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Maryke Silalahi Nuth

ELECTRONIC CONTRACTING IN EUROPE

**BENCHMARKING OF NATIONAL CONTRACT RULES OF
UNITED KINGDOM, GERMANY, ITALY AND NORWAY
IN LIGHT OF THE EU E-COMMERCE DIRECTIVE**

Senter for rettsinformatikk/Avdeling for forvaltningsinformatikk
Postboks 6706 St Olavs plass
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To André – who together with the universe conspires for me



FOREWORD

Two major researches have been conducted to produce this work. Firstly, part of this work was written as the final thesis for the Master of Laws (LLM) degree in Information and Communication Technology Law at the Norwegian Research Center for Computers and Law (NRCCL) in 2003. Secondly, this work represents the earlier research works conducted during the first two years of my doctoral studies (2004–2006) at the Faculty of Law, University of Oslo where I am currently working on my doctoral research project on “Electronic Contract Formation”. The works presented in this book have recently been updated.

This work considers the general rules on contract formation, and how the European Union regulates or attempts to regulate electronic contracting. In particular, this work explores contract formation rules in four European countries: United Kingdom (in particular England), Germany, Italy and Norway. It studies how these countries have implemented Article 11 of the EU E-commerce Directive in their respective national legislations, and provides country-specific chapters featuring a concise summary of national laws and practices. As such, this work can serve as a practical handbook for students, lawyers, business practitioners, or other parties interested in knowing the legal requirements of contract formation in the countries under consideration.

I would like to thank Emily Mary Weitzenboeck (NRCCL, Norway) and Guido Salzano (CIRSFID, Italy) for their valuable comments during the writing of my masters thesis; to NRCCL librarian, Anne Gunn Berge Bekken, for her ever quick and useful help in the provisions of information and materials; to Jon Bing for his enthusiasm for my project and his attentiveness; and to Dag Wiese Schartum and Olav Torvund for their kind embrace of my presence at NRCCL. Most of all, I would like to thank my loving husband, Ulf-Andre Nuth, for his never-ending patience, support, and encouragement. There is not one of my research papers that has not been the subject of his scrutiny as well as the object of our interesting and open-minding discussions. I will forever be grateful to him.

As I have often experienced frustration and difficulties in finding relevant materials on the laws and practices of non-English speaking countries written in English, it is my profound hope that this work will serve as a useful and helpful guide for international research purposes.

Oslo, December 2007 Maryke Silalahi Nuth

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1. INTRODUCTION

1.1. Subject Matter and Aims

The law of contract has a long history. Throughout the centuries, it has evolved into the structure that we have today, and the significance of the contract has changed within the legal psyche of lawyers since it emerged as a subject in its own right.¹ In this electronic age of instantaneous communications, the growth of information technology has facilitated the use of (electronic) contracts. Every day, many contracts are entered into in the online environment. As the use of the World Wide Web to display advertising and promotional materials has become more common, the number of electronic contracts concluded on the Internet is also increasing.

Within the area of contract law, every topic is important, and any choice among such topics will have its critics as well as its supporters. The formation of contracts was selected as the subject of this thesis for a number of reasons. The first is that it seems wise to start with a topic that is the pillar of the existence of contract. Another factor perhaps is the great practical importance of the subject, especially in light of international sales of goods and services. Last, but not least, is because of the European Union's ("EU")² strenuous and ongoing attempts to harmonize the pertinent rules of electronic contract formation insofar as they relate to the EU electronic commerce.

This work examines the law of contract formation as they exist in United Kingdom, Germany, Italy and Norway. The study is conducted to gain basic understanding of the general rules of contract formation and later to see how

1 Paul Richards, *Law of Contract*, 5th ed, Pearson Education Limited, 2002, p. 5.

2 The European Union (EU) is a family of democratic European countries. It is not a state intended to replace existing states, but it is more than any other international organization. The EU is, in fact, unique. Its Member States have set up common institutions to which they delegate some of their sovereignty so that decisions on specific matters of joint interest can be made democratically at European level. Initially, the EU consisted of just six countries: Belgium, Germany, France, Italy, Luxembourg and the Netherlands. Denmark, Ireland and the United Kingdom joined in 1973, Greece in 1981, Spain and Portugal in 1986, Austria, Finland and Sweden in 1995. In 2004, the biggest ever enlargement will take place with 10 new countries joining. For more information, see: The History of European Union available online: http://europa.eu.int/abc/history/index_en.htm last accessed 12 November 2007.

these general rules applicable in for electronic contracting in light of Article 11 of the EU E-commerce Directive. It is not the intention of this work to conduct a thorough comparative study of the selected legal systems. To begin with, this particular essay is more like a compilation and juxtaposition of the various solutions found in the four countries under consideration without proceeding further to comparative study. Needless to say, the mere description of a foreign approach may sometimes imply a comparison with certain elements in one legal system. Likewise, the steps to analyse the law of contract formation in different legal systems sometimes involves the identification of elements of similarity as well as dissimilarity, which are often considered compulsory in a comparative study.

1.2. Scope

1.2.1. Legislation

Apart from financing commercial communication, online transactions (contractual undertakings, online payments, subscriptions) are significant sources of revenue on the Internet. The ability to form enforceable contracts online is a fundamental requirement to the growth of electronic commerce on the Internet. For the EU, the widespread use of e-commerce in the financial service sector will enhance the functioning of the EU internal market. Thus, the EU has an interest in ensuring that online contracts are enforceable and simultaneously that consumers are confident about the applicability of their contractual arrangements. This has led to the adoption of the European Union Directive on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“E-commerce Directive”).³ Section 3 of this directive covers regulation concerning electronic contracts as provided in its articles 9–11. These articles aim to remove the restrictions on the enforceability of electronic contracts due to their electronic nature (Article 9), to ensure that the recipient of services is provided with explanatory information when entering into an electronic contract (Article 10) and to impose obligations on the service provider in relation to the placing of orders by the recipient of the services (Article 11).

The final text of Article 11 of the E-commerce Directive raises questions about both interpretation and implementation. This article will be the main legislation in focus throughout this study. A reference will be made to the prevailing legislations in the country concerned whenever relevant, or when

3 Adopted on June 8, 2000, O.J. L178, 17.7.2000.

discussing the member states' implementation of Article 11 of the E-commerce Directive (hereinafter shall be referred to as "Article 11").

1.2.2. Legal Systems

Article 11 provides that EU member states shall *ensure* the application of this article but the directive does not provide a way of ensuring such an application. It is therefore of interest to look at how the member states "*ensure*" the application of Article 11, especially since there is no uniformity in contract laws among all EU member states. Each EU member state has different principles and notions of contract laws that may not be found in other states. The different nature or source of each country's legal system could potentially lead to different approaches in regulating contract formation. While some parts of the general rules in formation of contracts are more or less similar in all countries, the larger portion of such rules shows a distinctive approach of each country to the formation of contract. It is therefore interesting to see how Article 11 is implemented in the EU member states that adhere to different legal traditions.

Legal systems considered in this thesis are chosen from the core EU member states, i.e. United Kingdom, Germany and Italy. In addition, Norwegian legal system is also considered. Norway is not a member of the European Union, but it joined the European Economic Area ("EEA") on January 1, 1994. The EEA is based on free-trade agreements between the EU and the EEA countries. Therefore, in most economic matters, similar EU regulations are in force in Norway, including the E-commerce Directive.

The reason for the selection of the English, Italian, Norwegian and German legal systems is because these legal systems represent rather different legal approaches to the issue of electronic contract formation.

- England is the birthplace of the common law system. Common law is case law or judge-made law. A case decided in one of the higher courts that states a principle of law is called a *precedent* and such precedents must be followed by judges in similar cases in the same court or the courts below it.
- As the most direct descendant of the Roman system, Italy inherited the Roman tradition of codified law as usually found in the civil law systems. The source of the law is the codified law, and judge-made law is not as important as what is regulated in the codified law.
- On the other hand, Norway possesses a unique characteristic. Although acknowledged as a civil law country with codified laws, the sources of law are codified laws and the development of case law. Norway represents the

blended approach of the civil law system and the common law system.⁴ Norwegian contract laws have their genesis in case law and custom. The most important rules on contract were compiled and codified by the Norwegian Contract Code: *avtaleloven*.⁵ However, this code is not an attempt to exhaustively regulate the questions that arise regarding treatment of the areas it covers. In modern Norway, many important rules have developed in case law and legal scholarship that now supplement the code.

- As Norwegian laws to some extent have their origin in Germanic legal codes from medieval times,⁶ it is also of interest to look at how Germany approaches the issue of electronic contract formation. Heavily influenced by the legal system of ancient Rome (Roman law), Germany also inherits the Roman tradition of codified law.⁷

1.3. Method and Structure

1.3.1. Method

Throughout this research, attention has been focused on what the law is (*de lege lata*), and not what it ought to be (*de lege ferenda*). The results reached might be of interest to those who in the future will be called upon to codify and perhaps to unify the law of formation of electronic contracts. But the present study itself was never intended to arrive at proposals for legislative reform, unification of existing law, or otherwise. This study is devoted exclusively to the demarcation of the fundamental principles of contract formation among legal systems, and on the broad-based discussion of such principles;

4 Daniel A. Nye, *Formation of Contracts: The Law in Norway*, Chapel Hill, 1987, p. 191-193.

5 Although most of its provisions are in conformity with previous case law and custom, some of the sections of *avtaleloven* represent what were wholly new trends of legal thought at the time of its adoptions in 1918.

6 Hans Petter Graver, National Origins of European Law: Towards an Autonomous System of European Law, ARENA Working Papers, Paper to the Conference of Stipendiefonds Ruhgas European Law in the German-Norwegian Context - Origins and Perspectives, Balestrand June-July 2000 available online: http://www.arena.uio.no/publications/wp00_24.htm#*bunn accessed November 5, 2007.

7 It should be noted that in the process of adoption/reception many Roman rules were amalgamated with, or amended to suit, the legal norms in Germany. Thus, Roman rules, applied in Germany, were not necessarily identical with Roman law from antiquity. Although Romanistic and Germanic legal systems are related to each other, each of them is considered a legal family of their own, independent of the other. See: K. Zweigert & H. Kötz, *Introduction to Comparative Law*, Clarendon Press, 1998, p. 132-156.

directions of the development on electronic contract formation provided by the EU were noted.

1.3.2. Organization of the Work

This book is divided into two parts. Part I starts by discussing the general principles of contract formation that commonly exists in all legal systems under consideration. Offer and acceptance that are known as the central pillar in determining the existence of agreement will be discussed for the most part. Analysis of Article 11 from the standpoint of general principle of contract formation will follow after the discussion on certain issues relevant for online contract formation. The scrutiny of Article 11 will reveal some unclear wordings: some propositions will be put forward in an attempt to rationalize the real meaning of the article by taking into consideration general principles of formation of contract.

Part II of this book provides an overview on national law and practices in four different countries. The legal systems are considered in alphabetical order. Each national approach consists of two sections. The first section provides descriptions of the general rules of contract formation, while the second section discusses national implementation of Article 11. Each of these country-specific chapters is presented in a consistent format, in so far as that is possible. Section 1 includes general principles: (i) offer, (ii) acceptance, (iii) communication of offer and, (iv) communication of acceptance. Section 2 includes analysis of legal issues pertaining to: (v) electronic offer, (vi) electronic acceptance, (vii) electronic acknowledgment of receipt, (viii) accessibility in electronic contract formation process and, (ix) correction of mistakes in representations (input errors).

In brief, the main body of this book consists of General Rules on Contract Formation (Chapter 2), Forming Online Contract (Chapter 3), Contracting Based on Article 11 EU E-commerce Directive (Chapter 4), National Laws and Implementation (Chapter 5–8) and Compilation and Conclusion (Chapter 9).

1.3.3. Technical Terms

Throughout the thesis, the term “proposal” is used to denote both an offer and a mere invitation to deal. Further, the term “invitation to deal” is used interchangeably with “invitation to treat”. Both terms carry the same meaning. The term “acknowledgement of receipt of order” will sometimes be shortened as “acknowledgement of receipt”, “acknowledgement of order” or “acknowledgement”.

**PART I:
GENERAL PRINCIPLES AND EU SPECIFIC RULES**

2. GENERAL RULES ON CONTRACT FORMATION

Under general contract laws, the following contractual elements must exist to establish a valid contract:

1. Offer
2. Acceptance
3. Consideration (known only to common law countries, such as England)
4. Legal intention to create legal relations
5. Legal capacity to contract

The characterisation of a party's communication as an offer or acceptance can determine when the exact moment of contract conclusion, and accordingly, affect which party assumes certain risks.⁸ Furthermore, it can also determine where the contract is deemed to have been made, where the parties are located in different jurisdictions, and accordingly, what laws will apply, and which courts will have jurisdiction. As such, it is important to examine whether there has been an event that constitutes a valid offer and acceptance, and whether and when communication of such an event took place.

2.1. Offer and Invitation to Treat

2.1.1. Nature

"The offer is an expression of willingness to contract made with the intention (actual or apparent) that it is to become binding on the person making it as soon as it is accepted by the person to whom it is addressed."⁹ It follows from this definition that a binding agreement will exist once the offer is accepted without further negotiation. In other words, the offer is capable of immediate translation into a contract by the fact of acceptance.

Two important features of the offer must be noted: that the terms of an offer must be clear, and that the offer is made with the intention that it should be binding. It follows that if an individual is not willing to implement the terms of his promise, but is merely seeking to initiate negotiations, then this cannot

⁸ Dennis Campbell (ed.), *Law of International On-line Business: A Global Perspective*, Sweet & Maxwell, 1998, p. 40.

⁹ Ruth Boardman and Peter Elliot, "Electronic Commerce", in *Encyclopaedia of Information Technology Law*, Sweet & Maxwell, 2001, p. 3031 [at 3.304].

amount to an offer; instead such statements are then said to be “invitations to deal” or “invitation to treat”. These invitations to treat would be restricted to statements made in the course of negotiations towards a contract indicating one’s willingness to receive offers.¹⁰

In practice, it may be difficult to differentiate offer and invitation to treat. A statement may amount to an invitation to treat even though it contains the word “offer” and *vice versa*. Conversely, a statement may be an offer even though it is expressed to be an “acceptance”, or even if it requests the addressee to make an “offer”.¹¹ Therefore, in deciding whether a statement amounts to an offer or an invitation to treat, the courts do not necessarily regard the actual wording of the statement, but instead look at the surrounding circumstances and the intention of the parties.

2.1.2. Communication

An offer cannot take effect until it is communicated to the offeree. The timing of communication of the offer is important to determine when the offeree can accept such offer. Generally, the acceptance can only take place when the offer has been received, however, if the offeror specifies a date by which time the offer must be accepted and that date has passed when the offer is received, then the offeree is unable to accept the offer. Similarly, where there is delay in the transmission of the offer and the offer has in fact lapsed, it is incapable of being accepted.

2.2. Acceptance

2.2.1. Nature

An acceptance is a final and unqualified expression of assent to the terms of an offer.¹² It turns a specific and comprehensive offer into an agreement. The

10 Such statements may take the form of attempts to stimulate interest, request for supply of information or any negotiating or preliminary statements falling short of an offer that furthers the bargaining process. One party may simply respond to a request for information (e.g. by stating the price at which he might be prepared to sell the house), or he may make a similar request (e.g. where he asks a prospective supplier whether he can supply goods suitable for his purpose). In both situations, the party does not make the offer but invites the other party to do so. For more explanation see Jill Poole, *Text Book on Contract Law*, 6th ed., Blackstone Press, 2001, p.32.

11 G.H. Treitel, *The Law of Contract*, 10th ed., Sweet & Maxwell, 1999, p.11.

12 Treitel, *supra* note 11, p. 16.

acceptance must be unconditional and unequivocal.¹³ This means the offeree's expression of intention and assent must be made in response to, and must exactly match, the terms of the offer.¹⁴ Any attempts to introduce a new term will itself become a counter-offer that destroys the original offer and operates as a rejection of the original offer.¹⁵

2.2.2. Theory and Rules of Communication

Acceptance has no effect until it is communicated to the offeror because it could cause hardship to an offeror if he is bound without knowing that his offer had been accepted.¹⁶ When the acceptance is sent by post, there are three basic rules that can be applied to decide when acceptance is actually communicated: (i) when the acceptance is posted ("Postal Rule"), (ii) when the acceptance is received or arrives in the address of the offeror ("Receipt Rule"), or (iii) when the acceptance comes to the knowledge of the offeror ("Knowledge Rule"). Each of these rules may be open to objections on the grounds of convenience and justice as discussed below. It is also possible for one legal system to combine any two of the rules for one particular communication.

Postal Rule

Based on the Postal Rule, often referred to as the dispatch rule, a postal acceptance takes effect when the letter of acceptance is posted or sent. Under English law, a letter is *posted* when it is in the control of the post office or of a post office employee authorised to receive letters for transmission to the addressee.¹⁷ In practice, mere dispatch of the letter of acceptance is generally enough to satisfy the requirement that the letter is sent, although it is sent without using the post office service.

The Postal Rule gives certainty as to when the contract is formed. Without such rules, the offeree would never know whether a contract had been formed

¹³ This is usually termed as mirror image rule under English law.

¹⁴ Poole, *supra* note 10, p. 41.

¹⁵ In the event that there is a battle of the forms, the terms contained in the "last shot" or the last document before the offer is accepted prevail. For further discussion, see Richard *supra* note 1, p. 28.

¹⁶ Treitel, *supra* note 11, p. 22.

¹⁷ Similarly, an acceptance by telegram takes effect when the telegram is communicated to a person authorised to receive it for transmission to the addressee: Treitel, *supra* note 11, p. 24.

and “no contract would ever be completed by post.”¹⁸ This rule also minimises difficulties of proof. It is easier to prove that a letter has been posted than to prove that it has been received. However, in a situation where the parties keep records of incoming and outgoing letters, it is not difficult to prove that a letter has been received.

Receipt Rule

The Postal Rule may lead to a situation in which an offeror discovers that he is bound by a contract of which he has no knowledge because, for example, the postal acceptance was lost in the post. This risk is avoided in the Receipt Rule, which provides that an acceptance has to be not only communicated to, but also received by the offeror.

In essence, the Receipt Rule requires that the declaration of acceptance reaches the sphere controlled by the offeror. When contract is made *inter praesentes* (where the parties face each other), the reception generally equals actual knowledge. For contracts made *inter absentes* (where the parties are not in each other's presence), the reception generally equals the receipt of the declaration of acceptance in the offeror address.¹⁹ The mailing destination should be the return address indicated by the offeror, or the offeror's office address if no return address appears, and the offeror's private address for non-commercial dealings.

The application of Receipt Rule can lead to a situation where the offeror is bound to a contract without his knowledge. The letter of acceptance may arrive at the offeror's address and be accepted by a receptionist, but is never forwarded to the offeror or is otherwise delayed. Applying the Receipt Rule, the offeree then considers that the contract has been concluded upon receipt of his letter of acceptance at the address of the offeror by the receptionist. This may prove unfair to the offeror if such a letter has never reached him or if it reaches him after many days have passed and he is exposed to a situation where he is bound to a contract without his knowledge.

18 *Adams v Lindsell* (1818) 1 B. Sld. 681 at 683, also published in 106 E.R. 250. This English case is considered to be one of the leading cases in support of the general Postal Rule theory, but in fact the court in this case did not mention the posting of the acceptance at all: *Ibid*.

19 Applying the Receipt Rule to non-instantaneous communication such as post means that the acceptance by post only binds the offeror if it reaches the offeror. This rule reveals that the Postal Rule can be ousted by express words if it is clear from the subject matter and the circumstances that the parties cannot have intended that there should be a binding agreement until there had been actual communication of an acceptance.

Knowledge Rule

According to the Knowledge Rule, an acceptance is not effective until it comes to the actual knowledge of the offeror. The actual knowledge of the offeror may be acquired by personally reading the postal acceptance. The problem with this theory is that it would be difficult to prove that the offeror had actual knowledge of the postal acceptance, and the offeror could then use this rule to avoid being bound to the contract by reason that he had no actual knowledge of the acceptance. This problem can be avoided by requiring the acknowledgment of receipt of acceptance to be personally signed by the offeror.²⁰ When the offeror is willing to sign the acknowledgment of acceptance, it can be assumed that he has knowledge of the acceptance.

2.3. Consideration

The doctrine of consideration is only known in common law countries. Consideration is the criteria used to determine the seriousness and binding nature of a declared human will. As a general rule, a promise is not binding as a contract unless it is made in a deed²¹ or supported by consideration. Traditionally, consideration is seen as either a benefit (something of value) to the promisor or a detriment incurred by the promisee (in that he may give value) and, in either case, must be in exchange for the promise. The benefit and detriment are usually merely the same thing seen from different points of view. Promises by the parties bargained for and given in exchange for each other constitute consideration.

Consideration may take the form of a promise to be performed in the future (executory consideration) or counter performance, which is usually in the form of a completed act (executed consideration). To be sufficient, the consideration must have some value. Something that is completely worthless cannot constitute sufficient consideration. However, it is the parties who have to consider the adequacy of the consideration as the court will not examine whether adequate value has been given.

Based on the doctrine of consideration, an offer is revocable. The offeror may withdraw his offer at any time before acceptance and has no obligation to keep it open unless the offeree provides him with consideration. In a case where there is an open offer for a fixed period of time, an offeror is under a

²⁰ This solution combines the application of the Receipt Rule and the Knowledge Rule.

²¹ Consideration is not necessary for the validity of a promise in a deed. A deed must mention that it is intended to be a deed and must be validly executed as such.

pre-contractual obligation to keep the contract open, but he is not obligated to enter into the contract with a particular offeree unless that offeree provides the offeror with consideration. This means that the offeror may freely withdraw his offer at any time before it is accepted by the offeree.

Past consideration is no consideration unless the act was done (or promise given) at the request of the promisor and it was understood that payment would be made (or some other benefit would be conferred). Likewise, performance of or promise to perform a public duty or a contractual duty already owed to the promisor is not sufficient consideration.

In a unilateral contract, the consideration is provided by the promisee when he completes the required act or forbearance. In the eyes of the law this is considered as detriment to the promisee, and may be seen as benefit to the promisor if he, for example, recovers from the promisee that which he has lost. Different views have been put forward as to when an offer in unilateral contract can be revoked. It has been suggested that when the promisee has begun the act of performance, but not completed it, the offer can be revoked as at this stage there is no consideration given for the promise and the promisee is not bound to complete the performance. However, case law has also held that the commencement of performance provides sufficient consideration for the promise and thus, the offeror cannot revoke his offer once the offeree has commenced the required act. Here, the offeror is the detrimental party because he is forced to keep his offer open, whereas the offeree has no binding obligation to complete the performance.

2.4. Legal Intention

It is a general rule that an agreement made without any intention of creating legal relations is not binding as a contract. Under English law, the separate element of intention in contract formation invites discussion as it is seen as part of the consideration or bargain between the parties. The presence of consideration normally implies the existence of legal intention to create legal obligation. However, it is possible that the consideration is provided but the parties do not have any intention of creating legal relationships. This is commonly found in domestic or social arrangements. When two friends promise to see a musical concert whereby one promises to pay the concert ticket if the other pays for the drinks after the concert, considerations are present in this relation but there is no intention to create legal obligations between the two friends. When one friend fails to fulfil his promise to pay for the drinks, the other party cannot bring the case to court to invite the court to provide a ruling or sanction.

In general, the court will look at the situation in which the parties were placed and ask if a reasonable person would assume that there is an intention on the part of the parties to be bound by the agreement. This can be inferred from the language used by the parties and from the circumstances in which they use it. For agreements made under social and domestic circumstances, there is a rebuttable presumption that no legal relation is intended by the parties. Judge Salmon L.J in *Jones v Padavatton* [1969] 2 All ER 616 (CA) states:

“...as a rule, when arrangements are made between close relations, for example, between husband and wife, parent and child, uncle and nephew, in relation to an allowance, there is a presumption against an intention of creating legal relations ... in such circumstances, men and women usually do not intend to create legal rights and obligations, but intend to rely solely on family ties of mutual trust and affection. There may, however, be circumstances in which this presumption can be rebutted.”

It follows from the above that in a situation where parties in social and domestic circumstances have the intention to create a binding legal obligation from their agreement, they have to make this clear in their agreement. In contrast, there is a presumption that legal relations are intended in commercial circumstances. This presumption can only be rebutted by a clear agreement. This means that when two parties in commercial relationships have no intention of making a binding agreement under the law, a declaration to this effect must expressly be made. The court will accept and implement their rejection of binding contractual obligations like other unambiguous expressions of intention. An exception to the general rule is collective agreement on the rates of wages and conditions of work that are reached after collective bargaining between trade unions and employers. Although made in commercial circumstance, this collective agreement is *prima facie* not intended to be binding unless it expressly provides to the contrary.

2.5. Legal Capacity

Capacity to contract usually refers to a natural person's legal competence to enter independently into valid transaction, for example, making a contract. A person who enters into a transaction with the intention of being bound by the law is expected to understand what he or she is doing and the consequences of his or her actions. The ability to understand the meaning of one's action often depends on the mental status of a person or, more precisely, the intellectual

capacity. The establishment of mental maturity primarily correlates with age. The age when a person is considered as an adult differs from country to country depending on the national legislation. However, 18 years of age is deemed to be the most common age as the same has been established in Germany (BGB §2), Norway (*Lov om vergemål for umyndige* §1) and Italy (*Codice Civile* art 2), as well as in France, Sweden, Finland, and Denmark.²² In England, the age limit of adulthood was originally 21, but it was reduced to 18 years in the course of family law reforms in 1969.

2.6. Exception to the General Rules

As a general rule, there is no contract when there is no offer and acceptance. Nonetheless, in some circumstances it may not be possible to analyse the agreement into offer and acceptance. An example of this is a negotiation process in which the parties have exchanged messages over a long period of time until it is no longer clear which of the messages should be considered as offer and acceptance and, accordingly, when the contract has actually been concluded.

In dealing with the above situation, English court suggests in *Gibson v Manchester CC* that “you should look at the correspondence as a whole and at the conduct of the parties and see therefrom whether the parties have come to an agreement.”²³ This decision has been criticized because it does not provide clear guidance as to how to determine if that agreement has indeed been reached. That’s why the following few cases, in which the English courts decided that the contract had been concluded despite no offer and acceptance, are regarded as exceptions to the general rule of contract formation.²⁴

(i) *Multipartite Agreement*

This is illustrated in the following case of *Clarke v. Dunraven* [1897] AC 59:²⁵

“The owners of two yachts entered them for the Mudhook Yacht Club Regatta. The rules of the club, which each owner of the yacht undertook in a letter to the

22 Paul Varul, Anu Avi and Triin Kivisild, “Restrictions on Active Legal Capacity”, *Juridica International* IX/2004: 99-107 at p. 100.

23 [1978] 1 W.L.R. 520 at 523, reversed [1979] 1 W.L.R. 294; See G.H. Treitel, *The Law of Contract*, 11th ed., Sweet & Maxwell, 2003, p. 47.

24 See Treitel, *supra* note 23, p. 48-49.

25 G.C. Cheshire, M.P. Furmston & C.H.S. Fifoot, *Cheshire, Fifoot and Furmston’s Law of Contract*, 13th ed., Butterworths, 1996, p. 65.

Club Secretary to obey, included an obligation to pay 'all damages' caused by fouling. While manoeuvring for the start, the Satania fouled the Valkyrie and sank her. The owner of the latter sued the owner of the former for damages."

The court held there was a contract between all the competitors on the terms of the undertaking although their immediate relations were not with each other, but with the yacht club. The competitors had accepted the rules as binding upon each other and the contract was created between them either when they entered their yachts for the race or when they actually sailed. It is not possible to analyse this argument into offer and acceptance. If the contract was concluded when the competitors entered their yachts in the race, then the entry of the first competitor was an offer, and the entry of the second competitor was an acceptance and simultaneously an offer to the next competitor. All the entries were put in the post and this resulted in cross-offers that did not create a binding contract. If the contract was concluded when the race started, all competitors accepted the terms of the undertaking from the organiser simultaneously, but they did not make an offer and simultaneous acceptance to each other. Even if their acts of accepting the terms of the race was to be considered as an acceptance and simultaneous offer to the next competitor, this would lead to the same situation where there would be cross-offers and no binding contract.

Some case laws in recent years have also held that the above reasoning is applicable to the contracts governing legal relations between members of unincorporated association.²⁶

(ii) Reference to third party

A contract is concluded when two negotiating parties simultaneously agree on the solution provided by a third party whom they have appointed because there was a deadlock in their negotiation process. It is not possible to define the solution provided by the third party as offer or acceptance between the parties.

(iii) Sale of land

In the sale of land where there is a clause "subject to contract", the parties are not bound until the formal contracts are exchanged. It is not possible to call it an offer since there is no intention to be bound in case of acceptance. However, the agreement does exist between the parties.

Norwegian courts also recognise that not all contract formation can be explained by analysing the negotiation into offer and acceptance. The most

²⁶ *Artistic Upholstery Ltd v Art Forma (Furniture) Ltd* [1999] 4 All E.R. 277, 285, See Treitel, *supra* note 23, p. 48.

basic question in Norwegian contract formation is known as *disposisjonsspørsmålet*.²⁷ This notion is related to the situations of the parties in the process of contract formation. In the early phase, when the party is making preparations for the contract formation, he is under no obligation (*uforpliktende*) to his counterpart. At one point in time, the situation changes and he becomes under obligation to the other party. *Disposisjonsspørsmålet* concerns the precise moment when the position of the parties change from *without obligation* to become *under obligation* to the other party, as well as the criteria that are relevant and decisive for such change (*disposisjonskriterier*). Statements like offer and acceptance are the relevant criteria for *disposisjonsspørsmålet*. In a circumstance where it is not possible to define offer and acceptance, the contract formation is thus based on other relevant *disposisjonskriterier*; for example, the conclusion of a contract for the use of a parking space by putting money in a parking meter, and a sale contract in a self-service store. Woxholth argues that in these particular types of contracts it is not possible to point out which one is offer or acceptance and thus, offer and acceptance are not the relevant *disposisjonskriterier* for the formation of these contracts.²⁸

In line with the principle of freedom to contract, contracting parties have the freedom to regulate how and when a contract becomes binding on them and based on which *disposisjonskriterier*.²⁹ When a confirmation of an order – which is different from offer and acceptance – is used in a process of sale and purchase of a service or goods, the seller may provide that he is not to be bound by the order unless he has confirmed the order and the buyer agrees to this, the seller's acknowledgement of the order becomes one of the *disposisjonskriterier* for the formation of a contract.

Through its practice, the Norwegian Supreme Court has established the following as *disposisjonskriterier* for contract formation as noted by Woxholth:³⁰

(i) *Form, when it has significance in deciding the validity of a contract*

This requirement is usually set by the law and generally consists of writing. However, this requirement may also be stipulated by the parties themselves and the so-called “voluntary agreed form” (*frivillig avtalte former*).³¹

27 G. Woxholth, *Avtalerett*, Gyldendal Akademisk, 2003, p. 55.

28 See further Woxholth, *supra* note 27, p 85-94.

29 Woxholth, *supra* note 27, p. 97.

30 Woxholth, *supra* note 27, pp. 98-112.

31 C.J. Arnholm, *Lærbok i Avtalerett*, 4th ed., Tanum-Norli, 1978, p. 30.

(ii) Content (innhold)

The more elements of a contract the parties agree to, the more reason there is to say that the contract has been concluded. However, the fact that some contract elements are not yet agreed by the parties should not hinder the formation of contract because the law, custom, or practice may fill in these contract elements.

(iii) Subsequent conduct (etterfølgende opptreden)

This covers behaviour of the parties after the contract is concluded. Some examples include payment after the conclusion of contract (Rt. 1978 s. 702) or any conduct done together by both parties after the conclusion of contract that shows that the parties have had an agreement (Rt. 1981 s. 595 where the parties together send an application of concession).

(iv) Policy consideration (reelle hensyn)

This is related to the test of reasonableness of which alternative – binding or not binding – that has reasons to be the more objective. This includes taking a consideration to the inequality or imbalance position between the parties, such as parties in business to consumer transaction.

(v) Line of conduct (handlemåte)

This concerns the conduct of parties that bring about contractual obligations. For example, when a bank customer writes a cheque exceeding his account balance and the bank cashes his check despite knowing that he has exceeded his account balance, this means the bank has accepted the overdrawn.

(vi) Passive attitude (passivitet)

In principle, a promisee is not bound by the promise by being passive. However, in a situation where reasonable regard must be given to the other party's interests by active conduct, the promisee is bound when he is passive. The most common example of this criteria is when a person is a member of book club and it is a condition of the membership that the member must accept and pay for the books sent to him periodically – although the member never personally orders those books – unless he actively cancels them. Passive attitude can also bring about a contract if it is the custom or practice between parties in long-established relationships.³²

32 See J. Hov, *Avtaleslutning og Ugyldighet*, 3rd ed., Papinian, p. 113.

(vii) *Culpa sanksjon and risk evaluation*

An agreement can become binding as a sanction or consequence of unwanted behaviour (*culpa-sanksjon*) as described in the case of the passive attitude described above. The fundamental notion of this principle is that the offeror bears the risk of contract formation if he has given the other party reason to believe that the contract has been concluded. In special circumstances, an agreement can also become binding as a result of risk evaluation (*risiko betraktning*). Although there is no particular statement that can bind one party to the contract, he is bound by the contract because he has accepted the risk of being involved in a particular conduct. This is best illustrated in the Baladi case (NJA 1977 s. 921)³³ whereby the court held that a contract had been concluded although there was no proper offer sent to Baladi because (i) the company was aware that Baladi was making preparations to accept the offer (ii) Baladi had reason to believe that the agreement would be concluded and (iii) the company took the risk of not informing Baladi that the company considered itself as having no obligation to Baladi. In other words, although in principle a statement binds its maker because the maker intends to be bound by his statement, he may be bound by a statement not intended to be bound as the consequences of *culpa-sanksjon*, or risks that he was aware of.

In Germany, a contract can sometimes be concluded although there is a lack of agreement (acceptance of an offer) between parties. The German Civil Code or *Bürgerliches Gesetzbuch* ("BGB") makes the distinction between open lack of agreement and hidden lack of agreement:

1. *Open lack of agreement (offener einigungsmangel)*

As a general rule and if there is doubt, a contract is not concluded as long as the parties have not agreed all points of a contract upon which, according to the declaration of even only one party, agreement has to be made (§154 BGB). In practice, it may sometimes depend on the intention of the parties whether or not the contract should be considered concluded. In the event that the lack of agreement concerns fundamental points of the agreement, the contract fails *ab initio* but if it concerns non-fundamental points of the agreement, the contract may be considered concluded.

2. *Hidden lack of agreement (versteckter einigungsmangel)*

In a situation where the parties to a contract regard that they have concluded the contract but in reality they have not agreed a point upon which an agreement should be made, what has been agreed is valid if it may be assumed that the contract would have been concluded even without a determination about

³³ See Woxholth, *supra* note 27, p. 111-112.

this point (§ 155 BGB). It follows that if the lack of agreement concerns a fundamental aspect upon which they cannot agree, the contract is not concluded. Here it is also important to consider the intention of the parties.

2.7. Contract Formalities

No legal systems treat all agreements as enforceable contracts. Some laws require documents to be in writing and signed. Validity of these documents depends on whether or not the requirement as to form or signature is satisfied. English law, for example, requires that all contracts meet the requirement of consideration for their enforceability while most, if not all, legal systems recognise the doctrine of formalities for certain contracts.³⁴ These formalities often relate to the notion of “writing”, “document” or “signature”. To combat fraud, most states have a law called the Statute of Frauds, which requires a contract to be signed and written. Where there is a requirement of writing, no writing means no contract. Contracts that are not in writing are called oral contracts.

Generally, there are at least two justifications of formal requirements: for the purpose of evidence in the case of disputes, and for the purpose of reminder/caution. Oral contracts can be as binding as written contracts. But without a written record, it can be difficult to prove that the contract has been established and the terms of the agreement. Written contracts give the impression and trigger awareness that an agreement is being entered into and perhaps emphasizes the importance of the agreement, and so encourages the parties to be more cautious about the terms of their agreement. It would be impractical and burdensome to require that all contracts be in writing. The laws provide for which contracts must be in writing.

Quite distinctively, there are no formal requirements on the formation of a contract in Norway. Contracts may be entered into in writing or verbally. However, in certain circumstances, the law may require that specific forms of agreement must be observed.³⁵

³⁴ It should however be noted that the doctrine of formalities does not replacing the requirement of consideration, it is an additional requirement.

³⁵ See Chapter 8.1.

3. FORMING ONLINE CONTRACT

In principle, general rules of contract formation are also applicable to electronic contracts. Although the e-commerce situation may not always make it easy to recognise online contractual elements, all these elements must exist in the formation of valid contracts. Electronic offer and electronic acceptance must be communicated before they are considered effective. Parties entering the transaction must have the legal capacity as well as the legal intention to be bound by the contract.

3.1. Making Offer and Acceptance Online

An electronic offer is usually published or transmitted electronically through the Internet through website shops, Usenet newsgroups, or electronic mailing list, or sent by email to a specific recipient. Many electronic or virtual shopping sites are set out to resemble real shops, so that the potential purchaser can browse through the products for sale in much the same way as one would do in a shop or supermarket. As the purchaser finds a product he wants to buy, he places the item into his virtual shopping basket. When the purchaser has completed his “shopping trip”, he then submits details of the products he has selected, registers his identity, and sends the details of his credit/debit card to the seller.³⁶

Online acceptance can be made by the same mode of communication used to make the offer in the first place, or by using other more reliable modes. It follows that an offer received by email may also be accepted by email unless the offer specifies some other mode of acceptance. Similarly, an offer placed through a website shall also be accepted through that website, unless the offer specifies alternative modes of acceptance, such as through email communication.

In real-time two-way communications, both parties usually make statements at the same time and, therefore, it is easy to know whether or not an offer has been accepted. However, parties communicating electronically on

³⁶ This situation was discussed in the English case *Pharmaceutical Society of Great Britain v Boots Cash Chemist (Southern) Ltd.* [1953] 1 All ER 482, [1952] 2 All ER 456. In this case, the goods were deemed to constitute an invitation to treat. Merchant invites the potential customer rather than actually making the offer. The offer arising when the buyer submits his details to the seller, which offer, can then be accepted or rejected by the merchant.

the Internet are not always engaged in real-time conversations. Consequently, it is not possible for the sender to know immediately when the message has reached the recipient. One way to avoid such problems is to apply the Postal Rule, which stipulates that a contract is concluded when it is sent. As a result, the parties can be sure that the contract has been formed without the need to wait for the acceptance to be received or for the recipient to read the acceptance. Alternatively, the parties can always agree on the terms of the offer in which the contract will only be formed when the offeror has received the communication of the acceptance as evidenced by his signing the acknowledgment of receipt of acceptance. Either way, this shows that the parties have the freedom to regulate the moment of contract conclusion through their contract. In the absence of such a stipulation, the general rules on contract formation will be applicable.

3.2. Website Presentation and Status

3.2.1. Designing the Website

E-commerce websites must be carefully designed and presented because the status of such websites (whether it amounts to offer or invitation to treat) is of significant legal importance. In fact, the treatment of websites as a binding offer or non-binding invitation to treat has been the one of the most controversial issues in the area of electronic commerce because of the serious legal consequences it has for online vendors. When the website is considered as an invitation to treat, the site owner retains freedom to contract. A customer's offer to buy something from e-commerce sites is not binding on the online vendor until he accepts it. The website provider can therefore avoid entering into contracts with the online buyer because he can refuse the customer's offer; for example, on the grounds of unavailability of goods/services. In contrast, when the website is considered an offer, a consumer's response to the e-commerce site will be considered as acceptance. The online vendor is bound to the contract and must perform his part of the contract, whatever that may be. Therefore, great care must be exercised when designing e-commerce websites.

The importance of the status of a website can clearly be seen in a situation where the price of the goods/services displayed on the website is incorrect; for example, when the price of a product is 500 euro, but somehow is displayed as only 50 euro. If the website constitutes no more than an invitation to treat, such an error will not result in the supplier having to fulfil a contract at the misquoted price. Nevertheless, this does not automatically mean that when the website constitutes an offer, the website provider must fulfil a contract at

the misquoted price. In the English case of *Hartog v Colin & Shields* [1939] 3 All ER 566, it was decided that there was no binding contract in the situation where the mistake as to the price term was very clear and the buyers knew very well that a mistake had been made and were seeking to “snap it up”. This approach can certainly be applied in the Internet/website situation although it may vary from country to country.

The above analysis is dependent on the content of the website. In some cases, it is possible to argue that a website in fact constitutes an offer and therefore where the purchaser places an order, such an order is an acceptance to the offer provided in the website. Such a situation can be avoided by merchants by ensuring that any promotional material placed on their website is not capable of being construed as an offer. To achieve this, website developers need to exercise great care in designing their websites.

3.2.2. Legal Framework

In the EU, no legislation exists that explicitly regulates the status of a website or what kind of elements must exist on a website to qualify as either offer or invitation to treat. Arguably, the inference that statements made by a supplier when he puts forward his goods or services, including through a website, are treated as an invitation to treat can be found in Article 7(2) of Directive 97/7/EC of the European Parliament and the Council of May 20, 1997, on the protection of consumers in respect of distance contracts (“Distance Selling Directive”). This article provides that the supplier is not to be bound by the statements – to which the customer has responded – that he has made.

Article 7(2) of the Distance Selling Directive reads as follows:

“Where a supplier fails to perform his side of the contract on the grounds that the goods or services ordered are unavailable, the consumer must be informed of this situation and must be able to obtain a refund of any sums he has paid as soon as possible and in any case within 30 days.”

Nevertheless, the use of the word “contract” in the first sentence of this article: “to perform his side of the *contract*”, raises doubts as to whether this article treats websites as an invitation to treat. Invitation to treat, offer, and acceptance are steps to follow before the contract is concluded, whereas Article 7(2) of the Distance Selling Directive gives the impression that the “contract” is already in existence (and consequently the invitation to treat, offer, and acceptance has taken place). It can be argued that the supplier is bound by the contract (which was preceded by invitation to treat, offer, and acceptance) but Article 7(2) of the Distance Selling Directive provides him with leeway

to avoid the performance of his side of the contract i.e. to deliver the goods or services in case of unavailability of the goods or services. Even so, this argument raises some questions: why would the legislator allow the supplier to escape its obligation to deliver the goods? What will be the legal basis or justification for the release of supplier from its obligation to deliver the goods? If the reason is to give the supplier time to check the availability of the goods or services, shouldn't the supplier check and ensure the availability of his goods or services *before* and not after he enters into the contract?

If Article 7(2) of the Distance Selling Directive is understood as allowing the supplier to avoid the performance of his side of a concluded contract, such an interpretation would be in conflict with the main purpose of the Distance Selling Directive: to protect customers. The suppliers can accept the order and enter into a contract with the consumer without checking his stocks because he can do it later. When he finds out that he has no stock, he can always cancel the contract without any consequences. This is certainly not the intention of the article.

A reasonable explanation for the provision of Article 7(2) of the Distance Selling Directive is that the supplier is not bound to deliver the goods or services because there is no contract yet in existence between supplier and customer. Statements made by the supplier in his website displaying his goods/services should be considered an invitation to deal, and not an offer. A customer's reply to an invitation to deal will be the real offer, and such an offer is not binding on the supplier. Therefore, the supplier is not bound to deliver the goods/services ordered by the customers.

3.3. Practicalities of Signature and Document

3.3.1. Electronic Signature

Conventionally, the signature is used to authenticate the document on which it appears. It symbolises the intention of the signatory to be bound by the content of the signed document. In electronic commerce, the signature's function as an authentication tool is vital since e-commerce transactions are often paperless and conducted totally online. In fact, the system of electronic signature is built around this functionality and electronic signature is seen as a method of authentication.³⁷ To ensure that the sender and receiver of electronic messages are whom they purport to be, it is now common practice to use electronic

³⁷ Article 2 of the EU Electronic Signature Directive ensures legal recognition of electronic signature and its admissibility as evidence in legal proceedings.

or digital signatures in message transmissions. Thus, signatures are not confined to hand-written signatures only.

It has been suggested that the requirement “to “sign” could be extended by analogy to include a digital equivalent of a signature”³⁸ There is a continuously developing legal framework directed towards the acceptance of electronic signatures as equivalent of handwritten signatures. In practice, not all electronic signatures are treated equally by the law simply because not all electronic signature systems meet all the functionalities of handwritten signature. Consequently, only certain electronic signatures can be regarded as legally equivalent to handwritten signatures. As a result, not all electronic signatures are treated equally by the law. In the European Union, different security levels of electronic signatures invite different treatment and, accordingly, different implications in e-commerce transactions.

The EU Electronic Signature Directive³⁹ makes the distinction between advanced electronic signature and electronic signature. Electronic signature is defined as data in electronic form that are attached to or logically associated with other electronic data, and which serve as a method of authentication. This type of signature qualifies for certain purposes but can be denied recognition on additional grounds. Advanced electronic signature is defined as an electronic signature that is:⁴⁰

- (i) uniquely linked to the signatory
- (ii) capable of identifying the signatory
- (iii) created using means that the signatory can maintain under his sole control, and
- (iv) linked to the data to which it relates in such a manner that any subsequent change of the data is detectable.

Advanced electronic signatures that are based on a qualified certificate and created by a “secure-signature-creation device” are considered (i) to meet the legal requirements of a signature in relation to data in electronic form in the same manner as a hand-written signature satisfies those requirements in relation to paper-based data, and (ii) admissible as evidence in legal proceedings. A qualified certificate is defined as a certificate that meets the requirements laid down in Annex I of the Electronic Signature Directive and is provided by a certification

38 Michael Mahony, Daniel Tunkel and Caroline Ball, “On-line Contracting”. In Daniel Tunkel and Stephen York (eds.), *E-commerce: A Guide to the Law of Electronic Business*, Butterworths, 2000, p. 80.

39 Directive 1999/93/EC of the European Parliament and of the Council of December 13, 1999, on a Community framework for electronic signature, O.J. L13, 19.1.2000.

40 Article 2 of the Electronic Signature Directive.

service provider who fulfils the requirements laid down in Annex II. A “secure-signature-creation device” is defined as a signature creation device that meets the requirements laid down in Annex III of the Electronic Signature Directive.

3.3.2. Electronic Document

With regard to the form requirement that certain contracts must be in writing, the law has yet to be clarified on this issue. Even if an electronic document is valid because a digital signature is attached to it, such a signature can’t be said to have fulfilled the law requirement as to form. Therefore, it is still advisable to follow the conventional way of printing the documents before signing it when requirements as to form exist.

Some scholars have suggested stretching the meaning of “writing” in the legislation to accommodate electronic representation of documents.⁴¹ Even so, it would take more than just stretching a definition of “writing” to abolish the form requirement. This could be done through a provision stating that form requirement is satisfied by an electronic document corresponding to the extended definition. Alternatively, the provision can list certain conditions for electronic documents to qualify for the form requirement in the same manner as an advance electronic signature must meet certain criteria before it is considered the legal equivalent of handwritten signature.

3.4. International Initiatives

Various international initiatives exist in the field of electronic contracting, the best known of which is the UNCITRAL Model Law on Electronic Commerce. Introduced in 1996, this initiative was intended to further the harmonisation of international trade law, to eliminate barriers to take advantage of computers, and to raise confidence on the use of electronic commerce. Since its introduction, it has influenced many countries and has been transformed into various national legislations on electronic commerce.⁴² It establishes the legal recognition of data messages and provides solutions to problems when documents are required to be “in writing” and “signed”. It proposes that form

⁴¹ Mahony, *supra* note 38.

⁴² UNCITRAL Secretariat, Presentation on Model Law on Electronic Commerce, *Raising Confidence in E-commerce: The Legal Framework*, UNCITRAL, Vienna, p. 9-12 available online: http://www.unescap.org/tid/projects/ecom04_s4sorieul.pdf last accessed 30 November 2007.

requirement is met by a data message if the information contained therein is accessible so as to be useable for subsequent reference, and establishes general conditions under which data messages would be regarded as authenticated with sufficient credibility and enforceable in the face of signature requirements. Communication of data messages in the course of contract formation procedure are also addressed in the UNCITRAL Model Law. Time and place of “dispatch” and “receipt” of data messages are defined in the UNCITRAL Model Law as well as the treatment of communication of acknowledgement of receipt. Nevertheless, it must be noted that the UNCITRAL Model Law is not intended to deal with legal consequences that may flow either from data messages or their communications.

After allowing international e-commerce to rely only on non binding laws for a decade, the United Nations adopted the Convention on the Use of Electronic Communications in International Contracts (CUECIC) in 2006. With this adoption, a new rigid international legal instrument was established and, therefore, it is considered to be one of the most important developments in international e-commerce law. The CUECIC is expected to provide certainty and predictability of international e-commerce contracts, in particular in Business-to-Business (B2B) transactions, as well as to provide more clarity in the national legal frameworks of electronic contracting. The number of contracting countries to this convention inevitably decides its significance for international e-commerce. Since only four countries had ratified this convention by the time this book was written, the true impact of this convention on international e-commerce remains to be seen.

4. CONTRACTING BASED ON ARTICLE 11 EU E-COMMERCE DIRECTIVE

4.1. Contract Formation Procedure

In the first draft of the E-commerce Directive, the EU Commission attempted to harmonize the time in which a contract is concluded. The EU Commission proposed that a contract, where a recipient is required to give his consent through technological means, is deemed to be concluded when the recipient of the service has confirmed receipt of the service provider's acknowledgement of receipt of the recipient's acceptance. This means that a contract's recipient is required to restate his or her desire to conclude such contract. To be more precise, four steps were required for a contract to be concluded online:

1. An offer is made by the website.
2. By filling out a form and clicking "OK" to the purchase, the contract is accepted.
3. An automatic email sent by the service provider's system provides the acknowledgement.
4. The recipient must reply to such acknowledgment and the contract will be considered concluded when the service provider has been able to access such reply.

This draft article addressed the fundamental requirement of determining when a contract is concluded electronically. The mechanism of concluding a contract specified in this article goes further than required by the traditional concept of "exchange of offer and acceptance" by adding the requirement that the recipient receives the provider's acknowledgement of acceptance electronically. Thus, an electronic contract is concluded when four statements are exchanged: (i) service provider's offer, (ii) recipient's acceptance, (iii) service provider's acknowledgement of acceptance and (iv) receiver's reply to service provider's acknowledgement of acceptance.

The above proposition was simplified by the EU Parliament's 42nd amendment to the proposal. When a recipient is required to give his consent through technological means, a contract will be considered concluded when the service provider has acknowledged the receipt of the recipient's acceptance. This reduced to three the steps for conclusion of online contract:

1. An offer is made by the website.
2. By filling out a form and clicking "OK" to the purchase, the contract is accepted.
3. An automatic email sent by the service provider's system provides the acknowledgement and only when the recipient has been able to access such acknowledgement would the contract be considered concluded.

From the foregoing, it can be seen that the proposed Article 11 of the E-commerce Directive was designed to specifically address the following situations:⁴³

- a contractual process in which the recipient of the service only has the choice of clicking "yes" or "no" (or the use of another technology) to accept or refuse an offer;
- a concrete offer made by a service provider (and thus the situation in which the service provider only issues an invitation to deal is not covered).

Only a little of the proposed harmonisation and its amendment did eventually remain in the final version of Article 11(1) of the E-commerce Directive. Instead of using a four or three-step-formation-procedure, the adopted Article 11(1) suggested the use of a two-step-procedure:

1. The service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means.
2. 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.

As opposed to the initial draft, this final version of the article gives no clarification as to the status of a website, whether it amounts to an offer or an invitation to treat. To some extent this can be seen as an advantage because by not limiting its application to a specific type of website, this article can be applied to all websites, regardless of their status as an offer or an invitation to treat. This adopted provision is indeed better than the previous proposal, which only covers situations in which a website constitutes an offer, leaving the website constituting invitation to treat with no clear regulations. However, as discus-

⁴³ The European Commission: A proposal presented for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market – Commentary on individual articles, January 1999, p. 9.

sed in the following sub chapter, the fact that the E-commerce Directive does not define implicitly or expressly the status of a website (whether it amounts to an offer or invitation to treat) will have some consequences.

4.1.1. Order

The use of the term “order” in Article 11 makes this article confusing. “Order” is not a common concept used in the legislation on contract laws.⁴⁴ In the Internet situation, the term “order” can be interpreted differently depending on the status of the website. When a website amounts to an invitation to treat, an order from the customer is in fact an offer to purchase the goods/services. On the other hand, when a website is deemed as an offer to customers, an order placed by the customer will constitute an acceptance.

The abovementioned interpretations of order will lead to different results. There is little complexity when an order is deemed to be an offer. Placing such an order on the Internet does not put any obligation on the website owner to provide the ordered goods/services. However, when an order constitutes an acceptance, the communication of the order places a binding obligation on the website owner to provide customers with the ordered goods/services.

4.1.2. Acknowledgement of Receipt of Order

Article 11 did not define the meaning of the acknowledgement of receipt of order and, therefore, a look at the practice will be of help to clarify the meaning of this term. However, it is not always easy in practice to determine the status of an acknowledgement. Very often documents titled acknowledgement of receipt or confirmation only contain a repetition of the terms to which the parties are already bound or order details. This is commonly found, especially in the Internet situation. The usage of automatic mailing enables the service provider to automatically send an acknowledgement of receipt of the customer’s order.⁴⁵ Some websites even provide automatic display of acknowledgement of receipt of the order in the website directly after the customer clicks on “OK” or “submit”. The acknowledgement of the receipt provided by the mechanism mentioned above will usually only contain a repetition of the terms of the order. As such, it serves as a confirmation of receipt of the order. On the other hand, an acknowledgement of receipt of order can be construed

⁴⁴ Christine Hultmark Ramberg, “The E-commerce Directive and Formation of Contract in a Comparative Perspective” (2001) *Global Jurist Advances*, Vol. 1: Iss. 2, p. 15.

⁴⁵ The customer will receive such acknowledgement of receipt in his email box provided that he supplies the website with the correct email address.

as an acceptance. This usually occurs when an acknowledgement of receipt of order does not merely repeat the terms of the offer but also contains some other words that may be construed as indicating an acceptance to the offer. Such acknowledgement is of legal importance.

Thus, it appears that acknowledgement of receipt of order can be construed as either a confirmation or an acceptance. When it constitutes the former, it basically has no legal effect other than for evidentiary purpose that the order has been placed. This is commonly found in a situation where an acknowledgement of receipt is only repeating the terms/details of the order as mentioned above. This type of acknowledgement of receipt does not amount to an acceptance, but instead it is a mere confirmation of the customer's order, which has no legal effect. If such is the correct meaning of acknowledgement of receipt of order in Article 11, this article introduces no new steps in the procedure of electronic contract formation. On the other hand, if the acknowledgement of receipt of order in Article 11 is construed as an acceptance, it is possible that this article is actually trying to add one more step on the contract formation procedure. In other words, the mere exchange of offer and acceptance is not enough to bring about the electronic contract, but electronic acceptance needs to be acknowledged. An electronic contract is concluded when the acknowledgement of receipt, which in fact constitutes an acceptance, is communicated to the offeror. This logic is contrary to the general rule of contract formation, which provides that a contract is concluded when the acceptance is communicated to the offeror without the need for confirmation to be given.⁴⁶ A mere exchange of offer and acceptance is enough. When a contract has been formed, the acknowledgement or confirmation has no legal importance except for evidentiary purposes. Consequently, the lack of acknowledgement or confirmation has no legal effect in private law.⁴⁷

Nonetheless, the above shows that Article 11 is capable of adding one step for contract formation procedure in circumstances where the acknowledgement of receipt of order constitutes an acceptance. However, since it is unlikely that the EU wants to change the principle of contract laws combined with the fact that the purpose of the EU Directive is mainly to protect the customer, it is logical to suggest that the requirement to provide acknowledgement of receipt is aimed at giving customers more security and certainty so that they know what they have ordered and are familiar with the terms of the order.

⁴⁶ According to the general contract rule, a mere exchange of offer and acceptance is enough to bring about contract. When a contract has been formed, the acknowledgement or confirmation has no legal importance except for evidentiary purposes. Consequently, the lack of acknowledgement or confirmation has no legal effect in private law.

⁴⁷ Ramberg, *supra* note 44, p. 14.

4.1.3. Application of Receipt Rule Theory

One possible interpretation of Article 11 is that this article does not necessarily add any steps in the contract formation but rather gives guidance on the communication of order and acknowledgment of receipt of order. As discussed in the previous chapter, many approaches can be used in deciding when the acceptance is deemed to be effective. The Postal Rule theorists view that the acceptance is effective when it is sent or dispatched. The Receipt Rule theorists consider that the acceptance is effective when it is received by the offeror. The Knowledge Rule theorists regard the acceptance as valid when the offeror has knowledge of it. Comparing the wording of Article 11 with these approaches can lead to three possible situations:

1. *No access.* The Postal Rule is not likely to apply since when an offer or acceptance is sent to the post office and thus comes under the control of the post office, it is not likely that any of the parties has access to it. The intended recipient can only have access to it when the post office actually delivers it to him.
2. *Able to access.* Under the Receipt Rule it is required for the communicated document to reach the intended recipient. When such order or acknowledgment of receipt of order reaches the address of the other party, that party could access it or is able to access it.
3. *Use of access.* The Knowledge Rule leads to a situation where the party has already used the access that he has. This rule requires the actual knowledge of the party that usually can be acquired by reading the communicated document. This means that such party is already in possession of access and using such access.

Neither the first nor the third situation are described by the E-commerce Directive, which clearly states that the communicated document is deemed to be received when the intended party is “able to access” it. The wording “able” in this phrase makes it clear that the party must possess the ability to access but no need to actually “access” the communicated document. This is the characteristic of the Receipt Rule and as such, it seems that the E-commerce Directive adheres to this particular rule of communication. For the EU member states whose contract laws are in favour of the Postal Rule, imposing the application of Receipt Rule for electronic communication will certainly invite difficulties. The situation is rather easier for countries that adhere to the Knowledge Rule, which states that the intended recipient must make use of access to the communicated document. This means that for someone to have

knowledge of a document, he needs to actually access to it.⁴⁸ When Article 11 requires only the existence of access (by virtue of Receipt Rule application), it demands less than the Knowledge Rule theorists. Meeting the requirement of the Knowledge Rule will in most cases mean also meeting the requirement of the Receipt Rule.

4.1.4. Accessibility

In assessing time of receipt, the E-commerce Directive focuses on accessibility. Article 11 provides that the order and the acknowledgement of receipt are deemed to be received when the recipient is “able to access” them. Indeed, this article provides certainty with regards to the moment when an order or acknowledgement of receipt is deemed to be received.⁴⁹ Nevertheless, such a rule is unclear or rather ambiguous because no clarification of the meaning of “able to access” is provided, while the meaning of “able to access” is uncertain in the electronic environment.⁵⁰

Some suggestions on when the message is accessible include: (i) when the message has entered the recipient’s network or server, (ii) when the message is already in the recipient computer system, (iii) when the message is already in the mailbox of the recipient. It would seem that being “able to access” is such an indeterminate criteria for establishing the conclusion of a contract, since either party may use any number of excuses to avoid conclusion of a contract, if that is their intention (e.g. “I have not been able to access your confirmation since my PC/network/server has been inoperable for days”).

The time of receipt, i.e. time when a message is accessible, determines which party should bear the risk of a message not reaching the addressee or being delayed. In the online environment where the time is of the essence, such placement of risk is of legal importance. For comparative purposes, we can look at the provision of the US Uniform Electronic Transaction Act (“UETA”) and the UNCITRAL Model Law, both of which have analysed in depth the general concept of “able to access”. The UETA provides that an electronic record is received when: (a) it enters the information processing system that the recipient has designated, or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve

48 It is suggested and agreed by many legal scholars agreed that the Knowledge Rule could be seen as a variant of the Receipt Rule.

49 This can be seen as the strong point of the E-commerce Directive since it regulates not only when an acknowledgement of receipt is deemed to have been received – as is usually the case with some national laws – but also when the order is deemed to have been received.

50 Ramberg, *supra* note 44, p. 18.

the electronic record, and (b) it is in a form capable of being processed by that system.⁵¹ The UNCITRAL Model Law regulates that receipt of an electronic message occurs: (i) at the time when the data message enters the designated information system, or (ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee.⁵² However, if the addressee has not designated an information system, receipt occurs when the data message enters the information system of the addressee.⁵³ These provisions illustrate that it is possible to provide extensive guidance as to the exact moment when the ability to access occurs. Noticeably, both UETA and UNCITRAL Model Law provide more helpful guideline on the time of receipt of electronic communication than the EU E-commerce Directive.

4.1.5. Consumer Protection

Given that under general contract law the acknowledgment basically has no legal effect for contract formation, we can question the effectiveness of Article 11. The fact that this article requires the service provider to issue an acknowledgement of receipt of the recipient's order can be interpreted that this article makes it compulsory for the service provider to issue an acknowledgement of receipt of order.

Applying this interpretation to the Internet situation can mean that even if the customer does not request any confirmation from the service provider of the placed order, the service provider is obliged to provide an acknowledgment of receipt. It follows that in the event that the service provider does not or is unable to provide any acknowledgement of receipt of the order placed by the customer, regardless of whether or not the customer requests it, the service provider is in breach of the provision of Article 11. It can therefore be suggested that this article provides protection to the customer when dealing with a service provider as it guarantees that the service provider will provide the customer with an acknowledgment of receipt of order if the customer does not request it. The fact that application of Article 11 is mandatory to the Business-to-Consumer (B2C) transactions, but not for B2B transactions, supports the argument that this article is indeed mainly aimed at protecting consumers. But since there is no legal consequence of the lack of acknowledgement under contract law in addition to the fact that the E-commerce Directive also did not provide any consequence of the lack of the acknowledgement of receipt in

⁵¹ Section 15(b) of the US Uniform Electronic Transaction Act.

⁵² Article 15(2)(a) of the UNCITRAL Model Law on Electronic Commerce.

⁵³ Article 15(2)(b) of the UNCITRAL Model Law on Electronic Commerce.

the transaction, this protection may end up becoming meaningless except for evidentiary purposes. This proposition is without prejudice to the fact that, although highly unlikely, EU member states may provide regulations to cover the consequence of the failure of the service provider to provide an acknowledgement of receipt of order as permitted by Article 20 E-commerce Directive.⁵⁴

4.2. Correction of Input Errors

4.2.1. Double Click Requirement

Article 11(2) of the E-commerce Directive stipulates that the service provider should make available to the recipient of the service appropriate, effective, and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order. This provision adds a new obligation for service providers, which could prove difficult to implement. Nowadays, it is common to place an order just by clicking “OK” or “Submit” on the provided form, and to avoid or detect the error, a user is usually required to check his input before he clicks on such buttons, but there is no special means in place to correct and identify input errors before he places the order. A simple click on “OK” will mean placing the order to the service provider and the customer has no opportunity to correct any error that he may have done before he clicks “OK”. This can lead to a situation where the customer is bound to a contract with unwanted terms resulting from input error. As such, this method does not seem to be enough to fulfil the requirement of Article 11.

Under online shopping circumstances where time is of the essence, it would be reasonable if, within a short period, input errors could be corrected in order to identify or correct the terms of the order. The E-commerce Directive tries to achieve this by requiring the existence of technical means capable of allowing the customer to identify and correct input errors before placing the order. Such technical means will allow the customer to read all the information he has provided and identify errors before he actually binds himself to the terms of the order by clicking “OK”, which places the order to the website provider. It is therefore suggested that the E-commerce Directive obliges the service provider to provide a second page or confirmation window that shows the contents of the submitted form and requires the customer to confirm that input by clicking once again

⁵⁴ Article 20 of the E-commerce Directive provides: “Member States shall determine the sanctions applicable to infringements of national provisions adopted pursuant to this [E-commerce] Directive and shall take all measures necessary to ensure that they are enforced. The sanctions they provide for shall be effective, proportionate and dissuasive.”

on “OK” or a similar button. In this second page, the customer should also be able to correct the input if needed. This means the customer must perform double clicks before sending the order. This scenario is purported to protect, and therefore benefit, the customer but not always benefit the service provider. Although the double-clicks system can provide certainty to the service provider on the acceptance of his offer or invitation to treat, the building of a second page to allow identifying and correcting errors can be very costly. In the end, this requirement could discourage the service provider from taking advantage of electronic commerce.⁵⁵

Alternatively, some service providers may try to send an overview of the order by email and ask the customers whether they are sure that they want to order the goods/services. Although appropriate, this may not be the most effective way to conduct business on the Internet since the recipient’s response may be delayed, which is possibly not in the interest of the service provider who usually wants to sell his goods/services quickly. Therefore, a page presenting an overview of what has been ordered, and allowing the identification and correction of input errors before sending the order to the service provider as required by the E-commerce Directive seems to be the most appropriate, effective, and accessible way.⁵⁶

4.2.2. Risk Allocation

The rationale for the requirement of technical means to identify and correct input errors is to properly secure the intention to be bound to an electronic transaction and prevent mistakes in the expression.⁵⁷ The speed and automation of electronic communication increase “the risks of making mistake that cannot be easily corrected before they reach the addressee and before the addressee takes action in reliance of the mistake.”⁵⁸ The mistake can happen because the “OK” or “send” button is clicked too early and also because the data input is not correct (mistake in expression). When this click brings about a contract, the person will be bound to a contract without having any intention to do so. Who should bear the risk of the mistake in expression?

⁵⁵ The service providers usually choose to conduct business online because this would save them from investing money on shops or other facilities. When conducting business online becomes costly (for example because the service providers must make available a confirmation page), service providers could be discouraged from continuing their business online.

⁵⁶ Arno R. Lodder and Henrik W.K. Kaspersen, *eDirectives: Guide to European Union Law on E-commerce*, Kluwer Law International, 2002, p. 86.

⁵⁷ The problem with mistake in expression is closely related to the situation when a party becomes bound by a contract without having the intention to be bound.

⁵⁸ Ramberg, *supra* note 44, p. 20.

To create an incentive to act carefully and avoid mistakes from being communicated, the risk for mistakes is traditionally placed upon the party making mistakes.⁵⁹ Although it may seem unfair to hold someone to a mistake, a party relying on the mistake may incur a loss and therefore should be entitled to compensation. This is particularly relevant when there are no mistakes, but merely a change of mind. Of course, in such case it is very difficult to prove whether a mistake has indeed been made or if the consumer has merely had a change of mind.

In the course of e-commerce development, there has been a trend to impose less liability on a party making input errors. This trend can be found in US Uniform Electronic Transaction Act (UETA) Section 10(2), which shifted the burden onto the party relying on the mistake.⁶⁰ This provision is purported to create a strong incentive for the service provider to introduce a confirmation page in order to delay the data sending, and provide the customer with time to read what they have input and eventually make necessary corrections. This mechanism is expected to reduce mistakes in Internet transactions. Where such a confirmation procedure is in place, the party making the mistake has to bear the risk for the mistake.

There is no such clear risk allocation in Article 11(2) of the E-commerce Directive, despite the fact that some have suggested that the trend of imposing less liability on a party making mistakes in expression can also be found in

⁵⁹ Ramberg, *supra* note 44, p. 19.

⁶⁰ Section 10(2) UETA provides: "If a change or error in an electronic record occurs in a transmission between parties to a transaction, the following rules apply:

- (1) If the parties have agreed to use a security procedure to detect changes or errors and one party conformed to the procedure, but the other party has not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party may avoid the effect of the changed or erroneous electronic record,
- (2) In an automated transaction involving an individual, the individual may avoid the effect of electronic record thus resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error and, at the time the individual learns of the error, the individual:
 - (A) promptly notifies the other person of the error and that the individual did not intent to be bound by the electronic record received by the other person;
 - (B) takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record; and
 - (C) has not used or received any benefit or value from the consideration, if any, received from the other person.
- (3) If neither paragraph (1) nor paragraph (2) applies, the change or error has the effect provided by other law, including the law of mistake, and the parties' contract, if any.
- (4) Paragraph (2) and (3) may not be varied by agreement.

this article.⁶¹ Such a suggestion is misleading because Article 11(2) regulates only as far as the requirement to put in place appropriate, effective, and accessible technical means to identify or correct errors, and does not address the distribution of liability in connection with mistakes. This article declines to state who should bear the risk when the service provider has put in place the required technical means and a mistake is still made by which the service provider is affected. Although it is highly possible that the party making mistake is the one who should bear the risk, such rationale is not provided under Article 11. Different legal systems of the individual EU member states may provide different approaches and solutions on how to deal with such a situation. Nonetheless, Article 11 does *imply* that when the required technical means is not put in place and the service provider relies on the input errors of the customers, the service provider will bear the risk.

4.2.3. Sanctions

Article 11 does not provide any consequences or sanctions when the required technical means is not provided by the service provider. Article 20 of the E-commerce Directive stipulates that it is up to the individual member states to regulate the sanction on the infringement of the national provisions adopting the E-commerce Directive, including failure to make available technical means as required by Article 11(2) of the directive. This may lead to inconsistencies of the application of this article. EU member states have different legal systems applications, which may lead to different interpretations of the necessity to put in place the required technical means, its legal effect, and the sanction on the service provider's inability to provide such technical means.

4.3. Scope of Limitation and Derogation

Article 11(3) of the E-commerce Directive indicates that the provisions of its paragraph 1, first indent, and paragraph 2, shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.⁶² It follows that the provision concerning the moment messages are deemed to be received as contained in the second indent of paragraph 1, is comprehensively applicable to individual communication including email.

⁶¹ Ramberg, *supra* note 44.

⁶² This provision is probably meant to make the regulation technically independent, not relying only on the electronic mail.

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Article 11 also provides that the requirements contained in this article do not apply if parties who are not customers have agreed otherwise.⁶³ This means the provision or the protection provided by this article can be contracted out of B2B transactions, but is mandatory for the B2C transactions. This provision is in line with the EU policy makers, who wish to protect mainly the customers.

⁶³ Article 11(1) of the E-commerce Directive.

PART II:
NATIONAL LAWS AND IMPLEMENTATIONS

5. UNITED KINGDOM

The United Kingdom of Great Britain and Northern Ireland or commonly known as the United Kingdom comprises four constituent countries: England, Wales, Northern Ireland and Scotland. It has three distinct systems of law: (i) English law (applies in England and Wales), (ii) Northern Ireland law (applies in Northern Ireland) and (iii) Scots law (applies in Scotland). English law and Northern Ireland law are based on common law principles while Scots law is a hybrid system based on both common law and civil law principles. In this book only the law of England is discussed.

England is the birthplace of the common law system. England has never had a codified system of law. The decisions of the court are the main source of the law. Concomitantly, statutes of law contribute to the development of the law. The law of contract is, however, one of those parts of the law where the statute of law is of limited importance.

5.1. General Rule

Under English law, there are three essential elements of formation of contracts: agreement, consideration, and intention to create legal relations.⁶⁴ As a general rule, an agreement is reached when there is an exchange of offer and acceptance. An exception to this rule can be found in a few special cases where the offer and acceptance are unidentifiable, but the court nevertheless held that the agreement has come to exist between the parties.

5.1.1. Offer and Invitation to Treat

An offer is a statement made by one party of willingness to contract on certain terms with the intention that it shall become binding when it is accepted by the person to whom it is addressed. Thus, an offer has two main characteristics. Firstly, it must contain sufficiently comprehensive terms of the offer so that it is capable of immediate acceptance and secondly, it must be made with the intention to be bound by the mere fact of acceptance.

⁶⁴ Treitel, *supra* note 23, see generally Chapters 2-4.

English law recognizes the distinction between offer, sometimes called proposal, and invitation to offer.⁶⁵ There is no fast rule that can be laid down to ascertain whether a given statement is an offer or an invitation to deal, as it often depends upon the interpretation of the language used and the surrounding circumstances. The mere use of the word “offer” does not necessarily make a statement an offer; but the definiteness of a statement will tend to impress upon the character of the offer. In deciding whether a statement will amount to an offer, the courts may be influenced by certain “factual elements”, such as:⁶⁶

- *Content of the proposal*: The more detailed and definite the proposal appears to be, the more likely it is to be upheld as an offer. It follows that when a statement contains hardly any details and is incomplete, the statement is likely to be construed as an invitation to offer rather than as an offer (*Clifton v Palumbo* (1944) 2 All R.E. 497).
- *Intention to be bound*: A person does not make an offer if he expressly says that he is making the statement without engagement (*Rossiter v Miller* (1878) 3 A.C. 1124, *Rossdale v Denny* (1921) 1 Ch. 57).
- *Addressee*: When an advertisement is sent to many persons, such as a statement, it is likely to be construed as an invitation to offer (*Carlill v Carbolic Smoke Ball Co.*).
- *Countervailing factors*: In the absence of countervailing factors, a statement may tend to be interpreted as an offer; for example, if the person inquiring about the price of the property to be sold had clearly asked for a binding offer. But merely quoting a price in a reply to an ordinary inquiry is an invitation to treat. However, when a person requests another to accept his offer or to inform him within a specified period concerning his acceptance, the letter is likely to be read as an offer, provided it is sufficiently definite as to terms.

Merely quoting a price in a reply to an ordinary inquiry is an invitation to treat.⁶⁷ However, when a person requests another to accept his offer or to inform

⁶⁵ One of the earliest cases in which the court was confronted with the distinction between an offer and an invitation to offer was the case of *Payne v Cave* (1789) 3 T. Rep. 148, 1 R.R. 769, where the court held that in a sale at auction on usual conditions to the highest bidder a bid is an offer and the highest bidder could not compel the auctioneer to sell him the goods at the price bid by him. Another often quoted case is the case of *Carlill v Carbolic Smoke Ball Co* [1892] 2 QB 484, where Bowen L.J. said: “It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisement is offers to negotiate... Offer to receiver offers... Offers to chaffer...”

⁶⁶ Poole, *supra* note 10, p. 33-36.

⁶⁷ *Stevenson v. Mclean* (1880) 5 Q.B.D. 346.

him within a specified period concerning his acceptance, the letter is likely to be read as an offer, provided it is sufficiently definite as to terms.⁶⁸

An advertisement may fall into the category of an offer because it can easily be fitted to a conditional promise or a unilateral offer.⁶⁹ However, most advertisements do not fall into this category and hence they do not amount to an offer, but instead are seen as a statement inviting further negotiations or invitations to treat.⁷⁰ The most common example of the occurrence of invitations to treat is in the case of goods displayed either in shop windows or within a shop itself.⁷¹ In this situation, it is the customer who makes the offer to the shopkeeper. There is no binding obligation on the shopkeeper to accept such an offer. The shopkeeper is free to accept or reject that offer as he wishes. Similar principles also apply to display of goods on the shelves of a self-service shop; the customer makes an offer when he presents the goods for payment, and the retailer may accept or reject the offer. An indication of price at a petrol station is also an invitation to treat; the offer is made by the customer and the retailer accepts the offer by putting the petrol into the tank.⁷² However, this principle may not be applicable in a self-service petrol station because the seller has no possibility to refuse in dealing with the customer once the customer has put the petrol into his tank.

⁶⁸ *Philip & Co. v Kanoblauch* (1907) S.C. 994.

⁶⁹ A simple example would be if an individual placed an advertisement offering a reward to the finder of a lost wallet. In such a case, there is clearly a conditional promise and the advertisement would amount to an offer.

⁷⁰ *Harris v Nickerson* [1873] LR 8 QB 286. In this case, an auctioneer advertised that certain goods would be sold at a certain location on a certain date. The plaintiff went to the sale but found that all the lots he was interested in had been withdrawn. He then sued the auctioneer for his loss of time and expenses. The court held that the advertisement of the auction was merely a declaration of intent to hold a sale and did not amount to an offer capable of being accepted, and thus forming the basis of a binding contract; that is, the advertisement merely amounted to an invitation to treat. The main proposition of this case is that while one can draw on certain generalisations, as in advertisements, one must treat each case on its own merits, assessing the intention of the parties.

⁷¹ *Fisher v Bell* [1961] 1 QB 394, where a price-marked flick-knife was displayed for sale in a shop window. The seller was prosecuted under then applied Restriction of Offensive Weapons Act 1961, which made it an offence to offer to sell such items, and was acquitted. Lord Parker said: "It is clear according to the ordinary law of contract that the display of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale, the acceptance of which constitutes a contract."

⁷² *Esso Petroleum v Commissioners of Customs & Excise* [1976] 1 W.L.R. 1 at 5, 6, 11; *Richardson v Worrall* [1985] S.T.C 693 at 717, See Treitel, *supra* note 23, p. 12.

5.1.2. Communication of Offer

The offer is effective when, and not until, it is communicated to the offeree. The time at which an offer becomes effective has an important bearing on the formation of a contract. It is at that time that the offer creates in the offeree a power of acceptance. With regards to the moment at which an offer is deemed to be communicated, Professor Winfield states: “the simple rule is that it is deemed to be communicated to the offeree when he knows of it.”⁷³ Thus, the power of acceptance is acquired by the offeree upon knowledge of the offer. If the offer comes to the offeree’s knowledge after the lapse of the time fixed for acceptance, the offeree never acquires power to accept, and the offer dies before it becomes effective.

An offer can no longer be accepted if there has been an express rejection by the offeree. A rejection can also be made by submitting a counter offer. A revocation (withdrawal) by the offeror also takes away the possibility of the offeree to accept the offer. Revocation of an offer may be made at any time before it is accepted and only effective when it is “received” by the offeree. Nonetheless, revocation needs not be communicated by the offeror. If the offeree, as a reasonable person, must know that the offer has been revoked and he acquired such knowledge not from the offeror, he cannot accept it (*Dickinson v Dodds* (1876) 2 ChD 463 (CA)). In unilateral contracts,⁷⁴ the offer cannot be revoked after the offeree has commenced the act which indicated acceptance. Other situations where it is no longer possible to accept the offer include: when there is a failure of condition precedents, and the death of offeror or offeree.

If two offers which are identical in terms get crossed in the post (cross-offers), they will not bring about contract when each of them is made in ignorance of the promise or offer made on the other side, and thus neither of them can be construed as an acceptance of the other.⁷⁵

5.1.3. Acceptance and Acknowledgement of Receipt

An acceptance is the final and unconditional expression of consent to the offer that is made in response to the offer. Unconditional means that the acceptance exactly matches all the terms of the offer without qualifications or additions.

73 Winfield: “Some Aspects of Offer and Acceptance” (1939) 55 Law Quarterly Review 499, quoted from Jill Poole, ‘Agreement: Subjectivity Versus Objectivity’ in *Casebook on Case Law*, 6th ed., Oxford University Press, 2003, p. 28.

74 Generally, a unilateral contract is a one-sided agreement whereby one party promises to do (or refrain from doing) something in return for a performance (not a promise).

75 Cheshire, *supra* note 25, p. 57.

In practice, it is important to know whether the offeree's reply to an offer is merely an acknowledgement of receipt or is, in fact, an acceptance of an offer. This will clarify whether the offeree intended to be bound, or was merely telling the offeror of receipt of the offer. In the first alternative, the offeree is bound by a contract which was concluded by his reply, while in the second, he remained free to reject the offer. Such uncertainty generally arises where the language of the statement is ambiguous and thus interpretation is needed. The question of interpretation of ambiguous terms in the offeree's answer raises not only questions of fact, but also of law. From case law, it appears that courts have taken into account the following factors where the language of the statement is not clear: (i) previous business dealings between the parties and subsequent behaviour, (ii) common usages or customs of trade, and (iii) nature of the particular relationship between the parties.

In comparison, courts in the United States have provided more clear guidance on whether a statement is non-promissory, and thus not binding when it is considered with anything else related to the statement. The US courts had held that the use of certain words like "will have our best attention", "is under consideration in our office" and "we believe we can work out a satisfactory arrangement with our mill" in certain situations would mean that no contract was formed.⁷⁶

5.1.4. Communication of Acceptance

In *Carlill v. Carbolic Smoke Ball Co.* [1892] 2 QB 484, Bowen L.J. laid down the law that "an acceptance of an offer made ought to be notified to the person who makes the offer, in order that two minds may come together ...". This statement contains a general rule as to the necessity of communication of acceptance in the law of England. Thus, an acceptance must be communicated and is only effective when it is received by the offeror. There is no binding

⁷⁶ The US courts have held that no contract was formed in the following situations:

(i) The acknowledgement asked for further specifications and implied that shipment would be at different dates, whereas the offer had called for shipment on one date, (ii) The acknowledgement asked for a different shipping date (subsequently accepted) of one part of a two-part order, and stated that the other part "will have our best attention", (iii) The acknowledgement stated that the order "is under consideration in our office", that "your kind letter is being checked with our production department in an effort to determine what program can be worked out", and that "we believe we can work out a satisfactory arrangement with our mill.", (iv) The acknowledgement of receipt stated: "Some has gone forward to the mill for their attention. It may be possible to get it here on the date specified, but everything coming in the present time is taken in turn and will be filled as quickly as the orders now placed with the mill are out of the way." For further discussion, see: E. Allan Farnsworth, *United States Contract Law*, Juris Publishing, 1999.

contract until notice of the acceptance is received by the offeror.⁷⁷ The offeror may specify the method for communicating acceptance. In the event that such method is mandatory, any other method of communicating acceptance will not be sufficient. If the method is not mandatory, the acceptance can be communicated by an “equally expeditious” method of communication. If no method is specified, the actual method of communicating acceptance must be reasonable in all circumstances.

An important distinction applies to *inter praesentes* situations and *inter absentes* situations. In the first situation, the acceptance will normally become effective when heard or received by the offeror⁷⁸ which is the core principle of the Receipt Rule. This rule is also applied to contracts made by telephone, telex, and similar devices. Where parties are not in each other’s presence, the Postal Rule shall apply.⁷⁹ A definite rule for the time of postal acceptance is the time when the letter is posted/sent and not the time it is received by the offeror. This Postal Rule also applies to acceptance by telegram.⁸⁰ As such, English Law adheres to two rules when deciding when the acceptance becomes effective: the Receipt Rule and the Postal Rule, which is most commonly used.

In some cases, an acceptance may be effective although it is not communicated to the offeror:

- *Communication is waived by the offeror.* This is often the case where an offer invites acceptance by conduct or in the case of an offer of a unilateral contract. However, the offeror may not bind the offeree by stipulating that silence is consent.
- *Acceptance by post where the “postal rule” applies.* If it is reasonable to use post, acceptance may be complete when the acceptance is posted or stamped in the post office (*Dunlop v Higgins*). It should be noted that the postal rule does not apply to acceptance made by some instantaneous mode of communication like telephone or telex for the reason that the offeree making the acceptance will often know at once that his attempt to communicate was unsuccessful, and therefore it is up to him to make a proper communication.⁸¹
- *Communication to the offeror’s agent.* If the agent has the authority to receive acceptance, the acceptance is effective upon its receipt by the agent. However, if the agent only has the authority to transmit the acceptance to its principal, the acceptance takes effect only when the offeror receives it.

⁷⁷ *Entores Ltd. v Miles Far East Corporation* [1955] 2 Q.B. 327, 336.

⁷⁸ This presupposes that the offeror is not suffering from deafness.

⁷⁹ The leading case on the development of this rule is *Adams v Lindsell*.

⁸⁰ *Cowan v O’Connor* (1888) 20 Q.B.D. 640.

⁸¹ Treitel, *supra* note 23, p. 26.

- *Conduct of the offeror.* If it is the offeror's own fault that he did not get the acceptance, the acceptance is considered effective; for example, if the acceptance is received during business hours but the offeror did not read it, or when the offeror could not hear clearly in the telephone conversation of the acceptance but did not request the offeree to repeat it.

An acceptance can be revoked provided that the revocation reaches the offeree before the acceptance. The problem arises when the acceptance is sent by post. According to the general rule, postal acceptance is effective at the moment the acceptance is handed in to the post office. Case law has not given any guidance in dealing with this problem. Although with doubt, some textbook writers have suggested that the offeree can revoke his acceptance by sending a telegram or calling the offeror provided that his posted acceptance has not reached the offeror because he cannot rely on its being accepted before he knew of its acceptance.⁸²

5.2. Directive Implementation

The Electronic Commerce (EC Directive) Regulations 2002 (Statutory Instrument 2002 No.2013) ("UK Regulations") is the United Kingdom response to E-commerce Directive.⁸³ Article 11 of the E-commerce Directive was implemented by article 11 UK Regulations which provides as follows:

1. Unless parties who are not consumers have agreed otherwise, where the recipient of the service places his order through technological means, a service provider shall:
 - a. acknowledge receipt of the order to the recipient of the service without undue delay and by electronic means, and
 - b. make available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors prior to the placing of the order.

⁸² See: W.R. Anson & J. Beatson, *Anson's Law of Contract*, 28th ed, Oxford University Press, 2002, p. 49-50; Treitel, *supra* note 23, pp. 28-29; Cheshire, *supra* note 25, p. 43-44.

⁸³ The United Kingdom consists of England, Wales, Scotland and Northern Ireland. The UK Regulations were laid before the UK Parliament on July 31, 2002, came into force August 21, 2002. It applies for the following situations: (i) selling of goods or services to business or consumers on the Internet or by email, (ii) advertising on the Internet or by email, or (iii) conveying or storing electronic content or providing access to a communications networks.

2. For the purpose of paragraph (1)(a) above: the order and the acknowledgement of receipt will be deemed to be received when the parties to whom they are addressed are able to access them, and the acknowledgement of receipt may take the form of the provision of the service paid for where that service is an information society service.
3. The requirements of paragraph (1) above shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

5.2.1. Electronic Offer

The UK Regulations provide that an “order” can be a “contractual offer” for the purpose of Article 11 of the UK Regulations.⁸⁴ Consequently, the provision on treatment of order in the UK Regulations may affect the general rule on the effectiveness of an offer. When an electronic order is in fact a contractual offer then the moment such offer is deemed to be received (leading to the effectiveness of the offer) will be the moment when the party to whom it is addressed has access to it. This means that for such an offer to be effective, the offeree does not need to have knowledge of the order by, for example, reading the offer. The fact that the offeree is able to access such an order triggers the effectiveness of the offer. This is different to the general contract rule, which provides that an offer is deemed to be communicated to the offeree when he knows of it.

5.2.2. Electronic Acceptance

Paragraph 5.31 of the Guide for Business to the Electronic Commerce (EC Directive) Regulations 2002 issued by the UK Department of Trade and Industry (“Guide to the Regulations”) makes it clear that the UK Regulations do not deal with contract formation itself. It follows that the general contract rule on the formation of contract is still applicable to contracts concluded electronically, including when it concerns the moment when the acceptance is deemed to be effective. In an *inter absentes* situation, the Postal Rule is often used in England.⁸⁵ A definite rule for the time of postal acceptance is that the acceptance becomes effective at the time when the letter is posted and not the time it was received by the offeror.

In a situation when the acknowledgement of receipt and acceptance are sent in one message, different rules of effectiveness apply for each. The acceptance

⁸⁴ Article 12 UK Regulations and paragraph 31 Guide to the Regulations.

⁸⁵ *Supra* note 79.

will be effective at the moment the message is sent by the offeree to the offeror, and thus the contract is concluded at that very same moment. However, the acknowledgement of receipt of order will only be deemed to have been received when the offeror has the capability to access such a message. The application of the Postal Rule in the online contracting can result in a situation where the acceptance has been effective by the sending of the acceptance, but the acknowledgement of receipt is not yet effective because the offeror is incapable of accessing such acknowledgement.

It is also of interest to analyse the application of the Receipt Rule in a situation when online acceptance and acknowledgement of acceptance are sent within one message, as England has also adhered to the Receipt Rule in certain instances. The acceptance will not be effective until such a message is received by the offeror while the acknowledgement of receipt will be deemed to be received when the offeror is able to access the message. Depending on the meaning of the offeror's *address*, it is possible that an acknowledgement of receipt becomes effective (by the existence of offeror's ability to access the message) even if such a message has not yet reached the offeror's address. The acceptance itself will never be effective until it reaches the offeror's address.

Specific regulations

In contrast to the UK Regulations, the Electronic Commerce Act Number 27 of 2000 ("UK E-commerce Act") addresses the issue of the time and place of dispatch and receipt of electronic communication in detail. Article 21 of this act provides that when an electronic communication enters an information system outside the control of the originator, such electronic communication is taken to have been sent when it enters such information system.⁸⁶ With regard to the moment of receipt of electronic communication, this act provides two possible approaches:⁸⁷

- Where the addressee of an electronic communication has designated an information system for the purpose of receiving electronic communications, then, the electronic communication is taken to have been received when it enters the information system.
- Where the addressee of an electronic communication has not designated an information system for the purpose of receiving electronic communication, then, the electronic communication is taken to have been received when it comes to the attention of the addressee.

⁸⁶ Article 21(2) of the UK E-commerce Act.

⁸⁷ Article 21(3) (4) of the UK E-commerce Act.

Although this provision does not offer much help to clarify the meaning of “capable to access” provided under Article 11 of the UK Regulations, this provision does provide guidance in deciding when the electronic acceptance is effective. When the Internet situation is considered as *inter absentes*, applying Article 21(1) of the UK E-commerce Act will make the acceptance effective when it is sent by the offeree i.e. when it enters the information systems outside his control. On the other hand, when Internet communication is considered instantaneous leading to the application of the Receipt Rule, there are two possible alternatives that may apply. Firstly, the online acceptance is taken to have been received when it enters the information system that has been designated by the offeror for the purpose of receiving electronic communication. Secondly, in a situation where the offeror has not designated any information system for the purpose of receiving electronic communication, the communication of the acceptance is deemed to have been received when it comes to the attention of the offeror.

5.2.3. Acknowledgement of Receipt

In the Guide to the Regulations, it was made clear that the UK Regulations do not deal with contract formation itself.⁸⁸ It follows that the general rule on the status of acknowledgement of receipt will apply i.e. acknowledgement of receipt has no legal effect and, as such, it is not a part of contract formation procedures.

The issue of acknowledgement of receipt has been previously discussed in the UK E-commerce Act.⁸⁹ Article 20(2) of this act provides that when the originator of the electronic communication requires the acknowledgement of receipt of electronic communication, the legal right and obligation of the parties will not be effective unless such acknowledgement is received. Please note that this provision requires the offeree to request that an acknowledgement of receipt be provided to him. This is rather different to the provision of Article 11(1) of the UK Regulations, which demands the existence of acknowledgement of receipt even though the offeree does not ask for it. It is not clear how

88 Paragraph 5.31 of Guide to the Regulations. This paragraph also provides that contract formation remains subject to common law, existing statutory provisions or the law of other national law.

89 An act to provide for the legal recognition of electronic contracts, electronic writing, electronic signatures and original information in electronic form in relation to commercial and non-commercial transactions and dealings and other matters, the admissibility of evidence in relation to such matters, the accreditation, supervision and liability of certification service providers and the registration of domain names, and to provide for related matters dated July 10, 2000.

these two provisions will be applied in practice. One possible alternative is that the provision of Article 11(1) of the UK Regulations will apply as a general law, whereas the provision of Article 20(2) of the UK E-commerce Act will serve as an exception to such general law.

5.2.4. Accessibility

Article 11(2) of the UK Regulations provides that the order and the acknowledgement of receipt will be deemed to be received when the parties to whom they are addressed are able to access them (i.e. they are capable of being accessed). The UK Regulations do not specify what is meant by “access” as this may vary according to circumstances.⁹⁰ This provides room for interpretation on a case-by-case basis. However, given the provision of Article 21 of the UK E-commerce Act as provided above, it is highly possible the interpretation of “access” and “able to access” will relate to the information system of the parties concerned. Using this proposition in interpreting the provision of Article 11 of the UK Regulations will provide that the order and the acknowledgement of receipt of order will be deemed to be received when the parties to whom they are addressed are able to access them i.e. when such messages enters the parties’ respective information systems.

Article 2 of the UK E-commerce Act defines information system as a system for generating, communicating, processing, sending, receiving, recording, storing, or displaying information by electronic means. The broad definition in this provision fails to clarify when the parties are deemed to be able to “access”, because both computer and server will satisfy the definition. Consequently, uncertainty will remain as regards the capability to access exists i.e. whether it exists when the message arrives on the server or when the message arrives on the computer.

5.2.5. Correction of Input Errors

Article 11(1)(b) of the UK Regulations is a mirror provision of Article 11(1)(b) of the E-commerce Directive. The service provider shall make available to the recipient of the service appropriate, effective, and accessible technical means allowing him to identify and correct input errors prior to the placing of the order. The UK Regulations do not specify what is meant by “appropriate, effective and accessible technical means” as this may vary according to circumstances.⁹¹ It follows that the enforcement authorities are expected to place

⁹⁰ Paragraph 5.29(a) of Guide to the Regulations.

⁹¹ Paragraph 5.27 of Guide to the Regulations.

the onus on the service provider to demonstrate that he has complied with these requirements. Furthermore, the UK Regulations do not provide for any sanctions for the failure to provide the technical means to identify or correct errors. This creates uncertainty on the application of such provision.

6. GERMANY

In Germany, the rules of contract formation are provided in Book 1 of the German Civil Code, or *Bürgerliches Gesetzbuch* (“BGB”).⁹² Book 1, or the so-called *Allgemeiner Teil* or General Part, consists of rules to apply throughout the law of obligation, property, family and inheritance as consisted in Books 2-5 of the BGB, and indeed, all areas of civil law.

6.1. General Rule

Declaration of intent constitutes the most important element of any legal transaction. Under BGB, to conclude an agreement one party must declare his intention to the other party to enter into an agreement, and the other party assents to this proposal. As such, a contract essentially consists of two or more corresponding declarations of intent (*Willenserklärung*) of the parties, aimed at bringing about particular legal effects. German law makes the distinction between the objective (external) and subjective (internal) aspects of the declaration. Objective aspect is the actual manifestation of the will, which may be in the form of written or spoken expression, known as express intent, and can also be in forms of conduct, known as implied intent.⁹³ Subjective intent concerns the actual intent or desire, and has three vital elements:⁹⁴

- General intention to act (*Handlungswille*): that a person must have intended to physically act or to make a movement. It follows that an unconscious movement cannot raise this element.
- Conscious declaration of intent (*Erklärungsbewußsein*): that the action is committing the person to the specific act or that action has legal effect. It follows that if an action can be attributed to a person then he should be bound by it.
- Business intent (*Geschäftswille*): that a person must have intended to conclude a particular contract and to bring about a particular legal effect.

⁹² Came into force on January 1, 1900.

⁹³ Based on the implied intent doctrine, the selection of goods in a supermarket and taking them to the check-out makes clear that the buyer has expressed the intention to purchase. See: N. Foster & S. Sule, *German Legal System and Laws*, (3rd ed.), Oxford University Press, 2002, p. 379.

⁹⁴ *Ibid.*

Both offer (*angebot* or *antrag*) and acceptance (*annahme*) are declarations of intent. The acceptance of an offer brings about a contract.

6.1.1 Offer and Invitation to Treat

BGB does not contain any definition of offer, but it stipulates some provisions on the effect of an offer. As a rule, once the offer is received by its addressee, it is irrevocable. An offeror is strongly bound by his offer and cannot withdraw his offer for the period of time he specifies in his offer or if he does not specify time for acceptance, for a reasonable time. He is freed from his obligation only if the offer expires or is rejected. The rule of irrevocable offer is purported to give certainty to the offeree that a contract will arise when he accepts the offer in time. During the preparation to accept the offer, the offeree may have rejected similar offers from other parties or made further offers to other parties based on the offer given to him. It would be very unfair to the offeree if the offeror revokes his offer before the acceptance. Therefore, under the German law, “the frustrated offeree (whenever he cannot claim specific performance of the offeror’s promise) will be able to claim a full, contractual measure of damages rather than the lesser “reliance” loss, which the US and French systems allow.”⁹⁵

In keeping with the ideas of contractual freedom, it is possible to avoid the binding effect of an offer. An offer may be made revocable by inserting a clause plainly reserving the rights to revoke it at any time up to acceptance. This is called qualified offer and may be recognised by the words “offer subject to change” (*freibleibend*), “revocable offer” (*widerruflich*) or “without recourse or obligation” (*ohne Obligo*).⁹⁶ It follows that an offer silent as to revocability is irrevocable.

Like in England, there is no clear borderline between invitation to treat and offer under the German law as this is often the matter of circumstance and interpretation. If someone does not want to be bound by his proposal, it is up to him to make this clear in his proposal. An invitation to treat does not constitute an offer, and consequently does not bind the promisor. In practice, it would seem that a proposal addressed to several persons is *prima facie* not an offer, but a mere invitation to treat.⁹⁷ The fact that the proposal is sent to several people should be seen as an indication that the proposal is not meant to be bound and

95 B.S. Markesinis, W. Lorenz & G. Dannemann, *The Law of Contracts and Restitution: A Comparative Introduction*, Book I, Clarendon Press, 1997, p. 53.

96 See e.g., R. Youngs, *Source book on German Law*, Cavendish Publishing, 2002, p. 359; Foster & Sule, *supra* note 19, p. 384.

97 See further R.B. Schlesinger, *Formation of Contracts*, Volume I, Oceana Publications, Inc., 1968, p. 668.

only purported to invite deals.⁹⁸ The same applies to newspaper advertisements, prospectuses, merchandise catalogues, and displays in shop windows.

There are, however, divided opinions with regards to displays of goods along with an indication of price. Some would consider it as an offer, others as an invitation to treat.⁹⁹ The latter opinion is based on the wish to avoid consequences that may take place if the offeror runs out of the stock and therefore the offeror wishes to retain the possibility of deciding later whether or not he would conclude the contract. This results in a situation whereby, under the German law, a customer is considered the offeror and the seller is the offeree.¹⁰⁰ It has also been argued that display of goods is considered an invitation to treat because of §147(1) BGB.¹⁰¹ This section provides that an offer is open to immediate acceptance only by those to whom it is made, if that person is either present or in contact by telephone. As a result, display of goods in shop windows is not an offer since it is not always made in the presence of the customer and thus it is not possible for the customer to accept it immediately. This argument is not as convincing as the previous one because it is still possible for a customer, who is present in the store, to accept the offer made by the shopkeeper immediately or at the same time when the shopkeeper puts the goods on display. And even if the display of goods is made in *inter absentes* and thus cannot be accepted immediately, it could still be considered as an offer. In addition, the use of §147(1) BGB as the basis for argument is questionable. This section is intended to regulate duration of the offer made in *inter praesentes* situation where both offeror and offeree are present or considered to be present (in case of communication by telephone) i.e. it will lapse unless it is accepted immediately. When the conditions provided in this section are not fulfilled, this does not automatically convert a proposal to an invitation to treat. An offer made in *inter absentes* transaction may be accepted until such time as it expires or is rejected by the offeree, or in other words, it can remain open up to the moment when the offeror expects to receive an answer under ordinary circumstances (See §147(2) BGB).

98 The exception is public promise of reward which is subject to special provisions that are different from the provisions governing offer in some respects. This promise is considered as unilateral *jural* act (*einseitiges Rechtsgeschäft*) or specifically called *Auslobung*. *Auslobung* is different to offer as it becomes effective upon its publication and no “acceptance” is required. As such, the one who performs the requested act may claim the reward upon completion of the act although he never notifies the promisor that he has begun to perform the requested act. See Schlesinger, *supra* note 97, p. 729.

99 Markesinis, *supra* note 95, p. 49.

100 *Ibid.*

101 Foster & Sule, *supra* note 93, p. 384.

An offer must be precise in the sense that it should contain all essential elements of the proposed contract (*essentialia negotii*).¹⁰² This means that “it must be phrased in such a way that it can be accepted by a mere “yes” from the other party.”¹⁰³ Nevertheless, the offer needs not contain all detailed terms of the proposed contract as this may be filled by the parties in the subsequent determination.

6.1.2. Acceptance and Acknowledgement of Receipt

Like English law, German law recognises the mirror image rule in relation to acceptance. An acceptance must meet the terms of the offer unconditionally and does not introduce any new terms. Any reply to an offer containing additions, limitations or other alterations is deemed as a refusal combined with a new offer (§ 150(2) BGB). A late acceptance is also considered as a new offer. However, when the acceptance is late *not* due to offeree’s fault because it has been sent in such manner that it should have reached the offeror in time and the offeror is aware of this situation, the acceptance is deemed to have arrived in time if the offeror delayed in informing the offeree of the delay.

Under German law, the contract shall be interpreted as required by good faith and with consideration to business custom. This also applies to formation of contract. A contract can be concluded although the acceptance is not communicated to the offeror if such declaration is not to be expected according to the business custom, or the offeror has renounced his right to it (§151 BGB). For this reason, silence – which normally would not constitute an objective expression of intent – constitutes an acceptance if it is a usual form of conduct between business partners. The moment at which the offer expires is determined according to the intention of the offeror in light of the offer or the circumstances. It is common practice between merchants to orally conclude the agreement and then summarise the terms of their agreement in a commercial letter of confirmation (*kaufmannisches Bestätigungsschreiben*). A confirmation containing the exact terms of the agreement is simply a declaration of what the parties have agreed. However, when a confirmation contains additions or modifications to the original terms and the addressee of this confirmation does not protest to the additions or modifications, his silence will be construed as an acceptance.¹⁰⁴ The foregoing shows that a letter of confirmation may be regarded either as itself, a confirmation, or as a new offer.

¹⁰² Markesinis, *supra* note 95, p. 48.

¹⁰³ Foster & Sule, *supra* note 93, p. 384.

¹⁰⁴ Foster & Sule, *supra* note 93, p. 385.

6.1.3. Communication of Offer and Acceptance

The German legal system follows the so-called theory of reception (§130 BGB). A declaration of intent – such as offer and acceptance – is effective when it reaches the addressee. This does not require the recipient to actually read the declaration of intent because it should not be up to the addressee when the declaration of intent becomes effective. It demands only that: (i) the declaration of intent has been directed to the addressee, (ii) it has reached the sphere of control (*machtbereich*) of the recipient and (iii) it could be expected that the addressee would take notice of it. In respect to the posting of declaration of intent, the last requirement is interpreted to mean that “it would be reasonably expected the letter would be collected from the mailbox.”¹⁰⁵ The same principles apply to revocation (and withdrawal) of declaration of intent: it is effective when it reaches the addressee provided that it arrives sooner than or at least simultaneously with the original declaration of intent.

6.2. Directive Implementation

In Germany, the EU E-commerce Directive was implemented by *Gesetz über rechtliche Rahmenbedingungen für den elektronischen Geschäftsverkehr*, BGBl. I 2001 S. 3721. Nevertheless, this particular law is more concerned with how services regulated by the directive handle information about the users. Articles 10 and 11 of the EU E-commerce Directive are implemented in Germany by § 312e BGB. BGB was lastly amended on January 1, 2002, by the so-called Act on the Modernisation of the Law of Obligations and § 312e was amongst BGB’s new provisions.

The following is the translation of §312e BGB:¹⁰⁶

Duties in electronic business dealings

(1) *If an entrepreneur uses a teleservice or media service in order to enter into a contract for the supply of goods or the rendering of services (e-commerce contract), he must:*

1. *provide the customer with reasonable, effective, and accessible technical means with the aid of which the customer may identify and correct input errors prior to making his order,*

¹⁰⁵ *Ibid.*

¹⁰⁶ This is an official translation of BGB as provided by the German Federal Ministry of Justice available online: http://bundesrecht.juris.de/englisch_bgb/englisch_bgb.html#Section%20312b last accessed November 12, 2007.

2. *notify the customer clearly and comprehensibly of information specified in the statutory order under Article 241 of the Introductory Act to the Civil Code [Einführungsgesetz zum Bürgerlichen Gesetzbuch] in good time prior to sending his order,*
3. *confirm receipt of the order without undue delay by electronic means for the customer, and*
4. *make it possible for the customer to retrieve the contract terms, including the standard business terms, when the contract is entered into and save them in a form that allows for their reproduction.*

The order and the acknowledgement of receipt in the meaning of sentence 1 no. 3 are deemed to have been received if the parties for whom they are intended are able to retrieve them in normal circumstances.

(2) Subsection (1) sentence 1 nos. 1 to 3 does not apply if the contract is entered into exclusively by personal communication. Subsection (1) sentence 1 nos. 1 to 3 and sentence 2 does not apply if otherwise agreed in a contract between parties who are not consumers.

(3) More extensive duties to provide information under other provisions are unaffected. If the customer has a right of revocation under section 355, the revocation period does not begin, notwithstanding section 355 (2) sentence 1, until the duties laid down in subsection (1) sentence 1 have been performed.

Read together with the §1 Ordinance of Civil Code – Information Obligations” (“BGB-Informationspflichten-Verordnung (“BGB-InfoV”), the information required in §312e(1)(2) are as follows:

- a. the different technical steps to follow to conclude the contract,
- b. whether or not the concluded contract will be filed by the service provider and whether it will be accessible,
- c. how to identify and correct input errors with the provided technical means prior to the placing of the order,
- d. the languages offered for the conclusion of the contract,
- e. any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically.

6.2.1. Electronic Offer and Electronic Acceptance

German law distinguishes between contracts concluded in the presence of both parties and contracts concluded where the parties are absent. When the parties communicate with each other directly online in real time, such as in

a chat room or in EDI,¹⁰⁷ they are considered present.¹⁰⁸ However, when it comes to electronic transmission or communication (including of electronic offer and acceptance), the parties will be considered *inter absentes* as reasoned by Glatt:¹⁰⁹

“Electronic messages are stored as files on computers, transmitted in data ‘packets’ and stored again on the addressee computer. Independent from the way of transmission (over a direct link between the parties or via networks), electronic declarations of intention are, therefore, likely to be regarded as embodies declarations inter absentes.”

The above view was confirmed by the German court in OLG (Court of Appeal) Köln NJW 1990, 1608 which stated that rules for declaration *inter absentes* is applicable to messages sent by videotext.¹¹⁰

A product placement on the website is deemed to be similar to a shop window and thus is not considered a legal offer, but rather an invitation to the viewer to make an offer.¹¹¹ Such placement is seen as a declaration made to the general public where the (online) merchant does not want to be bound by his statements and does not carry any contract law obligations with it. It follows that an order placed on a product displayed on a website with a certain price will not bring about contract because such an order (or offer) still needs to be accepted by online vendors. Furthermore, when there is an error in price displayed, the order on such item will not force the vendors to sell at this price (LG Essen, decision 13.02.2003, 16 O 416/02). Since it is only an invitation to treat, it is the buyer who makes an offer to buy the items at the wrongly-quoted price. The online vendors may choose to ignore such offer and place instead a counter offer stating the correct price of the goods, which then will be up to the buyer to accept or reject. The situation is different in Internet auctions where the seller has indicated the minimum price he wants for the item. Such indication of price is considered as a valid and binding offer (OLG Hamm, decision 14.12.2002, U 58/00). Placing a bid at the item’s minimum price constitutes electronic acceptance to the offer and brings about contract.

¹⁰⁷ EDI stands for Electronic Data Interchange.

¹⁰⁸ Brita Behrendt, *Electronic Commerce in German and Swedish law*, Stockholm University, 2000, p. 24.

¹⁰⁹ C. Glatt, “Comparative Issues in the Formation of Electronic Contracts,” *International Journal of Law and Information Technology*, Vol. 6, Issue 1, pp. 34-68, 1998, at p. 46.

¹¹⁰ Glatt, *supra* note 109.

¹¹¹ E.g. E.S. Purdue, *Creating Contracts Online* in: T.J. Smedinghoff (ed.), *Online Law, The SPA’s legal guide to doing business on the Internet*, Addison-Wesley, 1996, p. 82; Behrendt, *supra* note 108, p. 22.

Electronic offer can also be accepted by sending a formal acceptance letter or in the case of acceptance by vendors, by delivering the ordered goods. Payment by credit card during the order transaction process is not always considered as acceptance since in some web contracting mechanisms, the vendor usually states that the contract is not concluded before the goods are dispatched regardless of any payment.

6.2.2. Acknowledgement of Receipt

As a rule in Germany, contracts concluded via the Internet should follow the same rules as conventional contracts. §312e BGB defines the circumstances under which an electronic contract can be concluded using means of distance communication, or teleservice (distance electronic contract).¹¹² § 312b BGB defines the scope of distance selling contract similar to the EU Distance Selling Directive. § 312c BGB read together with §1 BGB-InfoV requires service providers to provide consumers with certain information before the conclusion of distant contract in a clear and comprehensive manner. Such information can be provided on a website and must contain (§1(1) BGB-InfoV) not only the identity and address of the service provider or description of main characteristic of goods or services, but also a description on how and when the contract is concluded. The latter can be done by “naming the action which leads from the supplier’s point of view to the conclusion of the contract (e.g. confirmation of the offer or delivery).”¹¹³

Online vendors are required to immediately confirm an order given by the customer. Basically, this provision is purported to avoid doubts on whether the order has been placed by the consumer. Such dispatch or receipt of acknowledgement of receipt has no effect whatsoever on contract conclusion since it is generally not considered as an acceptance. Nevertheless, it is included as one of the four requirements that a business must provide to its customers when offering goods or services.¹¹⁴ If online vendors neglect to provide acknowledgement of receipt of order to its customer, the customer may have the right to be reimbursed. In addition, the business is not permitted to exclude this

112 Dirk Hoffman, *Benchmarking of existing national legal e-business practices*, Country Report: Germany, DG ENTR/04/68, September 19, 2006, p. 11.

113 Helge Huffman, “Consumer Protection in E-Commerce: An examination and comparison of the regulations in the European Union, Germany and South Africa that have to be met in order to run internet services and in particular online-shops.” Research dissertation, University of Cape Town, 2004, p. 41.

114 The other three are provisions of: (i) possibility of correction of input error during order process, (ii) information about the contract and (iii) ability to view and save the terms of contract.

provision by agreements with the consumers. Any such agreement will be considered invalid by the laws.

6.2.3. Accessibility

German law also relies on accessibility in deciding moment of receipt of electronic messages. A declaration is considered received once the addressee is able to retrieve or access it in normal circumstances. There is no explanation of the meaning of “able to retrieve or access” but it does imply that it is not required for the addressee to actually access the message. What is important is that there is a possibility to access the message, which means that the message has already reached the addressee.

As provided above, German contract laws adhere to the theory of reception (§130 BGB) whereby a declaration of intent is considered effective when it reaches the addressee. The recipient is not required to actually read the declaration of intent because it should not be up to the addressee when the declaration of intent becomes effective. It demands only that the message has reached the sphere of control (*machtbereich*) of the recipient, and it could be expected that the addressee would take notice of it. An email is considered to have reached the addressee’s sphere of control when it is saved on his service provider’s mail server. Behrendt¹¹⁵ argues that for a business person who can be expected to check emails regularly, the receipt takes place the “very same day during business hours”. If the email reaches the business person’s mailbox after business hours, it can be expected to be read the next business day and thus receipt takes place then. For private persons who cannot be expected to read emails regularly, Behrendt suggests the following: (i) receipt happens when the private person actually reads the email because they cannot be expected to read their emails regularly or daily, or (ii) receipt takes place earliest one day after the message reaches the server because by providing his email address to participate in electronic commerce, such a person is expected to check his emails. Either way, this shows that Behrendt tried to provide two criteria for effectiveness of electronic communication: it must firstly reach the sphere of control of the addressee, and then it must be considered received.

A two-step approach can also be used to interpret “able to retrieve or access” of § 312e BGB in light of § 130 BGB i.e. by considering the previous as elaboration of the latter. § 130 BGB serves as a general rule that electronic messages reach the sphere of control of the addressee, while §312e BGB requires that such received messages must be retrievable or accessible. A mere receipt of a corrupted electronic message by the service provider’s computer,

¹¹⁵ Behrendt, *supra* note 108, pp. 24-25.

which stores the addressee's mailbox, will not trigger the effectiveness of the message because such a message cannot be opened or read by the addressee. This, of course, will require that intelligibility (readability) of the electronic message is set as the deciding element for ability to access in addition to the receipt of the representation of electronic data in the mailbox. It remains to be seen if this alternative interpretation can be used in practice.

6.2.4. Correction of Input Errors

Implementing Article 11 of the E-commerce Directive, §312e BGB requires service providers to furnish customers with *reasonable, effective and accessible* technical means to identify and correct input errors prior to placing an order. This rule is aimed at rendering impossible any input errors. If errors continue to occur even with the existence of such means, the person making the mistake (sender) should bear the risk of the mistake. This regulation is in contrast with the general rule of German contract law, which stipulates that a message sent by mistake is considered to be made without the sender's awareness of making a declaration of legal importance (*erklärungsbewußtsein*) and is therefore not a valid legal declaration (*willenserklärung*). As such, it will be "unduly hard to insist on the performance of such contract"¹¹⁶ unless, of course, in the above circumstance where the technical means of correcting errors is already provided.

§ 119 (1) BGB¹¹⁷ deals with certain situations in which the sender is aware of making a promise but he is mistaken about the content of his declaration; for example, if he misunderstands the meaning of the words, as very often happen in electronic commerce transactions. In such a situation, the sender may correct his mistake by giving a corresponding notice to the recipient of the message in due time. Such a notice will destroy any contract *ex tunc* or, in other words, the contract is considered to have never been concluded (§ 142(1) BGB). The recipient is allowed to claim damages according to § 122 BGB limited to his negative contract interest or the amount of money he lost for trusting the validity of contract in good faith. In electronic commerce, this situation is often reflected as a right of withdrawal after the message reaches the recipient of the message.

¹¹⁶ Behrendt, *supra* note 108, p. 48.

¹¹⁷ § 119: Voidability for mistake

(1) A person who, when making a declaration of intent, was mistaken about its contents or had no intention whatsoever of making a declaration with this content, may avoid the declaration if it is to be assumed that he would not have made the declaration with knowledge of the factual position and with a sensible understanding of the case.

7. ITALY

Italian law is a codified system. It is one of the legal systems that may be classified as the offspring of the Code Napoleon or Napoleonic Code.¹¹⁸ The Italian Civil Code of 1942 unified the whole area of substantive private law, by covering non-commercial (civil) as well as commercial law.¹¹⁹ The law on formation of contracts is dealt with mainly in articles 1326-1338 of the Italian Civil Code (“ICC”).

7.1. General Rule

7.1.1. Offer and Invitation to Treat

Italy recognizes the distinction between offer and invitation to deal. In deciding whether a statement should be construed as offer or mere invitation to deal, the following factors are taken into account:

- The more detailed and definite a statement is, the more likely it is to be construed as an offer.
- Where the alleged offeror reserves his liberty by using words like “subject to agreement” or “I reserve final determination” or “without obligation” there is a strong tendency to treat the proposal as a mere invitation to deal.
- Previous dealings between the parties may make it clear whether or not a certain phrase is understood by them as an offer.

Advertisements and price lists, generally speaking, are construed as mere invitation to deal. Exhibition of articles in shop windows is normally construed as an offer if the price is indicated. However, in light of the circumstances or trade practices, each of the above may be considered to the contrary.

118 This is especially true of the Civil Code of 1865, but the present Italian Civil Code of 1942 shows many important differences when compared to the French Civil Code.

119 Previously, civil law and commercial law were dealt within two different codes, respectively the Civil Code of 1865 and the Commercial Code of 1882.

7.1.2. Communication of Offer

The offer becomes effective when it is communicated to the offeree. It is generally recognized that the offer is not effective unless it is “received” by its addressee. Receipt does not always mean that the offeree has actual knowledge of the offer. What counts is the fact that (i) it is possible for the addressee to have access to the offer or acceptance and (ii) he/she should be able to get to know about it. This differs from actual knowledge.

Article 1334 of the ICC provides that an offer is effective when it comes to the notice of the offeree. Further, article 1335 of the ICC regulates that an offer addressed to a specified person is *deemed to have come to his knowledge when it arrives at his address*.¹²⁰ The latter article creates a presumption of notice, which the offeror may deny by evidence to the contrary when it is in his interest to prove that at a given moment the offeree did not have actual notice of the offer.

Taken together, the provisions of Articles 1334 and 1335 of the ICC suggest that the offeree cannot accept the offer before it has come to his knowledge by means of the offeror’s communication. Taking into account the presumption resulting from Article 1335, it is concluded that the offeree cannot accept an offer which has not yet arrived at his address although he has knowledge of its expedition by some other means. This means that it is not sufficient that the offer comes to the knowledge of the offeree upon expedition of the offer by any means whatsoever, but instead it *must* arrive at his address as it is at such moment that he is legally considered to come to knowledge of the offer.

Given that the offer is only effective when it comes to the knowledge of the offeree by its receipt in the offeree’s address, the offeror can withdraw his offer any time up to that moment and by doing so prevents the offeree’s power of acceptance from coming into existence. While withdrawal is concerned with stopping an offer before it becomes effective, revocation is about taking back an already effective offer. In Italy, it is very unusual to have an irrevocable offer as Italy maintains a general rule that an offer is revocable at any time (Article 1328) unless the offeror has stated that he will keep his offer open for a certain period (Article 1329) or unless there is an option in the contract (Article 1331).¹²¹ Revocation of an offer must be done before the offeree accepts the

120 Article 1335 of the ICC reads: “*La proposta, l’accettazione, la loro revoca e ogni altra dichiarazione diretta a una determinata persona si reputano conosciute nel momento in cui giungono all’indirizzo del destinatario...*” which unofficially translates to English as follows: “the proposal, the acceptance, their revocation and any other declaration addressed to a party are deemed to be known when they reach the address of the receiver...”.

121 Schlesinger, *supra* note 97, pp. 780 and 862.

offer and it is effective the moment it is sent if it is sent before the acceptance becomes effective as provided below.

7.1.3. Acceptance and Acknowledgement of Receipt

When the offeree has expressed himself unambiguously, no difficulty exists in deciding whether the statement made by the offeree should be considered as acknowledgement of receipt or acceptance. But the reply is not always clear and therefore an interpretation may be required. In Italian law, the interpretation of documents, even of contracts, is a question of fact reserved for the courts of first and second instance, whose findings are not reviewable in the Court of Cassation.¹²²

Since the question is one of fact or of interpretation, it can be assumed that from the standpoint of an Italian lawyer, the courts will take into account primarily the nature of the business relations and previous dealing between the parties, and their subsequent behaviour. It is not clear which one of these two factors will be considered as the most important factor.

7.1.4. Communication of Acceptance

Under Italian law, communication of acceptance is necessary for the formation of contract. As rule, the acceptance must arrive at the offeror's address.¹²³ This stems from the principle set forth in Articles 1326 and 1335 of the ICC.

In the case of acceptance *inter praesentes*, the contract is concluded at the moment the offeror "perceives" the declaration of acceptance. A similar rule applies to the acceptance by telephone. As to acceptance by mail, telegraph, or the offeree's messenger, Article 1326 (1) of the ICC provides that "a contract is formed at the moment when who made the offer is informed of the acceptance of the other party." This means that the contract is concluded at the moment the offeror learns of the acceptance. Taken together, Articles 1326(1) and 1335 of the ICC may be better stated thus: "The contract is concluded at

122 Provided that the lower court, in interpreting the statements of the parties, does not violate the rules of interpretation set out in Articles 1362-1371 of the ICC.

123 This principle, however, is subject to some exceptions in which the communication of an acceptance is not necessary in the following situations: (1) When it is dispensed with by usage, whether such usage has the force of a legal rule or represents merely commercial practice; (2) When the offeror expressly waives it; and (3) When the "nature of the transaction" so indicates, or when the offer is fairly interpreted as containing an implicit waiver of communication.

the moment when the acceptance reaches the offeror's address¹²⁴ unless the offeror proves that, without fault on his part, he could have known of it then".¹²⁵ If consideration is given to the points to be proved by the offeror (not just proof of not having knowledge of the acceptance, but also proof of not having been at fault), it becomes clear that Article 1335 does not create, in relation to acceptance, a mere presumption of knowledge. Some Italian scholars have concluded that in a situation in which the offeror acquires knowledge of the declaration of acceptance by any means other than by receipt of the declaration,¹²⁶ such knowledge is not sufficient for the formation of the contract because the declaration of acceptance must reach the offeror.¹²⁷ The contract is concluded at the moment the offeror actually takes notice of the declaration of acceptance, which is presumably as soon as it has reached him.¹²⁸

An offeror who wants to deny the existence of the contract is subject to the heavy burden of proving that he was not at fault in not knowing of the acceptance.¹²⁹ The offeree bears the risk if the declaration of acceptance never reaches the offeror or if it is delayed in the course of transmission. However, the offeree may revoke his acceptance until the offeror has taken notice of the acceptance.

Based on the foregoing, it can be said that Italy basically adheres to the Knowledge Rule. However, since the required knowledge is not actual knowledge but based on assumption – that the addressee is deemed to have obtained knowledge when the document reaches the addressee – it can also be said that Italy also adheres to the Receipt Rule. In other words, Italy adheres to both the Knowledge Rule and the Receipt Rule with some reservations, despite the fact that Italians in practice prefer to say that they adhere to the Receipt Rule.

124 The address mentioned in Article 1335 of the ICC means the address indicated by the offeror in his offer, or his actual address at the time when the offeree dispatches the acceptance. If the offeror changes his address without giving timely notice to the offeree, it seems that he has to be considered "at fault" within the meaning of Article 1335 of the ICC.

125 R.B. Schlesinger, *Formation of Contracts*, Volume II, Oceana Publications, Inc., 1968, p. 1497.

126 For example, when a third person informs the offeror that the offeree has sent a letter of acceptance.

127 See generally in Schlesinger, *supra* note 125.

128 Campbell, *supra* note 8, p. 486.

129 See Article 1335 of the ICC.

7.2. Directive Implementation

Article 11 of the E-commerce Directive was implemented in Italy by Article 13 of the Legislative Decree (D. Lgs) No. 70 of April 9, 2003, on the Implementation of the European Directive 2000/31/CE on certain legal aspects of information society service, in particular electronic commerce (“Decree No. 70/2003”) which provides:¹³⁰

Art. 13 – Placing of the order

The rules of the conclusion of contracts are also applied in the cases where the recipient of a good or a service of the information society places his order through telematic means.

Except when otherwise agreed by parties who are not consumers, the service provider has to acknowledge the receipt of the recipient’s order without undue delay and by telematic means, providing a summary of the general and particular conditions applicable to the contract, the information concerning essential characteristics of the good or service and the detailed indication of the price, means of payment, withdrawal, delivery costs and applicable taxes.

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.

Paragraphs 2 and 3 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

¹³⁰ This is an unofficial translation into English of article 13 Decree No. 70/2003 (Decreto Legislativo 9 aprile 2003, n. 70 “Attuazione della direttiva 2000/31/CE, relative a taluni aspetti giuridici dei servizi della società dell’informazione, con particolare riferimento al commercio elettronico”, published in Gazzetta Ufficiale No. 87, April 14, 2003 – Supplemento Ordinario No. 61/L) which in Italian reads as follows:

Art. 13 – Inoltro dell’ordine

Le norme sulla conclusione dei contratti si applicano anche nei casi in cui il destinatario di un bene o di un servizio della società dell’informazione inoltri il proprio ordine per via telematica.

Salvo differente accordo tra parti diverse dai consumatori, il prestatore deve, senza ingiustificato ritardo e per via telematica, accusare ricevuta dell’ordine del destinatario contenente un riepilogo delle condizioni generali e particolari applicabili al contratto, le informazioni relative alle caratteristiche essenziali del bene o del servizio e l’indicazione dettagliata del prezzo, dei mezzi di pagamento, del recesso, dei costi di consegna e dei tributi applicabili.

L’ordine e la ricevuta si considerano pervenuti quando le parti alle quali sono indirizzati hanno la possibilità di accedervi.

Le disposizioni di cui ai commi 2 e 3 non si applicano ai contratti conclusi esclusivamente mediante scambio di messaggi di posta elettronica o comunicazioni individuali equivalenti.

7.2.1. Electronic Offer and Electronic Acceptance

When an online order satisfies the requirements of an offer, the application of the Italian general rule on the effectiveness of the offer based on the application of the Knowledge Rule in combination with the Receipt Rule, will be set aside. Such order will be deemed to be received by the offeree when he is able to access it and not when he obtains knowledge of the existence of the offer by the receipt of the order at his address. As for an order that in fact constitutes an acceptance, the moment of effectiveness of such an order is decided by the general Italian contract rule i.e. by a combination of the Knowledge Rule and the Receipt Rule.

Under Italian law, the moment of effectiveness of electronic acceptance is decided based on the combining application of the Knowledge Rule and the Receipt Rule: the acceptance is effective when the offeror obtains knowledge of it by the receipt of it at his address.

When the acceptance and acknowledgement of receipt are sent separately or in the same document, the general rule is that different rules apply to each. Acknowledgement of receipt will be effective when the offeror is able to access it, whereas the acceptance will be effective when it reaches or is received at the address of the offeror, because it is at this moment that the offeror is deemed to obtain knowledge of the acceptance. The same will basically apply to a situation where the acknowledgement of receipt and the acceptance are sent in one electronic message. In this situation, it is possible that an acknowledgement of receipt has been effective because the offeror is capable of accessing it but the acceptance is not yet effective because it has not been received in the address of the offeror and thus no knowledge of its existence is deemed to be acquired by the offeror.

7.2.2. Acknowledgement of Receipt

Italy seems to consider that Article 11 of the E-commerce Directive provides no additional provisions about formation of contract. This can be seen from the wording of Article 13(1) of Decree No. 70/2003, which makes it clear that Italy wants to maintain its contract formation rule in dealing with electronic contracts. The application of the general contract rule will lead to the application of rules on formation of contract, including rules on offer and acceptance. Pursuant to Italian contract law, acknowledgement of receipt is not a part of the steps of conclusion of contract. In addition, the largest part of Italian doctrine states that the acknowledgement of receipt does not play a role in the

formation of the contract.¹³¹ This means that the acknowledgement should be considered as an obligation that comes into being only when the contract is already concluded.

When, instead, the order of the recipient can and is legally considered as an offer, the service provider's statement of acceptance could also contain the acknowledgement of receipt. However, this will not prevent the service provider from sending separate communications, one for the acceptance and one for the acknowledgement, since they are legally different from each other. It is the acceptance that leads to the formation of contract. The acknowledgement of receipt itself does not have any impact on the formation of contract. The acknowledgement of receipt can be given at the same time and in the same statement with the declaration of acceptance or later after the declaration of acceptance has been given and thus a contract has been formed. It follows that the failure or delay in sending the acknowledgement of receipt should imply a breach of a contract already formed, and not the voidness of the agreement for the lack of an essential requirement for the formation of contract.

Both the E-commerce Directive and Decree No. 70/2003 provide that the acknowledgement of receipt must be provided without undue delay. Unfortunately, the Italian legislator did not provide explicit legal consequences or sanctions when the service providers are in delay or fail to provide acknowledgement of receipt to the receipts.¹³² Such absence puts the application of the rule at risk.

Specific Information

Pursuant to Article 13(2) of Decree 70/2003, acknowledgement of receipt from the service providers must contain specific information, i.e. a summary of the general and particular conditions applicable to the contract, the information concerning essential characteristics of the goods or services and the detailed indication of the price, means of payment, withdrawal, delivery costs, and applicable taxes. In practice, this specific information is typically found in the contracts concluded by a consumer. As to its legal basis, this specific information was previously listed in and therefore taken from Article 31(1)(a) of Law No. 39 of March 1, 2002, on the Dispositions to perform duties deriving from

¹³¹ Guide to Law – Weekly Publication on Legal Documentations (*Guida al diritto - settimanale di documentazione giuridica*), No. 20, May 24, 2003, p. 44.

¹³² This is perhaps based on the opinion that acknowledgement of receipt basically has no legal consequences.

the belonging of Italy to European Community - Community Law 2001.¹³³ This law delegates the Italian government to issue, among others, a legislative decree to implement the E-commerce Directive in Italy i.e. the above-mentioned Decree No. 70/2003.

The purpose of requiring such specific information in the acknowledgement of receipt is to make sure the recipient knows exactly what he has ordered and how much he is going to spend for such contract. The provision of specific information is mandatory for consumer contracts. Because of such detail provision, Italy is one step ahead of the E-commerce Directive in providing protection to the consumer.

7.2.3. Accessibility

Article 13(3) of Decree No. 70/2003 provides that 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. The issue on the receipt of electronic document has actually been discussed in Italy by another legislation issued before the Decree No. 70/2003 was in force i.e. Presidential Decree No. 445 of December 28, 2000, on consolidated rules and regulations on administrative documents ("Decree No. 445/2000").¹³⁴ Article 14(1) of Decree No. 445/2000 states that the document is considered to be sent and received by the addressee if transmitted to the electronic address that he communicated to the sender.¹³⁵

133 Legge 1 marzo 2002, n. 39, "Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee - Legge comunitaria 2001", published in Gazzetta Ufficiale No. 72, March 26, 2002 - Supplemento Ordinario No. 54, available online: <http://www.parlamento.it/parlam/leggi/02039l.htm> last accessed November 11, 2007. Other rules regarding the specific information are contained in Article 3 legislation for the consumer protection i.e. Legislative Decree No. 185 of May 22, 1999, on the Implementation of the European Directive 97/7/CE on the protection of consumers in respect of distance contracts (*Decreto legislativo 22 maggio 1999, n. 185, "Attuazione della direttiva 97/7/CE relativa alla protezione dei consumatori in materia di contratti a distanza"*) published in Gazzetta Ufficiale Serie Generale No. 143, July 21, 1999, available online: <http://www.inea.it/reteleader/pubblica/atti/maiella/dl.pdf> last accessed November 11, 2007.

134 D.P.R. 28 dicembre 2000, n. 445, "Testo unico delle disposizioni legislative e regolamentari in materia di documentazione amministrativa (Testo A)", published in Gazzetta Ufficiale Serie Generale No. 42, February 20, 2001, available online <http://www.interlex.it/testi/dpr00445.htm> last accessed November 11, 2007.

135 In Italian, Article 14 paragraph 1 of Decree No. 445/2000 reads as follows: "Il documento informatico trasmesso per via telematica si intende inviato e pervenuto al destinatario, se trasmesso all'indirizzo elettronico da questi comunicato".

This provision, together with Article 1335 of the ICC and Article 13(3) of Decree No. 70/2003¹³⁶ will mean that when the electronic document is transmitted to the addressee, it is deemed to be known by the addressee when the addressee is able to access it. Some Italian scholars conclude that the parties are able to access the order and the acknowledgement of receipt when the information or the document reaches the hard disk of the communication service provider from which they download their emails. So, for example, if the offeree sends the offeror a declaration of acceptance, the offeror is “able to access it” when it reaches the offeror’s servers and not when the offeror, let’s say after a week or a month, decides to read it.

7.2.4. Correction of Input Errors

The issue of technical means is discussed in Article 12(1)(c) of Decree No. 70/2003, which requires the service provider to provide information on the technical means made available to the recipient of the service to identify and correct input errors before placing the order. Article 12(2) of Decree No. 70/2003 further regulates that the provision in Article 12(1), including obligation to provide information on the required technical means, is not applicable for contract concluded exclusively by exchange of emails or equivalent individual communication.

It might at first appear that Articles 12(1)(c) and 12(2) of Decree No. 70/2003 satisfy the requirement of Article 11(2) of the E-commerce Directive. However, further analysis of these provisions will lead to a different impression. When the service provider fails to provide information on the technical means to identify and correct error, he will be punished by Article 22 of Decree No. 70/2003, which imposes the payment of a fine ranging from 103 euro to 10,000 euro and double these amounts in case of serious breach or recidivism.¹³⁷ So it is the failure to *provide* information that is being punished, and not the failure to make available the required technical means.

When a service provider does not provide technical means to identify and correct input errors, he is basically not in breach of Decree No. 70/2003 because this decree does not oblige the service provider to make available such technical means. The sanction provided under Article 22 Decree No. 70/2003 cannot be used to deal with this issue. When a service provider fulfils its obligation to provide information on the required technical means but in reality

¹³⁶ Article 13(1) of Decree No. 70/2003 implementing the EU E-commerce Directive obliges the application of the general rules of the Civil Code for the formation of electronic and Article 1335 of the ICC is inserted in such rules.

¹³⁷ Articles 22 paragraph 1 and 2 of Decree No. 70/2003.

such technical means is not in existence or does not function, such sanction will also be inapplicable. In these later cases, the service provider does fulfil his obligation to provide information and therefore cannot be sanctioned under Article 22 of Decree No. 70/2003. Under the general law rules, he will be charged for providing false information to the recipient of the service, which could be punished under civil law and criminal law.

From the foregoing, it is clear that Decree No. 70/2003 does not yet satisfy the requirements of Article 11(2) of the E-commerce Directive. This decree does not provide an explicit rule that forces the service provider to put in place the required technical mechanism. It follows that there are no repercussions if the service provider does not provide such mechanism.

8. NORWAY

Like its Nordic neighbours, Norway is essentially pragmatic in its approach. Its laws are not as code-oriented as the rest of continental Europe, and not as case-oriented as the common law. Formation, interpretation, and questions of validity of contracts are mainly regulated in the codified Norwegian Contract Code, *avtaleloven*, dated May 31, 1918. The official title of the code is *Lov om avslutning av avtaler, om fuldmagt og om ugyldige viljeserklæringer* (Law on Formation of Contracts, on Agency and on Invalid Declarations of Will).¹³⁸

Avtaleloven is not an attempt to exhaustively regulate the questions that arise regarding treatment of the areas it covers. In modern Norway, many important rules have developed in case law and legal doctrine that now supplement the code. *Avtaleloven* deals only with the most common method of contract formation: the exchange of offer and acceptance (*konsensualavtale*). The Norwegian practice for formation of contracts leaves more of the regulations, including those concerning other methods of contract formation, to the framework set forth in mandatory laws or case law.¹³⁹

8.1. General Rule

In general, there are no formal requirements on the formation of a contract. Contracts can be made in writing or verbally. However, in certain circumstances, the law may require that specific forms of agreement must be observed. Examples of these are: Landlord and Tenant Act (*husleieloven*) No. 17 dated March 26, 1999, which requires that termination of tenancy agreement must be in writing; Law on Financial Agreement and Transaction Orders (*finansavtaleloven*) No. 46 dated June 25, 1999, which stipulates that to be valid a guarantee

¹³⁸ This code was formulated in cooperation with Denmark and Sweden. Later, Finland and Iceland made some effort to conform their contract laws to the Norwegian-Danish-Swedish model when codifying contract laws. Thus, it is not surprising that the Nordic codes are essentially equivalent although not necessarily identical in every detail. Although there is pan-Scandinavian law of contracts, the law of Nordic countries are probably equivalent to the rules explored in this thesis, see: Nye, *supra* note 4.

¹³⁹ For example: The implementing regulation of the Law on Public Procurement No. 69 dated July 16, 1999, on the procedure of public procurement of different things for the state (*fremgangsmåten ved offentlige anskaffelser av ulike slag*) requires that the contract of public procurement of a certain amount be done through tender.

agreement must be in writing; and Ground Lease Law (*tomtefesteloven*) No. 106 dated December 20, 1996, which regulates that long lease agreements must be in writing.

No requirement of consideration exists under Norwegian law, not even the continental European concept of *causa*. The obligation of a party is based on his promise (the “promise principle”), whether or not it requires anything in return.¹⁴⁰ The promise principle basically says that no contract is needed, the making of the promise itself is sufficient to make the promise binding as long as its contents contemplate a binding obligation upon the promisor.¹⁴¹

Promise Principle

The most basic premise in Norwegian contract law is the “promise principle”, *løfte prinsippet*.¹⁴² In essence, this promise principle says that no contract is needed, a promise is binding. All promises bind the promisors.¹⁴³

The promise principle only attaches to declarations that are intended to have legal consequences. Nevertheless, this principle can be applied when the promisor makes his promise conditional upon the receipt of acceptance within a certain period of time. In a situation involving mutuality of obligation between the parties where the promise of one party to perform is made conditional upon the other party’s promise to supply the *quid pro quo*, such condition converts a *løfte* (promise) into a *tilbud* (offer). It is only upon the receipt of some form of acceptance as the promisor demands; he is bound to perform his part of the bargain.¹⁴⁴

It should be noted that the promise principle concerns with the duty of the offeror to enter into a contract and *not* with the duty of the offeror to perform his promise. By applying this principle, Norwegian laws “add to the offer the promise that the offeror will enter into a contract if the offeree accepts the offer” and make the promise irrevocable once the offeree obtains knowledge of the promise.¹⁴⁵

140 The promise principle is not confined to Scandinavia, and in fact probably is part of Germanic heritage in Norway.

141 See generally Arnholm, *supra* note 31.

142 The promise principle has its roots not in Scandinavian, but rather in the German laws, which are probably part of German heritage in the Norway. Austria, Germany, and Switzerland all possess somewhat similar versions of the principle, see: Nye, *supra* note 4, p. 193-197.

143 Under the exceptional circumstances as permitted by the Norwegian courts, a promisor may call back his binding promise.

144 The wording “demand” here does not necessarily mean that the offeror must make it expressly. The demand is attached to the offer itself.

145 Nye, *supra* note 4, pp. 195-196.

8.1.1. Offer and Invitation to Treat

The simplest method of contract formation is by the exchange of statements between parties. Generally, there are two main groups of statements: *løfte* and *påbud*. Literally, *løfte* means promise. The person giving *løfte* is called promisor and the addressee of *løfte* is promisee. *Løfte* establishes a duty for the promisor to fulfil and thus *løfte* alone can create a legal relationship. It is a general principle that the binding effect of *løfte* is only temporary and becomes final once the addressee accepts it, often with the addressee concurrently assuming some obligations.¹⁴⁶ This type of *løfte* is called *tilbud* (offer). On the other hand, *påbud* is a response to the offer which generates a right on its giver and imposes obligation on the addressee. The best known *påbud* regulated under *avtaleloven* are acceptance and revocation of acceptance. Sometimes one statement can consist of both *løfte* and *påbud*. For example, when someone makes a statement that he accepts a sale offer, this statement binds the seller to fulfil his part of the promise and at the same time binds the maker of the statement to pay the price of the goods.

A valid offer must contain an adequate statement of its terms. In the event that there is a clear gap concerning vital elements of the offer, the courts may fill this gap according to a very general standard of reasonableness. There also exist various Norwegian statutes containing rules to be followed where a contract is silent regarding certain provisions.

Like English law, Norwegian law recognizes that the distinction between offer (*tilbud*) and invitation to deal (*oppfordring til å gjøre et tilbud*) often depends on the circumstances and interpretation. The distinction is crucial because once an offer has become effective, it is binding on the offeror. The promise principle does not attach to declarations that a party does not intend to have legal consequences. In a circumstance where the person making a proposal wants to avoid being bound by it, the law makes it clear that that person must give the proposal a form that leaves no doubt that it is not meant to bind its giver, but only invite offers.¹⁴⁷ Section 9.1 of *avtaleloven* provides that the use of the words *uten forbindtlighet* (without prejudice), *uten obligo* (without obligation) or their equivalent in a proposal that would otherwise be viewed as an offer, will instead be viewed as an invitation to treat and the recipient is or ought to be aware of this, he should without unnecessary delay inform the offeror if he is not going to accept the offer. Otherwise, the offer will be viewed as accepted.

¹⁴⁶ Arnholm, *supra* note 31, p. 13.

¹⁴⁷ This rule probably has its source in the promise principle.

Some particular situations can be in the borderline of offer and invitation to treat. The courts will not normally view advertisements and pricelists as offers. However, terms in the advertisement like “first come, first serve” or “as long as supplies last” may invite the court to construe advertisements as offers. Similarly, a pricelist in the course of an ongoing business relationship or a price tag attached to articles in shop windows may be considered as an offer.¹⁴⁸ The placing of items in automatic vending machines also amounts to a binding offer capable of being accepted by the customer by putting the money in the machine.

8.1.2. Communication of Offer

An offer becomes effective when communicated to the offeree. An offer is not effective until it has “come to the knowledge” of the addressee (*kommet til adressatens kunnskap*).¹⁴⁹ Mere receipt of the (letter of) offer by the offeree will not usually suffice to make an offer binding on the offeror. In an *inter absentes* situation, the offeree usually acquires the knowledge on the existence of the offer, when the offeree reads the (letter of) offer. Norwegian law does not require the offeree to have detailed information regarding the contents of the offer. It requires only that he/she understands that he/she has received a certain promise.

8.1.3. Acceptance and Acknowledgement of Receipt

By virtue of offer, the offeree acquires a right to create a contract by accepting the offer. An acceptance creates a contract if it unconditionally complies with the offer. It is not required that the wording of the acceptance perfectly mirrors that of the offer as long as it accords with the offer. Any response to the offer that does not match (*stemme med*) the offer is viewed as rejection and counter offer (§ 6 *avtaleloven*). This rule does not apply if such unmatched reply is sent by offeree, who believes that the reply matches the offer and the offeror is aware of this situation, but remains passive or does not immediately inform the offeree that he does not want to accept the acceptance. In such a situation, the contract is concluded with the terms contained in the acceptance.

The acceptance must be given within a reasonable period of time unless otherwise agreed. The standard of a reasonable period of time in accepting an offer with no specified time limit is stipulated in § 3 of *avtaleloven*. A written

¹⁴⁸ It has been suggested that since the price tag is considered as an offer, a customer may make that offer binding by picking up the item. When the customer pays the items, the contract is concluded.

¹⁴⁹ Article 7 of *avtaleloven*.

offer binds the offeror for the expected period of time that would be required for an offer and an acceptance to reach their respective addressee. In addition to this, the law also provides the offeree with time to contemplate (*overveie*) of the offer before he accepts the offer. For offer made through letter, the court allows the offeree the time required by a return letter. When the offer is made by telegraph, the acceptance must also be sent by telegraph or other equally expeditious method of communication. Oral offers, including by telephone, must be accepted immediately.

Norwegians view acceptance as having two components: *løfte* and *påbud*.¹⁵⁰ The first component, *løfte*, entails a rationalization that an acceptance contains a promise (*løfte*) of the offeree to undertake the performance contemplated by the offer, while the second component, *påbud*, is a unilateral declaration from the offeree that the offer is accepted, and as such operates to impose a legal duty upon the offeror by establishing the contractual relationship. The *påbud* power of acceptance shuts down the preliminary negotiation and simultaneously starts up the contractual relationship.¹⁵¹

The determination of whether the offeree's response is an acceptance or merely acknowledgement of receipt is considered as an issue of fact within the trial court's discretion. Similar to the practices in England and Italy, this raises the question of interpretation. The courts usually use an objective approach by looking at the language of the communication, any prior negotiation or agreements between the parties, the customs of trade if appropriate, and the parties' subsequent behaviour. However, when doubt exists, the communication will be interpreted against its author.

8.1.4. Communication of Acceptance

For an acceptance to be effective, it must be communicated to the offeror. Different rules apply to each of the components of acceptance, *løfte* or *påbud*.¹⁵² The rule governing when the promise contained in an acceptance becomes effective is the same as the rule that applies to offers and to all other promises in Norway, i.e. when it has come to the knowledge of the addressee. This means that when the offeree declares his acceptance, he is actually making a promise to be bound to the terms of the offer. This promise is not effective or bound to him unless such a promise comes to the knowledge of the offeror.

The effectiveness of *påbud* element in the acceptance decides the moment of conclusion of contract. The rule applies to *påbud* imposes a legal duty on its

¹⁵⁰ Nye, *supra* note 4, pp. 239-240.

¹⁵¹ The acceptance locks the offer firmly into a contract.

¹⁵² Nye, *supra* note 4.

addressee (offeror) on receipt, with some reservations. This means that *påbud* is not effective unless it reaches the sphere of control of the offeror. Consequently, a contract is not concluded until the acceptance (*påbud*) is received in the address of the offeror.¹⁵³ This situation shows that the Norwegian legal system adopts the Receipt Rule to decide when the acceptance becomes effective.¹⁵⁴

For oral acceptance, including by telephone, reception equals actual knowledge. What constitutes reception of written acceptance is more problematic. The court usually holds that the acceptance is effective when it reaches the mailing address indicated by the offeror or offeror's office for commercial dealings, or offeror's private address for non-commercial dealings. This means that when the letter containing acceptance has been placed in the mailbox of the offeror, the offeree has done all in his power to make the acceptance known to the offeror and thus it becomes immaterial whether or not the letter is read by the offeror.

The acceptance may be revoked by the offeror's receipt of a message to this effect before or at the same time that he acquires knowledge of the acceptance. This is because the promise contained in the acceptance is not yet binding on the offeror before the offeror acquires knowledge of it. Thus, the offeree can still prevent the final conclusion of contract by revoking his acceptance.

Generally, late acceptance is viewed as a new offer. However, when the offeree is of the opinion that the offer has arrived on time and the offeror knows or ought to know of this situation but takes no action, the contract is concluded by the late acceptance (§ 4(2) of *avtaleloven*). A contract may be avoided if the offeror without unnecessary delay informs the other party that he does not intend to enter the contract with the late acceptance.

8.2. Directive Implementation

The E-commerce Directive is implemented in Norway by virtue of Lov 2003-05-23 nr 35: *Lov om visse sider av elektronisk handel og andre informasjons-samfunnstjenester*, dated July 1, 2003 ("*ehandelsloven*"). Article 11 of the E-commerce Directive is transposed into the whole Article 12 of *ehandelsloven* and half of Article 11 of *ehandelsloven*, which provides:

¹⁵³ *Ibid.*

¹⁵⁴ However, it should be noted that the Receipt Rule is not mandatory under Norwegian law. All rules of *avtaleloven* are merely declaratory. The offeror is the master of the offer and may validly stipulate that the acceptance is deemed to be made, for example, when the offeree dispatches the acceptance.

Article 12:¹⁵⁵*Receipt and acknowledgement of order*

When a service recipient places an order electronically, the service provider shall, always and without unjustified delay, send the electronic acknowledgement that the order is received.

Order and acknowledgement of receipt that is given electronically, is deemed to be received when the party to whom it is addressed, has access to it.

The first paragraph shall not apply for contracts that are exclusively concluded by electronic post or equivalent individual communication.

The first and second paragraphs can be avoided for contract outside consumer relationship.

Article 11; lines 3 and 4:¹⁵⁶

The service provider shall organize the electronic contract formation so that input error can be identified and corrected easily before the contract is concluded.

The (first¹⁵⁷ and) third lines shall not apply to contracts exclusively concluded by electronic mail or equivalent individual communication, and can be deviated from for contracts outside consumer relationship.

155 This is an unofficial translation into English of Article 12 of *ehandelsloven*, which in Norwegian reads as follows:

Mottakelse og bekreftelse av bestilling

Dersom en tjenestemottaker foretar en bestilling elektronisk, skal tjenesteyteren alltid og uten ugrunnet opphold sende en elektronisk bekreftelse om at bestilling er mottatt.

Bestilling og bekreftelse som avgis elektronisk, anses mottatt når parten som den er adressert til, har tilgang til den.

Første ledd gjelder ikke for avtaler som utelukkende inngås ved elektronisk post eller tilsvarende individuell kommunikasjon.

Første og annet ledd kan fravikes i avtale utenfor forbrukerforhold.

156 This is an unofficial translation into English of Article 11 line 3 and 4 of *ehandelsloven* which in Norwegian reads as follows:

Tjenesteyteren skal tilrettelegge den elektroniske avtaleinngåelsen slik at inntastingsfeil på enkel mate kan oppdages og rettes for avtalen inngås.

(Første og) tredje ledd gjelder ikke for avtaler som utelukkende inngås ved elektronisk post eller tilsvarende individuell kommunikasjon, og kan fravikes i avtale utenfor forbrukerforhold.

157 This first line deals with information to be provided by the service provider before the order is placed.

8.2.1. Electronic Offer and Electronic Acceptance

Under the general Norwegian contract law, the moment when the offer and acceptance are deemed to be effective is different. An offer is deemed to be effective when it has come to knowledge of the addressee (offeree), whereas the acceptance is not effective until it is received at the address of the offeror. Note that the knowledge is only required for the effectiveness of the offer, but not for the acceptance.

At first glance, we can come to the conclusion that these Norwegian general rules are in conflict with the provisions of Article 12 line 2 of *ehandelsloven*, which deems the order and the acknowledgement of receipt to be received when the party to whom it is addressed has access to it. Applying this provision would mean that the offeree's knowledge as the pre-condition for the offer to be effective is no longer be relevant.

The first proposition may be correct in the situation where the order under consideration fulfils all the requirements of an offer. Such an offer will be deemed to be received by the offeree when he has access to it. The term "has access to it" does not require that the offeree knows about it. Thus, an offeree cannot use the argument that he has not read the offer and therefore the offer is not yet effective. When he is considered able to access the offer, then an offer is considered effective even though he has not read it. This clearly changes the Norwegian contract law on the formation of contract, but only when it concerns the electronic order that constitutes an offer. Any other offer must follow the requirement that such offer must come to the knowledge of the offeree for it to be effective.

Loosely scrutinizing Article 12 line 2 of *ehandelsloven* and the general principle of communication of acceptance may lead to the conclusion that the implementation of Article 11(1)(a) of E-commerce Directive brings with it a change to the general contract rule as regards the moment of the effectiveness of the acceptance. Under Norwegian contract law, an acceptance is not effective unless it is received at the address of the offeror. In the Internet, the address of a person is usually his email address. Therefore, the requirement that an acceptance is effective when such acceptance can be accessed by the offeror, i.e. when it has arrived in the server of the service provider, may invalidate the general contract rule on when the acceptance is effective. A server is not the address of the offeror. Thus, under the general contract rule, the mere arrival of the message containing acceptance in the server of the service provider does not trigger the effectiveness of the acceptance. For an acceptance to be effective, it must arrive in the address of the offeror, i.e. in his email address.

However, since under the Norwegian law, the acknowledgement of receipt of order does not have any effect on the validity of contract entered and is not construed as part of the contract formation, then a different interpretation of

this article may be discussed. The general rule on the effectiveness of acceptance will still be applied “as is” while the provision contained in Article 12 of *ehandelsloven* applies to the acknowledgment of receipt after the contract is concluded. As such, there is no contradiction between Norwegian general contract rules on the effectiveness of the acceptance with the provision of Article 12 of *ehandelsloven*.

There is little or no complexity when the acceptance is sent separately to the acknowledgement of receipt since the interpretation provided above will apply. In a situation where the offeree makes the acceptance in the same document as the acknowledgement of receipt of order, some doubts may arise. It is easy to mix up the moment of effectiveness of the acceptance with the time when the acknowledgement of order is deemed to have been received. This confusion can be tackled by analyzing the acceptance and acknowledgement of receipt separately, although they are contained in one document. The effectiveness of the electronic acceptance will follow the Norwegian general contract rule i.e. it will become effective when it arrives at the address of the offeror, whereas the acknowledgement of receipt will become effective as provided under Article 12 of *ehandelsloven* i.e. when the offeror has “access to” the message.

8.2.2. Acknowledgement of Receipt

Since under the Norwegian general rule an acknowledgement of receipt has no legal effect, the provision of Article 12 line 2 of *ehandelsloven* on the effectiveness of acknowledgement of receipt will have no impact on the electronic contract formation, nor on the validity of the electronic contract in Norway. The breach of such provision will bring no consequences under private law.¹⁵⁸ The provision of the acknowledgement of receipt is a step that follows after the contract has been entered into by the parties. It follows that any failure or delay in providing such acknowledgement of receipt to the recipient of the service will be a breach of the contract that has been performed and as such the failure and delay will not be able to invalidate or nullify the contract.¹⁵⁹

The requirement to provide acknowledgement of receipt has been previously discussed in *Lov om opplysningsplikt og angrerett m.v. ved fjernsalg og salg utenfor fast utsalgssted* (“angrerettloven”)¹⁶⁰ implementing most of the

158 Nærings- og Handelsdepartementet (1), *Høringsnotat: Innføring av Direktiv om Elektronisk Handel i Norsk Rett, Lov om visse sider ved elektronisk handel*, March 7, 2001, p. 26-27.

159 Nærings- og Handelsdepartementet (1), *supra* note 104, p. 25.

160 Lov-2000-12-21-105 dated May 1, 2001 and last updated by Lov-2003-05-09-28 of June 1, 2003.

EU Distance Selling Directive.¹⁶¹ Under *angrerettloven*, distance sale is defined as sale with the use of distance communication, such as TV, telefax, Internet and telephone that requires the seller or the service provider to make available a mechanism for the formation of contract at a distance and encourage the use of such contract formation.¹⁶² Article 9, line 1, point (e) of *angrerettloven* provides that a customer should receive information on the acknowledgement of order (*bekreftelse av bestillingen*) that is readable and saved in a paper or other durable medium that the customers can access.¹⁶³ Article 9 line 2 of *angrerettloven* further requires that such information must be given after the conclusion of the contract, although it had been given in such a way earlier. The main reason for this provision is to reduce uncertainty surrounding the contract formation and at the same time to clarify any uncertainty before the recipient enters into the agreement.¹⁶⁴ In this way, the recipient of the service will obtain knowledge that the electronic message has been received and the contract has been concluded. Such acknowledgement can later be used as evidence that the contract is concluded or to show delay in delivery of the service/goods.

Angrerettloven also provides a sanction for the failure to provide the required information, including information on the acknowledgement of receipt. Article 11 of *angrerettloven* stipulates that failure to provide the required information will be sanctioned with a substantial prolonging of withdrawal time limit from 14 days to three months, or one year when information on the right of withdrawal is not given. However, it should be noted that this sanction is applicable only on the failure to provide information on the acknowledgment of order, and not on the failure to provide the acknowledgement of the order itself.

From the foregoing, it can be concluded that neither *ehandelsloven* nor *angrerettloven* provide any sanctions on the failure of the service provider to acknowledge the receipt of an order.

161 When an electronic sale is conducted under B2C relations, the rules under *angrerettloven* (implementing Distance Selling Directive) and E-commerce Directive will be applied. The Distance Selling Directive focuses more on how (the way) the contract is concluded while E-commerce Directive focuses on how the service is given. See: Nærings- og Handelsdepartementet (2) 'Lovforslagets Hovedinnhold' in *Odeltingsproposisjoner* Nr. 31 (2002-2003) *om lov om visse sider av elektronisk handel og andre informasjonssamfunnstjenester (ehandelsloven)*, p. 14-15 available online: <http://www.regjeringen.no/nb/dep/nhd/dok/regpubl/otprp/20022003/Otprp-nr-31-2002-2003-/12.html?id=172219> last accessed November 12, 2007.

162 Article 6(a) of *angrerettloven*.

163 Forbrukerombudet, *E-handel – sammendrag av praksis m.m.*, May 28, 2003, available online: <http://www.forbrukerombudet.no/?id=958> last accessed November 28, 2007.

164 Nærings- og Handelsdepartementet (2), *supra* note 107.

8.2.3. Accessibility

Like the E-commerce Directive, *ehandelsloven* does not provide the meaning of the term “access to”.¹⁶⁵ Some scholars, however, have addressed this issue. It appears there is a broad agreement on when electronic messages are considered to be effective i.e. when the message enters the recipient’s server.¹⁶⁶ The same view is also expressed by Nærings- og Handelsdepartementet in its explanation of each article of *ehandelsloven*.¹⁶⁷

Using the above-mentioned interpretation for the purpose of discussing the acceptance and the acknowledgement of receipt contained in one electronic document can lead to a situation where an acknowledgement of receipt of order is already effective when such document arrives in the server of the offeror, because at that moment the offeror is deemed to be capable of accessing such document. The contract is however not concluded until the acceptance actually arrives in the (email) address of the offeror.

8.2.4. Correction of Input Errors

Article 11 line 3 of *ehandelsloven* obliges the service provider to make available a technical device that allows the recipient of the service to easily identify and correct input errors before a contract is concluded. The aim of this regulation is to ensure that the recipient of the service can acquire knowledge about all the steps in the contract formation procedure so that he will not be bound without being aware of all the required steps. This will help to provide safety and security for those who want to contract electronically.¹⁶⁸ Moreover, this will avoid a situation when an error exists in the contract and the customer finds himself bound to a contract without wanting to be bound.¹⁶⁹

The requirement that the mechanism to identify or correct errors should be made available before the contract is concluded are in line with the purpose of the E-commerce Directive, i.e. to ensure that electronic contract formation is

¹⁶⁵ Article 11 line 2 of *ehandelsloven*.

¹⁶⁶ Gunnar Karnell and Lars Gorton, *Festskript til Gunnar Karnell*, Carlsson Law Network, 1999, p. 657.

¹⁶⁷ Nærings- og Handelsdepartementet (3), ‘*Merknader til de enkelte bestemmelsene*’ in *Odeltingsproposisjoner* Nr. 31 (2002-2003) *om lov om visse sider av elektronisk handel og andre informasjonssamfunnstjenester (ehandelsloven)*, p. 9, available online: <http://www.regjeringen.no/nb/dep/nhd/dok/regpubl/otprp/20022003/Otprp-nr-31-2002-2003-/16.html?id=172284> last accessed November 12, 2007.

¹⁶⁸ Nærings- og Handelsdepartementet (1), *supra* note 104, p. 24.

¹⁶⁹ Nærings- og Handelsdepartementet (2), *supra* note 107, p. 12.

simpler and safer for the recipient of the service.¹⁷⁰ A customer would prefer to view all information that he has input, including information on what items he has ordered. This will give him a chance to see whether or not he has made an error. However, identifying the error alone is not enough. A customer can feel hopeless in entering electronic contracts when he can only acquire knowledge about his error, but has no power to correct it. He will be bound to a contract he does not want because of the error identified in such contract. This can lead him to feel unsafe or insecure. In the end, this can erode his confidence in contracting online. On the other hand, providing a confirmation page supported with technical means allowing identification and correction of errors will give the customer a feeling of security and safety. As such, this will encourage him to make frequent use of electronic contracts.

¹⁷⁰ Nærings- og Handelsdepartementet (1), *supra* note 105; Nærings- og Handelsdepartementet (3), *supra* note 113.

9. COMPILATION AND CONCLUSION

9.1. General Rules in Compilation

9.1.1. Common Rules

In all legal systems under consideration, the exchange of offer and acceptance is recognised as the fundamental requirement of contract formation. However, this is not the only method of contract formation. In Norway, a contract can be established even though it is not clear whether offer and acceptance have been exchanged. Through case law, Norwegian courts provide extensive criteria to determine the existence of agreement in the absence of offer and acceptance. On the other hand, England is more firm on the idea that the existence of offer and acceptance is prerequisite to the conclusion of contract. A few case laws, however, show that England also recognises the possibility of contract formation without identifiable offer and acceptance. Such cases are said to be the exception to the general rule of contract formation.

The general rules on offer and acceptance are quite similar in the four legal systems. They all recognise the distinction between an offer (which by acceptance ripens into a contract) and an invitation to deal (which creates no power of acceptance). All agree that the time when an offer becomes effective has an important bearing on the formation of a contract because it is at this time that the offer creates in the offeree a power of acceptance. All legal systems also commonly agree that communication of acceptance is necessary to bring about a contract.

9.1.2. Distinct Rules

The precise point in time when a contract is concluded by acceptance does not, even within a single legal system, admit a uniform answer. Furthermore, as much as it is important to draw a line between an offer and an invitation to deal, none of the legal systems under consideration provide clear guidelines to separate these two declarations. All of them rely heavily on case-by-case examination by judges. Similarly, there is no clear-cut answer in any legal system to decide whether a statement constitutes an acceptance of offer or simply an acknowledgement of receipt. Nevertheless, if the language is not clear, the courts in all legal systems will take into account: (i) the meaning of the phrase

used in accordance to its usual meaning in business dealings and in light of applicable trade usages, (ii) the nature of the business relation between the engaged parties and/or (iii) any previous dealings between the parties and their subsequent behaviours. In view of this, the parties should avail themselves of every opportunity to clarify ambiguous communications so as to avoid the uncertainty of submitting the matter to the courts.

It is a common rule that a proposal, even though stated to be irrevocable, may be withdrawn at any time before it becomes effective as an offer. There is a theoretical disagreement on the legal consequences of the issuance of the offer. English legal system agrees that an offer can be revoked until it is accepted unless a consideration is provided while German/Norwegian legal systems provide no possibility to revoke the offer (unless it is clearly expressed that the offer is revocable). This difference stems from the general principles that offer is revocable under common law tradition (England), whilst irrevocable under civil law tradition (German/Norwegian). On the other hand, Italy which to some extent is still under the influence of *ius commune* (pre-code civil law), maintains a general rule that an offer is revocable at any time (Article 1328 of the ICC) unless the offeror has stated that he will keep his offer open for a certain period (Article 1329 of the ICC) or unless there is an option in the contract (Article 1331 of the ICC).¹⁷¹ Contrary to the English tradition, there is no consideration required to make use of these two exceptions.

Table 1: General Rules on Communication of Offer

	Effective	Withdrawal*	Revocation**
UK (England)	It reaches the offeree	Before the offer is accepted	Possible When? Before the offer is accepted Effective? It is received by the offeree
Germany	It reaches the offeree	Before or at the same time the offer reaches the offeree	Not possible
Italy	It comes to the notice (knowledge) of the offeree i.e. when it arrives at the address of the offeree	Before or at the same time the offer comes to the knowledge of the offeree i.e. before or at the same time the offer reaches the offeree	Possible When? Before the offer is accepted. Effective? The moment it is sent if it is sent before the acceptance becomes effective.

¹⁷¹ Schlesinger, *supra* note 97, pp. 780 and 862.

Norway	It has come to the knowledge of the offeree	Before or at the same time the offer reaches the offeree	Not possible
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* *Withdrawal prevents an offer, even if irrevocable, from becoming effective*

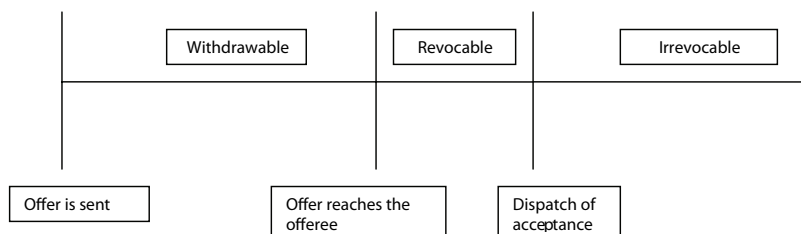
** *Revocation puts an end to revocable offers that have already become effective*

Table 2: General Rules on Communication of Acceptance

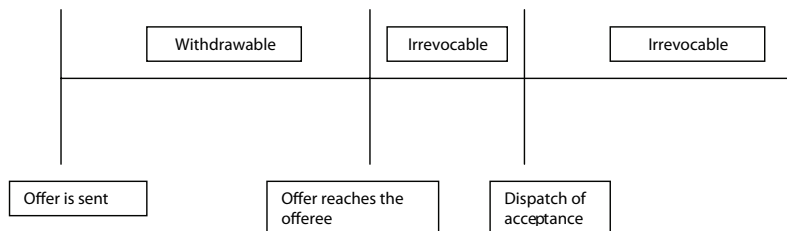
	Effective	Revocation / Withdrawal
UK (England)	Written acceptance (general rule): It reaches the offeror Postal acceptance: It is posted Oral acceptance: It is heard by the offeror	Before it reaches the offeror
Germany	It reaches the offeror	Before or at the same time it reaches the offeror
Italy	The moment the offeror learns of it i.e. when it reaches the offeror's address.	Before the offeror learns of acceptance
Norway	Written acceptance: it reaches the offeror Oral acceptance: Offeror has actual knowledge of it	Before or at the same time it reaches the offeror

The differences between the legal systems are clearly shown when there is a gap of time between the arrival of offer and dispatch of the acceptance. In this particular issue, it is interesting to note that despite the fact that England and Italy belong to two rather different legal traditions, both consider the offer to be revocable during the said period (Picture 1), whereas German/Norwegian laws consider the offer irrevocable during that period (Picture 2). The latter appears to provide more certainty because once the offer is effective, the offeree can be certain that his acceptance will surely bring about contract. The former puts the offeree under the risk that during the time he is considering accepting or rejecting the offer, the offeror may have revoked his offer.

Picture 1: Postal acceptance in the English legal system



Picture 2: German/Norwegian legal systems



As there are different communication theories to which the countries adhere, this has an impact on their respective contract formation rules. For postal acceptance, England uses the theory of expedition and considers the contract to be made at the moment the acceptance is put in the course of transmission. This rule places both the offeror and the offeree at a disadvantage. The offeror risks being bound to the contract even if the acceptance never reaches him or is delayed in the course of transmission. On the other hand, the offeree cannot revoke his acceptance during the period of dispatch of the acceptance and receipt by the offeror. When the acceptance is not sent by post, England conforms to the same theory of reception as Germany and Norway. As the consequences of theory of reception, the offeree bears the risk of loss or delay of the acceptance, but he may revoke his acceptance by sending a message that reaches the offeror before or at the same time as the acceptance. The question of whether an acceptance is deemed to have been “received” is understood as it has reached the sphere controlled by the offeror.

9.2. Attempted Regulation and Effects

9.2.1. New Rules

Although all legal systems under consideration have made it clear that general rules for contract formation under their national contract laws are still maintained in dealing with electronic contract formation, in a situation where an order is qualified as an offer, the member states are willing to let the provisions of Article 11 of the E-commerce Directive (on the moment at which the order is deemed to be received) apply to such qualified offer. The acceptance of this offer will conclude the contract. As such, Article 11 does provide a new rule on the communication of the order; the same can be said of acknowledgment of receipt of order. Nevertheless, contract laws in the four different countries do

not consider acknowledgement of receipt as part of the conclusion of contract procedure. A contract can be formed without the need of acknowledgement of receipt of order being given. A mere exchange of offer and acceptance is enough. When a contract has been formed, the acknowledgement or confirmation has no legal importance except for evidentiary purpose. As such, the provision of Article 11 on the effectiveness of the acknowledgement of receipt does not have any impact on the contract formation procedure.

It can be suggested that the purpose of Article 11, by imposing requirements on the availability of acknowledgement of receipt of order as well as technical means to identify and correct error, is to provide protection to customers on the electronic transactions. This argument is supported by the fact that Article 11 makes it mandatory for the service provider to fulfil the requirements provided under such article in B2C transactions, but does not oblige them to conform to such requirements when contracting in the B2B relationship. This provision is in line with the main goal of the E-commerce Directive, which is to protect consumers with the aim of increasing customer confidence in electronic transactions. Such customer confidence will encourage customers to conduct online transaction, which in turn will benefit the EU internal market.

9.2.2. Zero Effect

A contract comes to live when the acceptance of the offer is effective. Since there is no provision on the effectiveness of offer and acceptance in Article 11, this article has no effect when it comes to deciding the moment of contract conclusion. Even if an order is construed as an offer and the moment when such order (offer) effective is regulated under Article 11, it is the moment when the acceptance is effective that brings about contract. Therefore, this new rule does not have an impact on nor change any procedure in the contract formation. The procedure remains the same: an offer must be effective before the acceptance can take place and the acceptance will establish contract. Accordingly, general rules of contract formation, including rules on communication of the acceptance, continue to apply to the electronic contract unless the country has specifically regulated it. When it comes to order qualified as offer, Article 11 serves as an exception to the general principle of contract formation. All of this, of course, depends on the way in which the directive is implemented by the member states.

9.2.3. Uncertainties and Consequences

Article 11 contains many unclear wordings that need to be clarified or defined further. It uses the term “order”, a concept not commonly used in the

legislation on formation of contract, but does not qualify which statement can be considered order or the effect of such qualification. “Undue delay”, “able to access”, “appropriate, effective and accessible technical means” are other examples of words mentioned by the directive but with no clarifications on their meaning. In addition, the directive provides no provision on the legal consequences of the failure (i) to provide and to send “without undue delay” the acknowledgement of receipt of order, (ii) to conform to the provision that the order and acknowledgement of receipt are deemed to be received when the addressees are “able to access” them and/or (iii) to provide “appropriate, effective and accessible technical means” to identify or correct input errors. As such, it creates uncertainties in the implementation of Article 11.

Although Article 20 of the E-commerce Directive leaves it up to the individual member states to decide sanctions of the non-compliance of E-commerce directive provisions, none of the implementing legislations of the E-commerce Directive in the countries under consideration provide any sanctions on the failure to fulfil the requirements of Article 11. Indeed, Italy provides sanctions on the failure to provide *information* on the technical means to identify or correct input errors, but such provisions are more concerned with the availability of information on technical means than on the obligation to provide the required technical means. The same can be said of Germany. Furthermore, none of the legal systems provide any sanctions in case the technical means to identify and correct input error are in place, but are not “appropriate, effective, and accessible” as required by the E-commerce Directive. All of the countries under consideration are also silent on the consequences of the delay or failure to provide the communication of order as well as the acknowledgement of receipt of order. And they are just as silent with regard to sanctions if the parties in B2C relationships decide to set aside the provision of Article 11(1)(indent 1) of the E-commerce Directive (the moment order and acknowledgement of receipt are deemed to be received).



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