The European legal framework for e-commerce

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Assessing effectiveness

- Tests
  - Does the framework meet the needs of on-line businesses?
  - Is law and regulation consistent and transparent?
  - Are other interests protected, e.g. consumers?
  - Is it complete, i.e. are there areas where further action is required?

- Practical assessment
  - Examine the stages of a cross-border on-line transaction
    - Advertising and regulatory compliance
    - Contracting with customers
    - Payment
    - Resolving disputes

Advertising and regulatory compliance (1)

- E-commerce directive arts. 3-4 country of origin regime
  - establishment in one EU jurisdiction allows cross-border supplies of on-line services to all others
    - licensing, approvals and conduct of business - home country regulation only
    - contracts with end-user consumers - host country regulation applies
  - heavily restricted ability to maintain application of host country regulation
  - based on trust in other regulators
    - harmonisation of national law to achieve the Single Market
- Some gaps in the financial services sector
- Non-application to gambling, taxation, real estate dealings

Advertising and regulatory compliance (2)

- Information requirements under the Distance Selling and E-Commerce Directives
  - identity (e.g.. name, registration/authorisation details)
  - terms & conditions; price & costs (inc. discounts, promotions, taxes)
  - procedural arrangements (e.g.. payment, delivery, contract formation)
  - procedural rights (e.g.. withdrawal)
- Timing
  - prior to conclusion, during performance
- Form
  - 'durable medium', 'easily accessible', 'permanent manner', 'store and reproduce'

Contracting with customers

- Effectiveness achieved through E-Commerce and E-Signatures Directives
- Valid contracts
  - Formal validity (art. 9 E-Commerce directive)
  - Control of contract formation by the business (art. 10 E-Commerce directive)
- E-signatures meet national law requirements
  - E-signatures directive art. 5
  - Cross-border validity of signature certificates (art. 4)

Consumer contracts

- National law of consumer's country applies
- Consumer contract law partly harmonised
  - Distance selling directive
    - consumer's right to withdraw
    - performance and credit card provisions
  - Directive on unfair terms in consumer contracts
    - Exclusion and limitation of liability
- Uncertainties remain for unfair competition and national language laws

Payment

- Existing credit card legal framework works well
- Low value interbank payment less effective
  – Cross-border credit transfers directive of no benefit to e-commerce
- Electronic money directive is a failure
  – Barriers to entry are too high
  – In particular, restrictions on business activities prevent mixed activity business models
  – Likely effect is that businesses will need to use non-EU-issued e-money

Resolving disputes

- Reasonable certainty as to where an on-line business can sue or be sued
  - Brussels Regulation
  - But note uncertainty for B2C dealings in art. 15(1)(c)

- Less certainty as to applicable law
  - Choice of law for B2B dealings
  - Rome Convention and consumers
  - Improvement by aligning Rome with Brussels Regulation and clarifying "directed activities" drafting

Conclusions on effectiveness

- Regulatory compliance
  - Largely effective through country of origin regulation
  - Work in progress in financial services sector

- Contracting
  - Largely effective, especially B2B
  - Some uncertainties remain in unharmonised elements of consumer protection law

- Payment
  - Further action required

- Dispute resolution
  - Moving towards a satisfactory position, but not there yet

Completeness?

- Barriers to effective e-commerce still exist in two areas
  - Requirement to charge VAT at home country rates for B2C dealings
  - Wide variance in liability laws
    - Arts. 12-15 E-commerce directive clarify position for some intermediaries
    - But current complex mixed activity business models mean that their application is uncertain