

ELECTRONIC MASS PROCUREMENT BY MEANS OF “WEB TECHNOLOGY”: BASIC OPTIONS IN ITS REGULATION

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I. INTRODUCTION

Today, the acquisition of goods and services through the Internet is frequent, just like the use of the most varied information services on the net. Business figures are shocking: In Spain alone, the National Observatory for Telecommunications and Information Society (NOTIS) indicated in a recent study that in 2008, Internet transactions accounted for €5.362

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million; 58.3% of the population uses it and the volume of buyers totals 8.9 million.¹ The 2011 Annual Report of the Digital Content in Spain breaks down the increase by content sectors on the Internet, and it highlights that 91.5% of the Spanish population consumes digital content over the Internet or through an electronic device not connected to the network.²

This fantastic market for goods and services is a new channel of contractual transactions that does not necessarily generate a new way to form a contract. However, in contracts created between the so-called “service providers of the information society” and the “recipients of this type of service,” a legal response must be given.³ These categories constitute what the European environment considers mass electronic procurement.⁴ Spanish Law 34/2002, of July 11th on Services of the Information Society and Electronic Commerce (LSIECS), is the fundamental law on the subject of this article and incorporates the Directive 2000/31/CE on Electronic Commerce (DEC).⁵ Therefore, while this article is based on Spanish law, it reflects the common will to regulate electronic trading on a European level.⁶

This article will discuss the concept of electronic procurement and the more restricted electronic mass procurement. This mass procurement is characterized by the appearance of two new actors: services providers of the information society (SPIS) and service recipients, which will be discussed in Part Two. Part Three will analyze the basic concepts of electronic mass procurement, including how traditional concepts of offer and acceptance adapt to the new medium of contracting. Finally, Part Four

1 SECRETARÍA DE ESTADO DE TELECOMUNICACIONES Y PARA LA SOCIEDAD DE LA INFORMACIÓN [SECRETARY OF STATE FOR TELECOMMUNICATIONS AND FOR THE INFORMATION SOCIETY], LA SOCIEDAD EN RED—INFORME ANUAL DE LA SOCIEDAD DE LA INFORMACIÓN EN ESPAÑA 2008 [ANNUAL REPORT OF THE INFORMATION SOCIETY IN SPAIN 2008] 22, 144 (2009), available at http://www.ontsi.red.es/ontsi/sites/default/files/1259679987210_0_0_0_0.pdf (last visited Feb. 22, 2014).

2. *Industria y Hábitos De Consumo [Industry and Consumer Habits]*, Informe Anual de los Contenidos Digitales en España [Annual Report on Digital Content in Spain], OBSERVATORIO NACIONAL DE LAS TELECOMUNICACIONES Y DE LA SOCIEDAD DE LA INFORMACIÓN [NAT'L OBSERVATORY OF TELECOMMUNICATION AND INFORMATION SOCIETY] (“ONTSI”), at 7, available at http://www.ontsi.red.es/ontsi/sites/default/files/informe_contenidos_digitales_2011_v7.pdf last visited Oct. 6, 2013).

3. Law 34/2002 of July 11, Annex (c)–(d) (B.O.E. 2002, 166) (Spain).

4. See generally *id.*

5. See *id.* at Statement of Purpose I–IV; see generally Council Directive 2000/31, 2000 O.J. (L 178) (EC).

6. See Law 34/2002 of July 11, Annex (c)–(d) (Spain).

will discuss the unique scheme of contracts through e-mail exchange as a type of individual contract that the law regulates by exception.

II. ELECTRONIC CONTRACTS: ADAPTATION TO THE NEW ENVIRONMENT

The electronic medium is a new platform in contracting, although its result—the contract—is equivalent to the traditional contract, even if it is conducted differently. In this sense, the terminology used by the LSIECS, “electronic procurement,” indicates that the legislative intent—though perhaps unconsciously—considered that the formation of contracts through electronic equipment does not create a new category of contracting.⁷ The electronic platform simply offers a new medium for contractual agreements. This new medium creates ad hoc rules because electronic contracts are contracts carried out by a new platform. The law states the principle of functional equivalence.⁸ Thus, the principle of equivalence is the mechanism that perfectly adapts the specificities that electronic contracts raise in the conceptual framework that governs the classic principles of contracts.⁹

In fact, Article 23.1, Paragraph 1 of LSIECS is closely related to the language in Article 23.2 of LSIECS. In other words, a prior agreement for the use of electronic means is not necessary to prevent a party from disputing the validity of the contract.¹⁰ The agreement of the parties regarding the use of this support is dispensable, at least in cases of mass procurement. The categories of contractual offer and acceptance that produce the perfection of the contract either adapt to electronic procurement, understand that the offeror is one who manages a website with commercial content, or provides products and services via e-mail or chat.

A. Contracting Through Electronic Means

The LSIECS is not precise when dealing with what can be understood as a contract performed by electronic means. While the LSIECS refers to

7. See *id.* at Statement of Purpose IV.

8. *Id.* art. 23.

9. See generally Immaculada Barral Viñals, *La “Contratación por Vía Electrónica:” Adaptación del Marco Jurídico Mediante los Principios de Equivalencia* [Electronic Contracting: The Adaptation of Legal Frameworks using Principles of Equivalence], in ESTUDIO DE DERECHO DE OBLIGACIONES: HOMENAJE AL PROFESOR MARIANO ALONSO PEREZ [STUDY OF LAW ENFORCEMENT: HOMAGE TO PROFESSOR MARIANO ALONSO PEREZ] 107–24 (2006).

10. See Law 34/2002 of July 11, arts. 23.1, 23.2 (Spain).

“electronic commerce” in the title, both the Statement of Purpose¹¹ and the Articles refer to “electronic procurement” or directly to their result: “[C]ontracts formed by electronic means” or simply the “electronic contracts.”¹² In opposition to the notion of e-commerce, the idea of electronic procurement seems more limited, as it only refers to those electronic exchanges in which a contract is performed. E-commerce also encompasses all previous aspects: advertising, offering, and execution of the contract with aftermarket services. However, as in real life, procurement also includes formation and preliminary agreements, even if no contract is formed.

Thus, under Paragraph (h) of the Annex to LSIECS, an electronic contract is a contract in which the offer and acceptance are transmitted through electronic equipment connected to a telecommunications network for processing and data storage.¹³ Under this definition, the notion of electronic contract depends on two conditions that need to meet cumulatively. First, the offer and acceptance need to be transmitted by electronic equipment for data processing and storage. Second, the equipment needs to be connected to a network.¹⁴

Regarding the first condition, the equipment must be able not only to transmit, but also to archive data and to allow processing. For this reason, contracts by fax are excluded from the regulations on electronic procurement.¹⁵ Instead, this definition includes a variety of electronic media, and thus relates to contractual agreements that can be done by consulting websites through the exchange of declarations of intent by e-mail and those made while connected to a forum or chat dialog via audio or video.¹⁶ It also affects the communication of consent by third generation mobile phones (wap technology) or through interactive digital television.¹⁷ The law should also include traditional electronic media such as the telephone or telegraph in its definition of electronic procurement.

11. *Id.* at Statement of Purpose II.

12. *Id.*

13. *Id.* at Annex (h).

14. *Id.*

15. Law 34/2002 of July 11, Annex (a) (Spain).

16. *See id.*

17. *See id.*

B. *The Different Levels of Regulation*

The concept of electronic procurement is general because it must accommodate both contracts between entrepreneurs and those formed between individuals. Hence, we can distinguish three main categories:

- 1) Contracts between companies ("B2B" or "Business to Business"), especially used for distribution relationships;
- 2) Contracts between company and consumer ("B2C" or "Business to Consumer"); and
- 3) Contracts between consumers ("C2C," "P2P," "Consumer to Consumer," or "Person to Person").¹⁸

All three categories result in electronic contracts and are regulated in the same way. In fact, the LSIECS represents the beginning of a sector-based regulation that addresses the legal problem of contractual transactions globally, which does not mean the existence of a single legal regime for electronic contracts. In the LSIECS, and the DEC that gave rise to it, the traditional rules for procurement are adapted to the new platform and the specific problems it creates are resolved: The form of the declarations of intent, the admissibility of offers and tacit acceptances, and acceptance made by tacit declarations of intent.

In addition to the rules that address the phenomenon of electronic procurement by sectors, the final legislation on consumer protection is also applied. Indeed, the fact that one of the parties involved in electronic procurement can be described as a consumer requires the application of all the rules of consumer law, which must be classified as finalists, as they tend to offer consumers the necessary tools to restore contractual balance.¹⁹ The relationship between the by-sector rules and finalist rules is more intense by the fact that electronic procurement should be considered a remote contract. Electronic procurement takes place without the simultaneous physical presence of the parties and means of distance communication, which are the requirements for the implementation of the Directive on Distance Contracts.²⁰ The LSIECS provides that any legislation on consumer protection should be understood as incorporated to electronic procurement

18. EDUARDO GAMERO CASADO & JULIÁN VALERO TORRIJOS, *LA LEY DE ADMINISTRACIÓN ELECTRÓNICA* [THE LAW OF ELECTRONIC ADMINISTRATION] c.1 (Aranzadi ed., 3rd ed. 2007).

19. R.D.L. 1/2007, art. 3 (B.O.E. 2007, 287) (Spain).

20. See generally R.D.L. 1/2007, art. 92 (B.O.E. 2007, 287) (Spain); see generally Council Directive 7/97, 1997 O.J. (L 144) (EC).

whenever applicable.²¹ This relationship between by-sector regulation and finalist regulations means, for example, that all the rules on general contract conditions need to be applied.

C. *Types of Electronic Procurement*

The LSIECS begins to regulate the process of electronic procurement in Article 23; specifically, two different types of procurement are distinguished: Procurement “via e-mail or equivalent platform”²² and the so-called “procurement by automated devices.”²³ In reality, the scheme of Article 23 and its subsequent provisions relate mostly to the latter, in what is often called contracts by web technology. The law by exception, in Articles 27 and 28, regulates contracts, which while electronic, are not made by web technology but through e-mail exchanges or equivalent platforms.²⁴

The term “contract by automated devices” is located in the Additional Disposition 4 (FD4) of the LSIECS, amending Article 1262 of the Civil Code. FD4 discusses the formation of contracts negotiated at a distance and it adds a third section that is dedicated to this type of contract.²⁵ This terminology exists in the Civil Code and not in the LSIECS, which is the text that includes the amendments to Article 1262.3;²⁶ however, when the regulation of electronic procurement is carefully read, it is clear that the general regulation is intended for contracts made by the technical mechanisms presented in a web page. The regulation presents a particular way of making electronic contracts where consent is given tacitly and often by automated devices. These contracts by automated devices are the essence of electronic mass procurement.²⁷ This scheme best suits mass electronic procurement because contracts made by automated devices are generated on the web and are aimed at a wide range of potential contracting parties.²⁸ Significantly, the LSIECS and the categories of the service provider and service recipient treat contracts by automated devices as a

21. See R.D.L. 1/2007, art. 92 (B.O.E. 2007, 287) (Spain); see Law 34/2002 of July 11, art. 23.1 (Spain).

22. Law 34/2002 of July 11, arts. 27.2(b), 28 (Spain).

23. BARRAL, *supra* note 9, at 113.

24. Law 34/2002 of July 11, arts. 23, 27–28 (Spain).

25. See generally Law 34/2002 of July 11 (Spain); see CÓDIGO CIVIL [C.C.] art. 1262.3 (Spain).

26. See generally Law 34/2002 of July 11 (Spain).

27. *Id.*

28. *Id.*

basic type of mass procurement. These new actors will be discussed in the next section followed by the regulation of mass electronic procurement and the specificities of the so-called contract by e-mail or equivalent means.

III. THE CONTEXT OF MASS ELECTRONIC PROCUREMENT: THE SERVICES OF THE INFORMATION SOCIETY

The LSIECS regulates two distinct aspects. First, it regulates the Services of the Information Society (SIS) along with the status of their providers (PSSI). Second, it regulates electronic procurement. These two concepts do not coincide. In fact, it is possible to find cases of electronic procurement, according to the definition proposed in Part One, that are beyond the scope of the LSIECS because they are not SIS.²⁹ Because of this, it is necessary to determine if it is SIS to distinguish the two categories and design the scope of legislation that corresponds to each one. The regulation on electronic procurement is more general and ultimately the SIS concept leaves us in the field of mass recruitment, which is an important part of transactions on the web. This section will begin with the concept of SIS, which encompasses the context of transactions on the web and the concept of “service recipient” in accordance with the LSIECS.³⁰

A. *SIS Providers*

The Annex to the LSIECS defines the concept of SIS as “any service normally provided for remuneration, at a distance, by electronic means and at the recipient’s request. The concept of services of the information society also includes unpaid services by recipients, as long as they constitute an economic activity for the service provider.”³¹ This definition reflects the one given in the DEC, which in turn, includes the definition proposed by the “Transparency Directive.”³² According to Peguera Poch, there are four notes to highlight from this concept.³³

First, compensation is not a basic aspect since services can be paid or unpaid, but should constitute an economic activity by the provider. The LSIECS precludes the need for compensation in the definition of SIS; however, this is related to the second part of the concept wherein services

29. See Law 34/2002 of July 11, Annex (a), (c) (Spain).

30. *Id.* Annex (d).

31. *Id.*

32. Council Directive 98/34, art. 1.2, 1998 O.J. (L 204) (EC); see Council Directive 2000/31, art. 2(d), 2000 O.J. (L 178) (EC).

33. MIGUEL PEGUERA POCH, LA EXCLUSIÓN DE RESPONSABILIDAD DE LOS INTERMEDIARIOS EN INTERNET [EXCLUSION OF LIABILITY OF BROKERS IN THE INTERNET] 80 (Comares ed., 2007).

are to be provided at a distance. It is an SIS if it is free of charge, but it constitutes an economic activity for the person who organizes it.³⁴ A SIS depends on whether the provision of these services is exercised within the framework of a business on the part of the provider.³⁵ By contrast, the way the service is delivered to the client, i.e., direct remuneration and his expense or not, is not an element of the concept of SIS.³⁶ Though the service is free to the customer, if it is part of the normal activity of the company, it will be considered an SIS and thus, subject to the LSIECS.³⁷ Gratuitous services contained in the category of SIS include: collective buying sites, specialized search engines, information pages, and organization of private contracts (contracts “peer to peer” or “P2P”), among many others.³⁸ This justifies the explosion of new forms of contracts on the web, which are not created for direct compensation from the customer who uses them, but rather the business model depends on other sources of income, such as advertisements.³⁹

Second, services must be provided at a distance.⁴⁰ While the LSIECS does not provide its own definition of what is to be understood by these services, the Transparency Directive does: the services provided at a distance are those in which the parties are not present simultaneously.⁴¹ The idea of services provided at a distance is essential because although contractual relations through electronic means can be established, it will not be an SIS if they involve the physical presence of the parties, e.g., medical treatments with physical presence of the patient, booking airplane tickets, and computers made in an agency.⁴²

Third, there must be services provided “by electronic means.”⁴³ The notion of electronically provided service is again found in the Directive on Regulating Information Society Services (ISS), in which Article 1.2 indicates that “the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and

34. See Law 34/2002 of July 11, Annex (a) (Spain).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. Law 34/2002 of July 11, Annex (a) (Spain).

40. See generally Council Directive 98/34, 1998 O.J. (L 204) (EC).

41. *Id.*

42. *Id.* Annex V.

43. See generally Council Directive 98/34, 1998 O.J. (L 204) (EC).

received by wire, by radio, by optical means, or by other electromagnetic means.”⁴⁴ Thus, it appears that the information should be transmitted by equipment capable of treating and storing it. Notably, there are certain services, which although provided by electronic means, are not considered ISS⁴⁵ such as services rendered by phone call, fax and telex.⁴⁶

Fourth, the services must be delivered at the request of the recipient.⁴⁷ This element distinguishes ISS from the services of television or radio broadcasting, which are not considered SIS, precisely because there is no individual demand.⁴⁸ Nevertheless, there is a clear relationship between some audiovisual content offered by television services on-demand and ISS, used to deliver these same contents. The LSIECS launched from the idea of a joint-treatment of all ISS, such that it included among them the video on-demand services or any individual request of audiovisual content.⁴⁹ However, the Directive on Audiovisual Communication Services has regulated on a by-sector basis audiovisual contents whether its own television broadcasting contents (linear audiovisual services), or what has been called non-linear audiovisual services that integrate into the ISS.⁵⁰ The incorporation of this Directive amended the LSIECS’s Annex such that the video on request or the individual supply on audiovisual content is no longer considered ISS for the purposes of this LSIECS.⁵¹ Thus, the by-sector regulation of audiovisual content breaks the union with ISS.⁵² Since Law 7/2010, the ISS on audiovisual content has been regulated differently.⁵³

B. Intermediation Services

The LSIECS does not cover all legal aspects of ISS, it merely limits itself to give some guidelines. The PSSI are the companies that provide these services. The LSIECS regulates the status of PSSI; they are not subject to prior authorization to begin their operations.⁵⁴ Moreover, the

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *See generally* Council Directive 98/34, 1998 O.J. (L 204) (EC).

49. *Id.*

50. *See generally* Council Directive 2010/13, 2010 O.J. (L 95) (EU).

51. *See generally* Law 7/2010 of Mar. 31 (B.O.E. 2010, 79) (Spain).

52. *See id.*

53. *Id.*

54. Law 34/2002 of July 11, art. 6 (Spain).

control of their activity is done at origin through the notion of permanent establishment that the Article 7 of the LSIECS offers.⁵⁵ This idea aims to link a global activity to a particular country, making it subject to its legislation. It also identifies some limitations on the provision of services based on some general interests: Security and public order; public health, dignity, and protection of youth; and defense of intellectual property.⁵⁶

As already indicated, the LSIECS has a broad definition of SIS that encompasses a variety of services.⁵⁷ It identifies a specific type of ISS that has a unique scheme called intermediation services.⁵⁸ These services are ISS, but they act as intermediaries between service recipients and the PSSI identified as content providers.⁵⁹ Indeed, intermediation services favor the technical aspects of service delivery, and the LSIECS defines them as "service of the information society through which the provision or use of other services of the information society or access to information is facilitated."⁶⁰

Intermediation services are: telecom operators, i.e., the supply of Internet access services; caching services, i.e., data transmission through telecommunications networks conducting temporary copies of the web pages requested by users; hosting services, i.e., accommodation in own data servers; and portals and search engines, i.e., applications or services provided by others and the supply of search instruments, access, and retrieval of data or links to other Internet sites.⁶¹ Because of their status, intermediaries may be required to cooperate in the application of any content control restrictions⁶² as well as any duty to inform about the security of electronic communications in addition to the duty of retaining traffic data.⁶³ Significantly, these PSSI are exempt from certain types of liability⁶⁴ because of the technical role they typically play in many cases, and therefore they cannot be made responsible for the circulation of

55. *Id.* art. 7.

56. *See id.* art. 8.

57. *Id.* Annex (a).

58. *Id.*

59. Law 34/2002 of July 11, Annex (b) (Spain).

60. *Id.*

61. *Id.*

62. Law 34/2002 of July 11, arts. 8, 11 (Spain).

63. *See generally* Law 34/2002 of July 11 (Spain).

64. *Id.* arts. 13, 17.

content.⁶⁵ Thus, this type of PSSI falls outside the scope of the contractual legal relationship between service recipients and content PSSI.

C. Content Providers

Content providers are ones who offer goods and services online that generate various types of electronic contracts.⁶⁶ The LSIECS classifies these types of services as procurement of goods or services by electronic means, organization and management of auctions, electronic or virtual markets and shopping centers, online shopping management by groups of people, and sending commercial communications and supply of information through electronic means.⁶⁷

The law gives access to a range of models of online services considered subject to its requirements and, in particular, to the provisions on electronic procurement. The core of this concept is economic activity since e-mail exchange cannot be SIS if it does not generate economic activity for one of the parties. The ISS is an important part of electronic contracts because many electronic contracts take place between PSSI—who offers online services—and service recipients.⁶⁸ Notably, because the SIS exceed the traditional concept of purchase of goods and services typical in face-to-face contracting, some other SIS follow the P2P scheme, such as online auctions, or collective buying portals, which are booming today. Additionally, other types of SIS are based on sending commercial communications with direct income on advertising or providing information that can be of free entry, but also with significant revenues from advertising.

D. The Service Recipients

A “service recipient” is one who contracts with a PSSI in its capacity as a content provider.⁶⁹ The LSIECS defines a service recipient as “a natural or legal person that uses a service of the information society, whether or not for professional reasons.”⁷⁰ This means that the concept of

65. Busto Lago, J.L., *La Responsabilidad Civil de los Prestadores de Servicios de la Sociedad de la Información* [*The Civil Liability of Service Providers in the Information Society*], in *TRATADO DE RESPONSABILIDAD CIVIL* [TREATY OF LIABILITY] 973–1123 (Thomson-Aranzadi ed., 4th ed. 2008); POCH, *supra* note 34, at 120.

66. See generally Law 34/2002 of July 11 (Spain).

67. *Id.* Annex (a).

68. *Id.* Annex (a), (d).

69. *Id.* Annex (d).

70. *Id.*

service recipient is understood in conjunction with the concept of PSSI, which identifies the counterpart in contractual transactions.⁷¹

In this regard, Article 2(d) of the DEC, is more clear in defining a service recipient as “any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible.”⁷² This definition has two basic characteristics. First, it is a general concept that includes all natural or legal persons regardless of their status as a merchant. Second, it includes any user who comes into contact with the ISS and establishes a legal relationship with him through his use of the service;⁷³ however, it excludes those persons who do not use the ISS.⁷⁴

The recipient of the services is not necessarily the purchaser of the goods or services that the PSSI offers.⁷⁵ This distinguishes between the contractor/purchaser and the user, which merely visits but does not engage in a contractual relationship;⁷⁶ however, in light of some business models, it cannot be said that the recipient who does not acquire goods or services has no contractual relationship with the PSSI. This is because pages that provide information may involve the acceptance of terms of use or “browse-wrap agreements.” Such agreements may include the transfer of a recipient’s personal data, giving rise to the legal relationship, which can occur without the recipient being aware of it.⁷⁷ As such, the service recipient is anyone who comes into contact with an ISS, whether he purchases a product or not.⁷⁸ This means that merely visiting a web page may give rise to a legal relationship with a PSSI.⁷⁹ The law encompasses a broad concept of ISS that gives the status of service provider to any entity offering an ISS of any kind.⁸⁰ For this reason, the categories of service

71. See *id.*

72. Council Directive 2000/31, art. 2(d), 2000 O.J. (L 178) (EC).

73. See *id.* art. 2.

74. *Id.*

75. See generally Teresa Rodríguez de las Heras Ballell, *Terms of Use, Browse-Wrap Agreements and Technological Architecture: Spotting Possible Sources of Unconscionability in the Digital Era*, 2 CONTRATTO E IMPRESA/ EUROPA 849, 849–69 (2009).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. MORO ALAMARAZ, M.J., *Servicios de la Sociedad de la Información y Sujetos Intervinientes* [Services of the Information Society and Intervening Individuals], in AUTORES, CONSUMIDORES Y COMERCIO ELECTRÓNICO [AUTHORS, CONSUMERS AND ELECTRONIC COMMERCE] 134 (Colex eds., 2004).

recipient and consumers do not match. A consumer is a service recipient “who acts in a field outside business or professional activity.”⁸¹ As previously discussed, when a consumer is involved in an electronic contract, we must apply consumer protective legislation, especially that relates to the contracts at a distance—in addition to the rules of the LSIECS.⁸² The notion of service recipient is broader. In short, the categories of service recipients and PSSI, especially in its capacity of content provider, frame the electronic contracts in the so-called “web technology”—that is, the mass procurement possibilities that the web allows.

IV. THE CONTRACT WITH “AUTOMATIC DEVICES” OR USING WEB TECHNOLOGY

The LSIECS’s Final Disposition 4 mentions contracts by automated devices that are in contrast to contracts by e-mail exchange. Contracts by automatic devices are the maximum expression of the legal relationships between PSSI that are “content providers” and “recipients” of these types of services.⁸³ This Part of the Article will focus on the regulation of such contracts, emphasizing the formation of the contract: Offer, prior information requirements, acceptance, and further information.⁸⁴

A. *Offer on Contracts by Web Technology: The Tacit Offer Online*

The contractual offer is a declaration of intent in which the offeror expresses the conditions under which he is willing to contract.⁸⁵ The offer is complete if it contains all the necessary elements such that its acceptance perfects the contract.⁸⁶ The completeness of the offer requires that it contain all the terms on which the acceptance rests, especially the object and the cause, as well as other elements that the subject decides to introduce, e.g., accidental elements, guarantees of compliance, and other obligations that the parties must assume.⁸⁷ The offer is firm if the offeree accepts the contract on its terms,⁸⁸ giving up the ability to counteroffer,

81. R.D.L. 1/2007, art. 3 (B.O.E. 2007, 287) (Spain).

82. *Id.*

83. *See generally* Law 34/2002 of July 11 (Spain).

84. *See id.* art. 27.

85. BARRAL, *supra* note 9, at 109.

86. *Id.*

87. *Id.*

88. *Id.*

which would restart negotiations.⁸⁹ This scheme applies smoothly to electronic procurement, understanding that the offeror is the one who manages a website with commercial content or who provides products and services via e-mail or chat.⁹⁰ However, the common law world applies a different scheme and considers that the merchant is limited to an invitation of making an offer and it is the consumer, when choosing an item, who makes the actual contract offer.⁹¹ This matter does not provide differences at a scheme-level—besides the terminology—but it is useful to understand why the LSIECS sometimes speaks of “contract proposal.” For this reason, the distinction between “contract proposal” made by the PSSI on the website overlaps in the Spanish system with the offer, where service recipients are called only to accept the offer and perform under the contract, or to start a bargaining period in the event that it is not a contract of adhesion. The question is whether the information contained in a website is an offer. That is, if the PSSI is bound by the stated conditions.

In face-to-face contracting, the public display in an establishment of certain goods is an offer, and this is because the merchant cannot refuse to sell the products displayed in their present conditions. The law attributes the willingness to sell the displayed goods to the fact that a merchant has a physical store open for business.⁹² The only exception to this appears in relation to fixtures or furniture, or other objects expressly excluded. In this sense, having an establishment open to the public indicates that there is a genuine offer to sell every product or service, and not just a mere invitation to make an offer. It is also an implied offer as the declaration of intent may be inferred from the conduct of the offeror.⁹³ In electronic procurement, the presumption of Article 9 in the Law on the Management of Retail Commerce (LOCM for its Spanish initials), will make the existence of a business’s web page itself an offer that must include the completeness requirements we have already seen.⁹⁴ Thus, a company’s website, which has the possibility for purchasing goods or rendering services, is a tacit contractual offer if it meets the requirements of an offer—that is, a recipient can infer the minimum contractual requirements so that the user can provide his acceptance directly.⁹⁵

89. *Id.*

90. BARRAL, *supra* note 9, at 109.

91. *Id.* at 110.

92. *Id.*

93. *Id.*

94. Law 7/1996 of 15 Jan. 1996, art. 9 (B.O.E. 1996, 15) (Spain).

95. *Id.*

The application of the concept of tacit offer makes the content of Article 23.2 of LSIECS regarding the lack of necessity of express agreement to procure by electronic means unnecessary, at least with respect to online procurement;⁹⁶ however, this legal provision is justified by Article 51 of the Commerce Code (CCOM), which states that in connection with telegraph procurement, it requires prior agreement on its use, so that, in the case of electronic contracts, this Article is derogated *a fortiori*.⁹⁷ This rule must be understood to operate within a continuing contractual relationship that does not often occur on the Internet.⁹⁸ In an open network, it seems more logical to apply the presumption of offer from Article 9 of the LOCM, inferred from the fact of having a website where products and services are offered.⁹⁹ Thus, the problem lies in the existence of an offeree that voluntarily directs himself to the offeror.¹⁰⁰

In contrast, electronic advertisements that only represent preliminary information based on what the party can decide and soon thereafter contract, e.g., banners, do not constitute an offer. They have no binding effect. Banners merely advertise products on the web and cannot be considered offers because such an offer will be in the link that appears when the banner is clicked, as previously discussed. This concept is not unlike the approach of face-to-face contracting. An offer qualifies as such if it is complete and is made with the intent to contract. This leads us to a new distinction between what is advertising and what is an offer. Some confusion arises when the service recipient can be described as a consumer because then the advertising-integration mechanism of the contract allows the preliminary information received to be considered a contractual offer—although it may not be stated in the contract;¹⁰¹ however, when someone who is not a consumer enters into the electronic contract, the offer is valid and the offeror is bound by it.

A further distinction, however, must be done. The onset of e-commerce usually distinguishes between active and passive sites, depending on whether their mechanism allows them to carry out a whole procurement process. While the substantial element of Web 2.0 is

96. BARRAL, *supra* note 9, at 111.

97. ANGEL CARRASCO PERERA, DERECHO DE CONTRATOS [LAW OF CONTRACTS] 223 (Aranzadi ed., 2010).

98. APOLONIA MARTÍNEZ NADAL, *El Comercio Electrónico* [Electronic Commerce], in CURSO SOBRE PROTECCIÓN JURÍDICA DE LOS CONSUMIDORES [COURSE ON LEGAL PROTECTION OF CONSUMERS] 247, 248–49 (McGraw-Hill ed., 1999).

99. Law 7/1996 of 15 Jan. 1996, art. 9 (Spain).

100. BARRAL, *supra* note 9, at 111.

101. R.D.L. 1/2007, art. 62 (B.O.E. 2007, 287) (Spain).

interactivity, there are still cases of passive sites. While there may be advertising-integration in the case of a recipient-consumer in passive sites, there exists an offer in the active ones. The question is especially clear on two occasions: First, at the time of entering a credit card number, which initiates the end phase of the contract, and second, those cases of direct e-commerce in which the object of the contract is intangible and is sent directly to the recipient's computer via download, e.g., software, and music. In the present day, most sites have mechanisms that finalize the contract, such as applications that allow unconscious procurement.

Finally, it should be noted that Article 27.3 of the LSIECS deals with the terms of expiration of the offer, leaving it to the offeror. If the offeror does not establish an expiration date for the offer, it is understood that the offer remains valid while the service is accessible to the recipient.¹⁰² In contracts formed by electronic means, the offer will be valid even if it does not include an expiration date because this rule will integrate the omission with the criterion of service accessibility.¹⁰³

B. Prior Obligations: Streamlining Consumer Protection Requirements

The prior obligation requirements in the procurement process can be found in Article 27 of the LSIECS. Also, Article 10 of the LSIECS imposes some general duties on the identification of PSSIs, which are imposed on all providers regardless of whether they will form contracts, and serves both the users of the site and the competent authority.¹⁰⁴ Therefore, the requirement to identify the provider goes beyond pre-contractual obligation. Yet, this identification will be essential to allow claims for service recipients in case of non-compliance or defective compliance; however, this discussion will focus on Article 27, which imposes basic obligations in the contractual process.

Article 27 of the LSIECS, which incorporates Article 10 of the DCE, requires the offeror to provide the offeree with certain information before contracting.¹⁰⁵ Generally, it refers to the process of formation of the contract, and, *a priori*, it is justified by the novelty of the medium used to procure. Thus, the legislation is justified in imposing an obligation on the

102. Law 34/2002 of July 11, art. 27.3 (Spain).

103. GEMMA RUBIO GIMENO, *Validez y Perfección del Contrato Electrónico* [Validity and Perfection of the Electronic Contract], in LA REGULACIÓN DEL COMERCIO ELECTRÓNICO [THE REGULATION OF ELECTRONIC COMMERCE] in ESTUDIO DE DERECHO DE OBLIGACIONES: HOMENAJE AL PROFESOR MARIANO ALONSO PEREZ [STUDY OF LAW ENFORCEMENT: HOMAGE TO PROFESSOR MARIANO ALONSO PEREZ] 41, 51 (Dykinson, 2003) (Spain).

104. See Law 34/2002 of July 11, art. 10 (Spain).

105. *Id.* art. 27; Council Directive 2000/31, art. 10, 2000 O.J. (L 178) (EC).

offeror, the one offering the products on the web, to explain how a contractual agreement will be reached to the less sophisticated consumer.¹⁰⁶

In fact, the obligation to provide information to the consumer prior to contracting has been used as a great legal tool to restore balance in procurement with consumers—understanding that if the consumer has information on the formation of the contract, the contract will be voluntary.¹⁰⁷ This is not the place, however, to analyze the veracity of this assumption, nor will we develop it here. It is important to note that in this case, prior information requirements are generally provided for in all electronic contracts. They apply regardless of the counterparty's status as a consumer because of the novelty of the medium, which requires protective measures for not only the consumer, but also to any contracting party.¹⁰⁸

The prior information requirements that the LSIECS provides do not form part of the required elements of the offer, but consumers should know the different procedures that need to be followed in order to form the contract before accepting.¹⁰⁹ The non-expert contracting party needs to know what is required in order to accept the offer.¹¹⁰ In addition, this party should also know how to reach an agreement regarding the offer. First, the PSSI should inform the non-expert contracting party of the different technical steps to follow in order to form the contract.¹¹¹ Second, the non-expert contracting party should be informed of the technical means that are put at his disposal to identify and correct errors in data entry.¹¹² This requirement complements the previously mentioned obligation because it reflects whether the objective intent corresponds to the subjective intent of the parties.¹¹³

The law individualizes these two requirements separately but it is easy to understand the policy reasons behind the requirements. These obligations attempt to ensure accurate acceptance of the offer.¹¹⁴ The contracting party should be informed of the technical environment of the contract to avoid discrepancies between the intent of the party and the

106. See Law 34/2002 of July 11, art. 27 (Spain).

107. *Id.*

108. See generally Immaculada Barral Viñals, *Consumers and New Technologies: Information Requirements in E-commerce and New Contracting Practices on the Internet*, 27 PENN ST. INT'L L. REV. 609 (2009).

109. Law 34/2002 of July 11, art. 10 (Spain).

110. See generally Barral, *supra* note 108.

111. See Law 34/2002 of July 11, art. 27.1(a) (Spain).

112. *Id.*

113. *Id.* art. 27.1(c).

114. *Id.*

integrated terms of the contract on the website when the party clicks to accept such terms.¹¹⁵

According to Cavanillas Múgica, this so-called prior information requirement is to minimize the risk of error.¹¹⁶ In fact, in e-commerce, divergence between the statement intended to be issued and the statement that was actually issued or received is an error due to poor programming or functioning of the electronic elements employed.¹¹⁷ The need for prior information, reflecting the possibility of eliminating the error, does not prevent a challenge for a defect in the consent—in case of errors undetected during the acceptance process.¹¹⁸ The law, however, does not specify what consequences the error has in the formation of the contract. Voiding the contract for absolute lack of intent does not seem the best solution because it would allow the party who made the mistake to avoid the contract.¹¹⁹ It seems more logical to invoke the provision of error contained in Article 1300 Civil Code (CC) *et seq.*, which renders the contract voidable for a period of four years, and only by the one who suffered the error, that is, the recipient of the service, as he was not properly informed of the technical steps to follow in order to form the contract.¹²⁰

Finally, the provider must also provide information on whether to file the electronic document formalizing the contract and whether it will be accessible.¹²¹ Article 27 refers to the system of contract documentation by electronic means, that is, the offeree must have knowledge of the contents of his declaration, and the offeree must know how form and declaration of intent are to be translated in a durable platform and about its accessibility to ensure the possibility of an inquiry after the completion of the contract.¹²² The law also states that the language(s) in which the contract may be executed, and oftentimes selected at the option of the consumer, need to be reported;¹²³ however, the reference to the language of the contract is purely instrumental to achieve the above requirement of efficiency and it is only a

115. *Id.*

116. CAVANILLAS MÚGICA, *La Conclusión del Contrato en Internet* [*The Conclusion of the Contract on the Internet*], in *RESPONSABILIDAD CIVIL Y CONTRATOS EN INTERNET* [LIABILITY AND CONTRACTS IN INTERNET] 160 (Comares eds., 2003).

117. *Id.*

118. *Id.*

119. *Id.*

120. CODE CIVIL [C.C.] art. 1300 (Spain).

121. Law 34/2002 of July 11, art. 27.1(b) (Spain).

122. *See id.* art. 27.

123. *Id.*

tool to ensure the effectiveness of this obligation.¹²⁴ The same provision provided to the recipient that relates to the contract terms and general conditions must be made available in a way that allows him to store and reproduce them.¹²⁵

These prior information requirements are intended to serve recipients unaccustomed to this new medium of procurement by providing additional information about the procurement process and the evidence of the contract to restore the balance between the parties.¹²⁶ Notably, the service provider controls technology used to contract. In this sense, the information requirements regard the new medium of procurement rather than the contract itself. In e-commerce, the prior information requirements are a tool for consumer protection that have been extended to any contracting party, taking into account that with an electronic exchange of offer and acceptance, there is a weaker party that most likely needs to be informed.¹²⁷ Yet, there is an important caveat: these prior information requirements are waived if the other party is not a consumer.¹²⁸ Instead, these requirements are indispensable when the contract is between a PSSI and a consumer, as a consumer is understood to be the weaker party in the contract, with no exception. For the same reason, these requirements apply only when we are before a mass contract, but they shall not apply to contracts formed exclusively by exchange of e-mail or by equivalent individual communications, e.g., chat or videoconferencing, since in these cases, it is not a communication contract, and the imbalance between the service provider and the other contracting party does not exist.

The LSIECS does not submit these prior information requirements to a system of individual communication because it clearly states that they shall be considered satisfied if the information is available on the website, provided it is "permanent, easy and free," and that the "information is clear, comprehensible and unambiguous."¹²⁹ Thus, this information should be in an easily accessible webpage and not hidden in hyperlinks or parts of the site that the contracting party has to click to complete the procurement process.¹³⁰ The legal requirements demand that this information not be hidden in sections of the site that has nothing to do with the information to

124. *Id.* art. 27.1(d).

125. *Id.*

126. Law 34/2002 of July 11, art. 27 (Spain).

127. *Id.* art. 27.2.

128. *Id.*

129. *Id.* art. 27.1.

130. *Id.* at Statement of Purpose.

be provided.¹³¹ For this reason, Article 27.1 of LSICE, indicates that the information needs to be provided “by suitable techniques to the medium of communication.”¹³² This writing, taking into account the rise of the provision of SSI via SMS or MMS, does not aim to provide a set of means of presenting the information that must adapt to the media, mainly in the case of messages or web browsing.¹³³ It also directly generates an exception for the so-called “small-screen devices,” that can direct the contracting party to the required information through a link or redirect page.¹³⁴ This legal provision embraces new devices as electronic procurement tools, especially mobile phones, Personal Digital Assistants (PDAs), and tablets.

C. *Unequivocal Acceptance: Click Contracts*

The LSIECS does not clearly refer to acceptance, although when formed electronically, the method of acceptance must be adapted to the web environment. Thus, similar to the offer, the acceptance is also often implied. This possibility is acceptable if it unequivocally reflects the intent of procurement. Article 6 of the TRLGDCU states that “in contracting with consumers and users their unequivocal intent to procure must be stated,” but this does not indicate that the consumer's consent must be expressed explicitly.¹³⁵ This idea does not mean that the statement should be express through language, but that it can be inferred from behaviors that clearly reveal the intent to procure.¹³⁶ This is the case of “click-wrap agreements” or “point-and-click agreements” in which the offeree does not issue an express declaration of intent to procure, but performs an act from which his intent to accept can be inferred.¹³⁷ Technically, it is an implied acceptance, but it is sufficient if the behavior performed by the offeree is unequivocal such as when payment is made for the product that was purchased.¹³⁸ However, acceptance is not supported for simply activating a hyperlink because this does not reflect in itself intent to procure, but instead, indicates intent to access the content.¹³⁹ Along the same lines, Article 11 of the

131. Law 34/2002 of July 11, art. 27.4 (Spain).

132. *Id.* art. 27.1.

133. *Id.*

134. *Id.*

135. BARRAL, *supra* note 9, at 113.

136. See R.D.L. 1/2007, art. 62 (B.O.E. 2007, 287) (Spain).

137. BARRAL, *supra* note 9, at 114.

138. *Id.*

139. *Id.*

United Nations Commission on International Trade Law (UNCITRAL) Model Law admits that acceptance may be express or implied.¹⁴⁰

Actually, both Article 10.1 of the DEC and the LSIECS consider this acceptance to be not express, but unequivocal and valid when imposing on providers the need to inform consumers of the technical steps necessary to carry out the execution of the contract, and the obligation to make an acknowledgment of acceptance by "means equivalent to that used in the procurement process."¹⁴¹ Such recognition is, however, implicit in the regulation of what is called "prior information," as it is clear that acceptance occurs when the contracting party performs the technical steps necessary to accept.

In fact, this so-called prior information requirement serves to minimize the risk of error. As noted by Múgica, in e-commerce, divergence is an error due to the poor programming or operating elements used between the statement that was intended to be issued and the statement was issued or received.¹⁴² Although it should also be noted that the need for prior information, resulting in the possibility of eliminating the error, does not prevent the challenges for vices of consent in case of errors not detected during the acceptance process.

In addition, the rule that disallows silence as acceptance should be extended to this type of procurement. Following the traditional rule, silence in the response for a certain period of time can never lead to the perfection of the contract.¹⁴³ In electronic procurement by "World Wide Web (WWW)," it will not be possible to set the final option of accepting the contract as a default option, and it would not be possible that the activation of a specific window that warned that silence is binding could produce effects.¹⁴⁴

D. Post-Contract Information: Acknowledgment of Acceptance

The sending of an acknowledgment of receipt of the acceptance by the service provider is an obligation of the offeror after perfecting the

140. *Id.*

141. Law 34/2002 of July 11, arts. 27, 28(b) (Spain); Council Directive 2000/31, art. 10.1(a), 2000 O.J. (L 178) (EC).

142. SANTIAGO CAVANILLAS MÚGICA, *Informática y Teoría del Contrato [Computing and Contract Theory]*, in X AÑOS DE ENCUENTROS SOBRE INFORMÁTICA Y DERECHO [X YEARS OF FINDINGS ON COMPUTING AND LAW] 270 (Aranzadi eds., 1997).

143. BARRAL, *supra* note 9, at 115.

144. *Id.*

contract.¹⁴⁵ This rule comes from Article 11 of the proposition of DEC, which included fixing the time of perfection of the electronic contract in a fairly complicated way and required the sending of an acknowledgment in addition to the offer and acceptance that ended the process.¹⁴⁶ For this reason, the DEC has not entered into this issue, which left it to the freedom of national legislators because it is an issue affecting the essence of contractual regulation. As previously discussed, this acknowledgment is a final step that allows the accepting party to know that his declaration of intent has been received, and therefore, it is effective. This new requirement in a contract that has already been perfected completes the procurement process and is a new requirement that is adopted generally by being technically easy and thus economically viable.

In this sense, the LSIECS supports two types of acknowledgment: First, by sending a message that can be a personalized e-mail, the PSSI communicates the notice of receipt of acceptance (the classic means), or second, simply "sending a message that confirm[s] the order placed as soon as the recipient has completed the procurement process as long as it can be saved by him, meaning the instrumentalization of a purely automated acknowledgment."¹⁴⁷ The acknowledgment receipt confirms the previous perfection of the contract, so its absence allows the offeree to ignore such an extreme.¹⁴⁸ In addition, a deadline of twenty-four hours for acknowledgment is set—specifying the expression of the Directive "as soon as possible," which potentially prevents undue delay.¹⁴⁹

As already indicated, the acknowledgment ends the formation of the contract.¹⁵⁰ For this reason, it is important to set the time that it should be received, which is when the offeree has the ability to access the contract.¹⁵¹ The LSIECS speaks of "when the parties can have proof of the shipment," but this proof is not identified with actual knowledge that could be delayed by fraud, but rather by the time the acknowledgment is accessible to the recipient.¹⁵² This occurs when the recipient has the ability to access the receipt, that is, when it reaches the server of the recipient's e-mail account

145. Law 34/2002 of July 11, art. 28.2 (Spain); Council Directive 2000/31, art. 11, 2000 O.J. (L 178) (EC).

146. See Council Directive 2000/31, art. 11, 2000 O.J. (L 178) (EC).

147. Law 34/2002 of July 11, art. 28 (Spain).

148. *Id.*

149. *Id.*

150. *Id.*

151. Council Directive 2000/31, art. 11.1, 2000 O.J. (L 178) (EC).

152. Law 34/2002 of July 11, art. 28.2 (Spain).

or other equivalent means.¹⁵³ Therefore, it refers to the usual pass—accommodation on the server awaiting the user's individual inquiry of the mail or equivalent applications.¹⁵⁴ The possibility of having evidence is clearly qualified by the presumption that it occurs when the message arrives at the e-mail address or device designated for the receipt.¹⁵⁵ It is understood that waiting for the evidence of shipment would be accumulating negative actions by one who deliberately delays access to message data; this is regulated on a good faith basis. Regarding acknowledgment, in the event of an online provision, only the DEC has addressed the issue that a contract is formed by shipment of the product paid for by the offeree, which is the admission of a tacit acknowledgment.¹⁵⁶

V. THE INDIVIDUAL ELECTRONIC CONTRACT: CONTRACT BY E-MAIL OR EQUIVALENT TECHNIQUE

The LSIECS contains special rules when the contract is made by e-mail or equivalent techniques.¹⁵⁷ The rationale behind the special rules is to minimize the role of artificial agents and to enable long negotiation processes. In fact, this type of contract is very similar to procurement by mail because its specificity lies in the procurement, which is done by electronic processes that allow individual communications in which the contract requirements by web technology do not apply. Precisely for this reason, Article 27.2(b), on obligations prior to the start of the procurement process, limits the requirements for prior information that shall not be required because it is understood that there is no need to indicate how acceptance will be provided. It is not a click contract, but rather acceptance must be express and clearly stated in writing in the communication.¹⁵⁸ In short, the protections regarding how to procure or amend errors are not necessary. Moreover, Article 28.3(b) also modifies the regulation pertaining to the information after the formation of the contract—as in this case, the acknowledgment of receipt of the contract is not necessary.¹⁵⁹ However, the law includes a provision to prevent fraud because the acknowledgment is not necessary provided that “these means are not employed for the sole purpose of avoiding compliance with that

153. *Id.*

154. *Id.*

155. *Id.*

156. *See generally* Council Directive 2000/31, 2000 O.J. (L 178) (EC).

157. *Id.*

158. Law 34/2002 of July 11, art. 27.2(b) (Spain).

159. *Id.* art. 28.3(b).

obligation.”¹⁶⁰ The intention is that if the contract is perfected by e-mail only to avoid the acknowledgment, the latter will be necessary as in the case of a website that offers goods or services and allows the start of the procurement process, but then instead of accepting with a click, the page indicates the need to send an e-mail to a particular address. The acknowledgment provided in Article 28 pertains to the finalized contract and cannot be confused with the e-mail acknowledgment, which states that acceptance has been received, and along with proof of its contents, may have a similar effect.¹⁶¹ Therefore, no further information on the contract is required in the manner provided for procurement by web technology.

The law focuses on e-mail, but it also indicates the possibility that this scheme applies to other “equivalent means of communication,” which refer to any means of communication that meet the individual and asynchronous requirements, e.g., SMS, MMS, chat, or Whatsapp. In all of these cases, despite the speed at which messages can be displayed on the screen of the receiver, it is the crossing messages that have to be treated in the same manner as e-mail. This type of writing fully sympathizes with the principle of technological neutrality that permits the adaptation of new technical elements to the legal solution.

VI. CONCLUSION

Electronic contracts are those carried out by new platforms. Therefore, the law establishes the principle of functional equivalence, that is, the ability to generate effects of the statements made by electronic means, adapting traditional concepts of face-to-face contracting. In this context, the categories of PSSI, especially the ones of content provider and recipient of the service, frame electronic contracts by “web technology.” That is, websites that give us the possibility of mass procurement because they address a variety of potential contracting parties. Its importance lies in the fact that the LSIECS devotes much of its rules on electronic procurement to contracts by web technology—accepting them as basic type.

The presumption of Article 9 of the LOCM, adapted to electronic procurement, will make the existence of a webpage in which a business provides the possibility of purchasing goods and services, an offer that must contain the requirements of completeness. It is an online tacit offer. Acceptance in the so-called “click contracts,” is not express, although it does meet the requirement of being unequivocal because it is clear from the material fact of taking the necessary technical steps to perfect the contract.

160. *Id.*

161. *Id.*

Precisely because of the novelty of the medium, the European regulation introduces a series of prior information requirements with the clear intention to extend the tools on consumer protection to all procurement, depending on the how new the medium is. Therefore, prior information requirements tend to explain how consent should be given, and in turn, further information in the form of acknowledgment constitutes evidence for the recipient of the service, and is set as an obligation on the PSSI for being technically and economically simple. In contrast, the contract by e-mail exchange or any other equivalent means is drawn, and thus it is understood as an individual electronic contract, hence its different legal scheme.