force. For this reason nowadays in Europe there is no single response to solve the problem of the execution of an international electronic contract. All of these factors create insecurity especially for consumers who – frequently – take part in transnational transactions in which one of the parties may consider, according to their own national legal system, that the contract has been formalized while the other party, referring to their own legislation, considers that they are not yet legally bound by said contract.

On the other hand, the international vocation for the electronic market entails an increase in this type of contract with an international character carried out online. This increase in turn causes the different regulations to gain an increasingly relevant role. Up until now, the Spanish system PIL has scarcely been adapted to the new market. In International Jurisdiction, the only modifications made thus far are those in the Council Regulation (EU) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

In Applicable Law, regardless of the fact that many of the instruments that will be applied to provide a legal response to international contracts are already adapted to the digital era, suffice to say that 593/2008/EU Regulation, the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), has yet to be modified.

In this situation, an adequate regulation of these transactions demands the realization of a judicial development of existing standards in view of the principles and interests of the forum on the subject. One single policy response to the requirements of the “Information

⁵³See, Terré, F. (2009), *Pour une réforme du droit des contracts*, Dalloz, Paris, pp. 40 and f.

Society” on technological advances and complicity with international standards would allow our country to be bought up to date with the tendencies of the rest of the world. Furthermore these regulations would allow for possibilities of growth for local and international economies, speed in obtaining information, efficiency in Public Administration, and modernization of areas such as education, health or employment, among others, which would go a long way toward an efficient administration of public resources.

This objective is all the more relevant considering that the majority of regulations in place up to now can be considered to be inadequate and insufficient, others are fragmentary, as they do not regulate all pertaining questions, and, in general, they lack -unfortunately- the consequences of imposing traditional, local principles without satisfying the needs of modern practices.

References:

- AAVV, Cutsem Jean-Pierre, V. (2008), *E-commerce in the world, Aspect of Comparative Law*, Bruylant, Bruselas, pp. 15-39.
- Grassi, R. (2010), *Elementi di informatica in diagnostic per immagini*, Springer-Verlag, Milan, pp. 101-112.
- Valdés-Miranda Cros, C. (2010), *Creación y diseño web*, Anaya Multimedia, Madrid, pp. 32-41.
- Ramajuan, R. (2012), “Distributed Computing and Internet Technology”: *8 th International Conference Berlin*, pp. 41 and f.
- Menchen Peñuela, A. (2010), *Informática para la gestión y la administración*, Startbook, Madrid, pp. 32-39.
- Makesinis B., Underath H., Johston A. (2006), *The German Law of Contract, a comparative treatise*, Oxford and Portlan, Oregon, pp. 95-104.
- López Tarruela, A. (2006), *Contratos internacionales de software*. Tirant lo Blanch, Valencia, pp. 43-69.
- Cotino Hueso, L. (2008): *Consumidores y usuarios ante las nuevas tecnologías*, Tirant lo Blanch, Valencia, 24 and f.
- Mcintire, P. (2009), *Técnicas innovadoras en diseño web*, Anaya Multimedia, Madrid, pp. 31 and f.
- Jiménez Arroyo, M. (2011), *La gestión informática de la empresa, nuevos modelos de negocio*, Thomson-Aranzadi Madrid, pp. 61-84.

López Tarruela, A. (2006), *Contratos internacionales de software*, Tirant lo Blanch, Valencia, pp. 26-35.

De Miguel Asensio, P. A. (2011), *Derecho privado de Internet*, Civitas, 4^a ed. Madrid, 32 and f.

Serrano Fernandez, M. (2005), *Estudio Comparado sobre la interpretación de los contratos*, Tirant Monografías, Valencia, pp. 65-74.

Miguel Ibañez, C. (2010), *Derecho de los contratos, parte general*, Editorial Ábaco de Rodolfo de Palma, Buenos Aires, 15-24.

Furmston, M. (2007), *Law of contract*, Oxford University Press, Oxford, pp. 25-43.

Terré, F. (2009), *Pour une réforme du droit des contracts*, Dalloz, Paris, pp. 40 and f.