

E-Commerce:
**Its regulatory legal framework and the law governing electronic
transactions – The situation in Italy**

*“Submitted by **Cristiano Rizzi** to the University of Exeter as a dissertation towards the degree of Master of Law by advanced study in International Business Legal Studies, September 2002”.*

“I certify that all material in this dissertation which is not my own work has been identified and that no material is included for which a degree has previously been conferred on me”.

.....
Cristiano Rizzi

ABSTRACT

In the first part of this paper I shall examine the legal framework in which *electronic commerce* is developing, and thus the tools adopted both at a global level and at European level in order to regulate it. Furthermore, I shall analyse the impact that e-commerce is having on the way of doing business. In addition, consideration will be given to the taxation framework conditions because of their relevance to the development of e-commerce. The study will then focus on the delicate question concerning the applicable law and jurisdiction, especially in respect of business-to-consumer (B2C) cross-border transactions carried out over the Internet.

To determine the law governing electronic contracts (i.e. on-line transactions) and the jurisdiction in which proceedings have to take place is of fundamental importance for the proper functioning of e-commerce. “*On-line transactions*” are deemed to be qualified as “contracts”, therefore attention will be given to the 1980 Rome Convention on the law applicable to contractual obligations, and to the Brussels Regulation 44/2001, the rules contained in this new Community instrument having implications for electronic commerce.

In the second part of this work I shall focus also on the formation of the contract and on consumer protection because these two issues are of particular importance especially when transactions are concluded on the Internet. To conclude I shall explain what it implicates for an Italian company engaging in e-commerce nowadays.

Word count of the dissertation: **15.943**

ACKNOWLEDGMENTS

I would like to thank my Family, Prof. Avv. Fabio Ziccardi partner of the Law Firm “Santa Maria - Tristano - Ziccardi” (Milan), and Avv. Michele Soldati partner of the Law Firm “Chiomenti” (Milan) for encouraging me in taking this Master, and for their invaluable advice.

Many thanks to my supervisor Dr. Gerrit Betlem for his guidance during the development of this work and to all the post-graduate staff at the Exeter University – School of Law for their help and support.

TABLE OF CONTENTS

	Page
Title Page	1
Abstract	2
Acknowledgments	3
Contents Page	4
1. INTRODUCTION	6
PART ONE	
2. E-COMMERCE – THE REGULATORY LEGAL FRAMEWORK	8
2.1. E-Commerce – a new frontier in business activity	8
2.2. Global initiatives on e-commerce	9
2.3. The role of the OECD in the context of e-commerce	10
2.4. The position of the European Union	12
2.5. European initiatives in the context of e-commerce	12
2.5.1. - The “Electronic Commerce Directive” (Dir. 2000/31/EC)	13
2.5.2. - The “Distance Selling Directive” (Dir. 1997/7/EC)	15
2.5.3. - The “Electronic Signatures Directive” (Dir. 1999/93/EC)	16
2.5.4. - The Data Protection Directives (Dir. 95/46/EC & Dir. 02/58/EC)	18
2.5.5. - Council Regulation No 44/2001	19
2.6. Aspects of taxation – an essential framework	21
2.6.1. - Regulatory issues and the role of the OECD	21
2.6.2. - The Taxation Framework Conditions	22
2.6.3. - The European Union position on the taxation of e-commerce	24
2.6.4. - The position of the World Trade Organisation	27
2.7. Economic impacts & prospective policy challenges of e-commerce	28

PART TWO

3.	JURISDICTION AND APPLICABLE LAW IN E-COMMERCE	30
3.1.	The 1968 Brussels Convention and Regulation No 44/2001	31
3.2.	Avoid expansive jurisdictional claims	32
3.3.	The need for legal certainty-distinction between B2B and B2C	33
3.4.	Country of origin principle	35
3.5.	Country of destination principle	37
3.5.a.	<i>Jurisdiction, choice of law from the point of view of the consumer</i>	37
	- Relevance of the Rome Convention	38
3.5.b.	<i>Jurisdiction, choice of law from the point of view of the supplier</i>	39
3.6.	Difficulties posed by jurisdictional and choice of law issues	41
3.7.	The need for legal certainty of on-line contracts	42
3.8.	Formation of the contract	43
3.8.1.	Relevance of “pre-contractual” liability in e-commerce	44
3.8.2.	The E-Commerce Directive and the formation of the contract	45
3.8.3.	Using standard terms	49
3.9.1.	Consumer protection and ‘e-commerce’: Redress and Alternative Dispute Resolution	49
	- <i>Commission Recommendation 98/257/EC</i>	50
	- <i>Commission Recommendation 2001/310/EC</i>	51
	- <i>The European Extra-Judicial Network (EEJ-NET)</i>	51
3.9.2.	The role of dispute resolution service providers (DRSPs)	55
3.10.	Engaging in e-commerce for an Italian company	55
3.11.	The relevance of the EU Directives and the Italian legislation	56
	- <i>Different methods of contracting</i>	58
4.	CONCLUSION	59
	BIBLIOGRAPHY	60

1. INTRODUCTION

Electronic commerce is not only challenging traditional business methods but is also having a massive impact on consumers' habits.

The growing importance of e-commerce and the spreading of the Internet, which is having profound changes on almost all aspects of our society and life, has recently called for the drafting of new legal instruments, both at global and European level, in order to put the regulation of the "Net" on a more solid foundation and to better regulate the activities carried out through this medium. *"For most of its existence the Internet has been governed on the basis of consensus amongst its users, and regulatory structure tended to evolve rather than being developed in any structured manner"*¹. The growing importance of e-commerce has changed the situation. Indeed, e-commerce has pushed legislators, both at national and international level, to adopt new legal instruments to deal with it and to foster its development.

It is evident that no single government or nation can completely regulate the Internet or electronic commerce. Co-operation amongst States and international organisations is necessary in order to harmonise the existing rules and to give that certainty and predictability that business activity needs when taking place over the Net.

Today the Internet, and in particular "e-commerce", is the foundation for all business practices. It allows companies to establish a global presence, which is of paramount importance for relatively small and newly established entities who want to engage in cross-border trade. It offers competitive advantages in respect to traditional methods of doing business². Forward-thinking companies have grasped this truth and have opened their own website, confident of increasing and enhancing their business and efficiency. Engaging in e-commerce means doing business activities in an environment in which traditional rules need to be adapted in order to carry out transactions smoothly.

The aim of this research is to clearly identify the questions concerning e-commerce with particular attention to the applicable law for on-line transactions, and reference to jurisdiction and dispute resolution, in order to evaluate if the current legal framework governing e-commerce is adequate to deal with this new reality.

¹ In this sense, Ian J. Lloyd in *Information Technologk*

It is necessary to bear in mind that electronic commerce is based on the current technology, and as developments in technology will continue, governments and law makers have to monitor constantly them in order to be ready to adapt any of the rules in the future, should this become necessary.

The purpose of the first part of this work is to highlight the instruments adopted in order to deal with e-commerce. I shall take into account both global initiatives and European initiatives, which play a fundamental role in this context. In addition, consideration will be given to the aspects of taxation of e-commerce in order to delineate the entire legal framework in which e-commerce is developing.

In the second part I shall focus on the delicate issue concerning the applicable law to on-line transactions, moreover, considerations will be made on the formation of the contract on the Internet.

PART ONE

E-COMMERCE – THE REGULATORY LEGAL FRAMEWORK

2.1 Electronic Commerce – a new frontier in business activity

Electronic commerce has the potential to be one of the greatest economic developments of this century. Indeed, it is already revolutionizing the way of doing business. However, trust and confidence must be established amongst consumers if electronic commerce is to reach its full potential. Two points need to be addressed: (i) is the current legal framework concerning e-commerce adapted to create confidence, and (ii) are the existing rules providing that predictability that business activity needs?

Further, legal strategies should be adopted consistent with building the desired trust and confidence. Maintaining appropriate policies will help contribute to establishing a trust relationship. Fair, reasonable and consumer-friendly website terms of use agreements and click wrap agreements in easy to understand “lagalese” will also help. Easy access to privacy policies, warranty information and support information provides better disclosure and helps build customer trust and confidence. Giving customers the option to encrypt their communications with the e-commerce purveyor will also help. Reliable systems for accrediting e-buyers and e-sellers will promote confidence in their ability to deliver products, quality and payment.

Before analysing the legal tools governing e-commerce, it is interesting to note that the term ‘*e-commerce*’ has no widely accepted definition³. In a loose sense it means doing business over the Internet, selling goods and services which are delivered offline as well as products which can be ‘digitised’⁴ and delivered online, such as computer software. Trades can be among businesses or between businesses and consumers.

E-commerce is almost an absolute necessity. It is estimated there are over half a billion Internet users⁵. Seventy percent of small to medium enterprises use the Internet, and in

³ The Department of Trade and Industry of UK have proposed this working definition to the OECD (Organisation for Economic Cooperation and Development) : “*using an electronic network to simplify and speed up all stages of the business process, from design and making to buying, selling and delivery e-commerce is the exchange of information across electronic networks, at any stage in the supply chain, whether within an organisation, between business and consumers, or between the public and private sectors, whether paid or unpaid*”.

⁴ ‘Digitised’ means the physical form of a good or service can be coded using digital technology and thereby distributed over the Internet.

⁵ Source: NUA Internet Surveys, 513 million users.

Europe 57% of companies have their own domain name⁶. The rapid growth in both the number of people who use the Internet and its commercial applications has been stimulated by technological innovations and their diffusion. Together with economic and regulatory reforms, notably in the telecommunications sector, these technological advances have lowered the cost and improved the quality of Internet⁷ access.

Behind all the turbulence of the so called “dotcom.” phenomenon, the more serious business applications for the Internet, enabling it to be used as a business tool, were taking root and consequently e-commerce was gaining prominence.

E-commerce undeniably represents the new frontier in business activities. The legal environment in which it is developing, and the instruments adopted in order to regulate it, have an important role to play in realising its potential.

2.2. Global initiatives on Electronic Commerce

“Electronic Commerce is inherently transborder, and its successful development depends to a large extent on transborder solutions based on policy co-ordination between countries”⁸.

Given the international relevance of the topic, it is not surprising that international organisations, such as the UNCITRAL⁹ or the OECD¹⁰, are interested in contributing to regulating e-commerce. In 1996, the former organisation adopted a Model Law on Electronic Commerce¹¹, while in December 1999, the latter agreed Guidelines on Electronic Commerce¹².

It should be noted that both the model law and the guidelines have no binding force. However, on a global level they represent the basis for regulating e-commerce.

The purpose of the Model Law is two-fold: (i) to offer national legislators a set of international rules for creating a more secure legal environment for what has become known as “e-commerce” and thus facilitate its use, and (ii) to provide equal treatment

⁶ Source: CyberAtlas.

⁷ The main device currently used to access the Internet is the personal computer, but new hi-tech devices are gaining position (e.g. palm top, and 3rd generation mobile phones).

⁸ <http://www.oecd.org>, Electronic Commerce – About electronic commerce.

⁹ The United Nations Commission on International Trade Law was established by General Assembly Resolution 2205 (XXI) of 17 December, 1966.

¹⁰ Organisation for Economic Co-operation and Development. Web site: www.oecd.org

¹¹ The UNCITRAL Model Law on Electronic Commerce is available at: www.uncitral.org/en-index.htm

¹² The OECD Guidelines on Electronic Commerce are available at: www.oecd.org/news_and_events/release/guidelinesconsumer.pdf.

“to users of paper-based documentation and to users of computer-based information”¹³ (“*functional-equivalence*” approach)¹⁴.

It is worth stressing that the decision by UNCITRAL to formulate model legislation on electronic commerce was taken for two main reasons: 1) in response to the fact that in a number of countries the existing legislation governing communication and storage of information is inadequate or outdated because it does not contemplate the use of electronic commerce; and 2) no legislation exists for dealing with electronic commerce as a whole, and this may result in uncertainty as to the legal nature and validity of information transmitted via the Internet presented in a form other than a traditional paper document.

Furthermore, the Model Law may also be useful as a tool for interpreting existing international conventions and other international instruments that create legal obstacles to the use of electronic commerce and thus to international trade.

It is worth remembering that the UNCITRAL framework also includes the Model Law on Electronic Signatures which was adopted on 5 July 2001. The aim of this instrument is to facilitate use of electronic signatures in the context of international commercial activities. “*It does not override any rule of law intended for the protection of consumers*”¹⁵.

2.3. The role of the OECD in the context of electronic commerce

The OECD’s Committee on Consumer Policy represents the main forum for regulation of e-commerce at global level. It should be noted that electronic commerce is a central element in the OECD’s vision of the potential that our networked world holds for sustainable economic growth.

The OECD produced important papers concerning e-commerce; undoubtedly the most significant are: (i) the “*OECD Action Plan for Electronic Commerce*”¹⁶ (October

¹³ See “Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce”, contained in the Model Law (Objectives).

¹⁴ It is possible to affirm that the Model Law is based on the important principle of “functional equivalency”, which is an exceptionally helpful tool in analysing problems related to e-commerce. Article 5 of the UNCITRAL Model Law states: “*A data message shall not be denied legal effect, validity or enforceability solely on the ground that it is in electronic form.*” Traces of this principle can be found in Article 5 of the E-Signatures Directive (Dir. 1999/93, Off. J. EC L 13/12, 2000). See in particular the second part of Article 5.

¹⁵ Article 1 of the UNCITRAL Model Law on Electronic Signatures.

¹⁶ The OECD Action Plan for Electronic Commerce was endorsed by Ministers at the OECD Ministerial Conference, “A Borderless World: Realising the Potential of Global Electronic Commerce”, held on 7-9 October 1998 in Ottawa, Canada. The Action Plan for proposed OECD activities is intended as a

1998), which attaches particular importance to OECD work in the areas of privacy, authentication, consumer protection, taxation

transactions, whether carried out electronically or otherwise, are subject to the existing framework on applicable law and jurisdiction. In the European Union, the applicable law is determined by the Rome Convention on the law applicable to contractual obligations.

2.4. The position of the European Union

“Europe is well placed to capitalise on the global business opportunities now opening up. The completion of the Single Market, the development of Europe’s know-how and skills, and the introduction of the EURO create the strengths for the European economy and European Business to be at the forefront of the emerging global electronic marketplace. The challenge is to promote widespread adoption of electronic commerce as an integral part of the European way of doing business”²⁰.

So far the Single Market framework has proved its worth for traditional forms of business, it must now be made to work for electronic commerce. Building trust and confidence among businesses and consumers is not an easy task. The European Union has taken steps to establish a predictable legal and institutional framework to support and foster the development of the “Net” or “New” economy. In order to allow electronic commerce operators to reap the full benefits of the Single Market, it is essential to avoid regulatory inconsistencies and to ensure a coherent legal and regulatory framework for electronic commerce at EU level.

2.5. European Union initiatives in the context of e-commerce

The most important EU legislative initiatives²¹ affecting e-commerce as such, are:

- (i) the **“E-Commerce Directive”**²²;
- (ii) the **“Distance Selling Directive”**²³;

²⁰ Com (97) 157, para. 3

²¹ There are other initiatives at European level related to e-commerce, namely: the **“EU Database Protection Directive”** (Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases – see Official Journal of the EC of 27th March 1996, no. L77); **“E money Directive”** (Directive 2000/46/EC of the European Parliament of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions), and the **“Electronic Payments Recommendation”**.

²² The “2000/31/EC European Parliament and Council Directive on Certain Legal Aspects of Information Society Services, in particular Electronic Commerce, in the Internal Market” (Official Journal of the EC of 17th July 2000, no. L 178).

²³ Directive 97/7 on ‘the protection of consumers in respect of distance contracts’ (OJ 1997, L 144).

- (iii) the “**E-Signature Directive**”,²⁴;
- (iv) the **Data Protection Directives** ^{25 and 26}
- (v) the “**Council Regulation 44/2001**”,²⁷.

The aim of these initiatives is to stimulate the growth of electronic commerce in Europe. The European Union is seeking to promote e-commerce because it is a growing reality, and no doubt will have a considerable impact on Europe’s economy and thus on its competitiveness at global level. The European Council held in Lisbon on 23/24 March 2000 set the ambitious objective for Europe to become the most competitive and dynamic economy in the world. It recognised an urgent need for Europe to quickly exploit the opportunities of the new economy and in particular the Internet²⁸.

2.5.1. The “E-Commerce Directive”

The scope of the E-Commerce Directive is broad²⁹ and it applies to what are referred to as ‘Information Society Services’. It should be noted that “no other European directive has had such a long preamble which also shows the scale and complexity of the issues provided in the text”³⁰. However, the main aim of the Directive is to provide a legal infrastructure that facilitates the smooth functioning of the European Internal

²⁴ Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic Signatures (OJ 2000, L 13).

²⁵ Directive 95/46 of 24 October 1995, (OJ 1995, L 281/31).

²⁶ **Directive 2002/58/EC of the European Parliament and of the Council of 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), OJ 2002, L 201/37.**

²⁷ Council Regulation (EC) No 44/2001 of 22 December 2000. “*Regulation on Jurisdiction and the Recognition and Enforcement of Judgment in civil and commercial matters*” (OJ 2001, L 12).

²⁸ To achieve this, the Heads of State and Government invited the Council and the Commission to draw up “...a comprehensive eEurope Action Plan ... using an open method of co-ordination based on the benchmarking of national initiatives, combined with the Commission’s recent eEurope initiatives as well as its Communication ‘Strategies for jobs in the Information Society’.” In response to this endorsement the Commission adopted a draft **Action Plan** on 24th May 2000. This draft has been discussed with Member States, and was agreed by the European Council on 19/20th June. The objectives set out in the Action Plan are: (1) A cheaper, faster, secure Internet; (2) Investing in people and skills; (3) Stimulating the use of the Internet.

²⁹ The Commission have commented that: “*The Directive covers all Information Society services, both business-to-business, and business-to-consumer, and services provided free of charge to the recipient e.g. funded by advertising or sponsorship revenue and services allowing for on-line electronic transactions such as tele-shopping of goods and services and on-line shopping malls*”.

See ‘Commission welcomes final adoptions of legal framework Directive’. http://europa.eu.int/comm/internal_market/en/media/electcom/2k-442.htm.

³⁰ Kessedjian C., 2000. Hague Conference on Private International Law: Electronic Data Interchange, Internet and Electronic Commerce, Preliminary Document, No. 7.

Market³¹, and to ensure that both businesses and consumers benefit from the fundamental EU principles of freedom of movement, freedom of establishment and freedom of services. It is worth stressing that the Directive does not establish new rules on private international law (see recital 23 and Article 1 (4) of the E-commerce Directive). Indeed, the “EU Private International Law rules” influenced the drafting of the Directive. Notably the E-commerce Directive is mainly based on Article 49 of the EU Treaty as well as the case law of the European Court of Justice, which both establish the principles of country of origin control and mutual recognition of laws as the fundamental pillars of the internal market. A general application of the Country of Origin principle for applicable law (art. 3) has been established, altogether with an exception in the contracts with the consumers, in which case they will be allowed to sue in their own countries, applying their own law.

However, it seems that the Directive does not interfere with the freedom of the parties to choose the applicable law or forum and the application of the Brussels Regulation (i.e. Council Regulation 44/2001) on jurisdiction, recognition and enforcement in civil and commercial matters, as well as the Rome Convention (1980) on the law applicable to contractual obligations. These issues are treated in the second part of this work.

The E-Commerce Directive only applies to the activities of service providers established within the European Union. The place of establishment of a company providing services by an internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity. The Directive does not apply to e-commerce supplied by service providers established outside the European Union. However, the E-Commerce Directive specifies that in view of the global dimension of electronic commerce, it is appropriate to ensure that the Community rules are consistent with international rules. Therefore, the E-Commerce Directive is without prejudice to the result of discussions within international organisations (e.g. WTO, OECD and UNCITRAL).

The objective of the Directive is to create a legal framework to ensure the free movement of information society services between Member States (recital 8), and to ensure legal certainty and consumer confidence (recital 11 and 55), which is of basic importance for the growth of e-commerce. Although the Directive provides that:

³¹ Article 1 of the E-Commerce Directive states: “*This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between Member States.*”

*“Member State may not, ..., restrict the freedom to provide Information Society services from another Member State”*³², when reasons of public policy, public health and public security or protection of consumers is concerned, that Member State will be able to impose restrictions and to take appropriate measures³³.

The problem of Alternative Dispute Resolution is also recognized in the Directive. According to article 17 of the Directive, Member States shall not prevent out-of-court dispute resolution procedures, and they shall encourage adequate procedural safeguard. (See part two – ‘Consumer protection and e-commerce: Redress and Alternative Dispute Resolution).

2.5.2. The “Distance Selling Directive”

Directive 97/7 on ‘the protection of consumers in respect of distance contract’ is one of the most important European legal instruments concerning consumer contracts and, it is worth underling, it applies only to business to consumer (B2C) transactions.

“The directive applies to all forms of distance selling, but contains some provisions relating specifically to the use of electronic communications”³⁴. The Directive has, therefore, an obvious application to the Internet, and a particular relevance for e-commerce. Its object, as stated in Article 1 is “... *to approximate the laws, regulations and administrative provisions of the Member States concerning distance contracts between consumers and suppliers*”.

It is important to note that the Directive expresses the view that the introduction of new technologies is increasing the number of ways³⁵ for consumers to obtain information about offers anywhere in the Community and to place orders. In order to protect consumers some Member States have already taken different (or diverging) measures in

³² Article 3 (2) of the “E-Commerce Directive”.

³³ Such restrictions have to be in accordance with their objectives and will only be imposed after the Member State where the service provider is established has been asked to take adequate measures and fails to do so and the intention to impose restrictions had been notified in advance to the Commission and to the Member State where the service provider is established. In the case of urgency or the court actions, the reasons of such restrictions should be notified to the Commission and to the Member State of the service provider in the shortest possible time. If the Commission does not accept such restrictions Member State will be refrained from imposing them or urgently put an end to them.

³⁴ In this sense, J. Lloyd, *Information Technology Law*, third edition, 2000, at p. 555.

³⁵ Recital 9 of the ‘Distance Selling Directive’ states that “...*contracts negotiated at a distance involve the use of one or more means of distance communications; ...the various means of communication are used as part of an organised distance sales or service-provision scheme not involving the simultaneous presence of the supplier and the consumer; ...the constant development of these means of communication does not allow an exhaustive list to be compiled but does require principles to be defined which are valid even for those which are not as yet in widespread use*”.